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The Pregnancy Discrimination Act: Protecting a Man's Right to Infant-Care Leave

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THE PREGNANCY DISCRIMINATION ACT: PROTECTING A MAN'S RIGHT TO INFANT-CARE LEAVE

I. INTRODUCTION

Infants can benefit from a man's influence in child care.[1] Traditional employment practices in the United States,[2] however, can operate to limit a man's ability to exert his parenting influence. Employment practices that grant infant care leave solely to female employees deny male employees the right to fully participate in early child care. In addition, these employment practices tend to reinforce the stereotype[3] that women are the only legitimate providers of infant care.

Fortunately, the combined actions of both Congress and the Supreme Court provide men a new Title VII[4] employment right to participate in early child care. Title VII of the 1964 Civil Rights Act[5] prohibits employment discrimination. Specifically, Title VII section 703(a)[6] prohibits employment discrimination on the basis of

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1. The following are research findings on the effects of a father's participation in early child care: fathers can play a unique and influential role in infant child care by developing particular cognitive abilities and positive personality traits in their infants, R. PARKE, FATHERS 70 (1981); from birth, a father can directly influence the development of exploration, independence and autonomy in his infant, M. YOGMAN, OBSERVATIONS ON THE FATHER-INFANT RELATIONSHIP 119-20 (1982); an infant who is securely attached to both mother and father may be less vulnerable to stress because the relationship with one parent can compensate for difficulties in the relationship with the other, *Id.*; child development depends on sustained, concentrated interaction with parents and the early weeks and months of the child's life are a critical period in personality formation, S. KAMERMAN, MATERNITY POLICIES AND WORKING WOMEN 13 (1983).

2. Many other countries have recognized the importance of parental leave employment benefits. In fact, 75 countries, including many developing countries and every industrial country except the United States, provide some variation of parental child care leave, S. KAMERMAN, MATERNITY POLICIES AND WORKING WOMEN 13 (1983).

3. *See supra* note 1.

4. 42 U.S.C. § 2000e-2 (1982).

5. The Civil Rights Act of 1964, § 701, *as amended by* 42 U.S.C. §§ 2000e-2 to 2000e-17 (1982).

6. 42 U.S.C. § 2000e-2 (1982):

> (a) Employer Practices. It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

an individual's sex.

Congress' amendment of Title VII in 1978 was a first step toward protecting a man's right to participate in infant care. Congress enacted the Pregnancy Discrimination Act[7] [hereinafter "PDA"] to expand Title VII's employment discrimination prohibitions. The PDA amendment to Title VII defines discrimination on the basis of pregnancy as unlawful sex discrimination. The PDA requires that women affected by pregnancy be "treated the same" as other persons "for all employment-related purposes including the receipt of benefits under fringe benefit programs."[8]

Thus, under Title VII as amended by the PDA, an employer may not treat the sexes differently. Yet, a man's right to child-care leave is not fully secured by the language of the amendment alone because the PDA contains no reference to the scope of a *male* employee's right to pregnancy-related fringe benefits.

The Supreme Court's first interpretation of the PDA, however, provided the next step toward creating a new Title VII employment right for male employees.[9] The *Newport News Shipbuilding & Dry Dock Co. v EEOC*[10] decision expressly held that the PDA protects men in at least one employer-provided fringe benefit—a medical benefits plan.[11] The *Newport News* decision did not address how the PDA affects the allocation of another employer-provided fringe benefit—infant-care leave. Thus, the *Newport News* decision left unanswered whether an employer who provides female employees with an infant-care leave fringe benefit, but does not provide a similar

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religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

7. Title VII § 701(k), Pub. L. No. 555, § 1, 92 Stat. 2076, 42 U.S.C. § 2000e-(k) (1982). The text of the amendment reads:

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 . . . .

Id.

8. *Id.*

9. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); *see also infra* notes 65-78 and accompanying text.

10. 462 U.S. 669.

11. *Id.* at 684.

leave for male employees, has discriminated against male employees within the meaning of the PDA. An affirmative answer to this question provides men a new employment right to an employer's existing infant-care leave benefits.

This comment will demonstrate that a synthesis of the PDA and the *Newport News* decision provides men a new right to employer-provided infant-care leave.[12] First, a pervasive "identity of treatment" philosophy will be gleaned from an analysis of pre-PDA Supreme Court pregnancy discrimination case law, the PDA legislative history, and the *Newport News* decision. The ultimate goal of this same-treatment philosophy is equal/interchangeable treatment of the sexes in the workforce. Second, the comment will propose that infant-care leave should be considered a fringe benefit for the PDA purposes. Finally, the comment will demonstrate that the PDA protections extend to men and therefore give male employees a right to employer-provided child-care leave fringe benefits.

II. PDA-AMENDED TITLE VII MANDATES THAT EMPLOYEES BE TREATED THE SAME

Title VII broadly prohibits employment discrimination based upon race, color, sex, or national origin.[13] The statute makes it an unlawful employment practice for an employer to treat employees differently on the basis of any of the enumerated protected classifications. The plain language of Title VII mandates that protected clas-

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12. This comment does not address the related problem about the right to pregnancy disability leave when the employer does not provide such a benefit. The Ninth Circuit Court of Appeals has recently held that a California statute, CAL. GOV'T CODE § 12945 (West 1985), which guarantees female workers a leave of up to four months if they become disabled because of childbirth or pregnancy-related medical conditions is compatible with Title VII. California Fed. Sav. & Loan Ass'n v. Gurerra, 758 F.2d 390 (9th Cir. 1985).

The propriety of statutes which force employers to provide leave to women only is a current subject of controversy. The controversy arises because Title VII mandates all employees be treated the same for all purposes, including the allocation of employment leave benefits. Opponents of statutes such as California's believe that pregnancy-based distinctions subvert the goal of sexual equality by implying that women need special assistance to perform as equals in the workplace. Proponents say, however, that because only women can become pregnant, it is not illegal sex discrimination to single them out for benefits that are not required for other workers. Proponents say that requiring such leave for women will ultimately require employers who do not provide child-care leave benefits to provide them for parents of *both* sexes. For a more detailed discussion of this debate, see Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Weissmann, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983); and Krieger, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE 513 (1983).

13. *See supra* note 6.

ses be treated equally with regard to the distribution of all employment benefits. The statute does not require special treatment for any employee; on the contrary, its plain language requires all employees be treated the same.[14]

Similarly, the plain language of the PDA[15] does not require special treatment for any employee, nor does it limit the scope of the sex discrimination definition to women. Rather, the PDA amended Title VII by *expanding* the definition of sex discrimination to include discrimination on the basis of pregnancy and related medical conditions.[16] The following authorities have consistently endorsed identical treatment of the sexes under Title VII: a) pre-PDA Supreme Court Title VII pregnancy discrimination cases, b) the PDA'a legislative history, and c) the PDA's administrative interpretation. These endorsements should logically provide men PDA protection for pregnancy-related employment benefits.

A. *Supreme Court Title VII Pregnancy Discrimination Cases Prior to PDA*

Supreme Court pregnancy discrimination cases decided prior to the enactment of the PDA held that Title VII mandates employers to treat all employees the same without regard to the biological fact that pregnancy is unique to women. Under the pre-PDA Title VII analysis, the Court could do no more than to insure that pregnant employees were treated no worse but no better than non-pregnant employees.[17] Without any PDA requirement that all employees be treated the same with respect to pregnancy-related benefits, the Court could not begin to recognize the rights of even female employees in the area of child-care leave. In these early cases, the Court consistently held, however, that Title VII requires that employees of both sexes be treated identically with regard to the allocation of employment fringe benefits.[18] These Supreme Court decisions mark a significant first step to recognizing a man's right to receive child-care leave benefits.

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14. *Id.*

15. 42 U.S.C. § 2000e-(k) (1982). "The terms 'because of sex' or 'on the basis of sex' *include*, but are not *limited* to, because or on the basis of pregnancy, childbirth, or related medical conditions . . . ." (emphasis added).

16. *See supra* notes 7 and 15.

17. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

18. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). See also *infra* notes 19-32 and accompanying text.

General Electric Co. v. Gilbert[19] was the Court's first Title VII pregnancy discrimination case. This case held that under Title VII, an employer may exclude pregnancy-related disabilities from an otherwise comprehensive medical benefits plan.[20] This case provides guidance in evaluating whether a man has a right to child-care leave benefits; neither sex can be protected by the statute in this area unless Title VII prohibits discrimination in allocating pregnancy-related benefits. At the time of *Gilbert*, the Court had no guidance from Congress that discrimination on the basis of pregnancy benefits was equivalent to discrimination based on sex.[21] Therefore, it held that an employer need not provide pregnancy-related benefits at all because this would entail treating men and women differently based on their sex. The Court did not seek guidance from guidelines issued in 1972 by the Equal Employment Opportunity Commission [hereinafter "EEOC"].[22] The EEOC was named by Congress to administer Title VII,[23] and the agency had already issued the guidelines in 1972 to interpret what constitutes sex discrimination for Title VII purposes. One of the guidelines stated that benefits for pregnancy disabilities shall be applied on the same terms as they are applied to other temporary disabilities.[24] The Court declined to adhere to the guidelines because as such, they did not carry the force of law;[25] they were not a contemporaneous interpretation of Title VII;[26] and they conflicted with earlier EEOC pronouncements.[27]

The Court held that "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."[28] The Court in *Gilbert* was therefore concerned that male and female employees be treated

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19. 429 U.S. 125 (1976).

20. *Id.*

21. 429 U.S. 125, 133 (1976).

22. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1972). *See infra* notes 40-57 and accompanying text for more detail on the EEOC guidelines.

23. 42 U.S.C. § 2000e-12(a) (1982): "The Commission shall have the authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the subdivisions of this subchapter. . . ."

24. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(b) (1975): "Disabilities caused by pregnancy shall be treated the same as disabilities caused by other medical conditions under any . . . leave plan available in connection with employment."

25. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).

26. *Id.* at 142. (The guidelines were first promulgated eight years after enactment of Title VII).

27. *Id.* at 143.

28. *Id.* at 139 (emphasis in original).

equally with regard to parity in employment fringe benefits.

In *Nashville Gas Co. v. Satty*,[29] the Court followed *Gilbert* and denied sick-pay benefits for pregnant employees.[30] The Court did, however, find that the employer's policy of excluding only employees on pregnancy disability sick leave from accumulating seniority, while those on other disability leaves retained seniority, was an unlawful deprivation of an employment opportunity for women.[31] Here the Court found unlawful disparate treatment of the sexes in the area of seniority because the employer "imposed on women a substantial burden that men need not suffer."[32] The Court was able to protect a pregnant employee's seniority rights in this case even without the specific PDA prohibition of discrimination based on pregnancy. This was because in *Satty* both male and female employees were similarly situated—employees of one sex on disability leave accrued seniority and employees of the other sex did not. Here, pregnancy did not even have to enter the analysis because women on leave were treated differently than men on leave with regard to seniority benefits. Title VII strictly forbids such disparate treatment of similarly situated employees.

The Court resolved each of these sex discrimination cases differently. In *Satty*, the Court could analyze the fact pattern without regard to pregnancy, and could hold that disparate treatment of the sexes violated Title VII. Yet in *Gilbert*, the Court could not find disparate treatment because it did not have any legislative guidance that discrimination based on pregnancy was the equivalent of discrimination based on sex. Without the PDA, the Court could do nothing to assure employees of either sex the right to pregnancy-related benefits.

B. *Enactment of the PDA—The Congressional Response*

Congress responded to the Supreme Court's unguided handling of Title VII pregnancy cases with the enactment of the PDA.[33] The enactment of the PDA is another important step toward recognizing a man's right to child-care leave because it prohibits discrimination in allocating pregnancy-related benefits. The PDA adds to the Title VII same-treatment mandate by defining discrimination on the basis

29. 434 U.S. 136 (1977).
30. *Id.* at 145-46.
31. *Id.* at 139-41.
32. *Id.* at 142.
33. *See* 42 U.S.C. § 2000e-(k) (1982); *see supra* note 7.

of pregnancy as unlawful sex discrimination. The legislation was enacted to reverse the effect of the *Gilbert* analysis which "left a gaping hole in the protection afforded by Title VII."[34] The Senate Committee Report on the PDA said the effect of the *Gilbert* decision threatened "to undermine the central purpose of the sex discrimination prohibitions of Title VII"[35] because: "A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment."[36] Thus, Congress enacted the PDA to expand the scope of Title VII to cover discriminatory employment action which is based on pregnancy or related conditions.[37]

1. *PDA Statutory Language*

Specifically, the PDA amended section 701 of the Civil Rights Act by adding a new subsection. The subsection specifies that the terms "because of sex" and "on the basis of sex" include but are not limited by pregnancy, childbirth or related medical conditions.[38] This section expressly provides that women affected by pregnancy or related medical conditions must be treated the *same*—no better or no worse—as other employees for all employment related purposes, including the receipt of benefits under fringe benefit programs.[39] The statutory language gives all employees the right to be treated the same with regard to all employment practices, policies, and fringe benefits.

2. *The EEOC Guidelines on Discrimination Because of Sex—1972*[40] *and 1979*[41]

The EEOC, as the agency charged with interpreting and implementing Title VII,[42] has the authority to issue guidelines that define and clarify employer obligations under Title VII. Congress did not

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34. S. REP. NO. 331, 95th Cong., 1st Sess. 3 (1977), *reprinted in* New 1978 Pregnancy Benefits and Discrimination Rules, (BNA) at 159 (1978) [hereinafter cited as S. REP.].

35. *Id.* at 153.

36. *Id.*

37. *See also* Comment, *Interpretation of the Pregnancy Disability Act and EEOC Guidelines: Conflicting Federal Responses and Analogous Confusion at the State Level*, 1 DET. C.L. REV. 77, 84 (1984).

38. *See supra* note 7.

39. *Id.*

40. 37 Fed. Reg. 6835 (1972) (codified at 29 C.F.R. §§ 1604-1604.10).

41. 44 Fed. Reg. 23,803 (1979) (codified at 29 C.F.R. §§ 1604-1604.10).

42. 42 U.S.C. §§ 2000e-12(a) (1982); *see supra* note 23 and accompanying text.

give the Commission law-making authority[43] therefore, the EEOC's guidelines are not the equivalent of statutes or regulations. Thus, the guidelines do not carry the force of law.[44] Traditionally, the Court will defer to EEOC guidelines only when they are internally consistent with other EEOC positions on the issue, and when their application would not be inconsistent with obvious congressional intent.[45]

The EEOC's two sets of Guidelines on Discrimination Because of Sex, however, are consistent clarifications of Title VII sex discrimination prohibitions.[46] The first set of guidelines was issued in 1972,[47] prior to the PDA enactment. The second set was issued in 1979,[48] one year after the PDA. Although they were issued seven years apart, the two sets of guidelines are nearly identical.[49] Each set contains general principles to eliminate sex discrimination that apply to men and women, including seniority systems,[50] sex as a bona fide occupational qualification,[51] job opportunities advertising,[52] fringe benefits,[53] and employment policies relating to pregnancy and childbirth.[54] Most significantly, both sets of guidelines call for employees to be treated equally without regard to sex.

For example, the Employment Policies Relating to Pregnancy and Childbirth guideline requires employers to treat disabilities caused or contributed to by pregnancy or related medical conditions the same as the employer treats all other temporary disabilities.[55] The Fringe Benefit guideline includes in its definition "medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; *leave*; and other terms, conditions, and privileges of employment."[56] This guideline specifically mandates identical treat-

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43. *Id.*

44. General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 n.20 (1976).

45. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973) (Court refused to defer to EEOC guidelines which were inconsistent with obvious congressional intent).

46. *See infra* notes 47-48.

47. 37 Fed. Reg. 6835 (1972) (codified at 29 C.F.R. §§ 1604-1604.10).

48. 44 Fed. Reg. 23,803 (1979) (codified at 29 C.F.R. §§ 1604-1604.10).

49. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1983). The 1979 guidelines add "childbirth or related medical conditions" in addition to pregnancy as prima facie violations of Title VII when employers use them to exclude applicants or employees, 29 C.F.R. § 1604.10(a) (1985).

50. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.3 (1985).

51. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1985).

52. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.5 (1985).

53. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9 (1985).

54. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (1985).

55. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(b) (1985).

56. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(a) (1985) (emphasis added).

ment of the sexes by making it "an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."[57] Both sets of guidelines recognize a man's right to existing employer-provided pregnancy related benefits by citing men as potential recipients.

3. *The EEOC Questions and Answers of 1979*[58]

The EEOC's 1979 sex discrimination guidelines differ from the 1972 version because they include an appendix of thirty-seven Questions and Answers.[59] These Questions and Answers were designed to supplement the EEOC's 1979 Guidelines on Discrimination Because of Sex and to respond "to urgent concerns raised by employees, employers, unions and insurers who sought the Commission's guidance in understanding their rights and obligations under the [PDA]."[60] In the introduction to these Questions and Answers, the EEOC reiterates its position that the underlying principle of Title VII is that "employees be treated equally without regard to their race, sex, color, religion, or national origin. This equality of treatment encompasses the receiving of fringe benefits made available in connection with employment."[61] The Questions and Answers [with the exception of Question and Answer 18(A)][62] inform employers that both male and female employees have rights to pregnancy-related employment benefits.

Yet, the enactment of the PDA and the EEOC guidelines were not enough to convince the courts that men were entitled to share in pregnancy-related employment benefits. Lower court decisions after the PDA tended to narrowly construe the PDA and to limit its application only to the pregnancy-related conditions of female employees.[63] Finally, in *Newport News Shipbuilding & Dry Dock Co. v.*

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57. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(b) (1985).

58. 44 Fed. Reg. 23,804 (1979).

59. *Id.*

60. *Id.*

61. 44 Fed. Reg. 23,804-805 (1979).

62. *See infra* notes 83-113 and accompanying text.

63. In EEOC v. Emerson Electronic, 539 F. Supp. 153 (E.D. Mo. 1982), an employer's health plan covered the medical expenses of spouses, but limited coverage for a spouse's pregnancy-related conditions. The court analyzed the wording of the PDA and concluded that although legislative history indicated an intent that the Act was to protect only the benefits of female employees and not the spouses of male employees. This court also rejected the EEOC Interpretive Guidelines. In EEOC v. Lockheed Missiles & Space Co. Inc., 680 F.2d 1243 (9th Cir. 1982), *vacated*, 463 U.S. 1203 (1983), a medical plan excluded coverage for pregnancy-related conditions of the spouses of male employees. The court held that under Title VII as amended by the PDA, such exclusion for male employee dependents did not constitute gender-

EEOC,[64] the Supreme Court agreed to address the question of whether the PDA protected male employees in the area of spousal pregnancy insurance coverage.

III. THE *Newport News* DECISION

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[65] the Court interpreted the PDA for the first time and found that it conferred employment rights to both men and women. The majority held that the employer's limited spousal pregnancy insurance coverage violated Title VII by discriminating against male employees.[66] The *Newport News* decision recognized that the PDA protects the rights of both male and female employees to receive pregnancy-related benefits.[67]

A. Newport News *Facts and Arguments*

The Newport News & Dry Dock Shipbuilding Co. provided a medical plan for its employees that included comprehensive pregnancy benefits for female employees and 100 percent coverage of medical benefits for the spouse of a female employee. Male employees were also given comprehensive insurance coverage of *personal* medical conditions, but pregnancy benefits for their spouses were limited under certain conditions.[68]

The employer argued that the PDA applied exclusively to female employees and maintained that by enacting the PDA Congress focused "on the needs of female members of the workforce rather than the spouses of male employees."[69] The EEOC countered that Title VII principles would not allow any interpretation of the PDA that would bar discrimination claims from male employees. Therefore, the EEOC claimed the employer "had unlawfully refused to provide full insurance coverage for [a male employee's spouse's] hos-

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based discrimination. The decision in EEOC v. Joslyn Mfg. & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), held that the PDA did not require an employer to provide the same insurance benefits for spouses of male employees as it provided for dependents of female employees. The court reasoned that the PDA was enacted to narrowly overrule *Gilbert* and therefore applied only to pregnancy-related conditions of female employees and not to spouses of male employees.

64. 667 F.2d 448 (4th Cir.), *aff'd on rehearing*, 682 F.2d 113 (4th Cir. 1982), *aff'd*, 462 U.S. 669 (1983).

65. 462 U.S. 669 (1983).

66. *Id.* at 685.

67. *Id.*.

68. *Id.* at 672-73.

69. *Id.* at 679.

pitalization caused by pregnancy."[70]

B. Newport News *Reasoning and Holding*

The issue before the Court was whether the petitioner had "discriminated against its male employees with respect to their compensation, terms, conditions, or privileges of employment because of their sex within the meaning of section 703(a)(1) of Title VII."[71] The Court noted that although neither the PDA nor Title VII contains a definition of the word "discriminate," analysis "beyond the bare statutory language" of Title VII, including its legislative history, reveals Congress enacted the PDA to overturn both the specific holding in *Gilbert*[72] and to add "discrimination on the basis of pregnancy" to the definition of what constitutes unlawful sex discrimination.[73]

The Court then rebutted the employer's claim that these new PDA protections were limited to women, by noting that "Congress had always intended to protect *all individuals* from sex discrimination in employment—including but not limited to pregnant women workers."[74]

The Court held that the PDA applies to all employees because health insurance and other fringe benefits are, by definition, compensation, terms, conditions, or privileges of employment.[75] Therefore, male as well as female employees are protected against discrimination in the distribution of these benefits.[76] The Court held the medical plan violated the PDA because the proper Title VII discrimination test prohibits employers from treating "a male employee with dependents in a manner which, but for that person's sex, would be different."[77]

This Title VII discrimination test calls for identical treatment of the sexes. This test implies that identical treatment not only means that all employees be treated the same with regard to the distribution of benefits, but that *all* employees are protected from employment discrimination by the *same* Title VII standards. Thus, the

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70. *Id.* at 674.
71. *Id.* at 675.
72. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).
73. 462 U.S. 669.
74. *Id.* at 681 (emphasis added).
75. *Id.* at 682.
76. *Id.*
77. *Id.* at 683 (quoting City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 711 (1977)).

Court implicitly held that the PDA serves as a legitimate means for male employees to assert their rights to pregnancy-related employment benefits.

The *Newport News* decision reflected an overall concern to eliminate unequal treatment between the sexes with regard to the allocation of pregnancy-related employment benefits. Yet the Court's broad interpretation of the PDA and its reference to particular EEOC guidelines[78] still leaves many pregnancy benefits discrimination issues unresolved.

IV. Questions Left Unanswered By *Newport News*

The *Newport News* decision held that the PDA protects the spouses of male employees in the area of pregnancy disability medical benefits coverage by requiring they be treated the same as the spouses of female employees. Yet, the Court offered no guidance as to what extent the PDA provides male employees rights to any other pregnancy-related benefits. The Court, in reaching its decision, took guidance from the 1978 appendix of EEOC Questions and Answers numbers 21 and 22[79] which refer to spousal and dependent medical plan coverage. The Court did not elaborate on any of the other EEOC Questions and Answers or specify what level of deference should be accorded to them. The EEOC is authorized to promulgate "procedural regulations to carry out the provisions of [Title VII],"[80] yet EEOC directives are not afforded the force of law because Congress did not give the Commission law-making authority.[81] Thus, the validity of the remaining EEOC Questions and Answers remains unclear.

A. *PDA Coverage of Infant Care Leave—The Conflict Defined*

The *Newport News* decision held that the PDA protects male employees at least with regard to equal coverage of existing pregnancy disability benefits in an employer-provided medical plan. The Court held that the PDA was a legitimate means for men to assert their right to this specific pregnancy-related benefit.

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78. 462 U.S. 669, 673-74. The Court referred to Questions and Answers 21 and 22 which concern insurance coverage for the medical expenses of pregnancy-related conditions of spouses of male employees and other dependents of all employees. 44 Fed. Reg. 23,803, at 23,807 (1979).

79. 462 U.S. 669, 673-74; *see supra* note 78.

80. 42 U.S.C. § 2000e-12(a) (1982).

81. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 n.20 (1976).

Yet, EEOC Question and Answer 18(A)[82] erodes a man's right to child-care leave. Question and Answer 18(A) states that infant-care leave is not included in the PDA protections and implies that *only* female employees may take advantage of this employment benefit. The PDA must be interpreted to protect existing infant-care leave benefits before the *Newport News* reasoning can extend the right to this pregnancy-related benefit to men. Specifically, the text of Question and Answer 18(A) reads:

> 18(A) Q. Must an employer grant leave to a female employee for child care purposes after she is medically able to work following leave necessitated by pregnancy, childbirth or related medical conditions?
> A. While leave for child care purposes is not covered by the [PDA], ordinary Title VII principles would require that leave for child care purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to *remain* on leave for infant care, even though they are medically able to return to work.[83]

The following analysis will show that the application of Question and Answer 18(A) violates the Title VII identity of treatment philosophy. Question and Answer 18(A) would not only be inconsistent with obvious congressional intent, but would also contradict earlier EEOC positions. The PDA must extend to protect a male employee's right to employer-provided child-care leave in order to comply with the Title VII mandate that all employees be treated the same. To defer to Question and Answer 18(A) would encourage unlawful disparate treatment of men and women in violation of Title VII by restricting this important employment fringe benefit to women.

B. *Specific Problems with EEOC Question and Answer 18(A)*

1. *Question and Answer 18(A) is Inconsistent with Obvious Legislative Intent*

Statements in the PDA legislative history illustrate the congressional desire that the PDA "protection [extend] to the whole range of

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82. 44 Fed. Reg. 23,807 (1979).
83. *Id.* (emphasis added).

matters concerning the childbearing process."[84] For example, a statement in the Senate Report implies that the PDA was designed to include employer infant-care leave policies:

> [T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace. A failure to address discrimination based on pregnancy, in *fringe benefits* or any other employment practice, would prevent the elimination of sex discrimination in employment.[85]

This statement demonstrates that Congress intended the PDA to confer a comprehensive protection against discrimination in pregnancy-related benefits. Congressional intent, therefore, would logically extend the scope of the PDA to protect infant-care leave. The PDA could then eradicate employment sex discrimination by mandating that an employer's pregnancy-related fringe benefit policies be available to both men and women.

2. *EEOC Question and Answer 18(A) Contradicts Earlier Agency Positions*

In addition to contradicting the legislative purpose and goals of the PDA, Question and Answer 18(A) is internally inconsistent with regard to the other EEOC sex discrimination guidelines issued contemporaneously. Section 1604.9(a) of both the 1972 and 1979 EEOC guidelines defines fringe benefits to include "leave; and other terms, conditions, and privileges of employment."[86] Section 1604.9(b) prescribes that "[i]t shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."[87] Taken together, EEOC sections 1604.9(a) and (b) clearly define "leave" as a "fringe benefit" and prohibit sex discrimination with respect to such benefits.[88] The statement in Question and Answer 18(A) that child care is not covered by the PDA conflicts with the agency's own previous guideline that leave and other terms, conditions, and privileges of employment mandate Title VII protection.[89]

Yet the internal inconsistencies of Question and Answer 18(A)

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84. H.R. REP. NO. 948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4753 [hereinafter cited as H. REP.].

85. S. REP. *supra* note 34, at 153. (emphasis added).

86. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(a) (1985).

87. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(b) (1985).

88. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(a) (1985).

89. *See* Leeds, *Maternity Leave for Fathers*, 55 N.Y. ST. B. J. 32, 34 (1983).

do not end there. The last sentence of the 18(A) Answer implies that women have the sole responsibility for child care by use of the phrase "those who wish to *remain* on leave for infant care."[90] This assumption negates the EEOC guidelines themselves, as well as the legislative goal of Title VII, which both aim to prohibit discriminatory disparate treatment of the sexes and to eliminate the unfounded stereotypes that accompany such treatment. The PDA does not mandate that employers must provide child-care leave, but if employers do so provide it, leave must be available on an equal basis to employees of both sexes according to the EEOC Fringe Benefit guideline.[91] EEOC Question and Answer 18(A) contradicts this unambiguous PDA legislative and administrative mandate by implying that men and women may be treated differently with regard to the availability of child-care leave.

3. *Question and Answer 18(A) Lacks Authority*

Supreme Court case law provides guidance on how to determine whether, and to what extent EEOC guidelines should be accorded deference. In *Griggs v. Duke Power Co.*,[92] the Court said that because "the act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[93] However, in *Espinoza v. Farah Manufacturing Co.*,[94] the Court refused to defer to EEOC guidelines that were internally inconsistent with regard to other agency positions and that "would be inconsistent with an obvious congressional intent."[95]

Moreover, the *Gilbert*[96] Court disregarded the 1972 EEOC guidelines by using the test set forth in *Skidmore v. Swift Co.*[97] Under that test, the weight given EEOC guidelines will depend upon the "validity of [their] reasoning, [their] consistency with earlier pronouncements, and all those factors which give [them] power to persuade."[98] The Court applied the *Skidmore* test and disregarded the 1972 guidelines in part because they contradicted an earlier

90. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 App. 18(A) (1979) (emphasis added).

91. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(a) (1985).

92. 401 U.S. 424 (1970).

93. *Id.* at 434.

94. 414 U.S. 86 (1973).

95. *Id.* at 94-95.

96. 429 U.S. 125 (1976); *see supra* notes 19-28 and accompanying text.

97. 323 U.S. 134 (1934).

98. *Id.* at 140 (quoted in General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976)).

agency policy,[99] and because they were inconsistent with indicia of proper legislative intent contained in legislative history records.[100]

These Supreme Court rulings determine the proper disposition of Question and Answer 18(A). First, EEOC Question and Answer 18(A)'s statement that child-care leave is not covered by the PDA is inconsistent with the EEOC's earlier Fringe Benefit guideline section 1604.9 that defines "leave" as a PDA protected employment benefit.[101]

Second, although the House and Senate reports state that the EEOC's 1972 guidelines rightly implemented the Title VII prohibition of sex discrimination,[102] there is no similar indication of a congressional endorsement or even of a review of the 1979 Questions and Answers. The Fringe Benefit definition, section 1604.9, remained unchanged from the 1972 guidelines to the 1979 guidelines. To the extent that the Fringe Benefit guideline remained unchanged from its 1972 congressional endorsement to 1979, implies Congress felt the EEOC correctly determined that leave is a PDA protected fringe benefit. Yet Question and Answer 18(A) cannot claim the continuing congressional endorsement of the Guidelines on Discrimination Because of Sex. This is because Question and Answer 18(A) was first printed *after* Congress had endorsed the EEOC 1972 guidelines. Since it enacted the PDA in 1978, Congress has had no occasion to comment on the accuracy of the Questions and Answers. Moreover, Question and Answer 18(A) was not even included when the Questions and Answers were first published in interim form for public comment,[103] but was added for the first time when the guidelines were published in final form one month later.[104] Therefore, the language of 18(A) did not even receive public comment regarding its accuracy prior to its final publication.

Finally, legislative records indicate that both the Senate and the House found that fringe benefits such as leave deserved PDA protections. The House report discusses "Other Employment Policies" and states:

> [T]he consequences of other discriminatory employment policies on pregnant women in general has historically had a persistent and harmful effect upon their careers. . . . Therefore, elimina-

99. 429 U.S. at 142.
100. *Id.* at 143.
101. *See supra* notes 86-89 and accompanying text.
102. H. REP. *supra* note 84, at 4750; S. REP. *supra* note 34, at 152.
103. 44 Fed. Reg. 13,278 (1979).
104. 44 Fed. Reg. 23,804 (1979).

> tion of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.[105]

Similarly, the Senate report declares in its "Leave and Other Policies" section that "in addition to its impact upon fringe benefit programs, this legislation proscribes various other employment policies which adversely affect pregnant women. . . . The proscription of such policies is perhaps the most important effect of this bill."[106]

Question and Answer 18(A) contradicts previous EEOC provisions on fringe benefits;[107] fosters a stereotype that women are the sole legitimate child-care providers, was not endorsed or reviewed by Congress, and is contrary to legislative intent.[108] The applicable Supreme Court tests would disregard Question and Answer 18(A) as unauthoritative.

Given these deficiencies, Question and Answer 18(A) should be disregarded because existing[109] infant-care leave benefits are included in the scope of PDA protections both by indicia of congressional intent and by previous EEOC positions.[110]

Moreover, the *Newport News* reasoning logically extends PDA protection to recognize this pregnancy-related benefit for male employees. The *Newport News* decision held that Title VII PDA protections for spousal pregnancy disability benefits extend to male employees.[111] The decision cited EEOC Questions and Answers 21 and 22[112] but it gave no indication what, if any, deference should be accorded the remaining Questions. Previous Supreme Court decisions have declined to give deference to EEOC guidelines when such guidelines are inconsistent with other prior agency positions, or

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105. H. REP. *supra* note 84, at 4754.

106. S. REP. *supra* note 34, at 156.

107. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9 (1985).

108. *See supra* notes 33-37, 105-06 and accompanying text.

109. Proposed federal legislation would require employers who do not currently provide unpaid leave benefits to provide them to both male and female employees. This legislation is now being developed by Rep. Pat Schroeder (D-Colo) and the Congressional Caucus for Women's Issues to provide: 1) minimum unpaid disability leave for all employees who are temporarily disabled; and 2) minimum unpaid parental leave for all employees upon birth or adoption of their child. H.R. 2020.

In California, proposed A.B. 613 would make it an unlawful employment practice for any employer to refuse to permit an employee to take a leave of up to one year for child rearing.

110. *See supra* notes 84-91 and accompanying text.

111. 462 U.S. 669; *see also supra* notes 65-78 and accompanying text.

112. 462 U.S. at 673-74.

when they contradict legislative intent.[113] Question and Answer 18(A) is inconsistent internally with both prior agency interpretations and legislative intent. Not only does it foster stereotypes concerning sex roles, but adhering to its recommendation would render the PDA ineffective to eradicate discriminatory, disparate treatment of the sexes in the area of infant-care leave fringe benefits. A male employee would not have a PDA-protected right to infant-care leave if Question and Answer 18(A) was implemented. Therefore, Question and Answer 18(A) should be disregarded as counter-productive given these deficiencies.

V. RESOLUTION: THE PDA PROTECTS EXISTING INFANT CARE LEAVE

The scope of PDA protections should extend to make infant-care leave available to men because it is unlawful for an employer to discriminate against any employee with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[114]

Legislative intent, judicial reasoning, and overall administrative interpretation emphasize that both sexes should be accorded the same treatment in all employment policies in order to eliminate employment sex discrimination. Senator Williams' remarks, for example, are evidence that congressional intent in enacting the PDA was "to protect all individuals from unjust employment discrimination."[115] The *Newport News* decision held both that the PDA protects male employees with regard to spousal pregnancy disability benefits and that the sexes should not be treated "in a manner which but for that person's sex would be different."[116]

Finally, the preface to the 1979 EEOC Guidelines on Discrimination Because of Sex cite "The underlying principle of Title VII is that . . . employees be treated equally without regard to their . . . sex . . . . This equality of treatment encompasses the receiving of fringe benefits made available in connection with employment."[117]

Synthesis of the interpretations of each of these three arms of government advocate a policy that recognizes the right of male employees to equal access to child-care leave. Therefore, if an employer

113. General Elec. Co. v. Gilbert, 429 U.S. 125, 142-43.

114. *See supra* note 6.

115. 462 U.S. 669, 681 (quoting 123 CONG. REC. 7539 (1977)).

116. 462 U.S. 669, 683 (quoting City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 711 (1978)).

117. 44 Fed. Reg. 23,804-05 (1979).

grants child-care leave to female employees, the PDA mandates such leave must be available to male employees on the same basis.

VI. CONCLUSION

Title VII requires that employers treat all employees the same with regard to employment fringe benefits. The PDA expands this provision to include employer-provided pregnancy-related fringe benefits. The *Newport News* decision held that PDA provisions protect male employees in the allocation of at least one pregnancy-related fringe benefit—dependent medical coverage. Legislative history indicates Congress intended the scope of the PDA to cover all pregnancy-related fringe benefits, including existing child-care leave benefits. Thus, the PDA, as interpreted by the *Newport News* decision, recognizes a man's right to employer-provided child-care leave fringe benefits.

The PDA's protection of male employees in the area of child-care leave means men can have job security while taking part in important parenting functions which employment practices in the United States[118] often discourage them from undertaking. Children, too, can benefit from both male and female influences; both parents have much to offer their children.

Cynthia Hecht

118. *See supra* note 2.