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Current Trends in Pregnancy Benefits - 1972 EEOC Guidelines Interpreted

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CURRENT TRENDS IN PREGNANCY BENEFITS— 1972 EEOC GUIDELINES INTERPRETED

The last decade has witnessed significant changes in the area of women's rights, starting with the Civil Rights Act of 1964.[1] On the judicial front, the United States Supreme Court has encouraged the feminist movement through its interpretation of the equal protection[2] and due process[3] clauses of the fifth and fourteenth amendments. Overshadowing these developments is the proposed Equal Rights Amendment[4] to the

1. 42 U.S.C. §§ 1971, 1975a-d, 2000 a-h (1970), *as amended*, 42 U.S.C. §§ 1971, 1975a-d, 2000c, e, h (Supp. II, 1973). The Act contains ten specific titles. The most significant to women's rights is Title VII, 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended*, Equal Employment Opportunities Act of 1972, 42 U.S.C. §§ 2000e *et seq.* (Supp. II, 1973), which forbids employment discrimination based on sex. For a comprehensive discussion of this provision, prior to the 1972 amendment, *see* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967).

2. *See* Frontiero v. Richardson, 411 U.S. 677 (1973), in which a federal statute granting automatic dependency allowances and medical benefits to married *male* air force officers was held to violate equal protection as incorporated in the fifth amendment's due process clause; Reed v. Reed, 404 U.S. 71 (1971), in which the Court, basing its decision on the equal protection clause of the fourteenth amendment, struck down an Idaho statute which gave preference to males over females in the issuance of letters of administration where a male and a female were similarly situated. Both *Frontiero* and *Reed* have provoked considerable discussion concerning the extent to which the equal protection clause of the Constitution prohibits sex discrimination. *See, e.g.*, Comment, *Sex Discrimination and Equal Protection: An Analysis of Constitutional Approaches to Achieve Equal Rights for Women*, 38 ALBANY L. REV. 66 (1973).

3. *See* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974), in which the Court held that the arbitrary or capricious mandatory pregnancy leave policies of two school systems violated the due process clause "because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty." 94 S. Ct. at 801. *See also* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

4. Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Section 3. This amendment shall take effect two years after the date of ratification.
Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). For discussions of the ramifications of this proposed amendment, *see* Martin, *Equal Rights Amendment, An Overview*, 17 ST. LOUIS U.L.J. 1 (1972); Brown, Emerson, Falk & Freedman, *The*

United States Constitution, which to date has been ratified by the legislatures of thirty-three states.[5]

This activity has also involved the rights of pregnant employees. While the United States Supreme Court has held that a school board cannot arbitrarily require a pregnant teacher to take maternity leave four to five months prior to her delivery,[6] the Court has also held that a state disability program can constitutionally exclude benefits for normal pregnancies.[7] The extent to which private employers can be compelled to provide pregnancy benefits in their disability insurance plans is still unsettled. The Equal Employment Opportunities Commission[8] (EEOC) has promulgated guidelines[9] requiring private employers to treat pregnancy in the same manner as other temporary disabilities "under any health or disability insurance . . . plan . . . ."[10] The validity of these guidelines interpreting the Civil Rights Act of 1964 is uncertain since it is questionable whether it is discrimination because of sex to exclude pregnancy from health insurance programs.

Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871 (1971). *See also* additional works listed in DAVIDSON, GINSBURG & KAY, SEX-BASED DISCRIMINATION 107-08 (1974).

5. Interview with E.R.A. Central, Chicago, Oct. 8, 1974. Thirty-eight state legislatures must ratify the Equal Rights Amendment for adoption. U.S. Const. art. V.

6. Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974).

7. Geduldig v. Aiello, 94 S. Ct. 2485 (1974). This case is discussed at pp. 134-38 *infra.*

8. The EEOC was created under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(a) (1970), *as amended*, (Supp. II, 1973) to administer Title VII of the Act.

9. § 1604.10. Employment policies relating to pregnancy and childbirth.

(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.

29 C.F.R. §§ 1604.10(a)-(c) (1973) [hereinafter referred to as guidelines].

10. *Id.* at § 1604.10(b).

The Supreme Court will most likely be asked to rule on the validity of the guidelines, since several recent lower court decisions[11] dealing with this issue have reached opposite conclusions. This Comment will consider these guidelines which mandate that an employer provide the same supplementary compensation for pregnant employees as are provided for other employees who suffer a disability.[12]

ORIGIN OF THE GUIDELINES ON PREGNANCY BENEFITS

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment on the basis of race, color, religion, sex, or national origin.[13] To aid in the administration of Title VII, the Act created the EEOC which is empowered to issue guidelines to interpret the meaning and application of the Act.[14]

The guidelines issued on April 5, 1972, treating pregnancy as a disability that must be included under an employer's benefit program, marked a radical change from the EEOC's prior position. In 1966, the General Counsel of the EEOC issued opinion letters which sanctioned the practice of excluding pregnancy from disability insurance coverage.[15] This

11. Communications Workers v. American Tel. & Tel. Co., 2 CCH EMP. PRACT. G. (8 EPD) ¶ 9615, at 5637 (S.D.N.Y. Aug. 2, 1974) (benefits denied). Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974) (benefits allowed); Newmon v. Delta Air Lines, Inc., 2 CCH EMP. PRAC. G. (7 EPD) ¶ 9154, at 6824 (N.D. Ga. Dec. 31, 1973) (benefits denied); Gilbert v. General Elec. Co., Civil No. 142-72-R (E.D. Va. Apr. 13, 1974) (benefits allowed). *See also* Elliott & Turner Co., 73 C-1155 (Dec. 12, 1973), decided by the Illinois Fair Employment Practices Commission. In *Elliott*, the FEPC decided that the complainants were entitled to pregnancy benefits under state guidelines analogous to those of the EEOC.

12. 29 C.F.R. § 1604.10(b) (1973).

13. § 2000e-2. Unlawful employment practices—Employer practices
(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.
. . . .
42 U.S.C. § 2000e-2(a) (1970), *as amended*, (Supp. II, 1973).

14. 42 U.S.C. § 2000e-12(a) (1970).

15. One such opinion letter stated:
[T]he 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

policy was further reaffirmed in a later EEOC decision.[16] There was no further treatment of the subject until an EEOC decision summarily found that the denial of disability benefits for pregnancy was discriminatory.[17] Despite this rather unexpected holding, the EEOC remained silent until the publication of its guidelines over a year later.

The background of the guidelines was revealed in the deposition of Ms. Sonia P. Fuentes, the Chief of the Legislative Council Division of the EEOC at the time the guidelines were promulgated.[18] The Office of Legislative Counsel is responsible for drafting rules, regulations, and guidelines in the area of sex discrimination.

In the deposition, Ms. Fuentes admitted that the EEOC had conducted no medical studies concerning pregnancy prior to issuing the guidelines,[19] and that she was not aware of any financial studies conducted concerning the monetary impact of the guidelines on industry. She testified that she had no expertise in medicine, economics, or labor relations and that she was assisted in drafting the guidelines by four other people, including two law students. She also stated that no public hearings were held in connection with the proposed guidelines.[20]

The EEOC is empowered to issue, amend, or rescind suitable procedural regulations to carry out the provisions of Title VII.[21] The Administrative Procedure Act provides that when an agency proposes a rule, it shall be published in the *Federal Register*, and notice must be given of the

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> sex and more or less to be anticipated during the working life of most woman employees. Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such exclusion would not in our view be discriminatory.

General Counsel Opinion Letter, Nov. 10, 1966. CCH E.P.G. ¶ 17,304.49. *See also* Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 721.

16. EEOC Decision No. 70-360, 1973 CCH EEOC DECISIONS ¶ 6084 (Dec. 16, 1969).

17. EEOC Decision No. 71-1474, 1973 CCH EEOC DECISIONS ¶ 6221 (Mar. 19, 1971).

18. Ms. Fuentes was deposed for the case of *Newmon v. Delta Air Lines, Inc.*, 2 CCH EMP. PRACT. G. (7 EPD) ¶ 9154, at 6824 (N.D. Ga. Dec. 31, 1973).

19. *See* Brief for Delta Air Lines, Inc., as Amicus Curiae at 25, Cohen v. Chesterfield County School Bd., 94 S. Ct. 791 (1974), containing an abstract of the deposition.

20. *Id.* at 26.

21. Civil Rights Act of 1964 § 713(a), 42 U.S.C. § 2000e-12(a) (1970) which provides:

> (a) The Commission shall have authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

time, place, and nature of the public rule proceedings so that interested persons may comment.[22]

The EEOC did not have to follow the procedure of allowing the public to comment on the proposed guidelines prior to enactment because of an exception to the general notice requirement. This exception applies whenever an agency issues "interpretive rules" or "administrative interpretations."[23] "Interpretive rules," which are exempt from the general requirements of notice and opportunity for comment, have been defined as those which clarify or explain existing laws or regulations, rather than those which represent a substantial modification in or adoption of new regulations.[24] Furthermore, the fact that an agency characterizes a rule as "interpretive," which requires no notice and opportunity to comment, rather than "substantive," where the converse is true, is not determinative as to the nature of the regulation.[25]

Despite the facts that the EEOC had no empirical data upon which to base the new guidelines, that the guidelines represented a "substantive" modification in the EEOC position previously noted, and that the guidelines would have a substantial effect on industry, the EEOC gave no notice of the proposed interpretation nor opportunity for public comment. In its prefatory remarks to the guidelines the EEOC stated:

> Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in the effective date are inapplicable.[26]

Thus, by labeling the guidelines "interpretive" in nature, the EEOC was able to avoid the customary procedures. A review of the origin of the new guidelines set out above raises the question of whether the EEOC abused its administrative powers in promulgating the new guidelines.

THE GUIDELINES AND THE COURTS

The guidelines have been subjected to a number of direct judicial attacks. In the leading case upholding their validity, *Wetzel v. Liberty Mutual Insurance Company*,[27] female employees challenged, *inter alia*, the income protection plan of their employer. The Liberty Mutual Insur-

22. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970).

23. *Id.* at § 553(b)(A).

24. Continental Oil Co. v. Burns, 317 F. Supp. 194, 197 (D. Del. 1970).

25. Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 416 (1942); Pharmaceutical Mfg. Assoc. v. Finch, 307 F. Supp. 858, 863 (D. Del. 1970).

26. 37 Fed. Reg. 6836 (1973).

27. 372 F. Supp. 1146 (W.D. Pa. 1974).

ance Company provided its employees with a contributory insurance plan for continuation of income for long term illness, defined as an illness requiring treatment by a doctor for eight or more days and causing absence from work. The plan contained several exclusions: injuries or sickness covered by workmen's compensation insurance, disability in excess of 104 weeks, and disability due to pregnancy.[28]

The court, relying on the guidelines, found that the employer had violated Title VII by failing to include pregnancy as a "disability" under the plan.[29] Furthermore, it found that the employer was guilty of this violation from and after July 2, 1965, the date on which the plan was instituted, thereby exposing the employer to liability for pregnancy benefits denied in the ensuing period.

The court's decision was based on its characterization of pregnancy. In rejecting the defendant's argument that excluding pregnancy from the income protection plan was "not sex discriminatory because pregnancy is 'sui generis' and thus subject to special treatment,"[30] the court responded:

> Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in Defendant's 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.[31]

Once pregnancy was placed outside the class of "truly voluntary" conditions, the court had no problem finding discrimination because of sex since conditions peculiar to males were included in the plan.

> Pregnancy is the only disability, not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostrate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i.e. gout 19 to 1; the Merck Manual, 10th ed. 1961).[32]

The employer's contention that the cost of including pregnancy under the plan would be prohibitive was also rejected by the court:

> While cost may be a business purpose, and certainly to add pregnancy to the insurance program will cost more, it can only be a defense in a Title VII action where ". . . there exists an overriding legitimate business pur-

28. *Id.* at 1155.
29. *Id.* at 1162-63.
30. *Id.* at 1157.
31. *Id.* at 1158.
32. *Id.* at 1162.

> pose such that the practice is necessary to the safe and efficient operation of the business. Thus the business purpose must be sufficiently compelling to overridge any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact (footnotes omitted).[33]

The court noted, with respect to the increased costs, that the company had no duty to furnish any benefits, but if it did so, there could be no inequality on the basis of sex.

Ten days prior to the *Wetzel* decisions,[34] the Federal District Court for the Northern District of Georgia held for the employer by classifying pregnancy as a healthy and normal occurrence. In *Newmon v. Delta Air Lines, Inc.*,[35] the plaintiffs challenged, *inter alia*, the employer's denial of disability pay, sick leave pay, and other employment benefits for the time they were absent from work during pregnancy and childbirth. The court noted that there was a marked lack of criteria by which to evaluate the employer's action under Title VII.[36] After noting cases in which sex discrimination was found when members of both sexes were similarly situated and one sex was denied benefits, the court distinguished the instant case because the plaintiffs were not receiving disparate treatment on the basis of sex.[37]

Upon finding that the only authority supporting the plaintiff's claims of sex discrimination was the new guidelines, the court noted several of the more questionable aspects of the rules. The new guidelines are in

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33. *Id.* at 1162-63 (citation omitted).

34. In denying defendant's motion to reconsider, the *Wetzel* court acknowledged and rejected *Newmon*: "[W]e disagree with the finding of [the *Newmon*] court that pregnancy is not a 'disability.'" *Id.* at 1164.

35. Newmon v. Delta Air Lines, Inc., 2 CCH EMP. PRACT. G. (7 EPD) ¶ 9154, at 6824 (N.D. Ga. Dec. 31, 1973).

36. The court was quite correct in stating that there is a dearth of material specifically concerning pregnancy benefits. The subject has only been discussed as an adjunct to other areas of interest under Title VII. For a representative sampling *see* Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 721; Koontz, *Childbirth and Childrearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480 (1971); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 261, 283 (1972); Comment, *Equal Protection and the Pregnancy Leave Case*, 34 OHIO ST. L.J. 628 (1973); Comment, *Mandatory Maternity Leaves for Teachers—The Equal Protection Clause and Title VII of the Civil Rights Act of 1964*, 51 N.C.L.R. 768 (1973).

37. Newmon v. Delta Air Lines, Inc., 2 CCH EMP. PRACT. G. (7 EPD) ¶ 9154, at 6824 (N.D. Ga. Dec. 31, 1973).

fact inconsistent with the EEOC's prior position and followed eight years after the enactment of the Civil Rights Act. The court also commented that there was no factual basis upon which the guidelines were drawn as discussed earlier in this Comment.

In rejecting plaintiff's interpretation of the EEOC guidelines, the court rested its holding on a common sense interpretation of the facts presented at trial, stating:

> Whether the plaintiff and her class are the victims of sex discrimination depends on the definition of pregnancy.[38]

After considering all the evidence the court concluded that pregnancy was not an illness or disability, since pregnancy, in most cases, is a voluntarily imposed condition, and the fact that a woman is pregnant indicates that she is quite healthy and normal.[39]

The court reasoned that since pregnancy is not a sickness or disability, exclusion of it from an employer's benefit plan covering sickness or illness was not sexual discrimination. In rejecting the guidelines the court relied on *Griggs v. Duke Power Company*,[40] in which the United States Supreme Court had held that while guidelines issued by an administrative agency are entitled to great deference, they are not legally binding on the court.[41]

The most damaging decision affecting the guidelines has arisen, ironically, from a case in which they were not directly in issue. In *Geduldig v. Aiello*,[42] the United States Supreme Court considered a challenge to a statewide, employee funded disability program on the grounds that by not including normal pregnancies in its coverage, the plan violated the equal protection clause of the fourteenth amendment.[43] The California program was self supporting (i.e. required no state subsidy), and was funded by mandatory deductions from employee wages. The plan excluded benefits for several categories of disabilities: certain short term disabilities defined by statute; drug addiction and sexual psychopathy resulting in court commitment; and disabilities resulting from normal preg-

38. *Id.* at 6830.

39. *Id.*

40. 401 U.S. 424 (1971).

41. *Id.* at 433-34.

42. 94 S. Ct. 2485 (1974).

43. The actions challenging the exclusion of pregnancy and related complications from the plan were initially brought by four women, three of whom had abnormal pregnancies. The case of the three with abnormal pregnancies became moot as the litigation evolved, since the California plan was amended to allow benefits for abnormal pregnancies. *Id.* at 2489. *See* Rentzer v. California Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (2d App. Dist. 1973).

nancies, up to the termination of pregnancy and 28 days thereafter.

The Court was confronted with evidence of the extraordinary additional cost to the program of including pregnancy benefits.[44] In order to accommodate these benefits the Court recognized that the state would either have to require an increase in contributions by employees, provide assistance in the form of a subsidy, or reduce the compensation for the disabilities already included under the plan.

In deciding that the plan did not violate the equal protection clause, the Court found that the state had legitimate interests which it sought to protect through the exclusion of pregnancy benefits: (1) "maintaining the self-supporting nature of its insurance program"; (2) "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered"; and (3) "maintaining the contribution rate at a level that will not unduly burden [lower-income employees]."[45]

The dissenting opinion rejected the majority's view that the exclusion of pregnancy benefits rationally promoted legitimate state cost-saving interests and found that the plan discriminated on the basis of sex. Justice Brennan noted that the plan denied compensation for disabilities which could affect only women. In his view

> by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered . . . . In effect, one set of rules is applied to females and another to males. *Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.*[46]

Justice Brennan felt that since the plan constituted a legislative classification on the basis of *gender*, it involved a "suspect" classification and therefore there had to be a showing of an overriding or compelling state interest to sustain the plan. In his view, the state interest in preserving the fiscal integrity of the plan was not a sufficient justification. Further, he noted that the plan violated the EEOC guidelines concerning the treatment of pregnancy-related disabilities.[47]

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44. The state estimated that the increased cost of including benefits for normal pregnancies would range between $120.2 million and $131 million annually, while the plaintiffs contended that the cost would be $48.9 million per year. 94 S. Ct. at 2490 n.18.

45. *Id.* at 2491-92.

46. 94 S. Ct. at 2494 (emphasis added).

47. 94 S. Ct. at 2494-95.

The majority opinion, however, squarely rejected the dissenting view that because only women can become pregnant, any classification concerning pregnancy is inevitably sex-based, stating:

> [W]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .[48]

The majority then proceeded to define *normal* pregnancy, refusing to identify it with sex. According to the Court:

> *[N]ormal pregnancy is an objectively identifiable physical condition with unique characteristics.* Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*[49]

In addition, the Court found no sex discrimination in the selection of risks insured by the program, because there was no risk from which the overall group of males were protected and females were not. Rather 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.[50]

Since the plan provided equal benefits for disabilities suffered by the group of nonpregnant persons (males and females), it did not discriminate on the basis of sex when it denied benefits to the group of pregnant persons (exclusively females).

Perhaps the most significant aspect of *Geduldig* in terms of the guidelines is the definition of normal pregnancy and the manner in which it may be treated in a disability program. Although the majority did not specifically refer to the guidelines, it may have impliedly invalidated the guidelines by finding that normal pregnancy is not to be identified with sex, and that it may be included or excluded from a disability plan on any reasonable basis similar to any other physical condition without discriminating on the basis of sex.

This interpretation of *Geduldig* was relied upon in a recent case involving two class action suits brought under Title VII, the authority for the guidelines. In *Communications Workers of America v. American Telephone & Telegraph Co.*,[51] the Federal District Court for the Southern

48. 94 S. Ct. at 2482 n.20.

49. *Id.* (emphasis added).

50. *Id.*

51. 2 CCH EMP. PRACT. G. (8 EPD) ¶ 9615, at 5637 (S.D.N.Y. Aug. 2, 1974).

District of New York dismissed the suits based upon its interpretation of *Geduldig*.

In each class action the plaintiff employees contended that the defendants, private and municipal employers, were guilty of sex discrimination in violation of Title VII and the guidelines because the employers' benefit plans did not provide benefits for pregnancy related disabilities.

The plaintiffs contended that the *Geduldig* decision was inapplicable to a Title VII action because it involved a social welfare policy created by a state, and that deference is customarily to be shown to legislative judgments on social welfare matters. The instant cases, they argued, involved private and municipal employers and therefore no such deference was warranted under Title VII.

In rejecting this argument the court found that the threshold question, as well as the prerequisite to recovery under Title VII, was the determination whether the exclusion of pregnancy benefits constituted sex discrimination.

> [It is a question of] whether disparity between pregnancy related disabilities and other disabilities can be classified as discrimination on the basis of sex. *If, as footnote 20* [of *Geduldig*] *seems to suggest, it cannot be so classified*, then the further question of whether such disparity is justified—or less justifiable [sic] in the employment context than in some other context—can never be reached.[52]

Based upon this interpretation of *Geduldig*, that such disparate treatment of pregnancy related disabilities does not constitute discrimination on the basis of sex, the court found that the plaintiffs had no cause of action for sex discrimination under Title VII.

The court then dismissed the two actions with leave to replead, but certified to the Court of Appeals for the Second Circuit the question whether *Geduldig*

> has established—for the purposes of these actions or either of them—that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment.[53]

Although at the time of this writing the court of appeals has not ruled on this question, it is apparent that the *Geduldig* decision has clearly put in issue the validity of the guidelines.

As the above cases indicate, the stage is set for an Armageddon be-

52. *Id.* at 5639 (emphasis added).

53. *Id.* at 5640.

tween the various factions confronting each other over the issue of pregnancy benefits. It appears that the EEOC, although intending to reach an admittedly salutory result, exceeded its powers as an administrative agency in promulgating the new guidelines. Further, the guidelines do not eliminate sexual discrimination because, as the Supreme Court has indicated, no sexual discrimination occurs when pregnancy benefits are denied unless there is "a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . . ."[54]

BUSINESS NECESSITY AND COSTS AS A DEFENSE TO DENIAL OF BENEFITS

Even if the Supreme Court's holding in *Geduldig*, disassociating the exclusion of pregnancy benefits from sex discrimination, cannot be extended to private employers,[55] the recognized exception of "business necessity" and the cost of providing the additional benefits remain. While the EEOC guidelines provide that cost shall not be a defense to sexually discriminatory practices,[56] numerous cases have sanctioned disparate treatment where "business necessity" or cost is involved.

Although the business necessity exception has received its greatest recognition in the area of racial discrimination under Title VII, the basic principles are applicable to sex discriminaton. Under this judicially

54. Geduldig v. Aiello, 94 S. Ct. 2485, 2492 n.20 (1974). *But see* note 55 *infra.*

55. The *Geduldig* decision was based on the equal protection clause of the fourteenth amendment which requires state action. The guidelines are based on Title VII which does not have the same requirement and is applicable to private employers. The issue is whether acts of alleged sex discrimination, while permissible under the equal protection clause when public employers are involved, can be illegal under Title VII when private employers are involved. For example, in the area of racial discrimination, the Supreme Court cases indicate that for a classification scheme to violate the equal protection clause, the classification must involve race on its face, while an employment practice can violate Title VII by a showing of discriminatory impact. *Compare* Jefferson v. Hackney, 406 U.S. 535 (1972), *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Also, a classification based on sex could be constitutional under the equal protection clause if it has a rational basis or serves a compelling state interest (depending upon whether sex is a "suspect class"). The same classification could be impermissible under Title VII which has been said to allow only more stringent "defenses." *See* Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1159-60 (W.D. Pa. 1974).

56. 29 C.F.R. § 1604.9(e) (1973) provides:

> (e) It shall not be a defense under title VIII [sic] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than another.

created exception courts have allowed racially discriminatory policies to continue where "there is an overriding legitimate, non-racial business purpose."[57] In *Local 189, United Papermakers v. United States*[58] the court presented the business necessity exception in terms of a hypothetical. An employer could require that all applicants for the position of secretary be able to type. Although the effect of this might be that certain racial groups could not fulfill the position due to lack of qualifications, there would be no racial discrimination because the employer has an economic purpose. The employer has a legitimate business necessity and cannot be required to undergo the added expense of hiring unqualified individuals to redress the racial imbalance.

The requirements of business necessity were further defined in *Robinson v. Lorillard Corporation.*[59] Although the court found the employer's departmental seniority system to be racially discriminatory, it recognized that in certain circumstances business necessity could justify continued racial discrimination where

> there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[60]

Further, the court stated that although dollar cost alone was not determinative, considerations of economy were relevant in determining the existence of business necessity.[61]

As the above cases indicate, when an employer has an overriding business purpose for his practices, of which cost is a relevant factor, and there is no acceptable alternative, he may continue a practice which has a racially discriminatory impact. In applying this same rationale to sexual discrimination in pregnancy benefits, an employer might be able to claim this same exception. The employer has an overriding business purpose; namely, to maintain the fiscal integrity of his business while providing benefits for disability or illness which employees of both sexes can enjoy at a reasonable cost to himself. The cost of providing the added

57. Local 189, United Papermakers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

58. 416 F.2d 980 (5th Cir. 1969).

59. 444 F.2d 791 (4th Cir. 1971).

60. *Id.* at 798 (footnotes omitted).

61. *Id.* at 799 n.8.

pregnancy benefits is appreciable in terms of overall fiscal integrity of the business. Finally, he has no acceptable alternative: he must either incur the added expenses himself and jeopardize the entire business venture; or he can proportionately limit the disability or illness benefits presently being offered to employees of both sexes in order to absorb the additional costs. The latter alternative may be impossible to do unilaterally if he has agreed to a certain level of benefits under an existing contract and he is dealing with a strong labor organization. Since the first of the employer's alternatives is unreasonable in terms of cost, and the second appears unfeasible, he might be able to claim business necessity as a justification for the exclusion of pregnancy benefits.

In addition to the business necessity exception recognized under Title VII recent decisions of the United States Supreme Court indicate that the cost of providing benefits may be a relevant factor in excusing discrimination. Although *Dandridge v. Williams*,[62] *Jefferson v. Hackney*,[63] and *Geduldig v. Aiello*[64] involved challenges to state welfare benefit plans under the equal protection clause of the fourteenth amendment, the Court's rationale could possibly be applicable to an employer's allocation of the limited funds he has available to provide employee benefits.

In *Dandridge* the Court sustained Maryland's allocation of its available welfare funds, although this plan meant that certain families' received proportionately lower per capita benefits. The Court recognized that the state had a finite amount of funds and that it had to distribute them in such a way as to meet the needs of the largest possible number of families. Further, the Court stated:

> [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.[65]

Similarly, in *Jefferson*, the Court upheld the Texas plan for distribution of its funds among four welfare programs, although one of the programs received proportionately lower funds than the other three. The Court noted that so long as a state's judgment is rational and not invidious, its efforts to "tackle the problems of the poor and needy are not subject to a constitutional straight-jacket."[66]

Most recently in *Geduldig*, the Court upheld California's disability insurance under an equal protection attack which excluded from its cover-

62. 397 U.S. 471 (1970).
63. 406 U.S. 535 (1972).
64. 94 S. Ct. 2485 (1974).
65. 397 U.S. at 487.
66. 406 U.S. at 547.

age, disabilities due to normal pregnancy. The Court stated

> [A] State may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.[67]

The Court found the legislature had "rationally" excluded normal pregnancy as a disability under the plan[68] as the "State has a legitimate interest in maintaining the self-supporting nature of its insurance program."[69]

A private employer, albeit on a much reduced scale, is faced with the same dilemma as the states in *Dandridge*, *Jefferson* and *Geduldig*; he has a limited amount of funds to provide employee benefits. If he opts to expend these resources for benefits which *both* sexes can potentially receive (sick leave due to unexpected illness, natural illness, or accidental injury; medical and hospital care for accidental injury or sudden illness) while excluding those which only *one* sex can directly receive (pregnancy benefits), has he not complied with the criteria sanctioned in *Dandridge*, *Jefferson*, and *Geduldig*, although there may be sex discrimination? Thus it can be argued that an employer complies with the law when he attempts such an allocation of his available funds.

CONCLUSION

It is apparent that the Supreme Court will be faced with a difficult decision if it is ultimately faced with resolving the conflict over the guidelines. The Court will have to determine whether the guidelines represent an abuse of EEOC's rule making power; whether the denial of pregnancy benefits is sex discrimination as prohibited by Title VII; and finally, whether a denial of benefits can be justifed under either a business necessity or cost argument. The Court may refuse to rule on the guidelines, preferring to wait until Congress enacts one of the pending national health care plans,[70] all of which contain various provisions covering the expenses of maternity and childbirth.

In summary, the above discussion of the guidelines indicates that the EEOC was attempting to correct a situation which, when involving a

67. 94 S. Ct. at 2491, *citing* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). Although not referred to in the majority opinion, the dissenting opinion of Justice Brennan specifically cited the EEOC's guidelines in finding the State's insurance program worked an invidious discrimination. 94 S. Ct. at 2494-95.

68. *See* note 43 *supra*.

69. 94 S. Ct. at 2491.

70. *See* (H.R. 13870, S. 3286) proposed Comprehensive National Health Insurance Act of 1974, introduced by Representative Wilbur Mills (D-Ark.) and Senator Theodore Kennedy (D-Mass.); (H.R. 12684, S. 2970) proposed Comprehensive Health Insurance Act of 1974 (Administration bill), introduced by Representative Wilbur Mills (D-Ark.), Representative Herman Schneebeli (R-Pa.), and Senator Robert Packwood (R-Ore.).

state, the Supreme Court has held not to violate the equal protection clause of the fourteenth amendment. It is apparent that the EEOC attempted corrective action in a hastily enacted, poorly planned, and somewhat arbitrary fashion.

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