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If Employers Don't Provide Insurance Covering Infertility, Are They Guilty of Sex Discrimination?: A Federal Appeals Court Says No.

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IF EMPLOYERS DON'T PROVIDE INSURANCE COVERING INFERTILITY, ARE THEY GUILTY OF SEX DISCRIMINATION?
A Federal Appeals Court Says No.

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The United States Court of Appeals for the Second Circuit recently issued an important decision on federal anti-discrimination law in *Saks v. Franklin Covey Co*. There, it held that an employer can deny coverage for infertility procedures done only to women. Doing so, accordingly to the court, constitutes neither pregnancy nor sex discrimination. While the opinion is well-reasoned and at least mildly persuasive, there is a strong argument to be made that the wrong result was reached.

The decision is the first appellate ruling on an issue that has been brewing in lower courts, and it is likely to have an unfortunate effect. Because infertility treatments are costly, and insurance coverage is spotty, many women already find themselves pushing employers to reimburse them for their expenses. Others find themselves fired due to absences or sickness related to fertility treatments.

Infertility treatment should be addressed, under the law and insurance plans, in the same way pregnancy-related expenses are now treated. In addition, infertility-treatment-related absences and sick leaves should be treated in the same way as pregnancy-related absences and sick leaves. It only makes sense: For many couples, infertility treatment is a necessary step on the road to pregnancy.

The Facts of the Case

For four years, Rochelle Saks worked as a store manager for Franklin Covey. During her tenure there, she unsuccessfully tried to conceive a child with her husband. Over the course of several years, she underwent progressively more invasive fertility treatments--including intrauterine inseminations, oral and injectable fertility drugs, hormone injections, and in vitro fertilization (IVF). She became pregnant twice using these methods, but miscarried both times.

Saks sought reimbursement for these costly procedures through her employee health plan. The plan guaranteed coverage for "medically necessary" procedures--those required "for the diagnosis or treatment of an active illness or injury." Pregnancy was considered an "active illness" under the plan.

The plan covered some infertility products, including ovulation kits, oral fertility drugs, and even penile implants. It also covered surgery to correct conditions causing infertility, such as endometriosis or tubal blockages. But it expressly excluded much more expensive "surgical impregnation procedures," such as artificial insemination, IVF, and two other procedures known as GIFT and ZIFT. Accordingly, the plan denied Saks reimbursement for all but a few of her expenses.

Infertility: Most Solutions Are Very Costly, and Often Unreimbursed

Up to 6 million Americans are "infertile," a label assigned after a couple engages in unprotected intercourse for one year without achieving pregnancy. About forty percent of the time, the cause of infertility is attributable to a male factor, forty percent to a female factor, and twenty percent to a "couple factor" (such as an incompatibility between the male and female) or to some unknown factor.

Only half of those who are infertile seek treatment, and cost is a significant factor for those who forego it. That's not surprising, for the cost of fertility treatments is staggering. For instance, a single round of IVF can cost up to $12,000, and the procedure may have to be repeated several times before pregnancy is achieved.

Insurance coverage for infertility varies tremendously. According to a 1996 survey, about 40 percent of large employers covered some form of advanced fertility treatment, like IVF. But only nineteen percent of HMOs paid for IVF, and some large insurance plans have stopped covering such treatments in recent years because of the cost and increasing demand.

About a quarter of the states require health plans to provide coverage for at least some fertility treatments. New York, for example, requires insurers to cover infertility drug treatments, as long as they cover prescription drugs generally, and surgeries or treatments designed to correct a problem creating infertility. But it does not require coverage of the more expensive procedures like IVF.

Why State Mandated Benefit Laws Often Fail to Cover Employees

Mandated benefit laws, like New York's, are of limited usefulness, however. That's because of the Employee Retirement and Income Security Act (ERISA), a federal law governing employee pensions and benefits. ERISA pre-empts state law in certain circumstances. In particular, ERISA preempts mandated benefit laws with respect to companies that operate a self-insured health plan.

For example, Franklin Covey, Rochelle Saks's employer, was located in New York and thus might have been subject to the states mandatory coverage laws. But because it operated a self-insured plan, it was probably exempt. That left Saks with only one option: to challenge the plan's exclusion, not under state mandatory benefit statutes, but rather under anti-discrimination law.

Saks' First Legal Theory: Pregnancy Discrimination

First, Saks argued that the plan's failure to reimburse her for all her fertility expenses violates the Pregnancy Discrimination Act (PDA). The PDA is a 1978 statute that amended Title VII, the central federal anti-discrimination statute.

The enactment of the PDA made clear that pregnancy discrimination is a form of sex discrimination, and that pregnant workers need be treated at least as well as comparably disabled male workers. Thus, in deciding whether benefits provided under a given insurance plan violate the PDA, a court must compare the extent of the coverage provided to men and to women, respectively; or to pregnant workers, and other temporarily disabled workers, respectively.

The PDA makes it unlawful to discriminate on the basis of "pregnancy, childbirth, or related medical conditions." Does infertility qualify as a "related medical condition," because it relates to women's intention or potential to become pregnant? Case law affords some guidance on this point.

Is Infertility Discrimination Also Pregnancy Discrimination Under the PDA?

Most importantly, case law has established that pregnancy discrimination can precede conception and be asserted by a plaintiff who is not pregnant and indeed, is not even planning to become pregnant.

Thus, it is far too late in the day to claim, for example, that only pregnant women can invoke the protections of the PDA. For instance, the Supreme Court held in *International Union v. Johnson Controls* that it violates the PDA to deny women certain jobs (there, jobs with lead exposure) because they are fertile and thus might get pregnant, and if they did, their fetuses might be harmed.

The company couldn't, therefore, send only sterile women into an environment with lead exposure, and keep fertile women out. (Several women in that case had undergone voluntary sterilization in order to keep their jobs). The bottom line was that women's potential to get pregnant could not serve as the basis for discrimination, any more than pregnancy itself could.

Indeed, the PDA covers women who seek not to become pregnant as well. Thus, the EEOC has held that an employer's failure to provide insurance coverage for contraceptive pills and devices used only by women constitutes pregnancy discrimination.

The idea of the PDA, then, is not to give special rights to pregnant women. It is to ensure that women's capacity to bear children, and their choice whether or not to do so, do not subject them to unfair discrimination in the workplace.

On this theory, the PDA should extend to infertility as well. If a woman is fired, or denied insurance coverage, because pregnancy, in her case, requires infertility treatments, then she has suffered pregnancy discrimination within the meaning of the PDA.

Unfortunately, the *Saks* court concluded otherwise. The PDA only reaches pregnancy discrimination as a form of sex discrimination, it pointed out, and both sexes suffer from infertility, in roughly equal proportion. (Pregnancy, in contrast, affects only women.) Thus discrimination on the basis of infertility, the court held, does not constitute unlawful pregnancy discrimination.

The *Saks* court's ruling on this point is in some tension with the Supreme Court's ruling in *Johnson Controls*. That case said it is pregnancy discrimination to impose an employment rule that turns on a woman's child-bearing capacity. But Saks' insurance plan does that: it excludes coverage to some women based on their child-bearing capacity. Under *Johnson Controls*, that is arguably a form of pregnancy discrimination.

In short, discrimination based on female infertility may be conceptualized as pregnancy discrimination for a simple reason: For the women who must undergo it, the treatment is a necessary part of the process of achieving pregnancy.

Accordingly, the few courts asked to decide whether a woman may be fired because she is undergoing fertility treatments (and, because of their invasive and time-consuming nature, has been forced to miss days of work) have treated the employer's action as pregnancy discrimination. As one federal district court commented, in *Pacourek v. Inland Steel*, "It makes sense to conclude that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination againstpersons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law."

Like *Johnson Controls*, these well-reasoned decisions also undermine the reasoning of the *Saks* court.

Saks' Second Legal Theory: Sex Discrimination

Second, Saks argued that her insurance plan's exclusion of surgical impregnation procedures constituted sex discrimination pure and simple - prohibited not only by the PDA's logic, under which pregnancy discrimination is a kind of sex discrimination, but also by Title VII, which prohibits sex discrimination in itself.

Such procedures, Saks pointed out, are performed only on women. And similar procedures on men - for instance, surgery to remove a blockage in the vas deferens, which is the conduit for sperm - were covered under the plan.

Again the court ruled against Saks. It reasoned that surgical impregnation was equally likely to be a remedy for either male or female infertility, and thus both sexes were "equally disadvantaged" by the exclusion.

The court ignored the fact, however, that the surgical impregnation procedures are performed only on women, whatever their cause may be. And that means that men, under a plan like Saks's, are covered for every single medical or surgical infertility treatment performed on them, and women are not. That is plainly sex discrimination.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination Law, among other subjects. Her other columns on sex discrimination and related topics may be found in the archive of her columns on this site. In particular, Grossman's earlier column on contraceptive discrimination is relevant to the topic of this column.