

DISCRIMINATION IN THE WORK PLACE RELATED TO PREGNANCY, CHILDBIRTH, AND CHILD CARE

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ABSTRACT

Discrimination related to pregnancy, child birth and child care is an issue of growing relevance and concern in the United States. This concern is largely a result of the changing demographics of the work force. As the number of working women has grown, legislators and employers have been faced with the dilemma of how to provide equal opportunities for pregnant women, non-pregnant women and men. The Pregnancy Disability Act of 1978 was a major step towards defining fair practices in regards to pregnancy that left many unanswered questions and opened up new arguments concerning discrimination based on sex. The various arguments over what is fair and what is discriminatory treatment of workers and their employers will be addressed in the following paper.

INTRODUCTION

"It shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual's race, color, religion, sex or national origin . . ." (4) The previous statement is an excerpt from the Civil Rights Act of 1964 (Title VII), and has been subject to a multitude of interpretations in the U.S. judicial system since its enactment. The underlying dispute is in determining what is fair, and what constitutes "discrimination." In recent years, this question has been increasingly asked in regards to maternity leave policies. (12) The manner in which American businesses handle pregnancy, childbirth, and child care has fallen prey to public and legal scrutiny. How are today's businesses coping with pregnancy? What has happened in federal and state courts up to date? Exactly who is crying, "discrimination?"--how are legislators responding? The following discussion will concentrate on providing answers to these questions and on developing a comprehensive view of the difficulties involved in defining "discrimination" on the basis of sex.

BACKGROUND

Three trends in America are behind the recent interest in maternity leave and child care policies: (1) the percentage of working women in the work force rose from 43 percent in 1970 to 60 percent in 1987; (2) the number of households headed by single women increased by 88 percent between 1970 and 1982; and (3) 50 percent of all working mothers in 1987 were back at work before their children were a year old. (24;12;15) Learning to deal with these trends in fair and nondiscriminatory ways has become a difficult challenge for employers, legislators and the judicial system. The proverbial question of what is fair and what is discriminatory remains largely unanswered. (12)

Is the exclusion of pregnancy from sick leave and disability benefits program discrimination? This was the new question of the seventies. However, before the question could be answered, pregnancy had to be defined in terms of either a sickness or a disability. Both issues were addressed by the Supreme Court in the 1976 case, *general electric v. Gilbert*, in which the Court defined pregnancy as a disability. Though all the justices agreed that pregnancy was a disability, the Court went on to conclude by a 6 to 3 vote that exclusion of this one type of disability was not "discrimination based on sex" (4) and thus did not violate Title VII. (18)

Justice John Stevens, in support of the dissenting opinion argued that General Electric's disability program's regulations placed pregnancies in a class by themselves and "by definition, such a rule discriminates on account of sex: for it is the capacity to become pregnant which primarily differentiates the female from the male." (18) Justice William Rehnquist's majority opinion quoted a passage from the 1974 *geduldig v. Aiello* decision which also held that the exclusion of pregnancy from benefit programs was not illegal discrimination. The following is an excerpt from that quote:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition--pregnancy-- 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 pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risk. (18)

Congress disagreed with both the holding and the reasoning of the Court in the Gilbert decisions. This disapproval was clearly expressed in 1978 with the passing of the Pregnancy Discrimination Act (PDA). (7) The PDA is an amendment to the Civil Rights Act, specifically prohibiting sex discrimination by employers on the basis of pregnancy and thus requires pregnancy to be treated like any other disability. (9;10;14) The PDA requires that pregnancy and maternity be included in a company's disability plan if that employer has a plan. There is no stipulation that the organization must have such a plan to begin with. (6) In a

1983 decision in *Newport News Shipbuilding & Dry Dock Co. V. Equal Employment Opportunity Commission*, the Supreme Court stated the following: By enacting the PDA, Congress overturned the specific holding in *General Electric v. Gilbert* and also rejected the test of discrimination employed by the Court; thus any lower court relying on Gilbert is in error. (10)

THE PREGNANCY DISCRIMINATION ACT OF 1978

To provide the reader with a more thorough understanding of the 1978 Amendment, the first sentence of the Pregnancy Disability Act is provided:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this title shall be interpreted to permit otherwise. (10)

Practices which are regarded as discriminatory according to the PDA were confronted in a suit brought against Westinghouse Electric Corporation in 1974. Westinghouse was found in violation of Title VII on the following counts: Westinghouse did not credit seniority to employees when they were on maternity leave; denied certain health benefits to pregnant workers; and forced them to take unpaid maternity leave after a certain time, regardless of the employee's desire and physical capacity to work. (5) In 1974 when this suit was originally brought to court these practices were questionable; the 1978 Amendment clarified them as discriminatory.

Despite the unambiguous nature of this statute, employees continue to discriminate against female employees. One example is provided in the case *Maddox v. Grandview Care Center* Mrs. Maddox, on the advice of her physician, requested an unpaid leave of absence for the remaining months of her pregnancy. She was informed that company policy only permitted a three-month maternity leave of absence. However, for illnesses other than pregnancy, the policy provided that leaves could be granted on a doctor's recommendation and with the administrator's approval. Mrs. Maddox formally filed a request for a six-month leave of absence and did not return to work due to complications in her pregnancy. Mrs. Maddox' request was never addressed because she was terminated for missing three consecutive work days without arranging for a substitute worker. Her employer, Grandview Care Center, was found to be in violation of Title VII of the Civil Rights Act. (16) According to the PDA, any benefits offered to nonpregnant employees must also be extended to pregnant employees.

A more recent development in the courts, *California Federal Savings & Loan Association v. Guerra*, addressed two additional issues arising from the PDA in 1987. The first issue deals with the possible contradiction of state and federal law. California law requires that female employees be allowed to take a maximum of four months leave on account of pregnancy, and to be reinstated to the same or a similar position at the end of that period. (1;21;23) California Federal Savings & Loan challenged this state law when the firm was sued by an employee who was denied her prior position upon returning from maternity leave. The employer claimed that the California law was preempted by federal law and was supported by the ruling of the district court. However, the court's decision was overturned by the Ninth Circuit Court of Appeals which held that the two laws could coexist. The Supreme Court affirmed that the intent of Congress in passing the PDA was to construct a floor for pregnancy disability benefits, not a ceiling. (1;21;22;23)

The second issue arising from California Savings & Loan is the possibility of "reverse discrimination." (1) The district court supported the employer's argument that the laws were incompatible on the basis that California law constituted "preferential treatment" (23) and in itself violated the Civil Rights Act. (20;23) Thus the state law potentially subjected employees to discrimination lawsuits by temporarily disabled men who did not have the same guarantee of job reinstatement. In dispute of the district court's view, the Ninth Circuit panel stated that "Congress sanctioned the expenditure of more dollars on medical coverage for female employees than for male, in order to achieve equally complete health benefits for both." (1) Supreme Court Justice Marshall further refuted the accusation of reverse discrimination, in pointing out that California statute allows employers to provide comparable benefits to other disabled employees, and thus not to treat pregnant workers better than other disabled workers. (3)

The issue of reverse discrimination is by no means settled. A coalition of employers in California are currently seeking a rehearing before the Ninth Circuit, claiming that the California law is in conflict with equal-employment laws, by discriminating against men. (1;25)

CURRENT POLICIES

Three types of leave are most commonly associated with pregnancy, birth, and child care. "Disability" leave, paid (or not paid) according to state law, covers the time in which a woman is physically disabled as a result of pregnancy and childbirth. "Maternity" leave is usually an unpaid leave granted to mothers and covers an extended period in which the mother can care for her infant. The maternity leave usually begins at the end of the disability leave period (though the term is frequently used to refer to both the period of disability and the extended leave in combination). "Paternity" leave is usually a paid leave of a day or two given to the father at the time of birth. (14) Many current disability, maternity, and paternity leave policies are illegal. For example: consider a maternity leave which begins after the period of disability and permits a mother time to care for and develop a relationship with her infant; if this same leave is not offered to a father who wishes to provide care for his infant, the employer is in violation of Title VII. Thus the type leave described would be more appropriately termed "child care" leave. The federal law does not require employers to offer any leave; but in accordance with Title VII principles, any leave for child care purposes must be granted to both sexes on the same basis as leave which is granted for other nonmedical reasons. (13;14) Employers must take extreme caution in determining leave policies to ensure that not only are they nondiscriminatory according to federal law, but are also in accordance with any state laws. (1;10;13)

MATERNITY LEAVE STUDIES

A survey of small businesses in Amarillo and Hereford, Texas, was conducted by this author in 1987. The purpose of the research was to present an objective representation of pregnancy-related leave policies in the area. The survey was conducted in March and April of 1987, using telephone interviews. Twenty-one of the thirty-two businesses contacted took part in the Amarillo and Hereford area. The interviews began with open-ended questions; the researcher then asked structured questions in order to fill in areas which the respondent neglected to cover and to clarify statements made by the respondent. The line of questioning varied slightly from one interview to the next, depending on the details given by the respondent. A general outline of the interview questions is presented in Table 1.

TABLE 1: SURVEY QUESTIONS

What is your policy on maternity leave for employees?

How long may a woman take off work due to pregnancy and childbirth and still return to her previous position or a comparable position?

Is her leave paid while she is medically unable to return to work?

Are there any provisions for those who wish to extend their leave beyond the period that is medically required? (i.e., a child care leave)

If so, for what length of time is her position or a comparable position guaranteed?

Does she receive any pay during this period?

Does the company have a paternity leave policy? If so, what are the provisions?

Texas has no laws concerning pregnancy and child care leaves, with the exception of a law stating that unemployment benefits cannot be denied on the basis of pregnancy. (11) All of the businesses surveyed claimed to treat pregnancy and childbirth as any other disability, in compliance with federal law. However, the study revealed certain policies that, if enforced, would be in violation of the Civil Rights Act. For example, 39 percent of the businesses allowed women to take between 6 and 24 weeks leave associated with pregnancy and childbirth, without medical certification of illness. However, 80 percent of those surveyed responded that a father's only option was to use his accrued vacation, with only 14 percent offering the same leave as offered mothers. According to the Civil Rights Act, an organization must extend the same disability policy to a pregnant employee as to any other disabled worker in order to be nondiscriminatory. On the other hand, so must an organization extend the same child care leave policy to new fathers as it offers to new mothers. Most of these policies have never been discriminatory towards men in practice because, as is indicated in the survey, 60 percent claimed to have never received a request from a man for a child care leave. Seventy-six percent of the businesses allowed those on leave to use accrued vacation and sick pay for the duration of the actual physical disability; 5 percent provided up to 6 weeks of partial salary; and 29 percent provided full salary for a specified

period. (17) The details associated with pregnancy-related leaves, such as pay status and leave beyond the period of medical proof of disability, varied widely from organization to organization. There are no state laws in

Texas mandating child care leaves, or requiring disability insurance policies that would pay some percent of the employee's salary during pregnancy. Thus, any extended leave for either sex, with or without pay, is a fringe benefit offered voluntarily by the company. (See Tables 2 and 3.)

[TABLE 2: MATERNITY LEAVE POLICIES SURVEY RESULTS omitted]

[TABLE 3. PATERNITY LEAVE POLICIES omitted]

A more comprehensive study which included 153 companies was conducted by Bernard Hodes Advertising and indicated much higher compensation rates than the Texas study. The following practices were reported: half of the companies paid employees their full salary on maternity leave, about 25 percent did so for 16 weeks or less; companies with 500 or more employees are more likely to grant fullypaid leaves than those in the 100 to 499 range; 75 percent of the businesses offered a return-to-work guarantee for women on maternity leave (typically no longer than four months). (15) Paternity benefits were found in only one out of seven companies. The most frequently offered benefit is unpaid leave with just two percent offering a paid leave. Though these percentages seem very small, when compared to a generation ago when the concept of paternity leave was virtually nonexistent they indicate the growing interest of fathers in child care. (12)

FAMILY AND MEDICAL LEAVE ACT

The discrimination against fathers who wish to take leave for child care is evidenced by numerous studies. (12; 15; 16) Pregnant women continue to point out unfair labor practices of employers. One study by The Economic Policy Council, a nonprofit group that studies labor management practices, found that 60 percent of U.S. women aren't guaranteed their old jobs back after they give birth. (19) The United States is, in fact, the only industrialized nation without some type of federally mandated leave policy which requires the employer to guarantee the parent's job. (6;24) In Europe, many countries not only guarantee reinstatement, but also provide 26 to 52 weeks leave while paying anywhere from 69 to 100 percent of full salary. (2;3)

America may be following Europe's lead. Representatives Patricia Schroeder of Colorado and William Clay of Missouri introduced a bill that would require employers to offer 18 weeks of unpaid leave for parents of newborn, recently adopted, or seriously ill children. (19) All regular full-time and part-time employees who have worked at least three months for an organization employing 15 or more people would be covered by the bill. (6) All benefits would be continued and the same or equivalent position held before the leave would be guaranteed. The bill (H.R. 925) is presently in the House and a similar bill (s.249) is up for hearing in the Senate. (20) The Senate refers to this proposed law as the Family and Medical Leave Act (FMLA). (6)

FMLA addresses the reality of the demographics of the work force of the eighties. Close to 70% of mothers with children under 14 are now working outside the home. (6;24) Two out of three of these women are either the sole provider for their children or have husbands earning less than \$15,000 a year. Caring for very young or ill children is becoming a problem with few solutions for a growing number of Americans. (6)

Supporters of FKA contend that the bill is not only pro-family, but also probusiness. Companies with parental leave policies are better able to attract and maintain valuable employees. Businesses that have made some type of arrangement for child care boast reduced turnover and absenteeism. Parents lose, on average, eight days of work a year due to child care problems. By providing parents with legal support, FMLA may allow them to perform better as employees. Parents will be able to devote more energy to the work place if some of the stresses related to child care are alleviated. Proponents of the bill see it as a nondiscriminatory approach to improving the situation for both families and businesses. (6;24)

There are, of course, some who disagree with the proposal, and among them is The United States Chamber of Commerce. The Chamber agrees that the concept is admirable, but opposes that it be mandated. Much of the concern is focused on small businesses. The Chamber feels that Congress is ignoring the fact that all employers do not have the necessary resources enabling them to provide such benefits. Susan Hagar, testifying on behalf of the Chamber, provided her own small company as an example. The company makes every effort to accommodate parental leave needs; yet Ms. Hagar asserts that if 342 the proposed bill had been in effect two years ago when the firm was having problems, the company would have gone under. (8) In such cases, the proposal might be unjustly treating one group in favor of another. In the attempt to lighten the burden of working parents, the law may place financial and logistical hardships on small businesses that actually threaten their survival.

Small businesses may not be the only recipients of negative effects resulting from the proposed legislation. The very group that the bill was meant to protect may be hurt. The parental bill would effectively transfer some of

the burden of child care to employers and taxpayers, and the legislation would undoubtedly raise the total cost of employing young women with children. It is possible that the bill would make employers reluctant to hire women with young children and women likely to have children. If so, the results would be increased unemployment and lower earnings for women. Indeed the overall effect might be contrary to that intended. (2)

CONCLUSION

The dispute over the proposed Family and Medical Leave Act bill goes back to the original dilemma: exactly what constitutes discrimination? In passing the proposed bill would Congress be legalizing the discrimination of small businesses? Is it a choice between fair treatment of one or the other; the parent or the employer? Hopefully legislators can find some middle ground that will improve the plight of new parents without contributing to the demise of those companies with limited resources.

Another question of discrimination relating to pregnancy involves state laws such as California's which mandate extended maternity leaves for mothers of newborns. Do such laws discriminate against male employees by giving females preferential treatment? The Ninth Circuit said no, but certain groups are inclined to believe the ruling was misguided.

The Pregnancy Discrimination Act of 1978 defined many grey areas but still left room for debate over how an employer should provide equal opportunities for pregnant women, non-pregnant women and men. The difficulties involved in defining discrimination on the basis of sex are extensive as is indicated by the previous discussion. Whatever steps are taken in Congress in regards to pregnancy, childbirth and child care will surely be followed by a barrage of lawsuits, new legislative proposals and, of course, new claims of discrimination.

[REFERENCES omitted]