RECLAIMING TITLE VII AND THE PDA: PROHIBITING WORKPLACE DISCRIMINATION AGAINST BREASTFEEDING WOMEN

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A number of claims brought in federal courts across the United States document stories of working mothers who have encountered workplace discrimination directed at their breastfeeding status. Federal courts considering these claims uniformly have agreed that sex discrimination based on breastfeeding is not actionable under Title VII as amended by the Pregnancy Discrimination Act (PDA). In this Note, Diana Kasdan argues that this jurisprudence fails to consider the intent of the PDA and instead revives the flawed and rejected analysis of General Electric Co. v. Gilbert, *which, prior to enactment of the PDA, wrongly held that discrimination directed at a gender-specific condition such as pregnancy was not Title VII sex discrimination. In critiquing these cases, Kasdan suggests that they ignore the gender-specific nature of breastfeeding, thereby improperly foreclosing the application of Title VII to breastfeeding-based claims. She argues that the statutory language, legislative intent, and Supreme Court interpretation of the PDA support an interpretation that includes breastfeeding within the scope of Title VII's antidiscrimination protections. Finally, Kasdan concludes that such an interpretation of the PDA is essential to preserving the integrity of Title VII law and ensuring the advancement of women in the workforce and public life.*

INTRODUCTION

More than twenty years ago, with the enactment of the Pregnancy Discrimination Act (PDA),[1] Congress clarified its intent that under Title VII,[2] workplace discrimination based on a biological condition specific to women, such as pregnancy, is the same as discrimination

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1 Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)). The PDA amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-13 (1994), by changing the definition of "sex" so that 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." Id. § 2000e(k); see also infra notes 72-82 (describing meaning and scope of PDA language).

2 Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

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based on sex.[3] In so doing, Congress unequivocally rejected the holding and logic of *General Electric Co. v. Gilbert*,[4] which held that Title VII did not protect against workplace discrimination based on pregnancy.[5] Despite this irrefutable directive from Congress, incredibly, courts have continued to rely on *Gilbert* when interpreting the PDA.[6] The issue that seems to have confounded courts and revived the logic of *Gilbert* is whether Title VII, as amended by the PDA, prohibits workplace discrimination based on breastfeeding.[7] While to date this issue has arisen in a limited number of cases, it reveals a troubling jurisprudence: By reviving the flawed and rejected analysis of *Gilbert*,[8] courts are hindering the legislative mandate to eliminate all forms of sex discrimination in the workplace.[9]

The revival of a pre-PDA analysis of Title VII threatens to narrow the scope of sex discrimination law and undo the progress made thus far. This is a disturbing prospect given the persistence of workplace discrimination against women.[10] Many employers and cowork-

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[3] See infra notes 144-50 and accompanying text (discussing scope of PDA as evidenced by congressional reports and Supreme Court interpretation); cf. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) ("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.").

[4] 429 U.S. 125 (1976). For a discussion of the congressional overruling of *Gilbert*, see infra Part II.B; infra note 69.

[5] *Gilbert*, 429 U.S. at 145-46 (holding that "disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities").

[6] E.g., Martinez v. NBC Inc., 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (citing *Gilbert* for its Title VII analysis); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (noting PDA changed law after *Gilbert* but applying *Gilbert* logic to conclude that PDA does not protect against discrimination based on breastfeeding), aff'd mem., 951 F.2d 351 (6th Cir. 1991). For a description of the *Gilbert* analysis, see infra Part II.A, and as adopted by *Martinez*, see infra Part II.C.1.

[7] Throughout this Note, the term "breastfeeding" encompasses any form of expelling milk, such as breastfeeding or pumping.

[8] See *Newport News*, 462 U.S. at 684 (holding that "Congress has unequivocally rejected" reasoning of *Gilbert* "that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant"); see also *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting) ("Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" (citation omitted)); infra Part II.B (discussing legislative response to *Gilbert*).

[9] See infra notes 140-43 and accompanying text (quoting Senate and House reports); see also infra notes 146-48 (discussing interpretations of PDA by Supreme Court).

[10] For example, in fiscal year 1992, there were 21,796 sex-based claims filed with the Equal Employment Opportunity Commission (EEOC). Office of Research, Info., & Planning, EEOC, Sex-Based Charges: FY 1992-FY 1999 (1999), http://www.eeoc.gov/stats/sex.html. By fiscal year 1999 that number had increased to 23,907. Id. While only a small percentage of cases reached an administrative determination of "reasonable cause," the percentage that did almost doubled from 1992 to 1999. Id. (reporting that 3.4% of cases in 1992 and 6.4% of cases in 1999 had reasonable cause). The discrepancy in pay between

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ers still tend to stereotype women as less capable professionals, especially when childbearing issues and biological differences emphasize the real and perceived differences between men and women.[11] Thus, it is not surprising to find that women who are breastfeeding have been singled out as targets of sex discrimination. For example, one employer subjected several female employees to adverse employment actions and a litany of harassing remarks such as "[y]ou smell like curdled milk," and "Jesus, Patty, your tits are huge!"[12] In another case, a casino employee claimed that upon returning to work after time off for breastfeeding, she was dismissed upon the pretext of an expired license, despite the fact that it was company practice to allow employees with expired licenses to stay on while awaiting renewal.[13] In yet another case, a female employee alleged that male employees stood outside the room where she was breast pumping and made offensive comments.[14] According to the court in that case, however, a work environment "hostile to breast pumping" was not sex discrimination.[15]

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men and women may further support the existence of persistent workplace discrimination. See Bureau of Labor Statistics, U.S. Dep't of Labor, Highlights of Women's Earnings in 1998, at 1 (1999) (reporting that in 1998, women still only earned about seventy-six percent of that earned by men).

[11] For instance, female employees are subject to comments such as: "Are you really serious about your career, or are you just going to go home and get pregnant?," Quaratino v. Tiffany & Co., 71 F.3d 58, 61 (2d Cir. 1995), and "we are not a family oriented company, we are a business," Bond v. Sterling, Inc., 997 F. Supp. 306, 309 (N.D.N.Y. 1998). Even when corporations offer family-friendly policies such as childcare, parental leave, or flextime, research has shown that "in practice asking for these benefits is often taken as an admission of inadequacy—a sign that women are unable to manage their work and family demands . . . [and] women who took advantage of them were seen as less committed and less desirable." Rosalind C. Barnett, A New Work-Life Model for the Twenty-First Century, 562 Annals Am. Acad. Pol. & Soc. Sci. 143, 147 (1999); see also Leslie Bender, Sex Discrimination or Gender Inequality?, 57 Fordham L. Rev. 941, 950-51 (1989) (arguing that women's success in major law firms depends on their ability to "act and think most like the gendered male culture").

[12] Donaldson v. Am. Banco Corp., 945 F. Supp. 1456, 1462 (D. Colo. 1996). This case also demonstrates how pregnant women face discrimination in the terms of their employment. The three plaintiffs were all subject to either involuntary termination or reduction in hours after becoming pregnant or giving birth. Id. at 1460.

[13] Fejes v. Gilpin Adventures, Inc., 960 F. Supp. 1487, 1493-94 (D. Colo. 1997). For additional details of the *Fejes* case, see infra note 115 and accompanying text.

[14] Martinez v. NBC Inc., 49 F. Supp. 2d 305, 311 (S.D.N.Y. 1999) (referring to allegations of "tasteless and offensive remarks directed at the fact that she was engaged in pumping breast milk"); Plaintiff's Memorandum in Opposition to Motion at 5, *Martinez* (No. 98 Civ. 4842 (LAK)) [hereinafter Plaintiff's Memorandum].

[15] *Martinez*, 49 F. Supp. 2d at 311 (reasoning that even "assuming the truth of Martinez's allegations, [all that is left] is a work environment hostile to breast pumping, not a work environment that subjected women to treatment less favorable than was meted out to men"). For additional discussion of *Martinez*, see infra notes 102-07 and accompanying text.

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Most courts that have addressed this issue have agreed that sex discrimination based on breastfeeding status is not actionable under Title VII.[16] The disturbing logic emerging from the lower court holdings is that discriminatory distribution of benefits, harassment, demotions, or other adverse actions are permissible when employers direct this discrimination at the woman's breastfeeding status, not her "sex" generally.[17] Such a distinction between breastfeeding-based sex discrimination and other forms of sex discrimination ignores reality. Breastfeeding, like pregnancy and childbirth, is a biological, sex-based characteristic that conflicts with traditional workplace expectations.[18] Sex discrimination, whether based on pregnancy or breastfeeding, negatively distinguishes female employees because of their sex-specific characteristics. In either case, such treatment keeps women out of the workforce longer, thereby hindering their career and economic advancement.[19]

This Note argues that, in contrast to the findings of lower courts, applying Title VII protections to women who have suffered sex discrimination based on their breastfeeding status is necessary, logical, and required under the PDA. Part I establishes the clear biological causes and effects of breastfeeding, as well as its social context. Part II.A reviews the development of the Court's pregnancy discrimination analysis in *Gilbert* and Part II.B discusses its statutory overruling by the PDA. In light of this history, Part II.C analyzes the prevailing rationales among lower courts that have considered whether the PDA prohibits discrimination on the basis of breastfeeding and the detrimental effect of these decisions. Drawing from the statutory language, legislative intent, and the Supreme Court's interpretation of the PDA, Part III critiques the prevailing rationales and suggests a straightforward approach by which advocates and courts can promote a proper interpretation of the PDA that includes breastfeeding within the scope of Title VII's protections.

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16 See infra Part II.C for an analysis of how lower courts have responded to breastfeeding-based discrimination claims.

17 See infra Part II.C.1 (arguing that holdings in lower courts have revived logic of *Gilbert*).

18 See infra notes 40-43 (citing studies on women's maternity and employment choices).

19 See infra notes 79-80 and accompanying text (relating conclusion in congressional reports that sex stereotyping hinders women's advancement in workforce). For a discussion of the competition between breastfeeding and maternal employment, see Brian Roe et al., Is There Competition Between Breast-Feeding and Maternal Employment?, 36 Demography 157 (1999).

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I
THE BIOLOGICAL REALITY AND SOCIAL CONTEXT OF BREASTFEEDING

Despite the assumptions of some courts, breastfeeding is not simply a childcare choice independent of gender or pregnancy.[20] The biological causes and effects of lactation and subsequent breastfeeding,[21] as well as the accompanying social context, illustrate how breastfeeding engenders various physical and social effects unique to women.

The ability to breastfeed follows from lactation, a process triggered by pregnancy and childbirth.[22] This process results in numerous physical sequelae. Lactation often causes discomforts such as hardness, swelling, and heaviness of the breast, as well as leakage of breast milk.[23] A woman can end lactation and milk leakage by not breastfeeding, but, if breastfeeding is chosen, leakage and control over the feeding schedule can be difficult.[24] On the other hand, lactation and continued breastfeeding can provide significant physical benefits

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20 See infra notes 98-99 and accompanying text for a discussion of courts that have equated breastfeeding with childcare.

21 This Note recognizes that the act of breastfeeding extends the biological process of lactation, and that a woman could choose to prevent or stop lactation by not engaging in, or not continuing, breastfeeding. See Judith G. Greenberg, The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce, 50 Me. L. Rev. 225, 230 n.29 (1998) (noting that lactation process can be artificially aborted, but that courts should not expect this as norm); but cf. Jendi B. Reiter, Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm, 9 Tex. J. Women & L. 1, 8 (1999) (explaining that unless artificially terminated, "inability to relieve the build-up of milk" during lactation can cause great discomfort). However, this "choice" does not alter the sex-specific nature of breastfeeding or the corresponding Title VII analysis. See infra notes 165-71 and accompanying text.

22 Donna J. Chapman & Rafael Pérez-Escamilla, Identification of Risk Factors for Delayed Onset of Lactation, 99 J. Am. Dietetic Ass'n 450, 450 (1999) ("The human lactation process progresses rapidly in pregnancy during lactogenesis stage I, in which the structures of the mammary gland undergo preparation for milk production. At approximately 2 to 3 days postpartum, lactogenesis stage II occurs and is marked by copious secretion of breast milk.").

23 Id. at 452 (describing "[b]reast hardness, breast fullness/heaviness, breast swelling, and leakage of colostrum/breast milk").

24 See Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *4 (D. Or. Apr. 9, 1999) (describing one occasion in which employer would not let plaintiff go home to feed her son and "[s]he started leaking breast milk and was humiliated," and describing another occasion in which "she was forced to sit on the plane drenched in breast milk" after employer refused plaintiff any breaks); Rebecca F. Black et al., Lactation Specialist Self-Study Series, Module 2: The Process of Breastfeeding 48 (1998) (recommending eight to twelve feedings during twenty-four-hour period, but noting that newborn's needs and feeding duration will vary among individual babies); Work Group on Breastfeeding, Am. Acad. of Pediatrics, Breastfeeding and the Use of Human Milk, 100 Pediatrics 1035, 1036 (1997) [hereinafter AAP] (advising that newborns "should be nursed whenever they show signs of hunger").

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to women.[25] The American Academy of Pediatrics (AAP) reports that breastfeeding may improve bone remineralization and reduce ovarian and breast cancer in mothers.[26] Additionally, continued lactation controls postpartum bleeding[27] and helps decrease menstrual blood loss for months after delivery.[28]

In addition to the physical impact breastfeeding has on women, it brings with it significant social expectations and consequences.[29] The American medical community strongly advocates the benefits of breastfeeding for both mothers and infants, and mothers are actively encouraged to breastfeed for at least one year.[30] The AAP's most recent policy statement notes that human milk is the "optimal form of nutrition for infants," providing them with "general health, growth, and developmental" advantages.[31] Further, it has found that "breastfeeding provides significant social and economic benefits to the nation, including reduced health care costs and reduced employee absenteeism for care attributable to child illness."[32] The social impact of breastfeeding is extremely significant given the high rate of women and mothers in the workforce. Almost sixty percent of women in the

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[25] Isabelle Schallreuter Olson, Out of the Mouths of Babes: No Mother's Milk for U.S. Children: The Law and Breastfeeding, 19 Hamline L. Rev. 269, 271-74 (1995) (detailing extensive research on benefits of breastfeeding to mother and child); Corey Silberstein Shdaimah, Why Breastfeeding Is (Also) a Legal Issue, 10 Hastings Women's L.J. 409, 410-11 (1999) (same).

[26] AAP, supra note 24, at 1035.

[27] Breastfeeding and Human Lactation 103 (Jan Riordan & Kathleen Auerbach eds., 2d ed. 1999) [hereinafter Breastfeeding] (explaining that hormone oxytocin, which causes release of milk, also contracts uterus and controls postpartum bleeding).

[28] AAP, supra note 24, at 1035.

[29] For a discussion of why the feminist sociological agenda should focus more attention on breastfeeding given the social consequences that it has on women's personal and public lives, see Cindy A. Stearns, Breastfeeding and the Good Maternal Body, 13 Gender & Soc'y 308 (1999). Stearns studies the way women balance breastfeeding in response to "[t]he perceived need to hide breastfeeding . . . [which] effectively keeps some women at home and out of public life more than they would be otherwise." Id. at 323.

[30] AAP, supra note 24, at 1037. The United States Department of Health and Human Services, through its "Healthy People" initiative, has sought to increase the rate of breastfeeding in this country since 1984 when the Surgeon General convened a Workshop on Breastfeeding and Human Lactation. See Breastfeeding, supra note 27, at 18 (noting seventy-five percent breastfeeding rate as year 2000 goal). The new Healthy People 2010 initiative is still working toward a seventy-five percent rate for postpartum breastfeeding, fifty-percent rate at six months, and twenty-five percent at one year. See 2 U.S. Dep't of Health & Human Servs., Healthy People 2010 § 16-19 (2d ed. 2000), http://www.health.gov/healthypeople/Document/HTML/Volume2/16MICH.htm. While improvements have been made, the Department of Health and Human Services advises that success in reaching this goal will require greater "social support, including support from employers." Id.

[31] AAP, supra note 24, at 1035.

[32] Id.

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United States are employed,[33] and they constitute forty-six percent of the entire civilian workforce.[34] Notably, over half of those women with children under age one are employed.[35]

Reflecting the benefits that the AAP and other advocates of breastfeeding have identified,[36] the federal government has made breastfeeding a national health objective.[37] Programs designed to teach and assist new mothers in breastfeeding,[38] as well as the exis-

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33 According to 1998 statistics from the United States Department of Labor, 59.8% of women age sixteen and over are employed. Twenty Facts on Women Workers, in Facts on Working Women (Women's Bureau, U.S. Dep't of Labor), Mar. 2000, Fact 2, http://www.dol.gov/dol/wb/public/wb_pubs/fact98.htm [hereinafter Women's Bureau]. The employment rate is significantly higher, around seventy-five percent, for women between ages twenty and fifty-four. Id.

34 Id. Fact 4.

35 Women with infants under the age of one are employed at a rate of 53.6%. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment of Mothers with Infants, Monthly Labor Review: The Editor's Desk (June 8, 1999), available at http://www.bls.gov/opub/ted/1999/jun/wk2/art02.htm; see also Twenty Facts on Women Workers, supra note 33, Fact 6 (reporting that 60.7% of women with children under age three are employed). Not surprisingly, fathers with children under age six continue to work at a much higher rate (96.1%) than mothers with children under age six (64.9%). Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Participation of Fathers and Mothers Varies with Children's Ages, Monthly Labor Review: The Editor's Desk (June 3, 1999), available at http://www.bls.gov/opub/ted/1999/jun/wk1/art03.htm.

36 One of the oldest and most well-known breastfeeding advocacy groups is La Leche League, founded in 1956. La Leche League International (LLLI), at http://www.lalecheleague.org (last modified Oct. 18, 2000). Today, numerous breastfeeding organizations, professional groups, and other health organizations advocate for greater education, acceptance, and use of breastfeeding. See, e.g., Am. Coll. of Nurse-Midwives, Breastfeeding, at http://www.acnm.org/prof/breast.htm (July 27, 1992) (posting position statement encouraging educational programs, public policies, and workplace practices that support breastfeeding); Child Health and Development (CHD), World Health Org. (WHO), at http://www.who.int/chd (last visited Oct. 21, 2000) (suggesting six months of exclusive breastfeeding as WHO and UNICEF guidelines); Coalition for Improving Maternity Servs. (CIMS), at http://www.motherfriendly.org (last visited Oct. 21, 2000) (identifying coalition, including LLLI and lactation professionals, that identifies mother-friendly and baby-friendly birthing services); International Lactation Consultant Association (ILCA), at http://www.ilca.org (last modified Oct. 14, 2000) (detailing professional association that promotes development and advancement of lactation consultants); National Alliance for Breastfeeding Advocacy (NABA), at http://hometown.aol.com/marshalact/Naba/home.html (last visited Oct. 21, 2000) (working to promote breastfeeding as public health issue through lobbying, monitoring, advocacy development, and coalition building); World Alliance for Breastfeeding Action (WABA), at http://www.waba.org.br/ (last visited Oct. 21, 2000) (organizing, in conjunction with UNICEF, annual week long events to generate public awareness and support of breastfeeding).

37 See supra note 30 (describing Department of Health and Human Services goals for improving rate of breastfeeding).

38 See Shdaimah, supra note 25, at 430-35 (discussing congressional effort to educate low-income women on breastfeeding through federal nutritional program for "Women, Infants, and Children"); supra note 36 (listing numerous advocacy organizations that provide education and training).

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tence of supportive state legislation,[39] evidence a nationwide effort to encourage new mothers to breastfeed.

Still, women who attempt to continue breastfeeding while maintaining employment often encounter significant impediments that are at odds with the stated public policy of promoting breastfeeding.[40] For many women this conflict forces a choice between breastfeeding and work. A recent study on competition between breastfeeding and maternal employment revealed that most working mothers are concerned primarily with sustaining employment and adjust the frequency and duration of breastfeeding to accommodate that goal.[41] As a result, breastfeeding often ends considerably sooner than is recommended.[42] However, among those women who consciously develop strategies to balance breastfeeding and work simultaneously, breastfeeding duration increases.[43] Workplace discrimination against breastfeeding women threatens to negate this hard-earned balance and likely will discourage more women from attempting to continue breastfeeding while working. As will be discussed in Part III, Title VII provides a framework that can help reduce this threat by prohibiting discrimination against breastfeeding employees.[44]

[39] See, e.g., Ga. Code Ann. § 34-1-6 (Supp. 2000) (encouraging employers to provide breaks for women to express breast milk for infant children); Haw. Rev. Stat. § 378-10.2 (1999) (forbidding employers to prohibit employees from expressing breastmilk during meal or break periods); N.M. Stat. Ann. § 28-20-1 (Michie 2000) (declaring "[r]ight to breastfeed" in any public or private place where mother is authorized to be present); Tenn. Code Ann. § 50-1-305 (1999) (requiring employers to provide "reasonable unpaid break time" and "make reasonable efforts" to provide rooms for expressing breast milk). For a more detailed discussion of state legislation pertaining to breastfeeding, see Reiter, supra note 21, at 22-27.

[40] The Stearns study reports findings on how mothers attempt to negotiate discreetly breastfeeding in public places. Stearns, supra note 29, at 312-16. For example, Stearns found that work presented an institutional setting in which some women felt breastfeeding was never appropriate. Id. at 315; see also Breastfeeding, supra note 27, at 22-23 (noting that despite efforts to promote breastfeeding, social approval and acceptance are still lacking).

[41] Roe et al., supra note 19, at 158 ("[W]orking mothers will make decisions about employment first, and then structure the infant-feeding decision around work constraints."). Contrary to the researchers' expectations, the study discovered that "duration of breast-feeding is not a statistically significant determinant of work-leave duration." Id. at 164.

[42] Compare Roe et al., supra note 19, at 159 (reporting that working women in study breastfed for average of 21.53 weeks), with AAP, supra note 24, at 1037 (recommending one year minimum of breastfeeding).

[43] Roe et al., supra note 19, at 166 (noting that "the negative effect of market work on breast-feeding duration dissipates" if women aim to balance both objectives rather than prioritizing work schedules).

[44] State laws provide another avenue for protection against this type of discrimination, and in some states they may provide greater protection than Title VII. See supra note 39 (citing state breastfeeding statutes and article discussing state laws). This Note, however, is limited to an analysis of federal rights and protections provided by Title VII.

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II
From *Gilbert* to the PDA and Back Again: Title VII Sex Discrimination As Defined by Congress and the Courts

In 1976, the Supreme Court held in *General Electric Co. v. Gilbert*[45] that discrimination against pregnant women is not sex discrimination under Title VII.[46] Congress emphatically disagreed. Just two years after *Gilbert* was decided, Congress passed the PDA, which effectively overruled the *Gilbert* holding and rationale.[47] Parts II.A and II.B briefly introduce the premise of sex discrimination law under Title VII, outline the Court's position in *Gilbert* on pregnancy discrimination, and explain how and why Congress rejected that position by enacting the PDA. From the perspective of this framework, Part II.C analyzes how lower courts erroneously have interpreted the PDA when deciding cases of breastfeeding-based sex discrimination.

A. *Title VII and the* Gilbert *Analysis*

By the time the PDA was adopted, Title VII already had been in place for almost fifteen years. Since 1964, Title VII had provided a federal source of rights and remedies against various forms of workplace discrimination so as to open the mainstream job market to all individuals, regardless of race, national origin, religion, or sex.[48] Through extensive litigation, the understanding of what constitutes sex discrimination has developed substantially, and three general theories of sex discrimination under Title VII have evolved: facial discrimination,[49] disparate treatment[50] (which includes sexual

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[45] 429 U.S. 125 (1976).

[46] Id. at 145-56.

[47] See supra notes 1-5 and accompanying text (discussing Title VII as affected by *Gilbert* decision and subsequent amendment through PDA); infra notes 69-71 and accompanying text (discussing speedy reaction by Congress to reverse effect of *Gilbert*).

[48] See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1166-67 (1971) (discussing original purposes and concepts underlying Title VII).

[49] Facial discrimination occurs when an employment policy is based explicitly on sex. See City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 714-18 (1978) (holding that it is prima facie sex discrimination to require that female employees contribute more money to pension fund than male employees); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (holding that, absent exception for bona fide occupational qualification, it is prima facie sex discrimination for employer to have one hiring policy for women with preschool-aged children and another for men with preschool-aged children).

[50] In cases of disparate treatment, there is not an explicit sex-based policy, but the plaintiff alleges differential treatment "because of" or "based on" sex. The model for such claims is the same as that for disparate treatment based on race, as set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the *McDonnell Douglas* test, a plaintiff may establish a prima facie case of race discrimination

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harassment[51]), and disparate impact.[52] Applying these frameworks to Title VII as amended by the PDA, women can raise claims of sex discrimination if they encounter policies explicitly based on pregnancy, disparate treatment—including harassment—based on pregnancy, or if pregnant employees suffer a disparate impact from neutral policies.

Before Congress enacted the PDA, the plaintiffs in *Gilbert* asked the Supreme Court to find that, under Title VII, a policy explicitly distinguishing benefits on the basis of pregnancy was facially discriminatory, or alternatively, that it had a disparate impact on women.[53]

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.

Id. at 802; see also Johnson v. Transp. Agency, 480 U.S. 616 (1987) (applying framework set forth in *McDonnell Douglas* to claim of discrimination based on sex, in context of affirmative action plan). This same prima facie approach applies in cases where an employee faces discrimination in other terms of employment, including, for example, promotions, job assignments, and transfers. See generally Daniel M. Le Vay, Annotation, Sex Discrimination in Job Assignment or Transfer as Violation of Title VII of Civil Rights Act of 1964 (42 U.S.C.S. §§ 2000e et seq.), 123 A.L.R. Fed. 1 (1995) (citing and describing numerous cases finding sex discrimination in terms of employment after initial hiring).

[51] Although it took longer to develop the theory that sexual harassment that creates a hostile work environment is sex discrimination, it is now firmly recognized as a form of discriminatory treatment based on sex under Title VII. Sexual Harassment, 29 C.F.R. § 1604.11(a) (2000) ("Harassment on the basis of sex is a violation of . . . title VII."); see Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (establishing that employer is subject to vicarious liability to employee when supervisor creates hostile work environment because of sex); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (stating that both quid pro quo and hostile environment claims are cognizable and actionable under Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."). See generally Beverly Johnson, Sexual Harassment on the Job, in 33 Am. Jur. Trials 257, 270-83 (1986 & Supp. 1999) (detailing various theories and standards of proof for sexual harassment claims under Title VII).

[52] Disparate impact claims seek to demonstrate that a facially neutral policy has a disproportionately negative impact on one sex. The burden of proof for disparate impact claims was added to Title VII in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (1991) (codified at 42 U.S.C. § 2000e-2(k)) (requiring plaintiff to demonstrate that each challenged employment practice has disparate impact and allowing respondent to defend such practices by proving that they are business necessity). The Supreme Court first recognized this theory of discrimination in the context of race discrimination. Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971) (holding that Title VII forbids employment practice that is neutral on face if it preserves status quo of prior discrimination or operates to exclude minorities, regardless of intent). The Court then applied it to a claim of sex discrimination in Dothard v. Rawlinson, 433 U.S. 321, 332-34 (1977) (noting that Title VII is violated if facially neutral employment standards create significantly discriminatory hiring pattern with disproportionate negative effect on women, but holding that specific facts of case created allowable exception for bona fide occupational qualification).

[53] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136-37 (1976).

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The Court flatly refused to do so.[54] This, however, was not the first time the Supreme Court had declined to recognize pregnancy discrimination as a form of sex discrimination.

The basis for the Court's reasoning in *Gilbert* was laid down two years earlier in *Geduldig v. Aiello*.[55] In *Geduldig*, the Court considered whether pregnancy discrimination violated federal constitutional protections against sex discrimination. Workers sued the state for excluding pregnancy and related medical disabilities from coverage under California's mandatory state disability compensation program.[56] Under a Fourteenth Amendment equal protection analysis, the Court held that the plan's exclusion of pregnancy disabilities was constitutionally valid because "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[57] However, as the dissent noted, men received full compensation for several sex-related conditions, such as prostatectomies and circumcisions, while medical needs resulting from pregnancy were excluded.[58] The dissent aptly revealed the faulty basis of the majority's conclusion which had disregarded the fact that the *singular* area of benefits exclusion was for a condition specific to women.

The Court rationalized that the pregnancy exclusion was not based on gender because pregnancy is a physical condition that only some women experience.[59] From this rationale, the Court concluded that dividing "potential recipients into two groups—pregnant women and nonpregnant persons," was not gender-based discrimination because the latter group includes members of both sexes.[60] In other words, only the subgroup of women who became pregnant risked medical disability without coverage, whereas women avoiding pregnancy could enjoy coverage on par with men.

Geduldig established the principle that discrimination against women on the basis of avoidable, gender-based conditions, such as pregnancy, is not sex discrimination under the Fourteenth Amendment. Despite this restrictive constitutional definition of sex discrimination, appellate courts deciding Title VII discrimination claims post-*Geduldig* interpreted the *statutory* definition of sex discrimination to

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[54] Id. at 145-46; see also infra notes 62-68 and accompanying text (discussing Supreme Court analysis in *Gilbert*).

[55] 417 U.S. 484 (1974).

[56] Id. at 486.

[57] Id. at 496-97.

[58] Id. at 501 (Brennan, J., dissenting).

[59] Id. at 496-97 n.20 (rationalizing that plan "merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities").

[60] Id. at 497 n.20.

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include gender-based characteristics, such as pregnancy.[61] Nonetheless, with *Gilbert*, the Supreme Court rejected this body of Title VII jurisprudence and erroneously extended its equal protection analysis to Title VII.[62]

In *Gilbert*, several female employees who were denied medical benefits for disabilities arising from their pregnancies sued their employer for violating Title VII.[63] Noting the similarity between language in Title VII and its equal protection decisions, as well as the lack of persuasive legislative history, the Court concluded that the reasoning in *Geduldig* was applicable to an interpretation of sex discrimination under Title VII.[64] Without further considering congressional intent or policy, the Court applied the *Geduldig* rule and held that excluding pregnancy benefits from a medical coverage plan was not "a mere 'pretext[ ] designed to effect an invidious discrimination against the members of one sex or the other.'"[65]

In contrast to the majority opinion, strong dissents by several Justices established a more practical understanding of sex discrimination.

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61 E.g., Satty v. Nashville Gas Co., 522 F.2d 850, 854 (6th Cir. 1975) (holding that disparate treatment of pregnancy leave compared to other sick leave is violation of Title VII), vacated in part in light of *Gilbert*, 434 U.S. 136 (1977); Hutchison v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961, 965 (9th Cir. 1975) (holding that exclusion of pregnancy-related disabilities from sick leave coverage is Title VII violation), vacated in light of *Gilbert*, 429 U.S. 1033 (1977); Gilbert v. Gen. Elec. Co., 519 F.2d 661, 667 (4th Cir. 1975) (holding that denial of pregnancy-related disabilities under employer benefit program falls "clearly within the prohibitions of Title VII"), rev'd, 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089, 1098 (5th Cir. 1975) (citing with approval rationale in other circuits that found pregnancy-based discrimination is sex discrimination under Title VII, even if not under Constitution); Communications Workers of Am. v. AT&T Co., 513 F.2d 1024, 1031 (2d Cir. 1975) (holding that decision in *Geduldig* does not bar pregnancy discrimination claim under Title VII), vacated in light of *Gilbert*, 429 U.S. 1033 (1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 205-06 (3d Cir. 1975) (holding it discriminatory to treat disability due to pregnancy differently from other temporary disabilities), vacated on jurisdictional grounds, 424 U.S. 737 (1976).

62 Compare Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (reasoning that State's legitimate, noninvidious financial objective for excluding pregnancy conditions from disability program did not violate Equal Protection Clause of Fourteenth Amendment), with Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (concluding that reasoning of *Geduldig* was "precisely in point" for analysis of Title VII claim at issue). But as the Supreme Court noted after the enactment of the PDA, "in evaluating the constitutionality of California's insurance program, the [*Geduldig*] Court focused on the 'non-invidious' character of the State's legitimate fiscal interest . . . . This justification was not relevant to the statutory issue presented in *Gilbert*." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 677 n.13 (1983) (citation omitted).

63 *Gilbert*, 429 U.S. at 128-29. The women who brought the suit represented a class of women employees who similarly had been denied benefits. Id. at 127 n.2.

64 Id. at 133, 141-45 (finding that Court's equal protection cases were useful starting point while EEOC guidelines were not sufficiently persuasive).

65 Id. at 136 (quoting *Geduldig*, 417 U.S. at 496-97 n.20). The Court also held that the policy did not have a disparate impact on women. Id. at 137.

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Justice Brennan, with whom Justice Marshall concurred, made the simple and sensible statement that "it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'"[66] In a separate dissent, Justice Stevens similarly noted that "[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."[67] These dissenting views proved extremely prescient and ultimately were adopted by Congress.[68]

B. *Title VII as Amended by the Pregnancy Discrimination Act*

Just three months after the *Gilbert* decision, Congress moved swiftly and deliberately to invalidate the rule established by the Supreme Court.[69] With the introduction of the PDA, Congress sought to "change the definition of sex discrimination in Title VII to reflect the 'commonsense' view and to insure that working women are protected against all forms of employment discrimination based on sex."[70] By calling on the commonsense understanding of sex discrimination, Congress rejected the more rigorous constitutional standard established by the Supreme Court.[71]

Congress framed the PDA as a definitional amendment to Title VII that expanded the statutory language defining sex discrimination. As amended by the PDA, under Title VII of the Civil Rights Act of 1964 "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[72] In redefining sex discrimination, the

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[66] Id. at 149 (Brennan, J., dissenting) (citation omitted).

[67] Id. at 161-62 (Stevens, J., dissenting).

[68] The Senate Report on the PDA directly quoted Justice Brennan and Justice Stevens when it declared that the dissenting opinions "correctly express both the principle and the meaning of title VII." S. Rep. No. 95-331, at 2-3 (1977); accord Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 677-78 (1983) (citing approvingly dissenters' analysis in *Gilbert* and quoting Senate Report's express approval of dissenting Justices' interpretation of Title VII).

[69] *Gilbert* was decided on December 7, 1976, and the PDA was introduced in the Senate on March 15, 1977, S. Rep. No. 95-331, at 3. Congressional intent to overrule *Gilbert* was recognized by the Supreme Court in its first PDA case. *Newport News*, 462 U.S. at 676, 678 (holding that Congress "not only overturned the specific holding in . . . *Gilbert*, but also rejected the test of discrimination employed" in that case and reasoning that Congress "unambiguously expressed its disapproval of both the holding and reasoning of the Court in the *Gilbert* decision" (citation omitted)).

[70] S. Rep. No. 95-331, at 3.

[71] See *Newport News*, 462 U.S. at 679 (citing legislative history for proposition that "amending legislation was necessary to re-establish the principles of Title VII law as they had been understood prior to the *Gilbert* decision").

[72] 42 U.S.C. § 2000e(k) (1994).

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amendment also specifies that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes" as they treat other persons similar in their capacity to work.[73]

By adding a statutory definition of sex, Congress did not add new requirements for employment practices or benefits, but rather it clarified the scope of existing prohibitions against sex discrimination in employment.[74] As a result, the PDA applies to all Title VII provisions regarding unlawful employment practices based on sex[75] and is not restricted to any one particular employment practice described within the PDA itself.[76] Given the amendment's pervasive alteration of Title VII, *Gilbert* should not have been persuasive or controlling for subsequent Title VII analysis.[77]

In addition to creating a statutory amendment that overruled the holding of *Gilbert,* Congress forthrightly stated the policy reasons behind its rejection of the Court's analysis. The Senate declared that it disagreed with the Court's decision, which "threaten[ed] to undermine the central purpose of the sex discrimination prohibitions of Title

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[73] The second clause of § 2000e(k) reads in full:

> [W]omen 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.

Id.

[74] The House Report states:

> We recognize that enactment of H.R. 6075 will reflect no new legislative mandate of the Congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII of the Civil Rights Act. On the contrary, the narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination.

H.R. Rep. No. 95-948, at 3-4 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751-52; see also *Newport News*, 462 U.S. at 681 n.20 (citing Senate Report for proposition that PDA was intended to clarify definition of sex while preserving existing Title VII principles).

[75] For example, under 42 U.S.C. § 2000e-2(a), it is an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." A proper reading of this language, in light of § 2000e(k), includes the term pregnancy as part of the term sex.

[76] As explained by the Supreme Court, the second clause of the PDA, which is specific to medical benefits, is not a "limitation on the remedial purpose of the PDA," but rather it is an illustration directed at overruling *Gilbert*. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987); see also *Newport News*, 462 U.S. at 679 (noting that Act does not have scope limited to "the specific problem that motivated its enactment").

[77] See *Guerra*, 479 U.S. at 284-85 (citing *Newport News* for "well established" principle that Congress enacted PDA as reaction to and overruling of *Gilbert*); see also supra notes 68-71 and accompanying text (discussing accepted view that PDA overruled *Gilbert*).

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VII."[78] In contrast to the Court's application of a narrow constitutional analysis to Title VII, Congress insisted that the statutory law should provide greater protection against discrimination as a necessary step toward women's advancement and equality in society.[79] Congress realized that prohibiting pregnancy discrimination was essential to eliminating societal assumptions that childbearing women lack a commitment to their careers.[80] Without this amendment, Congress feared it could not successfully eliminate sex discrimination in the workplace.[81]

C. *The Current Jurisprudence: How Lower Courts Have Analyzed the PDA and Claims of Breastfeeding-Based Discrimination*

The Supreme Court has relied on the language and explicit policy goals voiced throughout the legislative history of the PDA to interpret Title VII broadly, rather than strictly limiting the impact of the PDA to pregnant women.[82] In contrast to this precedent, a line of cases

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[78] S. Rep. No. 95-331, at 3 (1977); see also supra notes 48-52 and accompanying text (discussing purpose of Title VII generally).

[79] As bill sponsor Senator Williams concluded during his remarks, "this legislation restores to our working women a very basic and fundamental protection against sex discrimination, one which we intended to provide them when title VII was enacted." 123 Cong. Rec. 29,387 (1977); see also 123 Cong. Rec. 29,663 (1977) (statement of Sen. Cranston, cosponsor) ("[T]his legislation will represent a significant step forward for working women and their families . . . to assure equality of employment opportunity and to eliminate those discriminatory practices which pose barriers to working women in their struggle to secure equality in the workplace."); 123 Cong. Rec. 29,388 (1977) (statement of Sen. Kennedy) (emphasizing high numbers of women in workforce and economic necessity of ensuring their equal treatment); 123 Cong. Rec. 29,387 (1977) (statement of Sen. Javits) (describing enactment of PDA as "vital social policy").

The floor debate in the House provides similar commentary. E.g., 124 Cong. Rec. 21,442 (1978) (statement of Rep. Tsongas) (stating:

> [The PDA] would go a long way toward assuring women equality in the job market. It would assure that women who work either out of choice or necessity are not penalized for having a family. It would also put an end to an unrealistic and unfair system that forces women to choose between family and career—clearly a function of sex bias in the law, which no longer reflects the conditions of women in our society.);

124 Cong. Rec. 21,435 (1978) (statement of Rep. Hawkins) ("[G]enuine equality in the American labor force is no more than an illusion as long as employers remain free to make pregnancy the basis of unfavorable treatment of working women.").

[80] See S. Rep. No. 95-331, at 3 ("[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.").

[81] Id. ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.").

[82] See UAW v. Johnson Controls, Inc., 499 U.S. 187, 205, 211 (1991) (relying on legislative history and holding that Title VII, as amended, forbids "sex-specific fetal-protection policies" because it is based on women's "capacity" to become pregnant); Newport News

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dealing with breastfeeding-based sex discrimination indicates a trend toward a more restrictive interpretation of sex discrimination under Title VII. Uniformly, these cases have held that breastfeeding-based sex discrimination is not within the meaning of Title VII as amended by the PDA. As this Section will reveal, contrary to engaging in a meaningful and accurate interpretation of Title VII, these cases have revived the logic of *Gilbert*, confused the issue of discrimination with that of accommodation, and ultimately precluded effective recourse for breastfeeding women.

1. *Reviving the Logic of* Gilbert

While only two jurisdictions have appellate level decisions on breastfeeding-based sex discrimination claims,[83] these precedents have become the foundation for a line of cases in several lower courts.[84] The appellate court rationales for rejecting breastfeeding-based claims thus have been carried across several jurisdictions and have established a prevailing approach to this question of law, with logic reminiscent of *Gilbert.*

In the Fourth Circuit, two cases, *Barrash v. Bowen*[85] and *Notter v. North Hand Protection*,[86] taken together, stand for the proposition that because "breastfeeding is not a medical condition related to pregnancy or to childbirth,"[87] it does not come within the meaning of the PDA.[88] With this rule, these cases deny Title VII protection from breastfeeding-based discrimination, just as the Supreme Court had denied such protection from pregnancy related discrimination.

In *Barrash*, the Fourth Circuit, in dicta, rejected a disparate impact breastfeeding-based sex discrimination claim, reasoning that the PDA only covers pregnancy and related conditions that, unlike

Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (applying Title VII, as amended by PDA, to male employees). The Supreme Court also has held that Title VII, as amended by the PDA, does not prohibit preferential treatment of pregnant workers. In so holding, it reasoned that the purpose of Title VII in achieving equality in employment takes into account the realities of "social context." Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288-90 (1987). This reliance on legislative history is markedly different from the Court's position in *Gilbert*, see supra notes 64-65 and accompanying text, thus indicating the PDA's legislative history as an important development in Title VII interpretation.

[83] Notter v. N. Hand Prot., No. 95-1087, 1996 WL 342008 (4th Cir. June 21, 1996); Wallace v. Pyro Mining Co., No. 90-6249, 1991 WL 270823 (6th Cir. Dec. 19, 1991); Barrash v. Bowen, 846 F.2d 927 (4th Cir. 1988).

[84] See infra notes 94, 99 (citing cases that adopted rationales originating in Fourth and Sixth Circuits).

[85] 846 F.2d 927 (4th Cir. 1988).

[86] No. 95-1087, 1996 WL 342008 (4th Cir. June 21, 1996).

[87] Id. at *5.

[88] See infra notes 89-92 and accompanying text (analyzing progression of "medical conditions" rule from *Barrash* to *Notter*).

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breastfeeding, are "incapacitating."[89] In *Notter*, a nonbreastfeeding case, the same court again considered whether the PDA only covers incapacity related to pregnancy.[90] The court admitted that the PDA did not require incapacitation and accordingly acknowledged that the *Barrash* interpretation of the PDA was partially incorrect.[91] However, *Notter* failed to remedy sufficiently the flawed analysis of *Barrash* for two reasons. First, it let stand the misconception that the PDA permits discrimination against nonmedical conditions of pregnancy, such as breastfeeding.[92] Second, *Notter* carried minimal impact and authority since it was an unpublished decision that was handed down eight years after *Barrash* was decided. By the time *Notter* was decided, other jurisdictions already had adopted the *Barrash* dicta.[93] Moreover, even after *Notter* was decided, other jurisdictions considering breastfeeding-based claims continued to cite and adopt the *Barrash* dicta without consideration of the *Notter* limitation.[94]

In *Wallace v. Pyro Mining Co.*,[95] the Sixth Circuit adopted and expanded the rationale developed in *Barrash* and reaffirmed in *Notter*. The district court explicitly adopted the *Barrash* medical con-

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89 846 F.2d at 931. The *Barrash* court actually held that, because the plaintiff had settled her claim of wrongfully denied maternity leave through a union grievance process, it was not properly before the court as a Title VII claim. Nonetheless, the court went on to state its interpretation of the PDA as requiring a showing of incapacitation and noted that, since the plaintiff had not shown incapacitation, she still would have failed to raise a Title VII claim. Id. at 930.

90 In *Notter*, the plaintiff claimed disparate treatment by her employer because she was fired after taking medical leave to recover from a caesarian. *Notter*, 1996 WL 342008, at *3-*4. The defendant argued that because the plaintiff's condition was not incapacitating, under *Barrash*, she had failed to establish that she was protected by the PDA. Id. at *4-*5.

91 Id. (describing requirement of incapacity in *Barrash* as made in dicta and without any citation to authority).

92 See id. (clarifying that "*Barrash* stands for the narrow proposition that breastfeeding is not a medical condition related to pregnancy or to childbirth" for purpose of PDA analysis). For the argument that nonmedical conditions of pregnancy are protected under the PDA, see infra Part III.A.

93 For example, before *Notter* was decided, a district court in the Sixth Circuit adopted the *Barrash* dicta. Wallace v. Pyro Mining Co., 789 F. Supp. 867, 868 (W.D. Ky. 1990), aff'd mem., 951 F.2d 351 (6th Cir. 1991). The rationale and holding were affirmed by the Sixth Circuit Court of Appeals, Wallace v. Pyro Mining Co., No. 90-6249, 1991 WL 270823 (6th Cir. Dec. 19, 1991), and then followed outside of the Sixth Circuit, e.g., Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 445 (D. Md. 1994) (quoting "incapacitating conditions" language from *Wallace*, which in turn had cited *Barrash* for support of this interpretation).

94 E.g., Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1492 (D. Colo. 1997) (decided after *Notter* but citing *Barrash*); McNill v. N.Y. City Dep't of Corr., 950 F. Supp. 564, 571 (S.D.N.Y. 1996) (same).

95 No. 90-6249, 1991 WL 270823 (6th Cir. Dec. 19, 1991). In *Wallace*, the plaintiff did not clarify whether her claim raised the issue of disparate treatment or disparate impact. *Wallace*, 789 F. Supp. at 868. Ultimately, the form of her claim was irrelevant since the court held that a breastfeeding person simply was not within the class of persons protected by the PDA. Id. at 868-69.

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dition rationale in refusing to apply the PDA to the plaintiff's claim.[96] The court of appeals affirmed, holding that because the plaintiff could not establish that breastfeeding was a medical necessity, the PDA did not apply.[97]

Lack of medical necessity, however, was not the sole rationale underlying the lower court holding. In its opinion, the district court equated breastfeeding with childcare and held that Title VII, as amended by the PDA, did not make it illegal for an employer to deny personal leave to a female worker who requested time off for childcare concerns such as breastfeeding.[98] Under the *Wallace* analysis, breastfeeding does not come within the scope of Title VII because it is not a medical condition of pregnancy *and also* because it is perceived as a form of childcare. As with the *Barrash* decision, other courts have adopted this precedent with approval.[99]

Perhaps most disturbing, while decisions like *Barrash, Notter,* and *Wallace* gave the abandoned logic of *Gilbert*[100] renewed currency,[101] a more recent decision, *Martinez v. NBC Inc.*,[102] went one step further and relied explicitly on *Gilbert*. In *Martinez*, the plaintiff was allowed to use an empty room at her office to pump breast milk. However, Martinez claimed that this activity led to discrimination in the form of disparate treatment by her supervisor[103] and a hostile environment at

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[96] The court stated: "[W]e find further guidance in the case of *Barrash v. Bowen*, . . . [which] noted that for purposes of the Pregnancy Discrimination Act, 'pregnancy and related conditions must be treated as illnesses only when incapacitating.'" *Wallace*, 789 F. Supp. at 870 (citation omitted).

[97] *Wallace*, 1991 WL 270823, at *1.

[98] *Wallace*, 789 F. Supp at 870.

[99] For example, in *Fejes v. Gilpin Ventures Inc.*, the district court of Colorado, noting that no Tenth Circuit decision addressed the issue, cited *Barrash* and *Wallace* to support its holding that, "[b]ased on the language of the PDA, its legislative history, and decisions from the other courts interpreting the Act, . . . breast-feeding or childrearing are not conditions within the scope of the PDA." 960 F. Supp. at 1491; see also Martinez v. NBC Inc., 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999) (citing *Wallace, Fejes,* and *McNill* for proposition that breastfeeding is not covered by Title VII); Moawad v. Rx Place, No. 95 CV 5243(NG), 1999 WL 342759, at *5 (E.D.N.Y. May 27, 1999) (citing *McNill,* which relied on *Wallace*, for proposition that women claiming conditions such as breastfeeding "cannot raise a claim under the PDA"); *McNill*, 950 F. Supp. at 570-71 (S.D.N.Y. 1996) (citing *Wallace* and dismissing plaintiff's PDA claim on summary judgment); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 444-45 (D. Md. 1994) (quoting *Wallace* extensively and analogizing case at bar to *Wallace* analysis of breastfeeding as childcare).

[100] See supra notes 68-71 and accompanying text (discussing rejection of *Gilbert* rationale and holding).

[101] At least one commentator has argued that this "most unfortunate" persistence of the "*Gilbert* doctrine" demonstrates the need to move beyond the civil rights paradigm in order to accommodate breastfeeding women in the workforce. Reiter, supra note 21, at 6.

[102] 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

[103] See id. at 311 (claiming unfair treatment by supervisor, demotion, and onerous schedule changes in response to her breast-pumping activity).

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work.[104] In response, the court failed completely to acknowledge the PDA and its impact on Title VII analysis. Rather, the court cited *Gilbert* for the proposition that, "[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII."[105]

With this statement, the District Court for the Southern District of New York indicated that *Gilbert* still provided the relevant analysis for Title VII sex discrimination claims and that, accordingly, breastfeeding-based discrimination is not sex discrimination under Title VII. This is a dangerous precedent.[106] First, it ignores two well-established bases for claiming sex discrimination under Title VII: differential treatment and harassment directed at gender specific conditions.[107] Second, it suggests that courts confronting a novel claim of sex discrimination may disregard the PDA's clarification of Title VII and singularly rely on the logic of *Gilbert.*

2. *Conflating Discrimination with Accommodation*

Courts further have failed to recognize that breastfeeding-based discrimination is sex discrimination under Title VII by categorizing claims brought in these cases as requests for accommodation.[108] In reframing a claim of discrimination as a request for accommodation,

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[104] See supra note 14 and accompanying text (citing plaintiff's brief and court's recitation of facts in *Martinez* regarding allegations that male employees made offensive and harassing comments while standing outside room where Martinez pumped milk).

[105] *Martinez*, 49 F. Supp. 2d at 309. Notably, *Wallace* also directly cited and relied on the logic of *Gilbert.* However, the court at least recognized the enactment of the PDA as altering Title VII sex discrimination law, even if it ultimately failed to see how that applied to the breastfeeding-based claims at bar. See supra notes 95-99 and accompanying text (discussing *Wallace* analysis of PDA). *Martinez* is yet more disturbing because it fails to cite or mention the PDA, let alone attempt to reject its applicability to the plaintiff's claims.

[106] There is reason to believe that *Martinez* could be followed widely given the dearth of cases on this issue and the widespread adoption of the *Wallace* reasoning, which also relied on *Gilbert.* See supra notes 99-100.

[107] See supra notes 50-51 (discussing disparate treatment and sexual harassment as two forms of discrimination in violation of Title VII). Although it is true that singular and isolated incidents of sexual harassment cannot generally sustain a claim of sex discrimination, Johnson, supra note 51, Supp. § 4.5, the *Martinez* court did not reject the claim because it failed to show an abusive or hostile environment. Rather, it rejected her claim because, as the court concluded, it alleged "a work environment hostile to breast pumping, not a work environment that subjected women to treatment less favorable than was meted out to men." *Martinez*, 49 F. Supp. 2d at 311. Thus, the court found that the *subject*, not the *extent*, of hostile treatment placed Martinez's claim beyond Title VII relief.

[108] See Wallace v. Pyro Mining Co., 789 F. Supp. 867, 870 (W.D. Ky. 1990) ("Nothing in the Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers."), aff'd mem., 951 F.2d 351 (6th Cir. 1991); see

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courts evidence their assumption that plaintiffs are asking for more than equal treatment—that they are asking employers to accommodate breastfeeding women's special needs by providing extra benefits.[109]

This distinction between accommodation and discrimination can be extremely fine.[110] For example, if a company provides a strict one-month limit for personal leave per year, it would be an accommodation to provide a breastfeeding employee a second month of personal leave that year. However, if the company refused to grant a female employee her *unused* month of personal leave to stay home and breastfeed, that likely would raise an issue of disparate treatment, rather than a refusal to accommodate.[111] Unfortunately, the courts

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also Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) (quoting *Wallace*); McNill v. N.Y. City Dep't of Corr., 950 F. Supp. 564, 571 (S.D.N.Y. 1996) (same).

[109] See *Fejes*, 960 F. Supp. at 1492 (discussing whether PDA requires accommodation of woman's breastfeeding schedule); *McNill*, 950 F. Supp. at 571 (quoting *Wallace* for proposition that employers need not accommodate women with breastfeeding leave because it is not available to men); *Wallace*, 789 F. Supp. at 870 (holding that PDA does not make it illegal for employers to deny discretionary leave that would accommodate employee's breastfeeding schedule). But cf. O'Hara v. Mt. Vernon Bd. of Educ., 16 F. Supp. 2d 868, 885 (S.D. Ohio 1998) (noting in dicta that EEOC guidelines suggest employer should grant leave for childcare purposes on same basis as leave for other nonmedical reasons (citing Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 444 (D. Md. 1994))).

Although a thorough discussion of whether the PDA does, or can, require accommodation as necessary to prevent discrimination is beyond the scope of this Note, commentators generally have agreed that current Title VII analysis does not require accommodation. See Reiter, supra note 21, at 3-4 (arguing that individual rights model, as exemplified by Title VII, is insufficient for accommodating biologically unique circumstances of women workers); D'Andra Millsap, Comment, Reasonable Accommodation of Pregnancy in the Workplace, 32 Hous. L. Rev. 1411, 1417 (1996) (explaining that "PDA does not grant a pregnant employee the affirmative power to demand accommodation" but rather is negative right to be treated equally with similarly situated workers); cf. Shdaimah, supra note 25, at 424-25 (explaining that Title VII was designed to remove barriers to equality, not favor groups, and that there is "fear that a policy which recognizes and accommodates difference can be dangerous ground"). Contra Candace Saari Kovacic-Fleischer, Litigating Against Employment Penalties for Pregnancy, Breastfeeding, and Childcare, 44 Vill. L. Rev. 355, 356-58 (1999) (outlining argument that Title VII, as amended by PDA, does require accommodation in order to prevent discrimination).

[110] Congress, nonetheless, indicated its awareness of this line. For example, in its report, the Senate clarified that

> the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

S. Rep. No. 95-331, at 4 (1977).

[111] See id.

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relying on the accommodation framework have failed to make such distinctions.[112]

The confusion between accommodation and discrimination in factual analysis has created a serious problem for the ensuing legal analysis. For example, in *Fejes v. Gilpin Ventures, Inc.*,[113] the court construed the breastfeeding-based portion of the sex discrimination claim as challenging the denial of a part-time schedule to accommodate the breastfeeding employee.[114] Given the facts reported, however, the claim also raised the question of whether, after taking time off for breastfeeding, Fejes was treated differently from other employees—a classic disparate treatment claim.[115] Despite these two different aspects of the claim, the bulk of the court's consideration of pregnancy discrimination focused on whether the PDA requires accommodation of a woman's breastfeeding schedule.[116] This accom-

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112 For instance, at one point in its discussion, the *Wallace* court identified specific claims and facts that could be interpreted as indicating the employer's refusal to accommodate the employee. It described the plaintiff's claim of sex discrimination as arising from the employer's refusal to grant plaintiff discretionary personal leave for breastfeeding. *Wallace*, 789 F. Supp. at 868-69. However, in holding that the PDA did not apply, the court did not rely on the fact that supplemental leave was "discretionary." Rather, the court stated that even when additional leave, as requested by Wallace, was a "condition of employment," the employer is entitled to a blanket policy prohibiting personal leave for breastfeeding. Id. at 869. Thus, under the *Wallace* court interpretation of Title VII, even if supplemental leave is a term of employment under the company policy, if it is requested for breastfeeding, it becomes an "accommodation."

113 960 F. Supp. 1487 (D. Colo. 1997).

114 Id. at 1491.

115 The plaintiff, a casino worker, and her employer initially set up a two-day workweek while she was establishing her breastfeeding schedule. However, after a switch in supervisors, she suddenly was issued a letter stating she had been self-terminated for failing to show up for work. After discussing the previous arrangement with her new supervisor, they agreed that she would return to a full-time schedule. Shortly after this agreement, Fejes realized her gaming license was about to expire. Fejes and her employer agreed that she would begin work full-time as soon as the new license arrived. Yet once again, she was informed that she was terminated, this time because her employer could not hold the position open until her return. Id. at 1490-91. Despite this explanation, Fejes alleged that other employees with expired licenses were allowed to work in nongaming positions until the license renewal arrived. Id. at 1494.

116 See id. at 1491-92. In comparison, the analysis of Fejes's other general sex discrimination claims looked more directly at the issue of discriminatory treatment. See id. at 1492-93. This separation exemplifies the tendency of courts to conceptualize pregnancy discrimination as something different from sex discrimination. See id. at 1491 (referring to "gender and pregnancy prongs of [plaintiff's] Title VII claim"); see also O'Hara v. Mt. Vernon Bd. of Educ., 16 F. Supp. 2d 868, 885 (S.D. Ohio 1998) ("As a result of the PDA, there are now, as one court has referred to it, two prongs of sex discrimination, 'the gender and pregnancy prongs of . . . Title VII.'" (quoting *Fejes*, 960 F. Supp. at 1491)). In contrast, as the legislative history of Title VII demonstrates, such separation of pregnancy and sex discrimination was not intended. See supra notes 74-80 and accompanying text (describing congressional intent to clarify pregnancy discrimination as one *form* of sex discrimination).

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modation discussion led the court to its broader holding that breastfeeding simply was not within the meaning of the PDA.[117]

The *Fejes* example demonstrates that, in form, the accommodation framework is somewhat different from the medical conditions or childcare arguments. It does not insist necessarily that breastfeeding is beyond the definition of sex.[118] Rather, it maintains that employers' actions or policies toward breastfeeding employees are beyond the meaning of *discrimination* under Title VII.[119] In substance, however, the "accommodation" analysis is similar to the medical condition or childcare analysis—it is yet another way of placing breastfeeding-based sex discrimination outside the scope of Title VII's proscriptions.[120] With such broad holdings, these decisions contribute to a per se rule that breastfeeding-based sex discrimination is never more than a refusal to accommodate.

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[117] See *Fejes*, 960 F. Supp. at 1492 (moving from discussion of breastfeeding as requiring accommodation to conclusion that, "as a matter of law," plaintiff could not establish prima facie case of pregnancy discrimination when based on breastfeeding status). The same type of blurring between accommodation and discrimination issues was seen in *Wallace*. The plaintiff, after completing her maternity leave, requested an additional six-week personal leave to breastfeed. The employer decided not to grant this leave, and, when Wallace did not promptly return to work, she was terminated. *Wallace*, 789 F. Supp. at 868. In deciding this case, the court seemed to infer a maximum level of benefits required by the PDA, holding that the PDA did not intend to make it illegal for an employer to deny personal leave for the accommodation of childcare concerns such as breastfeeding. Id. at 870. Without examining the specifics of the company's policy, it is unclear what factors determined the granting or withholding of personal leave. However, to hold simply that the PDA *never* requires personal leave for breastfeeding is to permit even those companies that generally provide leave for numerous nonmedical reasons to withhold it when requested for breastfeeding. This would raise the issue of discriminatory distribution of benefits, not accommodation. See infra Part III.C.

[118] The *Fejes* court, however, did accept the premise that breastfeeding is beyond the definition of sex under Title VII. *Fejes*, 960 F. Supp. at 1492 ("Also, I conclude that breastfeeding . . . [is] not [a] medical condition[ ] . . . within the meaning of the PDA.").

[119] While the PDA helped clarify the definition of the terms "because of sex" and "on the basis of sex," it did not define the term "discrimination," and discrimination is not otherwise defined in Title VII. See 42 U.S.C. § 2000e (1994) (giving definitions of terms for purposes of Civil Rights Act, but not including "discrimination"). Rather, Title VII lists the types of practices that, if done in a discriminatory manner, are unlawful. Id. § 2000e-2 (prohibiting discrimination in hiring, discharge, compensation, and terms, conditions, or privileges of employment, and prohibiting segregation or classifications that adversely affect employees' status or employment opportunity).

[120] The cases that used an accommodation analysis to reject breastfeeding-based claims, supra note 108, also have been cited as support for the more general proposition that plaintiffs cannot raise breastfeeding-based claims under Title VII, see Martinez v. NBC Inc., 49 F. Supp. 2d 305, 309 n.16 (S.D.N.Y. 1999) (citing *Fejes* and *McNill* for proposition that breastfeeding is not covered by Title VII); Moawad v. Rx Place, No. 95 CV 5248(NG), 1999 WL 342759, at *6 (E.D.N.Y. May 27, 1999) (citing *McNill* for proposition that women claiming conditions such as breastfeeding "cannot raise a claim under the PDA").

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3. *Precluding Effective Recourse*

The revival of *Gilbert* and conflation of discrimination and accommodation by the lower courts have left breastfeeding women suffering harassment or disparate treatment with little recourse. *Martinez* serves as a case in point. The plaintiff in *Martinez* attempted to frame her sex discrimination claim within the theory of "sex-plus discrimination."[121] Rather than argue that breastfeeding, like pregnancy, is a condition of sex recognized by Title VII, the plaintiff seemed to argue that breastfeeding was a "plus" to her sex and that this specific combination of characteristics subjected her to discriminatory treatment.[122] The sex-plus discrimination claim was, as the court explained, inappropriate in this context because the "plus" was not gender-neutral as required under that theory.[123] Yet, in light of the uniform failure of courts to consider the *possibility* that breastfeeding is protected under the PDA, the plaintiff effectively may have been forced into this posture.[124] Unfortunately, the court used the plaintiff's reliance on the sex-plus theory to ignore the relevance of the PDA.[125] The court concluded that the plaintiff's "allegations, if true, warrant sympathy for her and disapproval for those responsible,

[121] Under a sex-plus discrimination theory, discrimination, generally in the form of disparate treatment, is based on gender plus a second sex-neutral characteristic that may disguise the underlying gender-based discrimination. For example, if married women but not married men are discriminated against, when one removes the "plus" of marriage the reality is discrimination based on sex alone. See *Martinez*, 49 F. Supp. 2d at 310 (explaining sex-plus theory and its inapplicability to Martinez's case). For a discussion of the sex-plus theory, see generally Wendi Barish, Comment, "Sex-Plus" Discrimination: A Discussion of *Fisher v. Vassar College*, 13 Hofstra Lab. L.J. 239 (1995); Regina E. Gray, Comment, The Rise and Fall of the "Sex-Plus" Discrimination Theory: An Analysis of *Fisher v. Vassar College*, 42 How. L.J. 71 (1998).

[122] Martinez applied the sex-plus theory to both her claim of disparate treatment, *Martinez*, 49 F. Supp. 2d at 310 (claiming disparate treatment based on her sex plus secondary characteristic of breastfeeding), and her claim of sexual harassment, id. at 311 (asserting "'sex-plus' hostile work environment").

[123] Under the sex-plus theory, if the second characteristic must be sex-neutral, then breastfeeding, which is gender-specific, cannot fit within the framework. As explained by the court in *Martinez*, "'gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender.'" Id. at 310 (quoting Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997)).

[124] Compare Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 19-21, *Martinez* (No. 98 Civ. 4842 (LAK)) (citing *Wallace, Fejes, McNill,* and *Barrash*, among other cases, to argue that Title VII does not cover breastfeeding), with Plaintiff's Memorandum at 16-18 (relying on sex-plus claim with no specific reliance on PDA or counterargument to breastfeeding cases cited by defendant); see also *Martinez*, 49 F. Supp. 2d at 310 (noting that plaintiff's motion did not dispute court's analysis relying on *Gilbert* and *Wallace*).

[125] The *Martinez* court never directly cited or discussed the PDA; it only referred to it parenthetically in a footnote citing a case. See *Martinez*, 49 F. Supp. 2d at 309 n.16 (citing *Fejes*).

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[but] they do not make out a claim within the coverage of the statute."[126]

Martinez's last-ditch effort to rely on a sex-plus theory indicates that courts, and even plaintiffs, still have difficulty conceptualizing breastfeeding as part and parcel of pregnancy or sex as defined by Title VII. In the absence of such a construction of Title VII, working mothers are left without protection against discrimination directed at their breastfeeding status. Fortunately, with a more faithful interpretation of the PDA, courts can put Title VII sex discrimination law back on track.[127]

III
Interpreting the Language and Intent of the PDA to Prohibit Breastfeeding-Based Sex Discrimination

Courts interpreting the PDA narrowly are ignoring the impact of sex discrimination targeted at breastfeeding women. The dismissive treatment of these claims will tend to increase the tension between childbirth and employment, completely contradicting the goal of the PDA. Fortunately, only a relatively small number of jurisdictions and lower courts have addressed this issue. Thus, legal advocates and judges must begin considering an alternative analysis.

This Part explores several factors indicating that the decisions of the lower courts offer unpersuasive rationales and internally confused analyses. Moreover, statutory language and legislative intent strongly suggest that a sensible and reasoned interpretation of Title VII, as amended by the PDA, requires a broader interpretation than these courts have provided.

An analysis distinct from current court interpretations does not require a new understanding of sex discrimination law. Rather, it simply calls on courts to step out of the medical conditions or childcare framework and realize that breastfeeding is a sex-specific condition that can be, and is, the basis of sex discrimination. At the same time, courts must take care to distinguish appropriately those claims that seek accommodation from those that demonstrate discriminatory actions, such as disparate treatment and harassment, toward breastfeeding employees.

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126 Id. at 311.

127 As one commentator has argued, "[b]ecause Congress reversed the reasoning of *Gilbert* when it passed the PDA, presumably Congress did not intend to see the reasoning in it reemerge in a similar context." Kovacic-Fleischer, supra note 109, at 381.

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A. *Recognizing Sex Discrimination Based on Nonmedical Conditions of Pregnancy*

When Congress amended the language of Title VII with the PDA, it expressly redefined the term sex to "include, but . . . not [be] limited to, pregnancy, childbirth, or related medical conditions."[128] Despite the dominant conclusion among courts that breastfeeding, as a nonmedical condition, is not within the scope of the PDA's protections,[129] breastfeeding need not be conceptualized as a "related medical condition" for protection under sex discrimination law.[130] The only plausible reason for requiring all forms of pregnancy discrimination to relate to medical conditions would be if Congress so limited the language and purpose of the Act. As this Section will discuss, the legislative language and congressional intent prove otherwise. Moreover, the Supreme Court's repeated reliance on the legislative history of the PDA has proven it to be an exceptionally persuasive expression of Title VII goals.[131]

Courts that have decided that breastfeeding is not encompassed within the scope of the PDA generally have considered only part of the PDA's legislative history.[132] Despite the PDA's goal of expanding the meaning of sex discrimination generally, courts steadfastly have

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[128] 42 U.S.C. § 2000e(k) (1994).

[129] See supra notes 85-94 and accompanying text (describing development of medical conditions analysis and citing cases that rely on it).

[130] See Kovacic-Fleischer, supra note 109, at 380-83 (noting that breastfeeding does not properly fit within medical "disability" under PDA). Contra Olson, supra note 25, at 302-03 (arguing that breastfeeding should be considered "medical condition" for purposes of PDA analysis).

[131] In the very first PDA case to reach the Supreme Court, the legislative history became an integral part of the Court's opinion. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678-82 & 678 nn.15-20 (1983) (interpreting congressional intent by extensively citing and quoting House Report, Senate Report, floor debates, and hearings on PDA); see also UAW v. Johnson Controls, Inc., 499 U.S. 187, 205-06 (1991) (citing House and Senate Reports for proposition that "legislative history confirms what the language of the PDA compels," that discrimination on mere "capacity" to become pregnant is sex discrimination); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284-90 (1987) (proposing that Court "must examine the PDA's language against the background of its legislative history and historical context" and citing extensive legislative history).

[132] See, e.g., Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (considering legislative history, but relying only on legislative debates that addressed PDA goal to ensure disability benefits for pregnancy related medical conditions), aff'd mem., 951 F.2d 351 (6th Cir. 1991); see also Moawad v. Rx Place, No. 95 CV 5243 (NG), 1999 WL 342759, at *6 (E.D.N.Y. May 27, 1999) (discussing congressional intent that employers treat pregnancy disabilities as all other temporary disabilities, but concluding generally that breastfeeding cannot ground "claim" under PDA); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) (citing *Wallace* analysis of PDA legislative history); McNill v. N.Y. City Dep't of Corr., 950 F. Supp. 564, 570 (S.D.N.Y. 1996) (noting legislative history focusing on coverage of medical conditions and citing *Wallace* analysis of PDA legislative history).

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focused on the "medical conditions" aspect of the PDA.[133] In so doing, these courts disassociate the PDA from the broader sex discrimination law of which it is a part.[134]

The statutory language of the PDA provides a nonexhaustive list of physiological conditions that may constitute the basis of sex discrimination under Title VII. It does not, on its face, exclude additional bases for sex discrimination.[135] Courts holding that the PDA only covers medical conditions of pregnancy seem to have ignored the fact that a pregnancy-related medical condition is only one of three examples in a nonexhaustive list. This interpretation disregards the language "but not limited to," thereby rendering that language superfluous.[136]

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[133] For example, in *Wallace*, the only legislative history referenced was the meaning of "related medical conditions" which led the court to conclude that "[n]othing in the Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers." *Wallace*, 789 F. Supp. at 870; see also supra note 99 (identifying lower courts adopting medical conditions analysis).

[134] See supra Part II.B (discussing intent of PDA). Furthermore, if courts are focusing on the medical conditions requirement in hopes of preventing a slippery slope to accommodation requirements, this concern is not a legitimate reason for restricting the PDA's protections. See infra Part III.C (discussing how accommodation analysis is inappropriate framework for applying antidiscrimination law).

[135] The clear language of the Act states that discrimination "because of" or "on the basis of sex" is "*not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1994) (emphasis added). Applying the doctrine of *ejusdem generis*, which instructs that illustrations of a class indicate how extensively the act was intended to apply, it becomes evident that these three terms are primary, but not exclusive, illustrations of the definition of sex. See Norman J. Singer, 2A Statutes and Statutory Construction § 47:18, at 288-89 (6th ed. 2000) ("The purpose for defining the class by illustrative particularizations accompanied by a general catchall reference is to determine how extensively the act was intended or should reasonably be understood to apply."); see also infra notes 145-46 (citing Supreme Court interpretation of language).

[136] See Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (quoting Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988), for rule that Court is "'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law'"). Moreover, breastfeeding would seem to fit well within the definition of "sex" since, like the three terms added by the PDA, it is a sex-specific condition. See Singer, supra note 135, § 47:18, at 289 ("When people list a number of particulars and add a general reference like 'and so forth' they mean to include by use of the general reference . . . others of like kind."); see also Shdaimah, supra note 25, at 422-23 (suggesting that breastfeeding as condition specific to women is arguably within meaning of PDA). Alternatively, breastfeeding might be understood as part of "pregnancy" and "childbirth." Under such an interpretation, breastfeeding is not one of the nonenumerated definitions of sex discrimination, but rather the third phase of the biological continuum that includes pregnancy and childbirth. This approach would provide a sensible distinction between the gender-specific aspects of childbirth and the gender-neutral aspects of childrearing. See Reiter, supra note 21, at 2 (arguing that courts "could, but currently [do] not view breastfeeding as the final stage of the pregnancy cycle").

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While the language of the PDA does not exclude breastfeeding or other nonmedical conditions, neither does it explicitly include them. Therefore, a closer analysis of the legislative history is useful in determining congressional intent on this issue.[137] While the immediate goal was to reject *Gilbert* and to ensure that health benefit plans covered pregnancy-related medical disabilities,[138] the amendment had other, broader purposes and objectives. As part of Title VII, the PDA was intended to promote women's participation in the workplace and to overcome stereotypes that emphasized women's family and childcare functions over their professional and economic contributions to society.[139]

In keeping with the overarching principles of the PDA, the Senate called on the courts to adopt a broad interpretation of pregnancy and sex discrimination that would "insure that working women are protected against *all forms* of employment discrimination based on sex."[140] Deriding the Supreme Court's "narrow interpretations of Title VII," the House Report further declared that the PDA would "eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination."[141] Both the Senate and House Reports reaffirm that Congress

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137 See supra note 131 (describing Supreme Court's reliance on legislative history); see also Singer, supra note 135, § 48:03, at 422-28 (describing "established practice in American legal processes" of considering relevant historical background of enactment as valuable tool in determining statutory objective).

138 See supra note 69 and accompanying text (citing Supreme Court description of PDA as "overturning" *Gilbert*); supra note 76 and accompanying text (noting Supreme Court's recognition that disability coverage was critical, but not only, concern of PDA).

139 The House Report notes:

> Although recent attention has been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers.... Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

H.R. Rep. No. 95-948, at 6-7 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4754-55; see also Discrimination on the Basis of Pregnancy, 1977: Hearing on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Res., 95th Cong. 34 (1977) (statement of Ethel Walsh, Vice-Chairman, EEOC) (stating:

> [D]espite some thoughts to the contrary, working mothers are seriously attached to the labor force.... They are not in the labor force to have a casual flirtation with the market, but to earn income. Discrimination on the basis of pregnancy makes it difficult for women to remain in the labor force and maintain the continuity of their family incomes when they have children.).

140 S. Rep. No. 95-331, at 3 (1977) (emphasis added).

141 H.R. Rep. No. 95-948, at 4, reprinted in 1978 U.S.C.C.A.N. 4749, 4752.

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neither limited the PDA to a disability framework, nor enacted the amendment solely as a special protection for pregnant women.[142] If pregnancy disability was the singular concern, Congress could have enacted a separate pregnancy disability bill, but it did not. Rather, Congress emphasized that pregnancy discrimination is one of many incarnations of sex discrimination.[143]

The emphasis on pregnancy disability in the legislative history and in the second clause of the PDA[144] is best understood as a floor that Congress established in response to *Gilbert*, not as the ceiling of the PDA.[145] Because the Supreme Court had removed pregnancy

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142 See supra notes 75-76 (explaining PDA application beyond medical benefits for pregnancy disability); see also Donaldson v. Am. Banco Corp., 945 F. Supp. 1456, 1464 (D. Colo. 1996) ("If Congress intended to treat pregnancy as a disability only, it would have enacted the PDA as part of disability legislation. Instead, Congress chose to incorporate the PDA as part of Title VII, an anti-discrimination statute."). In *Donaldson*, three female employees were sexually harassed about their breastfeeding and pregnancies upon their return to work. See id. at 1462. Interpreting the PDA broadly within the full context of Title VII, the *Donaldson* court noted that "[i]t would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place." Id. at 1464. The court rejected the defendant's claim that the scope of the PDA was "limited to the policies which impact or treat medical conditions relating to pregnancy or childbirth less favorably than other disabilities," and refused to dismiss the case. Id. Despite this analysis, the same court decided *Fejes* a year later, explicitly accepting the medical conditions standard, at least in the context of benefits discrimination. See supra notes 94, 99 (discussing *Fejes* case and its reliance on *Barrash* analysis). Such inconsistency in the court's analysis further weakens the persuasiveness of *Fejes* and those decisions relying on it.

143 Notably, in subcommittee hearings, Senator Hatch inquired why this particular legislation belonged in Title VII instead of as a "special pregnancy bill." Discrimination on the Basis of Pregnancy, 1977: Hearing on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Res., 95th Cong. 44 (1977). Assistant Attorney General Days, speaking for the Department of Justice, responded:

> Because that piece of legislation [Title VII] represented, in my estimation, a determination by Congress to open opportunities up to minorities and women who had been discriminated against over many generations. It seems to me that pregnancy disability is a most modern example of that type of undue restriction upon the opportunities for women in employment.

Id.

144 Unlike the first clause of the PDA, which defines the terms "because of" or "on the basis of sex" for general application to all Title VII antidiscrimination provisions, the second clause explains how the prohibition on discriminatory treatment specifically relates to receipt of medical benefits. See 42 U.S.C. § 2000e(k) (1994).

145 Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284-85 (1987) (stating:

> By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*. Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.

(citation omitted)).

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from the definition of sex discrimination, Congress was forced to include it explicitly. This, however, does not mean that Congress intended to exclude other forms of sex discrimination from protection.[146] This reasoning has led the Supreme Court to interpret the PDA to extend to male employees[147] and to women who are not yet pregnant, but who have the capacity to become pregnant.[148] These holdings strongly suggest that it would be well within the bounds of Title VII, as amended by the PDA, to prohibit discrimination against female employees who are breastfeeding as a result of pregnancy and childbirth.

Congress emphasized the broad interpretations that courts could attribute to the chosen language. According to the House Report, the PDA was meant to clarify that the protections of Title VII "extend[ ] to the *whole range of matters concerning the child-bearing process*."[149] The Senate further explained that the new language defining sex discrimination was meant "to include these physiological occurrences peculiar to women."[150] As a matter of common sense, breastfeeding is a "physiological occurrence" within the "whole range of matters" relating to child-bearing.

The express addition of an abortion exemption to the PDA further indicates that Congress was well aware of the broad scope of the PDA terminology.[151] Where it wanted to exempt application of Title VII to a specific condition arising from pregnancy (abortion), Congress did so explicitly. It follows that if Congress wanted to exclude the physiological occurrence of breastfeeding, nonmedical conditions

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146 See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 679 (1983) ("[C]ongressional discussion focused on the needs of female members of the work force rather than spouses of male employees. This does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment.").

147 See id. at 684 (holding that it violates Title VII, as amended by PDA, to provide only limited pregnancy-related benefits to female spouses of male employees while providing more extensive coverage to male spouses of female employees).

148 See UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (holding that Title VII, as amended by PDA, forbids "sex-specific fetal-protection" policy because it discriminates against women for their capacity to become pregnant); see also King v. Peters & Assocs., No. Civ. A. 98-2455-GTV, 2000 U.S. Dist. LEXIS 1015, at *9-*10 (D. Kan. Jan. 7, 2000) (finding that employer's discharge of plaintiff upon learning she "might be pregnant" was sufficient to challenge employer's proffered reason as pretextual).

149 H.R. Rep. No. 95-948, at 5 (1978) (emphasis added), reprinted in 1978 U.S.C.C.A.N. 4749, 4753.

150 S. Rep. No. 95-331, at 4 (1977).

151 The House Committee on Education and Labor added language specifically to exempt employers from covering abortion because it realized that since "the bill applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies." H.R. Rep. No. 95-948, at 7, reprinted in 1978 U.S.C.C.A.N. 4749, 4755.

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of pregnancy, or other post-childbirth conditions, it would have done so in a similarly explicit and straightforward fashion.[152] Short of such a directive, and given the legislative history, it defies the statutory and congressional intent to read this exclusion into the Act.[153]

Ultimately, limiting the PDA's scope to medical conditions of pregnancy ignores its broader goal of promoting the advancement of women in the workplace.[154] Title VII, as amended by the PDA, aims to prevent all forms of sex discrimination against women,[155] not just discrimination against women temporarily "disabled" by pregnancy.[156] Given this mandate, courts have no sound basis for establishing a bright line rule that a condition related to pregnancy, such as breastfeeding, must be a medical condition in order to qualify for protection under the PDA.[157]

B. *Recognizing Breastfeeding as Gender Specific*

Along with the medical condition analysis, courts repeatedly have drawn parallels between breastfeeding and childcare.[158] Unlike the medical condition analysis, the childcare analysis is not a flawed interpretation of law, but rather a misrepresentation of reality: It dismisses the mother's individual condition and uniquely gender-specific role during the breastfeeding period.[159]

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[152] As a matter of statutory interpretation, "the enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." Singer, supra note 135, § 47:23, at 317; see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (applying "familiar principle of *expressio unius est exclusio alterius*" to interpret Cigarette Labeling and Advertising Act of 1965).

[153] When interpreting statutory language, the realization of congressional intent always should remain the primary objective. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (explaining Court's objective to "ascertain the congressional intent and give effect to the legislative will"). Contra Frank H. Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 Harv. J.L. & Pub. Pol'y 87, 87-94 (1984) (arguing that courts should not attempt to decipher legislative intent when interpreting statutes).

[154] See supra note 79 and accompanying text.

[155] See supra notes 78-80 and accompanying text (citing Senate Report).

[156] See supra notes 141-46 and accompanying text; see also 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams) ("This legislation will prohibit not only discrimination in the provision of disability benefits . . . but it will also prohibit discrimination on the basis of pregnancy or conditions arising out of pregnancy for all employment-related purposes.").

[157] Thus, for example, in *Wallace*, the court should not have focused on whether the plaintiff's reason for taking leave was based on a "medical condition," see supra notes 95-98, but rather it should have determined whether the plaintiff was denied leave simply because she wanted to use it for breastfeeding or for a legitimate nondiscriminatory reason under the employer's leave policy.

[158] See supra notes 98-99 and accompanying text (citing cases developing and relying upon childcare analysis).

[159] See discussion supra Part I; see also Kovacic-Fleischer, supra note 109, at 380-81 (noting that courts often ignore biological reproductive differences between men and women).

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Using the childcare analysis, courts have disregarded the physiological condition of breastfeeding and the physical impact it has on women.[160] By equating breastfeeding with gender-neutral childcare activities, courts fail to view breastfeeding as a stage along the continuum of pregnancy and childbirth. This misperception creates serious legal barriers for women in the workplace. Relying on the childcare framework, courts can dismiss these types of claims as based on the child's needs, which Title VII and the PDA are not designed to protect,[161] rather than as based on the female employee's condition.[162]

The reality of breastfeeding contradicts the rationales and conclusions common among the courts. As discussed in Part I, lactation has many physical effects on a woman's body, and breastfeeding is a normal and common way to respond to the physical changes resulting from pregnancy.[163] Thus, to harass or discriminate against a female employee because of this condition is to discriminate against her based on a condition of her pregnancy and a choice specific to her sex.[164]

The fact that breastfeeding, unlike lactation, is a choice,[165] or that it is a process that benefits the child,[166] does not change its gender-specific nature.[167] Nor does the "optional" nature of breastfeeding remove it from the purview of Title VII's proscriptions against sex discrimination. Women can, and do, make the choice to become preg-

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160 Supra notes 22-28 and accompanying text (detailing physical consequences of breastfeeding).

161 The Senate Report indicates that the PDA was not intended to require childcare. S. Rep. No. 95-331, at 4 (1977) ("For example, if a pregnant woman wishes, for reasons of her own, to stay home to prepare for childbirth, or, after the child is born to care for the child, no disability or sick leave benefits need be paid."). However, Congress also emphasized that "[e]mployers who provide voluntary unpaid leave of this type may continue to do so, as long as it is done on a nondiscriminatory basis." Id. In contrast, the Family & Medical Leave Act (FMLA) does require employers to provide leave for childcare purposes, regardless of the existing benefit policy. 29 U.S.C. § 2612(a)(1)(A) (1994) (granting twelve workweeks of leave during any twelve-month period for childcare). The difference between the PDA and the FMLA further illustrates the difference between an antidiscrimination statute and an accommodation statute. See supra Part II.C.2 (discussing difference between accommodation and antidiscrimination analysis).

162 See supra notes 98-99 and accompanying text for examples of how courts already have used the childcare framework to dismiss breastfeeding-based claims.

163 See supra notes 25-28 and accompanying text (describing breastfeeding's palliative effects on physical discomforts caused by pregnancy and childbirth).

164 See supra Part I (discussing gender-specific consequences of breastfeeding).

165 See supra note 21 and text accompanying supra note 24 (discussing ability to stop lactation).

166 Supra notes 30-32 and accompanying text (detailing benefits of feeding with breast milk to child and society).

167 It is self-evident that only the mother can breastfeed or pump breast milk. Although a father can serve bottled breast milk, it is still the mother that must go through the process, time, and effort of expelling the milk.

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nant while working. Even if a pregnancy is unintended, or ultimately unwanted, women can choose either to terminate[168] or carry to term and give birth. Pregnancy and childbirth simply are not unavoidable consequences of one's sex. They are "choices," and ones that most obviously benefit the child. Yet to discriminate against women for deciding to become pregnant or to give birth is unquestionably a violation of Title VII.[169] Simply put, the element of choice, or a resulting benefit to the child, are not sound foundations for stripping breastfeeding of protection under Title VII.

By guaranteeing that women will not face employment discrimination based on sex-specific choices, Title VII encourages working women to pursue or continue pregnancies.[170] It only makes sense then that Title VII also protects working women from discrimination against the sex-specific consequences of pregnancy and childbirth. To accomplish this goal, courts should recognize that breastfeeding, unlike childcare, is an experience unique to women[171] and one that should not serve as an acceptable pretext for sex discrimination.

C. *Differentiating Between Discrimination and Accommodation*

Another common error in courts' analyses is the conflation of discrimination with accommodation, which are two distinct issues.[172] Courts focusing on accommodation have failed to distinguish properly

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[168] Roe v. Wade, 410 U.S. 113, 153-54 (1973) (holding that women have constitutionally protected right to abortion).

[169] See UAW v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991) ("Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself."); see also supra Part II.B. But cf. Greenberg, supra note 21, at 229-32 (arguing that PDA is ineffective in removing barriers between motherhood and work because it allows courts to use biologically restricted definitions of pregnancy to exclude "consequences" of pregnancy from protection).

[170] See 124 Cong. Rec. 21,442 (1978) (statement of Rep. Tsongas) (stating that bill "would . . . put an end to an unrealistic and unfair system that forces women to choose between family and career—clearly a function of sex bias in the law"); see also Reiter, supra note 21, at 14 ("In enacting civil rights protections for pregnant women, our society made the laudable choice to accommodate reproductive difference so as to provide equality of opportunity."); supra notes 78-81 and accompanying text (discussing how PDA was enacted so that women would not feel need to choose between work or motherhood and could continue to advance in workforce).

[171] See supra notes 163-67 and accompanying text (discussing import of gender-specific nature of breastfeeding); cf. Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 445 (D. Md. 1994) (noting that "[t]here is, in sum, a point at which pregnancy and immediate post-partum requirements—clearly gender-based in nature—end and gender-neutral child care activities begin," but also citing *Barrash* for proposition that breastfeeding is not medical condition related to pregnancy under PDA).

[172] See supra notes 108-11 and accompanying text for a discussion of the difference between discrimination and accommodation in the context of the PDA.

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facts and rationales specific to requests for special accommodation from those that allege discrimination. As a result, these decisions generally hold that plaintiffs cannot sustain a claim of breastfeeding-based sex discrimination.[173]

Narrowly-tailored and fact-specific case analysis could overcome the confusion created by the accommodation rationale. For example, if a female employee claims she is not receiving benefits on the same terms as other employees—either because she is a woman, pregnant, or breastfeeding—the question is not whether Title VII requires those benefits in the first instance. The proper inquiry is whether, once included in a benefits plan, the personal leave policy is distributed equally as between the plaintiff and other workers with nonmedical reasons for taking leave.[174] Upon recognizing this distinction, courts could not peremptorily proclaim that the PDA does not require employers to provide accommodation. Rather, a court would determine whether an employer has withheld generally available benefits from breastfeeding employees who are similar to nonbreastfeeding employees in their ability or inability to work, and so limit its holding.[175]

Although an individual analysis of the company policy in each case may seem burdensome, the PDA specifically disclaimed any in-

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[173] See supra Part II.C.2 (discussing and citing case holdings that treat breastfeeding-based sex discrimination claims as accommodation requests and therefore reject them).

[174] See supra note 161 (citing Senate Report as evidence of congressional intent that PDA require equal distribution of benefits, even if not requiring accommodation). At least one court seems to have indicated a minimal recognition of the distinction between accommodation and discrimination. In O'Hara v. Mt. Vernon Bd. of Educ., 16 F. Supp. 2d 868 (S.D. Ohio 1998), the district court referred to the principles set forth by the EEOC, suggesting that, under Title VII, "leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons." Id. at 885 (citing *Barnes*, 846 F. Supp. at 444). Thus, the court recognized that even if time off for childcare is an "accommodation," employers should not withhold that accommodation when requested by a mother once similar accommodations are offered to other employees for similar purposes. However, in *O'Hara*, since the plaintiff "ha[d] made no claim of discrimination based on her pregnancy sick leave or the PDA," id., the court had no opportunity to discuss, specifically, the scope of the PDA's coverage, see id. at 885-86 (explaining that plaintiff did not raise claim of discriminatory treatment based on her pregnancy but claimed that more stringent rules for parental leave than for other types of leave disparately impacted women employees generally).

[175] See 42 U.S.C § 2000e(k) (1994) (requiring that "women 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"). For example, an employer's personal leave policy may be a discretionary policy circumscribed by any number of considerations, or one in which employees have a limited (or unlimited) number of personal days to use as they choose. In the latter case, it would be discriminatory to forbid an employee to use her personal days for breastfeeding. In the former, specific facts showing common practices or standard reasons for granting discretionary leave would reveal whether the plaintiff presented sufficient evidence of a discriminatory denial of leave.

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tent to establish a general standard for medical or maternity benefits, instead leaving the decision to employers.[176] If the employer policy in question is unusually complex, understandably, courts may have difficulty analyzing the pregnancy discrimination claim.[177] But when courts do fail to parse adequately the facts and claims in breastfeeding cases, they tend to reframe the allegation of discrimination as a request for accommodation.[178] Ultimately, whether a company must grant personal leave for breastfeeding women will be determined largely by the rules of that company's medical and personal leave policies, not by a court's assessment of what justifies such leave.[179]

CONCLUSION

It is long past the time when *Gilbert* officially was put to rest. The PDA clarified the congressionally intended meaning of "sex" under Title VII, and in so doing overruled *Gilbert*. There is no need for the statute to be revised every time courts confront a more subtle expression of sex discrimination.[180] Judges and advocates should not

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176 See H.R. Rep. No. 95-948, at 4 (1978) (citing House position on PDA's impact on employer distribution of medical benefits), reprinted in 1978 U.S.C.C.A.N. 4749, 4752; S. Rep. No. 95-331, at 5 (1977) (citing Senate position on same); infra note 179 (citing EEOC interpretation of medical disability requirements).

177 For example, in McNill v. New York City Department of Correction, 950 F. Supp. 564 (S.D.N.Y. 1996), the court faced this very problem. The employer offered a very elaborate and specific policy regarding personal absences, medical leaves, and discretionary benefits. Under a collective bargaining agreement, employees were entitled to "unlimited paid sick leave." Id. at 567. "To prevent abuse of this policy, employees who report[ed] sick for any reason except hospitalization, on twelve or more work days within a twelve month period" risked the loss of discretionary benefits. Id. Discretionary benefits included assignment of a steady tour, access to voluntary overtime, promotions, and secondary employment. Id. In addition, absences that "occur[red] when an officer [was] pregnant or as a result of the condition of being pregnant" along with the six week maternity leave were not counted toward the employee's absentee status. Id. Rather than relying on the terms of this policy to determine if the plaintiff was treated unfairly after taking excessive time off to breastfeed, the court became absorbed with an analysis of whether the PDA protected the plaintiff's right to unlimited absence, without loss of discretionary benefits, due to pregnancy. See id. at 569.

178 See supra note 112 (describing *Wallace* case).

179 The EEOC advises this approach in a sample Q & A in its regulatory guidelines:

> Q. Must an employer grant leave to a female employee for childcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?
>
> A. . . . [O]rdinary title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons.

Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604, app. 18(A) (2000).

180 The spate of cases removing breastfeeding from PDA protections already has led Representative Carolyn Maloney to introduce a bill amending the PDA to clarify that it was intended to prevent discrimination against breastfeeding employees. See Pregnancy

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wait for, or force, Congress to make another legislative amendment.[181] By invoking the expansive language and the well-documented intent behind the PDA, courts will have a strong legal foundation for prohibiting sex discrimination based on a woman's breastfeeding status. Including breastfeeding within the current definition of pregnancy and sex under Title VII is critical for preserving the integrity of employment antidiscrimination law and for ensuring the continued advancement of women in our workforce and public life.

Discrimination Act Amendments of 2000, H.R. 3861, 106th Cong. §§ 2(a)(9), 3 (2000) (stating that courts improperly have excluded breastfeeding women from PDA and expressly adding word "lactation" after "childbirth" in definition of sex), WL 1999 Cong US HR 3861. The bill was pending in committee when the 106th Congress adjourned. Thomas: Legislative Information on the Internet, http://thomas.loc.gov/bss/d106query.html.

[181] Some courts have stated their belief that a congressional amendment would be necessary to include breastfeeding within the scope of the PDA. See Martinez v. NBC Inc., 49 F. Supp. 2d 305, 311 (S.D.N.Y. 1999) ("[I]f breast pumping is to be afforded protected status, it is Congress alone that may do so."); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 870 (W.D. Ky. 1990) (reasoning that "[i]t is not the province of this court to add to the legislation by judicial fiat" because if Congress wanted breastfeeding to be covered by PDA "it could have included [it] in the plain language of the statutes"), aff'd mem., 951 F.2d 351 (6th Cir. 1991). These statements are highly reminiscent of the *Gilbert* Court's conclusion that "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant." Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976). However, when Congress responded with the PDA, it emphasized that the Court was misled in this assumption. It stated that the new amendment would "reflect no new legislative mandate of the Congress . . . . If, however, Congress were not to clarify its *original* intent, and the Supreme Court's interpretations of Title VII were allowed to stand, Congress would yield to an intolerable potential trend in employment practices." H.R. Rep. No. 95-948, at 3-4 (emphasis added), reprinted in 1978 U.S.C.C.A.N. 4749, 4751-52.

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