

COURTS' STRUGGLE WITH INFERTILITY: THE IMPACT OF *HALL V. NALCO* ON INFERTILITY-RELATED EMPLOYMENT DISCRIMINATION

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This Note focuses on a recent Seventh Circuit case of first impression, Hall v. Nalco, which held that Title VII prohibits an employer from firing an employee for absenteeism related to infertility treatments. Because Hall is the first circuit court decision to rule that fertility-treatment discrimination can be a form of sex discrimination under Title VII, it represents a victory for infertile employees suffering from workplace discrimination.

Yet Hall tells a tale of missed opportunities. This Note highlights how both the Seventh Circuit and the plaintiff, Cheryl Hall, missed opportunities to expand legal protection for employees undergoing infertility treatments. First, the Seventh Circuit missed an opportunity to create clear precedent for future litigants in similar situations. The opinion employs an implied—not express—disparate impact analysis. This lack of clarity further complicates infertility-related discrimination precedent under Title VII. Second, Cheryl Hall (and her lawyers) missed an opportunity to seek redress under two other federal employment statutes: the Americans with Disabilities Act and the Family and Medical Leave Act.

INTRODUCTION

Infertility is a disease of the reproductive system that impairs the body's ability to perform one of its most basic functions: reproduction.¹ The inability to conceive affects all as-

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1. Am. Soc'y for Reprod. Med., Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited Oct. 21, 2009) [hereinafter ASRM, Frequently Asked Questions].

pects of a person's life.² Infertility can cause feelings of depression, anger, low self-esteem, and stress.³ Affecting about 12 percent of the reproductive-age population,⁴ infertility "strikes people of every race, ethnicity and socio-economic level."⁵

Congress has not passed legislation specifically related to infertility. However, Title VII of the Civil Rights Act of 1964 ("Title VII"),⁶ as amended by the Pregnancy Discrimination Act ("PDA")⁷, and the Americans with Disabilities Act of 1990 ("ADA"),⁸ may protect infertile employees who allege infertility-related discrimination. Further, the Family and Medical Leave Act of 1993 ("FMLA")⁹ establishes an employee's right to unpaid time off for infertility treatments.¹⁰

This Note focuses on *Hall v. Nalco*, a recent case of first impression in the Seventh Circuit.¹¹ In *Hall*, the court held that Title VII prohibits an employer from firing an employee for absenteeism related to infertility treatments.¹² *Hall* marks the first time a federal appellate court ruled that fertility-treatment discrimination is a form of sex discrimination under Title VII.¹³ While *Hall* is a victory for infertile employees suffering from workplace discrimination, the case is a tale of missed opportunities. First, the Seventh Circuit missed an opportunity to create clear precedent regarding infertility-related discrimination under Title VII. Instead, the court chose to employ an implied, not express, analytical framework.¹⁴ Because the opinion unnecessarily obfuscates the court's reasoning,

2. LIZA CHARLESWORTH, THE COUPLE'S GUIDE TO IN VITRO FERTILIZATION: EVERYTHING YOU NEED TO KNOW TO MAXIMIZE YOUR CHANCES OF SUCCESS 62–63 (2004).

3. *Id.*; see also Tara Cousineau & Alice D. Domar, *Psychological Impact of Infertility*, 21 CLINICAL OBSTETRICS & GYNECOLOGY 293, 295–97 (2007).

4. ASRM, *Frequently Asked Questions*, *supra* note 1.

5. Elizabeth A. Pendo, *The Politics of Infertility: Recognizing Coverage Exclusions as Discrimination*, 11 CONN. INS. L.J. 293, 294 (2005).

6. 42 U.S.C. § 2000e-2(a)(1) (2006).

7. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

8. Pub. L. No. 101-336, § 2, 104 Stat. 328 (codified at 42 U.S.C. §§ 12101–12213 (2006)).

9. 29 U.S.C. §§ 2601–2654 (2006).

10. *See id.*

11. 534 F.3d 644, 646 (7th Cir. 2008).

12. *Id.* at 649.

13. *Id.* at 646 ("Whether allegations of the type Hall has made state a claim for relief under Title VII is an issue of first impression in this circuit; we are also unaware that any other circuit has addressed the precise question presented here.")

14. *See id.* at 648–49; see also *infra* Part IV.

Hall furthers the confusion surrounding infertility-related discrimination cases under Title VII.

Second, the litigant in the case, Cheryl Hall, also missed opportunities. Hall (and her lawyers) failed to utilize two other federal employment statutes that may provide infertile employees protection: the ADA and the FMLA. Hall's termination suggests facts giving rise to both an ADA claim and an FMLA claim.¹⁵

This Note highlights how both the court and Hall missed opportunities to expand legal protection for employees undergoing infertility treatments. Part I describes the causes of and treatments for infertility. It also provides an overview of how infertility affects the workplace, from both the employee and employer perspectives. Part II outlines the history of Title VII, including Congress's enactment of the PDA. Part III details how federal courts interpreted infertility-related discrimination under Title VII prior to *Hall v. Nalco*. The facts, procedural history, and holding in *Hall v. Nalco* are analyzed in Part IV. Part V examines how the Seventh Circuit missed an opportunity in *Hall* to explicitly employ a disparate impact analysis, and thus further complicated infertility-related discrimination precedent under Title VII. Finally, Part VI outlines how Cheryl Hall (and her lawyers) also missed an opportunity to seek protection under two other federal employment statutes: the ADA and the FMLA.

I. THE PROBLEM OF INFERTILITY

Infertility is defined as the inability to achieve pregnancy after one year of well-timed, unprotected intercourse,¹⁶ or achieving pregnancy but suffering repeated miscarriages.¹⁷ About 12 percent of the reproduction-age population, more than 7.3 million people, suffer from infertility.¹⁸ More than one

15. See *infra* Part V.

16. See AM. SOC'Y FOR REPROD. MED., INFERTILITY: AN OVERVIEW, A GUIDE FOR PATIENTS 3 (2003), http://www.asrm.org/Patients/patientbooklets/infertility_overview.pdf [hereinafter ASRM, INFERTILITY: AN OVERVIEW]; see also RESOLVE: The Nat'l Infertility Ass'n, Frequently Asked Questions About Infertility, http://www.resolve.org/site/PageServer?pagename=lrn_wii_faq (last visited Oct. 21, 2009).

17. NAT'L WOMEN'S HEALTH INFO. CTR., U.S. DEP'T OF HEALTH & HUMAN SERVS., FREQUENTLY ASKED QUESTIONS: INFERTILITY 1 (2006), available at <http://www.womenshealth.gov/faq/infertility.pdf>.

18. ASRM, Frequently Asked Questions, *supra* note 1.

million Americans seek medical treatment for infertility every year.¹⁹ Section A details the causes of infertility in both men and women. Section B presents an overview of the most common types of treatment for infertility, as well as their costs and success rates. Section C analyzes how the problem of infertility affects the workplace.

A. Causes of Infertility

Although many think of infertility as a woman's problem,²⁰ studies show that infertility actually occurs equally in men and women.²¹ The cause or causes of infertility can involve one or both partners. In about one-third of cases, infertility occurs because of a medical condition in the male partner alone.²² In about the same percent of cases, infertility occurs because of a medical problem in the female partner alone.²³ In approximately 20 percent of cases, infertility occurs because of medical problems in both the male and female.²⁴ In the remaining 10 percent of cases, infertility is unexplained.²⁵

For both men and women, infertility is generally caused by hormonal imbalances, structural damages to reproductive organs, or a combination of both.²⁶ Male infertility is most frequently caused by problems with sperm production or delivery.²⁷ Female infertility is most frequently caused by ovulation disorders.²⁸ Pelvic inflammatory disease or endometriosis can also block a woman's fallopian tubes and affect her fertility.²⁹ In both men and women, fertility decreases with age.³⁰ One-third of women over thirty-five years old who are attempting to

19. DIANE ARONSON, RESOLVE, RESOLVING INFERTILITY: UNDERSTANDING THE OPTIONS AND CHOOSING SOLUTIONS WHEN YOU WANT TO HAVE A BABY 3 (1999).

20. Brietta R. Clark, *Erickson v. Bartell Drug Co.: A Roadmap for Gender Equality in Reproductive Health Care or an Empty Promise?*, 23 LAW & INEQ. 299, 329 (2005).

21. ASRM, Frequently Asked Questions, *supra* note 1.

22. RESOLVE: The Nat'l Infertility Ass'n, Infertility Myths and Facts, http://www.resolve.org/site/PageServer?pagename=lrn_ffaf_moi (last visited Oct. 21, 2009).

23. *Id.*

24. *Id.*

25. *Id.*

26. See ARONSON, *supra* note 19, at 89–174.

27. ASRM, Frequently Asked Questions, *supra* note 1.

28. *Id.*

29. *Id.*

30. See ASRM, INFERTILITY: AN OVERVIEW, *supra* note 16, at 3, 9.

conceive experience problems with infertility.³¹ Finally, lifestyle factors such as body weight, sexually transmitted diseases, and the use of alcohol or tobacco can affect one's fertility.³²

B. Treatments for Infertility and Their Costs

There are many ways to treat infertility. The most common and least invasive treatment for infertile women is the use of ovulation-inducing drugs.³³ Ovulation-inducing drugs stimulate ovulation in women who do not regularly ovulate on their own.³⁴ Women who do ovulate may also take the drugs to increase the number of eggs in a given cycle, which increases the chance of conception.³⁵ Ovulation-inducing drugs are taken either on their own or in combination with artificial insemination, where sperm are inserted directly into the woman's uterus.³⁶ Typically patients undergo such treatment for three to six months.³⁷

The cost and success rate of ovulation induction and artificial insemination vary greatly depending on the specific drugs used and the patient's individual diagnosis. Clomiphene citrate, the most common ovulation-inducing drug,³⁸ typically costs between fifty and one-hundred dollars per month.³⁹ The price of treatment rises depending on the amount of medical monitoring—such as blood work, ultrasounds, and other testing—a patient needs during treatment.⁴⁰ Ovulation-inducing drugs, used alone or in combination with other treatments like artificial insemination, are highly effective. For example,

31. NAT'L WOMEN'S HEALTH INFO. CTR., *supra* note 17, at 2.

32. ASRM, Frequently Asked Questions, *supra* note 1.

33. See AM. SOC'Y FOR REPROD. MED., MEDICATIONS FOR INDUCING OVULATION: A GUIDE FOR PATIENTS 6–7 (2006), http://www.asrm.org/Patients/patientbooklets/ovulation_drugs.pdf [hereinafter ASRM, MEDICATIONS FOR INDUCING OVULATION].

34. See *id.* at 7.

35. See *id.*

36. See *id.*

37. See Amy B. Monahan, *Value-Based Mandated Health Benefits*, 80 U. COLO. L. REV. 127, 158 (2009).

38. ASRM, MEDICATIONS FOR INDUCING OVULATION, *supra* note 33, at 7. Brand names include Clomid and Serophene. *Id.* at 14.

39. See RACHEL PEPPER, THE ULTIMATE GUIDE TO PREGNANCY FOR LESBIANS: TIPS AND TECHNIQUES FROM CONCEPTION THROUGH BIRTH, HOW TO STAY SANE AND CARE FOR YOURSELF 71 (1st ed. 1999) (“[Clomiphene citrate] is taken orally, with a typical dosage being one or two pills of 50 mg per day for five days. The average cost of each pill is about \$10.”); see also CHARLESWORTH, *supra* note 2, at 86–87 (breaking down the costs of numerous infertility treatments).

40. Monahan, *supra* note 37, at 158.

about 80 percent of women who take clomiphene citrate ovulate, and about 40 percent become pregnant within two or three months of treatment.⁴¹

Another treatment option for infertility is in vitro fertilization ("IVF"). While IVF is the most invasive treatment option, it is also the most successful.⁴² IVF involves surgically removing a woman's eggs, fertilizing the eggs in a laboratory, and then placing the resulting embryos into the lining of the woman's uterus.⁴³ IVF costs around \$12,000 to \$20,000 per attempt,⁴⁴ and the average couple requires multiple rounds of treatment before conceiving.⁴⁵ In 2005, 34 percent of women who underwent IVF got pregnant, and 28 percent actually gave birth.⁴⁶ However, the success rate of IVF varies with age, from 37.3 percent for women under age thirty-five to 10.6 percent for women aged forty-one to forty-two.⁴⁷ Overall, IVF accounts for only 3 percent of infertility services used in the United States,⁴⁸ but it accounts for a substantial number of total births. From 1985 to 2006, almost 500,000 babies were born in the United States as a result of IVF procedures.⁴⁹ In 2002, approximately one in every one hundred babies born in the U.S. was conceived using IVF.⁵⁰ Accordingly, IVF is a necessary treatment in order for a small percentage of couples in America to reproduce.

C. *How Infertility Treatment Affects the Workplace*

The erratic nature of infertility treatment can be frustrating for both employees and employers. Of course, not all infertile people seek treatment for their infertility, and not all of those who do so have jobs to juggle at the same time. But a

41. ASRM, MEDICATIONS FOR INDUCING OVULATION, *supra* note 33, at 8.

42. Monahan, *supra* note 37, at 159.

43. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2007), http://www.cdc.gov/ART/ART2005/508PDF/2005ART508Cover_National.pdf; see also ASRM, Frequently Asked Questions, *supra* note 1.

44. MAURA A. RYAN, ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION: THE COST OF LONGING 20 (2003).

45. See ASRM, Frequently Asked Questions, *supra* note 1.

46. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 43, at 6.

47. *Id.* at 85.

48. ASRM, Frequently Asked Questions, *supra* note 1.

49. *Id.*

50. *Id.*

significant number of those who suffer from infertility have to struggle to balance work with the often invasive and time-consuming procedures used to achieve pregnancy.⁵¹ Most infertility treatments require employees to go to clinics for blood tests or sonograms.⁵² If employees have a long commute to work or a clinic, they may need continual or extended time off.⁵³ In addition, employees undergoing IVF treatment must also be placed under a general anesthetic, which requires a lengthy recovery time.⁵⁴ Some doctors even order bed rest after each IVF treatment.⁵⁵ Consequently, undergoing infertility treatment will require most, if not all, employees to take significant time off from work.

Studies show that such employees fear that they will suffer negative repercussions if they take extended absences from work.⁵⁶ They may believe that their absences, combined with the employer's knowledge of their infertility, will be viewed as a weakness.⁵⁷ They may also think that their supervisor will notice the demanding nature of fertility treatments and, as a result, not consider them for promotion.⁵⁸ Or they may believe that their supervisor will anticipate that the employee might become pregnant, and consequently might ask for extended time off during and after the pregnancy, and thus not consider them for promotion.⁵⁹ In fact, a recent study reveals that 20 percent of female employees who chose not to disclose their infertility to their employers did so because they worried that their chances of promotion would be hindered.⁶⁰

Extended absences can also create suspicion among co-workers.⁶¹ For example, a *Wall Street Journal* blog, *The Juggle*, reported that a university administrator who took twelve days off to undergo several rounds of infertility treatment sus-

51. Peter S. Finamore et al., *Social Concerns of Women Undergoing Infertility Treatment*, 88 FERTILITY & STERILITY 817, 817 (2007).

52. Sue Shellenbarger, *Women Battling Infertility Find a Friend in the Court*, WALL ST. J., Aug. 13, 2008, at D1, available at <http://online.wsj.com/article/SB121858336262134875.html>.

53. See Finamore et al., *supra* note 51, at 817.

54. Shellenbarger, *supra* note 52, at D1.

55. *Id.*

56. *Id.*

57. Finamore et al., *supra* note 51, at 820.

58. *Id.*

59. *Id.*

60. *Id.*

61. Posting of Sue Shellenbarger to WSJ Blogs: *The Juggle*, <http://blogs.wsj.com/juggle/2008/08/13/fitting-infertility-treatments-into-a-work-schedule> (Aug. 13, 2008, 09:51 EST).

pected that some co-workers thought she was missing work to job-hunt.⁶² One supervisor criticized her in the presence of co-workers, saying that she had missed work too frequently.⁶³ Another employee reported that she had to turn down prized work assignments that required travel so she could undergo infertility treatment,⁶⁴ which caused some awkward moments: “At one point, a frustrated co-worker asked why [the employee] couldn’t rearrange her schedule to take a business trip; she cited ‘personal reasons’ and held her silence. He apologized and backed off.”⁶⁵ As this comment demonstrates, juggling infertility treatments with a job can be very stressful for an employee. Unfortunately, a stressful work environment can affect an employee’s fertility.⁶⁶ Research suggests that stress, depression, anxiety, and other negative feelings result in decreased success for patients undergoing IVF.⁶⁷

In turn, erratic or prolonged employee absences—for whatever cause—can irritate even the most sympathetic employers. Absences interfere with planning, meetings, and work allocation. Employers may have to hire someone to replace the employee temporarily. Finally, employers often still pay the employee the same salary rate, yet they arguably get decreased productivity.

Employment law reflects an attempt to strike a fair balance between these competing concerns and frustrations at the federal level.

II. BACKGROUND ON TITLE VII AND SEX-BASED DISCRIMINATION

A. *History of Title VII*

Congress enacted Title VII as part of the Civil Rights Act of 1964.⁶⁸ Title VII is a remedial measure aimed at addressing unlawful discrimination in the workplace.⁶⁹ The relevant text of the statute states:

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Finamore et al., *supra* note 51, at 817.

67. *Id.*

68. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268–69 (W.D. Wash. 2001).

69. See *id.*

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to 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.⁷⁰

Originally, the primary focus of Title VII was to address race discrimination. The first draft of Title VII did not include “sex” as a prohibited basis of discrimination.⁷¹ Congressman Howard W. Smith, a civil rights opponent, amended the language of the statute to include “sex” only two days before it was passed, apparently in an effort to defeat the passage of the Act.⁷² Despite the “humorous debate,” later called “Ladies Day in the House,” the amendment passed that same day.⁷³ Nonetheless, as a result of this bizarre turn of events, Congress provided little guidance on the meaning of “sex” as a prohibited basis of discrimination.⁷⁴ As the Supreme Court noted, the “legislative history of Title VII’s prohibition of sex discrimination is notable primarily for its brevity.”⁷⁵

B. Judicial Development of Title VII: Two Theories of Discrimination

Because Title VII does not define “discrimination,”⁷⁶ courts have developed two basic theories of discrimination: disparate treatment and disparate impact. Disparate treatment is “the most easily understood type of discrimination.”⁷⁷ In the con-

70. 42 U.S.C. § 2000e-2(a) (2006).

71. See Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 172–74 (1991).

72. See Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–40 (1997); Freeman, *supra* note 71, at 163.

73. Freeman, *supra* note 71, at 163. Representative Smith later voted against the entire bill. *Id.* at 177. When Smith introduced the argument to the House Floor, “he played it for laughs, setting up a mocking and jocular tone which led to the two hour debate.” *Id.* at 176–77.

74. See Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 99–100 (2005).

75. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976).

76. See *id.* at 133 (noting that discrimination is not defined in Title VII).

77. Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1997).

text of sex discrimination, disparate treatment occurs when an employer intentionally discriminates against a person on the basis of sex.⁷⁸ The plaintiff must establish that sex actually motivated the employer's actions.⁷⁹ However, a discriminatory motive may be inferred when an employer utilizes facially discriminatory policies, such as not hiring members of a protected class.⁸⁰ The majority of employment discrimination cases are brought under a disparate treatment theory.⁸¹

The second theory, disparate impact, does not require a plaintiff to prove discriminatory intent.⁸² An employee alleging disparate impact must show that a facially-neutral employment practice "in fact fall[s] more harshly on one group than another and cannot be justified by business necessity."⁸³ Typically, a plaintiff needs sufficient statistical evidence to show that one sex is more adversely affected by the employer's actions than the other sex.⁸⁴ Equal treatment theorists embrace disparate impact claims "as critical in furthering the equality principles under Title VII and the PDA" because they allow an employee to bring a Title VII claim without proving intent.⁸⁵

C. *The Pregnancy Discrimination Act's Impact on Sex Discrimination*

The Supreme Court first examined the issue of whether pregnancy discrimination violates Title VII in 1976 in *General Electric Co. v. Gilbert*.⁸⁶ The Court reviewed a comprehensive short-term disability insurance policy that excluded pregnancy-related disabilities from coverage under an employer's health

78. *See id.*

79. *See id.*

80. *See id.*

81. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (noting that, in 1989, only 101 of the 7,613 employment discrimination cases were brought under the disparate impact theory).

82. *See Teamsters*, 431 U.S. at 335 n.15.

83. *Id.*

84. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) ("[T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."). There is no standard mathematical formula or magic number that automatically satisfies the statistical evidence threshold. *Id.* at 994-95.

85. Clark, *supra* note 20, at 353.

86. 429 U.S. 125 (1976).

care benefits plan.⁸⁷ Essentially, the benefits plan provided that employees would receive paid leave for nearly every medical condition *except* pregnancy.⁸⁸ The employee argued that the exclusion of pregnancy violated Title VII's ban on sex discrimination because only women can get pregnant.⁸⁹ The court disagreed. It reasoned that excluding pregnancy-related disabilities did not constitute impermissible sex discrimination "because not all women are or will become pregnant and because the plan covered the same set of [medical] conditions for both men and women."⁹⁰ Under the Supreme Court's interpretation of Title VII in *Gilbert*, pregnancy discrimination did not constitute sex discrimination.⁹¹

Almost immediately after *Gilbert*, Congress enacted legislation to overrule the court's holding. In 1978, Congress passed the PDA, amending Title VII to include the following:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work⁹²

Specifically, the PDA clarifies that "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."⁹³ The extent of Congress's intention to overrule *Gilbert*, however, remains unclear. Some courts and commentators argue that Congress enacted the PDA simply to repudiate *Gilbert's* holding that pregnancy discrimination does not equate to sex discrimination in violation of Title VII.⁹⁴ According to this argument, "the PDA simply

87. *Id.* at 127.

88. *Id.*

89. *Id.* at 129.

90. Colleen E. Medill, *Coverage of Reproductive Technologies Under Employer-Sponsored Health Care Plans: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Sections on Employee Benefits and Employment Discrimination*, 8 EMP. RTS. & EMP. POL'Y J. 523, 526 (2004); *see also Gilbert*, 429 U.S. at 145–46.

91. *See* 429 U.S. at 145–46.

92. 42 U.S.C. § 2000e(k) (2006).

93. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

94. Medill, *supra* note 90, at 526.

adds pregnancy, childbirth and related medical conditions to the list of Title VII's protected characteristics."⁹⁵

The prevailing view, however, is that Congress enacted the PDA to express disapproval of both the specific holding and the analysis employed in *Gilbert*.⁹⁶ The Supreme Court erred in *Gilbert* by finding that classifications based on pregnancy were permissible under Title VII based on an equal access theory.⁹⁷ Congressional Reports from both the House of Representatives and Senate⁹⁸ indicate that Congress felt that the dissenting justices in *Gilbert* correctly interpreted "both the principle and the meaning of Title VII."⁹⁹ Accordingly, the PDA clarifies that Title VII is violated whenever an employer discriminates on the basis of sex, which includes discrimination on the basis of pregnancy.¹⁰⁰

Erickson v. Bartell Drug Co. was the first case to formally adopt this approach.¹⁰¹ In *Erickson*, an employee sued her employer because her health benefits plan excluded oral contraceptives from its otherwise comprehensive prescription drug coverage.¹⁰² The employee alleged two separate claims. First, she asserted a disparate treatment claim under the PDA.¹⁰³ Specifically, she contended "that the capacity to become pregnant is itself a pregnancy-related medical condition under the [PDA]."¹⁰⁴ Consequently, the employer's benefits plan violated the PDA because it discriminated on the basis of the capacity to become pregnant by excluding coverage for birth control medication.¹⁰⁵ The district court granted summary judgment in favor of the employee, a landmark ruling because it marked the

95. *Id.* at 526-27.

96. *Id.* at 527.

97. *Id.*; *Newport News*, 462 U.S. at 678 ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.").

98. A House Report stated that "[i]t is the committee's view that the dissenting Justices correctly interpreted the Act." H.R. REP. NO. 95-948, at 2 (1978). A Senate Report quoted passages from two dissenting opinions in *Gilbert* and stated that those opinions correctly interpreted Title VII. S. REP. NO. 95-331, at 2-3 (1977).

99. 462 U.S. at 678 (internal quotation marks omitted) (quoting S. REP. NO. 95-331, at 2-3 (1977)).

100. Medill, *supra* note 90, at 527.

101. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

102. *Id.* at 1268.

103. *Id.* at 1268 n.2.

104. Medill, *supra* note 90, at 532.

105. *Id.*

first time a court held that an employer violates Title VII by providing unequal medical benefits for men and women.¹⁰⁶

The employee also brought a Title VII sex discrimination claim alleging disparate impact.¹⁰⁷ She argued that the plan's exclusion of oral contraceptives disparately impacts women because "only women can become pregnant and only women bear the physical, emotional and other consequences of an unintended pregnancy if they can't afford to use contraception and become pregnant."¹⁰⁸ Additionally, she argued, women disproportionately bear the financial burden of paying for contraceptives if their employer's plan does not cover it.¹⁰⁹ The district court did not reach this claim because it granted summary judgment on the PDA claim.¹¹⁰

Since *Erickson*, however, many courts have interpreted the PDA narrowly.¹¹¹ For example, in *Maldonado v. U.S. Bank*, the Seventh Circuit held that the PDA does not afford pregnant employees any additional rights.¹¹² Rather, the Act only requires that employers extend the same privileges and rights to pregnant employees as to all others.¹¹³ As Judge Richard A. Posner reasoned in another case, "[e]mployers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees, even to the point of 'conditioning the availability of an employment benefit on an employee's decision to return to work after the end of the medical disability that pregnancy causes.'" ¹¹⁴ Under this analysis, an employer may lawfully discharge a pregnant employee for an absence from

106. *Erickson*, 141 F. Supp. 2d at 1272, 1277.

107. *Id.* at 1268 n.2.

108. Medill, *supra* note 90, at 532.

109. *Id.*

110. *See Erickson*, 141 F. Supp. 2d at 1277.

111. *See, e.g., Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 583 (7th Cir. 2000) ("[T]he Pregnancy Discrimination Act does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked."); *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999); *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 297 (3d Cir. 1997) ("The PDA does not require an employer to grant maternity leave or to reinstate an employee after a maternity leave."); *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997) (noting that discrimination after childbirth based upon assumptions of a new mother's changed commitment to her career is outside the protection of the PDA).

112. 186 F.3d at 767.

113. *Id.*

114. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (quoting *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 445 (7th Cir. 1991)).

work, unless the employer overlooks similar absences of non-pregnant employees.¹¹⁵ Accordingly, in many jurisdictions, the PDA has become a toothless remedy.

Despite judicial reluctance to enforce the PDA's clear mandate to employers, the PDA has been effective in changing employers' behavior towards pregnant employees. As the attorney who represented the employee in *Erickson* noted:

[T]he fact is that so many employers, when we threaten to bring litigation against them, immediately change their policy, and I think there are a lot of reasons for that. One is that it's a good policy in terms of employees, a fairly inexpensive way to keep employees happy. . . . So, what we're seeing around the country is that when employees ask for the coverage, the employers in many cases simply agree to provide it.¹¹⁶

Therefore, the litigation surrounding pregnancy-related discrimination may be decreasing as employers weigh the costs of litigation against establishing pregnancy-friendly policies and providing adequate and equal health care benefits coverage. If the PDA forces employers to choose the latter, pregnancy discrimination is reduced.

D. Infertility-Related Discrimination Under Title VII and the PDA

Although a discussion of the PDA is relevant to courts' treatment of infertility-related discrimination, pregnancy and infertility are not the same. Most importantly for Title VII analysis, only women can become pregnant, whereas infertility is a condition experienced by both men and women in roughly equal numbers.¹¹⁷ In other words, if both men and women suffer from infertility, does discrimination based on infertility violate Title VII's ban on *sex* discrimination? Courts have struggled to answer this question, employing different—and often confusing—reasoning.

The Supreme Court first interpreted the PDA in relation to infertility in *UAW v. Johnson Controls, Inc.*, where it held that the PDA protects women both before and during pregnancy, and that discrimination on the basis of “potential for pregnan-

115. *Id.*

116. Medill, *supra* note 90, at 533.

117. *See supra* Part I.A.

cy” violates Title VII.¹¹⁸ In *Johnson Controls*, a battery production company excluded fertile women, but not fertile men, from certain jobs that involved exposure to lead because of potentially devastating reproductive health effects.¹¹⁹ The company prevented women from working in lead-exposure jobs unless they could present medical evidence that they were infertile, whereas men could work identical jobs regardless of their fertility.¹²⁰

The Supreme Court unanimously held that the employer’s policy violated Title VII under the simple but-for test for sex discrimination because it treated the reproductive capacity of male and female employees differently.¹²¹ Men could choose whether to expose themselves to lead, but women could not. Further, the policy referred to women “capable of bearing children” and therefore illegally classified women on the basis of “potential for pregnancy.”¹²² The employer’s choice “to treat all its female employees as potentially pregnant . . . evinces discrimination on the basis of sex.”¹²³ *Johnson Controls* exemplifies a pure Title VII disparate treatment action because the employer’s policy illegally discriminated based on sex—it treated fertile women differently than fertile men.¹²⁴

Johnson Controls also clarifies that the PDA’s protection is not limited to women who are already pregnant: a woman’s potential to get pregnant could not serve as the basis for discrimination any more than pregnancy itself could.¹²⁵ However, the PDA’s impact on infertility-related discrimination and the Supreme Court’s interpretation of the PDA in *Johnson Controls* remains unclear because infertility is a gender-neutral condition. *Johnson Controls* did not explicitly hold that infertility falls under the PDA’s inclusion of “[pregnancy-]related medical conditions.”¹²⁶ Had it so held, discrimination based on a woman’s infertility could be classified as discrimination based on her sex. Instead, the Court noted that the employer’s policy violated Title VII because it “classifie[d] [employees] on the basis

118. 499 U.S. 187 (1991).

119. *Id.* at 198.

120. *Id.*

121. *Id.* at 199.

122. *Id.*

123. *Id.*

124. *Id.* at 198.

125. *Id.* at 199.

126. *Id.*

of gender and childbearing capacity, *rather than fertility alone*.”¹²⁷

Based largely on this language, the Eighth and Second Circuits interpret *Johnson Controls* to mean that discrimination based on infertility alone does not violate Title VII.¹²⁸ In *Krauel v. Iowa Methodist Medical Center*, the Eighth Circuit held that the PDA does not cover infertility because infertility is not “pregnancy, childbirth, or a related medical condition.”¹²⁹ The employee in *Krauel* filed a claim against her employer because her self-funded medical benefits plan denied coverage for her infertility treatments.¹³⁰ The employee’s treatment was successful—she became pregnant and had a child.¹³¹ The plan only covered her expenses related to pregnancy and delivery.¹³² The employee argued that excluding infertility treatments violated the PDA because treatment of infertility is treatment of a medical condition related to pregnancy or childbirth.¹³³ The PDA, after all, explicitly includes “pregnancy-related medical conditions.”¹³⁴ The employer responded that the medical benefits plan did not discriminate against women because it excluded coverage for infertility treatment for both men and women.¹³⁵

The Eighth Circuit emphatically rejected the employee’s argument.¹³⁶ It reasoned that infertility differs from potential pregnancy, which *Johnson Controls* protects, because only women can get pregnant, whereas infertility affects both men and women.¹³⁷ The court also noted that infertility *prevents* pregnancy; therefore, it is outside the plain language of the PDA.¹³⁸ Accordingly, the court held that the employer’s health benefits plan’s gender-neutral exclusion of infertility treatment does not automatically violate Title VII.¹³⁹

127. *Id.* at 198 (emphasis added).

128. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679–80 (8th Cir. 1996).

129. 95 F.3d at 680.

130. *Id.* at 676.

131. *Id.*

132. *Id.*

133. *Id.* at 679.

134. 42 U.S.C. § 2000e(k) (2006).

135. *Krauel*, 95 F.3d at 680.

136. *Id.*

137. *Id.* at 679–80.

138. *Id.* at 679.

139. *Id.* at 680.

The Second Circuit, in *Saks v. Franklin Covey Co.*, came to a very similar conclusion, holding that infertility is not a pregnancy-related condition under the plain meaning of Title VII as modified by the PDA.¹⁴⁰ In *Saks*, the employer's health care benefits plan covered many infertility treatments for both men and women, including ovulation kits and fertility drugs for women, and prosthetic penile implants and surgery to correct testicular varicose veins for men.¹⁴¹ Nevertheless, the plan specifically excluded many surgical treatments that can only be performed on women, such as IVF.¹⁴² The employee argued that this exclusion violated Title VII because the plan covered all treatments of male infertility, including all surgical procedures, but did not cover all treatments of female infertility.¹⁴³

The Second Circuit rejected the employee's argument. The court first interpreted *Johnson Controls* as clarifying that discrimination based on "childbearing capacity" violates the PDA, but discrimination based on infertility does not.¹⁴⁴ The court differentiated between childbearing capacity and infertility on the grounds that only women can bear children, whereas both men and women can be infertile.¹⁴⁵ It then held that to include infertility under the protection of the PDA "as a 'related medical condition[]' would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination."¹⁴⁶ Therefore,

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

141. *Id.* at 341. Specifically, employees could:

claim benefits for a variety of infertility products and procedures, such as ovulation kits, oral fertility drugs, penile prosthetic implants (when certified by a physician to be medically necessary), and nearly all surgical infertility treatments. Examples of covered surgical infertility treatments include procedures to remedy conditions such as varicoceles (varicose veins in the testicles causing low sperm count), blockages of the vas deferens, endometriosis, and tubal occlusions.

Id. (citation omitted).

142. *Id.* at 342. The plan excluded coverage for "[s]urgical impregnation procedures, including artificial insemination, in-vitro fertilization or embryo and fetal implants" (collectively, 'surgical impregnation procedures'), even if medically necessary." *Id.* at 341 (quoting the employer's health care benefits plan). Therefore, the employer refused to reimburse the employee for most of the costs of her infertility treatments, "including all of the [intrauterine inseminations], IVFs, injectable fertility drugs, and tests necessary to monitor the potential side effects of the drugs." *Id.* at 342.

143. *Id.* at 346-47.

144. *Id.* at 345-46.

145. *Id.* at 346.

146. *Id.* (alteration in original) (quoting 42 U.S.C. § 2000e(k)).

unlike pregnancy, infertility does not serve as a proxy for sex under a Title VII analysis.¹⁴⁷

As to the health care benefits plan specifically, the Second Circuit held that it did not violate Title VII.¹⁴⁸ Even though only women can undergo surgical impregnation as a treatment option, it is not a sex-specific treatment because it can treat both male and female infertility.¹⁴⁹ Expanding upon this novel argument, the court found that a male's infertility can be treated by impregnating his female partner; accordingly, the exclusion disadvantaged both women and men equally.¹⁵⁰ The court explicitly rejected the argument that a health care benefits plan would not normally cover treatment of an employee's condition that requires surgery on another person.¹⁵¹ As one scholar has noted:

[I]t's hard to imagine many other circumstances in which the treatment of an employee requires doing something to somebody else. Organ donation is the only other example I can think of, and [the employer]'s plan specifically excluded the expenses of the organ donor.¹⁵²

The court found this argument irrelevant because the exclusion applied only to organ donation and did not explain how other expenses would be covered.¹⁵³

III. *HALL V. NALCO*

In 2008 the Seventh Circuit issued its first infertility-related employment discrimination decision in *Hall v. Nalco Co.*¹⁵⁴ *Hall* addressed a case of first impression at the circuit level: whether terminating a female employee for time she took off to undergo fertility treatments violates Title VII as amended by the PDA.¹⁵⁵ Few employment law decisions exist on infertility in general; therefore, *Hall* represented a unique opportunity for the Seventh Circuit to create persuasive precedent. Further, *Hall* focused on whether an employer's de-

147. *See id.* at 345.

148. *Id.* at 349.

149. *Id.* at 348.

150. *Id.* at 347.

151. *Id.* at 347–48.

152. Medill, *supra* note 90, at 529.

153. *Saks*, 316 F.3d at 358 n.7.

154. 534 F.3d 644 (7th Cir. 2008).

155. *Id.* at 645.

cision to fire an employee who underwent infertility treatment violated Title VII's ban on sex discrimination, whereas almost all other litigation in the area of infertility has analyzed whether the exclusion of a particular treatment or condition from an employer's health care plan violated Title VII.¹⁵⁶ As one commentator noted, "I think you're going to see more and more cases like this, and I think to the extent that this is the first case that has directly tackled this issue, other courts are going to look at this case to guide them."¹⁵⁷ Thus, *Hall* will likely have a large effect on infertility litigation in the future, both in the Seventh Circuit and nationwide.

Section A details the factual background of the case, including the district court's holding. Section B discusses the Seventh Circuit's ruling that Hall stated a cognizable Title VII sex-discrimination claim under the PDA.

A. *Background and Facts*

In 1997, Defendant Nalco Company hired Plaintiff Cheryl Hall to be a secretary in one of its Chicago sales offices.¹⁵⁸ Six years later, in January 2003, Nalco decided to consolidate its two Chicago offices in an effort to cut costs.¹⁵⁹ As part of the consolidation plan, Nalco decided to eliminate one of the two sales secretary positions.¹⁶⁰

In March 2003, Hall requested and was granted four weeks of leave to undergo her first IVF treatment for infertility.¹⁶¹ Upon returning to Nalco, Hall told her supervisor that the initial IVF treatment was unsuccessful and that she would need additional time off to undergo a second treatment.¹⁶² Before she took her second leave, however, she was fired.¹⁶³ Hall's supervisor told her that the company was undergoing consolidation and that it was keeping only one sales secretary as a result.¹⁶⁴ Hall's supervisor also said that the firing was in Hall's

156. *Id.*

157. Judy Greenwald, *Federal Pregnancy Bias Protections Extend to Infertility Care: 7th Circuit*, BUS. INS., July 28, 2008, at 4 (internal quotation marks omitted) (quoting Jonathan T. Hyman, an employers' attorney with Kohrman Jackson & Krantz P.L.L. in Cleveland).

158. *Hall*, 534 F.3d at 645.

159. *Id.* at 646.

160. *Id.*

161. *Id.* at 645.

162. *Id.* at 646.

163. *Id.*

164. *Id.*

best interest “due to [her] health condition.”¹⁶⁵ Prior to termination, Hall’s supervisor had discussed the matter with Nalco’s employee relations manager.¹⁶⁶ The manager’s notes cited “absenteeism—infertility treatments” and “missed a lot of work due to health” as reasons for the decision to fire Hall.¹⁶⁷

After her termination, Hall sued Nalco for sex-discrimination under Title VII.¹⁶⁸ Hall alleged that Nalco fired her for taking time off to undergo IVF treatments.¹⁶⁹ Specifically, Hall asserted that she was fired because she was a member of a protected class—she was a woman who suffered from a pregnancy-related condition, namely, infertility.¹⁷⁰

The district court granted summary judgment for Nalco.¹⁷¹ The court held that infertile women are not protected under the PDA because infertility is a gender-neutral condition.¹⁷² The opinion reasoned that “neither the legislative history nor the EEOC guidelines” suggest that infertility should fall within the PDA.¹⁷³ Consequently, the district court followed *Saks* and *Krauel* in holding that infertility-related discrimination does not give rise to a Title VII claim of sex discrimination.¹⁷⁴

B. *The Seventh Circuit’s Unanimous Ruling*

On appeal, Hall argued that the district court erred in characterizing her condition as “infertility alone.”¹⁷⁵ Rather, Hall asserted that she was “terminated because of her intention to become pregnant through infertility treatments.”¹⁷⁶ Therefore, she argued, Nalco terminated Hall because of her intention to become pregnant—a clear violation of the PDA.¹⁷⁷ Hall also claimed that although infertility is a gender-neutral condition,

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* Hall also filed a charge with the EEOC in March of 2004 and received a Dismissal and Notice of Right to Sue in August—a necessary prerequisite to filing a Title VII action. *Id.*

169. *Id.*

170. *Id.*

171. *Hall v. Nalco Co.*, No. 04 C 7294, 2006 WL 2699337 (N.D. Ill. Sept. 12, 2006), *rev’d*, 534 F.3d 644 (7th Cir. 2008).

172. *Id.* at *2–3.

173. *Id.* at *2.

174. *Id.* at *2–3.

175. Brief and Required Short Appendix of Plaintiff-Appellant Cheryl Hall at 6–7, 16–17, *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008) (No. 06-3684).

176. *Id.* at 14.

177. *Id.* at 16–17.

it could not be classified as such because the problems associated with infertility affect women disproportionately.¹⁷⁸ Accordingly, Hall urged the court to reverse summary judgment because women seeking infertility treatment to become pregnant are a protected class under the PDA.¹⁷⁹

Conversely, Nalco agreed with the district court's definition of Hall's condition as "infertility alone."¹⁸⁰ Nalco argued that because infertility affects both sexes equally, it is not a "related medical condition" under the plain language of the PDA.¹⁸¹ In response to Hall's claim that infertility is not gender neutral because it disproportionately affects women, Nalco asserted that the fact that both men and women can be infertile negates an argument that infertility discrimination is "because of sex."¹⁸² Nalco further claimed that no evidence existed to support Hall's claim that she was fired because of her potential to become pregnant.¹⁸³

The Seventh Circuit held that Hall stated a cognizable Title VII sex-discrimination claim under the PDA.¹⁸⁴ The unanimous opinion, written by Judge Diane S. Sykes, conceded that infertility is a gender-neutral condition, and therefore the PDA does not prohibit discrimination based on infertility alone.¹⁸⁵ However, Judge Sykes called the district court's reliance on this fact "misplaced."¹⁸⁶ The Seventh Circuit reasoned that, although both men and women suffer from infertility, the employer conduct at issue was not gender neutral because only women take time off to undergo IVF.¹⁸⁷ Consequently, Nalco's alleged policy of terminating employees for undergoing IVF treatments constituted sex-based discrimination because only female employees would ever be fired under such a policy.¹⁸⁸

In its analysis, the court compared Nalco's alleged policy to the policy at issue in *Johnson Controls*, which forbade women, but not men, from working in positions that would expose them

178. *Id.* at 20.

179. *See id.* at 17.

180. *See* Brief of Defendant-Appellee Nalco Co. at 9, *Hall v. Nalco Co.*, (7th Cir. 2008) (No. 06-3684).

181. *Id.* at 14–15.

182. *Id.* at 15–16.

183. *Id.* at 23.

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

185. *Id.* at 647–48.

186. *Id.* at 648.

187. *Id.* at 648–49.

188. *Id.* at 649.

to toxic chemicals due to concerns about infertility.¹⁸⁹ In *Johnson Controls*, the Supreme Court held that the policy discriminated on the basis of sex because the policy itself affected only women, even though the employer was motivated by concerns about infertility.¹⁹⁰ When viewed in the light most favorable to Hall, Nalco's conduct "suffer[ed] from the same defect as the policy in *Johnson Controls*," because it was not gender neutral.¹⁹¹ As the court stated, "even where (in)fertility is at issue, the employer conduct complained of must actually *be gender neutral* to pass muster."¹⁹² Nalco allegedly fired Hall for missing work to undergo IVF treatments.¹⁹³ Employees "taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy[-]related care[—]will always be women."¹⁹⁴ Nalco allegedly discriminated on the basis of sex because it terminated Hall "not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity."¹⁹⁵ Accordingly, the Seventh Circuit held that Hall stated a viable sex-discrimination claim under Title VII.¹⁹⁶

IV. THE SEVENTH CIRCUIT'S MISSED OPPORTUNITY TO EXPLICITLY EMPLOY A DISPARATE IMPACT ANALYSIS IN *HALL*

Hall marks the first federal appellate court victory for an employee alleging discrimination based on infertility since *Johnson Controls*.¹⁹⁷ *Hall* stands as persuasive authority for the proposition that the PDA provides employment discrimination protection for female employees seeking time off from work for IVF treatment.¹⁹⁸ However, the Seventh Circuit missed an important and rare opportunity to outline a clear path to success for future litigants in similar disputes.

189. *Id.* at 648.

190. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198–99 (1991).

191. *Hall*, 534 F.3d at 648.

192. *Id.*

193. *Id.* at 646.

194. *Id.* at 648–49.

195. *Id.* at 649.

196. *Id.*

197. *Hall* is, however, the second recent ruling extending PDA protections beyond traditional claims. See *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA grants employment discrimination protection to women who have had an abortion).

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

The biggest obstacle in interpreting and applying *Hall* lies in the Seventh Circuit's failure to explicitly utilize a disparate impact analysis to find that Nalco's conduct violated Title VII. As described above, disparate impact theory allows a plaintiff to challenge an employment practice that is facially neutral but in fact falls more harshly on one group than another.¹⁹⁹ The district court found that Nalco's conduct was facially neutral with respect to gender because it targeted infertile employees, and infertility affects men and women equally.²⁰⁰ Admittedly, Nalco's policy did not explicitly discriminate on the basis of sex.²⁰¹ In fact, Nalco's conduct towards Hall—the manager's suggestion that Hall's termination was best given her "health condition" and the observation that Hall's performance was negatively affected by her absenteeism—suggests that a male employee who suffered from infertility problems and took time off for treatment might also have been fired.²⁰² Thus, unlike the policy in *Johnson Controls*, Nalco's policy was gender neutral.

The district court grounded its holding on this alone: because infertility afflicts both genders equally, discriminating on the basis of infertility is a gender-neutral practice.²⁰³ The Seventh Circuit, however, did not expressly find that the policy at issue was facially neutral.²⁰⁴ It conceded that *infertility* is gender neutral,²⁰⁵ but did not explicitly acknowledge that Nalco's *policy* was gender neutral. In fact, the court took pains to analogize Nalco's policy to the policy in *Johnson Controls*—a comparison that lacks merit because the *Johnson Controls* policy was facially discriminatory against women.²⁰⁶ The court consequently failed to employ explicit reasoning in the necessary first step in its disparate impact analysis.

Unlike the district court, the Seventh Circuit did not stop the inquiry there; rather, it employed an implied disparate impact analysis by considering whether Nalco's policy in fact burdened female employees more than male employees.²⁰⁷ The

199. See *supra* notes 82–85 and accompanying text.

200. *Hall v. Nalco Co.*, No. 04 C 7294, 2006 WL 2699337, at *2–3 (N.D. Ill. Sept. 12, 2006), *rev'd*, 534 F.3d 644 (7th Cir. 2008).

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

202. See *id.*

203. See *Hall*, 2006 WL 2699337, at *2–3.

204. See *Hall*, 534 F.3d at 648–49.

205. *Id.* at 649.

206. See *id.* at 648–49.

207. *Id.*

court reasoned that Hall stated a Title VII claim because only women undergo IVF, and therefore termination based on such treatment would always fall more harshly on women.²⁰⁸ In other words, the court supplied a novel disparate impact theory: although firing a female employee for taking time off to undergo a sex-specific infertility treatment is not *per se* sex discrimination, female employees are disproportionately affected by such a practice because they undergo infertility treatment much more frequently.²⁰⁹ In other words, women bear a disproportionate burden. Thus, while in theory Nalco could fire both men and women for missing work to undergo infertility treatments, the fact that women will be terminated far more frequently than men gives rise to a disparate impact claim.²¹⁰ Accordingly, a female employee can state a claim for sex discrimination if her employer fires her for undergoing infertility treatments.²¹¹

This disparate impact analysis also allows *Hall* to be reconciled with *Saks* and *Krauel*.²¹² Certainly both cases can be read broadly to assert that denial of medical coverage for infertility treatments does not implicate Title VII.²¹³ However, the courts in *Saks* and *Krauel* expressly considered whether denying such coverage in fact imposed a disparate impact on women.²¹⁴ The *Krauel* court rejected the argument that “female employees were more adversely affected by the Plan’s fertility exclusion than male Plan participants,”²¹⁵ and the *Saks* court dismissed a similar disparate impact claim.²¹⁶ In other words, the two circuits did not merely hold that the employer conduct in question did not violate Title VII because infertility is a gender neutral condition.²¹⁷ They also analyzed whether the employer conduct disproportionately burdened women.²¹⁸

208. *Id.* at 649.

209. *See id.*

210. *Id.*

211. *Id.*

212. Harvard Law Review Ass’n, *Employment Law—Title VII—Seventh Circuit Allows Employee Terminated for Undergoing In Vitro Fertilization to Bring Sex Discrimination Claim*, 122 HARV. L. REV. 1533, 1539 (2009).

213. *See Saks v. Franklin Covey Co.*, 316 F.3d 337, 345–46 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 681 (8th Cir. 1996).

214. *See Saks*, 316 F.3d at 346; *Krauel*, 95 F.3d at 681.

215. *Krauel*, 95 F.3d at 681.

216. *See Saks*, 316 F.3d at 346–49.

217. *See id.*; *Krauel*, 95 F.3d at 681.

218. *See Saks*, 316 F.3d at 346–49; *Krauel*, 95 F.3d at 681.

The problem with *Hall*, then, is the court employs an implied—not express—disparate impact framework, which only furthers the confusion surrounding infertility discrimination cases under Title VII. The Seventh Circuit stated that “[e]mployees terminated for taking time off to undergo IVF . . . will always be women,” and then almost immediately concluded that Hall was terminated for “the gender-specific quality of childbearing capacity.”²¹⁹ This rushed analysis conflates the issue, as the two concepts are not necessarily related. An employer who terminates an employee for taking time off to undergo a gender-specific infertility treatment is not necessarily discriminating on the basis of sex. To state a disparate impact claim, female employees must also demonstrate through statistical evidence that they disproportionately bear the burden of undergoing a gender-specific infertility treatment. The Seventh Circuit’s failure to explicitly acknowledge that this additional condition must be met presents a huge obstacle for future plaintiffs: “The lack of clear reasoning about this point might prevent future courts from seeing *Hall* (correctly) as an opinion about the disparate impact certain treatments create, rather than as an opinion about the gender-specific nature of the treatments alone.”²²⁰

Nevertheless, *Hall* opens the door for courts to strike down a facially neutral employment practice based on infertility. While this avenue has always been available theoretically, *Hall* clearly establishes that an infertile woman can trigger the protection of the PDA if she can show that infertile women suffer disproportionately compared to men from the employer action at issue.²²¹ As one commentator noted, *Hall* “open[s] up a new potential source of complaints by employees, and employers are going to want to be sensitive to that.”²²²

Specifically, *Hall* teaches litigants that, in order to survive summary judgment, a sex-discrimination claim based on infertility-related discrimination must allege some facts upon which a court could conclude that the employer’s alleged policy fell more harshly on female employees than male employees. Simply pleading that an employee was fired because of her in-

219. *Hall v. Nalco Co.*, 534 F.3d 644, 648–49 (7th Cir. 2008).

220. Harvard Law Review Ass’n, *supra* note 212, at 1540.

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

222. Greenwald, *supra* note 157 (quoting Paul Mollica, an attorney with Meites, Mulder, Mollica & Glink in Chicago).

fertility is not enough.²²³ Second, an employee's infertility should be characterized as her childbearing capacity, in order to avoid drawing attention to the fact that infertility is gender neutral. Of course, whether an infertile male employee may experience success with a similar characterization remains to be seen. Finally, because of *Hall's* lack of clarity in its underlying reasoning, a plaintiff should bring both a disparate treatment and a disparate impact claim. If a court wants to follow the Seventh Circuit's lead, bringing both claims may enable a court to permit a disparate *impact* claim to survive summary judgment without explicitly overruling the Second and Eighth Circuits' holdings that an employee cannot state a disparate *treatment* claim based on infertility-related discrimination.

In sum, the Seventh Circuit missed an opportunity in *Hall*. Although plaintiffs now have an appellate ruling that infertility discrimination can be a form of sex discrimination under Title VII, the case fails to offer future litigants a clear path to success. Litigants can take advantage of this ambiguity by bringing a disparate impact claim, in addition to a disparate treatment claim, of sex discrimination. Perhaps the next court to address the issue will utilize such an opportunity to create a clear precedent that employers violate Title VII when their policies in fact fall more harshly on infertile employees.

V. HALL'S MISSED OPPORTUNITY TO BRING ADDITIONAL CLAIMS AGAINST HER EMPLOYER UNDER THE ADA AND THE FMLA

The Seventh Circuit was not the only player in the *Hall* litigation who failed to take advantage of the situation: Cheryl Hall (and, presumably, her lawyers) also missed an opportunity to seek redress in federal court under other employment statutes that provide infertile employees protection. Particularly, the ADA²²⁴ and the FMLA²²⁵ may protect certain infertile employees who allege infertility-related discrimination.

Cheryl Hall could, and therefore should, have sought protection under both the ADA and the FMLA. Although a more complete record would need to be developed to completely predict whether Hall's claim against Nalco for violating either the ADA or the FMLA would succeed on the merits, the facts re-

223. *Hall*, 534 F.3d at 647–48.

224. 42 U.S.C. §§ 12101–12213 (2006).

225. 29 U.S.C. §§ 2601–2654 (2006).

cited in the case suggest that Hall's situation implicates both federal statutes. Of course, an attorney's decision not to pursue a certain claim is not always a reflection of the merits of that claim; rather, the decision may be due to outside factors, such as the increased cost of alleging numerous claims. Further, a full analysis of ADA and FMLA claims is beyond the scope of this Note. Nevertheless, determining whether the ADA and FMLA were viable options for Hall provides an important lesson for future litigants in similar situations.

Nalco's termination of Cheryl Hall suggests facts giving rise to both an ADA and an FMLA claim. Section A analyzes the merits of a potential ADA claim, including the issue of whether infertility is a disability and therefore protected by the ADA. Section B addresses whether Nalco's firing of Hall, allegedly based on her decision to take time off from work for infertility treatment, implicates the FMLA.

A. *ADA and Disability-Based Discrimination*

Over twenty-five years after the enactment of Title VII, Congress passed the ADA to "provide clear, strong, consistent, enforceable standards [for] addressing discrimination against individuals with disabilities."²²⁶ The ADA prohibits an employer from discriminating on the basis of disability.²²⁷ To establish a prima facie case under the ADA, a plaintiff must show: (1) that she is a member of the protected class, or "disabled" as defined by the Act;²²⁸ and (2) the employer's conduct does in fact violate the statute's prohibition on discrimination because there is a reasonable accommodation to be made for the employee, or because the employee does not present a direct threat to herself or others.²²⁹

This Note will first address whether plaintiffs in infertility cases can establish statutory disability. Second, assuming that they can, it will discuss how, and to what extent, the ADA cov-

226. 42 U.S.C. § 12101(b)(2).

227. *Id.* § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

228. *See id.* § 12102(2); *see also* Sutton v. United Airlines, Inc., 527 U.S. 471, 481 (1999).

229. *See* 42 U.S.C. § 12182(2)(A), (3) (2006).

ers infertility-related discrimination cases. Finally, this Note argues that Hall's firing likely gave rise to an ADA claim.

1. Establishing Statutory Disability

Although proving membership in the protected class is rarely at issue under other federal anti-discrimination statutes, a plaintiff's ability to prove that she is "disabled" often becomes the central issue in ADA litigation.²³⁰ The ADA defines disability as "a physical or mental impairment that substantially limits one or more . . . major life activities."²³¹ An ADA plaintiff must therefore satisfy two requirements to prove statutory disability: (1) the plaintiff must have an impairment; and (2) the impairment must interfere with a major life activity.

The first requirement is rarely at issue in infertility cases. Although the statute does not define "impairment," EEOC regulations define an impairment to include a disorder of the reproductive system.²³² Thus, in infertility cases, the first inquiry is easily satisfied: infertility is an impairment of the reproductive system.²³³

As to the second requirement, courts initially split over whether the activity that infertility affects—reproduction—constitutes a "major life activity" within the meaning of the ADA.²³⁴ The ADA does not define "major life activity." The EEOC listed examples of major life activities, including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," but did not address reproduction.²³⁵

However, in a 1998 case, *Bragdon v. Abbott*, the Supreme Court determined that the ability to reproduce and bear children constitutes a "major life activity" within the meaning of the ADA.²³⁶ In *Bragdon*, a woman sued a dentist who refused to

230. See, e.g., *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002).

231. 42 U.S.C. § 12102(2)(A).

232. 29 C.F.R. § 1630.2(h)(1) (2009).

233. See, e.g., *Erickson v. Bd. of Governors*, 911 F. Supp. 316, 321 (N.D. Ill. 1995) (holding that infertility is an impairment under the ADA).

234. Compare *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102, 108 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996) (holding that reproduction is not a "major life activity"), and *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (same), with *Erickson*, 911 F. Supp. at 321 (holding that reproduction is a "major life activity"), and *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404–05 (N.D. Ill. 1994) (same).

235. EEOC Compl. Man. (CCH) § 902.3 (1995) (quoting 29 C.F.R. § 1630.2(i)).

236. 524 U.S. 624, 638 (1998).

treat her because she was HIV-positive.²³⁷ The Court held that the plaintiff was disabled under the ADA because she was substantially limited in her ability to reproduce in two ways.²³⁸ First, an HIV-positive woman attempting to become pregnant through unprotected sex risks transmitting the disease to her partner.²³⁹ Second, a woman living with HIV who becomes pregnant risks transmitting the disease to her future child.²⁴⁰ The Court noted that, in the face of uncontroverted testimony from the plaintiff that her HIV infection controlled her decision not to have a child, and in light of the fact that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself,”²⁴¹ the plaintiff was substantially impaired in the major life activity of reproduction.

As a result of *Bragdon*, many commentators believed that the ADA provided a clear avenue for challenging employment discrimination based on infertility.²⁴² Namely, people read *Bragdon* to clearly establish that infertile plaintiffs are statutorily disabled.²⁴³ Once infertility was declared a disability, many expected a floodgate of infertility-related ADA litigation.²⁴⁴

As a final note, Congress recently passed the ADA Amendments Act of 2008, which broadens the definition of disability significantly.²⁴⁵ Although the Act mainly changes ele-

237. *Id.* at 628–29.

238. *Id.* at 639–40.

239. *Id.* at 639 (“[A] woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected.”).

240. *Id.* at 640 (“[A]n infected woman risks infecting her child during gestation and childbirth.”).

241. *Id.* at 638.

242. See, e.g., James B. Roche, *After Bragdon v. Abbott: Why Legislation is Still Needed to Mandate Infertility Insurance*, 11 B.U. PUB. INT. L.J. 215, 220–21 (2002); Shorge Sato, Note, *A Little Bit Disabled: Infertility and the Americans with Disabilities Act*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 189, 189–90 (2001); Esther B. Fein, *AIDS Virus Case Opens Door for Infertile*, N.Y. TIMES, July 5, 1998, at D6.

243. See Sato, *supra* note 242, at 207 (“[A]s long as *Bragdon* remains good law, all people with medically diagnosed reproductive disorders are among the ‘disabled’ protected by the ADA.”); see also Medill, *supra* note 90, at 529 (“After the Court’s decision in *Bragdon v. Abbott*, many, if not most, infertility-related conditions are going to be considered disabilities under the ADA.”).

244. Jane Gross, *The Fight to Cover Infertility*, N.Y. TIMES, Dec. 7, 1998, at B1 (reporting the opinions of Saks’s attorney and an EEOC official on the impact of *Bragdon* on employer health care plans excluding infertility treatment).

245. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (codified at 29 U.S.C. § 705 and 42 U.S.C. §§ 12101–12103, 12111–12114, 12201, 12205–12213). For a complete analysis on how the Amendments affect the ADA, see U.S. Equal Employment Opportunity Comm’n, Notice Concerning the

ments of the definition not relevant to the above analysis, Congress explicitly noted that it intends for the ADA to be read expansively to protect disabled people from discrimination.²⁴⁶ The amendments went into effect on January 1, 2009.²⁴⁷ It remains to be seen whether the Amendments Act will change courts' analysis of statutory disability in infertility cases.

2. ADA's Protection of Infertility-Related Discrimination

Despite predictions, at the time of this Note's publication, no court had considered an ADA challenge based on an employer's decision to hire, discipline, or fire an employee allegedly because of infertility-related discrimination. Therefore, it remains an open question whether the ADA prevents an employer from purposely firing an employee based on his or her infertility. As with the PDA, the lack of litigation is likely explained by the fact that most employers, when faced with pending litigation, immediately change their policies.²⁴⁸ Therefore, *Bragdon's* impact on ADA claims based on workplace infertility-related discrimination may be as strong as commentators anticipated, but in a different way: it may have stopped litigation before it even started.

Most ADA litigation surrounding the issue of infertility addresses whether an employer violates the statute by excluding a particular treatment or condition from an employer's health care plan.²⁴⁹ Courts have consistently held that health insurance plans do not violate the ADA when they discriminate among types of disabilities, so long as all employees, regardless of disability, have equal access to the available range of bene-

Americans with Disabilities Act (ADA) Amendments Act of 2008, http://www.eeoc.gov/ada/amendments_notice.html (last visited Oct. 27, 2009).

246. ADA Amendments Act of 2008 § 2(a)(1) ("Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage." (quoting 42 U.S.C. § 12102)).

247. *Id.* § 8.

248. See Medill, *supra* note 90, at 533.

249. If an employer offers a health care insurance plan to its employees, the plan must comply with applicable federal laws, including Title VII and the ADA. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, DECISION ON COVERAGE OF CONTRACEPTION (2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> ("[T]he fact that ERISA does not require health plans to 'provide specific benefits' does not mean that other statutes—namely Title VII—do not impose such requirements where necessary to avoid or correct discrimination.").

fits.²⁵⁰ For example, the *Krauel* court held that the employer's health insurance plan did not violate the ADA by excluding coverage for infertility-related treatments because "[i]nsurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability."²⁵¹ *Krauel* was decided pre-*Bragdon*, and therefore ruled that infertility was not a disability protected by the ADA because it did not substantially affect a major life activity.²⁵² However, the Eighth Circuit ruled on the employee's challenge that the health insurance plan's exclusion for treatment of infertility was a disability-based distinction on its face.²⁵³

3. Hall's Firing Likely Gave Rise to an ADA Claim

Under an ADA analysis, Hall would have achieved success if she demonstrated that (1) she was infertile; (2) infertility is covered by the ADA; and (3) she was fired because of her infertility.²⁵⁴ Post-*Bragdon*, only the last prong would be at issue. Consequently, a court would have to conduct the same analysis under Title VII.²⁵⁵ Further, because *Bragdon* held that "reproduction" is a "major life activity," infertile women and men can seek the protection of the ADA because both suffer from an inability to reproduce, as opposed to the female-specific condition of lack of childbearing capacity required under Title VII.²⁵⁶ Accordingly, in so far as adverse employment actions are concerned, infertile employees may face an easier path to success under the ADA than under Title VII.

250. See, e.g., *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1015–16 (6th Cir. 1997).

251. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 678 (8th Cir. 1996).

252. *Id.* at 677.

253. See *id.* at 677–78.

254. See 42 U.S.C. §§ 12101–12213 (2006); see also *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (applying ADA analysis).

255. See *supra* Part II.B, for a discussion of disparate treatment claims, under which the plaintiff must establish that she suffered an adverse employment action because of her protected characteristic. Thus, Title VII would require Hall to prove that she was fired due to her infertility.

256. 42 U.S.C. § 2000e(k) (2006).

B. FMLA and Employee Leave Protection

In addition to Title VII and the ADA, the FMLA²⁵⁷ may provide protection to employees seeking time off for infertility treatments.²⁵⁸ Congress enacted the FMLA “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”²⁵⁹ The statute applies to any man or woman who has worked at least 1,250 hours a year at a company employing fifty or more employees at least twenty weeks of the year.²⁶⁰ The FMLA entitles eligible employees to unpaid leave of up to twelve weeks in a twelve-month period because of the birth of a child or a serious health condition.²⁶¹ Upon returning to work, the employee is entitled to reinstatement to her former position or an equivalent one.²⁶² Consequently, the FMLA essentially prevents employers from terminating employees who are unable to work for twelve weeks or less.

To qualify for FMLA leave, an employee must demonstrate that his or her infertility is a serious health condition.²⁶³ The statute defines a serious health condition as an “illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.”²⁶⁴ Courts have not specifically ruled on whether infertility is considered a “serious medical condition” under the FMLA. Therefore it is unclear whether, and to what extent, infertile individuals may find protection under the FMLA. *Bragdon’s* holding that infertility is a disability within the ADA suggests that infertility may also qualify as a serious health condition under the FMLA. If an infertile employee is unable to work because he or she needs treatment, the Supreme Court’s dicta in *Bragdon* that reproduction is “central to the life process itself” may persuade courts to hold that the FMLA applies.

257. 29 U.S.C. §§ 2601–2654 (2006).

258. Because the FMLA only offers time off, it offers no redress for employees seeking to challenge the second type of discrimination in infertility cases: health insurance benefits.

259. 29 U.S.C. § 2601(b)(1).

260. See 29 U.S.C. § 2611(2)(A), (4).

261. *Id.* § 2612(a)(1).

262. *Id.* § 2614(a).

263. See *id.* § 2611(11).

264. *Id.*

Further, pregnancy or prenatal care may be considered serious health conditions under the FMLA, and a visit to a health care provider may not be necessary for an absence to be covered. The legislative history specifically designates “ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth” as serious health conditions.²⁶⁵ However, the regulations promulgated by the Department of Labor state that there must be a “period of incapacity due to pregnancy, or for prenatal care.”²⁶⁶

Only one court has addressed whether the FMLA protects employees from adverse employment actions based on taking time off for infertility treatments.²⁶⁷ In 2008, a Tennessee district court held that an employer does not violate the FMLA by terminating an employee for five unexcused absences where the employee fails to provide evidence that she was incapable of attending work on those five days.²⁶⁸ The employer’s policy dictated that the employer could terminate any employee who had more than five unexcused absences in a twelve-month period.²⁶⁹ During the year in question, the employee took eleven days of FMLA leave to undergo several infertility-related procedures, including an egg retrieval procedure and fertilized egg implantation.²⁷⁰ The employee also had two unexcused absences prior to these fertility treatments.²⁷¹ According to her doctor, the employee required two separate periods of leave lasting three days each.²⁷² In other words, the doctor excused only six of the eleven absences. The employer then fired the employee for the five remaining absences, as well as the additional two prior to the fertility treatment.²⁷³

The employee argued that she “was too sore from her surgery and medication to work” on those five days.²⁷⁴ The employer responded that the FMLA only covers medically excused absences, and therefore it need only credit six absences toward

265. H.R. REP. NO. 103-8, pt. 1, at 40 (1993).

266. 29 C.F.R. § 825.115(b) (2009).

267. *Culpepper v. BlueCross BlueShield of Tenn., Inc.*, No. 1:07-CV-48, 2008 WL 149034 (E.D. Tenn. Jan. 11, 2008).

268. *See id.* at *5.

269. *Id.* at *1.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at *3.

FMLA leave, and could fire the employee for the other seven unexcused absences.²⁷⁵ The court granted summary judgment to the employer, reasoning that the employee's own doctor only required six absences from work, and the employee's testimony alone did not satisfy her burden of proof to establish the absences were medically necessary.²⁷⁶ The court in *Culpepper* therefore did not reach whether infertility constitutes a "serious medical condition" under the FMLA.

Despite the absence of case law, the FMLA may provide the best avenue of protection for infertile employees seeking time off for medical treatment.

CONCLUSION

As more and more couples delay having children, infertility will undoubtedly increase. The above analysis demonstrates that Title VII and the ADA provide infertile employees with inadequate protection from employment discrimination. Further, while the FMLA may protect employees who desire to take time off to undergo fertility treatments, it does not alleviate the huge financial burden caused by infertility treatments. However, *Hall* demonstrates courts' increasing willingness to extend the boundaries of federal anti-discrimination statutes to cover infertile employees. As the first circuit court to address whether Title VII permits an employer to fire a female employee for missing work to undergo fertility treatments, the Seventh Circuit interpreted the PDA broadly to comport with the purpose behind the Act. The decision also implicitly recognizes the difficulties infertile women face in deciding to undergo treatment. But the Seventh Circuit's opinion leaves many issues unresolved for future litigants, including whether Title VII protection extends to infertile male employees, whether and to what extent infertile employees must argue disparate impact to receive protection under Title VII, and how infertility is handled under the ADA and FMLA. Nevertheless, *Hall v. Nalco* marks a victory for infertile employees nationwide.

275. *See id.* at *1-2.

276. *Id.* at *5.