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Battle of the Sexes: Title VII's Failure to Protect Women from Discrimination Against Sex-Linked Conditions

Brooks Land
University of Georgia Law School

BATTLE OF THE SEXES: TITLE VII'S FAILURE TO PROTECT WOMEN FROM DISCRIMINATION AGAINST SEX-LINKED CONDITIONS

Brooks Land[*]

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[*] J.D. Candidate, 2019, University of Georgia School of Law; B.B.A, 2016, University of Georgia.

I. INTRODUCTION

"We're running out of time. I don't have time to play nice."[1] Actress Rose McGowan knew it was time to take a stand, and so did thousands of others.[2] In 2017, victims of sex discrimination and harassment in the workplace exorcised their feelings of helplessness by speaking out against the power of patriarchy.[3] The Silence Breakers, as they came to be known, started a global movement and were collectively selected as the TIME Person of the Year.[4]

From pop artist Taylor Swift to journalist Megyn Kelly to university professor Celeste Kidd, numerous victims broke the silence by telling their own stories of sexual harassment and discrimination, simultaneously validating the stories of women internationally.[5] Their stories sparked a revolution that empowered the victims and shamed the perpetrators.[6] The 2017 Golden Globe Awards saw the culmination of this international movement where the accessory of the evening was a black Time's Up pin that represented an initiative to fight sexual misconduct across the country.[7]

Far from the swanky Beverly Hills hotel where the award ceremony was held, Alisha Coleman, a middle-aged woman from Columbus, Georgia, decided to speak up about her own story of sex discrimination by confronting Congress's approach to providing victims relief.[8] Coleman's complaint, filed in the Middle District of Georgia, ignited a firestorm of controversy regarding the statutory

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[1] Eliana Dockterman, Haley Edwards, & Stephanie Zacharek, *TIME Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18 2017), http://time.com/time-person-of-the-year-2017-silence-breakers/.

[2] *See id*. (discussing the stories of women who decided to speak out against sexual discrimination and harassment).

[3] *See id*. (describing a "revolution of refusal").

[4] *Id*.

[5] *Id*.

[6] *See* Eliana Dockterman, *Survivors Used #MeToo to Speak Up. A Year Later, They're Still Fighting for Meaningful Change*, TIME (Sept. 20 2018), http://time.com/5401638/silence-breakers-one-year-later-2 (describing the development of a "sustaining movement" after 2017).

[7] *See* Valeriya Safronova, *Time's Up Pins Are the Political Accessory at the Golden Globes*, NEW YORK TIMES (Jan. 7 2018), https://www.nytimes.com/2018/01/07/fashion/times-up-pins-golden-globes-2018.html (detailing the mission behind the Time's Up initiative).

[8] *See* Complaint, Coleman v. Bobby Dodd Institute, Inc., No. 4:17-CV-00029, 2017 WL 2486080 (M.D. Ga. Jan. 31, 2017) (arguing that discrimination based on pre-menopausal conditions should entitle plaintiff to relief under the PDA).

interpretations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act of 1978 (PDA).[9] Coleman asserted the rights she thought Title VII afforded her and zealously advocated for its protection.[10] Although the parties settled in lieu of receiving an answer from the Eleventh Circuit, the unusual case raises an unprecedented sex-discrimination issue and presents a timely platform to reevaluate the PDA.[11]

II. *COLEMAN V. BOBBY DODD INSTITUTE, INC.*

On April 26, 2016, Alisha Coleman was fired from her job as an E-911 Call Taker by Bobby Dodd Institute Inc. (BDI), a job training and employment agency located at Fort Benning, Georgia, that serves people with disabilities.[12] Coleman was experiencing irregular and unpredictable menstrual periods because she was pre-menopausal.[13]

Two main incidents led to BDI firing Coleman. In August 2015, Coleman unexpectedly experienced her menstrual period which leaked fluid onto her office chair.[14] Following the incident, Coleman received a disciplinary write-up from the Site Manager and Human Resources Director who warned her "that she would be fired if she ever soiled another chair from sudden onset menstrual flow."[15] Almost a year later, on April 22, 2016, Coleman was walking to the bathroom at the workplace and "menstrual fluid unexpectedly

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[9] *See, e.g.*, Jay-Anne B. Casuga, *Firing Over A Sex-Linked Condition: Is It Discrimination?*, BLOOMBERG DAILY LABOR REPORT (Nov. 20, 2017), https://www.bna.com/firing-sexlinked-condition-n73014472272/ ("[C]ourts still grapple with what the federal protection against sex discrimination encompasses."); Areva Martin, *This Woman Was Fired for a Heavy Period Leak*, TIME (Oct. 26 2017), http://time.com/4999185/woman-fired-for-period-leak/ (proclaiming that the reasoning used by courts to discriminate against pregnant women in the last century resembles the pattern that inspired Congress to enact the PDA in the first place).

[10] Complaint, *supra* note 8, at 1.

[11] *See* Katheryn Tucker, *Woman Allegedly Fired Over Having a Period at Work Settles*, DAILY REPORT ONLINE (Nov. 13 2017), https://www.law.com/dailyreportonline/sites/dailyreportonline/2017/11/10/woman-allegedly-fired-over-having-a-period-at-work-settles (discussing plaintiff's choice to settle).

[12] *See* Initial Brief of Plaintiff-Appellant at 3–4, Coleman v. Bobby Dodd Institute, Inc., No. 4:17-CV-00029, 2017 WL 6762403 (11th Cir. Aug. 14, 2017) (describing Coleman's employment and firing).

[13] *Id*. at 3.

[14] *Id.*

[15] *Id*. at 4.

leaked onto the carpet."[16] Four days later, BDI fired her for failure to "practice high standards of personal hygiene and maintain a clean, neat appearance while on duty."[17]

On January 31, 2017, Coleman filed suit in the Middle District of Georgia, Columbus Division, alleging violations of Title VII, 42 U.S.C. § 2000e.[18] The District Court ultimately granted BDI's motion to dismiss on June 8, 2017, holding that terminating a female employee for soiling company property on two occasions due to menopause, a uniquely feminine condition, does not constitute sex discrimination under the PDA.[19]

Title VII makes it unlawful for an employer "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment, because of such individual's . . . sex."[20] Title VII protects all discrimination "because of sex," which the PDA defines as follows: "[t]he 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 . . . ."[21] Title VII is silent as to whether other uniquely female conditions are included under the phrase "because of sex" or "on the basis of sex."

A sex-discrimination claim under Title VII can be supported by direct or circumstantial evidence. The court characterized Coleman's complaint as alleging a claim based upon direct evidence of sex discrimination.[22] Her employer terminated her because of a uniquely female condition. To allege a claim based on direct evidence, a plaintiff must present "evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee and that, if believed, proves the existence of a fact without inference or

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[16] *Id.*

[17] *Id.*

[18] *See* Complaint, *supra* note 8, at 1 (seeking both legal and equitable remedies under Title VII).

[19] Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 WL 2486080, at *2 (M.D. Ga. July 8, 2017) ("Nothing in the text of Title VII, the PDA, or case law interpreting these Acts supports such a broad interpretation of the law.").

[20] 42 U.S.C. § 2000e-2(a)(1) (2012).

[21] 42 U.S.C. § 2000e(k) (2012).

[22] *Coleman*, 2017 WL 2486080, at *1.

presumption."[23] Coleman alleged that firing her because of a uniquely female condition amounted to firing her "because of" or "on the basis of" sex; she further argued that menopause fell within the "related medical conditions" protected by the PDA.[24]

The court held that the PDA does not cover uniquely female conditions unrelated to pregnancy, and to prevail the plaintiff must allege and prove that her condition was treated less favorably than a comparable male related medical condition.[25] Following this rationale, the court reasoned that Coleman's excessive menstruation was related to menopause, not pregnancy or childbirth, and therefore, was not protected under the Act.[26]

The court also observed that Coleman did not attempt to proceed under the traditional *McDonnell Douglas* analytical framework, which is typically reserved for claims based on circumstantial evidence.[27] Under this framework, Coleman might have created a prima facie case of discrimination by alleging that (1) she is in a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) her employer treated similarly situated employees who are not members of the protected class more favorably (the "comparator" requirement).[28] Her employer would then have the right to establish a non-discriminatory reason for its action, and Coleman would have to show its reason is pretextual to maintain her claim.[29]

However, Coleman would have only satisfied the first three prongs of *McDonnell Douglas*. Coleman, a female, was a member of a protected class; she suffered from the adverse employment event of discharge; and she was qualified for and was capable of service in

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[23] Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1320 (11th Cir. 2012) (quoting Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004) (alterations and quotation marks omitted)).

[24] Initial Brief of Plaintiff-Appellant, *supra* note 12, at 22–23.

[25] *Coleman*, 2017 WL 2486080, at *2.

[26] *Id*.

[27] *Id*. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the prima facie four-pronged test for discrimination claims).

[28] *See* Slater v. Energy Services Group, 441 F. App'x 637, 640 (11th Cir. 2011) (utilizing the *McDonnell Douglas* framework for discrimination claims under the PDA). *But see* Hamilton v. Southland Christian School, Inc., 680 F.3d 1316, 1320 (11th Cir. 2012) (holding that a plaintiff need not show a nonpregnant comparator who was treated differently "if she can show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination").

[29] *McDonnell Douglas*, 411 U.S. at 802.

her job. But Coleman did not attempt to show that her employer treated similarly situated males more favorably.[30] She pointed to no alleged male comparator.[31] To satisfy this fourth prong, the Court suggested that Coleman, therefore, could have alleged that male employees who soiled themselves and company property due to a medical condition such as incontinence would have been treated more favorably.[32] It is likely Coleman did not pursue this traditional path because no such comparator evidence existed. She instead had to rely upon the theory that uniquely female medical conditions should be treated for Title VII purposes the same as pregnancy-related medical conditions.

In light of the *Coleman* decision, legal commentators are questioning the judicial interpretation of the PDA with regard to the feminine medical conditions it encompasses.[33] The Act's ambiguous statutory construction combined with the minimal federal jurisprudence addressing it often leave women on shaky ground when determining their rights in the work place. For women to understand and avail themselves of the protections to which they are entitled, a consensus must be reached as to which sex-linked conditions are covered under the PDA and Title VII.

By evaluating the legislative intent and the judicial interpretations of the PDA, this Note analyzes whether sex-linked conditions, such as menopause, should be protected under the Act and Title VII. This Note also addresses the elements required for a plaintiff alleging a prima facie circumstantial case of sex discrimination based on a sex-linked condition under Title VII and specifically focuses on inherent difficulties of imposing the traditional comparator requirement on such claims.

Section III looks at three relevant episodes in the PDA's history: (1) sex-discrimination cases prior to the enactment of the PDA; (2) the enactment of the PDA and its legislative purpose; and (3) the relevant jurisprudence after the enactment of the PDA. Section IV examines various circuit court interpretations of the PDA to determine which rights are protected against discrimination under

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[30] *Coleman*, 2017 WL 2486080, at *2.

[31] *Id.*

[32] *Id.*

[33] *See, e.g.*, Tucker, *supra* note 11 (discussing the initial dismissal of Coleman's case, her appeal, and the case's eventual settlement).

the PDA. In particular, Section IV analyzes how the circuits interpret the PDA to protect—or not protect—sex-linked conditions, including menopause. Section IV also discusses the male-comparator requirement under the prima facie test for a circumstantial sex-discrimination claim. The focus here is on sex-discrimination claims where proving a male comparator is impossible and alternatives to the male-comparator approach.

Section V of this Note concludes by suggesting that Congress should rewrite the PDA to clearly protect against discrimination of all sex-linked conditions relating to a woman's reproductive capacity and that the judiciary should reevaluate the male-comparator requirement in these situations.

III. BACKGROUND

While the PDA expanded the definition of sex discrimination under Title VII, some commentators suggest that courts have not gone far enough in protecting the rights that the PDA was designed to establish.[34] An analysis of the pre-PDA case law, the legislative history of the PDA, and the post-PDA case law helps illuminate issues regarding the breadth of the PDA. First, Title VII case doctrine developed prior to the PDA shows why Congress thought its enactment necessary.[35] Second, the congressional process of drafting the PDA highlights the Act's statutory meaning. Finally, judicial interpretation of the PDA demonstrates how the Act is currently understood and applied.

A. TITLE VII SEX DISCRIMINATION PRIOR TO THE PDA

Title VII prohibits discrimination that is "because of . . . sex."[36] Absent the PDA's definition of "because of sex" to include discrimination "on the basis of pregnancy, childbirth or related medical conditions,"[37] Title VII's prohibition of sex discrimination

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[34] *See* Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV 187, 187 (2016) (arguing that since the passage of the Pregnancy Discrimination Act in 1978 courts have failed to fulfill the act's promise by reducing pregnancy "with all of its social and cultural meaning, to its 'purely' biological elements").

[35] *See id.* at 201 (outlining the cases that led to the PDA's enactment).

[36] 42 U.S.C. § 2000e-2 (2012).

[37] 42 U.S.C. § 2000e(k) (2012).

has scant legislative history.[38] The purpose of Title VII of the Civil Rights Act of 1964, proposed to Congress by President Kennedy, was to achieve equal employment opportunities for historically disadvantaged people by securing legal protections against race discrimination in the wake of the Birmingham riots.[39]

The legislative debate over the bill was almost complete when Virginia Representative Howard W. Smith offered an amendment proposing to add "sex" to Title VII.[40] Many legal commentators dismiss the legislative history of the "sex" provision as a last minute attempt to defeat the civil rights legislation by its conservative opponents who hoped it would lead to abandoning the entire bill.[41] These commentators classify the amendment proposal as "aberrant congressional behavior,"[42] "a little more than a 'joke' or a political ploy."[43] The amendment was passed after only a few hours of discussion.[44]

Other legal commentators and authors dispute this characterization, arguing that "[C]ongress added sex as a result of subtle political pressure from individuals . . . who were serious about protecting the rights of women."[45] But characterizing the

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[38] *See* Carly Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317 (2012) (suggesting that the legislative history of Title VII's sex provision was overshadowed by President Kennedy's goal to create civil rights legislation).

[39] *Id.* at 1318; *see also* Daniela M. de la Piedra, Note, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275, 277–78 (2008) (discussing Title VII's purpose and a plaintiff's burden of proof under the *McDonnell Douglas* test).

[40] 110 CONG. REC. 2577 (1964) (statement of Rep. Smith); *see also* Franklin, *supra* note 38, at 1318 (proposing that Title VII's sex provision was nothing but mere afterthought and a "last-ditch" to oppose the legal protection against race discrimination that Title VII would offer).

[41] *See, e.g.*, Deborah Epstein, *Can 'A Dumb Ass Woman' Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO L.J. 399, 409 n.62 (1996) (characterizing the amendment to prohibit gender discrimination as an effort to destroy Title VII).

[42] 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 (1997).

[43] *Id.* (quoting *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) ("This Court—like all Title VII enthusiasts—is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House . . . .")).

[44] Franklin, *supra* note 38, at 1318.

[45] Bird, *supra* note 42, at 138.

amendment as a political ploy "is so prevalent that it is almost uniformly followed at the district, appellate, and supreme court levels."[46] For those who rely upon legislative history for statutory interpretation, they have been sorely disappointed when they search the Congressional Record on Title VII.[47]

Nine years after Title VII's enactment, the United States Supreme Court established the framework for analyzing Title VII discrimination claims that rely solely upon circumstantial evidence.[48] The *McDonnell Douglas* test, as it came to be known, is a three-part burden-shifting analysis with the ultimate burden on the plaintiff to prove that the employer's proffered legitimate reason for adverse action was pretext for discrimination.[49] The first part of the test places the burden on the plaintiff to establish a four-pronged prima facie case of discrimination.[50]

The four prongs include (1) that he or she belongs to a protected class; (2) that he or she applied for and was qualified for the particular position; (3) that he or she suffered an adverse employment action; and (4) that the employer treated similarly situated employees who are not members of the protected class more favorably.[51] The burden then shifts to the employer who must articulate a legitimate, non-discriminatory reason for the adverse employment action.[52] If the employer meets its burden of production, the plaintiff has the opportunity to rebut the employer's articulated reason by showing that the reason is pretext for a discriminatory motive for the employer's action.[53]

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[46] *Id.*

[47] *See* Franklin, *supra* note 38, at 1318–19 (discussing how Title VII's lack of a legislative process provides little guidance in its statutory interpretation and suggesting that Title VII should be interpreted by considering not only its text and legislative history, but also what the statute should mean when considering the needs of today's society).

[48] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the framework for Title VII cases where the plaintiff presents only circumstantial evidence of discrimination); *see also* de la Piedra, *supra* note 39, at 278 (explaining the *McDonnell Douglas* burden shifting analysis that courts use today in evaluating a variety of discrimination claims).

[49] *McDonnell Douglas*, 411 U.S. at 802–04.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

Notably, *McDonnell Douglas* was an employment discrimination case based on racial discrimination.[54] Despite its origin, courts have applied the *McDonnell Douglas* test to sex-discrimination cases before and after the enactment of the PDA.[55] In Title VII cases, courts have adapted the last prong of the test to create a "male-comparator" requirement in which a female plaintiff must allege that a similarly situated male was treated more favorably.[56]

The United States Supreme Court decided two notable cases, *Geduldig v. Aiello*[57] and *General Electric Co. v. Gilbert*,[58] which motivated Congress to amend Title VII by enacting the PDA.[59] In 1974, the Supreme Court addressed pregnancy discrimination under the Equal Protection Clause of the Fourteenth Amendment in *Geduldig*.[60] Plaintiff, a pregnant woman, was denied medical benefits under California's disability insurance.[61] California justified the exclusion by arguing that the expense of paying benefits for disability accompanying pregnancy misaligned with the state's goal of maintaining a self-supporting benefit system.[62] The Court declined to find the state's justification pretextual.[63] Justice Stewart stated:

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[54] *Id.* at 799–800.

[55] *See* Slater v. Energy Servs. Grp., 441 F. App'x 637, 640 (11th Cir. 2011) (applying the *McDonnell Douglas* framework for discrimination claims under the PDA).

[56] *See* Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) (evaluating if the female appellant was treated less favorably than similarly situated male employees by considering whether employees who demonstrate same or similar conduct are disciplined differently).

[57] Geduldig v. Aiello, 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), *as recognized in* Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 462 U.S. 669 (1983) (utilizing the *McDonnell Douglas* framework for a §1983 claim brought under the Fourteenth Amendment, rather than a Title VII claim).

[58] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), *as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

[59] *See* Matambanadzo, *supra* note 34, at 201–04 (analyzing Supreme Court cases before the PDA).

[60] *Geduldig*, 417 U.S. at 486–87.

[61] *See id.* at 491 (stating the plaintiff's claim of disability insurance stemmed solely from normal pregnancy and childbirth rather than attributing her disability to an abnormal pregnancy).

[62] *See id.* at 492–93 (describing California's benefit system as an insurance program intended to function in accordance with insurance concepts and to be totally self-supporting, never using general state revenues for financial assistance).

[63] *See id.* at 493 (holding that requiring the state to pay pregnancy benefits would make it too expensive to maintain a self-supporting benefit system).

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.[64]

Following *Geduldig*, the majority of employee health benefit plans reflected the notion that excluding pregnancy-specific benefits did not violate the Equal Protection Clause, so long as pregnancy was not used as a pretext to discriminate against women.[65] Two years later, the Supreme Court formally addressed a Title VII sex-discrimination claim based on pregnancy in *General Electric Co. v. Gilbert.*[66] Female employees brought the discrimination action alleging that the employer's disability plan discriminated on the basis of sex in denying benefits for disabilities arising from pregnancy.[67]

Similar to California's defense in *Geduldig*, General Electric presented evidence to show that pregnancy-related disability coverage would drastically increase the plan's cost.[68] The Court held that such exclusions were not discriminatory and explained that

> [P]regnancy-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.[69]

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[64] *Id*. at 496 n.20.

[65] *See* Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace Legislation, Social Change and Where We are Today*, 22 J.L. & HEALTH 197, 207 (2009) (discussing the aftermath of the Supreme Court's decision regarding a pregnancy discrimination claim under the Equal Protection Clause).

[66] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 125 (1976).

[67] *Id*. at 127.

[68] *Id*. at 131.

[69] *Id*. at 139.

As the Court saw it, the denial of benefits for pregnancy-related disabilities "did not implicate concerns regarding equal treatment, but rather raised a question of whether employers should be required to provide 'greater economic benefits' to accommodate the extra disability unique to women."[70] The Court determined that an employer could treat pregnant workers differently than non-pregnant workers without running afoul of Title VII's prohibition against sex discrimination.[71] In reaching the same conclusion as that in *Geduldig*, the Court turned to "tradition" for guidance in its statutory interpretation.[72]

The Court cited the "long history of judicial construction" of the term discrimination which traditionally only had applied to practices that classified individuals on the basis of a protected trait.[73] Thus, an employment practice would not qualify as sex discrimination unless it divided men and women into two groups.[74] Pregnancy discrimination does not simply separate men and women along the axis of biological sex. Rather, it divides pregnant women and non-pregnant persons into distinct groups, the latter containing both men and women.

The Supreme Court's holding overruled existing precedent in six circuits, conflicted with decisions by eighteen district courts, and contradicted the Equal Employment Opportunity Commission's (EEOC's) legislative guidelines for applying Title VII.[75] In dissent,

> [Justice] Brennan accused the Court . . . of adopting a mindlessly formalistic approach to the concept of sex

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[70] Barnard & Rapp, 22 J.L. & HEALTH at 209 (internal quotations omitted).

[71] *General Elec.*, 429 U.S. at 134.

[72] *Id.* at 145. *See also* Franklin, *supra* note 38, at 1362–63 (arguing that the *Gilbert* court interpreted Title VII's prohibition of sex discrimination in a narrow, formalistic manner in order to remain faithful to the American legal tradition).

[73] *General Elec.*, 429 U.S. at 145 ("The concept of 'discrimination,' of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction.").

[74] *See id.* ("When Congress makes it unlawful for an employer to 'discriminate…because of . . . sex . . . ,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant. There is surely no reason for any such inference here." (alterations in original) (citations omitted)).

[75] *See* Matambanadzo, *supra* note 34, at 204 (discussing the effect of the Supreme Court's decision in *Gilbert*).

> discrimination—one that obscured legally salient questions about the social meaning and effects of pregnancy discrimination and the ways in which it reflected and reinforced traditional conceptions of women's sex and family roles.[76]

Similarly, Justice Stevens disagreed with the majority, finding that "it is the capacity to become pregnant which primarily differentiates the female from the male."[77] Shortly thereafter, the Supreme Court applied the *Gilbert* framework for the last time in *Nasvhille Gas Co. v. Satty*.[78] A year later, Congress enacted the Pregnancy Discrimination Act of 1978 as an amendment to Title VII to make it clear that discrimination based upon pregnancy violated Title VII.[79]

B. THE ENACTMENT OF THE PDA

Rather than creating a separate cause of action for pregnancy discrimination, the PDA expressly incorporated pregnancy, childbirth, and medically related conditions into the prohibition against sex discrimination under Title VII.[80] Specifically, the PDA amended the definition section of Title VII and defined "[t]he terms 'because of sex' or 'on the basis of sex' [to] include, but [not be] limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[81]

The PDA superseded the holding in *Gilbert*. During the debate over its enactment, Senator Javits stated that "it seems only

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[76] Franklin, *supra* note 38, at 1365.

[77] *Gilbert*, 429 U.S. at 162 (Stevens, J., dissenting).

[78] 434 U.S. 136, 141, 143–44 (1977).

[79] *See* AT&T Corp. v. Hulteen, 556 U.S. 701, 719–27 (2009) (Ginsburg J., dissenting) (discussing Congress's intent to completely repudiate *Gilbert* by enacting the PDA and demolish the justifications for employment practices that relied explicitly on stereotyped conceptions of gender-based roles).

[80] 42 U.S.C. § 2000e(k) (2012).

[81] *Id.* The PDA provides protection for pregnant employees in two ways. First, the PDA assures that discrimination "because of sex" includes "on the basis of pregnancy, childbirth, or related medical conditions." *Id.* Second, the PDA requires an employer to accommodate for pregnant women by stating that "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." *Id.*

commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women."[82] Legislative history indicates that Congress created the PDA to "eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination."[83] Congress intended to extend the bill's protection to cover "the whole range of matters concerning the childbearing process."[84]

Congress "recognized that, in order to ensure that pregnant women were no longer treated as second-class citizens on the job, employers must treat them as well as they treated other workers whose ability to do their job was affected by injury, disability, or disease."[85] Congress intended to provide women with equal opportunities in employment by eradicating "stereotypical assumptions about women's reproductive roles."[86] According to Senator Williams, the PDA's Congressional sponsor, "[t]he entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life."[87]

Although the PDA certainly provided new protections for pregnant employees, it does not provide any guidance for determining the scope of pregnancy-related medical conditions that the Act protects.[88] While the Act's legislative history confirms that its purpose was to place women on equal footing with men in the workplace despite pregnancy-linked medical conditions, courts have struggled with how broadly to apply the Act's protection to medical

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[82] 123 CONG. REC. 29387 (daily ed. Sept. 16, 1977) (statement of Sen. Javits).

[83] H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752. *See* Molly D. Edwards, Note, *The Conceivable Future of Pregnancy Discrimination Claims: Pregnancy Not Required,* 4 CHARLESTON L. REV. 743, 746 (2010) (discussing the process of President Carter correcting the Supreme Court's interpretation of Title VII in *Gilbert* by signing the PDA into law).

[84] H.R. REP. NO. 95-948, at 5.

[85] Brief of Members of Congress as *Amici Curiae* In Support of Petitioner at 4, Young v. UPS, 135 S.Ct. 1338 (2015) (No. 12-1226).

[86] Matambanadzo, *supra* note 34, at 205.

[87] 123 CONG. REC. 29658 (1977) (statement of Sen. Williams).

[88] *See* Matambanadzo, *supra* note 34, at 189 (discussing the major limitations of the PDA including the unclear scope and meaning of medical conditions related to pregnancy).

conditions related to a woman's reproductive system.[89] The following section examines the current state of the PDA's jurisprudence and its alignment with the Act's legislative purpose.

C. TOYING WITH THE PDA

The United States Supreme Court has had few opportunities to interpret pregnancy discrimination claims under the PDA. Among those that have arisen, the majority of the cases involved the accommodation clause of the PDA, rather than determining what medical conditions the PDA encompasses.[90] Generally, the Supreme Court has interpreted broadly the protections afforded to women under the Act.

The Supreme Court first interpreted the PDA in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.[91] In that case, the Supreme Court held that an employer insurance plan discriminated against employees on the basis of pregnancy by providing fewer health insurance benefits for pregnancy than for other medical conditions to the wives of male employees when compared to the coverage given to the husbands of female employees.[92] Following Congress's intent behind the PDA, the Court stated that

> The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.[93]

The Supreme Court followed a similar rationale in *International Union v. Johnson Control*s, *Inc.* where it held that fertility

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[89] *See id.* at 189–91 (discussing possible interpretations of the scope of that Act).

[90] *See, e.g.*, California Federal Sav. and Loan Ass'n. v. Guerra, 479 U.S. 272, 280 (1987) (holding that employers may treat pregnancy better than other disabling conditions, but they may not treat it any worse for "Congress intended [the PDA to be] a floor beneath which pregnancy disability benefits may not drop- not a ceiling above which they may not rise.").

[91] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983).

[92] *Id.*

[93] *Id.* at 684.

discrimination falls under the PDA's protection because discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.[94] Johnson Controls had a "fetal protection" policy barring "women who are pregnant or who are capable of bearing children" from all jobs involving lead exposure.[95] Rejecting Johnson Controls's argument that the policy was sex neutral, the Court found that the policy was facially discriminatory because it "classifies on the basis of gender and childbearing capacity, rather than fertility alone."[96] Unless medical conditions associated with a woman's reproductive capacity inhibit their job performance, an employer violates the PDA by discriminating against women because of their potential to become pregnant.[97] The Court explained that an employer cannot unilaterally decide "whether a woman's ability to become pregnant and have a family is more important than her ability to participate in the labor market."[98]

Most recently, the Supreme Court evaluated a PDA claim in *Young v. UPS* and addressed the evidentiary standard required for bringing a pregnancy-discrimination claim.[99] Peggy Young, a pregnant worker, alleged that UPS refused to accommodate her by adopting a twenty-pound lifting restriction recommended by her doctor.[100] Young presented evidence that UPS accommodated many of its other drivers who had suffered on-the-job injuries, who qualified as disabled under the Americans with Disabilities Act, or who had lost their Department of Transportation certification.[101]

The Court held that the proper analysis for proving a pregnancy-discrimination claim based on the denial of an accommodation by circumstantial evidence evolves from the *McDonnell Douglas* test, a framework previously created by the Court in Title VII precedent.[102] To make out her prima facie case, Young had to allege that she

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[94] Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).

[95] *Id.* at 192.

[96] *Id.* at 198.

[97] *See* de la Piedra, *supra* note 39, at 284 (referencing the Supreme Court's decision in *International Union v. Johnson Controls* in support of this proposition).

[98] *Id.*

[99] Young v. UPS, 135 S. Ct. 1338, 1355 (2015).

[100] *Id.* at 1344.

[101] *Id.*

[102] *Id.*; *see also generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the framework for a discrimination claim based on circumstantial evidence).

belonged to a protected class; that she sought accommodation; that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."[103] The Court held that Young adequately established a prima facie case and presented sufficient evidence that non-pregnant employees similarly situated in their inability to work were treated more favorably.[104] The decision shows the Court's attachment to the comparator requirement of the *McDonnell Douglas* test, "thereby requiring women seeking the protections of the Act for pregnancy-related absences and illnesses to compare themselves to men or other employees who are not pregnant."[105]

The Supreme Court precedent interpreting the PDA makes it clear that an employer cannot discriminate against its female employees based on their capacity to become pregnant and that the *McDonnell Douglas* framework can be used for circumstantial evidence cases under the PDA. Notwithstanding this Supreme Court precedent, some questions remain. Are women protected from discrimination against all medical conditions related to a woman's reproductive system? And, should their claim fail if a comparator is impossible to find? Legal commentators agree that "the seemingly clear prohibition against discrimination for pregnancy, childbirth, or related medical conditions in actuality lacks clarity and consistency across the federal courts."[106]

IV. ANALYSIS

The PDA defines discrimination "'because of sex' to include, but [not be] limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[107] Yet, Congress provided no guidance regarding what constitutes a "related medical condition."[108] The following section examines lower courts' interpretations of which sex-linked conditions the PDA protects, with a particular focus on evaluating whether menopause should be afforded the Act's protection. Furthermore, the section analyzes the

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[103] *Young*, 135 S. Ct. at 1354.
[104] *Id*. at 1355.
[105] Matambanadzo, *supra* note 34, at 213.
[106] *Id*. at 215.
[107] 42 U.S.C. §2000e(k) (2012).
[108] *Id*.

comparator requirement of the *McDonnell Douglas* test as applied to medical conditions related to pregnancy.

A. RIGHTS PROTECTED UNDER THE PDA

The courts continue to grapple with the meaning of pregnancy "related medical conditions" in the PDA.[109] The majority of the disagreements stemming from the scope and meaning of the PDA correlate with the "dynamic nature of pregnancy" and the medical conditions that pregnancy encompasses.[110] The slim legislative history provides little help, and the Supreme Court has not yet had occasion to interpret "related medical conditions." Must the condition relate directly to the condition of being pregnant or are conditions that are simply related to a woman's reproductive system protected?

1. Sex-Linked Conditions

Lower courts differ on which female-specific conditions are related to pregnancy and, therefore, fall within the coverage of the PDA. The most critiqued judicial decisions involve sex-discrimination claims based on medical conditions related to a woman's reproductive system occurring before or after pregnancy, such as breastfeeding and lactation.

A late-twentieth century ruling from Judge Simpson of the United States District Court of the Western District of Kentucky reflects the notion that breastfeeding is not a medical condition related to pregnancy.[111] Simpson's narrow interpretation of the PDA viewed breastfeeding and weaning as "natural concomitants of pregnancy and childbirth," rather than related medical conditions.[112] Contrary to the current legal landscape, Simpson believed that Congress intended to limit related medical conditions to "incapacitating conditions for which medical care or treatment is usual and normal," unlike breastfeeding.[113]

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[109] *See* Matambanadzo, *supra* note 34, at 215 (discussing how the statutory language of the PDA leads to ambiguous interpretations).

[110] *Id.*

[111] *See* Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990).

[112] *Id.* at 869.

[113] *Id.*

More recently, however, the Fifth and Eleventh Circuits held that lactation and breastfeeding, although occurring post-pregnancy, are pregnancy-related medical conditions that fall under the Act's protection. In *EEOC v. Houston Funding II, Ltd.*, the Fifth Circuit addressed a pregnancy-discrimination suit regarding lactation.[114] The employee in question was told that her position had been filled after she asked her employer if she could use private office space to express breast milk.[115]

In its analysis, the Fifth Circuit looked to the plain meaning of the term "medical condition" and determined that it included *any* physiological condition, thus encompassing lactation.[116] Since lactation is a physiological result of bearing a child, the court found that lactation is a pregnancy related medical condition for purposes of the PDA.[117] Therefore, the court held that discharging a female employee for lactating constitutes sex discrimination in violation of Title VII.[118]

Similarly, in *Hicks v. Tuscaloosa*, the Eleventh Circuit held that breastfeeding is protected under the PDA.[119] Hicks, a female police officer, was constructively discharged after asking for a desk job to avoid wearing a restrictive ballistic vest that could cause breast infections and lead to problems with breastfeeding.[120] To determine whether the city violated the PDA, the court looked to the plain meaning of the statute and congressional intent.[121]

The PDA covers discrimination "because of" or "on the basis of sex" and includes but is "not limited to [discrimination] because of or on the basis of pregnancy, childbirth or related medical conditions."[122] Referring to the statutory canon *ejusdem generis*, the court found that the catchall phrase "not limited to" when added to a specific list, signifies that "additional inclusions would be appropriate if they are sufficiently similar."[123] The court then held

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114 EEOC v. Houston Funding II, Ltd., 717 F.3d 425 (5th Cir. 2013).
115 *Id*. at 426.
116 *Id*. at 428–29.
117 *Id*. at 429–30.
118 *Id*. at 430.
119 Hicks v. City of Tuscaloosa, 870 F.3d 1253 (11th Cir. 2017).
120 *Id*. at 1256–57.
121 *Id*. at 1259–60.
122 *Id*. at 1259 (quoting 42 U.S.C. §2000e(k)(2012)).
123 *Id*. at 1259.

that breastfeeding is a sufficiently similar gender-specific condition that "clearly imposes upon women a burden that male employees need not—indeed, could not—suffer."[124]

Additionally, the court referred to the purpose of the PDA, highlighting its aim to protect the physiological occurrences peculiar to women.[125] Congress intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process,"[126] and give women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies."[127] Thus, the Eleventh Circuit found that Congress intended the PDA to cover these kinds of pregnancy-related physiological conditions that occur post-pregnancy.[128]

While a consensus now appears to exist with respect to the inclusion of breastfeeding and lactation under the PDA, whether the PDA covers fertility treatments remains unsettled. In *Krauel v. Iowa Methodist Medical Center*, the Eighth Circuit upheld a district court opinion that determined that infertility falls outside of the PDA since it is gender neutral because, unlike pregnancy or childbirth, both men and women can be infertile.[129] The court found that infertility occurs prior to conception and pregnancy and that the language of the PDA does not suggest that related medical conditions should be this inclusive.[130]

The Seventh Circuit disagreed. In *Hall v. Nalco Co.*, a female employee was fired for missing work for health reasons related to her infertility.[131] The court held that terminating the employee for missing work to receive fertility treatments constituted discrimination because the termination was tied to her potential to become pregnant and bear a child, rather than the gender-neutral condition of infertility.[132]

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[124] *Id.* at 1260 (quoting *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013)).

[125] *Id.*

[126] *Id.* (quoting H.R. REP. NO. 95-948, at 5 (1978)).

[127] 124 CONG. REC. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin).

[128] *Hicks*, 870 F.3d at 1260.

[129] Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679–80 (8th Cir. 1996).

[130] *Id.*

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

[132] *Id.* at 649.

The meaning of a "related medical condition" under the PDA remains debatable. A restrictive interpretation would include only medical conditions occurring while physically pregnant. On the other hand, a broader interpretation would find that all medical conditions associated with a woman's reproductive system, such as menopause, are covered by the PDA.

2. Menopause: The Final Taboo in the Workplace?

On April 26, 2016, BDI fired Alisha Coleman for soiling company property due to heavy pre-menopausal menstruation.[133] Coleman sued BDI in the Middle District of Georgia, arguing that menopause was a medical condition related to pregnancy and childbirth under the PDA and, therefore, should be afforded the Act's protection.[134] The court held that Coleman's excessive menstruation was related to menopause, not pregnancy or childbirth and that menopause was not a medical condition related to pregnancy or childbirth.[135] Therefore, under the plain language of the PDA, menopause was not covered.[136] This plain language interpretation would require Congress to amend the PDA if it determined that menopause or other uniquely female medical conditions should be expressly covered by Title VII.

Title VII protects against all discrimination "because of sex," which the PDA defines as follows: "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ."[137] While the Act does not define "related medical conditions," the PDA's core purpose was to prohibit discrimination against women based on "the whole range of matters concerning the childbearing process"[138] and to give women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies."[139] The PDA adopts the view, proposed by the dissent in *Gilbert*, that

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[133] Complaint, *supra* note 8.

[134] *Id.*

[135] Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 WL 2486080, at *2 (M.D. Ga. July 8, 2017).

[136] *Id.*

[137] 42 U.S.C. § 2000e(k) (2012).

[138] Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1260 (11th Cir. 2017) (internal quotations omitted).

[139] 124 CONG. REC. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin).

discrimination on the basis of a sex-linked condition like pregnancy constitutes the very definition of sex discrimination, "for it is the capacity to become pregnant which primarily differentiates the female from the male."[140] Courts have interpreted the PDA as covering a range of physiological conditions and their symptoms as being medical conditions related to pregnancy and childbirth, such as lactation, breastfeeding, and infertility treatments.[141]

Ambiguity arises when determining if menopause is a condition "related to pregnancy and childbirth" under the PDA. Coleman's argument relied on the nature of the condition of menopause, which represents the terminatation of a woman's ability to become pregnant.[142] Menopause, which by definition affects only those with female reproductive organs, is undoubtedly a sex-linked condition.[143] It typically occurs in women between the ages of 45-55 years and lasts four to eight years.[144] The more common symptoms of menopause include hot flashes, headaches, problems with memory or concentration, and mood changes.

Although menopause is not a direct result of pregnancy, legal commentators argue that the PDA encompasses all conditions related to female reproductive capacity.[145] These proponents of a broader interpretation of the PDA assert that "there is no biological function more specific to being female than the reproductive system" and "[t]erminating an employee because of any . . . condition

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[140] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 162 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), *as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). (Stevens, J., dissenting).

[141] *See, e.g.*, EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013) (holding that lactation is covered under Title VII because it is a medical condition that is related to pregnancy).

[142] *See supra* note 8 and accompanying text (describing the basis of Coleman's suit).

[143] *Menopause*, Merriam-Webster Medical Dictionary 2017, https://www.merriam-webster.com/dictionary/menopause (defining "menopause" as "the natural cessation of menstruation occurring usually between the ages of 45 and 55" and "the physiological period in the life of a woman in which such cessation and the accompanying regression of ovarian function occurs").

[144] *Id.*

[145] *See, e.g.*, Jay-Anne B. Casuga, *supra* note 9. Emily Martin, general counsel and vice president of workplace justice for the National Women's Law Center in Washington stated that, "[W]hen an employer takes action against somebody because something is unique and indicative of their sex, that is a form of discrimination that is unlawful." *Id.*

related to that system amounts to terminating an employee because of her sex."[146]

Some courts, such as the Eleventh Circuit, have viewed the language of the PDA as inclusive in that the term "'because of sex' includes, but is *not limited to*, because of or on the basis of pregnancy, childbirth, or *related* medical conditions."[147] The term "related" is a generous choice of wording and could suggest that courts should favor inclusion rather than exclusion in close cases.[148] Consequently, the Eleventh Circuit found that breastfeeding is protected under the PDA because it clearly imposes upon women a burden that male employees could not suffer.[149]

The Seventh Circuit supported a broader interpretation of the Act when it held that medical issues associated with female infertility were protected since they are conditions involving the capacity to become pregnant.[150] Extending this logic, one could argue that menopause stems from the termination of the ability to become pregnant, and therefore the PDA's inclusive language demonstrates Congressional intent for the Act to protect all medical conditions related to a woman's reproductive capacity.

While courts have recognized Title VII's application to a number of other sex-linked conditions related to female reproduction, case law is practically non-existent in addressing if the PDA protects menopause and the conditions that stem from it. Even the Equal Employment Opportunity Commission, which enforces Title VII, has yet to address whether a discharge based on menstruation is sex discrimination.[151] Cases which involve medical issues regarding menstruation are the most analogous fact patterns to Coleman's case.

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[146] Kate Sedey, *Court Holds Termination for Menstruation is Not Sex Discrimination. Seriously??*, THE CASE LAW FIRM (Aug. 25, 2017), https://www.thecaselawfirm.com/2017/08/25/court-holds-termination-menstruation-not-sex-discrimination-seriously/.

[147] 42 U.S.C. § 2000e(k) (2012) (emphasis added); *see also* Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259 (11th Cir. 2017) (interpreting "not limited to" to permit additional inclusions if they are sufficiently similar).

[148] *See* Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259 (11th Cir. 2017) (defining "not limited to" as a catchall phrase).

[149] *Id.* at 1260.

[150] *See* Hall v. Nalco Co., 534 F.3d 644, 645 (7th Cir. 2008) (finding that employment actions taken on account of child bearing capacity affect only women).

[151] *See* Matambanadzo *supra* note 34, at 226 (outlining the ambiguity of the PDA).

The Fifth Circuit addressed an employer's policy that required women returning from maternity leave to demonstrate that their menstrual cycles had returned to normal.[152] The court found that employment decisions related to women's menstrual cycles were covered under the PDA, and therefore, the policy constituted prohibited sex discrimination.[153] The court reasoned that the employer's policy "clearly deprive[d] [females] of employment opportunities and impose[d] a . . . burden which male employees need not suffer."[154] While this type of policy deals with a medical condition occurring immediately after pregnancy, a similar rationale could support protecting menopausal women from experiencing burdens nonexistent for male employees.

Other legal commentators and some courts favor a narrower interpretation of the PDA, "adher[ing] to a strict, biological-essentialist view of pregnancy, which restricts pregnancy to the forty-week period between conception and childbirth."[155] In *Jirak v. Federal Express Corp.*, the Southern District of New York held that menstrual cramps are not a medical condition related to pregnancy, and therefore, disparate treatment on such a basis is not sex discrimination.[156] The court found that although menstruation is a uniquely female attribute neither federal statute nor pertinent case authority support its protection under the PDA.[157] Additionally, the Eighth Circuit interpreted the Act strictly and found that medical issues associated with infertility occur prior to pregnancy and that "the language of the PDA does not suggest that 'related medical conditions'" should be this inclusive.[158] A literal interpretation of the PDA is appealing to some because of its potential for clarity and consistency.[159]

While a narrow textual approach draws a bright line around physical pregnancy, it undermines the PDA's purpose and permits employers to discriminate against women based on pregnancy-

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[152] Harper v. Thiokol Chemical Corp., 619 F.2d 489, 491 (5th Cir. 1980).
[153] *Id.* at 491–92.
[154] *Id.*
[155] Matambanadzo, *supra* note 34, at 218.
[156] Jirak v. Fed. Express Corp., 805 F. Supp. 193, 194 (S.D.N.Y. 1992).
[157] *Id.*
[158] Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996).
[159] *See* Matambanadzo, *supra* note 34, at 218 (discussing different approaches to interpreting the PDA).

related conditions and pregnancy-related social circumstances.[160] It may also be unduly restrictive given the breath of the PDA's statutory language.

The varied rationales of the courts and the lack of a standard interpretation of the PDA show that additional clarification is needed regarding what conditions are protected under the Act. To correlate with the Act's purpose and issues faced by the modern-working woman, Congress should extend the Act to protect women from discrimination against all sex-linked conditions associated with their reproductive system. Notably, a slippery slope arises with regard to coverage of conditions unique to a male's reproductive system as well.

In contrast to an expansion of conditions covered by the PDA, some legal commentators believe that it is not the condition that matters, but it is whether an employer is disparately treating similarly situated people based on gender.[161] If sex-linked conditions involving a woman's reproductive system are not protected under the PDA, a plaintiff can still bring a Title VII claim, alleging she was discriminated against for being female.[162] Most courts, however, require plaintiff to claim that a similarly situated male was treated more favorably.[163] In these cases, it is extremely difficult, if not impossible, to show a male comparator if the plaintiff is alleging discrimination as a female based on a sex-linked condition.

B. THE MALE COMPARATOR—IS A UNIQUE CONDITION ENOUGH?

The courts' ongoing demand for comparator evidence is the most formidable obstacle confronting plaintiffs who claim discrimination based on sex-linked conditions. To bring an adequate discrimination claim under the *McDonnell Douglas* framework, courts generally require claimants to allege that the employer treated similarly situated employees who are not members of their protected class

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[160] *Id.*

[161] *Id.*

[162] *See* Slater v. Energy Servs. Grp., 441 F. App'x 637, 640 (11th Cir. 2011) (utilizing the *McDonnell Douglas* framework for discrimination claims under the PDA).

[163] *Id.*

more favorably.[164] In Title VII sex-discrimination cases, plaintiffs must "adduce opposite-sex comparators—individuals similarly situated to themselves in all relevant respects aside from biological sex."[165]

Many courts heavily rely on these comparisons to determine that the alleged discrimination was truly based on sex.[166] When insisting upon comparator evidence, courts "often suggest that they are simply deferring to congressional intent and remaining faithful to the traditional conception of what it means to discriminate 'because of sex.'"[167] This section will discuss the difficulty of producing comparator evidence in sex-discrimination cases based on sex-linked conditions.

1. Menopause: Lacking a Comparison

The comparator requirement excludes from protection various plaintiffs who otherwise could bring sufficient sex-discrimination claims. In addition to people who work in sex-segregated places and those who are uniquely situated in their jobs, plaintiffs who are alleging discrimination based on medical conditions specific to their sex, such as menopause, will often be unable to produce comparators.[168] Effectively, they will reside outside the scope of Title VII's protection.

In *Coleman*, the district court suggested that its ruling that menopause was not covered by the PDA did not necessarily doom Coleman's claim.[169] The Court observed that she could still have the opportunity to present her claim using the traditional comparator framework under *McDonnell Douglas*.[170] Plaintiff argued that it

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[164] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (establishing the prima facie four-pronged test for discrimination claims).

[165] *See* Franklin, *supra* note 38, at 1367 (discussing the persistent demand for opposite-sex comparators). *But see* Holland v. Gee, 677 F.3d 1047, 1056 (11th Cir. 2012) (stating that where there is a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination" plaintiff need not allege a male comparator (quoting Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011))).

[166] *See* Franklin, *supra* note 38, at 1367–68.

[167] *Id*. at 1372.

[168] *Id*. at 1368–69.

[169] Coleman v. Bobby Dodd Inst. Inc., No. 4:17-CV-29, 2017 WL 2486080, at *2 (M.D. Ga. July 8, 2017).

[170] *Id*.

would have been impossible to identify a male comparator.[171] The Court suggested that Coleman could have alleged that male employees "who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably."[172]

While it is not always essential to show a comparator, many courts rely significantly on this factor when evaluating whether a claim based on circumstantial evidence leads to a reasonable inference of discrimination.[173] But situations in which the discrimination revolves around conditions related to female reproductive capacity make it very difficult to allege a male comparator.

Like the *Coleman* court, proponents of the comparator approach suggest that a direct parallel is not necessary. Monica Khetarpal, an attorney with Jackson Lewis in Chicago, describes a scenario in which a man with priapism is fired because his prolonged erection is causing distractions in the workplace.[174] Khetarpal concludes that the "proper analysis" is to evaluate if a woman with a similarly distracting condition is also being disciplined or terminated.[175]

Coleman's attorneys, as well as other legal commentators, are not convinced that a male comparator should be necessary at all.[176] These critics argue that such a formalistic approach has negatively impacted the courts' understanding of what it means to discriminate because of sex, leaving deserving plaintiffs without redress for discriminatory situations.[177] And, in fact, various lower courts have started to minimize their focus on the male comparator.

2. Elimination of The "Male Comparator"

The male comparator requirement in sex-discrimination claims is particularly problematic because a similarly situated employee

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171 Initial Brief, *supra* note 12, at 27.

172 *Coleman*, 2017 WL 2486080 at *2.

173 *See* Holland v. Gee, 677 F.3d 1047, 1056 (11th Cir. 2012) (finding that the *McDonnell Douglas* framework is not required where the evidence leads to one reasonable inference – discrimination).

174 *See* Casuga, *supra* note 9.

175 *Id.*

176 Initial Brief, *supra* note 12, at 27.

177 *See* Franklin, *supra* note 38, at 1373 (discussing how the male comparator requirement shuts the door to some claims).

often cannot be found. The very fact that a condition is sex-linked makes it so specific to one sex that comparisons are usually illogical. In these situations, the logical approach is to eliminate the male-comparator requirement. Various circuit courts and the EEOC have found sufficient evidence for sex-discrimination claims in the absence of alleging a male comparator. These decisions suggest that "evidence of sex stereotyping alone may be sufficient to show that gender played a part in an employer's decision."[178]

In a line of cases in which airlines implemented a policy restricting female employees' right to marry, the EEOC determined that "[t]he concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees."[179] The EEOC found it sufficient evidence that a company policy or rule rested on stereotyped conceptions of women's sex and family roles, absent a male comparator.[180] Rather than focusing on a formalistic test, the EEOC focused on the purpose of the PDA. The agency viewed the policy as discriminatory based on the outcome it would render–"push[ing] women out of the workplace and perpetuat[ing] the notion that after a woman married, her place was in the home."[181]

Similarly, in *Back v. Hastings on Hudson Union Free School District*, the Second Circuit did not require the plaintiff to produce a male comparator in order to show sex discrimination when an employer denied a school psychologist her tenure because she had kids at home.[182] The Court found that "the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based."[183] And the First Circuit granted a plaintiff summary judgement absent an allegation of a male comparator when a woman was denied a promotion because she was busy with kids at home.[184] In both cases, the courts realized that denouncing the

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[178] *Id*. at 1369 (internal quotations omitted).

[179] Neal v. Am. Airlines, Inc., EEOC Decision No. 6-6-5759, [1968-1969 Transfer Binder] Empl. Prac. Dec. (CCH) P8002, at 6010 (June 20, 1968).

[180] *Id*.

[181] Franklin, *supra* note 38, at 1372.

[182] Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113–15 (2d Cir. 2004).

[183] *Id*. at 121.

[184] *See* Chadwick v. Wellpoint, Inc., 561 F.3d 38, 42 (1st Cir. 2009) (granting summary judgment for the plaintiff).

negative actions of the employer outweighed the need to mechanically apply the *McDonnell Douglas* test.

However, many courts continue to strictly adhere to the *McDonnell Douglas* framework. The Supreme Court recently used the comparator approach to assess a pregnancy-discrimination claim in *Young v. UPS*.[185] The Court required a plaintiff to show that a non-pregnant individual was treated more favorably under similar circumstances.[186] Proponents of this approach argue that adverse actions based on uniquely sex-based conditions alone do not automatically constitute sex discrimination.[187] While this may be true, courts should lean away from the comparator requirement and focus on other types of evidence for plaintiffs to be able to establish their claim.

If sex-linked conditions related to a woman's reproductive system are not protected under the PDA, women seeking the protection of Title VII will be required to compare themselves to similarly situated males. While it would be beneficial to identify a male comparator in every sex-discrimination claim, it is essentially impossible in most situations regarding female-specific medical conditions. As a solution, courts should realize the male-comparator requirement is not essential to show sex discrimination and, therefore, they should move beyond the *McDonnell Douglas* framework and use alternative methods to evaluate the merits of sex-discrimination claims.

V. CONCLUSION

The PDA is ambiguous regarding which medical conditions relate to pregnancy. While its legislative history provides little guidance as to its statutory interpretation, it is clear that the intent of Congress was to protect women from sex discrimination in the

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[185] *See* Young v. UPS, 135 S.Ct. 1338, 1352 (holding that to bring a disparate treatment claim under the PDA a pregnant employee must show that the employer refused to provide accommodations and that the employer later provided accommodations to other employees with similar restrictions); *see also* Jirak v. Fed. Express Corp., 805 F. Supp. 193, 195–96 (S.D.N.Y. 1992) (noting that plaintiff did not produce evidence that the company's termination policy was applied differently to males than to females).

[186] *Young*, 135 S.Ct. at 1352.

[187] *See, e.g.*, Casuga, *supra* note 9 (identifying the rationale relied upon by those who find the requirement for a male comparator essential).

workplace. The inclusive language of the PDA leans towards the conclusion that all sex-linked conditions regarding a woman's reproductive capacity should be afforded the protection of the Act. However, the PDA's vague language leads to varying interpretations amongst courts. Recently, court decisions involving the PDA have protected breastfeeding and infertility as pregnancy-related conditions but have not extended to cover more distant conditions such as menopause.

In an ideal world, Congress would amend the PDA to prohibit discrimination against all conditions related to a woman's reproductive capacity to increase clarity and consistency in interpreting PDA claims. This amendment should include menopause and all of the conditions that stem from it. Otherwise, women may continue to be denied the right to bring successful discrimination claims regarding conditions that are linked to their reproductive system. And this in turn will allow the continuation of sex discrimination in the workplace in defiance of the overarching purpose of the PDA.

Similarly, the male-comparator requirement established in *McDonnell Douglas* should not be a uniform requirement to establish sex-discrimination claims. The *McDonnell Douglas* framework was established by analyzing a racial-discrimination case prior to the PDA and its continued use in other discrimination situations should be reevaluated. When courts today dismiss sex-discrimination claims because of the lack of a male comparator, they are "shifting the focus away from the social meaning and practical implications of discriminatory practices and toward questions about their formal characteristics."[188]

To remove sex discrimination from the workplace and provide a meaningful remedy to its victims, Congress should expand the protections of the PDA, and courts should abandon the formulistic approach of requiring a male comparator. Despite its current ambiguity, the PDA has the potential to broadly protect a variety of sex-linked conditions and to do justice for the modern working woman.

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[188] Franklin, *supra* note 38, at 1372.