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# *Eberts v. Westinghouse Electric Corp.* GENDER-BASED DISCRIMINATION AFTER *GILBERT* AND *SATTY*

## INTRODUCTION

If the major issue of the sixties was racial discrimination, it has been replaced in the seventies by sex discrimination.[1] In this decade, no other social concern has generated more public discussion, political devisiveness, legislative action, or judicial litigation. This has culminated in a massive legal attack upon sex discrimination through a proposed constitutional amendment,[2] newly enacted and amended statutory laws,[3] and increased judicial scrutiny of state and private actions that divide the populace into gender-based classifications.[4]

The major emphasis in the movement to eliminate sex discrimination concerns employment disparities. Title VII of the Civil Rights Act of 1964[5] has become the foundation upon which employees rely for federal redress of private employment practices which have the effect of disadvantaging one sex by separating the workforce into gender-based classifications. Female employees assert that distinguishing employment policies on the basis of pregnancy is discriminatory on its face because only females can become pregnant.[6] Employers defend such pregnancy-based classifications on two grounds: 1) they are not gender-based, but are based on the physical characteristic of pregnancy[7] and, 2) such distinctions do not disadvantage pregnant women because they share equally with men in all other

1. "Of my two 'handicaps,' being female put many more obstacles in my path than being black." S. CHISOLM, UNBOUGHT AND UNBOSSED xii (1970).

2. Equal Rights For Men and Women Amendment (Proposed), H.R. J. RES. NO. 208, 92 Cong., 2d Sess. (1972). The period allowed for ratification was extended by H.R. J. RES. NO. 638, 95th Cong., 2d Sess. (1978).

3. Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e (1976), *as amended by* 1978 Amendment to Civil Rights Act of 1964, Pub. L. No. 95-555, 92 Stat. 2076; Equal Pay Act of 1963, 29 U.S.C. § 206d (1976).

4. *See generally* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination* (1977), U. ILL. L.F. 69.

5. 42 U.S.C. § 2000e (1976).

6. *See, e.g.*, Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), EEOC v. Children's Hospital of Pittsburg, 415 F. Supp. 1345 (W.D. Pa. 1976).

7. *See, e.g.*, Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975).

company-sponsored benefits, but are denied additional benefits which non-pregnant employees cannot enjoy.[8]

Two recent United States Supreme Court decisions attempted to reconcile the conflict. In *General Electric Co. v. Gilbert*,[9] the Court validated the employer's contention that a disability insurance plan which excluded pregnancy from its coverage did not do so on the basis of sex, but on the sex-unique characteristic of pregnancy.[10] Because both sexes could share equally in coverage under the plan, the denial of pregnancy coverage was an exclusion to women that men could not enjoy and was therefore non-discriminatory.[11] Agreeing with employees in *Nashville Gas Co. v. Satty*,[12] the Supreme Court refined its position, finding that not all differential treatment of pregnancy by employers would be acceptable under Title VII. The Court held that an employment policy which denied seniority rights to pregnant women was not merely a refusal to extend to women an additional benefit which men could not enjoy, but constituted an imposition on pregnant women of a substantial burden that men could not suffer.[13]

In *Eberts v. Westinghouse Electric Corp.*,[14] the court attempted to reconcile the polar positions of *Gilbert* and *Satty* by basing its finding on the middle ground between the legal precedents. *Eberts* applied the reasoning of *Gilbert* to find the classification of the workforce to be based on pregnancy, not gender.[15] The denial of seniority rights, unlike the denial of disability benefits, was found to be discriminatory under the *Satty* analysis because of the burden it imposed on women.[16] More importantly, since *Eberts* included pregnancy distinctions not included in *Gilbert* or *Satty*,[17] the trial court was directed to ex-

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8. *See, e.g.*, Grogg v. General Motors Corp., 444 F. Supp. 1215 (S.D.N.Y. 1978).
9. 429 U.S. 125 (1976).
10. *Id.* at 136.
11. *Id.* at 138-40.
12. 434 U.S. 136 (1977).
13. *Id.* at 142-43.
14. 581 F.2d 357 (3d Cir. 1978).
15. *Id.* at 360.
16. *Id.* at 362.
17. The specific allegations were:

Count I: Challenge to Westinghouse's policy of providing sickness and accident benefit payments to employees who must be absent from work because of non-occupational disabilities, except disabilities relating to pregnancy or childbirth.

Count II & III: Challenges to Westinghouse's practice of denying female employees "credited service" and seniority for periods during pregnancy leave.

Count IV: Challenge to the requirement that written notice of the

amine the other-employment practices for their discriminatory effect, which was to be weighed by the burden placed on women.[18] Furthermore, all the challenged employment practices would be examined on a case-by-case basis to determine whether they violated Title VII.[19]

Subsequent to *Eberts*, the 1978 Amendment to the Civil Rights Act of 1964[20] was enacted. This amendment re-defines sex discrimination under Title VII to specifically include classification among employees based on pregnancy.[21] While this amendment invalidates the rationale of *Gilbert in toto*, it only supersedes *Satty* and *Eberts* to the extent that they reflect on pregnancy-based classifications. To the extent that *Satty* and *Eberts* still apply to non-pregnancy, gender-based classifications, they are still valid.

## FACTS AND HOLDING OF THE COURTS

### *Eberts in the District Court*

Twenty-two current and former female employees of the Westinghouse Corporation and their unions filed a class action complaint in 1974 against Westinghouse, charging the defendant with seven counts of Title VII violations[22] centered around two main allegations: 1) that Westinghouse had violated Title VII by the exclusion of pregnancy from coverage under its sickness and accident benefits program and, 2) that other policies of the corporation relating to pregnancy leaves discriminated against female employees, particularly the practice of denying seniority and credited service to females during a company-mandated pregnancy leave. Three years later, following the *Gilbert* decision, the district court dismissed the entire complaint. No independent analysis was provided, but the court supported its decision by referrence to *Lukus v. Westinghouse Electric Corp.*[23]

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condition of pregnancy be given during the first five months of pregnancy as a precondition for a leave of absence.

Count V: Challenge to the requirement that females have nine months of continuous employment with Westinghouse before being allowed to take maternity leave.

Count VI: Challenge to Westinghouse's forced maternity leave.

Count VII: Union challenges to the above practices in connection with a national collective bargaining agreement with the defendant. *Id.* at 358-59.

18. *Id.* at 362.
19. *See* notes 72-77, 89-91 and accompanying text *infra*.
20. P.L. 92-555, 92 Stat. 2076 (1978).
21. *Id.* at § 1.
22. *See* note 17 *supra*.
23. Order No. 76-1409 (W.D. Pa. 1977).

*Lukus* involved a single count of discrimination against the same defendant, based on the company's denial of disability insurance benefits to pregnant employees. The court held such a denial non-discriminatory and dismissed the complaint because *Gilbert* "was completely dispositive of the issue *sub judice*."[24]

*Eberts in the Third Circuit Court of Appeals*

The plaintiffs appealed to the Third Circuit Court of Appeals, claiming that the district court erred in its reliance on *Lukus*. They distinguished *Lukus* in that it entailed a single count directed at the defendant's disability insurance plan, while *Eberts* went beyond to include challenges to other employment practices as well. Additionally, the plaintiffs raised new claims of a discriminatory effect and purpose of the disability plan itself, contending that *Gilbert* was not dispositive of these issues.[25]

The court first interpreted *Gilbert* as bearing only on a claim of a disability insurance plan.[26] It then found each of the other challenged employment policies to result in a sufficient discriminatory effect to establish a cause of action under Title VII.[27]

24. Eberts v. Westinghouse Elec. Corp., 581 F.2d 359 (quoting Lukus v. Westinghouse Elec. Corp., Order No. 76-1409 (W.D. Pa. 1977)).

25. 581 F.2d at 360. The district court dismissed for failure to state a claim upon which relief can be granted on the basis that *Gilbert* precluded all issues in *Eberts* as it had in *Lukus*. The *Eberts* plaintiffs objected to this because, while the *Lukus* suit was only directed at a disability insurance plan, their suit involved other counts that *Lukus* had not challenged. Pointing to their challenges in Counts II and III, the plaintiffs claimed the intervening *Satty* decision controlled on these issues and appealed that the district court had either misread or misapplied *Gilbert* to their suit.

26. The court's limitation of *Gilbert* to a disability insurance plan was based on a review of the evidence presented in both *Gilbert* and the decision on which *Gilbert* was based, Geduldig v. Aiello, 417 U.S. 484 (1974). *Id.*

Both involved only a claim against a disability insurance plan. In *Geduldig*, the plaintiffs attacked a state-provided accident and disability insurance plan on constitutional grounds; in *Gilbert* the challenged plan was a company-provided disability insurance plan which was attacked under Title VII. Both plans were found non-discriminatory based on the evidence presented as to the parity of benefits for all employees under the plan's coverage schedule. *Eberts* concluded that since the evidence presented in both cases only involved a disability insurance arrangement, the authority of *Gilbert* should be limited to only that situation. *Id.*

27. 581 F.2d at 359-60. The court prefaced its analysis of the merits of the plaintiffs' contention by articulating the standard of review to be used in its decision. The specific issue on appeal was the validity of the district court's dismissal of the plaintiffs' complaint in its entirety. The court of appeals' review, therefore, would be confined to the facts of each count; the decision would be only whether the facts pleaded could prove a claim of employment discrimination under Title VII.

The *Eberts* court quoted the test established by the Supreme Court in Conley v. Gibson, 416 U.S. 41 (1974), as its determinative standard: a dismissal on the pleadings should occur "only if it appears beyond a reason-

While the court rejected the allegations of a discriminatory effect or purpose in the disability plan itself, this rejection was based on the grounds that the complaint as originally written did not sufficiently plead these claims, and was therefore, precluded by *Gilbert*.[28] However, since these claims were not denied on substantive grounds, the court left the final decision to the district court to determine if the plaintiffs had procedurally preserved the right to amend their pleadings to establish their claims.[29]

On the basis of these findings, the court reversed the district

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able doubt that the plaintiff can prove no set of facts in support of his claim. . . ." *Id.* at 45-46. Procedurally, the court views the allegations as admitted to determine their sufficiency as a legal cause of action. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

In the *Eberts* case, then, the court confined its decision to the sufficiency of the facts pleaded by the plaintiffs to establish a cause of action based on the two opposing precedents of the *Gilbert* and *Satty* holdings, but did not make any determination as to proof of these allegations. Eberts v. Westinghouse Elec. Corp., 581 F.2d at 359-60.

28. *Id.* The court's conclusion that the merit of the plaintiffs' cause of action must be determined on the allegations as pleaded in the original complaint only was in accord with other decisions following the *Gilbert* holding. In Guse v. J.C. Penny Co., 562 F.2d 6 (7th Cir. 1977), the court also refused to consider allegations of the discriminatory effect of a medical insurance and sickness benefit plan raised during the appeal. In response to the argument that the case should be remanded to allow the plaintiffs to prove "discriminatory impact" the court said:

> With all due deference to the liberal pleading rules embodied in the Federal Rules of Civil Procedure, we cannot believe that anyone reading those five words (utterly unsupported by any factual allegations) would understand this complaint to be attacking the company's benefits package as a whole, in terms of aggregate risk protection. The course of proceedings in the district court reinforces this conclusion, as it demonstrates that no one connected with this lawsuit has ever so understood the complaint. *Id.* at 8.

Similar requests to allow allegations pleaded at the appellate level, but not specifically pleaded in the original complaint, have been denied in Women in City Government United v. City of New York, 563 F.2d 537 (2d Cir. 1977) (the court barred the plaintiffs from proving the disparate impact of a disability insurance plan on appeal when the theory had not been pleaded at the district court level) and in Grogg v. General Motors Corp., 444 F. Supp. 1215 (S.D.N.Y. 1978) (failure of pleading to challenge total company benefits as discriminatory precluded inquiry into the discriminatory effect of a company insurance plan).

29. 581 F.2d at 362 n.3. The court relied on the Supreme Court decision in Foman v. Davis, 371 U.S. 178 (1962) as a basis for the action to allow an amendment to the pleadings. In *Foman*, the Court found a district court in error for denying the petitioner's motion to amend a complaint. Emphasizing that the purpose of pleading is to facilitate proper judgment, the Court stated that the Federal Rules interpret this to allow amendments to the pleadings to be freely given unless there is a strong countervailing interest to be protected from such amendments. The Court concluded that a refusal to grant a leave to amend without a justifiable reason is an abuse of the district court's discretion to allow such amendments and contrary to the spirit of the Federal Rules. 371 U.S. at 182.

court's dismissal of counts two through seven and remanded for further proceedings. However, it affirmed the dismissal of count one without prejudice to the plaintiffs to seek to amend their pleadings in the district court.[30] In effect, the court held that *Gilbert* had not settled all pregnancy-related issues and that the plaintiffs did, in fact, have a viable cause of action on issues other than the disability plan.

## OPINION OF THE THIRD CIRCUIT COURT OF APPEALS

### *Discrimination Per Se*

The threshold question for the *Eberts* court was the determination of whether the denial of benefits to pregnant employees constituted discrimination *per se*[31] under Title VII. Two opposing standards framed the issue: the EEOC interpretation of Title VII, which expressly defines such exclusions as dis-

30. 581 F.2d at 362 n.3:

> The result we have reached with respect to Count I is without prejudice to the plaintiffs to seek to amend their pleadings in the district court . . . We express no view on whether any such motion to amend should be granted by the district court, as it is a determination for that court in the first instance.

31. Title VII prohibits sex discrimination. The fundamental question in these suits is whether the division of the workforce on the basis of pregnancy or any other sex-related characteristic is a classification based on sex. If a distinction between employees on the basis of pregnancy is found to be sex-based, then the mere proof that such a distinction exists establishes the plaintiff's cause of action, eliminating the requirement of proof of a discriminatory effect or intent. It further necessitates a showing by the defendant that there is a bona fide occupational reason for the distinction; absent proof of this, the plaintiff's challenge is upheld. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) and Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

The controversy here is that all distinctions between men and women are not necessarily sex-based. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). While *Gilbert* held that classifications based on pregnancy were not gender-based, City of Los Angeles, Dept. of Water v. Manhart, 98 S. Ct. 1370 (1978) found a distinction between employees which forced women to pay a greater amount into a company pension plan than men *was* sex-based, rather than based on the characteristic of expected life longevity, which the defendant had claimed. The *Manhart* Court said, "the practice was discriminatory in its treatment of a person in a manner which for the person's sex would be different." 98 S. Ct. at 1377.

Furthermore, distinctions which are based on actual physical characteristics are not upheld if the distinctions are based on stereotyped characterizations of one sex's ability to perform. Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir. 1973) (hiring policy which refused to employ women because of the employer's assumption that women were physically unable to perform each and every production job was found sex-based) and Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 717 (7th Cir. 1969) (job assignment restricting women to jobs not requiring lifting more than 35 pounds were found discriminatory when restriction was based on employer's generalization about female strength).

crimination *per se*, and the constitutional standard, as applied to *Gilbert*, which does not.

*Historical Background*

To assure equal employment opportunities in private industry, Congress passed Title VII of the Civil Rights Act of 1964, and delineated its purpose as the elimination of discrimination in employment on the basis of race, color, religion, sex, or national origin.[32] To implement these goals, Congress created the Equal Employment Opportunity Commission (EEOC) and charged the agency with the authority to interpret the Act.[33] In 1972, Congress amended Title VII to clarify its intent regarding sex discrimination,[34] and the EEOC amended its guidelines to expressly define sex discrimination under Title VII as: exclusion from employment because of pregnancy,[35] distinctions between men and women with regard to fringe benefits,[36] and the failure to treat pregnancy as any other temporary disability.[37]

Prior to 1976, the courts had developed a dual approach to challenges to sex-based classifications. The Supreme Court maintained its refusal to label sex a suspect classification subject to strict judicial scrutiny under the equal protection clause of the fourteenth amendment.[38] The result was that plaintiffs'

32. Civil Rights Act of 1964, Title VII, P.L. 88-352, 78 Stat. 253. *See also* H.R. REP. NO. 914, 1, 88th Cong., 2d Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 2401, 2401: "The purpose of this Title is to eliminate through utilization of formal and informal remedial procedures, discrimination in employment."

33. 42 U.S.C. § 2000e(4) (1976).

34. Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 1005. *See also* H.R. REP. NO. 92-238, 92d Cong., 1st Sess., 5 (1971): "Discrimination against women is to be accorded the same degree of social concern given to any type of unlawful discrimination."

35. The EEOC adopted the Labor Department's regulations under the Equal Pay Act. 29 C.F.R. § 1604.10 (1976): "(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is a prima facie violation of Title VII."

36. 29 C.F.R. § 1604.10 (1976) states: "(a) 'Fringe benefits' as used herein, includes medical, hospital, accident, life insurance and retirement benefits . . . . (b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."

37. 29 C.F.R. § 1604.10 (1976) states: "(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery thereof, are, for all job-related purposes, temporary disabilities . . . and payments under any health or temporary disability insurance or sick leave plan . . . shall be applied . . . as they are applied to other temporary disabilities."

38. For an analysis of the standard of strict judicial scrutiny see Justice Powell's separate opinion in Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978) where Justice Powell defines strict scrutiny as "call(ing) for the most exacting judicial examination . . . [classifications

challenges to the constitutionality of sex-based classifications were seldom upheld because the burden of proof required that the classifications be intentionally imposed without a "fair or rational basis,"[39] or that they be based on "archaic" or "overbroad generalizations" about behavior.[40]

In contrast to the constitutional interpretation, the courts imposed a stricter construction in Title VII suits brought against private employers for gender-based classifications. Because the legislative intent was unclear as to which practices constituted sex discrimination under Title VII,[41] courts gave deference to

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subject to strict scrutiny] must be precisely tailored to serve a compelling governmental interest." *Id.* at 2749.

Justice Powell, while adhering to the traditional view that racial and ethnic distinctions of any sort are inherently suspect, does not treat sex as a suspect classification; his view is that "the Court has never viewed such classifications as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal-protection analysis." *Id.* at 2755. *But see* Frontiero v. Richardson, 411 U.S. 677 (1973) where a plurality of four Justices were willing to find sex classifications inherently suspect and subject to the same strict scrutiny accorded classifications based on race, although this finding was not necessary to the result.

39. Reed v. Reed, 404 U.S. 71 (1971). In *Reed*, the Court explicitly rejected strict scrutiny for sex classifications but held for the female plaintiffs on the grounds that a classification based on sex must bear a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76.

40. *See* Craig v. Craig, 429 U.S. 190 (1976), where the majority found a middle ground between the strict scrutiny of *Frontiero* and the fair and substantial relation of *Reed* by applying "intermediate" level scrutiny. *Id.* at 218. An Oklahoma statute prohibiting the sale of beer to males under twenty-one and to females under eighteen had relied on statistical data to prove the disparity in the drinking habits of each sex as a rational basis for the distinction. The Court rejected the data as "loose-fitting generalities concerning the drinking tendencies of aggregate groups" and overturned the statute. *Id.* at 209.

Other generalizations found invalid by the Supreme Court on the basis of "irrationality" include Stanton v. Stanton, 421 U.S. 210 (1975) (generalizations about working women); Weinberger v. Wiesenfeld, 420 U.S. 119 (1975) (generalizations about the role of women in society); Stanley v. Illinois, 405 U.S. 645 (1971) (presumptions about the ability of unmarried fathers to raise their children).

41. Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199, 202 (3d Cir. 1975), *cert. granted*, 421 U.S. 987 (1976), *vacated on other grounds*, 434 U.S. 737 (1976): "The legislative history pertaining to the addition of the word "sex" to the Act is indeed meager. It appears that the amendment to the Act was offered in a tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat." *See also* 110 CONG. REC. 2484-85 (1964). Originally, the proposed Civil Rights Act of 1964 did not include sex in its list of protected classifications. When the passage of the Act seemed inevitable, a coalition of Southern congressmen opposing the Act insisted that it be added, believing this would insure the Act's defeat because some members of Congress, who favored elimination of racial discrimination, would oppose affording equal protection to women. Although independent legislative action to eliminate sex discrimination could not have found support in Congress at that time, determination to provide racial protection prevailed and the Act was passed. As a result, the movement to eliminate

the EEOC interpretations[42] unless there was clear evidence of contrary congressional intent.[43] Using the EEOC guidelines, eighteen federal district courts and all seven federal circuit courts of appeals which considered cases alleging sex discrimination to pregnant employees, determined that the congressional intent in enacting Title VII was to prohibit sex classifications based on pregnancy in employment situations.[44]

The Supreme Court rejected the EEOC standard for Title VII in *General Electric Co. v. Gilbert* by holding that the exclusion of pregnancy from coverage under a company's disability insurance program did not constitute sex discrimination under Title VII.[45] The Court refused to follow the EEOC guidelines because the 1972 guidelines contradicted the agency's position when the Act was passed[46] and were in conflict with legislative pronouncements that the Court felt more accurately reflected the congressional intent.[47]

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sex discrimination was strengthened with Title VII eventually becoming its strongest judicial weapon. This eleventh-hour move left the courts with a lack of legislative history on the meaning of sex discrimination under Title VII.

42. *Id.* at 202-03. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

43. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). The petitioner alleged discrimination against her because of national origin. The Supreme Court concluded the EEOC guidelines did not have application because of contrary legislative action by Congress: "[T]he guideline relied on . . . is no doubt entitled to great deference [citing cases], but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." *Id.* at 94.

44. Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Holthaus v. Compton & Sons Inc., 514 F.2d 651 (8th Cir. 1975); Communications Workers v. A.T.&T., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975); Farkas v. South Western City School District, 506 F.2d 1400 (6th Cir. 1975). *See* S. REP. No. 95-331, 95th Cong., 1st. Sess., 6-8 (1977).

45. 429 U.S. at 145-46.

46. *Id.* at 141-45. The Court emphasized that the 1972 guidelines were issued eight years after the enactment of the Statute and therefore were not a contemperaneous interpretation; additionally, the Court felt they contradicted an earlier opinion of the General Counsel of the EEOC made two years after Title VII's enactment in which the General Counsel interpreted the salary continuation program and insurance benefit programs which excluded disabilities resulting from pregnancy as not discriminatory.

47. *Id.* at 144. The *Gilbert* Court focused on § 703(h) of Title VII which makes interpretations of the Equal Pay Act applicable to Title VII. The Wage & Hour Administrator under the Equal Pay Act had stated:

> 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 the other. The mere fact that the employer may make unequal contributions for employees of opposite

Instead, the Court favored the determination of an earlier constitutional action, *Geduldig v. Aiello*,[48] which found the applicable standard to be that pregnancy-based exclusions were not discriminatory on their face.[49] In *Geduldig* the Supreme Court concluded that the exclusion of pregnancy from a list of covered non-occupational disabilities under a state accident and insurance program was not discriminatory on its face because the group of eligible recipients for benefits—non-pregnant persons—consisted of both men and women to whom the fiscal and actual benefits accrued equally. The Court reasoned, that in effect, women were not excluded because of a gender distinction, but because their physical condition—pregnancy—was removed from the list of comprehensive disabilities.[50] The *Gilbert* Court construed Title VII to prohibit discrimination based on gender where all disadvantaged persons are of one sex and all advantaged persons are of the other.[51] The division of eligible and ineligible recipients by an exclusion based on the sex-unique characteristic of pregnancy was not gender-related and, therefore, not discrimination *per se* under Title VII.[52]

The impact of the *Gilbert* decision was immediate. Both houses of Congress introduced legislation designed to overcome the ruling by specifically re-defining sex discrimination under Title VII.[53] Using strong language to express their dissatisfac-

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> 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. 29 C.F.R. § 800.116(d) (1975).

Because of this interpretation, the Court concluded that if the exclusion of pregnancy from a benefits plan were judged to be in violation of § 703(a)(1), it would not be in violation of § 703(h). The Court felt Congress did not intend such an inconsistency. At the time of the enactment of Title VII Senator Humphrey indicated that such disability exclusions would not be violative of the Act. 110 CONG. REC. 13663-64 (1964). Using this language the Court concluded that the congressional intent was incorrectly interpreted in the EEOC guidelines. 429 U.S. at 144-45.

48. 417 U.S. 484 (1974).

49. *Id.*

50. *Id.* at 496-97 n.20.

51. 429 U.S. at 144-45.

52. *Id.* at 145-46. *See generally* Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805, 811 (1975); Note, *General Electric Co. v. Gilbert: The Plight of the Working Woman*, 11 J. MAR. J. 215, 223 (1977).

53. H.R. 6075, 95th Cong., 1st Sess. and S. 995, 95th Cong., 1st Sess. Both bills were introduced on March 15, 1977, the House bill with 81 co-sponsors and the Senate bill with 29 co-sponsors. The House approved its bill on July 18, 1978. The Senate version had been passed a year earlier in the Summer, 1977. On October 13, 1978, the Conference Committee issued its report. CONF. REP. No. 95-1786, 95th Cong., 1st Sess. (1978). That same day the Senate, by voice vote, approved the bill, and the House followed two days later. On October 31, 1978, President Carter signed the 1978 Amendments to the Civil Rights Act of 1964, Pub. L. 95-555, 92 STAT. 2076 (1978).

tion with the *Gilbert* decision,[54] these legislative amendments to Title VII underscored Congress' intent to ensure that working women were protected against all forms of employment discrimination, including discrimination by classifications based on pregnancy.[55] Not until after the decision in *Eberts*, however, was a bill enacted into law.[56]

Reaction in the private sector was equally strong. Commentators criticized the adoption of the constitutional standard in Title VII actions and predicted that the rejection of the EEOC standard would severely curtail the movement to eliminate discriminatory employment practices.[57]

Subsequent to *Gilbert*, courts could not agree on a uniform standard for Title VII actions. Some courts that had previously applied the EEOC guidelines to determine that pregnancy-based classifications were discriminatory began to apply *Gilbert* to find no violations of Title VII for all gender-based classifications.[58] Other courts refused to extend *Gilbert* beyond any issue specifically addressed in the final decision.[59] Several state

54. S. REP. NO. 95-331, 95th Cong., 1st Sess. (1977):

Even more important than our disagreement with the *Gilbert* decision is the fact that the decision threatens to undermine the central purpose of the sex discrimination prohibitions of Title VII . . . A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment. *Id.* at 7. H. REP. NO. 95-948, 95th Cong., 1st Sess. (1977): "Justice Brennan, in a dissenting opinion, supported the EEOC guidelines as a reasonable interpretation and implementation of the broad social objectives of Title VII . . . It is the committee's view that the dissenting Justice(s) correctly interpreted the Act." *Id.* at 2.

55. S. REP. NO. 95-331, 95th Cong., 1st Sess. (1977) at 6: "In the committee's view these [EEOC] guidelines rightly implemented the Congress' intent in barring sex discrimination in the 1964 Act."

56. *See* note 53 *supra*.

57. *See generally* Note: *General Electric Co. v. Gilbert: A Lesson in Sex Education and Discrimination—The Relationship Between Pregnancy and Gender and the Vitality of Disproportionate Impact Analysis*, 1977 UTAH L. REV. 119; Note, *Civil Rights—Sex Discrimination—Failure to Provide Pregnancy Disability Benefits Does Not Violate Title VII*, 45 FORDHAM L. REV. 1202 (1977).

58. *See, e.g.*, Women in City Government United v. City of New York, 563 F.2d 537 (2d Cir.), *cert. granted*, 429 U.S. 1033 (1977); Guse v. J.C. Penny Co., 562 F.2d 6 (7th Cir. 1977).

Both Circuit Courts of Appeals found a challenge to a company disability insurance plan completely precluded by *Gilbert* and dismissed the claim, although the Second Circuit had previously upheld such a claim in the pre-*Gilbert* era in Communications Workers v. A.T. & T., 513 F.2d 1024 (2d Cir. 1975), *vacated*, 429 U.S. 1033 (1977).

59. Cook v. Arentzen, [1977] 14 FED. EMPL. PRAC. (BNA) 1643. A female former U.S. Navy lieutenant challenged a U.S. Navy regulation requiring termination from service of all officers who became pregnant on equal protection grounds. The Navy defended the regulation by citing the *Gilbert* decision as support for the challenged regulation. The court refused to accept the authority of the *Gilbert* holding on this issue, stating: "[*Gilbert*

courts refused to apply *Gilbert* to actions in which there was a contrary state law.[60]

*The Standard Used*

In its resolution of the discrimination *per se* issue under Title VII, the *Eberts* court adhered to the *Gilbert* standard and held that since the recipients of the employment benefits consisted of a class of both non-pregnant females and males, no discrimination *per se* existed.[61] *Eberts'* refusal to apply the EEOC standard was an unquestioning acceptance of *Gilbert's* dictate that the EEOC guidelines incorrectly interpreted congressionally-prohibited sex discrimination for all claims under Title VII.[62] While the *Eberts* court was bound by *Gilbert* to apply the

has] . . . nothing to do with foreclosing employment opportunity. It is an insurance case and simply allows the exclusion of pregnancy-related disabilities from an employer's disability benefits plan. Nothing in *Gilbert* licenses an employer to permanently fire an employee for the 'offense' of becoming pregnant." *Id.* at 1645. This argument was later cited in MacLennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977) as support for that court's decision to refuse the defendant's motion for summary judgment on the basis of *Gilbert* in a suit challenging an airline's policy of required maternity leaves for pregnant flight stewardesses. The court in *MacLennan* found the forced maternity leave policy discriminatory. *Accord: In re* Consolidated Pretrial Proceedings, Etc., 582 F.2d 1142 (7th Cir. 1978), where the court referred to *Gilbert* as dispositive of an issue invalidating an airline's policy requiring female cabin attendants who became mothers to resign or accept ground duty positions.

60. Time Insurance Co. v. Department of Industry, Labor, & Human Relations, (Dane County, Wisc. Cir. Ct. Jan. 3, 1978). Prior to the *Gilbert* decision, the Wisconsin Supreme Court had determined that state FEP law prohibited denial of disability coverage for pregnancy. The Dane County Circuit Court refused to apply the *Gilbert* holding in a case before that court because it concluded that the Wisconsin Supreme Court would not reinterpret the state law according to *Gilbert* to the exclusion of the state's stricter standards.

In Brooklyn Union Gas Co. v. New York Human Rights Appeal Board, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976), the court found that denial of sick leave benefits for pregnancy-related disabilities constituted impermissible discrimination under New York state law, and stated: "We are aware, of course, that the United States Supreme Court has recently reached a contrary result in construing Title VII . . . The determination of the Supreme Court, while instructive, is not binding on our court. . . ." *Id.* at 86, 359 N.E.2d at 395, 390 N.Y.S.2d at 886.

61. The *Eberts* court had no discussion of this issue; instead the court cited *Gilbert* as authority for the facial neutrality of the disability plan and *Satty*, which applied *Gilbert* to find the denial of seniority rights non-discriminatory on its face. 581 F.2d at 360-61.

The *Satty* rationale was if any employee, male or female, took a disability leave, he accumulated seniority; if he or she took any non-disability leave, including pregnancy, seniority was divested. The distinction was not between male and female, but between male and females with certain physical characteristics labeled as disabilities and all other males and females. 434 U.S. at 140.

62. The *Eberts* suit was appealed before the Third Circuit Court of Ap-

constitutional standard of no discrimination *per se* for disability insurance coverage or exclusions, and by *Satty* for seniority rights claims, it might have refused to extend this standard to the remaining facets of the plaintiffs' complaint. The judiciary has consistently maintained an intent not to be bound by constitutional standards when adjudicating Title VII actions in other areas of discrimination.[63] The Supreme Court has determined that the judicial standard in constitutional and Title VII actions are not identical[64] and has affirmed the application of EEOC guidelines as the authoritative source for definitions of discrimination under the statute.[65] Title VII has never been limited by constitutional parameters; rather it has been broadened to include practices that could not be found constitutionally discriminatory.[66] At the same time, defenses to such practices have

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peals in Pennsylvania. Prior to the *Gilbert* decision, the Pennsylvania federal courts had applied the EEOC guidelines in suits challenging gender-based classifications in employment and had consistently found such practices to be violative of Title VII. *See* Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), *cert. granted*, 421 U.S. 987, *vacated on other grounds*, 424 U.S. 737 (1976); Jurinko v. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973).

After the *Gilbert* decision, the courts began to rigorously apply the holding, disregarding the EEOC guidelines to dismiss such actions at the district court level or reverse previous district court judgments at the appellate level. *See* EEOC v. Children's Hospital of Pittsburgh, 415 F. Supp. 1345 (W.D. Pa. 1976), *modified*, 556 F.2d 222 (3d Cir. 1977), *cert. denied* 434 U.S. 1009 (1978).

63. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court allowed proof of a discriminatory effect, absent the intent necessary in a constitutional action, to prove a claim of racial discrimination. *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

64. Washington v. Davis, 426 U.S. 229 (1976).

65. *See generally* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (*per curiam*), where the Supreme Court reversed the district court's grant of summary judgment and remanded based on the EEOC interpretation as to what constituted neutral sex criteria mandated by Title VII for hiring.

66. *Id. Phillips*, the only Title VII case involving sex discrimination to be decided by the Supreme Court prior to *Gilbert*, challenged an employment policy that refused to hire women with pre-school-age children while hiring similarly-situated men. The Court found this to be violative of Title VII, even though the defendant argued that both men and women were included in the class of hired employees.

In areas other than sex discrimination, Title VII was broadened to envelop employment practices that merely had a discriminatory effect; *see* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (the discriminatory effect of mandatory employment tests was upheld after plaintiffs proved other non-discriminatory tests could adequately screen job applicants); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (evidence of numerical disparity among classes of employees proved discrimination under Title VII); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (the purpose of Title VII was defined by the court to allow an individual woman to make a choice about the potential dangerousness of a job rather than the employer).

been narrowed under Title VII.[67] This judicial history suggests that a narrow application of the constitutional standard to only those claims controlled by the *Gilbert* and *Satty* holdings could have been justified by the *Eberts* court.

*The Discriminatory Effects Issue*

Even though the challenged employment practices were found to be facially neutral, they could still be found discriminatory if it were shown that the distinctions involving pregnancy were "mere pretexts" designed to discriminate against women.[68] Under the constitutional standard and § 703(a)(1) of Title VII, such invidious discrimination must be intentionally imposed, while in actions brought under § 703(a)(2) a mere discriminatory effect, absent proof of intent, will establish a prima facie case of discrimination.[69]

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67. Two separate defenses are available in Title VII actions: a justification of a discriminatory practice because of "business necessity" or the bona fide occupational qualifications (BFOQ) defense under § 703(e). Burnwell v. Eastern Airlines, [1978] 17 FED. EMPL. PRAC. (BNA) 1701.

An overriding legitimate business purpose such that a practice is necessary to the safe and efficient operation of the business constitutes a business necessity. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971). This is met by a showing that the business purpose is sufficiently compelling to override discriminating impact, the practice carries out a business purpose, and that there are no acceptable alternative policies for accomplishing this business purpose. *Id.* The burden of proof for this necessity is upon the defendant. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

§ 703(e) defines the BFOQ defense as "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . ." 42 U.S.C. § 2000e-2(e)(1) (1970). The EEOC guidelines state that "the [BFOQ] as to sex should be interpreted narrowly." 29 C.F.R. § 1604.2(a). It is established when an employer has a factual basis for believing that substantially all persons within a class would be unable to perform safely and efficiently the duties of the job involved or that it is important to deal with persons on an individual basis. Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977). In Dothard v. Rawlinson, 433 U.S. 321 (1977) the Court applied this test to find height and weight requirements discriminatory because they were not necessary to the efficient job performance of a "corrections counsellor" in an Alabama prison, but upheld gender criteria for employment as a guard in maximum-security institutions because of their job-related necessity.

Although courts have often failed to distinguish between these two defenses and, instead, viewed them as a single BFOQ defense, *e.g.* Harriss v. Pan Am World Airways, Inc., 437 F. Supp. 413 (N.D. Ca. 1977), *Satty* indicated that these are two distinct defenses available to an employer. 434 U.S. at 143.

68. General Elec. Co. v. Gilbert, 429 U.S. at 135; Eberts v. Westinghouse Elec. Corp., 581 F.2d at 360.

69. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). *Griggs* found a discriminatory effect, absent intent, sufficient to show discrimination under Title VII § 703(a)(2). Its applicability to § 703(a)(1) has never been determined by the Supreme Court, so the intent requirement for suits under that

The district court's dismissal of the *Eberts* complaint was based on the assumption, held by many courts following the *Gilbert* decision,[70] that the *Gilbert* Court had found that the prerequisite discriminatory effect necessary to establish such invidious discrimination did not result from any employment policy that merely denied to pregnant women an additional benefit men could not enjoy.[71] Because this determination was based on the particular factual situation confronting the *Gilbert* Court, the *Eberts* court considered the factors which compelled this finding to decide their applicability to the allegations of the *Eberts* complaint.

*Limitation of the Gilbert Holding*

In *Gilbert*, no discriminatory effect was found because it was shown that the aggregate risk protection under the chal-

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section of Title VII remains. *See also* Grogg v. General Motors Corp., 444 F. Supp. 1215 (S.D.N.Y. 1978).

70. *E.g.*, EEOC v. Children's Hospital of Pittsburg, 556 F.2d 222 (3d Cir. 1977), *reversing* 415 F. Supp. 1435 (W.D. Pa. 1976), *cert. denied*, 434 U.S. 1009 (1978) (decided in same circuit as *Eberts*). The plaintiff had charged the defendants with a violation of Title VII because of the Hospital's policy of prohibiting female employees from using their accumulated sick leave for pregnancy-related disabilities. The district court had found in favor of the plaintiffs and was reversed on appeal by the Third Circuit on the basis that "the decision of *Gilbert* controlled." *Id.* at 223.

71. The controversy was best summarized in Women in City Government United v. City of New York, 563 F.2d 537 (2d Cir.), *cert. granted*, 429 U.S. 1033 (1977), where the court refused to allow the plaintiffs' claim of the disparate impact of a disability insurance plan:

> [The plaintiffs'] argument is based on dictum in the *General Electric* case, and we find it unpersuasive. In order to bolster the finding of non-discrimination in *General Electric*, the Supreme Court noted that the plaintiffs had not even attempted to prove a discriminatory effect. While this theoretically implies the possibility of a case based on a disparate impact theory, it hardly amounts to . . . [such] a holding. *Id.* at 540.

The courts' reluctance to allow such actions may have been prompted by their fear that proof of such impact would involve a monumental evidentiary showing, for the court in *Women in City Government United* stated that proof would require the court to examine the value of every compensation plan provided by a company for a showing of disparity in the total value of all compensation. The court concluded: "To read Title VII so . . . would be to impose upon the Act an administrative complexity undreamed of by its draftsmen. Had the Supreme Court wanted the lower federal courts to embark on such a course, it would have been far more explicit in the *General Electric* opinion, . . ." *Id.* at 541.

The ambiguity of the majority in *Gilbert* as to what constituted a discriminatory effect allowed the lower courts to summarily dismiss plaintiffs' claims on this issue. Furthermore, the lower courts found support in the dissenting opinion of Justice Brennan and the opinion of Justice Blackman, who concurred in part. Although both objected to this finding, both read the majority as saying no discriminatory effect would be found when the benefits under the plan accrued equally to men and women. 429 U.S. at 146 and 155.

lenged disability insurance plan was the same for both men and women.[72] This finding was determined by the plaintiffs' failure to prove that the comprehensive package was worth more to men than to women and the defendant's evidence that the inclusion of pregnancy would realize a greater economic benefit to women.[73] The determinative factors were that the selection of risks included in the plan covered disabilities applicable to both sexes, a showing that the total cost to the plan of pregnancy inclusion was prohibitive, and proof that the particular employer policies which dictated these decisions were objective rather than invidious.[74] These factors are tied directly to a company's particular policies and its actuarial basis so, at best, they are only determinative in a claim involving a disability insurance plan, and not other employment policies.[75] Therefore, the

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72. 429 U.S. at 152. In his dissent, Justice Brennan objected to the majority's view that there were no risks that men were protected from and women were not, noting that the plan did cover such gender-based disabilities as vasectomies and circumcisions, for which there existed no female counterpart covered by the plan.

73. *Id.* at 139-40. The Supreme Court in *Gilbert* based its finding that the cost concerns of the defendant constituted a legitimate business necessity for refusing to include pregnancy in the plan on the reasoning of Geduldig v. Aiello, 417 U.S. 484 (1974). There the defendant produced evidence to show the inclusion of pregnancy in the plan would require the state either to increase the employee contribution rate above its present 1% level, or subsidize the plan, or reduce coverage of the disabilities currently under the plan. As to the first alternative, the Court felt the state had a legitimate state interest in maintaining the contribution rate at a level not unduly burdensome to employees, particularly low-income employees. As to the second alternative, the Court felt nothing in the state constitution demanded that the state create a more extensive plan by subsidy. Finally, the Court felt that pregnancy coverage was no more mandated than any of the other "expensive" risks the plan had excluded, nor that a reduction of coverage for disabilities currently included in the plan should be forced to accommodate the inclusion of pregnancy. *Id.* at 496-97.

The *Gilbert* Court stated that the same reasoning applied to a Title VII action and that additional coverage was not mandated by Title VII if the parity of benefits under the covered risks was equal.

74. General Elec. Co. v. Gilbert, 429 U.S. at 148. One of the policy reasons stated by the defendant that was decisive in refusing to treat pregnancy as a disability under the coverage was the "voluntary nature" of pregnancy. The majority agreed with this definition of pregnancy. Justice Brennan, in his dissent, strongly objected to the Court's characterization of pregnancy as voluntary; in addition, he noted voluntary disabilities such as suicide, sports injuries, and other similar "sicknesses" were covered by the plan. His view that the voluntary nature of pregnancy is an inaccurate defense to a treatment of pregnancy as a non-disability under Title VII has been validated by Congress and by numerous court decisions. *See, e.g.*, S. REP. No. 95-331, *supra* note 54.

75. In *Gilbert*, Justice Brennan would have found a discriminatory effect. He divided the plan into coverage of three groups: 1) coverage of all disabilities mutually affecting men and women; 2) all disabilities covered which were particular to men; 3) all disabilities covered which were predominantly female-based. He noted that the majority concentrated on the first category only; whereas he felt that the coverage of the second cate-

*Eberts* court decided *Gilbert* was applicable only to the claim against the disability plan.[76] Indeed, by the same reasoning, the court might have further limited *Gilbert* to only the particular plan at issue in that case.[77]

*Counts Two Through Seven: Application of the Satty Standard*

The limitation of *Gilbert* to control only count one of the *Eberts* complaint produced an independent finding by the *Eberts* court of the discriminatory effect of counts two through seven which challenged employment practices other than the defendant's disability plan. *Satty* had been decided in between the district court's dismissal of the *Eberts* complaint and the appeal in the circuit court. The Supreme Court in *Satty* advanced a new measure of discriminatory effect by holding that if a denial of a benefit unduly burdened a class of employees, a discriminatory effect in violation of Title VII was established.[78] The *Satty* plaintiffs attacked the employer's practice of not classifying pregnancy as a disability and then denying seniority rights to persons who took non-disability leaves. The denial meant that these women were relegated to the status of new employees upon return from maternity leave and were forced to bid for jobs, often being terminated if no new jobs were available.[79] The Court found this denial had a discriminatory effect

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gory while excluding pregnancy from the third showed a discriminatory effect. 429 U.S. at 155 (Brennan, J., dissenting).

76. 581 F.2d at 360:

> *Gilbert's* analysis is thus tied explicitly to the situation of a disability insurance arrangement. Not only is *Geduldig*, on which *Gilbert* relies, concerned with such a plan, but the Court's discussion in *Gilbert* of the effects of the plan is linked closely with its actuarial basis. It appears therefore that *Gilbert* should be seen primarily as bearing on a claim relating to an employer's insurance program, and not as prejudging other issues relating to employment security.

77. *See* notes 89-92 and accompanying text *infra*.

78. 434 U.S. 136. The *Satty* decision, handed down on December 6, 1977, came exactly one year after the *Gilbert* opinion on December 7, 1976. The majority opinion, delivered by Justice Rehnquist, the same Justice who wrote the majority opinion in *Gilbert*, finally addressed the ambiguity of the *Gilbert* decision in respect to the discriminatory effect controversy. *See* note 71 *supra*.

In the year between these two decisions, it had become apparent that the lower courts had interpreted *Gilbert* to say that *any* policy which provided equal benefits or status to employees could not be faulted for failure to provide additional benefits for pregnant females. The focus of the lower courts was on the parity of provided benefits; little to no attention was directed to the legality of the denial of benefits. *See, e.g.*, Grogg v. General Motors Corp., 444 F. Supp. 1215 (S.D.N.Y. 1978). The *Satty* Court, therefore, returned the focus of the legal inquiry back to a measurement of the denied benefit itself.

79. 434 U.S. at 138-39.

on women as a class because it imposed a substantial burden on women that men need not suffer.[80] Since counts two and three of the *Eberts* complaint paralleled this employment policy and result, the *Eberts* court found a discriminatory effect.[81]

To draw the distinction between a benefit and a burden, the court focused on § 703(a)(2) of Title VII, which specifically defines a sex classification that deprives an individual of employment status or opportunity as unlawful.[82] Classification of pregnancy as a non-disability divests pregnant employees of their seniority; since male employees do not suffer from the condition of pregnancy, an equal burden of loss and status is not imposed upon them. Therefore, *Satty* had held that a discriminatory effect upon women is produced by this classification.[83]

The fact that the loss of status and opportunity was a burden only pregnant women suffered is decisive; it is the point which distinguishes the result of *Gilbert* from both the *Eberts*

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80. *Id.* at 142.

81. 581 F.2d at 361-62.

82. Two separate sections of Title VII are at issue here. 42 U.S.C. § 2000e-2 (1976) provides:

> (a) Employer practices.
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge an 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.

In the *Gilbert* suit, the plaintiffs brought their challenge under § 703(a)(1); the Court upheld the disability insurance plan, finding no violation of that section. 429 U.S. 125 (1976).

In *Satty*, however, the plaintiffs' challenge was brought under § 703(a)(2). The Court found a violation of Title VII under this provision by the denial of seniority rights, concluding that this practice affected the employment status and opportunity of employees:

> We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other 'because of their different roles in the scheme of human existence' . . . (citations omitted) . . . . But that holding does not allow us to read § 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. 434 U.S. at 142.

The same finding, however, did not apply to the disability insurance plan, for the Court stated it did not see how a disability plan could *ever* deprive a plaintiff of employment status or opportunity. The Court further suggested that future disability insurance plan challenges be brought under § 703(a)(1) rather than § 703(a)(2). *Id.* at 144-45.

83. 434 U.S. at 140-41.

and *Satty* decisions.[84] In *Gilbert*, there was equal treatment of men and women because the aggregate risk protection under the plan was the same for both; consequently, the exclusion of pregnancy from the plan's coverage merely failed to provide extra compensation for an additional risk unique to pregnant women. However, a denial of seniority rights to pregnant women means that they are not equally protected from status or employment loss. Since only pregnant women are less protected, the denial has a discriminatory effect on women as a class.[85] In effect, both *Eberts* and *Satty* emphasize an insistance that a court's function is only to insure that all employees be treated equally.[86] The courts will intervene to prevent employers from penalizing employees because of pregnancy, but will not force employers to extend a higher standard of compensation to pregnant employees.[87] All the maternity leave practices alleged in counts two through seven imposed a discriminatory burden on women and were remanded by the *Eberts* court for trial on the issues.[88]

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84. *Id.* at 142: "The distinction between benefits and burdens is more than one of semantics."

85. *Id.* at 141-42. The Court quoted the decision in *Gilbert* as a comparison: "For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, 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." *Id.* at 141, *citing* 429 U.S. at 138.

86. *See id.* at 154-55 (Stevens, J., concurring). This difference between a benefit and a burden is "illusory" and an inadequate test of discrimination because the favored class is always benefited and the disfavored class is always burdened. Justice Stevens preferred a test which determines if the employer has a policy which adversely affects a woman beyond the term of her pregnancy leave as a measure of a discriminatory effect.

87. Recent court decisions have emphasized this distinction between preventing discrimination and affirmatively imposing a judge's conception of equality, *e.g.* Dandridge v. Williams, 397 U.S. 471, 487 (1970): "Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure,. . . But the intractable economic, social, and even philosophical problems presented . . . are not the business of this Court." Accordingly, while requiring that pregnancy be included in disability insurance plans, the 1978 Amendment to the Civil Rights Act of 1964 does not require an employer to create or maintain such a plan at all.

88. 581 F.2d at 362. Both the *Eberts* and the *Satty* decisions involved a denial of seniority rights to women returning from pregnancy leave, a refusal to allow females on maternity leave to use accumulated sick-days pay during the term of pregnancy, and a forced maternity leave after the fifth month of pregnancy. The denial of seniority rights had been specifically decided by the *Satty* decision while the sick-days issue had been remanded for further consideration. Other cases had supported a contention that inability to use sick-days for pregnancy is discriminatory. *E.g.*, Zichy v. City of Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975).

Also questionable was the company's mandatory maternity leave at the fifth month of pregnancy. Cleveland Board of Education v. LeFleur, 414 U.S. 632 (1974), in which a mandatory leave regulation imposed upon teachers

*Count One: The Procedural Right to Amend*

The original *Eberts* complaint filed in the district court, alleging a single claim of discrimination *per se* based on the exclusion of pregnancy from the disability insurance plan, was dismissed because of the *Gilbert* holding. The plaintiffs argued on appeal that the district court's dismissal foreclosed the plaintiffs from presenting evidence to prove the discriminatory effect or purpose of the company's plan. Since the *Gilbert* finding was evidentiary in nature,[89] the particular factors which established no discrimination in *Gilbert* were not necessarily applicable.[90] The *Eberts* court stressed these factors in differentiating between disability plans and other employment practices.[91] Having already decided that discrimination is decided on a case-by-case factual basis, there was no logical reason why the court should not have further limited *Gilbert* solely to the facts of one company's particular disability insurance plan.

Recognizing merit in the plaintiffs' arguments, the *Eberts* court limited its scope of review to a determination of count one, as pleaded in the original complaint. Since this had not included pleadings of the plan's discriminatory effect or purpose, the court found the *Gilbert* holding that such a plan was facially neutral controlling and affirmed the district court's dismissal.

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was found to violate the due process clause of the fourteenth amendment, specifically spoke of the burden this policy imposed upon women: "By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a *heavy burden* on the exercise of these protected freedoms." *Id.* at 635 (emphasis added). Several lower court decisions invalidate this practice in Title VII actions. *See* MacLennan v. American Airlines Inc., 440 F. Supp. 466 (E.D. Va. 1977) (a required maternity leave was found discriminatory, and the court suggested a proper rule to be that the employee be allowed to continue work until a doctor required her not to) and Newman v. Delta Air Lines, 374 F. Supp. 238 (N.D. Ga. 1973) (a mandatory leave policy was found violative of Title VII but the exclusion of pregnancy from disability coverage was not). In Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975), *vacated*, 434 U.S. 158 (1976), the Ninth Circuit had found a mandatory maternity leave not violative of the Title VII (although it had found the exclusion of pregnancy from the disability plan discriminatory). The Supreme Court vacated this judgment for further consideration in light of the *Satty* decision, and the appellate court remanded to the district court, 572 F.2d 709 (9th Cir. 1978).

In addition, the *Eberts* case involved allegations of written notices of the condition of pregnancy and nine months of continuous service prior to the maternity leave as conditions upon which the leave would be granted; failure to meet these requirements would result in the leave being denied, or termination. Since these requirements were not qualifications to the granting of other non-disability leaves, a burden to women not suffered by men seemed apparent. 581 F.2d at 362.

89. *See* notes 72-76 and accompanying text *supra*.

90. 581 F.2d at 362.

91. *See* note 76 *supra*.

However, the court emphasized that its decision did not preclude the possibility that the complaint could be amended to include these new contentions.[92]

The Federal Rules of Civil Procedure dictate that leave to amend "shall be freely given when justice so requires."[93] The Supreme Court has interpreted this to mean that in the absence of some compelling reason, such as undue delay or prejudice to the opposing party, the plaintiff should be afforded an opportunity to test a claim when the underlying facts relied on may be a proper subject of relief.[94] In *Eberts*, no evidentiary showing had been presented by either side, suggesting that the risk of undue delay or prejudice to the defendant was minimal.[95]

Furthermore, in the *Eberts* case there are facts present in the original pleadings sufficient to establish a cause of action on the issue of the discriminatory effect or purpose of the disability plan. The possibility that *Gilbert* does not control on the discriminatory effect and intent claims is supported by the action of the Court in *Satty*. Because the *Gilbert* decision was based on evidence unique to the defendant, the *Satty* Court dismissed the disability plan *only* after it reviewed the evidence and concluded that the plan was substantially the same as the *Gilbert* plan.[96] However, in *Eberts*, the plaintiffs had been prohibited by the district court's dismissal and the refusal of the defendants to produce discovery information from proving its plan was different from the *Gilbert* plan.[97]

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92. 581 F.2d at 362. *See* notes 28 and 29 *supra*.

93. FED. R. CIV. P. 15(a).

94. Foman v. Davis, 371 U.S. 178, 182 (1962).

95. *Id.* In *Foman*, the Supreme Court found the refusal of the district court to allow amendment to the cause of action and the First Circuit Court of Appeals' affirmation of that refusal to be an abuse of the court's discretion when no evidentiary showing had been presented by either side.

96. 434 U.S. at 143: "On the basis of evidence presented to the District Court, petitioner's policy of not awarding sick-leave pay to pregnant employees is legally indistinguishable from the disability insurance program upheld in *Gilbert*."

This conclusion was buttressed by the actions of the *Satty* petitioner who failed to show a discriminatory effect and had admitted that the disability insurance plan was the same as the weekly sickness and accident insurance plan in *Gilbert*. *Id.* at 142. The *Eberts* plaintiffs, however, have never made such an admission.

97. 581 F.2d at 359. The plaintiffs had requested, through a set of interrogatories served on the defendant, certain information relating to the operation of the company health plans. Such information would be determinative in the plaintiffs' case to prove the aggregate protection under the plan for women was less than that of the men. The defendant refused to provide the information, calling the request irrelevant and onerous, and was not required by the district court to produce the information.

The district court's view on this matter is to be contrasted with the view of the Illinois Appellate Court in Illinois FEP Comm'n v. Hohe, 53 Ill. App.

Additionally, new claims of discriminatory purpose or effect advanced in other court actions are applicable to the *Eberts* facts. The dissent in *Gilbert* argued that a defendant's total history regarding sex distinctions should be considered before the possibility of discriminatory purpose is eliminated.[98] The *Satty* plaintiffs enlarged this idea by claiming that the court's finding of discrimination by the denial of seniority rights inferred the conclusion that the disability plan was part of an over-all design to discriminate against women, compelling a finding of discriminatory intent.[99] The *Satty* Court did not specifically reject this theory, but instead refused to consider it on procedural grounds, leaving the final determination up to the district court.[100] Since

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3d 724, 368 N.E.2d 709 (1977), where a subpoena calling for the production of employment records and documents for a three-year period was determined not to be an unreasonable request if the records in question were kept in the ordinary course of business.

Interestingly, on November 3, 1978, the National Labor Relations Board directed the Westinghouse Corporation to provide statistical information on women and minorities to the Union of Electrical, Radio and Machine Workers, a plaintiff in the *Eberts* suit, ruling that Westinghouse had failed to bargain in good faith by refusing to give the union the requested information. Chicago Sun-Times, Nov. 4, 1978, at 16, col. 2.

98. 429 U.S. at 150. Justice Brennan, in his dissenting opinion, objected strongly to the majority's finding of no discriminatory intent because the Court had limited its review to an evaluation of the plan without examination of the company history. He faulted the majority for "studiously ignoring" the district court's conclusion that General Electric's discriminatory attitude was a motivating factor in its policy and went on to note in great detail the company history in respect to women, concluding that the disability plan was a "tainted product" of a total company design that was not neutral toward women. *Id.*

99. 434 U.S. at 145. The only issue in *Gilbert* was the company's exclusion of pregnancy from the disability plan. Admitting that the disability plan in *Satty* was the equivalent of that in *Gilbert*, the plaintiffs acknowledged that if this were the only way in which the women had been distinguished from the men by the defendant there would be no cause of action because of the *Gilbert* preclusion. But, the plaintiffs emphasized that in *Satty* two counts of discrimination had been alleged and the Court had found the defendant's other practice—the denial of seniority service—to be a discriminatory practice. The plaintiffs insisted that the exclusion of pregnancy from the disability plan must be judged in the context of the other discriminatory practice to infer an over-all design to discriminate against women, with the plan being a part of this design.

100. *Id.* at 145-46. The district court had not made a determination on discriminatory intent. The Supreme Court disposed of this issue by stating that while the denial of seniority rights might be relevant to the issue of discriminatory intent, it was not conclusive and did not require such a finding by the district court. Since the district court had not found such an intent, the Supreme Court refused to consider it, supporting this refusal by showing that the plaintiffs had abandoned attacks on other policies of the company after the district court had ruled adversely. In the majority's opinion, the abandonment was inconsistent with the contention that *all* policies of the company should be considered for determination of discriminatory intent.

The dissenting portion of Justice Powell's opinion disagreed that the

the *Eberts* court had made a similar finding of discriminatory effects resulting from the company's other employment policies, the same argument is viable in *Eberts*.

A further possible claim is that the disability plan results in a discriminatory effect in violation of § 703(a)(1).[101] Challenges to the exclusion of pregnancy under a disability plan must be found violative of § 703(a)(1) because, as the *Satty* Court held, no such exclusion deprives an individual of employment status or opportunity as required by § 703(a)(2).[102] Discrimination under § 703(a)(1) is especially difficult to prove because, although the holding of *Griggs v. Duke Power Co.*[103] eliminated the necessity of proving intent under § 703(a)(2),[104] the applicability of *Griggs* to § 703(a)(1) has not been determined. Consequently, a violation under § 703(a)(1) still requires proof of a discriminatory effect *and* intent.[105] The Court refused to decide

abandonment showed inconsistency, and emphasized the "meandering course" of adjudication in this area. He argued that this was not abandonment because of inconsistency, but because the lower court's erroneous application of the law in the pre-*Gilbert* era had made such pleadings unnecessary. Since the plaintiffs' favorable rulings were now overturned by *Gilbert*, Justice Powell urged that the Court follow the usual practice of remanding the issue for further hearings when there has been a recent clarification of the law. *Id.* at 146 (Powell, J., concurring in part). *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

101. *See* note 82 *supra*. The right to amend pleadings in a Title VII case to include a new theory has been addressed by several courts. In Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973), the court upheld a district court judgment on a theory that had not been an overt issue in the trial nor in the pre-trial stipulation by concluding: "An appellate court . . . may uphold a judgment on any theory which finds support in the record . . . Under Rule 15(b), F. R. Civ. P., 28 U.S.C., a liberal provision is made for amendments to conform the pleadings to evidence, . . . even though no formal application is made to amend." *Id.* at 1045. *See also* Picture Music Inc. v. Bourne Inc., 457 F.2d 1213 (2d Cir. 1972) (decision upheld on theory supported by record) and New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (4th Cir. 1963) (pre-trial stipulation did not prevent court from applying legal principles to facts disclosed by proof).

In Pennington v. Lexington School Dist. 2, 578 F.2d 546 (4th Cir. 1978) the court remanded the issue of a denial of seniority rights on the basis of the new *Satty* decision. Because the district court had tried the case before *Satty*, the court felt there had been little guidance on the issues and suggested the district court reopen the record, if necessary, for introduction of additional evidence. *Id.* at 549.

102. 434 U.S. at 145. Justice Rehnquist acknowledged the necessity of challenging disability insurance plans under § 703(a)(1) by stating that in *Gilbert* the disability plan was challenged under § 703(a)(1) and that "appear(s) to be the proper section of Title VII under which to analyze questions of sick-leave or disability payments." *Id.*

103. 401 U.S. 424 (1971).

104. *See* discussion at note 69 *supra*.

105. In his concurring opinion in *Satty*, Justice Stevens calls the distinction between the two sections "illusory," confessing that he cannot see the distinction that the majority sees requiring intent. 434 U.S. at 154 n.4.

the intent question in both *Gilbert* and *Satty*,[106] so the possibility still exists that the *Griggs* standard will be applied to allow a mere showing of a discriminatory *effect* to establish a violation of § 703(a)(1).[107]

A discriminatory effect is found when the disability plan is worth more to men than women.[108] The specific allegations of the *Eberts* complaint suggest the theory forwarded by Justice Powell's opinion in *Satty* to prove the disability insurance plan in *Eberts* is less valuable to women than to men.[109] Pregnant females were forced to take a maternity leave in their fifth month of pregnancy. During the leave they were prohibited from using their accumulated sick-pay benefits. Males have no comparable mandated leave; those who take a leave for any disability can use their accumulated sick pay and those who suffer

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106. The Court concluded that a prerequisite to a determination of intentional discrimination under § 703(a)(1) is a showing of a discriminatory effect of the challenged practice. Since both plaintiffs in *Satty* and *Gilbert* had failed to prove the discriminatory effect of the disability insurance plan, there was no need for the Court to determine the more inclusive issue of whether intent was necessary for § 703(a)(1). Consequently, the Court refused to address this question, leaving the challenge to the intent requirement under § 703(a)(1) an open issue. 434 U.S. at 144; 429 U.S. at 137.

107. The intent-necessity difference between the two sections is crucial to future litigations. As the interpretation of § 703(a)(1) now stands, discrimination under this section can only be shown by 1) proof that the exclusion of pregnancy from a disability insurance plan is discriminatory on its face (which has been foreclosed by *Gilbert*) or 2) a showing of an intentional policy to disadvantage one sex and a showing that such a disadvantaging effect has taken place.

If the *Griggs* standard is determined to apply to § 703(a)(1), however, the intent requirement in the second alternative is removed and only a discriminatory effect need be shown. Obviously, the lesser burden of proof would benefit future plaintiffs.

The importance of this distinction has not escaped plaintiffs. In several cases, plaintiffs who originally filed complaints under § 703(a) attempted to amend to specifically challenge under § 703(a)(2) after the *Satty* decision articulated the two sections' differences. *See* Grogg v. General Motors Corp., 444 F. Supp. 1215 (S.D.N.Y. 1978) (the court allowed amendment to bring suit under § 703(a)(2) on a challenge to a forced maternity leave policy, but refused amendment on a challenge to the disability insurance plan on the grounds that the amendment would not alter the holding) and EEOC v. Delta Air Lines Inc., [1978] 17 EMPL. PRAC. DEC. (CCH) ¶ 8560 (the court refused amendment to § 703(a)(2) from § 703(a) because the pre-requisite discriminatory effect for both sections had not been proven).

In Pennington v. Lexington School Dist. 2, 578 F.2d 546 (4th Cir. 1978) the plaintiff specifically brought suit against a denial of seniority rights under § 703(a)(2) and the challenge was upheld on the basis of *Satty*.

108. General Elec. Co. v. Gilbert, 429 U.S. at 138.

109. 434 U.S. at 150-52. Justice Powell urged that a discriminatory effect did result from the plan and the plaintiffs should be allowed to plead and present evidence on this theory. His basis for allowing such a pleading on remand, even though the plaintiffs had not originally advanced this theory, was that the law regarding the necessity of such proof had only been recently clarified by *Gilbert*. *See* discussion at note 100 *supra*.

from any ailment not classified as a disability under the plan are not forced to take a leave.[110] Therefore, the combination of forced maternity leave and a denial of sick-pay benefits under the plan result in less net compensation for female employees.[111]

Since the *Satty* Court refused to consider this theory on procedural grounds, but did not expressly reject it,[112] it could be advanced by the *Eberts* plaintiffs to prove a discriminatory effect.

## CONCLUSION

At the time of the *Eberts* decision, classifications based on pregnancy were no longer discriminatory *per se* because of *Gilbert*, but could be found unlawful under the *Satty* "burdens" test. Using this test, the *Eberts* court invalidated employment practices which denied seniority rights to pregnant women, forced them to take maternity leave, and restricted their eligibility for such leave. Other courts found that requiring women to pay more into a pension fund,[113] failing to renew employment contracts of pregnant women,[114] and changing employment status because of maternity equally violates Title VII.[115] Other courts may follow the *Eberts* procedure in future litigations, and hold *Gilbert* controlling over challenges involving disability insurance plans and then proceed to use the "burdens" test on all other pregnancy-related employment practices.[116] *Eberts* fur-

110. 581 F.2d at 358.

111. *See* Nashville Gas Co. v. Satty, 434 U.S. at 150-52 for a full discussion of this theory.

112. 434 U.S. at 146-47 n.6. The majority, in its footnoted response to Justice Powell's opinion on this issue, disagreed with his view that the law had been unclear in the pre-*Gilbert* era. Contrary to everyone else's view, Justice Rehnquist felt the *Gilbert* impact was minimal:

> [W]e do not think it (*Gilbert*) can rightly be characterized as so drastic a change in the law as it was understood to exist in 1974 as to enable respondent to raise or reopen issues on remand that she would not under settled principle be otherwise able to do. *Id.*

The Court, therefore, refused to allow this theory to be pleaded on remand but did not specifically overrule its validity. *Id.*

113. City of Los Angeles, Dept. of Water v. Manhart, 98 S. Ct. 1370 (1978).

114. Pennington v. Lexington School Dist. 2, 578 F.2d 546 (4th Cir. 1978).

115. *In re* Consolidated Pretrial Proceedings, Etc., 582 F.2d 1142 (7th Cir. 1978).

116. Whether a reaction to public dissatisfaction with *Gilbert* or a desire to return to the course followed prior to that decision, courts currently seem determined to restrict *Gilbert* to its issues alone. The "burdens" test of *Satty*, which supplies the distinguishing measure of discrimination on all other pregnancy classifications, is viewed by some courts merely as a judicial procedure to dilute *Gilbert* without specifically overruling it.

In City of Los Angeles, Dept. of Water v. Manhart, 98 S. Ct. 1370 (1978), Justice Blackmun, in his concurring opinion, said the majority's decision

ther suggests that challenges to disability plans could be upheld.[117]

The difficulty in applying the "burdens" test is that it requires each practice to be weighed in the context of its own evidentiary circumstances and not pre-determined by a previous court's holding that a similar practice did impose a discriminatory burden.

The 1978 Amendment to the Civil Rights Act of 1964[118] eliminates this arduous case-by-case measurement. The enacting provision defines pregnancy classifications as discrimination *per se* and specifies that pregnant employees are to be treated equally for all purposes, including fringe benefit coverage.[119] However, the statute does not provide a legislative solution to the larger question of whether employment practices which affect only one gender on the basis of a disability other than pregnancy, or on the basis of other gender-related criteria, are discriminatory. The language of the statute is addressed solely to the treatment of pregnant employees.[120]

A disability insurance plan which systematically denies coverage for all disabilities which are unique to one gender may produce a discriminatory effect and still not be unlawful under

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"cut-back" on *Gilbert*, although the majority said it "distinguished" that holding:

> A program such as the one challenged here does exacerbate gender consciousness. But the program under consideration in *General Electric* did exactly the same thing and yet was upheld against the challenge . . . The Court's distinction between the present case and *General Electric* . . . seems to be just too easy. For me it does not serve to distinguish the case on any principled basis. I therefore must conclude that today's decision *cuts back* on *General Electric* . . . I do not say that is bad . . . I feel, however, that we should meet the posture of the earlier cases head-on and not by *thin rationalization* that seeks to distinguish but fails in its quest. (emphasis added) *Id.* at 1383-84.

117. *See* note 76 and accompanying text *supra*.

118. Pub. L. No. 95-555, 92 Stat. 2076.

119. [1978] 55 LAB. L. REP. (CCH) ¶ 9101. Under the statute, all seven counts of the *Eberts* complaint, including the challenged disability insurance plan, would be violative of Title VII because the law makes no distinction between pregnancy-related classifications in disability insurance plans or other employment policies.

120. Amendment to the Civil Rights Act of 1964, Pub. L. No. 95-555, 92 Stat. 2076. The enacting provision amends § 701 of the Civil Rights Act of 1964 by adding § 701(k):

> (k) 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.

the Amendment.[121] Furthermore, it is unclear whether a plan which denies pregnancy benefits to the spouses of male employees, while covering all spouses for other medical benefits, would fall under the Amendment.[122]

The discriminatory effect of employment classifications not covered by the Amendment must still be subjected to the *Eberts* analysis for a "burden" imposed on women. Thus, some issues of sex discrimination can only be resolved on a case-by-case basis,[123] leaving the development of the law at a stage in which it is only a little bit pregnant.

*Carole M. Cervantes*

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121. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (Brennan, J., dissenting) where this issue was raised:

> [T]he shallowness of the Court's 'underinclusive' analysis is transparent. 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 operated equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and the other excluded 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 152-53 n.5.

It is not mere speculation to say that litigation over non-pregnancy, gender-based issues will occur. The March 4, 1979 Chicago Tribune, § 1, at 28, col. 5, reports the case of a female firefighter wishing to breastfeed her baby in the firehouse. So far she has prevailed before the Iowa Civil Rights Commission and a local court.

122. [1978 Special Report] 784 GOV'T. EMPL. REL. REP. (BNA), 5. Since only males can have spouses who become pregnant, females could claim that such a policy is discriminatory on its face.

123. Although the Amendment does not decide all sex discrimination issues, it does finalize the fact that an employer can no longer penalize employees in any way for becoming pregnant. "Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word." Green v. Waterford Board of Education, 473 F.2d 629, 635 (2d Cir. 1973).