Pregnancy-Based Sex Discrimination

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Abstract: The Civil Rights Act of 1964 (Title VII) officially made discrimination based upon sex unlawful. However, discrimination based upon pregnancy or maternity was not prohibited until 1978 with the passage of the Pregnancy Discrimination Act. This Act officially amended Title VII. The
law involving pregnancy discrimination has changed the workplace immensely, and the Supreme Court, through its case law, continues to refine "what is" and "what is not" pregnancy discrimination. This paper will focus on researching pregnancy discrimination under Title VII. Individual states' laws and cases will not be discussed. The purpose of this paper is to provide scholars, students, legal practitioners, and even victims, with an abundance of research mediums concerning pregnancy discrimination, including case law, legal scholarship, treatises, practice manuals, and other primary and secondary sources.

II. RESEARCH STRATEGIES

For women in the United States, the road to equality in employment has been long and arduous. For centuries, women have faced differential treatment because of one simple fact: they can bear children. This "mother" mentality infected the male-only courts and, as a result, the judicial decisions in this country legitimized and helped to further workplace discrimination.

As the American perception of the role of women in the workplace began to change, so too did the courts' antiquated views. Employers were faced with many new issues involving not only the prospect of hiring a woman in her childbearing years, but, also, the treatment of female employee who became pregnant.

Congress believed it answered these questions in 1964 with the passage of Title VII, which banned discrimination based on sex. Further, the Equal Employment Opportunity Commission (EEOC) promulgated a rule that pregnancy and maternity must be treated "on the same terms and conditions as they are applied to other disabilities." Despite Title VII and the EEOC guidelines, the Supreme Court held in General Electric Co. v. Gilbert that it was lawful to exclude pregnancy from other disabilities covered under an employer's disability plan. The Court distinguished pregnancy from other illnesses, noting that it is often a voluntary and desired

1. See discussion infra Part III.F (detailing law review articles which describe past discrimination of women).
2. See generally General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that disability plans which did not include coverage for pregnancy discrimination did not violate Title VII without any indication that the exclusion was a pretext for discrimination against women). See also discussion infra Part IV.E.
condition. The Court summarily disregarded the clear, but not binding, guidelines established by the EEOC.

Congress swiftly responded to Gilbert and the following Supreme Court decisions by passing the Pregnancy Discrimination Act of 1978 (PDA). The PDA amended Title VII, establishing that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Following the passage of the PDA, employers were placed under new guidelines—now not only from the EEOC, but also from Congress.

Researching a pregnancy-based sex discrimination claim under Title VII may be both difficult and frustrating because most of the resources are under the umbrella of "sex discrimination" and do not specifically focus on "pregnancy discrimination." For example, few books contain the phrase "pregnancy discrimination" within the title, but many books will have "sex discrimination" within the title and will have a chapter dedicated to pregnancy discrimination. It is imperative, therefore, to initiate a research path by searching through the voluminous sources referencing sex discrimination to find the individual pages or chapters that are dedicated specifically to pregnancy discrimination.

When researching paper media, the search must include many levels of keywords or search terms, such as "civil rights" or "employment discrimination," before pregnancy discrimination will be located. It is important, therefore, to have an expansive list of

6. See id. at 136.
8. Id.
these words prior to starting to research. When researching CD-ROM or on-line media, it is much easier and more efficient to enter the phrase “pregnancy discrimination” to locate results. It is also important to read both the secondary materials and the seminal cases on sex discrimination because they are the foundational elements of pregnancy discrimination.

Additionally, a researcher should read the table of contents and the index of each secondary source because these often contain bibliographic material, such as law review articles and treatises. Locating this bibliography will both expand and expedite one's research. Also, often the labor and employment law sections of local and state bar associations are helpful in locating both secondary sources and the names of other associations with an interest in pregnancy discrimination.

The following represents a bibliographic guide to the laws governing pregnancy-based sex discrimination.

III. SECONDARY SOURCES

A researcher should begin with secondary resources when researching pregnancy discrimination. Secondary sources lead the researcher to primary authorities, such as cases and statutes. Most secondary sources describe, analyze, critique, and explain primary authority. This synthesis, done by attorneys or experts in the area, will focus the research and save time. Additionally, pregnancy discrimination is such a narrow topic that secondary sources pertaining to sex discrimination, such as treatises, will help the researcher understand the role of pregnancy discrimination in the overall picture of sex discrimination.

A. Treatises and Looseleaf Services

A treatise is a comprehensive book on a particular subject. Its coverage can be broad, addressing such topics as employment law, or narrow, limiting the scope of its treatment to just employment discrimination. Treatises provide footnotes, analysis, and bibliographic information to help locate primary authority.

Most treatises are recognized by their looseleaf features, although hornbook treatises are hardbound. Treatises on pregnancy discrimination can be located by using an on-line computer

9. See infra Part IV.
database, such as the Online Public Access Catalogue (OPAC),\(^{10}\) the Library of Congress Subject Headings\(^{11}\) bound volumes, or a library's card catalog. The Library of Congress call numbers most relevant to pregnancy discrimination are Employment Discrimination, KF 3464 through 3469 and HD 4903 through 4903.5. In addition, looseleaf treatises can also be found in Legal Looseleafs in Print.\(^ {12}\)

Each type of research, either on-line or hard copy, is accomplished by starting with a selected term or heading, such as "discrimination," "sex discrimination," "employee rights," "civil rights," or "employment discrimination." The Legal Looseleafs in Print is the easiest and most efficient source to use because it is in print, is published yearly, and has both a table of contents and an index for easy reference. However, the computer media yield more results. The following are the relevant looseleaf services and hard-bound treatises.


  This is a very concise treatise with case citations and detailed analysis of theories involving sex and pregnancy discrimination.

- **Douglass Danner et al., Pattern Discovery in Employment Discrimination** (1994).

  This source is a must-have treatise on how to prepare and execute discovery. It provides specific questions and answers on such subjects as pregnancy-related and sex-related interrogatories and requests for documents. It is an excellent resource for both plaintiff and defense counsel.


  This is the best treatise I found. It is a Matthew Bender publication and is updated annually on current issues, including pregnancy discrimination. It provides relevant case citations in

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10. OPAC is utilized the same way one would search a card catalog. First, one would choose a type of search, either by "title," "author," or "subject," and then press the appropriate key. For a "title" search, one would type in the words which might be in the title of the items sought. For an "author" search, one would type in the names of the authors of the items sought. For a "subject" search, one would type in the terms that are in the Library of Congress Subject Headings assigned to the items sought.


each circuit and contains an excellent breakdown of each element involved in a cause of action for sex or pregnancy discrimination.

- **DOLORES Y. LEAL, LITIGATING SEXUAL HARASSMENT AND DISCRIMINATION CASES (1997).**

  This comprehensive guide covers all aspects of sex discrimination, including pregnancy discrimination. It is useful for both plaintiff and defense counsel because it walks a litigator through the litigation process. A computer disk is also provided.

- **HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 3.14 (1997).**

  This hornbook is current on all levels of pregnancy discrimination which concern both public and private employees.

- **2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (3d ed. 1996).**

  Lindemann and Grossman’s treatise is published by the ABA Labor and Employment Law Section. It provides an overview of employment discrimination law and is updated annually.

- **1 SUSAN M. OMILIAN, SEX-BASED EMPLOYMENT DISCRIMINATION (1990).**

  This resource includes a comprehensive look at sex discrimination, including pregnancy discrimination. It is updated annually.

- **MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW (2d ed. 1995).**

  This extensive hornbook covers the law of employment discrimination with a detailed examination of pregnancy-based claims.

- **CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS (2d ed. 1994).**

  This manual, written by a federal district judge, provides a thorough breakdown of the who, what, and when of
sex/pregnancy based discrimination claims, including civil procedure considerations.

• **1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 9 (1990).**

Rossein's resource is very useful when litigating because it provides examples and commentary on employment law litigation. It is updated annually.

• **1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW §§ 3.12, 4.29 (1994).**

This comprehensive hornbook addresses the general area of employment law, but it provides only a cursory examination of pregnancy discrimination claims.

• **ANDREW J. RUZICHO & LOUIS A. JACOBS, EMPLOYMENT PRACTICES MANUAL (1994).**

The Employment Practices Manual provides a good overview of employment discrimination, but has a somewhat cursory discussion of pregnancy discrimination. It is geared towards the management perspective, providing tips and pragmatic approaches to EEO problems. It is updated annually.

• **LAWRENCE SOLOTOFF & HENRY S. KRAMER, SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE §§ 1.05, 2.03(7), 2.02(1)(b) (1994).**

Solotoff and Kramer give an overview of pregnancy discrimination which is particularly useful for applying various state statutes.

### B. Legal Textbooks

Law school texts make good secondary sources because they are set up in a very systematic and reader-friendly manner. Furthermore, the texts discuss most of the relevant cases for a specific discipline, making it easy for the reader to grasp the importance of each case within the legal arena. Also, many texts provide separate pages dedicated to bibliographic material, including law reviews, hornbooks, and other secondary sources.
Besides browsing library shelves for texts, these sources can be found using the Bowker's Law Books and Serials in Print, or by searching a library's card catalog system using topic-relevant words and phrases. To obtain the most recent edition of a source, contact the publisher.

The following represents the pertinent legal textbooks, listed in alphabetical order by author.

• **ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW (1992).**

  Belton's text provides a very good overview of the theories of recovery underlying pregnancy discrimination, as well as an exhaustive analysis of the available remedies. It is updated with pocket parts.

• **JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION (Foundation Press 4th ed. 1997).**

  This resource discusses all aspects of employment discrimination and provides a strong, expansive section on pregnancy discrimination.

• **JAMES E. JONES, JR. ET AL., DISCRIMINATION IN EMPLOYMENT (West 5th ed. 1991).**

  This book provides a good overview of employment discrimination but only a cursory examination of pregnancy claims.

• **HERMA HILL KAY, SEX BASED DISCRIMINATION (West 3d ed. 1988).**

  This text seems to be one of the best textbooks on sex/pregnancy-based discrimination claims because it solely pertains to the issue of discrimination in employment and provides an in-depth section specifically concerning pregnancy discrimination.

• **CHARLES A. SULLIVAN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW (Little Brown 1993).**

  Although it has a somewhat cursory discussion of pregnancy discrimination, the text discusses a few of the seminal cases. It also provides a thorough bibliography of related articles.
• **CASES AND MATERIALS ON LABOR LAW** (LBC 3d ed. 1992).

This source provides a close look at discrimination cases arising under the National Labor Relations Act (NLRA); however, it does not thoroughly examine pregnancy or sex discrimination.

### C. Books

Books, both legal and non-legal, are invaluable when preparing a scholarly article, trial brief, or speech—even when dealing with clients. Books provide legal, sociological, economical, and practical insights for completing a research assignment or assisting a client understand her cause of action.

A researcher can locate books with the same research methods used to find treatises. Furthermore, books (mostly non-legal) can be found on the World Wide Web (WWW) at such sites as “amazon.com”\(^\text{14}\) and “barnesandnoble.com.”\(^\text{15}\) The America Online site on the World Wide Web (WWW) also lists numerous books. Go to the keyword “law,” click on “legal books,” and then click on “discrimination” or “labor/employment.” Finally, a last method of finding books consists of simply browsing the employment section of any commercial bookstore, where a researcher should be able to find material relevant to sex or pregnancy discrimination.

List One includes all relevant legal and non-legal books located by using a card catalog and computer-assisted aids such as OPAC\(^\text{16}\) and LEGALTRAC. LEGALTRAC searches under a subject guide term, such as “pregnancy discrimination,” or a key phrase search, such as “employment discrimination” and “pregnancy.” List Two includes relevant material I found by browsing commercial bookstores.

1. **List One: Card Catalog and Computer-Based Search**


   This source provides insight into the legislative processes behind the passage of both Title VII and the PDA.

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\(^{16}\) See *supra* note 10 for a discussion of how to use OPAC.
• JOHN J. DONOHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW (1997).

Although not specifically pertaining to sex or pregnancy discrimination, this collection of scholarly articles covers the development of discrimination law, as well as the encompassing historical and philosophical viewpoints. The book is very theoretically and economically based; however, it is useful for background information.


This handbook is an excellent reference for government agencies because it provides case examples pertaining to the issues frequently involved in sex and pregnancy discrimination suits.

• MICHAEL E. GOLD, AN INTRODUCTION TO THE LAW OF EMPLOYMENT DISCRIMINATION (1993).

Gold's book is useful for novice legal practitioners, as well as clients, by providing an overview of employment discrimination, including pregnancy discrimination.


Although this book does not thoroughly review pregnancy discrimination, it provides a sociological, legal, and scholarly debate about sex discrimination. It also provides a helpful list of suggested related readings.


It provides a good, but short, historic overview of the law and the PDA. It is a strong resource because it discusses the theories behind sex/pregnancy discrimination in layperson's terms, making the law easy to understand.

• KAREN J. MASCHKE, LITIGATION, COURTS, AND WOMEN WORKERS (1989).
This book includes a strong chapter on pregnancy discrimination, which provides the reader with the historic background of major cases, as well as their applications.

- **JOHN J. MORAN, EMPLOYMENT LAW—NEW CHALLENGES IN THE BUSINESS ENVIRONMENT (1997).**

  This source is helpful for attorneys reviewing pregnancy discrimination. It provides short hypotheticals, cases, questions and notes pertaining to the issues in the cases.

- **GERARD P. PAVARO, PREGNANCY & CHILDCARE ISSUES IN THE WORKPLACE (1987).**

  Although somewhat outdated, this book provides a thorough overview of all of the areas of pregnancy discrimination, including case studies.

- **MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION—IN A NUTSHELL (1997).**

  This is a succinct exposition of the law of discrimination, including a very short, but helpful, history of the PDA and the cases surrounding it.

- **BARBARA KAJVE REPA, YOUR RIGHTS IN THE WORKPLACE (3d ed. 1996).**

  Although this source contains a very cursory review of pregnancy discrimination, it may be useful when providing clients with an overview of sex discrimination.

- **STEVEN MITCHELL SACK, THE EMPLOYER RIGHTS HANDBOOK (1991).**

  This handbook provides a fair overview of pregnancy discrimination, as well as rules and practical tips for advising clients.

- **SUZANNE UTTARO SAMUELS, FETAL RIGHTS, WOMEN'S RIGHTS: GENDER EQUALITY IN THE WORKPLACE (1995).**

  This book details a pattern of gender politics in the United States and demonstrates the broader ramifications of gender in the workplace. It includes discussions of the cases involving pregnancy discrimination.
• **Fred S. Steingold, The Employer's Legal Handbook** (2d ed. 1997).

Although this handbook only briefly addresses sex discrimination, it is helpful for recognizing the relevant issues and for advising management.

• **Lise Vogel, Mothers on the Job—Maternity Policy in the U.S. Workplace** (1993).

This sociological look at what pregnancy means to the employer and to the female employee provides a good discussion of pregnancy discrimination law and its history in the courts.

2. *List Two: Commercial Bookstores*

• **Gary S. Becker, The Economics of Discrimination** (2d ed. 1971).

This book contains an interesting view of the economic effects of discrimination in the marketplace, pre-PDA. It does not, however, give extensive attention specifically to pregnancy or sex discrimination.

• **Jeffrey M. Bernbach, Job Discrimination: How to Fight, How to Win** (1996).

This is a straight-forward guide which could help a client address and fight unlawful discrimination. It clearly explains the legislation surrounding pregnancy discrimination.


This reference provides a helpful, basic overview of what the PDA means to an employee.

• **Patricia Phillips et al., Know Your Rights—A Legal Handbook for Women Only** (1997).

This is a wonderful, easy-to-read resource for all employees and clients because it is comprehensive and practical.
• **Paul H. Tobias & Susan Sauter, Job Rights and Survival Strategies—A Handbook for Terminated Employees (1997).**

This handbook provides thorough coverage of all of the legislation pertaining to sex discrimination, including the PDA. It also includes a checklist for the employee who thinks she may have been terminated because of discrimination.

• **Anne C. Weisberg & Carol A. Buckler, Everything a Working Mother Needs to Know About Pregnancy Rights, Maternity Leave, and Making Her Career Work for Her (1994).**

This is a must-have for every client and all female employees. It is the best off-the-shelf book I found pertaining to pregnancy discrimination and its effects on women because it is detailed, well-organized, and practical.

D. Practice Manuals and Guides

Practice manuals and guides, published for legal practitioners, provide practical references for litigation, settlement techniques, client counseling, client representation, forms, checklists, and other useful information that a lawyer can use daily. Organizations, such as the Bureau of National Affairs (BNA), the American Bar Association (ABA), the National Employment Lawyers Association (NELA), state bar associations, the Practicing Law Institute (PLI), and various chambers of commerce, publish these resources. These publications can be found through computer databases such as OPAC and INFOTRAC, as well as a card catalog system.

The following represents some of the relevant practice manuals available.

• **Richard T. Seymour, Equal Opportunity Law Update (1997).**

Published by the ABA, this manual is an excellent source for theories discussing sex and pregnancy discrimination. It publishes biannually all of the discrimination-related appellate cases.

• **Richard J. Simmons, Employment Discrimination and EEO Practice Manual for California Employers (1996).**
Although geared toward California lawyers, this manual provides an in-depth analysis of all of the seminal cases at the federal level. While focused on a management perspective, it provides a good breakdown of the issues involved in employment discrimination.

- **KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS** (1994).

  This provides a detailed section on pregnancy discrimination, including relevant cases. It addresses all of the areas of plaintiff representation, including fee arrangements.

- **LITIGATING EMPLOYMENT DISCRIMINATION CASES** (PLI 1997).

  This comprehensive compilation of articles covers all aspects of litigating a discrimination case. It is updated annually with recent Title VII cases.

- **NATIONAL EMPLOYMENT LAWYERS ASSOCIATION ANNUAL CONFERENCE** (NELA 1996).

  The conference publishes updates and trends in employment discrimination.

- **5B AM. JUR. PLEAD. & PRAC. FORMS § 86** (1998).

  This reference tool contains a useful complaint form for sick-leave pay during work absences due to pregnancy. It also provides helpful annotations referring to other Am. Jur. publications, as well as state code sections dealing with pregnancy discrimination.


  Useful forms, including complaints, answers, motions to dismiss, motions for summary judgment, and interrogatories, are found in this resource.

This is an excellent resource for finding secondary sources. It is extremely useful for understanding the differences between a bona fide occupational qualification exception (bfoq) and a "business necessity" defense in employment discrimination cases.


This article allows the reader to gain a quick and thorough knowledge of a Title VII action. It walks the reader through a discrimination case from the complaint to the trial. It also provides numerous annotations.

E. Legal Newsletters

Commercial publishers often publish newsletters with the legal professional in mind. These newsletters are useful for several reasons. First, they are compilations of specific legal topics. Secondly, newsletters are generally concise. Finally, they are important tools because they cover recent developments in a specific area of the law, providing information on new cases, statutes, and regulations, as well as on other legal and non-legal developments. Moreover, they are very timely because they are published monthly, weekly, or even daily.

Legal Newsletters in Print (LNP) is the most efficient way to locate pertinent newsletters. Published annually, it is organized by topic. For example, by reviewing the "Women's Rights" and "Discrimination" sections in the index, a researcher should be able to locate articles addressing sex or pregnancy discrimination. In addition, the labor/employment section of your local or state bar association can also suggest applicable newsletters.

The following represents the most useful newsletters located in LNP.


This newsletter reports on state and federal developments in civil rights.

17. LEGAL NEWSLETTERS IN PRINT (Arlene L. Eis ed., 1998).
18. Id.
• EEO Rev. (John Wiley & Sons, N.Y.).

The EEO Review informs managers and supervisors about how to avoid discrimination problems. It is a good, practical tool for management.


This covers decisional, legislative, and regulatory developments in equal employment opportunities.

• Employ. & Lab. Lawcast (Vox Juris, N.J.).

This newsletter publishes federal labor and employment law information, including new trends, causes of action, defenses, tactics, strategies, and trial techniques.

• Employ. Prac. Update (Clark Boardham Callaghan, West Group, Minn.).

This source analyzes recent cases involving employment discrimination and provides practical advice on handling such problems.

• Fair Employ. Compliance (Mgmt. Resources, N.H.).

This provides updates for managers regarding employment discrimination litigation, legislation, and regulation.

• Fair Employ. Prac. Guidelines (Bureau of Bus. Prac., Conn.).

Coverage of a specific fair employment topic each month, including three in-depth court cases regarding that topic, is included in this newsletter. It also provides a bulletin to keep readers up-to-date on the latest legislative, administrative, and judicial developments in the field.


This newsletter covers trends in equal opportunity laws, fair employment practice policies, regulations, and rules. It also provides federal and state court decisions.
• **FAIR EMPLOY. REP. (formerly Civ. RTS. EMPLOY. REP.)** (Bus. Publishers, Md.).

This discusses federal and state civil rights issues, including: cases, laws, and regulations.

• **FED. EEO UPDATE** (FPMI Comm., Ala.).

This includes a brief summary of important decisions from the courts and the EEOC.

• **SEXUAL HARASSMENT & DISCRIM. REP.** (James Publ’g, Cal.).

This newsletter is devoted to gender bias issues. It contains state and federal case summaries, legislative developments, and practical advice on handling claims.

### F. Law Review and Journal Articles

Law review and journal articles describe, analyze, and comment on the law. These articles tend to be quite comprehensive in their scope, providing background, analysis, and citations. Individuals can use these citations to find a plethora of primary authority, such as cases and statutes, as well as other law review articles and treatises. Unfortunately, law reviews and journals are not updated and the articles become outdated very quickly.

One can locate law review and journal articles in numerous databases. The computer resource LEGALTRAC, which is the CD-ROM version of the Current Law Index (CLI),19 is helpful. Although LEGALTRAC is easy to use, it does not have the most current articles because it is not on-line. Westlaw and LEXIS provide the most current and comprehensive results. On Westlaw, enter “pregnancy discrimination” into the ILP database (the database for the Index to Legal Periodicals).20 On LEXIS, use the ALLREV file in the LAWREV library. One can also use the bound version of the Index to Legal Periodicals; however, it is both cumbersome and time consuming because one must read every individual volume for each of the search terms. If one has more than one search term, using the bound version could take quite awhile. WILSONDISC, the CD-ROM version of ILP, is another computer-aided research tool.

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The following represents the most relevant and current law review articles that I located.


  This article is useful because of its summary of the analysis of the PDA under both Title VII and the Equal Protection Clause of the United States Constitution.


  This comment contains solid analysis regarding the issue of whether women who must use medical assistance to become pregnant are covered under the PDA.


  This comment analyzes the use of the “position-elimination” defense by a defendant in a pregnancy discrimination action. It is a good resource because of its explanation of the burden shifting theories implemented by the courts.


  This article presents a social-policy based critical analysis of Title VII and the FMLA, opining that neither statute sufficiently addresses the needs and interests of the pregnant female. It is very useful for its social, feminist, and parenting views concerning pregnancy discrimination.


  This comment describes a *Melrose Place* actress’ pregnancy discrimination lawsuit against entertainment giant, Aaron
Spelling. Its analysis of case law both before and after the enactment of the PDA is helpful.


In light of the Supreme Court's decision involving single-sex schools, Stramm presents an interesting, yet persuasive, argument in favor of schools for pregnant females.


Although not analytical, Bejarano's article is a very useful source for cases and the history of pregnancy discrimination.


This is a critical analysis of International Union, UAW v. Johnson Controls, Inc., a watershed pregnancy discrimination case. It also contains useful analysis of fetal protection policies.


Wylch presents a good, but short, review of the PDA. However, the analysis within the Turic discussion is not very useful.


This is an excellent resource for cases and analysis pertaining to fetal protection issues.


This article provides a strong analysis of the relationships between the Americans with Disabilities Act (ADA), the Civil Rights Act of 1991, and the Family Medical Leave Act (FMLA).
Furthermore, it discusses how all three Acts will influence future interpretations of the PDA.


Delano's useful article includes possible interpretations of the PDA. It also includes an examination of the PDA's legislative history and the EEOC's guidelines on pregnancy.


This provides a discussion of the parameters of the PDA in the context of *Guerra* and its "floor-ceiling" analysis.


This article focuses on the initial consequences of pregnancy in the workplace and employers' responses in light of the PDA.


Research on the PDA's legislative history can be found in this source.


This article is useful for its analysis of the PDA under both Title VII and the United States Constitution, as they specifically relate to fetal protection policies.


Kenney presents an analysis of pregnancy discrimination cases in three jurisdictions—the United States, Great Britain, and
the European Union. The article is useful to gain an international perspective on pregnancy discrimination.


This contains analysis of a conservative jurist's viewpoints on sex discrimination and how these viewpoints played a part in the *Troupe v. May Dep't Stores* decision.


Millsap provides a useful analysis of how the structures causing women to leave the workforce early and permanently after becoming pregnant contribute to job-market segregation and the wage gap. She also analyzes the application of the ADA to pregnancy discrimination.


This provides a useful analysis of benefits and maternity policies under the PDA.


Stolzy's article includes an in-depth view of pregnancy discrimination within the entertainment industry, including an analysis of the recently decided *Tylo v. Spelling Ent. Group, Inc.* case.

Besides general law reviews publishing articles on sex or pregnancy discrimination, topical law reviews and journals also exist. A list of the topical law reviews and journals that are most likely to publish articles on sex or pregnancy discrimination follows.

- American University Journal of Gender & the Law
- Berkeley Women's Law Journal
The American Law Reports (A.L.R.) are excellent tools to use when starting your research. The A.L.R. volumes have selected cases on a subject and provide annotations related to the topic. These annotations are very specific, such as “sex discrimination in law enforcement and corrections employment.”

The annotations, however, are not analytical. Nevertheless, they are important because they provide a collective summary of the important cases addressing pregnancy discrimination in most jurisdictions and briefly explain how the courts addressed the issue. They are a great starting tool for acquiring general knowledge and for finding secondary and primary authority.

Because the PDA is a federal statute, the A.L.R. Federal (A.L.R. Fed.) should be used. A.L.R. are located in the bound volumes section of library stacks. For specific annotations, search in the indices to the A.L.R. volumes.

LEXIS and Westlaw also provide A.L.R. Fed. under their respective files and databases. Although the index search with ALR is relatively simple, LEXIS and Westlaw are much more efficient. However, the hardbound books are easier to review than the computerized annotations.

The following are relevant A.L.R. annotations.


  Bourdeau provides a good overview of liability facing management for pregnancy discrimination.


  This is an insightful annotation discussing cases considering the right to unemployment compensation for workers who were terminated because of pregnancy.


  Director develops a strong argument that discrimination on the basis of pregnancy violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.


  This provides a good review of what the law was (and still is, in some jurisdictions) prior to the PDA.

- Wesley Kobylak, Annotation, *Exclusion of Women from Employment Involving Risk of Fetal Injury as Violative of Title*

This annotation helps find federal cases addressing the issues of pregnancy discrimination and termination based upon an alleged risk of fetal injury.


This annotation provides a thorough bibliography, analysis, and annotations to relevant cases. This is an excellent starting point for researching pregnancy discrimination.


This annotation analyzes federal cases against employers who have terminated employees for pregnancy or childbirth out of wedlock.

H. Encyclopedias

Encyclopedias should be used as an initial research tool to explain the law, rules, and procedures of a specific topic. Encyclopedias provide the "big picture" on sex and pregnancy discrimination.

Encyclopedias are located in print in American Jurisprudence Second (Am. Jur. 2d) and Corpus Juris Secundum (C.J.S.). Am. Jur. 2d is also located on LEXIS in the 2NDARY library in the AMJUR file. The most relevant Am. Jur. 2d reference pertaining to pregnancy discrimination is located in the job discrimination section of Am. Jur. 2d.\textsuperscript{22} The results were more limited in the Civil Rights section of C.J.S.\textsuperscript{23}

IV. PRIMARY FEDERAL SOURCES

Primary authority is important when researching because it is the law. One cites to primary authority in court briefs and motions to persuade judges that an employer has discriminated against a client, or, conversely, that a client did not act discriminatorily. The United States Constitution, federal statutes, federal regulations, and federal court decisions are primary authority for federal sex discrimination law.

A. United States Constitution


The best place to find the Constitution on LEXIS is in the USCNST file in the GENFED library. On the Westlaw database, the Constitution can be found in the USC and USCA databases. Below are the relevant sections of the United States Constitution pertaining to pregnancy discrimination.

• U.S. Const. amend. V.

The Fifth Amendment limits the power of the federal government to deprive a person of “life, liberty or property, without due process of law.” Although the Amendment does not specifically state the words “equal protection,” the United States Supreme Court has interpreted the constraint on the federal power through this Amendment to include the equal protection guarantee.

• U.S. Const. amend. XIV.

The Fourteenth Amendment limits state governments with the same language as the Fifth Amendment and also prohibits

states from denying "equal protection of the laws" to any person.

In the past, the Equal Protection Clause and the Due Process Clause have been used to bring suit for pregnancy discrimination. However, the Supreme Court rejected the use of an equal protection violation for an insurance system which excluded pregnancy as one of its listed disabilities. The Court held that the state's failure to provide an insurance program which covered pregnancy was not invidious discrimination under the Equal Protection Clause. Thus, considering recent Supreme Court jurisprudence, "most future challenges to public sector mandatory maternity leave programs are likely to rely principally upon Title VII rather than the Constitution."

B. Federal Statutes

Statutes are important for the same reasons the Constitution is important—they are the law. One locates federal statutes by using the same research techniques used to find the Constitution. Both Title VII and the PDA are federal statutes.

The relevant federal statutes pertaining to pregnancy discrimination follow.


This statute encompasses many acts seeking to end employment discrimination. This is the pre-eminent legislation prohibiting discrimination based on gender, including pregnancy discrimination.


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29. See id.
30. Friedman & Strickler, supra note 27, at 434. See also discussion infra Part IV.B.
31. See supra Part IV.A (discussing research methods for finding the U.S. Constitution).
The PDA is the amendment to Title VII expressly outlawing pregnancy discrimination.


The FMLA provides working Americans with the right to take time off from work for specified medical reasons (including pregnancy and childbirth) without the fear of losing their jobs.

C. Legislative History

An individual researches legislative history to understand the legislature's intent behind the language of a statute. The legislature's intent is very clear under the PDA. Unhappy with the Gilbert decision,32 which allowed the exclusion of pregnancy from an employer's disability insurance, Congress decided to include pregnancy in the definition of "sex discrimination."33

Most of the legislative histories are found in U.S.C.S. and U.S.C.A., as well as the United States Code Congressional and Administrative News (U.S.C.C.A.N.) and the Congressional Information System (CIS). CIS is much easier to use and provides more complete histories than does the U.S.C.C.A.N. The Library of Congress Subject Heading "Legislative Histories-United States"34 can be utilized, as well as Nancy Johnson's bibliography.35

The legislative history of the PDA can also be researched online. On LEXIS, use the CISLH file in the CODES library. On Westlaw, use the LH database. The following represents relevant information needed to search for the legislative history of the Pregnancy Discrimination Act:

- Title: Pregnancy Discrimination Act of 1978
- Public Law Number: Pub. L. No. 95-555
- Senate Bill Enacted: S995
- Statute at Large Number: 92 Stat. 2076

33. See supra Part I (describing the passage of the PDA).
34. See supra note 11.
Congress created the EEOC, an administrative agency, to help enforce Civil Rights legislation, including pregnancy-based employment discrimination. The EEOC has the power to promulgate both legislative and non-legislative regulations as they pertain to pregnancy discrimination. The legislative (or substantive) promulgations act as law and carry penalties. The non-legislative regulations include interpretative regulations (a statement of the EEOC's interpretation of the enabling statute), as well as definitions and guidelines. The non-legislative regulations, however, do not have the force of law, and courts are not bound by them.

One can locate pertinent pregnancy discrimination regulations by using various methods. The annotated codes (U.S.C.A. and U.S.C.S.) have notations to pertinent regulations. The Code of Federal Regulations (C.F.R.) is the official publication for administrative regulations concerning pregnancy-based sex discrimination. Use "EEOC," or the descriptive phrase "pregnancy discrimination," to find relevant sources in the index of the C.F.R. These regulations are also updated daily in the Federal Register (Fed. Reg.). It is efficient to use the List of C.F.R. Sections Affected (LSA). These soft-covered pamphlets identify where pertinent material might be located in recent issues of the Fed. Reg. The Fed. Reg. also lists proposed regulations. Both the C.F.R. and the Fed. Reg. are located on-line under the CFR and FR databases in Westlaw, and the FEDREG and CFR files in either the CODES or GENFED libraries in LEXIS.

The following are relevant C.F.R. sections.


This entry provides guidelines, as well as questions and answers from the EEOC, concerning the application of the PDA.

36. See id.
38. See supra Part II (discussing the Supreme Court's treatment of an EEOC guideline in Gilbert).
E. Federal Case Law

Case law addressing pregnancy-based sex discrimination can be found through various methods. First, these cases are annotated in both the U.S.C.A. and the U.S.C.S. under Title 42. Also, various secondary sources refer to relevant cases pertaining to pregnancy discrimination.

The LEXIS and Westlaw databases are the most efficient research methods. In LEXIS, use the MEGA library and file to access decisions by federal courts. In Westlaw, use the ALLFEDS database. In both services, the Boolean search “pregnancy discrimination,” placed in quotation marks, is the best search term.

Additionally, one can locate cases by using West’s Key Numbers in West’s Federal Practice Digest Fourth. To do so, choose a search term for researching the index. For example, the key number for civil rights cases addressing pregnancy/maternity is “162.” Once the volume containing the key number is located, so are many on-point annotations.

One can also find cases involving employment discrimination in Fair Employment Practice Cases. This multi-volume reporter provides the complete opinions for employment discrimination cases in both federal and state courts. Although this reporter provides all federal or state employment discrimination cases, it is not user-friendly.

The cases listed below are the landmark cases involving pregnancy-based sex discrimination.


  This case caused Congress to enact the PDA. Here, the Court held that the differentiation of pregnancy benefits from other benefits did not violate Title VII because it was condition-related, not gender-related.

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40. **FAIR EMPLOYMENT PRACTICE CASES** (BNA 1997).

The Supreme Court held that a company's health insurance plan providing greater pregnancy-related benefits to female employees, than to the spouses of male employees, discriminated against the male employees and thus violated the PDA.


The Supreme Court upheld a California law requiring employers to provide female employees both unpaid pregnancy disability leave and a qualified right to reinstatement, except upon the showing of a business necessity. The decision answered the question of whether the PDA preempted state law. The Court held that the PDA was only a floor, "not a ceiling." Id. at 280.


In this case, the Court did not accept the employer's excuse of "fetal protection" as being a basis for excluding pregnant workers from certain jobs. The Court held that the defendant's policy of barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure was discriminatory under Title VII.

Quarantino v. Tiffany & Co., 71 F.3d 58 (2d Cir. 1995).

The Second Circuit established the standard that if a prima facie case is made, the burden of production shifts to the employer to articulate a legitimate, clear, specific, and non-discriminatory reason for discharging the employee. If the employer meets this standard, the plaintiff has the ultimate burden of proving that the employer's reason was merely a pretext for pregnancy discrimination.


The Sixth Circuit was the first court to hold that "contemplation" of an abortion was protected by the PDA.

Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).
The Seventh Circuit held that the PDA does not require employers to offer maternity leave or to take other steps to make it easier for pregnant women to continue to work.

- *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380 (11th Cir. 1994).

The Eleventh Circuit held that the PDA prohibits discrimination on the basis of childbirth, pregnancy, or related medical conditions when providing fringe medical benefits.


The Ninth Circuit held that even if no employee suffered any tangible loss of an economic nature, the employer's implementation of a policy or practice under which pregnant employees were treated differently from other similar, temporarily disabled employees constituted a violation of Title VII.

- *Morgan v. Safeway Stores*, 884 F.2d 1211 (9th Cir. 1989).

The Ninth Circuit held that an employer who treats pregnancy-related conditions less favorably than other medical conditions, for purposes of employment benefits, violates Title VII.

- *E.E.O.C. v. Ackerman, Hood & McQueen*, 956 F.2d 944 (10th Cir. 1992).

The Tenth Circuit laid out two bright line standards. First, claims made under the PDA are analyzed under the disparate treatment analysis, as applied in Title VII cases. Secondly, courts should compare pregnant and non-pregnant workers, not men and women.


The Eleventh Circuit held that an employer committed sex discrimination when it failed to give a female department manager a substantially similar position when she returned from pregnancy leave.
V. ORGANIZATIONS AND ASSOCIATIONS

Organizations and associations keep legal practitioners informed of discrimination laws and are an invaluable resource for research and reference materials. Most are only a phone call away for advice or a reference to a resource that may help a researcher tackle an issue. Furthermore, the referrals and references are usually free.

One can locate organizations and associations by calling the local bar association's employment/labor law section or by looking in the yellow pages. Also, calling the local Congressperson usually receives a quick response. The Encyclopedia of Associations, the quickest way to locate organizations and associations, contains name and keyword indices.

The following represents some of the more prominent organizations confronting sex discrimination.

- American Federation of Teacher—Women's Rights Committee
  555 New Jersey Ave., N.W.
  Washington, DC 20001

- Discrimination and Sexual Harassment Support Group—Boulder NOW
  P.O. Box 7972
  Boulder, CO 80306
  (303) 444-7217

- Equal Employment Opportunity Commission (EEOC)
  1801 L Street, N.W.
  Washington, DC 20507
  (800) 669-EEOC
  (202) 634-7057—for hearing impaired

- Equal Rights Advocates
  1663 Mission Street, Suite 550
  San Francisco, CA 94103
  (415) 621-0672

- Federally Employed Women
  1400 Eye Street, N.W.

41. ENCYCLOPEDIA OF ASS'NS, REGIONAL, STATE, AND LOCAL ORG. (Gale Research Co. 1987).
VI. STATE GOVERNMENT AGENCIES

Below is a list of the state government agencies that are good resources. These, and similar agencies, can be easily located by calling the local and state bar associations.

• Arizona Civil Rights Division
  1275 W. Washington Street
  Phoenix, AZ 85007
  (602) 542-5263
• California Department of Fair Employment and Housing
  2014 T Street, Suite 210
  Sacramento, CA 95814
  (800) 884-1684

• Hastings College of Law—Legal Aid Society, Employment Law Center, Workers' Rights Hotline
  1663 Mission Street, Suite 400
  San Francisco, CA 94103
  (415) 864-8848

• Colorado Civil Rights Division
  1560 Broadway, Suite 1050
  Denver, CO 80202

• Connecticut Commission on Human Rights and Opportunities
  90 Washington Street
  Hartford, CT 06106
  (203) 566-3350

• Delaware Department of Labor
  State Office Building
  820 N. French Street, 6th Floor
  Wilmington, DE 19801
  (302) 577-2882

• DC Commission of Human Rights
  2000 14th Street, N.W., 3rd Floor
  Washington, DC 20009
  (202) 939-8740

• Florida Commissions of Human Relations
  325 John Knox Road, Building F
  Suite 240
  Tallahassee, FL 32303-4149
  (904) 488-7082
  (800) 342-8170

• Georgia Commission on Equal Opportunity
  710 Cain Tower, Peachtree Center
  229 Peachtree Street, N.E.
  Atlanta, GA 30303
  (404) 656-7708
- Hawaii Civil Rights Commission
  888 Mililani Street, 2nd Floor
  Honolulu, HI 96813
  (808) 586-8636

- Idaho Human Rights Commission
  450 W. State Street, 1st Floor
  Boise, ID 83720
  (203) 344-2873

- Illinois Department of Human Rights
  100 W. Randolph Street
  Suite 10-100
  Chicago, IL 60601
  (312) 814-6200

- Indiana Civil Rights Commission
  100 N. Senate Avenue, Room N10
  Indianapolis, IN 46204
  (800) 628-2909
  (317) 232-2600

- Iowa Civil Rights Commission
  Grimes State Office Building
  211 E. Maple Street, 2nd Floor
  Des Moines, IA 50309
  (515) 281-4121

- Kansas Commission on Civil Rights
  Landon State Office Building, 8th Floor
  900 S.W. Jackson Street, Suite 851
  Topeka, KS 66612-1258
  (913) 296-3206

- Kentucky Commission on Human Rights
  The Heyburn Building, Suite 700
  332 W. Broadway, Suite 700
  Louisville, KY 40202
  (800) 292-9808
  (502) 595-4024
• Maine Human Rights Commission
  Statehouse Station 51
  Augusta, ME 04333
  (207) 624-6050

• Maryland Commission on Human Relations
  20 E. Franklin Street
  Baltimore, MD 21202
  (410) 624-6050

• Michigan Department of Civil Rights
  333 S. Capitol
  Lansing, MI 48913
  (313) 876-5544 (Detroit)
  (517) 373-3590 (Lansing)
  (517) 373 2884 (Women’s Commission)

• Minnesota Department of Human Rights
  Bremer Tower
  Seventh Place and Minnesota Street
  St. Paul, MN 55101
  (651) 296-5663

• Missouri Commission on Human Rights
  P.O. Box 1129
  Jefferson City, MO 65102
  (800) 877-6247
  (314) 751-3325

• Montana Human Rights
  616 Helena Avenue, Suite 302
  P.O. Box 1728
  Helena, MT 59624-1728
  (800) 542-0807
  (406) 444-2884

• Nevada Equal Rights Commission
  1515 Tropicana Avenue, Suite 590
  Las Vegas, NV 89158
  (702) 486-7161 (Las Vegas)
  (702) 688-1288 (Reno)
• New Hampshire Commission for Human Rights
  163 Loudon Road
  Concord, NH 03301-6053
  (603) 271-2767

• New Jersey Division of Civil Rights
  383 W. State Street
  Trenton, NJ 08618
  (609) 292-4605

• New Mexico Human Rights Commission
  Aspen Plaza
  1596 Pacheco Street
  Santa Fe, NM 87501
  (505) 827-6838

• New York State Division of Human Rights
  Office of Sexual Harassment Issues
  55 Hanson Place, Suite 346
  Brooklyn, NY 11217
  (800) 427-2773
  (718) 722-2060

• North Carolina State Office of Administrative Hearings
  424 N. Blount Street
  Raleigh, NC 27601
  (919) 733-2691

• Ohio Civil Rights Commission
  220 Parsons Avenue
  Columbus, OH 43215
  (614) 466-5928 (Columbus) (419) 245-2900 (Toledo)
  (216) 379-3100 (Akron) (513) 285-6500 (Dayton)
  (216) 787-3150 (Cleveland)

• Oklahoma Human Rights Commission
  2101 N. Lincoln Boulevard
  Room 480
  Oklahoma City, OK 73105
  (405) 521-3441 (Oklahoma City)
  (918) 581-2733 (Tulsa)
• Oregon Bureau of Labor and Industry—Civil Rights Division
  800 N.E. Oregon Street
  Suite 1070
  Portland, OR 97232
  (503) 731-4075, ext. 421 (Portland)
  (503) 687-7460 (Eugene)

• Pennsylvania Human Rights Relations Commission
  101 S. Second Street, Suite 300
  Harrisburg, PA 17105-3145
  (717) 787-9784 (Harrisburg)
  (215) 560-2496 (Philadelphia)

• Rhode Island Commission for Human Rights
  10 Abbott Park Place
  Providence, RI 02903
  (401) 277-2661

• South Carolina Human Affairs Commission
  2611 Forest Drive
  P.O. Box 4490
  Columbia, SC 29240
  (800) 521-0725
  (803) 253-6339

• South Dakota Division of Human Rights
  222 E. Capitol, Suite 11
  Pierre, SD 57501-5070
  (605) 773-4493

• Tennessee Human Rights Commission
  530 Church Street, Suite 400
  Nashville, TN 37243
  (615) 741-5825

• Texas Commission on Human Rights
  8100 Cameron Road, Building B
  Suite 525
  Austin, TX 78754
  (512) 837-8534
VII. CONCLUSION

Sex discrimination based upon pregnancy is only one of the various types of sex discrimination prohibited under Title VII. It
continues to be one of the most challenged, misunderstood, and litigated areas of Title VII because of the historical "woman equals mother" mentality of American society. The books, articles, and other resources in this bibliography reflect law that continues to expand the protections afforded to women. It is the author's hope that this bibliography will be used to continue this expansion.