

# 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.<sup>1</sup> Infertility treatments, though available for both genders, carry differing burdens for the two sexes. Although either the male or the female can cause a couple to be unable to have children without medical intervention, only females are subject to invasive surgery that requires a significant time commitment.<sup>2</sup> Female surgery and required monitoring occur even when a woman's male partner is the source of the couple's infertility.<sup>3</sup> 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."<sup>4</sup> But the scope of the protection afforded against sex-based discrimination is unclear. For example,

---

\* J.D. Candidate, May 2010, Temple University James E. Beasley School of Law; Bachelor of Arts, Urban Studies, 2004, University of Pennsylvania. I would like to thank Professor Sandra Sperino and my mother, Janice Madden, for their guidance and feedback throughout the writing process. I would also like to thank Paul Madden, Erin Madden, and Alexis Rossman for their love and support.

<sup>1</sup> 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. LEON SPEROFF, ROBERT H. GLASS, & NATHAN G. KASE, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 811-12 (5th ed. 1994); see also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK QUARTERLY, LABOR FORCE 36-37 (1999), available at <http://www.bls.gov/opub/ooq/1999/winter/art06.pdf> (showing female share of labor force increased from 1988-1998 and was projected to increase further by 2008). As a result, women were postponing pregnancy and attempting to have children at later ages. SPEROFF ET AL., *supra*. Fertility declines with age, so more women have sought treatment for infertility. *Id.* It should be noted, however, that age is not the only cause of infertility. *Id.*

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

<sup>3</sup> See *supra* notes 56-57 and accompanying text (noting that regardless of whether infertility originates in male or female, prescribed treatment is often to perform surgical procedure on the female).

<sup>4</sup> Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a) (2006).

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. Courts have wrestled with how much of that difference should be protected from discrimination.<sup>5</sup>

In 1978, Congress reacted to the Supreme Court's decision two years earlier in *General Electric Co. v. Gilbert*.<sup>6</sup> In *Gilbert*, the Court held that Title VII did not require employer disability benefit plans to cover pregnancy related disabilities.<sup>7</sup> In response, Congress passed the Pregnancy Discrimination Act ("PDA")<sup>8</sup> to counteract the *Gilbert* decision.<sup>9</sup> The PDA expanded the definition of gender discrimination to expressly include "pregnancy, childbirth and related medical conditions."<sup>10</sup> Congress thus sided with the dissenting justices of *Gilbert* by unambiguously extending the gender protections of Title VII to include pregnancy.<sup>11</sup>

The PDA was enacted before the advent of modern-day reproductive procedures. The first successful in vitro fertilization ("IVF")<sup>12</sup> procedure took place in London in 1978,<sup>13</sup> and the first successful procedure in the United States did not occur until 1982.<sup>14</sup> Therefore, the language of the PDA was not, and could not have been,

<sup>5</sup> See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding woman's potential to become pregnant is protected from discrimination by Title VII); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (holding employer who did not cover pregnancy in its disability benefits did not violate Title VII); *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 944-45 (8th Cir. 2007) (holding Title VII does not require prescription contraceptives be covered by employer benefits plans). Compare *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (holding woman being treated for infertility is protected by Title VII because such treatments are both conditions related to pregnancy), with *Saks v. Franklin Covey Co.*, 316 F.3d 337, 348 (2d Cir. 2003) (holding employers did not have to provide coverage for female fertility treatments under PDA), and *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (holding PDA only covers post-conception conditions and thus, not infertility treatments).

<sup>6</sup> 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>7</sup> *Gilbert*, 429 U.S. at 145-46, *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>8</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

<sup>9</sup> H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 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 & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (noting Congress had unambiguously disapproved of both holding and reasoning of *Gilbert*). See generally Reva B. Siegel, Note, *Employment Equality under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985) (discussing gender discrimination under PDA).

<sup>10</sup> See *Newport News*, 462 U.S. at 678 (discussing changes PDA made to Title VII).

<sup>11</sup> See H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750 (noting committee's belief that dissenting *Gilbert* justices were correct).

<sup>12</sup> 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.

THE MERCK MANUAL OF MEDICAL INFORMATION 1419 (Mark H. Beers, MD et al. eds., 2d ed. 2003).

<sup>13</sup> 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 SOCIETY FOR REPRODUCTIVE MEDICINE, IVF AND GIFT: A GUIDE TO ASSISTED REPRODUCTIVE TECHNOLOGIES 3 (1995)).

<sup>14</sup> *Id.* at 395 (citing Elisabeth Rosenthal, *From Lives Begun in a Lab, Brave New Joy*, N.Y. TIMES, Jan. 10, 1996, at A1).

specifically intended to apply to these new reproductive technologies. Although Congress could not fully anticipate future advances in reproductive technology, the PDA has become the statute chosen by the courts to govern disputes involving Assisted Reproduction Technologies (“ARTs”).<sup>15</sup>

In 2008, when the United States Court of Appeals for the Seventh Circuit heard *Hall v. Nalco Co.*,<sup>16</sup> 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.<sup>17</sup> Instead, the court had to interpret the language of the PDA for circumstances that were unforeseen at its inception.<sup>18</sup> In reaching its decision, the court considered whether, and to what degree, the PDA expanded the gender protections of Title VII.<sup>19</sup> Specifically, the court evaluated whether 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.<sup>20</sup> In other words, 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 Court of Appeals for the Seventh Circuit. Part IV sets forth the facts of *Hall* and the court’s reasoning and conclusion. 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 for one year.<sup>21</sup> Infertility can result from disorders of the reproductive systems of either the man (“male factor infertility”), the

---

<sup>15</sup> See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 348 (2d Cir. 2003) (holding employers were not required to provide health benefits for female fertility treatments under PDA); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (holding PDA only covers post-conception conditions, not infertility treatments); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001) (adopting *Krauel* interpretation of PDA for cases involving fertility treatments); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (finding *Johnson Controls* brought “potential for pregnancy” under ambit of PDA in case involving discrimination due to absences caused by an in vitro fertilization procedure).

<sup>16</sup> 534 F.3d 644 (7th Cir. 2008).

<sup>17</sup> *Id.* at 645.

<sup>18</sup> See *id.* at 649 (finding *Nalco* terminated *Hall* due to gender specific quality of childbearing capacity in violation of Title VII as amended by PDA); see also *Bentley*, *supra* note 13, at 395 (noting Congress could not have intended to include in vitro fertilizations under original PDA as these procedures were not performed successfully in United States until four years after statute’s enactment (citing *Elisabeth Rosenthal, From Lives Begun in a Lab, Brave New Joy*, N.Y. TIMES, Jan. 10, 1996, at A1)).

<sup>19</sup> See *Hall*, 534 F.3d at 646-48 (analyzing interaction between Title VII and PDA and their impact on relevant cases).

<sup>20</sup> See *id.* (discussing statutory construction, case law, and legislative history).

<sup>21</sup> THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414.

woman (“female factor infertility”), or both.<sup>22</sup> Because the causes differ between genders, the treatments are also sex specific.

This section discusses the causes and treatments of infertility as they apply to both genders and the respective burdens of these treatments 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 may miss significant amounts of work time while undergoing either pregnancy or infertility treatment.

Male infertility, though common, does not require the same degree of invasive surgical procedures and significant time commitments for treatment.<sup>23</sup> Some conditions in males suppress the sperm count.<sup>24</sup> Other disorders cause sperm to be completely absent from semen or block the semen from being transferred out of the penis.<sup>25</sup> Different treatments are warranted depending upon the specific diagnosis of male factor infertility.<sup>26</sup> Initially, doctors examine the man’s reproductive system and his sperm.<sup>27</sup> When sperm cells are absent or when the sperm count is low, doctors may suspect some type of obstruction and will often take a testicular biopsy.<sup>28</sup> Biopsy is technically a surgical procedure, but it is minimally invasive and requires minimal time commitment from the male patient.<sup>29</sup> When an infertile male does not produce enough sperm, but the sperm produced are normal, doctors may prescribe oral drugs in an attempt to raise the sperm count.<sup>30</sup>

---

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Brett C. Mellinger, *Testicular Biopsy of the Infertile Male*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT 285, 286 (Fouad R. Kandeel ed., 2007) (noting biopsies are in-office procedure); Peter N. Schlegel & Jeremy Kaufman, *Surgical Treatment of Male Infertility*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT, *supra*, at 365, 370-74 (describing microsurgical process of modern vasectomy reversals and Intracytoplasmic Sperm Injections (ICSI)); LEON SPEROFF & MARC A. FRITZ, CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 1236 (7th ed. 2005) (describing Intracytoplasmic Sperm Injection (ICSI) procedure); Varicoceles.com, Varicocele Treatment Options and Varicocele Pictures, <http://www.varicoceles.com/varicocele-treatment-options.htm> (last visited Feb. 2, 2010) [hereinafter *Varicocele Treatment*] (stating embolization of varicocele is outpatient procedure performed without anesthesia).

<sup>24</sup> THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414-15 (noting conditions include but are not limited to: increased temperature to testes, hormonal and genetic disorders that interfere with sperm production, injury to testes, exposure to environmental toxins, drugs, and mumps that affect testes).

<sup>25</sup> 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. *Id.* Sometimes, sperm carrying semen moves into the bladder instead of down the penis resulting in the sperm not exiting the body. *Id.* Without treatment, all cases result in infertility. *Id.* at 1415.

<sup>26</sup> *Id.*

<sup>27</sup> See Chakriya D. Anunta & Fouad R. Kandeel, *Clinical Assessment of the Infertile Male*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT, *supra* note 23, at 261, 262-69 (describing first part of diagnosis as involving physical examination followed by examination of semen).

<sup>28</sup> See Mellinger, *supra* note 23, at 285 (describing conditions precedent to testicular biopsy).

<sup>29</sup> See *id.* (describing 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”).

<sup>30</sup> See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1415 (explaining 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 number of abnormal sperm and has not been proven to increase fertility in men).

Other more intensive surgical treatments, such as varicocele repair<sup>31</sup> and vasectomy reversal,<sup>32</sup> are offered for male infertility. While the actual time period involved in surgery to repair varicocele varies,<sup>33</sup> surgery is not often recommended for two reasons: (1) other treatments such as embolization of the varicocele,<sup>34</sup> intrauterine insemination,<sup>35</sup> and Intracytoplasmic Sperm Injection (“ICSI”)<sup>36</sup> are effective and less invasive;<sup>37</sup> and more importantly (2) varicocele repair is not an effective treatment for male or unexplained infertility.<sup>38</sup>

In the case of vasectomy reversals, the procedure reverses a previous voluntary surgery intended to create infertility. While vasectomy reversals are more invasive than other male infertility treatments,<sup>39</sup> vasectomy reversals are not necessarily the best option to achieve pregnancy because of other risk factors.<sup>40</sup>

---

<sup>31</sup> See 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.”); *see also* Varicoceles.com, Frequently Asked Questions, <http://www.varicoceles.com/faq.htm> (last visited Feb. 2, 2010) (stating varicocele is a leading cause of male infertility and two options for treating varicoceles are surgery and embolization). *But see* SPEROFF & FRITZ, *supra* note 23, at 1162 (stating although varicocele is more commonly found in men with abnormal semen, treating condition did not result in curing infertility in couple any more often than cure rate of untreated varicocele vis-à-vis infertility).

<sup>32</sup> See Schlegel & Kaufman, *supra* note 23, at 370-73 (describing microsurgical process of modern vasectomy reversals).

<sup>33</sup> Varicoceles.com, Frequently Asked Questions, <http://www.varicoceles.com/faq.htm> (last visited Feb. 2, 2010) (warning that repairing varicoceles through surgery can incapacitate man for several days to several weeks).

<sup>34</sup> Embolization of the varicocele is an outpatient procedure performed without anesthesia. *See Varicocele Treatment, supra* note 23. A small tube is placed into the groin through a “nick” in the skin after the skin has been numbed. *Id.* Next, a small catheter is painlessly passed through the tube into the varicocele vein guided by x-ray technology. *Id.* Metal coils or other embolizing substances are then inserted through the catheter to block the flow of blood. *Id.* The tube is removed and no stitches are needed. *Id.* The procedure is typically completed within 24 hours. *Varicocele Treatment, supra* note 23.

<sup>35</sup> See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1418 (explaining intrauterine insemination is treatment in which semen is placed directly into uterus).

<sup>36</sup> See SPEROFF & FRITZ, *supra* note 23, at 1236 (stating in Intracytoplasmic Sperm Injection (ICSI) procedure, single sperm is immobilized and drawn into pipette, then injected into egg and in most cases, achieves comparable fertilization rates to those of IVF absent male factor infertility).

<sup>37</sup> SPEROFF & FRITZ, *supra* note 23, at 1162 (noting although surgery is usual treatment, nonsurgical approach to repairing varicocele exists); Varicoceles.com, Frequently Asked Questions, <http://www.varicoceles.com/faq.htm> (last visited Feb. 2, 2010) (positing embolization requires no incision, stitches, or general anesthesia and rarely requires hospital stay).

<sup>38</sup> Johannes L.H. Evers & John A. Collins, *Assessment of Efficacy of Varicocele Repair for Male Subfertility: A Systematic Review*, 361 THE LANCET 1849, 1851-52 (2003) (concluding no evidence varicocele repair improved fertility after reviewing all studies of varicocele repair).

<sup>39</sup> See generally Schlegel & Kaufman, *supra* note 23, at 370-73 (describing 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 Schlegel & Kaufman, *supra* note 23, at 374 (describing ICSI as minimally invasive), and SPEROFF & FRITZ, *supra* note 23, at 1236 (discussing alternatives to vasectomy reversals).

<sup>40</sup> 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. *See* Brugh & Lynch, *supra* note 39, at 327. For healthy younger couples who are seeking to have more than one pregnancy, a vasectomy reversal would be cheaper per pregnancy, however. *Id.* *But see* Peter T. Chan & Marc Goldstein, *Vasectomy and Vasectomy Reversal*, in MALE REPRODUCTIVE DYSFUNCTION: PATHOLOGY AND TREATMENT, *supra* note 23, at 385, 403 (noting advancement in safety and ubiquity of microsurgical reconstruction procedures to reverse vasectomies has made such procedures the safest and most cost-effective option for couples).

In nearly all cases of male factor infertility, ICSI represents a workable alternative to more invasive surgery.<sup>41</sup> ICSI is used in conjunction with in vitro fertilization (“IVF”) procedures or other Assisted Reproduction Technology (“ART”) implantation procedures performed on the female.<sup>42</sup> Doctors can retrieve sperm from the testicles with a needle in a minimally invasive procedure for use in ICSI and IVF.<sup>43</sup> Similarly, in lieu of a vasectomy reversal, doctors can use the ICSI and IVF procedures to impregnate the woman.<sup>44</sup>

Women, on the other hand, require surgical procedures far more often than men for correction of either male or female factor infertility.<sup>45</sup> 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.<sup>46</sup> In many cases of male factor infertility, instead of repairing the male’s problem, doctors collect the male’s sperm, either after ejaculation or a minor extraction procedure,<sup>47</sup> for use in an IVF procedure performed on the woman.<sup>48</sup>

In vitro fertilization, the first developed and most commonly used ART,<sup>49</sup> is an invasive surgery that requires extended absences from work.<sup>50</sup> Before undergoing the procedure, the woman must regularly receive injections, blood tests, and ultrasounds which make consistently attending work extremely difficult.<sup>51</sup> The

---

<sup>41</sup> SPEROFF & FRITZ, *supra* note 23, at 1218 (stating when donor sperm is not acceptable option, IVF and ICSI offer realistic hope for conception).

<sup>42</sup> *Id.*

<sup>43</sup> See Schlegel & Kaufman, *supra* note 23, at 373-74; see also Valerie Vernaeve & Herman Tourmaye, *Sperm Retrieval Techniques for Intracytoplasmic Sperm Injection*, in MALE INFERTILITY: DIAGNOSIS AND TREATMENT, *supra*, note 39, at 319, 401 & 402.

<sup>44</sup> Brugh & Lynch, *supra* note 39, at 327.

<sup>45</sup> See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1414-19 (describing male and female treatments for infertility).

<sup>46</sup> See SPEROFF & FRITZ, *supra* note 23, 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> (last visited Feb. 2, 2010) [hereinafter *IVF FAQ*] (explaining significant time commitments are required from female); Regional Fertility Program, IVF Program Timeline, <http://www.regionalfertilityprogram.ca/program-timeline.php> (last visited Feb. 2, 2010) [hereinafter *IVF Program Timeline*] (detailing timeline of IVF treatment).

<sup>47</sup> Schlegel & Kaufman, *supra* note 23, at 374 (detailing various microsurgical techniques and processes); see also SPEROFF & FRITZ, *supra* note 23, at 1234-37 (detailing sperm extraction techniques).

<sup>48</sup> See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (noting when male suffers from poor sperm motility or low sperm count resulting in infertility, female partner must undergo surgical treatment to treat couple’s inability to have a child).

<sup>49</sup> See SPEROFF & FRITZ, *supra* note 23, at 1215 (describing IVF as first and most commonly used ART and noting when combined with other procedures such as ICSI, IVF has obviated use of other treatments).

<sup>50</sup> See Justin Kerner, Note, *Labor Pains: The Seventh Circuit Distorts the Pregnancy Discrimination Act to Bar Discrimination Based on In Vitro Fertilization*, 24 WIS. J.L. GENDER & SOC’Y 117, 131 (2009) (detailing scope of time commitments involved in IVF procedures (citing MAYO CLINIC FAMILY HEALTH BOOK, at 1069-70 (Scott C. Litin, ed., 3d ed. 2003)); see also *IVF Program Timeline*, *supra* note 46 (detailing timeline for treatment at clinic).

<sup>51</sup> See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001) (noting IVF process requires frequent visits to doctor to avoid potentially fatal condition that can result from process); see also *IVF Program Timeline*, *supra* note 46 (detailing time frame for each part of monitoring and procedure).

treatment period may last up to three weeks.<sup>52</sup> Additionally, after the monitoring and ensuing embryo transfer, women are advised to avoid heavy lifting and excess stress until after conception<sup>53</sup> – advice similarly 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.<sup>54</sup> Even when there is no evidence of female factor infertility, if other increased risks of failure to fertilize on the part of male or female are present, doctors often recommend the use of IVF to increase chances of conception.<sup>55</sup> 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.<sup>56</sup> Doctors often treat the female partner for the male partner's infertility.<sup>57</sup> Therefore, infertility treatments are distinct from the condition of infertility in that women need not suffer from the condition to be subject to infertility treatment and its consequences. Accordingly, women may 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. While the Supreme Court has yet to hear a case concerning infertility treatments, lower courts have applied the principles articulated by the Supreme Court to a variety of cases involving the Pregnancy Discrimination Act ("PDA"). Part B provides a survey of various lower court decisions relevant to interpreting infertility and its treatment under the PDA.

#### A. Supreme Court Cases

In 1976, the Supreme Court held in *General Electric Co. v. Gilbert*<sup>58</sup> that a disability plan which paid nonoccupational sickness and accident benefits, but not pregnancy benefits, did not violate Title VII.<sup>59</sup> The Court reasoned that although

---

<sup>52</sup> *IVF FAQ*, *supra* note 46.

<sup>53</sup> *Id.*

<sup>54</sup> 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. Murat Arslan, Sergio Oehninger, & Thinus F. Kruger, *Clinical Management of Male Infertility*, in *MALE INFERTILITY: DIAGNOSIS AND TREATMENT*, *supra* note 39, at 305, 310.

<sup>55</sup> *Id.* at 310-11.

<sup>56</sup> *See Saks v. Franklin Covey Co.*, 316 F.3d 337, 346-47 (2d Cir. 2003) (analyzing differing burdens of infertility treatments).

<sup>57</sup> *See id.* at 347 (finding females often undergo surgical procedures to remedy their male partners' infertility).

<sup>58</sup> 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>59</sup> *Gilbert*, 429 U.S. at 127-28, *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

pregnancy is a female specific condition, the lack of benefits paid under the plan did not discriminate between males and females because neither was covered for pregnancy.<sup>60</sup> Congress responded by siding with the *Gilbert* dissenters in passing the PDA.<sup>61</sup> The PDA brought “pregnancy, childbirth, and related medical conditions” within the protections afforded by Title VII.<sup>62</sup>

Following passage of the PDA, the Supreme Court decided *Newport News Shipbuilding and Dry Dock Co. v. EEOC*.<sup>63</sup> In *Newport News*, the defendant employer altered its health insurance plan to provide its female employees with pregnancy benefits.<sup>64</sup> However, the employer did not offer pregnancy benefits to the female spouses of its male employees.<sup>65</sup> When the male employees sued, the Court concluded the PDA clarified Title VII to make clear that discrimination based on a woman’s pregnancy constitutes gender discrimination.<sup>66</sup> 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.<sup>67</sup>

When the PDA appeared again on the Supreme Court’s docket years later in *California Federal Savings and Loan v. Guerra*,<sup>68</sup> the Court ruled that the PDA did not prohibit provision of additional health benefits to women for pregnancy related issues.<sup>69</sup> Though the Court reinforced the interpretation that the PDA prohibited discrimination based on pregnancy, it concluded that the PDA did not prohibit providing additional benefits to women for pregnancy-related issues.<sup>70</sup> In affirming the Ninth Circuit’s ruling that the PDA did not preclude additional benefits for pregnancy, the Court rejected the district court’s *Newport News* interpretation that

---

<sup>60</sup> *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)).

<sup>61</sup> H.R. REP. NO. 95-948, at 2 (1978), reprinted in 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, superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (Brennan, J., dissenting) (arguing plan violated Title VII because health conditions and risks specific to men were covered and pregnancy was only health risk regardless of sex-specificity that was not covered).

<sup>62</sup> Title VII provides that “[i]t 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 . . . .” 42 U.S.C. § 2000e-2(a) (2006). 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 of 1978, 42 U.S.C. § 2000e(k) (2006).

<sup>63</sup> 462 U.S. 669 (1983).

<sup>64</sup> *Newport News*, 462 U.S. at 670-71.

<sup>65</sup> *Id.* at 672-73.

<sup>66</sup> *Id.* at 684.

<sup>67</sup> *Id.* at 684-85.

<sup>68</sup> 479 U.S. 272 (1987).

<sup>69</sup> See *Guerra*, 479 U.S. at 280 (holding granting benefits to pregnant women not offered to their male counterparts did not violate Title VII).

<sup>70</sup> *Id.* at 284-85.



the PDA prohibited both preferential and discriminatory treatment.<sup>71</sup>

The Supreme Court re-examined a pregnancy discrimination issue in *UAW v. Johnson Controls, Inc.*<sup>72</sup> In *Johnson Controls*, the defendant employer prohibited all fertile women from working in battery manufacturing because the occupational exposure to lead was hazardous to fetuses.<sup>73</sup> 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.<sup>74</sup> The Supreme Court disagreed, finding that the policy classified employees on the basis of their gender and childbearing capacity, not fertility.<sup>75</sup>

The Court found that the employer's policy violated the PDA because it classified employees on the basis of their potential for pregnancy.<sup>76</sup> The Court determined the employer's policy treated all female employees as potentially pregnant and such an approach qualifies as sex discrimination under the PDA.<sup>77</sup> Specifically, the Court found that the policy was not gender neutral because it did not apply to fertile male employees in the same manner it applied to fertile females.<sup>78</sup> The Court concluded the PDA "prohibit[s] discrimination on the basis of a woman's ability to become pregnant."<sup>79</sup>

#### B. Lower Court Cases

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.<sup>80</sup> Since *Johnson Controls*, the lower courts have differed on how to articulate and enforce the precise rule created by the Supreme Court.<sup>81</sup> All courts accept that *Johnson Controls* prohibits discrimination

---

<sup>71</sup> *Id.* at 279 (dismissing district court's interpretation of *Newport News*, 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").

<sup>72</sup> 499 U.S. 187 (1991).

<sup>73</sup> *Johnson Controls*, 499 U.S. at 190-91.

<sup>74</sup> The Seventh Circuit concluded the policy was distinguishing between categories of women, and as such, it could not be discriminating against women. *Id.* at 197-98. The Supreme Court rejected this reasoning noting that the PDA made discriminating against a woman's childbearing capacity statutorily defined as tantamount to discriminating against women. *Id.* at 198-99.

<sup>75</sup> *Id.* at 198.

<sup>76</sup> *Id.* at 199.

<sup>77</sup> The employer's 1982 policy statement uses the phrase "capable of bearing children" as the criterion for exclusion from the disputed jobs. *Johnson Controls*, 499 U.S. at 199. The Supreme Court determined that in choosing to treat all fertile female employees as "potentially pregnant," the company was violating the PDA. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 211.

<sup>80</sup> *See, e.g., In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007) (declining to apply PDA to prescription contraception); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994) (dealing with women seeking infertility treatment).

<sup>81</sup> *Compare Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (holding treatment of infertility is not medical condition relating to pregnancy for purposes of PDA), *with Pacourek*, 858 F. Supp. 1393 (holding infertility is related medical condition for purposes of PDA).

based on potential pregnancy.<sup>82</sup> However, it is unclear whether the term “potential pregnancy” in *Johnson Controls* encompasses pre-conception issues, such as infertility and contraception, or just post-conception issues related to pregnancy.<sup>83</sup>

In *Pacourek v. Inland Steel Co.*,<sup>84</sup> 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.<sup>85</sup> The plaintiff and her employer communicated a number of times regarding the relationship between her career and her attempts to become pregnant.<sup>86</sup> Ultimately, the plaintiff was fired.<sup>87</sup>

The defendant employer put forth two principal arguments in defense of Pacourek’s termination. 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, bifurcating the issue of potential pregnancy from infertility.<sup>88</sup> With respect to the first argument, the court concluded the holding of *Johnson Controls* brought discrimination based on a woman’s capacity to become pregnant within the protection of the PDA.<sup>89</sup> Thus, because plaintiff had claimed that she was discriminated against based on her attempts to become pregnant, she had stated an appropriate claim that she was adversely treated on the basis of her

---

<sup>82</sup> See *Union Pacific*, 479 F.3d at 941 (interpreting *Johnson Controls* to say unless woman’s reproductive capability kept her from performing job, employer could not discriminate against her based upon that potential); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345-46 (2d Cir. 2003) (acknowledging *Johnson Controls*’ inclusion of potential pregnancy in protections of the PDA); *Krauel*, 95 F.3d at 680 (acknowledging in *Johnson Controls*, “the Supreme Court held that discrimination on the basis of potential pregnancy was discrimination on the basis of sex”); *Erickson v. Bd. of Governors of State Colls. and Univs.*, 911 F. Supp. 316, 319-20 (N.D. Ill. 1995) (noting *Johnson Controls* includes potentially pregnant women under PDA protections), *rev’d on other grounds*, 207 F.3d 945 (7th Cir. 2000); *Pacourek*, 858 F. Supp. at 1401 (citing *Johnson Controls* for proposition that “the PDA covers potential or intended pregnancy”).

<sup>83</sup> 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 although *Johnson Controls* is not directly applicable, issue in this case is guided by principles established therein). But see *Union Pacific*, 479 F.3d at 941 (noting holding of *Johnson Controls* applies to discrimination-based concerns about what may occur during pregnancy and declining to include preconception fertility matters within protection of PDA); *Saks*, 316 F.3d at 345-46 (interpreting *Johnson Controls* to hold while discriminating against potential for pregnancy violates Title VII, discriminating against infertility alone does 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 treatment of fertility problems applies to both female and male workers and thus is gender-neutral, *Johnson Controls* is inapposite.”).

<sup>84</sup> 858 F. Supp. 1393 (N.D. Ill. 1994).

<sup>85</sup> *Pacourek*, 858 F. Supp. at 1396-97.

<sup>86</sup> *Id.* at 1397.

<sup>87</sup> *Id.* at 1396.

<sup>88</sup> 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. See *id.* at 1401-04.

<sup>89</sup> See *id.* at 1402 (relying on legislative history for proposition that PDA was intended to combat discrimination against women because they “might become pregnant”).

potential for pregnancy.<sup>90</sup>

Second, the *Pacourek* court noted that discrimination on the basis of potential or intended pregnancy is a separate issue from determining whether infertility is a condition related to pregnancy for purposes of the PDA.<sup>91</sup> The court found that the language of the PDA is expansive, covering “pregnancy, childbirth, or related medical conditions.”<sup>92</sup> The court reasoned that the term “related” should favor inclusion over exclusion of conditions.<sup>93</sup> 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.<sup>94</sup> Accordingly, the court ruled in favor of the plaintiff employee, holding that she had established a claim under the PDA.<sup>95</sup> 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,<sup>96</sup> 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.<sup>97</sup>

Multiple courts have rejected the *Pacourek* interpretation of medical conditions covered by the PDA.<sup>98</sup> In *Krauel v. Iowa Methodist Medical Center*,<sup>99</sup> the Eighth Circuit Court of Appeals held the PDA covers only post-conception medical conditions.<sup>100</sup> 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.<sup>101</sup> The court also invoked a canon of statutory construction finding 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.<sup>102</sup> The court reasoned that “pregnancy” and “childbirth,” the two specific terms, limit “related medical conditions,” the following general term.<sup>103</sup> The court concluded that because pregnancy and childbirth are

---

<sup>90</sup> See *Pacourek*, 858 F. Supp. at 1402 (N.D. Ill. 1994) (finding plaintiff to have stated claim under the PDA).

<sup>91</sup> See *id.* (presenting two questions: whether it is illegal under PDA to discriminate based on potential or intended pregnancy; and whether infertility is condition related to pregnancy for the purposes of the PDA).

<sup>92</sup> *Id.* (quoting and interpreting Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006)).

<sup>93</sup> *Id.* (interpreting 42 U.S.C. § 2000e(k)).

<sup>94</sup> *Id.* at 1403.

<sup>95</sup> *Pacourek*, 858 F. Supp. at 1404.

<sup>96</sup> *Id.* at 1403 (“In ordinary terms, a medical condition related to the ability of a woman to have a child is related to pregnancy and childbirth.”).

<sup>97</sup> See *Erickson v. Bd. of Governors of State Colls. and Univs.*, 911 F. Supp. 316, 319 (N.D. Ill. 1995), *rev’d on other grounds*, 207 F.3d 945 (7th Cir. 2000) (noting *Pacourek* court held PDA applies to potential pregnancy and that “infertility is a pregnancy-related condition for purposes of the PDA”).

<sup>98</sup> See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (finding court’s reasoning in *Pacourek* unpersuasive); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001) (agreeing with *Krauel* analysis and declining to follow reasoning in *Pacourek*).

<sup>99</sup> 95 F.3d 674 (8th Cir. 1996).

<sup>100</sup> *Krauel*, 95 F.3d at 679.

<sup>101</sup> *Id.* (citing Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006)).

<sup>102</sup> *Id.* (citing *Norfolk & W. Ry. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991)).

<sup>103</sup> *Id.*

conditions occurring after conception, related medical conditions covered by the PDA must also occur at that point.<sup>104</sup> Thus, infertility was not covered by the PDA.<sup>105</sup>

The *Krauel* court construction was adopted years later by the Western District of Michigan in *LaPorta v. Wal-Mart Stores, Inc.*<sup>106</sup> In *LaPorta*, a former employee sued Wal-Mart alleging she was terminated for pursuing IVF treatments and would need to miss work.<sup>107</sup> The *LaPorta* court found *Krauel's* analysis of the PDA persuasive and declined to include 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.<sup>108</sup>

In *Saks v. Franklin Covey Co.*,<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup> In addition, the plan covered all post-conception pregnancy costs.<sup>112</sup> 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 employment benefits plan.<sup>113</sup> The court accepted the finding of fact, however, that only women undergo surgical impregnation procedures and do so even when only their male partner suffers from infertility.<sup>114</sup>

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*.<sup>115</sup> In *Union Pacific*, the court considered whether the PDA required employers to provide health care coverage for prescription contraceptives in their benefits packages.<sup>116</sup> Although addressed by several district courts,<sup>117</sup> the Eighth Circuit was the first appellate court to address this issue.<sup>118</sup> The

---

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

<sup>105</sup> *Krauel*, 95 F.3d at 679-80.

<sup>106</sup> 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001) (rejecting *Pacourek* court's interpretation of PDA's construction and adopting *Krauel* court's approach).

<sup>107</sup> *LaPorta*, 163 F. Supp. 2d at 761-63.

<sup>108</sup> *Id.* at 770-71.

<sup>109</sup> 316 F.3d 337 (2d Cir. 2003).

<sup>110</sup> *Saks*, 316 F.3d at 345-46.

<sup>111</sup> *Id.* at 341.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 345.

<sup>114</sup> *Id.* at 347. The important distinction here is between discrimination manifested in the terms of a benefits plan and discrimination manifested in an adverse employment action. See discussion *infra* Part V(B).

<sup>115</sup> 479 F.3d 936 (8th Cir. 2007).

<sup>116</sup> *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007).

<sup>117</sup> The court noted that in *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1016-17 (W.D. Mo. 2006), the district court skeptically held the PDA requires coverage. *Union Pacific*, 479 F.3d at 940 n.1 (citing *Stocking*, 436 F. Supp. 2d 1014, 1016-17 (W.D. Mo. 2006)); see also *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979, 984-85 (E.D. Mo. 2003) (denying summary judgment and holding denial of contraception coverage could constitute gender discrimination); *Erickson v. Bartell Drug Co.*, 141 F.

court held that *Johnson Controls* is consistent with the proposition that the PDA covers only women with post-conception medical issues.<sup>119</sup> 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."<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> The court in *Union Pacific* reasoned that contraception's effective result is to prevent pregnancy and childbirth, and that contraception, like infertility, can only be indicated prior to pregnancy.<sup>123</sup> 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.*,<sup>124</sup> a case where a woman was fired for absences related to her pursuit of fertility treatments.<sup>125</sup> The factual setting of the case, largely undisputed, presented an opportunity for the court of appeals to weigh in on the unsettled questions surrounding protection under the Pregnancy Discrimination Act ("PDA").<sup>126</sup>

##### A. Facts and Procedural History

In 1997, Cheryl Hall was hired by Nalco Company in its manufacturing facility.<sup>127</sup> After working three years, Hall became a sales secretary to the district sales manager, Marv Baldwin, in the Chicago-area office.<sup>128</sup> Baldwin, in turn, reported to Geordie Hamilton, the regional sales manager.<sup>129</sup>

In early 2003, Hall notified Baldwin that she would be requesting leave to undergo an in vitro fertilization ("IVF") procedure.<sup>130</sup> In March 2003, she formally

---

Supp. 2d 1266, 1270-71 (W.D. Wash. 2001) (holding company's exclusion of prescription contraceptives violated PDA because providing women-only benefits like prescription contraceptives was PDA's purpose). *But see* EEOC v. United Parcel Serv., Inc., 141 F. Supp. 2d 1216 (D. Minn. 2001) (noting Eighth Circuit has "made clear that prevention of conception is outside the scope of the PDA").

<sup>118</sup> *Union Pacific*, 479 F.3d at 940 ("Neither the circuit courts nor the Supreme Court has considered whether the PDA applies to contraception.").

<sup>119</sup> *Id.* at 941.

<sup>120</sup> *Id.* (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)).

<sup>121</sup> *Id.* at 941 (citing *Krauel*, 95 F.3d at 679).

<sup>122</sup> *Id.* (citing *Krauel*, 95 F.3d at 679-80).

<sup>123</sup> *Union Pacific*, 479 F.3d at 942.

<sup>124</sup> 534 F.3d 644 (7th Cir. 2008).

<sup>125</sup> *Hall*, 534 F.3d at 645.

<sup>126</sup> *See id.* (detailing facts of case).

<sup>127</sup> *Hall v. Nalco Co. (Hall I)*, No. 04 C 7294, 2006 WL 2699337, at \*1 (N.D. Ill. Sept. 12, 2006), *rev'd*, 534 F.3d 644 (7th Cir. 2008).

<sup>128</sup> *Hall*, 534 F.3d at 645.

<sup>129</sup> *Hall I*, 2006 WL 2699337, at \*1.

<sup>130</sup> *Hall*, 534 F.3d at 645.

requested work leave<sup>131</sup> and was absent from March 24, 2003 to April 21, 2003 as a result of the treatment.<sup>132</sup> The procedure, however, was unsuccessful.<sup>133</sup> Following treatment, Hall returned to work at her prior position, but notified Baldwin that she planned to undergo the infertility treatment again.<sup>134</sup> In late July 2003, Hall applied for another leave of absence set to begin on August 18.<sup>135</sup>

Beginning in January 2003, Nalco was undergoing reorganization of the company in an effort to reduce costs.<sup>136</sup> By mid-June, Nalco decided to consolidate the two Chicago offices.<sup>137</sup> As a result of the consolidation, only one of two secretaries would continue to be employed.<sup>138</sup> At the end of July 2003, Baldwin informed Hall of the office merge and that he planned to retain Hall's counterpart in the other office for the lone secretary position in the new office.<sup>139</sup>

Baldwin discussed Hall's termination with Jacqueline Bonin, Nalco's employee-relations manager, before informing Hall.<sup>140</sup> 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.<sup>141</sup>

Around August 5, 2003, Hall requested information as to the status of her leave.<sup>142</sup> On August 6, 2003, Baldwin replied that Hall had been terminated with an effective date of August 31, 2003.<sup>143</sup> Baldwin also told Hall that her firing "was in [her] best interest due to [her] health condition."<sup>144</sup> Additionally, the secretary Nalco retained in lieu of Hall had been incapable of becoming pregnant for fifteen years prior to the decision of whom to keep.<sup>145</sup>

Hall filed a sexual discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") in March 2004.<sup>146</sup> In August, the EEOC issued her a Dismissal and Notice of Right to Sue for her charge,<sup>147</sup> at which point she filed an action in federal district court.<sup>148</sup>

The district court granted summary judgment in favor of Nalco prior to reaching the merits of Hall's claim.<sup>149</sup> The court held that infertility did not qualify as a

---

<sup>131</sup> *Hall I*, 2006 WL 2699337, at \*1.

<sup>132</sup> *Id.*

<sup>133</sup> *Hall*, 534 F.3d at 645.

<sup>134</sup> *Hall I*, 2006 WL 2699337, at \*1.

<sup>135</sup> *Hall*, 534 F.3d at 646.

<sup>136</sup> *Hall I*, 2006 WL 2699337, at \*1.

<sup>137</sup> *Id.*

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

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

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

<sup>141</sup> *Hall I*, 2006 WL 2699337, at \*1.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Hall*, 534 F.3d at 646.

<sup>145</sup> *Id.* ("Dwyer . . . was a female employee who since 1988 had been incapable of becoming pregnant.").

<sup>146</sup> *Hall I*, 2006 WL 2699337, at \*1.

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

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

<sup>149</sup> *Hall*, 534 F.3d at 645.

“related medical condition” under the PDA<sup>150</sup> and noted that Title VII<sup>151</sup> does not protect a woman from adverse employment actions based upon treatment for infertility.<sup>152</sup> Hall appealed the district court’s decision to the Seventh Circuit Court of Appeals.

### B. Court’s Analysis

In *Hall v. Nalco Co.*,<sup>153</sup> the United States Appeals Court for the Seventh Circuit considered whether a woman states a cognizable claim under Title VII<sup>154</sup> when she alleges she was fired for taking a leave of absence from work to undergo infertility treatments.<sup>155</sup> The court’s answer to this issue of first impression<sup>156</sup> 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.<sup>157</sup>

First, the court examined the text of Title VII and the PDA amendment of 1978.<sup>158</sup> The court found that Title VII prohibits employers from discriminating against an employee due to the employee’s gender.<sup>159</sup> The *Hall* court noted that the PDA was enacted by Congress in response to *General Electric Co. v. Gilbert*<sup>160</sup> which held that excluding pregnancy from a list of non-occupational disabilities covered by an employer’s benefits plan was not a violation of Title VII.<sup>161</sup> The court concluded the PDA clarified the scope of Title VII and made it clear that discrimination based on pregnancy is tantamount to discrimination based on gender.<sup>162</sup>

The court found the proposition that Title VII, as amended, protects women from policies and actions adverse to pregnancy was not at issue.<sup>163</sup> Rather, the *Hall* court framed the question before it as whether infertility and women undergoing treatment for the condition are protected by Title VII.<sup>164</sup> The district court concluded that Hall’s allegations were insufficient to state a claim based primarily upon two cases:

---

<sup>150</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006) (amending Title VII to protect women from adverse employment actions based upon pregnancy and “related medical conditions”).

<sup>151</sup> Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a) (2006).

<sup>152</sup> *Hall I*, 2006 WL 2699337, at \*2.

<sup>153</sup> 534 F.3d 644.

<sup>154</sup> 42 U.S.C. § 2000e-2(a).

<sup>155</sup> *Hall*, 534 F.3d at 646.

<sup>156</sup> *Id.* (“[W]e are also unaware that any other circuit has addressed the precise question presented here.”).

<sup>157</sup> *Id.* at 648-49 (holding Hall’s allegations present cognizable claim under Title VII because employment actions based upon childbearing capacity – which includes actions based on fertility treatments - represent such a claim).

<sup>158</sup> *Id.* at 646-47.

<sup>159</sup> *Id.* at 647 (quoting 42 U.S.C. § 2000e-2(a)(2)).

<sup>160</sup> 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>161</sup> *Hall*, 534 F.3d at 647 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-78 (1983)).

<sup>162</sup> *Id.* (quoting *Newport News*, 462 U.S. at 683-85).

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

<sup>164</sup> *Id.* at 646-47.

*Saks v. Franklin Covey Co.*<sup>165</sup> and *Krauel v. Iowa Methodist Medical Center.*<sup>166</sup> The court of appeals found that both cases relied upon by the district court represented a departure from the Supreme Court's decision in *UAW v. Johnson Controls, Inc.*,<sup>167</sup> where the Court invalidated an employer's policy barring all fertile women from jobs involving lead exposure.<sup>168</sup> In *Johnson Controls*, the employer had instituted the policy because lead exposure has potentially damaging effects on fertility and fetuses.<sup>169</sup> The court found that the employer's policy violated the PDA because it did not base the classification on fertility alone, but rather on *gender* combined with childbearing capacity.<sup>170</sup>

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,<sup>171</sup> but that it is impermissible to use classifications based on "potential for pregnancy."<sup>172</sup> The *Hall* court agreed with the *Saks* analysis that such differentiation was necessary because "[i]ncluding infertility within the PDA's protection as a 'related medical condition[]' would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination."<sup>173</sup> 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.<sup>174</sup>

The *Hall* appeals court found that the district court erred in considering only infertility as the basis of the employment action.<sup>175</sup> The court concluded that regardless of whether infertility is at issue, employers' actions must be gender-neutral to be valid.<sup>176</sup> The court found the issue is not a question of infertility, but rather a question of the gender-specific characteristic of childbearing capacity.<sup>177</sup> The court reasoned that employees who are absent from work due to infertility treatments will always be women.<sup>178</sup> Therefore, the appeals court found that the district court erred by considering the relevance of the petitioner employee's infertility.<sup>179</sup>

Although the court declined to adopt the petitioner's position that infertile women

---

<sup>165</sup> 316 F.3d 337 (2d Cir. 2003).

<sup>166</sup> 95 F.3d 674 (8th Cir. 1996).

<sup>167</sup> 499 U.S. 187 (1991).

<sup>168</sup> *Hall*, 534 F.3d at 647-48 (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-200 (1991)).

<sup>169</sup> *Id.* (citing *Johnson Controls*, 499 U.S. at 190-92).

<sup>170</sup> *Id.* at 648 (citing *Johnson Controls*, 499 U.S. at 198).

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

<sup>172</sup> *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").

<sup>173</sup> *Hall*, 534 F.3d at 648 (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003)).

<sup>174</sup> *Id.* at 648 n.2 (quoting *Saks*, 316 F.3d at 346 n.4).

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

<sup>176</sup> *Id.* (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684-85 (1983)).

<sup>177</sup> *Id.* (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991)).

<sup>178</sup> *Hall*, 534 F.3d at 648-49.

<sup>179</sup> *Id.* at 649.



are a protected class under the PDA,<sup>180</sup> the court found that she nonetheless stated a cognizable sex discrimination claim under Title VII.<sup>181</sup> 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.”<sup>182</sup>

The respondent employer argued, in the alternative, that notwithstanding a cognizable claim, the legitimate business reasons for terminating the petitioner employee obviated a discrimination analysis.<sup>183</sup> The court found summary judgment inappropriate in this case.<sup>184</sup> Instead, the court determined that there was sufficient factual dispute to try the case to determine the reason Hall was fired, rendering summary judgment inappropriate.<sup>185</sup>

## 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.<sup>186</sup> However, the court failed to sufficiently emphasize such reasoning as the proper basis for finding the petitioner employee’s claim to be meritorious under Title VII.<sup>187</sup> The Pregnancy Discrimination Act (“PDA”) did not create any new rights or remedies for women,<sup>188</sup> but it did clarify the protections Title VII provided to women.<sup>189</sup>

---

<sup>180</sup> *Id.* at 649 n.3 (explaining court is not using Hall’s analysis but that it is not fatal to her claim).

<sup>181</sup> *Id.* at 649.

<sup>182</sup> *Id.* (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

<sup>183</sup> *Hall*, 534 F.3d at 649.

<sup>184</sup> *Id.*

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

<sup>186</sup> See *id.* at 648-49, for the court’s holding.

<sup>187</sup> *Id.* By not stating clearly that this is the most powerful reason behind ruling in Hall’s favor, the *Hall* court left open the possibility that courts and critics would seize on the gender-neutral quality of infertility as the cornerstone of the opinion and conclude the *Hall* court’s decision should be discounted. See, e.g., Kerner, *supra* note 50, at 139-41 (disagreeing with court’s reasoning insofar as it makes discrimination based on a woman’s infertility a violation of Title VII as amended by the PDA); see also *Deboom v. Raining Rose, Inc.*, No. 06-1063, 2009 Iowa Sup. LEXIS 86, at \*11-12 (Aug. 28, 2009) (citing *Hall*, 534 F.3d at 649) (interpreting *Hall* court as ruling “infertility is a pregnancy related condition” for the purposes of the Pregnancy Discrimination Act). Of course, the *Hall* court made the compelling argument that although infertility is gender-neutral, infertility treatments are not. *Hall*, 534 F.3d at 648-49. Yet, the lasting impact of the decision depends upon the differing burdens of gender-specific treatments being correctly identified as the dominant reasoning by future courts.

<sup>188</sup> See *Hall*, 534 F.3d at 647 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 (1983)); see also *Newport News*, 462 U.S. at 679 n.17 (“[The PDA] does not really add anything to Title VII as I and, I believe, most of my colleagues in Congress . . . understood . . .” (quoting 123 CONG. REC. 10581 (1977) (statement of Rep. Hawkins))); Siegel, *supra* note 9, at 934-940 (discussing Pregnancy Discrimination Act’s proper construction within the Title VII statutory scheme). To date, *Hall* has been cited by other courts to support the position that the PDA does not add anything to Title VII, or that a complaint need not specify the legal theory upon which the claim rests – only facts making up a cognizable claim; rather than the *Hall* court’s position on discrimination and fertility treatments. See, e.g., *Shafiuddin v. Evanston Northwestern Hosp.*, No. 09-cv-2416, 2010 WL 333699, at \*3 (N.D. Ill. Jan. 26, 2010) (“[T]he Seventh Circuit’s post-*Twombly* cases reaffirm that a plaintiff need not include a statutory hook in her complaint at all.” (citing *Hall*, 534 F.3d at 649 n.3)); *EEOC v. Menard Inc.*, No. 08-0655-DRH, 2010 WL 331729, at \*4 (S.D. Ill. Jan. 25, 2010) (“Pregnancy discrimination claims are analyzed like any other sex discrimination claim.” (citing *Hall*, 534 F.3d at

Congress adopted the PDA in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*<sup>190</sup> and sought only to expressly correct the Court's misguided thinking by clarifying the original intent of the legislation.<sup>191</sup> Since the PDA's enactment, the Title VII 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.<sup>192</sup>

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 premised upon gender-specific treatments and not the gender-neutral condition of infertility.<sup>193</sup> Second, the courts erroneously look to whether the PDA provides express coverage of infertility or its treatment.<sup>194</sup> The PDA need not expressly cover infertility because the condition is not the reason that plaintiffs like Hall are terminated. Rather, these plaintiffs are terminated for the absences associated with the condition's treatment – absences 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.*<sup>195</sup> did the court consider treatment differences between the sexes.<sup>196</sup> 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

---

647)); *Crumpley v. Rich. Twp. High Sch. Dist.*, No. 08 C 3467, 2009 WL 2031795, at \*7 (N.D. Ill. July 13, 2009) (citing *Hall*, 534 F.3d at 649 n.3) (noting complaint need not specify legal theory upon which it rests); *EEOC v. J.H. Hein Corp.*, No. 3:08-CV-44-TS, 2009 WL 1657878 (N.D. Ind. June 12, 2009) (citing *Hall*, 534 F.3d at 647) (noting pregnancy discrimination claims are analyzed just like any other discrimination claim); *Payne v. State Student Assistance Comm'n*, No. 01:07-cv-0981-DFH-JMS, 2009 WL 1468610, at \*9 (S.D. Ind. May 22, 2009) (citing *Hall*, 534 F.3d at 647) (same); *Brown v. Sara Lee Corp.*, No. 1:07-cv-1118-DFH-DML, 2009 WL 995755, at \*4 (S.D. Ind. Apr. 14, 2009) (citing *Hall*, 534 F.3d at 647) (same); *Tilson v. City of Lawrence*, No. 1:06-cv-1641-DFH-JMS, 2008 WL 3914989, at \*5 (S.D. Ind. Aug 20, 2008) (citing *Hall*, 534 F.3d at 647) (same).

<sup>189</sup> See *Hall*, 534 F.3d at 647 (citing *Newport News*, 462 U.S. at 684) (noting the PDA clarified the scope of Title VII by "recognizing certain inherently gender-specific characteristics that may not form the basis for disparate treatment of employees").

<sup>190</sup> H.R. REP. NO. 95-948, at 2 (1978), reprinted in 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]."); see also Siegel, *supra* note 9, at 935-36 (discussing how *Gilbert* provides context for enactment of PDA).

<sup>191</sup> *Newport News*, 462 U.S. at 679 n.17 (quoting S. REP. NO. 95-331, at 7-8 (1977), reprinted in 1978 U.S.C.C.A.N. 4749, 4756).

<sup>192</sup> *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). Although *Manhart* was decided before the PDA was enacted, the interpretation of Title VII contained therein was re-asserted in *Newport News*. See *Newport News*, 462 U.S. at 682-83.

<sup>193</sup> See, e.g., *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770-71 (W.D. Mich. 2001) (failing to consider whether treatments have significantly different burdens on men and women and also noting infertility is a condition that afflicts both men and women).

<sup>194</sup> See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (considering question of whether PDA's prohibition of discrimination based on "related medical conditions" includes discrimination on basis of infertility); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996) (applying general rules of statutory construction in effort to determine whether infertility is expressly covered by PDA); *LaPorta*, 163 F. Supp. 2d at 770-71 (agreeing with *Krauel* court's analysis of PDA vis-à-vis infertility).

<sup>195</sup> 316 F.3d 337 (2d Cir. 2003).

<sup>196</sup> See *Saks*, 316 F.3d at 346-49 (discussing plaintiff's gender discrimination claim).

treatment in an employer's benefits plan.<sup>197</sup> The court premised its analysis on the fact that infertility treatments are inexorably linked to a gender-neutral condition.<sup>198</sup> 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.<sup>199</sup> For example, the court noted that when a male suffers from infertility, his healthy female partner must undergo the surgical procedure.<sup>200</sup> The financial burden in such a case afflicts both the male and female parties in the couple evenly.

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 the burden of paying for treatment of infertility falls on couples, making it gender-neutral.<sup>201</sup> By contrast, only women bear the burden of missing work for significant periods of time.<sup>202</sup> Thus, only women are vulnerable to adverse employment action 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.<sup>203</sup> 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*.<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup>

*Hall* is factually distinguishable 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.<sup>207</sup> The appellate court in *Johnson Controls* wrongly assumed the policy was facially neutral because infertile women were not kept from working in the unit. Thus, the appellate court ruled *Johnson Controls* legally differentiated between fertile and infertile women, not between

---

<sup>197</sup> *Id.* at 346-47 (considering whether exclusion of coverage for surgical impregnation procedures violates Title VII because the procedure is performed only on women).

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

<sup>199</sup> *See id.* at 347 (noting surgical impregnation procedures performed for treatment of infertility are unique in that although they are performed only on women, they are a treatment for a gender-neutral condition).

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

<sup>201</sup> *See Saks*, 316 F.3d 337, for the fact that the court did not consider whether the same reasoning applies for same-sex couples.

<sup>202</sup> *See IVF FAQ*, *supra* note 46 (noting female requirements are much more time consuming than male's during infertility treatment).

<sup>203</sup> *See Hall v. Nalco Co.*, 534 F.3d 644, 646-47 (7th Cir. 2008).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 648-49.

<sup>206</sup> *See, e.g., Saks*, 316 F.3d at 345-46 (declining to extend principles of *Johnson Controls* to infertility case); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (declining to apply *Johnson Controls* to case concerning infertility).

<sup>207</sup> *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991).

genders.<sup>208</sup> The employee petitioner's claim in *Hall*, by contrast, alleged discrimination between infertile women seeking treatment and infertile women not seeking treatment.<sup>209</sup>

While the Supreme Court's holding in *Johnson Controls* was surely attractive to strengthen the precedent used by the *Hall* court, the reasoning in *Johnson Controls* is of questionable merit when applied to the circumstances of *Hall*. 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 the petitioner's potential for pregnancy was technically increased by undergoing the treatments. But other circuits have construed *Johnson Controls* to protect women against adverse actions only when the discrimination is based on both fertility **and** gender.<sup>210</sup> Thus, absent a showing that the respondent employer did not terminate men who sought infertility treatment, the "potential for pregnancy" 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.<sup>211</sup> Other courts have rejected applying the PDA to pre-pregnancy conditions notwithstanding the holding of *Johnson Controls*.<sup>212</sup> Thus, *Hall*'s 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.<sup>213</sup> Therefore, the process of treating a woman's infertility is the pertinent issue rather than her infertility itself. 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,<sup>214</sup> the treatment for male infertility is often performed on women.<sup>215</sup>

---

<sup>208</sup> *Id.* at 197-98 (rejecting appellate court's assumption that sex-specific fetal protection policies do not involve facial discrimination).

<sup>209</sup> See *Hall*, 534 F.3d at 646. *Hall* was replaced by a woman who was also infertile; therefore, the alleged discrimination was necessarily between those infertile persons seeking treatment and those not seeking treatment. See *id.*

<sup>210</sup> 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) (referring to court's previous interpretation and application of *Johnson Controls*' holding).

<sup>211</sup> See *Krauel*, 95 F.3d at 679-80 (interpreting PDA to exclude protection of infertility).

<sup>212</sup> See, e.g., *Union Pacific*, 479 F.3d at 941 (rejecting contention that *Johnson Controls* applies to pre-conception medical issues); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345-46 (2d Cir. 2003) (declining to extend holding of *Johnson Controls* to protect infertile women); *Krauel*, 95 F.3d at 680 (declining to apply *Johnson Controls* to case involving infertility).

<sup>213</sup> See *IVF FAQ*, *supra* note 46 (describing procedure); *IVF Program Timeline*, *supra* note 46 (detailing timeline for IVF treatment).

<sup>214</sup> Bentley, *supra* note 13, at 394-95 (citing American Society for Reproductive Medicine, *Male Infertility and Vasectomy Reversal*, at 3 (1995)).

<sup>215</sup> See *Saks*, 316 F.3d at 347 ("[W]here a man suffers from . . . low sperm count, resulting in his

The *Hall* claim is rightfully founded on Title VII, as amended by the PDA, rather than on 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.<sup>216</sup> But because Title VII includes gender as a protected class<sup>217</sup> 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 argue that she was discriminated against based on her pursuit of infertility treatments as opposed to being infertile. This is particularly important in light of the fact that the other secretary in *Hall* was also infertile.<sup>218</sup>

Infertility treatments represent the same dilemma as pregnancy. While it is true that both men and women suffer from infertility, the treatment options are not comparable. Similarly, both men and women have a significant and legitimate role in procreation, but Title VII, as amended, protects only the female role in childbearing.<sup>219</sup> 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. Women, on the other hand may miss up to three or four weeks while undergoing some infertility procedures,<sup>220</sup> and often have to undergo multiple rounds of treatments.<sup>221</sup> Furthermore, women occasionally must endure surgical procedures for their male partner's infertility.<sup>222</sup> Therefore, similar to pregnancy, women often bear the employment consequences of a 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.<sup>223</sup> Although a biopsy and or extraction procedure is occasionally necessary to retrieve the sperm, the

---

infertility, his healthy female partner must undergo the surgical procedure."); *see also* THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1416-19 (describing female infertility treatments); SPEROFF & FRITZ, *supra* note 23, 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.>").

<sup>216</sup> *See Saks*, 316 F.3d at 345-46 (arguing that discriminating against fertility alone is not a violation under PDA); *Krauel*, 95 F.3d at 679-80 (arguing infertility is a medical condition that is gender neutral and thus not cognizable under the PDA).

<sup>217</sup> Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a) (2006) (expressly including gender as protected class).

<sup>218</sup> *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

<sup>219</sup> *See* 42 U.S.C. § 2000e-2(a) (protecting women from discrimination); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (adding pregnancy and related conditions to description of protected class).

<sup>220</sup> *Kerner*, *supra* note 50, at 131 (citing MAYO CLINIC FAMILY HEALTH BOOK, *supra* note 50, at 1069-70) (describing scope of IVF process and absences associated with it); *see also IVF FAQ*, *supra* note 46 (describing procedure); *IVF Program Outline*, *supra* note 46 (detailing timeline for treatment).

<sup>221</sup> *See* THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1419 (noting rate of success is only 18%-25%).

<sup>222</sup> *Id.* at 1414-19; *see also* SPEROFF & FRITZ, *supra* note 23, at 1218.

<sup>223</sup> *Anunta & Kandeel*, *supra* note 27, at 265-67.

procedures involved require no preparation or recovery time and are handled in the doctor's office.<sup>224</sup> Due to the limited effectiveness of a number of treatments for male infertility, many couples seek IVF to overcome the sperm deficiencies.<sup>225</sup>

Conversely, the female role in ARTs involves repetitive monitoring of a woman's various reproductive attributes,<sup>226</sup> and in many cases, a surgical implantation of embryos.<sup>227</sup> Both the monitoring and the surgery can result in significant employment absences.<sup>228</sup> Moreover, by failing to protect women from discrimination based upon absences due to treatment, women are faced with the prospect of adverse employment actions based on their treatment as a legal proxy for what would otherwise be an illegal adverse action based on pregnancy.<sup>229</sup> Thus, Title VII must be read to protect the employment prospects of women 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.<sup>230</sup> The dissent argued that distinguishing between voluntary and involuntary pregnancies was impractical, and thus, should not be a relevant consideration.<sup>231</sup> 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 Leave Act,<sup>232</sup> Americans with Disability Act,<sup>233</sup> and Title VII as amended by the PDA.

---

<sup>224</sup> Mellinger, *supra* note 23, at 286 (noting biopsies are an in-office procedure); see Schlegel & Kaufman, *supra* note 23, at 374 (describing ICSI as minimally invasive); SPEROFF & FRITZ, *supra* note 23, at 1236 (detailing ICSI procedure).

<sup>225</sup> See SPEROFF & FRITZ, *supra* note 23, at 1218 (noting that when male treatments are ineffective, IVF presents a workable alternative in many cases).

<sup>226</sup> See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001) (noting stimulation of ovaries requires frequent visits to doctor's office to monitor for "hyperstimulation," a potentially fatal condition in which ovaries become swollen).

<sup>227</sup> See THE MERCK MANUAL OF MEDICAL INFORMATION, *supra* note 11, at 1419 (detailing IVF procedures).

<sup>228</sup> See *IVF Program Timeline*, *supra* note 46 (detailing timeline for treatment at clinic).

<sup>229</sup> The danger here is that by allowing employers to terminate women because they are seeking to become pregnant, we would be, in effect, allowing employers to terminate a subset of women who become pregnant. For women utilizing Assisted Reproduction Technologies (ARTs), their desire and attempts to become pregnant will usually be known to the employer due to the necessary absences associated with the procedures. Courts cannot sanction firings on the basis of these absences because it will provide a legal basis for employers to preemptively terminate women based on their impending pregnancy. Moreover, men would not be fired in such a scenario because the employer knows the male participation in these procedures is minimal and will not result in the male's eventual maternity leave. While some will surely argue that ART absences should not be protected and it is too difficult to discern whether the woman is fired "legitimately" for ART absences or illegitimately for prospective pregnancy absences, this additional danger of unequal treatment to women adds persuasive weight to the arguments in favor of protecting women's rights to undergoing fertility treatments without subjecting themselves to discrimination.

<sup>230</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>231</sup> *Id.* at 151 n.3 (Brennan, J., dissenting).

<sup>232</sup> Family and Medical Leave Act, 29 U.S.C. § 2601 (2006).

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).<sup>234</sup> 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.<sup>235</sup> The key to that analysis in the case of pregnancy is determining whether other conditions are treated alike.<sup>236</sup> 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.<sup>237</sup>

Infertility and its treatments present a unique situation. Infertility, unlike pregnancy, is a gender-neutral condition. However, infertility treatments are not gender-neutral, representing a significant similarity to pregnancy. Infertility treatments cannot be treated like pregnancy, but because of 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.<sup>238</sup> Seemingly, this would create a disincentive for employers to provide such benefits at all. Thus, by requiring employers to cover either treatments for both males and females, or neither

---

<sup>233</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006) (providing only limited protections).

<sup>234</sup> See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (“[W]omen affected by 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 . . .”). See Jamie L. Clanton, Comment, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to “Mean What it Says”*, 86 IOWA L. REV. 703, 713-14 (2001) for a discussion that, for purposes of treatment in the workplace, multiple circuits have held pregnancy to be analogous to other conditions that result in an inability to work. The primary dispute is whether pregnancy has to be treated similarly to other conditions that occurred either inside or outside the workplace or whether the relevant conditions are only those occurring outside the workplace. *Id.*

<sup>235</sup> See *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861-62 (5th Cir. 2002) (declining to rule employer needs to provide pregnancy leave under Title VII); see also *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1400 (N.D. Ill. 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.” (quoting *Troupe v. May Dep’t Stores, Co.*, 20 F.3d 734, 738 (7th Cir. 1994))).

<sup>236</sup> See Clanton, *supra* note 234, at 713-14 (noting pregnant women need to be treated same as those ‘similarly situated’ with regard to their ability to work).

<sup>237</sup> Cf. *Hall v. Nalco Co.*, 534 F.3d 644, 647 (noting PDA overturned *Gilbert*’s holding excluding pregnancy from list of nonoccupational disabilities covered by employer’s benefits plan does not amount to discrimination on basis of sex (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-78 (1983))).

<sup>238</sup> See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (holding Title VII was not violated where employer offered pregnancy-related benefits to women on top of all benefits offered to men); *Newport News*, 462 U.S. at 684-85 (holding employers could not discriminate between benefits offered to male employees and female employees). But see *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (holding denial of coverage for female-specific treatments disadvantages both men and women equally because infertility is gender-neutral occurring, by definition, in a couple).

males nor females, 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.

On the other hand, the *Saks* court 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.<sup>239</sup> 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 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.<sup>240</sup>

## 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*<sup>241</sup> was not intended to create new rights for women, but rather to allow women have the choice of having their own children 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.<sup>242</sup> Additionally, in many cases, the most effective treatments for infertility of either male or female factors are performed on women.<sup>243</sup> 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 treatment 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.<sup>244</sup> Any judgment based on the prospective absences is necessarily a judgment

---

<sup>239</sup> See *Saks*, 316 F.3d at 347 (holding because infertility is gender-neutral occurring in a couple, denying coverage for female-specific treatments disadvantages both men and women equally).

<sup>240</sup> See generally Rachel Reibman, Comment, *The Patient Wanted the Doctor to Treat Her in the Closet, but the Janitor Wouldn't Open the Door: Healthcare Provider Rights of Refusal versus LGB Rights to Reproductive and Elder Healthcare*, 28 TEMP. J. SCI. TECH. & ENVTL. L. 65 (2009) (discussing legal issues homosexuals encounter in the healthcare contexts of artificial reproduction and elder care).

<sup>241</sup> 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

<sup>242</sup> See *IVF FAQ*, *supra* note 46 (describing work limitations as similar to pregnancy).

<sup>243</sup> See SPEROFF & FRITZ, *supra* note 23, 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.").

<sup>244</sup> See Mellinger, *supra* note 23, at 286 (noting biopsies are an in-office procedure); Schlegel & Kaufman, *supra* note 23, at 374 (describing ICSI as minimally invasive); SPEROFF & FRITZ, *supra* note 23, at 1236 (detailing ICSI procedure).



based on gender. The law should not sanction the firing of an employee for the precursors to an expressly protected medical condition, pregnancy.

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.*<sup>245</sup> 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 the terms of Title VII: it protects employees from adverse employment actions based on their gender including, but not limited to, pregnancy. Therefore, by terminating a woman for missing work while undergoing treatment for infertility, employers are violating Title VII.

---

<sup>245</sup> 534 F.3d 644 (7th Cir. 2008).