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COMMENT

***ERICKSON v. BARTELL DRUG COMPANY:* REQUIRING COVERAGE OF PRESCRIPTION CONTRACEPTIVES**

MICHELLE SZALAI[†]

Women have been afforded greater opportunities in the workplace since the adoption of Title VII of the Civil Rights Act of 1964. Nevertheless, these opportunities arguably are still hindered by certain employer policies and actions.¹ Title VII makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”² In 1978, Title VII was amended to include discrimination based on “pregnancy, childbirth, or related medical conditions” as discrimination on the basis of sex.³ This amendment, the Pregnancy Discrimination Act, was added in response to discrimination women faced at the hands of these policies.⁴ Despite this,

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¹ See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 373 (1998) (arguing that employers’ policies that exclude contraceptives from otherwise comprehensive prescription plans disproportionately impact women); see also Kathleen A. Bergin, *Contraceptive Coverage Under Student Health Insurance Plans: Title IX as a Remedy for Sex Discrimination*, 54 U. MIAMI L. REV. 157, 157 (asserting that “[s]ex discrimination in health insurance coverage is an industry norm”).

² See 42 U.S.C. § 2000e-2(a)(1) (2000); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675 (1983) (contending that benefits such as an employer-provided prescription plan are part of the employee’s “compensation, terms, conditions or privileges of employment” protected under Title VII).

³ See 42 U.S.C. § 2000e(k) (2000).

⁴ See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (asserting that Congress enacted the Pregnancy Discrimination Act to “outlaw

legislation questions remain over the extent to which employer policies must accommodate the needs of women.⁵ These questions are especially prevalent in employer-provided insurance coverage.⁶ Recently, in *Erickson v. Bartell Drug Co.*,⁷ the District Court for the Western District of Washington held that Bartell's decision not to cover prescription contraceptives in its otherwise generally comprehensive prescription plan was sexual discrimination because it provided less complete coverage to female employees.⁸

In *Erickson*, an employee brought a class action⁹ against Bartell Drug Company, alleging that Bartell's decision not to cover prescription contraceptives under its Prescription Benefit Plan for non-union employees violated Title VII, as amended by the Pregnancy Discrimination Act.¹⁰ The defendant, Bartell, argued:

- (1) treating contraceptives differently from other prescription drugs is reasonable in that contraceptives are voluntary, preventative, do not treat or prevent an illness or disease, and are not truly a "healthcare" issue; (2) control of one's fertility is

any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees").

⁵ See *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 190-92 (1991) (holding employer's fetal protection policy forbidden as sex discrimination under Title VII); see also *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707-18 (1978) (holding the Department's policy of requiring female employees to make larger pension contributions than male employees because of women's longer life expectancy violated Title VII).

⁶ See *Erickson*, 141 F. Supp. 2d at 1276 (holding the selective exclusion of prescription contraceptives from employer's generally comprehensive prescription plan constitutes discrimination on the basis of sex); *EEOC v. United Parcel Serv., Inc.*, 141 F. Supp. 2d 1216, 1220 (D. Minn. 2001) (denying motion to dismiss because defendant employer's failure to provide coverage for an oral contraceptive used for treating a female hormonal disorder violated Title VII because the defendant provided prescription coverage for the treatment of male hormonal disorders); see also *Catholic Charities of Sacramento, Inc. v. Sup. Ct.*, 109 Cal. Rptr. 2d 176, 181-84 (Cal. Ct. App. 3d Dist. 2001) (determining whether a "religious employer" associated with the Catholic Church could exclude prescription contraceptives from its health insurance policy).

⁷ See *Erickson*, 141 F. Supp. 2d at 1266.

⁸ *Id.* at 1276-77.

⁹ The class action was brought on behalf of all "female employees of Bartell who at any time after December 29, 1997, were enrolled in Bartell's Prescription Benefit Plan for non-union employees while using prescription contraceptives." *Id.* at 1268 n.2.

¹⁰ See *id.* at 1268.

not “pregnancy, childbirth, or related medical conditions” as those terms are used in the PDA; (3) employers must be permitted to control the costs of employment benefits by limiting the scope of coverage; (4) the exclusion of all “family planning” drugs and devices is facially neutral; (5) in the thirty-seven years Title VII has been on the books, no court has found that excluding contraceptives constitutes sex discrimination; and (6) this issue should be determined by the legislature, rather than the courts.¹¹

The court disposed of each of these arguments¹² and granted summary judgment for Erickson on her claim of disparate treatment.¹³ Judge Lasnik ordered Bartell to “cover each of the available options for prescription contraception to the same extent, and on the same terms, that it covered other drugs, devices, and preventative care for non-union employees.”¹⁴ The court also ordered Bartell to offer coverage for contraception-related services, including the initial physician visit, to the same extent it did for other services.¹⁵

Writing for the district court, Judge Lasnik reasoned that because prescription contraceptives were used only by women, the defendant’s decision to exclude that particular benefit from its generally comprehensive prescription plan was discriminatory, in that the prescription plan provided less complete coverage to its female employees than to its male employees.¹⁶ He established that sex discrimination does not have to be intentional for it to be in violation of Title VII.¹⁷ In fact, he attributed this particular episode of discrimination to an “unquestioned holdover from a time when employment-related benefits were doled out less equitably than they are today.”¹⁸ Despite its presumably innocent origins, Bartell’s policy created

¹¹ *Id.* at 1272.

¹² *See id.* at 1272–77.

¹³ *Id.* at 1277.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1276–77.

¹⁷ *Id.* at 1272 n.7 (stating that the exclusion of women-only benefits from a generally comprehensive prescription plan is sufficient to constitute a violation of Title VII and that “lack of evidence of bad faith or malice toward women does not affect the validity of plaintiffs’ Title VII claim”).

¹⁸ *Id.* at 1272 n.7; *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134 (1976) (holding that a policy excluding pregnancy from disability coverage was not discriminatory, despite the obvious fact that “it is true that only women can become pregnant”).

unequal treatment in violation of Title VII of the Civil Rights Act of 1964.¹⁹ Judge Lasnik explained that when an employer offers a generally comprehensive prescription plan "covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."²⁰

In determining that Bartell's discriminatory prescription plan violated Title VII, the court recognized that prescription contraceptives are not specifically or inadvertently mentioned in Title VII or the Pregnancy Discrimination Act.²¹ Judge Lasnik asserted, however, that the goal of Title VII "was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce."²² Lasnik also pointed out that in enacting the Pregnancy Discrimination Act, Congress showed that "mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."²³

Judge Lasnik's attempt to ameliorate the discriminatory conditions that exist in the workplace is commendable. Although he also spoke vividly about the social importance of an employer's coverage of prescription contraceptives,²⁴ it is submitted that he failed to deal with the negative implications of

¹⁹ See *Erickson*, 141 F. Supp. 2d at 1276.

²⁰ *Id.* at 1272; see also *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (noting that classifications based on one's "potential for pregnancy... evinces discrimination on the basis of sex" under the Pregnancy Discrimination Act); *Newport News Shipbuilding Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) (reasoning that an employer's failure to provide coverage for male employees' dependents while providing coverage for female employees' dependents would constitute a Title VII violation because it did not provide equally comprehensive coverage for both sexes).

²¹ See *Erickson*, 141 F. Supp. 2d at 1270.

²² *Id.* at 1269.

²³ *Id.* at 1271; see also *Gen. Elec.*, 429 U.S. at 136 (stating that a policy "which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination").

²⁴ See *Erickson*, 141 F. Supp. 2d at 1273 (noting that unintended pregnancies, which can be prevented by prescription contraceptives, are too common in the United States and create enormous financial costs and dangerous medical situations for the mother, child, and society); see also *Law supra* note 1, at 346 (discussing the statistical relationship of unintended pregnancies and failure to use birth control).

such a decision. It seems Judge Lasnik used broad language in establishing that an employer's failure to cover prescription contraceptives in its generally comprehensive prescription plan was discrimination on the basis of sex. This Comment contends that such a holding could lead to a large increase in litigation over other treatments that are not uniformly covered in an employer's health plans today. While this decision may be deemed necessary in light of the present obstacles faced by women in the workplace,²⁵ courts must also be cognizant of the growing costs of healthcare, and the fact that employer-provided health insurance is an employee benefit and not a government mandate.²⁶

I. THE HISTORY OF EMPLOYERS' RESPONSIBILITIES UNDER TITLE VII

Since the inception of Title VII of the Civil Rights Act of 1964, and prior to the enactment of the Pregnancy Discrimination Act in 1978, many courts have examined the scope of an employer's responsibilities under Title VII with respect to its employment policies.²⁷ Similar issues have arisen outside of the employment context under the Equal Protection Clause.²⁸ The Pregnancy Discrimination Act was passed in 1978

²⁵ See generally Samuel Issacharoff & Elyse Rosenoff, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994) (discussing the particularities of discrimination based on pregnancy that women face in the workforce).

²⁶ See, e.g., Thomas D. Flanigan, *Assisted Reproductive Technologies and Insurance Under the Americans with Disabilities Act of 1990*, 38 BRANDEIS L.J. 777, 806 (2000) (citing EEOC Interim Guidance on how "employee health plans are fringe benefits").

²⁷ See, e.g., *Condit v. United Airlines, Inc.*, 631 F.2d 1136, 1138 (4th Cir. 1990) (holding an airline's policy of denying sick leave to pregnant flight attendants was not sex discrimination under Title VII); *Barwell v. Eastern Airlines*, 633 F.2d 361 (1980) (holding airline's policy of taking away flight attendants' seniority due to pregnancy violated Title VII, when no similar requirements existed for other health conditions); *Dessenberg v. Am. Metal Forming Co.*, 1973 U.S. Dist. LEXIS 11650 (N.D. Ohio Oct. 3, 1973) (concluding that an employer's leave policy was discriminatory in not providing sick leave during pregnancy and recuperation, when it provided this type of leave for other non-industrial injuries and illnesses such as alcoholism and tobacco abuse).

²⁸ See *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (holding that a Utah statute that specified a greater age of majority for males than females with respect to a parent's obligations to pay support for the child was in violation of the Equal Protection Clause); see also *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (concluding that the exclusion of coverage for disability accompanying a normal

in response to the Supreme Court's ruling in *General Electric Co. v. Gilbert*.²⁹ In *General Electric*, the Court held that an otherwise comprehensive short-term disability policy that excluded pregnancy-related disabilities from coverage did not discriminate on the basis of sex since the exclusion of pregnancy was not in itself a gender-based discrimination, but merely a removal of the physical condition from coverage.³⁰ Congress believed that the Supreme Court's decision was an erroneous interpretation of Title VII.³¹ Although the Pregnancy Discrimination Act has provided some clarification as to an employer's responsibilities towards its employees under Title VII, questions do remain.³²

II. NO COVERAGE FOR PRESCRIPTION CONTRACEPTIVES: THE CONSEQUENCES

In *Erickson*, the Bartell Drug Company defended its decision on many grounds.³³ Bartell argued that because prescription contraceptive devices are voluntary and do not prevent or treat

pregnancy and childbirth does not violate the Equal Protection Clause of the Fourteenth Amendment). The Court reasoned that "there is no risk from which men are protected and women are not" and that there is nothing in the Constitution "that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has." *Id.*; see also *Bond v. Va. Polytechnic Inst. and State Univ.*, 381 F. Supp. 1023, 1024 (W.D. Va. 1974) (determining that the Student Health Plan's denial of coverage for pap tests and gynecological examinations was not invidious discrimination based on the sex of the plaintiffs because, under *Geduldig*, under-inclusiveness without invidious discrimination is not a violation of the Equal Protection Clause).

²⁹ 429 U.S. 125 (1976).

³⁰ See *id.* at 138-39 (noting that "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive").

³¹ See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001); see also H.R. REP. NO. 95-948, at 2 (1978) (finding the majority of *General Electric* erred and expressing the view that the dissenting justices correctly interpreted the Act).

³² See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 681 (8th Cir. 1996) (affirming the district court's decision that defendant employer's exclusion of treatment for both male and female infertility problems did not constitute sex discrimination in violation of Title VII, the Pregnancy Discrimination Act, or the American Disabilities Act); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) (finding that plaintiffs had stated a claim under the PDA and abridging defendants' motion to dismiss on the issue of whether defendant employer's refusal to allow female employees to use sick time to obtain treatment for infertility constituted a violation of Title VII and the Pregnancy Discrimination Act).

³³ See *supra* text accompanying note 11.

an illness, they are not a genuine healthcare issue.³⁴ The court vigorously attacked this justification by discussing the consequences associated with the lack of coverage of prescription contraceptives.³⁵ Although prescription contraceptives are designed to prevent pregnancy, and pregnancy is not an illness, but rather a natural state, the court reasoned that the use and availability of contraceptives is a serious healthcare issue.³⁶ One commentator has noted that “[a]lmost sixty percent of the 6.3 million pregnancies that occur annually in the United States are unintended”³⁷ and has asserted that unintended pregnancy: “(1) increases infant mortality and morbidity; (2) generates financial costs for childbirth and the care of distressed newborns; (3) leads to high rates of abortion; and (4) limits women’s abilities to perform and contribute to society and undermines national economic stability.”³⁸ This commentator also explained why the exclusion of prescription contraceptives disproportionately impacts women: “Women spend approximately sixty-eight percent more in out-of-pocket health care costs than men,” and the price of prescription contraceptives is a significant reason for this huge disparity.³⁹

III. OPENING THE FLOODGATES

While the social problems associated with the lack of coverage of prescription contraceptives are clear, the implications of this decision are far less apparent. In addition to prescription contraceptives, the Bartell Drug Company’s prescription plan specifically excluded from coverage “drugs

³⁴ *Id.*

³⁵ See *Erickson*, 141 F. Supp. at 1273 (asserting that “[u]nintended pregnancies, the condition which prescription contraceptives are designed to prevent, are shockingly common in the United States and carry enormous health costs and health consequences for the mother, the child, and society as a whole”); see also *Law supra* note 1, at 364 (setting forth risks associated with unintended pregnancy).

³⁶ *Erickson*, 141 F. Supp. 2d at 1273 (establishing that “one reason why women do not use birth control is that health insurance commonly excludes coverage for effective forms of contraception that physicians provide”). See generally *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (asserting that “[t]he ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives”); Bergin, *supra* note 1, at 157 (noting that most private health plans typically exclude coverage for contraceptives).

³⁷ *Law, supra* note 1, at 364.

³⁸ *Id.* at 364–65.

³⁹ *Id.* at 374–75.

prescribed for weight reduction, infertility drugs, smoking cessation drugs, dermatologicals for cosmetic purposes, growth hormones, and experimental drugs.⁴⁰ This decision may lead to increased demands for coverage for infertility treatments and experimental treatments for women that affect only women.⁴¹ *Erickson*, though, is not likely to lead to further demands for the coverage of abortions because abortions are specifically excluded under the Pregnancy Discrimination Act.⁴² Professor Law contends that the abortion exclusion in the act "confirms that Congress understood that discrimination against pregnancy and related medical conditions encompassed discrimination against measures taken to avoid pregnancy."⁴³

As a result of the decision in *Erickson*, employees presumably will continue to fight for coverage of infertility treatments. In *Krauel v. Iowa Methodist Medical Center*, a female employee brought suit against her employer for its refusal to cover treatment for male and female infertility problems.⁴⁴ The court granted summary judgment for the defendant based on, inter alia, the fact that the "[p]lan did not violate the PDA because treatment for infertility is not treatment for pregnancy, childbirth, or a related medical condition."⁴⁵ A similar decision was reached in *Saks v. Franklin Covey Co.*,⁴⁶ where the court also concluded that the Pregnancy Discrimination Act did not require an employer to provide insurance coverage for infertility treatments.⁴⁷ If one follows Professor Law's rationale, however, perhaps infertility should be covered because it, too, is not specifically excluded from coverage in the Pregnancy Discrimination Act.

⁴⁰ *Erickson*, 141 F. Supp. 2d at 1268 n.1.

⁴¹ Based on the court's analysis, if prescription contraceptives existed for both men and women, an employer would be warranted in excluding its coverage because this method of curbing costs is would then not be discriminatory. *See id.* at 1276.

⁴² *See* 42 U.S.C. § 2000e(k) (2000) (providing that the PDA "shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion").

⁴³ Law, *supra* note 1, at 380 (asserting that "if Congress had intended to leave employers free to disfavor contraceptive services in employee benefit plans, Congress could have easily added the words 'or contraception' to the abortion exclusion").

⁴⁴ *See* *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996).

⁴⁵ *Id.* at 676.

⁴⁶ 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

⁴⁷ *Id.* at 329.

Another potential consequence of *Erickson* is that it will provoke controversy among religious groups and employers that do not believe in the use of prescription contraceptives, much less the coverage of prescription contraceptives.⁴⁸ In the recent case of *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*,⁴⁹ for example, Catholic Charities sought a preliminary injunction to permit it to provide its employees with health insurance that did not cover prescription contraceptives.⁵⁰ The Court of Appeals of California refused to grant the injunction and denied a writ of mandate on the grounds that the California prescription coverage statutes have a secular purpose and do not violate the religious guarantees of the United States and California Constitutions.⁵¹ Although Title VII does provide an exemption for religious organizations,⁵² courts have interpreted the exemption narrowly, as prohibiting “invidious discrimination on the basis of gender.”⁵³ In light of *Erickson*, the first federal case holding that employers with generally comprehensive prescription plans must cover prescription contraceptives, it seems likely that religious employers will protest the protection afforded to coverage of prescription contraceptives under Title VII and the Pregnancy Discrimination Act.

IV. WHO SHOULD BEAR THE COST ASSOCIATED WITH COVERAGE?

While public policy may warrant the coverage of prescription contraceptives,⁵⁴ one must consider who should bear the cost. In *Erickson*, Judge Lasnik struck down Bartell’s argument that the

⁴⁸ See Law, *supra* note 1, at 384 (discussing that “[r]eligious opposition to contraception has been a central factor in recent debates on proposed state laws requiring insurance coverage for contraception”). See generally *Catholic Charities, Inc. v. Super. Ct.*, 109 Cal. Rptr. 2d 176 (Cal. Ct. App. 3d Dist. 2001).

⁴⁹ 109 Cal. Rptr. 2d 176 (Cal. Ct. App. 3d Dist. 2001).

⁵⁰ *Id.* at 181.

⁵¹ *Id.*

⁵² See 42 U.S.C. § 2000e-1(a) (2000) (stating that prohibition against discrimination on the basis of race or sex does not apply “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of such corporation, association, educational institution, or society of its activities”).

⁵³ Law, *supra* note 1, at 384–85 (holding Christian school could not fire teacher based on the fact that she was pregnant and unmarried (citing *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980))).

⁵⁴ See *Erickson*, 141 F. Supp. 2d at 1273.

increased costs associated with the coverage of prescription contraceptives was sufficient to warrant the exclusion of coverage.⁵⁵ Lasnik reasoned that “[w]hile it is undoubtedly true that employers may cut benefits, raise deductibles, or otherwise alter coverage options to comply with budgetary constraints, the method by which the employer seeks to curb costs must not be discriminatory.”⁵⁶ In *City of Los Angeles Department of Water and Power v. Manhart*,⁵⁷ the Supreme Court also refused to allow defendants to cite “cost” as an excuse for its discriminatory policy, requiring female employees to make larger pension contributions than male employees because of their longer life expectancy.⁵⁸ One commentator argued that the actual cost of full prescription contraceptive coverage is “deminimus,”⁵⁹ and that the exclusion of prescription contraceptives from health insurance plans is “economically indefensible.”⁶⁰ Given the data suggesting that the addition of contraceptives to a health plan does not significantly raise costs, why hasn’t Congress passed any legislation requiring employers to cover prescription contraceptives in their generally comprehensive prescription plans? Perhaps the reason is that Congress feels employers should not be forced to bear this burden.

In contrast to the cases brought under Title VII, cost has been successfully raised as a defense for exclusions of coverage in other instances.⁶¹ In *McGann v. H & H Music Co.*,⁶² an employee

⁵⁵ See *id.* at 1274 (stating that cost is not a defense to allegations of violations of Title VII); see also *Ariz. Governing Comm. for Tax Deferred Annuity and Comp. Plans v. Norris*, 463 U.S. 1073, 1084–85 n.14 (1983) (stating that the PDA establishes “that the greater cost of providing retirement benefits for women as a class cannot justify differential treatment based on sex”).

⁵⁶ *Erickson*, 141 F. Supp. 2d at 1274.

⁵⁷ 435 U.S. 702 (1978).

⁵⁸ *Id.* at 716–17 (stating that there is no cost defense to Title VII violations).

⁵⁹ Bergin, *supra* note 1, at 159.

⁶⁰ *Id.* at 160 (asserting that “contraceptive coverage pays for itself” and that “a 15 percent increase in the number of oral contraceptive users in a health plan would provide enough savings in pregnancy costs alone to provide oral contraceptive coverage for all users in the plan”); see also Lisa Girion, *Costs and Benefits: Employers Weighing Birth Control Coverage Consider Other Factors Besides the Up Front Expenses*, L.A. TIMES, June 24, 2001, at W1 (citing a study by the Alan Guttmacher Institute which found that adding birth control pills to a health plan raises costs less than one percent, about eighteen dollars per employee).

⁶¹ See *McGann v. H & H Music Co.*, 946 F.2d 401, 404 (5th Cir. 1991) (concluding that cost was an appropriate motivation for an employer to reduce coverage in its health insurance plan under the Employment Retirement Income Security Act of 1974 [ERISA], the principal federal statute regulating employee

who was infected with AIDS was entitled to lifetime medical benefits of up to one million dollars under his employer-provided insurance plan.⁶³ McGann disclosed his disease to his employer, H & H Music Company, after which the employer announced a change that would limit benefits payable to AIDS related claims to a lifetime maximum of \$5,000.⁶⁴ McGann challenged the change in the policy as discriminatory since he was the only employee known to be suffering from AIDS and the change was clearly implemented in response to McGann's disclosure of his disease and his filing for claims under the policy.⁶⁵ McGann sued under section 510 of ERISA which provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.⁶⁶

Reasoning that Congress had not intended to take away an employer's ability to control its plan, the court upheld the change in policy as valid on the ground that H & H Music Company's purpose was to avoid the expense of paying for AIDS related treatment, not to retaliate against this particular employee.⁶⁷

The court also noted that in order to establish a violation under ERISA, there must be proof of specific discriminatory

benefit plans); *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (rejecting retirees' ERISA claim that an employer could not change the level of benefits without their retirees consent, and establishing that "medical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation").

⁶² 946 F.2d 401 (5th Cir. 1991).

⁶³ *Id.* at 403.

⁶⁴ *See id.* This was not the only change implemented in the policy. The employer also raised individual and family deductibles, eliminated coverage for chemical dependency treatment, and increased contribution requirements. *See id.* at 403 n.1.

⁶⁵ *See id.* at 403. H & H Music Company conceded that the implementation of the reduction of coverage in the policy for AIDS-related benefits was prompted by the disclosure of McGann's disease. *See id.* at 403-04.

⁶⁶ 29 U.S.C. § 1140 (2000). McGann argued that H & H Music Company had discriminated against him in violation of both prohibitions of section 510 of ERISA. *See McGann*, 946 F.2d at 403.

⁶⁷ *See McGann*, 946 F.2d at 408 (stating that if a "federal court could prevent an employer from reducing an employee's coverage limits for AIDS treatment once that employee contracted AIDS, the boundaries of judicial involvement in the creation, alteration or termination of ERISA plans would be sorely tested").

intent to engage in activity prohibited under section 510.⁶⁸ Conversely, in making his determination in *Erickson*, Judge Lasnik relied on the fact that discrimination need not be intentional to constitute a violation of Title VII.⁶⁹ While the discrimination seemed more overt in *McGann*, it appears to be more difficult to establish a violation under ERISA than it is under Title VII. The policy reasons behind the high standard invoked under ERISA seem quite relevant to claims brought under Title VII as well.⁷⁰ In *McGann*, the court reasoned that summary judgment in favor of the defendant was proper because the "defendant's motive was to ensure the future existence of the plan and not specifically to retaliate against McGann or to interfere with his exercise of future rights under the plan."⁷¹ Courts should also be mindful of the effects of their decisions under Title VII with respect to the future existence of employer-provided health insurance.⁷²

CONCLUSION

Although Title VII and the Pregnancy Discrimination Act have afforded women greater opportunities in the workplace, questions remain with respect to the scope of these acts. Courts have played an integral role in the application of Title VII and the Pregnancy Discrimination Act to changing conditions in society, such as the current need for coverage of prescription

⁶⁸ See *id.* at 404.

⁶⁹ See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (noting that "[e]ven if one were to assume that Bartell's prescription plan was not the result of intentional discrimination, the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII"); see also *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 (1983) (asserting that where a benefit plan is facially discriminatory, it is not necessary to establish subjective intent).

⁷⁰ See *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (stating that limiting an employer's right to change health insurance plans would, in effect, "decrease protection for future employees and retirees"); see also *Moore v. Reynolds Metals Co. Ret. Program for Salaried Employees*, 740 F.2d 454, 457 (6th Cir. 1984) (asserting that "judicial interference into the establishment of pension plan provisions . . . would serve only to discourage employers from creating voluntary pension plans").

⁷¹ *McGann*, 946 F.2d at 404.

⁷² See *Moore*, 740 F.2d at 456 (writing that "courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation").

contraceptives. This Comment has suggested that the consequences associated with the unavailability of prescription contraceptives are dangerous; however, it has also suggested that in focusing on social issues in making decisions, courts, such as in *Erickson*, have neglected to consider the implications of their decisions. Perhaps *Erickson* is the point at which the court should have deferred to Congress, despite continued Congressional failure to establish legislation requiring employers to cover prescription contraception. Perhaps Congress's decision not to mandate coverage of contraception is based on its recognition that employer-provided health insurance plans must be permitted to adapt to societal changes to ensure the future existence of those of the plans.

