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Introduction

In a society where many topics related to female reproduction are considered taboo, menopause is especially stigmatized because of its intersection with age and a perception that a woman's value ends with her reproductive ability.[1] As described by Gail Sheehy ("Sheehy") in *The Silent Passage*, menopause is "one of the most misunderstood passages in a woman's life."[2] Menopause causes shame and stigma because of its association with middle age in a culture obsessed with youth.[3] The failure of courts to extend available protections to claims related to menopause denies millions of working persons protections from unlawful discrimination under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Age Discrimination in Employment Act of 1967 ("ADEA").[4]

Generally, legal protections have not been extended to claims of employment discrimination due to menopause. While the ADA's scope of protection from employment discrimination would seem to encompass severe symptoms of menopause as a disability that substantially limits one or more "major life activities," courts have consistently held that menopause is not a cognizable disability under the ADA.[5] While Title VII prohibits discrimination

[1] Issues related to menstruation, and its cessation, predominantly, but not exclusively, affect women. However, transgender men and boys may also be menstruators and, therefore, may experience menopause. Viewing menopause as an issue unique to "women" unjustly ignores menstruators who are not cis-gender women. This paper generally uses the term "menstruator" to describe persons who experience menopause; however, in some cases, "women" is used based on historical context. *See* Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 9 (2019).
[2] Gail Sheehy, THE SILENT PASSAGE: MENOPAUSE 3 (1991).
[3] *Id.*
[4] 42 U.S.C. § 12101; *see also* 42 U.S.C. § 2000e; 29 U.S.C. § 621.
[5] *See e.g.*, McGraw v. Sears, Roebuck & Co., 21 F. Supp. 2d 1017, 1021 (D. Minn. 1998); Klein v. Dep't of Children and Families Servs., 34 F. Supp. 2d 1367, 1371 (S.D. Fla. 1998).

on the basis of sex, and was amended to clarify that "because of sex" encompasses female reproduction issues, the courts have consistently rejected claims of discrimination because of menopause.[6] Additionally, because menopause, either with or without physical symptoms, is usually perceived as a condition unique to older women, many employee-menstruators face intersectional discrimination against women and older workers. The movements for menstrual justice, feminist jurisprudence, rights for the aged, and others have helped raise awareness of legal issues related to menopause.[7] However, recognizing the need for targeted advocacy related to menopause is only the beginning.

This paper provides an overview of what menopause is and how it affects menopausal employees at work. It further reviews the current state of jurisprudence related to the civil rights of menopausal employees and suggests an alignment for menopause equity with the menstrual, or period, equity movement. Section I provides a brief description of menopause and the common cultural stigmas faced by persons who enter menopause. Additionally, Section I provides an overview on how menopause and its related symptoms interferes with work for many menopausal employees. Section II analyzes ways in which current law has failed to address employment discrimination for menopausal workers. First, it examines judicial treatment of menopause under the ADA with respect to courts' failure to recognize menopause as a cognizable disability. Next, it reviews judicial holdings where plaintiffs who have experienced discrimination related to menopause have made Title VII claims of discrimination on the basis of sex. Section III provides a brief review of intersectional menopause and age discrimination. Section IV discusses

[6] Brooks Land, *Battle of the Sexes: Title VII's Failure to Protect Women from Discrimination against Sex-Linked Conditions*, 53 GA. L. REV. 1185, 1193-94 (2019). *But see* source cited *supra* note 4, U.S.C. § 2000e (The Pregnancy Discrimination Act amended Title VII to expressly prohibit discrimination due to pregnancy by employers with fifteen or more employees).

[7] Naomi Cahn, *Justice for the Menopause: A Research Agenda*, 2021-05 U. Va. PUB. L. AND LEGAL PAPER SERIES 1 (2021).

menopause equity as an extension of the menstrual, or period, equity movement, including the emerging view that the menstrual equity "tent" includes menstruators who are facing, experiencing, or have reached menopause.[8] Finally, this article concludes by summarizing the need for focused advocacy, targeting legislation and regulatory policy, as well as raising awareness, to address the needs of menopausal persons, especially employees.

I. What is Menopause and How Does it Affect Menstruators?

All persons who can menstruate ("menstruators"), and who do not die prematurely, will experience menopause during their lifetime, either due to a medical issue or, more commonly, as a natural consequence of aging. Clinically, menopause is defined as the permanent cessation of menstruation.[9] The years leading up to that point are called the menopausal transition or perimenopause, where menstruators may experience changes in their monthly cycle and other symptoms.[10] The menopausal transition often begins between ages forty-five and fifty-five, with an average age of fifty-one; it lasts an average of seven years but can last up to fourteen years.[11] Regardless of age, menopause may be triggered by a hysterectomy or surgical removal of the ovaries.[12] For simplicity, this paper uses the term 'menopause' to encompass the experience of menstruators throughout the menopausal transition, beginning with the onset of perimenopause through the point of clinical menopause (twelve months after the last period) and beyond.

The symptoms most frequently associated with menopause are hot flashes, sleep

[8] Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld, & Emily Gold Waldman, *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 26 MICH. J. GENDER & L. 341 (2020).
[9] *What is Menopause?*, NAT'L INST. ON AGING, https://www.nia.nih.gov/health/what-menopause (last visited Oct. 29, 2019).
[10] *Id.*
[11] *Id.*
[12] *Id.*

disturbances, urinary complaints, sexual dysfunction, and mood changes.[13] Additionally, perimenopause is often characterized by erratic and perhaps heavy menstrual bleeding.[14] The age at onset, occurrence, and severity of menstruation symptoms can vary significantly from one menstruator to the next.[15]

The medical community has addressed menopause primarily as a condition to be addressed by drugs—i.e., hormone replacement therapy ("HRT").[16] HRT became widely regarded as the best way to "control" menopause after gynecologist Robert Wilson ("Wilson") published his 1968 best-seller *Feminine Forever*.[17] The book characterizes menopause as a "disease" resulting from estrogen deficiency.[18] Wilson advocates for treating menopause with estrogen replacement, with the implied promise that "women" will never age.[19] A study of HRT used between 1988-94 found that 44% of postmenopausal women reported having used some form of HRT.[20] Also, clinical trials have found significant risks associated with HRT including heart disease, stroke, blood clots, and breast cancer.[21] However, HRT continues to be marketed as a "pseudo-youth elixir" and preys on the stigmas associated with natural aging, despite HRT no longer being considered the only path to addressing the symptoms of menopause.[22]

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[13] *Dealing with Symptoms of Menopause*, HARV. HEALTH PUBL'G, https://www.health.harvard.edu/womens-health/dealing-with-the-symptoms-of-menopause (last visited Oct. 29, 2019).
[14] *Supra* note 9.
[15] *Id.*
[16] *Supra* note 7.
[17] *See, e.g.* Judith Houck, "*What do these Women Want?" Feminist Responses to Feminine Forever, 1963-1980*, BULL. HIST. MED. 103 (2003).
[18] *Id.* (citing Judith Houck, "*What do these Women Want?" Feminist Responses to Feminine Forever, 1963-1980*, 77 BULL. HIST. MED. 103 (2003)).
[19] *Id.*; *see also* Johnson, *supra* note 1 (citing not all menstruators are "women"; trans men and non-binary persons may also be menstruators.)
[20] Kate Brett & Yinong Chong, *Hormone Replacement Therapy: Knowledge and Use in the United States*, NAT. CTR. HEALTH STAT. 7 (2001).
[21] *Hormone therapy: Is it right for you?*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/menopause/in-depth/hormone-therapy/art-20046372 (last visited Mar. 15, 2021).
[22] Cahn, *supra* note 7, at 2.

A. Menopause is Uniquely Stigmatized in Western Culture

The word menopause is often avoided in Western society, in preference of a euphemism 'like the change'. A key myth about menopause is that it is "a time in woman's life when she goes batty for a few years, subject to wild rage and deep depression, and after it she mourns her lost youth and fades into the woodwork."[23] Sheehy relates the story of a woman experiencing early menopause who was shunned by her friends for mentioning her struggles with the "change."[24] The woman explained to Sheehy that "[p]eople wouldn't relate my problems to menopause because that would automatically classify them as old."[25] Feminist Germaine Greer speculated that menstruators do not speak of menopause because cultural norms have forced them into denial and perhaps it occurs as a non-event for many menstruators.[26]

Until the early 1900s, a woman's child-bearing years—regarded as her primary function—and life span were approximately the same.[27] As human life spans became longer, more women lived longer and their economic value to society increased.[28] However, historically, menopause has been used under the law *against* women.[29] For much of the twentieth century, the so-called menopause defense labeled any symptoms suffered by females at mid-life as "menopausal.[30] In their article "Mirrors and Gavels," Hoffman and Klein discuss the use of the "menopause defense" through the 20th century to "cast female plaintiffs in a negative light and as a way to persuade courts and juries that the woman suing them was already a damaged person and thus entitled to

[23] Sheehy, *supra* note 3, at 5.
[24] *Id.* at 7.
[25] *Id.*
[26] Phyllis T. Bookspan & Maxine Klein, *On Mirrors and Gavels: A Chronicle of How Menopause was Used a Defense Against Women*, 32 IND. L. REV. 1276 (1999).
[27] *Id.* at 1281.
[28] *Id.* at 1283.
[29] *Id.* at 1267 (emphasis added).
[30] *Id.* at 1271.

little or no recovery."[31] This defense was asserted in civil actions, primarily by men in male-dominated courtrooms, to "devalue female plaintiffs, cast blame upon them, and attempt to deny [them] compensation or other remedies."[32] This approach at law was the result of intersectional sexism and ageism because its central premise was that a woman approaching middle-age was "either mentally ill, physically ill, or both."[33]

Societal biases against menstruators are reflected in the lack of advocacy and resources dedicated to addressing "women's issues" related to female reproduction, including menopause, menstruation, miscarriage, endometriosis, and others.[34] In the United States ("U.S."), menopause advocacy by not-for-profit organizations is gaining significant traction. However, it is not especially visible or widespread yet. Organizations concerned with aging, such as the American Association of Retired Persons ("AARP"), and other women's organizations actively promote education for women, employers, and others on menopause—e.g., what it is, its symptoms, and available treatments. But these organizations stop short of meaningful advocacy for legislation and policy changes that protect menopausal persons. Also, the human resources community has taken steps to educate employers but stopped short of advocating for meaningful accommodations.[35] More recently, the movement for period equity has begun to include menopause equity in advocacy.[36] However, a concerted search for organized U.S. advocacy specifically directed at

[31] *Id*. at 1271-72.
[32] *Id.* at 1271.
[33] *Id.* at 1272.
[34] Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 2 (Nov. 2019). *See also* Keelyn Friesen, *Non-passage of the women's health equity Act: Inaction may lead to cancerous results*, 14 HAMLINE J. PUB. L. & POL'Y 1 (Fall 1993).
[35] Sheryl Kraft, *Menopause in the Workplace: How Women Can Cope*, NEXTAVENUE (Nov. 29, 2019), https://www.nextavenue.org/menopause-workplace-women-cope. *See also* Dana Wilkie, *How to Accommodate Menopause at Work*, SOC. FOR HUM. RES. MGMT. (May 26, 2015); Brief for Petitioner-Appellant at 4, *Coleman v. Bobby Dodd Inst.*, 13 (No. 71-13023).
[36] Jennifer Weiss-Wolf, *The Fight for Menstrual Equity Continues in 2021*, MARIE CLAIRE (Jan. 27, 2021), https://www.marieclaire.com/politics/a35280718/menstrual-equity-2021-goals; *see also*, Brief for Petitioner-

menopause issues, comparable to other issues related to female biology like pregnancy, breastfeeding rights, and menstrual justice, fails to reveal any menopause-focused group or movement other than World Menopause Day which received little attention in the U.S..[37]

The U.S. has shown little public policy response to the needs of menopausal persons, other than funding for clinical research around drugs and other therapies. Despite the thousands of bills and resolutions introduced in the last five sessions of Congress, only a small handful even include the word 'menopause'. All such references are incidental rather than related to the purpose of the proposed legislation.[38]

B. Symptoms During the Menopausal Transition Often Interfere With Menopausal Workers' Ability to Perform at Their Usual Levels

As the U.S. population ages and workers delay retirement, it is estimated that sixty-one million U.S. workers are either experiencing, or will soon experience, menopause at work.[39] Menopausal workers may be reluctant to complain to their employers or ask for help out of fear of being seen as old, less competent, less able, or lazy.[40] A 2015 study found that untreated vasomotor symptoms, characterized by hot flashes, night sweats, and flushes, accounted for lost work

Appellant *Coleman v. Bobby Dodd Inst.*, 13 (No. 17-13023) (the petitioner's brief argued that discrimination due to "premenopause" was prohibited discrimination on the basis of sex.).

[37] An internet search turned up only one U.S. hit: Fox affiliate in Indianapolis, Indiana broadcasted a story on support of World Menopause Day by a local company that designs and sells pajamas for women experiencing night sweats; *see World Menopause Day helps bring recognition for women's hygiene*, FOX59 WEB, https://fox59.com/news/world-menopause-day-helps-bring-recognition-for-womens-hygiene (last visited Mar. 21, 2021). There is no evidence that Congress considered adopting a resolution for the day, despite its usual practice of recognizing specific days to support certain groups, diseases, conditions, etc..

[38] *Menopause*, GOVTRACK, https://www.govtrack.us/congress/bills/117/hr2007 (last visited Oct. 29, 2019 6:00 PM); *see* Stephanie Tubbs Jones Uterine Fibroid Research and Education Act of 2021, H.R. 2007, 117th Cong. (2021) (recognizing that infertility is a widespread problem that affects populations of diverse ages, races, ethnicities, and genders cited in H.Res. 338, 117th Cong. (2021)).

[39] Hilary Weaver, *Menopause Discrimination Affects Millions of American Women*, SUPERMAJORITY ED. FUND (Feb. 7, 2020), https://supermajorityedfund.com/2020/02/menopause-discrimination-affects-millions-of-american-women.

[40] *Supra* note 35.

productivity as well as a significant rise in health claims.[41] Despite the apparent costs of unaddressed menopause, U.S. employers have not been proactive in addressing the needs of a significant portion of the workforce.

According to the Bureau of Labor Statistics, in 2018, the civilian labor force included 14.6 million women aged fifty through fifty-nine, representing about 9.4% of the total.[42] Further, in a survey of 400 women between the ages of fifty through fifty-nine by AARP, 84% of the respondents said their menopause symptoms interfere with their lives; 12% said their symptoms interfere "a great deal" or were debilitating.[43] The clear inference here, given the reported impact of menopause symptoms and the representation of women of menopausal age in the workforce, is that a significant segment of the labor force is experiencing menopause at work and for some, their symptoms are adversely affecting their ability to perform their jobs.

The impact on job performance posed by menopause symptoms can vary significantly by menstruator and perhaps by the circumstances of their job. For example, hot flashes would not significantly impair an employee who has a private office and can have closed-door privacy or control over their office temperature. On the other hand, an employee in a job where they must wear a constrictive uniform without the ability to take breaks could become so uncomfortable that they could not perform their job. Similarly, mood changes vary greatly in their severity and amongst menstruators. Jobs that require close work with others could be assessed poorly as not being team players.

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[41] *The Immense Burden of Menopausal Symptoms*, MGH CTR. FOR WOMEN'S MENTAL HEALTH (May 4, 2015), https://womensmentalhealth.org/posts/the-immense-burden-of-menopausal-symptoms.

[42] *Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race*, BUREAU OF LAB. STAT., https://www.bls.gov/cps/cpsaat03.pdf (last visited Oct. 26, 2019).

[43] Jenifer Wolff, *What Doctors Don't Know About Menopause*, AARP (Aug./Sept. 2018), https://www.aarp.org/health/conditions-treatments/info-2018/menopause-symptoms-doctors-relief-treatment.html.

In a survey published by the National Institutes of Health, women reported pervasive negative views on aging, particularly regarding the effects of menopause on their body image and "the sense of irrelevance and invisibility that many women experienced as they matured."[44] Among the four primary themes that emerged from the survey was "a plea for recognition of the need to maintain a contributory role in society."[45]

II. The ADA's Failure to Address Discrimination Due to Menopause

In claims of menopause discrimination under the ADA, the courts have consistently held that age-related menopause is not a disability. The ADA, as amended by the Americans with Disabilities Amendments Act ("ADAAA"), makes it unlawful for employers to discriminate against disabled individuals as candidates for employment, or in the course of their employment.[46] Under the ADA, a qualified individual is one who can perform the "essential functions of the job," with or without accommodation.[47] This section first provides an overview of disability under the ADA and reviews relevant case law where courts have denied ADA disability status for age-related menopause. Next, this section addresses the issue of accommodations broadly in terms of menopausal employees' needs.

A. Courts Have Generally Failed to Recognize Naturally Occurring Menopause as an ADA Disability

[44] Sara M. Hofmeier, et al, *Body Image, Aging, and Identity in Women Over 50: The Gender and Body Image (GABI) Study*, U.S. NAT'L LIBR. OF MED. NAT'L INST. OF HEALTH (July 11, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5215963 (last visited Oct. 30, 2019).
[45] *Id.*
[46] 42 U.S.C. § 12101(b)(1).
[47] 42 U.S.C. § 12111(8).

The ADA was enacted on July 26, 1990 with final regulations issued in 1991.[48] From that time until enactment of the ADAAA in 2008, the Supreme Court decided twenty ADA cases, where five were centered around the ADA's definition of disability.[49] The Court significantly narrowed the definition of disability in four of the five disability definition cases.[50] In response to the Court's action, Congress enacted the ADAAA which broadened the definition of disability to make it easier for an individual seeking protection under the ADA to establish that they had a disability eligible for coverage.[51] While courts' pre-ADAAA denial of disability status for menopause is not distinguished from its treatment of most other conditions where disability status was sought and denied, the broadening intent of the ADAAA has resulted in coverage of disability for severe menopause symptoms.[52]

Under the ADA, as amended, it is unlawful for a covered employer to discriminate against a qualified individual with a disability, defined under the three-prong test as someone who has:

> "[A] physical or mental impairment that substantially limits one or more major life activities of such individual; has a record of such impairment; or is regarded as having such an impairment."[53] Additionally, the ADA further provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[54] Under the ADA, major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing

[48] *Timeline of the Americans with Disabilities Act*, AMS. WITH DISABILITIES ACT NAT'L NETWORK, https://adata.org/ada-timeline (last visited Feb. 21, 2022).
[49] *The History: Americans with Disabilities Act (ADA)*, THRIVE TOGETHER, https://www.thrivetogethertoday.org/post/ada-the-history (last visited June 14, 2021).
[50] *Id.*; *see also* Sutton v. United Airlines, 527 U.S. 471, 478 (1999); Murphy v. United Parcel Serv., 527, 521-22 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 (1999); Toyota Motor Mfg., Ky. Inc. v. Williams, 534 U.S. 184, 193 (2002).
[51] Pub. L. 101-336 (examining the Americans with Disabilities Act), *Focusing on Ways to Determine the Proper Scope of its Coverage: Hearing Before the Comm. on Health, Educ., Lab., & Pension*, 110th Cong. (2008), available at https://www.govinfo.gov/content/pkg/CHRG-110shrg43702/html/CHRG-110shrg43702.htm. (U.S. Senate participants in the roundtable addressed concerns that the legislation's impact fell short of expectations because of narrow interpretation by the U.S. Supreme Court.)
[52] *Id.*
[53] 42 U.S.C. § 12102(1)(A)-(C).
[54] 42 U.S.C. § 12102(4)(D).

> hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[55]

Under the ADA, an employer is only required to provide accommodation if the worker's disability qualifies for ADA coverage.[56] However, the disability status of age-related menopause has generally not been given favorable treatment by the courts because the courts have only acknowledged the loss of reproductive ability as the major life activity affected by menopause.[57] At the same time, courts have allowed claims to proceed where younger workers have lost their fertility due to early onset of menopause.[58] Although the courts have left a small opening to consider severe symptoms related to age-related menopause, they have generally held that menopause *per se* is not a disability under the ADA and have ignored the impact of menopausal symptoms on many of the major life activities enumerated in the ADA—e.g., insomnia and sleep; "brain fog" and thinking; and working in general.[59] In cases based on specific symptoms of menopause, the courts have focused on menopause broadly rather than the specific facts of cases where menopause has manifested with debilitating symptoms that required accommodation.[60]

By way of example of courts' refusal to consider age-related menopause to be a disability, several cases where courts have rejected claims related to menopause symptoms are summarized. *McGraw v. Sears, Roebuck & Co.*, an example of a pre-ADAAA case where the court granted summary judgment to the employer, held that menopause is not a disability under the ADA.[61] In this case, the plaintiff's suit included a discrimination claim under the ADA because she was forced

[55] 42 U.S.C. § 12102(2)(A).
[56] 42 U.S.C. § 12112(a).
[57] Cahn, *supra* note 7, at 7.
[58] *Id.* at 7-8.
[59] McGraw v. Sears, Roebuck & Co., 21 F. Supp. 2d 1017, 1021 (D. Minn. 1998); *see also* Klein v. Dep't of Children and Families Servs., 34 F. Supp. 2d 1367, 1371 (S.D. Fla. 1998).
[60] *McGraw*, 21 F. Supp. 2d at 1021; *Klein*, 34 F. Supp. 2d. at 1372.
[61] *McGraw*, 21 F. Supp. 2d at 1021.

to resign for performance issues related to her menopause.[62] The court applied the *McDonnell Douglas Corp. v. Green* burden-shifting analysis, which requires a plaintiff to establish a *prima facie* case by showing: "(1) she is disabled within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job; and (3) she suffered an adverse employment action giving rise to an inference of unlawful discrimination."[63] The court notes that the Supreme Court in *Bragdon v. Abbott* had held the inability to have children is an ADA disability; however, the court distinguished from *Bragdon*, stating "[t]he Court takes judicial notice of menopause as an entirely normal consequence of human aging."[64] The court's holding indicates a predisposition against menopause as a disability, even if the broader definition had been in effect.

Similarly, in *Klein v. Dep't of Children and Families Services*, another pre-ADAAA case, the Southern District of Florida addressed the question of "whether complications of menopause, which temporarily interfere with a woman's ability to satisfactorily perform employment tasks, is a statutory handicap or disability for which an employer must make reasonable accommodations."[65] Iris Klein, a State of Florida Youth and Family Counselor, requested an exception to her employer's requirement that counselors report to work by 8:00 a.m. because of issues related to menopause, including nausea, insomnia, and bleeding, that made it difficult for her to begin work early in the morning.[66] The court rejected the plaintiff's claim of disability, calling her issue "morning lethargy," and holding that it did not limit a major life activity because she was able to function after 9:30 a.m..[67] The court allowed that a "complicated menopause may

[62] *McGraw*, 21 F. Supp. 2d at 1019 (noting that the plaintiff brought action against her employer, alleging discrimination on the basis age, ADA violations, breach of contract and failure to grant leave under the Family Medical Leave Act). *See also id.* at 1019.
[63] *Id.* at 1020, citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[64] *McGraw*, 21 F. Supp. 2d. 1017 at 1021 (citing Bragdon v. Abbott, 524 U.S. 624 (1998) (finding the inability to have children as a cognizable ADA disability related to an AIDS case).
[65] Klein v. Dep't of Children and Families Servs., 34 F. Supp. 2d 1367, 1368 (S.D. Fla. 1998).
[66] *Id.* at 1368-69.
[67] *Id.* at 1371-72.

be…disabling [*sic*] under the ADA," but held that Ms. Klein's menopause did not rise to the level of disability.[68] Although the court left the door open for severe symptoms, it held "[m]enopause, generally, is not a handicap [n]or disability."[69] These holdings imply that, notwithstanding the ADAAA's broadening of the definition of disability, the court manifested a bias against finding menopause to be a disability.

The general bias against age-related menopause is also demonstrated in *Saks v. Covey,* a case related to medical benefits coverage for infertility treatment, where the court rejected the premise that conditions resulting from the natural aging process could never be considered a disability while allowing that youthful infertility is likely a disability.[70] Further demonstrating the prevalence of the judicial view that menopause is not a disability, the Southern District of New York cited *McGraw*'s holding that menopause is not a disability, while adding that the holding represented "a proposition that enlightened women have been espousing for centuries."[71] In *Saks*, a complaint completely unrelated to menopause, the court unnecessarily and without basis, implied that "enlightened women" would not "want" menopause to be considered a disability.[72]

Following the broadening effect of the ADAAA, the court has treated early-onset menopause more favorably. In *Mullen v. New Balance Athletics, Inc.,* the District Court for Maine ruled "a reasonable jury could find…an impairment…sufficient to place the plaintiff abruptly into menopause at the age of 35" and thus, supported an ADA accommodation claim.[73] In this case, the plaintiff was pressured to resign from her position due to an emotional outburst that followed

[68] *Id.*
[69] *Id.* at 1372.
[70] *See generally*, Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 326 (S.D.N.Y 2000).
[71] *Id.*
[72] *Id.*
[73] Mullen v. New Balance Athletics, Inc., 2019 WL 958370 (D. Me. 2019) (ruling against the plaintiff because, although there was an ADA disability, there was no request for accommodation).

receiving critical feedback from a company trainer.[74] After bursting into tears, Ms. Mullen informed the trainer that she was experiencing hot flashes and emotional reactions as a result of a recent hysterectomy.[75] The *Mullen* court allowed the possibility of disability only for premature menopause where a woman loses her ability to have children.[76] Illustrating the general bias against older menopausal individuals, the court held that only early menopause was a disability, holding "a reasonable jury could find that an impairment … sufficient to place the plaintiff abruptly into menopause at the age of 35" and, thus, supported an ADA claim. Disability due to inability to have children while in traditional child-bearing age range was seen as an impairment of a major life activity.[77]

In another post-ADAAA case, the Eastern District of Arkansas court acknowledged that pre-ADAAA rulings against menopause as an ADA disability were not controlling and the issue must be considered anew.[78] The court in *Chipman v. Cook* stated that the plaintiff failed to present evidence that her symptoms related to menopause "'substantially limit' one or more of the major life activities of [an] individual" and therefore, there is an issue of material fact as to whether her symptoms are an ADA disability.[79] However, the court goes on to state "[i]t is undisputed that Ms. Chipman's menstrual cycle 'did not affect her ability to see, hear, eat, sleep, speak, breathe, learn, read, think, or communicate with others.'"[80]

Menopause as a disability has also not received favorable treatment under state law, either. In *Sipple v. Crossmark*, a menopausal employee made a claim under the California Fair

[74] *Id.* at 3-5.
[75] *Id*. at 4.
[76] *Id.* at 10.
[77] *Id.* at 10, 12.
[78] Chipman v. Cook, 2017 WL 1160585 8 (E.D. Ark. 2017).
[79] *Id.*
[80] *Id.*

Employment and Housing Act ("FEHA") that she was forced to resign after being improperly denied a dress code accommodation recommended by her physician.[81] The California court held that the plaintiff failed to allege and prove that her condition was a disability as defined under FEHA.[82] Despite ADAAA's significant changes to the definition of disability, the court stated "…no case law suggests that menopause qualifies as a disability either under the FEHA or the ADA."[83] Instead, the court cited pre-ADAAA cases to support its holding, stating:

> This [c]ourt is not willing to recognize menopause as a disability *per se*. Menopause is a natural progression over time…. While the effects of menopause may constitute a disability if it is shown to affect a body system as defined by the FEHA, and if shown to sufficiently limit a major life activity, menopause is not recognized by this [c]ourt to be a disability *per se* under the FEHA.[84]

Although the court appears to leave an opening for some menopausal symptoms to qualify for disability status, there is nothing in the court's statement that indicates it would expect to see any claim that qualifies as an eligible disability under either state or federal law.

B. The types of Requested Accommodations to Address Severe Menopause Symptoms of Are Likely to be Found Reasonable if Menopause Was Recognized as a Disability

The ADA requires accommodations for qualified workers who have an ADA disability, stating:

> It is unlawful for a covered entity not to make reasonable ADA accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[85]

Under the ADA, there are three categories of reasonable accommodations, described as modifications or adjustments to one or more of the following: (1) the job application process; (2) the work environment, or manner or circumstances "under which the position held or desired is

[81] Sipple v. Crossmark, Inc., 2012 WL 2798791 1-2 (E.D. Cal. July 9, 2012).
[82] *Id.* at 13.
[83] *Id.*
[84] *Id.*
[85] 29 C.F.R. § 1630.9(a); *see also* 42 U.S.C. § 12112(a).

customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (3) that enable an employee (with a disability) to "enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[86] An employer may be excused on the basis of undue hardship if providing an otherwise reasonable accommodation to a qualified worker causes the employer to incur significant expense or poses significant difficulty.[87]

Guidance from the Equal Employment Opportunity Commission ("EEOC") describes a reasonable accommodation as one that appears to be "feasible" or "plausible" and also "effective in meeting the needs of the individual."[88] However, there is little case law that addresses accommodations for disabilities related to menopause because, as discussed above, courts do not regard menopause as a qualified disability. In the absence of the courts holding that a worker qualifies for accommodations due to a menopause disability, the courts do not reach the issue of whether particular accommodations for menopause are reasonable or would pose an undue hardship on the employer.

Employers can accommodate workers experiencing symptoms of menopause by relaxing uniform requirements, allowing unscheduled breaks to recover from emotional outbursts caused by hormonal fluctuations, and intermittent paid leave to recover from acute symptoms, and other, similar accommodations.[89] As discussion of menopause becomes more common in mainstream media, human resource professionals and women's advocacy groups are urging employers to

[86] 42 U.S.C. § 12111(10)(A)(B); *see also* 29 C.F.R. § 1630.2(o)(i-iii).
[87] 42 U.S.C. § 12111(10)(B); *see also* 29 C.F.R. § 1630.9(a).
[88] "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA," U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 17, 2002), www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada (last visited Apr. 10, 2021).
[89] *See* Bianca Barratt, *She's Not 'Losing Her Touch': Employers Must Do More to Recognise Symptoms of Menopause*, FORBES (Oct. 18, 2019, 7:24 AM), www.forbes.com/sites/biancabarratt/2019/10/18/shes-not-losing-her-touch-employers-must-do-more-to-recognise-symptoms-of-menopause/?sh%E2%80%A6&sh=644cb9bd72fc.

develop policies and practices to accommodate workers who experience symptoms that affect their work.[90] Although it may take time to yield results, human resource experts' advice includes changes in corporate culture and updates to policies as well as simple, inexpensive accommodations to make menopausal workers more comfortable.[91] Examples include the following: providing fans or access to more ventilated areas, easy access to drinking water and restrooms, and flexible working hours.[92] These types of accommodations could become more common in workplaces if severe symptoms of menopause were recognized as an ADA disability.

With respect to schedule flexibility, EEOC guidance requires a covered employer to allow an employee with a disability to work a modified or part-time schedule (absent undue hardship).[93] The EEOC guidance states:

> A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.[94]

To request an accommodation, individuals need only inform their employer that they need adjustments or changes at work for a reason related to a medical condition.[95] In requesting an accommodation, the individual is not required to refer to the ADA or use the words "reasonable

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[90] Sarah Bolt, *Menopause: The last great taboo*, OPEN ACCESS GOV'T (Oct. 18, 2021) http://www.openaccessgovernment.org/menopause-the-last-great-taboo/100976; *see also* Barratt, *supra* note 86.
[91] Natalie Runyon, *How employers can support menopausal women at work*, THOMSON REUTERS (Mar. 15, 2021), http://www.thomsonreuters.com/en-us/posts/corporates/support-menopausal-women.
[92] *Id.*
[93] *Supra* note 88 (under the subheading *General Principles*, the EEOC outlines the guiding rules for reasonable accommodation and relevant definitions).
[94] *Id*. (under the subheading *Types of Reasonable Accommodations Related to Job Performance*, No. 22, the EEOC illustrates modified or part-time schedule as a reasonable accommodation by declaring the rule and providing examples).
[95] *Id*. (under the subheading *Requesting Reasonable Accommodation*, the EEOC outlines the mechanics of the process).

accommodation."[96] Despite the relatively low regulatory barriers to requesting accommodations, the cultural stigmas associated with menopause may suppress employees' willingness to make such requests.[97] For example, a survey conducted in the United Kingdom on women experiencing menopausal symptoms found that nearly one-third had taken sick leave because of their symptoms, but only one-quarter felt comfortable telling their supervisor that the leave was related to menopausal symptoms.[98]

The unwillingness of courts to recognize menopause as a disability *per se* and the stifling effect of cultural stigmas associated with menopause prevents the exploration of reasonable accommodations for menopausal symptoms. Paradoxically, success in achieving disability status poses the risk of greater stigmatization of menopause in the workplace. This can be avoided by shifting the focus from menopause in general as a disability to narrowly focusing on severe symptoms and the relatively small cohort that suffers from them.

III. Menopause Discrimination on the Basis of Sex Under Title VII

Claims for relief due to menopause-related employment discrimination have not found favor in the courts, despite the text of Title VII and the fact that menopause is a sex-related condition.[99] Acknowledging that menopause discrimination is "because of sex" seems obvious because it is a condition unique to persons born with female reproductive organs.[100] Title VII provides that it is unlawful for an employer to do the following:

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[96] *Id.*
[97] Megan Reitz et al., *Is Menopause a Taboo in Your Organization*, HARV. BUS. R. (Feb. 4, 2020) https://hbr.org/2020/02/is-menopause-a-taboo-in-your-organization.
[98] *Id.*
[99] *Supra* note 65; *see also* Mullen v. New Balance Athletics, Inc., (D. Me. 2019); Bailey v. Henderson, 94 F. Supp. 2d 68 (D.D.C. 2000); Saks v. Franklin Covey Co., 117 F. Supp. 2d 318 (S.D.N.Y 2000).
[100] Menopause marks the end of menstruation; not all females menstruate, and not all who menstruate are female, but all who do have "female biology"; *see* Margaret E. Johnson et al., *Title IX & Menstruation*, 43 HARV. J. L. & GENDER 225, 268 (2020).

> "[T]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…sex…or…to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's…sex…."[101]

The following sections provide a discussion of the problems inherent in requiring a similarly situated male comparator for discrimination claims based on menopause and how Title VII has failed to expansively cover the full range of female reproduction, despite its amendment by the Pregnancy Discrimination Act ("PDA") to encompass "female reproduction" as a general sex-related trait.[102]

A. "Similarly Situated" Male Comparators Miss ~~the point~~ Because Menopause is Uniquely Related to Female Biology

If there is no direct evidence of discrimination, Title VII disparate treatment claims on the basis of sex typically require a plaintiff to prove that their treatment differed from that of similarly situated members of the opposite sex, based on the burden-shifting test established by *McDonnell Douglas*.[103] While Mr. Green's complaint in *McDonnell Douglas* was based on racial discrimination in the employer's decision to deny him an offer of employment, the Court's holding in favor of Mr. Green's claim has created the test by which the burden of proof of discriminatory intent shifts from the plaintiff-employee to the defendant-employer.[104] The first part of the *McDonnell Douglas* three-part test requires the plaintiff to establish a four-pronged *prima facie* case of discrimination, including the following: (1) the plaintiff/complainant belongs to a protected class; (2) they applied for and were qualified for the particular position; (3) they suffered an

[101] 42 U.S.C. § 2000e–2(a).
[102] *See* 42 U.S.C. § 2000e.
[103] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802.
[104] Land, *supra* note 6, at 1185, 1193-94.

adverse employment action (i.e., were not hired or were terminated); and (4) the employer treated similarly situated employees, who are not members of the protected class, more favorably.[105] Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant to articulate a non-discriminatory reason for the action.[106] Next, assuming the defendant can articulate a satisfactory reason, the plaintiff has an opportunity to rebut the employer's stated reason as pretext for a discriminatory motive.[107]

In a Title VII claim related to female physical traits, the fourth prong, comparing the treatment of similarly situated employees, is often the most difficult to establish because biological features unique to female reproduction generally have no comparable conditions for males.[108] This lack of a comparator has not prevented the courts from adapting the last prong of *McDonnell Douglas* to create a "male-comparator" requirement, requiring a "because of sex" claim for an employee regarded as female to allege they were treated less favorably than a similarly situated male.[109] Plaintiffs have struggled with imperfect comparators in "because of sex" claims related to pregnancy (standing and lifting requirements), lactation (need for breaks and privacy), and menstruation (incontinence versus menstruation, etc.); however, male comparators for menopause, and the associated severe symptoms of hot flashes, erratic periods, are simply non-existent.[110]

In the Middle District of Georgia, *Coleman v. Bobby Dodd Institute, Inc.* garnered significant attention from national media and provided a rallying point for the menstrual-equity

[105] *Id. See also* note 103.
[106] *Id.*
[107] *Id.*
[108] Emily Gold Waldman, *Compared to What? Menstruation, Pregnancy, and the Complexities of Comparison*, 41 COLUM. J. GENDER L. 218, 220-21 (2021).
[109] Land, *supra* note 6, at 1194.
[110] Waldman, *supra* note 108, at 226-27.

movement; however, the case was arguably about menopause discrimination.[111] Ms. Coleman, a 911 dispatcher at a private employer, was terminated because of damage caused by her perimenopausal menstrual flow.[112] In addressing the claim that Title VII, as amended by the PDA, prohibits discrimination related to female reproductive processes, the court noted "a non-frivolous argument can be made that it is unlawful for an employer to treat a uniquely feminine condition, such as excessive menstruation, less favorably than similar conditions affecting both sexes, such as incontinence."[113] However, the court went on to say that "[h]ere Coleman's excessive menstruation was related to premenopause [*sic*], not pregnancy or childbirth."[114] The latter statement seemingly implies that the court would reject an argument that menstruation and menopause should be afforded the same protections as pregnancy and childbirth-related conditions and, even if they were, would only be protected if a male comparator was available.

In dismissing the case, the court rejected Coleman's argument that she was terminated because of her sex.[115] Instead, the court held that Coleman was not treated less favorably than if someone of either sex had caused similar damage due to any condition, such as a male with incontinence.[116] In short, Coleman was not treated less favorably because she suffered a "uniquely female condition."[117] In fact, the court went so far as to say that Coleman was not fired because of

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[111] Areva Martin, *This Woman Was Fired for a Heavy Period Leak*, TIME (Oct. 26, 2017, 2:35 PM), https://time.com/4999185/woman-fired-for-period-leak; Michael Alison Chandler, *This woman said she was fired for leaking menstrual blood at work. The ACLU is suing for discrimination*, WASHINGTON POST (Sept. 11, 2017), www.washingtonpost.com/local/social-issues/ga-woman-said-she-was-fired-for-leaking-during-her-period-at-work-the-aclu-is-suing-for-discrimination/2017/09/08/50fab924-8d97-11e7-8df5-c2e5cf46c1e2_story.html.

[112] *Coleman v. Bobby Dodd Inst., Inc.*, No. 4:17-CV-29, 2017 U.S. Dist. LEXIS 88334, 2-3 (M.D. Ga. June 8, 2017) (after her heavy menstrual flow damaged an office chair, Coleman was directed to control it with feminine hygiene products; when a second accident caused damage to office carpet, Coleman was fired).

[113] *Id.* at 4-5.

[114] *Id.* at 5. The court incorrectly refers to perimenopause as "premenopause." The latter term encompasses any menstruator who has not ceased menstruating rather than those, like Coleman, who are experiencing perimenopause and its related symptoms.

[115] *Id*. at 6.

[116] *Id*. at 6.

[117] *Id*. at 4-5.

her excessive bleeding but because of the damage caused by that bleeding and her failure to control it with feminine hygiene products.[118] Here, the court has created a judicial double-bind, requiring the plaintiff to plead that a uniquely feminine condition was the reason for the firing but making it seemingly impossible to establish a *prima facie* case for discrimination related to a female biological process (by holding the reason for the firing is legitimate, even if the underlying cause was uniquely female).

B. Cultural Discomfort Around Menopause Makes it More Difficult to Establish Discrimination and Harassment Based on Pejorative Comments by Supervisors

The courts have generally treated comments regarding an employee's menopausal status as "stray" remarks and therefore, lacking in particularity and temporal proximity to support a claim of discrimination. Some examples are:

- A fifty-two year-old-woman alleged discrimination on the basis of sex under Title VII and age where her employer referred to her as "*la menopausica*" (the menopausal one), among other age and gender-related insults.[119] Here, the court held that the comments lacked "the temporal proximity and specificity required to surmise they were directly connected to any particular adverse action" taken against the plaintiff.[120]
- A plaintiff claimed that her employer's decision not to promote her was based on impermissible sex discrimination under Title VII, where a person who interviewed her for the position described a building managed by the employee as "Menopause Manor," indicating gender animus.[121] Here, the court granted summary judgement for the

[118] *Id*.
[119] *Stray Remark or Comment Involving General References*, 7 A.L.R. Fed. 3d Art. 2, 70 (originally published in 2015), citing Acevedo Martinez v. Coatings Inc. and Co., 251 F. Supp. 2d 1058 (D.P.R. 2003).
[120] *Id*.
[121] *Supra* note 119 (citing Carver v. Michigan, 2012 WL 5397124 (W.D. Mich. 2012) (unpublished opinion)).

> employer, finding the phrase "Menopause Manor" was potentially a description of a group that did not include the employee and that the phrase was "vague and ambiguous, and not clearly indicative of a discriminatory animus towards women."[122]

In contrast, in *Bailey v. Henderson*, the court held that a supervisor's direction to another employee not to intercede in a conflict because it was "just some [B]lack women going through menopause," along with other sexist statements, provided a basis for a reasonable juror to find the conduct was "based on sex" in a claim of hostile work environment.[123] However, it is not clear if the holding would have been the same without the other sexist or racist comments alleged in the complaint.[124]

C. PDA's Language Encompasses the Full Range of Female Reproductive Issues, Its Protections Have Not Been Extended to Those in The Last Stage of The Female Reproductive Cycle: Menopause

The PDA was enacted by Congress to make it clear that discrimination based on "pregnancy, childbirth, or related medical conditions" is a form of discrimination on the basis of sex that is prohibited by Title VII.[125] Specifically, the text of the PDA states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, "because of" or "on the basis" of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.[126]

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[122] *Id.*
[123] Bailey v. Henderson, 94 F. Supp. 2d 68, 75-76 (D.D.C. 2000).
[124] *Id*.
[125] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [https://perma.cc/M6P8-HCFZ].
[126] 42 U.S.C. § 2000e(k).

According to the EEOC, the number of complaints under the PDA has increased substantially in the years since its enactment, with the majority of charges including allegations of discharge based on pregnancy.[127] Other charges include "allegations of disparate terms and conditions of employment based on pregnancy, such as closer scrutiny and harsher discipline than that administered to non-pregnant employees," and issues related to medical records and examinations.[128]

By clarifying that discrimination "on the basis of sex" included, but was not limited to, "because of or on the basis of pregnancy, childbirth, or related medical conditions," the PDA clarified that the "because of sex" protection includes uniquely female reproductive characteristics.[129] The plain language of the PDA seems to say that it encompasses all issues related to biological female reproduction, not just pregnancy, and would also apply to allegations arising from menstruation, miscarriage, abortion, fertility, menopause, and other uniquely female conditions.

However, an emerging legal question is whether Title VII, as amended by the PDA, encompasses menopause. At this time, there is little reported case law.[130] As discussed previously in *Coleman v. Bobby Dodd Institute, Inc.*, the lower court ruled in favor of an employer who fired a female employee who soiled company property due to heavy, erratic menstruation related to perimenopause.[131] On appeal, the plaintiff argued that "[t]he PDA was enacted to extend protection to conditions linked to sex," including "premenopause."[132]

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[127] *Supra* note 125.
[128] *Id*.
[129] 42 U.S.C. § 2000e(k).
[130] Cahn, *supra* note 7, at 33.
[131] Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 U.S. Dist. LEXIS 88334, 1 (M.D. GA 2017). *See also supra* note 112.
[132] Brief for Petitioner-Appellant at 13, Coleman v. Bobby Dodd Inst., Inc. (No. 71-13023).

Here, the plaintiff argued that "pregnancy, childbirth, or related medical conditions are not the *sole* conditions that might constitute prohibited sex discrimination, but rather, constitute a non-exhaustive list of forms that sex discrimination takes," including menopause.[133] However, the case was settled before the appeals court had the chance to rule.[134] While the settlement forestalled a definitive ruling on the issue of PDA coverage of menopause, it suggested a means for future plaintiffs to argue for a broad interpretation of the PDA and for it to include menopause-related discrimination.[135] Nonetheless, no U.S. court has taken up the matter to date.[136]

IV. Age Discrimination

Cultural stereotypes associated with female aging, especially in Western societies, underscore the challenges of pursuing legal claims for intersectional sex and age discrimination because they are pervasive.[137] Because naturally occurring menopause, or where there is no surgical or medical intervention to cause early onset menopause, occurs for most menstruators in middle age, menopause discrimination is arguably *per se* discrimination based on age. While there have not been cases that address this particular issue as the basis for relief, it is worth noting that there is a common thread in which plaintiffs' claims of discrimination on the basis of sex due to menopause often include complaints of age discrimination, and vice versa.[138]

A. The ADEA May Provide a Basis for Intersectional Age-Sex Discrimination Claims

[133] *Id*. at 13-14.
[134] Cahn, *supra* note 7, at 6.
[135] *Id*.
[136] *Id*.
[137] *Id*. at 8.
[138] Mesias v. Cravath, Swaine & Moore LLP, 106 F.Supp.3d 431 at 436, 438 (S.D.N.Y 2015); *see also* White v. Twin Falls Ct., 2016 U.S. Dist. LEXIS 45007.

The ADEA makes differential treatment of employees aged forty and over unlawful and suggests another avenue for plaintiffs to pursue their legal claims related to menopause discrimination. Specifically, the ADEA states:

> It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age….[139]

B. Intersectional Age-Sex Discrimination is Difficult to Prove based on Circumstantial Actions

Determining whether a specific act of discrimination is attributable to stereotypes related to age or to gender highlights the challenges of addressing this intersectional legal claim.[140] Claims of discrimination based on insidious motives like race, sex, and age can be difficult to prove in the absence of comparators that shift the burden of proof to the employer. In the absence of a comparator, often challenging to establish, plaintiffs must rely on direct or circumstantial actions and statements by decision-makers to demonstrate the employer's discriminatory motive.[141] This concept of 'stray remarks' can be crucial in supporting assertions of intersectional claims for sex–age discrimination for menopause. Menopausal workers may find themselves the butt of workplace jokes related to temperature issues or the perceived end of their usefulness.[142]

However, in *Price Waterhouse v. Hopkins*, the Supreme Court held that 'stray remarks' alone are insufficient to shift the burden to the employer and to prove that the employer's decisions

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[139] 29 U.S.C. § 623(a).
[140] Cahn, *supra* note 7, at 9.
[141] *Supra* note 119.
[142] Katie Grant, *Women in Midlife Are the Butt of Jokes': How Ignorance Around the Menopause Is Driving Women Out of Work*, INEWS (Mar. 20, 2021, 6:00 AM, updated 3:20 PM), https://inews.co.uk/news/long-reads/menopause-women-jokes-ignorance-workplace-921945.

were based on legitimate criteria.[143] While this case addressed a claim of discrimination on the basis of sex, some lower courts have applied *Price Waterhouse* by adopting Justice Sandra Day O'Connor's doctrine of "stray remark" and requiring biased comments (even those pertaining to non-sex based claims) to be both made by a decision-maker and connected to a decision relating to the plaintiff's employment as prerequisite for their consideration as evidence of discriminatory motive.[144] As an example of the application of this doctrine, the Third Circuit established three factors to determine whether a "stray remark" is probative of discrimination:

> (1) the relationship of the speaker to the employee and within the corporate hierarchy; (2) the temporal proximity of the statement to the adverse employment decision; and (3) the purpose and content of the statement. These factors must be considered in total in light of the nature and context in which the comment was made.[145]

There have been mixed rulings where pejorative comments about "menopausal women" have formed the basis for age discrimination or hostile work environment claims. In *Mesias v. Cravath, Swaine and Moore LLP*, the court held a supervisor's statement that he was "tired of working with menopausal women" lacked sufficient nexus to the disciplinary action to be probative of discriminatory intent.[146]

In *Mesias*, a terminated employee sued for discrimination on the basis of sex, age, and national origin under Title VII, the ADEA, and several New York state laws.[147] The Southern District of New York Court granted the defendant's motion to dismiss for failure to state a claim for, among other things, age and gender discrimination.[148] The plaintiff asserted a series of

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[143] Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[S]tray remarks in the workplace…cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecision makers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.").
[144] *Id.*
[145] *See supra* note 119 (citing Turner v. Leavitt, 2008 WL 828033 (W.D. Pa. 2008)).
[146] Mesias v. Cravath, Swaine & Moore LLP, 106 F.Supp.3d 431 at 438 (S.D.N.Y 2015).
[147] *Id.*
[148] *Id.*

interactions and acts by the employer that led up to her termination and claimed that she had been treated differently than other employees.[149] Her claims of age and gender discrimination were based on several interactions where her supervisor made negative comments, directed at her and in the presence of other employees, about working with "menopausal women."[150] The court held there was insufficient nexus between the remarks and the adverse action, despite the fact that the comments were made in the context of interactions that led up to her termination.[151] Further, the court held that, although her supervisor made these comments in the course of performance-related discussions, the complaint failed to allege that the remarks were "related to the decision-making process" that resulted in the plaintiff's termination.[152]

Notwithstanding the paucity of case law addressing the intersection of age and sex in employment discrimination, this remains an area where future plaintiffs may find success in pleading intersectional Title VII/ADEA claims by showing how the provisions of both laws apply to instances of intersectional discrimination.

V. Menopause and the Menstrual Equity Movement

"Menstrual equity" is a relatively young phrase, coined in 2015 by Jennifer Weiss-Wolf.[153] This phrase was used to discuss and frame the burgeoning policy agenda that addresses the "far-reaching societal importance of and need…to address the safety, affordability, and availability of menstrual products for everyone who needs them."[154] In the five years since the birth of the

[149] *Id*.
[150] *Id*. at 435.
[151] *Id*. at 438.
[152] *Id*.
[153] Menstrual Equity: A Legislative Toolkit, ACLU (Dec. 2019), available at: https://www.aclu.org/sites/default/files/field_document/121119-sj-periodequitytoolkit.pdf.
[154] *Id.*

movement, its advocates have achieved significant traction and seen legislative change to mandate menstrual access and affordable products in numerous states and cities.[155]

As the menstrual equity movement continues to gain traction and support, it is broadening its scope to include other issues related to female biology while, at the same time, identifying vulnerable cohorts for targeted advocacy. Given the mere fact that menopause is defined in terms of the cessation of menstruation and that all living menstruators will eventually experience menopause, "menopause equity" is a natural extension of the menstrual equity movement.[156] The discussion that follows summarizes the argument for pursuing menopause equity through the existing framework for menstrual equity, rather than seeking to build a new movement and risking a dilution of, and reducing the effectiveness of, each individual movement. Further, the persons who would benefit from menstrual equity are the same as those who, someday, are likely to face menopause discrimination.

A. The Menopause Equity Movement's Early Success Has Led Advocates to Broaden Its Scope

The early focus of the menopause equity movement has been on the "tampon tax," or sales taxes on menstrual products imposed by states and cities where other health and hygiene items are exempt from sales taxes.[157] However, as the movement has grown, its advocacy has expanded to address access to menstrual products for incarcerated women and students in schools; issues related to breaks and hygiene issues faced by low-wage workers, unique issues affecting marginalized menstruators, including persons of color, homeless persons, and transgender and

[155] Jennifer Weiss-Wolf, *The ERA Campaign and Menstrual Equity*, 43 N.Y.U. REV. L. & SOC. CHANGE HARBINGER I 168, 169 (June 17, 2019).
[156] The idea for this Note originated in a 2019 law class discussion of the menstrual equity movement. The author, a menopausal cis-gender woman, noted that the movement excluded former menstruators like herself, prompting her to choose menstrual equity for a course paper topic, which formed the basis for this paper.
[157] Weiss-Wolf, *supra* note 155, at 171.

non-binary menstruators; and classification of menstrual products for reimbursement by tax-exempt Health Savings or Flexible Spending Accounts.[158]

The menopause equity movement's early focus on the more tangible aspects of menstruation, such as access to menstrual hygiene products, does not speak to the needs of menopausal former menstruators who no longer need access to such products. However, the cultural biases and shame related to menstruation and menstruators, which the movement confronts, do not stop when menstruation ends and therefore, equity for menopause is, in fact, menstrual equity.[159] As Margaret Johnson notes in her 2019 paper on menstrual justice, "[s]ociety expects menstruators to be solely and invisibly responsible for their menstruation without recognizing it as part of the necessary reproductive life cycle."[160] Professor Johnson's description could equally apply to persons experiencing perimenopause.

B. Menopause Equity Advocates Recognize Menopause as a Next Phase For The Movement

Looking forward on behalf of the menstrual equity movement, Ms. Weiss-Wolf has identified the "other M-word" as one of the next priorities for the menstrual equity movement.[161] In a recent opinion piece, she notes that there are three generations that are now, or will be soon, facing real time issues perimenopause: "powerhouse" baby-boomers; GenXers, like herself; and millennials. In support of the natural alignment of menopause equity with the menstrual equity movement, she notes "[m]uch like we've shown with the movement for menstrual equity, menopause can also be a compelling catalyst for better, more representative lawmaking—from

[158] *Id.* at 171-73.
[159] *See also* Johnson, *supra* note 1.
[160] *Id.* at 2.
[161] Jennifer Weiss-Wolf, *The Fight for Menstrual Equity Continues in 2021*, MARIE CLAIRE (Jan. 27, 2021), https://www.marieclaire.com/politics/a35280718/menstrual-equity-2021-goals.

how we consider the equitable provision of health care to protections from workplace discrimination."

Given the common constituency amongst menstruators, menstruators in perimenopause, and former menstruators in menopause, and shared focus on removing discriminatory barriers related to menstrual concerns, advocates interested in menopause equity should seek to align with the menstrual equity movement and further the menstrual equity movement by welcoming this closely aligned opportunity for advocacy.

V. Conclusion

Issues related to workplace discrimination appear to be unlawful according to the plain language of existing civil rights protections afforded by the ADA, Title VII, and the ADEA. However, to date, the courts have not interpreted these statutes in a way that protects menopausal workers. While legal advocates should continue to build on arguments made to provide such protections (e.g., arguing for PDA coverage of perimenopause in *Coleman*), it is time to break the silent taboo of menopause through focused advocacy, like that of the burgeoning menstrual equity movement, to dispel the myths and biases that have plagued menopausal menstruators for centuries.