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ACCOMMODATING PREGNANCY IN THE WORKPLACE

Deborah A. Calloway*

I. SCOPE

A woman who becomes pregnant may be unable to work throughout her pregnancy and unable to return to work after delivering her child unless she is provided with workplace accommodations designed to permit her to perform and keep her job, including, for example, light duty, flexible schedules, and disability leave. Pregnant women who work in jobs requiring exposure to workplace hazards, such as toxic fumes and disease, may require accommodations to avoid endangering the developing fetus.¹ Litigation under the Pregnancy Discrimination Act of 1978 has produced mixed opinions concerning a woman's right to workplace accommodations to permit her to continue working and protect her fetus.² Congress recently enacted three statutes, the Americans with Disabilities Act (ADA),³ the Civil Rights Act of 1991,⁴ and the Family and Medical Leave Act of 1993 (FMLA),⁵ which collectively raise new questions

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1. Pregnant workers also need medical benefits. The right to accommodation addressed in this Article does not reach medical benefits.

2. See *infra* part III.

3. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. V 1993)).

4. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

5. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654

about the meaning and application of the Pregnancy Discrimination Act of 1978 (PDA).⁶ The ADA applies a concept of equal employment opportunity based on an affirmative obligation to accommodate differences, a marked change from the requirement of equal treatment of similarly situated individuals central to all prior anti-discrimination statutes.

In the Civil Rights Act of 1991 Congress recognized the judicially created concept of disparate impact discrimination, a concept which, although grounded in equal treatment principles, provides a mechanism for ensuring equal employment opportunity to employees who are not similarly situated. Finally, the FMLA imposes an affirmative obligation to promote employment opportunities by mandating benefits to specified classes of employees whose requirements differ from the employee population as a whole.

Although none of these statutes expressly requires employers to accommodate pregnancy in the workplace, all three adopt approaches designed to force employers to accommodate differences. All three are likely to influence future interpretations of the PDA. This Article concerns the relationship between these three statutes and the PDA with respect to employers' obligations to accommodate pregnancy in the workplace.

The arguments presented in this Article supporting a legal obligation to accommodate pregnancy in the workplace are based on statutes that focus on the rights of female employees. From a policy perspective, however, this Article takes the position that accommodating pregnancy should not be viewed as a right belonging to parents. Rather, it should be characterized as a legal obligation to promote the health of developing children. Statutes dealing directly with fetal health in the workplace would provide a more appropriate basis for imposing this obligation.⁷ Nonetheless, because the

(Supp. V 1993)).

6. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1988)).

7. Some state statutes impose a specific obligation to accommodate pregnancy. For example, California defines "unlawful employment practice" to include:

[refusing] to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated. . . . However, . . . no employer shall be required by this section to create additional employment . . . the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

CAL. GOV'T CODE § 12945(c)(2) (West 1992 & Supp. 1995). Similarly, Connecticut defines

problem is acute and the likelihood of a new statutory scheme remote, this Article provides an approach to protecting developing children that uses existing anti-discrimination statutes.

II. THE NEED FOR ACCOMMODATION

A. Accommodations Necessary to Permit Pregnant Employees to Perform Job Functions and Comply with Work Rules without Compromising Their Health

Pregnancy restricts a woman's ability to perform work tasks and comply with work rules. In addition, some jobs create health hazards for pregnant women.

First, with respect to a pregnant woman's ability to perform job functions, the physical changes caused by pregnancy interfere with a pregnant woman's ability to perform physical work. Relaxin, one of the hormones produced during pregnancy, causes ligaments to soften and stretch. The purpose of the hormone is to loosen-up the pelvic structure to accommodate the growing fetus and to permit delivery of the fetus. Unfortunately, the hormone also relaxes other ligaments, including those in the neck, shoulder, elbow, knees, and back. The laxity of a pregnant woman's ligaments shifts the burden of supporting her joints to her muscles, causing muscle fatigue, reduced strength and creating a heightened risk of injury, particularly to her lower back during the fifth to seventh month of pregnancy.⁸

"discriminatory practice" to include: Refusing to grant a pregnant employee a reasonable leave of absence; refusing to reinstate a pregnant employee to her original job or an equivalent position after pregnancy leave, and failing or refusing

to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which an employee gives written notice of her pregnancy to her employer and the employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus.

CONN. GEN. STAT. ANN. § 46a-60(a)(7)(E) (West 1986 & Supp. 1995). Louisiana also provides a right to reasonable leave and makes it an unlawful employment practice [f]or any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, . . . where such transfer can be reasonably accommodated, provided however, that no employer shall be required by this Section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee . . . who is not qualified to perform the job.

LA. REV. STAT. ANN. § 23:1008(A)(4) (West Supp. 1995).

8. See NATIONAL INSTITUTE OF SAFETY AND HEALTH, U.S. DEPT OF HEALTH, EDUC.

A pregnant woman's physical abilities also are compromised by her increased size and weight. Her growing body stretches and weakens her abdominal muscles as well as imposing stress on the already weakened joints and muscles of her back.⁹ The redistribution of her body mass displaces her center of gravity forward, interfering with her balance and equilibrium.¹⁰

As a result of these physical changes, women in the later stages of pregnancy may be unable to perform job tasks involving repetitive (more than four times in an eight-hour shift) climbing of ladders or poles or even stairs as early as the twentieth to twenty-eighth week of pregnancy. Intermittent climbing (less than four times in an eight-hour shift) may be restricted beginning with the twenty-eighth week of pregnancy. In addition, jobs requiring lifting sometimes become difficult or impossible as the pregnancy progresses.¹¹ Similarly, during the third trimester, pregnant women may have difficulty reaching high shelves or cleaning windows due to impaired equilibrium.¹² Loss of balance, loose joints, and reduced muscle strength also make running difficult. The National Institute of Safety and Health, however, in *Guidelines on Pregnancy and Work*, a booklet prepared by the American College of Obstetricians and Gynecologists, cautions that generalizations about the physical capabilities of pregnant women are dangerous:

Tolerance of strenuous exertion, such as lifting, pulling, pushing or climbing, will vary widely, depending on differences in the

& WELFARE, PUB. NO. 78-118, AMERICAN COLLEGE OF OBST. AND GYN., GUIDELINES ON PREGNANCY AND WORK 3, 18 (1977) [hereinafter GUIDELINES ON PREGNANCY AND WORK]; Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting and Work*, in DOUBLE EXPOSURE 197 (Wendy Chavkin ed., 1984) [hereinafter *Walking a Tightrope*]; Wendy Chavkin, *Work and Pregnancy: Review of the Literature and Policy Discussion*, 41 OBST. & GYN. SURVEY 467, 469 (1986) [hereinafter *Work and Pregnancy*]; J.A. Paul et al., *Work Load and Musculoskeletal Complaints During Pregnancy*, 20 SCAND. J. WORK ENV'T HEALTH 153, 153-59 (1994).

9. Paul et al., *supra* note 8, at 156.

10. *Id.*; see also GUIDELINES ON PREGNANCY AND WORK, *supra* note 8, at 34.

11. Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1996 (1984). This report suggests that women 20 weeks pregnant should not work at jobs involving repetitive lifting of weights over 23 kilograms. At 24 weeks, repetitive lifting of weights over 11 kilograms is not recommended. At 30 weeks, intermittent lifting of weights over 23 kilograms should be restricted, and at 40 weeks, a pregnant woman should not be working at a job involving repetitive lifting of any amount, although she still can safely lift weights less than 14 kilograms on an intermittent basis. *Id.*; see *Work and Pregnancy*, *supra* note 8, 469.

12. Paul et al., *supra* note 8, at 156.

woman's physical fitness and strength, the load handled, and the environment. The pregnant woman may be small, large, strong, weak. Her strength, balance, agility, and internal burdens change from month to month.

Packages or loads also vary widely in size, shape, and consistency, from a bale of towels to a case of goods, or a patient in a nursing home.¹³

Nonetheless, pregnancy for many women restricts their ability to climb ladders, poles, scaffolding, and stairs; lift or move heavy objects; run or walk quickly; or stretch to reach things. During pregnancy, especially during the later stages, women may be unable, therefore, to perform job functions that require these physical abilities.

In order to continue working during her pregnancy, a woman working at a physically demanding job may require accommodations including assistance performing some job functions (mechanical assistance or assistance from coworkers), temporary reassignment of job functions, or temporary reassignment to a less physically demanding job.

A further restriction on a pregnant woman's ability to perform job functions relates to her appearance. Pregnant women gain weight. Their entire body and facial features may become bloated with retained water. Some pregnant women's ankles swell and they may develop varicose veins. These changes in appearance make it difficult or impossible for pregnant women to perform jobs for which a non-pregnant appearance is a job pre-requisite. Actresses, entertainers, and dancers, for example, may be affected. In order to continue working during pregnancy, women performing such jobs may need special uniforms or clothes, a temporary waiver of the appearance requirement, or temporary reassignment to a less public position.

Even women in sedentary jobs with no significant physical demands may have difficulty performing job functions due to the physical changes associated with pregnancy. Weight gain in the abdominal area makes working at a desk uncomfortable and contributes to back pain.¹⁴ In one study, nearly one-third of women working in desk jobs "complained of difficulties of fit as the main

13. Martha Tabor, *Pregnancy and Heavy Work*, OCCUP. HEALTH & SAFETY, Feb. 1983, at 19 (quoting GUIDELINES ON PREGNANCY AND WORK, *supra* note 8).

14. GUIDELINES ON PREGNANCY AND WORK, *supra* note 8, at 35.

limiting factor in the third trimester."¹⁵ Women working in desk jobs may require special furniture to allow continued employment without extreme discomfort or injury.

Lax ligaments and easily strained muscles often result in muscle strain or back pain for pregnant women in jobs, such as retail sales or secretarial work, requiring prolonged standing or sitting in the same position.¹⁶ Prolonged standing or sitting creates circulatory problems for pregnant women. A woman's blood volume increases by thirty to forty percent during pregnancy and the veins in her uterus and lower body expand. The increased blood volume forces the heart to work harder. In addition, the woman's growing uterus interferes with circulation because it presses on major blood vessels. The combination of increased volume and obstructed flow creates a tendency for blood to collect in the woman's legs, causing swollen ankles and varicose veins. This tendency is exacerbated by jobs requiring prolonged sitting or standing in the same position.¹⁷ The Council on Scientific Affairs recommends that pregnant women refrain from prolonged standing (more than four hours at one time) when they are twenty-four weeks pregnant. Intermittent standing for more than thirty minutes at a time should be curtailed at thirty-two weeks pregnant.¹⁸ Women working in jobs requiring prolonged standing or sitting may require frequent work breaks permitting them to move about or elevate their feet.¹⁹

Some of the physical changes associated with pregnancy make it difficult for pregnant women to comply with rigid work rules that may be imposed as a condition of employment. Elevated pregnancy-related hormones cause most women to be nauseous during the first trimester of pregnancy. For some women, the problem persists throughout pregnancy. Nausea makes it difficult for pregnant women to arrive at work on time in the morning and work rules that prohibit snacking at the work station or restrict breaks can aggravate the problem.²⁰ Complying with rules restricting work breaks also causes discomfort for a pregnant woman because "[i]ncreased blood flow to the kidneys, together with the pressure of the expand-

15. Paul et al., *supra* note 8, at 156.

16. *Id.* at 157; see *Work and Pregnancy*, *supra* note 8, at 469.

17. JEANNE M. STELLMAN, *WOMEN'S WORK, WOMEN'S HEALTH: MYTHS AND REALITIES* 167 (1977); see *Walking a Tightrope*, *supra* note 8, at 197.

18. *Effects of Pregnancy on Work Performance*, *supra* note 11, at 1996.

19. *GUIDELINES ON PREGNANCY AND WORK*, *supra* note 8, at 35.

20. *Walking a Tightrope*, *supra* note 8, at 196-97; see also *Work and Pregnancy*, *supra* note 8, at 469.

ing uterus on the bladder, and hormonally induced changes all cause her to urinate frequently.²¹ Finally, a pregnant woman may have difficulty complying with work rules limiting absence from the workplace if she needs to schedule prenatal doctor's visits during normal work hours.²² In order to continue working comfortably, pregnant women require flexible work rules that permit frequent bathroom and snack breaks and, if possible, flexible starting times and personal leave for doctor's visits.

In addition to the pregnancy-induced changes that make it difficult for pregnant women to do their jobs and comply with work rules, physical changes associated with pregnancy make some work environments extremely uncomfortable. Increased metabolism along with increased levels of progesterone and human chorionic gonadotropin cause a pregnant woman's temperature to rise approximately one degree above normal. As a result, work conditions that are too hot become unbearable.²³ In order to continue working during pregnancy, a woman working in an extremely hot environment may require extra ventilation, a fan, or temporary reassignment to a position in a cooler environment.

Other physical changes associated with pregnancy pose health hazards for pregnant women in some work environments:

Many maternal physiologic functions operate at peak efficiency during pregnancy. It is a time of maximal production, storage, and turnover of maternal body constituents. It is a time when the woman's body ensures that it gets full access to oxygen and nutrients. Ironically, in an environment full of toxins this physiologic efficiency probably magnifies a woman's exposure . . .²⁴

Pregnant women breathe more efficiently than normal. A pregnant woman requires twenty to thirty percent more oxygen than normal to accommodate the needs of the fetus and her own growing body. This need is met primarily by increasing the amount of air exhaled after each breath. This increase improves lung efficiency because less air remains "in the lungs to dilute the new air breathed in."²⁵

21. *Walking a Tightrope*, *supra* note 8, at 197.

22. See GUIDELINES ON PREGNANCY AND WORK, *supra* note 8, at 20.

23. *Walking a Tightrope*, *supra* note 8, at 198; see also GUIDELINES ON PREGNANCY AND WORK, *supra* note 8, at 30.

24. *Walking a Tightrope*, *supra* note 8, at 198.

25. STELLMAN, *supra* note 17, at 168; see also *Walking a Tightrope*, *supra* note 8, at 198.

This increased efficiency may be hazardous to women working in toxic environments because they may absorb air-borne toxins more efficiently.²⁶ The increased fatty content of a pregnant woman's blood and the increased storage of fat throughout her body provides storage depots for fat soluble toxins such as benzene, toluene, pesticides, and organic solvents. A pregnant woman's increased bone turnover and improved intestinal absorption of calcium also may make her more susceptible to toxic substances such as lead and strontium-90, which are stored in bone, or lead and cadmium which are absorbed through the same mechanism as calcium.²⁷ In order to continue working during pregnancy, women working in environments that expose them to toxic substances may require protective masks, improved ventilation, or temporary reassignment to a position in a less toxic environment.

Table 1 shows the number of women working in occupations that subject women to health hazards if they are not accommodated during pregnancy. As you can see, thirty-eight percent of all working women labor in occupations where they may be unable to perform their job during pregnancy without risking their health.

26. STELLMAN, *supra* note 17, at 167-68; *Walking a Tightrope*, *supra* note 8, at 198; GUIDELINES ON PREGNANCY AND WORK, *supra* note 8, at 17.

27. *Work and Pregnancy*, *supra* note 8, at 468-69; *Walking a Tightrope*, *supra* note 8, at 198-200.

TABLE 1

*Potential Work-Related Disabilities
and
Health Risks for Pregnant Women
in Selected Occupations*

Occupation	Female Employment (est. 1993)	Potential Risk Factor or Work- Related Disability
Total (all occupations, civilian population 16 years and over)	54,642,000	
Health Care (nurses, physical therapists, LPNs, aides, orderlies and attendants)	3,751,000	lifting prolonged standing air-borne toxins inflexible work rules
Retail Sales Workers and Cashiers	4,076,000	prolonged standing inflexible work rules
Laborers (freight, stock, and material handlers, helpers)	845,000	lifting stretching and reaching inflexible work rules heat
Farmers, forestry and logging workers, fishers and hunters	512,000	lifting stretching or reaching pesticides heat air-borne toxins solvents
Mail Carriers	95,000	lifting prolonged standing/sitting heat
Protective Service (police, fire fighters correction institution officers, sheriffs, and guards)	370,000	lifting climbing ladders running

Child Care (nursery and kindergarten teachers, day care workers)	2,059,000	lifting running
Athletes	19,000	lifting balance running
Actors	37,000	appearance
Cleaners (servants, maids, house-servors, janitors)	1,619,000	climbing stairs and ladders air-borne toxins organic solvents
Mechanics and Repairers	155,000	lifting heat
Construction Trades	95,000	lifting climbing lifting or moving balance fat soluble toxins
Food Occupations (bartenders, waiters waitresses, counter service, kitchen workers)	3,324,000	lifting appearance balance inflexible work rules
Machine Operators (textile, apparel, furnishing, etc.)	2,870,000	pushing and pulling standing or sitting inflexible work rules heat air-borne toxins solvents
Hairdressers and Cosmetologists	683,000	toluene
Total (women employed in hazardous occupations)	20,510,000	(38% of female workforce)

Source: U.S. Bureau of Labor Statistics, *Employment and Earnings*, January 1993.

Approximately 6.3% of women of childbearing age (fifteen to forty-four) give birth to children each year. The birth rate ranges from 4.3% of women thirty to forty-four years old to 8.6% for women fifteen to twenty-nine years old.²⁸ In 1992, for example, fifty-eight million women between the ages of fifteen and forty-four gave birth to approximately 3.7 million babies.²⁹ The birth rate for employed women is somewhat smaller with 4.5% of employed women fifteen to forty-four years old giving birth each year. For employed women, the birth rate ranges from 6.1% for women fifteen to twenty-nine years old to 3.4% for women thirty to forty-four years old.³⁰ Approximately 70% of the women in the labor force are of childbearing age (fifteen to forty-four).³¹ If we assume that 70% of the women working in hazardous occupations are of childbearing age (14,357,000), and if we can assume that women who give birth while employed are randomly distributed throughout the workforce, these figures suggest that 646,000 women each year become pregnant while working in hazardous work environments. If younger women are concentrated in the hazardous professions, that number soars to nearly one million. Pregnancies in hazardous work environments may, therefore, constitute as many as 17% to 24% of births each year.

B. Accommodations Necessary to Protect Fetal Health

In addition to the accommodations a pregnant woman may require to permit her to continue working in spite of the physical effects and limitations associated with pregnancy, a pregnant woman also requires accommodations to ensure the health of her developing fetus.³² Many chemicals and diseases commonly present in the workplace create significant risks for fetal health:

Maternal exposure to elevated levels of lead during pregnancy has

28. CENSUS BUREAU, U.S. DEPT OF COMMERCE, STAT. ABSTRACT NO. 103, CHARACTERISTICS OF WOMEN WHO HAVE HAD A CHILD IN THE LAST YEAR: 1992, at 81 (1994).

29. *Id.*

30. *Id.*

31. CENSUS BUREAU, U.S. DEPT OF COMMERCE, STAT. ABSTRACT NO. 615, CIVILIAN LABOR FORCE AND PARTICIPATION RATES, WITH PROJECTIONS: 1970 TO 2005, at 395 (1994).

32. The capacity of both men and women to produce healthy offspring can be influenced by workplace hazards. See ROBERT H. BLANK, FETAL PROTECTION IN THE WORKPLACE 76-78 (1993). This Article is, however, solely concerned with work accommodations required by pregnant women.

been correlated with mental retardation, intrauterine growth retardation, and neurological disorders in their offspring

Inorganic and organic mercury, too, have been found to cross the placenta in . . . humans and cause damage to the central nervous system of the fetus

Many other substances widely used in industry are known or suspected to have adverse effects on the reproductive systems of exposed workers. Chromosomal damage has been reported in workers exposed to the solvent benzene, an element in paint strippers, rubber cement, nylon, and detergents. Anesthetic gases produce miscarriages and birth defects in the progeny of both male and female operating room and dental personnel. Exposure to pesticides and chlorinated hydrocarbons used to manufacture drycleaning fluid and other general solvents causes serious fetal damage. Workers exposed to vinyl chloride . . . has been tied to abnormal rates of miscarriage and chromosomal damage of fetuses. . . .

In addition to the growing evidence about specific chemical hazards a number of studies have examined the effects of particular workplace settings on reproduction, several of which are critical to working women. One study found that women involved in metal, chemical, wood, textile, and farm industries and medical technicians are at increased risk of fetal death. [Another study] found the highest rates of stillbirth and neonatal deaths correlated with women working in glass and pottery, hospitals, laundry/dry cleaning, the chemical industry, and woodworking and furniture manufacturing. . . . Another study found an increase in chromosomal abnormalities in women who worked in laboratories and the printing industry

In a major Finnish study the highest rate of spontaneous abortion was found among women textile workers. . . . A major study of California women found that work in electronics assembly was significantly associated with the delivery of low birth-weight infants³³

33. *Id.* at 68-71; see A.D. McDonald et al., *Fetal Death and Work in Pregnancy*, 45 BRIT. J. INDUS. MED. 148 (1988) (stillbirth and abortion rate significantly elevated in women exposed to solvents in manufacturing jobs); M.J. Saurel-Cubizolles et al., *Work in Operating Rooms and Pregnancy Outcome Among Nurses*, 66 INT'L ARCH. OCCUP. & ENVTL. HEALTH 235, 235-41 (1994) (rate of spontaneous abortion significantly higher for pregnancies during which mothers worked in an operating room than for other pregnancies); H. Taskinen et al., *Laboratory Work and Pregnancy Outcome*, 26 J. OCCUP. MED. 311 (1994) (study of women working in laboratories found significant associations between exposure to toluene and spontaneous abortion); see also GUIDELINES ON PREGNANCY AND WORK, *supra* note 8, at 23-28.

The following Table indicates potential health hazards for the offspring of pregnant women working in female dominated professions:

TABLE 2*Potential Health Hazards to Fetus in Selected Occupations*

Occupation	Female Employment (est. 1988)	Potential Risk Factors
Health Care (nurses, aides, dental assistants, laboratory technicians)	3,500,000	Ionizing radiation Infection Mercury vapor Anesthetic gases Disinfectants and sterilizing agents
Clothing and textile/ laundry and drycleaning	1,350,000	Phenolic compounds Benzidine-type dyes Formaldehyde Solvents Carbon disulfide
Office workers	14,500,000	Benzene in rubber cement, cleaning compounds, and solvents Ozone or methanol & ammonia from duplicating machines Air contaminants
Hairdressers and cosmetologists	750,000	Bleaches Hair Dyes Nail varnishes (acetone, toluene, xylene, plasticizers)
Cleaning, janitorial, household jobs	1,750,000	Cleaning substances Disinfectants Bleach/ammonia Organic solvents
Childcare	1,185,000	Infections

Source: U.S. Bureau of Labor Statistics, *Employment and Earnings*, January, 1989.³⁴

34. BLANK, *supra* note 32, at 71 (Table 3.6).

In order to continue working during pregnancy without harming their offspring, women working in environments that expose them to toxic substances or diseases may require protective masks, improved ventilation, or temporary reassignment to a position in a less toxic environment.

In addition to chemical and biological hazards found in the workplace are hazards associated with strenuous physical work, noise, and unusual work schedules. Intense physical activity decreases the flow of blood to the uterus.³⁵ A number of studies have found a relationship between heavy physical labor during pregnancy and preterm delivery and/or low fetal weight in relation to gestational age.³⁶ Some studies, however, suggest that adequate caloric intake can negate the adverse affects of heavy physical labor.³⁷ Others have suggested that the incidence of preterm birth and small size associated with physical labor may result from other factors, such as exposure to toxic chemicals, that correlate with jobs requiring heavy physical labor.³⁸ Women working irregular hours, evening hours and rotating shifts have infants with lower birth weights than women working day shifts, especially if the woman already has two or more children.³⁹ Work schedule also has been correlated with pregnancy loss.⁴⁰ Noise and vibration have been correlated with stillbirth, low birth weight and preterm labor.⁴¹

35. Geoffrey Chamberlain, *Work in Pregnancy*, 302 BRIT. MED. J. 1072 (1991).

36. Lenore J. Launer et al., *The Effect of Maternal Work on Fetal Growth and Duration of Pregnancy: A Prospective Study*, 97 BRIT. J. OBST. & GYN. 62, 62-70 (1990); A.D. McDonald et al., *Prematurity and Work in Pregnancy*, 45 BRIT. J. INDUS. MED. 56, 56-62 (1988) (heavy lifting related to low birth weight and preterm birth); cf. McDonald et al., *supra* note 33, at 148 (increased rates of abortion and stillbirth "found in women exposed to high levels of physical stress, particularly weight lifting, other physical effort and standing").

37. Talat J. Hassan et al., *Excessive Physical Work During Pregnancy and Birth Weight*, 16 ASIA-OCEANIA J. OBST. & GYN. 17, 18-19 (1990).

38. See generally Tuula Nurimen et al., *Physical Work Load, Fetal Development and Course of Pregnancy*, 15 SCAND. J. WORK & ENVTL. HEALTH 404 (1989); see McDonald et al., *supra* note 36, at 5 ("role of unidentified factors related to selection for work are difficult to assess").

39. See generally Gosta Axelsson et al., *Outcome of Pregnancy in Relation to Irregular and Inconvenient Work Schedules*, 46 BRIT. J. INDUS. MED. 393 (1989); McDonald et al., *supra* note 36 (long hours of work and changing shift work related to low birth weight and preterm labor).

40. Clair Infante-Rivard et al., *Pregnancy Loss and Work Schedule During Pregnancy*, 4 EPIDEMIOLOGY 73 (1993) (risk of pregnancy loss four times higher among women with fixed evening work schedules in comparison with women on fixed day schedules and more than twice as high among women on a fixed night schedule).

41. McDonald et al., *supra* note 33, at 152 (vibration related to still-birth); see also

In order to continue working during her pregnancy without harming her offspring, a woman working at a physically demanding job (see Table 1 for occupations and number of women affected) may require accommodations including assistance performing some job functions (mechanical assistance or assistance from co-workers), temporary reassignment of job functions, or temporary reassignment to a less physically demanding job. A woman working on a swing shift, evening shift, or night shift (e.g. health care workers, police officers, firefighters, food-service workers, and machine operators) may require temporary assignment to the day shift in order to protect her developing fetus from harm. Table 1 indicates the number of women working in these occupations. Finally, women working as mechanics and repairers, in the construction trades or operating manufacturing machines, jobs that expose them to significant noise and/or vibration, may require temporary reassignment to a position in an environment less stressful to their developing offspring.

C. Policy Considerations — Should Workplace Accommodations Be Required?

Before considering the legal arguments available to women to force their employers to accommodate pregnancy in the workplace, it is essential to consider the policy implications of mandating workplace accommodations for pregnant women. It is easy to conclude that pregnant women and their developing offspring would be healthier if they were not exposed to workplace hazards such as lifting, climbing, reaching, running, prolonged sitting or standing, toxic substances, diseases, noise, vibration, and inconvenient or rigid work schedules. In addition, working pregnant women clearly would be more comfortable if employers allowed them flexibility in snack and bathroom breaks and protected them from excessively hot work environments. All of these problems, however, could be avoided if pregnant women simply stopped working.

Why should the law impose an obligation on employers to make it possible for pregnant women to work in a healthy and comfortable environment? Accommodating pregnancy in the workplace is costly. What economic benefits justify imposing these costs on employers? Are there also non-economic costs and benefits associated

McDonald et al., *supra* note 36, at 60 (noise related to low birth weight in the health and manufacturing sectors).

with requiring employers to accommodate pregnancy?

1. *Economic Costs and Benefits of Accommodation*

Many pregnant women and their children might benefit if the pregnant woman could avoid hazardous work and stay at home both during her pregnancy and during the child's first few years to provide the child the physical advantages of nursing as well as the developmental advantages of a close nurturing relationship with a parent.⁴² This ideal, however, often is neither feasible nor advan-

42. A number of studies have questioned the impact on children of any kind of day care during the first year of life. Others have raised questions, not about day care per se, but about the quality of care provided in many day care centers. See Andrew Cherlin, *Too Young for Day Care*, N.Y. TIMES, Sept. 17, 1992, at A25 (citing a nationwide study conducted by the Labor Department and the National Institute of Child Health and Human Development finding negative effects on the intellectual development of children whose mothers work outside the home while the child is less than one year old); Bill Hendrick, *Some Child Care Centers May Be Harmful to Kids*, ATLANTA J. & CONST., Apr. 12, 1995, at C11 (discussing the dangers of poorly run day care centers for children's physical and mental development); *Life's First Bond*, SUN-SENTINEL (Ft. Lauderdale), Dec. 18, 1994, at 1E (discussing the importance of bonding with a parent during the first year of life for a baby's health and emotional development); "Quiet Crisis" for U.S. Children?, SACRAMENTO BEE, Apr. 23, 1994, at A20 (citing a recent study by the Families and Work Institute finding that only nine percent of family child care arrangements provide good quality care); see also BRENDA HUNTER, HOME BY CHOICE 52-72 (1991) (discussing the psychological harm to children of a mother's early absence from home).

There is not, however, unanimous agreement that a working mother has a negative impact on the development of her child. Erik Eckholm, in *Learning if Infants Are Hurt When Mothers Go to Work*, reports that experts generally agree that even during the first year of life any harm from good nonmaternal care is small and for children from poor families early, high-quality care improves test scores. N.Y. TIMES, Oct. 6, 1992, at A1. Sandra Scarr, Deborah Phillips, and Kathleen McCartney reviewed a report on research of working mothers conducted in 1982 by the National Academy of Sciences: "A distinguished panel of social scientists reviewed all of the evidence and concluded that there were no consistent effects of maternal employment on child development." Sandra Scarr et al., *Working Mothers and Their Families*, 44 AM. PSYCHOLOGIST 1402, 1404 (1989). Another review of the research conducted by Lois Hoffman in 1984 concluded that although some studies

found that young sons were slightly disadvantaged by the loss of maternal attention in the early years. . . . [D]aughters of employed mothers were often reported to be more self-confident, to achieve better grades in school, and to more frequently pursue careers themselves than were daughters of nonemployed mothers. . . . Hoffman also noted that few investigators asked how maternal employment could benefit children by higher family income, higher self-esteem for mothers, a less sharp distinction between male and female roles, and a more positive role model for both sons and daughters for later in their own lives.

Lois W. Hoffman, *Effects of Maternal Employment in the Two-Parent Family*, 44 AM.

tageous for the woman or her children. First, nearly 30% of pregnant women are either unmarried or separated.⁴³ Nearly 70% of pregnant teens are unmarried.⁴⁴ Single parenthood, however, is not primarily a teenage problem. Only 3% of single mothers are under twenty; 84% are twenty-five or older.⁴⁵ Nor is single parenthood a matter of choice for many women. Divorces are on the rise.⁴⁶ In 1992, 25% of all families with children were headed by single women.⁴⁷ Forty percent of children do not live with their fathers. Sixty percent will spend the majority of their childhood living in a single parent family headed by a woman.⁴⁸

For many children, living in a single parent household headed by a woman is the best alternative available. Many children are unfortunate enough to have a father who uses drugs, abuses alcohol, engages in criminal activity, or abuses the child or the child's mother.⁴⁹ For these children, a single parent may be the best alternative.⁵⁰

Unfortunately, the economic future of single women with children is bleak — nearly one-half will be poor.⁵¹ Very few single par-

PSYCHOLOGIST 283 (1989). The authors concluded that "the school achievement, IQ test scores, and emotional and social development of working mothers' children are every bit as good as that of children whose mothers do not work." *Id.*

43. William J. Bennett, *Rescuing America's Children, An Agenda for Saving a Generation at Risk*, SAN DIEGO UNION-TRIB., Apr. 9, 1995, at G1; see CENSUS BUREAU, *supra* note 28, at 79 (twenty-eight percent of women who had a child in 1992 were either separated, widowed, divorced, or never married).

44. Nancy Weaver, *Teen Moms Face Harsh Future*, SACRAMENTO BEE, May 23, 1995, at A1; THE 1994 INFORMATION PLEASE WOMEN'S SOURCEBOOK 288 (Lisa DiMona & Constance Herndon eds., 1994) (in 1988, 66% of women under age 20 who gave birth were single).

45. THE 1994 INFORMATION PLEASE WOMEN'S SOURCEBOOK, *supra* note 44, at 290.

46. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 1993 HANDBOOK ON WOMEN WORKERS: TRENDS & ISSUES 10 (1994).

47. Robert Suro, *For Women, Varied Reasons for Single Motherhood*, N.Y. TIMES, May 26, 1992, at A12.

48. Bennett, *supra* note 43, at G1.

49. Infante-Rivard et al., *supra* note 40, at 86-87; see Karen Fernau, *Children Imitate Violence at Home*, PHOENIX GAZETTE, May 5, 1995, at B1 ("in nearly 25 percent of battered families, the man physically abuses the children as well"); Leslie Gross, *Domestic Violence*, THE CAPITAL, July 19, 1994, at E1 (reporting that "[e]ach year, an estimated 3.3 million children in the United States witness domestic violence, according to statistics from the Maryland Network Against Domestic Violence").

50. See Ellen Warren & Patricia Callahan, *2 Parents Aren't Always Better than One*, CHICAGOLAND FINAL EDITION, Apr. 2, 1995, at C1.

51. Carrie Teegardin, *Single with Children*, ATLANTA J. & CONST., May 7, 1995, at G6; see RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 137 (1994) ("[f]or families headed by a single

ents receive child support payments.⁵² Welfare provides a safety net for pregnant women and women with small children, but government support provides only subsistence living. "[T]he combination of AFDC and Food Stamps is below the poverty line in every state and under 75 percent of the poverty line in thirty-eight states and the District of Columbia."⁵³ The actual level of support provided by the welfare system is even worse than it sounds because the federal government has set the poverty line substantially below what any reasonable person would define as poverty. For example, in 1992, a woman with one child is considered "poor" by federal standards only if she earned less than \$9,137 per year or \$761 per month.⁵⁴ And even the minimal safety net provided by AFDC is in jeopardy for some pregnant women. The House of Representatives recently passed a welfare bill that would bar unmarried parents under the age of eighteen from receiving welfare benefits.⁵⁵ Children living in poverty are at risk, particularly in urban centers where rural solutions such as growing food are unavailable, and the problems of poverty are multiplied by the concentration of low-income individuals in one geographic location. "These are environments in which prenatal care is inadequate, intervals between

woman, the poverty rate in 1991 was 36 percent; for all other American families, 6 percent. Indeed the national poverty rate for households headed by a single woman has been above 30 percent since official poverty figures began to be available in 1959"). The Children's Defense Fund, in a study based on 1992 Census Bureau Data, reports that 54.3% of children under 18 in female-headed families were poor. CHILDREN'S DEFENSE FUND, *WASTING AMERICA'S FUTURE* at xviii (1994). The United States Department of Commerce reports that in 1990, 58% of children in mother-only families were low income and between 1980 and 1990, 46.8% of children living with a single mother were poor. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *WE THE AMERICAN CHILDREN 13-14* (1993). The poverty rate for single mothers is significantly higher than for the population as a whole. In 1991, 20% of children in America lived below the poverty line. ANNIE E. CASEY FOUNDATION, *KIDS COUNT DATA BOOK 25* (1994).

52. WOMEN'S BUREAU, *supra* note 46, at 11; KIDS COUNT DATA BOOK, *supra* note 51, at 26.

53. KIDS COUNT DATA BOOK, *supra* note 51, at 27. For example, a mother with one child in Connecticut receives a flat grant of \$581 each month, while a mother with three children receives \$683. A pregnant woman with no dependent children receives a total of \$356 each month. Connecticut benefits are high compared to some other states and a current proposal in Connecticut would reduce these benefits, which were set in 1990, to the lower 1988 level. "Nationwide, monthly benefits for a family of three average \$378.02. Alaska pays the highest monthly benefits, \$923, and Mississippi the lowest, \$120." Bruce Alpert, *Plans for Re-Working Welfare Focus on Education*, THE PLAIN DEALER, May 4, 1994, at 14A.

54. CHILDREN'S DEFENSE FUND, *supra* note 51, at 3.

55. Sabrina Eaton, *House Oks Welfare Bill after Week of Rancor*, THE PLAIN DEALER, Mar. 25, 1995, at 1A.

births often too small, beliefs about child care too often dysfunctional, access to and use of well baby care inadequate, early intervention for child disabilities inadequate, and thus in which child mortality and morbidity are rampant."⁵⁶

Women who do not receive adequate prenatal care are more likely to give birth to low birth-weight babies who "have a high probability of experiencing developmental problems."⁵⁷ Poverty threatens the quality of a child's nutrition, shelter, educational resources, neighborhood environment, and medical care.⁵⁸ Children living in poor neighborhoods are more likely to be exposed to crime, toxic chemicals, pollution, drugs, and an absence of recreational opportunities.⁵⁹ The environment associated with poverty has a negative impact on children.⁶⁰ Long-term poverty is significantly associated with lower IQ's, lower scores on tests of mental ability and skills, lower incidence of completing high school and a higher incidence of child abuse.⁶¹ The affects of poverty outweigh the impact of single parenthood.⁶² In addition, children who live in poverty have a significantly higher incidence of serious health problems, including physical, sensory and mental disabilities serious enough to limit daily activities and or require special education.⁶³ Finally, persistent poverty has a negative effect on a child's mental health: "The length of time spent in poverty is an important predictor of children's mental health, even after current poverty status is taken

56. James Garbarino, *The Meaning of Poverty in the World of Children*, in ROBIN BROWN, *THE REFERENCE SHELF: CHILDREN IN CRISIS* 135 (1994).

57. KIDS COUNT DATA BOOK, *supra* note 51, at 21-22.

58. CHILDREN'S DEFENSE FUND, *supra* note 51, at 13-29, 38-45.

59. *Id.* at 39-42, 46-48; see KIDS COUNT DATA BOOK, *supra* note 51, at 21 (families living in severely distressed neighborhoods "find it exceptionally difficult to ensure that their children will grow into healthy, skilled, and productive adults. . . . [C]hildren of these neighborhoods are far more likely . . . to be exposed to violence, do less well in school, become unmarried teen parents, and fail to make a smooth transition to work").

60. Greg J. Duncan et al., *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296, 313 (1994) ("neighborhood income differences were significant determinants of age-5 IQ. . . . Residing in neighborhoods with more affluent neighbors raised IQ 1.6 points for each 10% increase in the proportion of affluent neighbors").

61. CHILDREN'S DEFENSE FUND, *supra* note 51, at 29-36, 82-83; see STATISTICAL HANDBOOK ON THE AMERICAN FAMILY 249 (Bruce Chadwick & Tim Heaton eds., 1992) (incidence of child abuse significantly higher in families with an income less than \$15,000 per year).

62. G. Duncan et al., *supra* note 60, at 311-12 ("family income is a far more powerful correlate of age-5 IQ than more conventional . . . measures such as maternal education, ethnicity, and female headship. . . . [T]he effects of persistent poverty were 60%-80% higher than the effects of transient poverty").

63. See CHILDREN'S DEFENSE FUND, *supra* note 51, at 64-80.

into account. As the length of time spent in poverty increases, so too do children's feelings of unhappiness, anxiety, and dependence."⁶⁴

The cost associated with poverty among single mothers is not limited to the women and their children. Poor children impose a substantial burden on society as a whole including the costs of welfare, special education, repeating grades at school, and medical care for poverty-related medical problems and drug treatment.

Is workplace accommodation a good strategy for dealing with the epidemic of poverty in single-parent households headed by women? Certainly there are other options. Perhaps the incidence of illegitimate births can be reduced by improving education to encourage consistent use of birth control measures. And for women who nonetheless get pregnant, workplace accommodations may not be the best approach to supporting them and their offspring. Staying at home during pregnancy and for an extended period of time after childbirth often would meet the health and developmental needs of mothers and their babies better than providing accommodations in the workplace.⁶⁵ Unwed mothers and their children could be provided for by increasing welfare benefits or by making fathers financially responsible for their offspring. Women could be encouraged to return to the workplace following pregnancy by providing job training programs and child care. Such measures should be undertaken, but it is likely that, even if successful, they would only reduce, not eliminate, the problem of poverty in single parent households.

The Family and Medical Leave Act⁶⁶ is another form of response with significant advantages. The FMLA provides many working women with the right to take unpaid leave during pregnancy or to care for a child. The FMLA encourages working by mandating that employers provide unpaid leave and hold positions open for employees who take leave. The FMLA, however, does not solve the problem of providing financial support to single pregnant women during that leave.

In a recent article, Samuel Issacharoff and Elyse Rosenblum propose the creation of a pregnancy support system similar to the

64. Jane D. McLeod & Michael J. Shanahan, *Poverty, Parenting, and Children's Mental Health*, 58 AM. SOC. REV. 351, 360 (1993).

65. See *supra* note 42 and accompanying text.

66. 29 U.S.C. §§ 2601-2654 (Supp. V 1993). See *infra* part IV for a more complete discussion of the benefits available under the FMLA.

unemployment compensation system to provide women with paid leave without discouraging employers from hiring women.⁶⁷ This approach has many advantages. It encourages work because the proposed benefit is available only to working women and, like the FMLA, the proposal calls for requiring employers to hold jobs open for women on leave. It provides for pregnant women and their offspring during leave, takes the woman and her child away from the potential hazards of the workplace, and supports women while they nurse and care for their babies during those crucial early months. The primary shortcoming of this proposal is its cost. Although the cost would be shared by all employers and the cost may well be worth the short-term benefits to women and children and the long range benefits to society, the cost of the proposal nearly guarantees that it will never become law in this country. And until this proposal, or something like it, becomes law, pregnant women will be faced with the problem of providing for themselves and their children.

For single parent families, working during pregnancy and early childhood may provide the best standard of living available for the mother and child. Women who work during their pregnancy remain productive members of society who do not impose a burden on public money. The Department of Commerce reports that when a single mother works full time, the chance of her family living in poverty reduces markedly. Remember that among single parent families headed by women, nearly half live in poverty. In comparison, only twenty-four percent of families headed by women working full time qualify as low income.⁶⁸ Protecting the health of pregnant workers and their offspring by requiring workplace accommodations should reduce the incidence of costly medical complications for the mother and child. Encouraging women to continue working in many instances will transfer the medical costs associated with pregnancy and childbirth from the taxpayer to private insurers. Encouraging women to work during pregnancy minimizes the career interruption necessitated by childbirth, increasing the likelihood that these women will successfully return to work, rather than to the public dole, following childbirth. Mandating workplace accommodations to permit pregnant women to work during pregnancy transfers some of the costs associated with pregnancy from the pregnant woman

67. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994).

68. CENSUS BUREAU, *supra* note 51, at 16.

and her child to society at large in the form of increased costs for products as a result of increased expenses by employers. This is appropriate. Children are society's future and obligation.⁶⁹ Meeting this obligation through increased employer expenses is less costly than through public handouts.

2. *Non-Economic Benefits and Costs of Accommodation*

Feminists have long struggled with the problem of developing a legal theory capable of promoting employment opportunities for women, without either ignoring women's inherent biological differences or demanding special treatment or accommodation for those differences. The early vision of equality for women, based on equal treatment, has been criticized for failing to acknowledge that women's differences place them at a disadvantage when the law requires only that women be treated the same as men.⁷⁰ The strict equality approach fails to question the assumptions underlying gender-neutral social institutions that severely disadvantage women and fails to protect women when they are victimized by those institutions.⁷¹ On the other hand, achieving employment opportunities for women by requiring special treatment or accommodation for women's differences has its own dangers. Highlighting differences stereotypes gender roles and provides a justification for imposing harmful limitations on women.⁷² The history of gender discrimination in the United States is littered with cases of "protective" legislation and policies that, in reality, served primarily to limit the rights and opportunities of women.⁷³

69. See *infra* part II.C.2.

70. See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1306 (1987) ("[l]egal equality analysis 'runs out' when it encounters 'real' difference, and only becomes available if an when the difference is analogized to some experience men can have too").

71. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 837 (1990) ("[t]he core truth is that an insistence on gender neutrality by definition precludes protection for women victimized by gender").

72. See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 190 (1982) ("by insisting upon our differences . . . [we] promote and reinforce the us-them dichotomy that permits the Rehnquists and Stewarts to resolve matters of great importance and complexity by the simplistic, reflexive assertion that men and women 'are simply not similarly situated'"); see also Williams, *supra* note 71, at 839 (the inequality approach "reinforce[s] and legitimize[s] the traditional assumption that childrearing is 'naturally' the province of women").

73. For example, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), the Supreme

Is it, therefore, a mistake to suggest that pregnancy should be accommodated in the workplace? Certainly, seeking special privileges for pregnant women may promote discrimination against women in the workplace because focusing on the inability of women to perform a variety of jobs while pregnant confirms employers' beliefs that women cannot compete equally in the workplace. Further, highlighting women's differences provides justification for different treatment and disadvantages in other contexts. Finally, from a practical perspective, imposing an obligation to accommodate pregnancy may deter employers from hiring women to avoid the costs associated with accommodating their pregnancies.

In spite of these dangers, employers should be obligated to accommodate pregnancy. First, the physical differences between women and men associated with pregnancy are in no way analogous to any stereotypical view of women's appropriate social role in this society. Women are in fact different when they are pregnant. Pregnancy is a difference that can be acknowledged without suggesting that women are otherwise less competent than men to perform most jobs. Pregnancy is not analogous to job-related characteristics such as strength, mathematical ability, manual dexterity, or aggression. With respect to such job-related skills and abilities, men and women may differ as a group, while individual men and women may not fit the group stereotype. Pregnancy, however, is exclusively a female phenomenon. Acknowledging this fact says nothing about whether women are otherwise competent.

Second, insofar as employers might avoid hiring women to avoid the costs of accommodating their pregnancy, such avoidance violates equal employment laws. A better policy would spread the costs of accommodating pregnancy to eliminate this disincentive.⁷⁴ Unless and until such legislation is enacted, however, protection

Court upheld Illinois' refusal to grant a license to a woman to practice law: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141; *see also* *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding Florida's jury selection system which excluded women who did not affirmatively indicate a desire to serve); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan statute prohibiting employing women as bartenders unless the woman was the wife or daughter of a male owner); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute prohibiting the employment of women in factories for more than 10 hours per day).

74. *See* Issacharoff & Rosenblum, *supra* note 67, at 2154 (proposing a system similar to unemployment compensation to spread the costs of accommodating pregnant women in the workplace).

against discrimination is available.

Most importantly, accommodating pregnancy in the workplace should not be classified as an issue of gender discrimination at all. The object of accommodating pregnancy should not be to provide equal employment opportunities to women. Pregnancy should be accommodated because the health of a developing fetus is at stake. Pregnancy should be accommodated to promote uninterrupted employment for women because the health and welfare of that woman's developing fetus and any other children that she may have is at stake. Accommodating pregnancy in the workplace is a child welfare issue, not an equal employment issue. The dangers that workplace hazards pose to the developing fetus cannot be ignored. Employers should be obligated to provide a safe workplace either by improving safety for all employees,⁷⁵ by providing accommodations to women who request them, or both.

Equal employment opportunity for women, however, is not irrelevant to the goal of promoting child welfare. First, most single parent households are headed by women and, as discussed in the previous section, these families are at serious risk for poverty. Encouraging the employment of single female heads of household by obligating employers to accommodate pregnancy is a small step in the direction of reducing the risk of poverty for these families and their children. Second, the employment rights of women are implicated by any policy adopted with a goal of protecting a developing fetus from harm. Only recently, employers sought to promote fetal health by excluding fertile women from jobs in hazardous work environments. In *International Union v. Johnson Controls, Inc.*,⁷⁶ the Supreme Court ruled that excluding women from dangerous jobs discriminates against them in violation of Section 703 of Title VII of the Civil Rights Act of 1964.⁷⁷ If the rights of the developing fetus are to be protected, they must be protected without interfering with the employment rights of women. Accommodating pregnancy

75. See Christine Neylon O'Brien & Margo E.D. Reder, *Strategies for Implementing Workplace Reproductive and Health Programs*, 19 J. LEGIS. 97 (1993) (urging employers to develop reproductive health programs to safeguard "employers' economic well-being, the safety and health of all workers, and their offspring"); Mark A. Rothstein, *Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards As an Example*, 12 ENVTL. AFFAIRS 627, 699 (1985) (suggesting that new regulatory strategies should "be developed to bring about reasonable, effective regulation of reproductive hazards under OSHA").

76. 499 U.S. 187 (1991).

77. 42 U.S.C. § 2000e-2 (1988 & Supp. V 1993).

in the workplace serves the interests of both the worker and her child.

Although the policy justifications supporting accommodating pregnancy in the workplace are derived primarily from a cost/benefit analysis and from society's obligation to promote the health of its offspring, the legal analysis and strategies that follow focus on equal employment arguments supporting an employer's obligation to accommodate pregnancy. This focus is necessitated by the current state of the law which deals with pregnancy in the workplace as an equal employment issue.

III. DISPARATE TREATMENT ANALYSIS UNDER THE PREGNANCY DISCRIMINATION ACT HAS PROVIDED SOME PREGNANT WOMEN WITH A RIGHT TO WORKPLACE ACCOMMODATIONS

The Pregnancy Discrimination Act of 1978 amended Title VII of the Civil Rights Act of 1964⁷⁸ by adding a new subsection, 701(k), which provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work⁷⁹

In *International Union v. Johnson Controls*,⁸⁰ the Supreme Court interpreted this provision to require employers to provide pregnant women with the same work opportunities that it provides to other individuals with a similar capacity to work. In that case, the employer excluded fertile women from battery manufacturing jobs involving exposure to lead in order to protect their offspring from damage. The Court found that danger to a fetus or potential fetus does not interfere with a woman's ability to efficiently manufacture batteries. The women could not, therefore, be prohibited from performing the job while other similarly qualified workers were permitted to work.⁸¹

78. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

79. 42 U.S.C. § 2000e(k) (1988).

80. 499 U.S. 187 (1991).

81. *Id.* at 191-92, 206.

Johnson Controls did not address the question of whether pregnant women are entitled to request alternative work assignments or other accommodations in order to protect their own health or the health of their offspring during pregnancy. The Equal Employment Opportunity Commission's "Questions and Answers on the Pregnancy Discrimination Act" indicates that employers must process a pregnant employee's requests for benefits based on her physical condition the same way as any other employee's request.⁸² Lower courts, applying the PDA, have followed the *Johnson Controls* Court and the EEOC guidelines, and have required employers to accommodate the needs of pregnant employees *only* when failing to accommodate treats pregnant women differently from other employees "similar in their ability or inability to work."⁸³ For example, in *Adams v. Nolan*,⁸⁴ the Eighth Circuit held that a police department should have assigned a pregnant employee to light duty because other similarly situated officers who were temporarily disabled due to non-work related injuries were granted light duty. Similarly, in *EEOC v. Ackerman, Hoods & McQueen*,⁸⁵ a pregnant worker was entitled to be excused from overtime work because the employer had an unwritten policy of granting work schedule requests for personal and medical reasons for other employees. In *Maddox v. Grandview Care Center, Inc.*,⁸⁶ the court found that the employer violated Title VII by limiting maternity leave to three months while permitting other disabled employees to apply for extended leave.

In keeping with the equal treatment approach of *Johnson Controls*, women denied accommodations to protect their own health or the health of their unborn children have not succeeded in establishing a violation of Title VII when their employer has denied accommodations to similarly situated employees. For example, in *EEOC v. Detroit-Macomb Hospital Center*,⁸⁷ a pregnant employee asked to be excused from treating patients in isolation to protect the health of her fetus. The employer placed the pregnant employee on

82. 29 C.F.R. pt. 1604 app. Questions 5, 6 (1994).

83. 42 U.S.C. § 2000e(k).

84. 962 F.2d 791 (8th Cir. 1992).

85. 956 F.2d 944, 948 (10th Cir.), *cert. denied*, 113 S. Ct. 60 (1992).

86. 780 F.2d 987 (11th Cir. 1986); *see also* Scherr v. Woodland Sch. Comm. Consol. Dist. No. 50, 867 F.2d 974, 980 (7th Cir. 1988) (pregnant worker entitled to combine sick leave with unpaid maternity or general leave if other employees permitted to combine paid and unpaid leave).

87. Nos. 91-1088 & 91-1278, 1992 WL 6099 (6th Cir. Jan. 27, 1992).

involuntary leave pursuant to a general policy of placing individuals with temporary medical restrictions on involuntary leave. Because similarly situated employees were not accommodated, the employer's failure to accommodate the woman's pregnancy did not violate Title VII.⁸⁸ In *Sanderson v. St. Louis University*,⁸⁹ a pregnant security guard was not entitled to transfer to light duty because the employer did not provide light duty assignments to employees regardless of the source of their disability.⁹⁰

In short, the PDA's prohibition against disparate treatment requires employers to accommodate pregnant employees, but only if the employer already accommodates other similarly situated employees. Disparate treatment claims under the PDA provide only limited relief for pregnant employees working in jobs that endanger their health or the health of their offspring.

IV. THE PDA AND THE ADA TOGETHER SUPPORT A WOMAN'S RIGHT TO ACCOMMODATIONS FOR PREGNANCY-RELATED DISABILITIES

A. Reasonable Accommodations Are Required by the PDA

The Americans with Disabilities Act requires employers to provide "reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"⁹¹

If a pregnant woman is an "individual with a disability," then she is entitled to reasonable accommodations under the ADA. Such ADA accommodations include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant posi-

88. *Id.*; see also *Armstrong v. Flowers Hosp., Inc.*, 812 F. Supp. 1183 (M.D. Ala. 1993) (pregnant nurse not entitled to be excused from treating HIV patient to protect unborn child because all nurses were required to treat all patients).

89. 586 F. Supp. 954 (E.D. Mo. 1984).

90. *Id.*; see also *Fields v. Bolger*, 723 F.2d 1216 (6th Cir. 1984) (failure to provide light duty to pregnant mail handler did not violate Title VII because light duty policy applied equally to all similarly situated disabled employees); *Elie v. K-Mart Corp.*, 64 Fair Empl. Prac. Cas. (BNA) 957 (E.D. La. 1994); *Robinson v. Vidmar*, No. 92-4074, 1993 WL 323849 (E.D. Pa. Aug. 11, 1993), *aff'd*, 30 F.3d 1488 (3d Cir. 1994); *Ekumah v. Greenery Group*, 58 Fair Empl. Prac. Cas. (BNA) 1045 (D. Mass. 1992).

91. 42 U.S.C. § 12112(b)(5)(A).

tion. . . ."⁹² These are exactly the accommodations women require in order to continue working during pregnancy. In order to be "qualified," and therefore entitled to ADA protection, an individual must be able to perform the essential functions of the job in question. This requirement limits the reasonable accommodation obligations of employers in that the employer is not required to restructure jobs or modify work schedules in ways that alter the essential functions of the job. Nonetheless, the reasonable accommodation requirement seems well suited to meet the needs of pregnant employees. If an employee, for example, cannot lift heavy weights, the reasonable accommodation requirement might require the employer to reassign the heavy lifting aspects of the job to other employees or perhaps to provide the pregnant employee with equipment to assist her in performing the heavy lifting. A reasonable accommodation requirement might also obligate an employer to allow a pregnant woman suffering from morning nausea to work a flexible morning schedule.

Under the ADA, an "individual with a disability" is a person who has or is perceived as having an "impairment that substantially limits one or more of the major life activities" of the individual.⁹³ The EEOC, in its interpretive guidance, concludes that pregnancy is not an impairment and, therefore, that pregnant women are not entitled to the protection provided by the ADA.⁹⁴

The EEOC's regulations, however, are not necessarily the last word on the meaning of the statute. Although the ADA requires the Commission to "issue regulations" to carry out the ADA, courts generally will not defer to regulations if they provide "unreasonable" interpretations of statutory language or if they are inconsistent with clear legislative intent. This is especially true where, as here, Congress has not explicitly left gaps in the statute for the agency to fill.⁹⁵ One commentator, Collette G. Matzzie, has argued that the EEOC's interpretation of the ADA's coverage is inconsistent with legislative intent.⁹⁶ Matzzie argues that the ADA's broad

92. *Id.* § 12111(9)(B).

93. *Id.* § 12102(2)(A). The regulations to implement the ADA define physical impairment as: "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the [several] body systems. . . ." 29 C.F.R. § 1630.2(b) (1994).

94. 29 C.F.R. pt. 1630 app. §§ 1630.2(h), (j).

95. See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 743-44 (1994).

96. See Collette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommo-*

language, the absence of an explicit statutory exclusion, and Congress' broad remedial purpose in enacting the ADA all support including pregnancy within its coverage.⁹⁷

It is not necessary, however, to bring pregnancy within the ADA for the ADA to have an impact on the rights of pregnant workers to accommodation in the workplace. First, the ADA, by imposing affirmative obligations on employers to accommodate employees' disabilities, alters the mindset of both employers and employees. As we have already discussed, feminists have long debated the advantages and disadvantages of women seeking preferences or accommodations in the workplace.⁹⁸ Now, Congress has embraced the concept of achieving equal employment opportunity by accommodating differences. Employers are obligated to treat disabled individuals differently and preferentially in order to level the playing field. Thus, an individual with a disability such as multiple sclerosis, that makes it difficult for the employee to walk, might be entitled under the ADA to an accommodation such as an office on the first floor. However, another worker whose walking is impaired by a temporary injury, such as a broken leg, has no right to an accommodation.

As accommodation becomes commonplace in the workplace, the expectations of pregnant employees will be raised. Whether the ADA covers pregnant employees or not, they will see their situation as comparable to that of individuals who are disabled by accidents or disease. As we have seen, pregnancy is a disabling condition. Pregnant women have difficulty climbing stairs and ladders, as do individuals with multiple sclerosis. Pregnant women have nausea, as do cancer patients receiving chemotherapy treatment. Pregnant women, like employees with disabling back conditions, cannot lift heavy weights. Pregnant women themselves often have disabling back pains. Like individuals with arthritis, pregnant women are uncomfortable standing or sitting in the same position for extended periods of time. Pregnant women require frequent bathroom breaks, as do individuals with some forms of diabetes. Pregnant women are sensitive to air-borne toxins as are individuals suffering from asth-

dating Pregnancy Under the Americans with Disabilities Act, 82 GEO. L.J. 193 (1993).

97. *Id.*; see also *Brennan v. National Tel. Directory Corp.*, 850 F. Supp. 331 (E.D. Pa. 1994) (discussing pregnancy discrimination as a cause of action under the Pennsylvania Human Rights Act's prohibition against discrimination on the basis of disability).

98. See *supra* part II.

ma, emphysema, or chronic obstructive pulmonary disease. When pregnant women see employers accommodate the needs of individuals protected by the ADA, they will demand and expect those same accommodations.

The civil rights movement in the United States was motivated primarily by a desire to eradicate discrimination against African-Americans. Other classifications of individuals, however, quickly perceived that if it is unfair to judge an individual solely on the basis of her race, it is also unfair to judge an individual solely on the basis of her gender, national origin, or religion. When Congress enacted the Civil Rights Act of 1964, it extended protection against discrimination not only to African-Americans, but also to other groups including women. Since 1964, more groups have seen themselves as subjects of arbitrary discrimination and demanded legal protection from discrimination. The ADA is likely to set off a new wave of demands for legal protection. The Americans with Disabilities Act has identified a right to a new variety of equal opportunity. Other groups, including pregnant women, are likely to see themselves as equally entitled to that right.

The question is whether, absent coverage by the ADA and without any additional legislation, there is any legal basis for pregnant women to demand the same accommodations that disabled individuals are entitled to under the ADA. Individuals covered by the ADA may, like pregnant women, require leave from work to see a doctor. Like pregnant women, disabled individuals may be unable to conform to rigid work rules or may be unable to perform job functions such as climbing stairs and lifting heavy weights. If an employer, in compliance with the ADA's reasonable accommodation requirement, grants leave, provides flexible work rules, or assigns a disabled individual to light duty, the PDA seems to require that employer to provide the same accommodations to pregnant employees who need the same accommodations.⁹⁹ More broadly, if an employer adopts a general policy of accommodating the needs of disabled individuals, which all employers covered by the ADA are required to do, the PDA requires that employer to apply the same policy to women disabled by pregnancy.¹⁰⁰

99. *Cf. Adams v. Nolan*, 962 F.2d 791 (8th Cir. 1992) (employer's refusal to assign pregnant police officer to light duty violates Title VII because other officers with temporary non-work related disabilities assigned to light duty).

100. There are, of course, limitations on the employer's obligation to provide accommodations to individuals with disabilities. An employer probably is not, for example,

The legislative history of the PDA supports this view. The Senate Report provides:

Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work *on the same conditions as other employees*; and when they are not able to work for medical reasons, they must be accorded *the same rights, leave privileges and other benefits, as other workers who are disabled from working*.¹⁰¹

The House Report is even more specific regarding employer's obligations to accommodate:

The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

The "same treatment" may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.¹⁰²

Both the House Report and the Senate Report referred favorably to the EEOC regulations in effect at that time requiring employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities.¹⁰³ This reference to "temporary" disabilities raises the possibility of an argument that Congress intended the disabilities associated with pregnancy to be treated the same as other *temporary* disabilities, but would allow employers to treat pregnancy-related disabilities differently than the long-term disabilities covered by the ADA.

required to restructure a job by reallocating one of its "essential functions" to another position. See 29 C.F.R. pt. 1630 app. § 1630.2(o). The ADA also provides a defense of undue hardship which relieves the employer of the obligation to accommodate. See 42 U.S.C. § 12112(5)(A). For a complete discussion of the steps necessary to establish discrimination under the ADA, see ZIMMER ET AL., *supra* note 95.

101. S. REP. NO. 331, 95th Cong., 1st Sess. 4 (1977) (emphasis added) [hereinafter SENATE REPORT].

102. H.R. REP. NO. 948, 95th Cong., 2d Sess. 4-5 (1978) [hereinafter HOUSE REPORT].

103. 37 Fed. Reg. 6835, 6837 (1972).

There is, however, little support for reading congressional intent in this way. First, the language of the PDA does not speak in terms of disabilities at all. Rather, it defines pregnancy discrimination by comparing the treatment of persons "similar in their ability or inability to work." Second, in discussing the meaning of the PDA, neither report talks in terms of comparisons with temporarily disabled individuals. Instead, the reports repeatedly refer to comparisons with other workers "disabled from work" or "similar in their ability or inability work." Finally, the current EEOC regulations define pregnancy discrimination by comparing the disabilities associated with pregnancy to "disabilities caused or contributed to by other medical conditions."¹⁰⁴

It might be argued that interpreting the PDA to require employers to accommodate pregnant women in the same way they accommodate disabled individuals under the ADA expands the coverage of the ADA beyond that intended by Congress. Congress, however, did not expressly exclude pregnancy from ADA coverage. While it may be difficult in the face of EEOC regulations to the contrary to establish that the ADA covers pregnancy, no evidence suggests that Congress intended to foreclose using the PDA to extend ADA accommodations to pregnant workers.

As to whether Congress intended to impose on employers the cost of treating pregnancy-related disabilities in the same way as other disabilities, the Senate Report on the PDA specifically acknowledged the potential costs associated with nondiscriminatory policies relating to pregnancy. The report concluded, however, that "even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country."¹⁰⁵

B. Establishing a Right to Reasonable Accommodation

The ADA defines discrimination to include

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity

104. 29 C.F.R. § 1604.10(b) (1994).

105. SENATE REPORT, *supra* note 101, at 11.

can demonstrate that the accommodations would impose an undue hardship on the operation of the business of such covered entity¹⁰⁶

In order to be "otherwise qualified" a disabled individual must be able, "with or without reasonable accommodation," to "perform the essential functions of the employment position that such individual holds or desires."¹⁰⁷ The ADA provides:

For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.¹⁰⁸

If pregnant women are entitled to the same accommodations that individuals with disabilities are entitled to under the ADA, then a woman must first demonstrate that she is able to perform the essential functions of her job. Women who become pregnant while working can establish that they are qualified by the fact that they already were performing the job in question.

If, because of her pregnancy, the woman can no longer perform some job functions, the first question is whether there are reasonable accommodations available that will make it possible for her to perform those job functions. The ADA identifies some of the accommodations that would be required for an individual with a disability:

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹⁰⁹

106. 42 U.S.C. § 12112(b)(5)(A).

107. *Id.* § 12111(8).

108. *Id.*

109. *Id.* § 12111(9).

Determining rights under the ADA requires a fact-based, case-by-case analysis. Any general discussion of the accommodations that an individual with a disability or a similarly situated pregnant woman might be entitled to is of limited utility because the particular circumstances of potential cases are infinitely variable. Nonetheless, consideration of the accommodations that pregnant women might be entitled to under the PDA due to the enactment of the ADA is worthwhile both because the disabilities associated with pregnancy are predictable and because such consideration provides a more concrete sense of how the two statutes work together.

Applying the ADA reasonable accommodation provisions to the disabilities associated with pregnancy means that a pregnant woman whose job requires climbing stairs might be accommodated by providing access to an elevator. A pregnant woman whose job requires lifting might be provided with a mechanical device or a personal assistant¹¹⁰ to help her do the lifting. A pregnant woman whose job requires her to wear a uniform might be provided with a maternity uniform. A pregnant woman who cannot sit and work comfortably at a standard desk may require a different work station configuration. These accommodations would be mandatory under the PDA because the ADA requires an employer to provide these accommodations to an individual with a disability who needs these accommodations to perform job duties that involve climbing stairs, lifting, wearing a standard uniform, or working at a desk. The pregnant woman and the individual with a disability are similar in their ability or inability to work.

If a pregnant woman is not able to perform some of her job functions, even with accommodations, the question then becomes

110. The ADA indicates that a reasonable accommodation might include providing a reader or interpreter. This provision indicates that in some circumstances it is reasonable to request an accommodation that involves hiring another individual to perform some of the disabled or pregnant individual's job functions. Of course, those functions must not be essential functions, but beyond the issue of essential functions, hiring someone to do a portion of the job would probably not be reasonable unless the cost of the assistant's services is relatively low and the value of the disabled or pregnant individual's qualifications and services is relatively high. Consider, for example, a pregnant lawyer who, due to pregnancy related back problems, cannot carry heavy books. Providing a paralegal or library personnel to carry books for her might be a reasonable accommodation. Similarly, consider a pregnant special education teacher whose primary responsibility and expertise is teaching children with special needs. Her job might also require her to lift a child out of a wheelchair. If her pregnancy causes back problems that make it impossible for her to carry out this job function, providing a teaching aide to assist her might be reasonable.

whether the task that she cannot perform is an essential function of the job. If, for example, a police officer becomes pregnant and can no longer chase criminals, the question is whether chasing criminals is an essential function of the job. If it is not, then a reasonable accommodation might include assigning this function to other officers. For example, on a police force in which some officers work at a desk as dispatchers and others are assigned to a beat, chasing criminals might not be an essential function under the ADA because some officers are not required to chase.¹¹¹ Because an individual with a disability that precludes chasing criminals has a right under the ADA to "light duty" as a dispatcher, the pregnant woman can argue that, under the PDA, she has the same right. If, however, chasing criminals is an essential function, neither the employee with a disability nor the pregnant employee is entitled to job restructuring that eliminates that responsibility.

For the pregnant woman whose job requires her to stand or sit for prolonged periods, arrive on a strict schedule or limit her bathroom breaks, the question is whether these requirements are essential functions of the job. If not, the employer must allow some flexibility to make it possible for the woman to perform her essential job functions.

The ADA also requires employers to make reasonable accommodations necessary to provide disabled individuals equal access to all of the terms, condition, and benefits of the job. For example, an individual with asthma or AIDS may be able to perform job functions, but because of her disability, workplace hazards such as smoke, dust, or diseases impair her health. That individual would be entitled to accommodations designed to reduce her exposure to smoke, dust, or diseases. For example, the employer might be required to provide improved ventilation or a protective mask. Similarly, a pregnant woman whose elevated body temperature makes working in an excessively hot environment intolerable could request an accommodation such as air conditioning or fans to allow her to be as comfortable as the rest of the employees. Or a pregnant woman exposed to air-borne toxins in the environment that, because of her pregnancy, may impair her health, could request similar accommodations. If exposure to the hot environment or the airborne tox-

111. See *Kuntz v. City of New Haven*, 63 Empl. Prac. Dec. (CCH) ¶ 42,766 (D. Conn. 1993) (Rehabilitation Act case applying principles subsequently adopted in the ADA), *aff'd*, 29 F.3d 622 (2d Cir.), *cert. denied*, 115 S. Ct. 667 (1994).

ins is not necessary to perform essential job functions, the disabled individual or the pregnant woman could also request reassignment to a more healthful location.

In each of these examples, the pregnant woman and the individual with the disability are similar in their ability or inability to work. Because the disabled individual is entitled to workplace accommodations to preserve his health, the pregnant woman is entitled to the same accommodations under the PDA.

There are, however, some difficulties with securing for pregnant women the right to be accommodated in the same way as disabled individuals covered by the ADA. A pregnant woman who works at a relatively small company may not be able to produce a similarly disabled individual (male or female) with whom comparisons can be made. This situation ought not to pose significant difficulties as long as the employee can establish that the employer has a policy of accommodating similarly situated disabled individuals. Because the ADA imposes an obligation to accommodate, an employer who is covered by the ADA should not be permitted to allege that it has no policy concerning accommodation. The employee would, of course, need to establish that the requested accommodations would be required under the ADA for an employee whose disabilities were similar to those experienced during pregnancy.

Another difficulty relates to accommodations required to protect a pregnant woman's fetus from workplace hazards. Women have been particularly unsuccessful under the PDA when they have requested accommodations to protect the life and health of their unborn children.¹¹² A pregnant woman may, for example, ask to be relieved of duties requiring her to be exposed to toxic fumes or communicable diseases in order to protect the health of her child. The Supreme Court has ruled that employers are prohibited under the PDA from preventing fertile and pregnant women from working in toxic environments.¹¹³ The Court in *Johnson Controls* reasoned that because pregnant women are capable of performing jobs re-

112. See *Armstrong v. Flowers Hosp., Inc.*, 812 F. Supp. 1183 (M.D. Ala. 1993) (pregnant nurse not entitled to be excused from treating HIV patient to protect unborn child), *aff'd*, 33 F.3d 1308 (11th Cir. 1994); *EEOC v. Detroit-Macomb Hosp. Ctr.*, Nos. 91-1088 & 91-1278, 1992 WL 6099 (6th Cir. Jan. 14, 1992) (pregnant nurse's aide not entitled to be excused from entering isolation rooms to protect her unborn child); *Frank v. Toledo Hosp.*, 617 N.E.2d 774, 778-79 (Ohio Ct. App. 1992)) (pregnant employee not entitled to be excused from Rubella vaccination to protect her unborn child).

113. *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); see *supra* notes 80-81 and accompanying text.

quiring exposure to toxic chemicals, they must be permitted to perform those jobs just like any other employee who is similarly able to perform the work.¹¹⁴ The danger to the fetus in no way impairs the woman's ability to perform the work.

Johnson Controls held that a pregnant employee has a right to work in a toxic environment if she so chooses.¹¹⁵ It says nothing about whether she has a right to be excused from working in a toxic or diseased environment. The reasoning in *Johnson Controls* does, however, create a problem with respect to analyzing pregnancy accommodation cases by looking at the employer's treatment of workers similar in their ability or inability to work. *Johnson Controls* makes it clear that fetal health does not relate to ability to perform a job. Pregnant women, therefore, are entitled under the PDA to be treated the same as any other employee who is capable of, for example, producing lead batteries or treating contagious patients. If other employees are required to work in the toxic or diseased environment, the pregnant employee who is not accommodated has no basis for claiming discriminatory treatment.

The question is whether any accommodations mandated by the ADA make it possible for a woman to argue under the PDA that she is entitled to accommodations designed to protect her offspring from harm. As previously discussed, the fetus can be harmed if, during pregnancy, its mother engages in heavy physical labor; works a swing shift, evening shift or night shift; or works in an environment in which there are toxins, diseases, vibration or noise.¹¹⁶ In addition, the fetus requires good prenatal care, including regular visits to the doctor.

The easiest approach to securing accommodations to protect a woman's child is to assert that the accommodations are necessary to protect the woman's health. As mentioned earlier, heavy physical labor and air-borne and other toxins are harmful, not only to the fetus, but to the pregnant woman herself.¹¹⁷ Similarly, pregnant women require prenatal doctors' visits to protect both their own health and the health of their offspring. If the ADA requires accommodations for individuals with disabilities who cannot perform physical labor or whose disabilities make them sensitive to toxins or who require frequent doctors' visits, then pregnant women who

114. 499 U.S. at 206.

115. *Id.*

116. *See supra* part II.B.

117. *See supra* part I.

are similar in their ability to work and who require similar relief should, under the PDA, be entitled to the same accommodations. Thus, for example, although pregnant employees at Johnson Controls cannot be excluded from jobs involving exposure to lead,¹¹⁸ they may be entitled to a lead-free environment as an accommodation if Johnson Controls has a policy, as required by the ADA, of accommodating employees with disabilities that make them particularly sensitive to lead poisoning.

Some situations involving fetal hazards, however, cannot be handled this way. The fetus can be harmed by contagious diseases, toxins, shift work, vibrations, and noise that do not impair the health of a woman because she is pregnant. There are individuals with disabilities who need accommodations relating to these workplace hazards. For example, an individual who has AIDS is extremely susceptible to contagious diseases which can be life-threatening because of the individual's compromised immune system. Employees who have AIDS may be entitled to accommodations designed to protect them from infectious diseases in the workplace. Such accommodations might include a protective mask or reassignment to a position in a more healthful environment. The question is whether the availability of accommodations for an AIDS victim entitles a pregnant woman to similar accommodations to protect her developing fetus. It could be argued that the employee with AIDS and the pregnant employee are similar in their ability or inability to work and, therefore, both are entitled to accommodations necessary to preserve their health. An employer might respond, however, that because accommodations are provided only to preserve the health of the employee there is no disparate treatment if pregnant women are denied accommodations to protect their offspring. Again, the easiest way to support accommodations that protect the fetus is to rely on evidence that the workplace hazard in question is harmful to the health of the pregnant woman herself.

C. Undue Hardship

The "reasonable accommodation" provision of the ADA defines the employer's obligation and provides a defense if the employer

118. If Johnson Controls adopted a policy prohibiting all employees with a sensitivity to lead from working in jobs involving exposure to lead, the employer could exclude pregnant women from those jobs without violating Title VII. The problem with Johnson Controls' policy is that only fertile women were excluded.

"can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business. . . ." ¹¹⁹ The availability of this defense adds an additional hurdle that must be cleared before pregnant women are entitled to accommodations in the workplace. In order to qualify for accommodations, the woman must be able to perform essential functions of the job, the requested accommodation must be reasonable, and the accommodation must not impose an undue hardship on the employer's business.

The undue hardship defense overlaps significantly with the ADA's requirement that accommodations be "reasonable." The availability of this defense, however, underscores congressional intent in enacting the ADA not to impose burdensome costs on employers. In this respect, the ADA is quite different from Title VII and the Pregnancy Discrimination Act. Title VII does not have a cost defense to intentional discrimination. As noted previously, Congress, in enacting the PDA, acknowledged the costs associated with employing pregnant women and indicated that such costs should not justify discrimination on the basis of pregnancy. If, however, the PDA is interpreted to provide pregnant women with the same rights available to individuals with disabilities under the ADA, cost becomes relevant. The PDA grants pregnant women the right to be treated as well as other employees similar in their ability or inability to work. If individuals with disabilities are not entitled to accommodations because they are too costly, then pregnant women may be denied that accommodation.

V. *THE CIVIL RIGHTS ACT OF 1991*

A. Disparate Impact Under the PDA

Pregnant workers seeking accommodation of their pregnancy related disabilities may be confronted with facially neutral work rules prohibiting the requested accommodation. If the employer applies its facially neutral rules in a discriminatory manner disfavoring pregnant employees, that will constitute disparate treatment and a violation of the PDA. Many work rules, even if facially neutral and applied equally to all employees have a disparate impact on pregnant workers. For example, a work rule compelling all employees to perform all components of a job requiring physical exertion or face dismissal probably will have a disparate

119. 42 U.S.C. § 12112(b)(5)(A).

impact on pregnant employees.

The Civil Rights Act of 1991 provides a statutory basis for the judicially-created theory of disparate impact discrimination. One of the stated purposes of the Civil Rights Act of 1991 was "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964."¹²⁰ Most courts applying the PDA have found disparate impact analysis applicable¹²¹ and congressional recognition of disparate impact in the 1991 Civil Rights Act made no exceptions for cases alleging pregnancy discrimination. Nonetheless, some courts interpret the PDA to prohibit disparate treatment only.¹²² If disparate impact claims are available under the PDA, pregnant workers seeking accommodation are entitled to accommodation if a rule prohibiting the requested accommodation has a disparate impact on women or pregnant women.

Courts declining to extend disparate impact analysis to pregnancy discrimination rely primarily on the language of the Pregnancy Discrimination Act¹²³ and statements in the legislative history of the Act suggesting that neutral rules that foreclose certain benefits to both pregnant and other disabled employees are permissible under the PDA. For example, the House Report states that the PDA in no way requires the institution of any new programs

120. Pub. L. No. 102-166, § 3(3), 105 Stat. 1071 (1991).

121. See *Maganuco v. Leyden Community High Sch.* Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991) (disparate impact claim available under PDA); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987) (disparate impact available but employer's rule prohibiting employment of unmarried staff who become or cause pregnancy is justified under the business necessity defense); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (fetal protection policy challenged under disparate impact theory); *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981) (ten-day limit on temporary disabilities could violate Title VII because of its disparate impact on pregnant women); *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737 (N.D. Ill. 1993) (disparate impact claim available under PDA); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647 (N.D. Ill. 1991) (company policy of discharging all first-year employees who required long-term sick leave violates PDA because of its disparate impact on women); and *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981) (disparate impact claim available under PDA), *vacated on jurisdictional grounds*, 685 F.2d 1088 (9th Cir. 1982).

122. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (disparate impact not available under PDA); *Connors v. University of Tenn. Press*, 558 F. Supp. 38, 41 (E.D. Tenn. 1982) (disparate impact not available under PDA); and *Brown-Weathersby v. Seaway Nat'l Bank*, No. 82-C-2351 (N.D. Ill. May 4, 1983).

123. 42 U.S.C. 2000e(k) ("women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work").

where none currently exist and will not require an employer who does not provide disability benefits or paid sick leave to other employees to provide them for pregnant workers.¹²⁴

Despite the language of the amendment and these statements in the legislative history, the majority of courts addressing this issue have correctly concluded that disparate impact analysis is available under the PDA.¹²⁵ First, the legislative history of the PDA repeatedly indicates that this amendment is designed merely to define pregnancy discrimination as a form of sex discrimination and to provide the full range of Title VII protection to discrimination on the basis of pregnancy. For example, the Senate Report provides:

This bill is intended to make plain that, under title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex. Thus, the bill defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women; *it does not change the application of title VII to sex discrimination in any other way.*¹²⁶

Similarly, the House Report states: "As an amendment to Title VII, this bill will apply to all aspects of employment . . . currently covered by Title VI. Pregnancy-based distinctions will be *subject to the same scrutiny on the same terms* as other acts of sex discrimination proscribed in the existing statute."¹²⁷ Both the Senate and the House Reports on the PDA suggest that Congress contemplated the application of ordinary Title VII principles, including disparate impact, to pregnancy discrimination cases.

In the House Report, Congress expressly acknowledged the continued viability of disparate impact claims in pregnancy discrimination cases. The House Report, in the course of discussing the PDA as a response to the Supreme Court's treatment of pregnancy discrimination, stated: "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"¹²⁸

124. See HOUSE REPORT, *supra* note 102, at 4-5.

125. See *supra* note 121 for a list of cases applying disparate impact analysis.

126. SENATE REPORT, *supra* note 101, at 3-4 (emphasis added).

127. HOUSE REPORT, *supra* note 102, at 4 (emphasis added).

128. *Id.* at 3 (second emphasis added).

Clearly, Congress understood that in some instances disparate impact theory would be necessary to establish a violation of the statute.

Finally, the PDA was enacted in response to the Supreme Court's ruling in *General Electric Co. v. Gilbert*¹²⁹ which held that discrimination on the basis of pregnancy in providing disability benefits is not discrimination on the basis of sex. The Court in *Gilbert* acknowledged the availability of disparate impact analysis in a pregnancy discrimination case,¹³⁰ but ruled against the plaintiffs because they failed to prove impact. In a subsequent case, *Nashville Gas Co. v. Satty*,¹³¹ the Court applied disparate impact analysis to find liability in a case in which women on pregnancy disability leave lost accumulated seniority. The Court distinguished *Gilbert* on the ground that the plaintiffs in *Gilbert* sought to secure a benefit that other employees did not have, while the neutral rule in *Satty* imposed a burden on women that other employees were not required to bear. Therefore, prior to the PDA, the Supreme Court interpreted Title VII to prohibit neutral rules that have a disparate impact on women because women get pregnant.

There is nothing in the legislative history of the PDA to suggest that, in expanding women's rights under Title VII, Congress intended to restrict them at the same time by foreclosing disparate impact claims in pregnancy discrimination cases. In fact, the House Report, while discussing the effective date of the amendment, acknowledged the continued viability of the impact approach applied in *Satty*: "Section 2(a) provides for an immediate effective date insofar as the bill affects employment policies other than fringe benefits Many, if not all such policies, are presumably invalid under present law as interpreted in *Satty*."¹³²

Disparate impact analysis can be used to resolve many of the accommodation problems faced by pregnant women. If, for example, an employer does not permit employees with medical needs to take leave, request light duty, take bathroom breaks, or work a flexible schedule, a pregnant woman may be able to challenge that policy on the ground that it has a disparate impact on women. This ap-

129. 429 U.S. 125 (1976).

130. *Id.* at 137. All of the Justices in *Gilbert* agreed with the majority on this point. See *id.* at 146 (Stewart, J., concurring); *id.* at 146 (Blackmun, J., concurring in part); *id.* at 155 (Brennan, J., dissenting); and *id.* at 161 (Stevens, J., dissenting).

131. 434 U.S. 136 (1977).

132. HOUSE REPORT, *supra* note 102, at 8.

proach was taken by the court in *EEOC v. Warshawsky & Co.*¹³³ In *Warshawsky*, the court, applying disparate impact analysis, found that the company's policy of discharging all first-year employees who requested long-term sick leave discriminated against pregnant women in violation of the PDA.¹³⁴

B. Proving Disparate Impact on the Basis of Pregnancy

Concluding that disparate impact analysis is applicable in pregnancy discrimination cases creates an issue which was central to the dispute in *Warshawsky* — how to define the groups to determine whether a neutral policy has an impact. In *Warshawsky*, the EEOC compared “the percent of pregnant first-year employees who were discharged because of the policy (95.2% — all except one) and the percent of all non-pregnant first-year employees who were discharged because of the policy (1.8%). . . .”¹³⁵ The company described the protected group as “all pregnant first-year employees *who required sick leave* [95.2% fired] and the non-protected group as all non-pregnant first-year employees *who required sick leave* [100% fired] . . .”¹³⁶ The *Warshawsky* court asserted that the appropriate analysis is “the traditional ‘sex discrimination’ analysis.”¹³⁷ The court then compared the percentage of female first-year employees fired (50 out of 1,105 or 4.5%) with the percentage of male first-year employees fired (3 out of 773 or .4%). The court applied the eighty percent rule and concluded that this comparison demonstrated disparate impact because “[i]f the likelihood of being fired for a male were 80% of the likelihood of being fired for a female . . . only 5 to 6 women would have been fired instead of 50.”¹³⁸

The court's measure of disparate impact in *Warshawsky* makes sense if the appropriate legal question is whether a neutral policy has a disparate impact on the women who work at a particular company. Why should women be the appropriate group rather than pregnant women? If the appropriate comparison is between pregnant women and non-pregnant people disparate impact will always be shown. For example, if an employer does not provide light duty

133. 768 F. Supp. 647 (N.D. Ill. 1991).

134. *Id.*

135. *Id.* at 651.

136. *Id.* at 652.

137. *Id.*

138. *Id.* at 654-55.

for individuals with a medically provable need and a comparison is drawn between pregnant women and non-pregnant people, nearly one hundred percent of the pregnant women will be impacted compared with the portion of non-pregnant workers who have medical restrictions on physical activity. While it is difficult to argue that Congress intended to foreclose the traditional sex discrimination impact analysis applied by the court in *Warshawsky*, it is unlikely that the PDA was designed to create an impact claim every time a neutral rule operates to the disadvantage of pregnant women.

Another question raised by *Warshawsky* concerning comparison groups is why the impact within a particular workforce should be the appropriate measure. Taking this approach means that a policy which violates the PDA at one company might be permissible if applied at a company where the entry level employees are substantially older. Eleven percent of women aged twenty to twenty-nine give birth each year while only 0.4% of women aged forty to forty-four give birth each year. If pregnancy is the primary reason why a neutral employment policy has a disparate impact on female employees, it probably will not have an impact if most of the female employees are middle aged.

An alternative approach would be to consider the impact of a particular policy on women in the workforce in general rather than women working at a particular company. This approach is likely to generate a disparate impact on women for any policy that denies to all employees accommodations relating to illness or injury. Data based on a National Health Interview Survey conducted by the U.S. National Center for Health Statistics produced Table 3, which shows that women, as a group, consistently suffer more days of illness or injury than men.¹³⁹ The difference is likely due to the fact that women get pregnant. If an employer restricts sick days or days that an employee can arrive late or leave early due to illness, such policies are likely to have a disparate impact on women because, as a group, they require more disability days. Perhaps it can also be inferred from this information that women more than men will need other workplace accommodations relating to disability, such as light duty and flexible breaks. Therefore, neutral rules denying such accommodations to all employees may have a disparate impact on female employees.

However, carrying this argument to its logical conclusion sug-

139. See *infra* note 144.

gests that it proves too much. Consider the employer who provides no medical benefits for employees. If women are disabled by illness and injury more often than men, it could be argued that refusing to provide medical benefits has a disparate impact on women. The disparate impact is probably the result of female pregnancy. It is, however, nearly impossible to argue that Congress intended this result when it enacted the Pregnancy Discrimination Act. Reconsider the legislative history of the PDA presented previously.¹⁴⁰ The history of the PDA clearly states that the PDA is not intended to force employers to provide medical benefits to pregnant women unless such benefits were already available to other employees. More recently, Congress and the Clinton Administration fiercely debated requiring employers to provide medical benefits to employees. A new statute imposing this obligation would be unnecessary if disparate impact analysis under the PDA already required employers to provide medical benefits.

If Congress did not intend to force employers to subsidize the medical expenses of pregnancy, does this mean that disparate impact analysis is not available under the PDA? Not necessarily. The Supreme Court, in *Alexander v. Choate*,¹⁴¹ while recognizing the availability of impact analysis under Section 504 of the Rehabilitation Act of 1973,¹⁴² nonetheless declined to apply impact analysis to prohibit a fourteen-day limitation on in-patient coverage being challenged which would not "deny respondents meaningful access to . . . Medicaid services or exclude them from those services."¹⁴³ *Choate* suggests that it is possible for disparate impact to be generally applicable without applying in all circumstances. In this case, while there is no evidence that Congress intended to exclude all impact claims relating to pregnancy, it is clear that this particular variety of impact claim was not intended.

140. See *supra* part III.A.

141. 469 U.S. 287 (1985).

142. Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988 & Supp. V 1993)).

143. 469 U.S. at 302.

TABLE 3¹⁴⁴

ITEM	DAYS OF DISABILITY PER PERSON					
	1970	1980	1985	1988	1989	1990
Restricted-activity days ¹⁴⁵	14.6	19.1	14.8	14.7	15.2	14.9
Male	13.2	17.1	12.8	12.7	13.2	13.1
Female	15.8	21.0	16.6	16.5	17.0	16.7
Bed-disability days ¹⁴⁶	6.1	7.0	6.1	6.3	6.5	6.2
Male	5.2	5.9	5.2	5.2	5.5	5.2
Female	6.9	8.0	7.1	7.3	7.4	7.1
Work-loss days ¹⁴⁷	5.4	5.0	5.3	5.3	5.6	5.3
Male	5.0	4.9	4.8	4.8	5.0	4.7
Female	5.9	5.1	6.0	5.8	6.4	5.9

Source: U.S. National Center for Health Statistics, *Vital and Health Statistics*, series 1 No. 181; and unpublished data.

Finally, disparate impact theory also is problematic as a basis for providing women with a right to accommodations designed to protect fetal health. If the employer does not offer any employee the option of avoiding toxins or contagious diseases in the workplace, what is the disparate impact on pregnant women? The pregnant woman, like all other employees, is faced with a difficult choice. The choice may be more difficult than for other employees, but it is

144. Table 3 is based on Table No. 199, entitled *Days of Disability, by Type and Selected Characteristics: 1970 to 1990*, in THE HEALTH AND NUTRITION SECTION of the 1993 STATISTICAL ABSTRACT. CENSUS BUREAU, U.S. DEPT OF COMMERCE, STAT. ABSTRACT OF THE UNITED STATES 1993, at 132 (113th ed. 1994).

145. "A day when a person cuts down on his activities for more than half a day because of illness or injury. Includes bed-disability, work-loss, and school-loss days." See *supra* note 144, at 132 n.1.

146. "A day when a person stayed in bed more than half a day because of illness or injury. Includes those work-loss and school-loss days actually spent in bed." See *supra* note 144, at 132 n.4.

147. A work-loss day is:

A day when a person lost more than half a workday because of illness or injury. Computed for persons 17 years of age and over (beginning 1985, 18 years of age and over) in the currently employed population, defined as those who were working or had a job or business from which they were not on layoff during the 2-week period preceding the week of interview.

See *supra* note 144, at 132 n.5.

nonetheless a choice. If she loses her job it is because she exercised a choice, not because the employer forced her to leave. In order to find disparate impact a court would have to be willing to recognize that imposing a choice between a job and a child's health is a different term and condition of employment than imposing a choice between a job and the employee's own health. The court in *Armstrong v. Flowers Hospital, Inc.*¹⁴⁸ was unwilling to characterize the more difficult choice as a cognizable variety of impact.

C. Business Necessity

Establishing that an employer's neutral rule has a disparate impact on pregnant employees is, of course, only the first step towards establishing liability under Title VII and the Pregnancy Discrimination Act. The 1991 amendments to the Civil Rights Act require the employer to bear the burden of proving that a neutral employment practice with a disparate impact is "job related for the position in question and consistent with business necessity."¹⁴⁹ The wording of this provision seems to suggest that cost alone will not satisfy the employer's burden absent a showing that the challenged rule is job related. This language is useful for pregnant women seeking to establish that neutral rules prohibiting workplace accommodations violate Title VII because employers will be required to establish not only that the challenged rule is efficient, but that it is job related. For example, an employer who will not permit a woman who is nauseous during the first few months of pregnancy to work on a flexible schedule will need to demonstrate that a fixed schedule is related to her job. This may be difficult when the job in question is a professional position that can be performed at any time. Similarly, while refusing to grant any sick leave in the first year may save money, the employer may have difficulty establishing that attendance every single working day is an essential job function.

Plaintiffs can also make out a discrimination case by establishing the availability of an alternative employment practice that will serve the employer's needs with less impact. If, for example, the employer assigns light duty by seniority, rather than on the basis of need, an employee could assert that light duty allocated on the basis of need, first come, first served, would get all the necessary

148. 812 F. Supp. 1183 (M.D. Ala. 1993).

149. 42 U.S.C. 2000e-2(k)(1)(A)(i).

jobs done without the adverse impact on women caused by the seniority system. The same could be said for assigning employees to the day shift. With respect to bathroom and eating breaks, an employee could suggest numerous short breaks in place of one long lunch break as an alternative policy designed to accommodate the needs of pregnant women.

VI. ACCOMMODATION UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Some of the accommodation problems faced by pregnant women are addressed by the Family and Medical Leave Act of 1993 (FMLA).¹⁵⁰ The FMLA requires employers to provide up to twelve weeks of unpaid leave for a variety of purposes, including the birth or adoption of a child.¹⁵¹ The Department of Labor (DOL) recognizes that circumstances may require that FMLA leave for the birth of a child, or for placement for adoption or foster care, be taken prior to the actual birth or placement.¹⁵² The DOL has indicated, however, that "[a]n employee's entitlement to [FMLA] leave for birth or placement [of a child] expires at the end of the 12-month period [after the] birth or placement."¹⁵³

The FMLA reduces, but by no means eliminates, the importance of the PDA for pregnant workers. While it provides an explicit right to one type of accommodation, it does not address other accommodations that a pregnant employee might need. Further, because the leave that it requires is unpaid, it does little to address the problems faced by single pregnant mothers. A single pregnant woman working in a job that is hazardous to her health or to the health of her offspring must decide whether to leave work without pay during part of her pregnancy to try to avoid harm to herself or her offspring or to take the leave after the birth of the child so that she can stay home and nurse and care for the baby. Even if she takes the entire twelve weeks during pregnancy, that may not be a sufficient amount of time to protect both her health and the health of her offspring. Her offspring is most at risk from some workplace hazards during the first three months of pregnancy.

150. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (Supp. V 1993)).

151. 29 U.S.C. § 2612; *see generally* Department of Labor, Interim Final Rule; Request for Comments, 58 Fed. Reg. 31,794 (1993).

152. 29 C.F.R. § 825.112(c), (d) (1994).

153. *Id.* § 825.201.

The hazards associated with the mother's health, however, tend to be concentrated in the last three months of pregnancy. In any case, the leave is without pay, forcing the single pregnant woman to turn to state aid for support. Further, the FMLA applies only to employers with fifty or more employees.¹⁵⁴

Because of these coverage limitations, part-time employees, first-year employees, and employees who work for small employers are among those who are not entitled to leave under the FMLA. The exclusion of small employers is particularly important because, "according to one [EEOC] official, [pregnancy discrimination claims] are often against small firms whose policies may be more 'paternalistic' than those of major corporations."¹⁵⁵

VII. ADVISING EMPLOYERS

Employers who prefer to avoid the costs of accommodating the needs of pregnant women should be aware that this approach is not cost-free. Although employers have been reasonably successful in defending against pregnancy discrimination lawsuits,¹⁵⁶ expectations raised by the accommodation of workers under the ADA may lead to increased litigation on this issue. Furthermore, the interaction between the ADA, the FMLA, the Civil Rights Act of 1991, and the PDA may lead to more success in the courtroom for pregnant females who sue. In some jurisdictions, state law requires employers to provide some workplace accommodation.¹⁵⁷

With respect to accommodations designed to protect the unborn children of pregnant workers, absent further legislation, employers have a somewhat better chance of defending their right to resist such accommodations. There may, however, be pragmatic reasons

154. The Department of Labor uses the following criteria to determine which employees are eligible to take leave under the FMLA:

To be "eligible," an employee must have worked for the employer: (1) For at least 12 months and (2) for at least 1,250 hours during the year preceding the start of the leave, and (3) be employed at a worksite where the employer employs at least 50 employees within a 75-mile radius. . . .

It is conceivable that a covered employer, employing more than 50 employees at multiple, geographically dispersed worksites, might have no eligible employees if fewer than 50 employees are working within 75 miles of each worksite.

58 Fed. Reg. 31,798 (1993).

155. *Complaints of Pregnancy Discrimination Persist Thirteen Years After Passage of Pregnancy Bias Act*, 137 Lab. Rel. Rep. (BNA) No. 11, at 331 (July 15, 1991).

156. See *supra* part III.

157. See statutes cited *supra* note 7.

why employers should consider granting such requests. The PDA, as interpreted by the Supreme Court in *Johnson Controls*, prohibits employers from barring pregnant women from toxic environments. Employers seeking to limit liability for damages to the unborn children of their pregnant workers, may wish to secure that protection by granting women the right to be reassigned away from dangerous environments during their pregnancy.¹⁵⁸ Many pregnant workers when faced with the choice of losing their job or exposing their unborn child to risks will choose to leave their job. A policy of not accommodating women in this respect will therefore protect the employer to some degree from tort lawsuits. Prior caselaw suggests that a lawsuit by the discharged pregnant female under the PDA is unlikely to succeed as well. However, the best approach for the employer may be to allow the accommodation. First, this approach protects the employer from defending against a PDA lawsuit by a discharged female. Second, more women are likely to accept voluntary reassignment than the complete loss of their job, thus reducing the employer's exposure to tort suits over fetal harm.

Finally, employers may be concerned that by accommodating the needs of pregnant employees they may face reverse discrimination lawsuits by other employees who are not similarly accommodated. The most obvious way to protect against such lawsuits is to provide the same accommodations to individuals who are disabled in the same way that pregnant women are disabled. But if the work environment makes it very costly to accommodate all employees in the same way, employers should be aware that the Supreme Court, in *California Federal Savings & Loan Association v. Guerra*,¹⁵⁹ indicated that preferential treatment of pregnant individuals probably does not violate the Pregnancy Discrimination Act. The Court stated:

[W]e agree with the Court of Appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise."

...

It is hardly conceivable that Congress would have extensively

158. See Susan S. Grover, *Employer's Fetal Injury Quandary After Johnson Controls*, 81 Ky. L.J. 639 (1993) (discussing employers' limited options to avoid both tort and discrimination liability after *Johnson Controls*).

159. 479 U.S. 272 (1987).

discussed only its intent not to *require* preferential treatment if in fact it had intended to prohibit such treatment.¹⁶⁰

Again, the safest approach is to accommodate all similarly situated employees equally, but the Court in *Guerra* appears to permit employers to voluntarily accommodate the needs of pregnant employees.

VIII. CONCLUSION

Failing to accommodate pregnancy in the workplace exposes seventeen to twenty percent of all pregnant women each year to health hazards including back injuries, muscle fatigue, falls, torn ligaments, strained muscles, swollen ankles, varicose veins, nausea, toxic substances, and general discomfort. Failing to accommodate pregnancy in the workplace exposes pregnant workers unborn offspring to workplace health hazards, including exposure to ionizing radiation, infection, toxic gases and solvents, and low birth weight due to physical stress. Single women who choose to avoid those hazards by leaving their employment face a high probability of living in poverty and exposing their children to inadequate prenatal care, poor nutrition, substandard shelter, health care and educational resources, drugs, crime, toxic chemicals, and pollution. Nearly thirty percent of pregnant women are either unmarried or separated.

A variety of legislative responses are available to address the problems posed by workplace hazards and single parenthood. Unless and until additional legislation is enacted, accommodating pregnancy in the workplace is one approach to improving the health of pregnant workers and their offspring and improving the employment opportunities of single pregnant women.

The Pregnancy Discrimination Act together with the Americans with Disabilities Act should be interpreted to require employers to accommodate pregnancy in the workplace. Employers should be required to accommodate pregnant women in the same way that the ADA requires employers to accommodate individuals with disabilities. In addition, disparate impact analysis should be applied under the Pregnancy Discrimination Act to prohibit employers from applying neutral employment rules that preclude accommodating pregnancy in the workplace. Statistics demonstrate that women, as

160. *Id.* at 285-87 (emphasis added).

a group, consistently suffer more days of illness or injury on the job than men. As a result, workplace rules that preclude accommodating pregnancy can be shown to have a disparate impact on women.

Accommodating pregnancy in the workplace implicates women's equal employment rights, but the policy justifications for imposing an obligation to accommodate pregnancy are not primarily based on equal employment opportunities for women. Pregnancy should be accommodated to promote the health and welfare of developing offspring and the children of pregnant single females.