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SEX DISCRIMINATION: THE PREGNANCY-RELATED DISABILITY EXCLUSION

STANLEY SCHAIR

The United States Supreme Court, on June 17, 1974, handed down its decision in Geduldig v. Aiello,1 holding that a state disability insurance program for private employees which excludes from coverage disabilities relating to normal pregnancy and childbirth does not invidiously discriminate on the basis of sex in violation of the equal protection clause of the fourteenth amendment to the United States Constitution. Less than one year later, on May 27, 1975, the Court granted a petition for a writ of certiorari in Liberty Mutual Insurance Co. v. Wetzel2 to review a decision by the United States Court of Appeals for the Third Circuit which concluded that a similar program, this time created by a private employer, constituted sex discrimination proscribed by Title VII of the Civil Rights Act of 1964.8 A decision by the Court is anticipated during its 1975-1976 term.

Paid sick leave and disability benefits provisions which exclude pregnancy-related disabilities under state or private programs have in recent times also become the subject of close scrutiny by state and local equal employment agencies and courts.4 In addition, their validity under federal enactments other than Title VII and executive orders directed at eliminating sex discrimination in employment is not free from doubt.5

An affirmance by the Supreme Court in Liberty Mutual would end this much litigated controversy for all but the very smallest employers

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2 95 S. Ct. 1989, granting cert. to 511 F.2d 199 (3d Cir. 1975). Petitions for writs of certiorari have also been filed as a result of two other Title VII cases involving the validity of excluding pregnancy-related disabilities from disability plans. See Gilbert v. General Elec. Co., 10 BNA Fair Empl. Prac. Cas. 1201 (4th Cir.), cert. granted, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975) (No. 74-1589); Communications Workers of America v. AT&T, 513 F.2d 1024 (2d Cir.), petition for cert. filed, 43 U.S.L.W. 8684 (U.S. June 19, 1975) (No. 74-1601). These cases are discussed in notes 96-114 and accompanying text infra.
5 See text accompanying notes 121-26 infra.
PREGNANCY RELATED DISABILITY EXCLUSION 685

in this country having similar disability provisions. All employers, both in the public and private sectors, employing 15 or more employees,\(^6\) would probably be required to eliminate from any such existing sickness or disability programs any blanket exclusion of pregnancy-related disabilities. The financial implications of such a decision would no doubt be enormous. The State of California, whose program was under attack in \textit{Aiello}, estimated that the cost of providing benefits for pregnancy-related disabilities under its program alone would be between $120 and $131 million per year.\(^7\) Experts have predicted that the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be in the area of $1,300 million.\(^8\)

A reversal by the Supreme Court in \textit{Liberty Mutual}, however, may not provide the last word on this subject either for the substantial portion of the work force covered by such plans\(^9\) or for their employers and unions. Just as it has been successfully argued in numerous state and federal appellate courts\(^10\) that the Supreme Court decision in \textit{Aiello} was decided in a constitutional context and is therefore not controlling in the interpretation of Title VII or other federal or state statutes barring sex discrimination in employment, it might similarly be contended that a ruling under Title VII is not determinative of the same question under a local or state statute or even under other federal enactments such as the \textit{Equal Pay Act of 1963}.\(^11\)

This Article will review the status of the law respecting the validity of pregnancy-related disability exclusions under the United States Constitution, Title VII of the Civil Rights Act of 1964, other major federal enactments and regulations governing sex discrimination in the employment context, and the laws of the State of New York.\(^12\)

\(^7\) \textit{417 U.S. at 494 n.18.}
\(^9\) It was estimated by one expert that some 32 million employees in the United States under age 65 are covered by sickness and accident disability insurance. See \textit{id.}
\(^12\) Numerous states have laws proscribing sex discrimination in employment. The New York experience is highlighted here because of a determination by its highest court that in construing New York's law against sex discrimination, \textit{Aiello} and other court
More than 32 million women are in the labor force in the United States. They constitute at least 38 percent of all workers and their numbers are growing. The United States Labor Department has estimated that 9 out of 10 females will work outside the home at some time during their lives. During the period from 1950 to 1969, the number of employed women in the United States rose 68 percent while the number of men employed increased only 17 percent.

As the number and relative importance of females in the work force have grown, so has the network of government regulations designed to create equal employment opportunity and eliminate sex-based discrimination in employment. In 1963, with the passage of the Equal Pay Act, Congress established the principle of equal pay for equal work. It assigned enforcement responsibilities under this law to the Wage and Hour Division of the United States Department of Labor and specifically empowered the Secretary of Labor to restrain alleged sex discrimination. In addition, the remedial scheme included a civil cause of action for aggrieved employees.

One year later Congress enacted the Civil Rights Act of 1964, including in Title VII thereof broad protection for women and minorities by prohibiting discrimination in compensation and in the terms, conditions, or privileges of employment. To effectuate the goals of Title VII, Congress created the United States Equal Employment Opportunity Commission (EEOC). The EEOC was given the power to issue regulations and guidelines indicating proscribed discriminatory employment practices. It also was empowered to entertain and determine claims of discrimination and, since 1972, to initiate court proceedings against offending employers, unions, and employment agencies.

determinations concerning pregnancy and childbirth are not controlling. Presumably, it will not consider itself bound by any United States Supreme Court decision in Liberty Mutual. See text accompanying notes 129-46 infra.

13 This statistic was reported in 1972 in a fact sheet issued by the Women's Bureau of the Employment Standards Administration of the U.S. Department of Labor.
14 This statistic was reported in “Equal Pay” (Publication 1320) of the Wage and Hour Division of the U.S. Department of Labor.
17 Id. §§ 216, 217.
20 Id. § 2000e-12.
Claimants themselves were also given access to the federal courts. Title VII permits consideration of employment discrimination claims successively, and in certain instances simultaneously, in several different forums including state and local courts and equal employment agencies, the EEOC, and the federal courts.

The Supreme Court recently noted that "over the past decade, Congress has . . . manifested an increasing sensitivity to sex-based classifications." The same comment might be employed to describe the Court itself. By finding violations of the due process and equal protection clauses of the fourteenth amendment, the Court, in recent years, has become increasingly active in removing sex-based discrimination. That same sensitivity to sex-based discrimination has also been at work in the third branch of the federal government. In September 1965, President Johnson issued Executive Order 11,246 making it mandatory for federal contractors to include in each contract an equal opportunity clause and requiring the contractor to take affirmative action to insure that minorities are employed. This Executive Order, as amended in 1967 by Executive Order 11,375, prohibited discrimination in employment because of race, color, religion, sex, or national origin. In addition, the Office of Federal Contract Compliance (OFCC) was created to carry out enforcement of the provisions.

On the state and local levels of government there has been a proliferation of regulation aimed at eliminating sex discrimination in employment. Since 1965, for example, the New York State Human Rights Law has contained a broad prohibition against sex discrimination in employment. Additionally, the City of New York has enacted its own laws in this area.

The public policy which has found widespread expression in this ever-growing and complex network of federal and state regulations has also found its way into the forum of labor arbitration. It is not uncommon for collective bargaining agreements between employers and unions to contain clauses barring sex discrimination. These clauses

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22 Id. For an analysis of Title VII see Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877 (1967).
25 See, e.g., id.; Reed v. Reed, 404 U.S. 71 (1971).
are often enforceable under the agreements' grievance-arbitration provisions and under the state and federal laws which encourage and regulate labor arbitration.

Although the foregoing discussion is not intended to exhaust the entire catalogue of regulations in the area, it does highlight the major remedial avenues open to victims of sex discrimination in employment. In addition, it illustrates the parallel and overlapping remedies and the multiplicity of forums — each completely independent of the others — which have become available in this area. Employees, their employers, and unions alike have experienced the resulting confusion. Both employers and unions have found themselves defending different causes of action arising out of a single discrimination claim in two or more different forums. And the lack of success experienced by a claimant in one forum does not usually preclude resort to another or even several others. The substantial litigation expenses involved as well as the risk that different forums will render differing decisions have led to unsuccessful attempts by defendants to import into this area the traditional doctrines of res judicata, collateral estoppel, waiver, and election of remedies.

The finality issue reached the Supreme Court in *Alexander v. Gardner-Denver Co.* in the context of a dispute over whether an adverse arbitration decision under a nondiscrimination clause in a collective bargaining agreement foreclosed a subsequent action on the same claim under Title VII. The Court held that it does not. Speaking generally about laws aimed at eliminating discrimination, it noted that legislative enactments in the area "have long evinced a general intent to accord parallel and overlapping remedies . . . ." Because, as the Court observed, Congress desired to grant its policy against discrimination the "highest priority," it provided in Title VII for consideration of discrimination claims both in the federal courts and in state and local agencies and courts. Moreover, the Court noted that resort to one forum will not generally preclude later submission of the same claim.

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81 For example, discharge of an employee in New York State who later claims that he or she has been the victim of sex-based discrimination might find its way to the New York State Department of Labor, and/or its Unemployment Insurance Division, both the New York State and New York City equal employment agencies, the EEOC, the OFCC, the U.S. Department of Labor, arbitration, and the federal courts. *See* notes 15-50 and accompanying text *supra.*


83 *Id.* at 46.

84 *Id.* at 36.

85 *Id.* at 47.

86 *Id.*
In other words, the Court read the legislative history of Title VII as permitting an individual to pursue his rights under both Title VII and any other applicable state or federal statutes, "[t]he clear inference [being] that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."38

Applying the Alexander rationale to the pregnancy-related disability exclusion, it becomes clear that any disability benefits program incorporating this exclusion must be examined in light of all existing federal, state, and local laws and regulations relating to employment discrimination based on sex.

THE CONSTITUTIONAL STANDARD

It was not until late 1973 that the Supreme Court was presented with cases involving pregnancy-related disabilities. These cases arose in the context of maternity leave regulations governing public employees, primarily public school teachers. At the time these suits were brought, Title VII did not apply to state agencies and public educational institutions39 and, therefore, these initial challenges to mandatory maternity leave rules were initiated under the fourteenth amendment to the United States Constitution.

Conflicts had arisen among the circuits. In Green v. Waterford Board of Education,40 Buckley v. Coyle Public School System,41 and LaFleur v. Cleveland Board of Education,42 the Courts of Appeals for the Second, Tenth, and Sixth Circuits, respectively, held that mandatory maternity leaves for pregnant schoolteachers were violative of the equal protection clause of the fourteenth amendment. In Schattman v. Texas Employment Commission43 and Cohen v. Chesterfield County School Board,44 on the other hand, mandatory leave policies were upheld by the Courts of Appeals for the Fifth and Fourth Circuits, respectively, both courts having found that the regulations established classifications which were reasonable and thus not violative of the fourteenth amendment. To resolve the conflict, the Supreme Court granted

37 Id. at 47-48.
38 Id. at 48-49.
40 473 F.2d 629 (2d Cir. 1973).
41 476 F.2d 92 (10th Cir. 1973).
43 459 F.2d 52 (5th Cir. 1972), cert. denied, 409 U.S. 1107 (1973).
certiorari in both *LaFleur* and *Cohen*, deciding the cases together on January 21, 1974 as *Cleveland Board of Education v. LaFleur.*

The Cleveland rule challenged in *LaFleur* required every pregnant schoolteacher to take maternity leave without pay beginning five months before the expected birth of her child. Return to work was not permitted before the beginning of the next school term following the date the child reached three months of age. Reemployment was not guaranteed; the teacher was merely given priority in reassignment.

The Virginia regulation involved in *Cohen* similarly required the pregnant teacher to leave work four months before the expected birth. Reemployment no later than the first day of the school year following the date of a finding of reeligibility, however, was guaranteed. This finding was to be based upon written notice of physical fitness and the teacher's assurance that child care would not interfere with employment.

In striking down both mandatory leave provisions as violative of due process, the Court held that the right to choose marriage and a family is a fundamental right protected by the fourteenth amendment:

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. Because public school maternity leave rules directly affect "one of the basic civil rights of man," . . . the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty.

The purpose of these regulations, the boards of education argued, was to achieve continuity of classroom instruction and insure the presence of a physically capable teacher. The Court noted that continuity of instruction, a perfectly legitimate educational goal, might support a requirement of advance notice to the school of the expected date of birth; however, "the absolute requirements of termination at the end of the fourth or fifth month" were not considered wholly rational. Ironically, as the Court illustrated, the arbitrary cutoff date might hinder the attainment of the very continuity sought by requiring teachers to leave

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46 *Id.* at 635 n.1.
47 *Id.* at 637 n.5.
48 *Id.* at 640 (citation omitted).
49 *Id.* at 642.
midsemester even though they might be willing and able to complete the school year.  

As to physical fitness, the Court concluded that

the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing... The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

Because the requirement that teachers not return until the beginning of the following semester was rationally related to the desired continuity, this part of the regulation was upheld. The requirement in the Cleveland rule that the teacher's child be three months old, however, was held to be arbitrary and irrational.

The Supreme Court in LaFleur, it must be emphasized, never addressed the issue of sex discrimination. The due process analysis of the case by the majority made it unnecessary to determine whether the maternity leave policies in question constituted sex discrimination or whether pregnancy was a valid classification under the equal protection clause of the fourteenth amendment. Thus the LaFleur decision was to have little, if any, impact when the pregnancy issue again presented itself to the Court later that same year in Geduldig v. Aiello.

The California disability insurance system involved in Aiello excluded disabilities attributable to normal pregnancies from coverage. This exclusion was attacked as being violative of the fourteenth amendment. Benefits under the system were paid to persons in private employment temporarily unable to work because of disabilities not covered by workmen's compensation. The program, funded entirely from employee contributions at the rate of 1 percent of salary to a maximum of $85 per year, excluded "any injury or illness caused by or arising

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50 Id. at 643.
51 Id. at 644.
52 Id. at 650.
53 Justice Stewart delivered the opinion of the Court in which Justices Brennan, White, Marshall, and Blackmun joined. Justice Douglas concurred in the result without filing an opinion. Justice Powell filed a concurring opinion rejecting the irrebuttable presumption approach as an inappropriate frame of reference and adopting an equal protection analysis. Id. at 651. Justice Rehnquist and Chief Justice Burger dissented. Id. at 657.
in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.”

A three-judge federal court ruled that the exclusion of pregnancy-related disabilities was not based upon a classification having a rational and substantial relationship with a legitimate state purpose. Accordingly, it violated the equal protection clause. The Supreme Court reversed. Justice Stewart, writing for the majority, observed that the state intended to establish its disability benefits system as an “insurance program . . . to function essentially in accordance with insurance concepts.” He pointed out that the state structured its program with a level of benefits and risks designed to maintain solvency at a 1 percent level of employee contribution. To cover the risks excluded, the Court noted, would be “substantially more costly.” In addition, it would require an increase in the employee contribution rate, a decrease in the level of benefits, state subsidization, or a combination of these possibilities.

The Court upheld the program as “rationally supportable.” The State, it said, had legitimate interests in maintaining the self-supporting nature of its program and in distributing the available resources in such a way as to keep benefits payments at a level adequate for covered disabilities, “rather than to cover all disabilities inadequately.” It also had a legitimate concern, the Court added, in keeping the contribution rate at a level which would not unduly burden participating employees. State policy determinations such as these, the Court concluded, “provide an objective and wholly noninvidious basis for the State’s decision not to create a more comprehensive program than it has.”

As for the persons covered by the program, Justice Stewart declared:

California does not discriminate with respect to the persons or

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57 417 U.S. at 492.

58 Id., at 498-94.

59 Id. at 495.

60 Id. at 496.

61 Id.

62 Id.
groups which are eligible for disability insurance protection under
the program. The classification challenged in this case relates to
the asserted underinclusiveness of the set of risks that the State
has selected to insure.63

And, as for the selection of those risks, he went on to state:

There is no evidence in the record that the selection of the risks
insured by the program worked to discriminate against any de-
finable group or class in terms of the aggregate risk protection
derived by that group or class from the program. There is no risk
from which men are protected and women are not. Likewise, there
is no risk from which women are protected and men are not.64

The dissenting opinion, authored by Justice Brennan and joined
in by Justices Douglas and Marshall, expressed the view that the State
program's exclusion of disabilities connected with normal pregnancy
constituted sex discrimination per se. By singling out pregnancy—a
gender-linked disability peculiar to women—for less favorable treat-
ment, the dissenters reasoned, the program creates a double standard
for compensation; men are covered for all disabilities they may suffer
but women are not. “Such dissimilar treatment of men and women,
on the basis of physical characteristics inextricably linked to one sex,”
the dissenting opinion concluded, “inevitably constitutes sex discrimina-
tion.” 65 At the core of the dissenting opinion is the view that because
only women are capable of becoming pregnant, an exclusion based
upon pregnancy is, per se, discriminatory.66

In a footnote which has become the subject of great controversy
in subsequent Title VII cases, “Footnote 20,” the Court expressly re-
jected the view that the state's exclusion of disabilities attributable to
normal pregnancies involved sex discrimination per se and in direct
answer to the dissent stated:

The dissenting opinion to the contrary, this case is thus 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 eligibility because of gender but merely removes one physical condi-
tion—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 . . . and Fronti-
tiero . . . . Normal pregnancy is an objectively identifiable physi-

63 Id. at 494.
64 Id. at 496-97 (emphasis added) (footnotes omitted).
65 Id. at 501.
66 Id.
cal 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.67

In the Court's view, the equal protection cases of Reed68 and Frontiero,69 both involving sex discrimination, were distinguishable since they involved similarly situated persons who were treated differently on the basis of sex alone. But in Aiello, women were not viewed as the class excluded from coverage; instead, pregnant women were deemed to be one class and men and nonpregnant women, another.

As will be discussed more fully in the section of this Article devoted to Title VII, several federal courts have read "Footnote 20" as no more than a continuation of the ongoing debate within the Court over the standard to be applied in sex discrimination cases under the fourteenth amendment's equal protection clause. The Supreme Court in the past has treated statutes and programs having a racially discriminatory effect as inherently suspect and subject to strict judicial scrutiny.70 States are required to demonstrate compelling interests which cannot otherwise be achieved before the Court will uphold any such statute or program.71 But there has not been a Court majority for the

67 Id. at 496-97 n.20 (citations omitted).
69 411 U.S. 677 (1973). In Reed, males similarly situated to females were preferred by an Oregon probate statute as administrators of children's estates. In Frontiero, servicemen could automatically claim spouses as dependents, while similarly situated servicewomen were required to prove the dependency of their spouses. In both cases, the goal of administrative convenience was held by the Court to be an insufficient basis—not a compelling state interest—for supporting the sex-based classification under the rational basis test. While Justices Brennan, Marshall, Douglas, and White declared in Frontiero that sex is an inherently suspect classification, the majority never went that far. See note 72 infra. Justices Powell, Burger, and Blackmun, while finding the challenged provisions unconstitutional, specifically rejected the inherently suspect approach in deference to the proposed equal rights amendment: "If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution." 411 U.S. at 692.
proposition that programs and statutes involving sex discrimination should be evaluated under the same standard. The standard used by the majority in this area has not gone beyond the traditional standard employed under the equal protection clause, viz., whether the classification in question "rationally promotes legitimate governmental interests."

Other courts have viewed "Footnote 20" as reaching well beyond a debate on the standards to be applied in analyzing sex discrimination cases under the equal protection clause. These courts see in "Footnote 20" a general holding that classifications based on pregnancy do not per se constitute sex-based discrimination, and, therefore, the singling out for exclusion of pregnancy-related disabilities from a disability benefits program is not, standing alone, gender-based discrimination even though only women can become pregnant.

No mention of Title VII can be found in the majority opinion in Aiello; nor does it discuss the EEOC's guidelines on pregnancy-related disability programs. Both proponents and opponents of the proposition that exclusion of pregnancy-related disabilities per se constitutes sex discrimination violative of Title VII have construed the Supreme Court's silence on these subjects in Aiello as beneficial to their respective positions. With the grant of certiorari in Liberty Mutual Insurance Co. v. Wetzel, the Supreme Court will soon have the opportunity to explain the reach of "Footnote 20." Because most employers in the public and private sectors of the economy are now covered by Title VII, the practical import of the Aiello decision, which as indicated above has been construed by several courts as not controlling in a Title VII context, has been minimal. A decision in Liberty Mutual, although not necessarily the ultimate determination on the subject since other statutes have yet to be tested in this area, ought to go a long way towards ending the uncertainty for many employers.

In Frontiero v. Richardson, 411 U.S. 677 (1973), the Justices wrote three separate opinions. Four Justices adopted the inherently suspect standard; a fifth Justice merely declared that the statutes worked an invidious discrimination; and three other Justices agreed that the statutes were unconstitutional without having to reach the question of whether sex is a suspect classification.

Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting). Another recent Supreme Court case involving sex discrimination is Weinberger v. Weisenfeld, 420 U.S. 696 (1975), where the Court, in a unanimous decision, declared invalid a provision of the Social Security Act which granted different survivor benefits to widowers and widows. This case, like Reed and Frontiero, involved a clear case of similarly situated persons being treated differently solely on the basis of sex.


As the political observer may recall, the addition of "sex" to the list of classes to be protected from discrimination by employers and others covered by the Civil Rights Act of 1964 was a tongue-in-cheek tactic designed to defeat the bill. Very little legislative debate is found in congressional records, and courts, in construing the Act, as far as sex discrimination is concerned, have little clear legislative intent to guide them. According to the EEOC: "the intent and reach of the amendment were shrouded in doubt." Indeed, the record is bare of any legislative history to guide the courts in deciding the validity of the pregnancy-related disability exclusion under Title VII.

The level of development of decisional authority under Title VII also may be wanting as an analytical framework for deciding a case such as Liberty Mutual. The neutral rule doctrine announced by the Supreme Court in Griggs v. Duke Power Co. will no doubt be urged by some as controlling. This doctrine generally provides that where a facially neutral employment policy has a "foreseeable disproportionate impact" upon a class protected by Title VII, the policy is unlawful unless the employer can show its necessity to the operation of the business.


(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


See 110 Cong. Rec. 2577-84 (1964). Note the relatively small number of pages (eight) of debate. The amendment prohibiting sex discrimination was first introduced by Congressman Smith (D., Va.). Several of the leading proponents of the bill spoke against the amendment which was clearly introduced to defeat the bill. These proponents included Congressman Celler (D., N.Y.), Chairman of the House Committee on the Judiciary; Congressman James Roosevelt (D., Cal.); Congresswoman Green (D., Ore.); and Congressman John Lindsay (R., N.Y.), to name a few. Congresswoman Green warned that the Judiciary Committee failed to consider the problems which would arise out of the biological differences between the sexes. Id. at 2484.

In the Senate, the amendment, known as the Bennett Amendment and now part of § 703(h) of Title VII, was discussed by Senator Randolph (D., W.Va.) as follows: Despite the sex discrimination prohibition, "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law." Id. at 13,663-64.

It is clear that the complex substantive issues facing the courts and industry today were not contemplated in 1964.


ness.\textsuperscript{80} In practice, however, the courts have been unable to apply this doctrine or any other theory to formulate a single conceptual framework for dealing with cases involving traits unique to one sex, including, of course, cases involving pregnancy.

Title VII cases dealing with other unique, \textit{i.e.} gender-linked, traits such as facial hair\textsuperscript{81} and with the stereotype of short hair as a proper male grooming standard\textsuperscript{82} have upheld, in some instances, employment policies relating to such traits or stereotypes, notwithstanding their disproportionate impact on one sex.\textsuperscript{83} But the right to grow one's hair or to keep it at a desired length certainly can be viewed on a different plane from the right to bear children. The obvious differences in the relative importance of these rights, it may be argued, militates against adopting any per se approach for dealing with employment policies involving gender-linked traits.

The EEOC, nevertheless, has formulated guidelines under Title VII that make it a per se violation to exclude pregnancy-related disabilities under any health or temporary disability insurance or sick

\textsuperscript{80}\textit{Id.} In \textit{Griggs}, either having a high school diploma or passing a standardized intelligence test was a prerequisite for employment. Where neither standard could be shown to be significantly related to successful job performance, and where the tests had a disproportionately high discriminatory impact on Negroes, the Court held that the use of such tests was violative of Title VII despite the fact that they were not used or intended to be used to discriminate on the basis of race. A broad objective test dealing with the actual discriminatory \textit{impact} was used rather than a subjective one based solely upon the employer's intent. \textit{See also} \textit{Gregory v. Litton Syss., Inc.}, \textit{316 F. Supp. 401} (C.D. Cal. 1970), \textit{modified}, \textit{472 F.2d 631} (9th Cir. 1972).

\textsuperscript{81}\textit{See, e.g.}, \textit{Rafford v. Randle E. Ambulance Serv., Inc.}, \textit{348 F. Supp. 816} (S.D. Fla. 1972) (discharge of plaintiffs for refusal to shave moustache and beards not discriminatory under \textit{Title VII}).

\textsuperscript{82}\textit{See}, \textit{e.g.}, \textit{Bujel v. Borman Food Stores, Inc.}, \textit{384 F. Supp. 141} (E.D. Mich. 1974) (two different grooming codes for men and women upheld under \textit{Title VII} so long as not a device to hinder or prevent employment).

\textsuperscript{83}\textit{See notes 81-82 supra.} In analyzing the effects of the proposed equal rights amendment, \textit{H.R.J. Res. 208, 92d Cong., 1st Sess.} (1971); \textit{S.J. Res. 8, 92d Cong., 1st Sess.} (1971), upon legislation specifically dealing with unique physical characteristics, commentators provide one approach to this question, \textit{viz}, that laws under the ERA will of necessity deal with individual attributes, not with classifications based on sex. \textit{Brown, Emerson, Falk, & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871} (1971).

In this situation it might be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. . . . So long as the law deals only with a characteristic found in all (or some) women but \textit{no} men, or in all (or some) men but \textit{no} women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, \textit{without more}, violate the basic principle of the Equal Rights Amendment. \textit{Id.} at 893 (emphasis added). The authors note that laws establishing medical leave for childbearing are permissible (though leave for childrearing would have to apply to both sexes), as are present laws punishing forcible rape and laws relating to determination of fatherhood. \textit{Id.} at 894.
leave program available in connection with employment. These guidelines are the agency's interpretation of the statute. *Griggs v. Duke Power Co.* is often cited in support of the rule that interpretations of a statute by an administrative agency enforcing that statute are normally accorded "great deference" by the courts. Insofar as these interpretations lack force of law and may not accurately interpret the statute, however, courts have found that they are not bound to apply them.

In *Espinoza v. Farah Manufacturing Co.* the Supreme Court held that the EEOC had misinterpreted the Act and therefore the EEOC guidelines concerning the interpretation of "national origin" versus citizenship under the Act were rejected:

> The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, . . . but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent. . . . Courts need not defer to an administrative construction of a statute where there are "compelling indications that it is wrong."

Thus it remains for the courts to determine whether the EEOC's guidelines on pregnancy are consistent or inconsistent with their own construction of the sex discrimination prohibitions contained in Title VII.

"Footnote 20" of *Aiello* cannot be ignored; employers will contend

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84 The following guidelines covering employment policies relating to pregnancy and childbirth were issued by the EEOC:

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

(b) 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 the commencement and duration of leave, the availability of extensions, the accrual of seniority and other 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.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.


86 See, e.g., Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973), wherein the court rejected EEOC pregnancy guidelines on the ground that they were apparently promulgated without a proper factual foundation.


88 Id. at 94-95 (emphasis added) (citations omitted).
that it provides a compelling, if not controlling, indication that the agency's guidelines are erroneous.

The first post-Aiello Title VII case involving pregnancy exclusion to reach the circuit courts was *Wetzel v. Liberty Mutual Insurance Co.*

Affirming the district court's grant of partial summary judgment, the Court of Appeals for the Third Circuit held that the employer's exclusion of pregnancy benefits from its income protection sickness and accident program violated Title VII. The court rejected the employer's contention that the EEOC's guidelines on pregnancy were undeserving of judicial deference since they were contrary to earlier positions taken by the EEOC and wholly inconsistent with the policy and understanding of the statute. The court concluded that, unlike *Espinoza*, there are no compelling indications that the EEOC position or guidelines on pregnancy are wrong or in any way inconsistent with any congressional intent. And as to the EEOC's reversal of its earlier positions on this subject, the court observed: "This evolutionary process is a necessary function of our legal system — a system that must remain flexible and adaptable to ever-changing concepts of our society." Finally, the current guidelines were given great deference by the court: "We feel that the legislative purpose of the Act is furthered by the

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Although guidelines on discrimination based on sex were issued by the EEOC in 1965, 30 Fed. Reg. 14,926 (1965), and amended in 1966, 32 Fed. Reg. 3344 (1968), and 1969, 34 Fed. Reg. 13,367 (1969), it was not until the most recent amendments, effective April 5, 1972, that any view was expressed in the guidelines as to how pregnancy-related disabilities were to be treated. These guidelines are set forth in note 84 supra. Public expression by the EEOC of how pregnancy should be treated under Title VII did, however, appear in other forms prior to 1972. For example, the *EEOC First Annual Report*, issued for the fiscal year 1966, *EEOC First Annual Report*, H.R. Doc. No. 86, 90th Cong., 1st Sess. (1965), states:

The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely.

*Id.* at 40. The EEOC then concluded:

The Commission does not have a comprehensive policy on pregnancy . . .

*Id.* The EEOC's early policy was also reflected in a Commission decision issued on December 16, 1969 which states in part:

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be special recognition for absences due to pregnancy . . .


511 F.2d at 205. *See also* note 105 infra. The legislative history on the addition of "sex" as a protected area under Title VII was characterized by the court as "indeed meager." 511 F.2d at 204.

92 *Id.* at 205.
EEOC guidelines and that the guidelines are consistent with the plain meaning of the statute.”

The employer in Liberty Mutual maintained that Aiello was controlling and completely dispositive of the case. The court disagreed, distinguishing Aiello on the grounds that, unlike the case before it, Aiello (1) presented a question of constitutional analysis of sex discrimination under the equal protection clause and not one of statutory interpretation under Title VII, and (2) involved a public social welfare program excluding only normal pregnancies and not a private plan excluding both abnormal and normal pregnancies. After rejecting the employer’s arguments that pregnancy is neither a sickness nor involuntary, and agreeing with the EEOC that the increased cost of coverage is no defense, the Third Circuit concluded:

We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand.

The Court of Appeals for the Second Circuit was the next circuit court to be called upon to determine Aiello’s effect on Title VII cases involving a pregnancy exclusion from a disability plan. In Communications Workers of America v. AT&T, the district court had dismissed a suit by the CWA to secure disability benefits for pregnant women employees. “Footnote 20” of the Aiello opinion was viewed by Judge Knapp of the district court as “the key to the [Aiello] Court’s decision.” He stated:

The holding was that California’s treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII . . .

The Second Circuit reversed and remanded. Addressing the “narrow question” of whether Aiello, as a matter of law, required dismissal of the union’s suit under Title VII, the court concluded that Aiello was not decisive of the issue raised in the Title VII case before it and that the lower court therefore erred in dismissing the complaint. The court observed that Congress, in enacting Title VII, did not require

93 Id.
94 Id. at 203.
95 Id. at 206.
97 379 F. Supp. at 682.
98 513 F.2d at 1028.
that the forbidden discriminatory practices be limited to practices violative of the equal protection clause. Indeed, practices outlawed by Title VII and the EEOC guidelines may nonetheless be able to survive attack under the equal protection clause. Further, as to the EEOC guidelines on pregnancy and the proposition that the Aiello holding invalidated them, the Second Circuit remarked: "It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines."99

On June 27, 1975, some three months after the Second Circuit decided Communications Workers and about four months after the Third Circuit handed down its decision in Liberty Mutual, the Court of Appeals for the Fourth Circuit decided Gilbert v. General Electric Co.100 Gilbert, like Communications Workers and Liberty Mutual, was a post-Aiello Title VII decision involving a disability program excluding pregnancy. Finding that the pregnancy exclusion before it violated Title VII, the court in a split decision followed the lead of the Third Circuit in Liberty Mutual. It held that the exclusion of pregnancy benefits under a companywide program which granted general disability benefits constitutes sex-based discrimination under Title VII. The court reasoned that

[pregnancy is a condition unique to women and a basic characteristic of their sex. A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employees than for men employees; and would do so on the basis of sex.101

99 Id. at 1030 (footnote omitted). The remand to the district court for determination of the Title VII issue may prove unimportant in light of the Supreme Court's decision to review Liberty Mutual.


Since Gilbert, the Courts of Appeals for the Sixth and Ninth Circuits have also confronted the pregnancy disability exclusion issue. Satty v. Nashville Gas Co., 11 BNA Fair Empl. Prac. Cas. 1 (6th Cir. 1975), dealt with whether the exclusion of pregnancy-related disabilities from a private employer's sick leave and seniority program was violative of Title VII. Rejecting the employer's contention that Aiello was controlling, the Sixth Circuit held that the "disparate treatment between pregnancy leave and other sick leave constitutes a violation of Title VII . . . ." Id. at 4. Similarly, in Hutchison v. Lake Oswego School Dist., 11 BNA Fair Empl. Prac. Cas. 161 (9th Cir. 1975), the Ninth Circuit, having found that Aiello is not determinative of the issue, ruled that the denial of sick leave benefits to a pregnant schoolteacher violated Title VII.

101 10 BNA Fair Empl. Prac. Cas. at 1203 (emphasis added). See also Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975); Farkas v. Southwestern City School Dist., 506 F.2d 1400 (6th Cir. 1974) (mem.).
General Electric argued to the contrary, contending that the pregnancy exclusion was not gender-based discrimination per se, relying on "Footnote 20" of the Aiello opinion. The majority, in rejecting this argument, noted that Aiello was not controlling.\(^{102}\) It read Aiello as deciding that the pregnancy classification under the social welfare program there involved was *discriminatory* but rationally supportable and not invidious.\(^{103}\) But Title VII, the court pointed out, does not authorize such a rationality test; "[i]t represents a flat and absolute prohibition against all sex discrimination in conditions of employment."\(^{104}\) Deference was granted to the EEOC pregnancy guidelines by the Gilbert majority, but it was noted that the result would have been the same had no guidelines been issued.\(^{105}\)

The dissenter, Judge Widener, read Aiello as precluding the holding reached by the majority.\(^{106}\) The inquiry in any sex discrimination case, he reasoned, must focus initially on whether the employment practice in question constitutes sex discrimination. If it is not sex discrimination, then, regardless of what standard is applied, whether it be equal

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\(^{102}\) 10 BNA Fair Empl. Prac. Cas. at 1206. In Satty v. Nashville Gas Co., 11 BNA Fair Empl. Prac. Cas. 1 (6th Cir. 1975), the Sixth Circuit, adopting this same approach, stated:

> It would appear harsh to read into footnote 20 that the Court expected . . . to preclude all future discussion of statutory interpretation under a relatively new act such as the Civil Rights Act of 1964.

\(^{103}\) Id. at 3-4 (footnotes omitted) (citations omitted). *Accord,* Hutchison v. Lake Oswego School Dist., 11 BNA Fair Empl. Prac. Cas. 161 (9th Cir. 1975). Several district courts have also refused to find that Aiello is controlling in a Title VII context. See, e.g., 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).

\(^{104}\) Id. (footnote omitted).

\(^{105}\) Id. at 1208 n.12. The Gilbert court refused to accept defendant's contention that the "waffling" between the EEOC's earlier opinions and its present position should minimize the weight to be afforded the guidelines. The Fourth Circuit noted, as did the district court, "that the guidelines, as presently promulgated, are merely expressive of what is the obvious meaning and purpose of the Act." *Id.* *Accord,* Hutchison v. Lake Oswego School Dist., 11 BNA Fair Empl. Prac. Cas. 161, 164 (9th Cir. 1975).

Great deference was also granted the EEOC's guidelines in Satty v. Nashville Gas Co., 11 BNA Fair Empl. Prac. Cas. 1 (6th Cir. 1975), wherein the Sixth Circuit observed that "absent clear indicia in the form of legislative history that the agency interpretation is unreasonable or unnatural, we must defer to the Commission's construction of the statute as articulated under [the guidelines]." *Id.* at 4 (footnote omitted).

protection, Title VII, or any other, there is no violation. Accordingly, if the exclusion of pregnancy-related disabilities is not sex-based discrimination, there can be no Title VII violation. Judge Widener, quoting from "Footnote 20" of the Aiello opinion, found the following "flat statement" of the Supreme Court controlling on the question of whether a pregnancy disability exclusion is sex-based discrimination: "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis." Since the exclusion at issue in Gilbert was precisely the same as that before the Supreme Court in Aiello, the dissenting opinion reasoned, it should no more support a finding of discrimination under Title VII than it did under the equal protection clause. The dissent further reasoned that the fact that the exclusion appears in a collective bargaining agreement in Gilbert and not in state legislation as in Aiello should not make any difference.

Judge Widener argued that Aiello "was written with an eye to Title VII cases certain to come, not in a vacuum . . . ." His disagreement with the majority is buttressed by the illogical results bound to follow adherence to the majority's approach. Because a state disability plan covering its own employees is covered by Title VII, the state would, under the Gilbert holding, not be permitted to exclude pregnancy from its coverage. Yet such an exclusion could freely be made in a state plan covering private employees of private employers such as that in Aiello.

The dissent read Aiello as posing a two-step analytical framework. First, was there discrimination on the basis of sex? Second, if so, was it defensible on any legally acceptable ground? While the second step of analysis may conceivably produce differing results in the statutory context of Title VII and the constitutional context of the fourteenth amendment, the first step should yield the same answer in either context. The primary difference in the interpretation of "Footnote 20" between, on the one hand, the dissent in Gilbert and district court opinion of Judge Knapp in Communications Workers and, on the other hand, the circuit court opinions in Gilbert, Communications Workers, and Liberty Mutual is that the former focus on the first step

107 10 BNA Fair EmpL Prac. Cas. at 1205.
109 10 BNA Fair EmpL Prac. Cas. at 1205.
110 Id. at 1207.
111 Id.
113 10 BNA Fair EmpL Prac. Cas. at 1207.
114 Id.
of the analysis just described, while the latter completely ignore that step, focusing instead on drawing distinctions between the constitutional and statutory contexts on the basis of the second step of the analysis. Consideration of elements pertinent to the second step might be totally irrelevant, it is submitted, if the first step yields the answer that the employment policy in question does not constitute sex discrimination.

A number of relevant Title VII judicial precedents are in accord with the conclusions perceived by Judges Knapp and Widener as flowing from “Footnote 20” of the Aiello opinion. These cases view the essence of the prohibition against sex discrimination contained in Title VII as barring different treatment on the basis of sex of persons similarly situated and qualified. In Phillips v. Martin Marietta Corp.,\textsuperscript{115} for example, the Supreme Court stated that “Section 703(a) of the Civil Rights Act of 1964\textsuperscript{116} requires that persons of like qualifications be given employment opportunities irrespective of their sex.”\textsuperscript{117} That case involved a company policy of refusing to hire women with preschool age children. Men with children of the same ages, however, were hired. The Supreme Court vacated the lower court’s decision which had upheld the policy and remanded the case. The lower court had erred in reading Title VII, the Supreme Court wrote, insofar as it believed that the statute permitted one hiring policy for women and another for men — each having preschool age children. The proper test to be applied is whether persons of “like qualifications” were treated differently because they were of opposite sexes.\textsuperscript{118}

This same rationale was applied by the district court in Rafford v. Randle Eastern Ambulance Service, Inc.\textsuperscript{119} Claiming that they were discharged for refusing to shave their beards and moustaches, the male employees in Rafford argued that such action constituted sex discrimination under Title VII because it was based solely on a special male characteristic, viz, the growth of facial hair. The court refused to find sex discrimination, characterizing as absurd the simplistic concept that any practice based on a sex-linked physical trait constitutes per se sex discrimination in violation of Title VII. It then articulated what it saw as the appropriate standard:

\textsuperscript{115} 400 U.S. 542 (1971).
\textsuperscript{117} 400 U.S. at 544 (emphasis added).
\textsuperscript{118} Accord, Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (section 703(a)(1) violated where airline policy required that stewardesses be unmarried, but there was no similar rule for male personnel).
\textsuperscript{119} 348 F. Supp. 316 (S.D. Fla. 1972).
Virtually all Title VII violations fit an equal protection definition of sex discrimination—**dissimilar treatment for similarly situated men and women, where the treatment is based on sex**. . . . Here, however, the Court is presented with a case where there can be no similarly situated members of the opposite sex. An analogy, for which there is some precedent, posits the discharge of a pregnant woman.

... The discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. These cases are perhaps more properly considered under the rubric of Cooper v. Delta Air Lines, Inc. . . . , that discrimination between different categories of the same sex is not unlawful discrimination by sex. 120

It might be contended that "Footnote 20" of Aiello, like Rafford, stands for the proposition, applicable to any sex discrimination case regardless of context, that the mere fact that an employment policy takes cognizance of a sex-linked trait does not by itself make it sex discrimination in violation of law. There must also be an element of favoritism toward similarly situated persons of the opposite sex. That favoritism cannot exist where, as in the case of pregnancy, no member of the opposite sex can be so similarly situated.

The confusion surrounding the effect to be given Aiello in the Title VII context has produced uncertainty among employers, employees, and unions. The Supreme Court, as indicated earlier in this Article, will have the opportunity to eliminate such confusion when it decides **Liberty Mutual** during the 1975-1976 term.

**THE STANDARD UNDER OTHER FEDERAL LAWS**

**Equal Pay Act**

Regulations promulgated by the Wage and Hour Administrator of the United States Department of Labor under the Equal Pay Act of 1963 121 provide that payments relating to maternity are not wages for purposes of that statute. 122 The regulations also provide:

If employer contributions to a plan providing insurance or similar

120 Id. at 519-20 (emphasis added) (citations omitted). Accord, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975), vacating 482 F.2d 535 (5th Cir. 1973); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973) (per curiam); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973), all holding that male grooming standards are not violative of Title VII.


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.\textsuperscript{123}

This standard of equal contributions or equal benefits, if applied to the disability plans involved in \textit{Aiello, Liberty Mutual, Communications Workers}, and \textit{Gilbert}, would probably validate them. There was no indication in the courts' opinions in those cases that employer contributions, if any, were greater for men than for women. Moreover, the \textit{Aiello} opinion noted that experience revealed that the aggregate benefits under the California program were greater for women than for men.\textsuperscript{124}

\textbf{Executive Order 11,246}

The sex discrimination guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11,246\textsuperscript{125} apply to most government contractors and subcontractors. They incorporate the equal contributions or equal benefits approach and, accordingly, do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contributions for employees of both sexes.\textsuperscript{126}

On December 27, 1973, however, the Secretary of Labor published \textit{proposed} revisions\textsuperscript{127} to the guidelines requiring that pregnancy-related disabilities be treated as temporary disabilities. This proposed guideline is in line with the existing EEOC guidelines on pregnancy. While the validity of these proposed guidelines, as a technical matter, would not be controlled by a decision under Title VII and the EEOC guidelines, as a practical matter the OFCC, which oversees the application of the Secretary's guidelines to government contractors and subcontractors, would probably be guided by such a decision.\textsuperscript{128} In any event, the OFCC may elect not to adopt the proposed guidelines until the Supreme Court issues an opinion in \textit{Liberty Mutual} concerning the EEOC guidelines.

\textbf{The New York Standard}

The highest court of the State of New York first considered "several facets" of pregnancy and childbirth in the employment relationship

\begin{itemize}
  \item \textsuperscript{123} \textit{Id.} § 800.116(d).
  \item \textsuperscript{124} 417 U.S. at 496, 497 n.21.
  \item \textsuperscript{125} 3 C.F.R. 170 (1974).
  \item \textsuperscript{126} 41 id. § 60-20.3(b) (1975).
  \item \textsuperscript{128} \textit{Id.} at 35,336 (Commentary).
\end{itemize}
in three cases decided in October 1974 under the State’s Human Rights Law. In affirming, without opinion, the decision below in each of the cases, the New York Court of Appeals adopted the opinion of Justice Hopkins in *Board of Education (East Williston) v. New York State Division of Human Rights*, one of the trilogy of cases under review, where it was held that the Human Rights Law prohibits employers from singling out pregnancy for special treatment in determining leave from duty.

The school board policy challenged in *East Williston* required a pregnant teacher to take an unpaid leave of absence no later than five months prior to the expected delivery date. In deciding the case, the Appellate Division, Second Department, rejecting as inapplicable the constitutional standard exemplified by *Reed* and applying instead the more rigorous standard of the Human Rights Law, stated:

> The Human Rights Law is undoubtedly a function of the equal protection guarantee, but it reflects a more direct and positive focus. Though in a sense the equal protection clause deals with classes, the Human Rights Law in contrast deals with individuals. The statute in essence prevents disparate treatment of individuals, having regard for their abilities, capacities and qualifications.

The true test to be applied under the Human Rights Law, Justice Hopkins wrote, is whether the employment policy has a “reasonable foundation.” Declaring the school board’s regulation invalid, the appellate division pointed out that the purpose of the regulation, to secure “continuity of competent instruction,” was not promoted by demanding an involuntary leave at four months “any more than it would [be] by demanding absence at six or eight months.”

A similar mandatory maternity leave policy was struck down in *Board of Educa-

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130 N.Y. EXEC. LAW §§ 290-301 (McKinney 1972), as amended (Supp. 1974). The Human Rights Law of New York provides, in part: “The opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized as and declared to be a civil right.” Id. § 291(1).


132 42 App. Div. 2d at 52, 345 N.Y.S.2d at 97.

133 Id. (citations omitted).

134 Id. at 53, 345 N.Y.S.2d at 98.
tion (Oyster Bay and Babylon) v. New York State Division of Human Rights, another of the trilogy of cases.

In the third case of the trilogy, a different facet of the maternity question was at issue. The New York Court of Appeals, in Board of Education (City of New York) v. State Division of Human Rights, ruled that the Human Rights Law requires that a pregnant teacher who takes a pregnancy-related leave must be permitted to take advantage of her sick and sabbatical leave entitlements to the same extent as would one suffering from some other temporary physical disability.

The State Division of Human Rights, whose determination was under review in this case, had found that the board discriminated against the schoolteacher in denying her sick leave and other benefits for which male teachers suffering from temporary physical disability would have been eligible.

In Union Free School District No. 6 (Town of Islip) v. New York State Human Rights Appeal Board, a posttrilogy and post-Aiello case, the complainant schoolteacher wished to return to her position five months earlier than the school board would permit and to preserve her right to various fringe benefits. She asserted that the Board's paid sick leave benefits should be applied to pregnancy in the same way it is applied to other temporary disabilities. In affirming the appellate division's decision, the New York Court of Appeals for the first time wrote an opinion on the subject of maternity and employment practices and policies under the Human Rights Law. The opinion contained a brief analysis of Aiello in relation to Title VII, the New York law, and the constitutional standard.

Citing with approval the district court's approach in Liberty Mutual — that a provision deemed constitutional may still violate Title VII — the court stated: "were the Supreme Court to declare that exclusion of pregnancy and maternity benefits was to no extent based on sex, we would not be obliged to accept such determination for the pur-


137 Id.


poses of the application of our State's Human Rights Law."\textsuperscript{141} In holding that the Board's policy was discriminatory and prohibited by the Human Rights Law, the court concluded: "what the Constitution does not forbid may nonetheless be proscribed by statute. In \textit{East Williston} and \textit{City of New York}, it had been. The case now before us is no different."\textsuperscript{142} Thus, the New York courts are bound to treat arbitrary mandatory maternity and sick leave policies that differentiate between pregnancy disabilities and other temporary disabilities as violative of the Human Rights Law. The exclusion of pregnancy from paid sick leave programs in such cases apparently will be viewed as sex discrimination per se.

Left undecided by the \textit{Town of Islip} opinion is its application to a state disability benefits program covering employees of private employers such as the type involved in \textit{Aiello} and to an insured or self-insured program of disability benefits such as those involved in \textit{Liberty Mutual, Communications Workers,} and \textit{Gilbert}. Indeed, the only employment policies under review in \textit{Town of Islip} were a public employer's maternity and paid sick leave policies. That this question has been left open by the court is of crucial importance to New York employers in the private sector since under New York law, nongovernmental employers are required to provide disability benefits coverage for their employees under an insured program.

The New York Disability Benefits Law\textsuperscript{143} specifies the level and type of disability coverage that New York employers must provide either through participation in the state insurance fund or through other private insurance plans, including a program of self-insurance. The New York system represents a comprehensive system of mandatory disability insurance providing for payments in lieu of wages when an employee is disabled by nonoccupational injury or sickness. In this regard, it is similar to the California program involved in \textit{Aiello}, and, as in \textit{Aiello}, the New York plan excludes pregnancy-related disability. Section 205 provides that employees are not entitled to benefits for any period of disability caused by or arising in connection with a pregnancy, except any such period occurring after return to employment with a covered employer for a period of two consecutive weeks following termination of such pregnancy . . . .\textsuperscript{144}

\textsuperscript{141} 35 N.Y.2d at 377 n.1, 320 N.E.2d at 861 n.1, 362 N.Y.S.2d at 142 n.1.
\textsuperscript{142} Id. at 377-78, 320 N.E.2d at 861, 362 N.Y.S.2d at 143.
\textsuperscript{143} N.Y. WORKMEN'S COMP. LAW §§ 200-42 (McKinney 1965), as amended (Supp. 1974).
\textsuperscript{144} Id. § 205(3) (McKinney 1965).
This exclusion of pregnancy was long a part of the statute when, in 1965, the New York State Legislature added the prohibition against discrimination on account of sex to the Human Rights Law. But there is no legislative history discussing this amendment to section 296(1)(a) of the Human Rights Law and its impact, if any, on the exclusion. Any determination by the courts that disability benefits programs created pursuant to the Disability Benefits Law are violative of section 296(1)(a) of the Human Rights Law insofar as they exclude pregnancy would, in effect, repeal the pregnancy exclusion contained in section 205.

This circumstance was brought to the attention of the New York Court of Appeals by various amici curiae in their respective motions to intervene in support of the school district’s motion for reargument in the Town of Islip case. It was argued that under general rules of statutory construction it must be presumed that the legislature was aware of the specific exclusion in section 205 of the Disability Benefits Law when it amended section 296(1)(a) of the Human Rights Law and that the latter must be construed with reference to the former. The court was also reminded of the fundamental rule often followed by it in other cases involving statutory construction that repeals by implication are not favored.

In denying the motion for leave to reargue the court indicated that the issues raised by petitioner school board and amici might be considered at “some future date.” Thus, the status of disability plans of New York employers which exclude pregnancy must await some future determination by the state courts. It is clear from the Court of Appeal’s analysis in Town of Islip that this determination will be made independent of and without regard to the United States Supreme Court decision in Aiello and any future decision by the Court in Liberty Mutual.

CONCLUSION

A complex and ever-widening substratum of related, but not generally controlling, issues has grown in this area. Is pregnancy either a sickness or an accident; and is it voluntary? Is it a disability or merely a unique physical condition? What increased costs might employers and/or employees incur should pregnancy-related disabilities be in-

cluded in existing disability benefit plans? Would inclusion breed widespread abuses? Is exclusion a business necessity? Should the courts defer to EEOC guidelines on pregnancy? What weight, if any, should courts give to insurance principles which have been consistently applied in connection with the exclusion of pregnancy as a covered risk? What standards should be applied in constitutional cases involving claims of sex discrimination? And, finally, what did the Court in *Aiello* really mean by “Footnote 20”?

The ultimate question which inevitably must surface and be answered is whether the exclusion of a pregnancy-related disability from disability benefits plans constitutes sex discrimination. The answer to this question oftentimes seems to depend on the analytical framework employed by the person answering it. Some have urged that the exclusion be examined on the basis of its “disproportionate impact” on women. Others have contended that the issue should be whether “similarly situated” persons have received different treatment because of their sex. Proponents of inclusion have pointed to the fact that pregnancy sometimes is the only disability excluded from the coverage of disability plans. Opponents like to emphasize that many, if not most, disability plans excluding pregnancy actually favor women since they still receive a larger share of the aggregate benefits than do men.

Although facially appealing to some, it seems simplistic to determine the validity of the pregnancy exclusion on the basis of the proposition that since only women can become pregnant any employment policy which treats pregnancy different from other temporary disabilities must *always*, regardless of the circumstances, be deemed discriminatory on the basis of sex. Equally simplistic, and equally appealing to others, is the proposition that since men and women can never be similarly situated with regard to pregnancy, the pregnancy exclusion may *never* amount to sex discrimination. To this writer, the only advantage to recommend either of these propositions is ease of application.

The elements of a fairer and more reasonable solution may ultimately be found in the rationale contained in “Footnote 20” of the Supreme Court’s opinion in *Aiello*. What is significant is the Court’s refusal to adopt the per se approach inherent both in the propositions described above and in the existing EEOC guidelines on pregnancy. The majority chose, instead, to fashion a more flexible standard which, by its nature, could be applied on a case-by-case basis. Thus the exclusion of pregnancy-related disabilities from a disability benefits program will not, without more, constitute sex discrimination. However, should the exclusion be found pretextual or, should the overall design and
operation of the disability benefits program provide significantly less benefits for women than for men, such an exclusion might, under all of the circumstances, amount to gender-based discrimination.

This standard may be applied by the courts equally and consistently both in the constitutional context, as in Aiello, and under Title VII and the other enactments discussed in this Article to determine whether or not the pregnancy exclusion in any particular disability benefits plan constitutes sex discrimination. Where in a specific case it is determined that gender-based discrimination exists, then, and only then, would the court be required to examine any other elements which might be pertinent to establish a violation under the specific statute or constitutional provision involved. The court would also consider any defenses interposed which are recognized under such statutes or constitutional provisions. This approach would significantly reduce the risks of obtaining different results in different forums. It, moreover, does not conflict with any expressed legislative intent concerning Title VII or any other federal or state enactment proscribing sex discrimination in the employment context.