Symposium Introduction: The Effect of *Dobbs* on Work Law

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Abstract

In March 2023, Chicago-Kent College of Law hosted a symposium—The Effect of Dobbs *on Work Law—to explore the ways that the* Dobbs *abortion decision has affected the workplace. The presenters at that live symposium wrote articles that are being published in this journal. As the host of the symposium and the Editor of this Journal, I use this Article to introduce the articles in this symposium issue and to provide my reflections on them. I also briefly address the topic that I presented at the symposium—the effect of* Dobbs *on people with disabilities.*

I. INTRODUCTION

The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*[1] was nothing short of monumental. It has—and will undoubtedly continue to have—significant and far-reaching effects on almost all areas of life and law, including families (and family law),[2] relationships, the criminal justice system, healthcare,

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[1] 597 U.S. 215 (2022).

[2] *See, e.g.*, Mark Spindelman, Dobbs' *Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 155–63 (2023) (discussing how *Dobbs* might mean that the conservative Court could use the Fourteenth Amendment's Privileges or Immunities Clause to redefine parental and other family rights in a way that harms LGBTQ workers, affect no-fault divorce rules, and interpret marital privacy in a way that rewrites several decades of history); Pnina Lifshitz-Aviram & Yehezkel Margalit, *From* Roe v. Wade *to* Dobbs v. Jackson*—Between Women's Rights Discourse and Obligations Discourse*, 33 HEALTH MATRIX J. OF L.-MED. 345 (2023) (discussing family rights versus women's rights after *Dobbs*).

travel,[3] and state[4] and federal politics, to name a few. It will also undoubtedly have significantly different effects based on race,[5] ethnicity, class, LGBTQ+ status,[6] age, and disability.[7] These issues are already being discussed and explored and will continue to be for years (if not decades).

Although all of these issues are and will continue to be important, in March 2023, a symposium hosted by the Martin Malin Institute for Law and the Workplace at Chicago-Kent College of Law focused on a context less obviously impacted—the effect of the *Dobbs* decision on labor and employment law, and on the workplace more generally. Distinguished scholars and advocates from around the country explored topics that included: privacy in the workplace, pregnancy discrimination protections, the newly enacted Pregnant Workers Fairness Act (PWFA),[8] state and federal maternity leave laws, employers' liability for assisting employees in procuring abortions, implications of the *Dobbs* decision for employees of religiously affiliated employers, effects on workers with disabilities, racial and class differences regarding how *Dobbs* affects the workplace, the effect of *Dobbs* on sexual harassment and gender-based violence law, the potential role of unions and other collective action, and the effects of the decision on employee benefits law. This symposium issue explores these issues.

This Introduction provides a preview of the articles to come and offers my reflections on the issues raised by the articles. Additionally,

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[3] Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE 21, 28–29 (2022).

[4] *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/XP2C-YX76] (discussing states that have enhanced or limited abortion protections, either through statute or constitutional amendment).

[5] *See, e.g.*, Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 34–55 (2022) (discussing the racist history and effects of the *Dobbs* decision).

[6] *See, e.g.*, Robin Maril, *Queer Rights After* Dobbs v. Jackson Women's Health Organization, 60 SAN DIEGO L. REV. 45 (2023); Katie Eyer, *Transgender Equality and* Geduldig *2.0*, 55 ARIZ. ST. L.J. 475, 480 (2023).

[7] *See, e.g.*, Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851 (2022) [hereinafter Powell, *Disability*]; Robyn M. Powell, *Including Disabled People in the Battle to Protect Abortion Rights: A Call-to-Action*, 70 UCLA L. REV. 774 (2023); Robyn M. Powell, *Forced to Bear, Denied to Rear: The Cruelty of* Dobbs *for Disabled People*, 112 GEO. L.J. (forthcoming 2024), https://ssrn.com/abstract=4558129.

[8] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. II, 136 Stat. 4459, 6084 (2022) (Pregnant Workers Fairness Act) (codified at 42 U.S.C. § 2000gg).

I use this Introduction to briefly address the topic that I discussed during the live symposium—the effect of *Dobbs* on people with disabilities. Part II provides a summary of each article that appears in this symposium issue. Part III provides a highlight of the issues facing people with disabilities in the workplace in light of *Dobbs*. Part IV briefly concludes.

II. THE ARTICLES

This Part summarizes each of the articles in this symposium volume. I present them in the same order they were presented during the live symposium.

A. Deborah A. Widiss, *The Federal Pregnant Workers Fairness Act: Statutory Requirements, Regulations, and Need (Especially in Post-*Dobbs *America)*[9]

Professor Deborah Widiss is undoubtedly one of the country's leading experts in all things related to pregnancy discrimination and leaves of absence.[10] I was delighted to have her join our symposium. Widiss's article focused on the newly enacted federal Pregnant Workers Fairness Act (PWFA), which allows pregnant workers to request accommodations at work in much the same way that people with disabilities can under the Americans with Disabilities Act (ADA). The PWFA requires employers to provide reasonable accommodations to employees with limitations related to pregnancy, childbirth, or related medical conditions, unless doing so would cause an undue hardship.[11]

In this article, Widiss first explains the types of accommodations pregnant workers might need in the workplace, including such things as extra restroom breaks, occasionally sitting during the day or otherwise taking extra breaks, having required uniforms modified, being allowed food and water with them during the work day, and

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[9] 27 EMP. RTS. & EMP. POL'Y J. 84 (2024).

[10] *See, e.g.*, Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961 (2013); Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131 (2022) [hereinafter Widiss, *State PWFAs*]; Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175 (2021); Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J. F. 215 (2021).

[11] 42 U.S.C. § 2000gg-1(1).

possibly having job duties modified, such as heavy lifting.[12] To emphasize the scope of the problem, Widiss highlights studies indicating that 250,000 pregnant workers were denied accommodation requests each year.[13] And the laws that might have provided protection left many gaps.[14] Widiss also describes the multi-year advocacy campaign that sought to address the inadequate protection for needed pregnancy accommodations; this campaign began and was remarkably successful at the state level, with half of the states (including many Republican-controlled states) passing some version of a Pregnant Workers Fairness Act.[15] Widiss's article also describes the advocacy campaign and the legislative history behind the federal PWFA.[16]

The article then turns to the PWFA statutory mandate, describing the ways in which the PWFA is modeled after the ADA,[17] but also the ways in which it is different from the ADA.[18] As I've also addressed, these differences will hopefully allow the PWFA to succeed where the ADA has struggled to effectuate meaningful change in the working lives of people with disabilities.[19] Widiss also addresses the scope of the statutory mandate, specifically how the statute interprets the phrase "pregnancy, childbirth, or related medical conditions."[20] This discussion is very thorough, incorporating the EEOC's final regulations, as applicable. Anyone wanting a thorough and accessible summary of all of the PWFA's provisions and the EEOC's regulations should read Widiss's article.

Finally, Widiss's article makes the important argument that the PWFA's protections are even more essential given the Supreme Court's decision in *Dobbs*, which will leave many pregnant women without the option of securing a safe and legal abortion.[21] This lack of access might lead to many more pregnant workers remaining

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[12] Widiss, *supra* note 9, at 86.

[13] *Id.* at 90.

[14] *Id.* at 91; *see also* Nicole Buonocore Porter, *Accommodating Pregnancy Five Years after* Young v. UPS: *Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 73, 107–09 (2020).

[15] Widiss, *supra* note 9, at 92; Widiss, *State PWFAs*, *supra* note 10.

[16] Widiss, *supra* note 9, at 93–95.

[17] *Id.* at 96.

[18] *Id.* at 100–02.

[19] *Id.* at 101; Nicole Buonocore Porter, *Subordination Through Schedules*, 55 ARIZ. ST. L.J. 1293, 1336–37 (2023).

[20] Widiss, *supra* note 9, at 112–18.

[21] *Id.* at 124–33.

pregnant and needing accommodations in the workplace for their pregnancies.[22] Although making clear that the lack of reproductive rights in many states after *Dobbs* is hugely problematic, Widiss discusses the many ways in which the PWFA should help protect both the health and job security of pregnant workers, along with protecting the health of the fetus.[23] As Widiss concludes:

> PWFA is a major new federal statute, passed with bipartisan support and endorsed by both leading business organizations and workers' rights advocacy groups. It's a commonsense solution to a common problem—one that will help ensure that pregnant and postpartum workers across the country are treated fairly and with dignity, and that they can receive the support they need to stay healthy and economically secure through a pregnancy.[24]

Widiss's article does a great job explaining the importance of this fairly monumental piece of federal legislation. As I've said elsewhere, although I am concerned that courts might narrowly interpret the PWFA's right to an accommodation as they have narrowly interpreted that right under the ADA,[25] Widiss's article offers a sliver of hope in what is otherwise the disastrous *Dobbs* decision.

B. Phillis Rambsy and Rebecca Salawdeh, *Chasing Freedom: The History of Government Oppression of the Most Vulnerable and How Expanded Leave Laws Can Promote Liberty for Workers in the Wake of* Dobbs[26]

Phillis Rambsy and Rebecca Salawdeh are practicing attorneys who specialize in employment law.[27] Their article addresses the history of government oppression of women and/or people of color, and criticizes the Court for using that sexist and racist history to justify its decision in *Dobbs*.[28] The article ultimately advocates for "ensuring more economic freedom for those whose economic security will be

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[22] *Id.* at 128–29.

[23] *Id.* at 130–33.

[24] *Id.* at 134.

[25] Porter, *supra* note 19, at 1337.

[26] 27 EMP. RTS. & EMP. POL'Y J. 135 (2024).

[27] *Meet the Rambsy Law Team*, RAMBSY LAW, https://www.rambsylaw.com/meet-the-team; *Rebecca Salawdeh*, SALAWDEH LAW OFFICE, https://www.salawdehlaw.com/cv.html.

[28] 597 U.S. 215 (2022).

threatened" in the wake of *Dobbs*.[29] The authors argue that because of the economic instability arising after *Dobbs* for many workers, there should be legislative responses to this reality. Specifically, the authors argue for an expansion of family and medical leave to include all workers and to include paid leave in an effort to ensure economic freedom.[30]

The first part of this article provides an interesting (albeit sobering) examination of the sexist and racist history of this country's birth and argues that this exclusionary history should not be used when interpreting the "liberty" right in the Fourteenth Amendment, as the Court does in *Dobbs*.[31] The article then moves to the history of the Supreme Court's decisions after the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments.[32] It explains how the Court severely limited the rights ostensibly provided by these amendments in a way that continued to discriminate against and oppress people of color and women.[33]

The article next turns to the history of work, explaining how the official end of slavery did not translate into workplace equality for Black people.[34] To make matters worse, the Supreme Court continued to prioritize the rights and interests of employers over the rights of workers, which allowed for the continued oppression of all workers, but especially Black workers.[35] Women were ostensibly put on a pedestal during this time period, but the protective legislation did more to harm women's economic freedom than it did to help women.[36] The authors also point out the fact that even the New Deal legislation excluded most Black workers by excluding from protection domestic workers and agricultural workers.[37]

Moving through history to the civil rights movement, the authors describe the important history of the Civil Rights Act of 1964, which was the first piece of legislation that worked to advance the economic security of women and Black workers.[38] The authors describe how Title VII dealt with the reproductive rights of women in the

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[29] Rambsy & Salawdeh, *supra* note 26, at 140.

[30] *Id.*

[31] *Id.* at 142–47.

[32] *Id.* at 148–53.

[33] *Id.*

[34] *Id.* at 153–56.

[35] *Id.* at 156.

[36] *Id.* at 157–58.

[37] *Id.* at 158.

[38] *Id.* at 163.

workplace.[39] Specifically, they describe the Court's refusal to hold that discrimination based on pregnancy *is* sex discrimination, which ultimately led to the passage of the Pregnancy Discrimination Act.[40] The cases in this time period are a mixed bag; some seem to protect women's rights (*Phillips v. Martin Marietta Corporation*[41] and *International Union, United Auto Workers v. Johnson Controls, Inc.*[42]) while others were undoubtedly harmful to women's interests (most notably *General Electric Co. v. Gilbert*[43] and *Geduldig v. Aiello*[44]). And at least one, *Young v. United Parcel Service, Inc.*, is itself a mixed bag.[45] Fortunately, the passage of the PWFA should help fill the gaps left by the Court's decision in *Young*.

Finally, the article describes the history and limitations of the Family and Medical Leave Act,[46] and ultimately argues for future legislation that would better protect female workers who are pregnant, and who will undoubtedly need leave from work, especially in places where their right to an abortion has been severely curtailed if not eliminated entirely.[47] Just as accommodations during pregnancy are important, so is the right to a paid, job-protected leave of absence.[48] As the authors sum up, "in light of the potential devastating impact of *Dobbs*, . . . [w]e must seriously consider . . . legislation that will mitigate a decision that has the potential to exacerbate the already damaging positions occupied by marginalized and vulnerable workers."[49]

This article presents an interesting intersectional and historical look at the state of the law with respect to the protection of vulnerable workers. Although there are so many aspects of the workplace and

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[39] *Id.* at 165.

[40] *Id.* at 168–70.

[41] 400 U.S. 542 (1971).

[42] 499 U.S. 187 (1991).

[43] 425 U.S. 989 (1976).

[44] 417 U.S. 484 (1974).

[45] 575 U.S. 206 (2015). *Young* is the 2015 case where the Court expanded the protection of the PDA for those women who need accommodations in the workplace because of their pregnancies or related conditions. *Id.* at 229–31. Although most scholars agree that *Young* was, as a whole, a positive for pregnant women, the case left behind a great deal of confusion and gaps in protection. Porter, *supra* note 14, at 84; Widiss, *State PWFAs, supra* note 10, at 1141–42.

[46] Rambsy & Salawdeh, *supra* note 26, at 175–80.

[47] *Id.* at 180–83.

[48] *Id.* at 175.

[49] *Id.* at 183.

workplace law that are implicated by *Dobbs*, the one thing that seems certain is that more employees will need leaves of absence, either because they cannot secure an abortion and therefore carry their baby to term, or because they will need time off to travel out of state to secure an abortion. Accordingly, I think the focus on the need for better leave laws to protect all vulnerable workers is very important and a valuable contribution to this symposium.

C. Ming-Qi Chu, *Abortion Rights Are Pregnancy Rights: Interpreting the Scope of Pregnancy-Related Medical Conditions Under Title VII*[50]

In this article, Ming-Qi Chu, the Deputy Director of the Women's Rights Project at the American Civil Liberties Union, argues that abortion rights are pregnancy rights and should therefore be protected in the workplace under Title VII. Specifically, she argues that although the Supreme Court held in *Dobbs* that abortion-based classifications are not sex classifications and are therefore not entitled to any heightened scrutiny, the analysis under Title VII is drastically different because of the passage of the Pregnancy Discrimination Act.[51]

After discussing the history and breadth of the PDA, which amended the definitional section of Title VII to indicate that the term "because of sex" includes because of pregnancy, childbirth, or related medical conditions,[52] Chu discusses Supreme Court decisions after the passage of the PDA that gave the statute an expansive scope.[53] Because the protection of abortion rights under Title VII depends on the interpretation of "related medical conditions" in the PDA, Chu also discusses the lower courts' jurisprudence interpreting that phrase for conditions other than abortion, such as breastfeeding, lactation, contraception, and infertility.[54] The lesson learned from these cases is that the PDA has been given a very broad interpretation, and the analysis of whether a condition is a "related medical condition" should not depend on whether it is gender neutral, when the condition occurs (pre- or post-partum), whether it is sufficiently incapacitating, or whether the condition is voluntary.[55]

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[50] 27 EMP. RTS. & EMP. POL'Y J. 184 (2024).

[51] *Id.* at 187

[52] *Id.* at 190–92; 42 U.S.C. § 2000e(k).

[53] Chu, *supra* note 50, at 192–95.

[54] *Id.* at 196–208.

[55] *Id.* at 208.

Chu's final move in this article is to demonstrate how lower courts have consistently held that abortion is included in the protection of the PDA.[56] These decisions have uniformly rejected the attempt to limit the scope of Title VII's protection to only ongoing pregnancies and have rejected attempts to differentiate between "worthy" and "unworthy" pregnancy-related conditions.[57] And importantly, these cases have made clear that the scope of sex discrimination under Title VII is completely separate from the constitutional analysis of reproductive rights.[58] As Chu states: "Abortion is protected under Title VII not because it is a constitutional right, but because it is one of a range of medical procedures and treatment . . . that can only be defined in relation to a pregnancy."[59] Although she notes the possibility that employers might attempt to relitigate issues of whether Title VII protects abortion, she is confident that the "universal recognition that abortion is pregnancy-related under Title VII by every court that has considered the question provides for a reasonable expectation that courts will continue to follow this interpretation. . . . [Accordingly, *Dobbs*] did not change employers' obligations under the [PDA]."[60]

I think Chu's article is an important reminder that workplace protections for abortion are not synonymous with constitutional protections. Although some workers will not be able to access an abortion because the state in which they live has restricted or prohibited it and they do not have the financial means to travel to another state to access an abortion,[61] other employees in such states will have the means of accessing abortion in another state, and it's important that these women are protected against discrimination if they procure an abortion in another state. Moreover, even in states where abortion is legal, it's possible there are employers whose views about abortion might make them more likely to discriminate against their employees for exercising their reproductive rights. Of course, obtaining an abortion (especially when doing so requires traveling to another state) will inevitably require some time off work. The PDA

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[56] *Id.* at 208–15.

[57] *Id.* at 215.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 216.

[61] Alvin Chang, Andrew Witherspoon & Jessica Glenza, *Abortion Deserts: America's New Geography of Access to Care—Mapped*, THE GUARDIAN (June 24, 2022, 2:01 PM), https://www.theguardian.com/world/2022/jun/24/abortion-laws-by-state-map-clinics.

does not directly address time off.[62] Fortunately, the PWFA does.[63] And both Rambsy and Salawdeh's article[64] and Runge's article[65] address expansions of leave rights in the U.S. for abortion and abortion-related care.

D. Marcia McCormick, Dobbs *and Exit in Antidiscrimination Law*[66]

Professor Marcia McCormick's article discusses the attempted challenges to Title VII advanced by the religious right, who claim that they should be exempt from many dictates of Title VII because of their religious beliefs; she borrows Robin West's phrase of "exit rights" to refer to this phenomenon.[67] Although many of the religious rights that are protected make sense (such as allowing an exemption to a rule that bans head coverings), other rights, such as allowing employers to be exempt from workplace discrimination laws, can block others from full participation in the workplace.[68] McCormick argues that when asserted religious rights clash with the rights of others to be free from discrimination, the courts should be deciding these cases on a case-by-case basis (under either the Free Exercise Clause[69] or the Religious Freedom Restoration Act[70] (RFRA)).[71] But the plaintiffs in the cases she discusses are attempting to circumvent this individualized inquiry by giving any religiously oriented employer in the country an

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[62] Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 KAN. L. REV. 355, 376 (2010).

[63] 42 U.S.C. §§ 2000gg-1(1), (4); Widiss, *State PWFAs, supra* note 10, at 1134–35.

[64] *See supra* Part II.B.

[65] *See infra* Part II.E.

[66] 27 EMP. RTS. & EMP. POL'Y J. 217 (2024).

[67] *Id.* at 219 (citing Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 399, 402–03 (Zoe Robinson, Chad Flanders & Micah Schwartzman eds., 2015) (discussing the ministerial exception and other assertions of religious freedom from compliance with antidiscrimination laws as vivid examples of rights to exit) and Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 897–98 (2014) (coining the term and warning that these rights to exit posed a danger to civil society)).

[68] McCormick, *supra* note 66 at 219.

[69] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

[70] 42 U.S.C. § 2000bb.

[71] McCormick, *supra* note 66, at 220.

exemption from anti-discrimination enforcement.[72] Although this litigation strategy has been used primarily to challenge access to contraception and anti-discrimination protection based on LGBTQ+ status, after *Dobbs* we should expect to see that strategy used to allow employers to exit from Title VII's prohibition (through the PDA) on discrimination because of an abortion.[73]

McCormick's article starts with the background of Title VII's protection of reproductive rights. Because much of this was covered in Chu's article,[74] my summary here will focus on McCormick's discussion of how religious claims are addressed in these cases. Specifically, because Title VII explicitly allows religious organizations to discriminate with respect to religion and religious beliefs,[75] some courts have allowed religious employers to discriminate because of an employee's pregnancy in cases where that pregnancy might be seen as immoral or against the employer's religious beliefs.[76] Expanding this analysis into abortion, McCormick notes that it is unclear whether discriminating on the basis of abortion for religious reasons will be viewed as religious discrimination (which is allowed) or sex discrimination (which is prohibited).[77]

McCormick's article then addresses what she calls the "new backlash" cases that are being filed through a concerted litigation strategy with the purpose of achieving a broad exemption for ostensibly religious employers to penalize employees for their sexual orientation, gender identity, and after *Dobbs,* accessing reproductive care.[78] This thorough discussion of the players, the claims, the strategies,[79] and how the courts are handling these cases presents a sobering look at the potential backlash against Title VII rights. McCormick criticizes these cases on several grounds, including the courts' very loose interpretation of the standards for standing to sue

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[72] *Id.*

[73] *Id.*

[74] *See supra* Part II.C.

[75] 42 U.S.C. § 2000e-1(a).

[76] McCormick, *supra* note 66, at 222.

[77] *Id.* at 223.

[78] *Id.* at 225–37.

[79] One such strategy is bringing the cases in one of two district courts in Texas, the Northern District of Texas, Fort Worth Division, where there was a high likelihood that the case would be assigned to Judge Reed O'Connor, a very conservative judge willing to issue very controversial decisions, or the Northern District of Texas, Amarillo Division, where it was guaranteed to be assigned to another very conservative judge—Judge Kacsmaryk, who McCormick describes as a "movement jurist." McCormick, *supra* note 66, at 227, 235–36.

and ripeness because the plaintiffs in these cases were not subject to any harm, nor was harm imminent.[80] Fortunately, McCormick ends with potential reasons for hope; most notably, that these cases will either be reversed on appeal or will not be followed by other circuits.[81] She analyzes the possible case that might be filed, attempting to insulate employers from liability for discriminating against employees based on their reproductive decisions.[82] Although she acknowledges some risk of an unfavorable ruling (unfavorable from the perspective of reproductive rights), she argues that discrimination by employers based on abortion is more likely to be seen as sex discrimination and therefore more clearly prohibited by Title VII.[83]

I am admittedly troubled by this litigation backlash that McCormick exposes. I had heard of the cases McCormick discusses but honestly never gave them too much thought, trusting that they would not make much headway. McCormick's article has me (to use her words) "concerned, confused, and at sea."[84] But leaning towards optimism as I do (or perhaps ignorance), I want to focus on the positive—that "there are reasons to be hopeful that Title VII's protections . . . will be harder to erode and might even serve as a bulwark to protect access to reproductive care through employers."[85]

E. Robin Runge, *Safe Leave from Work Post*-Dobbs[86]

Professor Robin Runge's article discusses the problem of pregnancy-related abuse, reproductive coercion, and interference with abortion-related decision making, arguing that state and federal laws that provide leave from work do and should protect leave for reasons related to this type of abuse.[87] Runge's purpose is to add to the discussion of employment-related protections for workers seeking abortions after *Dobbs* by arguing that we should be also considering laws that provide leave from work to specifically address the effects of domestic and sexual violence in employees' lives.[88]

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[80] *Id.* at 238–41.

[81] *Id.* at 244.

[82] *Id.* at 245–46.

[83] *Id.*

[84] *Id.* at 247.

[85] *Id.* at 247–48

[86] 27 EMP. RTS. & EMP. POL'Y J. 249 (2024).

[87] *Id.* at 250.

[88] *Id.*

Runge's article begins with a description of domestic and sexual violence, including the different effects of such violence experienced by women of color, Native American women, and immigrant women.[89] While most people are familiar with such violence, some might not be as familiar with the abuse surrounding pregnancy. Pregnant women are more likely to experience abuse, and this abuse often results in pregnancy complications, miscarriage, and other harm to the unborn fetus.[90] Moreover, many women suffer from "reproductive coercion," which includes behaviors and actions by an abuser with the attempt to gain control over the woman's reproductive choices, such as sexual assault, forcing them to use or not use birth control against their will, and forcing them to continue a pregnancy or end a pregnancy against their will.[91] Many of these survivors of domestic and sexual violence are employed, and that violence and abuse can and does affect them in the workplace in a variety of ways.[92]

Accordingly, Runge argues that survivors of gender-based abuse and violence will need leaves of absence for pregnancy-related medical assistance and/or abortion-related care, and she provides a landscape of the current laws that already provide some protection in this regard.[93] First, the FMLA has been interpreted to apply to employees who have serious health conditions caused by domestic violence.[94] Second, sixteen states have adopted laws that require employers to provide unpaid leave to survivors of domestic violence who might need to go to court, access support services, and/or seek medical attention because of the abuse, even if an injury doesn't rise to the level of a "serious health condition," the standard used in the FMLA.[95] Third, several states and cities have adopted legislation that would allow for *paid* sick days, and all of these statutes expressly allow employees to use such leave to address the impact of domestic violence.[96] Fourth, some states have laws that allow for longer paid leaves of absence, which can be used by survivors of domestic and gender-based

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[89] *Id.* at 251–52.

[90] *Id.* at 253–54.

[91] *Id.* at 254–56.

[92] *Id.* at 256; *see also* Nicole Buonocore Porter, *Victimizing the Abused: Is Termination the Solution When Domestic Violence Comes to Work*, 12 MICH. J. GENDER & L. 275, 287–89 (2006).

[93] Runge, *supra* note 86, at 258–70.

[94] *Id.* at 260.

[95] *Id.* at 260–63.

[96] *Id.* at 263–67.

violence.[97] Finally, some states have adopted laws that prohibit discrimination against and require accommodations for employees who are victims of domestic violence.[98]

In the last section of Runge's article, she analyzes whether workers will be able to use state leave laws to seek reproductive health services, including abortion, and ultimately argues that all workers should have this right.[99] Her analysis covers two situations where the hypothetical employees are in states where abortion care is widely available and two situations where the hypothetical employees are in states where abortion is prohibited.[100] This discussion highlights the benefits of some of these more progressive state laws, and provides some creative interpretations to describe how even states like Missouri have laws that could be interpreted to provide benefits for survivors of gender-based violence who need to seek reproductive rights.[101]

Attorneys and academics researching in this area will find Runge's state-specific analysis both thorough and very valuable. And Runge's article provides a helpful roadmap for both employees and their advocates who might need benefits for gender-based violence that affects their reproductive rights. Although Runge provides a silver lining of the cloud that is the *Dobbs* decision, I think both of us would agree that these laws should be universal to partly combat the limitations caused by the combination of gender-based violence that affects reproductive rights and the disastrous restrictions caused by *Dobbs*.

F. Ann McGinley, *Religious Accommodations in the* Dobbs *Era*[102]

Professor Ann McGinley wrote an interesting article about the conflict between anti-abortion activists and those who are devastated by the *Dobbs* decision, and how that conflict will manifest in the workplace.[103] Even before *Dobbs*, some plaintiffs have sued for

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[97] *Id.* at 267–68.

[98] *Id.* at 268–69.

[99] *Id.* at 270–75.

[100] *Id.*

[101] *Id.* at 273–75.

[102] 27 EMP. RTS. & EMP. POL'Y J. 276 (2024).

[103] *Id.* at 279.

religious discrimination under Title VII,[104] arguing that their opposition to abortion means that they cannot perform some functions of their jobs or that they have the right to engage in anti-abortion expression in the workplace.[105] Suits for religious accommodations have also become easier for plaintiffs because of the Supreme Court's 2023 decision in *Groff v. DeJoy*,[106] which made it harder for an employer to satisfy the undue hardship defense to the religious accommodation obligation.[107] Moreover, some employees' religious expression at work will be perceived as harassment by other workers, making these issues difficult for employers to address.[108] McGinley's article addresses the possible ramifications of the tension between these legal rights in the workplace.[109]

McGinley first lays out the religious accommodation landscape, dividing up all religious accommodation requests into four types: (I) waivers of dress code requirements to comply with religious beliefs or practices regarding the wearing of religious garb (such as a hijab); (II) changes in the employee's schedule to accommodate religious ceremonies or the employee's sabbath; (III) an employee's request to speak to other employees about her religion or to "bear witness" to her religious beliefs at work; and (IV) requests to avoid certain job responsibilities if they conflict with an employee's religious beliefs.[110] McGinley also addresses the history of the Supreme Court's jurisprudence surrounding the undue hardship defense to the religious accommodation obligation, which as mentioned earlier, was recently modified, making it harder for employers to prove undue hardship and therefore easier for plaintiffs to obtain a religious accommodation.[111]

McGinley then addresses perhaps one of the hardest religious accommodation issues that will likely arise after *Dobbs*—the conflict between the right to express one's religious views at work, and how that expression might be perceived as harassment by other

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[104] 42 U.S.C. §§ 2000e–2000e-17. In addition to prohibiting discrimination based on religion, Title VII also requires employers to accommodate an employee's religious beliefs or practices if it can do so without an undue hardship. 42 U.S.C. § 2000e(j).

[105] McGinley, *supra* note 102, at 279–81.

[106] 600 U.S. 447 (2023).

[107] *Id.* at 468.

[108] McGinley, *supra* note 102, at 282.

[109] *Id.* at 282–83.

[110] *Id.* at 285–87.

[111] *Id.* at 287–99.

employees.[112] She discusses two cases brought almost twenty-five years apart from each other that both involved a conflict between an employee asserting a religious right to speak out against abortion and the rights of other workers who are uncomfortable about such speech or find that it creates a hostile environment.[113] The 2019 case brought in a district court in Texas found in favor of the plaintiff's religious beliefs,[114] but the 1995 decision from the Eighth Circuit dismissed the plaintiff's claims, stating that "Title VII does not require an employer to allow an employee to impose his religious views on others."[115]

McGinley analyzes both cases, explaining why the Texas district court in *Carter* was wrong, stating that "there is no support for the proposition that Title VII requires an employer to grant a religious accommodation to an employee who claims that her religion compels here to harass another employee in violation of company policy or anti-discrimination law."[116] But she also discusses hypothetical situations that could arise where an employer might be required to allow an employee to express her anti-choice beliefs in the workplace.[117] I don't disagree with her analysis, but these are troubling scenarios.

With respect to the fourth type of religious accommodation request, where an employee is requesting exemptions from certain job functions (usually in the medical/pharmacy field where employees might be required to give medical advice or dispense contraceptives or medications believed to induce abortions), McGinley discusses very recent cases filed by such plaintiffs across the country.[118] McGinley argues that that these cases are different from other types of religious accommodation cases because the employees are alleging that their religious beliefs make then unable to perform an essential function of the job. In that way, these cases look more like cases brought under

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[112] *Id.* at 300–07.

[113] *Id.* (citing Wilson v. U.S. West Commc'ns, 58 F.3d 1337 (8th Cir. 1995) (involving an employee who was terminated following repeated absences after her employer told her not to report to work wearing anything depicting a fetus); Carter v. Transp. Workers of Am., Local 556, 353 F. Supp. 3d 556 (N.D. Tex. 2019) (involving an employee who was terminated following her repeated social media posts and messages to her coworkers and union president).

[114] McGinley, *supra* note 102 at 302–07 (discussing *Carter*, 353 F. Supp. 3d at 578).

[115] *Wilson*, 58 F.3d at 1342.

[116] McGinley, *supra* note 102, at 307–08.

[117] *Id.* at 309–19.

[118] *Id.* at 319–23.

the ADA.[119] Accordingly, we might look to the ADA for guidance, and the ADA would require a court to determine if the job task the plaintiff is seeking to avoid is an "essential function" of the job; if so, employers are not required to eliminate that function as a reasonable accommodation.[120] McGinley notes that these cases are going to involve tough, fact-sensitive decisions, where it will be difficult to predict the ultimate result.[121]

After a summary of the issues courts will be forced to decide in the future in the four types of religious accommodation requests,[122] McGinley addresses the unanswered questions, recognizing that there are more questions than answers for how religious accommodation issues will be decided post-*Dobbs*.[123] In conclusion, she suggests that the EEOC perhaps should issue guidance on these various accommodation issues and/or Congress should consider stepping into amend the statute.[124]

McGinley's article is thought provoking. When I teach employment discrimination, I always find these "religious expression vs. harassment" cases to be the most difficult to teach. I agree with McGinley that *Dobbs*, along with a stronger religious accommodation standard courtesy of *Groff*, will likely embolden many employees to seek religious accommodations to express their anti-choice views or to refuse to perform functions of the job that they believe are against their religion. I also agree with McGinley that these are going to be difficult issues, and because of lengthy litigation, it will likely be years before we have any real guidance on them.

G. Rebecca Zietlow, *Abortion, Citizenship, and the Right to Travel*[125]

Professor Rebecca Zietlow is a constitutional law expert. Thus, because *Dobbs* means that many pregnant persons seeking an abortion will need to travel out of their home state to do so, Zietlow's focus is on the constitutional right to travel to exercise reproductive rights in states where abortion is legal. Specifically, her article discusses the historical origins of the constitutional right to travel and

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[119] *Id.* at 323.

[120] *Id.* at 323–26; *see also* 42 U.S.C. § 12111(8); Porter, *supra* note 19, at 1317.

[121] McGinley, *supra* note 102, at 323–26.

[122] *Id.* at 331–33.

[123] *Id.* at 333–34.

[124] *Id.* at 334.

[125] 27 EMP. RTS. & EMP. POL'Y J. 335 (2024).

explores the extent to which people traveling across state borders to obtain abortions have a constitutional right to do so.[126]

Zietlow first discusses the right to travel in the antebellum era, where both slaves and freed Black people were restricted from interstate travel, as many states had enacted laws that prohibited Black people from traveling into those states.[127] After the passage of the 1850 Fugitive Slave Act, all Black people were significantly limited in their ability to travel.[128] In response to many race-based restrictions, anti-slavery activists argued in favor of a constitutional right to travel, claiming it as a right of citizenship.[129] Zietlow next discusses the Reconstruction period and the connection between the right to free labor and the right to travel.[130] As she states, "the right to travel is protected by the Fourteenth Amendment Privileges or Immunities Clause, as it had already been recognized under Article IV."[131]

Drawing the connection between past and present, Zietlow discusses the right to travel post-*Dobbs*, as women in many states must travel many miles in order to secure a legal (and safe) abortion.[132] Not surprisingly, after *Dobbs*, several states began passing laws trying to limit their residents' rights to travel to another state to secure an abortion, with some of these laws even imposing criminal penalties.[133]

Zietlow argues persuasively that the right to travel is instrumental to being treated as a full citizen, and that the Fourteenth Amendment of the Constitution protects this right.[134] She provides the reader with a thorough history of the Court's cases regarding the right to travel as instrumental to citizenship.[135] Zietlow also makes a creative argument that prohibiting people from traveling to obtain abortions arguably violates the Thirteenth Amendment by imposing an "involuntary servitude" on those travelers, citing to cases where the Court struck down statutes that

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[126] *Id.* at 337.

[127] *Id.* at 339–42.

[128] *Id.* at 342.

[129] *Id.* at 342–46.

[130] *Id.* at 346–48.

[131] *Id.* at 348.

[132] *Id.* at 349–51.

[133] *Id.* at 350.

[134] *Id.* at 351–56.

[135] *Id.*

made it a crime for workers to quit their jobs to find a better job.[136] Finally, Zietlow argues that the right to travel is an "essential aspect of our constitutional system of federalism and interstate comity."[137] Because the right to an abortion remains a fundamental right in many states, federalism demands that we not only allow states to welcome out-of-state pregnant persons who need an abortion, but that we respect the rights of this country's citizens to travel freely between states to access abortion care.[138]

Although *Dobbs* remains hugely problematic and distressing for many women, the right to travel to states that remain protective of this fundamental right is of utmost importance. Zietlow makes a compelling argument based on history that the Constitution protects this right to travel. I hope she is proven right if/when this issue gets tested in the courts.

H. Jeff Hirsch, *Labor Law and* Dobbs[139]

As a prominent labor scholar, Professor Jeff Hirsch's focus was (not surprisingly) on the power of the labor movement to help protect the right to an abortion. Hirsch argues that the ability to access an abortion is significantly reliant on employers, because employers provide most workers' health insurance and they also control employees' scheduling and leaves of absence.[140] Employer policies in this regard "can be the difference between an individual being able to realistically obtain an abortion or having to decide between an abortion and their job."[141] Although other articles in this symposium issue focused on employers' obligations with respect to pregnancy discrimination (including discrimination based on abortion),[142] accommodations for pregnancy,[143] and leaves of absence,[144] Hirsch focuses on labor law. Specifically, he discusses the power of unions and other concerted action to put pressure on employers to provide abortion-related benefits to their employees.[145]

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[136] *Id.* at 356–57.

[137] *Id.* at 357

[138] *Id.* at 358.

[139] 27 EMP. RTS. & EMP. POL'Y J. 360 (2024).

[140] *Id.* at 361.

[141] *Id.*

[142] Chu, *supra* note 50.

[143] Widiss, *supra* note 9.

[144] Rambsy & Salawdeh, *supra* note 26; Runge, *supra* note 86.

[145] Hirsch, *supra* note 139, at 361–62.

Hirsch first discusses the fact that the NLRA protects even non-unionized employees who work together to make changes in their work conditions—here, for better benefits related to procuring an abortion.[146] The statute should protect even two employees discussing the desire for better benefits and would protect them against workplace retaliation if they try to negotiate with their employer for abortion-related benefits.[147] Of course, as Hirsch notes, "section 7 does not require an employer to provide any items that employees seek [but] with enough pressure or a sympathetic employer, this right can result in meaningful change."[148] As Hirsch discusses, the most common things that employees might bargain for include health insurance coverage, leave, travel benefits, and privacy protections related to abortion care.[149] Employees might also engage in concerted activity for the purpose of effectuating political change, but as Hirsch notes, the law regarding whether this is protected activity is fairly murky.[150]

Unionized workers have even more leverage to expand abortion-related work benefits. On the employees' behalf, unions might bargain with the employer for better benefits related to abortion care, such as health-care benefits, travel benefits, and leave benefits; these are clearly mandatory subjects of bargaining, which means that both the union and the employer must bargain in good faith.[151] Hirsch also argues that unions are uniquely situated because of their negotiation experience and expertise to effectuate real change with respect to abortion-related benefits.[152]

However, the most difficult question is whether labor law will preempt state laws that not only prohibit abortion, but also subject individuals and entities to civil and/or criminal liability if they assist someone in procuring an abortion in another state.[153] This preemption issue could arise if the union and employer were to enter into an agreement that provides abortion benefits prohibited by these state statutes, or if the employer were to refuse to bargain, citing the state law, and the NLRB were to step in to argue that the NLRA preempts

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[146] *Id.* at 362–81.

[147] *Id.* at 362.

[148] *Id.* at 367.

[149] *Id.*

[150] *Id.* at 376–81.

[151] *Id.* at 382.

[152] *Id.* at 389.

[153] *Id.* at 390–91 (discussing Texas's and Oklahoma's laws).

the state law.[154] After a thorough explanation of the three types of preemption that could possibly apply, Hirsh admits that there are serious problems with these preemption arguments and that unions and employers who have negotiated abortion-related benefits in states like Texas and Oklahoma are in a "precarious position."[155]

I agree with Hirsch that although the benefits provided to employees by labor law are not a "panacea" to the problems caused by *Dobbs*, they do provide some help to employees who want their employers to provide abortion-related benefits, especially in states where abortion is lawful. For that reason, Hirsch's focus on the benefits of collective action is a very important contribution to this symposium. However, the possible or even likely lack of preemption of draconian state laws like those in Texas and Oklahoma is seriously concerning. One can only hope that those laws will be successfully challenged on constitutional grounds. If not, unions and employers in those states will have their hands tied when it comes to providing some assistance to employees who need to travel out of state to secure an abortion.

III. DISABILITY AND *DOBBS*

As stated in the introduction, during the live symposium, I presented on a topic I called "Disability and *Dobbs*." Even though I did not write a full article on that topic,[156] I believe it is important enough for me to discuss here.

The purpose of my talk was twofold: (1) to describe how people with disabilities are disadvantaged compared to their non-disabled counterparts with respect to pregnancy and abortion after *Dobbs*; and (2) to explore the employment consequences of this disadvantage.

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[154] *Id.* at 391.

[155] *Id.* at 395.

[156] After the symposium I hosted, I was asked to participate in another related symposium sponsored by the Oklahoma Law Review. I used some of the research I conducted for my symposium in the paper that will be published in the Oklahoma Law Review. Nicole Buonocore Porter, *Mothers with Disabilities in the Workplace Post-Pandemic and Post*-Dobbs, OKLA. L. REV. *26–27 (forthcoming 2024), https://ssrn.com/abstract=4798435. To the extent that I discuss research that also appears in that article, I will cite to the original sources.

A. Life Consequences of Disabilities after *Dobbs*[157]

I begin with a simple assumption—that because fewer women will have access to safe and legal abortion after *Dobbs*, more women will be carrying their pregnancies to term. And this fact is even more significant for people with disabilities because they are more likely to accidentally get pregnant. This can happen either because medications that treat some disabilities can interfere with birth control,[158] or because people with disabilities are more likely to experience sexual assault.[159]

So what are the consequences of people with disabilities accidentally becoming pregnant more often and possibly having to remain pregnant if they cannot legally secure an abortion? There are several.

First of all, pregnancy can be dangerous for some disabled women. Pregnancy exacerbates many disabilities, such as multiple sclerosis and bipolar disorder.[160] Moreover, if a disabled woman finds out she is pregnant, she might stop taking medication that might be dangerous to the fetus, but doing so might worsen the symptoms of her disability.[161] For instance, a medication that can be used to treat bipolar disorder and seizure disorders, Depakote, is dangerous to the fetus but often very much needed for the person who takes the medication.[162] Pregnant women with disabilities are more likely to be placed on bed rest or have other serious complications,[163] and for some women with disabilities, giving birth could put their lives at risk.[164]

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[157] This section is derived in part from *id.* at *23–26.

[158] Meena Venkataramanan, *Their Medications Cause Pregnancy Issues Post-Roe That Could Be Dangerous*, WASH. POST. (July 5, 2022), https://www.washingtonpost.com/health/2022/07/25/disabled-people-abortion-restrictions.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] Shruti Rajkumar, *With* Roe v. Wade *Overturned, Disabled People Reflect on How It Will Impact Them*, NPR.ORG (June 25, 2022), https://www.npr.org/2022/06/25/1107151162/abortion-roe-v-wade-overturned-disabled-people-reflect-how-it-will-impact-them; NAT'L P'SHIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOCACY NETWORK, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES 6 (2021), https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-abortion.pdf.

[164] Venkataramanan, *supra* note 158.

For instance, for someone with epilepsy, risk of death during pregnancy is ten times greater than the risk of death for someone without epilepsy.[165]

Second, for some women with disabilities, pregnancy can be dangerous for the fetus. As mentioned above, some medications that treat disabilities (like Depakote) are harmful to fetuses, and the harm might occur before the woman even knows she is pregnant.[166] Moreover, inaccessible medical care is a huge problem for people with mobility impairments and could negatively affect both the pregnant woman and the fetus.[167] As Elizabeth Pendo has discussed at length, many doctor's offices and medical facilities lack appropriate accessibility features for women who use wheelchairs, such as accessible scales or accessible tables where the pregnant woman is examined.[168]

Because of these risks and/or the enormous economic consequences of carrying a pregnancy to term and keeping the baby,[169] some people with disabilities who are pregnant will want an abortion. For those in states where it's illegal, even if the pregnancy is dangerous to a woman's health, states are already narrowly defining abortion exceptions for the health of the mother. And if the harm is to the woman's mental health rather than her physical health, most states that have outlawed abortion won't provide a health-related exception to the broad prohibition on abortion.[170] Moreover, not all states make exceptions for pregnancies that were the result of sexual assault, and as mentioned earlier, more women with disabilities will become pregnant because they are the victims of sexual assault.[171]

Pregnant women with disabilities who want an abortion but live in states where it is unlawful might also experience logistical

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[165] *Id.*

[166] *Id.*

[167] NAT'L P'HIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOCACY NETWORK, *supra* note 163, at 5–6.

[168] *See, e.g.*, Elizabeth Pendo, *A Service-Learning Project: Disability, Access, and Health Care*, 38 J.L. MED. & ETHICS 154 (2010); Elizabeth Pendo, *The Costs of Uncertainty: The DOJ's Stalled Progress on Accessible Medical Equipment under the Americans with Disabilities Act*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 351 (2019).

[169] *See, e.g.*, NAT'L P'SHIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOCACY NETWORK, *supra* note 163, at 6 (noting that the pay gap between people with disabilities who are working and people without disabilities is $12,000 per year).

[170] Venkataramanan, *supra* note 158.

[171] *See, e.g.*, *id.*

difficulties obtaining one. First, millions of women live in an "abortion desert" where they have to travel hundreds of miles to reach the nearest abortion provider.[172] To make matters worse, some states (such as Texas and Oklahoma) have passed statutes making it unlawful for a pregnant person to travel out of state to secure an abortion.[173] Hopefully as Zietlow[174] and others[175] have argued, these laws will eventually be found unconstitutional but for now, they represent a real hurdle or at least a real risk.

Even in states that don't outlaw out-of-state travel to obtain an abortion (but nevertheless outlaw abortion), travel is more likely to be logistically difficult or impossible for pregnant women with disabilities. Many cannot afford to travel—the poverty rate is 22.2 percent for women with disabilities compared to 11.9 percent for disabled men and 11.4 percent for non-disabled women.[176] Even if a pregnant woman with a disability can afford to travel, finding accessible travel options might be difficult, and even if that hurdle is overcome, some abortion facilities might be inaccessible for some people with disabilities.[177]

Even in states where abortion is legal, travel difficulties and inaccessible healthcare might still pose a hurdle for a pregnant disabled woman who wants to get an abortion. As just one example, one woman who is paralyzed due to a spinal cord injury tried to get an abortion, but when she arrived at the clinic, she was denied care.[178] She stated: "They were not comfortable giving me an abortion because I had a disability. [My] paralysis scared them. I don't know why. The disability just freaked them out. They said I would have to go to a doctor and have it done in a hospital, so I had to go through health insurance."[179]

Finally, even in a state where abortion remains lawful, some people with disabilities who are pregnant might face religious objections by people who provide services to people with disabilities, such as home health care or transportation services. Many entities that provide home health care are religiously affiliated and therefore

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[172] Zietlow, *supra* note 125, at 349.

[173] Hirsch, *supra* note 139, at 390–91.

[174] Zietlow, *supra* note 125.

[175] *See, e.g.*, Smith-Drelich, *supra* note 3, at 28.

[176] Rajkumar, *supra* note 163.

[177] Powell, *Disability, supra* note 7, at 1863.

[178] Rajkumar, *supra* note 163.

[179] *Id.*

some of those workers might object to assisting in any way with a disabled woman's procurement of an abortion.[180]

B. Employment Consequences of a Post-*Dobbs* World for People with Disabilities[181]

Some people with disabilities who become pregnant after *Dobbs* will experience a variety of (mostly negative) workplace consequences. First, people with disabilities are much less likely to be employed in the first place.[182] Second, even if employed, they are much less likely to have access to leaves of absence because they are more often employed in low-income positions that do not provide a right to a leave of absence.[183] And even if leave is available, the federal FMLA only requires unpaid leave,[184] so many low-income people with disabilities would be unable to afford leave. Even if they are in a position where obtaining an abortion is both legal and logistically feasible, many lower-income workers are subject to overly stringent attendance policies,[185] so taking even a few days off to access an abortion could lead to discipline or termination.[186]

Third, many people with disabilities who become pregnant will need some type of workplace accommodations. Fortunately, as Deborah Widiss discussed, the passage of the PWFA should make it much easier for those pregnant women to get the accommodations they need.[187] But what makes things more difficult for people with disabilities who become pregnant (as opposed to those whose pregnancy-related restrictions might entitle them to an accommodation) is that these women are more likely to need accommodations for *both* their disabilities and their pregnancies.[188] And if and when the baby is born, the new mother might need

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[180] NAT'L P'SHIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOCACY NETWORK, *supra* note 163; *see also* McCormick, *supra* note 66; McGinley, *supra* note 102.

[181] This section is derived in part from Porter, *supra* note 156, at *26–28.

[182] NAT'L P'SHIP FOR WOMEN & FAMS. & AUTISTIC SELF ADVOCACY NETWORK, *supra* note 163, at 7 (stating that when referring to people with significant impairments, one in four are employed compared to two-thirds of people without disabilities).

[183] Porter, *supra* note 156, at *26–27.

[184] 29 U.S.C. § 2612(c).

[185] Porter, *supra* note 156, at *6–7.

[186] Porter, *supra* note 19, at 1305–06.

[187] *See generally* Widiss, *supra* note 9.

[188] Porter, *supra* note 156, at *27.

accommodations for her disability and for caregiving responsibilities.[189] And because the need for or receipt of accommodations causes stigma,[190] the need for multiple accommodations is likely to multiply the stigma experienced.

As I have discussed,[191] pregnant women with disabilities might have difficulty performing as "ideal workers." This means they might miss too much work and violate their employers' attendance policies or otherwise work fewer hours than other employees.[192] Or they might be unable to perform some of the physical functions of the job.[193] The consequences that arise from this failure to perform as ideal workers are what I call "special treatment stigma."[194]

Special treatment stigma is a term I coined to refer to both the workplace consequences of needing accommodations in the workplace and the resentment of coworkers when people with disabilities or others receive accommodations.[195] On the employers' side of the equation, some employers might be reluctant to hire or promote someone who needs (or is perceived as needing) an accommodation.[196] So if a person with a known/visible disability becomes pregnant, an employer might be less likely to hire her because of the increased possibility that she will need an accommodation for either/both her disability and her pregnancy.[197] Or the employer might deny the request for an accommodation even if legally obligated to provide one, which will often lead to the employee being terminated, quitting, or putting her health at risk.[198] Finally, the employee who needs accommodations could experience other workplace consequences, such as lack of promotion or raises, being put on less important

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[189] *Id.* at *10; *see also* Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75, 107 (2018).

[190] NICOLE BUONOCORE PORTER, THE WORKPLACE REIMAGINED: ACCOMMODATION OUR BODIES AND OUR LIVES 93–100 (2023); Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 233–34 (2016) [hereinafter Porter, *Stigma*]; Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL. L. REV. 85, 96 (2016) [hereinafter Porter, *Everyone*].

[191] Porter, *supra* note 156; Porter, *supra* note 189.

[192] Porter, *supra* note 189, at 81.

[193] Porter, *supra* note 156, at *8.

[194] *See sources* cited *supra* note 190.

[195] Porter, *supra* note 62, at 359.

[196] Porter, *supra* note 189, at 108–09.

[197] Porter, *supra* note 156, at *11.

[198] *Id*. at *15; Porter, *Everyone, supra* note 190, at 117.

assignments, and being treated as less competent and less committed.[199]

On the coworkers' side of this problem, coworkers might be resentful of the perceived need for accommodations for either/both pregnancy and disability. First, some accommodations needed by employees with disabilities, pregnant workers, and/or workers with caregiving responsibilities place burdens on (or are perceived as placing burdens on) their coworkers.[200] These burdens can include being asked to perform functions (sometimes more arduous functions such as heavy lifting) that the disabled/pregnant employee cannot perform.[201] Or the coworkers might have to work more or different hours to accommodate schedule modifications needed by the disabled or pregnant worker.[202] Second, coworkers are often resentful of accommodations received by disabled, pregnant, and/or caregiving workers because they are accommodations that the coworkers also covet, such as flexible hours, reduced hours, missing work occasionally without penalty, etc.[203]

What all of this means for the post-*Dobbs* landscape is troubling. Although all workers might have difficulty accessing a legal and safe abortion, the consequences are more dire for those workers who are also disabled. As for reforms, I am heartened by the passage of the PWFA, but troubled by the relative lack of success of ADA cases. I agree with Rambsy and Salawdeh that our leave laws need improvement.[204] And I agree with Hirsch that collective action holds some hope for improvement. But ultimately, as discussed in my recent book, perhaps only a "reimagined workplace"—where we recognize and account for the reality, the precarity, and the diversity of all of our lives and all of our bodies—will truly end the stigma associated with needing accommodations for how the job is done or when and where the work is performed.[205]

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[199] Porter, *supra* note 156, at *11; Porter, *supra* note 189, at 81; Porter, *Everyone, supra* note 190, at 103.

[200] Porter, *Everyone, supra* note 190, at 100.

[201] *Id.*

[202] Porter, *Stigma, supra* note 190, at 237.

[203] *Id.* at 254–55.

[204] Rambsy & Salwdeh, *supra* note 26; *see also* PORTER, *supra* note 190, at 138–43 (proposing broad reforms to our laws regarding leaves of absence).

[205] *See generally* PORTER, *supra* note 190.

IV. CONCLUSION

For many people (and probably most people who attended the symposium in March 2023) the *Dobbs* decision was a devastating blow to women's reproductive freedom and therefore a devastating blow to women's economic equality. Even though some people might view this decision as only about constitutional rights and criminal law, these articles illustrate how much the decision has implications for work law. And although much of what was discussed might be concerning, depressing, or at least frustrating, there are some hopeful signs about how work law can help women access their right to an abortion and/or support and protect them when they do not want or cannot access an abortion. I want to thank all of our wonderful speakers and authors for sharing their thoughtful ideas about how *Dobbs* might affect the workplace and the law of the workplace.