FLIRTING WITH THE PDA: CONGRESS MUST GIVE BIRTH TO ACCOMMODATION RIGHTS THAT PROTECT PREGNANT WORKING WOMEN

DANIELA M. DE LA PIEDRA*

Amanda Reeves began working for Swift Transportation Company, Inc. (Swift) as a truck driver on August 9, 2002.[1] When she applied for the job, the employer advised her that the position required occasional physical activity, such as bending, twisting, climbing, squatting, crouching, and balancing, and that she would be required to push and pull contents weighing up to 200 pounds.[2] Reeves was physically able to meet the demands of the position when she was hired, and the employer recognized that she was qualified for the job.[3] On November 2, 2002, Reeves learned that she was pregnant, and her doctors determined that she was able to continue working, but restricted her to light work.[4] The employer responded by informing her that there were no available light duty positions and sent her home.[5] Reeves continued to ask for light duty work, but the employer

---

* Note & Comment Editor, American University Journal of Gender, Social Policy & the Law, Volume 16; J.D. Candidate, May 2008, American University, Washington College of Law.

I dedicate this article to my mother, Matilde Pinto, a strong woman who helped me find my voice at a very young age. Thank you to Professors Mary Clark and Candice Kovacic-Fleischer for their invaluable contributions and insight. Many thanks to my editor Sarah Acker and mentor Alice Riener for their guidance and endless editing, as well as to the staff of the Columbia Journal of Gender and Law for their dedicated work on my piece. Additionally, I am grateful to Bernardo Rodriguez, Jennifer Tanios, and Cheryl Torralba for their true friendship and unconditional support throughout our law school journey, and to Wilson Castellanos, whose love and excitement for life encourages me every day.

[1] Reeves v. Swift Transp. Co., 446 F.3d 637, 638 (6th Cir. 2006).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 639.

insisted that there was nothing available.[6] After two weeks of daily inquiries for light duty work, her employment was terminated on November 14, 2002.[7] On January 7, 2003, Reeves filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) alleging violations of the Pregnancy Discrimination Act (PDA).[8] During the lawsuit, Swift maintained that only employees injured on the job received light duty work, and since Reeves was not alleging a job-related injury, light duty work in the form of administrative duties, such as filing and answering phones, could not be made available to her.[9] Without a hearing, the circuit court affirmed the district court's decision that Swift's light duty policy did not amount to pregnancy discrimination and that Reeves did not prove pretext or intent to discriminate.[10] In fact, the court noted that Reeves's complaint asked the court to grant her preferential treatment, rather than equal treatment, which conflicts with the requirements of the PDA.[11]

Amanda Reeves is not alone in the experience of becoming pregnant and losing her job, notwithstanding her continued desire and ability to remain part of the workforce. Despite the enactment of the PDA over twenty-five years ago, the EEOC reported that in 2006, 4,901 women filed claims of pregnancy discrimination on the job.[12] The law does not explicitly mandate that employers accommodate employees' pregnancy-related limitations, even when the limitations are temporary. As a result, a number of federal circuit courts fail to protect the interests of pregnant women who want to maintain their jobs.[13] Despite the passage of the PDA,

---

[6] *Id.* (assessing that Reeves's failure to allege a job-related injury prevented the employer from granting her light duty work).

[7] *Id.*

[8] *Id.*; Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006).

[9] *Reeves*, 446 F.3d at 638.

[10] *Id.*

[11] *Id.*

[12] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAS COMBINED: FY 1997–FY 2006, http://www.eeoc.gov/stats/pregnanc.html (last visited Nov. 12, 2007) (showing a twenty-three percent increase in pregnancy discrimination charges since 1997).

[13] *See* D'Andra Millsap, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1449 (1996) (arguing that the PDA is insufficient to prevent discrimination based on pregnancy, penalizing women for an activity that is essential to society).

women still find themselves having to make the difficult choice between having a family and having a career.[14]

This Article argues that many pregnant women cannot win an employment discrimination case under the *McDonnell Douglas* test[15] even with the protection of the PDA and that Congress should amend the statute to correct this problem. Part I provides background on Title VII, the PDA, and the conflicting ways in which the federal circuit courts interpret these statutes in pregnancy discrimination cases. Part I also examines Supreme Court jurisprudence that can be used by the courts and Congress to mandate accommodations for pregnant employees without violating anti-discrimination laws. Part II demonstrates how different courts interpret the PDA to either permit adverse action against employees experiencing temporary pregnancy-related limitations or require employers to accommodate such employees with modified duty. Finally, Part III makes a policy recommendation to amend the PDA in order to require that employers accommodate temporary pregnancy-related limitations in the workplace.

I. BACKGROUND

A. Title VII and the *McDonnell Douglas* Test

Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, and national origin with respect to a person's "compensation, terms, conditions, or privileges of employment."[16] The purpose of Title VII is to achieve equal employment opportunities for historically disadvantaged groups.[17] The plaintiff's obligation is to prove that a protected trait played a role in the employer's

---

[14] *See* Alison Grant, *Avoiding the Pregnant Pause; The Civil Rights Act Amended a Quarter Century Ago to Outlaw Discrimination on the Basis of Pregnancy, Enabling Mothers to Have the Same Opportunity as Their Co-Workers to Advance in Their Careers*, CLEV. PLAIN DEALER, Jan. 23, 2006 at E1; *cf.* Millsap, *supra* note 13, at 1412 (stating that eighty-five percent of working women are likely to become pregnant during their careers).

[15] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[16] 42 U.S.C. § 2000e-2(a) (2006).

[17] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (elaborating that, with Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . [an] impermissible classification").

decision and that it had a determinative influence in an adverse employment action.[18]

The test to prove a violation of Title VII against an individual, using circumstantial evidence, was first articulated by the Supreme Court in *McDonnell Douglas Corporation v. Green*.[19] The Court established a three-part burden-shifting test with the ultimate burden on the plaintiff to prove that the employer's proffered legitimate reason for adverse action was pretext for discrimination.[20] In the first part of the *McDonnell Douglas* test, the plaintiff must establish a four-pronged prima facie case of discrimination. The four prongs are: (1) that he or she belongs to a protected class; (2) that he or she applied for and was qualified for a particular position; (3) that he or she was not hired to that position; and (4) that the position either remained open or was granted to a less qualified person outside of the plaintiff's protected class.[21] Once the plaintiff establishes a prima facie case, the second part of the *McDonnell Douglas* test shifts the burden to the employer who must articulate a legitimate, non-discriminatory reason for the adverse employment action.[22] If the employer meets its burden of production, the third part of the *McDonnell Douglas* test requires the plaintiff to rebut the employer's articulated reason by showing that the reason is pretext for a discriminatory motive for the employer's action.[23] *McDonnell Douglas* was a hiring discrimination case based on racial discrimination.[24] However, the test articulated by the Court has been applied to other fact patterns and other adverse employment actions.[25]

---

[18] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

[19] *McDonnell Douglas*, 411 U.S. at 802-04.

[20] *Id.*

[21] *Id.*

[22] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (indicating that the employer's burden at the second step of the *McDonnell Douglas* test is one of production and does not include a credibility assessment).

[23] *McDonnell Douglas*, 411 U.S. at 804.

[24] *Id.* at 794-95.

[25] *E.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 612-13 (1993) (applying the *McDonnell Douglas* test to an age discrimination case); Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) (referring to the *McDonnell Douglas* burden shifts in a sex discrimination lawsuit).

B. The Supreme Court First Considers Pregnancy-Based Discrimination

In *General Electric Co. v. Gilbert*, several female employees alleged violation of Title VII when their employer's disability plan provided benefits to employees who suffered non-occupational infirmities but excluded from its coverage the risk of any conditions resulting from pregnancy.[26] The Supreme Court acknowledged that only women may experience pregnancy, but it differentiated pregnancy from other covered medical conditions on the ground that disabilities from pregnancy are different from disease and accidents because pregnancy is voluntary and desired.[27] The Court held that the policy was non-discriminatory because it did not cover any more risks for male employees than it did for female employees, or vice versa.[28] Within the benefits framework, the Court reasoned that pregnancy-related disabilities constituted an additional risk, albeit one unique to women.[29] The Court viewed the insurance program as dividing employees into two groups, pregnant persons and non-pregnant persons, and since there were women in both groups it disagreed that the plaintiffs had demonstrated discrimination against a protected class, the first prong of the *McDonnell Douglas* prima facie case.[30]

---

[26] General Electric Co. v. Gilbert, 429 U.S. 125, 128-29 (1976).

[27] *Id.* at 136. *But see Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Education and Labor*, 95th Cong. 172 (1977) [hereinafter *Hearings*] (statement of Dr. Ruth B. Cowan, Chairperson, New York City Commission on the Status of Women) (arguing that not all pregnancies are planned and that the disabilities arising from pregnancies are neither desired nor voluntary).

[28] *Gilbert*, 429 U.S. at 138.

[29] *Id.* at 140-41 (disregarding EEOC guidelines that recommended the inclusion of pregnancy in insurance and sick leave plans related to employment because Title VII did not give the EEOC the power to promulgate rules and regulations).

[30] *Id.* at 135 (citing Geduldig v. Aiello, 417 U.S. 484 (1974), in which the Supreme Court explained that if the insurance policy covered pregnancy-related disabilities, then the plan would also have to cover all short-term disabilities).

C. Congress Passes the Pregnancy Discrimination Act

In response to the Court's holding in *Gilbert*, Congress passed the Pregnancy Discrimination Act (PDA),[31] thereby amending Title VII to clarify that sex discrimination includes discrimination on the basis of pregnancy, childbirth, or related medical conditions.[32] The legislative history suggests that the purpose of the PDA was to ensure that pregnancy-related disabilities would be treated the same as other temporary disabilities, thereby giving women a chance to be on equal footing with men.[33] Additionally, supporters of the PDA noted that discrimination against pregnant women required them to face an economic disadvantage greater than that faced by a person experiencing a different medical limitation, because adverse action against a pregnant employee increases social and economic costs at the same time that a new family member is added.[34] Congressional PDA supporters also recognized that women contributed significantly to their families' finances and that loss of income due to pregnancy discrimination could negatively affect the entire family unit.[35]

D. Applying the *McDonnell Douglas* Test to Pregnancy Discrimination Cases

In pregnancy-based employment discrimination cases, federal courts apply the *McDonnell Douglas* test.[36] The plaintiff alleges

---

[31] Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006); *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983).

[32] 42 U.S.C. § 2000e(k) (stating that women affected by pregnancy and its consequences shall be treated the same as non-pregnant persons similar in their ability or inability to work); *see also* 123 CONG. REC. 23,29661 (1977) (statement of Sen. Biden) (suggesting that discrimination against pregnancy is tantamount to sex discrimination because only women can bear children).

[33] *See, e.g.*, 123 CONG. REC. 23,29660 (1977) (statement of Sen. Biden) (explaining that the Act does not require employers to provide benefits or medical insurance, but that if the employer provides favorable treatment for a male employee's vasectomy, for example, it should treat pregnancy disabilities similarly by providing coverage).

[34] *See, e.g.*, *Hearings*, *supra* note 27, at 172 (statement of Drew Days, Assistant Att'y Gen. for Civil Rights, Dep't of Justice).

[35] *See, e.g.*, 123 CONG. REC. 23,29663 (1977) (statement of Sen. Culver).

[36] *E.g.*, Reeves v. Swift Transp. Co., 446 F.3d 637 (6th Cir. 2006); Tysinger v. Zanesville Police Dep't, 463 F.3d 569 (6th Cir. 2006); Dormeyer v. Comerica Bank-Illinois,

discrimination based on the fact that she is a pregnant woman. Because Title VII and the PDA classify sex and pregnancy as protected traits,[37] the plaintiff can typically satisfy the first prong of the prima facie case with relative ease.[38]

To satisfy the second prong of the prima facie case, the plaintiff must show that she was qualified for the position when the employer terminated her.[39] In cases where a plaintiff alleges unlawful termination because the employer refused an accommodation such as modified work, some courts have found that the plaintiff was no longer qualified for the unmodified position, and therefore she cannot satisfy the second prong of the prima facie case. For example, in *Dormeyer v. Comerica Bank-Illinois*, the Seventh Circuit held non-discriminatory an employer's assessment that a pregnant employee whose morning sickness caused absenteeism was no longer qualified for the position of a bank teller.[40] Likewise, the Eleventh Circuit in *Spivey v. Beverly Enterprises* found no unlawful discrimination when an employer fired a pregnant nurse's assistant, whose doctor restricted her to lifting a maximum of twenty-five pounds, rendering her unable to lift patients—just one of her many duties.[41]

To satisfy the third prong of the prima facie case, the plaintiff must show that she suffered an adverse employment action.[42] Although courts usually classify adverse action as termination or discharge, the Sixth Circuit

---

223 F.3d 579 (7th Cir. 2000); EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000); Spivey v. Beverly Enter., Inc., 196 F.3d 1309 (11th Cir. 1999); Urbano v. Continental Airlines, Inc., 138 F.3d 204 (5th Cir. 1998); Ensley-Gaines v. Runyon, 100 F.3d 1220, 1224 (6th Cir. 1996); Troupe v. May Dep't Stores, 20 F.3d 734 (7th Cir. 1994).

[37] 42 U.S.C. § 2000e(k).

[38] *See, e.g.*, Parker v. Albertson's, Inc., 325 F. Supp. 2d 1239, 1245 (D. Utah 2004).

[39] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[40] *Dormeyer*, 223 F.3d at 583.

[41] *Spivey*, 196 F.3d at 1311 (using the physician's lifting restriction as ground for finding the plaintiff's termination lawful, but disregarding the physician's observation that additional restrictions of other duties were unnecessary).

[42] *See* Troupe v. May Dep't Stores, 20 F.3d 734 (7th Cir. 1994) (finding that the plaintiff suffered an adverse employment action when the department store terminated her due to her tardiness arising from morning sickness, but holding nonetheless that (1) the timing of the discharge did not establish intentional discrimination, and (2) absence of better treatment of non-pregnant employees with similar tardiness records precluded the finding of pregnancy discrimination).

in *Tysinger v. Zanesville Police Department* found adverse employment action earlier, when the employer denied temporary accommodations to a pregnant patrol officer and forced her to take unpaid leave.[43]

When alleging discrimination based on an employer's failure to provide an accommodation, the fourth and final prong that a plaintiff must satisfy in her prima facie case is that a person outside of the protected class, who was similar in his or her ability to work, was accommodated.[44] The final prong is difficult for pregnant plaintiffs to prove when employers have policies that differentiate between occupational injuries and non-occupational injuries. For instance, state and federal workers' compensation laws only require accommodation of employees with employment-related injuries.[45]

E. The Supreme Court Expands the Pregnancy Discrimination Act

The Supreme Court has relied on the legislative history of the PDA to find state-mandated accommodation of pregnant employees consistent with Title VII's non-discrimination requirement.[46] The employer-plaintiffs in *California Federal Savings & Loan Ass'n v. Guerra* alleged that Title VII preempted a California law on the ground that the state law afforded more favorable treatment to pregnant employees than to non-pregnant employees.[47] The challenged law required employers to grant, *inter alia*, up to four months of unpaid leave to pregnant workers who had temporary medical work restrictions and to reinstate them after they returned.[48] The Court examined the PDA's legislative history and agreed with the Ninth Circuit that Congress intended for the Act to be a floor beneath which

---

[43] Tysinger v. Zanesville Police Dep't, 463 F.3d 569, 573 (6th Cir. 2006).

[44] *See* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1224 (6th Cir. 1996) (maintaining that to satisfy the fourth prong a plaintiff can show either that a comparable non-protected person was treated better or that that she was replaced by someone outside of the protected class).

[45] *See, e.g.*, *Spivey*, 196 F.3d at 1311-12 n.1 (showing that in order to comply with workers' compensation requirements, the employer prevented depletion of limited duty jobs by providing them only to employees injured on duty); *Ensley-Gaines*, 100 F.3d at 1222 (indicating that the Postal Service must abide by the Federal Employee Compensation Act, which provides compensation only for employees injured on the job).

[46] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 283-84 (1987).

[47] *Id.* at 275-76.

[48] CAL. GOV'T CODE § 12945(a), (b)(1) (West 1980).

pregnancy-related benefits must not drop, rather than a ceiling limiting a benefit's scope.[49] The Court highlighted the remarks of Senator Javits, who, during a debate over the PDA, acknowledged that some states already had laws mandating certain kinds of benefits for pregnant employees.[50] Moreover, the Court pointed out that if Congress had intended to prohibit any kind of preferential treatment of pregnant employees, it would have stated such intent specifically, rather than merely omitting explicit language requiring such treatment.[51] California narrowly tailored its law to provide a benefit to women during actual pregnancy-related disabilities; it was not a blanket policy that applied to all women simply because they were pregnant.[52] Therefore, the Court held, California's legislation was not preempted by the PDA, because it actually supported the purpose of the PDA, to allow women to have families without risk of losing their livelihoods.[53] The Court concluded that Congress left the decision to grant preferential treatment of pregnant employees to state legislatures and that, if they chose to give pregnant women benefits, such benefits would not violate Title VII.[54]

The Supreme Court later held that the PDA also applies to future pregnancies.[55] In *International Union v. Johnson Controls*, employees brought a class action alleging that the employer's fetal protection policy constituted sex discrimination.[56] In order to work in the company's battery-making jobs, a female employee had to provide medical evidence of infertility.[57] The Court recognized the employer's interest in protecting

---

[49] *Guerra*, 479 U.S. at 285.

[50] *Id.* at 287-88.

[51] *Id.* at 286-87.

[52] *Id.* at 290.

[53] *Id.* at 289.

[54] *Id.* at 287-88 (noting that federal law is also not contradicted by Connecticut and Montana laws that provide pregnant women reasonable leave, reinstatement to their original positions or equivalent positions with similar pay, seniority, retirement, and fringe benefits).

[55] Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 190 (1991).

[56] *Id.* at 191 (noting that prior to Title VII's enactment, the employer did not hire women for battery-manufacturing because the lead involved posed a risk to fetal development).

[57] *Id.* at 192.

itself from future tort liability arising from complicated pregnancies and birth defects caused by toxins in its factory.[58] However, the Court ultimately held that the PDA prohibits employers from discriminating against women because of their potential to become pregnant, unless their reproductive capacities limit their job performance.[59] Because fertile women are as capable as any other employee of participating in battery manufacturing, the Court held that the PDA prohibits employers from dismissing female employees for refusing to submit to sterilization.[60] Through this ruling, the Court established that the PDA prohibits an employer from deciding whether a woman's ability to become pregnant and have a family is more important than her ability to participate in the labor market.[61] This suggests that the Court has maintained a broad reading of the PDA's protective reach.

F. Pregnant Employees with Temporary Limitations Have No Legal Right to Accommodations Under the PDA

Pregnant women who lose their jobs because they are temporarily unable to perform all of their duties have found it particularly difficult to file successful claims under the PDA.[62] This is problematic for a plaintiff who has no other avenue for redress. In *Mullet v. Wayne-Dalton Corp.*, a district court in Ohio held that the law does not mandate temporary accommodations for pregnant employees.[63] However, the court suggested that, as a matter of public policy, Congress should mandate such accommodations by statute in order to ease the burden women face during an exclusively female experience.[64]

---

[58] *Id.* at 206.

[59] *Id.* (holding that Johnson Controls' policy was not applied to men, even though lead exposure from the production of batteries could also have an adverse effect on men's reproductive capacities).

[60] *Id.* at 207.

[61] *Compare id.* at 197, *with* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288-89 (1987) (emphasizing a woman's right to both work and have a family).

[62] *See* Patricia Smith, *Introduction*, *in* FEMINIST JURISPRUDENCE 22 (Patricia Smith ed., 1993) (arguing that instead of recognizing pregnancy as a distinct ability, worthy of its own treatment, the legal system forces pregnant women to mold into a male-centered model of injury and disability, thus putting women at a disadvantage).

[63] Mullet v. Wayne-Dalton Corp., 338 F. Supp. 2d 806, 812 n.8 (N.D. Ohio 2004).

[64] *Id.*

A pregnant woman seeking relief under the PDA is often unsuccessful because the text of the statute does not mention accommodations or the extent of an employer's obligation to a pregnant employee who is willing and able to continue working but needs temporary modifications to her responsibilities to do so. The statute only states that pregnancy discrimination is discrimination on the basis of sex and requires that employers treat pregnant women as they would treat any employee temporarily unable to fulfill his or her normal duties.[65] However, because the statute fails to suggest that providing accommodations to pregnant women can be a way to meet this requirement, plaintiffs have difficulty showing that Title VII entitles them to modified duty.[66]

Although the Supreme Court in *Guerra* clarified that the PDA is a floor and not a ceiling, which means that employers *may* temporarily grant pregnant women different treatment, most courts do not rely on this ruling to support the proposition that employers *must* grant a woman's request for accommodation.[67] Neither Congress nor the Supreme Court has explicitly specified that the PDA requires employers to accommodate pregnant employees. Hence, some courts find that employers have no obligation to provide modified duty and may lawfully terminate a pregnant plaintiff who makes such a request.[68]

Such courts seem to overlook the legislative history of the PDA and the Supreme Court's reasoning in *Guerra* regarding the purpose of the PDA.[69] When debating the Act, members of Congress recognized that

---

[65] Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (failing to state *how* pregnant employees should be treated similarly to non-pregnant employees).

[66] *See, e.g.*, Spivey v. Beverly Enter., Inc., 196 F.3d 1309, 1312-13 (11th Cir. 1999) (explaining that the PDA does not give a pregnant woman preferential rights, which makes her pregnancy-related limitations grounds for lawful termination).

[67] *E.g.*, Armindo v. Padlocker, Inc., 209 F.3d 1319, 1321 (11th Cir. 2000) (resisting the idea that the PDA could support the plaintiff's need for an accommodation due to morning sickness because the statute requires employers to ignore only pregnancy and not absences, even if they arise from the pregnancy).

[68] *E.g.*, Geier v. Medtronic, Inc., 99 F.3d 238, 242 (7th Cir. 1996) (maintaining that the PDA explicitly does not require accommodations because the employer must treat the employee as if she were not pregnant, and concluding that if the employer does not generally overlook absences, it does not need to overlook the absence of a pregnant woman, even if the cause of the absence is temporary and directly related to the pregnancy).

[69] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (quoting Senator Williams's statement that the PDA is meant to give women the right to participate fully and equally in the workforce).

working women made important financial contributions to their families and therefore should be able to maintain employment, even while pregnant.[70] They supported equal employment opportunities for women and passed the PDA to prevent employers from forcing them to choose between continuing a career and continuing a pregnancy.[71] However, because Congress did not explain what an employer must do when a pregnancy presents temporary limitations, courts are left with minimal guidance. Consequently, rulings where a court does not read accommodations into the PDA only further the type of discrimination and unfair treatment that the PDA was enacted to eliminate.

G. The "Inherent Differences" Approach as Support for Accommodating Pregnant Employees

Since *Guerra* and *Johnson Controls*, the Supreme Court has examined both womanhood and women's biological and reproductive differences in abortion and education cases, such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*[72] and *United States v. Virginia*,[73] respectively. Taken together, these two cases suggest the Supreme Court's recognition of inherent differences between the sexes that should allow for, if not mandate, the legal provision of accommodations to pregnant employees.

In *Casey*, the Supreme Court examined several restrictions to abortion that were included in Pennsylvania's amended abortion control law.[74] In reasoning that the Constitution prohibits the state from placing an undue burden on a woman's right to choose an abortion the Court referred to pregnancy as a unique female experience, too personal to be governed by

---

[70] *E.g.*, 123 CONG. REC. 23,29657 (1977) (statement of Sen. Williams) (emphasizing that the sponsors of the PDA were concerned with the detrimental impact on the family caused by the loss of a mother's, or soon-to-be mother's, salary).

[71] *E.g.*, *id.* at 29661 (statement of Sen. Biden) (decrying the reality that some pregnant women who cannot leave the workforce due to financial constraints will experience substantial pressure to terminate their pregnancies and that a policy which implicitly encourages abortion is morally unacceptable).

[72] 505 U.S. 833 (1992).

[73] 518 U.S. 515 (1996).

[74] *Casey*, 505 U.S. at 844.

policies based on stereotypical views of women as merely nurturers.[75] It underscored the highly personal nature of the physical constraints and pain experienced by pregnant women.[76] Moreover, the Court articulated that abolishing the right to terminate an unwanted pregnancy would impede women's right to shape their own position in society.[77]

Meanwhile, the Court in *Virginia* analyzed the constitutionality of the Virginia Military Institute's (VMI) same-sex state education policy and explored the state-operated institution's duty to make accommodations based on sex.[78] The Court held that VMI violated the Equal Protection Clause of the Fourteenth Amendment by prohibiting the enrollment of women.[79] It held further that VMI had to open its doors to women and that in doing so it also had to make accommodations based on average physiological differences between the sexes, such as upper-body strength, to promote equal opportunities.[80]

The Equal Protection Clause does not mention accommodations, but the Court has nonetheless held that where inherent physiological differences between men and women make them necessary, a state actor's failure to grant such accommodations amounts to unlawful sex discrimination under the Fourteenth Amendment.[81] The PDA also does not mention accommodations, but using the logic employed by the *Virginia* Court, it is possible to find unlawful sex discrimination under Title VII when private employers fail to accommodate pregnant employees seeking

---

[75] *Id.* at 852 (discussing that the perception of motherhood as an important role for women is not enough to support a state's restrictions on abortions).

[76] *Id.*; *see also*, Linda M. Trapp, *Pregnancy & Ergonomics*, PROFESSIONAL SAFETY, August 2000, *available at* http://www.crownsafety.com/pregnancy.pdf (explaining that pregnancy physically changes the way a woman's body is shaped, which can lead to balance problems, backache, and progressive impairment of dexterity, agility, and coordination).

[77] *Casey*, 550 U.S. at 853.

[78] *Virginia*, 518 U.S. 515.

[79] *Id.* at 534-35 (finding that Virginia's justification for an all-male school, to diversify educational opportunities, did not amount to an "exceedingly persuasive justification" for excluding all women from seeking an education and rigorous training at VMI).

[80] *Id.* at 533-34.

[81] *Id.* at 533 (citing Califano v. Webster, 430 U.S. 313 (1977) (per curiam), and indicating that policies may use sex classifications to create equal opportunities for women and to reduce economic disparities between men and women).

modified work because of physiological constraints experienced only by women.

Candace Kovacic-Fleischer has argued that while the *Virginia* Court required women to be qualified for the rigorous VMI curriculum, it also required VMI to make "alterations" and "adjustments" for "celebrated," inherent differences between the sexes.[82] Accordingly, *Virginia* offers courts hearing pregnancy discrimination claims an analysis of inherent differences and accommodations that supports the request by a pregnant employee with satisfactory job performance for temporary, modified duty due to pregnancy-related conditions. The Court's holding supports the proposition that an inherent difference between men and women makes different treatment of the sexes lawful, provided the difference in treatment is designed to celebrate those differences and alleviate historical discrimination.[83] If inherent differences, such as the ability to become pregnant, require accommodations in order to ensure equal opportunity, the denial of such a request is unlawful sex-discrimination. Kovacic-Fleischer emphasizes that since *Virginia* holds that *average* differences between men and women in upper body strength require the state to make accommodations in physical strength testing, then *absolute* differences between men and women, such as the ability to become pregnant, should provide even stronger support for requiring accommodations for pregnancy-related limitations in the workplace.[84] This would also support the conclusion that for employers to treat an inherently gender-specific limitation the same as a gender-neutral limitation, such as a medical restriction on physical activity following a heart attack sustained off the job, is also to discriminate based on sex.

Casey may also provide support for avoiding the burden-shifting test altogether and for amending the PDA to require accommodations for pregnant employees. In *Casey*, the Court notably balanced a woman's right to choose an abortion with the state's interest in the life of a fetus after viability.[85] This balancing of rights may support accommodations for

---

[82] Candace Saari Kovacic-Fleischer, United States v. Virginia*'s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 859-60 (1997).

[83] *Cf. Virginia*, 518 U.S. at 551 n.19 (stating that adjusting institutional standards because of physiological differences between the sexes is necessary to allow qualified women to enroll at VMI).

[84] *See* Kovacic-Fleischer, *supra* note 82, at 892-93.

[85] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869-70 (1992).

pregnant women in two ways. First, if the state has an interest in restricting abortion after viability, the state should also assist women in protecting the fetus by giving the mother the right to request accommodations that make the workplace safer during a time in which her own body and that of the fetus is at heightened risk for injury. Second, just as the state has a compelling interest in the potential life of a fetus after viability, it clearly also has a reasonable interest in a child's well-being after birth, which is furthered by the mother's ability to continue working so that she may continue earning income in order to support her child.

Casey supports the provision of temporary accommodations in the workplace for temporary pregnancy-related limitations on employees' ability to carry out their occupational responsibilities. This conclusion can be based on either (1) the physiological constraints of pregnancy experienced exclusively by women coupled with the anti-discrimination principles of *Virginia* or (2) *Casey's* emphasis on the state's compelling interest in the potential life of a viable fetus.

II. ANALYSIS

A. The *McDonnell Douglas* Prima Facie Case as Applied to PDA Claims for Accommodations

When circuit courts grant summary judgment against pregnancy discrimination plaintiffs, they rely on a narrow reading of the *McDonnell Douglas* test and its components. For example, to establish the qualification prong of the prima facie case, some courts seem to require plaintiffs to show that their pregnancy-related limitations were on-the-job injuries that would have qualified them for modified duty.[86] In *Spivey v. Beverly*, the Eleventh Circuit emphasized that the employer would not have been required to excuse the plaintiff, a nurse, from lifting patients until she actually sustained an on-the-job injury.[87] The Fifth Circuit arrived at the same conclusion in *Urbano v. Continental Airlines*.[88] According to these courts, an employee's articulation of a pregnancy-related restriction is not grounds for protection under the PDA, but rather grounds for her discharge.

---

[86] *E.g.*, Spivey v. Beverly Enter., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998).

[87] *Spivey*, 196 F.3d. at 1312.

[88] *Urbano*, 138 F.3d at 206 (suggesting that if the pregnant plaintiff eventually experienced back injury on the job, the employer would then be obliged to accommodate her request for light duty transfer).

Interestingly, such an accommodation would not be a remedy required by the PDA, but rather one required by the employer's general policy of providing modified duty to employees injured on-the-job.[89] Under this rubric, the PDA does not protect a pregnant employee until her employer's failure to accommodate results in an actual injury.

These same courts also use the qualification prong to examine whether the plaintiff was capable of carrying out her unmodified work duties at the time of termination.[90] However, such a requirement presents an insurmountable obstacle for a pregnant employee. Though she could perform her duties prior to pregnancy, she requested accommodation because she no longer could once pregnant.[91]

In *Spivey*, a pregnant nurse's assistant became concerned that lifting a patient over 250 pounds could harm her and her pregnancy.[92] Rather than agreeing to help the employee lift the patient when she needed it, the employer told her to consult with her doctor, who in turn issued a temporary lifting restriction.[93] In analyzing the qualification prong, the Eleventh Circuit recognized that the plaintiff's requested accommodation was not burdensome.[94] However, the court ignored her ability to fulfill her non-lifting duties, such as feeding and bathing patients and held lawful the employer's determination that her failure to meet her lifting responsibilities disqualified her as a nurse's assistant.[95] The holding here allowed for termination of an employee who was reasonably able to perform the

---

[89] *See id.* (indicating that all forty-eight accommodations made by the employer in 1994 were remedies made available by its policy of granting modifications exclusively to workers injured on the job).

[90] *Spivey*, 196 F.3d at 1312 (finding that the plaintiff's lifting restriction meant she was no longer qualified for her position as a nurse's assistant and that she was not qualified for temporary assistance in lifting patients).

[91] Deborah Calloway's work indicates that thirty-eight percent of women work in occupations, such as health care, retail, mail carrying, protective service, construction, and machine operations, that require duties that might pose a risk to them during pregnancy. *See* Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 8-11 (1995).

[92] *Spivey*, 196 F.3d at 1311.

[93] *Id.* at 1312.

[94] *Id.* at 1311 (determining that the plaintiff's only request was for assistance in lifting one particular patient so that she could keep her position).

[95] *Id.*

majority of her duties and who would likely be back to her pre-pregnancy performance after giving birth. The plaintiff was in fact rehired after she gave birth, which suggests that, but for her pregnancy, she would not have lost her job.[96]

However, some courts apply a more flexible *McDonnell Douglas* test in pregnancy discrimination cases and allow PDA claims for employer-provided accommodations to survive summary judgment. Unlike the Eleventh Circuit, the Sixth Circuit has found in at least one case that a plaintiff can establish the qualification prong of the prima facie case, as long there is no dispute as to the employer's satisfaction with the plaintiff's work prior to pregnancy.[97] In *Tysinger v. Zanesville Police Department*, the plaintiff was able to show evidence of satisfactory job performance prior to the manifestation of pregnancy-related limitations.[98] This version of the *McDonnell Douglas* test recognizes the potential limiting nature of pregnancy, providing a more realistic opportunity for a pregnant worker to fall within the protective scope of the PDA.

The Tenth Circuit has allowed a plaintiff to show that she was capable of performing the modified position sought without regard to the location in which her limitation arose.[99] In *EEOC v. Horizon*, the court held that the correct inquiry for the qualification prong is whether the plaintiff can show that she possessed the basic skills necessary to perform the responsibilities of the requested modified duty.[100] Furthermore, the court reasoned that it was inappropriate to require a plaintiff to meet an employer's qualifications, such as having sustained an on-the-job injury, non-essential to performing the job.[101] This interpretation gives a plaintiff

---

[96] *Id.*

[97] Tysinger v. Zanesville Police Dep't, 463 F.3d 569, 573 (6th Cir. 2006) (finding that the plaintiff's satisfactory performance in the eight years of employment prior to her pregnancy satisfied the qualification prong). *But see* Reeves v. Swift Transp. Co., 446 F.3d 637, 639 (6th Cir. 2006) (assessing that the pregnant plaintiff's failure to allege a job-related injury prevented the employer from granting her light duty work).

[98] *Tysinger*, 463 F.3d at 573 (assessing the plaintiff's job qualifications based on past satisfactory job performance instead of using a physician's temporary restriction of light duty).

[99] EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1193 (10th Cir. 2000) (stating that the plaintiff's failure to prove that her pregnancy is an injury sustained at work does not show that she lacks absolute or relative qualifications).

[100] *Id.*

[101] *Id.* at 1194 (explaining that the function of the prima facie burden to eliminate the common legitimate reason for adverse action—lack of minimal qualifications—is not

with a PDA claim to accommodations a chance to avoid summary judgment by showing that her pregnancy was a determinative factor in the employer's adverse decision.[102] If there was a modified position available and if the pregnant employee was capable of carrying out the duties of such a position, but the employer denies the accommodation, then courts should reject summary judgment for the employer because these facts call into question the actual reason why the employer terminated the plaintiff—an appropriate inquiry for the *McDonnell Douglas* pretext step.

The Tenth Circuit has also applied a broad interpretation of the "similarly situated" language from the PDA.[103] Where the plaintiff must point to a comparative group to show differential treatment, the court allows a plaintiff to compare herself to co-workers with occupational and non-occupational injuries who suffered a limitation and who were accommodated by the employer.[104] The Sixth Circuit has reasoned that the PDA mandates pregnant employees be treated the same as non-pregnant employees similarly situated in their ability to work, regardless of how or where the limitations arose.[105] The Tenth Circuit goes further, hypothesizing that restricting the comparison of treatment of a pregnant employee to treatment of employees injured off-the-job gives an employer the opportunity to devise an accommodation policy tailored to ensure that it could terminate pregnant employees while at the same time guaranteeing that other employees with limited work capabilities would be retained with accommodations.[106]

---

served by requiring a plaintiff to satisfy the qualification prong by showing that her temporary disabilities arose on the job rather than off the job).

[102] *See id.* at 1191.

[103] *Id.* at 1195 n.6 (explaining that comparing a pregnant plaintiff with medical work restrictions to an employee with a non-occupational injury is only one of several tests used to satisfy the fourth prong of the prima facie case, because proof that she was treated differently from any temporarily disabled employee is enough to raise an initial inference of unlawful discrimination).

[104] *Id.* at 1197.

[105] Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (stating that Congress enacted the PDA to include pregnancy within the purview of sex discrimination prohibited by Title VII, but also to protect consequences that arise from pregnancy). Because the consequences of pregnancy are within the PDA's scope, the analysis applied in a pregnancy discrimination case must be assessed differently than a typical Title VII case where the comparator must be similar "in all respects." *Id.*

[106] *Horizon*, 220 F.3d at 1195 n.7.

B. Sword or Shield? The PDA as a Defense For/Against Adverse Action

Once the plaintiff has established her prima facie case, the second part of the *McDonnell Douglas* test gives the employer an opportunity to rebut the inference of discrimination by articulating a legitimate, non-discriminatory reason for its adverse action.[107] If the court finds that the articulated reason is sufficient to rebut the inference of discrimination, it may grant the employer's motion for summary judgment and deny the employee the opportunity to move to the third part of the *McDonnell Douglas* burden-shifting test to prove pretext.[108]

In Title VII cases brought for failure of an employer to accommodate a pregnancy-related work limitation, the employer's articulated reason is typically that it terminated the employee because she was no longer qualified for the job, and since the PDA does not require "preferential treatment" of pregnant employees, it was free to terminate her rather than provide any temporary modifications to her job.[109] Some courts have suggested that if employers did provide accommodations, the preferential treatment would amount to unlawful discrimination against all non-pregnant people, including men.[110] However, it is hard to imagine how providing an accommodation to pregnant women that men will never need can amount to "preferential treatment." Nevertheless, the Seventh Circuit has employed this reasoning to grant summary judgment to an employer that terminated the plaintiff for absenteeism resulting from morning sickness symptoms,[111] denying the plaintiff a chance to show pretext. In *Dormeyer*, the court acknowledged that the plaintiff's morning sickness was related to her pregnancy but asserted that the PDA mandates that employers

---

[107] *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (explaining that a purpose of the second step is to force the employer to clearly frame the factual issue so that the employee may have a fair chance to rebut and prove pretext).

[108] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (explaining that at the summary judgment stage the plaintiff can only survive the employer's motion by showing that there is a genuine issue of fact in dispute for a fact finder to decide at trial).

[109] *E.g.*, Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006) (accepting the employer's argument that the PDA requires pregnancy-blind policies and, therefore, finding that the statute supports the termination of pregnant women who seek accommodations but who have not sustained an injury at work).

[110] *E.g.*, Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 208 n.2 (5th Cir. 1998) (stating in dictum that granting pregnant women a benefit men cannot request might violate Title VII because it would treat male employees differently because of their sex).

[111] Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583 (7th Cir. 2000).

not ignore a pregnant employee's absence if they do not ignore the absences of non-pregnant employees.[112] In *Troupe v. May Department Stores*, the Seventh Circuit used the PDA in favor of the employer by stating that the Act did not require an employer to make it easier for a pregnant woman than for her spouse to work during pregnancy.[113] Instead of using the PDA as a sword against discriminatory employers, the court provided the PDA as a shield, enabling employers to use the statute to defend the termination of an employee for work limitations caused by her pregnancy.

However, the Tenth Circuit has denied an employer's motion for summary judgment and offered the plaintiff an opportunity to prove pretext by pointing to additional factors not discussed in her prima facie case.[114] This approach allows the plaintiff to meet her burden at the third step by showing that the employer's actual motives were mixed and that her pregnancy-related condition was at least one of the motivating factors for her discharge.[115]

III. POLICY RECOMMENDATION

Pregnancy-blind policies are important to help women enter the workforce,[116] but when they are used to deny accommodations to employees experiencing pregnancy-related limitations they operate to their detriment.[117] When Congress enacted the PDA, it took an important step

---

[112] *Id.*

[113] Troupe v. May Dep't Stores, 20 F.3d 734, 738 (7th Cir. 1994) (comparing the plaintiff to a hypothetical husband, who would not have the capacity to become pregnant, thus never needing to request temporary, pregnancy-related accommodations).

[114] EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1198 (10th Cir. 2000) (listing numerous ways for the plaintiff to raise a genuine issue of fact, such as showing weaknesses, contradictions, and irregularities in the employer's argument).

[115] *Id.*; *see also* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 123 (2d Cir. 2004) (discussing that a plaintiff's burden of ultimate persuasion is proving that the adverse action was more likely than not prompted by unlawful discrimination).

[116] *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 205 (1991) (emphasizing a woman's ability to perform regardless of her reproductive capacity); *Troupe*, 20 F.3d at 738 (analogizing age-blind policies incorrectly to pregnancy-blind policies because age, unlike pregnancy, is not an inherent difference between the sexes).

[117] *See* Asad v. Cont'l Airlines, Inc., 328 F. Supp. 2d 772, 789-90 (N.D. Ohio 2004) (explaining that anti-discrimination laws cannot be applied in a social vacuum and that employers may grant pregnant workers accommodations that comprehend the disadvantages that the PDA was enacted to eliminate, thereby conferring a benefit upon an exclusively

toward achieving equality of opportunity for working women. However, the current language of the PDA is not enough to meet that goal.[118] In passing the Act, Congress contemplated that many women work out of financial necessity.[119] The Supreme Court recognizes that pregnancy is a unique and inherently female physiological experience.[120] The Court also considers failure to accommodate for inherent physiological differences between men and women to be sex discrimination, particularly when such accommodations would celebrate those differences while helping advance a historically disadvantaged class.[121] By this logic, and in contrast to the reasoning of some circuit courts, providing accommodations for pregnancy-related limitations is not the sort of preferential treatment that rises to the level of unlawful discrimination because it arises from a condition that only women can experience.[122]

However, the lack of a clear mandate for accommodations from the Supreme Court or Congress leaves employees experiencing pregnancy-related limitations under-protected from adverse employment action. In order to resolve this inadequacy, Congress should develop a legal framework, in the form of an accommodations amendment that expressly goes beyond *Guerra*. An amendment of this kind would create an affirmative duty for the employer to provide temporary accommodations for

---

female class of employees, without violating Title VII's prohibition on discrimination because of sex).

[118] *Cf.* Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 3 (2006) (arguing that the PDA fails to address the right of a pregnant employee who, despite the pregnancy, is fully capable of working to receive benefits that are different from those available to non-pregnant employees); Jamie L. Clanton, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to "Mean What It Says"*, 86 IOWA L. REV. 703 (2001); Millsap, *supra* note 13.

[119] *See* 123 CONG. REC. 23,29664 (1977) (statement of Sen. Brooke) (asserting that losing income, through the loss of a job, means that a woman and her family will forgo basic necessities).

[120] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860-61 (1992).

[121] *See* United States v. Virginia, 518 U.S. 515, 550-551 (1996) (supporting modifications to physical tests in order to allow women to train at a historically all-male military school).

[122] *Cf.* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, *in* FEMINIST JURISPRUDENCE 27, 38-41 (Patricia Smith ed., 1993) (arguing that pregnancy is a temporary episodic occurrence and that during the episode a woman's body functions in a unique way that the law should recognize and not penalize).

employees experiencing pregnancy-related limitations, making the failure to accommodate a *per se* violation of anti-discrimination law, similar to the mandate of the Americans with Disabilities Act.[123] Such an amendment would resolve the discrepancy in the circuit courts' interpretation of the "similarly situated" language in the PDA and eliminate the requirement that a plaintiff compare herself to a non-pregnant person or to wedge pregnancy-discrimination into an ill-fitting *McDonnell Douglas* test. This would also eliminate the need for a pregnant plaintiff to endure a long and complicated trial and ultimately work toward the PDA's goal of abating the working-woman's dilemma of choosing either to have a family or a career.[124] Amending the PDA to provide pregnant employees with a right to accommodations will help to allow women to play a full role in the labor market that amounts to more than a mere "casual flirtation."[125]

---

[123] *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2000) (defining unlawful discrimination as the failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee with a disability); *cf.* Millsap, *supra* note 13 (arguing that since the courts are unlikely to interpret the ADA to require employers to make reasonable accommodations for pregnant employees, Congress should amend the PDA to mandate a reasonable accommodation standard).

[124] *See* Lindy Fursman, *Ideologies of Motherhood and the Experiences of Work: Pregnant Women in Management and Professional Careers* 5 (Ctr. for Working Families, Univ. of Cal., Berkeley, Working Paper No. 34, 2002) (indicating that a national study found that women who become pregnant wish to continue working rather than become stay-at-home mothers).

[125] *See Hearings*, *supra* note 27, at 179 (statement of Alexis Herman, Director, Women's Bureau, Employment Standards Admin., U.S. Dep't of Labor) (explaining that despite stereotypical notions, some working mothers are the bread winners of the family unit and, thus, genuinely attached to the labor force).

Columbia Journal of Gender and Law

Volume 17 2008 Number 3

The *Columbia Journal of Gender and Law* (*JGL*) is published by students at Columbia University School of Law, 435 West 116th Street, New York, New York 10027. All correspondence should be directed to this address.
Phone: (212) 854-1602
Web address: http://www.columbia.edu/cu/jgl/index.html
E-mail: jrngen@law.columbia.edu

Subscriptions: Subscriptions are $65 per volume for institutions, $50 per volume for public interest organizations, $40 per volume for individuals, and $20 per volume for current students. For international subscribers, please add $10.

Submissions: *JGL* welcomes unsolicited submissions of articles, book reviews, essays, comments, and letters. Please note that due to the volume of materials received, submissions to *JGL* will not be returned to the author.

 This issue should be cited as 17 Colum. J. Gender & L. 3 (2008).

Columbia Journal of Gender and Law

The *Columbia Journal of Gender and Law* (*JGL*) is an interdisciplinary journal created to address the interplay between gender and law and its effects at the personal, community, national, and international levels. Our articles express an expansive view of feminism and of feminist jurisprudence, embracing issues related to women and men of all races, ethnicities, classes, sexual orientations, and cultures. *JGL* also embraces articles about law from other academic disciplines in order to show the connections between law and fields such as psychology, history, religion, political science, literature, and sociology.

JGL operates by consensus and is organized in a manner that supports internal debate and discussion. Every member is encouraged to contribute her or his views. *JGL* permits 1Ls to join as members, allowing for interaction between students from all classes, and provides second- and third-year students with the opportunity to serve as board members. All *JGL* members participate in the decision-making process regarding the selection and editing of articles. Members work in teams and follow one article in each issue from acceptance to publication.

In fostering dialogue, debate, and awareness about gender-related issues, our goal is to advance feminist scholarship at the law school beyond traditional legal academic confines and to serve as an outlet for interested students, practitioners, and faculty members.

We typically have published two issues per volume, but due to the increase in the number of excellent submissions we receive and the generosity of our contributors, we are expanding publication to three regular issues per volume. However, the number of issues we publish will continue to depend on the number of articles our members vote to accept, and some of our volumes may be complete in one issue. Thank you for your support, and we welcome your contributions and responses.