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Civil Rights-Sex Discrimination-Employer's Denial Of Disability Benefits Held To Violate Title VII Of The 1964 Civil Rights Act

Civil Rights—Sex Discrimination—EMPLOYER'S DENIAL OF DISABILITY BENEFITS HELD TO VIOLATE TITLE VII OF THE 1964 CIVIL RIGHTS ACT—*Gilbert v. General Electric Co.*, 519 F.2d 661 (4th Cir. 1975).

Prior to 1971[1] women found little relief in the courts for claims of sex discrimination. The Supreme Court upheld almost all legislation designed for the "protection" of women,[2] predicated on their virtue,[3] their health,[4] or the "well being of [their] race."[5] The first major legislative prohibition of sex discrimination, outside of judicial interpretation of the equal protection clause,[6] is found in Title VII[7] of the 1964 Civil Rights Act.[8] It seems ironic that a provision on sex discrimination, today a frequently litigated issue,[9] was amended to Title VII almost as an afterthought.[10] This may be

1. The Supreme Court first subjected state legislation affecting women's rights to something more than minimal scrutiny in Reed v. Reed, 404 U.S. 71 (1971). The Court therein employed an intermediate level of review. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection. The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 29-30 (1972).

2. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (upholding the right of the state of Illinois to deny a woman a license to practice law) (Bradley, J., concurring).

3. *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding a Michigan statute prohibiting a woman from tending bar unless she was the wife or daughter of a male owner).

4. *See* Radice v. New York, 264 U.S. 292, 294 (1924) (upholding a New York statute which did not allow women to work in restaurants at night).

5. *See* Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding an Oregon statute that limited women from working more than ten hours per day in factories, laundries, or "mechanical establishments").

6. *See* note 21 and accompanying text *infra*.

7. 42 U.S.C.A. § 2000e *et seq.* (1974) [hereinafter cited as Title VII]. For a numerical breakdown of the proportion of Title VII cases relating to sex discrimination see Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act*, 56 WOMAN LAW. J. 28, 30 (1970).

8. 42 U.S.C.A. § 2000e *et seq.* (1974).

9. *See generally* Draper, *A Historical Sketch of the Major Labor Law Developments That Have Occurred As A Result of The Civil Rights Act of 1964 and the Activities of the Equal Employment Opportunity Commission*, 18 How. L.J. 29 (1973) [hereinafter cited as Draper].

One indicator might be the proliferation of law review articles based on sex discrimination. CUMULATION 14, INDEX TO LEGAL PERIODICALS (Sept. 1964 - Aug. 1967) shows no articles listed under the heading "Sex Discrimination"; CUMULATION 15 (Sept. 1967 - Aug. 1970) lists 18 articles under that heading; CUMULATION 16 (Sept. 1970 - Aug. 1973) lists 26; VOLUME (Sept. 1973 - Aug. 1974) lists 79.

10. 110 CONG. REC. 2577 (1964) (amendment of Congressman Smith of Virginia). The codified version of the legislative history of Title VII in U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess. (1964) (Vol. 2) does not have the word "sex" added to Title VII at 2401, 2403, and 2455, and makes no reference to sex discrimination at all. The word "sex" was amended to Title VII without formal legislative hearing and with little floor debate. *See* 110 CONG. REC. 2577-84 (1964) (remarks of Congresswoman Green). *See also Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1196 (1971) [hereinafter cited as *Employment Discrimination*].

the reason Title VII, at its inception, had less impact upon sex-based discrimination than on other types of discrimination.[11]

Congress established the Equal Employment Opportunity Commission (EEOC)[12] to administer and enforce the provisions of the Title. Because the EEOC was initially endowed with little enforcement power,[13] it proved ineffective.[14] In 1972 Congress amended Title VII[15] by granting the EEOC access to the federal courts to redress any discernible discriminatory employment practices.[16] In addition, to render itself a more vital anti-discriminatory force, the EEOC began issuing guidelines[17] which, while not having the force of law, have generally been considered persuasive authority by the courts.[18]

Litigants have employed various means[19] to attack sex discrimination, using both Title VII[20] and the equal protection clause of the fourteenth amendment.[21] *Gilbert v. General Electric Co.*[22] represents such an action. Plaintiffs-Appellees,[23] women employees of General Electric, first filed a Title VII complaint[24] with the EEOC to recover disability benefits for pregnancy leave denied them by the employer.[25] Having secured a favora-

11. *See* LAB. REL. REP., FEP, 421:601 (1973); Comment, *Sex Discrimination in Employment: What Has Title VII Accomplished for the Female?*, 9 U. RICH. L. REV. 149 (1974) [hereinafter cited as *Title VII Accomplishments*].

12. 42 U.S.C.A. § 2000e (4) (1974).

13. *Title VII Accomplishments, supra* note 11, at 150.

14. *Employment Discrimination, supra* note 10, at 1196.

15. Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e (1)-(17) (1974).

16. *Id. See also* Draper, *supra* note 9, at 31.

17. 29 C.F.R. § 1604 *et seq.* (1975). The EEOC published no pregnancy guidelines until 1972. 37 Fed. Reg. 6835 (1972).

18. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Udall v. Tallman, 380 U.S. 1, 16 (1965).

19. *See* Draper, *supra* note 9, at 69.

20. *See, e.g.*, Wellingham v. Macon Tel. Publishing Co., 482 F.2d 535 (5th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

21. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973). *See also Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Equal Protection*].

22. 519 F.2d 661 (4th Cir. 1975).

23. In addition to Martha Gilbert there were six other female employees who were joined by the International Union of Electrical, Radio and Machine Workers (IUE) and Local 161 (Salem, Va.) of the International Union.

24. A complainant must first file the complaint with the EEOC which allows the EEOC to investigate and determine the validity of the complaint. If the EEOC finds the complaint justified it attempts to get the employer to correct its position before aiding the complainant in bringing the action in court.

25. Pregnancy issues were at first dominated by actions to overcome mandatory leave policies. These usually were brought by teachers under the equal protection clause as Title

ble decision by the EEOC,[26] the employees instituted a Title VII action in the federal district court against the still recalcitrant employer. Before the district court could deal with the substantive issues of the case, it ruled upon several motions,[27] and litigated a class action issue.[28] The district court then found for the plaintiffs,[29] concluding that the defendants were engaging in deliberate and intentional discriminatory practices.[30] On appeal the Fourth Circuit affirmed.[31]

In order to rebut the charge of sex discrimination, General Electric advanced many reasons[32] for making pregnancy-related absences noncompensable. The first was that pregnancy, being voluntary and subject to planning, is neither a sickness nor an accident. The court noted that this defense of the disability plan was raised against only this pregnancy-related voluntary disability, while other voluntary disabilities, such as cosmetic surgery, were covered by the plan.[33] General Electric's second defense focused on certain EEOC guidelines stating that denial of benefits for pregnancy does not constitute sex discrimination.[34] The court dismissed

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VII did not apply to public employees until amended as 42 U.S.C. § 2000e (a), P.L. 92-261, 86 Stat. 103 (1972). *See, e.g.,* Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds sub nom.,* 414 U.S. 632 (1974); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); LeFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), *aff'd,* 414 U.S. 632 (1974).

26. Gilbert v. General Elec. Co., N.Y.D.C. 3-093 (PX2B) (May 18, 1973). In 1972 the EEOC pregnancy guidelines provided in part:

> § 1604.10(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.

27. Gilbert v. General Elec. Co., 347 F. Supp. 1058 (E.D. Va. 1972). The defendants moved for a change of venue, and the plaintiffs moved to add parties as plaintiffs and to amend the complaint to overcome any adverse venue possibilities. The original plaintiffs were from Salem, Virginia within the venue of the Western District of Virginia. The court found plaintiffs' motion unnecessary while allowing it. The court noted that 42 U.S.C.A. § 2000e-5(f) (1974) conferred jurisdiction upon any judicial district in a state where the unlawful employment practice is alleged to have been committed and held that the venue was proper for the action brought.

28. Gilbert v. General Elec. Co., 59 F.R.D. 267 (E.D. Va. 1973).

29. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974).

30. *Id.* at 386. Judge Merhige 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." *Id.* at 385.

31. 519 F.2d at 667-68.

32. *Id.* at 665-67.

33. *Id.* at 665.

34. General Electric argued that prior EEOC guidelines, which denied that pregnancy was a compensable disability, should be used for "guidance" or given "minimal weight." *Id.* at 664 n.12.

this as irrelevant, holding that the guidelines, while helpful in determining the meaning and purpose of the Act, are not binding upon the court.[35]

The defendants based their strongest argument[36] for overruling the lower court upon the recent decision of *Geduldig v. Aiello*.[37] In *Geduldig* female employees in California attacked a statewide disability program because it did not allow benefits for pregnancy-related absences.[38] The Supreme Court applied the traditional minimum rationality test[39] to a California statute[40] holding that the state legislature need only show a rational basis for its classification.[41] Although the challenged classification was admittedly underinclusive, the Court held that the legislature could attack this disability program problem in a piecemeal fashion.[42] The Court perceived nothing irrational in excluding normal pregnancy leave benefits along with other non-compensable disabilities.[43]

The *Gilbert* court read *Geduldig* as not applying to actions under Title VII[44] citing two recent circuit decisions.[45] The court reasoned that *Geduldig* found discrimination but not invidious discrimination,[46] and concluded that Title VII forbids any type of discrimination whatsoever. This reasoning can be questioned in light of the language in *Geduldig* that "[t]here is no evidence in the record that the selection of the risks insured by the program *worked to discriminate against any definable group or*

35. *Id.*

36. *Id.* at 665-66.

37. 417 U.S. 484 (1974), *rev'g*, Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973). For a full discussion of the implications of this case see Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974) [hereinafter cited as *The Uniqueness Trap*].

38. 417 U.S. at 486.

39. This is sometimes referred to as the "permissive review." *See generally Equal Protection, supra* note 21, at 1077.

40. CAL. UNEMPL. INS. CODE § 2626 (West Supp. 1974). This section at that time defined compensable disabilities so as to exclude any pregnancy-related illness or injuries sustained either during gestation or for 28 days following birth.

41. Geduldig v. Aiello, 417 U.S. 484, 495 (1974).

42. *Id.* The Court also upheld a legislative attack in a piecemeal fashion in Williams v. Lee Optical Co., 348 U.S. 483 (1955).

43. 417 U.S. at 495. Other exclusions were: short term (had to exceed 7 days), long term (could not exceed 26 weeks), and court commitments (as a dipsomaniac, drug addict, or sexual psychopath). *Id.* at 488. As of 1974 ten other states had unemployment compensation programs that denied benefits to pregnant women. *The Uniqueness Trap, supra* note 34, at 1535.

44. 519 F.2d at 665-66.

45. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *cert. granted*, 43 U.S.L.W. 3624 (U.S. May 27, 1975) (No. 74-1245); Communications Workers v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1974).

46. 519 F.2d at 666-67.

class . . . ."[47] *Geduldig* does not mention sex discrimination per se except indirectly by way of a footnote.[48] The *sine qua non* then of the court's decision is whether note 20 in *Geduldig* does find sex-linked discrimination in denial of pregnancy benefits.

The court in *Gilbert* may have been on firmer ground if it had focused instead on the apparent distinctions between the disability plan in *Geduldig* and the General Electric plan. The former provided benefits for any abnormal conditions in pregnancy and disallowed claims only for normal delivery and recovery.[49] The latter disallowed any pregnancy-related disability claims.[50] Further, the California plan was funded solely from employee contributions,[51] whereas General Electric's plan was funded by the employer and was a union bargained-for benefit.[52] Since courts have traditionally been unsympathetic with claims of increased business expense as a reason for not complying with legislation,[53] this difference might be a basis for distinguishing *Geduldig*.

In his dissent in *Gilbert* Judge Widener argued that *Geduldig* should control. He believed that *Geduldig* was written with an eye to future actions brought under Title VII.[54] The briefs for the amici curiae in *Geduldig*

47. 417 U.S. at 496 (emphasis added). A number of courts have agreed with EEOC 1972 guidelines holding that pregnancy classifications in benefit programs discriminate against women because of their sex. *See* Farkas v. South West City School Dist., 8 E.P.D. ¶ 9619 (S.D. Ohio 1974); Dessenberg v. American Metal Forming Co., 8 E.P.D. ¶ 9575 (N.D. Ohio 1973); Vick v. Texas Employment Comm'n, 6 E.P.D. ¶ 8933 (S.D. Tex. 1973).

48. 417 U.S. at 496 n.20. This note was the answer to the dissent challenging the majority to explain why this case was different from *Reed v. Reed* and *Frontiero v. Richardson* which made sex a suspect classification (by a plurality not a majority of the Supreme Court) and subjected the legislation to an intermediate level of review. *See generally* Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination,* 75 COLUM. L. REV. 441, 446 (1975).

49. CAL. UNEMPL. INS. CODE § 2626 was amended following Rentzer v. California Unemployment Ins. Appeal Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973), to extend coverage to disability from medical complications arising due to pregnancy.

50. Gilbert v. General Elec. Co., 375 F. Supp. 367, 369 (E.D. Va. 1974).

51. The Court explained that any extension of the coverage would mean less benefit amounts for each claim or a rise in the percentage and/or total dollar amount of employee contribution. Each employee contributed one percent of his annual wages up to a present maximum of $90. Geduldig v. Aiello, 417 U.S. at 499 n.1 (Brennan, J., dissenting).

52. Gilbert v. General Elec. Co., 375 F. Supp. 367, 371 (E.D. Va. 1974).

53. *Id.* at 382. The court said: "[I]t is doubtful in the first instance if cost alone would constitute a proper defense." *See* Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971).

54. 519 F.2d at 669. (Widener, J., dissenting). At least one other court has also accepted this interpretation of *Geduldig*. In Communications Workers v. American Tel. & Tel. Co., 379 F. Supp. 679 (S.D.N.Y. 1974), the court read *Geduldig* as holding "that California's treatment of pregnancy disabilities did not in and of itself constitute a discrimination based on sex [or gender]." *Id.* at 682.

pointed out to the Court the Title VII cases pending with sex discrimination issues.[55] The dissent also argued that the majority decision ignored its own statement in a previous case that "the test of validity under Title VII is not different from the test of validity under the fourteenth amendment."[56] Judge Widener found this statement contradictory to the *Gilbert* holding that Title VII had a greater reach than the fourteenth amendment.[57]

The issues involved here will probably be resolved when the Supreme Court hears *Wetzel v. Liberty Mutual Insurance Company*.[58] The facts in *Wetzel* are almost identical to those in the *Gilbert* case.[59] The insurance company advanced the same arguments for its pregnancy exclusions.[60] The *Wetzel* court disposed of these on the same basis as did the *Gilbert* court.[61] The Third Circuit in *Wetzel* did not find *Geduldig* controlling, citing the difference between an equal protection claim and a legislative determination.[62]

It is submitted that the Supreme Court may well join both cases for a decision as the facts and holdings are nearly identical. If, however, *Gilbert* is heard separately,[63] the Court may employ this opportunity to distinguish *Geduldig* and still affirm the Fourth Circuit's decision without reaching the issue of whether withholding pregnancy benefits is per se sex discrimination. In *Geduldig* the Court stated:

> Absent a showing that distinctions involving pregnancy are *mere pretexts* designed to effect invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[64]

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55. Brief for Appellant at 20 n.26, 519 F.2d 661.

56. United States v. Chesterfield County School Dist., 484 F.2d 70, 73 (4th Cir. 1973).

57. 519 F.2d at 669 (Widener, J., dissenting).

58. 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975). The Supreme Court has granted certiorari. 95 S. Ct. 1989.

59. In *Wetzel*, the plaintiffs are also attacking, among other things, their employer's wage continuation plan which excludes benefits for any disabilities related to pregnancy. As in *Gilbert*, pregnancy is the only disability of any duration that is excluded and just as in *Gilbert*, the circuit court affirmed the lower court's decision holding such exclusions violative of Title VII. 511 F.2d at 209.

60. *Id.* at 206.

61. *Id.* at 205-06. The *Wetzel* court also had to decide a maternity leave issue. The court again allowed great deference to the Commission's guidelines, holding that the policies were based on class generalizations of one sex, and that the leave policies were also violative of Title VII as a matter of law. *Id.* at 208.

62. *See* note 31 and accompanying text *supra*.

63. A petition for certiorari has been granted. 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (Nos. 74-1589, -1590).

64. 417 U.S. at 496 n.20 (emphasis added).

The Court could hold that General Electric's plan with its broader pregnancy exclusions, given the background of past female discrimination by General Electric,[65] is a mere pretext effecting invidious discrimination clearly forbidden by Title VII. It may also hold that the *Geduldig* decision should be limited in application to legislative plans for pregnancy disabilities, or in the alternative, that designers of the plan are *constitutionally* free but not *legislatively* free to effect such exclusions. Such a decision would rule out legislative prohibitions set forth in Title VII. Until the Supreme Court decides *Wetzel* and/or hears *Gilbert*, private employers with disability plans similar to that of General Electric will wait expectantly and apprehensively to see if their "fringe benefit" programs will have to absorb the great expense necessarily involved in paying pregnancy-related disability claims.[66]

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65. Gilbert v. General Elec. Co., 375 F. Supp. 367, 380 (E.D. Va. 1974). Although the court did not reach plaintiffs' claim that the employer's history was dominated by a strain of male chauvinism, it pointed to several acts by GE that might be considered strong indications of prior intentional female discrimination.

66. In affirming, the Fourth Circuit suggested that the district court might defer further proceedings at least until *Wetzel* is decided. 519 F.2d at 668 n.25.