

1996

Preferential Treatment or Discriminatory Standards: Do Employer-provided Insurance Plans Violate Title VII When They Exclude Treatment for Breast Cancer

Laurie Dechery

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Dechery, Laurie, "Preferential Treatment or Discriminatory Standards: Do Employer-provided Insurance Plans Violate Title VII When They Exclude Treatment for Breast Cancer" (1996). *Minnesota Law Review*. 1785.
<https://scholarship.law.umn.edu/mlr/1785>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Note

Preferential Treatment or Discriminatory Standards: Do Employer-provided Insurance Plans Violate Title VII When They Exclude Treatment for Breast Cancer?

Laurie Dechery*

On the eve of the deadline for her entry into HCT/ABMT treatment, a high dosage chemotherapy treatment program for her breast cancer,¹ Karen E. Henderson sought a preliminary injunction² against her health plan provider for refusing to pay for the treatment.³ Henderson claimed that the provider, by denying coverage, discriminated against her in violation of the Americans with Disabilities Act (ADA)⁴ and Title VII of the Civil Rights Act of 1964.⁵ The federal district court, finding that Henderson failed to provide sufficient evidence that she was likely to prevail on the merits of her claim, denied the injunction.⁶

* J.D. Candidate 1997, University of Minnesota Law School; A.M. 1983, Harvard University; B.A. 1981, State University of New York at Buffalo. I would like to thank Professor Stephen Beffort of the University of Minnesota Law School for his help and support.

1. Appellants' Appendix at 19, *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958 (8th Cir. 1995) (per curiam) (No. 95-2469) [hereinafter Appellants' Appendix] (Ratkin Aff. para. 7) ("Mrs. Henderson must follow a treatment program rigid as to time sequence. That sequence has already been started. . . . Administration of chemotherapy on this program should start by June 16, 1995."). For a description of HCT/ABMT, high dosage chemotherapy with autologous bone marrow transplantation, see *infra* Part I.A.

2. *Henderson v. Bodine Aluminum, Inc.*, No. 4:95-CV-1051-CAS, 1995 WL 449086, at *1 (E.D. Mo. June 15, 1995).

3. See Appellants' Appendix, *supra* note 1, at 44 (Ratkin Aff. Ex. 2) (providing a model consent form explaining the procedure); *infra* Part I.A. (describing HCT/ABMT for breast cancer).

4. The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

5. 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. V 1993).

6. *Henderson*, 1995 WL 449086, at *1-3. Other grounds for denial included Henderson's failure to demonstrate irreparable harm, request of the wrong relief in terms of monetary damages, and failure "to exhaust the contractual duties under the ERISA approved group health plan . . . [which] requires claimants to wait a minimum of sixty days before filing any civil

On expedited appeal,⁷ the Eighth Circuit reversed the district court, remanding the case for a preliminary injunction and trial on the merits.⁸ In its reported opinion, the Eighth Circuit held that if a plaintiff can demonstrate that a given treatment is nonexperimental and that the exclusionary insurance plan provides the same treatment for other comparable conditions, the denial of treatment arguably violates the ADA.⁹ The court expressed no opinion regarding the Title VII discrimination charge.¹⁰

Vague terms in health insurance contracts have led to a growing wave of litigation among plaintiffs caught between their physicians' medical recommendations and their insurers' business judgment.¹¹ By focusing exclusively on legal questions of contract interpretation, courts historically have avoided ethical issues and provided what they considered just results.¹² Evolution in contract drafting toward more explicit exclusionary terms makes it necessary to confront those ethical issues. In the context of a worsening health care crisis, defining what constitutes discrimi-

litigation." *Id.* at *3. The district court found it dispositive of a discrimination charge that the list of exceptions to a blanket exclusion of HCT/ABMT failed to include breast cancer. *Id.* Furthermore, because the plan on its face made no distinctions based on sex, the court found the Title VII claim also lacked any support. *Id.*

7. See Appellants' Appendix, *supra* note 1, at 18-23 (Ratkin Aff. paras. 3-13) (explaining the deadline facing Henderson).

8. Henderson v. Bodine Aluminum, Inc., No. 95-2469EMSL, 1995 WL 394046, at *1 (8th Cir. June 16, 1995). On the dissent of Judge Hansen, the Eighth Circuit later issued a clarification specifying that the injunction applied only to the employer, not Blue Cross, the insurance provider. Henderson v. Bodine Aluminum, Inc., No. 95-2469, 1995 WL 506941, at *1 (8th Cir. July 21, 1995).

9. Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 960 (8th Cir. 1995) (per curiam).

10. See *id.* at 960-62.

11. See *infra* Part I.A. (discussing the controversy among patients, insurance companies, and doctors over HCT/ABMT).

12. "[C]ases of this nature pose troubling social as well as ethical questions that go well beyond the legal issues." *Fuja v. Benefit Trust Life Ins. Co.*, 18 F.3d 1405, 1412 (7th Cir. 1994). As one judge described it:

[Judges] are inspired and motivated by compassion as anyone would be. Consequently, we often must remind ourselves that in our official capacities, we have authority only to issue rulings within the narrow parameters of the law and the facts before us. . . . [In denying coverage,] no personal satisfaction is taken, but that the law was followed.

Harris v. Mutual of Omaha, No. 92-1089-C, 1992 WL 421489, at *1 (S.D. Ind. Aug. 26, 1992).

nation in a health insurance plan challenges courts, ethicists, and practitioners alike.¹³ The court in *Henderson v. Bodine Aluminum, Inc.*,¹⁴ committed itself to taking on this challenge.

This Note considers whether an insurer's denial of coverage of HCT/ABMT for breast cancer discriminates against women. Part I provides an overview of the relevant contract issues and the controversy surrounding HCT/ABMT for breast cancer. Part II examines the status of insurance benefits under Title VII and considers whether a cause of action under Title VII should exist for breast cancer patients whose health insurance, a benefit of employment, excludes coverage for HCT/ABMT. This Part compares the applicability of two types of Title VII analysis and discusses potential legal arguments for both plaintiffs and defendants. Part III proposes a method for measuring the validity of the policy by asking whether a health insurance plan requires women to bear the burden of health risk. This Note concludes that plaintiffs should have a valid cause of action under Title VII and that such claims will not result in providing special legal status for women's health concerns.

I. HISTORICAL AND LEGAL DEVELOPMENT OF DISCRIMINATION CLAIMS AGAINST THE TERMS OF INSURANCE BENEFITS

The transition in litigation over HCT/ABMT coverage from contract to civil rights law reflects the endurance of the issues at stake. Their complexity requires an appreciation of the status of HCT/ABMT with patients and physicians and within the many institutions, including the legal community and the insurance industry, that grapple with the problem.

A. PERSPECTIVES ON HCT/ABMT FOR BREAST CANCER

The medical community has described HCT/ABMT as a state-of-the-art treatment, a last resort attempt at prolonging life, and an unproven experimentation.¹⁵ Whatever the characterization, it is a complex,¹⁶ risky,¹⁷ and particularly expensive¹⁸ treat-

13. See *infra* Part I.B. (discussing insurance industry standards and their potential for discrimination).

14. 70 F.3d 958, 960-62 (8th Cir. 1995) (per curiam).

15. Nancy A. Wynstra, *Breast Cancer: Selected Legal Issues*, 74 *CANCER* 491, 492-93 (Supp. 1994).

16. The program to which doctors referred Henderson begins with four cycles of standard chemotherapy over four months. Appellants' Appendix, *supra*

ment for a common, life-threatening disease.¹⁹ The treatment itself is two-fold, involving high dosage chemotherapy to fight the cancer and a more expensive bone marrow transplant to prevent the chemotherapy from killing the patient.²⁰ Due to the risks associated with the treatment, physicians usually do not contemplate prescribing it unless the patient has a bleak prognosis and

note 1, at 44 (Ratkin Aff. Ex. 2). Once the blood count returns to normal, a hospital admits her for the bone marrow harvest, involving withdrawal of approximately one quart of bone marrow through her hip bones. *Id.* at 48. In addition, peripheral blood progenitor cells (white blood cells) are collected from her blood samples in a blood cell separator by a process called leukapheresis. *Id.* at 49. The bone marrow and white blood cells are frozen and stored while she undergoes the HCT process, an intensive dosage of the same drugs she had taken before, but with much more serious side effects expected. *Id.* After four days of HCT therapy, the bone marrow and peripheral blood cells are reinfused into her body, with the goal of having them repopulation. *Id.* at 48-49.

17. Of 68 women treated with HCT/ABMT for metastatic breast cancer in one medical center, 13% died as a result of the treatment, and 69% died of breast cancer within 22 months of the treatment. R.A. Saez et al., *Autologous Bone Marrow Transplantation for Metastatic Breast Cancer*, 87 J. OKLA. ST. MED. ASS'N 405, 405 (1994). Henderson was informed of a 10% risk of death as a direct result of the therapy should she be randomized to the HCT/ABMT arm of the trial. Appellants' Appendix, *supra* note 1, at 44 (Ratkin Aff. Ex. 2).

18. The cost of treatment ranges from \$100,000 to \$300,000. Richard S. Saver, Note, *Reimbursing New Technologies: Why Are the Courts Judging Experimental Medicine?*, 44 STAN. L. REV. 1095, 1111 (1992). The cost of Henderson's participation in a randomized clinical trial was estimated at between \$65,000 and \$100,000, but the chemotherapy drugs would have been free of charge. Appellants' Appendix, *supra* note 1, at 8 (Compl. para. 28). The overall cost of the procedure, however, is expected to drop. C. Faucher et al., *Comparison of G-CSF-primed Peripheral Blood Progenitor Cells and Bone Marrow Auto Transplantation: Clinical Assessment and Cost-effectiveness*, 14 BONE MARROW TRANSPLANTATION 895, 897-99 (1994).

19. Experts estimate that over 10% of all women will develop breast cancer during their lives. Wynstra, *supra* note 15, at 491. Breast cancer is the leading cause of death for women in the United States. *Id.* Furthermore, breast cancer is the most common form of cancer among women. Gabriel N. Hortobagyi & Aman U. Buzdar, *Current Status of Adjuvant Systemic Therapy for Primary Breast Cancer: Progress and Controversy*, 45 CA-CANCER J. FOR CLINICIANS 199, 199 (1995). Over 2,500 patients received autotransplants for breast cancer in over 80 medical centers in the United States and Canada from 1989 to 1994. K.S. Antman et al., *Autotransplants for Breast Cancer in North America* (Meeting Abstract), 13 PROC. ANN. MEETING AM. SOC. CLINICAL ONCOLOGISTS A69 (1994).

20. Henderson's consent form warned: "If you decide to participate, you must realize that withdrawal from the study, once chemotherapy is started and before the bone marrow transplantation is given, will result in your death." Appellants' Appendix, *supra* note 1, at 52 (Ratkin Aff. Ex. 2). Because high dosage chemotherapy destroys bone marrow, the transplantation is needed to prevent the death that would result from the treatment. *Id.*

meets stringent clinical criteria.²¹ Still, the promise that HCT/ABMT offers as a more effective treatment than standard chemotherapy is significant. Because the disease is so common, a small improvement in the efficacy of a treatment can save tens of thousands of lives per year.²² The medical community, however, has not fully articulated a standard for determining whether HCT/ABMT is either an experimental or an accepted medical practice.²³

Although cancer research remains active, controversies have developed as researchers fine-tune treatments and wait for clinical trial results.²⁴ The focus of current HCT/ABMT research compares the effectiveness of standard doses with that of high doses of the same drugs, rather than determining the validity of the treatment itself.²⁵ Clinicians have yet to complete the final stage of research, Phase IV randomized trials, on HCT/ABMT for breast cancer.²⁶ Patients may, however, bypass the randomization

21. Poor prognosis Stage IV (metastatic) breast cancer patients have at best a 10% survival rate with conventional chemotherapy. F.R. Dunphy et al., *Factors Predicting Long-term Survival for Metastatic Breast Cancer Patients Treated with High-dose Chemotherapy and Bone Marrow Support*, 73 *CANCER* 2157, 2157 (1994). The treatment strategy for breast cancer is a highly individualized process, and research may prove that HCT/ABMT is optimal for only a subgroup of breast cancer patients. See generally Charles H. Weaver et al., *High-dose Chemotherapy and Autologous Stem Cell Transplantation for Breast Cancer*, in *TECHNICAL & BIOLOGICAL COMPONENTS OF MARROW TRANSPLANTATION* 59, 62-71 (C. Dean Buckner & R.A. Clift eds., 1995) (discussing the factors that correlate with effectiveness of HCT/ABMT among breast cancer patients).

22. Hortobagyi & Buzdar, *supra* note 19, at 199.

23. See generally Angela R. Holder, *Funding Innovative Medical Treatment*, 57 *ALB. L. REV.* 795, 806 (1994) (discussing the ambiguity of the legal definition of "accepted medical practice"); Saver, *supra* note 18, at 1097 (discussing why unsophisticated definitions of "experimental medicine" prevail).

24. Hortobagyi & Buzdar, *supra* note 19, at 205-21 (providing an overview of the current clinical trial results related to breast cancer research and the controversies and questions that remain).

25. This focus is common to studies under Phase IV clinical trials, whose goal is typically to compare the results of promising treatments with the results of conventional treatments. Denise S. Wolf, *Who Should Pay for "Experimental" Treatments? Breast Cancer Patients v. Their Insurers*, 44 *AM. U. L. REV.* 2029, 2041-42 (1995) (describing the goals of clinical trials from Phase I to Phase IV).

26. *Id.* at 2043. Such clinical trials are currently underway at several research institutions, including the University of Pennsylvania Cancer Center, the Mayo Clinic, the San Antonio Cancer Institute, and the New England Medical Center. *Id.* at 2043 n.99. Henderson's treatment is conducted at Barnes Hospital of St. Louis under the aegis of the National Cancer Institute. Appellants' Appendix, *supra* note 1, at 19 (Ratkin Aff. para. 5). The goal of the program is to compare results of standard doses of chemotherapy, including one

process and enroll directly into treatment.²⁷ Indeed, many women refuse to participate in the randomized trials that would prove the treatment's efficacy because they fear ending up in the control group.²⁸ This consequence necessarily slows the verification of the treatment's efficacy.

B. MEDICAL TREATMENTS AND GROUP INSURANCE

Intensifying the controversy over HCT/ABMT's efficacy as an accepted medical practice is the potential discrimination involved in the insurance industry's traditional classification practices.²⁹ As the industry increases its involvement in rationing health care,³⁰ it faces the often conflicting imperatives of keeping costs down and avoiding discriminatory allocations.³¹ Insurers traditionally classify individuals according to risk data that highly correlate with suspect classifications such as sex.³² Such classifi-

"investigational agent" provided free of charge, with intensive HCT/ABMT doses of the same drugs. *Id.* at 44 (Ratkin Aff. Ex. 2).

27. See Pirozzi v. Blue Cross-Blue Shield, 741 F. Supp. 586, 591 (E.D. Va. 1990) (listing 15 major medical centers that use HCT/ABMT to treat breast cancer).

28. Participation in a randomized trial means that the patient cannot know whether she actually will receive HCT/ABMT treatment. For documentation of patients' reluctance to participate in such trials, see Kara Smigel, *Women Flock to ABMT for Breast Cancer Without Final Proof*, 87 J. NAT'L CANCER INST. 952, 952-55 (1994).

29. See generally BANKS MCDOWELL, *THE CRISIS IN INSURANCE REGULATION* 96 (1994) (discussing regulation issues and describing the nature of group health insurance and its potential for discrimination); see also Samuel Marcossou, *Who Is "Us" and Who Is "Them"—Common Threads and the Discriminatory Cut-Off of Health Care Benefits for AIDS Under ERISA and the Americans with Disabilities Act*, 44 AM. U. L. REV. 361, 405-20 (1994) (analyzing the applicability of the ADA to classifications within insurance contracts and concluding that group insurance principles allow no justification for discriminatory classifications because they are not based on generalizations about risk); Philip G. Peters, *Health Care Rationing and Disability Rights*, 70 IND. L.J. 491, 500-02 (1995) (describing the discriminatory implications inherent in medical care allocation); H. Miriam Farber, Note, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-provided Health Care Plans Violate the Americans with Disabilities Act?*, 69 N.Y.U. L. REV. 850-915 (1994) (considering whether the exemption under the ADA for traditional insurance practices allows insurers to make discriminatory classifications within health insurance plans).

30. See MCDOWELL, *supra* note 29, at 106-07 (noting that insurers are forced to deal with ethical issues they are neither professionally competent nor ethically inclined to resolve).

31. *Id.* at 113.

32. This is especially true with respect to setting premium levels for life insurance. See *id.* at 31, 160 (describing one of the goals of insurance regulation as the avoidance of discrimination even where "discriminatory"

cations, however, fundamentally differ from group health insurance principles.³³ While the industry bases individual insurance on the notion that individuals assume financial responsibility for their own risk, it grounds group underwriting on the principle that low-risk classes subsidize their high-risk counterparts within the group.³⁴ When each member of the group pays the same premium, group insurance systems avoid the classification problems inherent in other types of insurance.³⁵ On the other hand, a decision not to fund a particular treatment for a particular disease often will impact one class within the pool of beneficiaries more severely than others.³⁶

The insurance industry is not inclined to fund research, nor does the public expect it to do so.³⁷ Accordingly, most insurance plans contain an exclusionary provision that expressly precludes coverage for experimental treatments. Although insurance companies originally intended such provisions to "protect [themselves] against the occasional odd-ball or maverick medical

classifications realistically reflect actuarial risk data).

33. *See id.* at 97 (calling health insurance "an assessment policy instead of one written on the basis of risk for refined classes of members); *see also* Marcossan, *supra* note 29, at 410-20 (contrasting the nature of group insurance principles with traditional insurance practices, including underwriting, classifying, and assessing risk).

34. *See* MCDOWELL, *supra* note 29, at 95-100 (describing the nature of group health insurance underwriting and risk management). For the Supreme Court's articulation of the concept of risk in health insurance, *see* Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 710 (1978) ("[W]hen insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair."); *cf.* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 334 (1992) (arguing that "[a]ny voluntary insurance plan will disintegrate if some individuals find that they have to pay more in coverage than they expect to receive in benefits").

35. MCDOWELL, *supra* note 29, at 97 (describing the difficulties insurers have in keeping healthy members in the group and in maintaining a competitive premium rate).

36. *See infra* notes 57, 104 (discussing the ADA and its provisions for traditional insurance practices whose classifications may result in discrimination against disabled individuals).

37. MCDOWELL, *supra* note 29, at 110-11 (describing the effects of pressure to keep medical costs down on funding for medical research and development); Wolf, *supra* note 25, at 2046-54 (discussing insurers' refusal to fund science). *But see* Saver, *supra* note 18, at 1129-31 (encouraging private funding of clinical trials while avoiding a shift of all research costs onto third-party payers).

therapy,³⁸ they increasingly have used these exclusionary clauses to control costs.³⁹

C. LITIGATION OF INSURANCE COVERAGE OF HCT/ABMT FOR BREAST CANCER UNDER CONTRACT LAW

From 1988 to 1994, at least sixteen cases involved plaintiffs seeking payment for HCT/ABMT under a theory of breach of contract,⁴⁰ the most notorious resulting in an almost ninety million dollar award.⁴¹ During those years, insurance plans typically excluded experimental or investigational treatment, often without defining "experimental."⁴² On a case-by-case basis, insurance administrators interpreted policies with similar provisions both to require and to allow denial of HCT/ABMT.⁴³

38. Barbara A. Fisis, Comment, *Who Should Rightfully Decide Whether a Medical Treatment Necessarily Incurred Should Be Excluded from Coverage Under a Health Insurance Policy Provision Which Excludes from Coverage "Experimental" Medical Treatments?*, 31 DUQ. L. REV. 777, 778-79 (1993) (citation omitted).

39. "The primary reason insurers seek to exclude experimental medical treatments from coverage under health insurance policies is to limit their financial liability and keep the cost of insurance down." *Id.* at 780; see also Holder, *supra* note 23, at 796 ("Since insurance companies are motivated to refuse payment for any and all expensive treatments on whatever grounds they can find, each year insurance contracts include more restrictive definitions of which treatments are covered.")

40. Wynstra, *supra* note 15, at 491-504 (charting and analyzing the issues and results of these cases). Several other sources have thoroughly documented and analyzed cases falling under contract law. See, e.g., John A. Bourdeau, Annotation, *Propriety of Denial of Medical or Hospital Benefits for Investigative, Educational, or Experimental Medical Procedures Pursuant to Exclusion Contained in ERISA-governed Health Plan*, 122 A.L.R. FED. 1 (1994) (providing taxonomy of courts' affirmation or reversal of insurance exclusions for experimental treatment in general under ERISA plans).

41. A jury in California awarded \$77 million in punitive damages and \$12.1 million in compensatory damages, largely stemming from the insurer's inherent conflict of interest which caused it to succumb to economic pressures to deny coverage. *California Jury Orders HMO to Pay \$90 Million to Estate of Cancer Victim*, 3 Health L. Rep. (BNA) 18 (Jan. 6, 1994) (citing *Fox v. Health Net of California*, No. 219692, slip op. (Cal. Super. Ct. Dec. 23, 1993)).

42. See generally Fisis, *supra* note 38, at 783-91 (describing scenarios that patients face when they seek coverage for what their insurers call experimental treatment, depending on whether and how "experimental" is defined in the policy).

43. See William P. Peters & Mark C. Rogers, *Variation in Approval by Insurance Companies of Coverage for Autologous Bone Marrow Transplantation for Breast Cancer*, 330 NEW ENG. J. MED. 473, 473 (1994) (concluding that the "predetermination process as applied to patients receiving care in clinical research trials of cancer therapy was arbitrary and capricious"); Wolf, *supra* note 25, at 2046-57 (describing divergent positions on HCT/ABMT among

Courts faced with requests for injunctions and findings of breach had to decide whether the insurance company still should consider a particular treatment experimental⁴⁴ or whether the insurer could have reached its conclusion in good faith.⁴⁵ At least one commentator has criticized the courts' results as "arbitrary and capricious."⁴⁶ From these cases emerged a duty upon insurers to take reasonable steps to reconsider the experimental status at the time of the plaintiff's application before reaching a coverage determination.⁴⁷

Because the rules of contract interpretation in ambiguous

insurers and noting that many believe that denials based on experimental status "are really a pretext for insurers to evade coverage").

44. Compare *Adams v. Blue Cross/Blue Shield*, 757 F. Supp. 661, 674-76 (D. Md. 1991) (concluding the treatment is not experimental after considering quality of life factors affecting the patient) with *Thomas v. Gulf Health Plan*, 688 F. Supp. 590, 596 (S.D. Ala. 1988) (upholding insurer's decision to deny coverage of HCT/ABMT because of its experimental status). For more examples, see Norman Newman, *Don't Let a Court Interpret Your Plan*, 11 *BUS. & HEALTH* 61, 62 (1993) (discussing the Third Circuit's de novo review of whether a liver and pancreas transplant was experimental for pancreatic cancer in *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249 (3rd Cir. 1993)); Wolf, *supra* note 25, at 2035-36, 2054-86 (discussing federal district and circuit court split on whether insurers must pay for the treatment). Under contract law, the issue was whether the terms of the insurance contract defined "experimental" in such a way that the treatment reasonably fell within the definition. Wolf, *supra* note 25, at 2036.

45. See, e.g., *Pitman v. Blue Cross & Blue Shield*, 24 F.3d 118, 124 (10th Cir. 1994) (remanding the case in part because the district court "failed to articulate a standard of review and address Blue Cross's decision to deny benefits"); *White v. Caterpillar, Inc.*, 765 F. Supp. 1418, 1422 (W.D. Mo. 1991) (holding that because the insurer failed to execute reasonable efforts to research the treatment, its denial of HCT-ABMT was arbitrary and capricious), *aff'd*, 985 F.2d 564 (8th Cir. 1991); *Bucci v. Blue Cross-Blue Shield*, 764 F. Supp. 728, 733 (D. Conn. 1991) (finding that the coverage denial was arbitrary and capricious because vague terms gave the insurer a "floating standard which can rise or fall in any fact situation").

46. See, e.g., *Saver*, *supra* note 18, at 1113 (arguing that the judicial response to the nature of the treatment has been "characteristically haphazard" and noting the "grab bag of different standards" courts have used in making divergent determinations, from doctors' prescriptions, to expert testimony, to anecdotal reports).

47. Compare *Hasty v. Central States, S.E. & S.W. Areas*, 851 F. Supp. 1250, 1258-59 (N.D. Ind. 1994) (holding that the insurer's denial was not arbitrary because it had made reasonable efforts to research the current status of the treatment) with *White v. Caterpillar, Inc.*, 765 F. Supp. 1418, 1421-22 (W.D. Mo.) (holding that because the insurer chose to "bury its head in the sand" rather than consider scientific updates, its denial of HCT/ABMT coverage was arbitrary and capricious), *aff'd*, 985 F.2d 564 (8th Cir. 1991).

insurance cases often slant in favor of plaintiffs,⁴⁸ the insurance industry had a strong incentive to redraft its contracts.⁴⁹ Explicit terms began to appear in the policies, typically enumerating those treatments they would exclude as experimental or investigational.⁵⁰ This development solved the problem of defining "experimental" and ostensibly had the added virtue of providing notice to policyholders, who in theory could choose an alternate policy.⁵¹

Breast cancer patients found themselves without recourse if their physicians referred them to an unaffordable treatment explicitly excluded by their insurance plans.⁵² With media attention increasingly addressing the plight of breast cancer patients, a few women attempted to persuade and even to shame their insurers into paying for the treatment.⁵³ Because most

48. This legal standard depends on the type of insurance involved, whether public-payer, private-payer, or self-insured plans. See Saver, *supra* note 18, at 1098-1106 (comparing the standard under public-entitlement programs like Medicaid, which defer to administrators' definitions, with that under private insurance contracts, which favor construing ambiguous language against the insurer in a contract of adhesion).

49. Newman, *supra* note 44, at 61 (arguing that employers whose medical plans exclude experimental treatments "are legally better protected if they define the scope of the exclusion rather than leave interpretation to a court"); *Insurers Can Expect "Explosion" of Suits Seeking "Experimental" Coverage*, 3 Health L. Rep. (BNA) 486 (Apr. 14, 1994) (advising insurers to "tailor their contracts to the clues" in case law, to incorporate the criteria for determining a procedure to be experimental, and to describe their decision-making process).

50. For an example of a typical plan with a blanket exclusion of experimental treatment, see *Thomas v. Gulf Health Plan, Inc.*, 688 F. Supp. 590, 593 n.2 (S.D. Ala. 1988) ("Basic coverage: No benefits shall be provided . . . whether or not recommended or prescribed by a physician . . . [for] [a]ny treatment or procedure, medical or surgical, or any facilities, drugs, drug usage, equipment, or supplies which are Experimental or Investigative."). Alternative plans either append exceptions to a rule of inclusion or exclusion, or simply list what they will not cover.

51. See David M. Eddy, *The Individual v. Society*, 265 JAMA 1446 (1991) (hypothesizing a health plan where female beneficiaries choose to maximize benefit to the group by foregoing coverage for HCT/ABMT and applying the same estimated cost to screening procedures such as mammography instead). *But see* Wolf, *supra* note 25, at 2057 & nn.191-93 (noting that it is unrealistic to expect insureds to be aware of the complete terms of complex insurance policies). Explicit exclusions as opposed to blanket exclusions have their disadvantages as well. See Wolf, *supra* note 25, at 2048-49 (noting, among other disadvantages, the risk that specific exclusions may result in legislatively mandated coverage of the excluded treatment).

52. See *supra* note 18 (discussing the cost of HCT/ABMT).

53. See, e.g., Robert Russo, *I'll Have to Sell the House to Pay for Treatment*, N.Y. TIMES, Apr. 5, 1994, at A20 (describing in a letter to the editor the financial, emotional and physical burdens his insurer's denial of HCT-ABMT for his wife's breast cancer placed on the family); *A Woman Copes With New Breast*

Americans receive health insurance through their employers,⁵⁴ however, employment law provided an alternative battle ground.⁵⁵ Thus in 1994, plaintiffs whose insurers had denied payment for treatment began to bring the first discrimination-based lawsuits into federal court.⁵⁶

Cancer Treatment (Morning Edition, National Public Radio Broadcast, Nov. 8, 1994) (documenting the steps one family took while awaiting its insurer's eventual decision to fund HCT-ABMT).

54. MCDOWELL, *supra* note 29, at 102.

55. Once health insurance becomes a "benefit of employment," the plan is regulated by ERISA. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 (1988). Although ERISA neither mandates benefits nor prohibits discriminatory practices in providing benefits, plan participants receive a right to a cause of action for discrimination under Title VII and the ADA as a result of the "benefit." Thus, although ERISA preempts the several symbolic laws enacted by states as a result of the HCT/ABMT controversy, see FLA. STAT. ANN. § 627.4236 (West 1992); GA. CODE ANN. § 33-29-3.3 (1995); MASS. ANN. LAWS ch. 32A, § 17A (Law. Co-op 1994); MINN. STAT. § 62A.307 (1995); N.H. REV. STAT. ANN. § 415:18-c (1993); R.I. GEN. LAWS § 27-18-36.2 (1994); VA. CODE ANN. § 38.2-3418.1:1 (Michie 1994); Act of May 9, 1995, ch. 100, 1995 N.J. Sess. Law Serv. 316 (West), the "benefit" of an employer-provided health insurance plan has become a new testing ground to force insurers to pay for HCT/ABMT-type treatments.

56. *Henderson v. Bodine Aluminum, Inc.*, exemplifies this current trend. 70 F.3d 958, 960 (8th Cir. 1995) (per curiam). Other lawsuits have presented the same legal theory on the same or similar facts. *See, e.g.*, *Pokorney v. Miami Valley Career Technology Sch. Dist.*, No. C-3-94-247, slip op. at 1-2, 7, 11 (S.D. Ohio Feb. 14, 1995) (overruling employer's motion to dismiss ADA claim based on denial of medical treatment coverage but dismissing ADA claim against insurer because it is not a covered entity); *Reger v. Espy*, 836 F. Supp. 869, 872-73 (N.D. Ga. 1993) (holding that the decision of the Office of Personnel Management to exclude HCT/ABMT from coverage did not violate Title VII because the plan excluded the treatment for all but five listed cancers, and this broad exclusion therefore affected men and women equally); *Dodd v. Blue Cross & Blue Shield Ass'n*, 835 F. Supp. 888, 891 (E.D. Va. 1993) (rejecting breast cancer patient's claim that plan violated ADA); *see also* Wolf, *supra* note 25, at 2086-89 (discussing other litigation presenting the same theory); Dave Lenckus, *Experimental Coverage: Civil Rights Law Is Latest Twist in Cancer Treatment Fight*, BUS. INS., Aug. 14, 1995, at 40 (citing a federal district court in Eugene, Oregon, that granted a preliminary injunction forcing insurer to pay for HCT/ABMT for a breast cancer treatment); Christine Woolsey, *Denial or Discrimination? Patients Turn to ADA to Receive Controversial Treatments*, BUS. INS., June 26, 1995, at 2 (explaining the significance of the *Henderson* case); Christine Woolsey, *Discrimination Alleged: EEOC Probing Denial of Coverage for Cancer Treatments*, BUS. INS., Aug. 1, 1994, at 2 [hereinafter Woolsey, *Discrimination Alleged*] (reporting on the EEOC investigation of Blue Cross/Blue Shield of Missouri regarding the standard the insurer uses for determining that HCT/ABMT is experimental for breast cancer but not other cancers).

Most relevant discrimination claims are brought under the ADA. *See, e.g.*, *Polifko v. King*, No. 94-05, 1995 WL 33981, at *2 (EEOC Jan. 4, 1995). While

II. THE SEARCH FOR EQUAL TREATMENT IN HEALTH INSURANCE TERMS UNDER TITLE VII: COMPARING THE APPROPRIATE CLASSES

Plaintiffs are unlikely to maintain a disparate treatment cause of action except where there is intent to discriminate. The lack of mutually exclusive classes, the blur between disease and treatment, and the legal anomaly that would result if courts accepted the theory preclude basing a case on disparate treatment precedent notable for its clear-line classifications.⁵⁷ A plaintiff's prima facie case of sex discrimination under traditional disparate impact theory must demonstrate that an identifiable employment policy created a disparate impact upon one gender's compensation.⁵⁸ Disparate impact analysis thus becomes applicable to the denial of treatment in an employer-provided insurance plan for a disease that overwhelmingly affects women. As with disparate treatment analysis, however, the requirements under disparate impact present plaintiffs with significant evidentiary and theoretical hurdles.

A. TITLE VII DISPARATE TREATMENT AND DISPARATE IMPACT ANALYSES OF EMPLOYEE BENEFITS

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex with respect to health insurance benefits.⁵⁹ Courts have since applied two different

the ADA carved out an exception for the insurance industry and its traditional classification-based practices, 42 U.S.C. § 12201(c) (Supp. V 1993), it is uncertain how broadly the courts will interpret that exception. Farber, *supra* note 29, at 876-80.

57. See *infra* notes 86-88, 90-91 and accompanying text (discussing the rulings of *Manhart* and *Norris*).

58. See *infra* note 93 and accompanying text (discussing whether disparate impact analysis applies to an alleged § 703(a)(1) violation).

59. Title VII prohibits sex-based discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1988). Courts have interpreted fringe benefits as "compensation" under Title VII and under the EEOC guidelines. See 29 C.F.R. § 1604.9 (1995) (prohibiting discrimination with regard to fringe benefits in the same manner as compensation). These guidelines define fringe benefits to include "medical, hospital, accident, life insurance and retirement benefits." 29 C.F.R. § 1604.9(a) (1995). The courts accord great deference to administrative guidelines by the EEOC. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

The broad language of § 703(a)(1) of Title VII prohibits an employer from discriminating against employees with respect to compensation and the terms of employment, while § 703(a)(2) specifically prohibits discriminatory limitations

analytical models to determine discrimination under Title VII: disparate treatment and disparate impact.⁶⁰ In a disparate treatment case, the plaintiff must prove that the employer intentionally discriminated by treating members of one gender differently than similarly situated members of the other gender.⁶¹ Courts apply disparate impact analysis, however, where a facially neutral employment practice⁶² impacts one gender more severely than the other.⁶³ Once the plaintiff establishes a prima facie case of discrimination under either theory, the burden of production shifts to the employer to articulate a defense.⁶⁴

The level of proof that courts require for such a defense depends on whether the claim is based on disparate treatment or disparate impact. In a disparate treatment case, the burden of production shifts to the employer, who need only produce evidence of a legitimate, nondiscriminatory reason behind its employment

and classifications that deprive individuals of employment opportunities. 42 U.S.C. § 2000e-2(a)(1)-(2) (1988). Section 703(a) provides in pertinent part:

It shall be an unlawful employment practice for an employer —

(1) 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 . . . sex.

(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.

42 U.S.C. § 2000e-2(a)(1)-(2) (1988).

60. See generally SUSAN M. OMILIAN & JEAN P. KAMP, *SEX-BASED EMPLOYMENT DISCRIMINATION* § 11.10 (1995) (discussing proof of discrimination under Title VII).

61. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973) (discussing the allocation of the burden of proof for a prima facie case of disparate treatment); see also *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2754 (1993) ("It is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."); CHARLES A. SULLIVAN ET AL., 1 *EMPLOYMENT DISCRIMINATION* § 5.4.1, at 253-54 (2d ed. 1988) ("'Discriminatory intent' ranges from animus to stereotyped assumptions and unconscious perceptions.").

62. The first element of a prima facie case of disparate impact, identifying an employment practice, has been a matter of recent controversy. The Ninth Circuit has ruled, for example, that an employer's reliance on competitive market prices in setting wages cannot be labeled an employment policy. *Spaulding v. University of Wash.*, 740 F.2d 686, 706 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), overruled by *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987), rev'd, 490 U.S. 642 (1989).

63. Absence of intent is not a defense in a disparate impact case. See *infra* notes 67-74, 94-98 (discussing disparate impact analysis).

64. See 42 U.S.C. § 2000e-2(k)(1) (Supp. V 1993) (disparate impact); *Hicks*, 113 S. Ct. at 2747 (disparate treatment).

decision.⁶⁵ Conversely, in a disparate impact case, the Civil Rights Act of 1991 places the burden of persuasion of the defense on the employer.⁶⁶ Moreover, the Bennett amendment to the Civil Rights Act incorporated into Title VII the affirmative defenses to an Equal Pay Act claim.⁶⁷ As a result, if the claim of discrimination concerns unequal compensation, the employer may

65. *McDonnell Douglas*, 411 U.S. at 802 (providing a framework for allocating the burden of proof in a disparate treatment case). Burden shifting has been a topic of controversy and development in the Supreme Court and Congress. In a disparate treatment case, the current standard is found in *Hicks*, 113 S. Ct. at 2747 (holding that while the burden of production shifts to the employer to articulate a defense after the plaintiff's prima facie case, the burden of proof remains at all times with the plaintiff); see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE PROGRAM, THEORIES OF DISCRIMINATION, app. 2, at 4-8 (1995) (explaining that the *Hicks* analysis only applies to disparate treatment cases relying on circumstantial proof of discriminatory intent, not in cases where intent may be proved directly).

66. For disparate impact cases, the Civil Rights Act of 1991 legislatively overruled the Supreme Court ruling in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989), that the burden of persuasion never shifts from the plaintiff. The 1991 amendment places the burden of production and persuasion of the existence of a defense on the employer:

An unlawful employment practice based on disparate impact is established under this subchapter only if—(I) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of . . . sex . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A) (Supp. V 1993). Section 104 of the 1991 Act defines "demonstrate" to mean "meets the burdens of production and persuasion." For a commentator's views regarding the significance of the 1991 amendments relating to employers' defenses, see generally Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 298 (1993) (discussing the legislative history regarding how to define the employer's business necessity defense in the 1991 Civil Rights Act and concluding that "rather than resolving its disagreement as to the stringence [sic] of the business necessity defense, Congress simply codified it").

67. Under the Equal Pay Act, a wage differential between male and female employees performing equal work is permissible only "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1) (1988).

The Bennett Amendment to Title VII provides that "[i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [§ 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) (1988)]." 42 U.S.C. § 2000e-2(h) (1988).

justify the discrepancy if it is based on "any factor other than sex."⁶⁸ It remains uncertain whether such a factor must be a motivating factor⁶⁹ or to what extent factors highly correlated with sex function as a "factor other than sex."⁷⁰

If the employer establishes a defense under either theory, the burden shifts back to the plaintiff, who then must prove that the defense represents a mere pretext for discrimination.⁷¹ In codifying the allocation of the burden of proof in a disparate impact case, the Civil Rights Act of 1991 provides two alternative strategies for the plaintiff's rebuttal.⁷² The plaintiff may rebut either by attacking the employer's showing of business necessity or by demonstrating the existence of an alternative employment practice that the employer refused to adopt.⁷³

Biological differences between men and women have triggered several employment discrimination cases⁷⁴ that illustrate the courts' difficulty classifying an employment policy as either

68. 29 U.S.C. § 206(d)(1) (1988); see *Washington v. Gunther*, 452 U.S. 161, 166-68 (1981) (holding that the Equal Pay Act defenses apply to a Title VII discrimination case involving sex-based wage discrimination that does not fall under the Equal Pay Act).

69. If sex is one motivating factor among many, it nevertheless violates Title VII. 42 U.S.C. 2000e-2(m) (Supp. V 1993).

70. See *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir.1988) (holding the business necessity defense as the benchmark for evaluating the "factor other than sex" defense and upholding the employer's "head of household" requirement for spousal insurance coverage as a valid "factor other than sex"). In *J.C. Penney* the court reasoned that employment decisions regarding fringe benefits often impacted classes of employees along lines highly correlated with sex, but that this would not "detract from a showing of a legitimate belief that the benefits offered would be an appropriate and non-sex based incentive to attract, satisfy and retain employees." *Id.* at 254.

71. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (developing the rebuttal stage in a disparate treatment case); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983) (per curiam) (discussing the rebuttal stage in a disparate impact case). In *Wambheim*, the court noted "[e]vidence that the policy was a pretext might include proof of past intentional discrimination . . . or proof that an alternative policy would serve the employer's legitimate interests with less disparate impact." *Id.* at 1495 (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

72. 42 U.S.C. § 2000e-2(k)(1)(A), (C) (Supp. V 1993).

73. 42 U.S.C. § 2000e-2(k)(1) (Supp. V 1993); see *Greenberger*, *supra* note 66, at 299-302 (discussing the ambiguities of this section, despite Congress's intent to respond to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

74. See generally *OMILIAN & KAMP*, *supra* note 60, § 11:09 (discussing the distinction between the "differences approach" and the "inequality approach" to sex discrimination).

disparate treatment or disparate impact. Pregnancy discrimination provided the Supreme Court with its first conundrum. In *General Electric Co. v. Gilbert*, the Court held that discrimination based on pregnancy did not violate Title VII.⁷⁵ *Gilbert* involved a fringe benefit plan that paid a wage substitute to employees absent from work due to disabilities, while explicitly excluding pregnancy as a disability.⁷⁶ The Court held that disparate treatment analysis did not apply to classifications based on pregnancy because the classification is not drawn between men and women but between pregnant women and all others, including men and nonpregnant women.⁷⁷ The Court rejected arguments based on the disparate impact theory because female employees drew more from the fringe benefit plan as a whole than did men did.⁷⁸

Congress overruled *Gilbert* in 1978 by passing the Pregnancy Discrimination Act (PDA).⁷⁹ The PDA redefined the phrase "because of sex" for Title VII purposes to include discrimination "or on the basis of pregnancy, childbirth, or related medical conditions."⁸⁰ In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Supreme Court applied disparate treatment analysis in response to plaintiff's claim that limited coverage of pregnancy benefits for spouses of male employees violated the PDA.⁸¹ Noting the PDA's effect on the reasoning of *Gilbert*, the Court recognized that the appropriate classification was not between pregnant women and all others but "between persons who *face a risk* of pregnancy and those who do not."⁸² In addition to the

75. 429 U.S. 125, 145-46 (1976).

76. *Id.* at 128-29.

77. The Court noted that because the classification was not a facial discrimination against women, a disparate treatment case could be proven only if the plaintiff could "demonstrate that exclusion of pregnancy from the compensated conditions is a mere [pretext] designed to effect an invidious discrimination against the members of one sex." *Id.* at 136 (quoting *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding similar state disability insurance plan under a Fourteenth Amendment Equal Protection Clause challenge)).

78. *Id.* at 130 & n.10, 135.

79. 42 U.S.C. § 2000e(k) (1988).

80. *Id.* The statute imposes a new standard for the treatment of women by employers: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

81. 462 U.S. 669, 683-85 (1983).

82. *Id.* at 678 (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 161-62 n.5 (1976) (Stevens, J., dissenting)) (emphasis added).

specific context of pregnancy benefits, the Supreme Court has found that the use of sex-based distinctions in insurance plans violates Title VII.⁸³ In *Los Angeles Department of Water & Power v. Manhart*, treatment of women as “components of a . . . sexual . . . class,” rather than as individuals, fulfilled the necessary element of intent.⁸⁴ The Supreme Court also has ruled that, in the insurance context, neither cost arguments⁸⁵ nor reliance on actuarial data may justify an impermissible classification.⁸⁶

83. *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1081 (1983) (per curiam); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708-09 (1978). In *Manhart*, the employer required its female employees to make larger contributions to a pension fund than male employees, along the rationale that women as a class live longer than men and thus collect more from the pension in the long run. 435 U.S. at 704. The Supreme Court held that to take into account the sex of an employee in determining contribution levels into a benefit pension plan was a violation of Title VII. *Id.* at 710-11. The Court clarified its holding in *Norris*, where the benefits paid out to women under a pension plan were lower than those paid to men, to show that the violation applied to differences on the benefit side as well as the contribution side. 463 U.S. at 1081-82; see generally OMLIAN & KAMP, *supra* note 60, § 16 (discussing cases relating to discrimination in fringe benefits).

84. 435 U.S. 702, 707-08 (1978). The *Manhart* Court explained:

This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: Women, as a class do live longer than men. . . . The question, therefore, is whether the existence or nonexistence of discrimination is to be determined by comparison of class characteristics or individual characteristics. A “stereotyped” answer to that question may not be the same as the answer that the language and purpose of the statute command.

Id. In *Manhart's* reasoning, therefore, to make decisions according to class distinctions rather than individual distinctions fulfills the discriminatory intent element in a disparate treatment analysis. See *Norris*, 463 U.S. at 1082-83 (emphasizing that the threshold inquiry is whether the employer is treating its employees as individuals or impermissibly as “components of a . . . sexual . . . class”).

85. *Newport News*, 462 U.S. at 685 n.26 (“[A]lthough that type of cost differential may properly be analyzed in passing on the constitutionality of a State's health insurance plan, no such justification is recognized under Title VII once discrimination has been shown.”) (citation omitted).

86. The claim in *Manhart* was brought under the Equal Pay Act, whose standard for justification of an unlawful classification authorizes a “differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1)(iv) (1992). Nevertheless, the Court did not find that longevity data qualified as such an “other factor.” *Manhart*, 435 U.S. at 710; *cf. id.* at 727 (Burger, C.J., dissenting) (“The ‘other factor other than sex’ is longevity; sex is the umbrella-constant under which all of the elements leading to differences in longevity are grouped and assimilated, and the only objective feature upon which an employer—or anyone else, including insurance companies—may reliably base a cost differential for the ‘risk’ being insured.”).

Finally, while Title VII subjects employers to liability for a discriminatory insurance policy,⁸⁷ courts remain split on whether they also can hold insurance companies liable for discrimination as "agents" of the employer.⁸⁸

Courts rarely apply disparate impact analysis to alleged discrimination in benefits. The Supreme Court never has ruled whether disparate impact analysis applies to a claim of discriminatory fringe benefits, and lower courts have expressed confusion on this point.⁸⁹ In *Gilbert*, the Supreme Court did not analyze the

87. *Norris*, 463 U.S. at 1089 (noting that "the State cannot disclaim responsibility for the discriminatory features of the insurers' options"); *Manhart*, 435 U.S. at 718 n.33 (stating that an employer may not "avoid [its] responsibilities by delegating discriminatory programs to corporate shells"); see also *EEOC v. Colby College*, 589 F.2d 1139, 1141 (1st Cir. 1978) (holding that the employer was liable for insurance carrier's discriminatory policies).

88. In *Spirit v. Teachers Insurance & Annuity Association*, the Second Circuit held that an insurance company providing pension benefits to employers was "so closely entwined" with the employers as to subject them to Title VII. 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), *and modified on other grounds*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984). On virtually identical facts, the Sixth Circuit came to the opposite conclusion. *Peters v. Wayne State Univ.*, 691 F.2d 235, 238 (6th Cir. 1982), *vacated*, 463 U.S. 1223 (1983); see generally Andrew O. Schiff, Note, *The Liability of Third Parties Under Title VII*, 18 U. MICH. J.L. REF. 167, 180-85 (1984) (discussing the issue as related to insurance companies).

89. The disparate impact theory developed in cases where plaintiffs claimed violations of § 703(a)(2), involving discrimination with respect to "employment opportunities or . . . status as an employee." 42 U.S.C. § 2000e-2(a)(2) (1988). Disparate impact analysis has thus been applied to such facially neutral policies as intelligence testing, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971), height and weight requirements, *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977), pregnancy leave requirements, *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 673 (9th Cir. 1980), excluding applicants based on arrest records, *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632-33 (9th Cir. 1972), and in-house employee selection plans, *Shidaker v. Carlin*, 782 F.2d 746, 750 (7th Cir. 1986).

The circuit courts have split on whether disparate impact analysis applies to a § 703(a)(1) claim. See SULLIVAN, *supra* note 61, at 333 n.7 (discussing two possible readings of *Gilbert* regarding the applicability of disparate impact analysis to fringe benefit plans). In *Nashville Gas Co. v. Satty*, the Supreme Court struck down a policy as violating § 703(a)(2) but, following *Gilbert*, upheld a fringe benefit discrepancy involving pregnancy. 434 U.S. 136, 139-40 (1977). In *Wambheim v. J.C. Penney Co.*, the Ninth Circuit noted that although the Supreme Court had not explicitly decided that disparate impact analysis is appropriate in a § 703(a)(1) case, it had implied that such analysis may be applied to such a claim. 705 F.2d 1492, 1494 (9th Cir. 1983) (*per curiam*) (citing *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982)). As a result, the court concluded that disparate impact is appropriate in the § 703(a)(1) case. *Id. Cf. EEOC v. J.C. Penney Co.*, 843 F.2d 249, 251-52 (6th Cir. 1988) (noting that federal district courts have applied disparate impact analysis without considering whether the claim fell under § 703(a)(1) or § 703(a)(2)).

situation under disparate impact because evidence indicated that the compensation plan taken as a whole provided more to women than it did to men.⁹⁰ It is unclear to what extent *Gilbert* requires consideration of the compensation package as a whole, as opposed to consideration of a specific discriminatory policy term.

In *Wambheim v. J.C. Penney Co.*,⁹¹ the Ninth Circuit grappled with this difficulty when it applied disparate impact analysis to a "head of household" employment policy.⁹² Ruling that *Manhart* does not control because disparate treatment was not at stake,⁹³ the court concluded that the cost differential of providing benefits to male and female employees could constitute business necessity so as to justify a facially neutral policy that had a disparate impact upon women.⁹⁴ In sum, whether the cost of treatment may justify an insurance discrepancy that has a discriminatory impact upon women hinges on whether the particular fact situation warrants disparate treatment or disparate impact analysis.

B. DISPARATE TREATMENT ANALYSIS: BREAST CANCER AS A DISCRIMINATORY CLASSIFICATION

Where employers intend to discriminate against women,

90. The Court stated:

The [d]istrict [c]ourt noted the evidence introduced during the trial, a good deal of it stipulated, concerning the relative cost to General Electric of providing benefits under the plan to male and female employees, all of which indicated that, with pregnancy-related disabilities excluded, the cost of the [p]lan to General Electric per female employee was at least as high as, if not substantially higher than, the cost per male employee.

General Elec. Co. v. Gilbert, 429 U.S. 125, 130 (1976) (footnote omitted).

91. 705 F.2d 1492 (9th Cir. 1983) (per curiam).

92. This policy allowed insurance coverage of employees' spouses only if the spouse earned less than the employee. Because female employees comprised the bulk of the low-paying jobs at the company and thus tended to earn less than their spouses, the policy had a disparate impact upon female employees: 12.5% of the married female employees, as opposed to 89% of their male counterparts, qualified as heads of household. *Id.* at 1493-94.

93. *Id.* at 1495.

94. *Id.* The standard adopted for the employer's defense was to demonstrate "legitimate and overriding business considerations." *Id.* at 1495 (quoting *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984)). Cost was a permissible factor to be weighed along with J.C. Penney's rationale that the rule was designed to provide benefits where need was greatest. *Id.* at 1495.

courts will employ disparate treatment analysis.⁹⁵ In the case of insurance coverage exclusions, however, the motivating factor is more likely to be cutting costs than an intent to discriminate.⁹⁶ Notwithstanding the insurance company's motivating factors, however, sex-based classifications may themselves fulfill the intent element in disparate treatment analysis. Such was the case in *Manhart* where the employer, based on longevity statistics, demanded higher retirement benefit contributions from women.⁹⁷ Consequently, courts first must determine whether a case places a *Manhart*-type classification at stake.

It is counterintuitive to consider the term "breast cancer" as gender-neutral. As such, exclusion of a treatment for breast cancer is analogous to exclusion of pregnancy coverage under the PDA.⁹⁸ Plaintiffs therefore could argue that although the PDA does not prohibit denial of coverage for breast cancer explicitly, Congress intended to prohibit classifications based on conditions that affect only women as well as the disparate treatment that stems from such classifications.⁹⁹ Excluding a treatment for breast cancer while approving similar treatments for other cancers constitutes disparate treatment of women.¹⁰⁰

If the defendant employer cannot overcome this showing of differential treatment, the justifications available to it are

95. See *supra* note 61 and accompanying text (describing a prima facie case of disparate treatment and its intent element).

96. See *supra* note 39 and accompanying text (discussing insurers' increasing use of the "experimental" treatment clause to control the cost of insurance).

97. See *supra* notes 83-84 and accompanying text (discussing *Manhart* as a disparate treatment case).

98. See *supra* notes 79-82 (discussing the PDA and the Court's interpretation of it).

99. Congress declared that the term "sex" in Title VII includes "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1988). It seems clear that "other related medical conditions" refers exclusively to reproductive conditions and that no argument can be made that it includes breast cancer or other women's diseases. *Id.*; see *Maganuco v. Leyden Community High Sch.*, 939 F.2d 440, 444 (7th Cir. 1991) (holding that the scope of the PDA is limited to "policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities"). It is less clear whether insurers who refuse to pay for fertility treatment or sophisticated and expensive treatments relating to pregnancy are violating the PDA.

100. This line of reasoning links the Title VII analysis to analysis under the ADA, which requires proof of discrimination against a particular disability, such as breast cancer, or a class of disabilities such as cancer. See *supra* note 56 (discussing the ADA).

minimal.¹⁰¹ *Manhart* and *Norris* prevent cost or traditional insurance practice arguments from justifying an impermissible classification as a business necessity.¹⁰² Strict readings of the defense requirement in important precedents also appear to preclude any affirmative defense of disparate treatment in this case.¹⁰³

Defendants could claim, however, that the exclusion applies to a specific treatment only. As long as breast cancer is but one disease among many excluded from coverage for HCT/ABMT¹⁰⁴ and insurers exclude HCT/ABMT for diseases that affect men and women alike, they arguably are not discriminating on the basis of sex.¹⁰⁵ In *Manhart*, the Court held that discrimination resulted from a plan that treated each woman "in a manner which but for

101. In *International Union, UAW v. Johnson Controls, Inc.*, the Supreme Court declared that an employment policy, which excluded fertile women but not men from jobs that would expose them to toxic agents, warranted disparate treatment analysis as a sex classification. 499 U.S. 187 (1991). As for the justification available once a plaintiff has demonstrated a discriminatory classification, the Court noted: "The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) [of the Civil Rights Act of 1964] and thus may be defended only as a B[ona] F[ide] O[ccupational] Q[ualification]." *Id.* at 200. In *Manhart*, even proof that the challenged policy had no discriminatory effect on the protected class could not justify a classification which "on its face, discriminated against every individual woman employed by the Department." 435 U.S. at 715.

102. *See supra* notes 66 (discussing the limitations imposed upon defenses in disparate impact cases).

103. The statutory affirmative defense to disparate treatment is the bona fide occupational qualification (BFOQ). 42 U.S.C. § 2000e-2(e)(1) (1988). Because the exclusion of HCT/ABMT in an insurance policy cannot be considered an occupational qualification, the defense cannot apply in this case. *See Johnson Controls*, 499 U.S. at 199 (holding that the BFOQ defense is the only available defense to an explicit gender-based policy).

104. Typically, the blanket term excludes the treatment, followed by a list of exceptions. *See supra* note 50 (providing a typical exclusion provision). Exceptions have included leukemia, Hodgkin's and non-Hodgkin's lymphoma, neuroblastoma, and testicular, mediastinal retroperitoneal, and ovarian germ cell tumors. Wolf, *supra* note 25, at 2048 n.124. In contrast, insurers have refused to cover HCT/ABMT for ovarian cancer, testicular cancer, multiple myeloma, cervical cancer, melanoma, lung cancer, brain cancer, soft tissue cancer, prostate cancer, colon cancer, and AIDS. *Id.* at 2052 & nn.151-61.

105. This is the approach defendants facing discrimination claims under ADA have used. The argument hinges on a distinction between exclusion of a medical treatment and exclusion of a specific disease. Farber, *supra* note 29, at 851 n.9 ("Under the ADA [exclusions of specific treatments] seems to be an acceptable practice since they are facially neutral and do not involve an actual disability-specific determination").

[her] sex would [have been] different."¹⁰⁶ Defendants could argue that the plaintiff is not being treated in a manner which but for her sex would have been different: if she were male she would still face a risk of contracting a form of cancer for which HCT/ABMT would be denied coverage.¹⁰⁷ Moreover, what made the classification in *Manhart* discriminatory was that it included individual women in a class based on an attribute that might not apply to them.¹⁰⁸ *Manhart* insisted that Title VII's focus be on the individual. In contrast, while breast cancer patients are classified without respect to their individual differences,¹⁰⁹ women as a class are not.

Defendants also may prevail by denying the existence of any sex-based classification. Unlike pregnancy, breast cancer occasionally occurs among males,¹¹⁰ which may preclude a

106. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

107. Plaintiffs encountering this argument may be required to provide evidence of the relative demand for HCT/ABMT among each relevant form of cancer along with the differential risk faced by each gender of contracting each form of cancer. This is precisely what courts facing claims of discrimination under ADA ask for. See, e.g., Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 960 (8th Cir. 1995) (per curiam) (granting plaintiff's request for a preliminary injunction after plaintiff had established that HDCT for her type of cancer had passed the experimental stage and that the insurance plan provided the treatment for other comparable conditions); Polifko v. King, No. 94-05, 1995 WL 33981, at *8 (EEOC Jan. 4, 1995) (requiring the insurance carrier to provide information on what other conditions for which it denied HCT/ABMT coverage and explain its decision).

108. *Manhart*, 435 U.S. at 708 (explaining the attribute at issue as longevity).

109. This classification by disease rather than by individual attributes, moreover, runs contrary to medical practice, which ideally considers the potential benefit of the treatment on a case-by-case basis. See, e.g., Weaver, *supra* note 20, at 62-71 (discussing the many factors requiring consideration before physicians should recommend HCT/ABMT for breast cancer).

110. Although breast cancer is overwhelmingly a women's disease, approximately one percent of breast cancer cases occur among men. Beryl Sandler et al., *Cancer of the Male Breast*, 60 AM. SURGEON 816, 816 (1994) (stating that approximately 1000 new cases of male breast cancer and 300 resulting deaths occur each year). While the incidence of breast cancer among men has remained stable, the rate for women is growing at an alarming pace. When men do develop breast cancer, however, the prognosis, stage for stage, and the incidence of aggressive forms of the disease are the same as for women. *Id.* at 816-17. Moreover, although testing of the effectiveness of treatments like HCT/ABMT upon male breast cancer patients is lacking due to the rarity of the disease, researchers consider it appropriate to administer the same treatment options for male as for female patients. *Id.* at 819.

disparate treatment analysis.¹¹¹ Evidence relating to an insurance company's classification of the treatment as experimental may help the court to determine what comprises the classes. If, for example, no medical data discussing HCT/ABMT for breast cancer involves male patients, this omission weakens defendant's argument. Resolution of this issue will depend on the court's disposition toward accepting statistical composition of a class as opposed to an arguably "common sense" approach that concludes that if men get breast cancer, breast cancer cannot signify "female."¹¹²

If, however, the courts view breast cancer as a "women's disease," defendants still have a stare decisis argument that the reasoning in *Gilbert* may apply.¹¹³ By claiming that the PDA only overruled *Gilbert's* reasoning with respect to the defining terms of the act, "pregnancy, childbirth, and related medical conditions," defendants could argue that Congress only declared classifications by female reproductive capacities to be facial sex classifications.¹¹⁴ Outside of the context of reproduction, a classification using the term "breast cancer" is not a classification between men and women, but between those with breast cancer and all other people, male and female.¹¹⁵ The extent to which the

111. See *supra* notes 61, 65 (discussing the *McDonnell Douglas* prima facie requirements for disparate treatment). *Manhart* distinguished itself from *Gilbert* and thus evaded the issue of whether *Gilbert's* class-drawing principles applied, by noting that in *Manhart*, the groups are "composed entirely and exclusively of members of the same sex." *Manhart*, 435 U.S. at 715. These exclusive categories may be the key to whether *Manhart's* reasoning applies to this case.

112. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 n.17 (1983) (quoting Senator Hawkins as stating that "it seems only commonsense [sic], that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women.").

113. See *supra* notes 75-78 and accompanying text (discussing the holding and reasoning of *Gilbert*).

114. See *supra* note 77 (discussing classification under *Gilbert*).

115. This remains the framework for equal protection analysis of a constitutional claim. See *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (holding that exclusion from disability insurance protection was not invidious discrimination because the exclusion was between pregnant and non-pregnant people, not women and men). To the extent that the challenged employment policy involves a term of insurance, however, the reasoning of *Newport News* should govern. In that case, the Court noted that in the insurance context, the benefit provided is risk coverage. *Newport News*, 462 U.S. at 678. That is, a plaintiff must determine whether the health risks that women face are treated measurably differently than the health risks that men face. Once again, evidence of such a difference would face daunting statistical requirements.

PDA overruled *Gilbert* remains open to debate.¹¹⁶

Finally, the employer defendant's policy argument must focus on the anomalous result of disparate treatment analysis. If "breast cancer" is a proxy for "female" and virtually no defense applies, this would have the effect of singling out a "woman's disease" for special treatment. Moreover, women with breast cancer would have a remedy at law unavailable to women with a form of cancer that affects both sexes.¹¹⁷ Considering the circumstances, the courts appear reluctant to develop a special legal status for sex-specific diseases and disabilities under disparate treatment analysis.

C. EVIDENTIARY HURDLES UNDER DISPARATE IMPACT ANALYSIS

The first step under the disparate impact approach requires identification of the employment policy at issue.¹¹⁸ Plaintiffs are likely to make three alternate arguments. First, they could argue that it is the employer's choice of an insurance package that has a disparate impact upon women. This argument, however, appears circular and bootstraps the employer into liability through the definition of "policy." The employer in *Manhart* violated Title VII by offering a discriminatory pension plan.¹¹⁹ An employer could

116. Cf. Marcossou, *supra* note 29, at 407 (stating that the applicability of *Gilbert* should also determine whether exclusion of AIDS benefits is discriminatory).

117. This conclusion depends on how litigation of exclusions of HCT/ABMT under the ADA will evolve. In particular, it depends on how broadly courts will interpret the exemption for insurance industry practices. See *supra* notes 56, 100, 105 (discussing the insurance exemption under the ADA).

118. See, e.g., *Beard v. Whitley County REMC*, 840 F.2d 405, 409 (7th Cir. 1988) (holding that decision not to give a raise to majority female clerical workers but only to majority male supervisors was not an employment policy); cf. *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983) (*per curiam*) (finding an employment policy in the employer's decision to provide spousal insurance coverage only to spouses earning less than the employee). The Civil Rights Amendments of 1991 attempted to clarify the requirements for identifying the employment policy:

With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(I), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision[-]making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1)(B)(I) (Supp. V 1993).

119. See *supra* notes 83-84, 101, 106-09, 111 and accompanying text (discussing the significance of *Manhart*).

distinguish that case, however, because the use of sex-based actuarial tables to determine contribution levels was not an employment policy but a classification that violated § 703(a)(2).¹²⁰ Thus it is not clear whether the employer's action in *Manhart* is analogous for purposes of the plaintiff's prima facie case of a § 703(a)(1) violation. Next, plaintiffs could identify the "policy" as a denial of HCT/ABMT for breast cancer. This argument, however, would require the plaintiff to hinge a claim on a very attenuated decision-making process on the part of the employer. Finally, plaintiffs could define the blanket denial of HCT/ABMT coverage on the grounds that it is experimental as the "policy." This alternative also labels a classification arguably far removed from the employer's decision-making process an "employment policy."

Proof of disparate impact also presents semantical problems. On the one hand, plaintiffs could easily prove that an insurance policy's exclusion of a treatment for breast cancer would disproportionately impact women as opposed to men.¹²¹ Likewise, exclusion of a specific treatment for cancer disproportionately affects women if that treatment is mainly used to treat breast cancer as opposed to other forms of the disease.¹²² According to *Gilbert*, however, a plaintiff with a disparate impact claim must prove that the compensation package, taken as a whole, provides less to female employees than it does to male employees.¹²³ Actuarial valuation of the compensation package would thus become a difficult but necessary part of a prima facie

120. See *supra* notes 83-84 (discussing the holding and reasoning of *Manhart*).

121. See *supra* note 110 (stating that less than one percent of breast cancer patients are male).

122. Breast cancer has become the most common disease for which HCT/ABMT is used. William P. Peters, *High-dose Chemotherapy with Autologous Bone Marrow Transplantation for the Treatment of Breast Cancer: Yes, in IMPORTANT ADVANCES IN ONCOLOGY 1995*, at 215, 215 (Vincent T. DeVita et al. eds., 1995).

123. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 138 (1976). This is why the *Gilbert* Court refused to employ a disparate impact analysis. *Id.* Defendants demonstrated that women drew more out of the benefit package in spite of the exclusion of pregnancy coverage. See *supra* notes 75-78 and accompanying text (discussing the holding and reasoning of *Gilbert*). Treatment of disparate impact under *Gilbert* is nonetheless complicated. See SULLIVAN, *supra* note 61, at 333 (noting that *Gilbert* can be read in two ways: either as refusing to apply disparate impact analysis to fringe benefit plans, or as insisting that the entire benefit package be considered, rather than particular components of the package, for disparate impact).

case.¹²⁴

Under the *Newport News* model,¹²⁵ female employees may bring a claim based on the theory that the policy provides them less coverage for their health risks than it does for male employees. Conversely, male employees whose spouses need HCT/ABMT may claim discrimination because they receive less health risk coverage for their dependents than do female employees.¹²⁶ Consequently, the gender of the plaintiff claiming discrimination in the employment setting is not necessarily the same gender against which the insurer discriminated.

Defendants may exploit this ostensible contradiction by offering an alternate model for disparate impact analysis. Such a model would focus on the family unit instead of on classes of employees and, following *Gilbert*, on the health care package as a whole.¹²⁷ In *Newport News*, the special status of family health care as a benefit of employment turned limited coverage for pregnancy into discrimination against *male* employees.¹²⁸ This finding was possible because a discrepancy existed between pregnancy coverage available to female employees and pregnancy coverage available to male employees' spouses.¹²⁹ In contrast, no discrep-

124. See MCDOWELL, *supra* note 29, at 97 (describing the inherent difficulties in determining the prorated value per beneficiary of a group insurance plan).

125. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983); see *supra* notes 81-82 and accompanying text (discussing the holding and reasoning of *Newport News*).

126. This approach would be necessary unless spouses of employees have standing to bring claims under Title VII. Cf. *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960 (8th Cir. 1995) (finding likelihood of success on the merits of her claim indicates the Eighth Circuit found that Henderson, as a spouse of the employee and beneficiary of the employee fringe benefit, had standing to sue under Title VII and ADA); *Nicol v. Imagematrix, Inc.*, 773 F. Supp. 802, 804 (E.D. Va. 1991) (holding that male employee allegedly discharged due to the pregnancy of his wife, a coworker, had standing to bring a Title VII claim).

127. Such a focus on health insurance as a family benefit is open to criticism because it is based on assumptions reflecting an outmoded model of the labor force, where women were primarily insured by their husbands' employers. See CHARLOTTE F. MULLER, *HEALTH CARE AND GENDER* 58-70 (1990) (noting that today two-thirds of women in the U.S. under 65 are in the labor force and that women's status in the labor market is strongly linked with their access to health care).

128. *Newport News*, 462 U.S. at 676 (stating that "[u]nder the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees").

129. The EEOC stresses that the issue is not whether the plan treats two groups of women the same, for example, female employees and wives of male

ancy among classes of beneficiaries exists in a plan that excludes HCT/ABMT for breast cancer. Under this model, the plan treats male and female employees equally because for every female employee who receives "less" risk coverage from the policy, there is in theory her counterpart in the spouse of a male employee. The married male employee benefits no more from a family health care package than the married female employee does. Consequently, it does not matter whether discrimination impacts males or females as long as all employees receive the same package and are married.

If the plaintiff establishes a prima facie disparate impact case, the burden of production shifts to the defendant to articulate a permissible justification.¹³⁰ In most disparate impact cases, the employer can accomplish this only by proving that the practice was "job related . . . and consistent with business necessity."¹³¹ If the employment practice concerns compensation, however, the standard for business necessity is met if the practice is based on "any factor other than sex."¹³² The employer would merely have to show that the insurer classifies HCT/ABMT as an experimental treatment for breast cancer. Refusal to fund research is the justifying motivation, clearly a factor other than sex. Furthermore, a simple argument that the treatment is too costly also would probably justify the policy. This justification is permissible because no classification has taken place.¹³³

Once the employer justifies the policy, the burden shifts back to the plaintiff for rebuttal. Before the Civil Rights Act of

employees, but whether the plan gives the same level of coverage for medical conditions to spouses of male and of female employees. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 app. at 206 (1995) (Question No. 22).

130. See *supra* notes 62-63, 66-67 and accompanying text (describing the standard for defense of a prima facie case of disparate impact).

131. 42 U.S.C. § 2000e-2(k)(1)(A)(I) (Supp. V 1993); see *supra* notes 66-68 (discussing the business necessity defense and the Civil Rights Act of 1991 amendments).

132. See *supra* note 67 (discussing the Bennett amendment's incorporation of the Equal Pay Act defenses into Title VII where compensation discrepancies are at issue).

133. See *supra* note 83 and accompanying text (noting that classification by sex fulfilled the element of intent in *Manhart*). Although *Manhart* held that neither cost nor actuarial bases can justify a discriminatory classification, the *Wambheim* court found *Manhart* inapplicable in a disparate impact case. *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983) (per curiam).

1991,¹³⁴ the standard at this point seemingly brought the plaintiff back full circle to a disparate treatment case by requiring proof that the employer's articulated non-discriminatory motivation was a pretext.¹³⁵ The Civil Rights Act of 1991 gave the plaintiff the option of rebuttal through offering an alternative employment practice that the employer refused to adopt.¹³⁶

Several options exist for demonstrating an alternative employment practice. Because the statutory language does not provide guidelines for what constitutes an "alternative employment practice" sufficient to rebut a "factor other than sex" defense,¹³⁷ the effectiveness of this argument remains uncertain. If the plaintiff can show that the employer refused to adopt a health care plan that would have covered HCT/ABMT, the plaintiff easily demonstrates a pretext. On the other hand, the plaintiff could attempt to construe "alternative" broadly to mean that the insurer should define HCT/ABMT as an accepted medical practice rather than experimental treatment. Success would hinge on convincing the court that the treatment is no longer experimental. This approach is troublesome because, as in contract law litigation, it asks the court to render a scientific judgment that it is ill-equipped to make.¹³⁸ Finally, the plaintiff could contrast the explicit exclusion of HCT/ABMT in the current policy with the prior method of applying the rule of excluding experimental treatment on a case-by-case basis.¹³⁹ Not only is the effectiveness of this alternative unclear,¹⁴⁰ a showing that the latter

134. Pub. L. No. 102-166, § 105(a), 105 Stat. 1074 (1991) (codified at 42 U.S.C. § 2000e-2(k) (Supp V 1993)).

135. Pretext implies intent to discriminate. See Greenberger, *supra* note 66, at 300 (noting that "one major criticism of *Wards Cove* is that the Supreme Court seemed to collapse impact analysis back into disparate treatment" at the rebuttal stage).

136. See *supra* notes 66-67, 73-74 and accompanying text (discussing Civil Rights Act of 1991); cf. Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1016-17 (1993) (construing the "alternative employment practice" provision as an alternative way of establishing a prima facie case of disparate impact discrimination).

137. See Greenberger, *supra* note 66, at 301-02 (discussing the ambiguities inherent in the alternative employment practice provision).

138. See *supra* note 46 and accompanying text (discussing one commentator's critique of judicial competency to determine whether a medical treatment is experimental).

139. See *supra* notes 39-40 and accompanying text (describing the customary experimental treatment exclusion, which insurers had applied to HCT/ABMT before redrafting contracts to exclude the treatment explicitly).

140. See *supra* notes 49-51 (comparing the advantages and disadvantages of explicit exclusionary terms to blanket exclusions).

alternative has less of a discriminatory impact on women than the former may prove impossible.

The present state of the law pits a hard-won prima facie case for the plaintiff against an easy standard of defense. Furthermore, the plaintiff's burden of persuasion ultimately depends on proof that the defendant's claim of the treatment's experimental status is pretextual, unless the plaintiff can show the availability of an alternative policy that would cover HCT/ABMT for breast cancer. This burden appears far heavier than that faced by plaintiffs litigating under contract law.¹⁴¹ Defendants will argue that if the experimental treatment exclusion and cost containment are valid defenses, using the first as a pretext for the second fails to rise to the necessary level of discrimination. A ruling to the contrary requires courts to recognize that using the experimental treatment exclusion as a pretext to avoid paying for expensive procedures constitutes discrimination to the extent that it predominantly affects members of one sex.

III. BEYOND CLASSIFICATIONS AND VALUATIONS: HOW TO TELL IF WOMEN RECEIVE LESS FROM THEIR HEALTH INSURANCE

A. REQUIRE MUTUALLY EXCLUSIVE CLASSES FOR DISPARATE TREATMENT ANALYSIS WHERE THE CLASSIFICATION FULFILLS THE INTENT ELEMENT

Disparate treatment analysis should apply only if the plaintiff can prove that the employer or insurance company intentionally discriminated against women when it excluded a treatment for breast cancer.¹⁴² A classification using the term "breast cancer" should not fulfill the element of intent unless Congress amends the definition of "sex" as it did when it enacted the PDA.¹⁴³ A judicial extension of "sex" to include gender-specific diseases would result in a "jurisprudence of difference" based upon biology and, more specifically, upon body parts.¹⁴⁴ This is a direction the judiciary

141. See *supra* Part I.C. (discussing contract law litigation and the slant in plaintiffs' favor when cases applied the rules of construction).

142. See *supra* note 61 (discussing intent to discriminate as an element of a prima facie case of disparate treatment).

143. See *supra* notes 79-82 and accompanying text (discussing the PDA).

144. See Sue V. Rosser, *Gender Bias in Clinical Research: The Difference It Makes*, in *REFRAMING WOMEN'S HEALTH* 257 (Alice J. Dan ed., 1994) (arguing that the designation of heart disease and AIDS as "male diseases" results in neglect of research on classes of women at high risk for the same diseases).

justifiably may decline to take.

B. RECOGNIZE THE VALUE OF HEALTH INSURANCE BENEFITS AS RISK COVERAGE

While health insurance is a form of compensation, the value it provides beneficiaries extends beyond its actuarial value.¹⁴⁵ Justice Stevens understood this well, noting in his *Gilbert* dissent that risk coverage represents the true measure of the benefit.¹⁴⁶ The sole question for courts, therefore, should be whether the challenged plan covers the health risks women face to the same extent that it covers the health risks men face.

Likewise, courts should reject *Gilbert's* requirement that they compare the actuarial value of an insurance package to female employees with the value to male employees. Such a comparison runs contrary to insurance group underwriting practice, which works on the principle that some groups subsidize others.¹⁴⁷ If coverage of women's health risks is costlier than coverage of men's health risks,¹⁴⁸ this difference should not function to preclude any disparate impact claim female insureds may make. It would

Rosser also makes the important point, however, that the medical establishment has historically focused exclusively on women's reproductive organs "below the waist" and has neglected breast cancer because it does not fit within the obstetrics/gynecology "territory." SUE V. ROSSER, *WOMEN'S HEALTH: MISSING FROM U.S. MEDICINE* 56 (1994).

145. Cf. EPSTEIN, *supra* note 34, at 340-44 (insisting that the only proper measure is the benefit-to-contribution ratio which would force women to bear the cost of their own health risks, including pregnancy, as opposed to the "public subsidy" that results if health needs are covered on an equal basis).

146. Justice Stevens argued:

Insurance programs, company policies, and employment contracts all deal with future *risks* rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not. . . . If the word "risk" is used narrowly, men are protected against the risks associated with a prostate operation whereas women are not. If the word is used more broadly to describe the risk of uncompensated unemployment caused by physical disability, men receive total protection . . . against that risk whereas women receive only partial protection.

General Elec. Co. v. Gilbert, 429 U.S. 125, 161 n.5 (1976) (Stevens, J., dissenting). In a later decision, the Court, quoting Justice Steven's *Gilbert* dissent, applied his broad interpretation of "risk." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983).

147. See *supra* Part I.B. (describing the nature of group health insurance).

148. For various reasons, health care expense in general is higher for females than for males. MULLER, *supra* note 127, at 7-8 (arguing that in spite of this difference and the fact that women use health care services more than men, some women's health care needs remain unmet).

be anomalous to use cost differentials when creating a group plan and setting its premiums, only to insist subsequently on cost equality when measuring disparate impact.

Applying this model of analysis to exclusion of HCT/ABMT for breast cancer, relevant evidence includes comparisons of the rate of cancer between the two sexes, the incidence of each form of cancer, and the available treatments at each stage of the disease.¹⁴⁹ The cost of treatment is irrelevant to the purely medical question of whether the disease is treatable.¹⁵⁰ Therefore, cost is also irrelevant to whether the policy covers the disease at issue to the same extent as other diseases. Likewise, the effectiveness and experimental status of each treatment should factor into the analysis only to the extent that the plan articulates overall standards for such determinations.¹⁵¹

Courts must develop strict standards for potential defenses of an insurance policy that places the burden of health risks upon women. Because courts already have noted that such claims often mask the real reason for the exclusion,¹⁵² they carefully must scrutinize claims that the experimental status of the treatment constitutes business necessity as a factor other than sex.¹⁵³

149. The evidentiary problems inherent in these cases make them particularly difficult to litigate. The EEOC's recent attempt to investigate Blue Cross & Blue Shield of Missouri was met with predictable resistance. See *EEOC Asks Fed. Court to Enforce Subpoena Against Blue Cross Blue Shield*, 3 Health L. Rep. (BNA) 28 (July 14, 1994) (citing *EEOC v. Blue Cross Blue Shield*, No. 4:94MC00161 (E.D. Mo. filed July 7, 1994)); Woolsey, *Discrimination Alleged*, *supra* note 56, at 2. The EEOC attempted to determine how Blue Cross decides which cancers are eligible for HCT/ABMT and whether it applies a more stringent standard for claims by persons afflicted with breast cancer than it does for claims by people with other cancers. Citing confidentiality concerns, Blue Cross refused to provide information on any policyholders other than those who had filed EEOC claims.

150. See Holder, *supra* note 23, at 805 (hypothesizing a system where physicians have a duty to involve themselves in their patients' ability to pay for treatment).

151. Correlation between gender and access to clinical research can cut both ways: Women may both be encouraged to participate in treatments whose value is unproven, and denied access to emerging technology that is expensive. See MULLER, *supra* note 127, at 230-32 (calling for research on "whether receipt of unjustified treatment and delay in receiving newer efficacious treatment are affected by gender and whether type of health plan, source of payment, and characteristics of the treating doctor influence these outcomes").

152. See *supra* notes 45-46 (discussing cases litigated under contract law where courts ruled the exclusion on experimental grounds "arbitrary and capricious").

153. See *supra* note 67 and accompanying text (discussing Equal Pay Act defenses available to employers when discrimination with respect to compen-

Determining as sufficient the bare assertion that the treatment is experimental would force plaintiffs to bear the burden of producing scientific evidence, even though courts already have stressed that this burden should be borne by the insurance industry.¹⁵⁴ Instead, courts should require defendants to describe the standard by which they determined the treatment's experimental status and prove that they use the same standard for all other treatments and applications.¹⁵⁵ In the case of HCT/ABMT, the policy should articulate what portion of the procedure is experimental, and why it is experimental for breast cancer and not for other cancers.¹⁵⁶ If, for example, the purpose of the research "experiment" is to compare the effectiveness of standard versus high dosages of chemotherapy, the plan should indicate that it never approves dosage comparison studies. If the bone marrow transplant is considered experimental, defendants must show how it differs from bone marrow transplants among other cancer patients.

Finally, courts should impose a duty upon the insurance industry to reevaluate the experimental status of a treatment at the time of a plaintiff's application for coverage. Because a fiduciary must interpret insurance terms in good faith, it stands to reason that it also must revise explicit terms that have become anachronistic.¹⁵⁷ While it is difficult to distinguish between asking the court to decide whether the treatment is experimental and asking the court to decide whether the insurance company's determination that it is experimental was reasonable, such a distinction is the key to these cases.

sation is at stake).

154. See *supra* note 48 (discussing the duty courts place on insurers to research the current status of experimental treatments).

155. For example, it would be important to compare how the same policy dealt with the transition from radical mastectomy as the treatment of choice for breast cancer to adjuvant therapies, including radiation and chemotherapy. This transition took place over two decades beginning in the 1970s. Hortobagyi & Buzdar, *supra* note 19, at 200.

156. This would bring the Title VII cause of action in line with the doctrine emerging from courts that have applied the ADA in discrimination claims regarding HCT/ABMT for breast cancer. See *supra* notes 56, 100, 105 (discussing cases brought under the ADA).

157. See Lee N. Newcomer, *Defining Experimental Therapy—A Third-Party Payer's Dilemma*, 323 NEW ENG. J. MED. 1702, 1702-03 (1990) (noting that emerging technology requires reevaluation by insurers and thus creates exposure to risk); see also *supra* notes 44-47 and accompanying text (discussing the emergence from HCT/ABMT cases under contract law of a duty to update scientific judgments when a beneficiary requests coverage for an excluded treatment).

If the court accepts defendant's claim that the experimental status of the treatment constitutes a business necessity defense, plaintiff's proof that the claim is pretextual can take various forms. Showing that the insurance provider approved other medical treatments at the same stage of emergence as HCT/ABMT suggests that the claim of business necessity is pretextual.¹⁵⁸ Similarly, if the policy applies a different criterion for HCT/ABMT than it does for other treatments, the claim is a pretext. Finally, a plaintiff's showing that the insurer rejected an available alternative criterion for determining the experimental status of a treatment would be evidence of pretext.

CONCLUSION

HCT/ABMT is a promising, albeit costly, treatment for a disease that represents a major health risk for women. Although the practice of excluding experimental treatments from health care coverage relieves insurers from funding medical treatments of questionable value, HCT/ABMT for breast cancer does not fit this mold. When insurance companies apply the traditional experimental treatment exclusion rule to HCT/ABMT and deny coverage of the treatment to breast cancer patients, they stand a significant chance of losing when those patients sue under contract law principles. In an effort to avoid such litigation, many insurers now explicitly exclude HCT/ABMT for breast cancer from their policies. Although the rationale for this exclusion remains the same, plaintiffs cannot challenge application of the experimental treatment rule under contract law principles when exclusion is an explicit contract term.

For most insured Americans, however, health insurance is a benefit of employment. When cutting the cost of insurance is a pretext for discrimination on the basis of sex, it is ripe for challenge under civil rights law. Thus if an insurance plan offered as

158. In other words, courts should compare HCT/ABMT with other treatments undergoing Phase IV randomized trials, some of which may nevertheless be classified as accepted medical practice. Consistent criteria for determining what is accepted medical practice is the key to finding appropriately analogous treatments to HCT/ABMT. Courts evaluating claims under the ADA have used this analytical framework. *See, e.g., Polifko v. King*, No. 94-05, 1995 WL 33981, at *7 (EEOC Jan. 4, 1995) (seeking evidence that insurance carrier excludes coverage of ABMT for conditions other than breast cancer). Lack of established or consistent criteria was important in litigation of HCT/ABMT coverage for breast cancer under contract law. *See supra* Part I.C. (discussing the issues litigated under contract law).

a benefit of employment covers the health risks that women face to a lesser extent than it does the health risks faced by men, this discrepancy falls under Title VII. It is reasonable to expect that the duty not to discriminate in the employment setting includes the duty to prevent a class of individuals guaranteed protection under civil rights law from bearing the burden of health risk.