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PREGNANCY & POLICING: ARE THEY COMPATIBLE?
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INTRODUCTION

The job of a law enforcement officer is one of emotional stress, intellectual challenge and physical demands. It is a profession that requires the talents of people whose personal resources include courage, integrity and equilibrium. An effective law enforcement officer may be required to perform more than 600 essential functions,¹ many of which require a high level of physical fitness.

Today's law enforcement profession is comprised of courageous and talented men *and* women, with women making some special and valuable contributions. Although law enforcement is, at present, still a male dominated profession, women are becoming police officers in greater numbers and their contributions are being recognized. These contributions may be lost if law enforcement agencies fail to recognize that police officers become parents because the officers may otherwise be forced to choose between their profession and parenthood.

Not only have women proven to be as capable as men in performing law enforcement duties, studies have shown that women excel in defusing violent situations, demonstrating empathy in stressful situations and are less likely to be accused of using excessive force.²

¹ See Maryland Chiefs of Police Association, A TASK ANALYSIS STUDY OF ENTRY-LEVEL LAW ENFORCEMENT IN THE STATE OF MARYLAND, Dec. 1995.

² National Center for Women & Policing, *Hiring & Retaining More Women: The Advantages to Law Enforcement Agencies*, 2 (Spring 2003) accessed at www.womenandpolicing.com, Jan. 2006.; S. Martin & N. Jurik, DOING JUSTICE, DOING GENDER: WOMEN IN LAW & CRIMINAL JUSTICE OCCUPATIONS (1996).

It is critical, then, for the continued success of the profession that law enforcement agencies successfully recruit and retain women to serve as police officers. One important tool in achieving these goals is a favorable policy relating to pregnancy, one that supports parenthood without compromising police operations, without unfairly burdening non-pregnant employees, and without violating anti discrimination law.³

This paper addresses how and why law enforcement agencies should accommodate pregnant women so that they can safely perform the duties of a police officer during all or most of their pregnancy, and become mothers without being required to compromise their careers. Part I of this paper provides background about women in policing including a brief history. Part II examines the required qualifications and essential functions of the job of police officer. Part III discusses some of the policies that police agencies have imposed on pregnant officers, including a review of discrimination cases involving law enforcement officers. Part IV seeks to encourage police agencies to move beyond the minimum protections offered by the Pregnancy Discrimination Act and the Family and Medical Leave Act in order to preserve the valuable diversity of their workforce.

PART ONE: POLICEWOMEN ENTER THE SCENE

Women have been doing police work for over one hundred years, beginning as “police matrons” in the nineteenth century. In 1845 women were hired by the New York City prison system to serve as matrons in prisons and police stations to protect female

³ In a 1998 study performed by the International Association of Chiefs of Police, the most frequent reason women gave for resigning from law enforcement jobs was “family/children/birth of child.” International Association of Chiefs of Police, *The Future of Women in Policing: Mandates for Action* at 9 (Nov. 1998).

prisoners as a result of “intense pressure and lobbying” from social reform groups.⁴ Matrons were hired to perform limited duties such as searching female prisoners, preparing paperwork and answering telephones. They worked with “women, children and typewriters.”⁵ These women, who were performing social services, had to meet higher selection standards than male applicants, but were paid less, and given fewer opportunities for advancement. Indeed they were not permitted to perform basic patrol duties; and then were denied promotion because they lacked “full police experience.”⁶

In 1910, after women had organized and campaigned for women to be hired not just as matrons but as police officers, the Los Angeles Police Department hired Alice Stebbins Wells, a social reformer.⁷ In 1912 Isabella Goodwin, a widowed mother of four, became the world’s first woman detective in New York City.⁸

Until about 1915 the women who worked in law enforcement focused on moral reform and social rescue. Historians characterize the period of 1915-1930 as one dominated by individual “specialists and pioneers,” but with no real progress for policewomen up until 1970.⁹ Throughout, “policewomen were at first claiming to do a

⁴ Kerry Seagrave, *POLICEWOMEN – A HISTORY* (1995) at 5; Frances Heidenson, *WOMEN IN CONTROL?* at 41 (1992) .

⁵ Susan E. Martin, *Women on the Move: A Report on Women in Policing*, POLICE FOUNDATION REPORTS, at 2 (May 1989).

⁶ Barbara Raffel Price, *Female Police Officers in the United States*, *POLICING IN CENTRAL & EASTERN EUROPE: COMPARING FIRST HAND KNOWLEDGE WITH EXPERIENCE FROM THE WEST* at 1 (1996), accessed at: <http://www.ncjrs.org/policing/fem635.htm> (1/20/06). Great Britain was one of the first European countries to recruit women to policing, apparently as a result of the shortage of workers following World War I (1914-18). Dutch police employed women in 1911 because of social pressure arising from changes in the laws addressing sexual offenses, and increased prostitution. In 1925 the Polish Women’s Police Brigade was formed, and by 1935 the French police was deploying women as part of normal police operations. Not until 1944 however, did Britain’s Home Office start to encourage the appointment of more women police officers in operational capacity. See Jennifer Brown, *Integrating Women Into Policing: A Comparative European Perspective*, *POLICING IN CENTRAL & EASTERN EUROPE: COMPARING FIRST HAND KNOWLEDGE WITH EXPERIENCE FROM THE WEST* (1996), at 1, accessed at: <http://www.ncjrs.org/policing/fem635.htm> (1/20/06).

⁷ Heidenson, *supra* note 4, at 29.

⁸ Seagrave, *supra* note 4, at 10-11.

⁹ Heidenson *supra* note 4 at 41-42.

different job than that of the men, or at least, to be doing it better than the men, because of the very fact of being female.”¹⁰

The passage of Title VII of the Civil Rights Act¹¹ and the amendments to the Act that extended its coverage to state and local governments enhanced equal opportunities in law enforcement.¹² As a result of the new law, agencies were required to eliminate discriminatory employment policies.¹³ And even though male commanders expressed concerns about the impact of women police because “policemen would simply gaze at them all the time and not do their work,”¹⁴ civil rights lawsuits compelled the New York City Police Department, and others, to actively recruit women and to dispel sexist barriers.¹⁵

Although statistics indicate that “there is no systematic sex discrimination in the applicant selection process,”¹⁶ women in law enforcement remain at a disadvantage.

In 1998 Janis Appier, a former officer with the Los Angeles Police Department explained that the “macho culture of police work” equates peak performance with masculinity and a ready willingness to use force to resolve conflicts. From this sub-culture, she explains, comes “generally low opinions” of policemen for police women's

¹⁰ J. Carrier, *THE CAMPAIGN FOR THE EMPLOYMENT OF WOMEN AS POLICE OFFICERS* (1988), cited by Heidenson, *supra* note 4 at 44.

¹¹ 42 U.S.C. §2000e, *et seq.*

¹² Janis Appier, *POLICING WOMEN – THE SEXUAL POLITICS OF LAW ENFORCEMENT AND THE LAPD* (1998) at 169.

¹³ Martin, *supra* note 5 at 2.

¹⁴ Brown, *supra* note 6 at 2.

¹⁵ Interview with Margie Moore, Executive Director, National Center for Women & Policing, *The Mark Steiner Show*, Baltimore, MD, broadcast 1/30/06.

¹⁶ *Id.* at 5

work. She notes that this negative attitude “flies in the face of numerous studies showing that policewomen perform as well as policemen in patrol and detective work.”¹⁷

Women entering law enforcement have faced tremendous difficulties, primarily because their male colleagues have negative attitudes about them and their ability to do the work. They doubt that women are equal to men in performing the job skills, fear that they cannot do “real” police work, and have concerns about women’s “emotional fitness.”¹⁸ Studies have also shown that women in law enforcement face other “socially structured problems” including family responsibilities, role conflict, sexual harassment, self doubt about competence, sexual harassment, and have fears about complaining about abuse or mistreatment by their colleagues. They also struggle with inadequate facilities and equipment, including proper uniforms, patrol car seats and moderately sized handguns.¹⁹

In 2001 the National Center for Women in Policing conducted a study entitled “Equality Denied – The Status of Women in Policing: 2001.” The study determined that women comprise only 12.7% of police officers in large law enforcement agencies, 8.1% in small and rural agencies and 14.4% in federal agencies.²⁰ A combined weighted estimate of these figures indicates that only 11.2% of America’s police officers are women, whereas the percentage of women in the total work force is 46.5%.²¹ Both

¹⁷ Appier *supra* note 13 at 170. Appier explains that the “macho culture” is a natural outgrowth of the “crime control model” of policing, as compared to the community policing model which is based on communication rather than confrontation.

¹⁸ Price, *supra* note 6 at 2, citing various studies.

¹⁹ *Id. See also Wedow v. City of Kansas City, Missouri*, 442 F.3d 661 (8th Cir. 2006) (women firefighters prevail in sex discrimination case based on agency’s failure to provide properly fitting protective clothing and adequate locker room facilities because of gender.)

²⁰ National Center for Women and Policing, *supra* note 2 at 2.

²¹ National Center for Women in Policing, EQUALITY DENIED – THE STATUS OF WOMEN IN POLICING: 2001, April 2002, accessed at www.womenandpolicing.com, Jan. 2006.

women's advocacy groups and law enforcement leaders²² seek to increase these numbers and to retain female police officers, many of whom leave the profession for family/childbirth reasons.²³

PART TWO: THE ESSENTIAL FUNCTIONS OF A POLICE OFFICER

Law enforcement officers are public officials who hold a position of trust. As such, State law generally requires that police applicants undergo a rigorous and extensive employment screening process. Successful applicants must generally be free of any criminal history, be without significant debt, have successfully completed high school and have little or no history of use of controlled, dangerous substances. In addition, applicants must be in good psychological and physical health.²⁴

Many of the essential functions that law enforcement officers perform require physical strength and coordination. For instance, a police officer must be able to safely lift, carry and shoot a handgun. A police officer must have the physical ability to control and place handcuffs on another person, even an unruly one. An officer may have to pursue a suspect in a foot chase or wrestle an unruly person to the ground. An officer must be able to don a gas mask, protect his or her firearm, protect a fellow officer, ride a motorcycle, and wear a heavy equipment belt.²⁵

²² The 2001 survey found that women hold only 7.3% of top command positions and 9.6% of supervisory positions in large police agencies. More than 55.9% of the agencies surveyed reported no women in top command positions. *Id.*

²³ International Association of Chiefs of Police, *THE FUTURE OF WOMEN IN POLICING – MANDATES FOR ACTION*, Nov. 1998. Family/children/birth of a child was the most frequent reason women gave for resigning from a police force (12%). The second most frequent reason was job/career/better opportunity (10%), and only 2% reported that they foresee difficulties for women in policing in “balancing family life/pregnancy issues.”

²⁴ *See e.g.* MD. REGS. CODE, Title 12, Subtitle 04 (1998).

²⁵ In the State of Maryland, the “core” job description for an entry-level law enforcement officer includes, as essential functions, the following: arrest & detain persons, protect crime scene & collect evidence, enforce traffic laws and investigate accidents, execute motor vehicle stops, operate patrol vehicle, conduct search & seizure, use physical exertion to perform duties, use deadly weapons, provide emergency assistance, conduct initial investigations into various crimes & events, read & write reports, present

These examples illustrate, perhaps, why law enforcement agencies historically set certain physical requirements such as minimum height standards – until such standards were challenged as having a disparate impact on women. Those challenges succeeded because there were no legitimate business necessity reasons for these standards.²⁶ Modern applicant screening procedures use instead physical agility tests, drug testing and medical examinations to determine the fitness of the applicant to do the job.²⁷

It is axiomatic that a heavily pregnant woman may be physically and/or psychologically²⁸ unable to perform some of the essential functions. The physical changes that occur during pregnancy are significant, especially with respect to a woman's ability to do physical work. Hormones cause ligaments to stretch and relax to allow for growth of the fetus. A woman's increased size and weight causes muscle strain and ungainliness, she may have impaired equilibrium and reduced muscle strength, particularly during the third trimester. From the onset of pregnancy, a woman may suffer from fatigue, nausea and a frequent need to urinate.²⁹

PART THREE : PREGNANCY & POLICING

Women who work as police officers and choose to become mothers may, during the course of their pregnancies, become disabled such that they cannot perform all of the

testimony, handle human relations problems, perform general patrol duties. See A TASK ANALYSIS STUDY OF ENTRY-LEVEL LAW ENFORCEMENT IN THE STATE OF MARYLAND, *supra* note 1 at 107-117.

²⁶ Remarks of the Honorable Emory J. Plitt, Training Conference, *Americans for Effective Law Enforcement*, March 13, 2006.

²⁷ See *United States v. Erie, Pennsylvania*, ___ F.Supp.2___ (2005), 2005 WL 3610687 discussing tests that screen police officer candidates, and the illegality of agility tests that have a negative disparate impact on female applicants.

²⁸ For their own safety and that of others, police officers must be able to make split second life or death decisions in the face of physical danger. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). If a female officer finds herself more psychologically focused on the safety of her fetus, her ability to respond to such situations may be compromised and may be reason for her to assume light duty status.

²⁹ For a detailed description of the physiology of pregnancy, see Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (Fall 1995), and sources cited therein.

essential functions required by their jobs. Certain anti-discrimination laws protect those women, but only to a limited extent.

A law enforcement agency may not discriminate against its employees based on pregnancy, childbirth or related conditions, conditions that are unique to females. Thus, a police agency may not (1) refuse to preserve a job for an employee on maternity leave when it protects the jobs of others who are temporarily disabled; (2) deny seniority status upon return from maternity leave, unless others on disability leave are treated similarly; or (3) refuse to grant pension service time for the period of maternity leave unless other disabled employees are similarly disadvantaged.³⁰ Indeed, it is an unlawful employment practice to take an adverse action against an employee whenever her pregnancy is a motivating factor for the action.³¹

A. THE PREGNANCY DISCRIMINATION ACT

The federal Pregnancy Discrimination Act (PDA) requires employers to treat “women affected by pregnancy, childbirth or related conditions” the same “as other persons not so affected but similar in their ability or inability to work...”³² The PDA was designed 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.”³³

The PDA does not entitle women to ask for favorable accommodations during pregnancy,³⁴ nor does the Act require employers to provide more favorable treatment to

³⁰ Jeffery Higginbotham, *Pregnancy & Maternity Leave Policies: The Legal Aspects*, THE FBI LAW ENFORCEMENT BULLETIN, Vol. 62, No. 3 (March 1993).

³¹ *Maldonado v. U.S. Bank*, 186 F3d 759, 763 (7th Cir. 1999).

³² 42 U. S. C. § 2000e(k)

³³ *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987) (quoting 123 Cong. Rec. 29658 (1977) (remarks of Sen. Williams)).

³⁴ *Id.* at 292.

pregnant employees that it does not afford to non-pregnant employees.³⁵ It does require, however, that employers treat pregnant women as well, or as poorly, as other temporarily disabled employees. Thus, it has been interpreted by to require, at a minimum, “equal treatment.”³⁶

The PDA and its state law counterparts have had a positive impact on the ability of women to continue to work during pregnancy. For instance, in 1997 when four Massachusetts State Troopers were required to assume “temporary modified duty” assignments because of their pregnancies complained to the Equal Employment Opportunity Commission, citing a violation of the PDA, and they were reinstated to full duty within a week.³⁷

in *Allison-LeBlanc v. Department of Public Safety, Office of State Police*,³⁸ a state court found that the state police violated the Louisiana state counterpart of the PDA when it terminated a probationary state trooper who was pregnant. Louisiana State Police policy required that a trooper report to her supervisor her pregnancy as soon as she learned of it. The policy dictated that a pregnant officer would not be allowed to remain on patrol status. The court found that this policy treated pregnant women as “automatically disabled” because of pregnancy and was thus discriminatory. The court the employee to be reinstated.

In *Sanderson v. St. Louis University*,³⁹ a security guard brought suit when the University denied her a light duty or sedentary job assignment because of her pregnancy,

³⁵ *Id.* at 286-87.

³⁶ See e.g. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

³⁷ Ellen O’Brien, *Trooper Hit Work Curbs Over Pregnancy*, BOSTON GLOBE, Oct. 15, 1997 at A1; Julie Crittenden, *Pregnant Trooper May Return to Duty*, BOSTON HERALD, Oct. 18, 1997 at A7.

³⁸ 671 So.2d 448 (La. Ct. App. 1st Cir. 1995).

³⁹ 586 F. Supp. 954 (E.D. Mo.) (1984).

verified by a doctor's note saying that she could not perform the full range of police duties. But the employer told her that it did not have any "light duty" police positions, and since she failed to apply for a secretarial position about which she was notified, it terminated her employment. Interestingly, one of the employees to whom she was similarly situated⁴⁰ was a woman who continued to work full duty up until three weeks before giving birth,⁴¹ but the court ruled against her finding that she "did not prove that similarly situated white officers or male officers were treated differently"⁴² than she.

In *Adams v. Nolan*,⁴³ Officer Nolan requested and was denied a light duty assignment during her pregnancy. She provided a doctor's note advising that she should be assigned to "lighter work." The agency policy held that "no light duty assignments will be made for employees due to no-work related injury or illness."⁴⁴ During the next several months, Officer Adams continued to request light duty work assignments, but during the same period of time two male officers were allowed to work at desk jobs because of non-work related temporary injuries.⁴⁵ When she was approximately five months pregnant, she took her accumulated leave and some unpaid leave until after the birth of her child. She returned to work, and the department assigned her not to patrol work but in an administrative section, to which she had no objection.

The appellate court found that Adams established a *prima facie* case and that the agency failed to offer a legitimate non-discriminatory reason for its actions. It also found

⁴⁰ It is important to note and account for that pregnancy affects different women differently. Indeed, different pregnancies can affect the same woman differently as well. See Calloway, *supra* note 27 at 3-8.

⁴¹ *Id.* at 957.

⁴² *Id.* at 958.

⁴³ 962 F.2d 791 (8th Cir. 1992).

⁴⁴ *Id.* at 792-93

⁴⁵ The District Court held (erroneously) that these three were not "similarly situated" to Adams because they required light duty for only y brief periods of time, "not for the four or five months requested by the plaintiff." *Id.* at 795.

that the agency’s limited leave policy “strongly suggests intent to discriminate against women who are pregnant or have pregnancy-related conditions, which is expressly the type of discrimination prohibited by the Pregnancy Discrimination Act. ...”⁴⁶

These cases illustrate that the PDA has improved employment conditions for pregnant women, but only in that it provides a “negative right to be treated the same as other similarly situated workers.”⁴⁷ Indeed, at least one commentator has note that in dealing with the PDA and its equal treatment paradigm, most courts incorporate stereotypes about pregnancy that result in cases that “permit[] discrimination based on the very type of stereotyping that [the PDA] was expected to eradicate.”⁴⁸ Accordingly, the PDA alone does not effectively accommodate the needs of women in the law enforcement workplace.

B. THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 (FMLA)⁴⁹ provides pregnant women with a more “positive” or affirmative right – the right to up to twelve weeks of leave for a serious medical condition (of which pregnancy is one) without losing one’s job.⁵⁰ In addition, under the FMLA a woman may take leave intermittently for purposes of medical treatment and prenatal care.⁵¹ But the FMLA has serious limitations,⁵² and police

⁴⁶ *Id.* at 794.

⁴⁷ D’Andra Millsap, Comment *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1417 (1996).

⁴⁸ Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 226 (1998).

⁴⁹ 29 U.S.C. §§2601-2654 (Supp. V 1993).

⁵⁰ *Id.*

⁵¹ 29 C.F.R. §825.114(a)(2)(2000).

⁵² See Greenberg, *supra* note 43 at 247-48 describing the shortcomings of the FMLA to include lack of pay, inadequate time, non-provision of workplace accommodations, and the employer’s “option” of forcing women to take FMLA “as a means of protecting them.”

agencies tend to rely too heavily and exclusively on it.⁵³ Importantly as well, is that the FMLA does nothing to support a pregnant woman's ability to work, at least in some capacity, during much or all of her pregnancy term.⁵⁴

PART FOUR: LOOKING FOR SOMETHING MORE

The PDA does not require law enforcement employers to offer maternity benefits to make it easier for pregnant women to continue to work during pregnancy and to return to work after delivery.⁵⁵ The FMLA does not require employers to accommodate pregnant employees, except to provide them time to attend to medical appointments, or to be absent from work, with or without pay for limited time periods.⁵⁶ Neither law encourages employers to accommodate pregnant workers in ways that allow them to make realistic and productive choices about their work lives during pregnancy, because neither requires an employer to make accommodations for a woman whose work abilities may be changed because of pregnancy.⁵⁷

The PDA and FMLA are grounded on the "equal treatment model," a theoretical construct that posits that those who are alike, or are "similarly situated" to each other, should be treated alike and those who are not alike should not be treated alike.⁵⁸ But

⁵³ National Center for Women & Policing, *Workplace Issues: Pregnancy Issues in Law Enforcement*, accessed at <http://womenandpolicing.com/workplace4~pregnancy.asp> (last viewed 1/13/06).

⁵⁴ See Peter Horne, *WOMEN IN LAW ENFORCEMENT*, 140 (1980) noting that "A pregnant policewoman can usually adequately perform field patrol duties into her seventh or eighth month of pregnancy....If he police department has a policy of transferring injured male officers to light-duty assignments, then a pregnant policewoman should be transferred also, but only in her seventh or eighth month of pregnancy....She may be able to work quite well almost up to the birth."

⁵⁵ *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

⁵⁶ 29 C.F.R. §825.114(a)(2)(2000).

⁵⁷ See *id.* noting that PDA, ADA and FMLA do not "expressly require employers to accommodate pregnancy in the workplace, [but] all three adopt approaches designed to force employers to accommodate differences;" Millsap, *supra* note 42 at 1441-42, advocating amending the PDA to incorporate the ADA "reasonable accommodation" standard.

⁵⁸ Collette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans With Disabilities Act*, 82 GEO. L. J. 193, 211 (1993) (arguing that PDA equal treatment rights provide formalistic but not substantive equality)

because only women can become pregnant, and because policing remains a male-oriented profession,⁵⁹ the equal treatment model does not account for that situation in which women's needs differ from the needs of men, specifically pregnancy.

Good social policy and the cultural leadership role that law enforcement agencies play demands that police agencies work to accommodate pregnant police officers and institute policies that do not require women to choose between a productive career and parenthood. Moreover, in order to successfully recruit and retain women officers, agencies will find it useful to provide flexible policies to accommodate family needs, but must do so in a balanced and equitable fashion, and not from any notions of paternalism or gender discrimination. Thus, even if not required by federal or state law, it is time for police agencies to recognize that it is beneficial to agencies in fulfilling their public mission to accommodate the pregnant women who make significant contributions,⁶⁰ given that it is perfectly lawful for an employer to offer more benefits to pregnant employees than to non-pregnant employees.⁶¹

The "equal treatment" model does not really afford to agencies and to officers who seek to combine parenthood with a law enforcement career a flexible enough approach to meet the various needs that arise in different situations. The equal treatment model essentially requires equal treatment, "regardless of any inequality of effect that such treatment occasions."⁶² It makes it difficult for employers to account for the

⁵⁹ Millsap, *supra* note 42 at 1427 noting that workplace norms are based on "the male norm" that requires women to "either be[] the same as men or be[] different from men...two ways of having men as your standard," citing *Feminist Discourse, Moral Values, and the Law – A Conversation*, 34 BUFF. L. REV. 11, 21 (1985) (remarks of Catharine A. MacKinnon).

⁶⁰ National Center for Women & Policing, *Hiring & Retaining More Women: The Advantages to Law Enforcement Agencies*, 2 (Spring 2003)

⁶¹ *California Federal Savings & Loan Assn v. Guerra*, 479 U.S. 272 (1987).

⁶² 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, 540 (1983).

inevitable differences that arise among any group of employees in terms of competence, performance, loyalty to the agency and commitment to the profession, not to mention the undeniable physical differences among officers and between men and women. A better approach may be one that seeks to afford employees equal effects or equal results to insure that they are not discriminated against because of their gender.

The case of *United States v. Virginia*⁶³ may open the door to allow law enforcement agencies to adopt “equal results” policies, thus creating better flexibility and equity in responding to employee needs. In this case, the Supreme Court ordered the Virginia Military Institute (VMI) to admit capable women into its student body. But the Court ordered more; it directed VMI, where necessary, to make adjustments and alterations to the institution to facilitate the admission of women.⁶⁴ Justice Ruth Bader Ginsburg noted that to achieve real equality in education or in the workplace, institutions may have to make changes that serve to accommodate the “celebrated” differences between men and women, without relegating women to an inferior position.⁶⁵

The fact that only women can become pregnant is clearly one of the “celebrated” differences to which Justice Ginsburg refers. The equal results model may allow, or even require employers to provide expectant mothers with realistic and adequate employment benefits so that they can retain their professional status, just as expectant fathers do.⁶⁶

Law enforcement leaders and their employees should consider the opportunity that the *VMI* ruling allows to creative innovative and restructured law enforcement workplaces that can accommodate the important social need to allow parents to bear and

⁶³ 518 U. S. 515 (1996).

⁶⁴ *Id.* at 551, fn. 19; *id.* at 557-58.

⁶⁵ *Id.* at 533-34.

⁶⁶ See Candace Kovacic-Fleisher, *United States v. Virginia's New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting and Title VII*, 50 VAND. L. REV. 845, 849 (1997).

raise children, while still being productive workers. Below, I outline several specific types of accommodations that are both necessary and permissible under the principle that holds that sometimes equal results can only be achieved by providing *different* treatment.

The theory that “special treatment lead[s] to equal results” has emerged as a basis for accommodating the needs of workers who have differences that have, in the past, been the basis for discrimination and negative stereotypes. Examples of the special treatment model include the ADA, which requires an employer to provide reasonable accommodations based on individualized needs,⁶⁷ the Title VII⁶⁸ requirement that employers accommodate an employee’s religious beliefs, and the federal law protecting the employment rights of members of the uniformed services when they have been absent from work.⁶⁹ In each of these situations, an employer is not required to provide the employment accommodation if to do so would cause an “undue hardship” on the employer.⁷⁰

In the next sections of this paper, I discuss specific areas in which progressive law enforcement agencies can assist their female officers in achieving equality, without being forced to forgo motherhood. These include optional light duties assignments, maternity uniforms and body armor, deferral of in-service training, adequate maternity leave, continuation of benefits and seniority credits while on leave, and flexible schedules upon return.

A. *LIGHT DUTY BASED ON PHYSICAL CONDITION*

⁶⁷ 42 U. S. C. § 12111(9)(B).

⁶⁸ 42 U. S. C. § 2000e-2(j).

⁶⁹ 38 U. S. C. § 4301 *et seq.* (the “USERRA”).

⁷⁰ 42 U. S. C. § 12112 (b)(5)(A); 42 U. S. C. § 2000e(j); 38 U. S. C. § 4312.

Law enforcement officers may be required to confront dangerous situations that demand strenuous physical exertion. They must wear, carry and use specialized equipment. They must be able to quickly get out of vehicles and perform rescue operations. In nearly every case, a pregnant woman will have difficulty performing these tasks late in a pregnancy, but until that time, “[a]n employee must be permitted to work at all times during pregnancy when she is able to perform her job.”⁷¹ Indeed, since “the ability of any particular woman to continue at work past any fixed time in her pregnancy is very much an individual matter,”⁷² agencies may only assign pregnant officer to light duty upon an individualized basis, not as a matter of general policy.

Where a law enforcement agency does provide light duty assignments⁷³ to temporarily disabled officers, the PDA requires that it offer the same opportunity to women officers who are temporarily disabled by pregnancy and childbirth. Moreover, a law enforcement agency may not remove a pregnant officer from her assignment or compel her to assume a light duty assignment, unless she cannot perform the essential functions of a police officer.⁷⁴ In other words, a pregnant officer should only be assigned to a light duty status under the same criteria that other temporarily disabled employees are so assigned – for medical necessity. It is unlawful for an employer to take

⁷¹ 29 C.F.R. Pt. 1604, Appendix. (Equal Opportunity Commission Guidelines). *See* American Medical Association Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (JAMA) 1995, 1997 (1984)(noting that most women with uncomplicated pregnancies should be able to work until the onset of labor).

⁷² *LaFleur v. Cleveland Board of Education*, 414 U.S. 632, 645 (1974).

⁷³ “Light duty” refers to administrative job tasks that do not require the officer to perform the physical hands-on duties of a police officer and mandatory overtime is generally not required.

⁷⁴ *O’Loughlin v. Pinchback*, 579 So.2d 788 (Fla. App. 1 Dist. 1991) (termination of pregnant correctional officer unlawful in absence of evidence that her abilities were impaired).

“anticipatory” action against a pregnant employee, or to make general assumptions about the impact that a pregnancy might have on a woman’s ability to do her job.⁷⁵

Employers may not change a pregnant employee’s assignment against her will based on stereotypes about what types of work pregnant women should do, concerns about public perceptions of pregnant officers, or notions of fetal protection.⁷⁶ In short, a pregnant employee should not be forced into a light duty assignment as long as she is physically able to perform her regular assignment.

“One of the biggest complaints from female pregnant sworn officers is that when they notify their department that they are pregnant, they are removed from their position.”⁷⁷ This unfair practice arises from outdated stereotypes or from paternalistic or benevolent notions that police commanders may harbor toward pregnant women. When a law enforcement agency reassigns a woman to less than full duty when she remains otherwise capable of doing her job, it is discriminating on the basis of sex.⁷⁸

Some agency policies allow a pregnant officer to exercise the option of switching to a light duty assignment at some point in her pregnancy, regardless of whether it is medically indicated. Under the equal treatment theory, she should not be permitted to *elect* a light duty assignment before it is medically necessary, unless other employees who are disabled by conditions other than pregnancy are allowed to make this election.

⁷⁵ *Maldonado, supra* note 30 at 767; *LaFleur supra* note 72 at 644 (mandatory maternity leave rule based on “irrebuttable presumption of physical incompetency” ruled unconstitutional under Due Process clause.) Apparently, some agencies do not provide light duty assignments at all. For instance, in its 212th Session, the New Jersey legislature actually found it necessary to introduce a bill (A164/S325) requiring police departments to adopt maternity policies and to provide for light duty assignments.

⁷⁶ *See Workplace Issues: Pregnancy Issues in Law Enforcement, supra* note 53; *LaFleur supra* note 72 at 641, n. 9 (noting that mandatory leave rule may have been based, in part, on sparing “schoolchildren from the sight conspicuously pregnant women).

⁷⁷ *Id.*

⁷⁸ “Employers may not alter a woman’s assignment against her will based on her pregnancy if that decision is based on stereotypes about what kind of work pregnant women should do or on concerns about how the public or other officers will react to a pregnant officer.” *Workplace Issues: Pregnancy Issues in Law Enforcement, supra* note 53.

But under the special treatment approach, such an election may be appropriate.

Certainly, if a pregnant woman feels apprehensive about her safety or unsure of her physical abilities, even if not specifically medically indicated, it may be unsafe for psychological reasons for her to remain in a full duty status.

B. FETAL PROTECTION POLICIES

Pregnant women who want to and are able to continue working during their pregnancies, but will want to do so without posing risks to the unborn child. For police officers, workplace hazards may include “strenuous physical work, noise and unusual work schedules.”⁷⁹ Women police officers may be required to engage in physical activity in chasing and subduing suspects.⁸⁰ They are exposed to the noise of and lead dust produced from using firearms, especially during training and re-training periods.⁸¹ The job requires them to be available for duty 24 hours a day, every day of the year, and mandatory overtime is not unusual.⁸²

In *UAW v. Johnson Controls*,⁸³ the U.S. Supreme Court ruled that employers may not have fetal protection policies that exclude women from certain hazardous jobs, even if the intent of the policy is benevolent. Under Title VII, decisions about the welfare of future children are the responsibility of parents, not employers. Under this case, “women as capable of doing their jobs as their male counterparts may not be forced to choose

⁷⁹ Calloway, *supra* note 28 at 14, citing Clair Infante-Rivard, *et al.*, *Pregnancy Loss and Work Schedule During Pregnancy*, 4 EPIDEMIOLOGY 73 (1993) (risks to pregnancy correlated with evening and night work schedules).

⁸⁰ *Workplace Issues: Pregnancy Issues in Law Enforcement*, *supra* note 53.

⁸¹ *Id.*

⁸² Calloway *supra* note 27 at 15.

⁸³ 499 U.S. 187 (1991).

between having a child and having a job.”⁸⁴ An employer “may only take into account the woman’s ability to get her job done,”⁸⁵ not whether the job poses a risk to the fetus.

Similarly, in *LaFleur v. Cleveland Board of Education, et al.*, the school board sought to justify its mandatory maternity leave policy as a means of protecting “the health of the teacher and her unborn child....”⁸⁶ The Supreme Court found that this rule “contain[ed] an irrebuttable presumption of physical incompetency.... [and that] the conclusive presumption embodied in these rules....is violative of the Due Process Clause.”⁸⁷

So while agencies may not *require* that pregnant women not perform certain police functions because of a notion of protectionism, they should arrange for pregnant women to have an option of deferring certain training such as weapons training or highly physical defensive tactics, upon medical advice. Arrangements must be made to allow these women to make up the missed training opportunities immediately upon their return to full duty so as not to fall behind their non-pregnant counterparts.⁸⁸ Alternatively, agencies may be able to allow officers to train on computer firearms simulators, use sound silencers or substitute dry fire capability for live fire shooting. For those who are breastfeeding, the agency should provide lead-free ammunition⁸⁹

⁸⁴ *Id.* at 204.

⁸⁵ *Id.* at 205.

⁸⁶ *Supra* note 72 at 641.

⁸⁷ *Id.* at 644-46.

⁸⁸ *See* New York State Police policy eliminating range qualification for pregnant employees who are tested when they return from leave (on file with author).

⁸⁹ *Workplace Issues: Pregnancy Issues in Law Enforcement*, *supra* note 53; *see* Candace Kovacic-Fleisher, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355, 376-77 (1999) (noting that medical evidence supports breastfeeding as beneficial for both mother and baby, but employment trend shows hostility toward accommodating).

C. MATERNITY UNIFORMS & EQUIPMENT

A uniform is an important component to the safety, discipline and good order of policing. My anecdotal information is that almost no law enforcement agencies provide to its female employees maternity uniforms. Some agencies do allow women to request from the supply room larger uniforms as their pregnancy advances.⁹⁰ This option is not feasible for a very long time as pregnancy advances, may be unsafe and is not respectful to the women.⁹¹

“Providing pregnant employees who wear uniforms on a day-to-day basis with maternity uniforms is critical to making pregnant women feel valued by their department,”⁹² and is critical for those who remain on full duty. The National Center for Women and Policing contends that “[p]roviding uniforms for pregnant employees sends a strong message to those inside and outside the department that women law enforcement officers can be both mothers and criminal justice professionals.”⁹³ Accordingly, agencies should consider providing maternity uniforms, and equipment that accommodates a pregnant body, such as shoulder holsters. When the officer leaves full duty and begins a modified duty assignment it would be appropriate for her to wear maternity business attire, and should be permitted.

D. MATERNITY LEAVE

Ocean City, New Jersey has a contract with its police department that allows for three days of maternity leave. Under this 1970’s era contract “the idea was to allow a

⁹⁰My discussions with female officers showed that typically officers wear a uniform for as long as it fits, then may switch to a uniform shirt untucked with loose pants, and then to civilian “business/casual” attire.

⁹¹ *Wedow, supra* note 19 (failure to provide properly fitting clothing and gear to women resulted in injuries to firefighters, made jobs more difficult and hazardous than necessary and constituted an adverse employment practice in violation of Title VII).

⁹² *Workplace Issues: Pregnancy Issues in Law Enforcement, supra* note 53.

⁹³*Id.*

(male) police officer a 3-day leave to run the household and provide the childcare while his wife was in the hospital having a new baby.”⁹⁴ There was apparently no thought to giving leave to women officers who obviously require more than three days to give birth and recover.

Thankfully, the FMLA now requires the Ocean City Police Department, and all other covered employers, to provide leave for medical conditions, including pregnancy, for up to twelve weeks. But an employer is not obligated to provide paid leave, and may require a pregnant woman to exhaust all of her annual and sick leave before the woman is eligible for additional FMLA benefits. This means that when the officer returns to work she has no paid leave reserves (or even unpaid FMLA leave) in case of family emergency, or her own illness. Additionally, it is primarily younger women who have children early on in their careers when they have not yet earned or “stockpiled” much leave.

Additionally, agencies need to be aware that not all new mothers are capable of returning to full police duties six or eight weeks after giving birth. These times will vary, depending on the nature of the birth, the health of the newborn, whether the mother is suffering from any postpartum depression, the effects of sleep deprivation and whether she needs or desires to nurse her infant.⁹⁵

E. *JOB SHARING AND FLEX TIME*

Because the public needs law enforcement officers twenty four hours a day, every day of the year, law enforcement agencies have tremendous opportunities to offer job sharing, part time and flex time work arrangements to officers. For instance, an agency

⁹⁴ Electronic mail correspondence from “Kate,” an Ocean City Police Officer, 3/16/06, on file with the author.

⁹⁵ See *supra* note 89.

could permit officers to work fewer days per week, but longer shifts on those days. Two officers who have parental responsibilities could share one full-time job, assuming that pay and benefits were adequate. Some officers may prefer to work only weekends and holidays so as to be home for school children during the week. Others may need to work only dayshift because nighttime child care is difficult to find, while some will prefer night work so as to be home with a baby during the day. The possibilities of scheduling are limited only by the creative abilities of the managers and employees in a law enforcement agency.

F. *PROFESSIONAL RESPONSIBILITIES OF OFFICERS*

Women and men who seek careers as police officers, who want to be effective and who want to have the respect of their peers should be prepared to manage their personal lives so as to maintain a workable balance. For women that may include deferring pregnancy until a suitable point in their careers, to the extent possible. For instance, it is unreasonable for a woman to expect that a pregnancy can be accommodated while she is still in the police training academy. Entry level training is vigorous and of a defined duration; even a short absence or disability can interfere with a person's ability to graduate.

Likewise, the extent that a woman can defer pregnancy until after she has completed her employment probation period (generally about two years), she both better protects her own legal rights, and has had an opportunity to demonstrate to the agency that she is a valuable employee. Since employees do have a responsibility to be available for duty, whether they are pregnant or not, and whether they are parents or not, the

reliable police officer will make careful and reliable provisions for child care and for managing other family duties.

PART FIVE: CONCLUSION

Accommodating pregnancy in the workplace is costly, but women who work during their pregnancy remain productive members of society who do not impose a burden on public money.⁹⁶ The suggestions offered here require law enforcement agencies to accept that sometimes women need different treatment. And that the need for different treatment under certain circumstances in no way diminishes the value that women add to a law enforcement agency and fulfilling its mission.

There are compelling arguments in support of only an equal treatment model in gender discrimination matters. Advocates note that only the equal treatment model will “get the law out of reinforcing traditional, sex-based family roles and to alter the workplace so as to keep it in step with the increased participation by women.”⁹⁷ They fear that “to accord pregnant women preferential treatment...[will] likely jeopardize the hiring of women to begin with, because of the potential increase in costs to the employer.”⁹⁸ Moreover, if an agency uses the more simple equal treatment model, officials may believe that they will have an easier time dealing with those who claim discrimination because they are not afforded or eligible for the special benefits because of their non-pregnancy status. They want to rely on a gender neutrality approach, but this approach does not comport with reality, and it is time for all members of the law enforcement community to recognize this reality.

⁹⁶ Calloway, *supra* note 28 at 21.

⁹⁷ Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325,352 (1984-1985).

⁹⁸ Nadine Taub, *From Parental Leave to nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 382 (1984-1985).

Thus there appear to be two alternate paths to equality for women in the law enforcement profession: be the same as men (gender neutrality) or be different, but not disadvantaged by the differences. If “gender neutrality is thus simply the male standard” and if “our equality is judged by our proximity to [the male] measure,”⁹⁹ pregnancy, a difference, will always be an obstacle to equality in the workplace. Indeed, “[o]ne of the principle factors contributing to the difference in the employment status of men and women is the resistance of the workplace to accommodating childbirth and parental responsibilities. This resistance has a disproportionate impact on women who by their sex bear the burden of pregnancy, and who by social custom bear the primary responsibility for childrearing.”¹⁰⁰

Women in law enforcement seek changes that “would make possible a simple equal chance”¹⁰¹ to participate fully in the profession and to participate fully in the family life they choose. For this to happen, pregnancy must be recognized and accommodated as a difference that makes it impossible for women to conform to the male standard.

Those who oppose the special considerations that accommodating pregnancy claim that accounting for this difference “is sex discrimination to give women what they need because only women need it.”¹⁰² But actually the reverse is true: “It is sex discrimination not to give women what [they] need because then on women will not get what [they] need”¹⁰³ in order to participate fully in the law enforcement profession.

⁹⁹Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, MODERN CONSTITUTIONAL THEORY: A READER 2d ed. (John H. Garvey & T. Alexander Aleinikoff, eds.) at 410.

¹⁰⁰Nancy E. Dowd, *Maternity Leave: Taking Sex Difference Into Account*, 54 *FORDHAM L. REV.* 699, 699 (1986).

¹⁰¹MacKinnon, *supra* note 94 at 419.

¹⁰²*Id.* at 412.

¹⁰³*Id.*

Nearly all advocates for women in the workplace recognize that the workplace should be restructured to recognize that in many families with children all the adults work outside the home and share childrearing, if not child bearing, functions. Pregnancy can no longer be treated as a private “problem” suffered by marginal workers who were likely to be in the workforce only for the short-term any way. The law enforcement profession, in particular, can no longer assume that “real” cops are men whose family lives do not interfere with long work hours, shift assignments and holiday obligations. Both men and women officers deserve to have decent, balanced lives, lives that include children should they so choose. Indeed, it is an obvious benefit to society as a whole for police officers to be parents, which undoubtedly make them better police officers as well.