

# Hall v. Nalco Co.: Redefining Female Infertility

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### Repository Citation

Erin Percy, *Hall v. Nalco Co.: Redefining Female Infertility*, 70 La. L. Rev. (2009)  
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## ***Hall v. Nalco Co.: Redefining Female Infertility***

Biologically, men and women both suffer from infertility problems.<sup>1</sup> Emotionally, both members of a couple experience the agony of an inability to conceive, whether the cause of the infertility may be attributed to the male or female partner. Legally, however, some federal courts have chosen to treat a woman's infertility differently than a man's infertility.

According to the Pregnancy Discrimination Act of 1978 (PDA), sex discrimination includes discrimination on the basis of "pregnancy, childbirth and related medical conditions."<sup>2</sup> During the past two decades, several courts have considered whether the "related medical conditions" language of the PDA protects a female employee who receives treatments for infertility. Some courts have answered in the negative,<sup>3</sup> while at least two district courts have answered in the affirmative.<sup>4</sup> These cases have inspired numerous scholarly articles arguing the pros and cons of recognizing infertility protection in the PDA.<sup>5</sup> On July 16, 2008, the United States Court of Appeals for the Seventh Circuit weighed in on the debate. In *Hall v. Nalco Co.*,<sup>6</sup> the Seventh Circuit held that because only women receive procedures such as in vitro

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1. See NEGAR NICOLE JACOBS, COPING WITH INFERTILITY: CLINICALLY PROVEN WAYS OF MANAGING THE EMOTIONAL ROLLER COASTER 19 (2007) ("Since women carry and deliver a baby, there is a common misconception that infertility is the woman's problem. However, the causes of infertility can be attributed to women, men, or both. In actuality, men and women are equally affected by biological causes of infertility.").

2. 42 U.S.C. § 2000e(k) (2006).

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

4. *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994). Other district courts have dealt with the issue of whether the PDA protects a female employee who receives fertility treatments, but these two cases are cited with approval by *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008), discussed *infra*.

5. See, e.g., Cintra D. Bentley, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy Within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391 (1998); E. Renee Backmeyer, *Lack of Insurance Coverage for Prescription Contraception By An Otherwise Comprehensive Plan As a Violation of Title VII as Amended by the Pregnancy Discrimination Act—Stretching the Statute Too Far*, 37 IND. L. REV. 437, 456 (2004); Kathleen E. Abel, *The Pregnancy Discrimination Act and Insurance Coverage for Infertility Treatment: An Inconceivable Union*, 37 CONN. L. REV. 819 (2005); Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender and Discrimination*, 80 CHI.-KENT L. REV. 875 (2005).

6. 534 F.3d 644 (7th Cir. 2008).

fertilization (IVF), and IVF relates to a woman's capacity to bear children, discrimination based on a female employee's infertility treatment constitutes sex discrimination under the PDA.

The Seventh Circuit erred in its holding. This Note argues that *Hall* employed language from an inapposite United States Supreme Court case to stretch the PDA and dodge the real question of the case: whether a woman's fertility is protected by the PDA. Part I of this Note outlines the history of sex discrimination and the PDA. Part II offers a short background on infertility and discusses the policy reasons for and against protecting a woman's infertility under the PDA. Part III presents the facts of *Hall*, its procedural history, and the Seventh Circuit's decision. Part IV analyzes the Supreme Court case of *International Union v. Johnson Controls*, on which the Seventh Circuit relied in *Hall*. Part IV also summarizes other courts' analyses of the PDA's scope and analogizes the infertility issue to the similar debate concerning whether the PDA protects a woman's right to oral contraceptives. Part V elaborates on the error in the Seventh Circuit's reasoning in *Hall*. Finally, Part VI discusses the proper avenues of redress available to a plaintiff who experiences adverse employment action based on her infertility. This Note concludes that the PDA is inapplicable to a plaintiff who is fired for missing work to receive IVF.

## I. DISCRIMINATION ON THE BASIS OF SEX OR PREGNANCY

Within Title VII of the Civil Rights Act, the PDA protects female employees from adverse employment actions based on pregnancy.<sup>7</sup> Title VII prohibits discrimination "because of" sex, and the PDA adds pregnancy and childbirth to the definition of sex.<sup>8</sup> Thus, firing someone because she is pregnant is a form of gender discrimination in violation of Title VII.<sup>9</sup>

### A. Title VII of the Civil Rights Act

The purpose of the Civil Rights Act of 1964 is to "vindicate human dignity,"<sup>10</sup> and Title VII pursues that interest by prohibiting discrimination in the employment realm.<sup>11</sup> Title VII of the Civil Rights Act of 1964 prohibits adverse employment actions based on

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7. 42 U.S.C. § 2000e(k) (2006).

8. HAROLD S. LEWIS, JR. & ELIZABETH S. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 130 (2d ed. 2004).

9. *Id.*

10. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring).

11. 42 U.S.C. § 2000e (2006).

an employee's race, color, religion, national origin, or, most importantly for the purposes of this Note, sex.<sup>12</sup>

There are two main theories under which an employee may assert a Title VII sex discrimination claim: disparate treatment or disparate impact.<sup>13</sup> Disparate treatment claims allege different treatment "because of" or "based on" gender.<sup>14</sup> A plaintiff claiming disparate treatment must show that her employer "intentionally disfavored women."<sup>15</sup> Courts have recognized that it is not always self-evident that an employer's adverse employment action is "because of" a plaintiff's membership in the protected class.<sup>16</sup> Consequently, in *McDonnell Douglas Corp. v. Green*, the Supreme Court established a burden-shifting analysis for disparate treatment claims lacking direct evidence of discrimination.<sup>17</sup> Though *McDonnell Douglas* dealt with a claim of racial discrimination, courts have modified the framework to fit cases dealing with other protected classes.<sup>18</sup> For example, in a sex discrimination case, a court may require a plaintiff to show: "(1) that she belongs to the protected class (e.g., female or pregnant); (2) that she performed her duties satisfactorily; (3) that she suffered an adverse employment action; [and (4)] that similarly situated employees not in the protected class . . . received better treatment."<sup>19</sup>

Disparate impact claims, on the other hand, involve facially neutral employment actions that disproportionately affect a plaintiff based on her sex.<sup>20</sup> While disparate treatment cases

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12. *Id.*

13. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

14. Eldredge, *supra* note 5, at 877.

15. *Id.*

16. LEWIS & NORMAN, *supra* note 8, at 133 n.20.

17. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* requirements for a prima facie case of racial discrimination are: (i) that [the plaintiff] belongs to a racial minority; (ii) that [the plaintiff] applied and was qualified for the job for which the employer was seeking applicants; (iii) that, despite [the plaintiff's] qualifications, [the plaintiff] was rejected; and (iv) after such rejection the job remained open and the employer continued to seek applicants . . .

*Id.*

18. Eldredge, *supra* note 5, at 877. *See, e.g., Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998) (applying the *McDonnell Douglas* test to pregnancy discrimination claim); *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987) (applying the *McDonnell Douglas* test to disparate treatment gender discrimination claim absent a facially discriminatory policy); *Meiri v. Dacon*, 759 F.2d 989 (2d Cir. 1985) (applying the *McDonnell Douglas* test to claim of religious discrimination).

19. Eldredge, *supra* note 5, at 877.

20. MACK A. PLAYER, *FEDERAL LAW OF EMPLOYMENT DISCRIMINATION* 111 (2004).

generally turn on intent, disparate impact cases rely on statistics.<sup>21</sup> The burden of proof for a disparate impact claim is initially placed on the plaintiff to show, through statistical evidence, that the employer's policy has a disproportionate impact on the protected class of female employees.<sup>22</sup> The burden then shifts to the defendant-employer to assert a business necessity defense. In other words, the employer must show that the policy is based on job performance and not on sex.<sup>23</sup>

### *B. Pregnancy Discrimination*

Since 1972, the Equal Employment Opportunity Commission (EEOC)<sup>24</sup> has maintained "that employment policies . . . that [discriminate against] female employees because of pregnancy, childbirth, and related medical conditions constitute disparate treatment based on sex."<sup>25</sup> However, the Supreme Court did not initially follow the EEOC's guidance. In 1976, the Court held in *General Electric Co. v. Gilbert*<sup>26</sup> that an employer's failure to provide insurance coverage for disabilities arising from pregnancy did not constitute sex discrimination under Title VII.<sup>27</sup> According to the Court, the failure to provide disability benefits for pregnancy did not discriminate between women and men, but rather between pregnant employees and non-pregnant employees, male and female.<sup>28</sup> The Supreme Court held that the employer in *Gilbert* had

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21. Deborah L. Rhode & Joan C. Williams, *Legal Perspectives on Employment Discrimination*, in *SEX DISCRIMINATION IN THE WORKPLACE* 235, 236 (Faye J. Crosby et al. eds., 2007).

22. Wesley Kobylak, Annotation, *Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e et seq.), 68 A.L.R. FED. 19 (2008).

23. *Id.*

24. PLAYER, *supra* note 20, at 25–26 ("The EEOC is a five-person, presidentially appointed independent commission. Regional offices of the EEOC are located in major cities throughout the country. Charges of discrimination are filed by aggrieved individuals in a regional office of the agency and investigated by the personnel in that office. If the EEOC cannot informally resolve the conflict, it will notify the charging party, who may then file a private judicial action.").

25. BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 438 (3d ed. 1996). See also EEOC, *Pregnancy Discrimination*, <http://www.eeoc.gov/types/pregnancy.html> (last visited Nov. 4, 2008) ("In Fiscal Year 2007, EEOC received 5,587 charges of pregnancy-based discrimination.").

26. 429 U.S. 125 (1976).

27. LINDEMANN, *supra* note 25, at 439; Bentley, *supra* note 5, at 401–02.

28. Eldredge, *supra* note 5, at 875.

not discriminated on the basis of sex under Title VII,<sup>29</sup> reasoning that “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”<sup>30</sup>

In response to *Gilbert*, Congress enacted the PDA in 1978, redefining “sex discrimination” to include discrimination based on pregnancy. Codified at 42 U.S.C. § 2000e(k), the Act 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, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.<sup>31</sup>

The PDA’s “dominant principle is nondiscrimination, rather than preference.”<sup>32</sup> In other words, the PDA obligates employers to treat pregnant women the same as, but not better than, other, non-pregnant employees.<sup>33</sup> Consequently, the PDA does not require an employer to provide leave or benefits for pregnancy that the employer does not provide to non-pregnant employees for “comparable” conditions.<sup>34</sup> For example, in *Armando v. Padlocker, Inc.*,<sup>35</sup> the United States Court of Appeals for the Eleventh Circuit held that the PDA is not violated by an employer who fires an employee for excessive absences, even if those absences were a result of pregnancy, unless the employer overlooks the absences of other, non-pregnant employees.<sup>36</sup> Similarly, in *Troupe v. May Department Stores Co.*, the Seventh Circuit rejected a pregnancy discrimination claim from a plaintiff alleging that her employer fired her for tardiness caused by morning sickness.<sup>37</sup> The plaintiff in *Troupe* failed to make out a sex discrimination case because she

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29. LINDEMANN & GROSSMAN, *supra* note 25, at 439.

30. *Gilbert*, 429 U.S. at 134 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974)).

31. 42 U.S.C. § 2000e(k) (2006).

32. LEWIS & NORMAN, *supra* note 8, at 130.

33. *Id.*

34. *Id.* See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 286–87 (1987).

35. 209 F.3d 1319 (11th Cir. 2000).

36. *Id.* at 1320.

37. 20 F.3d 734 (7th Cir. 1994).

could not prove the employer treated her differently than other excessively absent, non-pregnant employees.<sup>38</sup> The Seventh Circuit stated:

The [PDA] does not, despite the urgings of feminist scholars [,] require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . . Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees, even to the point of “conditioning the availability of an employment benefit on an employee’s decision to return to work after the end of the medical disability that pregnancy causes.”<sup>39</sup>

The PDA does, however, allow states to create legislation that requires employers to give special treatment to pregnant employees. In *California Federal Savings & Loan Association v. Guerra*, the Supreme Court upheld a state statute ordering employers to provide pregnant employees with up to four months of unpaid leave.<sup>40</sup> The Court explained that Congress intended the PDA to be a “floor beneath which pregnancy disability benefits may not drop, not a ceiling above which they may not rise.”<sup>41</sup> The language of the PDA does not preclude employment practices that favor pregnant women; rather, the Act prohibits employers from treating pregnant employees *unfavorably* as compared to the rest of the workforce.<sup>42</sup>

## II. INFERTILITY, AN INCREASINGLY COMMON PROBLEM

Infertility, defined as the “inability of a couple to achieve a pregnancy after repeated intercourse without contraception for one year,” affects one of every five couples in the United States.<sup>43</sup> Age is an important factor in a couple’s ability to produce children, and because people are choosing to marry and start families later in life, infertility is becoming more and more prevalent.<sup>44</sup> The cause of a couple’s infertility may be due to problems in the man, the woman, or both.<sup>45</sup> Approximately thirty-five percent of cases are

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38. *Id.*, discussed in LINDEMANN & GROSSMAN, *supra* note 25, at 442.

39. *Troupe*, 20 F.3d at 738 (citations omitted).

40. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

41. *Id.* at 285.

42. *Id.* at 292 n.32.

43. *Infertility*, in THE MERCK MANUAL OF MEDICAL INFORMATION (Mark H. Beers et al. eds., 2004–2008), available at [www.merck.com/mmhe/sec22/ch254/ch254a.html](http://www.merck.com/mmhe/sec22/ch254/ch254a.html) (last visited Feb. 24, 2009).

44. *Id.*

45. *Id.*

termed “female factor,” and thirty-five percent of cases are termed “male factor.”<sup>46</sup> In twenty percent of the cases, the cause of infertility is a combination of problems in the male and the female both, and in the remaining ten percent of cases the cause of infertility is unknown.<sup>47</sup>

#### *A. Available Treatments*

The type of treatment a couple receives for an infertility problem may depend entirely upon the causes underlying the couple’s inability to conceive. For women, many treatment options are available. Nonsurgical remedies include fertility drugs and artificial insemination.<sup>48</sup> Surgery may be necessary for women who wish to reverse a tubal ligation procedure or whose infertility is due to scarring caused by sexually transmitted diseases or related to endometriosis.<sup>49</sup>

IVF, the impregnation procedure undergone by the plaintiff in *Hall*, is one of the three most commonly known Assisted Reproductive Technologies (ARTS).<sup>50</sup> IVF involves removing an egg from a woman’s ovary and fertilizing it outside of the body.<sup>51</sup> The procedure takes place in five main steps:

[First,] fertility drugs are given to the female during the first week of the IVF cycle. These drugs are intended to stimulate the growth of ovarian follicles containing eggs. [Second,] the eggs are retrieved from the woman’s body using an ultrasound-guided needle. [Third,] once the eggs have been removed from the woman’s body, they are placed in a petri dish along with a sample of sperm. The dish is allowed to incubate so fertilization can take place. [Fourth,] a number of the most developed embryos are transferred to the uterus. [Fifth,] the embryos implant themselves into the uterine lining. [After] successful implantation, the embryos develop as they would in a normal pregnancy.<sup>52</sup>

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46. JACOBS, *supra* note 1, at 19.

47. *Id.*

48. *Id.* at 30.

49. *Id.* at 31.

50. *Id.* Other commonly known ARTS include Gamete Intrafallopian Transfer (GIFT) and Zygote Intrafallopian Transfer (ZIFT). *Id.* These procedures differ with respect to where the sperm are introduced to the egg. *Id.* In a GIFT procedure, for example, fertilization occurs in a woman’s fallopian tubes rather than in a petri dish. *Id.*

51. *Id.* at 32.

52. *Id.* at 32–33.



Though IVF is often a viable option for infertile women, there is a downside: IVF is costly. The approximate price per procedure is \$10,000.<sup>53</sup> Unfortunately, the success rates are low,<sup>54</sup> and the likelihood of conception decreases with each treatment.<sup>54</sup>

Treatments for male factor infertility are often as physically invasive as treatments for women.<sup>55</sup> While feminist scholars have attempted to downplay men's role in infertility treatment,<sup>56</sup> male partners often must subject themselves to a series of tests and procedures to diagnose and treat the cause of the infertility.<sup>57</sup> For instance, a diagnosis of male infertility may include a physical exam, semen analysis, transrectal ultrasound, and testicular biopsy.<sup>58</sup> If the infertility is related to an infection affecting the production or movement of sperm, a man may undergo antibiotic treatment.<sup>59</sup> Many surgical procedures may also be used to correct male factor infertility.<sup>60</sup> Men who have had vasectomies may undergo vasectomy reversals, for example.<sup>61</sup> Surgery also is an option for men whose infertility is caused by blockages in the reproductive tract, such as those with varicoceles or blocked ejaculatory ducts.<sup>62</sup> In addition, men with low sperm counts may receive treatment through microsurgical techniques involving aspiration or extraction of sperm.<sup>63</sup>

### *B. Is it Really Different for Women?*

Courts have argued that, because both men and women suffer from infertility, the condition is gender neutral and thus not deserving of protection as sex discrimination under the PDA.<sup>64</sup>

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53. Elizabeth A. Pendo, *The Politics of Infertility: Recognizing Coverage Exclusion as Discrimination*, 11 CONN. INS. L.J. 293, 337 (2005).

54. *Id.* See also *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001). Each IVF procedure requires frequent trips to the doctor to avoid hyperstimulation, a condition which causes the ovaries to swell. *Id.* Hyperstimulation can be life-threatening because of possible interference with kidney and liver functions. *Id.*

55. JACOBS, *supra* note 1, at 30.

56. See, e.g., Bentley, *supra* note 5, at 398.

57. Brief of Defendant-Appellee Nalco Co. at 16, *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008) (No. 06-3684), (citing [UrologyHealth.org](http://www.urologyhealth.org/adult/index.cfm?cat=11&topic=38), <http://www.urologyhealth.org/adult/index.cfm?cat=11&topic=38>).

58. *Id.*

59. *Id.*

60. *Id.* at 31.

61. *Id.*

62. *Id.* at 17.

63. *Id.*

64. See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).

Other courts and some scholars counter that, in reality, the condition affects men and women differently.<sup>65</sup>

Fertility doctors admit that, for many years, there existed a “peculiar reluctance” to acknowledge the importance of a thorough investigation of the male partner in infertility cases, which may have led to a societal understanding of infertility as the female partner’s problem.<sup>66</sup> This reluctance may have proceeded from cultural ideas concerning gender.<sup>67</sup> Even today, society attaches a greater stigma to infertile men, owing to cultural attitudes concerning masculinity and male sexuality.<sup>68</sup> Often a couple’s infertility is ascribed to a woman in order to protect her husband from this stigma.<sup>69</sup> Some studies show that higher guilt and blame levels exist among infertile men than among men with infertile partners.<sup>70</sup> The fact that women alone often must undergo treatment such as IVF may be attributed partly to these social and cultural ideas surrounding a man’s infertility.<sup>71</sup>

Despite societal opinions, the medical profession views infertility as a couple’s disease rather than a woman’s problem.<sup>72</sup> Anne Jequier, a professor of obstetrics and gynecology, wrote in 2000:

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65. See, e.g., Bentley, *supra* note 5, at 416–17 (“A diagnosis of infertility occurs when a woman is unable to conceive; therefore, when a woman undergoes fertility treatment she is seeking assistance with conception. When we refer to a woman’s infertility as a gender-neutral condition, we have stripped her condition of any reference to its implications for potential pregnancy.”). See also *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994); *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995).

66. T.D. GLOVER ET AL., *HUMAN MALE FERTILITY AND SEMEN ANALYSIS* vii (1990).

67. *Id.*

68. Gay Becker, *Deciding Whether to Tell Children about Donor Insemination: An Unresolved Question in the United States*, in *INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES* 119, 119–20 (Marcia C. Inhorn & Frank van Balen eds., 2002).

69. *Id.* at 120.

70. *Id.*

71. Frank van Balen & Marcia C. Inhorn, *Interpreting Infertility: A View from the Social Sciences*, in *INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES* 3, 14–15 (Marcia C. Inhorn & Frank van Balen eds., 2002) (“Thus feminist critics in particular have pointed to this basic inequality—of women being treated for male infertility by means of [] risky, expensive, and not highly successful therap[ies]—as a potent example of male bias in the practices of modern Western biomedicine.”).

72. See, e.g., Nikolai Manassiev, Naim Abusheikha & John Collins, *Infertility*, in *FEMALE REPRODUCTIVE HEALTH* (Nikolai Manassiev ed., 2004).

Need one say again that infertility is a disorder of a couple, not of an individual, and the treatment of a couple's infertility is the evaluation of this childlessness in relation to *both* these individuals . . . . For this reason, both partners must be involved in the investigation of infertility as factors that may contribute to their problem of childlessness can interact in many often very subtle ways. Thus, both partners must be equally involved in all facets of the problem.<sup>73</sup>

Biology aside, the fact is that women today shoulder much of the responsibility in the effort to conceive through fertility treatments, regardless of the underlying causes.<sup>74</sup> For instance, even when the male partner of a couple is the source of the infertility problem, the female must subject herself to invasive impregnation procedures.<sup>75</sup> In addition to the time spent in clinics and hospitals undergoing these procedures, women also assume much higher levels of medical risk.<sup>76</sup> Yet, the treatment a woman chooses to receive for her infertility does not change the incidence of infertility in men, and, more importantly, it does not change the wording of the PDA or Title VII. If the PDA protects a woman's infertility, this protection must arise from the text of the Act. Rather than analyze the Act's language, however, the Seventh Circuit in *Hall* relied on inapposite case law to expand the PDA beyond its scope.

### III. *HALL V. NALCO*: THE CASE AT ISSUE

In *Hall*, plaintiff Cheryl Hall asked the Seventh Circuit to recognize a claim against her employer, Nalco, based on her membership in the PDA-protected class of infertile women.<sup>77</sup>

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73. ANNE M. JEQUIER, MALE INFERTILITY: A GUIDE FOR THE CLINICIAN 6 (2000).

74. *Id.* at 36.

75. *Id.* See also MARGARET MARSH & WANDA RONNER, THE EMPTY CRADLE: INFERTILITY IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 4 (1996) ("Although men are infertile as often as women, throughout these three centuries the woman, whether or not she has been the infertile partner, has disproportionately borne the medical, social, and cultural burden of a couple's failure to conceive. From the eighteenth century, when impotence was considered to be the only cause of sterility in men, to the late twentieth century, when women undergo invasive procedures in order to maximize the fertilizing potential of a partner's barely mobile sperm, women have been subject to more treatment, endured more blame, and generally felt more answerable for a couple's inability to conceive than their husbands.").

76. Balen & Inhorn, *supra* note 73, at 14.

77. *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008).

Refusing to acknowledge such a class, the Seventh Circuit held instead that Nalco had violated the PDA by discriminating against Hall based on her “potential for pregnancy.”<sup>78</sup> Following the reasoning of two district court cases from the mid-1990s, the Seventh Circuit erroneously relied on *Johnson Controls*, an irrelevant Supreme Court case.<sup>79</sup> By dodging the issue presented by Hall in her appeal—whether infertile women constitute a protected class under the PDA—the Seventh Circuit ignored the ongoing debate in courts across the United States.<sup>80</sup> *Hall* essentially redefined a woman’s infertility, in the context of IVF treatment, as the sex-specific state of “childbearing capacity.”<sup>81</sup>

#### A. *The Facts*

Nalco, a water treatment business,<sup>82</sup> hired Cheryl Hall in 1997 to work as a maintenance secretary in one of its manufacturing facilities in the Chicago area.<sup>83</sup> In 2000, Hall took a position as a sales secretary. In this capacity she reported to Marv Baldwin, a district sales manager in the area.<sup>84</sup> Early in 2003, Hall told Baldwin that she wished to undergo IVF treatments due to her infertility.<sup>85</sup> Hall filed a formal request for leave in March of that year.<sup>86</sup> Hall’s leave of absence lasted from March 24, 2003, to April 21, 2003.<sup>87</sup> In late April, after learning that the first IVF treatment had been unsuccessful, Hall told Baldwin that she planned to undergo the treatment again.<sup>88</sup>

Meanwhile, in January of 2003, Nalco began reorganizing its facilities, ultimately deciding to consolidate Hall’s office with another sales office.<sup>89</sup> Each of the two offices employed a sales secretary.<sup>90</sup> As a result of the consolidation, Nalco decided to keep

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78. *Id.* at 648–49.

79. *Id.*

80. *Id.*

81. *Id.* at 649.

82. Brief of Defendant-Appellee Nalco Co., *supra* note 59, at 3.

83. *Id.*; *Hall*, 534 F.3d at 645.

84. *Hall*, 534 F. 3d at 645.

85. *Id.*

86. *Id.*

87. *Id.* at 646. According to Hall, “[she] was required to be on bed rest for 48 hours, followed by four weeks of absence from work.” Brief of Plaintiff-Appellant Cheryl Hall at 6, *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008) (No. 06-3684).

88. *Hall*, 534 F.3d at 646.

89. *Id.*

90. *Id.*

only one of these two secretaries.<sup>91</sup> Near the end of July 2003, Baldwin informed Hall that Nalco had decided to terminate Hall and retain the sales secretary from the other office.<sup>92</sup> Prior to Hall's termination, Baldwin discussed the issue with Jaqueline Bonin, Nalco's employee-relations manager.<sup>93</sup> Bonin's notes from that conversation reflect that Hall had "missed a lot of work due to health" and cite "absenteeism-infertility treatments" in a section relating to Hall's job performance.<sup>94</sup> Shana Dwyer, the secretary who was retained, was at the time of the consolidation incapable of becoming pregnant and had been since 1988.<sup>95</sup>

After her termination, Hall filed an action against Nalco alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>96</sup> Specifically, she alleged that her termination violated the PDA, which amended Title VII to state that discrimination "because of sex" includes "related medical conditions" of pregnancy.<sup>97</sup> Hall argued that she was fired for being "a member of a protected class, female with a pregnancy related condition, infertility."<sup>98</sup>

### B. District Court Decision

The United States District Court for the Northern District of Illinois, Eastern Division, granted summary judgment for Nalco.<sup>99</sup> According to the district court, the central issue of the case concerned "whether a reasonable jury could find that infertility is included in the meaning of the phrase 'related medical conditions' of the PDA."<sup>100</sup> Judge David H. Coar held that infertile women are not a protected class under the PDA because infertility is a gender-neutral condition.<sup>101</sup> Judge Coar relied heavily on *Saks v. Franklin Covey Co.*<sup>102</sup> and *Krauel v. Iowa Methodist Medical Center*,<sup>103</sup> cases dealing with Title VII insurance coverage claims.

Citing *Krauel*, Judge Coar observed in *Hall*: "Neither the legislative history nor the EEOC guidelines reference infertility treatments or suggest that infertility should fall within the scope of

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91. *Id.*

92. *Hall v. Nalco Co.*, No. 04 C 7294, slip op. at 1 (N.D. Ill. Sept. 12, 2006).

93. *Hall*, 534 F.3d at 646.

94. *Id.*

95. *Id.*

96. *Id.*

97. 42 U.S.C. § 2000e(k) (2006).

98. *Hall*, 534 F.3d at 646.

99. *Hall v. Nalco Co.*, No. 04 C 7294, slip op. at 3 (N.D. Ill. Sept. 12, 2006).

100. *Id.* at 2.

101. *Id.*

102. *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).

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

the PDA.”<sup>104</sup> According to Judge Coar, the PDA protects female employees from pregnancy discrimination because pregnancy is a condition that affects only women.<sup>105</sup> Because men and women suffer from infertility with equal frequency, however, Judge Coar concluded that seeking infertility treatments does not give rise to grounds for sex discrimination under the PDA.<sup>106</sup> Judge Coar agreed with *Saks* and *Krauel* that “infertility standing alone does not fall within the meaning of the phrase ‘related medical conditions’ under the PDA.”<sup>107</sup>

### C. Seventh Circuit Reverses

Hall appealed, and on July 16, 2008, the Seventh Circuit<sup>108</sup> reversed Judge Coar’s decision. The Seventh Circuit held that Hall had presented a cognizable sex discrimination claim, stating:

Although infertility affects both men and women, Hall claims she was terminated for undergoing a medical procedure—a particular form of surgical impregnation—performed only on women on account of their childbearing capacity. Because adverse employment actions taken on account of childbearing capacity affect only women, Hall has stated a cognizable sex-discrimination claim under the language of the PDA.<sup>109</sup>

In this way, the Seventh Circuit ignored what the district court considered to be the ultimate question of the case: whether the “related medical conditions” language of the PDA reaches fertility. Instead, the court relied on the Supreme Court case of *Johnson Controls*<sup>110</sup> in its holding.<sup>111</sup> In *Johnson Controls*, the Supreme Court dealt with an employer policy that prohibited female employees who were capable of bearing children from working in certain areas.<sup>112</sup> The Seventh Circuit noted that *Johnson Controls* recognized the applicability of the PDA to classifications based on

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104. *Hall*, No. 04 C 7294, slip op at 2 (N.D. Ill. Sept. 12, 2006) (citing *Krauel*, 95 F.3d at 679–80).

105. *Id.* at 2.

106. *Id.*

107. *Id.* (citing *Saks*, 316 F.3d at 346 (2d Cir. 2003); *Krauel*, 95 F.3d at 679–80).

108. The panel included Judges Diane Sykes, Kenneth Ripple, and Ilana Rovner. *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008).

109. *Hall*, 534 F.3d at 645.

110. *Int’l Union v. Johnson Controls*, 499 U.S. 187 (1991).

111. *Hall*, 534 F.3d at 647.

112. *Johnson Controls*, 499 U.S. at 192.

“potential for pregnancy” and not merely the actual state of pregnancy.<sup>113</sup> According to the Seventh Circuit, it was not Hall’s fertility that was at issue, but the treatment she received as a result—the surgical impregnation procedure that could have rendered Hall pregnant.<sup>114</sup>

The Seventh Circuit pointed out that both *Saks* and *Krauel* distinguished *Johnson Controls* because, while *Johnson Controls* dealt with a policy that discriminated on the basis of childbearing capacity, the policies in *Saks* and *Krauel* discriminated based on “fertility alone.”<sup>115</sup> The Supreme Court implicitly held in *Johnson Controls* that discrimination based on “fertility alone” is not prohibited by the PDA, which reaches only gender-specific classifications.<sup>116</sup> But, the Seventh Circuit concluded, Nalco had discriminated against Hall based not on infertility alone but on her capacity to bear children:

Nalco’s conduct, viewed in the light most favorable to Hall, suffers from the same defect as the policy in *Johnson Controls*. Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women. This is necessarily so; IVF is one of several reproductive technologies that involve a surgical impregnation procedure.<sup>117</sup>

The Seventh Circuit admitted that it decided the case using a legal theory different from the one set forth in Hall’s complaint.<sup>118</sup> Because Hall received sex-specific medical treatment, the court redefined her infertility as “potential for pregnancy,” a characteristic protected by the PDA according to the Seventh Circuit’s interpretation of *Johnson Controls*.<sup>119</sup> The court cited *Pacourek v. Inland Steel Co.*<sup>120</sup> and *Erickson v. Board of Governors of State Colleges & Universities for Northeastern Illinois University*<sup>121</sup> in

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113. *Hall*, 534 F.3d at 648 n.1.

114. *Id.* at 648–49.

115. *Id.* at 647.

116. *Johnson Controls*, 499 U.S. at 198.

117. *Hall*, 534 F.3d at 648–49.

118. *Id.* at 649 n.3 (“We recognize that our analysis differs from the legal theory set forth in Hall’s complaint—that infertile women are a protected class under the language of the PDA. However, ‘[a] complaint need not identify a legal theory, and specifying an incorrect theory is not fatal’ to a plaintiff’s claim.”) (citations omitted).

119. *Id.* at 648.

120. 858 F. Supp. 1393 (N.D. Ill. 1994).

121. 911 F. Supp. 316 (N.D. Ill. 1995).

support of its holding that Hall's allegations presented a viable claim of sex discrimination.<sup>122</sup>

Nalco's request for a rehearing and rehearing en banc was denied on August 15, 2008.<sup>123</sup>

#### IV. OTHER COURTS AND THE INFERTILITY DEBATE

The other courts that have dealt with the issue of infertility in a PDA-related context have analyzed whether the language of the Act reaches a woman's inability to conceive. Understanding how the Seventh Circuit diverged from this line of reasoning and why this divergence was in error requires knowledge of the background concerning these other courts' holdings.

##### A. Johnson Controls and "Potential for Pregnancy"

In *Hall*, the Seventh Circuit relied on language from the 1991 Supreme Court case *Johnson Controls* to hold that Hall had stated a viable pregnancy discrimination claim.<sup>124</sup> *Johnson Controls* concerned employer-defendant Johnson Controls, a company that manufactures batteries.<sup>125</sup> Lead is a primary ingredient in the battery manufacturing process, and occupational exposure to lead causes several health risks, including the possibility of harm to a fetus carried by a female employee.<sup>126</sup> After several employees became pregnant while maintaining dangerously high blood lead levels, Johnson Controls decided to ban fertile women from jobs that involved lead exposure.<sup>127</sup> Despite evidence that lead exposure also affects male fertility, the employer prohibited only female employees from these workstations.<sup>128</sup>

Johnson Controls promulgated a broad exclusion policy that stated: "[W]omen who are pregnant or who are *capable of bearing children* will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights."<sup>129</sup>

The policy constituted what is known as "sex plus," disparate treatment discrimination. "Sex plus" discrimination refers to a policy or practice by which an employer classifies employees on

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122. *Hall*, 534 F.3d at 649.

123. *Id.* at 644.

124. *Id.* at 647-48.

125. *Int'l Union v. Johnson Controls*, 499 U.S. 187, 190 (1991).

126. *Id.*

127. *Id.* at 192.

128. *Id.* at 198.

129. *Id.* at 192 (emphasis added).



the basis of sex plus another characteristic.<sup>130</sup> In such cases the employer does not discriminate against all women, for example, but only against a particular subclass of women.<sup>131</sup> Johnson Controls' policy was first and foremost facially discriminatory against female employees,<sup>132</sup> but it subdivided this group into two categories—fertile and infertile—and discriminated against only the fertile subclass.

A group of Johnson Controls' employees filed a class action lawsuit against the company; some petitioners were females who had suffered pay losses when they were transferred out of jobs involving lead exposure, and at least one petitioner was a male employee who had been denied a request for leave of absence for the purpose of lowering his lead level because he intended to become a father.<sup>133</sup> The Supreme Court held that Johnson Controls' sex-specific policy violated Title VII by facially discriminating against female employees.<sup>134</sup> The Court did not rely on the PDA in its holding but merely referenced the Act, commenting that Johnson Controls' use of the words "capable of bearing children" classified on the basis of potential for pregnancy.<sup>135</sup> Such a classification, said the Court, constitutes sex discrimination under the PDA.<sup>136</sup>

#### *B. Krauel and Saks: Two Circuits Consider Infertility and the PDA*

Two cases from the United States Courts of Appeals, both dealing with Title VII insurance coverage claims,<sup>137</sup> directly addressed the issue presented in *Hall* of whether infertile women constitute a protected class under the PDA. Both *Krauel*<sup>138</sup> and *Saks*<sup>139</sup> held that, according to its wording, the PDA does not encompass infertility treatments, which are not pregnancy, childbirth, or related medical conditions under the Act's statutory language.<sup>140</sup> The Northern District of Illinois followed the reasoning of these cases to grant summary judgment for Nalco.<sup>141</sup>

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130. LINDEMANN & GROSSMAN, *supra* note 25, at 456.

131. *Id.*

132. *Johnson Controls*, 499 U.S. at 197.

133. *Id.* at 192.

134. *Id.* at 197.

135. *Id.* at 198–99.

136. *Id.* at 199.

137. *Id.*

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

139. *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).

140. *Hall v. Nalco Co.*, No. 04 C 7294, slip op. at 7 (N.D. Ill. Sept. 12, 2006).

141. *Id.* at 7.

*Krauel*, an Eighth Circuit case, involved Mary Jo Krauel, a female employee who gave birth to a child conceived through Gamete Intrafallopian Transfer (GIFT).<sup>142</sup> Krauel's employer's medical plan did not provide coverage for the procedure.<sup>143</sup> She challenged the plan as violative of several anti-discrimination statutes, including Title VII as amended by the PDA. The Eighth Circuit said that the "related medical conditions" language of 42 U.S.C. section 2000e(k) referred to "pregnancy" and "childbirth," because infertility relates to a pre-conception issue, the court held that infertility is not a "related medical condition[]" of pregnancy.<sup>144</sup> Focusing on the "general rules of statutory construction," the Eighth Circuit interpreted "related" as a reference to the specific enumerations of "pregnancy" and "childbirth."<sup>145</sup> Noting that pregnancy and childbirth are "strikingly different" from infertility, which prevents conception altogether, the *Krauel* court held that infertility is not a "related medical condition[]" for the purposes of the PDA.<sup>146</sup>

The Eighth Circuit distinguished *Johnson Controls*, in which the employer policy applied only to females capable of becoming pregnant.<sup>147</sup> "Potential pregnancy, unlike infertility[,] " said the Eighth Circuit, "is a medical condition that is sex-related because only women can become pregnant."<sup>148</sup> Concluding that a policy denying insurance benefits for infertility treatments applies to both male and female workers, the Eighth Circuit found *Johnson Controls* inapposite.<sup>149</sup>

The Second Circuit dealt with infertility in the context of the PDA with *Saks*, wherein the plaintiff, Rochelle Saks, received infertility treatments during her period of employment with Franklin Covey from 1995 to 1999.<sup>150</sup> Franklin Covey's health benefits plan excluded coverage for "[s]urgical impregnation procedures, including artificial insemination, in vitro fertilization or embryo and fetal implants," even if medically necessary.<sup>151</sup> Saks sued Franklin Covey under the PDA for reimbursement of the costs associated with her infertility treatments.<sup>152</sup> The Second

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142. GIFT is an ART similar to IVF. See *supra* note 52.

143. *Krauel*, 95 F.3d at 676.

144. *Id.* at 679.

145. *Id.* at 679-80.

146. *Id.*

147. *Id.* at 680.

148. *Id.*

149. *Id.*

150. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 342 (2d Cir. 2003).

151. *Id.* at 341.

152. *Id.* at 342.

Circuit interpreted the PDA to require employers to recognize pregnancy and related conditions as sex-based characteristics of women.<sup>153</sup> Under this reasoning, for a condition to fall within the PDA's scope, that condition must be unique to females.<sup>154</sup>

The Second Circuit focused on the absurdity of equating discrimination based on infertility with sex discrimination: "Including infertility within the PDA's protection as a 'related medical condition' would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination."<sup>155</sup>

Because both men and women suffer from infertility, the Second Circuit held that the exclusion of surgical impregnation procedures from employees' health care plans disadvantages male and female employees equally.<sup>156</sup> Thus, the court reasoned that Saks' claim did not fall within the scope of the PDA.<sup>157</sup>

*C. Pacourek and Erickson: The Northern District of Illinois Interprets the PDA*

The Northern District of Illinois has twice held that the PDA does in fact protect infertile women from adverse employment action in both *Pacourek*<sup>158</sup> and *Erickson*.<sup>159</sup> The Seventh Circuit cited both cases in *Hall* in support of its holding that Hall alleged a cognizable claim of sex discrimination.<sup>160</sup> Like the Seventh Circuit in *Hall*, the *Pacourek* and *Erickson* courts also relied on the Supreme Court's "potential for pregnancy" language in *Johnson Controls*.<sup>161</sup> *Pacourek* involved a plaintiff who was terminated after eighteen years of employment for missing work to receive fertility treatment.<sup>162</sup> Similarly, the plaintiff in *Erickson* was a female employee who alleged that her employer hired a male to replace her after she missed work to undergo fertility treatment.<sup>163</sup>

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153. *Id.* at 343.

154. *Id.* at 346.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994).

159. *Erickson v. Bd. of Governors of State Colls. & Univs for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995).

160. *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008).

161. *Erickson*, 911 F. Supp. at 319; *Pacourek*, 858 F. Supp. at 1401.

162. *Pacourek*, 858 F. Supp. at 1396.

163. *Erickson*, 911 F. Supp. at 318.

*I. Pacourek*

Charline Pacourek was diagnosed with esophofical reflux, a medical condition that prevented her from becoming pregnant naturally.<sup>164</sup> She became the University of Chicago's first IVF patient and was subsequently terminated from her position at Inland Steel.<sup>165</sup>

Pacourek alleged that her manager, Thomas Wides, had "verbally abused [her] concerning her pregnancy related condition by expressing doubt as to her ability to become pregnant and her ability to combine pregnancy and her career."<sup>166</sup> Pacourek also alleged that Wides had told her that her esophofical reflux was "a problem," that Wides had given her a memo that placed her on probation, and that he informed Pacourek that she was considered a high risk and would inevitably be terminated.<sup>167</sup> Pacourek further claimed that Inland Steel "engaged in disparate treatment of [her by] attempting to apply a sick leave policy to [her] due to [her] pregnancy related condition, while the same sick leave policy was not applied to other employees of Inland Steel."<sup>168</sup>

The court took "guidance" from *Johnson Controls*, holding that Inland Steel had violated the PDA by discriminating against Pacourek based on her "potential for pregnancy."<sup>169</sup> The court also looked to senators' language from the PDA floor debates, inferring the senators' intent for the PDA to reach women's "capacity to become pregnant."<sup>170</sup>

The *Pacourek* court then analyzed the text of the PDA, holding that infertility is a pregnancy-related condition.<sup>171</sup> According to the court, the "related medical conditions" language is expansive.<sup>172</sup> "Related," a "generous choice of wording," suggests "inclusion rather than exclusion in the close cases."<sup>173</sup> The *Pacourek* court also looked to the PDA's legislative history for support of its

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164. *Pacourek*, 858 F. Supp. at 1396.

165. *Id.*

166. *Id.* at 1397.

167. *Id.*

168. *Id.* at 1401.

169. *Id.*

170. *Id.* at 1402 ("Senator Harrison Williams, chief sponsor of the Senate bill leading to the PDA, stated in floor debate that '[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*.'" (citations omitted).

171. *Id.*

172. *Id.*

173. *Id.*

liberal construction<sup>174</sup> and concluded that it could find no reason to exclude plaintiff's infertility from the protection of the PDA.<sup>175</sup>

## 2. Erickson

During Melinda Erickson's employment at Northeastern Illinois University, she underwent infertility treatment.<sup>176</sup> Erickson claimed that, in May of 1993, her employer reprimanded her for tardiness.<sup>177</sup> Subsequently, she received a six-month notice of termination.<sup>178</sup> Erickson sued, claiming that her employer had violated several statutes, including the PDA.<sup>179</sup> In response, the employer moved for dismissal of the PDA claim, asserting that infertility was not a pregnancy-related condition.<sup>180</sup> The employer rejected the district's decision in *Pacourek*, arguing that "infertility is not a pregnancy-related condition within the meaning of the PDA."<sup>181</sup> The *Erickson* court, however, voiced its agreement with *Pacourek* and held that the plaintiff had stated a cognizable claim under the PDA.<sup>182</sup> In reaching this decision, the court relied on both the "potential for pregnancy" language of *Johnson Controls* and the statutory interpretation of the PDA utilized by the *Pacourek* court.<sup>183</sup>

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174. *Id.* ("Furthermore, there is at least one indication in the PDA's legislative history that such a liberal construction is proper: 'In using the broad phrase "women affected by pregnancy, childbirth and related medical conditions," the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.' H.R.REP. NO. 95-948, 95th Cong., 2d Sess. 5, reprinted in 5 U.S.C.C.A.N. 4749, 4753 (1978).")

175. *Id.* at 1402-03 ("The court can find no reason—not in the cases, not in the legislative history, and, most significantly, not in the plain meaning of the words of the statute—to exclude plaintiff's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for the purposes of the [PDA].")

176. *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316, 317-18 (N.D. Ill. 1995).

177. *Id.* at 318.

178. *Id.*

179. *Id.* at 317.

180. *Id.* at 319.

181. *Id.*

182. *Id.* at 320.

183. *Id.* at 318-20 ("Plaintiff alleges that she was discharged because of her potential pregnancy. Like the Supreme Court in *Johnson Controls*, the Court holds that 'the PDA means what it says,' and, thus, Plaintiff states a claim under the PDA.").

*D. A Related Point of Contention Among the Courts: The PDA and Oral Contraception*

Another PDA-related debate among the courts involves whether the Act protects a woman's right to oral contraception coverage in her employer's prescription drug benefits plan.<sup>184</sup> Together, the contraception and infertility cases indicate the wide range of issues for which plaintiffs argue the PDA offers protection. The cases show the importance of narrowly tailoring the PDA's scope and strictly defining the "related medical conditions" protected by the Act.<sup>185</sup>

Many parallels can be drawn between cases discussing the PDA's coverage of infertility and those concerning the PDA's coverage of oral contraception. The problem of gender-neutrality, for instance, plagues both issues. This is because a policy that excludes oral contraceptives is technically gender-blind: both men and women are denied coverage for birth control.<sup>186</sup> Because employee benefit plans do not reimburse men for the cost of condoms, employers argue that their plans treat women equally by denying them coverage as well.<sup>187</sup> Women, on the other hand, argue that contraception directly affects their ability to control their reproductive capacity, a sex-specific issue.<sup>188</sup> Alternatively, plaintiffs have argued that birth control pills are often prescribed for medical reasons unrelated to contraception; thus, if an employer's drug benefits plan provides full coverage to men but does not include birth control, the plan may discriminate against women by offering them less than comprehensive benefits.<sup>189</sup>

According to one scholar, gender discrimination claims involving an employer's failure to include prescription birth control in otherwise comprehensive prescription drug benefit plans have "succeeded far more often and on more sweeping grounds" than claims based on infertility treatments.<sup>190</sup> Indeed, the EEOC ruled in 2000 that an employer's exclusion of oral contraceptives

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184. See, e.g., *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003); *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014 (W.D. Mo. 2006); *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007).

185. 42 U.S.C. § 2000e(k) (2006).

186. SHERRY F. COLB, *WHEN SEX COUNTS: MAKING BABIES AND MAKING LAW* 157 (2007).

187. *Id.* at 157–58.

188. *Id.* at 158.

189. Equal Opportunity Employment Comm'n Enforcement Guidance, *Decision on Coverage of Contraception*, 2000 WL 33407187 (Dec. 14, 2000).

190. Eldredge, *supra* note 5, at 885–86.

may amount to discrimination on the basis of sex.<sup>191</sup> The EEOC relied on the *Johnson Controls* analysis, stating, “[T]he fact that it is women, rather than men, who have the ability to become pregnant cannot be used to penalize [women] in any way, including in the terms and conditions of their employment.”<sup>192</sup>

In *Cooley v. DaimlerChrysler Corp.*, the Eastern District of Missouri sustained a similar claim for the coverage of contraception under the PDA.<sup>193</sup> *Cooley* cited *Johnson Controls* for the proposition that the PDA encompasses the potential for pregnancy.<sup>194</sup> Refusing to provide an employee with a medicine that “allows [her] to control [her] reproductive capacity,” said the court, constitutes a “sex-based exclusion.”<sup>195</sup>

Critics of the contraception cases have argued that the policy reasons for advocating coverage of prescription birth control do not justify a “sweeping interpretation of Title VII to compel that coverage.”<sup>196</sup> The same argument exists in the infertility context. Although women face unique challenges in regard to infertility and its treatment, courts may not read into the PDA what Congress did not intend to cover.

## V. THE SEVENTH CIRCUIT’S MISSTEP

In *Hall* the Seventh Circuit turned down the opportunity to consider whether the PDA reaches infertility. Because the court failed to recognize infertile women as a protected class and instead relied on an irrelevant case, Hall’s claim should not have succeeded.

### A. Reliance on Johnson Controls

Rather than analyze whether the PDA sweeps broadly enough to reach infertility, the Seventh Circuit chose to rely on language

191. Coverage of Contraception, *supra* note 191.

192. *Id.*

193. 281 F. Supp. 2d 979 (E.D. Mo. 2003).

194. *Id.* at 984.

195. *Id.* Unlike Hall, the plaintiffs in *Cooley* also alleged straightforward sex discrimination. *Id.* at 981. Under a disparate treatment claim, the plaintiffs argued that contraceptives are commonly prescribed to women for medical reasons other than contraception; that under the employer’s plan, men were completely protected and women were granted only partial protection; and that, “to the extent that prescription contraceptives provide basic medical health care for women, excluding such medication from the plan results in less comprehensive benefits to women.” *Id.* at 985. The court found these allegations sufficient to state a claim of disparate treatment under Title VII. *Id.*

196. Backmeyer, *supra* note 5, at 459.

from *Johnson Controls*, a case unrelated to infertility and its treatment.<sup>197</sup> *Hall* should not have followed the reasoning of *Johnson Controls* because the cases are inapposite. Whereas *Hall* dealt with a narrow question concerning the PDA's scope,<sup>198</sup> *Johnson Controls* analyzed a sex-specific fetal protection policy that facially discriminated against women and thus constituted a straightforward Title VII, disparate treatment claim.<sup>199</sup> *Johnson Controls*' reference to the PDA should not have been used in the *Hall* analysis to arbitrarily differentiate between gender-neutral and gender-specific aspects of infertility treatment.

*Johnson Controls*' policy explicitly discriminated against female employees based on their potential for pregnancy.<sup>200</sup> The case's "childbearing capacity" language, quoted so favorably by the Seventh Circuit in *Hall*, originated not in the Supreme Court's opinion but rather in the actual wording of *Johnson Controls*' policy.<sup>201</sup> Furthermore, the Supreme Court did not even view *Johnson Controls* as a PDA-governed case. Rather, the Court stated that its holding was merely "bolstered" by the PDA.<sup>202</sup> "In its use of the words 'capable of bearing children,'" said the Supreme Court, "*Johnson Controls* explicitly classifies on the basis of potential for pregnancy."<sup>203</sup> Relying on legislative history, the Court stated that the PDA does not allow employers to treat all female employees as "potentially pregnant."<sup>204</sup>

In *Hall*, the Seventh Circuit acknowledged that *Johnson Controls* differentiated between policies that classify based on the gender-neutral characteristic of fertility alone and policies that discriminate based on the "gender-specific quality of childbearing capacity or potential for pregnancy."<sup>205</sup> The Seventh Circuit interpreted this distinction to mean that, because *Hall* received gender-specific treatment for her infertility, *Nalco*'s adverse employment action constituted discrimination. But the Seventh Circuit ignored the fact that the Supreme Court based its holding on the actual language of *Johnson Controls*' policy, stating that the policy "is not neutral because it does not apply to the reproductive

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197. *Hall v. Nalco*, 534 F.3d 644, 648–49 (7th Cir. 2008).

198. *Id.* at 649 n.3.

199. *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991).

200. *Id.*

201. *Hall v. Nalco Co.*, 534 F.3d at 648 ("The Court held the policy was invalid under the PDA because it 'classif[ie]d on the basis of gender and childbearing capacity, rather than fertility alone.'").

202. *Johnson Controls*, 499 U.S. at 198.

203. *Id.*

204. *Id.* at 199, 205.

205. *Hall*, 534 F.3d at 648 (citing *Johnson Controls*, 499 U.S. at 198–99).



capacity of the company's male employees in the same way as it applies to that of females."<sup>206</sup>

Unlike Johnson Controls, Nalco implemented no such policy. Despite Hall's lack of evidence of disparate treatment, however, the Seventh Circuit held that "Nalco's conduct . . . suffer[ed] from the same defect as the policy in *Johnson Controls*" because IVF is a treatment received only by women.<sup>207</sup> Ignoring the fact that Nalco had not promulgated a policy that facially discriminated against female employees, the Seventh Circuit inappropriately reached for a comparison between the holding in *Johnson Controls* and the facts of *Hall*.

### *B. Problems with "Potential for Pregnancy"*

Apart from the inapplicability of *Johnson Controls* to *Hall*, there are policy reasons that disfavor a ruling based solely on "potential for pregnancy." First, this wording is even more ambiguous than "related medical conditions" and has no finite scope. If discrimination based on *infertility* treatment constitutes discrimination based on "childbearing capacity," then no woman lacks a "potential for pregnancy." The PDA could thus be stretched to encompass all women, at all stages of life. Furthermore, *Hall v. Nalco* redefined Hall's *infertility* as "potential for pregnancy" based on the treatment she received as a result of her condition.<sup>208</sup> If, however, *Johnson Controls* implicitly held that discrimination based on "infertility alone" is gender-neutral and therefore does not violate the PDA,<sup>209</sup> then it makes no sense to classify infertility based on treatment. Men and women will always receive sex-specific treatment to combat the gender-neutral problem, owing to their respective biological make-ups.

The Seventh Circuit applied the broad "potential for pregnancy" language to a very narrow procedure: IVF, one type of surgical impregnation. The court did not address the PDA's coverage of any other type of infertility-related treatment, such as diagnosis or corrective surgery. The Seventh Circuit's holding is therefore only narrowly instructive. Yet, the overbroad "potential for pregnancy" language, on which the court's entire holding is based, could be stretched to include a range of situations and treatments never intended by Congress, the Supreme Court, or the Seventh Circuit.

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206. *Johnson Controls*, 499 U.S. at 199.

207. *Hall*, 534 F.3d at 648.

208. *Id.* at 648-49.

209. *Johnson Controls*, 499 U.S. at 198.

### C. Diverging from *Pacourek* and *Erickson*

Like the Seventh Circuit in *Hall*, the Northern District of Illinois erroneously relied on *Johnson Controls* to apply the “potential for pregnancy” language to adverse employment actions involving female employees who miss work to receive infertility treatments. However, in addition to relying on the language of *Johnson Controls*, both *Pacourek* and *Erickson* also looked to the actual text of the PDA, analyzing the all-important question: whether the Act may encompass infertility.<sup>210</sup> The *Hall* decision ignored this question altogether, setting a very dangerous precedent. The Seventh Circuit allowed the language of *Johnson Controls* to exist as the sole reason for recognizing Hall’s claim against Nalco. Essentially, according to the Seventh Circuit’s analysis, Hall’s entire case rested on one phrase from an inapplicable Supreme Court case.

## VI. PROPER ANALYSES OF HALL’S CLAIM

There is no need for courts to continue to broaden the scope of the PDA beyond its actual wording for two reasons. First, Congress, not the courts, is vested with the power to amend the Act.<sup>211</sup> After all, Congress enacted the PDA to amend sex discrimination to include “pregnancy, childbirth and related medical conditions.”<sup>212</sup> If the Legislature wanted to likewise amend pregnancy discrimination to include “infertility” or “surgical impregnation procedures,” then it could certainly do so. Before Congress acts, however, courts should not continue to rely on *Johnson Controls* as justification for “introducing a completely new classification of prohibited discrimination.”<sup>213</sup> Second, federal legislation already offers plaintiffs with claims such as Hall’s avenues of redress outside the realm of the PDA, including Title VII’s recognition of disparate impact and disparate treatment theories as well as the Americans with Disabilities Act.

### A. *Sex-Plus*

The Seventh Circuit essentially viewed Hall’s claim as one of disparate treatment.<sup>214</sup> Had the court held that infertile women

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210. *Erickson*, 911 F. Supp. at 320; *Pacourek*, 858 F. Supp. at 1403.

211. *Id.*

212. See 42 U.S.C. § 2000e(k) (2006).

213. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).

214. *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

constitute a protected class under the PDA, then, presumably, Hall's claim would have succeeded because she offered direct evidence of discrimination based on infertility.<sup>215</sup> However, the Seventh Circuit refused to recognize such a class. Rather than rely on *Johnson Controls* to broaden the scope of the PDA, the court should have viewed Hall's claim as one of sex-plus infertility.

While sex-plus issues are common among disparate treatment claims based on gender discrimination,<sup>216</sup> a valid sex-plus claim can be made only when there is a similarly situated subclass of men who are treated differently than women.<sup>217</sup> In *Johnson Controls*, for instance, one of the plaintiffs was a member of the similarly situated subclass—a fertile male employee who wished to have children but could not transfer out of a job that exposed him to dangerous levels of lead.<sup>218</sup> Hall, however, offered no evidence of Nalco's disparate treatment.<sup>219</sup> She made no showing that the company had treated infertile men any better than it had treated her.<sup>220</sup> Thus, Hall's claim should have fallen under a disparate impact theory, wherein Hall should have argued that Nalco's policy disproportionately impacted female employees.<sup>221</sup> Those scholars who wish to include infertile women within the ambit of the PDA may argue that sex-plus cases are too difficult to sustain in an infertility context—that rarely if ever will an employee be able to show that an employer treated

215. *Id.* at 649. Hall alleged that her boss told her that her termination was “in [her] interest due to [her] health condition” of infertility. *Id.*

216. LEWIS & NORMAN, *supra* note 8, at 83. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (sex plus pre-school-aged children); Int'l Union v. Johnson Controls, 499 U.S. 187 (1991) (sex plus childbearing capacity); Fisher v. Vassar Coll., 70 F.3d 1420 (2d Cir. 1995) (sex plus marital status); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984) (sex plus family status).

217. *See* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 40.04 (2d ed. 2002), *quoted in* Eldredge, *supra* note 5, at 879 (“[W]hen one proceeds to cancel out the common characteristics of the two classes being compared ([e.g.] married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and sex remains the only operative factor in the equation . . . . Plaintiffs may fail to state a claim when such a subclass does not exist.”). *See also* Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997) (“[G]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender. Such plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender.”).

218. Int'l Union v. Johnson Controls, 499 U.S. 187, 192 (1991).

219. Brief of Plaintiff-Appellant Cheryl Hall at 7, Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008) (No. 06-3684).

220. *Id.*

221. Kobylak, *supra* note 22, at 19.

infertile men differently than infertile women.<sup>222</sup> However, it is not up to the courts to read into a congressional act protection that does not exist.<sup>223</sup> The fact that infertile women suffer adverse employment action as a result of their condition does not justify a sweeping interpretation of the PDA.

### *B. Disparate Impact Claims*

Though infertile women may not constitute a protected class under the PDA, a female employee who suffers adverse employment action as a result of facially neutral employer policy may still bring a claim of disparate impact under Title VII.<sup>224</sup> A plaintiff may claim disparate impact when an employer policy does not discriminate on its face but affects a protected class disproportionately.<sup>225</sup> Thus, if an employer policy disparately affects female employees who, for instance, are more burdened by infertility treatments than male employees, a court may find the policy violative of Title VII. According to the Eighth Circuit in *Krauel*, in order to prove a disparate impact claim, a plaintiff must offer statistical evidence sufficient to prove that the employer practice or policy unequally affected the protected class.<sup>226</sup> The Fifth Circuit, however, has held that, in some cases, a plaintiff may not necessarily have to present statistical evidence of disparate impact.<sup>227</sup>

A plaintiff who suffers from adverse employment action for missing work due to a pregnancy-related or gender-specific condition must keep in mind that neither Title VII nor the PDA requires an employer to make any accommodation for members of the protected class that it does not make for its other employees. Thus, in *Stout v. Baxter Healthcare Corp.*, the Fifth Circuit held that a plaintiff may not claim disparate impact when her employer merely refused to grant her medical leave that it did not offer to other, non-pregnant employees.<sup>228</sup> “To hold otherwise,” said the

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222. See, e.g., *Eldredge*, *supra* note 5, at 876.

223. U.S. CONST. art. I, § 8, cl. 18 (“Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” (emphasis added)).

224. See *supra* Part I.

225. See *Eldredge*, *supra* note 5, at 878.

226. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

227. See *Garcia v. Woman’s Hosp. of Tex.*, 97 F.3d 810 (5th Cir. 1996), discussed in *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856 (5th Cir. 2002).

228. *Stout*, 282 F.3d at 862 (“*Stout* has no evidence that *Baxter* has in any way applied its policy unevenly or has favored non-pregnant employees. In the

Fifth Circuit, “would be to transform the PDA into a guarantee of medical leave for pregnant employees, something we have specifically held that the PDA does not do.”<sup>229</sup>

### *C. Infertility as a Disability*

Hall did not allege that Nalco committed a violation of the Americans with Disabilities Act (ADA),<sup>230</sup> but according to at least one scholar, the ADA is a better vehicle than the PDA for an employee’s claims concerning adverse employment action based on infertility.<sup>231</sup> Unlike the PDA, which requires equal, not preferential treatment,<sup>232</sup> the ADA requires employers to make “reasonable accommodations” for disabled employees, which may include time off from work.<sup>233</sup> Because Hall, Pacourek, and Erickson were each fired for missing work in order to receive infertility treatments,<sup>234</sup> the ADA’s requirement of a reasonable accommodation supplies such plaintiffs with better, more specifically tailored protection.

#### *1. How the ADA Works*

The ADA prohibits: (1) treating a qualified individual with a disability differently because of the disability, perceived disability, or record of a disability; (2) not making a reasonable accommodation for known physical or mental limitation of an otherwise qualified individual with a disability; and (3) using qualification standards or selection devices that tend to screen out

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end, Stout’s claim in this case is simply that she should have been granted medical leave that is more generous than that granted to non-pregnant employees. This the PDA does not require.”).

229. *Id.* at 861.

230. 42 U.S.C. § 12101–12113 (2006). The ADA Amendments Act became law on January 1, 2009. *See* 42 U.S.C. § 12101 (2006). The Amendments Act may change the law with regard to disability discrimination. However, the ramifications of the Amendment with regard to ADA jurisprudence remain to be seen.

231. James B. Roche, *After Bragdon v. Abbott: Why Legislation is Still Needed to Mandate Infertility Insurance*, 11 B.U. PUB. INT. L.J. 215, 224 (2002).

232. 42 U.S.C. § 2000e(k) (2006) (“[W]omen affected by pregnancy, childbirth, or related medical conditions, shall be treated the same for all employment-related purposes.”) (emphasis added).

233. *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 766 (W.D. Mich. 2001).

234. *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008); *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316, 318 (N.D. Ill. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1396 (N.D. Ill. 1994).

individuals with disabilities.<sup>235</sup> The Act applies in an employment context according to section 102(a), which prohibits discrimination against a member of the protected class “because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>236</sup>

Plaintiffs filing a claim under the ADA must establish that they have (1) a physical or mental impairment (2) that substantially limits (3) a major life activity and (4) that they are qualified in that they can perform “essential job duties” with or without reasonable accommodation.<sup>237</sup>

In determining whether an individual has an impairment as defined by the ADA, the Supreme Court has emphasized that the analysis must take place on a case-by-case basis, with consideration for the condition’s effect on the individual.<sup>238</sup> The ADA regulations define impairment broadly to include physiological disorders or conditions, cosmetic disfigurements, anatomical losses affecting one or more body systems, or any mental or psychological disorders.<sup>239</sup> Pregnancy is not covered,<sup>240</sup> but one court has indicated that complications arising from pregnancy could rise to the level of a statutory impairment.<sup>241</sup>

Before 1998, some courts refused to hold that reproduction constituted a major life activity under the ADA, and these courts denied relief to plaintiffs with claims similar to Hall’s.<sup>242</sup> But, in *Bragdon v. Abbott*, the Supreme Court classified “reproduction and

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235. THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 289 (2001).

236. 42 U.S.C. § 12112(a) (2006).

237. HAGGARD, *supra* note 237, at 290–99.

238. *Id.* at 291 (citing *Albertson’s v. Kirkinburg*, 527 U.S. 471 (1999)).

239. *Id.* at 291.

240. *Id.* (citing *Beverly v. Herr Foods, Inc.*, No. Civ. A. 92-7382, 1993 WL 101196 (E.D. Pa. 1993)).

241. *Id.* at 292. See *Cerrato v. Durham*, 941 F. Supp. 388 (S.D.N.Y. 1996).

242. See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996). There were exceptions to this pre-1998 rule, however. The court in *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994), for example, held that the plaintiff had stated a claim under the ADA. *Pacourek*, 858 F. Supp. at 1404. Charline Pacourek brought a claim under the ADA, claiming that defendants discriminated against her on the basis of a “physical impairment that substantially limits one of [her] major life activities—reproduction.” *Id.* Pacourek’s impairment, esophofical reflux, prevented her from becoming pregnant naturally. *Id.* The District Court for the Northern District of Illinois, Eastern Division, held that Pacourek’s condition was a physical or mental impairment that affected a major life activity and that the major life activity was substantially limited by the impairment. *Id.* at 1404–05.

sexual activity” as a major life activity under the ADA.<sup>243</sup> *Bragdon* involved a claim by a patient infected with HIV who brought an action under the ADA against a dentist who refused to treat her in his office.<sup>244</sup> The Court indicated in *Bragdon* that “the plain language meaning of the word ‘major’ denotes comparative importance” and “suggest[s] that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.” The Court thus held that reproduction was a major life activity, since “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”<sup>245</sup> This decision has made the ADA applicable to a plaintiff with a claim like Hall’s.

## 2. LaPorta: *Pregnant with Possibility*

In 2001, the United States District Court for the Western District of Michigan decided *LaPorta v. Wal-Mart Stores, Inc.*,<sup>246</sup> a case that arose from a fact pattern similar to that of *Hall*. Michelle LaPorta, a pharmacist, missed several weeks of work to undergo a cycle of IVF treatment in August of 1997.<sup>247</sup> This initial procedure proved unsuccessful, and LaPorta scheduled a second treatment.<sup>248</sup> After missing a day of work for a preliminary procedure related to this second round of IVF treatment, LaPorta was terminated.<sup>249</sup> LaPorta subsequently filed suit against her employer, alleging discrimination under both the PDA and the ADA.<sup>250</sup> United States Magistrate Judge Scoville relied on *Krauel* to deny plaintiff’s PDA claim,<sup>251</sup> specifically disagreeing with the Northern District of Illinois in *Pacourek* and finding *Krauel* “a more persuasive authority on [the] issue of statutory construction” of the PDA.<sup>252</sup> The court concluded “that infertility is not a medical condition related to pregnancy or childbirth within the meaning of the PDA.”<sup>253</sup>

Judge Scoville sustained LaPorta’s claim under the ADA, however, presenting an extremely thorough and well-reasoned five-step analysis.<sup>254</sup> First, the court followed the EEOC’s regulations

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243. 524 U.S. 624 (1998).

244. *Id.* at 628–29.

245. HAGGARD, *supra* note 237, at 294 (citing *Bragdon*, 524 U.S. at 638).

246. 163 F. Supp. 2d 758 (W.D. Mich. 2001).

247. *Id.* at 762.

248. *Id.*

249. *Id.*

250. *Id.* at 763.

251. *Id.* at 770.

252. *Id.*

253. *Id.*

254. *Id.* at 763–70.

defining physical impairments, which include a physiological disorder or condition that affects the body's reproductive system.<sup>255</sup> Quoting language from *Saks* that defined infertility as the "chronic failure of an organ system," the court in *LaPorta* stated that the condition "falls squarely within" the regulation's description.<sup>256</sup> The court then relied on *Bragdon's* holding that reproduction falls well within the phrase "major life activity."<sup>257</sup>

Next, the court held that infertility substantially limits the major life activity of reproduction, relying again on *Bragdon v. Abbott* for the proposition that "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."<sup>258</sup> The court thus rejected defendant's argument that because plaintiff eventually became pregnant as a result of her fertility treatments, plaintiff's infertility had not substantially limited her reproductive capacity.<sup>259</sup>

According to the court, plaintiff's request for time off fell "well within [the] statutory definition" of "reasonable accommodation" under the ADA.<sup>260</sup> An enormous amount of disability law is devoted to determining what constitutes a reasonable accommodation—which, if made, would render an individual qualified to perform the essential functions of the job and, if not made, would constitute an illegal form of discrimination.<sup>261</sup> Judge Scoville pointed out that reasonable accommodation under the ADA is a question of fact, and a plaintiff bears the burden of proving reasonableness.<sup>262</sup> Once the plaintiff does so, the burden of proof shifts to the employer to show the unreasonableness of the accommodation in terms of the particular circumstance facing the employer and employee.<sup>263</sup>

Finally, the *LaPorta* court addressed the issue of causation. A plaintiff seeking to establish a claim for wrongful termination under the ADA must show that she suffered the adverse employment action *because of* her disability.<sup>264</sup> Defendant-Wal-Mart argued that the plaintiff was fired not because of her disability but for her refusal to appear for work.<sup>265</sup> The court found that Wal-Mart's refusal to grant the plaintiff time off to receive the infertility treatment,

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255. *Id.*

256. *Id.* at 764.

257. *Id.* at 765.

258. *Id.* at 766 (citing *Bragdon v. Abbott*, 524 U.S. 624, 644 (1998)).

259. *Id.* at 765–66.

260. *Id.* at 766 ("Under the definitional section of the ADA, the term 'reasonable accommodation' is defined to include among other things, 'job restructuring' or 'part-time or modified work schedules' 42 U.S.C. § 12111(9)(B).").

261. HAGGARD, *supra* note 237, at 299.

262. *LaPorta*, 163 F. Supp. at 766.

263. *Id.*

264. *Id.* at 768.

265. *Id.* at 769.



followed by its decision to terminate her for her failure to appear for work on that day, constituted a jury-submissible issue.<sup>266</sup>

*LaPorta* stands as an instructive example of an infertile female employee who presented a cognizable employment discrimination claim through a theory other than the PDA. Because, under *Bragdon*, reproduction is considered a major life activity,<sup>267</sup> the ADA may reach out to protect employees such as Cheryl Hall from being terminated for receiving infertility treatment. Granting protection under the ADA rather than the PDA for infertility treatments would also ensure that men as well as women are protected for receiving treatment for infertility. Perhaps most importantly, however, the ADA, unlike the PDA, requires employers to make reasonable accommodations for disabled employees. Because female employees who undergo infertility often must miss work to receive treatment, *LaPorta*'s holding that time off constitutes a reasonable accommodation makes the ADA a better avenue of redress for plaintiffs like Hall and *LaPorta*.

## VII. CONCLUSION

The incidence of infertility is increasing in the United States.<sup>268</sup> Studies indicate that over the past two decades, men in the industrialized world have experienced a decline in sperm quality.<sup>269</sup> At the same time, women are choosing to have children later in life than they once did.<sup>270</sup> In fact, twenty percent of women in the United States are waiting until age thirty-five or older to have their first child,<sup>271</sup> and women in this age range are twice as likely to have problems conceiving as women in their early thirties.<sup>272</sup> Consequently, infertility and its treatment will continue to pose problems for women in the workplace. As more and more female employees suffer adverse employment action as a result of IVF or other infertility treatments, it is imperative that courts analyze the resulting suits properly and appropriately.

Congress may one day choose to extend the PDA to reach infertility, but it has yet to do so. For now, there are many other

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266. *Id.*

267. *Bragdon v. Abbott*, 524 U.S. 624, 644 (1998).

268. MARY JANE MINKIN & CAROL V. WRIGHT, *THE YALE GUIDE TO WOMEN'S REPRODUCTIVE HEALTH* 298 (2003).

269. *Id.* at 300. The decline may be attributable to occupational hazards, environmental pollutants, medications, and sexually transmitted diseases. *Id.*

270. *Id.*

271. WomensHealth.org, *Frequently Asked Questions: Infertility*, <http://www.womenshealth.gov/faq/infertility.cfm> (last visited July 1, 2009).

272. MINKIN & WRIGHT, *supra* note 270, at 300.

theories under which a plaintiff like Hall should assert her claim. This is not to say that an infertile female employee who suffers adverse employment action will surely succeed on one or any of these theories. But it is up to a plaintiff to present a prima facie case of discrimination, whether the claim invokes Title VII, the PDA, or the ADA. It is not up to the courts to stretch the scope of federal legislation in order to protect a plaintiff who cannot meet her burden of proof.

*Erin Percy\**

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\* Any errors in this Note are my own. As to the rest, I owe thanks to Professor William R. Corbett for his seemingly measureless knowledge and patience. I am also grateful to my parents and Jace for their support in this and all my endeavors.

