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Pacourek v. Inland Steel Company: Enforcing Equal Protection Rights by Designating Infertility as a Disability Under the Americans with Disabilities Act

I. INTRODUCTION

In *Pacourek v. Inland Steel Co., Inc.*,¹ the Federal District Court of the Northern District of Illinois articulated a three-prong test as a means of determining whether the condition of infertility falls under the protection of the Americans with Disabilities Act.² The decision in *Pacourek*, however, does not by any means answer the question; there is a definite split in the courts regarding infertility's qualifications as a basic disability. This issue has become increasingly important to employers and insurance companies alike, but those principally affected are, of course, the individuals who must cope with the physical and psychological effects of their own infertility.³

While the main issue in *Pacourek* was over the dismissal of the suit itself, other similar cases have arisen over insurance coverage.⁴ The issue is being watched carefully by the management side of the equation (i.e., employers and insurers) due to the potential for fertility treatments requiring coverage by law under the Act. The central concern for both of the

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1. 916 F. Supp. 797 (N.D. Ill. 1996).

2. 42 U.S.C. §§ 12101-12213 (1988 & Supp. IV 1992)[hereinafter "Act" or "ADA"].

3. See Sandra M. Tomkowicz, *The Disabling Effects of Infertility: Fertile Grounds for Accommodating Infertile Couples Under the Americans with Disabilities Act*, 46 SYRACUSE L. REV. 1051, 1085-88 (1996); Rhonda S. Tischler, *Infertility: A Forgotten Disability*, 41 WAYNE L. REV. 249, 251 (1994).

4. This note examines construction of the ADA and the extension of equal protection to those suffering from infertility. The implications of ADA coverage in regard to insurance benefits necessarily require consideration of factors related to business, insurance, and employment law, rather than disability and equal protection. For information pertaining to the impact in former areas, see, e.g., Krauel v. Iowa Methodist Medical Center, 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674(8th Cir. 1996); Maciosek v. Blue Cross and Blue Shield, 930 F.2d 536 (7th Cir. 1991); Reilly v. Blue Cross and Blue Shield, 846 F.2d 416 (7th Cir. 1988); Kinzie v. Physicians Liab. Ins. Co., 750 P.2d 1140 (Okla. Ct. App. 1987) (all holding that insurance coverage was properly denied on basis that infertility treatments are not "medically necessary" to the physical health of the insured). Cf., e.g., Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University (N.D. Ill. 1995); Ralston v. Connecticut Gen. Life Ins., 617 So.2d 1379 (3d Cir. 1993); Egert v. Connecticut Gen. Life Ins., 900 F.2d 1032 (7th Cir. 1990); Witcraft v. Sundstrand Health & Disability Group, 420 N.W.2d 784 (Iowa 1988)(all allowing insurance coverage for infertility treatments).

aforementioned parties lies in the costs associated with infertility treatments, as well as employee absenteeism in the case of the employers.

As there is no overriding precedent from the United States Supreme Court, the courts have been left to their own devices to come up with solutions to the controversy. As is common with new laws, the eye of the legal storm hovers in the too-often ambiguous language of the law itself. The Act defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities."⁵ The Federal Equal Employment Opportunity Commission (EEOC), which administers the law,⁶ describes capabilities such as walking, speaking, seeing, hearing, and caring for oneself as examples of "major life activities."⁷ The question, then, becomes whether the attempt to create life falls within the parameters of this designation.

This note will review the background of the principle case, and compare it to recent similar cases in other jurisdictions, the applicable provisions of the Americans with Disabilities Act (ADA), and the court's analysis of *Pacourek*, in light of the language within the ADA. This note will suggest the infertility issue is dispositive of the need for construing the ADA in the broad scope that was intended by Congress in its enactment. Finally, this note will conclude that employers' statutory duty to provide reasonable workplace accommodations in accordance with the ADA should extend to persons suffering from infertility in order to afford the unilateral equal rights guaranteed by the Constitution.

II. BACKGROUND

A. *Pacourek v. Inland Steel Co., Inc.*

Charlene Pacourek began working at Inland Steel, Inc., (Inland Steel) in March, 1975.⁸ In 1987, she began seeing a doctor regarding her infertility problems, causing her to miss several days of work that year to keep her appointments.⁹ In March, 1991, she began treatments for infertility.¹⁰ In August of the same year, her doctor eventually diagnosed her condition as unexplained infertility.¹¹

Pacourek soon began a barrage of infertility treatments during 1991 and 1992. These treatments included, among other things, intrauterine

5. 42 U.S.C. § 12102(A) (1988 & Supp. IV 1992).

6. See 42 U.S.C. § 12117(a) (1988 & Supp. IV 1992).

7. See 29 C.F.R. § 1630.2(i)(1995).

8. *Pacourek*, 916 F. Supp. at 799.

9. *Id.*

10. *Id.*

11. *Id.*

insemination and high-potency injections of the hormone Pergonal.¹² Pacourek was absent from work on some of the days she underwent treatment. The procedures proved fruitless at the time.¹³

In February, 1992, Pacourek's supervisor gave her a "90-Day Performance Plan," which directed that she was not to be absent from work during the 90-day period without a doctor's excuse.¹⁴ She missed three days of work, each time providing a medical explanation from her physician.¹⁵ In March, 1992, however, her supervisor at Inland Steel told her that she had been designated as a "high risk" for termination.¹⁶ Pacourek was terminated in May of 1993.¹⁷

Pacourek then proceeded to file a charge with the EEOC, which granted her the right to sue.¹⁸ Her suit alleged numerous claims,¹⁹ based on purported violations of Title VII of the Civil Rights Act of 1964,²⁰ the Pregnancy Discrimination Act,²¹ and the Age Discrimination in Employment Act of 1967,²² as well as her claim under the American with Disabilities Act. As applicable to this discussion, Pacourek contended that infertility was a disability which caused her termination, thus violating the ADA.²³ Inland Steel countered that the ADA was inapplicable to infertility. Specifically, Inland Steel argued that Pacourek's "unexplained infertility" was not an impairment covered by the ADA and that procreation is not a major life activity within the meaning of the ADA.²⁴

The court agreed with Pacourek, concluding that her unexplained infertility was a physical impairment.²⁵ The court also noted that reproduction is a "major life activity," according to the broad application intended for the stated EEOC regulation.²⁶ Because it was clear that Ms. Pacourek suffered infertility, a physical impairment of the reproductive system, the

12. *Id.*

13. *Id.* It is of note that in October 1993, Pacourek underwent a successful embryo transfer and became pregnant. *Id.* at 799, n.2.

14. *Id.*

15. *Id.*

16. *Id.* at 799, 800.

17. *Id.*

18. *Id.* at 799.

19. *Id.* Inland Steel apparently chose to contest only the ADA claim, moving for partial summary judgment. *Id.* This is similar to Inland Steel's earlier motion to dismiss for failure to state a claim, which the court also denied. *See Pacourek v. Inland Steel Co., Inc.*, 858 F. Supp. 1393, 1396-97 (N.D. Ill. 1994).

20. 42 U.S.C. §§ 2000e-2000e(17) (as amended) (1988 & Supp. IV 1992).

21. 42 U.S.C. § 2000e(k) (amendment to Title VII) (1988 & Supp. IV 1992).

22. 29 U.S.C. §§ 621-634 (1988).

23. *Pacourek*, 916 F. Supp. at 800.

24. *Id.*

25. *Id.* at 804.

26. *Id.* at 801, 804.

court concluded she was, in fact, disabled under the guidelines of the ADA, and therefore had a claim.²⁷

B. *The Split in the Courts*

In *Pacourek*, the court stated that "it defies common sense to say that infertility is not a physiological disorder or condition affecting the reproductive system."²⁸ In so concluding, the court provided well-reasoned analysis on how infertility fits into the ADA definition of disability by classifying it as a physical impairment that substantially limits one or more major life activities. The crux of the issue facing the *Pacourek* court and other courts in the nation is whether procreation constitutes a "major life activity." District courts in Louisiana²⁹ and Iowa³⁰ have concluded that it is not.

1. *Zatarain v. WDSU-Television, Inc.*

In *Zatarain v. WDSU-Television, Inc.*,³¹ the court found the reasoning in *Pacourek* to be "circular and unpersuasive."³² The *Zatarain* court further concluded that the *Pacourek* decision was defective because it "would allow [the plaintiff] to bootstrap a finding of substantial limitation of a major life activity onto a finding of an impairment."³³ The court continued on to find that reproduction as a "major life activity" would be inconsistent with the list of "major life activities" in the ADA regulations. Exclusion was justified on the grounds that reproduction is not engaged in with the same frequency or regularity as the other actions. The court concluded that "[a] person is required to walk, see, learn, speak, breath and work . . . day in and day out. However, a person is not called upon to reproduce throughout the day, every day."³⁴

2. *Krauel v. Iowa Methodist Medical Center*

The Iowa district court, later affirmed by the Eighth Circuit, also refused to recognize the validity of the *Pacourek* decision.³⁵ The *Krauel* court asserted that the *Pacourek* analysis was suspect because it "fail[ed]

27. *Id.* at 804.

28. *Id.* at 801.

29. *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D.La. 1995).

30. *Krauel v. Iowa Methodist Medical Center*, 915 F. Supp. 102 (1995). The Eighth Circuit affirmed this decision in September, 1996 (95 F.3d 674 (8th Cir. 1996)).

31. 881 F. Supp. 240.

32. *Id.* at 243.

33. *Id.*

34. *Id.* See 29 C.F.R. §1630.2(i).

35. 915 F. Supp. 102.

to recognize that 'physical or mental impairment' and 'major life activities' are separate and distinct components" according to the definition of disability under the Act.³⁶ In this instance, the *Krauel* court regarded reproduction as a lifestyle choice, and thus unqualified for protection under the ADA. It noted: "Some people choose not to have children, but all people care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn and work, unless a handicap prevents them from doing so."³⁷

III. CREATING A DEFINITION OF DISABILITY

The Americans with Disabilities Act of 1990³⁸ was enacted, in part, to prevent workplace discrimination against approximately 43 million otherwise qualified individuals with a disability.³⁹ The Act specifically defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities."⁴⁰ Under the ADA, an employer cannot discriminate against a person if that person is qualified for a position.⁴¹

The EEOC has the responsibility of overseeing and enforcing the provisions of the Act.⁴² The EEOC interprets its own guidelines for disabilities by using the following three-prong definition of disability: (1) a mental or physical impairment that substantially limits a major life activity;⁴³ (2) a record of an impairment; or (3) being regarded as having an impairment.⁴⁴

36. *Id.* at 107 (citing *Zatarain*, 881 F. Supp. at 243).

37. *Id.* at n.1.

38. 42 U.S.C. §§ 12101-12213 (1988 & Supp. IV 1992).

39. Title I of the ADA provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or *discharge of employees*, employee compensation, job training, and other terms, conditions, and privileges of employment (emphasis added).

42 U.S.C. § 12112(a)(1) to (3).

40. *Id.* at § 12117(a).

41. *Id.* at §§ 12111(8), 12112(a).

42. *Id.* at § 12117(a).

43. The ADA defines "physical impairment" as follows:

[A]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, *reproductive*, digestive, genito-urinary, hemic and lymphatic, and endocrine.

Technical Assistance & Resources, in AMERICANS WITH DISABILITIES ACT MANUAL (BNA), at 22 (1993) (emphasis added).

44. 42 U.S.C. § 12102(2)(A)-(C) (1988 & Supp. IV 1992); James R. Neely, Jr., *Current Critical Issues in Labor and Employment Law: EEOC Compliance Manual*, 40 ST. LOUIS U. L.J. 107,109-17 (1996).

It is the first prong of the definition which is the source of concern. If infertility is able to meet the first prong of the Act, then the other two prongs are necessarily satisfied *de facto*.⁴⁵ Creating a concrete notion of what comprises a "major life activity" is pivotal in the designation of "disability." Such definitive guidelines are glaringly absent from both the language and the legislative history of the Act.⁴⁶ It is thus not at all surprising that the courts, in attempting to fulfill the goals of the Act,⁴⁷ should generate rulings as individualistic as the triers of fact themselves. Under the specific ADA guidelines only those individuals who can successfully establish that their particular affliction impinges on a major life activity may be classified as "disabled" for protection under the ADA.⁴⁸ The real challenge is qualifying infertility as a protected disability according to the vague and varying definitions available.

IV. THE *PACOUREK* TEST FOR DETERMINING DISABILITY AND RESULTING CASE ANALYSIS

The *Pacourek* court affirmed the dismissal of Inland Steel's partial summary judgment motion, ruling that Pacourek's infertility was a "major life activity" that should be covered by the ADA.⁴⁹ In rejecting the arguments in *Zatarain* and *Krauel*, the court used its own three-prong test to determine if infertility was an impairment protected by the ADA. The *Pacourek* test includes the following factors: (1) whether the condition is a physical or mental impairment; (2) if yes, then whether that impairment affects a major life activity; and (3) whether the major life activity is itself substantially limited by the impairment.⁵⁰

The court particularly emphasized the wording of the ADA regulations.⁵¹ That language specifically designates the reproductive system as one of the bodily systems that can be impaired and covered by the Act.⁵² It is thus logical to assume that if a given malady that affects the reproductive system is termed an impairment under the ADA that the next step

45. Tomkowicz, 46 SYRACUSE L. REV. 1051, 1061 n.32 (1996).

46. Notable is the *Krauel* court's stipulation that legislative history "may provide some support" for the argument that Congress intended procreation to be a major life activity. 915 F. Supp. at 107. It asserts, however, that legislative history is often "highly unreliable" and "hazardous at best." *Id.* (citing *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 242 (1990)). The *Krauel* court then justifies its holding against infertility as a disability by arguing that legislative intent is opposed to such a designation. *Id.* at 108.

47. See *Pacourek*, *supra* note 10.

48. See Tomkowicz, *supra* note 45, at 1061.

49. 916 F. Supp. at 804.

50. *Id.* at 801. The court specifically applied the third prong to inquire as to "[w]hether the major life activity of reproduction is substantially limited by infertility." *Id.* at 804.

51. *Id.* at 801.

52. *Id.* citing, 29 C.F.R. § 1630.2(h)(1).

would be to assume that reproduction itself is a major life activity.⁵³ Holding otherwise "would . . . ma[k]e no sense [as] to includ[ing] the reproductive system among the systems that can have an ADA physical impairment."⁵⁴

Such reasoning was not the *Pacourek* court's only support in affirming the lower court's analysis. The decisions in *Zatarain* and *Krauel* were criticized and categorically rejected as interpreting major life activities too narrowly.⁵⁵ These decisions were both based on findings that reproduction is not engaged in with the same frequency as other activities.⁵⁶ The other courts found that because reproduction was not an activity required on a daily basis, it was not a major life activity. *Pacourek*, however, points out that "neither the ADA nor its implementing regulations either explicitly or impliedly defines 'major life activities' by the frequency with which they occur."⁵⁷ The court in *Pacourek* concluded that by including the reproductive system in the ADA description, the EEOC rulemakers anticipated possible physiological disorders that should be covered under the Act.⁵⁸ Further, the court reasoned, since the act of reproduction is probably the "major activity [to be] substantially limited by a physiological disorder of the reproductive system," the EEOC surely considered that reproduction would be considered a major life activity.⁵⁹ With such supports, the *Pacourek* court charged the *Zatarain* and *Krauel* courts with "trivializ[ing] reproduction."⁶⁰

The Court found that coverage of the act *did* apply to Ms. Pacourek. The court compared Ms. Pacourek's ability to procreate with that of the average person and concluded that she was either unable to do so or was at the very least substantially limited in performance.⁶¹ The court found that because Ms. Pacourek's infertility "substantially limits the major life

53. *See Id.*

54. *Pacourek*, 858 F. Supp. 1393, 1404.

55. *Id.* at 1395.

56. *See Krauel*, 915 F. Supp. at 106-07; *Zatarain*, 881 F. Supp. at 243.

57. 916 F. Supp. at 803.

58. *Id.* at 802.

59. *Id.*

60. *Id.* at 804.

61. *Id.* at 803. The EEOC regulations state that the "substantially limits" connotes: The inability] to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(i-ii) (internal designations omitted).

activity"⁶² that infertility must be a physical impairment that rendered her disabled under the ADA.

V. THE INFERTILITY DEBATE OUTSIDE THE COURTROOM

A. Definition and Scope

It is estimated that more than 5 million married couples in the United States suffer from infertility.⁶³ The standard generally used for defining infertility is "the inability of a couple to conceive after twelve months of intercourse without contraception."⁶⁴ The American College of Obstetricians Gynecologists and the American Fertility Society expand on the definition by designating infertility as "a disease resulting in the abnormal function of the reproductive system."⁶⁵

General approximations are that 7.9 per cent of the population of reproductive age is infertile.⁶⁶ Further, in 1988 an estimated 4.9 million women suffered from infertility according to this definition.⁶⁷ It appears that the base percentage of couples affected by infertility stays relatively constant, although the number of couples seeking infertility treatment has skyrocketed.⁶⁸ This particular increase has been attributed to factors including more widespread and improved availability of infertility treatment techniques,⁶⁹ the decreased number of infants available for adoption,⁷⁰ and the greater social acceptance toward pursuing treatments of infertility.⁷¹

As demonstrated in *Pacourek*, the pursuit of medical treatment to remedy infertility often becomes a very time-consuming quest which often creates difficulties in balancing personal needs with the responsibilities of the workplace. In addition to workplace pressures, infertility al-

62. *Pacourek I*, 858 F. Supp. at 1404-05 (citing *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992)). See *supra* note 37.

63. See, e.g., Tomkowicz, 46 SYRACUSE L. REV. at 1053, n.4; S. Rep. No. 102-452, 102nd Cong., 2d Sess. 2 (1992), reprinted in 1992 U.S.C.C.A.N. 3146.

64. Office of Technology Assessment, U.S. Congress, Pub. No. OTA-BA-358 Infertility: Medical and Social Choices 3, (1988) [hereinafter OTA Report].

65. Infertility and National Health Care Reform: A Briefing Paper, at 1 (RESOLVE, Inc. & The American Fertility Society)(1993) (cited in *Tischler*, 41 WAYNE L. REV. at 250, n.4).

66. William D. Mosher & William F. Pratt, *Fecundity and Infertility in the United States, 1965-88*, ADVANCE DATA AND HEALTH STATISTICS OF THE NATIONAL CENTER FOR HEALTH STATISTICS, (Dec. 4, 1990) at 1.

67. *Id.* See generally *Tischler*, 41 WAYNE L. REV. at 250.

68. *Tischler*, at 251; Mosher & Pratt, *supra* note 66, at 1, 5.

69. OTA Report, *supra* note 64, at 55-56.

70. *Id.*

71. *Id.* *Tischler* also ascribes this trend to other considerations, including that "more couples seem to be delaying childbearing" and "the widespread use of contraceptives." 41 WAYNE L. REV. at 251, n.21.

ways results in a certain amount of psychological stress,⁷² and often economic pressure.⁷³ The application of ADA disability standards to those suffering from infertility would allow many afflicted couples to pursue treatment for their condition without unnecessary additional concern for job security.

B. *The Correct Measure of a Protected Disability: Emphasizing the "Major Life Activity" Prong*

The *Pacourek* court's test for ADA applicability, namely, the focus on "major life activity," is a very thoughtful and correct means of determining that infertility is a covered disability. It is peculiar to argue that the procreative process — in essence, *creating* life — would not be considered a "major life activity." Most parents would likely disagree with any statement to the contrary. For those individuals who want to become parents, the successful pregnancy is the first step in realizing that desire. As Professor Elizabeth Bartholet stated: "We are all conditioned from early childhood to equate personhood with procreation and procreation with parenting."⁷⁴

1. *When the bodily system fails*

Any defect in the bodily system which effectually deprives a person of enjoying the benefits of the principle purposes of that system is an undeniably painful condition for the suffering individual.⁷⁵ The reproductive system has basically one sole function: to reproduce the species. When that physiological system is impaired to the point of being unable to carry out its basic design, a disability is necessarily created.

72. See Tomkowicz, 46 SYRACUSE L. REV. at 1085-88, and nn.186-203.

73. *Id.* at 1059-60 and n.28 (estimating that a successful delivery following average time and techniques of infertility treatments costs between \$67,000 to \$114,000); Tischler, 41 WAYNE L. REV. at 253,257; OTA Report, *supra* note 64, at 161; RESOLVE, Inc. *A Briefing Paper*, *supra* note 65, at 4.

74. FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 24 (1993). See also Tomkowicz, 46 SYRACUSE L. REV. 1053-54. Professor Lawrence A. Frolik elaborates on Professor Bartholet's theme by considering economic, as well as social ramifications of infertility:

Against all rational economic evidence of the cost of children, we are predisposed to want them. This is not merely a cultural construct; in every culture people want to have children. The desire for children . . . is in our nature. . . . [M]ost do not [resist it] and our culture reflects that procreative desire.

The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It? 57 U. PITT. L. REV. U. PITT L. REV. 841, 873-74 (1996) (internal designations omitted).

75. See Tomkowicz at 1070-71 (discussing analogies in designation of procreation as a major life activity in regard to HIV-AIDS cases in 8 Fair Empl. Prac. Man. (BNA) 405 at 1 (Sept. 27, 1988), (Justice Department Memorandum on the Application of §504 of the Rehabilitation Act to HIV-Infected Persons)[hereinafter DOJ Memo]).

Any aspects of the reproductive system, including impairments, must necessarily fall under the auspices of the ADA — if for no other reason than that the affected system itself is listed within the Act's own covered guidelines. The specific definitions for a covered disability are not novel or unvisited, as the *Pacourek* court recognized in citing *McWright v. Alexander*.⁷⁶ *McWright* held that the designations of impairments under the ADA are substantially identical with those of its predecessor, the Rehabilitation Act of 1973.⁷⁷

2. Comparing the ability to "interact with others" with the rest of the population

In the *Pacourek* holding, the emphasis was correctly placed on the "major life activities" prong. In its appendix, the EEOC is abundantly clear in its directive that their list of activities "is not exhaustive" or "limited to" those listed in the guidelines.⁷⁸ This principle of broad interpretation of a disability is an established judicial tenet.⁷⁹ The spirit of the Act encourages a broad reading of "major life activities," since it provides that they are "basic activities that the average person in the general population can perform with little or no difficulty."⁸⁰ Nowhere is a standard or requirement stated for the frequency or regularity of the action, as the court in *Zatarain* would suggest.⁸¹ In its Memorandum, the EEOC expanded previous examples of major life activities to also include "emotional processes such as . . . interacting with others," emphasizing the individual's functioning as compared with that of a normal person.⁸²

Through the express language of the Act, and additional interpretation by the EEOC,⁸³ the *Pacourek* court's holding is correct. The EEOC's

76. 982 F.2d 222 (7th Cir. 1992).

77. 29 U.S.C. §791 (1995). Compare 29 C.F.R. §§1613.702(a)(1), (b)(1), and (c) with 29 C.F.R. §§ 1630.2(g)(1), (h)(1), and (I) (1995). Also, the EEOC's interpretive guidance on the ADA, equates the regulations under the ADA with those under the Rehabilitation Act.

Congress adopted the definition of "disability" from the Rehabilitation Act definition of the term "individual with handicaps." This demonstrates that Congress intended that the relevant case law that developed under the Rehabilitation Act be applicable to the term "disability" as outlined in the ADA. 29 C.F.R. §1630 app. at 401 (citing H.R. Rep. 485, 101st Cong., 2d. Sess., pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 327, 329-30. See *Pacourek*, 916 F. Supp. at 802-03; *Erickson*, 911 F. Supp. 316.

78. 29 C.F.R. § 1630. app., § 1630.2(i)(1995).

79. See *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

80. 29 C.F.R. § 1630. app., § 1630.2(i).

81. 881 F. Supp. at 243.

82. EEOC Compl. Man. (BNA) 902, at 15 (March 14, 1995).

83. See *supra* note 75. The DOJ Memo focused on the impact that HIV has on an infected, though asymptomatic, person to procreate. *Id.* at 6-7. The memorandum concluded that "there is little doubt that procreation is a major life activity" and that infected persons cannot pursue this "basic human desire without significant fears concerning . . . the impact [the virus may have on his] biological child." *Id.*

latest guidance memorandum, titled "Definition of the Term Disability", includes "interacting with others" as a major life activity.⁸⁴ This is certainly significant, as there is no more elemental and personal interaction between individuals than that of procreation. The court in *Erickson* further held that even if procreation is a "complex process," not a simple one, such as walking or seeing might be, that such a standard is unpersuasive and "the simplicity or complexity of the process is insignificant."⁸⁵

By definition, then, an individual suffering the effects of infertility should certainly be declared disabled under the terms of the Act. As previously stated, infertility is found when an individual has been unable to conceive a child within a the space of one year.⁸⁶ This is certainly in contrast with the average person in the general population. Designating procreation as a major life activity based on its status as elemental human interaction is alone sufficient to be in harmony with the regulations of the Act and subsequent interpretive guidance of the EEOC in recognition of the concept.

VI. FUNDAMENTAL RIGHTS OF PARENTING AND PROCREATION

Fundamental rights are accorded special protection under the Constitution. The right to procreate, however, gained its fundamental status not in the explicit provisions of the Constitution, but through a long line of Supreme Court cases.⁸⁷ In the early case of *Meyer v. Nebraska*,⁸⁸ the Court specifically held that one of the freedoms guaranteed by the Fourteenth Amendment was "the right of the individual . . . to marry, establish a home and bring up children."⁸⁹

A House Report on the ADA states that a "person infected with HIV is covered under the first prong of the term 'disability' because of a *substantial limitation to procreation*[. . .]" H.R. Rep NO. 101-485 (1990), (*reprinted in* 1990 U.S.C.C.A.N. 267, 344)(emphasis added). *See also* Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310 (E.D. Pa. 1994)(finding that reproduction is a major life activity under the ADA for a person infected with HIV).

Tomkowicz argues that if the HIV-infected individual is protected in the Act because the potential of transmission of the virus to a biological child limits the major life activity of procreation, "then an infertile person, whose physical impairment substantially limits his or her ability to procreate in the first instance, likewise should be afforded the protection of the Act. . . . No such arbitrary distinction [. . .] should be drawn." 46 SYRACUSE L. REV. at 1071.

84. *See generally, supra* note 83.

85. 911 F. Supp. 316.

86. *See supra* notes 63-65.

87. *Skinner v. Oklahoma*, 316 U.S. 535 (1942)(holding that marriage and procreation are fundamental rights). *See also* *Eisenstadt v. Baird*, 405 U.S. 438 (1972)(recognizing, in dicta, the right to be free from unwanted governmental intrusion into matters "so fundamentally affecting a person" as relating to bearing a child).

88. 262 U.S. 390 (1923).

89. *Id.* at 399.

The Court continued this rationale in the landmark case of *Skinner v. Oklahoma*.⁹⁰ The Court termed procreation to be "one of the basic civil rights of man" that is "fundamental to the very existence and survival of the race."⁹¹ Since then, the Court, in reliance on *Skinner*, has also termed procreation to be one of "the most intimate concerns of an individual's life."⁹²

This right was deemed Constitutional in *Griswold v. Connecticut*,⁹³ establishing a fundamental right to aspects of "marital privacy." Although the Justices could not apply a particular clause of the Constitution, they emphasized broad interpretations of the First, Fourth, Fifth, and Fourteenth Amendments. They concluded that the right of couples to bear or beget children was a "longstanding tenet" of American legal history.⁹⁴ Justice Harlan, in concurrence, stated that this right to privacy was the very essence of a scheme of ordered liberty.⁹⁵

Recent cases before the Court have preserved this right. In *Planned Parenthood of Pennsylvania v. Casey*,⁹⁶ the Court continued to hold procreation as an "important decision." Here, the Court concluded: "While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make . . . are personal decisions 'relating to marriage, procreation . . . family relationships, and child rearing . . .'"⁹⁷ The *Casey* decision demonstrates a firm commitment to the constitutional value that procreation is an important and protected aspect of individual liberty. This holding was affirmed by a federal district court⁹⁸ to include within a "cluster of constitutionally protected choices" that of the right to pursue medical treatment that promotes procreation. The Court significantly noted, in dicta, that "there must be included [in the cluster of constitutionally protected choices] the right to submit to a medical procedure that may *bring about . . . pregnancy*."⁹⁹

90. 316 U.S. 535.

91. *Id.* at 541.

92. *Poe v. Ullman*, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting).

93. 381 U.S. 479 (1965).

94. *Id.* at 486. See Erika T. Blum, *When Terminating Parental Rights is Not Enough: A New Look at Compulsory Sterilization*, 28 GA. L. REV. 977, 985-86 (1994).

95. *Griswold*, at 500 (Harlan, J., concurring) (citing *Poe*, 367 U.S. at 548 (Harlan, J., dissenting)).

96. 505 U.S. 833, 859 (1992).

97. *Id.* (citations omitted).

98. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), *aff'd mem.*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) (finding a violation of a Constitutional right to privacy regarding that part of the Illinois Abortion Law prohibiting the sale or experimentation on "a fetus . . . unless such experimentation is therapeutic to the fetus thereby produced." 735 F. Supp. at 1363, 1377).

99. *Id.* at 1377 (emphasis added).

Merely the absence of a complete barrier to participating in a major life activity — namely, procreation — should not place infertility outside of the protection of the ADA.¹⁰⁰ Even if the analysis turns not upon the activity itself, the consequences intended to be effected by that activity—successful pregnancy—should be dispositive. The court in *Abbott v. Bragdon* recognized that *any* impairment that renders an individual infertile, limiting the ability to procreate, would satisfy the statutory requirements for protection under the Act.¹⁰¹

VII. CONCLUSION

Infertility is a condition that affects a substantial number of people in the United States. As more and more couples seek out improved techniques to remedy this impairment, employment issues will arise more frequently. This is especially true in regard to insurance benefits coverage and allowing time off work to pursue medical treatment. Before these policies can be dealt with effectively, however, there is an urgent need to consider the status of infertility as a disability. If couples are to enjoy the protection of their fundamental constitutional rights to become parents, they must be protected when their efforts are physiologically frustrated. The ADA is a civil rights statute. Civil rights statutes are generally held to be construed liberally to “effectuate [their] remedial purpose.”¹⁰² Thus the *Pacourek* court’s view of reproduction as a major life activity under the ADA is certainly in harmony with this canon of construction.

The purpose of the Americans with Disabilities Act is to protect those with disabilities from discrimination in the workplace due to their disability. Infertility *is* a disability which deserves protection from discrimination according to the terms of the ADA. It is certainly a physiological disorder of the reproductive system, which substantially limits a major life activity — child bearing. To qualify under the ADA, the disability must substantially limit a major life activity. The Equal Employment Opportunity Commission is explicit in its specification that in determining the existence of a disability “it is not necessary to consider if a person is substantially limited in the major life activity of working if the person is substantially limited in any other major life activity.”¹⁰³

The *Pacourek* court was correct to focus its analysis on the determinative prong of specifying that a disability must affect a major life activ-

100. See *Abbott v. Bragdon*, 912 F. Supp. 580 (D.Me. 1995).

101. *Id.* at 584.

102. *Stoner v. Department of Agriculture*, 846 F. Supp. 738, 742 (W.D. Wis. 1994); *Keller v. Prince George’s County*, 827 F.2d 952 (4th Cir. 1987).

103. *Technical Assistance & Resources*, BNA’s Americans with Disabilities Act Manual (BNA), at 24 (1993).

ity. To allow Ms. Pacourek the opportunity to pursue her claim of discrimination in the courts is entirely proper. This ruling clearly follows the intent with which the mandate was passed. The broad scope under which the Act was intended to be interpreted would establish infertility as a disability. This designation would not only establish guidelines for coverage of treatment and for workplace policies (i.e. scheduling, sick days, etc.), but would provide a much-needed boon to infertility sufferers. To exclude infertility from the coverage of the Act would effectuate disparate treatment against those with reproductive impairment. Fundamental constitutional principles demand equal treatment for all. Those with infertility are no different from those suffering with any other disability; as such, it is only just and proper that they are also permitted to enjoy the benefits of the Americans with Disabilities Act.

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