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Marcia Lynn Cohen

CASENOTES

GENERAL ELECTRIC COMPANY V. GILBERT: THE PLIGHT OF THE WORKING WOMAN

Historically, the legislative and judicial branches of the government have been faced with the problem of defining the role of women in society and determining whether certain practices by states and private employers constitute sex discrimination. In the late nineteenth and early twentieth centuries, sex discrimination cases arose under the equal protection clause of the fourteenth amendment.[1] These cases involved state legislation concerning the unequal treatment of men and women in their choices of profession,[2] employment[3] and hours.[4] In deciding these cases the Supreme Court applied the fourteenth amendment rational basis test[5] and concluded that the state's purpose in protecting women so that they may carry out their maternal functions justified the legislation.[6]

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1. U.S. CONST. amend. XIV § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* (emphasis added).

2. *See* Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (upholding the right of the State of Illinois to deny a woman a license to practice law).

3. *See* Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a Michigan statute prohibiting a woman from tending bar unless she was the wife or daughter of a male owner).

4. *See* Radice v. New York, 264 U.S. 292 (1924) (upholding a New York statute which did not allow women to work in restaurants at night); Muller v. Oregon, 208 U.S. 412 (1908) (upholding an Oregon statute which did not allow women to work in certain establishments more than ten hours a day).

5. *See* G. GUNTHER, CONSTITUTIONAL LAW at 657 (9th ed. 1976). The rational basis test, sometimes referred to as the minimal scrutiny test or permissive review, upholds classifications if the court can find a rational relationship between their existence and the legislative goal which the state is trying to achieve.

6. *See* notes 2-4 *supra.*

The courts took the view that if they limited the woman's role outside the home, they were promoting not only her health and welfare, but also preserving the well-being of the race.

Justice Bradley, in his concurring opinion in Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873), summed up the general attitude of the judiciary when he stated:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and

In 1920 a significant change in favor of women's rights came about with the passage of the nineteenth amendment giving women the right to vote.[7] However, social attitudes toward women have been slow to change. As late as 1961 the Supreme Court was still using the protective rationale of the earlier twentieth century cases when it upheld a Florida statute exempting women from jury service.[8]

In 1963, Congress began taking positive steps to combat sex discrimination by passing the Equal Pay Act as part of the Fair Labor Standards statute.[9] This provision outlawed sex discrimination in the payment of wages to employees performing jobs requiring equal skill and responsibilities under similar conditions. In 1964, Congress passed Title VII of the Civil Rights Act which stated that a private employer could no longer discriminate on the basis of race, color, religion, sex or national origin,[10] unless such discrimination was based on a bona fide occupational qualification.[11]

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functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Id. at 141.

7. U.S. CONST. amend. XIX. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

8. Hoyt v. Florida, 368 U.S. 57 (1961). This case was finally overruled by Taylor v. Louisiana, 419 U.S. 522 (1975), where the Court held that barring women from jury service was an unconstitutional denial of the sixth amendment jury trial guarantee.

9. 29 U.S.C. § 206(d)(1) (1970) reads in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

10. 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975) 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.

11. 42 U.S.C. § 2000e-2(e) (1970) provides:

Notwithstanding any other provision of this subchapter . . . (1) it

Following the congressional acts of the sixties, the Supreme Court's decisions in *Reed v. Reed*[12] and *Frontiero v. Richardson*[13] demonstrated a change in the Court's attitude toward sex discrimination under the fourteenth amendment.[14] In *Reed*, the Court held 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."[15] The plurality opinion in *Frontiero* attempted to carry this a step further by finding sex to be a suspect classification subject to strict judicial scrutiny[16] but failed to do so because the concurring opinion maintained that as long as this case could be decided on the basis of *Reed*, strict scrutiny was not necessary.[17] However, in one of the most recent fourteenth amendment cases concerning sex discrimination, *Geduldig v. Aiello*,[18] the Court

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

12. 404 U.S. 71 (1971).

13. 411 U.S. 677 (1973).

14. *But see* Kahn v. Shevin, 416 U.S. 351 (1974) where the Court upheld a "for widows only" property tax exemption using the rational basis test; Schlesinger v. Ballard, 419 U.S. 498 (1975) where the Court upheld a statute guaranteeing female officers 13 years of commissioned service before a mandatory discharge for want of promotion, while male officers were only allowed nine years.

15. Reed v. Reed, 404 U.S. 71, 76 (1971) (emphasis added). In this case, the Court declared an Idaho probate statute unconstitutional under the equal protection clause of the fourteenth amendment because men were given preference over women when both were of the same entitlement class for appointment as administrator of a decedent's estate.

16. 411 U.S. 677 (1973). In *Frontiero*, the Court struck down as unconstitutional a statute which provided that a serviceman may claim his wife as a dependent without regard as to whether she really was, whereas a servicewoman had to prove that her husband was a dependent before she could claim him as one.

For a discussion of the standard of strict judicial scrutiny see G. GUNTHER, CONSTITUTIONAL LAW at 658-59 (9th ed. 1976). A stricter standard of review is used in instances where discrimination is based upon a suspect classification or concerns a fundamental right. If such a test is invoked by the Court, the state must show a "compelling state interest" for maintaining such classifications before they are upheld. This is oftentimes called strict judicial scrutiny or active review.

The Supreme Court has held that the following classifications are subject to strict judicial scrutiny: Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Harper v. Virginia Bd. of Election, 383 U.S. 663 (1966) (voting); Oyama v. California, 332 U.S. 633 (1948) (national origin); Korematsu v. United States, 323 U.S. 214 (1944) (race).

17. 411 U.S. 677, 692 (1973) (Powell, J., concurring). The concurring opinion further stated that it was reluctant at this time to categorize sex as a suspect classification, due to the pendency of the equal rights amendment, which would resolve this issue. "To act before its passage, would be to perform a legislative duty, not appropriate for the Court." *Id.*

18. 417 U.S. 484 (1974).

seemed to be slowing its pace in eliminating unequal treatment between men and women.

In *Geduldig*, the Supreme Court held that a California state disability plan which excluded pregnancy-related disabilities did not constitute a violation of the equal protection clause of the fourteenth amendment. Following *Geduldig*, several lower courts reviewed private employment disability plans which excluded pregnancy under Title VII.[19] In contrast to *Geduldig*, these courts held that the disability plans constituted sex discrimination in violation of Title VII, distinguishing *Geduldig* on the ground that it was a fourteenth amendment case.[20] It was in view of this conflict that the case of *General Electric Co. v. Gilbert*[21] came before the Supreme Court.

FACTS AND FINDINGS OF THE LOWER COURTS

Seeking both declaratory relief and damages, Martha Gilbert and other female employees of defendant General Electric Company[22] brought a class action[23] arising out of defendant's refusal

19. *See, e.g.*, Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Communication Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784 (N.D. Iowa 1975); Vineyard v. Hollister Elementary School Dist., 64 F.R.D. 580 (N.D. Cal. 1974); Polston v. Metropolitan Life Ins. Co., 11 Fair Empl. Prac. Cas. 380 (W.D. Ky. 1975).

20. *See* Comment, *Waiting for the Other Shoe—Wetzel and Gilbert in the Supreme Court*, 25 EMORY L.J. 125, 147-51 (1976).

21. 429 U.S. 125 (1976).

22. The individual plaintiffs were present or former employees of General Electric's Salem, Virginia plant who became pregnant during 1971 or 1972 and who presented claims for disability benefits which were denied.

Named as co-plaintiffs in this action were the International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, the bargaining representative for employees of General Electric at plants throughout the United States and Local 161, which represents employees at the Salem, Virginia plant.

23. Gilbert v. General Elec. Co., 59 F.R.D. 267, 272 (E.D. Va. 1973), where the court held that the class met the requirements of FED. R. CIV. P. 23 (a) (d) (2).

The named plaintiffs were designated as class representatives for the class composed of all females who were or had ever been employed on or after the date measured at ninety days prior to the earliest date of the filing of charges with the Equal Employment Opportunity Commission or who became employed during the pendency of the suit and also all females whose claims were filed before such date and were still pending on such date. This class was composed of approximately 100,000 women, employed nationwide by General Electric. *Id.*

The named plaintiffs were also designated as class representatives of the subclass seeking damages. It was composed of those female employees who were or had been employed by General Electric during the period stated above and who had suffered damages as a result of being unable to work due to childbirth on or after such date. The subclass numbered approximately 5,659 female employees. *Id.*

to provide them with disability benefits for absence due to pregnancy and childbirth.[24] The insurance plan under attack provided nonoccupational sickness and accident benefit payments for a wide range of disabilities; however, disabilities relating to pregnancy, miscarriage and childbirth were excluded.[25]

The district court held that the exclusion of pregnancy-related disabilities was "sex discrimination" in violation of Title VII, and the relief prayed for was granted.[26] The Fourth Cir-

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24. These charges were first filed with the Equal Employment Opportunity Commission and were then processed by the Commission as required by statute. 42 U.S.C. § 2000e-5 (1970 & Supp. V 1975). The Commission found reasonable cause to believe that General Electric was engaged in acts of sex discrimination in violation of Title VII by excluding pregnancy-related disabilities from its insurance plan. Attempts at conciliation proved unsuccessful and the case was then filed in the District Court for the Eastern District of Virginia.

After several procedural questions concerning proper venue, (Gilbert v. General Elec. Co., 347 F. Supp. 1058 (E.D. Va. 1972)); compulsory joinder, (Gilbert v. General Elec. Co., 59 F.R.D. 273 (E.D. Va. 1973)); counterclaims, (Gilbert v. General Elec. Co., 59 F.R.D. 267 (E.D. Va. 1973)); and class determination, (Gilbert v. General Elec. Co., 59 F.R.D. 267 (E.D. Va. 1973)) were decided, the district court proceeded to hear the case on the merits. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974).

25. The General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended January 26, 1970, provides nonoccupational sickness and accident benefit payments to all employees in an amount equal to 60% of an employee's straight time earnings. Payments were to begin on the eighth day of total disability and continue for a maximum of 26 weeks for any one continuous period of disability or successive periods due to the same or related causes. Benefit payment coverage would terminate on the date active work ceased because of disability or pregnancy.

The plan would pay disability benefits for male or female employees due to the following causes:

(a) sclerosis of the liver
(b) lung cancer
(c) emphysema
(d) injury incurred in auto accident
(e) injury incurred in sport activity of employee
(f) injury incurred in a fight
(g) following a program for the cure of alcoholism
(h) injury incurred in an attempted suicide
(i) drug addiction
(j) following a program for the cure of drug addiction
(k) sterilization
(l) elective surgical operations unrelated to pregnancy
(m) elective plastic surgery
(n) following a program of psychiatric treatment.

Gilbert v. General Elec. Co., 375 F. Supp. 367, 374 (E.D. Va. 1974).

In addition, General Electric provided income for present and former employees who for various other reasons are unable to work. For example, it maintained policies covering medical expenses for not only present employees and their dependents, but also pensioners and their dependents, benefits in case of layoffs, supplemental military pay benefits for employees serving in the Armed Services and attending training camps or participating in emergency duty and retirement income under a pension plan. Brief for Appellee at 95, Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975).

26. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974). In reaching its decision, the court made the following specific findings:

cuit Court of Appeals affirmed the district court holding.[27] On appeal, the Supreme Court granted certiorari[28] to resolve the question as to whether the exclusion of pregnancy-related disability benefits constituted sex discrimination in violation of Title VII.

GILBERT IN THE SUPREME COURT

In an opinion written by Justice Rehnquist, the Supreme Court reversed the holding of the lower courts and held that the exclusion of pregnancy-related disabilities from a disability plan is not sex discrimination and therefore not a violation of Title VII.[29] In reaching its holding, the Court was faced with determining what Congress intended the term "sex discrimina-

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(1) While pregnancy is perhaps most often voluntary, a substantial incidence of negligent or accidental conception also occurs.
(2) Pregnancy, *per se*, is not a disease.
(3) A pregnancy without complications is normally disabling for a period of six to eight weeks, which time includes the period from labor and delivery or slightly before, through several weeks of recuperation.
(4) Ten percent of pregnancies are terminated by miscarriage, which is disabling.
(5) Five percent of pregnancies are complicated by diseases which are found in nonpregnant persons but which may have been stimulated by pregnancy. Five percent of pregnancies are complicated by pregnancy-related diseases. These complications are diseases which may lead to disability.

Id. at 377.

The court also found that the plan was objectionable because it excluded from coverage a disability unique to women while including disabilities which affect only men. *Id.* at 382.

The court further found that despite substantial testimony and statistics relating to the enormous increased cost of the plan if pregnancy were included, it was of too speculative a nature to be of probative value in determining actual future costs. *Id.* at 379.

In holding General Electric's actions to be deliberate and intentional, the court stated:

> There is no rational distinction to be drawn between pregnancy-related disabilities and a disability arising from any other cause. The defendant does not exclude from coverage any disability because it was voluntarily incurred other than disabilities arising from childbirth and other pregnancy-related conditions. That this is sex discrimination is self-evident.

Id. at 385-86.

27. Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975). The majority took note of the *Geduldig* case which had been decided a year earlier and found that it was not controlling, distinguishing it as a case treating sex discrimination under the fourteenth amendment and not as a case under Title VII. Therefore, since the case at bar was one of statutory interpretation and not constitutional analysis, the issues presented and the approach taken by the court in resolving the issues had to be different.

> To satisfy constitutional Equal Protection standards, a discrimination need only be 'rationally supportable' . . . . Title VII authorizes no such test . . . . It represents a flat and absolute prohibition against all sex discrimination in conditions of employment.

Id. at 667.

28. 423 U.S. 822 (1975).

29. 429 U.S. at 145-46.

tion" to mean under Title VII. The Court began by considering Title VII on its face[30] and the legislative history surrounding its enactment.[31] Finding no definition of sex discrimination in either source, the Court looked to the guidelines promulgated by the Equal Employment Opportunity Commission[32] and the cases and concepts concerning sex discrimination under the fourteenth amendment. One of the cases under the fourteenth amendment that the Court considered was *Geduldig v. Aiello*.[33]

In *Geduldig*, a group of women attacked a California statutory disability insurance plan. They contended that since the plan did not include coverage of pregnancy-related disabilities, it violated their rights under the equal protection clause of the fourteenth amendment. The Supreme Court took the view that such under-inclusiveness was not a denial of equal protection. The Court reached this conclusion by finding that the plan promoted legitimate state interests.[34] Furthermore, the Court concluded that the state's exclusion of pregnancy from its health plan did not amount to invidious discrimination under the equal protection clause of the fourteenth amendment.[35]

Analysis

The Supreme Court in *Gilbert* initially noted that *Geduldig* was relevant not only because it was a sex discrimination case, but also because of its similar factual situation.[36] In addition, the

30. For the text of Title VII concerning unlawful employment practices, *see* note 10 *supra*.

31. The inclusion of the word "sex" within Title VII of the Civil Rights Act occurred almost as if it were an afterthought, and discussion of the addition was very brief. Therefore, the legislative history provided the Court with little basis for determining congressional intent as to the meaning of sex discrimination. *See* 110 CONG. REC. 2577-84 (1964).

The amendment to add "sex" to the Civil Rights Act met with opposition from various representatives and women's rights groups. The thrust of their arguments centered around the point that sex discrimination involves problems different from those relating to racial or religious discrimination and the addition of sex to the Act would not be to the best advantage of women. *Id.* at 2577. It is interesting to note that only one of the 11 male members of the House who spoke in favor of the amendment voted for the Civil Rights Bill as amended. *See* 110 CONG. REC. 2577-84 (1964). *See generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967); 110 CONG. REC. 2728, 13837 (1964).

32. *See generally* notes 58-76 and accompanying text *infra*.

33. 417 U.S. 484 (1974).

34. *Id.* at 496. In *Geduldig*, the Court found that the following state interests justified the plan: maintaining the self-supporting nature of the program; distributing the sources in such a way so that they are adequate for the disabilities covered; and maintaining the contribution level at a rate which would not unduly burden the employees, especially those in the low income bracket.

35. *Id.* at 494.

36. 429 U.S. at 133. However, in Rentzer v. California Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973),

Court stated that in *Geduldig* it had held that there was no sex discrimination and that as a result it had been unnecessary to determine which fourteenth amendment standard of review to use. Therefore, although *Geduldig*, unlike *Gilbert*, was a fourteenth amendment case, the Court reasoned that *Geduldig* was directly on point since it is only a finding of sex-based discrimination which is necessary to prove a violation of Title VII.[37]

Sex Discrimination and the Concept of Sex-Unique Characteristics

In reaching its holding, the Supreme Court in *Gilbert* relied particularly on "footnote 20" from *Geduldig*.[38] "Footnote 20" stated in part that, "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like

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the California Appellate Court construed California's plan to preclude only the payment of benefits for disability accompanying normal pregnancy. In this way, the plan was different from General Electric's, which precluded payments of normal pregnancies as well as pregnancies accompanied by complications.

37. 429 U.S. at 136.

38. "Footnote 20" states:

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

417 U.S. at 496-97 n.20. This footnote has become controversial because commentators have disagreed as to whether it was just dictum or whether it was added only to combat a rigorous dissent. *See, e.g.*, note 19 *supra* (lower courts treating "footnote 20" as not controlling). *See generally* Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805, 809-14 (1975); Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 443-48 (1975); Comment, *Waiting for the Other Shoe—Wetzel and Gilbert in the Supreme Court*, 25 EMORY L.J. 125, 143-46 (1976); Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-Aiello Analysis*, 44 CIN. L. REV. 57, 69-74 (1975); Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last*, 44 GEO. WASH. L. REV. 381, 387-88 (1976).

those considered in *Reed* and *Frontiero*."[39] Essentially, "footnote 20" distinguishes between the situation where men and women are treated differently because of sex alone, as occurred in *Reed* and *Frontiero*,[40] and the situation where a difference in treatment is based on a sex-unique[41] characteristic. The concept of sex-unique characteristics is defined as a distinction made affecting only men or only women because of some unique physical characteristic possessed only by one sex,[42] such as pregnancy in women or beard growth in men.[43] The distinction made in "footnote 20" is crucial to the decision in *Gilbert* and presents the problem confronted by the Court in determining whether differences based on the sex-unique characteristic of pregnancy constituted sex discrimination in violation of Title VII. Quoting from "footnote 20," the Court stated that the situation in *Gilbert* is not a case involving men versus women but pregnant women versus nonpregnant persons.[44] This implies that sex discrimination under Title VII can only occur when all disadvantaged persons are of one sex and all advantaged persons are of the other.[45]

Thus, the Court reasoned that since discrimination based on pregnancy is not one based on gender and since Title VII applies only to discrimination based on gender, then Title VII does not apply to discrimination based on pregnancy.[46] The Court therefore construed the congressional intent as to the meaning of sex discrimination under Title VII to exclude distinctions based upon the sex-unique characteristic of pregnancy.[47]

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39. 417 U.S. at 496 n.20.

40. *See* notes 15-16 and accompanying text *supra*. In these cases the sole distinguishing characteristic was a difference in sex.

41. *See generally* articles cited in note 38 *supra*. This concept is sometimes referred to as "sex-linked" or "sex-plus." *See, e.g.*, cases cited in note 19 *supra* involving the sex-unique characteristic of pregnancy.

42. Comment, *Waiting for the Other Shoe—Wetzel and Gilbert in the Supreme Court*, 25 EMORY L.J. 125, 139 (1976).

43. Rafford v. Randle E. Ambulance Serv., 348 F. Supp. 316 (S.D. Fla. 1972) (where the court held that men are not victims of sex discrimination when forced to shave off their beards, a uniquely male characteristic, as a condition of employment).

44. 429 U.S. at 135.

45. *But see* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) where the court stated:

> The effect of the statute [Title VII] is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . .

46. *See* Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805, 811 (1975).

47. However, there are indications in the legislative history of Title VII to support the position that distinctions on the basis of pregnancy violate Title VII. *See* 110 CONG. REC. 2728, 13837 (1964), where an amendment was proposed in each house of Congress to insert "solely"

Discriminatory Effect

The Court in *Gilbert* did not end its analysis by showing that there was no sex discrimination *per se* on the face of General Electric's plan. Instead, it looked to another portion of "footnote 20" which stated that discrimination may also be shown if the "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other."[48] However, since pregnancy is significantly different from other disabilities covered by General Electric's plan, the *Gilbert* Court found that the exclusion of pregnancy-related disability benefits was not a pretext for discriminating against women.[49]

In reemphasizing the fact that *Gilbert* was a Title VII action, the Court stated that a prima facie violation of the Title is established by proof that a facially neutral classification has a discriminatory effect on a particular group.[50] Even absent proof of intent to discriminate, the Court stated that a violation of Title VII is proven if the effect of such a classification is found to be discriminatory.[51] On this point the Court concluded that the burden of showing discriminatory effect had not been sustained.[52] The Court reasoned that in light of the fact that the same fiscal and actuarial benefits accrued to both men and women from General Electric's plan, that since both sexes were equally protected for the same risks and since the plan was not worth more to men than to women, no gender-based discriminatory effect had been shown, and therefore there was no violation of Title VII.[53]

From a different perspective, the dissent approached the question of discriminatory effect by categorizing General Electric's

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before the categories of discrimination, so that in order to prove a violation of Title VII the alleged discrimination must have been the only reason. The purpose of the amendment was to make sure that nothing would be left uncertain for the Court to interpret. The amendment however, was defeated. From this it can be inferred that Title VII's application was not to be limited to discrimination based on sex alone, but was to include the sex-unique situation.

48. 429 U.S. at 134.

49. *Id.* at 136.

50. *Id.* at 137. For a discussion of discriminatory effect, see Washington v. Davis, 426 U.S. 229, 246-48 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

51. 401 U.S. at 432.

52. 429 U.S. at 137. However, Justice Brennan in his dissent noted that the majority could have found discriminatory intent by looking at General Electric's past history of sex discrimination and the fact that all other voluntary conditions except pregnancy were covered by the plan. *Id.* at 149-53.

53. *Id.* at 138. Quoting from "footnote 20" the Court stated that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

plan into three sets of effects.[54] First, the plan covered all disabilities mutually affecting men and women. Second, all disabilities that were male-specific or predominantly affected males were covered. Third, disabilities which were female-specific or which predominantly affected females were covered, except pregnancy. The dissent stated that the majority focused its analysis on the first category and therefore the finding of a lack of discriminatory effect was understandable. However, the dissent found that in light of the coverage of all male-specific disabilities, the exclusion of pregnancy showed a discriminatory effect on women.[55]

The Court summarized its findings by stating that sex discrimination had not been shown by the terms of General Electric's plan or by its effect.[56] It stated that had such discrimination as defined in *Geduldig* been established or had discriminatory effect been shown, a violation of Title VII would have existed.[57] However, the Court in *Gilbert* could not end its search for the meaning of sex discrimination under Title VII without considering the guidelines promulgated by the Equal Employment Opportunity Commission.

The Role of the Equal Employment Opportunity Commission Guidelines

The Equal Employment Opportunity Commission was the agency created under Title VII[58] for the general purpose of preventing employers from participating in any unlawful employment practices in violation of the Title.[59] The Commission was given the authority to issue procedural regulations and guidelines in order to carry out the provisions of Title VII.[60]

The Court looked specifically to the provisions of the *Guidelines*

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54. *Id.* at 155 (Brennan, J., dissenting).

55. Cases have held that if an inference of discrimination is shown, the burden of proof shifts to the employer to show justification for his plan. *See* Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017, 1019-20 (1st Cir. 1974); United States v. United Bro. of Carpenters & Joiners, Local 169, 457 F.2d 210, 214 (7th Cir. 1972); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971). The majority did not find such an inference. However, it seems contrary to the general policy of Title VII not to conclude that at least an inference of discrimination was shown by the fact that all other disabilities were covered except pregnancy.

56. 429 U.S. at 135.

57. *Id.* at 137 n.15.

58. 42 U.S.C. § 2000e-4(a) (1970 & Supp. V 1975).

The Equal Employment Opportunity Commission is hereinafter referred to in the text and footnotes as the "EEOC."

59. *Id.* § 2000e-5(a) (1970 & Supp. V 1975).

60. 42 U.S.C. § 2000e-12(a) (1970) reads in pertinent part: "The Commission shall have the authority from time to time to issue, amend,

on Discrimination Because of Sex issued by the EEOC in April 1972, which stated that pregnancy was a temporary disability and should be treated as such under an employment disability plan.[61] The Court decided that although the guidelines were not to be given "great deference"[62] in determining legislative intent, they were entitled to at least some consideration.[63] The Court adopted the classical rule in *Skidmore v. Swift & Co.*[64] as the standard to employ in deciding how much consideration should be given to the EEOC guidelines. In *Skidmore*, the Court held that administrative rulings and interpretations were not controlling upon the courts, although they may be resorted to for guidance.[65] The weight to be given these agency pronouncements "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[66] In applying the *Skidmore* standard, the Court noted a 1966 opinion letter issued by

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or rescind suitable procedural regulations to carry out the provisions of this subchapter."

See General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976), where the Court stated that Congress did not confer upon the EEOC the authority to promulgate rules or regulations.

61. The relevant portion of the guideline reads as follows:

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

29 C.F.R. § 1604.10(b) (1972).

For discussion of the EEOC guidelines, see Comment, *Disability Benefits for Pregnant Employees Under Title VII of the Civil Rights Act of 1964*, 9 CREIGHTON L. REV. 360, 361-63 (1975); Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DE PAUL L. REV. 127 (1974); Comment, *Waiting for the Other Shoe—Wetzel and Gilbert in the Supreme Court*, 25 EMORY L.J. 125, 127-38 (1976).

62. *But see* Griggs v. Duke Power Co., 401 U.S. 423, 434 (1971) and cases accompanying note 19 *supra*. Courts have given other agency guidelines great deference in determining congressional intent. *See* United States v. City of Chicago, 400 U.S. 8, 10 (1970) (Court held that a definition given to a term by the Interstate Commerce Commission should be given deference when interpreting the Interstate Commerce Act because the agency has greater oversight of the problem); Power Reactor Dev. Co. v. International Union of Electrical, Radio & Mach. Workers, AFL-CIO, 367 U.S. 396, 408 (1961) (Court held that regulations issued by the Atomic Energy Commission should be given that respect which is customarily given to a practical administrative construction of a disputed problem).

63. 429 U.S. at 141.

64. 323 U.S. 134 (1944).

65. *Id.* at 140.

66. *Id.*

the General Counsel of the EEOC which stated that an "employer who excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII."[67] The Court reasoned that since this letter was inconsistent with the 1972 guidelines, the guidelines should be accorded little weight in determining congressional intent as to the meaning of sex discrimination.[68]

The Court further noted that the guidelines should carry less weight because they were enacted almost eight years after Title VII.[69] However, in his dissent, Justice Brennan strongly attacked this contention by stating that the length of time before issuance shows that, at the very least, the 1972 guidelines represented "a particularly conscientious and reasonable product of EEOC deliberations."[70] In Justice Brennan's view the guidelines therefore should be given great deference.[71]

The Court also specifically looked to that portion of Title VII's legislative history which discussed the Equal Pay Act and found an indication of congressional intent contrary to that which was promulgated in the EEOC guidelines.[72] The Court relied on a Senate amendment to Title VII to the effect that it was not unlawful for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation to be paid if it is authorized by the Equal Pay Act.[73] The Equal Pay Act

67. General Counsel Opinion Letter, EMPL. PRAC. GUIDE (CCH) ¶ 17,304.49 (Nov. 10, 1966).

See EEOC Decision No. 70-360, 1973 EMPL. PRAC. DEC. ¶ 6084 (Dec. 16, 1969) which affirmed the position of the 1966 opinion letter. However, in EEOC Decision No. 71-1474, 1973 EMPL. PRAC. DEC. ¶ 6221 (Mar. 19, 1971) the Commission changed its earlier position to that promulgated in the 1972 guidelines.

68. There is further authority for the proposition that the views of an administrative agency will not be followed when their position flatly contradicts a previous pronouncement. *See, e.g.*, United Hous. Foundation, Inc. v. Forman, 421 U.S. 837, 858-59 (1975); F.T.C. v. Jantzen, Inc., 356 F.2d 253, 257n.4 (9th Cir. 1966).

69. 429 U.S. at 142.

70. *Id.* at 157 (Brennan, J., dissenting). In opposition to Justice Brennan's argument see Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DE PAUL L. REV. 127, 130 (1974), which discusses a deposition taken in the case of Newmon v. Delta Airlines, 374 F. Supp. 238 (N.D. Ga. 1973). Sonia Fuentes, Chief of the Legislative Council Division of the EEOC at the time the guidelines were written stated that before issuing the 1972 guidelines no medical or financial studies were conducted, and that she had no expertise in medicine, economics or labor relations. Fuentes also stated that of the five people who drafted the guidelines, two were law students.

71. 429 U.S. at 157.

72. *Id.* at 143. In Espinosa v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) the Court stated that great deference may be given to EEOC guidelines unless they are "inconsistent with an obvious congressional intent not to reach the employment practice in question" or there are "compelling indications that it is wrong."

73. Senator Bennett's amendment became part of 42 U.S.C. § 2000e-

has been interpreted by the Wage and Hour Administrator to mean that even if an employer makes unequal benefit fund contributions based on sex, for employees of opposite sexes, it does not violate the Act if the resulting benefits are equal for all employees.[74] The Court's finding of a consistency between the amendment and the interpretations of the Wage and Hour Administrator was construed as showing a clear legislative intent that not all unequal treatment between sexes is sex discrimination.[75] Since this was contrary to the EEOC guidelines, the Court decided that the guidelines should not be followed.[76]

The Court's conclusion that the EEOC guidelines were not indicative of congressional intent lends further support to its decision that Congress did not intend Title VII to include distinctions between men and women based upon the sex-unique characteristic of pregnancy. The *Gilbert* Court's holding that the exclusion of pregnancy-related disabilities from General Electric's disability insurance plan did not constitute sex dis-

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2(h) (1970). The amendment stated:

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

See 110 CONG. REC. 13647 (1964) which states that this amendment was necessary to make sure the provision of the Equal Pay Act would not be nullified if a conflict arose between it and Title VII.

74. The Wage & Hour Administrator, having the authority to interpret the Equal Pay Act 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 for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

29 C.F.R. § 800.116(d) (1975).

75. 429 U.S. at 145.

76. However, Justice Brennan's dissent points out instances which show that the guidelines are consistent with congressional intent:

> [P]rior to 1972, Congress enacted just such a pregnancy inclusive rule to govern the distribution of benefits for 'sickness' under the Railroad Unemployment Insurance Act, 45 U.S.C. § 351(K)(2). Furthermore, shortly following the announcement of the EEOC's rule, Congress approved . . . an essentially identical promulgation by the Department of Health, Education and Welfare, under Title IX of the Education Amendments of 1972, 20 U.S.C. (1970 ed., Supp. II) § 1681(a). *See* 45 C.F.R. § 86.57(c) (1976). Moreover, federal workers subject to the jurisdiction of the Civil Service Commission now are eligible for maternity and pregnancy coverage under their sick leave program. *See* Federal Personnel Manual, c.630, subch. 13 § 13-2 (FPM Supp. 990-2, May 6, 1975).

Id. at 158.

crimination in violation of Title VII presents interesting implications for the future of the working woman and Title VII.

THE IMPLICATIONS OF THE GILBERT DECISION

As a result of the Supreme Court decision in *Gilbert*, Congress and various other interested parties have taken positive steps to negate its effects. For instance, the EEOC decided to stand firm in its position that the denial of pregnancy-related disability payments from an insurance plan constitutes sex discrimination in violation of Title VII.[77] In like manner, the New York Court of Appeals held that the denial of such disability benefits was impermissible discrimination in violation of the New York Human Rights Law.[78]

On March 15, 1977, legislation was introduced in both houses of Congress which would amend Title VII to specifically prohibit discrimination based on pregnancy.[79] If the proposed amendment is passed, the *Gilbert* decision will lose its precedential value and the denial of pregnancy-related disability benefits will constitute a prima facie violation of Title VII.[80] If Congress chooses not to pass the amendment thereby leaving *Gilbert* in effect, it will remain lawful under Title VII for a private employer to discriminate on the basis of a sex-unique characteristic,

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77. EEOC COMPL. MAN. (CCH) ¶ 3200 (Dec. 30, 1976). However, at the present time, the EEOC has ceased processing allegations identical to those in *Gilbert*, in light of the decision rendered in that case. *Id.*

78. Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 359 N.E.2d 393 (1976). "The determination of the Supreme Court, while instructive, is not binding on our court. . . ." *Id.* at 87 n.1, 359 N.E.2d at 395 n.1.

79. The proposed amendnent reads as follows:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in . . . this title shall be interpreted to permit otherwise.

S.995, 95th Cong., 1st Sess. (1977).

Extensive lobbying by the Campaign to End Discrimination Against Pregnant Workers was responsible for the introduction of the amendment. Its passage is being supported by many organizations including major feminist groups, labor unions, the Leadership Conference on Civil Rights and the National Education Association. *The Spokeswoman*, April 15, 1977 at 1. At the time of this printing, the proposed amendment has been passed by the Senate. For a discussion of the amendment see 123 CONG. REC. 4142-45 (1977).

80. It should be noted that notwithstanding the amendment, actions brought under the fourteenth amendment would continue to be controlled by the holding of *Geduldig v. Aiello*, 417 U.S. 484 (1974), and the denial of pregnancy-related benefits would continue to be constitutionally permissible.

specifically, pregnancy.[81] Furthermore, if the amendment to Title VII is not passed, the *Gilbert* decision may prove to have varied sociological implications for the working woman. Today, with a greater dependency on women as a means of financial support, the *Gilbert* decision places the families of such women in serious economic jeopardy should they become pregnant and have to leave work without disability compensation.[82] Therefore, such a decision may serve to either discourage working women, who cannot afford the loss of income, from becoming pregnant or encourage them to resort to an early termination of their pregnancies.[83]

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81. This decision seems to possess overtones of the earlier twentieth century cases where women were necessarily thought to be in need of protection. By allowing an employer to discriminate against women based on pregnancy, the practical implication may be to put women back into the home, where they were historically thought to belong.

82. *See* 123 CONG. REC. 4143 (1977). Approximately 46% of all women over 16 years are in the labor force; 39 million are working or seeking work. Twenty-five million of these women are doing so because of the basic need to support their families.

83. *Id.*