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Denying Maternity Benefits Is Not Sex Discrimination Under Title VII

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NOTES

Denying Maternity Benefits Is Not Sex Discrimination Under Title VII

The U.S. Supreme Court, in *General Electric v. Gilbert*,[1] held that the exclusion of pregnancy benefits from General Electric's general coverage disability plan for employees did not violate Title VII of the Civil Rights Act of 1964.[2] General Electric's disability plan provided sickness and accident benefits for all employees, including those who became disabled as a result of a non-occupational sickness or accident. The plaintiffs in the initial suit were hourly paid production workers in General Electric's Salem, Virginia, plant, each of whom had become pregnant and had filed a claim for disability benefits. Each had been denied payment on the ground that the plan excluded pregnancy from its coverage. Plaintiffs then filed a class action suit in the federal district court for the Eastern District of Virginia seeking damages and injunctive relief. The district court held that General Electric's exclusion of pregnancy benefits from its general coverage plan did violate Title VII.[3] The Fourth Circuit Court of Appeals affirmed,[4] and this appeal followed.

This was not the first instance in which the U.S. Supreme Court was called upon to make a decision regarding sex classifications. Most of the previous decisions have been made within a constitutional framework. In 1971, *Reed v. Reed*[5] called into question the validity of a provision in the Idaho Probate Code, which gave mandatory preference to men over women when persons of the same entitlement class applied to serve as administrator of a decedent's estate. Although this provision served the legitimate purpose of reducing the workload of the courts by eliminating one class of contestants, the Supreme Court held that it violated the Equal Protection Clause of the Fourteenth Amendment. The provision was constitutionally defective because it required dissimilar treatment for men and women similarly situated.

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1. ___ U.S. ___, 97 S.Ct. 401, 50 L. Ed. 2d 343 (1976).
2. Section 703(a)(1) provides that it is 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." 42 U.S.C.A. §2000e-2 (1974) (emphasis supplied).
3. 375 F. Supp. 367 (E.D. Va. 1974).
4. 519 F.2d 661 (4th Cir. 1975).
5. 404 U.S. 71 (1971).

In *Frontiero v. Richardson*,[6] the Court again invoked the Equal Protection Clause, this time to invalidate a scheme under which married men in the military could draw added allowances for their spouses without proving that they were actually dependent,[7] while married women in the military were required to prove the dependency of their spouses before receiving an augmented allowance. The Court held that mere administrative convenience was not sufficient to justify the dissimilar treatment of men and women.[8] Four justices agreed that classifications based on sex are prima facie suspect.[9] Three justices declined to make this characterization because of the pendency of the Equal Rights Amendment. They felt that such a determination would be an intrusion into an area properly handled by the amendment process.[10]

In *Geduldig v. Aiello*,[11] the Supreme Court was confronted with a disability program similar to the program in the *Gilbert* case. The Court held that exclusion of normal pregnancy benefits from a California state program which provided disability payments to privately employed workers did not violate the Equal Protection Clause of the Fourteenth Amendment. The California program was self-supporting, with employees contributing 1% of their earnings up to a maximum of $85 per year. As it was, no great strain was placed on lower income groups; but the addition of pregnancy benefits would have greatly increased the costs of the program. The Court treated *Geduldig* as a social-welfare case, and that characterization made a rational basis for the exclusion sufficient.

The Court in *Geduldig* therefore held that within a constitutional framework, the exclusion of normal pregnancy benefits did not create an improper classification based on sex.[12] The Court concluded that a state was free to attack part of the problem of providing disability insurance without attacking every aspect of it. There was no suspect class or fundamental right deemed to be involved, and the stricter standard invoked in *Reed* and *Frontiero* was not applied. That standard would have required a fair and substantial relationship between the challenged classification and the in-

6. 411 U.S. 667 (1973).

7. "Dependent" meant that the spouse was dependent on his or her mate for more than one-half of his or her income.

8. One might conclude that *Frontiero* and *Reed* indicated the Court's desire to evaluate sex discrimination cases under a stricter level of scrutiny than that required by the traditional minimal scrutiny test.

9. Characterization as a suspect classification carries with it a strict scrutiny test. The interest sought to be enhanced must be justified by a compelling state interest. *See* Graham v. Richardson, 403 U.S. 365 (1971).

10. Justice Rehnquist was the lone dissenter. He is also the author of the Court's opinion in *Gilbert*.

11. 417 U.S. 484 (1974).

12. *Cf.* Jefferson v. Hackney, 406 U.S. 535 (1972) (racial classification); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare classification); Williamson v. Lee Optical, 348 U.S. 483 (1955) (business regulation classification).

terest of the state.[13] In a very significant footnote, the Court indicated that pregnancy could be excluded because it was a sufficiently distinct risk.[14] The Court went on to say that in the *Geduldig* plan "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."[15] Pregnancy was viewed as a "sex-plus" classification — a classification based on factors other than just sex — and the Court's analysis removed it from the equal-protection analysis of discrimination based on sex.

In *Geduldig*, the Court analyzed the exclusion of pregnancy benefits within a constitutional framework rather than the statutory framework provided by Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment relationships on the basis of sex.[16] Actually there was no reference to sex discrimination in Title VII until the day before its passage, when the word "sex" was added in an effort to block passage of the act.[18] Nevertheless, Congress did enact the civil rights legislation intact[19] and refused to limit the scope of protection under Title VII. Senator McClellan of Arkansas proposed an amendment to add the word "solely" before the list of categories of proscribed discrimination, but the Amendment was defeated in a roll-call vote.[20]

The Equal Employment Opportunity Commission (EEOC) was created

13. See Comment, *Waiting for the Other Shoe*—Wetzel *and* Gilbert *in the Supreme Court*, 25 EM. L.J. 125, 143 n.95 (1976).

14. Footnote 20 reads as follows: "The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, supra, and *Frontiero*, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496-497 n. 20 (1974).

15. 417 U.S. at 497 (1974).

16. See note 2, *supra*.

17. 110 CONG. REC. 2577 (1964).

18. This inference is drawn from the fact that every male who voted for the floor amendment voted against the Act. 110 CONG. REC. 2577-2584, 2804 (1964).

19. Pub. L. 88-352, §703, 78 Stat. 255 (1964).

20. 110 CONG. REC. 13838 (1964). By defeating this amendment, Congress declined to limit Title VII by cutting out sex-plus factors. Pregnancy is a sex-plus factor.

by Title VII and was given responsibility for carrying out its provisions.[21] In accordance with the agency's authorization to promulgate guidelines interpreting the provisions of Title VII,[22] guidelines were issued concerning discrimination based on sex.[23] Although the early EEOC position permitted pregnancy to be excluded from disability insurance plans,[24] the 1972 guidelines adopted a contrary position.[25]

Gilbert is not the first case that the Supreme Court has been called on to decide within the framework provided by Title VII. In 1971, the Supreme Court decided *Griggs v. Duke Power Co.*,[26] a case arising under the same section of Title VII. The action was brought by thirteen black employees, who attacked a company policy requiring passage of two general intelligence tests before an employee was eligible for promotion from the lowest division. The Court found that Congress had proscribed not merely overt discrimination but also procedures which are fair in form yet discriminatory in operation. The congressional intent was to proscribe discriminatory preference for any group. The Court held that Duke Power's testing scheme violated Title VII because it had a discriminatory effect.[27] In reaching this result, the Court made use of an EEOC guideline which required such tests to be job-related. The Court agreed that administrative inter-

21. 42 U.S.C.A. §2000e-4(a) (1974).

22. Pursuant to 42 U.S.C.A. §2000e-12(a) (1974), the EEOC has power to "issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title."

23. "Guidelines on Discrimination Because of Sex" were issued by the EEOC on November 24, 1965, 30 Fed. Reg. 14926 (1965). They were reaffirmed February 21, 1968, 33 Fed. Reg. 3344 (1968); amended August 19, 1969, 34 Fed. Reg. 13367 (1969); and last amended and reissued on April 5, 1972, 37 Fed. Reg. 6835 (1972). *See* Comment, *supra* note 13, at 128.

24. An opinion letter by General Counsel of the EEOC dated October 17, 1966, stated: "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII." EMPL. PRAC. GUIDE (CCH) ¶ 17,304.43 (1970), *quoted at* 97 S. Ct. at 411, 50 L. Ed. 2d at 358.

25. The guideline states: "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. . . . [Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. §1604.10(b) (1975), *quoted at* 97 S. Ct. at 410, 50 L. Ed. 2d at 357.

26. 401 U.S. 424 (1971).

27. The objective of Title VII is to "achieve equality of employment opportunities and remove barriers which have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-430 (1971).

pretation of Title VII by the enforcing agency was entitled to great deference.[28]

In *Washington v. Davis*,[29] the Court indicated a significant difference between the standard of review used in constitutional actions and the standard of review used in Title VII actions. The plaintiffs in *Washington* alleged that employment qualification tests given by the Washington, D.C., police department were racially discriminatory. The Court held that the racial effect of the tests was not sufficient to invalidate the scheme on constitutional grounds. But the Court opted for a more probing judicial review under Title VII. The Court found this more probing review to be appropriate when a special discriminatory effect is alleged in a Title VII action.

In reviewing a statute's applicability, a court normally gives great deference to agency interpretations. But the Court has clearly said that it will not defer to a guideline when there are "compelling indications that it is wrong."[30] In *Espinoza v. Farah Manufacturing Co.*[31] an action was brought under §703 of Title VII. The plaintiff alleged that she was denied employment because she was a Mexican alien. An EEOC guideline provided that a lawfully immigrated alien could not be discriminated against because of his citizenship. The guideline took the position that such treatment would have the effect of discriminating against a person on the basis of his national origin. However, the Supreme Court refused to defer to this guideline. The Court found that Farah did not discriminate against Mexicans. In fact, Farah hired a high percentage of Mexicans. In refusing to defer to the EEOC guideline, the Court noted that a prior guideline had taken a different view of the term "national origin." The prior inconsistent guideline weakened the authority of the more recent guideline.

Although the Supreme Court had never decided a case concerning exclusion of pregnancy benefits from a private disability plan, the issue had been decided by six of the eleven circuit courts of appeals. Each of these courts had followed the EEOC guideline in holding that pregnancy exclusion from an employer's disability plan violated Title VII.[32]

Although the Court in *Geduldig* held that pregnancy benefit exclusion from a state disability plan did not constitute gender-based discrimination within the constitutional framework, the Supreme Court had not deter-

28. *See* United States v. City of Chicago, 411 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965); Power Reactor Co. v. Electricians, 367 U.S. 396 (1961).

29. ___ U.S. ___, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

30. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

31. 414 U.S. 86 (1973).

32. *See* Communication Workers of America v. A.T.&T. Co., 513 F.2d 1024 (2nd Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3rd Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Tyler v. Vickery, 517 F.2d 1089, 1097-1099 (5th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Hutchinson v. Lake Oswego School District, 519 F.2d 961 (9th Cir. 1975).

mined the issue within a *statutory* framework. The Court conceded that there was no inference that Congress intended Title VII cases to be governed by constitutional principles. But Congress had not specifically defined the term "discrimination based on sex." In the absence of a clear definition, the Court used existing case law to define the term. Citing *Geduldig*, the Court concluded that General Electric's exclusion of pregnancy benefits did not constitute gender-based discrimination as such.[33] Under *Geduldig*, sex-based discrimination could still be found upon a showing "that distinctions involving pregnancy are mere *pretexts designed to effect an invidious discrimination against members of one sex* or the other."[34] In *Gilbert* there was no such showing. The Supreme Court found that the distinctions between pregnancy and the covered diseases were perfectly reasonable and valid. Pregnancy was viewed as atypical of the covered disabilities. The district court, cited in support of the Supreme Court's finding, had found that pregnancy was not a disease at all; rather, it was a desired and voluntary condition.[35]

Under Title VII unlawful discrimination can be found under another test. The Court determined in *Griggs* that although a program may be neutral on its face, it violates Title VII if it has a discriminatory effect.[36] The Court concluded that there was no showing of any discriminatory effect. Members of each sex received benefits from this plan, and there was no showing that men received more benefits than women.[37] The plan was considered to be no more than an insurance program which exempted one risk.

After disposing of claims that General Electric's plan effectuated invidious gender-based discrimination, the Court squarely confronted the relevant EEOC guideline,[38] which takes the position that pregnancy must be treated as any other temporary disability. The Court concluded that the guideline was not controlling and that Title VII did not confer on the EEOC the power to make rules and regulations pursuant to that title.[39] It was conceded that courts should give weight to the EEOC guidelines in

33. *See* 417 U.S. 484, 496-497 n.20 (1974).

34. *Id.* (emphasis supplied).

35. 375 F. Supp. 367, 375-377 (1974).

36. 401 U.S. 424, 431 (1971). *See* Washington v. Davis, 426 U.S. 229, ___, 96 S. Ct. 2040, 2051, 48 L. Ed. 2d 597, 611 (1976).

37. The district court included in its opinion a chart of benefits received in the years 1970 and 1971. In 1970 the average amount of benefits received by women was $82.57 as opposed to $45.76 for men. In 1971 the average amount was $112.91 for women and $62.08 for men. 375 F. Supp. at 377 (1974). In arguments before the Supreme Court, Theophil C. Kammholz, counsel for General Electric, noted that the cost of coverage for females was already 170% of that for males. He estimated that coverage of pregnancy for six weeks would raise the figure to 210%, and if coverage were unlimited it would rise to between 300% and 330%. See 45 U.S.L.W. 3296 (U.S., October 19, 1976).

38. See note 25, *supra*.

39. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

construing legislative intent, but the Court maintained that the guidelines do not have the force of law.

In *Skidmore v. Swift*,[40] the Supreme Court analyzed an administrative interpretation by the Administrator of the Wage and Hour Division of the Labor Department. The Court said, "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[41] In applying this standard, the Court noted that the 1972 guideline was inconsistent with the prior guidelines which had clearly permitted the exclusion of pregnancy benefits.[42]

As the Court intimated in *Skidmore*, the persuasive authority of a guideline largely depends on the extent to which it is shown to reflect congressional intent. The Supreme Court tested this guideline's persuasiveness by comparing it to other indicia of congressional intent and by evaluating congressional action in other areas of alleged discrimination under Title VII. One such action was an amendment to §703(h) of Title VII, which added:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.[43]

Section 206(d) of Title 29 is known as the Equal Pay Act. This amendment to Title VII, therefore, makes Title VII subject to agency interpretations of the Equal Pay Act. The Wage and Hour Administrator issued an interpretive regulation under the Equal Pay Act which states:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments *even though the benefits which accrue to the employees in question are greater for one sex than for the other.* The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.[44]

Concluding that this regulation was directly opposed to the EEOC guideline, the Court noted that the floor manager of the Equal Pay Act, Senator

40. 323 U.S. 134 (1944).
41. *Id.* at 140.
42. *See* note 24, *supra*.
43. 42 U.S.C.A. §2000e-2(h) (1974).
44. 29 C.F.R. §800.116(d) (1975) (emphasis supplied).

Humphrey, had said that the purpose of the amendment[45] was clearly to permit "differences of treatment in industrial benefit plans, including earlier retirement options for women."[46] The prior inconsistent guideline, coupled with other indicia of congressional intent, provided sufficient grounds to ignore the 1972 guideline.

If men and women are to receive the same protection in employment relationships, a different result in *General Electric v. Gilbert* would be necessary. In evaluating General Electric's disability plan, the Court emphasized: "There is no risk from which women are protected and men are not . . . [and] no risk from which men are protected and women are not."[47] In the words of Justice Brennan, that analysis is "simplistic and misleading."[48] Under the plan, all male sex-specific disabilities are compensated. These include prostatectomies, vasectomies and circumcisions. Pregnancy is the *only sex-specific disability excluded.* The Court also took the position that pregnancy was different from other disabilities because it was voluntary. However, the Court failed to distinguish the fact that the plan covers elective cosmetic surgery, attempted suicides, venereal disease, sports injuries, and injuries sustained during a fight or during the commission of a crime. In reaching the conclusion that General Electric's plan was not a pretext to inflict invidious discrimination, the Court ignored the district court's finding that General Electric's " 'discriminatory attitude' toward women was 'a motivating factor in its policy.' "[49] Finally, the Court ignored indicia of congressional intent which was consistent with the 1972 guideline.[50]

The narrow definition of sex discrimination adopted by the Court will place a burden on female employees that male employees need not bear. The income of a male employee is protected even though he is unable to work for any reason. The income of a female employee is not completely protected. This situation creates dissimilar treatment of men and women similarly situated. The Court's opinion fails to eliminate discrimination based on sex in employment relationships. Disability plans such as the one used by General Electric can easily be used to perpetuate gender inequality in employment relationships. If they have any justification, it must be

45. This amendment is referred to as the Bennett Amendment. 110 CONG. REC. 13647 (1964).

46. 110 CONG. REC. 13663-13664 (1964).

47. 417 U.S. 484, 496-497 (1974).

48. 97 S. Ct. at 416, 50 L. Ed. 2d at 364 (Brennan, J., dissenting).

49. *Id. See* Gilbert v. General Elec. Co., 375 F. Supp. 367, 383 (1974).

50. Congress enacted a rule similar to the 1972 guideline in the Railroad Unemployment Insurance Act. 45 U.S.C.A. §351(K)(2) (1974). There was also a similar promulgation under Title IX of the Education Amendments of 1972. 20 U.S.C.A. §1681(a) (Supp. 1977). Civil Service Commission employees receive pregnancy coverage under their sick leave plan. 5 C.F.R. §630.401(b) (1975).

economic pragmatism[51] and not the inaccurate view that such plans do not discriminate.

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51. See note 37, *supra*.