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SEX DISCRIMINATION AS TO MATERNITY BENEFITS†

by

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Sex discrimination as to maternity leave and benefits, under Title VII of the 1964 Civil Rights Act[1] and under the fourteenth amendment, generates two opposite types of problems.

The first occurs when a pregnant employee wants, and needs, maternity leave, but such leave is denied. The second occurs when a pregnant employee does *not* want, or need, maternity leave, but such leave is forced upon her. The pregnant employee now usually prevails in both situations. That is, ordinarily she is entitled to maternity leave when she needs it, but does not have to take it when she does not need it.

This field of law has been enlivened by two Supreme Court cases handed down in 1974, one for each of these two facets of the problem. *Cleveland Board of Education v. LaFleur*[2] largely disposed of the second issue, by holding arbitrary mandatory maternity leaves unconstitutional. But *Geduldig v. Aiello*,[3] by holding that a state temporary disability insurance system could constitutionally exclude normal pregnancy, although it closed one segment of the first controversy,

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

2. 414 U.S. 632 (1974), discussed in text accompanying notes 85-100 *infra*.

3. 417 U.S. 484 (1974) (6-3 decision), discussed in text accompanying notes 8-18 *infra*.

threw open the much larger question whether private health, hospital, and sick leave plans can also exclude pregnancy.

The purpose of this Article is to supply a general survey of the state of the law at all points where maternity produces a claim of sex discrimination in employment. In addition, an attempt will be made to analyze what the Supreme Court will do when it is confronted with the question whether, under *Geduldig*, all private fringe benefit systems must equate normal pregnancy with temporary sickness and disability.**

RIGHT TO LEAVES AND OTHER BENEFITS

The first issue, that of a right to maternity leave, falls under two main headings. First, when there is a temporary disability or paid sick leave plan in force, the question is whether maternity shall be treated the same as any other temporary disability. Second, if no such plan is available or if its paid leave is too short, the question is whether denial of unpaid leave for maternity is sex discrimination.

In 1972, the Equal Employment Opportunity Commission (EEOC) laid down the basic rule that maternity must be equated with temporary disability for purposes of sick leave or temporary disability benefits:

> (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 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.[4]

Court decisions before *Geduldig* adopted the same rule[5] with al-

** Ed. Note. After this Article went to press, the Supreme Court granted certiorari in Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975). 95 S. Ct. 1989 (1975).

4. 29 C.F.R. § 1604.10(b) (1972).

5. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974) (held unlawful union-bargained health plan which barred pregnancy benefits but paid benefits for other "voluntary" disabilities, such as sports injuries and alcoholism); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Ore. 1974) (school board violated Title VII and fourteenth amendment by refusal to treat pregnancy as an "illness or injury" under its sick-leave policy); Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 9 FEP Cas. 227 (3d Cir. 1975) (income protection plan providing pay-

most[6] complete unanimity, as did also, of course, the decisions of the EEOC itself.[7]

In the summer of 1974, however, the Supreme Court of the United States handed down an opinion, in the case of *Geduldig v. Aiello*,[8] that left room for speculation on what the final fate of this rather one-sided body of decisions would be. *Geduldig* involved the California State Temporary Disability Insurance system, which is associated with its Unemployment Compensation Statute.[9] This pro-

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ments during all disabilities except pregnancy held unlawful); Farkas v. South Western City School Dist., 8 FEP Cas. 288 (S.D. Ohio 1974) (school board violated Title VII by putting pregnant teacher on unpaid leave of absence instead of permitting her to use accumulated sick leave); Lillo v. Plymouth Local Bd. of Educ., 8 FEP Cas. 21 (N.D. Ohio 1973) (refusal to allow sick leave to pregnant teacher held sex discrimination under Title VII); Dessenberg v. American Metal Forming Co., 8 FEP Cas. 290 (N.D. Ohio 1973) (Title VII held violated when employers failed to pay sick leave to pregnant employees, while granting such leave to males suffering from such voluntarily induced conditions as alcoholism); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972) (distinctions between pregnancy and illness may not be drawn for purposes of sick pay and seniority); Black v. School Comm., 8 FEP Cas. 132 (Mass. Sup. Jud. Ct. 1974) (sick leave available for disabilities generally, whether voluntary or not, improperly refused for pregnancy). *See also* Goodyear Tire & Rubber Co. v. Rubber Workers Local 200, 8 FEP Cas. 128 (Ohio Ct. App. 1974). The union contract provided for six weeks leave for maternity, but for up to fifty-two weeks leave for other disabilities. The arbitrator, following the EEOC interpretation, ruled that the longer period applied when disability dne to pregnancy extended in fact beyond six weeks. The court held that the arbitrator did not exceed his authority in so doing.

6. *Contra*, Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238, 245 (N.D. Ga. 1973) (pregnancy is neither a sickness nor a disability and denial of disability benefits for pregnancy therefore did not violate Title VII).

7. EEOC Dec. No. 73-0497, 2 CCH EMPL. PR. GUIDE ¶ 6381 (1973) (medical disability plan excluded maternity leave); Andreev v. NBC, EEOC Dec. No. 73-0463, 1973 CCH EEOC Dec. ¶ 6380 (NBC violated Title VII by refusing to allow female employees to use their accumulated sick leave for maternity purposes, while not subjecting males to any restrictions on their use of sick leave); EEOC Dec. No. 71-1474, 1973 CCH EEOC Dec. ¶ 6221 (1971) (health plan allowed thirteen weeks benefits for all disabilities except pregnancy).

8. 417 U.S. 484 (1974).

9. Two other states, New York and New Jersey, have Temporary Disability Insurance plans that exclude pregnancy. New Jersey's plan, like California's, is attached to the unemployment compensation system, but New York's is associated with the Workmen's Compensation Law. At one time Rhode Island, which also has a temporary disability plan connected with unemployment compensation, provided benefits for pregnancy; however, eligibility did *not* depend on actual inability to work, as required in the law. Rather, a woman could draw benefits at any time she was not working during pregnancy, regardless of the reason. Under these conditions the payments for pregnancy were a heavy drain on the system. In 1969, therefore, the act was amended to provide a single lump sum for maternity benefits up to a maximum of $250.

Following *Geduldig*, a bill was introduced in the New York legislature by Assemblyman Seymour Posner (D-Bronx) and Senator Ron Goodman (R-Manhattan) to treat pregnancy like any other disability under the New York statute and to provide up to twenty-six weeks of benefits. Hearings were held early in 1975 before the Select Com-

gram, which is financed entirely by employee contributions amounting to one percent of payroll, specifically excluded disability from normal pregnancy and childbirth, while covering most other temporary disabilities of between eight days' and twenty-six weeks' duration. The Supreme Court held that this under-inclusiveness of the plan was not constitutionally fatal under the equal protection clause of the fourteenth amendment. A state, said the Court, "may take one step at a time," and may proceed with remedying one area while neglecting others.[10]

Geduldig had a completely constitutional focus. But all arguments in the controversial field of maternity benefits are now subordinate to the central question: Will the Supreme Court extend the same treatment to maternity benefits under Title VII? As far as the circuit and district courts are concerned, the cases have been just as predominantly on the side of the EEOC rule after *Geduldig* as before.[11] The typical opinion begins by distinguishing *Geduldig* because it involved a state program and a constitutional issue, and goes on to decide the case on the merits along essentially pre-*Geduldig* lines.

Since the ultimate question is what the Supreme Court will do, it seems more profitable, instead of analyzing the arguments in the lower court cases on their intrinsic merits, to test them against the holding and especially against the supporting language of *Geduldig*. The pattern will be, first, to sketch the probable lines of the argument in favor of extending the *Geduldig* result to Title VII, then to examine the oppos-

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mittee on Industrial and Labor Problems, in the course of which the Workmen's Compensation Board presented estimates that the cost might run to $100 million a year. Proponents rejected this estimate, arguing that the normal disability period would be about eight weeks, and that weekly medical examinations would prevent abuse.

10. 417 U.S. at 495. For this proposition, the Court relied on Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955), and Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

11. Communications Workers v. American Tel. & Tel. Co., 10 FEP Cas. 435 (2d Cir. 1975), *rev'g* 379 F. Supp. 679 (S.D.N.Y. 1974) (district court held *Geduldig* controlling in a Title VII case, and certified question to circuit court; Second Circuit held *Geduldig* not decisive of the issue and not requiring dismissal of the case as a matter of law); Wetzel v. Liberty Mutual Ins. Co., 9 FEP Cas. 227 (3d Cir. 1973); Sale v. Waverly-Shell Rock Bd. of Educ., 9 FEP Cas. 138 (N.D. Iowa 1975); Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974); Vineyard v. Hollister Elementary School Dist., 64 F.R.D. 580 (N.D. Cal. 1974); *accord*, under New York's Human Rights Law, Union Free School Dist. v. New York State Human Rights Appeal Bd., 35 N.Y.2d 371, 320 N.E.2d 859 (1974) (whether or not treating pregnancy differently from temporary disability violated the equal protection clause as interpreted in *Geduldig*, it did violate New York's Human Rights Law). *See also* Seaman v. Spring Lake Park School Dist., 10 FEP Cas. 31 (D. Minn. 1974) (following *Geduldig* in a fourteenth amendment case).

ing arguments, and finally to try to predict whether the Supreme Court in the end will uphold the rule favored by the EEOC and the great majority of courts.

The Argument for Extending Geduldig *to Title VII.*

A reader of the *Geduldig* opinion will quickly discover that the bulk of the opinion is cast in constitutional law terms, and is thus not directly relevant to the Title VII question. The essence of the court's rationale is this: the State of California has decided, as a policy matter, that it should have a particular kind of disability insurance program, that the cost should be kept within the boundaries of a one percent payroll tax, that the optimum use of the resources so created is to distribute benefits at certain levels to alleviate the impact of wage-loss associated with disability, and that excluding pregnancy from the risks covered is a legitimate state judgment designed to do the most good with the resources available. The Court concludes:

> These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[12]

At this point, the Court drops Footnote 20. For purposes of the inevitable counterattack against the EEOC rule that will be launched on the strength of *Geduldig*, it will be "Footnote 20" that takes the spotlight.

Footnote 20 was thought necessary because of the continuing constitutional law controversy on the levels of strictness of scrutiny to be applied to discriminatory state actions in different categories. The dissent in *Geduldig*, written by Justice Brennan, and joined in by Justices Douglas and Marshall, is premised on the proposition that in sex discrimination cases the strictest rule, not the "traditional rule," should apply:

> In the past, when a legislative classification has turned on gender, the Court has justifiably applied a standard of judicial scrutiny more strict than that generally accorded economic or social welfare programs . . . . Yet, by its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*. The Court's deci-

12. 417 U.S. 484, 496 (1974) (citation omitted).

sion threatens to return men and women to a time when "traditional" equal protection analysis sustained legislative classification that treated differently members of a particular sex solely because of their sex. . . .

I cannot join the Court's apparent retreat. I continue to adhere to my view that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." . . . When, as in this case, the State employs a legislative classification that distinguishes between beneficiaries solely by reference to *gender-linked* disability risks, "[t]he Court is not . . . free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means."[13]

The key word in this passage is the italicized word "gender-linked." The majority opinion does not challenge the dissent's assertion that the strict scrutiny category includes sex, although the basis for that assertion is an opinion in *Frontiero* joined in by only four Justices. Rather it rests its answer to the dissent on rejection of the "gender-linked" characterization. Footnote 20, which attempts this answer, is of such importance that it merits full quotation here:

The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed . . . and Frontiero v. Richardson . . . involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . , and *Frontiero*. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—

13. *Id.* at 502-03 (emphasis added, citations omitted).

> pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[14]

The potential relevance of this footnote to the attempt to extend the *Geduldig* rule to Title VII is clear. The obvious line of argument would be a simple syllogism: A discrimination based on pregnancy is not one based on gender (sex); Title VII applies only to discrimination based on sex (or other factors not here relevant); therefore Title VII does not apply to discrimination based on pregnancy.[15]

The assertion in *Geduldig* that pregnancy-based discrimination is not gender-based discrimination is not a casual dictum.[16] It is an essential link in the chain of argument disassociating *Geduldig* from cases "based upon gender as such," such as *Reed* and *Frontiero,* thus enabling the Court to apply the traditional rather than the strict-scrutiny test in this case. Moreover, the statement is repeated several times in different ways. Particularly potent is the declaration that "distinctions involving pregnancy" are not unconstitutional absent a showing

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14. *Id.* at 496 n.20 (citation omitted).

15. It was this straightforward application of Footnote 20 that supplied the rationale for the application of *Geduldig* to Title VII by the district court in Communications Workers v. American Tel. & Tel. Co., 379 F. Supp. 679 (S.D.N.Y. 1974), *rev'd,* 10 FEP Cas. 435 (2d Cir. 1975). The court quoted Footnote 20 in full and paraphrased it by saying, "It flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)." 379 F. Supp. at 681. It then dealt with attempts to distinguish the state legislative decision from the private employer decision. "While deference is to be shown to legislative judgments on social welfare matters, the argument goes, no such deference to allegedly discriminatory employers is warranted under Title VII." *Id.* at 682.

The district court dismissed this argument as begging the question. *Id.* The Supreme Court having ruled that discrimination based on pregnancy is not sex-related, the question whether such disparity would be more justifiable in a social legislation action than in a private employment action was never reached.

The court went further, and observed that the ruling disassociating pregnancy from sex discrimination precludes relief under Title VII even more clearly than under the fourteenth amendment:

> Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination 'because of . . . sex.' *Id.*

Thus, if an all-female organization excluded maternity benefits in its disability insurance program, it could not be accused of sex discrimination, but it might conceivably find itself charged with an equal protection violation, if the requisite state action were present and the necessary justification were absent.

16. *Cf.* Communications Workers v. American Tel. & Tel. Co., 10 FEP Cas. 435, 438 (2d Cir. 1975) (Second Circuit attempts to downgrade Footnote 20 by citing various pronouncements of the Court warning against taking "footnotes and other 'marginalia'" out of context).

that they are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." If this test could be lifted out and applied to Title VII cases, the EEOC and district court cases would apparently all have to be reversed, since it is unlikely that the usual plan involved in those cases was any more a pretext for invidious discrimination than was the California disability system.

The second paragraph in Footnote 20, if taken at face value and transferred to Title VII, would have far-reaching repercussions. It in effect says that there is never sex discrimination when, although *all* of those disadvantaged are of one sex, some of those advantaged are of both sexes. Carried to its logical conclusion, this translates into the following rule: sex discrimination occurs only when all persons disadvantaged are of one sex, and all persons advantaged are of the opposite sex.

What all this means is that the language of Footnote 20 perhaps will not be taken at face value and extrapolated to its logical conclusion when the whole subject is briefed and analyzed in relation to its impact on Title VII. In a literal sense, to say that pregnancy is not gender-related is plainly preposterous. What the Court is evidently struggling to convey is rather that pregnancy, while obviously gender-linked in that only one sex is capable of it, is such a special kind of disabling condition, with such "unique characteristics," that it does not necessarily have to be lumped with the usual array of illnesses and injuries covered by disability plans. Indeed, the Court could have avoided the Pandora's box opened by Footnote 20 if it had merely chosen to ignore the strict-scrutiny argument, on the theory that the four-judge position in *Frontiero* left that matter unsettled.[17] It could then have confined its rationale to the argument that pregnancy, whether sex-related or not, is a condition in a class by itself.

This approach is indeed contained in the footnote, when the Court says that what the statute did was to draw a distinction, not between categories of sex, but between categories of disability. The statute "merely removes one physical condition — pregnancy—from the list of compensable disabilities."[18]

The question can now be put as follows: If an employer has *any* kind of sick leave or temporary illness plan, must it cover *every* kind of disabling condition, when some excluded disabling conditions are predominant in or unique to one sex?

17. *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 116, 118-20 (1973).
18. 417 U.S. at 496 n.20.

We must begin with the proposition that the employer has no obligation, constitutional or statutory, to provide any sick leave pay, hospital and medical insurance, or other fringe benefits to his employees at all. Now, if the employer and union under a collectively bargained contract decide to start adding some such fringe benefits, basically it is their right to decide how to distribute the resources available for fringe benefits. Suppose, for a start, they provided wage-loss, hospital and medical benefits limited to a category identified as "non-occupational accidental traumatic injury." This would exclude many kinds of disabilities, including most diseases, as well as, of course, pregnancy. But would such a plan be invalid as violative of Title VII? Surely not, although it does exclude pregnancies, and although accordingly more female disabilities would probably go uncompensated. The reason is that the plan simply does not purport to cover a category of which pregnancy disability is a part. Next, suppose that the plan is expanded to add "non-occupational diseases," still with no mention of pregnancy. Is this any less valid than the first? The category covered is still not one of which pregnancy is a part, since normal pregnancy is not a disease.

If a case arose on this exact set of facts, it would be relatively easy to spotlight the argument that a categorization by kind of condition rather than by sex had taken place.

This distinction is somewhat obscured, however, when the facts are like those in *Geduldig*. It could be argued that in *Geduldig*, a category was adopted entitled "disability," that an exception was then carved out of that category for pregnancy disability, and that this exception was invalid because sex-related. What the Supreme Court seems to say is that this is only a difference in wording, and that the substance is essentially the same as if the category itself had been more narrowly described.

In any event, employers and unions that have pregnancy-excluding plans and want to keep them that way might do well to recast the langnage of the plans to specify affirmatively the coverage of injuries and disease, so that the category insured is clearly one of abnormal and diseased conditions. No specific exclusion of pregnancy would then be necessary, and the prospects of sustaining the validity of such plans would be strengthened at least as much as careful wording can do.

If the employer and union were not allowed to do this under Title VII, the alternative would apparently be to decree that employers and unions shall not have the right to decide what broad categories

of fringe benefits their resources are to be expended on; in other words, if they open up any part of the area of injury or illness benefits, they may not stop short of coverage of all disabilities including normal pregnancy. This seems particularly questionable when the Supreme Court has, in *Geduldig*, explicitly recognized that right when the actor is a state. Shall private employers and unions be held to a stricter standard than a state?

It may be answered that the state's duty was under a constitutional standard, which might be less exacting than the Title VII standard. It is true, of course, that Congress could, under the commerce power, impose a stiffer rule under Title VII than is imposed by the fourteenth amendment.[19] The real question is: Has it done so? And this merely brings us back to where we were, to the question: Is an accidental-injury-and-sickness plan a categorization based on sex, or a categorization based on kind of physical condition? The answer seems clear from the analysis above. This, of course, presupposes that there is a bona fide difference between the different categories of, say, accident, disease, and disability. Here again the answer is one of common sense. Practically all pregnancies result in at least some disability. Very few of them involve disease. There is nothing arbitrary about a categorization that distinguishes diseased conditions from healthy and normal conditions, even if the latter are disabling, as in the case of pregnancy.

Any other conclusion would precipitate some awkward questions for the future. One such question would arise from the fact that, under the California statute upheld in *Geduldig*, the employer has the option of maintaining a private plan,[20] if it is approved as being as good as the public plan. Suppose, then, that a private employer had an approved plan identical to that in *Geduldig*, and suppose that plan came before the Supreme Court under an attack based on Title VII. Could the Court reach a different conclusion from that in *Geduldig*? To do so, it would have to say that the exclusion of pregnancy benefits was a discrimination based on sex. How could it do this, having said repeatedly in Footnote 20 that the identical exclusion was not gender-related, but was based on a classification of disabilities?

19. The argument, which was relied on in several of the post-*Geduldig* cases, will be returned to later when the case for *not* applying *Geduldig* to Title VII is examined. See notes 48-60 *infra* and accompanying text. The purpose at this point is to sketch the strongest possible case for predicting that the Supreme Court *will* so extend *Geduldig*.

20. CAL. UNEP. INS. CODE §§ 3251-54 (West 1972).

Consider also the practical consequences of a holding that the private plan was invalid. The employers and unions involved would have a powerful incentive to drop the private plan and come under the state plan, where they could continue with impunity to have a disability plan without pregnancy benefits. The result would be no net gain in the rights of pregnant women, at the price of some inconvenience to employers and much heartache to insurance carriers.

The distinction here suggested as valid — that between diseased and normal conditions — has not been decisive in most of the reported decisions, although it has not gone entirely unnoticed. The one case clearly upholding the pregnancy exception, *Newmon v. Delta Air Lines, Inc.*,[21] gave considerable attention to this point. The court said:

> Whether the plaintiff and her class are the victims of discrimination because of sex depends on the definition of pregnancy. After careful consideration of the evidence, including the medical testimony, it must be concluded that pregnancy is neither a sickness nor a disability. In the first place, pregnancy is, in most cases, a voluntarily imposed condition[22] and the fact of its existence demonstrates that a woman is quite healthy and normal, since sick is defined as "affected with disease, not well or healthy, ill, ailing, indisposed." [citation omitted] A reasonable approach dictates the holding that pregnancy is not sickness in the usual sense of the word.[23]

A much more elaborate analysis may be found in the opinion in *Gilbert v. General Electric Co.*,[24] which concludes that pregnancy is not a disease, but that it must be treated the same as diseases because it is a source of disability and is peculiar to women. The court begins with the familiar theme of giving great deference to the EEOC interpretation of the statute. The heart of the court's rationale, however, is found in the following passage:

> While pregnancy is unique to women, parenthood is common to both sexes, yet under G.E.'s policy, it is only their female employees who must, if they wish to avoid a total loss of company induced income, forego the right and privilege of this natural state.[25]

One may pause here and point out how readily the court accepts the assumption that an insurance program addressed to a category de-

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21. 374 F. Supp. 238 (N.D. Ga. 1973).

22. The argument based on "voluntariness," which is a separate issue, is discussed later at text accompanying notes 38-47 *infra*.

23. 374 F. Supp. at 245-46.

24. 375 F. Supp. 367 (E.D. Va. 1974).

25. *Id.* at 381.

fined as "non-occupational accident or sickness" must be enlarged to cover a "natural state" that is temporarily disabling:

> Indeed, under G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before the court. Thus, women are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience.[26]

This type of argument, as will be seen later,[27] is appropriate and even decisive in the kind of case involving firing women for pregnancy without the option of unpaid leave, but it may be questioned whether it is in place in a discussion of fringe benefits. If the penalty for pregnancy is to be fired, it can well be argued that public policy is being seriously offended, since complete loss of a job means loss of the right to work and earn the basic means of subsistence. The Supreme Court, in *Truax v. Raich*,[28] said:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.[29]

But there is no such exalted constitutional or inherent right to be paid while temporarily not working, much less to be paid hospital and medical benefits, no matter what the reason for the nonworking status may be. As stated earlier, an employer would be completely within his rights if he provided no sick pay of any kind, as many still do not to this day.[30] Such a policy could not be challenged as a disincentive to human survival. Procreation has managed to flourish satisfactorily quite apart from paid maternity leaves in the past. It is one thing to say to a female employee: there are two fundamental rights — to work and to procreate— but you cannot have them both. It is quite another thing to say: if you procreate, your right to work and to be paid while working and to get your job back will remain unimpaired, but you will not be paid during the weeks you are not working. In the former case a fundamental right, the right to work and earn, is at stake. In the latter case a fringe benefit is at stake, and the ponderous

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26. *Id.*
27. See text accompanying note 71 *infra.*
28. 239 U.S. 33 (1915).
29. *Id.* at 41.
30. The United Mineworkers' contract, for example, did not contain sick leave pay until late 1974.

weight of the arguments based on the public policy recognizing the need for the human race to survive seems out of place.

There is danger that courts will allow themselves to be carried away by the sonorousness of this line of argument. Thus, in *Hutchison v. Lake Oswego School District*,[31] the court concludes this line of argument by saying: "The classification also discriminates because it requires the plaintiff to choose between employment and pregnancy."[32]

This being a sick leave pay case, the classification did not, of course, do anything of the sort. Plaintiff was absent from her employment only fifteen and one-half days, and all that was at stake was sick leave pay for those days. The plaintiff did not have to choose between pregnancy and employment; she only had to choose between pregnancy and $399.59.

The court in the Gilbert case added this statement: "To isolate such a disability for less favorable treatment in a scheme purportedly designed to relieve the economic burden of physical incapacity is discrimination by sex."[33] This sentence illustrates the point made earlier as to the importance of identifying the category within which equality must exist. Here the court insists on enlarging the category beyond the category chosen by the parties themselves. The parties did not choose a category embracing all "physical incapacity." Rather they chose the category "accident or sickness." The court, thus, first created a new and broader category of fringe benefits than the parties designated. Then — although there was equality within the parties' category of accident and sickness — the court found inequality within the enlarged category it had itself forced upon the parties, that of "physical incapacity."

The problem of breadth of category occurs in unusually sharp form in *Hutchison*, because in this instance the category was delimited by state statute. "Sick leave" to which teachers were entitled was defined in the statute as "absence from duty because of a teacher's illness or injury."[34] Here there is no reference at all to "disability" or "incapacity." The only words used are "sick," "illness," and "injury." The school district in turn issued a regulation, under advice of counsel, stating that "illness or injury" did not include pregnancy or childbirth. The court, in striking down this practice, never actually states that the statute itself is invalid. It speaks only of the invalidity of the regula-

31. 374 F. Supp. 1056 (D. Ore. 1974).
32. *Id.* at 1063.
33. 375 F. Supp. 367, 381 (E.D. Va. 1974).
34. ORE. REV. STAT. § 342.595(1)(a) (1973).

tion. But since pregnancy is clearly not "illness or injury," the court should have faced up to the question whether the legislature had a right to create a category of "illness or injury" for purposes of "sick leave" without going on to create a larger category of "disability" also entitled to sick leave benefits. When the matter is put this way, it becomes evident that the case is factually indistinguishable from *Geduldig*, since both involved state statutes providing benefits for a category stopping short of pregnancy disability. The only difference is that *Geduldig* did not involve Title VII. But it is interesting that *Hutchison* involved the fourteenth amendment as well as Title VII. Indeed, most of the discussion is concerned with equal protection, the court concluding that the limited leave rule was also a violation of that constitutional guarantee.[35] To this extent the opinion is quite obviously discredited by *Geduldig*; indeed, *Hutchison* relies repeatedly on the lower court holding in *Geduldig* that was reversed by the Supreme Court.[36]

To a person familiar with the everyday realities of fringe benefit plans in modern industrial society, the EEOC rule and the court opinions embracing it have a sort of "never-never-land" quality about them. They all seem to begin with a mental picture of an employer who unilaterally and arbitrarily makes a sexist decision to withhold maternity benefits from female employees. This, of course, is not what happens at all. Instead, in any typical contemporary labor setting, what happens is that the unions and the employer, by hard bargaining, arrive at an agreed "package" of wage and fringe benefits. At some point in the negotiations it may be agreed that the new contract will include wage and fringe benefits equivalent to, say, a dollar an hour. The next question is how that dollar is to be spread around. At this juncture, the employer may be quite content to leave that decision largely to the employees, so long as the cost to him remains no more than a dollar an hour. And so the final package may consist of fifty cents, in per-hour wage increases, twenty cents in improved medical benefits, twenty cents in increased pension, and ten cents in additional paid vacation. No doubt in many of these negotiations the possibility of devoting part of that dollar to maternity benefits has been discussed. If the employee representatives had indicated a preference for maternity benefits as against other fringe benefits, it is most unlikely that the employer would have objected, provided the total cost was not increased.

35. 374 F. Supp. at 1065.
36. *Id.* at 1061 *passim.*

One attempt to distinguish *Geduldig* has taken the form of stressing the fact that the State of California had adopted a strong policy of keeping its benefit structure within the limits of what a one percent payroll tax would support, and that therefore a step-by-step approach was a legitimate exercise of the state's right to balance the interests involved.[37] The distinction fades if it is understood that the private negotiators of a fringe benefit plan also begin with a fixed available resource within which, since it cannot possibly provide all possible desirable benefits, priorities have to be established. In other words, the decision on how to divide up the one dollar increase in the private negotiation is essentially the same as the decision on how to divide up the one percent payroll tax. Indeed, in one respect the case for respecting the private choice is stronger. It is participated and acquiesced in, if not dominated by, representatives of the employees themselves. By contrast, the state insurance benefit is indeed handed down from above, with no such direct involvement of workers as participants in the decision-making process.

It may be argued that these employee representatives may themselves be motivated by sex bias in setting fringe benefit priorities. This suggests still another respect in which the controversy has an air of unreality. Practically all of the opinions on this issue assume without question that a decision for or against maternity benefits is exclusively a decision for or against women. In the real world, this plainly is not so. By the nature of things, every maternity involves a man as well as a woman, not only physiologically but legally and economically. The husband (and, for that matter, the father of an illegitimate child) has a legal obligation of support. It follows that, if maternity benefits are granted, the father receives a direct economic benefit, and, if they are withheld, the father undergoes a direct financial burden. The decision for or against maternity benefits, then, is not a choice for or against women, but is a choice for or against childbearing family units. And, since childbearing family units constitute the great majority of family units (past, present, or prospective), any broad policy disfavoring such units is a decision, not by a majority or a superior against a minority, but by a majority against themselves. It is appropriate to speak of broad policy here, since the pattern of priorities in fringe benefits here at stake has been set, not on a narrow plant-by-plant basis, but on a basis of almost universal union, employer, and governmental consensus. In short, the correct mental picture is not

37. Vineyard v. Hollister Elementary School Dist., 64 F.R.D. 580, 584 (N.D. Cal. 1974).

that of a biased employer deliberately discriminating against women, but rather that of an entire industrial society, dominated by present or prospective childbearing family units, deliberately discriminating against childbearing family units, by deciding that they would rather have a given fixed fringe benefit resource applied to disability from sickness and injury than to disability from pregnancy.

The Voluntariness Argument

One line of argument that has been generally unsuccessful is that pregnancy can be treated separately from other disabilities because it is usually voluntary. The Fourth Circuit advanced this argument in a mandatory-leave case[38] that was later reversed by the Supreme Court without discussion of this particular argument:

> Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so . . . .
>
> Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it.[39]

The district court in *Dessenberg v. American Metal Forming Co.*,[40] after quoting this passage, makes the usual retort, on the theme that disability benefits were payable for many other voluntary conditions:

> [I]t appears from the record that sick leave is granted to dry out drunken employees and to those suffering from the abuse of tobacco, although it is refused to a pregnant woman . . . . [A]lcoholism is at least as voluntary and deliberate as pregnancy. If sick benefits are available for one, they should be for another.[41]

In the same vein, the court in *Gilbert v. General Electric Co.* adds, as examples of compensable voluntary conditions, cosmetic surgery, disabilities arising from attempted suicides, and vasectomies.[42] Other examples of allegedly "voluntary" compensable injuries cited in *Gilbert* are sports injuries, lung cancer, and emphysema.[43]

38. Cohen v. Chesterfield County School Bd., 474 F.2d 395, 398 (4th Cir. 1973), *rev'd sub nom.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

39. 474 F.2d at 398.

40. 8 FEP Cas. 290 (N.D. Ohio 1973).

41. *Id.* at 292.

42. 375 F. Supp. at 381.

43. *Id.* at 374.

The danger in relying too heavily on this line of argument is that, if an employer was really determined to retain the pregnancy exclusion, he might be tempted to try to neutralize the argument by simply excluding all voluntary conditions. The effect on the protective value of the system would be minimal. There might be room for a good deal of argument about whether sports injuries, lung cancer and emphysema from smoking, and even alcoholism are indeed "voluntary"—the difference being that, while the injured person intended the activity that in turn produced the injury, he probably did not intend the injurious consequence. That is beside the point however; the employer could label his plan "involuntary conditions only," and worry later about what marginal conditions might be covered.

This suggestion does expose, however, another difficulty with the "voluntariness" distinction. Some pregnancies are involuntary, and they cannot be dismissed as insignificant. It is well known that, in spite of the pill and all the other advances in contraception, the rate of illegitimacy is higher than ever.[44] And pregnancies among unwed mothers are presumably involuntary. Unless, then, the employer expressly excluded all pregnancies, he might be confronted with claims from all pregnant employees that this particular pregnancy was really accidental, and who is to say it was not?

A much better answer to the "voluntariness" argument is merely to point out that it is irrelevant—once a court has concluded that the controlling category is "disability," since disability is just as disabling when it is voluntary as when it is not. This was the line taken by Judge Weber in *Wetzel v. Liberty Mutual Insurance Co.*:[45]

> [W]e see no merit in Defendant's argument that it [pregnancy] may be excluded from equality of treatment in conditions and benefits of employment . . . . Whether voluntary or not, it occurs with certainty and regularity.[46]

So far as the Supreme Court is concerned, it steered clear of the "voluntariness" argument in *Geduldig*, although it was hinted at by the dissent, which pointed out that the California plan paid for "voluntary disabilities such as cosmetic surgery or sterilization. . . ."[47] It is a reasonable guess that this argnment will not play a significant part in the Supreme Court's final disposition of the controversy.

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44. United States Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, at 54 (1973).

45. 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd* 9 FEP Cas. 227 (3d Cir. 1975).

46. *Id.* at 1158.

47. 417 U.S. at 499-500.

The Argument Against Extending Geduldig *to Title VII*

Up to this point the analysis has been cast in the form of a presentation of the strongest possible case for extending *Geduldig* to Title VII. We may now face the other way and ask: What is the most likely course the Court would follow if it were to reject that extension and affirm the majority rule built up by the EEOC and the district courts?

A good clue lies in the opinion of the first post-*Geduldig* case declining to extend *Geduldig* to Title VII, *Vineyard v. Hollister Elementary School District*,[48] since it set the pattern for post-*Geduldig* opinions. This was a typical school case, in which a public school district denied sick leave benefits for disabilities due to childbirth. The court began with the customary invocation of "great deference" to the EEOC's interpretation. It proceeded to distinguish *Geduldig* on the ground that the standards controlling a fourteenth amendment determination are different from those controlling a Title VII determination. The court stated that Congress has power to pass implementing legislation under section five that reaches more broadly than the equal protection clause itself, citing *Katzenbach v. Morgan*.[49] It could have added, as was observed earlier in this discussion, that a fortiori Congress' reach under the commerce power, on which the Civil Rights Act of 1964 is primarily based, is obviously not confined to the scope of the unassisted equal protection clause. The next question is, of course: Did Congress in fact reach more broadly in Title VII? It is at this point that the *Vineyard* opinion breaks down. The court meets the problem—which is the crux of the entire matter—with nothing but a flat assertion: "Congress intended Title VII to be just such a broad implementing legislation."[50] A little earlier the court says: "Title VII is a congressional enactment that addresses the problems of employment discrimination based on sex and race more specifically than the broad mandate of the Equal Protection Clause of the Fourteenth Amendment."[51]

That is certainly true. But "more specifically" is not necessarily "more broadly." It could just as well be less broadly. What counts is what Title VII in fact provides. In simplest terms, it forbids unequal treatment of the sexes as to employment, including its compensation, terms, and conditions. So does the fourteenth amendment. In each case, the key concept is equality. And the crucial controversy is the

48. 64 F.R.D. 580 (N.D. Cal. 1974).
49. 384 U.S. 641 (1966).
50. 64 F.R.D. at 585.
51. *Id.*

breadth of the category of benefits within which equality must be measured, that is, whether an employer can choose a category limited to disease and injury within which to provide equality of fringe benefits. Presumably Congress, at least under the commerce power, could expressly require employers to provide normal maternity benefits if they provide any injury or illness benefits whatsoever. What is missing here is any proof that Congress actually did so in Title VII.

The *Vineyard* opinion has a little more substance when it discusses the difference in standards applied in fourteenth amendment and Title VII cases. The court says:

> The Hollister School District has not introduced evidence on the underlying rationale for their former maternity leave policy. Here there is no showing of a strong economic justification for singling out pregnant women for exclusion from disability benefits . . . .
>
> In a Title VII case, the court does not need to go through the balancing process followed by the Supreme Court in *Geduldig*.[52]

The reference to economic justification is curious, since economic cost is generally no excuse for violations either of Title VII[53] or of the fourteenth amendment.[54] It is true that the Court in *Geduldig* made something of the fact that the state had a strong policy of keeping the costs of the plan within the resources provided by a one percent payroll contribution, and this was one of the elements "balanced" by the Court. But it does not seem to have been central to the decision. What was central was the determination that pregnancy was a sufficiently different kind of condition to permit its being excluded from the category of insurance within which equality must exist.[55] If this had not been so, the result would certainly have been different, regardless of the economic cost factor. This point might have received a test if the original claim of Carolyn Aiello had been the one before the Supreme Court. Her claim was for abnormal complications requiring surgery to terminate the pregnancy. While this litigation was pending, a California appellate court held that the state plan precluded benefits only for normal pregnancy disability, and the administrator of the plan acquiesced in the construction, rendering Aiello's claim moot.[56]

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52. *Id.* at 584-85.

53. *See* EEOC Dec., Case No. YNY 9-047, 1973 CCH EEOC Dec. ¶ 6010 (1969).

54. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263-65 (1974); Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969).

55. See notes 14-18 *supra* and accompanying text.

56. Rentzer v. California Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (2d Dist. 1973). The statute was also amended to incorporate this interpretation. CAL. UNEP. INS. CODE § 2626.2 (West Supp. 1975).

If the Supreme Court had been confronted with a plan that denied benefits for diseases and complications associated with pregnancy, its decision as to such disabilities would quite probably have been different. This can be inferred from its basic rationale that "normal pregnancy is an objectively identifiable physical condition with unique characteristics."[57] This could not necessarily be said of the great variety of complications potentially associated with pregnancy.

If a plan excluded diseases and abnormal complications attending pregnancy, it could be argued, first, that these abnormal conditions cannot be distinguished from other abnormal conditions covered by the plan, and second, that their exclusion is sex discrimination, because of the peculiar impact on one sex.[58] It is as to this second point that the Supreme Court would have to modify some of its langnage in Footnote 20, as indicated earlier.

The point here is that, if the Supreme Court had concluded that this exclusion was clearly sex-discriminatory, it is unlikely that it would have condoned the discrimination merely because to correct it would have involved some economic cost. In other words, while a state may take one step at a time in curing a problem, there cannot be sex discrimination *within a given step*, justified only by cost.

If the Supreme Court wished to uphold the EEOC rule, it might reach that result in a simple series of propositions. Congress had the power in enacting Title VII to reach more broadly than the scope of equal protection. The EEOC has interpreted Title VII to have done so in the specific case of maternity benefits. The EEOC's interpretation is entitled to great deference. So, perhaps, is the one-sided lineup of lower court interpretations.[59] Therefore the EEOC rule should be upheld. This might be buttressed with generalizations about advancing the broad purposes of Title VII as to equal employment opportunities.

If, however, the Court approaches the matter as a problem in extrapolating *Geduldig* logically, as has been attempted here, the result might well go the other way. As for broad noulegal considerations, there should not be overlooked the fact that a Supreme Court adoption of the EEOC rule would overnight transform most temporary

57. 417 U.S. at 496 n.20.

58. Note that the Third Circuit's decision in Wetzel v. Liberty Mutual Ins. Co., 9 FEP Cas. 227 (3d Cir. 1975), is sharply narrowed in precedential value, as to the specific issue here under discussion, by the fact that the plan before it barred *all* pregnancy-related disabilities. The court relied heavily on this fact to distinguish *Geduldig*. *Id.* at 230.

59. See note 5 *supra*.

disability plans, including hospital and medical benefit plans, into something they were never intended to be by their creators, whether employers, unions, or governmental units. In terms of cost, as the Court pointed out in *Geduldig*, the impact would be very large. The California estimates varied from a cost increase of twelve percent, the plaintiff's figure, to an increase of from thirty-three to thirty-six percent, the defendant's figure. The United States, unlike many other countries, has generally treated maternity benefits separately in its social insurance as well as in its private insurance patterns, and, for whatever reason, has typically been much slower to cover them than illness and injury benefits. A Supreme Court adoption of the EEOC rule would, on the strength of a statute aimed, not at social or private insurance reform, but at employment discrimination, change all this, rearrange insurance categories and priorities, and markedly alter the allocation of the limited resources available for wage-loss, hospital, and medical benefits, away from the expectations of both the initiators and the beneficiaries of the plans. When this consideration is superimposed upon the awkwardness of having one rule for state plans and another for private, especially in the several states where employers could achieve compliance by abandoning private plans and coming within the state plan, the prospect of the ultimate survival of the EEOC rule is not as clear as the one-sidedness of both pre-*Geduldig* and post-*Geduldig* court holdings might indicate.[60]

Rights in Absence of a Disability Plan

If the employer has no sick leave or temporary disability program, the character of the maternity leave issue changes markedly. When temporary disability leave and benefits are generally available,

60. Up to this point it has been assumed that there is no express provision of maternity benefits in the applicable temporary disability plans. If, however, maternity benefits are provided, discrimination may sometimes occur within that program. Thus, the EEOC has held unlawful plans which make maternity insurance coverage available immediately to wives of male employees but only after two years employment to female employees, EEOC Dec. No. 71-1100, 1973 CCH EEOC Dec. ¶ 6197 (1970), or which make such insurance available to female workers only if they are "heads of households." EEOC Dec. No. 70-495, 1973 CCH EEOC Dec. ¶ 6110 (1970). *But see* Homesteaders Life Co. v. Iowa State Civil Rights Comm'n, 7 FEP Cas. 928 (Iowa Dist. Ct. 1974). The court there held that the Iowa Civil Rights Commission was not warranted in finding that an employer had violated the State Civil Rights Law by granting wives of male employees better benefits than female employees since: (1) the state law was inapplicable to benefit plans unless such plans were mere subterfuges to evade the law; and (2) evidence showed that the insurance company had recommended giving no maternity benefits at all to female workers and that the employer had worked steadily with the company to provide coverage.

the entire controversy is a matter of a *comparison* that has sex connotations—a comparison between the less generous benefits available to a class made up entirely of females with the more generous benefits available to a larger class made up of both males and females. But if there are no such more generous benefits to make a sex-linked comparison with, a new set of considerations has to be resorted to.

The typical fact pattern is this: the employer has no provision at all for sick leave; the plaintiff becomes pregnant and asks for unpaid maternity leave; the employer refuses; the employee has to take several weeks off, and is fired. The employee cannot as readily, in this instance, point to an invidious contrast with the treatment of men, since, if a man had been away from work for the same number of weeks, he would have received no unpaid leave and would have been fired in the same way. The situation is the same if, say, the employer has a maximum limit of two weeks on sick leave, and if pregnancy is assumed normally to require an absence of something like six weeks.

The EEOC has taken the position that refusal to grant adequate leave in these circumstances is sex discrimination. Its guideline on the point is couched in general phraseology, but is obviously aimed at this situation:

> (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.[61]

Given the EEOC approach to pregnancy as a temporary disability, leaves of absence must therefore be available to pregnant workers. An employer may not terminate a female employee who is compelled to cease work because of pregnancy without offering her, alternatively, a leave of absence.[62] The only exceptions to the mandatory leave

61. 29 C.F.R. § 1604.10(c) (1974).

62. Bradley v. Cothern, 384 F. Supp. 1216 (E.D. Tex. 1974). A school teacher was fired after giving birth to a child. The superintendent was ordered to reinstate her. The firing was held to violate her due process rights and her right to bear children. She had not requested a leave of absence, but the court held this immaterial, since the school board had no policy of providing such leaves, and therefore she could not be deemed to have waived her right to make such a request. *See* EEOC Dec. No. 71-2309, 7 FEP Cas. 454 (1971); EEOC Dec. No. 71-1897, 1973 CCH EEOC Dec. ¶ 6268 (1971); EEOC Dec. No. 71-308, 2 FEP Cas. 1104 (1970); EEOC Dec. No. 70-600, 2 FEP Cas. 514 (1970); EEOC Dec. No. LA 68-4-538E, 1973 CCH EEOC Dec. ¶ 6125 (1969). *See also* Godwin v. Patterson, 363 F. Supp. 238, (M.D. Ala. 1973), *vacated and remanded*, 498 F.2d 1400 (5th Cir. 1974). Dismissal of an untenured pregnant teacher was upheld at the district court level. The plaintiff had said that because of the pregnancy, she could not take the additional academic work necessary to meet requirements. The district court did state flatly, however, that discharge of a teacher for pregnancy

policy are the need for an immediate replacement and the impossibility of finding a temporary substitute worker.[63]

We have here an example of the kind of case in which an "equality" issue cannot be disposed of by decreeing that the sexes shall be treated exactly alike. Instead, we must build upon a quite different premise: when the two sexes are *dissimilar* in that one sex exclusively possesses a trait which the other, without exception, does not possess, and when that trait has a bearing upon employability, it is a differentiation based on sex to treat the two sexes *similarly* as to that trait. Clearly, if an employer says, "All pregnant employees will be fired," there is sex differentiation. It is really no different in effect to say, "No maternity leaves will be granted." The peasant woman who retired behind a haystack, delivered her own baby, and resumed pitching hay with no serious loss of work-time cannot be the model in which contemporary policy is based; some leave accompanying childbirth is an

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violated neither Title VII nor the fourteenth amendment. The Fifth Circuit vacated and remanded the case without formal opinion.

The fact that the mother is unmarried does not ordinarily change the rule. *See, e.g.*, Andrews v. Drew Municipal Separate School Dist., 9 FEP Cas. 235 (5th Cir. 1975) (school district's policy of discharging unwed mothers violated both the due process and the equal protection clauses of the fourteenth amendment; the assumption that unwed motherhood was prima facie proof of immorality was held to be an invalid irrebuttable presumption); *accord*, Doe v. Osteopathic Hosp., 333 F. Supp. 1357 (D. Kan. 1971) (policy of dismissing unwed mothers invalid because it necessarily would be applied mainly to women). *But cf.* Wardlaw v. Davidson, 10 FEP Cas. 891 (Travis County Dist. Ct., 126th Dist., 1975) (transfer of unwed mother from teaching to nonteaching position in a high school did not violate the Texas equal rights amendment; plaintiff subsequently brought an action in the United States District Court for the Western District of Texas, losing in this forum also. Wardlaw v. Austin Independent School Dist., 10 FEP Cas. 892 (W.D. Tex. 1975)).

63. EEOC Dec. No. 71-2309, 7 FEP Cas. 454 (1971) (when temporary replacement not feasible, employer must offer leave with preferral recall); EEOC Dec. No. 71-562, 1973 CCH EEOC Dec. ¶ 6184 (1970) (employer failed to meet burden of proving that job could not be filled temporarily); EEOC Dec. No. 70-600, 2 FEP Cas. 514 (1970) (airline stewardess' job not one that cannot be filled temporarily or left vacant for short period of time). *But see* Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) (employee justifiably not rehired after maternity absence when the reason for failure to rehire was a general business "slump"); McGaffney v. Southwest Miss. Gen. Hosp., 5 FEP Cas. 1312 (S.D. Miss. 1973) (nurse's aide held justifiably not rehired after maternity absence because of hospital's overriding need to fill vacancies; employee had also had unsatisfactory work record).

If continuation in a particular job involves hazards to the pregnancy, the EEOC has ruled that the employer cannot simply fire the employee. If any reasonable alternative exists, such as sick leave or transfer, termination is prohibited. In EEOC Dec. No. 75-072, 2 CCH EMPL. PR. GUIDE ¶ 6442 (Nov. 14, 1974), the Commission ruled that a leave should have been afforded, rejecting the hospital's contention that hiring a temporary replacement was too difficult. And in EEOC Dec. No. 75-055, 2 CCH EMPL. PR. GUIDE ¶ 6443 (Oct. 29, 1974), it was held that either a transfer or a layoff without seniority loss should have been offered.

accepted modern necessity, and a policy of denying it, with discharge as the alternative, is tantamount to a policy of outright discharge for pregnancy. In other words, discharge for pregnancy is sex differentiation unless accompanied by the alternative maternity leave. This in turn leads inexorably to the statement of the proposition that exposes the apparent paradox of requiring inequality to produce equality: it is sex differentiation *not* to offer to women a benefit denied to men—maternity leave. The reason is that this "inequality" is necessary to provide substantial equality of employment opportunity. Thus, the EEOC has ruled that, in the absence of proof by the employer that a policy denying maternity leaves was indispensable to the operation of his business, the discharge of an employee in her sixth month of pregnancy under this policy was unlawful under Title VII.[64] Similarly, the Commission has held that a union's acceptance of and support of an agreement under which airline stewardesses were automatically discharged upon pregnancy, without being offered maternity leave as an alternative, was discrimination based on sex.[65]

The employer's position is no less vulnerable if, instead of denying maternity benefits generally, he reserves the right to deny them selectively. Thus, a violation of Title VII was found by EEOC when a hospital refused maternity leave to one of its employees because she was "sickly" during her pregnancy and unable to get along with her fellow employees, under a company policy of offering maternity leave "depending upon individual circumstances surrounding the incident."[66] The Commission has also found probable violation in an employer's practice of maintaining a contract provision limiting maternity leave to "married female employees" with two years of service.[67] The observation was made that unmarried females would thus be terminated as a consequence of pregnancy, but unmarried fathers would not, and that the rule violated the pervading principle that maternity leaves should be subject to the same conditions as other disability leaves. In another case, the Commission made it clear that the length-of-service rule would in itself be enough to ground a violation, in this instance a limitation of maternity leave to employees with one year of service.[68]

64. EEOC Dec. No. 71-308, 2 FEP Cas. 1104 (1970).
65. EEOC Dec. No. 70-600, 2 FEP Cas. 514 (1970).
66. EEOC Dec. No. 70-360, 1973 CCH EEOC Dec. ¶ 6084 (1969).
67. EEOC Dec. No. 71-562, 3 FEP Cas. 233 (1970).
68. EEOC Dec. No. 72-1919, 1973 CCH EEOC Dec. ¶ 6370 (1972); *see* Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971), *aff'd* 464 F.2d 1223 (5th Cir. 1972); EEOC Dec. No. 71-562, 1973 CCH EEOC Dec. ¶ 6184 (1970). In *Jinks*, the board of educa-

An argument can also be made that, since men are not required to surrender their "father" role in order to participate in the labor force, women may not be required to surrender their unique role of motherhood. Just as an employer may not fire women for being married if he retains married men,[69] and just as he may not refuse to hire mothers if he employs fathers,[70] so he may not unnecessarily limit a woman's employment status because she becomes pregnant if similar restrictions are not placed upon men who impregnate.

It is at this point that the argument addressed to higher public policy protecting the right to reproduce is appropriate—the same argument that was criticized as out of place when applied to mere fringe benefits.[71] Here we are concerned with a woman's loss—not just of a few weeks of paid sick leave—but of her basic right to work and earn a living. It can thus be said with less exaggeration in many cases that a woman's right to have children is pitted against her fundamental economic rights.

Since we are dealing with an admittedly "unequal" solution in the interest of a higher equality, it should not be necessary to extrapolate the provision of maternity leave back to male employees by giving them sick leave benefits as extended as maternity benefits. Suppose the employer generally limits sick leave to one month, but grants four months' maternity leave. Suppose a male employee contracts hepatitis and is unable to work for four months. Should he be heard to complain that he is being discriminated against on the ground of sex, because the kind of physical disability he is capable of does not entitle him to as long a leave as pregnant female employees get? Although this line of argument might seem to have some force, it does not hold up in close scrutiny. Recall that we began with an inherent physical inequality *affecting employability* of one sex exclusively; to offset that inequality and restore equality of employment opportunity, it was necessary to afford an unequal benefit in the form of maternity leave. Equality of employment opportunity having been thus restored, noth-

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tion granted maternity leave to tenured but not to untenured teachers. This policy was held a violation of equal protection, having no rational basis and no relevance to the board's purposes. The board was shown to have freely granted study, bereavement, personal illness, emergency, and military service leaves. *See also* EEOC Dec. No. 71-1100, 1973 CCH EEOC Dec. ¶ 6197 (1970) (employer and union violated Title VII by maintaining a contract that delayed eligibility of female employees for maternity benefits for two years, while granting immediate maternity benefits to wives of male employees).

69. Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

70. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

71. See text accompanying notes 26-27 *supra*.

ing further is needed to redress the male-female balance. After all, females would still be subject to the same one-month limit as males for hepatitis. But if the male's argument were accepted, the next round would find females demanding four-month leaves for nonmaternity illnesses and disabilities—and the end result would be that the employer would have been forced, willy-nilly, to adopt a sick leave policy for everyone with leaves as long as the longest leave that might be granted for any pregnancy. It may be doubted whether the Civil Rights Act aspired, under the rubric of banning sex discrimination, to compel such a far-reaching change in sick leave practices by employers.

Sex discrimination issues may also arise not only as to the right to maternity leave, but as to the right to reinstatement after the leave and as to the right to unimpaired seniority status.

Post-leave reinstatement

In the case of a woman on pregnancy disability leave who is absent only around childbirth, the EEOC guidelines would suggest that her employer hold her job specifically for her return if it is his policy to do so in the case of other short-term disabilities. The EEOC recognizes, however, that job continuation rules cannot be inflexible. If a female employee cannot be reinstated immediately, she may be given preferential consideration for future openings.[72] There are allowances, subject to EEOC scrutiny, for business exigency or facts peculiar to an employee.[73] Thus the returning worker may not find her job available, due to an overall cut-back in her company[74] or due to her own poor work record.[75] A number of business justifications may be established by the employer. One thing is clear, however: the employer may not refuse to hire the returning female employee simply on the

72. EEOC Dec. No. 71-2309, 7 FEP Cas. 454 (1971) (when temporary replacement not feasible, employer must offer leave with preferral recall).

73. McGaffney v. Southwest Miss. Gen. Hosp., 5 FEP Cas. 1312 (S.D. Miss. 1973) (no violation on the part of an employer in failing to rehire a nurse's aide upon her return from maternity leave because an overriding need to fill vacancies rendered the hospital unable to guarantee re-employment to those taking leave; employee in question also had an unsatisfactory work record).

74. Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) (employer did not violate Title VII when it refused to re-employ a woman following pregnancy—it appearing that she was not rehired because of a business "slump").

75. McGaffney v. Southwest Miss. Gen. Hosp., 5 FEP Cas. 1312 (S.D. Miss. 1973). However, some employers have not been successful in arguments of business necessity. *See* EEOC Dec. No. 71-1100, 1973 CCH EEOC Dec. ¶ 6197 (1970); EEOC Dec. No. 71-562, 1973 CCH EEOC Dec. ¶ 6184 (1970); EEOC Dec. No. 71-308, 2 FEP Cas. 1104 (1970); EEOC Dec. No. 70-600, 2 FEP Cas. 514 (1970).

basis of her pregnancy, and she may not be treated less favorably than a person returning from sick leave for an illness.[76]

Post-leave seniority

Although employers are allowed some necessary flexibility in rehiring, requirements relating to seniority are quite fixed. Employers must calculate the seniority of an employee who takes maternity leave from the time of her original hiring, not from the date of her return to work after pregnancy.[77] Thus when a woman with five years of accrued seniority takes a brief maternity leave, she returns to work with five years seniority and may not be forced to start all over again.

Treatment of maternity as a temporary disability, according to Title VII guidelines, requires the continued accrual of seniority. Consequently, if persons on sick leave for illness get seniority credit for the period of their leave, the same must be done for persons on leave because of pregnancy.[78]

MANDATORY MATERNITY LEAVE

Mandatory maternity leave of arbitrary duration unrelated to the individual's actual ability to work is unlawful under the due process clause of the fourteenth amendment,[79] under the equal protection clause of the fourteenth amendment,[80] under Title VII of the Civil

76. The present question is closely related to that of mandatory leave, discussed at text accompanying notes 79-105 *infra*. Thus, in Black v. School Comm., 8 FEP Cas. 132 (Mass. Sup. Jud. Ct. 1974), the fourteenth amendment was held violated both by a mandatory "resignation" of teachers by the fourth month of pregnancy, and by a compulsory six-month waiting period after birth before reinstatement was possible. *Accord*, Kewin v. Board of Educ., 8 FEP Cas. 125 (Mich. Cir. Ct. 1974). In Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972), teachers on maternity leave were reinstated only if there were no qualified teachers ahead of them on the transfer list, while those returning from regular sick leave were placed at the top of the school's list used to fill vacancies. The court held this a violation of the equal protection clause.

77. EEOC Dec. No. 71-413, 1973 CCH EEOC Dec. ¶ 6204 (1970).

78. Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972).

79. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

80. Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973) (mandatory leave after six months of preguancy); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (mandatory leave after six months of pregnancy); Seaman v. Spring Lake Park Independent School Dist., 10 FEP Cas. 31 (D. Minn. 1974) (involving leave after seven months); Monell v. Department of Social Serv., 357 F. Supp. 1051 (S.D.N.Y. 1972) (involving leave after seven months); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972) (involving leave after five months); Pocklington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972) (involving leave after four and a half months); Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972) (involving leave after five months); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972) (involving leave after seven months); Black v. School Comm.,

Rights Act of 1964,[81] under regulations applicable to federal contractors[82] and employees,[83] and under state fair employment laws.[84]

The Supreme Court in 1974 largely removed the central point from controversy in the *LaFleur* case.[85] In *LaFleur*, the school board had required all pregnant teachers to take a maternity leave without pay, beginning five months before the expected birth of the child. A

8 FEP Cas. 132, 137 (Mass. Sup. Jud. Ct. 1974) (mandatory "resignation" by fourth month and six-month waiting period after birth before possible reinstatement violated United States Constitution—"[w]hichever may be the sounder ground of constitutional decision" as between due process and equal protection); Kewin v. Board of Educ., 8 FEP Cas. 125 (Mich. Cir. Ct. 1974) (mandatory leave extending from fifth month of pregnancy to four months after childbirth). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring); LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 414 U.S. 632 (1974) (involving mandatory leave after four months). *Contra*, Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd sub nom.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (leave after five months did not violate equal protection); Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (leave after seven months did not violate equal protection). *See also* Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded*, 409 U.S. 1071 (1972) (discharge of pregnant WAF did not violate equal protection; case vacated and remanded "to consider the issue of mootness in the light of the position presently asserted by the Government").

81. Wetzel v. Liberty Mutual Ins. Co., 9 FEP Cas. 227 (3d Cir. 1975) (mandatory leave at fixed period of pregnancy and requirement of return within three months of delivery or six months of commencement of leave, on pain of dismissal, violated Title VII); Singer v. Mahoning County Bd. of Mental Retardation, 379 F. Supp. 986 (N.D. Ohio 1974) (mandatory leave of teacher after fifth month violates Title VII); Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) (mandatory maternity leave for ground personnel at end of fifth month violated Title VII); EEOC Dec. No. 73-0520, 6 FEP Cas. 832 (1973) (mandatory leave within sixth month of pregnancy).

The EEOC initially leaned toward a four- to six-month period. It has since settled on a case-by-case approach. The Commission changed its attitude away from the fixed time period when it filed an amicus curiae brief in Schattman v. Texas Employment Comm'n, Amicus Curiae Brief of the EEOC, Schattman v. Texas Employment Comm'n, 330 F. Supp. 328 (W.D. Tex. 1971), *rev'd and remanded*, 459 F.2d 32 (5th Cir.), *cert. denied*, 409 U.S. 1107 (1973). The brief argued that defendant's maternity leave policy violated Title VII because it disqualified women from employment at a fixed point in their pregnancy period and, therefore, prevented a woman from working until her biological condition actually interfered with her ability to perform her job.

82. See text accompanying notes 120-23 *infra*.

83. See text accompanying notes 124-26 *infra*.

84. Board of Educ. v. New York State Div. of Human Rights, 42 App. Div. 2d 49, 345 N.Y.S.2d 93 (1973), *aff'd*, 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974) (New York State Human Rights Law held violated by mandatory leave of teachers at end of fourth month); Cerra v. East Stroudsburg Area School Dist., 450 Pa. 207, 299 A.2d 277 (1973) (mandatory leave after five months was sex discrimination under Pennsylvania Human Rights Act); Cedar Rapids Community School Dist. v. Parr, 6 FEP Cas. 101 (Iowa Dist. Ct. 1973) (forced maternity leave of teacher at beginning of sixth month violated IOWA CODE ANN. § 601A.7(1)(a) (1972), prohibiting sex discrimination in employment).

85. 414 U.S. 632 (1974).

teacher on maternity leave was not allowed to return to work until the beginning of the next regular school semester following the date when her child attained the age of three months. Teachers on such leave were not promised re-employment, merely priority in reassignment. Ms. LaFleur did not wish to take such leave, and presented a statement from her doctor to the effect that she would be physically able to complete the semester. Because of the school board policy, however, she was forced to leave her job in March. Her child was born on July 28th.[86]

The *LaFleur* circumstances are typical of those present in cases concerned with maternity leave, many of which have involved teachers.[87] The women involved have contended that the question of when to begin maternity leave was an individual decision to be made by the mother with the advice of her physician. The school board employers have argued that these policies were necessary for administrative convenience, educational continuity, and protection of the mother and child. The female employees have attacked the policies as violative of the equal protection clause in the fourteenth amendment. This equal protection argument had prevailed in the great majority of the jurisdictions which considered the question.[88]

However, in considering both the *LaFleur* and the *Cohen* cases, the Supreme Court based its decision on the due process clause of the fourteenth amendment. The Court acknowledged that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the fourteenth amendment, and recognized that overly restrictive maternity leave regulations burden those protected freedoms by acting to penalize the pregnant employee for deciding to bear a child. Such rules may not "needlessly, arbitrarily, or capri-

86. *Id.* at 634-36.

87. The employers who had traditionally been most strict about mandatory absence due to pregnancy were school boards and state employers. Until the 1972 amendment, these employers were not covered by Title VII; therefore, the mandatory leave questions that arose before 1972 were handled as issues of equal protection and due process. On March 24, 1972, the Equal Employment Opportunity Act of 1972 amended Title VII to withdraw the exemptions for state agencies and educational institutions. Pub. L. No. 92-261, 86 Stat. 103. *See* Schattman v. Texas Employment Comm'n, 330 F. Supp. 328 (W.D. Tex. 1971), *rev'd*, 459 F.2d 32 (1972), *cert. denied*, 409 U.S. 1107 (1973). Suit was filed by a state employee attacking the state's policy of terminating employment of female employees two months prior to delivery date. The district court considered the practice in light of Title VII and found it unlawful. The appellate court found, however, that the charge was filed before the 1972 amendment and thus was not within Title VII coverage. The court held that the policy did not violate the equal protection requirements of the Constitution. 459 F.2d at 41.

88. See cases collected in note 80 *supra*.

ciously"[89] impinge upon the employee's constitutional liberties.

The Court accepted as valid the school board's desire for physically capable teachers and for continuity of education.[90] The latter goal could easily be achieved by simply requiring notice of anticipated leave. In fact, the employer's policy often hindered continuity of education, as Ms. LaFleur's circumstances reveal, with the mandatory leave falling close to the end of the school term. Thus the arbitrary cutoff dates had no rational relation to this goal. In regard to teacher fitness, the rule was overbroad, in that it established a conclusive and irrebuttable presumption that every pregnant teacher who reached the fifth or sixth month of pregnancy was physically incapable of continuing. Such an irrebuttable presumption of physical incompetency was applied even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

The Court approved of requiring a medical certificate or supplemental physical examination both before and after childbirth as narrowly drawn methods of protecting an employer's interest in the fitness of his pregnant employees. The duration of maternity leave could thus be determined by the individual fitness of the employee.[91]

The Court also rejected the Cleveland requirement that a mother wait until her child reached the age of three months before the return rules begin to operate.[92] No justification for this rule was tendered, and the Court felt that it suffered from the same constitutional deficiencies that beset the irrebuttable presumption in termination rules. Administrative convenience was found to be no justification for maintaining unconstitutional employment practices.

The principal surprise in *LaFleur* was not so much the result, which was in line with the great majority of lower court cases, but the choice of the due process clause of the fourteenth amendment as the vehicle, rather than the equal protection clause, which had been the

89. 414 U.S. at 640.

90. The Court in a footnote observed that "[t]he records in these cases suggest that the maternity leave regulations may have originally been inspired by other, less weighty, considerations." *Id.* at 641 n.9. The Superintendent of Schools in Cleveland at the time the rule was adopted testified in the district court that the rule was meant to save pregnant teachers from embarrassment because of giggling school children. The cutoff date at the end of the fourth month was chosen because that was when a teacher "began to show." *Id.* A few members of the Virginia Board also wished to insulate school children from the sight of conspicuously pregnant women. One member thought it was not good for students to view pregnant teachers, " 'because some of the kids say, my teacher swallowed a water melon, things like that.' " *Id.*

91. *Id.* at 648-49.

92. *Id.* at 649.

almost exclusive reliance in the courts below. For purposes of the case's impact on the specific question of mandatory maternity leave as sex discrimination, this unexpected choice is probably of no particular importance. The result is clear: arbitrary mandatory maternity leave is unconstitutional. For the future, the emphasis may well shift to Title VII, as the Court itself observed, with teachers having been covered by that Title since 1972.[93] But it seems inconceivable that a more permissive rule toward mandatory maternity leave could emerge under Title VII than under the due process clause. Indeed, at least one court thought the situation was just the opposite, and that Title VII would ban such rules while the fourteenth amendment would not.[94] It is true that the carry-over from the fourteenth amendment to Title VII would have been a little more obvious if the equal protection clause had been relied on, since both that clause and Title VII basically rest on the concept of equality. One wonders, therefore, why the due process route was chosen.

The reason may be precisely the desire of the majority to avoid treating mandatory maternity leave as essentially a sex discrimination problem. Since the opinion was handed down in late January, 1974, and since *Geduldig*[95] was destined to make its appearance in June, 1974, the Court may well have wished to avoid saying anything that might seem inconsistent with the *Geduldig* theme that pregnancy discrimination is not gender-related.[96] It is true that the court theoretically could have applied equal protection principles without labeling this a sex discrimination issue, by measuring inequality between pregnant and nonpregnant persons, as one court has indeed suggested.[97] But since *Geduldig* was to be based on equal protection, the majority may have decided it would be better not to take any chances on being accused of inconsistency in its approaches to *Geduldig* and *LaFleur*.

The controversy between the majority in *LaFleur* and the two dissenters, Rehnquist and Burger, as well as Powell in his concurring opinion, is much more a matter of broad constitutional law theory than of sex discrimination law. The controversy centers on the rela-

93. See note 87 *supra*.

94. *See* Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

95. See text accompanying notes 8-18 *supra*.

96. See the extended discussion of this point at text accompanying notes 14-17 *supra*.

97. Communication Workers v. American Tel. & Tel. Co., 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd*, 10 FEP Cas. 435 (2d Cir. 1975).

tion of irrebuttable presumptions to the due process clause.[98] Rehnquist opens his dissent with this salvo:

> The Court rests its invalidation of the school regulations involved in these cases on the Due Process Clause of the Fourteenth Amendment, rather than on any claim of sexual discrimination under the Equal Protection Clause of that Amendment. My Brother *Stewart* thereby enlists the Court in another quixotic engagement in his apparently unending war on irrebuttable presumptions.[99]

Stewart's application of the "unending war" here, of course, took the form of attacking the irrebuttable presumption that women five months before childbirth are incapable of continuing work. Rehnquist's objection is primarily to the basic approach, his point being that irrebuttable presumptions abound in state legislative classifications, and are indispensable in the legislative process. He puts his finger on a vulnerable spot in the majority's opinion, where the court concedes that a regulation "requiring a termination of employment at some firm date during the last few weeks of pregnancy" might pass muster. He concludes: "If legislative bodies are to be permitted to draw a general line anywhere short of the delivery room I can find no judicial standard of measurement which says the ones drawn here were invalid."[100]

This point might have some practical importance in future planning of maternity policies by school boards and other employers. An employer might well, as a matter of administrative convenience, want to take advantage of the majority's hint, and require mandatory leave beginning, say, not later than a month before expected delivery.[101] The question now becomes whether the Court's hint affords any protection *under Title VII*. In a strictly legal sense, it does not. The reason is that it is addressed, not to the permissible limits of sex discrimination, but to the permissible limits of irrebuttable presumptions under the due process clause. As matters now stand, the individualized approach to maternity leave may be the only safe one under Title VII, in the light of both court and administrative decisions.

Under the individualized approach, there is room for a bona fide insistence on mandatory leave when the nature of the particular job

98. For a discussion of this constitutional law issue in the light of *LaFleur*, see Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

99. 414 U.S. at 657.

100. *Id.* at 660.

101. One district court since *LaFleur* has indeed upheld mandatory leave for teachers at the end of the eighth month of pregnancy. deLaurier v. San Diego Unified School Dist., 10 FEP Cas. 361 (S.D. Cal. 1974).

requires it. In one case, for example, the EEOC itself held that there was no cause to believe a violation existed when an employer required a pregnant employee to go on maternity leave earlier than her doctor recommended, because a later investigation by the company doctor revealed that her job required much bending, lifting, and climbing which could have been dangerous to a woman in an advanced state of pregnancy.[102] But, by the same token, the individual approach rules out the contention that fixed mandatory leaves are necessary because liability under workmen's compensation laws increases with the progressive accident propensity of late pregnancy. In any event, this contention does not seem to be supported by available actuarial data.[103]

In dealing with mandatory maternity leave, it is appropriate for courts to be mindful of the economics involved. Attitudes toward mandatory leave may sometimes reflect the stereotypical image of the pregnant woman as being married, with a working husband upon whom she can rely for support, happily prepared to abandon work and care for her child, because she only intended to work until she got pregnant anyway. This view misconceives the financial situation of working women. Few women have the option of working for "personal fulfillment." A large number of women[104] have no choice about working. Gainful employment is dictated by economic need.[105] The jobs of these women are the only sources of income for themselves and their families. Even when there are husbands who are employed, the

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102. EEOC Dec. No. 72-0372, 7 FEP Cas. 455 (1971).

103. Workmen's compensation analysts have no statistics showing higher accident rates for pregnant women. This is to be anticipated, since pregnant women have generally been forced to leave early in their pregnancies. However, see Bureau of National Affairs, *Sex and Title VII* 9 (Personnel Policies Forum, Survey No. 80, Apr. 1967): "While it is true that a pregnant woman is in a more delicate condition as a result of maternity, no such policy is extended to previous heart patients who return to work after being sick, who might also be in a weakened condition."

104. *See, e.g.*, Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 9 FEP Cas. 227 (3d Cir. 1975), which prefaces its discussion with a statistical analysis of the number of women of childbearing age in the work force:

> Women between the ages of fourteen through forty-four amounted to 43.5% of the total female population or 45,675,000 women, which we equate with the childbearing age. There is a necessary overlapping of the 31,000,000 women in the work force sixteen years of age and older, and the 45,000,000 women in the childbearing ages of fourteen to forty-four years of age. . . . If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statistically expectable number of employees. 372 F. Supp. at 1157-58.

See also United States Dep't of Labor 1969 *Handbook on Women Workers* (Women's Bureau Bull. No. 294) 31-36.

105. *Handbook on Women Workers, supra* note 104, at 130.

wife's earnings are often necessary to keep the family from relying on welfare support. Indeed the delivery of a baby puts an added drain on finances. Thus, especially to this core of workers, limiting mandatory leaves to the actual period of disability, as the current state of the law requires, reflects the economic realities of contemporary female employment.

UNEMPLOYMENT COMPENSATION AND MATERNITY

Denial of state unemployment compensation benefits to an otherwise qualified woman on the ground that after an arbitrarily fixed point in her pregnancy she is not qualified as "able" to work is illegal under the majority of court decisions.[106]

Provisions specifically denying unemployment compensation benefits to pregnant women are a familiar feature of unemployment compensation laws.[107] As a typical example, the Oklahoma statute[108] disqualifies a woman six weeks before and six weeks after childbirth, regardless of her willingness or ability to work. An Illinois provi-

106. Vick v. Texas Employment Comm'n, 6 FEP Cas. 411 (S.D. Tex. 1973) (pregnant mathematics analyst, who lost her job because of company's overall reduction in the work force and who presented proof that she was able to work until six weeks before childbirth, was denied unemployment compensation; suit was brought after the 1972 amendments to Title VII, which eliminated the exclusion of state employers and employees from coverage; the court decided that denial of unemployment benefits to pregnant women in these circumstances violated Title VII); Stickel v. Mason, Civ. No. 72-1017-H (D. Md. 1972) (pregnant members of the Baltimore Symphony brought a class action, urging the three-judge district court to view the disqualification as violative of both equal protection and due process; consent decree entered April 27, 1973, declaring the disqualification violative of the fourteenth amendment without specifying whether the equal protection or the due process clause applied, and enjoining defendants from denying unemployment compensation to any women pursuant to the Maryland statute; the motion for class certification was denied as moot); *cf.* Turner v. Department of Employment Security, 10 FEP Cas. 422 (Utah 1975) (upholding constitutionality under Utah constitution of a disqualification for unemployment benefits during any week of unemployment due to pregnancy). Miller v. Industrial Comm'n, 173 Colo. 476, 480 P.2d 565 (1971) (upholding constitutionality of Colorado's special award law which excludes from unemployment benefits women separated from their jobs due to pregnancy and which postpones the payment of special award benefits until the claimant has re-entered the labor market and completed thirteen full weeks of full-time work; claimant in this case was granted a leave of absence at the end of her sixth month of pregnancy, but found that her regular job was not open to her when she returned).

107. *E.g.*, COLO. REV. STAT. ANN. § 82-4-8(7)(a) (Supp. 1971); DEL. CODE ANN. tit. 19, § 3315(9) (Cum. Supp. 1970); ILL. REV. STAT. ch. 48, § 420(C)(4) (Supp. 1974); IND. ANN. STAT. § 22-4-15-1 (Burns 1974); OHIO REV. CODE ANN. § 4141.29 (D)(2)(c) (Page 1973), *amended* S. 479, effective May 24, 1974; PA. STAT. ANN. tit. 43, § 801(d)(2) (1974 Supp.); UTAH CODE ANN. § 35-4-5(h) (1974); VT. STAT. ANN. tit. 21, § 1344(4) (1967); WIS. STAT. ANN. § 108.04(1)(c) (1974).

108. OKLA. STAT. tit. 40, § 215(g) (1971).

sion[109] similarly disqualifies pregnant women thirteen weeks before and four weeks after delivery. Other jurisdictions provide a slight softening of these exclusions by decreasing the length of disqualification when the woman is the "sole support of children or invalid husband."[110] There are of course no prerequisites of sole support before men can obtain unemployment benefits.

Here again, as in the controversy touching the exclusion of maternity from disability benefits,[111] the crucial question is what the United States Supreme Court will do with this issue, rather than how the arguments have gone at the federal district and state court levels. Specifically, the question is whether this issue will be assimilated to that in *Geduldig* or to that in *LaFleur*. In *Geduldig* the court held that denying temporary disability benefits for normal pregnancy under a state plan did not violate the equal protection clause of the fourteenth amendment. In *LaFleur* the court held that mandatory maternity leave for an arbitrary period unrelated to the individual's actual ability to work was violative of the due process clause of the fourteenth amendment.

The unemployment compensation system is a federal-state program, but the federal involvement is largely in the mechanism of financing, and in some controls of standards not relevant here. On details of the kind involved in this controversy, such as specific exclusions, the states are free to make their own choices, so far as the federal legislation is concerned. The basic concept of unemployment compensation, however, is important to the pregnancy problem. Unemployment compensation is designed to deal with the problem of *economic* unemployment. It emphatically is not intended to handle unemployment due to physical disability. Such disability, if occupational, is the domain of workmen's compensation law. If nonoccupational, it falls within the temporary disability insurance systems of the few states that have such systems—otherwise under private plans or personal insurance. This being so, it is central to the concept of eligibility for unemployment compensation that the applicant be not only ready and willing but *able* to work.[112]

Now suppose that a large employer, because of business recession, has a plant-wide layoff, or perhaps closes the entire plant.

109. ILL. REV. STAT. ch. 48, § 420(C)(4) (Supp. 1974).
110. *E.g.*, COLO. REV. STAT. ANN. §§ 82-4-8(1)(c), (d) (Supp. 1971).
111. See notes 4-47 *supra* and accompanying text.
112. MONT. REV. CODES ANN. § 87-106(h) (Supp. 1974); NEV. REV. STAT. § 612.440 (1973).

Among the thousand workers laid off there are, let us say, thirty women in their sixth and seventh months of pregnancy. The thousand employees line up for their unemployment checks. Nine hundred seventy receive them. The thirty pregnant women are refused them. The reason given is a statutory or administrative rule that women in the sixth month of pregnancy or later are considered not "able" to work and are thus disqualified.

When the matter is put this way, it seems clear that the case should be controlled by *LaFleur*. The heart of the *LaFleur* rationale is that to base state action on an irrebuttable presumption that a woman is unable to work after an arbitrarily fixed point in pregnancy is a denial of due process under the fourteenth amendment. The fact that the Supreme Court chose the due process route rather than the equal protection route to arrive at its decision in *LaFleur* assumes unusual importance here, since it makes the applicability of *LaFleur* vividly apparent.

As for *Geduldig*, there is admittedly a certain superficial temptation to apply it here. It will be argued that both the temporary disability plan and the unemployment plan were concerned with dispensing benefits. Indeed, the two systems were organically linked in California—unlike in New York, where the temporary disability program is linked to the workmen's compensation act.[113] But this surface connection obscures the difference that is decisive for present purposes. The basic operative test for unemployment compensation eligibility is economic unemployment, and the thirty laid-off pregnant women obviously met that test as surely as did the other 970 employees. The basic test under the disability system was a specified category of disease and injury that did not include normal pregnancy. Ms. Aiello in *Geduldig* never at any time met that test.

In the former instance, the laid-off pregnant woman having met the test of economic unemployment, the state can deny her benefits only by establishing that she was not "able" to work. If it tries to do this on the strength of an irrebuttable presumption that women in a specified month of pregnancy are unable to work, it runs head-on into the holding in *LaFleur* that this identical presumption is a violation of due process.

This is not to say, of course, that there can be no period of denial of unemployment compensation in preguancy cases. For such period as the individual mother is in fact disabled prior to, during, and after

113. *Compare* CAL. UNEP. INS. CODE §§ 2601 *et seq.* (West 1972) *with* N.Y. WORKMEN'S COMP. LAW §§ 200 *et seq.* (McKinney 1965).

childbirth she is clearly disqualified, as not "able," just as she can also be required under *LaFleur* to accept mandatory leave for this period. The point once more is that irrebuttable and arbitrary presumptions about the timing and duration of incapacity associated with maternity must give way to individual determinations.

The case described here for purposes of discussion presents the combination of facts that most clearly exposes the application of *LaFleur* to this issue. Variations in the facts may make the result less self-evident, but should not alter the operative principle. Thus, in *Miller v. Industrial Comm'n*,[114] the plaintiff was not laid off for economic reasons, but took voluntary maternity leave under a system in which reemployment was not guaranteed. When she reapplied for work she was told that her place had been filled because of her extended period of leave. The Supreme Court of Colorado upheld as constitutional a rather complex provision denying benefits in such a case until the claimant requalifies by having thirteen additional weeks of employment. The question now becomes: At the moment she was denied reemployment, was the reason for denial economic or physical? The plaintiff at that point was "able" and willing to work. The answer, therefore, is that the obstacle was unavailability of a job, and that this is an economic factor.

One gets the impression from the opinion that, if a worker had been absent from work due to illness or injury, and had been similarly denied reemployment because his place had been filled, unemployment compensation benefits would have been paid. If this is so, it establishes the crucial point that unavailability of a reemployment opportunity after a period of physically caused unemployment is itself economic unemployment. It is true that the Colorado legislation expressed the broad intention that unemployment compensation was for the benefit of people who were unemployed "through no fault of their own."[115] This, of course, is aimed at claimants who voluntarily quit or get fired for misconduct. It does not fit the case of a woman who must take time off because of preguancy. To say that it was all through her own "fault" is to confuse the occasion for the leave with the occasion for the pregnancy. The issue of "voluntariness" is just as out of place here as in the cases on maternity benefits generally.[116] In an individual case, the pregnancy may not have been voluntary at all. Even if it were, to call it a "fault" is to fly in the face of the same high public

114. 173 Colo. 476, 480 P.2d 565 (1971).

115. *Id.* at 483-84, 480 P.2d at 568-69; COLO. REV. STAT. ANN. § 82-4-8 (Supp. 1971).

116. See notes 38-47 *supra* and accompanying text.

policy protecting the right to bear children that forbids firing women for pregnancy without granting them leave and reemployment rights.[117]

Here again, it must be stressed that the question is different from that in *Geduldig*. The claimant in this instance is not asking for a class of benefits different from those afforded to persons with other kinds of disabilities. When she applies for reemployment alongside a man who has been absent the same length of time because of illness, both are asking for the same benefits. Both have been absent for physical reasons; both have been disqualified during that period as not "able"; both are now "able." If both find their old jobs filled, they are both the victims of economic unavailability of employment and both should receive unemployment compensation.

In the light of the holdings in the great majority of cases, and particularly in the light of the probable holding of the Supreme Court under the present analysis, state legislatures could avert a great deal of needless litigation and confusion by eliminating from their unemployment compensation laws the offending exclusions based on pregnancy. The United States Department of Labor recommended this in December, 1970,[118] and several states have responded accordingly.[119] The federal Congress has the ultimate power to compel this change by making it a mandatory standard. But this device is cumbersome in the extreme. The only available sanction against a state that fails to conform to a federal standard is, in effect, complete destruction of the state's system by withholding from the state the revenues collected in the form of payroll taxes. As a result, the sanction is never used; its effectiveness is destroyed by its excessive potency. A more realistic solution, therefore, would be for states to realize that the change is only a matter of time, as the federal courts and the Supreme Court gradually build up the law by giving *LaFleur* its logical application, and that they might just as well work out a legislative solution that will clear the air for employers, employees, administrators and the courts.

MATERNITY ISSUES UNDER OTHER LAWS

Federal contractors and employees

The Office of Federal Contract Compliance (OFCC), which

117. See notes 62-71 *supra* and accompanying text.

118. United States Dep't of Labor, Unemployment Insurance Letter No. 1097 (Dec. 31, 1970).

119. ARK. STAT. ANN. § 81-1106(e) (1960) (repealed 1973); CONN. GEN. STAT. ANN. § 31-26 (1972) (repealed 1972); HAWAII REV. STAT. § 383-30(7) (1968) (repealed 1973); ME. REV. STAT. ANN. tit. 26, § 1193(1)(A) (1971) (repealed 1971); N.H. REV. STAT. ANN. § 282:4(J) (1966) (repealed 1973).

administers Executive Order No. 11,246,[120] has established the following guidelines on maternity leaves:

> (1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be justification for leave of absence for female employees for a reasonable period of time . . . .
>
> (2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence . . . . Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.[121]

In a November, 1970, memorandum to agency heads, the OFCC director further clarified his office's position:

> Female employees on leave of absence for childbearing must continue to accrue all seniority rights for job security, promotion, and pensions and other fringe benefits if the same policy applies to other types of leave . . . . The time when a woman leaves before childbearing is normally a matter between the pregnant employee and her doctor.[122]

If enforcement of the executive orders were as effective as it should be, the rights which the guidelines attempt to protect would be more nearly realized. Unfortunately, the staff of the OFCC is very small.[123] Its guidelines are significant primarily as the embodiment of new attitudes toward working women.

Civil service regulations

Executive Order 11,478[124] was issued by President Nixon on

120. Exec. Order No. 11,375, 3 C.F.R. 320 (1967 comp.), *amending* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.), 42 U.S.C. § 2000e (1970) (prohibits sex discrimination in employment by government contractors and subcontractors).

121. 41 C.F.R. § 60-20.3(g) (1974).

122. Memorandum from John L. Wilks, Director OFCC, to Agency Heads (Nov. 12, 1970).

123. No right to initiate a complaint is conferred on the aggrieved individual, and the OFCC staff is so small that it cannot possibly conduct investigations. The General Accounting Office, on May 4, 1975, issued a blistering report on what it characterized as a pattern of "almost nonexistence of enforcement actions." In thirty percent of the contracts studied, no finding had been made of nondiscrimination in advance of granting the contract, as the order requires. In ten years only one contractor, said the GAO, had been barred from bidding on contracts because of failure to comply with the order. N.Y. Times, May 5, 1975, at 1, col. 3.

124. 3 C.F.R. 133 (1969 comp.), 42 U.S.C. § 2000e (1970).

August 9, 1969, to prohibit discrimination in executive agencies of the federal government, in competitive positions of the legislative and judicial branches, and in the government of the District of Columbia. The Civil Service Commission, which administers the order, has always required that "an agency shall grant sick leave . . . when the employee . . . is incapacitated for the performance of duties by . . . pregnancy and confinement. . . ."[125]

In October, 1974, a number of significant changes were introduced in the form of more detailed rules in the Federal Personnel Manual. The former suggestion that maternity leave should consist of six weeks' absence before delivery and eight weeks after delivery was removed. The length of the absence is now to be determined by the employee, her doctor, and her supervisor on an individual basis.

The Manual, although not taking a position on the question of whether pregnancy is an illness or accident, says that the same regulations, procedures, and policies that govern sick leave should generally be applied in pregnancy cases. The agency should, as far as possible, see to it that a worker returning from maternity leave is given the same job, or a comparable assignment. Employees assigned to duties that are strenuous or might affect the health of mother or child should be transferred to lighter duties when this is feasible. The pregnant employee should inform her agency as early as possible of the prospective childbirth, giving requested dates for time off before and after delivery, to permit necessary adjustments to be made. Finally, agencies should try to work out schedules so that fathers who want to take time off to help with the new baby or other minor children can do so. The father would not be entitled to use his sick leave for this purpose, but could take either annual leave (*i.e.* vacation leave) or leave without pay.[126]

State laws and maternity

In recent years, there has been a marked increase in the number of complaints filed by pregnant employees with agencies charged with enforcement of state and local Fair Employment Practices (FEP) laws. State FEP laws may sometimes provide at least as ample protec-

125. 5 C.F.R. § 630.401 (1974).

126. *See* Wash. Post, Oct. 24, 1974, § H, at 9, col. 5. This guideline was upheld and followed in Martin v. Dann, 2 CCH EMPL. PR. GUIDE (9 EPD) ¶ 10,128 (D.D.C. May 7, 1975), where a district court held that denying a father the right to use sick leave for this purpose, while mothers can use sick leave for maternity, had a rational basis, since sick leave was designed only for "medically certifiable" personal disability.

tion against discrimination in the area of maternity leaves and benefits as does present Title VII case law.[127] In a typical case, the New York Appellate Division found that a school board's requirement of unpaid maternity leave after four months of pregnancy violated state law by discriminating in the terms, conditions, and privileges of employment.[128] The board was ordered to cease and desist from following its former policy. And in *Kupczyk v. Western Electric Corp.*,[129] the Appeal Board of the New York Human Rights Division affirmed a decision ordering an employer to offer all pregnant employees an unpaid leave of absence without termination of accrued seniority rights, and to retain such absent employees on the inactive seniority list for at least one year.

Revised state guidelines on sex discrimination also incorporate

127. Board of Educ. v. New York State Div. of Human Rights, 42 App. Div. 2d 49, 345 N.Y.S.2d 93 (1973), *aff'd*, 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974) (mandatory maternity leave at end of fourth month of pregnancy held violative of New York State Human Rights Law); Allison v. Board of Educ., 70 Misc. 2d 115, 333 N.Y.S.2d 261 (Sup. Ct. 1972) (mandatory leave after four months violated state law; challenge required to be brought in first instance before Division of Human Rights); Cerra v. East Stroudsburg Area School Dist., 450 Pa. 207, 299 A.2d 277 (1973) (mandatory leave after five months held sex discrimination); Nursing Homes, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 7 FEP Cas. 471 (Wisc. Cir. Ct. 1974). The employer had a mandatory leave rule at the fifth month of pregnancy. The employee stayed until her seventh month. It was held that refusal to rehire her when she returned was a violation of the Wisconsin Fair Employment Practice Act. There was some evidence of unsatisfactory performance, but the court observed that, if this was the real reason for the action, she should have been fired when the poor performance became known. Cedar Rapids Community School Dist. v. Parr, 6 FEP Cas. 101 (Iowa Dist. Ct. 1973) (mandatory maternity leave of teacher at beginning of sixth month of pregnancy held a violation of Iowa's law prohibiting sex discrimination in employment, IOWA CODE ANN. § 601.A.7(1)(a) (1972)); Minnesota v. Crow Wing County Welfare Bd., Minnesota Human Rights Comm'r Dec., (1971). A county welfare board violated the Minnesota Act Against Discrimination when it terminated a female employee who took unauthorized leave of absence for maternity purposes; Awadallah v. New Milford Bd. of Educ., No. E02ES-5337 (N.J. Div. of Civ. Rights, Dep't of Law & Pub. Safety, 1971) (school board's regulation allowing tenured teachers to return only in the September falling six months after confinement was held to be illegal under the state law as well as unconstitutional); *cf.* Wisconsin Tel. Co. v. Dep't of Indus., Labor & Human Relations, 6 FEP Cas. 1192 (Wisc. Cir. Ct. 1973). The Department attempted to issue a rule equating pregnancy with other disabilities and overriding contrary provisions in union contracts. A joint legislative committee indicated it would suspend the rule, but the Department issued a similar directive in the form of guidelines. The Department was held to lack authority to do this. Moreover, the Department was held to have violated the employer's due process rights in a number of ways in its handling of an employee's claim that she was not given re-employment rights as soon as she was physically able to return.

128. Board of Educ. v. New York State Div. of Human Relations, 42 App. Div. 2d 49, 345 N.Y.S.2d 93 (1973), *aff'd* 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974).

129. No. CSF-15206-64 (N.Y. Human Rights App. Bd., Mar. 16, 1971).

broad interpretations of the rights surrounding maternity leave.[130] Connecticut's Fair Employment Practices Act[131] explicitly forbids the termination of an employee because of pregnancy and the refusal of reasonable disability leave. Neither may employers, under Connecticut law, deny an employee who is disabled because of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employers.[132]

State protective laws prohibiting employment of women for arbitrary periods before and after childbirth[133] are presumably unconstitutional under *LaFleur*, since there would appear to be no distinction between action by a school board and action by a state legislature. They would also fall before Title VII under the federal supremacy doctrine, as other "protective" laws have done when they clashed with the federal policy of equal employment opportunity.[134] The Attorney General of Massachusetts has so ruled.[135] And, where state fair employment statutes exist, the later enactment of such a statute could be construed to be an implied repeal of the conflicting portion of the earlier protective statute.

Parental leave

Thus far, the discussion has related to leave and benefits for only the brief period of actual disability. However, some people want longer leaves for the purposes of child care. Unlike maternity disability leave, the child-care leave is for an extended period of time and potentially involves both men and women.

There is nothing particularly sex-related about parental leaves—either parent may care for a child. The policy of permitting such leaves, since the distinction it draws is only between parents and nonparents, encompasses no forbidden classification under Title VII. Thus, under Title VII, it is doubtful that an employer would be *required* to offer

130. E.g., draft of 1971 Massachusetts Commission Against Discrimination guidelines on sex discrimination which provides that

> [c]hildbearing must be accepted by the employer to be a justification for a leave of absence for . . . a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female shall be reinstated to her original job or to a position of like status and pay, without loss of service credit if any such benefits are carried over for all employees granted leaves of absence for circumstances other than childbirth.

131. CONN. GEN. STAT. §§ 31-122 *et seq.* (1975).

132. *Id.* § 31-126(g).

133. OKLA. STAT. tit. 40, § 215(g) (1971) (six weeks before and six weeks after); VT. STAT. ANN. tit. 21, § 1344(4) (1967) (eight weeks before and four weeks after).

134. *See* 1 A. LARSON, EMPLOYMENT DISCRIMINATION, § 19.00 (1975).

135. Mass. Pub. Doc. No. 12, REP. ATT'Y GEN. 95, 96 (1971).

child-care leave. If, however, such leave is offered, it must be equally available to both men and women. The logic of Title VII prohibits arbitrary distinctions between mothers and fathers.[136]

In *Danielson v. Board of Higher Education*,[137] plaintiffs Ross Danielson, a lecturer at City College, and his wife Susan, a lecturer at Lehman College, challenged defendant's maternity leave provision. The provision permitted women to take a leave of absence in connection with pregnancy up to three semesters, for the purpose, among others, of caring for a newborn infant, while denying such child-care leave to similarly situated men. In denying defendant's motion to dismiss, the court found that Mr. Danielson had presented "at least a 'colorable' constitutional claim."[138] However, *Danielson* did not reach a definitive holding because, before the court could reach the substantive merits of the case, the Board of Higher Education of the City of New York passed a resolution for equal child-care leaves for female and male teachers alike.[139]

A more recent case, *Ackerman v. Board of Education of the City of New York*,[140] involved similar facts. Mr. Ackerman was a junior high school teacher at the time his daughter was born. He applied for a leave of absence without pay pursuant to Board of Education By-laws governing maternity and child-care leave. Such leave was routinely granted to female teachers but was denied Mr. Ackerman. Mr. Ackerman took his "leave" anyway and was treated as terminated by the school board. Such an alleged resignation made Mr. Ackerman ineligible for work as a substitute teacher, which is permissible for teachers who are on child-care leave. In addition, Mr. Ackerman lost both his teacher's license and his accrued seniority. The school board policy was challenged both on constitutional and Title VII grounds. On December 29, 1972, the EEOC, in response to a complaint filed by plaintiffs, issued a determination that there was reasonable cause to believe that the Board's policy providing child-care leave to its female employees but denying them to its male employees violated Title VII.[141] In 1974 the

136. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

137. 358 F. Supp. 22 (S.D.N.Y. 1972).

138. *Id.* at 28. The court relied heavily on Reed v. Reed, 404 U.S. 71 (1971).

139. Section 13.5(c) of the Board of Higher Education By-Laws, which was passed on May 29, 1973, states:

> Special leaves for the purpose of caring for a newborn child shall be granted to a member of the instructional staff upon notification to the president and application for such leave, provided the applicant has legal responsibility for the care and/or support of said child.

140. 372 F. Supp. 274 (S.D.N.Y. 1974).

141. Determination of District Director, EEOC Case No. YNY 3, 2 CCH EMPL. PR. GUIDE ¶ 5127 (1972).

Southern District of New York denied summary judgment for both plaintiff and defendant.[142]

The only justification for the sex distinction advanced by the school board was administrative convenience. Given *Frontiero's*[143] rejection of this justification, it appears unlikely that such dissimilar treatment of similarly situated men and women will withstand constitutional scrutiny. And since Title VII is much more specific than the Constitution on the subject of sex discrimination, the New York Board of Education's policy was presumably also violative of Title VII. Leaves, like other fringe benefits, fall directly within the rubric of "terms, conditions, or privileges" of employment. By routinely granting to female teachers a leave of absence for child-care purposes but denying such a leave to male teachers, the Board was extending an employment benefit to parents of small children who happen to be women but denying it to similarly situated parents who happen to be men. No bona fide occupational qualification justification was advanced and it is unlikely that one will be. Stereotyped views, which appear to be largely responsible for the policies on child-care leave, have been consistently rejected as bona fide occupational qualification defenses.[144] Moreover, the bona fide occupational qualification exception applies only to discrimination in the act of hiring, or refusing to hire; it does not apply to "terms, conditions, and privileges," once a person has been hired.[145]

A case decided by a California Appellate Division court,[146] which can most charitably be described as a curiosity, involved a sort of reverse discrimination in this area. For a time, Sonoma County had an ordinance that allowed male employees, but not female employees, to use sick leave "in the event of the birth of his child." The Court of Appeals said:

> [T]he ordinance under review does not unconstitutionally discriminate against appellant and those of her sex similarly situated, because it is

142. Ackerman v. Board of Educ., 372 F. Supp. 274 (S.D.N.Y. 1974). The court also rejected the plaintiff's motion for certification as a class action. *Id.* at 277.

143. Frontiero v. Richardson, 411 U.S. 677 (1973). While only four justices in the plurality opinion characterized sex as a "suspect" classification, eight justices rejected "administrative convenience" as a justification for dissimilar treatment of men and women. *See generally The Supreme Court, 1972 Term, supra* note 17, at 116-18.

144. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

145. See 1 A. LARSON, *supra* note 134, at § 5.10 n.5.

146. Lombardo v. County of Sonoma, 1 Civ. 30176 (Cal. Ct. App., Dec. 26, 1972), in K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 508 (1974).

based on a natural difference between the respective natural functions and obligations of the respective parents at the time of the birth of a child, conceived by both and delivered by the mother. . . . [The ordinance] is directed not to the employee's inability to work, here the mother's inability to work during delivery and for such period of time as may be medically recommended by her physician, . . . but to the desirability of having the father available to minister to another who although not ill or disabled is unable to carry on her normal pursuits whether an employee or otherwise.[147]

The court concludes by approving the analysis of the trial court, phrased as follows:

[T]he difference in classification has a sound basis in reason, in that it allows the head of the family a short time to care for any emergency prior to the birth, to be present at the proudest moment of his and her life, and time to reassure her, his life partner . . . .[148]

This is one of those opinions, occasionally encountered, that is so wildly illogical that it is difficult to criticize it logically. Perhaps the shortest way to expose the fallacy is to point out that, although there are differences in the situations of father and mother, every such difference is on the side of strengthening the mother's claim to such leave. Moreover, any justificiation that can be advanced for the father has at least an equivalent justification for the mother. If he has to look after her, she has to look after the baby. If leave allows him time to care for any emergency prior to the birth, it does the same for her. If it is important for him to be at the hospital instead of at the office during the proudest moment of their lives, it is at least as important for her.

The case is deservedly unreported.

147. *Id.* at 509.
148. *Id.*