UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 61 | Number 4 Article 6

4-1-1983

Employment Discrimination-Pregnancy Discrimination against Male Employees: Extending the Pregnancy Discrimination Act to Employees' Dependents

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NOTE

Employment Discrimination—Pregnancy Discrimination Against Male Employees: Extending the Pregnancy Discrimination Act to Employees' Dependents

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex.[1] In 1978, Congress enacted the Pregnancy Discrimination Act (PDA), thereby amending Title VII to provide that sex discrimination includes discrimination on the basis of pregnancy.[2] The Fourth Circuit in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,[3] and the Ninth Circuit in *EEOC v. Lockheed Missile & Space Co.*[4] have reached radically different results concerning the scope of the PDA and its effect on prior Title VII law. This note discusses each court's analysis and considers the relative merits of their conclusions.

In 1976 the Supreme Court in *General Electric Co. v. Gilbert*[5] held that an employer did not violate Title VII by providing disability insurance benefits to all employees, but excluding from the plan's coverage disabilities arising from pregnancy.[6] The Court found that such an exclusion was not per se gender-based discrimination and caused no gender-based discriminatory effect.[7] The

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1. Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to 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 race, color, religion, sex, or national origin; or
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> (2) 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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976).

2. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (Supp. IV 1980)). See *infra* text accompanying note 12 for the text of the PDA.

3. 667 F.2d 448, *aff'd per curiam on rehearing en banc*, 682 F.2d 113 (4th Cir.), *cert. granted*, 103 S. Ct. 487 (1982).

4. 680 F.2d 1243 (9th Cir. 1982).

5. 429 U.S. 125 (1976).

6. *Id.* at 127-28. General Electric provided nonoccupational sickness and accident benefits to all its employees, but denied all claims arising out of an absence from work due to pregnancy. Female employees whose claims for pregnancy disability benefits had been denied brought a class action against General Electric seeking a declaration that the plan constituted sex discrimination in violation of Title VII. The district court held that the plan was discriminatory. 375 F. Supp. 367 (E.D. Va. 1974). The court of appeals affirmed. 519 F.2d 661 (4th Cir. 1975).

7. 429 U.S. at 136-39. The *Gilbert* Court cited Geduldig v. Aiello, 417 U.S. 484 (1974) (disability plan established under California law excluding pregnancy benefits held not violative of equal protection clause), as support for its holding. 429 U.S. at 134 (citing 417 U.S. at 496 n.20). Classifying employees on the basis of sex and then treating each class differently is per se discrimination. *Geduldig* had distinguished two such sex dixcrimination cases: Frontiero v. Richardson, 411 U.S. 667 (1973) (requirement that servicewomen prove that they supported husbands in order to receive spousal medical benefits, while servicemen automatically entitled to benefits for dependents), and Reed v. Reed, 404 U.S. 71 (1971) (statutory preference for naming men rather

plan did not constitute gender-based discrimination since pregnancy classifications do not divide the favored and disfavored groups on the basis of gender. Rather, the plan put pregnant women in one class and "non-pregnant persons" of both sexes in the other.[8] The plan had no discriminatory effect since there was no proof that the plan was worth more to men than to women.[9] In so holding, the Court refused to follow the Equal Employment Opportunity Commission's (EEOC) guidelines on the issue[10] and overruled the unanimous conclusion of the six circuit courts that had considered the question.[11]

In response to the *Gilbert* decision, Congress amended Title VII by enacting the Pregnancy Discrimination Act, which added the following subsection:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because or on the basis of pregnancy, child-

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than women as estate administrators). A facially neutral classification may still violate Title VII if the effect of the classification is to discriminate against members of one class. Dothard v. Rawlinson, 433 U.S. 321 (1977); Washington v. Davis, 426 U.S. 229 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

8. 429 U.S. at 135. In determining whether the plan constituted sex based discrimination, the *Gilbert* Court used the equal protection analysis of Geduldig v. Aiello, 417 U.S. 484 (1974). In *Geduldig*, the Court held that California's exclusion of pregnancy benefits from a disability program did not violate the equal protection clause of the fourteenth amendment. The *Gilbert* Court approvingly read *Geduldig* as holding that a pregnancy based exclusion "is not a gender based discrimination at all," 429 U.S. at 136, and quoted the *Geduldig* opinion extensively: " 'The lack of identity between the excluded disability and gender as such . . . becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.' " 429 U.S. at 135 (quoting 417 U.S. at 496-97). For an analysis of the *Geduldig* decision, see Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975).

9. 429 U.S. at 139. The Court reasoned that pregnancy-related disabilities constitute an additional risk to women, and the failure to compensate them for this risk does not destroy the presumed parity of the evenhanded inclusion of risks. For discussions of the cases that decided claims of pregnancy-based discrimination prior to the PDA, see Barkett, *Pregnancy Discrimination—Purpose, Effect, and Nashville Gas Co. v. Satty*, 16 J. FAM. L. 401 (1978); Ginsburg, *Gender and the Constitution*, 44 CIN. L. REV. 1 (1975); Note, *The Irrational Trend Toward Mandatory Maternity Coverage*, 26 DRAKE L. REV. 758 (1977); Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last*, 44 GEO. WASH. L. REV. 381 (1976); Note, *Gender-Based Discrimination After Gilbert and Satty*, 12 J. MAR. J. PRAC. & PROC. 459 (1979). For commentaries on the PDA and its effect on Title VII law, see Coffin, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 WASH. U.L.Q. 607 (1980); Thomas, *Differential Treatment of Pregnancy in Employee Disability Benefit Programs: Title VII and Equal Protection Clause Analysis*, 60 OR. L. REV. 249 (1981); Comment, *The 1978 Amendment to Title VII: The Legislative Reaction to the Geduldig - Gilbert - Satty Pregnancy Exclusion Problems in Disability Benefits Programs*, 27 LOY. L. REV. 532 (1981).

10. 429 U.S. at 140-45. The EEOC was established to interpret and administer Title VII. *See* 42 U.S.C. §§ 2000e-4 to 2000e-5 (1976). The EEOC publishes guidelines that reflect the agency's interpretation of the controlling statutes. The guidelines do not have the force of law, but are entitled to consideration by the courts. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971). The *Gilbert* Court found that the EEOC guidelines which treated pregnancy discrimination as sex discrimination were in conflict with what the Court termed the "plain meaning" of the statute. 429 U.S. at 140-41, 145.

11. Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1976), *vacated*, 429 U.S. 744 (1976); Satty v. Nashville Gas Co., 522 F.2d 850 (5th Cir. 1975), *modified*, 434 U.S. 136 (1976); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Communications Workers v. American Tel. & Tel., 513 F.2d 1024 (2d Cir. 1975), *vacated*, 429 U.S. 744 (1976); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976).

> birth, 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 . . . .[12]

Exactly what was left of *Gilbert* was unclear. It was clear, however, that discriminatory treatment of employees based on pregnancy was sex discrimination under the law.

The reach of the PDA has become a central issue in a similar employment situation: if an employer extends medical insurance coverage to employees' *spouses*, does limiting or excluding benefits for *spouses*' pregnancy-related expenses violate Title VII as amended by the PDA? The answer depends on the courts' construction of the PDA. One construction, adopted by the Ninth Circuit in *Lockheed*, is that the PDA does not extend protection to dependents, but provides only that employers may not discriminate against women employees on the basis of pregnancy.[13] An alternate construction, adopted by the Fourth Circuit in *Newport News*, is that the PDA renders discrimination on the basis of pregnancy sex discrimination for all Title VII purposes.[14]

The issue was first presented in *Newport News*. The company provided a health insurance plan for its employees' dependents, but limited the pregnancy-related hospital benefits.[15] A male employee, having incurred expenses in connection with the birth of his child, filed a charge with the EEOC alleging that the company's limitation on pregnancy benefits discriminated against him.[16] This action found support in the EEOC's Guidelines on Discrimination Because of Sex.[17] The company reacted by seeking an injunction against the EEOC's implementation and enforcement of the "unauthorized" guide-

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12. 42 U.S.C. § 2000e(k) (Supp. IV 1980).

13. 680 F.2d at 1247.

14. 667 F.2d at 451.

15. 667 F.2d at 449. The company's hospitalization and medical-surgical insurance plan extended coverage to spouses and unmarried children between the ages of 14 days and 19 years. The benefits included the full cost of a hospital room for up to 120 days, and also included 100% of the first $750 and 80% of the excess for other hospital and medical expenses while hospitalized, for a maximum of 120 days. As for maternity benefits for an employee's spouse, the plan provided full coverage for physician's charges, but limited coverage of hospital charges for an uncomplicated delivery to $500. *Id.*

16. 667 F.2d at 449.

17. In 1979, the EEOC issued guidelines, in a question and answer format, interpreting the PDA. The questions and answers concerning employees' dependents provide as follows:

> 21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?
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> A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employers' [sic] insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions. But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.
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> 22. Q. Must an employer provide the same level of health insurance coverage for the

lines.[18] The EEOC responded with a complaint against the company, alleging that the company's health plan was discriminatory.[19] The district court found that the PDA applies only to employees and does not extend to employees' dependents.[20] On appeal, the Fourth Circuit reversed the district court, concluding that the PDA applies to dependents.[21] On rehearing en banc, the Fourth Circuit adopted the panel opinion and reversed the district court.[22]

While appeal was pending in the *Newport News* decision, the Ninth Circuit was confronted with the same issue in *Lockheed*. Lockheed's medical benefit plan covered employees' dependents, but completely excluded any pregnancy benefits.[23] The district court found that Lockheed was entitled to summary judgment "for the reasons set forth in *Newport News*."[24] On appeal, the Ninth Circuit, though aware of the Fourth Circuit's panel decision reversing the district court, affirmed the lower court's decision.[25]

Although the courts reached different results, the positions of the EEOC and the employers appeared the same in both cases. The EEOC contended that a limitation on spousal pregnancy benefits discriminates against men because it provides a lesser compensation package for male employees than it does for female employees: although a female employee receives full spousal coverage, a male employee's spousal coverage is limited with respect to pregnancy benefits.[26] And since a distinction on the basis of pregnancy is a distinction on the basis of sex, the male employees' spouses, and therefore the male employees, are discriminated against on the basis of sex.[27]

The employers, Newport News Shipbuilding and Lockheed, argued that

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pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of the spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employees spouse must be coveraged at the 50 percent level.

29 C.F.R. app. § 1604 (1982).

18. 667 F.2d at 450.

19. *Id.*

20. *Id.* at 70-71.

21. 667 F.2d at 451.

22. 682 F.2d at 113.

23. 680 F.2d at 1245.

24. 27 Fair Empl. Prac. Cas. 1209, 1209 (N.D. Cal. 1981). Two other district courts have since considered the issue. In EEOC v. Joslyn Mfg. and Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), the court followed the *Newport* and *Lockheed* district court decisions. In EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo. 1982), decided after the reversal of *Newport*, the court "under[took] its own analysis of the statute," but substantively followed the other district courts. *Id.* at 156.

25. 680 F.2d at 1247. The court did note that the Fourth Circuit's panel opinion had been scheduled for rehearing en banc. 680 F.2d at 1244 n.1.

26. 680 F.2d at 1245; 667 F.2d at 449.

27. 680 F.2d at 1245; 667 F.2d at 450.

the PDA should not extend to spouses of employees, emphasizing that the Act was originally enacted in reaction to the *Gilbert* decision and was therefore intended to protect only women workers. With respect to spouses of employees, the companies argued, the *Gilbert* rationale remains intact, and the exclusion of pregnancy benefits is not sex discrimination.[28]

Both circuit courts attempted to determine congressional intent underlying the PDA by examining the language of the statute.[29] In *Lockheed* the Ninth Circuit viewed the PDA as providing that the word "sex" is to be read to mean "pregnancy, childbirth, or related medical condition."[30] Reading this construction into Title VII, the court found that the PDA amends Title VII to read that "it shall be an unlawful employment practice for an employer to 'discriminate against any individual with respect to his compensation . . . because of *such individual's* . . . pregnancy, childbirth, or related medical condition.' "[31] The court concluded that this construction cannot be read to apply to male employees. The court pointed to two phrases in the PDA that support this construction: " 'employment-related purposes' " and " 'other persons not so affected but similar in their ability or inability to work.' "[32] These phrases indicated to the court that the PDA applies only to employees. Unfortunately, the court did not explain why the extension of benefits to dependents fails to serve an "employment-related purpose." As for the phrase "other persons not so affected but similar in their ability or inability to work," the court presumably agreed with the dissenting opinion in *Newport News*: "To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee."[33]

The Fourth Circuit took a much broader approach to construction of the PDA. The court did not read the PDA as providing that sex means pregnancy, but instead construed the statute as providing that pregnancy disabilities are within the meaning of the word "sex."[34] Rather than superimposing the PDA onto Title VII, the court simply found that "there is nothing in the first clause [of the PDA] to suggest that the definition [of sex] will vary depending upon

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28. 680 F.2d at 1244-46; 667 F.2d at 450.

29. 680 F.2d at 1245; 667 F.2d at 450-51. Inquiries into the meaning of a statute begin with an examination of the language contained in the statute. International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558 (1979); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

30. 680 F.2d at 1245.

31. *Id.* (Quoting 42 U.S.C. §§ 2000e-2(a)(1), 2000e(k) (1976 & Supp. IV 1980) (emphasis by the court)). The court could not really have meant that the PDA substituted "pregnancy" for "sex" in Title VII. The PDA expressly provides that "sex" includes, but is not limited to, pregnancy. Furthermore, such a construction would make Title VII a statute that protects only against pregnancy discrimination. The only reasonable reading of the Ninth Circuit opinion assumes that the court intended its statements to be limited to the context in which they were employed—cases involving the PDA.

32. 680 F.2d at 1245 (quoting 42 U.S.C. § 2000e(k)).

33. 667 F.2d at 452. Judge Hall, dissenting in *Newport News*, viewed this single phrase as issue determinative. *Id.* Judge Widener and Judge Chapman joined in Judge Hall's dissent at the en banc hearing. 682 F.2d at 114.

34. *See* 667 F.2d at 450.

the employment status of the pregnant women."[35] As for the phrase "employment-related purpose," the court noted that the extension of benefits to spouses of employees serves an employment-related purpose just as does the extension of benefits to the employees themselves.[36] The court construed the statutory phrase "ability or inability to work" as denoting disability and not as requiring that the spouse must be an employee of the employer providing the coverage.[37] The court further observed that the PDA refers to " 'other persons not so affected,' " rather than to " 'other *employees* not so affected.' "[38]

After their grammatical exploration of the PDA, both circuit courts attempted to determine congressional intent by examining the PDA's legislative history.[39] The Ninth Circuit relied primarily on the following passage from the Senate Committee Report:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependants of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees; it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.[40]

Relying on this statement, the Ninth Circuit emphasized that the purpose of the PDA was to protect women employees, and that existing Title VII principles—unaltered by the PDA—should be applied to resolve the question of dependents' benefits.[41] The court reasoned that *Gilbert* announced one of Title VII's basic principles: for discrimination to be gender-based, the line between groups must be drawn strictly between males and females.[42] Since the *Gilbert* Court had already applied this "basic principle" to pregnancy benefit exclusions and had determined that such exclusions were not gender-based discrimination, that result necessarily applies to dependents.[43] In essence, then, the court found that the PDA did not alter *Gilbert*'s rationale, but merely provided a narrow exception to *Gilbert* for female employees.

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35. *Id.*

36. *Id.* The extension of benefits to spouses has been considered a fringe benefit to the employee for Title VII purposes. *See* Wambheim v. J.C. Penney Co., 642 F.2d 362 (9th Cir. 1981) (employer's health insurance plan that provided coverage for spouses only if the employee earned more than 50% of the combined income violated Title VII since it disproportionately deprived female employees of spousal benefits). *See also* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 709 n.14 (1978) (insurance benefits for spouses included in employee benefit package for Title VII purposes).

37. 667 F.2d at 450-51.

38. *Id.* at 451 (quoting 42 U.S.C. § 2000e(k); emphasis by the court).

39. *See* 680 F.2d at 1245; 667 F.2d at 451. The legislative history of a statute includes committee reports and floor discussions. *See* Woodwork Mfg. Ass'n v. NLRB, 386 U.S. 612, 639-42 (1967); Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384, 390-95 (1950).

40. S. REP. No. 331, 95th Cong., 1st Sess. 5-6 (1977).

41. 680 F.2d at 1246.

42. *Id.*

43. *Id.* at 1247.

The Fourth Circuit approached the legislative history of the PDA very differently. The court acknowledged congressional references to protecting "women workers" or "pregnant employees."[44] In response, the court pointed out that the two senators who specifically addressed the issue of dependents' benefits thought that the PDA would apply.[45] Like the Ninth Circuit, the

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44. 667 F.2d at 451. Some of the passages that reflect a purpose to protect female employees are as follows:

> [T]his bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert* . . . . This approach represents only basic fairness for employees who become pregnant . . . . [W]e can no longer in this country legislate with regard to women workers on the basis of outdated stereotypes and myths.

123 CONG. REC. 29,387 (1977).

"The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." H.R. REP. No. 948, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4752.

"H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex." H.R. REP. No. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4751.

"This bill would require that women disabled due to pregnancy, childbirth or other related medical conditions be provided the same benefits as those provided other disabled workers." H.R. REP. No. 948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753.

See also supra text accompanying note 43, and *infra* note 49.

45. *See* 667 F.2d at 451. Senator Bayh, one of the sponsors of the Senate bill that became the PDA, stated:

> There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

123 CONG. REC. 29,642 (1977), *cited in* 667 F.2d at 451 n.3.

Senator Cranston, a cosponsor of the legislation, stated:

> When the Human Resources Committee considered how S. 995 would affect medical coverage for dependents of employees, the question was raised about the obligation of an employer to pay for the pregnancy-related medical expenses of spouses of employees. The committee presumed that most comprehensive medical plans do cover dependents and that it was unlikely that any comprehensive plan covering spouses would cover husbands of women employees but not wives of male employees. Thus, the committee did not directly answer the question of whether such plans would be discriminatory under title VII.
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> Mr. President, I would like to express for the record my own view that such a plan would indeed be discriminatory, and would be prohibited by the title VII sex discrimination ban.

123 CONG. REC. 29,663 (1977), *cited in* 667 F.2d at 451 n.3.

The Ninth Circuit treated these statements as personal opinions of the speakers rather than as statements reflecting congressional intent. 680 F.2d at 1245 n.2. The court further noted that while Mr. Sarasin, a supporter of the House bill, expressed the view that such a plan would be discriminatory, he then stated, "I don't think that this is the intent, but I don't see how you can read it any other way." *Id.*

There was also a conversation between Senator Hatch and Senator Williams that suggests the PDA would apply only to pregnant female employees. Senator Williams, however, was discussing the bill in the context of income maintenance plans. Since such plans replace lost wages of disabled employees, the discussion is irrelevant to dependents' medical expenses. Senator Hatch appears not to have drawn the distinction between income maintenance plans and medical insurance coverage. 123 CONG. REC. 29,644 (1977).

court considered a passage from the Senate Committee Report that suggested the issue was left unanswered.[46] Unlike the Ninth Circuit, however, the Fourth Circuit refused to resolve the issue by considering the reach of Title VII prior to the enactment of the PDA: "If the Senate Committee thought the question would be resolved in subsequent litigation, the statute to be applied surely would be the statute as it existed at the time the operative facts developed."[47] As for the PDA's effect on *Gilbert*, the court stated: "We cannot read the statute so narrowly as to overturn the specific holding in *Gilbert* without affecting the reasoning upon which that holding was based."[48] The court concluded that the new statute indicates a purpose to equate distinctions based on pregnancy with distinctions based on sex.[49]

Thus, the circuit courts' analyses diverged at two main points. First, the Ninth Circuit found that the wording of the statute indicated congressional intent to protect only female employees, while the Fourth Circuit found that the PDA can be read to apply to all employment situations. Looking only to the language of the PDA, either interpretation is reasonable. The PDA is too broadly written to apply only to female employees, but too narrow to include employees' dependents. On its face, the PDA applies to all individuals, whether male or female, and simply provides that sex discrimination includes discrimination on the basis of pregnancy. On the other hand, the specific language of the PDA supports an implication that the statute refers only to women employees. In any event, it is apparent from the legislative history that Congress left the issue open.[50] Yet the Ninth Circuit found that the Act's language revealed that Congress intended to limit the PDA to employees.[51]

The second and most important difference in the courts' analyses is their view of the PDA's effect on the *Gilbert* decision. Both courts agreed that the issue was left open, to be decided on "existing" or "basic" Title VII princi-

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46. 667 F.2d at 451. The court reproduced the passage in full:

> "It was suggested before this committee that an effect of Title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.
>
> "On the other hand, the question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under Title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents."

Id. (quoting S. REP. No. 331, 95th Cong., 1st Sess. 5-6 (1977)).

47. 667 F.2d at 451.

48. *Id.*

49. *Id.*

50. *See supra* notes 40 & 46 and accompanying text.

51. *See supra* text accompanying notes 30-33.

ples.[52] From this premise, however, the courts moved in separate directions. The Fourth Circuit viewed the PDA as overruling the *Gilbert* decision and proceeded to apply the "new" statute to resolve the issue. The Ninth Circuit, on the other hand, found that the PDA was meant only to provide a narrow exception to *Gilbert* for female employees; outside the realm of female employees, *Gilbert* is alive and well.

There are a number of problems with the Ninth Circuit's analysis. In support of its conclusion that the PDA was meant to apply only to female employees, the court relied on a statement in the Senate Report that the basic purpose of the legislation was to protect women employees.[53] Indeed, there is no doubt that congressional concern centered upon female employees.[54] This concern, however, does not necessarily limit the scope of the statute. For example, there are many statements in previous Title VII history that voice concern for blacks, minorities, and women,[55] but there is no question that Title VII also protects whites and men.[56] Although the motivation for forbiding employment discrimination may be past practices that discriminate against certain groups, the scope of Title VII has not been limited to those groups. Accordingly, congressional concern for one group is little justification for allowing the same discriminatory practice against a second group.

A second problem with the Ninth Circuit's argument is its assumption that the *Gilbert* analysis is one of the "basic principles" of Title VII that should be applied to dependents.[57] By making this assumption, the court effectively decided the issue without considering whether Congress meant for *Gilbert* to be applied at all. Contrary to the court's belief that *Gilbert* should resolve the issue, there is ample legislative history that suggests Congress rejected both the result and the rationale of *Gilbert*.[58] For example, the Senate Report cited two

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52. *See* 680 F.2d at 1246; 667 F.2d at 451.

53. *See supra* text accompanying notes 40-41.

54. *See supra* note 44.

55. *See* 1964 U.S. CODE CONG. & AD. NEWS 2393-94; 110 CONG. REC. 2577-84 (1964).

56. *See, e.g.*, McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976) (white employee may allege race discrimination under Title VII); Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) (male employee challenged retirement benefits); Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975) (male employee may allege sex discrimination in retirement benefits), *rev'd on other grounds*, 427 U.S. 445 (1976); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.) (male challenged company's policy of using only females for flight attendants), *cert. denied*, 404 U.S. 950 (1971).

57. *See supra* text accompanying notes 42-43.

58. The following passages from the PDA's legislative history reject *Gilbert*'s conclusion that pregnancy-based distinctions are not sex based:

> This bill is intended to make plain that, under title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, child-birth, and related medical conditions is discrimination based on sex. Thus, the bill defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women; it does not change the application of title VII to sex discrimination in any other way.

S. REP. No. 331, 95th Cong., 1st Sess. 3-4 (1977).

> [T]he bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions.

S. REP. No. 331, 95th Cong., 1st Sess. 4 (1977).

> This bill became necessary in light of the Supreme Court's decision in *Gilbert* . . . which

passages from the dissenting opinions in *Gilbert* that

> correctly expressed both the principle and the meaning of Title VII. As Mr. Justice Brennan stated: "Surely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.' " Likewise, Mr. Justice Stevens stated that, "(b)y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[59]

These statements attack the heart of the *Gilbert* rationale and indicate a complete rejection of the logic of the decision. Thus, there is evidence that Congress disagreed with *Gilbert*'s finding that a pregnancy exclusion "is not a gender based discrimination at all"[60] and found that the *Gilbert* result offended common sense. It is thus difficult to believe that Congress, by stating that dependents' benefits would be determined on the basis of existing Title VII principles, was suggesting that the *Gilbert* rationale should resolve the issue.

There is a second reason Congress could not have intended that the courts should resolve the issue with the *Gilbert* analysis. Both circuit courts agreed that Congress did not resolve the dependents' benefits issue, but left it open for later decision by the courts.[61] If the issue was intended to remain an open one, *Gilbert* could not have been considered controlling, for if Congress viewed *Gilbert* as one of the basic Title VII principles to be used in resolving the issue, there would be no question that dependents' pregnancies could be excluded from an employer's insurance coverage.

The question remains as to what Congress meant by "basic principles of Title VII"[62] if it did not mean the *Gilbert* rationale. The meaning of this phrase becomes apparent when one considers the difference between coverage for employees and dependents. With female employees, *any* special limitation on pregnancy related coverage is discriminatory since the female receives less coverage than her male counterpart. Limitations on dependents' coverage, however, are not necessarily discriminatory, because not all special limitations result in differential benefits for male and female employees. For instance, an employer is not required to cover an employee's dependents to the same extent

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held that the exclusion of pregnancy and related conditions from otherwise comprehensive disability insurance plans did not constitute sex discrimination in violation of Title VII. This interpretation of Title VII was not in keeping with the original congressional intent and enactment of legislation to clarify the intent of Congress to prohibit pregnancy discrimination became imperative.

124 CONG. REC. 36,818 (1978).

> [W]hen an employer's plan provides protection in the event of virtually every conceivable disability but one, and that one can affect only women, it is an inescapable conclusion that such a plan by definition discriminates on the basis of sex.

123 CONG. REC. 4137 (1977). *See also infra* text accompanying note 59.

59. S. REP. No. 331, 95th Cong., 1st Sess. 2-3 (1977) (quoting *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting), 161-62 (Stevens, J., dissenting)).

60. 429 U.S. at 136.

61. *See supra* text accompanying notes 40-41 & 46.

62. S. REP. No. 331, 95th Cong., 1st Sess. 5 (1977).

as the employee himself.[63] As long as all dependents are covered to the same extent, the employees receive equal treatment. Furthermore, an employer could provide dependent children with full coverage but completely exclude dependent children's pregnancy benefits.[64] Again, the male and female employees receive equal compensation packages for their dependents. The issue, then, is whether male and female employees receive equal treatment, and "basic Title VII principles," rather than the PDA, resolve each particular situation with respect to dependents.

The Ninth Circuit's interpretation of the PDA altered it from a statute clarifying the meaning of sex discrimination as used in Title VII to a very narrow statute protecting only female employees. This construction produces a rather anamolous result: for women employees, discrimination on the basis of pregnancy is discrimination on the basis of sex; for employees' spouses, discrimination on the basis of pregnancy " 'is not a gender-based discrimination at all.' "[65] The Fourth Circuit, rather than strangling the PDA with the *Gilbert* decision, viewed the PDA as an integral part of Title VII, and took a fresh look at the reach of the amended Title VII. In so doing, the court reached a clear and logically consistent result: distinctions based on pregnancy are distinctions based on sex.[66]

Once the PDA is read as equating pregnancy with sex for all Title VII purposes, there is no question that a pregnancy exclusion is per se discriminatory under basic Title VII principles. The female employee receives full spousal coverage, while the male employee's spousal coverage is limited. Since this pregnancy limitation is a sex based limitation, the male receives less complete coverage solely because of his sex.

While the Ninth Circuit's legal analysis is open to criticism, there are equitable considerations that underlie, and seem to justify, the court's holding. Although Congress may have decided that equality of employment opportunity requires that pregnant workers be treated as other disabled persons, there is no compelling reason to do the same for employees' wives. Pregnancy is to a large extent a voluntary condition, not a disease or illness. But this argument loses much of its force when the employer has already decided to insure dependents of employees. Assuming that all employers who cover dependents also cover employees, the post-PDA female employee is already covered for pregnancy expenses. Viewing employee and spouse as a family unit, the male employee sees that his female coworker's family is covered for all medical

63. *See supra* note 17.

64. *See id.* Judge Wright, specially concurring in *Lockheed*, felt that the issue was whether the male and female health benefit plans were equivalent. Since the legislative history expressly left the issue open, he believed that neither the PDA nor *Gilbert* answered the question. He concluded that since a male employee must bear the cost of his spouse's pregnancy and a female employee must bear the cost of her "daughter's" pregnancy, the plans provided equal coverage. 680 F.2d at 1247-48 (Wright, J., concurring). This argument disregards the fact that a male employee must bear the cost of his spouse's pregnancy *and* his child's pregnancy, while the female employee must cover only the costs of her child's pregnancy.

65. *See Lockheed*, 680 F.2d at 1246 (quoting *Gilbert*, 429 U.S. at 136).

66. 667 F.2d at 451.

expenses, including those resulting from pregnancy. As for his own family, there is a glaring exception to the coverage he receives from the employer. Although the extent of a wife's coverage does not have to match the employee's coverage, to exclude completely coverage for just one medical expense, for only the male employee's family, solely on the basis of the employee's sex, is patently discriminatory.

The issue presented in *Lockheed* and *Newport News* concerns an important right for the male employee, his wife, and his family. In a wider context, its resolution also affects the legality of pregnancy discrimination throughout Title VII law. The two circuit courts that have considered whether the PDA applies only to female employees have reached opposite results. This discrepancy is based on the courts' different views of the purpose of the PDA, which in turn are based on inconsistent interpretations of the statutory wording and the legislative history.

The Fourth Circuit analysis appears to be the better reasoned approach. The court recognized that the ambiguous wording of the PDA was not intended to resolve the issue. Although individual statements within the legislative history can be construed as supporting each court's decision, when Congress spoke directly to the issue, it expressly stated that it was leaving the issue unanswered. The question then becomes whether the analysis of the Supreme Court in *Gilbert* should resolve the issue. The Ninth Circuit assumed that it should. The Fourth Circuit, on the other hand, viewed the PDA as overruling *Gilbert*'s finding that pregnancy discrimination is not sex discrimination. This result is supported by Congress' express and uncontroverted disagreement with *Gilbert*'s "offensive" result and Congress' position that the issue is still open and thus was not previously answered by the *Gilbert* decision. It is also supported by the clear and consistent result that it reaches: pregnancy is related to an individual's sex, and pregnancy discrimination is therefore sex discrimination. The view of the Fourth Circuit is sound because it provides not only equal treatment of employees, but also equitable treatment. Accordingly, future courts considering the issue should follow the Fourth Circuit: if an employer chooses to extend insurance coverage to dependents, a special limitation on spousal pregnancy benefits violates both the principle and the meaning of the Pregnancy Discrimination Act.

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