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California Federal Savings & (and) Loan Ass'n v. Guerra: State Guarantee of Pregnancy Disability Leave Confronts Title VII of the Civil Rights Act of 1964

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NOTES

CALIFORNIA FEDERAL SAVINGS & LOAN ASS'N v. GUERRA: STATE GUARANTEE OF PREGNANCY DISABILITY LEAVE CONFRONTS TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Women today compose almost one half of the labor force.[1] Many women work outside the home because their income contribution is essential to their own or their family's well being.[2] When the majority of these female employees become pregnant,[3] however, their job status is critically jeopardized. Pregnancy requires time off from work which includes, at a minimum, the actual disability period.[4] Unfortunately, only forty percent of working women get sufficient disability leave at the time of childbirth.[5] The use of sick leave and earned vacation time by others may result in less than one month away from the job. The remaining pregnant employees are even less fortunate. Because pregnancy inevitably requires time off from work, many women must choose between having a job and bearing a child.[6]

Congress addressed this problem by amending Title VII of the Civil Rights Act of 1964 to include a prohibition against discrimination on the

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1. L.A. Times, June 24, 1984, § 8 at 6, col. 1.

2. Women's Bureau, U.S. Dep't of Labor, *Twenty Facts on Women Workers* 2 no. 9 (1984).

3. Eighty percent of working women are in their childbearing years (ages 15 to 45) and ninety-three percent of these will have a child during their work life. S. KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES, AN INTERNATIONAL REVIEW (1980), cited in Kreiger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality,* 13 GOLDEN GATE 513, 518-519 (1983) [hereinafter cited as Krieger].

4. A six-week disability leave is generally necessary for a woman to recuperate after childbirth. H.R. REP. No. 948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4753 [hereinafter cited as House Report].

5. [new cite required. Cite directly to survey or find substitute]

6. " '[E]ight million women of childbearing age—or twenty-five percent of the women who work twenty hours a week, face the threat of unemployment if they choose to have a baby, because of company disability policies that don't return them to the same—or at least, a similar—job,' charges Sheila B. Kamerman in her book *Maternity Policies and Working Women." Pregnancy Leave — Is There Sufficient Legal Protection,* INDUSTRY WEEK, April 16, 1984, at 33, col. 1.

basis of pregnancy, childbirth, or related medical conditions.[7] Many companies interpret the Act to mean that they are restricted only from treating pregnant employees differently from others, and therefore may offer female employees the same leave for pregnancy disability which they grant to all employees for other disabilities. This equal treatment approach rests on the assumption that men and women are similarly situated with respect to employment, and if treated equally, will be able to compete on the same level.[8]

Conversely, some state legislatures construe Title VII in light of its purpose: to guarantee equal opportunity in employment.[9] One such law, the California Fair Employment and Housing Act (FEHA), expands upon the Title VII mandate and requires employers to provide up to four months disability leave for pregnant employees.[10] The constitutionality of this statute was challenged in the 1984 case, *California Federal Savings and Loan Association v. Guerra.*[11]

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7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (1976 and Supp. IV 1980), guarantees women equal opportunity in the work force. Congress amended the terms "because of sex" or "on the basis of sex" to include on the basis of pregnancy, childbirth or related medical conditions. The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (Supp. IV 1980), provides in pertinent part: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . ."

8. Proponents of the Equal Treatment Analysis believe that any kind of "special" or "preferential" benefits given to women will only perpetuate the stereotypes they already suffer in employment. *See, e.g.,* L.A. Times, March 21, 1984, at A3, col. 1 (quoting Mayor Diane Feinstein on the subject): "What we women have been saying all along is we want to be treated equally. Now we have to put our money where our mouth is." Mayor Feinstein cautioned against the establishment of "a special group of workers that in essence is pregnant women and new mothers." *Id.* The basis of her stance was that "the work market should not have to accommodate itself to women having children." *Id.*

9. "The elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964." HOUSE REPORT, *supra* note 4, at 7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4755.

States using an approach contrary to equal treatment, often termed special treatment, are California, Montana, and Connecticut. *See* CAL. GOV'T CODE § 12945 (West 1980); MONT. CODE ANN. § 39-7-203 (1981); CONN. GEN. STAT. ANN. § 46a-6 (West 1982).

10. CAL. GOV'T CODE § 12945(b)(2) (West 1980) provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification. . .
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> (b) for any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either . . .
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> (2) to take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

11. 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), *rev'd*, 758 F.2d 390 (9th Cir.

Judge Emmanuel Real, presiding in the federal district court in California, held that Title VII preempts Section 12945(b)(2) of the California Government Code. Judge Real found that the state law was inconsistent with the purpose of Title VII's Pregnancy Discrimination Amendment, and that it conflicted with Title VII's mandate because an employer could not comply with both the federal and the state laws simultaneously.[12] The United States Court of Appeals for the Ninth Circuit reversed, holding that Title VII not only permits, but advocates state laws which further equalize the employment opportunities of pregnant women with those of others not disabled by pregnancy.[13]

This note begins with a brief overview of the judicial standards applicable to a preemption issue under the United States Constitution's Supremacy Clause. It then lays a foundation for an examination of the conflict between the Pregnancy Discrimination Amendment to Title VII and California Government Code § 12945(b)(2) which provides affirmative guarantees to pregnant employees. The note analyzes the validity of this conflict and concludes that the state and federal laws are compatible because both require the same protections for pregnant employees.

I. JUDICIAL STANDARDS APPLIED UNDER THE SUPREMACY CLAUSE

The Supremacy Clause of the United States Constitution provides that the Constitution and the laws passed by Congress are supreme.[14] In 1824 Chief Justice Marshall proclaimed that a state law which contradicts or interferes with a law passed by Congress pursuant to its powers is inoperative under the Supremacy Clause.[15] Justice Black enunciated the *Hines* test in 1941, under which a state law is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[16]

1985), *cert. granted*, 106 S. Ct. — (1986) [hereinafter, both opinions will be cited as *California Federal*].

12. *Id.* at 568.

13. California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985).

14. U.S. CONST. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824). Even before Gibbons, the Supreme Court acknowledged that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 317 (1819).

16. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See also* Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896), where the Supreme Court declared that a state law would be invalid

To make this determination the court must inquire to what extent Congress intended to foreclose state regulation in a particular area.[17] If Congress did not preclude state action, the court, after determining the purpose of the federal statute, decides if the state scheme of regulation actually controverts the federal purpose.[18] Finally, a state statute will not withstand scrutiny where enforcement of its provisions prevents compliance with federal law.[19]

A. Congressional Intent to Preempt State Law

Congress may bar state action on a particular problem by manifesting its intent to preempt state laws in the statutory language.[20] Absent this express intent, the court may begin its search for an implied intent with the presumption that "the historic powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[21] Circumstances which may rebut this presumption exist (1) where the thoroughness of the federal scheme implies that there is no room for state augmentation,[22] (2) when Congress passes legislation in a field where the federal interest is prevalent,[23] or (3) where preemption is implicit from the particular goal of the law and the claims or rights it prescribes.[24]

The Supreme Court, considering Title VII's degree of supremacy over state laws, concluded that Title VII was designed to "supplement rather than supplant" prohibitions against employment discrimination.[25] The evi-

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if it "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the federal government to discharge the duties, for the performance of which they were created."

17. Justice Black noted that where the federal government, "in the exercise of its delegated powers has enacted a complete scheme of regulation . . ., states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxilliary regulations." *Hines*, 312 U.S. at 66-67.

18. *See infra* note 35 and accompanying text.

19. *See infra* note 36 and accompanying text.

20. Jones v. Rath Packing Co., 430 U.S. 519 (1977); Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983).

21. Pacific Gas & Electric Co., 461 U.S. at 193; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *Jones*, 430 U.S. at 525; Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100, 103 (9th Cir. 1981). *See also* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978), where the Court recognized that because Congress rarely states its intention to preempt state legislation in express terms, the Court tends to sustain the local regulation as long as it does not conflict with the federal law.

22. Pennsylvania R. Co. v. Public Service Comm'n, 250 U.S. 566, 568 (1919); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

23. *Hines*, 312 U.S. 52.

24. Southern Ry. Co. v. R.R. Comm'n of Indiana, 236 U.S. 439 (1915); New York Central R. Co. v. Winfield, 244 U.S. 147 (1917). *See also* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 140, 152-153 (1982).

25. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974). *Accord* Johnson v.

dence supports this conclusion. Congress included no express statement of an intent to preempt in the language of Title VII. Rather, the drafters inserted a broad anti-preemption provision which applies to the Act in its entirety.[26] An amendment to Title VII dubbing it the exclusive remedy for illegal employment practices was defeated in the Senate.[27] Instead, a vague provision authorizing some state action was included in Title VII, but it offers little guidance in determining the limits of that activity. Title 42, Section 2000e-7 of the U.S. Code provides:

> Nothing in this title shall be deemed to exempt or relieve any persons from any liability, duty, penalty, or punishment provided by any present or future law of any state or political subdivision of a state, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.[28]

Senator Joseph Clark, a sponsor of the bill, proffered the view that Congress did not intend to affect an individual's rights under state statutes.[29] Accordingly, the Senate committee considering the Equal Employment Opportunity Act of 1972, recognized that the new remedial scheme of Title VII would not affect protection afforded by other laws.[30] Plainly, there is no implication from Congress that Title VII is designed to preempt state prohibitions on employment discrimination.

The Pregnancy Discrimination Amendment adds no substantive provisions to Title VII. It only includes pregnancy discrmination in the definition of sex discrimination.[31] The accompanying House Report specifically acknowledged that the Pregnancy Discrimination Amendment would not "ef-

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Railway Express Agency Inc., 421 U.S. 454 (1975). "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Id.* at 459.

26. 42 U.S.C. § 2000h-4 (1982). ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.")

27. 110 CONG. REC. 13,650-13,652 (1964).

28. 42 U.S.C. § 2000e-7 (1982).

29. 110 CONG. REC. 7,207 (1964).

30. S. REP. No. 415, 92d Cong., 1st Sess. 24 (1971). The Equal Employment Opportunity Act encapsulates the 1972 Amendments to Title VII.

31. HOUSE REPORT, *supra* note 4, at 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4751 ("H.R. 6075 was introduced to change the definition of sex discrimination in Title VII to reflect the common-sense view and to ensure that working women are protected against all forms of employment discrimination based on sex.") *See also id.* at 4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4752.

fect changes in practices, costs, or benefits beyond those intended by Title VII."[32] In the same report, the Committee surveyed contemporary legal treatment of pregnancy through state disability insurance laws and state fair employment practice laws, and through judicial interpretations and agency regulations of relevant local legislation.[33] A United States district court concluded in its decision dealing with preemption of the Montana Maternity Leave Act (MMLA) that "[w]hen Congress passed Title VII and the Pregnancy Discrimination Act, it did not intend to completely occupy the field of employment discrimination to the exclusion of state laws."[34] Absent a finding of this express or implied intent to peempt, a state law may still be invalid under the Supremacy Clause if it conflicts with the federal act.

B. Conflict of State Law with the Purpose and Execution of Title VII

Conflict between state and federal laws may occur in two ways: (1) where the local law attempts to accomplish a goal contrary to the design of the federal statute;[35] and (2) where compliance with both federal and state laws is a practical impossibility.[36] In *Griggs v. Duke Power Co.*, where the Court rejected an employer's right to use tests unrelated to job performance as a condition of employment, the Supreme Court determined the goal of Title VII to be to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group . . . ."[37] The statutory language of Title VII verifies this determination. Title VII provides that it is an unlawful employment practice for an employer . . .

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to *deprive any individual of employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[38] (Emphasis added)

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32. *Id.* at 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4751.

33. *Id.* at 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4758. *See also* 123 CONG. REC. 29,648 (1977); S. REP. NO. 331, 95th Cong. 1st Sess. 3 (1977).

34. Miller-Wohl Co. v. Commissioner of Labor and Industry, 515 F. Supp. 1264, 1267 (D. Mont. 1981), *vacated*, 685 F.2d 1088 (9th Cir. 1982).

35. *Hines*, 312 U.S. at 67; *Jones*, 430 U.S. at 540-41.

36. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

37. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Those cases following *Griggs* have remained committed to an equivalent interpretation of the purpose behind Title VII. *See, e.g., Alexander*, 415 U.S. at 44; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 763 (1976); Hishon v. King & Spalding, 104 S. Ct. 2229, 2234, n.7 (1984).

38. 42 U.S.C. § 2000e-2(a)(2). *See also* 42 U.S.C. § 2000e (The subheading for Title VII is "equal [sic] Employment Opportunities"); 42 U.S.C. § 2000e-4 (The federal agency given the duty to enforce Title VII is the Equal Employment Opportunity Commission).

An individual is deprived of equal employment opportunity when an employer, with discriminatory motive, treats that individual differently from another because of his race, color, religion, sex or national origin.[39] This theory is termed "disparate treatment." Based on the goal of Title VII, the *Griggs* Court announced that the Act also prohibits "practices that are fair in form, but discriminatory in operation."[40] Under this second theory, coined "disparate impact," the evidentiary burden is initially on the claimant to establish a *prima facie* case by showing that an employment policy which is facially neutral in its treatment of different groups, tends to deny one group more opportunities than another. The burden then shifts to the employer to justify the policy by showing a business necessity.[41]

In establishing a *prima facie* case under the disparate impact theory, the Court determined in *Dothard v. Rawlinson* that a claimant need not proffer comparative statistics of actual employees or applicants denied employment due to the employer's neutral policies.[42] Instead, a claimant may present statistics from the total labor force to evidence a claim of employment discrimination.[43] Responding to *Dothard,* the Fourth Circuit stated that when these statistics cannot reasonably be questioned, courts will take judicial notice that a specific employment practice does produce a disparate impact.[44] The Supreme Court in *Dothard* also affirmed the district court's power to remedy a situation of disparate impact by ordering the employer to refrain from applying a facially neutral policy to those individuals adversely affected.[45]

In summary, a victim of employment discrimination can obtain relief by

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39. 42 U.S.C. § 2000e-2(a)(1).

40. *Griggs,* 401 U.S. at 431.

41. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-66 n.15 (1977) (The Court emphasized the distinction between disparate treatment and disparate impact).

42. 433 U.S. 321, 330 (1977).

43. *Id.* The Court recognized that statistics covering only actual applicants or employees would not reflect those individuals who did not try for the position because the discriminatory policy deterred them from the start. *Id.* at 330. *See, e.g., id.* at 329-30 (The Court accepted statistics showing that the employer's height and weight requirements disqualified 41.13 percent of women in the labor force but fewer than one percent of the men); *Griggs,* 401 U.S. at 430, n.6 (Statistics validating that substantially fewer blacks graduated from high school were utilized in Griggs); Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd in pertinent part,* 472 F.2d 631 (9th Cir. 1972) (Court allowed claimant to support a claim of disparate impact on blacks due to a policy against hiring persons with arrest records, with statistics that blacks were arrested in greater percentages than whites).

44. Mitchell v. Board of Trustees, 599 F.2d 582, 585 (4th Cir.), *cert. denied,* 444 U.S. 965 (1979).

45. Mieth v. Dothard, 418 F. Supp. 1169, 1185 (M.D. Ala. 1976) *aff'd in pertinent part,* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

proving that an employer has treated him differently from others on a basis protected by Title VII.[46] Alternatively, the employee may show that because a particular employment practice impacts more harshly on one group than another, it denies him equal employment opportunity. This latter determination is made by judicial examination of the employer's policy and the necessities of the employer's business operation. The use of a disparate impact analysis is fundamental in any situation where the discrimination is not pronounced.[47]

1. Supreme Court Interpretation of Pregnancy Discrimination Under Title VII

Disparate impact analysis is the only recourse when a classification is not specifically protected by Title VII. In the 1976 case of *General Electric Co. v. Gilbert,* the Supreme Court concluded that General Electric's (G.E.) disability insurance plan, which excluded coverage for pregnancy-related disabilities, was nondiscriminatory on its face because it treated equally those disabilities which male and female employees shared.[48] The Court reasoned that when Congress made it unlawful for an employer to discriminate "because of" or "on the basis of sex," those phrases bore no implication of an intent to prohibit discrimination because of or on the basis of pregnancy.[49] Hence, disparate treatment of the nonpregnant and the pregnant was not prohibited by Title VII. The *Gilbert* decision contradicted the latest guidelines from the Equal Employment Opportunity Commission (EEOC) and the six federal courts of appeal that had considered the issue.[50] However, the majority in *Gilbert* did recognize that the disability plan would constitute a *prima facie* violation of Title VII if the exclusion of certain risks in the plan impacted more harshly upon women than men.[51] The Court summarily concluded that the claimants had not proven any such disparate impact.[52]

There was a vigorous dissent by Justice Brennan with whom Justice Mar-

46. *Dothard,* 433 U.S. at 333 ("[I]t is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes . . . ."). The Court cited agreement from the federal courts and the EEOC. *Id.* at 333-34 n.17.

47. Recent cases emphasizing the applicability of a disparate impact analysis in Title VII discrimination suits include: Pullman-Standard v. Swint, 456 U.S. 273 (1982); Guardians Ass'n v. Civil Service Commission, 463 U.S. 582 (1983); EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984).

48. 429 U.S. 125 (1976).

49. *Id.* at 145.

50. *Id.* at 146-47 (Brennan, J., dissenting). *See also* HOUSE REPORT, *supra* note 4, at 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4750.

51. *Gilbert,* 429 U.S. at 136-37.

52. *Id.* at 138. The majority concluded, "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discrimination

shall concurred. Justice Brennan disagreed with the majority's simplification of the term "sex" as used in Title VII and directed attention to the Court's high standard of deference typically given to the EEOC's interpretations.[53] Additionally, the dissent suggested that G.E.'s insurance package did have a disparate impact on women because, while all male-specific and most female-specific disabilities were covered, pregnancy, the most prevalent disability unique to female employees, was excluded.[54] Justice Brennan, suspecting that the underlying reasons why benefits for pregnancy were not included in G.E.'s insurance package rested in a stereotypical view that women play only a minor role in the labor force, urged a return to an analysis which would flow from the social policies and objectives of Title VII.[55]

In 1977 two more employer policies related to pregnancy reached the Supreme Court in *Nashville Gas Co. v. Satty.*[56] In the first the Court held that a plan which denied an employee returning from pregnancy disability leave her seniority status, although neutral in its treatment of male and female employees, violated Title VII because it had a disparate impact on women.[57] While the claimant in *Satty* was on maternity leave, her position was eliminated due to a bona fide reduction in the size of her department. Upon her return, the employer placed her in a temporary position at a lower salary. Seeking job advancement, the employee applied for three different permanent positions. Had she been permitted to retain the seniority she accumulated before commencing pregnancy disability leave, she would have received one of the job openings.[58] Instead, the positions were given to employees who began work while the claimant was on leave. Eventually the temporary position terminated, leaving the claimant unemployed. From these facts the Court recognized that because only women get pregnant, they suffer a burden from a denial of seniority that men will never suffer.[59]

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effect in the scheme simply because women disabled as a result of pregnancy do not receive benefits."

53. *Id.* at 156 (Brennan, J., dissenting). For support, Justice Brennan cited to Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); *Griggs,* 401 U.S. at 433-34; Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

54. *Gilbert,* 429 U.S. at 155 (Brennan, J., dissenting).

55. *Id.* at 160 (Brennan, J., dissenting).

56. 434 U.S. 136 (1977).

57. *Id.*

58. *Id.* at 139.

59. *Id.* at 142. The Court could not dismiss that the "policy denied [claimant] specific employment opportunities that she otherwise would have obtained" as easily as it did in *Gilbert.* The Court was willing to admit that "[e]ven if [claimant] had ultimately been able to regain a permanent position with petitioner, she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career with petitioner." *Id.* at 141.

Therefore, a policy which denies women seniority upon return from pregnancy disability leave is a violation of Title VII's prohibition against disparate impact discrimination.

As to the second policy, under which the employees received compensation for time lost due to all non-job-related disabilities except pregnancy, the Court reaffirmed its analysis from *Gilbert.*[60] The employer was innocent of disparate treatment because the policy applied equally to men and women.[61] Moreover, the employer was innocent of disparate impact discrimination because, in the Court's view, exclusion of pregnancy from a sick leave compensation program *(Satty),* like exclusion of pregnancy from a disability insurance plan *(Gilbert),* does not deprive an individual of employment opportunity.[62]

These cases made it clear that an employer could treat pregnancy differently under employee benefit plans without committing a *per se* violation of Title VII. The Court was inconsistent, though, as to when it would find disparate impact. According to its holdings in *Gilbert* and *Satty,* women who become pregnant suffer substantial hardship when they are denied their seniority, but not when they are burdened with paying their medical bills and living expenses while on pregnancy disability leave. In response to this confusion, Congress enacted the Pregnancy Discrimination Act (PDA) with the expectation that "[b]y making it clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty.*"[63]

2. *Purpose and Execution of PDA Under a Disparate Impact Theory*

Congress chose to amend Title VII by simply broadening the definition of sex to include pregnancy, childbirth, and related medical conditions.[64] In

60. *Id.* at 144-45.

61. *Id.* at 140, 143. Quoting *Gilbert,* 429 U.S. at 136, the *Satty* Court acknowledged that pregnancy is a disability unique to women, but would not look beyond the fact that men and women both receive compensation for absence from work due to disabilities other than pregnancy and both retain job seniority while on leave for these non-job-related disabilities. *Id.*

62. *Id.*

63. HOUSE REPORT, *supra* note 4, at 3, *reprinted* in 1978 U.S. CODE CONG. AND AD. NEWS at 4751.

64. 42 U.S.C. § 2000e(k). With the new definition of sex inserted into § 2000e-2, Title VII provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions or privileges of employment, because of such individual's . . . [pregnancy] . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in

recommending the revised law for passage, the Education and Labor Committee expressed the hope that the PDA would effectively "encourage women to remain in the work force during and after pregnancy."[65] The Amendment affords protection for conditions of employment previously covered by Title VII including hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, and seniority.[66] The committee specifically stated that "[p]regnancy-based discrimination will be subject to the same scrutiny on the same terms as other acts of discrimination proscribed in the existing statute."[67] Unquestionably, under the PDA treating women differently from men because of pregnancy is *per se* a violation of Title VII.[68]

In addition to prohibiting disparate treatment, Title VII also forbids those employment "practices that are fair in form but discriminatory in operation" (disparate impact).[69] Logic impels the conclusion that the disparate impact theory is, therefore, applicable to discrimination on the basis of pregnancy. Furthermore, the goal of Title VII in conjunction with the PDA, the elimination of pregnancy discrimination to achieve equal employment opportunity, cannot be achieved without the use of a disparate impact analysis.

Treating an employee affected by pregnancy the same as other disabled employees guarantees equal employment opportunity to the pregnant employee only when the employer's policies provide adequate time off from work. In *Abraham v. Graphic Arts International Union,* the union as employer allowed ten days disability leave to all individuals employed on a particular project.[70] Laurie Abraham, an employee who needed pregnancy disability leave of more than ten days,[71] could not have argued her case against the union under a disparate treatment analysis because the ten-day leave policy applied equally to both men and women.[72] The United States

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any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's . . . [pregnancy] . . . .

65. HOUSE REPORT, *supra* note 4, at 12, *reprinted in* 1978 U.S. CODE CONG. AND AD. NEWS at 4760.

66. *Id.* at 4, *reprinted in* 1978 U.S. CODE CONG. AND AD. NEWS at 4753.

67. *Id., reprinted in* 1978 U.S. CODE CONG. AND AD. NEWS at 4752.

68. Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). *See also* Miller-Wohl Co. v. Comm'r of Labor & Industry, 515 F. Supp. 1264, 1267 (D. Mont. 1981), *vacated without op.*, 605 F.2d 1088 (9th Cir. 1982); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 390 (N.D. Texas 1980); Fancher v. Veterans Admin. Medical Center, 507 F. Supp. 124, 128 (E.D. Ark. 1981); Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. Cir. 1981).

69. *See supra* note 50 and accompanying text.

70. Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir. 1981).

71. *See supra* note 4.

72. A disparate treatment argument was also of no use to claimants in a Texas case where the employer denied accrual of seniority to any employee during leave, whatever the disability.

Court of Appeals for the District of Columbia Circuit, in recognizing the Title VII violation under a disparate impact analysis, stated "[i]n short, [that] the ten day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter."[73] In future situations like the one in *Abraham*, courts will have to make case by case determinations of which employment practices, although facially neutral, have a disparate impact on women. To avoid this tedious process, a few state legislatures which have reached the conclusion that inadequate pregnancy disability leave does have a disparate impact on women, have incorporated this finding into law.[74]

Based on such a determination, the Montana Maternity Leave Act provides that it is unlawful for an employer to refuse a woman employee a reasonable leave during the period of her pregnancy disability.[75] This law was challenged in *Miller-Wohl Co. v. Commissioner of Labor & Industry.*[76] Miller-Wohl's policy denied disability leave to any employee with less than one year seniority, and therefore violated the MMLA as to certain pregnant employees. The company defended on the ground that the MMLA conflicted with Title VII because it required the employer to grant a reasonable pregnancy disability leave regardless of seniority, thereby treating men differently from women.[77] The court saw no conflict, and suggested that the company could comply with the MMLA and Title VII by extending reasonable absences to new employees, both female and male, who missed work due to any sickness or disability.[78] The court also noted, based on the Supreme Court ruling in *Satty,* that the employer's policy, as it stood, would violate Title VII if shown to have a disparate impact on women.[79]

The Miller-Wohl Company appealed the district court's ruling to the Ninth Circuit.[80] That court summarily dismissed the case based on a finding

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In that suit the court concluded that there was insufficient proof of a disparate impact on women. Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 390 (N.D. Tex. 1980).

73. *Abraham,* 660 F.2d at 819.

74. *See supra* note 9.

75. MONT. CODE ANN. § 39-7-203 (1981). It is interesting to note that the MMLA was enacted in direct response to an amendment to Montana's constitution guaranteeing equal rights regardless of sex. The legislature realized that in order to achieve true equality between the sexes, equal treatment would not always suffice. Female employees could not compete for employment on the same level as men if they bore the burden from policies denying pregnancy disability leave. *See generally* Krieger, *supra* note 3, at 524-25.

76. 515 F. Supp. 1264 (D. Mont. 1981).

77. *Id.* at 1266.

78. *Id.* 1267. *But see* Homemakers, Inc. v. Division of Ind'l Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976).

79. *Miller-Wohl Co.,* 515 F. Supp. at 1267.

80. Miller-Wohl Co. v. Comm'r of Labor & Industry, 685 F.2d 1088 (9th Cir. 1982).

that the district court lacked subject matter jurisdiction.[81] Within the Ninth Circuit, the controversy between state acts and the PDA has been rejuvenated in a suit by California Federal Savings and Loan Association challenging the California law which guarantees adequate leave and reinstatement rights for disability due to pregnancy.[82]

3. *California Prohibition Against Pregnancy Discrimination, California Government Code § 12945*

The California Legislature responded to the Supreme Court's ruling in *Gilbert* with the same adamant disapproval as did Congress, but engineered a different scheme under which its statute would operate.[83] In an effort to promote equal employment opportunity,[84] the legislature predetermined that inadequate disability leave does have a disparate impact on pregnant employees, thereby relieving claimants of the burden to establish disparate impact discrimination in their *prima facie* case.[85] Such a legislative determination is permissible under California law where there is a rational relation between the facts and the presumption.[86] It is incontestable that pregnant employees require some time off from work. This leads to the presumption that pregnant employees faced with no-leave policies lose their jobs "because of" or "on the basis of" their pregnancy.[87]

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81. *Id.*

82. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 562.

83. *See* Note, *Review of Selected 1978 California Legislation, Employment Practices; Pregnancy Discrimination,* 10 PACIFIC L.J. 461, 463 (1979). *See also* 123 CONG. REC. 29,642-43 (1977) (discussion by Senator Bayh, co-sponsor of the PDA): "In handing down its decision in *Gilbert,* the Court made it clear that if Congress wanted to make sure that discrimination on the basis of pregnancy was to be considered sex discrimination, it would have to make that clear by passing legislation so stating. This is precisely what the legislation before us today does . . . ."

84. *See* Price v. Civil Service Comm'n, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr 475, *cert. dismissed,* 449 U.S. 811 (1980). The court noted that the state law shares the objectives of Title VII. *Id.* at 273, 604 P.2d at 1381, 161 Cal. Rptr. at 490. *See also* Sterling Transit Co., Inc. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981).

85. CAL. GOV'T CODE § 12945(b)(2). This section requires employers who do not offer general disability leave sufficient to suit pregnancy, childbirth, and related medical conditions, to provide adequate leave for pregnant employees. The Montana legislature predetermined disparate impact in favor of the pregnant employee. *See* Krieger, *supra* note 3, at 523-524. To contrast the state statutory design with the PDA, *see supra* notes 63-68 and accompanying text.

86. Kirchhubel v. Munro, 149 Cal. App. 2d 243, 249, 308 P.2d 432, 436 (1957). *See, e.g.,* Estate of Cornelious, 35 Cal. 3d 461, 465, 674 P.2d 245, 247, 198 Cal. Rptr. 543, 545, *appeal dismissed,* 104 S. Ct. 2337 (1984); Burg v. Municipal Court, 35 Cal. 3d 257, 268, 673 P.2d 732, 738-39, 198 Cal. Rptr. 145, 151 (1983), *cert. denied and appeal dismissed,* 104 S. Ct. 2337 (1984).

87. This result is prohibited by 42 U.S.C. § 2000e-2(h).

Specifically, Section 12945(b)(2) requires employers to provide pregnant employees with a reasonable disability leave of up to four-months. The statutory language defines a "reasonable leave" as that time during which the employee is actually disabled.[88] The need for a four-month requirement is substantiated by evidence that on the average, pregnant employees granted disability leave utilize 15.1 weeks.[89] Even with the four month requirement the statute is not overinclusive because pregnant employees able to return to work sooner must do so in order to preserve their rights under the law.[90] In *The Matter of the Accusation of the Department of Fair Employment and Housing v. Travel Express,* the Fair Employment and Housing Commission for the State of California interpreted this entitlement to a reasonable pregnancy disability leave as necessarily guaranteeing employees affected by pregnancy reinstatement rights to the same or an equivalent position.[91] The department's proposed administrative regulation goes further by creating a rebuttable presumption that while the employee is on pregnancy leave her employer is able to leave her job open, or fill it with a temporary replacement.[92] The employer may rebut with a showing of business necessity.[93]

Both Connecticut and Montana have laws similar to California Government Code § 12945(b)(2) which require employers to take affirmative steps in order to provide pregnant employees with equal opportunities in employment.[94] At first blush, these laws appear to contradict the literal wording of the PDA.[95] In *California Federal Savings and Loan Association v. Guerra,* the district court declared California's prohibition against pregnancy discrimination invalid for this reason.[96] The Ninth Circuit, however, was per-

88. CAL. GOV'T CODE § 12945(b)(2).

89. S. REP. NO. 95-995, 95th Cong., 1st Sess., 123 CONG. REC. 29,651 (1977) (The American Counsel of Life Insurance conducted a survey of one hundred eighteen companies and submitted the results to the Senate Human Resources Committee during its deliberations on the PDA).

90. *See supra* note 10. *See also* Proposed Regulation § 7291.2(c)(2)(C) *reprinted in* 34 Fair Empl. Prac. Cas. (BNA) at 570.

91. Case No. FEP 80-81, A7-09925 (1984) (cited in 34 Fair Empl. Prac. Cas. (BNA) at 566). *Accord* Proposed Regulation § 7291.2(c)(2)(B) *reprinted in* 34 Fair Empl. Prac. Cas. (BNA) at 569-70. The "same position" is defined as one "with the same pay, working conditions, benefits and opportunities for advancement . . . . Substantially similar job is defined as one of equal pay and benefits which is performed under similar working conditions, and provides similar opportunities for advancement." Proposed Regulation § 7291.2(b)(7), *reprinted in* 34 Fair Empl. Prac. Cas. (BNA) at 569.

92. *Id.*

93. CAL. GOV'T CODE § 12945. *See also* Proposed Regulation § 7291.2(c)(2)(C), *reprinted in* 34 Fair Empl. Prac. Cas. (BNA) at 570. The same defense is available under Title VII. *See supra* note 41 and accompanying text. *See also* 29 C.F.R. § 1604.10(c) (1984).

94. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 568.

95. *See supra* note 7.

96. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 568.

suaded by the argument supporting an application of the disparate impact theory in pregnancy discrimination suits.[97]

II. *California Federal Savings and Loan Association v. Guerra*

The district court attacked California's prohibition against pregnancy discrimination on the basis of three findings: (1) that the requirements of the state law are inconsistent with both the congressional purpose in enacting the PDA and with the goal of Title VII; (2) that the state law, by mandating preferential treatment for female employees, conflicts with Title VII; and (3) that discrimination against male employees due to pregnancy is discrimination on the basis of sex.[98] The district court opinion gives almost no consideration to the historical development of the PDA and provides little discussion of the rationale for its legal conclusions.

A. Conflict in Purpose

A state law is invalid under the Supremacy Clause if it conflicts with the purpose of a federal statute.[99] The basis for the district court's conclusion that California Government Code § 12945(b)(2) is inconsistent with Title VII stems from its interpretation of Congress' goal in enacting the federal law. The court suggested that the purpose of Title VII is "to provide equal treatment for males and females."[100] This finding ignores use of the disparate impact theory under Title VII. The Supreme Court has consistently construed the goal of Title VII as a guarantee of equal opportunity in employment, regardless of race, color, religion, sex, or national origin.[101] To achieve this goal, *Griggs* and its progeny have reaffirmed the theory that an employment practice which *treats males and females equally,* may in effect deny equal employment opportunity, and thereby violate Title VII if the practice has a disparate impact on one sex and is not justified by a business necessity.[102]

Prior to 1976, both the EEOC and the federal appeals courts interpreted Title VII's prohibition against disparate treatment and disparate impact discrimination to extend to pregnant employees.[103] When the issue reached the Supreme Court in *Gilbert* and *Satty,* a plurality of the bench decided that treating pregnant employees differently from others did not constitute sex

97. *California Federal,* 758 F.2d at 396.
98. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 568.
99. *See supra* note 35.
100. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 568.
101. *See supra* notes 35-39 and accompanying text.
102. *See supra* notes 40-47 and accompanying text.
103. *See supra* note 50.

discrimination in employment.[104] Congress responded by amending Title VII to specifically include prohibitions "because of" or "on the basis of" pregnancy.[105] Congress also included a phrase which provides that pregnant employees "shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work."[106] As the district court stated, Congress' purpose in enacting the PDA was to "eliminate classifications based on pregnancy,"[107] thereby correcting Supreme Court interpretations of Title VII to the extent that they denied pregnant women protection from disparate treatment. Yet, to argue that pregnant employees are not also protected from disparate impact discrimination, because of the Amendment's wording, is to suggest that Congress, while going overboard to rectify the *Gilbert* and *Satty* problems, intended to grant less protection to pregnant employees than that available to others.[108]

The statutory and legislative histories of the PDA clearly refute this proposition. Disparate impact analysis has been ingrained into Title VII law since *Griggs*.[109] Had Congress wanted to limit pregnancy discrimination victims only to remedies for disparate treatment, it certainly would have expressed such an intent. Congress chose instead to revise Title VII, not by adding a new substantive provision dealing with pregnancy, but by inserting a definitional amendment clarifying that discrimination on the basis of sex includes discrimination on the basis of pregnancy.[110] During the Senate debate on the PDA, Senator Javits, who co-sponsored the bill, explained:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this 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*] . . . .[111]

Even the Supreme Court had recognized in *Gilbert* and *Satty* that (the pre-PDA) Title VII afforded protection to pregnant women when a policy had a

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104. *See supra* discussion of *Gilbert* and *Satty*.

105. *See* 42 U.S.C. § 2000e(1)(k). *See also supra* note 63 and accompanying text.

106. 42 U.S.C. § 2000e(1)(K).

107. *California Federal*, 34 Fair Empl. Prac. Cas. (BNA) at 568.

108. *See also California Federal*, 758 F.2d at 395 ("Attributing to Congress an intent that employers or states must ignore pregnancy completely when fashioning their disability policies would be as absurd as discovering a congressional intent that states or employers must completely ignore prostatitis on pain of violating Title VII").

109. *See supra* note 37.

110. *See supra* notes 34, 64 and accompanying text.

111. 123 CONG. REC. 29,387 (1977). *See also* 123 CONG. REC. 29,647 (1977) (remarks of Senator Williams).

disparate impact on female employees.[112] Senator Javits' statement underscores an intent to retain this protection. In addition, the EEOC's pre-*Gilbert* interpretive guideline of Title VII protections for pregnant employees was reissued after Congress passed the PDA. The guideline provides in pertinent part:

> Where the termination of an employee who is temporarily disabled [due to pregnancy] is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.[113]

The House and Senate Committee Reports accompanying the PDA expressed full agreement with the EEOC's position.[114]

Within the California law is a finding that an employment policy which provides inadequate leave has a disparate impact on female employees. Based on this finding, the law requires employers to provide disability leave of up to four months for employees affected by pregnancy, childbirth, or related medical conditions.[115] This provision places pregnant women in parity with other employees. The state law fosters the objectives of Title VII as amended by the PDA—equal opportunity in employment.[116] Thus, California Government Code § 12945(b)(2) does not contradict either Congress' purpose in enacting the Pregnancy Discrimination Act, or the goal of Title VII.

B. Conflict in Operation

A state law may still be invalid under the Supremacy Clause if, through its operation, it prevents compliance with the federal law.[117] The district court concluded in *California Federal* that because the California prohibition on pregnancy discrimination compels preferential treatment for female employees disabled by pregnancy, an employer cannot comply under the law without violating Title VII's mandate to treat pregnant employees the same as employees disabled other than by pregnancy.[118] The court's conclusion em-

112. *Gilbert,* 429 U.S. at 137; *Satty,* 434 U.S. at 142.

113. 29 C.F.R. § 1604.10(c).

114. S. REP. NO. 331, 95th Cong., 1st Sess. (1977); HOUSE REPORT, *supra* note 4, at 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4748. The Court accords great deference to the EOOC's interpretations of Title VII. *Griggs,* 401 U.S. at 433-434. *See also supra* note 67 accompanying text.

115. CAL. GOV'T CODE § 12945(b)(2).

116. *See supra* note 84.

117. *See supra* note 36 and accompanying text.

118. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 568.

bodies its assumption that the PDA does not protect employees from disparate impact discrimination.

This assumption is unwarranted. Aside from the statutory structure and legislative history evidencing integration of disparate impact analysis into the PDA,[119] an extensive reading of the statute's language compels the same conclusion.[120] There are two segments to the PDA. The first calls for substitution of the term "pregnancy" for the term "sex" in § 2003-2(a) of Title 42 of the U.S. Code, making it a Title VII violation to "(1) discriminate against any individual with respect to [her] privileges of employment, because of [her] . . . [pregnancy;] or (2) to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of [her] . . . [pregnancy] . . . ."[121]

The language of subsection (1) would preclude the Supreme Court's interpretation in *Gilbert.* There, the employer's insurance plan included disabilities shared by female and male employees (i.e., broken bones); it also covered male-specific disabilities (i.e., vasectomies) and female-specific disabilities (i.e., mastectomies) but the plan excluded medical insurance coverage for pregnancy-related disabilities.[122] In essence, the package covered disabilities that only men suffer but eliminated from coverage the primary disability unique to women, pregnancy. This constitutes discrimination against an individual with respect to her privileges of employment because of her pregnancy, and is a violation under § 2000e-2(a)(1) of Title VII.

Under the language of subsection (2), an employee affected by pregnancy, childbirth or related medical conditions who loses her job because of an employment policy which provides inadequate disability leave, has had her "status as an employee" adversely affected because of her pregnancy. The D.C. Circuit, dealing with the ten-day disability leave policy in *Abraham,* recognized that "oncoming motherhood was virtually tantamount to dismissal."[123] California Federal's disability leave policy, like Miller-Wohl's, denies disability leave to an employee who has not been with the company for a minimum length of time.[124] With respect to these policies too, oncoming motherhood is virtually tantamount to dismissal. Thus, the first phrase of

119. *See supra* notes 109-12 and accompanying text.

120. *See California Federal,* 758 F.2d at 396.

121. *See supra* note 64 for a complete reconstruction of the statute's text.

122. *See supra* note 54.

123. *Abraham,* 660 F.2d at 819. *See also supra* note 73 and accompanying text.

124. *See California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 566 (an employee must have completed the third month of employment to be eligible for disability leave); *Miller-Wohl,* 515 F. Supp. at 1265, *vacated,* 685 F.2d 1088 (1982) (employees were denied sick leave during their first year with the company).

the PDA protects female employees affected by pregnancy from disparate treatment and from disparate impact discrimination.

The second phrase of the PDA provides:

> [W]omen 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 . . . .[125]

Had Congress inserted this phrase in order to require equal treatment of all employees, it would have effectively invalidated the first phrase of the PDA, the second part of which declares unlawful those policies which do extend equal treatment but which have a disparate impact on women. Instead, the second phrase should be read to safeguard the protection granted in the definitional phrase, by making it clear that the PDA entitles pregnant employees to the *same treatment* which Title VII affords to all other victims of discrimination—protection from disparate treatment and from disparate impact discrimination.[126] The second phrase of the PDA cannot be read at face value in light of the judicial and legislative history predate its passage.[127]

The spirit of the law is no less important than its letter. In holding that affirmative action is permissible, notwithstanding the strict wording of Title VII which prohibits racial discrimination in employment, the Supreme Court stated that it is a "familiar rule that a thing may be within the letter of the statute and not within the statute, because not within its spirit, nor within the intention of its maker."[128] The purpose of Title VII is to guarantee equal employment opportunity.[129] A strict reading of the second phrase of the PDA would only defeat such a purpose.

Once the PDA is construed to prohibit disparate impact discrimination, there is no conflict between the operation of California Government Code § 12945(b)(2) and Title VII. The California law requires an employer to give pregnant employees up to four months disability leave with reinstatement rights to their original or a similar position.[130] Title VII does not mandate these benefits but does prohibit policies which, although facially neutral, have a disparate impact on women.[131] An employer who provides inadequate disability leave and denies reinstatement to pregnant employees may

125. 42 U.S.C. § 2000e(k).

126. *See California Federal*, 758 F.2d at 396.

127. *See supra* notes 48-69 and accompanying text.

128. United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979).

129. *Griggs*, 401 U.S. at 429.

130. CAL. GOV'T CODE § 12945(b)(2).

131. *See Griggs*, 401 U.S. at 429-30 (interpreting 42 U.S.C. § 2000e-2(a)(2)). The House Report specifically acknowledges the Montana and Connecticut laws which are similar to Cali-

be enforcing a policy prohibited under Title VII. The policy burdens male and female employees as to non-gender-related disabilities equally. However, it imposes an additional burden on women because having children is a capability unique to the female sex. Where one half of the labor force is composed of women and four out of every five become pregnant during their working lives,[132] inadequate disability leave policies inevitably impose a disparate impact on female employees. An employer who grants adequate leave but, as did California Federal, does not guarantee reinstatement, in effect provides no leave at all. Both policies subject female employees to the disparate impact discrimination prohibited since *Griggs*.[133]

Rather than leaving this step to the claimant in establishing her *prima facie* case, the California law takes notice of the disparate impact, orders the appropriate remedy, and leaves to the courts only the adjudication of the employer's business necessity defense. Title VII may also require an employer to grant adequate pregnancy disability leave and reinstatement rights, but only after a court has taken judicial notice of the disparate impact resulting from an inadequate leave policy. Both methods achieve the same result—equal employment opportunity.

The district court in *California Federal* concluded that the California law mandated preferential treatment for women and therefore violated Title VII.[134] Yet prohibiting disparate impact discrimination is, in many instances, equivalent to requiring a form of preferential treatment which brings the disadvantaged group in parity with others. When the Supreme Court found in *Satty* that a denial of seniority upon return from disability leave adversely impacted on female employees affected by pregnancy,[135] the employer was left with two options: allow an employee returning from pregnancy disability leave to retain her seniority status while denying this right to others, or extend the right to all employees.

The first alternative, preferential treatment, was accepted by the Supreme Court in *Dothard v. Rawlinson*.[136] There the lower court barred the employer from applying a facially neutral policy to those employees adversely affected by it. The Supreme Court approved this as an appropriate remedy under Title VII.[137] Furthermore, the House Report accompanying the PDA

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fornia Gov't Code § 12945(b)(2). The report predates enactment of California's law. HOUSE REPORT, *supra* note 4, at 11, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4759.

132. *See supra* note 3.

133. *See supra* note 37.

134. *California Federal*, 34 Fair Empl. Prac. Cas. (BNA) at 568.

135. *Satty*, 434 U.S. at 141.

136. 433 U.S. at 331.

137. *Id.*

confirms that preferential treatment of female employees affected by pregnancy is permitted, although not mandated, by Title VII.[138] This report states that an employer who does not provide benefits such as paid sick leave to his employees is not required to provide them for pregnant employees.[139] However, the employer may select certain benefits to offer pregnant workers without granting the same to all employees.[140] This form of preferential treatment is the better alternative for an employer in some situations.

For example, the employer who does not guarantee reinstatement to employees who need extended disability leaves faces this situation. Once a court holds that the denial of reinstatement has a disparate impact on women, the employer has two choices: (1) guarantee women affected by pregnancy reinstatement to the same or similar job if they return from disability leave within a reasonable period; or (2) grant reinstatement rights to all employees who return from any disability leave within the specified time allotment. The second option places the employer in a difficult position; he must leave positions open and utilize temporary employees even in the case of an individual employee who, due to a particular disability, will probably never be able to return to work. Extension is not always the better solution, but it is certainly permissible.

The district court in *Miller-Wohl* suggested that the company should extend benefits to non-pregnant employees if it is concerned about Title VII violations.[141] A state law requiring that certain benefits be granted to pregnant employees, then, would not conflict with Title VII because compliance with both laws is not a practical impossibility.[142] The district court in *California Federal* responded to this contention by concluding that "an employer need not extend preferential treatment to all similarly situated employees."[143] The court cited authority in *Homemakers, Inc. v. Division of Industrial Welfare,*[144] where the state statute required employers to pay premium overtime pay to women only, in order to lessen the current pay dissimilarities of male and female employees.[145] The court rejected extending this requirement to male employees as a method of correcting the otherwise discriminatory statute, because such a remedy would defeat the purpose of

138. HOUSE REPORT, *supra* note 4, at 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4753.

139. *Id.*

140. *Id.*

141. *Miller-Wohl,* 515 F. Supp. at 1266.

142. *See supra* note 36 and accompanying text.

143. *California Federal,* 34 Fair Empl. Prac. Cas. (BNA) at 568.

144. *Id.; Homemakers,* 509 F.2d 20 (9th Cir. 1974), *cert. denied,* 423 U.S. 1063 (1976).

145. *Id.* at 1112.

the law.[146] In *Miller-Wohl*, however, the extension of disability leave and reinstatement rights to all employees would have preserved the legislature's intent—the removal of a burden from which female employees uniquely suffer.

C. Sex Discrimination

A final argument presented in the *California Federal* district court decision is that the Section 12945(b)(2) discriminates against male employees, which is discrimination on the basis of sex.[147] Title VII prohibits state laws which "require or permit the doing of any act which would be an unlawful employment practice under this title." If the state law requires employers to discriminate on the basis of sex as to male employees, then it is invalid under Title VII.

The lower court in *Miller-Wohl* found no such violation in Montana's Maternity Leave Act, which is similar to California's law.[148] The *Miller-Wohl* court found that Montana's law allowed an employer to treat equally male and female employees who are similarly disabled, and only barred employers from burdening female employees because of their different role in giving birth to children.[149] Therefore, Section 12945(b)(2), which denies a benefit to male employees which they will never need, cannot discriminate against them because it causes them no harm.

The Ninth Circuit commented that the district court's finding on this issue "defies common sense, misinterprets case law, and flouts Title VII and the PDA."[150] That court relied on the analytical difference between a 1983 Supreme Court decision, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[151] and Section 12945(b)(2), to support its contention that the PDA was passed to aid those who need it, women and not men.[152] In *Newport News* the court upheld an order for the employer to extend pregnancy benefits to female spouses of male employees so that the male employee's health insurance package would be equal to the female employee's package.[153] There, female employees whose husband-spouses were insured for all disabilities were getting a more comprehensive benefit than male employees whose wife-spouses were not covered for pregnancy disability. In California Fed-

146. *Id.*
147. *California Federal*, 34 Fair Empl. Prac. Cas. (BNA) at 568.
148. *Miller-Wohl*, 515 F. Supp. at 1266.
149. *Id.*
150. *California Federal*, 758 F.2d at 393.
151. 462 U.S. 669 (1983).
152. *California Federal*, 758 F.2d at 393.
153. *Newport News*, 462 U.S. at 669.

eral's case, however, granting a disability leave to pregnant employees causes no diminution to the benefit package of a male employee who will never become pregnant.[154] Therefore, Section 12945(b) (2) has no discriminatory effect on male employees.

III. CONCLUSION

Title VII, as amended by the Pregnancy Discrimination Act, guarantees equal opportunity in employment to female employees affected by pregnancy, childbirth, or related medical conditions. California Government Code § 12945(b)(2), acting under the realm of Title VII, requires employers to affirmatively comply with the federal statute by granting reasonable disability leave and reinstatement rights to pregnant employees. The legislative history of the PDA acknowledges a law similar to California's and the design of Title VII welcomes state action in this area. Use by state legislatures of a statutory scheme similar to California Government Code § 12945(b)(2) will provide better protection for pregnant employees without denying any rights to males and non-pregnant females. Absent state action, employers should voluntarily afford disability leave to female employees disabled by pregnancy.[155] Otherwise, they may be in violation of Title VII's prohibition against disparate impact discrimination on the bases of pregnancy, childbirth, or related medical conditions.

Marianne P. Eby

154. *California Federal*, 758 F.2d at 393.

155. "A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." *Id.* at 395 (quoting *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting)).