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INTRODUCTION

The Pregnancy Discrimination Act (PDA)[1] has been effective in making the most egregious and obvious forms of pregnancy discrimination illegal. Thus, when four State Troopers in Massachusetts recently complained to the Equal Employment Opportunity Commission that they had been removed to "temporary modified duty" because of their pregnancies, it took them less than a week to get reinstated.[2] Unfortunately, the PDA has also acted as a shield behind which employers can hide as they discriminate against their pregnant employees.[3] One court held that there was no discrimination if a woman on pregnancy leave was fired as part of a reduction in the size of the workforce merely because she happened to be on leave at the moment that the reduction took place.[4] Another court held that it was not pregnancy discrimination to fire a woman whom the employer feared

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1. 42 U.S.C. § 2000e(k) (1994). The PDA is an amendment to Title VII, 42 U.S.C. § 2000e (1994), which prohibits discrimination in the workplace on the basis of sex. The PDA itself provides:

> 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 . . . as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

2. Ellen O'Brien, *Trooper Hit Work Curbs Over Pregnancy*, BOSTON GLOBE, Oct. 15, 1997, at A1; Julie Crittenden, *Pregnant Trooper May Return to Duty*, BOSTON HERALD, Oct. 18, 1997, at A7.

3. Other commentators have made similar claims. *See* Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L. J. 61, 61 (1997) (noting that U.S. courts have been hostile to pregnancy discrimination claims).

4. *See In re* Carnegie Ctr. Assoc., 129 F.3d 290 (3d Cir. 1997).

might not return from a pregnancy leave.[5] Yet another court concluded that there was no discrimination when a pregnant woman was fired after her boss told her that new mothers should be home with their children.[6] Women who lose their jobs in these settings are not, according to the courts, discriminated against because of their pregnancies. Rather, they just happened to be on the receiving end of irrelevant comments or "neutral" criteria such as absence from the workplace that were used by the employer to make important decisions. Embedded in the courts' conceptions of neutrality and relevancy are a series of stereotypes about pregnancy. The result is that the PDA permits discrimination based on the very sort of stereotyping that it was expected to eradicate.[7]

There are two dominant stereotypes of pregnant women. Both are inconsistent with the image of a good worker. One stereotype connects pregnant women with the home. In one form or another it says, "Pregnant women are/should be preoccupied with their families."[8] The second classic stereotype portrays pregnant women as disabled by the pregnancy—lazy, hysterical, or otherwise ill.[9] It is important to recognize two things about these sterotypes that are so convincing to the courts. First, they represent only one side of the set of social stereotypes about pregnancy. People also say of pregnant women that they appear "radiant," "energized," or "more focused than ever before in their lives." None of this shows up in the cases. Second, the stereotypes that do exist are the stereotypes that are usually connected to pregnant *white* women. Women of color, particularly Black women, are often thought of as strong and able to work throughout their pregnancies. Breeding was part of the job for slaves in the United States.[10]

The courts have had difficulty defining what aspects of "pregnancy, childbirth, or related medical conditions" are protected by the statute. By using a narrow, medicalized definition of pregnancy, they have excluded the time that women take to care for young children from the statute's protection.[11] On the other end of the childbearing process, at least one court has refused to recognize the connection between infertility treatments and pregnancy.[12] The result is that women who need to take time off from work for medical appointments or who want

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5. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).

6. *See* Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997); *see also* Barbara Presley Noble, *An Increase in Bias is Seen Against Worker*, N.Y. TIMES, Jan. 2, 1993, at 1 (describing continuing discrimination against pregnant women).

7. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1128-42 (1986) (discussing stereotypes about pregnancy).

8. *See, e.g.*, Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997).

9. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).

10. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY (1997).

11. The Family and Medical Leave Act now provides limited protection to women who take time off without pay to be with their young children. *See* 29 U.S.C. § 2612(a)(1)(A) (1994).

12. *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996).

their employer-provided health care coverage to pay the bills for their infertility treatments may find themselves unprotected. These decisions allow narrow stereotypes of a work-family dichotomy to influence their definitions of pregnancy.

These problems do not indicate new forms of discrimination against women in the workplace. More than twenty years ago, the United States Supreme Court decided a pair of cases relating to pregnancy discrimination. In them it held that failure to provide benefits for pregnancy as part of a state disability insurance program or an employer's disability plan was not discrimination on the basis of sex.[13] The Court's finding that there was no sex discrimination because "[t]he program divides potential recipients into two groups—pregnant women and non-pregnant persons"[14] amazed many people. The result was the enactment of the PDA to combat discrimination based on pregnancy.[15]

Unfortunately, the elimination of pregnancy discrimination has proven to be an elusive goal. In order to achieve this goal, we would need to be able to identify exactly what is meant by "pregnancy," and when one is discriminated against on the basis of pregnancy. Because both of these issues require interpretation, we probably should not be surprised that stereotyped cultural images have affected our understanding of what constitutes pregnancy discrimination or that the courts have silently relied on these stereotypes. The result has been that instead of eradicating discrimination based on pregnancy, the PDA has often served to legitimate it.[16]

This Article focuses on three areas of pregnancy discrimination law to illuminate the mechanisms through which stereotypes of pregnant women have become part of the decisional process. Initially, I will discuss the biological definition of pregnancy that courts use and the ways in which this definition is used to make it appear as if women have chosen against the workplace. Next, I will discuss mixed motive

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13. *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (involving a state disability insurance program and interpretation of the Equal Protection Clause); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (involving an employer's disability plan and interpretation of Title VII).

14. Geduldig v. Aiello, 417 U.S. at 497 n.20.

15. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678-79 (1983).

16. Many other commentators have also been critical of the PDA's inability to eradicate discrimination on the basis of pregnancy. *See, e.g.*, D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411 (1996) (recommending amendments to the PDA to include reasonable accommodations); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995) (arguing in favor of requiring employers to accommodate pregnant women); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994) (proposing the socialization of pregnancy costs); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193 (1993) (recommending that pregnancy be included under the ADA).

pregnancy cases in which the plaintiff wants to use a comment or comments that the employer has made to her to show that her pregnancy was a motivating factor in the making of the adverse employment decision. Courts' failure to recognize the discriminatory animus demonstrated by the employers' comments show the courts' own receptivity to the stereotypes that underlie these comments. Finally, I will discuss the search for comparative groups of nonpregnant employees with whom a pregnant employee can compare herself in order to create a prima facie case under the burden-shifting approach to establishing pregnancy discrimination.[17] This time the stereotypes show up in determining the comparisons. As elsewhere, the stereotypes function to facilitate decisions that pregnant women are different from the usual employees and that, therefore, they can be excluded from the workplace without such exclusion being illegal discrimination. In short, the subtle adoption of classic stereotypes about pregnant women works to reinscribe the traditional idea that pregnancy and the workplace do not mix.

DEFINING PREGNANCY, DEFINING WORK

Pregnancy discrimination litigation invariably raises the question of what is "pregnancy." The cases define pregnancy in terms of a biological process that begins with conception and ends with delivery.[18] For example, Diana Piantanida's employer informed her, while she was on maternity leave, that she would be given a new job upon returning because she had not been satisfactorily performing at the old one.[19] When she returned to work, she was given a job that was described as "a good job for a new mom" to handle.[20] On deposition, she testified that

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17. In discussing comparisons, I will try not to repeat the intense, stymied sameness-difference debate of the 1980s. For an example of the difference position, see Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985). For an example of the sameness position, see Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987). For criticisms of this non-productive debate, see Finley, *supra* note 7, at 1142-63, and MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 3-11 (1992).

18. *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679-80 (8th Cir. 1996) (differentiating pregnancy and childbirth from infertility through their temporal relation to conception). Although the cases frequently appear to describe conception and delivery as instants in time, each actually is a process that takes place over a period of time. *See* Elizabeth Spahn & Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F. L. REV. 261 (1998) (discussing conception as occurring over a period of time). Most women can attest to the fact that delivery is a long process and that the recovery therefrom is even longer. Pregnancies can also end with miscarriages or abortions. For an example of a court that found pregnancy discrimination when an employer fired a woman because she was the center of controversy due to an alleged abortion, see *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996).

19. *See* Piantanida v. Wyman Ctr., Inc., 116 F.3d 340, 341 (8th Cir. 1997).

20. *Id.* n.2; *see also* Noble, *supra* note 6, at 1 (noting that women returning from pregnancy leaves often get pushed off the "fast track").

she understood she was being given this modified job because "now I have a new baby and I wouldn't be capable of doing the job."[21] The Eighth Circuit held that this was not discrimination on the basis that she had been pregnant,[22] but rather discrimination predicated on her new status of parenthood. There was nothing sex-based about this status according to the court's analysis: Parenthood is "not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees, including men and women who will never be pregnant."[23]

Biological processes cannot be separated so easily from the social construction of pregnancy and gender. After all, there is no reason to think that the employer also believed that its male employees who had recently fathered children were unfit for demanding jobs. If only female employees somehow become unfit as a result of the birth of children, then the resulting unfitness would certainly appear to be both because of pregnancy and because of gender.[24] The court did not question the employer's claim that parenthood was gender-neutral because, in many contexts, it is. In this particular context, however, it is unlikely that parenthood was treated in a gender-neutral manner.[25]

A second move that the Eighth Circuit makes in this case, which is also common in analyses that attempt to separate a biological definition from a socially constructed one, is to represent the pregnant woman as having chosen her situation. Thus, in *Piantanida* the court refers to "an individual's choice to care for a child."[26] The implication is that parenthood and Piantanida's career are somehow inconsistent. It is as if she had chosen to ask for some special accommodation as a result of having given birth. Nothing could be farther from the truth. She simply wanted to return to work. Portraying her as being in this situation as a matter of choice makes her "unfitness" and lack of a job sound as if they are not the employer's responsibility.

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21. Piantanida v. Wyman Ctr., Inc., 116 F.3d at 341 n.2.

22. Courts have found that there can be discrimination on the basis of pregnancy even if one is no longer pregnant. *See* Piraino v. Int'l Orientation Resources, Inc., 84 F.3d 270, 274 (7th Cir. 1996); Donaldson v. American Banco Corp., 945 F. Supp. 1456, 1464 (D. Colo. 1996).

23. Piantanida v. Wyman Ctr., Inc., 116 F.3d at 342; *see also* Pearlstein v. Staten Island Univ. Hosp., 886 F. Supp. 260, 266 n.5 (E.D.N.Y. 1995) (stating that the PDA does not cover requests for leave following adoption). This position echoes the Supreme Court's comment in *Geduldig* that classifications based on pregnancy are not sex-based. This was exactly what Congress intended to overturn in enacting the PDA.

24. The PDA explicitly defines discrimination "on the basis of sex" to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1994).

25. For what has become the classic discussion of the way in which workplace structures affect women's lives, see Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979).

26. Piantanida v. Wyman Ctr., Inc., 116 F.3d at 342.

The plaintiff in *Maganuco v. Leyden Community High Sch. Dist. 212*[27] experienced a similar problem. She was a school teacher who wanted to use her paid sick leave for a period of pregnancy-caused disability, followed by a period of unpaid maternity leave. The school district disallowed this because the collective bargaining agreement did not permit teachers to follow a period of sick leave with any other form of leave unless they continued to be disabled after their sick leave was exhausted. Any objective observer looking at this clause could predict that it would have its most significant effect on pregnant women who expected to take consecutive pregnancy and maternity leaves. This appears to be the ideal disparate impact case.

The court rejected a disparate impact challenge to the collective-bargaining agreement, combining both the non-biological and choice arguments into one:

> The impact of the leave policy . . . is dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a . . . schoolteacher's choice to forego returning to work in favor of spending time at home with her newborn child. However, this choice is not the inevitable consequence of a medical condition related to pregnancy . . . .[28]

According to the court, the biological consequences of pregnancy are limited and objectively ascertainable. They do not include a period of time at home with a newborn. Why the court should be so certain of this is not clear. What about the physical changes that come with lactation or the suppression of lactation? Are they not medical conditions related to pregnancy?[29] What about the psychological changes of the postpartum period and of bonding with a newborn?[30] The line between "biological" and "non-biological" effects of pregnancy is simply not self-evident in the way the court would have us believe it is. Instead, the use of a biological definition of pregnancy and its sequelae is simply a means of keeping women in their place. By defining pregnancy in terms

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27. 939 F.2d 440 (7th Cir. 1991).

28. *Id.* at 444-45.

29. The courts have repeatedly answered this question in the negative. *See* Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1492 (D. Colo. 1997) (finding that breast-feeding is not a medical condition related to pregnancy within the meaning of the PDA); McNill v. New York City Dep't of Correction, 950 F. Supp. 564, 569-71 (S.D.N.Y. 1996) (noting that breast-feeding is not protected by the PDA). The courts see breast-feeding as relating to the child's physical condition, not the mother's, and therefore not covered. What they do not consider is that delivery stimulates the woman's body to lactate, and that a lactating woman would be extremely uncomfortable if she were unable to relieve herself, including through breast-feeding. *See* DANFORTH'S OBSTETRICS AND GYNECOLOGY 168-69 (James R. Scott et al. eds., 7th ed. 1994). Of course, the lactation process can be artificially aborted, *see id.* at 172, but there is no reason why courts should consider this to be the norm instead of lactation.

30. *See, e.g.*, ROBERTA ROESCH, THE ENCYCLOPEDIA OF DEPRESSION 150-51 (1991) (defining postpartum depression).

of a narrow, biological series of processes, the court can reaffirm the distinction between work and family, and reinforce the sterotypical belief that women belong on the family side of the line.

The use of this definitive biological definition also allows the court to say that the consequences of pregnancy are neither covered by the PDA nor a matter of public policy, but instead are matters of individual, private choice. Because the court does not interpret the period that the plaintiff wishes to stay home to be necessary as a biological consequence of pregnancy, it instead becomes a matter of the woman's own choice. She, rather than the employer, is responsible for the adverse consequences.

The courts have had similar problems in attempting to determine where the protections of the PDA begin. A frequent question has been whether or not it covers treatment for infertility. For several courts, the United States Supreme Court's determination in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.*[31] that the PDA covers treatment based on the potential for pregnancy, as well as on-going pregnancies, has been crucial.[32] These courts—only district courts so far—have adopted a considerably less biologically based definition of pregnancy and related conditions. They have emphasized that before the passage of Title VII and its amendment by the PDA, women were often discriminated against because of their capacity to become pregnant. They were seen as marginal workers.[33] They were understood as imposing costs on the employer because of their ability to become pregnant.[34] Furthermore, women with the potential to become pregnant were subject to discrimination until they passed childbearing age.[35] By focusing on women's plans to become pregnant instead of on the physical pregnancy itself,[36] the courts are focusing more on the social meaning of pregnancy than on the biological changes that accompany it.

Even the courts that accept a social definition find it hard to let go entirely of the possibility of using biology to define pregnancy. Thus, they bolster their positions with help from biology. These courts emphasize that, "[w]hile infertility may well be gender-neutral, the ability

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31. 499 U.S. 187 (1991).

32. *See, e.g.*, Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312, 1318 (D. Or. 1995) (citing *Johnson Controls*); Erickson v. Board of Governors of State Colleges and Univs., 911 F. Supp. 316, 319 (N.D. Ill. 1995) (describing *Johnson Controls* as controlling); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1401-02 (N.D. Ill. 1994) (discussing *Johnson Controls*).

33. *See* Pacourek v. Inland Steel Co., 858 F. Supp. at 1402 (citing Senate floor debate on the PDA).

34. *See* Erickson v. Board of Governors of State Colleges and Univs., 911 F. Supp. at 320 (referring to legislative history).

35. *See id.*

36. *See, e.g.*, Cleese v. Hewlett-Packard Co., 911 F. Supp. at 1318.

to become pregnant clearly is not."[37] This observation is essential to show that the plaintiff has been discriminated against "because of . . . sex."[38] It also recenters the discussion on women's biological capacity. Similarly, the *Pacourek* court describes the PDA's coverage as being comprised of concentric circles, with actual pregnancy in the innermost circle.[39] Problems relating to the initiation of pregnancies would be in the next circle. This, too, recenters the discussion on women's biological capacity.

This reversion to the biological is likely to be problematic for women seeking protection under the PDA. In *Krauel v. Iowa Methodist Medical Ctr.*,[40] the Eighth Circuit, the only circuit court to speak on this issue so far,[41] held that an employer did not violate the PDA by excluding coverage for fertility treatments from its health plan. Staking out a biologically reductionist position, the court said that pregnancy and childbirth occur after conception and are "strikingly different" from infertility, which prevents conception.[42] The endorsement of this narrow biological definition of pregnancy allowed the court to separate the realm of work from the realm of women. Because the exclusion of infertility treatment from the health plan was not considered discrimination, the employer was within its rights to base its exclusion on the fear that it employed "too many" women of childbearing age whose infertility treatments might result in multiple births and increased costs for the health plan.[43] What does "too many" women mean? Presumably the company's vice-president, from whose statement the court was quoting, was thinking only in terms of costs to the firm. The implication, however, is that women impose costs on the business that men do not, and therefore they (or their womenly aspects—the ability to become pregnant) should be excluded from the business. Again, this is an example of how the biological definition of pregnancy is being used to exclude women's issues from the workplace.

DEROGATORY COMMENTS, STEREOTYPING, AND DIRECT EVIDENCE

Pregnancy discrimination cases are usually disparate treatment, not disparate impact, suits.[44] Disparate treatment cases may be proven in

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37. *Id.* at 1317.

38. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994).

39. *See* Pacourek v. Inland Steel Co., 858 F. Supp. at 1403.

40. 95 F.3d 674 (8th Cir. 1996).

41. *See id.* at 679.

42. *See id.*

43. *See id.* at 680.

44. Disparate treatment cases involve intentional discrimination against a target on the basis of a prohibited classification, such as pregnancy. Disparate impact cases involve the application of "neutral," facially non-discriminatory criteria that have a disproportionate impact on members of a protected class. *See* HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 4.1 (1997). Occasionally pregnancy discrimination cases are litigated as disparate impact

either of two ways. Plaintiffs who do not have direct evidence of discrimination may proceed according to what courts call the "now familiar" burden-shifting process set forth in *McDonnell Douglas Corp. v. Green*[45] and *Texas Dep't of Community Affairs v. Burdine*.[46] Plaintiffs who are fortunate enough to have direct evidence must simply show that improper reliance on a protected classification was a "motivating factor" in the defendant's decision, although there may also have been other reasons for the decision.[47] If the plaintiff can make this showing, then the burden of persuasion shifts to the employer, who must show that it would have taken the same action, even without the impermissible motivating factor, if it wants to avoid an award of damages or reinstatement against it.[48] In mixed-motive cases, as in burden-shifting cases, it is often next to impossible to prove that the employer's conduct was motivated by discriminatory animus because of rules about what kind of data counts for these purposes.

Often, plaintiffs in mixed-motive cases want to prove the employer's discriminatory animus by using antagonistic comments that supervisors or employers have made to them. Courts have greatly restricted, however, what they will allow to be considered as evidence in these mixed-motive cases. The Court of Appeals for the First Circuit held that, in order for the plaintiff to satisfy her burden of showing that the defendant acted with a discriminatory motive, she must produce a "smoking gun": direct evidence that the employer was motivated by animus toward her because of her membership in a protected class.[49] According to the First Circuit, a plaintiff might meet this requirement if she received "an admission by the employer that it explicitly took actual or anticipated pregnancy into account in reaching an employment decision"[50]—an admission that most employers are too clever to make.[51] Similarly, the Eighth Circuit, in a decision this past January, required that the comments be made "contemporaneously and directly in

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cases. *See, e.g.*, Maganuco v. Leyden Community High Sch. Dist. 212, 939 F.2d 440 (7th Cir. 1991); Roberts v. United States Postmaster Gen., 947 F. Supp. 282 (E.D. Tex. 1996); *see also* Millsap, *supra* note 16, at 1422 (noting that the Supreme Court has never explicitly recognized the existence of a disparate impact cause of action for pregnancy discrimination).

45. 411 U.S. 792 (1973).

46. 450 U.S. 248 (1981).

47. *See* 42 U.S.C. § 2000e-2(m) (1994); Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); Geier v. Medtronic, Inc., 99 F.3d 238, 241 (7th Cir. 1996). *See generally* LEWIS, *supra* note 44, § 4.5.

48. *See* 42 U.S.C. § 2000e-5(g)(B)(i), (ii) (1994).

49. *See* Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996).

50. *Id.*

51. *But see* Mojica v. Gannett Co., 7 F.3d 552, 561 (7th Cir. 1993) (involving a race discrimination case in which the defendant bluntly told Hispanic plaintiff that she was not promoted because she was not a Black man).

connection with the adverse employment decision."[52] This too is a requirement that most employers know enough not to meet.[53]

While the courts recognize discrimination in these cases only if defendants baldly state their dislike or distrust of pregnant women, preferably just as they are making the employment decision, people's true feelings about pregnant women are likely to be revealed in their casual conversations when they are less inhibited by the recognition that their actions and words are formally operative.[54] For example, how should we interpret the following? The plaintiff, Holly-Anne Geier, worked as a sales representative for the defendant. She was "something less than a model employee,"[55] frequently late for work, lying to her supervisor, neglecting to return customers' messages, and falling below the established quotas. As a result of these difficulties, she was on and off of probation even before she became pregnant. Nevertheless, from the moment she got married, her supervisor, Roberts, was clearly troubled by the possibility that she would become pregnant and that this would cause him to have to work harder. As soon as she returned from her honeymoon, he asked her if she intended to have children. The court does not recount her reply, but we can assume it was positive because he then retorted, "'Have all the kids you would like—between spring, summer, and fall. I will not work your territory during the winter months.'"[56] This conversation took place during a long car trip, not during a discussion of her job performance or of her frequent stints on probation. Ten months later, she was at home recovering from a miscarriage when Roberts called her to say, "'Get out of your G_d d__n bed and call your accounts if you want to keep your f_____g job.'"[57] She returned to work (again on probation) within a week of his abusive call. That was in October of 1991. By January of 1992, she was pregnant once more and so informed Roberts. Barely waiting for the news to settle, he fired her within two weeks.[58]

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52. Deneen v. Northwest Airlines, Inc., 132 F.3d 431, 436 (8th Cir. 1998); *see also* Geier v. Medtronic, Inc., 99 F.3d 238, 242 (7th Cir. 1996) (holding that to be indicative of discriminatory animus, the remark must be "contemporaneous with the discharge or causally related to the discharge decision making process").

53. In the *Deneen* case, however, a Northwest Airlines employee actually did make comments to Deneen in connection with a recall from lay-off status that showed its discriminatory animus toward pregnant women. The Eighth Circuit therefore upheld the district court's entry of judgment for Deneen. *See* Deneen v. Northwest Airlines, Inc., 132 F.3d at 438-39.

54. *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 340-41 (1987) (suggesting that stereotypes that are ordinarily repressed may slip out during casual conversation).

55. Geier v. Medtronic, Inc., 99 F.3d at 240.

56. *Id.*

57. *Id.* at 241.

58. *See id.*

It is exactly comments like these (combined with timing like this)[59] that are most likely to disclose the defendant's true attitude toward a pregnancy by the plaintiff. On a long car trip, Roberts is likely to have expressed himself in an uninhibited manner. What he was declaring was a clear anxiety that a pregnancy by the plaintiff would result in more work for him. While the court subsequently characterized the comment as indicating only an unwillingness to accept winter absences due to childbirth, it is hard not to also see in it Roberts's resentment that he might be called upon to work plaintiff's territory in addition to his own due to her pregnancy. The invasive phone call during her miscarriage indicates a similar fear that her pregnancy might mean extra work for him.

This would seem like a paradigmatic case for mixed-motive treatment. On the one hand, the defendant's supervisor made multiple comments indicating hostility to the idea of plaintiff's being pregnant and fired her within weeks of her announcement of her renewed pregnancy. On the other hand, there was also the distinct possibility that the plaintiff was fired for not performing well on the job. The Seventh Circuit, however, did not interpret Roberts's comments as indicative of animus toward the plaintiff's pregnancy or toward the possibility of her pregnancy. The court characterized the warning during the car trip as merely a "casual conversation during a long car trip," which was insufficient to create a showing of discrimination under the direct evidence approach because it was neither contemporaneous with her dismissal nor did it have a causal nexus to it.[60] The court recognized the brutal comments after Geier's miscarriage as "insensitive," "unconscionable," and "reprehensible," but, again, not as causally connected to her dismissal.[61]

How did the court arrive at this last conclusion? It asserted that the plaintiff had not proven that the comments reflected on her pregnancy rather than her absence from work.[62] If comments like Roberts's are not enough to meet the plaintiff's initial burden of showing that anti-pregnancy animus was a motivating factor, plaintiffs will indeed be required to come up with the impossible smoking gun.

Geier is not the only case in which the courts discount the potency of remarks made by defendants that illustrate hostility to employees' pregnancies. Other courts have downplayed employers' suggestions that pregnant women should not return to work after their pregnancies but rather should remain at home with their children,[63] that pregnant women

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59. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994) (recognizing the importance of suspicious timing to plaintiff's proof in mixed-motive cases).

60. *See* Geier v. Medtronic, Inc., 99 F.3d at 242.

61. *See id.*

62. *See id.*

63. *See* Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997) (noting that the employer thought mothers of young children should stay at home); EEOC v. Northwestern Mem'l Hosp., 858 F. Supp. 759 (N.D. Ill. 1994) (maintaining that the fact that the employer made three

do not perform well at work,[64] are repeatedly pregnant,[65] should focus on their families,[66] or should not be pregnant and unmarried.[67]

These cases illustrate the important, but subtle, ways in which traditional ideas about women and pregnancy still continue to influence courts' thinking. In *Geier*, the court understood Roberts's comments as indicating that he was really thinking that a pregnancy would mean more work for him. The members of the judiciary, like most of the rest of society, have been socially conditioned to think about women's pregnancies as disabling. This interpretation resonates with stereotypes and is convincing exactly because of its easy fit with them. Unfortunately, this does not make it the more likely interpretation of Roberts's words. In fact, in the particular sales job that Holly-Anne Geier held, the court did not indicate any reason to believe that Geier would need a maternity leave of more than a few weeks. If she remained healthy, she could be expected to continue working until quite close to the baby's birth and then to return to work within a matter of weeks. The case itself demonstrates that she could keep up with her work during that period by making telephone calls from home. If all this is true, then Roberts's fear of extra work is based on the outmoded belief that pregnant women cannot participate in paid work. This is exactly the type of stereotyped judgment that the PDA was intended to eliminate from employment decisions. Certainly the same is true about employment decisions motivated, even in part, by the idea that women should stay at home with their children instead of participating in the paid workforce. Pregnant women should not be forced to choose between work and home as if these were separate and irreconcilable realms.[68]

In other instances, the employer's comments do not even get discussed by the courts in making their decisions, or, if they are discussed, they are rejected as clearly not relevant. Thus, for example, in *In re Carnegie Ctr. Assocs.*,[69] when Deborah Rhett disclosed her pregnancy to her supervisors, they immediately asked if she was going

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different comments indicating that the mother of a young child should be at home may not be directly connected to the challenged employment decision).

64. *See* Lacoparra v. Pergament Home Ctrs., 982 F. Supp. 213, 225 (S.D.N.Y. 1997) (noting that the plaintiff "worked better before [her leave]").

65. *See id.* ("Here we go again.").

66. *See* McDonnell v. Certified Eng'g & Testing Co., 899 F. Supp. 739, 744 (D. Mass. 1995) ("[N]ow that [McDonnell] was pregnant, she had more important things [than work] to be concerned about.").

67. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 293 (3d Cir. 1997).

68. *See Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995), in which the Seventh Circuit affirmed a jury verdict for the plaintiff in a case tried on the direct evidence theory. As part of her evidence, the plaintiff proved that her supervisor, upon seeing her obviously pregnant, had said he was surprised with her condition because he had always believed her to be a "career woman." *See id.* at 1348. This statement is objectionable exactly because of its conventional assumption that pregnant women cannot be dedicated to their careers.

69. 129 F.3d 290 (3d Cir. 1997).

to get married and one said, "in society's eyes . . . [it was] the right thing to do."[70] This comment, and the immediate questions about her marriage prospects, disclose a good deal about the supervisor's discomfiture with Rhett's pregnancy as a single woman. Despite this, they are not even considered when the court discusses the plaintiff's evidence in proof of her mixed-motive case. Because the court does not discuss them, we have no way of knowing why it disregarded them. One explanation is that the court omitted any analytical reference to the comments because the court did not see them as indicative of any unusual level of animus toward pregnant employees. One explanation for the court's failure to discuss the comment is that the court also felt uncomfortable with the idea of an unmarried pregnant woman in the workplace. Thus, it did not see the employer's comments as evidence of discrimination. Instead, it saw the comments as natural and innocuous.

In *McDonnell v. Certified Engineering & Testing Co.*,[71] the plaintiff had announced her pregnancy, and then, on the same day, been told that her employment was being terminated.[72] The following day, when she went to say good-bye to one of her supervisors, he commented that now that she was pregnant she had "more important things to be concerned about."[73] This comment was not considered by the court in its analysis of the strength of the plaintiff's discrimination case. This could be because the court considered the plaintiff's case to be clear and strong without it.[74] But, if that was the situation, why does the court see the comment as adding nothing? Perhaps, in the court's mind, the comment was self-evident: pregnant women do have more important things than the workplace to think about. As with *In re Carnegie Ctr. Assocs.*, if the court understood the comment as clearly accurate, then it would not be likely to recognize its demeaning implications: pregnant women should not bother their little heads with anything but the thought of the life growing within them. Again, this is exactly the type of stereotyped approach to pregnancy and the workplace that the PDA was intended to prevent.

One of the most complicated and troubling of the cases decided under the PDA is *Troupe v. May Department Stores Co.*[75] The plaintiff in *Troupe* had worked for May Department Stores for three years before she became pregnant. Her work was considered completely satisfactory. Upon becoming pregnant, she developed terrible morning sickness. She requested, and was given, part-time status, working from noon to 5:00

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70. *Id.* at 293.

71. 899 F. Supp. 739 (D. Mass. 1995). *McDonnell* is actually decided under the *McDonnell Douglas* burden-shifting approach, but the court's failure to discuss the employer's derogatory comment is relevant in this context. *See id.* at 745.

72. *See id.* at 741.

73. *Id.* at 744.

74. The court rejected Certified's motion for summary judgment. *See id.* at 741, 753.

75. 20 F.3d 734 (7th Cir. 1994).

p.m. As Judge Posner described the situation in his opinion for the Seventh Circuit:

> Partly . . . because she slept later under the new schedule, so that noon was "morning" for her, she continued to experience severe morning sickness at work, causing what her lawyer describes with understatement as "slight" or "occasional" tardiness. In the month that ended with a warning from her immediate supervisor, . . . she reported late to work, or left early, on nine out of the 21 working days.[76]

Troupe was fired one day before she was scheduled to begin maternity leave. On the way to the meeting at which she was fired, she was told by her immediate supervisor that she was to be fired because the supervisor didn't believe that she would return to work after the baby was born.[77]

Troupe claimed that this, together with the timing of her firing, was direct evidence of discrimination. She argued that the reason for her firing could not have been the employer's fear that continued lateness on her part would result in continued disruption of the business. After all, she was due to begin a maternity leave. The employer could hire someone to replace her while she was on leave, and there was no reason to think she would continue to be late after the maternity leave was over and the pregnancy was finished.[78] Troupe argued that the plausible explanation for her firing was that the employer did not believe that she would return to work when her maternity leave was over—a common stereotype about pregnant women. According to Judge Posner, this would not be a violation of the PDA unless she could prove that a male about to take a long-term, health-based leave would not have been fired also. As he wrote: "Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees."[79] It was up to Kimberly Hern Troupe to prove that nonpregnant persons were treated differently.[80]

This is a case in which two common stereotypes about pregnant women reinforce each other, making it that much easier for the court to see the plausibility of the employer's position and making the employee's position appear implausible. First, there is the stereotype that women who take maternity leaves do not return. Her supervisor, a woman, had already accepted the truth of this stereotype in relation to Troupe. This stereotype is particularly convincing because of traditional beliefs that pregnant women and mothers of young children do not

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76. *Id.* at 735.

77. *See id.* at 734-36.

78. *See id.* at 737.

79. *Id.* at 738.

80. For a discussion of the difficulties of locating appropriate comparative groups, see *infra* notes 86-125 and accompanying text.

belong in the workforce.[81] The employer was willing to assume this of Troupe only because she was a woman.

Second, there is the stereotype that pregnant women are "fat and lazy."[82] Although the court here says nothing about Troupe's size, it does imply that she is lazy.[83] After her schedule was altered to help her accommodate her morning sickness, "she slept later . . . so that noon was 'morning.'"[84] The implication is that she was simply too indolent to get herself up and vomiting at a decent hour of the morning. Once the court has accepted the image of Troupe as slothful in the mornings, it is easy to extend that to the rest of her activities. It reinforces the impression that she will be too lazy to return to work after her leave. Furthermore, her attorney's legal work is portrayed as equally lacking in initiative. According to the court, she could not prove her case without finding a comparative group of nonpregnant employees who were similarly situated and treated better. Of this, the court said:

> We doubt that finding a comparison group would be that difficult. Troupe would be halfway home if she could find one non-pregnant employee of Lord & Taylor who had *not* been fired when about to begin a leave similar in length to hers. She either did not look, or did not find.[85]

Thus, the implicit acceptance of the image of pregnant women as lazy affects the court's understanding not only of the employer's discriminatory comment but also of the pregnant woman's ability to make her case.

The stereotypes of pregnant women that are accepted in these cases also support the notion that pregnancy is inconsistent with satisfactory performance in the paid work force. Pregnant women are viewed as undependable: they are late to work; they are unlikely to return after their leaves; and, after delivery, their minds are, or should be, on the children they have left at home. If the quality of Troupe's lawyer's work is implicitly connected to her laziness, one can anticipate that her own work as a pregnant woman would be judged equally harshly. Indeed, numerous pregnant plaintiffs claim that the negative comments or

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81. *See* Troupe v. May Dep't Stores Co., 20 F.3d at 737.

82. *See* Oliphant v. Perkins Restaurants Operating Co., 885 F. Supp. 1486, 1490 (D. Kan. 1995) (stating that an employer accused an employee of using "pregnancy as an excuse for absence from work" and called pregnant women "unproductive and lazy"); *see also* Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994) (arguing that the *Troupe* opinion is flawed, in part because it takes a deprecatory position in relation to Kimberly Hern Troupe).

83. *See* Troupe v. May Dep't Stores Co., 20 F.3d at 735; *see also* Colker, *supra* note 3, at 79-80 (noting that *Troupe* blames the plaintiff for her problems at work).

84. Troupe v. May Dep't Stores Co., 20 F.3d at 735.

85. *Id.* at 739.

evaluations began only after they announced their pregnancies.[86] Stereotypes about pregnant women emphasize their unfitness for work in the market. Tacit acceptance of these stereotypes—indeed, a failure to denounce them—reinforces the idea that pregnant women do not belong in the workplace.

BURDEN-SHIFTING, COMPARISON GROUPS, AND STEREOTYPES

If the Pregnancy Discrimination Act protects women who are pregnant against any form of discrimination, one would expect it to protect women who are on pregnancy leave from being fired merely because they are on leave. Yet, it does not do this. This scenario usually occurs in situations in which the employer needs to reduce its workforce. It then chooses to eliminate the job position occupied by the pregnant woman. It chooses her position merely because she is on leave. For example, in *Ulloa v. American Express Travel Related Serv.*,[87] the defendant decided to eliminate a position from the customer service department while the plaintiff was out on maternity leave. The defendant had no specific policy for determining which employees were to be terminated when a staff reduction was to occur; it chose the plaintiff because she was on leave.[88] According to the department's manager, had she not been on leave, seniority and productivity would have been utilized to determine whose job to cut.[89] The court ruled that the defendant had not violated the PDA.[90] Similarly, in *Crnokrak v. Evangelical Health Sys. Corp.*,[91] the plaintiff, on pregnancy leave, lost her supervisory job when a co-worker complained of feeling underpaid. The co-worker was promoted into the plaintiff's position, and the plaintiff was told by the supervisor that "she had been 'in the wrong place at the wrong time,' and that had she not been out on pregnancy leave she would not have been replaced."[92] The employer defended against the employee's pregnancy discrimination suit on the grounds that she had been terminated because she had been out of the office on leave,

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86. *See infra* text accompanying notes 86-125 (discussing the difficulties of locating appropriate comparative groups); *see also* Troupe v. May Dep't Stores Co., 20 F.3d at 735-36.

87. 822 F. Supp. 1566 (S.D. Fla. 1993).

88. *See id.* at 1571. Although Ms. Ulloa had exceeded her leave, testimony indicates that had she not been on leave, other criteria might have resulted in her retention. *See id.* at 1569.

89. *See id.* Had these criteria been used, the plaintiff would have scored high in terms of productivity. In the year before she took her leave, the defendant had called her the most productive employee in the unit. In that same year, the defendant had recognized the quality of Ms. Ulloa's work in its performance appraisal and had given her the "Star Performer Award" for five of the months of that year. Moreover, others in her unit were retained even though they had less seniority than the plaintiff. *See id.* at 1567-69.

90. *See id.* at 1571-72.

91. 819 F. Supp. 737 (N.D. Ill. 1993).

92. *Id.* at 739.

not because she was pregnant.[93] The court accepted this as a legitimate, non-discriminatory reason for the employer's action.[94]

Finally, just last fall, the Third Circuit decided *In re Carnegie Ctr. Assocs.* As in *Ulloa*, the employer in *Carnegie* decided while the claimant, Deborah Rhett, was on pregnancy leave that it needed to reduce the size of its workforce. Rhett was one of four secretaries in her department. While she was on leave, Carnegie hired a temporary secretary to take her place. When it came time to reduce the number of secretaries in the department, Rhett's position was eliminated because "it was easy to abolish her former position by not hiring any more temps."[95] The Third Circuit was very clear about the issue in the case, stating: "The main issue on this appeal is whether an employee's absence on maternity leave can be a legitimate nondiscriminatory reason for termination."[96] It also acknowledged that, "Carnegie has made no showing that Rhett's position would have been eliminated if she had not been away at the time."[97] The court then held that it did not violate the PDA for an employer who wanted to reduce the size of the workforce to fire a woman on pregnancy leave simply because she was absent from the office.[98]

How can it possibly be that conduct that so blatantly discriminates against pregnant women is permissible under a statute intended to outlaw exactly such pregnancy discrimination? Doctrinally, the problem is that a plaintiff must be able to show that she has been treated differently than those who are not members of the protected class have been treated in the same situation.[99] For some plaintiffs, this is a catch twenty-two. Often there is no one else who has been in plaintiff's situation, or, if there are others, they are all members of the protected class—pregnant women. The problem is more complicated than this, however. Comparing the treatment of a pregnant woman to that of someone similarly situated, but not a member of the protected class, requires a delineation of what constitutes "similarly situated." To do this, the courts must understand which of plaintiff's characteristics are part and parcel of her pregnancy and which are not. This is where the use of stereotypes enters the analysis, yet again.

In cases like *Ulloa*, *Crnokrak*, and *In re Carnegie Ctr. Assocs.*, the plaintiff claims that defendant's actions, such as firing her merely because she was on pregnancy leave, should be considered indicative of intent to discriminate despite the absence of blatant evidence of

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93. *See id.* at 743.

94. *See id.*

95. *In re* Carnegie Ctr. Assocs., 129 F.3d 290, 293 (3d Cir. 1997).

96. *Id.* at 294.

97. *Id.* at 296.

98. *See id.* at 297.

99. *See* Colker, *supra* note 3, at 79 (asserting the impossibility of identifying appropriate comparison groups).

discrimination. Cases like these are litigated under the burden-shifting approach of *McDonnell Douglas Corp. v. Green*.[100] Under this approach, the plaintiff initially must make a showing of a prima facie case against the defendant. The prima facie case consists of four elements.[101] First, the plaintiff must show that she is a member of a protected class. Here, that is accomplished by proof of her pregnancy. Next, she must show both that she was the subject of an adverse employment decision and that she was qualified for the position or benefit sought. Finally, in order to make a prima facie case, she must show that employees who are not members of the protected class were treated better than she was. The plaintiff's burden in showing a prima facie case is relatively light.[102] If the plaintiff is successful in making a showing of a prima facie case, the burden of production shifts to the employer to state a non-discriminatory reason for the employment decision. Once the employer has done that, the burden returns to the plaintiff to prove that the employer's stated reason is only a pretext for discrimination.[103]

In determining whether or not an employer's conduct is pretextual, plaintiffs can use much of the same kind of evidence as they use in showing direct discrimination. Thus, timing is important in establishing a pretext, just as it is in establishing direct discrimination.[104] Comments showing the employer's bias against the protected characteristic are also important. In one case in which a supervisor, upon learning of the plaintiff's pregnancy, had thrown her a key chain with a condom attached and said, "'[M]ake sure after you have this baby you use this so that we won't have to worry about you going on maternity leave again,'" the court found the remark relevant to both the direct discrimination and burden shifting approaches.[105]

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100. 411 U.S. 792 (1973).

101. *See* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1224 (6th Cir. 1996); Geier v. Medtronic, 99 F.3d 238 (7th Cir. 1996); *see also* LEWIS, *supra* note 43.

102. *See* Knezevic v. Hipage Co., 981 F. Supp. 393, 395 (E.D.N.C. 1997).

103. *See* Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1214 (6th Cir. 1996); Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996); *see also* LEWIS, *supra* note 44, § 4.4.

104. *See, e.g.*, Piraino v. International Orientation Resources, Inc., 84 F.3d 270, 276 (7th Cir. 1996); Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312, 1320 (D. Or. 1995); McDonnell v. Certified Eng'g & Testing Co., 899 F. Supp. 739, 749 (D. Mass. 1995).

105. Cmokrak v. Evangelical Health Sys. Corp., 819 F. Supp. 737, 743-44 (N.D. Ill. 1993). In contrast, at least one court in the same district as the *Cmokrak* court has held that employer statements that may not prove a case under the direct discrimination approach because they do not fit the nexus and contemporaneousness requirements will provide an inference of pretext under the burden-shifting approach. In *EEOC v. Northwestern Mem'l Hosp.*, 858 F. Supp. 759 (N.D. Ill. 1994), the plaintiff's supervisor had frequently made comments to the effect that women should stay home with their children. *See id.* at 766. The court found that although these comments may not have been sufficiently connected to the actual employment decision to meet the plaintiff's burden in a direct evidence case, they would allow the court to find that the employers's claimed neutral reason for dismissing the plaintiff was a pretext. *See id.* at 767.

The aspect of the burden shifting approach that pregnant plaintiffs find most problematic is the requirement that they be able to show that similarly situated non-members of the class were treated better than the pregnant plaintiff was treated.[106] Because this showing is a part of the plaintiff's prima facie case, inability to demonstrate that nonpregnant employees were treated differently is fatal to the plaintiff's action.[107] This requirement is particularly hard on pregnant plaintiffs because frequently there are no other employees who are "similarly situated" to the pregnant woman.[108] Remember Deborah Rhett in *In re Carnegie Ctr. Assocs.*, the plaintiff whose job was eliminated while she was on pregnancy leave?[109] The employer claimed that this was simply part of a reduction in force accomplished through the elimination of her leave position; Rhett claimed it was pregnancy discrimination.[110] As part of her prima facie case, she was required to prove that others on long leaves had not had their positions eliminated. Unfortunately for her, as the court noted, "it was difficult . . . to make such a showing because Carnegie never ha[d] had an employee on disability leave for a protracted period for a reason other than pregnancy."[111] As a result, Rhett lost her case.

Although it is unusual for a court to admit that there is no comparable group of nonpregnant employees with whom the plaintiff can compare herself, locating such a group is frequently very difficult. This is because pregnancy is a unique condition and imposes unique burdens on women who become pregnant. When else would you find a previously satisfactory worker who suddenly begins to be egregiously late for work

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106. This requirement may be part either of the fourth element of the prima facie case or of proving that the employer's asserted legitimate reason was merely a pretext. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 297-98 (3d Cir. 1997).

107. Some courts require a similar showing as part of a mixed-motive case in which the plaintiff needs to prove that she was intentionally discriminated against because of her pregnancy. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (holding that plaintiff who was routinely late because of morning sickness failed to meet her burden because she had not proven that the employer ignored similar absences of nonpregnant employees). Placing the burden on the plaintiff to make such a showing in a mixed-motive case is wrong, however, because the plaintiff's burden is only to show that the employer had a discriminatory motive, while the defendant then has the burden of showing that it had a legitimate business reason. If plaintiff can show a discriminatory motive, as the plaintiff did in *Troupe*, through the use of employer comments and the timing of the firing, *see id.* at 735-36, then the burden should be on the employer to show the legitimacy of its reason by proving that it has applied the same rationale to other employees similarly situated to the plaintiff. *See* Geier v. Medtronic, Inc. 99 F.3d 238, 243 (7th Cir. 1996) (requiring the plaintiff to discuss comparison group as part of the direct evidence method of proof).

108. Of course, this is not always the case. Occasionally the plaintiff is lucky enough to have a ready-made comparison group. *See, e.g.*, EEOC v. Lutheran Family Servs., 884 F. Supp. 1022, 1029-30 (E.D.N.C. 1994) (comparing leave periods and consideration of likelihood of need for additional leave in the plaintiff's case and in cases of employees seeking disability leave).

109. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 293 (3d Cir. 1997).

110. *See id.*

111. *Id.* at 297.

(because of morning sickness), whose lateness can be expected to continue for numerous weeks, who has a scheduled leave coming up, and who can be expected to return after that leave with no further lateness issues? These facts are taken from *Troupe* in which the court said that it doubted that finding a comparison group would be very difficult.[112] In another case, the plaintiff had a difficult time finding others who were "similarly situated" because she was working only part-time—because she had young children.[113] There is another case in which a plaintiff with superior evaluations requested consideration for an open promotion and was told that she would not be promoted because she would be going out on pregnancy leave. Again, the court held against the plaintiff because she had not shown that a position had previously been held open for an in-house male candidate who was on a long leave.[114] As with *Troupe,* how often will this constellation of facts exist?

These cases are similar to cases in which the pregnant plaintiff's work record is seriously blemished because of problems that are not derived from the pregnancy. Two courts of appeals have recently held that, in order to make the required prima facie showing, the plaintiff in such a situation must also locate a nonpregnant employee with all the faults of the pregnant employee, and show that the nonpregnant employee was treated better than the plaintiff.[115] As with other cases in which the plaintiff must locate a comparative group of employees, in these situations it will be virtually impossible for a plaintiff to find another employee who has demonstrated the same work faults and who made the same request for leave or reinstatement as she did.

It should be clear from this discussion that locating a comparison group of nonpregnant employees is crucial. It is crucial not just because of the role it plays in establishing plaintiff's case but also because of what it tells us about the courts' understanding of pregnancy. Who are pregnant women like, and who are they unlike? This often raises the question of whether pregnancy is a disability or whether pregnant women are able-bodied workers. Do they belong at home or in the workplace?

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112. *See* Troupe v. May Dep't Stores Co., 20 F.3d at 739 (7th Cir. 1994). To be fair to the court, it did note that the plaintiff had not argued that there was no appropriate comparative group and that "[w]hat to do in such a case is an issue for a case in which the issue is raised." *Id.*

113. *See* Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1155 (7th Cir. 1997). The plaintiff in *Ilhardt* is in this position not because of her present pregnancy, but rather because of her assumption of a woman's cultural role of prime caretaker for young children. Thus, her position involves the possibility of a combination of discrimination against her as a woman together with discrimination because of her pregnancy. *Asher v. Riser Foods*, No. 92-3357, 1993 WL 94305 (6th Cir. Mar. 30, 1993) also involves a pregnant plaintiff who is working part-time, but it is not clear from the opinion if that is related to previous pregnancies.

114. *See* Zoleke v. CNA Ins. Cos., No. 88C8080, 1992 WL 175526 at *1, *4 (N.D. Ill. Jul. 23, 1992).

115. *See* Geier v. Medtronic, Inc., 99 F.3d 238, 241 (7th Cir. 1996); DeJarnette v. Corning, Inc., 133 F.3d 293, 298 (4th Cir. 1998).

Often pregnant women are compared to the disabled. This invokes a common stereotyped image of pregnant women—women who because of their condition are too tired, too large, or too emotional to carry on their normal activities. In looking for a point of comparison for the employer's treatment of the pregnant woman and pregnancy leaves, courts frequently ask whether the plaintiff has shown that the employer would have treated a similarly disabled, nonpregnant employee's request for a leave more favorably.[116]

In *Troupe,* in which the Seventh Circuit decried the plaintiff's failure to find even one similarly situated employee as a point of comparison, the court addressed the issue of whether dismissing an employee for fear that she would not return from a pregnancy leave would be discrimination under the PDA.[117] In order to answer the question, the court felt that it had to imagine a comparable nonpregnant employee, and the employer's treatment of him. Who is this imaginary comparable employee? "[A] black employee scheduled to take a three-month paid sick leave for a kidney transplant."[118] But, are pregnancy and a kidney transplant really comparable? The heavy demand for transplant organs means that the kidney transplant candidate may have been on the waiting list for a donor kidney for quite some time, during which he may have been getting sicker and sicker. This may have interfered seriously with his work. After the transplant, he is likely to continue to be on anti-rejection medication that will undermine his immune system, making continuing absences more likely.[119] Finally, the transplant patient may imagine himself as a sick person as a result of the underlying kidney disease, the operation, and the long recovery period. This too may affect him as a worker. The pregnant employee, in contrast, may not have been ill before the delivery and may return from it in excellent shape. She is unlikely to see herself as an invalid. The courts' approach to comparative thinking encourages us to think about pregnancy as an illness or disabling condition.[120] It is not surprising that if we think about it in that way, we will discover all kinds of reasons why the (disabled) pregnant woman is unable to work. Once again, the structure of anti-discrimination law is built on traditional stereotypes of pregnancy. Their continued use creates doctrines that permit discrimin-

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116. *See* Zoleke v. CNA Ins. Cos., 1992 WL 175526, at *4; *In re* Carnegie Ctr. Assocs., 129 F.3d at 297.

117. *See* Troupe v. May Dep't Stores Co., 20 F.3d at 738.

118. *Id.* The court chose a Black employee as a way of thinking about what constitutes racial or pregnancy discrimination.

119. *See Transplant Surgery: Rejecting Rejection,* THE ECONOMIST, Aug. 23, 1997, at 60 (noting that organ transplants require suppression of the immune system).

120. This statement is not intended to endorse discrimination against people with disabling conditions or illnesses, but merely to point out that pregnancy differs from a disability and is not an illness. Persons with disabilities may be protected from employment discrimination by the Americans with Disabilities Act. *See* 42 U.S.C. §§ 12101-12213 (1994).

ation against pregnant women and that subordinate pregnant employees to nonpregnant employees.

On the other hand, pregnant women in the workplace are sometimes compared to nonpregnant, able-bodied employees. Interestingly, this too reinforces the stereotype of pregnant women as disabled. A nice, illustrative case is *Armstrong v. Flowers Hospital, Inc.*[121] In this well-known case, the plaintiff was a pregnant nurse who objected to being assigned to treat an HIV-positive patient with an opportunistic infection. The plaintiff was not only concerned about the risk to a fetus in its first trimester of development but also about the risk to her given that she had developed gestational diabetes.[122] The court held that she had not made out a prima facie case of discrimination under the burden-shifting approach because the policy she challenged, which required nurses to treat their assigned patients, had been applied in exactly the same way to pregnant and nonpregnant employees.[123]

In holding that the pregnant plaintiff should be compared to nonpregnant, able-bodied nurses, the court again reinforces stereotypes of pregnant women. It does not recognize the physiological changes that occur when a woman becomes pregnant. Pam Armstrong's claim was that her body was not the same in its ability to ward off disease as it was before she became pregnant.[124] Thus, she asserted, nonpregnant nurses are really not similarly situated in their ability to work as pregnant nurses. In refusing to recognize differences, the court makes the plaintiff sound like the stereotypical hysterical pregnant woman. By disregarding her concerns for both the fetus's and her own health, it implies that she exaggerated or made up the risks at stake here. Its recitation of the fact that three other nurses became pregnant after Armstrong, and that they all treated AIDS patients, makes her sound even more irrational.[125] The court further reinforces the impression of Armstrong's hysteria by telling us that her two nursing supervisors, both women, "did not understand

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121. 33 F.3d 1308 (11th Cir. 1994).

122. *See id.* at 1310.

123. *See id.* at 1314. The policy did make exceptions for some nurses. Those with "exudative (oozing) lesions or weeping dermatitis (inflamation of the skin)" were not to engage in patient care until their conditions were better. *See id.* at 1311. The court also rejected a disparate impact claim on the grounds that the adverse impact of the policy on pregnant women was the difficult decision between the job and potential harm to her fetus. Citing *Johnson Controls*, the court found that there was nothing wrong with imposing such a choice on women. *See* Armstrong v. Flowers Hosp., Inc., 33 F.3d at 1315-16.

124. She argued that gestational diabetes can weaken a woman's own immune system. *See id.* at 1310. Subsequently, an expert testified in deposition that a pregnant employee, even without gestational diabetes, is more susceptible to disease than nonpregnant employees. *See id.* at 1315.

125. *See id.* at 1311. Another way to understand the situation, however, would be to recognize that after Armstrong was fired for refusing to treat an HIV-positive patient, other pregnant nurses may have felt as if they had no choice but to treat them. Armstrong's position may have been one that the others wished they could follow.

why Armstrong would refuse to see an HIV-positive patient."[126] Here, we have two other trained nurses, both women, unable to understand what the plaintiff's concerns are. How can she possibly be sane? Once again, it is the courts' ability to use these stereotypes that makes its decisions plausible. On reading the opinion, we feel as if the plaintiff was asking for something to which she was not entitled—something that an excessively emotional, pregnant woman might believe was crucial, but which we rational, objective beings know is just an overreaction.

POSSIBILITIES

Pregnant women are trapped by these stereotypes of who they are. Because our culture normalizes negative stereotypes of pregnant women, it is easy for us to accept that pregnant employees will compare unfavorably with nonpregnant ones. Because we tend to separate the realms of work and family, negative stereotypes of pregnant women that make them appear unfit for the workplace ring true to us. The question is, how can we think beyond the stereotypes that have historically controlled our approaches to pregnancy in the workplace?

One possible solution to the problems that pregnant women face at work is to invoke the terms of the Family and Medical Leave Act (FMLA).[127] The FMLA provides for up to twelve weeks of unpaid leave for eligible employees because of either the birth of a child or because of a serious health condition that makes the employee unable to perform on the job.[128] Pregnancy-related complications count as a serious health condition.[129] If the need for the leave is due to a serious health condition, the leave can even be taken intermittently.[130] The FMLA will undoubtedly be helpful to many pregnant women, including those who are required to take short periods of bedrest because of spotting or cramping and those who must occasionally miss time at work for other pregnancy-related reasons.

The FMLA also has serious limitations for pregnant women. First, many pregnant women cannot afford to take advantage of the FMLA because it mandates only unpaid leave. Second, the FMLA only provides a leave of twelve weeks. This will not be long enough for women whose problems continue throughout the forty weeks of pregnancy. Third, the FMLA is of no assistance to pregnant women who do not want to take a leave, but simply want to be able to take a walk periodically around their workplace or to eat small snacks at their desks. In this way, it reinforces the stereotyped image of pregnant women as

126. *Id.* at 1311.
127. 29 U.S.C. §§ 2601-2654 (1994).
128. *See id.* § 2612 (1994).
129. *See* 29 C.F.R. § 825.114(a)(2)(ii) (1997).
130. *See* 29 U.S.C. § 2612(6) (1994).

unfit for work. The lesson of the FMLA is that if the woman's pregnancy is causing her to have difficulty with her usual work assignments, her remedy is to leave the workplace.

Finally, and most significantly, the FMLA is subject to the possibility of being misused against pregnant women instead of as a means of protecting them. In the recent case of *Harvender v. Norton Co.*,[131] the district court granted the employer's motion for summary judgment against a plaintiff who claimed that the employer had violated the FMLA by forcing her to take leave under the Act when she did not want it.[132] When the plaintiff first informed her employer that she was pregnant, the employer asked her to obtain a note from her doctor indicating that she should be protected from exposure to hazardous chemicals since her job as a lab technician exposed her to such chemicals approximately sixty percent of the time. The plaintiff procured the requested note. Claiming that there was no light duty work available, the employer then placed the plaintiff on FMLA leave although the plaintiff never requested it and did not want it.

The court upheld the employer's action on the grounds that plaintiff's pregnancy was clearly a "serious health condition" under the FMLA and that as a result of it she could not work with chemicals. The FMLA did not guarantee her alternative employment. Therefore, the court reasoned, she could be put on FMLA leave.[133]

In the absence of the FMLA, this case would have forced the court to address the issues left unaddressed in *Johnson Controls*. In *Johnson Controls*, the Supreme Court had held that an employer's fetal protection policy was unconstitutional, boldly proclaiming that the decision as to whether to remain in a hazardous position while pregnant was a decision for the pregnant woman alone.[134] *Johnson Controls* does not say what happens to the pregnant woman who chooses not to remain in a position that is potentially harmful to her fetus.[135] The *Harvender* court used the

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131. No. 96-CV-653 (LIK/RWS), 1997 WL 793085 (N.D.N.Y. Dec. 15, 1997).

132. *See id.* at *8.

133. *See id.* at *7-*8.

134. *See* International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991).

135. It is not clear from the *Harvender* court's opinion whether the plaintiff really chose to leave her lab technician's position as a result of her pregnancy. She obtained the doctor's note in response to the employer's request. The court stated:

> Harvender does not assert that she approached Norton with the argument nor the evidence that she was in fact willing and able to perform all of the elements of her position. While it may be true that Harvender wished to continue working as a laboratory technician, the fact remains that she could not perform an essential element of that job and therefore could not perform the job satisfactorily.

Harvender v. Norton Co., No. 96-CV-653 (LEK/RWS), 1997 WL 793085. There is no evidence that the plaintiff was physically unable to perform her job despite the court's assertion. Under *Johnson Controls*, she was entitled to decide whether or not to stay on the job. Both the employer and the court understood her presentation of the doctor's note as an indication that she chose not

FMLA as a means of avoiding this issue. The FMLA provided an easy excuse. The plaintiff could be forced to take the unpaid leave and the court did not need to face the issue of whether the plaintiff had been discriminated against on the basis of her pregnancy in either the initial request for the doctor's note or in not finding alternative work for her.

Another possible solution to the problems that pregnant women continue to face, according to some commentators, would be to rely on the provisions of the Americans with Disabilities Act (ADA).[136] Recently there have been a number of cases that have discussed whether pregnancy is a disability, given the ADA's definition of a disability as a "physical or mental impairment that substantially limits . . . [a] major life activit[y]."[137] Unfortunately, the Federal Regulations cite pregnancy as an example of a condition that does not fall within the definition of a disability because it is not a physiological disorder.[138]

One can still argue that specific, severe effects of the pregnancy are disabling. The crucial issue then becomes: which of the troublesome aspects of pregnancy are "normal" and which are the result of a disabling "physiological disorder"? Numerous cases have held a variety of pregnancy-related difficulties do not amount to disabilities under the ADA while other cases have found that many of the same difficulties do fit within the ADA's definition of disability.[139] Once again, as with the cases relating to infertility and the postpartum period discussed in the beginning of this Article, the courts have found themselves unable to agree upon a biological definition of pregnancy.

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to remain on the job. Whether she would have so chosen if she had known that no light duty was available, we cannot know because she was never given that opportunity. To choose between a potential risk to your child and your job is a terrible choice, but it is the choice that *Johnson Controls* forces on her.

136. 42 U.S.C. §§ 12101-12213 (1994); *see generally* Matzzie, *supra* note 16.

137. 42 U.S.C. § 12102 (1994).

138. *See* 29 C.F.R. app. § 1630.2(h) (1997); *see also* Darian v. University of Mass. Boston, 980 F. Supp. 77, 85 (D. Mass. 1997) (citing 29 CFR 1630.2(h) (1995)). *But see* E.E.O.C. Compliance Manual, Vol. 2, EEOC order 915.002, § 902.2(c)(3), *cited in Darian, supra* (stating that pregnancy complications may be considered impairments).

139. Some cases hold that problems caused by the pregnancy are not covered by the ADA. *See, e.g.*, Jessie v. Carter Health Care Ctr., 926 F. Supp. 613 (E.D. Ky. 1996) (holding that limits on weight lifting and hours worked per day are not unusual circumstances for a pregnancy); Johnson v. A.P. Prods., 934 F. Supp. 625 (S.D.N.Y. 1996) (holding that pregnancy is not covered by the ADA, even where the plaintiff claims that complications made her temporarily unable to work); Kindlesparker v. Metropolitan Life Ins., No. 94-C-7542, 1995 WL 275576 (N.D. Ill. May 8, 1995) (finding that pregnancy-related conditions required medical attention); Gudenkauf v. Stauffer Communications, 922 F. Supp 465 (D. Kan. 1996) (finding that plaintiff's morning sickness, nausea, back pain, swelling and headaches are all part of a normal pregnancy); Lacoparra v. Pergament Home Ctrs., 982 F. Supp. 213 (S.D.N.Y. 1997) (reaching a similar conclusion regarding spotting and cramping). Other cases hold that problems caused by the pregnancy are covered by the ADA. *See, e.g.*, Soodman v. Wildman, Harrold, Allen & Dixon, No. 95-C-3834, 1997 WL 106257 (N.D. Ill. Feb. 10, 1997) (incompetent cervix); Patterson v. Xerox Corp., 901 F. Supp. 274 (N.D. Ill. 1995) (back pain); Darian v. University of Mass. Boston, 980 F. Supp. 77 (D. Mass. 1997) (student, not employee, with pregnancy-related pain).

Even if the courts were able to agree on what aspects of pregnancy are physiological disorders, the ADA would not be a useful vehicle for accommodating many of the work-related problems that women face. Most "normal" pregnancies involve a certain level of discomfort that will interrupt the workplace's daily routines. Pregnant women with uncomplicated pregnancies are likely to need frequent breaks to walk around, use the rest room, or eat snacks.[140] In the first trimester in particular they are likely to experience morning sickness or exhaustion that will affect their ability to arrive at work on time or to retain their concentration while on the job.[141] To cover these under "physiological impairment" would stretch that term to the point of meaninglessness.[142] Women facing these common difficulties of pregnancy can hardly be considered impaired.

In addition, bringing pregnancy under the ADA would reinvigorate the stereotype of pregnant women as disabled and not fit for work. Pregnant women have only been successful in asserting claims under the ADA when their pregnancies resulted in significant impairment of their normal ability to function, or when the pregnancy-induced condition combined with an underlying disability. Thus, they have succeeded in cases in which the doctor ordered complete bedrest as a result of an incompetent cervix,[143] in which there was severe pelvic pain that made it impossible for the plaintiff to remain seated or to go upstairs,[144] or in which the pregnant woman experienced extreme back pain on top of a preexisting back condition.[145] The implication is that the condition will be covered by the ADA only if it fits the stereotype of being disabling.[146] To fit in this way, the normal inconveniences of pregnancy would have to be significantly exaggerated.[147] To qualify for ADA coverage,

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140. *See, e.g.*, Patterson v. Xerox Corp., 901 F. Supp. 274 (N.D. Ill. 1995) (noting the need to walk around because of back pain); Gudenkauf v. Stauffer Communications, 922 F. Supp. 465 (D. Kan. 1996) (noting the need or desire for frequent snacks).

141. *See, e.g.*, Gudenkauf v. Stauffer Communications, 922 F. Supp. 465 (D. Kan. 1996); Troupe v. May Dep't Stores, 20 F.3d 734 (7th Cir. 1994).

142. The ADA is not intended to cover "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact." 29 C.F.R. app. § 1630.2(j) (1997).

143. *See* Soodman v. Wildman, Harrold, Allen & Dixon, No. 95-C-3834, 1997 WL 106257 (N.D. Ill. Feb. 10, 1997).

144. *See* Darian v. University of Mass. Boston, 980 F. Supp. 77 (D. Mass. 1997) (involving an educational, rather than employment, setting).

145. *See* Patterson v. Xerox Corp., 901 F. Supp. 274 (N.D. Ill. 1995).

146. In *Lacoparra v. Pergament Home Ctrs.*, 982 F. Supp. 213 (S.D.N.Y. 1997), the court said: "[T]he question is whether the [pregnancy] complication itself (*i.e.*, the 'impairment,' or physiological disorder) is substantial enough to qualify as a 'disability,' regardless of the fact that the woman is pregnant." *Id.* at 227.

147. It is possible to read *Patterson v. Xerox Corporation* as providing more support for pregnant employees who would like accommodation. The plaintiff in that case complained only of severe back pain caused both by the pregnancy and a preexisting injury. Her doctor recommended walking breaks every hour. Many pregnant women experience some level of back pain. In finding that the plaintiff's condition was covered by the ADA, however, the court

pregnant women will need to make their conditions appear so severe that they are not able to undertake a normal work life. This strengthens the stereotype that pregnant women are too disabled to be part of the workforce.

Others have argued that rather than fit pregnancy under the ADA, the PDA should be amended to require accommodation in the same way that the ADA does.[148] At least one state has done this.[149] The danger here is that the same stereotypes of disability will take over the analysis under the PDA as under the ADA. For example, in *Jacobson v. Healtheast*,[150] a Minnesota case decided under state pregnancy and disability statutes that require accommodations, the hearing officer barely mentioned the pregnancy claim, while spending significant time on the disability claim.[151] As with the cases decided under the ADA, if a traditional debilitating disability is not present, pregnancy is not seen as necessitating accommodations.

One remaining strategy for reducing the covert use of stereotypes in pregnancy discrimination cases is to distinguish between traits that are due to the pregnancy and those that are not. In most of the cases discussed in this Article, the courts have allowed employers to take actions against pregnant women so long as those actions can be attributed to some trait or characteristic of the women other than the pregnancy itself. By portraying the rationales for the terminations as independent of the pregnancy, the courts can understand the cases as not involving pregnancy discrimination. In many instances, however, the characteristic or event for which the plaintiff was terminated is directly related to the pregnancy. The stereotypes make this invisible. Cases in which women are terminated merely because they are on pregnancy leave are examples of this. The courts do not see the terminations as pregnancy discrimination; instead, they see them as terminations because the plaintiff was on leave. Another example is *Troupe*, in which the employee was fired because the employer did not expect her to return from pregnancy leave. *Armstrong*, in which the pregnant plaintiff refused to treat an HIV-positive patient because of fear that the pregnancy had weakened her immune system, is another example. In all of these cases, if the plaintiff had not been pregnant, the critical trait would not have existed. If the stereotypes of pregnant women as unfit

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emphasized that the pain was due not only to the pregnancy, but also to the preexisting injury. The latter meant that the pain's duration could not be foreseen, but that it might not be temporary or of short duration. *See* Patterson v. Xerox Corp., 901 F. Supp. at 278. This appears to limit its usefulness for later pregnant plaintiffs.

148. *See, e.g.*, Millsap, *supra* note 16, at 1428-50.

149. *See, e.g.*, MINN. STAT. ANN. § 363.03, subd. 1(5) (West 1991) (prohibiting pregnancy discrimination and creating a duty to make "reasonable accommodations").

150. Deborah Jean Jacobson, No. 8-1700-6953-2, DHR File No. E23494 (Minn. Dep't of Hum. Rts. July 1993), *available in* 1993 WL 852242.

151. *See generally id.*

to work had not been so strong, the courts might have seen the relationship between the operative characteristic and the pregnancy.

Situations like these need to be contrasted with cases in which the characteristic that interferes with work simply exists independently in a pregnant woman. For example, the fact that a woman is pregnant should not protect her against dismissal if she engages in excessive, morale-undermining phone use while pregnant,[152] or if, unconnected with her pregnancy, she is unable to perform her job.[153] Pregnancy, after all, does not confer on the plaintiff an immunity from unrelated, adverse job determinations.

Interpreting the PDA in this way would require the court to identify when the operative trait or condition is a result of the plaintiff's pregnancy. In *In re Carnegie Assocs.*, Judge McKee recognized that employers historically discriminated against pregnancy because of assumptions about pregnant women.[154] "[E]mployers," he wrote, "have assumed that female employees may become pregnant and that pregnancy would make them unavailable for work."[155] He argued that the protections of the PDA are meaningless unless they extend to characteristics or events that are "endemic" to pregnancy, such as absence from work.[156] This is an argument in favor of recognizing the ways in which stereotypes of pregnancy affect our assessment of occurrences, like lateness, the need for frequent breaks, or the inability to stand for long periods.

If the particular trait or event on which the employer is basing the action is found to be due to the pregnancy, one way of protecting the plaintiff would be to switch the burden of locating an appropriate comparative group to the employer. As indicated above, locating a comparative group is often extremely difficult. Thus, for example, if the pregnant plaintiff has been fired because she was repeatedly late for work due to morning sickness, it would be the employer's responsibility to show that other employees who were late just as frequently, but were not pregnant, were also fired. This would make sense because the employer has better access to the comparative data than the plaintiff. It would also make sense because it would recognize the power of the stereotype that women with morning sickness should not be in the workplace. Once the lateness is connected to the morning sickness, why should we not assume that the stereotype has influenced the employer's

152. *See* Visco v. Community Health Plan, 957 F. Supp. 381 (N.D.N.Y. 1997) (finding that complaints about excessive phone use began before announcement of pregnancy and, subsequent to announcement, were well corroborated by other employees).

153. *See* Afande v. National Lutheran Home for the Aged, 868 F. Supp. 795 (D. Md. 1994) (noting the plaintiff's poor evaluations prior to and during pregnancy).

154. *See In re* Carnegie Assocs., 129 F. 3d 290, 299 (3d Cir. 1997).

155. *Id.* at 305.

156. *See id.*

judgment as to how seriously to treat the lateness? If this is not the case, let the employer prove it.

Although most courts have not recognized the problem of stereotypes or the promise of switching the burden, the District Court for the Northern District of Illinois has, on occasion, been willing to overlook the complete absence of comparative data from a plaintiff's case. In *EEOC v. Northwestern Memorial Hosp.*,[157] the district court recognized that there are many different types of acceptable evidence from which to draw an inference of intent to discriminate.[158] In one case—yet another of the cases in which the plaintiff's employment was terminated while she was on pregnancy leave—the court found that failure to show similar treatment of comparable, nonpregnant employees was not fatal to the plaintiff's case.[159] In a second case, the same court held that the plaintiff could make out a prima facie case if she simply showed that a nonpregnant employee was treated more favorably than she was.[160] The plaintiff was not required to show that the nonpregnant employee was similarly situated in all ways except for pregnancy. Both of these cases indicate a recognition of the difficulties for the plaintiff of forcing her to identify a comparative group of employees and to prove that the situation for which she was fired was connected to the pregnancy. The unconscious use of stereotypes is part of why this is so difficult.

Another way for courts to identify the role of stereotypes is for them to focus on the actual ability of pregnant women to work. *Ensley-Gaines v. Runyon*[161] provides an example of a court that did this. In *Ensley-Gaines*, the plaintiff requested light duty (sitting) assignments because of her pregnancy, but was given relatively few. In contrast, sitting work was regularly assigned to employees who needed it because of on-the-job injuries. In reversing the trial court's grant of summary judgment for the defendant, the Court of Appeals for the Sixth Circuit held that the issue was whether the plaintiff and the employees injured on the job were similarly situated in their ability to work. If they were, neither the genesis of their condition nor collective-bargaining obligations would justify treating the plaintiff differently.[162] On remand, the defendant would have to prove that the reason why it refused to assign the pregnant plaintiff to as much light duty work as employees injured on the job was not merely a pretext for discrimination. This will necessitate affirmative proof by the employer; it will not be able to rely merely on stereotypes.

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157. EEOC v. Northwestern Mem'l Hosp., 858 F. Supp. 759 (N.D. Ill. 1994).

158. *See id.* at 767.

159. *See id.*

160. *See* Cmoknak v. Evangelical Health Sys., 819 F. Supp. 737 (N.D. Ill. 1993).

161. 100 F.3d 1220 (6th Cir. 1996).

162. *See id.* at 1226. *But see* Urbano v. Continental Airlines, 138 F.3d 204 (5th Cir. 1998) (finding no violation of the PDA to provide light duty to those injured on the job and not to pregnant employees).

The crucial step in protecting pregnant employees from adverse employment decisions based on discriminatory stereotypes is to force courts and employers to focus on the employees' abilities. This can be done by requiring the employer to prove how comparable employees have been treated. It can also be done by mandating, as in *Ensley-Gaines,* that if any employees are treated better than the pregnant employee, the employer will have the burden of proving that this is not discriminatory. It could also be done, as in Minnesota, by requiring employers to accommodate the needs of the pregnant employee, and then by paying close attention to ensure that stereotypes did not creep into the analysis.

CONCLUSION

Whatever the method, the lesson of this Article is that we must encourage courts to be vigilant against the use of unconscious stereotypes in deciding pregnancy discrimination cases. These stereotypes have inserted themselves insidiously into the interpretation of the law. Their use has gone primarily undetected. They are used to claim that pregnancy should be interpreted according to a narrow biological definition. Their acceptance makes the discriminatory nature of derogatory comments about pregnancy pass unnoticed. They go to the core of pregnancy discrimination law, influencing our conception of how pregnant women act, and thus the comparisons between pregnant and nonpregnant employees. The continuing role of stereotypes in pregnancy discrimination law means that pregnant women continue to be subordinated to nonpregnant people (particularly men) in the workplace.

We cannot avoid this situation by continuing to claim that pregnant women are like nonpregnant persons in all ways except the fetus growing within. That claim reinforces the position that, if they are different, they do not belong in the workplace. Instead, we must learn to discuss openly the problems that pregnant women specifically have in their particular jobs. We must focus on the stereotypes that make courts see these women as unable to perform. When the problematic characteristics derive from the woman's pregnancy, we must be especially skeptical of disabling stereotypes. The PDA should not be allowed to become a site for reengrafting these stereotypes on pregnant women.