

ARTfully Discriminating: How *Hall v. Nalco Co.* Applies Title VII to Adverse Employment Actions Based on Assisted Reproduction Technologies

Patrick Madden

I. Introduction

Over the last few decades, the number of people seeking treatment for infertility has steadily risen.¹ Infertility treatments, though available for both genders, carry differing burdens for the two sexes. Although the inability to have children can be caused by either the male or the female, only women are subject to invasive surgery that requires a significant time commitment.² The female surgery and required monitoring occur even when her male partner is the source of the couple's infertility.³ This difference creates an interesting question: Can an employer make work-related decisions based on a woman's choice to pursue infertility treatment?

The Civil Rights Act of 1964 protects individuals from workplace discrimination on the basis of "race, color, religion, sex, or national origin."⁴ But the scope of the protection afforded against sex-based discrimination is unclear. For example, consider how an employer should treat circumstances arising from women's unique reproductive systems: Clearly, a woman's role in the creation of a child is different from that of a man due to her unique reproductive system. But courts have wrestled with how much of that difference should be protected from discrimination.⁵

¹ Leon Speroff, Robert H. Glass, & Nathan G. Kase, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 811-812 (5th ed., 1994) (The post-World War II generation was the first to exercise control over their fertility and women of the generation were entering the workforce in increasing numbers. As a result, women were postponing pregnancy attempting to have children at later ages. Fertility declines with age, so more women have sought treatment for infertility. It should be noted, however, that age is not the only cause of infertility.); *see also* United States Department of Labor, Bureau of Labor Statistics, *Labor Force*, OCCUPATIONAL OUTLOOK QUARTERLY, Winter 1999-2000, at 36-37, *available at* <http://www.bls.gov/opub/ooq/1999/winter/art06.pdf> (showing that the female share of the labor force increased from 1988-1998 and was projected to increase further by 2008).

² *See* discussion *infra* Part II (describing the differing burdens imposed on males and females as a result of treatment for infertility).

³ *See id.* (noting that regardless of whether the infertility is caused by the male or the female, the prescribed treatment is often to perform a surgical procedure on the female).

⁴ The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) (West 2009).

⁵ *See, e.g.,* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *overruled by* 42 U.S.C. § 2000e(k) (1978) (holding that an employer who did not cover pregnancy in its disability benefits did not violate Title VII); UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that discriminating on the basis of a woman's potential to become pregnant is protected by Title VII); *In re* Union Pac. R.R. Employment Practices Litig., 479 F.3d 936 (8th Cir. 2007) (holding that Title VII does not require that prescription contraceptives be covered by employer benefits plans). *Compare* Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994) (holding that a woman being treated for infertility is protected by Title VII because such treatments are both conditions related to pregnancy), *with* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996) (holding that the PDA only covers post-conception

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In 1978, Congress reacted to the Supreme Court’s decision two years earlier in *General Electric Company v. Gilbert*. In *Gilbert*, the Court held that Title VII did not require employer disability benefit plans to cover pregnancy related disabilities.⁶ In response, Congress passed the Pregnancy Discrimination Act (PDA)⁷ to counteract the *Gilbert* decision.⁸ The PDA expanded the definition of gender discrimination to expressly include “pregnancy, childbirth and related medical conditions.”⁹ Congress, thus, sided with the dissenting justices of *Gilbert* by unambiguously extending the gender protections of Title VII to include pregnancy.¹⁰

The PDA was enacted before the advent of modern-day reproductive procedures. The first successful in vitro fertilization (IVF)¹¹ procedure took place in London in 1978¹² and the first successful procedure in the United States did not occur until 1982.¹³ Therefore, the language of the PDA did not, and could not, have been specifically intended to apply to these new reproductive technologies. While the PDA could not fully contemplate future advances in

conditions and thus, not infertility treatments), and *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003) (holding that employers did not have to provide coverage for female fertility treatments under the PDA).

⁶ *Gilbert*, 429 U.S. at 145-46.

⁷ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

⁸ 1978 U.S.C.C.A.N. 4749, 4750 (“It is the committee’s view that the dissenting Justices [of *Gilbert*] correctly interpreted [Title VII.]”); see also *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 (1983) (noting that Congress had unambiguously disapproved of both the holding and the reasoning of *Gilbert*).

⁹ See *Newport News*, 462 U.S. at 678 (discussing the changes that the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), made to Title VII).

¹⁰ See 1978 U.S.C.C.A.N. 4749, 4750 (“It is the committee’s view that the dissenting Justices [of *Gilbert*] correctly interpreted [Title VII.]”).

¹¹ THE MERCK MANUAL OF MEDICAL INFORMATION 1419 (Mark H. Beers, MD ed., 2d ed. 2003) (“In vitro (test tube) fertilization involves stimulating the ovaries, retrieving the released eggs, fertilizing the eggs, growing the resulting embryos in a laboratory, and then implanting the embryos in the woman’s uterus [A] doctor inserts a needle through the woman’s vagina into the ovary and removes several eggs from the follicles After about 3 to 5 days, two or three of the resulting embryos are transferred from the culture dish into the woman’s uterus through the vagina.”).

¹² Cintra D. Bentley, Comment, *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, 395 (1998) (citing American Soc’y for Reprod. Med., *IVF and GIFT: A Guide to Assisted Reproductive Technologies* 3 (1995)).

¹³ *Id.* at 395 (citing Elisabeth Rosenthal, *From Lives Begun in a Lab, Brave New Joy*, N.Y. TIMES, Jan. 10, 1996, at A1).

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reproductive technology, the PDA is the statute chosen by the courts to govern disputes involving Assisted Reproduction Technologies (ARTs).¹⁴

In 2003, when the United States Court of Appeals for the Seventh Circuit heard *Hall v. Nalco Co.*,¹⁵ a case involving a woman fired for absences related to surgical fertility treatments, the court could not turn to the specific provisions of the PDA to determine whether it applied. Instead, the court had to interpret the language of the PDA for circumstances that were unforeseen at its inception.¹⁶ In reaching its decision, the court considered whether, and to what degree, the PDA expanded the gender protections of Title VII. Specifically, the court considered whether the Title VII as amended by the PDA should be narrowly construed to protect pregnant women, or whether it should include any matter relating to their unique reproductive systems, including but not limited to infertility treatments. To put it another way: Does the significantly greater burden placed on women with regard to infertility treatments constitute a protected difference between the sexes?

Part II of this article provides a brief discussion of infertility and its treatments as they apply to both genders. Part III provides a history of case law on the subject of pregnancy and infertility treatments in an effort to frame the issue presented to the United States Seventh Circuit Court of Appeals. Part IV sets forth the facts of *Hall* and the court's reasoning and conclusion.

¹⁴ See *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994) (holding that *Johnson Controls* brought 'potential for pregnancy' under the ambit of the PDA in a case involving discrimination due to absences caused by an in vitro fertilization procedure); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (holding that the PDA only covers post-conception conditions and thus, not infertility treatments); *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003) (holding that employers did not have to provide coverage for female fertility treatments under the PDA); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001) (adopting the *Krauel* interpretation of the PDA for cases involving fertility treatments).

¹⁵ 534 F.3d 644, 645 (7th Cir. 2008).

¹⁶ See *id.* at 649 (The Court found *Nalco* to have terminated *Hall* due to the gender specific quality of childbearing capacity and as such violated Title VII as amended by the PDA.); see also *Bentley*, *supra* note 12, at 395 (citing Elisabeth Rosenthal, *From Lives Begun in a Lab, Brave New Joy*, N.Y. TIMES, Jan. 10, 1996, at A1) (Because the first in vitro fertilization procedure took place in London in 1978 and was not successful in the United States until 1982 and Congress enacted the PDA in 1978, Congress could not have specifically intended the PDA to cover these treatments.).

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Part V contains a critical discussion of the court’s reasoning, consequences of the proposed reasoning, and arguments in favor of extending Title VII’s protection to women undergoing infertility treatments.

II. Infertility: Causes, Treatment, and Context

Infertility is defined as the inability of a couple to achieve a pregnancy after trying repeatedly through intercourse to do so for one year.¹⁷ Infertility can result from disorders of the reproductive systems of either the man (known as “male factor infertility”), the woman (known as “female factor infertility”), or both.¹⁸ Because the causes differ between genders, the treatments are sex specific as well.

This section discusses those causes and treatments as they apply to both genders and the respective burdens on an employee’s ability to work. The differences between the treatments constitute a parallel to pregnancy. In both pregnancy and infertility treatments, the male burden is minimal and will not result in significant absences from work. By contrast, women miss significant amounts of time in both pregnancy and infertility treatment scenarios.

Male infertility, though common, does not require the same degree of invasive surgical procedures and significant time commitments for treatment.¹⁹ Some conditions in males

¹⁷ THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414.

¹⁸ *Id.*

¹⁹ *See, e.g.*, Peter N. Schlegel & Jeremy Kaufman, *Surgical Treatment of Male Infertility*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT 365, 370-374 (Fouad R. Kandeel ed., 2007) (describing the microsurgical process of modern vasectomy reversals and Intracytoplasmic Sperm Injections (ICSI)); Brett C. Mellinger, *Testicular Biopsy of the Infertile Male*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT, *supra*, at 285, 286 (noting that biopsies are an in-office procedure); *Varicocele Treatment Options and Varicocele Pictures*, <http://www.varicoceles.com/varicocele-treatment-options.htm> (last visited Jan. 15, 2009) (stating that embolization of the varicocele is an outpatient procedure performed without anesthesia); *see also* Leon Speroff, Robert H. Glass, & Nathan G. Kase, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 1236 (7th ed. 2005) (describing an Intracytoplasmic Sperm Injection (ICSI) procedure).

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suppress the sperm count.²⁰ Other disorders cause sperm to be completely absent from semen or block the semen from being transferred out of the penis.²¹ Depending upon the specific diagnosis of male factor infertility, different treatments are warranted. Initially, doctors examine the man's reproductive system and his sperm.²² When the sperm is absent or the count is low, and the doctors suspect some-type of obstruction, they will often then take a testicular biopsy.²³ While the biopsy is technically a surgical procedure, it is minimally invasive and requires a minimal amount of time from the man.²⁴ When an infertile male does not produce enough sperm, but does produce normal sperm, oral drugs are sometimes prescribed in an attempt to raise the sperm count.²⁵

More intensive surgical treatments for male infertility are offered in a few cases including varicocele repair²⁶ and vasectomy reversal.²⁷ While the actual time period involved in surgery to

²⁰ THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414-15 (conditions include but are not limited to: increased temperature to the testes, hormonal and genetic disorders that interfere with sperm production, injury to testes, exposure to environmental toxins, drugs, and mumps that affect the testes).

²¹ *Id.* at 1415 (Serious disorders of testes and blocked or missing vasa deferentia, missing seminal vesicles, and blockage of both ejaculatory ducts can result in the complete absence of sperm from semen. Sometimes, sperm carrying semen moves into the bladder instead of down the penis resulting in the sperm not exiting the body. Without treatment, all cases result in infertility.).

²² See Chakriya D. Anunta & Fouad R. Kandeel, *Clinical Assessment of the Infertile Male*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT, *supra* note 19, at 261, 262-69 (describing the first part of the diagnosis as involving a physical examination followed by an examination of semen).

²³ See Mellinger, *supra* note 19, at 285 (describing the conditions precedent to a testicular biopsy).

²⁴ See *id.* (describing the most commonly used biopsy procedure in clinical practice as having “the advantages of an office-based, minimally invasive procedure: less patient anxiety, quick return to normal activity, and reduced costs”).

²⁵ See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1415 (explaining that though Clomiphene, a drug used to induce ovulation in women, is used to raise male sperm counts, it does not improve the sperm's mobility or suppress the number of abnormal sperm. Additionally, it has not been proven to increase fertility in men.).

²⁶ See *Varicocele Repair and Surgery – Frequently Asked Questions*, <http://www.varicoceles.com/faq.htm> (last visited Nov. 17, 2008) (stating that varicocele is a leading cause of male infertility and that the two options for treating varicoceles are surgery and embolization); see also THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1329 (“Varicocele is a condition in which the blood supply of the testis develops varicose veins.”). *But see* Speroff, *supra* note 19, at 1162 (stating that although varicocele is more commonly found in men with abnormal semen, treating the condition did not result in curing infertility in a couple any more often than the cure rate of untreated varicocele vis-a-vis infertility).

²⁷ See Schlegel, *supra* note 19, at 370-73 (describing the microsurgical process of modern vasectomy reversals).

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repair varicocele varies,²⁸ surgery is often not recommended for two reasons: 1) that other treatments such as embolization of the varicocele,²⁹ intrauterine insemination,³⁰ and Intracytoplasmic Sperm Injection (ICSI)³¹ are effective and less invasive;³² and more importantly 2) that varicocele repair is not an effective treatment for male or unexplained infertility.³³

In the case of vasectomy reversals, the procedure reverses a previous voluntary surgery whose purpose was to create infertility. While vasectomy reversals are more invasive surgical procedures than other male infertility treatments,³⁴ vasectomy reversals are not necessarily the best option to achieve pregnancy because of other risk factors.³⁵

²⁸ *Varicocele Repair and Surgery – Frequently Asked Questions*, <http://www.varicoceles.com/faq.htm> (last visited Nov. 17, 2008) (warning that repairing varicoceles through surgery can incapacitate a man for several days to weeks).

²⁹ *See Varicocele Treatment Options and Varicocele Pictures*, <http://www.varicoceles.com/varicocele-treatment-options.htm> (last visited Jan. 15, 2009) (Embolization of the varicocele is an outpatient procedure performed without anesthesia. A small tube is placed into the groin through a ‘nick’ in the skin after the skin has been numbed. Next, a small catheter is painlessly passed through the tube into the varicocele vein guided by x-ray technology. Metal coils or other embolizing substances are then inserted through the catheter to block the flow of blood. The tube is removed and no stitches are needed. The procedure is typically completed within 24 hours.).

³⁰ *See THE MERCK MANUAL OF MEDICAL INFORMATION*, *supra* note 11, at 1418 (explaining that intrauterine insemination is a treatment in which semen is placed directly into the uterus.).

³¹ *See Speroff*, *supra* note 19, at 1236 (stating that in an Intracytoplasmic Sperm Injection (ICSI) procedure, a single sperm is immobilized and drawn into a pipette. The sperm is then injected into the egg. In most cases, ICSI achieves comparable fertilization rates to those of IVF absent male factor infertility.).

³² *Varicocele Repair and Surgery – Frequently Asked Questions*, <http://www.varicoceles.com/faq.htm> (last visited Nov. 17, 2008) (positing that embolization requires no incision, stitches, or general anesthesia and rarely requires a hospital stay); *see also* Speroff, *supra* note 19, at 1162 (noting that although surgery is the usual treatment, there is a nonsurgical approach to repairing varicocele).

³³ Johannes LH. Evers & John A. Collins, *Assessment of efficacy of varicocele repair for male subfertility: A systematic review*, 361 *THE LANCET* 1849 (2003) (concluding that there was no evidence that varicocele repair improved fertility after reviewing all the studies of varicocele repair).

³⁴ *See generally* Schlegel, *supra* note 19, at 370-73 (describing the microsurgical process of modern vasectomy reversals). *Compare* Victor M. Brugh & Donald F. Lynch Jr., *Urological Interventions for the Treatment of Male Infertility*, in *MALE INFERTILITY: DIAGNOSIS AND TREATMENT* 319, 325-27 (Sergio C. Oehninger & Thinus F. Kruger eds., 2007) (discussing male vasectomy reversal), *with* Speroff, *supra* note 19, at 1236 (discussing alternatives to vasectomy reversals), *and* Schlegel, *supra* note 19, at 374 (describing ICSI as minimally invasive).

³⁵ *See* Brugh, in *MALE INFERTILITY: DIAGNOSIS AND TREATMENT*, *supra* note 34, at 327 (Depending on the health status of the couple, the maternal age, and the length of time since the vasectomy, ICSI may be the preferred option. For healthy younger couples who are seeking to have more than one pregnancy, a vasectomy reversal would be cheaper per pregnancy, however.). *But see* Peter T Chan & Marc Goldstein, *Vasectomy and Vasectomy Reversal*, in *MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT*, *supra* note 19, at 385, 403 (noting that the advancement in the safety and ubiquity of microsurgical reconstruction procedures to reverse vasectomies has made such procedures the safest and most cost-effective management option for couples).

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In nearly all cases of male factor infertility, ICSI represents a workable alternative to more invasive surgery. ICSI is then used in conjunction with an in vitro fertilization (IVF) procedure or other ART implantation procedure performed on the female to achieve pregnancy.³⁶ Doctors can retrieve sperm from the testicles with a needle in a minimally invasive procedure for use in ICSI and IVF.³⁷ Similarly, in lieu of a vasectomy reversal, doctors can use the ICSI and IVF procedures to impregnate the woman.³⁸

Women, on the other hand, require surgical procedures far more often than men for correction of either male or female factor infertility.³⁹ Regardless of whether the cause of infertility in a couple is attributable to the male or the female, it is often the woman who bears the burden of significant surgical and time commitments.⁴⁰ In many cases of male factor infertility, instead of repairing the male's problem, doctors collect the male's sperm, either after ejaculation or by use of a minor extraction procedure,⁴¹ for use in an IVF procedure performed on the woman.⁴²

³⁶ Speroff, *supra* note 19, at 1218 (stating that when donor sperm is not an acceptable option, IVF and ICSI offer realistic hope for conception).

³⁷ Schlegel, *supra* note 19, at 373; accord Valerie Vernaev & Herman Tournaye, *Sperm Retrieval Techniques for Intracytoplasmic Sperm Injection*, in MALE INFERTILITY: DIAGNOSIS AND TREATMENT, *supra* note 34, at 401, 402.

³⁸ Brugh, in MALE INFERTILITY: DIAGNOSIS AND TREATMENT, *supra* note 34, at 327.

³⁹ THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414-19.

⁴⁰ See Speroff, *supra* note 19, at 1218 (“When treatment [for male factor infertility] is not possible or fails and insemination with donor sperm is not an acceptable option, IVF and ICSI, using sperm isolated from the ejaculate or extracted from the epididymis or testis, offer a very realistic hope for success.”); see also *Regional Fertility Program >> IVF FAQ*, <http://www.regionalfertilityprogram.ca/faq-ivf.php> [hereinafter “IVF FAQ”] (last visited December 29, 2008) (explaining that significant time commitments are required from the female); *Regional Fertility Program >> Program Timeline*, <http://www.regionalfertilityprogram.ca/program-timeline.php> [hereinafter “Program Timeline”] (last visited Dec. 29, 2008) (detailing the timeline of the IVF treatment).

⁴¹ Speroff, *supra* note 19, at 1234-37 (detailing sperm extraction techniques); see also Schlegel, *supra* note 19, at 374 (detailing various microsurgical techniques and processes).

⁴² See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (noting that when a male suffers from poor sperm motility or low sperm count resulting in infertility, the female partner must undergo a surgical treatment to treat the couple's inability to have a child).

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In vitro fertilization, the first and most commonly used ART,⁴³ is an invasive surgery that requires extended absences from work.⁴⁴ Before the procedure, the woman must receive injections, blood tests, and ultrasounds with sufficient regularity as to make attending work extremely difficult.⁴⁵ The treatment period may last up to three weeks.⁴⁶ Additionally, after the monitoring and ensuing embryo transfer, women are advised to avoid heavy lifting and excess stress until after conception⁴⁷ – similar to the advice given to pregnant women.

Treatment plans for infertility should be constructed after identifying and reviewing both the male and female factors. If only male factor infertility is present, the recommended treatment still depends on the risk factors in the female.⁴⁸ Even when there is no evidence of female factor infertility, if there are other increased risks of failure to fertilize on the part of male or female, doctors often recommend the use of IVF to increase chances of conception.⁴⁹ Thus, doctors frequently recommend IVF treatments regardless of the cause of the infertility thereby imposing a greater burden on women.

While the condition of infertility can afflict both men and women, the treatment of infertility imposes differing burdens on the two sexes.⁵⁰ Additionally, doctors do not necessarily treat a man suffering from the condition, instead often treating his female partner for his

⁴³ See Speroff, *supra* note 19, at 1215 (describing IVF as the first and most commonly used ART and noting that when combined with other procedures such as ICSI, IVF has obviated the use of other treatments).

⁴⁴ See MAYO CLINIC FAMILY HEALTH BOOK, at 1069-70 (Scott C. Litin, ed., 3d ed. 2003) (detailing the scope of the time commitments involved in IVF procedures); see also Program Timeline, *supra* note 40 (detailing the timeline for treatment at a clinic).

⁴⁵ See Program Timeline, *supra* note 40 (detailing the time frame for each part of the monitoring and procedure); see also *LaPorta*, 163 F. Supp. 2d at 762 (noting that the IVF process requires frequent visits to the doctor to avoid a potentially fatal condition that can result from the process).

⁴⁶ IVF FAQ, *supra* note 40.

⁴⁷ *Id.*

⁴⁸ Murat Arslan, Sergio Oehninger, & Thinus F. Kruger, *Clinical Management of Male Infertility*, in MALE INFERTILITY: DIAGNOSIS AND TREATMENT, *supra* note 34, at 305, 310 (Risk factors such as age, duration of infertility, and presence of other pathologies can make Artificial Reproductive Technologies such as IVF more likely to be successful – even if no female factor infertility is present).

⁴⁹ *Id.* at 310-11.

⁵⁰ See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346-47 (2d Cir. 2003) (analyzing the differing burdens of infertility treatments).

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condition.⁵¹ Therefore, the treatment of infertility is separate and distinct from the condition of infertility in that women need not suffer from the condition to be subject to the consequences of treatment. Accordingly, women may also miss significant work time due to gender-specific treatments for a gender-neutral condition that they do not have.

III. Prior Law

This section examines the prior case law in two parts. Part A looks at the Supreme Court’s development of discrimination law as it pertains to pregnancy and fertility. However, the Supreme Court has yet to hear a case concerning infertility treatments. The lower courts have applied the principles articulated by the Supreme Court to a variety of cases involving the PDA. Part B provides a survey of various lower court decisions relevant to interpreting infertility and its treatment.

A. Supreme Court Cases

In 1976, the Supreme Court held in *General Electric Co. v. Gilbert* that a disability plan which pays nonoccupational sickness and accident benefits, but not pregnancy benefits, did not violate Title VII.⁵² The Court reasoned that although pregnancy is a female specific condition, the lack of benefits did not disturb the balance between male and female benefits because neither men nor women were covered for pregnancy.⁵³ Congress responded directly by siding with the *Gilbert* dissenters in passing the Pregnancy Discrimination Act (PDA).⁵⁴ The PDA brought

⁵¹ *See id.* at 347 (finding that females undergo surgical procedures to remedy their partners’ infertility).

⁵² 429 U.S. 125, 127-128 (1976), *overruled by* 42 U.S.C. § 2000e(k) (1978).

⁵³ *Id.* at 138 (“The [disability p]lan, in effect . . . , is nothing more than an insurance package, which covers some risks, but excludes others ‘[t]here is no risk from which men are protected and women are not.’ [citations omitted]).

⁵⁴ 1978 U.S.C.C.A.N. 4749, 4750 (“It is this committee’s view that the dissenting Justices [of *Gilbert*] correctly interpreted [Title VII of the Civil Rights Act of 1964].”). *See generally* *Gilbert*, 429 U.S. at 146-62 (Brennan, Marshall, JJ., dissenting) (arguing that the plan violated Title VII because health conditions and risks specific to men were covered and pregnancy was the only health risk regardless of sex-specificity that was not covered).

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“pregnancy, childbirth, and related medical conditions” within the protections afforded by Title VII.⁵⁵

Following passage of the PDA, the Supreme Court decided *Newport News Shipbuilding and Dry Dock Co. v. EEOC*.⁵⁶ In that case, the defendant employer altered its health insurance plan to provide its female employees with pregnancy benefits.⁵⁷ However, the employer still did not offer pregnancy benefits to the female spouses of its male employees.⁵⁸ When the male employees sued, the Court concluded the PDA clarified Title VII to make clear that discrimination based on a woman’s pregnancy is necessarily discrimination because of her sex.⁵⁹ The Court declared that the employer could not discriminate between the pregnancy benefits offered to the dependants of male employees and those of female employees.⁶⁰

When the PDA appeared again on the Supreme Court’s docket years later in *California Federal Savings and Loan v. Guerra*,⁶¹ the Court ruled that the PDA did not prohibit providing additional health benefits to women for pregnancy related issues.⁶² Though the Court reinforced the interpretation that the PDA prohibited discrimination based on pregnancy, the Court

⁵⁵ Title VII provides in relevant part:

“It shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . , sex;”

The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) (West 2009).

And the PDA amended Title VII to provide:

“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 . . . shall be treated the same for all employment-related purposes . . . , as other persons not so affected by similar in their ability or inability to work.”

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

⁵⁶ 462 U.S. 669 (1983).

⁵⁷ *Newport News*, 462 U.S. at 670-71.

⁵⁸ *Id.* at 671.

⁵⁹ *Id.* at 684.

⁶⁰ *Id.* at 684-85.

⁶¹ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

⁶² *See id.* at 280 (holding that benefits available to women relating to pregnancy that were not offered to their male counterparts due to their inability to get pregnant was not a violation of Title VII).

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concluded that the PDA did not prohibit providing additional benefits to women for pregnancy-related issues.⁶³ In affirming the Ninth Circuit’s ruling that the PDA did not preclude additional benefits for pregnancy, the Court rejected the District Court’s interpretation of *Newport News* that the PDA prohibited both preferential and discriminatory treatment.⁶⁴

The Supreme Court again took the opportunity to examine a pregnancy discrimination issue in *UAW v. Johnson Controls Inc.*⁶⁵ The defendant employer prohibited all fertile women from working in battery manufacturing because the occupational exposure to lead was hazardous to fetuses.⁶⁶ The Seventh Circuit Court of Appeals viewed the employer’s policy as facially neutral between male and female employees because it merely distinguished between fertile women and infertile women.⁶⁷ The Supreme Court, however, disagreed because the policy classified employees on the basis of their gender and childbearing capacity, not fertility.⁶⁸

The Court found that the employer policy violated the PDA because it classified on the basis of potential for pregnancy.⁶⁹ The Court determined that the policy treated all female employees as potentially pregnant and such an approach must necessarily be treated as sex discrimination under the PDA.⁷⁰ Specifically, the Court found that the policy was not gender neutral because it did not apply to fertile male employees in the same manner as it applied to

⁶³ *Id.*

⁶⁴ *Id.* at 279 (citing the district court’s interpretation of *Newport News* (462 U.S. 669) to say that policies “which require preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions are pre-empted by Title VII and are null . . . , [and] void”).

⁶⁵ 499 U.S. 187 (1991).

⁶⁶ *Johnson Controls*, 499 U.S. at 190-91.

⁶⁷ *Id.* at 197-98 (The Seventh Circuit concluded the policy was distinguishing between categories of women, and as such, it could not be discriminating against women. The Supreme Court rejected this reasoning because it ignored the fact that the PDA made discriminating against a woman’s childbearing capacity statutorily defined as tantamount to discriminating against women.).

⁶⁸ *Id.* at 198.

⁶⁹ *Id.* at 199.

⁷⁰ *Id.* (The employer’s 1982 policy statement uses the phrase “capable of bearing children” as the criterion for exclusion from the disputed jobs. The Supreme Court determined that in choosing to treat all fertile female employees as “potentially pregnant,” the company was violating the PDA.).

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fertile females.⁷¹ The Court concluded that the PDA “prohibit[s] discrimination on the basis of a woman’s ability to become pregnant.”⁷²

B. Lower Court Decisions

The Supreme Court has developed and articulated extensive precedent with regard to the PDA, but has yet to consider a case dealing with the applicability of Title VII to women undergoing infertility treatments. Lower courts, on the other hand, have attempted to apply the Supreme Court’s interpretations of Title VII and the PDA to a broader range of cases.⁷³ Since *Johnson Controls*, the lower courts have differed on how to articulate and enforce the precise rule created by the Supreme Court.⁷⁴ All courts accept that *Johnson Controls* prohibits discrimination based on potential pregnancy.⁷⁵ However, whether the term “potential pregnancy” in *Johnson Controls* brings pre-conception issues, such as infertility and contraception, or just post-conception issues related to pregnancy remains unclear.⁷⁶

⁷¹ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

⁷² *Id.* at 211.

⁷³ See, e.g., *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007) (declining to apply the PDA to prescription contraception); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994) (dealing with women seeking infertility treatment).

⁷⁴ Compare, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (holding that the treatment of infertility is not a medical condition relating to pregnancy for the purposes of the PDA), with *Pacourek*, 858 F. Supp. 1393 (holding that infertility is a related medical condition for the purposes of the PDA).

⁷⁵ See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345-46 (2d Cir. 2003) (acknowledging *Johnson Controls*’ inclusion of potential pregnancy in the protections of the PDA); *Krauel*, 95 F.3d at 680 (acknowledging that in *Johnson Controls*, “the Supreme Court held that discrimination on the basis of potential pregnancy was discrimination on the basis of sex”); *Union Pacific*, 479 F.3d at 941 (interpreting *Johnson Controls* to say that unless a woman’s reproductive capability kept her from performing the job, an employer could not discriminate against her based upon that potential); *Erickson v. Board of Governors of State Coll. and Univ.*, 911 F. Supp. 316, 319-20 (N.D. Ill. 1995) (noting that *Johnson Controls* includes potentially pregnant women under the PDA’s protections) *rev’d on other grounds*, 207 F.3d 945 (7th Cir. 2000); *Pacourek*, 858 F. Supp. at 1401 (citing *Johnson Controls* for the proposition that “the PDA covers potential or intended pregnancy”).

⁷⁶ See *Erickson*, 911 F. Supp. at 320 (N.D. Ill. 1995) (“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 [when she claims discrimination based on undergoing infertility treatments.]”); *Pacourek*, 858 F. Supp. at 1401-02 (acknowledging that, although *Johnson Controls* is not directly applicable, the issue in this case is guided by the principles established therein). But see *Saks*, 316 F.3d at 345-46 (interpreting *Johnson Controls* to hold that while discriminating against potential for pregnancy is a violation of Title VII, discriminating against infertility alone is not); *Krauel*, 95 F.3d 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

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In *Pacourek v. Inland Steel Co.*,⁷⁷ the United States District Court for the Northern District of Illinois handled a case where the plaintiff underwent in vitro fertilization (IVF) procedures with the knowledge of her employer.⁷⁸ The plaintiff and her employer communicated a number of times regarding the relationship between her career and her attempts to become pregnant.⁷⁹ Ultimately, the plaintiff was fired.⁸⁰

The defendant employer put forth two principal arguments. First, the defense argued that because the plaintiff was incapable of becoming pregnant naturally, she was not covered by the PDA. Second, the defense argued that because infertility is a gender-neutral condition, the condition is not covered by the PDA. On both grounds, the defense motioned that the plaintiff had failed to state a claim on which relief could be granted.

The court agreed that the defense had put forth two separate grounds for dismissal but rejected both arguments. The court, thus, bifurcated the issue of potential pregnancy from infertility.⁸¹ With respect to the first argument, the court concluded that the holding of *Johnson Controls* brought discrimination based on a woman's capacity to become pregnant within the protection of the PDA.⁸² Thus, because plaintiff had claimed that she was discriminated against

treatment of fertility problems applies to both female and male workers and thus is gender-neutral, *Johnson Controls* is inapposite."); *Union Pacific*, 479 F.3d at 941 (noting that the holding of *Johnson Controls* applies to discrimination-based concerns about what may occur during pregnancy and declining to include preconception fertility matters within the protection of the PDA).

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

⁷⁸ *Id.* at 1396-97.

⁷⁹ *Id.* at 1397.

⁸⁰ *Id.* at 1396.

⁸¹ *See id.* at 1401-04 (The analysis is split into two parts: discrimination based on potential or intended pregnancy; and plaintiff's condition of infertility as a pregnancy-related condition).

⁸² *See Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (relying on the legislative history for the proposition that the PDA was intended to combat discrimination against women because they "might become pregnant").

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based on her attempts to become pregnant, she had stated an appropriate claim that she was adversely treated on the basis of her potential for pregnancy.⁸³

Second, the *Pacourek* court noted that the issue of discriminating on the basis of potential or intended pregnancy is not necessarily the same issue as deciding whether infertility is a condition related to pregnancy for purposes of the PDA.⁸⁴ The court found that the language of the PDA is expansive, covering “pregnancy, childbirth, or related medical conditions.”⁸⁵ The court reasoned that the term “related” should favor inclusion over exclusion of conditions.⁸⁶ The *Pacourek* court held that if potential pregnancy is treated like pregnancy for the purposes of the PDA, potential-pregnancy-related medical conditions should be treated like pregnancy-related medical conditions for the purposes of the PDA.⁸⁷ Accordingly, the court ruled in favor of the plaintiff employee, holding that she had stated a claim under the PDA.⁸⁸ By making the additional finding that medical conditions related to a woman’s ability to have a child are necessarily conditions that are related to pregnancy and childbirth,⁸⁹ the *Pacourek* court went beyond the holding of *Johnson Controls*, and paved the way for a woman’s infertility treatments to be covered by the PDA.⁹⁰

⁸³ See *id.* (finding plaintiff to have stated a claim under the PDA).

⁸⁴ See *id.* (noting that there are two questions presented: whether it is illegal under the PDA to discriminate based on potential or intended pregnancy; and whether infertility is a condition related to pregnancy for the purposes of the PDA).

⁸⁵ *Id.* (quoting and interpreting Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978)).

⁸⁶ *Id.* (interpreting Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k)).

⁸⁷ *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1403 (N.D. Ill. 1994).

⁸⁸ *Id.* at 1404.

⁸⁹ *Id.* at 1403 (“In ordinary terms, a medical condition related to the ability to have a child is related to pregnancy and childbirth.”).

⁹⁰ See *Erickson v. Board of Governors of State Coll. and Univ.*, 911 F. Supp. 316, 319 (N.D. Ill. 1995) (agreeing with the *Pacourek* interpretation of the meaning of the PDA) *rev’d on other grounds*, 207 F.3d 945 (7th Cir. 2000).

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Multiple courts have rejected the *Pacourek* interpretation of medical conditions covered by the PDA.⁹¹ In *Krauel v. Iowa Methodist Medical Center*,⁹² the Eighth Circuit Court of Appeals held that the PDA covers only post-conception medical conditions.⁹³ The *Krauel* court first reasoned that the PDA requires discrimination on the basis of “pregnancy, childbirth, or related medical conditions” to be treated the same as discrimination on the basis of sex.⁹⁴ The court then invoked a canon of statutory construction that when a general term follows two specific terms, the rules of statutory construction require the general term to be bound by the limitations of the specific terms.⁹⁵ The court reasoned that “pregnancy” and “childbirth,” the two specific terms, limit “related medical conditions,” the following general term.⁹⁶ The court concluded that pregnancy and childbirth are conditions occurring after conception, and thus, related medical conditions covered by the PDA must also occur at that point.⁹⁷ Thus, infertility, a condition occurring prior to conception, was not covered by the PDA.

The *Krauel* court construction was adopted years later by the Western District of Michigan in *LaPorta v. Wal-Mart Stores, Inc.*⁹⁸ In *LaPorta*, a former employee sued Wal-Mart alleging that she was terminated because she was pursuing IVF treatments and would need to miss work.⁹⁹ The *LaPorta* court found *Krauel*’s construction persuasive and declined to include

⁹¹ See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (finding the court’s reasoning in *Pacourek* unpersuasive); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001) (agreeing with the *Krauel* analysis and declining to follow the reasoning in *Pacourek*).

⁹² 95 F.3d 674.

⁹³ *Krauel*, 95 F.3d at 679.

⁹⁴ *Id.* (citing Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978)).

⁹⁵ *Id.* (citing *Norfolk & W. Ry. v. American Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 163 F. Supp. 2d 758, 770 (rejecting the *Pacourek* interpretation of the PDA’s construction and adopting *Krauel*).

⁹⁹ *Id.* at 761-63.

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women undergoing fertility treatments as a protected class under the PDA because neither the language nor the legislative history of the PDA reflects a clear intent to cover infertility.¹⁰⁰

In *Saks v. Franklin Covey Co.*, the Second Circuit Court of Appeals considered a case in which a female employee sued her employer under the PDA because the employer health plan did not cover surgical infertility procedures. The court concluded that the lack of coverage did not violate the statute.¹⁰¹ The health plan in *Saks* covered some infertility treatments for both male and female employees, but it failed to cover other treatments including surgical impregnation procedures.¹⁰² In addition, the plan covered all post-conception pregnancy costs.¹⁰³ The court concluded that the PDA did not extend protection to infertility treatments because infertility is a gender-neutral condition and thus, did not require that infertility treatments be covered by the benefits plan.¹⁰⁴ The court accepted the finding of fact, however, that only women undergo surgical impregnation procedures and do so even when the it is their male partner suffering from infertility.¹⁰⁵

In 2007, the Eighth Circuit Court of Appeals revisited the issue of whether the PDA covers pre-conception medical conditions in *Union Pacific Railroad Employment Practices Litigation*.¹⁰⁶ In *Union Pacific*, the court considered whether the PDA required employers to provide health care coverage for prescription contraceptives in their benefits packages. Although addressed by several district courts,¹⁰⁷ the Eighth Circuit was the first appellate court to reach

¹⁰⁰ *LaPorta*, 163 F. Supp. 2d at 770-71.

¹⁰¹ *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003).

¹⁰² *Id.* at 341.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 345.

¹⁰⁵ *Id.* at 347.

¹⁰⁶ *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007).

¹⁰⁷ *Id.* at 940 n.1 (identifying *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1016-17 (W.D. Mo. 2006) (skeptically holding that the PDA requires coverage); *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979, 984-85 (E.D. Mo. 2003) (denying summary judgment and holding that denial of contraception coverage could constitute gender discrimination); *Erickson v. Bartell Drug Corp.*, 141 F. Supp. 2d at 1270-71 (W.D. Wash. 2001) (holding

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this issue.¹⁰⁸ The court held that *Johnson Controls* is consistent with the proposition that the PDA covers only women with post-conception medical issues.¹⁰⁹ The court reasoned that in *Johnson Controls* the employer's discrimination based on the potential for pregnancy violated the PDA because "only women can become pregnant."¹¹⁰ The court of appeals concluded that although contraception affects the "causal chain" that leads to pregnancy and childbirth, such a connection, by itself, is insufficient to establish a related condition.¹¹¹

The Eighth Circuit Court of Appeals had previously concluded in *Krauel* that infertility was "strikingly different" from pregnancy and childbirth and thus, could not be covered by the PDA.¹¹² The court reasoned that contraception's effective result is to prevent pregnancy and childbirth, and that contraception, like infertility, can only be indicated prior to pregnancy.¹¹³ The court did not, however, distinguish between conditions and actions that prevent pregnancy from those actions that seek to enable it.

IV. Hall v. Nalco: Facts and Reasoning

The Seventh Circuit Court of Appeals heard arguments in June 2007 for *Hall v. Nalco Co.*,¹¹⁴ a case where a woman was fired for absences related to her pursuit of fertility treatments. The factual setting of the case, largely undisputed, presented an opportunity for the court of appeals to weigh in on these unsettled principles.

that a company's exclusion of prescription contraceptives was a violation of the PDA because providing women-only benefits like prescription contraceptives was the purpose of the PDA); *but see* EEOC v. United Parcel Service, Inc., 141 F. Supp. 2d 1216 (D. Minn. 2001) (dismissing the claim that the exclusion of oral contraceptives was sex discrimination under Title VII).

¹⁰⁸ *Id.* at 940 ("Neither the circuit courts nor the Supreme Court has considered whether the PDA applies to contraception.").

¹⁰⁹ *Id.* at 941.

¹¹⁰ *Id.* (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)).

¹¹¹ *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 941 (8th Cir. 2007) (citing *Krauel*, 95 F.3d at 679).

¹¹² *Id.* (citing *Krauel*, 95 F.3d at 679-80).

¹¹³ *Id.* at 942.

¹¹⁴ 534 F. 3d 644 (7th Cir. 2008).

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A. Facts and Procedural History

In 1997, Cheryl Hall was hired by Nalco Company in its manufacturing facility.¹¹⁵ In April 2000, Hall became a sales secretary to the district sales manager, Marv Baldwin, in the Chicago-area office.¹¹⁶ Baldwin, in turn, reported to Geordie Hamilton, the regional sales manager.¹¹⁷

In early 2003, Hall notified Baldwin that she would be requesting leave to undergo an in vitro fertilization (IVF) procedure.¹¹⁸ In March 2003, she formally requested that leave¹¹⁹ and was absent from March 24, 2003 to April 21, 2003 as a result of the treatment.¹²⁰ The procedure, however, was unsuccessful.¹²¹ Hall returned to work at her prior position after her leave but notified Baldwin that she planned to undergo the infertility treatment again.¹²² In late July 2003, Hall applied for another leave of absence set to begin on August 18.¹²³

Beginning in January 2003, Nalco was undergoing reorganization in an effort to reduce costs.¹²⁴ By mid-June, the decision was made to consolidate the Chicago-area office in which Hall worked and the other Chicago-area office.¹²⁵ As a result of the consolidation, only one of two secretaries would continue to be employed.¹²⁶ At the end of July 2003, Baldwin informed Hall that the offices would be merging and that Hall's counterpart in the other office would be assuming the lone secretary position in the new office.¹²⁷

¹¹⁵ *Hall v. Nalco Co. (Hall I)*, 2006 WL 2699337, *1 (N.D. Ill. 2006), *rev'd*, 534 F.3d 644 (7th Cir. 2008).

¹¹⁶ *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008).

¹¹⁷ *Hall I*, 2006 WL 2699337, at *1.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Hall*, 534 F.3d at 645.

¹²² *Hall I*, 2006 WL 2699337, at *1.

¹²³ *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008).

¹²⁴ *Hall I*, 2006 WL 2699337, at *1.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

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Around August 5, 2003, Hall requested information as to the status of her leave.¹²⁸ On August 6, 2003, Baldwin replied stating that Hall had been terminated with an effective date of August 31, 2003.¹²⁹ Baldwin told Hall that her firing “was in [her] best interest due to [her] health condition.”¹³⁰ Additionally, the secretary Nalco retained in lieu of Hall, had been incapable of becoming pregnant for 15 years prior to the decision of whom to keep.¹³¹

Baldwin discussed Hall’s termination with Jacqueline Bonin (“Bonin”), Nalco’s employee-relations manager, before informing Hall.¹³² Bonin’s notes pertaining to the conversation show that Hall’s absences were discussed and, more specifically, that the absences were related to infertility treatments.¹³³

Hall filed a sexual discrimination complaint with the Equal Employment Opportunity Commission (EEOC) in March 2004.¹³⁴ In August, the EEOC issued her a Dismissal and Notice of Right to Sue for her charge,¹³⁵ at which point she filed an action in federal district court.¹³⁶

The district court granted summary judgment in favor of Nalco prior to reaching the merits of Hall’s claim.¹³⁷ The court held that infertility did not qualify as a “related medical condition” under the Pregnancy Discrimination Act (PDA)¹³⁸ and noted that Title VII¹³⁹ does not

¹²⁸ *Id.*

¹²⁹ *Hall v. Nalco Co. (Hall I)*, 2006 WL 2699337, *1 (N.D. Ill. 2006), *rev’d*, 534 F.3d 644 (7th Cir. 2008).

¹³⁰ *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

¹³¹ *Id.* (“Dwyer . . . , was a female employee who since 1988 had been incapable of becoming pregnant.”).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Hall I*, 2006 WL 2699337, at *1.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Hall*, 534 F.3d at 645.

¹³⁸ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978) (The PDA amended Title VII to protect women from adverse employment actions based upon pregnancy and “related medical conditions.”).

¹³⁹ The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) (West 2009).

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protect a woman from adverse employment actions based upon her receiving treatment for

infertility.¹⁴⁰ Hall appealed the district court's decision to the Seventh Circuit Court of Appeals.

B. Court's Analysis

In *Hall v. Nalco Co.*,¹⁴¹ the United States Appeals Court for the Seventh Circuit considered whether a woman states a cognizable claim under Title VII¹⁴² when she alleges that she was fired for taking a leave of absence from work to undergo infertility treatments.¹⁴³ The court's answer to this issue of first impression¹⁴⁴ was a resounding "yes." Although the court did not decide whether Hall's case was meritorious, the court held that employers may not make employment decisions based on a woman's utilization of infertility treatment.¹⁴⁵

First, the court examined the text of Title VII and the PDA amendment of 1978. The court found that Title VII prohibits employers from discriminating against an employee due to the employee's gender.¹⁴⁶ The *Hall* court noted that the PDA was enacted by Congress in response to *General Electric Co. v. Gilbert*¹⁴⁷ which held that excluding pregnancy as a non-occupational disability covered by an employer's benefits plan was not a violation of Title VII.¹⁴⁸ The court concluded that the PDA served to clarify the scope of Title VII and made it clear that discrimination based on pregnancy is tantamount to discrimination based on gender.¹⁴⁹

¹⁴⁰ *Hall I*, 2006 WL 2699337, at *2.

¹⁴¹ 534 F.3d 644.

¹⁴² Title VII, 42 U.S.C. § 2000e-2(a).

¹⁴³ *Hall*, 534 F.3d at 646.

¹⁴⁴ *Id.* (stating that the Court is "unaware that any other circuit has addressed the precise question presented here.").

¹⁴⁵ *Id.* at 648-49 (holding that Hall's allegations present a cognizable claim under Title VII because employment actions based upon childbearing capacity – which includes actions based on fertility treatments - represent such a claim).

¹⁴⁶ *Id.* at 647 (quoting Title VII, 42 U.S.C. §2000e-2(a)(2)).

¹⁴⁷ 429 U.S. 125 (1976).

¹⁴⁸ *Hall*, 534 F.3d at 647 (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-78 (1983)).

¹⁴⁹ *Id.* (quoting *Newport News*, 462 U.S. at 683-85).

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The court found the proposition that Title VII, as amended, protects women from policies and actions adverse to pregnancy was not at issue. Rather, the *Hall* court framed the question before it as whether infertility and women undergoing treatment for the condition are protected by Title VII. The district court concluded that Hall’s allegations were insufficient to state a claim based primarily upon two cases: *Saks v. Franklin Covey Co.*¹⁵⁰ and *Krauel v. Iowa Methodist Medical Center.*¹⁵¹ The court of appeals found that both cases relied upon by the district court represented a departure from the Supreme Court decision in *UAW v. Johnson Controls, Inc.*,¹⁵² where the Court invalidated an employer policy that barred all fertile women from jobs involving lead exposure.¹⁵³ In *Johnson Controls*, the employer had instituted the policy because lead exposure has potentially damaging effects on fertility and fetuses.¹⁵⁴ The court found that the employer policy violated the PDA because it did not base the classification on fertility alone, but rather on *gender* combined with childbearing capacity.¹⁵⁵

Based on the Supreme Court’s reasoning in *Johnson Controls*, the *Hall* court inferred that classifications based on fertility alone were acceptable under the PDA,¹⁵⁶ but that it is impermissible to use classifications based on “potential for pregnancy.”¹⁵⁷ The *Hall* court agreed with the *Saks* analysis that such a differentiation is necessary else “[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

¹⁵⁰ 316 F.3d 337 (2d Cir. 2003).

¹⁵¹ 95 F.3d 674 (8th Cir. 1996).

¹⁵² 499 U.S. 187 (1991).

¹⁵³ *Hall*, 534 F.3d at 647-48 (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991)).

¹⁵⁴ *Id.* at 648 (citing *Johnson Controls*, 499 U.S. at 198).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citing *Johnson Controls*, 499 U.S. at 198).

¹⁵⁷ *Id.* at n.1 (interpreting *Johnson Controls* to “recognize the applicability of the PDA to classifications based on ‘potential for pregnancy,’ not just actual pregnancy”).

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sex discrimination.”¹⁵⁸ However, the court noted that *Saks*, by its own terms, did not consider whether a female employee has a valid claim under the PDA or Title VII when she receives an adverse employment action for taking a leave of absence to undergo infertility treatments.¹⁵⁹

The *Hall* appeals court found that the district court erred in considering only infertility as the basis of the employment action.¹⁶⁰ The court concluded that regardless of whether infertility is at issue, employer actions must be gender-neutral to be valid.¹⁶¹ The court found that the issue is not a question of infertility, but rather a question of the gender-specific characteristic of childbearing capacity.¹⁶² The court reasoned that employees who are absent from work due to infertility treatments will always be women.¹⁶³ Therefore, the appeals court found that the district court committed error by considering the petitioner employee’s infertility to be the relevant consideration.¹⁶⁴

Although the court declined to adopt the petitioner’s position that infertile women are a protected class under the PDA,¹⁶⁵ the court found that she nonetheless stated a cognizable sex discrimination claim under Title VII.¹⁶⁶ The court reasoned that whenever an employer takes an adverse action based on a childbearing capacity, it will result in “treatment of a person in a manner which but for that person’s sex would be different.”¹⁶⁷

The respondent employer argued, in the alternative, that notwithstanding a cognizable claim, the legitimate business reasons for terminating the petitioner employee obviated a

¹⁵⁸ *Hall v. Nalco Co.*, 534 F.3d 644, 648 (7th Cir. 2008) (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003)).

¹⁵⁹ *Id.* at 648 n.2 (quoting *Saks*, 316 F.3d at 346 n.4).

¹⁶⁰ *Id.* at 648.

¹⁶¹ *Id.* (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684-85 (1983)).

¹⁶² *Id.* (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991)).

¹⁶³ *Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008).

¹⁶⁴ *Id.* at 649.

¹⁶⁵ *Id.* at 649 n.3 (explaining that the court is not using *Hall*’s analysis but that it is not fatal to her claim).

¹⁶⁶ *Id.* at 649.

¹⁶⁷ *Id.* (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

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discrimination analysis. The court found that there was enough of a factual dispute to have a trial to determine the reason Hall was fired, rendering summary judgment inappropriate for the case.¹⁶⁸

V. Critical Analysis

A. The Court's Reasoning

The *Hall* court correctly held that employees who miss significant work to undergo surgical infertility treatments will always be women.¹⁶⁹ However, the court failed to emphasize that this is the proper basis for the finding the petitioner employee's claim to be meritorious under Title VII. The Pregnancy Discrimination Act (PDA) did not create any new rights or remedies for women,¹⁷⁰ but it did clarify the protections Title VII provided to women already.¹⁷¹ Congress adopted the PDA in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*¹⁷² and sought only to expressly correct the Court's misguided thinking by clarifying the original intent of the legislation.¹⁷³ Since the PDA's enactment, Title VII's test has been best expressed as whether an adverse employment action treats the employee in a way that would be different were it not for the employee's sex.¹⁷⁴

Courts refusing to apply Title VII to women undergoing treatment for infertility make two fundamental errors in their analyses. First, the courts fail to recognize that the claim is

¹⁶⁸ *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

¹⁶⁹ *Id.* at 648-49.

¹⁷⁰ *See id.* at 647 (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 (1983)); *see also Newport News*, 462 U.S. at 679 n.17 (quoting 123 Cong. Rec. 10582 (1977) (remarks of Rep. Hawkins)) (“[The PDA] does not really add anything to Title VII as I and, I believe, most of my colleagues in Congress . . . , understood the prohibition against sex discrimination in employment.”).

¹⁷¹ *Hall*, 534 F.3d at 647 (citing *Newport News*, 462 U.S. at 684).

¹⁷² 1978 U.S.C.C.A.N. 4749, 4750 (“It is the committee's view that the dissenting Justices [of *Gilbert*] correctly interpreted [Title VII].”).

¹⁷³ *Newport News*, 462 U.S. at 679 n.17 (quoting S.Rep. No. 95-331, 95th Cong. 1st Sess. 7-8 (1978)).

¹⁷⁴ *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (Although *Manhart* was decided before the Pregnancy Discrimination Act was decided, the interpretation of Title VII contained therein was re-asserted in *Newport News*, 462 U.S. at 682-83.).

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premised upon gender-specific treatments and not the gender-neutral condition of infertility.¹⁷⁵

Second, the courts erroneously look to whether the PDA provides express coverage of infertility or its treatment.¹⁷⁶ The PDA need not expressly cover infertility because the condition is not the reason that plaintiffs like Hall are being terminated. Rather, it is the absences associated with the condition's treatment that afflict only women. Therefore, women seeking treatment for infertility suffer from adverse actions based on a gender-specific reason that is necessarily covered by Title VII.

Only in *Saks v. Franklin Covey Co.* did the court consider treatment differences between sexes.¹⁷⁷ However, the court's reasoning was inapplicable to whether an employer may take an adverse action against a woman for absences due to infertility treatments. First, the court considered only coverage for infertility treatment in an employer's benefits plan.¹⁷⁸ The court premised its analysis on the fact that infertility treatments are inexorably linked to a gender-neutral condition.¹⁷⁹ The *Saks* court then reasoned that because the condition is gender-neutral, the cost of excluding the treatment from benefits plans is a gender-neutral burden.¹⁸⁰ For example, the court noted that when a male suffers from infertility, his healthy female partner must undergo the surgical procedure.¹⁸¹

¹⁷⁵ See, e.g., *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770-71 (W.D. Mich. 2001) (noting that infertility is a condition afflicting both men and women and failing to consider whether the treatments have significantly different burdens on men and women).

¹⁷⁶ See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996) (applying general rules of statutory construction in an effort to determine whether infertility is expressly covered by the PDA); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (considering the question of whether the PDA's prohibition of discrimination based on "related medical conditions" includes discrimination on the bases of infertility); *LaPorta*, 163 F. Supp. 2d at 770-71 (agreeing with the *Krauel* analysis of the PDA vis a vis infertility).

¹⁷⁷ See generally *Saks*, 316 F.3d 337, 346-49 (discussing the plaintiff's gender discrimination claim).

¹⁷⁸ See *id.* at 346 (considering whether exclusion of coverage for surgical impregnation procedures violates Title VII because the procedure is performed only on women).

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* (noting that surgical impregnation procedures performed for the treatment of infertility are unique in that although they are performed only on women, they are a treatment for a gender-neutral condition).

¹⁸¹ *Id.*

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The circumstances described in *Saks* clearly implicate Title VII when an adverse employment action is taken against a woman for absences while undergoing treatment for infertility. The *Saks* court found that the burden of paying for treatment of infertility falls on couples, making it gender-neutral.¹⁸² By contrast, only women bear the burden of missing work for significant periods of time. Thus, only women are vulnerable to termination for those absences.

The *Hall* court concluded that because the significant absence burden associated with surgical infertility treatments affects only women, the petitioner employee had stated a cognizable claim under Title VII. However, the court used suspect analysis to bring *Hall* under the “potential for pregnancy” principles established by the Supreme Court in *UAW v. Johnson Controls*. The *Hall* court’s reasoning that the petitioner’s claim was cognizable because it constituted discrimination based on potential for pregnancy is flawed. The court relied heavily on the *Johnson Controls* ruling that discrimination based upon “potential for pregnancy” is impermissible.¹⁸³ The fault lies in the court’s attempt to equate adverse employment actions based upon infertility and adverse actions premised upon “potential for pregnancy,” an argument that has been considered and rejected in a number of courts.¹⁸⁴

Hall can be factually distinguished from *Johnson Controls*. The employer policy in *Johnson Controls* discriminated against women because fertile men were permitted to work in units that fertile women were not.¹⁸⁵ The appellate court in *Johnson Controls* wrongly assumed that the policy was facially neutral because infertile women were not kept from working in the

¹⁸² See generally *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (The court did not consider whether the same reasoning applies for same-sex couples as the question was not before the court.).

¹⁸³ *Hall v. Nalco Co.*, 534 F.3d 644, 648-649 (7th Cir. 2008).

¹⁸⁴ See, e.g., *Saks*, 316 F.3d at 345-46 (declining to extend the principles of *Johnson Controls* to an infertility case); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (declining to apply *Johnson Controls* to a case of infertility).

¹⁸⁵ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991).

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unit, and thus Johnson Controls was legally differentiating between fertile and infertile women, not gender.¹⁸⁶ The employee petitioner's claim in *Hall*, by contrast, alleged discrimination between infertile women seeking treatment and infertile women not seeking treatment.¹⁸⁷

While the Supreme Court's holding in *Johnson Controls* was surely attractive to strengthen the precedent used by the *Hall* court, the *Johnson Controls* reasoning is of questionable merit for the *Hall* circumstances. The holding in *Johnson Controls*, that an employer cannot discriminate against a woman based on her *potential* for pregnancy, applies literally to female infertility cases, since petitioner's potential was technically increased by undergoing the treatments. But *Johnson Controls* has been construed in other circuits to protect women against adverse actions only when the discrimination is based on both fertility *and* gender.¹⁸⁸ Thus, absent a showing that the respondent employer did not terminate men who sought infertility treatment, this line of reasoning is flawed.

By relying on "potential for pregnancy" as the predicate for the petitioner employee's action, the court obscures the rightful basis of her action: discrimination on the basis of work absence due to a surgical procedure that is unique to women necessarily discriminates based on gender. Perhaps the court couched its decision in the language of *Johnson Controls* to prevent a challenge on statutory construction grounds.¹⁸⁹ Other courts have rejected applying the PDA to pre-pregnancy conditions notwithstanding the holding of *Johnson Controls*.¹⁹⁰ Thus, *Hall's*

¹⁸⁶ *Id.* at 197-98 (The Court rejected the appellate court's assumption that sex-specific fetal protection policies do not involve facial discrimination).

¹⁸⁷ See *Hall v. Nalco Co. (Hall I)*, 2006 WL 2699337, *1 (N.D. Ill. 2006), *rev'd*, 534 F.3d 644 (7th Cir. 2008) (*Hall* was replaced by a woman who was also infertile. Thus, the alleged discrimination was necessarily between those infertile persons seeking treatment and those not seeking treatment).

¹⁸⁸ See *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 941 (8th Cir. 2007) (citing *Krauel*, 95 F.3d at 679-80, for an interpretation of *Johnson Controls's* holding).

¹⁸⁹ See *Krauel*, 95 F.3d at 679 (interpreting the PDA to exclude protection of infertility).

¹⁹⁰ See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345-46 (2d Cir. 2003) (declining to extend the holding of *Johnson Controls* to protect infertile women); *Krauel*, 95 F.3d at 680 (declining to apply *Johnson Controls* to a case

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reasoning is not exempt from challenge on the same grounds notwithstanding other more valid arguments made by the court.

In vitro fertilization (IVF) procedures are one of several surgical Assisted Reproduction Technology (ART) procedures unique to women that require extensive pre-operation monitoring and significant recovery time.¹⁹¹ Therefore, the process of treating a woman's infertility is the pertinent issue rather than her infertility. Indeed, although infertility is gender-neutral as both men and women deal with the condition, the process of treating infertility is not. In fact, even though men and women have roughly equal rates of infertility,¹⁹² the treatment for male infertility is often performed on the woman.¹⁹³

The *Hall* claim is rightfully founded on Title VII, as amended by the PDA, as opposed to the language of the PDA. The argument that infertility (and even its treatment) is expressly covered by the PDA is difficult and has been rejected by numerous jurisdictions.¹⁹⁴ But because Title VII includes gender as a protected class¹⁹⁵ and extended work absences associated with surgical ARTs are unique to women, adverse employment actions against women receiving those treatments are inevitably and illegally predicated on gender. Additionally, as in *Hall*, a plaintiff must necessarily argue that she was discriminated against based on the treatments as opposed to

involving infertility); *Union Pacific*, 479 F.3d at 941 (rejecting the contention that the *Johnson Controls* applies to pre-conception medical issues).

¹⁹¹ See IVF FAQ, *supra* note 40 (describing the procedure); Program Timeline, *supra* note 40 (detailing the timeline for treatment).

¹⁹² Bentley, *supra* note 12, at 394-95 (citing American Soc'y for Reprod. Med., *Male Infertility and Vasectomy Reversal* at 3 (1995)).

¹⁹³ THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414-19; *accord* Speroff, *supra* note 19, at 1218; *see also* *Saks*, 316 F.3d at 347 (noting that when a man suffers from low sperm count, resulting in his infertility, his healthy female partner must undergo the surgical procedure).

¹⁹⁴ *Krauel*, 95 F.3d at 680 (arguing that infertility is a medical condition that is gender neutral and thus not cognizable under the PDA); *Saks*, 316 F.3d at 345-46 (arguing that discriminating against fertility alone is not a violation under the PDA).

¹⁹⁵ See The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) (West 2009) (expressly including gender as a protected class).

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the condition when her replacement was also infertile.¹⁹⁶ Clearly, the treatment was the rightful basis of the *Hall* petitioner employee's action and not the condition of infertility.

Infertility treatments represent the same dilemma as pregnancy. While it is true that both men and women suffer from infertility, the treatment is not comparable. Similarly, both men and women have a significant and legitimate role in child creation, but Title VII, as amended, protects the female role in child bearing.¹⁹⁷ Just as we protect a woman's role but not a man's in carrying a child, we must protect the woman's role in conceiving a child. Infertility treatments for men do not require significant absences from work, and additionally, men have no prospect of becoming pregnant after the treatment.¹⁹⁸ Women, on the other hand miss up to three or four weeks while undergoing some IVF procedures,¹⁹⁹ and often have to return for another round of treatments.²⁰⁰ Furthermore, women occasionally must endure surgical procedures for their male partner's infertility.²⁰¹ Therefore, similar to pregnancy, women bear the employment consequences of the couple's reproductive activity.

The gender difference in treatment burdens for infertility rivals the difference in burdens for childbearing. The infertile male's treatment is comparatively short because no monitoring is required in the doctor's office, and the male's semen is simply examined for a diagnosis as to the cause of infertility.²⁰² Although a biopsy and or extraction procedure is occasionally necessary to retrieve the sperm, the procedures involved require no preparation or recovery time and are

¹⁹⁶ *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

¹⁹⁷ See Title VII, 42 U.S.C. § 2000e-2(a) (protecting women from discrimination); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978) (adding pregnancy and related conditions to the description of the protected class).

¹⁹⁸ See Schlegel, *supra* note 19, at 374 (describing ICSI as minimally invasive); Mellinger, *supra* note 19, at 286 (noting that biopsies are an in-office procedure).

¹⁹⁹ MAYO CLINIC FAMILY HEALTH BOOK, *supra* note 44, at 1069-70; IVF FAQ, *supra* note 40; Program Outline, *supra* note 40.

²⁰⁰ See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1419 (noting that the rate of success is only 18%-25%).

²⁰¹ *Id.* at 1414-19; accord Speroff, *supra* note 19, at 1218.

²⁰² Anunta, *supra* note 22, at 262-69.

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handled in the doctor's office.²⁰³ Due to the limited effectiveness of a number of treatments for male infertility, many couples seek IVF to overcome the sperm deficiencies.²⁰⁴

Conversely, the female role in ARTs involves repetitive monitoring of a woman's various reproductive attributes,²⁰⁵ and in many cases, a surgical implantation of embryos.²⁰⁶ Both the monitoring and the surgery can result in significant employment absences.²⁰⁷ Moreover, by not protecting women from discrimination based upon treatment absences, women are faced with the prospect adverse employment actions based on their treatment as a legal proxy for what would otherwise be an illegal adverse action based on pregnancy. Thus, Title VII must be read to protect the employment prospects of the woman under these circumstances.

B. Extensions and Consequences of the Ruling

Reasoning that women should be protected for matters unique to them, however, is not limitless. One necessary consideration is the voluntary nature of surgical fertility treatments. The *Gilbert* majority argued that pregnancy differed from other health conditions due to its voluntary nature.²⁰⁸ The dissent argued that the difficulty in distinguishing between voluntary and involuntary pregnancies was impractical and thus, should not be a relevant consideration.²⁰⁹ Although infertility treatments are clearly voluntary, Congress demonstrated a desire to protect women's ability to reproduce by enacting protections for pregnant women in the Family Medical

²⁰³ Speroff, *supra* note 19, at 1236 (detailing ICSI procedure); Schlegel, *supra* note 19, at 374 (describing ICSI as minimally invasive); Mellinger, *supra* note 19, at 286 (noting that biopsies are an in-office procedure).

²⁰⁴ Speroff, *supra* note 19, at 1218 (noting that when male treatments are ineffective, IVF presents a workable alternative in many cases).

²⁰⁵ See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001) (noting that stimulation of the ovaries requires frequent visits to the doctor's office to monitor for "hyperstimulation," a potentially fatal condition in which the ovaries become swollen).

²⁰⁶ See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1419 (detailing IVF procedures).

²⁰⁷ See Program Timeline, *supra* note 40 (detailing the timeline for treatment at a clinic).

²⁰⁸ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *overruled by* 42 U.S.C. § 2000e(k) (1978).

²⁰⁹ *Id.* at 151 n.3 (Brennan, J. dissenting).

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Leave Act,²¹⁰ Americans with Disability Act,²¹¹ and Title VII as amended by the PDA.

Regardless of whether the protections afforded by Congress were based on the premise that pregnancy is voluntary, they represent the idea that a woman's desire to reproduce is something that we, as a society, should protect.

The extent of the protection that should be afforded to women seeking surgical infertility treatments remains unresolved. Title VII, for example, does not require that employers treat pregnant women differently from similarly disabled employees (such as heart attack victims).²¹² If an employer enacts a leave policy stating that anyone who misses three consecutive days of work will be terminated, so long as the policy is uniformly applied across all conditions, it does not offend Title VII.²¹³ The key to that analysis in the case of pregnancy is determining whether other conditions are treated alike.²¹⁴ Similarly, employers are not required to provide health benefits to their employees. But, if an employer provides coverage for disabilities and illnesses like cancer, the employer must also provide benefits for pregnancy.²¹⁵

²¹⁰ Family Medical Leave Act, 29 U.S.C. §2601 (West 2009).

²¹¹ Americans with Disabilities Act, 28 U.S.C. §12101 (West 2009) (though it provides only limited protections).

²¹² See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978) (“pregnancy . . . , shall be treated the same for all employment-related purposes . . . , as other persons not so affected but similar in their ability or inability to work.”); cf. Jamie L. Clanton, Note, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to “Mean What it Says”*, 86 IOWA L. REV. 703 at 713-14 (Pregnancy has been held in multiple circuits to be analogous for the purposes of treatment in the workplace to other conditions that result in an inability to work. The primary dispute is whether pregnancy has to be treated similarly to conditions that are caused either inside or outside the workplace or whether the relevant conditions are only those occurring outside the workplace).

²¹³ See *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861-62 (5th Cir. 2002) (The Court held that the nature of pregnancy is such that the woman will miss a limited amount of work time at some point. However, to rule that the employer needs to provide leave sufficient to cover pregnancy-related absences would be to require employers to provide pregnancy leave under Title VII. The Court noted that this is not the law.); see also *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1400 (N.D. Ill. 1994) (quoting *Troupe v. May Dep’t Stores, Co.*, 20 F.3d 734, 738 (7th Cir. 1994)) (“The Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, 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 at all.”).

²¹⁴ See Clanton, *supra* note 212, at 713-14 (noting that pregnant women need to be treated the same as those ‘similarly situated’ with regard to their ability to work).

²¹⁵ Cf. *Hall v. Nalco Co.*, 534 F.3d 644, 647 (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-78 (1983)) (The PDA overturned *Gilbert*’s holding that excluding pregnancy from a list of nonoccupational disabilities that are covered by the employer’s benefits plan does not amount discrimination on the basis of sex.).

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Infertility and its treatments present a unique situation. Infertility, unlike pregnancy, is a gender-neutral condition. The treatment of infertility, on the other hand, is not gender-neutral, representing a significant similarity to pregnancy. Infertility treatments cannot be treated like pregnancy, but for the reasons stated above, they should also not be treated like other elective surgeries.

Under the principles of Title VII, an employer who provides coverage for infertility treatments in its health benefits to its male employees must provide them to its female employees notwithstanding the cost difference.²¹⁶ Seemingly, this would create a disincentive for employers to provide such benefits at all. Thus, by requiring employers to cover either treatments for both male and females, or neither male nor female, the law would effectively eliminate male infertility benefits from employer plans. In either case, female treatments will not be covered and so the relevant consideration is whether the cost of male fertility treatments is worth discriminating against women who undergo treatments on their own.

The *Saks* court, on the other hand, presents an interesting solution that could limit the protection of female infertility treatments to adverse employment actions. The court held that the burden of paying for surgical infertility treatments is gender-neutral because infertility afflicts couples.²¹⁷ However, the court's reasoning failed to consider the rights of single women and same-sex couples. The court's analysis requires acceptance of the fact that only couples consisting of a male and a female will seek treatment for infertility. Because the policy

²¹⁶ See *Newport News*, 462 U.S. at 684-85 (holding that employers could not discriminate between the benefits offered to male employees and female employees); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (holding that pregnancy-related benefits available to women that were not offered to their male counterparts due to their inability to get pregnant was not a violation of Title VII). But see *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (holding that because infertility is a gender-neutral condition occurring, by definition, in a couple, denying coverage for female-specific treatments disadvantages both men and women equally).

²¹⁷ See *Saks*, 316 F.3d at 347 (holding that because infertility is a gender-neutral condition occurring, by definition, in a couple, denying coverage for female-specific treatments disadvantages both men and women equally).

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articulated in *Saks* will burden single women and lesbian couples in a way that heterosexual couples are not burdened, courts must be wary of accepting it at face value.

VI. Conclusion

As women continue to compete with men in the workforce, the playing field must be leveled. Congress' reaction to *General Electric Co. v. Gilbert*²¹⁸ was intended, not to create new rights for women, but rather to allow them to have the choice of having children of their own without necessarily sacrificing their career. Men have no such choice to make as their role in the child-creation and childbearing processes is usually limited. Women, by contrast, are significantly limited in their ability to work during periods of their pregnancy and are similarly limited during certain infertility treatments.²¹⁹ Additionally, in many cases, the most effective treatments for infertility of either male or female factors are performed on women.²²⁰ Thus, women bear a gender-specific burden in their employment notwithstanding the gender-neutral condition requiring the treatment.

When a female employee notifies an employer that she will be undergoing treatment for infertility, the employer is faced with the prospect of losing that employee's attendance for around three weeks for the treatments in addition to the eventual pregnancy leave. Conversely, if a male employee notifies the employer that he will miss work for fertility treatments, he will usually miss a day or two at most.²²¹ Any judgment based on the prospective absences is necessarily a judgment based on gender. The law should not sanction the firing of an employee for the precursors to an expressly protected medical condition, pregnancy.

²¹⁸ 429 U.S. 125 (1976).

²¹⁹ See IVF FAQ, *supra* note 40 (describing work limitations as similar to pregnancy).

²²⁰ See Speroff, *supra* note 19, at 1218 ("When treatment [for male factor infertility] is not possible or fails and insemination with donor sperm is not an acceptable option, IVF and ICSI, using sperm isolated from the ejaculate or extracted from the epididymis or testis, offer a very realistic hope for success.").

²²¹ See Speroff, *supra* note 19, at 1236 (detailing ICSI procedure); Schlegel, *supra* note 19, at 374 (describing ICSI as minimally invasive); Mellinger, *supra* note 19, at 286 (noting that biopsies are an in-office procedure).

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The courts must be also be mindful of the consequences of ruling that Title VII protects women who are absent from work due to female-specific treatments of infertility. While it is true that protecting a woman's right to infertility treatments would likely result in the reduced availability of coverage for men who seek such treatments, that is no reason to sanction discriminating against women who undergo the treatments. We cannot sanction discrimination simply because the people who are not discriminated against will lose the benefits gained by discriminatory policies.

The Seventh Circuit Court of Appeals made the right decision in *Hall v. Nalco Co.*²²² Discriminating against a woman because she is seeking to treat her gender-neutral condition with a gender-specific treatment – the only treatment available, is a violation of Title VII. Although infertility is not enumerated in the Pregnancy Discrimination Act (PDA), the PDA was not enacted to list gender-specific conditions worthy of protection. Rather, the PDA was enacted to clarify that Title VII protects employees from adverse employment actions based on factors that, but for their gender, would result differently. Therefore, by terminating a woman for missing work while undergoing treatment for infertility, employers are violating Title VII.

²²² 534 F.3d 644 (7th Cir. 2008).