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# Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities

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# Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities

Maryn Oyoung\*

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## I. INTRODUCTION

Heather Wiseman worked as a Wal-Mart sales floor associate for almost a year prior to her pregnancy.<sup>1</sup> While pregnant, Wiseman experienced urinary tract

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2013; B.A., Sociology, University of California, Los Angeles, 2009. I would like to thank Professor Ruth Jones for generously making time to inspire, guide, and enrich the development of this Comment. I would also like to thank Andrew, my parents, Graham, and Leeza, for unwavering love, support, and encouragement.

1. *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9,

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and bladder infections.<sup>2</sup> Her doctor advised her to consume more water throughout the day and instructed her to carry a water bottle while at work.<sup>3</sup> Then the store changed its policy to specifically “prohibit non-cashier employees from carrying water bottles, and it told [Wiseman] to stop carrying one.”<sup>4</sup> Wiseman’s infections returned due to lack of hydration, so she obtained a doctor’s note instructing Wal-Mart to allow Wiseman to carry a water bottle at work.<sup>5</sup> Wal-Mart rejected the note and subsequently Wiseman began working in the fitting room, where she was further restricted from accessing the store’s water fountains.<sup>6</sup>

With no other option, Wiseman was forced to carry a water bottle again or else risk her health and that of her child.<sup>7</sup> As a result, Wal-Mart terminated Wiseman’s employment for “insubordination.”<sup>8</sup> Wiseman brought a suit against Wal-Mart.<sup>9</sup> Unfortunately, under existing law, Wal-Mart was within their legal rights to take such action.<sup>10</sup> Wiseman’s claims under the Family Medical Leave Act (FMLA)<sup>11</sup> and the Pregnancy Discrimination Act (PDA)<sup>12</sup> were insufficient to provide a remedy.<sup>13</sup>

Enacted in 1978, the PDA amended Title VII of the Civil Rights Act with the purpose of eliminating employment decisions based on pregnancy and promoting workplace equality for women affected by pregnancy.<sup>14</sup> Unfortunately, under the structural parameters of the PDA, pregnant women are judged by exactly the same standards as both non-pregnant women and men.<sup>15</sup> While this pregnancy-blind treatment may be considered desirable<sup>16</sup> if a woman experiences no side

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2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.* (stating that her infections “reoccurred due to a lack of hydration”).

8. *Id.*

9. *Id.*

10. *See infra* note 13 (describing the court’s reasoning in rejecting Wiseman’s claim).

11. 29 U.S.C. § 2601 (2006).

12. 42 U.S.C. § 2000e, (k).

13. The court rejected Wiseman’s FMLA claim because her complaint failed to meet the requisite number of hours worked and she did not allege either one of the two FMLA causes of action: retaliation or interference. *Wiseman*, 2009 WL 1617669 at \*2 (describing why neither cause of action applies to Wiseman’s case). Additionally, although the court did not address Wiseman’s pregnancy discrimination claim, it likely would have failed due to the current state of the law and its focus on a comparison approach. *See infra* Part IV.A (explaining the PDA’s comparison-based approach for evaluating discrimination claims).

14. 124 CONG. REC. 11839, 21435–37 (1978) [hereinafter CONG. REC.].

15. *Id.* (Pregnant women “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 . . .”).

16. CONG. REC., *supra* note 14, at 21436–37. “Desirable” pregnancy-blind treatment refers to the specific discrimination the PDA intended to eliminate—discrimination on the basis of pregnancy resulting in adverse employment actions based solely on this condition. *Id.* For instance, it is desirable for an employer to

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effects, even healthy pregnancies may affect a woman's ability to work.<sup>17</sup> This is because a completely symptom-free pregnancy does not exist based on the very nature of pregnancy.<sup>18</sup> Moreover, women experience conditions related to their reproductive capacities, which courts have found fall outside the scope of the PDA.<sup>19</sup> Therefore, women's reproductive capacities present unique conditions requiring accommodation in order to allow women to achieve these equal employment opportunities.

The female's unique anatomy is essential to reproductive ability.<sup>20</sup> Women bear the physical burdens of reproductive choices between couples. First, women alone experience the physical bodily changes that occur during pregnancy. Likewise, if infertility treatments are involved, the woman most often experiences the higher health risks and side effects.<sup>21</sup>

Issues involving pregnancy in the workplace will likely become more prevalent as more women decide to work.<sup>22</sup> As of 2010, women, in general, comprised forty-seven percent of the total labor force.<sup>23</sup> According to the Bureau of Labor Statistics, eighty percent of working women will become pregnant during their working lives.<sup>24</sup> These statistics show the high rate of participation of women in the workforce who will be affected by their unique reproductive capacity.

"Equal employment opportunity" focuses on an individual's right not to be discriminated against by an employer (or potential employer) based on one of the several specifically enumerated protected characteristics.<sup>25</sup> "Equal Employment Opportunity is a principle that asserts that all people should have the right to work and advance on the bases of merit and ability, regardless of their race, sex,

overlook a woman's pregnancy in making a hiring decision when the woman is capable of work. *Id.*

17. *See infra* Part V.A (listing the side effects that occur with all pregnancies, such as hormonal changes and fetal movement).

18. *Id.*

19. *See infra* Part IV.B (identifying the PDA's failure to cover biologically related functions and physiological effects of pregnancy).

20. *Female Reproductive System*, EDUCATION.COM, [http://www.education.com/reference/article/Ref\\_Female\\_Reproductive/](http://www.education.com/reference/article/Ref_Female_Reproductive/) (last visited Mar. 4, 2012) (on file with the *McGeorge Law Review*) (detailing the unique aspects of the female reproductive system, which facilitate pregnancy).

21. *See infra* Part IV.B.2 (detailing the higher risks of infertility treatments for women in comparison to men).

22. *See* Stephanie Armour, *Pregnant Workers Report Growing Discrimination*, USA TODAY (Feb. 16, 2005, 9:38 PM), [http://www.usatoday.com/money/workplace/2005-02-16-pregnancy-bias-usat\\_x.htm](http://www.usatoday.com/money/workplace/2005-02-16-pregnancy-bias-usat_x.htm) (on file with the *McGeorge Law Review*) ("The rise in pregnancy discrimination cases is important now because more women of child-bearing age are in the labor force . . .").

23. *Women in the Labor Force in 2010*, U.S. DEP'T OF LAB., <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited Mar. 5, 2012) (on file with the *McGeorge Law Review*).

24. *Pregnancy in the Workplace*, INC., <http://www.inc.com/encyclopedia/pregnancy-in-the-workplace.html> (last visited Jan. 26, 2013) (on file with the *McGeorge Law Review*).

25. *See Overview*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*) (describing the role of the Equal Employment Opportunity Commission in enforcing laws prohibiting such discrimination).

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color, religion, disability, national origin, or age.”<sup>26</sup> Better protection, in the form of reasonable accommodations for reproductive capacity, will expand the opportunities for women to remain in the workforce.

The PDA, as part of Title VII of the Civil Rights Act,<sup>27</sup> follows a comparison framework in evaluating discrimination claims.<sup>28</sup> Courts look for “equal treatment”<sup>29</sup> based on an evaluation of whether the employee claiming discrimination was treated less favorably in comparison to another employee who is “similarly situated” but for the particular characteristic that is the basis of the discrimination claim.<sup>30</sup> Under this theory, pregnant women are viewed as indistinguishable from others in a similarly situated class, or individuals “similar to the complainant in all respects but for the protected characteristic.”<sup>31</sup>

Men and women should be allowed to compete freely and on an equal basis in the workplace; however, current laws do not promote this idea because they do not take into account the reality that women uniquely experience the physical side effects of pregnancy. The PDA does not provide adequate protection, due to its limited coverage of the effects of gestation and birth, as well as its enactment as an amendment to Title VII (which focuses on comparison to a similarly situated class). This Comment argues for a federal law that requires employers to provide reasonable accommodations for employees who experience conditions related to pregnancy, childbirth, or related reproductive conditions.

Part II begins with the social context of employment discrimination against women, which led to the need for equal employment laws. Part III provides an overview of the case law leading up to the need for the PDA and a brief description of the PDA’s enactment, structure, and effect. Part IV addresses specific ways in which the PDA insufficiently protects women due to the Act’s comparator-based approach. Finally, Part V discusses the necessity of a new law

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26. *Centers for Disease Control and Prevention*, CDC EQUAL EMP’T OPPORTUNITY, <http://www.cdc.gov/diversity/equalopportunity/index.htm> (last visited Oct. 18, 2010) (on file with the *McGeorge Law Review*).

27. 42 U.S.C. § 2000e (2006). Title VII prohibits employers from making hiring or firing decisions or otherwise discriminating against individuals based on their “race, color, religion, sex, or national origin”; or otherwise adversely affect their employment status based on these characteristics. *Id.* § 2000e-2.

28. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 763 (2011) (“[C]ourts have transformed the comparator methodology into the substantive law of discrimination.”).

29. Nicholas Smith, *A Critique of Recent Approaches to Discrimination Law*, 2007 N.Z. LAW REV. 499, 504 (2007).

30. *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring).

31. Goldberg, *supra* note 28, at 731, 759 (citing to *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994)). In *Troupe*, the plaintiff was fired for tardiness due to morning sickness and was unable to prevail in her case for failure to provide an example of a similarly situated class. *Troupe*, 20 F.3d at 735. The court held that the PDA does not require employers to make it any easier for pregnant women to work than it is for their similarly situated co-workers. *Id.* at 738. Judge Posner explained that a similarly situated class would consist of a male who was as tardy as the plaintiff due to health problems and about to take a paid sick leave as a result of those problems. *Id.* As this case demonstrates, the possibility of a plaintiff finding a similarly situated class against which to compare her situation presents a difficult task. *But see id.* at 739 (“We doubt that finding a comparison group would be that difficult.”).

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that recognizes an accommodation approach rather than a comparative approach to women's reproductive functions. This Part utilizes the Americans with Disabilities Act as a model of a currently existing law that requires accommodations for employees with certain conditions, which are very similar in effect to pregnancy and related reproductive functions.<sup>32</sup> In addition, this Part refers to current California law<sup>33</sup> for a specific example of a pregnancy accommodation law, which may be modified in order to apply on the federal level.

## II. HISTORY OF EMPLOYMENT DISCRIMINATION AGAINST WOMEN

Section A provides the historical backdrop of women in the workplace beginning in the early twentieth century. This Section details women's entrance into the workforce and the important implications that resulted. More specifically, this Section traces the growing need and expectation of equality for women especially with respect to employment opportunities. Section B describes the enactment of Title VII and reveals the sexism involved in the drafting of this landmark law.

### A. *Women in the Workforce Prior to Title VII*

In the early twentieth century, women worked predominantly in the home, while some participated in the labor force.<sup>34</sup> The dominant social view at the time was that women should stay "within the home as wives and mothers."<sup>35</sup> Even when women did participate in the workforce, their presence remained "limited by cultural beliefs [and] social practices . . . that subordinated women to men."<sup>36</sup> As a class, women earned noticeably lower wages than men and filled the lower-paying occupations.<sup>37</sup> Women were also subjected to harsh and unsafe working conditions<sup>38</sup> at much lower rates than men, as a result of this perceived

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32. See 29 C.F.R. § 1630.2(g) (2011) (defining "disability" in the ADA regulations as "[a] physical or mental impairment that substantially limits . . . manual tasks . . . eating, sleeping, walking, standing, . . . lifting, bending, . . . breathing, . . . concentrating, thinking, . . . and working.").

33. CAL. GOV'T CODE §12945 (West 2011 & Supp. 2012).

34. *A History of Women in Industry*, NAT'L WOMEN'S HIST. MUSEUM 7, [http://www.nwhm.org/online-exhibits/industry/womenindustry\\_intro.html](http://www.nwhm.org/online-exhibits/industry/womenindustry_intro.html) (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*). Readers of this historical account of women in the workforce should note that lower class African-American and immigrant women already worked outside of their home as a matter of economic necessity and socially mandated conditions. See *id.* ("At the end of the 19th century, most women workers were non-white.").

35. *Id.* at 1.

36. Jeanne Boydston, *Women in the Labor Force*, AM. NAT'L BIOGRAPHY ONLINE, [http://www.anb.org/cush\\_wlabor.html](http://www.anb.org/cush_wlabor.html) (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*).

37. *Id.* While the wage gap between women and men has been slowly increasing, women still earned 23% less than men in 2010. *A Brief History of Pay Inequity*, AM. ASS'N OF UNIV. WOMEN, [http://www.aauw.org/act/laf/library/payequity\\_hist.cfm](http://www.aauw.org/act/laf/library/payequity_hist.cfm) (last visited Feb. 2, 2013) (on file with the *McGeorge Law Review*).

38. *A History of Women in Industry*, *supra* note 34, at 9 "[W]omen typically worked 12 to 14 hours, 7

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inferiority.<sup>39</sup> On average, women's wages amounted to a mere sixty percent of that earned by men.<sup>40</sup>

Employment conditions remained dismal and employment discrimination against women persisted even as women increasingly entered the labor force.<sup>41</sup> According to the National Women's History Museum, as women increasingly left the home to join the paid workforce, they experienced heavy criticism and discrimination.<sup>42</sup> More specifically, during the Great Depression, the American public viewed working women as stealing potential jobs from men.<sup>43</sup> The media also attacked working women for "abandoning their families,"<sup>44</sup> thus, reinforcing the notion of women's roles as homemaker first and worker second.<sup>45</sup> Laws that preferred men to women also perpetuated the discrimination.<sup>46</sup> Consequently, many public employers "nationwide began to fire and refuse to hire married women."<sup>47</sup>

During World War II, many men left to serve in the armed forces, which resulted in a labor shortage.<sup>48</sup> Responding to this shortage, women began performing traditionally male-held jobs in factories and on production lines.<sup>49</sup> Although many women were terminated after the war ended and men returned home, "there were lasting effects" of women's participation in traditionally male-held jobs.<sup>50</sup> Women were inspired by a belief in their right to receive fair working conditions.<sup>51</sup> "Women had proven that they could do the job and within a few decades, women in the workforce became a common sight."<sup>52</sup>

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days a week at a sewing machine in a factory without central heating, electricity, or ventilation." *Id.* As a result of the conditions, "women often suffered from serious workplace injuries . . . and contagious illnesses that spread quickly . . . in the cramped factories." *Id.*

39. *See id.* at 7.

40. *Id.*

41. *See id.* (referring to women's consistently lower wages and poor working conditions).

42. *Id.* at 14.

43. *Id.*

44. *Id.*

45. *See id.* (referring to the media's backlash against women for leaving the home and entering the workforce).

46. For instance, Congress enacted the Federal Economy Act, which excluded "a married woman from working in civil service if her husband did as well." *Id.*

47. *Id.*

48. *Women in the Work Force During World War II*, NAT'L ARCHIVES, <http://www.archives.gov/south-east/education/resources-by-state/wwii-women.html> (last visited Mar. 5, 2012) (on file with the *McGeorge Law Review*).

49. *Id.*

50. *Id.*

51. *A History of Women in Industry*, *supra* note 34, at 8.

52. *Women in the Work Force During World War II*, *supra* note 48.

*B. The Enactment of Title VII*

Congress enacted Title VII of the Civil Rights Act to achieve equal employment opportunities for individuals with certain specifically protected characteristics.<sup>53</sup> The characteristics protected under Title VII include “race, color, religion, sex, [and] national origin.”<sup>54</sup> Title VII explicitly prohibits employers from discriminating “because of” or “on the basis of” these enumerated characteristics.<sup>55</sup>

Many viewed the addition of “a sex discrimination provision to Title VII as little more than a ‘joke’ or a political ploy.”<sup>56</sup> As one court noted: “The sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith.”<sup>57</sup> Conservative civil rights opponents such as Smith believed that the inclusion of sex as a protected characteristic would result in the bill’s defeat.<sup>58</sup> The manner in which sex discrimination became a part of Title VII corroborates the long struggle women have faced in achieving equal employment opportunities.<sup>59</sup>

## III. THE PREGNANCY DISCRIMINATION ACT

Section A explains the employment conditions for pregnant working women in the period of time after the 1964 enactment of Title VII. Section B describes Congress’s clarification to Title VII with its 1978 enactment of the PDA.

*A. Pre-Pregnancy Discrimination Act*

Even after Congress enacted Title VII, women continued to be deprived of equal employment opportunities because employers regularly discriminated based on pregnancy.<sup>60</sup> Employers considered pregnancy in making employment

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53. See 42 U.S.C. § 2000e-4 (2006) (providing for the establishment of the Equal Employment Opportunity Commission).

54. *Id.* § 2000e-2.

55. *Id.*

56. Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997) (citing *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984)).

57. *Id.* at 137 n.4 (quoting *Rabidue*, 584 F. Supp. 419, 428 n.36).

58. *Id.* (citing Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996)).

59. *But see* Epstein, *supra* note 58, at 409 n.62 (arguing that passage of the item demonstrates the perceived merit of protecting against sex discrimination); Bird, *supra* note 56, at 138 (“Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women.”).

60. See CONG. REC., *supra* note 14, at 11839 (indicating that a significant number of employers force women to stop working even when they are able to continue, and citing many employers’ imposition of an arbitrary date to return to work “based on the stereotypical notions that women are unable to continue working

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decisions such as hiring, firing, and wage determinations.<sup>61</sup> Employers also terminated employment or forced women to take mandatory maternity leave at arbitrary points in their pregnancy.<sup>62</sup> Many pregnant women were forced to take mandatory maternity leave despite their capability and desire to continue working.<sup>63</sup> For example, General Electric required pregnant women to take leave “three months prior to birth and [they were] not permitted to return until six weeks after the birth.”<sup>64</sup> Further revealing the discriminatory practices against pregnant women, this policy of mandatory leave despite physical ability to work was not applied to any other employees—just pregnant women.<sup>65</sup>

In response to the continuing discrimination against pregnant women, women began bringing actions against their employers.<sup>66</sup> In 1974, the United States Supreme Court decided *Geduldig v. Aiello*.<sup>67</sup> This was the first time the Court addressed whether discrimination on the basis of pregnancy is unconstitutional gender discrimination.<sup>68</sup>

In *Geduldig*, California’s disability insurance system excluded coverage for disabilities caused by pregnancy.<sup>69</sup> Plaintiffs, four women denied disability benefits due to pregnancy complications, challenged California’s disability insurance program as a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>70</sup> Under the applicable constitutional law of the time, the plaintiffs bore the burden of “showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.”<sup>71</sup> If plaintiffs could not meet this burden, pregnancy could be excluded from insurance coverage “on any reasonable basis . . . .”<sup>72</sup>

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or do not desire to return to work”).

61. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 149–50 n.1 (1976) (Brennan, J., dissenting) (indicating General Electric’s decision to pay lower wages to women based on pregnancy and “other considerations”); see also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634–36 (1974) (forcing pregnant employees to take mandatory maternity leave at the beginning of their fifth month despite their willingness and ability to continue working).

62. CONG. REC., *supra* note 14, at 21435; *Gen. Elec. Co.*, 429 U.S. at 149–50 n.1.

63. *Cleveland Bd. of Educ.*, 414 U.S. at 636.

64. *Gen. Elec. Co.*, 429 U.S. at 149–50 n.1.

65. *Id.*

66. See Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> (last visited July 5, 2012) (on file with the *McGeorge Law Review*) (listing the numerous gender discrimination lawsuits leading up to the enactment of the PDA).

67. 417 U.S. 484, 496–97 (1976).

68. Diane L. Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 442 (1975).

69. 417 U.S. at 486.

70. *Id.* at 486 n.20, 487.

71. *Id.* at 496 n.20.

72. *Id.*

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The Court held that the policy's exclusion of pregnancy disability benefits did not violate the Equal Protection Clause because it did not involve discrimination against a definable protected group; the policy only discriminated against pregnant women rather than all women.<sup>73</sup> While recognizing that only women become pregnant, it reasoned that the insurance program drew a distinction between "pregnant women" and "nonpregnant persons."<sup>74</sup> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities."<sup>75</sup>

The Court concluded 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."<sup>76</sup> In support, the Court noted that, "[w]hile [pregnant persons are] exclusively female, the [category of nonpregnant persons] includes members of both sexes."<sup>77</sup> In order to reach this conclusion, the court relied on a categorization of "pregnant" versus "nonpregnant persons."<sup>78</sup> It then compared these two groups and found that women also fall into both the "pregnant" and "nonpregnant" categories, thus no gender discrimination occurred.<sup>79</sup> By categorizing the groups for comparison, the designation of pregnant or nonpregnant persons allowed employers to make decisions based on pregnancy.<sup>80</sup>

Notably, *Geduldig* did not create an immediate need to address pregnancy discrimination under Title VII because it was brought as a constitutional Equal Protection case and not a Title VII action.<sup>81</sup> The need to examine pregnancy discrimination under Title VII soon arose; in 1976, the Supreme Court relied on the *Geduldig* interpretation of non-pregnant persons in deciding *General Electric Co. v. Gilbert*.<sup>82</sup>

In *General Electric Co.*, employees sued as a class because the company's insurance plan excluded coverage of pregnancy-related disabilities, while covering other non-occupational situations such as vasectomies, cosmetic surgeries, and sports-related injuries.<sup>83</sup> The class members alleged that excluding

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73. *Id.* at 497.

74. *Id.* at 496 n.20.

75. *Id.*

76. *Id.* at 484.

77. *Id.*

78. *Id.* at 496 n.20.

79. *Id.*

80. See Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. REV. 375, 380 (1981) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–27, at 1071 (1978)) ("Thus, under *Geduldig*, 'the link of the excluded disability [due to pregnancy] was to be treated as essentially coincidental.'").

81. *Decisional Background of the Pregnancy Discrimination Act*, Employment Discrimination (MB) 3-47, at § 47.02 (2011) (on file with the *McGeorge Law Review*).

82. 429 U.S. 125, 133–34 (citing *Geduldig*, 417 U.S. at 484).

83. *Id.* at 127, 151–52.

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pregnancy coverage constituted sex discrimination in violation of Title VII's prohibition against gender discrimination.<sup>84</sup>

The Court rejected this argument and held that exclusion of pregnancy from insurance coverage does not constitute sex discrimination under Title VII.<sup>85</sup> It explained that a “prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another.”<sup>86</sup> The Court’s holding was based on the *Geduldig* “nonpregnant persons” distinction in order to assert that exclusion of pregnancy “is not a gender-based discrimination at all,”<sup>87</sup> and, thus, the class of women was not specifically discriminated against.<sup>88</sup> The majority noted that the financial benefits of the plan paid out equally to men and women.<sup>89</sup> It further justified non-coverage by distinguishing pregnancy from other covered diseases and disabilities by classifying pregnancy as a “voluntarily undertaken and desired condition.”<sup>90</sup> Despite Title VII, the *General Electric Co.* ruling permitted sex discrimination, which allowed unfair treatment based on pregnancy—a uniquely female reproductive function.<sup>91</sup>

#### *B. Enactment of the Pregnancy Discrimination Act of 1978*

Congress enacted the PDA as an amendment to Title VII in direct response to the Court’s ruling in *General Electric Co.*<sup>92</sup> The law explicitly states that under Title VII, discrimination “‘because of sex’ or ‘on the basis of sex’” also includes circumstances that occur “because of or on the basis of pregnancy, childbirth, or related medical conditions.”<sup>93</sup> Furthermore, the PDA states that women affected by pregnancy, childbirth, or related medical conditions “shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .”<sup>94</sup>

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84. *Id.* at 129.

85. *Id.* at 145–46.

86. *Id.* at 137.

87. *Id.* at 136.

88. *Id.* at 145–46.

89. *Id.* at 139 n.17.

90. *Id.* at 136.

91. *Id.* at 145–46.

92. See generally CONG. REC., *supra* note 14, at 21435–36 (multiple speakers stating that *General Electric Co.* necessitates clarification that Congress intended discrimination on the basis of sex to include pregnancy discrimination); see also *id.* at 34292–94 (including an article in the record titled “General Electric Company v. Gilbert: The Plight of the Working Woman”).

93. 42 U.S.C. § 2000e(k) (2006).

94. *Id.*

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Despite Congress's stated intention of alleviating employment discrimination on the basis of pregnancy,<sup>95</sup> the PDA is insufficient to provide equal employment opportunities to women. This insufficiency arises because the PDA does not cover certain reproductive conditions that women experience and it applies a comparative analysis in evaluating discrimination claims.<sup>96</sup> In addition, the PDA only addresses pregnancy discrimination and, thus, fails to address the situation in which reasonable accommodations would allow a woman to continue her employment, despite her unique reproductive capacity.<sup>97</sup>

## IV. INSUFFICIENCY OF THE PDA

This Part will explain in more detail the application of the comparator approach in order to argue that the PDA provides inadequate protection.

*A. The Comparator Approach Fails to Adequately Address Women's Reproductive Capacity*

The PDA utilizes a comparator-based analysis, which requires a plaintiff to identify a similarly situated non-pregnant individual who received better treatment.<sup>98</sup> An employer may deny accommodations for pregnancy and still comply with the PDA if their actions result in "treat[ing] nonpregnant employees the same as pregnant employees."<sup>99</sup> Since employers are only required to recognize women's reproductive capacities to the extent that they accommodate other conditions,<sup>100</sup> this allows an employer to treat all employees poorly and never accommodate reproductive capacities.<sup>101</sup> While this may seem fair initially, when considering that only women will ever experience the consequences of

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95. In enacting Title VII's PDA, Congress wanted to "insure that genuine equality in the American labor force is more than an illusion and that pregnancy will no longer be the basis of unfavorable treatment of working women." CONG. REC., *supra* note 14, at 21435-37 (statement of Representative Augustus F. Hawkins).

96. See *infra* Part IV (detailing the insufficiencies of the PDA).

97. For instance, Heather Wiseman could have carried her own water bottle at no cost to the employer. This would have allowed her to continue working and productively contributing to the labor force. *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9, 2009).

98. Goldberg, *supra* note 28.

99. See, e.g., *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548 (7th Cir. 2011). In *Serednyj*, the employer denied providing temporary accommodations for all non-work related injuries. *Id.* at 545-47. Since the policy distinguished between work-related and non-work related injuries, they were allowed to classify pregnancy as non-work related. *Id.* at 548. The court found that this policy treated non-pregnant employees the same as pregnant employees and was, thus, permissible under the PDA. *Id.* at 552.

100. See *Facts About Pregnancy Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/fs-preg.html> (last visited Feb. 2, 2013) (on file with the *McGeorge Law Review*) (explaining that an employer must treat an employee with pregnancy disabilities the same as it would treat any other temporarily disabled employee).

101. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . .").

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their unique reproductive capacity, it becomes clear that the current state of the law can systematically prevent women, as a class, from achieving equal employment opportunities.

A major problem with current law is that there is no similarly situated class to pregnant women.<sup>102</sup> In pregnancy and female reproductive issues, “there can be no precise comparator by reason of the different reproductive capacities of men and women . . . .”<sup>103</sup> Because symptoms and conditions vary among pregnant women, and even between pregnancies for the same woman,<sup>104</sup> finding a similarly situated non-pregnant person is often not possible.<sup>105</sup>

Many legitimate pregnancy discrimination claims fail due to the inability to find a legally acceptable comparator.<sup>106</sup> Even when a woman may continue working with the aid of a temporary accommodation, an employer may terminate her employment if they do not already provide accommodations to similarly situated employees.<sup>107</sup> As such, pregnant women may face a difficult choice between remaining in the workforce and receiving equal employment opportunities or leaving the workforce in order to protect their health or the health of their children. Sadly, pregnant women who are capable of continuing work if provided a reasonable accommodation may instead be fired.<sup>108</sup>

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102. Janna L. Grossman, *The Pregnant Workers’ Fairness Act: Accommodating the Needs of Pregnant Working Women*, JUSTIA (May 11, 2012), <http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act> (on file with the *McGeorge Law Review*).

103. Goldberg, *supra* note 28, at 761.

104. See *infra* Part V.A (providing examples of different symptoms that are not experienced by all pregnant women).

105. See Grossman, *supra* note 102 (noting that courts have not accepted comparisons to “employees who receive accommodations mandated by the [ADA]”).

106. See Goldberg, *supra* note 28, at 735 (arguing that many forms of discrimination are not heard due to the rare existence of a “sufficiently close comparator”).

107. See *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (holding that the PDA does not require employers to make it any easier for pregnant women to work than it is for their similarly situated co-workers). Judge Posner explained that a similarly situated class would consist of a male plaintiff whose health problems caused him to be as late and about to take a paid sick leave as a result of those problems. *Id.* at 738; see also *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 551–52 (7th Cir. 2011). In *Serednyj*, the court rejected the plaintiff’s proposed comparators and found her PDA claim insufficient. *Id.* at 548–52. For instance, one woman suffered disc degeneration in her back and took two leaves of absence to recover. *Id.* at 551. That woman had taken FMLA leave, which *Serednyj* did not qualify for because she had not worked at Beverly long enough. *Id.* at 546. The court also rejected comparison to Pam Seibert, a speech therapist who required frequent breaks due to a medical condition. *Id.* at 552. Seibert was not considered a proper comparator because she was hired as an independent contractor rather than a direct employee of Beverly. *Id.* Gina Sizemore, a pregnant woman fired for not being able to return to full working capacity upon returning from FMLA leave, presented another rejected comparator because the court found that this case showed Beverly applying its modified work policy uniformly. *Id.* This uniform application of the modified work policy results in permitting systematic exclusion of pregnant women requiring accommodations from the workplace.

108. See *Serednyj v. Beverly Healthcare, LLC*, No. 2:08-CV-4 RM, 2010 WL 1568606, at \*1 (N.D. Ind. Apr. 16, 2010). Rearranging tables and transporting residents to and from activities, the tasks for which the plaintiff needed accommodation, each required five to ten minutes per day. *Id.* at \*1. In addition, although her co-workers already assisted her with these activities prior to pregnancy and the only necessary accommodation required was the formality of stating that other co-workers must help her in these tasks, the employer was still

*McGeorge Law Review / Vol. 44**B. Non-Coverage of Biologically Related Functions and Physiological Effects*

As the PDA only addresses gestation and birth, many biologically related functions and physiological effects of a woman's reproductive capacity are not covered under existing law. Due to these limitations, federal courts repeatedly deny discrimination claims involving breastfeeding and fertility treatments that plaintiffs bring under the PDA.<sup>109</sup> The achievement of equal employment opportunities for women demands accommodation of these uniquely female conditions, which can interfere with a woman's ability to compete on an equal basis. If provided with reasonable accommodations, many women affected by their unique reproductive capacity may continue working at productive levels.<sup>110</sup>

*1. Breastfeeding*

Although the production of breast milk is directly related to pregnancy and women's unique reproductive capacities, the PDA does not require employers to accommodate lactation.<sup>111</sup> Women's bodies begin producing breast milk during pregnancy.<sup>112</sup> In addition, the body produces the hormone oxytocin in direct response to the birth of the baby,<sup>113</sup> triggering the lactation process.<sup>114</sup> Therefore, the production of breast milk is directly linked to pregnancy.<sup>115</sup> Despite these obvious connections between pregnancy, childbirth, and lactation, many courts

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within its legal rights under the PDA to refuse accommodation and fire her. *Serednyj*, 656 F.3d at 551–52.

In addition, it is arguably in the employer's best interest to provide reasonable accommodations. Reasonable accommodations will maintain worker satisfaction and team morale, reduce turnover rates, and cut the time and monetary costs of hiring and training new employees. See *The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksite*, U.S. DEP'T HEALTH & HUMAN SERVS., HEALTH RES., & SERVS. ADMIN., <http://www.womenshealth.gov/breastfeeding/government-in-action/business-case-for-breast-feeding/business-case-for-breastfeeding-for-business-managers.pdf> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*) (describing how accommodating breastfeeding actually saves employers money).

109. See *infra* Part IV.B.1–2 (providing case examples).

110. For instance, an employee who needs a regular water supply and, thus, requires an accommodation that allows her to carry a water bottle, does not present a significant (if any) reduction in her productivity level. *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9, 2009).

111. For cases holding that breastfeeding or breast-pumping and lactation do not fall under the coverage of the PDA, see *E.E.O.C. v. Houston Funding II, Ltd.*, No. H-11-2442, 2012 WL 739494, at \*1 (S.D. Tex. Feb. 2, 2012); *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999); *Fejes v. Gilpin Ventures, Inc.* 960 F. Supp. 1487, 1491 (D. Colo. 1997); *McNeill v. New York*, 950 F. Supp. 564, 571 (S.D.N.Y. 1996); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990).

112. *Breastfeeding: Overview*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/firstyearof-life/breastfeedingoverview.htm> (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*).

113. *Definition of Lactation*, MEDICINET.COM, <http://www.medterms.com/script/main/art.asp?articlekey=6202> (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*).

114. *Id.*

115. See *supra* notes 112–14 (demonstrating the clear link between pregnancy and the production of breast milk).

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hold that the PDA does not apply to workplace discrimination based on breastfeeding.<sup>116</sup>

In *McNill v. New York Department of Correction*, the plaintiff's child was born with a cleft palate and lip, which required breast-feeding as opposed to bottle-feeding prior to the corrective surgery and for several weeks thereafter during the healing process.<sup>117</sup> As the only individual capable of fulfilling her child's medical needs,<sup>118</sup> the plaintiff could not return to work at the originally agreed-upon date.<sup>119</sup> In finding that breastfeeding is not a medical condition related to pregnancy, the court reasoned that the PDA protects the mother against discrimination, but not the child.<sup>120</sup> This reasoning forced McNill to choose between keeping her job and fulfilling her child's medical needs.<sup>121</sup> This case demonstrates a situation in which the woman's unique reproductive capacity resulted in the loss of her job.<sup>122</sup> While *McNill* presents a presumably rare case, it

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116. See, e.g., *Martinez*, 49 F. Supp. 2d. at 310; *Wallace*, 789 F. Supp. at 869; *McNill*, 950 F. Supp. at 571; *Fejes*, 960 F. Supp. at 1491; *Houston Funding II, Ltd.*, 2012 WL 739494, at \*1 (all holding that breastfeeding or breast-pumping and lactation do not fall under the coverage of the PDA). While women may choose not to breastfeed, based on the extensive medical studies and advisories, breastfeeding is the most beneficial option for a child. See *The Surgeon General's Call to Action to Support Breastfeeding*, U.S. DEP'T HEALTH & HUMAN SERVS., <http://www.surgeongeneral.gov/topics/breastfeeding/factsheet.html> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*); *Why Breastfeeding Is Important*, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/breastfeeding/why-breastfeeding-is-important/> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*); *Benefits of Breastfeeding*, NATURAL RES. DEF. COUNCIL, <http://www.nrdc.org/breastmilk/benefits.asp> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*) (all explicitly stating that breastfeeding provides far better health benefits than formula for both mother and child). Therefore, this Comment argues that breastfeeding is really not a choice for a woman. When a couple decides to give their child the best possible nourishment via breast milk, it is always a woman who must bear any adverse employment effects of that joint decision.

117. 950 F. Supp. at 571.

118. It may be argued that McNill could have used a wet nurse. However, the risks likely outweigh the benefits of this solution. *Milk Donations*, LA LECHE LEAGUE INT'L, <http://www.llli.org/llleaderweb/lv/lvjulaug95p53.html> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*). A wet nurse is beneficial because McNill could continue working without requiring breastfeeding accommodations. *Id.* However, risks may include transmission of bacteria or viruses, "some of which may be found in milk expressed by asymptomatic women." *Id.* Babies also require different compositions of breast milk depending on their age. *Id.* The biological mother's breast milk provides the exact composition the child requires, whereas breast milk from a woman with a child of a different age does not. *Id.*

An additional burden of hiring a wet nurse is the cost. Wet nurse rates start at \$1,000 per week according to Robert Feinstock, an owner of a nationwide wet nurse agency. Jeninne Lee-St. John, *Outsourcing Breast Milk*, TIME MAG. U.S. (Apr. 19, 2007), <http://www.time.com/time/magazine/article/0,9171,1612710,00.html> (citing an interview with Robert Feinstock) (on file with the *McGeorge Law Review*).

Although accommodating breastfeeding requires costs to the employer, these costs are very small and pale in comparison to the risks and monetary expense of hiring a wet nurse when the mother is fully capable of supplying her own breast milk. See *infra* Part IV.B.1 (detailing the minimal requirements to accommodate breastfeeding).

119. *McNill*, 950 F. Supp. at 566.

120. *Id.* at 571; see also *Fejes*, 960 F. Supp. at 1487 ("[N]eeds or conditions of the child which require the mother's presence are not within the scope of the PDA.").

121. See *McNill*, 950 F. Supp. at 571.

122. *Id.* at 568 (detailing McNill's demotion and reinstatement upon return to an inferior post).

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nonetheless shows that the lack of accommodation for a woman's unique reproductive capacity affected her ability to remain in the workforce and to compete on an equal basis.<sup>123</sup>

Lactation may also cause great discomfort and pain and, without reasonable accommodations, may interfere with a woman's ability to work. Women often experience uncomfortable swelling, heaviness, hardness, and leakage as a result of lactation.<sup>124</sup> Lactation and continued breastfeeding also provide significant health and financial benefits to both mother and child.<sup>125</sup> Once again, a woman should not be forced to choose between maintaining her health, or her child's, and obtaining equal employment opportunities. Periodic pumping breaks and a private area to breastfeed are prime examples of reasonable accommodations that will give women the opportunity to remain in the workforce and continue to compete on an equal basis.

The Obama administration recently signed the Patient Protection and Affordable Care Act,<sup>126</sup> which includes an amendment to the Fair Labor Standards Act of 1938.<sup>127</sup> This amendment requires an employer to provide reasonable break time for a woman to pump her breast milk for one year after the birth of her child.<sup>128</sup> It also requires the employer to provide a private place to pump.<sup>129</sup> However, if an employer maintains less than fifty employees, it is exempt from this requirement if doing so would "impose an undue hardship . . . when considered in relation to the size, financial resources, nature, or structure of the employer's business."<sup>130</sup> While this new law improves equal employment opportunities for some women, a large number of women working for smaller employers will not receive these accommodations.<sup>131</sup> In addition, the law does not address workplace discrimination against women due to lactation, nor does it apply to non-exempt employees.<sup>132</sup> As a result, women may still have to choose

123. *Id.* at 573.

124. Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 313 (2001) (citing Chapman et. al, *Identification of Risk Factors for Delayed Onset of Lactation*, 99 J. AM. DIETETIC ASS'N 450 (1999)).

125. See *The Surgeon General's Call to Action to Support Breastfeeding*, *supra* note 116 (providing comprehensive overview of the benefits of breastfeeding to mother, child, and employer). Breastfeeding helps reduce the woman's risk of breast and ovarian cancer, and also provides crucial immune support to the child. *Id.* In addition, breastfeeding can save up to \$1,500 on formula in the first year as well as reduce the frequency of illnesses and, thus, medical expenses. *Id.*

126. Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010) (enacted).

127. 29 U.S.C. § 207 (2006).

128. *Id.* § 207(r)(1)(A).

129. *Id.*

130. *Id.* § 207(r)(3).

131. See *id.* (allowing employers of less than fifty to invoke an "undue hardship" defense and creating a possible lack of accommodation for breastfeeding women working for small employers).

132. See *Help Working Families Stay Healthy: Support Breastfeeding Mothers in the Workplace*, U.S. BREASTFEEDING COMM., <http://www.usbreastfeeding.org/Portals/0/Advocacy/2011-BPA-Fact-Sheet-USBC.pdf> (last visited Mar. 25, 2012) (on file with the *McGeorge Law Review*) (stating that lactating women "are still

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between carrying out their unique reproductive roles and advancing their careers or just keeping their jobs.<sup>133</sup>

Although the cost of providing reasonable breastfeeding accommodations presents a legitimate concern for employers, many sources indicate that the cost is de minimus.<sup>134</sup> At a minimum, lactation accommodation requires a private area,<sup>135</sup> an electrical outlet for the breast pump, and a chair.<sup>136</sup> Medical professionals confirm that refrigeration is not even necessary.<sup>137</sup> Therefore, costs of accommodations for lactation do not often present a strong counterargument to requiring reasonable accommodations for lactation.

### 2. Fertility Treatments

While the condition of infertility affects men and women, fertility treatments place a substantially higher burden on women, and consequently, impede their ability to continue full participation in the workforce.<sup>138</sup> The law remains unclear regarding whether the PDA provides coverage for discrimination based on infertility treatments.<sup>139</sup> In *Hall v. Nalco*,<sup>140</sup> the court found that adverse

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vulnerable to being fired or discriminated against in the workplace”).

133. This Comment does not argue that all employers must accommodate lactation even in spite of high costs or burdens. Rather, this section is included in order to illuminate the way in which women’s unique reproductive capacities may continue to interfere with equal employment opportunities despite the currently enacted federal laws. Therefore, enactment of a new federal law more specifically tailored to women’s unique reproductive capacities is required.

134. *Working It Out: Breastfeeding at Work*, LA LECHE LEAGUE INT’L, [http://www.llli.org/law/law\\_employment.html](http://www.llli.org/law/law_employment.html) (last visited Mar. 5, 2012) (on file with the *McGeorge Law Review*); Kathryn Tyler, *How to Establish a Workplace Lactation Program, GOT MILK?*, available at [http://www.kathryntyler.com/got\\_milk.htm](http://www.kathryntyler.com/got_milk.htm) (last visited Mar. 5, 2012) (on file with the *McGeorge Law Review*).

135. Current law provides for privacy by requiring an employer to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” 29 U.S.C. § 207(r)(1)(B). Thus, a small room or even a closet with a lock will suffice for smaller employers. See FACT SHEET #73: BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA, U.S. DEP’T OF LAB. WAGE & HOUR DIV., available at <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf> (last visited Mar. 5, 2012) (on file with the *McGeorge Law Review*) (providing further explanation of the room requirements for lactation accommodation).

136. Tyler, *supra* note 134.

137. *Id.* According to Marsha Walker, president of the International Lactation Consultant Association, “[y]ou don’t need refrigeration. You can put the milk in a cooler with blue ice packs and it will keep fine.” *Id.*

138. See *Male Infertility Overview*, UP TO DATE, <http://www.uptodate.com/contents/patient-information-treatment-of-male-infertility> (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*) (describing infertility treatments for men, assisted reproductive technologies (ART), the lack of risks to men versus the high risk and potentially life-threatening risks to women).

139. See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (holding that the PDA did not “prohibit[] discrimination based solely on reproductive capacity”). The court distinguished between reproductive capacity and pregnancy or related conditions. *Id.* It further stated that even though surgical impregnation procedures apply only to women, the need for the procedure is traceable to both women and men. *Id.* at 346. Therefore, the PDA was inapplicable. *Id.* Compare *Govori v. Goat Fifty*, No. 10 Civ. 8982(DLC), 2011 WL 1197942, at \*3 (S.D.N.Y. Mar. 30, 2011), with *Hall v. Nalco*, 534 F.3d 644, 648•49 (7th Cir. 2008) (both holding that discrimination based on in vitro fertilization treatments, not fertility alone, constitutes a valid

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employment actions taken against Hall for her absences due to undergoing in vitro fertilization (IVF)<sup>141</sup> constituted a valid cause of action under the PDA.<sup>142</sup> The court reasoned that “[e]mployees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women.”<sup>143</sup> More specifically, IVF involves surgical impregnation, which can only be performed on women.<sup>144</sup> Thus, by focusing on the plaintiff’s childbearing capacity—a condition specific to women—the court found discrimination on the basis of sex under Title VII.<sup>145</sup>

In a similar case, *Govori v. Goat Fifty, L.L.C.*,<sup>146</sup> the court followed *Hall* and found that women fired for undergoing IVF were discriminated against based on a medical condition related to pregnancy.<sup>147</sup> The court cited *Hall* for the proposition that “only women undergo surgical implantation procedures; therefore, only women and not men stand in potential danger of being fired for missing work for these procedures.”<sup>148</sup> Classifying surgical implantation procedures as “medical conditions related to pregnancy,”<sup>149</sup> the court found that adverse employment actions for absences due to IVF constitute a cognizable action under the PDA.<sup>150</sup> These two cases represent the idea that fertility treatments based on a woman’s reproductive capacity are protected by the PDA.<sup>151</sup>

Other courts, however, hold that surgical impregnation procedures do not fall under the coverage of the PDA.<sup>152</sup> For instance, in *Saks v. Franklin Covey Co.*, the Second Circuit stated “infertility standing alone does not fall within the meaning of the phrase ‘related medical conditions’ under the PDA.”<sup>153</sup> “Because reproductive capacity is common to both men and women, we do not read the PDA as introducing a completely new classification of prohibited discrimination based solely on reproductive capacity.”<sup>154</sup> Courts following this line of logic

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claim of sex-discrimination under the PDA).

140. 534 F.3d at 648•49.

141. In vitro fertilization, or IVF, is a type of “assisted reproductive technology (ART)” by which “special medical techniques are used to help a woman become pregnant.” *In Vitro Fertilization (IVF)*, MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/007279.htm> (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*).

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

143. *Id.* at 648•49.

144. *Id.* at 649.

145. *Id.* at 648•49.

146. No. 10 Civ. 8982(DLC), 2011 WL 1197942 (S.D.N.Y. Mar. 30, 2011).

147. *Id.* at \*4.

148. *Id.* at \*3.

149. *Id.*

150. *Id.*

151. *Id.*; *Hall v. Nalco*, 534 F.3d 644, 649 (7th Cir. 2008).

152. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003).

153. *Id.*

154. *Id.* at 345.

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reason that infertility affects both men and women and, thus, infertility is not a medical condition related to pregnancy or childbirth for purposes of the PDA.<sup>155</sup>

When looking at the different medical procedures required to address infertility in men and women, focusing on infertility alone provides too narrow an analysis. Although infertility affects both men and women,<sup>156</sup> treating infertility poses more severe health risks for women and more physically demanding, time-consuming procedures.<sup>157</sup> According to the Center for Disease Control and Prevention, “most cases [of] infertility [are] treated with drugs or surgery.”<sup>158</sup> The fertility drugs<sup>159</sup> administered to women require monitoring in the form of ultrasounds, blood estrogen levels, and urinary hormone testing.<sup>160</sup> Many of these treatments also have variable responses for different women, so each patient’s treatment and monitoring regimens will differ.<sup>161</sup> Some women experience mild side effects of fertility drugs, while others experience more severe complications.<sup>162</sup> These different responses and monitoring necessities further demonstrate that discrimination based on a woman’s reproductive capacity does not fit into the comparator-based evaluation.<sup>163</sup>

Women also undergo surgical procedures to address infertility. These procedures, known as assisted reproductive technologies (ARTs), include the IVF process.<sup>164</sup> Risks of assisted reproductive techniques for women include, among other things, infection, damage to organs, and ovarian hyperstimulation syndrome, which may cause death.<sup>165</sup> In addition, statistics indicate that women have higher infertility rates than men, which logically results in women undergoing fertility treatments more frequently.<sup>166</sup> On the other hand, “there are

155. *La Porta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770–71 (W.D. Mich. 2001).

156. It should be noted that men also undergo fertility treatments and procedures. *See generally Male Infertility Overview*, *supra* note 138. However, an examination of the discrimination men face based on this condition falls outside of the coverage of the PDA as well as the scope of this Comment.

157. *Male Infertility Overview*, *supra* note 138.

158. *Infertility FAQ’s*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/Infertility/> (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*).

159. Such drugs include: Clomiphene Citrate, Human Menopausal Gonadotropin, Follicle Stimulating Hormone, and Human Chorionic Gonadotropin. *Ovulation Induction*, UCSF MED. CTR., [http://www.ucsfhealth.org/education/ovulation\\_induction/index.html](http://www.ucsfhealth.org/education/ovulation_induction/index.html) (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*).

160. *Id.*

161. *Id.*

162. *See Fertility Drugs*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/fertility-drugs?page=2> (last visited Jan. 9, 2012) (on file with the *McGeorge Law Review*) (listing side effects ranging from “headaches and dizziness to ovarian hyperstimulation and multiple pregnancy, which present health risks for both mother and child”).

163. *See Part IV.A* (detailing the inadequacies of the comparator-based approach).

164. *See Infertility FAQ’s*, *supra* note 158 (describing several types of ARTs, including in vitro fertilization).

165. *Id.*

166. *See id.* (explaining that infertility cases in developed countries consist of eight percent, which are traceable to male factors versus thirty-seven percent traceable to female factors. The other cases can be traced to

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few to no risks [of ARTs] for men.”<sup>167</sup> Men have a small chance of “bleeding, damage to the testes, and infection.”<sup>168</sup>

If a woman must miss work to undergo fertility treatments or she experiences severe side effects from the procedures, an employer should not be permitted to take adverse employment actions against her based on her reproductive capacity. As detailed above, women disproportionately bear the burden of invasive physical procedures, time off of work to undergo treatment and monitoring, and risky health complications related to fertility treatments.<sup>169</sup> All of these issues will almost certainly interfere with her ability to work.

While the courts that follow the *Hall* and *Govori* line of reasoning recognize that a woman’s unique reproductive capacity affords her a remedy for discrimination based on fertility treatments such as IVF,<sup>170</sup> courts that follow *Saks* do not recognize this protection.<sup>171</sup> In order for women to be afforded truly equal employment opportunities, the laws related to women’s reproductive capacities must allow for accommodations in appropriate infertility situations. Recognizing that accommodations in certain infertility-related situations will afford equal employment opportunities can eliminate women having to choose between fulfilling their unique reproductive roles and maintaining employment.

#### V. AN ACCOMMODATION APPROACH TO PREGNANCY

Section A first explains the need for an accommodation approach by showing the inadequacy of the comparator-based method due to the wide-range of experiences even among pregnant women. Section A further explains the inapplicability of other laws such as the FMLA to the situations of many pregnant women, thus creating the need for an accommodation approach. Section B of this Part describes the ADA and Congress’s intent to alleviate the problems that this Comment is concerned with. This Section then explains the pregnancy-related conditions, which would fall under the coverage of the ADA if such conditions were not caused by pregnancy. Finally, this Part concludes by proposing a new federal law, modeled after the ADA, to provide reasonable accommodations for pregnancy and related reproductive conditions.

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both female and male partners or the source of infertility cannot be determined).

167. *Male Infertility Overview*, *supra* note 138.

168. *Id.*

169. *See generally supra* Part IV.B.2 (explaining in detail the disproportionate impact of fertility treatments on women as opposed to men).

170. *Hall v. Nalco*, 534 F.3d 644, 649 (7th Cir. 2008); *Govori v. Goat Fifty, L.L.C.*, No. 10 CIV.8982(DLC), 2011 WL 1197942, at \*3 (S.D.N.Y. Mar. 30, 2011).

171. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003).

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### A. The Need for Accommodation

Under an accommodation approach, employers must make reasonable accommodations based on the needs of the individual woman rather than considering whether accommodations are already being provided to similarly situated individuals.<sup>172</sup> An accommodation approach, as opposed to a comparator-based approach, is necessary to address the barriers to equal employment opportunities presented by women's unique reproductive capacities. Under the current comparative approach of the PDA, an employer is only required to accommodate a woman for pregnancy, childbirth, or related medical conditions, if and to the extent that they already accommodate an employee who is "similarly situated" to the woman.<sup>173</sup>

The main factor supporting an accommodation approach is that there is no similarly situated class—no men who will ever get pregnant. In addition, when a couple chooses to have a child, only a woman is able to get pregnant in order to fulfill that choice. Only women will experience disruptions to their ability to work as a result of pregnancy and their unique reproductive capacity. Even the "normal" pregnancies present some disruption to a woman's ability to work. At the very least, a pregnant woman will experience hormonal changes, a growing abdomen, weight gain, breast changes, fetal movement, and increased blood volume.<sup>174</sup> Other pregnancy side effects usually considered "normal" to a healthy pregnancy include: nausea, fatigue, increased urination, heartburn, headaches, mood swings, dizziness, leg cramps, shortness of breath, backaches, lifting restrictions, and swelling.<sup>175</sup>

While these "normal"<sup>176</sup> disruptive symptoms clearly interfere with a pregnant woman's ability to perform at optimum work levels,<sup>177</sup> even greater problems arise when a woman experiences side effects not typical to most pregnancies. Side effects such as depression, gestational diabetes, and severe, persistent nausea and vomiting<sup>178</sup> undeniably infringe upon the woman's ability to

172. See 42 U.S.C. § 12112(b)(5)(A)–(B) (2006) (requiring reasonable accommodation under the ADA).

173. See *supra* Part IV.A (detailing the comparative analysis under the PDA).

174. *Stages of Pregnancy*, WOMENSHEALTH.GOV, <http://womenshealth.gov/pregnancy/you-are-pregnant/stages-of-pregnancy.cfm> (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*).

175. *First Trimester Pregnancy: What to Expect*, MAYO CLINIC, <http://www.mayoclinic.com/health/pregnancy/PR00004> (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*); *Second Trimester Pregnancy: What to Expect*, MAYO CLINIC, <http://www.mayoclinic.com/health/pregnancy/PR00018> (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*); *Third Trimester Pregnancy: What to Expect*, MAYO CLINIC, <http://www.mayoclinic.com/health/pregnancy/PR00009> (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*).

176. The term "normal" is used in this Comment to refer to pregnancy symptoms without medical complications.

177. For example, the "normal" symptoms just listed may interfere with a woman's level of alertness due to increased fatigue, she may require slightly more time away from her desk in order to use the restroom, or she may need to rest for a few minutes in order to catch her breath.

178. *Stages of Pregnancy*, *supra* note 174.

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work. Furthermore, female-specific reproductive concerns, outside the strict timeframe of gestation and birth, present additional concerns for women specifically because of their unique reproductive capacity.<sup>179</sup>

The fact that pregnancy experiences and side effects vary even among members of the same class further supports the uniqueness of each individual case and indicates the inadequacy of the comparative method of evaluation. This wide-range of experiences makes the identification of an acceptable comparator impossible and explains why an accommodation approach is more appropriate to provide equal employment opportunities for women. Some women experience little-to-no problems, while others experience severely debilitating and, consequently, life-interfering conditions.<sup>180</sup> For instance, ectopic pregnancies, in which the egg implants outside of the uterus, may require surgery to avoid organ damage.<sup>181</sup> Another condition, hyperemesis gravidarum (HG), involves severe, persistent nausea and vomiting throughout the pregnancy.<sup>182</sup> Women experiencing severe cases of HG may require hospitalization in order to “be fed fluids and nutrients through a tube in their veins.”<sup>183</sup>

Although some may argue that a pregnant woman experiencing severe complications may use sick leave, vacation time, or take unpaid leave under the FMLA,<sup>184</sup> these options may not apply to a substantial number of pregnant women.<sup>185</sup> For example, if she experiences a complication throughout her entire pregnancy, she may not be entitled to enough sick days or vacation time under her employer’s policy in order to allow her to deal with her pregnancy complications.<sup>186</sup> Similarly, under the FMLA, a woman must be employed for at least twelve months and at least 1,250 hours within the preceding twelve-month period in order to qualify for leave under the FMLA.<sup>187</sup> The FMLA also does not

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179. See *supra* Part IV (providing more detailed explanation of these female-specific reproductive functions, such as breastfeeding and infertility treatments, and their interference with a woman’s ability to work).

180. *Stages of Pregnancy*, *supra* note 174; *Second Trimester Pregnancy: What to Expect*, *supra* note 175.

181. *Pregnancy Complications*, WOMENSHEALTH.GOV, <http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.cfm> (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*).

182. *Id.*

183. *Id.*

184. 29 U.S.C. § 2601 (2006).

185. *FMLA Facts and Statistics*, AM. ASS’N OF UNIV. WOMEN, <http://www.aauw.org/act/laf/library/fmlastatistics.cfm> (last visited Mar. 5, 2012) (on file with the *McGeorge Law Review*). The American Association of University Women indicates that about 40% of workers are not eligible to receive FMLA leave. *Id.*

Concededly, it may not be possible to provide accommodations for all pregnant women due to the cost burdens imposed upon employers; the new proposed law attempts to reach a larger number while still recognizing the cost implications and burdens for employers.

186. 29 U.S.C. § 2612(a)(1). Under the FMLA, an eligible employee is only entitled to twelve workweeks of leave in a one-year period. *Id.*

187. *Id.* § 2611(2)(A)(i).

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apply to employers with less than fifty employees.<sup>188</sup> Even if a pregnant woman qualifies for leave under the FMLA, she is only entitled to twelve-weeks of unpaid leave.<sup>189</sup> The lack of pay presents additional challenges because this remedy assumes that the woman is financially able to take this extended period of unpaid leave.<sup>190</sup>

#### *B. Accommodation Under the Americans with Disabilities Act*<sup>191</sup>

Because the PDA is ineffective and does not provide for reasonable accommodations, it is useful to look at how an accommodation model might work. The Americans with Disabilities Act (ADA)<sup>192</sup> represents an existing legal structure for accommodating certain conditions, which demonstrates recognition of the unique obstacles to equal employment opportunities that certain conditions may present. Under the ADA, “discrimination” includes not reasonably accommodating known physical or mental limitations if the disabled employee (or applicant) is otherwise qualified for the job.<sup>193</sup> The ADA does not require an employer to make reasonable accommodations for an individual if it can demonstrate that doing so would impose “undue hardship” on business operations.<sup>194</sup> “Disability” is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”<sup>195</sup>

Although the ADA regulations specifically reject pregnancy as a disability,<sup>196</sup> analyzing the nature of pregnancy explains why an accommodation approach can work. Similar to conditions covered by the ADA, pregnancy often involves side effects that interfere with a woman’s ability to perform certain job functions.<sup>197</sup>

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188. *Id.* § 2611(2)(B)(ii).

189. *Id.* § 2612(a)(1), (c).

190. *See id.* § 2612(c) (indicating the allowance of unpaid leave under the FMLA).

191. While some may argue that pregnancy conditions should be accommodated under the ADA, this Comment proposes a new law to accommodate pregnancy because pregnancy should not be classified as a disability. Rather than classifying pregnancy as a disability, it should be viewed as the unique ability of women to bear children. Only women get pregnant and experience the unique conditions of reproductive capacity. As a class, women have overcome centuries of oppression and a long history of employment discrimination. Even today women have not yet fully achieved equal employment opportunities. Recognizing pregnancy and reproductive capacity as distinct from disabilities will ensure the continued efforts to equalize working women’s opportunities with respect to men in relation to their unique childbearing and reproductive capacities. *But see* Jeannette Cox, *Pregnancy as ‘Disability’ and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (arguing that the ADA should extend coverage to pregnant women because they experience conditions that are already accommodated under the ADA).

192. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213.

193. *Id.* § 12112(b)(5)(A)–(B).

194. *Id.*

195. 42 U.S.C. § 12102(2)(A)–(B).

196. 29 C.F.R. app. § 1630.2(h) (2011).

197. *See supra* Part V.A.

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ADA coverage extends to an impairment that “substantially limits one or more of [an individual’s] major life activities . . . .”<sup>198</sup> Major life activities covered under the ADA, which are frequently associated with pregnancy and reproductive capacity, include: performing manual tasks, walking, and working.<sup>199</sup> The ADA requires reasonable accommodations for such conditions if adjustments will permit the qualified employee to receive the “benefits and privileges of employment equal to those enjoyed by employees without disabilities.”<sup>200</sup> Women may experience impairments similar to those recognized under the ADA, on a temporary basis, as a result of pregnancy or inability to become pregnant, in the case of fertility treatments. Although their ability with respect to these tasks may be temporarily impaired, many pregnant women may continue to work at a competent level with reasonable accommodations.

Further justification for accommodating pregnancy is found in the similarities between the effects of pregnancy discrimination and the problems the legislature sought to address with enacting the ADA.<sup>201</sup> One of the main purposes for enacting the ADA was prohibiting discrimination. The Findings and Purpose states that discrimination “denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . .”<sup>202</sup> In addition, statistics show that people with disabilities occupy an inferior status in society and are “socially, vocationally, economically, and educationally disadvantaged.”<sup>203</sup> According to the United States Office of the Attorney General, accommodation is necessary because “integration is fundamental to the purposes of the Americans with Disabilities Act.”<sup>204</sup> Accommodation provisions attempt to “prohibit exclusion and segregation of individuals with disabilities” and alleviate the denial of equal opportunities to these individuals.<sup>205</sup> Without accommodations such as ramps or braille text, wheelchair users and blind individuals, respectively, are “relegate[d] . . . to second-class status.”<sup>206</sup>

As demonstrated above, the ADA aims to address the very issue that this Comment is concerned with: achieving equal employment opportunities by providing accommodation for certain conditions. Unfortunately, the ADA

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198. 42 U.S.C. § 12102(2)(A).

199. See *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMPL. OPPORTUNITY COMM’N, <http://www.eeoc.gov/facts/ada17.html> (last visited Feb. 5, 2012) (on file with the *McGeorge Law Review*) (providing examples of activities restricted by a disability that warrant accommodations under the ADA).

200. *Id.*

201. 42 U.S.C. § 12101(a)(8) (findings and purpose).

202. *Id.*

203. *Id.* § 12101(a)(6).

204. *Nondiscrimination on the Basis of Disability in State and Local Government Services*, DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, available at <http://www.ada.gov/reg2.html> (last visited Mar. 4, 2012) (on file with the *McGeorge Law Review*).

205. *Id.*

206. *Id.*

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regulations specifically reject pregnancy as a disability covered under the law.<sup>207</sup> While this Comment does not argue that pregnancy should be covered under the ADA, it is important to note that women discriminated against on the basis of pregnancy may not seek a cause of action under the ADA; therefore, the PDA provides the only current legal cause of action for women discriminated against on the basis of pregnancy.<sup>208</sup> As previously explained, remedies under the PDA are ineffective.<sup>209</sup>

Similar to the disabilities of individuals protected by the ADA,<sup>210</sup> pregnancy and motherhood often interfere with women's ability to compete equally with non-pregnant persons. For instance, in *Troupe v. May Department Stores, Co.*, Troupe's employer fired her for absences due to morning sickness even though she experienced abnormally severe effects of pregnancy and provided a doctor's note.<sup>211</sup> Troupe sued under the PDA, but failed.<sup>212</sup> The court granted the employer's motion for summary judgment, stating "[t]he Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say as it is for their spouse to continue working during pregnancy."<sup>213</sup> The court further revealed the potential for discriminatory treatment of pregnant women under the PDA by stating that "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . ."<sup>214</sup>

Troupe's discrimination claim ultimately failed because of the comparator-based analysis.<sup>215</sup> She was unable to identify "a hypothetical Mr. Troupe"<sup>216</sup> as tardy as she was, experiencing health problems that also required sick leave equal in length to her maternity leave, but who was not fired.<sup>217</sup> Ms. Troupe likely could have kept her job and received employment opportunities equal to individuals not affected by pregnancy if her case had been evaluated under an accommodation standard.<sup>218</sup>

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207. 42 C.F.R. app § 1630.2(h) (2011). "Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments." *Id.*

208. See 42 U.S.C. § 2000e(k) (providing that Title VII prohibits discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions").

209. See generally *supra* Part IV (detailing the insufficient protection of pregnant women under the PDA).

210. 42 U.S.C. § 12101(a)(8) (findings and purpose).

211. 20 F.3d 734, 735 (7th Cir. 1994).

212. *Id.* at 739.

213. *Id.* at 738 (citations omitted).

214. *Id.*

215. See *id.* (comparing the plaintiff's situation to "a hypothetical Mr. Troupe").

216. See *id.* (discussing Ms. Troupe's inability to show a "hypothetical Mr. Troupe" in order to apply the comparator-based approach).

217. *Id.*

218. See *infra* note 235 (applying an accommodation approach to Ms. Troupe's situation).

*C. A New Federal Law Accommodating Pregnancy*

This Comment proposes a federal law requiring reasonable accommodation for women's unique reproductive capacities. This approach closely follows current California law.<sup>219</sup> Under current California law, "unless based upon a bona fide occupational qualification,"<sup>220</sup> it is unlawful for employers to "refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she so requests, with the advice of her health care provider."<sup>221</sup> However, unlike the California law, the new law will replace the term "medical" with "reproductive," thus requiring employers to provide reasonable accommodations related to pregnancy, childbirth, or a related reproductive condition. Deleting "medical" as a requirement provides broader coverage for women.<sup>222</sup> It is necessary to delete the qualifier "medical" because many courts have interpreted this term narrowly, to the detriment of women pursuing a remedy under California's law.<sup>223</sup> For instance, in *Wallace v. Pyro Mining Co.*, the court explicitly stated that breastfeeding, although a "natural concomitant[] of pregnancy and childbirth, . . . [is] not [a] 'medical condition[]' related thereto."<sup>224</sup> The "related reproductive conditions" term is necessary because even "healthy" or "normal" pregnancies can interfere with a woman's ability to work.<sup>225</sup> "Related reproductive conditions" should include *any* condition that results from a woman's unique reproductive capacity. For instance, breastfeeding and fertility treatments should receive coverage as a condition related to a woman's reproductive capacity.<sup>226</sup> The proposed law will keep the provision requiring the advice of a medical professional in order to mitigate the possibility of unnecessary accommodation requests.

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219. CAL. GOV'T CODE § 12945 (West 2011).

220. *Id.* § 12945. "Bona Fide Occupational Qualification" is defined as a practice of exclusion which is justified because "all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." 2 CCR § 7286.7(a) (2012).

221. Gov't § 12945(b)(3)(A).

222. This broader coverage of women, admittedly, means that it also extends application to a larger number of employees. However, employers will be exempt from providing an accommodation if they can prove that it will cause undue hardship.

223. *See, e.g., Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (finding that breastfeeding is not a related medical condition); *Williams v. MacFrugal's Bargains-Close-Outs, Inc.*, 79 Cal. Rptr. 2d 98 (Ct. App. 1998) (finding that a hysterectomy is not a related medical condition).

224. *Wallace*, 789 F. Supp. at 869.

225. *See generally supra* Part V.A (describing the normal symptoms of all pregnancies which may still prove disruptive to everyday life).

226. *See supra* Part IV.B.1-2 (presenting arguments for insufficient coverage under current law for conditions outside the direct scope of pregnancy and gestation); *see also Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003) (specifically stating that infertility "does not fall within the meaning of the phrase related medical conditions under the PDA").

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Similar to California, the statute’s use of “reasonable accommodations” may include “making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities,”<sup>227</sup> or job restructuring, modified work schedules, reassignment, modifications to examinations, policies, and other similar adaptations for individuals experiencing pregnancy or conditions related to the unique female reproductive capacity.<sup>228</sup> However, an employer is not required to provide reasonable accommodations if it can prove that doing so would cause undue hardship. This undue hardship shall be determined using a totality of the circumstances test,<sup>229</sup> where the court balances factors including, “size, financial resources, nature, or structure of the employer’s business.”<sup>230</sup> The employer will bear the burden of proving that providing the necessary accommodations would impose “significant difficulty or expense”<sup>231</sup> in light of the factors. Since the size of the employer is one of the factors to consider, there will not be a minimum employee requirement for this law.<sup>232</sup> Rather, the undue hardship element should provide adequate protection to small employers unable to bear the burden of providing the necessary accommodations while still maintaining a viable business.<sup>233</sup>

In summary, the new proposed federal law will state:

1. Unless based upon a bona fide occupational qualification, it is unlawful<sup>234</sup> for an employer to refuse to provide reasonable accommodation for an employee who requests such accommodation, with the advice of her healthcare provider, for a condition related to:
  - a. Pregnancy;
  - b. Childbirth; or
  - c. Other related reproductive conditions.

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227. CAL. GOV’T CODE § 12926(n)(1) (West 2011).

228. *Id.* § 12926(n)(2).

229. Using a totality of the circumstances test provides a different and more comprehensive evaluation of whether an accommodation truly imposes an undue hardship than the previously referenced laws. *See, e.g.*, 29 U.S.C. § 207(r)(3) (Supp. IV 2011) (permitting any employer with less than fifty employees to attempt to raise an undue hardship defense to providing a break time for nursing mothers).

230. *Id.*

231. GOV’T § 12926(t).

232. California excuses employers with less than five employees. *Id.* § 12926(d). While this limited application is an attempt to balance the cost burdens imposed upon employers, it is unnecessary to specify an arbitrary number of employees. Rather, the burden upon the employer to prove undue hardship suffices to show that the employer cannot withstand the cost burdens of providing accommodations.

233. Restructuring the undue hardship element in this manner aims to ensure that only those employers whose businesses will be direly affected by such accommodations may be excused.

234. This proposed law will provide a civil cause of action to employees who were wrongfully denied reasonable accommodations for pregnancy or related reproductive conditions.

2. An employer is not required to provide reasonable accommodations if the employer can prove that doing so would cause undue hardship based on the totality of the circumstances.

Under this new law, the woman's needs will be evaluated in conjunction with the employer's ability to provide reasonable accommodations to fit these needs. If an employer is able to provide reasonable accommodations without experiencing an undue hardship, women should be allowed to continue productively contributing to the workforce and not be held back by their unique reproductive capacities.<sup>235</sup>

## VI. CONCLUSION

Current federal law does not adequately address the barriers to equal employment opportunities that women face due to their unique reproductive capacities. Although the PDA is specifically designed to recognize women's role in reproduction,<sup>236</sup> it is limited in its coverage of a woman's general reproductive capacity.<sup>237</sup> Additionally, under the PDA's structural framework, discrimination is judged by comparing the plaintiff's situation to treatment of other similarly situated employees.<sup>238</sup> This results in inadequate protection of women because there is no similarly situated class for purposes of comparison.<sup>239</sup> Only women experience these unique conditions, and accommodations must be made in order for women as a class to receive equal employment opportunities.<sup>240</sup>

Since the comparison approach does not provide sufficient protection for working women, an accommodation approach is necessary to adequately address this issue.<sup>241</sup> This accommodation approach may be achieved through enacting a new federal law that requires employers to provide reasonable accommodations for pregnant employees as well as women affected by their reproductive capacity, pregnancy, childbirth, or related reproductive conditions.<sup>242</sup> Under this new law, rather than comparing pregnant women to other "similarly situated" classes,

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235. If the *Troupe* court had applied this accommodation approach to Ms. Troupe's case, she would not have been required to find a comparable male receiving better treatment. See *Troupe v. May Dep't Stores, Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (requiring a comparable "Mr. Troupe"). Rather, her individual condition and accommodation requirements would be evaluated on their own merits. *But cf. id.* (applying a comparator analysis to plaintiff's discrimination claim under the ADA).

236. See *Hunt-Golliday v. Metro. Water Reclamation Dist.*, 104 F.3d 1004, 1010 (7th Cir. 1997) ("The Pregnancy Discrimination Act brought discrimination based on pregnancy within a woman's protections against sex discrimination.").

237. See *supra* Part IV.B.

238. See *supra* Part IV.A.

239. *Id.*

240. *Id.*

241. See *supra* Part V.A.

242. See *supra* Part V.C.

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employers must consider the specific needs of these women on an individual basis in order to determine what types of accommodations are necessary.<sup>243</sup> Until men can bear children, women must not bear the costs that their unique reproductive capacity imposes upon their ability to achieve equal employment opportunities.

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243. *Id.*