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CHILD CARE AS AN EMPLOYEE FRINGE BENEFIT: MAY AN EMPLOYER DISCRIMINATE?

I. INTRODUCTION

The social problems related to unaffordable child care are many. Poverty, increased unemployment, and welfare dependence represent only a few of these problems. Recent cut-backs in federal funding of child-care services have magnified these difficulties and

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1. Child-care services are often quite expensive. For example, the average single mother in California with a child under two years old spends nearly half of her income on child-care services. See infra notes 2-3, 25-27 & 36 and accompanying text.

2. Many mothers must work on a part-time basis only because of child-care responsibilities. Part-time positions typically pay twenty-five percent less than comparable full-time positions. U.S. COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUBLICATION No. 67, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN 10-11 (1981) [hereinafter cited as CHILD CARE AND EQUAL OPPORTUNITY]. Additionally, many single mothers either do not participate in the labor force or are unemployed. See infra note 3.

Moreover, women workers remain concentrated in low-paying jobs with little possibility of upward mobility. Hence, the average woman worker earns only three-fifths of the amount that the average man earns, even when both work full-time. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, 20 FACTS ON WOMEN WORKERS 2 (1980) [hereinafter cited as 20 FACTS ON WOMEN WORKERS]. Since women are burdened with child-care responsibilities more frequently than men, and because women earn only a fraction of what men earn, it is not unusual that many of the children of single mothers live below the poverty level. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SPECIAL STUDIES SERIES P-23, No. 107, FAMILIES MAINTAINED BY FEMALE HOUSEHOLDERS 1970-79, at 5 (1980) [hereinafter cited as FAMILIES MAINTAINED BY FEMALE HOUSEHOLDERS]. See also infra note 36.

3. In 1982, almost 1.4 million women desired employment, but were not looking for jobs because of home responsibilities. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2175, HANDBOOK OF LABOR STATISTICS 34 (1983). Moreover, about forty-five percent of unmarried mothers who do not currently participate in the labor force would look for work if child care was available at a reasonable cost. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-23, No. 129, CHILD CARE ARRANGEMENTS OF WORKING MOTHERS: JUNE 1982 (1983) [hereinafter cited as CHILD CARE ARRANGEMENTS]. Single women with infant children experience a higher unemployment rate than does any other group. For example, in 1977, the unemployment rate for these women was 36.2 percent, although the national average unemployment rate was only 7.1 percent. Part of the reason for this high unemployment rate is that many day-care centers and private baby sitters are unwilling to assume the responsibility for infant care. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, SPECIAL STUDIES SERIES P-23 No. 117, TRENDS IN CHILD CARE ARRANGEMENTS OF WORKING MOTHERS 5-7 (1982) [hereinafter cited as TRENDS].

4. For many low-income parents receiving Aid to Families with Dependent Children (AFDC), there is an economic disincentive to accept paid employment if child-care expenses must be incurred. See infra note 32 and accompanying text.
increased the burden that child care creates for many parents. Moreover, the parents who suffer most frequently from the problems linked to unaffordable child care are women, especially minority women. Employers may alleviate some of these hardships by providing child care as an employee fringe benefit.

Relatively few employers currently offer child care as an employee fringe benefit, primarily because initiating and maintaining a child-care program is costly. However, a child-care fringe benefit may prove to be advantageous for most employers. For example, such benefits are often highly cost-effective because employee absenteeism decreases and productivity rises when child-care fringe benefits are offered.

An employer who provides child-care fringe benefits to all of his employees may be concerned that he is unlawfully discriminating against those employees who have no children if he does not offer a comparable benefit to his childless employees. This concern is unwarranted. Suppose, however, that an employer decides not to pro-

5. The Reagan administration has sharply reduced federal spending on child care. In 1981, federal spending on child-care services was cut by seven hundred million dollars. From 1981-1983, direct funding on state spending on child care for low-income families dropped an additional fourteen percent. Watson, What Price Day Care?, NEWSWEEK, Sept. 10, 1984, at 19, col. 3. Although the Reagan administration has offered new tax incentives to employers and parents who pay for day care, Watson observes that “[s]uch tax breaks do nothing for the people who need day care the most — those who are too poor to pay taxes.” Id. See infra note 16.

6. See infra notes 33-36 and accompanying text.

7. A fringe benefit is a form of employee compensation in addition to an employee’s regular pay. Examples of fringe benefits are medical insurance, paid vacations, and recreational facilities. For a discussion of the origin and history of fringe benefits and related definitions, see G. LEshIN, EEO LAW: IMPACT ON FRINGE BENEFITS 1-8, 144-59 (1981).

Child care as an employee fringe benefit may take a variety of forms. For example, an employer may pay directly for the child-care services his employees receive from day-care centers, family day-care homes, or private baby sitters. Alternatively, an employer may provide funding to establish a day-care center in the community which may be used without charge by his employees, while other members of the public must pay to use this facility. An employer may also open a day-care center at his place of business to be used exclusively by his childless employees. See CALIFORNIA DEP’T OF JUSTICE, INFORMATION PAMPHLET No. 9, WOMEN’S RIGHTS HANDBOOK 50-53 (1976).

8. Meyers, Child Care Finds a Champion in the Corporation, N.Y. Times, Aug. 4, 1985, at F1, col. 3. Although nearly two thousand corporations currently underwrite various forms of child-care services, these corporations constitute less than one percent of the nation’s six million employers. Id. at F1, col. 2.

9. Id. at F1, cols. 3, 4 and F6, col. 1. Accord Verzarro-Lawrence, LeBlanc, & Hennon, Industry-Related Day Care: Trends and Options, 37 YOUNG CHILDREN 8 (1982) [hereinafter cited as Industry-Related Day Care].

10. Antidiscrimination statutes prohibit discrimination on specific bases such as race, sex and religion. These statutes have not been extended to include “parenthood” (i.e., whether one is a parent or not) as a protected basis. 42 U.S.C. § 2000e-2 (1982); CAL. GOV’T CODE §§
vide child-care benefits for all of his employees who have children, but only for those who work in a certain department or at a particular salary level, or who are members of a specific racial group. Will his concern regarding liability under antidiscrimination statutes be equally unwarranted?

There are several reasons that an employer may decide to offer child-care benefits on a selective basis. For example, if an employer chooses to pay directly for child-care services, the cost may be prohibitive if offered to all employees. Or if the employer elects to open a child-care facility at the workplace, providing this service for all of his employees' children may cause the facility to be unmanageable. Alternatively, an employer may wish to use child-care benefits to attract a specific group of employees, such as minority women, to his company. Thus, although some employers might wish to offer child-care fringe benefits, it may be unfeasible to extend this benefit to all employees.

This author believes that society will profit if child-care benefits are more widely offered. Although the author believes it is preferable to make such a fringe benefit available to all employees, providing child-care benefits selectively is more desirable than declining to offer the benefit altogether. If employers could offer child-care benefits selectively without incurring liability under antidiscrimination statutes, some employers not currently providing this benefit may be more inclined to provide such benefits. Moreover, once a considerable seg-


11. See infra notes 38-40 and accompanying text.
12. As used in this comment, "selective child-care benefits" or "offering child-care benefits selectively" refers to the offering of child-care fringe benefits to fewer than all of the employees who have children.
13. This is known as the "voucher system," in which employees are given certificates worth a certain amount to be applied toward child-care fees. Industry-Related Day Care, supra note 9, at 9.
14. Cash subsidies to defray day-care expenses may cost an employer between $1,500 and $10,000 annually per employee, depending both on the day-care cost to the employee and on the percentage of day-care expenses subsidized by the employer. Meyers, supra note 8, at F1, col. 4.
15. See infra notes 105-37 and accompanying text. An employer may offer child-care benefits as part of an affirmative action plan. Alternatively, child-care benefits may be implemented pursuant to a collective bargaining agreement with labor union officials. Such an agreement may only require that the employer provide child-care benefits to minority women. Cf. United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) discussed infra, notes 125-35 and accompanying text.
16. There is, however, a tax incentive for an employer to make a child-care benefit available to at least eighty percent of his employee's children. See I.R.C. §§ 129, 188 (West 1985). See also K. Murray, supra note 10, at 3 n.12.
ment of employers offer child-care benefits, it is likely that many more will follow suit to avoid the risk of losing valuable employees to companies that offer child-care fringe benefits.\footnote{17}

There is virtually no guidance under current law for an employer who wishes to provide child-care benefits selectively and avoid unlawful discrimination actions. Therefore, this comment seeks to offer an employer guidance in this area. Section II of this comment examines the correlation between child-care difficulties and other social problems and reviews two fundamental antidiscrimination statutes. Since an employer may be liable under these statutes if he offers child-care benefits on a selective basis, Section III proposes judicial interpretations of existing law which will protect an employer who offers child-care benefits selectively. Finally, Section IV proposes legislation designed to encourage employers to provide child-care benefits.

\section*{II. Background}

\subsection*{A. Social Considerations}

\subsubsection*{1. The Demand for Child Care}

The past two decades have witnessed a marked increase in the participation rates of women in the workforce.\footnote{18} This increase has greatly expanded the class of parents who need child-care services for the care of their children.\footnote{19} In 1982, six million women with a child under five years old were in the labor force.\footnote{20} This figure represents a twenty-seven percent increase since 1977,\footnote{21} and it is predicted that the labor force participation rates of women with small children will continue to rise.\footnote{22}

\footnote{17. Many companies are beginning to realize that unless they help their working parents with child care, especially those parents who are in their thirties and represent the next generation of management, these employees may be lost to competitors who provide child care. Meyers, \textit{supra} note 8 at F1, col. 3.}

\footnote{18. In 1950, about twenty percent of mothers with minor children were in the labor force. \textit{Child Care and Equal Opportunity}, \textit{supra} note 2, at 8. Yet in 1979, fifty-five percent of mothers with minor children were in the labor force. \textit{20 Facts on Women Workers}, \textit{supra} note 2, at 1.}

\footnote{19. The largest proportional increases in labor force participation have occurred among mothers with children under six years old. Between 1950 and 1978, the labor force participation for women with children between 6 and 17 years old increased eighty-two percent while the rate among mothers with children under 6 more than tripled. \textit{Child Care and Equal Opportunity}, \textit{supra} note 2, at 8.}

\footnote{20. \textit{Child Care Arrangements}, \textit{supra} note 3, at 1.}

\footnote{21. \textit{Id.}}

\footnote{22. \textit{Trends}, \textit{supra} note 3, at 1.}
Despite the increased demand for child-care services, many families have not made satisfactory child-care arrangements. In fact, nearly five million children are left alone without any supervision while their parents are at work. The primary reason that many children are left unsupervised is that their parents cannot afford child-care services.

2. Unaffordable Child Care

Although the average cost of child care is difficult to calculate, the average monthly fee charged by a day-care facility in Santa Clara County to a parent with two children is five hundred sixteen dollars. Moreover, the average single mother in California with a child under two years old must spend forty-nine percent of her income on child care.

A further problem incidental to the high cost of child care is that many women are prevented from participating in the work force. Women who do work are often required to stay in low paying jobs, refuse job promotions or the training necessary for career advancement, and may experience difficulties performing their jobs because of inadequate child care.

Moreover, unaffordable child care creates a disincentive for many parents receiving Aid to Families with Dependent Children (AFDC) to accept paid employment. For example, a single mother in Santa Clara County who earns $13,032 annually would actually increase her gross income by seventeen dollars each month if she quit her job and received AFDC, rather than continue working while burdened with child-care payments.

23. Watson, supra note 5, at 14, col. 2.
25. The average cost of child care is difficult to calculate because payment arrangements differ greatly. For example, many children are cared for by relatives who charge the child's parents little or nothing while other children are cared for in expensive day-care facilities. Trends, supra note 3, at 10-13.
26. This figure is based on a telephone survey of ten day-care centers throughout Santa Clara County (January 15, 1985). A copy of this interview is filed with the Santa Clara Law Review office.
27. Watson, supra note 5, at 15, col. 3.
28. See supra note 3.
29. Child Care and Equal Opportunity, supra note 2, at 10-11.
30. Id. at 11.
31. For some women workers, concerns about inadequate child care is the single greatest cause of stress. Such stress is recognized as a significant factor in industrial accidents. Id. at 12.
32. A parent who earns $13,032 annually is completely ineligible for AFDC. If a woman earns this amount, but pays a typical amount for child-care services, $516 per month for
3. Persons Affected

Not all parents suffer equally from the problems associated with child care availability. Instead, a distinct segment of the population is affected by child-care concerns. This segment is comprised primarily of women, especially minority women.83 This is not unusual, considering that ninety-one percent of all single parent families are headed by the mother.84 Further, single mothers have a higher labor force participation rate than married mothers and hence, more frequently need child-care services for the supervision of their children.85 Yet despite their higher labor force participation rate, many single mothers are poverty-stricken.86 Therefore, child care represents a crucial issue to them.

B. Antidiscrimination Statutes and Employer Liability

Discrimination may be defined as a failure to treat all persons equally where there exists no reasonable distinction between those favored and those not favored.87 In the employment context, discrimination is prohibited by several laws.88 As used in this comment,
however, the term "discrimination" refers to only those types of discrimination proscribed by Title VII of the 1964 Civil Rights Act and the California Fair Employment and Housing Act. Before addressing potential employer liability arising from offering child-care benefits selectively, this comment examines the statutes under which discrimination actions are most commonly brought.

1. Title VII

The most comprehensive federal antidiscrimination statute is Title VII of the 1964 Civil Rights Act. Title VII prohibits discrimination in employment on the basis of race, color, religion, national origin or sex. Title VII applies only to those persons engaged in an industry affecting commerce who have at least fifteen individuals in their employ for at least twenty weeks in the preceding calendar year.

Under Title VII, an employer may not discriminate against an individual "with respect to his compensation, terms, conditions, or privileges of employment" because that person is a member of a protected class. Since child care, like all fringe benefits, is a term,
condition, or privilege of employment, an employer must not unlawfully discriminate among his employees when offering child-care fringe benefits. For example, it would be unlawful to offer child-care benefits to white employees and not to employees of other racial backgrounds.

The objectives of Title VII are enforced by the Equal Employment Opportunity Commission (EEOC). In connection with this authority, the EEOC has promulgated a series of guidelines which assist an employer in complying with Title VII. Courts generally give great deference to the guidelines if they accurately reflect the intent of Congress. Thus, courts will frequently uphold an employer's practice which follows the EEOC guidelines.

Unfortunately, the EEOC has not addressed methods by which an employer may lawfully discriminate when offering child-care benefits. Thus, should an employer offer child-care benefits selectively and be sued under Title VII, he will not have the advantage of finding specific support from the EEOC of his employment practice.

2. Fair Employment and Housing Act

Employers must also comply with state antidiscrimination laws. California’s major antidiscrimination statute is the Fair Employment

1604.9(a) (1985).

47. The EEOC was created by Title VII. The Commission is composed of five members who are appointed by the President to serve five-year terms. 42 U.S.C. § 2000e-4 (1982). The EEOC has the authority to investigate Title VII violations and must attempt to eliminate unlawful employment practices by conciliation or other informal methods. If attempts at conciliation fail, the EEOC may bring a discrimination suit against the employer. 42 U.S.C. § 2000e-5 (1982).


49. In its first discussion of the EEOC guidelines, the United States Supreme Court stated that “[s]ince 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.” Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971). Similarly, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court said that the guidelines “do constitute ‘[t]he administrative interpretation of the Act by the enforcing agency,’ and consequently are entitled to great deference.” 422 U.S. at 431 (quoting Griggs, 401 U.S. at 433-34). However, if the Supreme Court finds the guidelines do not reflect the intent of Congress, the Court may give them little or no consideration. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (Court held contrary to guidelines regarding seniority systems).

50. Although there are no specific guidelines on child care, Question 18(A) of the EEOC's Questions & Answers on the Pregnancy Discrimination Act states that unlike leave for pregnancy, leave for child-care purposes is not authorized by Title VII or its amendments. 29 C.F.R. § 1604 Q. 18(A) app. (1985).
and Housing Act (FEHA).\textsuperscript{81} In addition to prohibiting employment discrimination on all of the bases protected by Title VII, FEHA also proscribes discrimination on the basis of ancestry, physical handicap, age, medical condition and marital status.\textsuperscript{82} Further, FEHA affects more California employers than does Title VII.\textsuperscript{83} Thus, a California employer who is not covered by Title VII may nevertheless be subject to FEHA liability.

At first glance, it appears that as long as an employer's practice does not discriminate against an employee specifically because of that person's race, sex, or other protected-class membership, Title VII and FEHA are not violated. This is only partially correct. Claims of employment discrimination can be classified into two general categories. First, an employee may allege that he has received different treatment because of his race, ethnicity, or membership in another protected class, and thus, has suffered "disparate treatment."\textsuperscript{84} Second, an employee may allege that a specific employment practice, although not facially discriminatory, operates to have a disparate, or "adverse impact"\textsuperscript{85} on the employee's racial, gender, or ethnic group. Since adverse impact liability is a realistic concern for an employer who offers child-care benefits selectively, this comment next considers this strand of discrimination.

C. 

Employer Liability: Adverse Impact

1. Adverse Impact Under Title VII and FEHA

"Adverse impact" is the term used to describe a "neutral"\textsuperscript{86} employment practice which nonetheless violates Title VII and FEHA.
because of its disproportionate effect on members of protected classes. For example, classifying employees based on hair color may not appear to be unlawful discrimination since neither Title VII nor FEHA expressly prohibits discrimination because of hair color. Yet if it is an employer's policy not to hire persons with black hair, blacks, Asians, Hispanics, Native Americans and other minorities will be denied employment by this practice more frequently than will whites. Since this practice will have an adverse impact upon racial minorities, it may be as violative of Title VII and FEHA as if the employer expressly resolved to discriminate on the basis of race when hiring.

An employer may also face the problem of a Title VII and FEHA violation on the basis of adverse impact if he offers child-care benefits selectively. For example, consider an employer who decides to offer child-care benefits only to those employees in a certain department of his company. If the vast majority of these employees are racial minorities, white employees may claim that they are adversely affected by this employment practice, and have suffered unlawful discrimination. However, simply because an employer's practice adversely affects members of a protected class does not necessarily mean that an employer must discontinue the practice, nor does it mean that the employer is unquestionably liable under Title VII and FEHA. Rather, an employment practice which adversely affects members of a protected class is permissible and is not violative of anti-discrimination statutes if that practice constitutes a justifiable "business necessity." This exception may be useful to an employer who offers child-care benefits selectively in a way that adversely affects members of a protected class. Thus, this comment next explores

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57. A general rule for measuring adverse impact is the so-called "four-fifths" rule. The "four-fifths" rule has been defined by the EEOC as "[a] selection rate for any race, sex or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate [of selection]. . . ." 29 C.F.R. § 1607.4D (1985). For example, suppose that an employer interviews fifteen applicants for positions in his company, ten who are white and five who are black. If he hires all of the white applicants, this his selection rate for that group is one-hundred percent. If the employer does not hire at least four of the black applicants, then he has not hired blacks at eighty percent of the rate at which whites were selected. A violation of the "four-fifths" rule is not prima facie evidence of adverse impact or unlawful discrimination. Rather, a violation of this rule is merely evidence suggesting adverse impact. J. Norris, CONTRACT COMPLIANCE UNDER THE REAGAN ADMINISTRATION, 3 (1982).

58. The "business necessity" defense was created by the United States Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requirement of high school diploma and passing of standardized intelligence tests adversely affected blacks and thus violated Title VII unless business necessity shown). See also Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. denied, 404 U.S. 1006 (1971) (discriminatory seniority system violates Title VII unless business necessity shown).
the business necessity defense to unlawful discrimination actions.

2. The Business Necessity Exception

A neutral employment practice which has an adverse impact on a protected class is permissible if the practice constitutes a justified "business necessity." Once a plaintiff has established that an employment practice has a disparate impact on members of his protected class, the employer may continue the practice only if he demonstrates a business purpose which sufficiently purges his discriminatory practice.

Since courts have yet to apply the business necessity exception to the area of child-care fringe benefits, both the standard by which a court will measure the adequacy of an employer's claim and whether the business necessity exception is applicable at all to child-care benefits have not been decided. There are two main areas, however, in which the business necessity exception has been frequently applied. An analysis of these two areas is helpful before examining an application of the business necessity exception to child-care benefits.

The first such area is applicant testing as a precondition to employment. Here, courts have generally applied the "no alterna-

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59. The business necessity defense is only one defense to actions brought under Title VII. Although the business necessity defense may be used by employers in defending both claims of "disparate treatment" and "adverse impact" discrimination, it is most frequently used by employers to justify the continued use of employment practices which have an adverse impact on members of a protected class. J. Norris, supra note 57, at 9.

Other exceptions to Title VII include differentiation according to a bona fide seniority or merit system and circumstances in which sex, religion or national origin is a "bona fide occupational qualification." 42 U.S.C. §§ 2000e-2(b), 2000e-2(h) (1984). See also R. Gilbert Shaefller, Nondiscrimination in Employment And Beyond, 20-32 (1980). Another defense to claims of employment discrimination is that the challenged practice is part of an affirmative action plan. See infra notes 105-37.

60. An adverse impact cause of action proceeds as follows: To establish a prima facie case of discrimination evidenced by adverse impact, a plaintiff must first show that the neutral employment practice has had a significantly discriminatory impact. If a plaintiff can demonstrate this, only then is the employer required to prove business necessity. Even if the employer succeeds in showing business necessity, the plaintiff may prevail if he proves that the employer was using the practice as a mere pretext for unlawful discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).


62. Many employers require applicants to pass standardized tests before the applicants will be considered for employment. Often these tests bear little relation to the type of work the applicant would perform and are used as a pretext for unlawful discrimination. For example, requiring an applicant to pass an English test when the position which he is applying for does not require that English be spoken may be a covert method of discriminating on the basis of national origin. For a general discussion of applicant testing, see Machine & Allied Prod-
To satisfy the "no alternatives" test, an employer's purpose must be sufficiently compelling to override an adverse impact on members of a protected class. The practice must also effectively accomplish the business purpose, and the employer must not have acceptable, less discriminatory alternatives available. This test is so stringent that it is often difficult for the employer to satisfy.

The second area in which courts have frequently applied the business necessity defense is in situations involving the safety of others. Here, an employer may continue his neutral employment practice which adversely affects members of a protected class if the practice is "job-related." Unlike the stringent "no alternatives" test, an employer need not establish a compelling business purpose. Instead, his concern for the safety of others suffices.

For an explanation of the use of the term "no alternatives" in this comment, see infra note 68.

63. See, e.g., Griggs, 401 U.S. 424 (requirements of high school diploma and passing of standardized intelligence test failed to satisfy Title VII). The "no alternative" test has also been applied by courts to a variety of other employment situations. See, e.g., Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975) (absolute refusal by employer to consider for employment any person convicted of a crime other than minor traffic offense not justified by business necessity).


65. Id.

66. See e.g., Robinson, 444 F.2d 791 (employer unable to justify seniority system adopted during period in which employer practiced overt racial discrimination in hiring as business necessity); Griggs, 401 U.S. 424 (employer unable to show passing of a standardized intelligence test as a condition of employment fulfilled a genuine business need).

67. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (practice prohibiting hiring of ex-drug addicts upheld despite adverse impact on blacks because of safety considerations); Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (lighter burden on employer to show employment criteria are job-related where economic and human risks involved).

68. Beazer, 440 U.S. at 587; Spurlock, 475 F.2d at 218. The terms "no alternatives" test and "job-related" test have not been used consistently by the courts. As used in this comment, the "no alternatives" test denotes a strict application of the business necessity exception and the "job-related" test refers to the more lenient application of this defense to an employer's practice.

69. An employer's concern for the safety of others is a sufficiently compelling purpose. If such a concern is present, a court may find that the employer has not violated Title VII, despite evidence of adverse impact. Beazer, 440 U.S. at 587.

70. Id.

71. Spurlock, 475 F.2d at 219.
ployment, it is permissible even if feasible, less discriminatory alter-
natives exist. 72

The test which courts apply to the employment practice of of-
ferring child-care benefits selectively may be crucial to an employer, because the "no alternatives" test is considerably more difficult to
satisfy than the "job-related" test. 73 Accordingly, this comment next
proposes that courts assist employers in alleviating the problems as-
associated with child-care availability by interpreting existing law to
allow an employer in appropriate circumstances to offer child-care
benefits selectively with impunity. This comment explores two meth-
ods by which courts may offer such assistance. First, courts may con-
strue the employment practice of providing child-care benefits selec-
tively as a justifiable business necessity if an employer satisfies
certain requirements. 74 Second, courts may support an employer's
contention that offering child-care benefits selectively constitutes per-
missible affirmative action. 75

III. EMPLOYER'S ARGUMENTS SUPPORTING JUDICIAL ACCEPT-
ANCE OF SELECTIVE CHILD-CARE BENEFITS

A. Business Necessity Applied to Selective Child-Care Benefits

When an employer offers child-care benefits selectively in a way
which adversely affects members of a protected class, courts may le-
gitimately sanction the employer's practice for three reasons. First,
proving adverse impact may be difficult for an employee who is not
receiving child-care benefits. 76 Second, the proper test to be applied
to this area should be the more lenient "job-related" test, rather than
the restrictive "no alternatives" test. 77 Finally, even if courts decide

72. See, e.g., Beazer, 440 U.S. 568 which held that a practice prohibiting the hiring of
ex-drug addicts as bus drivers was permissible because of the public safety interest involved,
despite the adverse impact this practice had on blacks. Although New York City Transit could
have overseen the ex-addicts' methadone treatment, a less discriminatory alternative, it was not
required to do so. Similarly, in Spurlock, the airline's selection procedure for pilot training
could have had a lesser adverse impact on blacks if the airline incurred greater costs. The high
cost of the training program was found to be a valid business necessity and the airline was not
required to implement a costly, less discriminatory alternative. 475 F.2d at 219.

73. See supra note 66.

74. See infra notes 76-104 and accompanying text.

75. See infra notes 105-37 and accompanying text.

76. This proposition was demonstrated in Los Angeles Dep't of Water and Power v.
Manhart, 435 U.S. 702 (1978). See infra notes 79-87 and accompanying text. See also Moore
v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983) (absence of black females in higher
paid labor grades insufficient to establish prima facie case of employment discrimination on
theory of adverse impact).

77. See supra notes 62-72 and accompanying text.
to apply the stringent "no alternatives" test to the area of child-care benefits, an employer in appropriate circumstances may be able to demonstrate sufficient business necessity to justify his employment practice.\textsuperscript{78} This comment examines each of these bases for a judicially-sanctioned employment practice which provides child-care benefits selectively.

A United States Supreme Court case, \textit{Los Angeles Department of Water and Power v. Manhart},\textsuperscript{79} provides an example of the difficulty an employee may face in proving that his class has suffered adverse impact. In \textit{Manhart}, the Supreme Court held that the Department's retirement plan was unlawful under Title VII.\textsuperscript{80} The plan required that women's contributions to a retirement fund exceed those of men by nearly fifteen percent in order for women to receive equal benefits upon retirement.\textsuperscript{81} The Department based its justification of this unequal treatment on the fact that women generally live longer than men, and hence as a class would ultimately receive greater benefits.\textsuperscript{82} The Department contended that a gender-neutral plan\textsuperscript{83} would have an adverse impact upon men and as such would be prohibited by Title VII, because men would be required to subsidize benefits received by women.\textsuperscript{84} The Court rejected this argument stating "[e]ven a completely neutral practice will inevitably have some disproportionate impact on one group or another. . . . [T]his Court has never held, that discrimination must always be inferred from such consequences."\textsuperscript{85}

Since the Court rejected the Department's adverse impact argument, it did not address the standard of proof required to establish business necessity in the area of fringe benefits. However, the Court did clarify that it will not automatically infer discrimination merely because there is evidence of adverse impact, at least in the area of fringe benefits.\textsuperscript{86} This may assist an employer who has offered child-care benefits selectively, because until an employee has demonstrated unlawful discrimination as evidenced by adverse impact, the employer need not justify his practice by showing business necessity nor

\begin{footnotes}
\item[78] See infra text accompanying notes 98-104.
\item[79] 435 U.S. 702 (1978).
\item[80] Id.
\item[81] Id. at 705.
\item[82] Id.
\item[83] See supra note 56.
\item[84] \textit{Manhart}, 453 U.S. at 708-09.
\item[85] Id. at 711 n.20.
\item[86] \textit{Manhart}, 435 U.S. at 702.
\end{footnotes}
must he discontinue his practice. 87

The second argument that an employer may advance in order to gain judicial acceptance of selective child-care benefits is that the proper test to be applied to this area is the more lenient "job-related" test, 88 rather than the "no alternatives" test. 89 An adverse impact claim arising from offering child-care benefits selectively more closely resembles the public safety situation 90 than it does applicant testing. 91 Unlike applicant testing, offering child-care benefits selectively does not operate to deprive certain persons of employment opportunities. 92 Additionally, providing child-care benefits has not been a means used by employers to circumvent antidiscrimination statutes, as has applicant testing. 93 Moreover, as in the public safety cases, there is an important public interest in child-care benefits, such as reducing welfare dependence and unemployment. 94 Thus, when presented with the question of the proper test to be applied to child-care benefits, courts should require only that an employer satisfy the "job-related" test. An employer may satisfy this test by demonstrating that his basis of selection of employees to receive the benefit was related to a valid business purpose. 95

Should courts reject an employer's position that the "job-related" test is the proper test to be applied to selective child-care benefits, an employer must demonstrate that his employment practice satisfies the "no alternatives" test. Although this test is extremely difficult for an employer to satisfy, 96 the following hypothetical situation demonstrates arguments that an employer may advance to meet a claim of adverse impact with the "no alternatives" test of the business necessity defense.

Ms. Greene is an employer who decides to offer child-care benefits only to employees at the lowest salary level in the company. Suppose that ninety percent of the persons in this category are mi-

87. See supra note 60.
88. See supra notes 67-72 and accompanying text.
89. See supra notes 62-66 and accompanying text.
90. See supra note 67 and accompanying text.
91. See supra note 62 and accompanying text.
92. If an applicant fails to pass an employer's test, the applicant is denied an employment opportunity altogether. By contrast, child care is a fringe benefit and does not play a role in the applicant screening process.
93. Id.
94. See supra notes 3 & 32.
95. For an example of a valid business purpose, see text accompanying note 97. Even if an employer is financially able to offer child-care benefits to all of his employees, a court may not require an employee to implement this less discriminatory alternative. See supra note 72.
96. See supra notes 62-66 and accompanying text.
nority women, but that Ms. Greene has not selected this group to receive the benefit because she wishes to discriminate against men and nonminority women. Rather, she has observed that employees at this pay level are more frequently absent than employees at any other pay level. Accordingly, she opens a small day-care facility at the work place which is to be used exclusively by all employees at the lowest salary level. Since few men and nonminority women are able to receive this benefit, some of them bring action against Ms. Greene under Title VII for unlawful discrimination. Their basis for this unlawful discrimination action is that Ms. Greene’s employment practice has an adverse impact on their specific groups, which are protected under Title VII.97

If the “no alternatives” test is applied, Ms. Greene must first demonstrate that her business purpose is sufficiently compelling.98 Valid business purposes include safety and efficiency.99 Although economic considerations alone may not be determinative of business necessity, they are relevant concerns to a court examining business necessity.100 If Ms. Greene can demonstrate that high absenteeism in the covered job category is significantly affecting the productivity and efficiency of her business, then she may establish the existence of a valid business purpose for the employment practice, and thereby satisfy the first portion of the business necessity defense.

Next, Ms. Greene’s selective child-care program must effectively carry out the business purpose and there must not exist a less discriminatory alternative which advances her interests.101 If she can demonstrate that the reason employees in this department are frequently absent is child care-related, it is plausible that providing a child-care benefit would reduce absenteeism and hence, would effectively carry out her business purpose.102 To establish the unavailability of less discriminatory alternatives, Ms. Greene should show, for example, that it would be unaffordable to offer child care to all employees.103

A program such as the one described in Ms. Greene’s situation

97. See supra notes 42, 45-46 and accompanying text.
98. Robinson, 444 F.2d at 798.
99. Id. Beazer, 440 U.S. at 1366 n.31.
100. Robinson, 444 F.2d at 799 n.8.
101. Id. at 798.
102. Nearly one-fourth of working mothers have found that their child-care arrangement causes them to be late to work or absent from work. Child Care and Equal Opportunity, supra note 2, at 12.
103. The primary reason that many employers provide no child-care benefits is that such a benefit is costly. Meyers, supra note 8, at F1, col. 3. See also supra note 14.
could be highly advantageous to the employer. Since the employer will pay less in sick-leave benefits, a cost analysis may reveal that the day-care facility is self-supporting.\textsuperscript{104} As absenteeism decreases and productivity rises, an employer could invest additional profit into expanding the facility, so that the benefit could be extended to a wider group of employees.

B. Child Care As Permissible Affirmative Action

Another way in which employers may offer child-care benefits selectively without incurring liability under Title VII and FEHA is to include child-care benefits as part of an affirmative action plan. Affirmative action may be defined as the aggressive, determined recruitment of qualified members of groups which have historically been denied employment opportunities.\textsuperscript{105} Affirmative action programs may take a wide variety of forms. The range of such programs may extend from a brief advertisement in a newspaper frequently read by traditional victims of discrimination to active recruitment and preferential selection of those who have been discriminated against.\textsuperscript{106}

Affirmative action is not generally required of most employers;\textsuperscript{107} however, it is not always permissible.\textsuperscript{108} Private employers may voluntarily adopt affirmative action plans only if certain requirements are met.\textsuperscript{109} However, because the requisites of a satisfactory affirmative action plan using child-care benefits have not yet been considered by any court or legislature, an analysis of this area must be by analogy. Guidelines developed by the EEOC are useful in directing an employer in the proper use of an affirmative action program.\textsuperscript{110} Although the guidelines do not specifically address child care as part of an affirmative action plan, the principles espoused in

\textsuperscript{104} Although child-care benefits are expensive, these benefits are highly cost-effective because employee absenteeism decreases and productivity rises when child-care benefits are offered. See supra note 9 and accompanying text.

\textsuperscript{105} Kessler, \textit{Affirmative Action Can Mean the Best Person for the Job}, 22 \textit{Judges} J. 2, 13 (1983).

\textsuperscript{106} For a general discussion of the scope and purpose of affirmative action, see K. SOVEREIGN, PERSONNEL LAW 80-87 (1984).

\textsuperscript{107} Employers subject to Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967) are required to adopt affirmative action plans. See supra note 38. For an in-depth discussion of the federal regulations in this area, see J. NORRIS, supra note 57.


\textsuperscript{109} See infra notes 131-35 and accompanying text.

\textsuperscript{110} 29 C.F.R. § 1608 (1985) (EEOC guidelines on affirmative action).
the guidelines may support an extension of them to affirmative action plans using child-care benefits. Accordingly, this comment next examines the EEOC guidelines and considers their applicability to the area of child-care fringe benefits.

1. The EEOC Approach

The EEOC guidelines set forth a variety of situations in which voluntary affirmative action is appropriate.\(^{111}\) Such a situation occurs when an employer is faced with a "limited labor pool."\(^{112}\) The guidelines state:

Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available labor pool, particularly of qualified minorities and women, for employment or promotional activities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances. . . .\(^{118}\)

In addition to other approaches,\(^{114}\) the EEOC suggests that the employer implement training programs which will provide women and

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111. According to the guidelines, one example of a situation in which voluntary affirmative action is appropriate is when an employer's contemplated or existing practice has an actual or potential adverse impact. 29 C.F.R. § 1608.3(a) (1985). Thus, an employer need not have actually violated Title VII in order for him to implement a voluntary affirmative action plan. 29 C.F.R. § 1608.4(b) (1985). However, an affirmative action plan cannot be premised on discrimination by other employers or in society. Craig v. Alabama State University, 451 F. Supp. 1207 (M.D. Ala. 1978). Voluntary affirmative action is also appropriate when an employer seeks to correct the effects of his prior discriminatory practices. 29 C.F.R. § 1608.3(b) (1985).

112. 29 C.F.R. § 1608.3(c) (1985).

113. Id. This section implies that the employer implementing the affirmative action plan need not have actually discriminated. Instead, it appears that he may use affirmative action to undo the effects of historic discrimination by others. Prior to the publication of these guidelines, it was believed that affirmative action was not appropriate unless an employer himself actually discriminated. See Preferential Treatment, supra note 38, at 73. However, an affirmative action plan should be based on the composition of an employer's own workforce, and should only be implemented if an identifiable statistical disparity exists. Stotts v. Memphis Fire Dep't., 679 F.2d 541, 552 (6th Cir. 1982), cert. granted, 464 U.S. 808 (1983). See also Craig, 451 F. Supp. 1207, 1214 (employment practice which discriminated against whites not justified by fact that other employers in state discriminate against blacks).

114. Other suggestions of the EEOC designed to remedy a limited labor pool include extensive and focused recruiting activity and modification of layoff and promotion procedures. 29 C.F.R. § 1608(c) (1985). An affirmative action plan cannot provide for the immediate layoff of whites to create vacancies for minority applicants. Valentine v. Smith 654 F.2d 503 (8th Cir. 1981). Yet, if consented to by the union, a plan can create a "seniority override" for minority persons, even if this will result in senior white employees being laid-off while junior minority employees are retained. Stotts, 679 F.2d 559.
CHILD CARE DISCRIMINATION

minorities with the opportunity and skill necessary to qualify for positions in which the labor pool is limited. Additionally, the EEOC permits an employer to initiate measures "designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection."

The broadly permissive language of the EEOC guidelines may provide support for an employer who chooses to include child-care benefits as part of his affirmative action plan. The following hypothetical situation demonstrates both how the guidelines may be extended by analogy to this area and a situation in which an employer should consider the use of child-care benefits as affirmative action: an employer has a business located in a low-income community, providing positions which are primarily low-paid. Suppose further that minority women are underrepresented in this employer's work force, despite the fact that minority representation in the community in which the employer's business is located is high. The reason that minority women are underrepresented in this work force is not that the employer discriminates against them, but that few applications are made by such persons.

After a demographic review of the local community which reveals that a large portion of minority women are single parents with minor children, the employer concludes that he is faced with a limited labor pool. Aware of the high cost of child care, he surmises that although minority women are not now drawn to his low-paying positions, these women would find his company significantly more attractive if he were to offer child-care fringe benefits.

In this hypothetical situation, an affirmative action program which provides child-care benefits to minority women only would be appropriate as a method of assuring that members of the affected class are included in the labor pool. Such a plan is analogous to an employer implementing a special training program to augment a de-

115. 29 C.F.R. § 1608.3(c)(1) (1985).
117. Such a situation would not be unusual. See Economic & Social Opportunities, Inc., Female Heads of Household and Poverty in Santa Clara County 39 (1975). This publication discusses the increasing growth of female ghettos in Santa Clara County. The correlation between single parenthood and female ghettos is primarily attributed to the finding that single parents flock to census tracts where housing is least expensive; hence, female ghettos thrive. Id. at 39-49.
118. See supra notes 14 & 26 and accompanying text.
ficient labor pool as authorized by the EEOC guidelines.\textsuperscript{119} As would a special training program, an affirmative action plan which includes child-care benefits would provide the minority women in the hypothetical with an employment opportunity.\textsuperscript{120}

As training programs remove barriers to employment, child-care benefits may remove similar barriers for many women.\textsuperscript{121} Although an affirmative action plan which includes child-care benefits is not specifically authorized in the guidelines, presumably such a plan would be permissible because the EEOC has expressly stated that its suggestions do not represent an exhaustive list of strategies available to an employer.\textsuperscript{122}

An affirmative action plan which is consistent with EEOC guidelines may not satisfy the requirements of Title VII and FEHA, however, because the guidelines do not have the force of law.\textsuperscript{123} Yet courts often give great deference to the EEOC guidelines if they accurately reflect Congress' objectives in enacting Title VII.\textsuperscript{124} That the EEOC guidelines regarding affirmative action may in fact echo the Congressional motives behind Title VII can be inferred from the United States Supreme Court's decision in \textit{United Steelworkers v. Weber},\textsuperscript{125} announced a few months after the guidelines were published. The Court in \textit{Weber} held that Title VII does not prohibit all voluntary affirmative action plans.\textsuperscript{126} Although the Court did not refer to the EEOC guidelines, the Court's reasoning mirrored EEOC principles.\textsuperscript{127} Thus, although the guidelines may accurately reflect the intent of Congress and merit deference from the courts, a prudent employer should also strive to comply with a ruling of the United States Supreme Court. Accordingly, this comment next ex-

\begin{itemize}
  \item \textsuperscript{119} 29 C.F.R. § 1608.3(c)(1) (1984).
  \item \textsuperscript{120} Many women cannot participate in the labor force because of child care responsibilities and thus, are deprived of employment opportunities. \textit{See supra} note 3.
  \item \textsuperscript{121} \textit{See supra} note 3 and accompanying text.
  \item \textsuperscript{122} 29 C.F.R. § 1608.3(c) (1985).
  \item \textsuperscript{123} \textit{See supra} note 49 and accompanying text.
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} 443 U.S. 193 (1979).
  \item \textsuperscript{126} \textit{Id.} at 208.
  \item \textsuperscript{127} The EEOC's Statement of Purpose urges employers to adopt affirmative action plans to effectuate the "clear Congressional intent to encourage voluntary affirmative action." 29 C.F.R. § 1608.1(a) (1985). Further, the EEOC states that it "believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would . . . frustrate[e] the Congressional intent. . . ." \textit{Id.} Following an examination of legislative history, the Supreme Court also concluded that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary . . . affirmative action." \textit{Weber}, 443 U.S. at 207.
\end{itemize}
amines the *Weber* decision and analyzes the hypothetical situation above applying the *Weber* standards.

2. The Weber Decision

The *Weber* case arose when Weber, a white employee, challenged Kaiser Aluminum & Chemical Corporation's affirmative action program, which reserved half of all craft openings for blacks. The plan was to be effective until the percentage of black craftworkers was commensurate with those in the labor force, roughly thirty-nine percent. Although the Court held that Title VII does not prohibit voluntary affirmative action, it declined to delineate the components of a permissible plan. Kaiser's plan, however, was sanctioned for several reasons. First, the plan's objectives paralleled those of Title VII. The plan, like Title VII, was formulated to abolish traditional segregation and to provide employment opportunities for blacks in areas from which they had been historically excluded. Second, the plan did not "unnecessarily trammel the interests of white employees" because it did not require that blacks replace currently employed whites, nor did it reserve all positions for blacks. Third, the plan was temporary and would be abandoned once black representation reflected that of the local labor force.

Applying the *Weber* criteria to the hypothetical affirmative action plan above reveals that such a plan would be permissible under Title VII. First, the employer in the hypothetical, like the employer in *Weber*, is striving to integrate his work force. Second, the plan in the hypothetical is less imposing than that in *Weber*. Unlike blacks in *Weber*, the minority women in the hypothetical situation will be given no special consideration nor will newly opening positions be reserved for them. Instead, they will merely be offered an additional fringe benefit that other employees will not receive. Therefore, since this plan is less imposing than the *Weber* plan which did not "unnecessarily trammel" the interests of other employees, the plan in the hypothetical presumably satisfies *Weber*'s second criterion. Third, if

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129. *Id.* at 199.
130. *Id.* at 208.
131. *Id.*
132. *Id.* (citing 110 Cong. Rec. 6548 (1964)).
133. 443 U.S. at 208.
134. *Id.*
135. *Id.* at 208-09.
the employer in the hypothetical identified a fixed duration for the plan, the final Weber criterion, temporariness, would be satisfied. One way to limit the duration of the plan would be to discontinue the child-care benefit program, or extend it to all employees, once the children of the recruited employees reached school age.

An employer offering child-care benefits pursuant to an affirmative action plan will realize further benefits than those accompanying an integrated work force. Further, considering that some people disapprove of affirmative action plans because they believe that less-qualified individuals receive employment preference under such plans, this concern is not present when an affirmative action plan includes child-care benefits. Rather than being given special preference in hiring, the minority women in the hypothetical plan are merely attracted to the employer’s company by child-care benefits.

IV. LEGISLATIVE REFORM

A. Amending Title VII

The preceding sections of this comment have examined ways in which an employer may offer child-care benefits selectively without incurring liability under antidiscrimination statutes. Although these methods use defenses which are well-established under existing law, these defenses have yet to be specifically extended to child-care benefits. Because of the lack of clear judicial standards concerning selective child-care benefits, some employers may decide against providing child-care benefits selectively in order to avoid litigation. For those employers who are unable to offer child-care benefits to all of their employees who have children, the desire to avoid litigation in an area in which there are no clear judicial standards may result in some employers declining to offer the benefit altogether.

The social problems related to child care may linger indefi-
nitably unless child-care services become more available and affordable. In preceding sections, this comment has examined methods by which the judiciary can interpret existing law to make child-care services more available. Congress can also play a role. Since Congress has cut federal spending on child care,\textsuperscript{140} it should enact legislation which is designed to encourage the private sector to assist parents in their child-care arrangements. Accordingly, this comment next examines an amendment to Title VII which is designed to make child-care services more affordable for working parents.

Although problems related to child care are of great concern, not every serious social ill represents an employment discrimination issue.\textsuperscript{141} The demographic statistics concerning social problems related to child care reveal that an isolated group of society, women, are most harshly affected by child-care concerns.\textsuperscript{142} When a social ill operates to rob a protected class of employment opportunity and increases unemployment rates for these class members,\textsuperscript{143} the legislature should be alerted to an employment discrimination issue.

B. \textit{Amending Title VII: “Because of Sex” Expansion}

Title VII and the FEHA prohibit discrimination “because of sex.”\textsuperscript{144} How this clause is defined may greatly affect the rights of parent-employees.

One definition of discrimination “because of sex” was provided in \textit{General Electric Co. v. Gilbert}.\textsuperscript{145} In \textit{Gilbert}, the Supreme Court held that defendant General Electric Company did not discriminate against women by refusing to include pregnancy-related disabilities in its medical fringe benefits package.\textsuperscript{146} Instead of differentiating between men and women, General Electric was distinguishing between pregnant women and non-pregnant persons.\textsuperscript{147} Since the class of non-pregnant persons includes both men and women, the Court decided that this did not amount to discrimination “because of sex” and hence, General Electric’s practice did not violate Title VII.\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{140} See supra note 5 and accompanying text.
\item \textsuperscript{141} Child abuse, for example, is a problem meriting social concern, but is probably best addressed by the mental health system and criminal justice systems, rather than by antidiscrimination statutes.
\item \textsuperscript{142} See supra notes 33-36 and accompanying text.
\item \textsuperscript{143} See supra notes 2-3.
\item \textsuperscript{144} 42 U.S.C. § 2000e (1982); \textit{CAL. GOV’T CODE} § 12940 (Deering 1982).
\item \textsuperscript{145} 429 U.S. 125 (1976).
\item \textsuperscript{146} Id. at 133-46.
\item \textsuperscript{147} Id. at 133-36.
\item \textsuperscript{148} Id. at 145-46.
\end{itemize}
Congress responded to the *Gilbert* decision by amending Title VII with the Pregnancy Discrimination Act of 1978\textsuperscript{149} (PDA). PDA expanded the definition of "because of sex" to include pregnancy and pregnancy-related disabilities.\textsuperscript{150} It was designed to reflect the "common-sense view" that differentiation on the basis of pregnancy is actually gender-based discrimination, because only women may become pregnant.\textsuperscript{151} Similarly, child-care responsibilities most frequently fall upon the mother and it is the mother who experiences conflicts between her job and these responsibilities.\textsuperscript{152} Many women must remain in low-paying positions, refuse promotions, or decline to participate in the labor force because of child-care responsibilities.\textsuperscript{153} Moreover, ninety-one percent of all single-parent families are headed by the mother.\textsuperscript{154} Considering these facts, it is reasonable to conclude that a woman who is discharged because she cannot obtain child-care services has been discriminated against because of sex. Just as a classification between pregnant women and non-pregnant persons is actually gender-based discrimination, distinctions based on child-care responsibilities frequently amount to gender-based distinctions. Congress should take notice of the current plight of mothers and amend the PDA as outlined below.

An amendment to the PDA could simply expand the definition of "because of sex" to include pregnancy and pregnancy-related disabilities, as well as the effects of child-care responsibilities. This would ensure that women who are disproportionately affected by pregnancy and child-care responsibilities are protected from discrimination.


\textsuperscript{150} The text of the PDA provides:

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.

\textsuperscript{151} S. REP. NO. 331, 95th Cong., 1st Sess. 3 (1977). This view, unlike the one expressed by the Court, probably does reflect common sense. Consider the Court's syllogism in *Gilbert*: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 429 U.S. at 138 (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974)). Therefore, the Court concluded that there was no evidence that the benefit plan in *Gilbert* discriminated against women. Id. However, it does not follow that there was no risk from which men are protected that women are not. Men are protected from the risk of pregnancy since they cannot become pregnant.

\textsuperscript{152} *Child Care and Equal Opportunity*, supra note 2, at 12.

\textsuperscript{153} *Id.* at 9-12. See also *supra* notes 2-3.

\textsuperscript{154} *See supra* note 34.
of "because of sex" to include child care-related "disabilities."\textsuperscript{155} Under the PDA as it is currently written, no employer is required to offer medical disability benefits, but if an employer does offer these benefits, he must extend them to cover pregnancy-related disabilities.\textsuperscript{156} If further amended, the PDA would prohibit an employer from discriminating against one who is temporarily "disabled" because she cannot secure child care after the birth of her child. Thus, if a woman were unable to return immediately to work after childbirth because she could not afford child-care services, her employer would not be able to terminate her employment. Rather, he would be required to choose between paying her disability benefits or providing her with child-care benefits.\textsuperscript{157}

Such an amendment to the PDA would encourage many employers to begin providing child-care fringe benefits, because if they did they would avoid being required to pay child care-related disability benefits. If the PDA were amended as described above and child-care benefits were widely offered, it is probable that society would experience beneficial changes such as an increased labor participation rate of mothers,\textsuperscript{158} decreased welfare dependence,\textsuperscript{159} and an improved socio-economic position of single mothers.\textsuperscript{160} Further, basic beliefs concerning the way in which children should be reared may be altered significantly.\textsuperscript{161}

\textsuperscript{155} An example of a disability related to pregnancy occurs when medical complications arise because of the pregnancy, requiring the mother to remain at home for an extended period following childbirth. If amended, the PDA could cover an additional postpartum complication: difficulties in securing child care. Although not a physical disability, the inability to secure child care impairs the ability of many mothers to work. See supra notes 2-4. Further, Congress is free to change the definition of "disability" for the purposes of fringe benefit programs to include the inability to secure child care. Prior to the PDA, pregnancy and related conditions were not considered "disabilities" under fringe benefit programs. See supra notes 145-50 and accompanying text.

\textsuperscript{156} For a discussion of permissible disability plans under the PDA, see G. Leshin, supra note 7 at 26-48.

\textsuperscript{157} A further amendment of the PDA need not require that the employer provide child-care benefits indefinitely. Congress could decide upon a reasonable period of employer responsibility and require only that the employer provide child-care benefits (either in the form of disability leave or child-care benefits) for this fixed period.

\textsuperscript{158} See supra notes 2-3.

\textsuperscript{159} See supra note 32 and accompanying text.

\textsuperscript{160} See supra note 36 and accompanying text.

\textsuperscript{161} Many parents consider ideal child care that which most closely resembles the child's home environment. See Industry-Related Day Care, supra, note 9, at 4. The environment of a child-care facility may be significantly different from a child's home setting. However, many positive benefits have been associated with this difference. For example, children cared for in day-care facilities develop social skills at a remarkably earlier age than children cared for in a "homelike" environment. See Watson, supra, note 5, at 16, col. 1. Further,
Further action in the area of child care is necessary if the problems related to unaffordable child care are to be alleviated. Poverty, increased unemployment and welfare dependence are only a few of the problems related to the limited availability of affordable child care.

The solution to such problems may either come from Congress, or until Congress is prepared to act, from employers themselves. Although offering child care as an employee fringe benefit to all employees is undoubtedly preferable, our courts should recognize that an employer who is unable to offer child-care benefits to all employees may do so selectively, and avoid Title VII and FEHA liability by availing himself of the business necessity and affirmative action defenses.

JoAnne McCracken

children from low-income families may actually have increased IQs as a result of being cared for in a day-care facility. See Watson, supra, note 5, at 16, col. 2.

Although the benefits associated with facility care seem valuable, some are strongly opposed to children being cared for outside the home, including facilities located at the place of employment. Consider one author’s opinion:

Certainly, professional care is better than that of some natural mothers, but it can’t compare with that of truly devoted ones. Early socialization does have advantages, but many feel that today’s children are already maturing too fast. And mother being “just upstairs” at work can hardly match even greater ability at home.