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Claudia G. Allen

Jean C. Powers

SEX DISCRIMINATION—COURT NARROWS GILBERT—SOME PREGNANCY DISCRIMINATION IS SEX RELATED

INTRODUCTION

One year after its much criticized[1] decision in *General Electric Co. v. Gilbert*,[2] the Supreme Court rendered an opinion in *Nashville Gas Co. v. Satty*[3] which may give renewed life to the prohibition of sex discrimination in Title VII of the Civil Rights Act of 1964.[4] Like *Gilbert, Satty* involved the question of whether disparate treatment because of pregnancy constitutes sex discrimination under Title VII. A negative response by the *Gilbert* court had opened a possibility that all employment practices with regard to pregnancy were beyond redress. But in *Satty,* the court found one such practice discriminatory and thereby narrowed considerably the breadth of the *Gilbert* holding.

In *Gilbert,* the Court held that the exclusion of pregnancy from coverage under a disability benefits program does not amount to sex discrimination in violation of Title VII. Relying on *Geduldig v. Aiello*,[5] a case that arose not under Title VII but under the equal protection clause of the Constitution, and which held that pregnancy classifications are not gender-based *per se*,[6] the Court argued that pregnancy discrimination is not within the meaning of "sex discrimination" in Title VII. Therefore, a violation could be shown only by

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1. *See, e.g.,* Ginsburg & Ross, *Pregnancy and Discrimination,* N.Y. Times, Jan. 25, 1977, at 35, col. 2; Note, *Denying Maternity Benefits Is Not Sex Discrimination Under Title VII,* 28 MERCER L. REV. 977 (1977).

2. 429 U.S. 125 (1976).

3. 98 S.Ct. 347 (1977).

4. 42 U.S.C. § 2000e to 2000e-17 (1970 & Supp. IV 1974). Section 2000e-2, entitled "Unlawful employment practices," reads:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Id. at 2000e-2(a)(1), (2).

5. 417 U.S. 484 (1974).

6. *Id.* at 496-97 n.20, *cited in* General Electric Co. v. Gilbert, 429 U.S. at 134-35.

proving the existence of a pretext to discriminate.[7] Since the Court found no such pretext in *Gilbert*,[8] it appeared doubtful that any classification by pregnancy could be shown to be unlawful under Title VII.

Satty presented the Court with two allegedly discriminatory employment practices. The Nashville Gas Company required all pregnant employees to take a leave of absence without the benefit of accrued sick pay, a benefit to which all other disabled employees were entitled. Moreover, upon return to work, an employee who had been compelled to take such a leave of absence suffered a loss of all accumulated seniority for job-bidding purposes. Relying on *Gilbert* in its analysis of the sick-pay program, the Court in *Satty* found no discrimination on the theories presented, but remanded the case for a determination of whether Nora Satty could proceed on the theory of pretext.[9] The Court did find, however, that the policy of denying senority was unlawful under the theory of disproportionate impact upon women.[10] This holding thus reopened the possibility that where the facts of a case differ from those in *Gilbert,* classifications based on pregnancy may be found to constitute unlawful sex discrimination.

This comment will examine the issues presented in *Nashville Gas Co. v. Satty* and the Supreme Court's treatment of those issues. Since *General Electric Co. v. Gilbert* is central to *Satty's* analysis, it will be necessary to examine the decision rendered in *Gilbert,* as well as its application to the issues in *Satty*. In so doing, this Comment will show how the *Satty* opinion limits the scope of *Gilbert*. An analysis of the implications of the *Satty* decision will then be presented, with an emphasis on its potential impact on future cases involving pregnancy classifications.

I. General Electric Co. v. Gilbert

Gilbert involved a company disability plan which paid benefits to employees unable to work because of medical reasons. The only disabilities excluded from the plan's coverage were those that occurred during pregnancy; pregnant employees lost all benefits under the pro-

7. The Court left open the possibility that a violation may be found where discriminatory effect is shown, but did not reach this issue since the respondents made no such showing. 429 U.S. at 136-38.

8. *Id.* at 136.

9. 98 S.Ct. at 353.

10. *Id.* at 351.

gram, including coverage for disabilities unrelated to their pregnancies.[11] The district court,[12] adopting the Equal Employment Opportunity Commission's guidelines for sex discrimination under Title VII,[13] held that this exclusion violated Title VII's prohibition against sex discrimination.

The Fourth Circuit Court of Appeals affirmed the decision of the lower court.[14] The Supreme Court, however, found the EEOC guidelines inconsistent with earlier EEOC pronouncements and remote from the time of the enactment of Title VII.[15] It concluded that these administrative interpretations thus failed to meet the standards of persuasiveness set out in *Skidmore v. Swift & Co.*,[16] and declined to follow them. Since there is no definition of sex discrimination in the Civil Rights Act itself, the Court was then free to determine the meaning through prior judicial interpretations.

The Court turned to its 1974 decision in *Geduldig v. Aiello*,[17] where in a footnote it had stated that a pregnancy classification is not gender based *per se*. Accordingly, a policy to treat pregnancy differently from other conditions could not be considered *prima facie* discriminatory; such a policy would be facially neutral unless it had been created as a pretext to discriminate. Since *Geduldig* had involved a challenge to a California disability program which excluded pregnancy from its coverage, the Court found it to be "precisely in point" and dispositive of the issue in *Gilbert*.[18] But while the facts of the two cases may have been similar, the legal issues were not. *Geduldig* was argued on the grounds of the equal protection clause of the fourteenth amendment[19] which, in absence of a pretext to discriminate, requires only a minimally rational basis for a classification based on sex.[20] Thus, rely-

11. One female employee on maternity leave was denied disability benefits for hospitalization for a pulmonary embolism which was totally unrelated to her pregnancy. 429 U.S. at 129 n.4.

12. 375 F.Supp. 367 (E.D. Va. 1974).

13. 42 U.S.C. § 2000e-2(a)(1) (1970). *See* text accompanying note 111 *infra*.

14. 519 F.2d 661 (4th Cir. 1976).

15. 429 U.S. at 142-45.

16. 323 U.S. 134 (1944). In reference to interpretations of the administrative agency, the Court in *Skidmore* said: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. For a discussion of this point, see text accompanying notes 113-14 *infra*.

17. 417 U.S. 484 (1974).

18. 429 U.S. at 136.

19. 417 U.S. at 484.

20. Although the Supreme Court decisions in Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), led many to believe that gender

ing directly on *Geduldig,* the *Gilbert* Court applied the constitutional standard to a case brought on statutory grounds.

This application was clearly incorrect in light of the Court's decision only months earlier in *Washington v. Davis.*[21] There, the Supreme Court reversed the Court of Appeals for the District of Columbia which had applied Title VII standards in the resolution of a constitutional issue. *Davis* held that a statutory analysis required the application of a "more rigorous"[22] standard. A successful constitutional attack requires a finding of discriminatory purpose where the policy in question is facially neutral. In contrast, a Title VII violation may be found where there is no intent to discriminate, as long as a discriminatory impact is demonstrated. Therefore, absent a *bona fide* job-related purpose, a policy that has the *effect* of discriminating will be proscribed by Title VII.

This statutory analysis has been consistently applied since the Court's 1970 decision in *Griggs v. Duke Power Co.*[23] *Griggs* held that the absence of discriminatory intent did not legalize an employment practice under Title VII if its effect was discriminatory: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[24] When the Court in *Gilbert* applied the *Geduldig* holding that a pregnancy classification is facially neutral, it appeared to imply that discriminatory intent would be required. Thus, the *Gilbert* Court defined sex discrimination using a standard recognized as inappropriate in both *Griggs* and *Davis.*

Before *Gilbert,* courts deciding cases of alleged sex discrimination under Title VII had refused to rely on *Geduldig.* Although urged to apply the reasoning in *Geduldig,*[25] these courts felt constrained to limit the precedential value of the case to constitutional issues.[26] For exam-

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would invoke a more rigorous standard of scrutiny, the Court has refused to include sex as a suspect classification, *see, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975), and thus has applied a rationality test to such cases. *See, e.g.,* General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

21. 426 U.S. 229 (1976).

22. *Id.* at 247.

23. 401 U.S. 424 (1971). This case represents the Supreme Court's initial attempt at defining the scope of review under Title VII.

24. *Id.* at 432.

25. When confronted with the issue of whether a distinction between pregnancy-related disabilities and other disabilities is sex-based, it has been argued that the decision in *Geduldig,* that it is not sex-based (absent a showing of a pretext to discriminate), should control.

26. *See, e.g.,* Communication Workers of America v. American Telephone & Telegraph Co., 513 F.2d 1024 (2d Cir. 1975), *vacated and remanded,* 429 U.S. 1033 (1977); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on*

ple, in 1975 the Sixth Circuit in *Nashville Gas Co. v. Satty*[27] recognized the possibility of using the *Geduldig* footnote instead of the necessary statutory analysis under the Civil Rights Act but rejected this as a harsh result.[28] In December of the following year, however, the Supreme Court in *Gilbert* effected precisely the result the Sixth Circuit had tried to avoid. It substituted the admittedly different and narrower definition adopted under constitutional analysis for the statutory interpretation of "discrimination because of sex" under Title VII. Thus, when the *Satty* case reached the Supreme Court, the Nashville Gas Company argued that *Gilbert* required the reversal of the Sixth Circuit opinion. As the Company reasoned in its brief: "[I]t rationally follows from [the finding in *Gilbert*] that any personnel policy which excludes pregnancy from coverage but in all other aspects treats women and men equal is not in itself discrimination based on sex."[29]

II. NASHVILLE GAS CO. V. SATTY

Nora Satty was employed as an accounting clerk by the Nashville Gas Company. On December 29, 1972, following a period of absences due to pregnancy-related illness, she was placed on maternity leave at the request of the company's Vice President of Personnel. Because of a company policy that allowed pregnant employees to apply accumulated vacation time but not sick leave days to their maternity leave, Satty received none of the sick pay she had accrued over three and one-half years of employment.[30]

During her mandated maternity leave, Satty's position was eliminated as a result of a changeover to computer processing. When she returned from leave on March 14, 1973, she was assigned to a temporary position which she held until April 14, 1973. During this period, she applied for the three permanent positions that became available, but since the gas company's policy was to refuse to recognize for job-bidding purposes any seniority accumulated by an employee before a leave of absence, Satty was turned down each time in favor of an employee who had been hired after she first joined the company.[31]

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jurisdictional grounds, 424 U.S. 737 (1976). *Contra*, Hutchinson v. Lake Oswego School District, 519 F.2d 961 (9th Cir. 1975), *vacated and remanded*, 429 U.S. 1033 (1977).

27. 522 F.2d 850 (6th Cir. 1975).
28. *Id.* at 853.
29. Brief for Petitioner at 14, Nashville Gas Co. v. Satty, 98 S.Ct. 347 (1977).
30. 98 S.Ct. at 352-53.
31. *Id.* at 350.

On May 10, 1973, Satty requested that her employment be terminated to enable her to apply for unemployment compensation. She subsequently filed a complaint with the Equal Employment Opportunity Commission and, after exhausting her administrative remedies,[32] initiated an action against the Nashville Gas Company for alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[33] On November 4, 1974, the district court found the Nashville Gas Company in violation of Title VII for its policies of denying sick leave pay to persons on maternity leave and eliminating their seniority for job-bidding purposes.[34] It granted Satty recovery of sick leave benefits and back wages as well as reinstatement as a permanent employee with full seniority. The Sixth Circuit Court of Appeals affirmed the decision and reasoning of the lower court, and found the relief granted appropriate.[35]

On certiorari, the Supreme Court held that the issue of sick pay denial was controlled by its decision in *Gilbert* that a company policy denying benefits during pregnancy is not discriminatory on its face.[36] It found the Nashville Gas Company's policy "indistinguishable" from General Electric's disability plan, and therefore violative of Title VII only if the exclusion of pregnancy was a pretext for a discriminatory purpose.[37] The decision of the court of appeals on this issue was therefore vacated and the case remanded to consider two issues: (1) whether Satty had raised the claim of pretext so that this theory may be considered on appeal; and (2) whether such a pretext did exist.[38]

On the issue of seniority, however, *Gilbert* was not dispositive. The Court's analysis followed *Gilbert* only in finding that "[p]eti-

32. Satty received the required "right to sue" letter from the E.E.O.C. on April 5, 1974. Brief for Petitioner at 6, Nashville Gas Co. v. Satty, 98 S. Ct. 347 (1977).

33. Satty originally sought to maintain the suit as a class action, but subsequently stipulated that the number of persons she could represent would not be sufficiently numerous. *Id.*

34. 384 F.Supp. 765 (M.D. Tenn. 1974), *aff'd,* 522 F.2d 850 (6th Cir. 1975), *aff'd in part, rev'd in part,* 98 S.Ct. 347 (1977). The district court based its findings on an analysis of the standard applicable after the Supreme Court decision in *Geduldig.* The court held *Geduldig* not controlling. *Id.* at 771.

35. 522 F.2d 850 (6th Cir. 1975). In reaffirming the conclusion of the district court that the scope of Title VII extends beyond the reach of the equal protection clause, the court of appeals concluded: "Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing implementation." *Id.* at 855.

36. The majority opinion was delivered by Justice Rehnquist who was joined by Chief Justice Burger and Justices Stewart, White and Blackmun. Justices Brennan, Marshall and Powell joined in Part I of the opinion. 98 S.Ct. at 347-54.

37. *Id.* at 352.

38. *Id.* at 353.

tioner's decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy."[39] The Court then applied the *Griggs* standard to hold that since the *effect* of the Company's policy was discriminatory, it violated Title VII.[40] Explaining its holding, the Court stated: "It is beyond dispute that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as . . . employee[s].' "[41]

The majority attempted to distinguish *Gilbert* from *Satty* by characterizing the cases as a matter of benefits versus burdens. In *Gilbert,* the disability program provided monetarily equal benefits for men and women. The inclusion of pregnancy as a compensable disability would have provided an additional benefit for women. The *Satty* Court explained that *Gilbert* refused to extend greater benefits to pregnant women merely because of their different role "in the scheme of existence."[42] As a result of the Nashville Gas Company's policies regarding seniority, however, Satty was being *burdened* because of her gender by being deprived of employment opportunities after pregnancy leave.[43] This burden constitutes a violation of Title VII so long as there is no justifiable business necessity for its imposition. In *Satty,* the Supreme Court agreed that since no proof of business necessity was offered, the conclusion of the district court that no justification exists was correct.[44]

In holding that the senority policy's disproportionate impact upon women constituted unlawful sex discrimination, the *Satty* Court limited the application of *Geduldig* to situations which are factually similar to *Gilbert.* If *Geduldig* had been applied to the seniority issue, the company policy would have fallen only if intentional discrimination had been proven.[45] *Satty* adopted this analysis only in dealing with

39. *Id.* at 350. The company policy allowed the employee, male or female, to continue to accrue seniority while on leave for any illness or disability other than pregnancy. *Id.*

40. Justice Blackmun, in his concurring opinion in *Gilbert,* expressed his disagreement with the majority's possible inference that the effect may never be a controlling factor in a Title VII case. 429 U.S. at 146. This evidenced the concern—which was soon shared by others—that *Gilbert* would require all Title VII cases to be viewed under the standards applied in *Geduldig.*

41. 98 S.Ct. at 350-51.

42. 429 U.S. at 139 n.17, *cited in* 98 S.Ct. at 351.

43. 98 S.Ct. at 351.

44. *Id.* at 352.

45. See text accompanying notes 14-20 *supra.*

the gas company's sick-pay plan which it viewed as "legally indistinguishable" from General Electric's disability plan.[46]

But a disability plan that provides women with a set of benefits that is actuarially equivalent to the set of benefits provided to men, even though it may deny pregnant women certain benefits, is analytically distinguishable from an employment policy that places a burden upon women alone—that is, without placing an actuarially equivalent burden on men. Had *Satty* not made such a distinction, employers would have had enormous latitude in determining most conditions of employment for pregnant women,[47] making constitutional[48] and Title VII violations virtually impossible to prove.

Thus while *Gilbert's* interpretation of sex discrimination remains questionable, it appears that even after *Gilbert,* a pregnancy policy that shows a disparate effect upon women with regard to their employment opportunities or status as employees will not stand. *Satty* makes it clear that although pregnancy policies may be facially neutral with respect to gender, they may have the effect of discriminating against women and thus violate Title VII. It is possible, however, that a discriminatory effect will be found only in disparate treatment within the context of employment and not of leave,[49] owing to the long-term effect upon a worker of an employment practice such as the loss of seniority in *Satty.* In comparison with the denial of sick-leave pay, the seniority policy had a greater impact on Nora Satty in her role as an employee;[50] because of the denial of seniority, Satty's potential for economic and career advancement suffered permanent harm.

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46. 98 S.Ct. at 352.

47. Wendy W. Williams, Asst. Prof. of Law at Georgetown Univ. Law Center and attorney for plaintiffs in Geduldig v. Aiello, 417 U.S. 484 (1974), believes that had the *Satty* decision been favorable to the employers on all issues, "[c]ommon employer practices such as termination of pregnant employees, refusal to hire or promote because of pregnancy, loss of retirement benefits and benefit seniority, and loss of credit toward tenure for teachers would probably then be placed beyond redress under Title VII." Williams, *Nashville Gas Company v. Nora D. Satty,* PREVIEW OF UNITED STATES SUPREME COURT CASES No. 6 at 1, 3 (Oct. 10, 1977).

48. Since Geduldig v. Aiello, 417 U.S. 484 (1974), held that discrimination based on denial of disability payments for pregnancy is not gender-based, it may be that the Court viewed gender-based classifications as only those which provide different treatment for men and women with respect to shared traits or capacities. Hence, pregnancy discrimination is not sex discrimination and no violation of equal protection doctrines can result from exclusion of pregnancy benefits. However, Turner v. Dep't of Employment Security, 423 U.S. 44 (1975) suggests that due process arguments regarding conclusive presumptions of incapacity in the matter of maternity leaves are still valuable tools for protecting against extended forced leaves. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

49. *See* 98 S.Ct. at 357-59 (Stevens, J., concurring), for Justice Stevens' analysis of when the varying standards apply.

50. Williams, *supra* note 47.

Finally, Justice Rehnquist's majority opinion in *Satty* suggests that the two statutory subdivisions of Section 703 of Title VII may require different standards of proof. *Griggs* held that a violation of Section 703(a)(2) may be proven by a showing of discriminatory effect; *Satty,* however, implied that it may be necessary to prove intent under Section 703(a)(1).[51] That *Gilbert* was brought under Section 703(a)(1) may serve to explain the majority's reliance upon *Geduldig* in that case. The Court did not resolve this question in *Satty,* but it did limit its treatment of the effect to the issues of Section 703(a)(2): impact upon the employee within the scope of his employment. The mere loss of income while on leave falls within the *Gilbert* situation and, absent a discriminatory effect, is violative only where the preclusion is a pretext for sex discrimination. The majority pointed to Satty's admission that the decision in *Gilbert* would control on the question of sick leave[52] as evidence that Satty had not fulfilled her burden of showing effect.[53] However, Satty had contended—perhaps in light of *Gilbert* and the possibility that an impact upon employees while on leave might not be considered a discriminatory effect—that the entire treatment of pregnant employees evidenced a policy of sex discrimination by the Nashville Gas Company. It is this question which will be considered on remand if it appears from the record that the issue was properly reserved.

Justice Stevens, in his concurring opinion, attempted to reconcile the two parts of the *Satty* decision by viewing the denial of sick leave pay as discrimination among *disabilities;* the denial of seniority would constitute discrimination among *employees.* While the *Gilbert* Court found the former neutral, it would consider the latter discriminatory. Stevens concluded that where the employment practice in question adversely affects women workers after the pregnancy leave is terminated, it constitutes discrimination against a class of employees rather than discrimination among physical conditions.[54] Hence, where treatment is different only *during* pregnancy, the Court would find no discrimination because of sex.

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51. 98 S.Ct. at 352-53.

52. Brief for Respondent at 8, 12, Nashville Gas Co. v. Satty, 98 S.Ct. 347 (1977). *See also Arguments Before the Court, Sex Discrimination,* 46 U.S.L.W. 3231, 3232 (Oct. 11, 1977).

53. "When confronted by a facially neutral plan, whose only fault is underinclusiveness, the burden is on the plaintiff to show that the plan discriminates on the basis of sex in violation of Title VII. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973)." 98 S.Ct. at 352.

54. 98 S.Ct. at 357-59.

Justice Powell, concurring in part,[55] would have allowed the parties on remand to present evidence of the actuarially determined value of the sick-pay program to both men and women, since a finding that these values were indeed unequal would establish prima facie discrimination. He argued that such evidence was unnecessary before *Gilbert* and that it would therefore be unfair not to allow Satty the opportunity to present it. Powell felt that *Satty* should be broadened on remand to include theories consistent with the *Gilbert* opinion. The majority, however, disagreed. Characterizing the reasoning in *Gilbert* as merely one possible way to analyze a Title VII case after *Geduldig*,[56] it argued that Satty's failure to anticipate such reasoning is not excusable.[57]

III. Implications and Impact

The *Satty* case should have a strong impact on future sex discrimination cases brought under Title VII. In addition to distinguishing pregnancy discrimination claims arising under section 703(a)(2) of Title VII,[58] from *Gilbert*, which was brought under section 703(a)(1), *Satty* may give rise to several broader changes. For purposes of analysis, this section will focus on five areas most likely to be affected: (1) the Court's approach to sick pay claims and a projection of its effect on both future litigants and *Satty* on remand; (2) the "restoration" of the "discriminatory effect" method of proving a Title VII claim; (3) the reinstatement of at least part of the EEOC Guidelines called into question in *Gilbert;* (4) the extent to which cost to the employer may be considered by the Court in deciding whether a particular employer practice constitutes gender-based discrimination; and (5) the effect of current and pending legislation on the *Satty* and *Gilbert* decisions and the possible effect of *Satty* on pending federal legislation.

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55. Justices Brennan and Marshall joined with Justice Powell, concurring in the result. 98 S.Ct. at 354-57.

56. *Id.* at 353-54 n.6.

57. *Cf.* the concurring opinion of Justice Stevens, *id.* at 359 n.9. (agreeing with the majority on this point).

58. 98 S. Ct. at 351. Section 703(a)(1) addresses discrimination with respect to compensation, terms, conditions, and privileges of employment. Section 703(a)(2) makes unlawful employment practices that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of . . . sex." 42 U.S.C. § 2000e-2(a)(2).

A. *Exclusion of Pregnancy from Sick Leave Plans*

In *Nashville Gas Co. v. Satty,* the company's refusal to allow Nora Satty to use accumulated sick days to apply to her unpaid maternity leave was held to be legally indistinguishable from the denial of disability pay in *Gilbert* and therefore not per se violative of Title VII.[59] Whether this denial was nonetheless discriminatory was remanded.[60] For Nora Satty the crucial factor may prove to be the limited scope of remand. As noted above,[61] she must first prove that she adequately raised in the lower courts the theory that her employer's sick leave policy constituted a pretext for discrimination. Only then can the court consider the merits of her claim.

Even if the lower court finds that Satty preserved her right to proceed on the pretext theory, it is unlikely that she will recover the withheld sick pay. Because she abandoned her attacks on other employment policies following adverse rulings in the district court,[62] to succeed on the sick pay claim it is crucial that the lower court deem her employer's seniority policy relevant in determining whether the Nashville Gas Company's sick leave plan is a mere pretext for discrimination against women.[63] The Supreme Court found that the seniority policy does violate Title VII, but the majority opinion, while acknowledging that this policy "may" be relevant to pretext, emphatically asserted that the court on remand need not find it so.[64] Indeed, in *Gilbert* the Court found no pretext for discrimination, despite evidence of a long history of General Electric policies that restricted women's employment opportunities,[65] and despite the finding of the district

59. 98 S. Ct. at 352.

60. *Id.* at 353-54.

61. *See* text accompanying notes 37, 38 *supra.*

62. In addition to the claims argued on appeal, Satty had argued in district court that she was discriminated against because: her employer's medical insurance paid reduced benefits for pregnancy as compared to hospitalizations for other causes; her employer failed to hold her job open while she was on leave; she was forced to begin materity leave twenty-five days prior to the birth of her child; termination of her temporary assignment was alleged to be in retaliation for her complaints about her employer's policies regarding pregnancy. 384 F. Supp. at 765.

63. This is so because the Court in *Gilbert* declined to "infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women." 429 U.S. at 136.

64. 98 S. Ct. at 353.

65. General Elec. Co. v. Gilbert, 429 U.S. at 149-50 n.1 (Brennan, J., dissenting). That none of these practices persisted beyond the commencement of the suit may be significant.

court that General Electric displayed a discriminatory attitude toward women which acted as "a motivating factor in its policies."[66]

Even if Satty does not prevail on remand, other litigants attacking sick leave policies may be more successful.[67] In addition to using the pretext approach, future litigants should attempt to prove discriminatory effect.[68] The majority in *Satty* recognized the *Griggs* holding that a violation of section 703(a)(2) of Title VII can be established by proof of discriminatory effect.[69] Nevertheless, it found it "difficult to perceive" how exclusion of pregnancy from a sick leave compensation program could violate that section. Instead, it maintained that section 703(a)(1) would "appear" to be the proper section of Title VII under which to analyze such a claim.[70] Since a discriminatory effect had not been proven in *Satty*, it became unnecessary to decide whether such an effect would be sufficient to establish a violation of section 703(a)(1).[71] Thus, despite the Court's intonations to the contrary, future litigants may still be able to prevail on section 703(a)(1) claims without proof of discriminatory intent.

This possibility is likely to be tested in future complaints involving sick-pay plans. Where sick leave is accrued by length of employment and serves as a form of deferred compensation, it may be possible to show that a denial of earned sick pay for pregnancy, in conjunction with mandatory leave, causes women to receive less total compensation for their work than men.[72] Under such a scheme, men would be entitled to receive up to the specified number of paid sick

66. *Id.* at 150 (citing Gilbert v. General Elec. Co., 375 F. Supp. 367, 383 (E.D. Va. 1974)). But should the court of appeals find that the seniority policy is relevant to this issue, the fact that it was a current practice at the time of the suit may distinguish it from the past discriminatory practices ignored by the Supreme Court in *Gilbert*.

67. *But see* Women in City Gov't United v. City of New York, 563 F.2d 537 (2d Cir. 1977); Guse v. J.C. Penney Co., 562 F.2d 6, 7 (7th Cir. 1977); EEOC v. Children's Hosp., 556 F.2d 222, 223 (3d Cir. 1977); Liss v. School Dist., 548 F.2d 751 (8th Cir. 1977); Lewis v. Los Angeles City Unified School Dist., 429 F. Supp. 935 (C.D. Cal. 1977); Madrid v. Board of Educ., 429 F. Supp. 816 (N.D. Cal. 1977); Tawney v. Board of Educ., 428 F. Supp. 528 (S.D. W. Va. 1977).

68. 98 S. Ct. at 353-54 n.6. Footnote 6 of the majority opinion implies that the effect theory, while closed to Nora Satty, remains available for future cases.

69. *Id.* at 352 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

70.

> [I]t is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick leave compensation program "deprives an individual of employment opportunities" or "otherwise adversely affects his status as an employee" in violation of 703(a)(2). The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status.

Id. at 353.

71. *Id.*

72. See Justice Powell's suggestion that such a theory is plausible, even for Satty. *Id.* at 355-56 (Powell, J., concurring).

days for any sickness or disability suffered, while women would be precluded from using any of those sick days when actually disabled by pregnancy. If it could be shown that the men covered by the plan generally used more sick days than the women, it could be argued that pregnant women are denied access to sick leave, a component of their salary, in an amount equal to the unused portion of their sick time. To the extent that the salary of the average male employed in the same position includes payment for sick days in excess of the number of sick days taken by the average female employee in that position, the women would be receiving less total compensation for their work.[73] In addition to establishing its disparate impact, one could show that such a plan, if coupled with sex-stereotyping attitudes,[74] is a pretext for invidious economic discrimination against women.[75]

73. An amicus brief submitted in *Berg* characterized any denial of accrued sick leave for pregnancy, without regard to a statistical analysis of the comparative number of days generally used by men and women, as "a reduction of their salary." NEA Motion to File an Amicus Brief at 17, Richmond Unified School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975). *See also* Comment, *Income Protection for Pregnant Workers*, 26 DRAKE L. REV. 389, 402 (1976-1977). *But see* Women in City Gov't, United v. City of New York, 563 F.2d 537 (2d Cir. 1977):

> An insurance plan is merely a form of compensation. . . . Discriminatory effect or impact, in this context, is not measured by reference to a single form of compensation, but could be proved only by showing a disparity in the total value of all forms of compensation given to men and women. In determining whether or not such a disparity existed, it would be necessary to compute the value not only of health and disability insurance plans, but also of salary, life insurance and retirement plans, fringe benefits such as transportation, day-care services, physical fitness facilities, and the like. . . . Thus, if plaintiffs' views were sound, it would require every employer subject to Title VII to determine separately, with respect to race, color, religion, sex or national origin, the value of each type of compensation he provides. Presumably, the disparities that would inevitably be discovered would each have to be justified by a business necessity. . . . To read Title VII so as to require such determinations and justifications to be made by employers, and, concomitantly, by the district courts, would be to impose upon the Act an administrative complexity undreamed of by its draftsmen. Had the Supreme Court wanted the lower federal courts to embark on such a course, it would have been more explicit in the *General Electric* opinion; indeed, the entire thrust of recent Title VII decisions appears to point in the opposite direction.

563 F.2d at 540-41 (citations omitted).

74. The courts have consistently attacked sexual stereotyping. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curium) (summary judgement for defendant corporation improper when plaintiff charges denial of employment because of policy not to accept applications from women with pre-school age children); Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975) (gender-based generalization insufficient to justify exclusion of girls from Little League); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (employment policy denying opportunity on the basis of a characterization of the physical capabilities and endurances of women not excusable as a bona fide occupational qualification under Title VII); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (employer's refusal to hire males as flight attendants solely because of sex violates Title VII).

75. This was the factual situation in Berg v. Richmond Unified School Dist., 528 F.2d 1208 (9th Cir. 1975), *vacated and remanded*, 98 S. Ct. 623 (1977). Berg ad-

Gilbert's incorporation of constitutional notions into a Title VII case[76] has led at least one litigant to argue a Title VII claim by making use of due process attacks on conclusive presumptions. In *Richmond Unified School Dist. v. Berg*,[77] the plaintiff argued in part that a "conclusive presumption of a pregnant employee's *non-disability* for purposes of denying accumulated sick leave, surely is as vulnerable to the claim of a denial of due process as was the opposite presumption in [Turner v. Department of Employment Security]."[78] *Turner* declared a Utah statute making pregnant women ineligible for unemployment benefits unconstitutional because of a conclusive presumption of incapacity. In *Berg* the plaintiff contended that a conclusive presumption denying an employee liberty or property may signal not only a due process violation, but also an infraction of Title VII where the presumption is aimed at sex.[79]

Although the Court has not directly invalidated this approach,[80] it is unlikely to succeed. The *Gilbert* Court used constitutional analysis narrowly for the sole purpose of defining sex discrimination in a statutory case where the statute itself did not define sex discrimination.[81] Attacking conclusive presumptions as a denial of due process is a different and much broader use of constitutional analysis. The Court may well find it an unwarranted extension of reliance on the Constitution in a statutory claim.

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vanced the argument that such a situation is distinguishable from *Gilbert:*

> [the school district's] refusal to afford accumulated sick pay is part of an overarching scheme of sex discrimination against pregnant schoolteachers, founded upon invidiously discriminatory perspective upon the pregnant schoolteacher as one who must be forced to take leave because of a stereotype of her condition of "temporary disability" . . . while being denied accumulated sick pay when she actually does become disabled, during and after delivery or otherwise . . . .

Brief for Respondent at 41, Richmond Unified School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975). Moreover, Berg pointed to the sex stereotyping in the district's policy of refusing sick pay for pregnant employees while at the same time offering one day of paternity leave, without loss of pay, to fathers during or after their wives' confinements. Berg characterized the policy as a stereotyped view of the father as the breadwinner. *Id.* at 41-42.

76. Sex discrimination was defined by relying on Geduldig v. Aiello, 417 U.S. 484 (1974), an equal protection case. *See* text accompanying notes 17-20 *supra.*

77. 98 S. Ct. 623 (1977).

78. Brief for Respondent at 38, Richmond Unified School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975) (emphasis in original) (citing Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam)).

79. Brief for Respondent at 39, Richmond Unified School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975).

80. The Supreme Court remanded *Berg* without comment. 98 S. Ct. 623 (1977).

81. For the Court's reason for relying on *Geduldig,* see text accompanying notes 17-20 *supra.*

Berg was an action against a public employer, whereas both Satty and Gilbert sued private sector employers. It might be thought that in a suit against a state agency, the fourteenth amendment would provide a basis for employing due process analysis. The Court's remand of *Berg* for further consideration in light of *Gilbert* and *Satty*[82] may indicate that Title VII has a broader sweep than the constitutional arguments, making the latter unavailing to a plaintiff who is unsuccessful in establishing a violation of the statute.

The distinction drawn in *Satty* between disability benefits and burdens may not prove elucidating with respect to sick pay. One can view sick pay as a benefit extended to both men and women for ordinary illness but not extended to the unique condition of pregnancy.[83] On the other hand, denial of sick pay for pregnancy can be seen as a burden imposed on women by denying them access to a form of deferred compensation earned through their own past efforts. Such a burden is never imposed on men; nor is it imposed on non-pregnant women, although Justice Stevens' comment that "it is the capacity of women to become pregnant which primarily differentiates the female from the male"[84] indicates that all women are potentially burdened by this policy.[85] Thus, a plaintiff might argue that the exclusion of pregnant women from sick pay benefits disadvantages a large class of female employees on the basis of a condition unique to their sex, in violation of the policy of Title VII to insure equal treatment for all women.[86]

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82. 98 S. Ct. 623 (1977).

83. The district court in *Gilbert* specifically found that pregnancy was (1) often voluntary and (2) per se not a disease. Gilbert v. General Elec. Co., 375 F. Supp. 367, 377 (E.D. Va. 1974), *rev'd*, 429 U.S. 125 (1976). The Supreme Court found this critical. *Id.* at 136. Note that the district court also found that a pregnancy without complications is normally disabling for six to eight weeks following birth; 10% of pregnancies terminate in disabling miscarriages; 5% of pregnancies are complicated by diseases stimulated by pregnancy and such complications may lead to disability. *Id.* at 377.

84. General Elec. Co. v. Gilbert, 429 U.S. at 162 (Stevens, J., dissenting).

85. Approximately "80 percent of all women become pregnant at some point in their worklives." *Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 113,130 (1977) (statement of Wendy W. Williams) [hereinafter cited as *Hearings*]. It is notable that the capacity of women to become pregnant is the justification most often advanced for employment policies disadvantaging women. *Id.* at 123. Moreover, on the basis of capacity, the district court in *Gilbert* held that a class action could be maintained not just by GE employees who had been or were pregnant at the time of the suit, but by all women employees. Gilbert v. General Elec. Co., 59 F.R.D. 267, 272-73 (E.D. Va. 1973). *See also Recent Developments*, 45 FORDHAM L. REV. 1202, 1221 (1977).

86. NEA Motion to File an Amicus Brief at 18, Richmond Unified School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975). Since *Berg* was remanded for further consideration in light of *Gilbert* and *Satty*, this argument appears to have been unavailing.

The argument is unlikely to succeed, however, without concomitant proof of pretext or effect. In *Gilbert,* the Court did not find denial of disability insurance coverage for pregnancy per se violative of Title VII, and in *Satty* it found *Gilbert* dispositive of denial of sick pay to pregnant employees absent proof of pretext or effect. In *Berg,* the companion case to *Satty,* the Court appeared to impart no significance to a distinction between sick leave and disability insurance.[87] The plaintiffs in *Berg* characterized the former as an element of salary, payable even if the employee is temporarily absent due to illness or disability, so long as the absences do not exceed the specified number of days per year.[88] Insurance, on the other hand, they viewed as paying a benefit each time an employee incurred a covered illness or disability, regardless of whether a payment had been made within that year for other illnesses or disabilities suffered by that employee.[89] The Court remanded the case without elaboration.

B. *Restoration of Effect Analysis*

Perhaps the most significant aspect of the *Satty* case is its restoration of discriminatory effect analysis. The Supreme Court's opinion in *Gilbert* had led Justice Blackmun,[90] the Second Circuit Court of Appeals,[91] and at least one commentator[92] to wonder whether the effect analysis employed in *Griggs* for proving a Title VII claim had been rendered invalid.

Although the Court in *Gilbert* had acknowledged that a prima facie violation of Title VII can sometimes be established by proof of

87. Satty argued no such distinction. She conceded in her brief that the sick leave plan offered by her employer is "for all intents and purposes, the same as the plan examined in *Gilbert.*" Brief for Respondent at 8, Nashville Gas Co. v. Satty, 522 F.2d 850 (6th Cir. 1975).

88. NEA Motion to file an Amicus Brief at 16, Richmond Unified School Dist. v. Berg, 528 F.2d 1208 (9th Cir. 1975).

89. *Id.* Although not addressed in the brief, the distinction would not hold where disability pay is given only for a limited number of days per year or per illness.

90. "I do not join any inference or suggestion in the Court's opinion—if any such inference or suggestion is there—that effect may never be a controlling factor in a Title VII case, or that *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), is no longer good law. General Elec. Co. v. Gilbert, 429 U.S. at 146 (Blackmun, J., concurring). *But see Id.* at 146, (Stewart, J., concurring).

91. The Second Circuit has recently held that *Gilbert* bars plaintiffs from establishing discrimination through proof of disparate impact. Women in City Gov't United v. City of New York, 563 F.2d 537, 540 (2d Cir. 1977). *But see* Love v. Waukesha Joint School Dist. No. 1, 560 F.2d 285, 288 (7th Cir. 1977).

92. *See Recent Developments, supra* note 85, at 1216-17 which suggests that the validity of *Griggs* was called into question by the Court's citation of McDonnell Douglas Corp. v. Green, 416 U.S. 792 (1973) as contrary authority.

the discriminatory effect of an otherwise facially neutral plan, it had maintained that the respondents in that case had not attempted to demonstrate this effect,[93] and stated:

> 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 discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all inclusive. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks.[94]

Thus, although the effect analysis was still a possible approach, considerable doubts had been raised. Given the presumption of parity regarding benefits even when pregnancy is excluded, it seemed virtually impossible for a plaintiff to prove discriminatory effect.[95]

Shortly after *Gilbert,* the Supreme Court decided *International Brotherhood of Teamsters v. United States,*[96] a Title VII case involving racial discrimination. In that decision it carefully distinguished the disparate treatment theory of recovery from claims of disparate impact under a facially neutral plan.[97] In the former, discriminatory motive is critical; in the latter, motive is immaterial and the test is whether the practice is justified by business necessity. Recovery was granted under the disparate impact theory,[98] thus establishing it as a viable method of recovery for section 703(a) violations involving racial discrimination. Whether the technique was available in claims of sex discrimination remained open.

In its treatment of the senority issue in *Satty,* the Court employed a discriminatory effect analysis,[99] thus dispelling any fears that such an

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93. 429 U.S. at 137.

94. *Id.* at 138-40 (emphasis in original).

95. That such a burden rests on the plaintiff is clear. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See also* General Elec. Co. v. Gilbert, 429 U.S. at 137 n.14.

96. 97 S. Ct. 1843 (1977).

97. *Id.* at 1854-55 n.15.

98. *Id.* at 1854-58.

99.

> We have recognized, however, that both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2). Griggs v. Duke Power Co., 401 U.S. 431 (1971). It is be-

analysis would be unavailing where pregnancy is an issue. This is important because this analysis has often proved useful, especially in cases of less overt discrimination where the employee is usually unable to show the employer's intent.[100] In such cases, statistical analyses, while not irrefutable,[101] are considered competent as evidence of employment discrimination. Pervasive statistical disparity in the treatment of classes of workers—for example, by race or sex—constitutes a prima facie violation of Title VII and places on the defendant the burden of proving that the disparity, if admitted, serves legitimate business needs.[102]

Title VII cases that have successfully employed the effect analysis have generally involved racial discrimination by employers and unions.[103] *Satty* extends the use of this analysis at least to some section 703(a)(2) claims of discrimination involving pregnancy. In addition to seniority, rights such as accrued retirement benefits and freedom from involuntary transfers extending beyond the duration of the pregnancy may now be protected by the effect technique.[104] In matters of sick leave and disability benefits, however, the method may remain less useful. Unless the Court tests equality of benefits by examining exclusions from coverage as well as inclusions,[105] or adopts Justice

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yond dispute that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them "of employment opportunities" and to "adversely affect [their] status as an employee."

98 S. Ct. at 350-51.

100. *See* General Elec. Co. v. Gilbert, 429 U.S. at 154-55 n.7 (Brennan, J., dissenting) (listing eleven court of appeals cases that used discriminatory effect to make out a prima facie violation of Title VII); *See Recent Developments, supra* note 85, at 1218-19.

101. *See* International Bhd. of Teamsters v. United States, 97 S.Ct. 1843, 1856-57.

102. NAACP v. Beecher, 504 F.2d 1017, 1020-21 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); United States v. N.L. Indus., Inc., 479 F.2d 354, 368 (8th Cir. 1973); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 414 n.11 (2d Cir.), *cert. denied,* 412 U.S. 929 (1973); United States v. Chesapeake & O. Ry., 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); United States v. United Bhd. of Carpenters & Joiners Local 169, 457 F.2d 210, 214 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 550-51 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971).

103. *See* cases cited in note 102 *supra.*

104. *See, e.g.,* Harriss v. Pan Am. World Airways, 437 F. Supp. 413 (1977) (airline policy requiring pregnant flight attendants to liquidate their accrued vacation benefits, thereby depriving them of life and health insurance, travel benefits, and accrual of additional seniority during that period, violates Title VII).

105. *See* text accompanying note 94 *supra.* For criticism of the Court's approach, see Comment, *General Electric Co. v. Gilbert: A Lesson in Sex Education and Discrimination—The Relationship Between Pregnancy and Gender and the Vitality of the*

Powell's position that denial of sick pay during a mandatory maternity leave might result in less total compensation for women,[106] recovery for sick pay claims will be more likely where plaintiffs have shown discriminatory intent or pretext instead of merely discriminatory impact.

C. *EEOC Guidelines*

As noted above,[107] the Court in *Gilbert* declined to rely on a portion of the 1972 EEOC Guideline which instructed that "payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[108] But in a footnote in *Satty* the same Court gave credence to a different portion of the same guideline in its consideration of seniority.[109] The Court quoted, with apparent approval, the following portion: " 'written and unwritten employment policies and practices involving . . . the accrual of seniority . . . and reinstatement . . . shall be applied to pregnancy and childbirth on the same terms and conditions as they are applied to other temporary disabilities.' "[110] The full text of section 1604.10(b) of the guideline, from which the Court quoted, is as follows:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and 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,

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Disproportionate Impact Analysis, 1977 UTAH L. REV. 111, 131-33; Comment, 6 U. BALT. L. REV. 313, 328 (1977).

106. 98 S. Ct. at 355-56 (Powell, J., concurring).

107. *See* text accompanying notes 15-18 *supra.*

108. 29 C.F.R. § 1604.10(b) (1976). In rejecting the agency's guidelines, the *Gilbert* Court applied the rationale of Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972), *aff'd,* 414 U.S. 86 (1973), where an EEOC guideline was found invalid as inconsistent with a Congressionally approved policy. *Espinoza* concluded that the court need not defer to an administrative construction of a statute where there are "compelling indications that it is wrong." 414 U.S. at 94-95. In view of the similarity of interpretations issued by the Department of Health, Education and Welfare under Title IX of the Education Amendments of 1972 and by the Office of Federal Contract Compliance under Executive Order 11478, the application is questionable.

109. 98 S. Ct. at 351 n.4.

110. *Id.* (quoting 29 C.F.R. § 1604.10(b)).

> and payment under any health or temporary disability insurance or sick leave plan formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.[111]

The Court attempted to explain its editing:

> In *Gilbert* . . . we rejected another portion of this same guideline because it conflicted with prior, and thus more contemporaneous, interpretations of the EEOC, with interpretations of other federal agencies charged with executing legislation dealing with sex discrimination, and with the applicable legislative history of Title VII. We did not, however, set completely at nought the weight to be given the 1972 guideline. . . .
>
> The portion of the 1972 Guideline which prohibits the practice under attack here is fully consistent with past interpretations of Title VII by the EEOC. . . . Nor have we been pointed to any conflicting opinions of other federal agencies responsible for regulating in the field of sex discrimination. This portion of the 1972 Guideline is therefore entitled to more weight than was the one considered in *Gilbert. Skidmore v. Swift & Co.*[112]

The Court apparently rejected the first sentence of section 1604.10(b) and assigned different weight to various parts of the second. Specifically, it gave the portions regarding seniority and reinstatement more weight than the portion relating to disability payments. The precise degree of deference to be accorded this portion, however, was not made clear.

Furthermore, the Court's reference to *Skidmore v. Swift & Co.*[113] is somewhat puzzling. *Skidmore* set forth four criteria for determining the weight of an agency's interpretation of a statute: thoroughness, validity of reasoning, consistency with earlier and later pronouncements, and persuasiveness.[114] The Court in *Satty,* however, apparently found consistency most important, if not controlling.[115] It was the conflict between the EEOC's earliest pronouncement, contained in an opinion letter written in 1966,[116] and the more recent guidelines

111. 29 C.F.R. § 1604.10(b).
112. 98 S. Ct. at 351 n.4 (citations omitted).
113. 323 U.S. 134 (1944).
114. *Id.* at 140.
115. In both *Satty* and *Gilbert* the Court focused on this factor without mentioning the other three *Skidmore* criteria. While consistency may have some bearing on the other three factors, it by no means determines them.
116. An opinion letter by the General Counsel of the EEOC dated October 17, 1966, concluded that a longterm salary continuation plan which excluded pregnancy and childbirth would not be in violation of Title VII in accord with the Commission's

which was fatal to the disability insurance portion of the 1972 guidelines.

Given the context in which the EEOC's 1966 opinion letter had been written, the importance accorded it by the Court in *Gilbert* was undeserved. When the EEOC was created, it faced the task of interpreting the scope of the sex discrimination prohibition with no legislative guidance. It initially issued tentative interpretations, and, in its statement in the First Annual Report to Congress in 1966, admitted the difficulty of formulating standards for the treatment of pregnant employees:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous counterpart and pregnancy must necessarily be treated uniquely.[117]

It is thus clear that the agency had not formulated a consistent approach to pregnancy at that time.

The revised guidelines, promulgated just after the EEOC was given expanded powers under the 1972 Equal Employment Opportunity Act,[118] represent the most considered thinking of the agency on the subject. The *Gilbert* Court stated that there was "no suggestion that some new source of legislative history had been discovered in the intervening eight years" to justify the difference in the agency's position, but it failed to recognize the apparent Congressional desire to give the EEOC greater power to control employment discrimination.[119] In assessing an administrative interpretation, the Court in *Skidmore* weighed the "thoroughness evident in its consideration, and the validity of its reasoning."[120] In *Gilbert* and *Satty,* however, such factors were largely ignored.[121]

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earlier statement that "maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees" and, therefore, is not to be compared with illness or injury. EMPL. PRAC. GUIDE (CCH) ¶ 17, 304.43 (1970).

117. 1 EEOC ANN. REP. 40, 41 (1965).

118. Public Law 92-261, adopted on Mar. 24, 1972, gave the Commission authority to file suits against private employers, employment agencies and unions when conciliation efforts failed, expanded its jurisdiction to private and public educational institutions and state and local governments, and provided that, after March, 1973, coverage would be broadened to included employers or unions with fifteen or more employees.

119. 429 U.S. at 145.

120. 323 U.S. at 140.

121. Only in Justice Brennan's dissent in *Gilbert* did the Court recognize that the

The 1972 Guidelines had been attacked[122] for having been issued without scientific study as to probable impact,[123] and for the lack of public hearings or debate before their adoption.[124] By approving the seniority aspect of the guideline in *Satty* without addressing these deficiencies, it would appear that the Court has implied that these deficiencies are not fatal. Thus, the remainder of the EEOC Guidelines promulgated in 1972, while not applicable to *Gilbert* or *Satty*, would seem to stand unless found inconsistent with prior interpretations by the EEOC or other relevant agencies.[125] This is particularly important with regard to section 1604.10(a), which considers exclusion from employment because of pregnancy a prima facie violation of Title VII,[126] and section 1604.10(c), which allows proof of a violation by disparate impact where, absent business necessity, termination of a temporarily disabled employee is caused by a policy in which leave is insufficient or unavailable.[127]

1972 interpretation "followed thorough and well-informed consideration," 429 U.S. at 157, and therefore may comply with the *Skidmore* criteria. Mr. Justice Brennan further explained: "Indeed, realistically viewed, this extended evaluation of an admittedly complex problem and an unwillingness to impose additional, potentially premature costs on employers during the decisionmaking stages ought to be perceived as a practice to be commended. It is bitter irony that the care that preceded promulgation of the 1972 guideline is today condemned by the Court as tardy indecisiveness, its unwillingness irresponsibly to challenge employers' practices during the formative period is labeled as evidence of inconsistency, and this indecisiveness and inconsistency are bootstrapped into reasons for denying the Commission's interpretation its due deference." *Id.*

122. Prior to *Gilbert*, most of these attacks failed in the lower courts. Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037 (1977); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Communication Workers v. AT&T, 513 F.2d 1024 (2d Cir. 1975), *vacated and remanded*, 429 U.S. 1033 (1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976). *But see* Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973).

123. *See generally* Comment, *Waiting for the Other Shoe—Wetzel and Gilbert in the Supreme Court*, 25 EMORY L.J. 125, 129, 131-32 (1976) [hereinafter cited as Comment, *Waiting for the Other Shoe*]; Comment, *Current Trends in Pregnancy Benefits —1972 EEOC Guidelines Interpreted*, 24 DEPAUL L. REV. 127, 131, 134 (1974) [hereinafter cited as Comment, *Current Trends*].

124. This was not technically required. *See generally* Comment, *Waiting for the Other Shoe, supra* note 123, at 132-34; Comment, *Current Trends, supra* note 123, at 131.

125. Lack of contemporaneity is not specifically enumerated in *Skidmore*, but the Court listed it as a defect in *Gilbert* and began its analysis with it. Since that portion of the guideline accepted in *Satty* is also not contemporaneous with Title VII, the defect is apparently not fatal when no inconsistency with prior or later positions exists.

126. 29 C.F.R. § 1604.10(a).

127. *Id.* § 1604.10(c).

D. *Cost of Pregnancy Benefits*

The economic impact of extending benefits to or withholding them from pregnant employees must be examined from two perspectives: the cost to women in lost wages and benefits while on maternity leave,[128] and the cost incurred by employers in extending benefits for pregnancy. Although the former costs have never been elucidated by the Court, they may, in fact, be substantial. Approximately eighty percent of all women become pregnant during their worklives,[129] and seventy percent of working women are employed because they must support their families either because they are the sole earner or because their husband's income is less than $7,000 per year.[130] Moreover, the impact of lost income may be greater on families headed by females, since their median income is approximately half that of families headed by men.[131]

Because no violation of Title VII was found in *Gilbert* or for the sick pay claim in *Satty,* it was unnecessary to consider cost to the employer as a possible business necessity defense.[132] Nonetheless, the *Gilbert* Court noted that the average cost to the company of General Electric's current disability plan, excluding pregnancy, had been higher for women than men in both 1970 and 1971; the cost for females was estimated to be 170% of the cost for males at the time of trial.[133]

In *Geduldig v. Aiello,*[134] the Court specifically expressed concern for the cost of a pregnancy benefits plan to an employer, and recognized that California's interest in maintaining both the self-supporting nature of its insurance plan and a non-burdensome contribution

128. Under a disability insurance plan such as GE's, the cost would include loss of payments for any disability, even if unrelated to pregnancy, incurred while on maternity leave. Such was the plight of Emma Furch, a plaintiff in *Gilbert.*

129. *See* note 85 *supra.*

130. U.S. Dep't of Labor, EMPLOYMENT STANDARDS AD., WOMEN'S BUREAU, WHY WOMEN WORK (rev. ed. 1974). *See also Hearings, supra* note 85, at 26 (statement of Sen. Edward Kennedy). For a discussion of the economic problems faced by working women when they become pregnant, *see Hearings, supra* note 85, at 197 (statement of N.Y. State Sen. Carol Bellamy); Comment, *Waiting for the Other Shoe, supra note* 123, at 152.

131. In 1972 families headed by women had a median income of $5380 per year compared to $10,350 for families headed by men. Hayghe, *Marital and Family Characteristics of the Labor Force in March 1973,* 97 MONTHLY LABOR REV. 21, 25 (April 1974).

132. Cost is relevant to, but alone not determinative of, business necessity. Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971).

133. 429 U.S. at 130-31.

134. 417 U.S. at 493-96.

rate was legitimate.[135] Thus, it is possible that cost was an underlying reason for the Court's analysis in *Gilbert*.[136] The first part of the *Satty* decision is consistent with this possibility, since in maintaining accrued seniority benefits for women on maternity leave an employer would incur no significant cost. Whether there would be a substantial cost to an employer who allowed pregnant employees to utilize their accrued sick leave depends on the particular type of sick leave plan and to what extent the employees currently use their benefits under it. If sick leave is allowed to accumulate from year to year, there is no cost to the employer in allowing it to be used for pregnancy. In fact, it may be cheaper for the employer to permit the allotted sick days to be taken during pregnancy than to have them used in later years when the employee's rate of pay is likely to be higher. If the sick leave plan is non-cumulative, but women of child-bearing age generally use all their sick days, there would again be no cost to the employer. Employees who use up their accrued sick leave for pregnancy-related disabilities would not have those days available for other illnesses. If, however, the sick leave plan is non-cumulative—that is, any days not used within the year are lost—and those employees capable of becoming pregnant generally do not use up all of their sick leave time, there could be a significant cost to the employer who permits utilization of sick days for pregnancy.[137]

By refusing to require employers to assume the cost for disability payments and sick leave for pregnant workers, the Court has forced families to bear that cost. Ironically, families that cannot sustain this burden must resort to public and private welfare organizations. In

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135. *Id.* at 496.

136. *See* Comment, *Current Trends, supra* note 123, at 140-41 for the theory that analysis of cost in recent equal protection cases, in addition to the Title VII business necessity defense, may indicate that the Court considers cost of providing benefits a relevant factor in excusing discrimination.

137. For the theory that even these costs may not be as high as originally thought, see Kistler & McDonough, *Paid Maternity Leave—Benefits May Justify the Cost,* 26 LABOR L.J. 782, 786, 794 (Dec. 1975). the authors suggest that lower turnover rates and increased morale, which are likely to result from providing disability pay for pregnancy, may offset the costs of the policy. The article also contains a chart of insurance company disability plans and the additional cost of coverage for disabilities due to pregnancy. *Id.* at 792. The factors for determining the cost of any particular plan are: (1) anticipated number of pregnancies (based on the number and ages of female employees), (2) average duration of disability, (3) amount of salary paid during leave, and (4) expense of administering the plan. *Id.* at 793. *See also Hearings, supra* note 85, at 430, 447-49, 485-86, 568-74 for estimating costs of implementing S. 995 (discussed at text accompanying notes 146-50 *infra*) and for costs to various companies and states providing disability coverage for pregnancy. *Id.* at 174-75, 349, 358-62, 376-81, 385-92, 536, 570.

effect, the Court in *Satty* has decided that absent Congressional action, this is the most appropriate resolution. The Court seems to reflect the deep-seated aversion of many employers to what they view as a subsidy to families for a voluntarily assumed or planned condition.[138] If this is so, the Court has ignored the fact that many of the same companies already cover, and hence "subsidize," voluntary cosmetic surgery and non-work-related illnesses and injuries from smoking, sports, and other risky activities voluntarily undertaken.[139]

Of course, not all pregnancies are planned,[140] and in light of the Court's decision that the Constitution does not compel states to provide Medicaid coverage for elective abortions,[141] it is possible that not all pregnancies are voluntarily undertaken. Whether or not planned, pregnancy can in fact be disabling. While some incapacitation may be expected in a normal pregnancy, [142] complications are generally unforeseeable and certainly unplanned. Even when a company seeks to withhold coverage for time lost for a planned birth, complications should logically be covered. Where company policy is to cover all actual disabilities, however, whether or not a risk was voluntarily undertaken should be immaterial, and all disabilities, whether expected or unforeseen, should be covered for all pregnancies.

A further consideration in *Gilbert* and *Satty* may have been the fear that many pregnant women will not return to work following maternity leave and thus will receive an unjustified form of severance pay. Whatever merit this argument may have regarding disability insurance, it cannot reasonably apply to sick pay, which should be viewed not as a purely gratuitous benefit, but as an element of salary.[143] Sick pay is merely a form of compensation for past services. Moreover, the notion that women are less likely to return to work than an otherwise disabled employee may be based largely on a social stereotype which is no longer accurate.[144] In fact, by allowing use of sick days for disabilities or providing insurance coverage for time lost due to preg-

138. *See* Kistler & McDonough, *supra* note 137, at 786-87; Note, *Income Protection for Pregnant Workers,* 26 DRAKE L. REV. 389, 394 (1976-1977); Comment, *Waiting for the Other Shoe, supra* note 123, at 158-59.

139. *See, e.g.,* the disability plan provided by GE, which is set forth in part in Gilbert v. General Elec. Co., 375 F. Supp. 367, 374. *See also Arguments Before the Court, supra* note 52, at 3232.

140. Nora Satty's pregnancy was unplanned. Brief for Respondent, supra note 52, at 3.

141. Maher v. Roe, 432 U.S. 464 (1977).

142. *See* note 83 *supra.*

143. *See* text accompanying note 88 *supra.*

144. *See* note 130 & accompanying text *supra.*

nancy, an employer may provide an incentive for the worker to remain with the company. Finally, there are indications that rate of turnover may be related more to the kind of job held, its status and skill level, the age of the employee and length of tenure than to the decision of women to remain home with an infant.[145]

E. *Proposed Legislation*

In response to the Supreme Court's decision in *Gilbert,* Senator Harrison Williams introduced a bill to amend Title VII to clarify that prohibitions against sex discrimination in the Act include discrimination in employment on the basis of pregnancy or pregnancy related disabilities.[146] The bill was passed by the Senate on September 16, 1977. Its companion bill in the House,[147] which was reported out of Committee in amended form,[148] awaits a vote by the House membership. Moreover, twenty-two states, including New York, already require coverage of pregnancy in employee disability benefits programs.[149]

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145. *See* Grossman, *The Labor Force Patterns of Divorced and Separated Women,* 100 MONTHLY LABOR REV. 48, 49-51 (Jan. 1977); Johnson & Hayghe, *Labor Force Participation of Married Women, March 1976,* 100 MONTHLY LABOR REV. 32 (March 1977).

146. S. 995 proposes to add § 701(k) to 42 U.S.C. § 2000e:

> (k) 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, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

S. 995, 95th Cong., 2d Sess. (1977).

147. H.R. 6075, 95th Cong., 2d Sess. (1977).

148. The House version now adds:

> As used in this subsection, neither "pregnancy" nor "related medical conditions," as they relate to eligibility for benefits under any health or temporary disability insurance or sick leave plan available in connection with employment, may be construed to include abortions, except where the life of the mother would be endangered if the fetus were carried to term: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

H.R. REP. No. 95-948, 95th Cong., 2d Sess. (1978).

149. 1974 Alaska Sess. Laws § 39.20.260(e); CAL. LAB. CODE § 1420.2 (West Cum. Supp. 1978); CONN. GEN. STAT. ANN. § 31-126 (West Supp. 1978); HAW. REV. STAT. § 392-21 (Supp. 1974); ILL. ANN. STAT. ch. 48, § 85 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 22.9-1-1 (Burns Supp. 1977) (as interpreted by a state enforcement agency); KAN. STAT. § 44-1009 (Supp. 1977); MD. ANN. CODE art. 49B, § 19A (Michie Supp. 1977); MASS. GEN. LAWS ANN. ch. 149, § 150D (West Supp. 1977-1978); MICH. COMP. LAWS ANN. § 750.556 (West Supp. 1977-1978) (as interpreted in [1967] OP. ATT'Y GEN. No. 4168, at 150; MINN. STAT. ANN. § 363.01 (West Supp. 1978); Mo.

Since the Senate bill is a legislative response to *Gilbert,* the Court's assertion that the sick pay issue in *Satty* is controlled by *Gilbert* may give further impetus to the passage of its House counterpart; to the extent that *Satty* limits *Gilbert* to situations denying additional benefits rather than imposing long-term burdens, a small portion of the hardships encountered by pregnant employees and their dependents has been removed, making the bill less necessary in a narrow area. Should it be passed, the pending legislation will require any employer who chooses to offer disability coverage or sick pay to include benefits or paid sick days for actual disability related to pregnancy.[150] Similarly, the current state laws cited above impose such a duty and effectively negate *Gilbert* where they are operative.

CONCLUSION

Since 1974, when *Geduldig v. Aiello* held that disparate treatment of pregnancy does not constitute gender-based discrimination, pregnant women have been unable to look to equal protection analysis when denied disability benefits. In 1976, by applying *Geduldig*'s definition of sex discrimination to the Title VII claim in *General Electric Co. v. Gilbert,* the Supreme Court denied pregnant women statutory relief when disability benefits had been withheld. The Court's decision in *Nashville Gas Co. v. Satty* holds that denial of paid sick leave for pregnancy must be considered under a *Gilbert* analysis. Thus, unless pretext or disparate effect can be shown, the only recourse in these areas may be legislation or inclusion of the benefits in collective bargaining agreements.

ANN. STAT. § 296.020 (Vernon Supp. 1978) (as interpreted by a state enforcement agency); N.J. STAT ANN. § 43: 21-29 (West 1962); N.Y. EXEC. § 296 (McKinney Supp. 1977) (as interpreted in Union Free School Dist. No. 6 v. New York Human Rights Appeal Bd., 35 N.Y.2d 371, 320 N.E.2d 859, 362 N.Y.S.2d 139 (1974); Board of Educ. v. New York Div. of Human Rights, 35 N.Y. 673, 319 N.E.2d 202, 360 N.Y.S.2d 887, (1974)); OR. REV. STAT. § 659.029 (1977); PA. STAT. ANN. tit. 43, § 954 (Purdon Supp. 1977-1978) (as interpreted in Freeport Area School Dist. v. Pennsylvania Human Relations Comm'n, 18 Pa. Commw. Ct. 400, 335 A.2d 873 (1975)); R.I. GEN. LAWS § 28-41-8 (1956); S.D. COMPILED LAWS ANN. § 20-13-10 (Supp. 1977); WASH. REV. CODE ANN. § 49.60.010 (Supp. 1977) (as interpreted by state enforcement agency); WIS. STAT. ANN. § 111.31 (West Supp. 1977-1978) (as interpreted in Ray-O-Vac Div. of E.S.B., Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 70 Wis. 2d 919, 236 N.W. 2d 209 (1975).

150. In addition, many companies voluntarily include pregnancy in disability benefits. *See, e.g., Hearings, supra* note 85, at 60-62, 249-53, for a partial list of those firms. It is estimated that 60% of the disability plans in this country voluntarily cover pregnancy. *Id.* at 11 (statement of Sen. Birch Bayh).

In its treatment of seniority benefits, however, *Satty* represents progress for pregnant women. Under *Satty* an employment practice that burdens a woman beyond the duration of her pregnancy may be found violative of Title VII unless justified by business necessity. Thus, *Gilbert* has been limited in an important way. Moreover, *Satty*'s restoration of the discriminatory effect technique for proving a Title VII claim and its reinstatement of part of the 1972 EEOC Guidelines should facilitate recovery in future Title VII litigation.

CLAUDIA G. ALLEN
JEAN C. POWERS