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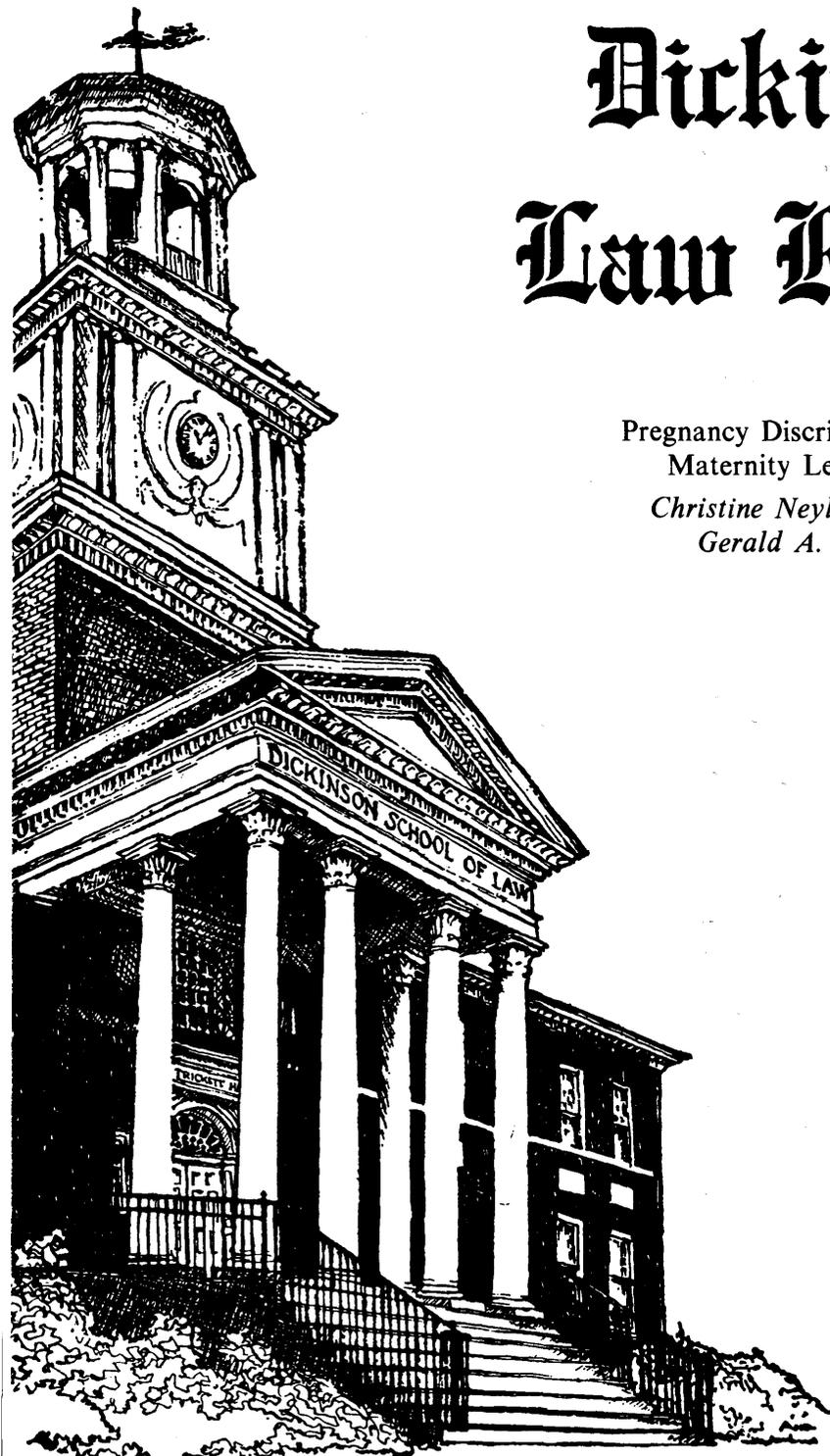
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Pregnancy Discrimination and Maternity Leave Laws

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I. Introduction

This article examines the current status of federal and state law regarding job preservation for the period of pregnancy-related disability. It also examines the issues of partial wage replacement and parental leave for child-rearing purposes. The thesis is that despite the federal laws prohibiting pregnancy discrimination, the rights of pregnant workers remain far from uniform or extensive. After analyzing state maternity and parental leave laws, recent United States Supreme Court pronouncements concerning such legislation, and state unemployment compensation provisions, the authors recommend a new national priority for parental leave with some wage replacement.

In 1978 Congress amended Title VII of the Civil Rights Act of 1964¹ adding the Pregnancy Discrimination Act (PDA)² in order to overturn the Supreme Court's holding in *General Electric Co. v. Gilbert*.³ In *Gilbert*, an employee challenged a medical fringe benefit plan that did not provide coverage for pregnancy-related disabilities. The Court upheld the insurance disability plan stating that it was facially neutral even though it was not all-inclusive.⁴

The Supreme Court in *Gilbert* relied upon its prior decision in *Geduldig v. Aiello*⁵ in which a state employee's insurance disability plan excluding pregnancy coverage failed an equal protection challenge. The *Geduldig* Court found that since pregnant women are not

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1. Pub. L. No. 88-352, tit. VII, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e (1982)).

2. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1982)).

3. 429 U.S. 125 (1976).

4. *Id.* at 137.

5. 417 U.S. 484 (1974).

members of a suspect class, the plan only had to bear a rational relationship to its purposes. It also found the plan consistent with the "one step at a time" approach.⁶ Justice Stewart, writing for the majority, concluded that the classification merely distinguished between "pregnant women" and "nonpregnant persons" on the theory that "the first group is exclusively female, the second includes members of both sexes."⁷

The Pregnancy Discrimination Act redefined sex discrimination under Title VII to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions."⁸ The amendment also mandated that "women affected by pregnancy . . . 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"⁹ This interpretation of the PDA has led to a debate whether equal treatment of women and men in the workplace prohibits special treatment for pregnant and postpartum women.

The Supreme Court addressed the issue of special treatment of pregnant women under the PDA in *California Federal Savings & Loan Association v. Guerra*.¹⁰ In *Guerra*, the issue before the Court was whether Title VII preempted a California law that required maternity leave and reinstatement rights for pregnant employees. The Court found that Title VII did not preempt the California statute because the statute was not inconsistent with the intent of Congress in enacting the PDA and it did not require employers to violate Title VII.¹¹ Quoting the Court of Appeals for the Ninth Circuit,¹² Justice Marshall agreed that "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise."¹³ Justice Stevens, concurring, upheld the California statute, citing *United Steelworkers v. Weber*.¹⁴ *Weber* allowed preferential treatment under Title VII provided such treatment is designed to accomplish equality of employ-

6. *Id.* at 495; see also Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591, 594 (1982).

7. *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974).

8. 42 U.S.C. § 2000e(k) (1982).

9. *Id.*

10. 107 S. Ct. 683 (1987).

11. *Id.* at 695.

12. *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985).

13. *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 691-92 (1987).

14. *Id.* at 695-96 (citing *United Steelworkers v. Weber*, 443 U.S. 193 (1979)). See *infra* notes 90-92 and accompanying text.

PREGNANCY DISCRIMINATION

ment opportunities and to remedy past discriminatory practices.¹⁵ According to *Guerra*, the PDA neither mandates nor prohibits preferential treatment for pregnant employees.¹⁶

Reaction to the Supreme Court's interpretation of the PDA in *Guerra* falls into two categories, the equal treatment model and the special treatment approach. The "parity approach" or "equal treatment" model advocates that there should be no distinction made between the sexes.¹⁷ Equal treatment supporters urge that the PDA mandates only that pregnancy be treated as any other temporary disability.¹⁸ According to the "special treatment" or "sex differences" approach, however, the genders should be treated equally except in areas of biological differences that should be recognized and treated in a compensatory manner to assure equal employment opportunity.¹⁹ The sex differences approach agrees with the majority in *Guerra* that the PDA allows for special treatment of pregnant workers in order to give women equality in the work place.²⁰

Proponents of the equal treatment view criticize the sex differences model and the holding in *Guerra* for opening the door to sex-based stereotypes that they contend are the basis of the paternalistic laws of the past.²¹ These critics are willing to sacrifice the present benefit of special treatment in exchange for nonrecognition of sex differences that might invite or reinforce gender roles or sex stereotypes.²² *Guerra* specifically mandated that the allowance for special treatment be limited to cover only actual disability and that it not be based upon stereotypes or generalizations about pregnant women's needs or abilities.²³ In this regard the Court noted, "A statute based on stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment opportunity."²⁴

15. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

16. *Guerra*, 107 S. Ct. at 692-93.

17. See Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 *FORDHAM L. REV.* 699, 716 (1986); Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 *COLUM. L. REV.* 690, 704 (1983) (This note refers to the parity approach as the assimilationist view) [hereinafter Note, *Sexual Equality*].

18. See Rodensky, *California Federal Savings & Loan Association v. Guerra: Preferential Treatment and the Pregnancy Discrimination Act*, 10 *HARV. WOMEN'S L.J.* 225, 232 (1987).

19. See Dowd, *supra* note 17, at 718; Rodensky, *supra* note 18, at 232; Note, *Sexual Equality*, *supra* note 17, at 707 (Referring to the sex differences approach as the pluralist view).

20. See Rodensky, *supra* note 18, at 248.

21. See Rodensky, *supra* note 18, at 228 n.16; Dowd, *supra* note 17, at 717.

22. See Rodensky, *supra* note 18, at 228 n.16; Dowd, *supra* note 17, at 717.

23. *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 691 n.17, 694 (1987).

24. *Id.* at 694.

Unlike the equal treatment approach, the sex differences approach recognizes that pregnancy cannot be analogized to other temporary disabilities suffered by men and women. Childbearing has a disparate impact on working women.²⁵ Women who take time off to give birth face loss of wages, loss of seniority and even loss of their jobs, while men may parent children without any effect on their job status.²⁶ Because the labor market is tailored to the male model, women can compete equally only if pregnancy is given special protection.²⁷

In the United States, women comprise forty-two percent of the total work force.²⁸ Thirty-three million of these working women are of child bearing age and seventy-five percent of them can expect to become pregnant during their careers.²⁹ Pregnancy necessitates taking some period of time for childbirth. Allowing maternity policies to develop on a state by state basis has left a void in this area of the law.³⁰ The United States has one of the worst policies regarding pregnancy and childbirth of any of the industrialized nations.³¹

Facially neutral policies for the disabled in many instances have not allowed women to preserve their jobs during the process of giving birth. In *Wimberly v. Labor and Industrial Relations Commission of Missouri*,³² a woman, ready to return to work twenty-five days after giving birth, lost her job under her employer's facially neutral policy because no position was available when she was ready to return to work. The facts in *Wimberly* do not reveal whether the employer maintained a recall list from which Wimberly might be called back to work, and the Court's opinion makes no reference to any right to recall as a prerequisite to compliance with section 701(k) of Title VII.

The Court has deemed the right to recall important in other contexts, such as the treatment of economic strikers under the Na-

25. See Rodensky, *supra* note 18, at 233.

26. *Id.*

27. See Casenote, *Expanding the Boundaries of Equality: Taking Pregnancy Into Account in California Federal Savings & Loan Association v. Guerra*, 28 B.C.L. REV. 783, 810 (1987) [hereinafter Casenote].

28. *Id.* at 783.

29. BUREAU OF NATIONAL AFFAIRS, PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE AND HEALTH AND SAFETY 3 (1987) [hereinafter BNA].

30. See *infra* notes 119-20 and accompanying text.

31. S. KAMERMAN, A. KAHN AND P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 145 (1983) [hereinafter MATERNITY POLICIES].

32. 107 S. Ct. 821 (1987); see also *infra* note 49 and accompanying text for a discussion of the issue of denial of unemployment compensation to women who leave their jobs because of pregnancy.

PREGNANCY DISCRIMINATION

tional Labor Relations Act.³³ In *NLRB v. Fleetwood Trailer Co.* the Court stated:

This basic right to jobs cannot depend upon job availability *as of the moment when the applications are filed*. The right to reinstatement does not depend upon technicalities relating to application If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justification."³⁴

There is no reason a woman returning to work from childbirth should be treated with less deference than economic strikers. Rather, the public policy expressed by the PDA indicates that such women should, at a minimum, be entitled to nondiscriminatory consideration for openings for which they are qualified.³⁵

II. Pregnancy Discrimination and the Federal Unemployment Tax Act

The rights and benefits of pregnant women have stirred a debate regarding section 3304(a)(12) of the Federal Unemployment Tax Act (FUTA).³⁶ The three primary elements of the debate include: (1) varying interpretations of a broadly worded statute whose plain meaning is in dispute; (2) differing perceptions of the legislative history and congressional intent behind the statute; and (3) contradictory views of courts and commentators regarding how the statute should be applied.

Congress enacted FUTA in response to widespread unemployment during the Depression.³⁷ Under the statute, unemployment compensation is provided through the cooperation and interlocking rules of the state and federal government. States must meet certain minimum federal requirements to qualify for funds as part of the scheme, but the states are allowed to set their own standards within

33. 29 U.S.C. §§ 151-169 (1982).

34. 389 U.S. 375, 381 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)) (emphasis added).

35. See SCHLEI AND GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 399 (2d ed. 1983) "Some courts, without articulating whether they were proceeding on an adverse impact rationale, have held that an employer that does not rehire a woman who has been on a pregnancy leave must establish a business necessity for its action." *Id.*

36. 26 U.S.C. § 3304(a)(12) (1982).

37. Title IX of the Social Security Act of 1935, Ch. 9, §§ 301-303, 49 Stat. 620 (1935); Note, *Wimberly v. Labor and Industrial Relations Commission of Missouri: The Plain Import of "Solely on the Basis of Pregnancy" and Unemployment Compensation*, 14 W. ST. U.L. REV. 587, 587-88 (1987) [hereinafter Note, *Plain Import*].

the broad parameters of the federal guidelines.³⁸ The Secretary of Labor must review and approve the guidelines of each state to ensure that they comply with federal standards.³⁹

Congress adopted the Unemployment Compensation Amendments of 1976,⁴⁰ adding requirements to FUTA that states must meet. One amendment provides that "no person shall be denied [unemployment] compensation under such State law solely on the basis of pregnancy or termination of pregnancy."⁴¹ Courts have taken varying views of how the plain language of the statute applies and have divined different meanings based on the statute's murky legislative history. Those differences are best illustrated by *Brown v. Porcher*⁴² and the *Wimberly* case.⁴³

In *Porcher*, a federal district court in South Carolina broadly interpreted the 1976 amendments to FUTA and ruled for the plaintiffs in a class action suit against the South Carolina Employment Security Commission. The Commission would not give unemployment compensation to women who left their jobs because of pregnancies and who could not find work upon re-entry in the job market. The court focused on the word "denied" in Section 3304(a)(12) of FUTA, stating that under the statute's plain language, no state action should deny women unemployment benefits as a result of pregnancy.⁴⁴ The court viewed the language of the statute as well as its "historical context" as a "sweeping ban on withholding unemployment compensation from women job seekers because they were pregnant when they left their most recent work."⁴⁵

The Court of Appeals for the Fourth Circuit agreed with the district court that the literal meaning of the statute is a clear ban on denial of benefits on the basis of pregnancy generally.⁴⁶ The appellate court stated that "[r]egardless of how the Commission treats employees with other disabilities, the mandate of the statute is clear: the Commission cannot deny compensation 'solely on the basis of

38. See I.R.C. §§ 3302, 3304 (1982); *Wimberly v. Labor and Indus. Relations Comm'n*, 107 S. Ct. 821, 824 (1987).

39. See I.R.C. § 3304(a), (c) (1982).

40. Pub. L. No. 94-566, 90 Stat. 2667 (codified as amended at 26 U.S.C. §§ 3301-3311 (1982)).

41. I.R.C. § 3304(a)(12) (1982).

42. 502 F. Supp. 946 (D.S.C. 1980), *modified and remanded*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

43. 107 S. Ct. 821 (1987).

44. *Porcher*, 502 F. Supp. at 955. "In plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse for *denying* benefits to otherwise eligible women." *Id.* (emphasis in original).

45. *Id.* at 953.

46. *Brown v. Porcher*, 660 F.2d 1001, 1004 (4th Cir. 1981).

PREGNANCY DISCRIMINATION

pregnancy or termination of pregnancy.’”⁴⁷

The plaintiff in *Wimberly*, a sales clerk for J.C. Penney Co., left her job of three years when she was seven months pregnant. About a month after the birth of her baby, she sought to return to her job. The company informed her no positions were available.⁴⁸ She filed for unemployment compensation but her claim was denied based on a Missouri statute that refused unemployment compensation to those who left their jobs “voluntarily without good cause attributable to [their] work or [their] employer.”⁴⁹

Justice O'Connor, writing for a unanimous Court, did not focus on the “denied” language of Section 3304(a)(12) of FUTA as the District Court had in *Porcher*. The Supreme Court rejected the *Porcher* court’s analysis and found that the word “solely” made the meaning of the statute evident.⁵⁰ According to the Court, the word “solely” meant merely that state requirements had to be neutral.⁵¹ Justice O'Connor interpreted the language of the statute as prohibiting *overtly* discriminatory treatment rather than “mandating preferential treatment.”⁵² In effect, states do not have to provide special treatment for pregnant or formerly pregnant women under section 3304(a)(12).⁵³

These cases, *Porcher* and *Wimberly*, represent different interpretations of the congressional intent and legislative history of FUTA. Petitioner’s brief in *Wimberly* claimed that the historical context in which the amendments were passed, and changes in an original draft of the amendments required that a pregnant woman or new mother who “can work and is looking for work . . . is eligible

47. *Id.*

48. *Wimberly v. Labor & Indus. Relations Comm'n*, 107 S. Ct. 821, 823 (1987).

49. *Id.* See also MO. REV. STAT. § 288.-050.1(1) (1951). Quitting a job because of pregnancy was considered voluntary.

50. *Wimberly*, 107 S. Ct. at 825.

51. *Id.* In this regard, the Court stated, “[I]f a State adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made ‘solely on the basis of pregnancy.’” The Court further added:

To apply this law, it is not necessary to know that petitioner left because of pregnancy: all that is relevant is that she stopped work for a reason bearing no causal connection to her work or her employer. Because the state’s decision could have been made without ever knowing that petitioner had been pregnant, pregnancy was not the “sole basis” for the decision under a natural reading of § 3304(a)(12)’s language.

Id.

52. *Id.* at 828.

53. See Note, *Plain Import*, *supra* note 37, at 597.

for unemployment benefits and should be paid."⁵⁴ The history of unemployment compensation shows that Congress and the courts intended the system to provide short-term benefits to the temporarily unemployed, to stabilize the marketplace in times of economic decline, and to address changes in the workforce to insure that "otherwise employable individuals did not fall out of the mainstream of American economic life."⁵⁵ Congress viewed section 3304(a)(12) of FUTA as a logical extension of this rationale by insuring that pregnant women be similarly protected.⁵⁶

Congressional examination of the role of women in the workplace was initiated in part by *Turner v. Utah Department of Employment Security*.⁵⁷ There, the Court struck down as a violation of due process state action that assumed women to be unable to work at a certain point in pregnancy. In contrast, the outcome in the *Porcher* decision suggested that section 3304(a)(12) went beyond the mere due process protection provided in *Turner* and imposed broad safeguards for pregnant women in the area of unemployment compensation.

The petitioner in *Wimberly* argued that the original draft of section 3304(a)(12) prohibited states from denying unemployment compensation based on pregnancy. Petitioner's brief stated that "determinations under any provision of such State law relating to voluntary termination of employment, availability for work, active search for work, or refusal to accept work . . . shall not be made in a manner which discriminates on the basis of pregnancy."⁵⁸ Since Congress removed the "discriminatory" language before passage of the section, Petitioner *Wimberly* claimed that the deletion showed congressional intent to transform the statute from a mere antidiscrimination statute to one that stands as a "broad, comprehensive mandate to eradicate all pregnancy-related disqualifications in the nation's unemployment insurance system."⁵⁹

The *Wimberly* decision did not address the *Porcher* court's historical analysis of the evolution of the unemployment compensation system. The Court in *Wimberly* rejected the petitioner's interpretation of the statute and held that section 3304(a)(12), rather than

54. Petitioner's Brief at 25, *Wimberly v. Labor and Indus. Relations Comm'n*, 107 S. Ct. 821, 826 (1987) (No. 85-129).

55. *Brown v. Porcher*, 502 F. Supp. 946, 954 (D.S.C. 1980).

56. *Id.* at 955.

57. 423 U.S. 44 (1975).

58. *Wimberly v. Labor & Indus. Relations Comm'n*, 107 S. Ct. 821, 826 (1987).

59. Petitioner's Brief at 10, *Wimberly v. Labor & Indus. Relations Comm'n*, 107 S. Ct. 821 (1987) (No. 85-129).

expanding the due process protection afforded in *Turner*, merely codified it in accord with the intent of the House and Senate Reports.⁶⁰ As for the change in language from the draft to final passage, according to the Court, the elimination of the discrimination language did not affect the meaning of the statute, but rather reflected congressional economy in its use of language.⁶¹

While commentators have differed from the Court's analysis of section 3304(a)(12),⁶² even those critical of the Court's analysis have acknowledged that there is not a definitive single view of whether Congress meant to prohibit facially neutral state statutes. One commentator notes, "There is no hint of Congressional condemnation of such facially neutral provisions, but there is also no hint of Congressional approval of the treatment accorded pregnant women under such provisions."⁶³ The *Wimberly* decision, however, is far from unassailable because of its public policy implications. The Court's interpretation of "voluntary" as it relates to pregnant women and the disparate impact such facially neutral qualifications have on women violates section 3304(a)(12) because it creates "the potential for intentional or effective gender discrimination."⁶⁴ The Court's interpretation of the provision sanctions state statutes that do in fact deny benefits to pregnant women. But for their pregnancies, these women would not be classified as voluntary quits and, despite their inclusion in a larger group of those disqualified from receiving benefits, they are suffering a disparate impact based on gender.

A. Policy Rationale for Providing Unemployment Benefits for Eligible Women Actively Seeking Work

Society gains by providing unemployment compensation benefits for eligible women who are willing to work but who are forced to leave their jobs because of pregnancy. Unemployment compensation

60. *Wimberly*, 107 S. Ct. at 827.

61. *Id.* at 826. In this regard the Court stated, "Indeed, however the first phrase is interpreted—either to ban discrimination or to mandate preference—the additional anti-discrimination language would have been superfluous. We conclude that Congress intended simply to eliminate a lengthy and redundant phrase, without intending to change the meaning of the provision."

62. See generally Note, *Plain Import*, *supra* note 37; see also Note, *Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act*, 82 MICH. L. REV. 1925 (1984) [hereinafter *Denial*].

63. Bellace, *Maternity Rights: The Limits of the Pregnancy Discrimination Act*, in SELECTED PAPERS OF THE AMERICAN BUSINESS LAW ASSOCIATION NATIONAL PROCEEDINGS 798, 801 (1987).

64. See *Denial*, *supra* note 62, at 1956.

offers a "partial wage replacement to the involuntarily unemployed worker so he or she can look for a job."⁶⁵ Pregnancy invariably forces a woman out of the labor force for at least a short time. Although some employers provide protection for their pregnant employees and allow them to return to work, that protection is by no means universal.⁶⁶ The woman who is not guaranteed a return to her old job must engage in a job search and her family can "suffer real economic hardship," if the woman worker has no unemployment compensation.⁶⁷

Without partial wage replacement, the woman may not be able to afford necessary child care services so that she can conduct her job search. A potentially useful worker suffers the financial and psychological trauma that is associated with unemployment. In addition to the loss of human capital, government loses financially through reduced tax revenues and a potential drain on the social service system. All of these dangers are exacerbated in society today because of the increasing numbers of unwed mothers and single parent households. It makes sense both in human and financial terms to provide unemployment compensation benefits in this instance.

B. *Neutral Statutes Have a Disparate Impact on Women*

To prevail in an equal protection claim, a plaintiff must prove that a law that seemingly discriminates in its effect against a suspect class has discriminatory intent.⁶⁸ The intent requirement persists when alleged constitutional violations based on gender are evaluated.⁶⁹ This standard, however, is substantially relaxed in light of statutory directives that mandate equal treatment in the workplace. In *Griggs v. Duke Power Co.*,⁷⁰ the Court barred the mere effect of discrimination in light of the directives of Title VII of the Civil Rights Act of 1964. The Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."⁷¹

In Title IX of the Social Security Act, the Pregnancy Discrimi-

65. *Id.* at 1954.

66. *Brown v. Porcher*, 502 F. Supp. 946, 955 (D.S.C. 1980); *see also Dowd*, *supra* note 17, at 710.

67. 502 F. Supp. at 955. The overwhelming number of women granted maternity leave forego all earnings during part or all of that leave. *See MATERNITY POLICIES*, *supra* note 30, at 52.

68. *Washington v. Davis*, 426 U.S. 229 (1976).

69. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

70. 401 U.S. 424 (1971).

71. *Id.* at 431.

PREGNANCY DISCRIMINATION

nation Act, and Section 3304(a)(12) of FUTA, Congress has made it clear that neither gender nor pregnancy can be the basis of discrimination. Although it did not discriminate on its face, the Missouri statute barring pregnant women who "voluntarily" left their jobs from receiving unemployment compensation if their jobs were not preserved, violated section 3304 in result. This is the only violation necessary under Congress' statutory scheme. The issue in *Wimberly* and in other states where statutes do not make positive provisions for pregnancy, is not that the state laws are intentionally discriminatory, but that they are discriminatory in effect. Thus, the "application of the state statute . . . is being challenged."⁷²

There is truly nothing "voluntary" about a woman's decision to leave her job because of pregnancy. As the dissenting opinion in the state supreme court's decision in *Wimberly* acknowledged, "A woman who becomes pregnant has to be absent from work for a time. She has no choice."⁷³ A neutral state statute interpreting pregnancy leave as voluntary, violates the law of the land as established by Congress.⁷⁴

The [Industrial and Labor Relations] Commission automatically classifies a pregnant woman as having voluntarily quit her job when she leaves for confinement and delivery. Pregnancy is, thus, the primary determinant in the denial of benefits. This conflicts with the purpose of the federal statute, regardless of whether state statute law specifically discriminates because of pregnancy.⁷⁵

The Supreme Court's reasoning in *Wimberly* fails to address traditional Title VII analysis of disparate impact. The Court concluded that section 3304(a)(12) of FUTA permits states to deny unemployment benefits to women whose employers did not provide pregnancy disability leaves, even though those women had earned the specified amount of wages, or worked the specified number of weeks of covered employment during a one-year base period, and were able and available for work.⁷⁶ If this is the intended meaning of section 3304(a)(12), then it should be amended. The *Wimberly* case makes clear that the Supreme Court will permit tremendous variance among state unemployment compensation laws pursuant to

72. *Wimberly v. Labor and Indus. Relations Comm'n*, 688 S.W.2d 344, 352 (Mo. 1985) (en banc) (Blackmar, J., dissenting) (emphasis added).

73. *Id.*

74. See *Denial*, *supra* note 62, at 1945.

75. *Wimberly*, 688 S.W.2d at 352.

76. *Wimberly v. Labor & Indus. Relations Comm'n*, 107 S. Ct. 821, 824-25 (1987).

FUTA's guidelines. The Court is correct in asserting that it is unnecessary to know whether the woman in *Wimberly* was pregnant.⁷⁷ One merely needs to know that only women get pregnant and that Congress has outlawed denial of unemployment compensation based on pregnancy.⁷⁸

III. State Maternity Leave Laws

Terminology is the first problem to address in analyzing state statutes pertaining to leaves for pregnant workers and working parents. Many states use maternity leave to mean pregnancy disability leave. Others use maternity leave to mean child care leave for mothers, and still others leave the term undefined, allowing it to be used to mean either disability leave or parenting leave. This diversity most probably stems from both a pre-*Guerra*⁷⁹ lack of clarity about what was permissible and/or desirable to legislate in the area of child rearing and a failure to understand the necessity to distinguish between medical disability leaves and child rearing leaves.

As a result, commentaries on state statutes often contradict each other about the number of pregnancy disability statutes or parental leave statutes on record or, in describing statutes as mandating maternity leave, obscure the content of these statutes.⁸⁰ For example, a Tennessee statute describes "maternity leave" as an unpaid leave of up to four months for pregnancy disability,⁸¹ while a Massachusetts statute allows an unpaid "maternity leave" of up to eight weeks after adoption of a child under three.⁸² The first statute describes a legally tenable pregnancy disability leave, while the second describes a legally untenable leave for child care allowed only to mothers. Both statutes define the same term, "maternity leave," in completely different and contradictory ways.

Clearly, in the post-*Guerra* era, no such confusion should be possible. Under *Guerra*, a pregnancy disability leave law such as the Tennessee law just described, which grants leave because of an actual, temporary physical inability to perform one's job during pregnancy and/or immediately following child bearing, is unequivocally

77. *Id.* at 825.

78. Congress has concluded that "[p]lans that label a woman's separation from work because of pregnancy as a voluntary termination of employment without good cause in essence act indirectly to deny benefits on the basis of pregnancy, when a state clearly could not do so directly." *Denial*, *supra* note 62, at 1945.

79. 107 S. Ct. 683 (1987).

80. Compare any of the commentaries cited in this paper.

81. TENN. CODE ANN. § 4-21-408 (1988).

82. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982).

PREGNANCY DISCRIMINATION

upheld.⁸³ On the other hand, any law granting maternity leave for child rearing to women only, such as the provision of the Massachusetts statute, will be subject to challenge under Title VII and the equal protection clause of the fourteenth amendment as discriminatory against fathers. In comparing the state statutes, therefore, the clearest analysis comes from grouping these laws in two distinct categories: (1) laws allowing leave for disability and (2) laws allowing leave for child rearing. Even after such a division, the statutes within each category still will vary widely in terms of actually ensuring equal employment opportunity. Because of these variances, many groups support enactment of a federal law like the Family and Medical Leave Act recently introduced in the U.S. Congress, only to die in committee.⁸⁴

The following discussion explores the legal issues raised by these two categories of leave laws, the extent to which such laws are in effect or pending, and the various characteristics of each type. The conclusion recommends a federal law that will insure uniformity of employment opportunity from state to state for pregnant women and parents.

A. Guidance from the United States Supreme Court: the Guerra Case

In *Guerra*, the Court made clear that any state that passes a pregnancy disability leave law, similar to the California statute in question, will be on firm legal ground.⁸⁵ Section 12945(b)(2)⁸⁶ of the California Government Code and its concomitant regulations mandate that employers with fifteen or more employees must provide reasonable leave for a worker disabled by pregnancy and/or childbirth. This leave can last up to four months and is accompanied by a qualified right to reinstatement. An employee must be given back

83. See generally *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987); see also Casenote, *supra* note 27, at 787.

84. See Casenote, *supra* note 27, at 809.

85. *Guerra*, 107 S. Ct. at 683-84.

86. Section 12945(b)(2) states:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification: . . . (b) for any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either: . . . (2) [t]o take a leave on account of pregnancy for a reasonable period of time; provided such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

CAL. GOV'T CODE § 12945(b)(2) (West 1980).

her previous job unless her job is no longer available due to business necessity, a strict standard, which precludes the use of cost as a criteria for denying to the returning mother her old job. If the business necessity rule precludes an employee's return to her pre-leave position, then the employer is required to make a good faith effort to place her in a substantially similar job, one with equal pay and status.

The operative elements in this law are medical disability and job reinstatement rights. Any state statute that confines itself within these parameters in terms of what it guarantees a pregnant worker will comply with Title VII and the PDA. Furthermore, this remains true *even if* the employer in question does not have a comparable leave policy for other nonpregnant employees who are similarly disabled. In other words, if an employer complies with a statute like the California statute by granting a pregnant employee with toxemia a leave with reinstatement rights but refuses the same type of leave to a male employee temporarily disabled by a heart attack, the employer will be in violation neither of Title VII's prohibition against sex discrimination⁸⁷ nor of the PDA's mandate that pregnant employees be treated the *same as* other similarly disabled employees.⁸⁸

This holds true for two reasons. First, the Supreme Court ruled that the relevant categories to be compared when determining sex discrimination are not pregnant workers and non-pregnant workers with similar disabilities *but rather* working mothers and working fathers. Thus, the Court interpreted the intent of Title VII and the PDA as allowing women as well as men to have families without risk of losing their jobs. The basis for the Supreme Court's ruling concerning comparable categories is its interpretation of congressional intent in passing the PDA. Senator Williams, one of the PDA's sponsors, made clear that "[t]he entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."⁸⁹ The clear inference here is that working fathers already enjoy co-existing rights to full participation in work life and family life. Consequently, working fathers are the appropriate group with which to compare working mothers in determining whether equality of opportunity exists for pregnant women in the workplace.

87. California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691 (1987).

88. *Id.*

89. 123 CONG. REC. 29,658 (1977); Guerra, 107 S. Ct. at 693-94.

PREGNANCY DISCRIMINATION

Second, in a concurring opinion in *Guerra*, Justice Stevens pointed out that in the previous case of *United Steelworkers of America v. Weber*,⁹⁰ the Supreme Court rejected the idea that Title VII prohibits all preferential treatment to the disadvantaged classes it was designed to protect.⁹¹ Justice Stevens then noted that it is a clear and logical inference that the PDA, as well as the rest of Title VII, permits preferential treatment of pregnant workers as long as the goal of such treatment is equality of employment opportunity.⁹²

In so defining the intent of these federal laws, the Supreme Court has given approval to a sex differences approach to writing state statutes to ensure equality for women in the workplace. The Court has said that, as long as state laws do not permit differences other than biological differences, e.g., child bearing capacity, to be treated differently under the law and as long as the goal of the law is equal employment opportunity, that law will be free from threats of reverse sex discrimination suits. Thus, in post-*Guerra* America, the sexes need not be treated equally in terms of disability, because women are more regularly disadvantaged by pregnancy disability without job protection than are men by any sex specific disability. Thus, if women are not given more generous policies for pregnancy related disability, they will not have employment opportunities in the workplace that are equal to the opportunities of their male colleagues.⁹³ A logical corollary of this is that a woman with a non-pregnancy disability must be treated the same as a similarly situated male.

What will be the reaction of the hypothetical male employee who is refused a leave of the type granted to his pregnant co-worker? The Court alluded to this issue when it determined that employers are not precluded from according the male employee equal treatment.⁹⁴ In other words, if a male employee complains about the apparent inequality present in an employer's leave policy, then the remedy cannot be to take away the pregnant woman's leave and job protection. However, nothing in Title VII, the PDA, or *Guerra* precludes the employer from giving to the male employee (and all similarly disabled employees) the same leave with job-protected rights. Indeed, this is the remedy proposed by proponents of the equal treat-

90. 443 U.S. 193 (1979).

91. *Guerra*, 107 S. Ct. at 697 (Stevens, J., concurring).

92. *Id.*

93. *Id.*

94. *Id.*

ment model rather than the sex differences model.⁹⁵

As a result of this interpretation of the *Guerra* precedent, state legislatures might be pressured by employers, concerned about the potential costs of a comprehensive disability leave policy, to refrain from passing any law mandating special treatment of pregnant workers. After all, the Supreme Court found that the PDA, while not prohibiting special treatment of pregnant workers, did not mandate such treatment either. Whether the possible impact on employers will discourage individual states from passing liberal pregnancy leave laws is problematic. In 1987, however, proposed state legislation for pregnancy disability leave failed in two states, Missouri and Virginia. If a decreased willingness to enact pregnancy disability laws is indeed a result of the *Guerra* decision, then clearly an argument should be made for the increased necessity of federal legislation in this area to guarantee women the equal employment opportunity envisioned by Title VII and the PDA.

B. Survey of State Laws

Presently, thirteen states have enacted pregnancy disability policies that fit the model upheld in *Guerra*.⁹⁶ These states include California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Kansas, Massachusetts, Montana, New Hampshire, Oregon, Tennessee and Washington. Three of these policies are state laws and seven are part of various antidiscrimination code guidelines and regulations.⁹⁷ In three states, pregnancy disability leave is mandated both by state

95. See *supra* note 17 and accompanying text.

96. CAL. GOV'T CODE § 12945(b)(2) (West 1980) and CAL. ADMIN. CODE tit. 2 § 7291.2(d)(30); COLORADO, SEX DISCRIMINATION RULES, Rule 80.8, reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 453:1125, 453:1127 (effective May 31, 1972); CONN. GEN. STAT. ANN. § 46a-60(a)(7) (West 1986); HAWAII ADMINISTRATIVE RULES ON SEX DISCRIMINATION § 12-23-58, reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 453:2328 (effective Nov. 15, 1982); ILL. ADMIN. CODE tit. 56 § 5210.110, reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 453:2761, 453:2764 (effective Nov. 14, 1985); IOWA CODE § 601A.6(2) (1987), 1987 IOWA LEGIS. SERV. 139 (West); KANSAS COMMISSION ON CIVIL RIGHTS RULES AND REGULATIONS § 21-32-6, reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 453:3301 (effective Jan. 1, 1974); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982) and MASS. REGS. CODE tit. 804, § 3.02(7)(a)-(h), § 8.01; MONT. CODE ANN. §§ 49-2-310 - 49-2-311 (1987) MONT. ADMIN. R. 24.9.1201-1207; NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS, HUM 402.03 (1987), reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 455:2451, 455:2464 (as amended Feb. 10, 1987); OR. ADMIN. R. 839-07-500-530 (1986); TENN CODE ANN. 4-21-408 (1988), reprinted in FAIR EMPL. PRAC. MANUAL (BNA) 457:1821 (effective Jan. 1, 1988); WASHINGTON, HUMAN RIGHTS COMMISSION SEX DISCRIMINATION REGULATIONS WAC 162-30-020 reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:2951 (effective Oct. 28, 1973).

97. Connecticut, Iowa and Tennessee have all enacted pregnancy disability leave legislation. Colorado, Hawaii, Illinois, Kansas, New Hampshire, Oregon and Washington require pregnancy disability leave by regulation under state antidiscrimination statutes.

PREGNANCY DISCRIMINATION

law and by civil rights guidelines.⁹⁸ Two of the three states with disability statutes, Iowa and Tennessee, passed these laws in 1987.⁹⁹

All of these policies seem to meet the criteria established in *Guerra* with the exception of one provision in the Massachusetts law. That provision combines pregnancy disability leave with child rearing leave by guaranteeing reinstatement rights to a female employee who is absent from work for up to eight weeks "for the purpose of giving birth" or "for adopting a child under three years of age."¹⁰⁰ Since adoption is not a biological function peculiar to women, as is childbirth, this provision clearly fails to maintain the necessary distinction between actual physical disability and child rearing. In addition, by limiting the child rearing leave provision to female employees, the Massachusetts law fails to meet the justifiable sex differences test established in *Guerra*.¹⁰¹ It could, therefore, be viewed under Title VII as discrimination against adoptive fathers.

Furthermore, this provision appears to run counter to the legislative intent established for the PDA in *Guerra*. That intent was to avoid any leave laws that perpetuated outmoded and undesirable cultural stereotypes about parenting, such as the stereotype that the mother is the one who should take the leave.¹⁰² If Massachusetts wishes to provide leave for adoption, it appears that it would have to do so in the form of a gender neutral parental-leave statute. In fact, such a law is pending in Massachusetts. A similar bill is pending in the Pennsylvania legislature¹⁰³ and is subject to the same criticism.

While the laws of these thirteen states fundamentally resemble each other, there is enough range among them to change the amount of equal employment opportunity guaranteed from state to state. This range is generally apparent in the qualifying stipulations included in these laws. All require that a woman be reinstated to her previous or similar job if her leave does not exceed the stipulated length unless "business necessity" or "changed circumstances" make this impossible. Tennessee is an exception in that it stipulates that, if a woman's job is so specialized that she cannot be replaced by a temporary employee, she need not be given her old job back.¹⁰⁴ This

98. These states are California, Massachusetts and Montana, *see supra* note 96 for statutory and regulatory citations.

99. *See supra* note 96.

100. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982).

101. California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 694 (1987).

102. MATERNITY POLICIES, *supra* note 30, at 144.

103. S. 350. This bill was pending in the Labor and Industry Committee as of June, 1987. *See BNA, supra* note 29, at 96-106.

104. TENN. CODE ANN. § 4-21-408, *reprinted in* FAIR EMPL. PRAC. MANUAL (BNA)

appears to be a specific form of business necessity.

The Massachusetts statute, which requires reinstatement to the same or a similar position, names another form of changed circumstances. That statute stipulates that a woman returning from a pregnancy disability leave need not be given her old job back if employees with similar status and length of service have been laid off due to "economic conditions" or other changes in operating conditions during her disability leave.¹⁰⁵ Most existing laws allow the business necessity defense only for private employers, while state employees have a virtually unqualified guarantee to reinstatement.

All of the laws, except Iowa's, set a minimum number of employees necessary before the statute is applicable. This number ranges from one to one hundred with nine of the statutes mandating employers with one to eight employees. Clearly, fewer women will be protected in Tennessee, which exempts employers with fewer than one hundred people from complying with the law. The minimum employee standard has greater impact than perhaps initially was understood since women tend to be disproportionately employed in smaller businesses.¹⁰⁶

Another variable that limits the applicability of these laws is the full-time, part-time issue. Although not all the laws state specifically that only full-time employees are covered, many do, and none specify that part-time employees are covered. This seems to allow a legal way to deny many women pregnancy disability leave, as women are disproportionately employed in part-time positions.¹⁰⁷ Perhaps this is true partially because of the lack of congruence between the current structure of the workplace and the demands of family responsibility.

In addition, another important issue to consider in assessing the level of protection afforded women by individual states is the allowed length of leave. Eight of the existing provisions stipulate that an employer must allow a reasonable leave for pregnancy disability.¹⁰⁸ This has generally been interpreted to mean the traditional six to eight week postpartum period with flexibility allowed for individual cases. The Washington regulation covers the "period of actual disability," thus appearing to allow total flexibility for individual cases.¹⁰⁹ The

457:1821 (effective Jan. 1, 1988).

105. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982).

106. Dowd, *supra* note 17, at 711.

107. *Id.* at 711-12.

108. These provisions are found in the following state statutes: California, Colorado, Connecticut, Hawaii, Illinois, Kansas, Montana and Oregon. For the statutory citation see *supra* note 96.

109. WASHINGTON HUMAN RIGHTS COMMISSION SEX DISCRIMINATION REGULATIONS

PREGNANCY DISCRIMINATION

statutes of California and Tennessee stipulate up to four months as the maximum leave permissible and New Hampshire's statute allows up to six months.¹¹⁰ Iowa and Massachusetts stipulate eight weeks, which in most cases corresponds to "reasonable time" but is too rigid to accommodate the individual with serious pregnancy/delivery complications.¹¹¹ In addition, the Massachusetts statute grants leave for the purposes of giving birth and seems to exclude disability leave for pregnancy complications experienced prior to birth. Thus, pregnant residents of Iowa and Massachusetts seem to get less complete job protection than do pregnant residents in several other states.

Existing leave policies vary in terms of the waiting period required before employers must grant pregnancy disability leave. Ten states allow the length of the waiting period to be determined by the employer's discretion.¹¹² Massachusetts specifies that in order to be eligible, an employee must have completed her company's stated probationary period. The Massachusetts statute, however, goes one step further by stipulating that if an individual employer has no stated probationary period, a pregnant employee must be employed full-time for three months before being eligible for pregnancy disability leave.¹¹³ Illinois specifies twenty calendar weeks and Tennessee specifies one year as the waiting period before the pregnancy disability leave guarantee applies.¹¹⁴

No state mandates that the leave be paid, but the Iowa statute stipulates that "disability leave needed because of pregnancy should be treated the same as any other disability leave. Written and unwritten policies on duration, seniority, benefits and pay would be the same for a pregnancy disability leave as for any other disability."¹¹⁵ Iowa's statute thus echoes the intent of the PDA to insure that if a

WAC 162-30-020 reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:2951 (effective Oct. 28, 1973). The regulation states that, "An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy of child birth."

110. CAL. GOV'T CODE § 12945(b)(2) (West 1980) and TENN. CODE ANN. § 4-21-408, reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:1821 (effective Jan. 1, 1988) provide for up to four months leave. New Hampshire Commission for Human Rights, HUM 402.03 (1987), reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 455:2451, 455:2464 (as amended Feb. 19, 1987) allows a maximum of six months leave.

111. IOWA CODE § 601A.6(2) (1987), 1987 IOWA LEGIS. SERV. 139 (West); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982).

112. These states are California, Colorado, Connecticut, Hawaii, Iowa, Kansas, Montana, New Hampshire, Oregon and Washington. See *supra* note 96.

113. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 1982).

114. ILL. ADMIN. CODE tit. 56, § 5210.110, reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 453:2761, 453:2764 (effective Nov. 14, 1985); TENN. CODE ANN. § 4-21-408 (1988), reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:1249 (effective Jan. 1, 1988).

115. IOWA CODE § 601A.6(2) (1987); 1987 IOWA LEGIS. SERV. 139 (West).

company has a paid disability leave for other temporary disabilities, it must also have one for pregnancy disability. In truth, all companies with fifteen or more employees in all states would appear to have to conform to this policy under the recent Supreme Court interpretation of the PDA.¹¹⁶ Iowa also approves of a limited sex differences approach in a second provision of its statute, which states that, if an employer does not have sufficient disability leave policy for other disabilities, then that employer must nevertheless grant a disabled pregnant worker a leave of absence of up to eight weeks.¹¹⁷ Here, Iowa legislators appear cognizant of the equal employment opportunity standard set out in Title VII and reiterated in *Guerra*.

As implied in the Iowa statute, legal requirements relative to a returning mother's status in the area of benefits and seniority will vary greatly. Some statutes specifically insure that upon reinstatement, an employee will regain her pre-leave level of benefits and seniority. Other statutes, like Iowa's, tie the returning mother's seniority and benefits to policies already in place for other disability leaves in each individual company. Still other statutes fail to make clear whether pre-leave benefits and seniority are protected at all.

In summary, thirteen states have disability leave policies in place that, with one exception, appear legally tenable.¹¹⁸ Three more states and the District of Columbia have legally tenable bills pending,¹¹⁹ while Pennsylvania's pending bill will probably not pass legal tests. In two states, Missouri and Virginia, the state legislatures recently defeated legally tenable pregnancy disability laws.¹²⁰ At best, pregnant women in sixteen states will soon be provided with equal employment opportunity through varying degrees of job protection. Whether the recent Supreme Court decision in *Guerra* mobilizes more states to mandate job protection for pregnant workers or discourages such laws remains to be seen. In the absence of a significant increase in such laws, there certainly will be increased lobbying by groups such as the Women's Legal Defense Fund for a federal law resembling the failed Family and Medical Leave Act¹²¹ in order to fill this void on the state level.

116. California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987). See *infra* note 146.

117. IOWA CODE § 601A.6(2)(e) (1987).

118. See *supra* note 96.

119. The three state bills are New York Bill A 5522, Vermont Bill H 322, and Wisconsin Senate Bill 235. The District of Columbia bill is 7-57. See BNA, *supra* note 29, at 96-106.

120. Missouri Bill H 615 was withdrawn from consideration in 1987. Virginia Bill H 1416 failed in committee in 1987. See BNA, *supra* note 29, at 96-106.

121. H.R. 925, 100th Cong., 1st Sess. (1987).

C. Parental Leave

The intent of pregnancy disability leave laws is to protect women from the potentially damaging effects on their careers of pregnancy-related physical problems. The intent of parental child care leave laws, however, is to allow mothers and fathers the bonding time that many child care experts view as essential to a healthy parent/child relationship. Leading child study expert T. Berry Brazelton has estimated that three months is the minimum time necessary for such bonding.¹²² Enacted with an intent different from that of pregnancy disability leave laws, parental child care leave laws are less directly governed by Title VII and the PDA. Thus, laws granting parental leaves for child rearing operate without the clear court rulings that exist in the area of pregnancy disability laws.

What seems certain from our preceding discussion of *Guerra*, however, is that leaves for child rearing differ from pregnancy disability leaves in one fundamental way — there is no biological basis for treating the sexes differently when granting leave for child rearing. In fact, any law that stipulates that only mothers can take family leave for child rearing purposes serves to perpetuate the cultural myth that mothers are by nature the ones who should be the primary caretakers of young children. Indeed, reinforcing such a cultural belief constitutes an obstacle to a mother having an employment opportunity equal to that of a father and would run counter to the goals of Title VII and the PDA as reaffirmed in *Guerra*.¹²³ Furthermore, feminist groups, as well as groups advocating for fathers' rights, would most certainly attack any such law on this basis. Clearly, the sex differences approach is not justified in this instance.

It is conceivable that other employees, desiring temporary unpaid leaves for personal purposes, such as extended travel or continuing education, would claim that parental child care leave statutes give special preference to parents and so discriminate against non-parents with personal needs to fulfill. No such claim could be brought under Title VII, but whether such an individual may have other legal recourse remains to be seen.

The four states that have enacted parental leave for child rearing statutes (Connecticut, Minnesota, Oregon and Rhode Island) appear to recognize the legal issues involved.¹²⁴ None of these statutes

122. See T. BERRY BRAZELTON, *TODDLERS AND PARENTS* 29 (1974).

123. *MATERNITY POLICIES*, *supra* note 31, at 149.

124. 1987 CONN. PUB. ACTS. 87-291; MINN. STAT. ANN. §§ 181.940-943; OR. REV. STAT. § 659.360 (1987), *reprinted in* 8A FAIR EML. PRAC. MANUAL (BNA) 457:617 (effec-

stipulates that only the mother can take such a leave. There is some confusion, however, about how to be nondiscriminatory in granting such leaves. For example, Connecticut's law allows state workers to take a maximum of twenty-four weeks of unpaid family leave. This statute does not state specifically whether both mother and father may take this leave for the same child. Nor does it indicate whether both leaves (if they are permissible) could run consecutively. Consecutive leaves would allow parents to minimize economic impact and delay the necessity for daycare.¹²⁵ Minnesota's law also allows "new parents" the option of taking six weeks of unpaid leave within six weeks of a child's birth or adoption. The wording in that statute seems to imply that one parent could take leave for the first six weeks after a child's birth/adoption, while the other parent could take off the second six weeks.¹²⁶ Both Connecticut and Minnesota, by not stating that only one parent may take leave for any one child, leave the way clear for both parents to do so.

Oregon, however, states explicitly what Connecticut and Minnesota leave to inference.¹²⁷ The Oregon statute provides that both mothers and fathers may take child care leave for the same child. It stipulates that employers must be given notice of the dates each parent intends to take leave, that their combined leave not exceed twelve weeks, and that the leaves not be taken concurrently. Rhode Island's statute also clearly grants both parents the right to child care leave for the same child. This statute provides thirteen weeks of unpaid child care leave for "every employee" who has met the waiting period requirements.¹²⁸

tive Jan. 1, 1988); R.I. GEN. LAWS §§ 28-48-1—28-48-9 reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:1249 (effective June 1, 1987).

125. The Connecticut statute states as follows: "Each permanent employee, as defined in subsection (0) of section 5-196 of the general statutes shall be entitled to the following: (1) a maximum of twenty-four weeks of family leave of absence within any two-year period upon the birth or adoption of a child such employee . . ." 1987 CONN. PUB. ACTS. 87-291 § 1(a).

126. The statute states, "The leave shall begin at a time requested by the employee. The employer may adopt reasonable policies governing the timing of requests for unpaid leave. The leave may begin not more than six weeks after the birth or adoption." MINN. STAT. ANN. § 181.941(2) (West Supp. 1988).

127. The Oregon statute states:

The employer is not required to grant to an employee parental leave which would allow the employee and the other parent of the child, if also employed, parental leave totaling more than the amount specified in paragraphs (a) and (b) of subsection (1) of this section nor to grant to an employee parental leave for any period of time in which the child's other parent is also taking parental leave from employment.

OR. REV. STAT. § 659.360(2) (1987), reprinted in 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:617 (effective Jan. 1, 1988).

128. The Rhode Island statute provides: "Every employee who has been employed by the same employer for twelve (12) consecutive months shall be entitled, upon advance notice to

PREGNANCY DISCRIMINATION

By applying the legal findings set forth in *Guerra*,¹²⁹ it seems that both parents should be allowed child care leave for the same child if each is to enjoy equal opportunity to parent that child without losing his or her job. All four of these statutes¹³⁰ seem to agree with this reasoning. With the exception of Oregon, each statute, however, stops short of stating clearly that parents need not choose who will take the child care leave. Realistically, if parental leaves remain largely unpaid, this may be a moot question since there will be few cases where both parents can afford to stop working, even if the leaves are taken consecutively rather than concurrently.

Furthermore, these four statutes vary with regard to the length of leave allowed. The range is from six weeks in Minnesota to a maximum of twenty-four weeks in Connecticut. This reflects a divergence of opinion about what constitutes the necessary bonding time in the parent/child relationship.¹³¹ The minimum number of employees a company must have before it needs to comply with the family leave statute also varies. That range is from twenty-one to fifty employees with the Connecticut statute covering only state employees.¹³² Connecticut's statute does not stipulate a waiting period, while Minnesota's and Rhode Island's stipulate a one year waiting period before the employer is required to grant the parent a child care leave. Oregon's statute has a ninety-day waiting period, which is considerably shorter than that of Minnesota or Rhode Island.

With regard to full-time/part-time coverage, the statutes in Connecticut and Oregon are silent on whether part-time employees are covered.¹³³ Theoretically, the way is clear for such employees to press their claim to the statutorily enacted child care leave. Minnesota's statute stipulates that a parent must work at least twenty hours per week in order to be eligible for child care leave.¹³⁴ Rhode Island's statute, meanwhile, specifically covers only employees who work a minimum of thirty hours per week.¹³⁵

his or her employer, to thirteen (13) consecutive work weeks of parental leave in any two (2) calendar years" R.I. GEN. LAWS § 28-48-2(a) (1988), *reprinted in* 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:1249 (effective June 1, 1987).

129. *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987).

130. *See supra* note 124.

131. *Id.*

132. *See BNA, supra* note 29, at 98 (1987). The Governor of Connecticut has, however, created a task force to consider the issue of parental leave in the private sector. The task force's report was due out in June, 1988.

133. 1987 Conn. Pub. Acts. 87-291; OR. REV. STAT. § 659.360 (1987), *reprinted in* 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:617 (effective Jan. 1, 1988).

134. MINN. STAT. ANN. § 181.940(2) (West Supp. 1988).

135. R.I. GEN. LAWS § 28-48-1(b) (1988), *reprinted in* 8A FAIR EMPL. PRAC. MANUAL (BNA) 457:1249 (effective July 1, 1987).

the intent of these statutes is to guarantee equal employment opportunity to present workers, not to guarantee these workers the right to bond with their children or to insure future generations of workers who have successfully bonded to their parents. Another explanation for the fact that child care leave statutes lag behind pregnancy disability statutes is that granting both parents extended child care leave represents a greater disruption to "business as usual" in the work place, a disruption, as seen before, which American business interests may not be willing to support. Nevertheless, it does appear that, as a nation, we have a clear and abiding stake in the well being of each new generation of Americans, and that this stake is best protected by a carefully developed uniform national policy mandating the granting of child care leaves to both parents upon request.

This survey of the current status of state laws addressing pregnancy disability leave and parental child care leave shows that, if there is to be a consistent restructuring of the workplace across the country to allow both mothers and fathers to have children and to bond with them without losing their jobs, then legislation on the national level is absolutely necessary. If such legislation could withstand and satisfy the inevitable demands of lobbyists for American business interests, it would guarantee that parents from state to state would have the *same* rights to job-protected pregnancy disability and child care leaves, rather than being subjected to the disparate priorities and vagaries of the various state laws. Only then would the equal employment opportunity goal of Title VII and the PDA be truly met.

IV. Conclusion

Neither the PDA nor FUTA have put working women and their families in a secure position in the event that pregnancy and childbirth interferes even briefly with their ability to work. A federal statute mandating job preservation for the period of pregnancy-related disability is critical to women's retention of any meaningful place in the employment sphere. In states that do not require employers to provide job preservation, equal treatment as "others disabled" according to the PDA does not even give women the right to take accrued vacation and sick leave as a maternity leave when a company's policy prohibits leave until the completion of a probationary period,¹⁴⁵ or prohibits leave during certain peak periods.

145. See Dowd, *supra* note 17, at 711.

PREGNANCY DISCRIMINATION

The equal treatment approach allows facially neutral policies for the disabled to wreak havoc on the ability of women to maintain their jobs through the process of childbirth.¹⁴⁶ Since some state unemployment compensation statutes (which will probably withstand the "neutral on its face" test enunciated by the Supreme Court in *Wimberly*) have a disparate impact on pregnant women, federal assurance of the earned benefit of partial wage replacement during the period of physical disability associated with childbirth would provide economic support to families at a critical time. Child rearing leaves extending beyond the actual period of a mother's disability should be available to mothers and fathers on a fair and equal basis to assure that men are not deprived of a right to which women are entitled, and to insure that women are not legally and culturally consigned to traditional roles as nurturers.¹⁴⁷

146. See generally Dowd, *supra* note 17, at 710-11. "[A] substantial number of working women are entitled to no leave or only to inadequate leave." *Id.* at 710. Dowd notes also that leave policies are far more common in large companies than in small companies, a finding that is not surprising in light of Title VII's applicability to employers having fifteen employees or more. See 42 U.S.C. § 2000e(B) (1982). Absent state statutes that entitle women in smaller companies to pregnancy disability leave, smaller employers are not legally required to preserve jobs, and a small employer that implements a generous leave policy puts itself at a competitive disadvantage. See MATERNITY POLICY, *supra* note 31, at 148. Furthermore, the problem is exacerbated by the fact that small firms employ a disproportionately large number of women. See BNA, *supra* note 29, at 119. See generally Note, *Equality in the Workplace: Is That Enough for Pregnant Workers?*, 23 J. FAM. L. 401, 417-18 (1984-85) (It is unwise as a matter of social policy to treat pregnancy as any other disability because "[s]ociety expects and demands, and it's a necessity that women become pregnant. Society both needs the woman worker and needs the mother." (footnote omitted). *Id.* at 417.

147. Employers would not view women as so at risk for career disruption if men were clearly entitled to paternity leave under federal law. See, e.g., MATERNITY POLICIES, *supra* note 30, at 149; Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 381 (1984-85) (parental leaves should be available to men and women); Dowd, *supra* note 17, at 714 (employment policies which deny parenting leave to men perpetuate invalid stereotypes of appropriate social roles that particularly disadvantage women).