COMMENT

Accommodation of Pregnancy-Related Disabilities on the Job

Laura Schlichtmann†

The author analyzes current legal protections afforded pregnant workers who want to continue working but need some degree of accommodation in order to stay on the job, concludes that they are inadequate, and calls for various reforms. Her focus is on employers with policies that deny accommodation to all temporarily disabled workers, and on the applicability of disparate impact analysis under Title VII to protect the jobs of pregnant workers in such settings. The comment discusses the concept and the incidence of pregnancy-related job disability, the impact of nonaccommodation policies on women workers and their families, and the current status of relevant federal and state laws. The author calls for requiring reasonable accommodation of temporary pregnancy-related disabilities, expanding eligibility for pregnancy-disability leave, and expanded availability of state short-term disability insurance to protect all workers sidelined by temporary disabilities.

I. INTRODUCTION ............................................. 337
   A. Clarification of Terminology and Focus ............... 338
      1. The Concept of Accommodation .................... 338
      2. On-the-Job Accommodation and Temporary Leave ... 339

† B.A., University of California, Berkeley; M.R.P [Master of Regional Planning], Cornell University; J.D., Boalt Hall School of Law, University of California, Berkeley. Ms. Schlichtmann is now an associate at Davis, Reno & Courtney, San Francisco.

This comment is the revised, updated version of a paper submitted while I was a student at Boalt Hall School of Law, University of California, Berkeley. I owe great thanks to Professor Reva Siegel of Yale Law School for providing encouragement and material throughout the development of the original paper and this later version, and for offering valuable suggestions for its improvement. A number of other people were also very helpful in providing material, encouragement, and reviews of earlier drafts. This list is headed by Linda Krieger, Prudence Poppink, and Catherine Ruckelshaus. I learned about Eva Gutierrez' case, the impetus for this comment, while clerking at Equal Rights Advocates, and I gained much useful background on pregnancy discrimination law both at ERA and at the Employment Law Center. Special thanks in this regard to Judith Kurtz and Rose Fua at ERA, and, at ELC, Patricia Shiu and Pauline Kim. In addition, I am grateful for the generous assistance provided by the staff of California State Assemblywoman Jacqueline Speier and officials in the other states discussed in part V, and for access to the obstetrics texts housed at the library of Oakland's Kaiser Permanente Medical Center. Any inadequacies that remain are my responsibility.

III. Importance of On-the-Job Accommodation of Pregnancy

A. Women Workers and Family Income ........................................ 347
B. Medical Information Relating to Accommodation Needs During Pregnancy ........................................... 350
C. Defining and Responding to Pregnancy-Related Disability in the Workplace ........................................ 358
   1. The Concept of Pregnancy-Related Disability ................. 358
   2. Pregnancy-Related Disabilities and Other Temporary Disabilities ........................................ 359
   3. Relationship of Accommodation and Leave ....................... 362

IV. Federal Law ................................................................. 365

A. Title VII ................................................................. 365
   1. Disparate Treatment and Disparate Impact Claims ... 365
   2. Pregnancy Discrimination Claims Under Title VII ......... 366
   3. Title VII Cases Seeking Accommodation for Pregnancy-Related Disabilities ......................... 370
      a. Applicability of Disparate Impact Theory in Pregnancy-Disability Cases ............................... 370
      b. Nature of Adverse Impact Showing ........................................ 379
      c. Business Necessity and Available Alternatives ................. 383
   4. Limitations of Disparate Impact Analysis Under Title VII .................................................. 388
      a. Uncertainty Created by Supreme Court Decisions ...... 388
      b. Limitations of Title VII Coverage and Protections ........................................ 390
   5. Authorization for More Far-Reaching State Statutes Under Title VII ........................................ 391
B. Americans with Disabilities Act ........................................ 391

V. State Statutes .............................................................. 394

A. Advantages of State Accommodation Statutes .................. 396
B. Limitations of State Statutes ........................................ 397

VI. Recommendations ............................................................ 399

A. Opportunities for Increasing the Availability of Accommodation ........................................ 401
   1. Health Care Professionals ........................................ 402
   2. Opportunity for Union Action .................................... 402
Eva Gutierrez’ pregnancy nearly cost her her job as a sales clerk after her obstetrician restricted her from lifting more than ten pounds. Though her employer could have readily accommodated this restriction, it adhered to its policy of offering no accommodation for temporarily disabling conditions. As a result, Ms. Gutierrez was compelled to start her pregnancy leave months earlier than she had planned. Because more than four months elapsed before her doctor cleared her to return to work, California’s pregnancy-disability leave law was inadequate to protect her from losing the position completely. Her union contract saved her job because it guaranteed her return rights after as much as six months’ leave. However, Ms. Gutierrez still lost thousands of dollars in wages and benefits.

Denise Dunning did lose her job as an assembly worker after her employer refused to accommodate her condition in mid-pregnancy. After transferring her to a new work station with temperatures that she found uncomfortably high, her employer warned her that her productivity was decreasing, the result of her need to go to the bathroom and drink water more often. Denying her request for transfer to a cooler area, her employer, as Ms. Dunning saw it, forced her into early pregnancy leave and denied her return after she gave birth. Two years later, a federal court ordered her job restored—but not on grounds of pregnancy discrimination. Instead, the court found that the employer had discriminated on the basis of race, by accommodating several white employees during their pregnancies while denying comparable accommodation to Ms. Dunning, an African-American.

This comment takes stock of current legal protections afforded pregnant employees who want to continue working but need some degree of accommodation from their employer to be able to stay on the job. The introduction omits specific citations. The cases from which these facts are derived are discussed in detail in part II, infra.

comment combines labor force data and vital statistics with available information on the incidence of a number of temporary disabilities associated with pregnancy. This statistical information documents the importance of on-the-job accommodation of such conditions to working women and their families. The comment then reviews federal and state law bearing on the provision of such accommodation by employers, and concludes with recommendations for strengthening legal protections for pregnant workers who want to stay on the job despite a temporary disability associated with their pregnancy.

It is not entirely coincidental that the two plaintiffs whose cases introduce this comment are working-class women of color. As discussed below, recent medical information indicates that women in more physically demanding and lower-wage occupations—disproportionately women of color—are especially likely to need on-the-job accommodation to avoid unplanned and costly leave during pregnancy. This is not particularly surprising. It may be more startling that the demands of a specific occupation or a particular employer can turn such a normal aspect of pregnancy as Ms. Dunning's increased need to urinate into a job disability. Throughout this comment, the circumstances of Ms. Gutierrez and Ms. Dunning serve as touchstones for understanding the human implications of aggregate data, and for assessing whether current laws and workplace policies adequately meet the needs of pregnant workers for job and income security.

A. Clarification of Terminology and Focus

This section specifies what this comment means by “accommodation,” and clarifies what this comment is not about.

1. The Concept of Accommodation

In this comment, “accommodation” covers several measures embraced by the term “reasonable accommodation” in the Americans with Disabilities

3. As discussed infra part III, this comment does not treat the state of pregnancy itself as inherently job-disabling or necessitating special accommodation. Instead, there are a number of complications, associated with varying percentages of pregnancies, that can be temporarily disabling. Many jobs can accommodate some of these complications, while other complications may require temporary leave from the position. In addition, normal childbirth is at least briefly disabling for most jobs, and the final weeks of normal pregnancy may impinge on performance in many positions (although, as part III points out, infra note 81 and accompanying text, increasing proportions of women now work to term). Finally, the nature of some occupations, or in some cases the demands of specific employers, may make even a normal pregnancy prematurely disabling, as in Denise Dunning’s case.

For convenience, this comment uses terms such as “temporary pregnancy-related disabilities,” “disabled through pregnancy,” and “pregnancy-disability” (as in “pregnancy-disability plaintiff”) more or less interchangeably to refer to such conditions.

4. This approach reflects Christine Littleton's instruction: “Feminists cannot ignore the concrete experience of women; it is the foundation of both feminist theory and practice. And theory that does not work in practice is bad theory.” Christine A. Littleton, In Search of a Feminist Jurisprudence, 10 Harv. Women's L.J. 1, 6 (1987).
Act (ADA). In the ADA, “reasonable accommodation” designates policies or modifications designed to help a disabled worker perform the “essential functions” of a job. These ADA measures may include “job restructuring, part-time or modified work schedules, reassignment to a vacant position,” modified or special equipment, modifications that make facilities accessible, provision of readers or interpreters, training, and policy changes. Short-term job restructuring, transfer, or modifications in the work schedule may be the most useful measures for accommodating employees with a temporary pregnancy-related disability. In some instances, special equipment might also allow a temporarily disabled employee to stay productive.

2. On-the-Job Accommodation and Temporary Leave

Temporary leave is an extreme form of work schedule modification, and in this sense constitutes one kind of accommodation. As the Gutierrez and Dunning cases illustrate, however, this form of accommodation does not always suit the needs or capabilities of a particular pregnant worker. Moreover, as it did with Ms. Gutierrez, premature, involuntary leave may threaten a worker’s job. The focus here is on on-the-job accommodation, which both Ms. Gutierrez and Ms. Dunning fought for; readers should look elsewhere for an extended discussion of pregnancy-related, parental, or family leave.


6. Under the ADA, capacity to perform (with or without reasonable accommodation) the “essential functions” of a position that a person holds or seeks helps define the term “qualified individual with a disability,” the category of persons protected by this Act. 42 U.S.C.A. § 12111(8). The ADA does not itself define “essential functions,” but requires that “consideration . . . be given to the employer’s judgment as to what functions of a job are essential.” Id. Regulations adopted by the U.S. Equal Employment Opportunity Commission to implement the ADA’s employment provisions define “essential functions” in general terms as “the fundamental job duties of the employment position.” 29 C.F.R. § 1630.2(n)(1) (1992). Providing further explanation of the concept, the regulations offer examples of “reasons” why particular job functions may be considered essential: “the position exists . . . to perform that function,” only a “limited number of employees [are] available among whom the performance of that job function can be distributed,” or the function is “highly specialized” and the person holding the position is hired specifically for “expertise or ability to perform the particular function.” 29 C.F.R. § 1630.2(n)(2).

7. 42 U.S.C.A. § 12111(9).

8. For example, a computer with a modem at home (possibly combined with reduced or flexible scheduling) might permit a writer or an academician to continue performing her job even if she was under fairly severe restrictions due to a complication of pregnancy.

9. See supra note 2 for examples of the many articles and books that do focus on pregnancy-related, parental, or family leave. The relationship of on-the-job accommodation and leave, as responses to temporary pregnancy-related disabilities, is revisited briefly in part III. See infra notes 176-97 and accompanying text.
3. Toxic Workplaces and Fetal Protection

In addition, this comment does not attempt to grapple with the special problem of the toxic workplace and fetal protection policies, which have justifiably claimed much recent attention. Toxic workplace issues overlap with the accommodation issues focused on here. Some cases discussed later in this comment also figure in the development of case law leading up to Johnson Controls. However, this comment focuses on pregnant workers in workplaces where the risk of toxic exposure during or before pregnancy is not above average. In an article focusing on women workers in toxic workplaces, Hannah Furnish calls a situation like that of Eva Gutierrez an “easier question” than the problem posed for women workers by the toxic work environment. Be that as it may, this comment will show that the problem faced by Eva Gutierrez remains unsolved.

4. Targeting Uniform Denial of Temporary Accommodation

Finally, the focus through most of this comment is on employers with policies that deny accommodation to all temporarily disabled workers across the board. Eva Gutierrez worked for this kind of employer. Denise Dunning’s employer also purported to have such a policy, although the court in her case questioned this assertion after reviewing evidence that Ms. Dunning’s employer had accommodated pregnant white workers. Under current law, the apparent “fairness” of such an employer’s uniform denial of accommodation may make nonaccommodation and its particularly harsh effects on women workers hard to resist.

B. Organization of Comment

Part II reviews the Gutierrez and Dunning cases in detail. These details underscore the grave threat that even a minor accommodation need can pose to a pregnant worker’s job under current law. In Ms. Dunning’s case, the details illustrate that even a normal accompaniment (or what I call “incident”) of a healthy pregnancy—something as seemingly trivial as more frequent urination—can disable a particular woman, depending on the nature of her occupation and specific requirements imposed by her employer.

Part III builds on this point in discussing the concept of pregnancy-related job disability. Part III covers additional terrain as well. First, it presents data indicating the importance of accommodation during pregnancy to working women and their families. Next, it summarizes current

---

medical guidelines on working during pregnancy and available information on the frequency of both complications and normal incidents of pregnancy. It then advocates requiring accommodation of pregnancy-related disabilities, if necessary even before extending similar accommodation to temporary disabilities in general.

Finally, after discussing pregnancy-related disabilities as a concept, part III considers the relationship between accommodation and leave. While almost all pregnant workers require some period of leave, pregnancy leave by itself fails to meet the needs of many women workers, particularly those in blue-collar or low-paid jobs and the overlapping category of working women of color. Part III therefore ends by calling for expanding the reform agenda to include on-the-job accommodation and broader eligibility for pregnancy-disability leave.

Parts IV and V clarify the need for further reform by surveying relevant federal and state law. Part IV focuses on disparate impact cases brought on behalf of pregnant women under Title VII seeking either adequate leave or on-the-job accommodation. These cases have been relatively rare and their outcomes uneven, as part IV documents. Title VII's utility as the basis for challenges to nonaccommodation policies is further constrained because the statute excludes smaller employers (who employ a large percentage of women workers), and does not permit damages for disparate impact claims.

Part IV also discusses the ADA briefly. Despite its name and the accommodation requirements that it imposes on employers, most women workers cannot rely on the ADA to secure on-the-job accommodation of pregnancy-related disabilities, because it primarily addresses longer-term impairments. This fact reinforces the importance of implementing Title VII in a manner that adequately protects pregnant workers' job security. At the same time, while the ADA's mandates do not apply to most pregnant workers, some of its key concepts and some of the case law under the ADA and its predecessor are applicable. In addition, I believe that increasing employer experience with the forms of accommodation mandated by the ADA will serve to bolster perceptions that accommodating pregnancy-related disabilities (as well as other temporary disabilities) is both feasible and appropriate.

13. Moreover, as part III points out, because of statutory exemptions for many employers and the exclusion of many employees from current federal and state leave laws, guaranteed leave with reinstatement rights is not available to a large number of women workers. See infra notes 178-82 and accompanying text.

14. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1993), is the major federal fair employment statute. Individuals challenging employer policies or practices under this law can base their claims of illegal discrimination on theories of disparate treatment or disparate impact, or both, as explained infra at notes 199-201 and accompanying text.

As little Title VII case law as there is relating to accommodation of pregnant workers, there is still less state law. Several years ago, the Supreme Court cleared the way for states to require reasonable leave and on-the-job accommodation for pregnant employees. In response, several states have enacted accommodation statutes in the past few years; but the total number remains very small, and there is virtually no reported case law under any of these statutes. Part V discusses existing state statutes and their potential for addressing pregnant workers' accommodation needs, as well as the limitations of those statutes. In particular, this part considers the efficacy of a recent amendment to California's pregnancy accommodation statute in meeting the needs of another Eva Gutierrez, or a Denise Dunning.

Finally, part VI offers recommendations aimed at improving the availability of on-the-job accommodation for pregnant workers. It proposes several specific changes concerning Title VII, and an additional set of changes to further improve California's accommodation statute. In addition, it suggests ways in which lawyers, unions, and health care providers can help pregnant workers obtain the accommodation they need at lower risk to their jobs.

II
THE CASES OF EVA GUTIERREZ AND DENISE DUNNING

A. Eva Gutierrez

Department of Fair Employment and Housing v. Save Mart, a precedential decision of the California Fair Employment and Housing Commission (FEHC), recounts Eva Gutierrez' case in detail.

Save Mart, a northern California supermarket chain, hired Ms. Gutierrez as a bakery/deli clerk in June 1986. In January 1988, Ms. Gutierrez notified store management that she was pregnant, and continued to perform all her usual duties. However, in late March 1988, while working, she experienced pain in her lower right abdomen and sought her doctor's advice. After she described the pain and her usual job duties, the doctor gave her a note with instructions to take periodic rest breaks and not to lift more than ten pounds for the duration of her pregnancy. Ms. Gutierrez passed this note along to store management.

Save Mart management responded by informing her that she would have to stop working until her doctor released her to return to work without

18. Id. at 2-3.
19. Id. at 3.
20. Id.
21. Id. The note was dated April 6, 1988. Id.
22. Id.
Ms. Gutierrez conveyed this information to the doctor; he removed the breaks requirement but maintained the lifting restriction. Save Mart then placed Ms. Gutierrez on an unpaid leave of absence pursuant to the store's collective bargaining agreement.

The sticking point for Save Mart was that Ms. Gutierrez' customary duties included lifting items weighing more than ten pounds: for example, pushing and lifting racks of bread, and cleaning the icing bowl. In fact, every shift in the bakery/deli department involved some lifting of items over ten pounds. Although clerks in the department might help each other with heavy lifting while on a shift together, there were times when only one bakery/deli clerk was on duty. At such times, the single clerk was required to handle the lifting without help: Save Mart did not allow employees in other departments to assist with any bakery/deli duties. As a part-time clerk, Ms. Gutierrez had to work whatever shifts she was assigned to, at times as the only bakery/deli clerk on duty.

Ms. Gutierrez asked to continue working after her doctor reaffirmed the lifting restriction. She proposed that her employer either relieve her of tasks involving excess lifting, or allow her to get help from a fellow employee. Save Mart later stipulated that it could have provided such accommodation. However, it chose instead to adhere to its long-standing policy that prohibited even temporary modification of an employee's duties to conform to a doctor's restrictions.

Consequently, Save Mart placed Ms. Gutierrez on contractual leave of absence, where she remained until mid-September 1988, when her doctor released her to return to work without restrictions. The resulting three to four months of involuntary leave (before her planned leave of absence for childbirth) cost Ms. Gutierrez approximately $4,500 in wages and benefits.

The only aspect of this history that worked out favorably for Ms. Gutierrez was that she had worked for Save Mart for more than one year, and therefore was covered by a collective bargaining agreement that provided temporary disability leave for as long as six months. Temporarily dis-
abled Save Mart employees not eligible for coverage under the collective bargaining agreement generally faced termination after an absence of fifteen consecutive workdays. The only exception to this policy, for employees not protected by the bargaining agreement, applied to temporary disabilities related to pregnancy; California's pregnancy-disability leave statute forced Save Mart to allow women workers disabled by pregnancy or childbirth to take up to four months of unpaid leave before facing termination. But even this would not have been long enough for Eva Gutierrez: her leave extended for six months, from April until September 1988.

Thus, the collective bargaining agreement saved her job.

Ms. Gutierrez complained to the California Department of Fair Employment and Housing (DFEH) about Save Mart's refusal to accommodate her, alleging an unlawful employment practice under the state's Fair Employment and Housing Act (FEHA). DFEH in turn charged Save Mart with several specific violations. These included a general charge of sex discrimination in employment, prohibited under section 12940(a) of the California Government Code; pregnancy discrimination under Government Code section 12945(c)(2); and violations of associated state regulations.

The Commission, however, found that Save Mart had not violated any of the statutory and regulatory provisions relied on by DFEH. Section 12945(c)(2) did appear to mandate that employers lacking accommodation policies for temporarily disabled employees nevertheless must permit temporary transfers for employees if their temporary disabilities were related to pregnancy or childbirth. But, as the FEHC pointed out, subdivision (e) of section 12945 exempted Save Mart from the requirement of section 12945(c)(2) because Save Mart is large enough to be subject to federal antidiscrimination law under Title VII.

The Commission acknowledged that imposing more stringent pregnancy accommodation requirements on smaller employers seemed "anomalous." However, in light of the Legislature's frequent "revisit[ing]" of the FEHA's sex and pregnancy discrimination provisions without modifying this disparity, the Commission declared that any correction of the statute must be made through new legislation, not adjudicatory interpretation.

37. Id.
38. Id.
39. Id. at 3-4.
40. Id. at 2. The Fair Employment and Housing Act (CAL. Gov't Code §§ 12900-12996 (West 1992)) is California's major antidiscrimination statute.
41. FEHC Dec. No. 92-01 at 2.
42. Id.
43. Id. at 7, 10, 12-13.
44. Id. at 7.
45. Id.
46. Id. at 13.
47. Id. at 12-13.
The Commission also declined to interpret either section 12940(a) or the state regulations promulgated under that section to require Save Mart to accommodate Eva Gutierrez.48

Several months later, in response to this decision, the California Legislature removed the exemption for Title VII employers under subdivision (c) of section 12945.49 Part V discusses the impact of this new legislation.

B. Denise Dunning

_Dunning v. National Industries, Inc._ chronicles Denise Dunning’s case.50 Ms. Dunning worked in an Alabama factory assembling wire harnesses for electrical systems.51 The work involved prolonged standing and was “difficult and physically demanding.”52 Hired in 1984, Ms. Dunning discovered in late 1986 that she was pregnant; she kept working.53 In April 1987, her employer transferred her to a different location of the plant.54 The new location was hotter than her earlier work station, because it was near molding machines that generated heat.55 Her advancing pregnancy made her especially sensitive to the heat, and Ms. Dunning felt ill and uncomfortable.56 She also had to stop her work frequently to go to the bathroom and drink water.57

On her first day in the new location, Ms. Dunning told her lead woman that she was uncomfortable and asked if she could get some ice.58 The lead woman relayed this request to a department supervisor, who turned it down and took Ms. Dunning to see a plant supervisor.59 The plant supervisor repeated the denial of Ms. Dunning’s request, adding a comment that her pregnancy “‘wasn’t his fault,’ ” and warned her that she would be fired if she left work early that day.60 Two days later, after Ms. Dunning had repeated her complaints about the heat to the department supervisor, he warned her that “she was not meeting her production quota.”61

In this meeting, Ms. Dunning requested a transfer to a cooler, better ventilated area, similar to her earlier work station.62 The department super-

48. _Id._ at 9-10.
49. 1992 Cal. Stat. 907 (Assembly Bill 2865 (Speier)). This amendment took effect January 1, 1993.
51. _Id._ at 926.
52. _Id._
53. _Id._
54. _Id._
55. _Id._ at 926-27.
56. _Id._ at 927.
57. _Id._
58. _Id._
59. _Id._
60. _Id._
61. _Id._
62. _Id._
visor turned down this request, commenting that Ms. Dunning’s pregnancy “was not his problem.” However, he also told her that he would transfer her if she brought in a doctor’s excuse. The next morning she obtained a note from her doctor stating that she should not work near excessive heat, and brought this note to the plant supervisor. The supervisor relayed the note to the firm’s president, who rejected both the medical excuse and Ms. Dunning’s transfer request. Instead, she gave her four options: keep working where she was, quit, accept a layoff, or take early maternity leave. Since work at her new station was so uncomfortable and she risked discipline for lower productivity, Ms. Dunning felt “forced to choose early maternity leave as the least objectionable of four bad options.”

After giving birth in July 1987, Ms. Dunning filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging race and sex discrimination in the refusal of transfer. In retaliation, National Industries denied her the usual return to her position after pregnancy leave. Instead, the personnel director told her she would have to reapply for a position at a starting wage below her wage level before her leave.

Two years later, the federal district court found in Ms. Dunning’s favor and ordered reinstatement with full back pay. However, the court declined to reach her claim of sex discrimination. Instead, it found that, contrary to National Industries’ asserted policy of nonaccommodation of pregnancy-related temporary disabilities (other than allowing unpaid maternity leave), the company had accommodated at least two white women under similar circumstances. Thus, Ms. Dunning prevailed on grounds of race discrimination.

Two aspects of Ms. Dunning’s case warrant attention here. First, it illustrates how—depending on the particular job—even a normal incident of a healthy pregnancy, like increased sensitivity to heat or more frequent urination, can be occupationally “disabling” and require accommodation. Second, it illustrates that current federal pregnancy discrimination law pro-

63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id. at 927-28.
69. Id. at 928.
70. Id.
71. Id. at 933.
72. Id. at 930 n.9.
73. Id. at 930-31.
74. In a footnote, the court mentioned Ms. Dunning’s sex discrimination claim but expressed puzzlement over “[t]he exact nature of this claim[,] . . . inasmuch as Dunning offered no evidence on National Industries’ policy with respect to men experiencing difficulty at work because of medical problems.” Id. at 930 n.9. Since her successful race discrimination claim entitled her to relief, the court explained, it need not and would not examine the sex discrimination claim. Id.
vides an unreliable tool for pregnant workers who want to assert a claim to accommodation on the job. Ms. Dunning would have been out of luck had she not succeeded on the separate ground of disparate treatment based on race.

III

Importance of On-the-Job Accommodation of Pregnancy

A. Women Workers and Family Income

In a generation, the role of women in the American economy has been transformed. Although some women have always worked outside their home, as recently as 1970 they remained in the minority.75 Today, by contrast, seven out of ten women between 25 and 64 years of age are in the labor force,76 and women constitute 45.6 percent of the nation’s civilian employees.77

Many of these women workers are already mothers, more will become mothers during their careers, and most will combine work and family life. Eighty-five percent of women workers are likely to become pregnant at least once during their working lives.78 While women’s labor force participation rates rise steadily with the age of their youngest child,79 today it is the norm even for mothers of infants under a year of age to work at an outside job.80 In addition, a majority of women today work while they are pregnant, many until their due date or the onset of labor.81

75. Although only barely, at 49% among civilian noninstitutionalized women 25 to 64 years old. Bureau of the Census, U.S. Dep’t of Commerce, Statistical Abstract of the United States: 1992, at 382, Table 611 (1992) [hereinafter Statistical Abstract]. In the same year, the labor force participation rate for all civilian noninstitutional females aged 16 years old and up was 43.3%. Id. at 381, Table 609.

76. The figure was over 69% and climbing as of 1991. Id. at 382, Table 611. In the same year, the labor force participation rate within the 25-64 age group was 75.8% for women who had some college education, and 81.3% for women who had four or more years of college. Id.

77. Id. at 392, Table 629.

78. Kamerman, supra note 2, at 8; see also Statistical Abstract, supra note 75, at 72, Table 97 (in 1990, among 16.5 million women workers between 18 and 34 years of age who reported whether they expected to have babies, 57% expected to have at least one baby in the future, while only 11% expected never to have a baby during their lifetime).

79. In 1991, the labor force participation rate for wives aged 16 and over, husband present, was 55.8% if the youngest child was one year of age or younger. Statistical Abstract, supra note 75, at 388, Table 621. The rate for wives with husband present rises by age of youngest child as follows: two years, 60.5%; three years, 62.2%; four years, 65.5%; five years, 67.1%; six to thirteen years, 72.8%; and fourteen to seventeen years, 75.7%. Id.

80. In 1990, the labor force participation rate of women 15 to 44 years of age who had had a baby in the last year was 53%. Id. at 71, Table 93. The rate had risen steadily from 31% in 1976. Id.

The numbers involved are as impressive as the rates. In 1990, more than two million of the four million women, aged 15 to 44 years, who had had a baby during the previous year were in the labor force. Young babies’ mothers thus accounted for five percent of the nation’s female labor force. Similar numbers and proportions of the female labor force become pregnant every year.

As Census data indicate, these women’s jobs are important to their families. In 1990, married couples with the wife in the labor force headed more than 30 million out of a total 66 million households (46 percent). Another 7.7 million families (12 percent) consisted of a female householder with children. The median annual income for all families was $35,353. While married-couple families had a somewhat higher median, at $39,895, the median among married couples with the wife in the labor force reached $46,777. The wife’s earnings were especially important to families in the three highest family income categories (starting at $35,000, $50,000, and $75,000, respectively). Between 65 and 74 percent of the married-couple families in these income brackets had a wife in the labor force.

As this profile suggests, policies that allow pregnancy to jeopardize a woman’s employment security not only marginalize women as workers and tend to weaken their labor force attachment, they also harm the economic well-being of entire families. Policies that instead protect job security during pregnancy and after childbirth are of great importance to working women and their families, as they should be to the many policy-makers and

time mothers quit their job after becoming pregnant in the 1980s, whereas 66% had done so during the 1960s. Id. Teenagers, high school dropouts, and minority women were the groups least likely to be employed when they became pregnant, and also least likely to return to work within six months of delivery if they had been employed during pregnancy. Id. However, the two major determinants of a woman’s return to work were length of employment before childbirth and having an employer who provided maternity leave. Id.

The Bureau of National Affairs (BNA) reports that the March of Dimes Birth Defects Foundation has found that 60% of all pregnant women work during their pregnancy. PREGNANCY AND EMPLOYMENT, supra note 2, at 107-08 (no document, specific source of the data, or date identified for the 60% figure).

The BNA also cites data from the National Center for Health Statistics, U.S. Department of Health and Human Services, indicating that in 1980, 41% of pregnant white-collar workers were on the job during their ninth month of pregnancy, and in 1982, 48% of pregnant women managers and professionals worked in the ninth month of pregnancy. Id. at 108.

82. STATISTICAL ABSTRACT, supra note 75, at 71, Table 93.
83. Id. at 70, Table 92.
84. In 1990, approximately 1.5 million women between 15 and 44 years of age gave birth for the first time. Id. at 70, Table 92 (58,381,000 women in this age group multiplied by 26 first births per 1,000 women). Applying the 65% figure from the early 1980s to this group (WORK AND FAMILY, supra note 81, at 56)—which in light of historical trends may be a conservative factor—produces an estimate of nearly 987,000 first-time mothers working during pregnancy in 1990.
85. STATISTICAL ABSTRACT, supra note 75, at 452, Table 708.
86. Id.
87. Id.
88. Id.
89. Id.
commentators who have expressed concern over the feminization of poverty and this nation’s millions of children growing up poor.90

The private sector has been slow to provide such policies voluntarily. The U.S. Bureau of Labor Statistics’ (BLS) 1989 survey of employee benefit coverage in large and medium-sized firms found that 37 percent of the covered employees could take unpaid maternity leave and 18 percent unpaid paternity leave; three percent could take paid maternity leave and one percent paid paternity leave; 22 percent could take personal leave; and 68 percent enjoyed paid sick leave.91 Corresponding percentages in the BLS 1990 survey of “small” firms were lower.92

Even these percentages overstate the actual availability of such benefits to employees throughout the economy. For one thing, the BLS definition of a “small” firm is one with fewer than 100 employees.93 In fact, millions of women work in the very smallest firms, those with fewer than 15 employees,94 which generally offer the least generous benefit packages to their workers.95 Moreover, the BLS survey covers only full-time employees.96 Yet only 51 percent of women workers in 1990 worked on a full-time, year-round basis.97

Eva Gutierrez was covered by a union contract that gave her extended pregnancy-disability leave. This contract ultimately saved her job, although it did not offer on-the-job accommodation of her pregnancy-related disability. But only a small percentage of other women workers are so fortunate. In 1991, fewer than 13 percent of women employees, 16 years old or older,


91. Statistical Abstract, supra note 75, at 417, Table 662.

92. The corresponding figures were 17, 8, 2, 0, 11, and 47 percent, respectively. Id.

93. Id.

94. According to the BNA, it is estimated that more than half of the workers in these firms are women. Pregnancy and Employment, supra note 2, at 42. The BNA also estimates that about one-sixth of the nation’s women workers are employed in such firms. Id. Applied to the 45.9 million women, aged 16 years or older, employed in 1991, Statistical Abstract, supra note 75, at 392, Table 629, this proportion produces an estimate of 7.66 million women employed in these very small firms.

The Census Bureau’s nationwide tabulation of 1990 employment by size of firm (measured by number of employees), which is not broken out by sex, reported that more than a quarter of the 93 million employees in the private sector (excluding railroads and the self-employed) worked in firms with fewer than 20 employees (15% working in firms with fewer than 10 employees); another 16.5% worked in firms with between 25 and 49 employees; and, altogether, more than 55% of the nation’s employees worked in firms with fewer than 100 employees. Bureau of the Census, U.S. Dep’t of Commerce, CBP-90-1, County Business Patterns 1990, United States x (Figure 2), 3 (Table 1b) (1993).

95. See Pregnancy and Employment, supra note 2, at 42-44 (summaries of two studies comparing benefits offered by large, medium-sized, and small employers).

96. Statistical Abstract, supra note 75, at 417, Table 662.

97. Id. at 414, Table 656. The corresponding figure for men was 68 percent. Id.
were union members, and fewer than 15 percent had union representation.\textsuperscript{98} Moreover, these figures had declined from 1983.\textsuperscript{99}

**B. Medical Information Relating to Accommodation Needs During Pregnancy**

A factor that may have obscured the importance of on-the-job accommodation of pregnancy-related disabilities until recently is the medical profession's former practice of routinely advising working women to leave their jobs by the sixth month of pregnancy.\textsuperscript{100} In the past, such a major interruption in work often meant losing the job entirely.\textsuperscript{101} In this environment, it would be understandable if pregnant workers were more preoccupied with arranging their affairs as best they could than with trying to persuade their employer—who did not expect them to return after childbirth—to let them keep working a few weeks longer by modifying conditions if a minor complication arose early in their pregnancy.

In 1984, however, the American Medical Association's Council on Scientific Affairs acknowledged that "few of our standard medical beliefs about the physical and emotional characteristics of pregnancy have any scientific basis."\textsuperscript{102} The Council's conclusion was that "[t]he advice given by generations of physicians regarding work during normal pregnancy has historically been more the result of social and cultural beliefs about the nature of pregnancy (and of pregnant women) than the result of any documented medical experience with pregnancy and work."\textsuperscript{103} The Council's new recommendation was that most women with uncomplicated pregnancies "should be able . . . to continue productive work until the onset of labor."\textsuperscript{104}

\textsuperscript{98} Id. at 422, Table 672.

\textsuperscript{99} Id. The actual number of women union members had gone up between 1983 and 1991, from 5.9 million to 6.1 million; however, the number represented by a union had declined slightly over the same years, from 7.26 million to 7.24 million. Id.

\textsuperscript{100} PREGNANCY AND EMPLOYMENT, supra note 2, at 30.

\textsuperscript{101} See, e.g., KAMERMAN ET AL., supra note 2, at 35-36 (in the 1950s and 1960s, returning to work after mandatory pregnancy leave was often "the equivalent of beginning again, as a new worker, regardless of the number of years on the job before"); many women were forced to forfeit accrued entitlements and found themselves lacking health insurance and disability coverage at a time when both were "especially important").


\textsuperscript{103} Id.

\textsuperscript{104} Id. at 1997. The Council's recommendations were based in large part on a 1977 publication of the American College of Obstetricians and Gynecologists (ACOG), GUIDELINES ON PREGNANCY AND WORK. This publication is no longer available, and the related ACOG Technical Bulletin 58, PREGNANCY, WORK AND DISABILITY (1980), has been withdrawn. Letter from Pamela Van Hine, Head Librarian and Associate Director, ACOG Resource Center (Mar. 18, 1993) (on file with author). However, ACOG's most recent guidelines reaffirm the Council's recommendations:

A woman with an uncomplicated pregnancy and a normal fetus may continue to work until the onset of labor if her job presents no greater potential hazards than those encountered in normal daily life in the community or home. Most women may return to work several weeks after an uncomplicated delivery. A period of 6 weeks is generally required for a wo-
In a table of "Guidelines for Continuation of Various Levels of Work During Pregnancy," the Council modified its recommendation that women work to term with respect to jobs that regularly require more physically demanding work, at least until the development of better data on the typical capabilities of women during various stages of pregnancy. According to these broad guidelines—which the Council several times stressed physicians should "adapt . . . to each pregnant woman individually"—women in more sedentary occupations and those requiring only relatively light lifting (under eleven kilograms) or intermittent standing, climbing, stooping, or low bending could expect to work until the fortieth week of gestation. But if the job required prolonged or frequent standing, repetitive stooping and bending, climbing of ladders or repetitive climbing of stairs, or heavy or repetitive lifting, the guideline dropped to between 20 and 32 weeks. However, in these cases, the Council suggested that "[i]f the employee is not disabled for another type of work, placement on an alternate lighter job assignment . . . may be appropriate." In contrast with this flexible approach in cases of normal pregnancy, the article listed a number of "[s]ubstantial complications" of pregnancy that "may be disabling for further work until after delivery." The Council repeatedly stressed that "[t]here are very little scientific data . . . to validate the frequency of [various pregnancy-related symptoms] or to verify "how many of the women who do experience them find their work substantially affected." Although the report highlighted relevant research that was underway, information on these questions remains patchy today. Until the systematic frequency and impact data that the Council called for become available, it is necessary to piece together a variety of sources to obtain rough estimates of the frequencies of some of the best-known complications and normal incidents of pregnancy. These estimates are rendered more useful by considering categories of occupations in which accommodation of such conditions may be particularly beneficial.

105. Effects of Pregnancy, supra note 102, at 1996.
106. Id. at 1997.
107. Id. at 1996.
108. Id.
109. Id. at 1997.
110. Id. These complications included preeclampsia, premature rupture of the membranes, vaginal bleeding, threatened abortion (miscarriage), two previous deliveries of premature, low-birthweight babies, incompetent cervix, and a number of others.
111. Id. at 1995.
112. Id. at 1996.
113. Id. at 1995, 1996.
114. Telephone interview with Dr. Diana Pettiti, Department of Family and Community Medicine, University of California at San Francisco (Mar. 25, 1993).
The most systematic study of the incidence of pregnancy complications remains the Collaborative Perinatal Study, which followed nearly 56,000 pregnancies sampled between 1959 and 1965 in eleven metropolitan areas.115 Now some thirty years old, this data base may include estimates that no longer reflect more recent frequencies.116 Moreover, the Collaborative Perinatal Study did not report some conditions, like ectopic pregnancy, possibly because such conditions were considerably rarer in the past.117 For these reasons, the ranges of estimates that follow also include those reported in current editions of two obstetrics texts, *Williams Obstetrics*118 and *Obstetrics: Normal and Problem Pregnancies*.119 In the absence of better data, comparing estimates across these sources provides a sense of the order of magnitude for certain conditions.

The estimates of the frequency of nausea and vomiting during early pregnancy range from roughly half of all pregnancies to as high as seventy percent.120 The Collaborative Perinatal Study found severe vomiting, or hyperemesis, in 1.64 percent of participating white women’s pregnancies and 0.71 percent of black women’s pregnancies,121 while neither obstetrics text provides an estimate.122 The reported frequencies for hydramnios (excessive amniotic fluid) range from 0.9 to 2.8 percent.123

---

115. *The Women and Their Pregnancies* 6-7 (Kenneth R. Niswander et al. eds., 1972). The overall aim of this study was to find ways of reducing the incidence of fetal and newborn death and congenital disabilities. *Id.* at 2.

116. For example, the frequency of certain complications occurring in later pregnancy could change over time as greater emphasis on early prenatal care prevents some potential complications from arising. *See, e.g.,* F. GARY CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS* 767 (19th ed. 1993) [hereinafter CUNNINGHAM ET AL.] (rate of eclampsia has declined in United States because of improving prenatal care). On the other hand, complications that occur more frequently among older women or in first-time pregnancies might tend to rise with the increasing number of women having their first baby in their late thirties or forties. *See, e.g.,* id. (incidence of preeclampsia varies with such factors as mother’s age and number of previous pregnancies).

117. *Id.* at 692-93 (“There has been a marked increase in both the absolute number and rate of ectopic pregnancies in the United States in the past two decades.” The increase tabulated showed a fairly steady rise from 0.45% among all reported U.S. pregnancies in 1970 to 1.68% in 1987.).


120. CUNNINGHAM ET AL., *supra* note 116, at 1146 (more than half of all pregnancies are accompanied by vomiting in the first trimester); GABBE ET AL., *supra* note 119, at 127 (“Nausea and vomiting . . . complicate up to 70% of pregnancies.”). *The Women and Their Pregnancies*, *supra* note 115, did not contain an estimate.

121. *The Women and Their Pregnancies*, *supra* note 115, at 389. This source reports data exclusively on a separate basis for the two racial categories.

122. CUNNINGHAM ET AL., *supra* note 116, at 1146, does say that this condition has “(f)ortunately” become “uncommon.”

123. CUNNINGHAM ET AL., *supra* note 116, at 734-35 (0.9%); GABBE ET AL., *supra* note 119, at 340 (2.8% incidence reported in one study of more than 2,500 patients); *The Women and Their Pregnancies*, *supra* note 115, at 405 (1.54% for white women, 1.26% for black women).
The sources agree that hypertensive disorders complicating pregnancy are comparatively "common," with several estimates ranging between five and thirteen percent. Preeclampsia is the most common of these disorders, with reported frequencies ranging between five and twenty percent. Eclampsia, a severe hypertensive disorder involving seizures, is more rare, and its incidence within the United States has been declining.

Vaginal bleeding is also a common occurrence during pregnancy, particularly early pregnancy. Early bleeding does not always indicate a serious problem, but it can signal a spontaneous abortion or an ectopic pregnancy. Reported frequencies for spontaneous abortion range between one in ten and one in four pregnancies. Both obstetrics texts agree that the rate of ectopic pregnancy has increased dramatically in the United States within recent years, although the current frequency does not appear to exceed approximately two percent.
Bleeding during the later stages of pregnancy, while its overall frequency is elusive, is likely to signal an urgent problem like abruptio placentae (premature placental separation from the uterus). While the Collaborative Perinatal Study found abruptio placentae in roughly two percent of its pregnancies, frequencies reported in the current texts range between 0.49% and 1.16% of births. Another serious problem that may lead to vaginal bleeding in the later months is placenta previa, which occurs in less than one percent of pregnancies.

The modern texts do not estimate the frequency of incompetent cervix, though one terms it “an important cause of second-trimester pregnancy loss.” The Collaborative Perinatal Study found this condition in about one third of one percent of its pregnancies. Finally, the reported frequencies of prolapsed or knotted cords range from 0.78 percent to 1.1 percent.

A number of these conditions are life-threatening to fetus, mother, or both, and are generally understood to require the woman’s departure from the workplace for some period of time, often until after delivery (or termination of the pregnancy). These, consequently, are less amenable to on-the-job accommodation—although anecdotal experience indicates that women in certain types of positions are still able to discharge important job functions even when required to stay home with a serious pregnancy complication.

---

133. *Cunningham et al., supra* note 116, at 819 (incidence of obstetrical hemorrhage “impossible to determine precisely” due to “inexact” definitions).

134. *Gabbe et al., supra* note 119, at 583 (third-trimester vaginal bleeding “is the hallmark of placental abruption”).

135. *The Women and Their Pregnanacies, supra* note 115, at 409 (2.39% for white women, 1.90% for black women).

136. *Cunningham et al., supra* note 116, at 827 (United States average approximately 1 in 150 deliveries, although reported frequencies vary; one study finds rising trend, but others find frequencies declining); *Gabbe et al., supra* note 119, at 579-80 (approximately 1 in 120 births but reported incidence varies from 1 in 86 to 1 in 206 births).

137. *Cunningham et al., supra* note 116, at 836 (three studies found frequencies ranging from 0.3% to 0.5% of deliveries, the 0.5% figure reflecting authors’ own experience); *Gabbe et al., supra* note 119, at 585 (frequency reported as 1 in 250 live births, but authors caution that this figure may be sample-dependent); *The Women and Their Pregnanacies, supra* note 115, at 407 (0.77% of pregnancies for white women, 0.56% for black women).

138. *Gabbe et al., supra* note 119, at 858.

139. *The Women and Their Pregnanacies, supra* note 115, at 395 (0.34% for white women, 0.36% for black women).

140. *Cunningham et al., supra* note 116, at 746 (one study reported “true knots” in 1.1% of 17,000 deliveries); *The Women and Their Pregnanacies, supra* note 115, at 416 (prolapsed cords found in 1.10% of white women’s pregnancies and 0.78% of black women’s pregnancies). No estimate was reported in *Gabbe et al., supra* note 119.

141. These include, for example, ectopic pregnancy (see, e.g., *Cunningham et al., supra* note 116, at 705); abruptio placentae (see, e.g., id. at 831); and placenta previa (see, e.g., id. at 840).

142. I have had several friends and acquaintances in professional and managerial positions who were able to complete critical studies and other tasks even when their physicians imposed mandatory bedrest to avert premature labor or other problems. Most saw this work, on a part-time and flexible basis, as welcome respite from the enforced tedium of weeks and even months spent in bed and also as a
Other complications and conditions associated with pregnancy are more susceptible of on-the-job accommodation. For example, with respect to less severe nausea or vomiting (which, when it occurs, usually subsides after the first three or four months\(^{143}\)), the AMA's lay medical care guide advises responding with more frequent, small meals through the day instead of the usual three squares.\(^{144}\) For women in workplaces with rigid schedules for meals and other periodic breaks, temporary accommodation would take the form of minor scheduling flexibility to permit appropriate snacks before and after the normal meal break.

Similarly, the AMA guide advises that in minor cases of hydramnios, which tends to occur later in pregnancy, women may simply need "a little more" rest.\(^{145}\) In jobs with greater scheduling flexibility, accommodation of this need may not even be noticed, whereas more tightly scheduled positions may require more formal accommodation.

As discussed earlier, vaginal bleeding during pregnancy can be symptomatic of such urgent problems as spontaneous abortion or a ruptured placenta,\(^{146}\) and requires medical evaluation.\(^{147}\) However, such bleeding often turns out to be less serious, particularly in early pregnancy.\(^{148}\) According to the AMA's lay guide, "about one in five women have [sic] some bleeding in the first three months, but if care is taken, the pregnancy usually proceeds normally."\(^{149}\) The necessary immediate care, however, includes promptly notifying the woman's doctor and resting in bed.\(^{150}\) Measures that may be indicated after this point, including those applying to the woman's job, are left to the discretion of the woman's physician.\(^{151}\)

The Collaborative Perinatal Study and the professional sources do not offer even rough estimates of the frequency of a number of pregnancy-related conditions that many jobs can most readily accommodate. Williams Obstetrics briefly reviews, without reference to frequency, a number of "common complaints" associated with pregnancy: backache, varicosities, diversion from constant worry about the outcome of their pregnancy. I am unaware of any systematic compilation of such cases.

143. See, e.g., Cunningham et al., supra note 116, at 265; AMA Guide, supra note 130, at 636.
144. AMA Guide, supra note 130, at 636.
145. Id. at 645.
146. Supra text accompanying notes 130-32; supra note 134.
147. Cunningham et al., supra note 116 at 23 (emphasizing that "[b]leeding per vagina at any time during pregnancy must be regarded as abnormal.").
149. Id. This source also explains that slight bleeding sometimes occurs when the fertilized egg implants in the uterus, which "may be misinterpreted as a threatened miscarriage." Id.
150. Id. at 643, 644, 647. After this point, the AMA Guide is less informative. It suggests that if the bleeding stops or is light, the doctor may recommend resting at home, but does not indicate how long this recommendation would extend. Id. at 644. If the pregnancy "seems to be continuing" despite the bleeding, the doctor may order more tests and advise avoiding sexual intercourse for a few weeks. Id. Beyond this, however, the AMA Guide says simply, "Consult your physician," before moving on to a discussion of miscarriage. Id.
151. Id.
hemorrhoids, heartburn, pica (food cravings), ptyalism (profuse salivation), fatigue, headache, and leukorrhea (increased vaginal discharge). Appropriate accommodations at work may mitigate some of these, such as backache, varicose veins, or fatigue. For example, the text suggests that some cases of varicose veins require elevation of the feet.

Similarly, while the same text devotes three pages to the “remarkable” changes that normal pregnancy brings about in the urinary tract and an entire chapter to diseases of the renal and urinary tract associated with pregnancy, it makes only passing mention of possible development of more frequent need to urinate. The AMA’s lay guide discusses greater frequency of urination only as a possibility during late pregnancy. Yet according to most popular pregnancy guidebooks, the need for more frequent urination is a virtually universal development among pregnant women, and not only near the end of pregnancy. Perhaps this need is taken for granted, and tends not to be noticed, by experts consumed with more urgent or esoteric aspects of pregnancy. However, as Denise Dunning’s case illustrates, in some jobs this normal, even healthy, condition may require overt accommodation.

Yet another normal aspect of a healthy pregnancy that may interfere with performance of the full range of regular job duties is the increasing size associated with advancing pregnancy, particularly in the later months. Of course, some adverse employment decisions based on a pregnant worker’s size or shape have borne no reasonable relationship to job performance, but instead were prompted by inappropriate stereotypes of how women should look. In other cases, however, courts have accepted ex-

152. CUNNINGHAM ET AL., supra note 116, at 265-68.
153. Id. at 266.
154. Id. at 230-32.
155. Id. at 1127-44.
156. Id. at 22 (in the context of diagnosing pregnancy, the authors explain that “micturition” “may” be more frequent during first trimester, as the enlarging uterus presses on the bladder, and again near delivery, as the descending fetal head presses against the bladder).
157. AMA GUIDE, supra note 130, at 632.
158. See, e.g., KATHRYN SCHROTTENBOER-COX & JOAN SOLOMON WEISS, PREGNANCY OVER 35, at 44 (1985) (“One of the trademarks of the pregnant woman is her frequent trips to the bathroom. . . . It’s a perfectly normal part of pregnancy, and will subside when your pregnancy is over.”); ANTONIA VAN DER MEER, GREAT EXPECTATIONS: AN ILLUSTRATED GUIDE TO YOUR PREGNANCY, YOUR BIRTH, YOUR BABY 79-80 (1993) (“Most pregnant women find themselves in and out of the bathroom all day long, especially during the first and third trimester. . . . Frequent urination is actually a good sign. It shows that you are getting enough fluids.”); WENDY LESKO & MATTHEW LESKO, THE MATERNITY SOURCEBOOK 52 (1984) (“By the end of these nine months you will know the location of every ladies’ room in town.”); HOWARD I. SHAPIRO, THE PREGNANCY BOOK FOR TODAY’S WOMAN 81 (2d ed. 1993) (greatest frequency during first twelve weeks and again during last month); MIKE SAMUELS & NANCY SAMUELS, THE WELL PREGNANCY BOOK 483 (1986) (explaining “important changes” in pregnant woman’s urinary system that increase frequency of urination).
pert medical testimony that increasing size adversely affected performance of selected specific tasks.\textsuperscript{160}

On top of any performance problem attributable to a particular pregnancy, the AMA’s 1984 guidelines indicate that in some pregnancies, it is the nature of the job rather than the development of the pregnancy that is temporarily “disabling.”\textsuperscript{161} Purely because of different job requirements, a woman in one job may have no problem working all the way through pregnancy, whereas a woman whose pregnancy is progressing similarly but who holds a more physically demanding job may be forced to leave work earlier. She would not have to leave, of course, if her employer temporarily mitigated those demands.\textsuperscript{162} More specifically, the guidelines suggest that women in blue-collar occupations and other occupations that require significant heavy lifting, climbing, or bending are particularly likely to need accommodation to remain on the job, at least during the second half of pregnancy.\textsuperscript{163} These workers are disproportionately women of color.\textsuperscript{164}

\begin{itemize}
  \item \textsuperscript{160} See, e.g., Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 366 (4th Cir. 1980) (“The medical witnesses agreed that . . . a normal, healthy woman experiencing a normal, healthy pregnancy would have little difficulty in performing the regular duties of a flight attendant until her girth has increased appreciably.”), cert. denied, 450 U.S. 965 (1981); \textit{id.} at n. 2 (flight attendants’ normal activities included repeated bending and stooping, while emergency duties included crawling over seats to assist with emergency evacuations and performing Heimlich maneuver). However, although the judges in this case agreed on the general point that increasing size could interfere with performance of some of the duties associated with the position of flight attendant, they disagreed on how soon such interference would set in. The majority identified its onset as “most often . . . shortly after the first trimester,” although acknowledging the possibility of individual variations. \textit{id.} at 366. In contrast, the dissenting judges pointed to expert testimony that increased weight and girth generally would not impair normal performance until after twenty, or even as late as twenty-eight, weeks. \textit{id.} at 375.
  \item \textsuperscript{161} See supra notes 106-09 and accompanying text.
  \item \textsuperscript{162} \textit{Effects of Pregnancy, supra} note 102, at 1996-97.
  \item \textsuperscript{163} \textit{Id.} at 1996.
  \item \textsuperscript{164} In 1991, 12,566,000 of the nation’s 44,723,000 civilian women employees aged 25 years or older worked in service, precision production (including craft and repair), operator/fabricator (including laborer), or farm/forestry/fishery occupations. \textit{Statistical Abstract, supra} note 75, at 396, Table 631. If the combination of these categories serves as a rough indicator of blue-collar employment (the other two categories in this table being managerial/professional and technical/sales/administrative), these figures indicate that just over 28% of the civilian female workforce, aged 25 and over, hold blue-collar jobs. (Note that Eva Gutierrez would not be among the 28%, since she had a sales job—an additional occupation that may involve significant lifting, climbing, or bending.)
  \item \textsuperscript{164} Whereas fewer than 26% of the white female employees worked in one of the four blue-collar categories in 1991, the proportion climbed to more than 41% for all nonwhite women, and to more than 43% for black women. \textit{Statistical Abstract, supra} note 75, at 396, Table 631. (Figures for non-white women were obtained by subtracting the data for white women from those for all women; the table reports separate data only for white and black men and women. Other nonwhites are included in the respective totals.) In other words, approximately one white woman worker in four (aged 25 or older) worked in one of the blue-collar occupations that the AMA guidelines suggest would need to provide some degree of accommodation to permit continued work through a normal pregnancy, whereas the proportion approached one out of two among black women workers. (Again, both proportions grow when jobs like Eva Gutierrez’ sales position are factored in.)
\end{itemize}
C. Defining and Responding to Pregnancy-Related Disability in the Workplace

1. The Concept of Pregnancy-Related Disability

The preceding paragraph raises an important point: in the employment context, the meaning of the term pregnancy-related disability is not entirely intuitive. It is not simply a matter of physiological condition. Instead, it is a construct that reflects the interaction between a pregnant woman’s physical condition and the requirements of her job (or employer).

The California Unemployment Insurance Code illustrates this interactive quality in its definition of “disability,” establishing one of the eligibility criteria for state disability insurance benefits: “An individual shall be deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her regular or customary work.” Under this definition, the worker’s physical condition is not the sole determinant of disability. The other crucial variable is the nature of the work this person regularly or customarily performs. Consequently, the same condition may disable a worker for one job, but not for another.

Following this approach offers a way to avert the trap of “classifying pregnancy as a disability.” First, this approach clarifies that it is not pregnancy itself that is job-disabling, but certain occasional complications or incidents of pregnancy that may give rise to a pregnancy-related disabil-

---

165. See, e.g., American College of Obstetricians and Gynecologists, Statement of Policy: Pregnancy Disability (1974) (reflecting such a strictly physiological focus). This policy statement identifies three sources of disability that may render pregnant women “unable to perform their usual activities”: the process of labor and delivery; complications on the order of toxemia, infection, hemorrhage, or ectopic pregnancy; and the addition of pregnancy to a preexisting condition such as diabetes or hypertensive cardiovascular disease. Id. To the extent that a woman’s usual activities include performance of a job outside the home, however, there is a fourth source: the nature of the job requirements.

166. Cal. Unemp. Ins. Code § 2626 (West 1986). Subdivision (a) of this section specifically includes “illness or injury resulting from pregnancy, childbirth, or related medical condition” among the categories of “illness or injury” that may qualify a worker to receive state disability insurance benefits. Id. (The language of § 2626, referring to “condition” in its general provision but only to “illness or injury” within the subdivision that mentions pregnancy, raises a question whether a worker in Denise Dunning’s circumstances would be found eligible for state disability benefits. She, after all, lost her job due to a combination of pregnancy-related conditions, not due to a pregnancy-related pathology in itself serious enough to be called an illness or injury. And yet her job loss was no less real and beyond her control than that of a worker ordered to stay home because of, for example, vaginal bleeding.)

167. Reproductive Health Hazards, supra note 10, at 49. See generally id. at 48-51 for a discussion of possible advantages and disadvantages of including either pregnancy or reproductive dysfunction as a disability under either the ADA or the state’s FEHA. As this discussion urges, defining pregnancy itself as a disability would reverse years of argument and pressure by many women against traditional stereotypes of this natural function. Id. at 49.
Moreover, the interactive definition stresses that although some conditions accompanying pregnancy are so severe that they may inevitably disable an employee for a while, other conditions impair performance and threaten job security only in particular positions. (Denise Dunning's case illustrates the latter circumstance.) These conditions are rendered job-disabling only when combined with particular occupational requirements, or the demands of a specific employer. At the same time, many women work in positions where the ten-pound lifting restriction that proved so costly to Eva Gutierrez would be irrelevant to job requirements, and consequently would not be occupationally disabling.

2. Pregnancy-Related Disabilities and Other Temporary Disabilities

Pregnancy, of course, is not the only source of temporary job disabilities. Every year many employees are temporarily disabled by heart attacks, cancer therapy, traffic accidents, and a wide variety of other illnesses and injuries. And many employers have policies of not accommodating any such temporary disabilities, or at best of accommodating them only with leave (paid or unpaid).

168. As the ACOG Statement of Policy on Pregnancy Disability, supra note 165, points out, virtually the entire term of an uncomplicated pregnancy, until the onset of labor, may be free from disability.

169. The Bureau of Labor Statistics' annual survey of job-related injuries and illnesses reportable under the federal Occupational Safety and Health Act (OSHA) produced a nationwide estimate of more than 6.3 million such injuries and illnesses occurring in private industry (excluding mines and railroads, small farms, private household employment, and the self-employed) during 1991. Bureau of Labor Statistics, U.S. Dept of Labor, News Release USDL-92-731, BLS Reports on Survey of Occupational Injuries and Illnesses in 1991, at 1, 4, Table 2 (1992). More than 2.9 million of these cases resulted in lost worktime or restrictions on affected workers' work activities, resulting in an average of 22 workdays lost or restricted per disability. Id. at 1, Table 2.

Estimates of the incidence of temporary disabilities that are not job-related (which form a more appropriate basis of comparison to the incidence of temporary pregnancy-related disabilities) are harder to come by, because there is no national program of worker benefits or employer responsibility associated with such disabilities. Telephone Interview with Larry Baumgartner, Bureau of Labor Statistics, Region IX (Nov. 3, 1993); Telephone Interview with Juliana Cyril, Information Specialist, Disability Statistics, Rehabilitation, Research and Training Center, University of California at San Francisco (Nov. 22, 1993).

However, administrative data generated by California's nonindustrial Disability Insurance (DI) program provide a rough sense of the number and frequency of such disabilities within this state. In 1992, the program paid more than 807,000 first DI claims to employees who met the program's eligibility requirements (which include sufficiently high wages during an earlier "base period" and, typically, missing work for a week before the loss becomes compensable). California Employment Development Dep't, Labor Market Conditions in California 20 (Oct. 3, 1993). One fifth of these claims (169,100) were based on pregnancy-related disabilities, while the remainder (638,400) were unrelated to pregnancy. Id. With statewide employment averaging more than 13.8 million that year, id. at 4, the 807,000 first claims paid produce a low-ball estimate of 5.8% as the overall incidence of nonoccupational illness and injury that resulted in lost workdays among California employees in 1992, and a 4.6% incidence of temporary disabilities unrelated to either the job or pregnancy.

170. Unfortunately, the survey data cited supra notes 91-93 and accompanying text do not specify percentages of employers reporting that they offer on-the-job accommodation of temporary disabilities.
The question naturally arises whether it is appropriate public policy to afford pregnancy-related disabilities greater accommodation than provided for other temporary disabilities, such as recovery from heart surgery. During the past decade, this question has fueled an active debate among feminist legal scholars over the relative merits of "equal treatment," "equal opportunity," and alternative principles in pursuing equal participation for women within the American economy.171

My position is that reasonable accommodation is appropriate for all temporary disabilities. The devastation to career and family well-being of facing job loss while trying to recover is as severe for the person surviving a heart attack or a serious collision as it is for a woman disabled through pregnancy.

However, whereas women as well as men can be sidelined by heart attacks or car accidents, only women face the risk of being temporarily disabled in connection with pregnancy. As fragmentary as available data and estimates on this phenomenon are, several things are clear. First, whatever the precise figures, every year large numbers of women are temporarily job-disabled as a consequence of pregnancy. Moreover, since it is not possible to predict whether any particular pregnancy will be without complications, every year far larger numbers of women workers—currently on the order of two million—run the risk of being job-disabled because they are pregnant. This means, as well, that failure to accommodate pregnancy-related conditions threatens the vast majority of women workers with serious career setbacks at least twice during their worklives.172

Denying accommodation to pregnant workers thus seriously undermines policies and laws aimed at affording women equal opportunities to participate fully in employment. It also weights women's scales very dif-


172. In 1990, lifetime expected births averaged 1,999 per 1,000 women between 18 and 34 years of age who were in the labor force, and 1,989 for those who were employed. STATISTICAL ABSTRACT, supra note 75, at 72, Table 97.

This threat is particularly menacing to women in more physically strenuous work. Not only do they share the general risk of being affected by a pregnancy complication; in addition, according to the AMA guidelines, the very nature of their jobs makes it more likely that even an uncomplicated pregnancy will cost them their job. See Effects of Pregnancy, supra note 102, at 1996.
ferently from men's as they attempt to balance work and family goals, reinforcing more traditional, stereotypical roles for women. For women who are a family's only wage-earner, and for the other members of such families, denial of accommodation is particularly punishing.

These reasons provide further justification for accommodating temporary job disabilities associated with pregnancy. And for these reasons it is valid to push for policies that accommodate pregnant workers, if such a choice is faced, even before similar accommodation can be obtained for workers temporarily disabled by conditions not related to pregnancy.

At the same time, I do not believe that obtaining accommodation of pregnancy-related disabilities would reduce effective pressure on behalf of other temporarily disabled workers. To the contrary, the reasonableness of the means through which many pregnant workers can be accommodated (like Eva Gutierrez) makes a strong practical case for extending accommodation to other temporarily disabled workers. In addition, once one set of employees gains such a benefit, the work force as a whole should be expected to bring increased pressure to extend that benefit to others.

173. Discussing leave policies that fail to accommodate pregnancy, Siegel, supra note 171, at 942-43 n.65, emphasizes their "powerful normative implications" (emphasis added) for women workers, but also refers to the impressive practical handicap faced by a new mother searching for a new job without an income to pay for child care. See also id. at n.67: "As long as leave policies remain inadequate for childbirth, and thus result in pregnancy-based terminations, women's transient employment must continue to factor in the daily calculations of employer and employee alike." In like manner, nonaccommodation policies that result in terminations factor into women employees' "daily calculations"; even premature, involuntary leave resulting from nonaccommodation policies (without permanent job loss, as in Eva Gutierrez' case) reinforces the second-class status of women as workers and economic providers for their families.

174. Wendy Williams comments that the choice is not this stark, at least under federal antidiscrimination law, in that the applicability of disparate impact doctrine (discussed infra part IV) to attack "apparently neutral rules that have a disproportionate effect on women" is "universally accepted among feminist litigators." Williams, supra note 171, at 364-66. However, she goes on to explain that equal treatment and equal opportunity adherents would seek different remedies when a court finds disparate impact based on pregnancy: equal opportunity feminists would "permit[ ] special pregnancy rules or laws to be upheld where they were instituted to overcome the adverse impact of workplace structures on women," whereas equal treatment feminists would insist on "reformulation or elimination of the rule for everyone." Id. at 368. The differences might be less apparent when considering the few relevant Title VII cases published so far (discussed infra part IV), but would be pronounced in treatment of state statutes that mandate feasible accommodation of pregnancy-related disabilities (the subject of part V).

175. I would expect ADA implementation to have a similar effect. As more employers comply with their new legal obligation to provide reasonable accommodation of workers protected by the ADA, and experience both the minor changes that reasonable accommodation often translates into and the benefits of gaining motivated, loyal employees, they may look with less trepidation on providing limited-term accommodation to incumbent employees recovering from illness or injury. See generally Frederic C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196 (M. Berkowitz & M.A. Hill eds., 1986) (in national survey of private-sector firms with federal contracts, great majority of respondents reported accommodating persons with disabilities at no or low expense and difficulty).
3. Relationship of Accommodation and Leave

Conceptually, leave with return rights is a form of accommodation of a temporary disability—an extended form of modified work schedule. However, until now most theory, debate, and action have focused on this single form, while the other possibilities for accommodating temporarily disabled workers, on the job, have received relatively little attention.\(^{176}\)

Leave is a very important form of accommodation, the form of direct benefit to most pregnant women. Virtually every working woman who brings a pregnancy to term will require some leave.\(^{177}\) Even since enactment of the new federal Family and Medical Leave Act,\(^{178}\) the need for leave exceeds the availability of leave for workers disabled by pregnancy-related conditions. The Act applies only to employers with at least fifty employees\(^{179}\) and employees who have worked for a qualifying employer for at least a year\(^{180}\) (and at least 1,250 hours during the last year\(^{181}\)), leaving many women without the benefit of its provisions.\(^{182}\)

But leave is insufficient by itself to meet the job security and income needs of pregnant workers, particularly if the leave is unpaid. This problem hits the overlapping categories of blue-collar women, low-wage women, and working women of color especially hard, as Eva Gutierrez’ case illustrates. Statistics back up the anecdotal evidence: the National Commission on Working Women has estimated that more than three-quarters of working

\(^{176}\) See, e.g., KAMERMAN, supra note 2, at 17 (only reference to conditions on the job is parenthetical mention of European restrictions against night schedules and heavy work); KAMERMAN ET AL., supra note 2, at 74 (three fundamental components of maternity policy are health insurance, job-protected leave, and wage replacement during leave); PREGNANCY AND EMPLOYMENT, supra note 2 (no mention of on-the-job accommodation); O’Hara, supra note 2 (no mention of on-the-job accommodation in this “overview of federal and state protections for pregnant workers”); Remmers, supra note 2. Exceptions include Furnish, supra note 10, at 22, 25-26, 33-41; Siegel, supra note 171, at 943-46.

\(^{177}\) AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 21 (7th ed. 1989) (several weeks generally required before a woman’s physiological recovery from uncomplicated delivery permits return to work).


\(^{179}\) Id. at § 101(4)(A)(i).

\(^{180}\) Id. at § 101(2)(A)(i).

\(^{181}\) Id.

\(^{182}\) Similarly, California’s 1993 amendments to the state’s family leave statute, enacted as an urgency statute (1993 Cal. Stat. 827, effective October 2, 1993) to bring the state law into closer conformity with the new federal Family and Medical Leave Act, applies to an employee only if she or he has worked for the employer for at least a year, the employee accumulated at least 1,250 hours of work for the employer within the past year, and the firm employs at least 50 employees within 75 miles of the employee’s worksite. FAIR EMPLOYMENT AND HOUSING COMMISSION, STATE OF CALIFORNIA, AB 1460’S AMENDMENTS TO THE CALIFORNIA FAMILY RIGHTS ACT 1, 6 (September 22, 1993). Incorporation of the 75-mile restriction had the effect of shrinking eligibility for family leave under the California statute (id. at 3), although the maximum protected leave (combining both pregnancy-disability leave and post-birth family leave) was extended for those remaining eligible for family leave and also qualifying for pregnancy-disability leave under a separate state law (id. at 2).
women are in low-paid nonprofessional jobs and simply cannot afford to take several months of unpaid leave.\textsuperscript{183}

Additionally, Eva Gutierrez and Denise Dunning illustrate the fact that women workers want and have actively sought on-the-job accommodation during pregnancy,\textsuperscript{184} particularly women working in more physically demanding occupations. Both of these women were forced to leave earlier than they wanted, and for both the cost was substantial.

Conversely, although they may be slow to realize it, employers who already offer pregnancy-related leave may benefit from adding on-the-job accommodation. The Bureau of National Affairs reports that the “growing presence of pregnant workers in the workforce” has led some employers to establish programs aimed at “encouraging them to leave the hospital earlier” and “reduc[ing] the amount of time the woman is out on maternity leave.”\textsuperscript{185} These programs include such measures as workplace seminars on prenatal health care and cash incentives.\textsuperscript{186} On-the-job accommodation of conditions now qualifying for leave might reduce the employer’s outlay on some cash payments; it would certainly gain the employer extended performance from an experienced worker. In addition, a recent study found that pregnant workers were more likely to return to highly accommodating employers than to unaccommodating employers after childbirth.\textsuperscript{187}

Why has so little attention been directed to on-the-job accommodation of pregnancy-related temporary disabilities so far? Two possibilities were suggested earlier: the role of medical advice until the 1980s in discouraging

\begin{footnotes}
\item[183.] Pregnancy and Employment, supra note 2, at 42.
\item[184.] Two of the cases discussed infra part IV also involved plaintiffs actively seeking accommodation on the job: Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982), and Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984).
\item[185.] From 1990 through 1992, the California Department of Fair Employment and Housing received between 46 and 65 formal complaints annually of refusal to accommodate pregnancy. DFEH printout, Pregnancy Employment Cases by Alleged Act(s) by Calendar Year from 1982 through 1992, at 6-8 (May 13, 1993) (on file with author). Total DFEH pregnancy discrimination filings over the same three years ranged between 1,510 and 1,632, with between 900 and 930 of these annual complaints alleging termination based on pregnancy. Id. During the same period, complaints of denial of leave ranged between 64 and 91, and complaints of denial of reinstatement after leave ranged from 91 to 123. Id.
\item[186.] Pregnancy and Employment, supra note 2, at 108.
\item[187.] Alison Leigh Cowan, Trend in Pregnancies Challenges Employers, N.Y. Times, April 17, 1989, at A1 (1987 study of 2,376 working women in 80 cities, conducted by National Council of Jewish Women, found that 78% of the women in highly accommodating workplaces returned to same employer after childbirth, as opposed to 50% return rate among women working for unaccommodating employers). Even the lower rate is remarkable, and should help correct any lingering misconceptions about women’s seriousness about their outside jobs after they start families, in view of the impediments and negative employer attitudes that such women would have to surmount in returning to unaccommodating positions. But since the return rate for accommodating workplaces was more than half again as great, these findings also underscore the benefits to an employer of an accommodation policy.
\end{footnotes}
work through pregnancy, and the fact that leave does respond to a major portion of overall accommodation needs.

The U.S. Equal Employment Opportunity Commission’s (EEOC) guidelines on pregnancy discrimination may also play a role. The guidelines refer specifically to inadequate leave availability in illustrating the type of workplace policy that can apply equally to men and women yet nevertheless leave an employer liable for pregnancy discrimination under federal law. However, the Commission also advises that employers need to provide on-the-job accommodation of pregnancy-related disabilities only to the same extent as they accommodate other temporary disabilities through on-the-job modifications.

Another factor may be the influence of European models on progressives in this country. Besides typically treating employees more liberally than does policy in this country, European countries tend to "solve" work/family problems by removing women, or parents, from the workplace.

Finally, it is likely that feminist legal theorists, as professionals, are less likely than many women workers either to need physical accommodation to perform their jobs, or to be perceived as disruptive when they do accommodate their pregnancy on the job (for example, by putting their feet up in their office). Thus, leave may be the form of accommodation most typically relevant to their own worklives. As these writers draw on their own experience to develop legal analysis in this emerging area, initial

---

188. See supra note 100 and accompanying text.
189. See supra note 177 and accompanying text.
190. 29 C.F.R. § 1604.10 (1992).
191. 29 C.F.R. § 1604.10(c).
193. See, e.g., KAMERMAN, supra note 2, at 13-19.
194. Similarly, in 1979, when the Connecticut General Assembly was considering the bill subsequently enacted as the state's statute requiring accommodation of pregnant women in hazardous positions, a state senator commented during the floor debate that her employment at a university while pregnant had enabled her to "move the kind of work that I did, even though it was not physically demanding .... And that is not true in a factory and in many other places ...." 22 CONN. S. PROC., Pr. 7, at 2248 (1979) (statement of Sen. Beck).
195. This is considered a legitimate, indeed a necessary, element in the development of feminist legal theory. See, e.g., Christine A. Littleton, Feminist Jurisprudence: The Difference Method Makes, 41 STAN. L. REV. 751, 763 (1989) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987)). As Littleton explains, feminists develop theory through introspection, induction, and other "intellectual tool[s] ... invented by or credited to men ... and one invented by women: feminist method." Id. at 763. A distinguishing feature of this method is that it "starts with the very radical act of taking women seriously, believing that . . . our experience is important . . . perhaps especially when[ ] it has little or no relationship to what has been . . . said about us." Id. at 764. The application of feminist method to legal analysis is straightforward: "Feminist jurisprudence . . . is simply feminist method applied to law." Id. at 766. Littleton illustrates the process, and the significant contribution it can make to legal analysis and fair employment opportunities, by describing MacKinnon’s development of sexual harassment doctrine. Instead of trying to fit women’s experiences within previously existing legal categories of tort or contract law, MacKinnon began by identifying women’s experiences and then insisting that law be developed to reflect these experiences. Id. at 766-71.
results may be analogous to the purportedly generalized "woman" derived in some earlier feminist analysis. Authors writing more recently have pointed out the "gender essentialism" of earlier feminist legal analyses, whose prototype of "woman" in fact most strongly reflects distinctive experiences of white women. Similarly, it would not be surprising if the first wave in analysis of employment policies needed for pregnant workers emphasized policies most responsive to the needs of academic and professional women. But if so, the analysis needs to move on to the second wave, reflecting the experiences and needs of a broader set of pregnant workers.

Whatever the reasons, the near-exclusive focus so far on leave is too narrow. On-the-job accommodation should be added to the reform agenda, even as further improvements are sought in the availability of leave. In view of the need and the private sector's slowness in moving to meet it, what potential does federal antidiscrimination law offer women workers and their advocates as a vehicle for obtaining accommodation of temporary pregnancy-related disabilities? This is the subject of part IV.

IV
FEDERAL LAW
A. Title VII
1. Disparate Treatment and Disparate Impact Claims

The major federal statute providing protection against discrimination in employment is Title VII of the Civil Rights Act of 1964. Individual plaintiffs challenging unfavorable employment decisions or workplace policies under Title VII may generally bring their action under a theory of disparate treatment, disparate impact, or both.

Disparate treatment analysis applies to claims of intentional discrimination based on membership in a demographic category protected by Title VII (such as race or gender), and is designed to determine whether the employer treated the plaintiff less favorably than similarly qualified workers.

Wendy Williams provides a simple illustration of the application of this approach to the subject of pregnancy accommodation when she refers to "[m]y own experience (pregnancy plus four years of motherhood)" to compare the "obstacle[s] to full workforce integration of women" posed by pregnancy and parenthood. Williams, supra note 171, at 353 n.12.

See generally Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990) (discussing "gender essentialism" in pieces by Catherine MacKinnon and Robin West); id. at 589 ("woman turns out to be 'white woman'").

This is the point recognized by the Connecticut state senator quoted supra note 194, who went on to say that because many workplaces did not afford the kind of accommodation she had enjoyed in a university setting, "I think [the Connecticut accommodation statute, then pending, is] a very, very necessary piece of legislation." 22 CONN. S. PROC., Pr. 7, at 2248 (1979) (statement of Sen. Beck).

on the basis of demographic identity.\textsuperscript{199} Disparate impact analysis is the legal methodology that courts follow to evaluate employment policies that are facially neutral but have a particularly unfavorable effect on one category of job applicants or employees, such as women or members of a specific ethnic group.\textsuperscript{200} If a workplace policy has such an effect and the employer cannot show that the policy is necessary for the business and for the position in question, the policy violates Title VII.\textsuperscript{201}

2. **Pregnancy Discrimination Claims Under Title VII**\textsuperscript{202}

Both the disparate treatment and disparate impact methodologies were first developed in race discrimination cases,\textsuperscript{203} and subsequently adopted by courts in sex discrimination cases.\textsuperscript{204} Application of these methodologies in cases involving claims of discrimination on the basis of pregnancy has been somewhat erratic, however. As outlined below, Title VII pregnancy discrimination cases may be grouped into three major time periods: those decided before 1976; those decided or arising between 1976 and 1978; and those arising since 1978.

\textsuperscript{199} In a typical disparate treatment claim, the court analyzes the evidence in three stages. First, has the plaintiff established a prima facie claim of belonging to a protected category and having been denied an employment opportunity for which she or he was qualified? If so, the employer is then allowed to state a "legitimate, nondiscriminatory reason" for the decision. If the employer meets this low rebuttal standard, the plaintiff has the opportunity to discredit the professed reason, showing it to be a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Alternatively, in cases involving discrimination based on sex, national origin, or religion—but not race or color—the employer may acknowledge deliberate discrimination but try to defend the policy on the ground that favoring or disfavoring a demographic group for a particular position is a "bona fide occupational qualification" (BFOQ). 42 U.S.C.A. § 2000e-2(e).

\textsuperscript{200} This approach was first developed by the Supreme Court in a case involving race discrimination, Griggs v. Duke Power Co., 401 U.S. 424 (1971). It was recently codified in modified form by the Civil Rights Act of 1991. Pub. L. No. 102-166, 107 Stat. 1074-75 (codified at 42 U.S.C.A. § 2000e-2(k) (West Supp. 1993)). To make out a disparate impact claim under current law, the plaintiff first tries to show that an employer policy that is not discriminatory on its face has a disproportionately adverse effect on applicants or employees in a protected category. If the plaintiff succeeds in this showing of "adverse impact," the employer may try to defend the policy on grounds of job-relatedness and business necessity. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i). Alternatively, the plaintiff may attempt to demonstrate that other ways of meeting the business need are available to the employer that would not have as detrimental an effect on the plaintiff's group, but that the employer refuses to adopt such practices. 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii).

\textsuperscript{201} See discussion supra note 200.

\textsuperscript{202} The discussion in this section applies to all types of pregnancy discrimination claims brought under Title VII, such as alleged refusal to hire due to pregnancy or discharge once management learns of an employee's pregnancy. The next section once again narrows the focus to cases concerning pregnancy-related disabilities.

\textsuperscript{203} McDonnell Douglas, 411 U.S. 792, was brought by a black mechanic whom the company had declined to rehire when recruiting after a general layoff; Griggs, 401 U.S. 424, by a group of black employees who challenged newly instituted requirements of a high school education and satisfactory scores on two general aptitude tests at a North Carolina power company that had discriminated openly until the effective date of Title VII.

\textsuperscript{204} See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (invalidating minimum height and weight requirements for state prison employees because of disparate impact on women).
Originally, Title VII did not specify pregnancy as one of the prohibited bases for an employment decision; it did, however, include sex on the list of forbidden criteria.\textsuperscript{205} Lower courts deciding Title VII cases generally understood that discrimination based on pregnancy constituted discrimination based on sex.\textsuperscript{206} But in 1976, in \textit{General Electric Co. v. Gilbert},\textsuperscript{207} a divided Supreme Court held that the exclusion of pregnancy from the company's otherwise comprehensive plan of nonoccupational disability benefits did not violate Title VII.\textsuperscript{208}

Carrying over into Title VII analysis the notorious\textsuperscript{209} "pregnant women and nonpregnant persons" division\textsuperscript{210} of \textit{Geduldig v. Aiello},\textsuperscript{211} an Equal Protection Clause case, the \textit{Gilbert} majority found "\textit{Geduldig} . . . precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."\textsuperscript{212} Since there was no legally cognizable facial discrimination, the \textit{Gilbert} majority went on to explain, a challenge against the exclusion of pregnancy-related disabilities would instead have to show that the exclusion was a "mere 'pretex[t] designed to effect an invidious discrimination against [women]'"\textsuperscript{213} or, alternatively, demonstrate disproportionate adverse effects on women as a whole.\textsuperscript{214} The plaintiffs in this case failed to meet either burden.\textsuperscript{215} Applying \textit{Gilbert}'s approach more broadly in Title VII cases contesting overt discrimination based on pregnancy would thus require plaintiffs either to make the pretext showing available under disparate treatment analysis or to prove disparate impact on women as a whole.

\begin{itemize}
\item 205. Both § 703(a)(1) and § 703(a)(2) of Title VII (codified at 42 U.S.C.A. § 2000e-2(a)(1) and (2), respectively) make it an unlawful employment practice for an employer to take adverse employment actions against employees or job applicants based on the workers' "race, color, religion, sex, or national origin."
\item 206. \textit{See} General Elec. Co. v. Gilbert, 429 U.S. 125, 146-47 (1976) (Brennan, J., dissenting) (noting that all six courts of appeal that had considered legality under Title VII of private disability plans compensating all temporary disabilities except pregnancy had found such an exclusion to be prohibited sex discrimination in employment, and citing decisions from Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits).
\item 207. 429 U.S. 125 (1976).
\item 208. \textit{Id.} at 145-46.
\item 210. Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (California's program of nonindustrial disability insurance "divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The . . . benefits of the program thus accrue to members of both sexes.").
\item 211. 417 U.S. 484.
\item 212. 429 U.S. at 136.
\item 213. \textit{Id.} (quoting Geduldig, 417 U.S. at 496-97 n.20).
\item 214. \textit{Id.} at 137.
\item 215. \textit{Id.} at 136-37.
\end{itemize}
The following year, in *Nashville Gas Co. v. Satty*, the Court strained to distinguish *Gilbert* by finding disparate impact in a company policy that required employees returning to work after childbirth to forfeit any accumulated job seniority. The asserted distinction: whereas General Electric had merely declined to extend women a benefit that men could never receive, either, Nashville Gas' compulsory forfeiture of accrued seniority on returning from childbirth forced women to bear a "substantial burden that men need not suffer."

Congress then moved to repudiate *Gilbert*, rendering the slippery benefit/burden characterization unnecessary. Enacted in 1978, the Pregnancy Discrimination Act (PDA) amended the definitional provisions of Title VII to clarify that employment discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited under Title VII. The Court explicitly acknowledged the import of this legislation several years later: "When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."

By reinstating the availability of the basic disparate treatment claim—premised on facial discrimination against pregnancy—to Title VII pregnancy discrimination plaintiffs, the PDA relieved many of them of the necessity of resorting to either disparate impact theory or a showing of pretext. A dozen years later, the Court's *Johnson Controls* decision

---

217. *Id.* at 139-42.
218. *Id.* at 142. In the same decision, the Court found a second company policy, which denied paid sick leave to pregnant employees, "legally indistinguishable from the disability-insurance program upheld in *Gilbert*." *Id.* at 143.
219. As Justice Stevens' *Satty* concurrence had predicted, the "illusory" distinction purportedly drawn between benefits and burdens in the majority's opinion had "engender[ed]... confusion." *Id.* at 153-54 (Stevens, J., concurring in judgment). See, e.g., Siegel, *supra* note 171, at 936 n.35, and JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS 386-87 (3d ed. 1993) for comparisons of appellate decisions purporting to apply the benefit/burden distinction, with varying results.
221. The PDA 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.
222. Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983); *see also id.* at 684 ("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.").
223. *See Siegel, supra* note 171, at 936 n.36: "By defining policies containing exclusionary pregnancy classifications as per se sex-based, the PDA enabled plaintiffs to challenge them on disparate treatment grounds, where *Gilbert* and *Satty* had required they be analyzed in disparate impact terms."
further refined the law in this area by clarifying that it is inappropriate, not merely unnecessary, to apply disparate impact analysis in a subset of Title VII pregnancy discrimination cases. The Court declared that cases involving company fetal protection policies\textsuperscript{225} that explicitly single out pregnant employees, or all women employees, require a disparate treatment analysis.\textsuperscript{226}

Similarly, a post-PDA court could apply disparate treatment analysis in a case alleging discriminatory employer behavior, short of policy, explicitly based on pregnancy. See, e.g., EEOC v. Financial Assur., Inc., 624 F. Supp. 686, 691-692 (W.D. Mo. 1985) (employer commented "[w]e can't have you running around the office with your belly sticking out to here" on learning executive secretary was pregnant, and fired her two weeks later). In this case, the plaintiff did have to persuade the court that the reasons given by the employer for the firing (poor performance, personal phone calls, insubordination) were pretextual, and that her pregnancy was "in fact a substantial motivating factor." \textit{Id.} at 92. However, the pretext involved here differs from the pretext showing that \textit{Gilbert} would have required: that overt discrimination based on pregnancy was actually covert discrimination on the basis of gender.


\textsuperscript{225} \textit{Id.} at 200 ("We hold that Johnson Controls' fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a 'bona fide occupational qualification.'"). Holding that the employer may escape liability for such a policy only by establishing sex as a BFOQ is tantamount to holding that the policy is facially discriminatory and subject to disparate treatment analysis. See \textit{ supra} note 199 (BFOQ as alternative defense against claim of sex-based disparate treatment).

Underlining that disparate impact theory was \textit{not} an available alternative on the facts of this case, the Court declared that "[w]e concluded . . . that Johnson Controls' policy is not neutral . . . " 499 U.S. at 199 (emphasis added). Commenting further, the Court observed that even if it had credited Johnson Controls' explanation that the company policy was based on concern for the health of employees' future children, "absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." \textit{Id.}

\textsuperscript{226} The \textit{Johnson Controls} Court also explained the advantage that its holding represented for plaintiffs who could show explicit sex-based discrimination in an employer's fetal protection policy: "The business necessity standard is more lenient for the employer than the statutory BFOQ defense." \textit{Id.} at 198.

\textit{Johnson Controls} is not directly relevant to the genuinely facially neutral employer policies and practices at issue in this comment. However, the majority's opinion rejected the disparate impact analysis undertaken in one of the leading pregnancy-disability cases discussed below, Hayes v. Shelby Mem. Hosp., 726 F.2d 1543 (11th Cir. 1984). \textit{Johnson Controls}, 499 U.S. at 197-98 ("assumption" of \textit{Hayes} that "sex-specific fetal-protection policies do not involve facial discrimination," and that consequently business necessity standard would apply, "was incorrect"). But it is important not to overstate the extent to which \textit{Johnson Controls} discredits \textit{Hayes} as precedent. Deciding one of the first pregnancy-disability cases to apply the PDA, the \textit{Hayes} court itself "tend[ed] to agree" that the facts presented there called for facial discrimination analysis. 726 F.2d at 1548. However, in order to "be completely fair to the Hospital" and to show that the hospital would still be liable under Title VII, the court also applied disparate impact analysis. \textit{Id.} at 1552. Although application of disparate impact analysis was a mistake on the facts of this case, once the PDA took effect, the disparate impact methodology followed by the \textit{Hayes} court would apply appropriately to employer policies and practices that are truly facially neutral under the PDA.
3. *Title VII Cases Seeking Accommodation for Pregnancy-Related Disabilities*

Only a few published pregnancy discrimination cases brought under Title VII, either before or after enactment of the PDA, deal directly with on-the-job accommodation of pregnancy-related disabilities. A somewhat larger set of published cases concerns leave for women employees temporarily disabled as a result of pregnancy. A number of these cases involve facially neutral employer leave policies attacked as disproportionately harsh on pregnant employees, or on women generally. Much of the analysis in these cases should extend to attempts to obtain on-the-job accommodation of a pregnancy-related temporary disability.

Considered from this perspective, the cases present three primary issues. First, is it appropriate to apply disparate impact analysis when an employer denies on-the-job accommodation to a woman temporarily disabled in connection with her pregnancy? Second, assuming that disparate impact analysis does apply, what showing of adverse impact satisfies the plaintiff's initial burden? Third, if the plaintiff succeeds in demonstrating adverse impact, what showings will suffice for the employer's defense (business necessity) and the plaintiff's rebuttal (availability of less discriminatory alternatives)?

a. *Applicability of Disparate Impact Theory in Pregnancy-Disability Cases*

*Scherr v. Woodland School Community Consolidated District No. 50* is the first case to hold explicitly that PDA claims may be brought under a disparate impact as well as a disparate treatment theory. A number of earlier cases applied disparate impact analysis to pregnancy-disa-
bility claims, but most of them were decided under Satty even though issued after enactment of the PDA. While a claim could qualify for disparate impact analysis under Satty if the plaintiff satisfied the court that a challenged policy targeting pregnant workers imposed a disproportionate burden on one or the other sex, during the early and mid-1980s disagreement arose as to whether disparate impact analysis remained available under the PDA. The controversy turned on proper interpretation of both the wording of the PDA’s second clause and the Act’s legislative history.

Some sources cite Abraham v. Graphic Arts International Union as one of the first decisions to apply disparate impact analysis under the PDA. However, the termination that gave rise to this case occurred before the PDA’s passage, and the court’s discussion relies heavily on Satty. But the opinion also clearly reflects the court’s anticipation that

234. E.g., Mitchell, 599 F.2d 582; Burwell, 633 F.2d 361; Zuniga, 692 F.2d 986. Most of the pregnancy-disability decisions issued during the first several years after enactment of the PDA came under pre-amendment law because the PDA was intended to have prospective force only. See Fields v. Bolger, 723 F.2d 1216, 1219 n.4 (6th Cir. 1984) (PDA “was intended to be prospective only in application”).
235. As summarized supra notes 216-18 and accompanying text.
236. See, e.g., Siegel, supra note 171, at 931 n.15 (summarizing cases and commentary interpreting PDA); id. at 931-40 (arguing that disparate impact cause of action remains available under PDA).
237. The relevant portion of the legislation reads: “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .” 42 U.S.C.A. 2000e(k). For a more complete version of PDA text, see supra note 221.
238. See, e.g., Siegel, supra note 171, at 931 n.38-39 and accompanying text (quoting passage in PDA’s House Report that some sources have taken to restricting PDA’s application to disparate treatment claims); id. at 938 n.47 (arguing that PDA must be interpreted “in . . . context” of “preoccupation” with overturning Gilbert and that “[t]here is simply no indication in the legislative history of congressional intention to abrogate a disparate impact cause of action for pregnancy discrimination. Rather, the House Report specifically recognizes its continued existence.”).
240. E.g., Scherr, 867 F.2d at 979; Siegel, supra note 171, at 936 n.37.
241. Abraham, 660 F.2d at 813, 818 n.56. In this case, a participant in a federally funded training program aimed at promoting employment for women in graphic arts was terminated while taking leave for several weeks after childbirth. Id. at 813. Because she was a temporary employee, the union insisted that the maximum leave available to her was ten days of sick leave and ten days of paid vacation. Id. at 818-19.
242. See id. at 817-19, nn.53-57, 65, 67. The beginning of this portion draws on Satty in a disparate treatment context, explaining that an employer must generally allow pregnant workers the same leave and reinstatement rights as enjoyed by employees temporarily disabled by any other condition. Id. at 817-18. The discussion then shifts to disparate impact analysis because of the “slight variant” involved in this case: the plaintiff’s status as a full-time temporary employee. Id. at 818. The union claimed that this was a special category to which it applied an evenhanded policy of no more than ten days sick leave for any health condition; the court found such evenhandedness insufficient without further justification because the policy had a “drastic” impact on women employees. Id. at 818-19.
much the same approach would apply under the PDA (dispensing only with having to try to draw the burden/benefit distinction).243

A pair of cases, Zuniga v. Kleberg County Hospital244 and Hayes v. Shelby Memorial Hospital, also illustrate this understanding that disparate impact analysis continued to apply as Satty gave way to the PDA.245 In each case, the hospital had terminated a pregnant x-ray technician on grounds of concern over fetal safety.246 But Zuniga arose before enactment of the PDA,247 and therefore followed the “burden” analysis of Satty, whereas Hayes was decided under the amendment.248 Both courts applied disparate impact analysis,249 and both went on to find that the plaintiff had shown disproportionate impact while the employer had failed to establish a business necessity defense.250

Three other opinions display less unanimity about the applicability of disparate impact theory under the PDA. These cases involve airline policies that imposed compulsory leave as soon as a woman flight attendant

243. Id. at 818 & n.56 (quoting Satty’s interpretation of Title VII as prohibiting employers from imposing burdens that deprive women employees of employment opportunities because of their reproductive role, and then explaining that enactment of the PDA had made this interpretation “plain beyond any possibility of any doubt whatsoever insofar as pregnancy and childbirth are concerned” while also “eliminat[ing] the benefit-burden distinction utilized in . . . Satty”).

244. 692 F.2d 986 (5th Cir. 1982).

245. 726 F.2d 1543 (11th Cir. 1984). In addition, as discussed infra note 251, comparison of the two cases demonstrates the PDA’s impact in restoring the disparate treatment cause of action in cases alleging pregnancy-based discrimination.

246. Zuniga, 692 F.2d at 988; Hayes, 726 F.2d at 1546.

247. Zuniga, 692 F.2d at 989 n.6.

248. Id. at 991.

249. 726 F.2d at 1546-47.

250. Zuniga, 692 F.2d at 989; Hayes, 726 F.2d at 1547, 1552-1554.

251. Zuniga, 692 F.2d at 991-94 (“Because the hospital failed to utilize an alternative, less discriminatory means of achieving its stated goals, its business purpose stands revealed as a pretext, and its business necessity defense must fail.”); Hayes, 726 F.2d at 1552-54 (ultimately faulting hospital administration for failing to consider seriously whether there were duties that Hayes could continue to perform that would meet the hospital’s business needs while exerting less discriminatory impact).

Hayes also scrutinized the hospital policy for both facial and pretextual disparate treatment. Id. at 1547-52. The court found that, under the PDA, the search for pretext no longer applied to the facts of this case and that facial discrimination was probably the preferable theory to apply under the Act. Id. at 1547-48 (“we tend to agree that this is a facial discrimination case”). However, as summarized supra note 226, after concluding that the hospital was liable under facial discrimination theory, the court subjected the policy to disparate impact analysis. This analysis served both to ensure “complete fairness to the Hospital” and to demonstrate the court’s conclusion that the hospital would be no more successful at escaping liability under this alternative theory. Id. at 1548, 1554. The court affirmed the district court’s findings “that the Hospital had failed to consider acceptable alternatives that would accomplish the Hospital’s purpose with a less discriminatory impact.” Id. at 1553. As discussed supra notes 224-26 and accompanying text, the Supreme Court in Johnson Controls has since disapproved of applying disparate impact analysis to a fetal protection policy; in such cases, only disparate treatment analysis is appropriate to apply. 499 U.S. 187, 199 (1991). The validity of an employer fetal protection policy was precisely what was at stake in Hayes, as the court there clearly recognized. See, e.g., 726 F.2d at 1552 & n.14 (twice using terminology “fetal protection program”); id. at 1554 (“fetal protection policy”). However, Hayes continues to offer a sound model for analysis of employer policies that are genuinely facially neutral but have a disproportionately harsh effect on pregnant workers.
learned she was pregnant and infringed on pregnant flight attendants’ seniority accrual and transfer rights. *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981). In 1974, the court found that concerns for passenger safety justified the Stop Policy as both a pre-PDA business necessity and a post-PDA BFOQ. *Burwell*, 633 F.2d at 372-73. “[T]here is credible evidence supporting Eastern’s conclusion that pregnancy during the first three weeks is a factor that might affect the safety of its passenger operation.” *Burwell*, 633 F.2d at 372. Although satisfied that flight safety and the risk of disability warranted delaying the return to work until after a postpartum exam at about six weeks after childbirth, the court remanded for a determination as to the 60-day wait under both the business necessity and BFOQ standards. *Harriss*, 649 F.2d at 677, 678. Similarly, it remanded concerning the seniority accrual policy under both standards. *Burwell*, 633 F.2d at 372.


253. Id. at 363.

254. Two policies were at issue in this case: the first required flight attendants to start maternity leave immediately upon finding out that they were pregnant; and the second required pregnant flight attendants to forfeit all accumulated seniority if they transferred to ground positions instead of taking maternity leave (whereas flight attendants temporarily transferred to ground positions because of disabilities not related to pregnancy continued to accumulate seniority). *Burwell*, 633 F.2d at 363. Following *Satty*, the Fourth Circuit called the seniority forfeiture “neutral in its treatment of male and female employees, but . . . [having an] impact . . . solely upon women,” and proceeded to find the policy indefensible under disparate impact analysis. *Burwell*, 633 F.2d at 364-65. The court distinguished a compulsory pregnancy leave policy from the unequal fringe benefits allowed women taking voluntary maternity leave in *Gilbert* and *Satty*, but proceeded to call this leave policy as well “facially neutral” and subject to disparate impact analysis. *Burwell*, 633 F.2d at 367-69.

255. 649 F.2d 670 (9th Cir. 1980).

256. The first, dubbed Stop Policy, required that women flight attendants start maternity leave as soon as they learned they were pregnant; the second (Start Policy) did not allow a woman flight attendant to return to work until 60 days after childbirth; and the third policy denied accrual of seniority after the first 90 days of maternity leave. *Burwell*, 633 F.2d at 367.

257. Id. at 673-79.

258. Id. at 673 (Stop Policy); id. at 677 (Start Policy); id. at 678 (seniority accrual policy).

259. Id. at 676 (Stop Policy); id. at 678 (Start Policy); id. at 679 (seniority accrual policy).

260. The court found that concerns for passenger safety justified the Stop Policy as both a pre-PDA business necessity and a post-PDA BFOQ. *Burwell*, 633 F.2d at 372-73. “[T]here is credible evidence supporting Eastern’s conclusion that pregnancy during the first three weeks is a factor that might affect the safety of its passenger operation.” *Burwell*, 633 F.2d at 372. Although satisfied that flight safety and the risk of disability warranted delaying the return to work until after a postpartum exam at about six weeks after childbirth, the court remanded for a determination as to the 60-day wait under both the business necessity and BFOQ standards. *Harriss*, 649 F.2d at 677, 678. Similarly, it remanded concerning the seniority accrual policy under both standards. *Burwell*, 633 F.2d at 372.

261. 730 F.2d 994 (5th Cir. 1984).

262. *Burwell*, 633 F.2d at 372.
Today, all these airline policies, along with the hospital policies on pregnant x-ray technicians discussed earlier, would be analyzed as facially discriminatory under Johnson Controls. To this extent, among these five decisions only Harriss retains continuing validity. However, Harriss does not stand for the proposition that pregnancy-disability plaintiffs are restricted to maintaining disparate treatment claims under the PDA. Harriss' analysis is properly based on its own facts, which involved policies that explicitly discriminated on the basis of pregnancy. Harriss does not speak to post-PDA situations in which an across-the-board policy or practice has a disproportionately harsh effect on workers disabled through pregnancy or childbirth.\textsuperscript{263}

Two decisions issued before Scherr did concern such situations, and both applied disparate treatment rather than disparate impact analysis: Fields v. Bolger\textsuperscript{264} and Carney v. Martin Luther Home, Inc.\textsuperscript{265} Although each opinion is troubling,\textsuperscript{266} neither clearly rejects the availability of dispa-
rate impact claims for post-PDA pregnancy-disability plaintiffs. In *Fields*, the plaintiff apparently advanced a disparate treatment claim, and this is the only theory the court considered. In *Carney*, there is no clear mention of the nature of the plaintiff's claim, but the court describes her as having been placed on involuntary leave at a time when, although several months pregnant, "she was fully able to perform her job"; this characterization is consistent with disparate treatment analysis.

A year after *Carney*, in *Scherr*, the Reagan administration sought a forthright holding that disparate impact claims did not apply under the PDA—but was rebuffed. Advocating the position of the defendant school districts as amicus curiae, federal attorneys relied on both the plain language and the legislative history of the PDA in attempting to persuade the court that cases brought under the amendment were limited to claims of disparate treatment. This argument did not succeed with the Seventh Circuit. Chiding the advocates for "neglecting the context of the PDA," the court discussed at length the proper interpretation of the amendment.

wheelchairs and assisting one resident who was recovering from surgery with dressing and grooming. *Id.* at 644. Much like Eva Gutierrez, she found herself fighting involuntary unpaid pregnancy leave after bringing in a note from her physician's assistant recommending that she do no unassisted lifting or pushing for the duration of her pregnancy. *Id.* at 644-45. She received this recommendation four and one-half months into her pregnancy, after reporting that she had experienced some lightheadedness and dizziness. *Id.* at 644. Also like Ms. Gutierrez, Ms. Carney eventually got her job back. *Id.* at 645.

The court determined that the facility had placed Ms. Carney on unpaid leave in response to a "pregnancy-related medical condition": namely, "the condition that plaintiff not lift or push without assistance." *Id.* at 648. Finding for the plaintiff, the court stressed that, despite the recommendation, at the time she was "forced... from the workplace" Ms. Carney "could perform her job without difficulty" and "her pregnancy in no way interfered with her job performance." *Id.* at 649.

What the court meant by these characterizations is unclear. Earlier, the opinion seems to allude to the possibility of accommodations. It describes initial reassurances from Ms. Carney's supervisor that other staff could handle occasional escorting of residents in wheelchairs. *Id.* at 644. It also mentions her physician's testimony that "he saw no reason why Carney could not lift a 70 pound resident such as she cared for at Martin Luther Home with assistance." *Id.* (emphasis added). But the court also cites Ms. Carney's testimony that she would not have changed how she performed her job in response to the recommendation, and evidence that several other houseparents had continued to perform their duties "as before" after receiving a doctor's recommendation not to do any heavy lifting or pushing. *Id.* at 645.

Ultimately, *Carney* provides little or no support for pregnant workers who seek accommodation when a pregnancy-related condition does affect their ability to perform particular functions. It could as plausibly be read to support allowing pregnant workers to continue on the job as long as they disregard their doctors' recommendations, and as long as their performance remains just "as before." This would be a sorry achievement. In this light, *Carney* illustrates the inadequacies of restricting the analysis of facially neutral practices that disproportionately harm pregnant workers to the disparate treatment cause of action.

267. 723 F.2d at 1219 ("We . . . note that the cases cited on appeal by defendant address employer policies with disparate impact, but that plaintiff's claim in this case involves disparate treatment of one employee.").

268. 824 F.2d at 645.


270. *Id.* at 977-78 ("They contend that the PDA is a sweeping mandate of equal treatment, but does not contemplate disparate impact claims.").

271. *Id.* at 978.

272. *Id.* at 978-80.
The court concluded that "the PDA did not abolish 'the impact approach.'"273 Instead, according to the court, the PDA restored the impact approach to its "original purpose under Title VII as a means of challenging facially neutral employment practices that nevertheless discriminate."274

Since Scherr, several published decisions have acknowledged the applicability of disparate impact analysis in pregnancy-discrimination cases275 (none cited Scherr directly on this holding, however276). The only post-Scherr opinion that appears unable to fathom the applicability of the disparate impact approach to a pregnancy-disability claim is Dunning.277 The

273. Id. at 980.
274. Id. (citing Siegel, supra note 171).

Although this decision is significant for explicitly affirming that a PDA claim could be based on a theory of disparate impact, ultimately the defendants in this litigation prevailed. The Seventh Circuit’s 1988 decision involved women school teachers in two consolidated cases who challenged school district policies that forbade combining paid sick leave with unpaid leave of absence to cover a period of pregnancy-related disability and a subsequent period immediately after childbirth to care for the new baby. Scherr, 867 F.2d at 975-76. One of the districts provided unpaid maternity leave for up to three semesters, which could start on the day that a woman’s doctor considered that her pregnancy disabled her from continuing to perform teaching duties. Id. at 977. But if a teacher chose this option, she had to forgo receiving paid sick leave for any time while she was disabled due to childbirth. Id. At the other district, where up to two terms of unpaid maternity leave were available as of right, a pregnant teacher who opted to use paid sick leave to cover her period of pregnancy-related disability had to return to work as soon as that disability ended; she could not extend her absence on an unpaid basis in order to care for her baby. Id. In both of the original cases, the lower court granted the school districts’ motions for summary judgment on the disparate impact claims; and on each appeal of the disparate impact ruling, the Seventh Circuit reversed and remanded for further development of the facts material to these claims. Id. at 983-84.

On remand after the 1988 decision, the district court once again held against one of the school-teachers, and this time the Seventh Circuit affirmed. Maganuco v. Leyden Community High Sch. Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991). The court explained that the policy did not affect teachers who returned to work as soon as their pregnancy-related disability ended, so its impact was attributable not to pregnancy but to a “choice . . . [that was] not the inevitable consequence of a medical condition related to pregnancy.” Id. at 444-45. So long as the leave allowed, paid or unpaid, was sufficient to cover a period of actual pregnancy-related disability, “leave policies that may influence the decision to remain at home after the period of pregnancy-related disability has ended fall outside the scope of the PDA.” Id. at 445.


276. Warshawsky does refer to Scherr in its discussion of the nature of the statistical showing required to establish adverse impact. Warshawsky, 768 F. Supp. at 653 n.6.

277. Dunning v. National Indus., Inc., 720 F. Supp. 924, 930 n.9 (M.D. Ala. 1989) (commenting that the “exact nature” of plaintiff’s sex discrimination claim concerning the employer’s refusal of accommodation is unclear to the court, “inasmuch as Dunning offered no evidence on National Industries’s policy with respect to men experiencing difficulty at work because of medical problems”). This evidentiary requirement assumes a disparate treatment approach. The court appears not to have troubled itself at any length to explore the “exact nature” of Dunning’s sex discrimination claim: “Since Dunning is entitled to relief on her theory of race discrimination, the court need not and does not reach her claim of sex discrimination on this particular adverse employment decision.” Id.
opinion leaves it unclear, however, whether the plaintiff sought to apply disparate impact analysis to her case.\textsuperscript{278}

There is one other opinion that might be read as limiting PDA-based pregnancy-disability claims to disparate treatment analysis, from the only other circuit to address this issue since \textit{Scherr: EEOC v. Ackerman, Hood & McQueen, Inc.}\textsuperscript{279} In this case, the employer fired an executive secretary who had presented a doctor’s recommendation that she not work more than forty hours a week for the last five months of her pregnancy.\textsuperscript{280} On appeal, after the district court ruled in favor of the plaintiff, the Tenth Circuit declared that "[c]laim[s] made under the PDA are analyzed under the disparate treatment analysis applied in Title VII cases."\textsuperscript{281}

In context, however, the apparent sweep of this statement can be seen as misleading. First, in the appeal, the only dispute concerned whether the district court had erred in finding disparate treatment\textsuperscript{282} Moreover, the plaintiff presented evidence of several instances in which the employer had accommodated employees’ temporary disabilities or personal problems, either through leave or by adjusting their work schedule.\textsuperscript{283} Thus, the employer’s policy was \textit{not} neutral, so disparate impact analysis would not have been apposite. Finally, neither of the two cases that the court cited for its statement actually stands for the proposition that only disparate treatment analysis may apply under the PDA.\textsuperscript{284}

So far, the Supreme Court has skirted this issue. The Court’s closest approach to confronting the applicability of disparate impact theory under the PDA came in \textit{California Federal Savings & Loan Assn. v. Guerra.}\textsuperscript{285} In this case, the financial institution challenged a California statute requiring employers of five or more employees to provide up to four months of leave, with return rights, to employees disabled by pregnancy, childbirth, or related medical conditions.\textsuperscript{286} The employer claimed that the preferential

\begin{itemize}
\item \textsuperscript{278} \textit{Id.}
\item \textsuperscript{279} 956 F.2d 944 (10th Cir. 1992).
\item \textsuperscript{280} \textit{Id.} at 946.
\item \textsuperscript{281} \textit{Id.} at 947.
\item \textsuperscript{282} \textit{Id.} at 946.
\item \textsuperscript{283} \textit{Id.; see also EEOC v. Ackerman, Hood & McQueen, Inc.}, 758 F. Supp. 1440, 1447 (W.D. Okla. 1991) (detailing prior accommodations by employer for nonpregnant employees, including an earlier instance involving plaintiff herself), \textit{aff’d}, 956 F.2d 944 (10th Cir. 1992).
\item \textsuperscript{284} \textit{See id.} at 947 (citing \textit{Carney} and \textit{Beck v. QuikTrip Corp.}, 708 F.2d 532 (10th Cir. 1983)). Regarding \textit{Carney}, see supra note 266 and accompanying text. \textit{Beck} was not a pregnancy-disability case: the plaintiff’s termination was triggered when she took time off work to take a sick child to see the doctor. 708 F.2d at 533. She claimed that her employer actually terminated her because she was pregnant, however, and the lower court found her evidence of disparate treatment persuasive. \textit{Id.} at 534. The employer’s appeal, which did not succeed, concerned the trial court’s acceptance of statistical information as bearing on the plaintiff’s pretext argument and the propriety of the court’s preparation of preliminary findings before the employer had finished presenting all its evidence. \textit{Id.}
\item \textsuperscript{285} 479 U.S. 272 (1987) [hereinafter \textit{Cal Fed}].
\item \textsuperscript{286} \textit{CAL. Gov’t Code} § 12945(b)(2) (West Supp. 1993). This is a companion provision of the accommodation statute at issue in Eva Gutierrez’ case, § 12945(c)(2).\end{itemize}
treatment of pregnancy afforded by the state statute was inconsistent with, and preempted by, Title VII (as amended by the PDA).287

A majority of five found instead that "Title VII, as amended by the PDA, and California's pregnancy disability leave statute share[d] a common goal."288 Quoting the seminal disparate impact case, Griggs, the majority declared that Title VII's purpose is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of... employees over other employees."289 The PDA overlay "guarantee[d] women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."290 The California leave statute likewise promoted equal employment opportunity: "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."291

However, despite drawing on Griggs and developing the equal employment opportunity justification for the California statute, in the end Cal Fed did not uphold the state statute on this basis. Instead, finding that employers could comply with both Title VII (as amended by the PDA) and the state leave statute,292 the majority held that Title VII did not preempt the California law.293 Since the preemption issue sufficed to decide the case, the majority explicitly declined to reach the question whether the statute could be upheld as providing an appropriate response to employer policies that had a disparate impact on women:

Because we conclude that in enacting the PDA Congress did not intend to prohibit all favorable treatment of pregnancy, we need not decide and therefore do not address the question whether § 12945(b)(2) could be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers.294

---

287. Cal Fed, 479 U.S. at 279; see also id. at 284:

Petitioners argue that the language of the federal statute itself unambiguously rejects California's "special treatment" approach to pregnancy discrimination, thus rendering any resort to the legislative history unnecessary. They contend that the second clause of the PDA forbids an employer to treat pregnant employees any differently than other disabled employees.

288. Id. at 288.


290. Id. at 289 (quoting Senator Williams from the PDA's legislative history).

291. Id. at 289.

292. Id. at 290-91.

293. Id. at 292.

294. Id. at 292 n.32.

Reviewing Cal Fed, the Harvard Law Review criticized the Court's failure to apply disparate impact analysis. The Supreme Court, 1986 Term—Leading Cases, 101 Harv. L. Rev. 119, 320, 328-29 (1987). The case summary suggests that the majority may have realized that "finding that denial of pregnancy leave disparately affects women could require it to hold that pregnancy leave is not merely permitted, but mandated by title VII." Id. at 327. Since the PDA's legislative history contains statements disavowing congressional intent to require employers to provide special pregnancy leave, the summary surmises, "the Court may have eschewed disparate impact analysis to avoid addressing the
At present, then, there is little case precedent that directly addresses the validity, under the PDA, of applying disparate impact analysis to genuinely neutral employer leave or accommodation policies that disadvantage pregnant workers. Most of the recent decisions, however, accept the principle that disparate impact theory may apply to such cases. In a particular case, a court must then determine whether the plaintiff’s evidence makes the necessary showing of adverse impact.

b. Nature of Adverse Impact Showing

Despite their differences over the appropriateness of treating workers with pregnancy-related disabilities any differently from workers with other temporary disabilities, Linda Krieger and Patricia Cooney, on the one hand, and Wendy Williams, on the other, have agreed in general terms on the kind of showing that can establish adverse impact in a pregnancy-disability discrimination case. As Krieger and Cooney explain:

In order to show that a no-leave policy has a disparate impact on women because of their role as childbearers, it is not necessary to show that such a policy has a statistically significant adverse impact on females employed by one specific employer. This proposition was adopted by the Supreme Court in Dothard v. Rawlinson. . . . Thus, a court can take judicial notice of the fact that since only women become pregnant, a no-leave policy will have a disproportionate impact upon them.295

Some courts have followed this approach in pregnancy discrimination cases. One decided Abraham v. Graphic Arts International Union,296 the case of the federal training program participant terminated for taking leave for several weeks after childbirth.297 As the court observed, “[w]hile a ten-contradiction inherent in the PDA: the relief that title VII requires upon a finding of disparate impact was specifically disavowed in the PDA’s legislative history.” Id. at 328.

For contrary views on the import of the PDA’s legislative history and the proper construction of its terms, see, e.g., Siegel, supra note 171, at 937-38 & nn.39-47 (in enacting the PDA, Congress repudiated Gilbert’s denial of a disparate treatment cause of action in pregnancy-based claims, which had restricted such plaintiffs to disparate impact theory; “Congress’ preoccupation with parity principles . . . must be read in that context,” id. at n.47, and thus the PDA must be understood as restoring the disparate treatment cause of action, not restricting the availability of disparate impact analysis, in pregnancy discrimination cases); Scherr, 867 F.2d at 978-80 (same).


Williams, also citing Dothard, suggests, though with less apparent enthusiasm, that statistical evidence from “a relevant population” “might be acceptable” when a single employer’s workforce would provide too small a sample to achieve statistical significance. Williams, supra note 171, at 373 n.189.

296. 660 F.2d 811 (D.C. Cir. 1981). As discussed supra notes 239-43, this case appears to have been decided under Satty rather than the PDA, but it also anticipated a basic continuity in approach to disparate impact claims under the PDA. Moreover, even cases based on pre-PDA law—but whose facts involve policies that did not explicitly target pregnancy, and thus would be regarded as neutral even after the PDA took effect—remain relevant precedent on the question of the type of adverse impact showing required of the pregnancy-disability plaintiff, once it is accepted that the disparate impact methodology continues to apply to claims arising after the PDA’s enactment.

297. Unlike Satty and the cases of the x-ray technicians (Zuniga, Hayes) and flight attendants (Burwell, Harriss, and Levin), the policy at issue in Abraham apparently was truly neutral in the post-
day leave undoubtedly would accommodate a wide range of temporary disabilities, it falls considerably short of the period generally recognized in human experience as the respite needed to bear a child.” Reemphasizing its reliance on common experience, the court asserted that it was “beyond peradventure” that such a short leave was too short for childbirth recovery. Consequently, the limitation had a “drastic effect on women employees of childbearing age—an impact no male would ever encounter.” In the court’s view, these considerations were sufficient to meet the plaintiff’s initial burden of demonstrating that the disputed policy caused an adverse impact.

Another case illustrating a court’s willingness to employ judicial notice in assessing the adverse impact of an employer policy was Mitchell v. Board of Trustees of Pickens County School District. Here, a high school teacher challenged a policy that required teachers to report their pregnancy as soon as they learned of it, along with the associated practice of refusing to renew pregnant teachers’ contracts for the following school year.

On appeal, the Fourth Circuit observed that the plaintiff had been able to point to only a few instances where the policy she was challenging actually applied.

Thus the court was faced with a record in which the universe of persons potentially affected and those actually affected by the challenged policy did not permit . . . reliable statistical proofs of actual consequences . . . . It had

PDA sense of not explicitly targeting pregnancy. It is hardly surprising that courts applying the disparate impact methodology to policies that discriminated against pregnancy would find resulting adverse impact on women to be “beyond dispute.” Saty, 434 U.S. at 141, or “obvious[.]” Burwell, 633 F.2d at 364 (at least once they disposed of satisfying the “burden” criterion under Saty; see, e.g., Harris’ disagreement with the district court on how to characterize the 90-day seniority forfeiture, 649 F.2d at 678-79). See, e.g., Zuniga, 692 F.2d at 991 (adverse impact established in “most clear-cut fashion imaginable” by unwritten policy that required pregnant x-ray technicians to resign or lose their jobs without reinstatement rights). But among the early-1980s cases, only Abraham remains relevant to the post-PDA problem of how to go about assessing whether a facially neutral policy exerts an adverse impact based on pregnancy.

298. Abraham, 660 F.2d at 819.
299. Id.
300. Id.
301. Id.
302. Id.
303. 599 F.2d 582 (4th Cir.), cert. denied, 444 U.S. 965 (1979). Arising in the early 1970s, this case was decided under pre-PDA law. Id. at 584-85.
304. Id. at 583. Unlike the policy at issue in Abraham, the policy in Mitchell did explicitly target pregnancy. Mitchell remains relevant in the present context as an illustration of judicial willingness to bring to bear recognition of the impact that such a policy would have in the labor force at large, instead of insisting on a statistically significant showing of adverse impact at a single workplace (as the courts did in several more recent district court decisions, discussed infra notes 309-25 and accompanying text). 305. Id. at 585.
instead to proceed on the basis of the few specific applications of the policy proven, such inferences of likely other applications as these instances could rationally support, and judicial notice of the world as it is and as it is known in common experience to be.\textsuperscript{306}

Approving the lower court's approach in this portion of the case, the appellate court commented that "'[s]tatistical proof of actual applications is not . . . indispensable to proving the disparate impact \textit{prima facie} case."\textsuperscript{307} As an alternative, it supported "'[c]ircumstantial evidence, complemented by judicial notice to show that a facially neutral policy must in the ordinary course have a disparate impact on a protected group of which an individual plaintiff is a member.'\textsuperscript{308}

However, several cases applying disparate impact analysis under the PDA have set exceedingly stringent criteria for the plaintiff's initial showing of differentially adverse impact. For example, \textit{United States EEOC v. Warshawsky and Co.}\textsuperscript{309} required fairly elaborate statistical modelling in a challenge to a firm's requirement that employees must have worked there for at least one year as a \textit{condition of eligibility for long-term sick leave}.\textsuperscript{310} Of over 1,800 employees who had had less than a year's tenure between 1985 and early 1989, the company had discharged 53 pursuant to this policy, 50 of them women and 20 of them pregnant.\textsuperscript{311}

As the court commented, "EEOC does not cite any case, and this court has not found any, in which a statistical model has been used to show disparate impact in a 'pregnancy discrimination' case."\textsuperscript{312} However, both the EEOC and the employer proposed statistical models for determining whether the policy created an adverse impact—and the court rejected both of these, instead applying a model of its own devising.\textsuperscript{313} As it happened, application of this model did produce statistically significant results indicating an adverse impact on women employees.\textsuperscript{314}

But although insistence on statistical significance within the employer's workforce did not thwart the disparate impact claim in \textit{Warshawsky}, such insistence did have this effect in a still more recent pregnancy

\begin{footnotes}
\footnote{306. Id.}
\footnote{307. Id. at 585 n.7.}
\footnote{308. Id. at 585-86 n.7 (citing Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)).}
\footnote{309. 768 F. Supp. 647 (N.D. Ill. 1991).}
\footnote{310. Id. at 650.}
\footnote{311. Id.}
\footnote{312. Id. at 653.}
\footnote{313. Id. at 651-55. The court did recognize that "[b]ecause only women can get pregnant, if an employer denies adequate disability leave across the board, women will be disproportionately affected." Id. at 654. Yet in order to assess the adequacy of the policy at issue, it applied the "eighty percent rule" to the sample of first-year men and women actually discharged under the long-term sick leave policy between 1985 and 1989, instead of considering whether a one-year tenure criterion would tend to have an adverse impact on women workers as a group. Id. at 654-55.}
\footnote{314. Id. at 655.}
\end{footnotes}
discrimination case, *Kelber v. Forest Electric Corp.*315 Here, the court found that a woman electrician failed to make a showing of adverse impact on either women or pregnant workers because small sample size rendered numerical disparities between the employment patterns of the company’s male and female electricians statistically insignificant.316 Combining the data for Forest Datacom (Kelber’s actual employer) and those of its corporate sibling, Forest Electric, did yield statistically significant disparities.317 However, based on the court’s finding that Electric was not sufficiently integrated with Datacom to be held liable under Title VII for Datacom’s acts, it declined to premise its adverse impact analysis on the combined data.318

Still another recent opinion illustrating judicial unwillingness to take judicial notice of a policy’s adverse impact on women employees is *Porter v. Kansas.*319 This decision approved termination of a pregnant psychiatric aide at a state hospital after she submitted a statement from her doctor that restricted her from lifting more than forty pounds.320 The court found that psychiatric aides “[o]n occasion” were required to “restrain and/or seclude” patients, and that either activity could entail lifting more than forty pounds.321

Applying disparate impact analysis, the court also found that Porter had not shown that the requirement of lifting more than forty pounds had a disproportionate adverse impact on women, “or even pregnant women, as a class.”322 As data “[t]o the contrary,” the court mentioned a single case, one of Ms. Porter’s co-workers whose doctor did not restrict her from lifting during her pregnancy and who therefore was not compelled to join Ms. Porter in involuntary leave “notwithstanding her pregnancy.”323 If the Supreme Court had reasoned this way in *Griggs*,324 it would have found no adverse impact attributable to the high school graduation requirement so long as the employer could produce one black employee who had graduated from high school.325

---

316. Id. at 333.
317. Id. at 333 n.7.
318. Id.
320. Id. at 1227, 1231. The plaintiff, a black woman, challenged the termination on grounds of both race and sex discrimination, but the employer prevailed on both claims. Id. at 1226, 1228, 1231.
321. Id. at 1227.
322. Id. at 1230.
323. Id.
325. It may have been somewhat more appropriate for the court to consider that Ms. Porter appears not to have advised the hospital that her new doctor removed the forty-pound lifting restriction before her formal discharge, although this occurred several days after she was sent home. Porter, 757 F. Supp. at 1228, 1230. Even at that, the nonaccommodation policy would still have cost her some days’ work, and it would have been the doctor, rather than an absence of adverse impact in the hospital policy, that might have spared her job.
To date, under the PDA and following Johnson Controls, only district courts have reached adverse impact determinations in pregnancy-disability cases involving neutral employer policies and practices, and these courts have applied excessively stringent criteria. In future pregnancy-disability cases brought under Title VII, courts should revert to the approach taken in Abraham and (assuming there was a truly neutral policy or practice) Mitchell with respect to the adverse impact showing. Referring to the kinds of data and medical guidelines reviewed in part III should be sufficient to establish that a genuinely neutral nonaccommodation policy or practice inherently exerts an adverse impact based on pregnancy. The key issue, on which the decision in any case of this nature should turn, is whether the disproportionate impact is nevertheless justified on the basis of business necessity and an absence of less discriminatory alternatives at the particular workplace.

c. Business Necessity and Available Alternatives

Business necessity and less discriminatory alternatives remain underdeveloped concepts, which very few of the published pregnancy-disability
cases have examined in detail. Some of the opinions confine their analysis to disparate treatment theory, while others that do apply disparate impact analysis either remand the justification determination or stop short of this point after finding no adverse impact. Still others offer only the sketchiest discussion of business necessity and possible alternatives, sufficient to communicate the court's satisfaction that even if the plaintiff had not failed (in the court's view) to show adverse impact, the employer would have prevailed on the strength of its business necessity argument.

Early Supreme Court disparate impact cases suggest that, at this stage, the analysis breaks down into two discrete steps. First, a court was to consider whether the employer had established business necessity. Then, if it found that the employer had carried this burden, the court was to turn to the question of whether the plaintiff had successfully rebutted by showing the availability of an alternative policy or practice that would accomplish the employer's legitimate purposes without as harmful an impact on a protected group.

327. E.g., Fields v. Bolger, 723 F.2d 1216 (6th Cir. 1984); Carney v. Martin Luther Home, Inc., 824 F.2d 643 (8th Cir. 1987).

328. E.g., Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 679 (9th Cir. 1980) (concerning denial of seniority accrual after 90 days of maternity leave); Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 820 (D.C. Cir. 1981). Mitchell v. Board of Trustees, 599 F.2d 582, 587-88 (4th Cir. 1979), remanded for the business necessity determination with an explanation that the district court appeared to have accepted a school board defense framed in terms of "legitimate state interest" instead of business necessity.


330. E.g., Porter v. Kansas, 757 F. Supp. 1224, 1230 (D. Kan. 1991). At this point, the court faults the plaintiff for failing to discredit the facility's "stated 'business necessity' reason" for requiring a capacity to lift more than 40 pounds: namely, that psychiatric aides were "sometimes required to help restrain patients." Id. The plaintiff did point out that such lifting was not part of her job description and was not a daily occurrence. Id. However, the court describes her as "conced[ing] . . . that such an ability could be called into play on occasion" and as having "produce[d] no other evidence in support of her argument that this ability was not 'reasonably necessary.' " Id. Although the discussion is so short as to be unclear on this point, it appears that the court may have assigned the plaintiff the burden of discrediting the employer's "stated" justification, instead of requiring the employer to establish the business necessity of its lifting requirement (as opposed to simply "stat[ing]" a reason). This verges on a misallocation of the burden at this stage of disparate impact analysis. See infra note 331 (Griggs' description of congressional allocation of this burden to employer); see also Harriss, 649 F.2d at 679 (employer carries burden of showing policy's necessity); United States EEOC v. Warshawsky & Co., 768 F. Supp. 647, 655 (N.D. Ill. 1991) (rejecting employer's defense of policy of no sick leave during first year of employment, as aimed at reducing high turnover among first-year employees, with comment that "[m]ere recitation of a policy's necessity is not sufficient to carry defendant's burden of production under Title VII").

331. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."); id. at 432 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

Some pregnancy-disability cases have effectively merged these steps, citing failure to use or give serious consideration to a less discriminatory alternative as refuting the employer's business necessity argument. For example, the *Zuniga* court bypasses the question of whether concern for employees' fetuses could qualify as a business necessity that legitimated terminating the pregnant x-ray technician: "*Zuniga* . . . effectively revealed the alleged business necessity to be a mere pretext for discrimination by showing that the Hospital failed to utilize an available, alternative, less discriminatory means of achieving its business purpose"—in this case, a leave of absence instead of outright termination.\(^\text{333}\)

The other x-ray technician decision, *Hayes*,\(^\text{334}\) more fully examines the possible bases for asserting business necessity in such a case, before proceeding to the question of alternatives. Here, the court rejected avoidance of tort liability as a basis for claiming business necessity,\(^\text{335}\) but accepted the possibility that concerns about fetal health could provide such a basis.\(^\text{336}\) However, it then expressed disbelief that the hospital was actually motivated by such concerns.\(^\text{337}\) Finally, the court concluded that the plaintiff had in any case succeeded in rebutting the hospital’s business necessity defense on the strength of the district court’s finding that

the Hospital failed to consider acceptable alternatives that would accomplish the Hospital’s purpose with a less discriminatory impact. In particular, . . . Hospital officials failed to explore seriously other duties within the Hospital that Hayes could perform. Additionally, . . . the Hospital failed to consider rearranging Hayes’s duties within the radiology department to minimize her radiation exposure.\(^\text{338}\)

\(^{333}\) *Zuniga* v. Kleberg County Hosp., 692 F.2d 986, 992 (1982). Two of the flight attendant cases take a somewhat similar approach: Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371-72 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981), and Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 674-76 (9th Cir. 1980) (each applying criteria from its respective circuit that incorporated absence of superior or less discriminatory alternatives as a factor in assessing business necessity); see also the Burwell dissent: "If . . . alternatives [better suited to accomplishing the legitimate business purpose, or equally effective but creating less adverse impact] exist, it cannot be said that the employer’s business practice, though job related, is necessary." 633 F.2d at 374 (Butzner, J., concurring in part and dissenting in part) (citing Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)).


\(^{335}\) Id. at 1552 n.15.

\(^{336}\) Id. at 1552-53.

\(^{337}\) Id. ("[T]he Hospital’s emphasis on the avoidance of litigation costs, rather than the health of its employees’ offspring, underscores our belief that the Hospital disregarded Hayes’s civil rights out of concern for the Hospital’s finances, not out of any genuine concern for Hayes’s fetus."). In addition, the court’s earlier disparate treatment discussion points out that the hospital’s policy “would probably have been ineffective in protecting Hayes’ fetus” because it did not become applicable until after a pregnancy was discovered, which in turn occurred after the period of greatest danger to a developing fetus. *Id.* at 1551 n.13. Even if the court had accepted as genuine the employer’s professed motivation, using such an ineffective means to accomplish an employer’s legitimate business purposes would tend to undermine the employer’s argument of business necessity.

\(^{338}\) Id. at 1553-54.
Burwell v. Eastern Airlines Inc. offers one of the most extensive analyses of an employer’s business necessity defense. Two policies were at issue here: one compelling flight attendants to take leave from their positions as soon as they found out they were pregnant, and the other imposing a forfeiture of accumulated seniority on pregnant flight attendants who transferred to ground positions instead of going on maternity leave. The court made short work of the company’s contention that the seniority forfeiture was required under its collective bargaining agreement, and consequently protected by the bona fide seniority system provision of Section 703(h) of Title VII: “It is not necessary to even consider that contention. The provision of the collective bargaining [agreement] upon which Eastern reportedly based this practice contains no language excluding pregnant flight transferees from its seniority provisions. It was only Eastern’s unilateral interpretation that effected this grossly discriminatory result.”

As for the compulsory leave, the court rejected concerns over fetal safety as a justification for this policy. However, the company’s argument that the policy was “legitimately designed to enhance the safety of passengers [met] with more success,” though not complete success. After reviewing evidence on how a flight attendant’s capacity to discharge her routine and emergency duties changes as her pregnancy progresses, the court ruled that the legitimate business objective of transporting passengers safely justified mandatory maternity leave (from the position of flight attendant) after the thirteenth week of pregnancy. However, the court found “no credible evidence supporting Eastern’s contention that pregnancy during the first thirteen weeks is a factor that might affect the safety of its passenger operation.” Therefore, the imposition of leave during this stage of pregnancy was invalid under Title VII.

In contrast, both Harriss and Levin imposed no starting point on mandatory maternity leave at Pan Am and Delta, concluding that even such a “stringent personnel policy” was a reasonable response to concerns for

---

340. Id. at 363.
341. Id. at 365.
342. Id. at 371.
343. Id.
344. Id. at 365-66.
345. Id. at 362, 371 ("majority of the court reverse[d] ... the district court's judgment that invalidated Eastern's mandatory leave policy between the 13th and 28th weeks of pregnancy."); see also id. at 367 (district court's findings, reversed in part by this decision, would have permitted later onset of mandatory leave for some flight attendants, depending on doctor's evaluation); id. at 373 ("an industry with a primary function of managing the safety of large numbers of passengers must be allowed more latitude").
346. Id. at 372.
347. Id. at 362.
350. Harriss, 649 F.2d at 675.
passenger safety. In addition, Levin applied a very narrow definition of "less discriminatory alternative": "only that which accords with the employer’s customary practices so amenably that the failure to use the alternative indicates that the legitimate concerns supporting the challenged standard are pretextual." Consequently, even though the court acknowledged that there was "no suggestion that transferring pregnant flight attendants to available ground positions would have effected a significant disruption of Delta’s operations," and that Delta had adopted just such a policy in 1974, it declined to find that such transfers qualified as a less discriminatory alternative.

The most recent pregnancy-disability case to consider an employer’s business necessity defense at any length is Warshawsky. Here, under a written policy, the company required all employees to work for at least a year in order to become eligible for paid sick leave, and discharged first-year employees who need long-term sick leave. After confirming that the policy had an adverse impact on women because of the high discharge rate it produced among pregnant first-year employees, the court turned to the employer’s justification for the policy. The company claimed that this policy rewarded employees who stayed with the firm for more than a year, and combatted high turnover among first-year employees. But the court observed that the employer “merely recite[d] th[is] reason as its business justification without providing any evidence for it.” This would not do: "Mere recitation of a policy’s necessity is not sufficient to carry defendant’s burden of production under Title VII."

Moreover, moving on to consider potential alternatives to this policy, the court found that the company had liberalized the policy in 1989, changing the eligibility threshold for paid sick leave from one year’s tenure to either sixty or ninety days, depending on the employee’s classification. Not only did this policy have less adverse impact; since most first-year turnover occurred within the first ninety days of employment at the firm,

351. Id.; Levin, 730 F.2d at 998.
352. Levin, 730 F.2d at 1001.
353. Id.
354. Id.
355. "[T]he job of flight attendant is manifestly distinct from any ground position; the training and skills required are generally unrelated. Consequently it cannot be said that permitting such transfers entailed no burden for the employer and was administratively a natural alternative to placing pregnant flight attendants on maternity leave." Id. at 1001-02.
357. Id. at 650.
358. Id. at 654-55.
359. Id. at 655.
360. Id.
361. Id. The court continued, “[N]o one in management knew the reason for the policy; the policy just existed.” Id.
362. Id. (citing Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659 (1989)).
363. Id.
the revised policy was also more effective in promoting the company's stated goal. The proffered business justification being so flimsy, and with superior alternatives readily available, the court granted summary judgment for the EEOC on its disparate impact claim.

As few pregnancy-disability decisions as there are discussing business necessity and available alternatives at any length, Warshawsky is the only genuine disparate impact case following Johnson Controls. Thus, current case law offers little guidance about the types of workplace conditions that qualify as a business necessity and thereby excuse nonaccommodation of pregnancy-related disabilities. Nor does it provide much indication about the types of accommodations that courts may require as less discriminatory alternatives in particular circumstances.

4. Limitations of Disparate Impact Analysis Under Title VII

Together, enactment of the PDA and development of disparate impact doctrine under Title VII should help promote increased employer accommodation of temporary pregnancy-related disabilities. However, the uneven results of the few cases published to date indicate that, so far, pressing a disparate impact claim under Title VII has been an unreliable means of seeking such accommodation.

a. Uncertainty Created by Supreme Court Decisions

Several Supreme Court decisions have also cast doubt on the reliability of Title VII for this purpose. One, as discussed earlier, is California Federal Savings & Loan Assn. v. Guerra, which appeared to evade deciding whether disparate impact claims remained available since enactment of the PDA. Only a week later, another Court decision denied federal protection to workers who left their jobs on account of pregnancy: Wimberly v. Labor and Industrial Relations Commission.

The plaintiff was a Missouri worker who had been on pregnancy leave under an employer policy that did not guarantee return rights. When she sought to return to work, her employer informed her that no positions were

364. Id.
365. Id.
366. A court today would analyze the x-ray technician and flight attendant cases as disparate treatment claims, subject to a BFOQ defense. See supra notes 224-26 and accompanying text.
367. See Siegel, supra note 171, at 943-46 (use of disparate impact analysis under PDA to challenge "inflexible job descriptions").
368. Wendy Williams observes that it can be complicated to establish proof of a violation under Title VII, and that the very uncertainty over whether a Title VII violation exists may tend to make litigation "perhaps more likely" when a dispute arises. Williams, supra note 171, at 373 n.190.
369. See supra notes 285-94 and accompanying text.
370. See supra note 294 and accompanying text.
372. Id. at 512-13.
At that point, she filed for state unemployment insurance benefits. However, the state denied her claim on grounds that, under the applicable Missouri statute, pregnancy did not qualify as a good cause for leaving a job voluntarily. Ms. Wimberly attacked the state statute as inconsistent with the Federal Unemployment Tax Act's (FUTA) prohibition against denying unemployment insurance benefits "solely on the basis of pregnancy or termination of pregnancy." The Supreme Court affirmed the decision by the Missouri Supreme Court that Missouri's statute was consistent with FUTA. Although most states' unemployment insurance programs treated pregnancy leave as a voluntary quit for good cause, this was not required under federal law. FUTA merely prohibited states from singling pregnancy out for unfavorable treatment; it did not require preferential treatment of pregnancy under the federal-state unemployment insurance program. The state statute applied equally to "all persons who [left] work for reasons not causally connected to the work or the employer . . . . " The state could have disqualified Wimberly without ever knowing she had been pregnant, so long as it knew that her work and her employer had played no part in her decision to quit. Consequently, pregnancy was not the "sole[ ] . . . basis" for the denial of unemployment benefits.

Since the Court decided it under FUTA, Wimberly does not apply directly to Title VII pregnancy discrimination claims. However, particularly with seven other Justices joining Justice O'Connor's opinion, the case reflects the Court's lack of recognition of pregnant workers' need for job and income security outside the Title VII context. The Court also shows its reluctance to interpret federal employment statutes in a manner that minimizes the disruptive effect of neutral "obstacles" on women workers' careers and on their families' income, unless inescapably compelled by the statute.

The most recent Supreme Court opinion to cast some doubt on the utility of disparate impact analysis in pursuing accommodation of pregnancy-related disabilities is Johnson Controls. As a disparate treatment decision, Johnson Controls does not bear directly on disparate impact anal-

373. Id. at 513.
374. Id.
375. Id.
376. Id. at 514.
377. Id.
378. Id. at 515.
379. Id. at 516-17, 518, 522.
380. Id. at 517.
381. Id.
382. Id.
383. Justice Blackmun took no part in the decision. Id. at 511.
analysis of pregnancy-discrimination claims that challenge neutral policies that
deny accommodation to temporary disabilities. However, the majority
opinion contains dictum that could invite citing out of context.

While their context limits the reach of most of these statements, one
passing reference remains troublesome: in its "word about tort liability," the
majority describes Cal Fed as having involved "a California statute that
expanded upon the requirements of the PDA." The majority does not
clarify precisely which aspects of the state statute it views as having ex-
panded on the PDA—for example, the basic requirement of leave with reinstatement rights for workers disabled in connection with pregnancy, or the
specified maximum length of the leave entitlement.

b. Limitations of Title VII Coverage and Protections

Besides these Supreme Court decisions, there are several other reasons
for concern about relying too heavily on Title VII as a means for bringing
about more widespread on-the-job accommodation of pregnancy-related
disabilities. First, the EEOC's guidelines on sex discrimination under Title
VII specify only "insufficient . . . leave" as a basis for disparate impact
analysis. The guidelines' discussion of accommodation of pregnancy-
disabilities on the job is limited to a disparate treatment framework.

385. Discussed supra notes 224-26 and accompanying text.
386. For example, "women as capable of doing their jobs as their male counterparts may not be
forced to choose between having a child and having a job," "employers may not require a pregnant
woman to stop working at any time during her pregnancy unless she is unable to do her work," "Con-
gress indicated that the employer may take into account only the woman's ability to get her job done."
Johnson Controls, 499 U.S. at 204-05.

A worker seeking accommodation of a pregnancy-related disability under disparate impact theory
acknowledges a temporary inability to perform some of her usual duties (or to perform them all in the
usual way). So it must not be overlooked that these statements about job performance are made in the
course of the majority's rejection of Johnson Controls' argument that concerns over fetal safety brought
its policy within the "safety exception" to Title VII's BFOQ provision. See id. at 202-06.
387. See supra notes 385-86 and accompanying text.
388. 499 U.S. at 208.
389. Id. at 209.
390. It would be surprising if the majority regarded the basic concept of requiring a leave sufficient
to protect most pregnant workers' job stability as going beyond the requirements of the PDA, in view of
the existence of a longstanding EEOC Title VII regulation which declares:

Where the termination of an employee who is temporarily disabled is caused by an employ-
ment policy under which insufficient or no leave is available, such a termination violates the
Act if it has a disparate impact on employees of one sex and is not justified by business
necessity.

1981), quoted and relied on the 1979 version of this regulation (which varied by only one word, refer-
ing to "disparate impact on employment of one sex") in finding adverse impact in a ten-day leave
policy.
391. 29 C.F.R. § 1604.10(c). See supra note 390 for the full text of this provision.
392. 29 C.F.R. Pt. 1604 (Appendix, question 5):

Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of
her job, does the employer have to provide her an alternative job?
Second, Title VII covers only employers with fifteen or more employees.\textsuperscript{393} As a result, the millions of women who work for smaller employers receive no protection under the statute.\textsuperscript{394} Finally, Title VII provides no damages for disparate impact claims.\textsuperscript{395} Given the costs and risks of a Title VII lawsuit, in practice this provision discourages workers from making a complaint about nonaccommodation of their pregnancy-related disabilities unless they feel confident that they can show that the denial was \textit{not} pursuant to an across-the-board policy.

5. \textbf{Authorization for More Far-Reaching State Statutes Under Title VII}

If \textit{Cal Fed} stopped short of affirming the availability of disparate impact analysis to attack failure to accommodate pregnancy-related disabilities, it did authorize states to enact their own statutes to require accommodation of pregnant workers, at least as long as these laws meet certain criteria.\textsuperscript{396} The current status of state accommodation statutes, and the guidelines within which states may broaden their reach, are taken up in parts V and VI. Before moving on to a review of existing state laws, however, it is appropriate to consider the relevance of another major federal statute and its associated body of case law: the Americans with Disabilities Act.

\textbf{B. Americans with Disabilities Act}

Enacted in 1990, the Americans with Disabilities Act\textsuperscript{397} (ADA) was designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."\textsuperscript{398} Title I of the Act promotes equal employment opportunities for persons with dis-

---

\textsuperscript{393} 42 U.S.C.A. 2000e(b) (1988).

\textsuperscript{394} See supra note 94 for available estimates of the numbers and proportions of female and total employment by size of firm.

\textsuperscript{395} Under the Civil Rights Act of 1991, damages are potentially available for prevailing disparate treatment plaintiffs. § 102, 105 Stat. at 1072-73. Back wages are awarded to prevailing plaintiffs under either theory.

\textsuperscript{396} Like California's pregnancy-disability leave statute, a state statute requiring leave for or other accommodation of pregnant workers must be "narrowly drawn to cover only the period of actual physical disability" and must not prevent employers from complying with Title VII. \textit{Cal Fed}, 479 U.S. 272, 290 (1986) (emphasis in original).


\textsuperscript{398} 42 U.S.C.A. § 12101(2)(b)(1).
abilities, expanding on the employment protections previously afforded by the Rehabilitation Act.399

Because the ADA focuses on longer-term and severe disabilities, its direct usefulness for most workers temporarily disabled by pregnancy is minimal. The EEOC regulations that implement Title I make the aims and limitations of the legislation plain in this respect, stating that pregnancy, as a "condition that is not the result of a physiological disorder," is not an "impairment" under the Act.400

Questions may remain about whether pregnancy or a pregnancy-related disability could nevertheless qualify as an ADA-covered disability under the definitional prong that includes "being regarded as having such an impairment,"401 or whether a serious complication of pregnancy (which did result from a physiological disorder) constitutes a qualifying "impairment." Even if so, a separate provision in the regulations makes it unlikely that the great majority of pregnancy-related disabilities would qualify for protection under the ADA. This is the definition of "substantially limits," which lists three factors to apply in determining "whether an individual is substantially limited in a major life activity."402 The factors are the nature and severity of the impairment, its duration or expected duration, and its actual or expected permanency or long-term impact.403

But even if the ADA's provisions do not apply to most pregnancy-disability accommodation cases, certain ADA concepts are relevant—most notably "essential functions,"404 "reasonable accommodation,"405 and "un-

399. Rehabilitation Act of 1973, Pub. L. No. 93-112, Title V, §§ 500-504, 87 Stat. 390 (codified as amended at 29 U.S.C.A. §§ 790-794 (West 1988)). Rehabilitation Act provisions apply variously to federal agencies (§ 501), federal contractors (§ 503), and recipients of federal funds (§ 504), whereas the requirements of ADA Title I apply to virtually all employers with 15 or more employees (after July 25, 1994; the coverage threshold was 25 employees during the phase-in period of July 26, 1992, through July 25, 1994). For an account of how the ADA was developed to build on the provisions of and experience under the Rehabilitation Act, see generally Arlene Mayerson, Title I—Employment Provisions of the Americans with Disabilities Act, 64 TEMP. L. REV. 499 (1991) (describing a number of ADA employment provisions whose language was developed in response to particular Rehabilitation Act regulations or cases decided under the Rehabilitation Act).

Much of the case law developed under the Rehabilitation Act remains valid with respect to the operative meaning of such concepts as reasonable accommodation and undue hardship, but the ADA and its legislative history did reject or clarify the analysis of certain Rehabilitation Act cases. See, e.g., Jeffrey O. Cooper, Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act, 139 U. PA. L. REV. 1423, 1446-47 (1991) (ADA "rejects the position espoused by the Fifth Circuit" in Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983) regarding degree of deference to accord employers' expressed safety concerns); Mayerson, supra, at 505-08 (ADA's legislative history "resolves the confusion created by" E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) "and its progeny" concerning reach of "regarded as" prong of disability definition).

400. 29 C.F.R. Pt. 1630, Appendix, Interpretive Guidelines, Section 1630.2(h), Physical or Mental Impairment (1992).


403. Id.

404. See supra note 6.
These concepts may not be indispensable to disparate impact claims that seek accommodation of a pregnancy-related disability, in that a similar result might be obtained by applying the standard disparate impact concepts of "business necessity" and "less discriminatory alternative." However, cases brought under the ADA and the Rehabilitation Act that apply these concepts may offer persuasive analogies in particular pregnancy accommodation cases. One example would be a case presenting the question of the extent to which an employer must accommodate lifting restrictions. Such analogies will not always benefit the worker who seeks accommodation of a pregnancy-related disability, given the uneven results among Rehabilitation Act cases based on similar facts. But attorneys for pregnancy-disability plaintiffs should be ready to discuss factually analogous Rehabilitation Act and ADA cases.

In addition, existing cases brought under the Rehabilitation Act illustrate that the plaintiff is not assured of success even after the court (or employer) agrees that the employer is subject to an accommodation mandate. At this juncture, instead, the focus of the argument shifts to the determination of precisely which measures are "reasonable" to require of the employer, and which would constitute "undue hardship," based on the particular facts presented by a specific plaintiff in a specific workplace.

406. Defined and discussed at 42 U.S.C.A. § 12111(10) and 29 C.F.R. § 1630.2(p).
407. Compare, e.g., Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981) (genuine issue of material fact existed concerning whether lifting items off six-foot-high ledge was essential function for clerk/carrier position) and Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988) (plaintiff raised legitimate factual dispute concerning whether 70-pound lifting requirement was essential for position of distribution clerk) with Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991) (70-pound lifting requirement was essential function of Postal Service distribution clerk position; elimination of lifting duties would be unreasonable).
408. See, e.g., Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987) (decision against Rehabilitation Act plaintiff seeking employment as post office distribution clerk in a specific branch office turned partly on distinctions between achondroplastic and pituitary dwarfism, partly on differences in structure of operations between low volume and high volume Postal Service facilities). Another Rehabilitation Act case illustrates that even a small difference in timing may affect the reasonableness of a particular accommodation measure: Gardner v. Morris, 752 F.2d 1271, 1275, 1281-84 (8th Cir. 1985) (construction of hospital near remote Saudi Arabian project site by early 1980 rendered feasible a blood testing protocol that Eighth Circuit found unreasonable to require employer to provide for manic-depressive engineering technician during 1977-78, when conducting the same blood tests would have necessitated special hiring of an on-site physician and equipping the site with laboratory facilities not then in existence).

More complete review of Rehabilitation Act and ADA cases that may prove relevant to workers seeking accommodation of pregnancy-related disabilities is beyond the scope of this paper. The point of referring to the few cases cited here is, again, to caution lawyers representing pregnancy-disability plaintiffs to be attentive to factually similar cases brought under the Rehabilitation Act or the ADA. For a discussion of the concepts of reasonable accommodation and undue hardship under the ADA, see Cooper, supra note 399; see also Mayerson, supra note 399, at 514-19 (examples of ADA drafting aimed at reversing specific court interpretations of "reasonable accommodation" and related concepts under the Rehabilitation Act).
As I argue above, \(^{409}\) similar issues, framed in the disparate impact terminology of business necessity and absence of less discriminatory alternatives, should be the determining factors when workers seek accommodation of temporary pregnancy-related disabilities in claims brought under Title VII.

V

STATE STATUTES

As mentioned above, \(^{410}\) *Cal Fed* cleared the way for states to enact statutes that require employers to provide adequate leave or other accommodation for pregnancy-related disabilities, at least within certain limitations. \(^{411}\) By now, most states have enacted maternity, parental, or family leave statutes or regulations. \(^{412}\) Only six, however, have either statutes or regulations mandating some form of accommodation of pregnancy-related disability, whether or not the employer accommodates other temporary disabilities. The five states with such statutes are California, \(^{413}\) Connecticut, \(^{414}\) Louisiana, \(^{415}\) Oregon, \(^{416}\) and Puerto Rico; \(^{417}\) Hawaii has an accommodation regulation. \(^{418}\)

California's statute requires temporary transfer of an employee with a pregnancy-related disability "to a less strenuous or hazardous position for the duration of her pregnancy" if several conditions are met: the employee requests the transfer "with the advice" of her doctor; the employer can "reasonably accommodate[ ]" the transfer; and the transfer does not require creating a new position, discharging a fellow employee, transferring an employee with greater seniority, or promoting an employee lacking qualifica-
tions for the new position. The Louisiana and Oregon statutes are worded similarly to California’s.

The Connecticut statute calls for “reasonable effort” to transfer the employee to “any suitable temporary position” if the employee gives her employer written notice of her pregnancy, and either employer or employee “reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus.” It further requires covered employers to provide notification that pregnant employees may appeal an employer’s requirement that they transfer positions during pregnancy, and that workers must give written notice of their pregnancy to be eligible for temporary transfer.

Puerto Rico’s statute and Hawaii’s regulation are the only measures in this group not limited to transfer. The Puerto Rican statute forbids discharge on the ground of decreased work productivity during pregnancy; it does not call for any specific form of accommodation on the job. Hawaii’s regulation is the most far-reaching of all of these measures, requiring employers to make “every reasonable accommodation to the needs of the female affected by disability due to and resulting from pregnancy, childbirth, or related medical conditions.”

Not surprisingly, published cases based on such a limited number of statutes are a rarity. I have found none besides the FEHC’s Save Mart decision (at least in English).

419. CAL. GOV’T CODE § 12945(c)(2).
420. 23 LA. REV. STAT. ANN. § 1008.A(4); OR. REV. STAT. § 659.389(1). The Oregon statute does not prohibit creating hardship for fellow employees, creating a new position, or promoting an employee above her qualification level.
421. CONN. GEN. STAT. ANN. § 46a-60(a)(7)(E).
422. Id. at (F).
423. Id. at (G).
424. P.R. LAWS ANN. tit. 29, § 469.
425. HAW. ADMIN. CODE tit. 12, § 12-46-107(c). Hawaii’s regulation is also the most comprehensive in terms of employer coverage, applying to all nonfederal employers having at least one employee. § 12-46-1; HAW. REV. STAT. § 378-1 (1993 Supp.).
426. Based in part on May 1993 LEXIS and WESTLAW searches for both the statutory sections and terms contained within the relevant state statute. Searches by section number are not possible for Hawaiian regulations. Similarly, the state-level data bases do not include Puerto Rican courts.

Staff at the FEHC knows of no cases other than Save Mart based on the California statute. Telephone interview with Prudence K. Poppink, Staff Attorney, California Fair Employment and Housing Commission (Mar. 10, 1993). However, as discussed supra note 184, complaints have been filed with DFEH under section 12945(c). The Department’s data do not identify which complaints were filed under paragraph (1) (the equal treatment provision) and which under paragraph (2) (the transfer requirement for employers lacking a general accommodation policy). The data from 1990 through 1992 reflect the period before the amendments to section 12945(c)(1) and (2) that extended these provisions to Title VII employers. It would not be surprising, therefore, if the number of such complaints were to rise in the future.

Correspondence with state officials in the other states discussed here identified only two potentially relevant cases. (Officials in Hawaii, Louisiana, and Oregon responded helpfully on the details of their respective regulations and statutes but knew of no related cases.) As of July 1993, an appeal was pending in a Connecticut superior court (Hartford/New Britain J.D. Docket CV-92-0509435S) against
A. Advantages of State Accommodation Statutes

Although the record under the existing state statutes is therefore quite thin, such state laws offer several potential advantages. First, a state statute can cover more women than Title VII by adopting a lower size threshold. In California, for example, the Fair Employment and Housing Act,427 which includes the pregnancy-disability accommodation provision, applies to employers with five or more employees.428 Connecticut’s statute applies to employers of three or more employees,429 and Hawaii’s regulation to all nonfederal employers with at least one employee.430

Second, a state statute can streamline the evidence and analysis required in a disparate impact case under Title VII. Instead of requiring a showing of adverse impact to undermine the presumption that an across-the-board nonaccommodation policy is acceptable, a state statute can start with a clear statement of employer duty to accommodate pregnancy-related disabilities, subject to an employer showing of unusual hardship. Similarly, a statute that stated clearly that employers were presumptively required to accommodate pregnancy-related disabilities would offer a clear counterweight to any employer policy stating that no accommodation would be available for temporary disabilities. Title VII contains no such clear language to encourage an employee to persevere in seeking accommodation in the face of an employer policy that purports to deny it. At the same time, Title VII’s lack of clarity may actually increase the frequency and complexity of litigation among workers who do persist in seeking pregnancy-disability accommodation.431

the decision of a hearing officer of the state Commission on Human Rights and Opportunities in the case of Janeen Rose v. Fenn Mfg. Div. of AMCA Eng’g, CHRO Case No. 8310410 (Feb. 21, 1992). The hearing officer found that the employer had violated the state statute by denying Ms. Rose, a stockroom coordinator, permission to leave her work area when zinc chromate paints were sprayed on housing units during the course of her pregnancy (after she was initially allowed to move to another area while spraying was in progress). According to Commission staff, this case was “the first of its kind to reach the public hearing stage.” Letter from Eleanor N. Caplan, Legislative Regulations Specialist, State of Connecticut Commission on Human Rights and Opportunities, to author (July 8, 1993) (on file with author).


One case from a state outside this group, Khalifa v. G.X. Corp., 408 N.W.2d 221 (Minn. Ct. App. 1987), entertained the possibility that a state statute might apply to the effort of a pregnant hairstylist made ill by permanent wave fumes to obtain on-the-job accommodation. However, the statute is closer in substance to the ADA than Title VII, and the court concluded that inability to give permanents disqualified a hairstylist on “essential function” grounds. Id. at 224.

428. CAL. GOV’T CODE § 12926(d) (West Supp. 1993).
430. HAW. ADMIN. CODE tit. 12, § 12-46-1; HAW. REV. STAT. § 378-1 (1993 Supp.).
431. Comparing Montana’s pregnancy-disability leave statute with Title VII, Wendy Williams gave the state statute the advantage in terms of clarity. Williams, supra note 171, at 373 n.190. Title VII’s vagueness, she suggested, made litigation under it both more complicated and at the same time more
Third, a legislature may be in a better position than a court to require employer policies that respond to social concerns about preventing or reducing the impoverishment of women or families. Particularly to the extent that the harshest impact of nonaccommodation of pregnancy-related disabilities falls on blue-collar and low-income women, a legislature can more directly make the policy choice to mitigate such impact. Courts are limited to applying statutes and doctrines that may target only tangentially related problems.\footnote{432}

\textbf{B. Limitations of State Statutes}

For all their promise, so far the state accommodation statutes are more notable for their limitations than for their accomplishments. The primary limitation at this point is scope: with only six states having an accommodation statute or regulation, there is clearly considerable room for expansion.

Moreover, how much accommodation do the existing statutes actually provide? Soon after the decision in Eva Gutierrez’ case, the California Legislature moved to correct the “anomaly” that had exempted Title VII employers from coverage under Section 12945(c)(2).\footnote{433} As a result, that provision now prohibits all employers with five or more employees “[from refusing] to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated.”\footnote{444}

How well would the amended California statute meet the needs of Eva Gutierrez, or of Denise Dunning? By its terms, the only accommodation that Section 12945(c)(2) requires of an employer is “transfer.”\footnote{445} In \textit{Save Mart}, DFEH had stipulated that Ms. Gutierrez made no request to transfer to another job classification, and this was one of the reasons that the Com-

\begin{itemize}
\item The California Policy Seminar’s Workplace Reproductive Hazards Policy Group makes a related point:
\begin{quote}
Pragmatically and politically, it may not be possible in the near future to either amend Title VII or convince judges that Title VII should be used to provide equality of opportunity for women . . . If this is the case, advocates for equality of opportunity may want to push for separate, free-standing statutory benefits for pregnancy leave and seniority and transfer rights, among others.
\end{quote}
\end{itemize}

\textit{Reproductive Health Hazards, supra} note 10, at 35.

\footnote{432. Title VII, for example, does not prohibit discrimination on the basis of occupation or income.}

\footnote{433. Assembly Bill 2864, carried by Assemblywoman Jacqueline Speier, was passed within months by the Legislature and signed by the Governor, becoming chapter 907 of the Statutes of 1992. This legislation also extended the “equal treatment” accommodation requirements of § 12945(c)(1) to Title VII employers.}

\footnote{434. \textit{Cal. Govt. Code} § 12945(c)(2) (West Supp. 1993).}

\footnote{435. \textit{Id.}}
mission cited for ruling against her. The Commission noted that amicus Employment Law Center had argued that Ms. Gutierrez' actions were tantamount to a transfer request, and suggested that "that may be a sound argument in other contexts"; however, it considered itself bound by the parties' stipulation to the contrary.

Moreover, the amicus brief submitted by the Employment Law Center in this case itself stressed that transfer is not equivalent to accommodation, which is a much broader concept. The Center's point was recently underscored by California's major amendments to the FEHA relating to the employment of persons with physical or mental disabilities, a state-level counterpart to the federal ADA. The definitional provisions of this new legislation define "reasonable accommodation" in language very similar to that of the ADA, listing a series of forms of accommodation of which "reassignment to a vacant position" (the nearest equivalent to "transfer") is only one.

Thus, the utility of the amended version of Section 12945(c)(2) for Eva Gutierrez remains doubtful. Denise Dunning, on the other hand, did explicitly request transfer back to a cooler area of the plant. In this respect, the amended transfer statute would be more advantageous for her. However, to the extent that her slipping productivity was attributable to her need for more frequent trips to the bathroom, and if she had trouble getting a doctor to recognize this as a disabling condition in the circumstances of her job, Ms. Dunning as well might find the amended statute an unreliable support.

The 1992 amendment to Section 12945(c)(2) made an important, long-overdue correction. Now it is time to improve the statute further, following Hawaii's lead by expanding the range of accommodation required for pregnant workers. With the new California statutory provisions concerning employment of persons with long-term disabilities spelling out a list of

437. Id. at 10 n.4.
438. Brief for amicus Employment Law Center at 4, Department of Fair Employment and Housing v. Save Mart, FEHC Dec. No. 92-01 (1992). The Center drew this distinction to support its argument that even though Title VII employers were exempt (at that time) from the transfer requirement of § 12945(c)(2), their coverage by the general antidiscrimination provisions of § 12940(a) required them to provide all other forms of accommodation that would be reasonable to avert adverse impact on women employees. Id. at 13-14. In Eva Gutierrez' case, such accommodation could have included allowing her to request assistance with lifting, or shifting her to a schedule where she would not have been the only bakery/deli clerk on duty. Id. at 3.
440. CAL. GOV'T CODE § 12926(l)-(m).
442. See supra notes 161-63 and accompanying text.
443. Since the Connecticut, Louisiana, and Oregon statutes are also limited to temporary transfer, their applicability to the Gutierrez and Dunning cases would be similar.
different forms of accommodation that employers must consider, courts may decline to give an expansive reading of the single form specified in Section 12945(c)(2).

Transfer by itself is simply not adequate to minimize the adverse impact of nonaccommodation policies on pregnant workers, and thus on women in general.

VI
Recommendations

How realistic is it to call for further legislation benefitting pregnant workers at this time? Last year's enactment of the federal Family and Medical Leave Act was a hard-won achievement that took years to bring about. For all its gaps, this legislation is the most responsive federal measure to date in addressing the single most useful form of pregnancy-disability accommodation: leave with return rights while the employee is disabled by pregnancy or childbirth. Isn't it more realistic at this point to anticipate a period of quiescence and consolidation while the new benefits are implemented and enforced?

Consider as well the extent of the unmet need among today's workers for reliable, affordable child care. Roughly one worker in eight is a parent who needs child care for a child under six years of age, either because the worker is a single parent or because the other parent is also in the labor force. This translates to more than fifteen million workers nationwide, as compared with the approximately two million workers who carry a preg-

444. One of the factors contributing to the FEHC's decision against Eva Gutierrez was its observation that the Legislature had already imposed broader and more detailed accommodation requirements on employers in connection with workers' long-term disabilities or religious beliefs than the accommodation it required for pregnant workers. Department of Fair Employment and Housing v. Save Mart, FEHC Dec. No. 92-01, at 11-12 (1992).

445. See Pregnancy and Employment, supra note 2, at 39 (as of 1987, introduced but unpassed versions of FMLA dated back through at least three sessions of Congress).

446. See supra note 177 and accompanying text.

447. Bureau of Labor Statistics, U.S. Dept. of Labor, Bulletin 2307, Labor Force Statistics Derived from the Current Population Survey, 1948-87, at 74, Table A-9; 795, Table C-10; 801, Table C-12; 803, Table C-13 (1988). The rough estimate is derived from these tables as follows: In 1987, the civilian labor force included 8,983,000 women who had at least one child under six years of age. Id. at 803, Table C-13. Of these women, 6,952,000 were married with the husband present. Id. at 801, Table C-12. Among married men from 20 through 54 years of age whose wife was present, labor force participation rates ranged from 97.2% (for married men aged 25-34) to 93.7% (in the oldest group, 45-54 years of age—the only group whose participation rate fell under 95%). Id. at 795, Table C-10. Assuming that 95% of the husbands of the 6,952,000 married working mothers were in the labor force, this would translate to 6,604,000 married fathers of at least one child under age six in the civilian labor force. Adding the 8,983,000 mothers and the 6,604,000 married fathers produces 15,587,000 such parents (a number that excludes unmarried fathers in the labor force, and thus tends to err on the conservative side). The 1987 civilian labor force averaged 119,865,000. Id. at 74, Table A-9. Dividing 15,587,000 by 119,865,000 produces a percentage of 13%—slightly under one in eight. The same methodology produces an estimate of 30.5% of the 1987 civilian labor force, or 36,583,000 workers, being the mothers or married fathers of at least one child under 18 years of age.

448. See supra note 447 (derivation of rough estimate of 15,587,000).
nancy to term every year.449 Moreover, it is self-evident that working parents’ need for child care lasts years longer than the period during which pregnancy may have a disabling effect on job performance.450 Yet despite the political clout that such a large, comparatively stable bloc451 of workers might be expected to wield on child care issues, the gap between need and supply remains wide.452

In the light of such realities, the prospect for serious progress on securing accommodation of temporary pregnancy-related disabilities may appear far off. At the same time, it is important not to lose sight of three points. First, enactments like the FMLA and most of the current state pregnancy-disability statutes have actually come about fairly quickly. Only a few years ago, legal commentators were still musing about the eventual possibility of enactment of legislation along the lines of the FMLA.453 Less than two years ago, the FMLA could not avoid a Presidential veto.454

Second, significant factors, some of them mutually reinforcing, favor the prospects for future pregnancy-disability accommodation legislation. One of these is the recency of most employment law, combined with the continual ferment that characterizes this area of the law. Many important legislative measures and major judicial decisions are no more than a few years old; this is not an area of law where extended inactivity is the norm after a significant legislative or judicial change.455 In addition, the sheer numbers of women now participating in the labor force, their evident commitment to their jobs and their careers, and the growing numbers of women who stay on the job well into pregnancy and who return within a few

---

449. See supra note 81 and accompanying text.

450. See, e.g., supra notes 104-08 and accompanying text (AMA recommendations on how long women having normal pregnancies should continue working, according to tasks required on job); note 143 and accompanying text (typical “morning sickness” subsides after first trimester).

451. “Stable” in the sense that once the child is born, the need for care and supervision continues for more than a decade, whereas pregnancy lasts roughly nine months till term, and the average woman worker carries two or three pregnancies to term. See supra note 172 and accompanying text (data on lifetime expected births).

452. Reliable national estimates comparing child care need and supply are unavailable, because data are so incomplete across so many states. CHILDREN NOW, CALIFORNIA: THE STATE OF OUR CHILDREN, DATA SUPPLEMENT 1993, at 17 (1993). However, recent estimates for California alone suggest the overall magnitude of the supply gap. The Child Care Law Center has estimated that the gap between the number of California children needing care outside their homes and the number of licensed child care “slots” within the state was on the order of one million. ABBY J. COHEN & CAROL S. STEVENSON, CARING FOR THE FUTURE: MEETING CALIFORNIA’S CHILD CARE CHALLENGES 13 (1992).

453. See, e.g., Remmers, supra note 1, at 402-11.


455. See FRIEDMAN & STRICKLER, supra note 219, at vii (second edition of employment discrimination casebook warranted only three years after original edition due to “[t]he continuing accumulation of employment discrimination decisions and particularly the Supreme Court’s willingness to return again and again to the area”), ix (preface to third edition, six years later, comments on intervening “period . . . marked by a significant level of legislative and judicial activity in the area of employment discrimination law,” including enactment of ADA, 1991 Civil Rights Act, amendments to Age Discrimination in Employment Act, and other significant legislation).
months after childbirth have made the combination of pregnancy and a job more “normal” in the public’s eye, especially over the span of a decade or more. The numbers of families and individuals economically dependent on these workers broaden the impact of an involuntary, avoidable separation from the job. Finally, institutional changes such as enactment of the FMLA and the ADA, as well as the PDA’s prohibition against outright firing based overtly on pregnancy, all work to change the context, open doors, raise expectations, and lead to the identification of new impediments (like nonaccommodation policies) to equal employment opportunity for women. As Reva Siegel has observed, these factors all can have a synergistic effect that rapidly makes possible measures that only a decade earlier might have been unthinkable.

Third, enactment of equal employment opportunity measures has generally required significant effort, often against long and persistent political odds. Supporters of women’s employment opportunities should begin now to draw attention to the need for reasonable accommodation of temporary pregnancy-related disabilities. They should also begin to press for such accommodation through both voluntary and governmental action.

A. Opportunities for Increasing the Availability of Accommodation

A number of actions can be taken, in different arenas and by different parties, each of which would strengthen the effectiveness of current law in “allow[ing] women, as well as men, to have families without losing their jobs.” The potential for making a valuable difference is not confined to the legal and legislative spheres. Health care professionals can contribute by paying more careful attention to the situation of pregnant workers, both as individual patients and as a group. Unions can give greater priority to on-the-job accommodation of temporary disabilities, as well as bargain for extended leave (beyond any statutory minimum). They also can play a very important role by helping to secure stronger legislation, at both the state and federal levels. Improved legal analysis, more forceful legal advocacy, and statutory amendments will also be important aspects in the overall process of bringing about necessary change.

456. See supra notes 75-84 and accompanying text.

457. See supra notes 85-89 and accompanying text.

458. Telephone discussions with Reva B. Siegel, then Assistant Professor, Boalt Hall School of Law (May 18, 1993 (synergistic effect) and July 2, 1993 (resulting in shifting legal norms)).

459. See, e.g., Jo Freeman, How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 Law & Ineq. J. 163 (1991) (revisionist history disputing widely accepted account that only last-minute, unsuccessful maneuvering by Congressional Dixiecrats opposed to 1964 civil rights bill produced inclusion of “sex” as a proscribed basis for discrimination under Title VII).

1. Health Care Professionals

Some health care professionals may need to refine their understanding of the concept of pregnancy-related disability in the employment context, and be especially careful about the restrictions and recommendations they issue to pregnant workers. Denise Dunning, for example, needed a doctor who understood the disabling significance, on her job, of so normal and seemingly trivial an incident of pregnancy as needing to urinate more frequently. On the other hand, Eva Gutierrez’ doctor withdrew one restriction after her employer refused to let her keep working under it—although he maintained the lifting restriction.

Obstetricians may understandably err on the side of caution in advising their patients, especially after some difficulty arises during a pregnancy. However, they need to keep in mind that routine imposition of restrictions during pregnancy, without consideration of the patient’s specific job circumstances, may result in job loss or severe income reduction that could have been avoided. Furthermore, the decision may not be a simple (if drastic) matter of choosing between livelihood and health; a pregnant woman who loses her job because of medical restrictions may lose her health care (and health care for her children) as well.

Besides carefully advising, and when necessary advocating for, individual pregnant workers, health care professionals can assist women workers as a group by joining in advocacy for stronger statutory requirements of reasonable on-the-job accommodation of temporary disabilities associated with pregnancy. They can help document the overall frequency of the need for such accommodation, describe specific forms of accommodation that are likely to be most helpful, and provide estimates of how long such accommodations may need to remain in effect. Much of this information is likely to prove reassuring to employers and lawmakers, in that the measures required for women like Eva Gutierrez and Denise Dunning are readily achievable and of relatively short duration. At the same time, presenting the stories of individual patients, like Eva Gutierrez, can help dramatize the damage done by inadequate accommodation and leave policies, pressing home the need for change.

2. Opportunity for Union Action

Eva Gutierrez’ union contract saved her job. Unions that are interested in expanding their representation of women workers can appeal to

461. See supra notes 23-25 and accompanying text.
462. Similarly, in discussing state provisions authorizing mandatory leave or transfer, the California Policy Seminar’s Workplace Reproductive Hazards Policy Group comments that “[f]or obvious reasons, doctors will in many cases be reluctant to certify in writing that there will be no undue risk, even if they are unaware of any particular risk in a given situation.” Reproductive Health Hazards, supra note 10, at 64.
463. See supra notes 36-39 and accompanying text.
them in part by placing priority on securing adequate leave for all temporarily disabled workers—longer than the four months guaranteed under the California pregnancy-disability statute. In addition, unions should work on developing contract provisions that promote on-the-job accommodation of temporarily disabled workers. In the political sphere, unions can help form coalitions to seek enactment of both short-term disability insurance programs and on-the-job accommodation mandates in the vast majority of states that have yet to create them. Finally, unions can forge or join campaigns to strengthen existing accommodation laws in the few states that have enacted them so far, like California.

3. **Improved Legal Advocacy**

Although appropriate legislative action in this area will be very helpful (as described below), in the absence of new legislation, courts and plaintiffs’ advocates can take useful steps to promote accommodation of pregnant workers.

Plaintiffs’ attorneys should rely on their state’s pregnancy-disability accommodation statute, if in a state that has one. In jurisdictions lacking their own accommodation statutes, plaintiffs’ representatives should seek enactment of such statutes. At the same time, until a state measure takes effect, attorneys representing clients who seek accommodation of pregnancy-related disabilities should press disparate impact claims under Title VII. Plaintiffs’ attorneys should assert the inherent disparate impact on women created by a policy refusing accommodation for temporary disabilities,\(^464\) taking care to evade the trap of trying to show statistical significance in a small sample of employees at a particular worksite. Citation of appropriate precedent,\(^465\) complemented by relevant demographic and labor force data for the nation as a whole,\(^466\) will help persuade more judges to recognize that disparate impact is inherent in a nonaccommodation policy.

Under either Title VII or state statutes, acceptance of the principle that the employer owes a reasonable measure of accommodation to workers with temporary pregnancy-related disabilities does not clinch the plaintiff’s case. Specific functions and requirements of the position, the precise ac-

---

464. The kinds of information reviewed in part III can help support this argument.
465. See, e.g., Scherr v. Woodland School Community Consolidated District No. 50, 867 F.2d 974 (7th Cir. 1988) (affirming applicability of disparate impact analysis under the PDA, as discussed supra notes 269-74 and accompanying text); Abraham v. Graphic Arts Int’l Union, 660 F.2d 811 (D.C. Cir. 1981) (acknowledging inherent adverse impact of 10-day leave policy on women workers, as discussed supra notes 296-302 and accompanying text); United EEOC v. Warshawsky & Co., 768 F. Supp. 647 (N.D. Ill. 1991) (mere recitation of business necessity insufficient to carry employer’s burden, as discussed supra notes 356-65 and accompanying text); and additional cases discussed supra part IV.
466. See generally supra part III for these data. In this context, “demographic . . . data” include the best available estimates of the frequency of pregnancy complications, along with current medical advice on the physical impact of pregnancy on the performance of (or the risks involved in performing) different types of tasks.
accommodation that the worker would need to be able to stay at work, and the employer's overall situation are crucial factors.\textsuperscript{467} As suggested earlier,\textsuperscript{468} in a particular situation there may be cases under the Rehabilitation Act or the ADA that turn on similar facts, such as the weight that an employee can be required to lift.\textsuperscript{469} Therefore, pregnancy-disability plaintiffs’ attorneys should familiarize themselves with cases under these two federal statutes where the determination as to the reasonableness of a particular accommodation can by analogy bolster or impair the pregnant worker’s claim. They should also be prepared to undermine employer assertions of business necessity (or, in the Rehabilitation Act/ADA framework, undue hardship), and courts should be properly skeptical in considering such assertions: Denise Dunning’s case, among others, cautions against taking employer claims of impracticality at face value.

4. Statutory Changes

A number of statutory changes would be appropriate. With respect to Title VII, it would be helpful for Congress to confirm that disparate impact analysis is to be applied to neutral employer policies challenged in pregnancy discrimination cases. Another useful step would be congressional action or EEOC regulations clarifying that in disparate impact challenges to nonaccommodation policies, judicial notice and data from the general population and the labor force at large may be used to establish adverse impact.\textsuperscript{470} Finally, Congress should express its intent to promote accommodation of pregnant workers, in order to end the confusion over the conflicting statements of legislative intent whose significance was debated in \textit{Cal Fed}.

Waiting for, or even working for, such Title VII changes is not enough, however. For one thing, securing such changes could take considerable time, meanwhile leaving Title VII as an insufficiently reliable source of protection for workers seeking pregnancy-disability accommodation in states whose own laws fail to guarantee such protection. Furthermore, because Title VII covers only those employers with fifteen or more employees,\textsuperscript{471} even after the changes recommended above are implemented, millions of women will remain unprotected in states whose laws continue to allow nonaccommodation on the part of smaller employers.\textsuperscript{472}

\textsuperscript{467} See supra text following note 326; text accompanying notes 408-09.
\textsuperscript{468} See supra note 407 and accompanying text.
\textsuperscript{469} See supra note 407 (comparing Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988) with Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991)).
\textsuperscript{470} As explained supra note 466, general population data would include estimates of the incidence of the various complications of pregnancy.
\textsuperscript{472} See supra notes 94 and 393-94 and accompanying text.
Consequently, advocates for working women should also make statu-
tory and regulatory changes at the state level a priority. In some states,
bringing about such changes may be more readily feasible than at the na-
tional level,473 and an expansion in the number of states with such enact-
ments may in turn help accelerate the passage of accommodation legislation
in Congress. In developing their accommodation statutes, states must take
care to stay within the limits of Title VII.474

In addition, most of the states that already have some degree of protec-
tion on the books could substantially strengthen this protection. For exa-
ample, as part V concludes, California should join Hawaii by expanding
Section 12945(c) of the Government Code to include the forms of accom-
modation now specified in Section 12926(l)-(m).475 Some of the other
states that already have accommodation statutes would significantly en-

crase their usefulness by extending their coverage to employers with
smaller numbers of employees.476

Finally, many more states should enact short-term disability insurance
programs to help cushion employees against the financial impact of unpaid
leave when they are temporarily disabled by a condition arising outside the
workplace. Only six states have such a program.477 The need for short-
term disability benefits is widespread, since on-the-job accommodation is
not always feasible, especially late in pregnancy and immediately after

473. This was obviously the case in the six states that have already adopted such protections
through legislation or regulatory action, as discussed supra part V.

474. Dictum in Cal Fed suggests that the duration of on-the-job accommodation, like that of leave,

must be related carefully to the period of actual disability associated with pregnancy, childbirth, or a
related medical condition in order to avoid preemption by Title VII. 479 U.S. at 290. Schafer v. Board
of Public Education, brought by a father seeking the same childrearing leave provided for women teach-
ers under the school district's collective bargaining agreement, distinguished the provision there from
the statutory leave challenged in Cal Fed on the basis of the absence of any requirement that a woman
teacher be disabled in order to obtain leave lasting up to one year. Shafer, 903 F.2d 243, 248 (3d Cir.
1990). Consequently, the court held that the agreement was inconsistent with Title VII and void as to
any leave granted beyond the duration of actual physical disability. Id.

See Furnish, supra note 10, at 32-41, for guidelines on drafting state legislation that provides
accommodation to pregnant employees in the toxic work environment and meets Cal Fed's criteria for
consistency with Title VII.

475. The California Policy Seminar's Workplace Reproductive Hazards Policy Group has sug-

gested other amendments to § 12945(c). One is to redesign the bifurcation between paragraphs (1) and
(2) to parallel the structure of subdivision (b), the pregnancy-disability leave provision. REPRODUCTIVE
HEALTH HAZARDS, supra note 10, at 63. This change would help protect against assertion by an em-
ployer with an inadequate accommodation policy that that was all pregnant workers had a right to claim.
Another recommendation is to amend both the statute and the regulations to “state more vigorously” the
conditions permitting an employer to deny accommodation of a pregnancy-related disability. Id. at 64.

476. For example, Louisiana's pregnancy discrimination statute applies only to employers of 26 or
more employees. 23 LA. REV. STAT. ANN. § 1008.B (West Supp. 1993). Similarly, Oregon's pregnancy

477. The six states are California, Hawaii, New Jersey, New York, Rhode Island, and Puerto Rico.
WORK AND FAMILY, supra note 81, at 92. All require employee contributions, though some add em-
ployer contributions. Id.
Moreover, such a program benefits all employees, not only those unable to work due to pregnancy.

B. Conclusion

The agenda of this comment was to assess the adequacy of existing workplace policies and laws in addressing pregnant workers' needs for job and income security. Based on the information and analysis presented in the preceding pages, four overall conclusions emerge:

(1) First, millions of working women risk significant income loss, even outright job loss, as a result of facially neutral nonaccommodation policies that are inherently more harmful to female than male workers because of women's role in procreation.

(2) Second, the harm done by these workplace policies is not distributed evenly among women workers. Their punitive effect, and consequently the unmet need for corrective public policies, is most severe among women in more physically demanding occupations. These workers, in turn, are more likely to be women of color and lower-income women.

(3) Third, since such policies often serve no legitimate business necessity, they are unlawful under Title VII as well as in the handful of states that already have their own pregnancy-accommodation laws. In other words, current laws already provide a measure of protection for pregnant workers against such nonaccommodation policies.

(4) But, fourth and finally, the protection currently afforded under Title VII is unreliable and completely unavailable to millions of women, and so far only a handful of states have acted to supplement this federal protection. Consequently, ample room remains to strengthen existing legal protections for pregnant workers who seek a reasonable measure of accommodation in order to be able to stay on the job when affected by a temporary pregnancy-related disability.

The measures of protection recommended here are reasonable; they are feasible; and they are necessary to ensure genuine equal employment opportunity for women.

VII

Postscript

When final editing of this comment was virtually complete, I came across a headline in a legal newspaper announcing a new ruling that "Pregnancy Ills Can Be Basis For Dismissal." The case referred to was

---

478. As discussed supra note 177 and accompanying text.
479. Work and Family, supra note 81, at 92.
480. Supra text accompanying notes 2-4.
481. If the employer employs at least 15 employees: see supra note 393 and accompanying text.
482. See supra notes 367-95 and accompanying text; see generally supra part III.
483. See supra notes 393-94 and accompanying text.
accommodation of pregnant employees

Troupe v. May Department Stores Co. According to the article, the opinion's author, Chief Judge Richard A. Posner of the Seventh Circuit, stated that the Pregnancy Discrimination Act "does not require employers to offer maternity leave or take other steps to make it easier for pregnant women to work."

Somewhat like Fields v. Bolger, Troupe is a disparate treatment case that contains some disturbing anti-disparate impact dictum. The dictum in Troupe is more pointed and more extensive than that in Fields, however. Thus, Troupe must be added to Dunning v. National Industries, Inc. as the second post-Scherr Title VII decision to cast doubt on

486. Middleton, supra note 484, at B1. In fact, what the article structures as a paraphrase is close to a direct quote. What Judge Posner actually wrote is, "The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars, e.g., Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," 1 Berkeley Women's L.J. 1, 30-31 (1985), require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . ." Troupe, 1994 U.S. App. LEXIS 6030, at *12.
487. 723 F.2d 1216 (6th Cir. 1984), discussed supra note 264, note 267 and accompanying text.
488. The plaintiff in Troupe was a sales clerk at a department store's women's accessories counter, fired a day before she was due to begin "maternity leave" as provided for in the store's personnel policy. Troupe, 1994 U.S. App. LEXIS 6030, at *2-4. The firing also came after unusually severe morning sickness had for several months played havoc with Ms. Troupe's former punctuality. Id. at *2-3.
489. Challenging the discharge on a theory of disparate treatment, Ms. Troupe testified that her supervisor informed her that the reason for the firing was that the supervisor did not expect Ms. Troupe to return after childbirth. Id. at *3.
490. The court determined that even if Ms. Troupe's firing had been motivated by this expectation, such a termination would not constitute a violation of Title VII absent a showing by Ms. Troupe that the store had refrained from firing an employee with health problems unrelated to pregnancy who was about to take a similarly "protracted sick leave." Id. at *11-12.
491. Moreover, the court pointed to "[t]he great, the undeniable fact[,] . . . plaintiff's tardiness." Id. at *9.
492. While Ms. Troupe's lawyer "argue[d] with great vigor that she should not be blamed—that she was genuinely ill, had a doctor's excuse, etc.[-]" such an argument was not "pertinent" in the absence of a disparate impact argument, which the lawyer had not presented. Id. And just as well, as far as this court was concerned: "This is rightly not argued. If an employee who (like Troupe) does not have an employment contract cannot work because of illness, nothing in Title VII requires the employer to keep the employee on the payroll." Id.
493. A later passage dismissed "feminist scholars['"] advocacy of the applicability of disparate impact analysis when the disabling condition is pregnancy-related, as quoted supra note 486. Finally, although the court acknowledged that Maganuco v. Leyden Community High Sch. Dist. 212, 939 F.2d 440 (7th Cir. 1991) "and other cases [had held] that disparate impact is a permissible theory of liability under the Pregnancy Discrimination Act, . . . properly understood, disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism." Id. at *13 (citation omitted). (As discussed supra note 274, Maganuco is the appellate decision that followed the remand from Scherr, the first case to affirm the continuing viability of disparate impact analysis in pregnancy-discrimination cases after passage of the Pregnancy Discrimination Act. Except possibly in the glancing mention of "other cases," Troupe makes no mention of Scherr.)
494. See supra note 488. By comparison, as discussed supra note 266, the anti-disparate impact dictum in Fields was limited to the single sentence, "Nothing in Title VII compels an employer to prefer for alternative employment an employee who, because of pregnancy, is unable to perform her full range of duties." 723 F.2d at 1220.
495. 720 F. Supp. 924 (M.D. Ala. 1989), discussed supra notes 51-75 and 278-79 and accompanying text.
496. Scherr v. Woodland Sch. Community Consol. Dist. No. 50, 867 F.2d 974 (7th Cir. 1988), discussed supra notes 231-32 and 269-74 and accompanying text.
the applicability of disparate impact analysis to a pregnancy-disability claim. Moreover, as an appellate decision, Troupe tends to carry more weight than Dunning.

Later articles by other authors may undertake more thorough analysis of Troupe, including the adequacy of its disparate treatment analysis. For present purposes, beyond highlighting the perils of reaching to offer pronouncements on issues that are not presented for a court's careful consideration, Troupe reinforces three of the points asserted in the body of

---

492. See supra note 488.

Note that, as distinct from Dunning and Troupe, several post-Scherr district courts have treated disparate impact theory as applicable under the Pregnancy Discrimination Act, as discussed supra notes 275-76 and accompanying text. None of these decisions are mentioned in Troupe.

493. This tendency may be augmented by the circumstance that Judge Easterbrook joined in the Posten opinion, along with Judge Ripple. Troupe, 1994 U.S. App. LEXIS 6030, at *1.

494. This subject by itself—the adequacy of Troupe's treatment of the disparate treatment claim—could support an analysis of substantial length. For example, the court's complacent anticipation that finding an appropriate comparison group "would [not] be that difficult" is open to debate. Id. at *15; see, e.g., Siegel, supra note 171, at 930.

Another problematic aspect of the court's discussion is the analogy drawn between Ms. Troupe's situation and that of a hypothetical black male employee fired when scheduled to take a three-month paid sick leave for a kidney transplant, because the store did not expect him to return once his sick leave ended. 1994 U.S. App. LEXIS 6030, at *11-12. Besides the fact that a prospective kidney transplant recipient of any race or ethnicity—or gender—would now turn to the Americans with Disabilities Act rather than Title VII in these circumstances (unless there appeared to be an additional dimension of race discrimination: i.e., unless the employer somehow expected white kidney transplant recipients to return, but was more pessimistic about the return of black transplant recipients), the implicit acceptance of statistical discrimination is erroneous in this context. The court ignores the decades-old reality that Title VII does abridge an employer's latitude in reaching economics-driven employment decisions, whether based on "stereotyped" or even accurate generalizations about protected classes. See, e.g., City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707-08 (1978) ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.") (footnote omitted).

Moreover, precisely in relation to the issue of predating employment decisions on expectations about a woman worker's return after childbirth, the court betrays astonishing forgetfulness concerning the historical role such "expectations" played in supporting overt and rampant discrimination against women workers. See supra notes 100-101 and accompanying text. This apparent oblivion underlies the equally astonishing conclusion that a firing motivated by the employer's expectation that a pregnant employee will not return after the conclusion of a pregnancy-related leave does not reflect discrimination forbidden by Title VII, as augmented by the Pregnancy Discrimination Act. 1994 U.S. App. LEXIS 6030, at *11.

495. According to the Seventh Circuit, Ms. Troupe's lawyer offered no disparate impact argument in her behalf. 1994 U.S. App. LEXIS 6030, at *9. Thus, the court neither was invited to undertake serious consideration of the adverse impact of the store's excess-tardiness policy nor showed any inclination to do so. Instead, in its evident eagerness to reject the applicability of disparate impact analysis to pregnancy-disability cases, the court:

(1) essentially ignored earlier opinions (see supra notes 488 (failure to mention Scherr—an earlier case, from the same Circuit, which reached the opposite conclusion about the applicability of disparate impact analysis under the Pregnancy Discrimination Act) and 492 (other cases ignored by this court));

(2) at a minimum, strongly implied that Title VII does not require covered employers to offer adequate pregnancy-disability leave, contrary to the clear statement of a longstanding Equal Employment Opportunity Commission regulation (see supra note 486 and accompanying text ("maternity leave" not required), notes 191 and 390-92 and accompanying
this comment. The first is the disproportionately greater impact that lack of accommodation of pregnancy-related disabilities tends to have on women in certain occupations. Many professional women would not have faced job loss due to a temporary span of tardy arrivals (particularly after they had established three years of good job performance before being affected by a pregnancy-related disability) so long as they produced the work expected of them, made up the time through later departure, or both.

The second point reinforced by the Troupe opinion is that acceptance of the principle of an employer's duty of reasonable accommodation for temporary pregnancy-related disabilities would not inevitably result in victory for the plaintiff in every case. In a counter sales position, it is conceivable that continual tardiness (of as much as an hour) could have disrupted operations in a way that occasional assistance with lifting heavy loads would not have in Eva Gutierrez' case. Thus, the result reached in text (EEOC regulation); only Troupe's use of the term "maternity leave," which may signify a more far-reaching policy than pregnancy-disability leave, creates some room for uncertainty whether the court actually intended to repudiate this regulation; (3) assumed the employer's cost defense (1994 U.S. App. LEXIS 6030, at *12), whereas under disparate impact analysis it would be the employer's burden to prove business necessity and job-relatedness once adverse impact was shown; and, (4) in its rejection of disparate impact analysis in the pregnancy-discrimination context as seeking "a warrant for favoritism" (id. at *13), reflected no awareness of the alternative approach to pregnancy-oriented disparate impact remedies advocated by Wendy Williams and other "equal treatment" feminist scholars (see supra note 171).

While this list is probably not exhaustive, it adequately illustrates the lack of careful analysis underlying the court's anti-disparate impact dicta.

From the court's statement that Ms. Troupe's lawyer attempted no disparate impact argument, it is apparent that the lawyer made no effort to demonstrate pregnancy- or gender-based adverse impact in the store's policy. Particularly in cases arising after the effective date of the Civil Rights Act of 1991, there is reason to hope that when a pregnancy-discrimination plaintiff's advocate does make an initial showing of adverse impact, other courts will adhere to the methodology now prescribed by statute for conducting a disparate impact analysis. See supra notes 201-02 and accompanying text (disparate impact methodology now codified at 42 U.S.C.A. § 2000e-2(k) (West Supp. 1993)). Thus, the future impact of Troupe on cases claiming disparate impact under the Pregnancy Discrimination Act may, as it should, be limited. Unfortunately for Ms. Troupe, her termination occurred in June 1991, a few months before the Civil Rights Act of 1991 took effect.

See supra notes 161-64 and accompanying text. Kimberly Troupe's case bears some similarity to that of Eva Gutierrez in that both women were retail sales clerks, although in different specific capacities (Troupe in a department store's women's accessories department, Gutierrez in a discount/supermarket's bakery/deli department).

As was true of Ms. Troupe. Troupe, 1994 U.S. App. LEXIS 6030, at *2.

See supra note 194 and accompanying text, note 197.

See supra text following note 326, notes 408-09 and accompanying text.

Troupe v. May Dep't Stores Co., No. 92 C 2605, 1993 U.S. Dist. LEXIS 7751, at *1-*2 (N.D. Ill. June 3, 1993). It appears from the district court's summary of the facts that most of the periods of tardiness ranged between ten minutes and half an hour, and that Ms. Troupe arrived late approximately two dozen times over a four-month time span. Id.

See supra note 32 and accompanying text: Ms. Gutierrez' employer stipulated that it could have accommodated the restriction her doctor temporarily imposed on heavy lifting. Note also, however, that Ms. Troupe's employer already had accommodated her morning sickness, on a voluntary basis, by granting her request for reassignment to an afternoon work schedule. Troupe, 1993 U.S. Dist. LEXIS 7751, at *1.
Troupe may have been appropriate with respect to a disparate impact claim challenging discipline for excess tardiness,\textsuperscript{502} however inappropriate much of the reasoning in the Seventh Circuit's opinion.

The third point reinforced by Troupe, unfortunately, is the unreliability of Title VII at this time for women seeking accommodation of temporary pregnancy-related disabilities.\textsuperscript{503} This case thus underlines the need for congressional action, separate state laws, or both, to ensure that women will face genuine equality of employment opportunity in tomorrow's job market.\textsuperscript{504}

\textsuperscript{502} Not, however, insofar as it reflected this court's determination that a termination motivated by expectations about a worker's likelihood of returning after childbirth did not constitute disparate treatment that is proscribed by Title VII.

\textsuperscript{503} See supra notes 367-68 and 393-95 and accompanying text. As suggested supra note 495, the impact of this opinion may be limited by such recent statutory enactments as the Civil Rights Act of 1991. However, at least until a more substantial body of case law develops in this area, a pregnancy-discrimination plaintiff seeking the protection of Title VII risks encountering a similarly unreceptive court that goes out of its way to reject disparate impact analysis.

\textsuperscript{504} See discussion supra notes 470-79 and accompanying text.