RECENT PREGNANCY DISCRIMINATION LITIGATION: DEFINING THE JURISDICTIONAL SCOPE OF THE PREGNANCY DISCRIMINATION ACT

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I. INTRODUCTION

Since its inception, the language of the Pregnancy Discrimination Act has proven to be quite challenging for the courts to construe.1 The judiciary has utilized various sources of guidance, running the gamut from the Pregnancy Discrimination Act’s legislative history to the EEOC’s administrative guidelines, to effectively interpret the broad language set forth in the statute. As this article will address, some areas of litigation have resulted in consistent opinions while other areas of litigation have produced radically different decisions.

This article explores the statutory scheme of the Pregnancy Discrimination Act (PDA) and provides an analysis of each provision. Discussion will follow on the specific language of the PDA and how the courts have been interpreting that language. Next, the article will survey the jurisprudence of the PDA cases. Included in this review is the most recent decision on point whereby the United States Court of Appeals for the Third Circuit had to determine if exercising the right to have an abortion would be protected under the PDA.2 This emerging area of litigation certainly creates a highly controversial atmosphere in which people’s emotions, opinions, and beliefs are brought to the forefront. The analysis of the cases summarized in this article is intended to increase awareness of the current variable state of the PDA’s interpretations and to provide clarification for practitioners and employers alike.

II. PREGNANCY DISCRIMINATION ACT: LEGISLATIVE HISTORY

In an attempt to create equality in the workplace,3 Congress passed Title VII of the Civil Rights Act of 1964.4 This incredibly broad piece of legislation prohibited

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1 42 U.S.C. §2000e(k) (2000). The Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1964. Under the PDA the plaintiff alleges that they have been discriminated against based on gender. The provisions of the PDA amended the term gender specifically to include “pregnancy, childbirth, and related medical condition.”

2 Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358 (2008). This was a case of first impression for the Third Circuit Court of Appeals.

3 David McCarthy, The Employee Retaliation Plaintiff and Title VII: The 800-Pound Gorilla Plays the Victim, 21 DCBA Brief 18, 21 (3d Cir. 2008). The Civil Rights Act was passed to “equalize employer and employee in matters in employment”. In effect, however, this author suggests that “Title VII and its ban on retaliation is not an equalizer.”

employment discrimination on the basis of race, color, religion, sex, and national origin. Title VII has proven to be a driving force in eradicating unfair practices in the employment arena and society. Of the five protected classes, discrimination based on sex has emerged as one of the most common types of discrimination complained of in the workplace.

For several years after the passage of the statute, courts had the opportunity to define the scope of sex discrimination. The task of interpreting how far coverage would extend proved, at times, to be complex and confusing for the courts. However, one area that gave rise to consistent and uniform interpretations among the Courts of Appeals was whether Title VII would include pregnancy as a prohibited form of gender discrimination. On this uniform front, six United States Courts of Appeals ruled that pregnancy discrimination should be covered under Title VII. In addition, the Equal Employment Opportunity Commission’s view, as promulgated in administrative guidelines, was consistent with these six appellate decisions.

Despite the broad sweeping adherence to this statutory interpretation that pregnancy should be covered under the protected class of sex, the United States Supreme Court, in the landmark case of General Electric Company v. Gilbert, did not agree with the lower courts. This previous widely recognized interpretation by the lower courts was now reversed as a result of the Gilbert case.

Turning to the facts of this case, General Electric implemented a disability plan that provided all employees nonoccupational sickness and accident benefits. General Electric denied coverage for claims submitted by female employees due to pregnancy related disabilities. As a result, female employees brought a class action against their

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5 Hillary Jo Baker, No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs From Employer Attacks, 20 HASTINGS WOMEN’S L.J. 83, 89 (2009). Interestingly, sex discrimination originally was not included in the language of the statute as a form of discrimination; however, Congressman Howard Smith of Virginia, an opponent of the bill, added it at the last moment with the hopes that the provision would assist in defeating the legislation. To his surprise, the bill passed as amended.

6 See Sex Discrimination Charges, U.S. Equal Opportunity Commission, at http://www.eeoc.gov/ stats/charges.html. According to the statistics, there were 24,826 charges filed based on sex discrimination for 2007 which is second only to those 30,510 charges filed for race discrimination.

7 Communications Workers of America v. American Tel. & Tel., 513 F.2d 1024 (2nd Cir. 1975); Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3rd Cir. 1975); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975); Tyler v. Vickery, 517 F.2d 1089, 1097 (5th Cir. 1975); Satty v. Nashville Gas Company, 522 F.2d 850 (6th Cir. 1975); Hutchison v. Lake Oswego Sch. Dist., 519 F.2d 961 (9th Cir 1975).

8 29 C.F.R. §1604.10(b) (1975) (providing that “[d]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery there from are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.”). The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) recognized that, “[t]hese EEOC guidelines are entitled to ‘great deference’ with respect to the proper interpretation of Title VII.”


10 Id. (reversing the holdings of both the District Court, 375 F. Supp 367, and the U. S. Court of Appeals for the Fourth Circuit, 519 F.2d 661.

11 Id. The plan, known as the Weekly Sickness and Accident Insurance Plan, paid benefits of 60% of the employee’s weekly earnings.

12 Id. at 128. The denial of the payment of these claims were due to General Electric’s policy to
employer arguing that they had been unfairly discriminated against due to their sex.\textsuperscript{13} In reversing both the District Court and the United States Court of Appeals for the Fourth Circuit, the United States Supreme Court pronounced that a disability plan that does not allow coverage for disabilities due to pregnancy does not violate Title VII of the Civil Rights Act.\textsuperscript{14} In summarizing its position, the Court stated, “gender-based discrimination had not been shown to exist either by the terms of the plan or by its effect.”\textsuperscript{15} The Court largely based their opinion on the 1974 United States Supreme Court decision \textit{Geduldig v. Aiello}.\textsuperscript{16} In that decision the court noted that the disability insurance plan was nearly identical to the one offered by General Electric in \textit{Gilbert}.\textsuperscript{17} In \textit{Geduldig}, the state of California, based on that plan, excluded pregnancy related disabilities from coverage.\textsuperscript{18} The plaintiffs sued arguing that, by excluding pregnancy from coverage, the state of California had violated the Equal Protection Clause of the United States Constitution.\textsuperscript{19} The Court disagreed and held that the State did not violate the Equal Protection Clause and that “not every disabling condition triggers the obligation to pay.”\textsuperscript{20} The Court, in supporting the limited breadth of coverage, continued: “There 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.”\textsuperscript{21} In conforming with the rationale used in the \textit{Geduldig} case, the \textit{Gilbert} Court acknowledged that the plan offered by General Electric, “does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition pregnancy from the list of compensable disabilities.”\textsuperscript{22} The Court summarized by pronouncing, “an exclusion of pregnancy from a disability benefits plan like petitioner’s providing general coverage is not a gender-based discrimination at all.”\textsuperscript{23}

Intriguingly, the Court did not effectually delineate the cases from the six lower exclude from coverage any disabilities arising from pregnancy.

\textsuperscript{13} \textit{Id.} The employees based their claim on Title VII of the Civil Rights Act of 1964.
\textsuperscript{14} \textit{Id.} The Court, in recognizing that there may be a situation where discrimination would be prohibited, concluded that this was not such a situation because there was no evidence that a pretext existed on the part of General Electric for discriminating against women.
\textsuperscript{15} \textit{Id} at 408. Interestingly, in the very next year, the United States Supreme Court decided \textit{Nashville Gas v. Satty} whereby the court held that there was a Title VII violation by an employer by depriving women of their seniority after returning from maternity leave. The Court distinguished \textit{Nashville Gas} from the \textit{Gilbert} decision by stating: “Here, by comparison, the employer has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer.” Arguably, this decision was inconsistent with the Court’s ruling in \textit{Gilbert}. \textit{Nashville Gas v. Satty}, 434 U.S. 136 (1977).
\textsuperscript{16} \textit{417 U.S. 484} (1974). This case was decided just one year prior to the \textit{Gilbert} decision.
\textsuperscript{17} \textit{Id.} The plan, referred to as the Unemployment Compensation Disability Fund, mandated that employees contribute 1\% of their annual salary up to $185.
\textsuperscript{18} \textit{Id.} The plan was not a comprehensive program as it did recognize several other exclusions in addition to pregnancy related disabilities.
\textsuperscript{19} \textit{Id.} The plaintiffs based their claim on the Equal Protection Clause in the \textit{Geduldig} case, as opposed to the plaintiffs in the \textit{Gilbert} case who based their claim on Title VII of the Civil Rights Act of 1964. This was a major distinction that the \textit{Gilbert} Court addressed.
\textsuperscript{20} \textit{Id} at 490. The Court stated that a comprehensive program would certainly cost more than the current plan. Therefore, the State was entitled to provide benefits for only certain disabilities.
\textsuperscript{21} \textit{Id.} at 497.
\textsuperscript{22} \textit{Id.} at 125.
\textsuperscript{23} \textit{Id} at 125. The Court noted that the \textit{Geduldig} holding was “precisely on point.”
courts that had all ruled that pregnancy should be covered under Title VII.\textsuperscript{24} Despite the avoidance of analyzing those cases, the Supreme Court did provide an in-depth discussion of the Equal Employment Opportunity Commission’s guideline addressing the exclusion of pregnancy related disabilities from insurance plans.\textsuperscript{25} The guideline promulgated by the EEOC stated that disabilities which are caused by pregnancies should be treated as temporary disabilities.\textsuperscript{26} Accordingly, if such disabilities were excluded the result would be discrimination based on sex.\textsuperscript{27} The Court clearly articulated why the EEOC’s position was not adhered to in this case.\textsuperscript{28} The Court was concerned that the EEOC had contradicted itself in a prior pronouncement regarding this issue by stating, “an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory.”\textsuperscript{29} Due to this inconsistency, the Court refused to extend due deference to the EEOC’s position in deciding the case.\textsuperscript{30}

The decision in \textit{Gilbert} was far from unanimous. Two justices authored dissenting opinions.\textsuperscript{31} Justice Brennan, in his influential dissent, stated his adamant disagreement with the majority opinion by noting that “today’s holding not only repudiates the applicable administrative guideline promulgated by the agency charged by Congress with implementation of the Act, but also rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question.”\textsuperscript{32} The dissent opined that the intention of Title VII had been completely disregarded by the majority.\textsuperscript{33} He advocated on behalf of working women and their plight in the workforce at that time.\textsuperscript{34} In addition, he referenced General Electric’s disability plan as “all-inclusive” as it related to the risks being encompassed, with the exception of pregnancy.\textsuperscript{35} This exclusion was acknowledged by the majority as being justified because pregnancy was, “an additional risk, unique to women.”\textsuperscript{36} Justice Brennan pointed out that under the plan certain covered risks were “unique to” men’s reproductive systems such as vasectomies, prostatectomies, and circumcisions.\textsuperscript{37} In addition, the dissent unequivocally opposed

\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 140.
\textsuperscript{26} 29 CFR §1604.10(b) (1975). According to this guideline, the EEOC interpreted an exclusion of such a disability as sex discrimination which is a violation of Title VII of the Civil Rights Act of 1964.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} 429 U.S. 125, 142 (1975).
\textsuperscript{29} \textit{Id.} at 143. The position that the Court was referring to was a response to a request that had been made to the agency for their opinion.
\textsuperscript{30} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 146.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} at 159. Justice Brennan argued that in order to effectuate the goals of Title VII, an employer must be cognizant of the current employment landscape as it affects women.
\textsuperscript{35} \textit{Id.} Justice Brennan characterized the plan as “all-inclusive” because in its totality he believed the plan was equitable to both men and women. The one exception to this view was that the pregnancy exclusion should have been part of the coverage.
\textsuperscript{36} \textit{Id.} at 419.
\textsuperscript{37} \textit{Id.} at 152.
the position that the EEOC’s guidelines should be ignored in this situation. On the contrary, Justice Brennan stated, “I can find no basis for concluding that the guideline is out of step with congressional intent.”

The second justice to author a dissenting opinion was Justice Stevens. The dissent observed that, “the word ‘discriminate’ does not appear in the Equal Protection Clause.” The quintessential basis of his dissent was that, because the Geduldig case was based on the Equal Protection Clause, the decision “does not control the question of statutory interpretation presented in this case.”

After this case was decided, widespread criticism emerged. Critics and commentators were concerned with the variable interpretations and the perceived unfairness that the case had generated. Even though the Gilbert decision was arguably theoretically based, the end result was a conundrum. Motivated by the legal environment shaped by the precedent that the Gilbert opinion created, Congress enacted the Pregnancy Discrimination Act of 1978 as an amendment to Title VII of the Civil Rights Act.

III. PREGNANCY DISCRIMINATION ACT: STATUTORY SCHEME

In an attempt to clarify and provide specificity as to the scope of sex discrimination under Title VII, Congress passed the Pregnancy Discrimination Act. As a result, Congress statutorily overruled the Gilbert case. As the United States Supreme Court subsequently disclosed, “when Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the court in the Gilbert decision.” The main thrust of the amendment was to refine the definition of sex discrimination under Title VII so as to include discrimination based on “pregnancy, childbirth, or related medical conditions.” In addition to Congress providing an extremely broad circumscription of what sex discrimination was now to include, Congress also constructed the amendment to specifically target the Gilbert case by stating, “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits.

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38 Id.
39 Id. at 158.
40 Id. at 160.
41 Id. at 161. Unlike the Geduldig case, the central issue was whether pregnancy discrimination was precluded by Title VII of the Civil Rights Act.
44 Id.
48 Julie Manning Magid, Pregnant with Possibility Reexamining the Pregnancy Discrimination Act, 38 AM. BUS. L.J. 819, 824, (2001) (suggesting that Congress provided two clauses within the amendment; the first was to amend the definition of sex discrimination by using the precise wording “pregnancy, childbirth, and related medical condition,”and the second provided guidance as to the treatment of women, and more specifically, statutorily overruled the Gilbert case).
under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” 49  As some commentators perceived, the passage of the amendment was merely reestablishing the original intent of Title VII, as opposed to creating an entirely new law. 50

After Congress passed the PDA, numerous complaints were filed with the EEOC based on pregnancy discrimination. The number of the complaints filed with the EEOC has continuously increased since the PDA’s inception.51  As such, the judiciary has been called upon in several of those cases to interpret the statutory language provided by the legislature and elucidate the scope of coverage.

IV. AMBIGUITIES ASSOCIATED WITH STATUTORY LANGUAGE

It is clear that numerous areas of ambiguity concerning the PDA exist due to the broad language and the lack of clear guidelines. In fact, emerging case law discloses that the language of the PDA has yielded numerous inconsistencies in application and interpretation of the PDA by the judiciary. Some commentators suggest that due to the overly broad statutory language found in the statute, the courts have at times been forced to speculate on the breadth of the Congressional intent as to the coverage of the PDA.52  The result has been a patchwork of contrasting judicial results.

One of the first indications that courts were floundering in their attempt to interpret the PDA’s pertinent language was when the issue of insurance coverage for infertility treatments emerged. The courts had to determine if insurance plans had to cover the costs associated with infertility. In the case of Krauel v. Iowa Methodist Medical Center, the Court of Appeals for the Eighth Circuit enunciated its ruling that “infertility is outside of the PDA’s protection.”53  In analyzing the language of the PDA, the court articulated that the terms pregnancy, childbirth, or related medical conditions do not encompass infertility treatments. The court opined: “pregnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception.”54

In contrast, the District Court for the Northern Illinois District concluded in Pacourek v. Inland Steel Company that infertility was a condition that the PDA’s coverage would include.55  In this case, the plaintiff was unable to conceive due to a medical

49 42 U.S.C. § 2000e(k) (2000). The legislative intent was to have employers treat pregnancy related disabilities the same as other types of temporary disabilities.
51 See Pregnancy Discrimination Charges, U.S. Equal Opportunity Commission, at http://www.eeoc.gov/stats/charges.html. From 1997 to 2007, pregnancy discrimination charges increased by 40%. In addition, for the first time, the total number of charges exceeded 5000 in 2007. Id.
53 95 F.3d 674 (1996); see also Saks v. Franklin Covey, 316 F.3d 337 (2d Cir. 2003). The Court of Appeals for the Second Circuit relied heavily on the rationale used in the Krauel case from the Eighth Circuit.
54 Id. at 679 (acknowledging congressional silence on this issue).
condition which led her to undergo infertility treatments in order to become pregnant. In concluding that her medical condition would “naturally” be included in the PDA’s scope, the court stated: “The court can find no reason—not in the cases, not in the legislative history, and, most significantly, not in the plain meaning of the words of the statute—to exclude plaintiff’s medical condition from the protection of the PDA.”

Another area where ambiguities permeated was whether contraception must be included under a prescription coverage plan according to the PDA. The courts were faced with further defining the scope of the PDA by interpreting the broad phrase “related medical conditions.” Once again, the judiciary did not agree on the precise scope. Several district courts had the opportunity to rule on this issue and the aftermath resulted in a patchwork of inconsistent applications of the phrase. Some courts determined that contraception was by statutory definition a “related medical condition” and as such an employer’s benefit plan must provide coverage for such expenses. For example, in Stocking v. AT & T Corporation, the District Court ruled that under the PDA prescription contraceptives must be covered. The judge stated that in this case, “we do have a sound Pregnancy Discrimination Act claim here.” Conversely, other courts determined that contraception coverage was beyond the range of the PDA and that Title VII permitted the exclusion of such coverage. One such court was the Eighth Circuit Court of Appeals when they decided the case of In re Union Pacific Railroad Employment Practices Litigation. In that case, the plaintiff alleged that her employer had discriminated against her by excluding contraception from the health insurance plan. The court ultimately ruled that because contraception was a “gender-neutral term”, there was no requirement that it be covered under the health insurance plan. Interestingly, the court further articulated that the EEOC’s position, which required benefit plans to cover prescription contraception, was “unpersuasive.”

A third area where ambiguities arose as a result of courts interpreting the PDA’s language was in calculating retirement benefits. At issue was the time off that some employees had taken due to maternity leave. Some employers were excluding this time off from the calculations being made for service credit. As a result, some women who had been affected by this sued their employers, arguing that the exclusion was sex discrimination under the PDA. Once again, the courts failed to interpret the language of the PDA in a uniform way. As a result, some courts held that this denial was sex

56 Id.
57 Id. at 1402; see also 534 F.3d 644 (7th Cir. 2008).
58 Stocking v. AT & T Corp., 436 F.Supp.2d 1014 (W.D. Mo. 2006) (acknowledging that although prescription contraceptives exist for women, there are no such prescription contraceptives for men).
59 Id. at 1017. For other cases that support this position see Cooley v. Daimler Chrysler Corp., 281 F.Supp.2d 979 (E.D. Mo. 2003); Erickson v. Bartell Drug Co., 141 F.Supp.2d 1266 (W.D. Wash. 2001).
61 479 F.3d 936 (2007).
62 Id. For a detailed discussion on the case see Samuel A. Green, Insurance Coverage, Prescription Contraception, and the Regression of Title VII and the PDA, 47 Washburn L.J. 151 (2007).
63 Id. at 943; see also Cummins, supra note 60; Alexander, supra note 60.
64 EEOC Commission Decision on Coverage of Contraception (2000), at http://www.eeoc.gov/policy/docs/decision-contraception.html. This position was based on a situation where a plan had included such things as vasectomies and tubal ligations. In contrast, the Union Pacific plan denied coverage for all contraception. Therefore, the court believed that the plan was not discriminating against contraceptive choices only for women.
discrimination while other courts held that the exclusion was nondiscriminatory in nature and did not violate Title VII. For example, in *Ameritech Benefit Plan Committee v. Communication Workers of America*, the Court of Appeals for the Seventh Circuit analyzed a policy whereby Ameritech excluded pregnancy leave time from the calculation of service credit.65 This policy was found to be lawful due to the fact that the court characterized the plan as a seniority plan. 66 As such, the court believed that the claim here was “nonactionable” because a seniority plan is immunized from a Title VII cause of action.67 By comparison, the Ninth Circuit Court of Appeals decided *Hulteen v. AT&T Corp.* in 2007, finding that if an employer excludes the time taken off for pregnancy from a credit service calculation, the PDA had been violated.68 Interestingly, the United States Supreme Court granted certiorari in 2008.69 At the time of the writing of this article, the Court had not yet rendered an opinion.

This next line of cases certainly exposes additional ambiguities associated with the differing interpretations of the PDA. These cases pertain to the second clause under the PDA which states in pertinent part, “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.”70 The courts have recognized that to ascertain if an employer has treated the employee “the same” there needs to exist a comparable group to measure the treatment against. Congress, in passing the PDA, did not identify such a group. In addition, pursuant to the United States Supreme Court holding in *McDonnell Douglas Corp. v. Green*, the prima facie case that a plaintiff needs to prove under Title VII involves four requirements.71 The four requirements are “(1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse action, and (4) that others similarly situated were more favorably treated”.72 It is the fourth element that is related to the process of identifying comparison groups and requires that the courts include in this group those individuals that are “similarly situated” to the plaintiff.

Therefore, the courts have been charged with determining who the comparative groups are, and have done so inconsistently. The jurisprudence has evolved into three categories of comparative groups. The first comparative group identified by the Fifth Circuit Court of Appeals in *Urbano v. Continental Airlines, Inc.* was “other employees injured off duty.”73 In this case, the plaintiff worked as a ticketing agent for an airline, at which time, she discovered she was pregnant.74 Pursuant to her doctor’s recommendation that placed a lifting restriction on her, she requested a different

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65 220 F.3d 814 (7th Cir. 2000).
66 Id.
67 Id. In 2007 the Court of Appeals for the Sixth Circuit embraced the rationale used by the *Ameritech* court in deciding *Leffman v. Spring*, 481 F.3d 428 (6th Cir. 2007) (holding that a service credit policy that excluded pregnancy leave from the calculation had not violated Title VII and the PDA).
68 498 F.3d 1001 (9th Cir. 2007).
70 42 U.S.C. § 2000e(k) (2000). The legislative intent was to have employers treat pregnancy related disabilities the same as other types of temporary disabilities.
72 Id.
73 138 F.3d 204, 208 (5th Cir. 1998).
74 Id.
position. In denying the request, the airline referenced a policy that reserved light duty position transfers only for those employees who had been injured on the job. Because the source of the plaintiff’s disability was not caused by an occupational injury, she did not qualify for the transfer. As a result, she sued arguing that she had been discriminated against based on pregnancy. The court, in ruling in favor of the airline, stated “Continental treated Urbano the same as it treats any other worker who suffered an injury off duty.” They concluded that the plaintiff was requesting “preferential treatment” and reasoned that the PDA requires equal treatment and nothing more.

One year later, the Eleventh Circuit Court of Appeals as well as a California Court of Appeals, adopted the rationale used by the Fifth Circuit in the Urbano case.

The Seventh Circuit Court of Appeals identified a second comparative group in Troupe v. May Department Stores Company. The plaintiff was employed by a department store as a salesperson. She became pregnant and as a result, she experienced severe morning sickness. This, in turn, lead to her termination due to her excessive absences. In holding that the PDA had not been violated, the court reasoned that, “The Pregnancy Discrimination Act requires the employer to ignore an employee’s

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75 Id.
76 Id.
77 Id.
78 Id.
79 Id at 208. The court focused on the source of the injury, in particular, whether the injury was caused on the job or off the job. In making this distinction, the court was comparing how the pregnant employee was treated to other employees who sustained injuries off the job. So long as that treatment was equal, there was no violation of the PDA.
80 Id.
81 Spivey v. Beverly Enters., Inc., 196 F.3d 1309 (11th Cir. 1999). The employer, in this case, adopted a policy whereby if an employee suffered a “work-related” disability, an accommodation would be made in terms of job duties. The pregnant plaintiff, a nurse’s assistant, had a weight lifting restriction placed upon her by her doctor. She did not qualify for the accommodation because pregnancy was not an occupational disability. She sued and argued that this was a violation of the PDA. The court, in identifying the comparison group stated that the “correct comparison is between Appellant and other employees who suffer non-occupational disabilities, not between Appellant and employees who are injured on the job.” The court, in making the comparison, acknowledged that all employees who experienced disabilities that were non-industrial were treated equally. In advancing the theory established in Urbano, the court recognized that there was no violation of the PDA.
82 Spaziano v. Lucky Stores, Inc. 69 Cal. App. 4th 106 (1999). In this case the plaintiff, because of pregnancy complications, was forced to utilize the employer’s disability leave of absence benefit. The employer’s policy, which was subject to a collective bargaining agreement, stated that an employee, who had been employed for over one year was entitled to take up to six months of temporary disability leave. In addition, the policy permitted the six months time period to be extended up to one year in those situations where there was an occupational injury. Because the plaintiff qualified for only six months of leave time she asserted that the policy violated the Fair Employment and Housing Act (FEHA) and was based on pregnancy. The court, in ruling in favor of the employer stated, “A leave policy such as Lucky’s, which differentiates between work-related disabilities and those which occur off the job, does not discriminate against pregnant employees.”
83 20 F.3d 734 (7th Cir. 1994); see also Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579 (7th Cir. 2000).
84 Id.
85 Id.
86 Id.
pregnancy, but, not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees.” Because the plaintiff did not present any evidence of such absences relating to the comparative group of non-pregnant employees, the court granted summary judgment to the employer.

A third definition of a comparable group emerged as a result of the Sixth Circuit Court of Appeals holding in *Ensley-Gaines v. Runyon*. The plaintiff, a mail handler for the Postal Service, became pregnant. As such, complications developed and her doctor recommended that she follow certain physical restrictions. Pursuant to her request for temporary “light duty” job responsibilities, the employer accommodated her by allowing her to engage in standing duties for four hours per day, at which time she was sent home. The plaintiff believed that this accommodation was unacceptable and in her lawsuit, alleged that she had been discriminated against due to pregnancy. In their Title VII analysis, the court first highlighted a modification imposed by the PDA upon the analysis. Specifically, the court stated: "While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated ‘in all respects,’ the PDA requires only that the employee be similar in his or her ‘ability to work.’” Based upon that premise, the court construed the comparative group in PDA cases to be an, “employee who was similar in her or his ability or inability to work.” Accordingly, the group would encompass “temporarily-disabled, non pregnant employees” who had received modified job responsibilities. The court explained that discrimination would exist if the types of benefits that were awarded to the comparative group were inconsistent with those awarded to the plaintiff. Because such evidence was presented, the court held that the granting of

87 *Id.* The court acknowledged that the employer does not have to tolerate a pregnant employee’s absences, even if those absences were pregnancy related. One commentator argued that this idea violates the entire goal set forth by the PDA. See Joan C. Williams, Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Careers” in the Workplace*, 13 DUKE J. GENDER L. & POL’Y 31, 46 (2006).

88 *Id.*

89 *Id.*

90 100 F. 3d 1220 (6th Cir. 1996).

91 *Id.* The plaintiff’s doctor recommended that she only lift up to fifteen pounds and only stand continuously for four hours.

92 *Id.*

93 *Id.* The plaintiff referenced situations where the employer, allegedly, treated other mail handlers with temporary disabilities, more favorably in the specific job alterations being granted.

94 *Id* at 1226.

95 *Id* at 1226. The court also noted that in identifying the comparison group, the question as to whether the injury was sustained on the job or off is irrelevant. See also *Mullet v. Wayne-Dalton Corp.*, 338 F.Supp.2d 806 (N.D. Ohio 2004).


97 *Id.*
summary judgment was improper. In applying the same comparative group definition, the Circuit Court of Appeals for the Tenth Circuit identified the group as, “nonpregnant employees who were temporarily disabled.”

In all four of the aforementioned areas, it is clear that the current judicial landscape is muddled and perplexing. Even though the Supreme Court has yet to rule on any of these particular issues, they have produced some key cases where they have delineated precise rulings that, in effect, assist in guiding the lower courts when charged with the task of defining the scope of the PDA. These rulings have solidified, at least to some degree, the Court’s position on the reach of the PDA. One of the Supreme Court’s decisions where the Court weighed in on the jurisdictional scope of the PDA was Newport News Shipbuilding & Dry Dock Co. v. EEOC. In this case the employer, under a health insurance program, had a policy to pay more extensive pregnancy related benefits to female employees as opposed to the spouses of male employees. The issue before the Court was to decide if the male employees had been wrongfully discriminated against pursuant to the PDA. The Court held that, indeed, the plan had violated the PDA by treating “pregnancy related conditions less favorably than other medical conditions.”

Further developments arose when the Supreme Court further clarified the scope of the PDA in the case of California Federal Savings And Loan Association v. Guerra. The crux of the conflict centered on a California state statute that required employers to provide pregnant employees “a qualified right to reinstatement” to their positions upon returning to work. The complaint made the argument that, in effect, this statute perpetuated reverse discrimination against temporarily disabled male employees by granting “special treatment” to female employees who were temporarily disabled due to pregnancy. In upholding the legality of the state statute, the Court acknowledged that the California statute “merely establishes benefits that employers must, at a minimum, provide to pregnant workers.” Continuing, the Court noted: “Employers are free to give comparable benefits to other disabled employees, thereby treating ‘women affected by pregnancy’ no better than ‘other persons not so affected but similar

98 Id.
99 Id. at 1195 (10th Cir. 2000). The court did not actually adopt this definition as the “proper articulation” for the comparative group. However, for the purposes of deciding the case at hand, the court “assumed” the defendant’s interpretation. For a discussion on the judicial evolution of comparative groups, see Jessica Carvey Manners, The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases, 66 Ohio St. L.J. 209 (2005).
101 Id. The specific provision at issue related to hospitalization benefits associated with pregnancy related conditions. The argument that emerged was that the married male employees were being discriminated against because of their sex.
102 Id.
103 Id. at 684.
105 Id. at 276. According to the language set forth in the statute, female employees were given the right to take up to four months of unpaid pregnancy leave. In addition, upon returning from this leave, the employer was required to reinstate the employee to the same job that she had prior to taking the leave.
106 Id. In essence, the argument was that the male employees are not receiving equal treatment as compared to the females.
107 Id. at 291.
in their ability or inability to work.” 108 The Court emphasized that the state statute’s goal for equal employment opportunity was consistent with the broad aims of the PDA.109

Another case that was fundamental in shaping the breadth of PDA coverage was UAW v. Johnson Controls in 1991.110 At issue in this case was a policy that had been implemented by the employer, which restricted female employees who were physically able to become pregnant from working in jobs in which they could be exposed to lead.111 This policy, referred to as a fetal protection policy, was challenged on the grounds that it resulted in sex discrimination against women because there was no such policy excluding male employees who were fertile.112 In interpreting the language of the PDA, the Court held, “Title VII, as so amended, forbids sex-specific fetal-protection policies.”113

V. COURT CASES WITH CONSISTENT RESULTS

As a result of these United States Supreme Court decisions, legislative history, the EEOC’s position, and persuasive authority, subsequent cases dealing with other PDA issues have emerged and have resulted in judicial uniformity. One such issue was whether taking leave from work to breastfeed a child would be covered under the PDA. Specifically, does taking this type of leave constitute a “related medical condition” according to the PDA language? In McNill v. New York City Department of Corrections, the plaintiff gave birth to a son who had a cleft palate.114 The plaintiff asserted that, due to her son’s medical condition, she needed to breastfeed him.115 To do this, she requested time off from work, beyond the six weeks of maternity leave which she had already been granted. Upon returning to work, her employer treated this additional absence from work “discretionary” and “unrelated to her pregnancy.”116 This in turn,

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108 Id.
109 Id. The Court, in quoting language from the Griggs v. Duke Power Co. holding reiterated that the main goal of Title VII and the PDA was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees”. 401 U.S. 424, 429 (1971).
111 Id.
112 Id.
113 Id. at 211. This case has been subsequently cited for the acknowledgment that the PDA’s scope includes the capacity to become pregnant. For example see the case of Kocak v. Community Health Partners of Ohio, Inc., 400 F.3d 466 (6th Cir. 2005). In citing the Johnson Controls case, the court held that the scope of the PDA would encompass the “capacity to become pregnant.” Another example where a court ruled that the PDA’s scope would include a future pregnancy was in Walsh v. National Computer Systems, Inc., 332 F.3d 1150 (2003). In this case, the Eighth Circuit recognized a cause of action based on pregnancy harassment. Specifically, the harassment was aimed at an employee who had recently returned from maternity leave. The employee was subjected to numerous derogatory comments from her supervisor relating to her past pregnancy, as well as potential future pregnancies.
115 Id. After her six weeks maternity leave, she requested to take additional time off for several weeks to breastfeed until her son could have surgery to correct the medical condition. She ended up being absent from June to November in 1991.
116 Id. at 567.
ultimately adversely affected her employment status.\textsuperscript{117} The plaintiff sued arguing that her additional absences were directly related to her pregnancy and therefore were covered under the PDA.\textsuperscript{118} The court disagreed and held that the employer’s actions did not violate the PDA because the plaintiff’s subsequent absences were in fact not related to her pregnancy.\textsuperscript{119}

Along this uniform front, the judiciary has shown consistency when another question of law pertaining to the PDA emerged. The issue presented to the courts was whether expressing breast milk at work must be accommodated. In \textit{Martinez v. N.B.C. Inc.}, Alicia Martinez held the position of an associate producer.\textsuperscript{120} Upon returning from maternity leave, she made the decision to continue to express breast milk for her child.\textsuperscript{121} Martinez contended that her employer did not accommodate her request in such as way as to provide a “safe, secure, sanitary and private area to breast pump.”\textsuperscript{122} Specifically, she argued that this was a sex-plus discrimination cause of action.\textsuperscript{123} In granting the employer’s motion for summary judgment, the court stated that by using the sex-plus theory, the plaintiff needed to demonstrate that “she was treated less favorably than similarly situated men.”\textsuperscript{124} Basing its decision on the simple fact that “there is no comparable subclass of members of the opposite gender,” the court found in favor of N.B.C.\textsuperscript{125}

Most recently, courts have had the opportunity to yet again define the scope of the PDA and specifically the phrase, “related medical conditions”. The issue at hand that has emerged in the lower courts is whether the act of obtaining an abortion should be included in this particular phraseology. The United States Court of Appeals for the Third Circuit has held that women who terminate their pregnancies are protected under the PDA.\textsuperscript{126} The plaintiff in this case, Jane Doe, discovered that she was pregnant.\textsuperscript{127} Upon discovering that the baby had severe deformities, her doctor recommended that she obtain an abortion.\textsuperscript{128} Following the advice of her doctor, the plaintiff terminated her pregnancy.\textsuperscript{129} As a result, the plaintiff needed to be absent from work periodically.

\textsuperscript{117} \textit{Id.} For example, the plaintiff requested to take paid time off for Martin Luther King Day. As a result of her compromised employment status, her request was denied.

\textsuperscript{118} \textit{Id.}


\textsuperscript{120} 49 F.Supp.2d 305 (S.D.N.Y. 1999).

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id. at} 308.

\textsuperscript{123} \textit{Id.} The cause of action used in this case was sex-plus discrimination which requires that, in addition to proving gender discrimination, there is an additional factor on which the discrimination was based. Here, she argued that the additional factor was her choice to pump breast milk.

\textsuperscript{124} \textit{Id. at} 310.

\textsuperscript{125} \textit{Id.; see also} Jacobson v. Regent Assisted Living, Inc. 1999 WL 373790 (D. Or. 1999).

\textsuperscript{126} \textit{Doe v. C.A.R.S. Protection Plus, Inc.}, 527 F3d 358 (3\textsuperscript{rd} Cir. 2008).

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.}
However, based on the employer’s policies regarding such absences, the employer terminated the plaintiff for violations outlined in the leave policy.\textsuperscript{130} The plaintiff asserted that her termination was due to her employer discriminating against her because she obtained an abortion.\textsuperscript{131} Such discrimination, she argued, was in violation of the PDA.\textsuperscript{132} The court, in recognizing that this was a case of first impression for the Third Circuit, emphatically pronounced: “We now hold that the term ‘related medical conditions’ includes an abortion.”\textsuperscript{133} The court’s reasoning was consistent with the EEOC’s position,\textsuperscript{134} the PDA’s legislative history,\textsuperscript{135} and persuasive authority enunciated by the Sixth Circuit Court of Appeals.\textsuperscript{136} Whether one believes in having a legal right to obtain an abortion or not, it is clear, based on an interpretation of the statute’s legislative history, the EEOC’s guidance, and case law, that abortion should be covered under the PDA.

\section*{VI. Conclusion}

Since the passage of the PDA in 1978, the courts have been presented with numerous cases on point. The evolution of the judicial opinions discloses that there exist several areas where the courts do not produce consistent conclusions. Such areas include the types of benefits that must be included under a health insurance plan. Specifically, the courts have disagreed as to whether or not coverage for infertility treatment and contraception must be included. In addition, contrasting opinions have emerged as to the treatment of pregnancy leave in regards to the calculation of retirement benefits. Another area where the courts have been inconsistent in their interpretation of the PDA has been in cases where the courts are called upon to articulate a comparative group by which to measure the plaintiff’s treatment. In all four situations, a resolution in needed either from congressional action or the judiciary. Either source could provide the much needed clarification for upcoming cases.

\textsuperscript{130} Id. In particular, there was no personal leave or sick leave for the employees. Rather, if an employee needed to be absent because they were sick they were required to contact the employer for every day that they were going to be absent from work. As a result, the employee would not get paid for the missed days. Interestingly, the evidence suggests that this policy was not followed consistently. The plaintiff in this case allegedly did not follow the policy, which led to her termination.

\textsuperscript{131} Id. Doe’s coworker claimed that she had heard Doe’s supervisor make a negative comment about her choice to get an abortion. This, the plaintiff argued, was the motivating reason for her termination.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 364.

\textsuperscript{134} 29 C.F.R. pt. 1604 App. (1986). This EEOC’s position is that abortion is covered by the PDA.

\textsuperscript{135} H.R. Conf.Rep. No. 95-1786 at 4 (1978). The report specifically stated that it would be a violation of the PDA if an employer terminated an employee for having an abortion.

\textsuperscript{136} Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir.1996). The Sixth Circuit Court of Appeals was the first circuit court to have the opportunity to define the scope of the Pregnancy Discrimination Act as it related to women employees and abortion. In this case the plaintiff, while pregnant, contemplated obtaining an abortion. Despite the fact that she had the baby, she was still terminated. She argued that the reason for her termination was because she “contemplated having an abortion”. The court expanded the scope of the statute by including those employees who were terminated for either having an abortion or considering having an abortion. \textit{See also} Doe v. First National Bank of Chicago, 865 F.2d 867 (7th Cir 1989) (not deciding the issue directly but acknowledging that the PDA would protect those women who had an abortion).
In contrast, there are some PDA related cases that have unfolded which reveal judicial uniformity in the application of the statutory language. One such line of cases has presented the issue of whether the time taken off of work in order to breastfeed would be subject to the PDA’s coverage. Courts have consistently resolved this issue by concluding that such time taken off is not covered under the statute. A second area where uniformity has evolved centered on the issue of expressing breast milk in the workplace. The judiciary has concluded that this is beyond the reach of the PDA. Another consistent application of the PDA by the courts is a resolution that termination because of obtaining an abortion is considered to be discrimination in violation of the PDA.

In observing the evolution of the judicial landscape, it is evident that the PDA has triggered much recent activity in the courts which demonstrates the continuous and gradual refinement of the PDA’s scope. Although the breadth of the PDA’s reach does currently not lend itself to a precise definitional boundary, the judiciary, in hearing an abundance of cases, has made strides to that end. There is no question that the courts will have future opportunities to further tailor the parameters of the PDA as the case law unfolds.