

[Professor Marcia McCormick](#) at the Workplace Prof Blog wrote an interesting [analysis](#) of the United States Supreme Court's [Hulteen](#) pregnancy discrimination decision that I wrote about in a [post](#) yesterday. Her comments cause me to respond below.

Prof. M:

Your analysis is thought provoking, but I think mistaken to the extent you believe the *Hulteen* Court "implicitly concludes that Congress did not define sex discrimination in the PDA, but simply added an additional classification." If the majority intended such an implication, then most certainly the Court would have addressed not only [General Elec. Co. v. Gilbert](#), 429 U.S. 125 (1976) but also [Newport News Shipbuilding & Dry Dock Co. v. EEOC](#), 462 U. S. 669 (1983).

After all, that post-*Gilbert* decision declared, "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." [Id. at 684](#). Furthermore, the *Newport News* Court made plain that Congress fully rejected the arguments that relied upon *Gilbert* as you suggest: "When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." [Id. at 678](#).

I don't disagree with you that Justices Thomas, Scalia, Alito, and Roberts are likely to take every opportunity to raise the bar on proving motive that is invidious discrimination. The question is whether they will exercise intellectual honesty consistent with their espoused views that their decisions should be on the most narrow grounds possible. If so, limiting *Hulteen* to a fact based decision is easy. If not, then they need to find one other Justice to make whatever

law serves their agenda of the moment, and I am sure that, on the Court as it is currently comprised, they will.