

**PREGNANT ATHLETES:
TACKLING
PREGNANCY DISCRIMINATION IN
PROFESSIONAL SPORTS**

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INTRODUCTION

In 2017, the WTA penalized Serena Williams for taking a medical-related leave due to pregnancy.¹ WTA's implied behavior appears to censure Williams's pregnancy leave by allowing her ranking to plunge from number one to four hundred and fifty-three.² After receiving criticism for the lack of protection surrounding pregnant tennis players, the WTA's rules currently encompass exceptions surrounding pregnancy matters.³

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† This article was written prior to and during policy changes around the subject matter of this article. Due to the longevity of time from press to print, new amendments to laws and changes to certain policies may be absent or not discussed herein.

¹ See Sonja Haller, *Serena Williams lost her ranking at French Open after maternity leave. Why is this still happening?*, USA Today (June 4, 2018, 11:22 AM) <https://www.usatoday.com/story/life/allthemoms/2018/05/24/serena-williams-ranking-down-french-open-maternity-leave/640166002/> [<https://perma.cc/WN3E-BEHP>].

² See Liz Clarke, *After Outcry Over Serena Williams's Rankings, WTA Alters Rules For Moms Returning to Competition*, The Washington Post (Dec. 18, 2018), [<https://perma.cc/MHD5-9DAK>].

³ *Id.*

Under the new rules, players returning to the tour after pregnancy may use an exclusive three-year ranking.⁴ The gravity of rank changes among female tennis players is seemingly more intricate than just a number indicating the best player in women's tennis; it affects their ability to play.⁵ For instance, a professional tennis player's ability to enter tournaments correlates with their rankings.⁶ The player's ranking depends on their performance in several major competitions.⁷ One major competition is the Grand Slam.⁸ A player's ranking is critical for the Grand Slam tournament and other significant events.⁹ The rankings protect top players from facing one another in the early rounds of the tournaments.¹⁰

Pregnancy discrimination from tennis courts to corporate board rooms rages like wildfire in America's largest industries.¹¹ The evidence of systematic punishment around pregnancy and women are prevalent in today's society.¹² It wears a mask around topics surrounding promotions and salary raises.¹³

While many American companies make more accommodations for pregnant women,¹⁴ a simple silent fact remains: some

⁴ See Jill Martin, Following Serena Williams' return, WTA changes rules on ranking after pregnancy and dress code, CNN (Dec. 21, 2018, 12:59 PM), [<https://perma.cc/PJ7H-3CWV>] ("A player who is out of competition for 52 weeks or longer may use her special ranking in 12 tournaments. If a player's special ranking would qualify her for a seeded position in a tournament, then she will be an "additional seed" in the draw. That means she will be randomly drawn to an available line in the draw that does not play another seeded player in the first round. As a result, no player will be bumped from her earned seeding position.").

⁵ See generally *id.*

⁶ See Gu Hadlich & Karue Sell, How Do Tennis Rankings Work? (Easy Guide), My Tennis HQ, [<https://mytennishq.com/how-do-tennis-players-earn-ranking-points/>] (last visited Sep 22, 2021).

⁷ *Id.*

⁸ *Id.*

⁹ Martin, *supra* note 4.

¹⁰ See Clarke, *supra* note 2.

¹¹ See Natalie Kitroeff and Jessica Silver Greenberg, Pregnancy Discrimination Is Rampant Inside America's Biggest Companies, *The New York Times* (Feb. 8, 2019), [<https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>] [<https://perma.cc/7TZ3-DP6J>].

¹² *Id.*

¹³ *Id.*

¹⁴ See Kitroeff & Silver-Greenberg, *supra* note 11 (stating that while American companies have "rolled out generous parental leave policies, designed cushy lactation rooms, and plowed millions of dollars into programs aimed at retaining mothers," these advances have not changed the simple fact that pregnancy often knocks women off of the professional ladder.).

companies indirectly push women off the professional ladder.¹⁵ Pregnant women in professional sports risk losing their ranking, team positions, endorsements, or reputation.¹⁶ Theoretically, women and men in the United States are entitled to equal protection of the law¹⁷ and freedom from discrimination in employment because of sex.¹⁸

Nevertheless, improving women's rights in the workplace continues to be a complicated issue.¹⁹ Despite the legislature's noble attempts, legislation addressing this issue remains fraught with limitations.²⁰ The Pregnancy Discrimination Act ("PDA") is one example of legislation.

Enacted by Congress in 1978 as an amendment to Title VII of the Civil Rights Act of 1964 ("Title VII"), the PDA seeks to prohibit discrimination in the workplace based on pregnancy, childbirth, or related medical conditions.²¹ The PDA enables more women to continue safely working while pregnant and work further into their pregnancies without being forced to leave their jobs.²² The PDA, however, appears to contain discriminatory practices targeting pregnant women.²³ The PDA's primary purpose is to secure more equitable working conditions.²⁴ Unfortunately, courts appear to fail

¹⁵ See Kitroeff & Silver-Greenberg, *supra* note 11.

¹⁶ See Laura M. Purtell & Anna Katherine Clemmons, Athlete-Mom Confidential: How the pros manage motherhood, *espnW* (Aug. 20, 2018), <http://www.espn.com/espn/culture/feature/article/24426696/athlete-mom-confidential-how-prosmanagemotherhood>.

¹⁷ See U.S. Const. amend. XIV.

¹⁸ See 42 U.S.C. § 2000(e) (1964); see also 29 U.S.C. § 206(d) (1963).

¹⁹ Women's Rights, ACLU, <https://www.aclu.org/issues/womens-rights> (last visited Sep. 22, 2021).

²⁰ See *id.* ("In the employment realm, laws and workplace policies that exclude women from certain job sectors and allow them to be forced out of the workplace when they become pregnant or return to work after having a baby cause persistent disabilities in women's income, wealth, and economic security.")

²¹ See 42 U.S.C.S. § 2000e(k).

²² See Chavi Eve Karkowsky & Liz Morris, Pregnant at work: Time for prenatal care providers to act, *306 Am. J. Obstetrics & Gynecology* 1 (Sep. 2016), https://worklife.law.org/wp-content/uploads/2016/11/Karkowsky_Pregnant-at-Work.pdf.

²³ See Liz Elting, Why Pregnancy Discrimination Still Matters, *Forbes* (Oct. 30, 2018, 2:19 PM), [<https://perma.cc/94B3-VW4E>].

²⁴ See Fact Sheet: Pregnancy Discrimination, U.S. Equal Emp. Opportunity Comm'n, <https://www.eeoc.gov/laws/guidance/fact-sheet-pregnancy-discrimination> (last visited Sep. 22, 2021).

at interpreting the law's protections correctly.²⁵ Subsequently, it seems that the PDA fails to serve its purpose effectively.

While there are varying legal aspects and views around pregnancy discrimination and the PDA, this Article examines the current and historical nature of the PDA and its influence on prohibiting discrimination in professional sports. Part I navigates the history of pregnancy discrimination, the significance of pregnancy in sports, negligent observation of pregnancy in sports, and the opposing perspective around the patriarchal model of professional sports. Part II explores Title VII, federal statutes relating to pregnancy discrimination, legal cases debating pregnancy as a disability, and intersecting issues on equality, pregnancy, and accommodations. Part III discusses varying types of pregnancy accommodation models. Lastly, Part IV concludes with pervasive thoughts on pregnancy discrimination.

I. THE NEGLIGENT OBSERVATION

Pregnancy and Sex Equality in Sports

While women's equality in the workplace is an ongoing defining issue in developing models of equality from a feminist legal perspective,²⁶ the issue is absent in sports.²⁷ When an athlete becomes pregnant and continues to participate in sports, the media frames the moment as a success story without any social critique.²⁸ Nevertheless, the challenges of pregnant athletes were irrelevant

²⁵ See Marco Di Stefano, *Young v. UPS and the Evidentiary Dilemma*, Seton Hall L. Sch. Student Scholarship (2017), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1909&context=student_scholarship.

²⁶ See generally Martha Chamallas, *Introduction to Feminist Legal Theory* 39-44 (Aspen Publishers, 2d ed. 2003).

²⁷ See Deborah L. Brake, *The Struggle for Sex Equality in Sports and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform. 13, 110-11 (Fall 2000-Winter 2001) ("The marginalization of women's sports occurs at many levels, including the unequal treatment of and benefits provided to female athletes, and the devaluation of female athletic by paying coaches more money to coach male athletes than female athletes... However, marginalization also occurs at the level of sport culture, conveying the message that athletic is, by nature, male, and that women's place in sport is peripheral.")

²⁸ See, e.g., Laura Gottesdiener, *WNBA Players Win at Motherhood and Career*, Huff Post (July 6, 2011), [<https://perma.cc/55JJR7NZ>] (explaining how a WNBA player, for example, returns to the game in full force after taking leave to have a baby).

until the Serena Williams and WTA controversy.²⁹ Pregnancy discrimination in sports remains an issue of sex equality that deserves further exploration.³⁰

A. Women in the Male-Dominated Sports Industry

Historically, men have dominated the institution of sports, excluding women entirely.³¹ Women's participation in sports is not present until the late eighteen hundreds and early nineteen hundreds.³² The presence of women in professional sports originates with the adoption of an All-American Girl Baseball League (the League) starting in 1943.³³

As male players leave to fight in World War II, the League put female athletes at the forefront of major sports for the first time.³⁴ While a substantial step for women's sports, the League quickly disbands in 1954 when the war ends, and the men return home.³⁵

B. Pregnancy in Sports: Is It a Significant Issue?

The question of how to treat pregnant athletes exposes a central and unresolved issue in discussing sex equality in sports.³⁶ The question appears jarring because pregnancy is a quintessential

²⁹ Cf. Smith Eibeler, LLC, USTA Changes Pregnancy Accommodation Policy, New Jersey Employment Lawyers Blog (June 27, 2018), <https://www.newjerseyemploymentlawyersblog.com/usta-changes-pregnancy-accommodation-policy/> [<https://perma.cc/N93G-6E7V>] (“Williams recently took a leave of absence from competing as she became pregnant and gave birth to her child, Olympia, in September of 2017. She also unfortunately experienced severe complications from this pregnancy that added to the physical strain of giving birth. Despite her record-breaking athletic history, she returned from pregnancy leave to find that she was unseeded in the French Open this year.”).

³⁰ See Brake, *supra* note 28.

³¹ See Richard C. Bell, A History of Women in Sport Prior to Title IX, *The Sport Journal* (Mar. 14, 2008), <http://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/>.

³² See Timeline: A Brief History of Women's Team Sports in America, PBS (July 17, 2001), <http://www.pbs.org/pov/trueheartedvixens/timeline/>.

³³ See Bell, *supra* note 32.

³⁴ See Bell, *supra* note 32; PBS, *supra* note 33.

³⁵ *Id.*

³⁶ See Brake, *supra* note 28; see also Varda Burstyn, *The Rites of Men: Manhood, Politics, and the Culture of Sport* 267 (1999); Jennifer Hargreaves, *Heroines of Sport: The Politics of Difference and Identity* 3 (2000); Welch Suggs, *A Place on the Team: The Triumph and Tragedy of Title IX* 45-65 (2005).

sex difference.³⁷ The dominant model of sports centers around the design of a non-pregnant body.³⁸

In contrast, modern times call for a sports model incorporating women and allowing space for athletes to become pregnant without making them deviant or unwelcome.³⁹ In order to make room for pregnant athletes, advocates of sex equality must confront this perennial issue of constructing a sports model to fit the needs of women.⁴⁰ Once the female athlete ceases competition due to her pregnancy, she risks her status in the sport and her economic viability.⁴¹

C. Sounding the Alarm: Neglect of Addressing Pregnancy and Female Athletes

The idea of a pregnant athlete is alarming to some.⁴² By virtually ignoring pregnancy, sports preserve the cultural notion that sports are male-dominated.⁴³ Historically, women did not participate in sports due to motherhood and caregivers.⁴⁴ Male dominant conceptions of gender roles reinforced beliefs about the incompatibility of pregnancy and athleticism.⁴⁵

Feminist philosopher Iris Marion Young describes how physical passivity—the opposite of the nature of sports—is projected onto a pregnancy.⁴⁶ Young explains:

In classical art, this “aura” surrounding motherhood depicts repose. The dominant culture projects pregnancy as a time of quiet waiting. We refer to the woman as “expecting,” as though this new life were flying in from

³⁷ See Brake, *supra* note 28.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Brake, *supra* note 28.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See generally Mary A. Boutilier & Lucinda SanGiovanni, *The Sporting Woman* 42-288 (1983); Susan K. Cahn, *Coming on Strong: Gender and Sexuality in Twentieth-Century Women's Sport* (1994); Mary Jo Festle, *Playing Nice: Politics and Apologies in Women's Sports* (1996); Jennifer Hargreaves, *Sporting Females: Critical Issues in the History and Sociology of Women's Sports* (1994).

⁴⁵ *Id.*

⁴⁶ See Iris Marion Young, *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* 54 (2005).

another planet and she sat in her rocking chair by the window, occasionally moving the curtain aside to see whether the ship is coming.⁴⁷

The image of uneventful waiting associated with pregnancy reveals clearly how much the debate around pregnancy and the subjective outlook on women is still prevalent in sports.⁴⁸

The battle surrounding pregnant female athletes is challenging; however, the next revolution appears to be changing an array of viewpoints that sees pregnancy as a disability.⁴⁹ The corporate world and professional sports still view motherhood as a liability in a woman's career.⁵⁰ For many athletes, getting pregnant can be the difference between economic stability and financial instability.⁵¹

The return from maternity leave to sports is unique compared to other workplace returns.⁵² In competitive sports, rankings are the guiding principle where the best player faces the lowest-ranked player at the start of the tournament.⁵³ However, the WTA is changing its rules regarding players who return to the tour from maternity leave.⁵⁴

Currently, the WTA preserves a female tennis player's ranking before taking pregnancy leave.⁵⁵ Upon return to competition, the female tennis player can use a special ranking method to enter tournaments.⁵⁶ The unique ranking is valid for up to three years and may be used to enter a maximum of eight tournaments.⁵⁷

⁴⁷ *Id.*

⁴⁸ See Young, *supra* note 47.

⁴⁹ See Olympic Moms: The Rise of Mothers in Elite Sports, NBC Chicago (July 26, 2012, 7:04 PM), <https://www.nbcchicago.com/news/sports/Women-Olympians-Proving-That-Motherhood-Is-No-Bar-To-Success-162076625.html> [<https://perma.cc/J258-GB7V>].

⁵⁰ *Id.*

⁵¹ See Laura Smith, Elite Athletes and the Pregnancy Penalty, *California Magazine* (Fall 2019), <https://alumni.berkeley.edu/california-magazine/fall-2019/elite-athletes-and-pregnancy-penalty-track-star-alyisia-montano>.

⁵² WTA Staff, In Focus: WTA maternity leave policy, rankings and seedings, *WTA Tennis* (June 27, 2018), <https://www.wtatennis.com/news/focus-wta-maternity-leave-policy-rankings-and-seedings> [<https://perma.cc/FZ65-WRJJ>].

⁵³ See Clarke, *supra* note 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See WTA Staff, *supra* note 53.

⁵⁷ *Id.*

II. PREGNANCY AT WORK AND IN SPORTS

A. *The Sword Fight of Legal Battles and Congressional Movement*

In 1964, Congress passed Title VII to combat growing sex discrimination.⁵⁸ Title VII of the Civil Rights Act of 1964 protects employees against discrimination,⁵⁹ including disciplining, measuring performance, or providing benefits.⁶⁰ ⁶¹ Before passing the PDA, an amendment of Title VII, the first landmark case to address this issue in the workplace is *Cleveland Board of Education v. LaFleur*.⁶²

The case involves a constitutional challenge to a school district policy “requir[ing] every pregnant school teacher to take maternity leave without pay, beginning five months before the expected birth of her child.”⁶³ The policy prevents teachers from returning to work before their infants are three months old.⁶⁴ The Supreme Court deliberates citing that the school board’s pregnancy policies are unconstitutional because they violate the Fourteenth Amendment’s Due Process Clause (“Due Process Clause”).⁶⁵

According to the Court, the “freedom of personal choice in marriage and family life” are essential aspects of liberty protected by the Due Process Clause.⁶⁶ The Court continues by stating:

[T]he mandatory maternity leave policy is overly restrictive and does not consider an individual’s capacity to work.⁶⁷ The maternity leave policies directly affect “one of the basic civil rights of man,” and therefore “needlessly, arbitrarily, or capriciously impinge[d] upon” the teacher’s

⁵⁸ 42 U.S.C. § 2000e-2(a) (2012).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Ethnic/National Origin, U.S. Dep’t Labor, <https://www.dol.gov/general/topic/discrimination/ethnicdisc> [<https://perma.cc/8R8U-8LJ2>].

⁶² See *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 632 (1974).

⁶³ *Id.*

⁶⁴ See *LaFleur*, 414 U.S. at 634-35.

⁶⁵ *Id.* at 639-40.

⁶⁶ *Id.*

⁶⁷ *Id.* at 640.

constitutional liberties as promised by the Due Process Clause.⁶⁸

While *LaFleur* describes the relationship between pregnancy and the Due Process Clause,⁶⁹ the Court's holding appears not to resolve the disagreement as to whether mandatory maternity leave policies based on pregnancy were "classification[s] based on sex" for purposes of the Fourteenth Amendment's Equal Protection Clause ("Equal Protection Clause").⁷⁰

Later, the Supreme Court addresses pregnancy discrimination under the Equal Protection Clause in *Geduldig v. Aiello*.⁷¹ The *Geduldig* Court rejects the equal protection claims in the case and upholds the exclusion of normal pregnancy-related disabilities.⁷² Writing for the majority, Justice Stewart states that pregnancy exclusion divides employees into two groups: solely female and the other containing both sexes.⁷³ Therefore, the exclusions are permissible and are not discriminatory because the distinction is not primarily sex-based.

After addressing pregnancy in the context of the Due Process Clause and the Equal Protection Clause, the Supreme Court later addresses pregnancy discrimination concerning Title VII in *General Electric Co. v. Gilbert*.⁷⁴ While there appears to be a circuit court split centering around pregnancy discrimination and its inclusion in the sex discrimination realm, the *Gilbert* decision clarifies pregnancy discrimination.⁷⁵ Justice Rehnquist, writing for the majority, states that employers have the right to exclude any condition, including pregnancy, from a disability plan on a reasonable basis.⁷⁶

The Court concludes that Title VII protections are facially neutral and do not encompass pregnant women because the Act

⁶⁸ *Id.*

⁶⁹ 414 U.S. at 648, 650.

⁷⁰ See Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women's L.J. 1, 3 (1985).

⁷¹ See 417 U.S. 484 (1974).

⁷² *Id.* at 486-89.

⁷³ See *Geduldig*, 417 U.S. at 496-97.

⁷⁴ See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 127-33 (1976).

⁷⁵ *Id.*

⁷⁶ *Id.* at 133-36, 138.

only protects against discrimination based on gender.⁷⁷ This neutrality provides male and female employees with the same coverage.⁷⁸ An employer, therefore, can treat pregnant employees differently than non-pregnant employees without violating Title VII's prohibition against sex discrimination. As a result, disparate treatment based on pregnancy does not, by itself, constitute sex discrimination.⁷⁹

Three dissenting justices—Justice Brennan, Justice Marshall, and Justice Stevens—argue strongly against the notion that classifications based on female-only characteristics are not necessarily discrimination.⁸⁰ The dissent highlights that the majority opinion examined the policy in isolation when it should have considered General Electric's history of downgrading the role of women in the workforce.⁸¹

B. The Debate About the Meaning of Equality and Pregnancy in Sports

Advocates of equal treatment have three main arguments surrounding equality, sports, and legislation.⁸² One argument supports laws throughout history aimed at protecting women because their biological or social differences from men have prevented women from leaving home and effectively entering the workplace.⁸³ The second argument recognizes that differences between men and women further perpetuate stereotypes of women

⁷⁷ See *Gilbert*, 429 U.S. at 125, 133-36, 138.

⁷⁸ *Id.*

⁷⁹ See *Id.* at 145-46.

⁸⁰ *Id.* at 147.

⁸¹ See *Gilbert*, 429 U.S. at 161-62.

⁸² See Samuel Issacharoff and Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 *Colum. L. Rev.* 2154, 2195 (1994); see also Smith, *supra* note 52.

⁸³ See Issacharoff & Rosenblum, *supra* note 84, at 2195; see also Lise Vogel, *Debating Difference: Feminism, Pregnancy, and the Workplace*, 16 *Feminist Stud.* 9 (1990); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in *Feminist Legal Theory—Readings in Law and Gender*, 25-26 (Katharine T. Bartlett & Rosanne Kennedy, eds., 1991).

that inhibit equality.⁸⁴ The third argument centers around the unique and oppressive treatment of women.⁸⁵

However, the equal treatment debate appears to have flaws. Under this approach, pregnancy equates to other temporary disabilities regardless of gender.⁸⁶ Therefore, under this philosophy, pregnancy is understood as primarily gender-neutral;⁸⁷ yet, this cannot be true as pregnancy biologically affects only women.⁸⁸ On the other hand, proponents of special treatment believe equality serves best if women possess specific rights.⁸⁹ Advocates of special treatment maintain that equal treatment of men and women “results in inequality for women” where women’s needs differ.⁹⁰ Proponents believe women are fundamentally different and need exclusive rights to acquire equal opportunities.⁹¹ Surprisingly, advocates of special treatment criticize a few similar treatment arguments for many reasons.⁹² The criticism centers on: 1). Equal treatment justifies differential treatment and impedes a finding of discrimination;⁹³ and 2). Equal treatment accepts maleness as the norm and allows equality only for women willing and able to conform to that norm.⁹⁴ Thus, this viewpoint

⁸⁴ See Joanne Conaghan, *Pregnancy and the Workplace: A Question of Strategy?*, 20 *J. L. & Soc’y* 71, 75 (1993).

⁸⁵ See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in *Feminist Legal Theory—Readings in Law and Gender*, 25-26 (Katharine T. Bartlett & Rosanne Kennedy, eds., 1991)

⁸⁶ See 42 U.S.C. § 2000e(k) (2006); 29 U.S.C. §§ 2601, 2612 (2000); see generally *Cal. Fed. Sav. & Loan Ass’n. v. Guerra*, 479 U.S. 272 (1987).

⁸⁷ *Brake*, supra note 29, at 345.

⁸⁸ *Id.*

⁸⁹ See Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 *Geo. L.J.* 193, 204 (1993).

⁹⁰ See Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women’s Equality*, 13 *Golden Gate U. L. Rev.* 513, 515 (1983).

⁹¹ *Id.*; see, e.g., Elizabeth H. Wolgast, *Equality and the Rights of Women* 156-58 (1980); see also Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 *Ind. L.J.* 375, 430-34 (1981); Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *Feminism and Political Theory* 117, 136-37 (Cass R. Sunstein ed., 1990).

⁹² *Id.*

⁹³ Matzzie, supra note 91, at 198-200.

⁹⁴ Krieger & Cooney, supra note 93, at 539.

results in women having no protection if they become pregnant or need more time to recuperate from childbirth than allowed.⁹⁵

While equal treatment and special treatment both fail to eliminate the male norm, the Americans with Disabilities Act's ("ADA") reasonable accommodation method overcomes the shortcomings of both approaches.⁹⁶ Reasonable accommodations are not male-centric but focus on each pregnant woman's individual needs and the reasonableness of accommodating those needs.⁹⁷ Under this approach, it is irrelevant to consider how an employer treats a man or other disabled employees when determining a pregnant employee's entitlement.⁹⁸

C. A Pregnancy Participatory Model: Incorporating Accommodations into Professional Sports

Pregnancy Participatory (PP) models in sports are necessary to deconstruct the dominant sports model designed around a non-pregnant body.⁹⁹ The PP models can allow female athletes to continue participating or temporarily leave their respective sports during their pregnancies without risking their status.¹⁰⁰ Sports observers believe the sports world needs to adopt policies

⁹⁵ *Id.*

⁹⁶ See 42 U.S.C. § 12101(a)(7); ADA Regulations, 29 C.F.R. pt. 1630 app. at 400; see also *Armstrong v. Flowers Hosp., Inc.*, 812 F. Supp. 1183, 1192 (M.D. Ala. 1993), *aff'd*, 33 F.3d 1308 (11th Cir. 1994); see *D'Amico v. N.Y. State Bd. Of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993); see *Matzzie*, *supra* note 91, at 208, 212, 215-16; see also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 *Colum. L. Rev.* 1118, 1127 (Oct. 1986).

⁹⁷ See ADA Regulations, 29 C.F.R. pt. 1630 app. 400, 403, 407, 414; see e.g., *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1396 (5th Cir. 1993); *Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992); *Barfield v. Bell S. Telecommunications, Inc.*, 886 F. Supp. 1321, 1324 (S.D. Miss. 1995); *Carlson v. InaCom Corp.*, 885 F. Supp. 1314, 1320 (D. Neb. 1995); *Dutton v. Johnson County Bd. Of County Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994); *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1216 (N.D. Ohio 1993); *D'Amico v. New York State Bd. Of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993); *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992).

⁹⁸ ADA Regulations, 29 C.F.R. pt 1630, app. at 400, 403, 407, 414.

⁹⁹ Maggie Mertens, *Maternity Leave Not Higher Pay Is the WNBA's Real Win*, *The Atlantic* (Feb. 1, 2020), <https://www.theatlantic.com/culture/archive/2020/02/why-wnba-s-new-maternity-leave-policy-revolutionary/605944/>.

¹⁰⁰ See generally *id.*

concerning pregnancy in sports that protect the health and rights of female athletes.¹⁰¹

Combined with the “existing legal regime,” the current sports model is untenable when measured against the standard of equality.¹⁰² The law fails to require reasonable accommodations for the physical effects of pregnancy.¹⁰³ The deprivation of female athletes in sports is systemic.¹⁰⁴

Denying accommodations for female athletes can be severe¹⁰⁵ and affect retiring from the sport.¹⁰⁶ The lack of accommodation surrounding pregnancy appears to mean that the female athlete will continue to lose ground in an arena they need to gain the most—an institution traditionally dominated by men.¹⁰⁷

Pregnancy only exacerbates the inflexible attitude of professional athletes toward women.¹⁰⁸ The current dominant sports model reinforces a long history of occupational segregation surrounding female athletes.¹⁰⁹ Female athletes are “second-class status” under this dominant sports model.¹¹⁰ Hence, pregnancy accommodations promote women’s equal participation in professional sports.¹¹¹ Seemingly, the additional accommodations might be the best way to ensure equality for pregnant athletes.

However, there are risks to mandating accommodations.¹¹² One concern is that it may also breed resentment from female athletes who perceive the accommodations as preferential treatment.¹¹³ Furthermore, mandatory accommodations may deter the visibility of female sports because employers may perceive

¹⁰¹ *Id.*

¹⁰² Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Geo. L.J.* 567, 619 (2010).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; *Women in Blue Collar Labor: The Numbers Grow*, *Occupational Health & Safety*, Feb. 1983, at 23.

¹⁰⁸ Grossman, *supra* note 103, at 621.

¹⁰⁹ *Id.* at 621.

¹¹⁰ *Id.* at 622.

¹¹¹ *Id.* at 623.

¹¹² Grossman, *supra* note 103 at 624.

¹¹³ Hal G. Gueutal & Elisabeth M. Taylor, *Employee Pregnancy: The Impact on Organizations, Pregnant Employees and Co-Workers*, 5 *J. Bus. & Psychol.* 459, 475 (1991).

women as more costly.¹¹⁴ The concerns, although accurate, are “insufficient to overcome” the benefits of implementing accommodations in professional sports.¹¹⁵ At a minimum, amending the current sports framework will create a counter-narrative for a more participatory sports model.

III. RECOMMENDATIONS

The Intricate Infrastructure of Pregnancy Accommodations and Urgent Need For Federal Legislation

An accommodation model for pregnant athletes might take different forms, but the goal is to maximize women’s opportunities to return to their respective sports without punishment.¹¹⁶ In the context of professional sports, accommodations would enable pregnant athletes, among other things, to preserve their rankings and retain their pay.¹¹⁷ Making such adjustments is an essential precondition for capturing equality in sports.¹¹⁸

A. Model Accommodations on the Americans with Disabilities Act

Currently, the ADA ensures that disabled individuals have reasonable accommodations if there is no undue hardship on the employer.¹¹⁹ Some suggest that a new pregnancy accommodation law can replicate certain similarities of the ADA, or a new amendment to the current ADA can recognize pregnancy as a qualifying disability.¹²⁰ If disability under the ADA includes

¹¹⁴ See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 *Stets on L. Rev.* 1, 22 (1995).

¹¹⁵ Grossman, *supra* note 103, at 625.

¹¹⁶ See Deborah L. Brake, *The Invisible Athlete and the Promise of Title IX*, 31 *Harv. J. L. & Gender* 323 (2008); see generally Liz Weber, *These extreme athletes are proof that pregnant women don’t have to take it easy*, *The Washington Post* (May 15, 2019), <https://www.washingtonpost.com/sports/2019/05/15/these-extreme-athletes-are-proof-that-pregnant-women-dont-have-take-it-easy>.

¹¹⁷ Mertens, *supra* note 100.

¹¹⁸ See generally *id.*

¹¹⁹ See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2 (j)(1)(ix) (March 25, 2011); see also Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *Duke L.J.* 1, 25 (1996).

¹²⁰ Grossman, *supra* note 103, at 625.

pregnancy, female athletes can take a pregnancy leave without risk.¹²¹

For athletes receiving medical benefits from their employer under the amendment recommendations, it ensures that pregnant athletes receive similar benefits as other medical conditions. If an athlete continues to play while pregnant, the ADA can require more frequent breaks throughout the pregnancy without any questions or further scrutiny other than providing a positive pregnancy test six weeks after leaving.¹²²

B. Urgent Passage of The Pregnancy Workers Fairness Act

The passage of the Federal Pregnancy Workers Fairness Act, which deals directly with accommodations for a pregnancy-related disability, is another viable option.¹²³ Congress repeatedly tries passing the Federal Pregnant Workers Fairness Act (FPWFA).¹²⁴ The legislation helps end pregnancy discrimination by requiring employers to make reasonable accommodations for employees with physical limitations because of pregnancy, childbirth, or related medical conditions.¹²⁵ Accordingly, this law would promote healthy pregnancies and protect the economic security of pregnant women and their families.¹²⁶

If Congress garners enough votes to pass the FPWFA, it appears it may help female athletes request more reasonable and case-specific accommodations, like those under the ADA.¹²⁷ Perhaps, the 21st century might see a paradigm shift towards more

¹²¹ *Id.*

¹²² See Krissi Danielson, *How Long Until hCG Falls to Zero After Miscarriage?*, verywellfamily (Nov. 29, 2020) <https://www.verywellfamily.com/how-long-until-hcg-falls-to-zero-after-miscarriage-2371511>.

¹²³ See *The Federal Pregnant Workers Fairness Act, a better balance* (Mar. 2, 2022), <https://www.abetterbalance.org/resources/the-federal-pregnant-workers-fairness-act/>.

¹²⁴ See *The Pregnant Workers Fairness Act, national partnership of women & families*, [<https://perma.cc/2UAJ-LTS7>] (last visited Mar. 23, 2022).

¹²⁵ Similar to the ADA framework, the Pregnant Workers Fairness Act would not require employers to provide such accommodations if doing so would create an undue hardship for them. *Pregnant Workers Fairness Act of 2013*, H.R. 1975, 113th Cong. § (2013); *Pregnant Workers Fairness Act of 2012*, H.R. 5647, 112th Cong. § (2012); See also *The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job*, NWLC (June 2015), [<https://perma.cc/M3CQ-BESK>].

¹²⁶ See generally *supra* note 126.

¹²⁷ See *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 C.F.R. § 1630.2 (j)(1)(ix).

thoughtful policies and legislation between private institutions, pregnancy, and intersecting sport-related issues.

IV. CONCLUSION

Gender discrimination remains a pervasive issue in professional sports. Although society usually thinks of gender equity in sports in terms of equal playing, opportunities, and pay, pregnancy discrimination continues to be an ongoing challenge for women. This type of discrimination limits women's opportunities and economic advancement. Female athletes should not fear punishment nor pick between motherhood and being professional athletes. The enactment of federal legislation and change in public and institutional policies are necessary.