2012

What's Wrong with Pregnancy in the Airline Industry and What to Do about It: Balancing Public Safety Interests, Disability Rights, and Freedom from Discrimination

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WHAT'S WRONG WITH PREGNANCY IN THE AIRLINE INDUSTRY AND WHAT TO DO ABOUT IT: BALANCING PUBLIC SAFETY INTERESTS, DISABILITY RIGHTS, AND FREEDOM FROM DISCRIMINATION

JENNIFER STATON*

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I. INTRODUCTION

WHAT HAPPENS WHEN a flight attendant becomes pregnant? Sue, a female flight attendant working for a major airline explains, “She can keep working, she just gets transferred to light duty, like the other disabled workers.” When asked whether it is fair that an airline requires its female flight attendants to go on mandatory unpaid maternity leave at the twenty-seventh week of pregnancy, Claire, a physician’s assistant, responds, “That’s only safe. You wouldn’t want a pregnant woman going into preterm labor and delivering a baby on a plane, would you?”

Pregnant women and the airline industry have endured a long and contentious history. As early as the 1930s, women were employed as stewardesses and were subject to harsh restrictions, including automatic termination upon becoming pregnant and ineligibility for the job if one had a child. With the passage of Title VII and later the Pregnancy Discrimination Act, women experienced much greater employment opportunities, such as being allowed to work longer into their pregnancies and being legally allowed to pursue both a career and a family. Yet today the airline industry remains in a unique position regarding its pregnant flight attendants and is one of the only industries where the courts allow an employer to enforce mandatory maternity leave at a certain point during pregnancy, regardless of individual capacity to work. Although women are typically excluded from their employment for only a few months, this situation occurs consistently and presents a complex social problem juxtaposing gender discrimination, disability rights, and public safety. It is particularly troubling when considering the goals of Title VII, the economic necessity of earning a paycheck, and the harsh realities these women experience if they must abruptly stop working for several months while preparing for a child.

1 Characters and their responses are loosely based on real conversations. The women’s names have been changed.

2 “Preterm labor . . . is labor that begins before thirty-seven weeks of pregnancy” and “occur[s] in about [twelve] percent of all pregnancies in the U.S.” It is one of the leading causes of infant mortality. Preterm Labor and Birth, NATIONAL INSTITUTES OF HEALTH (Aug. 2, 2010), http://www.nichd.nih.gov/health/topics/preterm_labor_and_birth.cfm.


This article will explore the current state of the law and airline policies regarding pregnant workers, focusing on flight attendants, and will make suggestions for how to better balance the competing interests of disabled workers, public safety, and pregnant women's rights to be free from discrimination and to pursue equal employment opportunities. Part II will delineate the history of treatment of pregnant flight attendants in the airline industry. As the conversations with Sue and Claire illustrate, misconceptions concerning employer policies and arguments focusing on safety concerns are common. Part III will analyze pregnancy policies and requirements common among airline employers under Title VII and the Pregnancy Discrimination Act, particularly regarding flight attendants. This section will focus on the problems with the current state of the law and policies, particularly how they enable discrimination and make it difficult to advocate for change by pitting public safety and disability rights against women's equal employment rights. Part IV will present possible solutions for a better balance of the competing interests at stake.

II. HISTORY OF PREGNANT FLIGHT ATTENDANTS

Women were first recruited by the airline industry as flight attendants in the 1930s. These first female flight attendants were required to be trained nurses, nursing being one of the few professions open to women at the time. Because of their skills as nurses, women were thought to be able to nurture and take care of the airlines' mostly male clients. In fact, later on, in response to calls for male flight attendants, the airlines would argue that women were in a unique position to care for the psychological needs of the male passengers, needs that were associated with the stress and anxiety of flying. Thus, in a way the airlines glorified women, although only for one of their traditional gender roles, that of nurturer or caregiver. Interestingly, while the airlines argued that women were valuable as natural nurturers, they continued to deny employment to women who

7 Julian, supra note 3, at 282.
8 Id.
were pregnant, had children, or were married. They thus exploited this gender stereotype, but denied it at the same time.

By the 1960s, the role of the female flight attendant morphed into a sex symbol. Women were employed because of their sex appeal and ability to sell the airline’s brand. This commodification of women brought with it many restrictions, as women were crammed into the confining picture of a petite, sexually available woman wearing hot pants in a magazine advertisement. These restrictions included immediate termination based on weight, height, marriage, and age requirements. Thus, prior to the passage of Title VII in 1964, the job of flight attendant was limited only to single women without children under the age of thirty-five.

Because the airlines employed an entirely female flight attendant workforce during this time, they were forced to confront pregnancy issues early on. Many airlines required pregnant flight attendants to alert their employers as soon as they discovered their pregnancies, at which point the flight attendants were automatically discharged. Not only were flight attendants not allowed to work during pregnancy, but they were not allowed to return to work after giving birth. Pregnancy and motherhood were thus incompatible with employment as a flight attendant. The reasons airlines gave for these policies were not necessarily informed by science. According to the airlines, pregnant flight attendants were bad for business: “customers preferred seeing young, attractive, single women.” However, in Southwest Airlines’ own study, it found that attractive flight attendants were ranked fifth in a customer preference survey, “behind on-time departures, frequent flights, helpful reservations and grounds personnel, and convenient departure times.” In addition, airlines cited safety concerns related to flying and pregnancy. It was in the mother’s and fetus’s best interests to keep them on the ground. Yet this idea would also

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10 Julian, supra note 3, at 282.
11 Id.
12 Id.
13 See id.
14 Id.
15 Id.
17 See In re Consol. Pretrial Proceedings, 582 F.2d 1142, 1144 (7th Cir. 1978).
18 Reed, supra note 6, at 271.
19 Id. at 272.
be found to lack a scientific basis, as courts found no evidence that flying endangered the health of the mother or the fetus.\textsuperscript{21} Furthermore, in \textit{International Union, UAW v. Johnson Controls, Inc.}, the Supreme Court firmly rejected fetal protection claims by an employer, stating that “[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”\textsuperscript{22} Despite gaps in scientific evidence and reasoning, airlines continued to impose restrictions on their female flight attendants.

\section*{A. Title VII}

Yet in 1964, the airline industry saw the beginnings of a momentous change. While most scholars agree that the inclusion of Title VII in the 1964 Civil Rights Act was a “historical accident,” designed primarily to prevent the bill’s passage, Title VII was nevertheless passed by Congress and stated that employers could not discriminate against women because of their sex.\textsuperscript{23} However, it was unclear whether the term “sex” included pregnancy and thus whether Title VII protected women from discrimination based on pregnancy as well as gender.\textsuperscript{24} Furthermore, perhaps because of the last-minute inclusion of the sex discrimination provision, women’s activists found themselves divided over the meaning of Title VII.\textsuperscript{25} While some women’s activists favored the equal treatment language of Title VII, others were wary of potentially harmful ramifications for women and supported many of the protectionist laws in place at the time, such as “maximum hours” or “weightlifting limits,” that shielded women from unaccommodating workplaces and guarded their role as mothers.\textsuperscript{26} Others supported the general idea of protectionist laws, but wanted them updated to better reflect women’s actual abilities and status in the workplace.\textsuperscript{27} For example, Mary Keyserling, head of the Department of Labor’s Women’s Bureau, stated that “these laws were put on the

\begin{thebibliography}{9}
\bibitem{21} See, e.g., id.
\bibitem{24} Pedriana, \textit{supra} note 23, at 8.
\bibitem{25} \textit{Id.} at 3.
\bibitem{26} \textit{Id.}
\bibitem{27} \textit{Id.}
\end{thebibliography}
books by women's organizations in the interest of women . . . [and] sought to eliminate the real abuses which prevailed widely in industry . . . the freeing of women from employment discrimination does not demand that they all have identical treatment."

Eventually—and due in large part to pressure from the National Organization for Women (NOW) to eradicate "all sex-specific employment practices"—the protectionist laws were disbanded. Groups that had pushed for the recognition of inherent differences, biologically and socially, between men and women thus lost the public debate to groups that framed discussions in terms of equality for both genders and minimized differences between the sexes.

Despite the passage of Title VII, the first suits challenging pregnancy discrimination were brought under the Fourteenth Amendment. For example, although Title VII was passed in 1964, attorneys in 1974 brought a pregnancy discrimination suit in Cleveland Board of Education v. LaFleur under the Fourteenth Amendment. In LaFleur, public school teachers challenged two school boards' mandatory maternity leave policies under the Equal Protection Clause, one requiring maternity leave at the fourth month of pregnancy and the other at the fifth month. The Sixth Circuit had held that the five-month policy discriminated against pregnant women without justification, but the Fourth Circuit had upheld the four-month policy's constitutionality. In spite of these conflicting decisions, neither policy seemed supported by "growing evidence and medical consensus that many women were capable of working . . . [during] their pregnancies."

The Supreme Court sided with the Sixth Circuit, but did so on due process grounds. Mandatory leave regulations could not be justified by the need for continuity in education, administrative convenience, or "the state interest in keeping physically

28 Id. at 3–4 (quoting EEOC, White House Conference on Equal Emp't Opportunity, Discrimination Because of Sex 22 (1965) (panel transcript available in the EEOC Library, Washington, D.C.)).
29 Id. at 5–6.
30 Id. at 4.
31 Id. at 6–7.
33 Id.
34 Id. at 636–38.
35 Pedriana, supra note 23, at 7.
36 LaFleur, 414 U.S. at 648.
unfit teachers out of the classroom” to ensure student safety.37 Because the policies conclusively presumed that women could not work past a fixed point in time, when ultimately the ability to work during pregnancy is an individual matter, they violated the plaintiffs’ due process rights to bear children without government interference and unduly penalized women for the decision to have a child.38 Because the Court based its holding on constitutional rights, it did not address whether Title VII includes discrimination based on pregnancy.39 However, lower trial and appellate courts consistently decided that it did.40

B. THE PREGNANCY DISCRIMINATION ACT

Particularly unsettling in the line of early pregnancy discrimination cases was the Supreme Court’s 1976 decision in General Electric Co. v. Gilbert that pregnancy discrimination was not barred by Title VII.41 In Gilbert, the Court found that an employer’s disability benefits plan did not violate Title VII when it failed to cover pregnancy-related disabilities.42 In response, Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination in employment based on pregnancy or a pregnancy-related condition is illegal.43 Specifically, Title VII provides that:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.44

The Pregnancy Discrimination Act added to the definition of “sex:”

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy . . . or related medical conditions; and women affected by pregnancy . . . shall be treated the same for all employment-related pur-
poses, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.\textsuperscript{45}

This piece of legislation thus overturned the Supreme Court's decision in \textit{Gilbert} and resolved the question that the Court had previously avoided by encompassing pregnancy within the meaning of sex discrimination prohibited by Title VII.\textsuperscript{46} It also demonstrated that the debate about women's treatment in the workplace was now unambiguously focused on equal treatment. For example, as one witness testified in the congressional hearings regarding the PDA,

Employers routinely fire pregnant workers, refuse to hire them, strip them of seniority rights, and deny them sick leave and medical benefits given other workers. Such policies have a lifetime impact on women's careers. Together, they add up to one basic fact: employers use women's role of childbearer as the central justification of and support for discrimination against women workers. Thus, discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated.\textsuperscript{47}

As the Supreme Court stated, "[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."\textsuperscript{48}

C. \textsc{Title VII, the PDA, and the Airline Industry}

The late 1970s and the 1980s saw a flurry of litigation in the airline industry concerning pregnancy. However, these cases came to different conclusions than similar cases in other industries.\textsuperscript{49} For example, while \textit{LaFleur} seemed to suggest that an

\begin{itemize}
\item Id. \S 2000e(k).
\item Pedriana, \textit{supra} note 23, at 1.
\item Id. at 12 (quoting \textit{Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. \& Labor, 95th Cong. 31-32 (1977) (statement of Susan Deller Ross, Campaign to End Discrimination Against Pregnant Workers)).
\item See \textit{Levin v. Delta Air Lines}, Inc., 730 F.2d 994, 996 (5th Cir. 1984) (airline policy requiring flight attendants to resign or transfer to ground positions upon becoming pregnant is justified as business necessity); \textit{In re Nat'l Airlines}, Inc., 434 F. Supp. 249, 263 (S.D. Fla. 1977) (airline could not require mandatory maternity leave before thirteen weeks, but could allow individual evaluation between thirteen and twenty weeks); Harriss v. Pan Am. World Airways, Inc., 437 F. Supp. 413, 422, 434 (N.D. Cal. 1977) (airline could require mandatory maternity leave upon knowledge of pregnancy because nausea, vomiting, and other pregnancy-related symptoms may interfere with a flight attendant's ability to do her job safely);
\end{itemize}
employer would have difficulty justifying a “sweeping” mandatory maternity leave requirement, courts were much more lenient with the airline industry. In *In re National Airlines, Inc.*, the court struck down an employment policy requiring a flight attendant’s removal from her position immediately upon discovery of her pregnancy. The court held that employment and the decision to have children are protected interests. The airline’s no-motherhood policy impinged on the choice to work and have children because “many flight attendants are capable of working during pregnancy and some need the income.” Thus, flight attendants “may delay their attempt to become pregnant because they cannot afford to go without” income for several months. Furthermore, there is no other condition that has similar effects, and because pregnancy is a uniquely female condition and is “inevitably sex-linked,” this policy had a disproportionate impact on women. The airline asserted a bona fide occupational qualification (BFOQ) defense, stating that it is dangerous to passengers, the mother, and the fetus for a pregnant flight attendant to continue working. The court rejected the latter two claims, stating that there was no medical evidence presented showing that flying is dangerous to the health of the mother and that it is the mother’s decision and not the court’s to decide what is in the best interest of the fetus. The court found it particularly persuasive that a competitor, Northwest Airlines, had a policy allowing pregnant stewardesses to fly until their twenty-eighth week if cleared by a doctor, and that, of 2,500 pregnant stewardesses, none reported fetal abnormalities. Also interesting was that by counting back from the date of birth, National’s own data showed that most women waited until the third month of pregnancy before grounding themselves, and some waited even until the fifth month. The court

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50 434 F. Supp. at 258. See also *In re Consol. Pretrial Proceedings*, 582 F.2d 1142, 1145 (7th Cir. 1978).  
52 Id. at 259.  
53 Id.  
54 Id. at 258–59.  
55 Id. at 259.  
56 Id.  
57 Id.  
58 Id. at 262.
also rejected National’s claim that flying while pregnant increases the occurrence of birth defects and spontaneous abortions for lack of any evidence.\(^{59}\)

However, the court was receptive to National’s argument that pregnant flight attendants pose a threat to passenger safety.\(^{60}\) Although the court rejected the claim that a flight attendant should be grounded before the thirteenth week of pregnancy (consensus among medical experts showed that a pregnant flight attendant at this stage can perform the same duties as a non-pregnant flight attendant), it found that between the thirteenth and twentieth weeks, National could implement a policy requiring that individual pregnant flight attendants be cleared by a doctor of National’s choice before flying, and further, that a flight attendant should be automatically barred from flying after the twentieth week of pregnancy due to concerns about her adequate performance of required safety duties in an emergency.\(^{61}\) Specifically, the court was concerned about a flight attendant in the third trimester of her pregnancy being able to evacuate a plane in ninety seconds, lift a 130-pound life raft, fit through a narrow hatch, and open a door requiring 100 pounds of force.\(^{62}\)

In a similar case, the court in *Burwell v. Eastern Air Lines, Inc.* again disallowed mandatory maternity leave for flight attendants before thirteen weeks of pregnancy, but reversed the lower court’s finding that Eastern must evaluate flight attendants individually between the thirteenth and twenty-eighth week of pregnancy.\(^{63}\) Eastern asserted the BFOQ defense, stating that its policy of mandatory maternity leave immediately upon knowledge of pregnancy was justified because pregnant flight attendants could hinder the safe evacuation of passengers in the event of an emergency.\(^{64}\) The court found that a mandatory leave policy was necessary to the safe and efficient operation of Eastern’s business and that determining maternity leave on an individual basis would not accomplish this purpose.\(^{65}\) Instead, Eastern could require mandatory leave after thirteen weeks of preg-

\(^{59}\) Id. at 259.

\(^{60}\) Id. at 263.

\(^{61}\) Id. at 262–63.

\(^{62}\) Id. at 260.

\(^{63}\) 633 F.2d 361, 366–67 (4th Cir. 1980) (per curiam).

\(^{64}\) Id. at 365.

\(^{65}\) Id. at 373.
nancy. As the court reasoned, "We do not minimize the importance of that working time to individual women who may desire and need the income which they would earn. In choosing between two critical values, however, passenger safety is sufficiently compelling to override this impact." With this statement, the court effectively pitted women's rights against passenger safety and found that passenger safety outweighs a woman's claim to be free from gender discrimination.

However, this holding appears suspect, as the dissent (written by Judge Butzner and joined by three others) pointed out. Interestingly, knowledge of pregnancy was Eastern's only health-related involuntary leave requirement; all other health problems were evaluated based on the individual's ability to perform flight duties, including both diabetes and epilepsy, which medical experts testified are more disabling than pregnancy. Furthermore, as the dissent also noted, while the case was on appeal, Eastern actually changed its policy, allowing pregnant flight attendants to work as long as their doctors or Eastern's medical department certified their capability. Thus, this policy change suggested that an individual evaluation regarding capability during pregnancy is a workable option.

Acting in concert with Title VII on airline workplace policies was the Pregnancy Discrimination Act (PDA). Following the passage of the PDA in 1978, employers were forced to treat a pregnant employee who experienced a temporary disability due to her pregnancy the same as other temporarily disabled employees. While this seems straightforward, feminists and women's rights activists were divided over what it meant in practice. Did "the PDA prohibit[] employers from treating pregnant workers more favorably than other temporarily disabled employees[?]" The debate was similar to the one that had erupted around Title VII, with women arguing on both sides. Some women's rights activists argued for "equal treat-

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66 Id.
67 Id. at 372.
68 See id. at 373 (Butzner, J., dissenting).
69 Id. at 365, 376.
70 Id. at 376.
71 Id. at 377.
74 Id.
ment,” meaning that pregnant employees should receive “exactly the same rights as other temporarily disabled” employees. Others thought that courts should embrace an “accommodation approach, which would permit employers to treat pregnant women better than other temporarily disabled workers as necessitated by the physical effects of pregnancy.” The Supreme Court ultimately ruled in California Federal Savings & Loan Association v. Guerra 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.’” Thus, employers can award their pregnant employees benefits and protections that they do not offer to other temporarily disabled workers.

The Court came to this conclusion after considering the extensive legislative history discussing the adverse impact of discrimination against pregnant workers. While the Court acknowledged that the legislative history says the PDA does not require employers to treat their pregnant workers better than their other employees, neither does the PDA prohibit employers from doing so. Thus, while the debate between equal treatment and special regulation regarding Title VII ended squarely on the side of equal treatment, the debate between equal treatment and special treatment surrounding the PDA ended in favor of special treatment, or at least allowing the possibility of special treatment for pregnant women.

Although it involved a ticketing sales agent and not a flight attendant, Urbano v. Continental Airlines highlights the effects of the PDA and a common problem among airlines regarding pregnant flight attendants who are temporarily disabled prior to their mandatory maternity leave date. In Urbano, a female ticketing sales agent became pregnant and suffered lower-back pain. Her job duties required that she lift passengers’ often-heavy baggage. Her physician ordered her to refrain from lifting more than twenty pounds during her pregnancy, “so [she] requested to work in a Service Center Agent position, which

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75 Id.
76 Id.
78 Grossman & Thomas, supra note 73, at 25.
79 Guerra, 479 U.S. at 285.
80 Id. at 285–87.
81 See Urbano v. Cont’l Airlines, 138 F.3d 204, 205 (5th Cir. 1998).
82 Id.
83 Id.
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[did] not require lifting heavy loads.” However, Continental’s light duty policy only applied to employees injured on the job. Thus, the court held that because Ms. Urbano’s condition (pregnancy) was not caused by an on-the-job injury, she could be denied a transfer to temporary light duty work since this work was not available to other employees injured off the job. The airline provided a legitimate, nondiscriminatory reason for the employment action, and a finding for the plaintiff would have had the effect of granting special treatment for pregnant employees, which the PDA does not require.

_Urbano_ thus shows the tension between the PDA’s prohibition on discrimination against pregnant women and the needs of other temporarily disabled workers. However, as the Court noted in _Guerra_, the purpose of the PDA “is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.” As Justice Stevens said in his concurrence, the PDA should be interpreted within the context of Title VII. There is a distinction between discrimination against members of a specific class and discrimination in favor of members of that class, and the PDA does not require absolute neutrality. While the court’s language in _Urbano_ focused on the rights of pregnant workers in comparison to other disabled workers, perhaps it should have focused primarily on pregnancy limiting women’s equal employment opportunities.

D. THE FAMILY AND MEDICAL LEAVE ACT

The final chapter in the line of anti-sex discrimination legislation involves the passage of the Family and Medical Leave Act of 1993 (FMLA), fifteen years after the PDA. This statute applies only to employers with fifty or more employees and to employees who have worked for their employer for at least twelve months. It provides both eligible men and women up to

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85 _Urbano_, 138 F.3d at 205.
86 Id. at 206.
87 Yue, supra note 84, at 494.
89 Id. at 293–94 (Stevens, J., concurring).
90 Id. at 294.
91 Grossman & Thomas, supra note 73, at 25.
twelve weeks of unpaid leave per year to care for a newborn, adopted child, seriously ill family member, or one's own serious health condition. What it means for pregnant women is that an eligible pregnant worker may take up to twelve weeks of unpaid maternity leave during her pregnancy or after she gives birth. An employer must continue to offer the employee health benefits during this time. Although the employee may not be paid for this time off, she will be guaranteed her position or, if it is no longer available, one equal in pay, benefits, and responsibility when she returns. The FMLA thus provides several substantive, guaranteed protections to pregnant workers as opposed to the general promise of freedom from discrimination of Title VII and the PDA.

III. CURRENT STATE OF THE LAW, EMPLOYER POLICIES, AND WHY THEY ARE PROBLEMATIC

While the passage of Title VII, the PDA, and the FMLA appeared to chip away at discriminatory practices against pregnant flight attendants in the airline industry, current airline policies regarding mandatory maternity leave look fairly similar to those of the late 1970s and the 1980s. In fact, it is as if this field, once a hotspot for action and change, is stagnant. Why is it that airlines are able to maintain their mandatory maternity leave policies when other industries have been forced to abandon them?

A. CURRENT STATE OF THE LAW

If Title VII and the PDA cracked the dam holding up the airline industry's mandatory maternity leave policies, the bona fide occupational qualification (BFOQ) defense provided the glue to stop the floodgates. Title VII provides for the BFOQ defense, encompassed in Section 703(e):

> Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice for any employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification

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93 Grossman & Thomas, supra note 73, at 25.
94 See id.
95 29 U.S.C. §§ 2612, 2614(c)(1).
96 Id. § 2614(a)(1).
97 Grossman & Thomas, supra note 73, at 29.
98 See Reed, supra note 6, at 281–82.
reasonably necessary to the normal operation of that particular business or enterprise.\textsuperscript{99}

Congress thus provided a statutory defense to a Title VII claim where an employer can establish that discrimination based on sex is "reasonably necessary to the normal operation of the business."\textsuperscript{100}

The BFOQ defense provides employers a way to get around Title VII's ban on gender discrimination by allowing employers to argue that their discriminatory behavior is necessary for their business.\textsuperscript{101} However, the BFOQ defense has been interpreted extremely narrowly.\textsuperscript{102} In fact, one of the only other industries besides the airline industry where employers can assert safety-related BFOQ defenses in response to a claim of gender discrimination is the prison system.\textsuperscript{103} The Supreme Court has upheld sexually discriminatory hiring practices of prison guards because of the necessity of security, the violence of male prisoners, and the risk to this security that female guards pose in prisons because of their "womanhood" and likelihood to incite violence and aggression in this environment.\textsuperscript{104} Courts have also upheld BFOQ defenses based on privacy concerns in industries such as healthcare.\textsuperscript{105} While mandatory maternity leave policies were struck down across other industries, they were allowed to a certain point—usually between five and seven months\textsuperscript{106}—in the airline industry.\textsuperscript{107} Justifications based on concern for the safety of the fetus or the mother could not stand, but concern for third-party passenger safety was allowed.\textsuperscript{108} Thus, even though

\textsuperscript{101} Manley, supra note 100, at 169.
\textsuperscript{102} Id. at 180 (citing Dothard v. Rawlinson, 433 U.S. 321, 334–35 (1977)).
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{108} See Burwell, 633 F.2d at 373.
courts interpreted the BFOQ defense narrowly, arguing that a pregnant flight attendant cannot perform her duties in an emergency was sufficient. Interestingly, a similar argument, that a pregnant teacher cannot safely perform her duties to children in an emergency, failed in Guerra. Thus, "the incantation of a safety rationale is not an abracadabra to which [the] court must defer judgment." However, courts remain receptive to at least some limitations on pregnant flight attendants based on passenger-safety concerns.

By the end of the 1980s, the BFOQ defense was firmly planted in airline legal discourse, and very few cases regarding pregnancy in the airline industry were litigated. The latest case involving mandatory maternity leave was In re Pan American Airways, Inc. in 1990. There, the court struck down the airline's policy requiring mandatory maternity leave immediately upon knowledge of pregnancy, but spoke approvingly in dicta of another airline's policy requiring mandatory leave at twenty weeks. Thus, although courts may have been moving away from immediate mandatory maternity leave upon knowledge of pregnancy, they continued to allow mandatory maternity leave policies at a certain point in a woman's pregnancy.

However, with no firm consensus among the lower courts on the exact date when a female flight attendant must stop work and with female flight attendants' continued need for income during their pregnancies, claims against airlines did not totally disappear. Instead, these cases were often settled. In 1991, the EEOC sued USAir over a policy requiring flight attendants to take mandatory maternity leave after the thirteenth week of pregnancy. USAir settled the case for $270,000. In fact, although some claims are still filed, mandatory maternity leave in the airline industry today is considered largely settled, with most airlines allowing flight attendants to work until the third trimester of pregnancy.

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111 See, e.g., Burwell, 633 F.2d at 373.
112 905 F.2d 1457, 1462 (11th Cir. 1990).
113 Id. at 1463.
114 Reed, supra note 6, at 281–82.
115 Id. at 282.
116 Id.
117 Id.
B. CURRENT AIRLINE POLICIES AND WHY THEY ARE PROBLEMATIC

Today, collective bargaining agreements (CBAs) between airline employers and flight-attendant unions usually include provisions requiring maternity leave for flight attendants fit to perform their duties between the second trimester and the beginning of the third trimester. These CBA provisions may even be considered fairly generous—although the maternity leave is unpaid, the CBA allows female flight attendants to accrue seniority and maintain health insurance and sick-leave benefits while on maternity leave. Furthermore, it is not uncommon for airlines to have temporary disability policies that include light duty assignments for employees injured on or off the job. Finally, major airlines typically employ more than fifty employees and are thus governed by the FMLA, giving women up to twelve weeks of unpaid maternity leave that can also be used, such as following the birth of the child. In light of these policies, it may seem as if discrimination against pregnant flight attendants has largely disappeared, or is at least contained as much as possible considering the critical interest of passenger safety. However, although the current policies may appear reasonable, in effect they enable continued discriminatory policies against women and make it difficult to advocate for change by pitting public safety and disability rights against women’s equal employment rights.

As courts have recognized, mandatory maternity leave in itself is a facially discriminatory practice. Thus, by codifying the BFOQ defense, Title VII essentially enabled some forms of discrimination. Interestingly, the BFOQ defense specifically does not apply to race.

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119 See id. at 648.

120 See, e.g., Urban0 v. Cont’l Airlines, 138 F.3d 204, 205 (5th Cir. 1998).


122 See, e.g., Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980).

123 Manley, supra note 100, at 169.

124 Id. at 170.
tries,\textsuperscript{125} it has a large impact on female flight attendants due to the recognition of passenger safety as a valid business purpose in the airline industry and the dominance of women in these positions.\textsuperscript{126} If the purpose of Title VII was to end discriminatory employment practices against women, then it seems as if the BFOQ defense as applied to women in the airline industry is antithetical.\textsuperscript{127} This is especially true in light of the suspect reasoning of cases that have applied the defense, concluding that there is no reasonable business alternative to a mandatory maternity leave policy.\textsuperscript{128} Specifically, these cases have disposed of the argument that airlines could evaluate their female employees individually to determine their capability to work.\textsuperscript{129} However, as the dissent in \textit{Burwell} said, some airlines do require individual evaluation, at least until the twenty-eighth week.\textsuperscript{130} After consulting medical experts at the Mayo Clinic, Northwest Airlines concluded that pregnancy does not affect flight attendants' abilities until late in gestation.\textsuperscript{131} As one expert in gynecology made clear, the risk of miscarriage, which he admitted could be disabling, poses no greater risk to pregnant flight attendants than male stewards suffering from appendicitis or a heart attack while in flight.\textsuperscript{132} However, the majority apparently did not agree and concluded that the airline's policy grounding pregnant flight attendants after the thirteenth week was necessary and that there was no reasonable business alternative.\textsuperscript{133} Although the logic of the majority is perhaps troubling, it is not surprising. The debate regarding mandatory maternity leave has focused on the BFOQ defense airlines assert, that of passenger safety. A woman's right to continue work while pregnant, free of discriminatory employment practices, is contrasted with the need for public safety. Framing the debate in this way puts women's rights activists in an uncomfortable position. Arguing

\textsuperscript{125} See \textit{id.} at 176–82 (illustrating the limited successful uses of the BFOQ defense for privacy and safety concerns).

\textsuperscript{126} See \textit{Burwell v. E. Airlines,} Inc., 633 F.2d 361, 363 (4th Cir. 1980) (per curiam) (at the time the suit was brought, women accounted for ninety percent of flight attendants).

\textsuperscript{127} See \textit{Manley, supra} note 100, at 169 ("[B]y utilizing the BFOQ defense, employers are permitted to partake in the exact discriminatory practices that Title VII directly seeks to forbid.").

\textsuperscript{128} See, e.g., \textit{Burwell,} 633 F.2d at 373.

\textsuperscript{129} \textit{Id.} at 372–73.

\textsuperscript{130} \textit{Id.} at 375 (Butzner, J., dissenting).

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 371–72.
for more equal treatment and a determination between a woman and her doctor based on individual capacity to work means denying some form of public safety. The contrast between the needs of public safety in the airline industry and other industries is seen sharply in the Supreme Court’s decision for teachers in LaFleur, which found two school boards’ sweeping maternity leave policies unconstitutional because the ability to work during pregnancy is an entirely individual matter.\textsuperscript{134} Thus, passenger safety in the airline industry is a legitimate rationale to bar pregnant women’s continued employment, while children’s safety in schools is not.

Another problem with mandatory maternity leave policies in the airlines is that these policies have rarely been based on firm scientific or medical knowledge.\textsuperscript{135} Instead, restrictions remain despite advances in medical knowledge and technology, the passage of the Pregnancy Discrimination Act, and the economic and social reality that many women in other industries work throughout pregnancy up until giving birth.\textsuperscript{136} Thus, employers can potentially discriminate against their pregnant employees based on stereotypes about the capabilities of pregnant workers, something that the PDA expressly forbids.\textsuperscript{137} This is illustrated by the fact that courts have ruled in various directions when considering the validity of mandatory maternity leave in the airline industry.\textsuperscript{138} Furthermore, as courts have pointed out, when mandatory maternity leave policies are in place, women often delay reporting their pregnancies so they can work as long as

\begin{footnotesize}
\textsuperscript{135} See Burwell, 633 F.2d at 375, 376 (Butzner, J., dissenting). Although Northwest Airlines consulted medical experts in crafting its policy, the dissent pointed out that “without conducting any study to determine whether pregnancy impairs stewardesses’ ability to work, [Eastern] adopted the rule requiring stewardesses to take unpaid leave when they became pregnant. Although aware that other airlines safely operated with less restrictive policies, Eastern has made no effort to administer its policy on an individual basis.” \textit{Id}.
\textsuperscript{136} As early as 1984, the Council on Scientific Affairs recommended that women “should be able to continue productive work until the onset of labor.” Grossman & Thomas, \textit{supra} note 73, at 19.
\textsuperscript{137} \textit{Id}. at 17–18.

\end{footnotesize}
possible. This fact calls into question whether the policies are necessary or reflect scientific realities. Because mandatory maternity leave policies are contained today in CBAs, which also include provisions requiring arbitration, women are not filing claims in court against the airlines challenging mandatory maternity leave like they did in the past. Airlines are preferring to settle claims as opposed to litigating them, which further produces divergent policies and results for women that are not based on current scientific knowledge.

While mandatory maternity leave policies assume that a pregnant flight attendant is capable and willing to work, pregnant women may also experience discrimination when they are not capable of performing their usual duties or are temporarily disabled at some point during their pregnancies. This situation can be particularly troubling because the PDA is crafted in terms of comparative rights, which courts have often interpreted to mean comparative to other temporarily disabled workers who have been similarly disabled. What this means for pregnant flight attendants who are temporarily disabled is that they are at the mercy of their employers' temporary disability policies. While airlines likely have some type of temporary disability policy in place, it may consist of a distinction between those employees injured on the job versus those that sustain off-the-job injuries. Because pregnancy does not fit neatly into either category, courts have trouble reaching consistent and fair results. The PDA requires comparing pregnant workers to other "similarly situated" employees, which most courts have interpreted to mean those employees injured off the job. Because an employer's policy may offer light duty assignments only to those employees with occupational injuries, pregnant flight attendants

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139 See In re Pan Am. Airways, Inc., 905 F.2d 1457, 1459 (11th Cir. 1990) (pregnant flight attendant delayed reporting she was pregnant until she was between twenty-one and twenty-four weeks pregnant where airline had policy requiring pregnant flight attendants to alert their employer upon knowledge of their pregnancy and required immediate maternity leave).

140 Reed, supra note 6, at 267-68.

141 Id. at 282.

142 Grossman & Thomas, supra note 73, at 17.

143 Id. at 18.

144 Id. at 28.

145 See, e.g., Urbano v. Cont'l Airlines, 138 F.3d 204, 205 (5th Cir. 1998) (airline gave light duty assignments to its temporarily disabled workers who sustained on-the-job injuries but did not provide light duty work for those injured off the job).

146 Grossman & Thomas, supra note 73, at 36.

147 Id. at 37.
are necessarily excluded. What this means for pregnant flight attendants is that they are essentially denied an opportunity to remain in the workforce during pregnancy and are deprived of the opportunity to earn additional income to support their families. As critics have noted, this burden often means the difference between getting by and falling into poverty. Yet this situation poses another problem when fighting for equal opportunity in the workplace. If pregnant women allege that they should be compared to all temporarily disabled employees “similar in their ability to work” (and not just in the cause of their disability), courts often construe these claims as requests by women for “special treatment.” The “structure of the [PDA itself] relies on the male norm” for benefits since pregnant workers are afforded “only those benefits that are also granted non-pregnant employees.” Since pregnancy is inherently a female condition, the statute thus fails to adequately take into account female needs and looks at the problem through a gendered lens. By framing the argument in this way, courts have essentially pitted women’s rights against rights for disabled workers as a whole, specifically those of disabled men. If we allow light duty assignments to be given to pregnant women who are not injured on the job, we therefore allow them to step ahead in line of disabled men. Because the debate has been framed as a demand for special treatment, it brings up images of the protectionist laws and other regulations now deemed harmful to the achievement of women’s equality. Women’s rights activists are thus inhibited by a strict definition of equality (framed in comparison to men) from seeking policies and workplace practices that could be potentially more beneficial and perhaps more “equal” to pregnant women than current practices.

While discrimination against women in itself likely damages women by reinforcing cultural stereotypes based on sex, the fact remains that this discrimination results in a negative impact on

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148 Id.
150 Id.
151 Grossman & Thomas, supra note 73, at 41.
152 Id. at 34.
153 Id.
154 Id.
women's economic realities.\textsuperscript{155} For example, an Ohio flight attendant placed on mandatory maternity leave filed for unemployment and was denied.\textsuperscript{156} In the resulting lawsuit, the court held that she was ineligible because she had left her employment voluntarily and the CBA included a mandatory maternity leave provision at twenty-seven weeks of pregnancy.\textsuperscript{157} Ohio had a common-law exception to the prohibition of a waiver of unemployment compensation claims for union-represented employees.\textsuperscript{158} This exception disallowed unemployment benefits for workers whose termination packages were pursuant to CBAs because the employees were deemed to have accepted the packages and were thus voluntarily unemployed.\textsuperscript{159} Because the mandatory maternity leave policy was contained in a CBA and union-represented employees inherently have more bargaining power, the court concluded that the pregnant flight attendant was subject to the agreement and thus ineligible for unemployment benefits.\textsuperscript{160} In essence, the union bargained away pregnant female employees' right to unemployment compensation. However, at least some courts have held that a Title VII right to be free from discrimination based on sex cannot be bargained away by a union.\textsuperscript{161} Furthermore, the case recognized that the modern view is to allow unemployment compensation when a maternity leave policy is contained in a CBA.\textsuperscript{162} The case itself stated that this is the law in both Florida and Colorado.\textsuperscript{163} However, this case illustrates the debilitating impact that inconsistent state laws can have on the economic lives of women.\textsuperscript{164} As the dissent noted, the medical field has evolved.\textsuperscript{165} Although the CBA provided for pregnant women to leave work at twenty-seven weeks (roughly six months pregnant), the flight attendant's doctor found no reason why she could not continue to work.\textsuperscript{166} While some states may allow pregnant flight attendants subject

\textsuperscript{155} Brief of Women's Legal Defense Fund, \textit{supra} note 149, at *3–4.
\textsuperscript{156} Cont'l Airlines, Inc. v. Ohio Dep't of Job & Family Servs., 878 N.E. 2d 647, 650–51 (Ohio Ct. App. 2007).
\textsuperscript{157} Id. at 656.
\textsuperscript{158} Id. at 651.
\textsuperscript{159} Id. at 652.
\textsuperscript{160} Id. at 656.
\textsuperscript{162} Ohio Dep't of Job & Family Servs., 878 N.E. 2d at 654.
\textsuperscript{163} Id.
\textsuperscript{164} See id. at 655–56.
\textsuperscript{165} Id. at 656 (Blackmon, J., dissenting).
\textsuperscript{166} Id.
to mandatory maternity leave provisions of CBAs to collect unemployment, others do not.¹⁶⁷

This recent unemployment case highlights the economic reality that many women today are reliant upon their income for survival and do not have the luxury to take a three-month maternity leave.¹⁶⁸ Furthermore, it stresses the need for a new look at the current law regarding the airline industry, which is inadequate and fails to protect women from discrimination in the workplace. Because they must take mandatory maternity leave at a certain point in pregnancy that is not adequately justified by medical knowledge or science, women are disproportionately impacted and subjected to treatment that has a severe economic effect on their potential earnings, ability to support themselves, and quality of life.¹⁶⁹ In addition, the mandatory maternity leave policy does not adequately protect the public interest of passenger safety due to variability in individual pregnancies and the risk levels for different women. For example, a flight attendant who is twenty weeks pregnant would technically be allowed to fly under her employer’s policy requiring mandatory maternity leave at twenty-seven weeks. However, if this flight attendant experiences symptoms, such as lower back pain, that prevent her from doing her job safely, she could perhaps fly under the radar and continue working despite possible safety concerns. This situation could potentially be avoided if flight attendants were evaluated individually based on ability to work and were given more options to maintain economic self-sufficiency. Because debates surrounding Title VII and the PDA have been framed with a gendered lens, women’s rights have been seen as a threat not only to the public’s safety but to disabled workers as well. This public discourse makes it even more difficult to fight for women’s equality, since efforts are seen as being in conflict with these other interests and as a demand for special treatment,¹⁷⁰ a concept that is distasteful in the minds of the general public and that also splits women’s rights activists.

IV. POSSIBLE SOLUTIONS

While the current mandatory maternity leave policies in the airline industry are problematic, the solution is not easy to iden-

¹⁶⁷ Id.
¹⁶⁸ Id.
¹⁶⁹ Id.
¹⁷⁰ Grossman & Thomas, supra note 73, at 34–35.
tify. This is partly due to the fact that there is no quick fix for a complex problem and because the solution can vary with the situation. For example, a different solution may be needed when a woman is capable and able to work during her pregnancy as opposed to when she is temporarily disabled during her pregnancy. It is also difficult to advocate for change due to the way the conversation has been framed, through a gendered lens and as a conflict between value systems: equality versus safety, or women’s equality versus disabled workers’ equality. Finally, the problem can be minimized since it affects only female flight attendants and restricts them for just a few months.

A. SOLUTION 1: CHANGE THE DEBATE

The first possible solution is to change the debate regarding pregnancy. Although arguably the hardest to implement, this solution would allow the problem to be reframed from one of opposing interests to focusing on gender discrimination and recognizing the importance of eliminating this persistent form of inequality. By reframing the debate, more creative solutions can be discussed, and the confines of a fixed pie of rights for various competing groups can be expanded.

To change the debate, we must first recognize that the debate is cast using a gendered perspective. Instead of being neutral, the language we use frames how we see and think about the problem.71 When we talk about equal rights for women, we are really talking about treating women equally to men in a historically male-dominated and male-focused workplace.72 Thus, by talking about equal rights, we are limiting ourselves to those rights that men currently enjoy.73 Since men cannot experience pregnancy, this comparison-based language does not take into account the fact that the workplace we imagine does not

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73 Albiston, supra note 171, at 1095.
74 As Joanna Grossman and Gillian Thomas note, “[T]he very structure of the [PDA] statute relies on the male norm as the baseline for benefits—that is, pregnant women are guaranteed only those benefits that are also granted non-pregnant employees. Yet, the needs of pregnant workers are likely to differ in significant ways from the needs of workers disabled by other causes.” Grossman & Thomas, supra note 73, at 34.
have pregnant workers in it. We limit ourselves by not considering all of the possibilities, such as a workplace that does not see pregnancy as a threat but as a normal and familiar part of employee life.

Instead of talking about equal rights in terms of men, we should reframe the debate to be about equal rights in terms of personal autonomy. Women and men should have the right to pursue both a career and a family. Women and men should be able to make decisions for themselves regarding these protected interests. Because women and men inherently experience family in different ways (women bear the children), the fight for equal treatment should focus not on limiting the rights for one group so they are the same as the other, but expanding the rights for both. And because men never have to make the choice between a career and a family due to pregnancy, women's forced choices should be lessened as much as possible. In a way, we have tried to become "gender-blind" similar to how we have tried to be "color-blind." Yet different treatment between the genders exists, and this treatment is often quietly discriminatory. By refusing to recognize differences between genders, we have solidified and accepted the disparate treatment that the different groups receive. Part of fixing the problem is thus to recognize it and take steps to correct it.

The difference between an equal rights focus and a personal autonomy focus can be illustrated by the language and reasoning courts apply to fetal protection arguments. For example, in Asad v. Continental Airlines, Inc., the court focused on the decisional autonomy that Title VII and the PDA preserve for pregnant women. The case involved a pregnant woman, Ms. Asad,
who worked on the ramp at Continental.\textsuperscript{182} Ms. Asad expressed concern about the air quality, de-icing fluids, and fumes on the ramp and their effects on her fetus, and requested a transfer.\textsuperscript{183} The airline refused and followed its normal bidding procedure, despite the fact that other suitable positions most likely became available.\textsuperscript{184} Ms. Asad continued to work until the week before her son was born because (as her testimony explains) "she could not afford to quit or take an unpaid leave of absence and was given no other option."\textsuperscript{185} Ms. Asad’s child was born with cerebral palsy and a brain injury.\textsuperscript{186} Ms. Asad sued Continental for negligence, but Continental argued that her claim was preempted by the PDA, which mandated that it could not treat her differently from other workers because of her sex.\textsuperscript{187} The court held that Ms. Asad’s claim was not preempted.\textsuperscript{188} The PDA guarantees decisional autonomy to women regarding pregnancy and work.\textsuperscript{189} The PDA prevents employment policies that discriminate against pregnant women, but it does not preclude policies that take into account the reality of pregnancy so long as these are not based on harmful stereotypes and do not disadvantage women.\textsuperscript{190} As the court noted,

\begin{quote}
[T]he PDA and Title VII should not prevent an employer from temporarily transferring a pregnant woman [sic], at her request, for the protection of her fetus. A transfer under such circumstances would preserve the decisional autonomy of the pregnant woman, is not based on stereotypical notions to preclude the employment of women, and in itself does not violate Title VII. . . . [S]uch a policy is one which might leave decisional autonomy with the woman, protect the job security of pregnant women, and level the playing field for male and female workers.\textsuperscript{191}
\end{quote}

Thus, although the court allowed a policy that could be argued as "special treatment" for pregnant workers (by allowing them to be transferred to positions outside the hierarchical bidding process), it focused on the need for decisional autonomy as a way to "level the playing field" or gain equality for female work-

\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 777, 779–80.
\textsuperscript{185} Id. at 780.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 785.
\textsuperscript{188} Id. at 790.
\textsuperscript{189} Id. at 789.
\textsuperscript{190} Id. at 789–90.
\textsuperscript{191} Id. at 790.
ers. Interestingly, this resulted in a policy that would allow a pregnant worker to request a transfer due to concern for the health of her fetus but would not allow an employer-mandated policy transferring all pregnant workers because of fetal protection concerns. The court made clear that while this type of alternative may impose additional costs on employers, the extra cost of employing members of one sex does not provide an affirmative Title VII defense.

By recasting the debate from equal treatment for men and women to personal autonomy, the court employed a line of reasoning that took gender and pregnancy into account, and ultimately achieved a result that gave women greater opportunities to be treated as equals in the workplace while balancing work and family. Personal autonomy logic can be applied to mandatory maternity leave policies in the airline industry. For example, instead of requiring mandatory maternity leave, employers could transfer pregnant women to a less safety-conscious position at their request. Although this transfer would violate bidding hierarchy and potentially allow a female to be transferred before a male, it would actually better achieve equality in the workplace between men and women by leveling the playing field. A personal autonomy focus takes account of the fact that only women become pregnant, but that both women and men should be allowed to work and have a family. Under current policy, only men are truly allowed to make this decision for themselves. This approach thus reshapes the debate such that women's rights and disability rights are not in conflict, but are each a separate goal to pursue.

If a pregnant flight attendant does not request a transfer, she could be allowed to work as long as she and her doctor decide it is safe. The doctor could be required to consult with the airline's physician or the pregnant flight attendant could be evaluated by the airline's own physician. When it becomes no longer feasible for the pregnant woman to continue to fly, she could be transferred to a less safety-conscious position. This policy moves the decision about work and pregnancy closer to the woman, while taking account of the passenger safety interest by allowing the woman and her doctor to make a joint decision about the safety of continuing to work and fly. Therefore, instead of third-

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192 See id. at 790, n.23.
193 Id.
194 See id. at 790.
party safety consistently overriding women’s interest in equal employment opportunities, a better balance is achieved.

B. SOLUTION 2: TREAT PREGNANCY DIFFERENTLY

Another possible solution would focus on recognizing that pregnancy is an inherently female condition with no comparable male counterpart. This view would legitimize pregnancy as a biological difference between men and women and would allow workplace policies to recognize this difference and conform to the unique requirements of pregnancy. Instead of treating pregnancy as all other temporary disabilities, we would treat pregnancy as a unique, temporary medical situation unlike other disabilities and craft workplace policies specifically for pregnant workers. This solution would allow advocates to request accommodations for pregnancy, such as light duty work even when the employer has no light duty policy at all.195 This solution accompanies Solution 1 not only by reframing the debate from that of gender-neutral equal treatment, but also by recognizing current treatment of pregnancy in the workplace as inherently unequal and requesting specific changes to accommodate pregnancy.196 Only by recognizing inequality and advocating for change, including not just equal treatment but also better treatment for pregnancy, would we be able to effectively achieve more equality for women in the workplace.

However, this solution is unlikely to gain much traction on its own. Disability rights activists would potentially see this as a threat to their rights, placing women ahead of temporarily disabled men by forming workplace policies that favor women. Courts traditionally have been unreceptive to this type of argument, instead viewing the workplace as a level playing field where a request for light duty work for pregnant employees is an unwarranted request for special treatment that is neither justified nor beneficial for society as a whole. For example, most courts analyzing whether women temporarily disabled during pregnancy should be treated as all disabled employees, injured on or off the job, or as only those employees injured off the job, have concluded that the correct comparison group is to those employees injured off the job, thereby rejecting a disparate impact argument.197 Even feminist activists could see this as a dan-

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195 Grossman & Thomas, supra note 73, at 41–42.
196 Id. at 47.
197 Id. at 42.
gerous and slippery slope back to the protectionist policies that valued women only as mothers and homemakers rather than workers, pushing women back into their traditional gender roles.\(^{198}\)

C. SOLUTION 3: EVALUATE INDIVIDUAL CAPABILITY

While there may be a consensus among the medical community that at some point pregnant women may not be able to perform safety functions adequately, this determination needs to be made on an individual basis as the Supreme Court has required in other industries and as is consistent with the language of the PDA.\(^{199}\) The current practice of allowing an airline to decide that all pregnant flight attendants are incapable of working without risking passenger safety ignores the fact that flight attendants can assess their personal abilities in consultation with their physicians and reinforces paternalistic norms.\(^{200}\) Furthermore, it prolongs gender discrimination by assuming that all women are unable to work because of their pregnancies, which the Supreme Court expressly forbade in \textit{LaFleur}.\(^{201}\) In addition, mandatory maternity leave policies often lack a scientific or medical basis and are uninformed by current medical knowledge.\(^{202}\) For example, while medical professionals historically advised women to leave their jobs at the sixth month of pregnancy, in 1984, the American Medical Association acknowledged that “the advice given by generations of physicians regarding work during normal pregnancy has historically been more the result of social and cultural beliefs about the nature of pregnancy (and of pregnant women) than the result of any documented medical experience with pregnancy and work.”\(^{203}\) The council went on to recommend that most women “should be able . . . to continue productive work until the onset of labor.”\(^{204}\)

\(^{198}\) Albiston, \textit{supra} note 171, at 1130–31.

\(^{199}\) Grossman & Thomas, \textit{supra} note 73, at 26–27.


\(^{202}\) See Burwell v. E. Airlines, Inc., 633 F.2d 361, 375 (4th Cir. 1980) (per curiam) (Butzner, J., dissenting).


\(^{204}\) \textit{Id.}
The airline-specific exception to an individual evaluation has been questioned by judicial experts in the past but ultimately has been upheld after a certain point.\textsuperscript{205} Instead of the current judicial allowances, the airline industry should be treated as other industries.\textsuperscript{206} Although passenger safety is a legitimate and critical public interest, the airline industry should not be able to whisper the words "passenger safety" and expect abracadabra effects without medical and scientific justification.\textsuperscript{207} Instead, a realistic alternative that would better account for a more equal balance between freedom from gender discrimination and passenger safety would be to evaluate pregnant flight attendants on a case-by-case basis, perhaps using factors such as the difficulty of the pregnancy, the length of the flight routes, the size of the aircraft, and specific emergency tasks, etc. The evaluation would be done by a medical professional, either a doctor of the airline's choosing or the woman's personal physician. The decision about when to leave work would be taken out of the sole grasp of the employer and placed back into the hands of the pregnant woman and her physician.

Although this approach would ameliorate the situation, it is not an all-encompassing solution. This approach does not address the fact that employer policies regarding pregnancy still use a capacity-based model and many women are temporarily disabled or unable to work fully at some point during pregnancy.\textsuperscript{208} Furthermore, while it addresses a specific problem in the airline industry, it does not address the larger issue of the problematic nature of the debate surrounding pregnancy and equal treatment. Thus, this solution alone will not solve the complex societal problem of discrimination regarding pregnancy.

D. Solution 4: Compare Pregnancy to Other Similarly Situated Disabilities

While Solution 3 would help address discriminatory treatment regarding pregnant flight attendants fully capable of working, at least until late in pregnancy, \textit{Urbano} illustrates that not all wo-
men are able to perform their job responsibilities once they become pregnant. In fact, "current data . . . estimate[s] that close to twenty-five percent of women in the U.S. workforce hold physically strenuous jobs that may conflict with pregnancy." Flight-attendant work itself has a physical component, which courts have considered, requiring assistance lifting passenger baggage into overhead bins, standing for long periods, and stooping. Some women classified as having a temporary disability due to pregnancy are thus temporarily unable to perform some of their assigned job functions and yet may want or need to continue working. Thus, employers should allow women to take on light duty assignments or other non-safety sensitive positions during pregnancy. This is an especially attractive option for pregnant flight attendants. Once it is determined that a pregnant woman is no longer able to carry out the duties of her position as flight attendant safely or effectively, the airline could transfer her to a light duty position. This would avoid the conflict between passenger safety and pregnancy discrimination by allowing for pregnant women to be accommodated in a non-discriminatory fashion. While opponents may argue that this gives women special treatment, perhaps by taking away positions available for other temporarily disabled employees, courts could employ a disparate impact analysis to justify this action. For example, the PDA grants pregnant women the right to equal treatment in comparison to non-pregnant employees who are temporarily disabled but "similar in their ability or inability to work." Thus, where an employer has a policy affording light duty to some employees (like employees injured on the job), a strong argument can be made that this policy has a disparate impact on pregnant women since it is not treating pregnant women equally to other workers similar in their ability to work; instead, it treats pregnant women similar to only those certain employees injured in a specific way, an "artificial distinction" not contained in the statute. The comparison group should be all

2009 See Urbano v. Cont'l Airlines, 138 F.3d 204, 205 (5th Cir. 1998) (pregnant ticketing agent experienced lower-back pain due to her pregnancy and was unable to perform her existing work, which required her to lift heavy passenger baggage).

210 Grossman & Thomas, supra note 73, at 20–21.


213 Id. at 36.

214 Id. at 33 (quoting 42 U.S.C. § 2000e(k) (2000)).

215 Id. at 36.
disabled workers, meaning both those injured on and off the job.\textsuperscript{216} As Joanna Grossman and Gillian Thomas note,

\textbf{[N]ot only do women face the predictable medical event of pregnancy, they also are equally at risk for "off-the-job" medical conditions that their male colleagues face—from car accidents to cancer. Put differently, to the extent that women are forced to exhaust all of their sick, vacation, and/or FMLA time because they are not permitted to continue working during pregnancy, they are in a worse position to weather any off-the-job period than their male colleagues, who might have the cushion of paid sick or vacation leave, or the guaranteed twelve weeks of unpaid leave afforded by the FMLA.}\textsuperscript{217}

However, courts have been hesitant to apply the disparate-impact theory.\textsuperscript{218} As the \textit{Urbano} court noted, "Under the PDA, an employer is obliged to ignore a woman’s pregnancy and ‘to treat the employee as well as it would have if she were not pregnant.’"\textsuperscript{219} Yet this type of language relies on a pregnancy-blind theory, which allows discrimination to continue by not addressing the systemic roots.

Even if courts accept disparate-impact claims, this approach will not completely solve the problem. While attorneys, courts, and employers can benefit their pregnant employees by changing the analysis from disparate treatment to disparate impact, this change will only affect those employers who have some form of temporary disability policy or light duty policy in place.\textsuperscript{220} Thus, pregnant employees whose employers have no temporary disability policy at all will still be left in the cold. At some point, it may be necessary to treat pregnancy differently to achieve a better outcome for pregnant workers and to pass laws requiring substantive changes to employer disability policies, like the FMLA did for maternity leave policies.\textsuperscript{221}

\textbf{E. Solution 5: State Action}

In some instances states have passed laws more favorable to pregnant women than are required by federal law. For example, states have passed laws regarding family medical leave that

\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id. at 47.}
\textsuperscript{218} \textit{See, e.g., Urbano v. Cont’l Airlines, 138 F.3d 204, 206 (5th Cir. 1998).}
\textsuperscript{219} \textit{Id.} (quoting Piraino v. Int’l Orientation Res., Inc., 84 F.3d 270, 274 (7th Cir. 1996)) (emphasis added).
\textsuperscript{220} Grossman & Thomas, \textit{supra} note 73, at 35–36.
\textsuperscript{221} \textit{Id. at 29.}
supplement the FMLA.  

However, other states have laws that are not so generous, as illustrated by Ohio’s line of common-law authority prohibiting pregnant women subject to a CBA from collecting unemployment and lack of a statutory override. While the reality of divergent state laws regarding treatment of pregnancy discrimination can be vexing, the broad room for experimentation has sometimes produced interesting and hopeful results. For example, some states have statutes or regulations mandating accommodation of pregnancy-related disabilities, even if the employer does not offer this treatment to other temporarily disabled employees. A California statute requires temporary transfer of an employee with a pregnancy-related disability to a less strenuous or hazardous position during the pregnancy as long as (1) “the employee requests the transfer” (on advisement of a physician); (2) “the employer can ‘reasonably accommodate’ the transfer”; and (3) “the transfer does not require creating a new position, discharging a fellow employee, transferring an employee with greater seniority, or promoting an employee lacking qualifications for the new position.”

However, only five states and one territory (California, Connecticut, Louisiana, Oregon, Puerto Rico, and Hawaii) have such laws or regulations. While arguably greater consistency among state statutes would be desirable, state legislatures are in a unique position to meet the needs of their pregnant employees as courts are limited to judicial doctrines and states may be better able to regulate employers. Constituents should push their representatives to fight for more accommodating policies that meet the needs of pregnant employees. Legislatures should be aware of the progressive laws in other states, and try to provide their residents with similar rights. Finally, legislatures should push for more uniform unemployment compensation laws, allowing pregnant flight attendants to collect unemployment for the time that they are put on mandatory maternity leave. This policy would help alleviate some of the financial stress and inequality that results from foregoing wages for several months, even when a woman is able and willing to work.

222 Id. at 30.
224 Schlichtmann, supra note 203, at 394.
225 Id. at 394–95.
226 Id. at 394.
227 Id. at 396.
V. CONCLUSION

A comprehensive solution to the problem of discrimination inherent in mandatory maternity leave policies for female flight attendants will require a combination of various solutions. Re-framing the debate from an equal treatment theory to an autonomy theory will not by itself eliminate discriminatory treatment. Instead, courts, advocates, and employers must implement new policies, such as evaluating individual capacity of pregnant workers, treating pregnancy differently, and/or applying light duty policies to pregnant employees. Finally, state action will likely be necessary to push employers to implement light duty policies if the policy does not already exist and create favorable pregnancy laws. Together, these strategies will help give meaning to Title VII and the Pregnancy Discrimination Act’s desire to end discriminatory treatment of pregnant workers, especially in the case of female flight attendants, and find a better balance of the competing interests of passenger safety, gender discrimination, and disability rights.