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PREGNANCY & POLICING: ARE THEY COMPATIBLE?  
PUSHING THE LEGAL LIMITS ON BEHALF OF EQUAL  
EMPLOYMENT OPPORTUNITIES

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INTRODUCTION

The job of a law enforcement officer is one of emotional stress, intellectual challenge, and physical demands. It is a profession that requires the talents of people whose personal resources include courage, integrity, and equilibrium. An effective law enforcement officer may be required to perform more than 600 essential functions,<sup>1</sup> many of which require a high level of physical fitness. Today's law enforcement profession is comprised of courageous and talented men *and* women, with women making special and valuable contributions. Although law enforcement is, at present, still a male-dominated profession, women are becoming police officers in greater numbers, and their contributions are being recognized.<sup>2</sup> However, these contributions may be lost if law enforcement agencies fail to recognize that police officers also become pregnant. Officers should not be forced to choose between their profession and parenthood. This happens when agencies fail to accommodate pregnancy as a temporary physical disability. Unfortunately, current law does not compel law enforcement agencies to take the important steps needed to accommodate pregnancy.<sup>3</sup> This Article argues that the law should.

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1. See 1 MD. CHIEFS OF POLICE ASS'N, A TASK ANALYSIS STUDY OF ENTRY-LEVEL LAW ENFORCEMENT IN THE STATE OF MARYLAND, 108-17 (1995).

2. See generally Peter Horne, *Policewomen: Their First Century and the New Era*, THE POLICE CHIEF, Sept. 2006, at 56, 58-60, available at [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1000&issue\\_id=92006](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1000&issue_id=92006) (describing the valuable contributions of women police officers from the early 20th century until today); The Nat'l Ass'n of Women Law Enforcement Executives, <http://www.nawlee.com> (last visited May 31, 2007) (addressing the unique needs and accomplishments of women holding senior management positions in law enforcement).

3. See Horne, *supra* note 2, at 61. "[C]ourt-ordered plans still remain necessary to get some police agencies to implement policies to recruit, promote and retain women." *Id.*

Not only have women proven to be as capable as men in performing law enforcement duties, studies have shown that women excel in defusing violent situations, excel in demonstrating empathy in stressful situations, and are less likely to be accused of using excessive force.<sup>4</sup> It is critical, then, for the continued success of the profession that law enforcement agencies recruit and retain women to serve as police officers.

There may be law enforcement executives and other government officials who are not persuaded of the value of these social goals. Those skeptics may be influenced the Equal Employment Opportunity Commission's recent report showing that discrimination claims based on pregnancy are among the fastest-growing nationally. The report reveals a record of 4,901 pregnancy discrimination complaints were filed in fiscal year 2006, a 23% increase since 1997.<sup>5</sup> Reportedly, women are complaining that "there appears to be a presumption or misconception about what women should be doing in the workplace if they're pregnant and whether they should be in the workplace if they are pregnant."<sup>6</sup> Indeed, even a retail store that sells maternity clothes recently agreed to pay \$375,000 to settle a pregnancy discrimination claim that alleged the store refused to hire pregnant applicants and fired an assistant manager after she filed a complaint.<sup>7</sup>

Even so, an EEOC spokesperson noted that many women fear that filing complaints and initiating litigation can be a "career killer."<sup>8</sup> He disavowed this notion, stating the EEOC's position that "[w]omen should never be forced to choose between motherhood and their livelihood." . . . 'Employers should be sensitive to this issue.'<sup>9</sup>

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(citing NAT'L CTR. FOR WOMEN & POLICING, UNDER SCRUTINY: THE EFFECT OF CONSENT DECREES ON THE REPRESENTATION OF WOMEN IN SWORN LAW ENFORCEMENT 3, 7-8 (2003), available at <http://womenandpolicing.org/pdf/Fullconsentdecreestudy.pdf>). "Two major barriers still exist in many police departments: sexual harassment and poor maternity leave policies." *Id.*

4. NAT'L CTR. FOR WOMEN & POLICING, HIRING & RETAINING MORE WOMEN: THE ADVANTAGES TO LAW ENFORCEMENT AGENCIES 2 (2003), available at <http://womenandpolicing.com/pdf/NewAdvantagesReport.pdf>. See also SUSAN EHRLICH MARTIN & NANCY C. JURIK, DOING JUSTICE, DOING GENDER 55 (1996); Deborah J. Campbell & Rafael P. Hernandez, Jr., *IACP Diversity Coordinating Panel*, THE POLICE CHIEF, Sept. 2006, at 1, 1, available at [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=994&issue\\_id=92006](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=994&issue_id=92006) (discussing "[t]he pivotal role that workplace diversity can play in promoting effective and representative law enforcement").

5. Hanah Cho, *Pregnant Need Not Apply; Bias Complaints are Up; Some Fear Career Impact*, BALTIMORE SUN, Mar. 28, 2007, at 1D.

6. *Id.* at 6D (quoting Maria Salacuse, a senior trial attorney in the EEOC's office in Baltimore, MD).

7. Press Release, EEOC, Maternity Store Giant to Pay \$375,000 to Settle EEOC Pregnancy Discrimination and Retaliation Lawsuit (Jan. 8, 2007), available at <http://www.eeoc.gov/press/1-8-07.html>.

8. Cho, *supra* note 5 at 6D.

9. *Id.* (quoting David Grinberg, EEOC spokesperson).

One important tool in achieving the goals of maintaining diversity and avoiding discrimination complaints is creating favorable pregnancy policies. Such policies support parenthood without compromising police operations, unfairly burdening non-pregnant employees, or violating antidiscrimination laws.<sup>10</sup> Because law enforcement was founded as (and remains) a male-dominated profession, its norms for performance and behavior are “unintentionally designed around the prototypical male officer.”<sup>11</sup> This adds practical obstacles to the legal ones in achieving equality for women.<sup>12</sup> Law enforcement is a profession in which “stereotypes about motherhood [are] a form of gender discrimination.”<sup>13</sup> Advocates for women must work to level the playing field.

This Article, as an advocacy piece, addresses how and why law enforcement agencies should accommodate pregnant women so that they can safely perform the duties of a police officer during all or most of their pregnancy and become mothers without being required to compromise their careers. Part I of this Article provides background about women in policing, including a brief history. Part II examines the required qualifications and essential functions of the job of police officer. Part III discusses some of the policies that police agencies have imposed on pregnant officers, including a review of discrimination cases involving law enforcement officers. Part IV seeks to encourage police agencies to move beyond the minimum protections offered by the Pregnancy Discrimination Act and the Family and Medical Leave Act in order to preserve the valuable diversity of their workforce.

## I. POLICEWOMEN ENTER THE SCENE

### A. *History of Discrimination*

Women have been doing police work for over 100 years, beginning as “police matrons” in the nineteenth century.<sup>14</sup> In 1845, women were hired by

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10. INT’L ASS’N OF CHIEFS OF POLICE, THE FUTURE OF WOMEN IN POLICING: MANDATES FOR ACTION 9 (1998) (noting that in a 1998 study performed by the International Association of Chiefs of Police, the most frequent reason women gave for resigning from law enforcement jobs was “family/children/birth of child.”).

11. Joanna Grossman, *A Big Win for Pregnant Police Officers: A Jury Finds A New York County’s Police Department Liable for Failing to Accommodate Pregnancy-Related Disability*, June 27, 2004, FindLaw, <http://writ.lp.findlaw.com/grossman/20060627.html>.

12. It appears that pregnancy discrimination or other “family responsibilities discrimination” cases are on the rise, with women in all professions challenging stereotypes about pregnancy and motherhood. See Molly McDonough, *Pregnant Pause: Lawyers See Rise in “Family Responsibilities” Cases and Wins for Plaintiffs*, A.B.A. J., Aug. 2006, at 14, 14.

13. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117 (2d Cir. 2004).

14. Horne, *supra* note 2, at 56.

the New York City prison system to serve as matrons in prisons and police stations to protect female prisoners as a result of "intense pressure and lobbying"<sup>15</sup> from social reform groups.<sup>16</sup> Matrons were hired to perform limited duties such as searching female prisoners, preparing paperwork, and answering telephones.<sup>17</sup> They worked with "women, children[,] and typewriters."<sup>18</sup> These women, who were performing social services, had to meet higher selection standards than male applicants but were paid less and given fewer opportunities for advancement.<sup>19</sup> They were not permitted to perform basic patrol duties and were denied promotion because they lacked "full police" experience.<sup>20</sup>

Some examples of early female police officers include Mrs. Marie Owens, who was appointed a member of the Chicago Police Department by the mayor in 1893, as a way to provide for her after her police officer husband's death.<sup>21</sup> She was paid as a "patrolman" for thirty years, visiting courts and helping male detectives with cases that involved women and children, and she retired on a pension.<sup>22</sup> Another woman, Lola Baldwin, made history in 1908 when she was sworn in as a "female detective to perform police service" in Portland, Oregon.<sup>23</sup> In 1905, Baldwin had been hired by the Portland Traveler's Aid Society to lead a group of social workers charged with protecting women and

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15. KERRY SEGRAVE, *POLICEWOMEN: A HISTORY* 5 (1995).

16. *Id.*; JANIS APPIER, *POLICING WOMEN: THE SEXUAL POLITICS OF LAW ENFORCEMENT AND THE LAPD* 9-12 (1998); FRANCES HEIDENSOHN, *WOMEN IN CONTROL?: THE ROLE OF WOMEN IN LAW ENFORCEMENT* 42-43 (1992). *See also* The N.Y. City Police Museum Website, *Women in Policing*, [http://www.nycpolicemuseum.org/html/tour/wip\\_web.htm](http://www.nycpolicemuseum.org/html/tour/wip_web.htm) (last visited Feb. 16, 2007).

17. *See* Susan E. Martin, *Women on the Move?: A Report on the Status of Women in Policing*, POLICE FOUNDATION REP., May 1989, at 2.

18. *Id.* (citation omitted).

19. SEGRAVE, *supra* note 15, at 50. *See* Horne, *supra* note 2, at 56.

20. Barbara Raffel Price, *Female Police Officers in the United States*, in *POLICING IN CENTRAL AND EASTERN EUROPE: COMPARING FIRST HAND KNOWLEDGE WITH EXPERIENCE FROM THE WEST* 635, 636 (1996) (Slovn.), *available at* <http://www.ncjrs.org/policing/fem635.htm>. Great Britain was one of the first European countries to recruit women to policing, apparently as a result of the shortage of workers following World War I (1914-18). Jennifer Brown, *Integrating Women Into Policing: A Comparative European Perspective*, in *POLICING IN CENTRAL AND EASTERN EUROPE: COMPARING FIRST HAND KNOWLEDGE WITH EXPERIENCE FROM THE WEST* 627, 627-28 (1996) (Slovn.), *available at* <http://www.ncjrs.org/policing/int627.htm>. Dutch police employed women in 1911 because of social pressure arising from changes in the laws addressing sexual offenses and increased prostitution. *Id.* In 1925 the Polish Women's Police Brigade was formed, and by 1935 the French police was deploying women as part of normal police operations. *Id.* Not until 1944, however, did Britain's Home Office start to encourage the appointment of more women police officers in operational capacity. *Id.*

21. Horne, *supra* note 2, at 56.

22. *Id.*

23. *Id.* *See also* GLORIA E. MYERS, *A MUNICIPAL MOTHER: PORTLAND'S LOLA GREENE BALDWIN, AMERICA'S FIRST POLICEWOMAN* 21-22 (1995).

juveniles from the “undesirable influences” of male visitors to the Lewis and Clark Exposition.<sup>24</sup> Her work was extremely effective and led the police chief to appoint her as the “Superintendent of the Women’s Auxiliary to the Police Department for the Protection of Girls,” a position she held for fourteen years.<sup>25</sup> Baldwin appears to have been the first woman paid by a municipality and given the powers of arrest as a policewoman, although her duties still “emphasized crime prevention and social work rather than law enforcement.”<sup>26</sup>

In 1910, after women had organized and campaigned to be hired not just as matrons but as police officers, the Los Angeles Police Department hired Alice Stebbins Wells, a social reformer.<sup>27</sup> Wells was a well-educated clergywoman and social worker whose employment was approved by the Los Angeles City Council as the “one police officer who shall be a woman.”<sup>28</sup> She handled cases that involved women and juveniles and was responsible for uncovering the reasons that they became involved in criminal activity.<sup>29</sup>

In 1912, Isabella Goodwin, a widowed mother of four, became New York City’s first woman detective.<sup>30</sup> The New York Police Department (NYPD) hired Goodwin in 1896 as a Police Matron, and her promotion to First Grade Detective marked the first such promotion in the police department.<sup>31</sup> Her service as a detective led Police Commissioner Richard E. Enright to propose the creation of a “Policewoman” position, and six women were so appointed on August 15, 1918.<sup>32</sup>

Until about 1915, the service of women working in law enforcement was focused on moral reform and social rescue.<sup>33</sup> Historians characterize the period

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24. DOROTHY MOSES SCHULZ, *FROM SOCIAL WORKER TO CRIMEFIGHTER: WOMEN IN UNITED STATES MUNICIPAL POLICING* 22 (1995).

25. Horne, *supra* note 2, at 56 (citation omitted).

26. *Id.* at 56-57 (describing Baldwin’s role as “a gender-specific social work role”).

27. HEIDENSOHN, *supra* note 16, at 29; Los Angeles Police Dep’t Website, Women in the LAPD, [http://www.lapdonline.org/history\\_of\\_the\\_lapd/content\\_basic\\_view/833](http://www.lapdonline.org/history_of_the_lapd/content_basic_view/833) (last visited May 31, 2007) (describing Wells as “the nation’s first female policewoman with arrest powers.”).

28. APPIER, *supra* note 16, at 9-10.

29. Horne, *supra* note 2, at 57.

30. SEGRAVE, *supra* note 15, at 10-11; The N.Y. City Police Museum Website, *supra* note 16.

31. The N.Y. City Police Museum Website, *supra* note 16.

32. *Id.*

33. See HEIDENSOHN, *supra* note 16, at 41-42 (dividing the early history of women in U.S. policing into five phases, the first of which she calls “[m]oral reform, rescue and matrons: 1840-1910/15”). See also, President’s Message International Association of Women Police, commenting on “the passing of former Toronto Police Officer Evelyn Morden Johnston, on August 15, 2006, age 95. She was the first policewoman in Scarborough, Ontario and one of the original ladies in a documentary known as ‘The Powder-Puff Patrol.’ Women like Evelyn carved a path for us . . .” available at <http://www.iawp.org/> (last visited Mar. 6, 2007).

of 1915-1930 as one dominated by individual "specialists and pioneers"<sup>34</sup> but with no real progress for policewomen up until 1970.<sup>35</sup> Throughout, "policewomen were at first claiming to be doing a different job from that of the men, or at least, to be doing it better than any man, because of the very fact of being female."<sup>36</sup> The women themselves seemed to assume that their job should be different from male police officers. Indeed, NYPD Commissioner Enright met with opposition from the Police Matrons, who by 1918 were referred to as "Policewomen" or "Protective Officers," when he sought to appoint "Patrolwomen."<sup>37</sup> These two classifications finally merged in 1937, but curiously, NYPD Policewomen were required to have college degrees, while Policemen were not.<sup>38</sup>

The passage of Title VII of the Civil Rights Act<sup>39</sup> and its amendments extending coverage to state and local governments enhanced equal opportunities in law enforcement.<sup>40</sup> As a result of the new law, agencies were required to eliminate discriminatory employment policies.<sup>41</sup> Although male commanders expressed concern about the change's impact because "policemen would simply gaze at them [women] all the time and not do their work,"<sup>42</sup> civil rights lawsuits compelled police departments to actively recruit women and to dispel sexist barriers.<sup>43</sup>

### B. Continuing Barriers

Although statistics indicate that "there is no systematic sex discrimination in the applicant selection process,"<sup>44</sup> women in law enforcement remain at a disadvantage. In 1998, Janis Appier, a former officer with the Los Angeles Police Department, explained that the "macho subculture of police work . . . equates peak job performance with masculinity and a ready willingness to use force" to resolve conflicts.<sup>45</sup> From this subculture, she explains, policemen

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34. HEIDENSOHN, *supra* note 16, at 41.

35. *See id.* at 40-41. There have been some exceptions, such as steady progress at the N.Y. Police Dep't. *See* The N.Y. City Police Museum Website, *supra* note 16.

36. HEIDENSOHN, *supra* note 16, at 44 (citation omitted).

37. The N.Y. City Police Museum Website, *supra* note 16.

38. *Id.*

39. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

40. *See* APPIER, *supra* note 16, at 169.

41. Martin, *supra* note 17, at 3.

42. Brown, *supra* note 20, at 2 (citation omitted).

43. Interview by Mark Steiner with Margie Moore, Executive Dir., Nat'l Ctr. for Women & Policing, in Baltimore, Md., *The Mark Steiner Show* (WPPR radio broadcast Jan. 30, 2006); The N.Y. City Police Museum Website, *supra* note 16. It is interesting to note that in 1958 the N.Y. police department paid male and female officers equally at a starting annual salary of \$4,500. *Id.*

44. Martin, *supra* note 17, at 5.

45. APPIER, *supra* note 16, at 170.

form “generally low opinion[s] of policewomen’s capabilities.”<sup>46</sup> She notes that this negative attitude “flies in the face of numerous studies showing that policewomen perform as well as policemen in patrol and detective work.”<sup>47</sup>

Women entering law enforcement have faced tremendous difficulties, primarily because their male colleagues have negative attitudes about them and their ability to do the work.<sup>48</sup> Male police officers doubt that women are equal to men in performing job skills, fear that women cannot do “real” police work, and have concerns about women’s “emotional fitness.”<sup>49</sup> Studies have also shown that women in law enforcement face other “socially structured problems” including family responsibilities, role conflict, sexual harassment, and self-doubt about competence.<sup>50</sup> These problems may make women fear filing abuse or mistreatment complaints against their colleagues. Female law enforcement officers also struggle with inadequate facilities and equipment, including proper uniforms, patrol car seats, and moderately-sized handguns.<sup>51</sup>

In 2001, the National Center for Women in Policing produced a report entitled *Equality Denied: The Status of Women in Policing: 2001*.<sup>52</sup> The study determined that women comprise only 12.7% of police officers in large law enforcement agencies, and 8.1% in small and rural agencies.<sup>53</sup> A combined weighted estimate of these figures indicates that only 11.2% of America’s police officers are women, whereas the percentage of women in the total work force is 46.5%.<sup>54</sup> Both women’s advocacy groups and law enforcement leaders

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46. *Id.*

47. *Id.* (citation omitted). Appier explains that the “macho subculture” is “a natural outgrowth of the crime control model” of policing, as compared to a model of community policing based on communication rather than confrontation. *Id.*

48. NAT’L CTR. FOR WOMEN & POLICING, *EQUALITY DENIED: THE STATUS OF WOMEN IN POLICING*, 1997 at 1 (June 1998), available at <http://www.womenandpolicing.org/status.html>. See Susan Aaron, *Women with Badges*, Monster.com, [http://featuredreports.monster.com/law\\_enforcement/women](http://featuredreports.monster.com/law_enforcement/women). “No matter how often a woman proves herself in the job, she’s got to do it over and over again . . . . Once a guy’s does it, he’s set.” *Id.* (quoting Diane Skoog, Executive Dir. of the Nat’l Ass’n of Women Law Enforcement Executives).

49. Price, *supra* note 20, at 2.

50. *Id.* (citations omitted).

51. *Id.* (citations omitted). See also *Wedow v. City of Kansas City*, 442 F.3d 661, 672 (8th Cir. 2006) (finding that women firefighters should prevail in a sex discrimination case based on agency’s failure to provide properly fitting protective clothing and adequate locker room facilities because of gender).

52. NAT’L CTR. FOR WOMEN & POLICING, *supra* note 48.

53. *Id.* at 2.

54. *Id.*

seek to increase these numbers and to retain female police officers,<sup>55</sup> many of whom leave the profession for family or childbirth reasons.<sup>56</sup>

Even more telling are the “real life” stories of women who serve as law enforcement officers. Consider “Kathy”<sup>57</sup> who is a police officer in a small city in Ohio. Kathy had a daughter two years ago and is expecting another one later this year.<sup>58</sup> Because her agency denied her a light duty assignment during her pregnancy, she was forced to not only use all of her accumulated sick time, vacation, and compensatory time, she also lost a year of seniority.<sup>59</sup> Unless the chief of police permits her to work light duty during this pregnancy, she stands to lose even more of these same employment rights.<sup>60</sup>

In an effort to preserve her career and her opportunities for advancement, Kathy spoke with the police chief about light duty for pregnant officers, as she and her husband, who is also a city police officer, plan to expand their family.<sup>61</sup> The chief suggested that she gather a petition of names of other officers in support of her case.<sup>62</sup> When Kathy next met with the chief, she had a petition signed by every officer in the department who recognized her special need and supported her request for a light duty assignment during her pregnancy.<sup>63</sup> She also submitted a written proposal of the duties she would be able to perform that would assist her fellow officers and contribute to the good order of the agency while she worked in a limited duty capacity.<sup>64</sup> The chief of police denied her request, noting that “the law does not require me to make any provision for you.”<sup>65</sup> He also expressed a concern that granting light duty to Kathy during her pregnancy would set a precedent that he would be “stuck”

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55. The 2001 survey found that women hold only 7.3% of top command positions and 9.6% of supervisory positions in large police agencies. *Id.* at 4. More than 55.9% of the large agencies surveyed reported no women in top command positions. *Id.*

56. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 5, at 9. “Family/children/birth of a child” was the most frequent reason women gave for resigning from police work (12%). *Id.* at 9. The second most frequent reason was “job/career/better opportunity” (10%). *Id.* Only 2% of police leaders reported that they foresaw difficulties for female police officers in “balancing family life/pregnancy issues.” *Id.* at 18.

57. Kathy has asked to remain anonymous out of fear of retaliation by her employer.

58. E-mail from anonymous detective at “Kathy’s” police department to author (Mar. 23 2007) (on file with author).

59. *Id.* Kathy filed an EEOC complaint based on the denial of light duty during her first pregnancy. Telephone interview with “Kathy,” (Mar. 23, 2007). Although the agency first seemed supportive of her claim, it ultimately issued a ruling of “no discrimination found.” *Id.*

60. Interview with Kathy, *supra* note 59.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

with—apparently forgetting that she is the *only* female police officer in the department.<sup>66</sup>

Kathy has been a loyal and committed police officer, has never been disciplined for misconduct on duty, has been an aggressive officer on the road and is a field training officer. Her friends describe her as having a “passion for law enforcement that surpasses most officers” and think she has the potential to be an excellent supervisor and administrator.<sup>67</sup> It is interesting to note that in the six surrounding cities that compose the local “Suburban Police Anti-Crime Network,” there are only three full-time and two part-time female officers.<sup>68</sup>

Nevertheless, by the fifth month of her pregnancy, Kathy was on leave—leave that the department charged against her FMLA allotment.<sup>69</sup> She would therefore exhaust the twelve weeks to which she is entitled *before* her baby was born, and would have to cope in a “leave without pay” status until she is able to return to full duty. She hopes that the department will preserve her position for her, but understands that it has no legal obligation to do so.<sup>70</sup>

Kathy describes her situation as “the pregnancy penalty.” “She may very well be forced to choose between a promising career to which she is committed, and having the family of her choice—an all too common scenario for women police officers, and almost certainly not common for many male officers.

## II. THE ESSENTIAL FUNCTIONS OF A POLICE OFFICER

Law enforcement officers are public officials who hold a position of trust. As such, state law generally requires that police applicants undergo a rigorous and extensive employment screening process.<sup>71</sup> To be qualified, applicants must generally have no criminal history, be without significant debt, have successfully completed high school, and have little or no controlled substance

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* Kathy has consulted a lawyer about her situation but has decided not to file any complaints because she fears that she will not only be excluded from returning to her home agency, but also that other police departments in the area will not want to hire her, as she will be described as a “complainer.” *Id.* She cannot even find support from her labor union, the Fraternal Order of Police (FOP), because the police chief is the FOP president. *Id.* She noted that she feels very vulnerable right now, too vulnerable to be assertive. *Id.*

71. These requirements are frequently set out on police departments’ internet recruitment sites. *See, e.g.*, Chi. Police Dep’t, Become a Chicago Police Officer, <http://egov.cityofchicago.org/police>; L.A. Police Dep’t, LAPD Recruitment Brochure Online, [www.lacity.org/per/recruit1.htm](http://www.lacity.org/per/recruit1.htm); N.Y. Police Dep’t, Applicant Processing Div., <http://www.nyc.gov/html/nypd/html/chfpers/personnel/applicant-home.html>; Phila. Police Dep’t, Requirements, [http://www.ppdonline.org/career/career\\_require.php](http://www.ppdonline.org/career/career_require.php); Va. Model Directive on Hiring Sworn Pers., <http://www.dcjs.virginia.gov/cple/sampleDirectives/manual/pdf/1-5.pdf> (all last visited Mar. 22, 2007).

use history.<sup>72</sup> In addition, applicants must be in good psychological and physical health.<sup>73</sup>

Many of the essential functions that law enforcement officers perform require physical strength and coordination. For instance, a police officer must be able to safely lift, carry, and shoot a handgun.<sup>74</sup> A police officer must have the physical ability to control and place handcuffs on another person, even an unruly one.<sup>75</sup> An officer may have to pursue a suspect in a foot chase or wrestle an unruly person to the ground.<sup>76</sup> An officer must be able to don a gas mask, protect his or her firearm, protect a fellow officer, ride a motorcycle, and wear a heavy equipment belt.<sup>77</sup>

These functions illustrate why law enforcement agencies historically set certain physical requirements, such as minimum height standards, until such standards were challenged as having a disparate impact on women.<sup>78</sup> The challenges succeeded because there were no legitimate business necessity reasons for these standards.<sup>79</sup> Modern applicant screening procedures instead use physical agility tests, drug testing, and medical examinations to determine the fitness of the applicant to do the job.<sup>80</sup>

Pregnancy and the physical changes that necessarily accompany it may interfere with a woman's ability to perform required tasks. A heavily pregnant woman may be physically or psychologically unable to perform some of law

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72. See, e.g., L.A. Police Dep't, *supra* note 71.

73. E.g., MD. CODE REGS. 12.04.01.09 (2007); L.A. Police Dep't, *supra* note 71; Phila. Police Dep't, *supra* note 71.

74. See, e.g., L.A. Police Dep't, *supra* note 71. The Philadelphia Police Department website may best describe the nature of police work where it states that an officer may expect "exposure to uncontrolled and/or unpredictable conditions and the frequent exercise of moderate physical effort." Phila. Police Dep't, Job Description, [http://www.ppdonline.org/career/career\\_jobdesc.php](http://www.ppdonline.org/career/career_jobdesc.php) (last visited June 1, 2007).

75. See, e.g., L.A. Police Dep't, *supra* note 71.

76. *Id.*

77. MD. CHIEFS OF POLICE ASS'N, *supra* note 1, at 108-117. In the State of Maryland, the "core" job description for an entry-level law enforcement officer includes the following as essential functions: arrest and detain persons, protect crime scene and collect evidence, enforce traffic laws and investigate accidents, execute motor vehicle stops, operate patrol vehicle, conduct search and seizure, use physical exertion to perform duties, use deadly weapons, provide emergency assistance, conduct initial investigations into various crimes and events, read and write reports, present testimony, handle human relations problems, and perform general patrol duties. *Id.*

78. Interview with Margie Moore, *supra* note 43.

79. Emory J. Plitt, Remarks at the Americans for Effective Law Enforcement Training Conference (Mar. 13, 2006).

80. See *United States v. City of Erie, Pa.*, 411 F.Supp.2d 524, 560 (W.D. Pa. 2005) (discussing tests that screen police officer candidates and the illegality of agility tests that have a negative disparate impact on female applicants).

enforcement officers' essential functions.<sup>81</sup> Indeed, her mere change in size alone will inhibit her ability to climb in and out of a patrol car, affect whether her equipment belt can encircle her body, and reduce the pace at which she can chase a suspect on foot. The physical changes that occur during pregnancy are significant, especially with respect to a woman's ability to do physical work.<sup>82</sup> Hormones cause ligaments to stretch and relax to allow for growth of the fetus.<sup>83</sup> A woman's increased size and weight causes muscle strain and ungainliness.<sup>84</sup> She may have impaired equilibrium and reduced muscle strength, particularly during the third trimester.<sup>85</sup> In addition, from the onset of pregnancy, a woman may suffer from fatigue, nausea, and a frequent need to urinate.<sup>86</sup>

Thus, a woman in an advanced state of pregnancy may not physically be able to perform all of the essential job functions of a full service police officer. Yet, in many cases, such women can continue to be effective and useful members of the team working in other capacities, if agencies provide for such situations.<sup>87</sup>

### III. PREGNANCY & POLICING

Women who work as police officers and choose to become mothers may, during the course of their pregnancies, become "disabled" such that they cannot perform all of the essential functions required by their jobs. Certain antidiscrimination laws protect those women, but only to a limited extent.<sup>88</sup>

A law enforcement agency may not discriminate against its employees based on pregnancy, childbirth, or related conditions<sup>89</sup> that are unique to

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81. For their own safety and that of others, police officers must be able to make split second life or death decisions in the face of physical danger. *Graham v. Connor*, 490 U.S. 386, 397 (1989). If a female officer finds herself more psychologically focused on the safety of her fetus, her ability to respond to such situations may be compromised and may be reason for her to assume light-duty status.

82. See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 3-4 (Fall 1995).

83. *Id.* at 3.

84. *See id.* at 3-4.

85. *Id.* at 4.

86. *Id.* at 3-5. For a humorous account of one policewoman's experience with pregnancy in the law enforcement workplace, see Sgt. Susan Grant, *Pregnancy and Police Work: Whose responsibility is it?*, Officer.com, <http://officer.com/article/article.jsp?id=27758&siteSection=17> (last visited June 1, 2007).

87. Calloway, *supra* note 82, at 2.

88. *See infra* Part III.A-B. *See also* DONNA MILGRAM, NAT'L INST. FOR WOMEN IN TRADES, TECH. & SCI., PREVENTING SEXUAL HARASSMENT: INTEGRATION OF WOMEN INTO MALE DOMINATED OCCUPATIONS, AN ANNOTATED BIBLIOGRAPHY: POLICING, FIRE SERVICE, MILITARY, BUILDING TRADES, available at <http://www.womentechstore.com>.

89. 42 U.S.C. § 2000e(k) (2000); EEOC, *Facts About Pregnancy Discrimination*, <http://www.eeoc.gov/facts/fs-preg.html> (last visited June 1, 2007).

females. Thus, a police agency may not: (1) refuse to preserve a job for an employee on maternity leave if it protects the jobs of others who are temporarily disabled; (2) deny seniority status upon return from maternity leave, unless others on disability leave are treated similarly; or (3) refuse to grant pension service time for the maternity leave period, unless other disabled employees are similarly disadvantaged.<sup>90</sup> Indeed, it is an unlawful employment practice to take an adverse action against an employee whenever her pregnancy is a motivating factor for the action.<sup>91</sup>

#### A. *The Pregnancy Discrimination Act*

The federal Pregnancy Discrimination Act (PDA) requires employers to treat “women affected by pregnancy, childbirth, or related conditions” the same “as other persons not so affected but similar in their ability or inability to work.”<sup>92</sup> The PDA was designed to ““guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.””<sup>93</sup>

The PDA does not entitle women to preferential treatment during pregnancy nor does the Act require employers to provide more favorable treatment to pregnant employees than it affords to non-pregnant employees.<sup>94</sup> It does require, however, that employers treat pregnant women as well (or as poorly) as other temporarily disabled employees.<sup>95</sup> Thus, it has been interpreted to require, at a minimum, “equal treatment.”<sup>96</sup>

The PDA and its state law counterparts have had a positive impact on the ability of women to continue to work during pregnancy. For instance, in 1997, four Massachusetts State Troopers were required to assume “temporary modified duty” assignments because of their pregnancies.<sup>97</sup> The state troopers

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90. Jeffrey Higginbotham, *Pregnancy & Maternity Leave Policies*, FBI LAW ENFORCEMENT BULL., Mar. 1993, at 27, 29.

91. *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (citing 42 U.S.C. § 2000e-2(a)).

92. 42 U.S.C. § 2000e(k).

93. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (quoting 123 CONG. REC. 29658 (1977) (statement of Sen. Williams)).

94. *Id.* at 286-87; *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 643 (6th Cir. 2006) (finding that a “pregnancy-blind” policy which denies light-duty work to pregnant employees is not discrimination under Title VII and concluding that “Reeves’ view of the law demands preferential, not equal treatment, and therefore finds no support in the Act”).

95. *Reeves*, 446 F.3d at 642.

96. *Id.*; *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

97. Ellen O'Brien, *Troopers Hit Work Curbs Over Pregnancy*, BOSTON GLOBE, Oct. 15, 1997, at A1.

complained to the Equal Employment Opportunity Commission citing a violation of the PDA, and they were reinstated to full duty within a week.<sup>98</sup>

In *Allison-LeBlanc v. Dep't of Public Safety and Corrections, Office of State Police*, a state court found that the state police violated the Louisiana state counterpart of the PDA when it terminated a probationary state trooper who was pregnant.<sup>99</sup> Louisiana State Police policy required that a trooper report her pregnancy to her supervisor as soon as she learned of it.<sup>100</sup> The policy dictated that a pregnant officer would not be allowed to remain on patrol status and "shall be placed on administrative duty or leave."<sup>101</sup> However, the policy also mandated that a "[p]regnant officer shall *not* be arbitrarily placed on sick leave. Such decisions *must* be based upon that officer's ability/inability to perform her duties or on the advice of her physician."<sup>102</sup>

Nevertheless, the State Police determined that Allison-LeBlanc was unable to perform her routine duties because of her pregnancy.<sup>103</sup> The department required her to use her sick and annual leave even though she had not requested to use it.<sup>104</sup> Because of this action, Allison-LeBlanc was unable to complete her entry-level training, and the State Police terminated her employment.<sup>105</sup>

The Court found that the agency's policy was discriminatory because it

[E]xcluded pregnant women from working regular duty from the onset of pregnancy. It required them to work administrative or light duty or be placed on leave from the onset of pregnancy regardless of their ability to perform road patrol duties. . . . Non-pregnant female officers and all male officers who were diagnosed with a medical condition were not relieved of road patrol duty without an evaluation of disability or inability to perform the required work. However, a pregnant police officer was automatically deemed disabled due to her condition.<sup>106</sup>

The Court went on to note: "We attribute no malevolent intent to State Police in establishing . . . [the procedural order excluding pregnant women]. However, lack of malevolent intent does not prevent a policy from being discriminatory when it results in treatment of a person in a manner which, but

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98. Jules Crittenden, *Pregnant Troopers May Return to Duty*, BOSTON HERALD, Oct. 18, 1997, at 7.

99. 95-0295, p. 6-8 (La. Ct. App. 1 Cir. 10/6/95); 671 So.2d 448, 453.

100. *Id.* at 2-3, 671 So.2d at 450.

101. *Id.* at 2, 671 So.2d at 450.

102. *Id.* at 2-3, 671 So.2d at 450.

103. *Id.* at 3-4, 671 So.2d at 451.

104. *Id.*

105. *Id.* at 4, 671 So.2d at 451.

106. *Id.* at 6, 671 So.2d at 452.

for that person's sex, would be different."<sup>107</sup> The Court concluded that decisions made by the State Police toward Allison-LeBlanc were not based on the fact that she was unable to perform all of her routine duties but "were based solely on the fact that appellant was pregnant . . . [and constituted] non-merit discrimination per se."<sup>108</sup> The court held that the policy treated pregnant women as "automatically disabled" because of pregnancy and was thus discriminatory<sup>109</sup> and ordered the state police to reinstate Allison-LeBlanc.<sup>110</sup>

In *Adams v. Nolan*, Officer Nolan requested and was denied a light-duty assignment during her pregnancy.<sup>111</sup> She provided a doctor's note advising that she should be assigned to "lighter work."<sup>112</sup> The agency policy held that "no light duty assignments will be made for employees due to non-work related injury or illness."<sup>113</sup> During the next several months, Officer Adams continued to request light-duty work assignments.<sup>114</sup> During the same period of time, two male officers were allowed to work at desk jobs because of non-work related temporary injuries.<sup>115</sup> When Adams was approximately five months pregnant, she took her accumulated leave, as well as some unpaid leave, until after the birth of her child.<sup>116</sup> When she returned to work, the department assigned her to an administrative section instead of patrol work, and there was no indication that she had any objection.<sup>117</sup>

The appellate court found that Adams established a prima facie case and that the agency failed to offer a legitimate nondiscriminatory reason for its actions.<sup>118</sup> It also found that the agency's limited leave policy "strongly suggests an intent to discriminate against women who are pregnant or have pregnancy-related conditions, which is precisely the type of discrimination expressly prohibited by the Pregnancy Discrimination Act . . ."<sup>119</sup>

While the PDA is not a comprehensive solution for pregnant women facing discrimination in the workforce, it still has provided positive results. In June 2006, a federal jury, in a suit brought under Title VII, found that the

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107. *Id.* (citation omitted).

108. *Id.* at 6, 671 So.2d at 453.

109. *Id.* at 6, 671 So.2d at 452.

110. *Id.* at 8, 671 So.2d at 453-54.

111. 962 F.2d 791, 792 (8th Cir. 1992).

112. *Id.*

113. *Id.* at 792-93.

114. *Id.* at 793.

115. *Id.* The District Court held (erroneously) that these three were not "similarly situated" to Adams because they required light duty for only brief periods of time, "not for the four or five months requested by the plaintiff." *Id.* at 795 (citing the district court decision).

116. *Id.* at 793.

117. *Id.*

118. *Id.* at 794.

119. *Id.*

Suffolk County, New York Police Department unlawfully discriminated against six female officers who were pregnant because the department denied them light-duty assignments.<sup>120</sup>

Before 2000, the Suffolk County Police Department (SCPD) made light-duty assignments available to officers who had disabilities regardless of the origin of the disability.<sup>121</sup> Light-duty assignments were those that required less physical exertion, posed less risk of injury, and were generally performed indoors and during regular business hours.<sup>122</sup> Examples of these assignments included desk jobs, academy instruction, drug program and community policing tasks, and beach patrol.<sup>123</sup> Pregnant officers took advantage of this policy in large numbers.<sup>124</sup>

In 2000, SCPD changed its light-duty policy and restricted light duty to officers who were disabled because of injuries they suffered while on duty or those facing the type of disciplinary investigation or action that would call into question their abilities or integrity as law enforcement officers.<sup>125</sup> Pregnant women were thus ineligible for light-duty assignments and had no alternative but to use their earned leave or take unpaid leave during pregnancy and postpartum recovery.<sup>126</sup>

Six female officers enlisted the assistance of the New York Civil Liberties Union and the Women's Rights Project sponsored by the American Civil Liberties Union to challenge the modified policy in federal court.<sup>127</sup> On June 14, 2006, a four-man, four-woman jury returned a verdict in favor of the officers, finding that the SCPD policy was discriminatory and that the department had intentionally discriminated against two of the six plaintiffs.<sup>128</sup> Each officer was awarded at least \$5,000.<sup>129</sup> One officer who was initially given a light-duty assignment that was later taken away when her superiors learned that she was pregnant was awarded \$23,000.<sup>130</sup>

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120. *ACLU Victory in Lochren v. Suffolk County*, Jun. 5, 2006, Am. Civ. Liberties Union Website, <http://www.aclu.org/womensrights/employ/25753res20060605.html>.

121. Grossman, *supra* note 11.

122. *See id.*

123. *Id.*

124. *Id.* According to Grossman, 45% of the light-duty assignments awarded to officers who were not injured in the line of duty were given to pregnant officers; 75% of the light-duty assignments taken by women for an "off-duty" disability were because of pregnancy. *Id.*

125. *Id.* *See* LOU REITER, LAW ENFORCEMENT ADMINISTRATIVE INVESTIGATIONS: A MANUAL GUIDE § 14.7 (1993) (advocating nonfield, nonpublic contact assignments when disciplinary investigation is pending).

126. Grossman, *supra* note 11.

127. *ACLU Victory in Lochren v. Suffolk County*, *supra* note 120; McDonough, *supra* note 12, at 14.

128. *ACLU Victory in Lochren v. Suffolk County*, *supra* note 120.

129. McDonough, *supra* note 12, at 14.

130. *Id.*

The attorney for the plaintiffs lauded the verdict as “a victory for women on police forces nationally or [in] any traditionally male field or occupation.”<sup>131</sup> The government’s counsel explained that the police department needed to enact a gender neutral policy for light duty or potentially face lawsuits from male and non-pregnant female officers who wanted light-duty assignments for reasons other than pregnancy.<sup>132</sup>

These cases illustrate that the PDA has improved employment conditions for pregnant women, but only in that the Act provides a “negative right to be treated the same as other similarly situated workers.”<sup>133</sup> There are at least as many cases that illustrate the shortcomings of the PDA.

In *Sanderson v. St. Louis University*, an African American female security guard brought suit when the University denied her a light-duty or sedentary job assignment because of her pregnancy, verified by a doctor’s note expressing her inability to perform the full range of police duties.<sup>134</sup> The employer told her that it did not have any “light-duty” police positions, and since she failed to apply for a secretarial position about which she was notified, it terminated her employment.<sup>135</sup> Interestingly, one of the employees to whom she was similarly situated<sup>136</sup> was a woman who continued to work full duty until three weeks before giving birth.<sup>137</sup> Yet, the court ruled against her, finding that she “did not prove that similarly situated white officers or male officers were treated differently” than she.<sup>138</sup>

Teresa Tysinger was a patrol officer for the City of Zanesville Police Department with eight years of seniority when she became pregnant.<sup>139</sup> When her doctor recommended that she be assigned to light duty and she made that request, the Chief of Police told her that light duty was not available.<sup>140</sup> He said that her only option was to take a leave of absence until she could return to full duty.<sup>141</sup> Tysinger commenced her leave but soon learned of an opening in

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131. *Id.* (quoting New York City employment lawyer Carmelyn Malalis who was part of the team representing the plaintiffs in *Lochren*).

132. *Id.* See also *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006) (“pregnancy-blind” policy of granting light-duty assignments only to workers who were injured on the job is legitimate and not unlawfully discriminatory).

133. D’Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1417 (1996) (citing *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)).

134. 586 F. Supp. 954, 955 (E.D. Mo. 1984).

135. *Id.* at 956.

136. It is important to note and account for the fact that pregnancy affects different women differently. Indeed, different pregnancies can affect the same woman differently as well. See Calloway, *supra* note 82, at 3-8.

137. *Sanderson*, 586 F. Supp. at 957.

138. *Id.* at 958.

139. *Tysinger v. Police Dep’t of Zanesville*, 463 F.3d 569, 570 (6th Cir. 2006).

140. *Id.* at 571.

141. *Id.*

the detective bureau that would have suited her duty restrictions.<sup>142</sup> However, the agency determined that the unit was overstaffed, and it would not fill that vacancy.<sup>143</sup> She returned to full duty after giving birth and filed a discrimination suit.<sup>144</sup> Tysinger alleged that the police department discriminated against her by failing to accommodate her pregnancy when suitable positions were available.<sup>145</sup> She also alleged that the agency had “granted accommodations to other similarly situated non-pregnant workers in the past.”<sup>146</sup>

Tysinger lost her claim as the court determined that she did not produce evidence that the police department had subjected her to disparate treatment because of her pregnancy.<sup>147</sup> She was also unable to successfully rebut the department’s nondiscriminatory reason for not assigning her to the detective bureau.<sup>148</sup> One of the significant weaknesses in Tysinger’s case, in the court’s view, was that she was unable to show a “causal nexus between her pregnancy and the denial of accommodation,”<sup>149</sup> in part because she could not point to employees who were similarly situated ““in all *relevant* respects.””<sup>150</sup> The court set forth the inherent flaw in the PDA, noting that “the law, rightly or wrongly, does not extend . . . [a] preferential obligation to the employer. A pregnant employee’s employer is required only to afford equal treatment, not preferential treatment.”<sup>151</sup>

When courts apply the PDA and its equal treatment paradigm, often times they incorporate stereotypes about pregnancy that result in cases that “permit[ ] discrimination based on the very sort of stereotyping that . . . [the PDA] was expected to eradicate.”<sup>152</sup> Accordingly, the PDA alone does not effectively accommodate the needs of women in the law enforcement workplace.<sup>153</sup>

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 580. In its defense, the City claimed that Tysinger became unable to work as a “direct result of actions taken by her, *i.e.*, becoming pregnant and presenting the doctor-prescribed work restrictions which prohibited continuing work as a patrol officer.” *Id.* at 573.

148. *Id.* at 573.

149. *Id.*

150. *Id.* at 574 (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998)).

151. *Id.* at 575-76, n.2.

152. Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 226 (1998).

153. See NAT’L CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT 112 (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185235.pdf>.

Agencies and employees accordingly face a dilemma in dealing with pregnancy-related issues under the “equal treatment” Title VII model.

### B. *The Family and Medical Leave Act*

The Family and Medical Leave Act of 1993 (FMLA)<sup>154</sup> provides pregnant women with a more “positive” or affirmative right—the right to up to twelve weeks of leave for a serious medical condition (of which pregnancy is one) without losing one’s job.<sup>155</sup> In addition, under the FMLA a woman may take leave intermittently for purposes of medical treatment and prenatal care.<sup>156</sup> However, the FMLA has serious limitations,<sup>157</sup> and police agencies tend to rely too heavily on it as a means of avoiding accommodating pregnancy.<sup>158</sup> The FMLA does nothing to support a pregnant woman’s ability to work, at least in some capacity, during much or all of her pregnancy term.<sup>159</sup> It is a means by which an employer can move a woman out of the workplace instead of accommodating her disability, so in some sense avoids the real issue.<sup>160</sup>

## IV. LOOKING FOR SOMETHING MORE—THE LEGITIMATE NEED FOR SPECIAL TREATMENT FOR PREGNANT WOMEN

The PDA does not require law enforcement employers to offer maternity benefits to make it easier for pregnant women to continue to work during

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154. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (2000)).

155. 29 U.S.C. § 2612(a)(1).

156. 29 U.S.C. § 2612(b).

157. See Greenberg, *supra* note 152, at 247-48 (describing the shortcomings of the FMLA to include lack of pay, inadequate time off work, no provision of workplace accommodations, and the employer’s “option” of forcing women to take FMLA “as a means of protecting them”).

158. NAT’L CTR. FOR WOMEN & POLICING, *supra* note 153, at 111.

159. See PETER HORNE, WOMEN IN LAW ENFORCEMENT 140 (2d ed. 1980).

A pregnant policewoman can usually adequately perform field patrol duties into her seventh or eighth month of pregnancy. . . . If the police department has a policy of transferring injured male officers to light-duty assignments, then a pregnant policewoman should be transferred to these also, but only in her seventh or eighth month of pregnancy. . . . She may be able to work quite well almost up to the birth.

*Id.*

160. There is little recent case law addressing problems with the application of the FMLA, as it appears that most employers now understand and comply with the law. See generally NAT’L CTR. FOR WOMEN & POLICING, *supra* note 153. But see Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001) (illustrating a gender discrimination suit by male State trooper alleging violation of his FMLA rights to care for newborn child).

pregnancy and to return to work after delivery.<sup>161</sup> The FMLA does not require employers to accommodate pregnant employees, except to provide them time to attend to medical appointments or to be absent from work with or without pay for limited time periods.<sup>162</sup> Neither law encourages employers to accommodate pregnant workers in ways that allow them to make realistic and productive choices about their work lives during pregnancy because neither requires an employer to make accommodations for a woman whose work abilities may be changed because of pregnancy.<sup>163</sup>

The PDA and FMLA are grounded on the “equal treatment model,” a theoretical construct that posits those who are alike, or are “similarly situated” to each other, should be treated alike, and those who are not alike need not be treated alike.<sup>164</sup> Because only women can become pregnant and because policing remains a male-oriented profession, the equal treatment model does not account for situations in which women’s needs differ from the needs of men, specifically during pregnancy.<sup>165</sup>

Good social policy and the cultural leadership role that law enforcement plays demands that police agencies work to accommodate pregnant police officers. Agencies can institute policies that do not require women to choose between a productive career and parenthood. Moreover, in order to successfully recruit and retain female officers, agencies will find it useful to provide flexible policies to accommodate family needs. They must do so in a balanced and equitable fashion, not based upon notions of paternalism or gender discrimination. Thus, even if not required by federal or state law, it is

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161. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (noting that the PDA “does not, despite the urgings of feminist scholars, . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work.”).

162. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (2000)).

163. See *Troupe*, 20 F.3d at 738 (noting that the PDA “does not, despite the urgings of feminist scholars, . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . .”); see also Millsap, *supra* note 133, at 1441-42 (advocating amending the PDA to incorporate the Americans with Disabilities Act’s “reasonable accommodation” standard).

164. Collette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 202-08 (1993). Matzzie argues that PDA equal treatment rights provide formalistic but not substantive equality. *Id.* at 211.

165. See Millsap, *supra* note 133, at 1427 (noting that workplace norms are based on “the male norm” that requires women to “either be[] the same as men or be[] different from men . . . [ , which is] just two ways of having men as your standard” (quoting *Feminist Discourse, Moral Values, and the Law: A Conversation*, 34 BUFF. L. REV. 11, 21 (1985) (remarks of Catharine A. MacKinnon))). See generally Candace Saari Kovacic-Fleischer, *United States v. Virginia’s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting and Title VII*, 50 VAND. L. REV. 845, 849, 854-55 (1997) (asserting “by analogizing parenting to privacy . . . that the institutional alteration analysis of *United States v. Virginia* requires employers to accommodate parenting obligations.”).

time for police agencies to recognize that it is beneficial in fulfilling their public mission to accommodate pregnant women who make significant contributions,<sup>166</sup> given that it is perfectly lawful for an employer to offer more benefits to pregnant employees than to non-pregnant employees.<sup>167</sup>

The "equal treatment" model does not afford to agencies and officers who seek to combine parenthood with a law enforcement career a flexible enough approach to meet the various needs that arise in different situations. The equal treatment model essentially requires equal treatment, "regardless of any inequality of effect that such treatment occasions."<sup>168</sup> The model makes it difficult for employers to account for the inevitable differences that arise among any group of employees. There will be differences in terms of competence, performance, loyalty to the agency, and commitment to the profession. Additionally, there are the undeniable physical differences among officers and between men and women. A better approach may be one that seeks to afford employees equal effects or equal results to insure that they are not discriminated against because of their gender.

*United States v. Virginia*<sup>169</sup> may open the door to allow law enforcement agencies to adopt "equal results" policies, thus creating better flexibility and equity in responding to employee needs. In that case, the Supreme Court ordered the Virginia Military Institute (VMI) to admit capable women into its student body.<sup>170</sup> Moreover, the Court ordered that VMI, wherever necessary, make adjustments and alterations to the institution to facilitate the admission of women.<sup>171</sup> Justice Ruth Bader Ginsburg noted that, to achieve real equality in education or in the workplace, institutions may have to make changes that serve to accommodate the "celebrated" differences between men and women without relegating women to an inferior position.<sup>172</sup> The fact that only women can become pregnant is clearly one of the "celebrated" differences to which Justice Ginsburg referred. The equal results model may allow, or even require, employers to provide expectant mothers with realistic and adequate

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166. NAT'L CTR. FOR WOMEN & POLICING, *supra* note 4, at 2-3 (discussing the unique style of policing used by women, which entails the lesser use of physical force, the better use of communication skills, and the facilitation of trust required for community policing models).

167. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (holding that the PDA does not require preferential treatment of pregnant employees, only equal treatment).

168. 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, 540 (1983).

169. 518 U.S. 515 (1996).

170. *Id.*

171. See *id.* at 550-51.

172. *Id.* at 533-34.

employment benefits so that they can retain their professional status, just as expectant fathers do.<sup>173</sup>

The VMI ruling may allow law enforcement managers to create innovative and restructured law enforcement workplaces without violating applicable discrimination laws. Such workplaces would allow parents to bear and raise children while still being productive workers.<sup>174</sup> Below, I outline several specific accommodations that are both necessary and permissible under the principle that sometimes equal results are achieved by providing *different* treatment.

The theory that special treatment leads to equal results has emerged as a basis for accommodating the needs of some workers suffering from discrimination and negative stereotypes.<sup>175</sup> Examples of the special treatment model include the Americans with Disabilities Act, which requires an employer to provide reasonable accommodations based on people with disabilities' individualized needs.<sup>176</sup> Also, Title VII requires that employers accommodate an employee's religious beliefs.<sup>177</sup> Finally, federal law protects the employment rights of uniformed services members when they have been absent from work.<sup>178</sup> In each of these situations, an employer is not required to provide the employment accommodation if to do so would cause an "undue hardship" on the employer.<sup>179</sup>

In the next Sections, I discuss specific areas in which progressive law enforcement agencies can assist their female officers in achieving equality without forcing them to forego motherhood. Such areas include optional light duties assignments, maternity uniforms and body armor, deferral of in-service training, adequate maternity leave, continuation of benefits and seniority credits while on leave, and flexible schedules upon return.

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173. See Kovacic-Fleischer, *supra* note 165.

174. See Karen J. Kruger, *Pregnancy and Policy: Law and Philosophy*, THE POLICE CHIEF, Mar. 2006, at 10, 10-11, available at [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=832&issue\\_id=32006](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=832&issue_id=32006) (advocating to law enforcement leaders that they implement "creative innovative and restructured law enforcement workplaces.").

175. See generally *United States v. Virginia*, 518 U.S. 515, 533 (1996) (affirming that preferential treatment for women "may be used to compensate women 'for particular economic disabilities [they have] suffered'" (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)), "to 'promot[e] equal employment opportunity,'" (quoting *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987)), and "to advance full development of the talent and capacities of our Nation's people.")).

176. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9)(B) (2000).

177. 42 U.S.C. § 2000e-2(j) (2000).

178. 8 U.S.C. § 4301(a)-(b) (2000).

179. 42 U.S.C. § 12112(b)(5)(A); 42 U.S.C. § 2000e-2(j); 38 U.S.C. § 4312(d)(2)(B).

*A. Light Duty Based on Physical Condition*

Law enforcement officers may be required to confront dangerous situations that demand strenuous physical exertion. They must wear, carry, and use specialized equipment. They must be able to quickly get out of vehicles and perform rescue operations.<sup>180</sup> In nearly every case, a pregnant woman will have difficulty performing these tasks late in a pregnancy, but until that time, “[a]n employee must be permitted to work at all times during pregnancy when she is able to perform her job.”<sup>181</sup> Indeed, since “the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter,”<sup>182</sup> agencies should only assign pregnant officers to light duty when their medical conditions so requires and not before.<sup>183</sup>

To provide equal opportunity and retain women employees, law enforcement agencies *must* provide light or alternative duty assignments to pregnant women whose condition prevents them from performing the full panoply of police duties. If an agency does not offer modified duty, the pregnant officer must take leave, either paid or unpaid, to accommodate her pregnancy. As a result, she may exhaust her leave entitlement even before giving birth, and her hire date may be negatively adjusted, impacting on her pension benefits and promotional opportunities.<sup>184</sup>

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180. Telephone Interview with MaryAnn Viverette, Chief, Gaithersburg, Md. Police Dep’t, in Baltimore, Md. (Mar. 6, 2007). Chief Viverette is the immediate past president of the International Association of Chiefs of Police (IACP) and its first woman president. In that capacity, she had the opportunity to interact with and visit hundreds of law enforcement agencies in the United States and abroad. *Id.*

181. Equal Opportunity Comm’n Guidelines, 29 C.F.R. § 1604 app. A (2006) (Questions and Answers on the Pregnancy Discrimination Act). See Am. Med. Ass’n Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1997 (1984) (noting that most women with uncomplicated pregnancies should be able to work until the onset of labor).

182. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974).

183. Interview with MaryAnn Viverette, *supra* note 180. See generally The Merck Manuals Online Medical Library, *Physiology of Pregnancy*, <http://www.merck.com/mmpe/ec18/h260ch260b.html?qt=pregnancy&alt=sh> (last visited June 4, 2007) (describing the medical aspects of pregnancy); Peoria, Illinois, Police Dept. General Order, *Maternity Leave Section IV*, available at: [www.peoriapd.com/file:///D:/maternity-ppd.html](http://www.peoriapd.com/file:///D:/maternity-ppd.html) (last visited Jan. 30, 2006) (“The department will not assume an employee is unable to continue her regular job function on the basis of her pregnancy-related condition alone.”); Cincinnati Police Department, *General Orders, 19.131 Employee Pregnancies A.2*, available at <http://www.cincinnati-oh.gov/police/pages/-3039-/file:///D:/maternity-cincinnati.html> (last visited Jan. 30, 2006) (stating pregnant employees will remain on unrestricted duty until employee requests limited duty, physician and employee determine she should be on limited duty or employee’s ability to perform required duties is impaired).

184. Telephone Interview with Lois Goland, Assistant Couns., N.Y. State Police, in Baltimore, Md. (Mar. 12, 2007).

If a law enforcement agency does provide light-duty assignments<sup>185</sup> to temporarily disabled officers, the PDA requires that it offer the same opportunity to female officers who are temporarily disabled by pregnancy and childbirth.<sup>186</sup> Moreover, a law enforcement agency may not remove a pregnant officer from her assignment or compel her to assume a light-duty assignment, unless she cannot perform the essential functions of a police officer.<sup>187</sup> In other words, a pregnant officer should only be assigned to a light-duty status under the same criteria that other temporarily disabled employees are so assigned—for medical necessity.<sup>188</sup>

Under the PDA, it is unlawful for an employer to take action against a pregnant employee based on general assumptions about the impact that a pregnancy might have on a woman's ability to do her job.<sup>189</sup> Employers may not change a pregnant employee's assignment against her will based on stereotypes about what types of work pregnant women should do, concerns about public perceptions of pregnant officers, or notions of fetal protection.<sup>190</sup> In short, a pregnant employee should not be forced into a light-duty assignment as long as she is physically able to perform her regular assignment.<sup>191</sup> "One of the biggest complaints from female sworn officers is that when they notify their department that they are pregnant, they are removed from their position."<sup>192</sup> This unfair practice arises from outdated stereotypes or from paternalistic and benevolent notions that police commanders may harbor toward pregnant women.<sup>193</sup> When a law enforcement agency reassigns a woman to less-than-

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185. "Light duty" refers to administrative job tasks that do not require the officer to perform the physical hands-on duties of a police officer, and mandatory overtime is generally not required.

186. See discussion *supra* Part III.A.

187. *LaFleur*, 414 U.S. at 644 (finding that a mandatory maternity leave rule based on "irrebuttable presumption of physical incompetency" unconstitutional under the Due Process clause); *O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. Dist. Ct. App. 1991) (finding the termination of a pregnant correctional officer unlawful in the absence of evidence that her abilities were impaired).

188. 42 U.S.C. § 2000e(k) (2000).

189. See *LaFleur*, 414 U.S. at 644.

190. NAT'L CTR. FOR WOMEN & POLICING, *supra* note 153, at 112. See *LaFleur*, 414 U.S. at 641 n.9 (noting that the mandatory leave rule that was eventually found unconstitutional may have been based, in part, on sparing "schoolchildren from the sight of conspicuously pregnant women").

191. NAT'L CTR. FOR WOMEN & POLICING, *supra* note 153, at 112.

192. *Id.* at 111.

193. Telephone Interview with Colonel Deborah Campbell, Deputy Superintendent, N.Y. State Police, in Baltimore, Md. (Mar. 6, 2007); Telephone Interview with Gary W. McLhinney, Chief of Police, Md. Transp. Auth. Police, in Baltimore, Md. (June 6, 2005); Telephone Interview with MaryAnn Viverette, *supra* note 180.

full duty, but she remains otherwise capable of doing her job, it is discriminating on the basis of sex.<sup>194</sup>

Some agency policies allow a pregnant officer to exercise the option of switching to a light-duty assignment at some point in her pregnancy, regardless of whether it is medically necessary.<sup>195</sup> Under the equal treatment theory, she should not be permitted to *elect* a light-duty assignment before it is medically necessary, unless other employees who are disabled (by conditions other than pregnancy) are allowed to make this election.<sup>196</sup> But under the special treatment approach, such an election may be appropriate. Certainly, if a pregnant woman feels apprehensive about her safety or unsure of her physical abilities, it may be unsafe for psychological reasons for her to remain in a full-duty status.<sup>197</sup>

### B. Fetal Protection Policies

Pregnant women who are able and so desire to continue working during their pregnancies will want to do so without posing risks to the unborn child. For police officers, workplace hazards such as "strenuous physical work, noise, and unusual work schedules" pose additional risk to their unborn children.<sup>198</sup> Police officers may be required to engage in physical activity by chasing and subduing suspects. They are exposed to the noise and lead dust produced from using firearms, especially during training and retraining periods.<sup>199</sup> The nature of the job requires them to be available for duty twenty-four hours a day every day of the year, and mandatory overtime is not unusual.<sup>200</sup>

In *United Auto Workers v. Johnson Controls*, the United States Supreme Court held that employers may not have fetal protection policies that exclude women from certain hazardous jobs, even if the intent of the policy is

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194. NAT'L CTR. FOR WOMEN & POLICING, *supra* note 153, at 112 ("Employers may not alter a woman's assignment against her will based on her pregnancy if that decision is based on stereotypes about what kind of work pregnant women should do or on concerns about how the public or other officers will react to a pregnant officer.").

195. Telephone Interview with Lois Goland, *supra* note 165 (noting New York State Police policy of permitting pregnant women to request "alternative assignments"). Interestingly, the New York State Police was recently ordered by the State Human Relations Commission to create a specific and beneficial light-duty pregnancy policy, which is expected to replace the current "alternative assignment" process. *Id.*

196. *See supra* Part IV.A.

197. Telephone Interview with MaryAnn Viverette, *supra* note 180 (pointing out that if an officer loses confidence in her ability to physically or emotionally perform her job, she could put herself and others at risk).

198. Calloway, *supra* note 82, at 14-15. *See generally* Claire Infante-Rivard, et al., *Pregnancy Loss and Work Schedule During Pregnancy*, 4 EPIDEMIOLOGY 73 (1993) (finding a correlation between risk to pregnancy and evening and night work schedules).

199. NAT'L CTR. FOR WOMEN & POLICING, *supra* note 153, at 113.

200. Calloway, *supra* note 82, at 15.

benevolent.<sup>201</sup> Under Title VII, decisions about the welfare of future children are the responsibility of parents, not employers.<sup>202</sup> According to *UAW*, “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”<sup>203</sup> Employers “may take into account only the woman’s ability to get her job done[,]” not whether the job poses a risk to the fetus.<sup>204</sup>

Similarly, in *LaFleur v. Cleveland Board of Education*, the school board sought to justify its mandatory maternity leave policy as a means of protecting “the health of the teacher and her unborn child . . . .”<sup>205</sup> The Supreme Court found that this rule “contain[ed] an irrebuttable presumption of physical incompetency”<sup>206</sup> and “the conclusive presumption embodied in these rules . . . is violative of the Due Process Clause.”<sup>207</sup>

Thus, while agencies may not *require* that pregnant women refrain from performing certain police functions based a “protectionist” notion, they should arrange for pregnant women to have a deferral option in certain training. Training that should perhaps be deferred upon medical advice, includes weapons training or highly physical defensive tactics.<sup>208</sup> Arrangements must be made to allow women to make-up the missed training opportunities immediately upon their return to full duty so as not to fall behind their non-pregnant colleagues.<sup>209</sup> Alternatively, agencies might allow officers to train on computer firearms simulators, use sound silencers, or substitute dry-fire capability for live-fire shooting.<sup>210</sup> For those officers who are breastfeeding, the agency should provide lead-free ammunition.<sup>211</sup>

### C. Maternity Uniforms & Equipment

A uniform is an important component to the safety, discipline, and good order of policing.<sup>212</sup> Almost no law enforcement agencies provide maternity

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201. See 499 U.S. 187, 199 (1991).

202. See *id.* at 206.

203. *Id.* at 204.

204. *Id.* at 205.

205. 414 U.S. 632, 641 (1973).

206. *Id.* at 644.

207. *Id.* at 646.

208. Telephone Interview with Colonel Deborah Campbell, *supra* note 193.

209. See N.Y. State Police policy eliminating range qualification for pregnant employees who are tested when they return from leave (on file with author).

210. NAT’L CTR. FOR WOMEN & POLICING, *supra* note 153, at 113.

211. *Id.* See Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355, 376-77 (1999) (noting that medical evidence supports breastfeeding as beneficial for both mother and baby, but employment trends shows hostility toward accommodating).

212. Telephone Interview with MaryAnn Viverette, *supra* note 180; Telephone Interview with Deborah Campbell, *supra* note 193.

uniforms.<sup>213</sup> Some agencies allow women to request larger uniforms as their pregnancy advances;<sup>214</sup> however, this option is disrespectful to women and infeasible for a long period of time, as it may be unsafe.<sup>215</sup>

“Providing pregnant employees who wear uniforms on a day-to-day basis with maternity uniforms is critical to making pregnant women feel valued by their department<sup>216</sup> and is critical for those who remain on full duty. The National Center for Women and Policing contends that “[p]roviding uniforms for pregnant employees sends a strong message to those inside and outside the department that women law enforcement officers can be both mothers and criminal justice professionals.”<sup>217</sup> Accordingly, agencies should consider providing maternity uniforms and equipment that accommodates a pregnant body, such as shoulder holsters. When the officer leaves full duty and begins a modified duty assignment, it would be appropriate (and should be permitted) for her to wear maternity business attire.

#### D. Maternity Leave

Ironically, in some departments, maternity leave policies seem to have been developed with the male officer in mind, incognizant of the impact that pregnancy has on female officers. Officers in one New Jersey police department have a contract that allows for *three days* of maternity leave.<sup>218</sup> Under this 1970's era contract, “the idea was to allow a (male) police officer a [three]-day leave to run the household and provide childcare while his wife was in the hospital having a new baby.”<sup>219</sup> There was apparently no thought given

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213. Telephone Interview with MaryAnn Viverette, *supra* note 180; Telephone Interview with Deborah Campbell, *supra* note 193.

214. See DONNA MILGRAM, NAT'L INST. FOR WOMEN IN TRADES, TECH. & SCI., POLICE EQUIPMENT AND UNIFORMS: SIZED TO FIT WOMEN (2006) (describing the general problem of uniform fit for female police officers).

215. Telephone Interview with Deborah Campbell, *supra* note 193; Telephone Interview with MaryAnn Viverette, *supra* note 180. My discussions with female officers at the 2005 Annual Conference of the Mid-Atlantic Association of Women in Law Enforcement (MAAWLE) in Annapolis, Md. anecdotally suggest that pregnant officers typically wear a uniform for as long as it fits, then switch to a uniform shirt untucked with loose pants, and then to civilian “business casual” attire.

216. NAT'L CTR. FOR WOMEN & POLICING, *supra* note 153, at 113.

217. *Id.*

218. E-mail from anonymous New Jersey police officer, to author (June 27, 2007, 20:03:37 EST) (on file with author). Furthermore, the officer explained that a female officer in the department recently became pregnant and requested a light duty assignment. *Id.* She was reluctantly granted a secretarial position as a records clerk which had been vacated by a male officer when his broken ribs had healed. *Id.* Her hours were arbitrarily cut to thirty-seven each week (those a secretary works), rather than the forty-two hours each week officers are guaranteed by contract with the city. *Id.* Noticeably, the male officer with broken ribs had worked his normal forty-two hours each week, as had other officers in that position—and other light duty assignments—granted due to medical need. *Id.*

219. *Id.*

to providing leave to female officers who require more than three days to give birth and recover.

Thankfully, the FMLA now requires the police departments (and all other covered employers) to provide leave for medical conditions, including pregnancy, for up to twelve weeks.<sup>220</sup> But an employer is not obligated to provide paid leave and may require a pregnant woman to exhaust all of her annual and sick leave before the woman is eligible for additional FMLA benefits.<sup>221</sup> This means that when the officer returns to work she has no paid leave reserves (or even unpaid FMLA leave) in case of family emergency or illness. Additionally, it is primarily younger women who have children early in their careers when they have not yet earned or “stockpiled” much leave.<sup>222</sup>

Moreover, agencies must be aware that not all new mothers are capable of returning to full police duties six or eight weeks after giving birth.<sup>223</sup> The length of time will vary depending on the nature of the birth, the health of the newborn, whether the mother is suffering from postpartum depression, the effects of sleep deprivation, and whether she needs or desires to nurse her infant.<sup>224</sup>

#### *E. Job Sharing and Flex Time*

Because the public needs law enforcement officers twenty-four hours a day every day of the year,<sup>225</sup> law enforcement agencies have tremendous opportunities to offer job sharing and part-time and flex-time work arrangements to officers. For instance, an agency could permit officers to work fewer days per week but with longer shifts. Two officers who have parental responsibilities could share one full-time job, assuming that pay and benefits were adequate. Some officers may prefer to work only weekends and holidays so as to be home for school children during the week. Others may need to work only the dayshift because nighttime child care is difficult to find, whereas others will prefer night work to be home with a baby during the day. The possibilities of alternative scheduling are limited only by the creative abilities of the managers and employees in a law enforcement agency.

#### *F. Professional Responsibilities of Officers*

Women and men seeking careers as police officers who want to be effective and have the respect of their peers should be prepared to manage their

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220. 29 U.S.C. § 2612(a)(1) (2000).

221. See 29 U.S.C. § 2612.

222. E-mail from anonymous female police officer *supra* note 218.

223. See Merck Manuals Online Medical Library, Postpartum Care, <http://www.merck.com/mmpe/sec18/ch265/ch265a.html> (last visited Mar. 12, 2007) (addressing the nature of postpartum conditions).

224. *Id.*

225. Telephone Interview with MaryAnn Viverette, *supra* note 180.

personal lives so as to maintain a workable balance. For women, this may include deferring pregnancy until a suitable point in their careers. For instance, it is unreasonable for a woman to expect that a pregnancy can be accommodated while she is still in the police training academy.<sup>226</sup> Entry-level training is vigorous and is of a defined duration; even a short absence or disability can interfere with a person's ability to graduate.<sup>227</sup>

Likewise, to the extent that a woman can defer pregnancy until she has completed her employment probation period (generally about two years), she both better protects her legal rights and has an opportunity to demonstrate that she is a valuable employee.<sup>228</sup> Since employees do have a responsibility to be available for duty (whether they are pregnant or parents), the reliable police officer will make careful provisions to plan for childcare and managing other family duties.

#### V. CONCLUSION

Accommodating pregnancy in the workplace is costly, but "women who work during their pregnancy remain productive members of society who do not impose a burden on public money."<sup>229</sup> The suggestions offered here require law enforcement agencies to accept that sometimes women need different treatment from men. That need for different treatment under certain circumstances in no way diminishes the value that women add to law enforcement agencies.

There are compelling arguments supporting an equal treatment model in gender discrimination matters. Advocates note that only the equal treatment model will "get the law out of the business of reinforcing traditional, sex-based family roles" and will "alter the workplace so as to keep it in step with the increased participation by women."<sup>230</sup> They fear that "to accord pregnant women preferential treatment will . . . likely . . . jeopardize the hiring of women to begin with, because of the potential increase in costs to the employer."<sup>231</sup>

Moreover, if an agency uses the more simple equal treatment model, officials may believe that they will have an easier time dealing with those who

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226. Telephone Interview with Deborah Campbell, *supra* note 193 (pointing out that a law enforcement agency may be able to accommodate a pregnancy that occurs late in the police academy training, whereas one occurring early in the six month training period may be sufficient reason to delay the officer's employment).

227. *Id.*

228. Telephone Interview with MaryAnn Viverette, *supra* note 180.

229. Calloway, *supra* note 82, at 21.

230. Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352 (1984-85).

231. Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 382 (1984-85).

claim discrimination because they are neither afforded nor eligible for special benefits due to their non-pregnancy status. Advocates want to rely on a gender neutrality approach, but this approach does not comport with reality, and it is time for all members of the law enforcement community to recognize this.

Thus, there appears to be two alternate equality paths for women in the law enforcement profession: (1) be the same as men (gender neutrality), or (2) be different without being disadvantaged by the differences. If “[g]ender neutrality is . . . simply the male standard” and if women’s “equality [is] judged by . . . [their] proximity to . . . [the male] standard,”<sup>232</sup> then pregnancy will always be an obstacle to equality in the workplace. Indeed,

One of the principle factors contributing to the difference in the employment status of men and women is the resistance of the workplace to accommodating childbirth and parental responsibilities. This resistance has a disproportionate impact on women who by their sex bear the burden of pregnancy, and who by social custom bear the primary responsibility for childrearing.<sup>233</sup>

Women in law enforcement seek changes that “would make possible a simple equal chance”<sup>234</sup> to participate fully in the profession and to participate fully in the family life they choose. For this to happen, pregnancy must be recognized and accommodated as a difference that makes it impossible for women to conform to the male standard.

Those who oppose the idea of having special considerations for accommodating pregnancy claim that accounting for this difference “is sex discrimination to give women what . . . [they] need, because only women need it.”<sup>235</sup> But actually, the reverse is true. “It is not sex discrimination not to give women what . . . [they] need because then only women will not get what . . . [they] need”<sup>236</sup> in order to participate fully in the law enforcement profession.

Advocates for women in the workplace recognize that the workplace should be restructured to recognize that, in many families with children, all adults work outside the home and share childrearing, if not child bearing, functions.<sup>237</sup> Pregnancy can no longer be treated as a private “problem” suffered by marginal workers who were only likely to be in the workforce for a

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232. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in MODERN CONSTITUTIONAL THEORY: A READER 559, 561 (John H. Garvey et al. eds., 5th ed. 2004).

233. Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 699 (1985-86).

234. MacKinnon, *supra* note 232, at 570.

235. *Id.* at 563.

236. *Id.*

237. See, e.g., Dowd, *supra* note 233; Kovacic-Fleischer, *supra* note 165, at 893-97; MacKinnon, *supra* note 232, at 563-65; Taub, *supra* note 231.

short-term anyway. The law enforcement profession, in particular, can no longer assume that “real” cops are men whose family lives do not interfere with long work hours, shift assignments, and holiday obligations. Both male and female officers deserve to have decent, balanced lives that include children, should they so choose.