Tulsa Law Review

Volume 23 | Issue 1

Fall 1987

Equal Employment Opportunity for Pregnant Workers: California Federal Savings & Loan Association v. Guerra

Beverly A. Stewart

NOTES AND COMMENTS

EQUAL EMPLOYMENT OPPORTUNITY FOR PREGNANT WORKERS: *CALIFORNIA FEDERAL SAVINGS & LOAN ASSOCIATION V. GUERRA*

I. INTRODUCTION

Will a woman lose her place on the ladder of employment advancement if she becomes pregnant and takes maternity leave? Pregnant women historically have been affected by one of two common employment policies. One policy provides no leave at all, often forcing the employee into voluntary or mandatory resignation; the other policy imposes mandatory unpaid leave during pregnancy and after childbirth.[1] The usual result of pregnancy is the loss of employment or, at the least, a temporary loss of income.[2] If the employer grants a leave of absence, there is seldom a guarantee of reinstatement; consequently, seniority and fringe benefits are lost. Three major assumptions form the basis for these policies: (1) women are temporary, marginal workers who will not return to employment after achieving their primary maternal role;[3] (2) women must be excluded from the hazards of the workplace for protection during childbearing and child-rearing;[4] and (3) a woman's income is

1. *See* S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 35-38 (1983) [hereinafter MATERNITY POLICIES].

2. *Id.* at 36.

3. *Id.* at 33-35. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 448-53 (1978-79). Two facts characterize women's status in the American labor market:

1) Female workers, especially working class women, tend to be segregated into a relatively small number of female-dominated occupations.

2) Women tend to occupy positions in the "secondary labor market," which is characterized by lack of provisions for job security, fringe benefits, or union representation.

4. Part of the rationale for denying employment to the pregnant woman stemmed from the idea that she needed protection and needed to stay home to care for the new child. Employment rules protecting pregnant women were similar to earlier protective state legislation requiring special conditions for working women on the premise that they were "more fragile than men" or "in greater need of moral guidance." E. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 81 (1986) [hereinafter THE AMERICAN FAMILY]. These pregnancy laws kept women from taking jobs

dispensable.

These assumptions are an attempt to justify mandatory leave or resignation, but they cannot be justified in today's economic environment. For women who are the sole family support, earned income is crucial. Working wives contribute twenty-six percent of family income; women working full time throughout the year contribute thirty-nine percent of the family income.[5] In June, 1987, over seventy percent of civilian women in the peak childbearing years, nineteen to thirty-four, were employed.[6] Furthermore, forty-eight percent of all mothers with children under one year old work, and sixty-seven percent of mothers with children under three years old work full time.[7] As these figures show, excluding mothers from the workplace would financially burden a substantial number of American families.

Following the recent United States Supreme Court decision in *California Federal Savings & Loan Association v. Guerra* (*Cal. Fed*),[8] employers in states with statutes that require maternity leave and reinstatement to the same or similar position must give pregnant women these statutory benefits. Because the Court found that Title VII of the Civil Rights Act of 1964 (Title VII)[9] did not conflict with the California statute,[10] a

---

that often had higher salaries, or they required special treatment which made it undesirable for employers to hire them. Like protective laws, pregnancy rules often subordinated women to men, eliminated job competition, and reinforced patriarchal social structures. *Id. See also* Boris & Bardiaglio, *The Transformation of Patriarchy: The Historic Role of the State*, in FAMILIES, POLITICS AND PUBLIC POLICY 80 (I. Diamond, ed. 1983). See B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 208-19 (1977) for a discussion of "protective" laws that have a discriminatory effect on women by making it difficult for them to obtain high-paying, desirable jobs.

5. MATERNITY POLICIES, *supra* note 1, at 10. Women have historically provided essential economic support for themselves and their families. J. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 21-22 (1978).

6. "Employment and Earnings," U.S. Dep't of Labor (July 1987). More than 50 percent of wives from ages 25 to 34 work full time throughout the year. MATERNITY POLICIES, *supra* note 1, at 10.

7. Press, McDaniel & Wright, "A New Family Issue," NEWSWEEK, Jan. 26, 1987, at 22. *See also* THE AMERICAN FAMILY, *supra* note 4, at 21-22, quoting a 1984-85 report of Family Service America:

> 1. The traditional nuclear family with the husband working to support his dependent wife and children has become the exception rather than the rule and is now typical of fewer than 10 percent of all households.
>
> . . . .
>
> 3. The number of working women is increasing, and if trends continue, men and women will soon be in the labor force in equal numbers. Married women including those with young children are now more likely than not to be employed.

Id. It is predicted that by 1990 women will make up more than 50 percent of the workforce. Silverman, *Re-examining Maternity Leave*, NATIONAL UNDERWRITER, April 12, 1985, at 35.

8. 107 S. Ct. 683 (1987).

9. 42 U.S.C. § 2000e to § 2000e-17 (1982).

woman's right to retain her position is secure in California and in the other states with similar legislation or regulations.[11] Several other states which do not specify reinstatement or job status do provide some guarantee to pregnant workers by prohibiting policies that have an adverse impact on women.[12]

Because it is necessary to ensure that the workplace gives equal opportunities to working women, the Supreme Court in *Cal Fed* upheld a state's right to enact and enforce laws affirming a benefit to pregnant employees.[13] California's affirmative statute is not preempted by federal legislation because it does not conflict with Title VII.[14] The statute reduces the disparate impact that inadequate maternity leave policies have on female workers.[15] Because the statute does not discriminate, but serves to achieve equality of employment opportunity, taking sex differences into account is justifiable.[16]

II. STATEMENT OF THE CASE

A. *Facts*

Lillian Garland, a receptionist for California Federal Savings and Loan Association, took a four-month pregnancy disability leave in January, 1982.[17] The following April, after recovering from a caesarean section,[18] she requested reinstatement to her job, but neither her old job nor any receptionist or similar position was available.[19] The financial institution did not reinstate Ms. Garland in a receptionist position until seven months later.[20]

---

10. CAL. GOV'T CODE § 12945(b)(2) (West 1980).

11. The states with legislation requiring reinstatement after maternity leave are Connecticut, Massachusetts, and Montana. Hawaii, Illinois, Kansas, New Hampshire, and Washington impose a reinstatement requirement by regulation or guidelines from state antidiscrimination statutes. Reinstatement may be implied in Wisconsin. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 720-32 & nn.93, 95 & 148 (1985). For the relevant citations, text of provisions, and discussion of regulations, *see infra* notes 93-108 and accompanying text.

12. The states are Colorado, Iowa, Maine, Missouri, Ohio, Oklahoma, and Rhode Island. Dowd, *supra* note 11, at 732. *See infra* notes 106-08 and accompanying text.

13. *Cal Fed*, 107 S. Ct. at 694-95.

14. 42 U.S.C. § 2000e to § 2000e-17 (1982); *see infra* notes 180-89 and accompanying text.

15. *See infra* notes 41-54 and accompanying text.

16. *See infra* notes 147-63 and accompanying text.

17. California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 392 (9th Cir. 1985).

18. Rust, *Maternity Leave: Caught in the Crossfire*, A.B.A. J., Aug. 1, 1986, at 52. Caesarean section is a surgical incision made through the uterus and abdominal wall to extract a fetus. THE AMERICAN HERITAGE DICTIONARY 186 (1969).

19. *Cal Fed*, 107 S. Ct. at 688.

20. *Id.* at n.7. During the seven months before reinstatement to her job, she was evicted from her apartment because she had no money with which to pay her rent. As a result, she had to sleep on

California's Fair Employment and Housing Act (FEHA)[21] prohibits employment discrimination. Section 12945(b)(2) of the FEHA requires employers to provide female employees with unpaid pregnancy disability leave.[22] The Fair Employment and Housing Commission has construed this section to require reinstatement of an employee returning from pregnancy leave to her previous job "unless it is no longer available due to business necessity."[23] If the job is not available, the employer must make a good faith effort to place the returning employee in a similar position. Title VII similarly prohibits employment discrimination on the basis of pregnancy.[24] When the Savings and Loan failed to reinstate Ms. Garland upon her request, she filed a complaint with the Fair Employment and Housing Commission. The Commissioner charged the financial institution with violating § 12945(b)(2).[25] The Savings and Loan sought declaratory and injunctive relief against enforcement of the statute[26] in federal district court, claiming that § 12945(b)(2) is inconsistent with and preempted by Title VII.[27] The district court granted the Savings and Loan's motion for summary judgment, holding that Title VII preempts § 12945(b)(2) because it "[d]iscriminat[es] against males"[28] by

---

a female friend's sofa. Because she had no resources to care for the baby, she lost custody to the child's father. Lewin, *Maternity Leave: Is it Leave Indeed?* New York Times, July 22, 1984, § 3, at 1, col. 5.

21. CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1987).

22. *Cal Fed*, 758 F.2d at 392. California Federal Savings & Loan, based in Los Angeles, is a federally chartered savings and loan association. As an employer of more than 15 employees, it is covered by federal law (Title VII) as well as California state law (§ 12945(b)(2)). Cal Fed's leave policy is facially neutral and permits workers with a minimum of three months of employment to take unpaid leaves for various reasons, including disability and pregnancy. *Cal Fed*, 107 S. Ct. at 687-88 (1987).

Section 12945(b)(2) provides in relevant part:

> It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> . . . .
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .
>
> (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. . . . An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

CAL. GOV'T CODE § 12945(b)(2) (West 1980).

23. *Cal Fed*, 107 S. Ct. at 687.

24. *Id.*

25. *Cal Fed*, 758 F.2d at 392.

26. *Id.* at 392-93. The Merchants and Manufacturing Association and the California Chamber of Commerce joined in the suit. *Cal Fed*, 107 S. Ct. at 688.

27. *Cal Fed*, 758 F.2d at 393.

28. *Id.* at 396.

requiring preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions.[29]

B. *Holding*

The Ninth Circuit Court of Appeals reversed the district court's decision[30] and found no preemption under Title VII as amended by the Pregnancy Disability Act (PDA).[31] The court of appeals determined that the PDA sets a minimum for pregnancy disability benefits and that the California statute simply furthers the goal of equal employment opportunity for women.[32] The United States Supreme Court granted certiorari and affirmed the appellate court's judgment, holding that Title VII does not preempt the California statute.[33]

C. *Issue*

The question presented to the Supreme Court was whether Title VII preempts a state statute that requires employers to provide leave and reinstatement to pregnant employees.[34]

III. LAW PRIOR TO THE CASE

A. *Title VII*

Title VII of the Civil Rights Act of 1964[35] prohibits discrimination in employment on the basis of sex.[36] Section 703(a)(1) of the Act makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[37] Even though the Supreme Court has not recognized sex as a "suspect classification" under the equal protection clause of the Constitution,[38] sex is as significant under Title VII as race and national origin,

29. *Cal Fed*, 107 S. Ct. at 688.
30. *Cal Fed*, 758 F.2d at 397.
31. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)) (1982) [hereinafter PDA].
32. *Cal Fed*, 758 F.2d at 396.
33. *Cal Fed*, 107 S. Ct. at 695.
34. *Id.* at 686.
35. 42 U.S.C. § 2000e to § 2000e-17 (1982) [hereinafter Title VII].
36. *Id.* at § 2000e-2(a).
37. *Id.*
38. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). In *Frontiero*, four Justices in the plurality opinion designated sex as a "suspect classification," but the four concurring and one dissenting Justice disagreed. Subsequently, in Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975), the Justices who viewed sex similar to race in *Frontiero* withdrew from their position. The absence of the race-

which the Supreme Court has classified as "suspect."[39] Because the Court has hesitated to label classifications based on sex as "suspect," claims of sex discrimination in maternity policies have been more successful under Title VII than under equal protection claims of sex discrimination.[40]

Discriminatory employment practices under Title VII have generally been established under one of two theories: disparate treatment or disparate impact.[41] Disparate treatment is patent discrimination against a protected Title VII class; the employer openly treats certain employees less favorably than he treats others.[42] To establish a prima facie case of disparate treatment, the employee must prove that the employer had discriminatory motives.[43] Evidence of discrimination is "virtually impossible to produce,"[44] however, so motive is usually inferred from comparative differences in treatment of similarly situated persons of another group.[45]

The disparate impact theory evolved in response to the Court's changing view of discrimination and its recognition that discrimination often results from systems inherent in various employment policies.[46]

---

sex analogy from the Court's opinion signaled that a different approach would be needed for the attack on sex discrimination. M. BERGER, LITIGATION ON BEHALF OF WOMEN, 17-18 (1980).

39. *See* J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW § 14.5 (3d ed. 1986).

40. See Geduldig v. Aiello, 417 U.S. 484 (1974), where the Court used only the rational basis test and found that the exclusion of pregnancy and childbirth disabilities from a state's employee disability benefits program was justified based on cost and an overall plan of employee contributions. *Id.* at 497. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), however, the Court found that the school board's mandatory leave rules bore no rational relationship to the state's interest in continuity of instruction and invalidated the provisions. *Id.* at 643, 647-48. Because the due process clause of the fifth and fourteenth amendments permits constitutional challenges only against employers with some state nexus, private sector employees relied on Title VII's prohibition of discrimination by employers with 15 or more employees. Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591, 593 & n.12 (1982). *See also* Thomas, *Differential Treatment of Pregnancy in Employee Disability Benefit Programs: Title VII and Equal Protection Clause Analysis,* 60 OR. L. REV. 249, 251-57 (1981); Erickson, *Pregnancy Discrimination: An Analytical Approach*, 5 WOMEN'S RTS. L. REP. 83 (1979).

41. *See* Note, *Sex Discrimination: Theories and Defenses under Title VII and* Burwell v. Eastern Airlines, Inc., 83 W. VA. L. REV. 605, 609-12 (1981) [hereinafter *Theories and Defenses*]; Erickson, *supra*, note 40, at 84-94.

42. *Theories and Defenses, supra* note 41, at 609. Groups with a common characteristic, such as race, color, religion, sex, or national origin, constitute a protected class under Title VII.

43. *Id.*

44. Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974).

45. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 82-84 (1983).

46. General Electric Co. v. Gilbert, 429 U.S. 125, 159-60 (1976) (Brennan, J., dissenting) (citing Lau v. Nichols, 414 U.S. 563 (1974)). The Court in *Lau* recognized that discrimination is a social phenomenon that is molded by legislation. The effects of the legislation may demand due consideration to the uniqueness of "disadvantaged" individuals. *Gilbert*, 429 U.S. at 159 & n.9.

The Supreme Court initially articulated the disparate impact theory of discrimination in *Griggs v. Duke Power Co.*[47] and held that a discriminatory motive was not essential to a Title VII case.[48] Therefore, in addition to prohibiting overt discrimination, Title VII also proscribes facially neutral policies that have a discriminatory effect on only one protected class of employees when the policies cannot be justified as a business necessity.[49] As a result, if an employee establishes that a neutral practice statistically disadvantages her protected class, the employer may respond by showing that the challenged practice is a business necessity.[50]

Sex discrimination under Title VII encompasses employment discrimination based on pregnancy.[51] Therefore, under a classical Title VII analysis, the validity of maternity leave statutes depends "on whether the statutes require disparate treatment or have a disparate impact on the basis of sex by mandating employment policies that solely benefit women."[52] Alternatively, statutory validity may depend on the application of general principles of discrimination in Title VII law.[53] The primary consideration is whether the statute furthers Title VII's goal of achieving equal employment opportunity.[54]

---

47. 401 U.S. 424 (1971).

48. *Id.* at 432. The Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures . . . that . . . are unrelated to measuring job capability." *Id.*

49. *Id.* at 431. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). The Court stated:

> Claims of disparate treatment may be distinguished from claims . . . [of] "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Id. Title VII prohibits conditioning employment on diploma and test requirements unrelated to job success when they serve to exclude blacks. Title VII's purpose is to achieve "equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30.

50. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981) (if employee establishes prima facie case, employer must give legitimate, nondiscriminatory reasons for practice); Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (statistical showing of disproportionate impact need not be based on applicants).

51. In 1972, the Equal Employment Opportunity Commission equated maternity with temporary disability for purposes of sick leave or temporary disability benefits. 29 C.F.R. § 1604.10 (1986).

52. Dowd, *supra* note 11, at 742-43 (footnotes omitted). Dowd takes the position that if pregnancy is recognized as a disability which is unique to women, then men and women are *not* similarly situated with respect to employment disabilities and risks. Therefore, neither sex suffers disparate treatment from pregnancy benefits. *Id.*

53. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII analysis directed mainly toward consequences of employment practices that discriminated against blacks based on claimed business necessity); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (comparing the prima facie showing with an ultimate factual finding of discrimination).

54. *Griggs*, 401 U.S. at 429-30.

B. *Federal Circuit Court Decisions*

Federal courts during the 1970's based their decisions on the disparate impact theory advocated in *Griggs*.[55] Accordingly, the courts that considered the maternity leave issue under Title VII invalidated disability plans without benefits for pregnant workers because such plans had a disparate impact on women.[56] For example, in *Satty v. Nashville Gas Co.*,[57] the Sixth Circuit looked to the EEOC regulations for guidance[58] in determining the validity of the gas company's disability policy under Title VII.[59] The court stated that the principal aim of Title VII is to eliminate artificial distinctions which further disparate treatment without a compelling reason for the disparity.[60] Consequently, the *Satty* court found that the policy's disparate treatment of pregnant employees violated Title VII.[61]

---

55. *Id.* at 424.

56. The circuit courts disregarded the Supreme Court's constitutionally-based decisions as inapplicable to Title VII pregnancy discrimination cases. *See* Communications Workers v. American Tel. & Tel. Co., Long Lines Dep't, 513 F.2d 1024 (2d Cir. 1975) (exclusion of pregnancy-related disability benefit plans are forbidden under Title VII), *vacated*, 429 U.S. 1033 (1977), *and remanded in light of* General Electric Co. v. Gilbert, 429 U.S. 125 (1977); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975) (private employer's income protection plan which excluded pregnancy benefits but included other disabilities and which limited pregnancy leave to three months without termination violated Title VII), *vacated and remanded on jurisdictional grounds*, 424 U.S. 737 (1976); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975) (exclusion of pregnancy-related disability benefits from employee benefit program violated Title VII), *rev'd*, 429 U.S. 125 (1976).

57. 522 F.2d 850 (6th Cir. 1975), *aff'd in part, vacated in part*, 434 U.S. 136 (1977).

58. The EEOC administers Title VII. 29 C.F.R. § 1604.10 (1986) provides in part:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

Id.

59. *Satty*, 522 F.2d at 854. Under the company policy, an employee retained job-bidding seniority following absence from work due to a nonwork-related disability, but an employee taking maternity leave did not. Similarly, vacation time could be applied to pregnancy-related absences but sick leave could not. *Id.* at 851-52.

60. *Id.* at 855.

61. *Id.* at 854. The Sixth Circuit declined to adopt the sex-neutral approach advocated by the Supreme Court in Geduldig v. Aiello, 417 U.S. 484 (1974), where the Court stated that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . ." *Id.* at 496 n.20. One commentator has characterized this statement as the Court's "Alice-in-Wonderland view of pregnancy as a sex-neutral

Despite using similar methods of analysis, the circuit courts were divided on which types of pregnancy-based discrimination established sex discrimination. Some courts used the bona fide occupational qualification (BFOQ) defense standard to rebut pregnancy-based employment distinctions showing disparate treatment of an entire class.[62] Other courts used the business necessity standard in determining whether a facially neutral practice had a disparate impact on a protected group.[63] The Supreme Court in *General Electric Co. v. Gilbert*[64] debated the sex-discriminatory impact of an employment policy on pregnancy, and the controversial decision reversed the effect of many of the circuit court decisions that upheld pregnant workers' rights.

C. General Electric Co. v. Gilbert

The Supreme Court in *General Electric Co. v. Gilbert*[65] squarely addressed the issue of whether the exclusion of pregnancy coverage from a company disability plan constitutes sex discrimination. Certain female employees brought a class action suit charging that the company disability plan violated Title VII because it excluded coverage of all pregnancy-related disabilities.[66] Relying on its reasoning in *Geduldig v. Aiello*,[67] the Court held that the exclusion of pregnancy benefits was not a "mere

---

phenomenon . . . ." Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 n.304 (1977).

62. To establish a BFOQ defense, the restrictive policy must be "reasonably necessary" to the employer's business and the employer must factually establish that substantially all pregnant women would be unable to perform their duties. *See* Wald, *supra* note 40, at 608-09. For examples of the employer BFOQ defense, *see* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (being a female not a BFOQ for the position of flight attendant); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (in order to invoke the BFOQ defense, the employer must prove that he had a factual basis for believing that women would be unable to perform the job of telephone switchman).

63. Business necessity must be established by evidence that the challenged practice is:

> necessary to the safe and efficient operation of the business . . . . [T]he challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . impact.

Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) (footnotes omitted). Some employers relied on the "bona fide occupational qualification" (BFOQ) exception in section 703(e) of Title VII.

64. 429 U.S. 125 (1976).

65. *Id.*

66. Evidence presented in the district court stressed the cost factor of implementing additional benefits for pregnancy and indicated that the inclusion of a pregnancy disability benefits plan would increase GE's cost by a large but indeterminable amount. *Id.* at 131 & n.10 (citing Gilbert v. General Elec. Co., 375 F. Supp. 367, 378 (E.D. Va. 1974)).

67. *Geduldig*, 417 U.S. 484 (1974).

pretex[t] designed to effect an invidious discrimination against the members of one sex . . . ."[68] Failing to find gender-based effects necessary to prove a Title VII discrimination class action case, the court found that the company plan was merely an insurance policy which covered some risks but excluded others.[69] The court based its finding on the assumption that employees can be divided into two groups—pregnant women and non-pregnant persons.[70] Moreover, it found that the EEOC guidelines on pregnancy disability benefits[71] which were to be included in insurance plans lacked the force of law[72] and actually conflicted with Title VII's concept of discrimination.[73] *Gilbert* thus established that discrimination on the basis of sex did not include discrimination on the basis of pregnancy.[74]

Congress enacted the Pregnancy Disability Act in 1978,[75] thereby expressly rejecting the *Gilbert* decision and adopting the *Gilbert* dissent as a correct interpretation of Title VII.[76] Justice Brennan's dissent focused on the discriminatory effect of General Electric's disability program on women.[77] The program insured against all male-specific disabilities, and it covered all female-specific disabilities except pregnancy, which is the most prevalent female-specific disability.[78] Justice Brennan also found that the 1972 EEOC guidelines represented eight

68. *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496-97 n.20). The Fourth Circuit majority in *Gilbert* concluded that *Geduldig* did not control because the *Geduldig* decision was based on the fourteenth amendment equal protection clause and not on Title VII. *Id.* at 132-33 (noting Gilbert v. General Electric Co., 519 F.2d 661, 666-67 (4th Cir. 1975)). The Supreme Court disagreed. *Gilbert*, 429 U.S. at 136.

69. *Id.* at 138. The court found that pregnancy, although confined to women, was significantly different from the typical covered disability or disease and was often voluntarily undertaken. Consequently, the Court would not infer that the exclusion of pregnancy disability benefits from the company plan was a pretext for discriminating against women; therefore, the plan was not gender-based. *Id.* at 136.

70. *Id.* at 135. *See* Karst, *supra* note 61.

71. 29 C.F.R. § 1604.10(b) (1986).

72. *Gilbert*, 429 U.S. at 141 (citing Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942)).

73. *Id.* at 142. The Court found that the EEOC guideline was promulgated eight years after Title VII's enactment and actually contradicted the agency's opinion letter to General Electric dated October 17, 1966. The letter stated: "a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes . . . those disabilities which result from pregnancy and childbirth would not be in violation of Title VII." *Id.*

74. *Id.* at 133-40.

75. PDA, *supra* note 31.

76. S. REP. NO. 331, 95th Cong., 1st Sess. 3 (1977); H.R. REP. NO. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750 [hereinafter PDA Legislative History].

77. *Gilbert*, 429 U.S. at 146 (Brennan, J., dissenting).

78. *Id.* at 155 (Brennan, J., dissenting). Justice Brennan denied the characterization of pregnancy as voluntary because General Electric had not eliminated other voluntary disabilities from its

years of conscientious deliberations and deserved "great deference."[79] In addition, the dissent stated, the 1972 guidelines were consistent with previous congressional enactments.[80] Enacting the PDA, Congress concurred with Brennan's position and found no conflict between the EEOC guidelines and Title VII's concept of discrimination.[81]

D. *The Pregnancy Disability Act of 1978*

Because it feared that working women would be adversely affected by the Court's holding in *Gilbert*, Congress amended Title VII by enacting the Pregnancy Disability Act of 1978 (PDA).[82] Congress' specific purpose was to insure that working women are protected against all forms of employment discrimination based on sex.[83] The PDA clarifies the definition of sex discrimination to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions."[84] The second clause of the Act states that women affected by pregnancy-related

---

plan, i.e., sports injuries, attempted suicides, venereal disease, cosmetic surgery, and disabilities incurred in a fight or commission of a crime. *Id.* at 151 (citing Gilbert v. General Elec. Co., 519 F.2d 661, 665 (4th Cir. 1975)).

79. *Gilbert*, 429 U.S. at 157 (Brennan, J., dissenting). While opinion letters issued by the EEOC during the eight-year period between enactment of Title VII and the finalized guidelines denied liability to employers, the final EEOC well-deliberated guideline governed. *Id.*

80. FEDERAL PERSONNEL MANUAL, ch. 630, subch. 13, S13-2 (FPM Supp. 990-2, May 6, 1975); Railroad Unemployment Insurance Act, 45 U.S.C. § 351(k)(2) (1982); Education Amendments of 1972, 20 U.S.C. § 1681(a) (1982), noted by Brennan in *Gilbert*, 429 U.S. at 157.

81. *See* Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669, 679 n.17 (1983).

82. PDA Legislative History, *supra* note 76, at 4751. Senator Williams, a sponsor of the PDA, stated: "The law must be changed to expressly prohibit pregnancy discrimination. If it is not changed, countless women and their families will be forced to suffer unjust and severe economic, social and psychological consequences." 123 CONG. REC. 7539 (1977) (statement of Sen. Williams). Congressman Hawkins also stated: "We must act now to guarantee that our progressive laws do not become regressive by fact of interpretation in the courts." *Id.* at 7671.

83. PDA Legislative History, *supra* note 76, at 4750.

> Although recent attention has been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, 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 . . . .

Id. at 4754-55.

84. 42 U.S.C. § 2000e(k) (1982). The PDA provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

The PDA applies to all situations in which women are affected by pregnancy and extends to abortion. While an employer may not fire or refuse to hire a woman who has had an abortion, an

conditions shall be treated the same for all employment-related purposes as other persons with a similar ability or inability to work.[85]

The PDA compels employers who provide health care benefits to employees to also provide benefits to female workers for pregnancy-related disabilities. The Supreme Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[86] acknowledged the PDA's effect of overruling *Gilbert* by citing legislative history favoring the argument of the dissenting justices in *Gilbert*.[87] Although *Newport News* extends the PDA's requirements to include coverage for female employees, employer-provided health care benefits for employees or their dependents is optional. However, any coverage for employees' wives must equal the coverage for female employees.[88]

The broader purpose of the Pregnancy Discrimination Act is to insure protection to working women against differential treatment based on pregnancy-related conditions.[89] The House Report on the PDA explains that all "[p]regnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination"[90] in Title VII. The House Report indicates that employers are not required to implement affirmative action programs for pregnant employees but are merely to treat those employees equally.[91] Moreover, the protection extends to all matters concerning the childbearing process,[92] such as medical and disability benefits, leave provisions, and job reinstatement. The PDA amplified the scope of Title VII to specifically address pregnancy discrimination thereby significantly aiding women workers.

---

employer is not required to pay for abortions except where the mother's life would be endangered. PDA Legislative History, *supra* note 76, at 4755. The PDA has made it clear that, under Title VII, "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

85. 42 U.S.C. § 2000e(k) (1982).

86. 462 U.S. 669 (1983).

87. *Id.* at 679 n.17.

88. *Id.* at 673-74. In an attempt to implement the PDA, the EEOC issued interpretive guidelines on sex discrimination and extended the protection of the PDA to apply to coverage for male employees' dependents with pregnancy-related disablities. 44 Fed. Reg. 23805, 23807 (1979). If an employer does not include dependents in health-care benefits, the employee's wife would not be entitled to the same medical coverage for pregnancy as a female employee. *Id.*

89. PDA Legislative History, *supra* note 76, at 4752.

90. *Id.*

91. *Id.* "The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work." *Id.*

92. *Id.* at 4753.

E. *Statutory Provisions, Regulatory Provisions, and Challenges*

1. Statutory Provisions

Although the PDA does not require affirmative treatment for pregnancy-related disabilities, several states have passed maternity leave statutes to prevent discrimination caused by the lack of adequate maternity leave policies.[93] California, Connecticut, Massachusetts, Montana, and Wisconsin guarantee maternity leave by statute.[94] Of these five states, Connecticut[95] and Montana[96] grant the most comprehensive guarantees of leave and job security. The essential provisions mandate a "reasonable" unpaid leave for all pregnancy-related disabilities; these provisions impose no maximum limitation on the length of the absence.[97] In addition, the statutory provisions guarantee reinstatement to an "equivalent" job upon return from leave.[98] Presumably, reinstatement includes the same compensation, status, responsibilities, and advancement opportunities. Private employers must reinstate returning employees unless circumstances have changed to make it impossible or unreasonable to do so.[99]

The California maternity leave statute,[100] at issue in *Cal Fed*, imposes a four-month limit on the duration of leave and does not explicitly provide for reinstatement and retention of job status. Nevertheless, the

93. *See* Dowd, *supra* note 11 for comprehensive treatment of relevant statutes. See also Wald, *supra* note 40 for a review of state statutory and common-law tools for redressing employment discrimination.

94. Dowd, *supra* note 11, at 720 & n.93 (1986).

95. CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West 1986). The Connecticut statute provides in part:

> (a) It shall be a discriminatory practice . . .
>
> (7) For an employer . . . (B) to refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy . . . [or] (D) to fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits upon her signifying her intent to return unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so . . . .

96. MONT. CODE ANN. § 49-2-310 (1987). Montana's maternity leave statute is similar to Connecticut's except that the Montana statute includes: "It shall be unlawful for an employer . . . to (3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled . . . or (4) require that an employee take a mandatory maternity leave for an unreasonable length of time." *Id.*

97. Reasonable leave is provided for the period of actual disability. CONN. GEN. STAT. ANN. § 46a-60(a)(7)(B) (West 1986); MONT. CODE ANN. § 49-2-310(2) (1987).

98. CONN. GEN. STAT. ANN. § 46a-60(a)(7)(D) (West 1986); MONT. CODE ANN. § 49-2-311 (1987).

99. CONN. GEN. STAT. ANN. § 46a-60(a)(7)(D) (West 1986); MONT. CODE ANN. § 49-2-311 (1987).

100. *See* CAL. GOV'T CODE, *supra* note 22 for the text of the California statute.

California Fair Employment Housing Commission has declared that reinstatement to a same or similar position is required unless the employer demonstrates a business necessity as a bona fide occupational qualification.[101]

Massachusetts and Wisconsin have statutes with significant variations. The Massachusetts statute guarantees female employees a maximum unpaid post-childbirth leave of eight weeks[102] and requires reinstatement to the same or a similar position.[103] However, the statute does not explicitly protect pre-leave seniority and benefits. Wisconsin's provision defines "prohibited sex discrimination" as discrimination on the basis of pregnancy, childbirth, maternity leave, or related medical conditions.[104] Nevertheless, the degree of protection guaranteeing maternity leave is unclear, and reinstatement or status retention is not explicitly granted.[105]

Despite some lack of clarity in those states' affirmative statutes, women residents are afforded guarantees of leave and job security, except perhaps in Wisconsin, and consequently have greater freedom and equal employment opportunities.

2. Regulatory Provisions

Rather than enacting statutes granting maternity benefits, several

101. *See* California Fair Employment Housing Commission proposed regulation 7291.2(c)(2)(B). The regulation provides in part:

> (B) The employee shall notify the employer as soon as she is ready to return and able to return to work. Unless pursuant to a bona fide occupational qualification or business necessity, the employer shall reinstate the returning employee to her original, or a substantially similar job, as defined in section 7291.2(b)(7), within a reasonable period of time.

Dowd, *supra* note 11, at 725 n.112. The parties in *Cal Fed* stipulated to the FEHA interpretation regarding reinstatement.

102. MASS. GEN. LAWS ANN. ch. 149, § 105(D) (West 1982 & Supp. 1987). The Massachusetts statute also extends this leave to female employees who take time off to adopt a baby. *Id.*

103. *Id.*

104. WISC. STAT. ANN. § 111.36(1) (West 1974 & Supp. 1986) provides in part:

> Employment discrimination because of sex includes . . .
>
> (c) Discriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in . . . [refusal to hire or employ, termination of employment, discrimination in compensation, terms, conditions or privileges of employment], including, but not limited to, actions concerning fringe benefit programs covering illnesses or disability.

Id.

105. Six jurisdictions have temporary disability statutes which provide income replacement to all eligible employees: California, Hawaii, New Jersey, New York, Rhode Island, and Puerto Rico. Dowd, *supra* note 11, at 725-26 n.116.

states have incorporated maternity leave guarantees in state agency regulations or guidelines which are based on state antidiscrimination statutes.[106] Hawaii, Illinois, Kansas, New Hampshire, and Washington require leave for pregnancy-related disability. They also require job reinstatement and maintenance of pre-leave seniority, fringe benefits, and job status.[107] Reinstatement is not guaranteed, nor is maternity leave required, in Colorado, Iowa, Maine, Missouri, Ohio, Oklahoma, and Rhode Island. In these states, however, inadequate maternity leave may be regarded as a violation of state antidiscrimination law if a challenger can show an adverse impact on women.[108]

3. The Challenge in Montana

Prior to the statutory challenge in *Cal Fed,* an employer challenged the Montana Maternity Leave Act (MMLA)[109] in *Miller-Wohl Co. v. Commissioner of Labor & Industry.*[110] The controversy arose out of an alleged discriminatory discharge of a newly-employed pregnant worker who was denied sick leave.[111] Miller-Wohl charged that the MMLA gave more favorable treatment to pregnancy-related disabilities than other disabilities and was therefore preempted by Title VII. Miller-Wohl also alleged that the MMLA violated the fourteenth amendment equal protection clause.[112] In spite of the statutory preemption and constitutional challenges, the federal district court declared the MMLA valid.[113] In a subsequent action the Montana Supreme Court also upheld the

106. *See id.* at 730-33 for a comprehensive listing and explanation of provisions. State agency regulations are more susceptible to alteration or discontinuance than statutes and therefore offer less definite guarantees of maternity leave. *Id.* at 731 n.143.

107. *Id.* at 731.

108. *Id.* at 721 & n.95, 732 & n.148. Similarly, if an adverse impact on women due to lack of reinstatement can be shown, perhaps the reasoning could be extended to such a discrimination challenge.

109. The Montana Maternity Leave Act was repealed and renumbered in 1983. The sections at issue in *Miller-Wohl* are now codified at MONT. CODE ANN. §§ 49-2-310, 49-2-311 (1987).

110. 515 F. Supp. 1264 (D. Mont. 1981), *vacated,* 685 F.2d 1088 (9th Cir. 1982). See generally Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and The Meaning of Women's Equality,* 13 GOLDEN GATE U.L. REV. 513, 518-36 (1983) for a discussion of the PDA's application to a state statute requiring affirmative treatment for pregnancy disability.

111. *Miller-Wohl,* 515 F. Supp. at 1265 (D. Mont. 1981). The company policy provided no sick leave or leave of absence during the first year of employment. The employee filed a complaint with the Montana Department of Labor and Industries against Miller-Wohl charging that the no-leave policy violated the maternity leave statute. Miller-Wohl then brought suit in federal district court. *Id.*

112. *Id.* at 1266.

113. The judgment was vacated on jurisdictional grounds. Miller-Wohl Co. v. Commissioner of Labor & Indus., 685 F.2d 1088 (9th Cir. 1982).

statute.[114]

The Montana Supreme Court held that discharge from employment because of pregnancy is an unlawful practice under Title VII and the PDA because it constitutes gender-based discrimination.[115] Title VII determines that women and men should be treated equally in employment matters. Therefore, a discharge because of the effects of pregnancy is discriminatory because it cannot affect men[116] and because it disparately impacts pregnant women. According to the State Commissioner of Labor and Industry, the MMLA did not discriminate in favor of pregnant women because it actually protected both sexes by preserving the right of husbands and wives to have a family without sacrificing the income of one spouse.[117]

Although the *Miller-Wohl* decision upheld affirmative treatment of pregnant employees, it divided the feminist legal community over the meaning of equality for women.[118] Attorneys who were active in passing the PDA took the position that any deviation from treating men and women alike is dangerous for women and is contrary to Title VII.[119] Proponents of the opposite view supported the affirmative action approach of the MMLA as essential in changing institutions based on a male prototype so that equality could actually be achieved. According to these attorneys, merely treating the sexes equally in pregnancy-related disabilities results in inequality for women.[120]

IV. THE DECISION

The Pregnancy Discrimination Act defines the appropriate legal standard for evaluating pregnancy discrimination. Because Congressional intent must be ascertained to determine whether federal law will preempt a state statute,[121] the Court in *Cal Fed* examined the legislative

114. *Miller-Wohl*, 692 P.2d 1243 (Mont. 1984).

115. *Id.* at 1251.

116. *Id.*

117. *Id.* at 1253.

118. Krieger & Cooney, *supra* note 110, at 515.

119. *Id.* The Montana court noted that in the views of the amici (ACLU, NOW, and the League of Women Voters) the MMLA represented protectionist legislation that hurt rather than helped women and kept them in marginal jobs, yet these groups desired to preserve the MMLA by judicial extension of benefits to all sexes. 692 P.2d at 1253. *Miller-Wohl* was pending before the Supreme Court when *Cal Fed* was decided. Miller-Wohl Co. v. Commissioner of Labor & Indus., 692 P.2d 1243 (Mont. 1984), *petition for cert. filed*, 54 U.S.L.W. 3064 (U.S. Mar. 27, 1985) (No. 84-1545).

120. Krieger & Cooney, *supra* note 110, at 515.

121. *Cal Fed*, 107 S. Ct. at 689.

history of the PDA to clarify congressional intent.[122] Based on this history and on consideration of the contemporary labor environment, the Court concluded that the PDA does not proscribe affirmative aid to those disabled by pregnancy.[123] Therefore, the California statute permitting favorable benefits for pregnancy disability did not violate the federal standard. Because the Court found common goals of equal employment opportunity for women in Title VII and California's disability statute, it found no conflict which would justify preemption.[124]

The Court in *Cal Fed* was divided on whether Section 708 of the PDA or Section 1104 of the 1964 Civil Rights Act applied in preempting state fair employment laws. The majority found that Sections 708 and 1104 allowed only a narrow scope of preemption, which reflected congressional deference to state antidiscrimination laws enacted to achieve Title VII's equal employment opportunity goals.[125] Finding that the PDA supported a narrow interpretation of preemptive provisions, the majority looked to whether the PDA prohibits the affirmative action of reinstatement provisions.[126]

In his concurrence, Justice Stevens agreed that the California statute was consistent with the PDA; therefore, it was unnecessary to determine whether either section applied.[127] Justice Scalia, however, considered only Section 708, which prohibits preemption unless state law requires or permits an act outlawed by the PDA.[128] Scalia further stated in his concurrence that the Court exceeded its jurisdiction in prematurely interpreting the PDA; the Justice also noted that the Constitution prohibits the Supreme Court's rendering of advisory opinions.[129]

The dissent argued that the PDA requires complete neutrality and forbids all beneficial treatment of pregnancy.[130] The dissenting Justices found that Section 708 did not save the California Code section because the statute authorized employers to engage in an employment practice which violated Title VII.[131]

---

122. *See infra* notes 140-46 and accompanying text.
123. *See infra* notes 164-69 and accompanying text.
124. *See infra* notes 180-89 and accompanying text.
125. *Cal Fed*, 107 S. Ct. at 690.
126. *Id.* at 690-91.
127. *Id.* at 696 n.1.
128. *Id.* at 697. Scalia found no basis for preemption because the California statute neither requires nor allows any refusal to accord equal treatment. *Id.*
129. *Id.* at 697-98. Scalia believes the Court should not render advisory opinions by interpreting an Act such as the PDA for the convenience of a state or its employers. *Id.* at 698.
130. *Id.* at 698-702.
131. *Id.* at 702.

Not surprisingly, the dissenting Justices in *Cal Fed* constituted the majority in the earlier *Gilbert* decision, which included Rehnquist, White, and Powell. In *Gilbert*, these Justices found that an employee insurance program's failure to cover pregnancy did not constitute sex discrimination under Title VII because the insurance "package" covered the exact same categories of risk for both sexes and as such was facially nondiscriminatory.[132] Only Justice Blackmun changed positions by joining the majority in *Cal Fed* after having joined in part the majority opinion in *Gilbert*. In *Gilbert*, Blackmun stated that the exclusion of disability coverage for pregnancy was not a per se violation of Title VII because the challenger failed to prove a discriminatory effect.[133] Justice Blackmun refused, however, to join the *Gilbert* majority's inference that effect is not a controlling factor in a Title VII case;[134] therefore, his position with the majority in *Cal Fed* could be expected because the *Cal Fed* Court focused on the effect of the California statute on women's employment opportunities.

Justices Brennan and Marshall, dissenting in *Gilbert*, formed the majority in *Cal Fed* along with O'Connor and Blackmun (Stevens and Scalia concurred). In *Gilbert*, the dissent found that the majority's suggestion that a pregnancy classification is not gender-related was offensive to common sense.[135] Furthermore, the dissenting Justices rejected the purported neutral criteria used to explain exclusion of pregnancy from the company insurance policy.[136] By looking at the burdened role of contemporary working women, as they did in *Gilbert*, these Justices in *Cal Fed* found that the objective of Title VII was to assure equal employment opportunities and to eliminate discriminatory policies which have have had the effect of disadvantaging women by sexually stratifying the job environment.[137] The majority in *Cal Fed* determined that the California statute, by "taking pregnancy into account," gives women the same opportunity as men to have a family and retain their employment status,[138] thereby effecting a complete change in the Court's approach to

132. General Electric Co. v. Gilbert, 429 U.S. 125, 138 (1976).

133. *Id.* at 146.

134. *Id.* Blackmun has been noted as being in the center of the Court but moving more in the liberal direction since his decision in *Roe v. Wade*. See Shea, *Sandra Day O'Connor—Woman, Lawyer, Justice: Her First Four Terms on the Supreme Court*, 55 UMKC L. REV. 1, 31 (1986).

135. *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting).

136. *Id.* at 160.

137. *Cal Fed*, 107 S. Ct. at 693-94 (citing General Elec. Co. v. Gilbert, 429 U.S. at 159 (Brennan, J., dissenting).

138. *Id.* at 694. It follows that disallowance of the affirmative statute would have the effect of perpetuating less than equal employment opportunity for women.

equal employment for women. The *Gilbert* dissent's evolution into the *Cal Fed* majority can therefore be categorized with those dissents which Justice Hughes called an appeal "to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed."[139]

V. ANALYSIS

A. *Equal Employment Opportunity Goal of Title VII*

1. PDA is a Congressional Guarantee

The passage of the PDA in 1978 indicated Congress' intention to grant pregnant women a guarantee against policies that have a disparate impact on them.[140] In the definitional first clause added to Title VII by the PDA, Congress clarified sex discrimination to include pregnancy and its related conditions.[141] The Court in *Newport News* found that the addition of pregnancy to the sex-discrimination definition reflected Congressional disapproval of the *Gilbert* decision.[142] As in its *Newport News* analysis, the *Cal Fed* Court emphasized Congressional intent.

The Court in *Cal Fed* examined the language of the PDA and the legislative history behind its passage.[143] The history indicates that Congress had found evidence of discrimination against pregnancy in disability and health insurance programs like those in *Gilbert* and *Satty*.[144] Representative Chisholm's support of the PDA "because it affords some 41 percent of this Nation's labor force some greater degree of protection

139. *See* R. HODDER-WILLIAMS, THE POLITICS OF THE U.S. SUPREME COURT 102 (1980) (quoting C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928)). *See also* Douglas, *In Defense of Dissent*, in THE SUPREME COURT: VIEWS FROM INSIDE 51 (A. Westin ed. 1961) (Justice Douglas recognizes the role of the judiciary in attempting to reconcile diverse groups in society and notes the effect of dissenting opinions on the character of government and future of the country.).

140. *See supra* notes 82-92 and accompanying text.

141. 42 U.S.C. § 2000e(k) (1982).

142. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. at 678-79, *cited in Cal Fed*, 107 S. Ct. at 691. See PDA Legislative History, *supra* note 76, at 4751-52, stating that Congress has "clarified its original intent" to eradicate the "intolerable potential trend" started by the Supreme Court in *Gilbert*.

143. *Cal Fed*, 107 S. Ct. at 692.

144. *Id.* at n.18 (citing Discrimination on the Basis of Pregnancy, 1977, Hearings on S. 995 before the Subcommittee on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess., 31-33, 113-21, 307-10 (1977)). *See, e.g.*, 124 CONG. REC. 38574 (1978) (statement of Rep. Sarasin) (stating subcommittee "learned of the many instances of discrimination against pregnant workers, as we learned of the hardships this discrimination brought to the women and their families . . . .").

and security without fear or reprisal due to their decision to bear children. . ." demonstrated Congress' intent to provide relief for working women by ending discrimination toward pregnant women.[145] Representative Tsongas stated that the bill was necessary to "put an end to an unrealistic and unfair system that forces women to choose between family and career—clearly a function of sex bias in the law."[146] Policies which force women to choose between family and career have a disparate impact on women when men are not forced to make the same choice.

2. Pregnancy Discrimination Remedies

Continuing its analysis of the language and intent of the PDA, the *Cal Fed* Court found that the second clause of the PDA illustrates how pregnancy discrimination can be remedied.[147] If pregnancy is to be treated the same as other disabilities, an employer's benefit program for disabilities, leaves of absence, and seniority must include pregnancy on the same basis with other disabilities.[148] Under this "same treatment" interpretation of the PDA, disability programs which exclude pregnancy from coverage must be remedied.[149]

Analysis of the judicial context of the PDA supports the "same treatment" interpretation. Congress enacted the PDA to counter Supreme Court decisions which allowed employers to exclude pregnancy from disability coverage.[150] Although pregnancy is akin to other disabilities in affecting ability to work, the Court had singled out its cost, predictability, voluntariness, and uniqueness to justify exclusion by an employer.[151] Congress, however, intended to prohibit all pregnancy discrimination, including employment policies which adversely affect pregnant workers, such as termination, lack of reinstatement, and loss of

145. 124 CONG. REC. 21440 (1978) (statement of Rep. Chisolm) (quoted in *Cal Fed*, 107 S. Ct. at 692 n.19).

146. 124 CONG. REC. 21442 (1978) (statement of Rep. Tsongas) (quoted in *Cal Fed*, 107 S. Ct. at 692 n.19).

147. *Cal Fed*, 107 S. Ct. at 691.

148. PDA Legislative History, *supra* note 76, at 4753. "This bill would prevent employers from treating pregnancy, childbirth, and related medical conditions in a manner different from their treatment of other disabilities." *Id.* Fringe benefit programs also must treat women affected by pregnancy-related conditions equally with respect to other employees on the basis of their ability or inability to work. *Id.* at 4752.

149. The PDA requirement that pregnancy receive the same treatment as other disabilties was intended as a means to insure that pregnancy would not be excluded from a list of disabilities. Note, *Sexual Equality under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 719 (1983).

150. *See* PDA Legislative History, *supra* note 76, at 4750-51, 4754-55.

151. General Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (pregnancy is a voluntary and desired condition); *id.* at 139 (pregnancy-related disabilities unique to women); Geduldig v. Aiello, 417 U.S. 484, 496 (1974) (cost factor).

fringe benefits.[152]

Congressional intent in passing the PDA reflects the district court's opinion in *Gilbert v. General Electric Co.*[153] The district court held that pregnancy should be treated like any other disability in an existing disability benefit program,[154] yet the court additionally stated that pregnancy is a unique disability that distinguishes women from men.[155] The lower court further stated that this distinction was not sufficient to support the argument that compensation for pregnancy disabilities is cost-prohibitive.[156] Therefore, pregnancy disabilities should be compensated in order to "sexually equalize employment opportunity."[157]

The first clause of the PDA[158] bars policies that penalize women because of pregnancy. When the second clause,[159] which requires same treatment, is added to the first clause, pregnancy is afforded the same treatment as other disabilities in employee benefit plans. Therefore, an employer is prohibited from discharging an employee because she is pregnant, regardless of how a non-pregnant employee is treated.[160] Prohibiting discharge is valid when the employee would not be fired but for her pregnancy.[161]

The Supreme Court in *Cal Fed* found no ambiguity in the PDA. Justice Marshall's opinion integrated the two clauses, finding that the second clause serves to illustrate how pregnancy discrimination is to be

152. PDA Legislative History, *supra* note 76, at 4752.

153. 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).

154. *Id.* at 385.

155. *Id.* at 383.

156. *Id.*

157. *Id.*

158. "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ." 42 U.S.C. § 2000e(k).

159. "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ." *Id.*

160. Note, *supra* note 149, at 696. *See also* Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 817-19 (D.C. Cir. 1981) (when employee terminated because of pregnancy, employer can incur Title VII violation as much by lack of an adequate leave policy, causing employment discrimination traceable to gender, as by unequal application of an existing policy); Miller-Wohl Co. v. Commissioner of Labor & Indus., 515 F. Supp. 1264 (D. Mont. 1981) (employer violation of state statute because of inadequate leave policy resulting in dismissal of pregnant employee), *vacated*, 685 F.2d 1088 (9th Cir. 1982).

161. Note, *supra* note 149, at 696. The EEOC has declared: "Where the termination of an employee who is temporarily disabled 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." 29 C.F.R. § 1604.10(c) (1986). This provision became effective in 1979.

remedied.[162] Therefore, the PDA prohibits certain discriminatory treatment but does not limit affirmative remedial action.[163]

3. State Affirmative Action

The Court in *Cal Fed* concluded that the drafters of the PDA did not intend to prohibit state affirmative action.[164] In fact, Congress acknowledged several state antidiscrimination laws that prohibit pregnancy discrimination.[165] Three of the states required employers to provide reasonable leave to pregnant employees.[166]

Numerous senators referred to state laws in the Congressional debates. One senator remarked that several state legislatures have chosen to mandate certain types of benefits for pregnant employees.[167] Another senator declared that nondiscrimination law affecting pregnancy is supported by twenty-five states; these states have implemented their own fair employment practices laws to prohibit sex discrimination based on conditions related to pregnancy.[168]

Congress showed no intent to supersede the affirmative state laws but merely stated that it would not *require* preferential treatment of pregnant employees.[169] Based on Congressional acknowledgement of affirmative state laws, the Court found that the California statute would remain effective under the PDA.

---

162. California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691 (1987). "The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." *Id.* (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 n.14 (1983)).

163. *Id.* at 691-92. The Court in *Cal Fed* cited with approval the court of appeals' conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *Id.* (quoting *Cal Fed,* 758 F.2d 390, 396 (9th Cir. 1985)).

164. *Id.* at 692-93.

165. *Id.* at 693.

166. *Id.* The Court cited the Connecticut, Montana, and Massachusetts statutes which were mentioned in the House and Senate Reports, indicating that Congress was aware of the statutory provisions.

167. 123 CONG. REC. 29387 (1977) (statement of Sen. Javits). He acknowledged that the PDA does not go so far as to mandate certain benefits, but it instead adopts equality of treatment based on benefit programs already in existence. *Id.* Prohibition of existing statutes was not mentioned.

168. 123 CONG. REC. 29662 (1977) (remarks of Sen. Williams). *See also* PDA Legislative History, *supra* note 76, at 4751. "The view of nondiscrimination incorporated in [the PDA] is supported by the fact that almost half of the States presently interpret their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth." *Id.*

169. *Cal Fed,* 107 S. Ct. at 692 (noting PDA Legislative History, *supra* note 76, at 4752). The PDA does not require institution of new programs where none exist. PDA Legislative History, *supra* note 76, at 4752. The dissent found that Congressional acknowledgment of state antidiscrimination laws did not support an inference that preferential treatment would be allowed under the PDA. The dissent argued that the House considered the state statutes in the context of a health

B. *Considering Pregnancy in the Current Labor Environment*

The contemporary labor environment is replete with record numbers of women in the labor force. Ninety percent of these working women are of childbearing age.[170] Ninety-three percent of women between fifteen and forty-four are likely to have at least one child,[171] which means that four of five female workers will probably become pregnant during their working years.

For women to realize equality in employment opportunity, the uniqueness of pregnancy requires that women be treated differently than men. Otherwise, women cannot be free to have families without fear of losing their jobs or at least their employment status.[172] Larson and Larson, employment discrimination authorities, note the "apparent paradox of requiring inequality to produce equality"[173] of employment opportunity. They suggest that "when the two sexes are *dissimilar* in that one sex exclusively possesses a trait which the other, without exception, does not possess, and when that trait has a bearing on employability, it is a differentiation based on sex to treat the two sexes *similarly* as to that trait."[174]

The Court in *Cal Fed* noted the importance of accounting for pregnancy in establishing disability policies that are congruent with women's roles in the current labor environment.[175] The majority noted that the end products of discrimination demand due consideration of the uniqueness of individuals "disadvantaged" by pregnancy.[176] Justice Stevens' concurrence supported the majority's position that the PDA allows some

insurance cost discussion rather than in a preemption context and that the Senate did not analyze the statutory provisions but merely listed states requiring coverage for pregnancy-related disabilities. *Cal Fed*, 107 S. Ct. at 700 (White, J., dissenting).

170. *See* Silverman, supra note 7.

171. S. KAMERMAN, MATERNITY AND PARENTAL BENEFITS AND LEAVES: AN INTERNATIONAL REVIEW 7 (1980).

172. "If a woman cannot choose whether to utilize her reproductive capacity, she is not a free moral agent, let alone the equal of a man." Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 23 n.125 (1985). Professor Kay proposes a model of equality that takes account of biological reproductive sex differences rather than characteristics of sexual identity. The model is "furthered by, but is not conditioned upon, a woman's having the legal right and the effective power to control her reproductive capacity." *Id.* But see E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 16, 25-30, 103-37 (1980) for a bivalent concept of equality. Wolgast uses biological reproductive sex differences as the foundation for sexual identity and consequently creates a "separate but equal" model of social differences. The bivalent view has been criticized for failing to distinguish childbearing from child-rearing. Koehane, *Feminist Scholarship and Human Nature,* 93 ETHICS 102, 108-11 (1982).

173. A. LARSON & L. LARSON, 1 EMPLOYMENT DISCRIMINATION § 38.22, at 8-31 (1985).

174. *Id.* (emphasis in original).

175. *Cal Fed*, 107 S. Ct. at 694.

176. *Id.* (quoting *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting)).

preferential treatment of pregnancy.[177] Although preferential treatment may mean additional cost, the Court noted in *Newport News* that cost differentiation is not recognized as justification for discrimination.[178] Equality for pregnant employees therefore requires measurement in terms of employment opportunity, rather than necessary costs.[179]

C. *Common Goal Identified in the PDA and the California Statute*

State laws are subject to preemption if they actually conflict with federal law and require or permit an act that would be an unlawful employment practice.[180] Therefore, the Court in *Cal Fed* found that federal law would preempt the California statute if the state statute required employers to violate the purpose and spirit of Title VII.[181] The purpose of Title VII is to achieve equality of employment opportunities, which has been extended by the PDA to include equality for pregnant workers.[182]

The Court in *Cal Fed* found that the California statute had the same goal as Title VII of promoting equal employment opportunity.[183] By requiring reinstatement after "reasonable" leave, the statute is narrowly drawn to cover only the disability period and provides only a qualified right of reinstatement.[184] Additionally, the statute did not reflect "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers,"[185] which would be inconsistent with Title VII's goal.

In striking down the statutory challenge, the Court stated that compliance with both the state statute and Title VII is theoretically possible because employers are not prohibited from granting comparable benefits

177. *Id.* at 696. The dissent found that the PDA's second clause mandates that pregnant employees be awarded only the same treatment as non-pregnant employees with no preferential treatment allowed. *Id.* at 698.

178. *Newport News*, 462 U.S. 669, 685 n.26 (1983) (quoting City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978)).

179. "A decision invalidating the California statute will condemn women to a perpetually inferior position in the labor market." Brief of California Women Lawyers; Child Care Law Center; Jessica McDowell; Lawyers Committee for Urban Affairs; Mexican American Legal Defense and Educational Fund; Women Lawyers' Association of Los Angeles; and Women's Lawyers of Sacramento, *Amici Curiae* at 5, *Cal Fed*, 107 S. Ct. 683 (1987) (No. 85-494). The amici in *Cal Fed* were split on the issues similar to the amici in *Miller-Wohl*. *See supra* notes 118-20 and accompanying text.

180. 42 U.S.C. § 2000e-7 (1982).

181. *Cal Fed*, 107 S. Ct. at 689.

182. *Id.* at 693.

183. *Id.* at 693-94. *See Review of Selected 1978 California Legislation*, 10 PAC. L.J. 247, 463 (1979).

184. *Cal Fed*, 107 S. Ct. at 694. Reinstatement was contingent upon the job's availability in light of business necessity. *Id.*

185. *Id.* The statute is unlike earlier protectionist labor legislation which hindered rather than furthered equal employment opportunities for women. *See supra* notes 4 & 119.

to other non-pregnant disabled employees.[186] Pregnant workers would therefore not be treated preferentially over other non-pregnant persons with similar capabilities.[187] The statute merely establishes minimal benefits that must be provided to pregnant workers.[188] By upholding legislation which ultimately will have the effect of equalizing employment opportunities, the Court has demonstrated its willingness to defer to women's uniqueness as childbearers in an environment where the majority of women of childbearing age are employed. The decision therefore reflects Justice Holmes' view of evolving law as an adaptation to the "felt necessities of the time."[189]

D. *Implications of the Decision*

Cal Fed sets a precedent for interpretation of the PDA and confirmation of the states' affirmative treatment of pregnancy disabilities.[190] By defining obligations of Title VII employers and rights of employees in states with affirmative statutes, the decision reduces uncertainty concerning the application of EEOC guidelines. Other states may be motivated to pass legislation to provide preferential treatment for pregnant employees, as well, especially larger industrial states with a liberal record of work regulations.[191]

---

186. *Cal Fed*, 107 S. Ct. at 695. The petitioners argued that the extension of benefits to other employees is inappropriate because the Court has declined to rewrite underinclusive statutes that violate the Equal Protection Clause. This argument was misplaced because the Court did not find that the statute was invalid. *Id.*

187. *Id.*

188. *Id.* However, the Court noted that the statute could only be extended to cover other employees if a court chose such a remedial option. *Id.*

189. Holmes felt the life of the law is not logic but experience and that the rules to govern man are developed from the necessities of the time in addition to moral and political theories, public policy, and judicial prejudices. D.W. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1963).

190. The decision in *Miller-Wohl* was vacated and remanded to the Montana Supreme Court for further consideration in light of *Cal Fed*. Miller-Wohl Co. v. Commissioner of Labor & Indus., 107 S. Ct. 919 (1987).

191. Rosenweig, *Maternity Leave Statutes*, SMALL BUSINESS REPORT, April 1987, at 79; *see also* Stewart, *Equal Treatment for Pregnant Workers*, A.B.A. J., Mar. 1, 1987, at 45 (quoting Robin Conrad of the Chamber of Commerce). Since the *Cal Fed* decision, many states have considered maternity leave legislation; Tennessee has passed a statute which guarantees leave in some circumstances. *See* HB 1002 (1987 P.L. Ch. 373) (cited in [Current Developments] Fam. L. Rep. (BNA) No. 40 at 1503 (Aug. 18, 1987)). Despite support by Governor Bellmon, a parental leave bill was defeated in Oklahoma on March 23, 1987. The Oklahoma bill required employers of 15 or more employees to provide unpaid parental leave for up to three months, but it did not require employers to provide health insurance coverage for pregnancy. The bill did not include reinstatement guarantees. H.R. Rep. No. 1338, 41st Okla. Leg., 1st Sess. (1987). To enhance passage of the bill, a section granting leave to new fathers had been removed and workers compensation benefits for pregnant workers had also been deleted. In defeating the bill, opponents charged that it would create a hardship for small busineses and would be detrimental to the state's business climate. *Maternity Leave Bill Defeated*, Tulsa World, Mar. 24, 1987, at 1B, col. 4 [hereinafter *Bill Defeated*].

The decision in *Cal Fed* will increase the likelihood that proposed federal legislation requiring parental leave will be adopted. "The Family and Medical Leave Act of 1986," presently before the House of Representatives, would require companies with fifteen or more employees to establish policies granting unpaid leave to both mothers and fathers.[192] A sample of major United States industrial, financial, and service companies in 1984 indicated that barely half of the firms offered unpaid maternity leaves and less than eight percent offered paid leaves.[193] The proposed bill provides up to 18 weeks of job-protected leave during a twenty-four-month period to care for either a baby or newly-adopted child.[194] Because the Court has indicated the necessity of equalizing employment opportunities for women in the current labor environment,[195] Congress may be encouraged to enact a national maternity policy as other industrialized nations have done.[196] Women who choose to have both a family and a career would then have greater opportunity to advance in their employment on an equal basis with other workers.

Conversely, positions in the primary job market could become even more difficult for women to achieve.[197] Employers, financially burdened by granting pregnancy disability leave and consequently incurring the costs of training temporary replacement employees, will be less likely to hire women of childbearing age.[198] Some commentators have found,

192. H.R. 4300, 99th Cong. 2d Sess. (1986); *reintroduced*, H.R. 925, 100th Cong., 1st Sess. (1987).

193. Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 384 (1984-85) (citing Dullen, *Conference Discusses Parental Job Leave*, N.Y. Times, Mar. 11, 1985 at C11, col. 2). *See also* "Policies on Leave from Work," Personnel Policies Forum (BNA) PPF Survey No. 136 (June 1983) (discussion of details of maternity leave provisions covering plant/service, office/clerical, and management/exempt employee groups).

194. Fassihi, *How Much Time For Him?*, Tulsa Tribune, Mar. 5, 1987, at 1B, col. 3. The strongest opposition to the bill is expected from the U.S. Chamber of Commerce, which also opposed the California statute. *Id. See* Brief of the Chamber of Commerce of the United States in Support of The Petitioners, *Amicus Curiae*, *Cal Fed*, 107 S. Ct. 683 (1987) (No. 85-494).

195. Various sources consider it unlikely that the bill will pass. *See* Rosenweig, *supra* note 191. George Mason University predicts that the bill has a 51% chance of passing in the House but only a 36% chance of passing in the Senate. (NEXIS, Billcast).

196. Seventy-five countries, including every industrialized country *except* the United States (as well as numerous developing countries), have a form of statutory maternity leave. *See* MATERNITY POLICIES, *supra* note 1 at 14. Sweden is the only country to date to extend the benefit to fathers. *Id.* at 16. Benefits range from a minimum paid leave of 12 weeks and cash benefits to job protected leaves for at least one year or as long as two years. *Id.* at 15, 19. National health insurance provides maternity benefits in most of the countries; however, sixteen countries without national health insurance nevertheless provide benefits. *Id.* at 14.

197. *See* Lewin, *supra* note 20, at 23, col. 2. An Oklahoma state representative predicted that women of childbearing age would be "shunned by the business community" if they are afforded such preferential treatment. *Bill Defeated*, *supra* note 191.

198. The Chamber of Commerce estimates that an employer would incur additional costs for 18

however, that these costs may be overestimated and employers would benefit from a happier, healthier, and more productive workforce.[199]

In addition to financial burdens, multijurisdictional employers also face problems of compliance in dealing with differences in state legislation.[200] Other problems were anticipated in the *amici* brief filed by the ACLU and the League of Women Voters.[201] Those groups argued that providing special benefits for pregnant workers permanently marginalizes their role as workers by placing women outside the main stream of the labor force.[202]

In another early 1987 decision, *Wimberly v. Labor & Industrial Relations Commission*,[203] the Court allowed the states substantial discretion in treatment of pregnant workers so long as treatment does not disadvantage workers solely because of their pregnancy.[204] Although affirmative treatment was allowed under the California statute in *Cal Fed*, the Court allowed Missouri in *Wimberly* to deny unemployment compensation to any worker (pregnant or not) who leaves a job without good cause due to conditions unconnected with the work or employer.[205]

However, despite allowing discretion to the states, the Court reemphasized its determination to help women achieve equality of employment by allowing an employer in a recent California case to promote a woman over a more-qualified man.[206] The affirmative action was deemed

---

weeks of parental leave for a word-processing employee of $1747 in St. Louis, $3363 in Houston, and $5186 in D.C. *See* Stewart, *supra* note 191, at 45.

199. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COL. L. REV. 1118, 1175 (1986) (citing Bruno & Vehling, *Day Care on the Job*, NEWSWEEK, Sept. 2, 1985, at 59-60; Lang, *Research: Child Care Policies*, YALE MAGAZINE, Sept. 1985, at 42-45). The Parental and Medical Leave Act of 1986, *supra* note 192, provides for a study of the optimal way to fund paid leave before any mandatory paid leave provisions will be enacted.

200. Stewart, *supra* note 191, at 45.

201. Brief of The American Civil Liberties Union, The League of Women Voters of the United States, The League of Women Voters of California, The National Women's Political Caucus, and The Coal Employment Project, *Amici Curiae* at 9, *Cal Fed*, 107 S. Ct. 683 (1987) (No. 85-494).

202. *Id.*

203. 107 S. Ct. 821 (1987). The Court held that the provision of the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (1982), which mandates that no person shall be denied compensation under state law because of pregnancy, does not mandate preferential treatment for women who leave work because of pregnancy. It only prohibits a state from singling out pregnancy for unfavorable treatment. 107 S. Ct. at 828.

204. *Id.*

205. The Missouri statute defines "leaving for good cause" narrowly; therefore, persons taking leave may forfeit benefits unless the reasons for leaving are job-related. *Id.* at 824.

206. Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987). The male employee's test score was higher. *Id.* The district court found the male worker more qualified for the position and that Ms. Joyce's gender was the determinative factor in her selection. *Id.* at 1449.

necessary to achieve a workforce that reflects the proportion of minorities and women in the labor force.[207] The Court also upheld a local Rotary Club's admission of women members despite the organizational policy prohibiting females.[208] The Court held that the state's interest in eliminating discrimination against women and allowing them equal access to acquisition of leadership skills and business contacts justified any slight infringement on members' rights of association.[209]

VI. CONCLUSION

The United States Supreme Court in *California Federal Savings & Loan Association v. Guerra* upheld a state's right to fashion and administer employment policies which allow preferential treatment for those disabled by pregnancy. By considering congressional intent behind the PDA, the Court found a common goal in Title VII and the California statute, which is to achieve equal employment opportunity for women. If women are to achieve equality in the workplace, treating pregnant workers "the same" as other workers may not be sufficient to equalize women's employment opportunities when women are not similarly situated because of the burden of pregnancy. Therefore, the Court justified the statute's preferential treatment. Additionally, the statute does not prevent employers from granting benefits to other disabled workers to prevent discrimination.

In the early pregnancy decisions, the Court's attitude was seen by some as punishing pregnancy by failing to recognize pregnancy discrimination as sex discrimination. The Court's views have evolved to the point that pregnancy is now seen as a biological reality affecting women's employment opportunities with enough significance to warrant consideration in terms of the contemporary labor environment. Although the *Cal Fed* decision was based on the preemption issue, the decision has precedential value for affirmative treatment for pregnancy-related disability.

Beverly A. Stewart

207. The Court found the agency's plan to be consistent with Title VII and an embodiment of what voluntary employer action could accomplish to eliminate discrimination in the workplace. *Id.* at 1458-59.

208. *See* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987) (unanimous decision) (local Rotary Club action complied with the Unruh Civil Rights Act, CAL. CIV. CODE ANN. § 51 (West 1982)).

209. *Rotary Club*, 107 S. Ct. at 1947-48.