EMPLOYMENT LAW — TITLE VII — EIGHTH CIRCUIT HOLDS THAT BENEFITS PLANS EXCLUDING ALL CONTRACEPTIVES DO NOT DISCRIMINATE BASED ON SEX. — *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007), *reh'g and reh'g en banc denied*, No. 06-1706 (8th Cir. May 23, 2007).

Title VII of the Civil Rights Act of 1964[1] forbids employers from discriminating in providing employment opportunities and benefits for male and female employees.[2] Since men and women have different health care needs, however, courts have had to grapple with whether identical treatment is necessarily nondiscriminatory. Recently, in *In re Union Pacific Railroad Employment Practices Litigation*,[3] the Eighth Circuit held that employer-based insurance plans' blanket exclusion of coverage for contraceptives does not discriminate on the basis of sex.[4] By failing to compare the extent to which the insurance plans met men's and women's sex-specific health needs, the court's analysis was flawed both in its interpretation of Title VII doctrine and in its failure to consider how the insurance program actually affected the lives of female employees.

Brandi Standridge and Kenya Phillips were two of approximately 450 female employees of childbearing age at the Union Pacific Railroad Company.[5] The company provided health care benefits to employees covered by collective bargaining agreements through five benefits plans.[6] The plaintiffs filed a class action suit in the U.S. District Court for the District of Nebraska arguing that the plans discriminated on the basis of sex in violation of Title VII as amended by the Pregnancy Discrimination Act[7] (PDA) because they did not cover contraceptives used for the sole purpose of preventing conception.[8] Specifically, the plaintiffs argued that the plans violated Title VII because they did not cover any contraceptives — including prescription contraceptives, over-the-counter prophylactics, and surgical options[9] — despite covering a variety of other preventive treatments,[10] includ-

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (2000).

[2] *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682–83 (1983).

[3] 479 F.3d 936 (8th Cir. 2007), *reh'g and reh'g en banc denied*, No. 06-1706 (8th Cir. May 23, 2007).

[4] *Id.* at 943–45.

[5] *Id.* at 938; *In re* Union Pac. R.R. Employment Practices Lit., 378 F. Supp. 2d 1139, 1141 (D. Neb. 2005).

[6] *In re Union Pacific*, 479 F.3d at 938.

[7] 42 U.S.C. § 2000e(k) (2000).

[8] *In re Union Pacific*, 479 F.3d at 938. The plans did cover contraceptives used for non-contraceptive purposes, such as acne treatment. *In re Union Pacific*, 378 F. Supp. 2d at 1142.

[9] *In re Union Pacific*, 479 F.3d at 943.

[10] *In re Union Pacific*, 378 F. Supp. 2d at 1141.

ing treatments for conditions that only men suffer.[11] The district court granted the plaintiffs' motion for summary judgment.[12] The court first decided that the PDA applied.[13] The PDA forbids discrimination not only on the basis of pregnancy alone, but "on the basis of pregnancy, childbirth, or related medical conditions," and against "women *affected by* pregnancy, childbirth, or related medical conditions."[14] The district court pointed to *UAW v. Johnson Controls, Inc.*,[15] which held that classifications based on childbearing capacity constitute sex discrimination in violation of the PDA,[16] as extending the PDA's protections to non-pregnant women.[17] The court concluded that the plans discriminated against women because they covered treatments "to prevent diseases or other medical conditions that pose an equal or lesser threat to employees' health than does pregnancy."[18]

The Eighth Circuit reversed and remanded.[19] Judge Gruender[20] first rejected the PDA's applicability, stating contraception was not "related" to pregnancy for PDA purposes because it was used before pregnancy.[21] The court relied on its opinion in *Krauel v. Iowa Methodist Medical Center*,[22] which held that a medical condition that prevents pregnancy is insufficiently related to pregnancy and childbearing for treatment to be required by the PDA.[23] The court further concluded that contraceptives were gender neutral because they are used by both men and women.[24] It then reasoned that, separate from the PDA, Title VII did not require an employer's benefits plan to cover contraceptives. The court stated that under a general Title VII analy-

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[11] These conditions include benign prostatic hypertrophy and erectile dysfunction. *Id.*

[12] *Id.* at 1149.

[13] *See id.* at 1143.

[14] 42 U.S.C. § 2000e(k) (2000) (emphasis added).

[15] 499 U.S. 187 (1991).

[16] *Id.* at 199.

[17] *In re Union Pacific*, 378 F. Supp. 2d at 1143.

[18] *Id.* at 1149. The district court also invoked the persuasive authority of the EEOC's policy declaration that denying insurance coverage of contraceptives violates Title VII. *Id.* at 1143–44. It rejected the plaintiffs' arguments based on the negative social impact of unplanned pregnancies, *id.* at 1144–45; Union Pacific's arguments that denial of all contraceptives constituted equal treatment of men and women, *id.* at 1145–46, that fertility is not related to pregnancy or childbirth, *id.* at 1146, and that contraceptives are not a "treatment" for a "medical condition," *id.* at 1146–47; and the arguments of both parties about the relative financial costs of insurance for male and female employees and for contraceptives and unplanned pregnancies, *id.* at 1145.

[19] *In re Union Pacific*, 479 F.3d at 945.

[20] Judge Bowman joined Judge Gruender's opinion.

[21] *In re Union Pacific*, 479 F.3d at 942.

[22] 95 F.3d 674 (8th Cir. 1996).

[23] *See id.* at 679–80.

[24] *In re Union Pacific*, 479 F.3d at 942. The court also rejected arguments that the PDA covered contraceptives because Congress intended the PDA as a "broad response" to pregnancy discrimination and because the express exclusion of abortion created a negative inference that contraception should be included. *Id.*

sis, plaintiffs must establish that similarly situated male employees received different coverage than did female employees, and it held that the plaintiffs could not meet this burden.[25] In reaching this conclusion, the court of appeals faulted the district court for comparing the plans' coverage of contraceptives to their coverage of preventive treatments for less risky medical conditions. It instead identified the relevant comparison as that between the plans' coverage of male and female contraceptives.[26] After determining that the coverage was equally nonexistent for both sexes, the court concluded that the plan did not violate Title VII.[27]

Judge Bye dissented. He first examined the court's assertion that Union Pacific provided equal coverage for male and female employees, noting that the failure to cover contraception "only medically affects females, as they bear all of the health consequences of unplanned pregnancies."[28] He then asserted that the PDA did require equal insurance coverage for contraceptives. In interpreting the PDA, Judge Bye noted that both the remedial nature of Title VII and the legislative history of the PDA indicated that Title VII should be broadly construed,[29] and he asserted that the language of the PDA explicitly extended the Act's protection to cover pregnancy-related conditions beyond pregnancy itself.[30] He further reasoned that the language stating that sex discrimination "*include[s], but [is] not limited to*, [discrimination] because of or on the basis of pregnancy, childbirth, or related medical conditions"[31] requires "a broad reading . . . because it suggests Congress was being illustrative rather than exclusive"[32] in listing distinctions covered by the PDA. He then noted that the Supreme Court apparently "broadened the scope of the PDA to include pre-pregnancy discrimination"[33] in *Johnson Controls*, which would mean that the majority's distinction based on timing did not hold wa-

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[25] *Id.* at 944–45.

[26] *Id.* at 944.

[27] *Id.* at 944–45. The court declined to address the defendant's argument that preventing pregnancy was not medically necessary because pregnancy is not a disease. *Id.* at 944.

[28] *Id.* at 945 (Bye, J., dissenting). Like the district court, Judge Bye restricted his analysis to coverage of prescription contraceptives because over-the-counter prophylactics were not covered by any health insurance plan he could identify. *Id.*; *see also In re* Union Pac. R.R. Employment Practices Lit., 378 F. Supp. 2d 1139, 1140 (D. Neb. 2005). He dismissed the argument that the failure to cover vasectomies made the plans gender neutral because, regardless of the contraceptive method, only women can bear the medical effects of pregnancy. *In re Union Pacific*, 479 F.3d at 945.

[29] *See In re Union Pacific*, 479 F.3d at 945–46.

[30] *Id.* at 946.

[31] *Id.* (quoting 42 U.S.C. § 2000e-2(a) (2000)).

[32] *Id.*

[33] *Id.*

ter.[34] Judge Bye concluded by stating that the "proper comparison [was] between the preventative health coverage provided to each gender."[35] Since Union Pacific's benefits plans covered a variety of preventive treatments for uniquely male conditions, but did not cover contraception to prevent the "uniquely female condition of potential pregnancy," the plans discriminated on the basis of sex in violation of Title VII as amended by the PDA.[36]

The Eighth Circuit erred by failing to compare the extent to which the Union Pacific health care plans met the sex-specific health needs of both men and women.[37] A doctrinal analysis faithful to the legislative histories of Title VII and the PDA requires such a comparison. Moreover, only by means of such a comparison will courts recognize and respond to the financial and health-related costs imposed upon women by the plans' failure to cover contraception.

Judge Bye and others have correctly recognized that the PDA's purpose demonstrates that Title VII requires a comparison of how a health care plan's sex-specific health benefits accrue to male and female employees. The PDA was enacted in response to the Supreme Court's holding in *General Electric Co. v. Gilbert*[38] that an employer's exclusion of insurance coverage for pregnancy-related disabilities did not violate Title VII.[39] In its analysis, the *Gilbert* majority asked whether the insurance plan covered treatment for the same medical conditions for both male and female employees; it did not consider whether the plan's coverage as a whole covered the sex-specific health needs of men more extensively than it covered those of women.[40] In contrast, Justice Brennan's dissent concluded that General Electric discriminated because it had "devised a policy that, but for pregnancy, offer[ed] protection for all risks, even those that are 'unique to' men or heavily male dominated."[41] In other words, the company violated Title VII because it covered male employees' sex-specific health needs

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[34] *See id.* at 946–47.

[35] *Id.* at 948.

[36] *Id.* at 949.

[37] Some have argued that Title VII also forbids insurance plans that have a disparate impact on male and female employees. *Compare* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (questioning the argument that the PDA allows for liability under a disparate impact theory), *with* EEOC v. Warshawsky, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (finding a prima facie case of sex discrimination under the PDA using a disparate impact theory). Since the parties did not bring a disparate impact claim, however, the analysis in this comment keeps a similarly narrow focus.

[38] 429 U.S. 125 (1976).

[39] *Id.* at 145–46.

[40] *See id.* at 139–40; *see also id.* at 147 (Brennan, J., dissenting) ("[The majority's analysis] views General Electric's plan as representing a gender-free assignment of risks in accordance with normal actuarial techniques.").

[41] *Id.* at 159 (Brennan, J., dissenting).

more extensively than it covered those of female employees. Further, the company discriminated because its failure to provide equal coverage for pregnancy-related disabilities affected the employment opportunities of women more than it affected those of men.[42]

As Judge Bye recognized, Congress endorsed the *Gilbert* dissenters' approach as providing the proper comparison under Title VII when it enacted the PDA. Congress enacted the PDA "specifically to overrule the reasoning employed by the majority in . . . *Gilbert* and to adopt the reasoning of the *Gilbert* dissenters."[43] The legislative history of the PDA confirms this conclusion. The House Report, for example, explicitly stated that "[i]t is the committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted the Act."[44] Similarly, the Senate Report directly quoted the *Gilbert* dissents[45] and stated that they "correctly express both the principle and the meaning of title VII."[46] Thus, as the Supreme Court has recognized,[47] Congress not only disclaimed the result of *Gilbert*, but also endorsed the dissenters' reasoning and interpretation under Title VII. Congress intended to mandate that a court interpreting the Act compare the health benefits available to male and female employees.

Moreover, Congress saw itself not as changing existing law, but rather as restoring the proper meaning of and approach to Title VII. The Senate Report, for example, states that "the bill [was] merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts."[48] Senator Javits similarly stated that the statute was "corrective legislation" intended to "restore the law" to its prior and correct interpretation.[49] Numerous other members of the House and Senate agreed.[50] Thus, the PDA merely restored the preex-

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[42] *Id.*

[43] *In re Union Pacific*, 479 F.3d at 949 (Bye, J., dissenting) (citation omitted).

[44] H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750.

[45] S. REP. NO. 95-331, at 2–3 (1977).

[46] *Id.* at 2; *see also* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678–79 (1983) (recognizing that the PDA was enacted to codify the *Gilbert* dissents).

[47] *Newport News*, 462 U.S. at 676–77 (concluding that the PDA specifically overturned the *Gilbert* majority's "test of discrimination" and endorsing an analysis based on the extent of coverage of men's and women's unique health care needs).

[48] S. REP. NO. 95-331, at 8; *see also* H.R. REP. NO. 95-948, at 8, *reprinted in* 1978 U.S.C.C.A.N. at 4756.

[49] 123 CONG. REC. 29,387 (1977) (statement of Sen. Javits); *see also id.* at 29,655 ("What we are doing is leaving the situation the way it was before the Supreme Court decided the Gilbert case last year.").

[50] *See, e.g.*, *id.* at 10,581 (statement of Rep. Hawkins) ("H.R. 5055 does not really add anything to title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy."); *see also*

isting understanding of Title VII, which required the comparison between an insurance plan's sex-specific health benefits to male and female employees.

In *Union Pacific*, the proper analysis would have compared the extent to which the plans cover treatments that are sex-specific in that they treat or prevent conditions that only men or women can suffer, rather than focusing exclusively on contraceptives. Since only women can become pregnant, contraceptives constitute a sex-specific treatment.[51] Similarly, treatments covered by the plans for prostate enlargement and erectile dysfunction are male-specific treatments. Although Title VII does not limit the number of sex-neutral treatments that a company's plans can cover, it does require that they cover sex-specific treatments to the same extent for both men and women.

Public policy concerns also suggest that the Eighth Circuit should have compared coverage of sex-specific male and female health benefits. The Eighth Circuit erred by assuming that treatment is nondiscriminatory merely because it is identical. This assumption takes for granted that the treatment itself is gender neutral and normatively unbiased — that coverage of any given set of conditions affects women and men in the same way. As feminist legal scholars have recognized, however, "[t]he very idea of a norm implies that whatever is considered 'normal' can take on a quality of objective reality, so that it is no longer possible to see that the standard of measurement reflects simply one group of qualities."[52] In other words, the preexisting structure of insurance coverage might well incorporate gender biases, and an appropriate analysis should take that possibility into consideration. Feminist legal theory further emphasizes that, for the most part, men have "defined and structured institutions, such as the family and the workplace, according to their own situation and needs."[53] Since workplace treatment, including insurance coverage, was developed specifically to respond to male needs, it makes little sense for equality analysis to turn on whether the treatment men and women receive is formally identical; instead, this analysis should examine whether the

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124 CONG. REC. 21,436 (1978) (statement of Rep. Sarasin) ("This bill would restore the interpretation of title VII prior to [*Gilbert*] . . . ."); 123 CONG. REC. at 29,647 (statement of Sen. Williams).

[51] Whether contraception is a medical "need" per se is beyond the scope of this comment. For information about the health risks of pregnancy, see COMM. ON UNINTENDED PREGNANCY, INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 74–75 (Sarah S. Brown & Leon Eisenberg eds., 1995).

[52] Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1154 (1986).

[53] *Id.* at 1155.

treatment respects "the right to have one's total health needs taken as seriously as are those of the other sex."[54]

Applying these theoretical concerns to the facts of *Union Pacific* leads to the conclusion that the Eighth Circuit's analysis was flawed. The Union Pacific plans' failure to cover contraceptives affects male and female employees differently. Most obviously, only women become pregnant and face the health risks associated with pregnancy, including risks of diabetes, dangerously high blood pressure, and open abdominal surgery.[55] Unintended pregnancies, such as those that result from the lack of access to birth control, are far more likely than planned pregnancies to be terminated, and only women undergo abortions.[56] Further, when carried to term, unintended pregnancies involve greater health risks to both mother and child than do planned pregnancies. These risks include low birth weight,[57] higher rates of infant mortality,[58] and poor child health and development,[59] as well as significant health concerns for mothers.[60]

Purchases of contraceptives outside of insurance plans also lead to a significant, well-documented cost to women. Prescription contraceptives cost an individual woman approximately $300 annually.[61] Over-

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[54] Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1397 (1986).

[55] *See In re* Union Pac. R.R. Employment Practices Lit., 378 F. Supp. 2d 1139, 1147–48 (D. Neb. 2005) (listing potential health consequences of pregnancy).

[56] About half of all unintended pregnancies in the United States end in termination, COMM. ON UNINTENDED PREGNANCY, *supra* note 51, at 51, and 49% of U.S. pregnancies are unintended, Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, 26 (1998). Since approximately 24% of pregnancies in the United States are terminated, virtually all abortions result from unintended pregnancies. *See* Laurie D. Elam-Evans et al., CDC, *Abortion Surveillance — United States, 2000*, MORBIDITY & MORTALITY WEEKLY REP., Nov. 28, 2003, at 1, 4.

[57] COMM. ON UNINTENDED PREGNANCY, *supra* note 51, at 70; *see also* Marjorie Sable et al., *Pregnancy Wantedness and Adverse Pregnancy Outcomes: Differences by Race and Medicaid Status*, 29 FAM. PLAN. PERSP. 76, 79 (1997).

[58] COMM. ON UNINTENDED PREGNANCY, *supra* note 51, at 72.

[59] *Id.* at 72–74. These include lower scores on verbal development tests among preschool-age children whose conceptions were unplanned. *Id.* at 73.

[60] *See id.* at 74–75.

[61] Rachel Benson Gold et al., *Mainstreaming Contraceptive Services in Managed Care — Five States' Experiences*, 30 FAM. PLAN. PERSP. 204, 204 (1998) (also noting that costs for contraceptive implants and IUDs run as high as $700 and $500, respectively); Adam Sonfield, *Preventing Unintended Pregnancy: The Needs and the Means*, GUTTMACHER REP. ON PUB. POL'Y, Dec. 2003, at 7, 7, *available at* http://www.guttmacher.org/pubs/tgr/06/5/gr060507.pdf; C. Keanin Loomis, Note, *A Battle over Birth "Control": Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 WM. & MARY BILL RTS. J. 463, 465 (2002). In contrast, employers can cover the "full range of reversible contraceptive[]" options, including prescription contraceptives, for only $1.43 per month — or $17.12 per year — per employee. Jacqueline E. Darroch, Cost to Employer Health Plans of Covering Contraceptives: Summary, Methodology, and Background (June 1998), http://www.guttmacher.org/pubs/kaiser_0698.html; *see also* NARAL PRO-CHOICE AM. FOUND., INSURANCE COVERAGE FOR CONTRACEPTION 2 (1997), http://www.

all, women spend nearly seventy percent more than men in out-of-pocket health care costs, and the cost of prescription contraceptives constitutes the single largest portion of this disparity.[62] These economic and social costs that women alone bear demonstrate the flaws in the Eighth Circuit's analysis. To address the ways that insurance coverage can discriminate by exposing one sex to greater costs and risks, courts interpreting Title VII should compare the extent to which a plan meets men's and women's sex-specific health care needs.

In *Union Pacific*, the Eighth Circuit failed to make this comparison. Title VII doctrine requires such an inquiry, and public policy concerns reveal that only through such an examination can courts recognize how formally identical treatment can affect men and women differently in practice. As applied, this analysis could take multiple forms, but any version would have to define the proper medical needs and determine how to measure whether those needs have been met. For example, this assessment might take the form of evaluating the degree to which men and women must bear the burden of meeting their own health care needs by comparing their average overall out-of-pocket health care expenses. Regardless of its form, however, a court's analysis must respond both to the ways that employer-based insurance programs impose costs on women and to the ways that those costs actually affect women's employment opportunities and lives.

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prochoiceamerica.org/assets/files/Birth-Control-Insurance-Coverage.pdf; Loomis, *supra*, at 465 n.8. Insurance covers about eighty percent of the cost. MERCER HEALTH CARE CONSULTING, WOMEN'S HEALTH CARE: UNDERSTANDING THE COST AND VALUE OF CONTRACEPTIVE BENEFITS 10 (2005).

[62] *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 109 Cal Rptr. 2d 176, 182 (Ct. App. 2001), *aff'd*, 85 P.3d 67 (Cal. 2004).