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SEX DISCRIMINATION AND THE U.S. SUPREME COURT

KAREN J. LEWIS
Legislative Attorney
American Law Division

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Introduction

The U.S. Supreme Court's treatment of gender-based discrimination has puzzled both legal scholars and the lower courts. One observer of the Court's decisions with regard to gender and the Constitution has pointed out that, "[T]he Court is not certain what constitutes sex discrimination, how virulent this form of discrimination is or how it should be analyzed in terms of due process and equal protection." (Johnston, Sex Discrimination and the Supreme Court -- 1971 - 1974, 49 N.Y.U. LAW REVIEW 617, 689 (November 1974)).

In describing the Court's production of conflicting views on the constitutionality of sex discrimination, one lower court remarked, "[T]his area of constitutional law is still evolving and is often highly dependent on the facts of each case. Accordingly, a full development of the facts ... is essential to any meaningful assessment of [a sex discrimination] claim against the rapidly changing, and variously interpreted, case law..." (Waldie v. Schlesinger, No. 74-1636, at 5 (D.C. Cir. Nov. 20, 1974).) (Emphasis supplied.)

In examining the Court's record in sex discrimination cases during the period from 1971 through the 1976-1977 Term, we shall try to ascertain whether there is any support for the foregoing evaluations of the Court's rulings in this area. It is our contention that prior to the 1976-1977 Term these descriptions had more validity than they do now. The principal purpose of this legal memorandum is to discuss the Supreme Court's sex discrimination decisions through the current Term;

however, we shall analyze two cases which the Supreme Court has already agreed to hear and which it will decide next Term, Nashville Gas Co. v. Satty, 75-536 and Richmond Unified School District v. Berg, 75-1069.

The Satty and the Berg cases both concern the rights of pregnant workers. In Satty, the employer required pregnant employees to go on leave and lose job bidding seniority where no leave was required for other nonwork-related disabilities. Sick leave benefits were also denied to the pregnant employees while such benefits were available for all other cases of nonwork-related disabilities. The contention in Satty was that in following such a policy the employer had violated Title VII of the 1964 Civil Rights Act. Berg involves a denial of sick pay for absence due to pregnancy. The challenge in this case concerns whether Title VII requires an employer to pay sick leave for absences due to normal pregnancy and delivery.

In order to place the aforementioned cases in proper perspective, it is necessary to set forth the background of the Court's treatment of gender-based distinctions from both a constitutional point of view as well as from a statutory one. Before we review the Supreme Court's significant sex discrimination decisions since 1971, we shall explain the various constitutional standards of review employed by the Court when it is confronted with cases involving equal protection and due process challenges. Our examination of the cases will be presented primarily topically -- e.g. Social Security cases; pregnancy cases; and the like will for the most part be analyzed as separate classifications. The cases will be grouped as such wherever possible because of the

similarities in the issues and problems presented to the Court. Otherwise, the discussion will be chronological.

It should be pointed out that up until the Court's decision in General Electric Co. v. Gilbert et al. (429 U.S. 125 (1976)), the Court had not rendered a decision in the sex discrimination area where plaintiffs had alleged that their statutory rights under Title VII were being violated. A discussion of the important distinctions between a constitutional challenge and a statutory one will be presented for the purposes of setting the background for the Gilbert decision, placing that case in its proper perspective, and for evaluating its significance in terms of future sex discrimination cases.

After our analysis of the holdings and rationales in the earlier cases, we shall set forth the facts, issues, and arguments in the two aforementioned cases pending before the Court in the upcoming 1977-1978 Term.

A. Explanation of the U.S. Supreme Court's Constitutional Standards of Review

The Fourteenth Amendment to the Constitution provides that:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State 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.
> (U.S. Constitution, Fourteenth Amendment.) (Emphasis Supplied.)

In the process of hearing and determining cases, the Court has developed different standards of review. First of all, there is the traditional

standard -- one which mandates restrained or passive review. Then there is the second standard that has evolved which requires active review and the application of a more stringent test.

The traditional standard grew primarily out of cases involving economic regulation. It is still mainly applied there; however, it does appear in other contexts. This restrained or more passive review approach requires that the person attacking the classification bears the burden of proving that such classification lacks a rational basis. Behind the traditional standard is the rule that the "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (F.S. Royster Guano Co. v. Virginia 253 U.S. 412, 415 (1920).) This traditional standard has come to be equated with the commonly referred to, "rational basis" test. So, whenever the governmental classification has a "rational basis" vis a vis a legitimate public objective, it is upheld by the Court when it is attacked as being violative of the equal protection clause. (McGowan v. Maryland 366 U.S. 420, 426 (1961).) Usually, this public objective is not required to be the dominating motive in the minds of the legislators; nor is it necessary to show that the relationship of the distinction to the objective is grounded in fact. (See Developments In The Law - Equal Protection, 82 HARVARD LAW REVIEW 1065, 1077-87 (1969).) Furthermore, very often, mere speculation on the part of the Court as to the existence of this relationship is sufficient to sustain the classification

(Id., at p. 1080, citing Goesaert v. Cleary 335 U.S. 464 (1948) and Kotch v. Board of River Port Pilot Comm'rs. 330 U.S. 552 (1947).)

In recent years, the Court has developed a higher standard of review. This more active review standard is used by the Court when classifications are based on either a "suspect" criterion or affect a "fundamental" interest. It should be emphasized that the Court will only invalidate invidious classifications. Therefore, in analyzing classifications established by certain statutes, the Court has to decide which ones are permissible and which ones are not because they are in fact invidious. In cases meriting active review, the Court exercises a "strict scrutiny." The government involved must in turn show a "compelling state interest" or a high degree of need for such legislation on its part.

Examples of "suspect classification," as defined by the U.S. Supreme Court, include race and nationality (See McLaughlin v. Florida 379 U.S. 184, 192 (1964); and Korematsu v. United States 323 U.S. 214, 216 (1944) respectively). As we will show below, sex has not been designated by the Court as being a "suspect" classification warranting an application of the active review analysis.

Before 1971, the Supreme Court generally upheld the constitutionality of sex-based classifications under the equal protection clause. The Court applied the traditional standard of minimal scrutiny and usually upheld the distinction being attacked on the ground that it was reasonable in view of women's proper role in society.

(Hoyt v. Florida 368 U.S. 57, 61-63 (1961).) Another explanation that the Court would invariably offer to justify its not striking down a sex discriminatory statute is that the female sex needed greater protection. (Muller v. Oregon 208 U.S. 412 (1908).) The Court based its rationales upon the assumption that women and men differed greatly and therefore, the sexes could justifiably be treated differently.

Following its decision in Reed v. Reed (404 U.S. 71 (1971)), where the Court struck down an Idaho statute that differentiated between men and women for the purpose of administering estates, the Court was very ambiguous about what the appropriate test should be in gender-based discrimination cases. Reed did appear to signal that something more than the traditional rational basis test was warranted in sex discrimination cases; however, on the surface, the Reed decision did seem to be decided in accord with traditional equal protection standards. Discussion ensued among constitutional law scholars as to the real meaning of the Court's language in Reed. The Court had held that the Idaho law in question represented an "arbitrary legislative choice" and was a denial of equal protection. (Id. at 76.) It is this language which had raised some discussion among constitutional law authorities.

The Court seemed to confuse the situation even further when it decided Frontiero v. Richardson (411 U.S. 677 (1973)), a case involving differential treatment between male and female military persons. Here eight Justices agreed that the Federal statute in question violated the equal protection standard of the Fifth Amendment; however, no theory

of review commanded more than a plurality. There were four Justices who held that the classifications based on sex were suspect. (Id. at 682.) There were two concurring opinions submitted separately, and each utilized the traditional rational basis test. Justice Rehnquist dissented, but did not write an opinion.

On December 20, 1976, the Court declared unconstitutional an Oklahoma statute which involved an age-sex differentiation in the sale of 3.2 per cent beer. (Craig v. Boren, 429 U.S. 190 (1976).) In Craig, the Court presented a cogent analysis in which it very clearly set forth a new standard of review to be applied in gender-based cases in which sex discrimination is alleged. The Court essentially adopted the test hinted at in Reed, supra. In emphasizing that Reed was controlling in Craig, the majority wrote,

> Analysis may appropriately begin with the reminder that Reed emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." 404 U.S., at 75. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives...
>
> Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification...
> (Craig, supra, at 197-198.)

In formulating the issue in Craig, the Court stated,

> We turn then to the question whether, under Reed, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute...
> (Id. at 199.) (Emphasis supplied.)

The Court later concluded that, "...under Reed, Oklahoma's 3.2% beer statute invidiously discriminates against males 18-20 years of age." (Id. at 204.)

The Reed test uses the "fair and substantial relation" criteria to judge the constitutional validity of a gender-based law. In Craig, in applying Reed, the Court's decision turned upon whether the State legislature, by the classification it selected, adopted a means that bore a "fair and substantial relation" to a specifically stated objective. The requisite important governmental objective here was traffic safety. Under the facts in Craig, the Court concluded that the State of Oklahoma failed to prove that the statute's different treatment of men and women is in fact "substantially" related to important government aims. The Court pointed out that, "...the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective." (Id.)

The separate concurring opinions as well as the dissenting opinions filed in Craig are interesting to examine from the standpoint of what test or form of constitutional review is to be applied in sex discrimination cases in the future. Justice Stevens expressed some dissatisfaction with characterizing the standards of review in terms of tiers. He pointed out that there was only one Equal Protection Clause. He wrote,

> It [the Equal Protection Clause] requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be levelled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard. (Id., Stevens' Concurrence, at 211-212.)

He added that the two-tiered analysis of equal protection claims really did not "describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." (Id. at 212.)

In his separate concurrence, Justice Powell also discussed the various equal protection standards and modes of constitutional review. In a footnote, he remarked,

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for a more critical analysis, that approach -- with its narrowly limited "upper-tier" -- now has substantial precedential support...
>
> (Id., Powell Concurrence, at 210-211.)

Justice Powell objected to the broad reading which the majority gave to Reed; however, he did concede that Reed was the most relevant precedent. From his concurrence, we have a clear statement that the Court in Craig adopted an intermediate standard of review for sex discrimination cases. He stated,

> ...As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification.
>
> (Id. at 211.)

Both Chief Justice Burger and Justice Rehnquist pointed out that the Court had adopted an intermediate level of scrutiny for sex. Chief Justice Burger wrote,

> Though today's decision does not go so far as to make gender-based classifications "suspect", it makes gender a disfavored classification...
> (Id., Burger's Dissent, at 217.)

Justice Rehnquist felt that the traditional rational basis test was sufficient in sex discrimination cases. He opposed the Court's enunciation of a new standard and argued that the majority formulated it "without citation to any source." (Id., Rehnquist's Dissent, at 217.) He was especially puzzled by the application of an intermediate standard when the discrimination alleged was against men rather than women -- his point being that men traditionally have not been a disadvantaged group. Justice Rehnquist remarked,

> ...There is...nothing about the statutory classification involved here to suggest that it affects an interest, or works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection.
> (Id. at 219.)

Justice Rehnquist went so far as to say,

> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard.
> (Id. at 220.)

B. General Discussion of the U.S. Supreme Court's Sex Discrimination Decisions

It was not until 1971 that the Supreme Court invalidated a sex discriminatory statute on equal protection grounds. (Reed v. Reed, supra.) In Reed, the Court unanimously invalidated a statute in Idaho which gave automatic preference to men over women in determining who should administer a decedent's estate. While the Court's action in striking down the statute in Reed is significant in respect to its stance regarding sex discrimination, the rationale was far from clear as we indicated above -- ie. one could not ascertain with precise certainty exactly what standard of review the Court had in mind in a sex discrimination case. As our earlier discussion indicates, the Court removed all ambiguities when it decided Craig, supra, and announced that on the basis of Reed, it was applying an intermediate standard of review in gender-based cases.

Since Reed, there have been numerous sex discrimination cases heard and decided by the U.S. Supreme Court. Among these are: Frontiero v. Richardson 411 U.S. 677 (1973); Cleveland Board of Education v. LaFleur 414 U.S. 632 (1974); Kahn v. Shevin 416 U.S. 351 (1974); Geduldig v. Aiello 417 U.S. 484 (1974); Schlesinger v. Ballard 419 U.S. 498 (1975); Taylor v. Louisiana 419 U.S. 522 (1975); Weinberger v. Wiesenfeld 420 U.S. 636 (1975); Stanton v. Stanton 421 U.S. 7 (1975); Turner v. Dept. of Employment Security and Board of Review of the Industrial Commission of Utah, 423 U.S. 44 (1975); Liberty Mutual Insurance Co. v. Wetzel et. al., 424 U.S. 737 (1976); General Electric Co. v. Gilbert et. al. 429 U.S. 125 (1976); Mathews v. DeCastro, 429

U.S. 181 (1976); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb ___U.S.___, 45 U.S.L.W. 4237 (March 2, 1977); Califano v. Webster, ___U.S.___, 45 U.S.L.W. 3630 (March 21, 1977); Vorchheimer v. School District of Philadelphia et. al., ___U.S.___, 45 U.S.L.W. 4378 (April 19, 1977); United Air Lines, Inc. v. Evans, ___U.S.___, 45 U.S.L.W. 4566 (May 31, 1977); and Dothard v. Rawlinson et. al., ___U.S.___, 45 U.S.L.W. 4888 (June 27, 1977). In none of these opinions did a majority of the Court pronounce sex a "suspect classification."

In Frontiero, supra, the Court invalidated a statute which allowed a male member of the Armed Forces to claim his wife as a dependent without regard to whether she was in fact dependent upon him, while requiring a women claimant to prove that her husband was in fact dependent. Eight Justices agreed that the statute violated the equal protection standard of the Fifth Amendment (n.b. a Federal statute was involved); however, no theory of review commanded more than a plurality. The four Justices who held that the classifications based on sex were suspect wrote:

> At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed, 404 U.S. 71 (1971). (411 U.S. 677, 682 (1973))

In Kahn v. Shevin, supra, and Schlesinger v. Ballard, supra, the Court's holdings and rationales made it even more apparent that the standard of review was still an unresolved matter in the sex classification area. In Kahn, the Court upheld a Florida statute granting widows a $500 exemption from ad valorem property taxation

against the constitutional challenge of a widower denied a similar exemption. The Court looked upon women as being in a disadvantaged position in the labor market because of the disparity between the earnings of men and women. In accord with this assumption, the Court observed that while the widower can usually continue the occupation which preceded his spouse's death, "in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." (416 U.S. at 354). The Court further stated,

> We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden.
>
> (Id. at 355.)

Using the test from Reed, the Court found that the statute in question was not unconstitutional because it rested "upon some ground of difference having a fair and substantial relation to the object of the legislation." (Id.)

In Schlesinger v. Ballard, supra, the Court upheld a law which provided for the mandatory discharge of a naval officer after twice failing to be promoted despite the fact that a related statute permitted a female officer of the same grade to remain in the service for thirteen years before she could be discharged for want of a promotion. Plaintiff male officer here was challenging the statute. In upholding the statute, the Court distinguished Reed and Frontiero and remarked,

> In both Reed and Frontiero the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution.

> In Reed, the assumption underlying the Idaho statute was that men would generally be better estate administrators than women. In Frontiero, the assumption underlying the federal armed services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.
>
> In contrast, the different treatment of men and women naval officers under [the challenged sections] reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.
>
> (419 U.S. at 508.) (Emphasis in original.)

The Court referred to the legislative history of the statute in question and concluded that there was a rational basis for the law because Congress foresaw that women line officers had less opportunity for promotion than did their male counterparts. The latter factor justified a longer period of tenure for women officers because this would "... be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.'" (Id.)

From a reading of the Court's rationales in Kahn and Ballard, it becomes apparent that the Court appears to be unwilling to invalidate legislation which it regards as intending to benefit women, either economically or professionally.

Shortly after Ballard, the Court decided Taylor v. Louisiana, supra. In Taylor, a jury selection system was being challenged by the defendant. In Louisiana, women were automatically exempt from jury service and could not be called unless they filed with the court clerk

a written declaration of their desire to serve. The Court invalidated the jury selection process in question by holding that the Sixth Amendment requires the presence on the venire of a fair cross-section of the community, including females. The majority wrote,

> Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. To this extent we cannot follow the contrary implications of the prior cases, including Hoyt v. Florida. If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.
> (419 U.S. at 537).

Taylor was predicated on the Sixth Amendment, and consequently, the Court avoided deciding the defendant's claim that Louisiana's jury selection system constituted unconstitutional sex discrimination in light of Reed and Frontiero. The Court did not even mention the equal protection issue. Another interesting point about Taylor is that because the rationale rested upon the Sixth Amendment, which applies only to criminal cases, prior law was left intact with respect to jury selection in civil cases.

In Taylor, as in all of the earlier cases, except for Frontiero, the Court used a narrow basis for its holding and declined to treat the issue of the extent to which the Constitution limits the power of government to assign social functions on the basis of sex.

After the Ballard and Taylor decisions, it was not long before the Court was again confronted with a sex discrimination issue. In Weinberger v. Wiesenfeld, supra, the Court invalidated a provision of the Social Security Act which allowed "Mother's Benefits" but not "Father's Benefits." Before the Court declared that provision unconstitutional, the law permitted both a widow and her minor children to receive payments based on the deceased spouse's earnings, but allowed such payments only to minor children and not to the surviving male spouse. The plaintiff male in Wiesenfeld challenged this provision on the ground that the statute unlawfully discriminated against him on the basis of his sex. Under the facts in Wiesenfeld, he was a male whose deceased wife's earnings were the couple's principal source of support during their marriage. In declaring the statute unconstitutional, the Court found that the assumption behind this law -- ie. the male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support -- was an "archaic and overbroad generalization that could not be tolerated under the Constitution." (420 U.S. 636, 643.) (quoting Schlesinger v. Ballard, supra.)

In Wiesenfeld, the Court examined the legislative intent and concluded that the purpose of the law was to secure payment for a wage earner's dependents on the basis of their respective probable

needs. Therefore, the Court reasoned that, in ruling out widowers as beneficiaries, Congress at the time was acting on the then widely accepted notion that a man is responsible for the support of his wife and child. The Court admitted that there might be empirical support for this proposition, but despite that, "...such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." (Id. at 645.)

In Wiesenfeld, the factual showing (causing the Court to rule as it did) was very strong. The majority opinion is lacking in any sort of express reference to the equal protection doctrinal analysis. In the 1976-1977 Term, the Court decided three more Social Security cases which we will discuss later for comparative purposes.

The next significant decision to be handed down by the Court was Stanton v. Stanton, supra. Stanton is the final sex discrimination decision in the 1974-1975 term. In Stanton, the Court invalidated a Utah statute which specified a greater age of majority for males than for females in the context of child support payments. The Court held that this law violated the female child's right to equal protection of the laws. The Court did not formulate any specific equal protection test to apply in sex discrimination cases. In fact, the Court declared that it was "unnecessary in this case to decide whether a classification based on sex is inherently suspect..." (421 U.S. 7, 13.) Justice Blackmun wrote that "... under any test -- compelling state interest, or rational basis, or something in between -- [the statute], in the context of child support, does not survive an equal protection attack." (Id. at 17.)

Despite the fact that the Court did not specify what standard of review it employed to measure the Utah law's constitutionality, the opinion does contain language within it that seems to indicate that the Court was exercising greater scrutiny than it would normally if it were applying the traditional rational basis test. For example, in referring to the Utah Supreme Court's rationale, the Court observed,

> Nothwithstanding the 'old notions' to which the Utah court referred, we perceive nothing rational in the distinction drawn by [the statute]... A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. [citation omitted]. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government, and indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance, particularly when marriage, as the statute provides, terminates minority for a person of either sex.
>
> (Id. at 14 - 15.) (Emphasis supplied.)

Of course, the fact that the Court intended to apply a standard more stringent than the traditional rational basis analysis has since been confirmed by the rationale it employed in Craig, supra.

During the 1976-1977 Term, the Court rendered decisions in three Social Security cases: DeCastro, supra; Goldfarb, supra; and Webster, supra.

In DeCastro, the Court held that the statutory classification of §202(b)(1) of the Social Security Act did not violate the Due Process Clause of the Fifth Amendment. This particular section of the law provides that a married woman under 62 whose husband retires or becomes disabled is entitled to monthly benefits under the Act if she has a minor or dependent child in her care; however, a divorced woman under 62 whose ex-husband retires or becomes disabled does not receive such benefits and this is the case even if she has a young or disabled child in her care. A divorced woman is entitled to get monthly payments if she is aged 62 or over and her ex-husband retires or becomes disabled. The Court concluded that this difference in statutory treatment of married and divorced women is permissible under the Fifth Amendment to the U.S. Constitution.

In considering the constitutionality of the statutory classification challenged in DeCastro, the Court was guided by the principle that the challenged statute is entitled to a strong presumption of constitutionality -- "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." (quoting from Jefferson v. Hackney, 406 U.S. 535, 546.) (DeCastro, 429 U.S. 181, 185.) In upholding the statute in question, the Court reasoned that it was in accord with the primary objective of the Social Security

system, ie. "...to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age." (Id. at 185-186.) The Court found that in view of the legislative purpose, it was understandable why Congress chose to treat married women differently from divorced women. The Court wrote:

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. For instance, a divorced wife need not forego work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. In short, divorced couples typically live separate lives. It was not irrational for Congress to recognize this basic fact in deciding to defer monthly payments to divorced wives of retired or disabled wage earners until they reach the age of 62.
> (Id. at 188.) (Emphasis supplied.)

While the Court in DeCastro felt that Congress could rationally decide that problems created for divorced women remained less pressing than those faced by women who continued to live with their husbands, there is nothing preventing Congress from amending this provision in the Social Security Act so that married women and divorced women would be treated alike in the case of wife's insurance benefits. (See §202(b)(1) of the Social Security Act, 42 U.S.C. §402 (b)(1).) The decision concerning whether to amend the law is a policy matter.

In March of 1977, the Court decided the Goldfarb case. This case was a direct appeal from a final judgment of a three-judge district court declaring 42 U.S.C. §§402(b); (c)(1)(c); (e); (f)(1)(D) unconstitutional insofar as these provisions discriminate against female individuals insured under Social Security and their spouses on the basis of sex. Under the Social Security Act, survivors' benefits based on the earnings of a deceased husband covered by the Act are payable to his widow regardless of dependency, but under 42 U.S.C. §402(f)(1)(D) such benefits on the basis of a deceased wife covered by the Act are payable to her widower only if he was receiving at least half of his support from her. In affirming the decision of the three-judge district court, the Supreme Court held that the different treatment of men and women required by §402(f)(1)(D) constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees. Justice Brennan, writing the main opinion for the Court, relied principally upon the rationale used in Wiesenfeld, supra, and declared that,

> Wiesenfeld thus inescapably compels the conclusion reached by the District Court that the gender-based differentiation created by §402(f)(1)(D) -- that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men -- is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations ... or "old notions" ... such as "assumptions as to dependency," ... that are more consistent with "the role-typing society has long imposed,"... than with contemporary reality. Thus §402(f)(1)(D) "[b]y providing dissimilar treatment for men and women who are ... similarly situated ... violates the [Fifth Amendment]... (Goldfarb, 45 U.S.L.W. 4237, 4239.) (citations omitted.)

The Court in Goldfarb examined to a great extent the legislative history of the statute being challenged. It concluded that from the legislative history, the general scheme of the Old Age, Survivors and Disability Insurance (OASDI) benefits program, and the phrasing of the law's provision itself, the differential treatment of nondependent widows and widowers resulted from an intention to aid the dependent spouses of deceased wage earners along with a presumption that wives are usually dependent. The Court rejected the idea that the reason for the provision was the Congressional intention to remedy the greater needs of the nondependent widows. The Court emphasized that "§405 (f)(1)(D) itself is phrased in terms of dependency, not need." (Id. at 4241.) It also pointed out that the "overall statutory scheme makes actual dependency the general basis of eligibility for OASDI benefits, and the statute, in omitting that requirement for wives and widows, reflects only a presumption that they are ordinarily dependent." (Id.) After analyzing the significant portions of the legislative history, the Court concluded that,

> The only conceivable justification for writing the presumption of wives' dependency into the statute is the assumption, not verified by the Government in Frontiero ... or here, but based simply on "archaic and overbroad" generalizations... that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes. We held in Frontiero, and again in Wiesenfeld, and therefore hold again here, that such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.
>
> (Id. at 4242.) (citations omitted.)

Justice Stevens wrote a separate opinion in which he concurred in the judgment but relied upon a different rationale. He wrote, "...I am persuaded that the relevant discrimination in this case is against surviving male spouses, rather than against deceased female wage earners." (Id., Stevens, Concurring Opinion.) Beginning on that premise, he concluded that "this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females." (Id. at 4243.) In Justice Stevens' estimation, "... something more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses." (Id. at 4243-4244.)

In footnote 2 of the main opinion, Justice Brennan referred to a number of lower court decisions in which the courts had struck down similar dependency provisions to the one in question in Goldfarb. (Goldfarb, supra, n. 2 at 4238.) These courts had held that it was unconstitutional to force husbands of retired workers applying for benefits to prove that they were dependent upon their wives for half their support when proof of dependency was not required of the wives. Of those cases mentioned, the Court, in accord with its holding in Goldfarb, summarily affirmed the following: Califano v. Silbowitz, 75-712; Jablon v. Califano, 75-739; and Califano v. Abbott, 75-1463. (See 45 U.S.L.W. 3632 (March 22, 1977).)

Mention should be made of the dissenting opinion in Goldfarb (a 5-4 decision) before we leave our discussion of that case. Justice Rehnquist wrote the dissent in which he was joined by Chief Justice Burger, and Justices Stewart and Blackmun. The dissenters contended that

there is more support in their cases for the opposite result than that reached by the Court's majority in Goldfarb. Justice Rehnquist said that, "...there are two largely separate principles which may be deduced from these cases which indicate that the Court has reached the wrong result." (Id. at 4244.) These two principles are: (1) The heightened levels of scrutiny for particular classifications under the Equal Protection Clause will not be applied automatically in the field of social insurance legislation and; (2) The Kahn v. Shevin concept, which allows differing treatment in legislation which has a compensatory effect, is applicable in the field of social insurance legislation. With respect to the first principle, the dissenters point out that social insurance legislation is unique in a number of ways. Two traits peculiar to it include: (1) the expansion of the statutory scheme in a piecemeal fashion "so that it is virtually impossible to say that a particular amendment fits with mathematical nicety into a carefully conceived overall plan for payment of benefits" (Id.) and; (2) administrative convenience bearing a vital relation to the overall legislative plan "because of congressional concern for certainty in determination of entitlement and promptness in payment of benefits." (Id.) Justice Rehnquist explained that the dependence test was not imposed on widows by the statute challenged in Goldfarb because of the legislative belief "that the actual rate of dependence was sufficiently high that a requirement of proof would create more administrative expense than it would save in the award of benefits." (Id. at 4247.) (See also Id., footnote 7 at 4247-48.)

The other aspect of the dissent which is significant is the discussion relating to Kahn v. Shevin and the application of the compensatory rationale. Under the social insurance scheme involved in Goldfarb, the dissent believed that Wiesenfeld and Frontiero were distinguishable. In Goldfarb, the benefit payments to the survivors were neither contractual nor compensatory for work done. In concluding, Justice Rehnquist wrote,

> The very most that can be squeezed out of the facts of this case in the way of cognizable "discrimination" is a classification which favors aged widows. Quite apart from any considerations of legislative purpose and "administrative convenience" which may be advanced to support the classification, this is scarcely an invidious discrimination...The classification challenged here is "overinclusive" only in the sense that widows over 62 may obtain benefits without a showing of need, where widowers must demonstrate need. Because this overinclusion is rationally justifiable, given available empirical data, on the basis of "administrative convenience," Mathews v. Lucas, supra, is authority for upholding it. The differentiation in no way perpetuates the economic discrimination which has been the basis for heightened scrutiny of gender-based classifications, and is, in fact, explainable as a measure to ameliorate the characteristically depressed condition of widows. Kahn v. Shevin, supra is therefore also authority for upholding it.
>
> (Id. at 4248-4249.) (Emphasis supplied.)

The language in the Goldfarb dissent is important because of the manner in which it depicts social insurance legislation, the application of an "administrative convenience" rationale, and the use of the Kahn v. Shevin analysis. The compensatory rationale for upholding ameliorative classifications in legislation is one which the Court will have to deal with and perhaps refine or even revise in

cases of reverse discrimination, eg. Regents of the University of California v. Bakke, No. 76-811, which is currently pending before the Court. The issue comes down to: under what circumstances is benign discrimination permissible?

On March 21, 1977, the Court decided Califano v. Webster, supra, in which it held in a per curiam opinion that a former section of the Social Security Act under which retired men are treated less favorably than women in determining their old age insurance benefits was constitutional. The law being challenged was 42 U.S.C. §415. Under this section of the Act, old-age insurance benefits are computed on the basis of the wage earner's "average monthly wage" earned during his "benefit computation years" which are the "elapsed years" (reduced by five) during which the wage earner's covered wages were highest. Prior to 1972 when the law was amended, "elapsed years" depended upon the sex of the wage earner. Then in 1972 Congress changed the formula to be used and specifically provided that equal treatment for the sexes be phased in over the next three years. Congress, however, chose not to make the amendment retroactive. Therefore, people who reached retirement age before the various effective dates of the changes were subject to the old formulas. As a consequence, there are still people today who are covered by the former section of the Social Security Act under which retired men received less favorable treatment than women in determining their old age insurance benefits.

The Court found that the old formulas as provided for in the law before 1972 were constitutional. It reasoned that the disparate treatment had been purposely enacted by Congress "to compensate women

for past economic discrimination." (Webster, 45 U.S.L.W. 3630.) The Court relied upon the legislative history to support its conclusion. (Id. at 3630-3631.) Kahn v. Shevin, supra, and Schlesinger v. Ballard, supra, are two earlier cases which the Court chose to rely upon as precedents in Webster. The Court wrote,

> To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, ___U.S.___, ___(1976). Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective. Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974)...
> (Id. at 3630.)

The Court distinguished the Webster situation from that present in Wiesenfeld, supra, and Goldfarb, supra. (Id.) It found that,

> The statutory scheme involved here is more analogous to those upheld in Kahn and Ballard than to those struck down in Wiesenfeld and Goldfarb. The more favorable treatment of the female wage earner enacted here was not a result of "archaic and overbroad generalizations" about women... or of "the roletyping society has long imposed" upon women,...such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents... Rather, "the only discernible purpose of [§215's more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women."...
> (Id.)

The Webster decision is significant because it reveals that the Court is still applying the concept of upholding gender-based differentiations in statutes if they, in fact, exist for the purpose of benefiting women who have suffered in the past from economic discrimination. It is the Kahn v. Shevin compensatory rationale that was relied upon by the Court in Webster. The Court's unsigned opinion in Webster drew a sharp distinction between the type of male-female disparity in old age insurance benefits (Webster) and the type in the survivor's benefits dependency requirement case (Goldfarb). In the first instance, the Court felt that the purpose of the distinction was to redress injury to women, while in the latter case the distinction was based upon outmoded stereotyping of women, eg. the assumption that women are in fact dependent. Webster is also an important decision because the Court held that the 1972 amendment did not have to be retroactive. The Court commented in the unsigned opinion that, "...Congress may replace one constitutional computation formula with another and make the new formula prospective only." (Id. at 3631.)

The Court has rendered a number of decisions in the area of discrimination against pregnant women. In November of 1975, it issued a per curiam opinion in which it concluded that, "...the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the LaFleur case." (Turner v. Department of Employment Security of Utah et al., supra, at 46.) The Utah law, challenged by petitioner in this case, specifically provided that pregnant women were ineligible for

unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth. (Utah Code Ann. §35-4-5 (h)(1)(1974).)

Cleveland Board of Education v. LaFleur, supra, is an earlier case in which the Court ruled that pregnant public school teachers could not be compelled to leave work after only four or five months of pregnancy. The Court's reasoning was founded on a due process - conclusive presumption theory. In LaFleur, the Court was rejecting an arbitrary rule which failed to take into consideration individual differences among various pregnant women. Such an inflexible rule would result in sending every pregnant teacher home at the same time and months in advance of delivery, and the basis of such discharge would be the statutorily established conclusive presumption of lack of fitness to perform one's teaching duties at school. Not only did the Court object to the failure of such rule taking into account individual differences, but also, the Court found that the rule impermissibly burdened the exercise of the fundamental right to bear a child.

In LaFleur, the Court noted that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause..." (Id. at 639.) The Court held that the Constitution required a more individualized approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." (Id., at 645.)

In Turner, the Court used reasoning similar to that which can be found in LaFleur. When it concluded that the Utah unemployment compensation statute was unconstitutional, the Court pointed out that, "The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake." (Turner, supra, at 46.)

The due process line of reasoning which the Court used in LaFleur and Turner, where the basis of the holding was the conclusive presumption doctrine, seems to have been abandoned by the Court. Various legal authorities have been critical of the conclusive presumption analysis. (See Bezanson, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 INDIANA LAW REVIEW 644 (1974); Note, 87 HARVARD LAW REVIEW 1534 (1974); Note, 72 MICHIGAN LAW REVIEW 800 (1974); Note, 27 STANFORD LAW REVIEW 499 (1974).) With the case of Weinberger v. Salfi, the Court itself joined the critics of this doctrine by rejecting its application to the facts at hand. (422 U.S. 749 (1975).) In writing for the majority, Justice Rehnquist said, "We think that the District Court's extension of the holdings of Stanley, Vlandis, and LaFleur to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." (Id. at 772.) (Emphasis supplied.)

Geduldig v. Aiello, supra, was decided by the Court around the same time as Kahn and Ballard; however, we have chosen to discuss it here because it relates to the Court's treatment of pregnancy and sheds some light upon the LaFleur holding and rationale. In Aiello, the Court rejected a claim that a California income insurance plan, which excluded disability resulting from normal pregnancy, was unconstitutional because it violated the equal protection clause of the Constitution. The Court concluded that the exclusion of pregnancy was a permissible means for achieving the legitimate state purpose of maintaining a low-cost, employee supported insurance plan. It is interesting to note also that the Court found that the California plan's exclusion did not amount to sex discrimination absent a showing that it was a pretext for invidious discrimination.

The constitutionality of mandatory maternity leave was involved in LaFleur. Because the Court found such a leave policy to be arbitrary, it struck it down on due process grounds and never had to decide whether treating pregnancy differently from other temporary disabilities was sex discrimination. In LaFleur, the Court accorded protection to a woman's right to work while pregnant, but not disabled. In Aiello, the Court rejected a wage earning woman's claim to income maintenance when pregnancy actually disabled her. Aiello was decided on equal protection grounds. A reading of Aiello indicates that the Court recognized that pregnancy was related to sex; however, it refused to go so far as to rule that this classification constituted

gender discrimination of the Reed or Frontiero variety. The majority noted in a footnote that,

> ...The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics...
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.
>
> (Id. n. 20 at 496-497.) (Emphasis supplied.)

In the text of the opinion itself, the Court emphasized that, "There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." (Id. at 496-497.)

In December, 1976, the Court decided General Electric Co. v. Gilbert et al., supra. In Gilbert, the Court effectively overruled the unanimous conclusion of six courts of appeals by holding that the exclusion of pregnancy related disability from an otherwise comprehensive, privately funded, employee disability benefits plan did not constitute sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. The majority in Gilbert relied heavily upon the Court's prior decision in Aiello, supra. In so doing, it refused to

extend the still evolving judicial theory which measures the legality of employment practices under Title VII in terms of their "consequences" or "effects" to the pregnancy exclusion at issue in Gilbert. Apart from the specific issue involved -- and, more generally, the status of pregnancy classifications in other employment contexts -- the theory of discrimination employed by Gilbert may also have far-reaching consequences in other "sex" cases under Title VII.

Gilbert involved a company financed program whereby General Electric provides weekly non-occupational sickness and accident benefit payments to all of its employees in an amount equal to 60 percent of an employee's straight time weekly wage up to a maximum benefit of $150 per week for each week the employee is absent from and unable to work on account of any disability resulting from nonoccupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive period of disability due to the same or related cause. The plan covers all disabilities of male employees, including those caused by voluntary medical procedures, self-inflicted injuries, injuries sustained in sports and fights, alcoholism and drug addiction. The only disabilities not covered by the plan are those arising from pregnancy, miscarriage or childbirth. Excluded from coverage also are non-pregnancy related medical conditions or accidents occurring while an employee is on pregnancy leave.

Women employees of General Electric initially filed an administrative complaint under Title VII with EEOC to recover disability benefits for pregnancy leave denied them by the company. Following a favorable decision by the Commission, the plaintiffs instituted

an action in federal district court. The district court found for the plaintiffs, concluding that the company was engaging in deliberate and intentional discriminatory practices. Judge Mehrige found that the "sex discrimination is self evident" and that there was no rational distinction to be drawn between pregnancy related disabilities and a disability arising from any other cause. (375 F. Supp. 367, 386 (E.D. Va. 1974).) On appeal, the Fourth Circuit affirmed. (519 F. 2d 661.)

Justice Rehnquist wrote the Supreme Court's opinion for the Gilbert majority in which he was joined by the Chief Justice and Justices Stewart, White, Powell, and Blackmun. Justices Stewart and Blackmun also filed separate concurring opinions. Justice Marshall joined Justice Brennan in dissent and Justice Stevens dissented separately.

In reversing the Fourth Circuit, the Supreme Court majority disagreed with the appeals court's basic contention that the equal protection analysis of the pregnancy exclusion in Aiello could be disregarded in considering the same issue in Gilbert under Title VII. Although impliedly acknowledging that the statutory and constitutional standards may differ, Justice Rehnquist felt that the case law elaborating the constitutional concept of discrimination is a "useful starting point" in ascertaining Congressional intent with respect to the analogous Title VII concept, particularly since "discrimination" is not defined in Title VII. (429 U.S. 125, 133 (1976).) The majority wrote,

> We think, therefore, that our decision in Geduldig v. Aiello, supra, dealing with a strikingly similar disability

> plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex.
>
> (Id.)

The Court in Gilbert interpreted Aiello as establishing a very fundamental principle -- ie. that the exclusion of pregnancy related disability from the legislative scheme was not to be equated in any sense with sex discrimination per se. Pointing to language in Aiello indicating a "lack of identity between the excluded disability and gender as such," the majority in Gilbert read Aiello as meaning that "the exclusion of pregnancy from coverage under California's disability benefits plan was not in itself discrimination based on sex." (Id. at 135.) And insofar as it held that an exclusion of pregnancy from a disability benefits plan providing general coverage is not gender-based discrimination at all, the Aiello rationale was applicable in the Title VII context as well. Furthermore, there was, according to the majority, no greater showing in Gilbert that the pregnancy exclusion was a "mere pretext" or "subterfuge to accomplish a forbidden discrimination." (Id. at 136.) Although confined to women, pregnancy was significantly different from other diseases or disabilities covered by the plan; indeed, it was not a "disease" at all since it was oftentimes a "voluntarily undertaken and desired condition." (Id.)

The Court's treatment of the pregnancy exclusion in Gilbert may have both short and long range implications for future Title VII litigation. Most immediately, the decision seems to sanction generally an employer's differential treatment of employees on the basis of pregnancy because of its broadly stated holding that pregnancy status may not be equated with sex for purposes of Title VII analysis.

Apart from the issue of pregnancy per se, at the time Gilbert was decided, it was thought that it may have broader ramifications, perhaps signaling the Court's unwillingness to apply with equal force the Griggs test of unlawful discrimination, predicated on the effects or consequences that employment practices have on protected minorities, to cases of asserted sexually discriminatory conduct. (Griggs v. Duke Power Co., 401 U.S. 424 (1971).) However, after the Court decided Dothard v. Rawlinson, supra, in June, 1977, invalidating statutory height and weight requirements for prison guards, it put to rest such conjectures and clarified that the Griggs test was in fact still viable in the context of gender-based discrimination.

In Griggs, the company had practiced overt racial discrimination prior to enactment of Title VII, but abandoned the policy after the law's adoption. In its place, the company developed a new policy of requiring completion of high school and satisfactory performance on a general intelligence test as a condition to placement in higher paying jobs. In striking down this policy, the Chief Justice noted that whites fared better than blacks and attributed this "consequence" to the "inferior education in segregated schools" received by minority groups. The Court went on to define permissible types of employment criteria in terms of their effects on protected classes under the Act, holding that requirements which are facially neutral but operate in a discriminatory fashion are barred unless justified by business necessity. Title VII was designed to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of...employees over other employees. Under the Act,

practices, procedures, or tests neutral on their face, and neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." (Id. at 429-30.) The diploma and testing requirements in Griggs were infirm because they were not shown to be job related and had the effect of perpetuating the company's pre-Act discrimination.

The critical aspect of Griggs was its apparent rejection of discriminatory intent as a prerequisite to relief under the Act. "Congress directed the thrust of the Act to the consequences of employment discrimination, not simply the motivation." (Id. at 432.) The policy in Griggs could not stand, regardless of the motive behind its adoption, because it had a disproportionate adverse impact on minority employees and could not be justified on grounds of business necessity. Thus, Griggs advanced a concept of intentional discrimination based on the adverse effects that challenged practices have on the employment opportunities of those protected by the Act.

In the next portion of this paper, we will discuss in more detail why legal scholars speculated that the Gilbert decision might have far-reaching implications with respect to the future application of the Griggs "effects" test in sex discrimination cases. However, before we proceed to that discussion, there is another decision handed down by the Court this Term which relates to sex discrimination in the constitutional context -- Vorchheimer v. School District of Philadelphia et al., supra.

Vorchheimer involved a challenge on constitutional grounds to the right of a municipal public school system to maintain a totally

sex-segregated senior high school for scholastically superior students. The effect of this policy in Philadelphia was to reserve to males and to deny to females access to the school in question which was distinguished by its national reputation, superior resources, and excellent scientific facilities. The U.S. Court of Appeals for the Third Circuit had previously held that where attendance at either of two single-sex high schools was voluntary, and the educational opportunities offered at the two schools were essentially equal, the regulations which established admission requirements based on gender classification did not violate the equal protection clause. (532 F. 2d 880 (1976).)

On April 19, 1977, the Supreme Court deadlocked, 4 to 4 on the issue in Vorchheimer of whether a city's public school system may have one college preparatory school for boys and one for girls. The deadlock occurred because Justice William Rehnquist did not participate in the case. The tie vote technically affirms the lower court decision. The Third Circuit had decided Title IX of the Education Amendments of 1972 did not apply to the situation because it does not cover the admission policies of secondary schools. It had been expected that Vorchheimer would be a precedent setting case in the Supreme Court. The fact that the Supreme Court affirmed without writing an opinion of its own is a decision on the merits; however, this affirmance is probably of little precedential value because the Supreme Court was equally divided. Therefore, the issue of sex-segregated schools in the public sector still remains.

C. After Gilbert -- Sex Discrimination in the Context of a Statutory Violation

Up until the Supreme Court's decision in Gilbert, legal scholars were speculating that the Court would apply a different form of analysis in cases of constitutional violations from that used when the challenge was based upon a statutory violation because this was what the Court was in fact doing in race discrimination situations. The rules for the type of analysis used in race cases were first set forth in Washington v. Davis (426 U.S. 229 (1976)) and then later elaborated upon in Village of Arlington Heights et al. v. Metropolitan Housing Development Corp. et al. (___U.S.___, 45 U.S.L.W. 4073 (January 11, 1977).) We shall discuss these two cases below. Until Gilbert was decided, the question of whether the same rules controlled in sex discrimination situations remained somewhat ambiguous. The Gilbert case tended to muddy the waters even further; for while the decision could be read narrowly, as limited in relevance to the specific question of the status of pregnancy classifications under Title VII, there were aspects of the majority opinion which could support a broader interpretation. Discussion of the latter will follow after our examination of the separate constitutional and statutory analysis applied in race discrimination cases.

From a legal analytical point of view in the case of race discrimination, it is important to distinguish between constitutional standards of interpretation and statutory ones. It is an accepted fact that no unconstitutional practice can be sanctioned statutorily.

It follows from this though that the equal protection clause in the Fourteenth Amendment of the U.S. Constitution, as well as any other constitutional provision, establishes only the minimum scope of protection. Congress is at liberty to legislate beyond that minimum limit or guarantee. Consequently, laws such as the civil rights acts can be more expansive than the minimal requirement set forth by the Constitution. The decision whether or not to enact such broad statutes is of course a policy decision on the part of Congress. This distinction between constitutional protections and statutory ones is fundamental to a legal understanding.

The standards which the U.S. Supreme Court applies in situations where the equal protection clause of the Fourteenth Amendment is violated are not necessarily the same as an analysis the Court would set forth when it is dealing with the violation of a statutory prohibition. In the constitutional context, the Court will go through an application of a particular standard of review -- traditional rational basis, intermediate, or active -- depending upon the facts of the case, the classification involved, and the nature of the discrimination. It is a highly sophisticated approach to ascertaining whether or not a person has been denied equal protection of the laws. When the Court is faced with a case that involves a specific statute, its review of the facts is done in accordance with the wording of the statute which has allegedly been violated. (See Washington v. Davis, supra, for an in depth discussion of the important distinction between constitutional and statutory standards of review.)

Significant legal consequences depend upon whether a plaintiff's cause of action derives from the statutory proscription against discrimination or the constitutional guarantee of equal protection. According to the Davis decision, when the plaintiff alleges a statutory violation and the questioned practice has a substantially disproportionate effect upon a protected minority, discriminatory purpose need not be proved. For example, when employment discrimination under Title VII of the Civil Rights Act of 1964, as amended in 1972, is the allegation, once the Title VII plaintiff establishes a prima facie case of discrimination under this disproportionate impact analysis, then the burden shifts to the employer to prove that the disqualifying employment practice is related to the employment in question.

Under Title VII of the Civil Rights Act, as amended, courts use a stricter standard or a more probing scrutiny into the employment decisions made by executives and administrators and other organizations covered by the law. The more probing judicial review is not the appropriate form of analysis for alleged constitutional violations. (Washington v. Davis, supra.) While the test under Title VII is one of impact, the test under the equal protection clause of the Fourteenth Amendment is one of intent. Under a constitutional analysis, disproportionate impact by itself is not enough to make out a case of invidious race discrimination. When a plaintiff's challenge rests upon constitutional grounds, he or she must show that the discrimination was purposeful; however, evidence of disproportionate impact is relevant to the question of intent.

The Supreme Court recently decided Village of Arlington Heights et. al. v. Metropolitan Housing Development Corp. et. al., supra, in which it held that in the context of zoning, proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment. According to the Court, respondents in Arlington Heights failed to carry their burden of proving that such an intent or purpose was a motivating factor in the Village's rezoning decision. The Court based its holding primarily upon Davis, supra. Justice Powell writing for the Court noted:

> Our decision last Term in Washington v. Davis ... made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.
>
> (Id. at 4077.)

Arlington Heights involved a suit by the corporation (MHDC) (a nonprofit organization formed to develop low and moderate income housing in the Chicago metropolitan area) and various individuals to compel a zoning change to permit construction in the village of a federally subsidized townhouse development, with a projected 40 percent minority occupancy, for low and moderate income tenants. The Village Board of Trustees denied the request to rezone the site from single family to multifamily residential because the Village's "comprehensive plan" permitted rezoning to "R-5" multifamily only if the area comprised a "buffer zone" between single family and high intensity use.

Plaintiffs brought an action claiming that the refusal to rezone violated the Fourteenth Amendment and various federal statutory provisions. The lower court's decision, however, was based solely upon the Equal Protection Clause of the Fourteenth Amendment. The complaint specifically alleged that the Village's refusal perpetuated segregation and denied Metropolitan Housing the right to use its property in a reasonable manner. The district court denied relief, finding the decision neither arbitrary nor capricious and justified by a "legitimate desire to protect property values and the integrity of the village's zoning plan." (373 F. Supp. 211 (N.D. Ill. 1974).) It found no evidence to prove that the decision was racially motivated.

The U.S. Court of Appeals for the Seventh Circuit reversed and held that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone consequently violated the Fourteenth Amendment. (See 517 F. 2d 409 (1975).) The Supreme Court rejected the Seventh Circuit's "ultimate effects" analysis when it concluded, "The Court of Appeals' further finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance." (Id. at 4078.)

There is really very little new in Arlington Heights in terms of how the Court is going to proceed with regard to applying Griggs, supra, and a disproportionate impact analysis because the Court followed without deviation its earlier decision in Davis. The Court did discuss some of the standards that might be used in proving a Fourteenth Amendment violation, eg.: 1) historical backgound of the action or decision being challenged; 2) specific sequence of events,

ie. whether the action represents a departure from normal procedure used by the person or agency carrying out that action; and 3) legislative or administrative history of the action. The Court indicated that all of the foregoing would be useful evidentiary sources to be used in helping determine whether an invidious discriminatory purpose was the motivating factor in the decision-maker's decision or action. In the context of Arlington Heights respondents had to show that the suburb's refusal to rezone stemmed from a desire to keep out minority group members.

Legally, the ruling in Arlington Heights appears to be part of, and to indicate a continuation of, a trend toward more restrictive Supreme Court rulings on issues of racial discrimination, at least in the context of constitutional challenges. It represents a continuation of the reasoning used in Davis, where the Court took a restrictive view of racial discrimination in examinations for job applicants. The majority in Arlington Heights did remand the case for consideration of a statutory issue, ie. whether the suburb's action violated the Fair Housing Act of 1968 (Title VIII of the 1968 Civil Rights Act). Therefore, it remains to be seen how the lower court will decide the issue in the context of a statutory challenge. It may be conjectured that the court will probably be guided by the standards set forth by the Supreme Court in Davis.

While Davis, Arlington Heights, and Griggs tend to establish the mode of analysis to be used in race cases arising under the Constitution on the one hand and under a statute on the other, it

remained for the Court to determine whether the same rules controlled in sex discrimination situations.

In January, 1976, two cases were argued before the Court and each involved the question of the intended scope of Title VII's prohibition against discrimination based on sex. (Liberty Mutual Ins. Co. v. Wetzel, supra; General Electric Co. v. Gilbert, supra.) In both cases, the respective Federal courts (the Third Circuit in Wetzel and the District Court in Virginia in Gilbert) held that an employer's exclusion of pregnancy-related disabilities from coverage under an employee disability income protection plan constitutes sex discrimination in violation of Title VII of the 1964 Civil Rights Act. Also at issue was the applicability of the Court's decision in Aiello, supra, where California's disability insurance system, which excluded disability because of pregnancy, was upheld because it did not constitute sex discrimination in violation of the equal protection clause of the Fourteenth Amendment.

The Court rendered a decision in Wetzel in March, 1976, but the decision was based upon procedural grounds and therefore offers no further insight into the Court's treatment of sex discrimination issues. The Court held that the district court's order was not appealable as a final decision under 28 U.S.C. §1291. It also ruled that the order was not appealable pursuant to 28 U.S.C. §1292's provision for interlocutory appeals. In writing the Opinion for the Court, Justice Rehnquist stated:

> ...We would twist the fabric of the statute more than it will bear if we were to agree that

> the District Court's order of February 20, 1974, was appealable to the Court of Appeals.
>
> The judgment of the Court of Appeals is therefore vacated and remanded with instructions to dismiss the petitioner's appeal.
>
> (424 U.S. 737, 746 (1976).)

The Gilbert case was decided in December, 1976, after it had been reargued before the Court in October of that year. As we indicated earlier in this memorandum, the Court in Gilbert appeared to have merged the constitutional and statutory standards of review in gender-based cases. It is precisely because of this merging that the Court was able to base its Gilbert decision and rationale upon its previous holding in the Fourteenth Amendment case, Aiello, supra. The majority wrote,

> ... Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under §703 (a)(1), Geduldig is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.
>
> (Gilbert, supra, at 136.)

Under the principles of Washington v. Davis, supra, a statutory challenge merely requires a showing of disproportionate impact in order to make out a prima facie case; whereas, a constitutional challenge mandates a showing of intent and disproportionate impact by itself is insufficient to prove a violation of the equal protection clause. In Gilbert, the Court used language which implied that in sex discrimination cases arising under either a statute or the Constitution the element of intent must be proven. Justice Rehnquist writing for the Court noted,

> There is no more showing in this case than there was in Geduldig that the exclusion of

> pregnancy benefits is a mere "[pretext] designed to effect an invidious discrimination against the members of one sex or the other." ...we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability... We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women.
> (Id.)

The majority in Gilbert did not ignore the previous rulings in Griggs, supra, and Davis, supra. In fact, the Court did discuss these two precedents and the "effects" test. Justice Rehnquist, writing for the majority, did not seem to repudiate either case. He wrote,

> The instant suit was grounded on Title VII rather than the Equal Protection Clause, and our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See Washington v. Davis... For example in the context of a challenge, under the provisions of §703(a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were "invidiously to discriminate on the basis of racial or other impermissible classification," Griggs v. Duke Power Co. ...
> (Id. at 136-137.)

The Court was not clear as to whether or not Griggs and Davis governed in gender-based discrimination cases. In its earlier discussion in Gilbert, the Court merged the statutory and constitutional standards of analysis. It also spoke in terms of the absence of a

pretext or motive to discriminate on the part of the employer, G.E. Furthermore, it drew a parallel to the situation in Aiello where it found no violation of the Fourteenth Amendment because the State of California lacked a discriminatory intent when it chose to exclude pregnancy from the disability plan. The thrust of such a discussion appeared to point in the direction of the Court holding that in sex discrimination cases, regardless of whether we have a statutory or constitutional challenge, the element of motive or intent must be shown to exist in order to prove a violation. Yet, after citing Davis and Griggs and explaining their holdings, the Court made the following statement in Gilbert,

> Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of §703(a)(1), but cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806 (1973), the respondents have not made the requisite showing of gender-based effects. (Id. at 137.) (Emphasis supplied.)

Some people read the foregoing statement to mean that the Court was not rejecting the "effects" test for gender-based classifications.

In his partial concurrence in Gilbert, supra, Justice Blackmun wrote, "I do not join any inference or suggestion in the Court's opinion -- if any such inference or suggestion is there -- that effect may never be a controlling factor in a Title VII case, or that Griggs v. Duke Power Co., 401 U.S. 424 (1971), is no longer good law." (Id., Blackmun partial concurrence, at 146.)

Justice Stewart had no doubts in his mind that the majority in Gilbert was not overruling Griggs. He commented, "Unlike my Brother

Blackmun, I do not understand the opinion to question either Griggs v. Duke Power Co., 401 U.S. 424, specifically, or the significance generally of proving a discriminatory effect in a Title VII case." (Id., Stewart concurrence.)

The statement by Justice Blackmun indicates that after Gilbert there was some doubt as to the legal status of Griggs and the "effects" test which was formulated by the Court in that decision.

An examination of Justice Brennan's dissent reveals the questions that the majority opinion raised with respect to the Griggs decision and the application of the "effects" analysis under Title VII. Justice Brennan wrote,

> Nothwithstanding unexplained and inexplicable implications to the contrary in the majority opinion, this Court, see Washington v. Davis, ... Albemarle Paper Co. v. Moody, ... McDonnell Douglas Corp. v. Green, ... Griggs v. Duke Power Co., ... and every Court of Appeals now have firmly settled that a prima facie violation of Title VII, whether under §703(a)(1) or §703(a)(2), also is established by demonstrating that a facially-neutral classification has the effect of discriminating against members of a defined class.
>
> (Id., Brennan Dissent, at 153-154.) (Emphasis supplied.) (citations omitted.)

Justice Brennan questioned the majority's cryptic "but cf." citation to McDonnell Douglas Corp. v. Green (411 U.S. 792 (1973).) (See Id., n. 6.) He also found it unacceptable that the Court's opinion implied that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII. He wrote, "Not only is this fleeting dictum irrelevant to the reasoning that precedes it, not only does it conflict with a long line of cases to the contrary ... but it is flatly contradicted by the central holding of last Term's Washington v. Davis..." (Id.)

Justice Brennan indicated, by way of a footnote in his dissent, that after Griggs, in 1972 Congress revised Title VII and expressly endorsed the use of the "effect only" test outlined in Griggs in indentifying "increasingly complex" "forms and incidents of discrimination" that "may not appear obvious at first glance." (See Id. n. 7 at 155 and also H.R. Rep. No. 92-238, 92d Cong., 2d Sess., U.S. Code and Admin. News, at 2144 (1972).) Congress, however, never wrote this form of analysis into the statute itself. Congress left the decision up to the E.E.O.C. in issuing guidelines which would cover the pregnancy disability coverage problem. E.E.O.C.'s guideline, which mandated the treatment of pregnancy as any other ordinary temporary disability and the inclusion of it in insurance plans, was not given judicial deference by the Court in Gilbert.

Because the Court in Gilbert merged the constitutional and statutory standards of analysis in the context of gender-based discrimination and spoke in terms of motive, intent, and pretext as being necessary elements to prove both a constitutional and statutory violation, in interpreting the significance of this mergence, one might have surmised that the Court intended to treat sex and race differently for the purposes of constitutional and statutory analyses. Such a conclusion meant that the plaintiff in a gender-based discrimination case would have to bear just as heavy a burden in statutory cases as in the constitutional situation where proving a prima facie violation requires a showing of an intent to discriminate, and the mere showing of disproportionate impact is inadequate.

However, the decision in Dothard, supra, the last sex discrimination case for the 1976-1977 Term, indicates that the Court intends to apply the Griggs test in gender-based situations. The Gilbert holding and rationale may have been misleading when the majority implied that perhaps a disproportionate impact analysis was not valid in the sex discrimination context. In any event, one might conclude that the Court was on the one hand, either less than clear in Gilbert as to what its real intent was; or on the other hand, the Court's opinion was a narrow one only to be applied in the context of pregnancy-based discrimination.

The Dothard holding removes the doubts that might have existed after Gilbert concerning the viability of the Griggs "effects" test in a gender-based context. In Dothard, the plaintiff challenged the statutory height and weight requirements for prison guards as well as a regulation which essentially barred women from "contact" positions in maximum security, all-male penitentiaries on the ground that both violated Title VII of the Civil Rights Act of 1964. A three-judge district court decided in plaintiff's favor.

The thrust of the plaintiff's claim in Dothard was that the statutory height (5ft. 2 in. minimum) and weight (120 lbs. minimum) requirements, while facially neutral, have a disproportionate impact upon women, ie. exclude women from eligibility for employment by the Alabama Board of Corrections. There was no assertion of purposeful discriminatory motive. The Supreme Court held that employment requirements for height and weight discriminate illegally against women

when statistics show a disproportionate impact upon women and when employers fail to demonstrate that the tests have some real relation to the ability to handle the job. The Court supported its ruling by relying on two of its earlier decisions, Griggs v. Duke Power Co., supra, and Albemarle Paper Co. v. Moody (422 U.S. 405 (1975)). In the latter two cases, the Court dealt with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment.

Griggs and Albemarle set out the factors needed to establish a prima facie case. First, the plaintiff has to show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. After it is shown that the employment requirements have a discriminatory effect, the burden then shifts to the employer to prove that the employment standards are in fact related to the employment in question. If the employer successfully meets this burden, then the plaintiff must come forth with proof that other selection devices exist which do not have a similar discriminatory effect and would still serve the employer's legitimate needs (Dothard, supra, 45 U.S.L.W. 4890.)

In Dothard, the Court accepted the district court's statistical information and found that it had not erred in holding that Title VII prohibited application of the statutory height and weight requirements to the appellee and the class she represents. The majority wrote,

> Although women 14 years of age or older comprise 52.75% of the Alabama population and 36.89% of its total labor force, they hold only

> 12.9% of its correctional counselor positions. In considering the effect of the minimum height and weight standards on this disparity in rate of hiring between the sexes, the District Court found that the 5'2" requirement would operate to exclude 33.29% of the women in the United States between the ages of 18-79, while excluding only 1.28% of men between the same ages. The 120-pound weight restriction would exclude 22.29% of the women and 2.35% of the men in this age group. When the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than one percent of the male population. Accordingly, the District Court found that Rawlinson had made out a prima facie case of unlawful sex discrimination.
>
> (Id.)

The Court held that those national statistics, rather than comparative statistics of actual applicants, sufficed to make out the prima facie case.

The Court also found that the appellants failed to rebut the prima facie case of discrimination on the basis that the height and weight requirements were job related. The majority noted that,

> In the District Court...appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards.
>
> If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that "measure[s] the person for the job and not the person in the abstract." Griggs v. Duke Power Co., 401 U.S., at 436. But nothing in the present record even approaches such a measurement.
>
> (Id. at 4890-4891.)

The significance of the Dothard decision rests largely upon the fact that it relied upon Griggs and Albemarle, two race discrimination cases, in its analysis of the statutory height and weight standards. The Court applied the same disproportionate impact analysis in the gender-based context as it did in those two race discrimination cases. Dothard makes it clear that when plaintiffs allege sex discrimination in violation of Title VII, they can make out their prima facie case by showing disproportionate impact. So whatever confusion may have arisen from the Gilbert decision seems to have been dispelled by Dothard. In both race and sex discrimination cases, the "effects" test is applicable and can be used to make out a prima facie case for statutory discrimination.

In Dothard, the Court upheld the regulation that barred women from "contact" positions -- those requiring continual close physical proximity to inmates -- in maximum security male penitentiaries where there is an environment of violence and disorganization. The particular facts and circumstances present with respect to Alabama prisons influenced the Court's decision. The Court did acknowledge that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes. It also stated that it was "...persuaded -- by the restrictive language of §703e, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission -- that the bfoq [bona fide occupational qualification] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the

basis of sex." (Id. at 4891.) However, the environment in Alabama's jails was such that the Court felt compelled to accept the bfoq contention advanced by the appellants. The majority wrote,

> In this environment of violence and disorganization, it would be an over-simplification to characterize Regulation 204 as an exercise in "romantic paternalism." ... In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a "contact" position in a maximum security male prison.
>
> (Id.)

Another Title VII decision handed down by the Supreme Court this term was United Air Lines, Inc. v. Evans, supra. Evans involved the problem of whether the reemployment of a former stewardess with a new date-of-hire seniority under a neutral seniority system resurrects that employee's time-barred claim for loss of seniority and pay resulting from an earlier termination. The statutory provision involved was section 706(e) of Title VII of the 1964 Civil Rights Act -- the time limitations provision. The Court held that the petitioner (United Air Lines, Inc.) did not commit a present, continuing violation of Title VII by refusing to credit respondent (Evans) after rehiring her in 1972, with pre-1972 seniority, absent any allegation that petitioner's seniority system, which is neutral in its operation, discriminates against former female employees or victims of past discrimination.

Under the facts of Evans, the plaintiff had been employed by United Air Lines, Inc. as a stewardess from November, 1966, until February, 1968. In February, 1968, she resigned involuntarily because at that time the Airline had a policy that marriage disqualified a woman from continuing in her position of stewardess. Then in November, 1968, United discontinued its "no-marriage" policy. In February, 1972, plaintiff was again hired as a new employee of United. She filed a charge of employment discrimination with EEOC on February 21, 1973 -- five years after her termination from employment, and more than four years after United had eliminated its "no-marriage" rule. United claimed that plaintiff's complaint should be dismissed on the ground that she had failed to file a charge with EEOC within 90 days of the alleged unlawful employment practice which it argued was in February, 1968, when she was forced to resign and her employment and seniority were terminated. The district court had granted United's motion to dismiss the complaint on the theory that the plaintiff was not suffering from a "continuing violation." Plaintiff appealed, and on the first appeal, the court affirmed the dismissal by the trial court. Then later in view of the U.S. Supreme Court's decision in Franks v. Bowman Transportation Co. (424 U.S. 747 (1976)), the U.S. Court of Appeals for the Seventh Circuit reheard the case and reversed and remanded. Then the case was ultimately taken to the Supreme Court.

The Court held that the complaint was properly dismissed, and it refused to give credence to the respondent's two principal arguments: 1) that she is treated less favorably than males who were hired after her termination in 1968 and prior to her re-employment

in 1972; and 2) the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination. The Court wrote,

> Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex.
>
> (United Air Lines, supra, 45 U.S.L.W. 4566, 4567.)

The Court found that there was no present violation, and that the seniority system was in fact neutral in its operation.

The Court in United Air Lines found an additional ground, §703(h), for rejecting respondent's claim. That section of Title VII expressly provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system, provided that any disparity is not the result of intentional discrimination. The respondent did not attack the bona fides of the seniority system; nor did she charge that the system was intentionally designed to discriminate.

D. Sex Discrimination Cases Currently Pending Before the U.S. Supreme Court

In this portion of the paper, we shall discuss two cases which the Supreme Court has agreed to hear and decide. The facts of each case and the precise issues before the Court will be set out. A summary of the arguments will also be presented.

After the Court rendered its opinion in Gilbert, supra, it agreed to hear two cases which involve the rights of pregnant workers--Nashville Gas Company v. Satty, supra, and Richmond Unified School District et al. v. Berg, supra.

Satty is on appeal from the U.S. Court of Appeals for the Sixth Circuit. The case involves a company sick leave plan under which the company pays employees absent from work due to non-occupational sickness or injury for a specified number of days based on the employee's seniority. Pregnancy is not treated as a sickness or injury under Nashville Gas Company's sick leave plan. A pregnant employee is granted instead a formal leave of absence by the Company and is paid for accumulated vacation time but does not receive sick leave payments. An employee who has been on formal leave of absence and who desires to return to work is permitted to return to work when a permanent position for which he or she is qualified becomes available and when no employee then permanently employed is bidding on the opening. An employee who has been on a formal leave of absence, including pregnancy leave, and who wants to return to work does not retain previously accumulated seniority for the purpose of bidding on permanent job openings, although he or she is given priority over non-employees. Upon returning to work, such employee does retain the previously accumulated seniority for purposes of pensions, vacations and other benefits. The Company does try to provide the employee with temporary work between the time when the employee is seeking to return to a permanent position and when the employee is actually re-employed on a permanent basis. When Mrs. Satty was placed on pregnancy

leave, the Company was converting certain of its accounting functions performed in her department to computers, and it was determined that her position would not be filled. The Company did provide her with temporary employment; however when she applied for three full-time positions, the jobs in each instance were awarded to a permanent female employee with seniority and not to Mrs. Satty. The latter occurred because she had lost her job-bidding seniority.

The statute involved in the Satty case is Title VII of the Civil Rights Act of 1964, as amended. The relevant provision follows:

> It shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin...
>
> (42 U.S.C. §2000e-2 (a)(1).)

The U.S. Court of Appeals for the Sixth Circuit held that the exclusion of normal pregnancy from a sick leave program and the denial of seniority constituted sex discrimination under Title VII. (Satty v. Nashville Gas Co., 522 F. 2d 850 (1975).) The court of appeals concluded that the Supreme Court's decision in Aiello, supra, was not dispositive because the issue involved was different. It viewed the issue in Satty to be: whether the exclusion by a private employer of pregnancy-related disabilities from its sick leave and seniority policies is a violation of Title VII. It believed that the issue in Aiello was whether a legislative classification dividing disability into two classes for the purposes of a state-supported disability income protection plan violates the Equal Protection Clause of the Fourteenth Amendment. (Id. at 853.)

The court of appeals also relied upon the EEOC regulations pertaining to pregnancy-related benefits and deferred to the Commission's construction of Title VII. (Id. at 854.)

The issue before the Supreme Court in Satty is: Does the disparity between treatment of pregnancy and other disabilities by the employer constitute sex discrimination within the prohibition of Title VII? The employment policies being challenged are: 1) the Company's denial of sick leave benefits to employees on pregnancy leave and 2) the Company's refusal to credit employees on leaves of absence, including pregnancy leave, with accumulated seniority for job-bidding purposes.

Petitioner Nashville Gas Co. argues that Satty is controlled by Gilbert, supra, which was decided by the Supreme Court after the Sixth Circuit issued its opinion in Satty. Petitioner states,

> Like the exclusion of pregnancy from coverage under a disability benefits plan, the employment policies at issue in this case do not discriminate on the basis of sex but merely exclude pregnancy coverage from the particular benefit and in all other respects treat women and men equally. Further, there has been no attempt to show that such policies are a mere pretext designed to effect an invidious discrimination against the members of one sex or the other nor has there been any showing that the effect of the Company's sick leave or seniority policies is to discriminate against the members of one sex or another.
>
> (Brief for the Petitioner, at 9.)

The petitioner also argues that the Company's policy in refusing to credit those persons on leave of absence, including pregnancy leave, with accumulated seniority for job-bidding purposes

is not sex discrimination. Petitioner takes this position because "...there is no risk from which one sex is protected and the other not, nor is there a benefit which one sex receives and which is denied the other sex." (Id. at 10.) In addition, petitioner believes that there is no proof "showing that a denial of seniority for job-bidding purposes is a mere pretext designed to effect invidious discrimination against the members of one sex or the other." (Id.)

Respondent argues that the Gilbert decision is not controlling:

> This Court in Gilbert was faced with the rather narrow issue of whether disabilities arising or connected with pregnancy could be excluded from an employer's Sickness and Accident Insurance Plan without violating Title VII. While respondent agrees that petitioner's sick leave plan is for all intents and purposes the same as the plan examined in Gilbert, respondent submits that because the exclusion of sick pay is only one of the many ways in which female employees who experience pregnancy are treated differently by petitioner, the holding in Gilbert is not controlling.
>
> (Satty, Brief for Respondent, 8.)

Satty involves a denial of sick pay, failure to hold employment positions open, and a denial of job-bidding seniority. Gilbert involved only the denial of sickness and accidental disability benefits to pregnant workers. Respondent argues that that is the only extent to which pregnant employees were treated differently; and she points out that, "While Gilbert dealt with disparate treatment during pregnancy and recovery therefrom, this case involves continuing disparate treatment of female employees long after pregnancy itself is all but a memory." (Id.) Respondent sees a distinction between the disparate treatment of pregnancy (which the Court in Gilbert found permissible) and the disparate treatment of women who have experienced pregnancy and return or try to return

to work. Respondent finds the latter impermissible because it constitutes sex discrimination. Respondent argues,

> This Court recognized in Geduldig v. Aiello, 417 U.S. 484 (1974) and reiterated in Gilbert, that a finding that there is not sex-based discrimination as such is not dispositive of a case alleging a violation of Title VII. Distinctions involving pregnancy are utilized by petitioner as mere pretexts to accomplish a forbidden purpose. Distinctions involving pregnancy are used as a justification for disparate treatment of women long after pregnancy is completely finished and are mere pretexts designed to effect an invidious discrimination against women who have, or who are likely to have, pre-school age children during their employment by petitioner.
>
> (Id. at 9.)

In summary, repondent's case rests on the following three arguments: (1) The Supreme Court's holding in Gilbert, supra, is not controlling; (2) The petitioner's policy of not crediting employees returning from pregnancy leave with accumulated seniority for job-bidding purposes constitutes sex discrimination in violation of Title VII; and (3) The Court's holding in Gilbert does not endorse exclusion of sick leave benefits for pregnant employees in a situation in which distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex. How the Supreme Court decides Satty will depend to a very great extent upon whether it accepts the gist of respondent's claim which is that the petitioner in this case, unlike the petitioner in Gilbert, did more to treat women differently than to just exclude pregnancy from sick pay benefits. It will also depend upon whether the Court follows the rationales it used in Griggs, supra, Albermarle, supra, and

Dothard, supra, and applies the "effects" test to what is arguably a facially neutral seniority system. Respondent argues that the greater impact upon women employees (through the denial of job-bidding seniority) without a rational basis "dictates a finding of discriminatory effect and a violation of Title VII." (Id. at 23-24.)

In Richmond Unified School Dictrict et al. v. Berg, supra, the other pregnancy case pending before the Court, Title VII and its regulations are also at issue. Ms. Berg was a teacher employed in the School District. Prior to November 20, 1972, the School District maintained a maternity leave policy which provided for a mandatory leave of absence commencing no later than the seventh month of pregnancy, and did not allow the use of accumulated sick leave credits to permit pay during maternity leave. On November 15, 1972, Ms. Berg filed a charge of discrimination with the EEOC against the School District. The U.S. Court of Appeals for the Ninth Circuit held that the School District's policy requiring a pregnant teacher to begin maternity leave at a fixed time and denying sick leave pay during pregnancy-occasioned absences violated Title VII. (528 F. 2d 1208 (1975).)

The principal issue before the Supreme Court in Berg is whether an employer under Title VII of the 1964 Civil Rights Act must pay sick leave for absences due to normal pregnancy and delivery.

Petitioners advance a series of procedural arguments to attack the validity of Ms. Berg's claims; however, they point out that even if the lower courts had jurisdiction of Ms. Berg's Title VII claims, their decisions on the merits were incorrect. Petitioners

cite Aiello, supra and Gilbert, supra, as the controlling precedents. According to the School District and other named petitioners, these two cases already established that absent invidious discrimination, employers are free to include or exclude pregnancy or any other physical condition from sickness or disability benefit plans. Petitioner argues that the principle of these decisions "is applicable to sick leave plans as well as insurance plans." (Brief for the Petitioners, at 43.) The School Board and other named petitioners point out further that, "This exclusion of pregnancy from the sick leave plan did not constitute a violation of Title VII unless (a) it was in fact a pretext for gender-based discrimination or (b) it resulted in gender-based effects in terms of disproportionate benefits provided." (Id.)

Petitioners also argue that their interim maternity leave policy did not violate Title VII. The emphasis of this portion of the argument is that the leave policy is in accord with the Court's earlier decision in Cleveland Board of Education v. LaFleur, supra. Petitioners state that,

> The interim policy provides for individual consideration of a teacher's request to continue work, based on medically verified standards which take the teacher's working conditions into account, and provide a right of appeal in the case of disagreement.
>
> (Id. at 45.)

Petitioners also rely upon Aiello and Gilbert in their argument supporting the legality of their maternity leave policy. They point out that pregnancy is unique and different from other diseases or disabilities. Furthermore, "Absent a scheme of invidious discrimination,

Title VII is not violated by a procedure designed to obtain an informed opinion when there is disagreement as to the proper time for a maternity leave to begin." (Id. at 47.)

It is petitioners' contention that because the School District had not treated its male and female employees differently with respect to medical conditions common to both, there is no violation of either the Fourteenth Amendment or Title VII. Therefore, under Aiello and Gilbert, "...the School District could lawfully take measures appropriate to the particular problems presented by pregnancy as distinguished from other medical conditions." (Id. at 48.)

Respondent's principal arguments include: (1) that petitioners' policies governing pregnancy and childbirth discriminate on the basis of sex in violation of Title VII; (2) that petitioners' compulsions as to the leave conditions of pregnant employees violate Title VII; and (3) that petitioners' unwritten policy denying accumulated sick pay for days of actual disability suffered by pregnant workers violates Title VII.

Respondent argues that petitioners have deliberately "whip-sawed pregnant employees as a matter of policy." (Brief for Respondent, at 20.) According to respondent the presence of intent in this case distinguishes it from Gilbert. Respondent points out that petitioners are guilty of failing to account for individual differences among women teachers:

> ...women are a part of the workforce who may be forced to submit to extraordinary examinations and to take leave, regardless of

> their own doctors' advice, under the pretext of petitioners' protection of them, their foetuses and their students, while being denied the sick leave pay that their years in service have earned them, upon the grounds that these women actually are not disabled, whether during delivery, recuperation after birth, or otherwise.
>
> (Id. at 22.)

In short, respondent is contending that the facts show that petitioners' chief purpose in following the policy they formulated was to discriminate against certain female employees by manipulating the terms and conditions of their employment under the pretext of "protecting" these women, their offspring and students.

Respondent outlines the various ways in which Berg differs from Gilbert. In Berg, respondent contends that petitioners failed to offer a basis for the different treatment of pregnant employees; such was not tne case in either Aiello or Gilbert where employers did offer in the eyes of the Court legitimate nondiscriminatory reasons for their policies.

Respondent argues also that petitioners' "...proposed reasons for compelling maternity leave and for ordering physical examinations essentially contradict their actions in refusing to afford accumulated sick leave earnings in this context." (Id. at 25.) The maternity leave is required by the School District at a specific time. Furthermore, the District can compel the leave in accord with its own doctor's diagnosis even if that examination is contrary to the women's personal doctors'. Respondent objects to the compulsory aspects of such a policy as well as the lack of individual consideration and the use

of an "average" instead which she feels is violative of Title VII. According to respondent, petitioners' policies are based on "gross sex-stereotyping." (Id. at 27)

Respondent also emphasizes the fact that petitioners' policy of denying accumulated sick pay for days of actual disability suffered by pregnant workers is an unwritten policy unlike the formal written exclusion at issue in Gilbert. Respondent argues that because the policy is unwritten this is "relevant to its susceptibility to use as a 'cover' for invidious discrimination against female workers, for the policy's informality lends itself to expansive readings against the claims of female employees." (Id. at 37.)

Respondent uses a conclusive presumption argument in challenging the denial of sick pay policy. She recognizes that this case addresses a Title VII and not a due process claim; however, "...it is quite apparent that the presence of a conclusive presumption in employment, depriving persons of liberty and property in a given case, may signal not only a due process violation, but a violation of Title VII, where that conclusive presumption is aimed at the sex, race, religion or color of those it purports to govern..." (Id. at 39.)

Finally, in distinguishing Berg from Gilbert, respondent argues that Berg involves a situation where "...petitioners' refusal to afford accumulated sick pay is part of an overarching scheme of sex discrimination against pregnant schoolteachers, founded upon an invidiously discriminatory perspective upon the pregnant schoolteacher as one who must be forced to take leave because of a stereotype of her condition...while being

denied accumulated sick pay when she actually does become disabled, during and after delivery or otherwise." (Id. at 41.) According to respondent, petitioners never offered any legitimate reason to justify their policy and to show it was nondiscriminatory.

Conclusion

One conclusion that may be drawn from the foregoing is that at the close of the 1976-1977 Term the status of sex-based classifications under the equal protection clause is in less of a state of uncertainty than it was prior to the commencement of the Term. The decision in Craig v. Boren clarified the standard of review to be applied in sex discrimination cases -- an intermediate test which requires the States accused of sex discrimination to prove that their different treatment of men and women is in fact "substantially" related to "important" governmental objectives. In issuing its ruling in Craig, the Court directly disapproved Goesaert v. Cleary (335 U.S. 464 (1948)). In Goesaert, the Court upheld a law prohibiting most women from tending bar. Justice Frankfurter wrote for the Court,

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic....The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.
>
> (Id. at 466.)

The type of law that the Court upheld in Goesaert has long been voided by the 1964 Civil Rights Act. (See Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P. 2d 529 (1971).) However, the constitutional status of Goesaert had been unclear until now, ie. until the Court's ruling in Craig. In a footnote in Craig, the Court commented,

> Insofar as Goesaert v. Cleary...may be inconsistent, that decision is disapproved. Undoubtedly reflecting the view that Goesaert's equal protection analysis no longer obtains, the District Court made no reference to that decision in upholding Oklahoma's statute. Similarly, the opinions of the federal and state courts cited earlier in the text invalidating gender lines with respect to alcohol regulation uniformly disparaged the contemporary vitality of Goesaert.
>
> (429 U.S. 190, n. 23 at 210.)

This outright overruling of Goesaert is significant as far as women and minorities are concerned because the Goesaert case had sanctioned the traditional rational basis standard of review and supported the view that mere speculation on the part of the Court as to the existence of the relationship between the distinction in the statute and the governmental objective was sufficient to sustain the classification. Craig clarifies the fact that mere speculation is inadequate. The new intermediate test established in Craig uses the "fair and substantial relation" criteria to judge the constitutional validity of a gender-based law.

Up until Craig, no case since Frontiero had directly focused on the matter of what standard to apply to sex classifications. In Cleveland Board of Education v. La Fleur, the Court made its decision on due process grounds. In LaFleur, the Court struck down mandatory

unpaid leave rules which were challenged by two pregnant public school teachers. The Court did not view Geduldig v. Aiello as a sex discrimination case. In Aiello, the Court stated that California's disability insurance program did not discriminate on the basis of sex because, "There was no risk from which men are protected and women are not." (Id., at 496-97, n. 20.)

Even before Craig, however, there was evidence showing that the Court was formulating a skeptical view of sex classifications. Proponents of equal treatment had some reason to be pleased especially since the Court did render decisions illustrating that it saw the need to cast doubt upon stereotype roles that had been assigned on the basis of gender in the past.

Taylor, Wiesenfeld, and Stanton are three Supreme Court decisions which illustrate the Court's readiness to reassess classifications based on outmoded stereotypes -- i.e. women's roles as wives and mothers while men the breadwinners and professionals outside the home. Therefore, even without setting forth the appropriate standard of review applicable to gender classifications, prior to Craig the Court had been cognizant of the changing role of women in our society and had ruled accordingly. It seemed to have rejected the reasoning used in a 1948 case where the following statement appeared in its rationale:

> Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long

> practiced, does not preclude the States from drawing a sharp line between the sexes....The Constitution does not require legislatures to reflect sociological insight, or shifting social standards....
>
> (Goesaert v. Cleary, supra, at 465-466.)

The Court's statement in Stanton indicates how far it had moved from its rationale in Goesaert. Examining the reasons assigned by the state courts for upholding the Utah age of majority statute, the Court found "nothing rational" in them:

> A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. See Taylor v. Louisiana, 419 U.S. 522, 535, n. 17 (1975). Women's activities and responsibilities are increasing and expanding....The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice....
>
> (Stanton, supra, at 14-15.)

The Court upheld statutes in Kahn and Ballard because they benefited women who have traditionally been treated unequally. While the Court reasoned that in Taylor, Wiesenfeld, and Stanton the sex-based classifications harmed women and therefore should be invalidated, the reverse was the situation in Kahn and Ballard. In upholding instances involving ameliorative discrimination, the Court has not actually provided a methodology for identifying and analyzing claims of ameliorative discrimination.

In the 1977 Term, the Court's decisions in Webster and Goldfarb are relevant to the two concepts of upholding ameliorative legislation,

on the one hand; while, on the other hand, rejecting legislation based on outmoded stereotypes (e.g. male as breadwinner; female as wife and mother). Both Webster and Goldfarb were Social Security cases. The significance of each decision rests in the way the Court viewed the disparate treatment. In Webster, the Court held that where there is disparate treatment of the sexes as a result of legislation directly addressing discrimination (which also serves to remedy it) such a provision is constitutional, at least as an interim measure. In Goldfarb, because the disparate treatment of the sexes was regarded by the Court to be the by-product of "romantic paternalism," of "the role-typing society has long imposed," and was not specifically aimed at redressing past injustices, the Court regarded such disparate treatment based on sex to be unconstitutional. Therefore, the Court is still using the compensatory rationale which it developed in Kahn. Moreover, in Dothard, its last decision of the 1977 Term, the Court found that a bona fida occupational qualification existed with respect to the regulation in Alabama barring women from "contact" positions in maximum security male penitentiaries. The language used by the majority reflects somewhat of a protective concern for the femal sex. The Court at one point wrote that, "The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." (Dothard, 45 U.S.L.W at 4892.) Of course, the facts in Dothard with respect to the conditions in the Alabama male maximum security prisons were unique.

The majority described the Alabama prison system as beset by "rampant violence" and a "jungle atmosphere." It would appear that absent such factors, the Court probably would not in the future sustain a regulation on the ground that it was justifiable as a bona fide occupational qualification despite the fact that it was discriminatory. Nevertheless, the precedents of Kahn, Ballard, and Webster indicate that the compensatory rationale is still a viable one.

Webster and Goldfarb are significant in the constitutional sense because the Court applied in each case the heightened review standard first enunciated in Craig. And Dothard is important for the future too; however, its significance stems from the rationale and analysis the Court used in a statutory context. The Court accepted national statistics as the basis for showing discrimination on the grounds of disproportionate impact. Dothard makes it clear that the Griggs "effects" test is relevant and applicable in the context of sex discrimination.

Two of the most puzzling decisions of all in the period from 1971-1977 are Aiello and Gilbert. In Aiello, using a constitutional analysis in a "sex-plus" situation, the Court concluded that certain types of discrimination against women are really not sex-based. In Gilbert, a Title VII case, the Court reached the same conclusion. The Court merged the constitutional and statutory analyses in Gilbert. Because the Court found that discrimination on the basis of pregnancy is not sex discrimination, it did not clarify what the status of the "effects" test would be when a statutory violation is alleged. This ambiguity was presumably clarified in Dothard, supra.

The significance of the Gilbert decision remains somewhat of a mystery. It can, of course, be viewed very narrowly as simply a determination that discrimination on the basis of pregnancy, absent a motive or pretext for disparate treatment of women as such, does not constitute sex discrimination either in the constitutional sense or the statutory sense. The rights of pregnant women have not yet been determined by the Court. After it had decided Gilbert, the Court agreed to hear two more cases that relate to this matter: Nashville Gas Co. v. Satty and Richmond Unified School District v. Berg. Perhaps, the decisions in these two cases next term will clarify what protections are accorded to pregnant workers under Title VII of the Civil Rights Act. Since there are no constitutional cases pending in this area, the holding in Aiello remains as the only precedent for the time being.

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