

DEFINING DISPARATE TREATMENT UNDER THE PREGNANCY DISCRIMINATION ACT: *HALL V. NALCO Co.*, WHAT TO DO WHEN YOU ARE IN A CLASS OF YOUR OWN

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INTRODUCTION

Imagine that a doctor diagnoses you with a medical condition that prevents you from accomplishing something that you have dreamed of your whole life. However, your doctor tells you that a medical procedure exists that could give you a twenty-five percent chance of achieving your dream. The procedure requires you to take a leave of absence from work. You collect your sick days and take a leave, but the procedure does not work. You chose to try one more time. After your employer approves your leave but a few days before it is supposed to begin, your employer informs you that it consolidated your position. Your employer tells you that because of your health problem it is in your best interest that you lose your job. This story is all too real for Cheryl Hall whose employer terminated her because she took time off to attempt to become pregnant through in-vitro fertilization (IVF).¹ Women across the country find themselves in similar positions as they try to balance concerns about maintaining their income with their efforts to create a biological child.² Recently, the Seventh Circuit Court of Appeals decided that employers of women who are undergoing IVF may not fire those women simply because of their IVF status under Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act (PDA).³ What that actually means for women like Cheryl Hall is the subject of this Note.

Employee absenteeism related to IVF and other aggressive fertility treatment presents a new challenge to courts in determining whether employers have unlawfully discriminated against women. Current judicial application of the law attempts to provide women with legal equality in the workplace, but in enacting the PDA Congress did not intend mere attempts at equality.⁴ This Note articulates why the current interpretation of the PDA is broken with regard to women in Hall's position and offers a possible judicial solution that favors

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1. See *Hall v. Nalco Co.*, 534 F.3d 644, 645-46 (7th Cir. 2008).

2. See Frequently Asked Questions: Infertility, <http://www.womenshealth.gov/faq/infertility.pdf> (last visited Jan. 8, 2009) (noting that ten percent of women, or 6.1 million, between the ages of fifteen and forty-four who attempt to conceive have trouble doing so).

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

4. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (discussing the legislative history of the PDA).

functionalism over legal formalism. Part I provides an overview of the PDA and its history and explains how the PDA is applied in litigation. Part II briefly explains IVF treatment and discusses the way federal courts have analyzed whether the PDA should protect IVF treatment. Part II also explains the Seventh Circuit's decision to extend the protection of the PDA to women who are undergoing IVF treatment. Part III explains why the courts' current definitions of disparate treatment in PDA cases is a problem for women who are undergoing IVF. Finally, Part IV offers a functional approach to defining disparate treatment in the IVF context.

I. THE PDA, ITS HISTORY, AND PREGNANCY DISCRIMINATION LITIGATION

Title VII provides that it is “an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁵ Originally, the statutory language excluded sex from the list of protected characteristics.⁶ Two days before the bill moved from the House to the Senate, House Representative Howard W. Smith proposed an amendment to include sex among the protected characteristics.⁷ Congress had little time to debate the amendment, and the statute passed with the additional language, which left the courts with little legislative history to explain the addition.⁸

To flesh out the PDA and the jurisprudence surrounding it, it is helpful to consider how the courts interpreted the term “sex” for Title VII purposes prior to the PDA. An overview of the PDA’s legislative history further clarifies the PDA’s scope. Finally, an examination of key Supreme Court precedent and the disparate treatment standard that courts actually apply in the context of litigation round out the inquiry into the PDA’s meaning.

A. The Judicial Construction of the Term “Sex” for the Purposes of Title VII Prior to the PDA

In 1972, the Equal Employment Opportunity Commission (EEOC)

5. 42 U.S.C. § 2000e-2 (2006).

6. Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 99 (2005).

7. *Id.* Representative Smith introduced the amendment in the hope that it would prevent the Civil Rights Act from passing, but the language came in and Title VII passed with the sex discrimination prohibitions intact. See Hillary Jo Baker, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 HASTINGS WOMEN’S L.J. 83, 89-90 (2009).

8. Barnard & Rapp, *supra* note 6, at 99-100 (quoting *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091-92 (5th Cir. 1975)) (noting a judicial belief that Congress did not intend the proscription of discrimination on the basis of sex to have broad significance and that the court believed that a fundamental line needed to be drawn between distinctions based on fundamental rights, and the judgment an employer uses to run his business).

promulgated guidelines that included pregnancy in the definition of “sex” for the purposes of Title VII.⁹ However, it was still legally hazy whether pregnancy-based discrimination was sex-based discrimination for the purposes of Title VII.¹⁰ In *General Electric Co. v. Gilbert*,¹¹ the Supreme Court clarified the status of pregnancy-based discrimination under Title VII.¹² In *Gilbert*, female employees asserted that General Electric’s disability plan, which paid weekly non-occupational sickness and accident benefits, unlawfully excluded pregnancy related disabilities from its coverage.¹³ The Court held that because the plan covered exactly the same categories of disability for men and women it did not unlawfully discriminate under Title VII.¹⁴

The majority opinion drew vigorous dissents from Justices Brennan and Stevens.¹⁵ Justice Brennan noted that the disposition of the case turned largely on the framework that the majority employed when it analyzed the operational features of the program.¹⁶ Justice Brennan reasoned that although the program mutually covered all sex-neutral disabilities, it did not cover the exclusively female “disability” of pregnancy while including coverage for exclusively male disabilities.¹⁷ Thus, if one focused on the risks that the plan did not cover, then it was obvious that the plan was discriminatory because it covered all risks except for those that were inextricably female.¹⁸ Justice Stevens concluded that treating a risk of absence because of pregnancy differently than any other risk of absence was per se discrimination because only women experience pregnancy.¹⁹

B. The Passage of the PDA

In 1978, just two years after *Gilbert*, Congress amended Title VII to include pregnancy in the definition of sex.²⁰ It believed that the Court had made a mistake in *Gilbert*, and the PDA was Congress’s attempt to return Title VII to what it believed to be the status quo.²¹ Thus, the PDA creates no new rights or

9. *Id.* at 100-01.

10. *Id.* at 101.

11. 429 U.S. 125 (1976), *superseded by statute*, 42 U.S.C. § 200e(k) (2006).

12. *See id.* at 127-28, 136.

13. *Id.* at 127-28.

14. *Id.* at 139-40.

15. *See id.* at 146, 160.

16. *Id.* at 147 (Brennan, J., dissenting).

17. *Id.* at 152.

18. *See id.* at 153 n.5.

19. *Id.* at 161-62 (Stevens, J., dissenting).

20. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983).

21. *See* H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752 (noting that if the Supreme Court’s interpretation of the definition of sex were allowed to stand Congress would yield to an “intolerable potential trend in employment practices”); *see also Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 679 n.17 (noting the legislative history

remedies under Title VII, but it clarifies the statutory definition of sex.²²

In the PDA, Congress expressly included pregnancy in Title VII's definition of "sex."²³ Congress wanted to ensure that Title VII protected women in their capacity as the only members of society with the physical ability to bear children.²⁴ Additionally, Congress hoped that the PDA would lead to an end of plaintiffs' need to resort to disparate impact theories in pregnancy discrimination cases under Title VII.²⁵ Thus, Congress intended that the PDA allow plaintiffs to successfully invoke disparate treatment as a legal theory under Title VII.²⁶ Further, Congress intended to "guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life."²⁷ The implication of the legislative history is that Congress intended the PDA to be functionally broad.²⁸ Congress tracked Justice Brennan's *Gilbert* dissent suggesting that it intended the courts to step away from formalism and instead assure women that they may participate, as men are able, in both the workforce and family life.²⁹

In the amendment, Congress defined "sex" under Title VII as follows:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.³⁰

Arguably, the amendment has two clauses.³¹ The PDA contains the definitional clause first, which includes pregnancy, childbirth, and other "related medical

of the amendment).

22. 42 U.S.C. § 2000e(k) (2006).

23. *Id.*

24. See H.R. REP. NO. 95-948, at 3 (noting that the goal of the amendment is to eradicate confusion by broadening the definition of sex).

25. See *id.*

26. See *id.* (noting that the PDA was introduced to "change the definition of sex discrimination . . . to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex").

27. See 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams).

28. See H.R. REP. NO. 95-948, at 3; 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams).

29. Compare 42 U.S.C. § 2000e(k) (2006) (including pregnancy expressly in the definition of sex), with *Gen. Elec. Co. v. Gilbert* 429 U.S. 125, 146-60 (1976) (Brennan, J., dissenting) (arguing that discrimination on the basis of pregnancy is per se sex discrimination); see also H.R. REP. NO. 95-948, at 2 (noting that Congress agreed with the *Gilbert* dissenters).

30. 42 U.S.C. § 2000e(k).

31. Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 212 (2005).

conditions” in Title VII’s definition of “sex.”³² Second, and more important for the purposes of this Note, is the “equality” clause.³³ The equality clause states that employers must treat women who fall into the umbrella provided by the definitional clause equally to employees who do not fit into the definitional clause but are similar in their ability (or inability) to work.³⁴ This language is the starting point for a court in determining what disparate treatment is in a PDA case.³⁵

C. Overview of U.S. Supreme Court Precedent Interpreting the Scope of the PDA

In *Newport News Shipbuilding & Drydock Co. v. EEOC*,³⁶ the EEOC filed a suit against an employer in which it alleged that the employer’s sponsored healthcare plan unlawfully covered maternity related hospital stays for female employees to a greater extent than it did for the spouses of male employees.³⁷ The Court held that the plan was unlawful sex-based discrimination because the husbands of female employees had hospitalization coverage equal to the male employees, but the wives of male employees were denied pregnancy related hospitalization coverage when female employees were covered.³⁸

The Court reasoned that:

the [PDA] has now made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.³⁹

The case illustrates that the Court registered Congress’s displeasure with the framing it used in *Gilbert*.⁴⁰ The Court, instead of using the *Gilbert* framework and considering only mutuality of coverage,⁴¹ looked broadly at the categories of coverage excluded and determined that the employer discriminated because of

32. See 42 U.S.C. § 2000e(k); Manners, *supra* note 31, at 212.

33. See Manners, *supra* note 31, at 212.

34. *Id.*

35. See, e.g., *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191-92 (10th Cir. 2000) (including the “similarly situated” language of the equality clause in the prima facie requirements for a case of disparate treatment under the PDA).

36. 462 U.S. 669 (1983).

37. *Id.* at 674.

38. *Id.* at 683-84.

39. *Id.* at 684.

40. See *id.*

41. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 139 (1976), *superseded by statute*, 42 U.S.C. § 2000e(k) (2006).

pregnancy.⁴²

In *California Federal Savings & Loan Ass'n v. Guerra*,⁴³ the employer of a pregnant worker sought a declaration that Title VII pre-empted a California law.⁴⁴ The challenged law required employers to provide unpaid leave and qualified reinstatement for pregnant women.⁴⁵ It noted that Congress indicated in the Civil Rights Act of 1964 that it only pre-empted state laws if there was actual conflict between the Act and state law.⁴⁶ Thus, only if compliance with both the California leave requirement and the PDA was either physically impossible or the California leave requirement stood in the way of accomplishing Title VII's objectives, should the California law should be struck down as pre-empted.⁴⁷ As a result, the question was whether the "equality" clause of the PDA prohibited preferential treatment of pregnant women under Title VII.⁴⁸ The Court held that it did not.⁴⁹ Instead, it determined that Congress simply intended to overrule *Gilbert* with the equality clause.⁵⁰ According to the Court, Congress meant the PDA to remedy pregnancy discrimination, not prohibit favorable treatment of pregnant employees.⁵¹ Thus, the PDA is the floor of legal protection that Congress allows pregnant women, not the ceiling.⁵²

In *UAW v. Johnson Controls, Inc.*,⁵³ the employer had a policy prohibiting all women of childbearing age without medical documentation of infertility from working in positions that involved actual or potential exposure to lead.⁵⁴ The purpose of the policy was to protect fetuses from harmful lead exposure.⁵⁵ The Court held that the policy classified explicitly based on childbearing capacity, not fertility (a gender-neutral status); thus, it was sex-based discrimination under the PDA.⁵⁶ Further, the Court held that Johnson Controls could not justify the discrimination as a bona fide occupational qualification⁵⁷ because the safety at

42. See *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 684.

43. 479 U.S. 272 (1987).

44. *Id.* at 279.

45. *Id.* at 275-76.

46. *Id.* at 281-82 (quoting 42 U.S.C. § 2000e-7).

47. *Id.* at 281.

48. See *id.* at 284.

49. *Id.* at 285.

50. *Id.*

51. *Id.* at 285-86.

52. *Id.* at 285.

53. 499 U.S. 187 (1991).

54. *Id.* at 192.

55. See *id.* at 191-93.

56. *Id.* at 199.

57. A bona fide occupational qualification is a narrow defense that Title VII provides to employers. See 42 U.S.C. § 2000e-2(e)(1) (2003). It allows an employer to discriminate in certain instances where the protected trait is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* The Supreme Court has construed it narrowly. *Johnson Controls Inc.*, 499 U.S. at 201. It was the only defense available

issue concerned the safety of fetuses not the safety of third parties or consumers.⁵⁸ The Court noted that the PDA contained its own bona fide occupational qualification standard, and the “equality” clause of the PDA means that “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”⁵⁹ The Court observed that the legislative history confirmed its reading of the statute because it indicates that Congress wrote the “equality” clause to ensure that female employees are treated the same as male employees regardless of childbearing ability.⁶⁰

The passage of the PDA is a powerful statement of Congress’s interest in protecting pregnant women from discrimination in their places of employment.⁶¹ Congress’s intervention after its observation of the Supreme Court’s ruling in *Gilbert* illustrates that Congress wanted a uniform judicial approach to Title VII cases brought by pregnant women.⁶² The Supreme Court recognized in the early days of the PDA that the amendment extended Title VII’s reach to pregnant women,⁶³ and the Court recognized further that the protections that Title VII offered to pregnant women were the floor of the protective social legislation, not the ceiling.⁶⁴ The Supreme Court’s interpretation of the PDA indicates that it understood that Congress did not intend the amendment to confer additional benefits on pregnant women, but that it did want to remedy pregnancy discrimination effectively.⁶⁵ However, the Supreme Court left the nuances of judicially determining disparate treatment in pregnancy discrimination cases to be resolved at the appellate level.

D. The Process of Litigation in Title VII Suits Based on Pregnancy Discrimination

In order to understand why IVF patients require a different judicial approach to disparate treatment, it is important to grasp how Title VII litigation works and how the various U.S. circuits deal with the question of whether disparate treatment exists in a PDA case. Each Title VII case follows a general process, and a plaintiff has several strategic options when she brings her claim. The circuits take different approaches when they determine whether a defendant

to Johnson Controls due to the facially discriminatory nature of the policy in question. *Id.* at 196.

58. *Johnson Controls Inc.*, 499 U.S. at 203-04.

59. *Id.* at 204.

60. *Id.*

61. See *supra* notes 20-34 and accompanying text.

62. See H.R. REP. NO. 95-948, at 2-3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4750-51.

63. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (noting that any discrimination based on pregnancy is discrimination based on sex for the purposes of Title VII).

64. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (noting that states may enact legislation that places more rigorous burdens on employers of pregnant women).

65. See *Johnson Controls Inc.*, 499 U.S. at 204 (noting that the PDA instructs employers to treat women, regardless of their childbearing ability, the same as their male colleagues).

subjected its employee to disparate treatment.

A plaintiff in a Title VII case using the PDA may prove unlawful discrimination in two ways.⁶⁶ She may proceed under a disparate impact theory, which requires her to show statistical evidence that a facially neutral employment policy has a discriminatory impact on protected persons.⁶⁷ These cases do not generally require that the plaintiff show that her employer had a discriminatory intent.⁶⁸ Once the plaintiff shows discriminatory impact, the defendant has an opportunity to put forward a business necessity defense.⁶⁹

But typically, a plaintiff in a Title VII case proceeds under a disparate treatment theory.⁷⁰ Under this theory, a plaintiff uses either direct or indirect evidence to show that her employer intentionally discriminated against her based on a protected characteristic, which for the purposes of this Note, is her effort to achieve pregnancy through IVF. It is difficult for plaintiffs to produce direct evidence.⁷¹ A plaintiff who chooses to proceed on indirect evidence may use the *McDonnell Douglas*⁷² burden-shifting framework.⁷³ Under this test, the plaintiff must first establish a “prima facie case by a preponderance of the evidence.”⁷⁴ In order to do that a plaintiff must show: (1) that she is a member of a protected group; (2) that she is qualified for the position; (3) that the defendant took adverse employment action; and (4) that the defendant treated the plaintiff less favorably than other employees who were not members of the protected group but were similar in their ability or inability to work.⁷⁵ If the plaintiff can articulate a prima facie case for discrimination, “the burden of production then shifts to the defendant who must articulate a legitimate, non-discriminatory reason for the adverse employment action.”⁷⁶ If the defendant does that successfully, the plaintiff can only block summary judgment if she can show that her IVF status was the determinative factor in her adverse employment action.⁷⁷

The United States appellate courts have taken different approaches to defining “similarly situated” for the purposes of proving disparate treatment under the fourth prong of the *McDonnell Douglas* burden-shifting test.⁷⁸ The

66. William G. Phelps, Annotation, *What Constitutes Termination of an Employee Due to Pregnancy in Violation of Pregnancy Discrimination Act Amendment to Title VII of Civil Rights Act of 1964*, 130 A.L.R. FED. 473 § 2[a] (1996).

67. *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999).

68. Phelps, *supra* note 66.

69. *Id.*

70. *Id.*

71. Dana Page, *D.C.F.D.: An Equal Opportunity Employer—As Long as You Are Not Pregnant*, 24 WOMEN’S RTS. L. REP. 9, 14 (2002).

72. 411 U.S. 792, 802-05 (1973).

73. *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000).

74. *Id.*

75. *Id.* at 1192.

76. *Id.* at 1191.

77. *Id.*

78. Compare, e.g., *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994), with

U.S. courts of appeals have yet to consider the issue of disparate treatment in IVF cases under the PDA.⁷⁹ Thus, in order to examine actual judicial application of the “similarly situated” standard, one must examine it in the pregnancy context. All plaintiffs who pursue a disparate treatment theory in a PDA case and proceed on indirect evidence are required to prove that their employer would have treated another employee who does not exhibit the protected characteristic but is “similarly situated” in his or her ability (or inability) to work more favorably than it treated the plaintiff.⁸⁰ Thus, the “similarly situated” standard is likely what courts will require IVF plaintiffs to meet.

In *Troupe v. May Department Stores Co.*,⁸¹ the Seventh Circuit defined “similarly situated” in terms of the expense the employee caused the employer.⁸² Lord & Taylor department store, the employer, terminated Troupe on the day that her maternity leave was to begin.⁸³ Over the course of her pregnancy, Troupe suffered particularly severe morning sickness, and as a result, she was late to work several times.⁸⁴ Her employer put her on probation, and during her probationary period Troupe was late several more times.⁸⁵ However, Troupe’s employer did not fire her at the conclusion of her probationary period.⁸⁶ Instead, Lord & Taylor waited until just before Troupe’s maternity leave was to begin.⁸⁷

Troupe’s supervisor told her that Lord & Taylor was not firing Troupe because of her tardiness but, instead, because the company believed that she would not return after her maternity leave concluded.⁸⁸ If the employer fired Troupe for chronic lateness, it did not act unlawfully as long as the employer would have fired someone who was not pregnant but was also consistently late.⁸⁹ The Seventh Circuit held that if the employer did fire Troupe because it feared that she would not return upon the conclusion of her maternity leave, the termination was legal as long as the employer would have also fired a man who

Horizon/CMS Healthcare Corp., 220 F.3d at 1195 nn.6-7.

79. See *infra* Part II.B (explaining that courts have dismissed most cases involving fertility treatment as being based on fertility, a sex-neutral condition, and never reached the question of disparate treatment). *Hall v. Nalco Co.* did not address the correct standards for disparate treatment in IVF absence cases because of the procedural posture in which it arrived at the Seventh Circuit. See *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008). The focus of the court was solely whether Hall stated a lengthy cognizable claim when she alleged that Nalco illegally discriminated against her by allegedly firing her because of her IVF related absence. *Id.*

80. *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1192 (setting forth the requirements for a plaintiff to prove disparate treatment in a PDA case).

81. 20 F.3d 734 (7th Cir. 1994).

82. *Id.* at 738.

83. *Id.* at 735-36.

84. *Id.* at 735.

85. *Id.*

86. *Id.*

87. *Id.* at 736.

88. *Id.*

89. *Id.* at 737-38.

was about to embark on sick leave for, say, a kidney transplant.⁹⁰ According to the court, an employer can treat a pregnant woman “as badly as [it] treat[s] similarly affected but nonpregnant employees.”⁹¹ As long as Lord & Taylor fired Troupe because of her expensive nature, and the employer fired all other employees similar in expense, then the court could not infer that Troupe was fired because of her pregnancy.⁹²

In *Urbano v. Continental Airlines, Inc.*,⁹³ the Fifth Circuit Court of Appeals selected a “similarly situated” standard that is seemingly the narrowest imaginable.⁹⁴ In order to establish a case under this test, the Fifth Circuit required that the plaintiff be compared to a limited group.⁹⁵ In *Urbano*, a doctor ordered the plaintiff, a pregnant woman, to refrain from heavy lifting.⁹⁶ As a result, the plaintiff requested a modified work assignment so she would have to lift no more than twenty pounds.⁹⁷ The employer had a policy by which it allowed modified work assignments, but only if the employee required it because of an on-the-job injury.⁹⁸ Because the plaintiff’s pregnancy was not an on-the-job injury, the employer refused to give her a modified work assignment.⁹⁹ The Fifth Circuit upheld the employer’s refusal.¹⁰⁰ The court reasoned that the most appropriate comparison group would be non-pregnant employees with non-occupational injuries.¹⁰¹ Thus, because the employer’s denial to the plaintiff was no different than its response to any other non-occupationally injured employee’s modified duty request, the employer had not, according to the Fifth Circuit, acted unlawfully.¹⁰² The Sixth and Eleventh Circuits have also determined that when an employer has objective qualifications, such as the injury’s location for modified duty work, those qualifications ought to be part of the disparate treatment analysis.¹⁰³

In *EEOC v. Horizon/CMS Healthcare Corp.*,¹⁰⁴ the Tenth Circuit Court of Appeals suggested a slightly broader comparison group in order to apply the “similarly situated” standard.¹⁰⁵ Unlike the Fifth, Sixth, and Eleventh Circuits,

90. *Id.* at 738.

91. *Id.*

92. *Id.*

93. 138 F.3d 204 (5th Cir. 1998).

94. *See id.* at 208.

95. *Id.*

96. *Id.* at 205.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 208.

101. *Id.*

102. *See id.*

103. *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 642 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999).

104. 220 F.3d 1184 (10th Cir. 2000).

105. *Id.* at 1194-95.

the Tenth Circuit suggested that the proper comparison group to determine whether the employer ought to assign modified work duty is simply all employees who are injured, regardless of where those injuries took place.¹⁰⁶ In *Horizon*, the plaintiffs were four pregnant nursing home employees who alleged that their employer denied them modified duty in violation of Title VII as amended by the PDA.¹⁰⁷ The defendant maintained a policy by which employees were allowed to work in modified duty positions consistent with any work restrictions made by an employee's physician, provided that the reason the employee had work restrictions was a work-related injury.¹⁰⁸ The Tenth Circuit assumed, without deciding, that the proper comparator group would be all employees who were injured and required modified duties, regardless of where the injury occurred.¹⁰⁹ But the Tenth Circuit did not need to decide that this was the proper standard because it found that the employer failed even under the narrower Fifth Circuit standard.¹¹⁰

II. OVERVIEW OF JUDICIAL TREATMENT OF IVF CASES UNDER THE PDA

The judiciary and scholars have had problems trying to determine whether IVF and other aggressive fertility procedures should fall under the PDA's protection.¹¹¹ In attempting to understand the debate, the basics of IVF and other aggressive fertility treatments must be first understood and then the factual contexts of federal IVF cases may be compared to illustrate why the Seventh Circuit correctly concluded that the PDA protects a woman who is undergoing IVF treatment.¹¹²

A. Brief overview of IVF

IVF is part of a family of aggressive fertility procedures meant to help an infertile couple conceive.¹¹³ A doctor will diagnose a couple as infertile only after that couple has failed to become pregnant after a year of consistent unprotected sexual intercourse.¹¹⁴ Infertility can exist because of a defect in the

106. *Id.* at 1195 n.7.

107. *Id.* at 1189.

108. *Id.*

109. *Id.* at 1195.

110. *Id.*

111. See *Hall v. Nalco Co.*, 534 F.3d 644, 648 (7th Cir. 2008) (discussing the various factual settings where the question of whether IVF treatment is protected under the PDA); Cintra D. Bentley, Note, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy Within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 391-92 (1998) (discussing the issue of whether IVF treatment should be protected under the PDA).

112. See *Hall*, 534 F.3d at 649.

113. THE CORNELL ILLUSTRATED ENCYCLOPEDIA OF HEALTH 659 (Antonio M. Gotto Jr. ed., 2002).

114. *Id.* at 657.

contribution to the pregnancy of either the male partner, the female partner, or both partners.¹¹⁵ IVF, Gamete Intrafallopian Transfer, and Zygote Intrafallopian Transfer are the three most aggressive forms of infertility treatment currently in existence.¹¹⁶

All three of these fertility treatments are composed of the same four steps.¹¹⁷ The only difference is where the fertilization of the egg takes place.¹¹⁸ First, the doctor must stimulate a woman's ovulation.¹¹⁹ In order to achieve this effect, a physician will prescribe one of many different available fertility drugs.¹²⁰ Second, the doctor retrieves the eggs in an invasive procedure, either transvaginal ultrasound aspiration or laparoscopy.¹²¹ Third, the doctor inseminates the eggs with either fresh or frozen sperm from either the woman's partner or a donor.¹²² Approximately forty hours later, the doctor places the inseminated eggs back in the woman's uterus.¹²³ The success rate for each episode of embryo transfer in IVF treatment is approximately twenty-five percent.¹²⁴

B. Title VII Law in the Context of Infertility Treatment

In *Pacourek v. Inland Steel Co.*,¹²⁵ Charline Pacourek's employer, Inland Steel, fired her from her position as senior price computer in June 1993.¹²⁶ In 1986, Pacourek found out that she had esophogical reflux, "a medical condition that prevented her from becoming pregnant naturally."¹²⁷ Sometime after 1986, Pacourek informed her employer that she was undergoing IVF treatment in an effort to become pregnant.¹²⁸ Pacourek alleged that after her disclosure, her supervisor "disparately applied a sick leave policy to" her absence due to her IVF treatment.¹²⁹ Further, Pacourek alleged that another supervisor expressed his "doubt as to her ability to become pregnant and her ability to combine pregnancy and her career."¹³⁰ The same supervisor informed her that her condition was a problem while handing her a memorandum placing her on probation.¹³¹

115. *Id.*

116. *Id.* at 659.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 649.

122. *Id.*

123. *Id.*

124. *Id.*

125. 858 F. Supp. 1393 (N.D. Ill. 1994).

126. *Id.* at 1396.

127. *Id.*

128. *Id.*

129. *Id.* at 1397.

130. *Id.*

131. *Id.*

Ultimately, Inland terminated Pacourek's employment.¹³²

The court held that it is unlawful to discriminate against employees based on intended or potential pregnancy, and because Pacourek's attempted pregnancy through IVF was a still a "intended or potential pregnancy," the court held that the PDA protects it.¹³³ The court concluded in light of the PDA's language and the legislative history, "that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women."¹³⁴ In addition to the broad language of the statute and its legislative history, the court relied on *UAW v. Johnson Controls, Inc.*,¹³⁵ to come to its conclusion.¹³⁶

The court noted, however, that to hold discrimination because of potential or intended pregnancy unlawful does not necessarily mean that Pacourek's health condition that prevented her from becoming pregnant is a condition medically related to pregnancy under the PDA.¹³⁷ Nonetheless, the court concluded that "a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth" under the PDA.¹³⁸ The court applied a canon of statutory construction that instructs courts to broadly construe civil rights laws.¹³⁹ Further, the court reasoned that the language of the PDA itself sweeps broadly, and thus, its holding followed from a natural reading of the statutory language.¹⁴⁰ The court reasoned under *Johnson Controls*, that if "potential pregnancy is treated like pregnancy for the purposes of the PDA, it follows that potential-pregnancy-related medical conditions should be treated like pregnancy-related medical conditions for the purposes of the PDA."¹⁴¹ The court swept Pacourek's condition into the protection of the PDA because it concerned the initiation of pregnancy and thus was medically related to pregnancy.¹⁴²

In *Krauel v. Iowa Methodist Medical Center*,¹⁴³ Mary Jo Krauel sued her employer, alleging that its denial of insurance coverage for her fertility treatments violated the PDA.¹⁴⁴ The court held that the treatment of infertility was not the treatment of a medical condition related to pregnancy or childbirth

132. *Id.* at 1396.

133. *Id.* at 1401-02.

134. *Id.* at 1401.

135. 499 U.S. 187 (1991).

136. *Pacourek*, 858 F. Supp. at 1401-02.

137. *Id.* at 1402.

138. *Id.* at 1403.

139. *Id.* at 1402.

140. *Id.* at 1402-03.

141. *Id.* at 1403.

142. *See id.* at 1403-04.

143. 95 F.3d 674 (8th Cir. 1996).

144. *Id.* at 676.

protected under the PDA.¹⁴⁵ The court appealed to the rules of statutory construction.¹⁴⁶ It noted that courts should understand “related medical conditions” to refer to the more specific terms, “pregnancy” and “childbirth” that precede it.¹⁴⁷ It used this method of construction to distinguish between conception and pregnancy, and infertility that prevents conception.¹⁴⁸ Further, the court noted that the PDA’s legislative history does not mention infertility.¹⁴⁹ Thus, the court decided, infertility is not a sex-related medical condition.¹⁵⁰

In *Saks v. Franklin Covey Co.*,¹⁵¹ Rochelle Saks brought suit under the PDA against her employer because its self-insured employee health benefits plan denied her claim for expenses related to surgical impregnation procedures.¹⁵² The court found that with respect to Saks’s infertility discrimination claim the threshold question was whether the PDA’s prohibition of pregnancy-based discrimination extends to infertility-based discrimination.¹⁵³ Ultimately, the court held that it does not.¹⁵⁴ The court noted that at the core of PDA protection is Title VII protection, and Title VII prohibits discrimination “because of sex.”¹⁵⁵ The court reasoned that reproductive capacity is common to both men and women, and as a result, the PDA cannot introduce “a completely new classification of prohibited discrimination based solely on reproductive capacity.”¹⁵⁶ The court noted further that its holding comports with *Johnson Controls* because, in that case, the Supreme Court drew a line between discrimination based on “childbearing capacity” and “fertility alone.”¹⁵⁷ According to the Second Circuit, *Saks* is only about infertility, and “infertility standing alone does not fall within the meaning of the phrase related medical conditions under the PDA.”¹⁵⁸

C. *The Seventh Circuit’s Decision to Hold IVF Treatment as a Protected Status Under the PDA*

On July 16, 2008, in *Hall v. Nalco Co.*, the Seventh Circuit was the first U.S. appellate court to address whether a woman who is fired allegedly because of her absences related to IVF treatment, can state a claim for discrimination under the

145. *Id.* at 679-80.

146. *Id.* at 679.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 679-80.

151. 316 F.3d 337 (2d Cir. 2003).

152. *Id.* at 340.

153. *Id.* at 345.

154. *Id.* at 346.

155. *Id.* at 345.

156. *Id.*

157. *Id.* at 345-46 (quoting *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991)).

158. *Id.* at 346 (internal quotations omitted).

PDA.¹⁵⁹ The court held that an employee in that situation has a legally cognizable Title VII claim.¹⁶⁰ Nalco hired Cheryl Hall in 1997, and in 2000, she attained the title of sales secretary.¹⁶¹ In March 2003, Hall requested a leave of absence in order to undergo a round of IVF.¹⁶² Hall's March IVF treatment failed.¹⁶³ In July, she filed another request for a leave of absence, which was to commence in August.¹⁶⁴ Just before Hall's second leave was to begin, Nalco informed Hall that it was consolidating its offices and that it would retain only one staff member in her position.¹⁶⁵ Further, Nalco informed Hall that it would not retain her.¹⁶⁶ Hall's supervisor at Nalco told her that it was in her "best interest" that she not be retained because of her "health condition," and in Hall's job performance review the supervisor noted that Hall was frequently absent due to infertility treatments.¹⁶⁷

Hall alleged that Nalco fired her because she was "a member of a protected class, female with a pregnancy related condition, infertility."¹⁶⁸ The district court granted summary judgment in favor of Nalco on Hall's claim under the PDA on the grounds that infertile women are not a protected class under the PDA because infertility is a gender-neutral condition.¹⁶⁹

The Seventh Circuit Court of Appeals reversed.¹⁷⁰ The court acknowledged that infertility is a gender-neutral condition but distinguished Hall's claim from one based on infertility alone.¹⁷¹ The key piece of the claim was that she was undergoing IVF in order to become pregnant.¹⁷² According to the court, Hall's claim was inextricably tied to sex because of its implications for Hall's childbearing capacity.¹⁷³ The Seventh Circuit distinguished *Krauel* and *Saks* from *Hall* because *Krauel* and *Saks* based their analysis heavily on the issue of infertility alone, but that type of reliance is "misplaced in the factual context of [*Hall*]."¹⁷⁴

The court reasoned that *Hall* was much more like *Johnson Controls* because in that case fertility was important, but the conduct complained of was not gender

159. *Hall v. Nalco Co.*, 534 F.3d 644, 645-46 (7th Cir. 2008).

160. *Id.* at 649.

161. *Id.* at 645.

162. *Id.*

163. *Id.* at 646.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 649.

171. *Id.* at 647-49.

172. *Id.* at 648-49.

173. *Id.*

174. *Id.* at 648.

neutral.¹⁷⁵ In *Hall*, the Seventh Circuit reasoned that Nalco's action amounted to the same thing.¹⁷⁶ "Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth . . . will always be women. This is necessarily so; IVF is one of several assisted reproductive technologies that involves a surgical impregnation procedure."¹⁷⁷ Thus, the court concluded, if the facts are taken in the light most favorable to Hall, Nalco terminated her for the sex-specific characteristic of childbearing capacity not the sex-neutral condition of infertility.¹⁷⁸ Therefore, it appears that the Seventh Circuit extended protection of the PDA to women who must be absent from work due to IVF treatment because adverse employment action based on childbearing capacity is always sex-based discrimination.¹⁷⁹ In light of *Johnson Controls*, the Seventh Circuit made the right decision.¹⁸⁰ However, it is unclear how a woman in this situation could actually prove that her employer subjected her to disparate treatment.

III. THE PROBLEM WITH THE "SIMILARLY SITUATED" STANDARD

According to the Federal Department of Health and Human Services, approximately ten percent of women aged fifteen to forty-four in the United States had trouble becoming pregnant or carrying a baby to term in 2002.¹⁸¹ Infertility is a problem that is not going away, and because women are employed in large numbers,¹⁸² we can expect more cases like Hall's. As a result, it is important for the courts to determine a workable solution for the nuanced problem of defining disparate treatment under the PDA for women undergoing IVF and other aggressive fertility procedures. The problem that this Note seeks to address is contained within the fourth prong of the *McDonnell Douglas* test¹⁸³ as courts apply it to PDA cases.¹⁸⁴ After *Hall*, it should be straightforward for

175. *Id.* at 648-49.

176. *Id.*

177. *Id.*

178. *Id.* at 649.

179. *See id.*

180. *See* 499 U.S. 187, 198 (1991).

181. Frequently Asked Questions: Infertility, *supra* note 2.

182. *See* Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 6, 2009, at A1 (noting that although women make up approximately 47.1% of the work force, the industries hit hardest by the recession are occupied primarily by men, putting women in the position of being close to the majority of American workers for the first time in history).

183. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192 (10th Cir. 2000) (noting that the four factors of the McDonnell Douglas test as it is applied in PDA cases require the plaintiff to show: (1) that she is a member of a protected group; (2) that she is qualified for the position; (3) that the defendant took adverse employment action; (4) that the defendant treated the plaintiff less favorably than other employees who were not members of the protected group but were similar in their ability or inability to work).

184. *Id.* (noting that the fourth prong is whether the employer treated the employee less

a woman undergoing IVF to assert facts that fulfill the first three requirements of the test,¹⁸⁵ but the fourth factor, the “similarly situated” standard, is a problem for plaintiffs who are undergoing IVF.¹⁸⁶ In cases with plaintiffs who base their claims on IVF treatment, the “similarly situated” standard does not fulfill Congress’s intention in enacting the PDA.¹⁸⁷ The “similarly situated” standard also presents policy-based problems in cases with plaintiffs who are seeking to prove that their employers discriminated against them because of their IVF status.

A. The “Similarly Situated” Standard is Flawed in Light of Congress’s Purpose in Enacting the PDA

The “similarly situated” standard does not provide women with the full extent of protection that Congress envisioned when it enacted the PDA.¹⁸⁸ A rigid reliance on positive law, legal formalism, pervades the judicial application of this standard,¹⁸⁹ even in the Tenth Circuit, which put forth the broadest application of any circuit court.¹⁹⁰ A court’s choice to rely on positive black letter law is not inherently wrong, but the positivist application of the “similarly situated” standard does not fulfill the intention of Congress.¹⁹¹ Although the “similarly situated” language appears in the “equality clause” of the statute, the plain language and the Supreme Court precedent interpreting the statute do not cabin the disparate treatment analysis in these cases to the narrow formal equality the federal courts of appeals have enforced as the law.¹⁹² Instead of seeking out actual equality for men and women in the workplace, this rigid black letter interpretation of the standard promotes nothing more than mere formal

favorably than other employees not in the protected class but “similarly situated” in their ability or inability to work).

185. See *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008) (establishing that women undergoing IVF treatment are protected under the PDA).

186. See *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195; *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 207 (5th Cir. 1998); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

187. See H.R. REP. NO. 95-948, at 3-4 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4752-53.

188. See 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams) (noting that under the PDA Congress sought 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”).

189. See Eric Engle *The Fake Revolution: Understanding Legal Realism*, 47 WASHBURN L.J. 653, 660 (2008) (noting that “legal formalism” can mean “legalism,” which is a rigid inflexible application of black letter law without regard to the practical consequences).

190. See *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191.

191. See 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams).

192. See 42 U.S.C. § 2000e(k) (2006); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285-86 (1987); see also discussion *supra* Part I.D.

equality.¹⁹³ The problem is that fertility treatment is different in kind from kidney disease and broken bones. That difference is not only that IVF treatment is a protected characteristic but also that its effects and duration are so uncertain.¹⁹⁴

The current judicial interpretation of disparate treatment under the PDA only catches the most obvious examples of pregnancy-based discrimination.¹⁹⁵ As a result, a woman is still not safe in her workplace from the threat of adverse employment action based on her pregnancy or other medically related conditions.¹⁹⁶ The House Committee Report that accompanied the PDA stated that “testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and it is at the root of the discriminatory practices which keep women in low-paying and deadend jobs.”¹⁹⁷ As a result of the phenomenon described in the House Committee Report, women in Hall’s situation are in an even more precarious position than pregnant women because of the subtlety of the issues surrounding IVF treatment.¹⁹⁸ IVF, unlike pregnancy, is more purely a health status that is closely associated with disease and complication.¹⁹⁹ Further, it is unclear how long a woman might continue to pursue IVF treatment in order to achieve a pregnancy.²⁰⁰ The uncertain nature of the woman’s time commitment to undergoing IVF treatment provides a huge incentive to her employer to terminate her because of her potentially high cost.²⁰¹ Under the “similarly situated” standard, if an employer terminated an IVF

193. See, e.g., *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

194. See *supra* Part II.A (discussing IVF treatment).

195. See *Manners*, *supra* note 31, at 222-24 (discussing how the “similarly situated” standard does not promote the purpose of the PDA because it does not protect most pregnant employees).

196. See 42 U.S.C. § 2000e(k) (requiring that employers not take adverse employment action against employees because of the employees’ pregnancy or medically related condition); *but see* *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 642-43 (6th Cir. 2006) (finding no unlawful disparate treatment when a pregnant woman was denied light duty assignment because her pregnancy was not an injury sustained on the job); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1311 (11th Cir. 1999) (finding no disparate treatment or disparate impact when a woman was terminated due to pregnancy induced physical limitations); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (finding that employer’s denial of light duty assignment to a woman limited in her physical ability due to pregnancy was not unlawful); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738-39 (7th Cir. 1994) (finding that an employer’s termination of a woman due to either lateness because of her morning sickness or a fear that she would not return after her maternity leave was not unlawful).

197. H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

198. See *supra* Part II.A-B.

199. Paul Ogburn Jr., *Deadly Deliveries*, N.Y. TIMES, Oct. 14, 2007, at CY14 (noting the close association between fatal maternal complications and IVF treatment).

200. See *supra* Part II.A.

201. *Cf. Troupe*, 20 F.3d at 738 (noting that the expense of an employee’s leave is a significant reason for the employer to fire the employee).

patient, even though the employer is acting directly on the protected characteristic, the employer's action would be legal.²⁰²

Additionally, IVF treatment still is subject to a lot of societal contention, and thus, it is more difficult for the courts to evenhandedly determine what disparate treatment is in this context.²⁰³ Broadly, Congress wanted to provide women with a legal mechanism that would allow them to avoid being pigeonholed in "low-paying and deadend jobs."²⁰⁴ Therefore, that legal mechanism would have to combat the stereotypes that pervade the perception that employers have of women in relation to their business.²⁰⁵ In the context of pregnancy discrimination based on IVF treatment, that means the courts need to be extra vigilant for disparate treatment because of the uncertain position that IVF treatment occupies in society.²⁰⁶ Thus, in order to prevent discrimination in cases that involve IVF, the courts need to look at the employer's action in light of the protected characteristic, and the "similarly situated" standard does not allow the courts to do that.²⁰⁷

Additionally, Congress wanted the PDA to lessen the need for disparate impact as a theory of discrimination.²⁰⁸ In order for women to take full advantage of the protections of Title VII, they must resort to disparate impact theories because of the cramped formal nature of the current judicial interpretation of disparate treatment.²⁰⁹ Therefore, with regard to Congress's preference for a type of litigation that results from the statute, the "similarly situated" standard also thwarts Congressional intent.

B. Public Policy Supports a New Approach to Disparate Treatment in IVF Based PDA Cases

It is not uncommon to hear in popular discourse that today's women "want to do it all."²¹⁰ Although patronizing all on its own, this phrase is often accompanied by criticism, as though women are not entitled to anything more

202. *See id.*

203. *See* Ann Adams Lang, *Doctors Are Second Guessing the 'Miracle' of Multiple Births*, N.Y. TIMES, June 13, 1999 § 15, at 4 (noting that "[e]thics, emotion and money . . . cloud the already murky waters of assisted reproduction").

204. *See* H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

205. *See* Peggy Orenstein, *In Vitro We Trust*, N.Y. TIMES, July 20, 2008, at MM11 (noting that a perception exists that IVF is not an acceptable medical procedure).

206. *See id.*

207. *See In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting) (noting that the employer's action in firing a woman because of her absence on maternity leave was functionally equivalent to firing her because she was pregnant).

208. *See* H.R. REP. NO. 95-948, at 3.

209. *See, e.g., Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (noting that plaintiffs may proceed on either a disparate treatment theory or a disparate impact theory).

210. *See Bentley, supra* note 111, at 391.

than they already have.²¹¹ The reality is that many women who might fall into this category only want what men have had all along, the ability to maintain both family and career.²¹² Said differently, women want fairness in employment. Although the law, through mechanisms like Title VII, gave women the opportunity to get their feet in the doors of mega corporations and law firms, women continue to struggle for legitimate status as true players in corporate America.²¹³

It is in the general interest of women that employers truly accept them and present them with equal opportunity to gain employment commensurate with their skill and education even though the physical responsibility for bearing children falls to them.²¹⁴ Employers can help women realize their interests by avoiding the use of stereotyping when they make their employment decisions.²¹⁵ The law can help ensure that women realize their interests by requiring that the courts actually examine the reasons employers make employment decisions that involve women who are protected by the PDA.²¹⁶ If the reason that the employer is making an employment decision is actually the employee's IVF status, then the PDA mandates that the court step in and protect the woman.²¹⁷ The "similarly situated" standard does not allow the court to consider what the employer is actually doing.²¹⁸ It instructs the court to stamp its judicial "OK" to functional instances of adverse employment action based on pregnancy in all but the most facially discriminatory cases.²¹⁹ The broad interests of fairness and equal

211. Jodi Kantor & Rachel L. Swarns, *A New Twist in the Debate Over Mothers*, N.Y. TIMES, Sept. 2, 2008, at A1.

212. *See id.*

213. *See* Barnard & Rapp, *supra* note 6, at 130-31.

214. *See id.* at 131 (citing Joan S. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77-78 (2003)) (noting that although young women's and men's wages are roughly equal, mothers' wages are only sixty percent of the wages that fathers earn).

215. *See* H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751 (noting that the use of sex-based stereotyping in hiring results in women being stuck in "low-paying and deadend jobs").

216. *See In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 305 (3d Cir. 1997) (McKee, J., dissenting) (noting that the longstanding "fear that women would get pregnant and be absent from their jobs" was at least partially responsible for workplace discrimination against women).

217. *See id.* at 308 (noting that Title VII requires a causal nexus between the employer's state of mind and the protected trait and when the adverse employment action is based solely on pregnancy-related absence then the causal nexus "runs afoul of Title VII's prohibition of sex discrimination").

218. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (illustrating that the "similarly situated" standard requires the court to divide pregnancy and morning sickness, two concepts that are inextricably intertwined).

219. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 306 (noting that the employer's action in firing a woman because of her absence on maternity leave was functionally equivalent to firing her because she was pregnant).

opportunity dictate that the “similarly situated” standard is not the best tool to prevent employers from being allowed to act on stereotypes regarding women who are undergoing IVF.

Broad utilitarian considerations provide another reason for courts to use a more pragmatic approach to defining disparate treatment in situations where a woman is undergoing IVF. In 2003, thirty-three percent of women aged twenty-five to twenty-nine had a bachelor degree or more education compared with only twenty-nine percent of their male counterparts.²²⁰ Because the current employment paradigm often does not support women in their capacity as caregivers, many women end up at home instead of in the work place, but that is typically after employment through a pregnancy.²²¹ These women at least have more time and security in their employment through the course of their pregnancies than women who must undergo aggressive fertility procedures like IVF. Cheryl Hall and women like her encounter resistance from their employers before they even face the question of whether they should “opt-out,” and thus, it is likely that the market will lose their services sooner than even those women who become pregnant in the traditional way.²²² Sheer numbers dictate that quite a few women will be in the same predicament as Ms. Hall in the upcoming years.²²³ The current judicial interpretation of disparate treatment does not protect these women, and as a result, the market will end up losing access to a high percentage of educated participants.²²⁴ Therefore, not only is the statute amenable to a different approach to disparate treatment,²²⁵ but society needs it if it is to tap into the education and skills of the population with the highest number of college educated members, women.

IV. ANALYTICAL CONNECTION: AN ANSWER TO THE “SIMILARLY SITUATED” PROBLEM

There is a better judicial approach to defining disparate treatment in Title VII cases where the plaintiff is undergoing IVF treatment. It is appropriate for both the U.S. Supreme Court and the lower courts to define disparate treatment in a unique way for Title VII plaintiffs involved in IVF treatment. A new approach to disparate treatment in this context, analytical connection analysis, better addresses the problem of disparate treatment in IVF cases. The contours of analytical connection analysis become clear through its application to a series of hypothetical situations involving a woman who suffers adverse employment

220. *Facts for Features: Women’s History Month*, U.S. Census Bureau, available at <http://www.census.gov/Press-Release/www/2003/cb03-ff03.pdf>.

221. Barnard & Rapp, *supra* note 6, at 132 (describing the “opt-out” phenomenon).

222. *See* Hall v. Nalco Co., 534 F.3d 644, 646 (7th Cir. 2008).

223. *See* Frequently Asked Questions: Infertility, *supra* note 2.

224. *See* Lisa Belkin, *Life’s Work; For Women, the Price of Success*, N.Y. TIMES, Mar. 17, 2002, § 10, at 1 (noting that women increasingly must choose between “megawatt careers” and having children).

225. *See* sources cited *supra* note 192.

action because of her IVF status. Due to the nature of IVF treatment, the courts need a principled way to limit the application of analytical connection analysis in IVF cases, but such limits are available.

A. IVF Treatment Requires Its Own Test

Approaching the problem by evaluating the analytical connection between the employment action and the plaintiff's protected status is not perfect, but it is much truer to Congressional intent than the "similarly situated" standard in a situation involving enforcement of Title VII in a case where an employee is undergoing IVF treatment.²²⁶ The analytical connection theory of disparate treatment is unique within the disparate treatment jurisprudence of Title VII. Typical *McDonnell Douglas* analysis requires a plaintiff to show that the employer treated employees who were not members of the protected group more favorably than the plaintiff even though those employees were "similarly situated" in their ability to work.²²⁷ Asking whether non-protected employees were treated better than protected employees is a reasonable barometer for courts to use in determining whether an employer discriminated on the basis of race, religion, ethnicity, national origin, or even sex broadly on its face.²²⁸ None of these protected classifications is analytically related to the employee's ability to work.²²⁹ An African-American employee is just as capable as his Irish-American coworker is if both are similarly situated in their ability to work. Therefore, when the employer fires the African-American employee and promotes the Irish-American employee, the employer's action raises a permissible inference that the employer acted solely because of a protected characteristic, race.²³⁰ This type of analysis works for every protected classification, except those that the PDA implicates.²³¹ Thus, in Title VII cases that do not rest on the PDA, no reason exists for a court to get into a consideration of the analytical connection between the employer's purported reason for the adverse employment action and the protected characteristic. It is enough in those situations that a court look to whether the employer treated non-protected employees who were similar in their

226. See *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 305-06 (3d Cir. 1997) (McKee, J., dissenting) (discussing the legal implications of the analytical connection test in the context of pregnancy based Title VII litigation).

227. See *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000) (noting that the fourth prong is whether the employer treated the employee less favorably than other employees not in the protected class but "similarly situated" in their ability or inability to work).

228. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973) (discussing the test for determining disparate treatment outside of the pregnancy context).

229. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 304-05.

230. See *id.* at 306 (distinguishing disparate treatment in the pregnancy context from disparate treatment in any other Title VII context).

231. See 42 U.S.C. § 2000e (2006) (defining the protected classifications for the purposes of Title VII).

ability to work similarly to how it treated its protected employees.²³² In cases where the employee has the protection of Title VII because of her IVF status, the protected trait itself affects her ability to work.²³³ The very nature of the protection that Title VII extends through the PDA is protection from discrimination because of a health status, and that is unique among the classes protected under Title VII.²³⁴ Thus, it is appropriate for a court to make sure that it is giving the protected characteristic real consideration when it determines whether the employer subjected the employee to disparate treatment.²³⁵ In order to do that, analytical connection analysis is necessary.

Further, the basic syllogism that allows the “similarly situated” standard to work for discrimination in Title VII cases where other protected classes are implicated might superficially function in IVF cases. But there is no true comparison group for women who are undergoing IVF treatment; so, the entire test falls apart upon closer inspection.²³⁶ The “similarly situated” standard forces the court to reach for groups that are similar only in some respects to women who are undergoing IVF and then requires a court to infer the employer’s intent from that imperfect analogy. It does not make sense to try to stretch the logic of the *McDonnell Douglas* test when the unique health-based characteristic at play in IVF cases allows a court to look directly at the protected characteristic and its analytical connection to the adverse employment action that the employer took against the employee.²³⁷

B. Analytical Connection: Its Origin and How It Works

If the courts are to realize the broad social mandate of the PDA,²³⁸ then they must take a more pragmatic approach to defining disparate treatment in cases of adverse employment action based on IVF status.²³⁹ The concept of analytical connection is helpful in considering the best way to approach defining disparate

232. See *Dandy v. United Parcel Serv.*, 388 F.3d 263, 272 (7th Cir. 2004) (applying the *McDonnell Douglas* analysis in a Title VII case in a context outside of the PDA).

233. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 306.

234. Compare *Hall v. Nalco Co.*, 534 F.3d 644, 645-46 (7th Cir. 2008) (describing the health based protected characteristic) with 42 U.S.C. § 2000e(j)-(k) (defining the protected classifications for the purposes of Title VII).

235. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 306.

236. See *supra* Part II.A (describing IVF treatment); *Manners, supra* note 31, at 209-11 (illustrating the difficulty in finding a class of employees “similarly situated” to pregnant women).

237. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 308.

238. See *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1317(11th Cir. 1994) (noting that “[b]oth legislative history and relevant caselaw support a conclusion that Congress intended the PDA to end discrimination against pregnant employees”).

239. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 304-07 (noting that the *Troupe* approach to disparate treatment, and others like it, removes a “substantial portion of the protection Congress intended” and suggesting that a broader analysis might be necessary in order to ensure that women receive all of the protection Congress intended the PDA to afford them).

treatment in a more pragmatic way for the purposes of PDA cases.²⁴⁰ The idea for an analytical connection analysis comes from *Hazen Paper Co. v. Biggins*,²⁴¹ which the Supreme Court decided under the Age Discrimination in Employment Act (ADEA).²⁴² The ADEA is concerned with protecting employees over the age of forty from adverse employment action that employers might take against them based on stereotypes about their age.²⁴³ In *Hazen Paper Co.*, a sixty-two-year-old man was fired just before his pension was about to vest.²⁴⁴ The Court found that Hazen Paper fired Biggins because his pension was about to vest, and that was not *analytically* related to his age.²⁴⁵ The Court stated, “[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age based.’”²⁴⁶ Therefore, Hazen Paper’s termination of Biggins was not unlawful under the ADEA.²⁴⁷ The idea of an employer being able to take account of one concept and not logically ignore the other is the fundamental definition of analytical connection analysis,²⁴⁸ and that is what makes it so useful for defining disparate treatment in IVF based PDA cases. An employer cannot consider IVF related absence from work for the purposes of employment decisions without considering IVF treatment itself, the protected characteristic.²⁴⁹

1. *Analytical Connection or Cause in Fact?*—Analytical connection analysis, though somewhat similar to cause in fact analysis, is not precisely the same.²⁵⁰ Under analytical connection analysis, if an employer takes adverse employment action against a woman who is undergoing IVF treatment because of that IVF treatment or any of its directly related consequences, then the employer is acting against the woman because of her protected characteristic.²⁵¹ Put another way, if an effect flows directly from the woman’s IVF status, then it is analytically connected to her IVF status such that it should be considered to

240. *See id.* at 306.

241. 507 U.S. 604 (1993).

242. *See id.* at 611-12.

243. *See* 29 U.S.C. § 623(a)(1) (2006); *Hazen Paper Co.*, 507 U.S. at 608.

244. *Hazen Paper Co.*, 507 U.S. at 606, 611-12.

245. *Id.*

246. *Id.* at 611.

247. *Id.* at 611-12.

248. *See id.* 610-11.

249. *See In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting) (noting that “[p]regnancy and absence are not, however, analytically distinct, and an employer can not punish for the absence occasioned by pregnancy under Title VII. . . . [The protection afforded by the PDA] is meaningless unless it is intended to extend to the ‘temporary’ absence from employment that is unavoidable in most pregnancies.”) (internal quotes omitted).

250. Compare *Hazen Paper Co.*, 507 U.S. at 611-12 (applying analytical connection analysis), with RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (1979) (explaining cause in fact analysis).

251. *Cf. Hazen Paper Co.*, 507 U.S. at 611-12.

legally be one in the same with her status as an IVF patient.²⁵²

A simple hypothetical is illustrative of the difference between analytical connection analysis and cause in fact analysis. Mrs. O'Leary's cow apocryphally kicked over a lantern and caused the Great Chicago Fire of 1871.²⁵³ As a result of the fire, Mr. and Mrs. Brown quickly left their home, and on the way out, they forgot to lock the door. The fire did not harm Mr. and Mrs. Brown's home. Before the Browns got home, Mr. Smith made his way into their home through the unlocked door and broke his leg because he tripped on a loose board in the Brown's front room. The action of Mrs. O'Leary's cow is the *cause in fact* of Mr. Smith's broken leg.²⁵⁴ If the cow had not caused the fire that spread and caused the Browns to panic and leave their home without locking the door, then Mr. Smith would never have been able to enter the Brown's home where he tripped on their loose floorboard. Therefore, in fact, Mrs. O'Leary's cow caused Mr. Smith's injury. However, Mrs. O'Leary's cow is not analytically connected to Mr. Smith's injury because Mr. Smith's injury does not directly relate and interconnect to the action of Mrs. O'Leary's cow.²⁵⁵ Thus, analytical connection analysis is different from pure cause in fact analysis because it is limited to objective, direct consequences that result from the protected status instead of tracing the adverse employment action all the way back to its perhaps subjective cause.²⁵⁶ Courts should carefully consider the reasons employers give for firing IVF patients. If the courts examined those reasons in relation to the IVF status of the plaintiff, they could uncover analytical connections that would illustrate that, unlike Mrs. O'Leary's cow and Mr. Smith's injury, the plaintiff's IVF status is tightly analytically connected to the reason the employer gave for taking adverse employment action against the plaintiff.²⁵⁷ The "similarly situated" standard, however, would not afford these women protection.²⁵⁸

2. *How It Works*.—Both the "similarly situated" standard and analytical connection analysis require a court to make a decision about an employer's motivation, and that is hard.²⁵⁹ However, the analytical connection test offers a

252. Cf. *In re Carnegie Ctr. Assocs.*, 129 F.3d at 304-305.

253. See Thomas F. Schwartz, *Forward* to RICHARD F. BALES, *THE GREAT CHICAGO FIRE AND THE MYTH OF MRS. O'LEARY'S COW* 1, 1 (McFarland 2005) (noting that although initially thought of as the originator of the Great Chicago Fire, Mrs. O'Leary's cow is innocent). This example is the product of the imagination of the Author of this Note.

254. See RESTATEMENT (SECOND) OF TORTS, *supra* note 250 (explaining cause in fact analysis).

255. See *Hazen Paper Co.*, 507 U.S. at 611-12 (explaining analytical connection analysis).

256. See RESTATEMENT (SECOND) OF TORTS, *supra* note 250 (explaining cause in fact analysis).

257. Cf. *Hazen Paper Co.*, 507 U.S. at 611-12; see also *In re Carnegie Ctr. Assocs.*, 129 F.3d at 306 (applying analytical connection to absence related to morning sickness).

258. Cf. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (upholding the legality of firing a pregnant woman for tardiness because of morning sickness).

259. See generally Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 492 (2006) (describing the difficulty

court a flexible approach to a fluid problem, which is a distinct benefit over the somewhat static “similarly situated” approach.²⁶⁰ It also allows the court to look at the plaintiff’s situation on its own merits instead of requiring a court to come up with a strained and imperfect comparison.²⁶¹ The distinction between form and function is paramount because of the uncertainty that surrounds the infertility treatment process.²⁶² The “similarly situated” standard could conceivably let employers get away with firing a woman upon the onset of her infertility treatment simply because of the uncertainty and potential cost to the employer associated with the woman’s IVF status.²⁶³ In order to implement analytical connection analysis in a case involving an IVF patient, a court must first examine the employer’s asserted reason for the adverse employment action the employer took against the plaintiff.²⁶⁴ To tease out the subtleties in the issues surrounding discrimination based on IVF, it is useful to look at a spectrum of examples and examine how the analytical connection theory of disparate treatment would apply in each case.

The most obvious case of illegal disparate treatment in a case involving an IVF patient is where the employee has clear evidence that the employer took adverse employment action against her simply because the employer had an ideological problem with IVF.²⁶⁵ In this situation, the employer’s action is based entirely on his or her own biases regarding IVF. The analytical connection between the adverse employment action that the employer took against the plaintiff and the plaintiff’s status as an IVF patient is clear. The employer’s ideological problem with IVF is inextricably linked to the adverse employment action that the employer took against the IVF patient.²⁶⁶ Even under the

of determining employer motivation when analyzing disparate treatment).

260. *Compare In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 305-06 (3d Cir. 1997) (McKee, J., dissenting) (applying analytical connection to the facts of *Troupe*), *with Troupe*, 20 F.3d at 735 (applying the “similarly situated” standard to the same facts).

261. *See Manners*, *supra* note 31, at 209-11 (illustrating the difficulty in finding a class of employees that are “similarly situated” to pregnant women).

262. *See THE CORNELL ILLUSTRATED ENCYCLOPEDIA OF HEALTH*, *supra* note 113, at 649 (noting that each embryo transfer in IVF treatment is around twenty-five percent successful).

263. *See Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (defining the “similarly situated” standard in terms of expense the employee causes the employer).

264. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993) (applying analytical connection analysis in the context of the Age Discrimination in Employment Act).

265. Title VII provides an exemption for religious corporations, associations, educational institutions, or societies such that it might not be illegal for a Roman Catholic school to fire a woman for undergoing IVF treatment in contravention of Church law. *See* 42 U.S.C. § 2000e-1(a) (2006); *Church of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (upholding the constitutionality of the exception). *But see Miller v. Bay View United Methodist Church*, 141 F. Supp. 2d 1174, 1180 (E.D. Wis. 2001) (noting that these exempted organizations may not discriminate because of sex even though they may make religiously based employment decisions).

266. *Cf. In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 305 (3d Cir. 1997) (McKee, J., dissenting) (applying analytical connection to the facts of *Troupe*).

“similarly situated” standard, the action of this employer would be illegal because the employer undertook the adverse action solely because of the IVF treatment, and presumably, the employer would treat employees not undergoing IVF but “similarly situated” in their ability to work differently.²⁶⁷

The next situation might be a little less obvious. In this case, the IVF patient’s doctor directs her to take three weeks off work in order to undergo her IVF procedure, and her employer takes adverse employment action against her based on her absence. In this situation, the IVF patient’s absence is directly medically related to her IVF status, her protected characteristic.²⁶⁸ Thus, the absence is analytically connected to the IVF patient’s protected characteristic. Under the analytical connection analysis, a court would determine that the employer’s action against this woman for her absence is tantamount to taking adverse employment action against her because of her IVF status.²⁶⁹ Thus, the adverse employment action would be unlawful.²⁷⁰ Yet, under a “similarly situated” test it is likely that any adverse employment action the employer takes against the IVF patient is legal.²⁷¹ As long as the employer would have taken a similar employment action against a male employee embarking on a leave of absence for a kidney transplant that is similar in type and duration, then the employer is within the bounds of the PDA under the “similarly situated” standard.²⁷² The problem is that Title VII does not protect kidney transplants, but it does protect IVF treatment.²⁷³ Thus, the “similarly situated” standard does not ensure that the employer follows the law, but an analytical connection analysis does.

The final situation is the least clear. The IVF patient has been unsuccessful in her pursuit of pregnancy through IVF. As a result of her second cycle of

267. Cf. *Troupe*, 20 F.3d at 738 (applying the “similarly situated” standard).

268. See *supra* Part II.A (describing IVF).

269. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 306 (noting that pregnancy and absence are not analytically distinct).

270. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993) (applying analytical connection analysis in the context of the Age Discrimination in Employment Act); *In re Carnegie Ctr. Assocs.*, 129 F.3d at 305 (applying analytical connection to the facts of *Troupe*).

271. See *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 638, 642 (6th Cir. 2006) (finding no unlawful disparate treatment when a pregnant woman was denied light duty assignment because her pregnancy was not an injury sustained on the job); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1311, 1314 (11th Cir. 1999) (finding no disparate treatment or disparate impact when a woman was terminated due to pregnancy induced physical limitations); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 205, 207-08 (5th Cir. 1998) (finding that employer’s denial of light duty assignment to a woman limited in her physical ability due to pregnancy was not unlawful); *Troupe*, 20 F.3d at 738 (finding that an employer’s termination of a woman due to either lateness because of her morning sickness or a fear that she would not return after her maternity leave was not unlawful).

272. See *Troupe*, 20 F.3d at 738 (noting that as long as similar action is taken against employees similar in their expense there is no unlawful discrimination).

273. See 42 U.S.C. § 2000e (2006) (protecting pregnancy and medically related conditions as part of the definition of sex under Title VII but no other health based traits).

treatment, she medically requires a second leave of absence.²⁷⁴ The problem in this example is whether a court should carry the analytical connection analysis through to a second round of IVF. In this instance, the court needs to make a policy decision because Congress did not mean for the PDA to confer a benefit on women who fell into its definition.²⁷⁵ As a result, a question exists whether the employee's absence is more about her choice to pursue a strategy to achieve pregnancy that has proved unsuccessful, or her protected IVF status.²⁷⁶ A court that applied the "similarly situated" standard might analogize this employee to an athlete who has to continuously rehab a knee injury, which requires the knee patient to take repeated leaves from work.²⁷⁷ Under the "similarly situated" standard, if the employer would take adverse employment action against the knee patient for his absences, then the employer could legally take adverse employment action against the repeat IVF patient.²⁷⁸ Because courts must avoid conferring a special benefit on the employee, it is appealing to use the "similarly situated" standard as the preferred judicial approach in repeat IVF cases. In a repeat IVF case, the analytical connection might be strongest between the adverse employment action and the woman's choice to pursue a medical strategy that is failing. The "similarly situated" standard provides courts with a way to allow the employer to fire this woman with few questions.²⁷⁹ However, the woman's choice still puts her in a position where she exhibits a protected characteristic, IVF status. Thus, it should not be a foregone conclusion that her employer can fire her with impunity.

C. A Method for the Courts to Distinguish Between Unlawful Employment Action and Judicially Conferred Benefits

The analytical connection analysis may not be as satisfying as a brightline test. But the "similarly situated" standard does not offer a brightline solution either because there is no clear comparison group for women who are undergoing IVF.²⁸⁰ Further, the analytical connection model provides the IVF patient with at least one clear protected opportunity to pursue IVF treatment, and because of that opportunity, it is more faithful to Congressional intent than the "similarly

274. See THE CORNELL ILLUSTRATED ENCYCLOPEDIA OF HEALTH, *supra* note 113, at 649 (noting that IVF has a twenty-five percent success rate for each attempted embryo transfer).

275. See H.R. REP. NO. 95-948, at 3-4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751-52 (1978) (noting that the PDA was not intended to confer additional benefits on pregnant women).

276. *Cf. In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting) (noting that pregnancy and absence are not analytically distinct).

277. See *Troupe*, 20 F.3d at 738 (noting that a man undergoing a kidney transplant might be an appropriate comparison for a woman leaving on maternity leave).

278. See *id.*

279. See *id.*

280. See *Manners*, *supra* note 31, at 209-11 (noting the difficulty in finding a class of employees that are "similarly situated" to pregnant women).

situated” standard.²⁸¹ However, when it enacted the PDA, Congress did not want it to confer additional benefits to the women protected by the PDA.²⁸² Therefore, a line must exist where the woman’s absence is less directly related to her IVF status and more directly related to her choice to continue to pursue IVF treatment. The uncertainty that surrounds the IVF procedure is not just a problem for the woman undergoing it, but it is a problem for her employer and the courts.²⁸³ Thus, the court must engage in some amount of interest balancing in order for it to determine what disparate treatment looks like in repeat IVF cases.

An employer’s primary interest at stake in these cases is maintaining an economically feasible business.²⁸⁴ In fact, the employer’s economic interest is so important that it has been some courts’ primary consideration in determining the nature of disparate treatment in cases that involve the PDA.²⁸⁵ PDA cases that involve IVF treatment demand a particularly stringent examination of the interests of the employer because of the uncertainty that is attendant to the entire fertility treatment undertaking.²⁸⁶ To avoid conferring a benefit on the employee who is undergoing IVF, it is important to draw a line at the protection that the PDA affords her. The analytical connection between the employee’s behavior and the protected characteristic is so strong in the first instance of the IVF related behavior, that the employer should have no legal choice but to refrain from acting against the employee’s behavior.²⁸⁷ In that instance, any adverse employment action that the employer takes against the employee based on her IVF status would contravene the statutory requirement that it not take any adverse employment action against an employee because of her protected characteristic.²⁸⁸

However, if the employee chooses to undergo successive IVF treatments that necessitate more and more absence, the court must be able to point to a place in time where the strongest analytical connection is between the employee’s behavior and the employee’s inefficient choice to continue to pursue pregnancy through aggressive fertility treatment.²⁸⁹ In those cases, courts should shift the burden of proof to the employer after the employee establishes her prima facie

281. See *In re Carnegie Ctr. Assocs.*, 129 F.3d at 307.

282. See H.R. REP. NO. 95-948, at 3-4 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751-52.

283. See, e.g., *Troupe*, 20 F.3d at 738 (noting that cost is important to employers).

284. See *id.* (noting that businesses have an interest in economic feasibility).

285. See, e.g., *id.* (defining the “similarly situated” standard in terms of expense to the employer).

286. See *supra* Part II.A.

287. See *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 305-08 (3d Cir. 1997) (McKee, J., dissenting) (applying analytical connection analysis to an employee’s pregnancy based absence).

288. See *id.*

289. The employee who chooses to undergo IVF treatment for yet another time is more like an employee whose pension is vesting because of years of service than the employee who is undergoing IVF for the first time who is more like the employee whose pension is vesting because of age. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993).

case of analytical connection. The employer should have the opportunity to put forward the same business necessity defense that is available for other violations of the statute.²⁹⁰ This defense is a narrow one that generally consists of the employer putting forth evidence that shows that the adverse employment action is essential for the safety and efficiency of the employer's business.²⁹¹ Further, the employer must show that it had no less discriminatory alternative to the adverse employment action.²⁹² The courts simply must allow a showing of this defense as a matter of convention in this new type of case. In this way, courts can take care of the economic interests of the employer by allowing the employer to assert its essential interests, and courts can afford the employee the protection that the statute requires. Thus, the woman is not forced into a difficult position where she has to prove intent but has little access to the evidence.²⁹³ Additionally, courts are not forced to find a "similarly situated" group when a perfect one does not likely exist because of the unique problems associated with IVF treatment.²⁹⁴

CONCLUSION

The Seventh Circuit correctly extended the umbrella of PDA protection to women who are undergoing IVF.²⁹⁵ However, that extension of protection presents problems for the current judicial structure for dealing with disparate treatment claims under Title VII. Congress intended the PDA to end all employment discrimination against women.²⁹⁶ The "similarly situated" standard contravenes the purpose of Congress in enacting the PDA in the IVF context because it allows the courts to avoid analyzing the actual basis for the employer's adverse employment action.²⁹⁷ Analytical connection analysis presents a workable approach to disparate treatment because it cuts to the heart of the employer's action and provides the plaintiff with the protection Congress promised, but it does not require courts to allow the employee infinite bites at the apple.

290. See generally James O. Pearson Jr., Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discriminatory Under Title VII of the Civil Rights Act of 1964*, 36 A.L.R. FED. 9 (1978) (describing the parameters and application of the business necessity defense).

291. See *id.*

292. See *id.*

293. See *supra* note 71 and accompanying text.

294. See *Manners*, *supra* note 31, at 209-11 (illustrating the difficulty in finding a class of employees that are "similarly situated" to pregnant women).

295. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991).

296. See *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1317 (11th Cir. 1994) (noting that "[b]oth history and relevant caselaw support a conclusion that Congress intended the PDA to end discrimination against pregnant employees").

297. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (holding that it is legal to fire a woman because of absenteeism caused by morning sickness).