



Notre Dame Law Review

Volume 49 | Issue 3

Article 5

2-1-1974

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Recommended Citation

Roger A. Bird, *Title VII and the Pregnant Employee*, 49 Notre Dame L. Rev. 568 (1974).

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NOTES

TITLE VII AND THE PREGNANT EMPLOYEE

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate with respect to policies concerning hiring, discharging, compensation and terms and conditions of employment because of an individual's sex.¹ The Act, however, does provide that it shall not be an unlawful employment practice for an employer to hire or classify an individual because of sex where sex is a "bona fide occupational qualification" reasonably necessary to the normal operation of that particular business.² The purpose of this note is to explore the meaning of "bona fide occupational qualification" (BFOQ) as applied to pregnant employees and discuss the interpretations given to this qualification by the courts and administrative agencies. This note will also discuss protection against employment discrimination afforded by Title VII and by the fourteenth amendment.

I. Brief History of Discrimination of Female Employees

A. Before Title VII

The issue of equal employment opportunities for women is not new; yet the right of women to nondiscrimination in employment is a concept only recently given effect by the courts. In 1908 the Supreme Court held that a state protective law limiting female employees to ten-hour workdays was justified by the "inherent difference between the sexes, and in the different functions in life which they perform."³ This policy of upholding state protective legislation which, *inter alia*, limited the number of hours a woman could work in one day, was rejected by the Supreme Court in 1923 in *Adkins v. Children's Hospital*,⁴ where the District of Columbia's minimum wage law for women was declared invalid. This rejection of discriminatory legislation by the Court was short-lived. In 1937 *Adkins* was overruled when a Washington minimum wage and working conditions law was upheld.⁵ Following this decision, this type of state protective law was not held unconstitutional by the Court until the mid-1960's.

1 42 U.S.C. § 2000e-2 (1964), as amended 42 U.S.C.A. § 2000e-2 (1972).

2 42 U.S.C. § 2000e-2(e) (1964). Nowhere in Title VII is there a definition of "bona fide occupational qualification." In only one committee report filed concerning Title VII [H.R. REP. NO. 914, U.S. CODE CONG. AND AD. NEWS, 88th Cong., 2d Sess. 2391 (1964)] is the BFOQ clause mentioned, and it merely states that the BFOQ is a "very limited exception" and shall be applied in only "rare situations." (at 2403). An interpretative memorandum was submitted to the Senate [110 CONG. REC. 7212 (1964)], which provides some examples of a BFOQ:

... the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.

Id. at 7213. With only this sparse legislative history as a guide, it is no wonder that there has been great difficulty in interpreting the meaning of BFOQ.

3 *Muller v. Oregon*, 208 U.S. 412, 423 (1908).

4 261 U.S. 525 (1923).

5 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

B. Title VII's Impact

Title VII made it unlawful for employers⁶ to engage in discriminatory employment practices. The Equal Employment Opportunity Act of 1972,⁷ amending Title VII, extended coverage to state and local government employees and the employees of educational institutions. Federal employees, although not within the ambit of protection of Title VII, are entitled to nondiscriminatory employment practices pursuant to Executive Order No. 11478.⁸ This order, among other things, delineates the federal policy of protecting women from employment discrimination. The vast majority of working women, therefore, are protected from employment discrimination by either Title VII, as amended, or by executive order.

This protection against discrimination for women is not all-encompassing. The existence of bona fide occupational qualifications allows a certain degree of sexist discrimination. A BFOQ based on sex exists where due to the inherent requirements and necessities of a particular job discrimination is necessary to prevent an unduly burdensome business situation. Where such a situation is present, the BFOQ clause of Title VII permits lawful discrimination.⁹ In effect, this clause creates an internal contradiction within Title VII, as one author aptly states: "Theoretically, the BFOQ provision is absolutely contradictory to the anti-discrimination provision of Title VII because it allows persons to be evaluated according to their class status rather than their individual capabilities."¹⁰

In order to minimize the counterproductive effect of the BFOQ provision, the Equal Employment Opportunity Commission (EEOC), empowered by Title VII,¹¹ has issued guidelines concerning the BFOQ as applied to women.¹² In 1972 the EEOC promulgated specific guidelines concerning pregnant employees.¹³

6 The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26:
42 U.S.C. § 2000e(b) (1964).

7 42 U.S.C.A. §§ 2000e(b), 2000e-1 (1972) *amending* 42 U.S.C. §§ 2000e(b), 2000e-1 (1964).

8 3 C.F.R. 133 (Comp. 1969), *superseding* Exec. Order No. 11246, *as amended* Exec. Order No. 11375, 3 C.F.R. 402 (1970).

9 42 U.S.C. § 2000e-2e (1964).

10 Shaman, *Toward Defining and Abolishing the Bona Fide Occupational Qualification Based on Class Status*, 22 LAB. L.J. 332, 333 (1971).

11 42 U.S.C. §§ 2000e-4, 12 (1964), *as amended* 42 U.S.C.A. § 2000e-4 (1972).
§ 2000e-12.

(a) The Commission shall have the authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter

12 29 C.F.R. § 1604 (1972). The EEOC Guidelines On Discrimination Because of Sex, in general, delineate the Commission's position on various employment practices in regard to sex discrimination. Examples of what policies are discriminatory, such as assumptions of the comparative employment characteristics of women in general, are given and the premise that all employees, male or female, are to be treated as individuals and not classified by sex is clearly established.

13 29 C.F.R. § 1604.10 (1972).

Sec. 1604.10 Employment Policies Relating to Pregnancy and Childbirth.

(a) A written or unwritten policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

(b) 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, and payment under any health or temporary disability insurance 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.

(c) 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.

The mandate of Title VII, as refined by the EEOC guidelines, is that an employee is to be treated as an individual and not as a stereotype representative of a class.¹⁴

The EEOC is not the only federal agency promulgating sex discrimination guidelines. The Office of Federal Contract Compliance (OFCC), in furtherance of Executive Order 11246,¹⁵ has issued guidelines which are applicable to all contracting agencies of the Government and to contractors and subcontractors performing under Government contracts.¹⁶ These guidelines require childbearing to be treated as a short-term disability justifying a leave of absence.¹⁷ In general, no discrimination is allowed unless sex is a bona fide occupational qualification.¹⁸ The guidelines go on to state: "In most Government contract work there are only very limited instances where valid reasons can be expected to exist which would justify the exclusion of all men or all women from any given job."¹⁹

The language and treatment of sex discrimination by the EEOC and the OFCC are similar and help to establish a common denominator in dealing with interpretations of administrative rulings. Although such interpretations do not have the force of law, the courts show "great deference to the interpretation given the statute by the officers or agency charged with its administration"²⁰ and may even accept guidelines as issued by an administrative agency in total.²¹

The judicial system has also declared certain employment practices violative of the spirit and letter of Title VII. In many cases arising under Title VII

14 See Comment, *The Mandate Of Title VII Of The Civil Rights Act Of 1964: To Treat Women As Individuals*, 59 GEO. L.J. 221, 223 (1970).

15 Exec. Order No. 11246, 3 C.F.R. 167 (Supp. 1965).

16 41 C.F.R. § 60-1.1 *et seq.* (1972).

17 41 C.F.R. § 60-20.3(g) (1973).

18 41 C.F.R. § 60-20.3(b) (1973).

19 *Id.*

20 *Udall v. Tallman*, 380 U.S. 1, 16 (1964).

21 See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the Supreme Court upheld and accepted the EEOC's guidelines relating to employment testing.

the test announced in *Weeks v. Southern Bell Telephone & Telegraph Co.*²² is applied to the alleged discriminatory practice.²³ In *Weeks* a claim of discrimination was made by a female employee when Southern Bell refused to consider her for a switchman position. Southern Bell claimed that the discrimination was based on a BFOQ in that women as a class could not perform the function of a switchman. The court in rejecting Southern Bell's contention stated:

. . . [I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.²⁴

This standard of "reasonable cause to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" does not allow for stereotyped characterization of the abilities and effectiveness of a class of individuals. To sustain a claim of a BFOQ, a factual basis must be established. A defendant cannot use broad generalities or assumed characteristics to support his contention. The court went on in *Weeks* to state:

We think it clear that the burden of proof must be on Southern Bell to demonstrate that this position fits within the "bona fide occupational qualification" exception. The legislative history indicates that this exception was intended to be narrowly construed.²⁵

By placing the burden of proof on the employer, the court helps to effectuate the narrow application of the BFOQ, as suggested by the EEOC and OFCC guidelines, in that it increases the difficulty of providing a sufficiently comprehensive factual basis for the application of the BFOQ exception.

II. Decisions Relating to Title VII Protection of Pregnant Employees

Discrimination against pregnant employees has been manifest in four general areas: hiring, fringe benefits, forced termination, and the right to a maternity leave of absence. To determine the status of the rights of pregnant employees in these areas, it is necessary to examine court interpretation and acceptance of EEOC guidelines and Title VII language itself.

A. Hiring

It is clear that refusing to hire an individual because of sex is a violation of Title VII unless that individual may be classified within a valid BFOQ. In a complaint filed with the EEOC, the practice of refusing to consider married

²² 408 F.2d 228 (5th Cir. 1969).

²³ See *Cheatwood v. South Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 757 (M.D. Ala. 1969); *Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467, 469 (W.D. Penn. 1971); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089, 1094 (S.D. Ohio 1971).

²⁴ *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

²⁵ *Id.* at 232.

women for employment due to the fact that married women frequently leave a job because of pregnancy and family considerations was challenged.²⁶ The employer claimed that the discrimination qualified as a BFOQ because training costs would make hiring a married woman unfeasible due to the high probability of losing her on becoming pregnant. The EEOC, using *Weeks* language, stated:

Respondent has the burden of proving that it had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform efficiently the duties of the job involved. . . .²⁷

The employer in this case failed to meet the burden and the possibility of pregnancy was held not to be a BFOQ for hiring discrimination. It would seem that unless an employer could factually demonstrate pregnancy to be disabling to a majority of women, pregnancy could not qualify as a BFOQ.²⁸

B. *Fringe Benefits*

Under EEOC guidelines it is unlawful for an employer to discriminate between men and women in regard to fringe benefits.²⁹ Maternity benefits for wives of male employees cannot be greater than those given female employees.³⁰ Likewise, making insurance including maternity benefits available for male employees and their wives but only making it available for female employees if they are heads of households violates Title VII.³¹ Although arbitrators have tended not to allow maternity leave as accumulated sick leave,³² the EEOC has found the refusal to allow female employees to apply accrued sick leave for maternity purposes, where there is no similar restriction on the use of male sick leave, to

²⁶ CCH EEOC DEC. (1973) ¶ 6011 (1969).

²⁷ *Id.* at 4031.

²⁸ (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

²⁹ C.F.R. § 1604.2(a) (1973).

²⁹ 29 C.F.R. § 1604.9 (1973).

(a) "Fringe benefits," as used herein, include medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

³⁰ CCH EEOC DEC. (1973) ¶ 6197 (1970).

³¹ CCH EEOC DEC. (1973) ¶ 6110 (1970).

³² Sipser, *Maternity Leave: Judicial and Arbitral Interpretation 1970-72*, 24 LAB. L.J. 173, 188 (1973).

be a violation of Title VII.³³ Subjecting pregnant and postpregnant women to more stringent eligibility requirements for unemployment benefits than are applied to other temporary disability situations is discriminatory.³⁴ Refusal to credit a female employee for time spent on maternity leave in computing her seniority is unlawful discrimination based on sex.³⁵ The scope of the EEOC guidelines seems to be all-encompassing in supporting the proposition that pregnancy is to be treated as a short-term disability, and discrimination against pregnant employees is barred in any aspect of fringe benefits unless it is so necessary to the operation of the business as to justify its discriminatory impact on females.

C. *Forced Termination*

Forced termination of an employee due to a temporary disability such as pregnancy is a violation of Title VII "if it has a disparate impact on employees of one sex and is not justified by business necessity."³⁶ Such a violation occurs where a school policy forces resignation or termination upon a teacher who is pregnant and rehires her only in a substitute capacity while allowing leaves for sickness and personal reasons.³⁷ An airline policy requiring resignation of flight hostesses after becoming pregnant was found to be a violation unless the airline alternatively offered a leave of absence except where the position could not be left vacant or filled temporarily during the anticipated absence.³⁸ Similarly, in another airline case involving permanent severance of a flight cabin employee who became pregnant, the EEOC stated: "[t]hus Title VII requires any employment practice or policy which adversely affects females because of their pregnancy be justified by business necessity."³⁹ In *Doe v. Osteopathic Hospital Of Wichita, Inc.*⁴⁰ an unwed pregnant hospital office clerk was discharged. The court determined that the discharge was due to the fact that the clerk was unwed and pregnant and not "for cause" as claimed by the hospital.⁴¹ The court went on to find a violation of Title VII in that a dismissal for pregnancy, even of an unwed individual, "was *not* a bona fide occupational qualification by reason of being reasonably necessary to the normal operation of the business of the Osteopathic Hospital."⁴² A female employee cannot be terminated for pregnancy nor can she be subjected to a discriminatory reemployment policy unless such termination or discrimination can be justified by business necessity.

D. *Right to Maternity Leave of Absence*

In a 1969 decision⁴³ the EEOC reiterated its position on the granting of

33 CCH EEOC DEC. (1973) ¶ 6380 (1973).

34 2 CCH EMPLOYMENT PRACTICES GUIDE ¶ 5051 (1972).

35 CCH EEOC DEC. (1973) ¶ 6204 (1970).

36 29 C.F.R. § 1604.10(c) (1973).

37 2 CCH EMPLOYMENT PRACTICES GUIDE ¶ 5079 (1971); *Id.* ¶ 5112 (1972).

38 CCH EEOC DEC. (1973) ¶ 6226 (1971).

39 *Id.* ¶ 6268 at 4474 (1971); *Accord, id.* ¶ 6170 (1970).

40 333 F. Supp. 1357 (D. Kan. 1971).

41 *Id.* at 1360.

42 *Id.* at 1362.

43 CCH EEOC DEC. (1973) ¶ 6084 (1969).

maternity leaves whether or not leaves are granted for illness.⁴⁴ The granting of maternity leave depending on the individual circumstances surrounding the incident,⁴⁵ conditioning leave upon two years of service while leave of absence or disability leave is not so conditioned;⁴⁶ or limiting maternity leave to "married" females,⁴⁷ discriminates against females in violation of Title VII. The failure to rehire after a maternity leave is not necessarily discriminatory if there is an overriding need to fill the vacancy created by the leave as soon as possible.⁴⁸

An employer, to avoid a charge of discrimination, must offer a pregnant employee a leave of absence and cannot refuse to rehire that employee unless there is an overriding business necessity which cannot be met without discrimination.⁴⁹

III. Decisions Relating to Constitutional Protection of Pregnant Employees

A. Constitutional Challenges

Due to the fact that government employees,⁵⁰ and until recently, state employees and teachers,⁵¹ were exempt from Title VII protection, much of the federal legislation concerning discrimination against female employees has been based on denial of due process or denial of equal protection of the law under the fourteenth amendment. Nonetheless, many of the same criteria used in determining discrimination under Title VII have been employed by the courts. In *Williams v. San Francisco Unified School District*,⁵² the court granted injunctive relief against the school district's mandatory maternity leave policy stating: "[t]he District's maternity leave policy is neither rationally related to a legitimate objective nor promotes any compelling interest of the defendants."⁵³ The standards presented by this decision closely parallel the EEOC concept of barring discrimination unless it is so necessary to the operation of business as to justify its discriminatory impact on females.

Charges of discrimination based on lack of due process or denial of equal protection have as a general rule not been as successful as charges brought under

44 The EEOC, in quoting from opinion letter of Nov. 15, 1966, stated:

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be special recognition for absences due to pregnancy . . . for this reason . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness.

Id. at 4130.

45 *Id.*

46 *Id.* ¶ 6184 (1970).

47 *Id.*

48 *McGaffney v. Southwest Miss. Gen. Hosp.*, 5 EPD ¶ 8409 (S.D. Miss. 1973).

49 CCH EEOC DEC. (1973) ¶ 6184 at 4313 (1970).

50 42 U.S.C. § 2000e(b) (1964), as amended 42 U.S.C.A. § 2000e(b) (1972).

51 42 U.S.C. §§ 2000e(b), 2000e-1 (1964), as amended 42 U.S.C.A. §§ 2000e(b), 2000e-1 (1972). In the 1972 amendment, states and political subdivisions thereof were deleted from the exclusion of employers covered by Title VII. Also, educational institutions were deleted from exemption of Title VII.

52 340 F. Supp. 438 (N.D. Cal. 1972).

53 *Id.* at 443.

Title VII. Claims arising under the equal protection clause of the fourteenth amendment are subject to two standards of review. Under the "permissive view," the challenger to the constitutionality of a classification must show that the policy is arbitrary and does not have a "fair and substantial relation to the object of the legislation."⁵⁴ This places a burden of proof on the challenger that is almost impossible to meet. The "strict scrutiny" test, however, places the burden of proof on the Government which must show a "compelling state interest" to sustain the constitutionality of the questioned regulation.⁵⁵ This more strict standard is applied whenever the classification is based on "suspect" criteria or when it infringes on a fundamental right. Although the right to work is important, policies limiting the type or scope of work available for a woman cannot, in a constitutional sense, be seen as an infringement on a fundamental right.⁵⁶ In a recent decision⁵⁷ the Supreme Court found that a suspect classification did not exist where "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁵⁸ Applying this definition to discrimination in employment based on sex, it is evident that sex is not a suspect classification. Women are not relegated to such a position of political powerlessness nor are they subjected to such unequal treatment as to command extraordinary protection. Women are a viable force both politically and economically and do not require the extra protection afforded members of a suspect classification.

In *Struck v. Secretary Of Defense*⁵⁹ the Court of Appeals for the Ninth Circuit, in reference to the dismissal of a female Air Force officer due to pregnancy, held that "[a] relevant physical difference between males and females justifies their separate classification for some purposes, and avoids the problem of a denial of Equal Protection of the Law."⁶⁰ The court based its finding on the fact that "there is a compelling public interest in not having pregnant female soldiers in the Military establishment."⁶¹ Clearly this kind of stereotyped reasoning has been found invalid under EEOC guidelines. Every individual must be evaluated as an individual⁶² and not simply placed into a group, such as pregnant female

54 *Reed v. Reed*, 404 U.S. 71, 76 (1971).

55 *Shapiro v. Thompson*, 394 U.S. 618, 638 (1968).

56 Recent Supreme Court decisions have indicated that the concept of a "fundamental" right is limited to those rights mandated by the Constitution. In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court found that "the Constitution does not provide remedies for every social and economic ill." *Id.* at 74. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court stated in regard to education:

It is not the province of the Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33. Since there is no explicit or implicit right to work in the Constitution, the right to work is not a "fundamental" right.

57 *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

58 *Id.* at 28.

59 460 F.2d 1372 (9th Cir. 1971), *remanded* (to determine mootness) 409 U.S. 1071 (1973).

60 *Id.* at 1375.

61 *Id.* at 1377.

62 *See* note 14, *supra*.

soldiers, for easy classification. Although there may be a compelling public interest due to individual physical characteristics in not having *some* pregnant females in the military, there is no compelling public interest for a blanket exclusion of *all* pregnant females from the military.

In *Schattman v. Texas Employment Commission*⁶³ the court upheld a policy of forced termination for pregnancy in that it was "rationally related to a permissible state purpose."⁶⁴ The case was decided on a claim of denial of equal protection after the court decided that the Texas Employment Commission was excluded from Title VII coverage under § 2000e(b)(1) as a state agency.⁶⁵ Arguably, if the question had been decided under Title VII mandates, as the dissent reasoned,⁶⁶ the policy would have been found discriminatory as the agency would have had to show an overriding business necessity justifying discrimination. Such a necessity did not exist in this case.

It cannot be said that the equal protection clause is of no value in striking down discriminatory classifications based on pregnancy, but the burden of proof required by the permissive standard of review must be met. In light of this, challenges of discriminatory policies will be more successful if brought under the coverage of Title VII.⁶⁷

There are now pending before the Supreme Court two school cases involving forced maternity leave policies. The respective circuit courts of appeal have reached different conclusions as to the constitutionality of the regulations. In *LaFleur v. Cleveland Board Of Education*,⁶⁸ the Sixth Circuit Court of Appeals found a school policy requiring unpaid maternity leave to commence five months before the expected due date to be unsupported by a valid state interest and hence unconstitutional. In *Cohen v. Chesterfield County School Board*,⁶⁹ the Fourth Circuit Court of Appeals upheld the validity of a school policy requiring maternity leave to commence at the end of the fifth month of pregnancy. The court stated:

We conclude, first, that the regulation is not an invidious discrimination based on sex. It does not apply to women in an area in which they may compete with men. Secondly, school officials have a duty to provide, as best they can, for continuity in the instruction of children and, to that end, they have a legitimate interest in determining reasonable dates for the commencement of maternity leaves and a right to fix them.⁷⁰

The Supreme Court is thus faced with conflicting decisions from these circuit courts. In *Cohen* a legitimate state interest in regulating maternity leaves was found; in *LaFleur* no valid state interest was found. Although both are brought

63 459 F.2d 32 (5th Cir. 1972).

64 *Id.* at 41.

65 *Id.* at 38. 42 U.S.C. § 2000e(b)(1) has subsequently been amended by 42 U.S.C.A. § 2000e(b)(1), ending the exclusion of state agencies from Title VII coverage. Therefore, employees of the Texas Employment Commission are now protected from discrimination by Title VII.

66 *Id.* at 41-42 (Wisdom, J., dissenting).

67 Landau, *Sex Discrimination In Employment: A Survey Of State And Federal Remedies*, 20 DRAKE L. REV. 417, 425 (1971).

68 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974).

69 474 F.2d 395 (4th Cir. 1973), *rev'd sub nom.* Bd. of Educ. v. LaFleur, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974).

70 *Id.* at 397.

under a claim of denial of equal protection,⁷¹ the Court, in deciding these cases, will have difficulty in ignoring the applicable guidelines and will undoubtedly find forced maternity leave policies to be discriminatory.

The establishment of a female employee's right to be free from discriminatory employment policies can be most successfully maintained as a right afforded by Title VII. Constitutional considerations, however, should not be ignored and may provide an alternative route in pursuing remedial action to insure non-discriminatory treatment.

B. *Constitutionality of State Protective Statutes*

With the enactment of Title VII there was a question as to how this federal legislation would affect state protective statutes. It was uncertain whether Title VII pre-empted state protective statutes or merely provided concurrent regulation in this area. Initially, Title VII and state statutes stood together.⁷² In 1969, however, new guidelines were established which removed state protective laws from the BFOQ exception.⁷³

EEOC guidelines expressly provide that state employment legislation limiting female employment for certain periods of time before and after childbirth is in conflict with Title VII and will not justify discrimination or qualify as a BFOQ exception.⁷⁴ The supremacy of Title VII, as interpreted by the EEOC, was sustained in *Bowe v. Colgate-Palmolive Co.*⁷⁵ Although there are still discriminatory laws on the books,⁷⁶ it is certain that they will not survive constitutional challenge.

71 Title VII will not apply to these cases because until 42 U.S.C. § 2000e(b)(1) (1964) was amended by 42 U.S.C.A. § 2000e(b)(1) (1972), Boards of Education were excluded as a state agency from Title VII coverage. Both of these cases were brought before the amendment became effective.

72 When guidelines were first established by the EEOC, state laws inconsistent with the guidelines were, in some instances, considered a BFOQ.

(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception.

29 C.F.R. § 1604.1(c) (1966).

73 The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

29 C.F.R. § 1604.1(b)(2) (1970).

74 29 C.F.R. § 1604.1(b)(1) (1973).

75 416 F.2d 711 (7th Cir. 1969); *accord*, Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970).

76 MASS. ANN. LAWS ch. 149, § 55 (1966); N.Y. CONSOL. LAWS 30 Labor § 206(b) (1962); MO. ANN. STAT. 15A § 290.060 (Vernon's 1965); PUERTO RICO ANN. LAWS T. 29 § 467 (1969).

IV. Conclusion⁷⁷

Title VII and the ensuing EEOC guidelines make it clear that any written or unwritten employment policy discriminating because of pregnancy is unlawful unless an overriding business necessity can be factually substantiated. This exception has been very narrowly construed. Pregnancy must be treated as a short-term disability, and an opportunity for a maternity leave must be afforded. It is doubtful if any forced maternity leave policy will be upheld in the future. Fringe benefits must be equitably applied to the maternity situation and cannot favor nonmaternity-related events. State protective laws are no defense to a charge of discrimination nor do they qualify as a BFOQ. Truly, the aim of this legislation is to treat pregnant employees as individuals, and not place them into a stereotyped class with alleged inferior capabilities against which discrimination may be practiced.

Roger A. Bird

⁷⁷ Since the time this article was originally written the Supreme Court has (as predicted at p. 577, *supra*) held the mandatory maternity termination provisions of the Cleveland and Chesterfield County maternity regulations to be violative of due process and thus affirmed *LaFleur v. Cleveland Board of Education* (*supra*, note 68) and reversed *Cohen v. Chesterfield County School Board* (*supra*, note 69). *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974).