Pregnancy Disability Benefits Under State-Administered Insurance Programs

Virginia Voorhees

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol24/iss2/5
COMMENT

PREGNANCY DISABILITY BENEFITS UNDER STATE-ADMINISTERED INSURANCE PROGRAMS

Traditionally, the unequal treatment accorded men and women was thought to be dictated by their biological and psychological differences. Yet with the recent erosion of the mythology surrounding woman, it has become increasingly clear, that, in a society where an individual's strength is commonly measured by his or her wealth or influence, it is largely the denial of equal employment opportunity to woman that perpetuates the status to which she traditionally has been relegated. The threshold problem in eliminating sex discrimination in employment has been to assure that jobs are made available to equally qualified men and women on an equal basis. Yet many of the women who cross the threshold and procure employment find that discrimination persists in such conditions of employment as rate of compensation, opportunity for promotion and job-related benefits. Discrimination in the conditions of employment, rather than in initial hiring practices, is far more difficult to detect and to measure. In view of the extensive and ever-growing participation of women in the labor force, such discrimination poses a problem whose resolution warrants considerable adjustments in judicial attitudes, employer-employee relations and society's perception of the role of women.

The magnitude of the problem is easily demonstrated. In 1973, nearly 35 million women, or 45% of all women over sixteen and under seventy years of age, worked to earn 59% of what men earned. Of these 35 million women, 42% were married and living with their husbands and 4.8 million had children under six years old. The participation in the labor force of over two-thirds of these women is primarily attributable to economic need; in 1973, 24% were single; 22% were married to men with incomes under $7,000, including 6% married to men with incomes under $3,000.1

The Supreme Court's response to this major change in the composition of the labor force has been grudgingly slow and not completely consistent.2

2. For an analysis of the Court's case-by-case response to sex discrimination, see Comment, Sex Discrimination and Equal Protection: An Analysis of Constitutional Approaches to Achieve Equal Rights for Women, 38 ALBANY L. REV. 66 (1973), and
The implications of a recent Supreme Court decision which dealt with the constitutional dimensions of an employment disability program which did not compensate for disabilities arising as a result of normal pregnancy are potentially significant for this issue and warrant detailed examination.

I. Geduldig v. Aiello—Insurance for Disabled Workers

To augment its Workmen’s Compensation and unemployment legislation, California has established a state-administered disability insurance program which pays benefits to persons unable to work because of disabilities stemming from a substantial number of “mental or physical illness[es] and mental or physical injur[ies].” The purpose of the program, as expressed in the California Unemployment Insurance Code, is

- to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom.
- This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

In Geduldig v. Aiello, the Supreme Court, in an opinion by Justice Stewart, held that California’s failure to insure the risk of disability resulting from normal pregnancy did not constitute an invidious discrimination in violation of the equal protection clause of the fourteenth amendment. The district court had held that the omission from the program’s coverage of disability incurred by women as a consequence of normal pregnancy constituted a classification based on sex which had no rational and substantial relationship to a legitimate state purpose, and thus fell within the fourteenth amendment’s proscription.

4. Id. § 2601.

When the class action was originally filed, those women who suffered disability caused by, or arising in connection with, any pregnancy were not eligible for benefits; but before the district court announced its decision, the California Court of Appeals, in Rentzer v. California Unemployment Ins. Appeals Bd. Human Relations Agency, 32 Cal. 3d 604, 108 Cal. Rptr. 336 (1973), ruled that payments of disability benefits could be prohibited only where the pregnancy was normal. The change was codified by a deletion and amendment to Cal. Unemployment Ins. Code § 2626.2 (West Supp. 1974). The modified provision was never considered by the district court in Aiello. The Code originally provided:
A. The Nature of California's Program

California's disability insurance system is supported solely by employee contributions: an employee contributes one per cent of his salary, with a maximum annual contribution of $85 and a minimum contribution of one per cent of an income of $300. Weekly benefits vary from $25 to $105 depending upon the greatest amount earned by the employee in one of four quarters of a twelve month base period, and benefits begin on the eighth day of disability or the first day of hospitalization, whichever comes first.

"Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his mental or physical condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter. CAL. UNEMPLOYMENT INS. CODE § 2626 (West 1972). As modified, section 2626 now reads:

"Disability" or "disabled" includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. CAL. UNEMPLOYMENT INS. CODE § 2626 (West Supp. 1974). Section 2626.2 states:

Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, cesarean section delivery, ectopic pregnancy and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, venous thrombosis.

CAL. UNEMPLOYMENT INS. CODE § 2626.2 (West Supp. 1974).

This liberalization of the California statute caused the Supreme Court to find the claims of three plaintiffs to be moot, since their disabilities had resulted from abnormal pregnancies and disability payments had been made to them. The validity of the pregnancy exclusion for normal pregnancies remained a live issue for a fourth plaintiff, Jacqueline Jaramillo.


9. Id. § 2652.
10. Id. § 2655.
11. Id. § 2627(b).
Disabilities lasting beyond twenty-six weeks are not covered, nor are benefits awarded in excess of one-half of an employee's base period earnings.\textsuperscript{12}

The range of illnesses and injuries for which the risk of disability is covered is extensive and includes, for example, disabilities resulting from cosmetic plastic surgery, voluntary sterilization, obesity, sex change operations, hemophilia, prostatectomies, hernias, sickle cell anemia, heart attacks, removal of wisdom teeth, orthodonture, and hair transplants.\textsuperscript{13} Disabilities resulting from "abnormal and involuntary complications of pregnancy" are also covered.\textsuperscript{14} Aside from disabilities resulting from normal pregnancy and disabilities lasting less than eight days or more than twenty-six weeks, the only other disabilities which are excluded from coverage are those resulting from court commitment as a dipsomaniac, drug addict, or sexual psychopath.\textsuperscript{15}

The Court's evaluation of the coverage afforded by California's program led to one of its most critical conclusions, that the system was intended by the legislature to operate in accordance with standard insurance concepts,\textsuperscript{16} a point disputed at length by the parties in their briefs.\textsuperscript{17} Actuarial principles require that premiums be correlated to the insurer's foreseeable expense and that illnesses which are unusually expensive or frequent be excluded unless the insured pays a premium commensurate with the risk he represents. Therefore, in view of the substantial expense to be anticipated in covering normal pregnancy, the Court's conclusion that California intended its system to operate in accordance with insurance concepts facilitated its ultimate decision to uphold the exclusion as rationally supportable.\textsuperscript{18}

However, the basis for the Court's conclusion that actuarial considerations govern California's plan is not clear. The program, unlike many private

\textsuperscript{12} \textit{Id.} § 2653.
\textsuperscript{14} \textit{CAL. UNEMPLOYMENT INS. CODE} § 2626.2 (West Supp. 1974).
\textsuperscript{15} \textit{Id.} § 2678 (West 1972). However, the Deputy Attorney General of California took the position before the Court that since court commitment in such cases is "a fairly archaic practice . . . it would be unrealistic to say that they constitute valid exclusions." See 417 U.S. at 499 n.3 (Brennan, J., dissenting).
\textsuperscript{16} The Disability Fund is wholly supported by the one percent of wages annually contributed by participating employees. . . . In recent years between 90% and 103% of the revenue . . . has been paid out in disability and hospital benefits. This history strongly suggests that the one-percent contribution rate, in addition to being easily computable, bears a close and substantial relationship to the level of benefits payable and to the disability risks insured under the program.
\textsuperscript{17} Brief for Appellant at 10-14, 30-36, Geduldig v. Aiello, 417 U.S. 484 (1974); Brief for Appellee at 6-20, \textit{id.}; Reply Brief for Appellant at 3-4, \textit{id.}
\textsuperscript{18} See 417 U.S. at 492.
plans, consists of a pooling of all risks by insuring all employees at the same rate. The flat one per cent contribution rate means that low risk employees are actually charged more than actuarial principles require, making the good risks carry the bad. Moreover, there is no direct proportional relationship between contributions made and benefits received, since employees with high earnings whose percentage of contributions to the plan are greater receive benefits only equal to those received by lower paid workers who have contributed less. Nevertheless, it can be argued that all insurance is based on the pooling of some risks and the exclusion of others and that, aside from pregnancy-related disabilities, short term and long term disabilities are also excluded from the pool.

A common actuarial consideration is a group's contributions in relation to the proportion of benefits it receives, and the statistics which the Court quoted showing that women already receive a disproportionately high share of benefits were used to substantiate its holding that there was no discrimination on the basis of sex. However, if the Court had not determined that California's insurance plan was governed by actuarial principles, the level of benefits received in relation to contributions made by a particular group of participants would have been irrelevant.

That a disproportionate share of benefits are received by women may be explained by the fact that women are lower wage earners than men and that the program is structured to be of equal benefit to low income and high income workers. The discrepancy between contributions made and benefits received by women is mitigated further by evidence that age and income are far more significant factors in predicting the amount of disability benefits payable than sex, yet there are no exclusions of disabilities correlated with these factors.

B. The Court's Acceptance of California's Policy Determination

A second key to evaluating Aiello is analysis of the Court's view that the

20. Appellant contends that the fact that women as a class contribute 28% of program funds and receive 38% of program benefits demonstrates that they are more costly to insure . . . . Women receive more than they contribute, however, not because they have more costly disabilities, but rather because (1) average wages for women are only 60% of those for men, and (2) California's statutory scheme ensures that lower paid workers will get paid more than they contribute for the same disability experience. Brief for Appellee at 82-83, Geduldig v. Aiello, 417 U.S. 484 (1974) (citations omitted).
22. See California Assembly's Joint Committee on Unemployment Compensa
variables of the program—the benefit level, the risks selected to be insured, and the contribution rate—are policy determinations by the state. The Court framed the issue of the case as whether the equal protection clause requires that the state provide benefits to women who have incurred disability in the course of a normal pregnancy.23

In one sense, the program may be viewed as implementing the state's broad policy of compensating disabled workers. Other policy determinations were made in order to effectuate this goal, including the decisions to collect a minimal one per cent contribution from each worker, to provide protection for workers without drawing on state resources, and the decision not to establish a maternity benefit program for normal childbirth.24 Rather than policy determinations, however, it is arguable that these last three "policies" are merely the procedures for the administration of the program, and as such should not be elevated to the status of a legislative policy to which the Court must defer.25 This was essentially the position of the district court; the legislative purpose of the disability insurance plan is solely to alleviate the economic hardship of those unable to work, a hardship which is the same for pregnant women as it is for other disabled workers.26 From this perspective, the fiscal integrity of the plan may be viewed not as a goal, but as a means to achieve a goal.

From the Supreme Court's perspective, however, the legislative purpose is more specific and encompasses not only the desire to alleviate economic hardship but to regulate the manner in which this is done by providing the broadest possible coverage at a rate affordable even by the lowest paid worker.27 The Court found support for its decision to defer to the judgment of the state legislature from its earlier rulings in *Dandridge v. Williams*,28 *Jefferson v. Hackney*,29 and *Williamson v. Lee Optical Co.*30

23. "The essential issue . . . is whether the Equal Protection Clause requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery." 417 U.S. at 494.
25. See Brief for Appellee at 56, id.
26. Applying the standard of Reed v. Reed, 404 U.S. 71 (1971), discussed at pp. 272-73 infra, the district court stated that the decision "whether the exclusion of pregnancy-related disabilities from the program is arbitrary or rational depends upon whether pregnancy and pregnancy-related illness substantially differ from the included disabilities in some manner relevant to the purposes of the disability insurance program." Aiello v. Hansen, 359 F. Supp. 792, 797 (N.D. Cal. 1973).
27. 417 U.S. at 493.
Pregnancy Disability Benefits

Dandridge and Jefferson involved the constitutionality of public welfare assistance programs, known as Aid to Families with Dependent Children (AFDC), as administered by the states of Maryland and Texas. In Maryland, discrimination against large families was alleged because an upper limit had been placed on the amount of money any one family could receive under the program. In Texas, a percentage reduction factor had been applied to the amount which had been determined necessary for each category of assistance. Percentage reduction factors of 100%, 95%, and 75% were applied to programs designed to assist the elderly, the disabled, and for AFDC, respectively. Racial discrimination was alleged because the proportion of Mexican Americans and blacks in the AFDC program was higher than in the other Texas public welfare assistance programs.

Both cases were preceded by Williamson, in which the Court rejected due process and equal protection attacks on a statute which prohibited fitting lenses without a physician's prescription, but which excepted ready-to-wear eyeglass concerns from it prohibition. The Court upheld this classification, finding that a legislature may address itself to those phases of a problem which it sees as most acute, while neglecting others, without falling within the fourteenth amendment's proscription of invidious discrimination.

Although the classification in Williamson had no relation to an identifiable class against which there had been frequent discrimination, the reasoning of the case was incorporated and expanded in Dandridge and Jefferson. The standard applied was the same: the legislative scheme need not be comprehensive but only rationally based to be found free from invidious discrimination.31

The recognition of the states' broad discretion in administering their social welfare programs mark the Jefferson, Dandridge and Aiello decisions as part of a continuing attempt by the Court to protect the states from a flood of

lawsuits on grounds that their programs disproportionately benefit one group of citizens, or from liability for a commitment of welfare funds in excess of that allocated by their legislature. In holding that the asserted under-inclusiveness of the set of risks California selected to insure did not violate the equal protection clause, the Court in *Aiello* anticipated that if disability payments for normal pregnancy were required, payments for long and short term disabilities, also excluded, could be compelled.  

The extreme complexity involved in constructing a social program which balances conflicting demands is one further factor in favor of giving state statutory schemes considerable deference. These concerns were expressed by the Court in *Dandridge*:

> We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure . . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court . . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

The Court's concerns, if not its conclusions, in *Jefferson* and *Dandridge* may be justified. The application of these holdings to the California legislative scheme, however, raises questions not presented by those cases because the exclusion at issue in the California program applies solely to women, and, as a sex classification, may require a different standard of review. In *Dandridge* the classification was based on family size, and in *Jefferson* each category of assistance had substantial numbers of interracial members, so

---

32. 417 U.S. at 495.
33. 397 U.S. at 487. See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In upholding Texas' statutory scheme for financing public education through the use of an *ad valorem* tax by each school district to supplement state funds, which resulted in substantial disparities in per pupil expenditures due to the differences in amounts received through local property taxation, the *Rodriguez* Court, in part, justified its refusal to strictly scrutinize the challenged procedure by stating:

> Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues . . . . In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

*Id.* at 41 (footnote omitted).
34. 406 U.S. at 548.
that there was no one category containing only members of the class subject to the alleged discrimination. A further basis for questioning the application of these holdings to Aielo is that, unlike the programs at issue in Maryland and Texas, the California disability insurance system is not financed from the public treasury but exclusively from contributions of the employees who enjoy its benefits. In view of the expressed goals of the program, the exclusion of a class of needy contributors under a claim of blanket discretion to remedy problems "one step at a time" is not nearly so rational.

II. PREVIOUS JUDICIAL RESPONSE TO ASSERTIONS OF WOMEN'S RIGHTS

The evolution of the consciousness of the courts, and particularly the Supreme Court, in the area of women's rights has been remarkably slow in view of the activist role it has played in striking down discriminatory practices aimed at other highly "visible" groups, especially those which were identifiable on the basis of race.\(^{38}\) A partial explanation may be that women have not been residentially segregated, and the socio-economic problems which they endure as a group are unique. Further, although they form a majority of the population,\(^{37}\) they cannot point to as clear a fourteenth amendment mandate to end discrimination as may those who have been the target of racial discrimination.\(^{38}\)

The traditional approach of the courts has been to place woman in a class by herself, purportedly in the interest of her protection.\(^{39}\) Her position has

35. Id. at 546.
36. See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967) (article in state constitution, prohibiting state from denying right of any person to sell his real property to whomever he chooses, involves state in private racial discrimination to unconstitutional degree); Evans v. Newton, 382 U.S. 296 (1966) (municipality barred from acting as trustee under private will that fosters racial segregation); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (state cannot restrict alien's ability to earn living); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant held unconstitutional).
37. See The World Almanac 132 (1973 ed.).
38. See Brown, Emerson, Falk & Freedman, The ERA: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971). The authors advocate enactment of the Equal Rights Amendment, for "without a constitutional mandate, women's status will never be accorded the special concern which race now receives because of the history of the Fourteenth Amendment." Id. at 885.
39. See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961) (affirming second degree murder conviction of woman tried by all-male jury under statute providing, in substance, that no woman shall be taken for jury duty unless she volunteers for it). Contra, Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S. Jan. 21, 1975); Goesaert v. Cleary, 335 U.S. 464 (1948) (state statute which, in effect, forbids any female to be a bartender unless she
been viewed, not as disadvantaged, but as the natural and desirable result of the effort to spare her the base concerns of the everyday business world:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.40

It is only in the most recent times that such sentiments have been more commonly characterized as romantic paternalism.41

The first significant breakthrough in the Supreme Court's analysis of sex discrimination was Reed v. Reed,42 where the Court invalidated an Idaho statute which gave mandatory preference to male applicants over equally qualified female applicants for appointment as administrators of decedents' estates. Articulating what has since become a commonly quoted equal protection standard, the Court stated that, while different classes of people may be treated differently, a classification

must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object

is wife or daughter of male owner does not violate equal protection); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (state statute providing minimum wages for women upheld); Radice v. New York, 264 U.S. 292 (1924) (state can prohibit women from working in restaurants in large cities between 10:00 p.m. and 6:00 a.m.); Muller v. Wilson, 236 U.S. 373 (1915) (upholding state statute prohibiting employment of women in certain industries, e.g., hotels); Riley v. Massachusetts, 232 U.S. 671 (1914) (state can limit hours worked by women in factories); Quong Wing v. Kirkendall, 223 U.S. 59 (1912) (upholding statute imposing license fee on bar laundries but exempting those employing two or less women); Muller v. Oregon, 208 U.S. 412 (1908) (state statute forbidding females from working in certain establishments more than ten hours a day upheld, at least with respect to laundries); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (upholding state's refusal to grant license to practice law to a woman). See also Comment, Sexual Mythology and Employment Discrimination, 3 SETON HALL L. REV. 108 (1971).

41. See, e.g., Sailer Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 334 (1971) (statute prohibiting women from tending bar unless they are liquor licensees, wives of licensees or, individually or with their husbands sole shareholders of corporate licensee, violates equal protection). The court stated:

The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from [certain hazardous occupations]. . . . Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment. . . . We can no more justify denial of the means of earning a livelihood on such a basis than we could deny all women drivers' licenses to protect them from the risk of injury by drunk drivers.

42. 404 U.S. 71 (1971).
of the legislation, so that all persons similarly circumstanced shall be treated alike.\textsuperscript{43}

Since \textit{Reed}, this standard of review has been utilized to invalidate various sex-related discriminatory practices. For example, in \textit{Green v. Waterford Board of Education}\textsuperscript{44} and \textit{Heath v. Westerville Board of Education},\textsuperscript{45} the courts relied on \textit{Reed} to hold school board practices requiring mandatory resignations or unpaid leaves of absence for pregnant teachers without regard to the individual teacher's ability to continue working violative of the equal protection clause. In \textit{Heath}, the court held that pregnancy could not be distinguished from other medical disabilities.\textsuperscript{46}

The district court in \textit{Aiello} used the \textit{Reed} standard to invalidate California's exclusion of pregnancy-related disabilities. The court adopted the view that \textit{Reed} requires a somewhat more rigorous analysis than the rational basis test, the traditional mechanism for equal protection review.\textsuperscript{47} This theory, which has gained considerable acceptance,\textsuperscript{48} was conceived by

\begin{itemize}
\item 43. \textit{Id.} at 76, quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
\item 44. 473 F.2d 629 (2d Cir. 1973).
\item 46. After pointing out that the defendant had failed to distinguish pregnancy from other temporary debilitating conditions, the court quoted from the district court's opinion in Cohen v. Chesterfield County School Bd., 326 F. Supp. 1154, 1161 (E.D. Va. 1971), in holding that "[\textit{b}ecause pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis . . . ."] 345 F. Supp. at 506.
\item 47. According to the court, \textit{Reed} requires "rejection of statutory classifications based upon stereotypical generalizations rather than reason." 359 F. Supp. at 797.
\item 48. Justice Brennan reiterated this view in his \textit{Aiello} dissent, where he warned that "[t]he Court's decision threatens to return men and women to a time when 'traditional' equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex." 417 U.S. at 503 (citations omitted).
\end{itemize}
Professor Gerald Gunther, who saw Reed as the Burger Court's attempt "to blur the distinctions between strict and minimal scrutiny precedents by formulating an overarching inquiry applicable to all."49 In deciding Reed as it did, the Court provided an intermediate equal protection analysis for sex-based legislative classifications. The validity of Gunther's theory is not yet proven. The recent case of Cleveland Board of Education v. LaFleur,50 which dealt with the constitutionality of mandatory maternity leave rules for public school teachers, was not decided under this intermediate equal protection analysis, but rather on due process grounds.51

The Reed standard was utilized in Scott v. Opelika City Schools,52 decided about one month prior to Aiello, to uphold an equal protection challenge to a plan which distinguished maternity disabilities from other conditions requiring sick leave. Relying on several lower court cases,53 including the district court opinion in Aiello, the court in Scott said that there was no justification for the defendant employer's treatment of maternity disabilities, since "[t]his Court . . . is unable to find that pregnancy in at least its final stages is not a 'disability.'"54 The court rejected financial considerations as a justification by suggesting that similar savings could be made by denying use of sick leave for other disabilities, especially those of long duration.55

In contrast to the Scott decision, the Supreme Court in Aiello did not apply the Reed analysis, and it ultimately upheld the classification at issue. Two conclusions made by the Court seem to underlie this ultimate holding: 1) its determination as to the object of California's disability insurance program, and 2) its determination as to whether persons disabled by normal pregnancy are similarly circumstanced with persons disabled by other illnesses and injuries.

The object of California's program, as expressed in the statute, is to re-

---


51. However, Justice Powell's concurring opinion is consistent with Gunther's theory.

52. 63 F.R.D. 144, 147 (M.D. Ala. 1974).


54. 63 F.R.D. at 148 n.8.

55. Id. at 147 n.6.
Pregnancy Disability Benefits

lieve the economic hardship of unemployment caused by disability. The Supreme Court, on the other hand, viewed the statute as having the multifaceted purpose of maintaining a self-supporting program functioning essentially in accordance with insurance concepts and providing the broadest possible disability protection affordable by all employees. It is this more detailed view of the purpose of the program which was the basis for the Court's conclusion that California's choice of benefit level, risks to be insured against, and contribution rate bore a close and substantial relationship to the legislative goals and, as such, were policy determinations to which the Court must defer as long as "the line drawn by the State is rationally supportable."

If, on the other hand, the extent of the coverage and the rate of individual contributions were viewed as merely the mechanics for accomplishing the program's primary purpose of aiding those unable to work, then the determination that the risk excluded had a fair and substantial relation to the object of the program would be questionable.

In view of its determination that California's legislative scheme was rational, the Supreme Court considered the issue of whether those disabled by pregnancy were similarly situated to those disabled for other reasons only perfunctorily, saying, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Thus the Court concluded that no discrimination on the basis of gender as such is involved, and that, therefore, Reed was inapplicable.

Justice Brennan, however, in his dissenting opinion, found pregnancy-related disabilities to be functionally indistinguishable from disabilities arising from other sources, in that they require medical care and usually hospitalization, may involve risk to health and life, and result in economic hardship due to medical expenses and lost wages.

Implicit in the majority's reasoning is the belief that women are not disadvantaged vis-à-vis men since their situations are incomparable, that the ex-

56. See note 4 supra.
57. 417 U.S. at 493.
58. Id. at 495.
59. Id. at 496-97.
60. The Court found that, notwithstanding the fact that only women become pregnant,
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.

Id. at 496-97 n.20.
clusion is based on an actual physical difference between the sexes and not on stereotypes or presumptions. This reasoning is symptomatic of the substantial amount of confusion over whether legislation may reflect the physical differences between the sexes and still be constitutional.

It is possible that even the passage of the Equal Rights Amendment62 will not resolve the question. The prospective amendment provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The amendment's legislative history indicates, however, that at least some legislators feel that some classifications on the basis of sex will be permissible.63 Such classifications might be made, for example, in statutes providing separate treatment of men and women when required by such compelling social interests as privacy, or in statutes whose subject matter relies upon the objective physical differences between the sexes.64 Nevertheless, this is not to say that legislation applicable to both sexes which eliminates one sex from its benefits or burdens is within the spirit of the amendment.

At the heart of the issue whether those disabled by pregnancy are similarly situated as those otherwise disabled were the questions of whether pregnancy is an "illness,"65 whether it is voluntary, and of the reliability of conflicting data on the duration, frequency and cost of covering normal pregnancy as compared with other disability risks. Much of the debate involved the mar-

---

62. H.R.J. Res. 208, 93d Cong., 1st Sess. (1971). The resolution passed the House in 1971 and passed the Senate and was cleared for ratification in 1972. As of October 8, 1974, the National Archives and Records Office of the General Services Administration had received thirty-three official confirmations from states which had ratified the amendment.

63. This was indicated by Rep. Martha Griff'ths (D-M'ch.) when she moved to discharge the ERA from further consideration by the Judiciary Committee. See 116 Cong. Rec. 27999, 28005 (1970). It was also recognized by other supporters of the Amendment, including Rep. Florence Dwyer (R-N.J.) and Rep. Donald Fraser (D-Minn.). See 116 Cong. Rec. 28004, 28018 (1970). See Brown, supra note 38, for an extensive discussion of the ERA.

64. As was pointed out by Rep. Griffiths, one example of the type of law inapplicable to one sex because of objective physical differences are laws dealing with rape. See 116 Cong. Rec. 28005 (1970).

65. Appellants distinguished normal pregnancy from covered disabilities by finding pregnancy to be a normal biological function necessary for the survival of the species as opposed to illness which exists because the body has failed to function properly. Brief for Appellant at 18, Geduldig v. Aiello, 417 U.S. 484 (1974). Appellees argued that the injuries occurring to a woman's body during normal childbirth are similar to those now covered, stressing physical trauma and open wounds. While pregnancy may be normal from a statistical point of view, the physiological condition which it produces is abnormal to the body. See Brief for Appellee at 58, 60, 65, 71, id.
shalling of statistics, expert testimony, and semantical wrangling, which may in part explain the Court's failure to discuss the issue in detail.

Although pregnancy is often the result of choice and is subject to planning in many cases, California's coverage of disabilities resulting from voluntary procedures such as plastic surgery, hair transplants and orthodonture significantly diminishes the argument that only unpredictable illnesses or disabilities are contemplated under California's plan. Moreover, a practical evaluation of the type of disabilities which are predictable in a labor force which is 34.2% female reveals that pregnancy is clearly an inevitable event among a great percentage of women.

Because pregnancy is a natural, expectable, and societally necessary condition...[there is] no merit in...[the] argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity.

Thus, if women are to assume an equal position in the labor force, the fact that they inevitably and by nature, albeit "voluntarily," incur certain temporary disabilities may not reasonably be said to justify the denial of the incidents of their equal position, among which are the benefits which usually accompany disability.

If the Reed standard is to be applied in the future to cases involving classifications based on pregnancy, the issue to be resolved in each case must be "not whether pregnancy is, in the abstract, sui generis, but whether the legal treatment of pregnancy in various contexts is justified or invidious." In Aiello the answer depended upon whether the legislative purpose was to provide disability insurance for those unable to work or was to provide the specific disability insurance program which was in fact created. It also depended on whether, in the context of the legislative purpose, there was sufficient difference between the included and the excluded disabilities to justify the conclusion that they were not similar situations.

A. Is Pregnancy a Sex-Based Classification?

The Supreme Court concluded that the exclusion of pregnancy in the California statute was not a classification based on gender as such because in its view not every legislative classification involving pregnancy is sex-based.

This view is similar to that expressed by a Florida federal district court in

69. 417 U.S. at 496 n.20. See note 60 supra.
Rafford v. Randle Eastern Ambulance Service, Inc.," in which it held that the discharge of men because of their moustaches and beards did not constitute sex discrimination. The court said that

[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 . . . that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discrimination in favor of men who shave . . . .]

The analogy between pregnancy and wearing a beard is suspect. The decision not to shave facial hair is neither an inevitable and necessary occurrence among a certain percentage of our population, nor has there been recognized a fundamental right to wear a beard. While it may be constitutional to discriminate between different categories of the same sex with respect to some characteristics, to discriminate on the basis of a trait unique to one sex is inevitably to classify on the basis of sex.

The basis for the Supreme Court's distinction in Aiello between a sex-based classification and a classification based on a characteristic unique to one sex is a view similar to that of the Rafford court. The Court attempted to distinguish the Aiello facts from Reed v. Reed and Frontiero v. Richardson on the grounds that in the latter the discrimination was based on "gender as such," while in the California legislation, benefits accrue to members of both sexes since the program divides potential recipients into two groups—pregnant women and non-pregnant persons.

The lack of identity between the excluded disability and gender as such . . . 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.

The Court's conclusion in Aiello that the exclusion was not based on gender as such was supported by statistics showing the aggregate risk protection of the program and indicating that both the annual claim rate and the annual claim cost are greater for women than for men: women receive 38% of the

71. Id. at 320.
73. 417 U.S. at 496-97 n.20. See note 60 supra.
benefits and contribute about 28% of the fund.74

The Court's analysis can be challenged, however, since, due to the nature of pregnancy, a woman obviously cannot be pregnant at all times, and thus may be within the class of pregnant women at one time and the class of non-pregnant persons at another. This conclusion had been rejected by the spate of lower court cases which concluded that regulations pertaining to pregnancy are sex classifications.75 Statistical realities also detract from this view: 84% of all married women become pregnant at least once,76 and "[n]obody—and this includes Judges, Solomonic or life-tenured—has yet seen a male mother."77 In the California statute in question, only women are excluded from benefits because no man has ever experienced the ill-favored, gender-linked condition of pregnancy, and no disability risk to which men only are characteristically subjected is excluded from coverage.

The fact that women as a group benefit from a scheme and that not all women are excluded does not mean that the classification is not based on sex. In Phillips v. Martin Marietta Corp.,78 for example, the fact that the employer, in refusing to consider female applicants with pre-school age children, was choosing from among primarily female applicants which gave a net effect of non-discrimination did not prevent the Court from finding that


78. 400 U.S. 542 (1971).
this was a case of classification on the basis of sex. 79

B. Sex as a Suspect Class

Because the Court in Aiello determined that the California disability exclusion could not be classified as discrimination based on gender as such, as in Reed and Frontiero, 80 it was unnecessary for it to resolve what is usually the threshold issue in a sex discrimination case, the standard of review to be applied to test the validity of the classification.

The Reed analysis, as discussed above, 81 offers one approach for evaluating the constitutionality of a classification based on sex. Other possibilities have been suggested by Frontiero and Cleveland Board of Education v. LaFleur. 82

In Frontiero the Court invalidated statutory provisions 83 providing increased benefits for married male members of the armed services based on a conclusive presumption of their spouses' dependency, but requiring female members to prove that their spouses were dependent in fact for more than one half of their support in order to qualify.

Due to the lack of consensus among the Justices, Frontiero is responsible, to a large extent, for much of the uncertainty in the evaluation of sex-based classifications. Chief Justice Burger and Justices Powell and Blackmun, and Justice Stewart in a separate opinion, considered the statute invalid on the basis of Reed. Justice Stewart said only that the statute caused invidious and unconstitutional discrimination, 84 while the Burger opinion stated that the decision as to whether sex is a suspect class was unnecessary because of the pending ratification of the Equal Rights Amendment. 85

79. Since § 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1970), requires that persons of like qualifications be given employment opportunities irrespective of their sex, the Court concluded that the court of appeals erred in construing it as, in fact, allowing one policy of hiring for women and another for men when each have preschool age children. However, since the court of appeals had affirmed the motion for summary judgment, 416 F.2d 1257 (5th Cir. 1969), the Supreme Court remanded the case for further evidentiary consideration as to whether the absence of preschool children of female employees was a bona fide occupational qualification. 400 U.S. at 544.
80. See note 72 supra.
81. See p. 272 supra.
84. Justice Stewart, citing Reed, concurred in the majority opinion and stated: "[T]he statutes . . . work an invidious discrimination in violation of the Constitution." 411 U.S. at 691.
85. Speaking for Justice Blackmun and Chief Justice Burger, Justice Powell concluded that Reed should control and that the instant case should be decided on its authority, reserving for the future "any expansion of its rationale." Justice Powell indicated that
The plurality opinion, written by Justice Brennan and joined in by Justices Douglas, White, and Marshall, held that sex is a suspect class[86] and that the legislative scheme in question could not survive the scrutiny it invited. In finding that the statute constituted a deprivation of the fifth amendment guarantee of due process, the Court rejected the administrative convenience argument that it was more economical and simpler to conclusively presume the dependency of wives in the absence of evidence that the government had saved money.

The plurality's ruling that sex is a suspect class has been concurred in by a growing number of state and lower federal courts including the Washington Supreme Court in Hanson v. Hutt,[87] where a statute disqualifying pregnant women from receiving unemployment insurance was held invalid, and a Pennsylvania federal district court in Stern v. Massachusetts Indemnity & Life Insurance Co.,[88] which concerned selling insurance to men and women on equal terms.

The determination that sex is a suspect class would be consistent with the Supreme Court's repeated recognition of the constitutional rights of classes which have been saddled with special disabilities, historically subjected to purposefully unequal treatment, or relegated to a position of political powerlessness.[89] The Court has extended this protection in the past to those classified as a result of congenital and immutable characteristics, which were accidents of birth over which the individual had no control, by requiring the state to demonstrate that the challenged legislation served overriding or compelling interests which could not be achieved by a more narrowly drawn legislative classification or by the use of feasible, less drastic alternatives.[90]
The strict scrutiny which is required after the determination that a class is suspect imposes a heavier burden upon the plaintiff than that applied to other plaintiffs challenging economic and social welfare programs, such as those of *Dandridge* and *Jefferson*. In fact, the district court in *Frontiero* relied on *Dandridge* to find that the rational basis behind the classification was substantial economic and administrative savings. However, once the classification was termed suspect by the *Frontiero* plurality of the Supreme Court, more than a showing that the statute rationally promoted legitimate government interests was required. It is unlikely that the fiscal integrity of a disability insurance program would justify such a differentiation as was made in the California statute if strict scrutiny were applied, especially in view of the variety of alternatives suggested by the district court.

Strict scrutiny is required not only where a suspect class is involved, but where the exercise of a fundamental right is prevented or impaired. Several lower courts, for example, have found the right to employment to be one of the basic civil rights guaranteed by the Constitution. In addition, the right to conceive and bear children has been considered part of the fundamental right to privacy in matters of marriage and family life, and has been

---

93. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119.
359 F. Supp. at 798.
96. *See* Cleveland Bd. of Educ. v. *LaFleur*, 414 U.S. 632, 639 (1974) (freedom of choice in matters of marriage and family life protected by due process clause); *Loving* v. Virginia, 388 U.S. 1, 12 (1967) (marriage is a fundamental right); *Skinner* v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are fundamental rights); *Pierce* v. Society of Sisters, 268 U.S. 510, 534 (1925) (recognition of "liberty of parents and guardians to direct the upbringing and education of children under their control");
Pregnancy Disability Benefits

reaffirmed in cases dealing with a state's regulation of contraceptives and abortion.97

In Cleveland Board of Education v. LaFleur, the Supreme Court struck down mandatory cut-off dates after which pregnant public school teachers were required to take maternity leave as an unjustifiable legislative impingement upon a woman's right to decide whether to bear a child, void under the due process clause of the fourteenth amendment. The conclusive presumption of the teacher's physical incapacity in her fifth or sixth month of pregnancy was held to be unsound, and it was further held that the ends of administrative convenience could not supersede the due process requirement where the rights of individuals were concerned.98

The result that the Court sought to avoid in LaFleur, the imposition of a heavy economic burden on a woman as a consequence of her choice to exercise a fundamental right, is the same result permitted by Aiello. Implicit in the California exclusion is the same type of presumption as to the nature of pregnancy and pregnant women as was prohibited in LaFleur. The only distinctions which seem to indicate why the results in these cases are different are that LaFleur was more directly concerned with an individual woman's decision to become pregnant than was Aiello. Also the correction of the inequity in LaFleur did not have the same fiscal consequences as would result from inclusion of pregnancy-related disabilities in the California disability insurance program.

C. The Protective Exception

Another dimension of the confusion surrounding the standard to be applied by the courts in reviewing a classification based on sex is illustrated in


97. See Roe v. Wade, 410 U.S. 113 (1973) (prior to end of first trimester of pregnancy, state may not interfere with or regulate doctor's decision reached in consultation with patient whether pregnancy should be terminated); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute making it a crime to sell, lend or give away contraceptives except to married persons violates equal protection clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute making use rather than distribution or manufacture of contraceptives a criminal offense is unconstitutional invasion of privacy of married persons).

98. The opinion was written by Justice Stewart and joined in by Justices Brennan, White, Marshall, and Blackmun. Justices Douglas and Powell wrote concurring opinions and Chief Justice Burger joined Justice Rehnquist's dissent. The Court did leave open the question of the permissibility of mandatory maternity leave at some definite date close to the expected date of birth. 414 U.S. at 647 n.13. See also Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972).
Kahn v. Shevin, where the Supreme Court upheld the constitutionality of a Florida statute giving widows a $500 exemption from property taxation but offering no similar benefit for widowers. Writing for the Court, Justice Douglas, notwithstanding his *Frontiero* opinion, found that according to the *Reed* standard Florida's differing treatment of widows and widowers should be upheld because it was reasonably designed to further the state policy of cushioning the financial impact of spousal loss on the sex for whom that loss imposes a disproportionately heavy burden. The Court said that "[w]hile the widower can usually continue in the same occupation which preceded his spouse's death in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." The dissenting opinions reiterated that sex is a suspect classification and, under the strict scrutiny standard, found that the classification must be more narrowly drawn. The Florida exemption was in no way tied to the actual need of the widow claiming it, but was founded upon the presumption that all widows are more needy and less qualified for employment than their male counterparts.

Similar reasoning provided the basis for the Second Circuit's decision in *Gruenwald v. Gardner*, where the Social Security Act was upheld against a challenge by a male on the ground that the computation of benefits was more favorable for women retiring at age sixty-two than for men retiring at the same age with a history of equal earnings. As in *Kahn*, the purpose of the legislation was to "reduce the disparity between the economic and physical capabilities of a man and a woman." The court found a reasonable relationship between the object of the classification and the means employed to achieve it. In sanctioning preferential treatment of women in certain contexts, *Gruenwald* and *Kahn* represent a new alternative to equal

---

101. 416 U.S. at 355.
102. 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968). *Cf. Kohr v. Weinberger*, 43 U.S.L.W. 2066 (E.D. Pa., July 26, 1974), in which a three judge court held that the benefits computations under the Social Security Act which permit women to use fewer years than men to compute average monthly wage, which is the basis of benefits, thereby eliminating more years of lower earning than men, is not unconstitutional discrimination against men. The court relied on the authority of *Kahn* and *Gruenwald*.
104. 390 F.2d at 592-93.
Pregnancy Disability Benefits

protection and due process "rational basis" analysis for cases involving protective legislation.

The question presented by these cases in the context of Aiello is whether providing benefits for pregnancy-related disabilities, when women already receive a disproportionate share of benefits in relation to their contributions, would constitute the same type of preferential protective legislation. The answer, however, is no, because social programs with narrowly drawn regulations which ultimately aid one group more than another can be distinguished from social programs with broad exclusions or exemptions for entire classes.

III. Aiello Viewed From A Title VII Perspective

Although not discussed by the majority of the Court in Aiello, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972105 and the Sex Discrimination Guidelines promulgated by the Equal Employment Opportunity Commission,106 the federal agency charged with enforcement of the Act, are relevant to this case as an expression of congressional intent and administrative policy regarding the treatment of women in the area of employment.

Title VII was enacted by Congress as a comprehensive prohibition of private acts of employment discrimination, but, as amended in 1972, it now prohibits most public and private employers from discriminating against an employee in hiring and firing practices or in the terms or conditions of employment on the basis of sex except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."107 The Act, therefore, was not legally binding in Aiello even if its violation were alleged, because California is not acting as an employer or an employment agency in administering its plan.108

107. 42 U.S.C. §§ 2000e-2(i) (Supp. II, 1972). One example where sex is a bona fide occupational qualification is in the theatre. Section 703(a), which reveals the basic thrust of Title VII, reads in part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

The EEOC, pursuant to its power under the Act to "issue, amend, or rescind suitable procedural regulations to carry out the provisions of Title VII," has published Sex Discrimination Guidelines which prohibit specific forms of sex discrimination such as sex stereotyping, separate lines of progression for men and women, discrimination against married women and discrimination in job advertising. These Guidelines explicitly provide that an employment practice which excludes employees because of pregnancy is a prima facie violation of Title VII. Since one statutory basis for a violation of Title VII is sex discrimination, the fact that the Guidelines make discrimination because of pregnancy a violation of the Act indicates that the Commission considers pregnancy a sex classification. The Guidelines further provide that disabilities caused by pregnancy, miscarriage or abortion are to be treated as temporary disabilities under any health, insurance or sick leave plan available in connection with employment.

Although Title VII was not legally binding on the Court in Aiello, nor even considered by the majority, the case should be viewed in light of the fact that one of the Commission’s major roles is that of safeguarding the rights of working women. The Commission’s view is that a pregnancy exclusion similar to the one at issue in Aiello, if contained in a private or public employee disability plan, would violate Title VII. In its amicus brief the Commission recommended that the Court apply standards similar to Commission Guidelines in evaluating California’s program.

The typical pattern in Title VII sex discrimination cases involves some form of sex stereotyping prohibited under the Guidelines. A classic example is the case of Weeks v. Southern Bell Telephone & Telegraph Co., in

110. 29 C.F.R. § 1604.10 (1974).
111. 29 C.F.R. § 1604.10 (1974) provides:
   (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 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.
114. 408 F.2d 228 (5th Cir. 1969).
Pregnancy Disability Benefits

which a well-tenured female employee’s application for a higher position was rejected solely because of her sex. The Fifth Circuit held that in this case sex did not fall within the narrow bona fide occupational qualification exception, since there was no evidence that all or substantially all women would be unable to perform the heavy lifting or respond to the occasional late night calls which were part of the job. Rejecting the stereotyped conception of woman’s weakness and her need to be sheltered as outmoded, the court held that, henceforth, an individual determination of each woman’s capabilities was required. Another case dealing with the traditional stereotype of women is Burns v. Rohr Corp., where a state regulation requiring rest periods for women was invalidated. An employer’s refusal to hire women with preschool age children while hiring men who were heads of households which included preschool age children was also invalidated under Title VII as based on a stereotyped distinction between the sexes in Phillips v. Martin-Marietta Corp.

A more recent trend in Title VII litigation has been to challenge practices which distinguish between men and women in the conditions of their employment, including sick leave and disability benefits. Three such recent cases involved maternity leave, sick leave, and unemployment compensation. In Vick v. Texas Employment Commission, the disqualification by a state employment agency of a pregnant applicant for unemployment benefits on the ground that her condition did not permit her to hold a job was held void under Title VII. The thrust of the decision was that a woman’s individual medical employment record must be considered; “such a natural and necessary female condition cannot be a basis for categorical discrimination in light of Phillips and its plain interpretation of Title VII.”

In Hutchinson v. Lake Oswego School District, a school district’s rule

115. See also Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
117. 416 F.2d 1257 (5th Cir. 1969), vacated and remanded, 400 U.S. 542 (1971).
118. See 29 C.F.R. § 1604.9(a)(6) (1974). One such series of cases involves pension plans in which women are given the benefit of earlier retirement ages or the opportunity to withdraw a substantial amount of their accrued benefits at an earlier age upon optional retirement. Several plans have been invalidated under the guideline prohibiting unequal pension or retirement plans for men and women. See Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971). Urgansky v. Flynn Em- rich Co., 365 F. Supp. 957 (D. Md. 1973), involves a Title VII challenge brought by men.
120. Id. at 5992.
121. 374 F. Supp. 1056, 1061 (D. Ore. 1974). The court did not consider whether sex is a suspect class, but rather utilized the Reed test.
that a teacher may not use her accumulated sick leave for absence caused by childbirth was held to be both an unfair labor practice under Title VII and contrary to the equal protection clause. In *Wetzel v. Liberty Mutual Insurance Co.*, the court denied a motion to reconsider a finding that the exclusion of pregnancy from the list of disabilities covered by a disability income plan was sex discrimination.

The practices prohibited in these cases are ultimately based on sex stereotypes more subtle than those underlying weight limitations or required rest periods. Implicit in the denial of equal conditions of employment to women disabled by pregnancy are notions that women leave their jobs for extended periods when they have children because they are not as interested in their jobs as are men and because their income is only supplementary to that of their husbands. These are the same stereotypical views of women that are implicit in California's exclusion, and which were implicitly endorsed in *Aiello*.

Because the program established by California is analogous to practices which have been prohibited under Title VII, and because of the potential impact of the *Aiello* decision on the Sex Discrimination Guidelines issued from the Office of Federal Contract Compliance, numerous amici curiae briefs were submitted by companies and associations anxious to ascertain the status of similar employer-sponsored programs. At present, the status of similar disability insurance programs which are within the reach of Title VII may be largely dependent on whether continued deference is paid to the EEOC's pregnancy-disability Guideline.

In determining the weight to be accorded an administrative guideline, among the factors generally considered are whether the guideline is consistent with congressional intent, whether it is reasonable and thoughtful,

125. See note 111 supra.
whether the agency has demonstrated expertise with the subject matter, whether the interpretation is contemporaneous with the passage of the statute, and whether the interpretation is one consistently held by the agency.\textsuperscript{128} The EEOC's position, as expressed in the pregnancy disability Guideline in question, was announced in 1972, several years after Title VII became effective. It is a clear departure from the prior published position of the EEOC as expressed in a series of opinion letters of the EEOC's General Counsel in 1966. Whether it is consistent with Congressional intent is far from clear. The Equal Rights Amendment\textsuperscript{129} and the Equal Pay Act of 1963\textsuperscript{130} are possibly accurate reflections of congressional intent in this area. That intent, however, is in contrast with several other congressional enactments, particularly those dealing with military matters, which authorize different treatment for men and women.\textsuperscript{131}

\textsuperscript{128} Cf. NLRB v. Boeing Co., 412 U.S. 67 (1973) (Court considered NLRB's longstanding administrative construction that it should not inquire into reasonableness of union penalties imposed upon members); Zuber v. Allen, 396 U.S. 168 (1969) (Court upheld injunction against farm location differential provided by order of the Secretary of Agriculture as contrary to Agricultural Marketing Agreement Act of 1937).

\textsuperscript{129} See note 62 supra.

\textsuperscript{130} 29 U.S.C. § 206(d)(1) (1970), which reads in part:

No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

\textsuperscript{131} For an exhaustive listing of such enactments, see Brief for General Electric Co. as Amicus Curiae at 46-47, Geduldig v. Aiello, 417 U.S. 484 (1974). A few examples of such statutes are 14 U.S.C. § 762 (1970) (husband of member of Coast Guard Women's Reserve not a dependent unless in fact dependent on her for support); 37 U.S.C. § 401 (1970) (a person is not a dependent of a female member of the military unless in fact dependent on her for over one-half of his support); 38 U.S.C. § 315 (1970) (additional compensation for "wife" of disabled veteran); 41 U.S.C. § 35(d) (1970) (different minimum employment ages for males and females under government contracts).

The leading case involving the judicial weight accorded to an EEOC guideline is *Griggs v. Duke Power Co.*, in which the Supreme Court accepted the agency's ruling permitting only job-related tests to be used in hiring, after a review of the legislative history convinced the Court that the decisions or interpretations of agencies entrusted with enforcement of a federal statute are entitled to great deference.

More recently, however, in *Espinoza v. Farah Manufacturing Co.*, the Supreme Court found that the practice of refusing to hire aliens was not discrimination on the basis of national origin despite a guideline making discrimination on the basis of citizenship equivalent to discrimination on the basis of national origin. The Court found no need to defer to an administrative construction when there were "compelling indications that it is wrong." The majority found that the guideline was inconsistent with a prior Commission position, that its application would be inconsistent with congressional understanding of the term "national origin" expressed in other legislative enactments, and inconsistent with general understanding of the term.

The guideline prohibiting discriminatory treatment of pregnancy-related disabilities is not clearly contrary to congressional intent. Merely because it differs from the position originally taken by the Commission does not detract from the weight to be accorded the EEOC guideline in question; such development is explained largely by the nature of our society's developing understanding of and sensitivity to the sources of discrimination:

Guidelines evolved as perceptions of what constituted employment discrimination altered . . . . Both the Congress and the Courts have recognized this to be the case. The Commission carefully scrutinized both employer practices and their crucial impact on women . . . and . . . it became increasingly apparent that sys-

---

133. The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) [a section of the Civil Rights Act of 1964 pertaining to the use of professionally developed ability tests utilized by the employer] to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.
401 U.S. at 433-34 (citations omitted).
135. 29 C.F.R. § 1606.1(d) (1973) reads in relevant part:
Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship . . . .
136. 411 U.S. at 194-95.
tematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunities and benefits to women on the basis of the childbearing role. The fact that the Commission did not issue its Guidelines immediately cannot abrogate those rights already enforceable under the Act. However, even if the pregnancy guideline were to be invalidated in future litigation, the central issue will always be whether the practice in question is violative of Title VII. This is essentially the reasoning of Judge Mehrige in *Gilbert v. General Electric Co.* General Electric provided non-occupational sickness and accident benefits for employees with the sole exception of sickness or other disabilities arising from pregnancy, miscarriage or childbirth. The court accepted the EEOC's construction of the Act as requiring pregnancy to be treated similarly to other temporary disabilities because it felt this was consistent with the purposes of the Act. "[I]t cannot be reasonably argued that Congress ever intended an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination."

However, the court stated that, regardless of the validity of the guideline, the denial of benefits constituted sex discrimination in violation of the Act itself because it involved disparate treatment of similarly situated people "on the basis of a particular condition, the peculiarity of which is both irrelevant to the purposes of the company program and ineluctably sex linked." The court further found that regardless of the possibility that women might receive more benefits than men if pregnancy-related disabilities were covered, in view of the plan's purpose to relieve the economic burden of physical incapacity through an all-inclusive disability scheme, the marginally greater benefits which might inure to women was not preferential treatment but "recognition of women's biologically more burdensome place in the scheme of human existence." To avoid any increased costs, the company could simply change the distribution of benefits.

In view of the striking similarities in the fact patterns of *Aiello* and *Gilbert*, the question remains how the courts could have reached such disparate results. One possible explanation may be that the mechanics employed by the

---

139. *Id.* at 381-82.
140. *Id.* at 385.
141. *Id.* at 383.
142. Under the Guidelines, increased costs is not a defense to a charge of sex discrimination in benefits. 29 C.F.R. § 1604.9(e) (1974).
private employer whose benefit plan is part of his employees' compensation deserve less deference than the schema enacted by a state legislature in view of the difficulties encountered in formulating such programs noted in Dan-
dridge and Jefferson. It is also arguable that Congress' purpose in enacting Title VII may have been to create a mechanism better suited for the protection of employment rights than is the fourteenth amendment.

Ultimately, the difference in the resolution of these cases results from the conflicting views adopted by the respective courts as to whether pregnancy is a sex classification. In view of the Supreme Court's statement in Aiello that not "every legislative classification concerning pregnancy is a sex-based classification," other courts may be wary of characterizing practices involving differing treatment of pregnant women as sex discrimination. The unresolved question, whether Aiello established that disparate treatment of pregnancy-related and other disabilities does not constitute sex discrimination within the prohibition of Title VII or the fourteenth amendment, is the issue certified to the Court of Appeals for the Second Circuit in Communications Workers of America v. American Telephone & Telegraph Co.

The plaintiffs, who brought suit before the Supreme Court had decided Aiello, alleged a violation of Title VII because their employer's health and hospitalization insurance plans offered fewer benefits for pregnancy and pregnancy-related conditions than for other medical problems. Reading Aiello as holding that disparate treatment based on pregnancy is not in and of itself sex discrimination, and noting that Title VII deals only with discrimination which is based on sex classification, the district court concluded that the Act was clearly inapplicable. The court thus rejected any attempts to distinguish Aiello, as a case involving deference to a state legislature's policy decision, from a case involving employer-sponsored programs. For those courts who seek it, Title VII and its Sex Discrimination Guidelines provide some support for striking down of such practices. On the other hand, for those courts which choose to take the opposite position, the effect of Aiello and Espinoza is to provide a new justification for avoiding the prohibitions of Title VII.

143. See page 270 supra.
144. 417 U.S. at 496 n.20.
146. Id. at 681.
148. 379 F. Supp. at 682. The court indicated that the claim might be better argued under the fourteenth amendment where the plaintiffs could assert that it was irrational to single out pregnant women regardless of whether that classification is sex based. Id.
Practical problems arising from sex discrimination in the conditions of employment survive the Supreme Court's decision in *Aiello*. Whether the solutions will ultimately be judicial, evolving on a case-by-case basis under Title VII and its Sex Discrimination Guidelines, or legislative, under the Equal Rights Amendment, there exists a plausible constitutional rationale upon which a different conclusion may be based.

*Virginia Voorhees*