

NOTES

THE 1978 PREGNANCY DISCRIMINATION ACT: A PROBLEM OF INTERPRETATION

In late 1978 Congress enacted the Pregnancy Discrimination Act, adding section 701(k)¹ to Title VII of the Civil Rights Act of 1964.² This legislation climaxed a long period of judicial juggling, including three United States Supreme Court decisions, with the problem of differential treatment of pregnant employees. To the extent that the act quelled this turbulent area of law and improved the lot of pregnant workers, the amendment to Title VII was welcome and necessary. As this Note will demonstrate, however, the drafters of the 1978 amendment, and the Congress that enacted it, failed to foresee that the mandate of section 701(k) contradicts, in some instances, that of Section 703 of Title VII. The law regarding pregnancy based discrimination, therefore, remains unsettled and uncertain.

I. THE BACKGROUND

Commentators have extensively surveyed the cases that decided claims of pregnancy based discrimination prior to the 1978 Pregnancy Discrimination Act.³ A review of these decisions is necessary, however,

1. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-(k) (1976 & Supp. II 1978)). This section provides as follows:

The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(emphasis in original).

2. 42 U.S.C. § 2000 (1976 & Supp. II 1978).

3. See generally Barkett, *Pregnancy Discrimination—Purpose, Effect, and* Nashville Gas Co. v Satty, 16 J. FAM. L. 401 (1978); Ginsburg, *Gender and the Constitution*, 44 CIN. L. REV. 1 (1975); Note, *The Irrational Trend Toward Mandatory Maternity Coverage*, 26 DRAKE L. REV. 758 (1977); Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last*, 44 GEO. WASH. L.

to appreciate the "state of national confusion"⁴ that Congress intended to eliminate by enacting the 1978 amendment to Title VII. The tortured evolution of this area of law may be classified into distinct stages delineated by three Supreme Court decisions. The lower federal and state courts generally sought to minimize the impact of these decisions, but in Congress alone lay the power to correct the disorder. The congressional exercise of that power, however, left still more confusion.

Constitutional challenges to pregnancy based discrimination had only short lived success in the Supreme Court.⁵ In 1974 the Supreme Court in *Cleveland Board of Education v. Laflaur*⁶ held that school board policies requiring pregnant teachers to take maternity leave four and five months before the expected delivery dates violated the fourteenth amendment's due process clause.⁷ In that same year, however, the Court in *Geduldig v. Aiello*⁸ held that California's exclusion of benefits for normal pregnancy from its disability insurance plan did not violate the fourteenth amendment's equal protection clause. Private employees received benefits under the plan for temporary disabilities other than normal pregnancy that were not covered by workmen's compensation.⁹ The Court, in an opinion by Justice Stewart,¹⁰ found no evidence that the selection of insured risks discriminated against

REV. 381 (1976); Note, *Gender-Based Discrimination After Gilbert and Satty*, 12 J. MAR. J. PRAC. & PROC. 459 (1979); 28 S.C. L. REV. 219 (1976).

4. H.R. REP. NO. 948, 95th Cong., 2nd Sess. 3 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4749.

5. For a comprehensive review of the Supreme Court's treatment of constitutional challenges to sex discrimination, see generally Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978). See also Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161.

6. 414 U.S. 632 (1974).

7. *Id.* at 651. The Court also overturned Cleveland's policy prohibiting the teachers from returning to work until three months after delivery. *Id.* at 650. Both policies, in the Court's view, created unwarranted "irrebuttable" presumptions against the teachers' capacity to work that violated due process. See 414 U.S. at 649, 651. On the "irrebuttable presumption" doctrine, see Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 514-25 (1977). See also Note, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1544-47 (1974).

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

9. *Id.* at 486. Under the California plan, disabilities of less than eight days' duration were not compensable unless the employee was hospitalized; furthermore, no benefits were payable for any one disability beyond twenty-six weeks. *Id.* at 488. The plan also excluded disabilities resulting from court commitment as a dipsomaniac, drug addict, or sexual psychopath. *Id.* The Supreme Court in *Geduldig* had only to consider the exclusion of normal pregnancy from coverage under the plan. Prior to the district court's decision in the case, a California appellate court had ruled that the plan did not bar benefit payments for disabilities resulting from abnormal

any definable group in terms of the "aggregate risk protection" derived from the program.¹¹ The Court upheld that selection as "objective and wholly non-invidious" and as justified by the state's legitimate interests.¹²

The Court, in a significant footnote, sought to distinguish pregnancy-based classifications from sex discrimination—a distinction which it amplified two years later in *General Electric Company v. Gilbert*¹³ and which Congress expressly repudiated in 1978.¹⁴ The Court first declared the *Geduldig* case to be a "far cry" from two early sex discrimination cases—*Reed v. Reed*¹⁵ and *Frontiero v. Richardson*¹⁶—in that these cases involved "discrimination based upon gender as such."¹⁷

pregnancy. *Rentzer v. Unemployment Ins. App. Bd.*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973). See 417 U.S. at 490.

10. Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist joined in the opinion of the Court. Justice Brennan filed a dissenting opinion, in which Justices Douglas and Marshall joined. See note 17 *infra*.

11. 417 U.S. at 496. The Court continued: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97.

Two years after *Geduldig*, Justice Stevens responded to this argument as follows:

If the word "risk" is used narrowly, men are protected against the risks associated with a prostate operation whereas women are not. If the word is used more broadly to describe the risk of uncompensated unemployment caused by physical disability, men receive total protection (subject to the 60% and 26-week limitations) against that risk whereas women receive only partial protection.

General Elec. Co. v. Gilbert, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting) (citation omitted).

12. 417 U.S. at 496. The Court found legitimate state interests in maintaining the self-supporting nature of the program, in keeping benefit payments at an adequate level, and in maintaining a contribution rate which was not unduly burdensome. *Id.*

13. 429 U.S. 125 (1976). See notes 42-51 *infra* and accompanying text.

14. See notes 108-116 *infra* and accompanying text.

15. 404 U.S. 71 (1971). In *Reed* the Court overturned an Idaho statute which gave preference to males in appointments as administrators of estates though female applicants were equally qualified. *Id.* at 72-73. The Court held that administrative convenience could not justify Idaho's denial of equal protection to women. *Id.* at 74.

16. 411 U.S. 677 (1973). In *Frontiero* the Court invalidated, again on equal protection grounds, federal statutes which required female members of the Armed Services, but not male members, to prove the dependency of their spouses in order to receive increased housing and health care benefits. Four Justices, in a plurality opinion, viewed sex as a "suspect" class, but this view has yet to draw majority support in the Court. See Ginsburg, *Sex Equality and the Constitution*, *supra* note 5, at 463.

17. 417 U.S. at 496 n.20. This footnote begins, "The dissenting opinion to the contrary . . ." In the dissent, Justice Brennan, joined by Justices Douglas and Marshall, disputed the majority's use of a "rational basis" standard in evaluating the California program and argued that *Reed* and *Frontiero* mandated "a stricter standard of scrutiny which the State's classification fails to satisfy . . ." 417 U.S. at 498. The *Geduldig* dissenters found the "invidious distinctions" of the program unjustified by California's interest "in preserving the fiscal integrity of its disability

The Court reasoned that the California plan excluded no one from coverage because of gender, but “merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities.”¹⁸ The *Geduldig* Court conceded that pregnancy is unique to women, but denied that every pregnancy based classification is therefore a sex based classification.¹⁹ The California program, the Court explained, simply divided potential recipients of disability benefits “into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”²⁰ The Court concluded that the benefits of the program thus accrued to members of both sexes²¹ and therefore found no invidious discrimination.²² The Court thereby closed the federal constitutional avenue to challenging this type of pregnancy based classification.

The lower federal courts quickly deadened *Geduldig*'s impact by distinguishing its facts and the constitutional claim involved.²³ The courts of appeals, continuing a trend in the district courts,²⁴ agreed that the

insurance program,” which interest, moreover, “could easily have been achieved through a variety of less drastic, sexually neutral means.” *Id.* at 504-05.

18. 417 U.S. at 496 n.20.

19. 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.

417 U.S. at 496 n.20.

20. *Id.* Justice Stevens, in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), disputed the accuracy of this reasoning: “Insurance programs, company policies, and employment contracts all deal with future *risks* rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not.” *Id.* at 161-62 n.5 (Stevens, J., dissenting) (emphasis in original).

21. 417 U.S. at 496 n.20.

22. *Id.* at 494, 496.

23. See generally 28 S.C. L. REV. 219, 224-31 (1976).

24. See *Gilbert v. General Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Hutchinson v. Lake Oswego School Dist. No. 7*, 374 F. Supp. 1056 (D. Or. 1974), *modified*, 519 F.2d 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037 (1976), *vacated*, 558 F.2d 1037 (9th Cir. 1977); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated*, 424 U.S. 737 (1975), *cert. denied*, 429 U.S. 1000 (1976); *Dessenberg v. American Metal Forming Co.*, 8 F.E.P. 290 (N.D. Ohio 1973); *Farkas v. South Western City School Dist.*, 8 F.E.P. 288 (S.D. Ohio 1974), *aff'd*, 506 F.2d 1400 (6th Cir. 1975). *Contra*, *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973) (pregnancy neither a sickness nor a disability, therefore denial of benefits did not violate Title VII). See generally *Barkett*, *supra* note 3, at 413-33.

exclusion of pregnancy related disabilities violated Title VII of the 1964 Civil Rights Act.²⁵ The opinions typically reasoned that *Geduldig*, decided on equal protection grounds, was inapposite to a Title VII action,²⁶ and stressed the unusual facts of the *Geduldig* case.²⁷ Furthermore, although the Supreme Court in footnote 20 of the *Geduldig* opinion denied that pregnancy based classifications are gender based classifications,²⁸ several courts of appeals viewed that footnote as likewise inapplicable to Title VII claims.²⁹ Finally, the intermediate courts showed great deference to the 1972 Equal Employment Opportunity Commission (EEOC) guidelines on employment policies relating to pregnancy and childbirth.³⁰ The EEOC, in its guidelines, interpreted Title VII as requiring the inclusion of pregnancy related disabilities in disability and health insurance plans "on the same terms and conditions as . . . other temporary disabilities."³¹ Despite *Geduldig's* admo-

25. *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975), *rev'd in part*, 434 U.S. 136 (1978); *Hutchinson v. Lake Oswego School Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037 (1976), *vacated*, 558 F.2d 1037 (9th Cir. 1977); *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Communications Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir.), *vacated*, 424 U.S. 737 (1975), *cert. denied*, 429 U.S. 1000 (1976). *See also* *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975).

26. *See* *Gilbert v. General Elec. Co.*, 519 F.2d 661, 666 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Communications Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 203 (3d Cir.), *vacated*, 424 U.S. 737 (1975), *cert. denied*, 429 U.S. 1000 (1976).

27. *Geduldig* involved a state created disability plan that excluded coverage of only normal pregnancies. *See* note 9 *supra*. Some courts of appeals found that plan significantly different from private employment disability plans excluding disabilities from all pregnancies, normal or not. *See* *Gilbert v. General Elec. Co.*, 519 F.2d 661, 666 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 203 (3d Cir.), *vacated*, 424 U.S. 737 (1975), *cert. denied*, 429 U.S. 1000 (1976).

28. *See* note 19 *supra* and accompanying text.

29. The Second Circuit concluded that footnote 20 of *Geduldig* dealt with "the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more." *Communications Workers of America v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1030 (2d Cir. 1975). *Accord*, *Gilbert v. General Elec. Co.*, 519 F.2d 661, 666-67 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). The court in *Communications Workers* noted that footnote 20, like "other 'marginalia' in Supreme Court opinions . . . should be read 'within the context of the holding of the court and the text to which it is appended' . . ." 513 F.2d at 1028, *quoting* *Harkless v. Sweeny Indep. School Dist.*, 427 F.2d 319, 322 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

30. *See* cases cited in Note, *Title VII, Pregnancy and Disability Payments*, *supra* note 3, at 390 n.53.

31. 29 C.F.R. § 1604.10(b) (1975). The EEOC issued its guidelines on employment policies relating to pregnancy and childbirth on March 31, 1972 (effective April 5, 1972), as an amendment to its Guidelines on Discrimination Because of Sex. *See* 37 Fed. Reg. 6836 (1972); 29 C.F.R.

dition that excluding pregnancy related disabilities is not sex discrimination, the courts of appeals agreed with the EEOC in its interpretation of Title VII.

In *General Electric Company v. Gilbert*,³² the Supreme Court abruptly ended this line of cases by ruling that the Fourth Circuit had been "wrong in concluding that the reasoning of *Geduldig* was not applicable to an action under Title VII."³³ The Court held *Geduldig* was "precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."³⁴

In *Gilbert*, a Title VII class action, the Supreme Court upheld General Electric's disability plan that provided benefits for nonoccupational sickness and accidents but excluded pregnancy related disabilities.³⁵ The district court had found this exclusion to be sex discrimination in violation of Title VII,³⁶ and the court of appeals had affirmed, limiting the intervening *Geduldig* decision to its fourteenth

§ 1604.10 (1972). The 1972 pregnancy guidelines signaled a reversal of the EEOC's position with regard to the exclusion of pregnancy benefits from disability and health insurance plans. See note 55 *infra*. The full text of these guidelines follows:

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

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance 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.

(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.

32. 429 U.S. 125 (1976).

33. *Id.* at 136. For a comprehensive discussion and analysis of *Gilbert*, see Barkett, *supra* note 3, at 433-57.

34. 429 U.S. at 136.

35. *Id.* at 128-29. In addition, General Electric's plan excluded coverage for disabilities not related to pregnancy if they arose during the employee's pregnancy leave. Thus, General Electric had denied an individual in the plaintiffs' class benefits for a pulmonary embolism which, though not related to her pregnancy, occurred during her pregnancy leave. *Id.* at 129 n.4.

36. *Gilbert v. General Elec. Co.*, 375 F. Supp. 367, 385-86 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).

amendment context.³⁷ The Supreme Court in *Gilbert*, however, made clear that its analysis in *Geduldig* was not so narrow.

The *Gilbert* Court, in an opinion by Justice Rehnquist,³⁸ considered whether the concept of discrimination is the same under section 703(a)(1) of Title VII³⁹ as under the fourteenth amendment's equal protection clause. The Court first noted that Congress failed to define "discrimination" in Title VII. Justice Rehnquist then reasoned that the law analyzing "discrimination" in equal protection cases was developed to alleviate concerns similar to Congress' concerns when it enacted Title VII.⁴⁰ Consequently, the Court reasoned, *Geduldig* was a useful starting point in determining whether a pregnancy exclusion similar to General Electric's plan in fact discriminates on the basis of sex.⁴¹ Justice Rehnquist then reviewed the earlier decision, quoting footnote 20⁴² of *Geduldig* in its entirety. This language, according to the Court, clearly indicated the basis of *Geduldig*: the exclusion of pregnancy from California's disability plan "was not in itself discrimination based on sex."⁴³ A final premise—that General Electric's disability plan was "strikingly similar" to California's plan⁴⁴—completed

37. *Gilbert v. General Elec. Co.*, 519 F.2d 661, 666-67 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). See notes 26-29 *supra* and accompanying text.

38. Chief Justice Burger and Justices Stewart, White, and Powell joined in the opinion. Justice Blackmun concurred in part. Justices Brennan, Marshall, and Stevens dissented.

39. 42 U.S.C. § 2000e-2(a)(1) (1976). Section 703(a)(1) declares it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ." For the full text of section 703(a) of Title VII, see note 186 *infra*.

40. 429 U.S. at 133.

41. *Id.* Justice Stevens, in dissent, rejected this reasoning with the observation that "when it enacted Title VII of the Civil Rights Act of 1964, Congress could not possibly have relied on language which this Court was to use a decade later in the *Geduldig* opinion." *Id.* at 161. In a footnote to this passage, Justice Stevens further observed that neither could Congress have intended to adopt the Supreme Court's analysis of sex discrimination, "because it was seven years after the statute was passed that the Court first intimated that the concept of sex discrimination might have some relevance to equal protection analysis. See *Reed v. Reed*, 404 U.S. 71 (1971)." *Id.* at 161 n.3.

Justice Brennan, in a dissenting opinion in which Justice Marshall concurred, also regarded as "unacceptable" the Court's "implication . . . that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII." *Id.* at 153 n.6. The Court's "fleeting dictum," in Justice Brennan's view, was "irrelevant to the reasoning that precedes it, . . . [in] conflict with a long line of cases to the contrary, . . . [and] flatly contradicted by the central holding of last Term's *Washington v. Davis*, 426 U.S. 229, 239 (1976) . . ." *Id.*

42. See notes 15-22 *supra* and accompanying text.

43. 429 U.S. at 135.

44. *Id.* at 133.

the syllogism: General Electric's exclusion of pregnancy benefits was not "in itself" sex discrimination under Title VII.

The Court recognized in *Gilbert*, as it had in *Geduldig*,⁴⁵ that its conclusion required qualification because of the rule that one can at times establish a prima facie violation of Title VII by showing that the effect of an otherwise facially neutral classification is to discriminate against members of a class.⁴⁶ Justice Rehnquist, reaffirming *Geduldig's* focus on the "aggregate risk protection" provided by the disability plan,⁴⁷ observed that General Electric's package covered the same categories of risk and was, therefore, facially nondiscriminatory.⁴⁸ Because there was no proof that the package was worth more to men than to women, General Electric's disability plan had no gender based discriminatory effect.⁴⁹ Because the plan was less than all inclusive did not, without more, produce a discriminatory effect.⁵⁰ Pregnancy related disabilities, the Court concluded, "constitute an *additional* risk, unique to women,

45. We recognized in *Geduldig*, of course, that the fact that there was no sex-based discrimination as such was not the end of the analysis, should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other," [quoting 417 U.S. at 496 n.20]. But we noted that no semblance of such a showing had been made . . . [quote from 417 U.S. at 496-97 omitted.]

Id. at 135. See note 11 *supra* for portion of opinion quoted in *Gilbert* but omitted here.

46. *Id.* at 137, citing *Washington v. Davis*, 426 U.S. 229, 246-48 (1976). The Court also cited *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), as an application of the "effect" test to a facially neutral employment exam challenged under § 703(a)(2) of Title VII. (For text of § 703(a)(2), see note 186 *infra*.) The Court then continued: "Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973), the respondents have not made the requisite showing of gender-based effects." 429 U.S. at 137 (footnote omitted).

The Court's "but cf." citation to *McDonnell Douglas* prompted varied reactions from several Justices. Justice Brennan termed the citation "cryptic" and "mystifying," because, in his view, the Court in *McDonnell Douglas* "expressly held that a prima facie violation of Title VII could be proved without affirmatively demonstrating that purposeful discrimination had occurred." *Id.* at 153 n.6 (Brennan, J., dissenting). Apparently as a result of the citation to *McDonnell Douglas*, Justice Blackmun concurred in the Court's opinion only in part. He refused to join "any inference or suggestion in the Court's opinion—if any such inference or suggestion is there—that effect may never be a controlling factor in a Title VII case, or that *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is no longer good law." *Id.* at 146 (Blackmun, J., concurring in part). Justice Stewart, in a brief concurring opinion, replied that "[u]nlike my Brother Blackmun, I do not understand the opinion to question either *Griggs v. Duke Power Co.* . . . specifically, or the significance generally of proving discriminatory effect in a Title VII case." *Id.*

47. *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974). See note 11 *supra* and accompanying text.

48. 429 U.S. at 138.

49. *Id.*

50. *Id.* at 138-39.

and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks."⁵¹

In the final section of its opinion in *Gilbert*, the Court considered the deference due the EEOC guidelines on pregnancy related employment policies.⁵² Justice Rehnquist found the EEOC's position unpersuasive on several grounds: Congress had conferred only limited authority on the EEOC to promulgate regulations;⁵³ the agency's guidelines were not a contemporaneous interpretation of Title VII;⁵⁴ the guidelines

51. *Id.* at 139 (emphasis in original). Justice Brennan viewed the Court's "underinclusive" analysis as particularly deserving of reproach, describing the argument as "simplistic and misleading" and of transparent "shallowness." *Id.* at 152 & n.5 (Brennan, J., dissenting). He sought to discredit the Court's analysis through extrapolation:

Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage *every* disability that is female-specific or predominantly afflicts women, the Court could still reason as here that the plan operates equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payments for pregnancies, breast cancer, and the other female-dominated disabilities. Along similar lines, any disability that occurs disproportionately in a particular group—sickle-cell anemia, for example—could be freely excluded from the plan without troubling the Court's analytical approach.

Id. at 152 n.5 (Brennan, J., dissenting) (emphasis in original).

52. See notes 30-31 *supra* and accompanying text. The Court in *Gilbert* discussed only subsection (b) of 29 C.F.R. § 1604.10 (1975). 429 U.S. at 140-41. See note 31 *supra*.

53. 429 U.S. at 141. The Court observed that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." *Id.* Indeed, in § 713(a) of Title VII, Congress gave the agency only the authority to "issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a) (1976). No one contended in *Gilbert*, according to the Court, that the pregnancy guideline involved was either "procedural in nature or in effect." 429 U.S. at 141 n.20.

Nevertheless, Congress tacitly acknowledged in § 713(b) of Title VII that the EEOC could issue "written interpretation[s] or opinion[s]," for it provided that good faith conformity with and reliance upon on EEOC interpretation or opinion was a defense to liability under Title VII. Congress also, however, recognized that a judicial authority could determine the interpretation or opinion "to be invalid or of no legal effect . . ." 42 U.S.C. § 2000e-12(b) (1976).

Precisely because the guidelines on employment policies related to pregnancy and childbirth are "interpretive in nature," the EEOC concluded that the Administrative Procedure Act's requirements of "notice of proposed rule making, opportunity for public participation, and delay in the effective date are inapplicable." 37 Fed. Reg. 6836 (1972); see also Administrative Procedure Act § 4, 5 U.S.C. § 553(b)(A) (1976). The EEOC, in addition to holding no public hearings before issuing the pregnancy guidelines, conducted neither medical studies on pregnancy nor financial studies on the anticipated monetary impact of the guidelines. See Note, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DEPAUL L. REV. 127, 130 (1974). Although the Court in *Gilbert* did not advert to these facts, the lack of public response and empirical data concerning the EEOC guidelines do not attest to their meriting "great deference" by the courts.

54. 429 U.S. at 142. The EEOC issued its guidelines on employment practices relating to

contradicted earlier enunciations by the EEOC;⁵⁵ and the EEOC's position was "diametrically oppos[ed]" to the Wage and Hour Administrator's interpretation of the Equal Pay Act.⁵⁶ The Court thus rejected the

pregnancy and childbirth in 1972, eight years after Congress enacted Title VII of the Civil Rights Act of 1964. See note 31 *supra*.

55. 429 U.S. at 142-43. In late 1966 the General Counsel of the EEOC issued opinion letters stating the EEOC position to be that "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such exclusion would not . . . be discriminatory." General Counsel Opinion Letter, Nov. 10, 1966. E.P.G. (CCH) ¶ 17,304.49. The EEOC based its refusal at that time "to compare an employer's treatment of illness or injury with his treatment of maternity" upon the view that "maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most woman employees." *Id.* The EEOC affirmed this position in a 1969 decision, [1973] EEOC DEC. (CCH) ¶ 6084 (Dec. No. 70-360 (1969)), but then summarily reversed itself fifteen months later, [1973] EEOC DEC. (CCH) ¶ 6221 (Dec. No. 71-1474 (1971)). The pregnancy guidelines followed a year later. See Note, *Current Trends in Pregnancy Benefits*, note 53 *supra*, at 129-30.

Justice Brennan, dissenting in *Gilbert*, found "bitter irony" in the Court's reasoning in that: the care that preceded promulgation of the 1972 guideline is today condemned by the Court as tardy indecisiveness, its unwillingness irresponsibly to challenge employers' practices during the formative period is labeled as evidence of inconsistency, and this indecisiveness and inconsistency are boot-strapped into reasons for denying the Commission's interpretation its due deference.

429 U.S. at 157 (Brennan, J., dissenting). In light of the absence of hard studies and solicitation of public response by the EEOC prior to issuing the guidelines, see note 53 *supra*, and the analysis upon which the EEOC based its earlier position, Justice Brennan's conclusion that "the 1972 guideline represents a particularly conscientious and reasonable product of EEOC deliberations," 429 U.S. at 157 (Brennan, J., dissenting), is of doubtful accuracy.

56. 429 U.S. at 144-45. The Wage and Hour Administrator had determined that it is not a violation of the Equal Pay Act, 29 U.S.C. § 206(d) (1976), "[i]f employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women . . . even though the benefits which accrue to the employees in question are greater for one sex than for the other." 29 C.F.R. § 800.116(d) (1980). Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976)—the "Bennett Amendment"—provides that it is not an unlawful employment practice for an employer to differentiate on the basis of sex for determining the compensation of its employees if such differentiation is authorized by the Equal Pay Act. Therefore, the Court reasoned, the Wage and Hour Administrator's interpretation of the Equal Pay Act was, by virtue of § 703(h), applicable to Title VII as well. 429 U.S. at 144. The Court concluded that, if it were to accept the EEOC position, "[p]etitioner's exclusion of benefits for pregnancy disability would be declared an unlawful employment practice under § 703(a)(1), but would be declared not to be an unlawful employment practice under § 703(h)." *Id.* at 145.

When Congress enacted the 1978 Pregnancy Discrimination Act, see note 109 *infra*, it expressly repudiated this reasoning by the Court. Section 701(k) accomplishes this by first mandating that women affected by pregnancy or related medical conditions be treated the same as other employees not so affected but similarly disabled; the section then provides that "nothing in section 703(h) shall be interpreted to permit otherwise." See note 1 *supra*. The purpose of the disclaimer, according to the Senate committee report on the amendment, was to make clear that "any application of the Bennett amendment which assumes that the provision insulates from Title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act is not correct," and to ensure that "employers may not rely on the Equal Pay Act to prevent the correc-

EEOC pregnancy guidelines as standing virtually alone and followed instead what it perceived to be the plain meaning of section 703(a)(1).⁵⁷

After *Gilbert*, lower federal courts upheld,⁵⁸ often summarily,⁵⁹ the exclusion of pregnancy benefits from disability plans similar to General Electric's. These courts did not always agree on the extension of *Gilbert* to other areas of alleged pregnancy discrimination⁶⁰ or on the possibility of showing a violation of Title VII by proof of a discriminatory effect on women.⁶¹ For the most part, however, the federal courts accepted the *Gilbert* decision rather than attempting to distinguish it as they had *Geduldig*.⁶²

State courts, on the contrary, overwhelmingly rejected the result in *Gilbert*. As one commentator observed, "the ink was hardly dry on *Gilbert* when the Court of Appeals of New York refused to follow it."⁶³ Courts in Illinois,⁶⁴ Massachusetts,⁶⁵ Iowa,⁶⁶ New Jersey,⁶⁷ Penn-

tion of pregnancy discrimination under Title VII." S. REP. NO. 331, 95th Cong., 1st Sess. 7 (1977). See also H.R. REP. NO. 948, *supra* note 4, at 7.

57. 429 U.S. at 145.

58. See, e.g., *Eberts v. Westinghouse Elec. Corp.*, 581 F.2d 357 (3d Cir. 1978); *Women in City Government United v. City of New York*, 563 F.2d 537 (2d Cir. 1977); *Guse v. J.C. Penney Co.*, 562 F.2d 6 (7th Cir. 1977). See generally *Barkett*, *supra* note 1, at 461-64.

59. See, e.g., *Liss v. School Dist. of Ladue*, 548 F.2d 751 (8th Cir. 1977); *Madrid v. Board of Educ. of Gilroy Unified School Dist.*, 429 F. Supp. 816 (N.D. Cal. 1977); *Willett v. Emory & Henry College*, 427 F. Supp. 631 (W.D. Va. 1977), *aff'd*, 569 F.2d 212 (4th Cir. 1978); *Tawney v. Board of Educ. of Boone*, 426 F. Supp. 528 (S.D. W. Va. 1977).

60. Compare *Mitchell v. Board of Trustees of Pickens County School Dist. A*, 15 Fair Empl. Prac. Cas. 338 (D.S.C. 1977) (in light of *Gilbert*, defendants' policy of not renewing pregnant teachers' contracts did not constitute sex discrimination) with *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977) (*Gilbert* holding is not precedent for excluding pregnancy from protection against invidious employment termination).

61. Compare *Women in City Government United v. City of New York*, 563 F.2d 537, 540-41 (2d Cir. 1977) (*Gilbert* bars plaintiffs from establishing discrimination through proof of disparate impact) with *In re National Airlines, Inc.*, 434 F. Supp. 249, 256 (S.D. Fla. 1977) (after *Gilbert*, plaintiffs may still show gender based effect of pregnancy policy under Title VII).

62. See cases cited in I A. LARSON, *EMPLOYMENT DISCRIMINATION*, 8-23 n.57 (1979).

63. I A. LARSON, *supra* note 62, at 8-61 to 8-62. The case referred to is *Brooklyn Union Gas Co. v. New York State Human Rights App. Bd.*, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976).

64. *Illinois Bell Tel. Co. v. Fair Employment Practices Comm'n*, 68 Ill. App. 3d 829, 386 N.E.2d 599 (1979).

65. *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, — Mass. —, 375 N.E.2d 1192 (1978).

66. *Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n*, 268 N.W.2d 862 (Iowa 1978).

67. *Castellano v. Linden Bd. of Educ.*, 158 N.J. Super. 350, 386 A.2d 396 (1978).

sylvania,⁶⁸ and Wisconsin⁶⁹ followed New York's lead.⁷⁰ These courts generally based their decisions on state antidiscrimination or fair employment laws⁷¹ and held that *Gilbert's* interpretation of Title VII did not dictate the result under state law.⁷² As the Massachusetts Supreme Judicial Court recognized, state law may "impose a higher duty than that existing under present Federal law."⁷³ An interpretation of state law that requires the inclusion of pregnancy benefits in a comprehensive disability plan, reasoned that court, "is certainly not inconsistent with the expressed purpose of Title VII of eliminating all practices which lead to inequality in employment opportunity."⁷⁴

One year after its decision in *Gilbert*, the United States Supreme Court handed down its final word on pregnancy discrimination before Congress acted. In *Nashville Gas Company v. Satty*,⁷⁵ the Court again faced the question of when an employment policy that "attaches a special burden to the risk of absenteeism caused by pregnancy" violates Title VII.⁷⁶ This time, however, Justice Stevens observed, the Court made clear that the correct answer to this question is neither "always" nor "never," but simply "sometimes."⁷⁷

Satty involved two distinct employment practices—sick pay and seniority—and the Supreme Court reached opposite conclusions with re-

68. *Anderson v. Upper Bucks County Area Voc. Tech. School*, 30 Pa. Commw. Ct. 103, 373 A.2d 126 (1977).

69. *Goodyear Tire & Rubber Co. v. Department of Indus., Labor & Human Relations*, 87 Wis. 2d 56, 273 N.W.2d 786 (1978).

70. *Contra*, *Narrangansett Elec. Co. v. Rhode Island Comm'n for Human Rights*, 118 R.I. 457, 374 A.2d 1022 (1977); *Group Hospitalization, Inc. v. District of Columbia Comm'n on Human Rights*, 380 A.2d 170 (D.C. 1977).

71. "Although only a few states . . . have passed legislation specifically prohibiting employment discrimination based on pregnancy, some 30 states presently interpret their own fair employment practices laws, state constitutions, or other laws to prohibit sex discrimination based on pregnancy and childbirth." *Pregnancy Benefits and Discrimination Rules*, [1978] LAB. L. REP. (CCH), No. 55, ¶ 201. For a comprehensive survey of the various state laws, regulations, guidelines, FEP Commission decisions, case law, and Attorney Generals' opinions regarding pregnancy discrimination, see *id.* at ¶¶ 202-36. See also Note, *Pregnancy-Based Discrimination—Gilbert and Alternative State Remedies*, 81 DICK. L. REV. 517, 536-38 (1977).

72. See, e.g., *Brooklyn Union Gas Co. v. New York State Human Rights App. Bd.*, 41 N.Y.2d 84, 85, 885, 359 N.E.2d 393, 394, 390 N.Y.S.2d 884 (1976); *Anderson v. Upper Bucks County Area Voc. Tech. School*, 30 Pa. Commw. Ct. 103, 108, 373 A.2d 126, 131 (1977).

73. *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, — Mass. —, 375 N.E.2d 1192, 1198 (1978).

74. *Id.*

75. 434 U.S. 136 (1977).

76. *Id.* at 153 (Stevens, J., concurring in the judgment).

77. *Id.* at 153-54 (Stevens, J., concurring in the judgment).

gard to each. The first company policy at issue was the denial of sick pay to employees disabled by pregnancy, while granting sick pay to employees disabled by nonoccupational sickness or injury.⁷⁸ The Court, in an opinion by Justice Rehnquist⁷⁹ who had written the *Gilbert* opinion,⁸⁰ found the denial of sick pay to pregnant employees “legally indistinguishable from the disability insurance program upheld in *Gilbert*.”⁸¹ Thus the Court sanctioned the denial with only brief discussion, citing *Gilbert* as authority that “exclusions of this kind are not *per se* violations of Title VII.”⁸² Nevertheless, the Court remanded the case for a determination of Mrs. Satty’s right to proceed further in the district court on the theory that denial of sick pay was a “mere pretext” designed to effect invidious discrimination against women.⁸³ The Court recognized here, as it had in both *Geduldig*⁸⁴ and *Gilbert*,⁸⁵ that a showing of such pretext would overcome the “facial neutrality” of the sick pay policy.⁸⁶

The second employment policy at issue in *Satty* was the denial of accumulated seniority to employees returning from pregnancy leave.⁸⁷ Nashville Gas Company required pregnant employees to take indeterminate leave; these employees accumulated no seniority during that leave and forfeited all seniority previously accrued.⁸⁸ Because of this policy, Mrs. Satty—who had accumulated three years seniority—was unsuccessful in her three bids for permanent positions with the com-

78. *Id.* at 138.

79. Chief Justice Burger and Justices Stewart, White, and Blackmun joined in the opinion. Justices Brennan, Marshall, and Powell joined only in that part of the opinion dealing with the seniority policy. See notes 86-104 *infra* and accompanying text. Justice Powell filed an opinion, in which Justices Brennan and Marshall joined, concurring in the result and concurring in part. Justice Stevens filed an opinion concurring in the judgment. See note 105 *infra*.

80. See note 38 *supra*.

81. 434 U.S. at 143.

82. *Id.*

83. *Id.* at 146.

84. See note 10 *supra* and accompanying text.

85. See note 46 *supra* and accompanying text.

86. 434 U.S. at 145.

87. *Id.* at 138.

88. *Id.* at 138-39. Nashville Gas Company awarded permanent jobs on the basis of seniority among equally qualified applicants. The company placed an employee returning from pregnancy leave in any position for which she was qualified, provided that no individual currently employed had bid for the job. If a permanent position was not immediately available to the returning employee, the company attempted to place her in a temporary position. If the employee eventually acquired a permanent position, she regained her lost seniority for the purposes of pension and vacation plans, but not of bidding for future job openings. *Id.* at 139.

pany after her pregnancy leave.⁸⁹

The Supreme Court unanimously concluded that the seniority policy violated Title VII's ban on sex discrimination.⁹⁰ The majority of the Court used novel reasoning to distinguish the denial of seniority from the denial of disability benefits or sick pay.⁹¹ The Court based its decision on section 703(a)(2) of Title VII; this section prohibits an employer from limiting or classifying employees in any way that deprives an individual of "employment opportunities" or adversely affects an employee's status because of gender.⁹² The majority found it beyond dispute that the company's seniority policy deprived an employee returning from pregnancy leave of employment opportunities and adversely affected her employee status.⁹³ The pivotal question, then, was whether this was done because of her sex.⁹⁴

Geduldig and *Gilbert* declared that "because of pregnancy" does not imply "because of sex" and that pregnancy discrimination is not per se sex discrimination.⁹⁵ These decisions also recognized, however, that in some circumstances one can establish a prima facie violation of Title VII by showing that a facially neutral employment policy has a discriminatory effect.⁹⁶ The Court in *Gilbert* seemed to doubt whether

89. *Id.* at 139. Upon Mrs. Satty's return from seven weeks' pregnancy leave, the company placed her in a temporary position at a lower salary than she had previously earned. After completion of her temporary assignment—and the three unsuccessful bids for a permanent position—Mrs. Satty requested that the company terminate her employment in order to draw unemployment compensation. Had she retained her accumulated seniority, Mrs. Satty concededly would have secured one of the positions. *Id.*

90. *Id.* at 139-40. Justices Brennan, Marshall, and Powell joined in this part of the Court's opinion. *See* note 78 *supra*. In a separate opinion, Justice Stevens concurred only in the judgment, reaching the same result through very different reasoning. *See* note 106 *infra*.

91. The observations of one commentator privileged to attend oral argument of this case raises the possibility that the Court's reasoning here was ad hoc.

There was no quarrel with the fact that specific job opportunities were lost to Mrs. Satty as a result of the seniority policy. At oral argument of this case, . . . the Justices were clearly troubled by this fact, especially when the Company's counsel could offer no reason whatsoever for the existence of the policy. Neither the Company's counsel nor Mrs. Satty's counsel could offer the Court a plausible means to distinguish *Gilbert*, but one sensed that some means would be found

Barkett, *supra* note 3, at 469 n.270.

92. 42 U.S.C. § 2000e-2(a)(2) (1976). *See* note 186 *infra* for the full text of this section.

93. 434 U.S. at 141.

94. *See* note 92 *supra*.

95. *See* notes 34 and 43 *supra* and accompanying text. The Court in *Satty* reaffirmed this: "Petitioner's decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy." 434 U.S. at 140.

96. *See* note 46 *supra* and accompanying text.

proof of a discriminatory effect will suffice under section 703(a)(1),⁹⁷ and the Court in *Satty* again declined to decide this issue.⁹⁸ The *Satty* Court left no doubt, though, that intentional discrimination and policies neutral on their face, but having a discriminatory effect, may violate section 703(a)(2).⁹⁹

The Court, despite its uncertainty about the significance of a discriminatory effect in General Electric's disability plan, held in *Gilbert* that no such effect had been shown.¹⁰⁰ To distinguish the seniority policy in *Satty*, the Court relied upon a double dichotomy: between benefit and burden, and between section 703(a)(1) and section 703(a)(2). The employer in *Gilbert*, the Court explained, "merely refused to extend to women a benefit that men cannot and do not receive"; the employer in *Satty*, however, imposed a substantial burden on women that men need not suffer.¹⁰¹ The Court characterized the distinction as more than one of semantics.¹⁰² *Gilbert* held that, under section 703(a)(1), greater economic benefits need not be paid to one sex or the other solely because of their "differing roles in the 'scheme of human existence.'" ¹⁰³ That holding, the *Satty* Court reasoned, "does not allow us to read section 703(a)(2) to permit an employer to *burden* female employees in such a way as to deprive them of employment opportunities because of their different role."¹⁰⁴ To complete the analysis, the Court had only to consider the argument that the seniority policy, though

97. See note 46 *supra*.

98. We again need not decide whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703(a)(1). Cf. *McDonnell Douglas Corp.*, [411 U.S. 792 (1973)] at 802-806. . . .

Respondent failed to prove even a discriminatory effect with respect to petitioner's sick-leave plan.

434 U.S. at 144-45. The Court, however, did allow a remand with regard to this issue. See note 83 *supra* and accompanying text.

99. 434 U.S. at 141, *citing* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

100. See notes 47-51 *supra* and accompanying text. The Court in *Satty* quoted this portion of the *Gilbert* opinion. See 434 U.S. at 141-42.

101. 434 U.S. at 142.

102. *Id.*

103. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 139 n.17 (1976) (emphasis added).

104. 434 U.S. at 142 (emphasis added). The Court also reasoned that the denial of sick pay to pregnant employees did not constitute this type of impermissible burden on women employees:

[I]t is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick-leave compensation program 'would deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee' in violation of § 703(a)(2). The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status. . . . § 703(a)(1) . . . would appear to be the proper

burdensome on female employees, was justified by "business necessity."¹⁰⁵ The Court found no such justification, and therefore held the policy unlawful under Title VII.¹⁰⁶

The *Satty* decision required the lower courts to reassess the implications drawn from *Gilbert*. Courts often found a result deemed compelled by *Gilbert* to be in fact prohibited after *Satty*.¹⁰⁷ The Supreme

section of Title VII under which to analyze questions of sick-leave or disability payments.

Id. at 144-45.

In its report on the 1978 amendment to Title VII, the House committee in charge of the bill criticized the Court's conclusions here, stating that the Court "did not explain why the 'burden' approach did not apply in *Gilbert*, where only women were burdened with paying their living expenses out of their own savings during a disability period. Nor did it explain why the right to retain one's seniority while absent from work is not a 'benefit.'" H.R. REP. No. 948, *supra* note 4, at 3. The committee concluded, therefore, that *Satty* "left both employers and employees in the untenable position of guessing, without any judicial guidance, whether the courts would apply the 'benefits' or the 'burdens' label to a particular policy." *Id.*

105. 434 U.S. at 143. The "business necessity" defense to a Title VII claim is a judicially-evolved doctrine to the effect that Title VII does not prohibit employment practices required by business necessity, so long as no discriminatory intent exists. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971), the court explained that the "test" under this doctrine is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." The court then continued:

Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish it equally well with a lesser [discriminatory] impact.

Id. at 798. See generally Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L. J. 98 (1974). The business necessity defense supplements the statutory exemption from Title VII's requirements for bona fide occupational qualifications. See note 190 *infra*.

106. In a separate opinion, Justice Stevens concurred in the judgment of the Court in *Satty*, but characterized the dichotomies on which the Court relied as "illusory" and capable of engendering "confusion among those who must make compliance decisions on a day-to-day basis." 434 U.S. at 153-54 (Stevens, J., concurring in the judgment). Consequently, Justice Stevens offered an alternative, "and rather pragmatic, basis for reconciling the two parts of the decision with each other and with [*Gilbert*]." *Id.* at 153. This reconciliation allows an employment policy which burdens pregnant or formerly pregnant employees, but "only to the extent that the focus of the policy is . . . on the physical condition [of pregnancy] rather than the person." *Id.* at 156 n.7. Though the *Gilbert* Court held that pregnancy discrimination is not per se sex discrimination, still, in Justice Stevens' view, "discrimination against pregnant or formerly pregnant employees—as compared with other employees—does constitute sex discrimination." *Id.* at 155. The difference, expressed "pragmatically," is whether or not the employer has "a policy which adversely affects a woman beyond the term of her pregnancy leave." *Id.* If the employer's policy treats pregnancy as more than a "temporal gap in the full employment status of a woman," then, according to Justice Stevens, that policy violates Title VII as interpreted by *Gilbert*. *Id.* at 156-57.

107. Compare *Mitchell v. Board of Trustees, Pickens County School Dist. A*, 15 Empl. Prac.

Court, however, gave little guidance in *Satty* for applying its extemporaneous “benefit/burden” distinction to pregnancy related employment policies.¹⁰⁸ Thus, the task of bringing order to this area of Title VII fell virtually by default to the Congress.

II. THE PROBLEM

On October 31, 1978, President Carter signed into law the Pregnancy Discrimination Act of 1978,¹⁰⁹ amending section 701 of Title VII of the Civil Rights Act of 1964.¹¹⁰ Ostensibly, the amendment’s purpose was merely to “clarify” existing law, not to substantively change the application of Title VII.¹¹¹ This estimation is too modest, however, in view of the many new questions that the amendment raises.

The 1978 amendment, at times referred to as the “Gilbert Amend-

Dec. 6111 (D.S.C. 1977) (refusal to rehire teacher because of pregnancy not sexually discriminatory in light of *Gilbert*) with *Mitchell v. Board of Trustees, Pickens County School Dist. A*, 599 F.2d 582 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 453 (1979) (intervening *Satty* decision requires reversal of district court).

108. See H.R. REP. NO. 948, *supra* note 4, at 3 for a discussion of the problematic “benefit/burden” distinction.

109. Pub. L. No. 95-555, 92 Stat. 2076. Senator Williams introduced S. 995 on March 15, 1977, for himself and ten co-sponsors. Representative Hawkins introduced H.R. 5055, with eighty-one co-sponsors, on the same date. On April 5, 1977, the House bill was reintroduced as H.R. 6075. The Senate Subcommittee on Labor reported S. 995 to the full Committee on Human Resources on June 8, 1977. This committee, after amending the bill to add an effective date and to provide for the adjustment of existing benefit plans, unanimously reported the bill to the Senate on June 16, 1977. The Senate passed S. 995 on September 16, 1977.

On February 2, 1978, the House Subcommittee on Employment Opportunities reported H.R. 6075 to the full Committee on Education and Labor. This committee, on March 2, 1978, amended the bill to provide for exemption of abortions from fringe benefit coverage except where the life of the mother is endangered, and then, by a vote of 25 to 6, reported the bill to the House. The House passed H.R. 6075 on July 18, 1978. Because the Senate version of the bill contained no abortion amendment, the House Committee of Conference met to consider S. 995 and issued its report on October 13, 1978. On this same date, the Senate agreed to recede from its disagreement with the House abortion amendment, with some modification, and passed S. 995 as amended. On October 15, 1978, the House approved the bill and sent it to the President. See S. REP. NO. 331, *supra* note 56, at 3; H.R. REP. NO. 948, *supra* note 4, at 4; H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess. 3 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4765.

110. 42 U.S.C. § 2000e (1976).

111. “This bill is intended to make plain that, under Title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex.” S. REP. NO. 331, *supra* note 56, at 3. See also H.R. REP. NO., 948, *supra* note 4, at 2, in which the committee stated that the House bill “will amend Title VII to clarify Congress’ intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment.” See also *id.* at 3-4 (necessary that Congress “clarify its original intent” with regard to sex discrimination).

ment,"¹¹² embodies Congress' express intention to overrule the *Gilbert* decision by making clear that sex discrimination includes pregnancy based discrimination.¹¹³ Congress, through this amendment, sought to "reflect the commonsense view" of sex discrimination and to "ensure that working women are protected against *all* forms of employment discrimination based on sex."¹¹⁴ The Senate and House committees that studied the amendment concluded that the 1972 EEOC pregnancy guidelines,¹¹⁵ the pre-*Gilbert* lower federal court rulings,¹¹⁶ and the dissenting Justices in *Gilbert*¹¹⁷ had correctly interpreted the prohibition of sex discrimination in Title VII of the 1964 Act. Furthermore, the House committee charged that, contrary to the original congressional intent, the Supreme Court's "narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment," leaving in their wake "a state of national confusion" and "inconsistent practices from State to State."¹¹⁸ This committee further found that the high court's interpretations of Title VII portended "an intolerable

112. See, e.g., 1 A. LARSON, *supra* note 62, at 8-19.

113. For a discussion of *Gilbert*, see notes 32-57 *supra* and accompanying text.

114. H.R. REP. NO. 948, *supra* note 4, at 3 (emphasis added). Compare the virtually identical language in S. REP. NO. 331, *supra* note 56, at 3.

115. Referring to the EEOC's 1972 guidelines which interpreted Title VII's prohibition of sex discrimination to include discrimination based on pregnancy or related medical conditions (see note 19 *supra*), both the Senate and House committees concluded that "these guidelines rightly implemented the Congress' intent in barring sex discrimination in the 1964 [Civil Rights] act." S. REP. NO. 331, *supra* note 56, at 2. See also H.R. No. 948, *supra* note 4, at 2.

116. The House committee report noted that, prior to *Gilbert*, "[e]ighteen Federal district courts and all seven Federal courts of appeals which have considered the issue have rendered decisions prohibiting discrimination in employment based on pregnancy, in accord with the Federal guidelines." H.R. REP. NO. 948, *supra* note 4, at 2. See also cases cited in notes 24 and 25 *supra*. The Senate committee report referred only to the pre-*Gilbert* decisions in the federal courts of appeals. S. REP. NO. 331, *supra* note 56, at 2.

117. The Senate committee report quoted with approval Justice Brennan's statement in his dissent in *Gilbert*, that "[s]urely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" S. REP. NO. 331, *supra* note 56, at 2, quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 149 (Brennan, J., dissenting). See also H.R. REP. NO. 948, *supra* note 4, at 2. Both the Senate and House committees also quoted Justice Stevens' argument in his dissent in *Gilbert*, that "it is the capacity to become pregnant which primarily differentiates the female from the male." S. REP. NO. 331, *supra* note 56, at 3; H.R. REP. NO. 948, *supra* note 4, at 2, quoting 429 U.S. at 162 (Stevens, J., dissenting). Both committees viewed the quoted passages from the *Gilbert* dissents as "correctly express[ing] both the principle and the meaning of Title VII." S. REP. NO. 331, *supra* note 56, at 2; H.R. REP. NO. 948, *supra* note 4, at 2.

118. H.R. REP. NO. 948, *supra* note 4, at 3. Note that even after the Pregnancy Discrimination Act of 1978, the danger of "inconsistent practices from State to State" still exists, though to a lesser degree. See notes 72 and 73 *supra* and accompanying text.

potential trend in employment practices” to which Congress could not yield.¹¹⁹ The Senate committee likewise viewed *Gilbert* as “threaten[ing] to undermine the central purpose of the sex discrimination prohibitions of [T]itle VII.”¹²⁰ Congress added section 701(k) to alleviate this threat.

As one commentator has observed,¹²¹ section 701(k) has on its face two functions: definitional and substantive. Section 701 is the definitional section of Title VII;¹²² the first clause of subsection (k) therefore appropriately defines “because of sex” or “on the basis of sex,” for all purposes of Title VII, as including “because of or on the basis of pregnancy, childbirth or related medical conditions.”¹²³ The second clause of the subsection then imposes a requirement that “women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”¹²⁴ If this clause in fact announces a new substantive obligation for employers, its presence in an otherwise definitional section of Title VII is anomalous. Of course, Congress could have simply amended the definition of “sex discrimination” and relied on existing substantive provisions of Title VII—particularly sections 703(a)(1) and (2)¹²⁵—to implement the newly clarified original intent of the prohibition of sex discrimination. Indeed, if the sole purpose of section 701(k) is merely to make explicit what has always been embodied in Title VII, (though disregarded by the Supreme Court), one may question the necessity of the second clause of the amendment.¹²⁶

119. H.R. REP. NO. 948, *supra* note 4, at 4.

120. S. REP. NO. 331, *supra* note 56, at 3.

121. Barkett, *supra* note 3, at 482 n.306.

122. The other terms defined, for purposes of Title VII, by subsections of § 701 are as follows: (a) “person;” (b) “employer;” (c) “employment agency;” (d) “labor organization;” (f) “employee;” (g) “commerce;” (h) “industry affecting commerce;” (i) “State;” and (j) “religion.” Subsection (e) alone goes beyond pure definition by declaring that “[a] labor organization shall be deemed to be engaged in an industry affecting commerce” if certain enumerated criteria are satisfied, but this subsection in effect simply expands the definition in subsection (d).

123. 42 U.S.C. § 2000e-(k).

124. *Id.* (emphasis added).

125. *See* note 186 *infra*.

126. Conceivably, Congress may have been concerned solely with limiting the effect of § 703(h), the “Bennett Amendment.” *See* note 56 *supra*. Then the language requiring equal treatment for pregnant workers may be viewed as merely prefatory to the disclaimer of the applicability of § 703(h). The legislative history of § 701(k), however, contradicts this interpretation of its underlying intent. *See* notes 113-120 *supra* and accompanying text. Furthermore, both the House

The legislative history of section 701(k) belies the interpretation that Congress intended the amendment to impose a new substantive obligation on employers. As indicated earlier,¹²⁷ congressional committees that studied the amendment viewed it as simply clarifying the intent of the Congress that enacted the Civil Rights Act of 1964. The amendment did this by expressly broadening the definition of sex discrimination, "as proscribed in the existing statute, to include these physiological occurrences peculiar to women [viz., pregnancy, childbirth, and related medical conditions]"¹²⁸ The House committee recognized that the amendment would "reflect no new legislative mandate . . . nor effect changes in practices, costs, or benefits beyond those intended by Title VII"¹²⁹ On the contrary, the amendment purposefully utilized a narrow approach to dispel the confusion resulting from *Gilbert*.¹³⁰

Given the barren legislative history of the addition of sex discrimination to the prohibitions of Title VII in 1964,¹³¹ the declaration of another Congress, fourteen years later, that it is merely clarifying the original intent underlying that addition, is less than candid. This is particularly true if, as the little available history indicates, the sponsor

and Senate committee reports recognized that the disclaimer provision of § 701(k) is "[i]n addition to" the provision mandating that pregnant employees be treated the same as nonpregnant, but similarly disabled, employees. H.R. REP. NO. 948, *supra* note 4, at 7; S. REP. NO. 331, *supra* note 56, at 7.

Most likely, Congress intended the second clause of § 701(k) to clarify the implications of its broadened definition of 'sex discrimination'; that is, Congress, by expressly requiring equal treatment for pregnant workers, was merely spelling out what the already existing substantive provisions of Title VII would require of employers under the expanded definition. This interpretation seems the most reasonable in light of the legislative history of § 701(k). *See* notes 128-130 *infra* and accompanying text. Congress' attempt at translucence in § 701(k), however, has resulted in opaqueness with regard to fundamental questions of the interpretation and application of the amendment. *See* notes 171-200 *infra* and accompanying text.

127. *See* note 111 *supra* and accompanying text.

128. S. REP. NO. 331, *supra* note 56, at 3-4. *See also* H.R. REP. NO. 948, *supra* note 4, at 3-4.

129. H.R. REP. NO. 948, *supra* note 4, at 3.

130. *Id.* at 4.

131. As Justice Rehnquist pointed out in his opinion for the Court in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976): "The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity." *Id.* at 143. Indeed, Representative Green cited the absence of legislative hearings in her arguments against the House floor amendment adding the ban on sex discrimination. She noted that "there was not one word of testimony in regard to this amendment given before the Committee on the Judiciary of the House or before the Committee on Education and Labor of the House, where this bill was considered." 110 CONG. REC. 2582 (1964). *See generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967).

of the sex discrimination amendment in 1964 intended it to help prevent passage of Title VII by that Congress.¹³² One may argue that it is irrelevant whether section 701(k) is only expositive of the original congressional intent in enacting Title VII or, instead, imposes a new substantive requirement upon employers; the prospective effects of the amendment will be significant regardless of the interpretation.¹³³ Serious problems arise, however, with regard to the application of section

132. Rep. Green of Oregon held this view, as evidenced by her warning to the House that the "sex discrimination" amendment to Title VII "will clutter up the bill and it may later—very well—be used to help destroy this section of the bill by some of the very people who today support it." 110 CONG. REC. 2581 (1964).

The origin of the amendment justifies Rep. Green's skepticism. Rep. Smith of Virginia, a staunch opponent of the Civil Rights Act, introduced the amendment on the House floor, and a group of Southern representatives joined in support: Rivers (S.C.), Andrews (Ala.), Huddleston (Ala.), Tuten (Ga.), and Pool (Tex.). See *id.* at 2577, 2583-84. The proponents argued that, unless a prohibition of sex discrimination were included in Title VII, employers would always hire black women over white women. See *id.* at 2578. Though she did not address this nonsequitur, Rep. Green did question the sincerity of the proponents' concern for women's rights when she sardonically welcomed the "conversion" of those gentlemen "who are most strong in their support" for the amendment, noting that these same congressmen "probably gave us the most opposition when we considered the bill which would grant equal pay for equal work just a very few months ago." *Id.* at 2581.

To be sure, several congresswomen also spoke in support of the sex discrimination amendment, including Bolton (Ohio), Griffiths (Mich.), St. George (N.Y.), May (Wash.), and Kelly (N.Y.). See *id.* at 2578-82. Rep. Kelly sought to reassure women's rights advocates by voicing her certainty that "the acceptance of the amendment will not repeal the protective laws of the several States." *Id.* at 2583. Nevertheless, as Rep. Green stated, "[t]here was not one single organization in the entire United States that petitioned either one of [the House] committees to add this amendment to the bill." *Id.* at 2582. In fact, many women's groups, including the President's Commission on the Status of Women, opposed the amendment on the ground that sex discrimination involves problems sufficiently different from other discrimination to make their joint treatment under Title VII undesirable. See Miller, *supra* note 131, at 881; 110 CONG. REC. 2577-78 (1964) (remarks of Rep. Celler).

The House finally passed the sex discrimination amendment by a vote of 168-133. 110 CONG. REC. at 2584. Rep. Green's apprehensions with regard to the underlying intent of the amendment's sponsors were apparently well founded. Ten of the eleven congressmen who spoke in support of the amendment voted against the Civil Rights Bill as amended. See Miller, *supra* note 131, at 882 n.29.

133. In testimony before the congressional committees considering the legislation, estimates of the added employer costs for maternity benefits that would be required by the Pregnancy Discrimination Act under temporary disability plans ranged from \$130 million to \$571 million. See *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 180-86 (1977); *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 424-25 (1977). Both the House and Senate committees, however, found the Department of Labor's estimate of \$191.5 million in additional costs, including administrative costs, to be the most reasonable. This amount represents a 3.5 percent increase in total contributions to

701(k) precisely because its underlying intent is unclear. To these problems this Note now turns.

The Senate committee report clearly states that the basic standard embodied in section 701(k) is "comparability among employees."¹³⁴ As one senator explained in debate, the "touchstone of compliance" with the amendment is equality of treatment.¹³⁵ Both the literal language of the amendment¹³⁶ and abundant, unambiguous legislative history¹³⁷ compel this interpretation of the subsection. Thus, differential treatment of employees for any employment related purpose must be based on differences in the employees' ability or inability to work

temporary disability plans—an additional 1-½ cents per dollar of wages for covered workers. H.R. REP. NO. 948, *supra* note 4, at 9-10; S. REP. NO. 331, *supra* note 56, at 10-11.

To the \$191.5 million estimate must be added the additional employer costs incurred under hospital-medical benefit plans as a result of the amendment to Title VII. Estimates of this cost reached \$1.7 billion, representing a 5.4 percent increase in the cost of hospital-medical benefits. The Senate committee report, however, challenged the reliability of this figure in that two-thirds of the estimate was apparently based on the "assumption that this legislation could require medical and hospital insurance coverage for maternity under all plans administered by insurance companies"—an assumption expressly repudiated by the committee reports. *Id.* at 9. *See also* notes 164-70 *infra* and accompanying text. While both the Senate and House committees conceded that "no accurate estimate of this cost is practicable," the Senate committee contended that the cost increase would be "far less" than the 5.4 percent estimate. S. REP. NO. 331, *supra* note 56, at 10; H.R. REP. NO. 948, *supra* note 4, at 10. The Senate committee concluded that the expected costs due to the amendment, "although not negligible, can be sustained without any undue burden on employers." S. REP. NO. 331, *supra* note 56, at 9. The committee added, however, that "even a very high cost could not justify continuation" of pregnancy discrimination. *Id.* at 11.

The Congressional Budget Office assessed the likelihood of increased governmental costs due to H.R. 6075 and concluded that "no additional cost to the government would be incurred as a result of enactment of this bill." *See* H.R. REP. NO. 948, *supra* note 4, at 12.

134. S. REP. NO. 331, *supra* note 56, at 5.

135. 123 CONG. REC. 29645 (1977) (remarks of Sen. Stafford).

136. "[W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e-(k) (1976 & Supp. II 1978) (emphasis added).

137. [Under this bill,] [p]regnant women who are able to work must be permitted to work on the *same* conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the *same* rights, leave privileges and other benefits, as other workers who are disabled from working.

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

. . . [T]his bill would prevent employers from treating pregnancy and childbirth *differently* from other causes of disability. . . .

. . . .

. . . [Section 701(k)] makes clear that fringe benefit programs must treat women affected by [pregnancy-related] conditions *equally* to other employees on the basis of their ability or inability to work;

S. REP. NO. 331, *supra* note 56, at 4, 14 (emphasis added).

rather than on differences in sex, including differences resulting from pregnancy, childbirth or related medical conditions.¹³⁸

The Senate committee report makes clear that ability to work is the only permissible criterion for differential treatment of employees, and that employers may not approach pregnancy generically, "without regard to its functional comparability to other conditions."¹³⁹ The treatment of pregnant employees must focus "not on their condition alone but on the actual effects of that condition on their ability to work."¹⁴⁰

The above interpretation of section 701(k) seems to establish a straightforward, concise rule for employers: treat pregnancy related disabilities the same as any other disability for all employment related purposes. Moreover, the EEOC guidelines on pregnancy related employment policies, modified only slightly after enactment of section 701(k),¹⁴¹ and a series of thirty-seven "Question and Answers on Preg-

H.R. 6075 . . . specifically defines standards which require that pregnant workers be treated the *same* as other employees on the basis of their ability or inability to work.

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

. . . . This bill would prevent employers from treating pregnancy, childbirth and related medical conditions in a manner *different from* their treatment of other disabilities. In other words, this bill would require that women disabled due to pregnancy, childbirth or other related medical conditions be provided the same benefits as those provided other disabled workers.

H.R. REP. NO. 948, *supra* note 4, at 3, 4, 5 (emphasis added).

Remarks of legislators during debate on the amendment echo this understanding that the amendment embodies a basic principle of equality of treatment: "[T]his bill demands *equal treatment* and nothing more. When an employer treats pregnancy, childbirth, and related conditions *the same as* he treats any other disabling condition, then he has complied with this bill." 123 CONG. REC. 29645 (1977) (remarks of Sen. Stafford) (emphasis added). "If there is any ambiguity, with regard to income maintenance plans, I cannot see it. . . . shall be treated the *same* for all employment-related purposes." *Id.* at 29644 (remarks of Sen. Williams) (emphasis added).

138. 42 U.S.C. § 2000e-(k) (1976 & Supp. II 1978).

139. S. REP. NO. 331, *supra* note 56, at 4. *See also* note 133 *supra*.

140. S. REP. NO. 331, *supra* note 56, at 4.

141. The EEOC modified in only minor respects its guidelines on employment policies relating to pregnancy and childbirth in response to the "Gilbert Amendment." Indeed, the EEOC prefaced its amended guidelines with the statement that "[t]he Pregnancy Discrimination Act reaffirms EEOC's Guidelines with but minor modifications. For that reason, the Commission believed that only slight modifications of its Guidelines were necessary . . ." 44 Fed. Reg. 23804 (1979).

Sections (a) and (b) of the amended guidelines, 29 C.F.R. § 1604.10 (1979), now read, in part, as follows (added material is italicized, deleted material is bracketed):

nancy Discrimination" appended to those guidelines,¹⁴² embody this basic principle¹⁴³ of the 1978 amendment. The guidelines require equal treatment among pregnant employees and those suffering from other disabilities with regard to coverage of pre-existing conditions;¹⁴⁴ alternative light duty jobs;¹⁴⁵ disability determinations;¹⁴⁶ predetermined leave time;¹⁴⁷ retention of job;¹⁴⁸ credit for time on leave;¹⁴⁹ time limits on benefits;¹⁵⁰ benefits during leave time;¹⁵¹ use of vacation time;¹⁵² leave for childcare;¹⁵³ benefits for dependents;¹⁵⁴ optional insurance plans;¹⁵⁵ reimbursable expenses;¹⁵⁶ dollar limits on benefits;¹⁵⁷

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

(b) Disabilities caused or contributed to by pregnancy, [miscarriage, abortion,] *childbirth or related medical conditions*, [and recovery therefrom are,] for all job-related purposes, [temporary disabilities and should be treated as such] *shall be treated the same as disabilities caused or contributed to by other medical conditions*, under any health or [temporary] disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or [temporary] disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, [or] *childbirth, or related medical conditions* on the same terms and conditions as they are applied to other [temporary] disabilities.

142. The EEOC approved the "Questions and Answers on Pregnancy Discrimination" on March 6, 1979, effective March 9, 1979 (44 Fed. Reg. 13278 (1979)), as an appendix to 29 C.F.R. § 1604. The EEOC amended the "Questions and Answers" by 44 Fed. Reg. 23804 (1979), effective April 20, 1979. The purpose of the appendix was "to clarify [the EEOC's] position on issues relating to enforcement of the Pregnancy Discrimination Act." 29 C.F.R. § 1604 app., at 917 (1979).

143. The introduction to the "Questions and Answers" appendix states that "[t]he basic principle of the Act is that women affected by pregnancy and related conditions must be treated the *same* as other applicants and employees on the basis of their ability or inability to work." 29 C.F.R. § 1604 app., at 917 (1979) (emphasis added).

144. Questions 3-4.

145. Question 5.

146. Question 6.

147. Questions 7-8.

148. Question 9.

149. Questions 10-11.

150. Questions 15-16.

151. Question 17.

152. Question 18.

153. Question 18A.

154. Questions 21-22.

155. Questions 23-24.

156. Question 25.

157. Question 26.

deductibles on benefits;¹⁵⁸ health insurance coverage;¹⁵⁹ and extended benefits.¹⁶⁰ Only rarely does the EEOC's interpretation stray from this requirement of strict equality of treatment.¹⁶¹

The mandate of section 701(k) is clear for an employer who provides leave or benefits to any disabled employees: provide the same benefits for similarly disabled pregnant employees. Because most workers are covered by some form of short term disability plan,¹⁶² section 701(k) should cause few interpretive problems in the usual case.¹⁶³ The problems lie, rather, in the unusual case of an employer who provides little or no leave or benefits to any disabled employee. Under Title VII, may that employer deny maternity benefits to a pregnant employee? Furthermore, may the employer discharge a pregnant employee who of necessity takes maternity leave, though she is thereby treated the same as any similarly disabled, but nonpregnant, employee?

158. Question 27.

159. Question 28.

160. Questions 29-30. Questions 1 and 2 deal with the applicability of the Pregnancy Discrimination Act; question 13, unwed pregnancies; question 14, the absence of male employees; question 19, preemption of state laws; question 20, coverage of state employees; question 31, sharing of costs, question 32, reduction in benefits; question 33, self-insurance; question 34, abortion discrimination; and questions 35-37, benefit coverage of abortions.

161. Question 12 of the appendix asks: "Must an employer hire a woman who is medically unable, because of a pregnancy-related condition, to perform a necessary function of a job?" The EEOC's answer states, in part, that "[a]n employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job." C.F.R. § 1604 app., at 919 (1979). At least one commentator has questioned the authority of the EEOC to qualify "functions necessary to the job" by the word "major," arguing as follows:

Suppose an employer would normally refuse to hire any worker, male or female, who could not perform *all* the necessary functions of the job—major, minor, or in-between. Plainly, under the wording of the statute and under the EEOC's emphatically repeated refrain, the employer could also refuse to hire a pregnant woman similarly limited in her ability.

1 A. LARSON, *supra* note 62, at 8-26 (emphasis in original). This same argument leads one to question the EEOC's authority to require an employer to provide maternity leave though it provides no sick leave generally. See notes 171-175 *infra* and accompanying text.

162. In testimony before a House subcommittee concerning the expected cost of implementing the Pregnancy Discrimination Act, the Department of Labor estimated that 34.2 million workers in the private sector alone were covered by temporary disability insurance plans in 1976. *Hearings on H.R. 5055 and H.R. 6075, supra* note 133, at 180-81. In similar testimony before a Senate subcommittee, the American Council of Life Insurance and the Health Insurance Association of America estimated that 68 percent of the total work force was covered by short-term disability plans. *Hearings on S. 995, supra* note 133, at 429.

163. There will, of course, be a question whether a pregnant employee in a particular case is "similarly disabled" vis-à-vis another employee, so that Section 701(k)'s basic standard of comparability is satisfied. This question, however, seems more one of fact than of statutory interpretation.

The legislative history of section 701(k) overwhelmingly supports an affirmative answer to the first question. The House and Senate committee reports are replete with assurances that section 701(k) does not require an employer who provides no fringe benefits to any employee to provide maternity benefits.¹⁶⁴ The sponsors of the amendment,¹⁶⁵ as well as other legislators in debate,¹⁶⁶ President Carter upon signing the bill into law,¹⁶⁷ and various commentators,¹⁶⁸ all acknowledged this corollary to the equal treatment for pregnant employees that section 701(k) demands. The 1978 amendment clearly does not entitle a pregnant employee to favored treatment¹⁶⁹ where a similarly disabled, but nonpregnant, employee does not enjoy the security of disability or health insurance benefits.¹⁷⁰

The second question regarding discharge of a pregnant employee is more difficult, and section 701(k) gives no clear answer. As one commentator has noted, "some leave accompanying childbirth is an accepted modern necessity, and a policy of denying it, with discharge as

164. An employer who does not provide disability benefits or paid sick leave to other employees will not, because of S. 995, have to provide these benefits.

[S]ince the basic standard is comparability among employees, an employer who does not provide medical benefits at all would not have to pay the medical costs of pregnancy or childbirth.

S. REP. NO. 331, *supra* note 56, at 4-5. *See also id.* at 9; H.R. REP. NO. 948, *supra* note 4, at 5, 6.

165. Rep. Hawkins, who introduced the House bill, noted that "this legislation would not require an employer to have a temporary disability plan or provide other employee benefits. Rather, the bill requires that employers who currently provide benefits for other disabilities must provide the same benefits for pregnancy." 124 CONG. REC. H6863 (daily ed. July 18, 1978). *See also* 123 CONG. REC. 29644 (1977) (remarks of Sen. Williams).

166. "[T]he legislation would not require employers to provide hospital medical coverage for maternity. What it does require is that where hospitalization is offered for other disabilities, it must be offered on the same basis for pregnancy related disabilities." 123 CONG. REC. 29642 (1977) (remarks of Sen. Bayh). *See also* 124 CONG. REC. H6864 (daily ed. July 18, 1978) (remarks of Rep. Sarasin).

167. President Carter, in a statement made when signing into law S. 995, emphasized that the amendment "does not bestow favored treatment on America's 42 million working women. . . . It simply requires employers who have medical disability plans to provide for disability due to pregnancy and related conditions on an equal basis with other medical conditions." Statement on Signing S. 995 Into Law, 14 WEEKLY COMP. OF PRES. DOC. 1906 (Oct. 31, 1978).

168. *See, e.g.*, Barkett, *supra* note 3, at 483; [1978] LAB. L. REP. (CCH), No. 55, *Pregnancy Benefits and Discrimination Rules* 7, 11.

169. Statement on Signing S. 995 Into Law, *supra* note 167, at 1906.

170. Subsection (b) of the EEOC guidelines on pregnancy related employment policies supports this view. That subsection, unlike subsections (a) and (c) of the guidelines, expressly incorporates section 701(k)'s "same treatment" standard. *See* note 141 *supra*. *See also* notes 179-180 *infra* and accompanying text.

the alternative, is tantamount to a policy of outright discharge for pregnancy."¹⁷¹ On its face, section 701(k) seems to sanction such discharge so long as the "touchstone of compliance"—equality of treatment among similarly disabled employees—is satisfied.¹⁷² The discharge, on this view, is not for pregnancy, but rather for disablement. One may even argue that this is an equitable result: if an employee stricken by appendicitis faces discharge because little or no sick leave is available, there is no apparent basis on which a pregnant employee should receive favored treatment.¹⁷³ Though the underlying cause differs, the inability to work is the same. Therefore, because under section 701(k) differential treatment of pregnant and nonpregnant workers may be grounded only upon differences in their ability to work,¹⁷⁴ an employer who grants sick leave to a pregnant employee while denying it to an employee similarly disabled by some other cause would apparently violate Title VII as amended—not by discharging the pregnant employee, but by failing to discharge her.¹⁷⁵

If section 701(k) in fact compels this result, its enactment is a mixed

171. I A. LARSON, *supra* note 62, at 8-31.

172. *See* notes 134-40 *supra* and accompanying text.

173. Indeed, in at least one respect—that of notice of impending disablement and opportunity for advanced planning—a pregnant employee is already in a more favorable position than one suddenly stricken by a disabling malady.

174. *See* notes 139-40 *supra* and accompanying text.

175. This same reasoning implies a violation of section 701(k) if, in what is likely the more frequent case, an employer were to allow longer maternity leave than sick leave generally. One commentator hypothesizes an employer who limits sick leave to one month generally, but allows four months' maternity leave. He then continues:

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?

I A. LARSON, *supra* note 62, at 8-34. Despite the clear statutory command of equal treatment among similarly disabled employees, Larson concludes that the male employee's argument "does not hold up on close scrutiny."

[W]e 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, nothing further is needed to redress the male-female balance.

Id. (emphasis in original). In Larson's analysis, if Title VII as amended did not allow this "admittedly 'unequal' solution in the interest of a higher equality"—viz, "substantial equality of employment opportunity"—then an employer could never choose to limit or not permit sick leave. *Id.* at 8-31 to 8-34. If the male employee with hepatitis may demand four months' leave, "the next round would find females demanding four month leaves for *non-maternity* illnesses and disabilities." *Id.* at 8-34 (emphasis in original). The "end result," according to Larson, would then be

blessing for pregnant workers. Prior to the *Gilbert* decision, the EEOC consistently maintained that an employer could not lawfully discharge an employee solely on the basis of pregnancy, unless justified by business necessity.¹⁷⁶ Some courts, moreover, shared this position.¹⁷⁷ In 1972, the EEOC codified this interpretation of Title VII in its guidelines on pregnancy related employment policies.¹⁷⁸ Subsection (a) of these guidelines provided that an "employment policy or practice which excludes from employment . . . employees because of pregnancy is in prima facie violation of [T]itle VII."¹⁷⁹ Subsection (c) provided that "[w]here 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."¹⁸⁰ Significantly, the EEOC reissued subsection (a) with

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." *Id.*

Applying the "basic standard" of section 701(k)—equality of treatment among similarly disabled employees—avoids this "snowballing" effect. Each employee is then entitled to the same leave as any other similarly disabled employee, regardless of the cause of the disability, and no "reverse discrimination" issue arises. Furthermore, it is not clear that abiding by the plain language of section 701(k) will sacrifice the "higher equality" of "substantial equality of employment opportunity" between the sexes. Larson's argument from "an inherent physical inequality affecting employability of one sex exclusively" applies as well to a male employee requiring a prostatectomy and faced with a "no leave" policy. So long as the particular disablement is sex specific and no sick leave is available, the "physical inequality" will affect the employability of that one sex exclusively. Pregnancy, in this respect, is indistinguishable from other sex specific disablements. Though strong societal considerations may favor preferential treatment of pregnancy, logic does not dictate such preference as a condition of attaining equality of employment opportunity.

176. [1974] EEOC DEC. (CCH) ¶ 6487 (Dec. No. 75-038); [1974] EEOC DEC. (CCH) ¶ 6476 (Dec. No. 75-026); [1974] EEOC DEC. (CCH) ¶ 6475 (Dec. No. 75-025); [1974] EEOC DEC. (CCH) ¶ 6474 (Dec. No. 75-024); [1974] EEOC DEC. (CCH) ¶ 6443 (Dec. No. 75-055); [1974] EEOC DEC. (CCH) ¶ 6442 (Dec. No. 75-072); [1973] EEOC DEC. (CCH) ¶ 6411 (Dec. No. 71-2309 (1971)); [1973] EEOC DEC. (CCH) ¶ 6268 (Dec. No. 71-1897 (1971)); [1973] EEOC DEC. (CCH) ¶ 6197 (Dec. No. 71-1100 (1970)); [1973] EEOC DEC. (CCH) ¶ 6170 (Dec. No. 71-308 (1970)); [1973] EEOC DEC. (CCH) ¶ 6122 (Dec. No. 70-600 (1970)). Regarding the "business necessity" defense to a Title VII action, see note 107 *supra*.

177. *See, e.g.,* *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *St. John v. G.W. Murphy Indus., Inc.*, 407 F. Supp. 695 (D.N.C. 1976); *Bradley v. Cothorn*, 384 F. Supp. 1216 (D. Tex. 1974). *Contra, Godwin v. Patterson*, 363 F. Supp. 238 (D. Ala. 1973), *vacated and remanded*, 498 F.2d 1400 (5th Cir. 1974).

178. *See* note 141 *supra*.

179. 29 C.F.R. § 1604.10(a) (1979).

180. *Id.* § 1604.10(c).

only minor modifications¹⁸¹ after the 1978 amendment to Title VII and left subsection (c) entirely unchanged. Neither subsection, however, incorporates the basic principle of section 701(k)—equal treatment of pregnant and nonpregnant employees, with disparity permitted only if based on ability to work.¹⁸² One may question, therefore, whether the EEOC correctly interpreted Title VII's ban on sex discrimination in light of section 701(k).

The potential conflict between section 701(k) and the EEOC guidelines stems from the subsection's dual functions discussed earlier.¹⁸³ Section 701(k) clearly mandates equal treatment for pregnant employees based upon their "ability or inability to work."¹⁸⁴ Yet this subsection also defines "because of sex" or "on the basis of sex" as including, for purposes of Title VII, "because of or on the basis of pregnancy."¹⁸⁵ There lies the rub; the obligation that the subsection imposes contradicts an obligation that the definition implies.

The contradiction is evident when one applies the definition in section 701(k) to a primary substantive provision of Title VII: Section 703(a)(1). This section declares it unlawful for an employer to "discharge any individual . . . because of such individual's . . . sex" ¹⁸⁶ If one substitutes "because of pregnancy" for "because of sex," in accordance with the definition in section 701(k), then section 703(a)(1) appears to flatly prohibit an employer from discharging an employee because she is pregnant—regardless of whether an employer would discharge a similarly disabled, but nonpregnant, employee.¹⁸⁷

181. 29 C.F.R. § 1604.10(a) (1979). For the current version of this subsection, see note 141 *supra*.

182. See note 134 *supra* and accompanying text. Subsection (b), on the other hand, does incorporate this principle. See note 141 *supra*.

183. See notes 121-26 *supra* and accompanying text.

184. See notes 134-61 *supra* and accompanying text.

185. See note 123 *supra* and accompanying text.

186. 42 U.S.C. § 2000e-2(a)(1) (1976). Section 703(a) of Title VII states in full as follows:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

187. Presumably, the "business necessity" defense would still be available to the employer. See note 107 *supra*.

According to the ninety-fifth Congress, furthermore, this was the original intent of the eighty-eighth Congress in 1964.¹⁸⁸ On this view, the EEOC guidelines discussed above correctly interpret Title VII. Discharge because of pregnancy is unlawful per se despite the mandate of section 701(k) that pregnant employees be treated the same as all similarly disabled employees.

One commentator has rejected this conclusion, arguing that the equal treatment clause of section 701(k) restricts the scope of the substantive provisions of section 703.¹⁸⁹ On this view, the second clause of section 701(k) supplements the bona fide occupational qualification section.¹⁹⁰ Section 703(a)(1), therefore, will permit an employer to discharge an employee because she is pregnant so long as she is "treated the same as employees similar in their ability or inability to work."¹⁹¹

This argument is unpersuasive absent evidence of a congressional intent to provide an additional exemption to the requirements of section 703. To be sure, portions of the legislative history of section 701(k) seem to signal such intent.¹⁹² Other portions, however, create ambiguity on this point. For example, though the Supreme Court in *Gilbert* gave little weight to the EEOC guidelines on pregnancy related employment policies,¹⁹³ both congressional committees in charge of the 1978 amendment expressly endorsed the EEOC's interpretation of Title

188. See note 111 *supra* and accompanying text.

189. Barkett, *supra* note 3, at 482 n.306.

190. *Id.* The bona fide occupational qualification section referred to is section 703(e) of Title VII, 42 U.S.C. § 2000-2(e) (1976), which provides in part:

Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

191. Barkett, *supra* note 3, at 482-83 n.306.

192. The strongest evidence supporting Barkett's argument is, perhaps, the following language from the committee reports:

[T]he bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, *providing sick leave*, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

S. REP. NO. 331, *supra* note 56, at 4 (emphasis added). The House committee report contains language identical to that quoted above, and in addition states that "H.R. 6075 in no way requires the institution of *any* new programs where none currently exist." H.R. REP. NO. 948, *supra* note 4, at 4 (emphasis added). See also note 137 *supra*.

193. See notes 52-57 *supra* and accompanying text.

VII.¹⁹⁴ The *Gilbert* Court referred only to subsection (b) of the guidelines¹⁹⁵—requiring parity of disability benefits¹⁹⁶—but the congressional endorsement was broader. Both committees noted that, under the guidelines, excluding applicants or employees from employment because of pregnancy is a violation of Title VII.¹⁹⁷ The committees also concluded that these guidelines rightly implemented the Title VII prohibition of sex discrimination in the 1964 Act.¹⁹⁸

If the committees intended to endorse only subsection (b) of the guidelines, the intent was well concealed. Also, if Congress intended section 701(k) to supplement the existing bona fide occupational qualification exemption in Title VII, one may question the repeated assurances that the narrow approach adopted by the amendment reflected “no new legislative mandate”¹⁹⁹ with regard to Title VII’s application. Finally, section 701(k) explicitly restricts the scope of section 703(h), which allows differentiated pay scales for men and women so long as the Equal Pay Act is not violated.²⁰⁰ One may ask, then, why Congress did not similarly act with respect to section 703(a) if it intended the amendment to restrict the scope of that section. That Congress could easily have made such intent explicit, but chose not to, cautions against inferring that intent.

III. CONCLUSION

Any hope of resolving the dilemma posed by the plain language of section 701(k) lies in the purpose underlying the amendment: to prohibit “discrimination” based on pregnancy. The question then becomes whether an employer who discharges a pregnant employee because of a policy of little or no sick leave for any disabled employee—pregnant or not—thereby “discriminates” against the employee because of her pregnancy.

The EEOC, according to subsection (c) of its pregnancy guidelines, finds such discrimination if termination under a “no leave” policy “has a disparate impact on employees of one sex and is not justified by busi-

194. See note 115 *supra* and accompanying text.

195. See note 52 *supra*.

196. See note 31 *supra*.

197. S. REP. NO. 331, *supra* note 56, at 2; H.R. REP. NO. 948, *supra* note 4, at 2. The reference here is most likely to subsection (a) of the pregnancy guidelines. See note 31 *supra*.

198. S. REP. NO. 331, *supra* note 56, at 2; H.R. REP. NO. 948, *supra* note 4, at 2.

199. See notes 129-30 *supra* and accompanying text.

200. See note 56 *supra*.

ness necessity.”²⁰¹ The implications of this guideline, however, are unclear since termination because of pregnancy will necessarily have a disparate impact on the “one sex” which alone can become pregnant.²⁰² The guideline thus is tantamount to an absolute prohibition by the EEOC against an employer discharging an employee because of pregnancy, regardless of whether a similarly disabled, but nonpregnant, employee would be treated the same.

The validity of this prohibition depends, ultimately, on the courts’ interpretation of section 701(k) and its relation to section 703(a)(1). Congress clearly intended section 701(k) to require equality of treatment among employees based on their ability or inability to work, not on their being pregnant or nonpregnant.²⁰³ It remains for the courts to determine—in the face of the ambiguous legislative history and improvident drafting of the 1978 amendment—whether Congress also intended to ratify or preclude the EEOC’s stance, or whether, indeed, the thought never crossed its collective mind.

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201. See text accompanying note 180 *supra*. On its face, this subsection seems to apply to discharge of an employee temporarily disabled by any cause, not simply pregnancy. The inclusion of this guideline, however, in the section entitled “Employment policies relating to pregnancy and childbirth,” 29 C.F.R. § 1604 (1979), indicates that the EEOC’s concern lay especially with disability caused by pregnancy and childbirth.

202. One may question what constitutes “disparate impact” in this context. As one commentator has articulated the problem: “By definition, any distinction involving pregnancy will have an impact only on women. Hence, does ‘disparate’ refer to the number of women affected or to something else?” Barkett, *supra* note 3, at 419 n.71. In light of the EEOC’s long standing position that, absent business necessity, an employer cannot discharge an employee solely on the basis of pregnancy, see notes 176-80 *supra* and accompanying text, the number of women affected by termination under a “no leave” policy seems irrelevant; discharge because of pregnancy, on this view, is unlawful under Title VII regardless. Further indication that this is the EEOC’s view lies in its finding of disparate impact when a policy or practice has “a significantly disproportionate adverse effect . . . upon the employment opportunities of a class protected by Title VII.” EEOC COMPL. MAN. (CCH) ¶ 3192 (emphasis added). With regard to pregnancy related policies, the EEOC clearly considers the protected “class” to be that of women generally. In discussing the “underlying premise” in section 703 impact cases, the Compliance Manual states: “If there is not a socio-economic explanation for the differential impact, then there should be a biological one—e.g., the impact of a policy forbidding maternity leaves results from the fact that only females get pregnant; . . .” *Id.* Thus, according to the EEOC, it is the fact that pregnancy is sex specific, not the number of women affected by an employment policy, that is central to a finding of disparate impact.

203. See notes 134-40 *supra* and accompanying text.