Reconstructing Pregnancy

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Congress passed the Pregnancy Discrimination Act ("PDA") in 1978. The PDA was passed in response to the Supreme Court's determination that pregnancy discrimination is not sex discrimination for the purposes of Title VII of the 1964 Civil Rights Act. Drafted as part of Title VII's definition section, the PDA provides protection for pregnant employees in two ways. First, the PDA defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. Second, the PDA requires employers to treat pregnant employees the same as other employees who are not pregnant but similarly situated in their ability or inability to work.

Since the passage of the PDA, however, the meaning and scope of pregnancy discrimination has become unclear along multiple dimensions. Some of the confusion about the scope and meaning of the PDA concerns the question of whether employers are required to grant pregnant employees accommodations to deal with temporary limitations on their ability to work. After the ADA Amendments, there is some question as to whether employers must provide requested accommodations, like light duty assignments, assistance with responsibilities related to heavy lifting, additional restroom breaks or water breaks, breaks at fixed times, or stools to sit on, to pregnant employees. On July 2, 2014, the United States Supreme Court granted certiorari to Young v. United Parcel Services in order to determine whether the Americans with Disability Act as Amended in 2008 requires an employer to provide reasonable accommodations for pregnant employees who are limited in their ability to work if it provides reasonable accommodations to other temporarily disabled employees who are similarly limited in their ability to work. While Young v. United Parcel Services has the potential to provide some clarification to the Federal Appeals Courts and guidance for employers about the scope of required ADA accommodations, it will not resolve one of the most foundational disputes about the PDA's protections: how to define pregnancy itself for the purposes of the act.

Some of the uncertainty and indeterminacy in PDA's interpretation stems, in part, from fundamental disagreements about how to define the scope of discrimination arising from pregnancy, childbirth, or related medical conditions. In efforts to elucidate the meaning of sex discrimination for the purposes of pregnancy, federal courts forged a jurisprudence of pregnancy discrimination that is contradictory in its articulations and inconsistent in its outcomes. In many circumstances, the seemingly clear prohibition against discrimination arising from pregnancy, child birth, and related medical conditions lacks clarity and consistency across the federal courts. It is not clear what pregnancy discrimination includes, what it excludes, and why. The indeterminate meaning of pregnancy discrimination, as such, has given rise to a jurisprudence of pregnancy discrimination that may be at best uncertain and at worst arbitrary and irrational.

This presentation explores how the federal courts have defined pregnancy for the purposes of Title VII of the 1964 Civil Rights Act. It argues that the meaning of pregnancy discrimination in the jurisprudence related to

Title VII is inconsistent and contradictory because courts continue to interpret pregnancy discrimination cases from a limited perspective. This perspective contains a set of presumptions that fundamentally obscure the complex nature and scope of pregnancy. This failure emerges from the willingness of courts to employ the lens of pregnancy essentialism. Pregnancy essentialism is an ideology that reduces the relational, social, cultural, and physiological processes of pregnancy to physiological biology and adopts the presumption that pregnancy is an ahistorical natural event that is the same for all women across cultures and social contingencies.

Informed by the ideological force of pregnancy essentialism, courts embrace the presumption that pregnancy has a "plain meaning" that is universally accessible regardless of cultural, historical personal contingencies. Instead pregnancy, from the perspective, is a biological "reality" that cannot be understood apart from the social, political, legal, and cultural frameworks that naturalize it. The ideology of pregnancy essentialism limits the scope of pregnancy by presuming that pregnancy is an ahistorical universally applicable biologically-based event that begins with conception and ends with the birth of the child. Such a perspective fails to provide a nuanced understanding of the nature of pregnancy that is responsive to diversity among pregnancy women and the social, cultural, psychological, and economic aspects of pregnancy that are historically contingent. For this reason, I argue the meaning and scope of pregnancy itself should be reconstructed for the purposes of the PDA in ways that resist the urge to reduce pregnancy to its biological or physiological aspects. Legal actors should not reduce pregnancy to its physiological and biological aspects. Instead, pregnancy must be reconstructed as a state of being that is comprised of physical, medical, psychological, social, cultural, and economic factors that can give rise to disparate treatment in the workplace. Until the definition of pregnancy is pushed beyond presumptions of a plain meaning grounded in pregnancy essentialism, courts will continue to consistently fail to protect pregnant women from sex discrimination.