DISABILITY BENEFITS FOR PREGNANT EMPLOYEES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Employee non-occupational health and disability insurance plans commonly exclude pregnancy from compensable disabilities while providing coverage for all other temporarily debilitating conditions. As a result of this policy, the pregnant employee receives neither sick leave pay while she is absent from her employment nor compensation for medical expenses.

Affected employees have claimed that the denial of disability benefits for pregnancy constitutes invidious discrimination based on sex and violates the equal protection clause of the fourteenth amendment. These claims have met with mixed success, but the possibility of future equal protection actions for disability benefits was eliminated by the Supreme Court decision in Geduldig v. Aiello [Aiello]. In Aiello, the Court held that the exclusion of disability benefits for pregnant employees does not constitute invidious discrimination based on sex.

However, pregnant employees claiming disability and sick leave benefits under Title VII of the Civil Rights Act of 1964 have been successful in recent cases. This recognition of Title VII claims

1. Claim for disability benefits denied:
   Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973);

2. Claim for disability benefits upheld:
   Scott v. Opelika City Schools, 63 F.R.D. 144 (M.D. Ala. 1974);

3. Id. at 494.


5. Claim for disability benefits upheld:
   Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974);
   Vineyard v. Hollister Elementary School Dist., 64 F.R.D. 580 (N.D. Cal. 1974);
   Farkas v. South Western City School Dist., 8 CCH E.P.D. § 9619 (S.D. Ohio 1974);

for disability benefits will subject numerous employer-sponsored health insurance plans to charges of discrimination. The rationale for the recent judicial acceptance of Title VII disability benefit claims will be the focus of this comment.

TITLE VII: LEGISLATIVE BACKGROUND AND EEOC INTERPRETIVE GUIDELINES

Title VII prohibits any discrimination in "... compensation, terms, conditions, or privileges of employment" on the basis of sex. Proper application of Title VII requires that the legislative history be examined to determine congressional intent. It was claimed that the amendment to Title VII, which added discrimination based on sex to the proposed prohibition against race, color, religion, and national origin discrimination, would jeopardize the Act's chances for passage. Some congressmen who supported the amendment were, in fact, opposed to the Act which was originally designed to ensure equality of treatment in employment opportunities for racial minorities. These circumstances surrounding the amendment's enactment might have engendered the feeling that

See also Cedar Rapids Community School Dist. v. Parr, 227 N.W. 2d 486 (Iowa 1975), where the Iowa Supreme Court, considering similar questions, determined that denial of sick leave benefits to a school teacher while she was disabled due to pregnancy constituted prohibited discrimination under Iowa Code §§ 105A.7, 105A.9, subd. 11 (1971).

6. As a result of the 1972 amendments to Title VII employees of local governments and political subdivisions are within the coverage of the Act. Coverage is also extended to employees of businesses with as few as 15 employees, 42 U.S.C. § 2000e (1970), as amended, (Supp. II, 1972).


8. 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. . . . 42 U.S.C. § 2000e-2 (1970), as amended, (Supp. II, 1972).


11. See Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 IOWA L. REV. 778, 791-92 (1965); A Post AIELLO Analysis at 76.
any questions relating to sex discrimination under Title VII should be construed in a restrictive manner.\textsuperscript{12}

The 1972 amendments to the Act markedly altered the status of the sex discrimination prohibition in Title VII.\textsuperscript{13} The amendments provided Congress with the opportunity to drop sex as an included category of prohibited discrimination. Congress took no such action. This Congressional inaction suggests approval of the Title VII provisions as enacted.\textsuperscript{14}

The Equal Employment Opportunity Commission [EEOC] is for the interpretation of Title VII through opinion letters and interpretive guidelines.\textsuperscript{15} The EEOC has travelled full circle on the question of pregnant employees' rights to disability and sick leave benefits under employee health and disability insurance programs. In 1966, the EEOC issued an opinion letter which unequivocally stated that pregnancy did not give rise to a compensable disability.\textsuperscript{16} In 1971, the EEOC abandoned its position and held that the denial of disability benefits to pregnant employees violates Title VII.\textsuperscript{17}

The EEOC's 1972 interpretive guidelines firmly established the Commission's position that pregnant employees may successfully challenge an employee disability plan which excludes pregnancy disabilities from compensation under Title VII when their physical conditions forces them to leave their employment temporarily. Section 1604.10(b) of the guidelines states:

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 ex-


\textsuperscript{13} Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Colum. L. Rev. 441, 464 (1975) [hereinafter cited as Geduldig v. Aiello: Pregnancy Classifications].

\textsuperscript{14} Id.


tensions, 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.\textsuperscript{18}

\textbf{RECENT DECISIONS: EQUAL PROTECTION v. TITLE VII}

The 1972 amendments to Title VII and the EEOC policy reversal are not surprising developments when viewed in light of recent legislative and judicial action aimed at claims of sex-based discrimination. Title IX of the Higher Education Act of 1972\textsuperscript{19} and the proposed Equal Rights Amendment\textsuperscript{20} as well as the line of equal protection decisions beginning with \textit{Reed v. Reed}\textsuperscript{21} and \textit{Frontiero v. Richardson}\textsuperscript{22} indicate increased deference to claims of sexual inequality.

The equal protection clause of the fourteenth amendment is invoked to strike down allegedly discriminatory classifications involving state action.\textsuperscript{23} Over the years, three methods of equal protection analysis have evolved. Traditionally, the courts have upheld the state's classification unless the plaintiff is able to prove the classification to be arbitrary or not reasonably related to the purpose it purportedly serves.\textsuperscript{24} The courts have added the requirement that the state show a compelling interest in the classification if it is based on suspect criteria or interferes with a fundamental right.\textsuperscript{25} When the challenged classification is based on

\textsuperscript{18} 29 C.F.R. \textsection 1604.10(b) (1974).
\textsuperscript{20} U.S. Const. proposed amend. XXVII.
\textsuperscript{21} 404 U.S. 71 (1971) (outlawing statutory preferences for men as administrators of estates).
\textsuperscript{22} 411 U.S. 677 (1973) (invalidating requirement that female members of the armed services prove that their husbands are dependent, but requiring no such proof from male members claiming their spouses as dependent).
\textsuperscript{23} See \textit{Sail'er Inn, Inc. v. Kirby}, 95 Cal. Rptr. 329, 485 P.2d 529 (1971) (invalidating a state law forbidding women to tend bar unless they are licensees or the wives of licensees).
sex, the courts have employed a standard of review that requires the state's enunciated purpose to be more than reasonably related to the classification but does not require that the state have a compelling interest in its purpose.\(^{26}\)

The basis of the classification determines the degree of scrutiny with which the courts will view the defendant's discriminatory actions and is thus the threshold question in equal protection analysis. In Aiello the Supreme Court viewed the denial of disability benefits to pregnant employees as a non-sex based classification; consequently, the mere rationality test was applied.\(^{27}\)

In Aiello, the plaintiffs, pregnant employees in the State of California, claimed that the denial of disability benefits for a pregnancy constituted an act of invidious discrimination violating the equal protection clause of the fourteenth amendment.\(^{28}\) The California health and disability plan under attack covered most significant disabilities\(^{29}\) except those arising out of the attendant to pregnancy.\(^{30}\)

Upon cursory analysis, the classification complained of in Aiello appears to be sex based since only women are affected by the pregnancy exclusion. The Court, however, found the classification to be pregnant persons and non-pregnant persons rather than males and females.\(^{31}\) Although pregnant persons are necessarily female, non-pregnant persons include both males and females.\(^{32}\) Therefore, both men and women receive the actuarial benefits derived by excluding pregnancy from compensation.\(^{33}\)

---

28. Id. at 492.
29. CAL. UNEMP. INS. CODE § 2626 (West 1972). Employment disability is defined as that which renders an employee unable to perform his regular or customary work due to a physical or mental condition. Id.
30. CAL. UNEMP. INS. CODE § 2626 (West 1972). In no case shall the term "disability" or "disabled" include any injury caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter. Id.
31. Also excluded from benefits were drug addiction, sexual psychopathy resulting in confinement and certain statutory short-term disabilities. Aiello at 488.
32. Aiello at 496-97 n.20.
33. Id.
In light of Aiello, it appears unlikely that any employee benefit plan which excludes pregnancy-related disabilities from compensation will be viewed as classifying on the basis of sex. The economic burden which would accompany the inclusion of pregnancy-related disabilities in an insurance plan will probably provide the requisite rational justification for any pregnant versus non-pregnant person classification.\[^{34}\]

Title VII claims for pregnancy benefits are not precluded by Aiello. The Civil Rights Act is based in part upon the commerce clause of the Constitution.\[^{35}\] To sustain claims based on commerce clause legislation requires only a showing that the proscribed activity has an effect upon interstate commerce.\[^{36}\] To uphold equal protection claims there must exist proof of state action,\[^{37}\] and the court must balance the interests of the state and the person challenging the classification.\[^{38}\]

Title VII standards are a "statutory mandate," and consequently claims brought thereunder are more compelling than those based upon equal protection.\[^{39}\] Courts, recognizing the distinction between equal protection and commerce clause analysis, have viewed Title VII as a valid basis for claims of sex discrimination which might not have been successful under the equal protection clause as a result of the Aiello decision.\[^{40}\]

\[^{34}\] Geduldig v. Aiello: Pregnancy Classifications at 455.
\[^{40}\] See Communication Workers of America, AFL-CIO v. American Tel. & Tel. Co., Long Line Dep't, 513 F.2d 1024, 1031 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 203 (3d Cir. 1975); Sale v. Waverly-
The language of Title VII is to be broadly interpreted so that the apparent congressional intent may be carried out. Title VII prohibitions are not limited to discriminations that are patently discriminatory. Consequently, an employee health and disability insurance policy which is neutral on its face but, in fact, contributes to disparate treatment between the sexes also violates Title VII. The fact that pregnant benefits may be unavailable to males as well as females under an employee health and disability insurance program indicates a policy that is sexually neutral in its coverage. However, the de facto operation of the policy bears out objectionable discrimination because only females can be injured by the pregnancy exclusion. Thus, a policy without gender-based exclusions may be sexually discriminatory.

Recent decisions have been consistent in holding that the pregnancy exception to compensable disabilities constitutes discrimination based on sex and violates Title VII. In Sale v. Waverly-Shell Rock Board of Education, the plaintiff, a school teacher employed by the defendant school board, had been denied sick leave benefits during 1973 when she was absent from her teaching position to give birth. The court based its decision to grant Sale relief under Title VII upon a literal application of the EEOC interpretive guidelines.

The guidelines have subsequently been interpreted as stating that any disparate treatment between pregnancy-related and non-pregnancy related disabilities in an employee non-occupational health and disability insurance program gives rise to a presumption of a violation of Title VII. Although the guidelines do not carry


44. Sprogis v. United Air Lines, Inc., supra note 42, at 1198. "Discrimination is not to be tolerated... through the unequal application of a seemingly neutral company policy." Id.

45. 390 F. Supp. 784 (N.D. Iowa 1975) [hereinafter cited as Sale].

46. Id. at 785.

47. Id. at 788.

The force of law, they are entitled to great deference to the extent they do not conflict with congressional intent. The Sale court noted the growing congressional concern with sex-based discrimination to provide further justification for its literal compliance with the guidelines. In Communications Workers of America, AFL-CIO v. American Telephone and Telegraph Company, Long Lines Department the Second Circuit held that Title VII claims need not satisfy equal protection criteria to state a cause of action. The plaintiffs claimed that AT&T's health and disability insurance program had a discriminatory impact upon pregnant employees in violation of Title VII. The circuit court criticized the district court's analysis of Aiello as holding that disparity of treatment between pregnancy-related and non-pregnancy related disabilities does not constitute sex-based discrimination as prohibited by either Title VII or the fourteenth amendment. The circuit court's decision reaffirmed the practice of granting great deference to the EEOC guidelines and alluded that, although the plaintiff's claim might fail if submitted under equal protection clause, it would stand as establishing prohibited discrimination under Title VII.

TITLE VII: THE EMPLOYER RESPONSES

In an attempt to vindicate their refusal to provide disability benefits to pregnant employees, the corporate defendants in these cases have suggested that as a voluntary condition, pregnancy is not properly compensable. The Fourth Circuit in Gilbert v.

49. Id. at 381; United Shoe Workers of America, AFL-CIO v. Vedell, 506 F.2d 174 (D.C. Cir. 1974).
52. Sale at 788.
53. 513 F.2d 1024 (2d Cir. 1975) [hereinafter cited as C.W.A.].
54. Id. at 1031.
55. Id. at 1026.
56. Id. at 1027.
57. Id. at 1030.
58. Id. at 1031.
59. Id. at 103.

The circuit court held that Title VII claims for disability benefits by pregnant employees stated a cause of action, however the nature of the appeal prevented the court from reaching the merits of the case. Id.
General Electric Company [Gilbert] recently affirmed a lower court decision recognizing a pregnant employee's Title VII claim to disability benefits. The district court, in rejecting the voluntary condition argument, refused to allow the dictates of an employer-sponsored health insurance plan to interfere with the female's "fundamental" right to procreation by denying pregnancy benefits.

In Wetzel v. Liberty Mutual Insurance Company [Wetzel], the Third Circuit declared the defendant's income protection plan to be discriminatory on the basis of sex in contravention of Title VII. The plan provided benefits for all employee disabilities excluding those related to pregnancy. Liberty Mutual asserted pregnancy was a voluntary condition and, therefore, not subject to disability compensation. The circuit court found the voluntariness argument to be without merit. The court could find no justification for the defendant's exclusion of pregnancy from coverage, as a voluntary condition, when disabling conditions arising from voluntary activities, such as smoking, drinking alcoholic beverages, and active participation in sports would be compensable.

Liberty Mutual also suggested that pregnancy is not a sickness and as a result was not subject to the plan's coverage. The circuit court rejected this contention as well, stating that similar treatment should be given to an employee losing time on the job, whether due to pregnancy or temporary illness, thus avoiding the sickness distinction.

The courts have summarily rejected the voluntary condition and sickness defenses to Title VII claims. A basis for the rejection may lie in the recognition of a right to procreation as a fundamental right or as a penumbra to the right to privacy.

---

61. Id. at 381-82.
62. 511 F.2d 199 (3d Cir. 1975).
63. Id. at 207.
64. Id. at 206.
65. Id.
66. Id.
Such analysis by the courts would eliminate the interference in an employee's private life caused by subtle distinctions in employee benefit plans and provide a constitutional basis for rejecting the defenses.

The cost of providing sick leave and disability benefits for pregnant employees has been urged as a legitimate defense to a Title VII claim. The proponents of the cost defense have alleged that including pregnancy within the schedule of covered disabilities would threaten the fiscal integrity of their insurance plans. The court's responses have been that an employer's interests in economy alone will not justify the exclusion of certain disabilities from coverage. This judicial pronouncement is in accord with the EEOC guidelines which state that the cost of providing benefits to one sex vis-à-vis the other sex is not a defense to a claim of sex-based discrimination under Title VII.

If the cost of providing pregnancy disability benefits would imperil the viability of an employee health and disability insurance program, the employer can cut costs by lowering or eliminating the coverage available for non-sex-linked disabilities. Thus, the cost of including disability and sick leave benefits for pregnant employees (a sex-linked disability) may be offset by lowering the recovery available to an employee who suffers from a non-sex linked disability.

The rejection of the cost defense by the courts may induce the employers to rely upon Section 703(e) of the Civil Rights Act which authorizes otherwise discriminatory conduct if justified by a "...bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The bona fide occupational qualification standard for permissible dis-

---


71. 29 C.F.R. § 1604.9 (1974).


73. Civil Rights Act of 1964, § 703(e), as amended, 42 U.S.C. § 2000e-2(e) (1970). The bona fide occupational qualification exception was addressed briefly by the courts in Gilbert v. General Elec. Co., supra note 69, at 382-83, and in Wetzel at 208. In neither case had the defendants formally pleaded the exception, nor had they provided sufficient statistical evidence from which the courts would have been able to rule on the exception.
crimination was shaped into a “business necessity” exception by the court in *Diaz v. Pan American Airways* [*Diaz*]. The *Diaz* court announced that discrimination is permissible only if the “essence” of the employer’s business would be imperiled if non-discriminatory policies were enforced. The possibility that the business necessity exception will be extended beyond employment qualifications to encompass terms and conditions of employment has been reduced as a result of an EEOC interpretive guideline which states that the bona fide occupational qualification is to be narrowly interpreted.

Furthermore, the difficulty employers have encountered in trying to prove a “business necessity” for occupational qualifications based on sex would appear to be indicative of the burden employers will have to overcome in order to prove a “business necessity” for terms or conditions of employment based on sex.

The decisions of the courts on the employer’s defenses are commendable only in that they are directives not likely to be misunderstood. The failure of the courts to elucidate the rationale for their rejection of the alleged defenses impinges upon any instructive benefit that could be derived for use in future litigation.

**THE WETZEL CERTIORARI**

The Supreme Court has granted certiorari in *Wetzel* on the question of whether the denial of disability benefits to pregnant employees constitutes sex discrimination prohibited by Title VII.

The Court’s decision in *Aiello* may provide a basis for its forthcoming decision in *Wetzel*. The Third Circuit in *Wetzel* held the equal protection rationale in *Aiello* to be inapplicable to a Title VII claim. The crux of *Aiello* was that the exclusion of disability benefits for pregnancy does not present a sex-based classification for purposes of equal protection. The Court could adopt this approach and hold that the denial of disability benefits does not constitute discrimination on the basis of sex under Title VII and

---

74. 442 F.2d 385, 388-89 (5th Cir. 1971).
75. Id. at 388.
77. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969); cf. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).
81. *Aiello* at 496-97.
thereby reverse Wetzel. As an alternative to applying the Aiello rationale, the Court could recognize the viability of one of the employer's alleged defenses as a ground for reversal.

It appears to be more likely that the Court will affirm Wetzel. First, Title VII is remedial legislation and is to be broadly interpreted. A holding by the Court that the exclusion of a disability which is unique to females is nonetheless not sex-based discrimination would appear to be an overly restrictive interpretation of the Act.

Secondly, an indication of the outcome of the Wetzel certiorari may have been inferred by the Court's decision in Cleveland Board of Education v. LaFleur [LaFleur]. Justice Stewart wrote the LaFleur opinion which held that the forced termination of a female's employment following the fourth month of pregnancy gave rise to an unconstitutional irrebuttable presumption that the employee's physical condition rendered her unable to effectively continue in her position. In a footnote to the LaFleur decision, Justice Stewart, referring to the 1972 amendments to Title VII and the EEOC guidelines stated that:

The practical impact of our decision in the present cases may have been somewhat lessened by several recent developments. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

This reference to Title VII and the EEOC interpretive guidelines seems to indicate Justice Stewart's opinion that claims brought under Title VII are distinct from fourteenth amendment claims. Since Justice Stewart was the author of the five-to-four decision in Aiello, a change in his position on a claim for disability bene-

82. A recent Nebraska Supreme Court case adopted this reasoning from Aiello as part of its rationale for denying a claim for pregnancy disability benefits under the Nebraska Fair Employment Practice Act. Richards v. Omaha Public Schools, 194 Neb. 463, — N.W.2d — (1975). It would appear that a Nebraska plaintiff seeking disability benefits for pregnancy will have to rely on a Title VII action in federal courts, because of the Nebraska decision, at least until the Supreme Court decides Wetzel.

83. The cursory treatment given to the employer's defenses in the Wetzel decision precludes any meaningful discussion of the probable Supreme Court approach to those allegations. See text and notes at notes 65-68 supra.

84. Sale at 788; Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

85. See note 43 supra and accompanying text.


87. Id. at 647-48.

88. Id. at 639 n.8.
fits for pregnant employees may well determine the outcome in Wetzel. Based on his apparent opinion that Title VII analysis and fourteenth amendment analysis are distinct it would appear that Justice Stewart would reject any attempt to apply classification analysis borrowed from Aiello in deciding Wetzel.

Once the hurdle of Aiello is overcome the Court may continue its policy of granting great deference to the guidelines and affirm Wetzel.

CONCLUSION

The pronouncements by the circuit courts granting sick leave and disability benefits to pregnant employees have been unequivocal. The courts have employed the broad language of Title VII to uphold attacks on this instance of sex-based employment discrimination. The courts in fact seem to feel compelled to act within the boundaries of the EEOC interpretive guidelines.

The treatment given by the courts to defenses raised by employers has been cursory. The courts, granting deference to the EEOC guidelines and the apparent legislative intent behind the Civil Rights Act, may be stating that there is no valid defense to the exclusion of pregnancy benefits from coverage. The recognition of a right to procreation alluded to in Gilbert would provide a rationale for the rejection of the defenses. In any event, the basis for rejection of the asserted defenses deserves greater amplification by the courts.

The applicability of the Aiello decision has been of great concern to the courts in granting benefits to pregnant employees in Title VII actions. The Supreme Court's forthcoming decision in Wetzel should resolve that issue and determine the validity of such claims under Title VII.

Mark A. Thornhill—'77

---

89. The reader should note that the nature of the appeal prevented the circuit court from reaching the merits in C.W.A. The tenor of the opinion however, suggests the belief by the court in a right to relief. C.W.A. at 1031-32.

90. Sale at 788; Gilbert v. General Elec. Co., supra note 69 at 381; Wetzel at 205.