

Pregnancy in Pieces: The Potential Gap in
State and Federal Provided Pregnancy Leave

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The American University

Journal of Gender, Social Policy & The Law

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I. INTRODUCTION

Over the last fifty years, the percentage of women in the workforce has increased dramatically.¹ As a result of this change, more women become pregnant while in the workforce.² Over the past fifteen years, both the federal government and several state governments have attempted to meet the needs of pregnant employees by passing leave legislation, which requires employers to offer a required amount of job-protected leave for women during and after their pregnancies.³ However, despite these efforts, significant gaps in the law remain that prevent pregnant employees from receiving the comprehensive leave they

¹ See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CHANGES IN WOMEN'S LABOR FORCE PARTICIPATION IN THE 20TH CENTURY (2000) (reporting that from 1950 to 1998 the participation rate of women in the workforce increased from one in three to three in five).

² See SHEILA B. KAMERMAN ET AL., MATERNITY POLICIES AND WORKING WOMEN 5 (1983) (estimating that eighty-five percent of working women are likely to become pregnant during their careers).

³ See, e.g., Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2005) (providing twelve weeks of leave for medical reasons, including pregnancy); CAL. UNEMP. INS. CODE § 3300-3306 (2005) (providing residents of California with six weeks of paid leave to care for a newborn or newly adopted child).

need.⁴

The source of this gap is the separation of the singular condition of pregnancy into three distinct categories of absence.⁵ The first category of absence covers illnesses directly related to gestation, which can require leave from work.⁶ The second category of absence covers the physical act of

⁴ See JODI GRANT ET AL., *EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS* 9 (2005) (reporting that no state gives all employees both job-protected leave and benefits).

⁵ See, e.g., 29 U.S.C. § 2612 (separating pregnancy and childbirth under its medical leave provision and allowing parental leave for the birth of a child under the parental leave provision).

⁶ See, e.g., LA. REV. STAT. ANN. § 23:341 (2005) (limiting leave only to medical conditions associated with pregnancy and childbirth and excluding parental leave). See Am. Pregnancy Ass'n, *Pregnancy Symptoms - Early Signs of Pregnancy*, <http://www.americanpregnancy.org/gettingpregnant/earlypregnancysymptoms.html> (last visited Nov. 15, 2005) (listing some of the most common symptoms of pregnancy as morning sickness, tiredness/exhaustion, backaches, and frequent urination). If severe, these symptoms can impede the performance of basic work duties. *Id.*

childbirth that can require leave from work for the event and recovery.⁷ Because these first two categories of absence deal primarily with the physiological conditions related to pregnancy, legislation usually refers to both as forms of medical leave.⁸ The third category of absence, referred to as parental leave, covers leave from work for the employee to care for and bond with the new child.⁹

By dividing pregnancy into these separate categories and

⁷ See MASS. GEN. LAWS ch. 149, § 105D (2005) (requiring eight weeks of leave upon the birth of a child). See Mayo Clinic, *Caesarian Birth and the Road to Recovery*, CNN.COM, Dec. 21, 2004, <http://www.cnn.com/HEALTH/library/PR/00101.html> (reporting that vaginal births usually require six weeks of recovery time, while caesarian births can require up to eight).

⁸ See, e.g., Family and Medical Leave Act of 1993, 29 C.F.R. § 825.114 (2005) (defining “serious medical condition” under the medical leave provision as any period of incapacity due to pregnancy or childbirth).

⁹ See, e.g., 29 U.S.C. § 2612 (distinguishing childbirth leave to allow the employee time to recover from the physical condition of labor from parental leave to allow the employee time to care for and bond with her child because childbirth leave requires medical certification).

not treating the condition comprehensively, leave legislation creates gaps between coverage for medical leave and coverage for parental leave, during which time the pregnant employee would be without leave and vulnerable to job termination.¹⁰ The seminal case illustrating this problem is the recent New Jersey Supreme Court case of *Gerety v. Atlantic City Hilton Casino Resort*.¹¹ In addition to demonstrating the lack of comprehensive leave for pregnant employees, *Gerety* also demonstrates the failure of anti-discrimination statutes to fill such gaps and protect pregnant employees from discrimination.¹²

¹⁰ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1334-36 (N.J. 2005) (stating pregnant employees could be covered for both state medical and federal parental leave).

¹¹ See *id.* (reporting that a pregnant employee was fired during a thirteen day gap in leave coverage).

¹² See *id.* at 1242 (finding that the employer's policy did not succeed under disparate impact theory because of the policy's neutral application). Disparate impact theory involves an employment practice that is facially neutral in their treatment of different groups but impacts one group more harshly than another and cannot be justified by business necessity. *Id.* at 1237.

In Part II, this Comment describes *Gerety* in detail, along with the current state of both federal and state leave laws and federal and state pregnancy discrimination laws.¹³ In Part III, this Comment argues that it is the interaction of federal and state leave laws that most often creates a gap in leave and that this gap produces a disparate impact on pregnant employees, which violates the Pregnancy Discrimination Act.¹⁴ Finally, Part III examines the most common misinterpretations courts make when examining pregnant employees' requests for recovery under anti-discrimination laws.¹⁵ In conclusion, this Comment advocates for the treatment of pregnancy as one singular condition under leave laws, because a holistic approach would more closely mirror

¹³ See *infra* Part II.A-B (describing the different ways in which pregnant employees are covered under state and federal leave laws and the theories of recovery found in anti-discrimination statutes).

¹⁴ See *infra* Part III.A (explaining in detail the potential for gaps within several states and how a reasonable accommodation standard not only fixes the gap but more realistically meets the needs of employees and employers).

¹⁵ See *infra* Part III.C (exploring the courts' misinterpretation of disparate impact theory and confusion over pregnant women's unique position).

women's real world experience with pregnancy and prevent discriminatory gaps.¹⁶

II. BACKGROUND

Lack of comprehensive leave laws can cause significant harm to pregnant employees.¹⁷ First, without leave and job protection, a pregnant employee is at risk for termination, which puts her economic well-being in jeopardy during an already financially trying time.¹⁸ Also, adequate leave time also assures both the physical and psychological well-being of the

¹⁶ See *infra* Part IV (advocating that a holistic approach is far superior to the piecemeal fashion in which legislation is currently being passed).

¹⁷ See GRANT ET AL., *supra* note 4, at 7 (stating studies show that parental leave results in better prenatal and postnatal care, more intense parental bonding over a child's lifetime, and lower accident rates in the first year of life).

¹⁸ See CENT. FOR NUTRITION AND PUB. POLICY, U.S. DEPT. OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES 2 (2005) (reporting that the average child-rearing costs in the first year of life for a two-child, married-couple family in the middle-income group was between \$9,840 and \$10,900).

employee.¹⁹ In addition, not only basic fairness but the law itself dictates that employers should not require pregnant employees to face gaps in coverage that other non-pregnant employees do not face.²⁰ Lastly, adequate leave also confers concrete benefits upon employers.²¹

¹⁹ See Sue Shellenbarger, *Shorter Maternity Leaves Are a Danger to Working Mothers*, CAREERJOURNAL.COM: THE WALL STREET JOURNAL, <http://www.careerjournal.com/columnists/workfamily/20040521-workfamily.html> (last visited Nov. 15, 2005) (reporting on a National Bureau of Economic Research study that found mothers who take at least three months off after childbirth show fifteen percent fewer symptoms of depression after they return to work).

²⁰ See 124 CONG. REC. 38, 573 (1978) (statement of Rep. Hawkins) (arguing that the PDA, which legally requires pregnant employees be treated the same as other employees, ". . . represents only basic fairness for women employees.").

²¹ See Christy Ogelsby, *More Options for Moms Seeking Work-Family Balance*, CNN.COM, May 10, 2001, <http://www.cnn.com/SPECIALS/2001/working.moms/stories/mainstory.html> (contending that studies link the lack of good medical and parental leave to problems for employers, such as absenteeism and burnout).

A. Gerety and the Gap Created by Current Medical and Parental Leave Laws

The facts in *Gerety v. Atlantic City Hilton Casino Resort* clearly illustrate the gap in coverage created by the lack of comprehensive leave legislation.²² Christina Gerety had worked for the Atlantic City Hilton Casino Resort ("Hilton") for almost ten years when she learned that she was pregnant with twins.²³ While intending to work during her pregnancy, approximately a month into her first trimester Gerety took a short leave of absence due to illness related to her condition.²⁴ Later, upon the advice of her physician, Gerety requested an extended period of leave.²⁵ Hilton's leave policy only provided for two types of

²² See 877 A.2d 1233, 1234 (N.J. 2005) (reporting that there was a gap in coverage between when the employee exhausted her medical leave and when she would have been eligible for parental leave).

²³ See *id.* at 1234 (reporting that Gerety's husband also worked at the Hilton and that they both stayed and worked through a major change in management).

²⁴ See *id.* (noting that Gerety only took a two day leave of absence in the beginning of her pregnancy).

²⁵ See *id.* (stating that Gerety's original leave of absence was to end on Dec. 1st and was later extended through Feb. 1st).

leave: (1) leave under federal and state leave legislation, and (2) fourteen weeks of leave under its own policy.²⁶ Her doctor certified the first twelve weeks of Gerety's leave as medical leave under the main form of federal leave legislation - The Family and Medical Leave Act of 1993 ("FMLA").²⁷

In 1993, Congress passed the FMLA in recognition of the importance of a work and life balance, not only for pregnant employees but for all employees.²⁸ The FMLA requires that all large employers provide twelve workweeks of leave during each twelve-month period.²⁹ An employee can request leave for four reasons, the two applicable to pregnant employees are the birth of the employee's child or because of the employee's own

²⁶ See *id.* at 1237 (allowing leave under the federal Family and Medical Leave Act of 1993 and the New Jersey Family Leave Act).

²⁷ See *id.* (reporting that up to this point both Gerety and Hilton anticipated Gerety's return to work without any adverse repercussions).

²⁸ See Family and Medical Leave Act of 1993, Pub. L. No. 103-3 (1993) (finding that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.").

²⁹ See 29 U.S.C. § 2611 (2005) (defining employers as those with fifty or more employees within a seventy-five mile radius).

"serious health condition."³⁰ In addition to providing an employee with twelve weeks of leave, an employer may not discharge or otherwise discriminate against an employee for taking advantage of the FMLA and must return the employee to her original position upon her return from leave.³¹

During Gerety's leave, her physicians discovered one of the babies had a serious health problem and hospitalized Gerety as a result.³² Based on these developments, her physician recommended Gerety further extend her absence from work.³³ Because she had exhausted all twelve weeks of FMLA medical leave and the

³⁰ See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a) (2005) (stating that the other two reasons for leave are because the employee has adopted a child or received a foster child or to care for a family member with a serious health condition).

³¹ See 29 U.S.C. § 2615 (2005) (disallowing retaliatory action by the employer, such as firing or reduction in seniority).

³² See *Gerety*, 877 A.2d at 1234 (acknowledging that Gerety had a bona fide medical concern and that there was no dispute to this matter).

³³ See *id.* (stating that at this time Gerety's anticipated due date was still May, which meant Hilton expected her to need an additional month of leave then she would have needed due to the premature birth of the twins).

additional fourteen weeks provided to her by Hilton, Hilton terminated Gerety and told her that while they would consider rehiring her, she would lose all seniority benefits.³⁴ However, despite exhausting all twenty-six weeks on medical leave, Gerety was still eligible for twelve weeks of parental leave under the New Jersey Family Leave Act ("NJFLA").³⁵

Several states have their own versions of parental and medical leave legislation and the FMLA clearly states that the law does not interfere with or supersede additional leave provided by state laws.³⁶ Some states, like New Jersey, restrict leave to cover only medical leave or only parental leave.³⁷ When

³⁴ See *id.* (stating that the only other option given Gerety by Hilton was to return to work immediately under New Jersey law).

³⁵ See *id.* (stating that she would have been eligible for more leave upon the birth of her children).

³⁶ See 29 U.S.C. § 2651 (2005) (including in this provision any leave provided under parental and medical leave or anti-discrimination laws); see also 29 U.S.C. § 2653 (2005) (stating explicitly that employers should feel free to retain or adopt more generous leave policies).

³⁷ See, e.g., New Jersey Family Leave Act, N.J. STAT. ANN. § 34:11b-4 (West 2005) (excluding all serious medical conditions,

that happens, the state leave does not run concurrent to the FMLA leave, as it would if both state and federal law covered the same type of leave.³⁸ As a result, a pregnant employee in these states is in the same position as Gerety - that is, she may be eligible for twelve weeks of medical leave under federal law and an additional twelve weeks of parental leave under state law.³⁹

Unfortunately, Gerety was unable to take full advantage of both banks of leave because she was fired before the birth of her children, which would have triggered eligibility for more state parental leave.⁴⁰ The gap in time between the exhaustion of her medical leave and the birth of her children, which would

including pregnancy-related illness or childbirth, but covering parental leave).

³⁸ See 29 U.S.C. § 2651 (stating that leave provided under the FMLA does not supersede *additional* state leave coverage, not equivalent state leave coverage).

³⁹ See *Gerety*, 877 A.2d at 1235 (reporting that Gerety would have been eligible for a total of thirty-eight weeks of leave between federal leave, state leave, and employer leave).

⁴⁰ See *id.* (stating that Hilton fired Gerety after she had used only 182 days of leave).

have triggered her parental leave, was only thirteen days.⁴¹ In other words, if Gerety had begun her medical leave only thirteen days later, she would have been covered through birth by the medical leave and after birth by the NJFLA.⁴² Thus, despite going over Hilton's twenty-six week leave policy, the NJFLA would have prohibited Hilton from terminating her employment because she took parental leave.⁴³ However, because of the gap in coverage, the law left Gerety without leave and without protection.⁴⁴

⁴¹ See *id.* (reporting that Hilton fired Gerety on April 2nd and that she went into labor and delivered twin daughters on April 14th).

⁴² See *id.* (showing that if she had begun her leave in mid-October the twenty-six weeks of leave would have reached until the birth of her children in mid-April).

⁴³ See New Jersey Family Leave Act, N.J. STAT. ANN. § 34:11b-4 (West 2005) (prohibiting the termination or denial of seniority benefits upon return from leave to employees taking the parental leave).

⁴⁴ See *Gerety*, 877 A.2d at 1235 (stating Gerety was left without options and filed a complaint with the Equal Employment Opportunity Commission, the federal agency charged with enforcing Title VII).

B. Gerety and the Hesitation of Courts to Find Disparate Impact in Pregnancy Discrimination Cases

After her termination, Gerety filed a gender discrimination claim under New Jersey's Law Against Discrimination ("LAD") alleging that Hilton's policy had a disparate impact on pregnant employees.⁴⁵

The LAD is the equivalent of Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law, which prohibits employers from discriminating on the basis race, color, religion, sex, or national origin.⁴⁶ In the first ten years after enactment, the majority of state and federal courts interpreted sex discrimination under Title VII to include pregnancy discrimination.⁴⁷ Despite this precedent set by other

⁴⁵ See *id.* (reporting that the plaintiff also alleged wrongful termination, intentional infliction of emotional distress, and retaliatory action against her husband).

⁴⁶ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a)(1) (2005) (including prohibition against discrimination with regards to "compensation, terms, conditions, or privileges of employment . . .").

⁴⁷ See, e.g., *Hutchinson v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961, 968 (9th Cir. 1975) (dismissing employer policy that did not pay disability benefits for pregnancy or childbirth-

courts, the Supreme Court in *General Electric Co. v. Gilbert* clearly stated that Title VII did not cover pregnancy discrimination.⁴⁸ Congress quickly responded to the Court's decision by passing the Pregnancy Discrimination Act ("PDA") as an amendment to Title VII that states the terms:

'[B]ecause of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.⁴⁹

Not only did the amendment include pregnancy in the definition of sex discrimination, the PDA codified what state courts had been requiring from employers for several years - that employers

related absences as discriminatory under Title VII); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1163 (W.D. Pa. 1974) (maintaining that the school board's policy of firing employees if they did not return three months after birth was a violation of Title VII).

⁴⁸ See 429 U.S. 125, 137 (1976) (stating that there was no way to prove that the exclusion of pregnancy benefits were designed to discriminate and that the plaintiff failed to prove the neutral plan had a disparate impact on women).

⁴⁹ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005).

must treat pregnancy, childbirth, or a related medical condition the same as any other temporary disability.⁵⁰

As previously mentioned, several states have their own anti-discrimination law; and after the passage of the PDA, it was unclear whether or not the federal law pre-empted any state laws offering more expansive coverage.⁵¹ In *California Fed. Sav. & Loan Ass'n v. Guerra*, the Supreme Court looked at a California statute that required every pregnant employee to receive up to four months of leave for either pregnancy or childbirth, even if other employees received less temporary disability leave.⁵² In its analysis, the Court found that the state law was not

⁵⁰ See 37 Questions & Answers, 29 C.F.R. Part 1604, Appendix (EEOC 1978) (appending the guidelines to Title VII with these Questions and Answers for employees to provide guidance on the interpretation of the new amendment).

⁵¹ See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 273 (1987) (considering whether or not Title VII pre-empted a state anti-discrimination law that required leave in addition to prohibiting discrimination and finding there was no pre-emption).

⁵² See *id.* at 276 (evaluating the plaintiff's claim that the job-protected leave was denied to her because upon her return she was refused an equivalent position).

inconsistent with the purpose of Title VII and that the federal law did not pre-empt the state law.⁵³

In examining Gerety's claim of discrimination under the NJFLA, the court stated that it would look to the "substantive and procedural standards established" under Title VII in determining discrimination claims.⁵⁴ Since Title VII now explicitly covers pregnancy as a form of sex-based discrimination, federal courts have stated repeatedly that plaintiffs, like Gerety, would have the same two legal theories available to them as any other Title VII plaintiff, including disparate impact theory.⁵⁵ Since the LAD is New Jersey's version

⁵³ See *id.* at 285 (quoting and agreeing with the Court of Appeals that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise").

⁵⁴ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1237 (N.J. 2005) (quoting *Viscik v. Fowler Equipment Co., Inc.*, 173 N.J. 1, 13 (2002)) (finding that federal standards had been applied however with flexibility).

⁵⁵ See *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, 867 F.2d 974, 984 (7th Cir. 1988) (holding explicitly for the first time that PDA claims may be brought under both disparate impact and disparate treatment theory); see also *McDonnell Douglas*

of Title VII, the court allows the use of both disparate treatment and disparate impact theories, focusing in particular in *Gerety* on the plaintiff's claim of disparate impact.⁵⁶

Under this theory, an employee can prove a violation of the PDA based on the disparate impact of a facially neutral policy, like Hilton's leave policy, on a protected group, here, pregnant women.⁵⁷ The employer can defend itself by proving that the

Corp. v. Green, 411 U.S. 792, 801 (1973) (explaining the other theory available to the plaintiffs, disparate treatment, as combating intentional, willful discrimination against members of a protected class and setting out a test to prove this type of discrimination).

⁵⁶ See *Gerety*, 877 A.2d at 1237 (focusing only on the disparate impact claim because it was the only theory presented during argument).

⁵⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (finding that an employer's requirement of a high school education or a general intelligence test had an adverse impact on black applicants); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (stating that statistical evidence played an important role in proving disparate impact, particularly in employment cases).

practice is a job-related business necessity.⁵⁸ However, even if the employer establishes business necessity, the employee can still prevail if she can prove that there was a less discriminatory policy that would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"⁵⁹ In addition, the employee is under no requirement during any point in this process to prove that the employer had a discriminatory motive.⁶⁰

⁵⁸ See *De Laurier v. San Diego Unified School Dist.*, 588 F.2d 674 (1978) (finding a school district correctly asserted a business necessity defense where they prohibited pregnant teachers from working during the ninth month of pregnancy because of safety and efficiency concerns related to a teacher's multifarious duties).

⁵⁹ See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)) (finding that a height and weight requirement for prison guards had a disparate impact on women and limiting the tasks available to women guards had a less discriminatory impact).

⁶⁰ See *id.* at 335-36 (clarifying that the legislative intent of Title VII was to prevent discriminatory consequences not discriminatory motives).

However, while disparate impact theory is available to pregnant employees facing discrimination, as the court shows in *Gerety*, plaintiffs have had a difficult time proving their case.⁶¹ First, while the Seventh Circuit stated that disparate impact was applicable to pregnancy discrimination claims in *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, the Supreme Court has never explicitly declared its applicability, and many districts and several circuits hold that it is not available in pregnancy discrimination cases.⁶²

Second, in addition to overall reluctance on the part of

⁶¹ See Pamela L. Perry, *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 HARV. WOMEN'S L.J. 127, 136-39 (1991) (noting the courts' historical resistance to disparate impact theory in all gender discrimination contexts).

⁶² See Laura Schlichtmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 373 (1994) (arguing that the closest the Court has come in addressing the issue was in *California Federal Savings & Loan Assn. v. Guerra*, where the Court looked at a California law that required enhanced leave for pregnant employees). Despite the Supreme Court's quoting a seminal disparate impact case, they held the state law was not pre-empted by Title VII. *Id.*

the Court, many courts have stated that the PDA requires only equal treatment between pregnant employees and non-pregnant, but similarly disabled, employees.⁶³ This seems to be the conclusion of the majority in *Gerety*, which granted the employer's motion for summary judgment based solely upon the policy's neutral application and the fact that the policy was not subject to any exception, no matter the employee's illness.⁶⁴

However, other courts have held that the PDA can require leave for pregnant employees claiming disparate impact.⁶⁵ In

⁶³ See, e.g., *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 949 (10th Cir. 1992) (finding that pregnant employee's only had access to disparate treatment analysis, as opposed to disparate impact analysis, because Title VII only required neutral application).

⁶⁴ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1242 (N.J. 2005) (claiming that the case was about preferential treatment for pregnant employees and not freedom from discrimination).

⁶⁵ See, e.g., *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986, 994 (5th Cir. 1982) (finding that an employer's policy of terminating pregnant employees because of concerns with fetal safety had a disparate impact and was discriminatory because the employer failed to use alternative, less discriminatory policy);

Abraham v. Graphic Arts Int'l Union, the court found the employer's policy of allowing only a ten-day leave, while applied equally to both pregnant and non-pregnant employees, was still discriminatory towards pregnant employees.⁶⁶ This is the position taken by the dissent in *Gerety*, which argues that Hilton's policy does have a disparate impact on pregnant employees, that the LAD prohibits this form of discrimination, and that it is within the power of the courts to require reasonable accommodation of pregnant employees.⁶⁷

III. ANALYSIS

Gerety is the paradigmatic case illustrating how the

Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543, 1554 (11th Cir. 1984) (finding disparate impact where employer had failed to establish a business necessity for firing a female x-ray technician when she became pregnant).

⁶⁶ See 660 F.2d 811, 819 (D.C. Cir. 1981) (stating that it was "[b]eyond peradventure, the limitation of leave to ten days affected women employed in the PEP program much more severely . . .").

⁶⁷ See *Gerety*, 877 A.2d at 1243 (Portiz, C.J. dissenting) (arguing that the case is not about preferential treatment, but about women being treated unfairly and differently than non-pregnant employees).

separation of pregnancy into distinct categories of absences under both state and federal leave legislation creates potential gaps between the different categories of leave.⁶⁸ These gaps in leave not only require women to separate their one condition in order to meet differing leave standards⁶⁹ but also expose pregnant employees to a risk of termination or loss of benefits not faced by non-pregnant employees.⁷⁰ This disparate impact is clearly prohibited by the PDA.⁷¹ However, as the majority decision in *Gerety* shows, disparate impact theory under anti-

⁶⁸ See *id.* (stating the gap was created between the first category of medical leave and the third category of parental leave).

⁶⁹ See Family and Medical Leave Act, 29 U.S.C. § 2612 (2005) (setting a certification standard for pregnancy-related illness leave higher and harder to reach than the standard for childbirth or parental leave).

⁷⁰ See *Gerety*, 877 A.2d at 1234 (stating *Gerety* was fired upon expiration of leave and told she could be rehired but would lose all seniority benefits).

⁷¹ See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005) (stating clearly that pregnant employees must be treated the same as “persons not so affected but similar in their ability or inability to work. . .”).

discrimination statutes has not always been successful in protecting pregnant employees facing such gaps.⁷²

A. State Leave Legislation: The Separation of Pregnancy into Distinct Categories of Absences Creates Gaps in Leave Coverage that Have an Disparate Impact on Pregnant Employees in Violation of the PDA

The court in *Gerety* correctly called on state lawmakers to respond to the needs of pregnant women with legislation that requires enhanced leave that would prevent gaps in coverage from occurring.⁷³ Unfortunately, it is precisely such responses by state lawmakers that have created the gap in the first place; therefore, any future legislation will need to look closely at the examples of several states whose leave legislation prevents potential gaps from forming.⁷⁴

⁷² See *id.* at 1240 (finding that Hilton's leave policy did not have a disparate impact on pregnant women because it would also impact men facing gender-specific medical conditions such as testicular cancer).

⁷³ See *id.* at 1241 (arguing that it is the legislature's job to require enhanced leave and that the Court can not "legislate our personal preferences . . .").

⁷⁴ See, e.g., CONN. GEN. STAT. § 46a-60 (2005) (requiring that employers with three or more employees grant pregnant employees a reasonable leave of absence for pregnancy-related illness,

1. The FMLA Creates Separate and Discriminatory Standards for Pregnant Employees to Meet and Does Not Provide an Adequate Amount of Leave

The FMLA alone has fallen short of meeting the needs of pregnant employees, and several states have responded with legislation to address those inadequacies.⁷⁵ First, the separation of pregnancy under the FMLA into three categories of absences forces pregnant employees to meet stricter eligibility requirements for leave for illnesses related to gestation than required for childbirth leave.⁷⁶ Second, by only covering twelve weeks of leave, the FMLA makes gaps in leave coverage more

which would prevent gaps from forming by not setting distinct time limits).

⁷⁵ See, e.g., CAL. UNEMP. INS. CODE § 3300-3306 (2005) (addressing the one problem with the FMLA, the fact that most families cannot afford to take unpaid leave, by becoming the first state in the nation to provide paid leave to employees for the care of their newborn child).

⁷⁶ See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2005) (requiring employees taking medical leave for pregnancy-related illness to prove that their symptoms are a serious medical condition).

likely, especially in the case of high-risk pregnancies.⁷⁷

While the FMLA made inroads into the needs of pregnant employees, the separate treatment of pregnancy and childbirth within the law creates different eligibility requirements for coverage, which can have a discriminatory impact on pregnant employees.⁷⁸ The FMLA automatically covers the birth of an employee's child under either the first provision providing parental leave or the fourth provision providing medical leave.⁷⁹ However, the FMLA would not automatically cover a pregnant employee, like Gerety, who wants to use the medical leave for

⁷⁷ See *Multiple Pregnancies: Maternal Complications*, WOMEN'S HEALTH CHANNEL, http://www.womenshealthchannel.com/multiplepregnancies/risks_maternal.shtml (last visited Nov. 15, 2005) (stating that multiple births are twelve times more likely to be premature and therefore, often require long periods of bed rest for the mother).

⁷⁸ See 29 U.S.C. § 2612 (requiring pregnancy-related illness to meet the requirements for "serious medical condition," while not requiring childbirth to meet any standards). As a result, only pregnant women would be required to differentiate symptoms within one medical condition. *Id.*

⁷⁹ See *id.* (noting that the adoption of a child would also be automatically covered for parental leave).

illness related to gestation before childbirth and would require her to prove that the illness qualified as a "serious medical condition" which would prevent her from performing the essential functions of her job.⁸⁰

The FMLA classifies serious medical condition as falling in one of two categories; pregnancy-related illness falls in the second category, as a condition that requires "continuing care by a health care provider."⁸¹ Congress originally envisioned this category as covering all illnesses related to gestation, including common symptoms.⁸² In addition, the legislature

⁸⁰ See Family and Medical Leave Act of 1993, 29 C.F.R. § 825.115 (2005) (using the definition of disability within the Americans With Disabilities Act, which is that the employee be unable to perform the essential functions of the position).

⁸¹ See 29 U.S.C. § 2611(11) (2005) (defining serious health condition as any condition that requires (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider).

⁸² See H.R. REP. NO.8, 103RD CONG., 1ST SESS., pt. 1 at 29 (1993) (listing among the conditions to be covered "ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth . . . ").

explicitly lists "any period of incapacity due to pregnancy, or for prenatal care" as included within the continuing care test.⁸³

However, pregnancy claims were the among the first tried under the serious medical condition provision of the FMLA and the courts incorrectly strayed from this legislative intent immediately by requiring that pregnancy-related absences be the result of severe symptoms.⁸⁴ In particular, in *Gudenkauf v. Stauffer Commc'n, Inc.* the court denied an employee's FMLA claim, despite the presence of morning sickness, stress, nausea, back pain, swelling, and headaches, wrongly concluding that these were no more than the normal complications of pregnancy and did not prevent the employee from performing the essential functions of her job, in direct conflict with the legislative

⁸³ See 29 C.F.R. 825.114(a)(2) (listing prenatal care *separately* from incapacity related to pregnancy).

⁸⁴ See *Kindlesparker v. Metropolitan Life Ins. Comp.*, No. 94-C-7542, 1995 U.S. Dist. LEXIS 6164, at *1 (D. Ill. May 8, 1995) (assessing a plaintiff's claim that she was discharged when her pregnancy required medical attention and denying relief because her pregnancy was not a serious medical condition, because it did not involve severe symptoms).

intent expressed for the FMLA.⁸⁵ Under the current standard, the FMLA would provide leave to a pregnant employee for a normal childbirth without complications, but not for a normal illness related to gestation, and in fact, would require a pregnant employee to prove her symptoms are severe.⁸⁶ While this higher standard was not difficult for Gerety to meet because of the high-risk nature of her pregnancy, a pregnant employee attempting to receive medical leave for normal pregnancy-related illness essentially would face a much stricter standard than a pregnant employee attempting to receive medical or parental leave for childbirth.⁸⁷

By differentiating between pregnancy-related illness and

⁸⁵ See 922 F. Supp. 465, 469 (D. Kan. 1996) (accepting the incapacity requirement, that the employee be unable to perform the essential functions of her position, as controlling).

⁸⁶ See 29 U.S.C. § 2611 (2005) (allowing the employer to require the employee to seek a second opinion if he or she doubts the results of the first certification of leave).

⁸⁷ See Family and Medical Leave Act, 29 U.S.C. § 2612 (2005) (covering work absences for the birth or care of a child, the adoption of a child, to care for an ill family member, or for the employee's own illness that makes it impossible to perform the essential functions of her job).

childbirth, this requirement forces pregnant employees to look at her pregnancy as separate conditions and meet differing standards based on the stage of her conditions, something a non-pregnant employee would not be required to do.⁸⁸ As a result of these different standards, an employer can treat a pregnant employee differently than a non-pregnant employee.⁸⁹ However, this different treatment clearly violates the PDA by treating pregnant employees differently than non-pregnant employees by requiring of them what would not be required of others, which creates a disparate impact on pregnant employees.⁹⁰

⁸⁸ See *id.* (requiring pregnancy-related illness to be severe and incapacitating, while not requiring the presence of abnormal severity for childbirth).

⁸⁹ See William McDevitt, *Evaluating the Current Judicial Interpretation of "Serious Health Condition" Under the FMLA*, 6 B.U. PUB. INT. L.J. 697, 716 (1997) (calling on the Supreme Court to define a bona fide period of incapacity or prenatal care, therefore decreasing the difference in the standard for childbirth and pregnancy).

⁹⁰ See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005) (requiring all pregnant employees be treated the same as similarly disabled employees for all "employee-related purposes . . .").

The FMLA has also fallen short of its goals of meeting the needs of working mothers and contributes to the gaps in coverage by providing inadequate amounts of leave time.⁹¹ While it has added greatly to the rights of pregnant employees by providing leave where before none was available, by not acknowledging that pregnancy sometimes requires enhanced leave, the FMLA increases the likelihood of gaps in coverage. Beyond the general eligibility requirements that exclude a large number of employees, the twelve weeks provided for both pregnancy-related illness and childbirth under the FMLA falls far short of meeting the realistic needs of most pregnant women, in particular women like Gerety experiencing complications from a high-risk pregnancy that can require extensive leave.⁹² Since there is only one bank of twelve weeks from which an employee can draw both pregnancy and childbirth leave, there is a high likelihood a pregnant employee will quickly exhaust her FMLA leave far

⁹¹ See Am. Pregnancy Ass'n, *supra* note 6 (stating that women can require anywhere from six weeks to several months of leave because of pregnancy-related illness, childbirth, or bonding time).

⁹² See *Multiple Pregnancies*, *supra* note 77 (stating that because of the multitude of risks involved in multiple births, large amounts of leave are often required).

before the birth of her child.⁹³

2. By Separating Pregnancy into Distinct Categories of Absences, State Legislatures Have Created Discriminatory Gaps Between Medical Leave and Parental Leave Which Creates a Disparate Impact on Pregnant Employees in Violation of the PDA

Eighteen states and the District of Columbia have enacted legislation that provides medical and/or parental leave above and beyond that offered under the FMLA.⁹⁴ Notwithstanding the differences between states, most state legislatures have followed the scheme of the FMLA and have separated pregnancy into distinct categories of absences.⁹⁵ In addition, several states, like New Jersey, have restricted the leave to one

⁹³ See, e.g., *Gerety v. Atlantic City Hilton Casino Report*, 877 A.2d 1233, 1234 (N.J. 2005) (stating that Gerety exhausted all twelve weeks of FMLA leave while still in the second trimester of her pregnancy).

⁹⁴ See GRANT ET AL., *supra* note 4, at 17 (listing California, Connecticut, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, and Washington as providing expanded leave).

⁹⁵ See, e.g., IOWA CODE § 216.6 (2004) (using the same language of the FMLA, "pregnancy, childbirth, or related medical conditions . . . ," to describe the distinct categories).

category of absence, and in so doing, create a potential gap between medical and parental leave, as illustrated in *Gerety*.⁹⁶ Since pregnant employees face a gap in leave not faced by non-pregnant employees taking temporary disability leave, this creates a disparate impact on pregnant employees, which is violative of the PDA.⁹⁷

State legislatures provide additional, but restricted, leave for pregnant employees in several ways.⁹⁸ First, the majority of states with enhanced leave legislation provide an additional bank of time accessible for either medical leave or

⁹⁶ See, e.g., LA. REV. STAT. ANN. § 23:341 (2005) (limiting leave only to medical conditions associated with pregnancy and childbirth and excluding parental leave).

⁹⁷ See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005) (prohibiting dissimilar treatment between pregnant employees and non-pregnant employees, particularly when it comes to the benefits of employment).

⁹⁸ See GRANT ET AL., *supra* note 4, at 6 (describing the ways in which legislators provide leave including: parental leave, medical leave, paid leave, sick leave flexibility, and disability benefits).

parental leave.⁹⁹ Some states, like Iowa, Louisiana, and New York, restrict the use of leave only to medical conditions related to pregnancy.¹⁰⁰ Because it excludes parental leave, the FMLA considers this state leave additional, and therefore, the law would cover a pregnant employee for another twelve weeks of parental leave under the FMLA upon the birth of her child.¹⁰¹ For example, if Gerety were within such a state, she would have

⁹⁹ See *id.* (listing Iowa, Louisiana, Maine, Massachusetts, Minnesota, New Jersey, Tennessee, and Vermont as providing anywhere from six to twenty-six weeks additional medical leave for pregnant employees).

¹⁰⁰ See IOWA CODE § 216.6(2) (requiring employers with four or more employees to provide eight weeks of leave); LA. REV. STAT. ANN. § 23:342 (2005) (requiring employers with twenty-five or more employees to provide a reasonable amount of leave, not to exceed sixteen weeks); N.Y. WORKER'S COMP. LAW § 205 (Consol. 2005) (requiring employers with one or more employees to provide twenty-six weeks of leave).

¹⁰¹ Compare IOWA CODE § 216.6(2) (granting eight weeks of leave for pregnancy, childbirth, or related medical conditions for employees at businesses with four or more employees), with 29 U.S.C. § 2612 (providing twelve weeks of leave for the birth of an employee's child at a business with fifty or more employees).

fallen in another gap; however, she would have first exhausted the state leave during her pregnancy and been eligible for federal leave upon the birth of her twins.¹⁰² Therefore, the exclusion of parental leave under state law creates a gap in leave, which would not be faced by non-pregnant employees. In this gap, any pregnant employee would be vulnerable to termination or loss of seniority, a disparate impact not felt by non-pregnant employees facing temporary disability.¹⁰³

The reverse is true in other states where the exclusion of medical leave under state law creates a gap, like the one in *Gerety*, between federally provided medical leave and state provided parental leave.¹⁰⁴ Other states, such as Massachusetts and Minnesota, have legislation like the NJFLA that limits leave for pregnant employees to parental leave and excludes medical

¹⁰² See 29 U.S.C. § 2612 (recognizing that both medical and parental leave are triggered by childbirth).

¹⁰³ See *id.* (stating that the employer would have rehired Gerety, but she would have lost almost ten years of seniority).

¹⁰⁴ Compare 29 U.S.C. § 2612 (providing twelve weeks of medical leave), with MASS. GEN. LAWS ch. 149, § 105D (2005) (providing eight weeks of leave for the birth of a child).

leave for pregnancy-related illness.¹⁰⁵ Again, because of the separation into distinct categories of absence and the exclusion of one category, the FMLA would consider leave provided for pregnancy-related medical condition to be in addition to any state provided parental leave.¹⁰⁶ Therefore, like in *Gerety*, the gap existed where the employee exhausted all of her FMLA medical leave on pregnancy-related illness only days before the birth of her twins, when she would have been eligible for state parental leave.¹⁰⁷ This gap and the risk of termination that accompanies it have a disparate impact on pregnant employees, which is in direct violation of the PDA.¹⁰⁸

¹⁰⁵ See MASS. GEN. LAWS ch. 149, § 105D (2005) (requiring eight weeks of leave for childbirth); MINN. STAT. § 181.941 (2004) (requiring six weeks of leave for the birth of a child).

¹⁰⁶ See 29 U.S.C. § 2651 (2005) (prohibiting leave provided under the FMLA from superseding any *additional* leave provided under state law).

¹⁰⁷ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1236 (2005) (reporting that plaintiff exhausted leave and was fired on April 2nd and gave birth on April 14th).

¹⁰⁸ See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005) (prohibiting discrimination in employment between pregnant and non-pregnant employees).

The first two ways states provide enhanced leave create gaps in the law by excluding one category of leave.¹⁰⁹ The third way states provide enhanced leave is by providing one bank of time that is available for both medical *and* parental leave, which avoids such the gap and therefore does not violate the PDA.¹¹⁰ As previously mentioned, when state leave provides for both medical and parental leave as covered by the provisions of the FMLA, the leave is not considered additional to the FMLA and the state leave runs concurrent with the federal leave.¹¹¹ Therefore, states can provide enhanced leave through increasing the amount of leave provided or by decreasing the number of employees required for eligibility, but by still covering both medical *and* parental leave in one bank of time they avoid gaps

¹⁰⁹ Compare 29 U.S.C. § 2612 (providing twelve weeks of medical leave), with MINN. STAT. § 181.941 (2004) (requiring six weeks of leave for the birth of a child).

¹¹⁰ See, e.g., ME. REV. STAT. ANN. tit. 26, § 844 (providing ten weeks for both medical and parental leave).

¹¹¹ See 29 U.S.C. § 2651 (2005) (prohibiting federal parental and medical leave from superseding only state parental and medical leave laws that provide *additional* leave).

between state and federal leave.¹¹² For example, both Maine and Vermont provide leave to more of their citizens by reducing the number of employees needed for eligibility; however, they avoid a gap between federal and state leave by expressly providing for both medical and parental leave so that the pregnant employee is not eligible for both state and federal leave.¹¹³ Even if an employer had enough employees to qualify for FMLA, and therefore, by default, the lesser requirements under state leave laws, any pregnant employees would not be eligible for both state and federal leave.¹¹⁴ If Gerety were to have been employed

¹¹² See, e.g., VT. STAT. ANN. tit. 21, § 472 (2005) (requiring employers with ten employees or more to provide leave, as opposed to the FMLA's eligibility requirement of fifty or more employees).

¹¹³ See, e.g., ME. REV. STAT. ANN. tit. 26, § 844 (requiring an employer with fifteen or more employees to provide ten weeks of leave for the birth of a child or a serious health condition); VT. STAT. ANN. tit. 21, § 472 (requiring employers with ten employees or more to provide twelve weeks of leave for pregnancy-related medical conditions or to care for a newborn child).

¹¹⁴ See 29 U.S.C. § 2651 (allowing only additional state leave not equivalent state leave).

in one of these states, only one bank of twelve weeks would have been available to her under both state and federal leave and there would have been no discriminatory gap.¹¹⁵

The fourth way states provide enhanced leave is by going far beyond the FMLA in meeting the needs of pregnant employees by providing additional banks of time for both medical and parental leave, instead of the one bank of time accessible for both.¹¹⁶ As previously mentioned, if both state and federal legislation cover a pregnant employee for both parental and medical leave, she is not eligible for twice the leave.¹¹⁷ Therefore, in these states, there is no potential gap between

¹¹⁵ Compare ME. REV. STAT. ANN. Tit. 26, § 844 (covering pregnancy, birth, and the care of an infant), with 29 U.S.C. § 2612 (covering pregnancy, birth, and the care of an infant).

¹¹⁶ See GRANT ET AL., *supra* note 4, at 17 (giving California an A- for providing additional leave time for both pregnancy-related medical leave and parental leave to care for a newborn, with Hawaii, the District of Columbia, and Oregon following closely behind with B+'s because they do not provide paid leave as does California).

¹¹⁷ See 29 U.S.C. § 2651 (prohibiting federal parental and medical leave from superseding any state parental and medical leave laws).

federal and state leave. However, because these states still set finite time limits on medical leave, there is a potential gap between the state provided medical and parental leave.¹¹⁸ For example, in Gerety's case, the large amount of absence required as a result of her high-risk pregnancy makes it very likely she would have exhausted even the most generous state provided medical leave and faced a gap before the beginning of further parental leave provided by the state.

Many work and family groups recognize California as a leader in providing enhanced medical and parental leave to its citizens.¹¹⁹ However, despite its generous leave provisions, Gerety would still face a potential gap between the state's medical leave and parental leave for pregnant employees. As discussed previously with regards to *Guerra*, California's Fair Employment and Housing Act ("FEHA") requires all private employers with five or more employees to provide up to four months of unpaid job-protected leave for pregnancy-related

¹¹⁸ See, e.g., OR. REV. STAT. § 51.659 (2005) (providing twelve weeks of pregnancy-related medical leave and twelve weeks of parental leave upon the birth of a child).

¹¹⁹ See GRANT ET AL., *supra* note 4, at 20-21 (commending California as an innovator in parental leave because of the combination of unpaid leave and paid leave).

medical conditions.¹²⁰ Since the coverage focuses on the physiological aspect of pregnancy, it covers childbirth.¹²¹

The leave provided under the FEHA is in addition to any leave the pregnant employee takes under the second bank of leave provided by California in the Family Rights Act ("FRA").¹²² An employee is eligible for an additional twelve weeks upon the birth of the child under the FRA.¹²³ The FRA shares almost all of its provisions and much of its legislative history with the

¹²⁰ See Fair Employment and Housing Act, CAL. GOV'T CODE § 12945 (b) (2) (West 2005) (requiring employers to provide leave regardless of the amount of time the woman has worked for the employer and the number of hours she has worked).

¹²¹ See *id.* at § 12945 (a) (waiving a length of service requirement and allowing the employee to use any accrued sick leave or vacation time, but still requiring notice to the employer).

¹²² See *Liu v. Amway Corp.* 347 F.3d 1125, 1132 (9th Cir. 2004) (finding that a pregnant employee was entitled to unpaid leave under FMLA after her FEHA pregnancy disability leave expired).

¹²³ See California Family Rights Act, CAL. GOV'T CODE § 12945.2(c)(3)(A) (2005) (allocating twelve weeks of parental leave similar to the provisions of the FMLA, except for the exclusion of medical leave).

FMLA.¹²⁴ However, with regards to pregnant employees, they differ in one important way - the provision of the FRA that allows leave for serious medical conditions excludes any pregnancy, childbirth, or related medical conditions.¹²⁵ Under the FRA, an employee, such as Gerety, would be eligible for coverage upon the birth of her child, despite the fact that the coverage excludes actual childbirth.¹²⁶

However, despite these two generous allotments of leave under both the FEHA and the FRA, Gerety would have exhausted her pregnancy-related illness leave two months before the birth of her twins, a larger gap than she faced under Hilton's policy.¹²⁷

¹²⁴ See GRANT ET AL., *supra* note 4, at 7 (noting the legislative findings of both laws explore the changing workforce and the challenges of such changes).

¹²⁵ See CAL. GOV'T CODE § 12945.2(a), (b) (allowing leave for the "birth of an employee's child" however excluding pregnancy-related disabilities including childbirth).

¹²⁶ See *id.* (requiring fifty or more employees for an employee to be eligible for leave, greatly reducing the number of citizens with access to such leave).

¹²⁷ See *id.* at 1234 (reporting that Gerety was on leave for twenty-six weeks, which would have been beyond the twenty-four covered under California law).

However, by extending a maximum of four months of medical leave, California does extend leave to employees whose employer's policy would not be as generous as Hilton's.¹²⁸ Of course, the most extreme of high-risk pregnancies like Gerety's would still run out of leave.¹²⁹ As a result of this gap and the accompanying risk of termination, any pregnant employee would face a disparate impact not faced by non-pregnant employees, which is a violation of the PDA.

4. A Reasonable Accommodation Standard Prevents a Discriminatory Gap in Leave Coverage

Three states function under the standard of leave called for by the dissent in *Gerety*.¹³⁰ Connecticut, Hawaii, and

¹²⁸ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1243 (N.J. 2005) (Portiz, C.J. dissenting) (acknowledging that Hilton's policy of providing an additional fourteen weeks of leave above and beyond what was required by law was very generous, but that it still did not change the fact that the impact of the policy was discriminatory).

¹²⁹ See *Multiple Pregnancies*, *supra* note 77 (noting that women pregnant with twins or other multiples are more likely to need several months of leave prior to the birth of their children).

¹³⁰ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1243 (N.J. 2005) (Poritz, C.J., dissenting) (arguing that

Montana require reasonable accommodation for women taking pregnancy-related disability leave.¹³¹ Reasonable accommodation for pregnancy is based on the standard of reasonable accommodation for disabilities under the American with Disabilities Act ("ADA").¹³² Several courts have found that federal and state anti-discrimination laws only require that employers treat pregnant employees the same as other temporarily

the court should require that employers institute a flexible leave policy in order to reasonably accommodate pregnant employees).

¹³¹ See CONN. GEN. STAT. § 46a-60 (2005) (requiring employers with three or more employees to grant "a reasonable leave of absence" for pregnancy-related disabilities); HAW. ADMIN. RULES § 12-46-108 (2005) (requiring all employers to grant job-protection for a "reasonable period of time" for disability due to pregnancy, childbirth, or related medical condition).

¹³² See D'Andra Millsap, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1412, 1430 (1996) (forcing employers to accommodate a disabled person's need either through making physical changes to the workplace or changing the work environment or structure).

disabled employees.¹³³ Instead of setting a ceiling above which employers cannot rise, a reasonable accommodation sets a floor below which they cannot sink by investing pregnant employees with an affirmative right to be treated according to their needs instead of the needs of employees in very different medical situations.¹³⁴ By creating a flexible standard for the amount of leave employers allow a pregnant employee to take, pregnant employees would no longer face finite amounts of medical leave that could potentially run out before childbirth and would have access to whatever meets their needs.¹³⁵ Therefore, pregnant

¹³³ See *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 949 (10th Cir. 1992) (finding that employers were only required to treat pregnant employees the same as non-pregnant employees with temporary disabilities).

¹³⁴ See *id.* at 1433 (examining the equal treatment standard and special treatment standards within the PDA and arguing that reasonable accommodation avoids the pitfalls of a male-centered norm found in the equal treatment standard and discrimination problems when special treatment is required).

¹³⁵ See, e.g., Fair Employment and Housing Act, CAL. GOV'T CODE § 12945 (2005) (requiring employers to grant leave for pregnancy-related illness, but strictly limiting the amount to four months).

employees would not face potential gaps in coverage between medical and parental leave because they would be reasonably covered, especially in the case of high-risk birth presenting clear disabilities, until childbirth. Without these gaps, state legislatures would prevent this form of disparate impact on pregnant employees and, therefore, violations of the PDA.

PDA equal treatment has always been difficult to understand and enforce because there is no male equivalent to pregnancy.¹³⁶ Instead of trying to force pregnant employees into a standard and workplaces not designed with their needs in mind, a reasonable accommodation standard forces the employer to change the workplace to meet the needs of pregnant employees.¹³⁷ Reasonable accommodation requires case-by-case analysis that would not only prevent unfair comparisons, but also prevent discriminatory gaps or disparate impacts, like the one present in *Gerety*, by providing leave for clearly disabling pregnancy-

¹³⁶ See Millsap, *supra* note 132, at 1424 (criticizing the equal treatment standard because the inherent standard is a male-centered standard with women struggling to "become more like men.").

¹³⁷ See *id.* at 1434 (arguing that since every employee has their own standard upon which to be judged there are no unnecessary comparisons).

related illness up until birth.¹³⁸

As a result of *Gerety*, a bill recently passed in the New Jersey Senate that expressly adds familial status to the state's LAD and adopts the reasonable accommodation standard called for by the dissent in *Gerety*.¹³⁹ Senate Bill 2522 expressly provides for "reasonable accommodations for pregnancy or pregnancy-related conditions unless to do so would impose an undue hardship upon the employer."¹⁴⁰ By requiring a reasonable accommodation standard, the New Jersey Senate will prevent any leave gaps from forming, which will put pregnant employees on equal footing with non-pregnant employees as required by the PDA.

¹³⁸ See *id.* at 1435 (preventing the blanket-policies that discriminate against women because of the perceived "special treatment" required by forcing the employer to deal with the individual accommodations needed by the employees).

¹³⁹ See S. 2522, 211th Leg., 2004-2005 Sess. (N.J. 2005) (including independent contractors within the definition of employee).

¹⁴⁰ *Id.* See Assemb. 4157, 211th Leg., 2004-2005 Sess. (N.J. 2005) (awaiting posting by the Speaker of the House so that the bill can come to the floor for a vote).

B. Gerety: Courts Have Misinterpreted Disparate Impact Theory As Only Requiring Equal Access to Leave and Have Ignored the Unique Nature of Pregnancy that Creates Per Se Discrimination with Disparate Impact

The court in *Gerety* explored whether or not plaintiffs can use anti-discrimination statutes to force employers to fill the gaps in leave faced by pregnant employees.¹⁴¹ The court made several mistakes in examining this issue, which are reflective of the uphill battle all plaintiffs face in using disparate impact theory.¹⁴²

First, courts have incorrectly interpreted the PDA as only requiring that pregnant employees have equal access to the employer's current temporary disability policy.¹⁴³ Therefore,

¹⁴¹ See *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1233 (2005) (concluding that a plaintiff is not asking for judicial remedy in facing discriminatory treatment, but rather is asking for preferential treatment).

¹⁴² See *id.* at 1234 (describing the company's policy as allowing twelve weeks of leave under either the FMLA or New Jersey's Family Leave Act, in addition to fourteen weeks provided by the company).

¹⁴³ See *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 949 (10th Cir. 1992) (concluding that the PDA only required neutral

even when the courts allow disparate impact theory to be used, their analysis ends with proof of neutral application.¹⁴⁴

However, if the PDA only required neutral application of the policy already in place, then it would fall far short of truly protecting pregnant employees and disparate impact theory would be completely ineffective.

For example, the court in *Gerety* made the same mistake by finding that New Jersey's anti-discrimination statute only requires neutral application and equating that requirement with the requirement of disparate impact theory.¹⁴⁵ However, as the dissent argued, the court has been granted the "broad remedial purpose" of eliminating all discrimination and that mere neutral application falls far short of achieving that goal.¹⁴⁶ If the

application between pregnant employees and non-pregnant, but similarly disabled, employees).

¹⁴⁴ See *Gerety*, 877 A.2d at 1240-42 (misinterpreting the requirements of disparate impact and incorrectly rejecting pregnant women as a protected class).

¹⁴⁵ See *id.* at 1240 (stating that there is no disparate impact because there was gender-neutral application which is "what the LAD requires . . .").

¹⁴⁶ See *id.* at 1243 (disagreeing that the judiciary usurps legislative function in requiring enhanced leave and stating

PDA only required neutral application then disparate impact theory would be inapposite because its is to provide remedy in the case of discrimination *even if* there is neutral application.¹⁴⁷ Therefore, the requirement is that the plaintiff proves a discriminatory impact and successfully defends any claims by the employer of business necessity.¹⁴⁸ If a plaintiff could only succeed in circumstances where there was no facially neutral policy, then discriminatory impact would be completely unnecessary because all such claims would fall under a disparate treatment analysis.¹⁴⁹

that the LAD would be ineffective without judicial intervention).

¹⁴⁷ See *United Prop. Owners Ass'n of Belmar v. Borough of Belmar*, 777 A.2d 950, 978 (N.J. Super. Ct. App. Div. 2001) (finding disparate impact when a facially neutral policy "resulted in a significantly disproportionate or adverse impact members of the affected class . . .").

¹⁴⁸ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (2005) (requiring only discriminatory impact not discriminatory motive).

¹⁴⁹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (stating that an employee can establish a prima facie case of disparate treatment by showing that she belongs to a

By focusing only on application, the court never truly examined the impact of Hilton's policy on Gerety and other pregnant employees.¹⁵⁰ The court only mentioned that additional leave would have been available to Gerety after childbirth and ignored completely the thirteen-day gap between when the employer fired the plaintiff and when the state would have provided her with additional leave for childbirth.¹⁵¹ The court never even alluded to the fact that Mr. Gerety also had a baby but was not fired.¹⁵² When courts focus only on neutral

protected class, that she applied and was qualified for a job, despite that she was rejected, and that after this rejection, the position remained open).

¹⁵⁰ See *Gerety*, 877 A.2d at 1240 (examining no statistics with regards to the impact on pregnant women of the policy or even selective individual evidence beyond that presented by Gerety herself).

¹⁵¹ See *id.* at 1241 (mentioning additional leave when expounding on the "generosity" of Hilton's policy and how it far surpassed the requirements of the law but failing to mention the gap the policy created).

¹⁵² See *id.* at 1246 (Poritz, C.J., dissenting) (pointing out that Mr. Gerety was able to keep his job and that the fact that Mrs.

application, they ignore impacts such as these. While not every pregnant employee works with her spouse, so that the court can clearly see a discriminatory impact, disparate impact can be proven by looking to the male employees with children who escape the birth of a child without job-related harm. In Gerety's case, it is not only that her husband did not lose his job, but also that the law would not force other temporarily disabled employees to separate their condition into distinct categories and face gaps in coverage between those categories.

Second, courts continually refuse to see pregnancy as a medical condition unique to women and therefore, any leave policy affecting only pregnant women should be seen as per se discrimination, as stated in the PDA.¹⁵³ The court in *Gerety* concludes that pregnancy is a medical condition *unique to women*, but that with regards to leave, pregnancy is no different than medical conditions affecting only men, such as testicular

Gerety was not, is precisely what the Court stated anti-discrimination laws were trying to prevent).

¹⁵³ See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005) (stating clearly that pregnancy is unique to women and therefore should be included in the definition of gender discrimination).

cancer.¹⁵⁴

The court's logic was erroneous for a number of reasons. First, as the plaintiff argues, pregnancy is very different from a gender-specific cancer, primarily because cancer affects both genders in specific ways.¹⁵⁵ More importantly, however, the legislature rejected this reasoning, present since *Gilbert*, with the PDA specifically because it treats pregnancy only as a medical condition, instead of as a unique characteristic that creates groups composed entirely of women.¹⁵⁶ Instead, the court stated that Gerety was requesting preferential treatment, not protection from discrimination, which the court concluded was

¹⁵⁴ See *id.* at 1240 (asserting that the plaintiff would require more leave for a pregnant woman than a woman suffering from ovarian cancer).

¹⁵⁵ See *Gerety*, 877 A.2d at 1241 (responding to plaintiff's argument that both sexes can be affected by cancer by arguing that pregnant women should not be afforded more leave than women with ovarian cancer).

¹⁵⁶ See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 130 (1976) (approving the exclusion of pregnancy, "a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one . . . sex" from insurance coverage).

not required by federal or state law.¹⁵⁷ However, the majority mischaracterized the issue.¹⁵⁸ The issue was not one of preferential treatment, but the inadequacy of leave provided for pregnancy-related illness under the employer policy and the disparate impact of that inadequacy upon pregnant employees.¹⁵⁹ Pregnancy is a medical condition not only unique to women, but unique from other medical conditions because pregnancy has a definitive end. Therefore, policies such as Hilton's discriminate against pregnant employees using leave for pregnancy-related illness by not only limiting the leave available to medical conditions unrelated to pregnancy, but,

¹⁵⁷ See *Gerety*, 877 A.2d at 1242 (proffering that it is the legislator's duty to decide if employers should be required to provide "enhanced leave to cover the panoply of medical needs that may arise during pregnancy").

¹⁵⁸ See *id.* at 1246 (Poritz, C.J., dissenting) (arguing the majority completely misinterpreted the LAD and the broad remedial powers granted the court under the legislation).

¹⁵⁹ See *id.* (Poritz, C.J., dissenting) (arguing that the leave policy would only be preferential if both men and women could become pregnant and women then asked to be treated differently).

more importantly, limiting the leave available to childbirth.¹⁶⁰ Leave legislation would not limit a non-pregnant employee in such a way, especially if such limitations created a gap in coverage. Therefore both the LAD and the PDA prohibit this type of treatment.¹⁶¹

Last, courts rejecting disparate impact theory claims ignore precedent requiring that employers comprehensively meet the needs of pregnant employees.¹⁶² Several cases set a clear

¹⁶⁰ See *Gerety*, 877 A.2d at 1243 (Poritz, C.J., dissenting) (interpreting the LAD broadly as prohibiting all discrimination and granting the judiciary remedial power to end such discrimination without usurping the legislature).

¹⁶¹ See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005) (stating clearly that pregnant employees should be treated the same as "other persons not so affected but similar in their ability or inability to work" with regards to benefits and leave).

¹⁶² See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L. J. 77, 131 (2003) (suggesting that plaintiffs desiring to prove a disparate impact anticipate the usual objections to the use of statistical evidence and perhaps use demographic data that shows the impact on women in general).

precedent regarding the use of disparate impact theory in pregnancy discrimination cases.¹⁶³ Even when, as in *Gerety*, the employers complied with the legislation in place at the time, other courts have still found a disparate impact on pregnant employees.¹⁶⁴

¹⁶³ See *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, 867 F.2d 974, 978 (7th Cir. 1988) (holding explicitly that PDA claims may be brought under a disparate impact theory); see also *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 813 (D.C. Cir. 1981) (applying disparate impact theory to pregnancy discrimination cases and anticipating further application as the PDA progressed); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 654 (N.D. Ill. 1991) (permitting the use of disparate impact theory with statistical evidence in a pregnancy discrimination case).

¹⁶⁴ See *Scherr*, 867 F.2d at 978 (finding the school's policy of disallowing a combination of leave could be challenged under disparate impact, even though the policy was legal under federal and state leave legislation); see also *Abraham*, 660 F.2d at 813 (finding that the company's policy of allowing only ten days of leave had a disparate impact on pregnant employees, even though the policy did not violate federal and state leave legislation); *Warshawsky*, 768 F. Supp. at 654 (finding that the employer's policy of firing first-year employees who required long-term

Of course, employer's policies are very diverse and the response differs from court to court.¹⁶⁵ However, as the *Gerety* dissent argues, the presence of a leave gap is reflective of a bigger issue of insufficient leave.¹⁶⁶ In *Abraham v. Graphic Arts Int'l Union*, the court clearly stated 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

sick leave had a discriminatory impact, even though the policy did not violate federal and state leave legislation).

¹⁶⁵See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 365 (1984-5) (suggesting that the reason for the lack of precedent applying disparate impact theory to pregnancy discrimination cases is because in earlier years overt discrimination predominated, necessitating the application of disparate treatment theory and only later in the 1970's did it become apparent that neutral rules could also be discriminatory).

¹⁶⁶ See *Gerety v. Atlantic City Hilton Casino Resort*, 866 A.2d 1233, 1243 (N.J. 2005) (Poritz, C.J., dissenting) (arguing this lack of sufficient leave has a clear impact on pregnant employees).

have."¹⁶⁷ Unfortunately, the majority in *Gerety* mirrored other courts' views that employer policies that comply with more generous federal and state leave policies are not discriminatory.¹⁶⁸ One can assume a pregnant employee would be rejected if filing suit against an employer policy that was in legal compliance with a state law, such as California's, which offers several months of leave. However, such a preference by the court would be erroneous because the generosity of the legislation alone does not change the fact that legislation can create a gap, which has a disparate impact upon only pregnant employees.

A plaintiff has several strategies available to her whether

¹⁶⁷ See *Abraham*, 660 F.2d at 819 (finding that despite the fact that pregnant employees had access to the same ten-day leave policy as male employees, it was "beyond peradventure" that the leave policy was too short for adequate pregnancy or childbirth leave).

¹⁶⁸ See *Gerety*, 877 A.2d at 1234 (emphasizing that the employer already provided an amount of leave "more than the twice as much as required by law"); see also *Davidson v. Franciscan Health Sys. of the Ohio Valley, Inc.*, 82 F.2d 768, 772 (2000) (finding that a hospital's policy of fourteen weeks of leave in addition to the twelve weeks provided by FMLA did not violate the PDA).

she is pleading in a no-leave state or a generous leave state, such as California.¹⁶⁹ In order to make a case for disparate impact, pregnant employees can employ social statistics to give judicial notice of general discrimination, instead of being forced to rely only on instances of impact at that specific employer.¹⁷⁰ This type of proof is particularly important in the case of leave gaps because they disproportionately affect high-risk pregnancies and an employee might have a difficult time showing multiple instances of affected high-risk pregnancies at one employer, since they are relatively rare.¹⁷¹ However,

¹⁶⁹ See Williams, *supra* note 162, at 134 (arguing that plaintiffs should use new demographic data on motherhood to establish "how objective work requirements, like mandatory overtime, have a disparate impact on women and mothers in the workforce . . .").

¹⁷⁰ See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (stating: "There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants.").

¹⁷¹ See *Gerety*, 877 A.2d at 1234 (stating that the employee suffered bona fide medical conditions due to being pregnant with twins); see also *Davidson*, 82 F.2d at 768 (stating that the employee suffered from bona fide medical conditions due to being pregnant with triplets).

employers can always defend themselves with claims of business necessity, especially in the face of extensive leave requirements.¹⁷² In response, several legal scholars argue that to combat this defense, employees should rely on increasing evidence of employers adopting generous leave policies and the positive business impact of such policies.¹⁷³ This type of evidence not only combats the business necessity defense but also goes to establishing a less discriminatory alternative.¹⁷⁴

C. Implications and Recommendations

1. Leave Benefits Not Only the Employee and Employer but Society in General and Should Be Legally Mandated

¹⁷² See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (resolving that a discriminatory employer policy cannot be sustained unless it can be shown to relate to job performance).

¹⁷³ See *Williams*, *supra* note 162, at 134 (arguing that plaintiffs should also use recent demographic data that demonstrates objective work requirements discriminatorily effect women). For instance, policies that require mandatory overtime or offer reduced benefits to part-time employees have a disparate impact on women, particularly women with children. *Id.*

¹⁷⁴ See *id.* (establishing that family friendly policies are not only less discriminatory but also improve productively and reduce rates of absenteeism, turnover, recruitment).

Women do not experience pregnancy in clearly definable categories. Pregnancy is seen as a holistic experience covering all aspects of a person's life, including physical, psychological, economical, and emotional, and the law should treat it as such. Our country simply does not provide the comprehensive leave pregnant employees need to meet their own and their growing family's needs, despite increasing evidence that expanded leave would be best for both the employer and employee.¹⁷⁵

As previously stated, comprehensive leave for pregnant employees can prevent the formation of other medical conditions.¹⁷⁶ In addition, adequate leave can result in better prenatal and postnatal care, which is good not only for the

¹⁷⁵ See GRANT ET AL., *supra* note 4, at 7 (noting that despite political rhetoric, the U.S. is ranked virtually last among industrialized nation with regards to parental leave).

¹⁷⁶ See Shellenbarger, *supra* note 19 (reporting that fifty to seventy percent of women experience post-partum anxiety, which can be exacerbated by the stress of returning to work too soon).

mother and child, but society in general.¹⁷⁷ More importantly, adequate leave upon the birth of the child can result in a bevy of benefits for the parents and child including: improved brain development, social development, and overall well-being of the baby.¹⁷⁸ Adequate leave policies also have positive results for society by increasing the likelihood that children will be immunized and, as a result, are decreasing childhood mortality rates.¹⁷⁹

Comprehensive leave not only benefits employees, and therefore, society in general, but also results in benefits to

¹⁷⁷ See GRANT ET AL., *supra* note 4, at 7 (arguing that parents are already attuned to the benefits of leave and want better legislation).

¹⁷⁸ See *id.* (arguing far too many parents are robbed of these benefits by citing a survey that found four out of five parents with children believe that many new mothers are pressured to return to work too quickly).

¹⁷⁹ See *id.* (arguing that better parental leave policies would help other societal problems, such as the lack of quality child care).

employers.¹⁸⁰ Several studies have shown that access to leave is directly tied to employee retention and increased productivity.¹⁸¹ While the FMLA does not provide enough leave to meet the needs of working parents, that small increase alone has already had a positive impact on profitability and growth of leave.¹⁸²

2. Recommendations

The number of working women reporting instances of pregnancy discrimination continues to rise, even as the birth rate declines.¹⁸³ As a result, pregnant women are taking less

¹⁸⁰ See *id.* at 11 (stating that an increase in the leave available to employees, be it paid or unpaid, is beneficial to employers).

¹⁸¹ See Katherine Ross Phillips, *Getting Time Off: Access to Leave Among Working Parents* (The Urban Institute 2004) (showing also that morale improves and employees show more loyalty toward the company).

¹⁸² See *id.* (stating that in 2000, ninety percent of covered establishments reported that the FMLA had either a positive or neutral effect on profitability and growth).

¹⁸³ See Rob Schumaucher, *Pregnant Workers Report Growing Discrimination*, USATODAY.COM, Feb. 16, 2005, http://www.usatoday.com/money/workplace/2005-02-16-pregnancy-bias-usat_x.htm?

time off and working even up until their last month of pregnancy.¹⁸⁴ This is an important issue that states need to address and the first step is adopting reasonable accommodation standards for medical and parental leave.¹⁸⁵ In doing so, states would treat pregnancy comprehensively instead of drawing confusing lines that create potential gaps in coverage.

The federal government should include a reasonable accommodation standard within the PDA that applies to all

POE=click-refer (reporting that pregnancy discrimination complaints to the EEOC jumped thirty-nine percent between 1999 and 2003, even though the birth rate dropped nine percent).

¹⁸⁴ See Sharon Jayson, *New Moms Taking Less Time Off With Babies*, USATODAY.COM, Nov. 13, 2005, http://www.usatoday.com/news/nation/2005-11-13-mombabytime_x.htm?POE=click-refer (reporting that about fifty-seven percent of new moms worked full time while pregnant in 1996-2000 as opposed to about forty percent in 1961-65). In addition, over half of pregnant employees worked into the last month of pregnancy. *Id.*

¹⁸⁵ See Millsap, *supra* note 132, at 1450 (arguing that the federal government should also adopt a reasonable accommodations standard under the PDA).

pregnancy-related conditions, including childbirth.¹⁸⁶ The physiological needs of pregnant women have a definitive end, and therefore, could be safely dealt with under the reasonable accommodation standard. However, the federal government should adopt a completely separate system of parental leave that begins several weeks after childbirth and could have finite amounts of coverage, since bonding time is an amorphous concept, but still essential to American families.¹⁸⁷

IV. CONCLUSION

The separation of pregnancy into the three distinct periods of absence due to illness related to gestation, childbirth, and parental creates potential gaps in coverage that can leave pregnant employees without leave and without job protection.¹⁸⁸

¹⁸⁶ See *id.* (arguing that the adoption of a reasonable accommodation standard within the PDA would prevent inconsistent results among states and employers).

¹⁸⁷ See, e.g., California Family Rights Act, CAL. GOV'T CODE § 12945.2(c)(3)(A) (2005) (providing twelve weeks of leave for the birth of a child or for a serious medical conditions, excluding pregnancy-related conditions).

¹⁸⁸ See, e.g., *Gerety v. Atlantic City Hilton Casino Resort*, 877 A.2d 1233, 1236 (N.J. 2005) (stating that the plaintiff was

While legislators have gone a long way in responding to the needs of pregnant employees, their piecemeal efforts have resulted in gaps between medical and parental leave provided at both the state and federal level. Only a reasonable accommodation standard can solve this problem by refusing to set strict leave limits on pregnant employees and thus adequately providing for their needs.¹⁸⁹ However, where such legislation is not available, employees who are faced with such a gap in coverage should still be able to go to the court under disparate impact theory and ask for remedy.¹⁹⁰

fired during thirteen day gap in coverage between federally provided medical leave and state provided parental leave).

¹⁸⁹ See *Gerety*, 877 A.2d at 1243 (Poritz, C.J., dissenting) (arguing that plaintiff should be reasonably accommodated during her pregnancy and that this is not preferential treatment, because of the unique reproductive position of women).

¹⁹⁰ See *Williams*, *supra* note 162, at 134 (arguing that disparate impact theory is a viable and successful option for discrimination litigation, if pursued in the correct manner).