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Pregnant Employees, Working Mothers and the Workplace - Legislation, Social Change and Where We are Today

Thomas H. Barnard

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PREGNANT EMPLOYEES, WORKING MOTHERS AND THE
WORKPLACE — LEGISLATION, SOCIAL CHANGE AND
WHERE WE ARE TODAY

THOMAS H. BARNARD
ADRIENNE L. RAPP

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I. INTRODUCTION

Over the past 40 years, courts and employers have struggled to define the meaning of Title VII’s implicit promise to provide and protect the employment opportunities available to certain classes of individuals. Pregnancy-based discrimination has posed an especially difficult challenge. Unlike other proscribed forms of discrimination, the unfair treatment of pregnant employees presents a unique analytical wrinkle: only women become pregnant, and women’s ability to work is affected by pregnancy (including childbirth and/or related medical

conditions). At a minimum, women must take a leave of absence to give birth and recover, physically, from childbirth. A woman with a more physical job — such as a police officer — will undeniably find that her pregnancy complicates her ability to perform that job.¹ How then do we define and enforce Title VII's promise of equal treatment and equal opportunity? If a pregnant woman cannot in fact perform her job duties while pregnant, how do employers ensure equal treatment of these temporarily disabled employees?

In the past, employers — and courts — have cited the physical differences between men and women to justify treating female employees differently than their male counterparts. Indeed, case law prior to the passage of Title VII is replete with examples of court-sanctioned disparate treatment of the sexes based on this rationale. For example, in 1908, the Supreme Court penned the following opinion in *Muller v. Oregon*:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, *as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.* . . . [The Mother] is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. . . . This difference justifies a difference in legislation.²

As evidenced by the above provision, according to the Supreme Court in 1908, a woman's innate physical inferiority justified both her protection but also her disparate treatment. Thus, first and foremost, a woman was defined by her childbearing capabilities. Further, according to the Court, it was “an object of public interest” that pregnant women receive particular, protectionist care — not just for her own sake, but also “to preserve the strength and vigor of the race.”³ The maintenance of a woman's health and childbearing capabilities, therefore, was not just her concern, but a societal one as well.⁴

¹*See, e.g.*, *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 570–71 (6th Cir. 2006) (holding that police department had no obligation to provide light duty assignment to pregnant police officer, despite pregnancy-related work restriction prescribed by her doctor).

²*Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (holding that the government's interest in protecting women outweighed the “right” of women to have free contracts; upholding an Oregon law restricting the number of hours women could work in factories).

³*Id.* at 421.

⁴Similar concerns are expressed through reports and studies conducted during this period. *See, e.g.*, Consumers' League of New York City, *Behind the Scenes in a Restaurant*, 1916, at 6, available at <http://pds.lib.harvard.edu/pds/view/2573413?n=12&s=4> [hereinafter Consumers' League Report]. For example, research into women's working conditions in restaurants in New York City during the early 1900s led the Consumers' League of New York City to conclude that restaurant-related occupations presented “physical dangers” to the reproductive capacities of young women: “Medical authorities have pointed out the serious

In 1964, with its passage of the Civil Rights Act, Congress proposed to change the face of the American workforce “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”⁵ In that legislation, Congress provided a broad legal approach with which to address a complex social harm.

Among other things, Title VII of the Civil Rights Act (“Title VII”) provided that it is an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” With the passage of the Pregnancy Discrimination Act of 1978 (“PDA”) nearly 15 years later, Congress made clear that Title VII’s prohibition against sex-based discrimination included pregnancy discrimination.

Although a century has now passed since the Supreme Court’s decision in *Muller*, do remnants of the patriarchal views evidenced by that Court still survive today? Women are now more readily welcomed into the workplace, but do work-life balance challenges and perceptions of women’s role as primary caretaker impede their ultimate professional success? Does a perception that a female employee will likely opt-out of the workforce to care for her family and concerns about pregnancy-related leave negatively impact female hireability? Are women’s post-hire job performance evaluations and perceived promotability further affected by such concerns? More than 40 years after Congressional enactment of Title VII, and 30

results that follow the strain of continued standing and over-work of young girls;” ““there is a definite hazard to the child-bearing capacity of women. This is of vital consequence to society as a whole.”” *See id.* at 6–7 (quoting a doctor in support of the proposition). *See also id.* at Appendix II, at 34 (setting forth Extracts from a Tentative Report on the Physical Condition of Women Employees in Restaurants Conducted by the Occupational Clinic of the Health Department of the State of New York, by Louis I. Harris, Chief, Division of Indus. Hygiene), available at <http://pds.lib.harvard.edu/pds/view/2573413?n=50&s=4> (concluding that “[t]he effect of work that requires standing and running about while carrying loads for many hours during the day will be particularly marked upon the generative organs of the woman” and “[t]he influence of the work in this particular, which we were unfortunately unable to study, because of the opposition that would inevitably arouse, leads me to believe that from this standpoint alone, there is a definite hazard to the child-bearing capacity of the woman.”). Note that the Consumers’ League of New York City was a group founded to advocate on working women’s behalf. “The Consumers’ League of New York City was formed in 1891 as a result of a report made in 1890 by Alice Woodbridge, secretary of the Working Women’s Society, the forerunner of the Women’s Trade Union League. This report enumerated the deplorable working conditions and long hours under which women engaged in the retail trade had to work.” Kheel Center for Labor-Management Documentation and Archives, Cornell University Library, *Guide to the Consumers’ League of New York City Records*, (200), at <http://rnc.library.cornell.edu/EAD/htmldocs/KCL05307.html>. According to one source, “[r]eports and agitations of the league were probably more influential in the field of legislation than in any other way and effected the passage, enforcement, and defense of laws having to do with safety, sanitation, night work, maximum hours, child labor, minimum wages, social security, and fair employment practices.” *See id.*

⁵*Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (articulating “the objective of Congress in the enactment of Title VII;” “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

years after the PDA, do modern workplace realities measure up to the lofty goals underlying that legislation? Today, there is no question that pregnancy-related discrimination is illegal, but we are still working through the ultimate contours and effect of that prohibition to this day.

Accordingly, the focus of this Article is on the legal and social evolution resulting from the Civil Rights Act's prohibition of sex-based discrimination — and, in particular, pregnancy-related discrimination — in the workplace. Section II of this Article details the reluctance with which courts and employers initially extended workplace rights to women. Sections III and IV discuss Title VII's prohibition against “sex” discrimination and initial court hesitation to interpret that prohibition to include employees discriminated against on the basis of pregnancy. Sections V and VI provide an overview of federal and Ohio law granting pregnancy-related rights to women, including the PDA, the Family Medical Leave Act and Ohio Revised Code Chapter 4112. Section VII of this Article examines problematic pregnancy-related workplace perceptions, including how the modern woman's entry and acceptance into the workplace remains complicated by traditional notions of proper female roles. Finally, this Article asks whether stereotypical perceptions of what characteristics comprise the “ideal worker” (*e.g.*, office “face-time”) continue to feed negative perceptions of working mothers, slow their workplace advancement and ultimately contribute to many mothers' decisions to simply “opt-out” of their careers. Section VIII contains suggestions for legislative and corporate policy changes that speak to modern realities regarding pregnancy discrimination, specifically, and female workplace advancement, more generally.

II. THE SHORT-LIVED, LARGE-SCALE SHIFT FROM UNPAID HOUSEHOLD LABOR TO PAID WORKFORCE ENTRY DURING WORLD WAR II

The country's workforce needs during World War II created significant new employment opportunities for American women. Although women have always “worked,” much of that work was completed in their homes—*i.e.*, *unpaid* household labor.⁶ Other exceptions included the service industry and “pink collar” positions filled by lower-class women.⁷ For example, women worked in restaurants as “dishwashers, silver cleaners, tray girls, cashiers, laundry workers and pantry hands,”⁸ as nurses, bookkeepers, stenographers, clerical workers⁹ or secretaries.

⁶See National Park Service, *Rosie the Riveter: Women Working During World War II*, at <http://www.nps.gov/pwro/collection/website/worked.htm> (noting, for example, housework or work on the family farm) [hereinafter National Park Service, World War II Online Exhibit].

⁷Consumers' League Report, *supra* note 4, 11, at <http://pds.lib.harvard.edu/pds/view/2573413?n=19&s=4&imagesize=1200&rotation=0> (noting that, in 1916, New York City restaurant workers were largely recruited from the “European peasant class”).

⁸See Consumers' League Report, *supra* note 4, 6, at <http://pds.lib.harvard.edu/pds/view/2573413?n=12&s=4>. Pursuant to this study, the Consumers' League interviewed 1,017 women in New York City to establish the prevailing conditions of labor in restaurants in New York City. *Id.* at 3. Among other things, the survey noted that “[a]n outstanding feature of restaurant work is the presence in this occupation of a very large proportion of girls and young women.” *Id.* at 6. A quarter of the workers were under 21 and two-thirds under 30 years old. *Id.* The survey also noted the “physical dangers” of this occupation for young women: “Medical authorities have pointed out the serious results that follow the strain of continued standing and over-work of young girls;” “there is a definite hazard to the child-bearing

These women, however, were typically paid very little and were certainly paid less than men who worked identical jobs.¹⁰

By and large, prior to the war, women were not considered for, or welcome to pursue positions of significance among the paid American workforce. This all changed with the entry of the United States into the Second World War. Wartime production created millions of new jobs, while, at the same time, the draft caused the removal of increasing numbers of men from the workforce each year.¹¹ The need arose for a new source of labor. In response, government agencies, businesses, and private organizations called for the mobilization of a female workforce.¹² Propaganda in the form of posters, movies and advertisements called for women to support the war effort by filling the jobs left empty by men departing overseas.¹³

Women responded to this need by entering the workforce in droves. Specifically, from March 1941 to August 1944, “the number of women employed in the labor

capacity of women. This is of vital consequence to society as a whole.” *See id.* at 6–7 (quoting a doctor in support of the proposition). Further, the survey reported that after a year or two of “the hard labor required in a restaurant kitchen,” many of the working women lost “much of their sturdiness,” the “color and brightness are gone from their faces, and they have become pale and listless. A curiously dull, passive look is characteristic of many of them.” *Id.* at 8.

⁹*See* Amy G. Maher, U.S. Department of Labor, U.S. Women’s Bureau, Bulletin of the Woman’s Bureau No. 95, *Bookkeepers, Office Clerks and Stenographs in Ohio: 1914 to 1929*, United States Government Printing Office (Washington 1932), at <http://pds.lib.harvard.edu/pds/view/2574474?n=3&s=4> (“report on the earnings and trends of employment of office workers in the State of Ohio over a period of 16 years”) [hereinafter U.S. Women’s Bureau 1932 Bulletin]. “In 1939, almost three-tenths of all women employed in Ohio were” clerical employees. *See id.*, at V (Letter of Transmittal from Mary Anderson, Director of the U.S. Department of Labor, Women’s Bureau, Washington, February 26, 1932).

¹⁰*See e.g., id.* at 2, at <http://pds.lib.harvard.edu/pds/view/2574474?n=3&s=4>. For example, in 1929, male clerical workers earned a median of \$38.57 per week, whereas female clerical workers earned a median wage of \$22.40 per week. *See id.*

¹¹*See* National Park Service, World War II Online Exhibit, *supra* note 6, at <http://www.nps.gov/pwro/collection/website/rosie.htm> (“Before the United States entered World War II, several companies already had contracts with the government to produce war equipment for the Allies. Almost overnight the United States entered the war and war production had to increase dramatically in a short amount of time. Auto factories were converted to build airplanes, shipyards were expanded, and new factories were built, and all these facilities needed workers. At first companies did not think that there would be a labor shortage so they did not take the idea of hiring women seriously. Eventually, women were needed because companies were signing large, lucrative contracts with the government just as all the men were leaving for the service.”)

¹²Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 107 (2002) (Government, public and private organizations expressly recognized that ““There is an acute shortage of workers Practically all available man-power has been exhausted, so the solving of the problem rests with the women.””).

¹³*Id.* For example, “a Mobile Press Register advertisement commissioned by ‘patriotic’ businesses, in conjunction with the War Manpower Commission, implored women to lend their labor to the war effort.” *Id.*

force swelled from 10.8 million . . . to 18 million . . .”¹⁴ For the first time in this country’s history, women dominated the American workforce.¹⁵ By war’s end, [women] would represent a record 57 percent of all employed people.¹⁶

Along with the altered face of the country’s workforce came shifting views of appropriate female roles. The labor shortage that occurred during World War II required women to work jobs traditionally reserved for men, including “millions of high-paying industrial jobs.”¹⁷ Further, the government began providing benefits to aid the female transition into the workplace, including “day care and household assistance.”¹⁸

Far from being shunned for acting outside of their perceived gender roles, women who answered the calls for workforce entry were publicly hailed as heroes. Federal brochures saluted the hardy working woman as a true patriot. “Strong women,” such as Rosie the Riveter, “became cultural icons.”¹⁹

Many women accepted this change as permanent and embraced their redefined role. “Once at work, [women] discovered the nonmaterial benefits of working, like learning new skills, contributing to the public good, and proving themselves in jobs once thought of as only men’s work.”²⁰ Accordingly, many women indicated their intent to keep their jobs after the men returned from overseas: “Seventy-five percent reported in government surveys that they were going to keep their jobs after the war.”²¹ “The old theory that a woman’s place is in the home no longer exists,” declared a female steelworker during that WWII-era survey. “Those days are gone forever.”²² This, of course, proved untrue.

¹⁴*Id.* at 108.

¹⁵SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 51 (1991).

¹⁶*See id.*

¹⁷*See id.*

¹⁸*See id.*; *see also* Marlys Ann Boschee, Ed. D. and Geralyn M. Jacobs, Ed.D., *Child Care in the United States: Yesterday and Today*, National Network for Child Care, at <http://www.nncc.org/Choose.Quality.Care/ccyesterd.html> (“During World War II, the Federal Government sponsored day care for 400,000 preschool children. Again, this was not done because Congress perceived day care to be beneficial for children, but because the mothers of these children were needed to work in industries producing war materials. . . . [A]fter the war, the Federal government abdicated all support for day care and instructed women to quit working, go home, and take care of their children.”).

¹⁹FALUDI, *supra* note 15, at 51.

²⁰*See* National Park Service, World War II Online Exhibit, *supra* note 6, at <http://www.nps.gov/pwro/collection/website/rosie.htm>.

²¹FALUDI, *supra* note 15, at 51.

²²*Id.* at 47. Of course, this was not the first time in history that a woman maintained false hopes of women’s liberation. For example, “[a]t the opening of the twentieth century,” Ida Husted Harper proclaimed that “the female condition was ‘completely transformed in most respects.’” *Id.*

The acceptance of female entry into the workplace was short-lived. From the very start of the war women were only viewed as a temporary solution to the workplace vacancies left by men sent overseas.²³ “Mainstream society accepted temporary changes brought about by a war, but considered them undesirable on a permanent basis.”²⁴

By the end of the war, “efforts by industry, government, and the media converged to force a female retreat” from the workplace.²⁵ With the return of the men from war, women were no longer needed -- nor wanted -- at work. Indeed, public and private entities and employers went so far as to enact rules designed to hasten female retreat to their homes. For example, employers revived rules that prohibited the hiring of married women and imposed caps on female workers’ salaries.²⁶ Further, “the federal government proposed giving unemployment assistance only to men, shut down its day care services, and defended the ‘right’ of veterans to displace working women.”²⁷

Attitudes towards women in the workforce also changed. No longer hailed as heroes, “[e]mployers who had [once] applauded women’s work during the war now accused working women of incompetence or ‘bad attitudes’ — and laid them off at rates that were seventy-five percent higher than men’s.”²⁸ Thus, just as swiftly as women were swept into the workforce, they found themselves pushed back out again.

During this time, however, an important shift in perception may have occurred in the collective female psyche. Among the women disappointed by being forced out of the workforce after the war were the daughters of those women who, during the wartime, formed a belief that they, too, desired a career. In a survey conducted by *Senior Scholastic* around this time, about “88 percent of the 33,000 girls polled . . . said they wanted a career.”²⁹ More and more women began to envision change.

III. 1964 -- THE CIVIL RIGHTS ACT PROHIBITS WORKPLACE DISCRIMINATION ON THE BASIS OF “SEX”

Over its relatively short lifetime, Title VII has had an important influence on the workplace opportunities and the conditions of employment available to women. For many years after World War II, employment opportunities for women remained

²³See National Park Service, World War II Online Exhibit, *supra* note 6, at <http://www.nps.gov/pwro/collection/website/propaganda.htm> (“The propaganda campaigns used during the war never had any intention of bringing about permanent changes in women’s place in society. Rather, the government used them to fill temporary labor shortages with women workers.”).

²⁴See *id.*, at <http://www.nps.gov/pwro/collection/website/rosie.htm>.

²⁵FALUDI, *supra* note 15, at 51 (quoting the response of a female steelworker to a government survey at the end of World War II).

²⁶*Id.* at 52.

²⁷*Id.* at 51.

²⁸*Id.* at 52.

²⁹*Id.* at 51.

scarce, restricted primarily to “lower-paid clerical and administrative positions.”³⁰ Furthermore, employers made jobs outside the home “as inequitable and intolerable as possible, pushing women into the worst occupations, paying them the lowest wages, laying them off first and promoting them last, refusing to offer child care or family leave, and subjecting them to harassment.”³¹ No longer “needed” in the workforce, women were once again treated as unwanted interlopers.

“In the 1950s and 1960s, a wave of protest aimed at ending discrimination and segregation against African Americans, especially in the South, brought civil rights to the forefront of national debate.”³² On Feb. 28, 1963, President John F. Kennedy issued a “Special Message on Civil Rights” press release and announced his plan for civil rights legislation³³ and, by the spring of 1963, President John F. Kennedy had submitted a draft civil rights bill to Congress.³⁴

There is little or no evidence, however, that President Kennedy or Congress initially intended to include women among Title VII’s classes of protected individuals.³⁵ The draft civil rights bill initially submitted by President Kennedy to

³⁰*Id.* at 53.

³¹*Id.* at 55.

³²Congress and the Civil Rights Act of 1964, http://www.archives.gov/exhibits/treasures_of_congress/text/page24_text.html (n.d).

³³Office of the White House Press Secretary, Press Release, Feb. 28, 1963, *available at* http://www.congresslink.org/print_basics_histmats_civilrights64_doc1.htm (Everett M. Dirksen Papers. Working Papers, f. 241. The Dirksen Congressional Center, Pekin, IL).

³⁴Everett M. Dirksen: Supporting Cloture on the Civil Rights Bill, June 10, 1964, *available at* http://www.congresslink.org/print_basics_histmats_civilrights64_doc9.htm (From Senator Robert C. Byrd’s *The Senate, 1789-1989, Classic Speeches, 1830-1993*, (Vol.3) pp. 701–07. Courtesy of the U. S. Senate Historical Office).

³⁵This is not to say that there was no concern for working women’s rights during this time. On June 10, 1963, for example, President Kennedy signed the Equal Pay Act into law and made the following remarks:

I am delighted today to approve the Equal Pay Act of 1963, which prohibits arbitrary discrimination against women in the payment of wages. This act represents many years of effort by labor, management, and several private organizations unassociated with labor or management, to call attention to the unconscionable practice of paying female employees less wages than male employees for the same job. This measure adds to our laws another structure basic to democracy. It will add protection at the working place to the women, the same rights . . .

While much remains to be done to achieve full equality of economic opportunity--for the average woman worker earns only 60 percent of the average wage for men--this legislation is a significant step forward.

Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force.

It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children which they must leave at home or in school, and for protection of the family unit. One of the prime objectives of the Commission on the Status of Women, which I appointed 18 months ago, is to develop a program to accomplish these purposes.

Congress did not include “sex” among its protected characteristics.³⁶ Also, legislative history reveals that there was little debate in Congress preceding the addition of “sex” to the civil rights legislation. Indeed, according to some accounts, the extension of workplace equality rights to women instead resulted from the political posturing of a man who hoped that prohibiting discrimination on the basis of sex would *defeat* the passage of Title VII.³⁷ Specifically, on February 8, 1964, just two days before the bill that would later become Title VII of the Civil Rights Act moved from the House to the Senate, Representative Howard W. Smith, a vocal opponent of the Civil Rights Act, proposed that discrimination on the basis of “sex” be added to the bill.³⁸ If killing the bill was his goal, however, Representative Smith failed. The bill passed in both the House and Senate, and on July 2, 1964, President Johnson signed the Civil Rights Act into law, including Title VII’s prohibition against sex-based discrimination.

IV. BEFORE 1978 -- COURTS ARE DIVIDED AS TO WHETHER PREGNANCY-BASED
DISCRIMINATION FALLS WITHIN THE DEFINITIONAL AMBIT OF PROSCRIBED
“DISCRIMINATION ON THE BASIS OF SEX;” EARLY SUPREME COURT JURISPRUDENCE
HOLDS THAT IT IS NOT INCLUDED

From the very start, courts struggled to define sex-based discrimination. According to one court in 1975, the last-minute addition of “sex” to the Civil Rights Act meant that “Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications.”³⁹ According to that court, “fundamental rights,” such as “the right to have children or to marry,” did not include the right to equal opportunity in the workplace, to the extent that the provision of that opportunity might interfere “with the manner in which an employer exercises his judgment as to the way to operate a business.”⁴⁰

Additionally, for many years following the passage of Title VII, it remained unclear whether Congress intended for the proscription against sex-based

Gerhard Peters, The American Presidency Project, *John F. Kennedy: Remarks Upon Signing the Equal Pay Act*, (June 10, 1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9267>.

³⁶See National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers 40 Years After the Civil Rights Act of 1964*, executive summary (July 2004), available at http://www.nationalpartnership.org/site/DocServer/portals_p3_library_CivilRightsAffAction_WomenAtWorkCRA40.pdf?docID=590 [hereinafter *Women at Work*].

³⁷See *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (“The amendment adding ‘sex’ . . . was introduced by Representative Howard Smith of Virginia, who . . . was accused by some of wishing to sabotage its passage by his proposal of the ‘sex’ amendment.”).

³⁸See *Women at Work*, *supra* note 36. Note that the late timing of the addition of “sex” to Title VII precluded detailed debate by Congress on the issue of what, precisely, Congress intended when it prohibited “discrimination on the basis of sex.” *Id.* Thus, Congress created very little legislative history to inform court interpretation of sex-based discrimination. *Id.* Courts were instead left to define the parameters of illegal sex-based discrimination without the guideposts of legislative intent that accompanied the statute’s other prohibitions. *Id.*

³⁹*Willingham*, 507 F.2d at 1090.

⁴⁰*Id.* at 1091.

discrimination to include discrimination on the basis of pregnancy and pregnancy-related conditions. In particular, public and private entities remained widely divided regarding the issue of whether Title VII's prohibition against sex-based discrimination included women who could not perform their jobs during their pregnancy.

Courts and employers also struggled with the impact of Title VII on the provision of employee benefits. On the one hand, in 1972, the EEOC issued guidelines that interpreted Title VII coverage to include "disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery" and advised that "[employment benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."⁴¹ On the other hand, many employers refused to extend employment policies and benefits such as temporary disability, paid sick leave and accumulated seniority status to women who took a pregnancy-related leave of absence.⁴² For example, in the early 1970s, General Electric argued before the U.S. Supreme Court that the majority of U.S. employers did not provide their employees with disability coverage for pregnancy-related conditions. According to General Electric:

[As of 1974,] approximately 40 per cent of the work force in the United States under 65, or some 32,168,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 per cent of the plans provide 13 weeks benefit coverage; 50 per cent provide coverage for 26 weeks; and only 5 per cent provide coverage for 52 weeks. Only about 42.6 per cent of these plans, covering about 13,500,000 employees, provide a pregnancy benefit, and such coverage . . . is 'almost always . . . limited to six weeks . . .'⁴³

Thus, for a decade after the passage of the Civil Rights Act, the majority of employment policies reflected a belief by employers that pregnancy-based discrimination did not fall within the scope of sex-based discrimination proscribed by Title VII and that it was therefore not illegal to exclude female-specific benefits from health benefit plans. The United States Supreme Court in *General Electric Co. v. Gilbert* agreed. In that case, the Supreme Court first addressed whether an employment benefit plan that excluded pregnancy-related benefits violated Title VII.⁴⁴ The case involved a challenge brought by a class of female General Electric employees against the company's disability plan which excluded disabilities arising from pregnancy from its coverage, despite providing otherwise broad coverage for all other "non-occupational sickness and accident benefits."⁴⁵ Specifically, at issue

⁴¹29 C.F.R. § 1604.10(b) (1975).

⁴²See Brief for General Electric Co. as Amicus Curiae Supporting Petitioner at 23, *Geduldig v. Aiello*, 94 S.Ct. 2485, (1974) (citation omitted).

⁴³*Id.* at 24 (citation omitted).

⁴⁴429 U.S. 125 (1976).

⁴⁵*Id.* at 127–28. The class consisted of female employees that became pregnant in 1971 or 1972, who presented claims under the company's disability plan "to cover the period while absent from work as a result of the pregnancy. These claims were routinely denied on the ground that the Plan did not provide disability-benefit payments for any absence due to pregnancy." *Id.* at 129.

in *Gilbert* was whether an employment practice that offered unequal benefits based on an employee's pregnancy or pregnancy-related condition constituted a form of "sex discrimination in violation of Title VII."⁴⁶

To defend its exclusion of pregnancy-related conditions from coverage by its employee disability plan, GE employed a "cost differential defense."⁴⁷ In particular, GE presented evidence that (1) the cost of providing disability coverage to each female GE employee was equal to, if not greater than, the cost of coverage per male, and (2) pregnancy-related disability coverage would substantially increase the cost of its disability insurance plan.⁴⁸

The district and appellate courts rejected GE's cost-differential defense, concluding that "[i]f Title VII intends to sexually equalize employment opportunity, there must be one exception to the cost differential defense."⁴⁹ Accordingly, the district court concluded that GE's disability plan, which provided general coverage for employee disabilities except when those disabilities resulted from pregnancy, discriminated on the basis of sex in violation of Title VII.⁵⁰ By a two-to-one margin, the Court of Appeals for the Fourth Circuit affirmed that decision.⁵¹

The Supreme Court in *Gilbert*, however, reversed the lower court's decision and held that employers could legally exclude pregnancy and pregnancy-related conditions from employee sickness and accident benefits plans.⁵² In reaching that conclusion, the *Gilbert* court focused its analysis on a concept not addressed by the lower courts: whether an employment policy that had a discriminatory effect only on employees who became pregnant constituted a gender-based discriminatory practice. After framing the issue as such, the Court rejected the notion that a distinction based on pregnancy is synonymous with sex-based discrimination.⁵³ More specifically, the majority reasoned that the differential treatment of pregnancy distinguished not between men and women, but between pregnant women and non-pregnant persons of both sexes.⁵⁴ Thus, the fact that only women could become pregnant did not itself support a finding that "the exclusion of pregnancy benefits is a mere 'pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.'"⁵⁵ Accordingly, the *Gilbert* court held that the disability insurance plan provided by GE

⁴⁶*Id.* at 127–28.

⁴⁷*Id.* at 132.

⁴⁸*Id.* at 132 (citing *Gilbert*, 375 F. Supp. at 383).

⁴⁹*Gilbert*, 429 U.S. at 132 (quoting *Gilbert*, 375 F. Supp. at 383). In 1982, Congress expressly precluded employer use of a cost differential defense with its enactment of 29 C.F.R. § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.").

⁵⁰375 F. Supp. at 385–86.

⁵¹*Gilbert v. General Elec. Co.*, 519 F.2d 661, 668 (4th Cir. 1975).

⁵²*General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

⁵³*See Gilbert*, 429 U.S. at 133–40.

⁵⁴*Id.* at 135.

⁵⁵*Id.* at 135, 136 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974)).

afforded equal benefits to male and female employees, notwithstanding the exclusion of pregnancy-related disabilities:

The Plan, in effect . . . is nothing more than an insurance package, which covers some risks, but excludes others The “package” going to . . . General Electric’s male and female employees covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” . . . As there is no proof that the package is in fact worth more to men than women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits *For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.*⁵⁶

With this rationale, the Court acknowledged that pregnancy is a condition unique to women, but found this unique condition to be something “extra.” Thus, the provision of pregnancy disability benefits did not implicate concerns regarding equal treatment, but rather raised a question of whether employers should be required to provide “greater economic benefits” to accommodate the “extra” disability unique to women.⁵⁷ Given that analytical framework, the Court concluded that, because Title VII promises equal, but not special treatment, the statute does not afford protection to a pregnant employee seeking “extra” benefits with regard to her employer’s disability plan.⁵⁸

⁵⁶Gilbert, 429 U.S. at 138–39 (quoting *Geduldig*, 417 U.S. at 496–97) (emphasis added).

⁵⁷See *id.* at 139 n.17 (referring to “‘extra’ disabilities due to pregnancy”).

⁵⁸See *id.* (stating that Title VII’s proscription on discrimination does not require the employer to pay “an incremental amount over her male counterpart due solely to the possibility of pregnancy related disabilities”). The *Gilbert* Court acknowledged that its holding ran directly contrary to EEOC Guidelines promulgated in 1972, which provided that pregnancy disability benefits should be provided on a basis equal to that provided other temporary disabilities. See *id.* at 140; 29 C.F.R. § 1604.10(b) (2004). To justify this departure, the Court first noted that EEOC Guidelines have the power to persuade, but not bind. According to the Court, the “weight of such a judgment in a particular case will [therefore] depend upon the thoroughness of evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Gilbert*, 429 U.S. at 141 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court then cited an early opinion letter issued by the General Counsel of the EEOC, which took a position directly contrary to that provided by the 1972 Guidelines. *Id.* at 142–43. Based on that contradictory stance, the *Gilbert* Court determined that the interpretive stance taken by the 1972 EEOC Guidelines deserved little persuasive weight. *Id.* at 143 (“In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore*.”).

In a strongly-worded dissent, Justice Brennan took issue with the conclusion reached by the majority, which he believed “offend[ed] common sense.”⁵⁹ In particular, Justice Brennan wrote in his dissent that it “offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly ‘sex related.’”⁶⁰ “Indeed, it is the capacity to become pregnant,” Justice Stevens concluded in his dissent, “which primarily differentiates the female from the male.”⁶¹

Moreover, Justice Brennan took the majority to task for singling out pregnancy and childbirth as legitimate exclusions from coverage:

Indeed, the shallowness of the Court’s “under-inclusive” analysis is transparent. Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage *every* disability that is female-specific or predominantly afflicts women, the Court could still reason as here that the plan operates equally: *Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and the other excluded female-dominated disabilities.* Along similar lines, any disability that occurs disproportionately in a particular group - sickle-cell anemia, for example - could be freely excluded from the plan without troubling the Court’s analytical approach.⁶²

In 1977, the Supreme Court applied the *Gilbert* framework again, in *Nashville Gas Co. v. Satty*, and held that an employer could exclude pregnancy-related leave from its sick leave policy without violating Title VII.⁶³ The very next year, Congress responded by enacting the PDA.

V. 1978 -- CONGRESS AMENDS TITLE VII WITH THE PREGNANCY DISCRIMINATION ACT

In 1978, Congress amended Title VII with the PDA. With that amendment, the collective understanding of legally permissible treatment of pregnant employees changed.⁶⁴ In the PDA, Congress expanded the contours of actionable sex-based

⁵⁹*Id.* at 149 (Brennan, J., dissenting) (citation omitted).

⁶⁰*Id.*

⁶¹*Id.* at 162 (Stevens, J., dissenting).

⁶²*Id.* at 153 (Brennan, J., dissenting) (citation omitted) (emphasis added). Justice Stevens commented similarly: “the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan.” *Id.* at 152.

⁶³*Nashville Gas Co.*, 434 U.S. 136, 141, 143-44 (1977).

⁶⁴42 U.S.C. § 2000e(k) (2008). The PDA resulted directly from Congress’s “disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.” *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983). Both House and Senate Reports accompanying the passage of the Act opined that the two dissenting opinions in *Gilbert* correctly interpreted the principles underlying Title VII. *See id.* at 678 n.15 (citing H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 2 (1978); Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor

discrimination to include discrimination “on the basis of pregnancy, child birth, or related medical conditions.”⁶⁵ Congress further provided that women affected by pregnancy, childbirth, or related medical conditions “shall be treated the same for all employment–related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work”⁶⁶ According to the PDA’s Congressional sponsor: “[t]he entire thrust . . . behind this legislation [was] to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”⁶⁷

A. What is Equal Treatment?

A plaintiff need not be pregnant to raise a claim for pregnancy discrimination under the PDA.⁶⁸ “[I]n using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the [PDA] makes clear that its protection extends to the whole range of matters concerning the childbearing process.”⁶⁹ This includes “potential pregnancy” or a plaintiff who “asserts that she was discriminated against . . . because she is a woman who had been pregnant, had taken a maternity leave, and might become pregnant again.”⁷⁰ Thus, all women of child bearing age are potentially protected by the PDA’s promise of equal treatment.

The PDA expressly defines the proper comparator for pregnancy-related claims of discrimination. Specifically, the PDA provides that “women affected by pregnancy, childbirth, or related medical conditions 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*”⁷¹ Thus, the PDA definition of sex-based

and Human Resources), Ser. No. 96-2, p. 148 (1979) [hereinafter Leg. Hist.], U.S. CODE CONG. & ADMIN. NEWS 1978, pp. 4749, 4750; S. REP. NO. 95-331, 95th Cong., 1st Sess. 2-3 (1977), Leg. Hist. at 39–40.

⁶⁵ 42 U.S.C. § 2000e(k) (2008).

⁶⁶Title VII, 42 U.S.C. § 2000e(k) (2008) (“The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment–related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work”).

⁶⁷123 CONG. REC. 29658 (1977).

⁶⁸42 U.S.C. § 2000e(k) (2008); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 469 (6th Cir. 2005).

⁶⁹H.R. REP. 95-948, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

⁷⁰*Walsh v. Nat’l Computer Sys.*, 332 F.3d 1150, 1160 (8th Cir. 2003). “Potential pregnancy . . . is a medical condition that is sex–related because only women can become pregnant.” *Id.* (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)).

⁷¹42 U.S.C. § 2000e (2008), with the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (emphasis added); *see also* *Tysinger v. Police Dep’t of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006) (Under the PDA, “[w]omen who are affected by pregnancy, childbirth or related medical conditions are required to be treated the same, for all employment

discrimination sets forth what appears to be a simple mandate: co-workers in similar employment circumstances, whether pregnant or not, must be treated the same. How to define equal treatment, however, proved to be the next challenge facing the courts.

1. Equal Treatment Does Not Mean That An Employer Can Take No Adverse Action Against a Pregnant Employee

Pregnancy, unlike, for example, skin color in a race discrimination case, directly affects a woman's ability to perform her job.⁷² Thus, in certain circumstances, the PDA does not prohibit terminating the employment of a pregnant woman based on her inability to perform her job. For example, the PDA's promise of equal treatment does not mean that an employer must:

1. Create a special, "light duty" assignment (or similar accommodation) for a woman to perform during her pregnancy, if the employer does not offer light duty assignments or similar accommodations to other temporarily disabled employees.⁷³
2. Hire a pregnant woman if the applicant would require a leave of absence immediately after starting work, if the employer would not hire anyone who required a similar leave.⁷⁴
3. Modify its leave policy to provide special accommodations to pregnant employees, "if a company's business necessitates the adoption of particular leave policies."⁷⁵
4. Continue to employ a pregnant employee when her requested leave coincides with the busiest time of the year for that employer.⁷⁶

Further, the physical limitations specific to pregnancy may complicate a woman's ability to point to a similarly disabled comparator. For example, in *Tysinger v. Police Dep't of City of Zanesville*, the Sixth Circuit rejected the plaintiff's attempt to point to two temporarily disabled police officers as comparators, because the disabled officers, although unable to fully perform their jobs, did not request light duty assignments:

In fact, there is no evidence that either officer sought an accommodation of any kind or even advised Chief Lambes that his physician had ordered him off work or prescribed restrictions. Despite their temporary inability to perform all the duties of their positions, they continued working in their usual assigned capacities. It is in this crucial respect that Landerman and

purposes, as other persons not so affected but who are similar in their ability or inability to work.") (citing 42 U.S.C. § 2000e(k)).

⁷²See, e.g., *Walker v. Fred Nesbit Distrib. Co.*, 331 F. Supp. 2d 780, 787–89 (S.D. Iowa 2004).

⁷³*Priest v. TFH-EB, Inc.*, 127 Ohio App. 3d 159, 165 (10th Dist. 1998) ("Federal law simply requires employers to treat pregnant employees the same as similarly situated nonpregnant employees; it does not create substantive rights to preferential treatment.").

⁷⁴See, e.g., *Marafino v. St. Louis County Circuit Ct.*, 707 F.2d 1005, 1006–07 (8th Cir. 1983).

⁷⁵*Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); Title VII, Pub. L. No. 88-352, § 703(a)(2) (1964).

⁷⁶See, e.g., *Armindo v. Padlocker, Inc.*, 209 F.3d 1319 (Fla. 2000).

Madden were not similarly situated to Tysinger. Despite their temporary infirmities, they presented themselves to their employer as willing and able to continue working in their ordinary capacities. *Tysinger*, on the other hand, distinguished herself by asserting the need for and requesting a temporary alteration in her job duties. In this respect, she sought from her employer not the same or equal treatment received by Landerman and Madden, but more favorable treatment. Chief Lambes affirmatively stated that Tysinger would have received the same treatment as Landerman and Madden, if she had elected to continue working as a patrol officer despite her pregnancy: “Had she been willing to perform full duty work, she would not have been removed from the active duty roster.”⁷⁷

Thus, even though the temporarily disabled officers admitted that they could not fully perform their jobs, the fact that they did not request a temporary reassignment sufficiently distinguished their situation from that of the pregnant officer/plaintiff to defeat her pregnancy discrimination claim. According to the *Tysinger* court, the plaintiff’s request to change her job duties while she was physically unable to perform those responsibilities constituted a request for more “favorable” treatment than her comparators, and Title VII promises women equal, but not more favorable treatment.

Put simply, the PDA does not completely prohibit all adverse employment action taken against a pregnant employee. Thus, much of the pregnancy discrimination jurisprudence turns on the ability of the plaintiff to establish that similarly disabled employees were treated more favorably.⁷⁸

2. Equal Treatment Means An Employer Cannot Make Adverse Employment Decisions Based on Assumptions About a Pregnant Employee’s Ability to Perform Her Job

Employer decision-making based on protectionist impulses may lead to employer liability under the PDA. For this reason, employers must be careful to parse stereotypical beliefs about pregnant women’s job capabilities from the employment decision-making process. For example:

- a) An employer must apply identical standards to evaluate the ability of its pregnant and temporarily disabled employees to work.⁷⁹
- b) It is a violation of the PDA to take an adverse employment action based on an assumption that a pregnant woman will leave her job after giving birth.⁸⁰

⁷⁷463 F.3d 569, 574 (6th Cir. 2006)

⁷⁸See William G. Phelps, J.D., *What Constitutes Termination of Employee Due to Pregnancy in Violation of Pregnancy Discrimination Act Amendment to Title VII of Civil Rights Act of 1964*, 42 U.S.C.A. § 2000e(k), 130 A.L.R. FED. 473 (1996); *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002) (if all employees taking a leave under similarly disabling circumstances face the same adverse employment action, a court will likely find that proscribed pregnancy-based discrimination did not cause the adverse action, and the plaintiff/employee’s claim for pregnancy discrimination must fail. To hold otherwise would be to transform the PDA into a guarantee of medical leave for pregnant employees, something [courts] have specifically held that the PDA does not do.”) (emphasis added).

⁷⁹See *Automobile Workers, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1990).

- c) It is a violation of the PDA to take an adverse employment action based on an assumption that a pregnant woman is incapable of performing her job responsibilities.⁸¹

Consider, for example, a position waiting tables in a restaurant: “As long as [the pregnant woman] can do the work of a waitress, [the employer] cannot deny her the job because he fears that at some point [she] won’t be physically able to carry heavy trays or because [the employer is] afraid that she’ll miscarry if she does carry the trays or because he’s afraid of what his customers might think if he allows her to carry the trays throughout her pregnancy. If it turns out that [she] is unable to lift the serving trays, then [the employer] must treat her [like] any other employee similarly unable to perform this function of the job. Let’s say that another waiter . . . breaks his arm. If [the employer] arranges for a bus boy to carry [that waiter’s] trays, that’s what [the employer] should do for [the pregnant waitress].”⁸²

- d) It is a violation of the PDA to adopt employment policies or decisions that seek to “protect” the health of pregnant women and/or their unborn child.⁸³

In *Zuniga v. Kleberg County Hosp.*, for example, the court held that a hospital’s concern for the health of a woman’s fetus and fear of liability for damages to the future child did not constitute a business necessity justifying termination of pregnant x-ray technician, when the hospital failed to utilize available, alternative, less discriminatory means of achieving its business purpose (such as granting a leave of absence).⁸⁴

- e) It is a violation of the PDA and Ohio Revised Code Chapter 4112 to adopt employment policies to address subjective concerns about pregnant women.

For example, an employer who adopted an employment policy requiring that pregnant women wear makeup, based on a premise that pregnant employees are less attractive, was found to have violated the PDA in *Tamimi v. Howard Johnson Co.*⁸⁵

⁸⁰*Maldonado v. U.S. Bank*, 186 F.3d 759, 769 (Ill. 1999). But see *Troupe v. May Dep’t. Stores Co.*, in which the Seventh Circuit found that an employer who terminated a pregnant employee based on a fear that she would not return to work after her pregnancy leave, coupled with its desire to avoid paying the costs of her maternity leave, asserted a legitimate non-discriminatory reason for her termination. 20 F.3d 734 (7th Cir. 1994). Note also that if the employer designates the employee’s leave as FMLA leave, the employee will be entitled to reinstatement at the end of that leave. 29 U.S.C. § 2614(a)(1). Specifically, an employee out on FMLA leave is entitled to reinstatement to his or her previously held job or “an equivalent position” with equivalent employment benefits, pay and other terms and conditions of employment. *Id.*

⁸¹*Touvell v. Ohio Dept. of Mental Retardation and Dev. Disabilities*, 422 F.3d 392, 403 (Ohio 2005).

⁸²THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE PROGRAM, SEX DISCRIMINATION ISSUES, PRACTICAL GUIDANCE ON PREGNANCY DISCRIMINATION, at G-1 (1998) [hereinafter EEOC PRACTICAL GUIDANCE].

⁸³*See Atteberry v. Dep’t. of State Police*, 224 F. Supp. 2d 1208, 1214 (C.D. Ill. 2002) (holding that pregnancy was “a medical condition without medical restrictions” and that no evidence was introduced indicating that Plaintiff objecting to light-duty assignment was physically prevented from performing her duties as a police officer).

⁸⁴692 F.2d 986 (5th Cir. 1982).

⁸⁵807 F.2d 1550 (11th Cir. 1987).

The company's proffered reason for the policy — that it wanted to maintain its “public image” and that a pregnant woman that did not wear makeup tarnished that image — did not constitute a business justification sufficient to defeat the plaintiff's sex and pregnancy discrimination claims.⁸⁶

B. Equal Treatment with Regard to Medical Benefits and Leave

1. The Meaning of Equal Treatment with Regard to Medical and Fringe Benefits

Title VII's promise of equal treatment with regard to the “terms, conditions, or privileges of employment” also includes fringe benefits, such as health insurance coverage for employees and their spouses.⁸⁷ An employer who provides benefits to workers on leave must extend the same benefits to women on leave for pregnancy-related conditions.⁸⁸ Seniority, vacation calculation, and pay rate determinations also must be provided on an equal basis.⁸⁹ The provision of benefits triggers the responsibility to provide benefits equally.

While the PDA does not require employers to extend any medical benefits to employees, it nonetheless requires employers to include coverage for pregnancy, childbirth and other related costs, if the employer decides to offer any medical benefits at all.⁹⁰ “If an employer's health plan covers pre-existing medical conditions, then it must cover an insured employee's pre-existing pregnancy. Deductibles for pregnancy-related medical costs must [b]e the same as deductibles for other conditions. Limitations on expenses cannot be applied exclusively for pregnancy-related conditions.”⁹¹ An employer must extend medical benefits to pregnant employees in the same manner it extends those benefits to other employees with similarly-diminished capacities.⁹²

Further, Title VII and the PDA protect both men and women with regard to pregnancy-related fringe benefits. Under Title VII, it is an unlawful employment practice for an employer to discriminate between men and women with regard to the granting of fringe benefits. To the extent any benefits are granted in association with

⁸⁶ *Id.* at 1554.

⁸⁷ *See* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 673 (1983) (holding that fringe benefits must be provided on a non-discriminatory basis). The *Newport News* court found that a health insurance plan granting less coverage to the pregnancy-related disabilities of employees' spouses violated Title VII because the plan gave “married male employees a benefit package for their dependents that [was] less inclusive than the dependency coverage provided to married female employees.” *Id.* at 684.

⁸⁸ *See* *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (finding that a policy that, on its face, appeared to be neutral, but in effect denied accumulated seniority to female employees returning from pregnancy leave, violated Title VII).

⁸⁹ *See id.*

⁹⁰ *See* EEOC PRACTICAL GUIDANCE, *supra* note 81, at G-2.

⁹¹ *Id.* at G-3.

⁹² *See, e.g.,* *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983) (holding that an employer violated Title VII when the plans offered by that employer to its employees each paid women lower monthly retirement benefits than men who made the same contributions).

pregnancy-related leave, the employer must extend equal benefits to its male and female employees.⁹³ For example, in *Newport News Shipbuilding*, the Supreme Court held that an employer's health insurance plan violated Title VII because it provided female employees more pregnancy-related benefits than it did to the spouses of male employees.⁹⁴ Thus, with regard to fringe benefits, equal treatment means equal coverage.

2. The Meaning of Equal Treatment with Regard to Pregnancy or Maternity Leave

The EEOC defines "maternity leave" as "the period of a female employee's physical inability to work as a result of pregnancy, childbirth or related medical conditions," which includes an additional period of absence taken after childbirth to care for the baby.⁹⁵ The PDA does not require that an employer have a maternity leave policy but, to the extent that an employer permits its employees to take pregnancy-related disability leave (*e.g.*, maternity leave) the PDA imposes certain requirements.⁹⁶ Specifically, with regard to pregnancy-related leave, the PDA requires:

"If an employer allows leave for temporary disabilities not related to pregnancy, it may not deny leave for pregnancy-related disabilities or apply different terms or conditions to such leave."⁹⁷

- "An employer may not specify the time that maternity leave commences."⁹⁸
- "An employer must use the same procedures to determine a pregnant employee's ability to work as it uses to determine a temporarily disabled employee's ability to work."⁹⁹
- The leave granted to pregnant women must be similar to that granted to employees with temporary disabilities.¹⁰⁰
- An employer cannot order a pregnant woman to go on leave.¹⁰¹

⁹³*See id.* EEOC sex discrimination guidelines provide similarly, stating that "it shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits." *Id.*

⁹⁴*Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁹⁵EEOC PRACTICAL GUIDANCE, *supra* note 81, at G-2. States can provide greater pregnancy benefits than that provided by the PDA. *See Cal. Fed. Savings & Loan v. Guerra*, 479 U.S. 272 (1987) (holding that Title VII does not preempt a state law that required employers to provide four months unpaid leave to pregnant female employees).

⁹⁶*See Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all").

⁹⁷EEOC PRACTICAL GUIDANCE, *supra* note 81, at G-2.

⁹⁸*Id.* at G-3.

⁹⁹*Id.*

¹⁰⁰*See Maddox v. Grandview Care Ctr.*, 780 F.2d 987, 991 (11th Cir. 1986) (noting that the employer discriminated when it offered three months leave for pregnancy-related medical conditions but offered longer periods of time for leave associated with non-pregnancy-related health conditions or disabilities).

VI. BEYOND THE PDA: THE FMLA, OHIO LAW, AND PREGNANCY-RELATED
WORKPLACE LEAVE

A. *The Family Medical Leave Act and Pregnancy-Related Workplace Leave*

The PDA does not require that an employer provide its employees with pregnancy-related medical leave.¹⁰² However, pursuant to the Family Medical Leave Act (“FMLA”), pregnant employees may be *entitled* to pregnancy-related leave.¹⁰³ The FMLA entitles an eligible employee¹⁰⁴ of a covered employer¹⁰⁵ to 12 weeks of unpaid leave each year for personal and family related health conditions, including those specifically related to, *inter alia*, pregnancy, the birth or adoption of a child, the care of a family member with a serious health condition, or recovery from an employee’s own serious health condition.¹⁰⁶

¹⁰¹See also EEOC Notice, Policy Guidance on Parental Leave, N-915-058 (August 27, 1990), in THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE PROGRAM, SEX DISCRIMINATION ISSUES, at 1 (1998). Employers may also develop “parental leave” policies. For male employees, parental leave is “leave to care for a child of any age or to develop a healthy parent-child relationship, or to help a family adjust to the presence of a newborn or adopted child.” *Id.* Parental leave is therefore “applicable to leave to care for any family member at any age or, indeed, leave for any purpose.” *Id.* With regard to parental leave for childcare, Title VII requires that the employer grant men and women equal lengths of leave.

¹⁰²*Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002).

¹⁰³FMLA, 29 U.S.C. § 2601 (2005). The FMLA requires that covered employers provide their employees who otherwise qualify for coverage at least twelve weeks per year of unpaid leave for personal and family related health conditions, including those specifically related to, *inter alia*, pregnancy, childbirth, and adoption. *Id.*

¹⁰⁴“An ‘eligible employee’ is an employee of a covered employer who: (1) Has been employed by the employer for at least 12 months, and (2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and (3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.” 29 C.F.R. § 825.110(a) (2009). “The 12 months an employee must have been employed by the employer need not be consecutive months, provided . . . If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers’ compensation, group health plan benefits, etc.), the week counts as a week of employment.” 29 C.F.R. § 825.110(b)(3) (2009).

¹⁰⁵“An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.” 29 C.F.R. § 825.104(a) (2009). “Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed.” *Id.*

¹⁰⁶29 U.S.C. § 2612(a)(1), (c) (2005); 29 C.F.R. § 825.115(a)(2) (2009). Note that although FMLA only entitles the employee to take *unpaid* leave, the employee is entitled continuing health care coverage during that leave. Note also that an employee out on FMLA leave is entitled to reinstatement to his or her previously held job or “an equivalent position”

Complications during pregnancy may constitute a “serious health condition” entitling an employee to take FMLA leave.¹⁰⁷ For example, in *Hiemer v. Anthem Ins. Co.*, the plaintiff’s pregnancy exacerbated a severe lung condition, for which she took intermittent FMLA leave until the birth of her baby.¹⁰⁸

Note that both men and women are entitled to take FMLA leave for child birth- and adoption- related events.¹⁰⁹ Thus, for eligible male and female employees of covered employers, the FMLA supplements the rights provided by Title VII.

B. Ohio Revised Code Chapter 4112, Pregnancy Discrimination and Pregnancy-Related Workplace Leave

Ohio law regarding pregnancy discrimination is set forth in Ohio Revised Code (“O.R.C.”) Chapter 4112. Ohio adopted § 4112.02 prior to the passage of the Civil Rights Act of 1964. In 1980, after the Supreme Court’s 1976 decision in *Gilbert* and Congressional passage of the PDA in 1978, the Ohio legislature adopted § 4112.01(B), which provides that for employers with four or more employees, the terms “because of sex” and “on the basis of sex” include discrimination “because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.” This amendment to the definitions section of Chapter 4112 redefined the terms “because of sex” and “on the basis of sex” to incorporate the language of the PDA.

The meaning of R.C. § 4112.01(B) can also be found, in part, in an administrative rule enacted by the Ohio Civil Rights Commission (“OCRC”) “to clarify the rights and obligations of employers and pregnant employees”¹¹⁰ Specifically, R.C. § 4112(A)(4) empowers the OCRC “to adopt, promulgate [and] amend . . . rules to effectuate the provisions of [Chapter 4112] and the policies and practices of the commission in connection with this chapter.”¹¹¹ Pursuant to that enabling provision, the OCRC enacted Ohio Administrative Code § 4112-5-05. While the Ohio Supreme Court has held that “federal case law interpreting Title VII of the Civil Rights Act of 1964 . . . is generally applicable to cases involving alleged violations of R.C. Chapter 4112,”¹¹² as can be seen below, the OCRC has extended protections to pregnant employees beyond those provided by federal law interpreting the PDA.

with equivalent employment benefits, pay and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1) (2008).

¹⁰⁷Order granting in part, denying in part Motion for Summary Judgment at 7, *Hiemer v. Anthem Ins. Co.*, (S.D. Ohio 2007) (No. C-1-05-124), 2007 WL 915191.

¹⁰⁸*Id.* at *1.

¹⁰⁹*See, e.g.*, *Alston v. Sofa Express*, No. 2:06-CV-0491, 2007 WL 3071662 (S.D. Ohio Oct. 19, 2007) (plaintiff took FMLA leave for the birth of his daughter).

¹¹⁰Kevin P. McNeil, *Reasonable and Sufficient Pregnancy Leave: Refining the Ohio Civil Rights Commission’s Rule on Pregnancy Discrimination*, in *HOT ISSUES IN EMPLOYMENT LAW: FMLA/LEAVE AND WAGE/HOUR*, 2.1, 2.1 (Ohio State Bar Assoc. ed., 2000) [hereinafter *Reasonable and Sufficient Pregnancy Leave*].

¹¹¹*Id.* at 2.2.

¹¹²*Hollingsworth v. Time Warner Cable*, 157 Ohio App. 3d 539, 2004-Ohio-3130, 812 N.E.2d 976.

1. Ohio Administrative Code Section 4112-5-05 Interprets Chapter 4112 to Require that an Employer Provide its Pregnant Employees Reasonable and Sufficient Leave

Pursuant to Ohio Administrative Code § 4112-5-05, the OCRC has “made clear that the prohibition against pregnancy discrimination set forth in Ohio Revised Code Chapter 4112[::]”

- “includes the failure or refusal of an employer to provide a pregnant employee with leave for pregnancy, childbirth or a related medical condition;”
- “requires that women affected by pregnancy, childbirth or a related medical condition be permitted to take leave for a reasonable period of time;”
- “prohibits employers from terminating an employee affected by pregnancy, childbirth or a related medical condition under the auspices of a policy that provides insufficient or no pregnancy/maternity leave.”¹¹³

Further, Ohio Administrative Code § 4112-5-05(G) provides that:

- “Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.”¹¹⁴
- “[I]f the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time.”¹¹⁵

Hence Chapter 4112, as interpreted by Ohio Administrative Code § 4112-5-05, goes further than Title VII, which courts hold does not necessarily require the provision of maternity leave. Federal case law interpreting the PDA, therefore, is not instructive as to Chapter 4112’s pregnancy-related prohibitions in this regard.

The OCRC has acknowledged that the rule set forth in Ohio Administrative Code § 4112-5-05 “has generated a noticeable degree of uncertainty” and that it is “often difficult to apply because it does not tell employers or employees when leave for pregnancy, childbirth or related medical conditions is ‘reasonable’ or, on the other

¹¹³Reasonable and Sufficient Pregnancy Leave, *supra* note 108, at 2.3 (citing OHIO ADMIN. CODE § 4112:5-05(G) (2008)).

¹¹⁴*Id.* (citing OHIO ADMIN. CODE § 4112:5-05(G)(2) (2008)); *see also* Marvel Consultants, Inc. v. Ohio Civ. Rights Comm’n (1994), 93 Ohio App.3d 838, 841, 639 N.E.2d 1265, 1267 (“Denial of maternity leave mandated by [OHIO ADMIN. CODE § 5112:5-05(G) (2008)] is, in effect, terminating the employee because of her pregnancy.”).

¹¹⁵Reasonable and Sufficient Pregnancy Leave, *supra* note 108, at 2.3 (citing OHIO ADMIN. CODE § 4112:5-05(G)(6) (2008)); *see also* McConaughy v. Boswell Oil Co. (1998), 126 Ohio App.3d 820, 829, 711 N.E.2d 719, 725 (noting “if any employer has a leave policy, a female employee must be provided a leave of absence ‘for a reasonable period of time’”).

hand, ‘insufficient.’”¹¹⁶ Accordingly, in 2004, “to provide guidance on the issue of what constitutes reasonable and sufficient leave under the agency’s rule on pregnancy discrimination,” the OCRC adopted Technical Policy T-29, Pregnancy/Maternity Leave.¹¹⁷ According to that Policy:

- “Women affected by pregnancy, childbirth, or a related medical condition are entitled to at least the same amount and type of leave and benefits as other employees who are provided leave and benefits and who are similar in their ability or inability to work.”¹¹⁸
- “A leave policy providing at least twelve weeks of pregnancy/maternity leave, applied regardless of length of service, is presumed to be reasonable and sufficient; however the reasonableness and sufficiency of a leave policy may be rebutted based upon the past practices of the employer, the type of work involved and other relevant factors.”¹¹⁹
- “No employer is required to provide unlimited pregnancy/maternity leave, unless it provides unlimited leave to other employees similar in their ability or inability to work.”¹²⁰

In effect, Technical Policy T-29 “creates a presumption — albeit a rebuttable presumption — that the period of leave provided is reasonable and sufficient” when an employer provides its employees 12 weeks of unpaid maternity leave.¹²¹ The corollary is also true: an employer that does not provide its pregnant employees at least 12 weeks of leave cannot take advantage of the presumption that the leave it provided was reasonable and sufficient.¹²² In such circumstances, the OCRC “will make a case-by-case determination of reasonableness and sufficiency, and will examine and consider any relevant, legitimate factors that may make a leave period shorter than the 12 weeks nonetheless reasonable and sufficient (*e.g.*, the size of an employer, the nature of the position, or the complexity of operations).”¹²³

The OCRC advises employers to “take advantage of the safe harbor afforded under Technical Policy T-29” by making available 12 weeks of leave to its employees, “regardless of how long that employee has been employed” and “exclusively for pregnancy, childbirth or a related medical condition.”¹²⁴ Although this does not ensure that the OCRC will conclude that the employer complied with Ohio law, the OCRC will at least “begin its investigation with *the presumption* that

¹¹⁶ Reasonable and Sufficient Pregnancy Leave, *supra* note 108, at 2.4 (citing OHIO ADMIN. CODE § 4112:5-05(G) (2008)).

¹¹⁷ *Id.* at 2.5.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2.6.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 2.7.

the period of leave provided by the employer is reasonable, sufficient and in compliance with Ohio law.”¹²⁵

2. The Ohio Civil Rights Commission’s Proposed Revisions to Ohio Administrative Code Section 4112-5-05

The OCRC is currently undertaking a revision to the pregnancy discrimination rule “to redefine the current loose Ohio policy to provide ‘reasonable leave’ for women.”¹²⁶ In its initial submission to the Ohio Joint Committee on Agency Rule Review (“JCARR”), the OCRC contended that its rule requiring employers to provide 12 weeks of maternity leave — no matter what — would have zero economic impact on business.¹²⁷ “Business owners vehemently disagree[d].”¹²⁸ Accordingly, the JCARR rejected the OCRC’s initial proposal, requiring the OCRC to conduct an economic impact report before resubmitting its proposed rule to the JCARR.¹²⁹

According to the OCRC, by revising the pregnancy discrimination rule, its goal is “to identify and eliminate the invisible barriers to equality and fairness that women face in the workplace due to pregnancy”—*i.e.*, “those policies and practices that on the surface appear neutral and equally applied, but in reality create an unfair, gender-specific disadvantage to women.”¹³⁰ The OCRC further contends that “this proposed revision would address those employment situations in which the leave that an employee is otherwise eligible to take is not adequate for a normal pregnancy, or the conditions imposed on eligibility for leave, *i.e.*, a length of service requirement, have disparate impact upon pregnant employees.”¹³¹

¹²⁵*Id.* (emphasis added). “This means that an employer cannot refuse to provide the same benefits and privileges to a woman affected by pregnancy, childbirth or related medical conditions simply because she has not been on the job long enough, or because her pregnancy is not due to a work-related injury.” *Id.*

¹²⁶Kristen Hampshire, *Understanding Leave Policies Can Protect Your Business from Costly Lawsuits*, INSIDE BUSINESS, June 1, 2008, available at <http://www.allbusiness.com/labor-employment/labor-sector-performance-labor-force/11483352-1.html>.

¹²⁷Hampshire, *supra* note 124. The Ohio General Assembly, Joint Committee on Agency Rule Review Home Page, <https://www.jcarr.state.oh.us/>. “The Joint Committee on Agency Rule Review (“JCARR”) was created in 1977 by HB 257 of the 112th General Assembly (RC 101.35).” “The primary function of JCARR is to review proposed new, amended, and rescinded rules to ensure the following: (1) the rules do not exceed the scope of the rule-making agency’s statutory authority; (2) the rules do not conflict with a rule of that agency or another rule-making agency; (3) the rules do not conflict with the intent of the legislature in enacting the statute under which the rule is proposed; and, (4) the rule-making agency has prepared a complete and accurate rule summary and fiscal analysis of the proposed rule, amendment, or rescission (RC 127.18) and if the agency has incorporated a text or other material by reference, the agency has not met the standards stated in ORC sections 121.72, 121.75, or 121.76.” JCARR, *supra* (emphasis added).

¹²⁸Hampshire, *supra* note 124.

¹²⁹*Id.*

¹³⁰Reasonable and Sufficient Pregnancy Leave, *supra* note 108, at 2.7.

¹³¹*Id.*

As it currently stands, the revisions to the pregnancy discrimination rule proposed by the OCRC includes the following provisions:

- “[W]omen affected by pregnancy, childbirth or related medical conditions [would be] entitled to the same benefits and privileges of employment as any other employee similar in his or her inability to work, *irrespective of whether the pregnant employee is otherwise similarly situated in other respects*;”¹³²
- Employers would be required to provide pregnant employees with “*a minimum leave of up to [twelve] weeks, except when a lesser amount of leave is justified by a business necessity*;” and¹³³
- “[U]pon signifying her intent to return to employment,” the employer would be required to permit the employee “*to return to work without a change in position, or a loss of service time or other benefits*.”¹³⁴

3. Has the OCRC Gone Too Far?

The OCRC has yet to promulgate the proposed revisions to Ohio Administrative Code § 4112-5-05. According to the Commission, it still must conduct research and analysis into issues regarding “the amount of leave needed by pregnant employees,¹³⁵ tenure/length of service requirements for qualifying leave,¹³⁶ and the interplay between the rule and light duty programs for injured workers.”¹³⁷

¹³²*Id.* at 2.8 (emphasis added).

¹³³*Id.* (emphasis added).

¹³⁴*Id.* (emphasis added). The revisions, as currently proposed by the OCRC, would expand protections currently afforded by Chapter 4112 to pregnant employees. *See* discussion *infra* Section 3. These revisions, however, are not without limitation. In particular, the OCRC further proposes that, pursuant to the revised rule, (1) the employer would have discretion whether to pay the employee during her twelve week period of leave; (2) the leave would have to be medically recommended; and (3) the right to reinstatement would be “limited to that period of leave otherwise available to a pregnant employee under the rule.” Reasonable and Sufficient Pregnancy Leave, *supra* note 108 at 2.8.

¹³⁵*Id.* “Under the current rule, the amount of leave that an employer must provide to a pregnant employee is ambiguous and uncertain, *i.e.*, the amount of leave must be reasonable and sufficient.” *Id.* at 2.9.

¹³⁶*Id.* at 2.8. According to the OCRC, “[t]he availability of leave is considered to be a critical component of ensuring equal employment opportunity for pregnant employees, even when similar leave is not otherwise available to other employees. Again, this is due to the simple fact that pregnant employees always require a minimum leave of absence from work.” *Id.* at 2.9.

¹³⁷*Id.* at 2.8. The OCRC contends that “[o]ne of the most contentious pregnancy issues is whether pregnant employees must be eligible for light duty programs limited to employees who have suffered an on-the-job injury.” *Id.* at 2.9. Many employers take the position that “their programs [are] limited to employees with on-the-job injuries,” and that this requirement is “primarily an effort to avoid an often substantial increase in workers compensation premiums.” *Id.* “This is an issue that the Ohio Civil Rights Commission would like to address in its next revision.” NEED SOURCE.

There are, however, problems with the revisions to the rule proposed by the OCRC. For example, there is no question that imposing a mandatory period of 12 week leave and a mandatory reinstatement requirement imposes greater requirements upon employers than that which was previously called for by Chapter 4112. What was once a presumption of reasonableness and sufficiency would be transformed into a hard and fast rule.

As noted above, the OCRC has already promulgated administrative regulations which provide that Chapter 4112 requires that employers provide their pregnant employees reasonable and sufficient leave. Such proposed leave requirements appear more like FMLA-conferred rights than those afforded pregnant employees by Title VII and the PDA. Moreover, with its proposed amendment to Ohio Administrative Code § 4112-5-05, the OCRC, in effect, proposes to read additional, mandatory FMLA-like leave benefits into Chapter 4112. This raises the question of whether the OCRC has the power to enact such a rule.

Chapter 4112 promises pregnant employees *equal* treatment. What the OCRC proposes to provide pregnant employees, however, is *better* treatment than other similarly disabled employees. More specifically, with its proposed rule, the OCRC would require that Ohio employers provide their pregnant employees with 12 weeks of leave.¹³⁸ Under Ohio law, however, employers are not required to provide other employees with 12 weeks of leave, even if those employees are similar to pregnant women in their ability or inability to work. Thus, the administrative rule currently proposed by the OCRC confers the benefit of 12 weeks mandatory leave only upon pregnant employees, providing those employees better treatment than other similarly disabled employees. By promising pregnant employees better treatment, the OCRC and its proposed administrative rule goes beyond the equal treatment promised pregnant women by O.R.C. § 4112.01(B).¹³⁹

While the goal underlying the OCRC's reform effort is certainly laudatory, the question still remains whether the OCRC in fact has the power to go this far. Is the OCRC acting within the power conferred upon it to "adopt, promulgate [and] amend . . . rules to effectuate the provisions of [Chapter 4112]," or is the OCRC taking it upon itself to expand the meaning of what constitutes illegal discrimination on the basis of sex, as it is defined by O.R.C. § 4112.01(B)?¹⁴⁰ Without further action by the Ohio legislature (*i.e.*, by enacting a state law that mirrors the FMLA), it would seem that the OCRC's proposed revision to Ohio Administrative Code § 4112-5-05 may overstep the agency's rulemaking authority.

¹³⁸Note that under the OCRC's proposed rule, FMLA leave is not a set-off. Thus, if an employee has taken (for example) 10 weeks of FMLA leave — for a reason unrelated to pregnancy — the employee is still entitled to 12 weeks of pregnancy-related leave. *See* Reasonable and Sufficient Pregnancy Leave, *supra* note 108.

¹³⁹*See supra*, Section V.A ("What is Equal Treatment?").

¹⁴⁰Further, the revisions proposed by the OCRC to the agency's pregnancy discrimination rule may raise more questions than it resolves. For example, with regard to the mandatory provision of twelve weeks of leave, it remains unclear what would constitute a legitimate "business necessity" meriting exception to the rule. The OCRC acknowledges that "there are some situations where this approach may not be feasible," such as for temporary or other nonpermanent workers." Reasonable and Sufficient Pregnancy Leave, *supra* note 108, at 2.9. Does the switch to a mandatory rule, with an exception for business necessity, really add anything to employers' understanding of the requirements of Chapter 4112?

The OCRC may not have the authority to promulgate mandatory leave regulations, but the Ohio legislature does. Thus, perhaps the best means by which to impose a 12-week maternity leave requirement is to call for an amendment to Chapter 4112 that mirrors the language of Ohio Administrative Code § 4112-5-05 or the FMLA.

VII. CURRENTLY UNPROTECTED BY LAW: BREAST-FEEDING, BREAST-PUMPING AND RELATED MEDICAL NEEDS

With regard to conditions that could be deemed as pregnancy-related, the PDA is by no means comprehensive. There is a notable absence of current federal legislation responsive to post-pregnancy issues facing working mothers today. In particular, there is an absence of legislation dealing with mothers' need to breastfeed their newborn children and their corollary need to pump breast milk during the workday. The PDA's prohibition against pregnancy-related discrimination, Title VII's prohibition against gender discrimination, the ADA, and the FMLA do not provide women any rights regarding breastfeeding, which would seem to be a pregnancy-related condition uniquely experienced by women.¹⁴¹

Breast-feeding and pumping activities involve the physical condition of women who have recently given birth. In this regard, lactating could be deemed a pregnancy-related condition. According to the courts, however, breastfeeding and weaning do not constitute the types of conditions "related to pregnancy" that Congress intended to protect with the PDA.¹⁴² Technically, according to those courts, a woman is no longer pregnant when breastfeeding. Moreover, the need to pump breast milk or feed a baby no longer relates to the mother's pregnant condition, but instead bears a direct relationship to her need to care for her child—*i.e.*, lactating is a condition related to childcare, not pregnancy.¹⁴³ Accordingly, courts have held that the PDA does not confer any rights on women with regard to breastfeeding or the need to pump breast milk.¹⁴⁴

As a practical matter, because the PDA does not cover conditions related to lactating, an employer can terminate an employee who needs to leave work frequently to breastfeed her child or to pump breast milk.¹⁴⁵ So when faced with a

¹⁴¹The FMLA does provide women the right to take unpaid leave from work for care of a newborn, but this right does not address the issue of activities conducted while at work.

¹⁴²*McNill v. New York City Dep't of Corr.*, 950 F. Supp. 564, 571 (S.D.N.Y. 1996) ("We believe these factors indicate Congress' intent that 'related medical conditions' be limited to incapacitating conditions for which medical care or treatment is usual and normal. Neither breast-feeding and weaning, nor difficulties arising therefrom, constitute such conditions.") (quoting *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869–70 (W.D. Ky. 1990), *aff'd without opinion*, 951 F.2d 351 (6th Cir. 1991)).

¹⁴³*See id.*

¹⁴⁴For example, in *McNill v. New York City Dep't of Corr.*, the court held that plaintiff's absence from work to breastfeed her child was not an absence related to "pregnancy, childbirth or [a] related medical condition" within the meaning of the PDA, and therefore not an activity protected by the Act. *Id.* at 564.

¹⁴⁵Likewise, "absent unusual conditions," the ADA does not cover breastfeeding. *See Martinez v. N.B.C., Inc. and M.S.N.B.C., Inc.*, 49 F.Supp. 2d 305, 309 (S.D.N.Y. 1999) (finding that "[e]very court to consider the question to date has ruled that pregnancy and

request by a new mother to accommodate her breast pumping needs, an employer is not required to accommodate her request. For example, current federal law does not require that an employer accommodate a female employee's request to provide a private area for her to pump her breast milk.¹⁴⁶ Courts, repeatedly holding that such requests are beyond the scope of Title VII and PDA protection, have effectively banished breast pumping women to locked back rooms and bathroom stalls.

A. *An Amendment to Title VII May Be Necessary to Protect Lactating-Related Needs of New Mothers*

Although it is not presently covered, the question remains whether breastfeeding *should* be an activity protected by the PDA. Arguably, a legislative amendment would not be needed if courts recast lactating as a physical condition that is naturally a part of a woman's pregnant condition, thereby constituting a "pregnancy-related condition" within the scope of the Act. This result would require abandoning the current analytical linchpin, which views lactating (and the choice to breastfeed) as a

related medical conditions do not, *absent unusual conditions*, constitute a [disability] under the ADA" and *the need to pump breast milk does not qualify as an "unusual condition"* triggering coverage by the ADA because "it is simply preposterous to contend a woman's body is functioning abnormally because she is lactating" (quoting *Bond v. Sterling*, 997 F. Supp. 306 (N.D.N.Y. 1998) (emphasis added)).

¹⁴⁶*See, e.g.,* *Martinez v. N.B.C., Inc. and M.S.N.B.C., Inc.*, 49 F.Supp. 2d 305 (S.D.N.Y. 1999) (holding that Title VII and the PDA do not impose requirements on employers to provide space in which women may pump their breast milk). In *Martinez*, an associate producer sought to use an electronic breast pump at work "to pump breast milk to feed her child when she was not available to nurse him. With [her supervisor's] consent, Martinez left her work to pump breast milk three times a day for periods of about twenty minutes," using an empty edit room at MSNBC's studio. *Id.* at 307. Martinez locked the door but, on several occasions, however, someone tried to enter the room with a key while she was inside. Martinez requested that NBC provide her with a private room to pump her breast milk. MSNBC offered alternative solutions, but ultimately denied her request for a private room specially allocated for breast pumping purposes. *Id.*

Among other things, Martinez's charge with the EEOC alleged that her former employer "'failed to provide [her] with a safe, secure, sanitary and private area to breast pump' and that her complaint to human resources was followed by a course of retaliatory conduct including verbal harassment, schedule changes, and the demotion to associate producer." *Id.* at 308. The *Martinez* court rejected her contention that Title VII requires employers to provide mothers a special area for breast pumping by citing the principal tenet that Title VII promises equal, but not special treatment. *Id.* (citing *General Electric Co. v. Gilbert*, 429 U.S. 135 (1976)).

The *Martinez* court also rejected Martinez's contention that discriminating against breastfeeding mothers could form the basis of a "sex-plus" discrimination claim—*i.e.*, discrimination that occurs "when a person is subjected to disparate treatment based not only on her sex, but on her sex considered in conjunction with a second characteristic" — because Martinez would be unable to point to an appropriate male comparator. *Id.* at 310 (internal quotations omitted). According to that court, "men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men." *Id.* For this reason, the "sex-plus" theory cannot logically extend to protect "a characteristic — breast feeding — that is unique to women." *Id.*

means of childcare, not pregnancy.¹⁴⁷ Accordingly, a shift in perception, as opposed to legislation, could bring lactating-related activities within the parameters of Title VII and the PDA.

It is more likely, however, that a legislative amendment to the PDA will be needed before employers and courts will recognize the lactating-related issues unique to female employees who have recently become mothers. Indeed, one court expressly acknowledged as much, stating that, “[i]f Congress had wanted these sorts of child-care concerns to be covered by Title VII or the Pregnancy Discrimination Act, it could have included them in the plain language of the statutes. It did not. It is not the province of this court to add to the legislation by judicial fiat.”¹⁴⁸ Thus, absent a legislative amendment to the PDA, there is unlikely to be much meaningful change regarding the extension of PDA coverage to breastfeeding mothers.¹⁴⁹

B. Proposed Analytical Framework

To protect the lactation-related needs of employees, Congress could amend the PDA to require that employers reasonably accommodate working mothers who are lactating and need to pump breast milk during the workday. Such a duty could thereby incorporate analytical principles already found in the reasonable accommodation provisions of Title VII¹⁵⁰ and the ADA.¹⁵¹

Interpretative case law addressing the accommodation requirements of Title VII and/or the ADA may inform, in a general sense, the analysis of any proposed lactation-related statutory accommodation requirements. With regard to lactation-related accommodations, this could mean:

- An employee must first request an accommodation for her lactation-related needs;

¹⁴⁷See *McNeill v. New York City Dep't. of Corr.*, 950 F. Supp. 564, 571 (S.D.N.Y. 1996).

¹⁴⁸*Id.* at 571 (quoting *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869–70 (W.D. Ky. 1990), *aff'd without opinion*, 951 F.2d 351 (6th Cir. 1991)).

¹⁴⁹Some states, however, have sought to fill the gaps left by federal statute through legislative enactments of their own. Ohio, for example, recently enacted a statute granting women the right to breastfeed their children in public buildings. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (“Breast-feeding in place of public accommodation”) (effective September 16, 2005).

¹⁵⁰Title VII imposes a duty upon employers to accommodate an “employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” See 42 U.S.C. § 2000e (1991).

¹⁵¹In certain circumstances, employers are required by the ADA to provide a “reasonable” accommodation to an employee with a disability. See 42 U.S.C. §§ 12111–12112. Like Title VII, the ADA does not require that an employer implement any means of accommodation that constitute an undue hardship on the employer — but under the ADA, an accommodation that causes an undue hardship on the employer is, by definition, not reasonable. See *Vande Zande v. Wisconsin Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995) (finding that cost may factor into the undue hardship analysis). The analytical distinction is a subtle one — under Title VII, the undue hardship analysis only comes into play if the employee suggests the method of accommodation, whereas a court will always consider the undue hardship of an accommodation on the employer under the ADA.

- If an employer offers no accommodation or does not provide an accommodation that is reasonable, the employee may make suggestions in that regard; and
- If an employer offers an accommodation that is deemed reasonable, the employee must accept that accommodation.¹⁵²
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Alternatively, a lactation-related amendment could require that the employer accept and implement any reasonable accommodation made by the employee, unless that accommodation would impose an undue hardship on the employer.¹⁵³ Either way, a breastfeeding-related amendment that includes a reasonable accommodation provision would balance both employer and employee needs.

VIII. THE PRACTICAL IMPACT OF TITLE VII AND THE PDA ON WORKPLACE POLICIES AND PROCEDURES: WHAT EQUAL TREATMENT MEANS TODAY

The face of the workforce has changed, remarkably and undeniably, since the passage of federal and state legislation promising equal workplace opportunity to women. Much has been made about the workplace choices now available to women. Indeed, today, “from the very first stages of their professional careers, men are working side-by-side with an equal number of female peers.”¹⁵⁴

Much has also been made about the fact that, despite new doors being opened, many women still choose to leave the workforce to care for their families. Hence, the modern evolution of women’s workplace struggles is now less about admission into the workplace, and more about long-term acceptance and retention. More specifically, a woman who chooses to have children may find that that choice preempts her ability to also choose to have a meaningful career. By and large, the modern workplace paradigm is simply not designed to accommodate a working mother’s inevitable need for flexible work-life balance.¹⁵⁵ Further, there is evidence to suggest that stereotypical perceptions about working mothers negatively impact their workplace opportunities for career advancement.

Although the law requires employers to open their doors to women, the ultimate goal underlying Title VII is true inclusion. Nevertheless, stereotypes and implicit assumptions about “a woman’s place” remain. The simple fact is that women remain

¹⁵²*See* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (holding that an employee’s dissatisfaction with the accommodation provided by an employer is irrelevant so long as that accommodation is found to be “reasonable”).

¹⁵³*See id.*

¹⁵⁴HOLLY ENGLISH, *GENDER ON TRIAL: SEXUAL STEREOTYPES AND WORK/LIFE BALANCE IN THE LEGAL WORKPLACE* (ALM Publishing 2003).

¹⁵⁵Indeed, there seems to be some correlation between motherhood and receipt of a smaller salary than male colleagues. “Sociological studies show that motherhood accounts for an increasing proportion of the wage gap between men and women. While the wages of young women . . . are close to those of men, mothers’ wages are only sixty percent of those of fathers.” Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 77-78 (2003) [hereinafter Williams & Segal, *Beyond the Maternal Wall*]. This means that a female employee who has children can expect to earn less than her male co-workers. The salary of a male employee with children, however, is not similarly impaired. *Id.*

the primary home and family caretakers, and this role continues to limit women's ultimate career advancement. Does this mean that women must either choose a career or a family? Is there nothing else, legislatively or otherwise, that can be done to retain female employees who desire a family *and* a career? As a practical matter, what, then, is the modern manifestation of equal treatment in the workplace?

A. *"The Maternal Wall": Women's Workplace Advancement Stymied by Family Caretaker Roles*

*We all know about the glass ceiling. But many women never get near it; they are stopped long before by the maternal wall.*¹⁵⁶

It is no secret that women today struggle to balance workplace and family obligations. By and large, women either choose or are expected to act as their families' primary caretaker and, despite social strides, women's prospects for career advancement remain inevitably limited by that role.¹⁵⁷ Indeed, the debate about whether women should work and/or adopt a full-time homemaker position is often presented in tandem with a more modern question: can women really have it all?

1. Popular Discourse Regarding Work-Family Balance in the 1970s and 80s

During the 1970s and 1980s, popular discourse largely focused on common notions regarding a woman's proper place and role in society, such as whether women were physically and mentally capable of performing jobs as well as their male counterparts. Also debated was whether female entry into the workplace would signal the end of healthy American families.

For example, in the 1980s, certain media stories openly questioned whether working women were properly caring for their children. Along the same lines, news stories raised questions about whether mothers who placed their children in daycare exposed their children to likely harm. "The anti-day care headlines practically shrieked in the 80s: 'Mommy, don't leave me here!' 'The day care parents don't see.' 'Day care can be dangerous to your child's health.' 'When child care becomes child molesting: it happens more often than parents like to think.'"¹⁵⁸ Such stories presented accounts of day care abuse, cited studies that children in daycare were sick more often and warned that placing children in daycare "diminished bonds between mother and child."¹⁵⁹

¹⁵⁶See Williams & Segal, *supra* note 153, at 77.

¹⁵⁷See Laura D'Andrea Tyson, *What Larry Summers Got Right*, Bus. Wk., March 28, 2005. "Specifically, women perform about eighty percent of the childcare for their families and, as a result, over ninety percent of mothers cannot do the type of overtime required by the best jobs." Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM.U.L. REV. 305, 313 (December 2004) (Despite the fact that the education gap between women and men has all but disappeared, women in most families are still expected to shoulder the lion's share of caring for children, for elderly parents, and for spouses.) NEED CITE.

¹⁵⁸FALUDI, *supra* note 15, at 41-42.

¹⁵⁹*Id.* at 43. Less frequent were the stories portraying the positive effects of placing children in day care. For example, "[R]esearch over the last two decades has consistently found that if daycare has any long-term effect on children, it seems to make children slightly more gregarious and independent." *Id.*

Such social messages villainized working mothers who “abandon[ed]” their children to pursue a career.¹⁶⁰ Advocates of stay-at-home parenting had even gone so far as to suggest that the morality of the entire country was at stake. President Theodore Roosevelt, for example, once stated that “[i]f the mother does not do her duty, there will either be no next generation, or a next generation that is worse than none at all.”¹⁶¹ More recently, one of President Reagan’s “top military officials proclaimed, ‘American mothers who work and send their children to faceless centers rather than stay home to take of them are weakening the moral fiber of the nation.’”¹⁶²

Other media messages simply portrayed women’s desire for work-family balance as an impossibility. For example, a 1986 *Newsweek* cover story essentially concluded that women could not successfully balance their career and family obligations. The article opened with the following anecdote:

Colleen Murphy Walter had it all. An executive at a Chicago hospital, she earned more than \$50,000 a year and had two sons . . . But there was a price. Late at night, when everyone else was sleeping, she would be awake, desperately trying to figure out how to survive “this tangle of a lifestyle.” Six months ago, Walter, thirty-six, quit, to stay home and raise her children. “Trying to be the best mother and the best worker was an emotional strain,” she says. “I wanted to further myself in the corporate world. But suddenly I got tired and realized I just couldn’t do it anymore.”¹⁶³

Far from proposing solutions to “make it work,” the article concluded with a dire prediction: “‘Today the myth of Supermom is fading fast — *doomed by anger, guilt and exhaustion*’ . . . ‘An increasing number’ of mothers are working at home and ‘a growing number’ of mothers have reached ‘the recognition that they can’t have it all.’”¹⁶⁴

¹⁶⁰*See generally id.* One study even suggested that employment adversely affects a woman’s health. As *The Type E Woman* advised, “Working women are swelling the epidemiological ranks of ulcer cases, drug and alcohol abuse, depression, sexual dysfunction and a score of stress-induced psychological ailments, including backache, headache, allergies, and recurrent viral infections and flu.” *Id.* at 38. Other experts added to this list heart attacks, strokes, hypertension, nervous breakdowns, suicides, and cancer. “Women are freeing themselves up to die like men,” asserted Dr. James Lynch. *Id.* at 38.

¹⁶¹*Id.* at 263–64.

¹⁶²FALUDI, *supra* note 15, at 42. Faludi takes issue with the messages bestowed by the media, noting its ability to “shap[e] the way people would think and talk about the feminist legacy and the ailment it supposedly inflicted on women. It coined the terms that everyone used: ‘the man shortage,’ ‘the biological clock,’ ‘the mommy track’ and ‘post feminism.’” *Id.* at 77. Faludi further criticizes the negative attention the media focused on women’s struggles to balance work and family responsibilities: “the press was the first to set forth and solve for a mainstream audience the paradox in women’s lives . . . women have achieved so much yet feel so dissatisfied; it must be feminism’s achievements, not society’s resistance to these partial achievements, that is causing women all the pain.” *Id.*

¹⁶³*Id.* at 89–90.

¹⁶⁴*Id.* at 90 (emphasis added).

There are many examples of working women today who do appear to “have it all,” or at least, are able to somehow juggle family obligations with successful careers. Tina Fey and Sarah Palin are two recent examples of such women. But even among high profile, successful family women, remnants of Newsweek’s dire proselytizations still linger. Take for example, Tina Fey, who gave birth to a daughter in the fall of 2005, while working full time as the head writer for Saturday Night Live.¹⁶⁵ Ms. Fey returned to work only 43 days after giving birth.¹⁶⁶ “I had to get back to work,” she said at the time. “NBC has me under contract; the baby and I only have a verbal agreement.”¹⁶⁷

In a recent interview with Parade Magazine, Ms. Fey offers her own take about being a part of the “have it all” generation: “I think my generation has been slightly tricked in that you’re really encouraged to try to have it all. And sometimes your body will not let you wait as long as you want.”¹⁶⁸ Ms. Fey goes on to describe “tears involved at home occasionally — just occasionally.”¹⁶⁹ “The life of the working parent,” she says, “is constantly saying, ‘This is impossible,’ and then you just keep doing it.”¹⁷⁰

2. Modern Discourse Regarding Work–Family Balance: Discrimination Versus Choice and “the Opt-Out Hypothesis”

*As feminist theorist Christine Littleton has pointed out: “what makes pregnancy a disability rather than, say, an additional ability, is the structure of work, not reproduction.”*¹⁷¹

As women have increased their presence in the workforce and expanded their career ambitions beyond traditional confines,¹⁷² the central debate has shifted focus. The doors have largely been open, but it cannot be denied that women are still failing to realize the same workplace opportunities as men. Why? Consider, for example, the following statistics:

¹⁶⁵James Kaplan, *Making it Work*, PARADE MAGAZINE, Mar. 17, 2008, available at http://www.parade.com/articles/editions/2008/edition_03-09-2008/1Tina_Fey. For an interesting article on women in comedy, see also Alessandra Stanley, *Who Says Women Aren’t Funny*, VANITY FAIR (April 2008), available at <http://www.vanityfair.com/culture/features/2008/04/funnygirls200804>.

¹⁶⁶Kaplan, *supra* note 163.

¹⁶⁷*Id.*

¹⁶⁸*Id.*

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹Gloria Steinem, *Revaluating Economics*, in MOVING BEYOND WORDS 221 (Simon & Schuster 1994) (quoting Christine A. Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279 (1987)).

¹⁷²The type of work done by women has likewise experienced only limited diversification. “While women have more job options than they did in 1964, they continue to be concentrated in certain industries and traditionally female jobs. The top five occupations for women in 2003 were secretaries and administrative assistances (96.3% female), elementary and middle school teachers (80.6%), registered nurses (90.2%), nursing psychiatric, and home health aides (89%), and cashiers (75.5%).” *Women at Work*, *supra* note 36 (citation omitted).

- “[A]ccording to a recent U.S. survey, 1 in 3 women with an MBA is not working full-time, vs. 1 in 20 men with the same degree.”¹⁷³
- “Today many companies are recruiting female MBA graduates in nearly equal numbers to male MBA grads, but they’re finding that a substantial percentage of their female recruits drop out within three to five years.”¹⁷⁴
- In the legal profession, the number of female partners in mid- to large-sized firms has not experienced growth proportional to the steady increase in female law school graduates since the 1980s.¹⁷⁵
- Indeed, “[w]omen flee law firms in much larger numbers than do men. As [one] survey found, the attrition rate for women each year was three to seven percentage points higher than for their male counterparts, and was most evident in the sixth through eighth years following law school.”¹⁷⁶
- Instead, there is a clear tendency for women to “disappear” along the partnership track. Indeed, as of 2002: “men constituted 70% of practitioners, still the great majority. They are even more overwhelmingly the leaders. Eighty-five percent of firm partners, 95% of managing partners” are men.¹⁷⁷
- Moreover, approximately “88% of general counsel in Fortune 500 companies are male.”¹⁷⁸
- Approximately “[t]hree-quarters of federal judges and 80% of state supreme court justices are men.”¹⁷⁹

The fact remains that men continue to outnumber women by a sizeable margin in the upper echelons of the corporate and business worlds.¹⁸⁰ It cannot be denied that the top tier of the corporate and professional worlds remains in the near exclusive control of men.¹⁸¹ Thus, even with the 40-year-old equal-opportunity mandate of Title VII, the gender composition of the highest-ranking professional boardrooms remains strikingly unchanged. It appears that the modern problem for employers is not *finding* female talent — it is *retaining* and *promoting* female talent.¹⁸²

¹⁷³Tyson, *supra* note 155.

¹⁷⁴*Id.*

¹⁷⁵See ENGLISH, *supra* note 152, at 4.

¹⁷⁶*Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *See* Tyson, *supra* note 155.

¹⁸² *Id.* (“The vexing problem for businesses [and employers] is not finding female talent but retaining it.”). Still, the majority of women are employed today. “In 2003,” for example, women comprised forty-seven percent of the total labor force, with a labor force participation rate of 59.5 percent (meaning that 59.5 percent of women, sixteen years of age or older, were

To some, women disappear from the workplace because they “are unwilling” to put in the time required to develop their careers. This, for example, was the opinion professed by Lawrence H. Summers, president of Harvard University, who “argued that top leadership positions in academia, business, and law require a time commitment that many women are unwilling to make.”¹⁸³

This notion that women choose not to put the time into their careers that advancement requires is sometimes referred to as the “opt-out hypothesis.” In particular, the opt-out hypothesis holds that women simply choose — freely and willingly — to devote their time to their families, rather than work, regardless of, for example, the time that they spent educating themselves to achieve professional careers. In this regard, the opt-out hypothesis is cited as an explanation for why so few women with advanced degrees continue to work after obtaining that degree.¹⁸⁴

It is clear that pressure placed upon women (by themselves? by society? by their families?) to choose between family and career has not decreased much over the decades. For example:

In 1990, a poll of working women by Yankelovich Clancy Shulman found almost 30 percent of [working women] believed that ‘wanting to put more energy into being a good homemaker and mother’ was cause to consider quitting work altogether — an 11 percent increase from just a year earlier and the highest proportion in two decades.¹⁸⁵

Also, in a March 28, 2005, *Business Week* article, Laura Tyson noted the prevalence of the opt-out phenomenon among women with graduate, professional, or high honors undergraduate degrees: “some 37% of the women surveyed — and 43% of those with kids — voluntarily left work at some point in their careers, with the average break lasting about two years.”¹⁸⁶ Of these women, 44% “cited family responsibilities as the reason for their leaving.”¹⁸⁷ Only 24% percent of men, by contrast “took time off from their careers, with no statistical difference between those who were fathers and those who were not,” and only 12% of those men left for

either working or looking for work). *Women at Work*, *supra* note 36. At the end of 2002, close to sixty percent of American women had a job. Sharon Rabin Margalioth, *Women, Careers, Babies: An Issue of Time or Timing*, 13 UCLA WOM. L.J. 293, 299 (2005) (citing U.S. Census Bureau, 2003 Statistical Abstract of the United States, 387 tbl.591, <http://www.census.gov/prod/2004pubs/03statab/labor> (last visited Jan. 10, 2005)). “By the year 2002, 59.4% of all women in the United States were employed.” *Id.*

¹⁸³Tyson, *supra* note 155 (emphasis added); *see also* Marcella Bombardieri, *Harvard Women’s Group Rips Summers*, THE BOSTON GLOBE, Jan. 19, 2005, at A1, *available at* http://boston.com/news/education/higher/articles/2005/01/19/harvard_womens_group_rips_summers/.

¹⁸⁴*See* Tyson, *supra* note 155.

¹⁸⁵FALUDI, *supra* note 15, at 81.

¹⁸⁶Tyson, *supra* note 155.

¹⁸⁷*Id.*

family reasons.¹⁸⁸ Instead, “[a]mong men, who averaged about one year off, the primary reason was career enhancement.”¹⁸⁹

It is misleading, however, to discuss women’s abandonment of their careers as a “choice,” without taking a closer look at the forces driving that choice. More to the point, it seems that women, more so than men, continue to feel the most pressure to perform on the home front. Assuming that women also want to pursue successful careers, whose responsibility is it to help them in that regard? To answer that question, the potential for internal sources of limitation (a woman’s own career expectations) must be considered in connection with influential external sources (social messages, legislation and workplace terms and conditions of employment).

3. Redefining the Workplace Paradigm: Workplace Policies, Reinforcing Mother-Friendly Workplace Discourse and Implementing Fair Evaluation of Female Employees

*Designing workplace objectives around an ideal worker who has a man’s body and men’s traditional immunity from family caregiving discriminates against women. Eliminating that ideal is not “accommodation;” it is the minimum requirement for gender equality.*¹⁹⁰

The ability to retain female talent requires more than simply breaking down the barriers that may prevent workforce entry and acclimation. The simple reality is that, although federal legislation such as Title VII and the PDA opened the door to female entry into the workforce, the retention of female workers and their ability to advance their careers is influenced by factors beyond legislative control.

Some measures of self-regulation have already been taken by employers. By enacting policies more accommodating to working mothers, employers at least appear to have become more sensitive to their employees’ family caregiving needs. Flex-time and job-sharing programs are two examples of flexible work arrangements designed to help employees balance their work and family responsibilities.

What remains unclear, however, is whether employers that provide flex-time and job-sharing accommodations hold employees who take advantage of these policies in

¹⁸⁸*Id.*

¹⁸⁹*Id.* Of course, some women who take time off to care for their families may not realize how difficult it is to re-enter the workforce. Difficulty finding a job after several years off may cause a woman to resignedly accept her position as full-time homemaker and mom, despite earlier ambitions to the contrary:

[Ninety-three percent] of the women who took time off from work wanted to return to their careers, despite the painful work-life tradeoffs required. Unfortunately, only 74% of those were able to do so, with 40% returning to full-time professional jobs and 24% taking part-time positions. And even those who returned to the workforce lost substantial earning power, with the penalties becoming more severe the longer the break. Overall, women who took time out from careers lost an average of 18% of their earning power; in business careers, the average loss was 28% even though the average break lasted little more than a year. Accordingly, recent studies show that “a large percentage of . . . highly qualified women do indeed choose to take time off from their careers, and they pay a huge price in terms of future job opportunities and financial rewards to do so.”

Tyson, *supra* note 155.

¹⁹⁰Williams & Segal, *Beyond the Maternal Wall*, *supra* note 153, at 80].

high esteem. Some believe that employees who work reduced hours are not as financially valuable to employers. Those critical of the mommy track and similar family-friendly flexible work arrangements characterize these programs as an expensive accommodation. According to Yale Law School professor Christine Jolls, for example, “antidiscrimination law fairly obviously operates to require employers to incur *undeniable* financial costs associated with employing the disfavored group of employees — and thus in a real sense to ‘accommodate’ these employees.”¹⁹¹

Those in support of flex-time and job-sharing policies, by contrast, argue that “the impression that family-friendly policies are expensive may be inaccurate once the long-term costs of doing business in a family-hostile atmosphere are taken into account.”¹⁹² “Family-responsive policies hold the promise to save money by decreasing the costs associated with attrition, absenteeism, recruiting, quality control, and productivity.”¹⁹³

In law firms, for example, studies show that “replacing an experienced law firm associate is estimated to cost between \$200,000 and \$500,000 per year.”¹⁹⁴ In this regard, it would seem most cost-effective to enact policies more flexible to working mothers’ needs, rather than incur expensive replacement costs. Moreover, the perception that a law firm is hostile towards working mothers could inflict damage upon that firm’s reputation — and a damaged reputation is likely to translate into very real costs, such as a decreased client base, low morale among workers, and an inability to attract well-qualified employees overall.¹⁹⁵

On the other hand, can’t every woman who needs to leave work early to care for her family be replaced by a man who is willing to work late? Isn’t that an issue of work productivity, and not gender? From an employer perspective, do policies sensitive to the needs of working mothers ultimately translate into real value? After all, so long as there remain lawyers willing to spend their days, nights and weekends sitting at a desk billing hours to earn money for their employers, do working mothers really stand a chance? Are law firms simply not a viable career option in that regard?

Regardless of (or perhaps because of) their perceived value, the reality is that flexible work arrangements have, as of yet, failed to remedy the barriers to career advancement facing women with children:

¹⁹¹*Id.* at 85 (criticizing the “accommodation is costly” assumption made by other scholars). *Id.* at 86–87 (quoting Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001)).

¹⁹²*Id.* at 87 (quoting Ernst & Young partner Alison Hooker, and citing JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 64–114 (2000)).

¹⁹³*Id.* at 88 (citing Joan Williams & Cynthia Calvert, THE PROJECT FOR ATTORNEY RETENTION, BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS, at 7–12 (2d ed. 2001)).

¹⁹⁴*Id.*

¹⁹⁵*See, e.g.,* Kaminer, *supra* note 155, at 323 (“By failing to accommodate working parents, employers are . . . limiting their pool of potential employees, and particularly employees with certain qualities and skills.”).

Across the country, female managers and professionals with young families are leaving the fast track for the mommy track,' *Business Week* proclaimed in a cover story." There was speculation that "the majority of women ['career-and-family' women] . . . were willing and satisfied to give up higher pay and promotions. Corporations should . . . treat these women different from 'career-primary' women, allotting them fewer hours, bonuses, and opportunities for advancement."¹⁹⁶

Is this true? Do women choose to abandon promising careers by choice — or is it because they believe they have no choice, because working mothers are perceived as less valuable than those without family obligations? Consider the following, which articulates a popular sentiment expressed by some:

[W]omen who did not have problems at work before having children may find their competence questioned after they become mothers. For example, a lawyer found that once she announced her pregnancy, she began to encounter negative performance evaluations and other problems. Another lawyer, given the work of a paralegal upon her return from maternity leave, reported that she wanted to say, 'I had a baby, not a lobotomy;' she had ceased to be perceived as a high-competence business woman once she became a mother.¹⁹⁷

Indeed, in an article published in the *Harvard Women's Law Journal*, Joan C. Williams & Nancy Segal discussed the impact of stereotypes on working mothers' perceived value as employees:¹⁹⁸

- *Memory and Perception*: "Once stereotypes take hold, other information inconsistent with the stereotype is ignored or excluded.' Thus, an employer or co-workers may notice every time a mother leaves work early, but forget those instances when [she] leave[s] late."
- *Interpretation of Ambiguous Events*: "For example, in a training hypothetical developed by Deloitte & Touche, when two parents arrived late for an early morning meeting, their co-workers assumed that the woman, but not the man, was having childcare problems (although, in fact, the man was having childcare problems while the woman's train was late)." This may further result in a "difference in attribution: the man's absence is coded as unimportant because 'it happens to everyone,' whereas the woman's absence is coded as further proof she has fallen from go-getter 'businesswoman' to 'lost her edge' housewife."
- *Inference*: "For example, even today, women are sometimes advised to remove their wedding rings when they interview for employment, presumably to avoid the inference that they will have children and not be serious about their careers."¹⁹⁹

¹⁹⁶FALUDI, *supra* note 15, at 91 (internal quotations omitted).

¹⁹⁷Williams & Segal, *Beyond the Maternal Wall*, *supra* note 153, at 91.

¹⁹⁸*Id.* at 96 (quoting Jane A. Halpert, Midge L. Wilson & Julia Hickman, *Pregnancy as a Source of Bias in Performance Evaluations*, 14 J. ORGANIZATIONAL BEHAV. 649, 650 (1993)).

¹⁹⁹*Id.* at 97 (citations omitted).

Studies also suggest that the diminished physical presence of part-time employees correlates to decreased employer esteem.²⁰⁰ Put simply — face time counts. The fact that employers tend to associate long hours at the office with dedication and commitment may inevitably lead them to discount the value of women who work part-time. Employer impressions of the personality traits of such part-time workers may also suffer from a belief that such employees lack the ideal traits of prized employees — ambition and drive.²⁰¹

Of particular interest is a study analyzing pregnancy as a source of bias in performance evaluations. This study found that performance reviews by managers plummeted after pregnancy. Because pregnancy tends to trigger the most traditional feminine stereotypes [‘submissive, dependent, selfless, nurturing, tidy, gentle, and unconfident’], researchers found not only that performance appraisals of pregnant women plummet, but that the women also report negative attitudes and behaviors by co-workers.²⁰²

Such findings “provide insight as to why, given the business case for family-friendly policies, many employers have been unable to implement such policies effectively. Often, even well-intentioned attempts to shift toward a new workplace paradigm may be subverted by unexamined gender stereotypes.”²⁰³

In addition to negative performance assessments by their managers, many mothers who work part-time report experiences with co-workers that border on hostility. One study, reporting on the stereotypes, found that “women employed part-time are viewed more similar to homemakers than to women employed full time. Part-timers, they found, are viewed as low in agency: ‘Women who are employed part-time are probably thought to have homemaker as their primary occupational role,’ the authors concluded.”²⁰⁴ Other employees may believe that, once an employee has a young child, she is no longer pulling her weight at the office. Thus, working part-time may ultimately distinguish and isolate a working mother from her peers.

The mommy track and flexible-work arrangements remain largely in early, experimental stages for most employers and, for the most part, their promise of career advancement while working part-time has yet to be fulfilled. What will the future workforce look like? How will market forces further encourage — or stifle — the implementation of new, innovative work arrangements to better accommodate work-life balance? We shall see.

²⁰⁰*Id.* at 93.

²⁰¹*Id.* (citing Lottie Bailyn, *BREAKING THE MOLD*, at 105–15 (1993); Rhoda Rapoport et al., *BEYOND WORK-FAMILY BALANCE: ADVANCING GENDER EQUITY AND WORKPLACE PERFORMANCE* 38 (2001)).

²⁰²Williams & Segal, *Beyond the Maternal Wall*, *supra* note 153, at 93 (citing Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 *GENDER IN THE WORKPLACE: A SPECIAL ISSUE OF J. SOC. BEHAV. & PERSONALITY*, 6–7 (1995)).

²⁰³Williams & Segal, *supra* note 153, at 94.

²⁰⁴*Id.* at 91 (citing Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs about Part-Time Employees*, 10 *PSYCH. OF WOMEN Q.* 252, 254 (1986)).

B. *Why Do So Many Women Conclude That They Cannot Balance Family and Career Responsibilities (And Therefore Abandon Their Careers)?*

To the extent that debates regarding women's rights are popularly entertained today, those debates primarily focus on issues of family. Today, the difficult struggles faced by women who seek to balance careers with family obligations is a popular media theme, and the underlying message is clear: Women, you cannot really have it all — or perhaps you no longer want it all.²⁰⁵ That message no longer encourages women to shatter the glass ceiling, but instead tells women that they must acknowledge their limitations and make a choice: family or career.²⁰⁶

However, it cannot be denied that the issue of female retention and career choice remains closely related to issues regarding family care. In particular, women remain the primary family caretakers.²⁰⁷ The “pervasiveness of the traditional division of labor within families” remains. “Despite the fact that the education gap between women and men has all but disappeared, women in most families are still expected to shoulder the lion's share of caring for children, for elderly parents, and for spouses.”²⁰⁸

Today, the pregnancy/parenting debate also focuses on whether employers have a responsibility — moral, legal, or otherwise — to accommodate employees' needs with regard to their children.²⁰⁹ In addition to practices that actively seek to incorporate women in the workplace, employers should be wary of policies that further exclude women, albeit inadvertently. “[D]iscrimination today rarely operates in isolated states of mind; rather, it is often influenced, enabled, even encouraged by structures, practices, and opportunities of the organizations within which groups and individuals work.”²¹⁰

For example, playing a large role in this debate are unspoken expectations with regard to the importance of workplace face-time. “[M]any employers measure worker quality time by ‘face time’ *even when no clear correlation between hours at the job and productivity exists*. This focus on ‘face time’ discriminates against employees with childcare responsibilities and ignores the fact that employers may actually improve their bottom line when they accommodate working parents.”²¹¹

²⁰⁵See, e.g., Gaby Hinsliff and Amelia Hill, *Why the have-it-all woman has decided she doesn't want it all* (Nov. 27, 2005), <http://observer.guardian.co.uk/politics/story/0,6903,1651808,00.html> (“The myth of the superwoman ‘having it all,’ juggling a stellar career and children with breezy efficiency, has given working mothers inferiority complexes for decades. . . . But now, the Having It All generation are giving way to the Actually, I Don't Want It All - or at least, Not All At The Same Time generation.”).

²⁰⁶See Sharon Rabin Margalioth, *Women, Careers, Babies: An Issue Of Time Or Timing?*, 13 UCLA WOM. L.J. 293 (Spring 2005). “It seems that women are still confronted with the cruel choice of either having a career or a family life.” *Id.*

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹See Williams & Segal, *Beyond the Maternal Wall*, *supra* note 153, at 82.

²¹⁰Tristen K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 128 (2003).

²¹¹Kaminer, *supra* note 155, at 323 (emphasis added).

Ultimately, women may simply decide that, if they must choose between family and workplace face-time, their family relationships are simply more valuable to them than their careers.

IX. CONCLUSION

Legislative history accompanying passage of the PDA provided that “[t]he entire thrust . . . behind [that] legislation [was] to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”²¹² Perhaps the promise of “full participation” in both the workplace and family life was too ambitious a promise for Congress to make. By all accounts, in the 30 years since passage of the PDA, women have found it difficult, if not impossible, to completely balance their childcare responsibilities with a demanding career.

This is not to say, however, that important progress has not been made. Legislation, such as the PDA and Ohio Revised Code Chapter 4112, and interpretative case law have played an important role in defining what it means to provide equal treatment to pregnant employees. More, however, can be done in this regard, particularly with regard to new mothers’ breastfeeding-related needs.

Further, constant evaluation of employer and employee needs, including workplace perceptions and policies, is necessary to promote female career advancement. Modern wisdom holds that, by enabling women to better balance work-family concerns, employers increase their chances of retaining top female talent, and many employers have enacted family-friendly workplace policies in this regard.²¹³ Nonetheless, “top female talent” may necessarily exclude women who fail to demonstrate their willingness or ability to place their employers’ needs before their own. A proper work-life balance, therefore, must be one that takes into account both the employer’s realistic workplace productivity expectations and the employee’s desire to develop and maintain healthy family relationships away from the office.

Employees must have realistic job expectations. Some jobs allow for more free time (and/or family time) than others. A law firm with a billable hour requirement, for example, measures each lawyer’s value by the amount of money that lawyer brings in to the firm. Money is earned by billable hours worked, and an employee who works part-time, by definition, is only partially profitable. Moreover, clients who expect their lawyer to be accessible at all times may shy away from those attorneys who are only available three out of seven days a week. So long as there are employees willing to sit at their desks all day, every day, market forces and client needs will inevitably slow employer acceptance of a working mother’s desire for flexible hours.

But the employer must form realistic workplace expectations as well. For example, modern advances in technology make it possible and very feasible for some work to be done away from the office and at home. Employers who still cling to a belief that “face time” translates into career dedication may unwittingly isolate

²¹²123 CONG. REC. 29658 (1977).

²¹³“By failing to accommodate working parents, employers are also limiting their pool of potential employees, and particularly employees with certain qualities and skills.” Kaminer, *supra* note 155, at 310.

working mothers eager to devote themselves to their careers, but not necessarily to their desks, full-time.

Further, “[l]aw firm models that emphasize profits over culture harm attorney retention,” and “chip away at cohesiveness.”²¹⁴ For example, according to a female partner now practicing employment law at a large international firm, “[w]hen you let go of that culture and manage only by profits by partner, there is no glue to hold people together.”²¹⁵ “You’ve got to have trust between partner and partner, and partner and associate, and between clients and law firms.”²¹⁶ Thus, in the end, a churn and burn business model may sacrifice the trust and cohesion essential to long-term law firm success.

Ultimately, although pregnancy remains a condition unique to women, there remains the simple proposition that childcare and household labor can, and should, be evenly divided between husband and wife. Husbands and fathers could offer to stay home with the children more, since presumably both parties made the decision to reproduce. Indeed, perhaps the most straightforward way to reduce the post-pregnancy family caretaking burden upon working women is for that burden to be shared. Perhaps, therefore, a woman who wants it all — a career and a family — must accept some personal responsibility to negotiate with her family in this regard. Indeed, it is not that women cannot have it all. It is that women cannot do it alone.

²¹⁴Debra Cassens Weiss, *Ex-Heller Partner: Women Lawyers Were ‘Canaries in the Coal Mine’*, Posted Nov. 3, 2008, 2:56pm CST, at http://www.abajournal.com/news/ex_heller_partner_women_lawyers_were_canaries_in_the_coal_mine (repeating comments by Patricia Gillett, a former Heller Ehrman employment law partner who changed law firms “for cultural reasons”).

²¹⁵*Id.*

²¹⁶*Id.*