Employment Discrimination - In Vitro Fertilization and the Pregnancy Discrimination Act of 1978: How Far Can the Courts Expand the Coverage of the PDA to Protect Reproductive Technology

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EMPLOYMENT DISCRIMINATION—IN VITRO FERTILIZATION AND THE PREGNANCY DISCRIMINATION ACT OF 1978: HOW FAR CAN THE COURTS EXPAND THE COVERAGE OF THE PDA TO PROTECT REPRODUCTIVE TECHNOLOGY?

I. INTRODUCTION

A young wife begins her career as an attorney soon after she passes the bar exam. She spends several years working long, hard hours until she finally receives the news that she will become a partner. At the same time she hears of this promotion, she also finds out that she will become a mother. After the law firm learns of this news, they immediately terminate her employment because they fear that her pregnancy will interfere with her job.

Situations similar to the one above are the primary reason that Congress passed the Pregnancy Discrimination Act of 1978 (PDA). This act amended the Civil Rights Act of 1965 to add pregnancy protection within the scope of sex discrimination by employers. Under the PDA, any adverse treatment of an employee based on pregnancy, childbirth, or other pregnancy-related medical condition is actionable as sexual discrimination.

Even though the situation above is clearly within the scope of the PDA, a number of new PDA cases have arisen over the past twenty years that have lead to disagreements among the courts. The primary disagreement is whether infertility or infertility treatments fall within the scope of the PDA.

For example, what if a woman is fired after missing several weeks of work due to receiving several rounds infertility treatments, such as in vitro fertilization procedure? Does the PDA protect this woman even though she is not yet pregnant? Are treatments to facilitate conception of an infertile mother part of “pregnancy-related medical conditions”? Or, should these days missed by the employee be treated like any other employee’s truancy?

These types of questions plague the courts with uncertainty during a time when there have been significant advancements of medical technologies to treat infertility. First, this note will give a detailed background of the

cases which have attempted to define the scope of the PDA. Next, this note will discuss the different processes courts can use to interpret statutes, specifically the PDA. The last section of the note will argue that the PDA clearly does not include protection for women who are infertile or those women undergoing procedures to treat their infertility.

II. BACKGROUND

When determining whether infertility or infertility treatments are protected under the PDA, the court must first look at the bulk of case law that has attempted to define the scope of this statute. This section details the cases that have framed the argument on both sides of this issue.

A. The Pregnancy Discrimination Act and the Overruling of General Electric Co. v. Gilbert

President Jimmy Carter signed the PDA into law on October 31, 1978. This law amended Title VII of the Civil Rights Act of 1964, making it illegal to discriminate against a person on the basis of pregnancy. The enactment of this law by Congress was in direct response to the decision of the Supreme Court of the United States in General Electric Co. v. Gilbert.

In Gilbert, a group of female employees filed a class action suit against General Electric for excluding pregnancy from the company’s disability

2. See infra Part II, A, B, C.
3. See infra Part II, D.
4. See infra Part III.
5. 429 U.S. 125 (1976).
7. Id. at III.
8. Gilbert, 429 U.S. at 125 [cases that discuss the General Electric decision refer to it as the Gilbert case, thus, for the purposes of this article, the author will refer to this decision as the Gilbert case.]. During the debate on the House floor, Representative Augustus Hanks from California stated that because of the decision in Gilbert, this bill was introduced “to clarify congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.” LEGIS. HISTORY OF PDA, supra note 6, at 166. There are numerous law review articles that were published in response to the decision in Gilbert. These articles criticized the decision to not protect pregnancy under Title VII and gave various approaches to circumvent the ruling. See Nancy S. Erickson, Pregnancy Discrimination: An Analytical Approach, 5 WOMEN’S RTS. L. REP. 83 (1979); Gene Ann Roelofs, Sex Discrimination and Insurance Planning: The Rights of Pregnant Men and Women Under General Electric Co. v. Gilbert, 22 ST. LOUIS U. L.J. 101 (1978); Kathleen R. McGrath, Pregnancy-Based Discrimination—General Electric Co. v. Gilbert and Alternative State Remedies, 81 DICK. L. REV. 517 (1977).
plan coverage of nonoccupational sickness and accident benefits. The employees claimed this constituted discrimination under Title VII of the Civil Rights Act of 1964, and the District Court for the Eastern District of Virginia agreed, holding that the exclusion of pregnancy from General Electric’s disability plan violated Title VII.\footnote{Gilbert, 429 U.S. at 127–28.}

The Court granted certiorari on the case after the Fourth Circuit affirmed the district court’s decision.\footnote{Id. at 128.} In an opinion delivered by Justice Rehnquist, the Court reversed the decision of the lower courts, stating that failure to cover pregnancy-related disabilities under the company’s disability plan was not a violation of Title VII.\footnote{Id. at 146–47.}

Section 703(a)(1) of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.\footnote{Id. at 133 (citing 42 U.S.C. § 2000e-2(a)(1) (2000)).} The “because of . . . sex” interpretation was important to Justice Rehnquist’s opinion, which stated that without gender-based discrimination in effect or in form there cannot be discrimination under section 703(a)(1).\footnote{Id. at 138 (citing Geduldig v. Aiello, 417 U.S. 484 (1974) (ruling against an employee’s Fourteenth Amendment Equal Protection claim that it was sex discrimination to exclude pregnancy from disability program established under California law), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, as recognized in Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983)).} The Court claimed that a disability plan is “nothing more than an insurance package which, covers some risks, but excludes others.”\footnote{Id. at 138.} The “package” at issue in Gilbert covered and excluded the same risks for male and female employees.\footnote{Id. at 138–40.} The Court held that Title VII does not require a disability plan to be all-inclusive, and just because pregnancy affects women to a greater degree does not mean the noninclusion of disability benefits for pregnancy is facially a gender-based discrimination.\footnote{Id. at 161 (Stevens, J., dissenting).}

In his dissenting opinion, Justice Stevens asked whether the disability plan provided by General Electric, treating absences caused by pregnancy differently than other kinds of absences, was discrimination because of an individual’s sex.\footnote{Id. at 161} He believed the disability plan was discriminatory because the rules relating to absenteeism were not based on neutral criteria, such as whether the absence was voluntary or involuntary. The plan, he
stated, puts pregnancy in a criteria by itself, and because the ability to become pregnant is a primary difference between men and women, the plan was discriminatory on its face because of sex.\(^9\)

After this decision, Congress had to make sure that discrimination based on pregnancy would be considered sex discrimination under Title VII.\(^{20}\) With the passage of the PDA, Congress added a new subsection (k) to the definition of section 701 of the Title VII of the Civil Rights Act of 1964.\(^{21}\) The section now reads: “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[.]”\(^{22}\)

B. Applying the Pregnancy Discrimination Act

1. Newport News

The first case brought before the Court addressing the new amendment to Title VII was *Newport News Shipbuilding v. EEOC*.\(^{23}\) Delivering the majority opinion, Justice Stevens borrowed significantly from his dissent in *Gilbert* in defining how this new statute protected pregnant women.\(^{24}\)

In *Newport News*, the company amended its health insurance plan on the effective date of the PDA to include coverage of expenses relating to pregnancy-related conditions. This coverage was extended to all female employees; however, the insurance plan provided less coverage to spouses of male employees.\(^{25}\)

The Court’s opinion stated that section 703(a) of Title VII makes it unlawful to discriminate against individuals with respect to “compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex[.]”\(^{26}\) Because a company’s insurance plan is compensation for or a privilege of employment, male employees have a right, as well as females, not to be discriminated against based on the coverage of that insurance. The insurance plan in *Newport News* provided full coverage for medical-related cost to the spouses of female employees, and it gave the same coverage to

\(^{19}\) Id. at 161–62 (Stevens, J., dissenting).

\(^{20}\) LEGIS. HISTORY ON PDA, supra note 6, at 74–75 (recording remarks of Senator Bayh during debate on the Senate floor).

\(^{21}\) Id. at III.


\(^{24}\) Id. at 670.

\(^{25}\) Id. at 669.

\(^{26}\) Id. at 676 (citing 42 U.S.C. §§2002e-2(a) (1976)).
the spouses of male employees minus any pregnancy-related expenses. The Court said that the PDA makes it clear that it is discriminatory on its face if a company treats pregnancy-related medical expenses less favorably than other medical expenses. The Court held that the company’s insurance plan was discriminatory because it did not allow the same amount of pregnancy-related coverage for male employees’ spouses as it did for their female employees, and, thereby discriminated against the male employees.

The Court’s decision in Newport News effectively overruled Gilbert. It is an important case because it holds that pregnancy itself is protected under Title VII; however, as the cases that follow will show, Newport News provided little guidance as to the exact scope of protection provided by this newly enacted statute. Still, the question of coverage for infertility treatments remains.

2. International Union

The Supreme Court began to provide answers regarding the relatedness of infertility and the PDA in International Union v. Johnson Controls, Inc. In that case, a group of employees filed a class action suit against their employer for its fetal-protection policy. Johnson Controls was in the business of making batteries, and the main ingredient in the process of making batteries is lead. Research shows lead could cause harm to a fetus when the mother is exposed. Johnson Controls’s policy prohibited women capable of being pregnant from working in jobs involving lead exposure. The only women excused were those that had medical documentation of their inability to bear children.

In the Court’s decision, it claimed that Johnson Controls’s policy did not classify women on the basis of infertility alone, but rather on the basis of gender and childbearing capacity. The Court noted that infertility affects men as well as women. Johnson Controls, however, chose to explicitly classify all of its employees on the basis of their potential for pregnancy, not solely on the basis of infertility. Thus, under the PDA the “choice evinces

27. Id. at 682–83.
28. Id. at 685.
31. Id. at 192.
32. Id. at 190.
33. Id. at 191.
34. Id. at 192.
35. Id.
37. Id.
discrimination on the basis of sex." Though the Court in *International Union* discussed the implication of infertility in sexual discrimination cases based on the PDA’s amendment to Title VII, the cases that follow reveal confusion about the impact that infertility treatments have on these discrimination cases.

C. Further Defining Infertility in the Courts

The courts are firmly split on both sides of the issue. The next portion of this note will first discuss the decisions of courts that hold that infertility treatment is not covered by the PDA because it is facially neutral in that it affects men and women similarly. Thus, any decision made by a company based on treatment of infertility is not discriminatory “because of . . . sex.” This note will then address two decisions which hold that infertility treatments may be covered under the PDA. These courts argue that infertility treatment is protected under the plain statutory reading of the PDA, and also that it was Congress’s intent in passing the PDA to protect all aspects of pregnancy, including treatment of the inability to become pregnant.

1. Infertility Not Protected Under the PDA

The first United States court of appeals case that decided whether infertility was covered by the PDA was *Krauel v. Iowa Methodist Med. Ctr.* The employee in this case was diagnosed with a disorder that made it impossible for her to become pregnant. She received artificial insemination treatments and eventually gave birth to a baby girl. Her company’s health care plan paid for her pregnancy and all related expenses, but the plan did not cover the artificial insemination.

The employee in *Krauel* claimed that the employer’s medical plan violated the PDA because infertility is a medical condition related to pregnancy or childbirth. In support of her claim, she cited *International Union* for the proposition that discrimination based on the potential for pregnancy is discrimination on the basis of sex under the PDA. The court held that po-

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38. *Id.* at 199.
41. *See infra* Part II.C.1.
42. 95 F.3d 674 (8th Cir. 1996).
43. *Id.* at 675.
44. *Id.* at 676.
45. *Id.*
46. *Id.* at 679.
potential for pregnancy is covered by the PDA because it is exclusive to women but stated that infertility is not covered because it equally affects both women and men.\textsuperscript{48} This decision also distinguished \textit{Pacourek v. Inland Steel Co.},\textsuperscript{49} stating that relying on the legislative history of the PDA is not persuasive because there is no direct evidence that Congress intended that infertility be covered under the PDA.\textsuperscript{50} Thus, this court authoritatively held that infertility is not covered under the PDA.\textsuperscript{51}

The next case that denied protection under the PDA for women claiming discrimination based on infertility was \textit{Saks v. Franklin Covey Co.}\textsuperscript{52} The facts of this case were similar to those of \textit{Krauel}. The employer's health benefit plan did not cover surgical impregnation procedures such as in vitro fertilization.\textsuperscript{53} The employee claimed that this exclusion violated the PDA.\textsuperscript{54}

The Second Circuit held that the statutory language of the PDA—prohibiting discrimination on the basis of pregnancy or pregnancy-related conditions—was broader than pregnancy alone.\textsuperscript{55} The court said that a condition only falls within the protection of the PDA if that medical condition is unique to women.\textsuperscript{56} The court reasoned that infertility affects men and women equally, and thus the exclusion of surgical impregnation for the corrective purpose of infertility affects both men and women in the same manner.\textsuperscript{57} This court again decided, as the federal district court in \textit{Krauel} decided, that infertility is not covered by the PDA's amendment to Title VII.\textsuperscript{58}

These two cases found that infertility is a condition equally common among men and women. To trigger discrimination "because of sex" under the PDA, the employee must show that she is being discriminated against based on a medical procedure that is unique to women. It is not enough for the procedure to be done merely to facilitate pregnancy. Below is a discussion of the opposite side of the current split, affirmatively deciding that the PDA does protect infertility and its treatment.

2. \textit{Fertility Treatment Protected Under the PDA}

The only other federal court of appeals addressing whether infertility treatments fall within the scope of the PDA and Title VII is the Seventh

\begin{enumerate}[48.]
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Saks}, 316 F.3d at 346.
\end{enumerate}
Circuit in *Hall v. Nalco Co.* The court in *Hall* based its opinion on two federal decisions from the northern district of Illinois: *Pacourek v. Inland Steel Co.* and *Erickson v. Board of Governors.*

In *Pacourek*, the plaintiff worked for the Inland Steel Company for eleven years before a doctor diagnosed her with esophageal reflux, a medical condition that prevented her from becoming pregnant. She began to receive in vitro fertilization treatments from the University of Chicago and notified her employer that she was trying to get pregnant through this experimental treatment. Pacourek claimed that the defendants disparately applied their sick leave policy to her and terminated her because of esophageal reflux.

The *Pacourek* court began its analysis by stating its understanding of the general principle of *Newport News*. The court indicated that only women can become pregnant, and stereotypes or classifications based on pregnancy or any related medical conditions are never gender-neutral. From this, the court reasoned that "discrimination against persons who intend to or can potentially become pregnant is discrimination against women." The court then moved from its analysis of infertility to the legislative history of the PDA. The court pointed out that during debate on the Senate floor, Senator Harrison Williams, chief sponsor of the Senate bill leading to the PDA, continually commented that, historically, women have been the target of sex discrimination because of their "capacity to become pregnant." The court took this to mean that the interpretation of the statute should be broad enough to include more than just pregnancy itself.

With this case law and statutory interpretation, the *Pacourek* court believed that a medical condition that rendered the plaintiff unable to become pregnant naturally "is a medical condition related to pregnancy and childbirth for purposes of the [PDA]." The court reasoned that the neutrality argument ("[because] both men and women cannot become pregnant, infer-

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59. 534 F.3d 644 (7th Cir. 2008).
60. 858 F. Supp. 1393 (N.D. Ill. 1994).
63. *Id.* Pacourek was actually the University of Chicago’s first patient to receive in vitro fertilization. She alleged that both she and the school expended substantial amounts of time and money for this procedure. *Id.*
64. *Id.* at 1397.
65. *Id.* at 1401 (citing Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983)).
66. *Id.*
67. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1403.
tility is a gender neutral condition") failed because infertility—the inability to become pregnant—is a medical condition that is protected by the PDA and not neutral at all. This court brought infertility under the umbrella protection of Title VII.

The court in Erickson v. Board of Governors based its analysis directly on the decision in Pacourek. Melinda Erickson was an employee of Northeastern Illinois University. During her employment, Erickson used her accrued sick-leave time to undergo infertility treatments. She claimed that her supervisor expressed disapproval of her frequent use of sick leave for infertility treatments. Erickson was eventually terminated, and she claimed that she was discriminated against because of her infertility treatments, a medical condition related to pregnancy.

The Erickson court agreed with Pacourek when it denied the employer’s motion to dismiss. It reasoned that the PDA is broad in that it covers discrimination based on actual pregnancy or any intended or potential pregnancy. It decided that infertility is a pregnancy-related condition and should be covered under the PDA. These two federal district court decisions ultimately led to a similar holding in Hall v. Nalco Co.

Cheryl Hall was hired by Nalco in 1997 and later took the role as sales secretary for Marv Baldwin, a district sales manager. In 2003, she requested time off from her job to undergo an in vitro fertilization procedure. Mr. Baldwin approved her leave of absence for one month. When she returned to work, Ms. Hall notified Mr. Baldwin that she would need to take another month off from work because the first procedure was unsuccessful.

During the time these in vitro fertilization treatments were taking place, the company consolidated two of its sales offices and determined that they needed to retain only one of the two sales secretaries. Baldwin terminated Hall, saying it “was in [her] best interest due to [her] health condition.”

72. Id.
73. Id.
74. Erickson, 911 F. Supp. at 319.
75. Id. at 317.
76. Id. at 318.
77. Id.
78. Id. at 318–19.
79. Id. at 319.
80. Erickson, 911 F. Supp. at 319.
81. Id.
82. 534 F.3d 644 (7th Cir. 2008).
83. Id. at 645.
84. Id.
85. Id. at 646.
86. Id.
87. Id.
88. Hall, 534 F.3d at 646.
The record shows that Baldwin also had a conversation with the employee relations manager during which it was revealed that Hall "had missed a lot of work due to her health," citing "absenteeism—infertility treatments" as the reason.\(^9\)

Hall claimed that her termination amounted to discrimination for being a female with a pregnancy-related condition—infertility.\(^9\) The court heard the case after the district court granted summary judgment for the defendant on the ground that infertile women were not a protected class under the PDA.\(^9\) The Hall court overruled the district court's decision in as far as it relied on the cases of Saks v. Franklin Covey Co. and Krauel v. Iowa Methodist Med. Ctr. for their emphasis on the classification of infertility alone.\(^2\) The appellate court went on to state that the district courts should have relied on International Union for its interpretation of the scope of the PDA.\(^9\) The appellate court in Hall explained that, based on International Union's interpretation, infertility alone may not be actionable, but the infertility issue must still be gender neutral.\(^9\)

The court's logic was that persons who take time off to have in vitro fertilization or other pregnancy-related operations would always be women.\(^9\) The court characterized this case not as an issue of infertility treatments in general, but looked at the situation more broadly.\(^9\) It stated this was a case where termination was based on childbearing capacity.\(^9\) Thus, this case was a termination based on a gender quality specific only to women.\(^9\) In response, the court said that Hall had a cognizable claim under the PDA.\(^9\)

As the case law above points out, a court is faced with a problem when it tries to define the scope of the PDA by using only case law. In this sort of predicament, a court must look to statutory interpretation for assistance. The

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id. at 647–49 (citing Saks v. Franklin Covey Co., 316 F.3d 337 (2d Cir. 2003); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996)). The court in Saks adduced that “[i]ncluding infertility within the PDA’s protection as a ‘related medical condition []’ would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.” Saks, 316 F.3d at 346.

\(^{93}\) Hall, 534 F.3d at 648–49 (citing Int’l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991)). The court in Hall points out that it is implicit in International Union’s interpretation of the scope of PDA that classifications based on fertility alone or infertility alone are not prohibited by PDA because they are not gender-specific. Id. at 648.

\(^{94}\) Id. at 648 (citing Newport News Shipbuilding v. EEOC, 462 U.S. 669 (1983)).

\(^{95}\) Id.

\(^{96}\) Id. at 649.

\(^{97}\) Id.

\(^{98}\) Id.

\(^{99}\) Hall, 534 F.3d at 649.
next section of this note discusses how courts use such interpretation to define the meaning of a particular statute.

D. Statutory Interpretation

The central question important to the cases discussed above is whether the PDA expanded the coverage of Title VII of the Civil Rights Act of 1964 to include protection for women's infertility treatments. The disagreement of these courts in their decisions is primarily based on their interpretation of the statute. A general understanding of statutory interpretation is important to the understanding of this issue; thus, a basic primer follows.

When interpreting a statute, a court should first look at the plain meaning of the words. If it is clear, then the inquiry into the meaning of the text is finished because "the sole function of the courts is to enforce it according to its terms." As is apparent by disparate interpretations of the PDA, the statute does not provide a clear meaning by looking at its words alone. This section will look at two different tools courts use in statutory interpretation. First, it will discuss a general understanding of canons of statutory construction, which a majority of legal scholars have refuted as a method of statutory interpretation, but which are still used notwithstanding. This section will close with a discussion of the use of legislative history.

1. Canons of Statutory Construction

Canons of statutory construction are judicially created maxims that are used to decipher the meaning of a statute. There are many different types of canons available for judicial use, but it is only necessary to refer to two in this section. The first are canons of word associations—specifically, ejusdem generis.

Under ejusdem generis, a Latin phrase meaning "of the same kind," a term that follows a specific enumeration shall apply only to the general kind or class specifically enumerated. This canon encompasses the idea that an individual statute shall not be broadly interpreted unless the lawmaking body indicates otherwise.

100. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 10 (1997) (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)).
101. Id. at 23–24.
103. Id.
105. ESKRIDGE, supra note 102, at 262.
The second set of canons is that of negative implication, *inclusion unius est exclusion alterius*. This Latin phrase means "the inclusion . . . of one thing suggests the exclusion of all others." Judges who apply this canon argue that if the legislature specifically excludes a term from a statute’s application, then any other term that is not specifically excluded shall be considered included. This logic rests on the reasoning that by prohibiting a specific term, the legislature intends for the specifically prohibited term to apply only when specifically included elsewhere.

As previously stated, the use of canons as a method of statutory interpretation has fallen out of favor with many legal intellectuals. There are two major criticisms of canons: (1) they are “not a coherent shared body of law from which correct answers can be drawn,” and (2) legal commentators consider many canons to be incorrect.

Karl Llewellyn presented the first objection to the use of canons in statutory construction. He stated that every canon could have two opposing points on every point. Operating under this premise, Llewellyn argued that statutory interpretation based on specific canons could not yield correct answers. In order to prove his point and refute their significance, Llewellyn took a list of canons and wrote out each of their opposing points. For example, Llewellyn stated the opposing points of *ejusdem generis* in the following way:

> It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned (ejusdem generis). General words must operate on something. Further, *ejusdem generis* is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended.

The next objection to using canons to interpret statutes is that most are simply wrong. Judges applying canons presume that they are the intent of the legislature. Canons do not allow for an inquiry into the exact intent of the legislature, and they are at “odds with legislative supremacy . . . by forcing the burden on the legislature to overcome a judicial presumption, rather than requiring the court to dig for the meaning.” In other words, these canons do not give credence to the legislative process.
Despite these criticisms, judges still widely use canons to interpret statutes, as seen in the cases discussed above that interpret the PDA.\textsuperscript{114} This is particularly true at the state level because there is often not enough legislative history for interpretation.\textsuperscript{115} Legislative history gives the interpreter of the statute something to balance the canon against.\textsuperscript{116}

2. \textit{Legislative History}

Aside from the plain meaning of a statute, its legislative history is the most important tool in determining the intention or purpose of those who enacted it. An interpreter of a statute should use the legislative history only if it is relevant, reliable, and routinely discerned by interpreters at a reasonable cost.\textsuperscript{117} Unfortunately, a hierarchy of legislative history sources constrains these standards.\textsuperscript{118}

The most authoritative source at the top of this hierarchy is committee reports. Committee reports are useful because they tell the interpreter the policy and need behind the statute, give a detailed analysis of the entire statute, and state how each part of that statute relates to the whole.\textsuperscript{119} Committee reports are available in a variety of different forms, and they often speak to the relevant issues.\textsuperscript{120}

Explanatory statements by sponsors or floor managers of legislation are another important source of legislative history.\textsuperscript{121} These statements are persuasive because they usually refer to the direct coverage of the statute itself. They give the interpreter an understanding of the purpose of a particular statute as intended by those legislators who enacted it.\textsuperscript{122}

After the committee reports and the sponsor statements, the persuasiveness of various legislative sources drops off dramatically. These other legislative sources, such as the colloquy on the floor and subsequent history, may still be helpful if the two superior forms do not address the particular issue searched for within the statute.\textsuperscript{123} The interpreters must determine the relevant material within the legislative material, and if it is reliable, relevant, and widely available, then they may use it as a tool for statutory interpretation.

\begin{footnotes}
\item[114.] Id. at 27.
\item[115.] Id.
\item[116.] Id.
\item[117.] Id. at 304.
\item[118.] MIKVA \& LANE, \textit{supra} note 100, at 304.
\item[119.] Id.
\item[120.] Id.
\item[121.] Id. at 312.
\item[122.] Id.
\item[123.] Id.
\end{footnotes}
III. Analysis

The remainder of the note will rely on case law and tools of statutory interpretation to illustrate how infertility and infertility treatments are clearly not covered within the intended scope of the PDA and Title VII. First, this section will review case law to demonstrate how the courts that found for protection of infertility and infertility treatments erroneously failed to follow legal precedent. Second, this section will use the two tools of statutory interpretation, canons of statutory interpretation and legislative history, to demonstrate the meaning of the PDA.

A. Interpreting the Case Law

The case law detailed above, which present arguments for both sides of the issue, leaves courts in a grey area as to whether infertility or treatments for infertility are protected from discrimination by the PDA. When analyzing the early cases of *International Union* 124 and *Newport News*, 125 it becomes clear that the PDA only grants protection for pregnancy discrimination based on sex; because infertility is gender neutral, courts should not award Title VII protection in cases where the plaintiff alleges discrimination on the basis of infertility.

The courts in *Pacourek* and *Erickson* based their analyses on the fact that women who seek infertility treatment are persons who intend to be pregnant or potentially could be pregnant. Thus, the courts reasoned that these women should receive the protection intended by the PDA. The two courts could have reached this conclusion had they relied on the holdings in *International Union* and *Newport News* and found that the disparate treatment of the females seeking infertility treatments was based on their sex. Because neither court made such a finding, the analyses in both *Pacourek* and *Erickson* are flawed.

In both *International Union* and *Newport News*, the Supreme Court of the United States stated that any sort of policy outlined by a company is discriminatory under Title VII if the discrimination is based on a person's gender or childbearing capacity. In *Pacourek*, *Erickson*, and *Hall*, the employees were ultimately terminated because of excessive use of sick-leave time due to infertility treatments. If these terminations were strictly based on excessive leave, these policies were not discriminating on the basis of a person’s gender or childbearing capacity. Would the courts have ruled the same if it was a man who missed excessive work days for infertility treatments?

The court in *Hall* argued that persons who receive infertility treatments or pregnancy-related operations would always be women.\(^{126}\) This is not true because there are many surgeries offered to men to correct infertility problems; a simple internet search demonstrates this point.\(^{127}\) Although it seems that the case law supports the holding that infertility and infertility treatments are not covered by the PDA, it is important to also look at the statute itself, on which each of these courts based their holdings, to gain a firmer understanding of its meaning.

B. Statutory Interpretation the PDA

The text of the PDA does not directly mention infertility. In interpreting the PDA, the courts have reached opposing outcomes. As the statutory interpretation demonstrated in the remainder of the note will show, however, the PDA clearly does not confer protection for infertility and infertility treatment.

The subsection that follows will review the two canons of statutory construction used in the case law, and then make an argument as to the correct usage of this tool. The next subsection will review the legislative history of the statute and how this information can best be used in the interpretation of the PDA.

1. *Canons of Statutory Interpretation and the PDA*

The court in *Pacourek*, based part of its decision—that infertility was encompassed within the meaning of the PDA—on a settled canon of statutory construction.\(^{128}\) This canon was "‘that remedial statutes, such as civil rights laws, are to be broadly construed.’"\(^{129}\) The court stated that the phrasing of the statute—"pregnancy, childbirth, or related medical conditions"\(^{130}\)—required the reader to take a broad approach in interpreting its meaning.\(^{131}\) This allowed the court to conclude that infertility was a medical condition related to pregnancy that would be allowed as a claim under Title VII.\(^{132}\)

\(^{127}\) See James Buchanan Brady Urological Institute, http://urology.jhu.edu/male/ (last visited Mar. 29, 2010).
\(^{129}\) *Id.* (quoting Stoner v. Dep’t of Agric., 846 F. Supp. 738, 742 (W.D. Wis. 1994)).
\(^{131}\) *Pacourek*, 858 F. Supp. at 1402.
\(^{132}\) *Id.* at 1402–04.
The decision in *Krauel* is another example of the use of canons of statutory construction to interpret the meaning of the PDA. The *Krauel* court applied the rule that “‘when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.’” The court stated that the term “medical condition” was a general term that followed the specific terms “pregnancy” and “childbirth.” This means that if a medical condition is outside the context of childbirth or pregnancy, it is not covered by the PDA unless specifically stated elsewhere in the statute. According to the *Krauel* court, this canon proved that infertility was not covered by the PDA because it was not within the context of pregnancy or childbirth.

As stated before, canons of statutory construction have been widely debunked by the legal intellectual community for many reasons. Because courts used these tools of statutory interpretation in construing the PDA, this discussion is necessary. The canon used by the *Pacourek* court seems flawed by its very words. The court stated that remedial statutes shall be broadly construed. If remedial statutes should always be broadly construed, why add “pregnancy, childbirth, and medical-related conditions?” A broad understanding of pregnancy would encompass childbirth and the medical-related conditions that went along with it. It seems the legislature would have broadened the language if it intended for the entire statute to be interpreted broadly.

The canon used by the *Krauel* court is persuasive because the court followed the rule when it gave the logic behind its conclusion. The rule is that when a general term follows a specific term, the general term shall be understood as a reference to the subject given by the specific term. The terms “pregnancy” and “childbirth” are specific because of the plain meaning of each term. The term “medical-related condition” is general and must be understood as referring to the conditions related to pregnancy and childbirth. It seems logical that neither infertility nor infertility treatment is a medical condition specific to either pregnancy or childbirth. Thus, the term “medical-related condition” is specific only to infertility.

Although the canons of statutory construction do not create a perfect understanding of the PDA, they do allow courts to refute the notion that the PDA covers infertility treatments. Ultimately, the complete legislative history is the best tool that courts have to interpret the statute.

134. *Id.* (quoting *Norfolk & W. Ry. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991)).
135. *Id.*
136. *Id.*
137. *Id.* at 679–80.
2. Legislative History of the PDA

When looking at the legislative history of the PDA, it is apparent that Congress meant to clarify the scope of Title VII, specifically with regard to sex discrimination. After General Electric Co. v. Gilbert was decided, the legislature felt obligated to add, within the statutory code, explicit protection for women being discriminated against for pregnancy or taking time off work for childbirth. A closer look at the committee reports and the statements by the sponsors of the PDA will give a clearer understanding of the intended breadth of this statute.

Senator Williams, from the Committee on Human Resources, submitted a report detailing the committee’s reason for adopting the bill for the PDA. In his report, Williams reiterated Justice Steven’s dissent in Gilbert when he wrote, "[b]y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." By quoting from this language, Williams showed that discrimination based on pregnancy or childbirth was in itself discriminatory because it was only applicable to women. Williams did not contemplate a situation such as infertility that affects men and women equally.

In the committee report, Williams frequently referred to a need to address discrimination based on pregnancy and childbirth. Williams asserted that a “failure to address discrimination based on pregnancy . . . would prevent the elimination of sex discrimination in employment.” Williams continued, stating that the “bill does not require employers to treat pregnant women in any particular manner . . . [but] would simply require that pregnant woman be treated the same as other employees on the basis of their ability or inability to work.” The committee’s intent was to protect pregnant women specifically. Congress was concerned that if the law stood as it did after Gilbert, pregnant women would have no protection from discrimination. There is no evidence within the entire committee report that the senators intended for this protection to cover infertility or infertility treatment. The language continues in a similar vein when turning to the statements made by the sponsors of the bill.

In his opening remarks before the debate on the senate floor, Senator Williams reiterated the rationale in his committee report. He stated that this statute would “prohibit discrimination on the basis of pregnancy or conditions arising out of pregnancy for all employment-related purposes.”

139. LEGIS. HISTORY OF PDA, supra note 6, at 39–40.
140. Id. at 40 (emphasis added).
141. Id. at 40–41 (emphasis added).
142. Id. at 62.
According to Williams's opening remarks, a major reason for the bill was to deter the common practice of putting "pregnant women on mandatory unpaid leave, regardless of their ability or inability to work." Senator Bayh, another sponsor, stated that discrimination against pregnant workers was the major concern of the bill. He said "[d]iscrimination against pregnant workers remains one of the areas of employment discrimination facing women in the work force."

These statements indicate that the PDA sponsors' major concern was to correct the lack of protection given specifically to pregnant women in the workforce. The legislative history makes no reference to a lack of protection for those who are infertile. It seems absurd to add infertility to the interpretation of the statute when there is no evidence that Congress contemplated such broad coverage at the time of the bill's passage. Congress may take corrective measures if it believes infertility should be added within the understanding of the PDA, but it is not the courts' job to expand its coverage.

The courts in *Pacourek* and *Erickson* both relied upon the legislative history of the PDA to prove that infertility is within its scope of coverage. In *Pacourek*, the court relied on language such as "because of their capacity to become pregnant" and "on the grounds that they might become pregnant" to prove this point. The rationale of these courts is that if certain language in the legislative history demanded protection for women who possibly are or possibly might become pregnant, then protection should be granted for those women who use infertility treatment to become pregnant. Also, the court in *Erickson* stated that language in the legislative history, similar to that given in *Pacourek*, prohibits an employer from discriminating on the basis of a woman's ability to become pregnant.

The court in *Krauel* argued against these premises by pointing out that *Pacourek* relied heavily on the argument that the language in the legislative history permitted a broad interpretation of the PDA. Yet there is no direct evidence in any of the language cited in *Krauel* that "Congress intended infertility to be covered by the PDA." With the plethora of language within the legislative history of the PDA, it seems apparent that Congress would have been more specific if it intended the PDA to cover more than pregnancy and childbirth.

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143. *Id.*
144. *Id.* at 77.
The legislative history of the PDA shows that the legislators intended the PDA to protect against sex discrimination involving pregnancy and childbirth. This well-established specificity clearly defined the legislator’s intended scope of protection. The legislative history makes no mention of infertility or infertility treatment; therefore, it would be wrong to read such terms into the scope of a statute that is clearly defined.

IV. CONCLUSION

In applying the proper case law and different tools of statutory interpretation, it becomes clear that the Pregnancy Discrimination Act does not protect persons that are infertile or receive infertility treatments. This note does not argue that infertility or infertility treatments should not be protected; it only argues that neither infertility nor infertility treatments are protected under Title VII as the PDA is currently written. Hopefully the Supreme Court of the United States will rehear this issue in the near future and give definite clarity to the scope of the PDA. Until that time, however, the inferior courts will remain split on both sides of this intellectual divide.

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