FACING REALITY: THE PREGNANCY DISCRIMINATION ACT FALLS SHORT FOR WOMEN UNDERGOING INFERTILITY TREATMENT

Katie Cushing

I. INTRODUCTION

Having a child is a major life event around which most Americans build their lives. For millions of couples in the United States, finding out that they are unable to conceive is a crushing emotional blow. Increasingly, infertile couples are placing their hopes of having a child in infertility treatments, most commonly through in-vitro fertilization (IVF). Women who choose to undergo IVF, however, face two risks in the employment setting. The first is that insurers or employers will deny insurance coverage for the treatment and, thus, make IVF impossible to afford. Second, and worse, is the risk that the potential mother’s employer will terminate her for taking time off to undergo infertility treatment. Do women have legal recourse to combat refusal of insurance or adverse employment actions? The answer to this question remains unclear despite a significant amount of litigation and scholarship in this area. Even so, it seems that women have some protection against adverse employment actions, but they still have no legal means of requiring employers to provide insurance coverage for infertility treatments.

In 1978, Congress amended Title VII of the Civil Rights Act of 1964 to include the Pregnancy Discrimination Act (PDA). The PDA

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1 J.D., 2010, Seton Hall University School of Law; B.S., magna cum laude, 2007, The College of New Jersey. The author would like to thank her family and friends for their love, support, and patience. Additionally, the author thanks her comment editor, Bradford Muller, and Professor Charles Sullivan for their guidance and advice throughout the writing and editing process.

2 See STAFF OF RESOLVE WITH DIANE ARONSON, RESOLVING INFERTILITY 40–41 (Diane N. Clapp & Margaret R. Hollister eds., 1999) [hereinafter ARONSON].


4 See infra Parts V–VI.

5 See infra Part VII.

defined sex discrimination as including discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”

Thus, Congress made clear that discrimination on the basis of pregnancy constituted discrimination on the basis of sex. Since the enactment of the PDA, however, the lower federal courts as well as the courts of appeals have struggled to define its scope. One of the most significant and controversial issues confronting the judiciary today is the confusion surrounding infertility treatments, particularly IVF, and whether women undergoing IVF have any protection under the PDA. Recently, in \textit{Hall v. Nalco Co.}, the Court of Appeals for the Seventh Circuit held that adverse employment actions based on a woman’s need to take time off to undergo IVF constituted discrimination on the basis of the gender-specific condition of childbearing capacity. In effect, the court recognized that an infertile female employee terminated for receiving IVF could maintain an action against her employer pursuant to the PDA. Unfortunately, even after \textit{Hall}, the PDA falls short in a significant way—it does not require that employers provide insurance coverage for infertility treatments.

This Comment surveys the law surrounding infertility treatments and gender discrimination and concludes that the legal protection for female employees undergoing IVF is disappointing and inadequate. Part II of this Comment discusses the causes and prevalence of infertility as well as the various treatments available for infertile couples, specifically IVF. Part III then examines the history of the PDA, including the Supreme Court case that prompted Congress to enact the PDA. Next, Part IV looks at two of the Supreme Court cases that followed the enactment of the PDA, which provide some guidance to the lower courts in interpreting the PDA. Part V summarizes three cases from the courts of appeals and their respective approaches in interpreting the PDA in the context of infertility treatments.

\textsuperscript{6} See § 2000e(k).

\textsuperscript{7} \textit{Id.}

\textsuperscript{8} Congress “change[d] the definition of sex discrimination in title VII to reflect the ‘commonsense’ view and to insure that working women are protected against all forms of employment discrimination based on sex.” S. REP. No. 95-331, at 3 (1977).

\textsuperscript{9} 534 F.3d 644 (7th Cir. 2008).

\textsuperscript{10} \textit{Id.} at 645.

\textsuperscript{11} \textit{Id.} at 649.

\textsuperscript{12} See discussion \textit{infra} Part VI.


\textsuperscript{14} Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).
Part VI analyzes the three cases and explores the strengths and limitations of each court’s approach. Finally, Part VII asserts that Congress should amend the PDA to clarify the scope of “related medical conditions” to provide more protection to women undergoing IVF against adverse employment actions like terminations and demotions. Furthermore, Part VII concludes that existing federal statutes, such as the PDA, the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA), are the inappropriate legal tools to compel employers to provide coverage for infertility treatment because they were not designed for this type of claim. Additionally, state laws are limited in scope and lack the benefit of uniformity. Instead, this Comment suggests that the most promising avenue for obtaining insurance coverage for infertility treatments is through lobbying Congress to pass legislation like the proposed Family Building Act of 2009, which is designed to address the financial needs of infertile couples seeking fertility treatment.

II. INFERTILITY: A PHYSICAL DISEASE AND AN EMOTIONAL ROLLERCOASTER

Infertility is a serious and widespread condition affecting approximately 7.3 million couples of reproductive age in the United States. It is a disease of the reproductive system that interferes with one of the human body’s most basic functions—the ability to reproduce. Infertility is a term used to describe one’s inability to become pregnant after one year of sexual intercourse without conception.

19 ARONSON, supra note 1, at 5.
Occurring equally in both men and women, infertility does not discriminate on the basis of sex. About one third of infertility cases can be attributed to male factors, one third to female factors, and the remaining one third is because of either a combination of male and female factors or is unexplained.

In addition to its physical aspects, infertility provokes strong emotions, such as grief, anger, and guilt. Most couples dream of having a family and assume that they can have children one day. When that possibility is jeopardized by an infertility diagnosis, it can be an extremely painful and difficult reality to face. In fact, an infertility diagnosis engenders such intense emotional feelings that mental health professionals consider it a life crisis. “Coping with infertility requires the same kind of psychological and physical strength as does coping with the death of a parent, a divorce, or a life-threatening disease.” While infertility is a frightening and emotional diagnosis for many couples, an increasing number of treatment options are available. Still, understanding the severe emotional effects of infertility is essential to improving the legal protection for women pursuing such treatment options; legal change cannot come about until infertility treatment is accepted as a necessity rather than a luxury.

Today, infertility is no longer a taboo issue, mainly because of the advances in medical technology that have led to a number of treatment options and have given hope to millions of infertile couples. Some treatment options include fertility drugs and hormonal treatments, surgery, and assisted reproductive technologies (ARTs). The U.S. Centers for Disease Control and Prevention (CDC) defines ARTs as “all treatments or procedures that involve the handling of human eggs and sperm for the purpose of helping a woman become pregnant.”

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20 Id. at 7.
22 ARONSON, supra note 1, at 40–41.
23 Id. at 40.
24 See id.
25 Id.
26 Id.
27 See infra text accompanying note 29.
28 ARONSON, supra note 1, at 6.
29 Id.
30 Id. at 175 (quoting Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs.). ART includes “in vitro fertilization (IVF), gamete intrafallopian...
each year doubled from 1996 to 2005 because of, in part, the correlation between age and fertility. As men and women age, they experience a significant decline in fertility. With more women waiting until their thirties and forties to have children, an increasing number of women are turning to ARTs to achieve pregnancy.

This Comment is primarily concerned with IVF, the most commonly used ART. IVF is a procedure in which fertilization occurs outside of the woman’s body in a laboratory dish. IVF is used to treat infertility problems, such as tubal factor, endometriosis, male factor, and unexplained infertility. Even when a male-factor causes infertility, the woman must undergo IVF because the procedure requires that the embryos be placed in the uterus.

transfer (GIFT), zygote intrafallopian transfer (ZIFT), embryo cryopreservation, egg or embryo donation, and gestational carriers. . . . ART does not include intrauterine insemination (IUI). Id. ARTs, like IVF, involve four basic steps: ovulation stimulation and egg maturation, egg retrieval, fertilization, and embryo placement in the uterus. CAROL TURKINGTON & MICHAEL M. ALPER, UNDERSTANDING FERTILITY AND INFERTILITY: THE SOURCEBOOK FOR REPRODUCTIVE PROBLEMS, TREATMENTS, AND ISSUES 40–41 (2003).

“The number of ART cycles performed in the United States has more than doubled, from 64,681 cycles in 1996 to 134,260 in 2005.” CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 61 (2007), available at [hereinafter CDC SUCCESS RATES].

See ARONSON, supra note 1, at 11; see also TURKINGTON & ALPER, supra note 30, at 10–11 (“[B]ecause eggs are some of the longest-living cells in the body, there is a greater risk that the eggs may be defective with each subsequent year of life.”).


The average age of women receiving ART services was thirty six in 2005. CDC SUCCESS RATES, supra note 31, at 15.


ARONSON, supra note 1, at 176. In-vitro is Latin for “in glass.” Id.

Id. at 177.

See id. at 155, 176.
fere with one’s work and social obligations. Each IVF cycle may require weeks to complete, and if a pregnancy does not result, many IVF cycles may be required.

With the average cost of an IVF cycle in the United States being $12,400, IVF is an expensive procedure. In addition to the emotional and physical obstacles that infertility causes, many women will face financial obstacles relating to two different employer actions: their employer may refuse to provide insurance coverage or a health plan that includes infertility treatments, and their employer may terminate them for taking time off from work to undergo infertility treatment. Thus, financial obstacles may force women who cannot afford infertility treatment without insurance coverage or who have to forgo infertility treatment to avoid losing their job to abandon their dream of having a family. Whether infertile women have legal recourse to overcome these obstacles is still unclear.

III. THE SUPREME COURT’S 1978 DECISION IN GILBERT LED TO THE ENACTMENT OF THE PDA

Congress enacted the PDA in 1978 in response to the United States Supreme Court decision in General Electric Co. v. Gilbert, in which the Court held that discrimination based on pregnancy did not constitute discrimination based on sex. In a class-action suit

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Infertility exacts an enormous toll on both the affected individuals and on society. Women and men in their most active and productive years are distracted by the physical, financial and emotional hardships of this disease. Infertility is more than a disease, it is a devastating life crisis which can greatly impact the health, relationships, job performance and social interactions. Added to the emotional and physical toll exacted by infertility is the financial burden carried by many seeking treatment.

Id.

40 See MAYO CLINIC FAMILY HEALTH BOOK 1069–70 (Scott C. Litin et al. eds., 3d ed. 2003). An IVF cycle normally begins with requiring the woman to take ovulation-stimulating drugs. TURKINGTON & ALPER, supra note 26, at 41. The eggs are then surgically removed and mixed with the sperm in a Petri dish. Id. at 42. If the eggs have been fertilized by the sperm, then the fertilized eggs, or embryos, are placed in the uterus. Id.

41 Am. Pregnancy Ass’n, supra note 21.

42 See discussion infra Parts V–VI.


44 Id. at 139–40.
brought by several female General Electric employees, the Court addressed the question of whether Title VII’s prohibition on sex discrimination applied to pregnancy-based discrimination. The female employees at General Electric challenged the company’s disability plan, which provided extensive coverage for all “nonoccupational sickness and accident benefits” but excluded from its coverage disabilities arising from pregnancy.

In reaching its decision, the Gilbert Court relied primarily on its decision two years earlier in Geduldig v. Aiello, in which the Court had held that pregnancy discrimination is not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. In Gilbert, the Court again employed the Geduldig reasoning to conclude that the disability plan distinguished not between men and women but between pregnant persons and nonpregnant persons of both sexes.

Accordingly, the Gilbert Court held that because the nonpregnant class consisted of both men and women, the plan did not constitute sex discrimination on either its face or its impact on women—even though the Court noted that the category of pregnant persons could necessarily include only female employees. The Court rea-
soned that the insurance program covered the “same categories of risk”\(^{53}\) for both men and women and that pregnancy constituted an “an additional risk, unique to women,”\(^{54}\) for which employers were not required to provide “greater economic benefits.”\(^{55}\) In other words, the Court held that women were not entitled to benefits greater than those provided to men just because they are susceptible to an “extra” risk—pregnancy.

The majority’s opinion in Gilbert produced two dissents, one from Justice Brennan and one from Justice Stevens.\(^{57}\) In his dissent, joined by Justice Marshall, Justice Brennan asserted that the majority’s reasoning was “fanciful”\(^{58}\) and “transparent”\(^{59}\) in ignoring the reality that all pregnant persons will necessarily be women. Justice Brennan argued that General Electric’s disability plan violated Title VII because excluding coverage on the basis of pregnancy is the same as excluding coverage on the basis of sex.\(^{60}\) In a separate dissent, Justice Stevens declared that the disability plan constituted sex discrimination because “it is the capacity to become pregnant which primarily differentiates the female from the male.”\(^{61}\)

Congress agreed with the Gilbert dissents and prospectively overruled the majority’s decision by adding pregnancy discrimination to Title VII’s definition of sex discrimination.\(^{62}\) The purpose of Title VII is to provide equal employment opportunities to all groups of employees and thus prohibit private and public employers from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

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53 Id. at 138.
54 Id. at 139.
55 Id. at 138, 139 & n.17.
56 Gilbert, 429 U.S. at 138, 139 & n.17.
57 Id. at 146 (Brennan, J., dissenting); see also id. at 160 (Stevens, J., dissenting).
58 See id. at 148 (Brennan, J., dissenting).
59 Id. at 152 & n.5.
60 See id. at 149.
61 See id. at 160.
62 Gilbert, 429 U.S. at 161–62 (Stevens, J., dissenting).
63 Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678, 679 & n.17 (1983) (noting that the PDA was designed to overrule the Gilbert decision).
64 See Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 288 (1987) (emphasizing that the purpose of Title VII is “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.” (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–430 (1971))).
individual’s race, color, religion, sex, or national origin.\textsuperscript{65} Congress legislated that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”\textsuperscript{66} The second clause of the definition states that “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.”\textsuperscript{67} This clause mandates equal employment treatment, including insurance coverage, for pregnancy-related conditions as for other disabilities and thus overturns the Supreme Court’s specific holding in \textit{Gilbert}.\textsuperscript{68}

IV. Supreme Court Precedent Post-PDA Enactment

While the Supreme Court has yet to address the issue of whether women undergoing IVF are protected under the PDA, it has provided some guidance regarding the scope and proper interpretation of the Act. The Court has decided three cases addressing the PDA, none of which specifically address infertility treatments.\textsuperscript{69} Two of the decisions, however, provide particularly useful guidance to the infertility analysis because one of the cases involved the related issue of equality

\textsuperscript{66} § 2000e(k) (emphasis added).
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{See Newport News}, 462 U.S. at 678, 679 & n.17. The Court used legislative history to bolster its conclusion that the PDA’s second clause was meant to directly repudiate \textit{Gilbert}. \textit{Id.} For example, the Court cited the remarks of Representative Hawkins:

\begin{quote}
H.R. 5055 does not really add anything to Title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy.
\end{quote}

\textit{Id.} at 679 n.17 (quoting 123 CONG. REC. 10,581 (1977) (statement of Rep. Hawkins)).
\textsuperscript{69} \textit{See Int’l Union v. Johnson Controls}, 499 U.S. 187, 210–11 (1991) (holding that employer’s policy prohibiting all fertile women from having jobs involving actual or possible lead exposure was facially discriminatory and violated the PDA); \textit{Cal. Fed. Sav.}, 479 U.S. at 285, 287–88 (holding that the PDA is the floor beneath which pregnancy benefits cannot fall and that state statutes may provide more protection to pregnant women); \textit{Newport News}, 462 U.S. at 683–84 (holding employer’s insurance coverage plan discriminatory against male employees and violative of the PDA where it provided less extensive benefits for the pregnancy-related conditions of spouses of male employees than for other medical conditions of spouses of female employees).
of insurance coverage, and the other addressed discrimination on the basis of “potential for pregnancy.”

A. Pregnancy Discrimination Is Sex Discrimination

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Supreme Court held that an employer must provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it does for all other medical conditions of the spouses of female employees. In *Newport News*, the employer’s health insurance plan provided complete coverage for the pregnancy-related expenses of its female employees but limited pregnancy-related benefits for the spouses of male employees. The plan also provided extensive coverage for all other medical conditions for the spouses of female employees.

The Court followed the Equal Employment Opportunity Commission’s (EEOC) interpretive guidelines, which stated that “if an employer’s insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.” The Court reasoned that although the PDA prohibits discrimination against female employees on the basis of pregnancy, it never altered Title VII’s original prohibition against discrimination on the basis of sex. Thus, the Court found that the employer’s plan discriminated against married male employees because it provided them less comprehensive coverage than it provided for married female employees.

B. The Definition of Pregnancy Includes the “Potential for Pregnancy”

In *International Union v. Johnson Controls*, the Supreme Court addressed whether the employer’s fetal-protection policy constituted sex discrimination in violation of Title VII. The employer, Johnson

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70 *See Newport News*, 462 U.S. at 675–76.
73 Id. at 684.
74 Id. at 671.
75 Id. at 672.
76 Id. at 673.
77 Id. at 684–85.
78 *Newport News*, 462 U.S. at 676.
80 *See id.* at 190.
Controls, Inc., manufactured batteries, in which lead was a primary component. Because of the harmful effects of lead exposure on fetuses, the company implemented a “fetal-protection policy” that excluded all women who were pregnant or capable of becoming pregnant from working in a battery-manufacturing job. The policy required female employees to prove that they were not capable of reproducing to obtain this particular job. Both the district court and the Court of Appeals for the Seventh Circuit analyzed the policy as facially neutral with a discriminatory effect on women’s employment opportunities. Accordingly, applying the “business necessity test” and granting summary judgment in favor of the employer, both courts concluded that the employer’s policy was necessary to avoid the substantial health risk to the fetus.

The Supreme Court reversed the Seventh Circuit’s holding and rejected its application of the business-necessity test. The Court held that the policy was facially discriminatory under the PDA, which necessarily constitutes sex discrimination, because it “classified on the basis of gender and childbearing capacity, rather than fertility alone.” The policy classified on the basis of gender because it required only women to prove their lack of reproductive capacity despite evidence that lead exposure adversely affects the male reproductive system; consequently, the policy gave only men a “choice as to whether they wish[ed] to risk their reproductive health for a particu-

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81 Id.
82 Id. at 191–92.
83 Id.
84 Id. at 197–98.
85 Id.
86 Johnson Controls, 499 U.S. at 197–98.
87 Id.
88 Id. at 198.
Furthermore, the policy was also facially discriminatory under the PDA because of its childbearing-capacity classification, which excluded employees who were “pregnant or . . . capable of bearing children.” Moreover, the Court noted that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.” Consequently, the Court rejected the more lax business-necessity test under which facially neutral policies are analyzed and instead addressed whether the policy satisfied the narrow bona fide occupational qualification (BFOQ) defense to Title VII.

The BFOQ exception permits sex discrimination “in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” Johnson Controls argued that female sterility constituted a BFOQ because the battery-manufacturing job compromised the safety of the unborn children of its fertile female employees. The Court rejected this argument. Because the protection of fetuses was not necessary to the essence of battery manufacturing and because fertile women could perform the essential duties of battery manufacturing as efficiently as all other employees, Johnson Controls could not establish female sterility as a BFOQ.

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89 Id. at 197. The Court reasoned that the employer was concerned only with the safety of the unborn offspring of its female employees despite potential harms to the offspring of male employees as well. Id. at 198.
90 Id. at 198–99.
91 See id. at 192.
92 Johnson Controls, 499 U.S. at 199.
93 Id. at 199–200.
95 Johnson Controls, 499 U.S. at 206.
96 The Court stressed that the exception applied only in the narrow circumstances where sex or pregnancy actually interferes with the woman’s ability to perform the job-related activities that go to the “essence” of the employer’s business. Id. Accordingly, in cases where the safety of a third party is at issue, such safety must be an essential aspect of the employer’s business, and the woman’s sex, pregnancy, or reproductive potential must actually interfere with the woman’s ability to ensure the safety of those third parties. Id. at 202–04. In Johnson Controls, the Court rejected female sterility as a BFOQ because the essence of Johnson Controls’ business was battery manufacturing and not concern for children; thus, the fetal-protection policy was not essential to its business. Id. at 207. “Concerns about the welfare of the next generation [cannot] be considered a part of the ‘essence’ of Johnson Controls’ business.” Id. The potential fetuses were “neither customers nor third parties whose safety [was] essential to the business of battery manufacturing.” Id. at 203. Additionally, the status of a woman’s fertility did not relate to, let alone interfere with, her ability to perform the job’s duties. Id. at 206.
97 Id.
Ultimately, the Court concluded that the Johnson Controls policy violated Title VII, as amended by the PDA, because the PDA was meant “to protect female workers from being treated differently from other employees simply because of their capacity to bear children.”

And in Johnson Controls, the employer determined the eligibility of workers based on their reproductive capacity or potential for pregnancy, which constituted pregnancy discrimination.

V. DEFINING PREGNANCY DISCRIMINATION: A DIFFICULT TASK PRODUCING CONSIDERABLE CONFUSION AMONG THE FEDERAL COURTS

While the Supreme Court has offered some general guidance on the scope of the PDA, the task of deciding whether infertility is a pregnancy-related condition under the PDA has been largely left to the lower federal courts. The lower courts have taken varying approaches in interpreting the PDA in the infertility context, which has led to confusion and inconsistent results among them.

A. The Eighth Circuit: Infertility Is Not a Related Medical Condition under the PDA

In Krauel v. Iowa Methodist Medical Center, the Eighth Circuit Court of Appeals addressed the issue of whether infertility was a medical condition related to pregnancy or childbirth within the meaning of the PDA. It held that infertility fell outside the PDA’s protection.
because infertility did not include pregnancy, childbirth, or a related medical condition.  

The plaintiff in *Krauel* was diagnosed with endometriosis and, as a result, was unable to conceive naturally.  

104 The plaintiff-employee paid for her own infertility treatment because her employer’s medical benefits plan did not provide coverage for treatment of infertility problems.  

105 The plan excluded insurance coverage for both male and female infertility treatments.  

106 When the plaintiff’s employer denied reimbursement for her infertility treatments, the plaintiff filed suit and alleged that the employer’s denial of coverage for infertility treatments violated the PDA.  

107 The plaintiff argued that infertility was a medical condition related to pregnancy, and therefore, the employer’s refusal to provide coverage for infertility treatments was discrimination on the basis of a “related medical condition” under the PDA.  

108 The court rejected the plaintiff’s argument and affirmed the district court’s grant of summary judgment in favor of the employer.  

109 The court employed a canon of statutory construction, *ejusdem generis*,  

110 meaning that when a general term follows a specific term, the general term should be understood as referring to matters similar to those in the specific terms.  

111 Here, the general term was “related medical condition,” and the specific term was “pregnancy or childbirth.” Consequently, the court held that the plain language of the PDA did not suggest that “related medical conditions” should be applied to conditions outside the context of pregnancy and childbirth.  

112 The court concluded that, because infertility, which “prevents conception,” is “strikingly different” from pregnancy and childbirth, “which occur after conception,” it was not a “related medical condition” as contemplated by the PDA.
The court distinguished Johnson Controls, in which the Supreme Court held that sex discrimination included discrimination on the basis of “potential pregnancy.” While “potential pregnancy” is a gender-specific medical condition because only women can become pregnant, infertility is gender neutral because it affects both men and women. Accordingly, the court held that the employer’s refusal to cover the cost of infertility treatments was not sex discrimination because both men and women are affected by infertility. The court further supported its holding by stating that the fact that neither the legislative history of the PDA nor the EEOC guidelines made any explicit reference to infertility treatment suggests that infertility is outside the purview of the PDA’s protection.

Finally, the Krauel court expressly rejected the reasoning in Pacourek v. Inland Steel Co., in which the District Court for the Northern District of Illinois held that infertility is a medical condition related to pregnancy for purposes of the PDA. The court in Krauel found the result in Pacourek unpersuasive for two reasons. First, the district court relied too heavily on the legislative history of the PDA, in which infertility is not explicitly mentioned, and second, the defendant in Pacourek, unlike the defendant in Krauel, did not concede that the employer policy was gender-neutral and applicable to all infertile employees, both male and female.

Because the policy at is-

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114 Id. at 680.

Potential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant. In this case, because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral, Johnson Controls is inapposite.

115 Id.

116 Id.

117 Id. at 679–80.

118 858 F. Supp. 1393, 1401 (N.D. Ill. 1994).

119 Krauel, 95 F.3d at 80.

120 Id. The Pacourek court cited legislative history to support the notion that Congress intended for the PDA to provide broad protection to women against any and all employment discrimination based on gender. Pacourek, 858 F. Supp. at 1402. The court quoted Senator Harrison Williams’s statement, “[T]he overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status. . . .” Id. (quoting 123 CONG. REC. 29,385 (1977)). The Pacourek court also relied on Representative Ronald Sarasin’s statement that the PDA gives a woman “the right . . . to be financially and legally protected before, during, and after her pregnancy.” Id. (quoting 124 CONG. REC. 38,574 (1978)).

121 Krauel, 95 F.3d at 680. In Krauel, the insurance policy denied benefits to all infertile employees. Id. In Pacourek, on the other hand, the plaintiff claimed that she
sue in Krauel applied to all infertile employees regardless of sex, the court held that it was gender-neutral and thus did not violate the PDA.\textsuperscript{122}

\textbf{B. The Second Circuit: Providing Less Complete Coverage for Female Infertility Does Not Run Afoul of the PDA}

In \textit{Saks v. Franklin Covey Co.},\textsuperscript{123} the Second Circuit Court of Appeals addressed the same issue that was presented in \textit{Krauel}—whether an employer’s denial of health coverage for infertility treatments that can be performed only on women violated the PDA.\textsuperscript{124} The court held that because the employer’s health-benefits plan’s exclusion of surgical impregnation procedures disadvantaged infertile male and female employees equally, the plan did not violate Title VII, as amended by the PDA.\textsuperscript{125}

During the course of her four years of employment at Franklin Covey Sales, Inc., the plaintiff-employee, an infertile female, underwent several infertility procedures, including IVF, to achieve pregnancy with her husband.\textsuperscript{126} The plaintiff-employee sued her employer after being denied coverage for the cost of her infertility treatments—IVF, intrauterine insemination, and injectable fertility drugs—under her employer’s self-insured health-benefits plan (“the Plan”).\textsuperscript{127} The Plan entitled employees to coverage for “medically necessary procedures,” including a variety of infertility products and procedures and surgical infertility treatments.\textsuperscript{128} But the Plan expressly excluded surgical impregnation procedures, including IVF and intrauterine insemination.\textsuperscript{129} The plaintiff claimed that the Plan violated several statutes, including the PDA, because it provided inferior coverage for infertility treatments than for illnesses unrelated to pregnancy.\textsuperscript{130}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Krauel}, 95 F.3d at 680.
\item \textit{Saks}, 316 F.3d 337 (2d Cir. 2003).
\item \textit{Id.} at 340.
\item \textit{Id.} at 346.
\item \textit{Id.} at 341.
\item \textit{Id.} at 340–42.
\item \textit{Id.} at 341 (“Examples of covered surgical infertility treatments include[...d] procedures to remedy conditions such as varicoceles (varicose veins in the testicles causing low sperm count), blockages of the vas deferens, endometriosis, and tubal occlusions.”).
\item \textit{Saks}, 316 F.3d at 341.
\item \textit{Id.} at 342.
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Despite noting that the phrase "related medical conditions" encompassed more than pregnancy itself—a concession that the Krauel court was unwilling to make—the court rejected the plaintiff’s PDA claim.\(^\text{131}\) The court framed the issue as infertility, separate and apart from its treatment.\(^\text{132}\) As a result, the court found that Johnson Controls provided support for its interpretation of the PDA—that discrimination based on "fertility alone" and, by implication, infertility alone—does not violate the PDA because infertility affects men and women in equal numbers.\(^\text{133}\) Accordingly, the court concluded that the Plan did not violate the PDA because its denial of coverage for surgical impregnation procedures constituted discrimination based on fertility alone and thus disadvantaged both male and female employees equally.\(^\text{134}\) The court further noted the anomalous implications of including infertility within the protection of the PDA—that only infertile women would be part of the protected class, even though the affected class includes both men and women.\(^\text{135}\) Therefore, the court held that infertility is not a pregnancy-related condition under the PDA and that infertility discrimination does not violate the PDA.\(^\text{136}\)

\textit{C. The Seventh Circuit: The Issue is Not Infertility Alone}

In a case of first impression, \textit{Hall v. Nalco Co.}, the Seventh Circuit Court of Appeals confronted the issue of whether the plaintiff-employee, Hall, stated a cognizable PDA claim against her employer who terminated her after she took time off to undergo IVF.\(^\text{137}\) The court reversed the district court’s grant of summary judgment to the employer and held that an adverse employment action based on a gender-specific infertility treatment, such as IVF, constitutes sex discrimination under Title VII, as amended by the PDA.\(^\text{138}\)

Hall was a sales secretary for Nalco Company when, in March 2003, she requested a leave of absence to undergo IVF treatments.\(^\text{139}\) Hall’s supervisor approved the leave.\(^\text{140}\) Hall’s IVF cycle was unsuc-

\(^{131}\) Id. at 345–46.
\(^{132}\) Id.
\(^{133}\) Id. at 346.
\(^{134}\) Id.
\(^{135}\) Saks, 316 F.3d at 346.
\(^{136}\) Id. at 345–46.
\(^{137}\) Hall v. Nalco Co., 534 F.3d 644, 646 (7th Cir. 2008).
\(^{138}\) Id. at 649.
\(^{139}\) Id. at 645. The court noted that each IVF cycle takes several weeks to complete and that several cycles may be required to achieve pregnancy. Id. at 645–46.
\(^{140}\) Id. at 646.
cessful, however, and in July 2003, she requested another leave of absence to begin that August. \[^{141}\] Shortly after her request, Hall’s supervisor told her that the sales office was merging with another office and that her position would be terminated as a result. \[^{142}\] Hall’s supervisor also told her that “her termination ‘was in [her] best interest due to [her] health condition.’” \[^{143}\] Prior to her termination, Hall’s supervisor discussed her potential termination with the company’s employee-relations manager whose notes from the conversation referred to Hall’s “absenteeism—infertility treatments” and stated that Hall “missed a lot of work due to health.”

Hall filed a discrimination charge with the EEOC, and she subsequently sued her employer and alleged discrimination on the basis of sex in violation of Title VII. \[^{145}\] In her complaint, Hall alleged that she was terminated for being “a member of a protected class, female with a pregnancy-related condition, infertility.” \[^{146}\] The district court found that Hall did not state a claim cognizable under the PDA and granted summary judgment to her employer. \[^{147}\] The court reasoned that infertility is a gender-neutral condition, and thus, infertile women are not a protected class under the PDA. \[^{148}\]

The Seventh Circuit reversed the lower court’s decision and held that Hall presented a cognizable PDA claim. \[^{149}\] First, the court rejected the district court’s characterization of the issue as “infertility alone” \[^{150}\] as well as Hall’s theory that infertile women are a protected class under the PDA. \[^{151}\] The PDA, the court held, was not meant to create a new protected class or to create “new rights or remedies” but was intended only to “clarif[y] the scope of Title VII by recognizing certain inherently gender-specific characteristics that may not form the basis for disparate treatment of employees.” \[^{152}\] Thus, the Hall court recognized that classifications based solely on the gender-

\[^{141}\] Id.
\[^{142}\] Id.
\[^{143}\] Hall, 534 F.3d at 646.
\[^{144}\] Id.
\[^{145}\] Id.
\[^{146}\] Id.
\[^{147}\] Id.
\[^{148}\] Id.
\[^{149}\] Hall, 534 F.3d at 649.
\[^{150}\] Id. at 648.
\[^{151}\] Id. at 649 n.3.
\[^{152}\] Id. at 647.
neutral condition of infertility are not prohibited by the PDA. To this extent, \textit{Hall} is consistent with \textit{Krauel} and \textit{Saks}.

Relying on \textit{Johnson Controls}, the \textit{Hall} court stated that, even where infertility is at issue, the “employer conduct complained of must actually be gender neutral to pass muster.” Here, the court held, the issue was not infertility alone but also whether the employer conduct was gender-neutral in response to the employee’s need to undergo IVF. To assess whether an employer action violates Title VII, the court reiterated the test for sex discrimination: “whether the employer action in question treats an employee ‘in a manner which but for that person’s sex would be different.’”

The court analogized the employer conduct in this case to the employer conduct in \textit{Johnson Controls}, where the employer barred only fertile women from employment even though the lead exposure affected the fertility of both men and women. The court concluded that Nalco’s conduct suffered the same defect as the employer conduct in \textit{Johnson Controls}—that the employer policy “did not classify based on the gender-neutral characteristic of fertility alone, but rather on the gender-specific characteristic of childbearing capacity, or ‘potential for pregnancy,’ and was therefore invalid under the PDA.”

The court reasoned that where an employer bases an employment decision on an employee’s absences related to IVF treatments,

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\footnote{\textit{Id.} at 648.}

The [\textit{Johnson Controls}] Court held the policy was invalid under the PDA because it “classify[ed] on the basis of gender and childbearing capacity, rather than fertility alone.” Implicit in this holding is that classifications based on “fertility alone”—and by like implication, infertility alone—are not prohibited by the PDA, which reaches only gender-specific classifications. As the Second Circuit noted in \textit{Saks}, this conclusion is necessary to reconcile the PDA with Title VII because “[i]ncluding infertility within the PDA’s protection as a ‘related medical condition[]’ would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.”

\textit{Id.} (quoting \textit{Saks} v. Franklin Covey Co., 316 F.3d 337, 346 (2d Cir. 2003) (footnotes and citation omitted)).

\footnote{\textit{See} discussion \textit{infra} Part VI.A.}

\footnote{\textit{Hall}, 534 F.3d at 648.}

\footnote{\textit{Id.} at 648–49.}

\footnote{\textit{Id.} at 647 (quoting L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).}

\footnote{\textit{Id.} at 648–49.}

such decisions are not gender-neutral because IVF is a surgical impregnation procedure that can be performed only on women. Employees who undergo IVF will necessarily always be women because only women have the capacity to bear children. Thus, the court concluded that “Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.”

Although the court did not reach the merits of the case, as to whether Hall was terminated on the legitimate basis of restructuring or on her absence for IVF treatments, it did suggest the latter because of the timing of her termination—shortly after her first failed IVF cycle and request for another leave of absence—and the employee-relations manager’s notes expressly referring to her IVF treatments. The court concluded that Hall’s allegations presented a cognizable Title VII claim “[b]ecause adverse employment action based on childbearing capacity will always result in ‘treatment of a person in a manner which but for that person’s sex would be different.’

VI. MAKING SENSE OF THE PREGNANCY DISCRIMINATION ACT IN LIGHT OF KRAUEL, SAKS, AND HALL

The conflict between the courts arises from a threshold question—how to frame the issue. In Krauel and Saks, the courts framed

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160 Id. at 648–49.
161 Hall, 534 F.3d at 648–49.
162 Id. at 649; see also Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ., 911 F. Supp. 316, 320 (N.D. Ill. 1995) (holding that female employee stated a claim under Title VII because she was terminated for undergoing fertility treatment and that her termination was thus based on her capacity to become pregnant).
163 Hall, 534 F.3d at 649.
164 Id. (quoting L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

The problem stems from how this issue is approached and subsequently framed. Proponents of including women undergoing fertility treatment within the PDA aver that the diagnosis of infertility cannot be bifurcated from its treatment. This belief allows proponents to frame the issue as: whether women undergoing fertility treatment are included in the scope of the PDA. Conversely, because opponents do not, or cannot, acknowledge that the two aspects of infertility cannot be bifurcated, opponents frame the issue as: whether women who are infertile are included in the scope of the PDA. This explains why a court may conclude that the phrase “treatment for a medical condition related to pregnancy” does not include women undergoing fertility treatment:
the issue as whether infertility is a “related medical condition” under the PDA. Because infertility is gender neutral, the courts answered in the negative. The Hall court, on the other hand, did not separate infertility from the context of IVF; instead, the court framed the issue as whether women undergoing IVF can present a cognizable claim under the PDA. The Hall court noted that IVF is related to pregnancy because it involves the “potential for pregnancy” and requires that the person receiving treatment have childbearing capacity. By ignoring the connection between IVF and childbearing capacity, the Krauel and Saks courts viewed infertility in a vacuum.

A. The Krauel and Saks Decisions Only Scratch the Surface of the Infertility Issue

In Hall, the Seventh Circuit distinguished Krauel and Saks, each of which involved insurance coverage for infertility treatments rather than the termination of a female employee undergoing IVF. While the Seventh Circuit did not necessarily disagree with the decisions reached by the Eighth and Second Circuits in Krauel and Saks, respectively, its reasoning conflicts with certain aspects of the arguments employed in these cases.

The Krauel court dismissed the plaintiff’s PDA claim because it held that infertility is not related to pregnancy. The court reasoned that infertility, which prevents conception, is not a condition related to pregnancy. The condition of infertility is being considered outside the context of diagnosis and treatment.

Id.

166 See Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996) (“[T]he issue before us is whether the District Court properly determined that treatment of infertility is not treatment of a medical condition related to pregnancy or childbirth.”); see also Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003) (“Whether the PDA’s prohibition of discrimination on the basis of pregnancy and ‘related medical conditions’ extends to discrimination on the basis of infertility.”).

167 See Krauel, 95 F.3d at 680; see also Saks, 316 F.3d at 346.

168 See Hall v. Nalco Co., 534 F.3d 644, 648 (7th Cir. 2008) (“The district court’s emphasis on this issue of ‘infertility alone’ is therefore misplaced in the factual context of this case.”).

169 See id.

170 See Bentley, supra note 165, at 416–17 (analyzing the Krauel case and concluding that “consideration of infertility in this vacuum is the root of the most common objection to finding that women undergoing fertility treatment are within the scope of the PDA: that infertility is a gender-neutral condition”).

171 See Hall, 534 F.3d at 648.

172 See id.

to pregnancy and childbirth, which occur post-conception.\textsuperscript{174} The \textit{Krauel} court drew a bright line at pregnancy to implicate the PDA; essentially, the court made a blanket rule that infertility cannot serve as the basis for pregnancy discrimination because it is not “related to” pregnancy. This kind of analysis, however, is superficial because it looks only at the condition of infertility and stops there instead of also looking at infertility in the context of both the treatment and employer action at issue. Additionally, as the \textit{Hall} court noted, this reasoning was nullified by \textit{Johnson Controls}, in which the Supreme Court held that the PDA applies to classifications based on “potential for pregnancy” in addition to actual pregnancy.\textsuperscript{175} Contrary to \textit{Krauel}'s rationale, a woman’s protection under the PDA does not exist only during her nine months of pregnancy.\textsuperscript{176} A woman is part of the protected class whenever an employer action adversely affects her on the basis of a biological difference, such as the capacity to become pregnant, regardless of temporal considerations.\textsuperscript{177}

The \textit{Krauel} line of reasoning is similar to that employed by the majority in \textit{Gilbert}. \textit{Krauel} created two classes, fertile and infertile employees, as the \textit{Gilbert} majority differentiated between pregnant and nonpregnant employees.\textsuperscript{178} In both cases, the courts upheld the employment policy because the class claiming discrimination included both men and women.\textsuperscript{179} As Justice Stevens wrote in his \textit{Gilbert} dissent, with which Congress agreed, the flaw in this reasoning is viewing the condition at issue, pregnancy in \textit{Gilbert} and infertility in \textit{Krauel}, in a “vacuum” instead of looking at the condition in a practical context—that pregnant persons can only be women and infertile persons

\textsuperscript{174} \textit{Id.} at 679–80. The Eighth Circuit extended its \textit{Krauel} rule to the issue of contraception in \textit{In re Union Pac. R.R. Employment Practices Litigation}, 479 F.3d 936, 942 (8th Cir. 2007). Using the same statutory construction, the \textit{Union Pacific} court held that contraception is not a medical condition associated with “pregnancy” or “childbirth.” \textit{Id.} The court reasoned that contraception, like infertility, prevents conception, and pregnancy, childbirth, and related medical conditions can occur only after conception. \textit{Id.}

\textsuperscript{175} \textit{Hall} v. Nalco Co., 534 F.3d 644, 648 n.1 (7th Cir. 2008).

\textsuperscript{176} \textit{See generally} \textit{Int’l Union v. Johnson Controls}, 499 U.S. 187, 199 (1991) (holding that classifying groups on the basis of potential for pregnancy is the same as sex discrimination).

\textsuperscript{177} \textit{See Kocak v. Cmty. Health Partners of Ohio, Inc.}, 400 F.3d 466, 469–70 (6th Cir. 2005) (holding that employee need not be pregnant at the time of the discrimination to bring a claim under the PDA).


\textsuperscript{179} \textit{Gilbert}, 428 U.S. at 136–40, 145–46; \textit{Krauel}, 95 F.3d at 680.
undergoing IVF can only be women. In the case of infertility, the practical context includes which gender the infertility treatments affect and how employers treat their employees with regard to gender-specific infertility treatments.

The Second Circuit in *Saks* applied the *Krauel* reasoning to uphold an employer plan that provided complete insurance coverage for male infertility treatments but excluded coverage for surgical impregnation procedures. Like the Eighth Circuit in *Krauel*, the Second Circuit held that “infertility standing alone does not fall within the meaning of the phrase ‘related medical conditions’ under the PDA.” The court refused to include infertility within the PDA because it would create a protected class—infertile persons—which includes both men and women. In *Saks*, however, the plaintiff claimed that the employer plan provided complete surgical infertility coverage for male employees but incomplete coverage for female employees. Thus, the issue stated in *Hall* was not the gender-neutral condition of infertility alone but rather the gender-specific condition of childbearing capacity. The health-benefits plan in *Saks* fell within the PDA because it discriminated against employees on the basis of childbearing capacity by excluding coverage for infertility treatments performed only on women on account of their childbearing capacity. Making blanket assertions that infertility is or is not included within the purview of the PDA allows courts to avoid the specific employer action at issue and the class of persons it affects.

Ironically, the Seventh Circuit would probably have come to the same conclusion—albeit employing a different analysis—as the Eighth Circuit did in *Krauel*. The Seventh Circuit agreed that discrimination on the basis of infertility alone, a gender-neutral condition, does not violate the PDA. Therefore, if an employer, like the one in *Krauel*, provides no coverage for infertility treatments or terminates an employee merely for being infertile, then the issue is infertility alone and the employer does not violate the PDA. On the

180 See Gilbert, 429 U.S. at 161–62.
182 Id. at 346.
183 Id.
184 Id. at 342. The court disagreed with the plaintiff’s contention that the employer plan provided inferior coverage for female infertility. Id. at 346. It stated, however, that even if it did agree with the plaintiff that the plan provided inferior coverage for women, “such inferior coverage would not violate the PDA.” Id.
185 See *Hall* v. Nalco Co., 534 F.3d 644, 649 (7th Cir. 2008).
186 See *Saks*, 316 F.3d at 342.
187 *Hall*, 534 F.3d at 648.
other hand, if the employer provides coverage for male infertility treatments but not for female infertility treatments, like the employer in Saks, then the issue is not infertility alone because the employer is discriminating on the basis of childbearing capacity, a gender-specific condition. Likewise, if an employer terminates an employee for the reason that she is undergoing IVF, then the employer is discriminating on the basis of childbearing capacity because it is that capacity which necessarily requires the woman, not the man, to undergo IVF. In sum, courts must conduct more than a superficial analysis—examining infertility only on its surface—and instead more closely scrutinize infertility in the context of its treatment to determine whether the employer action is gender neutral.

B. The Limitations of the PDA Even After Hall

The Hall decision provides and promotes greater protection from adverse employment actions on the basis of gender-specific infertility treatments by highlighting the shallow analysis with which other courts have addressed the infertility issue. But the practical significance of the decision may be disappointing for many working women undergoing IVF.

First, employment actions based on infertility alone are not unlawful because they affect men and women equally. Only where an employer takes into consideration a woman’s gender-specific characteristic, reproductive capacity, in taking adverse actions against her does impermissible gender discrimination arise. Accordingly, employers may lawfully exclude insurance coverage for all infertility treatments because such an employer action is gender-neutral—that is, the exclusion affects men and women in equal proportion and is not based upon any gender-specific quality. Both men and women will presumably have to face this employer policy in equal measure by paying out of their pockets for infertility treatments for themselves or their spouses. In fact, an employer will invite sex discrimination claims from infertile male employees if it provides insurance coverage

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188 Id. at 648–49.
189 Id. at 648.
190 See id. at 648–49.
191 See, e.g., Saks, 316 F.3d at 346.
192 See id. at 347 (“[M]ale and female employees afflicted by infertility are equally disadvantaged by the exclusion of surgical impregnation procedures . . . . “).
for female infertility treatments only. The PDA does not compel employers to provide coverage for IVF.

In contrast, adverse employer actions, such as demotion or termination, based not on infertility alone but rather on infertility treatment that can be performed only on women because of their childbearing capacity—such as IVF—could lead to a valid PDA claim. Men and women do not have to face this employer action in equal measure; women bear this burden because men do not have to take extensive time off to undergo IVF treatments. Additionally, whereas women who undergo IVF may be viewed by their employer as potentially pregnant (thus requiring insurance coverage and more time off in the future), men can never be viewed this way. Therefore, for employers to take adverse employment action against women on the grounds that they are taking time off to undergo IVF is unlawful discrimination.

Even though women who are terminated for undergoing IVF may have a valid PDA claim, the impact of the Hall decision is further limited by the fact that Title VII requires equal treatment, not better treatment. Unfortunately, even though Hall may seem like a victory...
for infertile women, its impact is restricted because the employer does not commit discrimination if the employer would have fired any employee under similar circumstances. “The Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees in which event it would not be ignoring pregnancy after all.” 199 For example, if the employer would have fired a male employee for taking time off to undergo cosmetic surgery, then a female employee terminated for absenteeism related to IVF will likely not be successful in bringing a PDA claim. Only where an employer singles out a gender-specific procedure like IVF for adverse employment treatment does a viable claim of sex discrimination arise. A final limitation of the Hall decision is that its effects are potentially restricted to those women living in the Seventh Circuit. Thus, the PDA does not provide the kind of broad protection that women need when they are trying to build a family through IVF.

VII. FEDERAL LEGISLATION IS STILL NECESSARY AFTER HALL

Two separate forms of federal legislation are still necessary after Hall. First, Hall highlighted the need for Congress to clarify the definition of “related medical conditions” under the PDA so that women can achieve uniform results when they sue their employers for taking adverse employment actions against them on the basis of absences in connection with infertility treatments. 200 Second, and more importantly, federal legislation such as the Family Building Act of 2009 201 is necessary to mandate infertility insurance so that infertile couples can afford to experience one of life’s greatest joys—have children. Currently, the PDA, the ADA, and the FMLA provide some protection against adverse employment actions, but they do not provide much hope for requiring infertility insurance. 202

199 Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (citations omitted).
200 See discussion infra Part VII.A.
201 See discussion infra Part VII.D.
202 See discussion infra Parts VII.B–C.
A. The PDA Should Be Clarified but Would Still Not Require Infertility Insurance

Since the enactment of the PDA, the judiciary has grappled with how to properly interpret which “related medical conditions” fall within its scope. Because infertility is a significant unsettled area of law within PDA jurisprudence, PDA compliance is more complex and confusing for both employers and employees. This confusion is reflected in the significant rise in PDA charges filed with the EEOC since 1997. As the number of PDA charges steadily increase, the judiciary is being asked to play the central role in protecting women from employment discrimination.

Infertile women are essentially asking the courts to determine two issues: first, whether the PDA can be used as a means of compelling an employer to provide insurance coverage for infertility treatments; and second, whether the PDA can be used as a tool to seek damages against an employer who has taken an adverse employment action against a woman for taking time off to undergo infertility treatment. Unfortunately, the federal courts cannot give a clear answer on either issue, and the litigation surrounding the PDA has resulted in a lack of uniformity among the courts in regard to the scope of “related medical conditions” under the PDA.

Because of the magnitude and complexity of pregnancy discrimination issues today, the courts are not the appropriate forum to

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204 See, e.g., Saks v. Franklin Covey Co., 316 F.3d 337, 340–42 (2d Cir. 2003); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996).

205 See e.g., Hall v. Nalco Co., 534 F.3d 644, 646 (7th Cir. 2008).

206 Compare Saks, 316 F.3d at 346 (holding “[t]hat infertility standing alone does not fall within the meaning of the phrase ‘related medical conditions’ under the PDA”), and Krauel, 95 F.3d at 679–80 (holding “[t]hat the District Court properly concluded that infertility is outside of the PDA’s protection because it is not pregnancy, childbirth, or a related medical condition”), with Hall, 534 F.3d at 648–49 (discussing how discrimination on the basis of childbearing capacity is prohibited by the PDA).

207 In addition to infertility treatments, cases involving the scope of the PDA regarding contraception have been hotly debated. The lower federal courts have been reaching divergent decisions when considering contraception. Compare Cooley v. Daimler Chrysler Corp., 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (holding that denying insurance coverage for a prescription medication that allows women to control their potential for pregnancy is a sex-based exclusion under the PDA), and Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (holding
shape the contours of the PDA. Having a child is a major life event that should not hinge on a court’s use of a particular canon of statutory interpretation, framing of the issue, or survey of legislative history that does not address the specific pregnancy-related issues that are currently important. The level of delicacy and controversy surrounding these issues requires a uniform approach developed by Congress. The only equitable and practical way to develop guidance defining the responsibilities of employers and the rights of women in the workplace is through legislation or regulations clarifying the meaning of “related medical conditions” under the PDA.

Such clarifying legislation would achieve consistency for similarly situated plaintiffs, reduce the number of PDA charges filed each year, and follow the broader and more practical approach espoused in Hall. But even if Congress prohibits employer discrimination against women for undergoing gender-specific infertility treatments, it would likely protect women only from adverse employment actions taken against them for absenteeism arising from infertility treatments because only women have to miss work to undergo surgical impregnation procedures. As for insurance coverage, the PDA has never been interpreted to require insurance coverage for such treatments as long as employers offer the same coverage to all of their employees.\(^{208}\)

**B. Little Hope for Infertility Insurance Under the ADA and the FMLA**

Women undergoing IVF may have an alternative avenue for financial relief under the ADA. The ADA prohibits employers from discriminating against qualified individuals on the basis of disability.\(^{209}\) The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more . . . major life activities.”\(^{210}\) In *Bragdon v. Abbott*, the Supreme Court held that reproduction is a major life activity.\(^{211}\) Thus, plaintiff-employees may sue their employ-
ers under the ADA on the theory that infertility is a disability impairing a major life activity—reproduction.\textsuperscript{212}

The ADA may provide a successful cause of action where the employee is suing the employer for taking an adverse employment action against her for taking time off to treat her disability.\textsuperscript{213} For example, a jury could find that granting Hall’s requests for time off is a “reasonable accommodation” that her employer must make.\textsuperscript{214} The ADA, however, is not likely to provide an impetus for employers to provide insurance coverage for infertility treatments. As with the PDA, employers do not violate the ADA as long as they offer the same coverage for all employees, even if that means no coverage is offered to anyone.\textsuperscript{215}

Likewise, claims brought under the FMLA\textsuperscript{216} would suffer the same fate. The FMLA entitles individuals who cannot perform their regular job functions because of a “serious health condition”\textsuperscript{217} to twelve weeks of leave as well as restoration of their former position—or an equivalent position—upon returning to work.\textsuperscript{218} The FMLA

\begin{footnotes}
\item[212] See, e.g., LaPorta v. Wal-Mart Stores, 163 F. Supp. 2d 758, 763 (W.D. Mich. 2001). In LaPorta, the plaintiff employee asserted the ADA as one of her claims against her employer for terminating her after she took time off to undergo infertility treatment. \textit{Id.}
\item[213] See, e.g., \textit{id.} at 769–70. The LaPorta court denied summary judgment to the employer on the issue of whether the employer wrongfully terminated the infertile employee on the basis of her absences from work to undergo infertility treatment because the ADA gave the employee the right to “reasonable accommodations” for her disability of infertility. \textit{Id.} Thus, the court recognized that the plaintiff had a cognizable ADA claim against her employer. \textit{Id.}
\item[214] See, e.g., \textit{id.}. The ADA requires employers to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5)(A) (2006).
\item[215] See Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000) (rejecting the plaintiff’s ADA claim because the employer’s refusal to provide infertility insurance “[d]id not offer infertile people less pregnancy and fertility-related coverage than it offer[ed] to fertile people”), \textit{aff’d in part, remanded in part}, 316 F.3d 337 (2d Cir. 2003); \textit{see also} Jessica L. Hawkins, Note, \textit{Separating Fact from Fiction: Mandated Insurance Coverage of Infertility Treatments}, 23 Wash. U. J.L. & Pol’y 203, 213 (2007) (“[S]o long as insurers and employers offer the same insurance coverage to all its employees, they do not violate the ADA by refusing to cover infertility treatments.”).
\item[217] “The term ‘serious health condition’ means an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” \textsection{2611(11)}.
\item[218] \textsection{2612(a)(1)(D)} (“[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.”); \textsection{2614(a)}.
\end{footnotes}
protects women whose IVF procedure is successful because the statute expressly authorizes employee leave for the birth of a child. But whether the FMLA can protect women against adverse employment actions for the actual process of undergoing IVF is unclear. Such protection depends on the facts of the case—for example, how severely the infertility treatments are impacting the woman’s ability to function—as well as the court’s interpretation of what constitutes a “serious health condition.” Moreover, the FMLA does not require employers to provide infertility insurance but rather requires only unpaid leave for eligible employees. Therefore, infertile women should turn to the legislature to create a new federal mandate rather than ask the judiciary to broadly interpret the express terms of already-existing laws—a task many courts are hesitant to do.

C. The Limitations of State Law Coverage for Infertility Insurance

Although fifteen states have enacted statutes mandating insurance coverage for infertility treatments, each state’s mandate varies in the amount of insurance coverage that employers are required to provide.

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219 See § 2612(a)(1)(A).
220 See § 2612(a)(1)(D).
221 See, e.g., Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996) (narrowly interpreting the PDA’s “related medical condition” and holding that “the District Court properly concluded that infertility is outside of the PDA’s protection because it is not pregnancy, childbirth, or a related medical condition”).
provide and the requirements that women must meet to qualify for coverage.\textsuperscript{223} State infertility-insurance laws contain several limitations, and while female employees can lobby their state legislature to pass legislation mandating any coverage or more comprehensive coverage for infertility treatments, such actions may be futile.\textsuperscript{224}

Twelve states have “mandate to cover” laws, which “require insurance companies to cover infertility treatment” in every health plan.\textsuperscript{225} Two states, California and Texas,\textsuperscript{226} have “mandate to offer” laws, which require insurance companies to offer coverage for infertility treatment,\textsuperscript{227} but “[e]mployers are not required . . . to purchase this additional coverage.”\textsuperscript{228} Some states require coverage or an offer of coverage for IVF only,\textsuperscript{229} and others require coverage for all infertility treatments except for IVF.\textsuperscript{230}

Additional state-law limitations exist in the form of eligibility requirements for coverage. Many states limit the number of times that a patient may undergo fertility treatment before insurance coverage is no longer provided, require a period of years (usually two to five) of infertility before a couple is eligible for coverage, require that the couple have tried less expensive procedures first, or require that the couple be married and that the donor sperm be from the husband.\textsuperscript{231} Finally, four states also impose age requirements.\textsuperscript{232}

\textsuperscript{223} See infra notes 225–235 and accompanying text.

\textsuperscript{224} See id.


\textsuperscript{228} A RONSON, supra note 1, at 269.


\textsuperscript{230} See CAL. HEALTH & SAFETY CODE § 1374.55(a)-(b) (West 2008); N.Y. INS. LAW § 3221(k)(6)(C)(v) (McKinney 2006 & Supp. 2010).

\textsuperscript{231} See ARK. INS. DEP’T, RULE AND REGULATION 1, §§ 1(5)(B), (C)(1)–(2) (1991), available at http://www.insurance.arkansas.gov/Legal%20DataServices/rulesandregs/rn01.pdf (requiring that the couple be married, that the woman’s egg be fertilized by her husband’s sperm, and that the couple “have a history of unexplained infertility” for at least two years in order to qualify for coverage); HAW. REV. STAT. § 431:10A-116.5(a)(3)-(5) (Westlaw with amendments through the 2009 3d Spec. Sess.) (imposing three eligibility requirements for insurance coverage: the couple has been infer-
In addition to the state statutes’ internal limitations, the Employee Retirement Income Security Act (ERISA) exempts self-funded insurance plans from state law. Thus, self-insured employers are not subject to the minimum infertility-insurance requirements imposed by state law. This is a significant limitation on the protection of state law because a majority of covered workers participate in insurance plans that are completely or partially self-insured. Finally, state law is limited by the “religious employer” exemption. Six states have an exemption for religious employers whose religious tenets are inconsistent with providing insurance coverage for infertility treatments. Because of the limitations of state law, a federal mandate is more appropriate because it establishes a minimum level of uniformity among the states.

...
D. The Family Building Act Is the Best Option for Mandating Infertility Insurance

The most compelling option for women who need insurance coverage for infertility treatment is to lobby their representatives in Congress to pass the Family Building Act of 2009 ("the Act"), proposed by Representative Anthony Weiner in the 111th Congress. The Act is not subject to as many restrictions as state infertility-insurance laws. First, the Act requires insurance carriers to cover the costs of infertility treatments including all ARTs. Second, the Act is not preempted by ERISA. Instead, the Act amends the Public Health Service Act and ERISA to require insurance coverage for the treatment of infertility. Third, the Act applies to all employers—
and contains no exemption for religious employers—as well as all people, regardless of age. Finally, the Act also provides the floor, not the ceiling, of insurance coverage; that is, it does not preempt state law that provides greater benefits to infertile couples.

The Act does, however, retain some common state-law limitations—albeit less stringent ones—on insurance coverage to achieve cost-effectiveness. First, the Act provides insurance coverage for ARTs only where “the participant or beneficiary has been unable to bring a pregnancy to a live birth through less costly medically appropriate infertility treatments for which coverage is available under the insured’s policy, plan, or contract.” Furthermore, the Act limits the fertility procedures covered to those that the Secretary of Health and Human Services deems “non-experimental.” Finally, the Act imposes a lifetime cap of six on the number of egg retrievals that can be covered by insurance. After four egg retrievals are performed, insurance is no longer required to cover additional retrievals unless a live birth results from one of the egg retrievals; in that case, two more egg retrievals are covered, for a maximum of six egg retrievals.

The Act provides the most promising way for infertile couples to receive insurance coverage that will enable them to undergo infertility procedures because it recognizes the significance of the dream of having children and appropriately addresses the financial obstacles

240 The absence of an exemption in the statute would likely overcome a constitutional challenge based on the First Amendment’s Free Exercise of Religion Clause. The constitutional issue is nearly identical in contraception-insurance cases. Two states have upheld state laws that mandate insurance coverage for contraception without providing an exemption for religious employers. See Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 528 (N.Y. 2006) (holding that state’s contraceptive-equity act mandating that health-insurance plans that provide prescription-drug coverage also cover prescription contraceptives did not violate the state constitution’s free-exercise clause); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91–94 (Cal. 2004) (holding that the state’s contraceptive-equity act mandating that certain employer health and disability plans that cover prescription drugs also cover prescription contraceptives did not violate state constitution’s free-exercise clause even when reviewed under strict scrutiny).

241 See generally H.R. 697.

242 Id. § 2708(b).

243 § 2708(b) (2)(A)(i).

244 § 2708(b) (1). The Secretary makes this determination “after consultation with appropriate professional and patient organizations such as the American Society for Reproductive Medicine, RESOLVE, and the American College of Obstetricians and Gynecologists.” Id.

245 § 2708(b) (2)(A)(ii).

246 Id.
that put that dream at risk. At the same time, the Act is economical and includes provisions to minimize the cost to employers.

VIII. CONCLUSION

Women undergoing IVF constitute a class vulnerable to adverse employment actions, whether it is because employers view them as potentially becoming pregnant or whether employers simply do not want to pay for the cost of the infertility treatment. Infertility affects women in a unique way in that their childbearing capacity requires them to undergo time-intensive surgical impregnation procedures. Confronted with this reality, the Hall court provided women with broader protection under the PDA by recognizing that it is a woman’s childbearing capacity, not her infertility, which distinguishes her experience with infertility from that of a man. This biological difference, the capacity to become pregnant, exposes women to employer actions that endanger their workplace status.

Because employers are not required to provide full or even partial coverage for infertility treatments in every state, national guidelines are necessary to adequately protect women trying to conceive via IVF. In order to provide this nationwide, comprehensive protection for women, Congress should clarify that the scope of the PDA encompasses employer actions that discriminate on the basis of a woman’s childbearing capacity or other sex-specific conditions related to pregnancy. This clarifying legislation would prohibit employers from terminating female employees based on their need to undergo IVF because such action would constitute pregnancy discrimination.

While a broader definition of the protected class would come closer to providing women with equal opportunities in the workplace, the PDA is still inadequate to compel employers to provide insurance coverage for infertility treatments. Given the importance of having a family, and the rise in technology that has allowed couples to achieve pregnancy, denying infertile couples a chance at parenthood would be unfair. Therefore, a uniform policy of insurance coverage, such as the Family Building Act of 2009, is needed to provide millions of infertile couples with the ability to create a family.