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DADS ARE PARENTS, TOO: WHY AMENDING THE PREGNANCY DISCRIMINATION ACT IS NECESSARY FOR COURTS TO DETERMINE IF A PARENTAL LEAVE POLICY VIOLATES TITLE VII

ABSTRACT

To attract millennials desiring a work-life balance, large companies have begun to offer new parent leave to both male and female employees and commonly offer longer leave to women than men. Although a company may offer pregnancy disability leave to women without offering similar leave to men, if the company classifies the leave as parental bonding leave, it must be offered equally. If it is not, as highlighted by recent lawsuits against JP Morgan and Estée Lauder, a Title VII claim can arise. Historically, courts have had difficulty deciding if such a policy does in fact violate Title VII, because local courts, the United States Supreme Court, and the EEOC offer conflicting views on how long pregnancy disability leave may be before it becomes parental bonding leave. This Note calls on Congress to amend the Pregnancy Discrimination Act to clearly define the length of pregnancy leave and parental leave that employers must offer to comply with Title VII.

INTRODUCTION

The United States is the only industrialized country that does not require employers to offer paid parental leave.¹ Instead, employers must create their own parental leave policies.² For nearly four decades, the lack of clear federal guidelines for parental leave policies has caused employers to struggle to create competitive leave policies that comply with Title VII of the Civil Rights Act of 1964.³ Title VII⁴ was enacted to eradicate employment discrimination and, consequently, proscribes discriminatory conduct that would deprive an employee of equal employment opportunities

1. See Rebecca A. Brusca, *A Comprehensive Analysis of the Effects of Paid Parental Leave in the U.S.*, 19 DUQ. BUS. L. J. 75, 75 (2017); Sara Cohen, Note, *Have Your Cake and Eat It Too: How Paid Maternity Leave in the United States Could End the Choice Between Career & Motherhood*, 36 WOMAN'S RIGHTS L. REP. 1, 1 (2014); see also Samantha Jean Quan Forsyth, Note, *Bringing Up Baby Under the FMLA: How the Federal Unpaid Maternity Leave System in the United States Will Not Carry to Term*, 24 WM. & MARY J. WOMEN & L. 380, 380 (2018) (“Only two of the 185 countries and territories studied by the International Labour Organization do not have [paid maternity leave]: Papua New Guinea and the United States of America.”).

2. See Brusca, *supra* note 1, at 75.

3. See Christen Linke Young, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 188 YALE L.J. 1182, 1197, 1184, 1210 (2009).

4. Throughout this Note, “Title VII” refers to Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (2012).

and benefits.⁵ Thus, although the United States does not require employers to offer parental leave, if an employer does offer this benefit, it must be offered equally to men and women.⁶ In recent years, some employers have begun to offer parents substantial leave after the birth of a child. Policies vary by employer and range from a few weeks to a few months.⁷ Regardless of length, however, almost all policies offer longer leave to mothers than fathers.⁸

As highlighted by lawsuits brought by the Equal Employment Opportunity Commission (EEOC),⁹ against JP Morgan¹⁰ and Estée Lauder¹¹ in Summer 2017, employers are increasingly uncertain as to whether parental leave policies that offer longer leave to mothers than fathers violate Title VII. Both of these companies attempted to comply with Title VII by offering seemingly gender-neutral parental leave policies that determined leave time not by sex, but rather by the parent's classification as either the "primary" or "secondary" caregiver.¹² In both cases, the plaintiffs alleged that the leave policies violated Title VII because, under the policies, women were automatically given longer leave than men since they were presumed to be their child's primary caregiver.¹³

It is well established by federal courts that employers may offer leave to a mother after the birth of a child without offering leave to a father, so long

5. Anastasia Niedrich, *Removing Categorical Constraints on Equal Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 26, 27 (2011).

6. See Young, *supra* note 3, at 1210.

7. Rachel Gillet, *19 Companies That Offer Some of the Best Parental Leave Policies in America*, BUS. INSIDER (May 7, 2016), <https://www.businessinsider.com/the-best-parental-leave-policies-in-america-2016-5>.

8. See *id.*

9. The EEOC is the government administrative agency responsible for investigating employment discrimination. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Nov. 9, 2018).

10. See *EEOC Charge of Discrimination by Derek Rotondo*, ACLU, at 1 (June 14, 2017), <https://www.aclu.org/legal-document/eeoc-charge-derek-rotondo> (last visited Oct. 27, 2018) [hereinafter *Rotondo v. JP Morgan Charge by Petitioner*].

11. Charge by Petitioner at 6, *E.E.O.C. v. Estee Lauder*, No. 2:17-cv-03897-JP, 2017 WL 3730882, at *1–2, *9 (E.D. Pa. Aug. 30, 2017) [hereinafter *EEOC v. Estee Lauder Charge by Petitioner*]. On July 17, 2018 Estée Lauder entered a settlement in this matter for \$1.1 million. *Id.* In addition to the cash settlement, the settlement decree requires Estée Lauder to "administer parental leave and related return-to-work benefits in a manner that ensures equal benefits for male and female employees and utilizes sex-neutral criteria, requirements, and processes." *Id.* Estée Lauder met this requirement prior to the settlement decree by implementing new parental leave standards. The company now provides all eligible employees, regardless of gender, with twenty weeks of child bonding time and six weeks of flexible work schedule once returning to work. *Id.* For biological mothers, this time is additional to medical leave associated with childbirth. See Press Release, EEOC, *Estée Lauder to Pay \$1.1 Million to Settle EEOC Class Sex Discrimination Lawsuit* (July 17, 2018), <https://www1.eeoc.gov/eeoc/newsroom/release/7-17-18c.cfm>.

12. *Rotondo v. JP Morgan Charge by Petitioner*, at 1; *EEOC v. Estee Lauder Charge by Petitioner*, *supra* note 11, at 6.

13. *Rotondo v. JP Morgan Charge by Petitioner*, at 1; *EEOC v. Estee Lauder Charge by Petitioner*, *supra* note 11, at 6.

as the leave is classified as pregnancy disability leave.¹⁴ Courts have made clear, however, that there is a distinction between pregnancy disability leave, which may be offered to a woman during pregnancy and after birth, and generic parental leave, which can be given to both parents after birth.¹⁵ If an employer chooses to classify leave as parental leave, the leave time must be offered equally to both parents.¹⁶ This distinction is the key issue in the cases brought against JP Morgan and Estée Lauder.¹⁷ At first, it would seem that employers desiring to offer longer leave to female employees than male employees would simply need to classify the leave given to women as pregnancy disability leave to comply with Title VII since pregnancy disability leave can be given to women without offering any leave to men. Unfortunately, creating such a policy is difficult because there is no clear federal standard defining the acceptable length of pregnancy disability leave.¹⁸ The purpose of pregnancy disability leave, however, is to take into account the disability associated with pregnancy.¹⁹ Therefore, a woman cannot be given pregnancy disability leave when she is no longer disabled from pregnancy. There is currently no standard stating how long this disability period is, and consequentially, at what point a woman is no longer taking disability leave to recover from birth. In fact, not only is there no standard, but the Supreme Court,²⁰ circuit courts,²¹ and EEOC²² offer conflicting opinions as to what the acceptable length of pregnancy disability leave should be, ranging from six weeks to one year.²³ Without a clear national standard, employers are unable to determine the length of pregnancy disability leave they can offer a female employee before they

14. See *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 742 (S.D. Iowa 2004) (noting that federal courts “give great deference . . . to EEOC regulations issued in furtherance of Title VII” and, “[a]ccording to EEOC interpretations, Title VII prohibits covered employers from providing any caregiving leave to mothers if the employer does not also provide commensurate leave to fathers [A]n employer may provide pregnancy disability leave to mothers without providing leave to fathers if mothers are entitled to leave pursuant to their disability, not their sex. Therefore . . . if an employer provides caregiving leave to mothers, it must offer equal caregiving leave to fathers.”).

15. See *id.* at 744.

16. *Schafer*, 903 F.2d at 250.

17. See *Rotondo v. JP Morgan Charge by Petitioner*, at 1; *EEOC v. Estee Lauder Charge by Petitioner*, *supra* note 11, at 9.

18. Employers in the United States are not required to offer pregnancy disability leave. See *Johnson*, 408 F. Supp. 2d at 742.

19. See *id.*

20. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 279 (1987).

21. *Johnson*, 408 F. Supp. 2d at 741.

22. *Id.* at 742.

23. See *id.* at 741. Traditionally, the medical community has recommended that a woman’s body needs at least six weeks to recover from childbirth, as this is the time it takes her reproductive organs to return to their non-pregnant state. See Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, 4 ANNALS FAM. MED. 159, 159 (2006).

must also offer comparable parental leave to men.²⁴ Consequently, companies struggle to create policies that comply with Title VII.²⁵

This Note argues that two levels of change are necessary for companies like JP Morgan and Estée Lauder to create parental leave policies that certainly will comply with Title VII. First, Congress must amend the Pregnancy Discrimination Act (PDA) codified in Title VII to establish a clear national standard that states the length of acceptable pregnancy disability leave employers may offer new mothers. Second, employers must eliminate parental leave policies that distinguish between primary and secondary caregivers and that automatically consider women to be the primary caregiver. Employers that have such a policy should replace it with a policy that offers longer pregnancy disability leave to women and equal parental leave time to men.

Part I of this Note will discuss the history of parental leave policies in the United States and federal laws that address these policies, specifically the formation of the landmark PDA.²⁶ Part II discusses the ways an employer may violate Title VII by offering or not offering certain parental leave benefits. Part III analyzes the ways employers may offer parental leave policies that include a longer disability leave period to new mothers and still comply with Title VII. Part IV argues that amending the PDA is the only way to clarify the length of required pregnancy disability leave. Part V address why current federal legislation, such as the Family Medical Leave Act, is inadequate to address this problem. Part VI addresses the current state of maternity leave laws. Finally, Part VII addresses the reasons employers currently do not offer parental leave policies that comply with Title VII and calls on Congress to amend the PDA to clearly define the length of pregnancy disability leave and parental leave that employers must offer to comply with Title VII.

I. HISTORY OF PARENTAL LEAVE LAWS

Passed in 1964, the Civil Rights Act (the Act) contains eleven titles that protect individuals from various discrimination based on race, color, religion, sex, or national origin.²⁷ Title VII of the Act specifically protects individuals from employment discrimination. Section 703(a) provides broad protections against discrimination in all aspects of employment: “It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges

24. *See id.* at 742 (noting the conflicting viewpoints of acceptable disability leave length offered by the Supreme Court, lower federal courts, and the EEOC).

25. *See id.* at 745.

26. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012).

27. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 126 (Robert C. Clark et al. eds., 8th ed. 2015).

of employment, because of such individual's race, color, religion, sex or national origin"²⁸

The constitutionality of the Act was challenged almost immediately after it passed. In *Heart of Atlanta Motel, Inc. v. United States*, the United States Supreme Court held that Congress had the authority to enact the Civil Rights Act by the powers granted to it by the Commerce Clause and the Fourteenth Amendment.²⁹ *Heart of Atlanta* was one of the first cases to challenge the Act and specifically challenged Title II, which grants individuals the right to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of accommodation . . . without discrimination on the ground of race, color, religion, or national origin."³⁰ In *Heart of Atlanta*, a motel in Georgia refused to rent rooms to African American customers.³¹ The motel was located near a major highway, advertised on over fifty billboards, and also advertised in other states.³² The plaintiff argued that the Act deprived the hotel of its liberty to conduct business as it wished because the hotel was not free to choose its own customers, and therefore, the Act forced the motel into involuntary servitude.³³ Therefore, the plaintiff argued, the Act exceeded the authority of Congress and was unconstitutional.³⁴ The Supreme Court disagreed.³⁵ The Court held that the determinative test of whether Congress may regulate an activity under the Commerce Clause is simply "whether the activity sought to be regulated is commerce which concerns more states than one and has a real and substantial relation to the national interest."³⁶ Under this test, the Court held that Congress had a valid interest in regulating hospitality segregation because it was in the national interest to ensure that interstate travelers could find lodging.³⁷ The Court explained that studies by Congress had found that African Americans frequently traveled between states, and the inability to secure accommodations prevented them from easily traveling.³⁸ Congressional intervention, therefore, was necessary to allow them to easily migrate between states.³⁹

Although *Heart of Atlanta Motel* addressed Title II specifically, it nonetheless provided protections to the other sections of the Act, including

28. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

29. ROTHSTEIN ET AL., *supra* note 27, at 127; *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

30. 42 U.S.C. § 2000a.

31. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

32. *Id.*

33. *Id.* at 244.

34. *Id.* at 243.

35. *Id.* at 261–62.

36. *Id.* at 255.

37. *Id.* at 261.

38. *Id.* at 252.

39. *Id.* at 261.

Title VII, because Americans often travel between states for employment purposes.⁴⁰ Similar to the hotel that wanted the right to choose its customers from the array of interstate travelers, employers want the freedom to choose their own employees.⁴¹ However, unlike the Supreme Court's willingness to step in and require a motel to serve certain customers that it did not want to serve, legislators and judges are more "reluctant to infringe on the employer's managerial prerogatives" in regards to the employer's hiring and firing practices.⁴² Therefore, it is important to note that Title VII does not require employers to hire anyone.⁴³ Instead, the Act plays a negative role in employee selection. That is, employers may hire employees based on whatever factors they choose; it only prohibits employer action that is improperly motivated by a discriminatory intent or has unacceptable discriminatory consequences.⁴⁴

The Act has been amended four times.⁴⁵ First, in 1972 it was amended to increase the EEOC's enforcement power; second, in 1978 it was amended to include the PDA; third, in 1991, it was amended to overrule a Supreme Court decision clarifying the burden of proof required in a claim and adding compensatory and punitive damages as forms of relief; and finally, in 2009, it was amended to expand a plaintiff's ability to recover for pay discrimination.⁴⁶ Most important to this Note is the 1978 amendment adding the PDA.⁴⁷

The PDA was passed in response to the public outrage at the Supreme Court's holdings in *Geduldig v. Aiello*⁴⁸ and *General Electric Co. v. Gilbert*.⁴⁹ *Geduldig* challenged the constitutionality of the California disability insurance program that excluded disabilities attributed to pregnancy from disability coverage.⁵⁰ The suit was brought by four women who were told they could not receive coverage under the program.⁵¹ Three of the women had experienced complications during pregnancy and childbirth, and one was classified as having a normal pregnancy and childbirth.⁵² Under the program, California workers contributed a portion of each paycheck to the state disability fund.⁵³ Employees were told that they could receive a "weekly benefit amount" if they became temporarily

40. ROTHSTEIN ET AL., *supra* note 27, at 127.

41. *Id.*

42. *Id.* at 126.

43. *Id.*

44. *Id.*

45. *Id.* at 128.

46. *Id.*

47. Pregnancy Discrimination Act of 1978, 42 U.S.C § 2000e (2012).

48. *Geduldig v. Aiello*, 417 U.S. 484, 484 (1974).

49. *See Young, supra* note 3, at 1212–13; ROTHSTEIN ET AL., *supra* note 27, at 183.

50. *See Geduldig*, 417 U.S. at 488–89.

51. *Id.* at 489.

52. *Id.* at 489.

53. *Id.* at 487–88.

disabled from working and their illness or injury was not covered by workmen's compensation.⁵⁴ However, Section 2626 of the Unemployment Insurance Code specifically excluded pregnancy-related disabilities from coverage.⁵⁵ The Code stated, "[i]n no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."⁵⁶ The United States Court for the Northern District of California held that the Code violated the Equal Protection Clause because the Code purposefully excluded a medical condition that could apply only to women, and there was no "rational and substantial relationship to a legitimate state purpose."⁵⁷ However, the United States Supreme Court reversed.⁵⁸ Ten days before the appellate court ruling in *Geduldig*, California's highest court had held that disability relating to complications of pregnancy and childbirth may be covered by the program.⁵⁹ Therefore, the only question the United States Supreme Court considered was if a woman who had experienced normal pregnancy and childbirth without complications could receive disability benefits from the program.⁶⁰ The Court upheld the prohibition against women with normal pregnancy because the State had the legitimate interest of maintaining the program.⁶¹ Specifically, the Court reasoned that if the program had to accommodate a disability as common as a pregnancy, it would be "hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees" and consequently, the program would no longer be able to exist.⁶²

Similarly, in *General Electric*, the Supreme Court considered whether an employer's benefit plan that offered nonoccupational accident and sickness benefits, but excluded pregnancy, violated Title VII.⁶³ Both the district court and the appellate court found that it did, reasoning that pregnancy could only affect women, and therefore, violated Section 703(a)(1) of Title VII.⁶⁴ The Supreme Court relied on its analysis in *Geduldig*, and once again held that a policy that excludes pregnancy is not sex discrimination under Title VII.⁶⁵ Following its reasoning in *Geduldig*, the Court reasoned that the policy was not discriminatory because it "does

54. *Id.*

55. *Id.* at 488–89.

56. *Id.* at 489.

57. *Id.* at 490.

58. *Id.* at 497.

59. *Id.* at 490; *see generally* Rentzer v. Unemployment Insurance Appeal Board, 32 Cal. App. 3d 604 (1973).

60. *Geduldig*, 417 U.S. at 491–92.

61. *See id.* at 495–96.

62. *Id.* at 496.

63. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 127 (1976).

64. *Id.* at 125, 127.

65. *Id.* at 136.

not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.”⁶⁶ Furthermore, the Court held that when Congress passed Title VII, it knew pregnancy was a condition that only affects women but chose not to list pregnancy as a protected class.⁶⁷ Therefore, Congress did not intend pregnant women to be a class protected against employment discrimination when it passed Title VII.⁶⁸

The dissent in *General Electric* disagreed that pregnancy was merely a nondiscriminatory medical condition, because pregnancy is a condition that can only affect women.⁶⁹ Specifically, Justice Stevens reasoned that the policy did discriminate on the basis of sex by providing protection for men in all categories of risk that they may experience, but only gave women partial protection against the medical conditions that they may experience.⁷⁰ Thus, Justice Stevens reasoned that the employer had created a condition where employment of females was less favorable than the employment of males, which was exactly a situation Title VII sought to prevent.⁷¹

Congress adamantly opposed the reasoning and holding of the majority in *General Electric*, and determined a bill would be necessary to “re-establish the principles of Title VII law as they had been understood prior to the [*General Electric*] decision.”⁷² Both the House Report and Senate Report quoted passages from the dissenting opinion in *General Electric* and stated that these opinions best expressed the “correct” meaning of Title VII.⁷³ During debates, proponents of the legislation stressed that Congress had always intended Title VII to protect all individuals from discrimination, including pregnant workers.⁷⁴

To protect pregnant workers, Congress passed the PDA in 1978.⁷⁵ Instead of providing a different cause of action for pregnancy discrimination claims, the PDA incorporated pregnancy, childbirth, and related medical conditions into the Title VII “sex discrimination” definition section, thus providing pregnant employees with the same protections afforded to the other classes under Title VII.⁷⁶ The definition of “sex discrimination” now reads:

[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related

66. *Id.* at 134.

67. *Id.*

68. *Id.* at 134–35.

69. *Id.* at 162 (Stevens, J. dissenting).

70. *Id.*

71. *Id.*

72. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 (1983).

73. *Id.* at 678.

74. *Id.* at 681.

75. Saur M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L.J. 187, 188 (2016).

76. *Id.* at 205.

medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .”⁷⁷

Consequently, the PDA supersedes *Geduldig* and *General Electric* by providing protection for pregnant workers in two ways.⁷⁸ First, the Act expands the definition of sex discrimination to include “discrimination on the basis of sex, pregnancy, childbirth, or related medical conditions.”⁷⁹ Second, the PDA requires employers to treat pregnant employees the same as those who are not pregnant, but are similarly unable to work.⁸⁰ This includes the right to fringe benefits, such as disability leave.⁸¹ Therefore, if an employer offers paid disability to recover from other non-pregnancy-related illnesses and injuries, it must also offer paid disability leave to women recovering from childbirth.⁸²

II. TITLE VII VIOLATIONS

For an employment practice to violate Title VII, the employee alleging discrimination must show that the policy is deliberately discriminatory, or that a facially neutral policy is discriminatory in practice.⁸³ The first category of claims, known as discriminatory intent claims, focus on the intent of the employer.⁸⁴ Here, a claimant must show that an employer implemented a policy for the purpose of discriminating against a protected class.⁸⁵ Because gender is a protected class under Title VII, an employment policy may violate Title VII if it offers one parental leave policy specifically for women and another specifically for men.⁸⁶ In order to make a successful claim that an employer’s parental leave policies violate Title VII under this approach, the employee must show that the difference in

77. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

78. Matambanadzo, *supra* note 75, at 205.

79. *Id.* at 205; 42 U.S.C. § 2000e.

80. *See* Matambanadzo, *supra* note 75, at 205.

81. *See id.*

82. *See id.*

83. *See* ROTHSTEIN, *supra* note 27, at 132; Schafer v. Bd. of Public Educ. of School Dist., 903 F.2d 243, 247 (3d Cir. 1990); Lorraine Hafer O’Hara, Comment, *An Overview of Federal and State Protections for Pregnant Workers*, 56 U. CIN. L. REV. 757, 763 (1987).

84. ROTHSTEIN, *supra* note 27, at 132.

85. *Id.* at 132.

86. *See* Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 742 (S.D. Iowa 2004); *see also* Young, *supra* note 3, at 1224 (noting that an employer may have a parental leave policy that “arguably violate[s] Title VII” when it “offer[s] an extended disability leave that effectively provides a childrearing benefit to women alone, or [disguises] gender bias in a primary caregiver leave policy.”); Amanda Wingfield Goldman, *Insights on Avoiding the “Parental Leave” Trap*, LAW360 (Jul. 3, 2017, 12:47 PM), <https://www.law360.com/articles/938907> (“Current EEOC guidance and jurisprudence support a policy that any leave offered beyond the time to recover from pregnancy/childbirth must be equally offered to men and women.”).

policy offerings to men and women was a pretext for sex discrimination and the result of a purely discriminatory motive.⁸⁷ The Supreme Court has been reluctant to find that employers violated Title VII under this approach.⁸⁸

The second category, known as disparate impact claims, focuses on the consequences of an employer's facially neutral policy.⁸⁹ This category of claims focuses on "the consequences of employment practices and not simply the motivation behind them."⁹⁰ Under this approach, the employee establishes a prima facie discrimination case by "showing that an employer's practice adversely affects a protected class to a greater degree than other persons."⁹¹ For example, a parental leave policy, may be facially neutral because it does not state that one leave policy is specifically for women and another specifically for men. The policy may nonetheless may be found to be discriminatory if it causes one gender to be adversely protected by the leave policies but not the other.⁹² The specific facts of a case will determine if a plaintiff has a discriminatory intent or adverse impact claim, although, as previously mentioned, plaintiffs are more likely to succeed on an adverse impact claim than a discriminatory intent claim.⁹³

After the PDA was passed, employers immediately struggled to create pregnancy and parental leave policies that complied with Title VII.⁹⁴ Interestingly, one of the first plaintiffs to argue that their employer's benefit plan was discriminatory under the amended Title VII was a man.⁹⁵ In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,⁹⁶ one of the only cases to address the PDA,⁹⁷ an employer amended its parental leave policy on the effective date of the PDA in attempt to comply with the new Title VII requirements.⁹⁸ Under the new policy, female employees would not receive the same length of hospitalization benefits for pregnancy-related disabilities as male employees received for non-pregnancy-related disabilities.⁹⁹ However, the spouses of male employees were not entitled to this policy change.¹⁰⁰ Therefore, under the new plan, all covered males, whether employees or dependents, were treated the same, but female

87. See O'Hara, *supra* note 83, at 763–64.

88. *Id.* at 764.

89. *Id.* at 765.

90. *Id.*

91. *Id.*

92. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that a policy that is not facially discriminatory, but discriminates in practice, violates Title VII).

93. See O'Hara, *supra* note 83, at 763.

94. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 671 (1983) (noting an instance where a company amended its parental leave policies immediately after the PDA was passed, but its policies were still found to be in violation of the statute).

95. *Id.*

96. *Id.* at 671.

97. See O'Hara, *supra* note 83, at 767.

98. See *Newport News Shipbuilding*, 682 F.2d at 670.

99. *Id.* at 671–72.

100. *Id.*

dependents of male employees were treated differently from female employees.¹⁰¹ A male employee filed a Title VII discrimination charge with the EEOC, alleging his employer's benefit plan violated Title VII because it covered all hospitalization stays of dependents of female employees, but not all dependents of male employees.¹⁰² The United States District Court for the Eastern District of Virginia upheld the employer's policy, reasoning that the PDA intended to only protect female employees, not spouses of male employees.¹⁰³ Both the United States Court of Appeals for the Fourth Circuit¹⁰⁴ and the Supreme Court disagreed.¹⁰⁵ The Supreme Court explained that Congress did not erase the original prohibition against sex discrimination by amending Title VII to protect pregnant workers.¹⁰⁶ Although the revised language of the statute specifically protected female workers, Congress did not intend to mean men could not be discriminated against on the basis of their sex.¹⁰⁷ The Supreme Court held that the benefit plan violated Title VII because "[t]he sex of the spouse is always the opposite of the sex of the employee,¹⁰⁸ it follows inexorably that discrimination against a female spouse in the provision of fringe benefits is also discrimination against male employees."¹⁰⁹ This case is important to our current analysis because it established that the PDA also affects a men's right to fringe benefits¹¹⁰ related to pregnancy. Consequently, since parental leave is a fringe benefit, this case also affects their rights to equal parental leave.¹¹¹

Nearly thirty years after *Newport*, employers continue to struggle to create fringe benefit policies that comply with Title VII. Great uncertainty currently exists regarding the length of leave time employers must give new parents to comply with Title VII, as evidenced by the JP Morgan¹¹² and Estée Lauder lawsuits.¹¹³ Employers traditionally categorize leave taken

101. *Id.* at 672.

102. *Id.* at 674.

103. *Id.*

104. *Id.* at 675.

105. *Id.* at 676.

106. *Id.* at 685.

107. *Id.* at 684.

108. It is no longer true that an individual's spouse is always the opposite gender. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (finding that same-sex couples have a constitutional right to marry).

109. *Newport News Shipbuilding*, 682 F.2d at 684.

110. Christy Hopkins, *Fringe Benefits: What They Are and How They Work*, FIT SMALL BUS., May 8, 2017, <https://fitsmallbusiness.com/fringe-benefits/>.

111. *See* Barbara Gault et al., *Paid Parental Leave in the United States: What the Data Tell Us About Access, Usage and Economic and Health Benefits*, INST. FOR WOMEN'S POL'Y RES. 2 (2014), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2608&context=key_workplace.

112. *Rotondo v. JP Morgan Charge by Petitioner*, at 1.

113. *EEOC v. Estee Lauder Charge by Petitioner*, *supra* note 11, at 6.

after the birth of a child in two ways: parental leave and disability leave.¹¹⁴ In general terms, parental leave, sometimes referenced in employer policies as caregiver leave, encompasses the time a new parent spends bonding and caring for their child.¹¹⁵ Therefore, both men and women can take parental leave.¹¹⁶ Specifically, in the lawsuit filed against JP Morgan in Summer 2017, the plaintiff claimed that his employer's policies violated Title VII because female employees were given more *parental leave* than men.¹¹⁷ In contrast, disability leave focuses only on the time a woman spends physically recovering from pregnancy and childbirth.¹¹⁸ Accordingly, only a woman who has given birth can take pregnancy-related disability leave.¹¹⁹ One of the claims by the plaintiff in *Estée Lauder* was that his employer gave excessive disability leave to women by providing medical leave and "transition back to work leave" in addition to already giving women extended parental leave.¹²⁰

III. PRIMARY CAREGIVER LEAVE THAT INCLUDES PREGNANCY-RELATED DISABILITY LEAVE

A leave policy that includes both pregnancy disability leave and caregiving leave, and thus gives longer leave time to women than men, may be permissible.¹²¹ Employers are permitted to give new mothers longer *disability leave* to recover from pregnancy and childbirth.¹²² Any leave beyond this disability leave is considered parental leave and must be offered equally to men and women.¹²³ If, however, an employer offers a policy in which women receive both disability leave and parental leave, the employer may be susceptible to a Title VII suit, as evidenced in *Estée Lauder* and *JP Morgan* lawsuits. Currently, there is currently no federal guideline or standard that designates how many weeks of leave an employer may give for pregnancy-related disability.¹²⁴ This lack of a standard makes it difficult

114. See *Schafer v. Board of Public Educ. of School Dist.*, 903 F.2d 243, 248 (1990) (analyzing the difference between parental leave and disability leave policies).

115. Young, *supra* note 3, at 1191.

116. *Id.*

117. *Charge Alleges Bank Broke Federal Law By Denying Fathers the Same Amount of Leave Time As Mothers*, ACLU (June 17, 2017), <https://www.aclu.org/news/fathers-denied-paid-parental-leave-jp-morgan-chase-file-sex-discrimination-complaint-eoc>.

118. Howard R. Flaxman, *Family vs Profession? Responding to Childbirth and Parental Leave Requests*, 17 LAW PRAC. MGMT 31, 31 (1991) ("Pregnancy disability leave is a medical leave given to female employees who cannot work because of pregnancy or pregnancy-related conditions."); see also Young, *supra* note 3, at 1220 ("employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy.").

119. See Flaxman, *supra* note 118, at 31.

120. *EEOC v. Estee Lauder Charge by Petitioner*, *supra* note 11, at 6.

121. See *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 742 (S.D. Iowa 2004).

122. *Id.*

123. *Id.*

124. *Id.* at 742; see also Brusca, *supra* note 1, at 78.

for courts to determine if a parental leave policy that includes disability leave in fact violates Title VII by not giving equal leave time to men.¹²⁵ It makes it equally difficult for employers, such as Estée Lauder, to create policies that align with Title VII. Therefore, Congress must amend Title VII, specifically the PDA, to create a pregnancy disability leave standard. This standard must clearly state how many weeks of disability leave an employer may give a woman who has given birth. This way, courts and employers will know that any leave beyond this standard disability length is parental leave and thus must be offered equally to men and women.

Absent a clear federal statute, the Supreme Court, federal courts, and the EEOC continue to disagree on the appropriate length of pregnancy disability leave an employer may give a woman.¹²⁶ This is important, because employers are allowed to give paid disability leave to mothers after the birth of a child, but not fathers, and still be in compliance with Title VII.¹²⁷ According to the EEOC's interpretation of Title VII, the law prohibits employers from "providing any caregiving leave to mothers if the employer does not also provide commensurate leave to fathers."¹²⁸ Under this interpretation, the only way an employer can give longer paid leave to mothers after the birth of a child, but not fathers, is through disability leave.¹²⁹ Any leave beyond this disability leave period must be offered equally to mothers and fathers.¹³⁰ Thus, a standard disability leave period length is necessary to determine when disability leave ends and parental leave begins.¹³¹

It is difficult for employers to create and enforce policies that abide by these requirements when they do not know the acceptable length of disability leave they may provide a female employee who has recently given birth.¹³² In *California Federal Sav. & Loan v. Guerra*,¹³³ the Supreme Court upheld a California law requiring employers to provide female employees with an unpaid pregnancy leave for up to four months and then reinstate an employee returning from such pregnancy leave unless the job is no longer available due to business necessity, and if the same job is not available, the employer must make a good faith effort to place the employee in a substantially similar job.¹³⁴ In that case, a loan association allowed employees to take disability leave for a variety of reasons, including

125. *Johnson*, 408 F. Supp. 2d at 742 (noting the conflicting views of the Supreme Court, lower federal courts, and the EEOC regarding permissible pregnancy disability leave length).

126. *Johnson*, 408 F. Supp. 2d at 741.

127. *Id.* at 742.

128. *Id.* at 741; EEOC Compliance Manual, sec. 626.6.

129. *See Johnson*, 408 F. Supp. 2d at 742.

130. *See id.*

131. *See id.*

132. *Id.*

133. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

134. *Id.*

pregnancy.¹³⁵ However, the company reserved the right to terminate an employee returning from leave if her position was no longer available.¹³⁶ When a female employee attempted to return to work after taking disability leave, she was informed her job had been filled and there were no similar positions available for her to fill.¹³⁷ She sued claiming the bank violated state law because she was not reinstated, as required by the statute.¹³⁸ In its defense, the bank argued that the California state law requiring pregnancy leave violated Title VII because it granted reinstatement of women, for a condition that only women could experience, without requiring a comparable reinstatement policy for men.¹³⁹ The district court agreed, finding that the law was pre-empted by Title VII because it required sex-based “preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions.”¹⁴⁰ The Court of Appeals for the Ninth Circuit reversed, holding that the District Court’s decision that the law “discriminates against men on the basis of pregnancy defies common sense” and the Supreme Court affirmed.¹⁴¹ Specifically, the Supreme Court’s majority noted that the Court of Appeals for the Ninth Circuit stated, “the PDA is a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which it may not rise.”¹⁴² The California statute provided the baseline of acceptable disability leave, which the legislature determined was an appropriate length for a woman to recover from childbirth. However, under the Court’s reasoning, an employer may give more time than this if they wish, because this standard is just the base line. The Supreme Court, in upholding the statute, considered the “actual physical disability on account of pregnancy, childbirth, or related medical conditions” and did not consider the “archaic or stereotypical notions about pregnancy and the ability of pregnant workers.”¹⁴³ Yet, the Supreme Court failed to reveal what analysis they used to determine the “actual physical disability,” and set no guidelines for future courts to use to determine this “actual physical disability.”¹⁴⁴

Justice Stevens’s concurring opinion gave limited insight into what factors the Supreme Court used to determine the length of the “actual physical disability” a woman experiences as a result of pregnancy and childbirth.¹⁴⁵ In his opinion, Justice Stevens reasoned that preferential

135. *Id.* at 278.

136. *Id.*

137. *Id.*

138. *Id.* at 272.

139. *Id.* at 279.

140. *Id.*

141. *Id.* at 280.

142. *Id.* (citation omitted).

143. *Id.* at 290.

144. *See id.*

145. *Id.* at 293.

treatment is only permissible so long as it is consistent with the goal of Title VII.¹⁴⁶ That is, “to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.”¹⁴⁷ Following this reasoning, a policy that grants leave in excess of the actual time it takes a woman to recover from pregnancy and childbirth will not be upheld as permissible disability leave.¹⁴⁸

Although the Supreme Court in *Guerra* established that disability-related pregnancy leave of four weeks was based on the actual time of physical disability, it failed to state what an “actual” or “reasonable length of disability leave should be.”¹⁴⁹ The Court did not say how long or short a “reasonable” leave must be.¹⁵⁰ In *Schafer v. Board of Public Education*,¹⁵¹ a teacher’s collective bargaining agreement stated, “all female teachers shall be entitled to maternity leave” and also provided that female teachers could take up to one year of unpaid leave after the birth of a child “for personal reasons relating to childbearing or childrearing.”¹⁵² Similar to the court in *Guerra*, the Third Circuit considered the “actual time” of disability-related to childbirth and concluded that one year was excessive, but gave no guidance as to how it determined that this was excessive.¹⁵³

The EEOC has also failed to establish guidelines for courts or employers to use to determine the actual length of disability.¹⁵⁴ In contrast to the Supreme Court, which held in *Guerra* that pregnancy disability leave may be given preferential treatment, the EEOC takes the position that pregnancy, childbirth, and related medical conditions, “shall be treated the same as disability caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.”¹⁵⁵ This stands in direct contrast to the Court’s ruling in *Guerra*, that disability related to pregnancy may receive “preferential treatment.”¹⁵⁶

146. *Id.* at 294.

147. *Id.* (citation omitted).

148. *See id.*

149. *See id.* at 290.

150. *Id.*

151. *Schafer v. Board of Public Educ. of School Dist.*, 903 F.2d 243, 245 (1990).

152. *Id.* at 244–45.

153. *Id.* at 248.

154. *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 741–42 (S.D. Iowa 2004).

155. *Id.* at 741.

156. *Id.*

IV. THE NEED FOR A CLEAR FEDERAL GUIDELINE REGARDING APPROPRIATE PREGNANCY-RELATED DISABILITY LEAVE LENGTH

Courts have expressed confusion and frustration in trying to decide the appropriate length of pregnancy disability leave to determine if a Title VII violation has occurred.¹⁵⁷ In *Johnson v. University of Iowa*,¹⁵⁸ the court explained its difficulty in trying to decide an appropriate length of leave and if the employer's policy ultimately violated Title VII; due to the conflicting approach of the Supreme Court, circuit courts, and the EEOC.¹⁵⁹ In that case, a husband and wife were employed by the same university.¹⁶⁰ Prior to the birth of their child, both parents applied for leave.¹⁶¹ Under the university's policy, the mother was entitled to six weeks of disability leave, while the father could only take five days of caregiving leave.¹⁶² The father claimed this policy violated Title VII because it discriminated on the basis of sex by determining leave time based on the employee's sex.¹⁶³ Although his wife's leave was classified by the university as disability leave, the father claimed only the first four weeks of his wife's leave should be classified as such, because it only took her four weeks, not six, to physically recover from childbirth.¹⁶⁴ Thus, the extra two weeks under the policy should be classified as parental leave, and given equally to him and his wife.¹⁶⁵ In trying to decide if the two-week difference was disability leave or parental leave, the district court struggled to determine the length of leave permitted, due to the incongruence between the EEOC, the Supreme Court in *Guerra*, and the Third Circuit in *Schafer*.¹⁶⁶ Absent clear guidelines, and because it was not discriminatory on its face, the district court examined the case under a *McDonnell Douglas* framework.¹⁶⁷ Courts use the *McDonnell Douglas* framework to evaluate Title VII discrimination claims that lack evidence of discriminatory intent.¹⁶⁸ Under this framework, once an employee establishes a prima facie case that a policy has a disparate impact on members of a protected class, the burden then shifts to the employer to show that there was a business necessity for this policy.¹⁶⁹

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.* at 734.

161. *Id.*

162. *Id.*

163. *Id.* at 733.

164. *Id.* at 734–35.

165. *See id.*

166. *See id.* at 741.

167. *Id.* at 744.

168. Jessica Bergin, Note, "Ability" Means Ability: An Ability-Centric Interpretation That Reinvigorates the Pregnancy Discrimination Act's Protections for Pregnant Workers, 36 WOMEN'S RIGHTS L. REP. 36, 45–46 (2014).

169. *Id.* at 51–52.

If the employer meets this burden, the burden then shifts back to the employee to show that another policy would equally serve the employer's legitimate business interest without having the discriminatory effect of the challenged policy.¹⁷⁰

In *Johnson*, the employee failed to meet the burden in the third step of the framework.¹⁷¹ The court explained that the stated purpose behind the University's leave policy was to, "permit parents who have care giving responsibilities to have time off to spend with a child newly added to the family."¹⁷² The court found this failed the first step because this statement alone does not establish a discriminatory policy.¹⁷³ The plaintiff also failed to show that the policy created a pretext for discrimination.¹⁷⁴ A plaintiff may show pretext by showing that other similarly situated employees were treated differently. Here, the plaintiff claimed he received different treatment from his wife in regards to benefits.¹⁷⁵ In this case, the court found that the employees were not similarly situated, because they worked in different departments of the University, and one was a part-time employee while the other was a full-time employee.¹⁷⁶ Given that the court chose to follow the *McDonnell Douglas* framework to determine if a Title VII violation had occurred, and because the plaintiff did not show a prima facie discriminatory policy, or prove that he was similarly situated compared to his wife, the court upheld the policy.¹⁷⁷ On appeal, the United States Court of Appeals for the Eighth Circuit affirmed.¹⁷⁸

All of this litigation failed to establish an acceptable length of pregnancy disability leave under Title VII.¹⁷⁹ These cases have created a confusing gray area surrounding parental leave. The confusing current state of pregnancy-related disability leave is: case law permits employers to give longer pregnancy disability leave to women than to men,¹⁸⁰ this disability leave must be less than a year but should take into account actual disability—even though the Supreme Court in *Guerra* explained that employers are not in a position to make this complicated determination of "actual disability."¹⁸¹ But the EEOC rejects this view and states pregnancy disability leave should be the same length of disability leave given to

170. *Id.* at 52.

171. *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 745 (S.D. Iowa 2004).

172. *Id.* at 743.

173. *Id.* at 745.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 732.

179. *See id.* at 729; *Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243, 248 (1990); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 279 (1987).

180. *Cal. Fed. Sav.*, 479 U.S. at 279.

181. *Id.*

men.¹⁸² Without a clear standard, courts, like that in *Johnson*, may consider a potentially complicated and subjective burden-shifting analysis. This is a waste of judicial time and resources because this process could be avoided if there was a clear federal standard.

V. THE FAMILY MEDICAL LEAVE ACT FAILS TO SERVE AS A PROPER “PRESUMPTIVE DISABILITY PERIOD” FOR THE PREGNANCY DISCRIMINATION ACT

The purpose of the FMLA was not to designate an acceptable length of disability leave a new mother may take.¹⁸³ Instead, it was passed to address the failure of both Title VII and the PDA to address gender-based discrimination in regards to benefits, especially pregnancy disability leave.¹⁸⁴ Congress intentionally included the self-care provision in the FMLA which states that a man or woman may take twelve weeks of unpaid leave to take care of a serious personal health condition, such as childbirth, to counter the stereotype that women take more leave than men.¹⁸⁵ By creating an across-the-board benefit, Congress sought to ensure pregnancy-related sick leave was no longer stigmatized.¹⁸⁶ Under the FMLA, both men and women are entitled to twelve weeks of unpaid leave. Therefore, employers can no longer refuse to hire a woman in fear that she may take maternity leave, because a male employee can take the same amount of leave for a medical condition of his own, often without giving nine-months’ notice.¹⁸⁷ Because the purpose of the FMLA was to bridge the gender gap between benefits, and not to establish a length of actual disability time, it is improper to use the FMLA as a standard to establish an appropriate pregnancy disability leave length standard.

Furthermore, not only was the FMLA not intended to establish a proper length of maternity leave time, it does not cover the same employees as Title VII.¹⁸⁸ Unlike Title VII, which applies to the vast majority of employers in the United States, the FMLA only covers about sixty percent of the American workforce.¹⁸⁹ This is because Title VII applies to “all

182. 29 C.F.R. § 1604.10(b) (2012).

183. *See* Univ. of Texas at El Paso v. Herrera, 281 S.W.3d 575, 585 (Tex. App. 2008), *rev’d on other grounds*, 322 S.W.3d 192 (Tex. 2010).

184. *See id.* (When creating the FMLA, “Congress sought to ensure that pregnancy-related sick leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men . . . the FMLA attacks the formerly state-sanctioned stereotype that women of child-bearing age are absent more than other employees, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”)

185. *Id.*

186. *Id.*

187. *See id.*

188. *See generally* Brusca, *supra* note 1, at 80–81 (discussing the narrow group of individuals covered by the FMLA).

189. *Id.* at 80.

private employers, state and local governments, and educational institutions that employ more than 15 individuals.”¹⁹⁰ In contrast, the FMLA applies only to employers that employ fifty or more individuals within a seventy-five mile radius.¹⁹¹ For an employee to qualify for FMLA leave, the employee must have worked for the employer for twelve months, worked at least 1,250 hours for the employer in the twelve months immediately preceding the requested leave time, and must be employed at one of the employer’s locations that employs fifty employees within a seventy-five mile radius.¹⁹² Even if an employee meets all of these requirements, the employer may still require the employee to use all of their accrued vacation and sick leave during the FMLA leave period before officially taking FMLA leave.¹⁹³ Although Congress did not intend the FMLA to designate an appropriate length of maternity leave time, and although the FMLA does not apply to forty percent of the American workforce, it remains the only federal regulation of parental leave in existence in the United States.¹⁹⁴

A bill was unsuccessfully proposed in 2009,¹⁹⁵ and reintroduced in 2017,¹⁹⁶ which set a federally required length of maternity leave.¹⁹⁷ Instead of creating a new law, Congress should amend the PDA to set an appropriate length of disability leave time. Creating a standard of “acceptable” pregnancy disability length may seem daunting at first because the time needed to physically recover from pregnancy and childbirth may vary greatly from woman to woman.¹⁹⁸ However, this should not prevent Congress from creating a federal standard. Under the FMLA, Congress created a standard twelve-week medical leave time, even though medical conditions vary greatly in the amount of time needed to recover. For example, both an individual recovering from a broken arm that required an in-patient visit, and an individual recovering from a heart transplant, are equally entitled to twelve weeks of FMLA leave, even though it can be

190. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, THE U.S. EQUAL EMP. OPPORTUNITY COMM’N, (Nov. 21, 2009), <https://www.eeoc.gov/facts/qanda.html>.

191. The Family Medical Leave Act of 1993, 29 U.S.C. § 2611 (2012).

192. *Id.*; see also Brusca, *supra* note 1, at 79 (explaining the requirements that an individual must fulfill in order for their leave to be covered by the FMLA).

193. Brusca, *supra* note 1, at 80.

194. *Id.* at 81.

195. *Id.* at 81.

196. Federal Employees Paid Parental Leave Act of 2017, H.R. 1022, 115th Cong. (2017).

197. Both bills would only include federal employees, and therefore even fewer employees than the FMLA or Title VII. Federal Employees Paid Parental Leave Act of 2017, H.R. 1022, 115th Cong. (2017); see also Brusca, *supra* note 1, at 81 (explaining the proposal and failure of the Federal Employees Paid Leave Act of 2017).

198. See Young, *supra* note 3, at 1225 (“[T]here may be some legitimate uncertainty about the scope of permissible ‘pregnancy disability leave.’ . . . Typical estimates of postpartum disability cluster around six weeks, so employers may simply be erring to the safe side by providing eight or even ten weeks disability leave.”); see generally McGovern, *supra* note 23, at 160 (identifying the array of postpartum health concerns a woman may face, including recovery of reproductive organs, infections, fatigue, and discomfort).

argued their medical conditions vary in severity. Thus, the twelve-week FMLA is just a baseline standard. Similarly, if Congress amended the PDA, the amendment would create a baseline standard, not an absolute time length intended to cover all women in every circumstance. Instead, it would establish a threshold for courts and employers to structure their parental leave policies.

The federal government's failure to clearly define an acceptable length of pregnancy disability leave, let alone require parental leave or paid maternity leave, has caused states to enact parental leave policies of their own.¹⁹⁹ California became the first state to institute a statewide family leave policy in 2002 as part of its disability insurance program.²⁰⁰ Since then, several states have enacted parental leave legislation, and other states and the District of Columbia currently have pending parental leave legislation.²⁰¹ The new mixture of state parental leave laws, which vary greatly, in addition to the conflicting federal court rulings, and EEOC standards, creates a very disorderly and confusing picture of parental leave in the United States and makes it difficult for employers to know what kind of leave policies they must offer to comply with Title VII. This is because Title VII is a federal statute. Not only do state laws lack clarification of Title VII requirements, hypothetically, an employer could comply with a state maternity leave law, but nonetheless have a policy that violates Title VII. For example, a state could require employers to offer non-disability leave to new mothers, but not new fathers. If an employer was to offer such a plan, this could violate Title VII. Therefore, only an amendment to Title VII is appropriate to clarify federal law.

Furthermore, state parental leave laws, similar to the FMLA, will not apply to vast majority of the American workforce. State parental leave laws will only apply to residents in that state, therefore, only a federal law can reach the vast majority of American workers. Instead of proposing new legislation to set a length of acceptable parental leave, which has now failed twice, Congress must amend the PDA because it already directly addresses parental leave and covers the vast majority of American workers and employers.

VI. THE CURRENT STATE OF PRIMARY AND SECONDARY CAREGIVER LEAVE

Parental leave is "unavoidably intermingled" with pregnancy disability leave because all leave for new parents will ultimately be classified as pregnancy disability leave or parental leave.²⁰² Therefore, even if employers

199. See Brusca, *supra* note 1, at 83.

200. *Id.*

201. *Id.* (noting that only California, Massachusetts, and Rhode Island have paid parental leave programs).

202. *Johnson*, 408 F. Supp. 2d at 742 n. *5.

create policies with no mention of sex, there is still the possibility that a Title VII claim will arise. At both JP Morgan and Estée Lauder, the length of leave that a new parent is granted is determined by the employee's classification as the primary or secondary caregiver of the child. The lawsuits brought against JP Morgan and Estée Lauder highlight the problem with this classification.²⁰³ However, even though these policies did not explicitly mention sex, the employers were susceptible to a Title VII lawsuit because the policies had a disparate impact.

The plaintiffs claim that the leave policies at JP Morgan and Estée Lauder violate Title VII because they automatically presume the mother to be the primary caregiver and therefore provide women with a longer leave time.²⁰⁴ Under its policy, JP Morgan presumptively treats biological mothers as primary caregivers and entitles them to sixteen weeks of paid parental leave, while biological fathers are presumptively considered secondary caregivers and are only given two weeks paid leave.²⁰⁵ A father can only be recognized as a primary caregiver if his spouse or domestic partner has returned to work, or if his spouse is physically unable to care for the child.²⁰⁶ Similarly, under the Estée Lauder policy, there are four kinds of leave offered to new parents: maternity leave, adoption leave, primary caregiver leave, and secondary caregiver leave.²⁰⁷ Birth mothers automatically receive six to eight weeks of medical leave, and then six weeks of paid maternity leave.²⁰⁸ Fathers, however, can only receive secondary caregiver leave, which entitles them to two weeks of paid leave.²⁰⁹

Although the policies appear neutral because they do not explicitly mention sex, they nonetheless expose the company to liability because the policies offer parental leave, not pregnancy disability leave.²¹⁰ The Third Circuit has held that parental leave may not be longer for mothers than for fathers.²¹¹ In *Schafer v. Board of Public Education*,²¹² the collective bargaining agreement at issue stated, "all female teachers shall be entitled to maternity leave," and also provided that female teachers could take up to one year of unpaid leave after the birth of a child "for personal reasons

203. EEOC v. Estee Lauder Charge by Petitioner, *supra* note 11, at 6; Rotondo v. JP Morgan Charge by Petitioner, at 1.

204. Rotondo v. JP Morgan Charge by Petitioner, at 1; EEOC v. Estee Lauder Charge by Petitioner, *supra* note 11, at 7.

205. Rotondo v. JP Morgan Charge by Petitioner, *supra* note 11, at 1.

206. *Id.*

207. EEOC v. Estee Lauder Charge by Petitioner, *supra* note 11, at 5.

208. *Id.* at 7.

209. *Id.*

210. Rotondo v. JP Morgan Charge by Petitioner, at 1; EEOC v. Estee Lauder Charge by Petitioner, *supra* note 11, at 6.

211. See *Schafer v. Bd. of Pub. Educ. of Sch. Dist. Of Pittsburgh, PA*, 903 F.2d 243, 247 (1990).

212. *Id.* at 245 n. 1.

relating to childbearing or childrearing.”²¹³ After a male teacher was denied his request for a year of unpaid leave to care for his newborn, he filed suit with the EEOC, claiming this policy was a prima facie discrimination case.²¹⁴ The Third Circuit agreed and held that an employer may not have a separate parental leave policy for men and women.²¹⁵

VII. REASONS EMPLOYERS OFFER PRIMARY AND SECONDARY CAREGIVER DISTINCT LEAVE POLICIES

In both the JP Morgan and Estée Lauder lawsuits, the longer leave for new biological mothers would have been permissible if it was categorized as disability leave. This is because under *Guerra*, pregnancy disability leave may be longer than regular disability leave and does not need to be given to males.²¹⁶ But, the courts must still first determine how long the length of this disability leave may be. In a footnote in *Johnson*, the court reasoned that employers are not properly suited to determine when disability should end and caregiving leave begin, and that this determination is “properly left to Congress or another legislative entity.”²¹⁷

There are three primary reasons companies continue to offer primary and secondary caregiving distinct leave, even though such policies make the companies susceptible to Title VII suits.²¹⁸ First, an employer may be legitimately confused and uncertain about permissible “pregnancy disability leave.”²¹⁹ Employers, many of whom are not medical practitioners, and are unfamiliar with the time required for woman’s body to recover from giving birth, may legitimately believe a woman’s body needs more than twelve weeks to recover.²²⁰ Even if such extended leave is well intended, like the policy in *International Union v. Johnson*,²²¹ good intentions do not remove Title VII lawsuit susceptibility. In *International Union*,²²² the Supreme Court held that a pregnancy policy that discriminates in practice, even if well intended, will violate Title VII.²²³ In that case, a battery manufacturer prohibited “women capable of bearing children” from holding positions in the company that might expose them to lead, because exposure to lead might hurt a fetus.²²⁴ The Court of Appeals for the Seventh Circuit held that

213. *Id.*

214. *Id.* at 245.

215. *Id.* at 247.

216. *See generally* California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 285 (1987).

217. *See* Goldman, *supra* note 86; Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 742 n. 5 (S.D. Iowa 2004).

218. Young, *supra* note 3, at 1225.

219. *Id.*

220. *See id.*

221. *See* Int’l Union v. Johnson Controls, 499 U.S. 187, 187 (1991).

222. *Id.*

223. *See id.* at 206.

224. *Id.* at 191–92.

the company had a reasonable purpose for this exclusion: to protect unborn children.²²⁵ The Supreme Court disagreed, holding the policy was discriminatory under Title VII because it did not apply to fertile male employees, but only fertile female employees.²²⁶ Furthermore, the Court reasoned “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy.”²²⁷ Likewise, “the beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a).”²²⁸

Although a court has not stated a specific amount of time that will be considered reasonable disability leave—although under the *Schaefer* analysis, a reasonable amount of time is at least less than a year—the more weeks granted in excess of an employer’s traditional disability leave policy, the more susceptible a policy is to a Title VII suit.²²⁹

Second, employers may believe they have a competitive advantage by offering generous leave policies.²³⁰ There has been an increased focus in recent years to allow time to learn how to be a parent for women, but such an allowance has not been made for men.²³¹ Thus, to be competitive, employers create longer leave policies for women. Employers that do this, like *Schaefer*,²³² fail to recognize that fathers also need additional time to adjust to parenthood and bond with their new child.²³³

Third, it is possible that employers are simply unaware of the Title VII liabilities their policies create.²³⁴ Employers may believe that by including a primary and secondary caregiver language, instead of a mother and father distinction, removes sex discrimination liability.

Amending the PDA to create a specified pregnancy disability leave period standard would address the reasons employers offer “primary” and “secondary” caregiver leave.²³⁵ First, the confusion regarding the amount of disability leave time that can be offered would be clearly removed.²³⁶ Second, companies could still offer competitive leave policies, and employers would have confidence that these policies are in compliance with Title VII. For example, an employer could still offer longer leave time to a new mother, by offering her both disability leave and parental leave. The only change would be that employers would know at which point disability

225. *Id.* at 194.

226. *Id.* at 197.

227. *Id.* at 199.

228. *Id.* at 200.

229. *See* Young, *supra* note 3, at 1218–19.

230. *Id.* at 1225.

231. *See* Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 STAN L. REV. 967, 978 (2001).

232. *See* *Schaefer v. Bd. of Pub. Educ. of School Dist.*, 903 F.2d 243, 247 (3rd. Cir. 1990).

233. Cunningham, *supra* note 231, at 972.

234. *See* Young, *supra* note 3, at 1226.

235. *See id.*

236. *See id.*

leave ends and parental leave begins, and consequently, how much leave time must be offered to fathers.²³⁷

CONCLUSION

Nearly forty years after the first pregnancy-related discrimination case regarding Title VII was filed, employers still struggle to create parental leave policies that comply with the Act, as demonstrated by the lawsuits against JP Morgan and Estée Lauder this summer. Forty years of litigation and draining judicial resources is enough. Current federal legislation is insufficient to establish a federal standard regarding acceptable pregnancy disability leave length. Specifically, the twelve-week medical leave standard in the FMLA is improper because the Act does not encompass all employees covered by Title VII, nor was it entitled to. After Congress once again failed this year to pass a federal maternity leave bill, it is clear that the only way to create a concrete standard defining the length of pregnancy disability leave is to amend the PDA. The creation of a clear, concrete standard would also address the primary reasons employers have policies that fail to comply with Title VII because the standard would allow employer to know exactly what leave policies it is required to offer and how it must adjust its “competitive” leave policies to give more leave time to women if it desires. Indeed, a clear federal standard would provide the guideline courts have requested.²³⁸ This Note calls on Congress to amend Title VII to clearly state an acceptable length of pregnancy disability leave, and employers to abandon “primary” and “secondary caregiver” policies for policies based on pregnancy disability and parental leave.

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²³⁷. *See id.*

²³⁸. *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 742 n. 5 (8th Cir. 2004).

* B.S. B.A. John Brown University, Siloam Springs, AR. This Note is dedicated to my grandmother, Donna Currier, and my late grandfather, Donald Currier, whose love, encouragement, and sacrifices have made all of my dreams possible; and to Trisha Posey, my former professor, mentor, and friend, whose guidance has been invaluable during law school. A special thanks to Caitlin Baranowski, Echo Wang, and the staff of the Journal for their hard work and advice on this Note.