Charting Infertility in the Workplace: An Analysis of Hall v. Nalco and the Seventh Circuit's Recognition of Sex Discrimination Based on In Vitro Fertilization

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CHARTING INFERTILITY IN THE WORKPLACE: 
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INTRODUCTION

Since the advent of Title VII of the Civil Rights Act of 1964, which proscribed discrimination in the workplace based on sex, the woman’s quest for equality in the workplace has become increasingly realized.\(^1\) Congress’s enactment of the Pregnancy Discrimination Act (PDA) in 1978 clarified Title VII by providing that discrimination based on sex includes discrimination based on “pregnancy, childbirth, or related medical conditions.”\(^2\) The PDA reaffirmed a commitment to equality by seeking to remove pregnancy-based discrimination as an obstacle for women who desire to experience motherhood without sacrificing their place in the workforce.\(^3\)

Recent advances in reproductive medicine have eliminated certain barricades to motherhood, and the development of assisted reproductive technology has afforded more women the opportunity to experience motherhood than ever before. Assisted reproductive technologies—such as in vitro fertilization—offer a second chance at parenthood to women and couples previously incapable of conceiving a child; the opportunities created are vast. For example, a cancer patient—whose treatment may lead to infertility and difficulties with childbirth—may now use assisted reproductive technology to preserve her fertility;\(^4\) a young woman who experiences premature menopause now has the potential to become pregnant through assisted reproductive technology;\(^5\) and a couple in which one or both partners have

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HIV now has new opportunities for safe and healthy conception.\textsuperscript{6} Millions of women affected by infertility are afforded opportunities to conceive where the potential did not previously exist.

The simultaneous pursuit of equality in the workplace and the availability of increased options for achieving pregnancy have created new tensions in the law. While Title VII requires that employees of both sexes be treated equally in the workplace, the reality is that biological differences make men and women fundamentally distinct.\textsuperscript{7} Based on these distinctions, the precise meaning of discrimination "because of sex," as described in Title VII, and "because of pregnancy," as defined in the PDA, becomes difficult to ascertain.\textsuperscript{8} While only women are able to become pregnant, infertility as a medical condition is not limited to women.\textsuperscript{9} In fact, men are equally susceptible to infertility and they too can seek infertility treatments.\textsuperscript{10} In the courts, the line is blurred between infertility as a medical condition common to both sexes and infertility as a condition related to pregnancy.\textsuperscript{11} The ques-

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\textsuperscript{7} See Cooper, supra note 1, at 445.

While nearly everybody believes in sex equality, there is little understanding about what sex equality means. Indeed, there is confusion about what is meant by "sex." The problem is that we know that women are different—they can make babies—but we do not quite know what to make of that difference. American law bases its equality doctrine on "formal equality," which requires that likes be treated alike, and allows differences to be treated differently. But if women are different from men . . . how can equality between the sexes be achieved?

\textsuperscript{8} See id.; see also John Kohl et al., Recent Trends in Pregnancy Discrimination Law, 48 Bus. Horizons 421, 421 (2005) (noting that although the PDA’s prohibition of discrimination against women sounds simple enough, it “may be one of the least understood of the legal protections afforded to women who work”).


In the past few years, "equality-versus-difference" has been used as a shorthand to characterize conflicting feminist positions and political strategies. Those who argue that sexual difference ought to be an irrelevant consideration in schools, employment, the courts, and the legislature are put in the equality category. Those who insist that
tion remains whether fertility issues fall within Title VII's purview; in other words, at what point does a woman's infertility or infertility treatment become related to pregnancy within the meaning of the PDA?

The role of infertility treatments in sex discrimination analysis has yet to be definitively decided. In Hall v. Nalco, when the Seventh Circuit's decision addressed in vitro fertilization in the workplace, it became the first circuit court to hold that an employer's decision to terminate a female employee for undergoing in vitro fertilization would violate Title VII.

This Note explores the Seventh Circuit's decision in Hall v. Nalco and argues that its interpretation of sex discrimination in the workplace was in line with the objectives of the PDA. Part II examines Title VII and the federal prohibition of sex discrimination in the workplace; provides a brief description of infertility, assisted reproductive technologies, and in vitro fertilization; and explores the status of infertility treatment in sex discrimination law prior to Hall. Part III discusses the Hall decision. Part IV expounds on the holding in Hall and analyzes the appropriateness of the holding in light of the PDA's objectives. Further, Part IV evaluates the implications of the Hall decision for sex discrimination cases involving employers' benefit plans, and it predicts that the Seventh Circuit would hold that surgical impregnation procedures must be covered by otherwise comprehensive policies. Finally, Part V addresses the practical implications of Hall for sex discrimination law, employers, employees, and the development of assisted reproductive technologies.

II. FEDERAL PROHIBITION OF SEX DISCRIMINATION IN THE WORKPLACE: TITLE VII AND THE PDA

In order to aid an analysis of Hall v. Nalco, this Part provides an introduction to the federal prohibition on sex discrimination in the workplace. Appeals on behalf of women ought to be made in terms of the needs, interests, and characteristics common to women as a group are placed in the difference category. Scott, supra, at 614.

12. The Supreme Court has not yet evaluated infertility treatments for women under a Title VII sex discrimination analysis.
14. See infra notes 24-107 and accompanying text.
15. See infra notes 108-123 and accompanying text.
16. See infra notes 124-200 and accompanying text.
17. See infra notes 211-250 and accompanying text.
18. See infra notes 251-267 and accompanying text.
workplace, as well as a brief discussion of infertility and infertility treatments and their role in sex discrimination law. Section A of this Part introduces Title VII of the Civil Rights Act of 1964 and its prohibition of sex in the workplace. Section B discusses General Electric Co. v. Gilbert, in which the U.S. Supreme Court limited the scope of Title VII by holding that an employer's exclusion of pregnancy-based medical costs was not sex discrimination. Section C addresses the PDA, which codifies Congress's reaction to the Supreme Court's decision in Gilbert. Section D provides the basics of infertility, assisted reproductive technology, and in vitro fertilization. Finally, Section E discusses the status of sex discrimination jurisprudence dealing with infertility and infertility treatments prior to Hall v. Nalco.

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Acts of 1964 prohibits employers from discriminating against individuals because of their sex. The statute lists a number of unlawful employment practices, including discharge, refusal to hire, or discrimination with respect to "compensation, terms, conditions, or privileges of employment." Title VII proscribes both intentional discrimination and sex-neutral policies that disproportionately impact individuals based on sex.

To establish a claim under Title VII, a plaintiff may proceed under either one of two theories: disparate treatment or disparate impact. A disparate treatment analysis focuses on the motivation of the employer, seeking to identify unlawful intentional discrimination. The "simple test" is whether an employer's policy or decision demonstrates "treatment of a person in a manner which but for that person's
sex would be different.”29 In disparate treatment cases, a plaintiff may prove discriminatory treatment by using direct evidence that “can be interpreted as an acknowledgement of discriminatory intent by the defendant,” but in practice, this evidence is rarely available.30 Absent direct evidence demonstrating an employer’s discriminatory motivation, however, a plaintiff may prove discrimination using indirect evidence from which discriminatory intent may be inferred.31 Under this indirect evidence method, the court employs a burden-shifting framework that was first established in *McDonnell Douglas Corp. v. Green.*32 This test first requires a plaintiff to establish a prima facie case of discrimination, elements of which vary depending on the alleged discrimination.33 If a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate and non-discriminatory reason for its action or policy.34 If the employer does so, the plaintiff must prove that the employer’s proffered reasons did not truly motivate the practice, but were a pretext for discrimination.35

Under the disparate impact theory, the focus of the analysis is on the discriminatory effects of an employer’s practice rather than on the employer’s motivation or intent.36 Disparate impact claims typically address facially neutral employment practices that have disproportionate adverse impacts on women.37 These disparate impact claims are founded on the premise that although intentional discrimination may be absent, an employer’s neutral practice may “deprive or tend to deprive an individual of employment opportunities.”38 Just as in dis-

33. See *Burdine,* 450 U.S. at 252–53. The specific elements of a prima facie case of disparate treatment depend on the facts of a particular case. See EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, supra note 27, at 130. A prima facie case, generally speaking, requires that a plaintiff demonstrate that (1) she was a member of a protected class, (2) she was qualified to perform her job, (3) she was subject to adverse employment action, and (4) similarly situated employees not in the protected class were not subject to such adverse employment action. *Id.* at 130.
34. See *Burdine,* 450 U.S. at 253.
35. See id.
36. See GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY & DOCTRINE 71 (2d ed. 2007).
37. See EMPLOYMENT DISCRIMINATION LAW & PRACTICE, supra note 27, at 181.
38. *Id.* at 183. Title VII makes it an unlawful employment practice to “limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an
parate treatment claims, courts use the burden-shifting framework when the plaintiff proceeds under a disparate impact theory. To establish a prima facie case of sex discrimination, a plaintiff must demonstrate that a facially neutral practice has had a significantly discriminatory impact. An employer must then demonstrate a manifest relationship between the requirement and the employment. As in the disparate treatment context, a plaintiff may prevail by demonstrating that the employer's reasoning was a pretext for discrimination.

Title VII provides two affirmative defenses to an allegation of sex discrimination. For both disparate treatment and disparate impact claims, a discriminatory practice does not violate Title VII when the sex classification is a "bona fide occupational qualification reasonably necessary to the normal operation" of the employer's business. Additionally, a practice that has a disparate impact does not violate Title VII if the employer demonstrates that the practice is "job related for the position in question and consistent with business necessity."

B. General Electric Co. v. Gilbert: Frustrating Congress's Intent to Remove Women from the Margins of the Workplace

The interpretation of "discrimination" and "because of sex" under Title VII has been the subject of much litigation. In General Electric Co. v. Gilbert, a 1972 decision that severely limited the scope of the phrase "because of sex," the Supreme Court held that an employer's exclusion of pregnancy coverage from an otherwise comprehensive health plan did not violate Title VII. In Gilbert, the employer's disability plan for its employees excluded disabilities arising from pregnancy while providing coverage for all other non-occupational sicknesses and accident-related injuries. The majority held that the employer's plan did not violate Title VII's prohibition of sex discrimination, likening Title VII analysis to that under the Equal Protection Clause. The majority noted that pregnancy, while confined to employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(2).

40. See id. at 446–47.
41. See id. at 447.
42. 42 U.S.C. § 2000e–2(e).
45. See id. at 127.
46. See id. at 145–46.
47. See id. at 133. The Court relied on Geduldig v. Aiello, decided two years prior to Gilbert, in which employees challenged a disability plan that excluded pregnancy coverage as a violation of the Equal Protection Clause. See Geduldig v. Aiello, 417 U.S. 484, 487–89 (1974). The Gil-
women, was not comparable to other covered diseases or disabilities because it is "often a voluntarily undertaken and desired condition." Adopting a facial parity test, the Court reasoned that there was "no risk from which men [were] protected and women [were] not." The majority explained that "pregnancy-related disabilities constitute an additional risk, unique to women," and that a failure to compensate for that risk did not destroy the parity of the benefits. The employer simply removed one physical condition from its list of compensable disabilities.

Justices Brennan, joined by Justice Marshall, dissented. Justice Brennan rejected the majority's conceptual framework of the case as incompatible with the objectives of Title VII. He reasoned that the court inappropriately relied on the plan's equal inclusion of mutual risks, instead of the adverse impact on women from the unequal exclusion of the female-specific disabilities arising from pregnancy. Justice Stevens, in a separate dissent, stated that the employer's policy placed the risk of pregnancy-caused absence in a class by itself. This made the policy discriminatory "by definition" because "it is the capacity to become pregnant which primarily differentiates the female from the male." The majority's interpretation, according to the dissenters, frustrated Title VII's purpose of "eliminat[ing] those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women]."

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48. Gilbert, 429 U.S. at 133.
49. Id. at 138. The Court reasoned as follows: For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here. Id. at 139-40.
50. Id. at 139.
51. See id. at 146 (Brennan, J., dissenting).
52. See id. at 146 (Brennan, J., dissenting).
53. See id. at 148 (Brennan, J., dissenting).
54. See id. at 155 (Brennan, J., dissenting).
55. See id. at 161 (Stevens, J., dissenting). Justice Stevens' dissenting opinion also criticized the majority's reliance on the Equal Protection Clause when interpreting Title VII. Id. at 160-61.
56. Id. at 162.
57. Id. at 160 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).
C. The Pregnancy Discrimination Act of 1978: Congress Reacts to the Fallacy of Gilbert

Congress reacted swiftly to the Gilbert Court’s interpretation of Title VII by enacting the Pregnancy Discrimination Act (PDA) in 1978.\(^{58}\) This amendment to Title VII provides a definition of “because of sex” in order to clarify Congress’s intended meaning of sex discrimination under Title VII.\(^{59}\) The amendment clarifies that the phrase “because of sex” includes “because of or on the basis of pregnancy, childbirth, or related medical conditions.”\(^{60}\) Enacted to combat “the view of women as marginal workers,” the PDA’s definition of “because of sex” was meant to restore Congress’s original intent behind Title VII’s prohibition of sex discrimination, and the amendment expressly adopted the reasoning of the Gilbert dissenters.\(^{61}\)

The PDA did not create new rights under Title VII, but it “made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”\(^{62}\) The amendment, according to the House Report, would eradicate the need to rely on a discriminatory impact analysis by clarifying that distinctions based on pregnancy are “per se violations of Title VII.”\(^{63}\)

D. Infertility, Assisted Reproductive Technologies, and In Vitro Fertilization

Reproductive science has changed significantly since Congress’s decision to include pregnancy, childbirth, and related medical conditions in its definition of “because of sex.” A basic understanding of infertility and assisted reproductive technology is necessary to analyze the holding of Hall v. Nalco and the relationship between Hall and Title VII’s prohibition of discrimination “because of sex,” as provided by the PDA.

The medical definition of infertility is a “1-year period of unprotected intercourse without successful conception.”\(^ {64}\) Infertility is commonplace among couples, affecting 10% to 15% of all couples.
attempting to conceive.\textsuperscript{65} Approximately one out of every four women experience infertility for which they seek medical assistance,\textsuperscript{66} and 1.2 million women of reproductive age have had an infertility-related medical appointment in the previous year.\textsuperscript{67}

Infertility can be caused by male factors or female factors because both men and women can suffer from infertility. Male factors cause infertility in 30% of infertile couples, while female factors cause infertility in 37% of couples.\textsuperscript{68} Of the remaining couples, about 20% have infertility caused by a combination of both male and female factors.\textsuperscript{69} Unexplained infertility accounts for the remainder.\textsuperscript{70} Some of the most common causes of infertility in males are low or abnormal sperm production and impaired sperm delivery.\textsuperscript{71} Causes of female infertility include fallopian tube damage, endometriosis, ovulation disorders, early menopause, thyroid problems, and cancer treatment.\textsuperscript{72}

Treatment for infertility varies. About 90% of infertility cases can be treated medicinally or by surgical repair of reproductive defects.\textsuperscript{73} Ovulation medications and surgeries to correct fallopian tube blockage and endometriosis are common treatments for women.\textsuperscript{74} Certain types of male infertility can be treated through surgical procedures, such as correction of anatomic abnormalities and sperm retrieval.\textsuperscript{75} The 1980s "revolutionized reproductive medicine" by introducing assisted reproductive technology.\textsuperscript{76} Since the 1980s, assisted reproductive technology has helped women become pregnant, most frequently through the process of in vitro fertilization (IVF).\textsuperscript{77} IVF is the most
common and most effective method of assisted reproductive technology and is used to treat infertility caused by both male and female factors. The process of IVF involves extracting a man's sperm and using it to fertilize a mature egg that has been surgically retrieved from a woman, and then implanting the embryos back into the woman's uterus several days later. Although more effective than other methods, the process of IVF takes several weeks and often requires multiple treatments in order to be successful.

E. The Status of Infertility in the Law Under Title VII
Prior to Hall v. Nalco

As assisted reproductive technology becomes more advanced and as more couples are able to achieve pregnancy when conventional treatments fail, issues surrounding infertility and infertility treatments are becoming commonplace in the law.

The Supreme Court has dealt limitedly with fertility in Title VII cases in the context of an employer's fetal protection policy. In Johnson Controls, the Court held that the employer's policy, which banned fertile women—but not fertile men—from working certain jobs, was facially discriminatory under Title VII. The employer, a battery manufacturer, enacted the policy because of the health risks associated with exposure to lead, which is used during the manufacturing process. The Court reasoned that the policy classified its employees on the basis of childbearing capacity "rather than fertility alone." The Court noted that the employer's exclusionary policy "explicitly classify[d] on the basis of potential for pregnancy." The Court stated that a classification based on the potential for pregnancy is "explicit sex discrimination" under the PDA.

In the years following the Johnson Controls decision, several district and circuit court decisions addressed infertility treatment issues under Title VII with differing analyses and results. In Pacourek v. Inland

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78. See id.
79. See University of Chicago Medical Center, Infertility, supra note 10.
80. See id.
82. See Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991). The primary focus of the Court's opinion was whether the exclusion was acceptable under Title VII as a bona fide occupational qualification. See id. at 200–11.
83. See id. at 190–92.
84. Id. at 198.
85. Id. at 199 (emphasis added).
86. Id.
Steel Co., the Northern District of Illinois held that “a woman’s medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy” under the PDA. Because the court held that the condition was related to pregnancy, termination based on the employee’s condition would violate Title VII. The court reasoned that “if potential pregnancy is treated like pregnancy for purposes of the PDA, it follows that potential pregnancy-related medical conditions should be treated like pregnancy-related medical conditions for purposes of the PDA.” The Court explained that its holding requires that employers treat a woman’s medical infertility with neutrality in order to comply with the PDA.

Taking a different approach to infertility analysis under Title VII in Krauel v. Iowa Methodist Medical Center, the Eighth Circuit held that an employer’s denial of coverage for infertility treatments for a female employee did not constitute illegal discrimination. In Krauel, the employer’s medical benefit plan excluded coverage for infertility treatments for both its male and female employees. The court distinguished pregnancy from infertility by noting that pregnancy occurs after conception, while infertility prevents conception. Thus, according to the court, infertility is “strikingly different” than pregnancy or childbirth. The court concluded that infertility is not protected by the PDA “because it is not pregnancy, childbirth, or a related medical condition.” The court then distinguished the Johnson Controls conclusion that discrimination based on potential pregnancy is actionable under the PDA. The court reasoned that potential pregnancy “is a medical condition that is sex-related because only women can become pregnant,” but that the employer’s policy in Krauel did not classify based on potential pregnancy. Because the employer’s policy denied medical coverage for all infertility treatments, the court concluded that the policy was “gender-neutral” and that Johnson Controls was thus inapposite.

88. See id.
89. Id.
90. See id. at 1403.
91. See Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680 (8th Cir. 1996).
92. See id. at 680.
93. See id. at 679.
94. Id.
95. Id.
96. See id. at 680.
97. Id.
98. See id.
99. Id.
Similarly, the Second Circuit’s decision in *Saks v. Franklin Covey Co.* held that the exclusion of infertility treatments from an employer’s benefits plan did not violate Title VII. The employer’s plan provided benefits for infertility products and procedures, but it expressly excluded coverage for surgical impregnation procedures. The court first determined that infertility was not a “related medical condition” under the PDA. The court relied on the Supreme Court’s indication in *Johnson Controls* that discrimination based on “fertility alone” would not violate Title VII. The *Saks* court interpreted the PDA to require that a medical condition be unique to women in order to be a medical condition related to pregnancy. The *Saks* court noted that infertility afflicts men and women with equal frequency, so it is not unique to women and thus could not be a related medical condition under the PDA. Further, the court concluded that the employer’s policy did not violate Title VII under a discriminatory impact analysis because while only women undergo surgical impregnation, the procedures are necessary to treat male, female, or couple infertility. The court reasoned that male and female employees were equally disadvantaged by the exclusion, so the plan had no discriminatory impact.

III. *Hall v. Nalco*: Termination Based on IVF is Actionable Under Title VII

In *Hall v. Nalco*, the Seventh Circuit was the first circuit court to address whether terminating a female employee for undergoing in vitro fertilization procedures violates Title VII. The facts of *Hall* proceed as follows. Cheryl Hall was a sales secretary who was employed by Nalco Company. Hall took a three week leave of absence to undergo IVF in an attempt to become pregnant but was unsuccessful. After returning to work, Hall requested another leave of ab-

100. See *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).
101. See id. at 341.
102. Id. at 346.
103. Id. at 345-46.
104. See id. at 346.
105. See id. The court also reasoned that “[i]ncluding infertility within the PDA’s protection as a ‘related medical condition’ would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.” Id.
106. See id. at 347.
107. See id.
109. See id. at 645-46.
sence for a subsequent IVF procedure. Nalco decided to terminate Hall during a reorganization of the company and a consolidation of its offices. Hall was informed that the discharge was in her “best interest due to [her] health condition,” and her performance reviews cited “absenteeism” due to “infertility treatments.” Hall brought an action under Title VII alleging sex discrimination. The district court granted summary judgment for Nalco, reasoning that Hall could not prove sex discrimination because the gender-neutral condition of infertility is not protected under the PDA. To support its conclusion that Hall’s allegations did not state a Title VII claim, the district court relied on Krauel and Saks, in which the Eighth and Second Circuits held that the PDA does not require an employer to cover infertility treatment in its benefit plans as long as male and female infertility treatments are treated equally.

The Seventh Circuit reversed, holding that Hall’s allegations were sufficient to state a claim under the language of the PDA. The court criticized the district court’s reasoning and its reliance on the “fertility alone” language from Johnson Controls, where the Supreme Court had admonished classifications based on childbearing capacity “rather than fertility alone.” The court recognized that the holding in Johnson Controls implied that classifications based on infertility alone do not violate the PDA. However, the court concluded that “even where (in)fertility is at issue, the employer conduct complained of must actually be gender neutral to pass muster.” The court reasoned that Nalco’s decision, as alleged, was not gender neutral because employees terminated for taking time off to undergo IVF will always be women, just like those who take a leave of absence to give birth. A medical procedure such as IVF is performed only on women, precisely because of their childbearing capacity. Therefore, Hall was not discharged based on infertility, but instead based on her

110. See id. at 646.
111. See id.
112. Id.
113. See id.
114. See id.
115. See id.
118. See id.
119. Id. at 648.
120. See id. at 648–49.
121. See id. at 645.
childbearing capacity. Under the PDA, disparate treatment based on childbearing capacity is, on its face, discrimination because of sex.

IV. Analysis

The Seventh Circuit’s decision in *Hall* shapes the current status of sex discrimination law. Section A addresses the relationship between infertility, infertility treatments, and the PDA by organizing potential infertility-related classifications into an “infertility chart.” Section B analyzes the Seventh Circuit’s decision in light of congressional intent behind the PDA, and it argues that the Seventh Circuit’s holding is more faithful to Congress’s intent than contrary holdings in the Second and Eighth Circuits. Section C addresses the potential reach of *Hall* to the different categories on the infertility chart. Finally, Section D examines the application of *Hall* to employment cases involving employer benefit plans for medical and health coverage.

A. What *Hall* Means for Infertility Cases: Charting Infertility

The Supreme Court in *Johnson Controls* created the backdrop against which infertility cases have been analyzed under Title VII: while a classification based on infertility alone might not amount to sex discrimination under the PDA, a classification based on the potential for pregnancy is explicit sex discrimination. The dispositive question in subsequent cases has become whether a plaintiff’s discrimination claim stems from a classification based on infertility alone or on potential pregnancy. The difficulty inherent in attempting to make this distinction is created by the biological fact that infertility always relates, in some fashion, to potential pregnancy because the

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122. See id.
123. See id. at 647.
124. See infra notes 128–163 and accompanying text.
125. See infra notes 164–192 and accompanying text.
126. See infra notes 193–210 and accompanying text.
127. See infra notes 251–267 and accompanying text.
129. *Johnson Controls* did not offer a more precise guideline to determine when treatment of infertility becomes related to potential pregnancy because the employer’s policy did not classify solely based on fertility. See id. The policy expressly singled out women, thus obviating the need for a discussion about the sex-specific nature of an infertile woman’s quest to become pregnant. Id.
very definition of infertility focuses on the ability to become pregnant.130

The potential lines that can be drawn between sex-neutral classifications related to infertility and sex-specific classifications based on infertility can be organized in to an infertility chart. The chart separates the potential classifications into four categories: sex-specific, infertility-based classifications (S/I); sex-specific, infertility treatment-based classifications (S/IT); sex-neutral, infertility-based classifications (N/I); and sex-neutral, infertility treatment-based classifications (N/IT).

**Figure 1: Infertility Classifications Under Title VII**

<table>
<thead>
<tr>
<th>S/I: Sex-specific, infertility-based classifications</th>
<th>N/I: Sex-neutral, infertility-based classifications</th>
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<td></td>
<td></td>
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<tr>
<td>S/IT: Sex-neutral, infertility-based classifications</td>
<td>N/IT: Sex-neutral, infertility treatment-based classifications</td>
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<td></td>
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</tbody>
</table>

The columns of the infertility chart separate classifications based on whether the classifications are *sex-neutral* or *sex-specific*. The rows of the infertility chart separate classifications that focus on *infertility* from classifications that focus on *infertility treatment*. The significance of categorizing classifications in this manner stems from the manner in which infertility has been addressed under Title VII. Whether and to what extent a court distinguishes between these classifications can make a critical difference in the outcome of a case. As this Note will argue, *Hall* correctly identified the type of classification at issue, while other courts have mischaracterized the employers’ classifications, causing disparate reasoning and outcomes in resolving Title VII cases involving infertility and infertility treatments.

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130. The medical definition of infertility is a “1-year period of unprotected intercourse without successful conception.” *Horowitz*, *supra* note 64, at 507.
1. **S/I: Sex-Specific, Infertility-Based Classifications Violate Title VII**

Sex-specific, infertility-based classifications fall within S/I of the infertility chart. S/I encompasses classifications that focus on a woman's childbearing capacity and her ability or inability to become pregnant. *Johnson Controls* is instructive in determining whether classifications of this type explicitly violate the PDA. The employer's policy in *Johnson Controls* specifically prohibited women who were either pregnant or "capable of bearing children" from working in certain factories.\(^{131}\) The *Johnson Controls* Court stated that classifications based on the potential for pregnancy are facially discriminatory under the PDA.\(^{132}\) The employer's policy in *Johnson Controls* violated the PDA by excluding a group of employees based on the sex-specific characteristic of childbearing capacity.\(^{133}\) Thus, because classifications that focus on a woman's childbearing capacity—her ability or inability to become pregnant—necessarily relate to her potential for pregnancy, sex-specific, infertility-based S/I classifications violate Title VII under the explicit language of the PDA.

**FIGURE 2: S/I Classifications Violate Title VII**

<table>
<thead>
<tr>
<th>S/I: Sex-specific, infertility-based classifications</th>
<th>N/I: Sex-neutral, infertility-based classifications</th>
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<td>• Violate Title VII</td>
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<tr>
<td>(<em>Johnson Controls</em>)</td>
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</table>

<table>
<thead>
<tr>
<th>S/IT: Sex-neutral, infertility-based classifications</th>
<th>N/IT: Sex-neutral, infertility treatment-based classifications</th>
</tr>
</thead>
</table>

2. **N/I: Classifications Based on Infertility Alone**

Sex-neutral, infertility-based classifications fall within N/I of the infertility chart. This would encompass classifications that focus on the condition of infertility in general. For example, an employer's decision to terminate all infertile employees would be an N/I classification.

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\(^{132}\) See id. at 199.

\(^{133}\) See id.
The Johnson Controls Court indicated that these classifications do not explicitly violate Title VII by stating that classifications based on "fertility alone" might not amount to sex discrimination under the PDA.\textsuperscript{134} The implication of the Court's language is that had the employer excluded all fertile employees from its workplace, the policy may have passed muster under Title VII.\textsuperscript{135}

An employment practice or policy that truly focuses on infertility or fertility as a condition will rarely occur. In fact, while Title VII cases often address classifications based on infertility treatment (for example, the termination of a female employee for undergoing IVF or the exclusion of infertility treatment from an employer-provided health plan), fetal protection policies appear to be one of the only factual scenarios in which the practice or policy actually classifies based only on reproductive capacity (for example, fertile but not infertile employees may perform certain tasks). The applicability of the Johnson Controls Court's "fertility alone" language to all cases relating to infertility and infertility treatment under Title VII and the PDA is not entirely clear. The employer's policy in Johnson Controls explicitly excluded women based on their childbearing capacity.\textsuperscript{136} Thus, the Court did not need to analyze the sex-specific or sex-neutral qualities of infertility. Instead, the facts presented a blatant bias that the Court recognized as facially discriminatory: fertile women, but not fertile men, were excluded from the employer's workforce.\textsuperscript{137} In essence, the discriminatory nature of the policy had nothing to do with fertility. The policy would have been equally discriminatory had women of any characteristic been excluded from the workplace while men of the same characteristic were not.\textsuperscript{138}

Nevertheless, despite the indirect manner in which the "infertility alone" language arose in Johnson Controls, it has been heavily relied on by subsequent courts and has created the starting point for infertility analysis under Title VII. Thus, under Johnson Controls, N/I classifications do not violate Title VII as explicit sex discrimination.

However, from another perspective, any classification based on infertility violates the PDA because infertility is inherently and in-

\textsuperscript{134} See id. at 198 (concluding that a policy was discriminatory because it classified based on childbearing capacity, "rather than fertility alone").

\textsuperscript{135} See id.

\textsuperscript{136} Id.

\textsuperscript{137} Id. at 197.

\textsuperscript{138} All of the following policies discriminate based on sex: literate women, but not literate men, are excluded from an employer's workforce; tall women, but not tall men, are precluded from coming to work; overweight women, but not overweight men, will not be hired by the employer.
separably related to the ability to become pregnant, an ability that only women, of course, possess.\(^{139}\) The district court’s decision in Pacourek could be read to reflect this view.\(^{140}\) There, the woman had a medical condition that prevented her from becoming pregnant naturally.\(^{141}\) The court held that her medical condition was a “related medical condition” under the PDA because it affected her potential for pregnancy.\(^{142}\) According to the court, infertility can always be classified as a “medical condition rendering [a woman] unable to become pregnant naturally,” thereby affecting a woman’s potential for pregnancy.\(^{143}\) Under this view, infertility is a “related medical condition” under the PDA, and an employer’s classification based on infertility would, on its face, discriminate against women.\(^{144}\) Pacourek could be read such that N/I classifications necessarily violate the PDA; if classifications based on infertility are explicit sex discrimination because infertility is a medical condition related to pregnancy, then even sex-neutral, infertility-based classifications would violate the PDA.

In Hall, the Seventh Circuit expressly rejected the opportunity to hold that the plaintiff’s medical condition of infertility was related to pregnancy.\(^{145}\) The plaintiff’s legal theory was that she was a member of a protected class: “female with a pregnancy related condition, infertility.”\(^{146}\) The Seventh Circuit declined to label infertility as a related medical condition under the PDA.\(^{147}\) To do so, the court reasoned, “‘would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable


\(^{140}\) See Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994). The court did not hold that a sex-neutral, infertility-based policy would violate the PDA because the issue was not before it:

The court does not find persuasive defendants’ argument that, since both men and women cannot become pregnant, infertility is a gender-neutral condition. . . . If it is defendants’ contention that their policy was one of gender-neutral discrimination against infertile workers, then the issues such a policy raises would be before the court.

\(^{141}\) See id. at 1403–04.

\(^{142}\) Id.

\(^{143}\) Id. at 1403–04.


\(^{145}\) See Hall v. Nalco Co., 534 F.3d 644, 649 n.3 (7th Cir. 2008), reh’g denied, No. 06-3284, 2008 U.S. App. LEXIS 18449, at *1 (7th Cir. Aug. 15, 2008). “We recognize that our analysis differs from the legal theory set forth in Hall’s complaint—that infertile women are a protected class under the language of the PDA.” Id.

\(^{146}\) See id. at 646.

\(^{147}\) See id. at 648.
to sex discrimination.’’

Thus, Hall’s conclusion is in accord with Johnson Controls’s conclusion that N/I classifications do not violate Title VII.

**Figure 3: N/I Classifications Do Not Violate Title VII**

<table>
<thead>
<tr>
<th>S/I: Sex-specific, infertility-based classifications</th>
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<tr>
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<tr>
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<td>N/IT: Sex-neutral, infertility treatment-based classifications</td>
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3. **S/IT: Sex-Specific, Infertility Treatment-Based Classifications**

Sex-specific, infertility treatment-based classifications fall within S/IT of the infertility chart. This encompasses classifications that focus on the infertility treatment that is specific to women. Hall directly addressed this type of classification. Hall was faced with a classification based on IVF, an infertility treatment performed only on women for the specific purpose of becoming pregnant. The court relied heavily on the Supreme Court’s interpretation of the PDA in Johnson Controls and its conclusion that “the PDA prohibited discrimination on the basis of a woman’s ability to become pregnant.” The Hall court reasoned that adverse treatment based on the sex-specific treatment of surgical impregnation procedures would always affect women on the basis of their ability to become pregnant. Thus, the Hall court held that this classification violated the PDA because it discriminates against women based on their childbearing capacity.

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148. Id. (quoting Saks v. Franklin Covey Co., 316 F.3d 337, 346 (2d Cir. 2003)).
149. See id. at 647.
150. See id.
152. See Hall, 534 F.3d at 649.
153. See id.
154. See id.
However, not all courts have concluded that S/IT classifications violate Title VII. The Second Circuit maintains the opposite view. In *Saks*, the Second Circuit upheld an employer’s benefits plan that expressly excluded surgical impregnation procedures. Although faced with a sex-specific, infertility treatment-based classification, *Saks* held that Title VII had not been violated. Because both sexes can be infertile and because both men and women are diagnosed with infertility with essentially equal frequency, the *Saks* court concluded that the S/IT classification was not discriminatory. This conclusion stemmed from the *Saks* court’s focus on infertility as a condition as opposed to the sex-specific infertility treatment that was at issue. The court noted that because both men and women can be the underlying cause of infertility among couples, the sex of the partner requiring treatment will vary depending on the couple’s situation, and while surgical impregnation procedures are performed only on women, male participation is required. Accordingly, the court opined that to label infertility as sex-specific would “result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.” Thus, the infertility chart contains conflicting results within S/IT.

**Figure 4: Circuits are Split Regarding S/IT Classifications**

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<td></td>
</tr>
</tbody>
</table>

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155. See *Saks* v. Franklin Covey Co., 316 F.3d 337, 341 (2d Cir. 2003).
156. See *id*.
158. See *Saks*, 316 F.3d at 346.
159. See *id*.
160. Id. at 346.
4. **N/IT: Sex-Neutral, Infertility Treatment-Based Classifications**

Finally, sex-neutral, infertility treatment-based classifications fall within N/IT of the infertility chart. This includes classifications that focus on infertility treatment in general, without specifically identifying infertility treatments that are performed on women in order for her to become pregnant. The Eighth Circuit in *Krauel* dealt with such a classification, and it held that an employer’s plan that excluded all infertility treatments did not violate the PDA.\(^{161}\) The court reasoned that infertility is fundamentally distinct from pregnancy and childbirth, which occur after conception, while infertility prevents conception.\(^{162}\) This view asserts that infertility is the complete opposite of the potential for pregnancy, precluding the conclusion that infertility is related to potential pregnancy under the PDA.\(^{163}\) Thus, N/IT classifications would not discriminate against women under the PDA.

**B. Hall is Consistent with Congress’s Intent Behind the PDA**

The Seventh Circuit rejected the reasoning used by the Eighth and Second Circuits, which respectively concluded that sex-neutral, infertility treatment-based classifications and sex-specific, infertility treatment-based classifications do not violate Title VII. Both the Eighth and Second Circuits analyzed the classifications without identifying the category in which they would fall on the infertility chart; the temp-

\(^{161}\) See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).
\(^{162}\) See *id.* at 675.
\(^{163}\) See *id.*
tation appears to be to analyze all classifications that somehow relate to infertility as though they sex-neutral, infertility-based N/I classifications. This Sub-section discusses the differences between the rationales used by the different circuit courts when classifying infertility and the effect of a misplacement within the infertility chart on the Title VII analysis.

In *Krauel*, the court held that an insurance plan that excluded all infertility treatments did not discriminate against women under either a disparate treatment or disparate impact theory.\(^{164}\) The *Krauel* court was faced with a N/IT classification, a gender-neutral, infertility treatment-based classification. The *Krauel* court focused on the distinction that "[p]regnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception."\(^{165}\) By focusing on the pre-conception distinction between pregnancy and infertility, the court focused on infertility as a condition, therefore analyzing the employer's classification as though it was a N/I sex-neutral, infertility-based classification. Thus, when faced with the question of whether the employer's intent to exclude infertility treatments could demonstrate intent to exclude based on sex or pregnancy, the court dismissed the question because it had already determined that infertility was sex neutral.\(^{166}\) The *Krauel* court rejected the argument that treatment for infertility was related to a woman's childbearing capacity.\(^{167}\)

In *Hall*, the Seventh Circuit expressly rejected the pre-conception distinction discussed in *Krauel*, noting that it was specifically foreclosed by *Johnson Controls*'s application of the PDA to classifications based on the pre-conception "potential for pregnancy."\(^{168}\) The *Hall* court also identified that the classification at issue—IVF—was based on an infertility treatment rather than simply infertility.\(^{169}\) *Hall* recognized that surgical impregnation procedures are sex-specific because they are only performed on women, based on their childbearing capacity.\(^{170}\) Both the *Hall* court's rejection of the pre-conception distinction and the court's focus on the treatment at issue indicate that had the *Hall* court been faced with a sex-neutral, infertility treatment-based classification like the one in *Krauel*, it may have analyzed the

\(^{164}\) See id. at 681.
\(^{165}\) Id. at 679.
\(^{166}\) See id. at 680.
\(^{167}\) See id.
\(^{169}\) See id. at 649.
\(^{170}\) See id.
case differently. By rejecting the *Krauel* court’s rationale for distinguishing potential pregnancy from infertility, the *Hall* court recognized that infertility is not always separable from potential pregnancy. And by focusing on the treatment at issue, rather than the condition of infertility, the *Hall* court was able to conclude that discrimination based on a procedure that is performed on a woman based on her childbearing capacity violates the PDA. Faced with a sex-neutral, infertility treatment-based classification, the *Hall* court would presumably ask whether and to what extent infertility treatments are performed on women based on their childbearing capacity. This differs from the *Krauel* court’s focus on whether the condition occurs pre-conception or whether the condition—not the classification—is sex-neutral.

In *Saks*, the Second Circuit upheld the legality of an employer’s benefit plan that provided coverage for infertility treatment for all employees but expressly excluded surgical impregnation procedures.\(^{171}\) Thus, the procedure was both sex specific and infertility treatment-based because surgical impregnation procedures are treatments performed only on women, based on their childbearing capacity.\(^{172}\) Yet, the court held that the exclusion of surgical impregnation procedures did not violate the PDA.\(^{173}\) The court reasoned that surgical impregnation procedures are used to treat the sex-neutral condition of infertility.\(^{174}\) The court opined that in order to classify on the basis of sex, the classification had to relate to a condition unique to women.\(^{175}\) By analyzing the employer’s exclusionary policy in this manner, the *Saks* court focused on the policy as a sex-neutral, infertility-based N/I exclusion, rather than a sex-specific, infertility treatment-based S/IT classification. The court noted that surgical impregnation procedures are used to treat infertility that is caused by both male and female factors.\(^{176}\) Thus, according to the court, the plan’s express exclusion of surgical impregnation procedures treated and affected male and female employees equally.\(^{177}\)

The *Saks* court ignored both the infertility treatment-based nature of the employer’s exclusion and the sex-specific nature of the exclusion. *Saks* and *Hall* focus on the same medical procedure—surgical

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171. See *Saks* v. Franklin Covey Co., 316 F.3d 337, 341 (2d Cir. 2003).
172. See *Hall*, 534 F.3d at 649.
173. See id.
174. See *Saks*, 316 F.3d at 345–46.
175. See id. at 346.
176. See id.
177. See id.
impregnation.\textsuperscript{178} The employment practices in both \textit{Saks} and \textit{Hall} were based on a sex-specific, infertility treatment-based classification.\textsuperscript{179} However, by focusing on the \textit{condition} rather than the \textit{treatment}, the Second Circuit in \textit{Saks} failed to recognize that the employer's exclusion applied only to women employees:\textsuperscript{180} while both men and women can be infertile, and while surgical impregnation procedures are used to treat infertility that is caused by both male and female factors, surgical impregnation procedures can only be performed on women, based on their childbearing capacity.\textsuperscript{181} The \textit{Hall} court recognized that such procedures are therefore not sex neutral.\textsuperscript{182}

The Seventh Circuit's recognition of surgical impregnation procedures as a sex-specific infertility treatment was faithful to Congress's intent behind the PDA. The undeniable connection between IVF and pregnancy may compel the conclusion that discrimination based on IVF is sex-specific and violates the PDA. IVF, as the court noted, is performed on women to cause them to become pregnant.\textsuperscript{183} The procedure is not performed on men because of the obvious difference in reproductive capacity. As Justice Stevens pointed out in his dissent in \textit{Gilbert}, "[I]t is the capacity to become pregnant which primarily differentiates the female from the male."\textsuperscript{184} In fact, the House Report for the PDA quotes this exact language.\textsuperscript{185} Accordingly, IVF is intrinsically connected to a woman's potential to become pregnant. The Supreme Court's decision in \textit{Johnson Controls} made clear that discrimination based on a woman's potential for pregnancy must be regarded as explicit sex discrimination under Title VII.\textsuperscript{186}

This holding comports with Congress's intention to use the PDA as a means of returning "commonsense" to an analysis of sex discrimination under Title VII.\textsuperscript{187} IVF is performed only on women,\textsuperscript{188} and while the PDA was meant in part to eliminate the need for a disparate

\begin{itemize}
  \item \textsuperscript{178} \textit{Compare Hall}, 534 F.3d at 648-49 (addressing the plaintiff's termination for undergoing IVF, a surgical impregnation procedure), \textit{with Saks}, 316 F.3d at 341 (analyzing the express exclusion of surgical impregnation procedures from the infertility treatments that were covered by the employer-provided benefits plan).
  \item \textsuperscript{179} See id.
  \item \textsuperscript{180} See \textit{Saks}, 316 F.3d at 341.
  \item \textsuperscript{181} See \textit{Hall}, 534 F.3d at 648-49.
  \item \textsuperscript{182} See \textit{Hall}, 534 F.3d at 648 (quoting Int'l Union v. Johnson Controls, 499 U.S. 187, 198 (1991)).
  \item \textsuperscript{183} See \textsc{Mayo Clinic Family Health Book} 1069-70 (3d ed. 2003).
  \item \textsuperscript{185} H.R. Rep., supra note 3, at 2.
  \item \textsuperscript{187} See H.R. Rep., supra note 3, at 3.
  \item \textsuperscript{188} See \textit{Hall}, 534 F.3d at 648-49.
\end{itemize}
impact analysis, the obvious disparate impact of termination based on undergoing IVF further supports the Seventh Circuit’s decision. Only women will undergo IVF. Only women can be terminated for taking time off to undergo IVF. In all instances where an employee is discharged for taking time off to achieve surgical impregnation, the employee will be a woman. Thus, whether conducting a disparate treatment or disparate impact analysis, terminating an employee for undergoing surgical impregnation procedures violates the Title VII.

C. Does Hall Extend Past Surgical Impregnation Procedures?

The narrow focus on the plaintiff’s specific surgical impregnation procedure made the court’s conclusion in Hall a seemingly straightforward one: classifying a woman based on a surgical impregnation procedure that is performed only on women for the purpose of achieving pregnancy constitutes discrimination under Title VII. However, the court’s reasoning extends beyond IVF procedures. Under the holding in Hall, sex-specific, infertility treatment-based S/IT classifications violate the PDA. But the effect of the court’s holding on the legal issues involving types of infertility treatments other than surgical impregnation procedures is not immediately clear.

Identifying the potential scope of the Hall decision depends on one’s analysis of the court’s reasoning. The court relied on two characteristics of IVF to come to its conclusion. First, IVF can only be performed on women. Second, IVF’s purpose—to facilitate pregnancy—directly relates to a woman’s potential for pregnancy. An emphasis on the court’s first distinction—that IVF is performed only on women—limits Hall’s application to classifications based on sex-specific infertility treatments such as surgical impregnation procedures. An emphasis on the second distinction—that treatment relates to a woman’s potential for pregnancy—extends the application

189. See H.R. Rep., supra note 3, at 3 ("By making clear that distinctions based on pregnancy are per se violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions in Satty.").
191. See id.
192. See id.
193. See id. at 648–49.
194. See id.
195. See id.
196. See infra notes 198–199 and accompanying text. Under this interpretation, classifications falling within S/IT would violate Title VII, but classifications falling within N/IT would not.
of Hall to classifications based on a woman’s participation in infertility treatments in general.\textsuperscript{197}

Hall could be interpreted as applying PDA protection only to surgical impregnation procedures and not to infertility treatment in general. This interpretation relies on the court’s focus on the fact that the immediate intended result of IVF is impregnation. Because men cannot become pregnant, IVF is only performed on women.\textsuperscript{198} Under this interpretation, the sex-specific nature of surgical impregnation procedures cannot be extended to infertility treatments in general because infertility treatments (other than impregnation) can be performed on both men and women, and in fact, some infertility treatments can only be performed on men.\textsuperscript{199}

Alternatively, Hall can be interpreted broadly to suggest that women seeking infertility treatment are protected by the PDA. This interpretation recognizes a distinction between the condition of infertility and a woman’s treatment of infertility. The Hall court notes that the condition of infertility itself is sex-neutral, and a classification based on that condition would not violate the PDA.\textsuperscript{200} However, an infertile woman who seeks infertility treatment does so to increase her potential for pregnancy.\textsuperscript{201} Accordingly, any classification of a woman based on her use of infertility treatments relates to her potential for pregnancy.

This expansive interpretation addresses the difficulty with the limited interpretation’s fictional separation of non-impregnating infertility treatments from the potential for pregnancy.\textsuperscript{202} The goal of IVF is for a woman to achieve pregnancy.\textsuperscript{203} However, that same goal exists for women whose infertility problems can be treated without actual surgical impregnation procedures.\textsuperscript{204} Women who seek infertility treatments—whether those treatments involve regulating hormone levels to achieve ovulation, surgical correction of blocked fallopian tubes, or impregnation through IVF—do so in order to become pregnant.\textsuperscript{205} Those treatments are performed because of a woman’s po-

\textsuperscript{197} See infra notes 211–218 and accompanying text. Under this interpretation, classifications falling within either S/IT or N/IT would violate Title VII.

\textsuperscript{198} See \textit{Hall}, 534 F.3d at 648–49.

\textsuperscript{199} See Ohl et al., supra note 68, at 525; \textit{Kolettis, supra} note 75, at 793.

\textsuperscript{200} See \textit{id.} at 648 n.1 (“Notably, this understanding of \textit{Johnson Controls} rests on the fact that infertility is gender neutral . . . .”).

\textsuperscript{201} See Bentley, \textit{supra} note 139, at 416–17.

\textsuperscript{202} See \textit{id.} at 416–17.

\textsuperscript{203} See \textit{Mayo Clinic Family Health Book, supra} note 183, at 1069–70.

\textsuperscript{204} See University of Chicago Medical Center, Infertility, \textit{supra} note 10.

\textsuperscript{205} See \textit{Mayo Clinic Family Health Book, supra} note 183, at 1069.
potential for pregnancy. To draw the line at surgical impregnation procedures ignores the self-evident purpose of all infertility treatments: that a woman will achieve pregnancy. In this sense, termination of a woman’s employment because she was undergoing a surgery to correct blocked fallopian tubes would be based on childbearing capacity as much as a termination for undergoing IVF. The expansive interpretation recognizes that infertility treatments for women cannot be separated from their potential for pregnancy. In light of the purpose of the PDA, which was enacted to protect “the whole range of matters concerning the childbearing process,” recognizing the connection between a woman’s infertility treatments and her potential for pregnancy may be essential to the materialization of Congress’s intent.

Regardless of whether the scope of Hall is read as limited or expansive, the case unquestionably asserts that S/IT classifications, such as those based on in vitro fertilization and surgical impregnation procedures, violate Title VII. If the more expansive interpretation takes hold, Hall indicates that all infertility treatment-based classifications—not simply surgical impregnation procedures—violate Title VII.

D. Hall’s Implications for Medical and Health Coverage Cases

Hall’s conclusion that terminating a woman for undergoing IVF violates Title VII reaches further than employer termination practices. Title VII prohibits discriminatory classifications in all aspects of employment, not simply termination of an employee. Thus, Hall’s holding is applicable to medical and health coverage as well, and it may have far-reaching effects.

206. See id.
207. See Bentley, supra note 139, at 416–17 (“[W]hen a woman undergoes fertility treatment she is seeking assistance with conception.”).
208. See id. at 419–20.
1. The Prohibition of Discriminatory Classifications Extends to Benefit Plans

Under the PDA, a classification that is found to be discriminatory cannot serve as a basis for any employment action. In *Gilbert*, the Court did not find exclusion of pregnancy benefits discriminatory because there was "no risk from which men [were] protected and women [were] not." In *Satty*, a case decided by the Supreme Court one year after *Gilbert* but prior to the enactment of the PDA, the Court held that an employer's policy of depriving seniority to women who were absent from work due to childbirth violated Title VII under a disparate impact analysis. The Court distinguished the case from *Gilbert* based on an ambiguous semantic distinction between the refusal to extend the "benefit" of medical coverage in *Gilbert* from the "burden" of denying seniority in *Satty*. The PDA dispelled this distinction by declaring that any classifications based on pregnancy are discriminatory, regardless of whether the employer's action can be categorized as a "burden" or a "benefit." If a classification is based on pregnancy or the potential for pregnancy, it is a per se violation of Title VII. Congress intended that the PDA apply to "all aspects of employment—hiring, reinstatement, termination, disability, benefits, sick leave, medical benefits, seniority, and other conditions of employment currently covered by Title VII." Therefore, a classification that is facially discriminatory in one practice will be facially discriminatory in another.

2. The PDA's Mandate for Equal Treatment of Benefit Plans

Because the PDA was a reaction to *Gilbert*, a case in which the employer denied its female employees pregnancy coverage in an otherwise comprehensive plan, the PDA explicitly addresses Congress's intent with regard to fringe benefits under Title VII. The PDA pro-

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212. *Satty* attempted to distinguish *Gilbert* by creating a distinction between policies that deny benefits and policies that impose burdens. See Nashville Gas Co. v. Satty, 434 U.S. 136, 141–42 (1977). The PDA was enacted in order to obviate the difficulties in applying such a distinction. See H.R. Rep., *supra* note 3, at 3.


hibits employers from treating "pregnancy, childbirth, and related medical conditions in a manner different from their treatment of other disabilities."

Although the PDA does not mandate that employers provide disability benefits, sick leave benefits, or medical benefits, it requires an employer who chooses to provide such benefits to do so without discriminating on the basis of sex or pregnancy-related conditions. The PDA "simply require[s] that pregnant women be treated the same as other employees on the basis of their ability or inability to work."

3. Under Hall, Surgical Impregnation Procedures Must Be Treated Non-Discriminatorily

The Hall court held that employment decisions based on IVF are discriminatory because they are performed only on women, and on the basis of their childbearing capacity. Because surgical impregnation procedures are inextricably tied to the potential for pregnancy, classifications based on such procedures must be regarded "in the same light as explicit sex discrimination." Accordingly, classifications based on surgical impregnation procedures are explicitly discriminatory.

Extending Hall, classifications based on surgical impregnation procedures are impermissible in "all aspects of employment—hiring, reinstatement, termination, disability benefits, sick leave, [and] medical benefits." Just as an employer may not limit its coverage based on pregnancy, an employer may not limit its insurance benefits based on any other impermissible classification, including potential for preg-

220. See id. at 5.
221. See id. at 5-6. Some states mandate that insurance providers offer some kind of coverage for infertility treatment, including Arkansas, Hawaii, Illinois, Maryland, Montana, New Jersey, New York, Ohio, Rhode Island, and West Virginia. See Katherine E. Abel, Note, The Pregnancy Discrimination Act and Insurance Coverage for Infertility Treatment: An Inconceivable Union, 37 Conn. L. Rev. 819, 823 (2005). California, Connecticut, and Texas require that insurance coverage be offered, but consumers may choose not to purchase it. Id.
223. Id. at 4.
226. See Hall, 534 F.3d at 648–49.
Classifications based on surgical impregnation procedures are necessarily based on the potential for pregnancy. As such, surgical impregnation procedures may not be singled out or excluded to any greater extent than other medical conditions. Coverage for surgical impregnation procedures must be provided under the same terms and conditions as coverage for other medical costs.

a. *Hall and Saks Cannot Be Reconciled*

*Hall* and *Saks* cannot be reconciled. *Saks* involved an employer’s insurance policy that specifically excluded coverage for surgical impregnation procedures, while *Hall* involved an employer’s termination of a woman based on her surgical impregnation procedure. Both classifications focus on infertility treatment, not on infertility as a condition. And both classifications focus on a sex-specific infertility treatment: surgical impregnation procedures. Thus, both classifications are sex-specific, infertility treatment-based classifications falling within S/IT of the infertility chart. The PDA clarified that the distinction between benefits and burdens does not bear any weight on whether discrimination occurred. In *Hall*, the fact that the discrimination took the form of a burden (termination) while in *Saks*, the discrimination took the form of withholding a benefit (the exclusion of coverage) does not change the underlying analysis of whether the classification is related to childbearing capacity. If the classification (here, surgical impregnation procedures) is related to potential pregnancy or childbearing capacity, discrimination based on that classification is sex-specific and violates Title VII. *Hall* recognizes that surgical impregnation procedures enter the realm of potential pregnancy and are therefore protected by the PDA. Accordingly, under a *Hall* analysis, which is arguably more consistent with the congressional intent behind the PDA, the employer’s plan in *Saks* violates the PDA by failing to provide coverage for costs related to potential pregnancy in the same manner as the coverage it provides for other medical costs.

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228. See Johnson Controls, 499 U.S. at 198.
229. See *Hall*, 534 F.3d at 648–49.
231. See id.
232. See id. at 3.
233. See id.
236. See id.
b. Hall’s Effect on Krauel and Other Medical Benefit Cases

The employer’s coverage plan in Saks would clearly violate the PDA under the rationale of Hall because it expressly excluded coverage based on the precise S/IT classification that Hall identified as protected under the PDA. Hall may also impact those cases in which an employer provides comprehensive medical coverage for its employees but excludes all infertility treatments, such as the one in Krauel. These plans would fall within N/IT of the infertility chart because they classify based on infertility treatments but do not single out sex-specific infertility treatments. Because these plans would exclude coverage for infertility treatments equally for infertile men and women, the exclusion would be a sex-neutral, infertility treatment based-classification.

**FIGURE 6: Hall’s Application to N/IT Classifications**

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<tr>
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<td>• Violate Title VII (Expansive interpretation of Hall)</td>
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Hall’s application to benefit plans depends in part on the interpretation of Hall, as discussed in Part IV.C. Under the limited interpretation of Hall, classifications based on surgical impregnation procedures would violate the PDA. Non-surgical impregnation treatments, however, such as a hormone treatments or surgical repairs

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237. See Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 675 (8th Cir. 1996). Hall would only be extended to these types of scenarios if an expansive interpretation of Hall takes hold. See supra notes 200–209 and accompanying text.
238. See supra notes 193–210 and accompanying text.
of fallopian tubes, could be excluded as long as infertility treatments for males were similarly excluded. Under this interpretation, infertility treatments that are not performed exclusively on women would not relate to childbearing capacity. Thus, the employer’s plan in *Krauel* would not violate the PDA if it excluded infertility treatments performed on both men and women.

Under the more expansive interpretation of *Hall*, however, infertility treatments for women could not be excluded to any degree if medical coverage is otherwise comprehensive. Under this interpretation, any classification that excludes a woman’s access to infertility treatments relates to her potential for pregnancy and therefore violates the PDA as explicit sex discrimination based on childbearing capacity. Medical benefit plans or disability leave plans that exclude coverage for infertility treatment would exclude treatment unique to women. The PDA was enacted as a response to the *Gilbert* Court’s flawed reasoning that pregnancy-related conditions are an *additional* risk unique to women, so “the failure to compensate them for this risk [would] not destroy the presumed parity of the benefits.”

The PDA requires that an employee medical benefit plan provide coverage for pregnancy, childbirth, and related medication conditions “under the same terms and conditions of coverage for other medical conditions.” The House Report for the PDA provided an example: if the plan covers the medical and hospital costs of all employees, the plan must also cover the costs related to pregnancy, childbirth, or related medical conditions. Thus, the evenhanded exclusion of benefits that excluded coverage for infertility treatment excludes treatment related to a woman’s potential for pregnancy. Under this interpretation of *Hall*, infertility treatment must therefore be treated the same as treatment for other medical conditions. If a court were confronted with a case with the facts of *Krauel*, this reading of *Hall* would lead to the conclusion that the employer’s exclusion of infertility treatments violates the PDA.

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242. *Id.*
243. Even if excluding infertility treatment from insurance coverage plans is not facially discriminatory and is instead seen as facially neutral, a focus on the infertility treatment-based (as opposed to infertility-based) nature of such exclusions may lead to the conclusion that the exclusions violate Title VII because they have a disparate impact on women. The burdens from the costs associated with infertility treatments fall more heavily on women than on men, violating Title VII under a disparate impact analysis. *See* Employment Discrimination Law and Practice, supra note 37, at 181–83. Women face a greater financial burden when infertility treatment is excluded because women are subject to more tests and procedures to treat infertility, even if the male partner is the source of the problem. *See* Brietta R. Clark, *Erickson v. Bartell Drug*
This expansive interpretation leads to a curious result. Under this expansive interpretation, the PDA would require that employers’ medical benefits plans cover infertility treatments for women if the plan is otherwise comprehensive. The threshold question under the PDA becomes whether infertility treatments are treated the same as other conditions, as opposed to whether infertility treatments are provided equally between men and women employees. An equal exclusion of all infertility treatments would discriminate based on women’s childbearing capacity because the excluded coverage—women’s access to infertility treatment—relates to potential for pregnancy. However, an employer who covers all infertility treatments but only for women could potentially violate Title VII by discriminating against men. This is an admittedly odd result, which would be justified under the expansive interpretation by the rationale that access to infertility treatment means something different to women than to a man: infertility treatment is uniquely related to the potential for pregnancy (requiring protection under the PDA), but infertility treatments is not related to a man’s potential for pregnancy. Thus, the expansive interpretation of Hall could potentially require an employer whose medical plan covers other medical costs to cover infertility treatment for both women (to satisfy the PDA’s prohibition of discrimination based on pregnancy) and for men (to satisfy Title VII’s general prohibition of sex discrimination).

This result may suggest to some courts that sex-neutral, infertility treatment-based N/IT classifications cannot serve as the basis of sex discrimination. However, applying the expansive interpretation of Hall to Krauel and similar cases at least appears to adhere to the underlying purpose of the PDA. The PDA prohibits employers from discriminating against women based on their potential for pregnancy. Women seek infertility treatments, including surgical impregnation

Co.: A Roadmap for Gender Equality in Reproductive Health Care or an Empty Promise?, 23 Law & Ineq. 299, 320 (2005). Additionally, because the structural defects that cause male infertility can more frequently be linked to noninfertility-related conditions than can the causes of female infertility, infertility treatments that are specific to men could often be covered by the policy as non-fertility related, making the exclusionary policy more exclusionary for women than for men. See id. The structural deficiencies that often cause male infertility can potentially be covered despite a plan’s exclusion of infertility treatments because these deficiencies may be considered related to something other than infertility. See id. The disparity created by the fact that male infertility can be linked to noninfertility-related medical conditions is significant, as “infertility is hormonal [and not structural] in women 30 percent of the time, but only about 10 percent of the time in men.” Id.

244. See H.R. Rep., supra note 3, at 6.
245. See id.
procedures, in order to become pregnant or to increase their potential for pregnancy.\textsuperscript{247} While the PDA does not require an employer to provide benefits, should an employer choose to do so, it must do so non-discriminatory.\textsuperscript{248} Accordingly, medical treatment that relates to women's childbearing capacity must be provided in the same manner as other medical treatment.\textsuperscript{249} A benefit plan that excludes infertility treatment inhibits women's childbearing capacity in the same manner as would the exclusion of coverage of other pregnancy-related treatment. Under the expansive interpretation of Hall, when an employer provides an otherwise comprehensive plan, excluding coverage for infertility treatments discriminates against women.\textsuperscript{250} Congress intended to eradicate such a result through the enactment of the PDA.\textsuperscript{251}

V. IMPACT: THE WORKING WORLD AFTER HALL v. NALCO

Hall v. Nalco clarified the scope of the PDA by holding that terminating a female employee for undergoing IVF violates Title VII.\textsuperscript{252} For the plaintiff, the decision means that the defendant acted unlawfully if the motivation for her discharge was truly her IVF treatment. Beyond the scope of the specific facts on which Hall was decided, the decision has implications for subsequent sex discrimination cases under Title VII, the duties of employers, and the rights of employees.

A. What Hall Means for Title VII Sex Discrimination Law

The specific holding of Hall is clear: terminating a female employee for undergoing IVF treatment violates Title VII.\textsuperscript{253} As the first federal circuit court to address the issue of discharge of an employee based on IVF, Hall sets precedent in the Seventh Circuit and provides a strong analysis for other circuit courts to follow. The extension of Hall's precise holding to other employment practices and policies—and to other infertility treatments besides IVF—may have far-reaching effects.

\textsuperscript{247} See Horowitz, supra note 64, at 507–09.
\textsuperscript{248} See 42 U.S.C. § 2000e(k).
\textsuperscript{249} See H.R. Rep., supra note 3, at 5. "[T]his Bill would require that women disabled due to pregnancy, childbirth, or other related medical conditions be provided the same benefits as those provided other disabled workers. This would include temporary and long-term disability insurance, sick leave, and other forms of employee benefit programs." Id.
\textsuperscript{250} See id. at 6.
\textsuperscript{251} See id. at 4.
\textsuperscript{252} See Hall v. Nalco Co., 534 F.3d 644, 645 (7th Cir. 2008), reh'g denied, No. 06-3284, 2008 U.S. App. LEXIS 18449, at *1 (7th Cir. Aug. 15, 2008).
\textsuperscript{253} See id. at 649.
Undoubtedly, district courts will continue to face challenges involving sex discrimination based on infertility treatment, whether in the context of hiring and firing decisions, insurance coverage, or any other potentially discriminatory policy or practice. Those courts will have to determine where in the infertility chart the particular claim lies, which in turn will shape their decisions as to whether a particular challenge is actionable under Title VII. The U.S. Supreme Court refrained from labeling fertility as a medical condition related to pregnancy, and this instructs courts that sex-neutral, infertility-based N/I classifications do not violate Title VII. Unlike the Second and Eighth Circuits, however, which fail to consider the implications of an infertility treatment-based classification, the Seventh Circuit's decision in Hall provides courts with another line of reasoning: where the medical procedure or treatment in question is performed on women for the sex-specific purpose of achieving pregnancy, it is related to women's childbearing capacity and cannot serve as a legitimate classification in employment decisions.

Courts following a limited interpretation of Hall would still differ from the decisions in the Second Circuit by recognizing that IVF and surgical impregnation procedures have a protected status. For courts extracting a broader analysis from Hall, non-surgical impregnation treatments, such as hormone treatments or structural correction surgeries pursued for the purpose of achieving pregnancy, would also be related to childbearing capacity. This expansive interpretation may more faithfully adhere to the PDA's prohibition of employment decisions based on potential pregnancy because treatments performed on a woman for the purpose of achieving pregnancy are necessarily related to her childbearing capacity.

B. What Hall Means for Employers

Employers subject to Title VII's prohibition of sex discrimination in the workplace are affected by the Seventh Circuit's decision in Hall. At the very least, Hall tells employers that they may not subject a woman to disparate treatment based on undergoing IVF. This extends not only to termination decisions but also to "hiring, reinstatement . . . disability benefits, sick leave, medical benefits, seniority, and other conditions of employment." Accordingly, an employer may not base any adverse employment decision on a woman's participation

255. See Hall, 534 F.3d at 648–49.
256. See id. at 645.
in surgical impregnation procedures, nor can an employer single out surgical impregnation procedures for exclusion from any benefit plans that otherwise provide comprehensive coverage for infertility treatments. Surgical impregnation procedures must be covered at least to the same extent as other pregnancy-related medical cost.

Cautious employers may find it prudent to read Hall as requiring extra attention when making decisions or enacting policies regarding infertility treatment as applied to women. Under the expansive reading of Hall—under which termination based on IVF violates Title VII because the treatment relates to a female employee’s childbearing capacity—an employer would violate the PDA by singling out a woman’s access to any infertility treatment. For example, an employer who chooses not to hire a woman because she is seeking infertility treatment would violate the PDA. Similarly, an employer who discharges a woman for undergoing a surgical procedure to correct a blockage of her fallopian tubes would violate Title VII. Further, in order to avoid discriminating against men in an attempt to comply with the PDA, an employer may find it prudent to cover all infertility treatment—for men and women—if the employer provides coverage for other medical conditions.

Hall does not change the nature of the PDA, which does not affirmatively require any particular treatment for women. Instead, the PDA requires that “women be treated the same as other employees on the basis of their ability or inability to work” and provides that women should not be treated differently based on pregnancy or potential for pregnancy. Thus, while employers may not make decisions motivated by a woman’s decision to undergo a surgical impregnation procedure, employers may take adverse action based on a woman’s inability to work. Accordingly, Hall does not assert that female employees seeking surgical impregnation procedures are categorically protected from adverse employment action. For example, a female employee cannot avoid the enforcement of a mandated attendance policy because she is seeking surgical impregnation treatment. Under the burden-shifting framework used in Title VII cases, employers have the opportunity to assert a legitimate and non-discriminatory reason for its action or policy. An employer may still discharge a female employee who takes time off to undergo such treatment if—

258. See id.
based on the employer's mandated attendance policy, for example—a man taking that time off would have been discharged as well.

C. What Hall Means for Employees

Like employers subject to Title VII, employees are also affected by the Seventh Circuit's decision in Hall. Most specifically, Hall assures female employees that they may not be punished or treated differently at work based on their decision to undergo surgical impregnation procedures. The decision removes intentional discrimination at work as one of the obstacles for a woman making the choice to become a mother. For the female employee, Hall means that an employee's surgical impregnation cannot serve as the basis of adverse employment action.

On a broader scale, by concluding that sex-specific, infertility treatment-based classifications violate Title VII, Hall acknowledges the relationship between those procedures and a woman's capacity to become pregnant. The PDA reflects Congress's belief that such discrimination "keeps women in low-paying jobs and deadend jobs," and by refusing to allow employers to discriminate against a woman seeking pregnancy through surgical impregnation, Hall is one step in the continuous endeavor to remove women from the margins of the workforce. The decision thus comports with Title VII's ultimate goal of "eliminat[ing] those discriminatory practices and devices which have fostered sexually stratified job environments to the disadvantage of women.""

D. The Impact of Hall on Assisted Reproductive Technology

Medical options available to women seeking pregnancy have changed since the enactment of the PDA and Congress's decision to include pregnancy, childbirth, and related medical conditions in its definition of "because of sex." When Congress formulated the language of the PDA in 1978, the ability to use assisted reproductive technology did not yet exist. While the PDA did not anticipate the scientific advances that would make pregnancy an option to women for whom such an option did not previously exist, under Hall, those new technologies cannot become the basis of sex discrimination.

264. See UC Davis Fertility Center, Assisted Reproductive Technology, supra note 76.
The temptation for courts and employers to treat infertility treatments as voluntary and elective procedures that are not subject to protection is strong.\textsuperscript{265} The Supreme Court in \textit{Gilbert} relied on its view of pregnancy as often a "voluntarily undertaken and desired condition."\textsuperscript{266} As new medical options become available, making pregnancy and the preservation of fertility possible, a similar temptation to view such treatment as merely "voluntarily undertaken and desired" still exists. However, Congress rejected the Supreme Court's reasoning in \textit{Gilbert} and adopted its dissent, which dismissed the idea that the "voluntary" nature of pregnancy supported its exclusion from the employer's health coverage.\textsuperscript{267} A cancer patient's use of assisted reproductive technology to preserve her fertility, an HIV-positive couple's use of IVF to conceive a child that will not be infected, and any woman's use of infertility treatment can all be seen as "voluntarily undertaken and desired."\textsuperscript{268} The PDA's refusal to adopt \textit{Gilbert}'s holding mandates that courts' treatment of assisted reproductive technology will not be subject to the same flawed argument. Congress could not predict and did not address these medical innovations when it enacted the PDA; \textit{Hall} provides an analytical lens through which courts may view these medical innovations and their relation to a woman's childbearing capacity.

\section{VI. Conclusion}

Surely, reproductive technology will continue to advance, and the options available to infertile women will continue to grow. As pregnancy becomes possible for an increasing number of women through an increasing variety of procedures, the inherent relationship between reproductive technology and a woman's potential for pregnancy may prohibit employers from using such technology as a basis for employment decisions. \textit{Hall} recognizes that IVF is intrinsically connected to a woman's potential to become pregnant, acknowledging Justice Stevens' statement in his \textit{Gilbert} dissent that "it is the capacity to become pregnant which primarily differentiates the female from the male."\textsuperscript{269}

\begin{itemize}
\item \textsuperscript{266} \textit{Gilbert}, 429 U.S. at 136.
\item \textsuperscript{267} \textit{Id.} at 151 (Brennan, J., dissenting). Justice Brennan commented that the employer in \textit{Gilbert} had not "construed its plan as eliminating all so-called 'voluntary' disabilities, including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery." \textit{Id.}
\item \textsuperscript{268} See Bedaiwy et al., \textit{supra} note 4, at 490; Delvaux & Nöstlinger, \textit{supra} note 6, at 55.
\item \textsuperscript{269} See \textit{Gilbert}, 429 U.S. at 161–62 (1976) (Stevens, J., dissenting); H.R. \textit{Rep.}, \textit{supra} note 3, at 2.
\end{itemize}
In doing so, *Hall* follows the Supreme Court’s mandate that discrimination based on a woman’s potential for pregnancy must be regarded, under Title VII, as discrimination “because of sex.” *Hall* concludes that sex-specific, infertility treatment-based classifications violate Title VII, and it potentially instructs employers that even sex-neutral, infertility treatment-based classifications fail to comply with the PDA.

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