INCOME PROTECTION FOR PREGNANT WORKERS

I. The Need for Income Protection

An early judicial impression that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"[1] has been laid to rest by the reality of increasing numbers of women entering the nation's work force. Women accounted for 1.1 million of the 1.5 million increase in the labor force in 1975;[2] 37 million women,[3] well over half of all women between the ages of 18 and 64,[4] worked outside the home in that year. The most rapid increases are among women who are young, married, and have small children.[5]

Women work for the same reasons men work. Almost two-thirds of all women who work are either single, widowed, divorced, separated, or married to husbands who earn less than $7,000 annually.[6] These women work out of necessity, to provide financial support for themselves and those dependent upon them.

Yet the median income for women working full-time in 1975 was only fifty-seven percent of the median income received by working men in that year.[7] Although there are several reasons for this pay disparity, the single most important factor is the concentration of women in lower paying occupations.[8] Despite some redistribution of women workers in recent years, they continue to be employed primarily in clerical and service occupations.

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1. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (upholding the state's denial of admission to the bar to Mrs. Myra Bradwell).

2. Commission on the Observance of International Women's Year, To Form a More Perfect Union 57 (1976). Women accounted for two-thirds of the increase in total employment during the 1960's according to the U.S. Bureau of Census, *Occupation by Industry*, PC-7C (1970). Over forty percent of the American work force is presently female. *Id.*

3. Commission on the Observance of International Women's Year, To Form a More Perfect Union 57 (1976).

4. U.S. Dep't of Labor, Women in the Labor Force (1974).

5. Walman & Whitmore, *Children of Working Mothers*, 97 Monthly Lab. Rev. 50 (1974), *cited in* Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441, 476-77 (1975) [hereinafter cited as Zimmerman].

6. Women's Bureau, U.S. Dep't of Labor, Why Women Work (1974). Barbara J. Lautzenheiser, Vice-President and Actuary of Bankers Life Nebraska, notes that women are a permanent, not temporary, part of the work force. "The concern for the female getting married and quitting work is not valid—63% of women working are married. The concern for the woman quitting when she has children is not valid—30% of the women with a child less than six years old work." Address by Barbara Lautzenheiser, The Impact of Women's Lib on Disability Income Insurance (1973). *See also* Geduldig v. Aiello, 417 U.S. 484, 501 n.5 (1974) (Brennan, J., dissenting).

7. Employment Standards Administration, U.S. Dep't of Labor, 1975 Handbook on Women Workers.

8. Iowa Commission on the Status of Women, A Study of the Underemployment and Utilization of Women in Iowa (1976). *See also* Conlin, *Equal Protection versus Equal Rights Amendment—Where Are We Now?*, 24 Drake L. Rev. 259, 292-93 (1975) [hereinafter cited as Conlin].

Because most women are low or middle income level workers, any income disruption may cause great difficulty and even financial disaster for them and those dependent upon them for support. Income protection programs can help alleviate the effects of loss of income due to an absence from work caused by a temporary inability to work. Unfortunately, the most common exclusion from income protection programs is pregnancy-related disability. Because "[p]regnancy is of course confined to women,"[9] such exclusion creates greater economic hardship for female workers than for male workers.

Two major forms of income protection are currently available. A common form provided by employers in both the public and private sector is the use of accrued days of paid sick leave for recovery from temporary disabilities, illnesses, and accidents.[10] Usually an employee receives full pay for the days absent from work up to the number of days she or he has accrued, at a rate of one or two days per month employed or a specified number of days per contract period. A plan may provide for an unlimited accumulation of unused sick days or may place a ceiling on such accumulation. An employer might qualify the use of sick leave by requiring a medical confirmation of the necessity for the absence from work beyond a specified number of days or might exclude from the use of paid sick leave certain physiological conditions.

The other widely-used form of income protection is that provided by disability insurance.[11] These policies can be purchased by workers individually or by employers in order to provide group insurance protection for their employees. Most of the latter are funded entirely by employer contributions, although some are funded by employee contributions and others by a combination of both.[12] Some states require by statute that disability insurance coverage be provided for employees.[13]

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9. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 408 (1976). Mr. Justice Rehnquist delivered the opinion of the Court.

10. *See* Zichy v. City of Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975). Under this defendant's sick leave plan, an absent employee would receive his or her full salary, and accrue future sick leave, pension, vacation, promotional, and other fringe benefits. This court states that an employee under a sick leave plan would lose far more by not being entitled to its benefits than would an employee under an income disability insurance plan. The argument can be made, however, that since most pregnant women are young, often with a short length of service in their employment, they may not have accrued the necessary number of sick days to cover the time they are absent from work due to pregnancy-related disability.

11. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 487 (1974); Communications Workers v. American Tel. & Tel. Co., 379 F. Supp. 679, 681 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *vacated*, 45 U.S.L.W. 3455 (Jan. 11, 1977); Gilbert v. General Elec. Co., 375 F. Supp. 367, 368-69 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 97 S. Ct. 401 (1976); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1155 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 737 (1976); Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381 n.6 (1975). The benefit is typically a monthly payment in the amount of a percentage (usually sixty percent maximum) of the monthly income prior to disability. TASK FORCE ON CRITICAL PROBLEMS, NEW YORK STATE SENATE, INSURANCE AND WOMEN 22 (Oct. 1974) [hereinafter cited as New York Study].

12. "Group insurance purchased in connection with employment is by far the greatest source of protection against loss of income due to temporary disabilities." Note, *Pregnancy and Disability Insurance*, 23 DRAKE L. REV. 806, 807 n.8 (1974) (citing U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 340 (1973)).

13. *See* CAL. UNEMP. INS. CODE § 2626.2(c) (West Supp. 1977); HAW. REV. STAT. tit.

Although income protection plans are different in form, they have a common purpose: to alleviate the economic burdens caused by a loss of income due to absence from work. Keeping this purpose in mind, it is difficult to justify the exclusion of pregnancy-related disabilities from otherwise broad coverage. A woman unable to work as the result of a pregnancy has as great a need for income protection as an employee disabled as the result of an injury or disease.[14]

> Disabilities caused by pregnancy . . . require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life. Moreover, the economic effects caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work, and medical expenses are incurred for the delivery of the child and for postpartum care.[15]

Furthermore, many women have no alternative means of support while they are not working due to pregnancy and childbirth.[16] Not all pregnant women are married, and those that are may not be fully supported by their spouse. In over one-third of all families, both spouses work, often because the family is financially dependent upon two incomes.[17]

II. Employer Justifications for Pregnancy Exclusion

Employers as defendants have offered several justifications for excluding pregnancy from their sick leave and/or disability insurance plans: that pregnancy is not an illness, accident, or long-term disability within the terms of their plan, but rather a normal, healthy, physiological condition that is at most a temporary disability;[18] that pregnancy and childbirth are voluntary;[19] that the cost of including pregnancy within the plan would be prohibitive[20] and the administrative inconvenience would be unduly burdensome;[21] and that many women

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21, ch. 392-3(5) (Supp. 1975); N.J. Stat. Ann. § 43.21-29, § 43.21-39(e) (West 1976); New York Work. Comp. Law § 205(3) (McKinney 1965); R.I. Gen. Laws § 28-4-8 (Supp. 1976). Only Hawaii requires that pregnancy be treated as are other short term disabilities. California, New Jersey, New York and Rhode Island include pregnancy on a restricted basis.

14. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975); Ray-O-Vac v. Wisconsin Dep't Indus., Labor & Human Relations, 236 N.W.2d 209, 215 (Wis. 1975).

15. Geduldig v. Aiello, 417 U.S. 484, 500 n.4 (1974) (Brennan, J., dissenting).

16. *See* Gilbert v. General Elec. Co., 375 F. Supp. 367, 381 n.12 (4th Cir. 1974). For example, one of the plaintiffs in the *Gilbert* case became pregnant unintentionally. She worked until five weeks before the birth of the child. She was denied disability benefits and was without other support for herself and her two-year old child. As a result, her electricity and fuel were cut off, and they lived for two months without heat, light, refrigeration, or hot meals. She returned to work six weeks after the birth of her child.

17. *See* note 6 *supra* and accompanying text. *See also* Note, *Pregnancy and Disability Insurance*, 23 Drake L. Rev. 806, 808 (1974).

18. *See* Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 963 (9th Cir. 1975); Scott v. Opelika City Schools, 63 F.R.D. 144 (M.D. Ala. 1974).

19. *See* Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1157 (W.D. Pa. 1974); Gilbert v. General Elec. Co., 375 F. Supp. 367, 375 (E.D. Va. 1974).

20. Geduldig v. Aiello, 417 U.S. 484, 492-93 (1974); Gilbert v. General Elec. Co., 375 F. Supp. 367, 378 (E.D. Va. 1974).

21. Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 788 (N.D. Iowa 1975); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 445 (N.D. Cal. 1972); *contra*, Schattman v. Texas Employment Comm'n, 459 F.2d 32, 39 (5th Cir. 1972).

fail to return to full-time employment after the birth of the child so that the disability benefits become a form of severance pay.[22] These defenses have been discussed by the courts that have been confronted with them and in most instances rejected.

A. *Pregnancy Not An Illness*

Most courts have held that although a normal pregnancy is not an illness as such, it can be a temporary, disabling physiological condition.[23] Moreover, disabling complications may arise during pregnancy, either as a result of the pregnancy, or without any relation to the pregnancy.[24] Some income protection plans do include complications of pregnancy within their coverage; others exclude both normal pregnancy and its complications.[25]

Early decisions that comment on the nature and definition of pregnancy reflect the courts' struggle with two conflicting positions. On the one hand, it is contended that pregnancy is not disabling and therefore sick leave benefits should not be afforded the worker. On the other hand, a pregnant worker is considered to be less capable of performing the responsibilities of the job and so must leave work no later than at the end of the second trimester.[26]

The conflict is due in part to the use of the term "maternity leave" by many employers. This term has come to include a period beginning with some arbitrarily selected time during pregnancy, usually the end of the fifth or sixth month, and ending at some time, often six months to a year after birth of the

22. *See* notes 40-44 *infra* and accompanying text.

23. *See* Geduldig v. Aiello, 417 U.S. 484, 500 n.4 (1974) (Brennan, J., dissenting, referring to the American College of Obstetricians and Gynecologists Policy Statement on Pregnancy-related Disabilities, March 2, 1974, *cited in* brief for appellees.) *See also* Green v. Waterford Bd. of Educ., 473 F.2d 629, 634 (2d Cir. 1973) (court notes that men are also subject to "crises of the body", some of which, such as a cataract operation or a prostatectomy, like childbirth, may be planned months ahead, but for which men are not forced to take a premature leave of absence from work).

24. "Five percent of pregnancies are complicated by diseases which are found in nonpregnant persons but which may have been stimulated by pregnancy. Five percent of pregnancies are complicated by pregnancy-related diseases. These complications are diseases which may lead to disability." Gilbert v. General Elec. Co., 375 F. Supp. 367, 377 (E.D. Va. 1974).

25. Payne v. Travenol Labs., 416 F. Supp. 248 (N.D. Miss. 1976) (normal pregnancy and complications of pregnancy excluded from employee salary continuation plan); Zichy v. City of Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975) (paid sick leave covered abortions and miscarriages but not normal pregnancies); Rentzer v. California Unemployment Ins. Appeals Bd., Human Relations Agency, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (Ct. App. 1973) (ectopic pregnancy not a true pregnancy and thus not within the pregnancy exclusion of the California Insurance Code which was subsequently amended to exclude only normal pregnancies).

26. Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238, 245-46 (N.D. Ga. 1973) (court concluded that pregnancy is neither a sickness nor a disability—"the fact of its existence demonstrates that a woman is quite healthy and normal" and invalidated an early leave requirement, but disallowed sick leave benefits); Bravo v. Board of Educ., 345 F. Supp. 155, 158 (N.D. Ill. 1972), *rev'd*, 525 F.2d 695 (7th Cir. 1975) (court granted preliminary injunction on finding probable cause that defendant could show no medical justification for the maternity leave policy in light of the board's policy of allowing pregnant students to continue school and pregnant teachers to be substitute instructors while on maternity leave); Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159, 1160 (E.D. Va. 1971), *rev'd*, 474 F.2d 395 (4th Cir. 1973), *rev'd*, 414 U.S. 632 (1974) (court held that there was no medical justification for requiring leave at the end of the fifth month

child. Most women are not incapable of working during this lengthy period, and thus in most cases the employer's refusal to provide sick leave or disability insurance benefits for the *entire* duration of the absence is reasonable. However, the great length of the absence from work is usually mandated by the employer's own maternity leave policy rather than by the worker's inability to work. The effect of such a policy is to require the woman worker to be without income for a prolonged period of time and thus leave her in great need of some form of income protection or replacement.[27]

The courts have now differentiated and separated the two problems created by mandatory, arbitrarily defined maternity leaves. First, most women are capable of working until the onset of labor or shortly before,[28] and accordingly, most physicans encourage their patients to carry on their normal activities throughout their pregnancy. But,

> [u]nquestionably, a pregnant woman, at some point in time, will suffer some temporary disability as the result of her pregnancy. . . . However, the court is not permitted to speculate as to when this condition will occur or how long said disability will last. The case of every woman is different. . . .[29]

Second, "maternity leave" had been used to denote the period of absence for both childbirth and child-rearing. Although women differ in the time needed for postpartum recovery, very few women require for that purpose the three, six or twelve months absence from work formerly required by some employers.[30] The average period of recovery is between four and eight weeks, with some women returning to work two or three weeks after the birth of their child.[31]

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of pregnancy; in fact, incapacitation was more probable during the first four months of pregnancy).

27. *See* notes 82-86 *infra* and accompanying text on unemployment compensation as a form of income replacement for persons forced to be on leave while able to work.

28. *See* Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 443 (N.D. Cal. 1972); Pocklington v. Duval County School Bd., 345 F. Supp. 163, 164 (M.D. Fla. 1972); Cedar Rapids School Dist. v. Parr, 227 N.W.2d 486, 493 (Iowa 1975).

29. E.E.O.C. v. Children's Hosp., 415 F. Supp. 1345, 1349 (W.D. Pa. 1976); *accord*, Scott v. Opelika City Schools, 63 F.R.D. 144, 148 (M.D. Ala. 1974): "No one disputes the fact that childbirth is physically disabling and renders a woman temporarily incapable of performing ordinary work." The Citizens Advisory Council on the Status of Women was instrumental in clarifying the distinction between childbirth and child-rearing with regard to maternity leave. Remarks by Jacqueline G. Gutwillig, Chairperson, Job-Related Maternity Benefits 4 (1972) [hereinafter cited as Gutwillig].

30. Satty v. Nashville Gas Co., 522 F.2d 850, 852 (6th Cir. 1975), *cert. granted*, 97 S. Ct. 806 (1977) (six weeks); Gilbert v. General Elec. Co., 375 F. Supp. 367, 385 (E.D. Va. 1974) (six weeks); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 504 (S.D. Ohio 1972) (one year); Black v. School Comm., 310 N.E.2d 330, 333 (Mass. 1974) (six months). Many school districts would not allow a teacher to return from maternity leave until the beginning of the next semester or school year. *See* Pocklington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972); Cedar Rapids Community School Dist. v. Parr, 227 N.W.2d 486, 489 (Iowa 1975). Other employers require that an employee return to work from maternity leave within a specified time or be terminated, though such a restriction is not placed on other disabilities. This requirement was held to be a violation of title VII of the Civil Rights Act of 1964 in Vineyard v. Hollister Elem. School Dist., 64 F.R.D. 580, 583 (N.D. Cal. 1974). In Leechburg Schools v. Pennsylvania, 339 A.2d 850 (Pa. Commw. Ct. 1975), the court held a policy requiring a teacher to teach at least one year between maternity leaves to be violative of the Pennsylvania Human Relations Act.

31. The medical rule of thumb is that six weeks are required for recuperation

B. *Voluntariness*

The second major category of defenses raised by employers is that pregnancy is a voluntary condition. The courts' rejection of this defense is two-fold. First, although pregnancy may in most cases be voluntary,[32] other voluntary conditions are frequently not excluded from the employer's sick leave/income protection plan, even those incurred solely or primarily by males.[33] Thus, the voluntariness of pregnancy is irrelevant. Second, it is the *capacity* to become pregnant that differentiates the female from the male sex, not the voluntariness of the condition. This differentiation based on a sex-related characteristic is the very basis of sex discrimination.[34] Furthermore, the condition of pregnancy is essential to the continuation of the society and, women should not be penalized for the necessary role they play in the procreative process.[35]

C. *Cost*

The third major argument raised by employers defending the pregnancy exclusion is that of cost, even though there are no certain indicators of what the cost of including pregnancy in a sick leave/income protection program would be.[36] Estimates have come from numerous studies,[37] but the factors on

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> from delivery . . . . [H]ousewives who perform daily household chores may find themselves back at the rigorous demands of family raising within a week or so. . . . A pregnancy without complications is normally disabling for a period of six to eight weeks, which time includes the period from labor and delivery, or slightly before, through several weeks of recuperation.

Gilbert v. General Elec. Co., 375 F. Supp. 367, 376-77 (W.D. Pa. 1974). *See also* Liss v. School Dist., 396 F. Supp. 1035 (E.D. Mo. 1975), *vacated*, 548 F.2d 751 (8th Cir. 1977) (vacated and remanded in view of Gilbert v. General Elec. Co. 97 S. Ct. 401 (1976)); Dessenberg v. American Metal Forming Co., EMPL. PRAC. GUIDE (CCH), 8 Empl. Prac. Dec. ¶ 9575 (N.D. Ohio 1973).

32. "While pregnancy is perhaps most often voluntary, a substantial incidence of negligent or accidental conception also occurs." Gilbert v. General Elec. Co., 375 F. Supp. 367, 377 (E.D. Va. 1974). Testimony was introduced estimating that one-fourth of all pregnancies are aborted. *Id.* at 375.

33. There are numerous activities in which people participate knowing that there is a potential of harm, such as drinking intoxicating beverages, smoking, skiing, and playing handball—yet these voluntary risks do not preclude disability insurance coverage. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975). Cosmetic surgery and attempted suicides are covered by General Electric's disability insurance program. Gilbert v. General Elec. Co., 519 F.2d 661, 665 (4th Cir. 1975). Most disability insurance and sick leave programs cover vasectomies, prostatectomies, and hemophilia, while excluding pregnancy.

34. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 421 (1976) (Stevens, J., dissenting). *See also* Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975); Buckley v. Coyle Pub. School Sys., 476 F.2d 92, 95 (10th Cir. 1973); Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 (1971); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 788 (N.D. Iowa 1975); Ray-O-Vac v. Wisconsin Dep't Indus., Labor & Human Relations, 236 N.W.2d 209, 215 (Wis. 1975); Note, *Liberty Mutual Insurance Company v. Wetzel: New Rights For Pregnant Workers?*, 11 NEW ENGLAND L. REV. 225, 239 (1975).

35. Buckley v. Coyle Pub. School Sys., 476 F.2d 92, 96 (10th Cir. 1973); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1158 (W.D. Pa. 1974).

36. *See* Gilbert v. General Elec. Co., 375 F. Supp. 367, 377-78 (E.D. Va. 1974); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1162-63 (W.D. Pa. 1974); Robinson v. Rand, 340 F. Supp. 37, 39 (D. Colo. 1972); Ray-O-Vac v. Wisconsin Dep't Indus., Labor & Human Relations, 236 N.W.2d 209, 216 (Wis. 1975). Under the EEOC Guidelines § 1604.9(e), cost is no defense to a sex discrimination charge; several courts have

which each study has been based have varied widely so that the range of predicted cost is wide indeed. The most unknown factor is the length of absence due to pregnancy-related disabilities, which appears to be far shorter, on the average, than had been anticipated by employers and insurance companies.[38] As women move into upper level positions, obtaining careers rather than low paying, dead-end jobs, as comprehensive child care becomes more readily available, and as increasing numbers of women continue to enter the labor force out of economic need, the stereotype of the malingering woman will be forced to give way to the reality that most women do return to work as soon as they are physically capable of so doing, according to their doctor's advice.[39]

D. *Stability of Workers*

Some employers advance a fourth argument for excluding pregnancy-related disabilities from income protection plans—women on maternity leave are unlikely to return. In 1971 a Pennsylvania school board defended its policy of terminating pregnant teachers after the fifth month on the grounds that a critical teacher shortage was created when women on leave failed to return.[40] General Electric defended its pregnancy exclusion in that forty percent failed to return;[41] a year later, Metropolitan Life Insurance Company defended its

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assumed that EEOC was aware of the increased costs that would be required in order to comply with its guidelines. Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 965 (9th Cir. 1975) *cert. denied*, 97 S. Ct. 731 (1977); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 788 (N.D. Iowa, 1975); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1162 (W.D. Pa. 1974).

37. CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, WOMEN AND INSURANCE (Feb., 1975) [hereinafter cited as California Study]; CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1975 61-66 (Mar., 1976); IOWA COMMISSION ON THE STATUS OF WOMEN, A STUDY OF INSURANCE PRACTICES THAT AFFECT WOMEN (Feb. 1, 1975) [hereinafter cited as Iowa Study]; INSURANCE BUREAU, MICHIGAN DEP'T OF COMMERCE, WOMEN'S TASK FORCE REPORT TO THE MICHIGAN COMMISSIONER OF INSURANCE ON SEX DISCRIMINATION IN INSURANCE (June 2, 1975) [hereinafter cited as Michigan Study]; INSURANCE COMMISSIONER'S ADVISORY TASK FORCE ON WOMEN'S INSURANCE PROBLEMS, PENNSYLVANIA INSURANCE DEPARTMENT, FINAL REPORT AND RECOMMENDATIONS (June, 1974) [hereinafter cited as Pennsylvania Study]; New York Study, *supra* note 12; Greenwald, *Maternity Leave Policy*, NEW ENGLAND ECON. REV. (1975); Kistler & McDonough, *Paid Maternity Leave—Benefits May Justify the Cost*, 26 LAB. L.J. 782 (1975); Zimmerman, *supra* note 5, at 478-87.

38. *See, e.g.*, Gilbert v. General Elec. Co., 375 F. Supp. 367, 378-79 (E.D. Va. 1972); Gutwillig, *supra* note 29, at 7-8.

39. Public Health Service Surveys indicate that men and women lose almost the same amount of time from work due to acute disabilities, including childbirth and complications of pregnancy. In 1968 men averaged 5.2 days per year and women 5.9; in 1971 the figures were 5.1 days for men and 5.2 days for women. Moreover, the number of days of absence from work due to pregnancy-related disabilities in 1972 was one-tenth of the days missed due to respiratory ailments and less than one-fifth of the days missed due to accidents. HEW, CURRENT ESTIMATES FROM THE HEALTH INTERVIEW SURVEY UNITED STATES 1972, Table 3 (1973), *cited in* Note, *Pregnancy and Disability Insurance*, 23 DRAKE L. REV. 806, 810 n.24 (1974).

40. Cerra v. East Stroudsburg Area School Dist., 285 A.2d 206 (Pa. Commw. Ct. 1971), *rev'd*, 299 A.2d 277 (Pa. 1973). The dissent in the lower court noted that not all the teachers on leave due to childbirth failed to return and that Mrs. Cerra, in particular, had a small child when hired, making her return quite probable.

41. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974) (testimony indicated that the population average was fifty percent return).

same policy on the basis of a thirty percent no-return rate.[42] But even though the probability that persons on leave due to a pregnancy disability will not return may be greater than the corresponding probability for persons absent from work for any other reason, it appears that more women are returning than not, and in ever increasing proportions.[43] Furthermore, the fact that some persons will not return to employment after recovery from a given disability does not justify a blanket, stereotypical exclusion of that disability from an income protection program.[44]

III. Judicial Remedies

A. *Equal Protection and Title VII*

During the early 1970's, most challenges to the exclusion of pregnancy-related disabilities from sick leave and income protection programs were brought under the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment.[45] Applying either the traditional rational basis level of scrutiny[46] or the "fair and substantial relation" test[47] to such exclusions, some courts found them to be in violation of the United States Constitution.[48]

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42. Polston v. Metropolitan Life Ins. Co., Empl. Prac. Guide (CCH), 11 Empl. Prac. Dec. ¶ 10,826 (W.D. Ky. 1975).

43. *See* Note, *Liberty Mutual Insurance Company v. Wetzel: New Rights for Pregnant Workers?*, 11 New England L. Rev. 225, 247 (1975).

44. Section 703(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1972), as amended in 1972, permits only one exception to the proscription against discrimination in employment—if "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." This language has been interpreted to impose upon an employer "the burden of proving that he had reasonable cause to believe, that is a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969); *accord*, Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969). In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1224 (9th Cir. 1971), the court held that the exclusion of women is justified only when "the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of wet-nurse." Furthermore, in Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971), the court said that "business necessity" did not mean business convenience. Under these principles, an employer's refusal to grant income protection to pregnant workers on the grounds that some will fail to return to work would not qualify under the "bona fide occupational qualification" exception. *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

45. Some suits were brought under corresponding provisions in state constitutions and under state fair employment practice laws. *See* notes 94-104 *infra*; Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972), *rev'd*, 525 F.2d 695 (7th Cir. 1975).

46. *See generally* Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); Goesaert v. Cleary, 335 U.S. 464 (1948).

47. Reed v. Reed, 404 U.S. 71, 76 (1971). The United States Supreme Court has thus far refused to hold sex to be a suspect classification requiring strict scrutiny, although a plurality of four justices so held in Frontiero v. Richardson, 411 U.S. 677 (1973). Some lower federal courts and state courts have held sex to be a suspect classification in employment discrimination challenges. *See, e.g.*, Monell v. Department of Social Servs., 357 F. Supp. 1053 (S.D.N.Y. 1972) (court held that the suit could be maintained as a class action), *dismissed as moot*, 394 F. Supp. 853 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 259 (2d Cir. 1976), *cert. granted*, 97 S. Ct. 807 (1977); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971).

48. Scott v. Opelika City Schools, 63 F.R.D. 144, 149 (M.D. Ala. 1974) (court held that defendant had been unable to offer "any rational justification for its policy" of forced

In 1972 Congress passed the Equal Employment Opportunity Act amending title VII of the Civil Rights Act of 1964 to cover state and local governments, governmental agencies, educational institutions, and employers and unions of fifteen or more employees/members.[49] Less than a month later, the Equal Employment Opportunity Commission issued guidelines that declared unlawful the exclusion of pregnancy-related disabilities from any temporary disability insurance or sick leave plan by anyone covered under title VII.[50] In consequence, a great number of suits were brought under amended title VII against school districts and other employers who continued to require early maternity leaves and/or refused to allow the use of accrued sick leave or disability insurance benefits for work absence due to pregnancy-related disability.

In 1974 the Supreme Court held, in *Geduldig v. Aiello*,[51] that a state administered employee disability insurance program need not cover all possible disabilities and that the lone exclusion of normal pregnancies, in effect, was not a denial of equal protection on the basis of sex.[52]

Despite the conclusion reached by the Supreme Court in *Geduldig*, six courts of appeals[53] have since held that the exclusion of pregnancy-related dis-

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maternity leave without benefits of sick leave); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 443 (N.D. Cal. 1972) (court held defendant's maternity leave policy "is neither rationally related to a legitimate objective nor promotes any compelling interest of the defendants").

49. Sec. 703. (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;

(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.

Equal Employment Opportunity Act, § 703, 42 U.S.C. § 2000e-2(a)(1) (Supp. 1972).

50. § 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.

29 C.F.R. § 1604.10 (1972). *See generally* Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 788 (N.D. Iowa 1975) for a discussion of that court's opinion that the EEOC's 1972 Guidelines were reflective of congressional intent in title VII. *Contra*, General Elec. Co. v. Gilbert, 97 S. Ct. 401, 411-12 (1976); Newmon v. Delta Airlines, 374 F. Supp. 238, 245 (N.D. Ga. 1973).

51. 417 U.S. 484 (1974).

52. *See* Conlin, *supra* note 8, at 303, for a criticism of the *Geduldig* holding. *See also* Zimmerman, *supra* note 5, at 475.

53. Communications Workers v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975); Gilbert v. General

abilities from a sick leave or disability insurance program does violate title VII and the EEOC Guidelines. Five of the circuits expressly distinguished *Geduldig*.[54] They held that since *Geduldig* was an equal protection challenge to a state legislated insurance program, it could be narrowly confined to that type of analysis and those facts.[55] Moreover, each of the circuit courts held that Congress had clearly indicated its intent to ban all sex discrimination in employment[56] in enacting title VII of the Civil Rights Act of 1964 and in strengthening and expanding its coverage by the 1972 amendments.[57] Most federal district courts and state courts confronted with the issue reached a similar holding.[58]

Elec. Co., 519 F.2d 661 (4th Cir. 1975); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975). The Fifth Circuit in Tyler v. Vickery, 517 F.2d 1089, 1097-99 (5th Cir. 1975) distinguished the *Geduldig* equal protection analysis from a title VII analysis in a challenge to the Georgia bar examination based upon alleged racial discrimination.

54. The Eighth Circuit in Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975) held that an employer's failure to grant sick leave to and subsequent termination of a pregnant employee was a violation of title VII but without distinguishing *Geduldig*. But in 1977 in view of *Gilbert* the Eighth Circuit vacated and remanded *Liss v. School Dist.* 548 F.2d 751 (1977) in which the district court had expressly distinguished *Geduldig*. The First and Tenth Circuits have not been confronted with a title VII challenge to sick leave or disability coverage policies excluding pregnancy. The Seventh Circuit in Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), held that under title VII discrimination is not to be tolerated under the guise of physical properties possessed by one class, or through the unequal application of a seemingly neutral company policy. However, that court of appeals reversed without opinion a district court holding that a mandatory maternity leave policy was violative of equal protection and the Illinois Fair Employment Practice Act. Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972), *rev'd*, 525 F.2d 695 (7th Cir. 1975). Thus it is unclear how the Seventh Circuit Court of Appeals would decide a challenge under title VII to a sick leave/disability insurance policy that excluded pregnancy.

55. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821), *cited* in distinguishing a title VII analysis from an equal protection analysis *in* Communications Workers v. American Tel. & Tel. Co., 513 F.2d 1024, 1028 (2d Cir. 1975), and *in* Satty v. Nashville Gas Co., 522 F.2d 850, 853 (6th Cir. 1975). The circuit courts each expressly noted the distinction: "In this case . . . the issue is not whether the exclusion of pregnancy benefits under a social welfare program is 'rationally supportable' or 'invidious,' but whether Title VII, the Congressional statute, in language and intent, prohibits such exclusion." Gilbert v. General Elec. Co., 519 F.2d 661, 667 (4th Cir. 1975); *accord*, Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 203 (3d Cir. 1975); Tyler v. Vickery, 517 F.2d 1089, 1098 (5th Cir. 1975); Hutchison v. Lake Oswego School Dist., 519 F.2d 961, 964-65 (9th Cir. 1975).

56. The narrow exception is the bona fide occupational qualification (business necessity). *See* note 44 *supra*.

57. "Despite the progress which has been made since passage of the Civil Rights Act of 1964, discrimination against minorities and women continues. The persistence of discrimination, and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment." H.R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2139. *See generally* [1972] U.S. CODE CONG. & AD. NEWS 2139-44 (noting the seriousness of discrimination against women in particular). *See also id.* at 2138 (expressing the need to strengthen the power and authority of the EEOC).

58. *See, e.g.*, Payne v. Travenol Labs., Inc., 416 F. Supp. 248 (N.D. Miss. 1976); EEOC v. Children's Hosp., 415 F. Supp. 1345 (W.D. Pa. 1976); St. John v. G.W.

B. *General Electric Co. v. Gilbert*

General Electric Company appealed the decision of the Fourth Circuit[59] on the grounds that *Geduldig* was dispositive of the issue, and that title VII and the EEOC Guidelines did not compel the decision reached by the court of appeals. The Supreme Court granted certiorari and reversed.[60]

In so doing, the Court reiterated its holding in *Geduldig* that pregnancy is unrelated to sex discrimination, and that, therefore, the exclusion of pregnancy from an income protection plan is not gender-based discrimination.[61] Since the Court did not find sex discrimination in General Electric's disability insurance program, it concluded that there was nothing about that program to "trigger . . . the finding of an unlawful employment practice under § 703 (a)(1), 42 U.S.C. § 2000e-2 (a)(1)."[62]

The Court summarily dismissed the possibility that the plan might be discriminatory in its effect even if neutral on its face. Without having looked at the disparate effect of pregnancy exclusion on male and female workers, the Court circuitously argued that there could be no discriminatory effect because plaintiffs had failed to make out a prima facie case "that the acts they complain[ed] of constituted discrimination in violation of Title VII."[63]

An additional hurdle for the Court was the respondent's argument that General Electric's plan was in direct conflict with the 1972 EEOC Guidelines. The Court swept aside this argument by holding that the Commission's guidelines were entitled only to "consideration" and not "great deference"[64] because they were inconsistent with EEOC pronouncements regarding pregnancy which were more contemporaneous with the enactment of title VII.[65] In addition, the EEOC Guidelines conflict with those issued by the Wage and Hour Administrator on the subject.[66]

Murphy Indus., Inc., 407 F. Supp. 695 (W.D.N.C. 1976); Mitchell v. Board of Trustees, 415 F. Supp. 512 (D.S.C. 1976); Liss v. School Dist., 396 F. Supp. 1035 (E.D. Mo. 1975); Zichy v. City of Philadelphia, 392 F. Supp. 338 (E.D. Pa. 1975); Paxman v. Wilkerson, 390 F. Supp. 442 (E.D. Va. 1975); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784 (N.D. Iowa 1975); Polston v. Metropolitan Life Ins. Co., EMPL. PRAC. GUIDE (CCH), 11 Empl. Prac. Dec. ¶ 10,826 (W.D. Ky. 1975); EEOC v. Barnes Hosp., EMPL. PRAC. GUIDE (CCH), 11 Empl. Prac. Dec. ¶ 10,726 (E.D. Mo. 1975); Vineyard v. Hollister Elem. School Dist., 64 F.R.D. 580 (N.D. Cal. 1974). *Contra*, Roller v. City of San Mateo, 399 F. Supp. 358 (N.D. Cal. 1975); de Laurier v. San Diego Unified School Dist., EMPL. PRAC. GUIDE, 9 Empl. Prac. Dec. ¶ 9,893 (S.D. Cal. 1974). *See also* notes 94-98 *infra*.

59. Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975), *cert. granted*, 423 U.S. 822 (1975).

60. 97 S. Ct. 401 (1976).

61. *But see* General Elec. Co. v. Gilbert, 97 S. Ct. 401, 414 (1976) (Brennan, J., dissenting): "Surely it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly sex-related."

62. *Id.* at 408.

63. *Id.*

64. *See* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Udall v. Tallman, 380 U.S. 1, 16 (1965).

65. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 411-12 (1976).

66. This argument by the Court is strained in light of its invocation of the EEOC Guidelines in earlier title VII cases. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1970) (Marshall, J.,

The decision reached by the Court and the reasons given in support of its decision are difficult to accept. The Court's decision to look to equal protection cases, in particular *Geduldig*, rather than to title VII cases, for the meaning and limits of discrimination is unexplainable in light of the specific issue the Court was asked to decide in *Gilbert*, as well as in light of early decisions by the Court under title VII. The Court not only avoided a determination of the discriminatory effect of excluding pregnancy from income protection, but also ignored the factor of discriminatory intent on the part of the defendant. Intent under title VII requires only that the defendant employer meant to do what it did, that is, that the employment practice was not accidental. It is not necessary that there be a willful and deliberate intention to violate the law.[67]

The Court was also oblivious to Congress's intent in passing the Civil Rights Act of 1964 and the amendments strengthening it in 1972. The lower federal courts relied heavily on congressional intent in determining not only that the exclusion of pregnancy from a sick leave or income protection plan was contrary to the clear meaning of title VII, but also that the 1972 EEOC Guidelines were in no way inconsistent with the language of title VII or congressional intent to eliminate employment practices which discriminate on the basis of sex.[68] The unwillingness of the Court, for the first time, to grant great deference or in fact accord *any* weight to EEOC Guidelines is especially troublesome.[69]

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concurring). In Satty v. Nashville Gas Co., 522 F.2d 850, 854 n.9 (6th Cir. 1975), the Sixth Circuit dismissed defendant's similar contention that the EEOC Guidelines were unreflective of congressional intent. The defendant argued that the Guidelines were contrary to the policy toward pregnancy of the Wage and Hour Administration under the Equal Pay Act and the interpretation by the Office of Federal Contract Compliance of Executive Order No. 11246. The Sixth Circuit said these were irrelevant because the issue before it was an interpretation of title VII and not the Equal Pay Act or Executive Order No. 11246.

67. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 415 (1976) (Brennan, J., dissenting). For a discussion of earlier judicial interpretations of intent under title VII, *see* Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 246 (3d Cir. 1973); Sprogis v. United Air Lines, 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1163 (W.D. Pa. 1974); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969).

68. *See* General Elec. Co. v. Gilbert, 97 S. Ct. 401, 418 (1976) (Brennan, J., dissenting); Communications Workers v. American Tel. & Tel. Co., 513 F.2d 1024, 1031 (2d Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850, 854 (6th Cir. 1975); Farkas v. South Western City School Dist., 506 F.2d 1400 (6th Cir. 1974), *aff'g* LAB. REL. REP. (BNA) 8 Fair Empl. Prac. Cas. ¶ 288 (S.D. Ohio 1974); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 788 (N.D. Iowa 1975).

69. *See* note 64 *supra*. The Court questioned both the EEOC's authority to promulgate guidelines, and the difference between its 1972 Guidelines and earlier informal opinions by the Commission. The Third Circuit had already addressed these issues, stating:

> The EEOC as the agency charged with the responsibility of administering the Act, has issued the Guidelines to keep pace with changes in society's attitudes. This evolutionary process is a necessary function of our legal system—a system that must remain flexible and adaptable to ever-changing concepts of our society.

Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 205 (3d Cir. 1975).

The Court in *Gilbert* cited two opinions in support of its lack of deference to the noncontemporaneous Guidelines; both are easily distinguished. In Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), the Court refused to follow an EEOC Guideline on the grounds that it was not reflective, but in fact contrary, to congressional intent. In United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1975), the Court stated that it was unwilling to rest its decision on an amicus brief filed by the SEC because it conflicted with an earlier

However, the most disconcerting message of the Court's holding in *Gilbert* is its failure to look beyond semantics and to the real effect of the exclusion of pregnancy from income protection on the role of women in the labor force. The Court is reinforcing old myths about women workers—that they are not permanent members of the labor force and that they work only until marriage or childbirth and then quit. Thus, in the eyes of the Court, it is acceptable for women to be paid less and to be less than fully protected against the financial loss of income disruption, especially those disruptions occurring as a result of pregnancy. This is a stereotypical view, contrary to the evidence. Furthermore, this is not what Congress intended and it is not how the circuit courts have interpreted title VII.

On the other hand, the *Gilbert* decision can be limited strictly to its facts just as was *Geduldig* by lower federal courts. General Electric was, in effect, a self-insurer, using the administrative services of an outside insurance company merely to process employee claims. Thus, neither *Geduldig* nor *Gilbert*, on their facts, reach directly a disability insurance policy issured by a state regulated insurance company to an employer for the protection of its employees.

Furthermore, neither *Gilbert* nor *Geduldig* reach sick leave benefit plans, a form of income protection widely used by schools and government as well as other employers. However, in January, 1977, the Supreme Court granted certioriari[70] to the decisions of the Fifth and Ninth Circuits in *Satty v. Nashville Gas Co.*[71] and *Berg v. Richmond Unified School District*,[72] respectively. The question before the Supreme Court is whether an employer's[73] denial of accrued sick leave benefits for pregnancy-related disabilities is sex discrimination in violation of title VII. In both *Satty* and *Berg*, the employee was required to begin her maternity leave at a fixed point in her pregnancy without regard to her ability or desire to continue working, and was denied the use of her accrued sick leave. In *Satty*, the employee was denied not only sick leave pay, but also her job bidding seniority.

An accrued sick leave plan as a form of income protection is distinguishable from employer provided disability insurance. Under a disability insurance program, the employee, while temporarily unable to work, is given a percentage of the income he or she would have earned had the disability not prevented job performance. In the case of accrued sick leave benefits, however, the employee has earned through performance of his or her employment responsibilities

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Commission release.

The Court in *Gilbert* also cites Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), for the proposition that the degree of judicial deference given an agency determination is proportionate to the thoroughness evident in its consideration and the validity of its reasoning. In light of the time and study spent in developing the 1972 Guidelines, the EEOC's product is entitled to the great deference it had been given by the Court in earlier decisions.

70. 45 U.S.L.W. 3499 (Jan. 25, 1977).
71. 522 F.2d 850 (6th Cir. 1975).
72. 528 F.2d 1208 (9th Cir. 1975).
73. Appellant in *Berg* is a public employer; in *Satty*, a private employer.

the right to use an accumulated number of paid work days to recover from a non-work-related disability. Thus, the denial of accrued sick leave for pregnancy-related disabilities is the taking back of a vested employment benefit, whereas the exclusion of pregnancy from disability insurance plans is rather the refusal by the employer to grant an employment benefit.[74] The holding in *Gilbert* can be narrowly interpreted to mean only that an employer need not provide all workers with a particular *benefit* of employment.

Secondly, the Supreme Court in *Gilbert* was confronted with much data regarding actuarily determined insurance costs and benefits. The employer utilized this data in determining which benefits to bestow upon its employees. The Court will not be so confronted in the *Berg* and *Satty* arguments, in that all employees of the Richmond School District and the Nashville Gas Company have the opportunity to accrue sick leave days.

The overriding problem to be tackled by the *Berg* and *Satty* appellees is that the Court will be construing the same federal statute, title VII, in reaching its decision in those cases as it did in the *Gilbert* case. Thus, the distinctions that the Court will be asked to make in *Berg* and *Satty* are primarily factual ones and not those of statutory construction, legislative intent, and legal analysis that the Court was asked to make in the *Gilbert* decision.[75]

IV. Post Gilbert Income Protection

Reading *Geduldig* and *Gilbert* broadly, it is presently a violation of neither the fourteenth amendment nor title VII to deny women workers full income protection. Thus, the immediate task is to find alternatives to federal judicial action to remedy this inequity.

A. *Equal Rights Amendment*

Ratification of the Equal Rights Amendment to the Constitution will prohibit the denial of "equality of rights under the law . . . by the United States or by any State on account of sex." Three more states must ratify the amendment before it becomes part of the Constitution. However, there are doubts as to whether the Supreme Court will interpret the amendment as prohibiting disparate treatment of female and male workers as regards the exclusion of a "sex-unique trait," *i.e.*, pregnancy, from income protection plans, sick leave policies, and insurance programs. The insurance companies that issue both private disability insurance to individuals and group disability insurance to employers may not be affected by the amendment unless the state action require-

74. Information obtained during phone conversations on March 11, 1977 with counsel for appellees Berg and Satty: Mary Dunlap, Equal Rights Advocates, San Francisco, and Robert W. Weismueller, Jr. & Tom. H. Williams, Jr., Nashville, Tennessee, respectively.

75. Certiorari also has been granted in Monell v. Department of Social Servs., 532 F.2d (2d Cir. 1976). The Second Circuit dismissed an appeal from the decision of the District Court for the Southern District of New York which held that the denial to pregnant

ment is met.[76] Furthermore, the legislative history of the amendment's passage by Congress makes unclear its application to pregnancy treatment by employers and others.[77]

Some hope is found in those states which have an equal rights amendment to their state constitution. In the state of Washington, which has an equal rights amendment, a statute that denied unemployment compensation to a woman who was involuntarily unemployed because of pregnancy was held violative of the state constitution.[78] Pennsylvania, a large insurance state that also has a state equal rights amendment, has to date construed its amendment in challenges involving mandatory maternity leave and school athletics, but not in a disability insurance challenge.[79]

The primary hope is that pregnancy and the right to bear children will be viewed by the Court as a "socially beneficial function," and that when confronted with a pregnancy exclusion challenge under a ratified equal rights amendment, the Court will accord great deference to the congressional intent that the amendment have a remedial effect in eradicating present sex discrimination.[80]

B. *Federal Legislation*

Another alternative to the result in *Gilbert* is the possibility of Congress legislatively overruling that decision. A bill has been introduced in the United States Senate that will incorporate into title VII of the Civil Rights Act section 1604.10(b) of the EEOC Guidelines.[81]

C. *Unemployment Compensation*

For those women who are forced to leave their jobs at a stage in pregnancy when they are still able to work and/or are not allowed to return to work for

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workers of accrued sick leave was a denial of equal protection. But the Second Circuit did uphold the district court's dismissal of the claim for damages and back pay under 42 U.S.C. § 1983 on the grounds that the defendant was not a person within the meaning of section 1983. It is that issue which will be before the Supreme Court.

76. *Cf.* Reichardt v. Payne, 396 F. Supp. 1010, 1014-15 (N.D. Cal. 1975); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 437-39 (E.D. Pa. 1973).

77. *See, e.g.*, 117 CONG. REC. 35296 (1971) (Rep. Griffiths stated that "equality" would not preclude legal distinctions between the sexes that are generally related to their physical differences, citing criminal rape laws as her only example.); 118 CONG. REC. 9320 (1972) (Sen. Stennis, an opponent of the Equal Rights Amendment, noted that under the amendment, there would continue to be legal recognition of sexual differences, *e.g.*, laws protecting the rights of working women during pregnancy.); 118 CONG. REC. 9554 (1972) (Sen. Bayh indicated that the amendment would not prohibit reasonable classifications based upon characteristics unique to one sex.).

78. Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1974).

79. *See* Leechburg Area School Dist. v. Commonwealth, 339 A.2d 850, 853 n.2 (Pa. Commw. Ct. 1975); Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839, 841 (Pa. Commw. Ct. 1975).

80. For additional discussion *see* Zimmerman, *supra* note 5, at 473; Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381, 1396 (1975).

81. S. 995, introduced by the Subcommittee on Employment of the Senate Human Resources Committee, March, 1977.

a predetermined length of time after the birth of their child, without regard for their desire and ability to return, there is unemployment compensation. This is a form of income protection for persons who are involuntarily unemployed and who are able to work. In *Turner v. Department of Employment Security*,[82] the United States Supreme Court held that Utah's denial of unemployment compensation benefits to pregnant and postpartum women who were willing and able to work was constitutionally invalid.[83] The Court said that such a denial is based on an irrebuttable presumption identical to that found unconstitutional in *Cleveland Board of Education v. La Fleur*.[84]

Furthermore, last year the Unemployment Compensation Amendments of 1976 were passed by Congress and signed into law. The new amendments prohibit states from denying benefits on the basis of pregnancy with respect to certifications for 1978 and later.[85]

The *Turner* decision and the Unemployment Compensation Amendments will not provide relief from income disruption for women workers during the time they are absent from work due to disabling complications of pregnancy, childbirth, or recovery therefrom. However, unemployment compensation should soon be available for those women forced to take premature and unnecessarily lengthy leaves of absence on account of their pregnancies.[86]

D. *Individual Disability Insurance Policies*

A possible alternative, but an expensive one, is privately purchased individual disability insurance. Its expense is double barrelled—the policies available for women generally offer significantly less insurance coverage than similar policies offered to men and the costs are considerably higher.[87] Furthermore, pregnancy-related disability is the major excluded category. In studies in several states within the past four years, it has been found that no companies yet offer pregnancy coverage in individual disability insurance policies, although some

82. 423 U.S. 44 (1975) (per curiam).

83. In *Turner*, the Court noted that "a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after birth." *Id.* at 46. Mrs. Turner, in fact, was employed intermittently as a clerical worker while pregnant and presumed incapacitated. *See also* Cedar Rapids Community School Dist. v. Parr, 227 N.W.2d 486 (Iowa 1975) (pregnant physical education teacher allowed to work as substitute teacher after forced to take early maternity leave).

84. 414 U.S. 632, 639 (1974). However, the Court in *La Fleur* left open the possibility that a mandatory leave date set closer to expected delivery date might be found reasonable in light of medical evidence and the interests of the school system. *Id.* at 647 n.13. In *deLaurier v. San Diego Unified School Dist.*, EMPL. PRAC. GUIDE (CCH), 9 Empl. Prac. Dec. ¶ 9893 (S.D. Cal. 1974), the court upheld a mandatory leave requirement at the end of the eighth month of pregnancy, relying on *LaFleur*. *Accord*, Roller v. City of San Mateo, 399 F. Supp. 358 (N.D. Cal. 1975) (city policy placing pregnant police officers on leave without pay when determined incapable of full performance of employment duties upheld).

85. UNEMPL. INS. REP. (CCH) ¶ 23,031 (1977).

86. *See* Conlin, *supra* note 8, at 304-06 for a summary of state legislation and judicial decisions in the area of unemployment compensation.

87. Pennsylvania Study, *supra* note 37, at 18; New York Study, *supra* note 11, at 22.

companies which sell group disability insurance to employers do offer limited pregnancy-related disability coverage.[88]

There are two reasons offered by the insurance industry for the exclusion of pregnancy coverage. One is cost. The industry points to the already high cost of such insurance for women and argues that the inclusion of pregnancy coverage would increase the cost much further. There are several counterarguments to this stance. At present, actuarial tables segregate male and female insureds before classifying them by occupational risk. Because fewer women than men buy disability insurance, segregating by sex, rather than by job regardless of sex, creates a distortion that causes women to be worse insurance risks than men.[89] Further, the present high rates may be anti-selective; that is, many women—perhaps those who consider themselves healthier—refuse to buy such expensive insurance, resulting in a small population of insureds. If the rates were lower, it is argued, more women would buy, creating a larger group over which the risks of insurance could be spread.

Many estimates have been made as to the cost of including pregnancy in disability coverage. They vary so widely that there is no way of knowing what the actual costs will be until such insurance is offered and purchased by a large number of individuals and employers.[90] In those states where disability insurance must cover pregnancy by law, the cost increases have been moderate to minimal.[91]

The other arguments raised by the insurance industry in support of its present policy on disability insurance for women are the same as those espoused by employers for denying sick leave benefits and/or disability coverage to pregnant workers. Pregnancy is voluntary; women are temporary workers who will abuse the insurance system by staying home, *i.e.*, malingering, if they can be collecting disability insurance instead of working.[92]

In Iowa, the State Insurance Department, in 1976, promulgated departmental rules prohibiting the denial of disability income coverage to working women and the differentiation between the complications of pregnancy and any other covered disability.[93] The rules, while a positive step, do not require the

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88. Pennsylvania Study, *supra* note 37, at 20; New York Study, *supra* note 11, at 24; California Study, *supra* note 37, at 19; Michigan Study, *supra* note 37, at 24; Iowa Study, *supra* note 37, at 42.

89. New York Study, *supra* note 11, at 23.

90. *See* notes 36-39 *supra*.

91. *See* New York Study, *supra* note 11, at 25-26; Note, *Pregnancy and Disability Insurance*, 23 DRAKE L. REV. 806, 810 (1974).

92. *See* Michigan Study, *supra* note 37, at 25-26. One insurance company's underwriting manual reads:

> . . . women's role in the commercial world is a provisional one . . . they work not from financial need but for personal convenience. The subjective circumstances which create "convenience" tend to change; and if a woman has disability coverage, the temptation exists to replace her earnings with an insurance income once work loses its attractiveness.

Id.

93. 510 IOWA AD. CODE § 15.53 (1976).

inclusion of income disruption due to normal pregnancy in disability insurance coverage.

E. *State Statutes*

In some states, state courts have interpreted state employment laws to prohibit employers from denying pregnant workers the use of paid sick leave or full disability insurance coverage. In 1971, the Supreme Court of Pennsylvania held the dismissal of a teacher at the end of the fifth month of pregnancy to be violative of Pennsylvania's Human Relations Act.[94] Three years later the New York Court of Appeals affirmed two state supreme court decisions, one holding that a school district policy requiring early maternity leave was prohibited by the state's Human Rights Law,[95] and the other that a denial of accrued sick leave to persons on leave of absence due to pregnancy-related disabilities was likewise violative of state laws.[96] A year later, the Wisconsin Supreme Court upheld a finding by the Wisconsin Department of Industry, Labor and Human Relations that an employer's policy limiting disability benefits for pregnancy and childbirth to six weeks while allowing twenty-six weeks coverage for all other disabilities was violative of the state's Fair Employment Law.[97]

The Iowa Supreme Court, in *Cedar Rapids Community School District* v. *Parr*,[98] decided that a mandatory leave policy, without pay, for pregnant employees was violative of the Iowa Civil Rights Act.[99] In reaching that decision the Iowa court held that state statutory authority can be broader in its effect than the federal statute after which it was modeled.[100]

Subsequent to the *Parr* decision, the Iowa General Assembly enacted legislation that allows state public and public school employees to use accrued sick leave benefits for any medically-related disability, including pregnancy and recovery from pregnancy.[101] Subsequent challenges in Iowa to the exclusion of

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94. Cerra v. East Stroudsburg Area School Dist., 299 A.2d 277, 279 (Pa. 1973), *rev'g* 285 A.2d 206 (1971). *But see* Richards v. Omaha Pub. Schools, 232 N.W.2d 29 (Neb. 1975).

95. Board of Educ. v. New York State Div. of Human Rights, 35 N.Y.2d 673, 319 N.E.2d 202, 360 N.Y.S.2d 887 (1974), *aff'g* 42 App. Div. 2d 49, 345 N.Y.S.2d 93 (1973).

96. Board of Educ. v. New York State Div. of Human Rights, 35 N.Y.2d 675, 319 N.E.2d 203, 360 N.Y.S.2d 889 (1974), *aff'g* 42 App. Div. 2d 854, 346 N.Y.S.2d 843 (1973). *But see* Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 50 App. Div. 2d 381, 378 N.Y.S.2d 720 (1975); State Div. v. Crouse-Irving Memorial Hosp., 50 App. Div. 2d 1083, 377 N.Y.S.2d 315 (1975); American Airlines, Inc. v. New York State Human Rights Appeal Bd., LAB. REL. REP. (BNA), 12 Fair Empl. Prac. Cas. 166 (N.Y. App. Div. 1974). These cases illustrate the split which exists among the New York departments on the issue of whether the New York Human Rights Act forbidding the exclusion of pregnancy benefits from income protection plans repealed by implication the New York Workmen's Compensation Law which permits the exclusion.

97. Ray-O-Vac v. Wisconsin Dept. Indus., Labor & Human Relations, 236 N.W.2d 209 (Wis. 1975). This is a common practice, according to the Pennsylvania Study, *supra* note 37, at 20.

98. 227 N.W.2d 486 (Iowa 1975).

99. Iowa Civil Rights Act, IOWA CODE ch. 601A (1974).

100. Civil Rights Act, § 703(e), 42 U.S.C. § 2000e-2e (1964).

101. Public Officers & Employees—Sick Leave, H.F. 243, 1976 Iowa Acts ch. 1083

pregnancy-related disabilities from income protection plans will be aided by this strong indication of legislative intent.

Following the United States Supreme Court's decision in *Gilbert*,[102] the Iowa Civil Rights Commission issued a statement reiterating its determination to enforce the Iowa statute as interpreted in *Parr*, regardless of the United States Supreme Court's interpretation of the federal statute title VII.[103] The Iowa Civil Rights Commission had earlier promulgated rules nearly identical to the EEOC Guidelines.[104]

F. *Collective Bargaining*

A final hope for income protection during absences from work due to pregnancy-related disabilities rests with collective bargaining. Unions have already demonstrated their position in support of pregnancy inclusion in fringe benefit agreements, and have gone to court on behalf of their members to gain such protection.[105] According to the Fourth Circuit the general rule in labor arbitration cases "is to equate pregnancy disability and sickness and to find an employee entitled to the same disability benefits in pregnancy confinement as in the case of any other disability under an employee sickness benefit."[106] As more women enter non-traditional occupations that have been unionized, and as many other professions begin to unionize, collective bargaining may prove itself to be the most effective way for women to gain the equitable income protection they must have.

V. Conclusion

The Victorian paternalism reflected in the *Bradwell*[107] decision is not appropriate to the economic needs of women today. Women work for the same reasons that men work and their income needs are as much entitled to protection. "The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure."[108] It was the

(amending Iowa Code § 79.1 (1975)). However, the Iowa General Assembly has failed to amend the Iowa Civil Rights Act to remove the provision in the Act that exempts sex provisions in the Act from applying to retirement plans and employment benefit plans. A bill that would have this effect has been introduced again in the 67th General Assembly. H.F. 481, March 31, 1977, sent to House Comm. on the Judiciary and Law Enforcement.

102. 97 S. Ct. 401 (1977).

103. 240 Iowa Ad. Code, ch. 4.10 (601A) (1976).

104. Letter from Thomas Mann, Jr., Executive Director of the Iowa Civil Rights Commission, to Jack Schmidt, Chairperson, Davenport School Board, with copies to School Board, Iowa Ass'n of Local Human Rights Commissions, Iowa State Education Association, and the American Federation of Teachers (Feb. 18, 1977).

105. *See, e.g.*, General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976) (International Union of Electrical, Radio and Machine Workers); Geduldig v. Aiello, 417 U.S. 484 (1974) (AFL-CIO); Communications Workers v. American Tel. & Tel. Co., 513 F.2d 1024 (1975) (Communications Workers of America, AFL-CIO).

106. Gilbert v. General Elec. Co., 519 F.2d 661, 665 (1975).

107. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

108. Truax v. Raich, 239 U.S. 33, 41 (1915).

intent of Congress that title VII further secure for women the opportunity to pursue work and earn an economic livelihood on the same footing as men. The *Gilbert* decision is contrary to this manifested intent but it will not prevent women from continuing to seek full disability coverage—in state courts, by congressional action, through changes in insurance regulations and enforcement, and under inclusive collective bargaining agreements.

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