

Fall 1987

California Federal Savings & (and) Loan Association v. Guerra: Supreme Court Affirms California's Efforts to Accommodate Pregnancy in Fair Employment Laws, 21 J. Marshall L. Rev. 181 (1987)

Judith Gallo

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Business Organizations Law Commons](#), [Civil Rights and Discrimination Commons](#), [Jurisprudence Commons](#), [Labor and Employment Law Commons](#), [Law and Gender Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Judith Gallo, California Federal Savings & (and) Loan Association v. Guerra: Supreme Court Affirms California's Efforts to Accommodate Pregnancy in Fair Employment Laws, 21 J. Marshall L. Rev. 181 (1987)

<https://repository.law.uic.edu/lawreview/vol21/iss1/9>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

CASENOTES

CALIFORNIA FEDERAL SAVINGS & LOAN ASSOCIATION v. GUERRA:* SUPREME COURT AFFIRMS CALIFORNIA'S EFFORTS TO ACCOMMODATE PREGNANCY IN FAIR EMPLOYMENT LAWS

In 1978, Congress enacted The Pregnancy Discrimination Act ("PDA"),¹ which amended Title VII² of the Civil Rights Act of 1964

* 107 S. Ct. 683 (1987).

1. Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982), provides in relevant part:

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,

42 U.S.C. § 2000e(k) (1982).

2. 42 U.S.C. §§ 2000e - 2000e-17 (1976). Congress adopted Title VII of the Civil Rights Act of 1964 to eliminate employment discrimination based on race, color, religion, sex, or national origin in all industries affecting interstate commerce. *Id.* §§ 2000e(b), 2000e-2. Title VII imposed a new set of obligations on employers, labor unions, and employment agencies not to discriminate in their hiring, firing, or other terms and conditions of employment based on race, color, religion, sex, or national origin. *Id.* Title VII gave employees, job applicants, and minority groups a new right to be free from employment discrimination and to have equal employment opportunities. *Id.* Title VII created procedures for enforcing these rights through the Equal Employment Opportunity Commission ("EEOC"). *Id.* § 2000e-4. The EEOC is an independent commission consisting of five presidentially appointed members. *Id.* § 2000e-4(a).

The Congressional passage of Title VII has a complicated legislative history. See Vaas, *Title VII: Legislative History*, 7 BOST. C. IND. & COMM. L. REV. 431 (1966). The antecedent of the current act was proposed by President Kennedy in 1963 as part of a broad program of civil rights legislation. *Id.* at 432. The House Bill was passed first. *Id.* at 443. The Senate debated for 83 days and made substantial amendments to the original House Bill. *Id.* at 443-57. Floor debate and memoranda from Senate floor managers produced the relevant legislative history. *Id.* at 457. The Senate, finally, passed a compromise bill, which the House adopted without further amendments. *Id.* President Johnson signed the bill and Title VII became effective July 2, 1965. *Id.*

In 1972, the Equal Employment Opportunity Act, Pub. L. No. 92-261 §§ 2-4 (1972) (codified, as amended, 42 U.S.C. §§ 2000e - 2000e-17 (1976)), extensively amended Title VII. The amendments gave the EEOC power to file suit, 42 U.S.C. § 2000e-5(f); extended Title VII to cover state and local governments, *id.* § 2000e(a);

("Title VII")³. In enacting the PDA, Congress expanded the term "sex" in section 703(a)(1)⁴ of Title VII to include a prohibition against discrimination on the basis of pregnancy.⁵ In *California Federal Savings and Loan Association v. Guerra*,⁶ the United States Supreme Court addressed the issue of whether the PDA, in amending Title VII, preempted section 12945(b)(2),⁷ of California's Fair

and proscribed separate enforcement procedures for federal employers, *id.* § 2000e-16. The amendments provided additional Congressional reports. These reports produced more legislative history to guide the EEOC and the judiciary, particularly in the areas of sex and religious discrimination.

A major interpretative question evolved from Title VII as to what extent the statute applied to pregnancy distinctions. M. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 30 (2d ed. 1984). Three major United States Supreme Court cases were the catalyst for the enactment of the Pregnancy Discrimination Act of 1978, which further amended Title VII. First, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court found that a state employee insurance plan which excluded pregnancy benefits, did not violate the equal protection clause of the fourteenth amendment. The second case was a Title VII action, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that excluding pregnancy benefits from a private employer's disability benefits program was not sex discrimination within the meaning of Title VII. The third case, *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), held that denying a pregnant worker's seniority credit after a pregnancy leave was a form of sex discrimination within the meaning of Title VII. Congress passed the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982), in reaction to these decisions. *See infra* note 43 (discussing why Congress passed the Pregnancy Discrimination Act). Title VII, as amended, now includes the prohibition against employment discrimination on the basis of pregnancy.

3. 42 U.S.C. §§ 1981-2000h (1976). This casenote focuses only on Title VII of the Civil Rights Act of 1964, as amended. Title VII, however, is but one segment of the comprehensive Civil Rights Act. Other titles of the Civil Rights Act include the prohibition against discrimination in public accommodation, *id.* § 2000a; access to public facilities, *id.* § 2000b; desegregation of public schools, *id.* § 2000c; and the prohibition against discrimination under federally assisted programs, *id.* § 2000d.

4. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976) provides:

- (a) 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.

42 U.S.C. § 2000e-2(a) (1976).

5. *See supra* note 1 for the PDA text which should be read in conjunction with § 703(a) of Title VII.

6. 107 S. Ct. 683 (1987).

7. CAL. GOV'T CODE § 12945(b)(2) (West 1980). Section 12945(b)(2) provides in part:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

- (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions
- (2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. . . . Reasonable period of time means that period during which the female em-

Employment and Housing Act ("FEHA").⁸ Section 12945(b)(2) required employers to provide female employees with a reasonable pregnancy leave not exceeding four months.⁹ This section also required employers to reinstate female workers upon their return to work from a pregnancy leave.¹⁰ The Court resolved the preemption issue in favor of the FEHA,¹¹ holding that the PDA did not preempt section 12945(b)(2) because the state statute was consistent with the purpose of the federal statute.¹² The Court further held that section 12945(b)(2) did not require employers to commit acts unlawful under Title VII.¹³ In so holding, the Court properly determined that Title VII and the PDA do not prohibit, under certain circumstances, preferential state treatment of the condition of pregnancy.

In January 1982, Lillian Garland, an employee of California Federal Savings and Loan Association ("Cal Fed"), took a pregnancy disability leave.¹⁴ In April 1982, Garland notified Cal Fed that she was able to return to work.¹⁵ Cal Fed¹⁶ informed Garland that her position had been filled and that a similar position was not available.¹⁷ Garland then filed a complaint with The California De-

ployee is disabled on account of pregnancy, childbirth, or related medical conditions. . . .

An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

CAL. GOV'T CODE § 12945(b)(2) (West 1980).

8. CAL. GOV'T CODE §§ 12900-12996 (West 1980 and Supp. 1986), [hereinafter FEHA] is California's comprehensive law that prohibits discrimination on the basis of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age. *Id.*

9. The Fair Employment and Housing Commission (the "Commission"), is the state agency authorized to interpret the FEHA. *Guerra*, 107 S. Ct. at 687 & n.4. The parties stipulated that the Commission's interpretation of § 12945(b)(2) required employers to extend reasonable pregnancy leave and reinstatement after a pregnancy leave to the same or similar position the employee occupied prior to her pregnancy leave. *Id.*

10. *Id.*

11. *Id.* at 695. Mark Guerra is California's Director of the Department of Fair Employment and Housing. *Id.* Co-defendants were Fair Employment and Housing Commission of the State of California, and Cruz F. Sandoval, as Chair Commissioner of the Fair Employment and Housing Commission. *Id.* at 683.

12. *Id.* at 695.

13. *Id.* at 694, 695.

14. *Id.* at 688.

15. *Id.*

16. Cal Fed had a facially neutral leave policy. *Id.* This policy allowed employees, who had completed three months of service, to take unpaid leaves of absence for temporary disabilities and pregnancy. *Id.* Although Cal Fed would try to reinstate employees returning from a leave of absence, Cal Fed expressly reserved the right to terminate an employee if a similar position was not available. *Id.* Cal Fed reinstated Garland in November 1982. *Id.* at 688 n.7.

17. See Chicago Tribune, Jan. 18, 1987, § 4, at 4, which noted that Garland lost custody of her child to her ex-husband, because she was not immediately reinstated.

partment of Fair Employment and Housing ("Department").¹⁸ The Department charged Cal Fed with violating section 12945(b)(2) of the FEHA, and scheduled a hearing before the Fair Housing and Employment Commission.¹⁹

Prior to the hearing, Cal Fed²⁰ brought an action against the Department in the United States District Court for the Central District of California.²¹ Cal Fed sought a declaration that Title VII, as amended by the PDA, preempted section 12945(b)(2) of the FEHA, thus enjoining its enforcement.²² The district court granted Cal Fed's motion for summary judgment.²³ The district court reasoned that employers who complied with section 12945(b)(2) of the FEHA were subject to a claim of reverse sex discrimination under Title VII.²⁴ The court concluded that Title VII preempted section 12945(b)(2) of the FEHA, which required preferential treatment of pregnant employees, and was, therefore, null and void under the Supremacy Clause of the United States Constitution.²⁵

The United States Court of Appeals for the Ninth Circuit reversed the District Court.²⁶ In a strongly worded opinion, the court stated that the district court's conclusion that section 12945(b)(2) discriminated against men defied common sense and flouted Title

18. *Guerra*, 107 S. Ct. at 688.

19. *Id.*

20. Petitioner Cal Fed was a Los Angeles based, federally chartered savings and loan association. *Id.* at 687, 688. Cal Fed was joined by petitioner Merchants and Manufacturers Association, a trade association representing various California employers; and petitioner California Chamber of Commerce, which also represented various California employers. *Id.* at 688 & n.8. Petitioners, or their members, had facially neutral leave policies and were subject to liability under both Title VII and § 12945(b)(2). *Id.* at 688 & n.8.

21. *Id.* at 688.

22. *Id.*

23. *Id.* After the district court's judgment, Garland moved to intervene in the action. *Id.* at 688, 689 n.11. The district court denied her motion on several grounds including the defendant's adequate representation of her interests. *Id.* The United States Court of Appeals for the Ninth Circuit affirmed the denial of intervention. *Id.* Garland did not appeal. *Id.*

24. *Id.* at 688. The district court relied on *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 685 (1983). The *Newport* Court held that an insurance plan which gave female employees pregnancy coverage but did not give equal coverage to spouses of male employees, was sex discrimination against male employees. *Id.* at 688 n.10. See *infra* notes 61-67 and accompanying text for a thorough discussion of *Newport*.

25. *Guerra*, 107 S. Ct. at 688. The Supremacy Clause, art. VI, cl. 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

26. *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985), cert. granted, 106 S. Ct. 783 (1986).

VII.²⁷ The court found that the PDA did not demand that a state's laws be blind to pregnancy's existence.²⁸ Rather, the court concluded that "Congress intended to construct a floor beneath which pregnancy disabilities may not drop-not a ceiling above which they may not rise."²⁹

The United States Supreme Court granted certiorari.³⁰ In addressing the preemption issue, the Court determined that Congress did not intend to preempt a state's fair employment laws unless the laws were inconsistent with Title VII's purpose.³¹ The Court also determined that Title VII would not preempt a state law unless the two laws actually conflicted.³² The Court affirmed the Ninth Circuit and held that Title VII did not preempt section 12945(b)(2) because it was not inconsistent with, nor unlawful under, Title VII.³³

The Court, in first examining the general preemption doctrine,³⁴ determined that Congress did not expressly intend to preempt state fair employment laws,³⁵ nor did Congress intend to occupy the field of fair employment laws.³⁶ The Court, however, did find that if a

27. *Guerra*, 758 F.2d at 393.

28. *Id.* at 395.

29. *Id.* at 396. See Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175, 196 (1981-82). Williams advocates an equal treatment approach to pregnancy rights, stating that the PDA not only created the desired floor under the pregnant women's rights, but also the ceiling. *Id.* at 196. Although the court of appeals used this floor/ceiling analogy, it reversed Williams' reasoning. See generally Note, *California Federal Savings & Loan Association v. Guerra: The State of California Has Determined That Pregnancy May Be Hazardous To Your Job*, 16 GOLDEN GATE U. L. REV. 515, 525 n.6. [hereinafter *Pregnancy Hazards*]. (casenote on the court of appeals' *Guerra* decision).

30. *California Fed. Sav. & Loan Ass'n. v. Guerra*, 106 S. Ct. 783 (1986).

31. *Guerra*, 107 S. Ct. at 690. The *Guerra* Court construed § 1104 of Title XI, a preemption provision applicable to all titles under the Civil Rights Act. Section 1104 provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4 (1976).

32. *Guerra*, 107 S. Ct. at 689. The *Guerra* Court construed the preemption provision of Title VII. Section 708 provides:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. § 2000e-7 (1976).

33. *Guerra*, 107 S. Ct. at 695.

34. *Id.* See generally Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959) (discussing general preemption doctrine).

35. *Guerra*, 107 S. Ct. at 695.

36. *Id.* at 689. Federal law may supersede state law in different ways. *Id.* Con-

state law actually conflicted with Title VII, the state law would be preempted.³⁷ A conflict with Title VII occurs if compliance with Title VII and the state law is physically impossible,³⁸ or if compliance with the state law frustrates the purpose of Title VII.³⁹ With these preemption standards as a guide, the Court addressed the issue of whether the PDA and Title VII prohibited a state from enacting preferential pregnancy disability legislation.⁴⁰

Cal Fed argued that the plain language of the PDA expressly forbids preferential treatment of the pregnancy condition.⁴¹ Rejecting Cal Fed's construction of the PDA, the Court instead looked to the historical context in which Congress passed the PDA.⁴² The PDA was Congress' reaction to the decision in *General Electric Company v. Gilbert*,⁴³ which held that excluding pregnancy from a

gress may expressly preempt state law. *Id.* (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)). The *Jones* Court held that the Federal Fair Packaging and Labeling Act preempted a California flour packaging statute because the California law frustrated the express purpose of the federal law. *Jones*, 430 U.S. 519 (1977). Congress may also intend that a federal regulation occupy the field, and impliedly preempt supplementary state regulations. *Guerra*, 107 S. Ct. at 689 (citing *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247 (1974)). The *Rice* Court held that the Federal Commodity Exchange Act implied that Congress intended to occupy the field of regulating trading on the contract market, however, a nonconflicting state law should be left undisturbed. *Rice*, 331 U.S. 247 (1974).

37. *Guerra*, 107 S. Ct. at 690.

38. *Id.* at 689. (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963)). In *Florida Lime*, Florida avocado growers claimed a federal regulation which certified their avocados as mature preempted a California statute which had a different standard for measuring an avocado's maturity. *Florida Lime*, 373 U.S. at 143. The *Florida Lime* Court held that the Florida growers could physically comply with both the federal and state laws, therefore, preemption would not apply. *Id.*

39. *Guerra*, 107 S. Ct. at 689 (citing *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941)). In *Hines*, the Alien Registration Act preempted Pennsylvania's strict alien registration statute because the state law interfered with the full purpose and objectives of the federal law. *Hines*, 312 U.S. at 74. See also *Michigan Canners & Freezers Ass'n, Inc. v. Agriculture Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984) (Federal Agricultural Fair Practices Act preempted a Michigan statute conferring bargaining authority on agricultural co-operatives); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 156 (1982) (California Supreme Court imposed restrictions on the use of due-on-sale clauses in mortgage contracts; the Federal Home Owners Loan Act of 1933 preempted these restrictions).

40. *Guerra*, 107 S. Ct. at 691.

41. Brief for the Petitioners at 18, *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987) (No. 85-494). See also *supra* note 1 for the PDA's full text.

42. *Guerra*, 107 S. Ct. at 691.

43. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). The *Guerra* Court found that the PDA was passed in reaction to the *Gilbert* decision. *Guerra*, 107 S. Ct. at 691. See House Comm. on Ed. & Labor, *Prohibition of Sex Discrimination Based on Pregnancy*, H.R. REP. No. 95-948, 95th Cong. 2d Sess., reprinted in [1978] *Pregnancy Benefits & Discrimination Rules*, (CCH) ¶402, at 53, (Mar. 13, 1978) ("It is the committee's view that the dissenting [*Gilbert*] Justices correctly interpreted the Act"); Senate Comm. On Human Resources, *Amending Title VII, Civil Rights Act of 1964*, S. REP. No. 95-331, 95th Cong. 1st Sess., reprinted in [1978] *Pregnancy Benefits & Discrimination Rules*, (CCH), ¶501 at 70-72, (May 18, 1977) (The two dissenting opinions in the *Gilbert* case correctly expressed the commonsense view that preg-

general disability insurance plan was *not* sex discrimination within the meaning of Title VII. The Court concluded that the first clause of the PDA expressed congressional disapproval of the *Gilbert* decision.⁴⁴ The second clause overruled *Gilbert* and provided a remedy for discrimination based upon pregnancy.⁴⁵ Based on this construction, the Court determined that the PDA's "same treatment" language was the floor of pregnancy rights⁴⁶ and the PDA did not, therefore, expressly forbid preferential treatment.⁴⁷

The Court reviewed the legislative history of the PDA to support its construction.⁴⁸ Cal Fed contended that although Congress intended to end pregnancy discrimination, remedial measures would not require employers to initiate preferential pregnancy disability

nancy discrimination is sex discrimination within the meaning of Title VII; S.995 was introduced to reflect this commonsense view). See also *supra* note 2 (discussing the history of Title VII).

44. For the complete text of the PDA, see *supra* note 1. The *Guerra* Court concluded that the PDA's first clause meant that excluding pregnancy from otherwise complete plans or policies was sex discrimination within the meaning of Title VII. *Guerra*, 107 S. Ct. at 691.

45. The *Guerra* Court concluded that Congress intended the second clause to be an express overruling of *Gilbert* which excluded pregnancy coverage from a fringe benefit plan. *Guerra*, 107 S. Ct. at 691. The Court further ruled that the same treatment language used in the PDA is the minimum requirement for remedying pregnancy discrimination. *Id.* at 691-92.

46. *Id.* at 692.

47. The Court relied on commentators who interpreted the second clause of the PDA to mandate at least equal treatment but not prohibit special treatment. *Id.* at 692 n.16 (citing Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 696, & n.26 (1983); Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 937 (1985)). But see Williams, *Equity's Riddle*, 13 N.Y.U.L. REV. & SOC. CHANGE 325 (1985) (comment in support of the same treatment approach).

48. To support the remedy construction of the PDA, the Court focused upon the legislative history of the PDA. *Guerra*, 107 S. Ct. at 692 & n.18. The reports, debates, and hearings clearly stated that Congress intended to provide relief for pregnant workers and to put an end to pregnancy discrimination. *Id.* See 124 CONG. REC. S36819 (1978) (remarks of Sen. Stafford) (bill will end "major source of discrimination unjustly afflicting working women in America"); 124 CONG. REC. H21437 (1978) (remarks of Rep. Quie) (bill is "necessary in order for women employees to enjoy equal treatment in fringe benefit programs"); 124 CONG. REC. H21439 (1978) (remarks of Rep. Akaka) ("bill simply requires that pregnant workers be fairly and equally treated"); 124 CONG. REC. H21440 (1978) (remarks of Rep. Chisholm) (bill "affords some 41% of this Nation's labor force some greater degree of protection and security without fear of reprisal due to their decision to bear children"); 124 CONG. REC. H21442 (1978) (remarks of Rep. Tsongas) (bill would put an end to an unrealistic and unfair system that forces women to choose between family and career - clearly a function of sex bias in the law"); 124 CONG. REC. S38574 (1978) (remarks of Sen. Javits) (the "bill represents only basic fairness for women employees"); 124 CONG. REC. H38574 (1978) (remarks of Rep. Sarasin) (subcommittee "learned of the many instances of discrimination against pregnant workers, as we learned of the hardships this discrimination brought to women and their families"); 123 CONG. REC. S8144 (1977) (remarks of Sen. Bayh) (legislation "will end employment discrimination against pregnant workers").

plans.⁴⁹ The Court rejected this contention and concluded that "[i]f Congress had intended to *prohibit* preferential treatment, it would have been the height of understatement to say only that the legislation would not *require* such conduct."⁵⁰

The Court further denied preemption because section 12945(b)(2) did not frustrate the purpose or objectives of Title VII.⁵¹ The Court found that the federal and state law shared the common purpose of promoting equal employment opportunity.⁵² The Califor-

49. Brief for Petitioners at 20-21, *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987) (No. 85-494). Cal Fed relied on the PDA's legislative history that emphasized that employers would not be required to treat pregnant workers in any particular manner. *Id.* See 124 CONG. REC. H6863 (1978) (remarks of Rep. Hawkins) ("This legislation would not require an employer to have a temporary disability plan or provide other employee benefits"); 124 CONG. REC. H6864 (1978) (remarks of Rep. Sarasin) (the law "would not require any coverage at all where no temporary disability, or sick leave . . . is provided"); 123 CONG. REC. S15037 (1977) (remarks of Sen. Bayh) ("Nothing under this legislation would require a company to offer . . . a disability plan"). See also H.R. REP. NO. 948, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4750, 4751 (the bill "does not require employers to treat employees in any particular manner"); S. REP. NO. 331, 95th Cong., 2d Sess. (1978) (the bill "rejects the view that employers may treat pregnancy . . . as *sui generis*").

50. *Guerra*, 107 S. Ct. at 693 (emphasis in original). The Court relied upon the fact that Congress knew of current state legislation similar to California's law. *Id.* at 693 n.23, 24. See 123 CONG. REC. S29387 (1977) (remarks of Sen. Javits) ("several state legislators . . . have chosen to address the problem by mandating certain types of benefits for pregnant employees"); S. REP. NO. 331, 95th Cong., 2d Sess. (1977) (several "states have already mandated a policy of nondiscrimination . . . two states, New Jersey and Hawaii, . . . affirmatively require that benefits be provided for pregnancy disabilities"); H.R. REP. NO. 95-948, 95th Cong. 2d Sess. (1978) ("at least 22 states . . . now mandate some form of pregnancy disability coverage"). Connecticut, Massachusetts and Montana have laws similar to California's in that they mandate a reasonable pregnancy leave and require reinstatement after a pregnancy leave. See CONN. GEN. STAT. § 46a-60(a)(7) (1985); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982); MONT. CODE ANN. §§ 49-2-310, 49-2-311 (1986). These laws were in effect prior to the passage of the PDA and Congress did not indicate in any manner that these laws would be in conflict with the PDA. *Guerra*, 107 S. Ct. at 694.

51. *Guerra*, 107 S. Ct. at 693.

52. *Id.* The Court relied on case law and legislative history that clearly established the purpose of Title VII and the PDA as being the promotion of equal opportunity of employment. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). The *Griggs* Court stated that Title VII's purpose was to achieve equality of employment opportunity and to remove barriers that have operated in the past to favor an identifiable group of employees over other employees. *Griggs*, 401 U.S. at 429-30. See also *Hinshon v. King & Spalding*, 467 U.S. 69, 75 n.7 (1984) (Title VII's purpose of equal employment opportunity includes all the compensation, terms, conditions, and privileges of employment); *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (Congress intended to prohibit all employment practices which create inequality in employment opportunity); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Congress enacted Title VII to assure equality of employment opportunity); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (the language of Title VII makes plain the purpose of Congress was to assure equality of employment opportunities). See generally 124 CONG. REC. H6803 (1978) (remarks of Rep. Hawkins) ("genuine equality in the American labor force is . . . an illusion as long as employers remain free to make pregnancy the basis of unfavorable treatment of working women"); 123 CONG. REC. S15053 (1977) (remarks of Sen. Williams) ("the entire

nia law was consistent with Title VII because the law allowed women to participate equally with men in the work place, without denying women the right to have families.⁵³

Finally, the Court addressed the issue of whether section 12945(b)(2) compelled employers to violate Title VII.⁵⁴ The Court concluded that even if it accepted Cal Fed's equal treatment construction of the PDA, compliance with both laws would not be physically impossible.⁵⁵ Employers were free to provide similar benefits to other temporarily disabled workers, thereby treating everyone equally and complying with both laws.⁵⁶ The PDA, however, did not prohibit preferential treatment of pregnancy. Employers, therefore, would not violate Title VII if they did not extend similar benefits to other temporarily disabled employees.⁵⁷

The Court correctly held that the PDA does not preempt a state's fair employment law that attempts to treat pregnancy more favorably than other temporary disabilities. Despite criticism that

thrust behind . . . this legislation is to guarantee women the basic right to participate fully and equally in the workforce without denying them the fundamental right to full participation in family life").

For a discussion of the purpose of California's FEHA, see *Price v. Civil Service Comm.*, 26 Cal.3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980), *cert. denied*, 449 U.S. 811 (1980) (the objective of the FEHA is a society in which equal employment opportunity is a reality). See also CAL. GOV'T CODE § 12920 (West 1980) which declares that the public policy of the state is to protect the right and opportunity to hold employment without discrimination.

53. *Guerra*, 107 S. Ct. at 694.

54. Cal Fed contended that the California law could not be harmonized with the federal law. Brief for Petitioners at 35, *California Fed. Sav. & Loan v. Guerra*, 107 S. Ct. 683 (1987) (No. 85-494). Cal Fed argued that if employers extended a benefit to pregnant workers, they will violate Title VII if they do not extend the same benefit to other temporarily disabled workers. *Id.*

55. *Guerra*, 107 S. Ct. at 695. See *supra* note 38 (physical compliance with state and federal law possible).

56. *Guerra*, 107 S. Ct. at 695. The Court was not advocating an extension remedy. *Id.* A statute must first be invalidated before the remedial measure of extension could be applied. *Id.* (citing *Califano v. Wescott*, 443 U.S. 76, 89-90 (1979)). The *Califano* Court found the Aid to Families with Dependent Children Act unconstitutional because the gender qualification was not substantially related to an important government interest and, thereafter, extended benefits to the needy families of unemployed mothers as well as the needy families of unemployed fathers. *Califano*, 443 U.S. at 89.

The *Guerra* Court did not invalidate § 12945(b)(2), nor did the Court extend § 12945(b)(2)'s benefits to other disabled employee's. *Guerra*, 107 S. Ct. at 695. The Court did state, however, that employers were free to give comparable benefits to other disabled persons. *Id.* The dissent labeled this statement as the majority's equally "strange ground" for upholding § 12945(b)(2). *Id.* at 701 (White, J., dissenting). The dissent misconstrued this statement. The Court was not applying the extension remedy. The Court assumed, *arguendo*, that even if it agreed with petitioner's construction of the PDA, compliance with both statutes was not physically impossible. *Id.* at 694. The Court, however, did not accept Cal Fed's construction of the PDA. Therefore, the extension remedy was unnecessary. *Id.*

57. *Id.* at 695. See also *id.* at 697 (Stevens, J., concurring).

the Court prematurely interpreted the PDA,⁵⁸ the *Guerra* Court quieted conflict over the PDA's scope.⁵⁹ First, the Court accurately applied previous precedent which had interpreted the PDA. The Court was not, therefore, without guidance in making its decision. Second, the Court correctly analyzed Congress' intent in enacting Title VII. Thus, the Court considered the original goals influencing Title VII's creation. Third, the Court's opinion developed guidelines for states that desire a more favorable approach to the treatment of pregnancy in their laws and policies. In so doing, the Court settled an area of law wrought with confusion. Finally, Justice Steven's concurring opinion correctly analogized an affirmative action case to the *Guerra* issue. Thus, the Court recognized that preferential treatment may in fact further the goal of equal employment opportunity. Because of the *Guerra* Court's analysis, state legislatures will now be able to include favorable treatment of pregnancy in their fair employment laws and policies and not be in conflict with the federal law.⁶⁰

58. *Guerra*, 107 S. Ct. at 697 (Scalia, J., concurring). Justice Scalia stated that "[t]he majority . . . decides more than is necessary I am fully aware that it is more convenient for the employers of California and California's legislature to have us interpret the PDA prematurely." *Id.* Further, Justice Scalia contended that the majority had issued a prohibited advisory opinion. *Id.* at 698. His own analysis of the *Guerra* case was limited. He stated that section 12945(b)(2) "[c]annot be pre-empted, since it does not remotely purport to require or permit any refusal to accord federally mandated equal treatment to others similarly situated. No more is needed to decide this case." *Id.* at 697.

59. For an excellent compilation of statistics reflecting the need for a timely interpretation of the PDA, see Note, *Pregnancy Hazards*, *supra* note 29 at 528 nn. 76-79. The number of women in the labor force has increased in the last few years, four out of five of these new jobs have been in the service area. Most women work in low-paying jobs without opportunities for advancement, such as waitressing or food service, health care, clerical or child care work. *Id.* at 528 n.76 (citations omitted). Families headed by female householders with no spouse present: 1970, 10.8%; 1980, 14.5%; 1983, 15.4%. Married coupled families with husband and wife employed: 1970, 29.4%; 1980, 44.8%; 1984, 48.7%. Of married coupled families with the husband unemployed, the percent having only wife employed: 1970, 33.4%; 1980, 39.5%; 1984, 41.7%. The census bureau reported these additional findings for 1984: 28% of the births by 18 to 24 year olds were to unmarried women; of women past age 30 who gave birth, 52% were working or looking for work, up from 28% in 1976; women with no high school diploma had the highest birth rate at 81.9 per 1,000; women with three years of college or more had the lowest rate with 54.8 per 1,000; women with family incomes of less than \$10,000 had a rate of 88.5 births per 1,000; the rate dropped to 46 births per 1,000 for women in families with an income above \$35,000 a year. *Id.* at 528 n.77 (citations omitted). Eighty-five percent of working women are likely to become pregnant at least once during their working lives. *Id.* at 528 n.78 (citation omitted). A study, conducted for the congressional Joint Economic Committee, reported that the share of national income going to families with children has dropped 19% since 1973. The statistics indicated that families with single female heads had a mean income last year of \$13,257, less than 40% of the \$34,379 average income for two-parent families. *Id.* at 528 n.79. See generally Bernstein, *California Pregnancy Law, A Step in the Right Direction*, Miami Herald, Feb. 1, 1987, § F, at 23. (article emphasizing the need for pregnancy disability laws).

60. See Kleiman, *Facing a Fact of Life*, Chicago Tribune, Jan. 18, 1987, at 1, §

The Court's interpretation of the PDA has, at last, firmly decided the issue that preferential treatment of pregnancy, under certain circumstances, does not discriminate against men. In so doing, the *Guerra* Court correctly applied the holding of *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.⁶¹ In *Newport*, an employer had a disability insurance plan that covered female employees claiming pregnancy-related disabilities.⁶² The insurance plan, however, excluded the wives of male employees from the coverage. The *Newport* Court held that providing less pregnancy coverage to the spouses of male employees was sex discrimination within the meaning of Title VII.⁶³

At first glance, the *Newport* holding seems to prohibit giving female employees preferential treatment in pregnancy disability plans. The *Guerra* Court, however, properly noted that the California statute was narrowly drawn to cover only actual physical disability brought on by pregnancy.⁶⁴ Men will never become pregnant and, therefore, do not need pregnancy leave, or reinstatements after pregnancy leaves.⁶⁵ The male employees in *Newport* were in a similar situation as their pregnant co-workers.⁶⁶ Both male employees with pregnant wives, and pregnant employees themselves, needed pregnancy medical insurance coverage. The *Newport* Court and the *Guerra* Court both concluded that the PDA mandates equal treatment of pregnancy where women and men have equal needs.⁶⁷

4 ("[t]he Court's decision is having a ripple effect throughout the U.S. as women's advocacy groups coast to coast organize to introduce legislation similar to the California statute . . ."). See also Wall St. J., July 21, 1987, § 1, at 1 (mandatory maternal or parental leave laws were enacted in 5 states this year, 15 states now have laws or rules on pregnancy leave, and 16 states are considering them).

61. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). *Newport* is the only prior United States Supreme Court case interpreting the PDA. Ironically, *Newport* was a reverse discrimination suit in which male employees received less pregnancy benefits than female employees. *Id.* at 674. See also *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981) *vacated on other grounds*, 685 F.2d 1088 (1982) (district court held that the PDA did not preempt Montana's Maternity Leave Act which required employers to reinstate employees after a reasonable maternity leave).

62. *Newport*, 462 U.S. at 672.

63. *Id.* at 685.

64. *Guerra*, 107 S. Ct. at 694. Section 12945(b)(2) is not a parenting leave statute. *Id.* See also *Guerra*, 758 F.2d 390, 395 (9th Cir. 1985) for the Court of Appeals analysis of § 12945(b)(2) as not being a parenting leave statute.

65. See Note, *Pregnancy Hazards*, *supra* note 29 at 520 n.28 (1986). Section 12945(b)(2) is not based on stereotypical assumptions that women need pregnancy leaves. *Id.* Under § 12945(b)(2), pregnant workers are not automatically entitled to the maximum four month leave. *Id.* Pregnant workers can only take a leave for medical reasons relating to pregnancy. *Id.* See *supra* note 7 for the text of § 12945(b)(2).

66. *Newport*, 462 U.S. at 685.

67. The *Newport* Court also determined that although complete pregnancy insurance may cost more than underinclusive pregnancy insurance, the cost differential is necessary to equalize the burdens of reproduction. *Id.* at 685 n.26. (citing 29 C.F.R. § 1604.9(e)). The rule states that, "it shall not be a defense under Title VII to a

Unlike the district court,⁶⁸ the *Guerra* Court did not allow the *Newport* holding to prohibit preferential treatment of pregnancy under the PDA. Preferential treatment should be allowed in situations where women have different needs than men. To support this notion, the *Guerra* Court analyzed the scope of the PDA. The Court determined that treating pregnancy favorably in certain situations did not frustrate the purpose of Title VII or compel employers to violate Title VII.⁶⁹

The core of the *Guerra* Court's interpretation of the PDA was that Congress never intended to preempt state fair employment laws that furthered the goals of Title VII.⁷⁰ The PDA is part of Title

charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." *Id.* See also Stewart, *Equal Treatment for Pregnant Workers*, A.B.A.J., Mar. 1, 1987, at 45 (statistical analysis of small employer costs for providing pregnancy disability leaves). Eighteen weeks of leave for a word processing employee would cost an employer an additional \$1,747 in St. Louis; \$3,363 in Houston; and \$5,186 in Washington, D.C. *Id.* A survey of employer benefits at 700 firms found that only 19% of the companies surveyed had a formal pregnancy leave policy, while 31% integrated pregnancy leave into their general sick leave policies, and 27% claimed they met employee needs informally. *Id.* See generally *Guerra*, 758 F.2d at 395 (discussing *Newport's* impact on benefits cost analysis).

68. *Guerra*, 107 S. Ct. at 688. The district court stated: "California employers who comply with the state law are subject to reverse discrimination suits under Title VII brought by temporarily disabled males who do not receive the same treatment as female employees disabled by pregnancy . . ." *Id.*

The district court did not understand that pregnancy will not disable men. Men will, however, be temporarily disabled by other illnesses such as broken bones or prostatitis. Women will also suffer temporary disabilities such as broken bones or breast cancer. Under these circumstances, temporary disabilities should be treated equally. Pregnancy, however, should not be denied different treatment just because men will never experience pregnancy disability. See Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985) (advocating different treatment to accommodate pregnancy).

69. The plain language of the PDA seems to conflict with a preferential treatment approach to pregnancy. See *supra* note 1 for the PDA's complete text. The PDA, however, does not expressly prohibit preferential treatment. See *supra* note 1 and *infra* note 89 to compare the language of § 701(k) of Title VII and § 703(j) of Title VII. The *Guerra* Court went beyond the plain meaning of the PDA to determine if Congress intended to prohibit preferential treatment of pregnancy. *Guerra*, 107 S. Ct. at 691.

An examination of the legislative history of the PDA was only minimal help to the *Guerra* Court. Congress did not specifically address a preferential treatment situation. *Id.* at 692. Congress did intend, however, to put an end to pregnancy discrimination in employment. *Id.* See *supra* note 48 (remarks of legislators supporting the PDA).

On the other hand, there was evidence that Congress did not intend that employers would be required to treat pregnancy in any particular or special manner. See *supra* note 49 (remarks of legislators explaining the effects of the PDA). The *Guerra* Court weighed this evidence and determined if Congress had intended to totally prohibit preferential treatment, Congress would not have only discussed its intention not to require preferential treatment. *Guerra*, 107 S. Ct. at 693 (emphasis in original). Certainly, some language would have been added to the PDA if Congress intended to prohibit preferential treatment of pregnancy.

70. The preemptive provisions of Title VII were designed to eradicate inconsistent state laws. *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 103 (1983) (Title VII did

VII.⁷¹ Congress' goal in enacting Title VII was to end employment discrimination and to achieve equal employment opportunities for all individuals.⁷² Title VII does *not* require "sameness" of treatment.⁷³ Unlike unlawful protective legislation,⁷⁴ the FEHA did not limit women in their employment opportunities. Rather, the requirement of reinstatement after a reasonable pregnancy leave removed an obstacle that had barred pregnant workers from participating equally in the workplace.⁷⁵ Women in California now have the opportunity to participate equally with men in the workplace, have families, and retain their jobs,⁷⁶ which all serve to further the

not preempt a New York statute which prohibited discrimination on the basis of pregnancy prior to the enactment of the PDA because the New York statute was not inconsistent with Title VII). See *Pavel Indus. v. Connecticut Comm. on Human Rights & Opportunities*, 468 F. Supp. 490, 493 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980) (although Connecticut's anti-discrimination law was consistent with Title VII, this consistency did not save the law from being inconsistent with the federal Employee Retirement Income Security Act of 1974 ["ERISA"] and ERISA, therefore preempted Connecticut's anti-discrimination law).

71. The PDA should be read together with § 703(a). See *supra* notes 1 and 4 for the complete text of both sections. See also *supra* notes 44 and 45 and the accompanying text for the construction analysis of the PDA.

72. For the purpose of Title VII, see *supra* note 52.

73. As the United States Court of Appeals for the Ninth Circuit noted, "We are not the first court to announce that the goal of Title VII is equality of employment opportunity, not necessarily sameness of treatment." *Guerra*, 758 F.2d at 396 n.7. See also *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (Title VII did not forbid private employers from adopting affirmative action plans); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (facially neutral policies cannot be maintained if they operate to freeze the status quo of prior discriminatory practices); *La Riviere v. EEOC*, 682 F.2d 1275, 1279 (9th Cir. 1982) (states as well as employers may adopt affirmative action plans); *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981) *vacated on other grounds*, 685 F.2d 1088 (4th Cir. 1982) (Montana's preferential pregnancy statute is not inconsistent with the purpose of Title VII). See generally *Kreiger & Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513 (1983) (for a discussion of the inadequacies of an equal treatment approach).

74. *Guerra*, 107 S. Ct. at 694 n.28 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), exclusion of men from state nursing school was held invalid because there was no showing that women had lacked opportunities in nursing). See also *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977) (outdated stereotyped assumptions, such as viewing women, and not men, as dependant spouses, cannot be used to justify dissimilar treatment of women and men); *Homemakers, Inc. v. Division of Indus. Welfare*, 509 F. 2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 163 (1976) (Title VII superceded a provision of the California Labor Code which required employers to pay overtime to female employees, but did not extend the same benefit to male employees); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (Title VII struck down weight lifting restrictions); *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972) (Title VII preempted labor regulation granting rest periods to female employees, but not to male employees); *Murray & Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 231, 240 (1967) (separate dormitories or toilet facilities do not imply inferiority); Comment, *Developments in Title VII*, 84 HARV. L. REV. 1109, 1186 (1971) (for a thorough discussion of state protective laws and Title VII).

75. See *infra* note 96 and accompanying text for a discussion of the purpose of Title VII.

76. *Guerra*, 107 S. Ct. at 694.

goals of Title VII.

Although the *Guerra* Court did not define the exact boundaries of what is permissible and impermissible under the PDA, states now have accurate guidelines for accommodating pregnancy in their laws and policies. Same or equal treatment is the minimum requirement of the PDA.⁷⁷ This requirement influenced subsequent Supreme Court decisions.⁷⁸ States that desire to accommodate pregnancy differently than other disabilities, must limit their benefits to the actual physical pregnancy disability.⁷⁹ If a state desires a broader parenting leave policy, the state must extend the same or equal benefits to males, as well as females.⁸⁰ If a state elects to treat pregnancy favorably, a state does not have to extend similar benefits to other temporarily disabled employees.⁸¹ Thus, the *Guerra* Court helped to settle a confused area of the law.

Although the Court's analysis adequately decided the issue, the *Guerra* Court could have analogized favorable treatment of pregnancy to similar affirmative action cases. The majority presumably did not make the analogy to affirmative action because of the adverse public reaction previous affirmative action opinions had evoked. California's law requiring preferential treatment of pregnancy, however, is *not* an affirmative action plan.⁸² Affirmative ac-

77. *Newport*, 462 U.S. at 685.

78. Exactly one week after the *Guerra* decision, the Court decided *Wimberly v. Labor & Indus. Relations Comm'n of Mo.*, 107 S. Ct. 821 (1987). Although the *Wimberly* Court construed § 3304(a)(12) of the Federal Unemployment Tax Act and not Title VII, the Court held that § 3304(a)(12) prohibited discrimination against pregnancy but did not mandate preferential treatment in favor of pregnancy. The Court heard the case because two states had interpreted § 3304(a)(12) differently. *Id.* South Carolina characterized pregnancy as good cause to receive unemployment compensation. *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983). Missouri, on the other hand, included pregnancy under the neutral general disability clause that made pregnant women ineligible to collect unemployment compensation. *Wimberly*, 107 S. Ct. at 824. The Court upheld Missouri's same treatment approach, but never specifically overruled South Carolina's special treatment approach. *Id.* at 828. See generally Barnett, *Pregnancy Discrimination*, TRIAL, July, 1987, at 38. (for an article discussing the impact the *Guerra* decision had upon the *Wimberly* decision).

79. *Guerra*, 107 S. Ct. at 694.

80. *Id.* The proposition that broader parenting leave benefits must be given equally to men and women can be inferred from the Court's remark that § 12945(b)(2) is narrowly drawn to cover only the actual physical disability brought on by pregnancy. *Id.* See *supra* note 65 (discussing medical pregnancy leaves).

81. *Guerra*, 107 S. Ct. at 697 (Stevens, J., concurring).

82. Affirmative action is a remedial measure imposed by the courts, *Rios v. Enterprise Ass'n of Steamfitters*, 501 F.2d 622 (2d Cir. 1974), or voluntarily adopted by employers, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) to correct or remove obstacles that have acted as barriers to the achievement of equal opportunity goals. See also *United States v. Paradise*, 107 S. Ct. 1053 (1987) (most recent Supreme Court case reaffirming a court order to implement an affirmative action plan).

In *Guerra*, California made a public policy choice when enacting the preferential

tion is a remedy for blatant discrimination practices and for facially neutral policies that have a disparate impact on an identifiable group of individuals.⁸³ Although the *Guerra* Court was confronted with Cal Fed's facially neutral leave policy,⁸⁴ the majority declined to comment on whether section 12945(b)(2) could be upheld as a legislative response to neutral leave policies that had a disparate impact on pregnant workers.⁸⁵ Justice Stevens, however, concurring with the majority, compared the lawfulness of preferential treatment of pregnancy under the PDA to the lawfulness of affirmative action under Title VII.

In his concurring opinion, Justice Stevens⁸⁶ noted that *United Steelworkers of America v. Weber*,⁸⁷ one of the leading cases addressing affirmative action, was strikingly similar to the *Guerra* Court's dilemma. In *Weber*, an employer voluntarily adopted an affirmative action plan which reserved fifty percent of the openings in a training program for black employees.⁸⁸ The issue was whether an employer could voluntarily prefer blacks over whites without violating Title VII's prohibition against race discrimination and section 703(j)'s⁸⁹ prohibition against preferential treatment. The *Weber*

treatment approach to pregnancy. Therefore, California's approach to pregnancy is a public policy choice and not a remedy. However, the similarities between preferential treatment and affirmative action are worth noting. See *infra* notes 91-96 and accompanying text for a discussion of the similarities between preferential treatment and affirmative action.

83. Affirmative action is a remedy for individual claims that allege that an employer practice treats one group of individuals better than another or that an employer practice, which is facially neutral, has a disparate impact on one identifiable group of individuals over another. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) (discussing the difference between disparate treatment and disparate impact). Proof of discriminatory motive is critical under a disparate treatment theory; proof of discriminatory motive is not required under a disparate impact theory. *Id.* Either theory may be applied to a particular set of facts. *Id.*

84. *Guerra*, 107 S. Ct. at 688.

85. *Id.* at 695 n.32. The Court of Appeals for the Ninth Circuit noted in *Guerra* that this case only involved a challenge to the facial validity of § 12945(b)(2). *Guerra*, 758 F.2d at 394. The only issue involved was a question of law on cross-motions for summary judgment. *Id.* Neither party had alleged or raised any factual questions on a disparate impact theory. The *Guerra* Court concluded that because the PDA did not prohibit all preferential treatment of pregnancy, the Court did not need to decide whether § 12945(b)(2) could be upheld as a proper legislative response to leave policies that had a disparate impact on pregnant workers. *Guerra*, 107 S. Ct. at 695 n.32.

86. *Id.* at 696 n.2.

87. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

88. *Id.* at 198.

89. *Id.* at 200, 205 n.5. Section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) (1976), provides in part:

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization . . . to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which

Court held that Title VII does not prohibit preferential treatment of blacks.⁹⁰

The reasoning the *Guerra* Court employed in reaching a similar conclusion closely paralleled that of the *Weber* Court. In *Weber*, as Justice Stevens noted, the plain language of section 703(a) of Title VII appeared to mandate equal treatment.⁹¹ The legislative history also mandated equal treatment.⁹² Moreover, Congress did not consider the consequences of a completely neutral rule.⁹³ Finally, there was evidence that Congress did not intend to require preferential treatment.⁹⁴ The *Weber* Court concluded, however, that Congress did not intend to prohibit all preferential treatment.⁹⁵ This conclusion was based on the fact that Congress enacted Title VII to achieve equal employment opportunity and to remove barriers, which appeared in the form of facially neutral policies, that have historically operated to favor one group of employees over another.⁹⁶

Affirmative action and preferential treatment of pregnancy, in certain circumstances, further the goal of equal employment opportunities.⁹⁷ The *Weber* decision and many other subsequent decisions

may exist with respect to the total number or percentage of persons of any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force

42 U.S.C. § 2000e-2(j) (1976).

90. *Weber*, 443 U.S. at 208.

91. See *supra* note 4 for the complete text of § 703(a).

92. For a thorough analysis of the legislative history of Title VII, with an emphasis on a same treatment approach, see *Weber*, 443 U.S. at 219-55 (Rehnquist, J., dissenting).

93. Congress' attention was focused on the plight of the black worker and discrimination against the black worker. *Id.* at 202.

94. *Id.* at 205. The *Weber* Court stated that if Congress meant to prohibit all race-conscious affirmative action, Congress would have provided that Title VII would not require or *permit* racially preferential treatment. *Id.* (emphasis in original).

95. *Id.* at 206.

96. *Id.* at 208. The *Weber* Court found that the employer's affirmative action plan was consistent with Title VII because both were designed to break down old patterns of racial segregation and to open employment opportunities for blacks which had been traditionally closed to them. *Id.*

97. The *Weber* affirmative action case devised a four-part test which distinguished a permissible affirmative action plan from an impermissible affirmative action plan. A permissible affirmative action plan must be designed to break down old patterns of racial discrimination; the plan must not unnecessarily trammel the interests of other employees; the plan must not create an absolute bar to the advancement of other employees; and the plan must be a temporary measure. *Id.* at 208. This test has been reaffirmed in *Johnson v. Transportation Agency Santa Clara County, Cal.*, 107 S. Ct. 1442 (1987) (county transportation agency's affirmative action plan was voluntarily adopted to attain a balance between the sexes in its work force); *United States v. Paradise*, 107 S. Ct. 1053 (1987) (Court ordered affirmative action plan to achieve a racial balance in Alabama's state police force affirmed); *La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982) (affirmative action plan to remedy longstanding male-female imbalance in the California Highway Patrol affirmed). See *supra* notes 77-81 and accompanying text discussing the limitations the PDA places upon states.

support this proposition.⁹⁸ By analogizing affirmative actions cases to the *Guerra* case, the Court could have supported the holding that preferential treatment of pregnancy is consistent with Title VII.

The *Guerra* Court's timely interpretation of the PDA has firmly resolved the issue that preferential treatment of pregnancy is lawful under Title VII. The holding that the PDA mandates equal treatment, but does not prohibit preferential treatment, has already impacted caselaw.⁹⁹ Consequently, states now have accurate guidelines,¹⁰⁰ which enable them to correctly tailor their fair employment laws and policies. States are further assured that they have the power to favorably accommodate the condition of pregnancy in their laws, while not conflicting with federal law. Finally, and most important, women will confidently know that the birth of one career does not require the end of another.

Judith Gallo

98. See, e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984) (dominant purpose of Title VII is to root out discrimination in employment); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (primary objective of Title VII is to bring employment opportunities); *Connecticut v. Teal*, 457 U.S. 440 (1982) (the statute speaks, not in terms of jobs and promotions, but in terms of limitations and classifications that would deprive any individual of employment opportunities); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (paramount concern of Congress in enacting Title VII was the elimination of employment discrimination).

99. See *supra* note 78 for a discussion of the *Wimberly* case.

100. See *supra* notes 77-81 and accompanying text for the PDA guidelines affecting states.

