(*Wrongful death case—claim by decedent's estate*)

4.1 That decedent's (death/property damage) resulted from (describe defect, occurrence, or other cause) .

(*Recovery of damages occasioned by death*)

4.2 That the death of (decedent) , and (if applicable) claimant's (loss/injury) resulted from (describe defect, occurrence, or other cause) .

(*Notice of subrogation by insurance company*)

4.3 That the (loss/injury) of claimant's insured, (name insured) , resulted from (describe defect, occurrence, or other cause) , and that this claimant has become subrogated to the right of recovery of (name insured) .

5. That claimant demands the sum of $____ and (or) (state further relief demanded) .

(*Where amount of damages is not yet ascertainable*)

5.1 That the full extent of claimant's (injuries/expenses/losses) cannot be determined with accuracy at this time.

(signature)

# Case Notes

**CONSTITUTIONAL LAW**—MANDATORY MATERNITY LEAVE TERMINATION AND RETURN PROVISIONS OF SCHOOL BOARDS VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.—*Cleveland Board of Education v. LaFleur* (U.S. Sup. Ct. 1974).

Plaintiff-appellee was a pregnant school teacher employed within the Cleveland school system. Plaintiff was forced to leave her position due to a mandatory maternity leave regulation that required a pregnant school teacher to take unpaid leave five months before the expected childbirth, with the application for such leave made no later than two weeks prior to the date of departure. The regulation provided that a teacher could not return to work until the beginning of the next regular school semester following the date when her child attained the age of three months. Re-employment was guaranteed no later than the first day of the school year after the date she was declared re-eligible. A doctor's certificate attesting to the health of the teacher was a prerequisite to return. In reversing the district court, the Court of Appeals of the Sixth Circuit held the Cleveland rule unconstitutional.[1] In *Cohen v. Chesterfield County School Board*,[2] the Fourth Circuit Court of Appeals held the Chesterfield rule, which was analogous to the Cleveland rule, constitutional. Both cases were argued together before the United States Supreme Court. The Supreme Court, one justice dissenting, *held*, the mandatory termination provisions of both maternity rules violated the due process clause of the fourteenth amendment. The Court also held the Cleveland three month return provision to be violative of due process, being both arbitrary and irrational. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

The fourteenth amendment provides that states cannot deprive "any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[3] Both plaintiffs in the *LaFleur*[4] and *Cohen*[5] cases, and plaintiffs in a majority of lower court cases,[6] argued that a school board's mandatory maternity leave regulations

1. LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).
2. Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973). See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 635 n.1, 637 n.5 (1974), for maternity leave provisions of both school boards.
3. U.S. CONST. amend. XIV, § 1.
4. LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1186 (6th Cir. 1972).
5. Cohen v. Chesterfield County School Bd., 474 F.2d 395, 396 (4th Cir. 1973).
6. *See, e.g.*, Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972). *But cf.*, Pockington v. Duval County School Bd., 345 F. Supp. 163 (M.D. Fla. 1972).

were arbitrary, unreasonable, and discriminatory and thus in violation of the equal protection clause of the fourteenth amendment. In his concurring opinion in *LaFleur*, Mr. Justice Powell questioned the wisdom of the majority in its analysis of the case under the due process clause and pointed out that the case presented the kind of problem susceptible to an equal protection argument.[7]

Analyzing equal protection cases requires the use of "concepts that bend or fall limp to chase words that move with a mind of their own into categories which are just not there anymore."[8] Through a case by case process, the Supreme Court has devised two "tests" when dealing with the equal protection clause, and is slowly developing a third. In what has been called an "old equal-protection" test, statutory or regulatory classifications are presumed constitutional and will not be disturbed unless the person assailing the classification shows that there is no rational relationship to a valid objective under state police powers.[9] However, under the "new equal protection" test, a strict scrutiny is required for a fundamental right or a suspect classification and if either is found a regulation or statute will not stand unless it is necessary for an accomplishment of a compelling state interest.[10] A third "sliding scale test" attempts to balance personal interests with a compelling state interest and analyze cases on the basis that "[a]s the nexus between the specific constitutional guarantee and [a] nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."[11]

The present Supreme Court appears uncomfortable and unsure of itself upon dealing with these tests.[12] In *Dunn v. Blumstein*,[13] Mr. Chief Justice Burger expressed his fear that no state has ever been able to satisfy the insurmountable "compelling state interest" standard.[14] In another decision, *San*

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7. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974).

8. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973). There have been several notable articles analyzing the due process and equal protection clauses. *See, e.g.*, Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969); Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103 (1972).

9. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Morey v. Doud, 354 U.S. 457, 463-64 (1957); Bravo v. Board of Educ., 345 F. Supp. 155, 157 (N.D. Ill. 1972).

10. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438, 443 (N.D. Cal. 1972).

11. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting). *See also* James v. Strange, 407 U.S. 128, 140 (1972); Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972); Reed v. Reed, 404 U.S. 71, 75-76 (1971).

12. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70-137 (1973) (Marshall, J., dissenting).

13. 405 U.S. 330 (1972).

14. *Id.* at 363-64.

*Antonio Independent School District v. Rodriguez*,[15] the Court seemed hesitant to apply a rigorous judicial scrutiny test.[16] Division can also be found among the Justices upon whether sex should be considered a suspect classification.[17] Confronted with these problems in *LaFleur*, it appears that the Supreme Court found it expedient to analyze the facts under the due process clause where an "individualized determination" of the case can take place. Former Mr. Justice Harlan, dissenting in *Shapiro v. Thompson*,[18] expounded upon the proper use of the due process clause by stating that when "a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution then there is no need for any resort to the Equal Protection Clause; in such instances this Court may properly and straight forwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause."[19] Due process analysis permitted the Court in *LaFleur* to identify both a valid state interest and an individual fundamental right and to weigh them to see if the particular school board regulation unduly infringed upon the teacher's constitutional liberty.[20] Irrebutable presumptions of physical incompetency are invalid when there are reasonable alternative means by which the school boards could make a final determination. Pregnancy is an individualized matter and due process requires an individualized determination.[21]

In *LaFleur*, the Supreme Court did not address itself to specific guidelines that the school boards must follow, as it has done in other due process cases.[22] "Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable."[23] Today, school boards are confronted with a variety of problems when dealing with their maternity leave provisions. In *LaFleur*, the Court alluded to the proposition that school boards now have a heavy burden to present medical data to justify any regulation which terminates the pregnant teacher's job before the delivery date.[24] There is some medical opinion that a woman can work almost until her due date,[25] although "if a statutory generalization is necessary, the maximum period of disability would be approximately two weeks before delivery to four weeks after."[26] The condition of pregnancy is not one of gen-

15. 411 U.S. 1 (1973).
16. *Id.* at 28-34.
17. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), four justices found classifications based upon sex as inherently suspect while three other justices did not wish to recognize sex as a suspect classification. *See also* Reed v. Reed, 404 U.S. 71 (1971).
18. 394 U.S. 618 (1969).
19. *Id.* at 659-61 (Harlan, J., dissenting).
20. 414 U.S. 632, 640-41, 649-50 (1974).
21. *Id.* at 645-46.
22. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).
23. Railroad Express Agency v. New York, 336 U.S. 106, 112 (1949).
24. 414 U.S. 632, 647 n.13 (1974).
25. Pockington v. Duval City School Bd., 345 F. Supp. 163, 164 (M.D. Fla. 1972). In this case a doctor testified, "'I know of no medical reason why a pregnant school teacher who is progressing normally should not continue to work practically until her due date.'" When asked if there was any other view within the medical profession, the doctor answered, "'I am not familiar with any other.'"
26. Comment, *Love's Labor Lost: New Conceptions of Maternity Leaves*, 7 HARV.

eral limitation and the duration of childbirth leave should be a matter between the individual woman and her physician.[27] A school board runs a high risk of facing litigation if there is any implication that its physician has been giving "stamped" recommendations on a pre-birth termination date.[28] Also, maternity leave regulations of school districts that are based upon a distinction of tenured and untenured teachers face the possibility of being classified as arbitrary.[29] However, the Court in *LaFleur*, despite Mr. Justice Powell's doubts,[30] recognized a valid school board interest in continuity of instruction and in requiring a teacher to return at the next semester following the child's birth.[31] According to one author's opinion, it appears that fairness would require a teacher to give reasonable notice to the school board of her anticipated departure date, her physician's name, and a tentative commitment that she will return when she is physically capable.[32] Any difficulties arising from delivery or any illness to the child should be determined by the woman's physician and the school board may require medical certification for extended absences.[33] This places the school boards in the position of having to consider absences due to childbirth as being equivalent to leaves accorded for other temporary physical disabilities.[34]

In *LaFleur*, it is pointed out the practical impact that the recent amendment to Title VII of the Civil Rights Act of 1964 will have on similar suits in the future.[35] This amendment[36] extends the application of Title VII to state agencies and educational institutions.[37] Title VII forbids discriminatory practices by employers based on race, religion, sex, color or national origin. The effectiveness of Title VII in dealing with maternity leave practices depends upon the "bona fide occupational qualification" exception. Under this exception, discrimination is permissible when reasonable necessity within a particular business requires it.[38] The Equal Employment Opportunity Commission

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CIV. RIGHTS-CIV. LIB. L. REV. 260, 287-88 (1972) [hereinafter referred to as *Love's Labor Lost*]. In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 656 n.5 (1974), Mr. Justice Powell, in his concurring opinion, thinks that in the light of the Court's language a four week pre-birth cutoff date would be acceptable, and in *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501, 508 (S.D. Ohio 1972), the district court granted an award for lost pay of an amount equal to eight weeks salary which constituted reasonable delivery and postnatal care.

27. Comment, *Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis*, 45 TEMP. L.Q. 240, 245 (1971).

28. *See generally* Green v. Waterford Bd. of Educ., 473 F.2d 629, 636 (2d Cir. 1973) for the court of appeals' discussion of the "battle of obstetricians."

29. Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 507 (S.D. Ohio 1972).

30. 414 U.S. 632, 655 n.4 (1974).

31. *Id.* at 641, 648-50.

32. *Love's Labor Lost*, *supra* note 26, at 295.

33. *Id.* at 296.

34. Green v. Waterford Bd. of Educ., 473 F.2d 629, 636-37 (2d Cir. 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 507 (S.D. Ohio 1972).

35. 414 U.S. 632, 638-40 n.8 (1974).

36. 42 U.S.C. § 2000e(a) (Supp. 1972), *amending* 42 U.S.C. § 2000e(a) (1964).

37. In *Buckley v. Coyle Pub. School Sys.*, 476 F.2d 92, 94 n.1 (10th Cir. 1973), plaintiff-appellant brought an action under amended Title VII, but the action was not allowed because she failed to exhaust her administrative remedies.

38. 42 U.S.C. § 2000-2(e) (1970).

(E.E.O.C.), the administrator of Title VII, has asserted that an employer's maternity leave policy may fall within this exception but the employer would have a heavy burden to prove that all women at any particular stage of pregnancy cannot efficiently and safely carry out their duties.[39] In response to the amendment of Title VII, the E.E.O.C. has adopted guidelines classifying mandatory maternity leave rules as prima facie violations of Title VII.[40] Women are only affected when there is forced termination of employment or loss of seniority due to childbirth and this would be classified under Title VII as discrimination.[41]

With Title VII now included with the equal protection and due process clauses as a means of attacking maternity leave policies,[42] these mandatory regulations can no longer be based upon fears of problems that might eventually arise. It is recognized that school boards do have a valid interest in the administration and the protection of their school children and teachers, however, such interests should not deny a teacher certain employee benefits because she is pregnant. The concept that pregnancy is a "physiological condition" rather than a temporary disability has been used as an excuse to deny women disability benefits such as sick leave and insurance.[43] Once pregnancy can be established as a temporary disability and "women are entitled the same autonomy and economic benefits in dealing with it that employees have in dealing with other temporary disabilities,"[44] then a school board's unpaid maternity leave of absence policy appears unjustifiable. However, the success of Title

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39. *See* Brief for E.E.O.C. as Amicus Curiae, Schattman v. Texas Empl. Comm'n, 330 F. Supp. 328 (W.D. Tex. 1971).

40. 29 C.F.R. § 1604.10 (1972).

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 or unwritten employment policies and practices involving matter 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 health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

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

41. *Love's Labor Lost, supra* note 26, at 268.

42. Another means of attacking mandatory maternity leave provisions could take place under the equal rights amendment. As of this date, thirty-three states have ratified the amendment.

43. *Love's Labor Lost, supra* note 26, at 286. *See also* Hanson v. Hutt, 517 P.2d 599 (Wash. 1974), where the Washington supreme court held a statute that disqualified pregnant women from unemployment insurance benefits violated the equal protection clause of the United States Constitution.

44. *Love's Labor Lost, supra* note 26, at 286; *see* Green v. Waterford Bd. of Educ., 473 F.2d 629, 636-37 (2d Cir. 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 507 (S.D. Ohio 1972); Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N.Y.L. FORUM 480, 501 (1971).

VII and the E.E.O.C. guidelines in helping establish pregnancy as a temporary disability depends upon their acceptance by the courts as valid propositions. The practical application of the E.E.O.C. guidelines as the basis for pregnant teachers' arguments requesting maternity leave pay can be somewhat diminished in strength by judicial opinions. A recent Iowa district court decision, *Jordan v. West Des Moines School District*,[45] held the term "personal illness" could not be construed to include pregnancy and childbirth.

The decision in *LaFleur* and the amendment to Title VII do not completely abolish school board mandatory maternity leave policies. School boards may still establish maternity leave policies that do not arbitrarily infringe upon each individual woman's teaching capability. In constructing these maternity policies, school boards must recognize their obligation to treat each pregnant teacher as an individual and justify any mandatory termination and return dates by sufficient evidence. Whether pregnant school teachers can now receive the same employee benefits as other employees depends upon judicial acceptance of the proposition that pregnancy is a temporary disability. This, in turn, may hinge upon the passage of the equal rights amendment. However, school board interests can no longer be based upon cultural assumptions of pregnancy and employment discrimination based upon sex.[46] Only for employment purposes is the pregnant woman considered disabled. Hence, the school districts, in creating these maternity regulations, should no longer be able to penalize the pregnant school teacher for being a woman.

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45. In *Jordan v. West Des Moines School Dist.*, Equity No. 1-475 (Polk Co., filed March 15, 1974), the plaintiff's contended the school board's denial of maternity leave pay violated the fourteenth amendment as well as Title VII. The plaintiffs also contended that section 279.40 of the *Iowa Code* (1973), which allows compensation to teachers for absences due to personal illness, should be construed to include pregnancy and childbirth. However, the court concluded pregnancy is not an illness as contemplated by the provisions within section 279.40. But in *Hutchison v. Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974), a court found a school board's refusal to allow a teacher to apply her accumulated sick leave to pregnancy-related disability a violation of the equal protection clause of the fourteenth amendment and an unfair labor practice under Title VII of the 1964 Civil Rights Act. The court recognized that the Equal Employment Opportunity Commission guidelines are not law; however, they are entitled to great deference by the courts. There is no need to consider whether sex is a suspect classification requiring a compelling state interest in order to be held constitutional because the challenged classification is invalid even under the rational basis equal protection standard. The court concluded that there was no merit to the school board's contention that pregnancy is voluntary and thus may be excluded from equality of treatment. The classification not only penalizes female teachers for being women but discriminates in forcing them to choose between employment and pregnancy.

46. *Cf.* Note, *Equal Protection and The Pregnancy Leave Case*, 34 OHIO STATE L.J. 628 (1973).

**CONSTITUTIONAL LAW—EQUAL PROTECTION**—THE SIXTY DAY NOTICE OF CLAIM STATUTE APPLICABLE TO TORT ACTIONS AGAINST MUNICIPALITIES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.—*Lunday v. Vogelmann* (Iowa 1973).

Plaintiff was severely injured when run over by a lawn mower while chasing a ball during a physical education class supervised by Vogelmann, an employee of the Denison Community School District. The lawn mower was operated by an employee of the City of Denison. Plaintiff brought suit against defendants Vogelmann, the school district and the City. Iowa law requires a plaintiff seeking damages for injury from any municipality to commence the action therefor within three months or to give written notice of the injury and claim for damages within sixty days of the alleged injury and commence the action within two years of such notice.[1] Plaintiff filed his petition alleging negligence on the part of defendants some twenty-two months after his injury without giving the required notice to the school district and the City. They alleged the action was barred by failure to give such notice or to commence the action within three months of the date of the injury. Plaintiff replied by alleging the notice requirement is unconstitutional as a denial of equal protection. The district court sustained the statute's constitutionality and dismissed plaintiff's action against the school district and the City. The Supreme Court of Iowa *held*, affirmed, the sixty day notice of claim statute applicable to tort actions against municipalities does not violate the equal protection clause of the fourteenth amendment. *Lunday v. Vogelmann*, 213 N.W.2d 904 (Iowa 1973).

Municipalities in Iowa are subject to liability for their torts and those of their officers, employees and agents acting within the scope of their employment or duties[2] with certain exceptions.[3] "Municipality" as used in the statutes refers to all governmental subdivisions, including cities and school districts.[4]

The tort liability of governmental subdivisions is subject to limitation by *Iowa Code* section 613A.5. That section states:

> Limitation of actions. Every person who claims damages from any municipality for or on account of any wrongful death, loss or injury within the scope of section 613A.2 shall commence an action therefor within three months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. Failure to state the amount of compensation or other relief demanded shall not invalidate the notice; providing, the claimant shall furnish full information regarding the nature and

1. IOWA CODE § 613A.5 (1973).
2. *Id.* § 613A.2.
3. *Id.* § 613A.4.
4. *Id.* § 613A.1.