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Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

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A prominent contributor to Rick Santorum's presidential campaign startled audiences last week by suggesting that Bayer aspirin could be used as a reliable method of contraception. The contributor, Foster Friess, in **an interview (http://www.huffingtonpost.com/2012/02/16/foster-friess-rick-santorum-contraception_n_1282466.html)** with MSNBC host Andrea Mitchell, insisted that "back in [his] day," aspirin was a surefire way to prevent pregnancy.

How exactly would that work? Friess explained, "The gals put it between their knees." In other words, aspirin-clenching knees would prevent conception by preventing sex. An added bonus: this aspirin method of contraception, claimed Friess, "wasn't that costly."

Friess was, of course, joking, although I doubt that many women were laughing. But the recent fight over the scope of the religious exemption to the provision of the federal health care reform law—which requires comprehensive insurance plans to provide coverage for prescription contraceptives at no cost to the user—is no joke. It's a dead serious, highly contested issue.

The new federal law mandates that insurance plans must cover prescription contraceptives at no cost to the women who use them. The mandate resulted from **a report (http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx)** by the Institute of Medicine finding that access to contraception is essential to women's health, and that contraception is insufficiently accessible to many women.

Beginning in August 2012, contraception will be one of several preventive health services that must be included in health insurance plans, at no cost to the user. The Catholic Church strenuously objects to the mandate, and has been locked in a bitter battle with the Obama Administration over the scope of the religious exemption. (The religious-exemption issues were recently explored in detail by my Verdict co-columnist, Vikram Amar, and by Verdict guest columnist Alan Brownstein, **here (http://verdict.justia.com/2012/02/16/the-right-way-to-accommodate-religious-objections-to-the-contraception-coverage-mandate)** .)

The exemption, as embodied in **a final ruling**

(http://www.regulations.gov/#%21documentDetail;D=HHS_FRDOC_0001-0443) of the Department of Health and Human Services in December 2011, was narrow—applying only to churches and other houses of worship. However, the Obama Administration backtracked a bit after a furious backlash ensued. The Administration has now agreed to a compromise that will guarantee employees of religiously-affiliated organizations (such as certain hospitals and universities) access to prescription contraceptives at no cost, but will also ensure that the insurance company, rather than the employer, foots the bill.

Putting the religious issues aside, though, this controversy about the federal mandate for contraceptive coverage is merely the latest battle in a long-running war—variously involving employers, employees, insurance companies, state governments, and the federal government—about whether women, alone, should bear all the consequences, costs and hardships of reproduction.

One focal point of this debate has been the courts, which have been asked repeatedly to decide whether employers' failure to provide insurance coverage for prescription contraceptives constitutes either sex discrimination or pregnancy discrimination.

Now, the very same legal issue is at the core of a recent ruling by a federal judge in ***EEOC v. Houston Funding, Inc. (http://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2011cv02442/899819/21)*** that lactation discrimination is not actionable under Title VII or the Pregnancy Discrimination Act (PDA) because lactation is, the judge reasoned, not related to pregnancy. In this column, I'll consider this recent case, as well as earlier cases on contraceptive equity and infertility discrimination, which raise similar questions about how far the law goes—and should go—to protect women against reproduction discrimination.

Lactation Discrimination In Employment: A Federal Judge Holds That Such a Claim Is Not Actionable as Either Pregnancy or Sex Discrimination

The plaintiff in the lactation-discrimination case was Donnicia Venters. Venters was hired by Houston Funding in 2006. Two years later, on December 1, 2008, she took a leave of absence to give birth. The company had no maternity leave policy and was too small to be covered by the Family and Medical Leave Act (FMLA), which guarantees up to 12 weeks of unpaid leave for a variety of reasons, including childbirth and newborn parenting, for employees of companies with at least fifty employees.

Venters gave birth on December 11. A few days later, she spoke with the company's vice president, Henry Cagle, who asked her when she planned to return to work. She said that she did not know, and that she was waiting for her doctor to advise her on that subject. During January and early February 2009, Venters communicated regularly with people at her office, including team leaders, and continued to pay her insurance premium. She never provided an exact return date, but she repeatedly expressed her desire to return soon.

During a meeting held on February 10, a group of employees, including Cagle, met and together decided to fire Venters. A few days later, Venters's doctor advised her that she could return to work. On February 16, Venters left a message informing Cagle that she had been cleared to work. The next day, February 17, Venters called again; told Cagle that she was ready to return to work; and asked if she could use a back room to pump breast milk. Cagle informed her that they had replaced her because they had not heard from her about firm plans to return to work. Only then did the company send her a letter firing her—purportedly for job abandonment. Venters received that letter—which was dated February 16, the day before Venters had asked to be able to pump breast milk in a back room at work—on February 26.

The Equal Employment Opportunity Commission (EEOC) sued Venters's employer on her behalf. It claimed that the company had fired Venters because she wanted to pump breast milk at work. However, the federal district judge who heard Venters's case ruled that even if Venters was right that the company had, indeed, fired her because of her request to pump breast milk, firing her for that reason was not a legally actionable form of discrimination.

"The law," the judge wrote, "does not punish lactation discrimination." Lactation discrimination is not pregnancy discrimination, according to the judge, because it is not "pregnancy, childbirth, or a related medical

condition" under the Pregnancy Discrimination Act.

The EEOC also contended, on Venters's behalf, that to fire Venters had constituted sex discrimination. But the judge deemed that argument worthy of but a single, conclusory sentence: "Firing someone because of lactation or breast-pumping is not sex discrimination."

What Legal Protections Do Women Have When the Reproductive Process Conflicts With Work?

The reproductive process can have many consequences for women. But one type of consequence is the impact on their working lives. Women can suffer temporary disability, due to pregnancy and childbirth, which makes them unable to work. They can require time off work or other accommodations because of partial incapacity, or the need to tend to medical issues. And, they may need the benefit of insurance coverage to cover medical costs or disability payments to compensate for lost wages due to temporary incapacity that is due to pregnancy or childbirth.

These work-related conflicts can arise not only during the nine months of pregnancy, or during the period of childbirth and recovery from it, but also at the outer edges of the reproductive process. Conflicts may arise, for instance, when women are trying to access contraception in order to prevent pregnancy, or seeking infertility treatments to achieve it. And conflicts may arise when women are trying to juggle breastfeeding with the demands of work after a child is born, as Venters sought to do.

Importantly, each of these issues—access to prescription contraceptives, treatment for female infertility, pregnancy, childbirth, and lactation—is unique to women. Thus, the way an employer deals with any of these issues can raise the specter not only of pregnancy discrimination, but also of sex discrimination.

In an ideal world, the workplace would be structured to accommodate reproduction, as it is an essential aspect of human life. But historically, most workplaces were designed with male workers in mind, and the evolution of a more inclusive and accommodating structure has been slow. Law has played an integral—though, disappointingly, not yet sufficient—role in protecting women as they try to navigate the many potential conflicts between reproduction and work.

The centerpiece of protection for women in the reproductive phase of life is the Pregnancy Discrimination Act of 1978 ("PDA"). The PDA amended Title VII, the central federal anti-discrimination statute.

Prior to the enactment of the PDA, the Supreme Court, in ***General Electric v. Gilbert*** ***(http://supreme.justia.com/cases/federal/us/429/125/case.html)*** , had interpreted Title VII to exclude pregnancy discrimination from its protection. The PDA specifically overruled the ruling in that case, and made clear that Title VII's ban on sex discrimination included discrimination on the basis of "pregnancy, childbirth, or related medical conditions." The PDA, in a second clause, also guarantees that employers must treat pregnant workers at least as well as they treat comparably-disabled workers, with respect to leave, insurance benefits, and so on.

The cases dealing with contraception, infertility treatment, and lactation all raise the same question: What is the intended scope of the phrase "related medical condition" in the first clause of the PDA? The U.S. Supreme Court has spoken to this question only once, in its 1987 decision in ***International Union, UAW v. Johnson Controls*** ***(http://supreme.justia.com/cases/federal/us/499/187/case.html)*** . There, the court considered the validity of a battery manufacturer's policy of prohibiting fertile women from working in jobs involving lead exposure. The Court struck down the policy as a violation of the PDA. To reach that conclusion, the Court reasoned that the PDA prohibits discrimination on the basis of potential, as well as actual, pregnancy. Thus, screening out applicants based on whether they could become pregnant while in a job with potentially dangerous lead exposure was unlawful under the PDA.

Contraceptive Coverage and the Pregnancy Discrimination Act

Based in large part on the precedent set by *Johnson Controls*, the EEOC issued a ruling that the PDA also prohibits employers from discriminating against employees who try to control their own ability to get pregnant, through the use of contraception. The class of prescription drugs and devices that are currently available to

prevent pregnancy– birth control pills, Depo Provera, and intrauterine devices (IUDs), to name the most common options—are exclusively used by women. Female employees are therefore the ones who are hurt by the lack of insurance coverage for contraception. And if the lack of access to contraception contributes to unwanted pregnancies, that situation, in turn, visits upon the pregnant employee a host of additional disproportionate and unique burdens of the type that only women face.

While the EEOC has been a strong supporter of contraceptive equity, court rulings on the topic have been mixed. In 2001, a federal district court in Washington State reached the same conclusion as the EEOC had in *Erickson v. Bartell Drug Co.* This was the first court ruling to hold that employer-based insurance plans must cover prescription contraceptives as a matter of federal anti-discrimination law. But other federal courts have reached the opposite conclusion, including the U.S. Court of Appeals for the Eighth Circuit, in ***Standridge v. Union Pacific Railroad Company (http://law.justia.com/cases/federal/appellate-courts/ca8/06-1706/061706p-2011-02-25.html)*** . The court in that case concluded that contraception is not a "related medical condition" under the terms of the PDA, even though the Supreme Court had held in *Johnson Controls* that the statutory text was broad enough to encompass "potential pregnancy."

Although litigation over contraceptive coverage was successful only sometimes, the number of insurance plans that cover prescription contraceptives has tripled in the last decade. As many as 9 in 10 plans today provide such coverage, due in large part to the adoption, in many states, of laws mandating this type of coverage. Efforts were also made at the federal level to pass a contraceptive equity law, but such a law never made it through Congress. As part of federal health care reform, however, coverage for prescription contraceptives will become, as discussed at the beginning of this column, nearly universal. The religious exemption and a temporary grandfather clause will allow some employers to continue excluding contraceptives from the coverage they provide, but now, most insurance plans will provide cost-free contraceptives to their customers.

Even With Greater Coverage for Contraception as the Result of Federal Health Care Reform, the Meaning of the PDA Still Matters

The importance of the PDA to contraceptive equity has diminished greatly, given the state and federal contraceptive benefit mandates. But the meaning of the PDA's phrase "pregnancy, childbirth, and related medical conditions" is still highly relevant for women who are discriminated against at work because they seek treatment for infertility, or seek to breastfeed after returning to work.

Women suing under the PDA for discrimination based on the denial of insurance coverage (through an employer-provided plan) for infertility treatment have generally been unsuccessful. The U.S. Court of Appeals for the Eighth Circuit rejected such a claim in the 1996 case of *Krauel v. Iowa Methodist Medical Center*, holding that infertility is not a "related medical condition" under the PDA because both men and women can suffer from it. Infertility is thus unlike the "potential pregnancy" recognized in Johnson Controls, which is unique to women.

The U.S. Court of Appeals for the Second Circuit reached a similar conclusion in *Saks v. Franklin Covey Co.*, even though the procedures that were excluded by the insurance plan, such as artificial insemination and in vitro fertilization (IVF), were only performed on women. In that court's view, the PDA only covers conditions that are "unique to women." Infertility, it reasoned, could affect women, men, or couples in combination.

A woman who was allegedly fired for requesting time to undergo IVF won her case, however. The U.S. Court of Appeals for the Seventh Circuit held in 2008, in *Hall v. Nalco*, that if the plaintiff's allegations were true, she "was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity." (I have written about this case in detail **here (http://writ.news.findlaw.com/grossman/20080819.html)** .) Central to the court's reasoning was that those who take "time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women."

Lactation Is, of Course, a Condition Related to Pregnancy and Childbirth—and Courts Should So Hold

The lactation case discussed above involving Venters, ***EEOC v. Houston Funding***

(http://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2011cv02442/899819/21) , raises the same question, in essence, as *Hall*: Can an employee be fired because of her childbearing capacity. Venters alleged not that she was refused time or space to pump breast milk, but that she was fired for even asking to pump breast milk at work. The judge in that case rejected her pregnancy discrimination claim, offering the following reasoning:

> Discrimination because of pregnancy, childbirth, or a related medical condition is illegal. Related conditions may include cramping, dizziness, and nausea while pregnant. Even if the company's claim that [Venters] was fired for abandonment is meant to hide the real reason—she wanted to pump breast milk—lactation is not pregnancy, childbirth, or a related medical condition. She gave birth on December 11, 2009. After that day, she was no longer pregnant and her pregnancy-related conditions ended.

This reasoning is preposterous from virtually any perspective:

Scientifically, of course, it would be ridiculous to argue that lactation is not a "related medical condition" regarding pregnancy or childbirth, since the production of milk is an involuntary, physiological response to giving birth.

Logically, as well, the reasoning can't be followed, since it would mean that a woman who suffers any number of childbirth-related complications is not protected by the PDA if those complications happened to occur after, rather than before, the birth.

Legally, too, the judge's reasoning is absurd. It violates both the text and spirit of the PDA. The PDA was enacted to strike at the broad spectrum of employer policies and practices designed to keep women of reproductive age out of the workplace. It was enacted to stop employers from reacting on impulse and stereotype about the capabilities and talents of pregnant women and to force them to assess women as individuals. As written, the PDA prohibits employers from subjecting women to any employment decision because of pregnancy, childbirth, or related medical conditions. Firing a new mother because she seeks to breastfeed is exactly the type of discrimination the PDA was intended to eradicate. If employers could legally fire employees for lactating, that would be an easy way to rid the workplace of many of its women. Moreover, singling out employees for adverse treatment, based on a characteristic that afflicts only one members of one sex, is sex discrimination, plain and simple. Only women give birth, and only women lactate.

Note, in this case, that the plaintiff, Venters, did not request any time off or change in her duties to accommodate her desire to pump milk. The PDA, particularly as interpreted by federal courts, is quite stingy regarding the right to insist on workplace accommodations for pregnancy, childbirth, or related medical conditions. As I have written **elsewhere (http://writ.news.findlaw.com/grossman/20081028.html)** , employers need only accommodate such needs if they offer accommodation for other temporarily disabled employees. Venters's employer may well, thus, have been able lawfully to refuse her request.

But Venters, the plaintiff in *Houston Funding*, was simply asking not to be fired after revealing that she planned to breastfeed (and pump milk) after returning to work. She deserved the chance to prove that her employer had fired her for just that reason—and thus to vindicate her right against this form of discrimination. Health care reform may resolve the important and longstanding problem with contraceptive access in this country, but even though this important battle has been mostly won, we must not forget about other aspects of the reproductive process that still leave women especially vulnerable in the workplace.

Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of Inside the Castle: Law and the Family in 20th Century America (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of Gender Equality: Dimensions of Women's Equal Citizenship

(Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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