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THE DEMISE OF THE DISCRIMINATORY EFFECT ANALYSIS—
NASHVILLE GAS CO. V. SATTY

Employment practices relating to pregnancy have given rise to court challenges on a major scale,¹ in part because of the influx of women in the workforce.² The most recent United States Supreme Court decision in this area is Nashville Gas Co. v. Satty,³ in which the Court considered whether denial of sick leave pay and seniority rights to female employees returning from pregnancy leave violated Title VII of the Civil Rights Act of 1964.⁴ After the respondent filed


In Turner v. Department of Employment Security, 423 U.S. 44 (1975) (per curiam), a Utah statute denied pregnant women unemployment compensation benefits twelve weeks before and six weeks after childbirth. The Court stated that the statute presented an irrebuttable presumption that pregnant women were unable to work before and after delivery of their child and thus violated the Due Process Clause. Id. at 46.

See also Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977). In Jacobs, an unwed pregnant employee was given two weeks notice of termination by her employer after he had been told of her pregnancy. After she filed a complaint with the EEOC, the employer changed her work assignment, which in effect acted as a constructive termination. The Court found this action a clear violation of Title VII of the Civil Rights Act of 1964. Id. at 371. See General Electric Co. v. Gilbert, 429 U.S. 125 (1976) [hereinafter cited as Gilbert]. For a discussion of this case, see notes 38-50 and accompanying text infra. See also Geduldig v. Aiello, 417 U.S. 484 (1974) [hereinafter cited as Geduldig]. This decision is discussed at notes 19-25 and accompanying text infra.

2. In the United States today, forty-six percent of all women over the age of sixteen are employed. S. 995, 95th Cong., 1st Sess., 123 CONG. REC. 4143 (1977). The latest statistics indicate that thirty-nine million women are working or seeking work. Id. Twenty-five million are employed because of a basic need to supplement their husband's income or because they are divorced, single or widowed. During the past fifty years, an increasing number of women have entered the work force. In 1920, 22.7% of the female population was employed; by 1970, this number had reached nearly fifty percent. Since the mid-1960's, the most rapid increase has come from those women in the twenty to thirty-four year old group. Many of these women are mothers of pre-school age children and at some point interrupted their career to have a child or did not start working until the children were born. B. BARCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW 192-93 (1975), citing Simmons, Freedman, Dinkle & Blau, Exploitation from 9 to 5 (Background Paper for the Twentieth Century Fund Task Force on Women and Employment) ch. 1 (1974).


charges with the Equal Employment Opportunity Commission (EEOC), she received a “right to sue” letter, a jurisdictional prerequisite necessary to bring an action against her employer in the federal district court. Thereafter, the district court held that the company violated Title VII by denying sick leave pay to the respondent while she was on pregnancy leave and by not permitting her to retain her previously accumulated seniority. This decision was affirmed by the court of appeals.

In an opinion written by Justice Rehnquist, the Supreme Court considered the issues of a sick leave pay and seniority separately. The

5. If the Commissioner of the EEOC is unable to secure from the respondent a conciliation agreement to prevent further unlawful employment practices, the EEOC must notify the aggrieved party within thirty days. Thereafter, a civil action may be brought against the respondent in district court. See 42 U.S.C. § 2000e-5(e) (1964), as amended, 42 U.S.C. § 2000e-5(f)(Supp. IV 1974).

6. Satty v. Nashville Gas Co., 384 F.Supp. 765 (M.D. Tenn. 1974). The employment practices at issue were a lower payment for pregnancy benefits than for other medical benefits under the company insurance policy, the denial of sick leave pay during a mandatory maternity leave, the refusal to hold open the plaintiff’s position while she was on maternity leave and the denial of accumulated seniority rights for the purpose of bidding on job openings.

The maternity leave policy came under close judicial scrutiny. Ms. Satty had been informed that although the decision concerning the commencement of her maternity leave would be based on several factors including the company doctor’s opinion, Ms. Satty’s duties, her work area and the degree of public contact, the company itself would make the final decision as to when the leave was to begin. Id. at 771-72. In this respect, maternity leave was “mandatory”. In practice, pregnant employees could not decline to accept maternity leave and retain employment affiliation with the company. Id. at 767. However, the court found that the date of Ms. Satty’s leave was not unreasonable. Id. at 772. This issue was not raised on appeal.

7. Id. at 771. Employees at Nashville Gas earned a given number of sick days to use in the future. The number of earned days depended upon the length of continuous employment and how frequently the sick leave days were used in the past. See Amicus Curiae Brief for Respondent at 4, n.3, Nashville Gas Co. v. Satty, 98 S.Ct. 347 (1977). The employer did not have a disability plan for its employees.

8. 384 F. Supp. at 771. The company credited the employee returning from maternity leave with accumulated seniority rights for the purposes of pension, vacation and other employee benefits. However, it did not credit her with previously accumulated seniority for the purpose of bidding on job openings. As a consequence, the respondent lost several opportunities for permanent positions when she was preempted by those who had been employed after her. Id. at 767.

In discussing both the sick leave and the seniority issues, the court distinguished the standards to be applied to those cases arising under the Equal Protection Clause and those under Title VII. Id. at 770. To withstand judicial scrutiny, those claims raised under the former need show a reasonable basis for the discriminatory employment practice. For those cases falling under Title VII, the employer must show a business necessity in order to withstand the challenge. Id. Since the company offered no such proof of business necessity, the court assumed no business justification existed. Id. at 771.

9. Satty v. Nashville Gas Co., 552 F.2d 850 (6th Cir. 1975). The court stressed that the policy behind Title VII was to remove artificial barriers that operated to discriminatorily effect members of a class. It also viewed the reach of Title VII as broader than that of the Equal Protection Clause. Id. at 855.
Court unanimously upheld the Sixth Circuit finding that the denial of accumulated seniority to females returning from pregnancy leave violated Title VII, because the company policy acted both to deprive these women of employment opportunities and to "adversely effect [their] status as employees."  Moreover, the Court emphasized the district court's finding that the employer offered no proof of business necessity to justify its discriminatory actions.

The Supreme Court, however, reversed the district court's ruling of the issue on sick leave pay to pregnant employees. After finding that exclusion of this benefit from a sick leave plan had no direct effect on employment opportunities \textit{per se}, the Court noted that the only consequence flowing from the exclusion would be a "mere" loss of income, an effect it deemed insufficient to prove a discriminatory practice. Justice Rehnquist, in the decision, spoke in terms of an equal protection analysis rather than a Title VII analysis, although the complaint was raised solely under Title VII.

The purpose of this Note is to analyze the \textit{Satty} decision in the context of prior case law and Title VII of the Civil Rights Act. It will suggest that the discriminatory effect test used by the Court in previous employment discrimination and Title VII decisions has been replaced, at least in some circumstances, by the equal protection test of "pretext designed to effect an invidious discrimination." In conclusion, this Note will suggest alternative avenues of relief for pregnant employees with claims of sex discrimination.

\underline{The Historical Underpinnings of \textit{Nashville Gas Co. v. Satty}}

\textit{The Equal Protection Clause}

The Equal Protection Clause of the Fourteenth Amendment guarantees that no state shall "deny to any person within its jurisdic-
tion the equal protection of the laws." 16 State action is a prerequisite to maintaining a cause of action predicated on this amendment. 17 Hence, the violation of equal protection of the laws became an argument available to those with claims of sex discrimination as promulgated and enforced by state legislation. 18

In Satty, the Supreme Court relied on its discussion of equal protection as applied to the claim of sex discrimination in Geduldig v. Aiello 19 and as specifically discussed in the Title VII case of General Electric Co. v. Gilbert. 20 In Geduldig, the plaintiff charged that the practice of excluding pregnancy benefits from a state disability program constituted sex discrimination in violation of the Equal Protection Clause. 21 While the Court declared that classifications based on pregnancy were not sex-based classifications per se, 22 they indicated such classifications could violate the Constitution if they served as a "pretext designed to effect an invidious discrimination against a particularly identifiable group." 23 However, in Geduldig no such pretext was found because there was insufficient evidence of discrimina-

16 U.S. Const. amend XIV.
18 See, e.g., Kahn v. Shevin, 416 U.S. 351, 355 (1974) (classification "widow" had a fair and substantial relation to the object of the Florida property tax exemption legislation); Reed v. Reed, 404 U.S. 71, 75-76 (1971) (Fourteenth Amendment mandates that a classification based on sex must rest on a fair and substantial relation to the legislation); see also Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (statutory scheme which acted to discriminate against females and which was predicated upon administrative efficiency violated the Due Process Clause of the Fifth Amendment).
21 417 U.S. at 486. California had a disability insurance program which excluded from coverage certain disabilities resulting from pregnancy and pregnancy itself. The major issue was whether the program invidiously discriminated against pregnant women by not paying insurance benefits for disabilities that accompanied normal pregnancy and childbirth. Id. at 492.
22 Id. at 496 n.20.
23 Id. at 496-97, n.20. Footnote 20 is perhaps the most discussed and oft-quoted comment from the Geduldig decision. It left the door open for claims involving pregnancy related issues but, simultaneously, it indicated that complainants would face a difficult task in proving sex discrimination. For an analysis of the Court's holding, see Comment, Geduldig v. Aiello, Pregnancy Classifications and the Definition of Sex Discrimination, 75 Colum. L. Rev. 441 (1975); Comment, Pregnancy and the Constitution: The Uniqueness Trap, 62 Cal. L. Rev. 1532 (1974). See generally Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 New York L. Rev. 36 (1977) [hereinafter cited as Constitutional Adjudication]; Comment, Gender-Based Discrimination and a Developing Standard of Equal Protection Analysis, 46 U. Cin. L. Rev. 572 (1977); Comment, Equal Protection Challenges to Gender-Based Classifications Evoke Varied Court Responses, 17 Washburn L. J. 182 (1977); Note, The Impact of Geduldig v. Aiello on the EEOC Guidelines on Sex Discrimination, 50 Indiana L. J. 592 (1975).
tory intent on the part of the State when it excluded pregnancy as a compensated disability.24

The seeking of evidence of discriminatory purpose or intent seems to be consistent with later case law which suggests that the 'pretext' approach in equal protection cases depends heavily upon such a finding of discriminatory purpose or intent.25 Although the Court has not obviated an analysis of the impact of an allegedly discriminatory practice, it has indicated that the invidious nature of a challenged practice normally must "ultimately be traced to a . . . discriminatory purpose."26 However, it also has recognized that ascertaining a discriminatory purpose or intent is extremely difficult, if not futile.27 Given the Geduldig holding that discrimination based on pregnancy is not equated with discrimination based on sex and given decisions indicating that establishment of discrimination without establishment of a discriminatory purpose is a difficult method of proving an equal protection violation, the Geduldig ruling presented a formidable obstacle to respondent Satty's Title VII claim.

**Title VII of the Civil Rights Act of 1964**

Title VII of the Civil Rights Act of 1964 forbids employer discrimination on the basis of race, color, sex, religion or national origin.28

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25. See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) [hereinafter cited as Arlington Heights v. M.H.D.C.]. This case challenged zoning practices which allegedly worked a discriminatory effect against racial minorities. Id. at 254. The Court stated that once the proof had shown that a discriminatory purpose was the motivation behind a legislative decision, judicial deference to that decision would no longer be justified. Id. at 256-66.

26. Washington v. Davis, 426 U.S. 229, 250 (1976). In Davis, the Court held that "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Id. Justice White, in his majority opinion, indicated that the demonstration of such discriminatory purpose is critical in proving an equal protection violation. Id. at 244-45. See generally, Note, Discriminatory Purpose: What It Means Under The Equal Protection Clause—Washington v. Davis, 26 DE PAUL L. REV. 650 (1977).

27. Palmer v. Thompson, 403 U.S. 217, 224 (1971). In Palmer, a city closed swimming pools allegedly to avoid racial integration. Justice Black, speaking for the majority, stated that ascertaining motivation was extremely difficult. Furthermore, to invalidate a law because of bad motives was an almost futile endeavor. To determine whether an invidious discriminatory purpose was the motivation behind the practice required judicial inquiry into circumstantial evidence of intent. See also, Arlington Heights v. M.H.D.C., 429 U.S. at 266. See generally Constitutional Adjudication, note 23 supra. Therein, the author suggests that the Court has failed to develop a coherent body of law indicating when motive is or is not relevant in the judicial determination. Id. at 113. He presents four reasons why the courts should not discuss legislative motive when deciding a case. Id. at 115-17.

The Act provides all these groups with a powerful weapon in the job market by providing for injunctive relief as well as reinstatement or hiring of the employee with or without compensation.29

Most case law clarifying Title VII30 has involved challenges to racially discriminatory employment practices in violation of Sections 703(a)(1) and 703(a)(2) of the Civil Rights Act. Section 703(a)(1) bars discrimination against an employee in the terms or conditions of his or her employment.31 Section 703(a)(2) declares that an unlawful employment practice occurs if an employer classifies an employee in such a way as to deprive the individual of employment opportunities or otherwise adversely affect that employee’s status.32 It would seem that since Title VII also prohibits discrimination based on sex, these decisions, by analogy, should be applied with equal force to cases alleging sex discrimination.

The landmark decision under Section 703(a)(2), Griggs v. Duke Power Co.,33 illustrates the standard to be applied to challenges arising under this section. Although the complaint in Griggs specified a violation of Section 703(a)(2), the Supreme Court declared, in most general terms, that “Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply to the motivation.”34 It likewise noted that Congress proscribed those

30. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977) (seniority system perpetuating effects of past racial and ethnic discrimination was a prima facie violation of Title VII); Albermarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975) (once employer proves that pre-employment tests are job related, complainant must show that other tests would better perform this function in order to present evidence that employer was using the tests as a pretext for discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (pre-employment intelligence test was discriminatory in operation). Since classifications based on both sex and race are prohibited under Title VII, the law as it applies to one group should apply to the other.
31. Section 703(a)(1) provides:
   It shall be an unlawful employment practice for an employer—(1) to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual’s race... or sex...
32. Section 703(a)(2) declares it an unlawful employment practice for an employer:
   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... or sex... .
33. 401 U.S. 432 (1971). Griggs raised a Section 703(a)(2) claim when the company testing program, neutral on its face, had a disproportionate impact on blacks in that it excluded a significantly high number of blacks from employment opportunities. Id. at 426.
34. Id. at 432.
practices which were fair in form but discriminatory in operation. In 1977, the Court reiterated the applicability of the "discriminatory effect" standard when it stated:

the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.

The discriminatory effect analysis, however, was not limited explicitly to Section 703(a)(2) controversies. It can be argued that because the Court was discussing Section 703(a)(2) issues, the dicta was applicable to only that section of Title VII. The implication, however, was that this analysis was applicable to all Title VII controversies.

Notwithstanding the fact that most of the Title VII cases involved racial discrimination, the Supreme Court has considered Section 703(a)(1) in the context of alleged sex discrimination. In General Electric Co. v. Gilbert, the plaintiff argued that the exclusion of pregnancy from a disability benefits plan violated Title VII. Although the cause of action was based solely on Title VII, a plurality of the Court incorporated the concepts of the Equal Protection Clause into the Title VII claim. Given the precedent of Geduldig the Court found the disability plan in Gilbert to be non-discriminatory.

By applying an equal protection analysis to a Section 703(a)(1) controversy, the plurality departed from a strict application of the dis-

35. Id. at 431.

In Griggs, the employer offered a showing of its good intent by presenting its policy of funding two-thirds of an employee's high school education. However, the Court indicated that the possibility of good intentions by Duke Power did not outweigh the consequences of the employment practice. 401 U.S. at 432.

37. If the dicta was applicable to only Section 703(a)(2), the Court could be accused of poorly articulating its standards since its language was directed towards all Title VII violations. 38. 429 U.S. at 127-28.
38. 429 U.S. at 127-28.
39. The fact that the opinion in Gilbert was a plurality opinion is of utmost importance when scrutinizing the Satty decision. Five justices implicitly or explicitly recognized the continuing viability of the discriminatory effect test. See note 48 and accompanying text infra.
40. Id. at 133, 136. The Court stated that the exclusion of pregnancy from a disability benefits program was not gender-based discrimination. Since a finding of discrimination would trigger a Title VII claim, and no such finding existed, the Court decided that it could legitimately follow the analysis of Geduldig and find no pretext to effectuate invidious discrimination if no discriminatory intent could be found. Id. at 135-36.
41. Id. at 140.
criminatory effect standard previously used for proving Title VII violations in racial discrimination cases. The thrust of the Gilbert opinion signified that a pretext analysis was appropriate in certain situations. However, as an alternative, the plurality noted that, in some circumstances, the plaintiff could prove a Title VII violation by proving a discriminatory effect. The Court failed to explain in what situations the pretext analysis was appropriate and in what other situations the discriminatory effect analysis was appropriate. Nevertheless, the Court determined that the plaintiff had failed to meet either burden.

42. See Washington v. Davis, 426 U.S. 229, 247 (1976). In Davis, the Court noted that Congress demanded more than a rational basis to uphold an employer's discriminatory practices. Review under Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators...than is appropriate under the Constitution. Id. The employer must show that any given requirement which has a disproportionate impact on a protected group has a demonstrable relationship to the employment policy in question. Griggs, 401 U.S. 424, 432 (1971). The proof is a showing of business necessity. Id. See generally Title VII, 42 U.S.C. §§ 2000e-2000e(17) (Supp. IV 1974).


43. 429 U.S. at 135-37.

44. Id. at 136-37. Justice Rehnquist, stated that "our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the effect of an otherwise facially neutral plan ... is to discriminate."

45. Id. at 137.

The Gilbert Court also chose to disregard the EEOC guidelines set forth concerning Title VII. 429 U.S. at 142. These guidelines prohibited discrimination in any disability or sick leave plan because of pregnancy or related illnesses. See 29 C.F.R. § 1604.10(b) (1975). The Court stressed that the guidelines were not issued contemporaneously with the original Title VII legislation enacted in 1964. Gilbert, 429 U.S. at 142. In addition, it noted that these guidelines conflicted with earlier EEOC pronouncements and, therefore, were not to be accorded "great deference" during the judicial inquiry. Id. at 142-43. See generally Note, Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted, 24 De Paul L. Rev. 127 (1974) (discussing validity of EEOC guidelines).

However, the Court generally has allowed agencies which are faced with new developments or in reconsideration of relevant facts to alter and perhaps overturn past administrative interpretations, rulings and practices. See e.g., American Trucking Ass'ns. v. Atchison, T. & S.F. Ry., 387 U.S. 397, 416 (1967). However, because the EEOC did not follow the appropriate procedure, i.e., did not allow the public to comment on the new guidelines for Title VII, the guidelines were considered "interpretive." See generally Koch, Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy, 64 Geo. L.J. 1047 (1976). The Court could have accorded the guidelines great weight as long as they were not inconsistent with congressional intent. See also Espinoza v. Farah Mfg. Co. Inc., 414 U.S. 86, 94-95 (1973). The Gilbert Court looked to recent congressional enactments to determine the intent of the sex discrimination clause in Title VII. 429 U.S. at 143. It then declared that a fair reading of Title VII would preclude deference to the EEOC guidelines. Id. at 143-45.
An analysis of the plurality holding of Gilbert suggests that two standards have emerged in adjudicating Title VII claims. The general standard which the Court has followed in race discrimination cases is the discriminatory effect test. The alternative approach in adjudicating some Section 703(a)(1) employment claims is to find evidence of a pretext designed to effectuate invidious discrimination. Despite this dual standard, five justices stated that the discriminatory effect analysis still was viable in all Title VII adjudications. Justice Blackmun stated this point most succinctly when he declared:

I do not join any inference or suggestion in the Court's opinion . . . that effect may never be a controlling factor in a Title VII case, or that Griggs v. Duke Power Co., is no longer good law.

Although the EEOC guidelines were considered "interpretive", they suggest a common sense belief that what affects pregnancy necessarily affects women. As a lower court previously had stated, "Even if it is thought that the rule [mandatory maternity leave] is neutral on its face, because only females can become pregnant, the rule's application has a gender-based discriminatory effect." See MacLennan v. American Airlines, Inc., 440 F. Supp. 466, 470 (E.D. Va. 1977). Why the Supreme Court did not contemplate that this logic was also implied by the legislative enactment and the EEOC guidelines was not addressed by the Court. But see Gilbert, 429 U.S. at 155-56 (Brennan, J., dissenting).


See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In this case, the basis of the complaint was that the employee's discharge was racially motivated. The Court therein reviewed the proper order and nature of proof in a pretext analysis for actions under Section 703(a) (1). Id. at 783-94. The complainant must carry the initial burden to establish a prima facie case of racial discrimination. Id. at 802. The burden then shifts to the employer "to articulate some legitimate nondiscriminatory reason" for the employment practice. Id. The burden of going forward with the evidence shifts again to the aggrieved party so that he or she has the opportunity to demonstrate that the so-called valid reason for the employment practice was a pretext designed to effect discrimination. Id. See also Barnes v. Callaghan & Co., 559 F.2d 1102, 1107 (7th Cir. 1977) (employer's reason for terminating the employee served to rebut a prima facie case of sex discrimination); but see Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977). In Turner, the court stated that an employer must present proof of a legitimate reason for his decision, rather than merely articulating a nondiscriminatory reason, in order to rebut a prima facie case of racial discrimination. Id. at 1256. It distinguished this case from McDonnell Douglas v. Green, where the issue there was whether an articulated reason could rebut the prima facie case of discrimination. 555 F.2d at 1254.

Justice Stewart (concurring) stated, "I do not understand the opinion to question . . . the significance generally of proving a discriminatory effect in a Title VII case." Gilbert, 429 U.S. at 146 (Stewart, J., concurring). Justice Brennan, with whom Justice Marshall concurred, declared in his dissent: "[A] prima facie violation of Title VII whether under § 703(a) (1) or § 703 (a) (2), also is established by demonstrating that a facially neutral classification has the effect of discriminating against members of the defined class." Id. at 155 (Brennan, J., dissenting). Justice Stevens stressed that the burden of proof in a cause of action based on a constitutional claim is heavier than that in proving a statutory prohibition; therefore, the analysis of Geduldig should not control the statutory interpretation of the Gilbert case. Id. at 160 (Stevens, J., dissenting).

For Justice Blackmun's comments, see note 49 and accompanying text infra.


48. Justice Stewart (concurring) stated, "I do not understand the opinion to question . . . the significance generally of proving a discriminatory effect in a Title VII case." Gilbert, 429 U.S. at 146 (Stewart, J., concurring).

49. Gilbert, 429 U.S. at 146 (Blackman, J., concurring) (citation omitted).
As evidenced by this disagreement between the members of the Court, it appeared that after Gilbert, the state of the law in this area was less than clear.  

A NEW STANDARD EMERGES FROM NASHVILLE GAS CO. v. SATTY

Although Gilbert suggests that both the pretext analysis and the discriminatory effect test are proper standards for evaluating Title VII claims, the language of the Court in Satty seems to limit the "either/or" application of these standards. In considering the respondent's claim concerning seniority rights, the analysis of the Supreme Court incorporated the discriminatory effect test in determining whether the loss of seniority was in fact a violation of Section 703(a)(2). The Court found that the denial of accumulated seniority to those on a leave of absence was a facially neutral company policy. However, it noted that the effect of the policy as it pertained to pregnancy leave was to deprive those women of "employment opportunities". Moreover, the Court noted, this policy would "adversely affect [women's] status as employees." Accordingly, because

50. That there was confusion as to the law is indicated by recent articles on the Gilbert decision. See Comment, General Electric v. Gilbert: A Lesson in Sex Education and Discrimination—The Relationship Between Pregnancy and Gender and the Vitality of the Disproportionate Impact Analysis, 1977 UTAH L. REV. 119, 133 (1977) [hereinafter cited as Disproportionate Impact Analysis] (suggesting that a plurality of the Court is willing to limit Griggs to Section 703(a)(2) actions); Note, General Electric v. Gilbert, Denial of Employment Rights Under Title VII, 46 UMKC L. REV. 133, 140 (1977) (suggesting that the practical results of Gilbert may be the requirement of intent to prove a prima facie case under Title VII); Recent Cases, 91 HARV. L. REV. 241, 242-43 (1977) (suggesting that Justice Rehnquist hinted that a showing of intent was necessary, but proceeded in conformity with Title VII to examine the effects of the employment practice). See also G. GUNTHER, CONSTITUTIONAL LAW 126-27 (9th ed. 1977 Supp.). Professor Gunther noted that the plurality in Gilbert recognized discriminatory effect as a valid analysis under Title VII but at the same time cast doubt on its persuasiveness. Id.


52. 98 S. Ct. at 350. The seniority policy applied to both male and female employees who were returning from a leave of absence. However, this policy had not been applied to any leave outside the pregnancy context since those employees who had been affected by the leave policy failed to return to the company. Id. at 350 n.2.

53. Id. at 351. The Court noted that Ms. Satty would have felt the effects of the lower seniority for the remainder of her career with Nashville Gas Co. Id. The burden Ms. Satty suffered apparently refers to the long-term effects of the seniority policy. See generally Aaron, Reflection of the Legal Nature and Enforceability of Seniority Rights, 75 HARV. L. REV. 1532 (1962) (seniority system in American industry is the source of employment opportunities for those covered by a seniority program).

In his concurrence, Justice Stevens discusses the majority's handling of the benefit-burden issue. He found the difference between a benefit and a burden illusory, noting that this is not a
women would feel the effect of this practice for the remainder of their careers, the Court found the requisite discriminatory effect.\textsuperscript{54}

In examining the claim concerning the denial of sick leave pay, the Court used a different and ambiguous standard. It first established that the sick leave plan in \textit{Satty} was legally indistinguishable from that in \textit{Gilbert}.\textsuperscript{55} Therefore, it held that \textit{Gilbert} should control.\textsuperscript{56} It then stated that Ms. Satty could prove discrimination in violation of Section 703(a)(1) if she could demonstrate that the Company's practice was a "[pretext] designed to effect an invidious discrimination against the members of one sex . . . ."\textsuperscript{57}

It appears that if the majority had presented the pretext approach as an alternative to the discriminatory effect approach, they would have been in accord with the \textit{Gilbert} decision.\textsuperscript{58} However, the Court prefaced the comment with the statement that "[o]nly if a plaintiff . . . can demonstrate [a pretext] . . . does Title VII apply."\textsuperscript{59} The Court gave no hint to the meaning of "only if". If the Court interprets "only if" to mean that a pretext to effectuate discrimination must be proven before a violation of Section 703(a)(1) can be found, a new, judicially developed mandate clearly has been placed on this section as it applies to pregnant women\textsuperscript{60} and potentially as it may apply to all persons raising claims under this section.

\textsuperscript{54} Id. at 351-52.
\textsuperscript{55} Id. at 353. The Court also noted that both the sick leave plan in \textit{Satty} and the disability plan in \textit{Gilbert} appropriately fell within the scope of Section 703(a)(1). \textit{Id.}.
\textsuperscript{56} It could be argued that the respondent made a fatal error when she conceded that the petitioner's sick plan was generally identical to the disability plan examined in \textit{Gilbert}. On first glance, the policies may appear similar. However, in \textit{Satty}, the respondent was deprived of sick days which she had previously earned as part of the terms of her employment. See note 7 and accompanying text \textit{supra}. Once these sick days were expended, whether for a pregnancy related disability or another illness, the employee would have no more opportunity to use sick leave. On the other hand, the company policy in \textit{Gilbert} allowed an employee to draw from the disability insurance several times during the year, with a limit only upon the number of days for which disability benefits would be paid for a single illness. 429 U.S. at 128. Thus, in that circumstance, a pregnant employee may in fact draw a higher benefit than a male employee. However, in the present case, the maximum number of days for sick leave was predetermined and was applicable to both males and females with equal force. Thus, once the earned sick days were exhausted, for any reason, the employee would have to take leave without pay.

\textsuperscript{57} 98 S.Ct. at 353.
\textsuperscript{58} See note 46-47 and accompanying text \textit{supra}.
\textsuperscript{59} 98 S.Ct. at 352 (emphasis added).
\textsuperscript{60} When discussing the proper scope of the remand, the Court stated that the lower court may consider the company's seniority policy in considering whether the sick leave plan was a pretext to effectuate discrimination. \textit{Id.} at 353. This is consistent with the position that the Supreme Court is adopting a pretext approach for Section 703(a)(1) claims.
As a result of Satty, it appears that the Court has enunciated a new standard for Section 703(a)(1) controversies. As previously discussed, Gilbert implied that the pretext approach was an alternative to, rather than in lieu of, a discriminatory effect analysis. Yet, in the more recent Satty opinion, the Court indicates that the pretext analysis is the only applicable statutory test. Yet, seemingly as an afterthought, the Court went on in Satty to mention that the respondent "... failed to prove even a discriminatory effect ..." The Court, however, failed to indicate what in fact constituted such an effect. The only indication offered in this opinion as to what was not a sufficient discriminatory effect was the mere loss of income. Thus, although the Court perhaps has not completely discarded the traditional discriminatory effect approach to Title VII, it has rendered the application of the test vague and diluted.

With regard to whether the plaintiff has to prove intent as an element of the cause of action in a Section 703(a)(1) violation, the Court expressly refused to decide the issue. Nevertheless, precedent indicates that the presence of bad intent or lack of good intent is not dispositive in the determination of whether a discriminatory practice exists. Indeed, the Court previously has noted that Title VII is directed towards the consequences of employment practices, not to the motivation behind them. Accordingly, one can argue that such precedent applies equally to both Sections 703(a)(1) and 703(a)(2). But, by looking in Satty for a pretext to effectuate discrimination, the Court in effect is employing an equal protection analysis, which requires the rigorous demand of proof of intent. Thus, the Supreme Court, with its ostensible avoidance of the "intent" issue, has implied its necessity for proving Section 703(a)(1) claims.

As a consequence, Nashville Gas Co. v. Satty has left the state of the law in a turmoil. Although this opinion only discussed Section 703(a)(1) in terms of discrimination based on pregnancy, the validity of a discriminatory effect analysis is highly questionable for other con-

61. See notes 47-49 and accompanying text supra.
62. 98 S.Ct. at 353 (emphasis added).
63. Id. at 352-53. Notwithstanding this statement, the pregnant employee also loses that which she has earned by virtue of her service of employment—accumulated sick days—an integral part of her employment terms. In this regard, she is discriminated against in her compensation and privileges of employment. She has not only been denied a benefit granted others, but has also been deprived of a benefit she justly earned.
64. Id. at 352.
65. See note 36 and accompanying text supra.
troversies which may arise under this section.\textsuperscript{67} Furthermore, any analysis based on "pretext" seems to require intent, thus destroying Title VII's emphasis on consequences of rather than motivation behind the employment practices.\textsuperscript{68}

**IMPACT**

The ramifications of the *Satty* decision are indeed profound. Although the Supreme Court has recognized that society cannot impermissibly discriminate against women, as it cannot impermissably discriminate against minorities in violation of the Equal Protection Clause,\textsuperscript{69} the Court has declared that the exclusion of *pregnant* women from certain benefit packages is not *per se* impermissible discrimination, under both the Equal Protection Clause and Title VII.\textsuperscript{70} The Supreme Court clearly has indicated that pregnant women are faced with a formidable task in proving deliberate forms of discrimination. This task, coupled with the chaotic opinion from *Satty*, indicates that the Supreme Court is not the ideal arbiter of claims raised by...

\textsuperscript{67} The discriminatory effect analysis is viable for Section 703(a)(2) claims. However, if the Court has changed the standard to be applied to some Title VII controversies, i.e., Section 703(a)(1) claims, it may generalize that new standard and incorporate it within Section 703(a)(2) claims. The results would be the demise of the effectiveness of Title VII. For example, if Griggs v. Duke Power Co. had been scrutinized under the pretext approach, the Court may have found that the Company's testing policy was not a violation of Title VII if it had found no intent to discriminate against minority applicants. See *Disproportionate Impact Analysis*, supra note 50, at 133.


\textsuperscript{69} See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Justice Brennan stated:

> it can hardly be doubted that because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle discrimination. . .Moreover, since sex, like race. . . is an immutable characteristic. . .the imposition of special disabilities upon the members of a particular sex because of their sex violates the concept that burdens bear some relationship to individual responsibility.

See generally 411 U.S. at 686-88. See also *Stanton v. Stanton*, 421 U.S. 7 (1975). In that case, a lower age of majority for females than for males was found to be unconstitutional. The Supreme Court stated, "No longer is the female destined solely for the home and the rearing of a family, and only the male for the marketplace and the world of ideas. . ." *Id.* at 14; *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho's estate statute that gave preference to men over women found unconstitutional); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (hiring policy for women different than that for men, each having preschool aged children, found impermissible under Title VII).

\textsuperscript{70} *Gilbert*, 429 U.S., at 136.
female workers who happen to be pregnant, unless those practices clearly affect prospective employment opportunities.\(^7\)

Although the coverage of Title VII is somewhat in question,\(^7\) it is important to note that a viable alternative exists at the state level. To date, several state legislatures have incorporated within their fair employment practice statutes the prohibition against discrimination because of pregnancy.\(^7\) These state legislative bodies implicitly recognize that employment policies segregating pregnancy or pregnant women for different treatment are in fact policies of sex discrimination.

Moreover, at least one state judicial body has provided an alternative forum beyond Title VII for those alleging sex discrimination be-

\(^7\) See, e.g., City of Los Angeles v. Manhart, — U.S.—, 46 U.S.L.W. 4347 (1978). In Manhart, the higher contribution by female employees than male employees to a retirement plan was found to be a \textit{prima facie} violation of Section 703(a)(1). Justice Stevens, in his majority opinion, distinguished Manhart from Gilbert and consequently Satty by noting that the classification of pregnant and non-pregnant persons included a group which was composed of both sexes. On the other hand, the discriminatory practice in Manhart was directed to only one group—women. \textit{Id.} at 4351 & n.29.

Although Manhart may clarify the parameters of sex discrimination in general under Title VII, it does not provide much assistance to pregnant females raising claims. An alternative avenue of relief, therefore, may be premised on the Civil Rights Act of 1866 and 1877, 42 U.S.C. §§ 1981, 1983, 1985 (1970) which collectively prohibit the deprivation of civil rights by state or private action. Although the acts do not specifically proscribe discrimination in employment, they can be used to redress such discriminatory actions. See Brooks, \textit{Use of Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination}, 62 \textit{CORNELL L. REV.} 258, 258-60 (1977). See also Reiss, \textit{Requiem for an "Independent Remedy": The Civil Rights Act of 1866 and 1871 as Remedies for Employment Discrimination}, 50 \textit{S. CAL. L. REV.} 961 (1977)
cause of pregnancy. The New York Court of Appeals has ruled that a public employment personnel policy, which treated pregnancy and childbirth differently than it treated other medical disabilities, was prohibited by a New York statute virtually identical to Title VII.74 The court noted that the Gilbert decision, although instructive, was not binding.75 Should the remaining state judicial bodies follow New York's lead, female litigants would be wise to raise their claims of employment discrimination in the state courts. However, for those states with anti-discrimination statutes nearly identical to Title VII,76 it should be noted that courts of those respective states may look to the determinations of the Supreme Court decisions for guidance.

For the present, those women who are unprotected by state fair employment practice laws77 or case law are left to the mercy of lower courts which attempt to follow the dictates of Gilbert and Satty.78 This is true, of course, unless Congress overrules Gilbert and Satty through an amendment to Title VII. Indeed, the Gilbert decision has already served as a catalyst for such congressional clarification.79 The Senate has recently passed a bill which would, in effect, overrule

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Since Title VII of the Civil Rights Act of 1964 made clear that Congress did not intend to preclude state efforts to bar discrimination, the Gilbert and Satty decisions will have no impact in these states. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-7 (1970).


77. See, e.g., Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, North Dakota, Tennessee, Texas and Virginia. See 3 EMPL. PRAC. GUIDE (CCH) §§ 20,101; 20,723, 21,912; 23,548; 24,701; 26,448; 26,523; 27,898; 28,048; 29,398 respectively (1976).

78. Those women who are unprotected by state statutes can file claims with the EEOC if applicable. 42 U.S.C. § 2000e-5 (1970 & Supp. IV 1974). Thus any judicial review would occur in federal courts.

both decisions. The Senate report accompanying the proposed legislation declares that the purpose of the amendment is to make plain that discrimination based on pregnancy, childbirth and other related medical conditions is indeed discrimination based on sex. The Senate intends for the bill to insure that working women are protected against all forms of employment discrimination based on sex. The report also reiterates the general congressional intent of the 1972 amendments to Title VII: discrimination against women is to be granted the same degree of social concern given to any type of unlawful discrimination. Furthermore, the Senate stated that the EEOC properly implemented the congressional intent when it promulgated guidelines later ignored by the Supreme Court. 

Although the Senate report can only assume what previous members of Congress intended, it nevertheless serves as a more plausible interpretation, certainly one deserving more credence than the interpretation proffered by the Supreme Court. Significantly, Congress, the direct representative of the people, has expressed its complete dissatisfaction with the Court's treatment of the pregnancy issue. Of course, the ultimate resolution in this area of the law must await passage of the Senate bill by the House of Representatives. Only then will women in all fifty states be protected against all forms of discrimination based on pregnancy and on sex. With passage of the Senate amendment to Title VII, the Gilbert and Satty decisions are now placed in the annals of history.

Janet K. De Costa

80. S. 995, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 995]. The committee adopted Justice Brennan's and Justice Stevens' dissents in Gilbert and stated, "...S. 995 was introduced to change the definition of sex discrimination in Title VII to reflect the commonsense view..." S. Rep. No. 331 at 3. In so doing, the committee noted that the two dissenting opinions correctly "expressed the principle and meaning of Title VII." Id. at 2. S. 995, in pertinent part, is as follows:

The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs...

Id.


82. Id.


85. While this Note was being prepared for printing, the President signed S. 995 into law. Accordingly, the law now overrules the results in both Gilbert and Satty but does not disturb the legal analysis proffered by the Court.