Litigation Against Employment Penalties for Pregnancy, Breastfeeding, and Childcare

Candace Kovacic-Fleischer

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LITIGATING AGAINST EMPLOYMENT PENALTIES FOR
PREGNANCY, BREASTFEEDING AND CHILDCARE*

CANDACE SAARI KOVACIC-FLEISCHER**

I. INTRODUCTION

IN the last State of the Union Address before the new millenium, President Bill Clinton proposed a number of reforms for women and for parents. He called for equal work for equal pay; quality childcare; subsidies for working parents; tax credits for working and stay at home parents; and expansion of the Family and Medical Leave Act (FMLA). Most importantly for purposes of this Article he said, “[p]arents should never face discrimination in the workplace. I will ask Congress to prohibit companies from refusing to hire or promote workers simply because they have children.”

It is probably not a coincidence that those proposals were made together. They inter-relate. Parenting takes time, and, as society is currently structured, those time demands fall disproportionately on mothers. Of course, pregnancy, childbirth and breastfeeding are exclusively functions of being a woman and may cause women to take leaves from jobs. Lack of excellent and affordable child care as well as parental choice, may also cause either fathers or mothers to take leaves from jobs, but more often, mothers. Until the passage of the FMLA, the first statute that President

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** Professor of Law, Pauline Ruyle Moore Scholar, American University, Washington College of Law; A.B. Wellesley College, 1969; J.D. Northeastern University School of Law, 1974. I would like to thank my research assistants, Debra L. Satinoff and Jennifer A. Brennan, Class of 1999 and my students, Sun Hi Ahn, Jennifer Brennan, Daphne Fields and David Terbush, Class of 1999 for their research and editing assistance and/or their insightful comments. In addition, I would like to thank the American University Washington College of Law Research Fund for generously assisting with this research.


2. President William Jefferson Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 19, 1999), in 35 WEEKLY COMP. PRES. DOC. 78, 81 [hereinafter State of the Union]; see also Candace Saari Kovacic-Fleischer, United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII, 50 VAND. L. REV. 845, 909 (1997) (recipient of Washington College of Law’s Pauline Ruyle Moore Scholar Award for 1997) (asserting that “[b]ecause Congress has had political success with the FMLA, Congress could amend the FMLA or Title VII to provide further workplace adjustments for parenting.”).

3. For a further discussion of the disproportionate impact that inadequate family employment policies have on women, see infra note 68.

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Clinton signed into law after it had been vetoed twice by the prior administration, no federal law had been interpreted to require employers to provide job protection for child-related leaves. The FMLA, however, has only limited coverage, and no federal law requires employers to provide paid leave for any child-related activity. Studies have shown that, without guarantees of reemployment taken for pregnancy, unpaid job interruptions, breastfeeding or childcare have contributed to the pay differential between men and women. Thus, to eliminate the pay differential and other discrimination against mothers, President Clinton advocates more vigilance in ensuring equal pay for equal work, and also appears to realize that without maternity leave benefits and childcare, this will not be possible.

President Clinton also realizes that parents, and not just mothers, must be protected from discrimination in the workplace. If benefits are provided only to mothers, fathers would have to choose between time with their children or their job success, as mothers now often do; the idea that only mothers are important in the lives of their children would be perpetuated; and there would be continued discrimination against mothers because they would be viewed as different from fathers.

Not all of what President Clinton proposes is currently unavailable. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA), prohibits employers from intentionally discriminating against women, including pregnant women, and prohibits employers from having policies that have that effect. As this Article will demonstrate, however, lack of leaves for pregnancy, breastfeeding and childcare discriminate against women, but the courts, for the most part, have not recognized those deficiencies as Title VII violations. Despite the fact that many companies find family-friendly policies cost effective, many others penalize parents for having or caring for children.

4. See 29 U.S.C. §§ 2601-2654. Although the FMLA requires employers to provide certain pregnancy, childcare and other leave, those leaves are limited and unpaid. See 29 U.S.C. § 2612(a)-(c) (providing for maximum of 12 unpaid weeks of leave from work for birth of child or to care for ill family member). Moreover, the FMLA does not cover much of the workplace because only employers who have 50 or more employees are covered. See 29 U.S.C. § 2611(4)(A)(i). Additionally, employees eligible for leave under the FMLA must be employed for at least 12 months. See 29 U.S.C. § 2611(2)(A)(i). The FMLA was the first statute that President Clinton signed into law after it had been vetoed twice by the prior administration. See State of the Union, supra note 2, at 81; see also Kovacic-Fleischer, supra note 2 at 898-99, 903-04 (discussing limitations and history of FMLA).

5. For a further discussion of the economic impact of job interruption, see infra note 68 and accompanying text.


8. For further discussion of Title VII and its amendments, see infra Part II.B.

9. For a further discussion of lower court cases disregarding the protections of Title VII and the PDA, see Part II, infra, notes 83-194.

10. For further discussion of the cost-effectiveness of family-friendly policies, see generally Kovacic-Fleischer, supra note 2.
In this Article, I will describe a theory under Title VII that plaintiffs, both mothers and fathers, can use to challenge some inadequate parental employment policies, without having to wait for legislation. I derived this theory from three United States Supreme Court cases and first articulated it in an earlier article that focused on United States v. Virginia.\footnote{11. 518 U.S. 515 (1996); see generally Kovacic-Fleischer, supra note 2 (examining and applying Justice Ginsburg’s opinion in United States v. Virginia).}

In that case in 1997, the United States Supreme Court held that Virginia violated the Fourteenth Amendment’s Equal Protection Clause by excluding women from its all-male public military college.\footnote{12. See Virginia, 518 U.S. at 546 (holding that VMI’s “gender-defined classification” invalid); see also U.S. Const. amend. XIV, § 1 (“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”). See generally Jason M. Skaggs, Justifying Gender-Based Affirmative Action Under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard, 86 CAL. L. REV. 1169 (1998) (examining controversy surrounding “exceedingly persuasive justification” standard); Tracy Eubanks-Dawe, Note, Equal Opportunity at VMI: United States v. Virginia, 116 S.Ct. 2264 (1996), 22 S. ILL. U. L.J. 443, 460-66 (1998) (commenting on lower courts’ acceptance of female stereotypes in explaining why rational basis and strict scrutiny are inappropriate for gender classifications); Deborah A. Widiss, Note, Reviewing History: The Use of the Past as Negative Precedent in United States v. Virginia, 108 YALE L.J. 237 (1998) (developing theory of history as negative precedent).} The Court also held that the college would need to accommodate, but not to denigrate, the “celebrated differences” between the sexes.\footnote{13. See Virginia, 518 U.S. at 533 (‘‘Inherent differences’’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”).} Unfortunately, many lower courts have allowed employers to denigrate women for their celebrated differences with respect to reproduction, despite these women’s claims that employment penalties have discriminated against them in violation of Title VII and the PDA.

This Article argues that, based on my theory, such lower court cases are wrongly decided and conflict with United States v. Virginia\footnote{14. 518 U.S. 515 (1996).} and two other United States Supreme Court cases—California Savings & Loan Assoc. v. Guerra,\footnote{15. 479 U.S. 272 (1987).} and Newport News Shipbuilding & Dry Dock Co. v. EEOC.\footnote{16. 462 U.S. 669 (1983).} My theory derives elements from each of the three cases: first, United States v. Virginia’s recognition that institutions must accommodate women’s celebrated differences in order to provide true equality;\footnote{17. For a further discussion of the necessity of accommodating celebrated differences as expressed in United States v. Virginia, see infra Part IIA, notes 26-47 and accompanying text.} second, Guerra’s recognition that pregnancy leaves free women from the necessity of choosing between having a job and having a child;\footnote{18. For a further discussion of Guerra’s interpretation of Title VII, see infra Part IIB, notes 48-78 and accompanying text.} and third, Newport News’ acknowledgment that if Title VII’s pregnancy discrimination prohibition ap...
plied only to female employees, male employees with families would be subject to discrimination.\textsuperscript{19}  

My theory is premised on an equality model for men and women that compares fathers with mothers. It then looks at the societal disparate impact occurring on the latter when workplaces do not take into account employees' children.

Part II describes this three-case theory in more detail and concludes that when women, and not men, have to choose between having a child and having a job, women's celebrated differences are denigrated and that those women are discriminated against because of their sex.\textsuperscript{20} Part II further describes how adjustments made for women with children should be extended to men with children to avoid discrimination against men.\textsuperscript{21}

Part III of this Article describes and critiques a number of lower court cases, chronologically by category, that have held that Title VII allows employers to make women choose between having a child and having a job. Proponents hailed Title VII as a major victory for women's rights, believing that it would enable women to compete for jobs on the basis of their merit, undisadvantaged by their gender. Because, however, men and women have different physical demands when their children are born and traditionally have had different roles with respect to child care, a view of Title VII that ignores these differences prohibits mothers from competing equally with fathers.\textsuperscript{22} Part III explains that these lower court cases, penalizing women for having children, are in conflict with the three Supreme Court cases that form the core of my theory.\textsuperscript{23}

Part IV discusses the few lower court cases that have ruled consistently with my three-case theory, recognizing the logic of treating men and women in the biological context of their lives.\textsuperscript{24} Part IV also applies the theory to the situations described in Part III, with different results, concluding that courts can have an appropriate role in restructuring work and family balance.\textsuperscript{25}

\textsuperscript{19} For a further discussion of the Court's view of equality expressed in \textit{Newport News}, see \textit{infra} Part IIC, notes 79-89 and accompanying text.

\textsuperscript{20} For a further discussion of the impact of \textit{Virginia} and \textit{Guerra} on Supreme Court equal protection jurisprudence, see \textit{infra} Parts IIA and B, notes 26-78 and accompanying text.

\textsuperscript{21} For a further discussion of the implications of \textit{Newport News} for extending maternity-related adjustments to fathers, see \textit{infra} Part IIC, notes 79-89 and accompanying text.

\textsuperscript{22} For a further discussion of differences between mothers and fathers, see \textit{infra} notes 90-194 and accompanying text.

\textsuperscript{23} For a further discussion of the conflict between lower court cases dealing with Title VII and the Supreme Court opinions in \textit{Virginia}, \textit{Guerra} and \textit{Newport News}, see \textit{infra} notes 90-194 and accompanying text.

\textsuperscript{24} For a further discussion of lower court cases consistent with my three-case theory, see \textit{infra} Part IV, notes 228-57 and accompanying text.

\textsuperscript{25} For further discussion of how courts can apply the three-case theory to address the tension between work and family requirements, see \textit{infra} Part IV, notes 228-57 and accompanying text.
II. LITIGATION THEORY TO ADJUST FOR "CELEBRATED DIFFERENCES"

A. United States v. Virginia

The Supreme Court first adopted the idea of "celebrated differences" between the sexes in United States v. Virginia. There, the Court held that Virginia had violated the Fourteenth Amendment by excluding women from the Commonwealth's only single-sex school. Justice Ginsburg, writing for a majority of six Justices, used that phrase to identify circumstances when legislatures could justifiably classify men and women differently. The Court made clear that those classifications could not be used to denigrate women and cited past economic discrimination and pregnancy as situations in which legislatures could appropriately classify by sex. By stressing that only in narrow circumstances can men and women be treated differently, Justice Ginsburg appeared to meld together two opposing arguments among feminists: whether legislatures should treat men and women identically and afford them equal opportunities, or whether they should adjust for significant differences between men and women to allow them to achieve equality.

The differences at issue in United States v. Virginia were physical strength and privacy concerns. The case involved a publicly funded all-male military college, Virginia Military Institute (VMI), which employed

26. See United States v. Virginia, 518 U.S. 515, 533 (1996) (stating that "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration").

27. See id. at 532-33 n.6 (discussing heightened review standard for gender-based classifications and noting that "[t]he Court has thus far reserved its most stringent judicial scrutiny for classifications based on race or national origin."). In gender classification cases, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." See id. at 523 (describing "exceedingly persuasive" standard to require "'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives"'").

28. See id. at 533-34 ("Inherent differences between men and women . . . remain cause for celebration, but not for denigration . . . . Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promote equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.") (quoting Califano v. Webster, 430 U.S. 313, 320 (1972) (per curiam) and California Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) and citing Goesaert v. Cleary, 355 U.S. 464, 467 (1948)").

29. See id.

30. See id. at 551 n.19 (noting at one point that "the question is whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords" but later acknowledging that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs") (emphasis added). For a more complete discussion of the different feminist viewpoints, including equal treatment and equal results theories, as well as Justice Ginsburg's approach in United States v. Virginia, see Kovacic-Fleischer, supra note 2, at 892-66.
an "adversative method" of education, which involves a lack of privacy in the barracks and strenuous physical requirements designed to create "citizen soldiers."³¹ The Justice Department brought suit against Virginia claiming that the exclusion of women from VMI violated the Fourteenth Amendment.³² The Supreme Court agreed. The Court held that Virginia failed to prove that the sister program recently instituted in a private women's school was comparable to VMI,³³ that VMI's adversative method was necessary to achieve the school's goal of creating citizen soldiers or that admission of women would destroy the adversative method.³⁴ Therefore, the Court held that VMI must admit women.³⁵

The Court chose not to rely on its few prior cases involving physical differences between men and women. Those cases had held that the statutes classifying the sexes differently did not violate the Fourteenth Amendment because in those instances men and women were not similarly situated.³⁶ Although VMI's curriculum involved rigorous physical skills

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³¹ See Virginia, 518 U.S. at 522. The extreme pressure placed on cadets as part of this adversative method, the Court observed, bonds the cadets to their fellow sufferers and eventually to their tormentors. See id.

³² See id. at 530. In United States v. Virginia, the United States Department of Justice filed suit on behalf of a female high school student who wanted to be considered for admission to VMI. See United States v. Virginia, 766 F. Supp. 1407, 1408 (W.D. Va. 1991) (discussing background of complaint). The defendants were the Commonwealth of Virginia; Governor Wilder; Virginia Military Institute, its president, superintendent and members of its Board of Visitors; and Virginia's State Council of Higher Education and its members. See id. at 1408.

³³ See Virginia, 518 U.S. at 548-54 (noting that sister program developed at Mary Baldwin College, Virginia Women's Institute for Leadership (VWIL), lacked both rigorous military training and military-style living quarters and had inferior facilities, faculty, courses, admissions criteria and endowments).

³⁴ See id. at 540-46, 542 (noting that district court found, based on stereotypes of women and men, that admission of women would destroy adversative method, but concluding that "state actors may not rely on 'overbroad generalizations to perpetuate historical patterns of discrimination.'"). The Court stated the issue as "not whether 'women—or men—should be forced to attend VMI;' rather, the question is whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords. The notion that admission of women would . . . destroy the adversative method and, with it, even the school, is an . . . self-fulfilling prophecy; once routinely used to deny rights or opportunities." Id. at 542-43 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)). The Court ultimately concluded that "Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI." Id.

³⁵ See id. at 558 (holding VMI's male-only admissions policy unconstitutional); see also id. at 525-26 (citing Virginia, 976 F.2d at 900) (noting that Fourth Circuit initially gave Virginia the option of privatizing VMI and thus maintaining its male-only policy). The Commonwealth chose not to create a women's military program at a private women's college. See Kovacic-Fleischer, supra note 2, at 867 n.116.

³⁶ See Virginia, 518 U.S. at 558-59 (Scalia, J., dissenting) (arguing that VMI's single-sex program was constitutional under "the standard elaboration of intermediate scrutiny" appropriate to gender classifications). Justice Scalia, however, argued that under intermediate scrutiny all that was required was "a substantial
and a lack of privacy, the Court did not hold that strength and privacy
differences between men and women justified the exclusion of women.
Nor did the Court simply order that women be admitted to VMI as the
program then existed. Although stressing that the women attending VMI
would need to be capable and willing to meet its strenuous curriculum,
the Court noted that VMI would need to accommodate the differences
between the sexes by adjusting the physical skills requirements and altering
the housing situation. Justice Ginsburg struck a balance in the feminist
debate by requiring both that women who attend VMI be capable and
that VMI make institutional alterations to its program.

Similar precedents also were apparently disregarded by the United States v. Virginia Court. See, e.g., Lehr v. Robinson, 463 U.S. 248, 267-68 (1983) (upholding differential treatment because unmarried mothers and fathers are “not similarly situated” with respect to adopting children); Michael M. v. Superior Ct., 450 U.S. 464, 470-73 (1981) (holding statutory rape law applicable only to men constitutional because women were punished enough by “inescapably identifiable consequences of teenage pregnancy”); see also Kovacic-Fleischer, supra note 2, at 882-83 nn.202-14 (describing difference between United States v. Virginia’s and Rostker’s analysis of sex-based discrimination and concluding that “not similarly situated” is no longer a per se justification for upholding sex-based classifications).

37. See Virginia, 518 U.S. at 551-52 n.19. The Court stated that, “[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.” Id. The Court went on to conclude that, based on the experience at the military academies, “such adjustments are manageable.” Id. (citing A. Vitters et al., U.S. Military Academy, Report of Admission of Women (Project Athena I-IV) (1977-1980) and Defense Advisory Committee on Women in the Services, Report on the Integration and Performance of Women at West Point 17-18 (1992)). For a further discussion of the Court’s reference to military academies, see Kovacic-Fleischer, supra note 2, at 865-67 nn.108-16 and accompanying text.

38. See Virginia, 518 U.S. at 523 (noting that “some women are capable of all of the individual activities required of VMI cadets,” and “can meet the physical standards [VMI] now impose[s] on men” but also discussing alterations to VMI’s program “necessary to adjust aspects of the physical training program”); see also Kovacic-Fleischer, supra note 2, at 858-66 (describing how Justice Ginsburg combined equal treatment theory—requiring women who want to attend VMI to be capable—with equal results theory—requiring VMI to make adjustments to accommodate capable women). For a further discussion of the difference between equal treatment and equal results feminist theories, see Kovacic-Fleischer, supra note 2, at 852-58.
Justice Ginsburg was careful to note that legislative classifications that differentiate between the sexes cannot denigrate women.\textsuperscript{39} She thus distanced herself from older cases such as \textit{Muller v. Oregon},\textsuperscript{40} which upheld legislation to “protect” women, but not men, from some rigors of the workplace, but also had the effect of making women’s work less valuable.\textsuperscript{41} Avoiding the approach in \textit{Muller}, \textit{United States v. Virginia} appears to order institutional alterations and adjustments to VMI, not to provide women with “special treatment,” but to redesign an institution that had been unnecessarily designed for men only.\textsuperscript{42}

The celebrated differences accommodated in the VMI case are analogous to pregnancy and parenting differences. Upper body strength is a physical characteristic, as is the potential to become pregnant and have a child. Privacy concerns are a combination of physical and cultural characteristics, as are parenting obligations. Parenting may include breastfeeding, which can only be performed by mothers, and also other care-giving activities, which are not biologically restricted to mothers. The division of this latter group of activities between mothers and others typically has been structured by society, and this structure has remained generally entrenched.\textsuperscript{43} If equality under the Fourteenth Amendment requires VMI not merely to admit women but also to accommodate their admission, then equality under Title VII (whose definition of equality follows the constitutional definition)\textsuperscript{44} should require the workplace not merely to admit women, but also to adjust for them as well.\textsuperscript{45} Under this model, mothers would be compared with fathers. If one group faces the loss of a job or income upon the birth of the child, but the other group does not, the groups are not equal.\textsuperscript{46} If women can have the same opportunities in the workplace as men only if they do not have children, then gender equality has not been achieved. The Court articulated this realization in \textit{California}...

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\textsuperscript{39} See \textit{Virginia}, 518 U.S. at 534 (stating that “[sex] classifications may not be used, as they once were...to create or perpetuate the legal, social, and economic inferiority of women”) (citing \textit{Goesart v. Cleary}, 335 U.S. 464 (1948)).

\textsuperscript{40} 208 U.S. 412 (1908).

\textsuperscript{41} See \textit{id.} at 421-22 (holding that state law limiting working hours for women, but not men, in laundry business was justified because women needed to preserve their health for bearing children).

\textsuperscript{42} See Kovacic-Fleischer, \textit{supra note 2}, at 863-65 (commenting that \textit{United States v. Virginia} essentially examines how VMI could have been designed to maximize talents of both men and women).

\textsuperscript{43} See \textit{id.} at 892-98 (discussing how pregnancy and parenting, including breastfeeding, are analogous to celebrated differences of strength and privacy accommodated in \textit{United States v. Virginia}).


\textsuperscript{45} See Kovacic-Fleischer, \textit{supra note 2}, at 888-91 (relying on implication in \textit{Guerra} that pregnancy leave is required, not merely permitted, by Title VII).

\textsuperscript{46} For authorities describing policies that disadvantage women, but not men, for having children, see Kovacic-Fleischer, \textit{supra note 2}, at 854 n.39, 888 n.243.
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Federal Savings & Loan Assoc. v. Guerra,\(^47\) which supports the view of equality derived from United States v. Virginia.

B. California Federal Savings & Loan Assoc. v. Guerra

The second case in this three-case theory is Guerra, a decision based on Title VII rather than the Constitution. Title VII prohibits employers whose businesses affect interstate commerce and who have fifteen or more employees from discriminating on the basis of sex and other categories.\(^48\) Title VII prohibits both discriminatory treatment and discriminatory effects.\(^49\)

Under what is referred to as the disparate treatment theory, an employer cannot treat a woman differently because she is a woman, nor treat a man differently because he is a man.\(^50\) If the employer does, then the remedy can be damages and/or a court order to the employer to reinstate the employee or to pay back or front pay.\(^51\) Disparate treatment can often be proved by comparing an employer’s treatment of one sex with the treatment of the other sex. A lack of a comparison group, however, will not necessarily defeat a claim of discrimination because of the system of presumptions established by the United States Supreme Court.\(^52\)

\(^48\) See 42 U.S.C. § 2000e-2(a) (1994). This section provides that:

[i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

\(^49\) See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (distinguishing between disparate treatment where “employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin” from disparate impact where “employment practices that are facially neutral in factfall more harshly on one group than another and cannot be justified by business necessity”) (emphasis added).

\(^50\) See id. (noting that, among other things, employers may not treat employees “less favorably” simply based on their sex).


\(^52\) See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (establishing three-part framework for proving disparate treatment in which plaintiff must meet four-prong prima facie case of discrimination—that plaintiff was member of protected class, was qualified, rejected and job remained open; burden of production then shifts to defendant to articulate “legitimate, nondiscriminatory reason” for employer’s decision; and, finally, plaintiff has opportunity to prove that employer’s articulated reason was mere pretext). See generally St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993) (suggesting that plaintiff’s proof of pretext may not be enough to prove discrimination but rather that “the fact finder must
Under the disparate impact theory, an employee must prove that a neutral employment practice caused a disproportionate impact on a class protected by Title VII. Although an employer may be able to justify the practice at issue as a business necessity, a plaintiff then has the opportunity to prove that there is a less discriminatory practice that will achieve the same end.\footnote{3} The employee need not prove that the employer intended to discriminate by its use of the challenged practice.\footnote{4} The remedy is an equitable order to eliminate or change the practice, and this order will affect all employees.\footnote{5} Typically disparate impact is proved through a variety of statistical methods.\footnote{6} The cases described in Part III that reject disparate

believe the plaintiff’s explanation of intentional discrimination”); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (establishing that defendant has burden of proving that same action would be taken if there had been no discrimination where both discrimination and legitimate rationale have been proved); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981) (holding that once plaintiff proves prima facie case of disparate treatment, defendant may rebut presumption of discrimination merely by providing evidence, but not necessarily persuading court, that employer “was actually motivated by the proffered reasons”); Candace S. Kovacic-Fleischer, Proving Discrimination after Price Waterhouse and Ward’s Cove: Semantics as Substance, 39 Am. U. L. Rev. 615, 635-58 (1990) (providing detailed analysis of burden of production and allocation of proof requirements in pre-1990 Title VII disparate treatment and disparate impact cases).


An unlawful employment practice based on disparate impact is established under this subchapter only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

\textit{Id.}; see also \textit{id.} (providing that “[a]n unlawful employment practice . . . is established . . . (ii) [if] the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice”).

\footnote{54}{See 42 U.S.C. § 2000e-2(k)(2) (“A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination. . . .”); see also Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977) (noting “the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive.”); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (noting that under disparate impact theory of discrimination “good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability”).

\footnote{55}{See 42 U.S.C. § 2000e-5(g). The Civil Rights Act of 1991 provides that its compensatory and punitive remedies are not applicable to disparate impact claims. See 42 U.S.C. § 1981A(a)(1)-(2).}

impact claims either do not understand the claims or use a pinched view of workplace statistics. Many courts, however, including the United States Supreme Court, "caution that a plaintiff is not required to produce perfect evidence of adverse impact." For example, in *Dothard v. Rawlinson*, national statistics demonstrated that height and weight restrictions for applicants seeking prison guard jobs in Alabama had a disproportionate impact on women.

In this broad respect my three-case theory is similar to *Dothard's* disparate impact analysis, but my theory does not require statistical proof; rather, it looks at the impact practices, such as denying leaves for pregnancy or denying accommodations for breastfeeding or childcare as society is currently structured, have on women in general. Lack of leaves and other adjustments for childcare can affect all women who might have or adopt a child or who have children needing care. Lack of these policies may also have affected women who have grown children or chose not to have children, by influencing their family-size or job-related decisions. And, lack of these policies may also discourage men from spending more time with their families, which exacerbates the dilemma for women.

Title VII was amended in 1978 by the PDA. Congress passed that Act to overturn *General Electric Co. v. Gilbert*, which held that excluding pregnancy benefits from an employee's benefit program was not discrimination on the basis of sex. Following its constitutional counterpart,
Geduldig v. Aiello, the Gilbert Court reasoned that discrimination on the basis of pregnancy is not discrimination on the basis of sex because the classification of pregnant versus nonpregnant people includes both men and women in the second category. The PDA defines discrimination on the basis of sex to include discrimination on the basis of pregnancy and also says that pregnant women should be treated the same as others similar in their ability or inability to work. Despite the prohibition of discrimination on the basis of pregnancy, more women than men appear to leave the workplace after the birth of a child. As the cases described in Part III demonstrate, this is often the result of employer practices that penalize pregnancy leaves or deny breastfeeding or childrearing leaves. The ability to have a child and to breastfeed, however, are two of the "celebrated" reproductive roles in which men and women are not alike. The failure of the workplace to accommodate those roles forces women, but not men, to make choices with respect to their jobs and their biology.

In United States v. Virginia, the Supreme Court cited Guerra as an example of a legislature properly classifying persons according to their sex. Guerra involved a California statute that requires employers to give their employees up to four months of unpaid pregnancy leave for physical disa-

65. 417 U.S. 484, 496-97 n.20 (1974) (rejecting constitutional equal protection challenge to California's disability insurance program that excluded coverage for disabilities related to normal pregnancy and childbirth because classifications were not based on gender, but rather "pregnant women and nonpregnant persons," the second group of which "included members of both sexes") (citing Geduldig, 417 U.S. at 496-97 n.20).

66. See Gilbert, 429 U.S. at 125, 135-40 (rejecting Title VII challenge to employer's disability plan that excluded coverage for disabilities related to normal pregnancy and childbirth because of reasoning in Geduldig).


68. See Martha E. Ertman, Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements, 77 Tex. L. Rev. 17, 112 n.6 (1998) (showing that fewer mothers of young children work in labor force than other women and men and that mothers are likely to have sporadic or part-time employment where wages are lower and opportunities are limited in order to accommodate their childrearing responsibilities); Angie K. Young, Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children, 5 Mich. J. Gender & L. 113, 115-16 (1998) (noting that more than one-half of all working women have left work force at least once for family reasons, while only one percent of men have left work force for such reasons) (citing Deborah L. Rhode, Justice and Gender 174 (1989)); see also Kovacic-Fleischer, supra note 2, at 855 n.43 (summarizing studies showing that job interruption negatively impacts salaries of women).

69. See Kovacic-Fleischer, supra note 2, at 892-98 (discussing how pregnancy and parenting, including breastfeeding, are analogous to celebrated differences of strength and privacy accommodated in United States v. Virginia).

70. See United States v. Virginia, 518 U.S. 515, 533 (1996) (stating that sex-based classifications may be used to "promot[e] equal employment opportunity") (quoting California Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (alteration in original)).
LITIGATING AGAINST EMPLOYMENT PENALTIES

A bank that refused to reinstate a receptionist after her pregnancy leave sued the state agency that enforced the statute; the bank claimed that the statute was preempted by the PDA because the statute provided better treatment for pregnant women than for similarly situated disabled, nonpregnant persons. The Supreme Court held that the statute was not preempted, noting that the PDA had been passed to prevent the exclusion of pregnancy from employee benefits plans. The Court held that Congress had not intended to foreclose favorable treatment for pregnant women, but concluded instead that "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'" Justice Marshall, writing for the majority, described the rationale underlying the Court's holding, "[b]y 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." Thus, it appears to follow from this statement that Title VII requires pregnancy leaves. This statement is also consistent with the equality model derived from United States v. Virginia. If, however, this analysis were limited only to helping women, it could perhaps be criticized as a return to Muller v. Oregon, where the Court's protectionist attitude toward women ultimately hindered women in the workplace. Therefore, the last case in the three-case theory, Newport News Shipbuilding & Dry Dock Co. v. EEOC, must be added.

C. Newport News Shipbuilding & Dry Dock Co. v. EEOC

Newport News uses a two-step approach to equality. The case involved an employer who, prior to the passage of the PDA, had a health insurance plan that limited the amount that employees and spouses of employees could recover for pregnancy-related medical costs. After the effective date of the PDA, the employer amended its insurance plan and removed the limit on benefits for pregnant employees, but not for pregnant women.

71. See Guerra, 479 U.S. at 275; CAL. GOV'T CODE § 12945(b) (2) (West 1980) (requiring employers to reinstate employees returning from no more than four months pregnancy or disability leave unless job is no longer available due to business necessity); see also 29 U.S.C. §§ 2601-2654 (Supp. 1997). The California statute predated the FMLA. For a further discussion of the FMLA, see supra note 4.

72. See Guerra, 479 U.S. at 279, 286.

73. See id. at 288-89.

74. Id. at 285 (quoting Guerra v. California Federal Savings & Loan Assoc., 758 F.2d 390, 396 (9th Cir. 1985)).

75. Id. at 289.

76. For a further discussion of the equality model as it is reflected in the United States v. Virginia case, see supra notes 26-47 and accompanying text.

77. See Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (describing women as physically inferior to men, and therefore dependent on men to protect their reproductive health as well as shield them from men's "greed" and "passion").


79. See id. at 670-71.
spouses of male employees. The Court held that, although the PDA referred only to employees, the general Title VII protection against discrimination required that a male employee's family benefits package not be less than that of a female employee. Thus, the Court's first step was to ensure adjustments in the workplace to prevent pregnancy discrimination under the PDA; its second step was to adjust workplace policies to prevent discrimination against men under the general prohibition against sex discrimination under Section 703(a) of Title VII.

My three-case theory also adopted a two-step approach to equality in the workplace. Accommodations for women's reproduction and childcare differences must be made for women to be equal to men in the workplace, and these accommodations, such as leave during childbirth and childcare leaves, must be extended to men so that they will be equal with women in the workplace.

Some lower courts, both before and after Newport News, have recognized that men must receive family rights equal to those of women. In 1990, the United States Court of Appeals for the Third Circuit in Schafer v. Board of Public Education reversed a summary judgment motion in favor of a teacher's union whose collective bargaining agreement provided maternity, but not paternity, leave. In 1972, just as the Supreme Court had begun to hold that the Equal Protection Clause protects women, the United States District Court for the Southern District of New York in Danielson v. Board of Higher Education refused to rule as a matter of law that

80. See id.
81. See id. at 684 ("[T]he husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage for all conditions except for pregnancy-related conditions . . . . Thus petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees.").
82. See id. (setting forth two-step analysis). The Court reasoned: (1) under the PDA, discrimination based on pregnancy is discrimination based on sex and, therefore, it is prohibited under Title VII; and (2) "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." Id.
83. 903 F.2d 243 (3d Cir. 1990).
84. See id. at 244-45, 247-48 (noting that year-long childrearing leave could not be justified as accommodation exclusively for women because childrearing is not normal disability resulting from "pregnancy, childbirth, or related medical conditions").
85. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that policy allowing male military personnel to obtain benefits for their wives, but denying female personnel benefits for their husbands unless they could prove that they provided at least one-half of husband's support, violated Fifth Amendment's Due Process Clause); Reed v. Reed, 404 U.S. 71 (1971) (holding that state law favoring fathers over mothers to administer child's estate without "fair and substantial" relationship to purpose of statute violated Fourteenth Amendment's Equal Protection Clause).
leave for childrearing could constitutionally be limited to women. 87 Two years later, the same district in *Ackerman v. Board of Education* 88 noted that the Bylaws of New York's Board of Education had been amended to provide paternity leave as well as maternity leave, and reserved for trial proof of monetary damages for the father who had been denied paternity leave prior to that amendment. 89

**III. Employment Penalties for Pregnancy, Breastfeeding and Childrearing**

Many courts, other than the United States Supreme Court, have held that employers can penalize women for pregnancy, breastfeeding and childrearing. Many of these penalties are a result of employers and courts focusing on the second clause of the PDA that says, "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." 90 The employers and courts also focus on EEOC guidelines and statements in the legislative history that the PDA will not require employers to provide leaves or benefits if none are provided. 91 There is also, however, a first clause that defines "the terms 'because of sex' or 'on the basis of sex' [to] include, but are not limited to because of or on the basis of pregnancy, childbirth, or related medical conditions. . . ." 92 and an EEOC Guideline that provides that in-

87. See id. at 26-27 (explaining that summary judgment against father was not proper when issues of material fact remained unresolved, including whether female, but not male, employees of school system were entitled to three semesters of leave to care for their newborn children absent medical disability related to pregnancy).


89. See id. at 277. But cf. *Cooper v. Drexel Chem. Co.*, 949 F. Supp. 1275, 1280 (N.D. Miss. 1996) (holding employer did not violate PDA by terminating father for taking paternity leave because employer had no written maternity leave policy and employee “did not have any independent right to take leave time because of his wife’s medical condition”). Additionally the court in *Cooper* found that the employee’s eight-month term of employment made him ineligible for benefits under the FMLA, 29 U.S.C. § 2612(a)(1)(A). See id. at 1280 n.2. For a discussion of the FMLA, see * supra* note 4.


91. See 29 C.F.R. § 1604.18A (1978) (stating that “leave for childcare purposes is not covered by the [PDA] . . . leave for childcare [should] be granted on the same basis as leave which is granted to employees for other non-medical reasons”); H. REP. No. 948, 95th Cong. 5, *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753 (stating “if a woman wants to stay home to take care of the child, no benefit must be paid because this is not a medically determined condition related to pregnancy”); see also Kovacic-Fleischer, * supra* note 2, at 899-902 (reviewing legislative history of PDA, and suggesting that legislative history is in conflict with the purpose of PDA be reinterpreted or ignored).

adequate leave could have a disparate impact. 93 In addition, there is legislative history, quoted with approval in *Guerra*, that says that Title VII and the PDA were intended to end requiring women to choose between work and family. 94 These were summarized in 1993 by one district court, in *Crnokrak v. Evangelical Health Systems Corp.*, that said:

Looking at the second clause of the PDA, one might infer that disability leave policies are immune from attack under Title VII if they treat all disabilities identically. If that were so, however, then the PDA would have expanded the rights of some pregnant women asserting disparate treatment claims only to abrogate the rights of other pregnant women asserting disparate impact claims. 95

After discussing the unanimity among the Justices in *Gilbert* about "the possibility of establishing disparate impact claims based on benefits policies toward pregnant women," 96 and after quoting from *Guerra*, saying, "'[g]iven that the PDA was designed 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,'" 97 the same court said, "it is hardly possible that Congress sought to strip pregnant women of rights that they formerly had been granted. Thus, the legislative history of the PDA, as well as the history of Title VII in general, establish that Congress understood that in some cases 'equality cannot be achieved by treat-

93. See C.F.R. § 1604.10(c) (1979) (providing that "[w]here the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employment of one sex and is not justified by business necessity").

94. One of the sponsors of the PDA, Senator Williams said, "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." *Guerra*, 479 U.S. at 288 (quoting 123 CONG. REC. 29658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams)). A Congressperson said, "Title VII and the PDA are designed to 'put an end to an unrealistic and unfair system that forces women to choose between family and career.'" 124 CONG. REC. 21442 (1978) (remarks of Rep. Tsongas). Another said, "the PDA gives a woman the right . . . to be financially and legally protected before, during and after her pregnancy." 124 CONG. REC. 38574 (1978) (remarks of Rep. Sarasin).

95. *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 741, 743-45 (N.D. Ill. 1993). *Crnokrak* had denied the motion for summary judgment with respect to the disparate treatment claim of the employee who was replaced while on pregnancy leave. See id. at 743. Despite the language approving disparate impact pregnancy theories, the court granted the employer's motion with respect to the disparate impact claim because plaintiff's long pregnancy leave due to complications made her an atypical pregnant woman and she offered no statistics showing that women were disadvantaged by the employer's leave policy. See id. at 744-45.

96. Id. at 741-42 (citing *Gilbert* and concurring or dissenting opinions).

97. Id. at 742 (citing *Guerra*, quoting remarks of Sen. Williams (23 CONG. REC. 29658 (1977))).
ing identically those who are not alike.' 98 The cases that follow demonstrate the inequality that can result when courts do not understand that view of equality.

A. Pregnancy

Some courts have penalized women for being or having been pregnant. For example, in 1983, in *Marafino v. St. Louis County Circuit Court*,99 an applicant was denied employment as a staff attorney because she was going to need four to eight weeks of pregnancy leave.100 The United States District Court for the Eastern District of Missouri, affirmed by the Eighth Circuit found no disparate treatment because the court found that defendant's reason for not hiring plaintiff was not pretextual. The employer had claimed it could not hire someone who would need any leave soon after having been hired because that leave would interfere with training.101 The court also found no disparate impact against pregnant women because one of the staff attorneys who had been working for the employer before becoming pregnant had been permitted to take a pregnancy leave.102 Rather, the court noted again that the “length and timing” of the leave sought, not the pregnancy, had influenced the employer’s decision.103

The court further considered whether the employer’s “policy of refusing to hire those who planned to take an early leave of absence had a disparate impact on women in general.”104 Because four out of the ten individuals who were employed as staff attorneys were women, the court found no statistical evidence to support a theory of disparate effect.105 Noting that, one might presume that “women, more often than men, are in a position to know that they will require leaves of absence from work” from the facts that: (1) women and men are subject to most of the same illnesses and surgeries and (2) “[w]omen are subject to the occasional physical condition of pregnancy and . . . childbirth” the court nonetheless concluded that it “cannot simply imagine disparate impact. In the total


99. 537 F. Supp. 206 (E.D. Mo. 1982), aff’d, 707 F.2d 1005 (8th Cir. 1983). Complicated pregnancies, however, are still pregnancies. Inadequate leave for complicated pregnancies discriminates against all women because no woman knows ahead of time what her pregnancy will be like. If only uncomplicated pregnancies are protected, then women’s “choice” to have a child could be affected by the fact that she might lose her job if she cannot return to work in six or fewer weeks.

100. *See id.* at 208-09.

101. *See id.* at 212.


103. *See id.* at 212.

104. *Id.* at 213 (raising issue *sua sponte*).

105. *See id.*)
absence of any evidence that women do, in fact, request lengthy leaves of absence more frequently than men, the court cannot conclude that disparate impact has been shown.\textsuperscript{106}

With this narrow description of the evidence required to prove disparate impact, the court did not address the issue that it had framed—whether applicants needing leaves early in their employment might disproportionately be pregnant women. One would think that judicial notice could be taken of the fact that if a pregnant woman is applying for a job, she knows that she will need a leave early in her employment.\textsuperscript{107} If, therefore, an early maternity leave is grounds for rejecting pregnant applicants, it will be impossible for pregnant women to obtain jobs, and women will therefore be discriminated against because of pregnancy. Note that the court uses the word “occasional” to refer to childbirth. Although childbirth may be occasional for each woman, in the aggregate, approximately eighty-five percent of women will have children.\textsuperscript{108} Ignoring the aggregate impact of employment penalties for childbirth ignores the discriminatory effect of those penalties.

The court in \textit{Marafino} went one step further and alternatively held that even if there were a disparate impact, the employer had demonstrated that its policy was a business necessity because plaintiff’s early leave would have had a “sizable impact” on the department where she would have worked.\textsuperscript{109} Oddly, however, the court had used the fact of another staff attorney taking maternity leave to negate a finding of disparate impact.\textsuperscript{110} Why was not that same “sizable impact” a business necessity to require dismissing her as well? In the next cases discussed, however, most of the courts found no discrimination and thus did not even consider the affirmative defense of business necessity.

Eleven years later, in \textit{Troupe v. May Department Stores Co.},\textsuperscript{111} the United States Court of Appeals for the Seventh Circuit held that the PDA did not

\begin{itemize}
\item \textsuperscript{106} Id. (emphasis added).
\item \textsuperscript{107} Cf. Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156-57 (7th Cir. 1997) (holding that to take judicial notice of issue, such as that most part-time workers are women, “that fact must be indisputable . . . and the decades-old conclusions of the studies . . . present[ed] are certainly subject to dispute”) (citing \textit{Hennessy v. Penril Datacomm Networks, Inc.}, 69 F.3d 1344, 1354 (7th Cir. 1995)). The elimination of part-time work, even if it were a policy and not a one time occurrence, disproportionately impacted women with young children because the statistical studies plaintiff relied upon were possibly outdated. \textit{See id.} at 1156-57. The physical reality of pregnancy and childbirth, however, should not require statistical proof.
\item \textsuperscript{109} \textit{See} \textit{Marafino}, 537 F. Supp. at 214.
\item \textsuperscript{110} \textit{See} id. at 212-13.
\item \textsuperscript{111} 20 F.3d 734 (7th Cir. 1994). \textit{See generally} Maganuco v. Leydon Community High Sch. Dist. 212, 939 F.2d 440 (7th Cir. 1991) (holding that school policy prohibiting employees from combining paid medical leave, including maternity leave, did not violate PDA).
\end{itemize}
prohibit an employer from terminating a salesperson for excessive tardiness due to morning sickness nor from terminating her because she might not return from maternity leave. The employee had been terminated one day before her partially compensated maternity leave was to begin. She claimed that she had been discriminated against because of her pregnancy, but the district court granted the employer’s summary judgment motion.

In affirming, the Seventh Circuit identified three types of circumstantial evidence of intentional discrimination that a plaintiff may rely upon to demonstrate disparate treatment: inferential evidence, comparative evidence and pretextual evidence. The court said that the plaintiff presented no comparative evidence about other employees and could not prove pretext because her tardiness made her unqualified. The court did not consider as inferential evidence that she was fired for morning sickness tardiness one day before her maternity leave because she did not prove that the employer treated nonpregnant employees who were tardy or planning lengthy leaves less severely. The court appears to be combining comparative evidence with inferential evidence. By doing so, the court has read “pregnancy” out of the PDA and interpreted it to mean that discrimination on the basis of pregnancy is on the basis of sex only if there is a nonpregnant person in the employer’s workplace with similar needs receiving better treatment. This is the result foretold one year earlier in *Crnokrak* by the district court, which had said, “If [disability leave policies are immune from attack under Title VII if employers treat all disabilities identically] then the PDA would have expanded the rights of some pregnant women asserting disparate treatment claims only to abrogate the rights of other pregnant women asserting disparate impact claims.”

The Seventh Circuit justified drawing a conclusion from the lack of a comparison class of nonpregnant but otherwise similarly situated employ-

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112. See *Troupe*, 20 F.3d at 737.
113. See *id*.
114. See *id* at 737, 739.
115. See *id* at 736 (describing inferential evidence as “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces”; comparative evidence as evidence, “whether or not rigorously statistical,” that other employees similarly situated to plaintiff received better treatment; and pretextual evidence as evidence suggesting that employer’s proffered reason for differential treatment is mere pretext for discrimination).
116. See *id* at 736-37. The court is referring to the *McDonnell Douglas* framework of proof. For a discussion of that framework, see *supra* note 52.
117. See *id* at 738 (suggesting that if employer would have fired nonpregnant employee about to take protracted leave for medical reasons, it would imply that employer did not fire plaintiff on basis of pregnancy but rather fired plaintiff for her tardiness and impending leave because she “cost the company more than she was worth”).
ees, insisting that “[w]e doubt that finding a comparison group would be that difficult.” As will be seen, in the next case discussed the Third Circuit recognized that finding such a group is, in fact, difficult.

The Seventh Circuit also dismissed a disparate impact claim in *Troupe*, stating that “properly understood, disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism.” Disparate impact analysis, however, does not require any proof of intentional discrimination, residual or otherwise.

Finally, without having the benefit of *United States v. Virginia* and without discussing *Guerra* or *Newport News*, the court held that “[t]he Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . to make it as easy, say, as it is for their spouses to continue working during pregnancy.” As described in Part II, however, “feminist scholar” Dean Kay is correct that the appropriate comparison group is not the spouses of the female employees, but their male counterparts in their workplace. Male employees can have children without needing physical accommodations and, as the penalty in this case illustrates, are probably less likely to take months of leave. With the proper comparison group, my three-case theory supports the theories of “feminist scholars” dismissed by the Seventh Circuit.

In 1997, the Third Circuit in *In re Carnegie Center Assoc.*, citing *Troupe*, held that an employer could dismiss a secretary on maternity leave rather than determine the comparative qualifications of its staff when making an economically justified reduction in force. The court said that to prove discrimination, the employee had to demonstrate that the employer would have treated a nonpregnant person on leave dissimilarly, even though, contrary to the Seventh Circuit’s statement in *Troupe*, the Third Circuit recognized that “it was difficult for her to make such a showing because Carnegie never had an employee on disability leave for a pro-

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119. *Troupe*, 20 F.3d at 739.

120. For a discussion of *In re Carnegie*, see infra notes 124-129 and accompanying text.

121. *Troupe*, 20 F.3d at 738 (citing *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992)).

122. For authority that employer intent is irrelevant under a disparate impact theory, see supra note 54 and accompanying text.

123. *Crnokrak*, 819 F. Supp. at 738 (citing Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 *Berkeley Women’s L. J.* 1, 30-31 (1985)). By rejecting Professor Kay’s theory, the court rejected, *sub silencio*, the dictum in *Crnokrak*, 819 F. Supp. at 741, that had referred to Professor Kay’s theory as “another formulation” of liability under Title VII. For a further discussion of *Crnokrak*, see supra notes 95-98.

124. 129 F.3d 290 (3d Cir. 1997).

125. See id. at 297 (stating that employer can consider employee’s absence in making adverse employment decisions).

126. See *Troupe*, 20 F.3d at 739 (“We doubt that finding a comparison group would be that difficult.”).
tracted period for a reason other than pregnancy." One would think that this lack of a comparison group is itself evidence of disparate impact.

The Third Circuit further stated that "the PDA is a shield against discrimination, not a sword in the hands of a pregnant employee," and that "[t]he PDA does not require fairness." But the "shield" of the PDA in this case did not prohibit a pregnant woman from being singled out for unfavorable treatment, and it seems odd that fairness and prevention of discrimination are not synonymous.

During that same year, the United States Court of Appeals for the Eighth Circuit reached a similar result, but with some deprecatory language. In Piantanida v. Wyman Center, Inc., a woman who was demoted to a lower paying job after returning from maternity leave claimed that her employers' executive director "told her that she was being given a position 'for a new mom to handle.'" She declined the new job because it paid only half of her original salary; the individual who eventually filled the new job, however, received the same salary as plaintiff had in her original job. The employer sought summary judgment on the ground that the status of a "new mom" is not protected by the PDA. The trial court granted the motion, and the Eighth Circuit affirmed.

The Eighth Circuit reasoned that caring for a new child is not a medical condition related to pregnancy, but rather "is a social role chosen by all new parents who make the decision to raise a child." The court pointed out that "new parents" include not only women who give birth to

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127. Carnegie, 129 F.3d at 297 (relying on Troupe and distinguishing Smith v. F.W. Morse & Co., 76 F.3d 413 (1st Cir. 1996), and holding that employee was fired during pregnancy leave not because of pregnancy but because job became superfluous); see also Victoria R. Riede, Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance, 27 GOLDEN GATE U. L. REV. 223, 230-42, 247-50 (1997) (describing Smith and recommending that expansion of FMLA to provide 180 day leave would have protected her job).


129. See Judith G. Greenberg, The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce, 50 ME. L. REV. 225, 225 (1998) (describing pregnancy discrimination and arguing that PDA is "a shield behind which employers can hide as they discriminate").

130. 116 F.3d 340 (8th Cir. 1997).

131. Id. at 341 (noting that demotion was not result of failure to return to work) (citations omitted).

132. See id.

133. See id. at 340. Cf. Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1492-93 (D. Colo. 1997) (stating that "[t]he [PDA] does not specify whether the discrimination must occur during pregnancy. However, to read Title VII so narrowly would lead to absurd results such as 'prohibit[ing] an employer from firing a woman during her pregnancy but permit[ing] the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place.' The plain language of the statute does not require plaintiff to be pregnant when the alleged discrimination occurs." (citing Donaldson v. American Banco Corp., 945 F. Supp. 1456, 1463-64 (D. Colo. 1996))).

134. See Piantanida, 116 F.3d at 340.

135. Id. at 342.
children, but also men who biologically become fathers, as well as men and women who adopt.\textsuperscript{136} This plaintiff, however, was not asking for childrearing leave; in fact, she had returned to work after having a baby.\textsuperscript{137} The status of "new mom" will always follow a pregnancy, assuming a live birth. The Eighth Circuit concluded that "an employer's discrimination against an employee who has accepted this parental role—reprehensible as this discrimination might be—is therefore not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees, including men and women who will never be pregnant."\textsuperscript{138} The court did not inquire, and probably plaintiff did not think she had to prove, whether the employer also demoted "new dads" in order to treat everyone equally. Perhaps the court found the discrimination "reprehensible" because, although childrearing is theoretically a gender-neutral task, treating it as such appears to be having a disproportionate impact on women. The court, however, did not address the disparate impact theory.

B. Leaves of Absence for Mothers in the Workplace

There is some irony in mothers having to sue for breastfeeding and childcare leaves. Early cases dealing with childcare leaves involved workplace policies that mandated pregnant women to take leaves or even forced them to give up their jobs.\textsuperscript{139} Women objected to the assumption that they could not or should not work while pregnant or caring for a small child.\textsuperscript{140} Women do not want to go back to mandated leaves, but they do want the choice to have extended maternity leaves, preferably with pay.

1. Breastfeeding Leaves

There is mounting medical evidence that breastfeeding is beneficial for both the baby and the mother.\textsuperscript{141} Despite this evidence, a number of women in the United States have had to choose between breastfeeding

\textsuperscript{136} See id.
\textsuperscript{137} See id. at 341.
\textsuperscript{138} Id. at 342 (emphasis added).
\textsuperscript{139} See, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634-35 (1974) (holding that school board policy requiring pregnant public school teachers to take mandatory unpaid five-month maternity leave created irrebuttable presumption that violated Due Process clause).
\textsuperscript{140} See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (holding that employer's policy prohibiting women, but not men, with preschool-age children from being hired violated Title VII unless bona fide occupational qualification could be demonstrated).
\textsuperscript{141} See Isabelle Schallreuter Olson, Comment, Out of the Mouths of Babes: No Mother's Milk for U.S. Children. The Law and Breastfeeding, 19 Hamline L. Rev. 269, 271-74 (1995) (citing numerous studies confirming that breastfeeding protects mothers and children from illness and disease, and also enhances children's developmental and intelligence test scores).
their newborn children and having a job. Some of these women unsuccess-
fully brought suits claiming that their employers' denial of their re-
quests to take medically advised, unpaid, breastfeeding leaves violated
Title VII. One woman had been advised that her child's cleft palate re-
quired that the child be breastfed rather than bottlefed before his sur-
gery.142 Some women had requested six months of leave, others six weeks.
In contrast to the United States, most European countries provide at least
six months of paid maternity leave after the birth of a child.143

In the twenty-five years since the law has become settled that employ-
ers cannot force women employees to take maternity leave, some new
mothers have sued to extend physical maternity leaves into longer-term
breastfeeding leaves.144 Although some lower courts have found such
leaves to be a logical extension of the PDA, the trend of the cases has been
to deny breastfeeding leaves. As many cases described in this Part will
show, courts are holding that breastfeeding is not a medical condition re-
lated to pregnancy. As previously discussed, none of the courts have ana-
alyzed the phrase "not limited to" in the first clause of the PDA, that says,"[t]he terms 'because of sex' or 'on the basis of sex' include but are not
limited to, because of pregnancy, childbirth, or related medical condi-
tions. . . ."145 As discussed above, the courts relate gender specific
breastfeeding to gender neutral childrearing and point to some state-
ments in the legislative history that say that employers are not required to
give childcare leave, or any leave, if they are not providing leave.146

In Board of School Directors v. Rossetti,147 conflicting opinions from the
Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court

142. See generally McNill v. New York City Dep't of Correction, 950 F. Supp.

143. See Kristin Downey Grimsley, Study: U.S. Mothers Face Stingy Maternity Ben-
A10 (reporting that in February 1997 United Nations study, United States ranked
defeated last among industrialized countries in benefits and protections it offers chil-
dren). The study found that 80% of the countries studied required maternity
leave by law, one third permitted leaves lasting more than 14 weeks, and 80% re-
quired breaks for nursing mothers. See id.; see also T.R. Reid, Norway Pays a Price for
Family Values: Parents Receive Stipends to Stay Home With Children, WASH. POST, Nov. 1,
1998, at A26 (discussing Norway's parental leave policy paying parent who leaves
job to raise child 80% of his or her regular salary during first 12 months of child's
life and about $5,000 to stay at home during child's second year).

144. See LaFleur, 414 U.S. at 644 (establishing that employers cannot force
employees to take maternity leave). But see O'Hara v. Mt. Vernon Bd. of Educ., 16
agreement that allowed employees taking disability leave, including disability preg-
nancy leave, to return to work at any point after termination of the disability, but
prohibited employees taking nondisability parental leave from returning until fol-
lowing school year unless permission were granted, did not violate Title VII be-
cause men and women treated same and there was insufficient evidence of
 disparate impact).


146. See id.

analyzed a request for a breastfeeding leave. 148 Unfortunately, the view that prevailed penalized, instead of celebrated, a woman for breastfeeding her child. In *Rosetti*, an employee asked to extend her eight weeks of paid physical disability maternity leave or discretionary unpaid childrearing to breastfeed her child in accordance with her doctor's recommendation, specifically to protect her child from her allergies. 149 The school board denied the request. When she did not return to work after the expiration of her maternity leave, she was dismissed. 150 The Pennsylvania Secretary of Education, however, overturned the school board's decision and ordered that the employee be reinstated to her teaching position. 151 The school board appealed the Secretary's decision. 152

The Commonwealth Court's majority opinion held that the school board had discriminated against the employee in violation of Pennsylvania's Human Relations Act (PHRA), which prohibits sex discrimination by refusing to grant unpaid leave. 153 The court reasoned that because its Supreme Court had interpreted that law to prohibit mandatory resignations by pregnant women based on the premise that only women can become pregnant, then "it follows that the request for additional leave for breastfeeding purposes under the circumstances of this case is merely a logical and natural extension of that concept." 154 The dissent would have denied the leave as a matter of law, relying on a Pennsylvania regulation that provided "[n]othing in these regulations shall prohibit an employment policy that permits granting of leave for purposes of childbearing beyond the period of actual disability, but such leave shall not include

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149. See *Rosetti*, 397 A.2d at 958, 958 n.1. According to the Commonwealth court, the child was apparently unable to take breastmilk from a bottle. See id. at 959 ("As a result, unless the child was to be fed intravenously or by a stomach tube, his sole means of nourishment was breastfeeding."). The Supreme Court, however, found that the school board had disbelieved that the baby rejected bottle-feeding. See *Rosetti*, 411 A.2d at 488 n.4.

150. See *Rosetti*, 397 A.2d at 958-59.

151. See id. at 958.

152. See id. at 957.

153. See id. at 960. Section 5(a) of the Pennsylvania Human Relations Act provides that:

it shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . . (a) for any employer, because of . . . sex . . . to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is the best able and most competent to perform the services required.

*Rosetti*, 411 A.2d at 131 n.6 (quoting 43 PA. CONS. STAT. ANN. § 955(a) (1998)).

payment of sickness or disability benefits."\(^{155}\) The dissent further concluded that this regulation recognizes "that there is nothing in [PHRA] that requires the inclusion of childrearing leave with maternity leave."\(^{156}\) It is odd, however, to interpret a regulation that does not prohibit unpaid childrearing leave as one justifying a denial of that leave for breastfeeding.

The Supreme Court of Pennsylvania agreed with the lower court's dissent.\(^{157}\) Although the relevant collective bargaining agreement permitted maternity leave to be extended if a mother's health required it, the Pennsylvania Supreme Court held that her health did not include the health of the child.\(^{158}\) The court also held that the PHRA did not require employers to provide leaves for childrearing, noting that:

\[
\text{[A]ppellee has in no way suggested that male teachers have been or would be granted discretionary leaves of absence while females were denied them. To the contrary, appellee has been treated no differently than any male teacher would be who had to remain at home to care for a physically or emotionally disabled newborn infant.}\(^{159}\)
\]

In other words, both men and women would be fired if they required an extended leave to care for a newborn. Not surprisingly, few men had sought to stay home to breastfeed a baby. The majority did not seem to recognize the irony of its own logic when it stated that "[w]hile choosing between the health-care needs of one's child and keeping one's job may be a difficult choice, appellee did choose to remain at home."\(^{160}\) Thus, although the majority concluded that men and women will not be treated differently under this policy, they also appear to acknowledge that denying breastfeeding leave to women makes women face choices that men do not have to face and, ultimately, renders women unequal in the workplace.

Similar irony had existed in the lower court's dissent, which was followed by the Pennsylvania Supreme Court. Despite calling plaintiff's decision to breastfeed her child "laudable" and "admirable," that dissent had said that her decision was "one [for] which she, and not the District, must bear the consequences."\(^{161}\) Neither the dissent nor the Pennsylvania Supreme Court explained why taking care of children should be an individual, and not a societal, concern.

\(^{155}\) *Id.* at 961 (Mencer, J., dissenting) (quoting 16 Pa. Code § 41.104(a) and referring to § 41.103(a) as requiring pregnancy and childbirth to be treated as temporary disabilities are treated).

\(^{156}\) *Id.* at 960-61 (Mencer, J., dissenting).

\(^{157}\) See generally Rosetti, 411 A.2d 486.

\(^{158}\) See id. at 489 n.7. The court also noted that the union had been unsuccessful in negotiating childcare provision in collective bargaining agreement. See id. at 489 n.7.

\(^{159}\) *Id.* at 489 (emphasis added).

\(^{160}\) *Id.* at 489 n.8.

One problem with classifying breastfeeding leaves as either due to the disability of pregnancy or for childrearing is that breastfeeding does not fit either description. Breastfeeding is not disabling, but it does require time with the baby (or if it is done not as nature designed, time with a pump); on the other hand, it is not gender neutral, similar to pregnancy disability. Childrearing leave, in contrast, is not related to breastfeeding and is gender neutral. The court seems to ignore the biological, reproductive differences between men and women that follows the birth of a child.

Recognizing this problem, the dissenting Pennsylvania Supreme Court opinion would have affirmed the Commonwealth Court’s decision that this breastfeeding leave was required by the PHRA, stating that the majority’s reasoning “ignores the obvious reality that only women can perform the breastfeeding function” and, thus, the school board was “discriminating on the basis of sex” when it denied the breastfeeding leave. 162

Ten years later, the United States Court of Appeals for the Fourth Circuit reached the same result as the Rossetti court. In Barrash v. Bowen, 163 a woman was discharged for taking a six-month breastfeeding leave based on her pediatrician’s recommendation. 164 Her employer, the Social Security Administration (SSA), had once given six-month maternity leaves, but had tightened its leave policy prior to the plaintiff’s pregnancy. 165 In this case, the SSA extended plaintiff’s leave to more than five months, but discharged her when she did not return after that time. 166 When plaintiff sued, claiming that her discharge was unconstitutional and violated the applicable collective bargaining agreement, the district court held that the new, shorter leave policy had a disparate impact on mothers wishing to breastfeed.167

The Fourth Circuit, in a per curiam opinion reversed, with language that reflects hostility toward women’s claims for leaves of this type:

There was data showing that several women received maternity leave without pay of six months or more in 1983. The figure declined in 1984, and no such extended leaves were granted in 1985. Those figures were compared with figures showing that the number of men on sick leave of six months or more in-

162. Rossetti, 411 A.2d at 489-90 (Roberts, J., dissenting).
163. 846 F.2d 927 (4th Cir. 1988).
164. See id. at 928. The doctor admitted, however, that the recommendation was his routine prescription, presumably believing that this was best for the health of all newborn children. See id. at 928-29.
165. See id. at 928 (noting that at time of plaintiff’s first pregnancy, SSA had granted her six-month maternity leave to breastfeed her child).
166. See id. at 930 (highlighting testimony from pediatrician that terminating breastfeeding after five months would have no adverse impact on child and fact that SSA extended plaintiff’s request for leave based on her own post-partum illness, although it was “apparent that [her] claims of incapacity were insufficiently documented”).
167. See id. at 928, 929.
creased over the same three year period, but the data was not comparable. The men were incapacitated, while the women were not. If the required documentation was provided, the men were entitled to the sick leave they received, while maternity leave without pay was not available as a matter of right but only on a discretionary basis. One can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.\(^{168}\)

This comment trivializes the care of infants. It relegates breastfeeding to the private sphere of home and assumes that a woman's "choice" to have children and to exercise the celebrated biological function of breastfeeding is also a choice to put her job at risk.\(^{169}\) As long as women need to choose between having a child and having a job, they cannot be truly equal with men in the workplace. The court correctly notes that people with illnesses should not have to lose their jobs because of lost time from work. What the court does not see is that women who have children need that same accommodation in order to be equal to men in the workplace who have children.

The Fourth Circuit, confusing the distinction between disparate impact and disparate treatment theories, held further that:

Any limitation upon the liberality with which leave without pay had been granted in earlier years would have an adverse impact upon young mothers wishing to nurse their babies for six months, but that is not the kind of disparate impact that would invalidate the rule, for it shows no less favorable treatment of women than of men.\(^{170}\)

This insistence upon comparing women and men who breastfeed seems as sensible as the pregnant versus nonpregnant people distinction in *General Electric Co. v. Gilbert*, a case that was reversed by the PDA.\(^{171}\) Although there may be women and men who have children and do not breastfeed them, there are no men who have children and do breastfeed, just as there are no men who become pregnant. Because Congress reversed the reasoning of *Gilbert* when it passed the PDA, presumably Congress did not intend to see the reasoning in it reemerge in a similar context.\(^{172}\)

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168. *Id.* at 931-32 (emphasis added).

169. See Joan Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797, 825-35 (1989) (explaining that women’s choices are imposed by workplace that is designed around worker who can devote substantial time to job because his wife is devoting substantial time to home).

170. *Barrash v. Bowen*, 846 F.2d 927, 932 (4th Cir. 1988) (citing no authority to support court’s position). For a further discussion of disparate treatment and disparate impact, see *supra* notes 50-61 and accompanying text.

171. For a further discussion of the holding of *Gilbert* and the interplay between it and the PDA, see *supra* notes 63-68 and accompanying text.

172. *See S. Rep. No. 95-331, at 7-8* (1978) (stating that "bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower
In Wallace v. Pyro Mining Co., a new mother requested an additional six-week leave because her child refused to take breast milk from a bottle. The United States District Court for the Western District of Kentucky characterized her claim as one of disparate impact, but found that her discharge for taking that leave was not discriminatory. Although noting that the PDA does not define the term "related medical conditions," the court concluded that "[w]hile it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto." The court said that its "conclusion is mandated by the plain language of the act" and by its history. The court added that "[n]othing in the PDA or Title VII itself, obliges an employer to accommodate the child-care concerns of breast-feeding women. If Congress had wanted these sorts of child-care concerns to be covered in Title VII or the Pregnancy Discrimination Act, it could have included them in the plain language of the statute." Once again, this court did not address the "not limited to" "plain language." It would seem that breastfeeding could fit into that catch-all. The court concluded that "[n]othing in the Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers." Once again, this is an odd statement because men obviously cannot breastfeed and would not request such a leave. Not surprisingly, men are not requesting breastfeeding leave. Perhaps courts are afraid that men will request comparable time with their children. Perhaps they will and should. The third case of my

courts); see also H.R. Rep. No. 95-948, at 2 (1978) (same). Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted Congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the Gilbert decision. See id. Many of them expressly agreed with the view of the dissenting Justices in Gilbert. See id.

174. See id. at 868.
175. See id. at 869.
178. Id. at 869 (emphasis added). For a further discussion of the legislative history, see supra notes 94-102 and accompanying text.
179. Id. at 870.
182. For a discussion of cases in which fathers have sought paternity leave, see supra notes 83-89 and accompanying text.
three case theory would allow men to request this childrearing time.\textsuperscript{183} Perhaps that would be expensive for employers, but perhaps it would not, as family-friendly policies may reap benefits that outweigh costs.\textsuperscript{184}

In \textit{McNill v. New York City Department of Correction},\textsuperscript{185} a corrections officer claimed that her downgraded employment status for excessive absenteeism was discriminatory because her leaves were related to her pregnancy.\textsuperscript{186} The corrections officer contended that because it was medically necessary that she nurse her baby until surgery could correct a cleft palate, her absences were pregnancy related.\textsuperscript{187} The United States District Court for the Southern District of New York, relying on \textit{Wallace}, held that her leave was not a medical condition related to pregnancy.\textsuperscript{188} As in \textit{Wallace}, the court parsed the meaning of “pregnancy, childbirth and related medical condition,” but neglected “not limited to.”\textsuperscript{189} Although noting that the correction officer’s case was distinguishable from other breastfeeding cases because of the medical necessity involved,\textsuperscript{190} the court concluded that:

\begin{quote}
[T]here can be no issue that there are many children who suffer from serious birth defects and that for many of these children, their mother is, for all practical purposes, absolutely essential to their survival. If plaintiff’s claim here is covered by the PDA, then a multitude of mothers who have left work involuntarily to attend to their children’s medical needs would also have claims. I am unwilling to infer that Congress intended such a broad expansion of the scope of Title VII from the fairly narrow language of the PDA.\textsuperscript{191}
\end{quote}

A case that would grant leaves in this narrow context of medically essential breastfeeding would not appear to cause others to roll down a slippery slope. The court, however, enlarged the potential impact of its decision from mothers who would be required to breastfeed a child to “a multitude

\textsuperscript{183} For a discussion of how \textit{Newport News} requires benefits provided to women to be extended to men, see \textit{supra} notes 79-82.

\textsuperscript{184} For a survey of studies showing that benefits can outweigh costs of family-friendly policies, see Kovacic-Fleischer, \textit{supra} note 2, at 905 n.337.

\textsuperscript{185} 950 F. Supp. 564 (S.D.N.Y. 1996).

\textsuperscript{186} See id. at 569.

\textsuperscript{187} See id.

\textsuperscript{188} See id. at 569-71.

\textsuperscript{189} See id. at 569 (relying on dictionary definitions of pregnancy and childbirth to conclude that “conditions related to pregnancy or childbirth would directly involve the condition of the mother” and not her child’s malformed lip.”). The district court also quoted from the House Report. See id.

\textsuperscript{190} McNill, 950 F. Supp. at 570 (“Admittedly, none of these cases are perfect analogues. In none of them was there a medical necessity that the child be breastfed, a function which can only be performed by a newborn’s mother.”). Despite distinguishing those cases, the district court had quoted from \textit{Wallace} and \textit{Barnes} and relied on \textit{Barrash} to reach its conclusion. See id. at 570-71.

\textsuperscript{191} McNill, 950 F. Supp. at 571 (footnote omitted).
of mothers who have left work involuntarily to attend to their children's medical needs." In enlarging this impact, however, the court identified only women—note its use of the word "mothers," not "fathers." But in enlarging the issue from breastfeeding to other "medical needs," the proper term should have been "parents." By not using the word "parents," the court is implicitly recognizing that mothers, more than fathers, are taking leaves to care for medical emergencies of children, but the court did not address that disparate impact. Until the workplace can allow both men and women to take medical leaves to care for their children, more women will be disadvantaged, as further seen in the section below.

2. Childcare Leave

Courts deny childcare leaves on the ground that they are not sex based. As a result, however, more women than men are leaving the workplace or working in low-paying jobs. One would think, therefore, that this policy of denying leave has a sex-based disparate impact on women, which under Title VII would require employers to change the practice for both men and women or prove that it is a business necessity.

In 1985, the Eastern District of New York, in Record v. Mill Neck Manor Lutheran School, held that the PDA "does not protect people wishing to take childrearing leaves, as opposed to women wishing to take pregnancy leaves. . . . A disservice is done to both men and women to assume that child-rearing is a function peculiar to one sex." Indeed it is a disservice to assume that childrearing is women's work. But to whom in this case is a disservice done by that assumption? So long as more women than men take childrearing leaves, a lack of childrearing leaves will have a disparate impact on women. Apparently because of a pleading mishap, the court did not have to address a disparate impact claim.

Record involved an art teacher who had taken a two year leave of absence with her first child and who requested another year of leave as she was planning another pregnancy and did not want to disrupt the school

192. Id.
193. For studies showing that more mothers than fathers take childcare leave, see supra note 68. For four cases in which fathers attempted to take paternity leave, see supra notes 83-89 and accompanying text. For a further discussion of disparate impact, see supra notes 52-59 and accompanying text.
194. Although the FMLA does require that some employers provide some unpaid leaves, for a discussion of the limitations of the Act, see supra note 4.
195. For studies that compare women's and men's participation in the workforce, see supra note 67.
196. For a discussion of the remedy in a disparate impact case, see supra notes 52-59 and accompanying text.
198. Id. at 907.
199. See id. ("Plaintiff does not claim that defendant's actions have a disparate impact on women. . . .").
year. She became pregnant, but was denied further childcare leave; instead, she was offered a job as a woodworking instructor with subsequent pregnancy disability leave when her second child was born. She declined and was told her job teaching art would not be renewed. The court found that the reason the school offered her the woodworking job was because her pregnancy leave would disrupt that class less than the art class and found that reason not to be pretextual. Inability to prove pretext prevented plaintiff from establishing a prima facie case of disparate treatment by presumption. The court was careful to note that the disruption the school feared was not from a pregnancy leave, but from a longer childcare leave that it anticipated she would take after the child was born. There is some inconsistency with this reasoning, however. Because the school had denied additional childcare leave, the school would not be faced with childcare leave interruption, unless she quit. But she wanted her job.

At first reflection, Record may appear an unsympathetic case for plaintiff because, after all, she wanted a third year of leave (for a second child). There is, however, a statute that provides veterans with five years of job protection. Could not raising the future generation be an important societal issue as is domestic and international security? The judge raised a similar question by mentioning an issue not before the court—whether childcare leave protection should be provided as it is for jury duty leave.

In a 1989 decision, Payseur v. W.W. Grainger, Inc., the United States District Court for the Northern District of Illinois also held that an employer who denied childcare leaves to two women had not discriminated against them under Title VII as amended by the PDA. Relying on Record, 611 F. Supp. at 907 (noting that "[w]hether leaves for child-rearing should be protected from employer discrimination, as leaves for jury duty are, is not a question for this court to determine").

200. See id. at 906.
201. See id. at 906-07.
202. See id. at 907.
203. See id.
204. For further discussion of proving disparate treatment presumptions, see supra note 52 and accompanying text.
205. Record, 611 F. Supp. at 907 ("There is no evidence that [the] decision to offer plaintiff the woodworking position and to terminate her were based on [her] desire to take a pregnancy leave. . . . The problem of class and faculty disruption was caused by plaintiff's desire to take a leave of absence to raise the child.").
206. See Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4312(a) (1998) (providing members of uniformed services reemployment rights and benefits for cumulative period of five years); see also Kovacic-Fleischer, supra note 2, at 888 (noting that protecting jobs of those taking military absences could be model for protecting jobs of those taking childrearing absences).
207. Record, 611 F. Supp. at 907 (noting that "[w]hether leaves for child-rearing should be protected from employer discrimination, as leaves for jury duty are, is not a question for this court to determine").
209. See id. at *2 (granting employer's motion for summary judgment).
the court stated that "[t]here is nothing inherently sex-related about child-care . . . either parent, may care for a child." It followed, the court reasoned, that "new mothers, as individuals seeking childcare leave" and as distinguished from pregnant women, "are not members of a protected group." Because the court reasoned that new mothers are not a protected class, it held that these mothers could not bring a disparate impact claim against their employer. Nevertheless, the court equated the phrase "new mothers" with the gender-neutral category of "individuals seeking childcare leave," despite the fact that the court noted that no new fathers were seeking the leave. As discussed above, although childcare leave could be sought by both men and women, it appears to be sought more often by women, and its denial disparately impacts them. There is a catch-22 here because the hostility of the case law toward mothers seeking leave may well discourage many fathers from seeking such leave, perpetuating disparate impact against mothers.

The court in Payseur alternatively held that even if new mothers were a protected class, the statistics would not support a disparate impact claim. The court noted that thirteen women and two men sought leaves from the employer. The employer granted nine of the women and both of the men leaves. Therefore, the court found that "[t]hese disparities fall far short of what would be necessary to create an inference of discriminatory impact because both the sample size and the alleged effect are statistically insignificant." The court, however, did not analyze the statistics as a percentage of requested leaves granted. For example, even though numerically the employer granted more leaves to women than men, it granted leaves to one hundred percent of the men who requested them, but only to sixty-nine percent of the women. The court's disparate impact analysis considered only the composition of the defending employer's workplace and the events occurring within it. But even

210. Id. at *1.
211. Id.
212. See id. at *2 (stating that to establish "prima facie case of discrimination under a disparate impact theory a plaintiff must show through significant statistical disparity that a facially neutral employment practice has a discriminatory impact on a protected class"). For a further discussion of disparate impact theory, see supra notes 52-59 and accompanying text.
214. For a discussion of three cases involving fathers seeking paternity leave, see supra notes 83-89 and accompanying text.
215. See Payseur, 1989 WL 152583, at *2 (stating that "plaintiff must show through significant statistical disparity that employment practice has discriminatory impact on new mothers).
216. See id.
217. See id.
218. Id.
219. See id.
220. Compare id. at *2, with Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (holding national statistics on height and weight permitted to determine whether
within that framework, the court did not discuss the types of leaves allowed and why. The court did not appear to recognize that denying childrearing leaves, given the current structure of society, impacts women more than men.

Five years later, *Barnes v. Hewlett-Packard Co.* involved a sales representative who claimed that she had been discriminated against on the basis of sex when she returned to work after taking the four-month "personal leave" permitted by her employer to care for medical problems of newborn twins. Although the leave was permitted by company policy, the sales representative was demoted, and the employer filled subsequent openings for new sales representatives with men. The United States District Court for the District of Maryland, relying upon legislative history, EEOC Guidelines and some of the breastfeeding cases described above, held as a matter of law that discrimination for taking a childcare leave, as opposed to medical pregnancy leave, was not covered by the PDA. The court concluded that caring for a child is not a medical condition, stating "[h]owever logical it may be to argue, as [plaintiff] does, that parental leave following maternity leave is gender-based and thus protected under Title VII, that proposition has been consistently rejected from the outset." Perhaps the rejection of the logical position by most, but not all judges, has not itself been logical.

prison's height and weight restrictions had disparate impact on women). For a discussion of *Dothard*, see *supra* notes 60-61 and accompanying text.


222. *See id.* at 443 (quoting employer policy that permitted "birth mother" to take maximum four-month parental leave after medical pregnancy leave as "personal leave," not extension of medical leave).

223. *See id.*

224. *See id.* at 443-44 (citing H.R. REP. No. 95-948, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4753). It stated that ninety-five percent of pregnant women need six or fewer weeks of leave, other five percent with medical complications should be covered as are employer's disabled workers, and childcare is not a "medically determined condition related to pregnancy." *Id.* It also stated that childcare leaves are to be treated as are nonmedical leaves. *See id.* at 444 (quoting from 29 C.F.R § 1604.18A (1984)); *see also id.* at 444-45 (quoting from Record, Wallace and Barrash and citing Payseur). For a further discussion of the conflicting legislative history of the PDA, see *supra* notes 94-102 and accompanying text.

225. *Barnes*, 846 F. Supp. at 443. The court's care to exclude pregnancy leave from its analysis might indicate that this court would have decided *Troupe*, which held that planning to take pregnancy leave was not protected by the PDA, differently than did the Seventh Circuit. For a further discussion of *Troupe*, see *supra* notes 93-104 and accompanying text.

226. Cf. *O'Hara v. Mount Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 885-86 (1998) (evaluating teacher's claim that school's parental leave policy discriminates against women because it requires them to take off remainder of school year whereas disability leave does not). The *O'Hara* court, specifically rejecting the logic of *Barnes*, stated that parental leave is protected under Title VII as discrimination based on sex, irrespective of the PDA and that the proper comparison group is between women and men taking parental leave. *See id.* at 885-86. The court ultimately rejected the plaintiff's disparate impact claim, however, because she had no statistics to prove that men had ever taken parental leave, and thus no way to...
The judge in *Barnes* did not recognize that the plaintiff was claiming that she was discriminated against for taking a company leave offered to mothers. The court did not even ask, as did the court in *Troupe* that same year and month,\(^{227}\) whether any nonpregnant people were given similar leaves and then *not* demoted. Nor did the court ask whether fathers were not given similar leaves (which would discriminate against them). If fathers are not allowed to take childcare leave, but mothers are, but are then demoted for taking it, then this employment policy would appear to have a disparate impact on mothers. As will be seen below, a few courts recognize this.

### IV. Applying the Three-Case Theory to Pregnancy, Breastfeeding and Childrearing Leave Cases

A few lower court cases have applied the reasoning with respect to reproductive differences between men and women that was later employed by the Supreme Court in *United States v. Virginia*. In 1981, before *Guerra* and *United States v. Virginia* were decided, the United States Court of Appeals for the District of Columbia Circuit held in *Abraham v. Graphic Arts International Union*,\(^{228}\) without requiring statistical evidence that was demanded by so many cases described in Part III, above, that an employer’s policy of providing no more than ten days of sick leave for any temporary employee had a disparate impact on women. The court reversed the summary judgment dismissing plaintiff’s claim that she was fired from her job with the union because of her pregnancy.\(^{229}\) The District of Columbia Circuit held that too many facts were in dispute to allow the trial court to rely on the union’s allegations that the plaintiff lacked the qualifications to resume her job, which had been “redefined” while she was on maternity leave.\(^{230}\) The court stated that “the work absence incidental to her impending motherhood loomed as a likely explanation for her discharge.”\(^{231}\)

In addition, the court decided that a trial was necessary to determine whether the employer’s policy that granted temporary employees, such as

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\(^{227}\) See *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 734 (7th Cir. 1994). For a further discussion of *Troupe* see *supra* notes 111-23. Both *Troupe* and *Barnes* were decided in March 1994.

\(^{228}\) 660 F.2d 811 (D.C. Cir. 1981).

\(^{229}\) See *id.* at 815-16.

\(^{230}\) See *id.* at 816.

\(^{231}\) *Id.* at 817.
plaintiff, only a ten-day leave for a medical disability, including pregnancy, had a disparate impact on pregnant women, and the court referred to the fact that all temporary employees received the same disability benefits as only a "slight variant" from the prohibition against employers from excluding pregnancy benefits from employees' benefit packages. The court noted that an unlawful employment practice is discharging "any individual . . . because of such individual's . . . sex," and that:

Title VII outlaws any detrimental visitation on employees of either sex "because of their differing roles in the 'scheme of human existence'" . . . . Title VII cannot be read "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role."

The court emphasized that ten days was an inadequate period of time to bear a child and was thus discriminatory, saying, "while many female as well as male employees could have held a [temporary] job without any problem at all, any such jobholder confronted by childbirth was doomed to almost certain termination. Oncoming motherhood was virtually tantamount to dismissal . . . . In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter." The court concluded, therefore, that the leave policy had a disparate impact on women employees of childbearing age.

The court then said that the argument that the maximum ten-day leave policy was justified on the ground that the project on which plaintiff had been employed was one of short term "clashes violently with the letter as well as the spirit of Title VII."

Relying on an EEOC Guideline, the court further said:

An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see an

232. See id. at 818-19.
233. Id. at 818.
234. Id. at 817 (quoting 42 U.S.C. § 2000e-2(a)(1) (1976)).
235. Id. at 818 (holding that Title VII prohibits burdening women because of pregnancy, distinguishing "benefit" that could be withheld under Gilbert (footnotes omitted) (quoting Nashville Gas Co. v. Satty, 434 U.S. 136 (1977))).
236. See id. at 819 (suggesting that in 95% of pregnancies six-week maternity leave was adequate) (citing H.R. Rep. No. 95-948, at 5 (1978)).
237. Id. (citing Nashville Gas, 434 U.S. at 142).
238. See id. at 819.
239. Id.
This reasoning makes sense because policies that penalize women for having children may influence either job-related or family-size decisions of all women of childbearing age and may have influenced decisions of women who have already had, or decided not to have children.

Abraham was favorably cited in dicta by one 1991 Seventh Circuit case, Magano v. Lyden,241 and by a 1993 Illinois district court case, Cnokrak v. Evangelical Health Systems Corp.,242 which had also cited the "noted scholar," Dean Kay. Those dicta appear to have been rejected three years later by the Seventh Circuit in Troupe, which explicitly rejected the reasoning of Dean Herma Hill Kay and subtly contradicted Magano.243

In 1996, fifteen years after Abraham and a few months after United States v. Virginia, the United States District Court for the Eastern District of Texas in Roberts v. United States Postmaster General,244 relied on Abraham and denied an employer's motion to dismiss, holding that "[w]hile an employer can violate Title VII by applying unequally a policy it does have, an employer can also violate Title VII by failing to provide an adequate policy; a policy which on its face is neutral, but which has a disparate impact on women."245 In that case, a woman had been using her accumulated sick leave to care for her premature infant until her employer changed its policy to restrict use of sick leave to cases in which only the employee was ill.246 In denying the employer's motion to dismiss plaintiff's disparate impact claim, the court said "[t]he plaintiff... argues that... women are forced to resign more often than men because of their more frequent role as child-rearers, and the failure of the defendant to allow employees to take time off to care for children disparately impacts women. This court's

240. Id. (quoting 29 C.F.R. § 1604.10(c) (1979)) (footnote omitted). Section 1604.10(c) states, "where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employment of one sex and is not justified by business necessity." 29 C.F.R. § 1604.10(c). Presumably, however, an affirmative defense of business necessity is also an issue of fact to be decided at trial.

241. 939 F.2d 440 (7th Cir. 1991). Magano found that the school district's leave policy did not have a disparate impact on pregnant women, even though the policy did not permit following paid sick leave with unpaid leave causing pregnant women to lose paid leave if they took leave beyond their disability. See id. at 444. The court found that the employer had enough leave available for the physical pregnancy disability and therefore said, "[t]his is not to say that a policy which does not provide adequate leave [for pregnancy] might not be vulnerable under a disparate impact theory." (citing Abraham and Miller Wohl Co. v. Graphics Arts Int'l Union, 515 F. Supp. 1264, vacated, 685 F.2d 1088 (9th Cir. 1982).


243. See Troupe v. May Dep't Stores Co., 20 F.3d at 738 (7th Cir. 1994).


245. Id. at 289.

246. See id. at 284.
analysis is consistent with the equality theory I derived from *United States v. Virginia*, *Guerra* and *Newport News* and described in Part III above. It is exactly this type of harm that Title VII seeks to redress. But, as the cases in Part III illustrate, it is exactly this type of harm that frequently is not redressed.

Other maverick district courts differed from the cases discussed in Part III, above, by not looking for nonpregnant people with similar leave requirements who are treated more favorably than the plaintiffs or by not removing new mothers from the protection of the PDA. The United States District Court for the Northern District of Iowa in 1987, in *Packard-Knutson v. Mutual Life Insurance Co.*, found that a woman discharged after taking maternity leave was discriminated against on the basis of pregnancy by looking at the timing of the discharge as one factor in concluding that plaintiff's discharge was because of pregnancy. The court said, "It was not until after the birth of plaintiff's baby that defendant began to complain of her alleged lack of production." The court also found defendant's explanation that it fired her for lack of production pretextual because another employee, who had not been on leave, but who had low production, was not treated as severely.

Nine years later, the United States District Court for the District of Colorado, in *Donaldson v. American Banco Corp.* explicitly rejected an employer's argument that Title VII does not "protect parents caring for small children from being fired because that is a gender-neutral problem." The court refused to dismiss the claims of three plaintiffs, saying that the PDA:

[D]oes not specify whether the discrimination must occur during the pregnancy. . . . It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place. The plain language of the statute does not require it, and common sense precludes it.

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247. See id.
249. Id. at 1266.
250. See id.
252. Id. at 1463.
253. Id. at 1464. In addition, the court cited yet another statement from legislative history from Representative Sarasin that conflicts with that relied on by some of the cases in Part III. See id. For further discussion of legislative history, see supra notes 93-97. *Donaldson* also declined to follow *Maganuco*, 999 F.2d 400 (7th Cir. 1991), which, despite language favorable to pregnant employees, had held that a plaintiff needing a long leave because of complications from childbirth would not be protected by the PDA. See id. at 445. The court in *Donaldson* said, "to the extent that Maganuco, can be read to state a general rule that pregnancy is only to be treated as a disability, I decline to follow it." *Donaldson*, 945 F. Supp. at 1464.
As can be seen by comparing the cases described in this Part with those in Part III, above, the courts disagree as to what "makes sense." The cases discussed in this Part do not represent the current mainstream of lower court cases, but they should. The cases described in Part III above indicate that many courts are not celebrating, but rather are denigrating, women's reproductive differences and, as a result, are limiting women's employment opportunities. Not all lower courts, and not all judges in the cases described in Part III agree that Title VII permits this limitation. The logic of those judges is consistent with the theory derived from the three United States Supreme Court cases.

Because women's and men's natural reproductive roles are not going to change, without employment adjustments women frequently will be disadvantaged and society will be disadvantaged by the resulting "brain drain." Presumably society does not want to discourage all women from having children, nor should women be made to feel that they must give up natural biological functions, such as having children and breastfeeding, in order to work. As the Supreme Court held in 1996, women's differences from men should be celebrated, not denigrated.

Applying the three-case theory, courts could conclude, as did Abraham and Roberts, that denying adequate pregnancy leave denigrates women. Courts could also conclude that penalizing an employee for taking pregnancy leave or for absences related to pregnancy denigrates women, regardless of whether nonpregnant people are treated similarly.

In addition, courts should not require women to abandon the biological function of breastfeeding, another difference that should be celebrated, in order to keep a job. Accommodations for breastfeeding should be manageable for employers. If not, employers can prove that failure to provide such accommodations is a necessity to their business, but the benefits from such accommodations might make that proof difficult. If leaves are not possible, there are other alternatives than making a woman choose between breastfeeding her child and her job, such as telecommuting, bringing the baby to work, flexible schedules or time for expressing milk on the job.

Finally, employers should provide adequate childcare leave or accommodations, so that women are not disparately impacted on a societal basis for having children. Then, the leaves or accommodations could also be

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255. See United States v. Virginia, 518 U.S. 515, 533 (1996) ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.").

256. For a survey of studies of the cost effectiveness of family-friendly policies, see generally Kovacic-Fleischer, supra note 2.

257. See Kovacic-Fleischer, supra note 2, at 905-07 (discussing types of possible family-friendly employer accommodations).

258. See id.
extended to men, as described in Newport News. When this happens, stereotypical notions of parenting could begin to break down. Currently, it is not easy for fathers to ask for parenting leaves when the cases are so hostile to such leaves. But when fathers as well as mothers are able to have time with children, it will come from society having celebrated their reproductive differences without denigrating either women or men. The assumption that childcare is not a function of the workplace could be eroded and society could acknowledge the importance of broad-based support, including workplace support, for raising future generations of healthy, intelligent and well-adjusted children.

259. See id. at 912-15 (discussing how family-friendly policies could reduce societally entrenched differences between sexes).