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## COMMENT

### Defining the Protected Class: Who Qualifies for Protection Under the Pregnancy Discrimination Act?

*[W]hat makes pregnancy a disability rather than, say, an additional ability, is the structure of work, not reproduction.*<sup>1</sup>

## INTRODUCTION

The Pregnancy Discrimination Act (PDA)<sup>2</sup> amended Title VII of the Civil Rights Act of 1964<sup>3</sup> to combat systemic workplace discrimination against women because of their reproductive capacity. Congress drafted the PDA to frame pregnancy discrimination broadly in pursuit of this ambitious goal, intending to protect women “before, during, and after” pregnancy.<sup>4</sup> The ambiguity of the Act’s text and legislative history, however, has caused confusion in the courts, which have differed in their interpretations of the PDA’s scope. Many of these disagreements have centered on what types of employer actions constitute “discrimination” and whether the PDA entitles a woman to accommodation or simply protection from discrimination. This Comment focuses instead on a prior question: who is sufficiently “affected by pregnancy, childbirth, or related medical conditions”<sup>5</sup> to qualify for the PDA’s protection? This preliminary decision is a crucial, yet underexplored, component of the discussion about the PDA’s scope.

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1. Christine A. Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279, 1306 (1987).
  2. 42 U.S.C. § 2000e(k) (2000).
  3. 42 U.S.C. § 2000e (2000).
  4. 124 CONG. REC. 38,573, 38,574 (1978) (statement of Rep. Sarasin).
  5. 42 U.S.C. § 2000e(k) (2000).

Defining the PDA's protected class is particularly difficult when the plaintiff is not pregnant at the time of the alleged discrimination. In 2007, the Eighth Circuit became the first circuit court to address whether the PDA applies to contraception in *Union Pacific*.<sup>6</sup> That case illuminates the doctrinal inconsistencies in judicial applications of the PDA to alleged discrimination arising outside the nine-month window of pregnancy. The Supreme Court made clear in *UAW v. Johnson Controls, Inc.* that an employer's exclusion of all women "capable of bearing children" from certain jobs violated Title VII.<sup>7</sup> The scope of the Court's decision in *Johnson Controls*, however, remains unclear. Far from resolving the dispute, *Union Pacific* highlighted the extent of the discord among courts with regard to contraception specifically, and "potential pregnancy"<sup>8</sup> more generally. The court's decision contradicts several federal district court holdings<sup>9</sup> and casts doubt on the PDA's coverage of women who are not yet pregnant at the time of the alleged discrimination. Moreover, it fails to acknowledge that the structural reality of the workplace more heavily burdens women because of their biological differences from men.

While this Comment advocates a broad interpretation of the PDA's protected class, it does not support an *unlimited* interpretation. Indeed, one concern in extending the PDA's scope is to avoid expanding it beyond recognition, to the point where it is no longer a useful tool. Misplacing women's traditional social care-giving roles under the rubric of sex-specific, biological differences also creates a danger of reinforcing the very sex stereotypes the PDA was designed to combat. Therefore, while courts should remove a woman's current pregnancy status from the question of whether she is a member of the protected class, there is still a need to distinguish between alleged discriminatory acts that implicate women's biological differences and those that do not.

For example, an employer who fires a woman for missing work to care for her children likely would not be liable under the PDA because the employer's decision implicates no biological difference specific to women. Instead, it implicates this particular woman's social role as a caregiver. By contrast, an employer who fires a woman because of an assumption that she might take too much time off in the future (once she becomes pregnant and has children) would be liable under the PDA. The PDA would cover the employer's actions because the employer's assumption rests on a belief in the connection between

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

7. 499 U.S. 187, 199 (1991).

8. *Id.* at 204.

9. *See infra* Part III.

a biological ability (pregnancy and childbirth) and a social act (primary caregiving). Here, the employer assumes that a woman's reproductive capacity will (or may) lead to a certain behavioral result (more time with her kids and less time at work). The employer's assumption thus implicates women's biological difference from men because it is rooted in a belief about the connection between childbearing and childrearing.

This Comment argues that the doctrine could be clarified if courts understood and accounted for how predominant workplace structures limit women's professional opportunities during their childbearing years. Such an understanding exposes the need for a broader conception of the PDA's protected class, which would bring PDA jurisprudence in line with the original broad aims of the Act. This Comment proposes that women be covered by the PDA whenever an employer action threatens their workplace status because of their reproductive capacity.

## I. A BRIEF HISTORY OF THE PDA

Congress's primary focus in passing the PDA was to overturn *General Electric Co. v. Gilbert*,<sup>10</sup> in which the Supreme Court held that pregnancy discrimination was not a sex-based classification under Title VII.<sup>11</sup> Consequently, both the text and legislative history offer little guidance for applying the PDA other than the basic premise that discrimination on the basis of pregnancy is sex-based discrimination. Congress used expansive language both in the statute itself and in the legislative history,<sup>12</sup> but it left key components of the text undefined, including the phrase "related medical conditions."<sup>13</sup> Comments by lawmakers and subsequent Supreme Court opinions indicate support for a broad interpretation of the phrase,<sup>14</sup> but they fail to specify precisely how broad. In addition, neither the text nor the

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10. 429 U.S. 125 (1976).

11. *Id.* at 133-36.

12. H.R. REP. NO. 95-948, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4753 ("In using the broad phrase 'women affected by pregnancy, childbirth and related medical conditions,' the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process."); *id.* at 6-7, reprinted in 1978 U.S.C.C.A.N. at 4754-55 ("Women are still subject to the stereotype that all women are marginal workers. . . . [They are] viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women . . .").

13. 42 U.S.C. § 2000e(k) (2000).

14. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288-89 (1987).

legislative history specifies what range of behavior would comprise an action taken “because of” pregnancy. These ambiguities have led to considerable debate over the PDA’s intended or ideal reach.

Existing literature, while discussing several of the PDA’s ambiguities,<sup>15</sup> fails to critically examine the breadth of the class protected by the PDA, despite the prominence of this distinction in numerous judicial interpretations of the PDA’s scope. For example, in *Sura v. Stearns Bank*,<sup>16</sup> the plaintiff alleged that tension beginning during her pregnancy about the terms of her maternity leave culminated in a discriminatory restructuring of her job upon her return to work. The court placed a temporal limit on the protection of the PDA, holding that because the plaintiff had returned from maternity leave about six weeks before the adverse employment action occurred, she no longer was a member of the protected class.<sup>17</sup> Another district court, by contrast, has held that a three-month gap between childbirth and the alleged discrimination maintains enough of a temporal connection to pregnancy to establish the plaintiff as part of the protected class.<sup>18</sup> Without consistent criteria for who is covered under the Act, similarly situated plaintiffs may achieve radically different results based on each court’s definition of the protected class.

The statute fails to answer the questions raised by *Sura* and other cases. Neither the text nor the legislative history adequately specifies *who* is covered under the Act and whether (or to what extent) there is a temporal limit to the protection. Given this ambiguity, courts and scholars must determine how best to construe the statute in line with its purpose. The next two Parts offer a more coherent theory of who should be covered under the PDA. The structural realities of the workplace mandate expanding the protected class beyond the rigid nine-month confines of women’s pregnancies.<sup>19</sup> Courts should apply the PDA to all instances in which an employer’s act or policy has an impact on a

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15. At issue in many PDA cases is the debate over whether the PDA mandates (or should mandate) “equal treatment” or “special treatment,” or as Christine Jolls has framed it, antidiscrimination or accommodation. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); see also Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2157 (1994); Reva Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985); Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

16. 90 Fair Empl. Prac. Cas. (BNA) 1176 (D. Minn. Dec. 18, 2002).

17. *Id.*; see also *Solomen v. Redwood Advisory Co.*, 183 F. Supp. 2d 748 (E.D. Pa. 2002).

18. *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1493 (D. Colo. 1997).

19. This structural perspective has been employed by other scholars to point out flaws in the equal treatment model, but not to criticize the narrowing of the class subject to the PDA’s protection. See, e.g., Issacharoff & Rosenblum, *supra* note 15, at 2157.

woman's workplace status because of her reproductive capacity. This interpretation of the PDA would better comport with Congress's broad goals for the Act.

## II. THE IMPACT OF WORKPLACE STRUCTURES

The greatest problem for many working women lies not in combating or overcoming discrete instances of invidious discrimination, but rather in building successful long-term careers given the structural obstacles to their professional advancement.<sup>20</sup> At the simplest level, these obstacles stem from the typical workplace's restriction of space (physical location away from the home) and time (long blocks of time at work each day, over a continuous period of years).<sup>21</sup> The assumption underlying this structure is that the employee has no significant personal obligations that might cut into his workday or necessitate a temporary absence from the workforce. Underlying these assumptions, then, is another assumption: someone else (e.g., a nonworking spouse) is available to handle the employee's personal responsibilities for him. Women who bear children automatically depart from this default workplace model, at least temporarily.<sup>22</sup>

Even absent discriminatory animus, the expectation that women will diverge from the default worker model leads many employers to invest significantly less in female employees through wages, training, and opportunities for advancement.<sup>23</sup> Indeed, because employers have difficulty determining which of the women they employ will leave at some point (and for how long), all women of childbearing age may be lumped together into the same "flight-risk" category.<sup>24</sup> In this way, women may experience workplace

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20. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Siegel, *supra* note 15.

21. Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 26-27; Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 5-6 (2005).

22. For empirical research on the structural obstacles in the workplace and work-life conflict, see JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* (2004); and Marcie Pitt-Catsouphes & Bradley K. Googins, *The Paradox of Corporate Solutions: Accomplishments, Limitations, and New Opportunities*, in *UNFINISHED WORK: BUILDING EQUALITY AND DEMOCRACY IN AN ERA OF WORKING FAMILIES* 224 (Jody Heymann & Christopher Beem eds., 2005).

23. Issacharoff & Rosenblum, *supra* note 15, at 2166-69.

24. See, e.g., *id.* at 2169.

consequences because of their reproductive capacity even if they are not pregnant and do not intend to become pregnant. Women's physical status *at the time of the alleged discrimination* is thus largely irrelevant to the question of whether or not the alleged discrimination was *on the basis of pregnancy*.<sup>25</sup>

The Supreme Court has acknowledged the impact of these structural constraints to women's progress and has supported the PDA's broad goal of eradicating these obstacles.<sup>26</sup> Yet all too often, lower courts have declined to address the impact of workplace structures<sup>27</sup> and have consequently restricted the size of the protected class. Without accounting for the impact of structural obstacles on women's workplace status, courts cannot adequately construe the PDA according to its mission.

### III. THE PDA AND THE CAPACITY TO BECOME PREGNANT

In *Union Pacific*, female employees of a railroad brought a class action suit arguing that the exclusion of contraceptives from the company's insurance policy violated the PDA. They alleged that because the company offered insurance coverage for other types of preventive care and some prescription drugs that benefited only men—including treatment of conditions such as male-pattern baldness—the denial of contraceptive coverage constituted discrimination under the PDA. The district court agreed.<sup>28</sup>

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25. For a defense of a biologically based definition of the protected class, see Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 22, 24, 29 (1985).

26. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) ("The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." (quoting 123 CONG. REC. 29,658 (1977) (statement of Sen. Williams))).

27. Travis, *supra* note 21, at 6 ("[J]udges have interpreted . . . Title VII through the lens of 'workplace essentialism.' . . . [They] have assumed that jobs are defined at least in part by the default organizational structures that make up the full-time face-time norm, thereby placing those structures beyond the reach of antidiscrimination law and undermining the law's transformative potential.").

28. *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139 (D. Neb. 2005), *rev'd*, 479 F.3d 936 (8th Cir. 2007).

The Eighth Circuit, however, reversed,<sup>29</sup> holding that the female employees were not a protected class under the PDA because the statute does not apply to women with respect to contraceptive use. According to the court, “contraception is not ‘related to’ pregnancy for PDA purposes and is gender-neutral.”<sup>30</sup> This conclusion diverged from three district court opinions,<sup>31</sup> the Equal Employment Opportunity Commission (EEOC) decision on the issue,<sup>32</sup> and a prior Eighth Circuit decision that a plaintiff need not be pregnant at the time of the alleged discrimination in order to qualify for protection under the PDA.<sup>33</sup> Given this array of cases, *Union Pacific* fails to offer a compelling and administrable standard for determining when nonpregnant women can be covered by the Act. By making the blanket assertion that women are not covered by the PDA in the context of contraceptive use, the court avoids fully addressing the specific facts of the benefit plan at issue. Rather than releasing a decision based narrowly on the merits of Union Pacific’s plan, the court constricts the size of the PDA’s protected class and precludes future plaintiffs

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

30. *Id.* at 942.

31. *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014 (W.D. Mo. 2006), *vacated on reconsideration*, 2007 WL 3071825 (No. 03-0421-CV) (W.D. Mo. Oct. 22, 2007) (vacating prior judgment on account of *Union Pacific*); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) (holding that “denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion” covered by the PDA); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (“The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. . . . [I]t is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women . . . . The special or increased healthcare needs associated with a woman’s unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.”). *But see* *Cummins v. Illinois*, No. 2002-cv-4201, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005) (holding that an insurance policy denying contraceptive coverage does not violate the PDA).

32. EEOC Commission Decision on Coverage of Contraception (Dec. 14, 2000), *available at* <http://www.eeoc.gov/policy/docs/decision-contraception.html> (“Contraception is a means by which a woman controls her ability to become pregnant. The PDA’s prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”).

33. *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (reasoning that the plaintiff had raised a valid claim that “she was discriminated against . . . because she is a woman who had been pregnant, had taken a maternity leave, and *might become pregnant again*. ‘Potential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant.’” (emphasis added) (quoting *Kravel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)); *see also* *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 469-70 (6th Cir. 2005).

from raising any claim under the PDA related to contraceptive coverage.<sup>34</sup> The court permits a policy that prevents women from mitigating the effects of the typical workplace structure by planning their pregnancies (or avoiding them altogether). The *Union Pacific* decision thus overlooks the structural concerns of the workplace that necessitate a broad construal of the PDA's protected class and instead leaves many women without recourse under the PDA when they are outside the nine-month window of pregnancy.

*Union Pacific* also diverges from the Supreme Court's decision in *UAW v. Johnson Controls*,<sup>35</sup> which held that the PDA applies to discrimination on the basis of "potential pregnancy." The *Union Pacific* court attempted to distinguish *Johnson Controls* by reasoning that "potential pregnancy" is distinct from "contraception," which it found to be a gender-neutral term.<sup>36</sup> However, this rationale ignores the sex-specific medical effects of contraceptive use in women.<sup>37</sup> More importantly, it fails to account for the logistical complications of balancing work and family that impose a disproportionate burden on women to plan, and often postpone, their pregnancies. Women who want to remain on the path most employers expect of their employees must plan to continue working. Women's ability or inability to control their reproductive capacity has a crucial impact on their advancement prospects, future earnings potential, and job security. Access to contraceptives thus directly affects women's ability to conform to the "ideal worker" model. As Judge Bye pointed out in dissent, prescription contraception is the means through which "a woman controls her potential pregnancy" and is therefore "necessarily gender-related because it prevents pregnancy only in women."<sup>38</sup>

Viewed in this light, the assertion that contraception and fertility are gender-neutral misses the point. While both men and women may be fertile or infertile, their fertility determines the likelihood that they will cause pregnancy, and its associated career burdens, *in women*. Similarly, both men and women may use contraception, but contraception's primary purpose is to prevent pregnancy *in women*. The effects of contraception are thus sex-specific, placing

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34. Other scholars have examined standing doctrine more broadly and the inconsistent way that courts have related questions of standing to the merits of a case. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1998).

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

36. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 941-42 (8th Cir. 2007).

37. EEOC Commission Decision on Coverage of Contraception, *supra* note 32 (noting that pregnancy presents significant health risks to women and that women's bodies cannot withstand the number of pregnancies that would arise during their childbearing years if they did not use family planning).

38. *Union Pacific*, 479 F.3d at 947-48 (Bye, J., dissenting).



it firmly within the purview of the PDA. It is the means by which women regulate pregnancy so that they can integrate themselves into the workplace. This ability to integrate is a significant substantive goal of the PDA that the Supreme Court has acknowledged and supported.<sup>39</sup> Moreover, it is one of the central obstacles for women operating within a workplace structure designed for people without personal responsibilities. Employment decisions often are not isolated, episodic judgments, but rather are based on an employee's longstanding record within the company and an employer's calculation of her past (and expected future) performance. If women are to participate in the workplace on truly equal terms, then, the protected class must be broad enough to encompass all women who are vulnerable to adverse action because of their reproductive capacity. While the *Union Pacific* holding does not, on its own, conclusively deny PDA coverage to all nonpregnant women, the decision rests on a faulty rationale that disregards the intricate ways in which reproductive capacity interacts with women's professional lives.

#### IV. A WAY OUT?

Despite the PDA's broad aims, *Union Pacific* chips away at its power. It relies on the woman's current physical state as the primary prerequisite for her membership in the protected class, sometimes ignoring alleged discrimination stemming largely from the employer's traditional notions of gender roles and the inherent biases of a workplace designed for men. The PDA implicates coverage of contraception not only because it is medically related to pregnancy, but more importantly, because coverage that omits contraception disadvantages women, who bear both the physical burdens and the primary career burdens of pregnancy. Denial of contraception reinforces workplace structures that permit men to engage fully in both their public and private lives, but that maintain obstacles preventing women from doing the same. In light of these structural biases, then, all women affected by employer actions that threaten their workplace status because of their inherent biological differences from men should be included as members of the PDA's protected class.

In order to provide comprehensive protection for women, courts should construe the PDA broadly to encompass all forms of discrimination on the basis of women's childbearing capacity, regardless of the woman's pregnancy status at the time of the discrimination. Given the workplace structure and its impact on the progression of an employee's career, defining the protected class

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39. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288-89 (1987).

of the PDA in narrow, temporal, discrete terms misconstrues the Act. Instead, courts should employ a more flexible definition of the protected class that accounts for the continual obstacles posed by a workplace designed for the traditional, single breadwinner family. Courts should consider women to be members of the PDA's protected class if employment decisions affect them on the basis of sex-specific conditions related to procreation. This broader definition of the protected class not only comes closer to fulfilling the PDA's purpose, but also offers a more honest perspective on the challenges women face when they attempt to reconcile their reproductive lives with active workforce participation.

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