

# CONNECTICUT LAW REVIEW

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VOLUME 42

MAY 2010

NUMBER 4

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## Note

### FEMALE INFERTILITY IN THE WORKPLACE: UNDERSTANDING THE SCOPE OF THE PREGNANCY DISCRIMINATION ACT

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*Pregnancy discrimination was once used to marginalize female workers. Today, infertility discrimination is used in much the same way. Employers often refuse to accommodate infertile women who request time off to undergo fertility treatments, forcing them to choose between family and work. Employers have even terminated infertile women because of their potential to strain company resources over a prolonged period of time. In addition, employer-funded health plans rarely provide coverage for fertility treatments, leaving infertile working women at a disadvantage compared to their pregnant counterparts. The Pregnancy Discrimination Act expanded Title VII's definition of sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions, but it did not define "related medical conditions." This Note argues that infertility is a medical condition related to pregnancy for the purposes of the PDA and advocates that Congress clarify that sex discrimination includes infertility discrimination.*

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# FEMALE INFERTILITY IN THE WORKPLACE: UNDERSTANDING THE SCOPE OF THE PREGNANCY DISCRIMINATION ACT

JEANNE HAYES\*

*I'm hurt, hurt and humiliated beyond endurance, seeing the crops ripen, the fountains give water endlessly, the ewes bear scores of lambs, and the bitches pups, till the whole countryside seems to rise up and show me its tender sleeping young, while I feel two hammer-blows here, instead of a child's mouth.<sup>1</sup>*

## I. INTRODUCTION

In 1987, NBC correspondent Maria Shriver called childlessness “The Curse of the Career Woman.”<sup>2</sup> Shriver was acknowledging a prominent social trend that persists today. Women intent on advancing their careers are increasingly waiting until later in life to have children.<sup>3</sup> But postponing childbearing adversely affects female fertility. A woman aged thirty-five to forty-four is twice as likely to be infertile as is a woman aged thirty to thirty-four.<sup>4</sup> Even at the relatively young age of thirty, up to ninety percent of a woman's eggs are gone.<sup>5</sup>

There are now more women in the workforce battling infertility than ever before.<sup>6</sup> Today, approximately 6.1 million women of childbearing age

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<sup>1</sup> FEDERICO GARCÍA LORCA, YERMA, act II, sc. 2. (A.S. Kline trans., 2007) (1934).

<sup>2</sup> SUSAN FALUDI, BACKLASH 104–05 (1991). See also SANDRA FREDMAN, WOMEN AND THE LAW 127 (1997) (noting that after World War II, childless women were increasingly able to penetrate traditionally male occupations, while women with children remained in “positions of disadvantage”).

<sup>3</sup> See Leslie Sowers, *Wanted: A Child of Our Own*, HOUSTON CHRON., Aug. 25, 1996, at 1 (describing the problems inherent in the trend toward later childbearing); see also FREDMAN, *supra* note 2, at 180 (discussing why women are delaying childbearing, namely, the “deepening gulf between the labour market position of women with children and those without”); U.S. Bureau of Labor Statistics, *Changes in Women's Labor Force Participation in the 20th Century*, THE EDITOR'S DESK, Feb. 16, 2000, <http://data.bls.gov/cgi-bin/print.pl/opus/ted/2000/Feb/wk3/art03.htm> (showing the increase in female labor force participation from 1950 to 1998).

<sup>4</sup> Sowers, *supra* note 3.

<sup>5</sup> Roger Fortuna & Suzan Clarke, *For Women Who Want Kids, 'The Sooner the Better': 90 Percent of Eggs Gone by Age 30*, ABC NEWS, Jan. 29, 2010, <http://abcnews.go.com/GMA/OnCall/women-fertility-falls-lose-90-percent-eggs-30/story?id=9693015>.

<sup>6</sup> The increased number of women in the workforce battling infertility is attributable to their increased participation in the workforce, not increased incidences of infertility. See also ETHEL SLOANE, BIOLOGY OF WOMEN 390 (1985) (noting one study that suggested women should devote their twenties to childbearing and their thirties to career development in order to prevent age-related infertility).

are battling infertility; of these, almost seventy percent are in the workforce.<sup>7</sup> The number of infertile women in the workforce is expected to increase: female labor force participation is anticipated to climb to over seventy-five percent by 2020.<sup>8</sup>

Twenty percent of infertile women will undergo time-consuming and costly fertility treatments that are generally much more burdensome for women than men.<sup>9</sup> But this decision creates new professional and economic problems. First, employers have fired or refused to accommodate women requesting time off for time-consuming fertility treatments.<sup>10</sup> Second, even if women receive the necessary time off, employer-funded health plans rarely provide coverage for the costly treatments.<sup>11</sup>

These problems are acute, even thirty years after passage of the Pregnancy Discrimination Act ("PDA").<sup>12</sup> The PDA amended Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination "because of or on the basis of pregnancy, childbirth, or *related medical conditions*."<sup>13</sup> Thus, the threshold question is "[w]hether the PDA's prohibition of discrimination on the basis of pregnancy and 'related medical conditions' extends to discrimination on the basis of infertility."<sup>14</sup> This Note posits that it does.

To date, the only U.S. Courts of Appeals to have considered this question—the Second, Eighth, and Seventh Circuits—agree that the PDA

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<sup>7</sup> OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., INFERTILITY (2009), available at <http://www.womenshealth.gov/faq/infertility.pdf>. The most illustrative labor force participation statistics available for female workers of childbearing age reveals that in 2005, approximately 69.26% of females aged 16–44 participated in the labor force. Abraham Mosisa & Steven Hipple, *Trends in Labor Force Participation in the United States*, MONTHLY LAB. REV., Oct. 2006, at 35, 40, 46.

<sup>8</sup> See OFFICE ON WOMEN'S HEALTH, *supra* note 7. The projected 2020 mean labor force participation rate for women aged 16–44 is approximately 76.5%. Mitra Toossi, *A Century of Change: The U.S. Labor Force 1950–2050*, MONTHLY LAB. REV., May 2002, at 15, 22.

<sup>9</sup> Becky Ham, *Money Matters when Choosing Fertility Treatments, Study Finds*, HEALTH BEHAV. NEWS SERVICE, Sept. 22, 2006.

<sup>10</sup> See *Hall v. Nalco Co. (Nalco II)*, 534 F.3d 644, 645–46 (7th Cir. 2008) (holding that the plaintiff stated a cognizable claim of pregnancy discrimination because she was terminated for undergoing fertility treatments after being told she could not take time off); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 760, 771 (W.D. Mich. 2001) (holding that an employer's refusal to accommodate a woman's request to take time off to undergo fertility treatments did not constitute discrimination); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402–03 (N.D. Ill. 1994) (holding that an employer unlawfully terminated a woman undergoing fertility treatments).

<sup>11</sup> See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 193–96 (2006) (describing the lack of legislation requiring employer-funded health insurance coverage for fertility treatments).

<sup>12</sup> Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

<sup>13</sup> 42 U.S.C. § 2000e(k) (emphasis added).

<sup>14</sup> *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).

does not prohibit employment decisions based on infertility.<sup>15</sup> The holdings of the Second<sup>16</sup> and Eighth<sup>17</sup> Circuits are premised on dicta from a U.S. Supreme Court decision, *United Auto Workers v. Johnson Controls*, which suggests that classifications based on fertility—and by like implication, infertility—do not constitute sex discrimination because both men and women can be fertile or infertile.<sup>18</sup>

In July 2008, the Seventh Circuit similarly held that the PDA does not cover infertility. But the Seventh Circuit diverged from the Eighth and Second Circuits by engaging in a novel, albeit problematic, analysis.<sup>19</sup> In *Hall v. Nalco* (“*Nalco II*”), the Seventh Circuit held that plaintiffs could seek protection under the PDA for discrimination based on *gender-specific fertility treatments*, but not for discrimination based on *gender-neutral infertility*.<sup>20</sup> The court found that assisted reproductive technologies, such as in-vitro fertilization (“IVF”), require surgical impregnation that will always affect women, not men, thus making them gender-specific, not gender-neutral.<sup>21</sup>

The Seventh Circuit’s decision swung the pendulum closer to recognizing infertile females as a protected class, but regrettably stopped short.<sup>22</sup> *Nalco II* limits protection to only those infertile women who are actively getting fertility treatment; infertile women who have not yet received treatment are outside the scope of protection. Under *Nalco II*, an infertile woman who reveals her intention to become pregnant, but not the specific nature of her fertility treatments, can still be fired. In addition, under *Nalco II*, an employer is still under no obligation to provide coverage for infertility, even if it provides an otherwise inclusive health benefit plan.<sup>23</sup> So long as infertility is considered gender-neutral, an employer’s health plan excluding coverage for infertility is legal.

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<sup>15</sup> See *Nalco II*, 534 F.3d at 648–49 (holding that discrimination based solely on infertility, and not infertility treatments, is not protected by the PDA); *Saks*, 316 F.3d at 348–49 (holding that infertility is a gender-neutral condition and therefore falls outside the scope of protections afforded by the PDA); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (same).

<sup>16</sup> *Saks*, 316 F.3d at 348.

<sup>17</sup> *Krauel*, 95 F.3d at 680.

<sup>18</sup> See *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (“Johnson Controls’ policy [violates Title VII because it] classifies on the basis of gender and childbearing capacity, rather than fertility alone.”).

<sup>19</sup> See *Nalco II*, 534 F.3d at 648 n.1 (acknowledging that the court’s holding rested on an analysis different from that of *Krauel*).

<sup>20</sup> *Id.* at 648–49.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 648, 648 n.1 (declining to disagree with the Court’s holding in *Johnson Controls* that infertility is not covered by the PDA because it is a gender-neutral condition).

<sup>23</sup> It is discriminatory to exclude pregnancy coverage from an otherwise inclusive insurance plan because pregnancy is related to sex for purposes of the PDA. In *Geduldig v. Aiello*, the Supreme Court accepted the cost-justifications of the defendant employer and upheld the constitutionality of excluding pregnancy coverage under California’s disability insurance plan. 417 U.S. 484, 496, 496 n.20 (1974). The Court in *General Electric Co. v. Gilbert* relied on *Geduldig* and found that an exclusion of pregnancy from a disability benefits plan providing general coverage was not gender-based

Part II of this Note explains the physical, psychological, and economic costs of infertility, as well as its relationship to the workplace, paying attention to the disproportionate burdens placed on women, as opposed to men. Part III details the legislative history of Title VII and the PDA, particularly as it relates to infertility. Part IV addresses the significance of *Johnson Controls* and the contrasting circuit court decisions, including *Nalco II*, and focuses on the arguments both for and against recognition of infertility under the PDA. Part V argues that *Nalco II* is but a small victory for patients undergoing fertility treatments and provides an incomplete solution for infertile women because it does not require employers to offer insurance coverage for infertility. Part VI advocates for Congress to clarify that the PDA unequivocally protects infertility, in addition to women undergoing fertility treatments. Until then, Part VII offers practical advice to working women navigating infertility in the workplace.

## II. THE PROBLEM OF INFERTILITY

### A. *Infertility as a Medical Problem*

Although a medical analysis of infertility is outside the scope of this Note, some background information is necessary to understand the special challenges that infertile women face. Each year in the United States, 6.1 million women, or roughly ten percent of women of childbearing age, battle infertility.<sup>24</sup> The medical definition of infertility is a “failure to achieve pregnancy during one year of frequent, unprotected intercourse.”<sup>25</sup> Doctors can determine the cause of infertility in eighty percent of couples.<sup>26</sup> In those cases, female factors cause approximately one-third of

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discrimination. 429 U.S. 125, 136 (1976). Thereafter, the PDA clarified that pregnancy was related to sex and that it was therefore illegal to treat pregnancy-related conditions differently from other medical conditions in a benefit plan. 42 U.S.C. § 2000e(k) (2006). See also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 677–78 (1983) (describing this evolution in discrimination law).

<sup>24</sup> For the purpose of this statistic, “childbearing age” includes only women aged 15–44. See OFFICE ON WOMEN’S HEALTH, *supra* note 7.

<sup>25</sup> Alaina B. Jose-Miller et al., *Infertility*, 75 AM. FAM. PHYSICIAN 849, 849 (2007). Despite this definition, many states have their own statutory definitions of infertility. For example, New Jersey defines infertility as follows:

[T]he disease or condition that results in the abnormal function of the reproductive system such that a person is not able to: impregnate another person; conceive after two years of unprotected intercourse if the female partner is under 35 years of age, or one year of unprotected intercourse if the female partner is 35 years of age or older or one of the partners is considered medically sterile; or carry a pregnancy to live birth.

N.J. STAT. ANN. § 17:48-6x (West 2008). Connecticut defines infertility as “the condition of a presumably healthy individual who is unable to conceive or produce conception or sustain a successful pregnancy during a one-year period.” CONN. GEN. STAT. § 38a-536 (2007).

<sup>26</sup> ACCESS: Australia’s National Infertility Network, About Infertility, [http://www.access.org.au/about\\_infertility](http://www.access.org.au/about_infertility) (last visited Apr. 2, 2010).

infertility and male factors cause one-third of infertility.<sup>27</sup> The remaining one-third of infertility is caused by a combination of male and female factors.<sup>28</sup> Female factors that cause infertility include increased age, tubal dysfunction, uterine abnormality, irregular ovulation, and hypothyroidism.<sup>29</sup> Male factors that cause infertility include increased age, testicular dysfunction, low sperm vitality or production, irregular hormone levels, and ejaculation problems.<sup>30</sup>

Although infertility has long been a problem,<sup>31</sup> advanced treatment options have only recently become available. Medical treatment of infertility involves the administration of medication, surgical procedures, or both.<sup>32</sup> Although infertility is caused equally by male and female factors, treatments are often more grueling for women (even if the cause is male-factor infertility), and are not always successful.<sup>33</sup> Women must often commit a larger amount of time to treatments and suffer more side effects than men.<sup>34</sup> This creates asymmetry in the world of infertility: while both men and women experience infertility, women bear the brunt of time-consuming and costly treatments.

For example, physicians often start the battle against infertility by prescribing an oral medication such as Clomid, which stimulates follicle hormones, for the female partner.<sup>35</sup> Even then, doctors often require women to make frequent visits to hospitals to monitor follicular development via ultrasound.<sup>36</sup> If a patient fails to become pregnant, physicians then typically recommend intrauterine insemination ("IUI") in which a doctor introduces sperm into the female uterus via a catheter (i.e., fertilization occurs inside the body).<sup>37</sup> If IUI and other methods fail to achieve pregnancy, then doctors may recommend that a woman undergo

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<sup>27</sup> OFFICE ON WOMEN'S HEALTH, *supra* note 7.

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

<sup>29</sup> *Id.*

<sup>30</sup> Cindy Pan, *Sussing Out the Swimmers*, SUNDAY MAIL (Austl.), Sept. 7, 2008, at 6.

<sup>31</sup> The Book of Genesis describes the plight of Abraham's infertile wife, Sarah. So desperate for a child was she that she sent her husband to sleep with her handmaiden. *Genesis* 16:1–2 (King James). See also DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 6–13 (2006) (describing the long history of female infertility).

<sup>32</sup> See JACQUELINE TOMLINS, *THE INFERTILITY HANDBOOK: A GUIDE TO MAKING BABIES* 100–04 (2004).

<sup>33</sup> The success rate for one round of fertility treatments is only about twenty-eight percent. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 6 (2007), available at <http://www.cdc.gov/ART/ART2005/508PDF/2005ART508.pdf>. In 2005, of the 134,260 assisted reproductive technology fertility treatments, there were 38,910 live births. *Id.* at 11.

<sup>34</sup> See TOMLINS, *supra* note 32, at 102.

<sup>35</sup> Jose-Miller et al., *supra* note 25, at 850.

<sup>36</sup> DukeHealth.org, Care Guides: Fertility, Clomid, [http://www.dukehealth.org/health\\_library/care\\_guides/fertility/medications/clomid](http://www.dukehealth.org/health_library/care_guides/fertility/medications/clomid) (last visited Apr. 2, 2010).

<sup>37</sup> RESOLVE: The National Fertility Association, Intrauterine Insemination, [http://www.resolve.org/site/PageServer?pagename=lrn\\_wamo\\_IUI](http://www.resolve.org/site/PageServer?pagename=lrn_wamo_IUI) (last visited Apr. 2, 2010).

IVF, a procedure in which an egg is fertilized outside of the body and then implanted into the woman's uterus.<sup>38</sup>

In fact, it was the emergence of IVF in the mid-to-late twentieth century that brought infertility out of the closet and into the public consciousness.<sup>39</sup> In 1978, the same year as the passage of the PDA, the first IVF child, Baby Louise, was born in Britain.<sup>40</sup> Louise's mother had been unable to conceive naturally, so doctors collected her eggs, fertilized them with her husband's sperm in an artificial environment, and implanted the fertilized egg back into her uterus.<sup>41</sup> This same procedure would be performed for the first time in the United States just three years later.<sup>42</sup> As one commentator noted, this "'miracle of science' has become just another technique in the medical arsenal."<sup>43</sup> According to Stephanie Greco, Director of Communications for RESOLVE, the National Infertility Association, IVF has raised infertility "awareness, so people are beginning to feel it's O.K. to get help, rather than to feel totally isolated and helpless."<sup>44</sup>

While IVF can produce miracles, it is grueling for women, both physically and emotionally. IVF requires the female patient to have numerous pelvic exams and to take ovary-stimulating drugs via painful injections that often cause mood swings.<sup>45</sup> Almost daily, the female patient must have blood drawn to monitor hormone levels.<sup>46</sup> Ultrasound examinations must frequently be performed on the female's eggs.<sup>47</sup> The procedures must often be done on a moment's notice, leaving little opportunity for advance planning and causing strain on women with work commitments.<sup>48</sup> A typical timeline for a woman undergoing IVF is as follows:

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<sup>38</sup> JOHN YEH & MOLLY ULINE YEH, *LEGAL ASPECTS OF INFERTILITY* 62 (1991); Saul Spigel, *Infertility: Causes, Treatment, Insurance and Disability Status* (Conn. Gen. Assembly Office of Legislative Research Report No. 2005-R-0145, 2005), available at <http://www.cga.ct.gov/2005/rpt/2005-R-0145.htm>.

<sup>39</sup> Laurie Tarkan, *Fertility Clinics Begin To Address Mental Health*, N.Y. TIMES, Oct. 8, 2002, at F5.

<sup>40</sup> MARCIA MOBILIA BOUMIL, *LAW, ETHICS AND REPRODUCTIVE CHOICE* 1 (1994).

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

<sup>42</sup> PBS, *Test Tube Babies Timeline*, <http://www.pbs.org/wgbh/americanexperience/features/timeline/babies/2/> (last visited Apr. 2, 2010).

<sup>43</sup> Sowers, *supra* note 3.

<sup>44</sup> Tarkan, *supra* note 39.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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

<sup>48</sup> In one case, doctors informed the patient on a Friday that she was ready for egg retrieval that had to occur on Monday. The patient advised her employer that she needed that day off, but her employer refused because a replacement could not be found on such short notice. *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001).



*Day 1:* First day of menses

*Day 2:* Start of ovulation induction

*Day 6:* Start of monitoring for estrogen levels and follicular growth until ideal levels are obtained

*36 Hours After Ideal Follicular Growth Levels Are Obtained:* Follicles retrieved from female and sperm obtained from male; fertilization of eggs outside uterus

*48 Hours After Oocyte Retrieval:* Transfer of embryos to female

*Next Two Days:* Bed rest<sup>[49]</sup>

*2 Weeks After Oocyte Retrieval:* Pregnancy test<sup>50</sup>

An IVF cycle is successful only twenty-five percent of the time; more often than not, a woman must undergo subsequent rounds of IVF treatment to achieve pregnancy in order to become pregnant.<sup>51</sup>

The time-consuming procedures and often discouraging results can take a significant psychological toll on women. Dr. Nada Stotland, Professor of Psychiatry at Rush Medical College in Chicago, notes that “women regard infertility as the most disastrous thing that’s ever happened to them.”<sup>52</sup> One woman who was required to undergo many medical procedures, even though it was her husband who was infertile, explained her resentment: “I felt like he had the cancer and I was taking the chemo.”<sup>53</sup> Because of the stressful nature of fertility treatments, many fertility clinics have now begun to address the mental health of their female patients.<sup>54</sup> Even though stress alone does not cause female infertility, it can trigger irregular menstruation, thereby creating a vicious cycle of stress and infertility.<sup>55</sup>

Many couples exhaust their savings or go into debt to pay for these expensive treatments, and often treatments must be tried again.<sup>56</sup> Because

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<sup>49</sup> Sue Shellenbarger, *Women Battling Infertility Find a Friend in the Court*, WALL ST. J., Aug. 13, 2008, at D1.

<sup>50</sup> YEH & YEH, *supra* note 38, at 62.

<sup>51</sup> See Spigel, *supra* note 38.

<sup>52</sup> Tarkan, *supra* note 39.

<sup>53</sup> Sowers, *supra* note 3.

<sup>54</sup> See Tarkan, *supra* note 39 (describing Boston IVF’s Mind/Body Center for Women’s Health, which opened in 2002 and teaches women stress management and other ways of coping with the emotional issues of infertility).

<sup>55</sup> Randi Hutter Epstein, *A Low-Tech Approach to Fertility: Just Relax*, N.Y. TIMES, Sept. 4, 2007, at F6.

<sup>56</sup> See Tarkan, *supra* note 39 (describing that the high cost of IVF means that some couples must choose between one cycle of IVF or adoption). In 1998, Rochelle Saks and her husband went into debt after they discovered her employer would not cover her \$10,000 fertility treatments. Jane Gross, *The Fight To Cover Infertility; Suit Says Employer’s Refusal To Pay Is a Form of Bias*, N.Y. TIMES, Dec. 7, 1998, at B1.

there are no reporting requirements, the exact cost of fertility treatments is unknown.<sup>57</sup> The American Society of Reproductive Medicine estimates that one round of IUI can cost anywhere from \$275 to \$2457, and one round of IVF costs in excess of \$12,000.<sup>58</sup>

The scope of insurance coverage varies considerably among states, as does the definition of infertility.<sup>59</sup> Infertility laws generally fall into one of two groups: a “mandate to cover” or a “mandate to offer.” A mandate to cover requires that insurance companies provide coverage for infertility treatments as a benefit included in every policy.<sup>60</sup> Only ten states mandate coverage for fertility treatments.<sup>61</sup> In those states, an employee must meet certain requirements to qualify for coverage. Examples of qualifying requirements include the following: (1) the fertilization attempt must be made with the spouse’s sperm;<sup>62</sup> and (2) the patient must have used all reasonable, less expensive, and medically appropriate treatments before IVF.<sup>63</sup> This second requirement has the consequence of encouraging women to undergo less effective treatment, so long as it is reasonable, merely because it is covered under their insurance plans.<sup>64</sup> Some states that provide coverage for infertility treatments specifically exclude IVF. New York, for example, requires insurers to provide coverage for infertility drugs so long as they typically provide coverage for prescription drugs, but does not require coverage for more expensive procedures such as IVF.<sup>65</sup> Other states impose lifetime limits; Illinois, for example, limits coverage for egg retrievals to four attempts.<sup>66</sup> These limits greatly reduce the value of infertility laws. The ABC morning show *The View* ran a

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<sup>57</sup> KINDREGAN & MCBRIEN, *supra* note 11, at 193 n.2.

<sup>58</sup> See Barbara Collura, *The Costs of Infertility Treatment*, FAM. BUILDING, Summer 2006, available at [http://www.resolve.org/site/PageServer?pagename=lrn\\_mta\\_cost](http://www.resolve.org/site/PageServer?pagename=lrn_mta_cost) (breaking down the costs of IUI and IVF in terms of surgery and medications); see also KINDREGAN & MCBRIEN, *supra* note 11, at 193 n.2 (noting that the high cost of American fertility treatments has led many Americans to seek less costly fertility treatments in countries such as Germany, Israel, Columbia, France, South Africa, and Singapore).

<sup>59</sup> KINDREGAN & MCBRIEN, *supra* note 11, at 197–98, 200.

<sup>60</sup> RESOLVE: The National Fertility Association, Health Insurance 101, [http://www.resolve.org/site/PageServer?pagename=lrn\\_ic\\_101](http://www.resolve.org/site/PageServer?pagename=lrn_ic_101) (last visited Apr. 2, 2010).

<sup>61</sup> These include: Arkansas, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, and Rhode Island. Janet L. Kaminski, *Insurance Coverage for Infertility Treatment* (Conn. Gen. Assembly Office of Legislative Research Report No. 2005-R-0236, 2005), available at <http://www.cga.ct.gov/2005/rpt/2005-R-0236.htm>. See also Chen May Yee & Josephine Marcotty, *Miracles for Sale*, STAR TRIB. (Minneapolis), Oct. 22, 2007, at 1A (discussing the various ways that couples finance fertility treatments).

<sup>62</sup> HAW. REV. STAT. § 432:1-604(3) (2005); Kaminski, *supra* note 61.

<sup>63</sup> 215 ILL. COMP. STAT. ANN. 5/356m (West 2008); N.J. STAT. ANN. § 17B:27-46.1x (West 2006); Kaminski, *supra* note 61.

<sup>64</sup> Gross, *supra* note 56.

<sup>65</sup> N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (McKinney 2006). For more information on state specific laws, see RESOLVE: The National Fertility Association, Infertility Coverage in Your State, [http://www.resolve.org/site/PageServer?pagename=lrn\\_ic\\_stintro](http://www.resolve.org/site/PageServer?pagename=lrn_ic_stintro) (last visited Apr. 2, 2010) (discussing fifteen states’ infertility insurance laws).

<sup>66</sup> Infertility Coverage in Your State, *supra* note 65.

segment on infertility in February 2010.<sup>67</sup> One woman complained that although she had insurance coverage, she had exhausted her lifetime infertility benefits in just three months, from June to August.<sup>68</sup> A mandate to offer, in contrast, only requires that insurance companies make available for purchase a policy that covers infertility treatment; employers are under no obligation to purchase the plans.<sup>69</sup> Five states (California, Connecticut, Ohio, Texas, and West Virginia) currently require insurers to offer fertility treatment coverage to group health plan sponsors.<sup>70</sup>

But even in the fifteen states that have a mandate to cover or a mandate to offer, the federal ERISA statute preempts state law, thereby precluding employers with self-funded health plans from falling within the scope of the statute.<sup>71</sup> Because they are not required to offer coverage, these employers have been reluctant to do so, fearing it would cause employee premiums to increase.<sup>72</sup> Consequently, many couples face the daunting task of paying for fertility treatments themselves, often going into extreme debt to do so, or declining treatment all together.<sup>73</sup>

#### B. Infertility as a Work Problem: Putting Employers on Guard

In addition to the negative physical and psychological side effects of treatment, there are professional consequences as well. Of the 6.1 million women battling infertility, approximately seventy percent are employed.<sup>74</sup> Those in need of time-consuming fertility treatments face a fundamental problem: fertility treatments require the patient to have a flexible schedule, something many working women lack.<sup>75</sup>

For example, if a blood test indicates that a patient has a forty-eight-hour window in which to undergo impregnation procedures, then there is relatively little opportunity for advanced planning.<sup>76</sup> It is now or never. And therein lies the conundrum: the female worker must decide whether to place her career in jeopardy by asking her employer for a more flexible or

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<sup>67</sup> *The View* (ABC television broadcast Feb. 25, 2010).

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

<sup>69</sup> Health Insurance 101, *supra* note 60.

<sup>70</sup> Kaminski, *supra* note 61.

<sup>71</sup> KINDREGAN & MCBRIEN, *supra* note 11, at 200.

<sup>72</sup> See Yee & Marcotty, *supra* note 61.

<sup>73</sup> *Id.*

<sup>74</sup> See *supra* note 7 and accompanying text.

<sup>75</sup> In 2004, only 26.7% of women and 28.1% of men worked flexible schedules that allowed them to alter the time they began or ended work. U.S. Bureau of Labor Statistics, *Flexible Work Schedules in 2004*, THE EDITOR'S DESK, July 5, 2005, <http://www.bls.gov/opub/ted/2005/jul/wk1/art01.htm>. For further discussion of the impact workplace flexibility has on women, see generally Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203 (2010).

<sup>76</sup> See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001) (discussing a three-day time constraint on the plaintiff to undergo an egg harvesting procedure).

reduced work schedule.<sup>77</sup> Not doing so could result in childlessness, but doing so can have significant professional consequences. Many legal scholars have suggested and, indeed, some courts have found that employers often assume that a woman who reveals her desire to have a child is shifting her priorities from work to family.<sup>78</sup> This revelation is especially problematic for the infertile woman: she must reveal both her desire to have a child *and* her inability to do so without recourse to expensive and time-consuming<sup>79</sup> artificial treatment. Thus, infertile women have the potential to strain companies' resources more than fertile women, giving employers extra motive to terminate them.

This is particularly true because the potential for the infertile woman to strain company resources can last in excess of the nine-month gestation period of traditional pregnant workers.<sup>80</sup> Fertility treatments such as IVF have only a twenty-five percent success rate and often must be tried again, causing the pregnancy process to sometimes last for years.<sup>81</sup> Women undergoing fertility treatments are in a prolonged, perpetual state of pregnancy in their employers' eyes—one without a predictable end and one with the potential to strain resources indefinitely.<sup>82</sup>

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<sup>77</sup> Unlike the traditional pregnant employee who keeps her pregnancy under wraps until after the first trimester, infertile women are unique in that they are often forced to reveal a potential pregnancy before they are pregnant in order to secure the necessary time off. *Compare* *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1002 (7th Cir. 2001) (noting that the plaintiff did not disclose her pregnancy to her employer until she was seven months pregnant), *with* *Nalco II*, 534 F.3d 644, 645 (7th Cir. 2008) (describing an infertile woman who disclosed her condition to her supervisors before she became pregnant). This request gives an employer notice that an employee is potentially pregnant.

<sup>78</sup> See *Clay*, 253 F.3d at 1009 (finding that hospital administration fired a pregnant doctor who they felt "lacked the drive, work ethic, and dedication"); *Goss v. Exxon Office Sys. Co.*, No. 82-3156, 1983 WL 612, at \*9 (E.D. Pa. July 1, 1983) (finding the plaintiff's "expressed desire to combine motherhood with her sales career was a determining factor in defendant's decision to remove her" from her job); see also Kellee Boulais Kruse, *The Protections Offered to Non-Pregnant Plaintiffs by the Pregnancy Discrimination Act* 5–8 (George Washington Univ. Law Sch. Pub. Law & Legal Theory Working Paper No. 427, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1234702](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1234702) (discussing this problem in detail as it relates to pregnant employees, infertile employees, and employees contemplating starting a family).

<sup>79</sup> See Sowers, *supra* note 3.

<sup>80</sup> For example, an infertile woman undergoing consecutive, unsuccessful infertility treatments may require considerable time off over a long period, and may need further accommodations if a treatment results in pregnancy.

<sup>81</sup> Tarkan, *supra* note 39.

<sup>82</sup> This perpetual state of pregnancy is similar to that which adoptive mothers experience. See SHERRY F. COLB, *WHEN SEX COUNTS: MAKING BABIES AND MAKING LAW* 217 (2007). Colb writes:

In October 2002, I adopted a beautiful baby girl from China. While I was waiting to learn when I would travel and who would become my new child, a colleague told me that I was "not showing yet." This joke comes back to me now. Because I was becoming a mother for the first time, the colleague thought of me as in a state of virtual pregnancy, one in which I would eventually begin "showing" but had not yet begun to do so.

*Id.* In the floor debate for the PDA, Senator Harrison Williams stated that employers' different treatment of females because of their capacity to have children is exactly what the PDA intended to combat. LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 61 (1979) [hereinafter LEGISLATIVE HISTORY] ("Because of their capacity to become pregnant, women have been

The likelihood that an infertile employee will strain company resources provides little incentive for an employer to accommodate or retain infertile female employees.<sup>83</sup> As a result, preemptive termination—the firing of a woman who an employer suspects will drain company resources over a prolonged period of time—remains a major problem for the infertile woman.<sup>84</sup> Although the number of claims alleging workplace discrimination against infertile women is unknown, case law and the increased use of fertility treatments suggests it is a problem that deserves attention.<sup>85</sup>

### III. LEGISLATIVE HISTORY OF TITLE VII AND THE PDA

Does the PDA prohibit discrimination based on infertility? Does it require insurance coverage for infertility? The language of the PDA is vague, which proves to be a double-edged sword that can both help—and hurt—arguments for the protection of infertility. Additionally, because time-consuming and costly fertility treatments such as IVF were not available in the United States at the time the PDA was enacted, the PDA's legislative history is of limited use in discerning the legislature's intent.<sup>86</sup> Nonetheless, an analysis of the legislative history and accompanying materials suggests that protection of infertility is consistent with the purpose of this remedial statute.

Congress passed the PDA in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*, which held that discrimination on the basis of pregnancy was not sex discrimination.<sup>87</sup> In *Gilbert*, the Supreme

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viewed as marginal workers not deserving the full benefits of compensation and advancement. . . . In some of these cases, the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant.”).

<sup>83</sup> See *Nalco II*, 534 F.3d 644, 645–46 (7th Cir. 2008) (involving a woman who was fired after she told her employer about her infertility); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1396–97 (N.D. Ill. 1994) (involving a woman undergoing fertility treatments).

<sup>84</sup> The EEOC does not keep records of claims filed for discrimination on the basis of infertility, but in 2009 the EEOC received 6196 complaints alleging a violation of the PDA. EEOC, Pregnancy Discrimination Charges, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Apr. 2, 2010).

<sup>85</sup> See L.A. Schieve et al., *Use of Assisted Reproductive Technology—United States, 1996 and 1998*, 51 MMWR WEEKLY 97 (2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5105a2.htm> (describing how the utilization of fertility treatments increased more than twenty-five percent in a two-year span, between 1996 and 1998); see also *Cleese v. Hewlett-Packard Co.*, 911 F. Supp. 1312, 1318 (D. Or. 1995) (“It is simply common sense to recognize that an employer may treat a female employee differently when it knows that she can or will become pregnant.”); *Pacourek*, 858 F. Supp. at 1400–01 (finding discrimination after an employee announced her intention to undergo fertility treatments); *Goss v. Exxon Office Sys. Co.*, No. 82-3156, 1983 WL 612, at \*9 (E.D. Pa. July 1, 1983) (finding that the plaintiff’s “expressed desire to combine motherhood with her sales career was a determining factor in defendant’s decision to remove her”).

<sup>86</sup> The first American IVF baby was born on December 28, 1981. PBS, *supra* note 42. This was more than three years after passage of the PDA.

<sup>87</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976).

Court ruled in favor of General Electric's disability plan, which excluded insurance coverage for women with pregnancy-related disabilities.<sup>88</sup> The Court's holding was based on the premise that the exclusion was condition-related, not sex-related.<sup>89</sup> But Justice Brennan, in a strongly worded dissent, argued that "the Court's assumption that General Electric engaged in a gender-neutral risk-assignment process is purely fanciful" since General Electric had a history of practices designed to undercut the achievement of women who became pregnant while employed.<sup>90</sup> Justice Brennan further explained that plans excluding pregnancy coverage "both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."<sup>91</sup> Justice Stevens, in his own dissenting opinion, added that the plan was blatantly gender-based because "it is the capacity to become pregnant which primarily differentiates the female from the male."<sup>92</sup>

After *Gilbert*, Representative Augustus Hawkins sponsored a 1977 bill to clarify the scope of the word "sex" in Title VII's prohibition against sex discrimination.<sup>93</sup> Representative Hawkins was instrumental in passing Title VII and strongly believed that targeting discrimination in the workforce was necessary for the advancement of civil rights.<sup>94</sup> Ninety-two members of the House of Representatives agreed with him and co-sponsored the bill.<sup>95</sup> The stated purpose of the bill was to add a new subsection to section 701—section 701(k)—that would "explicitly provide that the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."<sup>96</sup>

Wendy Williams, a professor at Georgetown Law School, submitted a prepared statement to the Committee on Education and Labor that encapsulates the main problem that women of childbearing age face in the workplace: all women of childbearing age are subject to the effects of the stereotype that they are marginal workers because "until a woman passes the childbearing age, she is viewed by employers as potentially

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

<sup>89</sup> *Id.* at 134. This is the same premise that courts would later use to deny coverage for infertility treatment. See *infra* notes 132–40 and accompanying text (discussing *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003)).

<sup>90</sup> *Gilbert*, 429 U.S. at 148 (Brennan, J., dissenting).

<sup>91</sup> *Id.* at 158 (Brennan, J., dissenting).

<sup>92</sup> *Id.* at 162 (Stevens, J., dissenting).

<sup>93</sup> LEGISLATIVE HISTORY, *supra* note 82, at 11–12.

<sup>94</sup> Black Americans in Congress, Augustus Freeman (Gus) Hawkins, <http://baic.house.gov/member-profiles/profile.html?intID=30> (last visited Apr. 2, 2010).

<sup>95</sup> LEGISLATIVE HISTORY, *supra* note 82, at 11.

<sup>96</sup> *Id.* at 13.

pregnant.”<sup>97</sup> During the floor debate, Senator Alan Cranston emphasized that the bill did not give women special treatment; instead, pregnant workers able to work would be treated the same as other able workers, and pregnant workers unable to work would be treated the same as other disabled workers.<sup>98</sup>

Despite calculations that mandating insurance coverage for pregnant women would cost an additional \$1.7 billion each year,<sup>99</sup> the bill passed in 1978, and section 701(k) became known as the Pregnancy Discrimination Act. A milestone for women, the PDA prohibits an employer from: (1) refusing to hire a pregnant woman because of her pregnancy or pregnancy-related condition, or because of the prejudices of co-workers, clients, or customers; and (2) singling out pregnancy-related conditions for specific procedures to determine an employee’s ability to work.<sup>100</sup> The PDA further places an affirmative duty on employers to treat pregnancy-related medical conditions similarly to other medical conditions, both in terms of employment and with respect to employer-funded health plans.<sup>101</sup>

But the PDA, which was intended to eradicate confusion by broadening the definition of sex discrimination to include pregnancy-based discrimination, caused confusion of its own. Just what is a pregnancy-related medical condition? Must a woman be pregnant to have a related medical condition? Is infertility included within the definition of pregnancy discrimination? These questions, and others like them, would continue to confront courts in the years following passage of the PDA.<sup>102</sup>

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<sup>97</sup> *Discrimination Based on Pregnancy: Hearing on S. 995 Before the Subcommittee on Labor*, 95th Cong. 1st Sess., 113–17 (Apr. 26, 1977), reprinted in LEGISLATIVE HISTORY, *supra* note 82, at 30; FEMINIST LEGAL THEORY FOUNDATIONS 128, 179 (D. Kelly Weisberg ed., 1995).

<sup>98</sup> LEGISLATIVE HISTORY, *supra* note 82, at 131.

<sup>99</sup> The Health Insurance Association of America provided this high estimate. *Id.* at 46.

<sup>100</sup> EEOC, Facts About Pregnancy Discrimination, <http://www.eeoc.gov/eeoc/publications/fs-preg.cfm> (last visited Apr. 2, 2010).

<sup>101</sup> *Id.*

<sup>102</sup> See *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) (finding that the PDA protects women even before they are pregnant); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (holding that infertility is a gender-neutral condition and therefore falls outside the scope of protections afforded by the PDA); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (same); *Panizzi v. City of Chicago Bd. of Educ.*, No. 07-C-846, 2007 WL 4233755, at \*3 (N.D. Ill. Nov. 19, 2007) (holding that women who are not pregnant at the time of the adverse action are not protected by the PDA); *La Porta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001) (finding that “[n]either the language nor the legislative history of the PDA reflects an intent to cover infertility”); *Cleese v. Hewlett-Packard Co.*, 911 F. Supp. 1312, 1317–18 (D. Or. 1995) (holding that the PDA protects a female employee who informed her employer that she was undergoing fertility treatments, but who was not pregnant at the time of the termination); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402–03 (N.D. Ill. 1994) (holding that infertility is a pregnancy-related medical condition).

## IV. RELEVANT CASE LAW AND THE CIRCUIT SPLIT

A. *The Supreme Court: Johnson Controls*

The Supreme Court has not decided a case involving the scope of the PDA since 1991, and that decision left many questions unanswered. In *United Auto Workers v. Johnson Controls*, female employees brought a class action suit against their employer alleging Title VII sex discrimination.<sup>103</sup> The employer, Johnson Controls, ran a battery manufacturing plant that processed lead.<sup>104</sup> To protect fetuses *in utero*, Johnson Controls announced a policy barring only women, except those whose infertility was documented, from jobs involving high levels of lead exposure.<sup>105</sup> The trial court considered whether this policy had a disparate impact on women. Disparate impact is a basis of liability whereby an employer, even if it lacked discriminatory intent, becomes liable for a facially-neutral policy that has an adverse effect on members of a protected class.<sup>106</sup> If the plaintiff establishes a disparate impact, then the employer must prove that the challenged practice is “job related for the position in question and consistent with business necessity.”<sup>107</sup>

The trial court granted summary judgment in favor of the employer, finding that the fertility policy, even though it caused a disparate impact, was a business necessity because it promoted workers’ safety.<sup>108</sup> On appeal, the Seventh Circuit affirmed that disparate impact was the correct basis of liability and noted that the outcome would have been the same even if the court had used a disparate treatment analysis.<sup>109</sup> Disparate treatment, unlike disparate impact, requires that a plaintiff show, by direct or circumstantial evidence, that the defendant had discriminatory intent when instituting a facially discriminatory policy.<sup>110</sup> Facially discriminatory policies are only permitted if sex, national origin, or religion is a bona fide occupational qualification (“BFOQ”) reasonably necessary to the normal operation of the particular business.<sup>111</sup> The

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<sup>103</sup> *Johnson Controls*, 499 U.S. at 192.

<sup>104</sup> *Id.* at 190.

<sup>105</sup> *Id.* at 192. The policy defined “women . . . capable of bearing children” as “[a]ll women except those whose inability to bear children is medically documented.” *Id.* (citations omitted).

<sup>106</sup> See *United Auto Workers v. Johnson Controls, Inc.*, 680 F. Supp. 309, 316 (E.D. Wis. 1988) (describing that, although a fetal protection policy was “facially neutral,” it had a disproportionate impact on women).

<sup>107</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

<sup>108</sup> *Johnson Controls*, 680 F. Supp. at 316–17.

<sup>109</sup> *United Auto Workers v. Johnson Controls, Inc.*, 886 F.2d 871, 893–94 (7th Cir. 1989), *rev’d*, 499 U.S. 187 (1991).

<sup>110</sup> See 42 U.S.C. § 2000e-2(a) (defining unlawful employer practices that may result in disparate treatment); § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor any employment practice, even though other factors also motivated the practice.”).

<sup>111</sup> 42 U.S.C. § 2000e-2(e)(1).



Seventh Circuit found that the employer had established a valid BFOQ defense because the fertility policy was reasonably necessary to the operation of Johnson Controls' business.<sup>112</sup>

The Supreme Court granted certiorari, and Justice Blackmun, writing for the majority, reversed the decision of the Seventh Circuit and held that Johnson Controls' fetal protection policy discriminated against women in violation of the PDA.<sup>113</sup> The Court found that the PDA prohibits an employer from discriminating against a woman because of her "childbearing capacity."<sup>114</sup>

In reaching this conclusion, the Court evaluated the classification itself and the employer conduct complained of using a disparate treatment analysis.<sup>115</sup> The Court made it clear that the policy was discriminatory because it classified "on the basis of gender and childbearing capacity, rather than fertility alone."<sup>116</sup> This finding is significant for two reasons. First, it could be understood to suggest that classifications based on fertility—and, by like implication infertility—are not pregnancy-related medical conditions protected by the PDA.<sup>117</sup> Second, because the policy facially discriminated on the basis of gender, the Court had to determine whether the health of unborn fetuses was reasonably necessary to the operation of Johnson Controls' business; it held that it was not.<sup>118</sup>

Put simply, Johnson Controls ran afoul of the PDA because the employer conduct complained of—applying a fertility policy to only women—was not gender-neutral. Johnson Controls applied its fetal protection policy unequally with respect to men and women—fertile women, but not fertile men, were prohibited from working with lead batteries. In dicta, the Court suggested that Johnson Controls would have been immune from liability if it had applied its fertility policy to fertile women *and fertile men*.<sup>119</sup> Subsequent court decisions have erroneously interpreted this as suggesting that a policy that is applied to infertile women and infertile men would never run afoul of the PDA.<sup>120</sup> This is

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<sup>112</sup> *Johnson Controls*, 886 F.2d at 898.

<sup>113</sup> *Johnson Controls*, 499 U.S. at 197.

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

<sup>115</sup> *Id.* at 199–200.

<sup>116</sup> *Id.* at 198.

<sup>117</sup> See *infra* note 122 and accompanying text (citing an Eighth Circuit case where infertility was alleged as the principal basis for discrimination in violation of the PDA).

<sup>118</sup> *Johnson Controls*, 499 U.S. at 202–04.

<sup>119</sup> See *id.* at 197 ("The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."). This classification, the Court found, is facially discriminatory in violation of Title VII's prohibition of sex discrimination: "Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females." *Id.* at 198–99.

<sup>120</sup> See *Nalco II*, 534 F.3d 644, 648 (7th Cir. 2008); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345–46 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).

false. The policy at issue in *Johnson Controls* is distinguishable from an absentee policy for infertile workers. If the employer in *Johnson Controls* had applied its policy equally to women and men, the consequences for each group of workers would have been the same, namely, an inability to work. But, if an employer applies an absentee policy for infertile workers equally to women and men, then women will always suffer more because fertility treatments are more time-consuming for women.

B. *The Eighth Circuit: Krauel*

Five years after the Supreme Court decided *Johnson Controls*, the Eighth Circuit considered whether the PDA covers infertility.<sup>121</sup> In *Krauel v. Iowa Methodist Medical Center*, a female employee alleged that her employer's policy denying insurance coverage for her fertility treatments discriminated against her on the basis of her infertility, thereby violating the PDA.<sup>122</sup>

Krauel, a respiratory therapist at Iowa Methodist Medical Center ("IMCC"), was diagnosed with endometriosis, a condition that causes tissue to grow abnormally outside the uterus, often causing severe pain and infertility.<sup>123</sup> She had difficulty becoming pregnant naturally and underwent three fertility treatments, the last of which was successful.<sup>124</sup> IMCC denied coverage for Krauel's fertility treatments but provided coverage for her pregnancy and delivery expenses.<sup>125</sup>

Krauel advanced disparate treatment and disparate impact theories of liability and argued that infertility is a medical condition related to pregnancy because there is a causal connection—fertility causes pregnancy while infertility prevents pregnancy. In other words, both affect one's childbearing capacity.<sup>126</sup> To evaluate Krauel's argument, the Eighth Circuit analyzed the statutory construction of the PDA by applying the following rule: "[W]hen a general term ['related medical conditions'] follows a specific one ['pregnancy' and 'childbirth'], the general term should be understood as a reference to subjects akin to the one with specific enumeration."<sup>127</sup>

The court found that infertility was not sufficiently akin to pregnancy and childbirth because (1) they occur *after conception*, while infertility occurs *prior to conception*;<sup>128</sup> and (2) the legislative history makes no

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<sup>121</sup> *Krauel*, 95 F.3d at 679.

<sup>122</sup> *Id.* at 676, 679.

<sup>123</sup> *Id.* at 675–76.

<sup>124</sup> *Id.* at 676.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 679.

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

<sup>128</sup> *Id.* (emphasis added).

reference to fertility treatments.<sup>129</sup> Thus, the Eighth Circuit held that the exclusion of infertility coverage from Krauel's benefits plan was not in violation of the PDA because infertility was not a pregnancy-related medical condition.<sup>130</sup> Importantly, the court also rejected Krauel's argument, on the basis of insufficient statistical evidence, that the policy had a disparate impact on women because they undergo treatment and bear a greater proportion of the costs; however, the court's holding suggests that disparate impact might be shown where statistical evidence is sufficient to meet the burden of proof.<sup>131</sup>

### C. *The Second Circuit: Saks*

In 2003, the Second Circuit affirmed a ruling nearly identical to the Eighth Circuit's decision in *Krauel*.<sup>132</sup> The plaintiff in *Saks v. Franklin Covey Co.*, Rochelle Saks, claimed that her employer's health benefits plan, which excluded coverage for surgical impregnation procedures, violated the PDA's prohibition of discrimination on the basis of pregnancy and "related medical conditions."<sup>133</sup> Saks also argued that the plan discriminated on the basis of sex because surgical impregnation procedures by their very nature are sex-specific, as they can only be performed on women.<sup>134</sup>

The court noted the fundamental problem with the PDA: "Related medical conditions . . . clearly embraces more than pregnancy itself . . . . The question is how much more."<sup>135</sup> To answer this question, the court analyzed the text of the statute by "look[ing] to the particular statutory language at issue, as well as the language and design of the statute as a whole."<sup>136</sup> The court found:

Title VII is, at its core, a statute that prohibits discrimination "because of," *inter alia*, an individual's sex. The PDA modified Title VII by requiring that discrimination on the basis of "pregnancy, childbirth, or related medical conditions" be considered discrimination "because of sex." Because reproductive capacity is common to both men and women, we do not read the PDA as introducing a completely new classification of prohibited discrimination based solely on reproductive capacity. Rather, the PDA . . . [prohibits] . . .

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 680.

<sup>131</sup> *Id.* at 681.

<sup>132</sup> *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003).

<sup>133</sup> *Id.* at 345 (internal citations omitted).

<sup>134</sup> *Id.* at 346.

<sup>135</sup> *Id.* at 345.

<sup>136</sup> *Id.* (internal citations omitted).

discrimination based on “childbearing capacity . . . .”<sup>137</sup>

The court reasoned that reproductive capacity—fertility or infertility—as opposed to childbearing capacity, is gender-neutral and outside of the scope of the PDA because infertility affects men and women in equal proportions.<sup>138</sup> Specifically, the court noted that “[i]ncluding infertility within the PDA’s protection . . . would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.”<sup>139</sup> Affirming the decision of the district court, the Second Circuit held that an employer’s health plan excluding coverage for fertility treatments performed solely on women was lawful.<sup>140</sup>

Importantly, the court expressly declined to consider whether an infertile female employee would be able to state a claim under the PDA or Title VII for an adverse employment action taken against her because she took numerous sick days to undergo surgical impregnation procedures.<sup>141</sup> This is likely because the court foresaw the disparate impact such a policy would have on women.

#### D. *The Seventh Circuit: Pacourek, Nalco I, and Nalco II*

Although it would not be until July 2008 that the Seventh Circuit considered the PDA’s coverage of infertility, the District Court of the Northern District of Illinois addressed the question in 1994.<sup>142</sup> In *Pacourek v. Inland Steel Co.*, the court held, on grounds that the PDA is to be broadly construed, that infertility is a pregnancy-related medical condition.<sup>143</sup> Ultimately, the Seventh Circuit would back-pedal on this holding fourteen years later, in *Nalco II*, by limiting the scope of PDA coverage to only infertile women undergoing fertility treatments.<sup>144</sup>

##### 1. *Pacourek*

Charlene Pacourek, diagnosed with a medical condition that rendered her infertile, entered an experimental fertility treatment program at the University of Chicago.<sup>145</sup> Pacourek alleged that upon notifying her employer of her efforts to become pregnant, her supervisor verbally abused her about her infertility, expressed doubt as to her ability to become pregnant, and was skeptical of her ability to combine pregnancy and her

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<sup>137</sup> *Id.* at 345–46 (internal citations omitted).

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

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 349.

<sup>141</sup> *Id.* at 346 n.4.

<sup>142</sup> *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1396–97 (N.D. Ill. 1994).

<sup>143</sup> *Id.* at 1402–03.

<sup>144</sup> *Nalco II*, 534 F.3d 644, 648–49 (7th Cir. 2008).

<sup>145</sup> *Pacourek*, 858 F. Supp. at 1396.

career.<sup>146</sup> Pacourek's supervisor also informed her that she was a "high risk" employee and subsequently terminated her.<sup>147</sup>

The court in *Pacourek* was the first to recognize the unique relationship between fertility, women, and the workplace: "Only women can become pregnant; stereotypes based on pregnancy and related medical conditions have been a barrier to women's economic advancement; and classifications based on pregnancy and related medical conditions are never gender-neutral."<sup>148</sup> Unlike in *Krauel*, the court made no distinction between medical conditions that occur pre-conception and post-conception; *Johnson Controls* precluded that reasoning since the Supreme Court held that the PDA applies before pregnancy.<sup>149</sup>

The court held that "discrimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law."<sup>150</sup> The court added that "[t]o hold . . . that it is illegal under the PDA to discriminate on the basis of potential or intended pregnancy, is not necessarily to hold that the plaintiff's condition [of infertility] is related to pregnancy for purposes of the PDA."<sup>151</sup> That is a separate, additional analysis that the court undertook.

Like the courts in *Saks* and *Krauel*, the district court in *Pacourek* looked first to the legislative history of the PDA for guidance.<sup>152</sup> But rather than take a restrictive approach to statutory interpretation, the court looked at the statute through the lens of a "well settled canon of statutory construction that remedial statutes, such as civil rights laws, are to be broadly construed."<sup>153</sup>

The court noted that the expansive language prohibiting discrimination on the basis of "pregnancy, childbirth, or related medical conditions" supported its holding that female infertility is a medical condition related to pregnancy and childbirth for purposes of the PDA.<sup>154</sup> The modifier "related," the court found, is purposefully broad and suggests that the Act applies to the whole childbearing process, not just to that which occurs post-conception.<sup>155</sup> The court noted that this reading was consistent with the legislature's intent to repudiate *Gilbert* and cited the floor debate

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<sup>146</sup> *Id.* at 1396, 1401.

<sup>147</sup> *Id.* at 1397.

<sup>148</sup> *Id.* at 1401.

<sup>149</sup> *Id.* at 1402.

<sup>150</sup> *Id.* at 1401.

<sup>151</sup> *Id.* at 1402.

<sup>152</sup> *Id.* at 1402–03.

<sup>153</sup> *Id.* at 1402 (internal quotations omitted).

<sup>154</sup> *Id.* But, in an effort to quell employers' fears, the court noted that this decision did not instruct employers to treat a woman's infertility in a certain way; it only requires that they treat her medical condition neutrally. *Id.* at 1403.

<sup>155</sup> *Id.* at 1402.

testimony of Senator Harrison Williams:

[B]ecause of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement . . . . In some of these cases, the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant. . . . The overall effect of discrimination against women because they might become pregnant . . . is to relegate women in general . . . to a second-class status.<sup>156</sup>

The court added that “once it is determined that a classification is in contravention of the PDA, that classification is not to be further tested with an eye toward approving the classification if it is found to be gender neutral in its specific content.”<sup>157</sup> In other words, a painstaking search for gender neutrality based on hypothetical situations is insufficient to strip the classification of protection.

## 2. Nalco I

After *Pacourek*, more than a decade passed before the Seventh Circuit considered whether the PDA protects infertility. In 2003, Cheryl Hall, a sales secretary, informed her boss that she wished to take a leave of absence from work to undergo fertility treatment.<sup>158</sup> Around this same time, her company began a massive reorganization and consolidation of its offices, requiring the elimination of one of two sales secretary positions.<sup>159</sup> Hall’s first treatment failed, and she again asked for time off to undergo a second round of treatment.<sup>160</sup> Her employer terminated her two weeks later.<sup>161</sup> Hall’s supervisor had discussed the termination with an employee relations manager whose notes reflected that Hall “missed a lot of work due to health” and cited “absenteeism” due to “infertility treatments.”<sup>162</sup> At the time of her termination, Hall’s supervisor explained that it was “in [her] best interest due to [her] health condition.”<sup>163</sup>

Hall filed a complaint with the Northern District of Illinois alleging that she was terminated in violation of the PDA.<sup>164</sup> In an unpublished September 12, 2006, opinion, the district court held that infertility is not a pregnancy-related medical condition protected by the PDA and granted

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<sup>156</sup> *Id.* (internal citations and emphasis omitted).

<sup>157</sup> *Id.* at 1404.

<sup>158</sup> *Nalco II*, 534 F.3d 644, 645 (7th Cir. 2008).

<sup>159</sup> *Id.* at 646.

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

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

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

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

<sup>164</sup> *Hall v. Nalco Co. (Nalco I)*, No. 04-C-7294, 2006 WL 2699337, at \*2–3 (N.D. Ill. Sept. 12, 2006).

judgment in favor of Nalco.<sup>165</sup> In doing so, the court ignored the reasoning in *Pacourek* and relied instead on the same arguments found in the Second Circuit's opinion in *Saks* and the Eighth Circuit's opinion in *Krauel*.<sup>166</sup>

The court found that no sex discrimination occurred because infertility affects men and women with equal frequency.<sup>167</sup> To hold otherwise, the court explained, would be incompatible with the PDA's definition, "because of sex," since it would result in the anomaly of including equal numbers of both sexes.<sup>168</sup> The court failed to realize that the employer conduct complained of—terminating employees who take time off for fertility treatment—will always affect women more than men because fertility treatment is more onerous and time-consuming for women.

The court also noted that the legislative history contained no reference to fertility treatments.<sup>169</sup> As discussed in Part IV, this is necessarily so because fertility treatments were in their infancy in 1978. It was not until more invasive and time-consuming procedures became widely available that fertility treatments proved burdensome for women in the workforce.

### 3. Nalco II

Cheryl Hall appealed the district court's grant of summary judgment in favor of her employer, and the U.S. Court of Appeals for the Seventh Circuit heard arguments on June 4, 2007.<sup>170</sup> Judge Sykes, writing for the majority, held that Hall had indeed stated a claim for sex discrimination under the PDA and reversed the decision of the lower court, remanding the case for further fact-finding.<sup>171</sup> This opinion was novel because although the court agreed with the Eighth and Second Circuits that the PDA does not protect infertility, the court held that the PDA does protect women undergoing fertility treatments.<sup>172</sup> The court recognized fertility treatment (specifically, IVF) as a treatment that "takes weeks to complete" and sometimes requires "multiple treatments," a treatment that burdens women more than men.<sup>173</sup>

The Seventh Circuit subtly faulted the district court for relying on *Saks* and *Krauel*.<sup>174</sup> First, the court noted that any reliance on *Saks* was misplaced because the Second Circuit expressly declined to consider the

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<sup>165</sup> *Id.* at \*3.

<sup>166</sup> *Id.* at \*2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Nalco II*, 534 F.3d 644, 644 (7th Cir. 2008).

<sup>171</sup> *Id.* at 645.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 645–46.

<sup>174</sup> *See id.* at 647, 648 nn.1–2 (finding that *Saks* declined to consider a case in which a woman took time off to undergo fertility treatments and that *Krauel* mistakenly asserted that the PDA applies only post-conception).

question presented in *Nalco*.<sup>175</sup> Second, the court noted that *Saks* and *Krauel* misconstrued the holding of *Johnson Controls*.<sup>176</sup> While the court acknowledged that *Johnson Controls* suggested that infertility is gender-neutral, it nonetheless found that “even where (in)fertility [a gender-neutral condition] is at issue, the employer conduct complained of must actually *be gender neutral*.”<sup>177</sup> The employer’s conduct in *Johnson Controls* ran afoul of this mandate by treating fertile female employees and fertile male employees differently: only females were barred from working with lead.<sup>178</sup>

The court found the same was true in the case of Cheryl Hall. *Nalco*’s conduct—terminating employees for taking time off to undergo IVF—only affects women because IVF involves a surgical impregnation procedure that can only be performed on women.<sup>179</sup> It is thus irrelevant that infertility affects men and women equally; the employer conduct complained of was not gender-neutral because only women take significant time off to undergo IVF.

There is one significant difference, however, between *Johnson Controls* and *Nalco II*: the Supreme Court analyzed *Johnson Controls* as a disparate treatment case, whereas the *Nalco II* court appears to have analyzed Hall’s claim as a disparate impact case. The court would have been wise to have explicitly stated this point, thereby clarifying the parties’ respective burdens of proof. By not doing so, the court opened up the possibility that Hall could have argued a disparate treatment or mixed-motives case on remand.<sup>180</sup>

## V. PRACTICAL IMPLICATIONS OF *HALL V. NALCO*

### A. *An Uphill Battle on Remand*

Hall’s attorney, Eugene Hollander, was quoted in the *Wall Street Journal* after the decision in *Nalco II*, claiming that because of this ruling, women will have to worry less about the “repercussions of taking time off for IVF.”<sup>181</sup> This analysis ignores the fact that plaintiffs such as Hall still face an uphill battle on remand.<sup>182</sup> The Seventh Circuit merely held that Hall had indeed stated a cognizable claim of sex discrimination on which a

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<sup>175</sup> *Id.* at 648 n.2.

<sup>176</sup> *Id.* at 648 n.1.

<sup>177</sup> *Id.* at 648 (first emphasis added).

<sup>178</sup> *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 191–92 (1991).

<sup>179</sup> *Nalco II*, 534 F.3d at 648–49.

<sup>180</sup> The court held that issues of fact existed as to who terminated Hall and whether the decision maker had knowledge of her IVF treatments. *Id.* at 649.

<sup>181</sup> Shellenbarger, *supra* note 49.

<sup>182</sup> Joanna Grossman, *Can a Woman Be Fired for Absenteeism Related to Fertility Treatments? A Federal Appeals Court Says No*, FINDLAW, Aug. 19, 2008, <http://writ.news.findlaw.com/GROSSMAN/20080819.HTML>.



trier of fact could find that she was terminated based on sex-specific fertility treatments.<sup>183</sup> Hall wisely settled, instead of pursuing her case in court. If she had litigated her claim, she would have faced difficulty proving her case, regardless of whether she framed it as one of disparate impact, disparate treatment, or mixed motives.

It would have been difficult for Hall to be successful on remand if she framed her case as one of disparate impact because the Seventh Circuit has found that PDA plaintiffs cannot succeed under the concept of disparate impact in cases involving absenteeism, since attendance at work is a business necessity.<sup>184</sup> In *Dormeyer v. Comerica Bank-Illinois*, the Seventh Circuit recognized that PDA plaintiffs might attack a company's policy on absenteeism as having a disparate impact if it could be shown that the policy weighed more heavily on members of a protected class (e.g., pregnant employees or women undergoing fertility treatments) and if this policy was not justified by a business necessity.<sup>185</sup> The court found that the second prong will never be satisfied because the concept of disparate impact is intended only for cases in which employers impose eligibility requirements not really necessary for the job, such as height or weight requirements.<sup>186</sup> Attendance will always be necessary for a job. Like a pregnant woman who is absent from work because of morning sickness, Hall's disparate impact claim would fail because an employer is under no obligation to excuse women from having to satisfy the necessary requirements of their jobs.<sup>187</sup>

If Hall had litigated her case, she may have been more successful if she framed her claim as a disparate treatment case. Even then, however, her employer would have two arguments: (1) it terminated her as part of its reorganization process, not because of her fertility treatments; and (2) even if it terminated her for getting fertility treatments, her attendance at work is a BFOQ.

In response to the first argument, Hall's attorney would likely have argued a mixed-motives case because Hall's IVF attempts and the company reorganization were in close temporal proximity.<sup>188</sup> This would reduce Hall's burden of proof. Hall did not need to prove that her sex was a but-for cause of her termination, only that it was one factor in her

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<sup>183</sup> *Nalco II*, 534 F.3d at 645.

<sup>184</sup> *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 583 (7th Cir. 2000).

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

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 583–84.

<sup>188</sup> A plaintiff states a cognizable sex discrimination claim when sex, in conjunction with a legitimate business reason, motivated the employer to take the adverse action. See 42 U.S.C. § 2000e-2(m) (2006) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." (emphasis added)).

employer's decisionmaking process.<sup>189</sup> The comments of Hall's supervisor and the notes of the employee-relations manager could have been used as circumstantial evidence to create an inference of discrimination.<sup>190</sup>

The timing of her supervisor's remarks is critical.<sup>191</sup> When terminating Hall, her supervisor told her that it "was in [her] best interest due to [her] health condition."<sup>192</sup> This proves that a nexus existed between Hall's fertility treatments and her termination. Unfortunately, the record is somewhat vague as to whether the supervisor, on her own, made the decision to fire Hall. If her supervisor was the decision maker, then Hall could have had a strong claim that her comment was not a stray remark, but instead shows discriminatory intent.<sup>193</sup>

Nalco's second likely argument—that attendance at work is a BFOQ—would be based on the premise that strict attendance is reasonably necessary to the normal operation or essence of Nalco's business and that Nalco had a reasonable factual basis for believing that all women receiving fertility treatments would be able to perform the job inefficiently.<sup>194</sup>

One Seventh Circuit case analyzing the BFOQ in the context of a pregnancy discrimination claim is worth noting. In *Maldonado v. U.S. Bank & Manufacturer's Bank*, a female bank teller claimed she was fired after notifying her employer that she was pregnant.<sup>195</sup> In fact, the bank conceded that it had fired the bank teller for this reason.<sup>196</sup> The bank argued that her pregnancy and anticipated due date would have made her unavailable in the summer months, a qualification necessary for the normal operation of the business.<sup>197</sup> Assuming that summer availability was a BFOQ, the court considered situations where an employer might be justified in taking anticipatory action against a pregnant employee: "an

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<sup>189</sup> See *id.* (stating that sex need only be "a" motivating factor).

<sup>190</sup> See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151–54 (2000) (holding that age-related comments at the time of termination can support an inference of age discrimination, even if the employer took into consideration other legitimate factors when making a termination decision).

<sup>191</sup> Compare *Barnes v. Foot Locker Retail, Inc.*, 476 F. Supp. 2d 1210, 1214–15 (D. Kan. 2007) (finding that an employer's ageist comment made at the time of a final warning and before firing the plaintiff was sufficient to create a material issue of fact concerning whether the employer's stated reason for firing the plaintiff was pretextual), with *Boyd v. State Farm Ins. Co.*, 158 F.3d 326, 330 (5th Cir. 1998) (finding that an employer's racist comment made one year prior to failing to promote a worker was not enough to establish discriminatory intent).

<sup>192</sup> *Nalco II*, 534 F.3d 644, 646 (7th Cir. 2008) (alteration in original).

<sup>193</sup> Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (finding that sexist comments from an employer's partners relied on by the employer's board when deciding whether to promote a female employee to partner showed discriminatory intent), with *Hunt v. City of Markham*, 219 F.3d 649, 652–53 (7th Cir. 1999) ("[T]he fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the decision had a discriminatory motivation.").

<sup>194</sup> See ROBERT H. BLANK, *FETAL PROTECTION IN THE WORKPLACE* 40 (1993) ("The BFOQ exception has generally been interpreted very narrowly by the courts.").

<sup>195</sup> *Maldonado v. U.S. Bank & Mfr.'s Bank*, 186 F.3d 759, 765 (7th Cir. 1999).

<sup>196</sup> *Id.* at 766.

<sup>197</sup> *Id.*

employer cannot take anticipatory action unless it has a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an employee's pregnancy will require special treatment."<sup>198</sup>

The court noted that it will rarely be demonstrable that a woman will be unable to meet a BFOQ in the future, but it did suggest that this burden may be met in cases where an employee announces that she will be unavailable to work in the future and explicitly requests special treatment.<sup>199</sup> Because the bank was merely speculating as to the employee's availability in the summer months, the court held that the bank was not justified in firing the plaintiff.<sup>200</sup>

Unlike the plaintiff in *Maldonado*, Cheryl Hall specifically asked for time off in order to undergo fertility treatments.<sup>201</sup> Therefore, Nalco may have tried to show that Hall was fired for her anticipated absenteeism based on the employee-relation manager's notes, which stated "absenteeism—infertility treatments."<sup>202</sup> Nalco's BFOQ defense would likely have succeeded unless Hall could prove that her supervisor's comment indicated that it was not her absenteeism, but her fertility treatments that motivated her employer to fire her.<sup>203</sup> In any event, Hall would have faced an uphill battle on remand since the manager's notes ("missed a lot of work due to health" and "absenteeism—infertility treatments") might have counteracted the sufficiency of her supervisor's remarks (that termination was in her "best interest due to [her] health condition") in creating an inference of sex discrimination.<sup>204</sup>

#### B. *A Battle that Never Ends: Still No Insurance Coverage*

Even if Hall had gone to trial and was successful on remand, she would still be responsible for the crippling costs of IVF. The *Nalco* decision is an incomplete solution for infertile working women because its limited holding—extending protection to women undergoing fertility treatment, but not to all infertile women—does not extend to cases in which an employer excludes costly fertility treatments from its health plan.

*Nalco II* makes it unlawful to discriminate against a woman with respect to her compensation, terms, conditions, or privileges of employment because of her use of fertility treatments. This assumes that the woman has already obtained medical treatment for her infertility, suggesting that the employer is under no legal obligation to cover the cost

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<sup>198</sup> *Id.* at 767.

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

<sup>200</sup> *Id.* at 768.

<sup>201</sup> *Nalco II*, 534 F.3d 644, 646 (7th Cir. 2008).

<sup>202</sup> *Id.*

<sup>203</sup> See *Barnes v. Foot Locker Retail, Inc.*, 476 F. Supp. 2d 1210, 1215 (D. Kan. 2007) (holding that an age-related remark at the time of termination may show pretext).

<sup>204</sup> *Nalco II*, 534 F.3d at 646.

of treatment. If, on the other hand, the law protected women with infertility much in the same way that the law protects pregnancy,<sup>205</sup> then employers would be required to provide insurance coverage for fertility treatments.

Numerous policy rationales support the argument that employers ought to provide health plans that cover fertility treatment. First, providing coverage for fertility treatments is similar to providing coverage for contraceptives, since both affect one's ability to become pregnant.<sup>206</sup> Second, providing coverage can help attract and retain workers, ultimately improving a company's bottom line.<sup>207</sup> Third, contrary to critics' arguments, providing coverage for treatments causes only a slight increase in employees' premiums.<sup>208</sup> Fourth, the ability to have children is a human right and employees seem to recognize this, as evidenced by their willingness to pay increased premiums so that infertile women may receive treatment.<sup>209</sup>

Employers should be required to provide insurance coverage for female fertility treatments that help *increase* the chances for pregnancy because the Equal Employment Opportunity Commission ("EEOC") has ruled that employers must provide coverage for female contraceptives, which help *decrease* the chances for pregnancy.<sup>210</sup> In 2000, the EEOC concluded that employers who fail to provide insurance coverage for female contraceptive drugs and devices may be discriminating against females (and males with female dependents) if they provide insurance coverage for other preventative treatment.<sup>211</sup>

The EEOC found that a classification based on contraception is a classification based on pregnancy for two reasons. First, the EEOC concluded that avoiding being pregnant and being pregnant are the same for purposes of the PDA.<sup>212</sup> In reaching this conclusion, the EEOC relied on the holding in *Johnson Controls* that the PDA protects "a woman's

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<sup>205</sup> The PDA states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women* affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .

42 U.S.C. § 2000e(k) (2006) (emphasis added).

<sup>206</sup> See *infra* notes 210–16 and accompanying text.

<sup>207</sup> See *infra* notes 217–21 and accompanying text.

<sup>208</sup> See *infra* notes 222–29 and accompanying text.

<sup>209</sup> See *infra* notes 230–35 and accompanying text.

<sup>210</sup> EEOC, Commission Decision on Coverage of Contraception, <http://www.eeoc.gov/policy/docs/decision-contraception.html> (last visited Apr. 2, 2010) [hereinafter EEOC Decision on Coverage of Contraception].

<sup>211</sup> *Id.*; EEOC, Questions and Answers: Commission Decision on Coverage of Contraception, <http://www.eeoc.gov/policy/docs/qanda-decision-contraception.html> (last visited Apr. 2, 2010).

<sup>212</sup> EEOC Decision on Coverage of Contraception, *supra* note 210.

potential for pregnancy, as well as pregnancy itself.”<sup>213</sup> Second, the EEOC rejected the respondents’ argument that a plan barring coverage for all contraception for women and men, equally, was not discriminatory because prescription contraceptives are available only for women.<sup>214</sup> It might also have added that while both men and women can prevent pregnancy, it is easy and cheap for men to do so, but can be difficult and expensive for women.

In much the same way, an employer’s health plan excluding IVF treatment coverage for men and women will always affect women more than men because surgical impregnation procedures are only available for women. Akin to denying contraception coverage, denying IVF coverage always burdens women more than men because fertility treatments are cheap and easy for men but difficult and expensive for women.<sup>215</sup> In addition, if avoiding being pregnant and being pregnant are equivalent under the PDA, then it follows that trying to become pregnant is also protected. Finally, because the majority of employer-sponsored health plans provide coverage for contraceptives intended to prevent pregnancy,<sup>216</sup> they should also be required under the PDA to provide coverage for fertility treatments intended to achieve pregnancy.

Including coverage for fertility treatments is in an employer’s best interest because doing so can help attract and retain workers. For example, Erin Davis loved her job at a public relations firm, but she quit because her company’s health insurance would not pay for her high-tech fertility treatments.<sup>217</sup> She found Sprint, a telecommunications company, one of only about twenty percent of large firms whose insurance plan covered

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* See also Joanna Grossman, *Insurance Coverage for Birth Control: The EEOC Speaks*, FINDLAW, Jan. 2, 2001, <http://writ.news.findlaw.com/grossman/20010102.html> (detailing the EEOC’s decision). The Eighth Circuit is the only circuit to have considered whether the PDA mandates coverage for contraceptives after the EEOC decision, and it ruled that the PDA did not. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007). For a criticism of the decision, see Alyson L. Cantrell, Comment, *Weaving Prescription Benefit Plans into the Birds and the Bees Talk: How an Employer-Provided Insurance Plan that Denies Coverage for Prescription Contraception Is Sex Discrimination Under Title VII, as Amended by the PDA*, 39 CUMB. L. REV. 239, 261 (2008–09). Prior to *Union Pacific*, the district courts in the Eighth Circuit held that the PDA requires coverage of contraception. See *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1015, 1017 (W.D. Mo. 2006) (holding that exclusion of contraceptive coverage may constitute a PDA violation); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (holding that the exclusion of contraceptives could constitute discrimination under the PDA).

<sup>215</sup> See The Turek Clinic, *Varicocele Repair*, <http://www.theturekclinic.com/varicocele-repair> (last visited Apr. 2, 2010) (noting that one of the most invasive procedures to treat male infertility, varicocele surgery, costs about seventy-five percent less than IVF treatment for females).

<sup>216</sup> In 2002, seventy-eight percent of workers with employer-sponsored health plans had coverage for oral contraceptives. Memorandum from The Henry J. Kaiser Family Foundation on Latest Findings on Employer-Based Coverage of Contraception to Interested Parties (Aug. 7, 2002), available at <http://www.kff.org/womenshealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14079>.

<sup>217</sup> Julie Appleby, *Pricey Infertility Care Sparks Insurance Clash*, USA TODAY, Dec. 19, 2001, at 1B.

fertility treatments.<sup>218</sup> Even though she was paid less at this new job, she came out ahead because Sprint covered four IVF attempts, the equivalent of approximately \$48,000.<sup>219</sup>

Including coverage for fertility treatments can also improve worker morale and encourage honesty in the workplace. Sam Albimino moved from Virginia to Illinois, a state that requires insurers to pay for infertility coverage, so that his wife could afford IVF treatment. He found that he was more satisfied with his job and that his productivity increased because of it.<sup>220</sup> Ben Willmott of the Chartered Institute of Personnel and Development in the United Kingdom emphasizes, "It's much better to have a [business] culture where people can be open than one where they take time off without being entirely honest about it."<sup>221</sup>

Admittedly, providing coverage for fertility treatments, like any other expansion in coverage, will increase premiums for employees; but critics have grossly exaggerated the extent to which premiums will increase. Insurers argue that requiring coverage will send premiums skyrocketing.<sup>222</sup> Insurers used this same logic to protest mandatory coverage of pregnancy prior to the enactment of the PDA.<sup>223</sup> But just as this argument proved inflated after the passage of the PDA,<sup>224</sup> so too is it unconvincing in the case of infertility coverage. One study found that coverage of fertility treatments would increase premiums by only \$3.14 per employee, per year.<sup>225</sup> Employers argue that this figure is wrong since mandating

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* Retaining workers can also save companies huge amounts of money that would otherwise be spent on headhunters to replace infertile workers. See STEVEN K. WISENSALE, FAMILY LEAVE POLICY 98 (2001) (describing First Tennessee National Bank's increased efforts to balance work and family and increase its retention rate, which in turn produced a \$106 million profit gain over two years).

<sup>220</sup> Appleby, *supra* note 217.

<sup>221</sup> Neasa MacErlean, *Bosses Join the IVF Learning Curve*, OBSERVER, July 20, 2008, at 15.

<sup>222</sup> E.g., Adam Sonfield, *Drive for Insurance Coverage of Infertility Treatment Raises Questions of Equity, Cost*, 2 GUTTMACHER REP. ON PUB. POL'Y 4, 5 (1999), available at <http://www.guttmacher.org/pubs/tgr/02/5/gr020504.html>.

<sup>223</sup> *Compare Legislation To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong. 95-98 (1977) (statement of the American Council of Life Insurance and the Health Insurance Association of America) (estimating that insurance companies would suffer debilitating costs if the PDA were enacted), with LISE VOGEL, *MOTHERS ON THE JOB* 103-04 (1993) (noting that increased costs due to the PDA are quite small). See also Robert Pear, *Women Buying Health Policies Pay a Penalty*, N.Y. TIMES, Oct. 30, 2008, at A23 (discussing the uphill battle that women of childbearing age face with respect to insurers); Sonfield, *supra* note 222, at 5 (describing insurance coverage costs and their impact on women and insurers). But see Linda Lowen, *About.com*, How the Healthcare Reform Bill Benefits Women, <http://womensissues.about.com/od/milestones/advancements/a/HealthCareReformBenefitWomen.htm> (last visited Apr. 19, 2010) (describing how the recent Health Care Reform Bill eliminates the practice of charging women higher insurance premiums based solely on their gender).

<sup>224</sup> VOGEL, *supra* note 223, at 103-04.

<sup>225</sup> Sonfield, *supra* note 222, at 5. See also RESOLVE: The National Fertility Association, Insurance Coverage Facts, [http://www.resolve.org/site/PageServer?pagename=ta\\_ic\\_icf](http://www.resolve.org/site/PageServer?pagename=ta_ic_icf) (last visited Apr. 2, 2010) (noting that a 2006 survey recorded that ninety-one percent of respondents providing

coverage could lead to a steep increase in the utilization of fertility treatment by employees.<sup>226</sup> Some critics suggest the figure would raise premiums by as much as twenty dollars per year.<sup>227</sup> In reality, studies report that the utilization of IVF in states that require coverage is only about 2.8 times the rate in states that do not require coverage of fertility treatments.<sup>228</sup> In addition, research suggests that increased demand will lead to increased supply, and the more IVF clinics there are, the lower the cost of treatment.<sup>229</sup>

Even if the cost is slight, why should employees be required to foot the bill, in the form of higher premiums, for fertility treatments? Opponents argue that having children is a lifestyle choice, akin to cosmetic surgery, that should not be subsidized by other employees.<sup>230</sup> In fact, eighty percent of insurers treat it as a lifestyle choice not deserving of the insurance cost-spreading mechanism.<sup>231</sup> This logic is unsound. Fifty percent of pregnant women in America have *chosen* to have children, and insurance covers their condition.<sup>232</sup> Similarly, women on prescription contraception have *chosen* not to have children, and the EEOC has held that the PDA requires coverage of contraception in most cases.<sup>233</sup> So, too, should insurance cover infertile women who have *chosen* to get help having children.

For the millions of women trying so desperately to conceive, childbearing is not a luxury akin to cosmetic surgery; it is a human right, whose benefits far outweigh the costs. A cost-benefit analysis proves that society tends to agree. If each IVF cycle costs \$12,000 and has a twenty-five percent chance of resulting in a live birth, the average cost per baby is \$48,000. Do the average benefits of a birth from IVF outweigh the \$48,000 cost? One survey asked 231 respondents of different ages and income levels what they would be willing to pay in increased taxes for a public program that would provide access to IVF for couples in Massachusetts.<sup>234</sup> The average amount was \$32 per year.<sup>235</sup> This study

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coverage for fertility treatments did not experience an increase in their healthcare costs). *But see* Appleby, *supra* note 217 (noting that critics argue that premiums will increase by as much as \$20 per year per employee).

<sup>226</sup> Sonfield, *supra* note 222, at 5.

<sup>227</sup> Appleby, *supra* note 217.

<sup>228</sup> David S. Guzick, *Should Insurance Coverage for In Vitro Fertilization Be Mandated?*, 347 NEW ENG. J. MED. 686, 687 (2002).

<sup>229</sup> Collura, *supra* note 58.

<sup>230</sup> Appleby, *supra* note 217; MacErlean, *supra* note 221.

<sup>231</sup> Press Release, RESOLVE: The National Infertility Association, National Survey Finds Employers Covering Infertility Treatment Experience No Significant Increase in Cost (July 20, 2006), available at [http://www.resolve.org/site/PageServer?pagename=fmed\\_mcpr2006720](http://www.resolve.org/site/PageServer?pagename=fmed_mcpr2006720).

<sup>232</sup> See Planned Parenthood, *Pregnancy Options*, <http://www.plannedparenthood.org/health-topics/pregnancy/pregnant-now-what-4253.htm> (last visited Apr. 2, 2010) (noting that half of all pregnancies in the United States are unplanned).

<sup>233</sup> EEOC Decision on Coverage of Contraception, *supra* note 210.

<sup>234</sup> Guzick, *supra* note 228, at 688.

<sup>235</sup> *Id.*

suggests that people would be more than willing to pay a \$20 increase in premiums, the highest estimate provided by opponents, each year to provide IVF coverage.

Importantly, although this Note posits that bearing children is a human right, not a luxury, it may be necessary to draw a line when this right becomes abused. Lines have been drawn on other rights, such as the First Amendment's freedom of speech.<sup>236</sup> Even though most women are capable of self-regulating the number of times they use IVF, thereby keeping the cost of premiums in check, there will always be women, as evidenced by the highly publicized "octomom," who do not know when to stop IVF treatments.<sup>237</sup> Because of this, New Jersey recently proposed legislation limiting insurance coverage of IVF to women with fewer than two children.<sup>238</sup>

## VI. SOLVING THE PROBLEM: RECOGNIZING INFERTILITY

This Note proposes that Congress is in the best position to clarify that infertility falls within the scope of the PDA. So long as courts feel constrained by the *Johnson Controls* dicta, they will continue to view infertility as gender-neutral. It would take a brave court to break this pattern, but the legislature is free to do so without consideration of *Johnson Controls*. To date, plaintiffs alleging infertility discrimination have fallen into one of two groups: plaintiffs who were terminated for undergoing fertility treatments or plaintiffs whose employer-funded health plans denied coverage for fertility treatments. Accordingly, court holdings are typically limited to the context in which infertility discrimination arose.<sup>239</sup> To solve the two-fold problem that working women face, Congress should again clarify the definition of sex discrimination and should articulate that infertility is a pregnancy-related medical condition protected by Title VII, as amended by the PDA. Congress has shown its inclination to clarify the definition of "sex" in Title VII when it passed the PDA, and this Note encourages Congress to do so again.

It is important that Congress clarify that infertility is a pregnancy-related medical condition because a federal law, if drafted correctly, would overcome ERISA and require all (or at least some) employers to offer infertility insurance.<sup>240</sup> Although Congress can act without regard to

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<sup>236</sup> See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that freedom of speech does not allow one to shout "fire" in a crowded theater).

<sup>237</sup> See, e.g., Stephanie Saul, *Birth of Octuplets Puts Focus on Fertility Industry and Risks*, N.Y. TIMES, Feb. 12, 2009, at A1 (describing Nadya Suleman, a woman who had fourteen children via IVF).

<sup>238</sup> A. 1402, 214th Gen. Assem., Reg. Sess. (N.J. 2010).

<sup>239</sup> See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 n.4 (2d Cir. 2003) (declining to decide whether a woman who takes numerous sick days to undergo fertility treatments is protected by the PDA because only insurance coverage was at issue).

<sup>240</sup> Health Insurance 101, *supra* note 60.



legislative purpose, recognition of infertility is consistent with the legislative purpose of Title VII. Critics of such inclusion argue that Congress must have intended to exclude infertility from the scope of the PDA because it is not discussed anywhere in the legislative history or in the language of the Act.<sup>241</sup> But this absence does not necessarily mandate such a conclusion. Instead, this absence likely reflects society's general reluctance to discuss infertility, which, as one legal scholar noted in 1978, was considered a "silent" problem.<sup>242</sup> Infertility did not gain the national attention it now enjoys until July 1978 when Baby Louise was born in England via IVF.<sup>243</sup> By this time, the majority of legislative hearings on the PDA had already occurred.<sup>244</sup> As of October 31, 1978, when President Carter signed the PDA into law, no babies had been born via IVF in the United States. The only medical treatments available for infertility in the United States when the PDA was passed were hormone therapy, ovarian stimulation drugs, and sperm donations.<sup>245</sup> While these treatments were sometimes successful, they provided no relief for women whose bodies were unable to fertilize eggs.<sup>246</sup> Such procedures were also less costly and less time-consuming for women than IVF.<sup>247</sup> It is no surprise then, that Congress did not anticipate the work-related problems that infertile working women undergoing IVF treatment would face in the years ahead.

A strict adherence to textualism and intentionalism, such as that found in the Eighth Circuit's *Krauel* decision, is misguided because it does not take into account changed circumstances and scientific advancements like IVF.<sup>248</sup> William Eskridge, one of the leading scholars on the statutory interpretation of civil rights laws, has acknowledged that treating statutes as static can render them irrelevant, while treating them as dynamic can render them applicable: "When the world changes, there are several things

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<sup>241</sup> See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679–80 (8th Cir. 1996) (holding that the district court properly found infertility to be outside of the PDA's protection because the legislative history and EEOC guidelines do not make any reference to it).

<sup>242</sup> Gina Bari Kolata, *Infertility: Promising New Treatments*, 202 SCI. 200, 200 (1978). See also Courtnei E. Molnar, "Has The Millennium Yet Dawned?": *A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163, 165 (2005) (noting that it has only been acceptable to discuss pregnancy and related conditions openly in the past decade or two).

<sup>243</sup> Kolata, *supra* note 242, at 200. Baby Louise was born in England, but it was not until 1981 that the first IVF baby in the United States, Elizabeth Jordan Carr, was born. American RadioWorks, *A Fertility Timeline*, [http://americanradioworks.publicradio.org/features/fertility\\_race/part1/timeline.shtml](http://americanradioworks.publicradio.org/features/fertility_race/part1/timeline.shtml) (last visited Apr. 2, 2010).

<sup>244</sup> LEGISLATIVE HISTORY, *supra* note 82, at v (showing that the majority of hearings occurred in Spring 1977).

<sup>245</sup> American Radio Works, *supra* note 243.

<sup>246</sup> *Id.*

<sup>247</sup> Spigel, *supra* note 38.

<sup>248</sup> *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996); see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14 (1994) ("[N]one of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or the coalition 'would want' over time, after circumstances have changed.").

that can happen to a statute. It can become irrelevant and basically wither away . . . [o]r the statute can remain relevant but . . . can change its form to deal with the policy chasms introduced by the obsolescence of some of its assumptions.”<sup>249</sup>

To illustrate his point, Eskridge points to *United Steel Workers of America v. Weber*, a case in which the Supreme Court interpreted Title VII to reflect its statutory purpose instead of its original legislative intent.<sup>250</sup> Legislative intent can be understood to be the considerations the legislature had in mind when passing legislation. In contrast, legislative purpose relates to the overall goal of legislation. In *Weber*, the plaintiff, a white worker, protested his employer’s affirmative action plan, which was designed to eliminate racial imbalances in an almost entirely white workforce.<sup>251</sup> Even though Title VII was enacted to prohibit discrimination based on race, the Court upheld the plan since it was in conformity with the *purpose* of Title VII, a remedial statute, to end the history of discrimination against African Americans in the United States.<sup>252</sup> In his dissent, Justice Rehnquist accused the majority of acting like “escape artists” to evade what he saw as the statute’s static prohibition against taking race into account when making employment decisions.<sup>253</sup> Justice Rehnquist maintained that that such a result could not possibly have been enacted in 1964.<sup>254</sup>

But the *Weber* majority, like the district court in *Pacourek*, did not use evasive tactics to avoid adherence to the law. Instead, both courts recognized that civil rights statutes are remedial and are to be liberally construed using the statutory language and legislative purpose; only then can the laws be adapted to deal with current issues facing the courts.<sup>255</sup>

Adopting the approach advanced by Eskridge, the language of the PDA supports the conclusion that the statutory purpose of the PDA is to protect women who suffer from a “medical condition rendering [them] unable to become pregnant naturally.”<sup>256</sup> It reads in part:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women* affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-

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<sup>249</sup> ESKRIDGE, *supra* note 248, at 55.

<sup>250</sup> *United Steel Workers of America v. Weber*, 443 U.S. 193, 201 (1979).

<sup>251</sup> *Id.* at 198–200.

<sup>252</sup> *Id.* at 208.

<sup>253</sup> *Id.* at 222 (Rehnquist, J., dissenting).

<sup>254</sup> ESKRIDGE, *supra* note 248, at 15.

<sup>255</sup> *Weber*, 443 U.S. at 204–05; *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994).

<sup>256</sup> *Pacourek*, 858 F. Supp. at 1403.

related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .<sup>257</sup>

The noun “women” in the second clause makes it clear that any pregnancy-related medical condition (such as infertility) must necessarily relate to a female-based condition.<sup>258</sup> Because of the female’s unique capacity to become pregnant, it is likely that only women battling infertility would be a protected class under the PDA. The relationship of male infertility to female pregnancy is likely too attenuated to constitute a protected class under the PDA. Of course, men may still challenge an employer’s policy giving preferential treatment to infertile women, but not infertile men; however, this legal claim would likely be framed under the larger umbrella of sex discrimination, not the more specific claim of pregnancy discrimination. This result is logical since most published opinions thus far involving discrimination claims based on infertility under the PDA have been filed by women. This is probably because IVF—the most time-consuming and costly of all fertility treatments—will always burden women more than men.<sup>259</sup> As Congress noted, the PDA was not enacted to protect men, but instead to give women “the right to choose both [work and family], to be financially and legally protected *before*, during, and after [their] pregnancies.”<sup>260</sup>

## VII. UNTIL THEN, WHERE DOES THIS LEAVE WORKING WOMEN?

Many women, unlike Hall, keep their fertility treatments secret from their employers for personal reasons and simply cite unspecified “medical reasons” for time off.<sup>261</sup> According to one woman, secrecy “made it easier for me to just do my job instead of having people wonder if I was pregnant, wonder if I was going to leave, etc.”<sup>262</sup> But if these women are fired for their absences, it is unlikely they will be able to launch a successful pregnancy discrimination claim absent proof that their employers knew they were undergoing fertility treatments. Pregnant women, on the other hand, by virtue of their physical appearance, may be able to prove that

<sup>257</sup> 42 U.S.C. § 2000e(k) (2006) (emphasis added).

<sup>258</sup> See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (“[T]he PDA requires that pregnancy, and related conditions, be properly recognized as sex-based characteristics of women.”).

<sup>259</sup> *Nalco II*, 534 F.3d 644, 648–49 (7th Cir. 2008).

<sup>260</sup> EEOC Decision on Coverage of Contraception, *supra* note 210 (emphasis added). Admittedly, if men were one day able to conceive children themselves with the help of reproductive technology, then the PDA should, in keeping with the remedial nature of civil rights statutes, protect their child-bearing capacity as well.

<sup>261</sup> Shellenbarger, *supra* note 49. See also *EEOC v. Menard*, No. 08-0655-DRH, 2010 WL 331729, at \*2 (S.D. Ill. Jan. 25, 2010) (noting that the only reason the plaintiff told her employer she was infertile and considering IVF was that so he would understand why she was requesting time off).

<sup>262</sup> *Id.*

their employer was aware of their pregnancies even if they made no verbal revelation. The special nature of infertility suggests that a woman should give her employer notice that she is undergoing fertility treatments so as to establish a record that her employer had direct knowledge and terminated her on the basis of these treatments.

As *Maldonado* illustrates, even a pregnant woman runs the risk of being legally terminated when an employer is put on guard that she may require time off.<sup>263</sup> Therefore, current law suggests that before asking for time off, a woman should inquire about her employer's absentee policy for those with illnesses. If an employer allows employees with illnesses to take time off for curative medical treatments but refuses to allow a woman to take time off for fertility treatments, then under *Nalco II*, a female plaintiff may be able to establish a prima facie case that she was terminated on the basis of her fertility treatment.<sup>264</sup> Admittedly, the advice that a woman should report her infertility to her employer, but not necessarily ask for absences, is unrealistic: after all, the only reason most women disclose their infertility is to explain their absences from work when they are receiving treatment.<sup>265</sup>

### VIII. CONCLUSION

The Eighth, Second, and Seventh Circuits have recognized infertility as a gender-neutral condition that affects men and women equally.<sup>266</sup> Emanuel Celler, a Democrat from New York, Chairman of the House Judiciary Committee, and floor leader for the Civil Rights Bill of 1964, warned of the shortcomings inherent in treating the sexes equally and insisted on their uniqueness: "You know, the French have a phrase for it when they speak of women and men . . . 'vive la difference.' I think the French are right."<sup>267</sup> Celler's approach is best suited to understanding the innate differences between female and male infertility. Women are unique

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<sup>263</sup> See *Maldonado v. U.S. Bank & Mfr.'s Bank*, 186 F.3d 759, 766 (7th Cir. 1999) ("The bank is correct that an employer can dismiss an employee for excessive absenteeism, even if the absences were a direct result of the employee's pregnancy.").

<sup>264</sup> See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("The Pregnancy Discrimination Act requires the employer to ignore an employee's pregnancy . . . not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees.").

<sup>265</sup> Shellenbarger, *supra* note 49.

<sup>266</sup> *Nalco II*, 534 F.3d 644, 648 (7th Cir. 2008); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).

<sup>267</sup> Allan Carlson, *The Curious Case of Gender Equality*, SOCIETY, Sept.-Oct. 2004, at 29, 32. Protesting the addition of "sex" to Title VII, Celler added:

Imagine the upheaval that would result from the adoption of blanket language requiring total [sexual] equality. Would male citizens be justified in insisting that women share with them the burdens of compulsory military service? What would become of traditional family relationships? What about alimony? . . . Would fathers rank equally with mothers in the right of custody to children? . . . This is the entering wedge, an amendment of this sort.

*Id.*

because only they have the capacity to become pregnant. It is this special nature that has historically subjected them to the effects of the stereotype that women are marginal workers—a stereotype that proponents of the PDA clearly intended to combat.<sup>268</sup>

Fertility was once a reason to discriminate against female employees, and today infertility is used in much the same way.<sup>269</sup> Employers have an extra incentive to fire infertile women who undergo fertility treatments because fertility treatments can last indefinitely, greatly straining financial and staff resources. To ensure that the legislative purpose of Title VII is best served, Congress should clarify that female infertility is a pregnancy-related medical condition under the PDA, as did the court in *Pacourek*.<sup>270</sup> Recognizing infertility will ensure that infertile women receive the same health insurance coverage that their pregnant counterparts enjoy. To recognize infertility as within the PDA's scope will, at the very least, free women from worrying about how to obtain the necessary time off from work and how to pay for their costly treatments so that they may concentrate on how to conceive.

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<sup>268</sup> LEGISLATIVE HISTORY, *supra* note 82, at 61.

<sup>269</sup> Compare *id.* (noting that because of pregnancy and motherhood, women were forced to take leave without pay), with *supra* Part II.B (discussing the ways in which refusal to recognize infertility as a protected class results in termination).

<sup>270</sup> *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1403 (N.D. Ill. 1994).