
RECENT CASES

EMPLOYMENT LAW — TITLE VII — SEVENTH CIRCUIT ALLOWS EMPLOYEE TERMINATED FOR UNDERGOING IN VITRO FERTILIZATION TO BRING SEX DISCRIMINATION CLAIM. — *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008).

In 1978, Congress amended Title VII of the Civil Rights Act of 1964 to proscribe discrimination on the basis of pregnancy,¹ a formative step in the political recognition of reproductive capacity as a sex-specific condition in need of legal protection.² Passed specifically in response to a 1976 Supreme Court decision declaring that pregnancy-related classifications did not discriminate on the basis of sex,³ the Pregnancy Discrimination Act⁴ (PDA) revolutionized the landscape of employment protections available to pregnant women and women who may become pregnant. But dramatic advances in assisted reproductive technologies have complicated the nature of Title VII pregnancy discrimination claims.⁵ Recently, in *Hall v. Nalco Co.*,⁶ the Seventh Circuit held that a woman who was allegedly terminated by her employer for undergoing in vitro fertilization (IVF) stated a viable claim under Title VII. In reaching this conclusion, the court in effect adopted a disparate impact theory, correctly reasoning that the employer's conduct disproportionately affected women; however, the court failed to make clear that it was basing its holding not on the gender-specific nature of certain procedures like IVF, but rather on the greater burden women face in undergoing treatment. Although *Hall* was technically consistent with prior cases involving infertility treatments, an explicit disparate impact analysis would have better

¹ See 42 U.S.C. § 2000e(k) (2000) ("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 . . .").

² Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 938 (1985) (noting that Congress passed the Pregnancy Discrimination Act (PDA) because "it understood that pregnancy played a central role in the logic of sex-based employment discrimination").

³ In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court held that an employer's disability benefits plan did not discriminate on the basis of sex when it excluded coverage for pregnancy-related disabilities. For a historical account of the PDA and its abrogation of *Gilbert*, see Cintra D. Bentley, Note, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment To Achieve Pregnancy Within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 400, 402-03 (1998).

⁴ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e(k) (2000)).

⁵ See, e.g., Bentley, *supra* note 3, at 392 (noting that "the issue of whether a woman has a claim against her employer for workplace discrimination based on an employer's policies that deny or affect her use of Assisted Reproductive Technologies ('ARTs') is a subject of debate in the federal courts").

⁶ 534 F.3d 644 (7th Cir. 2008).

signaled to future courts the need to consider gender-specific burdens imposed by employer conduct and would have dispelled any confusion as to the standards parties must meet under Title VII in factually similar situations.

In early 2003, Cheryl Hall, a sales secretary in Nalco's Chicago-area office, informed her supervisor Marv Baldwin that she wished to take a leave of absence from work to undergo IVF.⁷ After Baldwin approved the request, Hall took approximately twenty days off to undergo treatment.⁸ When she returned to work at the end of April 2003, Hall notified Baldwin that the initial procedure had been unsuccessful and that she planned to repeat the infertility treatment.⁹ In July 2003, Hall filed another application for a leave of absence.¹⁰ These requests did not go unnoticed. Baldwin discussed Hall's employment status with Jacqueline Bonin, Nalco's employee-relations manager.¹¹ According to Bonin's notes from this conversation, Hall had "missed a lot of work due to health," and her job performance was characterized by "absenteeism — infertility treatments."¹²

Some months earlier, Nalco had begun reorganization efforts in an attempt to reduce operating costs.¹³ The resulting deliberations led to a decision in mid-June to consolidate Hall and Baldwin's office with another Chicago-area office.¹⁴ At the end of July, Baldwin notified Hall that only Shana Dwyer, the secretary serving in the other office, would be retained after the consolidation.¹⁵ Baldwin told Hall that her termination "was in [her] best interest due to [her] health condition."¹⁶ Dwyer "was a female employee who since 1988 had been incapable of becoming pregnant."¹⁷

After her termination, Hall filed a timely Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC), which declined to pursue further action but provided a Notice of Right to Sue.¹⁸ Hall then filed an action against Nalco alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.¹⁹ In

⁷ Hall v. Nalco Co., No. 04 C 7294, 2006 WL 2699337, at *1 (N.D. Ill. Sept. 12, 2006).

⁸ *Id.*

⁹ Hall, 534 F.3d at 646.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (quoting Bonin's notes) (internal quotation marks omitted).

¹³ Hall, 2006 WL 2699337, at *1.

¹⁴ *Id.*

¹⁵ Hall, 534 F.3d at 646.

¹⁶ *Id.* (alteration in original) (quoting Brief and Required Short Appendix of Plaintiff-Appellant Cheryl Hall at 5, Hall, 534 F.3d 644 (No. 06-3684), 2006 WL 4121733) (internal quotation marks omitted).

¹⁷ *Id.*

¹⁸ Hall, 2006 WL 2699337, at *1.

¹⁹ 42 U.S.C. § 2000e (2000).

her complaint, she alleged that she was fired on account of being a “member of a protected class, female with a pregnancy related condition, infertility.”²⁰

The district court disagreed. In an opinion granting summary judgment for Nalco, Judge Coar ruled that because infertility is a “medical condition that afflicts men and women with equal frequency[,] . . . including infertility within the PDA’s protection as a ‘related medical condition’ would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.”²¹ In his analysis, Judge Coar gave “due weight”²² to *Krauel v. Iowa Methodist Medical Center*²³ and *Saks v. Franklin Covey Co.*,²⁴ both of which held, in the context of health benefits coverage, that infertility was a gender-neutral condition and that denying female employees access to treatments like IVF did not implicate Title VII. Moreover, neither the legislative history of the PDA nor the EEOC guidelines suggested that infertility should fall within the scope of the PDA.²⁵ As a result, Judge Coar followed *Saks* and *Krauel* in holding that “infertility alone does not fall within ‘related medical conditions’ of the PDA, and seeking infertility treatment does not give rise to grounds for sex discrimination.”²⁶

The Seventh Circuit reversed and remanded.²⁷ Writing for a unanimous panel, Judge Sykes²⁸ conceded that infertility was a gender-neutral condition. However, Judge Sykes held that the district court improperly relied on this classification as grounds for dismissal of Hall’s claim.²⁹ The court reasoned that, although infertility afflicts both sexes equally, the employer conduct under dispute nevertheless was not gender neutral because only women take time off to undergo IVF. Consequently, Nalco’s alleged policy of terminating employees for undergoing IVF treatments was sexually discriminatory because only females would ever be fired on such grounds.³⁰

²⁰ *Hall*, 534 F.3d at 646 (quoting Complaint at Law at 4, *Hall*, 2006 WL 2699337 (No. 04 C 7294), 2004 WL 2889281).

²¹ *Hall*, 2006 WL 2699337, at *2 (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003)) (internal quotation marks omitted).

²² *Id.*

²³ 95 F.3d 674 (8th Cir. 1996).

²⁴ 316 F.3d 337.

²⁵ *Hall*, 2006 WL 2699337, at *2 (citing *Krauel*, 95 F.3d at 679–80).

²⁶ *Id.* (citing *Saks*, 316 F.3d at 346).

²⁷ *Hall*, 534 F.3d 644.

²⁸ Judge Sykes was joined by Judges Ripple and Rovner.

²⁹ See *Hall*, 534 F.3d at 648 (“The district court’s emphasis on this issue of ‘infertility alone’ is therefore misplaced in the factual context of this case.”).

³⁰ *Id.* at 648–49. It should be noted that Hall did not raise this argument in her complaint. The Seventh Circuit supplied this legal theory in place of Hall’s complaint, which argued that infertile women are a protected class under the PDA. See *id.* at 649 n.3.

In reaching this conclusion, Judge Sykes drew a comparison to *International Union v. Johnson Controls, Inc.*,³¹ in which the Supreme Court considered an employer policy forbidding female employees from working in positions that would expose them to toxic metals unless they could affirmatively demonstrate that they were infertile. The *Johnson Controls* Court held that the employer policy in question discriminated on the basis of sex, even though fertility was a condition that implicated both men and women, because the policy itself was limited to women.³² Judge Sykes concluded that, when viewed in a light most favorable to Hall, Nalco's conduct "suffer[ed] from the same defect as the policy in *Johnson Controls*," because while infertility itself was gender neutral, the employer's conduct might not have been.³³ As the court stated, "[E]ven where (in)fertility is at issue, the employer conduct complained of must actually *be gender neutral* to pass muster."³⁴ The realities of sexual difference made it "necessarily so" that only women will take time off to undergo a surgical impregnation procedure like IVF.³⁵ Thus, Nalco's alleged behavior discriminated on the basis of sex because Hall was terminated for her "gender-specific quality of childbearing capacity."³⁶ Accordingly, the court ruled that Hall stated a viable claim under Title VII.

On its face, a ruling that recognizes that infertile women attempting to become pregnant have cognizable claims under Title VII seems to square with Title VII's broader goal of preventing discrimination against women who are fertile and could become pregnant. However, the Seventh Circuit did not explicitly acknowledge that it based its decision on the disparate burdens imposed by Nalco on female employees, rather than on the gender-specific nature of IVF. Utilizing an explicit disparate impact analysis in Hall's case would have clarified where the disproportionate burdens actually fell and provided clearer standards for future parties to meet in factually similar disputes.

The district court had emphasized that Nalco discriminated against Hall on the basis of a gender-neutral condition, infertility — an argument that carries intuitive appeal. While the Seventh Circuit ultimately recognized as valid under Title VII the claim that Nalco terminated Hall because she could potentially have become pregnant, the court could have just as easily found that Nalco fired Hall because she

³¹ 499 U.S. 187 (1991).

³² *See id.* at 198.

³³ *Hall*, 534 F.3d at 648.

³⁴ *Id.*

³⁵ *Id.* at 649.

³⁶ *Id.* The court also concluded that there was sufficient evidence to create a triable issue of fact about whether Nalco had a legitimate business reason to terminate Hall, and whether the Nalco employee who decided on the termination was aware of Hall's IVF treatment. *See id.*

took time off to undergo infertility treatments, a justification for termination that would apply with equal force to men. It is admittedly true that no male employees had ever been fired by Nalco on this basis, but the employer conduct, unlike that in *Johnson Controls*, was facially neutral and did not explicitly discriminate on the basis of sex. Nalco's interactions with Hall — Baldwin's comment that the termination was best given Hall's "health condition" and Bonin's observations that Hall's job performance was hindered by health problems — suggest that a male suffering from infertility problems and demanding time off for surgery or hormonal treatments might similarly be terminated.³⁷

The district court found this truism — that since infertility afflicts both genders equally, discriminating on the basis of infertility is a gender-neutral practice — to be the animating force behind two other circuits' decisions rejecting Title VII as a basis for a claim against the employer.³⁸ Its reading of these cases, though, was arguably incomplete. To be sure, the holdings of *Saks* and *Krauel* at their broadest affirm the notion that denial of coverage for infertility treatments does not come within the ambit of Title VII protection. But the district court left out a crucial prong of the Title VII inquiry. It borrowed the categorical principle that infertility is a gender-neutral condition, without further considering whether the employer conduct in question was actually gender neutral in impact.³⁹ Both *Saks* and *Krauel* framed the inquiry, much as the Supreme Court did in *Johnson Controls*, in terms of effect on gender. The *Krauel* court, for instance, rejected the claim that "female employees were more adversely affected by the Plan's fertility exclusion than male participants";⁴⁰ the *Saks* court undertook a similar impact analysis.⁴¹ These two courts did not simply find that

³⁷ Some of the infertility treatments available for members of both genders are described in more detail in Brietta R. Clark, *Erickson v. Bartell Drug Co.: A Roadmap for Gender Equality in Reproductive Health Care or an Empty Promise?*, 23 *LAW & INEQ.* 299, 315–17 (2005).

³⁸ In *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), the employer health benefits plan in question "excluded medical coverage for treatment of [both] male [and] female infertility problems," *id.* at 675, while in *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003), the benefits plan excluded medical coverage for surgical impregnation procedures, *id.* at 341. The female plaintiffs in these cases argued that their employers discriminated against them on the basis of sex by excluding these benefits, but both courts affirmed the grants of summary judgment in favor of the employers. See *Saks*, 316 F.3d at 340–41; *Krauel*, 95 F.3d at 680.

³⁹ To be fair, the district court may have chosen not to consider this issue because the plaintiff did not argue it in her complaint. Hall's claim advanced the contention that Hall belonged to a protected class — females who suffer from infertility — under the Pregnancy Discrimination Act and that she was impermissibly terminated on the basis of this classification. Complaint at Law at 4, *Hall v. Nalco Co.*, No. 04 C 7294, 2006 WL 2699337 (N.D. Ill. Sept. 12, 2006) (No. 04 C 7294), 2004 WL 2889281.

⁴⁰ *Krauel*, 95 F.3d at 681.

⁴¹ Although the employer conduct in *Saks* seems discriminatory, the *Saks* court held that the employer conduct was actually gender neutral because "[a]lthough the surgical procedures are

infertility afflicted both genders equally and conclude that no Title VII claim existed; instead, they considered whether the employer conduct in question burdened one sex disproportionately. This was a question the district court in *Hall* did not reach.

Unlike the district court, the Seventh Circuit considered the relative burdens in its analysis. The court stated that the reason Hall had a viable Title VII claim was because the treatment Hall underwent, IVF, was exclusively for women, and therefore a termination based on such treatment could never be gender neutral. As the court stated, “Employees terminated for taking time off to undergo IVF — just like those terminated for taking time off to give birth or receive other pregnancy-related care — will always be women.”⁴² In staking out this claim, the court implied not just that only women underwent particular kinds of procedures (just as other infertility treatments target the disorder specifically in men), but also that only women required significant periods of time off to do so.

The crux of the court’s holding was thus, in effect, an imputation of a previously unargued disparate impact claim. Under a disparate impact theory, plaintiffs can challenge “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.”⁴³ As in the typical disparate impact case, the employer conduct in *Hall* was facially neutral with respect to gender. Firing an employee for taking time off to undergo infertility treatment has no inherent gender bias. However, females are disproportionately affected by such a practice because they more frequently require time-intensive treatments.⁴⁴ That is, while Nalco could theoretically fire both men and women for missing work to undergo fertility treatment, the reality remains that such terminations occur far more frequently for females.⁴⁵ If one accepts that dis-

performed only on women, the need for the procedures may be traced to male, female, or couple infertility with equal frequency,” and therefore having an exclusionary policy that denied surgical implantation to women burdened both genders equally. *Saks*, 316 F.3d at 347.

⁴² *Hall*, 534 F.3d at 648–49.

⁴³ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977). For more on this point, see also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a seminal Title VII disparate impact case in which the Supreme Court invalidated an employer practice that treated all job applicants comparably but nonetheless favored whites by requiring employment tests and a high school diploma, without sufficient business justification.

⁴⁴ See Sue Shellenbarger, *Women Battling Infertility Find a Friend in the Court*, WALL ST. J., Aug. 13, 2008, at D1 (noting that “[t]reatment for men usually takes less time”); cf. Clark, *supra* note 37, at 320 (noting that “women have to undergo many more tests and procedures in the process of diagnosis and treatment, even when male infertility is the source of the problem”).

⁴⁵ There is a principled distinction between terminating women because their infertility treatments take more time or require more resources than treatments for men and terminating women because they have the potential to become pregnant, a possibility men do not confront. The Seventh Circuit appears to conflate these two concepts, which may be properly rationalized in practice by the fact that a woman undergoing infertility treatment will always belong to both classes.

crimination on the basis of potential pregnancy falls under the “related medical conditions” provision of the PDA, then a female confronting such circumstances states a viable claim under Title VII.⁴⁶ Asking whether women bear a disproportionate burden of a particular rule or policy thus gives substance to an inquiry into the gender neutrality of an employer’s conduct.

This disparate impact framework illustrates how *Hall* is in fact consistent with health plan cases like *Saks* and *Krauel*. Health benefit plans evaluated by their impact on each gender can arguably be deemed gender neutral. Because infertility treatment is costly for either sex, an employer does not, by denying coverage to both genders (or, as in *Saks*, by framing the denial of coverage to one gender as burdening both genders equally), necessarily impose an unequal burden upon a single sex.⁴⁷ Denial of coverage in an employee health plan does not actually discriminate on the basis of sex, assuming infertility in fact afflicts both genders equally. By accounting for the actual impact on the respective sexes, a disparate impact analysis concedes that infertility is a gender-neutral condition but looks beyond the categorical rule to ascertain the actual burdens.

An *implied* framework, however, may not provide the clarity that an explicit disparate impact analysis would. In fact, the implied test used in *Hall* might only serve to further the confusion and uncertainty surrounding infertility treatment cases. The court in *Hall*, after finding that “[e]mployees terminated for taking time off to undergo IVF . . . will always be women,”⁴⁸ hastily concluded as a result that “Hall was terminated . . . for the gender-specific quality of childbearing capacity.”⁴⁹ The connection between the two concepts, however, is

⁴⁶ Courts have also disagreed about whether including the potential to become pregnant as a “related medical condition” is a fair reading of the PDA. Compare *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1403 (N.D. Ill. 1994) (holding that infertile women can be a protected class under the PDA), with *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (holding that the PDA only applies post-conception). A reading of the PDA that excludes women who could become pregnant is difficult to sustain on precedent alone because *Johnson Controls* explicitly recognized the applicability of the PDA to classifications based on “potential for pregnancy.” *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

⁴⁷ It is certainly possible that the costs of infertility treatments for women could be greater (perhaps substantially) than for men and that even a facially neutral rule denying coverage in all instances of infertility treatments might nevertheless have a discriminatory impact on women. For a cost comparison and extended discussion of outlays as the grounds for a possible disparate impact claim, see Clark, *supra* note 37, at 319–20. However, courts have generally rejected this argument because plaintiffs have not met the burden of production necessary to satisfy a prima facie claim. See, e.g., *Krauel*, 95 F.3d at 681 (“[Krauel] has offered no statistical evidence showing that female participants in [the] medical plan and their dependent spouses incurred a disproportionate amount of the cost of infertility treatments as compared with male Plan participants and their dependent spouses.”).

⁴⁸ *Hall*, 534 F.3d at 648–49.

⁴⁹ *Id.* at 649.

not immediately transparent. An employer who terminates an employee for undertaking gender-specific infertility treatment is not discriminating on the basis of sex *per se*. Both sexes face different challenges in infertility that require gender-specific procedures. It is only because an additional condition is met — that females incur a disproportionate burden in undertaking a gender-specific treatment, whether through time off or along some other dimension⁵⁰ — that the employer conduct can be said to have a disparate impact on women. The court should have more explicitly emphasized this particular disparity, as it provides the critical insight to understanding why a blanket rule requiring termination of employees for taking time off for infertility treatments is in fact discrimination on the basis of sex. A consideration of unequal burdens is, indeed, the only reading that renders *Hall* consistent with *Saks* and *Krawel*. The lack of clear reasoning about this point might prevent future courts from seeing *Hall* (correctly) as an opinion about the disparate impact certain treatments create, rather than as an opinion about the gender-specific nature of the treatments alone.

By and large, the *Hall* ruling recognizes the gender-specific burdens women face in their attempts to treat infertility and affirms the principle that women cannot be summarily terminated simply because they need assistance to become pregnant. A contrary holding would have deprived women of their right to start a family without suffering adverse consequences to their careers — a move that contravenes the spirit of the Pregnancy Discrimination Act.⁵¹ Regrettably, however, the *Hall* court failed to acknowledge explicitly that the impact of employer conduct on the respective sexes was the decisive factor in its analysis. As a result, what plaintiffs must show as an initial burden, and what defendants may present as a defense, remains shrouded in doubt. The responsibility for identifying the relevant burdens and setting forth an explicit disparate impact analysis will fall to future courts.

⁵⁰ The plaintiff under a disparate impact theory would still have to present statistical evidence of this disparity to establish a *prima facie* claim of discrimination. See *supra* note 47 for a discussion of a similar requirement in the cost-of-treatment context.

⁵¹ See 124 CONG. REC. 21,439 (1978) (“This bill will facilitate a woman’s choice to conceive and bear children without facing undue economic hardships.” (statement of Resident Comm’r Corrada del Río)).