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## Courtroom Bias: Gender Discrimination Against Pregnant Litigators

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## **COURTROOM BIAS: GENDER DISCRIMINATION AGAINST PREGNANT LITIGATORS**

"We need to recognize difference among women as diversity rather than division, and difference between women and men as opportunity rather than danger."<sup>1</sup> With a mass of literature and scholarly writing on topics ranging from gender discrimination to affirmative action, the single fact remains throughout all legal thought that men and women are "different." Although this statement seems simplistic in its characterization of the sexes, it raises questions and issues that are yet to be answered. One of the most obvious areas of life where the differences between men and women shine through is pregnancy. Whatever advances women make in society to become equal in the workplace, the fact will always remain that women become pregnant, and as such must deal with the joys and problems arising from it. This Note will focus on whether this basic biological fact leads to the ultimate conclusion that women will necessarily face gender discrimination as long as there remains a physical difference between men and women.

The first section of this Note will look at the history of pregnancy discrimination. Before 1978 the courts did not view discrimination against women due to pregnancy as gender discrimination under Title VII.<sup>2</sup> In 1978 Congress passed the Pregnancy Discrimination Act<sup>3</sup> and cases after 1978 will be discussed to show the way courts have interpreted the Act. The second part of this Note will focus on discrimination in general against women in the legal profession. There is evidence that gender bias does still exist in this area. However, there is also an implication that the discrimination is not as prevalent as previous years, and the manifestations — where they still exist — are subtle. The third part of this Note will discuss an area where the two sections merge: pregnant female litigators in the courtroom. This section will look at specific instances of overt discrimination against pregnant litigators and discuss how the Pregnancy Discrimination Act does not address this issue. Finally, this Note will give possible suggestions to remedy the continuing discrimination in the courtroom.

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1. Catherine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1303 (1987) (citation omitted).

2. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976).

3. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e) (1994).

## PREGNANCY DISCRIMINATION

*History of the Act*

One of the first major Supreme Court cases to deal with the issue of pregnancy and discrimination is *General Electric Co. v. Gilbert*.<sup>4</sup> In this case female employees of General Electric were denied disability benefits when they were absent from work as a result of pregnancy.<sup>5</sup> They sued under Title VII of the Civil Rights Act of 1964,<sup>6</sup> arguing that the denial of benefits constituted gender discrimination in violation of the Act.<sup>7</sup> The district court found that the disability plan was sex discrimination,<sup>8</sup> and the appellate court affirmed.<sup>9</sup> However, when the case reached the United States Supreme Court it was reversed.<sup>10</sup> The Court said that the exclusion of pregnant women was not gender-based discrimination because "it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive."<sup>11</sup> The Court showed its reluctance to expand the meaning of the Act through judicial intervention and said that "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant."<sup>12</sup>

Congress responded to the wording of the *Gilbert* decision in 1978 by creating the Pregnancy Discrimination Act as an amendment to Title VII of the Civil Rights Act of 1964.<sup>13</sup> Later cases interpreted this amendment as effectively overruling the Supreme Court's decision in *Gilbert*.<sup>14</sup> The Act prohibits an employer from discriminating against an employee in any way on the basis of the individual's race, color, religion, sex, or national origin. The clause relating to pregnancy states that:

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4. 429 U.S. 125 (1976).

5. *Id.* at 127.

6. 42 U.S.C. § 2000e-2(a)(1).

7. *Gilbert*, 429 U.S. at 130.

8. *Id.* (citing 375 F. Supp. 367 (E.D. Va 1974)).

9. *Id.* (citing 519 F.2d 661 (4th Cir. 1975)).

10. *Id.* at 147.

11. *Id.* at 138-39.

12. *Id.* at 145.

13. 42 U.S.C. § 2000(e).

14. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983).

[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 medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.<sup>15</sup>

Although the amendment was a step toward equality for women in employment, some legal scholars argue that the method Congress chose does not fully appreciate the physical difference between men and women.

Legal equality analysis "runs out" when it encounters "real" difference, and only becomes available if and when the difference is analogized to some experience men can have too. Legislative overruling of *Gilbert* by the Pregnancy Discrimination Act was thus accomplished by making pregnancy look similar to something men experienced as well — disability.<sup>16</sup>

Later cases have used the Pregnancy Discrimination Act to flush out congressional intent.<sup>17</sup> One of the Supreme Court's first interpretations of the Act came in *Newport News Shipbuilding & Dry Dock v. Equal Employment Opportunity Commission*.<sup>18</sup> The employer in this case amended its health insurance policy to conform to the new Act.<sup>19</sup> It extended coverage to pregnancy-related conditions to the same extent as any other medical condition.<sup>20</sup> The coverage also extended to spouses of male employees, but not to the same extent for female employees.<sup>21</sup> The male employees in *Newport News Shipbuilding* sued the employer based on the Pregnancy Discrimination Act arguing that the employer was discriminating against them based on their sex. In interpreting the Act the Supreme Court agreed with the male employees and found the employer's policy violated the Act "because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees."<sup>22</sup> The use of the Act to protect male employees in this way tends to support Christine Littleton's characterization of the Act

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15. 42 U.S.C. § 2000(e)(k) (1994).

16. Littleton, *supra* note 1, at 1306.

17. See *Newport News Shipbuilding*, 462 U.S. at 669; *Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

18. 462 U.S. 669 (1983).

19. *Id.* at 670.

20. *Id.*

21. *Id.*

22. *Id.* at 676.

as disability-focused rather than pregnancy-focused.<sup>23</sup> The male employees in *Newport News Shipbuilding* were not going to become pregnant, so their use of the Pregnancy Discrimination Act was based on a claim of mistreatment due to gender.<sup>24</sup> This is a disability-focused argument and does not relate to the pregnancy aspects of the Act.

A final interpretation of the Act comes from the Supreme Court case of *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*<sup>25</sup> In this case the employer implemented a policy that excluded all female workers from working in areas of the plant that would expose them to lead.<sup>26</sup> Occupational exposure to lead, for a pregnant woman, could lead to a risk of harm to the fetus.<sup>27</sup> The female employees filed a class action suit based on the Pregnancy Discrimination Act arguing that the policy was discrimination based on sex.<sup>28</sup> The Court agreed with the employees and said that "[r]espondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex."<sup>29</sup> The Court elaborated on its decision and said that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."<sup>30</sup> The decision dealt directly with the physical difference between men and women and prohibited discrimination against women based on the fact that they are capable of becoming pregnant, unless that fact prevents the particular woman from performing her job duties.<sup>31</sup>

### *Limitations of the Act*

Although the Pregnancy Discrimination Act has helped to alleviate the adverse employment effects that a pregnancy can have for a woman, the reach of the legislation's protection is not boundless. For example, in *Sharp v. United Airlines, Inc.*,<sup>32</sup> the U.S. Court of Appeals for the Seventh Circuit held that a woman's pregnancy discrimination claim may be barred by a state statute of limitations.<sup>33</sup>

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23. See Littleton, *supra* note 1, at 1306.

24. See *Newport News Shipbuilding*, 462 U.S. at 669.

25. 499 U.S. 187 (1991).

26. *Id.* at 191.

27. *Id.* at 190.

28. *Id.* at 192.

29. *Id.* at 199.

30. *Id.* at 204.

31. See *Johnson Controls*, 499 U.S. at 207 (declaring that Johnson Controls was excluding women because of their reproductive capacity).

32. 236 F.3d 368 (7th Cir. 2001).

33. *Id.* at 372.

In Illinois a plaintiff must file a discrimination charge with the Equal Employment Opportunity Commission (EEOC) within 300 days after the unlawful employment practice.<sup>34</sup> The plaintiff in this case waited two years and consequently had her claim barred.<sup>35</sup> Although equitable estoppel, equitable tolling, and continuation of the violation could extend the statutory period, the court held they were not applicable in this case.<sup>36</sup>

The case *Barnett v. Nevada*<sup>37</sup> illustrates a second limitation. In *Barnett* the plaintiff's action was barred because she did not first exhaust all possible administrative remedies before filing suit in federal court.<sup>38</sup> Barnett worked as a corrections officer for the Nevada Department of Prisons and claimed she was denied reasonable accommodation when she became pregnant.<sup>39</sup> The plaintiff filed a complaint with the Nevada Equal Rights Commission (NERC), but did not fill out all the appropriate requests, and did not file a separate complaint with the EEOC.<sup>40</sup> The U.S. Court of Appeals for the Ninth Circuit held that "[b]ecause Barnett's failure to cooperate with the NERC's investigation caused the administrative action to be closed without any action having been taken by the NERC, she failed to exhaust her administrative remedies."<sup>41</sup>

The case of *Miller v. American Family Mutual Insurance Co.*<sup>42</sup> demonstrates two limitations on the Pregnancy Discrimination Act.<sup>43</sup> The plaintiff, Mrs. Miller, filed discrimination charges after she discovered she was the lowest paid employee in her office, among all her co-workers who had never been pregnant.<sup>44</sup> First, although seemingly obvious, the case states that an employer must have actual knowledge of the pregnancy for a plaintiff to successfully charge discrimination.<sup>45</sup> The court opinion stated "[h]er claim of pregnancy discrimination with respect to her April 1996 raise cannot be based on her *being* pregnant if [employer] King did not know she was."<sup>46</sup>

34. *Id.*

35. *Id.*

36. *Id.*

37. 2001 U.S. App. LEXIS 3169 (2001).

38. *Id.* at \*4.

39. *Id.* at \*2.

40. *Id.*

41. *Id.* at \*6.

42. 203 F.3d 997 (7th Cir. 2000).

43. *See id.* at 1006 (discussing limitations of knowledge and adverse action).

44. *Id.* at 1001.

45. *Id.* at 1006.

46. *Id.*

The second limitation that can be extracted from the *Miller* case is that the action taken against the plaintiff must be adverse.<sup>47</sup> In this case, a raise that the plaintiff received was actually larger than her non-pregnant co-workers and the court said that this fact was "fatal to Miller's claim, for without a materially adverse job action, discrimination is not actionable."<sup>48</sup>

## GENDER DISCRIMINATION AGAINST WOMEN IN THE LEGAL PROFESSION

### *Gender Discrimination Still Exists*

Several task forces around the country have been assigned over the years to survey and report on the level of discrimination in the current workforce, particularly in the legal area.<sup>49</sup> Few scholars would disagree that when women entered the legal profession the previously male-dominated profession responded with a certain amount of malice and discrimination.<sup>50</sup> Women, however, are increasingly making their mark,<sup>51</sup> and it is therefore necessary to first determine if gender discrimination is even present in the year 2001.

In 1997, the U.S. Court of Appeals for the Second Circuit created a task force to explore the issue of gender discrimination and survey lawyers on the issue.<sup>52</sup> The study looked at discrimination based on gender and race and those conducting the study interviewed 238 white male lawyers, 226 white female lawyers, ninety-five minority male lawyers, and fifty-three minority female lawyers.<sup>53</sup> Women attorneys reported the remnants of gender-based discrimination, and "roughly half of the female lawyers reported experiencing biased conduct based on gender."<sup>54</sup> The report also suggested that working in the legal profession brought on more discrimination for females than simply participating in the system.<sup>55</sup> Although some discrimination was

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47. *Id.*

48. *Miller*, 203 F.3d at 1006.

49. See *infra* notes 51, 57, 90.

50. See Elizabeth A. Delfs, *Foul Play in the Courtroom: Persistence, Cause and Remedies*, 17 WOMEN'S RTS. L. REP. 309, 311 (1996).

51. See Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers, Litigation Prevention Measures, and the Limits of Anti-Discrimination Law*, 6 COLUM. J. GEN. & L. 323, 331 (1996) (discussing survey results of the Second Circuit task force).

52. Sharon E. Grubin & John M. Walker, Jr., *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 11 (1997) (reporting conclusions of the Second Circuit task force).

53. *Id.* at 11.

54. *Id.* at 42.

55. *Id.* at 51.

reported against parties and witnesses, "[b]iased conduct toward lawyers, based on gender or race or ethnicity, has occurred to a greater degree."<sup>56</sup>

The D.C. Circuit Court of Appeals also conducted a task force investigation in 1996.<sup>57</sup> This report showed that gender discrimination is also present in the D.C. Circuit.<sup>58</sup> However, some of the reports here showed discrimination in a subtle form. For instance, "[i]n focus group discussions, women attorneys commented that they were more likely to be interrupted or ignored by judges or by other attorneys than were their male counterparts."<sup>59</sup> This is not blatant discrimination that would violate Title VII,<sup>60</sup> but it is still felt by women. Other observations come from judges who say that "some of their colleagues 'do not respond' to women attorneys in the same way as they do males, or may express irritation at, or hold women attorneys to a higher standard than men."<sup>61</sup>

The subtle types of discrimination in the D.C. Circuit also extend to the work assignments that women receive. For example, "[w]omen responding to the Attorney Survey reported that their assignments are affected for reasons associated with gender more often than did their male colleagues."<sup>62</sup> The study cited one woman saying of her firm's assigning policies, "I know that when someone is staffing up for an emergency case, they don't want a woman with young children. They assume that these women can't give the time."<sup>63</sup> A Massachusetts task force went so far as to say that "from their entrance into the courthouse and throughout their participation in the business of the courts, female . . . attorneys are faced with unnecessary and unacceptable obstacles that can be explained only in terms of their gender."<sup>64</sup>

In her article, Elizabeth A. Delfs relates the history of women in the legal profession as well as her personal experiences.<sup>65</sup> Delfs is an attorney in private practice and summarizes her thoughts on women in the law field by saying, "I've been practicing law for twenty years and I still can't believe the level of garbage that women

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56. *Id.*

57. *Special Section: Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 84 GEO. L.J. 1657 (1996) [hereinafter *D.C. Circuit Report*].

58. *Id.* at 1709-11, 1734-36.

59. *Id.* at 1709.

60. See Civil Rights Act, Title VII, 42 U.S.C. § 703(a) (1964).

61. *D.C. Circuit Report*, *supra* note 57, at 1711-12.

62. *Id.* at 1735.

63. *Id.* at 1736.

64. Delfs, *supra* note 50, at 309.

65. See *id.*



attorneys have to put up with."<sup>66</sup> She notes that women have been dealing with discrimination in the courtroom since they entered the field in the 1960s and '70s.<sup>67</sup> The discrimination does not come solely from the bench either. "Stereotypes about women may be used as a trial tactic to silence a female attorney. In one instance, a male attorney demanded that his female opponent not interrupt him any further, stating that 'women attorneys have a hard time keeping their mouths shut.'"<sup>68</sup> Comments like this place women attorneys in the awkward position of choosing to zealously represent their client, thereby playing into the stereotype with which they are faced, or to stand back to avoid fitting into that female category even if that choice may injure the client. Men deal with female opposing counsel in different ways and "some male attorneys believe it is fair play to actively undermine a woman attorney's case by using her gender."<sup>69</sup> These types of discrimination apparently are still present in the legal workforce and are not addressed by Title VII<sup>70</sup> nor the Pregnancy Discrimination Act.<sup>71</sup>

*Gender Discrimination, Where it Still Exists, is Subtle*

Although the above sections show that women in certain areas do still feel the bite of prejudice based on their sex, that feeling is not unanimous.<sup>72</sup> In fact, other studies show that some women who acknowledge the presence of discrimination argue that it is waning.<sup>73</sup> Women in the legal profession are no longer significantly outnumbered by their male counterparts, as they were when they first entered the field.<sup>74</sup> This trend extends out into the private sector as well and "[w]omen's battle for access to the elite enclaves of the profession — large law firms — has been won."<sup>75</sup>

The Second Circuit survey cited above<sup>76</sup> also contains indications that existing discrimination is slowly being eliminated.<sup>77</sup> There is a trend toward increased participation by females in the judicial

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66. *Id.*

67. *Id.* at 311.

68. *Id.* at 314.

69. *Id.* at 315.

70. Civil Rights Act, Title VII, 42 U.S.C. § 703(a) (1964).

71. Pregnancy Discrimination Act, 42 U.S.C. § 2000(e) (1978).

72. See Bisom-Rapp, *supra* note 51, at 331; *infra* note 90 and accompanying text.

73. Bisom-Rapp, *supra* note 51, at 331.

74. See *D.C. Circuit Report*, *supra* note 57, at 1686.

75. Bisom-Rapp, *supra* note 51, at 331.

76. See *supra* notes 49-71 and accompanying text.

77. See generally Grubin & Walker, *supra* note 52.

system.<sup>78</sup> "The significant representation of women and minorities on some of the courts of the Second Circuit is a relatively recent phenomenon."<sup>79</sup> Although the study as cited earlier states that women do still feel the effects of their gender, the study also says that "an overall majority of lawyers — regardless of gender, race or ethnicity — reported that they had not experienced biased conduct personally."<sup>80</sup>

The results from the D.C. Circuit task force ran along similar lines. There was evidence that the feeling of discrimination existed, but it too appeared to be waning. Statistically, more females are entering the legal area.<sup>81</sup> "In 1970, only 3-5% of the attorneys in this country were women. Today, women constitute close to one-fourth of the attorneys in the nation. Twenty years ago law school classes were about 15% female. Today, they are 43% female."<sup>82</sup>

Again, the D.C. Circuit echoes the idea that the areas where women still feel bias cannot be reached by the arms of the protective legislation.<sup>83</sup> Outright discrimination that is covered under Title VII is now missing from most workplaces, and both genders in the D.C. survey agree that "the more overt forms of gender-biased behavior are, with only a few exceptions, absent from proceedings before the courts of the D.C. Circuit."<sup>84</sup> Mainly, discrimination manifests itself in more subtle ways, and "[t]hese more subtle forms of difference in treatment relate to how they [women] were addressed, whether they were interrupted or listened to, and whether they were recognized as attorneys. These behaviors can undermine, albeit in subtle ways, perceptions as serious professionals and hence their effectiveness."<sup>85</sup> These subtle practices, however, can have serious effects on a woman's ability to do her job. A large part of success in the legal profession is based on reputation and the foundation of confidence that an attorney has established. Women in the profession will have an uphill battle to stay on the same level with men if they start out being treated differently, even in these subtle ways.

There is some indication that in certain parts of the country discrimination is completely eliminated.<sup>86</sup> For instance, attorneys had no complaints in the D.C. Circuit regarding the way they were

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78. *Id.*

79. *Id.* at 29.

80. *Id.* at 42.

81. *D.C. Circuit Report*, *supra* note 57, at 1677.

82. *Id.*

83. *Id.*

84. *Id.* at 1707.

85. *Id.*

86. *Id.* at 1708.

treated by judges.<sup>87</sup> The study stated that "blatant gender bias by judges toward attorneys is virtually nonexistent in the courts of the D.C. Circuit."<sup>88</sup> Although this study does not address the issue of subtle discrimination, it does illustrate that overt gender discrimination in the legal profession is no longer a significant problem in some jurisdictions.<sup>89</sup>

An Eighth Circuit Court of Appeals task force study came to a similar conclusion.<sup>90</sup> In this area, the survey concluded that "[t]he results . . . indicated that 'overall, females are treated fairly and equally in every aspect of judicial conduct.'"<sup>91</sup>

The evidence as a whole suggests that gender discrimination in the legal profession, and particularly against female litigators, does still exist. However, that discrimination appears in subtle forms which, although still damaging, is most likely beyond the protections given by statute. The next section of this Note determines if there is an area of discrimination that is blatant, and therefore could be solved statutorily.

#### PREGNANCY DISCRIMINATION AGAINST FEMALE LITIGATORS

Males in the legal profession are most obviously faced with a woman's gender differences when she is showing her pregnancy. There is evidence that pregnant female litigators still feel outright discrimination when they are arguing in a courtroom and showing their condition.<sup>92</sup> Consider the following reports from women attorneys:

One woman reports she was told during trial, "So I see you got yourself knocked up."<sup>93</sup> Another relates being told, "What do you think this is lady — a delivery room?"<sup>94</sup> A female prosecutor says a judge said to her "Ms. X, I think you are too pregnant to prosecute."<sup>95</sup> Further, as if those comments do not go far enough, imagine being told by a judge in a courtroom, "My, your breasts have gotten big from nursing, haven't they!"<sup>96</sup> Worse still, imagine one woman's situation

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87. *D.C. Circuit Report*, *supra* note 57, at 1708.

88. *Id.*

89. *See id.*

90. Rena M. Atchison, *Survey: A Comparison of Gender Bias Studies: Eighth Circuit Court of Appeals and South Dakota Findings in the Context of Nationwide Studies*, 43 S.D. L. REV. 616, 620 (1998).

91. *Id.*

92. Delfs, *supra* note 50, at 317.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

where the judge told her, "If your husband had kept his hands to himself you wouldn't be in the condition you are in."<sup>97</sup> The judge that made the last comment was publicly reprimanded by the court in a later decision.<sup>98</sup> One woman relates a story from her pregnancy that shows a woman can be left with no option from a judge — she will be criticized whether she continues to work through her pregnancy or chooses to stay home.

This tactic can take the form of overly stringent requirements. A Connecticut attorney was given only a week after the birth of her baby to begin a case. After much argument and castigation, she was given three weeks. When she appeared three weeks after the birth of her child, she was admonished for coming to work so soon after giving birth. The judge further remarked: 'you yuppies want only money.' In California, a judge refused to grant continuances, even when the attorney was about to deliver her child.<sup>99</sup>

These comments show that the subtle forms of bias can disappear when judges are faced with a woman's pregnancy rather than just her gender and can be replaced with overt discrimination. Other examples support this theory. For instance, a newspaper article related a story from former First Lady and current New York Senator Hillary Rodham Clinton.<sup>100</sup> She stated that her pregnancy caused her male colleagues and judges to become uncomfortable. Clinton said, "A judge looked me straight in the eye and said, 'Hillary,' . . . 'you just can't have this baby in this courtroom.' I said, 'Judge, I'm not planning on doing that.'"<sup>101</sup> These stories articulate how males in the profession react when they are confronted with the physical difference between men and women.

Discrimination against women in general has waned as men have become more accustomed to women sharing the role that men alone have enjoyed. However, men will never be in the role of a pregnant litigator, and "[p]regnant attorneys do indeed make some of their male

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97. *Id.*

98. See *In re Deming*, 736 P.2d 639, 657 (Wash. 1987). One scholar points out that the decision did not sufficiently meet the offense in terms of reprimand. "However, the wording of two judicial opinions provides a clue to the tolerant attitude of the judiciary towards gender-biased behavior, blatant or otherwise. Judge Deming's outrageous acts of sexual harassment were referred to in the opinion as a 'lack of social graces, restraint and decorum.'" Delfs, *supra* note 50, at 329.

99. Delfs, *supra* note 50, at 317 (citations omitted).

100. Alison Mitchell, *Banking on Family Issues, Clinton Seeks Parent's Votes*, N.Y. TIMES, June 25, 1996, at A19.

101. *Id.*

colleagues uneasy."<sup>102</sup> Society views the role of a mother and the role of a professional separately; when the two views conflict women attorneys are adversely affected.<sup>103</sup>

To show this mind-set, another female attorney relates this story from her experience at a law firm:

During my third year of legal practice, a single spoken sentence led me to consider at length the position of women attorneys in Wall Street law firms. Commenting on my recent announcement that I was pregnant, a male partner assured me, "In this department you will be treated as an attorney, not as a pregnant woman." I puzzled over this dichotomy, wondering about the choice the partner had imposed on himself. Although I was pregnant and an attorney, he preferred not to see me as a pregnant attorney.... My professional status was severed from my sex and physical condition.<sup>104</sup>

The statement again brings to light the problem males have with integrating the image they have of women and their capabilities with how they view attorneys.<sup>105</sup> As the attorney above stated, men can separate the female as an attorney and the female as a woman who may become pregnant and have children.<sup>106</sup> Discrimination in this area comes from men, and occasionally other women, who cannot integrate the two versions of a woman into one functional being.

This passage also shows that it is possible for men to discriminate against women based on pregnancy without feeling any actual malice towards the woman. A discrimination offender's motives may be benevolent — the person may sincerely be concerned about the woman's health and the child's well-being; however, the effects on the woman are the same whether or not the discrimination comes with kind intentions. Therefore, to solve the problem the remedies must be aimed at the actual forms of discrimination rather than the underlying intentions.<sup>107</sup>

A final example from California shows the effect that this discriminating has had on a woman's career. Susan Sergiojan and another former prosecutor, Laura Akers, were interviewed after they filed suit against two San Diego district attorneys for discriminating

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102. Bisom-Rapp, *supra* note 51, at 323 n.1.

103. *Id.* at 337.

104. *Id.* at 323-24.

105. *Id.*

106. *Id.*

107. For a full discussion of possible remedies in the area, see *infra* notes 116-30 and accompanying text.

against them while they were pregnant.<sup>108</sup> In the interview, Sergiojan said that "she had long witnessed examples of discrimination against women in the office, particularly when they became pregnant. She said Miller [one of the district attorneys] would not allow her to handle trials during her two previous pregnancies."<sup>109</sup> As a result of discrimination, women can be kept out of the courtroom or given lesser assignments, which could dampen their career movement in ways not experienced by men.<sup>110</sup> If women are given the less appealing or challenging cases to deal with while they are pregnant, they are at a strategic disadvantage in terms of job advancement because men will not be faced with this obstacle. Again, this is true despite the possibility that women were being denied job opportunities because of genuine concern over their health.

Fortunately, this type of pregnancy discrimination can be met by legislation. The Pregnancy Discrimination Act forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>111</sup> This means that if women can show that they were kept out of the courtroom or passed over for better assignments because of their pregnancy they will have a successful suit under the Act. The Act also eliminates the employer's ability to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, or national origin."<sup>112</sup> The difficulty here is proving a *prima facie* case that the employment decision was based on the pregnancy. The employer has the right to rebut that *prima facie* case with evidence that the adverse action was the result of another legitimate business reason.<sup>113</sup> The employer will then be successful on the case unless the female employee can show that the legitimate business interest is mere pretext.<sup>114</sup> This is very difficult to prove. And even beyond these actions, the Act will not stop the

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108. Ann Krueger, *Ex-Prosecutors Sue DA, Claim Discrimination, Pair Say Rights Were Violated While Pregnant*, SAN DIEGO UNION-TRIB., June 2, 1999, at B1.

109. *Id.*

110. *D.C. Circuit Report*, *supra* note 57, at 1735.

111. 42 U.S.C. § 2000e-2(a)(1) (1994).

112. *Id.* § 2000e-2(a)(2).

113. *See generally* *Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (discussing the procedure for establishing a gender discrimination suit under the Civil Rights Act).

114. *Id.*

comments in court from judges and male attorneys since this does not constitute an employment action by an employer.<sup>115</sup> The next section will look at what remedies are available to avoid these problems.

### PROPOSED REMEDIES OF PREGNANCY DISCRIMINATION

The first possibility to more broadly lessen the existence of pregnancy discrimination specifically and gender discrimination generally is to institute a proper review system of legal places of employment. Although this policy would have little effect on the conduct of judges, it would have an impact on firms and the treatment of female litigators in the private sector. The firms should "implement and administer a carefully written performance review system for the lawyers they employ. These evaluations should then be scrutinized for evidence of stereotyping or bias."<sup>116</sup> A review system will help firms stay aware of the problems they are facing concerning discrimination so they can formulate responses before the discrimination adversely affects female employment. The system would help ensure that assignments are given to female litigators without discrimination. A solid system also increases stability because "[s]ystematizing the evaluation of employees enhances the appearance of rationality in the decision-making process. Scrutinizing reviews for stereotypical comments, and then altering them through expansion and clarification when such comments are found, produces documents which demonstrate that the evaluation was based upon neutral criteria."<sup>117</sup> Such reviews would also allow companies and firms to set out appropriate guidelines in the area based on what current practices are in comparison to acceptable practices. It is necessary, for this suggestion to have effect, that an unbiased party compiles the information.<sup>118</sup> Attorneys may feel more comfortable being honest during such reviews if they know the information will not lead to any reprisals from their job.

A second suggestion is for jurisdictions to create and publish task force findings. The majority of the statistical data from this Note was gathered from the results of task force findings, as they are an excellent way to stay aware of the problems in particular jurisdictions.<sup>119</sup> Participants in judicial proceedings will be better

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115. See 42 U.S.C. § 2000(e) (1978).

116. Bisom-Rapp, *supra* note 51, at 344.

117. *Id.* at 345.

118. See *supra* notes 51-52 and accompanying text.

119. See *supra* notes 51-52, 57, 90.

able to address and eliminate courtroom discrimination if they are in tune with the specific offenses that are present in their area. The surveys should include topics such as overt and subtle discrimination and comments from judges, treatment regarding gender from opposing counsel, and the job opportunities and chances for advancement that are available based on gender in the public and private legal employment areas. Studies should be conducted on gender fairness and then made available to all players in the system: judges, attorneys, and non-judicial court staff.<sup>120</sup>

An effective way to ensure that the discrimination problem is not ignored is for female attorneys to file formal complaints. Most states offer an opportunity for lawyers to file formal complaints against judges.<sup>121</sup> This option is an efficient way to bring attention to particular judges who consistently discriminate in their courtrooms, as well as to identify geographic areas that are inept at dealing with the problem. When an attorney files a formal complaint against a judge, the process begins with the state judicial conduct group, and these "organizations exist in the majority of states and are charged with the responsibility of ensuring that judges maintain the standards of professional conduct."<sup>122</sup>

One necessary aspect of the complaint procedure is assurance of confidentiality. Women attorneys who litigate may be afraid to report practices by judges whom they will argue in front of again, and may therefore not file reports if they are afraid of reprisal.<sup>123</sup> An unbiased ethical state organization is the key to this requirement and women must be able to lodge anonymous complaints without worrying that their identity will be discovered.

Another option to eliminate discrimination is to start educating law students. Law schools report the existence of gender bias in growing numbers.<sup>124</sup> It makes sense that this would be an appropriate forum to begin discussion on the issues of discrimination and to propose measures to stop it. Curricula should include classes and discussions that explore the dangers of discrimination and the harms it causes for women. Law schools should allow students to question and study the area, as well as taking "a firm and public stand against gender bias within their own backyard."<sup>125</sup> Training at the law school level should include the notion that good intentions may still have

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120. Grubin & Walker, *supra* note 52, at 104.

121. Delfs, *supra* note 50, at 328-29.

122. *Id.* at 327-28.

123. *Id.* at 330.

124. *Id.*

125. *Id.*



negative consequences. Students must understand that they need not intend to discriminate against a woman for her career to be adversely affected. Law schools must ensure that there is no gender discrimination, particularly against pregnant students, in admissions or treatment during classes and activities.

Gender bias is currently not recognized as prohibited behavior by the Model Code of Professional Responsibility.<sup>126</sup> This fact could not only discourage women from reporting discrimination behavior, but could also make them feel such behavior is acceptable. If the judiciary has not chosen to denounce such activity a woman may feel as if she is complaining about nothing. This can be a strong disincentive if a woman is already feeling the effects of discrimination. Judiciaries have the option of adopting a canon that would forbid such discrimination as part of the expected ethical conduct in that particular jurisdiction.<sup>127</sup> Such an adoption would inform attorneys in that area that discrimination is not an appropriate form of courtroom behavior. This suggestion ties in with the formal complaint procedure suggestion in that such complaints are made more difficult if a jurisdiction has not announced a policy against discrimination.

Another approach would be to focus on the development and creation of judges as well as the creation of lawyers. Training for judges would occur separately from law school and would follow separate standards than those set out for practicing attorneys. The training should come in two forms. First, judges should be instructed on how to deal with discrimination between attorneys. If judges have adequate control over the courtroom atmosphere then a great deal of discrimination from opposing counsel against a female litigator will be reduced. Second, judges should be informed of the direct and subtle occurrences of discrimination in their jurisdiction, and instructed on ways to avoid similar behavior. This approach would tie in to the suggestion of regular creation and publication of task force surveys. Judges should be encouraged to take the initiative and correct any person present in the courthouse when she/he engages in gender-biased conduct.<sup>128</sup> Judges could further be informed of which private activities tend to foster discrimination, and some argue that "membership by judges in private clubs which discriminate on the basis of race, sex or national origin [should be] discouraged."<sup>129</sup> This would help eliminate the possibility that judges would set an example of discrimination unintentionally through their private activities.

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126. *Id.*

127. *Id.*

128. Atchinson, *supra* note 90, at 628.

129. *Id.* at 629.

A few other secondary suggestions may help eliminate the problem in gradual steps. For instance, any written literature that is produced from the court, including decisions and correspondence, should be reviewed and monitored to ensure that gender-neutral language and thoughts are used. Judges should be informed when they have produced documentation that does not meet this requirement. To be done effectively, this operation would also need a neutral review system or board that would use a pre-determined set of criteria in making these judgments and recommendations. The criteria should be made available to judges and attorneys so as to aid their compliance. Jurisdictions would need to set up guidelines for this suggestion so as to ensure and maintain the confidentiality of any litigation documents.

Another possibility would be for firms and government offices to create programs or opportunities for younger attorneys to have contact with the more experienced attorneys in a mentor fashion. Women could learn from older attorneys the ways to deal with discrimination both from judges and from male attorneys during courtroom interactions. Female mentors could also make younger attorneys aware of the proper methods to lodge complaints and inform them of any other avenues that are available to air grievances. In exchange the newer attorneys would be able to keep the more established female attorneys informed of the discrimination that still exists even if they did not inform the mentors. This system would also help women litigators generally understand that their experiences are not isolated and give women a chance to discuss their problems first to determine if a formal actual need to be taken.

### CONCLUSION

Outright discrimination against pregnant women in employment practices is not addressed and prohibited by the Pregnancy Discrimination Act that was passed in 1978 as a response to the Supreme Court decision in *General Electric Co. v. Gilbert*.<sup>130</sup> The Court had said pregnancy did not constitute sex-based discrimination and Congress responded by saying the opposite.<sup>131</sup> Future cases used the act to extend protection to the spouses of male employees<sup>132</sup> and the

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130. 429 U.S. 125 (1976).

131. *See id.* at 125.

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

female employees who were kept away from certain factory jobs on the chance that they may become pregnant.<sup>133</sup>

Gender discrimination does still exist in the legal profession. Surveys done in different jurisdictions report that women still feel they are treated differently than their male counterparts by judges and by opposing counsel.<sup>134</sup> Women are often placed in a difficult position based on this discrimination because if they try to avoid the generalized female stereotypes so as to not offend judges, they may risk failing to properly serve their clients.

There is also evidence, however, that for the most part the discrimination that is still felt by women in the legal field is subtle and waning. Women report more derogatory comments, looks, and acts from judges and male attorneys as opposed to blatant offensive statements or adverse employment actions. There are also reports from the surveys cited that in some areas women do not feel discriminated against at all, and are encouraged that the trend seems to be towards acceptance of women in the field.<sup>135</sup> However, these subtle types of discrimination are still damaging and they cannot be properly addressed by the protective legislation in the area because they do not result in overt adverse employment actions.

Overt discrimination remains against pregnant female litigators. Females report incidents of overt discrimination in the courtroom setting despite the fact that the trend in the legal system appears to be towards subtle discrimination, if any at all.<sup>136</sup> Male judges and attorneys were reported to make highly offensive comments to pregnant litigators in open court.<sup>137</sup> Women litigators also reported being assigned to lesser cases when they were pregnant. This discrepancy between the treatment of women as legal professionals and soon-to-be mothers comes from the dual roles that women are placed in within society. When some men are confronted with the physical manifestations of a woman's gender they place her in the female-motherhood role. The discrimination results when the woman places herself back in the professional role through litigating in a courtroom. Again, the Pregnancy Discrimination Act does not address these comments; however, it does contain a remedy for women who suffer adverse employment decisions because of their pregnancy.<sup>138</sup>

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133. *Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

134. See *supra* notes 49-71 and accompanying text.

135. See *supra* notes 72-91 and accompanying text.

136. See *supra* notes 49-71 and accompanying text.

137. Delfs, *supra* note 50, at 317.

138. 42 U.S.C. §2000(e)(k) (1994).

The difficulty is in proving that the action was a result of bias against the woman based on her pregnancy.

There are several remedies that can be integrated into the legal system to address the areas of discrimination that the protective legislation cannot reach. First, a proper review system should be implemented in firms to ensure that assignments are given to female litigators without discrimination, although this would have little effect in the courtroom itself. Second, task forces should be created to investigate gender bias in particular jurisdictions and publish the findings. Another effective alternative is to encourage female lawyers, and particularly litigators, to file formal complaints. A key element of this complaint system is anonymity of the proceedings. Also, education about ways to deal with and avoid discrimination should begin in law school because the majority of lawyers are required to attend and graduate from a law school. Similarly, training of judges should include ways to avoid perpetuating discrimination themselves, as well as ways to deal with the discrimination when it is manifested from other players in the courtroom. All correspondence and decisions from the courthouse should be reviewed to ensure gender-neutral conduct. Finally, firms and government offices should implement mentor systems to help younger female attorneys deal with discrimination.

All of the above suggestions are just a start, a way for jurisdictions to recognize that certain types of discrimination still exist, and to send a message that they will not be tolerated. It is encouraging that studies show a reduction in discrimination, particularly overt discrimination, and this trend should be applauded. However, the legal system must not discontinue its efforts to ensure equality for those who participate in the adversarial process until that goal is reached for every person — man or woman.

SANDY MASTRO