

WORKING WOMEN SEEKING INFERTILITY TREATMENTS: DOES THE ADA OR TITLE VII OFFER ANY PROTECTION?

TABLE OF CONTENTS

I. Introduction	296
II. Background.....	297
A. Infertility in the United States.....	297
B. Legal Developments Involving the ADA and the PDA.....	299
III. Do Women Who Suffer Adverse Employment Actions for Reasons Related to Infertility Treatments Have a Claim Under the ADA?	300
A. Three-Step Test of Whether a Person Has a Disability Under the ADA	301
1. Is Infertility a Physical Impairment?	301
2. Is Reproduction a Major Life Activity?	302
3. Does Infertility Substantially Limit Reproduction?	304
4. Conclusion to Three-Step Test of Disability.....	308
B. What Comes After Infertility Is Accepted as a Disability Under the ADA?	309
C. Remaining Issues on Infertility and Disability	310
IV. Do Women Who Suffer Adverse Employment Actions for Reasons Related to Infertility Treatments Have a Claim Under the PDA?	310
A. How the PDA Fits Within Title VII.....	310
B. Circuits That Have Found Infertility Is Not Covered Under the PDA	312
C. District Courts That Have Found Infertility Is a Related Medical Condition	316
D. Analysis of the Seventh Circuit's Ruling in <i>Hall v. Nalco</i> <i>Co.</i>	319
E. Remaining Circuit Courts Should Adopt the Reasoning of the Seventh Circuit	321
V. Conclusion	321

I. INTRODUCTION

After a couple discovers they are infertile and decides to seek treatment, one of the many challenges they will face is balancing infertility treatments with their work lives. In addition to being costly, infertility treatments can be time-intensive.¹ Infertility treatments for women may require frequent blood tests, surgery under general anesthesia, bed rest, and numerous doctor appointments.² Another hardship of infertility treatments is that the appointments and procedures can be unpredictable.³ Many procedures are dependent upon the woman's menstrual cycle, and it is not uncommon for a woman to have blood drawn in the morning and be called back in the afternoon based on the test results.⁴ Unpredictable and frequent absences from work can be frustrating for the woman's employer.⁵ Thus, some women have suffered adverse employment actions for receiving infertility treatments.⁶ Some of these women have brought discrimination claims against their employers, either under the Americans with Disabilities Act (ADA) or the Pregnancy Discrimination Act (PDA) of Title VII of the Civil Rights Act.⁷

This Note will examine the development of discrimination claims by women seeking infertility treatments under both the ADA and the PDA. Part II of this Note provides background on infertility and infertility treatment in the United States, along with an overview of the ADA and the PDA. Part III addresses how the Supreme Court's decision in *Bragdon*

1. See Sue Shellenbarger, *Women Battling Infertility Find a Friend in the Court*, WALL ST. J., Aug. 13, 2008, at D1 (discussing the "erratic nature of infertility treatment").

2. See *id.*

3. Interview by Sue Shellenbarger with Barbara Cullura, Executive Dir., Resolve (2008), <http://podcast.mktw.net/wsj/audio/20080812/podwsjshellenbarger/podwsjshellenbarger.mp3>.

4. See *id.*

5. See *id.*

6. See *infra* Parts III & IV.

7. See, e.g., *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008) (PDA claim); *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003) (ADA and PDA claims); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (ADA and PDA claims); *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001) (ADA and PDA claims); *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995) (ADA and PDA claims); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995) (ADA claim); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994) [*Pacourek I*] (ADA and PDA claims).

v. Abbot and the 2008 Amendments to the ADA will likely end the debate on whether infertile women who take time off work to receive infertility treatments are protected under the ADA.⁸ Part IV discusses the split among courts on whether the PDA includes infertility, and the Seventh Circuit's recent decision that infertile women who suffer adverse employment action for taking time off work are protected under the PDA. This Note will conclude, based on statutory interpretation and case-law development, that women seeking treatment for infertility are protected under both the ADA and the PDA.

II. BACKGROUND

A. Infertility in the United States

It is estimated that more than seven million women and their partners suffer from infertility—affecting around twelve percent of the reproductive-age population.⁹ The medical definition of *infertility* is the “[d]iminished or absent ability to produce offspring; in either the male or the female, not as irreversible as sterility.”¹⁰ The Mayo Clinic considers a couple infertile when the couple is unable to conceive after one year of frequent, unprotected sex.¹¹ Infertility afflicts the same number of women as it does men.¹² When a couple is infertile, one-third of the time it is caused by the female, one-third of the time it is caused by the male, and the remaining one-third results either from a combination of the partners' problems, or is unexplained.¹³ The most common causes of male infertility are a low sperm count or no sperm cells.¹⁴ Ovulation disorders are the most common cause of female infertility.¹⁵

Each year, more than one million Americans seek infertility treatment.¹⁶ Although the infertility rate has remained stable over the

8. See *Bragdon v. Abbot*, 524 U.S. 624 (1998).

9. American Society for Reproductive Medicine: Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited Nov. 13, 2009) [hereinafter ASRM].

10. STEDMAN'S MEDICAL DICTIONARY 896 (27th ed. 2000).

11. Mayo Clinic: Infertility, <http://www.mayoclinic.com/health/infertility/DS00310> (last visited Nov. 13, 2009).

12. ASRM, *supra* note 9.

13. *Id.*

14. *Id.*

15. *Id.*

16. Elizabeth A. Pendo, *The Politics of Infertility: Recognizing Coverage*

years, the use of fertility services has increased.¹⁷ The increase is attributed to people starting families later in life and to the fact that technology for fertility services is relatively new.¹⁸ The vast majority of couples seeking infertility treatments—between eighty-five to ninety percent—will be treated with conventional medical therapies, including surgical repair of the reproductive organs or use of medications.¹⁹

Although in vitro fertilization (IVF) is an uncommon infertility treatment—“account[ing] for less than five percent of all infertility treatments in the United States”—it is important to discuss because it is a common infertility treatment in the cases discussed in Parts III and IV of this Note.²⁰ IVF is the process of fertilizing an egg outside of a woman’s body.²¹ More than one million children have been born as a result of IVF since it was first used in 1978.²²

During the first stage of IVF, the patient is injected with drugs to increase the growth of multiple ovarian follicles a week before the patient begins her normal menstrual cycle.²³ Once the follicles reach the desired size, usually after nine to twelve days, the patient is injected with hormones to trigger ovulation.²⁴ Generally, ovulation occurs forty hours after the injection.²⁵ The patient will undergo egg collection usually within the next thirty-four to thirty-six hours.²⁶ The collected eggs are then placed with the sperm and incubated.²⁷ Three to five days later, selected embryos (eggs that were successfully fertilized) are transferred into the patient’s uterus.²⁸ For the next two weeks, the woman receives injections and suppositories of

Exclusions as Discrimination, 11 CONN. INS. L.J. 293, 298 (2005) (citation omitted).

17. JOHN D. GORDON & MICHAEL DiMATTINA, 100 QUESTIONS & ANSWERS ABOUT INFERTILITY 5–6 (2008).

18. *Id.* Since 1981, the birthrate for women between the ages of forty and forty-four has increased seventy-four percent; today, one in three new mothers is over the age of thirty. STAFF OF RESOLVE WITH DIANE ARONSON, RESOLVING INFERTILITY 14 (1999).

19. ASRM, *supra* note 9.

20. *See id.*

21. *See* GORDON & DiMATTINA, *supra* note 17, at 70.

22. *Id.*

23. *See id.* at 70–71.

24. *Id.* at 71.

25. *Id.*

26. *Id.*

27. *Id.* at 72–73.

28. *Id.* at 73.

progesterone supplement.²⁹ After the two weeks, the patient will take a blood test to determine if the procedure was successful—that is, whether she is pregnant.³⁰

IVF is a costly procedure; each IVF procedure costs between \$14,000 and \$16,000, and the medicine costs between \$2,000 and \$4,000.³¹ Despite the substantial cost and time, there is no guarantee that a woman will become pregnant after IVF. Depending on the age of the woman and the couple's specific infertility problems, multiple attempts may be required, and for some, IVF may never prove successful.³²

B. *Legal Developments Involving the ADA and the PDA*

Women who have suffered adverse employment actions for taking time off from work to receive infertility treatments have sought protection under the ADA and the PDA.³³ The ADA was enacted in 1990 to address the historical discrimination against Americans with physical or mental disabilities.³⁴ Prior to the ADA, people who suffered discrimination because of their disabilities had no legal recourse.³⁵ Congress stated that the goal of the ADA is “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for individuals with disabilities.³⁶ The ADA was not designed to be an affirmative-action statute, but to ensure that people with disabilities are simply “placed at the same ‘starting line’ as those who are nondisabled.”³⁷ The ADA prohibits employers from discriminating on the basis of disability against qualified future and current employees.³⁸

29. *Id.* at 74.

30. *Id.*

31. *Id.* at 30.

32. *See id.* at 76.

33. *See, e.g., supra* note 7 and accompanying text.

34. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 328.

35. 42 U.S.C.A. § 12101(a)(4) (West 2005); *see also* Peter K. Rydel, *Redefining the Right to Reproduce: Asserting Infertility as a Disability Under the Americans with Disabilities Act*, 63 ALB. L. REV. 593, 599 (1999) (citation omitted).

36. 42 U.S.C.A. § 12101(a)(7) (West Supp. 2009).

37. WILLIAM D. GOREN, *UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT 1* (2d ed. 2006).

38. *See* 42 U.S.C.A. § 12112(a) (“No covered entity shall discriminate against a qualified individual on the basis of disability 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.”); *id.* § 12111(2)

In addition to discrimination claims under the ADA, infertile women have also brought discrimination claims under the PDA.³⁹ Prior to the PDA, women attempted to bring pregnancy discrimination cases under Title VII's prohibition of sex discrimination.⁴⁰ Under Title VII, it is illegal "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."⁴¹ In 1976, the Supreme Court dealt a blow to women seeking pregnancy discrimination claims under Title VII by concluding that, under Title VII, classification based on pregnancy is not sex discrimination.⁴² In *General Electric Co. v. Gilbert*, the Court ruled that an employer's disability benefit plan that did not provide compensation during pregnancy was not in violation of Title VII because "pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks."⁴³ Two years later, Congress overruled *Gilbert* by amending Title VII to include the Pregnancy Discrimination Act.⁴⁴ The PDA states that discrimination because of pregnancy, childbirth, or related medical conditions is discrimination on the basis of sex.⁴⁵

Further discussion of the application of the ADA and the PDA follows in more detail in Parts III and IV of this Note.

III. DO WOMEN WHO SUFFER ADVERSE EMPLOYMENT ACTIONS FOR REASONS RELATED TO INFERTILITY TREATMENTS HAVE A CLAIM UNDER THE ADA?

In the context of employment discrimination, the premise of the ADA is that employers cannot discriminate against qualified individuals

(defining covered entity as including employers).

39. See *supra* note 7 and accompanying text.

40. Sarah E. Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U. L. REV. 591, 593 (1982).

41. 42 U.S.C.A. § 2000e-2(a)(1).

42. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976).

43. *Id.* at 139 (emphasis removed).

44. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684-85 (1983).

45. 42 U.S.C.A. § 2000e(k).

with a disability because of that individual's disability.⁴⁶ Women who believe they have suffered an adverse employment action for taking time off to receive infertility treatments have attempted to state a claim of employment discrimination under the ADA.⁴⁷ Prior to 1998, cases focused on whether infertility was a disability under the ADA. District courts ruled both ways on the issue,⁴⁸ and the Eighth Circuit concluded that infertility was not a disability under the ADA.⁴⁹ However, because of the Supreme Court's decision in *Bragdon* and the recent amendments to the ADA, future courts will likely conclude that infertility is a disability protected by the ADA.

A. Three-Step Test of Whether a Person Has a Disability Under the ADA

The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."⁵⁰ Based on that definition, the courts follow a three-step test to determine whether a condition is a disability: (1) does the plaintiff have a physical impairment; (2) does the physical impairment affect a major life activity; and (3) does the physical impairment substantially limit that affected major life activity.⁵¹

1. Is Infertility a Physical Impairment?

It is generally accepted that infertility is a physical impairment.⁵² In

46. See 42 U.S.C.A. § 12101.

47. See, e.g., *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001); *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995); *Pacourek I*, 858 F. Supp. 1393 (N.D. Ill. 1994).

48. See *Pacourek I*, 858 F. Supp. at 1405 (finding infertility a disability under ADA); see also *Erickson*, 911 F. Supp. at 321 (same); *Zatarain*, 881 F. Supp. at 243 (finding infertility not a disability under ADA).

49. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that plaintiff had "[no] impairment that substantially limit[ed] her in any major life activity that is within the purview of the ADA").

50. 42 U.S.C.A. § 12102(2)(A) (2006).

51. Several district courts have used the three-step test in analyzing infertility disability cases. See, e.g., *Erickson*, 911 F. Supp. at 321 (citing EEOC, EEOC COMPLIANCE MANUAL § 902.1(b) (1995)); *Zatarain*, 881 F. Supp. at 242–44; *Pacourek I*, 858 F. Supp. at 1404–05. The Supreme Court also used the three-step test when determining whether HIV was a disability under the ADA. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

52. For example, when the Eighth Circuit ruled that infertility was not covered by the ADA, the court—and even the defendant—employer—did not debate

determining that infertility is a physical impairment, the courts have relied upon the regulations issued by the Equal Employment Opportunity Commission (EEOC).⁵³ The EEOC regulations state that “physical impairment” includes any physiological disorder or condition affecting the reproductive system.⁵⁴ Thus, the courts have had no difficulty determining that infertility is a physical impairment.⁵⁵

2. *Is Reproduction a Major Life Activity?*

Infertile women seeking protection under the ADA maintain that reproduction is a major life activity.⁵⁶ Prior to 1998, courts disagreed on whether reproduction was a major life activity. Two federal district courts in Illinois ruled that reproduction was a major life activity.⁵⁷ In *Pacourek v. Inland Steel Co. (Pacourek I)*, an employee sued her employer, claiming a violation of the ADA for being terminated after informing her employer of her intention to undergo IVF.⁵⁸ The district court concluded that because the EEOC regulations included the reproductive system as a potentially impaired system, reproduction must also be a major life activity—otherwise there would be no reason to include reproduction as a system that can be impaired.⁵⁹ A year later, another Illinois federal district court

that infertility was a physical impairment. *Krauel*, 95 F.3d at 677 (describing the issue as not whether the plaintiff’s infertility was a physical impairment but whether the physical impairment affected a major life activity).

53. See, e.g., *Krauel*, 95 F.3d at 677; *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 763–64 (W.D. Mich. 2001); *Erickson*, 911 F. Supp. at 321; *Zatarain*, 881 F. Supp. at 242; *Pacourek I*, 858 F. Supp. at 1404.

54. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h) (2008).

55. See, e.g., *Krauel*, 95 F.3d at 677; *LaPorta*, 163 F. Supp. 2d at 763–64; *Erickson*, 911 F. Supp. at 321; *Zatarain*, 881 F. Supp. at 242; *Pacourek I*, 858 F. Supp. at 1404.

56. See *Krauel*, 95 F.3d at 677; *LaPorta*, 163 F. Supp. 2d at 764–65; *Erickson*, 911 F. Supp. at 321; *Zatarain*, 881 F. Supp. at 243; *Pacourek I*, 858 F. Supp. at 1404. In *Zatarain*, the plaintiff also contended that her infertility affected the major life activity of working. *Zatarain*, 881 F. Supp. at 243. The court rejected this argument because in order to establish a substantial limitation of the major life activity of working, a plaintiff must show she is significantly restricted from performing “a broad range of jobs in various classes.” *Id.* at 243–44 (citation omitted). As will be discussed later in this section, there is no longer any need for a woman to argue that infertility affects any major life activity other than reproduction now that the Supreme Court has ruled that reproduction is a major life activity. See *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).

57. See *Erickson*, 911 F. Supp. at 321–23; *Pacourek I*, 858 F. Supp. at 1404.

58. See *Pacourek I*, 858 F. Supp. at 1396.

59. *Id.* at 1404.

ruled that reproduction was a major life activity based on the EEOC regulations and Congress's intent.⁶⁰

The United States Court of Appeals for the Eighth Circuit reached a different conclusion. In *Krauel v. Iowa Methodist Medical Center*, the plaintiff alleged that her employer violated the ADA by denying insurance coverage for infertility treatments.⁶¹ The Eighth Circuit called *Pacourek I*'s reasoning flawed, saying the district court combined the "physical impairment" element with the "major life activity" element, when the two are actually "separate and distinct" components under the ADA.⁶² The Eighth Circuit focused on the regulations concerning the term *major life activity*.⁶³ The EEOC does not define major life activity, but does provide examples of major life activities, such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁶⁴ In *Krauel*, the Eighth Circuit refused to find that reproduction was a major life activity, arguing that to do so would be inconsistent with the illustrative examples in the regulations.⁶⁵

In 1998, the Supreme Court unequivocally answered the question of whether reproduction is a major life activity.⁶⁶ When a dentist refused to fill a patient's cavity in his office and required the procedure be done at a hospital because the patient had human immunodeficiency virus (HIV), the patient filed suit under the ADA.⁶⁷ For the patient to state a valid claim under the ADA, HIV needed to be considered a disability—a physical impairment that substantially limited a major life activity.⁶⁸ The patient maintained that HIV was a physical impairment that substantially limited the major life activity of reproduction.⁶⁹ The Court agreed.⁷⁰ The Court relied on the plain meaning of the word *major* and said that the

60. See *Erickson*, 911 F. Supp. at 321–23.

61. *Krauel*, 95 F.3d at 676.

62. See *id.* at 677 (citing *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995)).

63. See *id.*

64. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h)(2)(i) (2008).

65. *Krauel*, 95 F.3d at 677.

66. See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

67. *Id.* at 628–29.

68. *Id.* at 631.

69. *Id.*

70. *Id.* at 638.

standard for inclusion was the activity's significance.⁷¹ Based on that standard, the Court easily concluded that reproduction fell "well within the phrase 'major life activity.'"⁷² The Court also noted that reproduction was "central to the life process."⁷³

Chief Justice William Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, concurred in the judgment and dissented in part.⁷⁴ The dissent rejected the Court's conclusion that reproduction was a major life activity.⁷⁵ Following reasoning similar to that of the Eighth Circuit in *Krauel*, the dissent argued that the Court failed to show that reproduction is consistent with the illustrative examples issued by the EEOC, which include activities such as walking, hearing, speaking, breathing, etc.⁷⁶ The dissent stated that although the decisions people make regarding reproduction are of fundamental importance, so are the decisions regarding marriage, career, and where to live.⁷⁷ The common thread among the activities listed in the regulations was not fundamental importance, but that the listed activities were "repetitively performed and essential in the day-to-day existence of a normally functioning individual."⁷⁸ Chief Justice Rehnquist also rejected the reasoning used in *Pacourek I*—that reproduction must be a major life activity because the regulations define physical impairments as including disorders affecting the reproductive system—because there are disorders that affect the reproductive system that substantially limit major life activities included in the illustrative list in the regulations.⁷⁹ However persuasive one might find the *Bragdon* dissent and the reasoning of the Eighth Circuit, the issue was ultimately decided—reproduction is a major life activity.

3. *Does Infertility Substantially Limit Reproduction?*

Infertility qualifies as a disability under the first two steps of the three-step test. Thus, whether infertile women may state a claim under the

71. *Id.* (citation omitted).

72. *Id.*

73. *Id.*

74. *Id.* at 658 (Rehnquist, C.J., dissenting in part).

75. *Id.* at 658–60.

76. *Id.* at 659.

77. *Id.* at 660.

78. *Id.*

79. *Id.* (identifying dysmenorrhea and endometriosis as disorders affecting the reproduction system that are so painful they limit major life activities, such as working and walking).

ADA depends on whether infertility substantially limits reproduction. Some courts have already concluded that infertility substantially limits reproduction.⁸⁰ Common sense and the 2008 Amendments to the ADA will prevent future courts from deciding otherwise.

The EEOC regulations define “substantially limits” as “[u]nable to perform a major life activity that the average person in the general population can perform” or “[s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.”⁸¹ The two district court cases that decided that infertility was covered under the ADA prior to *Bragdon* easily concluded that infertility substantially limited reproduction. In fact, *Erickson v. Board of Governors of State Colleges & Universities for Northeast Illinois University* did not even address the issue—the bulk of the analysis focused on whether reproduction was a major life activity, and once the court determined that it was, the court automatically concluded the plaintiff had a claim under the ADA without addressing whether infertility substantially impairs reproduction.⁸² In *Pacourek I*, the court spent just four sentences addressing the issue—the court cited the regulations and concluded the plaintiff clearly fit within the regulations, saying it was just “a matter of common sense” that infertility substantially limits reproduction.⁸³

Despite its prior rejection of infertility as a disability, the Eighth

80. See, e.g., *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995); *Pacourek I*, 858 F. Supp. 1393 (N.D. Ill. 1994).

81. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j)(1) (2008).

82. See *Erickson*, 911 F. Supp. at 321–23.

83. *Pacourek I*, 858 F. Supp. at 1405.

The last element of the definition is substantial limitation of the major life function. Once reproduction is categorized as a major life activity, the conclusion that infertility substantially limits the major life activity is a matter of common sense. The regulations state that “substantially limits” means rendering one either “[u]nable to perform a major life activity that the average person in the general population can perform” or “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j). Plaintiff’s allegations clearly state a claim within that definition.

Id.

Circuit will likely have to conclude that infertile women are protected under the ADA. After *Bragdon*, the only way for the Eighth Circuit to conclude that infertility is not a disability is to decide that infertility does not substantially limit reproduction. Common sense prevents a serious argument that infertility does not substantially impair reproduction—an employer would be hard-pressed to argue that infertility does not significantly restrict the manner under which an infertile individual can reproduce compared to the manner under which an individual in the general population can reproduce.

In 2001, a plaintiff alleged that her termination was due to seeking infertility treatment and thus was in violation of the ADA.⁸⁴ The Michigan federal district court rejected the employer's argument that infertility did not substantially limit reproduction.⁸⁵ The crux of the defendant's argument was that the plaintiff's infertility did not substantially limit reproduction because the plaintiff eventually became pregnant via artificial insemination.⁸⁶ The defendant relied on three Supreme Court decisions from 1999 that have become known as the *Sutton* trilogy.⁸⁷ The defendant

84. See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 760 (W.D. Mich. 2001).

85. *Id.* at 765–66.

86. *Id.* at 765.

87. *Id.* The *Sutton* trilogy consists of *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). The plaintiffs in *Sutton* had severe myopia, resulting in an uncorrected visual acuity of 20/200 in one eye and 20/400 in other. *Sutton*, 527 U.S. at 475. The plaintiffs had 20/20 vision with corrective lenses. *Id.* When the plaintiffs failed to meet a commercial airline's vision requirement for pilot positions, the plaintiffs sued under the ADA. *Id.* at 475–76. The court held that measures that mitigate an impairment must be considered when determining whether an individual is disabled. *Id.* at 482. The plaintiffs' impairment was considered with the ameliorative effect of corrective lenses, and the court concluded there was no disability—and thus no claim—under the ADA. See *id.* at 475. The plaintiff in *Murphy* was fired from a position that required him to drive commercial trucks because his blood pressure was too high to qualify for Department of Transportation health certification. *Murphy*, 527 U.S. at 519–20. The Court relied on the *Sutton* decision and evaluated the plaintiff when he was on blood pressure medication. *Id.* at 521. Because the plaintiff's high blood pressure did not substantially limit any major life activity when medicated, the Court said the plaintiff was not disabled under the ADA. See *id.* Again, the Court in *Albertson's, Inc.* reiterated the requirement of considering ameliorative measures when determining whether an impairment substantially limits a major life activity. *Albertson's, Inc.*, 527 U.S. at 565 (citing *Sutton*, 527 U.S. at 482). The plaintiff was fired from his job as a truck driver when he failed to meet the Department of Transportation's vision standard. *Id.* at 560. The plaintiff

maintained that the *Sutton* trilogy stood for the proposition that a physical condition could not be “a disability under the ADA if it is subject to any ameliorative treatment or measures.”⁸⁸ The court rejected the defendant’s argument.⁸⁹ The court concluded that although a woman may eventually become pregnant through infertility treatments, that fact does not prevent the classification of infertility as a disability.⁹⁰ While the *Sutton* trilogy required that ameliorative measures be taken into account when determining whether a physical impairment substantially limits a major life activity, the court noted that the trilogy also required that both the positive and negative effects of the measures be considered.⁹¹ The court considered the expense, the intrusive nature of the tests, and the requirement of treatment during working hours as negative effects of the ameliorative measures.⁹² The court noted that infertility treatments do not cure infertility, but simply help the woman do what normally functioning bodies do.⁹³ Ultimately, the district court followed the reasoning of *Bragdon*—that the ADA “addresses substantial limitations on major life activities, not utter inabilities.”⁹⁴

Although other courts may have ruled differently than the district court in *LaPorta v. Wal-Mart Stores, Inc.*, employers will not be able to make future arguments that infertility does not substantially limit reproduction based on the *Sutton* trilogy’s ameliorative measures requirement. In 2008, Congress amended the ADA, specifically stating that the purpose of the Amendment was to reject the *Sutton* trilogy and its proposition that substantial limitation is to be considered in light of the ameliorative effects of mitigating measures.⁹⁵ The Amendment states that

suffered from monocular vision, but his brain had subconsciously developed mechanisms to cope with his impairment. *Id.* at 565 (citing *Kirkingburg v. Albertson’s, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1998)). The Court concluded whether the plaintiff had a disability must be considered in light of the brain’s subconscious mitigating measures—“[w]e see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body’s own systems.” *Id.* at 565–66.

88. *LaPorta*, 163 F. Supp. 2d at 765.

89. *See id.*

90. *Id.* at 765–66.

91. *Id.* at 765 (citing *Sutton*, 527 U.S. at 482).

92. *Id.* at 766.

93. *Id.*

94. *Id.* (quoting *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998)) (internal quotes omitted).

95. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

“[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effect of mitigating measures such as . . . use of assistive technology.”⁹⁶ Based on the 2008 Amendments to the ADA and the EEOC regulations, courts will likely continue to conclude that infertility substantially limits reproduction.

4. *Conclusion to Three-Step Test of Disability*

First, infertility is a physical impairment—even the Eighth Circuit, which rejected the classification of infertility as being a disability under the ADA, considered infertility a physical impairment.⁹⁷ Second, the Supreme Court has decided that reproduction is a major life activity.⁹⁸ Third, common sense and Congress’s desire that the ADA be broadly interpreted make it unlikely that a court could conclude that infertility does not substantially impair reproduction. The 2008 Amendments state that “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”⁹⁹ Thus, infertility is a disability under the ADA.

It remains to be seen whether the medical cause of the infertility matters.¹⁰⁰ In *Krauel*, the Eighth Circuit focused on the origins of infertility and held:

[T]he Plan’s infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for treatment of infertility problems. For example, the Plan exclusion bars coverage for infertility caused by age, a condition which is not recognized as a disability under the ADA, and for infertility caused by ovarian cancer, which is defined as a disability under the ADA. Therefore, the District Court properly held that the Plan is not a disability-based distinction in violation of the ADA.¹⁰¹

Although the Supreme Court rejected *Krauel*’s reasoning that reproduction was not a major life activity, it is unclear whether “*Krauel*’s

96. 42 U.S.C.A. § 12102(4)(E)(i)(II) (West Supp. 2009).

97. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (stating that even the defendant conceded that infertility was a physical impairment).

98. See *Bragdon v. Abbott*, 524 U.S. 624, 647 (1998).

99. 42 U.S.C.A. § 12102(4)(A).

100. See *Pendo*, *supra* note 16, at 326.

101. *Krauel*, 95 F.3d at 678.

emphasis on the origin of the infertility was similarly abrogated.”¹⁰² In *Zatarain v. WDSU-Television, Inc.*, the employer argued that the employee failed to state a claim because the employee’s infertility was likely caused by her age or stress, which are not physiological disorders.¹⁰³ The district court ruled that there was sufficient evidence to establish that the employee’s infertility resulted from a reproductive disorder not caused by age or stress.¹⁰⁴ Thus, the district court was able to avoid deciding whether women who suffer from infertility not caused by ADA-recognized impairments (such as infertility caused by age) are protected under the ADA. However, the district court in *Pacourek I* addressed the issue and ruled that there was no requirement of a medical cause.¹⁰⁵ The court stated that “it does not matter whether the infertility is explained or not. The ADA and regulations under it are simply devoid of any requirement that a physiological disorder or condition have a scientific name or known etiology.”¹⁰⁶ Similarly, in *LaPorta* the court was not concerned about what caused the plaintiff’s infertility, but simply whether the plaintiff was infertile.¹⁰⁷ Therefore, it remains unknown whether future courts will require employees to establish that the cause of their infertility is an ADA-recognized impairment.¹⁰⁸

B. *What Comes After Infertility Is Accepted as a Disability Under the ADA?*

The remaining obstacles for an infertile woman seeking to state a successful claim under the ADA are fact-based.¹⁰⁹ A plaintiff must prove that she is a qualified individual with a disability and that her employer discriminated against her because of that disability.¹¹⁰ As noted earlier, a

102. See Pendo, *supra* note 16, at 326.

103. *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 242–43 (E.D. La. 1995).

104. *Id.*

105. See *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 801 (N.D. Ill. 1996) [*Pacourek II*].

106. *Id.*

107. See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 764 (W.D. Mich. 2001) (holding that defendant’s argument that it is necessary to pinpoint the precise cause of the infertility is unreasonable).

108. See Pendo, *supra* note 16, at 328.

109. Because courts should conclude that infertility is a disability, plaintiffs will not be subjected to summary judgment, but will have to prove that the requirements of stating an ADA employment discrimination claim factually occurred.

110. See Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104

qualified individual with a disability is a person who can perform the essential functions of the job, with or without reasonable accommodation.¹¹¹ The ADA states that reasonable accommodation may include job restructuring and part-time or modified work schedules.¹¹² An employer must provide reasonable accommodations to a qualified individual with a disability unless it would impose undue hardship on the employer.¹¹³ In addition, the plaintiff must show causation—that she suffered an adverse employment action solely because of her disability.¹¹⁴ Therefore, if a plaintiff can show that she is qualified, that she sought reasonable accommodation that would not have imposed an undue hardship on her employer, and that she suffered an adverse employment action because of her infertility, she will state a cognizable claim of employment discrimination under the ADA.

C. Remaining Issues on Infertility and Disability

When a woman suffers an adverse employment action for undergoing infertility treatment, the woman only has a cause of action if she herself is infertile.¹¹⁵ There is no disability if the woman is not infertile.¹¹⁶ Thus, a woman who sought infertility treatments due to her partner's infertility and suffered an adverse employment action as a result will have to seek recourse elsewhere. Many of these women turn to the PDA.

IV. DO WOMEN WHO SUFFER ADVERSE EMPLOYMENT ACTIONS FOR REASONS RELATED TO INFERTILITY TREATMENTS HAVE A CLAIM UNDER THE PDA?

A. How the PDA Fits Within Title VII

Title VII prohibits discrimination because of an individual's sex.¹¹⁷ When Congress amended Title VII to include the PDA, it did so to clarify that discriminating against a woman because of pregnancy amounted to

Stat. 327 (codified as amended at 42 U.S.C.A. § 12112(a) (West 2005 & Supp. 2009)).

111. 42 U.S.C.A. § 12111(8).

112. *Id.* § 12111(9)(B).

113. *Id.* § 12112(b)(5).

114. *Id.* § 12112(a); *Monette v. Elec. Data Sys., Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996).

115. *See* 42 U.S.C.A. § 12111(8); *id.* § 12112(a).

116. *See supra* note 116.

117. 42 U.S.C.A. § 2000e-2(a).

discriminating against her because of her sex.¹¹⁸ In Title VII sex-discrimination cases, the courts have followed what they call a “simple test”—whether the employee was treated “in a manner which but for that person’s sex would be different.”¹¹⁹ The Supreme Court has indicated the PDA does not change that simple test.¹²⁰ The Seventh Circuit described the role of the PDA as not creating new rights, but rather simply clarifying that Title VII prohibits disparate treatment of employees based on inherently gender-specific characteristics.¹²¹ The PDA, in relevant part, provides:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.¹²²

As the PDA clarifies, discrimination on the basis of “pregnancy, childbirth, or related medical conditions” is discrimination because of sex, and therefore a violation of Title VII.¹²³ Women who have suffered an adverse employment action for seeking infertility treatment argue that such action is sex discrimination because infertility is a “related medical condition” covered by the PDA.¹²⁴ As the following discussion will show, courts are split on whether infertility is a related medical condition and whether women who have suffered adverse employment action for taking time off to receive infertility treatment state a cognizable claim under the PDA.¹²⁵ Two circuit courts of appeals, considering the issue in the context

118. *See supra* Part II.

119. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983) (quoting *City of L.A. v. Manhart*, 435 U.S. 702, 711 (1978)).

120. *See id.* at 684–85.

121. *Hall v. Nalco Co.*, 534 F.3d 644, 647 (7th Cir. 2008) (citing *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 678–79).

122. 42 U.S.C.A. § 2000e(k).

123. *Id.*

124. *See Hall*, 534 F.3d at 645; *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001); *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316, 318–19 (N.D. Ill. 1995); *Pacourek I*, 858 F. Supp. 1393, 1400–01 (N.D. Ill. 1994).

125. The Second and Eighth Circuits have ruled that infertility is not a “related medical condition.” *See Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003);

of health insurance plans, concluded that infertility is not a related medical condition.¹²⁶ Two federal district courts in Illinois concluded that infertility was a related medical condition, and thus women who suffered adverse employment actions for taking time off work for infertility treatments stated a cognizable claim under the PDA.¹²⁷ In 2008, the Seventh Circuit was faced with the same issue as the district courts and, without deciding that infertility was a related medical condition, decided that the plaintiff had stated a cognizable claim under the PDA.¹²⁸

B. Circuits That Have Found Infertility Is Not Covered Under the PDA

The Second and Eighth Circuits have not specifically addressed whether a woman who suffered an adverse employment action because she took time off to receive infertility treatments has a claim under the PDA. However, both circuits have addressed whether infertility is covered under the PDA in the context of employer health insurance plans.¹²⁹ The Second and Eighth Circuits relied on statutory construction, legislative history, and the principles of Title VII employment discrimination cases in reaching their conclusions.

In *Krauel*, the plaintiff brought an action against her employer claiming the employer was in violation of the PDA because its medical coverage excluded infertility treatments.¹³⁰ The Eighth Circuit concluded that infertility was not a related medical condition; thus, there was no PDA violation.¹³¹ The Eighth Circuit relied on the principle of *ejusdem generis*. *Ejusdem generis* is a statutory rule of construction which provides that “when a general term follows a specific one, the general term should be

Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679–80 (8th Cir. 1996). The Seventh Circuit has ruled that women who suffer adverse employment action for taking time off work state a cognizable claim under the PDA. See *Hall*, 534 F.3d at 649.

126. *Saks*, 316 F.3d at 346; *Krauel*, 95 F.3d at 679–80. The Second Circuit specifically refused to address the issue of whether a woman who suffered adverse employment action because she missed work for infertility treatments had a claim under the ADA. See *Saks*, 316 F.3d at 346 n.4. When declining to address the issue, the court cited two district court decisions that had reached the conclusion that infertility was a related medical condition. See *id.* (quoting *Cleese v. Hewlett-Packard Co.*, 911 F. Supp. 1312, 1317–18 (D. Or. 1995); *Pacourek I*, 858 F. Supp. at 1401–02).

127. *Pacourek I*, 858 F. Supp. at 1402–04; see also *Erickson*, 911 F. Supp. at 320.

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

129. *Saks*, 316 F.3d at 337; *Krauel*, 95 F.3d at 674.

130. *Krauel*, 95 F.3d at 676.

131. *Id.* at 679–80.

understood as a reference to subjects akin to the one with specific enumeration.”¹³² *Pregnancy* and *childbirth* are specific terms followed by the general phrase “related medical conditions”;¹³³ thus, the court concluded the phrase “related medical conditions” should be understood to refer to conditions related to pregnancy and childbirth unless the context of the PDA requires otherwise.¹³⁴ The Eighth Circuit said that nothing in the plain language of the PDA suggested that the general phrase *related medical condition* should be read more broadly than the specific terms *pregnancy* and *childbirth*.¹³⁵ The court also said that “related medical conditions” could not be read to include infertility because “[p]regnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception.”¹³⁶ In addition, the Eighth Circuit noted that neither the legislative history nor the EEOC guidelines referenced infertility.¹³⁷ The Eighth Circuit also rejected the plaintiff’s Title VII sex-discrimination claim.¹³⁸ Title VII sex-discrimination claims may be established either by showing intentional sex discrimination or by showing a facially neutral employment policy is discriminatory in operation.¹³⁹ The Eighth Circuit found that the plaintiff failed to prove any intentional discrimination or that females were more adversely affected by the employer’s practice than males.¹⁴⁰

In 2001, a Michigan federal district court chose to adopt the Eighth Circuit’s reasoning, concluding that it was the only rational construction of the PDA.¹⁴¹ In *LaPorta*, the plaintiff, a pharmacist, had been undergoing infertility treatment with the knowledge of her employer, Wal-Mart.¹⁴² After several months and a failed IVF procedure, the plaintiff’s doctor, on

132. See *id.* at 679 (quoting *Norfolk & W. Ry. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991)).

133. 42 U.S.C.A. § 2000e(k) (West 2005) (“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* . . .”) (emphasis added).

134. *Krauel*, 95 F.3d at 679.

135. *Id.*

136. *Id.*

137. *Id.* (citation omitted).

138. *Id.* at 680.

139. *Id.* at 680–81.

140. *Id.*

141. *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 771 (W.D. Mich. 2001).

142. *Id.* at 762.

a Friday, scheduled her for egg retrieval the following Monday.¹⁴³ The plaintiff informed her manager, who then informed the plaintiff that no one was available to cover that shift, so the plaintiff was required to report to work as scheduled.¹⁴⁴ The plaintiff did not report to work on the following Monday and was subsequently fired.¹⁴⁵ The plaintiff then filed suit against Wal-Mart, claiming it violated the PDA.¹⁴⁶ The district court concluded that infertility, within the meaning of the PDA, was not a medical condition related to pregnancy or childbirth.¹⁴⁷ The court concluded that nothing in the language of the PDA or its legislative history suggested that Congress had any intention to cover infertility.¹⁴⁸ In addition to statutory construction and legislative history, the district court relied on the principles of Title VII litigation to support its conclusion.¹⁴⁹ One of those principles was that a “core issue [in Title VII litigation] is whether the plaintiff was replaced by an individual outside the protected class.”¹⁵⁰ The court stated that if the protected class consisted of infertile women, then replacing the infertile woman with a fertile, or even pregnant, woman would be a violation of Title VII.¹⁵¹ The court refused to allow such a situation—stating that it would “stand the PDA on its head.”¹⁵²

In 2002, the Second Circuit, using a somewhat different approach than *Krauel* and *LaPorta*, also concluded the term “related medical condition” did not include infertility.¹⁵³ In *Saks v. Franklin Covey Co.*, the plaintiff claimed a PDA violation based on an employer healthcare plan that excluded surgical impregnation procedures.¹⁵⁴ The court said that because the PDA included the term “related medical condition,” the PDA obviously included more than just pregnancy.¹⁵⁵ According to the court,

-
143. *Id.*
144. *Id.*
145. *Id.* at 762–63.
146. *Id.* at 763.
147. *Id.* at 770.
148. *Id.* (accepting *Krauel* as the most persuasive authority for statutory construction).
149. *Id.*
150. *Id.* at 770 (citing *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 349 (6th Cir. 1997)).
151. *Id.*
152. *Id.*
153. *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).
154. *Id.* at 342.
155. *Id.* at 345 (citing *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 647–48 (8th Cir. 1987)).

the issue was just how much more the PDA embraced.¹⁵⁶ To answer the question, the court said it must start with the words of the statute.¹⁵⁷ The court said that “[t]he text’s plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.”¹⁵⁸ The court stated that a statutory provision should be interpreted so it is consistent with the rest of the statute.¹⁵⁹ The court recognized that one of the fundamental principles of Title VII was to prohibit discrimination because of an individual’s sex.¹⁶⁰ The court said that because both men and women have reproductive capacity, the PDA does not prohibit discrimination because of an individual’s reproductive capacity.¹⁶¹ Instead, the PDA required “that pregnancy, and related conditions, be properly recognized as sex-based characteristics of women.”¹⁶² The court relied on the Supreme Court’s decision in *International Union v. Johnson Controls*—that discrimination based on childbearing capacity violated Title VII and the PDA, but discrimination because of fertility alone did not.¹⁶³ Based on the Supreme Court’s decision, the Second Circuit concluded that a condition is only included under the PDA if the condition is unique to women.¹⁶⁴ The court concluded that because infertility afflicts both men and women, infertility alone does not fall within the meaning of the PDA.¹⁶⁵ The court said that to conclude otherwise would be to define a class that consists of an equal number of both sexes as subject to sex discrimination.¹⁶⁶ However, the

156. *Id.*

157. *Id.* (citing *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 300–01 (1989)).

158. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

159. *Id.* (citing *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002); *United States v. Interlink Sys., Inc.*, 984 F.2d 79, 82 (2d Cir. 1993)).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 345–46 (citing *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991)). In *Johnson Controls*, the employer banned fertile women from jobs with lead exposure. *Johnson Controls*, 499 U.S. at 191. The Supreme Court concluded the employer’s policy violated the PDA. *See id.* at 198–99. The Court stated the policy was not based on fertility alone, but on gender and childbearing capacity, since only fertile women were barred, not fertile men. *See id.* at 197.

164. *Saks*, 316 F.3d at 346 (noting that the court was not precluding the inclusion of a condition that occurs in both females and males that occurs because of pregnancy—i.e. diabetes).

165. *Id.*

166. *Id.*

Second Circuit explicitly refused to consider the issue of whether a female who suffered an adverse employment action for missing work for infertility treatments had a claim under the PDA.¹⁶⁷

Based on statutory construction, the legislative history of the PDA, and the principles of Title VII, the Second and Eighth Circuits have concluded that infertility is not a related medical condition under the PDA.

C. District Courts That Have Found Infertility Is a Related Medical Condition

Two district courts in the Seventh Circuit ruled that infertility is a related medical condition and that plaintiffs who suffered adverse employment action for seeking infertility treatments had stated cognizable claims under the PDA.¹⁶⁸ In *Pacourek I*, an employee sued her employer claiming a violation of the PDA for being terminated after informing her employer of her intention to undergo IVF.¹⁶⁹ The district court first addressed the issue of whether the PDA is violated when employers discriminate based on intended or potential pregnancy.¹⁷⁰ Based on the theory of the PDA, the Supreme Court's interpretation of the PDA in *International Union v. Johnson Controls, Inc.*, and the legislative history of the statute, the district court concluded that the PDA covers discrimination based on potential or intended pregnancy.¹⁷¹ According to the court, the PDA was enacted because only women can become pregnant and thus the economic barriers resulting from stereotypes of pregnancy and related medical conditions will never be gender neutral.¹⁷² The court then concluded that the PDA logically covered the potential or the intention to become pregnant "because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law."¹⁷³ The court said it is illegal to discriminate against an employee

167. *Id.* at 346 n.4. When refusing to consider the issue, the court cited two district court cases that concluded that female plaintiffs have a claim. *Id.* (citing *Cleese v. Hewlett-Packard Co.*, 911 F. Supp. 1312, 1317–18 (D. Or. 1995); *Pacourek I*, 858 F. Supp. 1393, 1401–02 (N.D. Ill. 1994)).

168. *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995); *Pacourek I*, 858 F. Supp. 1393.

169. *Pacourek I*, 858 F. Supp. at 1396.

170. *Id.* at 1401.

171. *Id.* at 1401–02.

172. *Id.* at 1401.

173. *Id.*

simply because she has the potential to become pregnant.¹⁷⁴ The district court also supported its conclusion using *Johnson Controls*.¹⁷⁵ The district court stated that the employment policy in *Johnson Controls* classified on the basis for potential pregnancy, and cited the Supreme Court's statement that "[u]nder the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination."¹⁷⁶ In addition, the court turned to legislative history to support its proposition.¹⁷⁷ The district court quoted Senator Harrison Williams discussing how employers have refused to hire women simply because the women may become pregnant.¹⁷⁸ The district court quoted Representative Ronald Sarasin saying that the PDA gives a woman "the right . . . to be financially and legally protected before, during, and after her pregnancy."¹⁷⁹ The district court concluded that the plaintiff's allegations that she was adversely treated because of her potential or intended pregnancy amounted to a valid claim under the PDA.¹⁸⁰

The district court then addressed the plaintiff's allegations that she was discriminated against on the basis of the related medical condition.¹⁸¹ The district court prefaced its analysis by noting that remedial statutes, such as civil rights laws, are to be construed broadly.¹⁸² The district court focused on the plain language of the statute, specifically Congress's use of

174. *Id.*

175. *Id.*

176. *Id.* at 1401–02 (quoting *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991)) (internal quotes omitted).

177. *Id.* at 1402.

178. *Id.* (quoting 123 CONG. REC. S29,385 (1977) (statement of Sen. Williams)). The district court quoted Senator Harrison Williams, who sponsored the Senate bill that lead to the PDA, as saying during a floor debate:

Because of their capacity to become pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement In some of these cases, the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant [T]he overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status

Id.

179. *Id.* (quoting 124 CONG. REC. H38,574 (1978) (statement of Rep. Sarasin)).

180. *Id.*

181. *Id.*

182. *Id.* (citing *Stoner v. Dep't of Agric.*, 846 F. Supp. 738, 742 (W.D. Wis. 1994)).

the word “related.”¹⁸³ The district court described “related” as a “generous choice of wording” signifying that statutory interpretation of the PDA should be inclusive, not exclusive.¹⁸⁴ The court also found support for its liberal interpretation in the legislative history—“[i]n using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.”¹⁸⁵ The court concluded that there was nothing in precedent, the legislative history of the PDA, or the plain meaning of the statute that excluded infertility from the protection of the PDA.¹⁸⁶ Thus, the court concluded that, “[a]s a general matter, a woman’s medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for purposes of the Pregnancy Discrimination Act.”¹⁸⁷

The next year, the Northern District of Illinois faced another case in which a plaintiff claimed a PDA violation for termination relating to infertility treatments.¹⁸⁸ In *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois Universities*, the court followed the same reasoning used in *Pacourek I*.¹⁸⁹ In addition, the court rejected the defendant’s argument that because infertility is common to both genders, employment decisions based on infertility do not constitute unlawful discrimination.¹⁹⁰ The court noted that “[a] male employee’s infertility treatment does not seek to achieve his pregnancy; in other words, a male’s infertility does not relate to his capacity to become pregnant.”¹⁹¹ Thus by construing “related matters” to include infertility, the two federal district courts in Illinois have found that employees who suffer adverse employment action for seeking infertility treatments have stated claims under the PDA.

183. *Id.*

184. *Id.* at 1401.

185. *Id.* at 1402 (quoting H.R. REP. NO. 95-948, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753) (internal quotes omitted).

186. *Id.* at 1402–03.

187. *Id.* at 1403.

188. *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995).

189. *Id.* at 319.

190. *Id.* at 320.

191. *Id.*

D. *Analysis of the Seventh Circuit's Ruling in Hall v. Nalco Co.*¹⁹²

In July of 2008, the Seventh Circuit issued a ruling contrary to those of the Second and Eighth Circuits, concluding that infertility is covered by the PDA.¹⁹³ The Seventh Circuit specifically addressed whether a plaintiff who suffered an adverse employment action for taking time off to receive infertility treatments stated a claim under the PDA.¹⁹⁴ In *Hall*, the plaintiff, a secretary at Nalco Company, had requested and was granted two separate four-week leaves of absence in order to undergo IVF.¹⁹⁵ When the first procedure was unsuccessful, the plaintiff requested the second leave of absence.¹⁹⁶ Meanwhile, as a result of a reorganization, Nalco decided to combine two offices and keep only one secretary.¹⁹⁷ Nalco decided to terminate Hall and keep the other secretary.¹⁹⁸ When Hall was informed of the decision, she was told it “was in [her] best interest due to [her] health condition.”¹⁹⁹ In the employee-relations manager’s notes taken during termination discussions, the manager had noted Hall’s missed work and infertility treatments.²⁰⁰ Hall filed suit, alleging she was terminated in violation of the PDA.²⁰¹ The district court granted summary judgment for the employer after concluding that infertility is gender neutral, and thus infertile women are not a protected class.²⁰²

The Seventh Circuit rejected the district court’s conclusion that infertility, because it is gender neutral, is not covered under the PDA.²⁰³ The Seventh Circuit also specifically rejected the trial court’s, as well as the Second Circuit’s and Eighth Circuit’s, application of *Johnson Controls*.²⁰⁴ The court acknowledged that the employer’s illegal conduct in *Johnson Controls* was a policy based on gender and childbearing capacity instead of only infertility.²⁰⁵ The court stated that “[i]mplicit in this holding is that

192. Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008).

193. *Id.*

194. *Id.*

195. *Id.* at 645–46.

196. *Id.* at 646.

197. *Id.*

198. *Id.*

199. *Id.* (alteration in original).

200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.* at 648–49.

204. *See id.* at 647–48.

205. *Id.* at 648 (citing *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198

classifications based on ‘fertility alone’—and by like implication, infertility alone—are not prohibited by the PDA, which reaches only gender-specific classifications.”²⁰⁶ The Seventh Circuit even acknowledged that this conclusion was necessary in order to avoid the anomaly the Second Circuit noted in *Saks*—defining a class, infertile people, as vulnerable to sex discrimination when it is comprised of equal numbers of each sex.²⁰⁷ However, the Seventh Circuit found that based on the facts of the case, the trial court placed too much emphasis on infertility alone.²⁰⁸ The Seventh Circuit held that the employer’s conduct must still be genderneutral.²⁰⁹ Thus, when employers classify based on gender-specific characteristics, such as childbearing capacity or the potential for pregnancy (as was the case in *Johnson Controls*) it is discrimination under the PDA.²¹⁰ The Seventh Circuit said that the employer’s conduct suffered from the same problem as the conduct of the employer in *Johnson Controls*.²¹¹ When an employer terminates an employee for taking time off to undergo IVF, the employee will always be a woman, just like employees who are terminated for taking time off to give birth will always be women.²¹² The court concluded that Hall was not terminated because of her infertility, but rather because of her gender-specific capacity to become pregnant.²¹³ The court said Hall had met the simple test of Title VII sex discrimination—“adverse employment action based on childbearing capacity will always result in ‘treatment of a person in a manner which but for that person’s sex would be different.’”²¹⁴ Thus, the Seventh Circuit concluded that an employee who suffers an adverse employment action for taking time off work to receive infertility treatments has stated a cognizable claim under the PDA.²¹⁵

(1991)).

206. *Id.*

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

208. *Id.*

209. *Id.* (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684–85 (1983) (“By making clear that an employer could not discriminate on the basis of an employee’s pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee’s sex.”)).

210. *Id.*

211. *Id.*

212. *Id.* at 648–49.

213. *Id.* at 649.

214. *Id.* (quoting *City of L.A. v. Manhart*, 435 U.S. 702, 711 (1978)).

215. *See id.*

E. *Remaining Circuit Courts Should Adopt the Reasoning of the Seventh Circuit*

Future courts should follow the reasoning in *Hall* and find that a woman who suffers an adverse employment action for taking time off work to receive infertility treatments has a cognizable claim under the PDA. The Seventh Circuit acknowledged the concerns of the *Krauel* and *Saks* courts—that classifications based on fertility alone are not prohibited under the PDA and that the PDA only covers gender-specific classifications (since to conclude otherwise would result in a group of an equal number of men and women being considered vulnerable to sex discrimination).²¹⁶ However, the Second and Eighth Circuits failed to consider the next level of analysis—whether the employer’s conduct was in fact gender neutral.²¹⁷ Just as only women will ever be terminated for taking time off for child birthing, only women will be terminated for taking time off to receive infertility treatments. A woman’s infertility treatment, unlike a man’s, is done to achieve pregnancy. Thus, a woman who is terminated for taking time off work to receive infertility treatments is being terminated not for her infertility, but for her capacity to become pregnant. Therefore, future courts should find that women who suffer adverse employment action for taking time off to receive infertility treatment have stated a claim under the PDA.

V. CONCLUSION

The beginning of this Note discussed the difficulties women face in the workplace when seeking infertility treatments. The Supreme Court’s decision in *Bragdon*²¹⁸ and the 2008 Amendments to the ADA²¹⁹ have made it more likely that infertile women who suffer adverse employment actions for taking time off to receive infertility treatments will have recourse under the ADA. It is not as clear whether the same claim is cognizable under the PDA. As discussed, some district courts have focused on infertility being protected under the PDA because it is a “related medical condition” to pregnancy and childbirth.²²⁰ Because the Second and Eighth Circuits, in different contexts, have rejected arguments that infertility is a related medical condition, they may rule that women who

216. *Id.* at 647–48.

217. *See id.* at 648–49.

218. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

219. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

220. *See, e.g., Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995); *Pacourek I*, 858 F. Supp. 1393 (N.D. Ill. 1994).

suffer adverse employment actions due to infertility are not protected under the PDA.²²¹ The Seventh Circuit, without focusing on infertility as a related medical condition, held that an adverse employment action for taking time off constituted sex discrimination because it was not gender-neutral treatment.²²² Thus, it now appears that women who suffer adverse employment action for taking time off to receive infertility treatments may have protection under the ADA and the PDA.

*Teresa M. Abney**

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

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

* B.A., Drake University, 2007; J.D. Candidate, Drake University Law School, 2010.