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DOES BRAGDON v. ABBOTT PROVIDE THE MISSING LINK FOR INFERTILE COUPLES SEEKING PROTECTION UNDER THE ADA?

Kimberly Horvath

INTRODUCTION

Infertility rips at the core of life itself: the ability to have a child. For the 6.1 million Americans suffering from infertility, the inability to bear a child can have a devastating impact on their lives. Infertile couples often suffer an immense amount of emotional and psychological stress due to their inability to live up to society's expectations, the strain on their marriage, and discrimination at work. This stress may become so great that couples who have the courage to begin treatment often stop prematurely because the stress is too much to handle. The recent United States Supreme Court opinion, Bragdon v. Abbott, which found that reproduction is a major life activity under the American with Disabilities Act, (ADA) and thus asymptomatic HIV is a disability under the ADA, may help infertile couples find protection under the ADA. This article will discuss the potential impact of Bragdon on the infertile community.

To understand the dynamics of infertility, background information on the

3Telephone interview with volunteer from Resolve of Illinois, "Treatment did not fail us, we failed it."
causes of infertility and the treatments available will be provided before providing an overview of the elements necessary to qualify as disabled under the ADA. Finally, the conflicting opinions in the lower courts on whether infertility is protected under the ADA will be addressed and will use this information to discuss how the Supreme Court’s decision in Bragdon v. Abbott will impact infertile individuals seeking protection under the ADA.

BACKGROUND

Infertility in General
Infertility has a broad impact on our society, as it affects 6.1 million Americans or ten percent of the couples of childbearing age.\(^5\) Infertility is defined as the inability to reproduce after one year of intercourse without contraception,\(^6\) and does not discriminate against gender, race, culture, or education.\(^7\) Of those couples with infertility, forty percent can attribute their infertility to the female, and forty percent can attribute it to the male; the remaining twenty percent of the couples suffer from both male and female infertility or an unknown cause.\(^8\) In addition, twenty-five percent of couples have more than one factor contributing to their infertility.\(^9\)

The first step couples who have been unable to conceive must take is locating the cause of their infertility.\(^10\) Much more information is known about what causes female infertility then male infertility.\(^11\) Generally, infertility in both male and females is caused by age, physical

\(^5\)FACT SHEET, supra note 1; Luigi Mastroianni, et al., Helping Infertile Patients, 31 PATIENT CARE 103, 103 (1997). Often the estimates of infertility underestimate the number of couples who are incapable of having a child because they do not include couples who are capable of conceiving but cannot carry a pregnancy to term. THE NEW YORK TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 13 (1998) [hereinafter TASK FORCE].

\(^6\)TASK FORCE, supra note 5, at 10.

\(^7\)However, one and a half times more married African-American women are infertile than married white women. OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, INFERTILITY MEDICAL AND SOCIAL CHOICES 51 (1988).


\(^9\)FACT SHEET, supra note 1.

\(^10\)TASK FORCE, supra note 5, at 16-35.

\(^11\)Id. at 29.
condition, medical treatment, and environmental factors. Age is identified as the cause of infertility for a number of women because a woman's fertility gradually begins to decline after the age of thirty, with a steeper decline between the ages of thirty-five to forty. In addition, age increases the incidence of contracting other medical conditions that may cause infertility. Age is also a factor in male infertility because the number of motile sperm reduces with age.

Female infertility is also caused by physical conditions that inhibit the egg and sperm from successfully joining or from the fertilized egg attaching to the wall of the uterus. These conditions can be caused by pelvic inflammatory disease (PID), polycystic ovarian syndrome, endometriosis, and fibroid tumors. Physical conditions that may lead

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12 Id. at 16-35; infra notes 12-27 and accompanying text.
13 See, e.g., id. at 16-18 (describing the incidence of impaired fecundity, or the inability to carry a fetus to term, increases from 1 in 18 women between the ages of 15 and 24 to 1 in 8 women between the ages 35 and 44).
15 Van Voorhis, supra note 14, at 834.
16 TASK FORCE, supra note 5, at 8.
17 Id. at 18-19 (defining pelvic inflammatory disease as "[a] general term for sexually transmitted infections that move from the vagina and cervix into the upper reproductive tract to infect the uterine lining, fallopian tubes, or lining of the pelvic cavity") (citing L. Westrime, Pelvic Inflammatory Disease, 266 JAMA 2612 (1991)). In 1982, 14% and in 1995, 8% of women between the age of 15 and 44 reported being treated for at least one PID. Chlamydia and gonorrhea are the most common sexually transmitted diseases which cause PID related to infertility because they often cause an infection in both the cervix and lower reproductive tract. TASK FORCE, supra note 5, at 19.
18 See TASK FORCE supra note 5, at 20 (Polycystic Ovarian Syndrome can cause infertility because of absent or infrequent ovulation and hormonal aberrations. It is estimated that 75% of women suffering from POS are infertile.) Id. (citing A. Shushan et al., Subfertility in the Era of Assisted Reproduction: Changes and Consequences, 64 FERTILITY AND STERILITY 459 (1995)).
19 TASK FORCE supra note 5. Endometriosis occurs when the tissue that lines the uterus is also present in sites outside the uterus such as the fallopian tubes, ovaries, and other abdominal organs. TASK FORCE supra note 5, at 20-21. Endometriosis affects 10-20% of women. Id. (citing D.L. Olive L.B. Schwarz, Endometriosis, 328 NEW ENG. J. MED. 1759 (1993)).
20 TASK FORCE supra note 5, at 22. Fibroid tumors are noncancerous tumors that develop in the uterus, on the outer surface of the uterus, or within the muscular layers of the uterus. Id. Approximately 20-50% of women suffer from fibroid tumors; the risk of fibroid tumors increases with age. B.S. Verkauf, Myomectomy for Fertility Enhancement and Preservation, 58 FERTILITY AND STERILITY 1, 1 (1992).
to male infertility include inborn abnormalities, varicocele, and infections.

Medical treatments, such as intrauterine devices and hysterectomies may also lead to infertility in females, while medications and hernia repair have been attributed to male infertility. In addition, residual effects of diethylstibestrol (DES) have been linked to infertility in both male and females.

Finally, environmental factors and lifestyle habits may play a key role in causing both male and female infertility. Activities such as smoking, eating habits, stress, drinking alcohol and caffeine, and taking illegal drugs have all been attributed to infertility.

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21 TASK FORCE supra note 5, at 29. Inborn abnormalities may include genetic disorders involving the Y chromosome. Id. (citing A.C. Bonaccorsi et al., Genetic Disorders in Normally Androgenized Infertile Men and the Use of Intracytoplasmic Sperm Injection as a Way of Treatment, 67 FERTILITY AND STERILITY 928 (1997); N. Pandiyan and A.M. Jequier, Mitotic Chromosomal Anomalies Among 1210 Infertile Men, 11 HUMAN REPRODUCTION 2604 (1996); A. Yoshida, K. Miura and M. Shirai, Chromosome Abnormalities and Male Infertility, 6 ASSISTED REPRODUCTIVE REV'S. 93 (1996)). In addition, disorders such as cystic fibrosis may result in the absence of the vas deferens. TASK FORCE supra note 5, at 29.

22 TASK FORCE supra note 5, at 30. Varicocele occurs when the veins draining the testes become abnormally dilated and twisted. U.S. Congress, Office of Technology Assessment, INFERTILITY 66.

23 TASK FORCE supra note 5, at 30-31. Infections causing male infertility include sexually transmitted diseases such as gonorrhea and chlamydia. If untreated, gonorrhea can inflame or block the reproductive tract. Chlamydia can cause infections in the canal where the sperm are matured and stored after leaving the testes. Id. (citing G.A. Greendale et al., The Relationship of Chlamydia Trachomatis Infection and Male Infertility, 83 AM. J. PUB. HEALTH 996 (1993)).

24 TASK FORCE supra note 5, at 22. Between the 1940s and 1970s, approximately 1.5 million women were exposed to DES in utero. Id.

25 See id. at 31-32.

26 Id. at 22-23, 31.

27 Id. at 25-28, 32-34.

28 Stress and psychological factors are estimated to account for 40-50% of the cases of infertility. TASK FORCE supra note 5, at 28 (citing M. Seibel and M. Taymor, Emotional Aspects of Infertility, 37 FERTILITY AND STERILITY 137 (1982)). Researchers have found that stress is usually the result of infertility treatments, rather than the cause of infertility. Recently, however, researchers have found that stress may be attributed to a woman's failure to ovulate. TASK FORCE supra note 5, at 28, 32-34 (citing S.L. Berga, T.L. Daniels, and D.E. Giles, Women with Functional Hypothalamic Amenorrhea but Not Other Forms of Anovulation Display Amplified Cortisol Concentrations, 67 FERTILITY AND STERILITY 1024 (1997)).
Infertility Treatments
While there are several treatments for infertility, only 31.4 percent of infertile couples seek treatment. This fact may be attributable to the psychological roller coaster that couples seeking infertility treatment face, the time commitment necessary to undergo treatment, risks associated with treatment, the high cost of treatment, and the lack of insurance coverage for infertility treatments.

Treatments for both female and male infertility include non-surgical and surgical treatments. When these methods are unsuccessful, many couples turn toward assisted reproductive technologies (ARTs). Knowing the cause of infertility aids in determining the appropriate form of treatment. For example, some studies have found that changes in psychological factors such as depression and stress have resulted in live

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29 Office of Technology Assessment, Congress of the United States, Infertility Medical and Social Choices 54 (1988). Couples with primary infertility, those who have no children, are twice as likely to seek treatment than couples with secondary infertility, those who have children. Id.  

30 See Task Force supra note 5, at 69. Of those women who achieve pregnancy from assisted reproductive technologies, such as IVF, 2.7% will have an ectopic pregnancy, which is a life threatening condition, and 17% will have a miscarriage. In addition, pregnancies established with ARTs are more likely to face complications such as bleeding, pre-eclampsia, restriction of fetal growth, anemia, and low birth weight. Id.  

31 Bradley J. Van Voorhis et al., Cost-Effectiveness of Infertility Treatments: A Cohort Study, 67 Fertility and Sterility 830 (1997). The cost of infertility treatments varies widely. For example, intra uterine insemination can cost from $7,800 to $10,300 per delivery, in vitro fertilization can cost $37,000 per delivery, and tubal surgery performed by laparotomy can cost $76,000 per delivery. Id.  

32 Thirteen states mandate coverage for infertility including: Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Montana, New York, Ohio, Rhode Island, and Texas.  

33 Non-surgical treatments include ovulation stimulating drugs and antibiotics to fight infections. Task Force supra note 5, at 37-38.  

34 Female surgical treatments include tubal surgery to correct a blocked fallopian tube, myomectomy to remove uterine fibroid tumors, and endometriosis surgery to remove cysts and scar tissue outside the uterus. See Task Force supra note 5, at 39-40. Male surgical treatments include varicocelectomy, vasovasostomy, and vasovasopididymostomy. See id. at 41-42.  

35 Assisted Reproductive Technologies are usually a last resort for couples who have been unsuccessful using surgical and nonsurgical methods, or for couples who cannot pin point the cause of their infertility and, therefore, cannot identify a surgical or non-surgical treatment to correct their condition. ARTs include assisted ovulation, in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, assisted fertilization, assisted sperm retrieval, and assisted hatching. See Task Force supra note 5, at 43-66.
birth rates up to thirty-six percent. Couples, therefore, may simply need to change their lifestyle or work habits. If a physical condition such as endometriosis is identified, women may undergo surgery to remove the cysts, implants, and scar tissue that may be causing their infertility. Similarly, men may undergo a varicocelectomy to tie off or occlude varicose veins of the scrotum. Couples who are unsuccessful in surgical and non-surgical intervention or who do not know the cause of their infertility may turn to ARTs, such as in vitro fertilization (IVF), gamete intrafallopian tube transfer (GIFT), and zygote intrafallopian tube transfer (ZIFT).

The Americans With Disabilities Act
The ADA was passed in 1990 to eliminate discrimination against individuals with disabilities. Specifically, the Act was aimed at

36Id. at 38 n. 9 (citing A.D. Domar et al., The Relationship Between Distress and Conception in Infertile Women, presentation at the American Society for Reproductive Medicine annual meeting, Cincinnati, Ohio Oct. 18-22, 1997).
37This may not be as easy as it seems as many couples have experienced discriminatory treatment by their employers when they have attempted to relieve work related stress, see discussion infra pp. 715-17.
38TASK FORCE, supra note 5, at 40. Seventy percent of women who have endometriosis surgery become pregnant within two years. K. Pagidas et al., Comparison of Reoperation for Moderate (Stage III) and Severe (Stage IV) Endometriosis-Related Infertility with In Vitro Fertilization-Embryo Transfer, 65 FERTILITY AND STERILITY 791, 794 (1996).
40In vitro fertilization (IVF) involves several cycles of treatment. First the woman is given ovulating stimulating drugs, then the eggs are collected before they are released into the ovaries. Next the eggs are fertilized in a laboratory to create a viable embryo. The embryo is then transferred to the woman to establish pregnancy. Gamete Intrafallopian Transfer (GIFT) is similar to IVF except that after the eggs are retrieved they are mixed with washed sperm and reintroduced into the woman’s fallopian tubes. Fertilization, therefore, occurs in the fallopian tubes rather than a culture dish in a laboratory. Zygote Intrafallopian Transfer (ZIFT) is a combination of both IVF and GIFT. Similar to IVF the eggs are fertilized in a laboratory; however, like GIFT the zygotes or early embryos are introduced into the woman’s fallopian tube before becoming a viable embryo. TASK FORCE supra note 5, at 63.
eliminating discrimination by employers, state and local governments, and in public accommodations.\footnote{42} The ADA was necessary because the Rehabilitation Act, which was passed in response to discrimination against Vietnam Veterans, only prohibited discrimination from the federal government, federal contractors, and recipients of federal funds.\footnote{43} Much of the language in the ADA is based on the Rehabilitation Act of 1973.\footnote{44} Therefore, the Rehabilitation Act is often consulted where the intent of the legislators or meaning of the terms in the ADA are unclear.\footnote{45} The ADA is divided into four different titles, with each title focusing on a specific area of discrimination,\footnote{46} but only Title I and Title III will be addressed. Many of the cases involving infertility have arisen under Title I,\footnote{47} which prohibits employers from discriminating against a person with a disability "in regard to job application procedures, the hiring, advancement, or discharge of employers, compensation, job training, and other terms, conditions, and privileges of employment."\footnote{48} In Bragdon v. Abbott, Bragdon alleged a violation of Title III of the ADA, which prohibits discrimination in any place of public accommodation.\footnote{49} Specifically, Title III prohibits discrimination against individuals "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public employers with 25 or more employees and two years later for employers with 15 or more employees. S. Rep. No. 116, 101st Cong., 1st Sess., 2 (1989). Titles II and III became effective 18 months after enactment."\footnote{Id.}

\footnote{Ann Hodges, Dispute Resolution Under the American with Disabilities Act: A Report to the Administrative Conference of the United States, 9 ADMIN. L.J. AM. U. 1007, 1009 (1996).}

\footnote{Id. at 1010 (1996).}

\footnote{See H.R. REP. No. 101-485, pt. II, at 50 (describing the intent of the legislature to use the term disability the same way as the term handicap has been interpreted under the Rehabilitation Act); Hodges supra note 41, at 1010.}

\footnote{Id.; Pacourek v. Inland Steel Co., 916 F. Supp. 797, 802 (N.D. Ill. 1996).}

\footnote{Title I addresses employer discrimination, 42 U.S.C. § 12111-12117; Title II addresses, discrimination in public services, 42 U.S.C. § 12131-12165; Title III focuses on discrimination in public accommodations and services operated by private entities, 42 U.S.C. § 12181-12189; and Title IV includes miscellaneous provisions, 42 U.S.C. § 12201-12213.}


\footnote{42 U.S.C. § 12112(a) (1998).}

\footnote{42 U.S.C. § 12182-12189 (1998).}
accommodation by any person who . . . operates a place of public accommodation.”

Qualifying as Disabled under the ADA

To qualify as disabled under the ADA, an individual must have either:

1. "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,”
2. "a record of such an impairment,” or
3. must be “regarded as having such an impairment.”

For purposes of this discussion it is only necessary to focus on the first part of the definition. An individual asserting protection under this provision must prove three elements:

1. she suffers from a physical or mental impairment,
2. she is limited in one or more major life activities, and
3. the physical or mental impairment substantially limits the major life activity.

Actually applying these terms to specific facts is difficult because the statute fails to define the key terms “physical or mental impairment” and “major life activity.” To interpret these terms, therefore, courts have looked at the legislative history and the Rehabilitation Act of 1973 for guidance. For example, the ADA legislative history and the Rehabilitation Act provide the same definition of physical or mental impairment which includes:

any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemicadin lymphatic; skin and

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5042 U.S.C. § 12182(a) (1998). Health care providers are specifically included in the list of private entities that are considered public accommodations when such entity affects commerce. 42 U.S.C. § 12181(7)(F) (1998).
53Erickson, 911 F. Supp. at 322; Pacourek, 916 F. Supp. at 802.
endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.\textsuperscript{4}

Courts have had more difficulty interpreting the meaning of the term “major life activity” because it is not defined in either the statute or legislative history. Courts, therefore, have consulted several additional sources for guidance. For example, courts have relied on a list of activities found in a Congressional house report and regulations issued by the Equal Employment Opportunities Commission (EEOC) for guidance on what constitutes a major life activity. This list includes activities such as, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\textsuperscript{5}

While the legislators did not define major life activity, they did provide some guidance on how to determine if a major life activity is limited. According to the legislative history, courts must look at what most people are capable of performing when determining if a major life activity is limited.\textsuperscript{6} When making this determination, courts should not take into account mitigating circumstances, such as medications used by an individual with a physical or mental impairment to aid his or her ability to live with a disability.\textsuperscript{7}

While the list of examples in the legislative history and regulations do not include reproduction or procreation as a major life activity. Advocates have argued that Congress meant to include procreation and intimate sexual relationships in the definition of major life activity because an example of the application of the Rehabilitation Act states that a person with HIV meets “physical or mental impairment” definition of


\textsuperscript{6}H.R. REP. No. 101-485, pt. III, at 28. The EEOC regulations provide a list of possible major life activities including “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i) (1998).

\textsuperscript{7}H.R. REP. No. 101-485, pt. II, at 52.

\textsuperscript{7}A person is considered an individual with a disability... when the individual’s important life activities are restricted as to conditions, manner, or duration under which they can be performed in comparison to most people.” H.R. REP. No. 101-485, pt. III, at 28.
disability because he or she is substantially limited in procreation and intimate sexual relationships.\(^5\)

**Is Infertility a Disability?**

**The Split Among the Courts**

The courts are split on whether infertility qualifies as a disability under the ADA. While the courts agree that infertility is a physical or mental impairment, there is strong disagreement about whether reproduction constitutes a major life activity.\(^5\) These cases have generally arisen in the context of either employment or insurance discrimination. For example, *Pacourek v. Inland Steel Co.*,\(^6\) *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*,\(^6\) and *Zatarain v. WDSU-Television, Inc.*\(^6\) all involved employment discrimination. In these cases, the woman suffering from infertility was terminated from her job either because she had taken too much time off work or because she requested time off work to undergo infertility treatments.

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\(^6\)Pacourek, 916 F. Supp. at 977. In *Pacourek*, Charline Pacourek was terminated from her position at Inland Steel due to poor attendance despite the fact that her supervisor knew the time off was for infertility treatments which she proved with medical certificates issued by her physician. The cause of Charline's infertility was unknown. Her infertility treatments included injections of a natural hormone drug called Pergona, followed by intra-uterine insemination (IUI). These treatments were given over several one week periods, including Oct. 6-13, 1991; Dec. 3-10, 1991; Jan. 18-24, 1992; and Mar. 3-10, 1992.

\(^6\)Erickson, 911 F. Supp. at 317-18. Melinda Erickson was terminated from employment at Northeastern Illinois University when she used her sick days to undergo infertility treatments, despite the fact that her supervisor knew that she was undergoing infertility treatments and approved her written request for sick leave.

\(^6\)Zatarain, 881 F. Supp. at 241-42. Lynn Zatarain, a television reporter and anchor at WDSU, did not have her personal services contract renewed because her employer would not agree to allow her to cut back from three to two evening broadcasts and take additional time off in between the broadcasts while undergoing infertility treatments. Lynn had been working approximately eight hours per day. She was the anchor for three evening newscasts at 5:00 p.m., 6:00 p.m. and 10:00 p.m. Lynn typically arrived at work at 3:00 p.m. and left after her 10:00 newscast. In order to receive shots at her physician's office she wanted to arrive at work later than 3:00 p.m. In addition, the cause of Lynn's infertility was unknown, but her physician suspected that a reduction in work related stress would increase her chances of becoming pregnant (n. 2). Under her physician's recommendations, Lynn requested that she arrive at work at 5:00 to do the 6:00 newscast, then go home in between and return to do the 10:00 newscast. The station refused to renew her personal services contract under these conditions. *Id.*
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Cases involving insurance discrimination have also been brought under the ADA. For example, *Krauel v. Iowa Methodist Medical Center* and *Bielicki v. City of Chicago* both involved insurance companies that refused to cover all infertility treatments, or a specific infertility treatment such as in vitro fertilization.

Reproduction Is a Major Life Activity

In both *Erickson* and *Pacourek* the Northern District of Illinois found that reproduction was a major life activity under the ADA. Both cases relied on the holding in *McWright v. Alexander* and legislative history.

**Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University**

In *Erickson*, Melinda Erickson was terminated from her job while she was undergoing infertility treatments due to excessive tardiness. Erickson argued that she used legitimate sick leave and vacation days, usually in half-day increments, to undergo her infertility treatment. Despite the fact that her supervisor signed her written requests for time off, Melinda was reprimanded for her tardiness and eventually terminated as a result. Erickson filed suit against her employer alleging discrimination in violation of the Pregnancy Discrimination Act and ADA.

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63 *Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996)*. Mary Jo Krauel received medical benefits from a self-insured ERISA plan through her Iowa Methodist Medical Center. Because the plan is regulated by ERISA it is not subject to state laws that regulate insurance. Krauel underwent and paid for three gamete intrafallopian tube transfers, one of which resulted in a baby. When she submitted the bills to IMMC, they denied coverage of her infertility treatments but paid for the expenses related to laparoscopy to diagnose her infertility, as well as her pregnancy and delivery expenses.

64 *Bielicki, 1997 U.S. Dist. LEXIS 6880, at *3.*

65 *Erickson, 911 F. Supp. at 323.*

66 *Pacourek v. Inland Steel Co., 916 F. Supp. 797, 804 (N.D. Ill. 1996).*

67 *McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992)* (holding that an infertile employee had a valid claim for discrimination under the Rehabilitation Act where her employer refused to provide reasonable accommodations for the employee to take family leave when she adopted a child).


69 *Id. at 318-19.* Erickson’s employee benefit plan entitled her to ten sick days per year, with 1.5 additional days accrued each month, not to exceed 300 days. *Id. at 318.*

70 *Id.*

71 *Id. at 317.*
In its analysis of whether the actions of Erickson’s employer constituted a violation of the ADA, the court reviewed case law and the ADA’s legislative history. First the court rejected the defendant’s argument that reproduction is not a major life activity because it is distinguishable from the list of activities provided in the EEOC regulations. The defendant argued that reproduction differed from these other activities in two ways. First, unlike the other activities listed in the regulation, reproduction requires the participation of two individuals. Second, the defendant distinguished reproduction from the other activities in the list on the basis that reproduction is a “very complex process.”

The court emphatically rejected both of these arguments.

Next the court rejected the defendant’s reliance on Zatarain, which found that reproduction is not a major life activity because it is not engaged in with the same frequency as the activities listed in the EEOC regulations. The court found this argument unpersuasive because it limited reproduction to the act of conception, thus ignoring the processes that are continually occurring in the male and female reproductive systems that are necessary for conception.

To find support for its analysis that reproduction is a major life activity, the court turned to the legislative history of the ADA. Based on an example in the legislative history, which stated that a person infected with HIV is considered disabled because he or she is substantially limited in procreation and sexual relations, the court found that Congress intended both procreation and intimate sexual relations to be considered major life activities. From this information, the court inferred that Congress also intended reproduction to be a major life activity.

The court also relied on the holding in McWright, a case involving the definition of handicapped persons under the Rehabilitation Act of

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72 Id. at 321.
73 Erickson, 911 F. Supp. at 321.
74 Id.
75 Id.
76 Id.
77 Id. at 322.
78 Erickson, 911 F. Supp. at 322.
79 Id. at 322.
80 Id. at 323. The court in Pacourek agreed with this reasoning in Erickson. Pacourek v. Inland Steel Company, 916 F. Supp. 797, 802-03 (N.D. Ill. 1996).
81 Erickson, 911 F. Supp. at 323.
82 Id.
The court in *McWright* found that individuals with physiological disorders affecting the reproductive system were included in the definition of handicaps. While the *McWright* court did not explicitly analyze the major life activity prong, it stated that the Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives. Based on this analysis, the *Erickson* court found that by referring to child rearing as part of a "normal life," the *McWright* court determined that the major life activity prong of the ADA included having children. Thus, the *Erickson* court found that reproduction is a major life activity.

**Pacourek v. Inland Steel Company**

In *Pacourek*, the Northern District of Illinois affirmed that reproduction was a major life activity. Similar to Melinda Erickson, Charline Pacourek was fired by her employer due to absenteeism while undergoing infertility treatments. Pacourek started receiving infertility treatments in March 1991 and was diagnosed as having unexplained infertility five months later. Following this diagnosis, Pacourek began taking Pergonal, a hormonal drug, and received intrauterine insemination. Each treatment session lasted one week and occurred in October 1991, December 1991, January 1992, and March 1992. During these treatment sessions, Pacourek missed some days of work. In February 1992, Pacourek’s supervisor warned her that her absenteeism was excessive and that she needed to provide a note from her physician substantiating missed days in the future. Pacourek provided a letter from her physician for future absences, however, she was eventually terminated on May 21, 1993.

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83 *Id.* at 322.
84 *Id.* (citing *McWright* v. Alexander, 982 F.2d 222, 226-27 (7th Cir. 1992)).
85 *Id.* (citing *McWright*, 982 F.2d at 227).
86 *Erickson*, 911 F. Supp. at 322.
88 *Id.* at 804.
89 *Id.* at 799.
90 *Id.*
91 *Id.*
92 *Id.*
94 *Id.*
95 *Id.* Pacourek’s last day of work was June 11, 1993.
Like Erickson, the court in Pacourek relied on McWright and the ADA’s legislative history to determine whether reproduction was a major life activity. In addition, the court relied on EEOC regulations that provided for the implementation of the employment provisions of the ADA. The court found that because the EEOC included reproductive systems among the systems that may have a physical or mental impairment, they must have anticipated that a physiological disorder of the reproductive system would be covered under the ADA, otherwise including reproductive systems in the list of possible impairments would have been superfluous. They found it reasonable to infer, therefore, that the EEOC contemplated that reproduction may be considered a major life activity. The court commented that the courts in Zatarain and Krauel misconstrued this reasoning in the lower court’s opinion. The court also found that the courts in Zatarain and Krauel interpreted “major life activities” too narrowly because they defined “major life activity in terms of quantity not quality.” In effect, the court found this “trivialize[s] reproduction” because reproduction is “one of life’s most significant moments and greatest achievements.”

The court also relied heavily on the influence of the Rehabilitation Act on the ADA. The court found that the definition of “handicapped person” under the Rehabilitation Act and “disability” under the ADA were substantially identical. Therefore, the court found that the relevant case law on the interpretation of “handicapped persons,” under the Rehabilitation Act must also apply to the definition of “disability.”

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96Id. at 802. The court observed that in McWright, the court noted in dictum that the regulations under the Rehabilitation Act defined handicapped individuals to include “any person with a physiological disorder affecting the reproductive system.” Id. (citing McWright, 982 F.2d at 226-27). The court found that Congress intended the definition of handicap under the Rehabilitation Act and relevant case law would apply to the term disability under the ADA.

97Pacourek, 916 F. Supp. at 802, 804.

98Id. at 801-02. But see Krauel and Zatarain where both courts found that the lower court’s reasoning in Pacourek was circular. The District Court in Pacourek found that the courts in Krauel and Zatarain oversimplified and miscomprehended the lower court’s reasoning regarding the use of the EEOC guidelines and definition of physical or mental impairment to find that reproduction was a major life activity.

99Id. at 802.

100Id. at 801-02.

101Id. at 804.

102Pacourek, 916 F. Supp. at 804.

103Id. at 802.

104Id. at 802.
court's holding in McWright, which found that a woman unable to bear children is handicapped under the Rehabilitation Act, therefore, should also hold true under the definition of disabled in the ADA.  

The court also relied on the canon of construction that civil rights statutes should be construed liberally to effectuate their purpose, and therefore, the ADA should be construed liberally. In addition, the court believed "disability" should be defined broadly under the ADA because "handicap" is defined broadly under the Rehabilitation Act. Accordingly, "major life activity," which is part of the definition of disability, should also be defined broadly.

Reproduction is Not a Major Life Activity

The Eastern District of Louisiana and the Eighth Circuit have both found that reproduction is not a major life activity. In making this determination, both courts relied on the list of activities that constitute a major life activity provided in the EEOC Regulations or Compliance Manual. According to the EEOC regulations, the term "major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning.

Zatarain v. WDSU-Television

In Zatarain, Lynn Zatarain filed suit against her employer, WDSU, for violations of the ADA and Title VII of the Civil Rights Act of 1964. Zatarain, who suffered from an unknown cause of infertility, was a reporter and anchor person for three evening newscasts at WDSU. When Zatarain wanted to begin hormonal treatments to become pregnant

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105 Id. at 802.
106 Id. at 803.
107 Pacourek, 916 F. Supp. at 803.
108 Id.
110 Id.
111 Zatarain, 881 F. Supp. at 243; Krauel, 95 F.3d at 677.
112 Zatarain v. WDSU Television, 881 F. Supp. at 243, (citing 29 C.F.R. § 1630.2(i)); Krauel, 95 F.3d at 677.
113 Id.
114 Id. at 242.
115 Id. at 241. Zatarain was the only anchor person for three newscasts and was the highest paid news anchor at WDSU.
WDSU allowed her to arrive at work late every day. \(^{115}\) Zatarain and WDSU had been negotiating renewing her personal services contract for several months. \(^{116}\) In October, WDSU offered Zatarain a higher salary and two year guarantee to renew her contract. \(^{117}\) As her treatment for infertility progressed, Zatarain’s physician recommended that she reduce her work schedule to two newscasts per evening and take breaks between each newscast. \(^{118}\) This modification changed Zatarain’s regular eight hour work schedule, which began at 3:00 p.m. and lasted until the end of her newscast at 10:00 p.m., to a four hour day where Zatarain would arrive at work at 5:00 p.m. for the 6:00 newscast, go home, and return at 9:00 for the 10:00 newscast. \(^{119}\) When Zatarain requested this modification in her new contract WDSU chose not to renew her contract. \(^{120}\)

In her suit against WDSU, Zatarain alleged that she was substantially limited in the major life activities of working and reproduction. \(^{121}\) The court accepted Zatarain’s argument that working was a major life activity because the ADA regulations explicitly include working as a major life activity. \(^{122}\) The court found, however, that her infertility did not substantially impair her ability to work because it has “not significantly restricted her ability to perform a class of jobs or a broad range of jobs in various classes.” \(^{123}\) Rather, she was only limited in performing the particular job as evening news anchor at WDSU. \(^{124}\) Therefore, Zatarain failed to meet the substantial limitation part of the test to assert protection under the ADA. \(^{125}\)

The court also rejected the argument that reproduction was a major life activity. \(^{126}\) The court rejected the holding in *Pacourek*, and found that

\(^{115}\) Id. at 242. Zatarain was scheduled to arrive at work at 3:00 p.m., however, she needed to go to her physician between 4:00 p.m. and 6:00 p.m. to receive infertility treatments. WDSU permitted her to arrive late, accommodating her ability to receive infertility treatment.

\(^{116}\) Id. at 242.

\(^{117}\) Zatarain, 881 F. Supp. at 242. This second offer was made after Zatarain rejected WDSU’s first offer of $168,000 annual salary because the salary was too low, and the contract was too short. The parties dispute whether Zatarain accepted the second offer.

\(^{118}\) Id.

\(^{119}\) Id. at 242. The parties are in dispute over when Zatarain requested this modification.

\(^{120}\) Id.

\(^{121}\) Id. at 243.

\(^{122}\) Id.; see supra p. 708.

\(^{123}\) Id.; see supra p. 708.

\(^{124}\) Id.

\(^{125}\) Id. at 244.

\(^{126}\) Id. at 243.
a major life activity is separate and distinct from the physical impairment that limits it.\textsuperscript{127} Allowing Zatarain to argue that reproduction is a major life activity would allow her to "bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment."\textsuperscript{123} The court found this analysis circular.\textsuperscript{129} The court also rejected the argument that reproduction was a major life activity based on the list of activities included in the EEOC regulations.\textsuperscript{130} The court found that reproduction could not be interpreted to be included in the list of activities because it is not engaged in with the same frequency as the other activities included in the list.\textsuperscript{131} "Treating reproduction as a major life activity under the ADA would be a conscious expansion of the law, which is beyond the province of this court."\textsuperscript{132}

\textit{Krauel v. Iowa Methodist Medical Center}

In \textit{Krauel} the Eighth Circuit also rejected the argument that reproduction was a major life activity.\textsuperscript{133} In 1992, Mary Jo Krauel was diagnosed with endometriosis.\textsuperscript{134} After undergoing a laparoscopy, a surgical procedure to correct endometriosis, Krauel was still unable to become pregnant.\textsuperscript{135} A year later Krauel began several assisted reproductive technology treatments, including artificial insemination and three GIFT procedures, all of which she paid for on her own.\textsuperscript{136} One of the GIFT procedures resulted in a successful pregnancy.\textsuperscript{137} Krauel received insurance through her employer's self-funded plan.\textsuperscript{138} Because her employer was self-insured under ERISA the plan did not have to follow any state mandates requiring coverage for infertility treatments.\textsuperscript{139} Thus, the plan excluded

\textsuperscript{127}Zatarain, 881 F. Supp. at 243.
\textsuperscript{128}Id.
\textsuperscript{129}Id.
\textsuperscript{130}Id.
\textsuperscript{131}Id.
\textsuperscript{132}Zatarain, 881 F. Supp. at 243.
\textsuperscript{133}Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996).
\textsuperscript{134}Id. at 675.
\textsuperscript{135}Id. at 675-76.
\textsuperscript{136}Id. at 676.
\textsuperscript{137}Id.
\textsuperscript{138}Krauel, 95 F.3d at 675.
\textsuperscript{139}Id.
coverage for treatments related to both male and female infertility.140 When Krauel submitted her bill for artificial insemination and GIFT to her insurance company, payment was denied.141 Krauel filed suit against her insurance company alleging violations under the ADA, Pregnancy Discrimination Act (PDA), and Title VII of the Civil Rights Act of 1964.142 Krauel argued that her infertility was protected under the ADA because it is a physical impairment that substantially limits two major life activities, reproduction and caring for others.143

The court followed the reasoning in Zatarain which relied on the definition of major life activity in the EEOC regulations.144 The list of activities provided by the EEOC does not include reproduction or caring for oneself.145 The court found, therefore, that “to treat reproduction and caring for others as major life activities would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of the law.”146

The court also explicitly rejected the lower court’s holding in Pacourek that “reproduction was a major life activity because the reproductive system was included among the systems that can have an ADA impairment.”147 To discount this argument the court relied on Zatarain’s reasoning that physical or mental impairment and major life activities are separate and distinct components of the ADA’s definition of disability.148 The court found, therefore, that reproduction and caring for others are not major life activities under the ADA.149

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140 Id.
141 Id. at 676.
142 Id. at 675-76.
143 Krauel, 95 F.3d at 677.
144 Id.
145 Id.
146 Id.
147 Id. at 677 (citing Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) aff’d 916 F. Supp. 797 (N.D. Ill. 1996)).
148 Krauel, 95 F.3d at 677 (citing Zatarain v. WDSU Television, 881 F. Supp. 240, 243 (E.D. La. 1995)).
149 Id. at 677.
In *Bragdon v. Abbott*, the Supreme Court was faced with a case of first impression on whether asymptomatic HIV was a disability under the ADA. *Bragdon* involved the refusal of a dentist to fill a cavity in his office for a patient with HIV. Following a dental check-up, Sidney Abbott’s dentist told her that she had a cavity but that she could not have it filled in his office. Her dentist informed her of his policy against filling cavities of HIV-infected patients in his office and that he would only fill her cavity in a hospital where she would have to pay the additional cost.

Abbott brought a claim under Title III of the ADA alleging discrimination in a place of public accommodation. Abbott claimed that HIV is a physical impairment that substantially limited her ability to reproduce and bear children. The Supreme Court found that asymptomatic HIV met the physical or mental impairment test due to the immediacy of the infection’s attack on the infected person’s white blood cells and severity of the illness. Unlike the lower courts who pined over whether reproduction was a major life activity, the Supreme Court had little difficulty in determining that reproduction was a major life activity. The Court agreed with the Court of Appeals’ reasoning that the “plain meaning of the word ‘major’ denotes comparative importance,” and that the key to determining whether an activity is a major life activity is its “significance.” The Court found that reproduction is a major life activity because it is central to the life process itself. They found this reasoning was further supported by the regulations of the Rehabilitation Act which state “reproduction could not be regarded as less important than working or learning.” The Court also rejected the defendant’s argument that a major life activity must have a public, economic, or daily

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151 *Id.* at 2200.
152 *Id.* at 2201.
153 *Id.*
154 *Id.* at 2199.
155 *Bragdon*, 118 S. Ct. at 2204.
156 *Id.* at 2204-05. The court stated in addition to the limit on the ability to reproduce and bear children, other major life activities may have been relevant based on the facts of the case.
157 *Id.*
158 *Id.*
159 *Id.*
character. The Court stated "this argument flounders on the statutory language. The breadth of the term major ‘confounds the attempt to limit it in this manner.'"

The Court also held that Abbott was substantially limited in regards to reproduction. The Court agreed with Abbott’s argument that she was substantially limited in two ways. First, she was substantially limited because she would impose on her male partner a significant risk of infection when attempting to conceive. Second, she was substantially limited because she would risk infecting her child with HIV during gestation and childbirth. The Court held this met the substantial limitation requirement because, while “[c]onception and childbirth are not impossible for an HIV victim, they are dangerous to the public health.” The Court held, therefore, that asymptomatic HIV is a disability under the ADA because it is a physical impairment that substantially limits the major life activities of reproduction and bearing children.

DOES BRAGDON PROVIDE THE MISSING LINK FOR INFERTILE COUPLES SEEKING PROTECTION UNDER THE ADA?

Although the Bragdon decision concerned the protection of asymptomatic HIV under the ADA, not infertility, the reasoning used by the Supreme Court to find that reproduction is a major life activity may provide the missing link infertile couples have been seeking to advocate for their own protection. It is possible, therefore, that while fighting against her own discrimination, Sidney Abbott was unknowingly fighting for the 6.1 million couples suffering from infertility. In previous cases concerning the ADA and infertility, the courts have agreed that infertility constitutes

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160 Bragdon, 118 S. Ct. at 2205.
161 Id.
162 Id. at 2206
163 Id.
164 Id.
165 Bragdon, 118 S. Ct. at 2206.
166 Id. at 2206.
167 Id. at 2213.
a physical or mental impairment. They differed, however, on whether reproduction constituted a major life activity. In Bragdon, the Court had little difficulty in concluding that reproduction was a major life activity. Future courts faced with deciding whether infertility is a disability must follow Bragdon for this position and should, therefore, also have little difficulty concluding that infertility is a disability.

Does this mean that all infertile couples can seek protection under the ADA? Probably not. Since an individual must meet a three-part test to qualify as disabled under the ADA courts can limit the effect of Bragdon by tightening the other elements required to qualify as disabled. For example, couples who cannot identify the cause of their infertility, or whose infertility is attributed to environmental factors rather than a physical condition may fail to meet the physical condition test. In addition, courts may find that the physical condition is not substantially related to the major life activity. This reasoning is unlikely, however, because in Bragdon the Court found that Abbott was substantially limited even though she could physically still have children. An infertile couple's position is much stronger than Abbott's position because they are physically unable to reproduce.

The Bragdon decision, however, will likely impact infertile couples in various ways. First, couples suffering from infertility who meet the three part test will now be part of a protected class of individuals who have additional protections against discrimination under the ADA. As part of this protected class, individuals suffering from infertility will be protected from discrimination by employers. Under the ADA, employers


166See Erickson, 911 F. Supp. at 316; Pacourek, 916 F. Supp. at 797; Bielicki, 1997 U.S. Dist. LEXIS 6880, at *9 (finding reproduction is a major life activity). But see Zatarain, 811 F. Supp. at 243; Krauel, 95 F.3d at 677 (finding that reproduction is not a major life activity).

167Bragdon, 118 S. Ct. at 2205.

168To qualify as disabled under the physical and mental impairment prong of the ADA, the individual must prove the following three elements: (1) she suffers from a physical or mental impairment; (2) she is limited in one or more major life activities; and (3) the physical or mental impairment substantially limits the major life activity. See supra p. 708-09.

169This reasoning would be similar to the courts reasoning in Zatarain when it found that while working was a major life activity, Zatarain's infertility did not substantially limit her ability to work, therefore, she was not protected under the ADA. Zatarain, 881 F. Supp. at 243-44.
must provide reasonable accommodations to disabled employees.173 Therefore, they may have to provide adequate time off work for couples seeking infertility treatment. The extent of this protection, however, is unclear. While employers may have to allow an employee suffering from infertility a few days off of work each month to attend doctor’s appointments, they may not have to give employees several weeks or even months off to relieve the stress or depression that may be causing their infertility. An employer must also reinstate an employee who was discharged due to a disability when the employee is no longer disabled. Infertile couples, therefore, may have a valid claim against their employer for failure to reinstate them if they have been discharged due to their infertility after they have successfully had a child.174

Infertile couples may also receive greater protection for health care coverage. If infertility is defined as a disability, employers must provide coverage for infertility treatments in their health care plans. Any disability-based distinction is a violation of the ADA.175 This protection, however, is not without exceptions as companies may limit coverage of certain disabilities by making classification of risks or limits based on sound actuarial principles.176 For example, employers may exclude all infertility treatments from their health plan.177 This would not be considered a disability based distinction if it applied equally to individuals with a disability and individuals without a disability.178

Under the ADA, employers are also prohibited from engaging in a contractual relationship with a health plan that would discriminate against a disabled employee.179 If infertility is considered a disability, therefore,

174 See Carparts Distribution Ctr., Inc. v. Automotive Wholesaler’s Assoc. of New Eng., Inc., 37 F.3d 12, 20 (1st Cir. 1994).
175 Bonnie Poitras Tucker, Symposium: Individual Rights and Reasonable Accommodations under the Americans with Disabilities Act: Insurance and the ADA, 46 DEPAUL L. REV. 915, 922, 925 (1997) (discussing the types of provisions that may constitute a disability-based distinction. Also presuming that courts finding infertility is a disability would also find that an insurance provision refusing coverage for infertility treatments would constitute a disability-based distinction).
176 Id. at 921.
177 The court in Krauel found the exclusion of coverage for infertility treatments from Krauel’s plan was not a disability based distinction. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677-78 (8th Cir. 1996).
178 See e.g., Krauel, 95 F.3d at 677-78. The court also provides examples of permissible exclusions for health insurance plans. For example, insurance companies may exclude coverage for eye care because it applies equally to individuals with and without disabilities.
employers could not enter into a contract with an insurance company that would discriminate against those suffering from infertility. An employer’s health plan, however, may impose annual or lifetime benefit caps on all types of treatment, but they could not tie an annual or lifetime cap to a disability.\textsuperscript{189} Insurance policies, therefore, could not place limits on the number of infertility treatments that would be covered or monetary caps specifically on infertility treatments.

**CONCLUSION**

The *Bragdon* decision may provide a giant leap for infertile couples faced with barriers to infertility treatment because of their employers and insurance companies. It is still unclear, however, what kind of impact this decision will have on the infertile community. Courts will be faced with several cases testing the impact of *Bragdon* on infertility. The outcome of these cases will help shed light on the extent of protection infertile couples will have under the ADA.

\textsuperscript{189}Tucker, *supra* note 175, at 929-32 (discussing permissible annual or lifetime benefit caps).