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Mandatory Maternity Leaves for Teachers -- The Equal Protection Clause and Title VII of the Civil Rights Act of 1964

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COMMENTS

Mandatory Maternity Leaves for Teachers—The Equal Protection Clause and Title VII of the Civil Rights Act of 1964

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adopted to the general constitution of things, and cannot be based upon exceptional cases.[1]

Women can no longer be treated in the manner described above, yet many state laws and regulations have as their underlying basis protection of the female. An example of this is the standard mandatory maternity leave regulations of some school boards. These regulations generally require that if a teacher becomes pregnant she must notify the school board of the expected date of normal delivery. She will then be required to take a leave of absence, usually beginning at the end of the fourth or fifth month of pregnancy, and often continuing for several months after delivery.[2] These regulations have recently been under attack on a number of fronts[3] and two United States Courts of Appeals

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[1]Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., dissenting).

[2]There are wide variations on this theme. An Atlanta school board regulation granted a leave of absence for tenured pregnant teachers but treated untenured pregnant teachers as having "resigned." After the birth of the child the untenured teacher could return to the school system only as a substitute teacher. This policy was struck down in Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971). The San Francisco School District policy was to require a leave of absence two months before birth which continued for one month after the birthof the child. This policy was struck down in Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972).

[3]Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971), *modified*, 464 F.2d 1223 (5th Cir. 1972); La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971), *rev'd*, 465 F.2d 1184 (6th Cir. 1972); Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971), *aff'd*, 467 F.2d 262 (4th Cir. 1972), *rev'd*

have reached opposite conclusions regarding their validity under the equal protection clause.

In *La Fleur v. Cleveland Board of Education*[4] the Sixth Circuit struck down a school board rule requiring an unpaid leave of absence from school duties beginning five months before expected delivery and continuing until the beginning of the first term after the child reaches three months of age. The school board attempted to justify its regulation as providing for continuity of classroom education, relieving the board of burdensome administrative problems, and removing pregnant teachers as the source of "pointing, giggling and . . . snide remarks,"[5] but the court found that the regulation was arbitrary and unreasonable in its overbreadth and thus denied pregnant teachers equal protection of the laws. The court reasoned that any teacher disability (including the common cold) causes some administrative problems; that the basic rights involved in the employment relationship cannot be made to yield to embarrassment; that the medical evidence presented no support for the regulation; and that there was no employer interest at all involved in the three-month post-delivery leave requirement.

In *Cohen v. Chesterfield County School Board*[6] the Fourth Circuit, sitting *en banc*, reversed its earlier panel opinion in the same case[7] by upholding a school board regulation that required that notice of the fact of pregnancy be given six months in advance of the date of expected birth and that employment terminate four months prior to that date. The teacher had contended that the decision as to when to start maternity leave was an individual one, otherwise she would be subjected to an impermissible discrimination based on her sex. The majority of the closely divided court disagreed, holding that the regulation was not an invidious discrimination based on sex and that the school baord had a legitimate interest in fixing reasonable dates for maternity leaves.

This comment will examine the equal protection analysis of the

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on rehearing en banc, No. 71-1707 (4th Cir., Jan. 15, 1973); Amster v. Board of Educ., 55 Misc. 2d 961, 286 N.Y.S. 687 (Sup. Ct. 1967); Cerra v. East Stroudsburg Area School Dist. 5 Pa. Cmwlth. 365, 285 A.2d 206 (1971).

[4]465 F.2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971). The district court had found the regulation reasonable on the grounds that it was for the pregnant teacher's protection (citing indignities suffered, violence in the schools, accidental injury in the corridors and medical complications) and that it provided for continuity in the classroom program.

[5]*Id.* at 1187.

[6]No. 71-1707 (4th Cir., Jan. 15, 1973).

[7]Cohen v. Chesterfield County School Bd., 467 F.2d 262 (4th Cir. 1972).

Cohen and *La Fleur* decisions and explore the effect of Title VII of Civil Rights Act of 1964[8] on policies respecting pregnancy.[9] The following discussion and conclusions though narrowly phrased in terms of "pregnancy" and "school board" are equally appropriate to other conditions unique to women in other employment situations.

I. EQUAL PROTECTION ANALYSIS

The fourteenth amendment to the United States Constitution provides in part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10] This clause has been applied to all state legislation (and regulations of state agencies) where classification of individuals is involved. The Supreme Court has consistently recognized that the equal protection clause does not deprive the states of all power to classify,[11] but does require that the treatment of different classes in different ways bear some rational relationship to a legitimate state objective.[12] Thus the Constitution forbids not discrimination but "invidious discrimination."[13]

The determination of whether or not a statute or regulation constitutes an "invidious discrimination" has become refined in recent years. In economic and regulatory cases the test has been whether there is some "reasonable basis" for the discrimination.[14] This test focuses on the purpose of the classification and has been applied to give the states much leeway in providing different treatment for different classes. Under this test a regulation will be invalidated only where no "state of facts reasonably can be conceived that would sustain it."[15] It has been

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[8]42 U.S.C. §§ 2000e to 2000e-15 (1970).

[9]This comment will not discuss the Equal Rights Amendment passed by Congress March 22, 1972, which is currently in the process of ratification. The proposed constitutional amendment states: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. RES. 208, 92d Cong., 1st Sess. (1971); S.J. RES. 8, 92d Cong., 1st Sess. (1971). The possible impact of this amendment on maternity leave regulations, as well as its prospects for ratification, is speculative. For an exhaustive comment on the Equal Rights Amendment *see* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80* YALE L.J. 871 (1971).

[10]U.S. CONST. amend. XIV, § 1.

[11]Reed v. Reed, 404 U.S. 71, 75-76 (1971); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[12]*See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971); Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938).

[13]Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[14]Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[15]*Id.*

said that in economic and regulatory matters the Court has presumed the regulation valid, placed the burden of showing no rational basis on the complaining party, and in fact almost abandoned the review of such equal protection questions.[16]

Where a "suspect classification" or "fundamental right" is involved, a much stricter test has been applied to state regulations. Under the "compelling state interest" test, the state must be able to point to some compelling governmental interest promoted by the regulation or statute in question before it will be upheld.[17] Thus a significant burden of justification is placed on the state.[18]

What constitutes a "suspect classification" or a "fundamental right" is not altogether clear because the Supreme Court has not enunciated "a rational standard, or even points of reference, by which to judge what differentiations are permitted and when equality is required."[19] Classifications based on race,[20] national ancestry,[21] alienage,[22] and wealth[23] have been treated as "suspect," with racial classifications receiving the strictest treatment. Personal interests found to be "fundamental" include procreation,[24] education,[25] voting,[26] rights respecting criminal procedure,[27] and the right to travel.[28]

In testing the mandatory maternity leave regulations against the equal protection clause one must look first to the classification to determine whether it is "suspect." If not, the compelling state interest test may still be invoked if there is a "fundamental interest" involved. If neither a "suspect classification" nor a "fundamental interest" is present, then the regulation needs only to have some reasonable basis in order to withstand an equal protection challenge.[29]

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[16]*Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

[17]Shapiro v. Thompson, 394 U.S. 618 (1969).

[18]Loving v. Virginia, 388 U.S. 1, 9 (1967).

[19]COX, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966).

[20]*See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

[21]*See* Korematsu v. United States, 323 U.S. 214 (1944).

[22]*See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[23]*See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S.12 (1956).

[24]Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[25]*See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

[26]*See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[27]*See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[28]Shapiro v. Thompson, 394 U.S. 618 (1968).

[29]Arguments that sex-based discrimination violates the equal protection clause have not fared well in the Supreme Court. In fact, the Supreme Court did not find a sexual classification violative

A. Are Maternity Leave Regulations Sex Classifications?

Most of the cases involving regulations concerning maternity leave simply assume that pregnancy is a sex classification.[30] In *La Fleur* the court found the regulation to be inherently based on a sex classification because, though men are subject to many types of disabilities, only women were singled out for restrictions upon their employment.[31] Chief Judge Haynsworth, writing for the majority in *Cohen*, rejected as too simplistic the leap from the physical fact that only women can become pregnant to the conclusion that the regulation of pregnancy and maternity is a classification based on sex.[32] He pointed out that invidious discrimination based on a sex classification occurs only in instances where the two sexes are in actual or potential competition with one another.[33] This proposition gets some support from *Reed v. Reed*,[34] a recent Supreme Court decision that concluded that only dissimilar treatment of men and women who are "similarly situated" violates the equal protection clause. The fact that only women can become pregnant could arguably remove all possibility for "competition" between the sexes[35] and make it impossible for men and women to be "similarly situated" in respect to the regulation.

It is also arguable that a maternity leave regulation, by itself, does not discriminate between men and women. Rather, while the regulation applies to everyone, it is nature that makes the regulation apply only to

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of the equal protection clause until 1971 when in Reed v. Reed, 404 U.S. 71 (1971), it struck down an Idaho probate law giving preference to men over women in the administration of estates. Until *Reed*, the Court seemed to share Mr. Justice Bradley's beliefs about the status of women quoted at the beginning this comment. Several manifestations of the Court's past philosophy are: Muller v. Oregon, 208 U.S. 412 (1908), holding that the state's fixing maximum working hours for women was neither arbitrary nor unreasonable under the due process clause since women need protection in employment; Goesaert v. Cleary, 335 U.S. 464 (1948), holding that a state law prohibiting a female from being licensed as a bartender unless she was the wife or daughter of the owner was not a denial of equal protection of the laws; and Hoyt v. Florida, 368 U.S. 57 (1961), upholding a state statute excluding women from jury service unless they voluntarily applied for it.

[30]*See, e.g.*, Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971), *aff'd*, 467 F.2d 262 (4th Cir. 1972), *rev'd on rehearing en banc*, No. 71-1707 (4th Cir., Jan. 15, 1973); La Fleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971), *rev'd*, 465 F.2d 1184 (6th Cir. 1972).

[31]465 F.2d at 1188.

[32]No. 71-1707, at 6.

[33]*Id.*

[34]404 U.S. 71, 77 (1971) (dictum).

[35]No. 71-1707, at 6.

women.[36] As Chief Judge Haynsworth noted, no man-made law or regulation excludes men from becoming pregnant, and no law can relieve women from it.[37] In short, the regulations here involved can be seen as no different from many other instances where the law is more burdensome on some than others simply because of the nature of things. Chief Judge Haynsworth cited laws punishing the forcible ravishing and carnal knowing of women, laws prohibiting or licensing prostitution, and regulations requiring that soldiers be clean-shaven as examples. It should be noted that an analogous argument has been made concerning wealth classifications. Justice Harlan, dissenting in *Griffin v. Illinois*[38] and *Douglas v. California*,[39] argued that in each case the state had made no discriminatory classification; rather it was the defendant's condition of poverty that caused the unequal treatment. The majority of the Court in each of those cases rejected Harlan's argument and found a denial of equal protection.

To dismiss the contention that maternity leave regulations involve sex classifications because there is no "competition" between men and women in becoming pregnant or because the argument is "simplistic" subverts a realistic analysis of the issue. The irrefutable physical fact is that only women can become pregnant. When the state classifies on the basis of physical attributes unique to one group, it necessarily classifies on the basis of that group. If a state statute forbade all those susceptible to sickle-cell anemia from serving on juries it would surely be recognized as making a racial classification since only Negroes are susceptible. Even more basically, if a school board adopted a regulation denying sick leave to those teachers who had black skins, there would be no doubt that it was a racial classification. Similarly, any regulation singling out pregnant teachers for discriminatory treatment must be recognized as a sex classification for the "simple" reason that it operates only against women.

To say that the maternity leave regulation is not a sex discrimination because there is no competition between men and women in becoming pregnant merely clouds the issue with an irrelevancy. There certainly is no competition in becoming pregnant, but there is competition for employment and earnings, and this is the area in which the mandatory

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[36] *Id.*
[37] *Id.*
[38] 351 U.S. 12, 34-36 (1955).
[39] 372 U.S. 353, 361-63 (1963).

maternity leave regulation operates to oust women from their jobs while a man in a similar situation[40] would not be forced to quit.

B. *The Compelling State Interest Test*

1. *Suspect Classification?* Assuming arguendo that mandatory maternity leaves involve a classification based on sex, such classification may not necessarily be "suspect." Generally, sex-based discriminations have been tested under the more lenient rational basis test.[41] Nevertheless, two recent cases have treated sex as a suspect classification and have applied the stricter compelling state interest test. In comparing sex-based discrimination to other "strictly scrutinized" classifications, one federal court concluded that "it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group."[42] The California Supreme Court has also found sex to be a suspect classification.[43] The court reasoned:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that a whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.[44]

The finding of a sex-based classification in *La Fleur* was made in a context where the determination was of little or no consequence to the outcome. Since the court was not prepared to include sex among the group of "suspect classifications," and since it found that the maternity leave regulation failed the less strict reasonable basis test, the decision would have been the same even if the classification had been between

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[40]*See* No. 71-1707, at 19-20 (Winter, J., dissenting). Judge Winter gives as an example prostatitis, a uniquely male disease. Though surgery can be scheduled within a reasonable time range to suit the convenience of the patient, the male teacher is not required to give advance notice of the operation nor to seek permission tocontinue work until date of the operation. The same is true for any elective surgery.

[41]*E.g.*, Reed v. Reed, 404 U.S. 71 (1971); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

[42]United States *ex. rel.* Robinson v. York, 281 F. Supp. 8, 14 (D. Conn. 1968).

[43]Sail'er Inn, Inc., v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971).

[44]*Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

pregnant teachers and teachers with other disabilities, rather than a sex classification. If sex becomes generally accepted as a suspect classification,[45] the determination in *La Fleur* that the maternity leave regulations are sex-based discriminations may have a more far-reaching effect than the Sixth Circuit intended. For instance, while the use of the reasonable basis test may leave some room for the school boards (or other employees) to regulate maternity leaves, perhaps with a short leave requirement, the compelling state interest test may prohibit *all* group administration of maternity leaves.

2. *Fundamental Right Involved?* Assuming arguendo that there is no sex-based discrimination in the maternity leave regulations or, that if there is, that sex is not a "suspect classification" and that the regulation may be reasonably related to a legitimate state objective, the compelling state interest test may nevertheless be invoked if there is a "fundamental right" involved.[46] The maternity leave regulations involved in *La Fleur* and *Cohen* touch on two possibly fundamental rights—the right to bear children and the right to work.[47] In *Skinner v. Oklahoma*[48] the Supreme Court held that procreation was "one of the basic civil rights of man."[49] The Court there struck down as a violation of the equal protection clause a state statute authorizing sterilization of persons more than twice convicted of felonies involving moral turpitude, but excluding certain offenses such as embezzlement. Because of the great difference between maternity leave regulations and a sterilization statute, *Skinner* is easily distinguishable, thus making the right to bear children argument tenuous at best.[50]

A more persuasive argument available in these cases is the funda-

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[45]At least one authority believes this is likely. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 741 (1969).

In fact, sex-based classifications have rarely been found to be violations of the equal protection clause. *See* note 25 *supra*.

[46]*See* text accompanying notes 20-24 *supra*.

[47]It appears that the right-to-work argument was made in the trial of *La Fleur*, because the district court rejected it, 326 F. Supp. at 1214, but it has been accepted by another district court in Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 443 (N.D. Cal. 1972).

[48]316, U.S. 535 (1942).

[49]*Id.* at 541. Presumably procreation is also a basic civil right of *women*.

[50]Not only was there a possible fundamental right involved in *Skinner*, but also a suspect classification, wealth. It is arguable that the right to procreate is not by itself a fundamental right, but only in combination with a suspect classification. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (upholding against an equal protection attack the sterilization of mental defectives in state institution.) Moreover, in *La Fleur* and *Cohen* the teachers were denied not the right to procreate, but only the right to work while in the process of procreating.

mental nature of the right to work, which is temporarily denied by the maternity leave regulations. The authority for the status of the right to work as a fundamental right stems from *Traux v. Raich*,[51] where the Court held violative of the equal protection clause a statute requiring certain employers to employ electors or natural-born citizens as eighty percent of their work force. The Court in so holding said that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[52] Many other cases have recognized the importance of the right to work,[53] and the California Supreme Court has used the compelling state interest test in a right-to-work case. In *Purdy & Fitzpatrick v. State*[54] the court struck down a California statute prohibiting the employment of aliens on public works as a violation of the equal protection clause, stating that "[any] limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny."

Though neither *La Fleur* nor *Cohen* accepted the above bases for applying the compelling state interest test, it is nevertheless interesting to speculate as to the effect of the use of this strict test on maternity leave regulations. The most immediate effect would be to shift the burden of proof from the teacher to the school board. Under the reasonable-basis test the teacher has the burden of showing that there is no reasonable basis for the regulation, but where a fundamental right or suspect classification is involved, the school board would have the burden of showing a compelling state interest.

While the *La Fleur* court had no difficulty finding a violation of

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[51]239 U.S. 33 (1915). It should be noted that this decision antedates the compelling state interest test.

[52]*Id.* at 41. It has been asserted that the author of the sentence in the fourteenth amendment containing the equal protection clause believed that the right to work was a natural right secured to all citizens by the privileges and immunities clause, but believed the right so important that he intended it to be encompassed by the fourteenth amendment as well. Avins, *The Right to Work and the Fourteenth Amendment: The Original Understanding*, 18 LAB. LAW J. 15 (1967).

[53]*See, e.g.*, Green v. McElroy, 360 U.S. 474 (1959); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Smith v. Texas, 233 U.S. 630 (1914).

[54]71 Cal. 2d 566, 579, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969). The fundamentality of the right to work was reaffirmed by the California Supreme Court in a later case involving both a sex-based classification and the right to work. Sail'er Inn, Inc., v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329(1971).

the equal protection clause by the five-month leave requirement, a closer question is presented by regulations requiring only a one-month or two-week leave of absence. It may be relatively simple for a willing court to find a reasonable basis for such regulations, but not a compelling state interest. Administrative justifications have consistently been rejected as coming within the zone of "compelling" interests in similar cases.[55] Continuity of education in the classroom, the school board's main justification for the regulations, may often be better obtained by allowing the pregnant teacher to continue teaching as long as possible—especially where the end of the school term is near. Thus any maternity leave regulation that treats pregnant teachers as a group may be overbroad and therefore a denial of eual protection by analogy to the reasoning of *Kramer v. Union Free School District*.[56] There the Supreme Court recognized that limiting the franchie to those who are primarily interested in school affairs was a "compelling" interest, but held that the statute limiting the vote to property taxpayers violated the equal protection clause because it was too broad in its exclusions. Since it would be virtually impossible to draw a maternity leave regulation that dealt with pregnant teachers as a group that was not "overbroad," the compelling state interest test would require *individual* determination of maternity leave by the school board.

3. *The Reasonable-Basis Test.* In *La Fleur* and *Cohen* the courts reached opposite conclusions on whether there was some reasonable basis for the extended maternity leave regulations. Each school board offered similar justifications for the regulations—administrative burdens, protection of the pregnant teacher, and continuity of education in the classroom—but only the *Cohen* court found these persuasive.

The administration of maternity leaves under the regulations in these two cases was relatively simple. The teacher gave notice of the expected date of arrival, and four or five months before that date she was required to quit work. Each school board argued that determination of maternity leaves on an individual basis would take up too much of the school board's time because there would have to be conferences between the teacher, school board officials, and the teacher's physician (if only by means of letter). The court in *La Fleur* recognized the admin-

[55] *See, e.g.*, Stanley v. Illinois, 92 S. Ct. 1208 (1972); Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969).

[56] 395 U.S. 621 (1969).

istrative convenience of the uniform mandatory maternity leaves, but found such convenience no justification because it was "not the only value concerned."[57] Quoting from *Stanley v. Illinois*[58] the court reasoned that "[p]rocedure by presumption is always cheaper and easier than individualized determination," but when it forecloses the real issues (here competency of the teacher) it needlessly runs the risk of inundating important individual interests, and, therefore, cannot stand. The *Cohen* court, on the other hand, emphasized the need and opportunity to find a more permanent replacement rather than a mere substitute teacher. Accordingly it found it reasonable to require a standard date for beginning maternity leave.[59]

Protection of the pregnant teacher's health was also urged as a justification in *La Fleur* and *Cohen*. The lower court in *La Fleur* went to great lengths to point out how the problems of pregnancy were accentuated by remaining at school.[60] It pointed out the incidence of violence in the Cleveland schools, the rate of accidental injury to teachers, the hazards of maintaining order in the halls and corridors, and complications of pregnancy such as toxemia and placenta previa. The Sixth Circuit dismissed these justifications without even mentioning them by declaring that under no construction of the record was there medical evidence supporting the extended maternity leave required by the regulation.[61] The panel in the earlier *Cohen* decision also found no medical justification for the regulation involved since women are more likely to be incapacitated during the first two trimesters of pregnancy than during the later stages.[62] This argument was ignored, however, in the subsequent *en banc* decision.

The main justification for mandatory maternity leaves presented by each school board was the need to preserve continuity of education in the classroom.[62] The school boards felt that a uniform date for beginning leave would enable them to anticipate the absence in advance and thus have a substitute rady to take over the class. Here again the regulations operated against the medical evidence which indicated that compli-

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[57]465 F.2d at1187.

[58]92 S. Ct. 1208, 1215 (1972).

[59]No. 71-1707, at 10-11.

[60]326 F. Supp. at 1210-11. That there was some medical reason for the regulation was refuted in *Cohen*. 326 F. Supp. at 1160.

[61]465 F.2d at 1188.

[62]467 F.2d at 264. The Court of Appeals adopted the lower court's findings.

[63]*See id.* at 11; 465 F.2d at 1186.

cations causing unexpected absences occurred more frequently during the early stages of pregnancy, prior to the mandatory leave date required by the regulation.[64] Moreover, any disability, including elective surgery or even the common cold, would cause an absence and consequent disruption of continuity of classroom instruction, but there was no leave of absence requirement as to them. The Sixth Circuit recognized the validity of these considerations and concluded that there was no reasonable basis for the mandatory maternity leave requirement.[65] The Fourth Circuit, on the other hand, attempted to distinguish pregnancy from other disabilities by comparing it to sudden, unexpected disabilities such as mononucleosis or breaking a leg,[66] and concluded that since pregnancy was planned, it was reasonable to require a "planned" leave. What this reasoning ignores is that though pregnancy can easily be distinguished from disabilities which arise suddenly and with no warning, there are many other "elective" or "planned" disabilities which are indistinguishable from pregnancy in their effect on continuity of classroom education.[67] Yet of these, only pregnancy is singled out for uniform mandatory leave treatment by the school board regulations. Furthermore, as the dissent points out, the continuity-of-education justification was particularly disingenuous on the facts presented.[68] Mrs. Cohen's principal had requested that she be allowed to teach through the end of the first term, but strict adherence to the regulation prevailed with the consequent effect of creating a greater disruption than there otherwise would have been.

In light of the split of opinion over the validity of four- and five-month mandatory leaves, it is interesting to speculate on the constitutionality of a shorter mandatory leave requirement—for example, a one-month required leave. The considerations would be the same, but the justification may become more reasonable for the shorter leave requirement. The crucial issue would seem to the medical evidence.[69] If there

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[64]*See* 326 F. Supp. at 1160.

[65]465 F.2d at 1188.

[66]No. 71-1707, at 9-10.

[67]The teacher will be taken out of the classroom for an uncertain length of time by any surgery or hospitalization. To the extent that such surgery or hospitalization is scheduled in advance for a future date it is indistinguishable from pregnancy. Examples of this type of disability are hernia operations, extraction of wisdom teeth, nasal reconstructions, tumor removals, and any number of other operations.

[68]No. 71-1707, at 19 n.2 (Winter, J., dissenting).

[69]Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), upheld a state maternity leave policy requiring that leave begin two months prior to the expected date of birth

were a history of pregnant teachers having complications in the last month of pregnancy, then perhaps there would be a reasonable basis for such a regulation, but when most complications occur early in pregnancy, the better reasoning would seem to be to follow *La Fleur* and find the one-month required leave a violation of the equal protection clause.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Congress, in Title VII of the Civil Rights Act of 1964,[70] undertook to aid minorities in entering the mainstream of American life by ensuring that they could compete for jobs on a non-discriminatory basis.[71] To this end, discrimination in employment based on race, color, religion, sex, or national origin was prohibited.[72] "Sex" as a prohibited basis for discrimination is somewhat unique, since women make up a majority of the population and thus are well within the mainstream of American life. In fact "sex" was added to the Act by a floor amendment in an apparent attempt to prevent passage of the bill.[73] But notwithstanding the fact that women may be in the mainstream of American life, they have never occupied the same status in the work force that men have.

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largely upon the testimony of a physican who said that during the later stages of pregnancy women become less efficient because they were irritable, increasingly susceptible to headaches, make more trips to the bathroom and snack bar, and require assistance to get around and to do things that they could normally do alone. *Id.* at 39.

For a contrary opinion, *compare* Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972).

[70]42 U.S.C. §§ 2000e to 2000e-15 (1970).

[71]*Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971).

[72]42 U.S.C. § 2000e-2(a) (1970).

[73]*See* 110 CONG. REC. 2581 (1964) (remarks of Congresswoman Green). Congressman Smith (of Virginia) offered his floor amendment one day before the Act passed. *Id.* at 2577. Congressman Dowdy (of Alabama) had also proposed amendments prohibiting sex-based discrimination to several other sections of the bill: the Public Accomodations section, *id.* at 1979; the Public Facilities section, *id.* at 2264-65; and the Public Education section, *id.* at 2280-81. Every male Congressman voicing support of Congressman Smith's amendment to Title VII voted against the House bill as a whole. *Id.* at 2804-05 (Smith, Dowdy, Tuten, Pool, Andrews, Rivers, Gary, Huddleston, Watson, and Gathings).

The retention of the sex amendment to Title VII by the Senate seems to have been prompted by the President's wife. *See* Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 678. After Senator Dirksen announced his intention to delete the sex provision, Professor Murrary of Yale wrote a memorandum advocating retention and circulated it to, among others, Lady Bird Johnson. Several days later Mrs. Johnson's secretary advised Professor Murray that the sex provision would remain in the bill. *Id.* at 678 n.44.

At the time the *La Fleur* and *Cohen* cases were brought, school boards were not covered by the Act.[74] Prior to the decision of the court of appeals in each case, the Equal Employment Opportunity Act of 1972 was signed into law amending Title VII to include school boards within its coverage.[75] Thus maternity leave regulations must now satisfy not only the equal protection clause, but also Title VII and the guidelines of the Equal Employment Opportunity Commission (EEOC) issued thereunder.

Section 703(a) of the Act makes it an unlawful employment practice for an employer, on the basis of sex, (1) to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, or (2) to classify or limit his employees in such a way as to deprive an individual of employment opportunities or adversely affect his status as an employee.[76] Section 703(e)[77] exempts sex-based discrimination from the rule of section 703(a) in instances where sex is a "bona fide occupational qualificaton" (BFOQ) reasonably necessary to the normal operation of the particular business or enterprise. To aid in the administration of Title VII the Act creates the EEOC[78] and vests it with the power to bring civil suits to enforce the Act where conciliation has failed.[79]

Because of the lack of hearings on the sex provision of Title VII the meaning of "sex" has never been entirely clear. Even where there is some legislative background there has been trouble defining the scope of the prohibition on sex discrimination. Thus, notwithstanding the House's rejection of an amendment to Title VII that would have limited the Act's prohibition to discrimination based *solely* on race, color, religion, sex, or national origin,[80] the Fifth Circuit has held that discrimination based on sex plus some other reason was not prohibited by the Act.

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[74]42 U.S.C. § 2000e(b)(1) (1970), *as amended*, Equal Em oyment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (state's and their political subdivisions not included in the definition of "employer"); 42 U.S.C. § 2000e-1 (1970), *as amended*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 104. (Title VII not applicable to educational institutions with respect to the employment of individuals who perform educational activities).

[75]Pub. L. No. 92-261, § 2(2), 86 Stat. 103. The Act was signed and became effective on March24, 1972.

[76]42 U.S.C. § 2000e-2(a) (1970).

[77]42 U.S.C. § 2000e-2(e) (1970).

[78]42 U.S.C. § 2000e-4(a) (1970).

[79]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 105.

[80]110 CONG. REC. 2728 (1964).

In *Phillips v. Martin Marietta Corp.*[81] the Fifth Circuit upheld a company policy of hiring men with pre-school age children but refusing to hire women so situated. The court reasoned that the plaintiff was denied a job not because of her sex, but because of her sex *plus* having pre-school age children. This "sex-plus" reasoning was subsequently vacated by the Supreme Court.[82]

There has been less doubt over the prohibition of more explicit sex discrimination where "sex" as a broad classification is used as the sole basis for the discrimination. A prime example of this is where sex is used as a definition, such as a school board regulation that required that its teachers be solely "male" or solely "female." It has been said that explicit discrimination also includes classification schemes based on physical attributes that are characteristic of only one sex—such as the ability to become pregnant.[83] This line of reasoning is supported by several EEOC guidelines. The EEOC has said that individuals are to be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.[84] This guideline was endorsed by a federal district court in *Schattman v. Texas Employment Commission*[85] and was interpreted to prohibit a maternity leave policy that required an employee to quit work two months prior to the date of expected delivery. Additional guidelines have recently been issued declaring that excluding employees from employment because of pregnancy is *prima facie* a violation of Title VII[86] and requiring that employers treat disabilities caused by pregnancy and childbirth like all other temporary disabilities.[87]

It is with respect to these last two guidelines that *La Fleur* and *Cohen* have their major impact. Though the EEOC's guidelines are entitled to great deference,[88] they do not carry the force of law. The apparent effect of *La Fleur* and *Cohen*, then, is to create a split of

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[81]411 F.2d 1 (5th Cir. 1969).

[82]Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam).

[83]*Developments in the Law, supra* note 71, at 1170.

[84]29 C.F.R. § 1604.1(a)(1)(ii) (1971).

[85]330 F. Supp. 328 (W.D. Tex. 1971), *rev'd on other grounds*, 459 F.2d 32 (5th Cir. 1972). The district court's decision was reversed on appeal on the ground that the Texas Employment Commission was not subject to the Act. The Fifth Circuit went on to find that there was no denial of equal protection because there was a reasonable medical basis for the two-month maternity leave policy.

[86]29 C.F.R. § 1604.10(a) (1972).

[87]29 C.F.R. § 1604.10(b) (1972).

[88]Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

authority on the validity of these pregnancy guidelines.[89] The Sixth Circuit's decision that the maternity leave regulation involved a sex classification supports these guidelines at least to the extent of sustaining them against constitutional attack. The Fourth Circuit, on the other hand, may have invalidated the pregnancy guidelines, for if maternity leave regulations are not sex-based discriminations they are not within the prohibition of section 703(a) of the Act.

Even if one assumes that maternity leave regulations are within the ambit of the Act, there remains the possibility that problems in the later months of pregnancy may justify a "bona fide occupational qualification" exception. An initial problem here is the scope of section 703(e) of the Act. The provision states that it is not an unlawful employment practice to "hire and employ" on the basis of sex where sex is a bona fide occupational qualification.[90] It has been suggested that the quoted language limits the BFOQ exception to the threshold determination of whether or not to hire an individual.[91] While this would surely be the correct interpretation if the language were simply "hire," the addition of the words "and employ" would seem to comprehend an on-going relationship covering the terms, conditions, and privileges of employment. Further semantic difficulties are raised by the use of the word "qualification," which on its face comprehends only initial suitability for employment. Upon scrutiny, however, it would seem that to the extent that maintenance of the "qualification" is a prerequisite to keeping the job, it becomes a condition of employment.[92] On these interpretations, then, the BFOQ section is coextensive with the unlawful employment practice section.

The major issue that section 703(e) raises is the extent to which its implicit recognition of physical and cultural differences between the sexes will be allowed to justify discriminations based on sex. The EEOC has maintained that the BFOQ exception is to be construed narrowly,[93] and this would seem necessary to prevent the exception from emasculating the rule, but the first case applying the BFOQ exception to sex discrimination adopted a broad equal-protection-type test. In *Bowe v.*

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[89]Both *La Fleur* and *Cohen* arose before title VII was applicable to political subdivisions of states so the validity of the EEOC guidelines was not directly in issue in either case. No. 71-1707, at 2 n.1; 465 F.2d at 1186.

[90]42 U.S.C. § 2000e-2(e) (1971).

[91]*See* Comment, 1968 DUKE L.J., *supra* note 73, at 719.

[92]*Id.*

[93]29 C.F.R. § 1604.1(a) (1971).

Colgate-Palmolive Co.[94] the district court, in upholding a thirty-five-pound limit on lifting by women (thus excluding them from some jobs), stated the test to be "whether the discrimination of the employer is rationally related to an end which he has a right to achieve—production, profit, or business reputation." Thus, where a discriminatory rule was rationally related to one of these objectives it was protected from being an unlawful employment practice by section 703(e). This test fails completely to consider individual capabilities.

Perhaps the most widely recognized statement of the scope of the BFOQ exception is *Weeks v. Southern Bell Telephone & Telegraph Co.*[95] The court there, in finding a thirty-pound weight-lifting limit discriminatory, stated that "an employer has the burden of proving that he had reasonable cause to believe, that is a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[96] While this "all or substantially all" test does not consider capabilities individually,[97] it is a much narrower interpretation of the BFOQ exception than that of the district court in *Bowe*.

The *Weeks* test leaves open the possibility that school boards could maintain certain maternity leave regulations notwithstanding the determination that they are discriminations based on sex. The application of the BFOQ exception where pregnancy is the reason for discriminatory treatment is the inverse of its normal application. Here the school board, rather than proving that being male is a BFOQ for the job, must prove that the *absence* of the condition of being pregnant is a BFOQ.[98]

The matter of proof of the BFOQ is the crux of the determination of whether or not the maternity leave regulation will be allowed. For the regulation to be upheld, the school board must be able to point to a *factual* basis for believing that the safety or efficiency of substantially all pregnant teachers would be adversely affected by their continued teaching after a certain stage of pregnancy. The Sixth Circuit in *La*

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[94]272 F. Supp. 332, 362 (S.D. Ind. 1967), *rev'd in part*, 416 F.2d 711 (7th Cir. 1969).

[95]408 F.2d 228 (5th Cir. 1969).

[96]*Id.* at 235.

[97]The Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), involving a company requirement of a high school diploma or a passing grade on an intelligence test, provides some indication that qualifications should be measured with respect to the *individual's* capabilities. The Court there stated that "[w]hat Congress has commanded [in Title VII] is that any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436.

[98]*See* Comment, 1968 DUKE L.J., *supra* note 73, at 722.

Fleur said that no factual basis exists for a regulation requiring leave after the fourth month of pregnancy. The Fourth and Fifth Circuits in *Cohen* and *Schattman*[86] stated that there is a factual basis for a regulation requiring leave after the fifth or seventh month of pregnancy.[99] In each of these cases, however, there was conflicting medical evidence presented. So, while a school board could point to *Schattman* for authority for a two-month leave requirement, it could not be assured of prevailing because of the vagaries of the medical evidence that would be presented.[100]

III. CONCLUSION

The lesson for school boards (and other employers) from *La Fleur* and Title VII is that regulations founded upon general stereotypical assumptions of the needs and capabilities of women employees will no longer be tolerated. It would seem that neither the equal protection clause nor Title VII, at their present stage of interpretation, requires strict individual treatment, though such treatment is to be commended. The command of the Sixth Circuit and the Congress is tht school boards should cast aside their historic, often outmoded, reasons for extended maternity leave requirements and re-examine the *facts* to see if such requirements are needed and, if so, what a reasonable leave would be. The Fourth Circuit in upholding the maternity leave requirement has taken a step backward against the flow of the times and has moved toward the viewpoint of Mr. Justice Bradley with which this comment began.

There are several alternatives open to school boards. They could maintain a maternity leave policy with a short (less than two months) duration; they could continue their present extended leave policies, but provide partial or whole pay during the absence; or they might abolish the leave policy altogether and leave the problem up to the teacher and her physician.[101] Since different courts have reached opposing results based on essentially the same medical evidence, perhaps the best approach for a school board to take would be to operate without any leave policy for a period of time. If problems arose with teachers in the later

[99] *Schattman* is factually distinguishable from the teacher pregnancy cases in that Mrs. Schattman's job entailed no physical exertion on public contact, whereas a teacher encounters a considerable portion of each.

[100] *See* Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, (N.D. Cal. 1972).

[101] *Id.* at 449-50.