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## OHIO'S —PREGNANCY-BLIND|| LEAVE POLICY: THE PUBLIC POLICY RAMIFICATIONS OF MCFEE V. NURSING CARE MANAGEMENT OF AMERICA

Jessica Monroe

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OHIO'S "PREGNANCY-BLIND" LEAVE POLICY: THE PUBLIC  
POLICY RAMIFICATIONS OF *McFEE V. NURSING CARE  
MANAGEMENT OF AMERICA*

*Jessica Monroe\**

I. INTRODUCTION

On February 5, 2010 women became the majority on the nation's payrolls for the first time in United States history.<sup>1</sup> Most women in the workforce will become pregnant at some point in their working lives,<sup>2</sup> making employers' treatment of pregnant women an extremely significant national issue.

Take, for example, the case of Tiffany McFee, who requested leave from her job as a nurse due to a pregnancy-related condition.<sup>3</sup> Instead of granting her request, her employer, Pataskala Oaks, fired her six days after she went on leave and only three days after giving birth to her child.<sup>4</sup> McFee had worked at Pataskala Oaks for eight months, but her employer's policy required a year of service before allowing employees to take unpaid leave.<sup>5</sup> The Supreme Court of Ohio held that her termination did not constitute pregnancy discrimination because her employer denied all disability leave for all employees with less than a year's service.<sup>6</sup>

This Casenote will analyze the Supreme Court of Ohio's recent decision in *McFee v. Nursing Care Management of America*<sup>7</sup> as evidence of the long overdue change needed in pregnancy

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1. Zoe Savitsky, *Inertia and Change: Findings of The Shriver Report and Next Steps*, 25 BERKELEY J. GENDER L. & JUST. 172, 173 (2010).

2. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 579 (2010).

3. *Nursing Care Mgmt. of Am., Inc. v. Ohio Civil Rights Comm'n*, 910 N.E.2d 482, 483 (Ohio Ct. App. 2009), *rev'd sub nom. McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069 (Ohio 2010).

4. *Id.*

5. *Id.*

6. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069 (Ohio 2010).

7. *Id.*

discrimination law. The current state of the law fails to promote gender equality in the workplace because the law insists on ignoring that only women become pregnant and risk losing their jobs because of pregnancy. Until the law takes into account the medical and social realities of pregnancy, women will not truly have equal opportunity in employment. By admitting that pregnancy is not a “disability,” society can cease comparing pregnant workers to nonpregnant workers and start building a framework for pregnancy policies that benefit women, families, and businesses.

Part II of this Casenote provides a brief background of the federal Pregnancy Discrimination Act and relevant cases interpreting the legislation. Part II then describes Ohio’s pregnancy discrimination law. Part III summarizes the Supreme Court of Ohio’s decision in *McFee*. Part IV considers the opinion’s arguments as well as its problematic public policy ramifications. Finally, Part V concludes that in light of the decision in *McFee*, legislative action is needed to protect Ohio workers from pregnancy discrimination.

## II. THE PDA, FMLA, AND RELEVANT CASE LAW

Several pieces of state and federal legislation, fueled by numerous and sometimes conflicting approaches, have attempted to protect employees from pregnancy discrimination. This Part will provide a summary of pregnancy discrimination law and precedent relevant to the arguments made in *McFee v. Nursing Care Management of America*. Subpart A provides a brief overview of the Pregnancy Discrimination Act and relevant case law. Next, subpart B briefly explains how the Family and Medical Leave Act attempted to address the shortcomings of the Pregnancy Discrimination Act. Finally, subpart C provides a general overview of Ohio’s pregnancy discrimination laws and their application in Ohio courts.

### A. *The Pregnancy Discrimination Act*

Congress passed Title VII of the Civil Rights Act of 1964 to equalize employment opportunities and remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate

invidiously to discriminate on the basis of racial or other impermissible classification[s].”<sup>8</sup> Title VII included sex as a protected category; however, the statute did so without much consideration for whether, or how, it would provide pregnancy protections in employment.<sup>9</sup> In the early 1970s, the Equal Employment Opportunity Commission (EEOC) began to rule pregnancy leave should be granted regardless of employer policies on leave for illness.<sup>10</sup> EEOC regulations provided that discrimination on the basis of pregnancy could violate Title VII by: (1) denying women access to work because of pregnancy, (2) firing or refusing to hire a woman because of her pregnancy, or (3) prohibiting women from taking leave or providing inadequate leave that resulted in the employee’s termination.<sup>11</sup> One theory behind the EEOC regulations is that providing no leave or inadequate leave violated Title VII due to the disparate impact of the policy on women.<sup>12</sup> In effect, the EEOC provisions of 1972 allowed women to take pregnancy leave even when employers offered no leave at all.<sup>13</sup>

These provisions did not survive very long. In *Geduldig v. Aiello*, the Supreme Court of the United States held that excluding pregnancy from a temporary disability insurance plan did not violate Title VII because the denial of benefits was not based on sex.<sup>14</sup> In 1976, the Supreme Court followed *Geduldig* and overturned the EEOC regulations interpreting Title VII in *General Electric Co. v. Gilbert*. In *Gilbert*, the Court held that an employer’s exclusion of benefits for pregnancy was not sex discrimination under Title VII.<sup>15</sup> The majority reasoned the plan excluding pregnancy was not discriminatory against women because there “is no risk from which men are protected and women are not . . . it

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8. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–431 (1971); *see also* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

9. Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 18 (2007).

10. *Id.* at 20.

11. 29 C.F.R. § 1604.10(a)–(c) (1979); *see also* O’Leary, *supra* note 9, at 21.

12. O’Leary, *supra* note 9, at 21.

13. *Id.*

14. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974), *superseded by statute*, 42 U.S.C. § 2000e(k) (2006).

15. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138 (1976), *superseded by statute*, 42 U.S.C. § 2000e(k) (2006).

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.”<sup>16</sup>

In response to *Gilbert* and *Geduldig*, Congress passed the Pregnancy Discrimination Act (PDA) in 1978, explicitly including discrimination based on pregnancy as a violation of Title VII.<sup>17</sup> The PDA states that discrimination “because of sex” includes discrimination “on the basis of pregnancy, childbirth or related medical conditions.”<sup>18</sup> The PDA provides that women affected by pregnancy and related conditions “shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”<sup>19</sup> Congress added the PDA to Title VII to ensure that women would not be hindered in job advancement because of pregnancy.<sup>20</sup> The legislative history accompanying the PDA expresses congressional intent to achieve the “full realization of equal employment opportunity.”<sup>21</sup>

Shortly after the passage of the PDA, a Montana district court interpreted the PDA to incorporate the disparate impact theory in *Miller-Wohl Co. v. Commissioner of Labor and Industry*.<sup>22</sup> The court stated that a one-year service requirement for disability leave would leave an employer subject to a disparate impact claim by pregnant women. While this decision was vacated and remanded as a state law issue,<sup>23</sup> the Montana court handling the remand maintained that the employer’s no-leave policy violated the PDA and the state maternity statute under a

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16. *Id.*

17. O’Leary, *supra* note 9, at 22.

18. 42 U.S.C. § 2000e(k).

19. *Id.*

20. Jamie L. Clanton, Note, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to “Mean What It Says,”* 86 IOWA L. REV. 703, 726 (2001) (citing Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2181 (1994)).

21. Clanton, *supra* note 20, at 727 (citing Staff of Senate Comm. On Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 iii (Comm. Print 1980)).

22. *Miller-Wohl Co., Inc. v. Comm’r. of Labor and Indus.*, 515 F. Supp. 1264, 1267 (D. Mont. 1981), *vacated and dismissed*, 685 F.2d 1088 (9th Cir. 1982), *remanded*, 692 P.2d 1243 (Mont. 1984).

23. *Miller-Wohl Co., Inc. v. Comm’r of Labor and Indus.*, 685 F.2d 1088 (9th Cir. 1982), *remanded*, 692 P.2d 1243 (Mont. 1984).

disparate impact theory.<sup>24</sup> In another case, *Abraham v. Graphic Arts International Union*, the D.C. Circuit Court of Appeals noted that “[a]n employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have.”<sup>25</sup>

In *California Federal Savings & Loan Ass’n v. Guerra*, the United States Supreme Court upheld a California statute requiring employers to provide up to four months of unpaid pregnancy disability leave.<sup>26</sup> The Court determined that Congress intended the PDA to be the minimum protection for pregnant workers, not a ceiling preventing states from taking further measures.<sup>27</sup> The Supreme Court further held that the PDA does not require preferential treatment for pregnant workers. Instead, the Court stated the PDA allows measures that advance the legislation’s purpose of achieving equal employment opportunity for women.<sup>28</sup>

Despite the Court’s ruling in *Guerra*, more recent decisions have held that Title VII allows facially neutral leave policies despite their failure to provide any pregnancy leave. For example, the Fifth Circuit Court of Appeals rejected a disparate impact claim based on a policy allowing only three days of leave within the first ninety days of employment.<sup>29</sup> Other circuit cases have denied protection to pregnant workers on the grounds that the PDA does not require employers to treat pregnant workers better than other workers.<sup>30</sup> Advocates soon realized that new legislation was necessary to provide job protection for pregnant women, and Congress responded by enacting the Family and Medical Leave Act.<sup>31</sup>

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24. *Miller-Wohl Co., Inc. v. Comm’r of Labor and Indus.*, 692 P.2d 1243, 1251–52 (Mont. 1984).

25. *Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981).

26. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 276–92 (1987).

27. *Id.* at 285.

28. *Id.* at 286–89.

29. *Stout v. Baxter Health Care Corp.*, 282 F.3d 856, 861 (5th Cir. 2002) (rejecting the claim that all or substantially all pregnant women would be negatively impacted by the policy, reasoning that such a holding would “transform the PDA into a guarantee of medical leave for pregnant employees, something we have specifically held the PDA does not do”).

30. *See e.g., Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

31. *See* Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL’Y & L. 459, 468 (2008).

*B. The Family and Medical Leave Act of 1993*

The Family and Medical Leave Act of 1993 (FMLA) guarantees up to twelve weeks of unpaid leave per year for the birth or care of an employee's child.<sup>32</sup> The FMLA was motivated by the decision in *Guerra*, which had struck down the California statute mandating four months of unpaid pregnancy leave.<sup>33</sup> Congressman Berman, author of the California legislation, called for federal laws to guaranteeing pregnant women the right to take temporary disability leave without losing their jobs.<sup>34</sup> However, this request reignited the strict equality versus accommodation debate among feminists.<sup>35</sup> Feminists supporting a strict equality approach worried accommodation statutes would lead to implicit discrimination against women of childbearing age because the potential for leave would make them more expensive to hire.<sup>36</sup> Other feminist advocates saw an accommodation model as a way to ensure women had an equal opportunity to participate in the job market.<sup>37</sup>

The House of Representatives recognized that the limited protections provided by the PDA were inadequate for workers whose employers did not offer leave or disability policies and designed the FMLA to fill the gaps remaining in the PDA.<sup>38</sup> However, by the time the FMLA was actually enacted, it had lost this focus. Lobbying for small business exemptions, part-time employee exemptions, and a one-year

32. 29 U.S.C.A. §§ 2611–2612 (West 2011).

33. Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 39 (2007).

34. Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. TIMES, July 22, 1984, § 3, at 1, col. 2.

35. *Id.*

36. *Id.*; see also Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

37. Lewin, *supra* note 34. The article quotes San Francisco's Employment Law Center attorney Linda Krieger, "We are the only industrialized nation that doesn't provide paid maternity leave as a matter of national policy . . . . I don't see why it should be illegal sex discrimination to fire a woman because she gets pregnant, but acceptable to tell her she loses her job if she takes off a few weeks for childbirth. In the real world, it's the same thing. The point isn't that men and women must be treated alike, it's that they must have equal opportunities. When it comes to pregnancy, equal treatment means inequality for women." Lewin, *supra* note 34; see also Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983).

38. O'Leary, *supra* note 9, at 18.

probationary period for FMLA eligibility chopped away provisions necessary to protect many workers, especially in jobs more often held by women.<sup>39</sup> Despite the positive changes the FMLA created, it still does not cover employers with less than fifty employees or part-time workers.<sup>40</sup> The workers not covered by the FMLA disproportionately include women and lower-income workers.<sup>41</sup> Women are also less likely to meet the one-year service requirement, since childbearing and other family needs make women more likely to change jobs or come in and out of the work force.<sup>42</sup> In total, the FMLA only covers 46% of workers.<sup>43</sup>

### C. Ohio Law

Ohio's version of Title VII, Ohio Revised Code § 4112.02(A), provides that it is an unlawful discriminatory practice for any employer to refuse to hire a person, discharge a person without just cause, or otherwise discriminate against a person with respect to terms or conditions of employment because of the person's sex.<sup>44</sup>

In 1980, the Ohio General Assembly adopted § 4112.01(B), Ohio's version of the PDA, articulating that "because of sex" in § 4112.02(A) means "because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions."<sup>45</sup>

Section 4112.04(A)(4) empowers the Ohio Civil Rights Commission (OCRC) to adopt "rules to effectuate the provisions of [§ 4112] and the policies and practice of the commission in connection with this chapter."<sup>46</sup> Ohio Administrative Code § 4112-5-05 clarifies the rights of

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39. *Id.* at 43–45. One-fourth of employed women work part time, compared to only one-tenth of employed men, and women constitute two-thirds of the part-time workforce. *Id.*

40. 29 U.S.C.A. §§ 2611–2612 (West 2011).

41. O'Leary, *supra* note 9, at 39.

42. Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 475 (2008).

43. *Id.*

44. OHIO REV. CODE ANN. § 4112.02(A) (LexisNexis 2010).

45. OHIO REV. CODE ANN. § 4112.01(B) (LexisNexis 2010); OHIO REV. CODE ANN. § 4112.02(A) (LexisNexis 2010).

46. OHIO REV. CODE ANN. § 4112.04(A)(4) (LexisNexis 2010).

pregnant employees under Chapter 4112.<sup>47</sup> Section 4112-5-05(G)(2) provides, “Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.”<sup>48</sup> While § 4112-5-05(G)(2) seemingly mandates maternity leave, paragraph (G)(5) of the same rule contemplates an employer instituting a minimum length of service requirement.<sup>49</sup> Paragraph (G)(5) specifies that when an employee qualifies for leave, childbearing must be considered by the employer to be a justification for leave. The rule elaborates: “*For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing.*”<sup>50</sup> Any perceived inconsistency between these provisions could be resolved by paragraph (G)(6), which provides, “Notwithstanding paragraphs (G)(1) to (G)(5) of this rule, if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time.”<sup>51</sup>

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47. OHIO ADMIN. CODE § 4112-5-05 (2010).

48. OHIO ADMIN. CODE § 4112-5-05(G)(2) (2010).

49. OHIO ADMIN. CODE § 4112-5-05(G)(5) (2010) (“Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer’s leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. *For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing.* Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer’s leave policy.”).

50. *Id.*

51. OHIO ADMIN. CODE § 4112-5-05(G)(6) (2010). In 2004, the OCRC adopted Technical Policy T-29 which created a rebuttable presumption that a twelve week leave is reasonable and sufficient. See Thomas H. Barnard and Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 220 (2009). This Casenote will not address the controversy in 2007 and 2008 over the OCRC’s attempts to define a “reasonable period of time” for pregnancy leave required by R.C. 4112 as twelve weeks, since such a provision would be obsolete after the Ohio Supreme Court ruled in *McFee* that employers have to offer pregnancy leave only to the extent they offer other disability leave. See James Nash, *Pregnancy-leave Change Still Unresolved*, COLUMBUS DISPATCH (Dec. 31, 2008), [http://www.dispatch.com/content/stories/local/2008/12/31/CIVIL.ART\\_ART\\_12-31-08\\_B1\\_PLCCQH9.html](http://www.dispatch.com/content/stories/local/2008/12/31/CIVIL.ART_ART_12-31-08_B1_PLCCQH9.html). James Nash, *Maternity Leave Plan Shot Down*, COLUMBUS DISPATCH (Dec.

State and federal courts interpreted these rules to require reasonable maternity leave, whether or not the employer had a disability leave policy.<sup>52</sup> In *McConaughy v. Boswell Oil*, Ohio's First District Court of Appeals held that under § 4112-5-05(G)(5)-(6), a female employee must be granted reasonable maternity leave regardless of internal policy.<sup>53</sup> Additionally, the Southern District of Ohio noted in *Woodworth v. Concord Management* that "[d]enial of maternity leave mandated by the Ohio Administrative Code 'is, in effect, terminating the employee because of her pregnancy.'"<sup>54</sup>

Before *McFee*, Ohio courts disagreed on what facts a plaintiff must show to establish a prima facie case of pregnancy discrimination. Some courts held the plaintiff must "assert that (1) she was pregnant, (2) discharged, and (3) replaced by nonpregnant personnel."<sup>55</sup> On the other hand, some courts held that to establish a prima facie case of pregnancy discrimination under § 4112.02, a plaintiff must demonstrate that (1) she was pregnant, (2) she was discharged, and (3) a nonpregnant employee similar in ability or inability to work was treated differently.<sup>56</sup> Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the termination.<sup>57</sup> If the defendant provides a legitimate reason for termination, the burden shifts back to the plaintiff to demonstrate that the reason was a pretext for unlawful discrimination.<sup>58</sup>

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4, 2007), [http://www.dispatch.com/content/stories/local/2007/12/04/MATERNITY.ART\\_ART\\_12-04-07\\_A1\\_KR8LSRL.html](http://www.dispatch.com/content/stories/local/2007/12/04/MATERNITY.ART_ART_12-04-07_A1_KR8LSRL.html).

52. *Frantz v. Beechmont Pet Hosp.*, 690 N.E.2d 897, 901 (Ohio Ct. App. 1996); *McConaughy v. Boswell Oil Co.*, 711 N.E.2d 719, 725 (Ohio Ct. App. 1998); *Dirham v. Van Wert Cnty. Hosp.*, No. 3:99cv07485, 2000 U.S. Dist. LEXIS 6417 at \*9-12 (N.D. Ohio Mar. 3, 2000); *Woodworth v. Concord Mgmt.*, 164 F. Supp. 2d 978, 982 (S.D. Ohio 2000); *Morse v. Sudan, Inc.*, No. 66032, 1994 Ohio App. LEXIS 3480 at \*8-9 (8th Dist. Ct. App. Aug. 11, 1994).

53. *McConaughy*, 711 N.E.2d at 725.

54. *Woodworth*, 164 F. Supp. 2d at 985.

55. *Dirham*, 2000 U.S. Dist. LEXIS at \*11; *see also Frantz*, 690 N.E.2d at 901; *Marvel Consultants, Inc. v. Ohio Civil Rights Comm'n*, 639 N.E.2d 1265, 1267 (Ohio Ct. App. 1994).

56. *Hollingsworth v. Time Warner Cable*, 812 N.E.2d 976, 983-84 (Ohio Ct. App. 2004); *see also Priest v. TFH-EB, Inc.*, 711 N.E.2d 1070, 1075 (Ohio Ct. App. 1998) ("While Ohio courts often employ the 'comparable employee' analysis for the fourth prong of the *McDonnell Douglas* test in pregnancy discrimination cases, at least one Ohio court has used the 'replacement' analysis to determine if the prima facie test was met.")

57. *Hollingsworth*, 812 N.E.2d at 984.

58. *Id.*

### III. *McFEE V. NURSING CARE MANAGEMENT OF AMERICA*

Tiffany McFee had worked for Pataskala Oaks for eight months when she requested leave due to a pregnancy-related condition.<sup>59</sup> However, Pataskala Oaks's leave policy required employees have at least one year of service before they could take leave.<sup>60</sup> As the Fifth District Court of Appeals noted, assuming a normal gestation period, McFee was five to seven weeks pregnant at the time she was hired.<sup>61</sup> She was fired three days after she gave birth and six days after she went on leave.<sup>62</sup>

McFee filed a charge with the (OCRC) alleging unlawful termination due to her pregnancy. The OCRC held that McFee's termination violated Ohio's laws against pregnancy discrimination because maternity leave caused her termination.<sup>63</sup> The Licking County Court of Common Pleas reversed the OCRC, citing Ohio Administrative Code § 4112-5-05(G)(4),<sup>64</sup> which provides that "Employment policies . . . shall be applied to disability due to pregnancy and childbirth on the same terms and conditions as they are applied to other temporary leaves of absence of the same classification under such employment policies . . . ."<sup>65</sup> The trial court held that termination of a pregnant employee due solely to her need for maternity leave was not a termination because of pregnancy.<sup>66</sup>

On appeal, the OCRC argued that under O.A.C. § 4112-5-05(G)(2), an employer must provide reasonable maternity leave regardless of its leave policy.<sup>67</sup> The Fifth District Court of Appeals agreed, holding that O.A.C. § 4112-5-05(G)(2) required employers to provide maternity leave for a reasonable period of time, consistent with the purpose of

59. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1071 (Ohio 2010).

60. *Id.*

61. *Nursing Care Mgmt. of Am., Inc. v. Ohio Civil Rights Comm'n.*, 910 N.E.2d 482, 483 (Ohio Ct. App. 2009), *rev'd sub nom. McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069 (Ohio 2010).

62. *Nursing Care Mgmt. of Am., Inc.*, 910 N.E.2d at 483.

63. *Id.* at 483-484.

64. *Id.*

65. OHIO ADMIN. CODE § 4112-5-05(G)(4) (2010).

66. *Nursing Care Mgmt. of Am., Inc.*, 910 N.E.2d at 488-89.

67. *Id.*

Chapter 4112 to promote equal employment opportunities for women.<sup>68</sup>

The Ohio Supreme Court reversed and held that a uniformly applied minimum-length-of-service leave requirement did not violate Chapter 4112.<sup>69</sup> The court cited federal cases holding that the PDA did not require preferential treatment for pregnant employees.<sup>70</sup> Since § 4112.01(B) mirrors the PDA, case law interpreting the PDA is generally applicable to the Ohio provision.<sup>71</sup> Therefore, the court reasoned that Ohio Revised Code Chapter 4112 also did not require the preferential treatment of providing leave to pregnant employees when others similar in their ability or inability to work were not offered leave.<sup>72</sup>

The Supreme Court of Ohio disagreed with the appellate court that McFee's termination constituted direct evidence of discrimination.<sup>73</sup> The court ruled that direct evidence of discrimination is "evidence that proves that discrimination has occurred without requiring further inferences."<sup>74</sup> Since the parties agreed that McFee was terminated because she took leave from work even though she was not eligible, McFee did not present direct evidence of discrimination.<sup>75</sup> The court concluded that the employer's leave policy was not direct evidence of sex discrimination because it is "pregnancy-blind," meaning the policy does not treat pregnant employees differently from employees "not so affected but similar in their ability or inability to work."<sup>76</sup> In so holding, the court rejected the OCRC's argument that the "treated the same" clause of § 4112.01(B) must be read separate from the first sentence prohibiting termination "because of or on the basis of pregnancy."<sup>77</sup> Instead, the court held that the treated-the-same clause is an explanation

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68. *Id.* at 488–89.

69. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1072 (Ohio 2010).

70. *Id.* at 1073.

71. *Id.* (citing *Plumbers & Steamfitters Join Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 421 N.E.2d 128 (Ohio 1981)).

72. *McFee*, 931 N.E.2d at 1073.

73. *Id.*

74. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1076 (Ohio 2010) (quoting *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 640–641 (6th Cir. 2006)).

75. *Id.* at 1077.

76. *Id.* (citing *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 640–641 (6th Cir. 2006)).

77. *Id.* at 1073.

and application of the because-of-pregnancy clause.<sup>78</sup> According to the court, both sentences served the same goal: “to ensure that employees who are pregnant are not discriminated against on the basis of pregnancy.”<sup>79</sup> The court reasoned that “[t]o hold otherwise would be to require that employers treat pregnant employees more favorably than other employees.”<sup>80</sup> Thus, the court deemed the employer’s pregnancy-blind policy was not direct evidence of discrimination and stated that McFee was terminated for taking unauthorized leave, not because of her pregnancy.<sup>81</sup>

When construing the OCRC rules, the court interpreted O.A.C. § 4112-5-05(G)(5) to be incongruent with (G)(2). The court relied on paragraph (G)(5) as evidence that (G)(2) does not mandate reasonable leave because it contemplates that a uniform minimum-length-of-service requirement for leave eligibility is permissible. According to statutory construction, the court held it must resolve the ambiguity in a manner that gives effect to both provisions.<sup>82</sup> This led the court to rule that O.A.C. 4112-5-05(G)(2) “must mean that when an employee is otherwise eligible for leave, the employer cannot lawfully terminate that employee for violating a policy that provides no leave” for pregnancy or a related condition.<sup>83</sup>

The Supreme Court of Ohio further held that O.A.C. § 4112-5-05(G) cannot require employers to provide maternity leave because that mandate would exceed the statutory authority of the Civil Rights Commission.<sup>84</sup> Claiming the OCRC’s interpretation requires preferential treatment for pregnant workers, the court ruled the regulations exceed the public policy Chapter 4112, which is for employers to treat pregnant employees the same as nonpregnant employees.<sup>85</sup>

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78. *Id.* at 1074.

79. *Id.*

80. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1074 (Ohio 2010).

81. *Id.*

82. *Id.* at 1076.

83. *Id.*

84. *Id.* at 1075.

85. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1075 (Ohio 2010).

## IV. DISCUSSION

This Part will discuss the Supreme Court of Ohio's decision in *McFee* and will analyze it as an example of the inadequate protection current discrimination laws provide to pregnant employees. First, subpart A will argue that the result of the court's decision is inconsistent with § 4112.02(A). Second, subpart B will show that the contemplation of a one-year service requirement in (G)(5) need not be interpreted to take the reasonable leave mandate out of (G)(2) and (G)(6). Third, subpart C will examine *McFee* in light of the purpose of the PDA, which is to promote equal employment opportunity for women. Fourth, subpart D will consider in more detail how a pregnancy-blind policy can still be discriminatory. Finally, subpart E will conclude with a brief comparison of Ohio's post-*McFee* pregnancy leave policy to that of other states and developed nations.

A. *McFee Is Inconsistent With Revised Code Section 4112.02(A)*

Prior to *McFee*, federal and Ohio courts had held that the Ohio Administrative Code "plainly indicates that new mothers must be granted a reasonable leave on account of childbearing" and that denial of such leave "is, in effect, terminating the employee because of her pregnancy."<sup>86</sup> In *McFee*'s case, if not for her pregnancy, it is fair to assume she would not have been terminated. The only way the prohibition on discrimination in § 4112.02(A) can be followed is by adopting the Ohio Civil Rights Commission's interpretation of O.A.C. 4112-5-05(G)(2). A no-leave policy is virtually impossible for a pregnant employee to follow because childbirth necessitates time away from work.<sup>87</sup>

Section 4112.02(A), in conjunction with § 4112.01(B), explicitly prohibits an employer from refusing to hire a pregnant applicant because

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86. *Nursing Care Mgmt. of Am., Inc. v. Ohio Civil Rights Comm'n*, 910 N.E.2d 482, 490 (Ohio Ct. App. 2009), *rev'd sub nom. McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069 (Ohio 2010).

87. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 582 (2010).

of pregnancy or from firing an employee because of her pregnancy.<sup>88</sup> However, a one-year minimum service requirement for leave eligibility allows employers to terminate or refuse to hire pregnant employees or applicants due solely to the need for maternity leave that directly results from pregnancy. Failing to require employers to provide pregnancy leave violates § 4112.02 by condoning the termination of employees because of their pregnancy.

In addition, § 4112.08 requires courts to construe Chapter 4112 “liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply.”<sup>89</sup> Furthermore, § 1.11 provides that “[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.”<sup>90</sup> Accordingly, courts should interpret Ohio’s pregnancy discrimination law to fulfill its purpose—protecting pregnant workers—and construe the law liberally to require maternity leave for a reasonable period of time. To deny maternity leave is to deny pregnant women substantial equality of employment opportunity contrary to the goals of Chapter 4112. Therefore, the Fifth District Ohio Court of Appeals correctly held that McFee’s termination constituted direct evidence of pregnancy discrimination.<sup>91</sup>

*B. The Reasonable Leave Required by Ohio Administrative Code Sections 4112-5-05(G)(2) and (G)(6) Was Consistent With (G)(5) and Was Within the Scope of Revised Code Section 4112.02(A)*

The Ohio Supreme Court relied on O.A.C. 4112-5-05(G)(5) as evidence that (G)(2) does not require reasonable leave because it contemplates that a uniform minimum-length-of-service requirement for leave eligibility is permissible. According to statutory construction, the court held it must resolve the ambiguity in a manner that gives effect to both provisions.<sup>92</sup> This led the court to rule that O.A.C. 4112-5-05(G)(2) “must mean that when an employee is otherwise eligible for

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88. OHIO REV. CODE ANN. § 4112.02(A) (LexisNexis 2010).

89. OHIO REV. CODE ANN. § 4112.08 (LexisNexis 2010).

90. OHIO REV. CODE ANN. § 1.11 (LexisNexis 2010).

91. *Nursing Care Mgmt. of Am., Inc.*, 910 N.E.2d at 489.

92. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1076 (Ohio 2010).

leave, the employer cannot lawfully terminate that employee for violating a policy that provides no leave" for pregnancy or a related condition.<sup>93</sup> However, as noted by the Ohio Court of Appeals for the First District in *McConaughy*, (G)(6) explicitly states, "[n]otwithstanding paragraphs (G)(1) to (G)(5) of this rule, if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time."<sup>94</sup> The O.A.C. provided this separate section for the sole purpose of clarifying that reasonable maternity leave is required and that any apparent inconsistency in provisions (G)(1) through (G)(5) does not override this requirement.

Additionally, the alleged tension between (G)(2) and (G)(5) can be eradicated without taking the leave requirement out of (G)(2). The clause contemplating a minimum length of service requirement in (G)(5) is preceded by the words "[f]or example."<sup>95</sup> This introductory phrase demonstrates that the provision intends to clarify what is required when an employer elects to offer disability leave. Contemplating this situation does not negate what § 4112-5-05 requires in other situations, especially since the provisions require the same thing—that employers offer their employees pregnancy leave. This is especially apparent when considering the preceding sentence, and what the minimum length of service contemplation seeks to illuminate: "When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence . . . ."<sup>96</sup> Paragraph (G)(5) can be interpreted as requiring employers who offer leave to also offer pregnancy leave, while (G)(2) and (G)(6) provide that even if an employer does not offer other leave, it must offer pregnancy leave. The separate provisions cover different situations, but all require employers to offer reasonable maternity leave. In addition, as the Fifth District Court of Appeals noted, "[A] reviewing court must give deference to an administrative agency's interpretation of its own rules and regulations where such interpretation is reasonable and consistent with the plain language of the

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93. *Id.*

94. OHIO ADMIN. CODE § 4112-5-05(G)(6) (2010).

95. OHIO ADMIN. CODE § 4112-5-05(G)(5) (2010).

96. *Id.*

statute and rule.”<sup>97</sup> The Supreme Court of Ohio, on the other hand, found that interpreting the OCRC rules as mandating pregnancy leave violates the Ohio constitution by exceeding the statutory authority granted by the Ohio General Assembly. Specifically, the rules thus interpreted would “expand the public policy set by the legislature” that pregnant employees be treated the same as other employees, not preferentially.<sup>98</sup> As a result, the court found it must interpret the rules as only requiring employers to treat pregnant employees the same as other employees similar in their ability to work.

*C. The Decision in McFee Contradicts the Purpose of § 4112.02(A)*

While the Supreme Court of Ohio claimed the purposes of O.R.C. § 4112.02(A) and the PDA are to treat pregnant persons the same as nonpregnant persons, a broader purpose of Title VII and Chapter 4112 is to promote the equal employment opportunity of women. Section 4112.02 is similar to the PDA, and the court has held that federal case law interpreting Title VII is generally applicable to Chapter 4112 cases.<sup>99</sup> Accordingly, the Fifth District Court of Appeals took note of a U.S. Supreme Court decision on a similar issue. In *California Federal Savings and Loan Association v. Guerra*, the U.S. Supreme Court held that a California law requiring employers to provide unpaid pregnancy disability leave was not inconsistent with Title VII because: (1) the PDA was intended by Congress to provide a floor, not a ceiling, for pregnancy benefits and (2) the leave mandate was in line with Title VII’s intent to promote equal employment opportunity.<sup>100</sup> The Fifth District Court of Appeals quoted Justice Stevens’s concurring opinion in *Guerra*, noting that while the plain words of the PDA seem to mandate treating pregnant employees the same as other employees, the U.S. Supreme Court previously rejected that argument and held that Title VII prohibits all preferential treatment of the disadvantaged classes that the

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97. *Nursing Care Mgmt. of Am., Inc. v. Ohio Civil Rights Comm’n*, 910 N.E.2d 482, 490 (Ohio Ct. App. 2009).

98. *McFee*, 931 N.E.2d at 1075.

99. *Nursing Care Mgmt. of Am., Inc.*, 910 N.E.2d at 486 (citing *Plumbers & Steamfitters Join Apprenticeship Comm. v. Ohio Civil Rights Comm’n*, 421 N.E.2d 128 (Ohio 1981)).

100. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987).

statute was enacted to protect.<sup>101</sup> Justice Stevens argued that while the statutory language “seems to mandate treating pregnant employees the same as other employees” one cannot “ignore the fact the PDA is a definitional section of Title VII's prohibition against gender-based discrimination.”<sup>102</sup> Justice Stevens refused to accept the proposition that the PDA requires absolute neutrality, but instead allows, like other parts of Title VII, preferential treatment of the disadvantaged class so long as it is consistent with accomplishing the legislative goal.<sup>103</sup> Accordingly, the Fifth District Court of Appeals agreed with the Ohio Civil Rights Commission that the reasonable leave requirement in paragraph (G)(5) “is consistent with the goals of the PDA and R.C. § 4112.02 by promoting equal employment opportunity by ensuring that women will not lose their jobs on account of pregnancy disability.”<sup>104</sup>

The fact that the PDA was a congressional response to *Gilbert* is further evidence that equal employment opportunity is the true goal of the legislation. In *Gilbert*, the Supreme Court held that excluding pregnancy from disability coverage was not sex discrimination under Title VII because the disparate treatment was not gender-based.<sup>105</sup> The Court considered the distinction in treatment as comparing pregnant and nonpregnant persons, not women and men, because men cannot become pregnant and not all women will become pregnant.<sup>106</sup> Since both women and men can be nonpregnant, singling out pregnancy is not gender discrimination. This reasoning, as legal scholar Deborah Anthony describes, “represents an intentional self-delusion as to both biological and social reality, manifested in a requirement that discrimination cannot take place unless similarly situated groups are treated differently.”<sup>107</sup> The PDA is, therefore, a congressional

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101. *Nursing Care Mgmt. of America, Inc.*, 910 N.E.2d at 487 (quoting *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 293 (Stevens, J., concurring)).

102. *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 293–94 (Stevens, J., concurring).

103. *Id.*

104. *Nursing Care Mgmt. of Am., Inc. v. Ohio Civil Rights Comm'n*, 910 N.E.2d 482, 489 (Ohio Ct. App. 2009).

105. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, 42 U.S.C. § 2000e(k) (2006).

106. *Id.* at 134–35.

107. Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 464–65 (2008).

instruction to courts to move away from the pregnant-nonpregnant distinction used in *Gilbert*, as well as a congressional recognition that pregnancy discrimination is sex discrimination. Indeed, the comments of PDA sponsor Senator Williams, cited by the Supreme Court in *Guerra*, support this conclusion: “The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”<sup>108</sup> The Supreme Court of Ohio ruled the regulations exceed the public policy addressed in § 4112.02 and § 4112.01 because the purpose of those policies is to treat pregnant employees the same as nonpregnant employees.<sup>109</sup> However, if the public policy of § 4112.02(A) is, like its corresponding federal legislation, to ensure equal employment opportunity for women, then the reverse is true: if § 4112-5-05 does not require reasonable maternity leave, the rule does not fulfill the statutory duty the OCRC has been given by the Ohio General Assembly.

#### *D. A Pregnancy-Blind Policy Can Still Be Discriminatory*

The Supreme Court of Ohio ruled *McFee* was terminated because she took leave for which she was ineligible, not because she was pregnant. This is, as the court said, a pregnancy-blind policy, but this policy is also discrimination-blind. Comparing pregnant workers to nonpregnant workers disguises the gender discrimination inherent in a situation where a woman—and only a woman—can be fired because of pregnancy. A lack of pregnancy leave can place a female employee in a position of choosing between her job and the continuation of her pregnancy; an implicit ultimatum that the Fifth District Court of Appeals noted is “a dilemma which would never face a male employee in the first year of employment.”<sup>110</sup> The Fifth District Court of Appeals also noted that “[b]oth sexes are entitled to have a family without losing their jobs; to hold otherwise would be to completely ignore the plain

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108. *Id.* at 466.

109. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069, 1075 (Ohio 2010).

110. *Nursing Care Mgmt. of America, Inc. v. Ohio Civil Rights Comm’n*, 910 N.E.2d 482, 489 (Ohio Ct. App. 2009), *rev’d sub nom. McFee v. Nursing Care Mgmt. of Am., Inc.*, 931 N.E.2d 1069 (Ohio 2010).

language of Ohio Admin. Code 4112-5-05(G)(2),"<sup>111</sup> and would completely counteract the goals of the PDA and Chapter 4112.

By ignoring how pregnancy affects genders differently, society loses sight of why pregnancy protection exists in the first place. Whether or not a woman is pregnant at the time she is hired or knows she is pregnant at the time she is hired, *McFee* holds that she will face termination or denial of hire in three scenarios a male employee would never encounter. First, a female applicant could be unknowingly pregnant when she accepts a position with an employer operating under a one-year no-leave policy. At some point within her first year, assuming her pregnancy continues, she will need time off to give birth and could be terminated because she was pregnant. A second possibility is that a female applicant knows she is pregnant when she accepts the position and discloses this to the employer. If the employer refuses to hire her because she will not be able to comply with the no-leave policy, the employer is in effect refusing to hire her because of her pregnancy. Finally, if a new female employee becomes pregnant within her first few months of employment, she could face termination for taking leave to give birth. New male employees would not face any of these scenarios, demonstrating how the no-leave policy disguises pregnancy discrimination and inhibits the equal employment opportunity of women. Even if a woman is neither pregnant nor intending to become pregnant at the time she is hired, a no-leave policy in effect compels women to guarantee to not become pregnant. In such a scenario, it places a woman in the position of choosing a family or employment, which runs counter to the purpose of the legislation.

The above scenarios demonstrate that comparing pregnant workers to nonpregnant workers rather than male employees to female employees disguises the gender discrimination inherent in denying maternity leave. The Supreme Court of Ohio utilized a pregnant versus nonpregnant comparison to show that providing maternity leave, but not other types of leave, is preferential treatment. However, comparing pregnant to nonpregnant persons, instead of women to men, allows women to be equal only to the extent that they are like men—in this case, to the

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111. *Id.*

extent they are not pregnant.<sup>112</sup> Comparing how males and females are situated differently under the same no-leave policy reveals how requiring maternity leave places males and females on equal ground. It places women in the same position as men, i.e., not facing the risk of losing a job because of pregnancy.

The Supreme Court of Ohio held that McFee had to make her claim under the *McDonnell-Douglas* framework, which required her to establish that a nonpregnant employee similar in ability or inability to work was treated differently.<sup>113</sup> However, this reasoning subscribes to the pregnant versus nonpregnant comparison used in *Gilbert*. Congress addressed the inadequate protection this distinction provides when it enacted the PDA in response to *Gilbert*. The PDA's mandate of equal treatment for pregnant employees has been difficult to apply to cases because there is no male equivalent to pregnancy.<sup>114</sup> In addition, using the similarly situated requirement implicitly encourages treating different groups of people differently, which contradicts the objective of all anti-discrimination laws.<sup>115</sup> In any event, no other employee is truly similarly situated to a pregnant woman forced to choose between continuing her pregnancy and keeping her job. Even if one assumes an employee with a similar disability exists, it is less likely that the most vulnerable groups of female employees—those outside the scope of the FMLA—will be able to find an instance of a similarly situated employee at a small employer.

This difficulty in finding a similarly situated employee is the reason some courts have held that women making a claim under the PDA can utilize a disparate impact theory. In *Abraham v. Graphic Arts International Union*, the D.C. Circuit Court of Appeals found an employer's policy of allowing only a ten-day leave discriminated against pregnant employees despite the policy's equal application to both pregnant and nonpregnant employees.<sup>116</sup> The court found that the policy had a drastic effect on pregnant employees that "clashes violently

112. Anthony, *supra* note 31, at 493.

113. *McFee*, 931 N.E.2d at 1076–1077.

114. Sarah Stewart Holland, Comment, *Pregnancy in Pieces: The Potential Gap in State and Federal Pregnancy Leave*, 27 BERKELEY J. EMP. & LAB. L. 443, 461 (2006).

115. Anthony, *supra* note 31, at 492.

116. *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981).

with the letter as well as the spirit of Title VII.”<sup>117</sup> Under a disparate impact theory, an employee can prove discrimination based on the disparate impact of a facially neutral policy on a protected group, like pregnant women.<sup>118</sup> Unlike a disparate treatment theory, an employee is not required to prove that the employer had a discriminatory motive.<sup>119</sup> In a disparate impact case, the employer can defend itself by proving the practice is a job-related necessity, but the employee can still prevail if she can prove the existence of a lesser discriminatory policy that would “serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’”<sup>120</sup> However, the Supreme Court has never explicitly declared the disparate impact theory applicable to pregnancy discrimination claims and lower courts are divided on the issue.<sup>121</sup> Even if an employee is allowed to argue disparate impact, many courts have stated the PDA requires only equal treatment of pregnant and nonpregnant employees.<sup>122</sup> Using this comparison, courts are unlikely to find evidence of discrimination.<sup>123</sup>

The Supreme Court noted in *Nevada v. Hibbs* that when passing the FMLA, Congress responded to the failure of the PDA to adequately address gender discrimination.<sup>124</sup> Congress chose to go beyond a strict-equality approach like that of Title VII, which would not adequately address gender discrimination because “[s]uch a law would allow States to provide for no family leave at all.”<sup>125</sup> That is the situation for women who constitute a disproportionate number of the 46% of workers who are not protected by the FMLA and the women who are more likely than men to fall below the one-year service requirement.<sup>126</sup> The strict equality, pregnancy-blind approach is not fulfilling the promise of equal

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117. *Id.*

118. Sarah Stewart Holland, Comment, *Pregnancy in Pieces: The Potential Gap in State and Federal Pregnancy Leave*, 27 BERKELEY J. EMP. & LAB. L. 443, 451 (2006).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

125. *Id.* at 738.

126. Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL’Y & L. 459, 475 (2008).

employment opportunity for women. This is demonstrated by the fact that women, such as McFee, are terminated because of leave necessitated as a direct result of pregnancy. In *Hibbs*, the Supreme Court made clear that Congress has the authority under § 5 of the Fourteenth Amendment to address family leave needs that have precluded women from equal participation in the labor market. The Court further acknowledged that a policy of mere non-discrimination would fail to create real employment equality.<sup>127</sup>

#### *E. Pregnancy Leave in Other States and Countries*

Two states have adopted rules prohibiting termination of employment because of pregnancy when an employer offers no leave or inadequate leave by regulation,<sup>128</sup> and three other states require reasonable leave by statute.<sup>129</sup> The scarcity of state laws ensuring equal employment opportunity by mandating unpaid leave for pregnant workers is partly explained by the passage of the Family and Medical Leave Act, even though as discussed above, the FMLA fails to protect a great number of workers, which disproportionately include women. Some states have passed laws that protect workers who fall outside the scope of the FMLA, like California's Fair Employment and Housing Act, which requires all private employers with five or more employees to provide up to four months of unpaid, job-protected leave for pregnancy-related medical conditions, including childbirth.<sup>130</sup> Congress has the ability to take further action to protect pregnant workers from losing their jobs.

The United States is the only modern country worldwide without paid

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127. *Hibbs*, 538 U.S. at 735–38.

128. HAW. CODE R. § 12-46-108 (LexisNexis 2010); WASH. ADMIN. CODE § 162-30-020(4)(b) (2010) (noting the disparate impact that inadequate leave policies have on women, stating: “There may be circumstances when the application of the employer’s general leave policy to pregnancy or childbirth will not afford equal opportunity for women and men. One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.”).

129. CAL. GOV’T CODE § 12945(b)(2) (West 2010), CONN. GEN. STAT. § 46a-60 (2010), MONT. CODE ANN. § 49-2-310 (2010).

130. CAL. GOV’T CODE § 12926(d), 12945(a) (West 2010).

maternity leave for employees.<sup>131</sup> As early as 1989, most Western countries “provided paid leave, including Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.”<sup>132</sup> Many workers in the United States, however, do not even have unpaid leave available and may face termination as a result of pregnancy if they are part of the 46% of workers not covered by the FMLA.

#### V. CONCLUSION

Without the availability of disparate impact theory under the PDA and state statutes based on the PDA, workers need new legislation to prevent pregnancy discrimination. Until Congress makes the FMLA more inclusive, states have the responsibility to protect their workers against sex and pregnancy discrimination.

Congress, and states like Ohio with PDA language in their employment discrimination statutes, could amend the PDA to codify the disparate impact theory and make clear that women are protected against job discrimination even when employers have a no-leave policy. The same is true for FMLA and state laws based on the FMLA that can be amended to provide all employees a reasonable amount of leave to bear a child and physically recover.<sup>133</sup> In Ohio, the legislature could restore the protections the Ohio Administrative Code provided to women by codifying the language of Ohio Administrative Code § 4112-5-05(G)(6): “[I]f the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time.”<sup>134</sup> Until such actions are taken, the goals of Title VII and state companion legislation will not be realized, and employment inequality between the genders will persist.

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131. Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL’Y & L. 459, 483 (2008).

132. *Id.*

133. Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 58 (2007).

134. OHIO ADMIN. CODE § 4112-5-05(G)(6) (2010).