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Sexual Discrimination: Pregnancy Benefits as Interpreted by the EEOC and the Courts

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SEXUAL DISCRIMINATION: PREGNANCY BENEFITS AS INTERPRETED BY THE EEOC AND THE COURTS—*Wetzel v. Liberty Mutual*, 511 F.2d 199 (3d Cir.), *cert. granted* 95 S.Ct. 1989 (1975).*

Illness and disability are two of the major problems facing the over 86,000,000 men and women, sixteen years of age and older, who comprise today's total labor force in the United States.[1] Due to the extreme probability that one of these misfortunes will strike at some point in their working careers, workers, in considering job positions with different organizations, are demanding some type of security to insulate them from the financial consequences of long-term illnesses and on-the-job injuries. In an effort to meet these demands, employers have devised and instituted various insurance and disability plans. A typical plan will more often than not be financed by both employer and employee contributions. While the plans themselves are fairly comprehensive in scope, they frequently exclude from coverage certain stated disabilities, *e.g.*, alcoholism, suicide and drug addiction.

In addition to these exclusions, a large number of insurance plans also disallow compensation for disabilities due to pregnancy and related causes, although companies normally allow pregnant employees to take leaves of absence.[2] In recent years these practices have come under attack. While employers are not compelled by law to provide disability plans, Title VII of the Civil Rights Act of 1964[3] provides that once these plans are established they cannot treat similarly situated employees differently.

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* The Supreme Court has vacated the judgment of the court of appeals with instructions to dismiss the appeal. Liberty Mutual Insurance Co. v. Wetzel, 96 S. Ct. 1202 (1976). The Court held, on its own motion, that because the district court had not finally disposed of any of Wetzel's prayers for relief, the court of appeals lacked jurisdiction to hear Liberty Mutual's appeal. The issue presented in *Wetzel* still has relevance, however, in that *Wetzel*'s companion case, Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), *cert. granted*, 423 U.S. 822 (1975), has yet to be decided by the Supreme Court.

1. Bureau of Statistics, annual averages for 1974: 33,417,000 women and 52,519,000 men. WORLD ALMANAC BOOK OF FACTS of 1976 (1975).

2. Prior to Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), noted in 23 DRAKE L. REV. 690 (1974), some employers imposed mandatory termination dates on pregnant employees. In *LaFleur*, the Supreme Court held that arbitrary termination regulations violated the due process clause.

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)(Supp. III, 1973), *amending* 42 U.S.C. § 703(a)(1964):

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

The Equal Employment Opportunity Commission (EEOC), established by the Act[4] and authorized to enforce Title VII,[5] has drafted guidelines which specifically state that pregnancy-related disabilities are temporary disabilities for all job-related purposes and should be treated as such under any temporary disability insurance or sick leave plan available in connection with employment.[6] Although Title VII and the EEOC's guidelines appear dispositive of the situation, there are several underlying issues which have given rise to a considerable amount of litigation.

In light of the recent Supreme Court decision, *Geduldig v. Aiello* (holding that a California state insurance program, by its exclusion of pregnancy-related disabilities, did not discriminate on the basis of sex in violation of the equal protection clause),[7] an obstacle, if not an insurmountable barrier, blocks the total effectiveness of Title VII and its interpretative guidelines. The legality of the guidelines has also been put into question since, arguably, the EEOC did not follow the standards and limitations set forth by the Administrative Procedure Act[8] as required by Title VII.[9] The guidelines also represent, it has been argued, a position contrary to the EEOC's former stance when employers were informed that they were not compelled to include pregnancy-related disabilities in their plans.[10]

Despite the apparent strength of these arguments, an overwhelming number of cases, both before and after *Geduldig*, have followed the EEOC interpretation by holding that mandatory termination dates for pregnant employees and the exclusion of pregnancy-related disabilities from benefit plans do violate Title VII.[11] In recognition of this conflict, the United States Supreme

4. 42 U.S.C. § 2000e-4 (Supp. III, 1973).

5. 42 U.S.C. § 2000e-5(a) (Supp. III, 1973).

6. 29 C.F.R. 1604.10(b) (1975): Disabilities caused or contributed to by pregnancy, miscarriage, abortion. . .are, for job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.

7. 417 U.S. 484 (1974).

8. 5 U.S.C. § 551 *et seq.* (1970). See discussion of this issue p. 204 *infra*.

9. 42 U.S.C. § 2000e-12(a) (Supp. III, 1973).

10. Several companies, in attacking the EEOC's interpretation of Title VII, have contended that pregnancy is a voluntary condition and therefore is outside the scope of a disability and illness plan; that since pregnancy is a uniquely female condition, exclusionary plans do not discriminate in favor of men; and that the coverage of these disabilities would be so extraordinarily expensive that the primary purpose of the plans, *i.e.*, minimal cost to employees, would be defeated. See p. 207 *infra*.

11. *See, e.g.*, Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir.), *cert. granted*, 96 S. Ct. 36 (1975) (argued Jan. 19, 1976); Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Holthaus v. Compton & Sons, 514 F.2d 651 (8th

Court recently granted certiorari to two cases involving this issue: *Wetzel v. Liberty Mutual Insurance Co.*[12] and *Gilbert v. General Electric Co.*[13] The scope of this note will be limited to a discussion of the rationale and impact of the *Wetzel* decision.

I. FACTUAL BACKGROUND OF WETZEL

Two named plaintiffs, Sandra Wetzel and Mari Ross, commenced a Title VII class action in February, 1972, challenging their employer's (Liberty Mutual Insurance Company) hiring and promotional practices, its pregnancy-related disabilities policy, and its practice of providing disparate compensation for certain labelled jobs. The United States District Court for the Western District of Pennsylvania entered partial summary judgment in favor of the plaintiffs on the issue of liability.[14] Liberty Mutual filed two appeals, one regarding its hiring and promotional practices and the class action aspects of the case, and the other regarding its disability plan concerning pregnancy.[15] The lower court's judgment was affirmed by the United States Court of Appeals for the Third Circuit in two separate opinions.[16] The issue presently before the Supreme Court is whether a private employer's exclusion of pregnancy-

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Cir. 1975); Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975); Farkas v. South W. City School Dist., 506 F.2d 1400 (6th Cir. 1974).

Contra, Seaman v. Spring Lake Park Ind. School Dist. No. 16, 387 F. Supp. 1168 (D.Minn. 1974); Newmon v. Delta Airlines, Inc., 475 F.2d 768 (5th Cir. 1973); Godwin v. Patterson, 363 F. Supp. 238 (M.D. Ala. 1973).

12. 511 F.2d 199 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

13. 519 F.2d 661 (4th Cir.), *cert. granted*, 96 S. Ct. 36 (1975).

14. 372 F. Supp. 1146 (W.D. Pa. 1974). Plaintiffs were notified by letters of February 15, 1972, of their right to institute this action pursuant to 29 C.F.R. § 2601.25a(c) (1975) (Rules and Regulations of the EEOC).

15. Liberty Mutual's policy may be instructive as a typical plan. It provided a contributory disability insurance program (Income Protection Plan) to which its employees must subscribe as a condition of employment. This plan is considered a fringe benefit and provides employees with the payment of income during periods of disability. With the exception of disabilities resulting from acts of war and intentionally self-inflicted injuries, only disabilities due to or related to pregnancy are excluded from coverage. Supplementary salary benefits are also paid by Liberty Mutual. In cases covered by the Income Protection Plan, the company will pay an employee's full salary for the first week of disability, thereafter paying one half the difference between full salary and insurance benefits, for as many weeks as the employee has completed years of service. Because pregnancy-related disabilities are not covered by the first plan, the pregnant employee is not eligible for the supplementary salary benefits. In cases of long term illnesses due to pregnancy where a physician is consulted, an employee's supervisor has the discretion to consider the first five days of such absences compensable under the company's short term absence policy. A different more liberal short term plan applies to all other disabilities.

16. 508 F.2d 239 (3d Cir.), *cert. denied*, 95 S. Ct. 2415 (1975) determined the appeal regarding hiring and promotion practices and the applicability of a class action; 511 F.2d 199 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975) determined the pregnancy exclusion issue.

related disabilities from its income protection plan constitutes sex discrimination under Title VII of the Civil Rights Act of 1964, as amended.

II. The Rationales of Wetzel and Geduldig—A Comparison

Liberty Mutual contended that *Geduldig* was dispositive of this issue. The Third Circuit in *Wetzel*, however, distinguished the two cases in a comprehensive analysis. The court held that *Wetzel* involved a Title VII claim requiring a statutory interpretation while *Geduldig* dealt with an equal protection claim calling for a constitutional analysis.

A. *Use of the Rational Basis Test*

The majority of the Supreme Court in *Geduldig*, relying on *Dandridge v. Williams*,[17] implemented a rational basis test in order to conclude that California had a legitimate interest in maintaining a self-supporting disability plan at a low rate of employee contribution despite the plaintiffs' desire for a more inclusive plan to cover pregnancy disabilities. After a finding that increasing the plan's scope would inevitably require a state subsidy, a higher rate of contribution, or a lower scale of benefits, the Court held that, absent a showing of invidious discrimination on the basis of sex, the Constitution does not require a state to subordinate its legitimate interest solely to create a more comprehensive social insurance program.[18] In so holding, the Court affirmed its earlier position that legislatures are permitted to take "one step at a time" when attacking social problems.[19]

By contrast, implicit in the *Wetzel* court's argument is the theory that a rational basis test cannot be utilized in the determination of Title VII claims. It has long been recognized that legislatures have a wide range of discretion in creating classifications and that the constitutionality of these classifications will be upheld provided they are not arbitrary.[20] To circumscribe the possibility that discriminatory employment practices may be granted favorable presumptions, Congress enacted Title VII to assure equality of employ-

17. 397 U.S. 471 (1970).

18. 417 U.S. at 496.

19. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Jefferson v. Hackney, 406 U.S. 535 (1972); these cases specifically stress the fact that they deal with social welfare legislation.

20. Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283 (1898); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), *rehearing denied*, 411 U.S. 959 (1973).

ment opportunities[21] and directed the thrust of the Act toward the consequences of employment practices.[22] Where the plaintiff alleges a constitutional violation and does not belong to a group which has been categorized a "suspect classification"[23] (s)he must overcome the presumption of constitutionality and demonstrate invidious discrimination.[24] A Title VII plaintiff, however, need only show membership in a statutorily protected group (*e.g.*, sex, race) and an adverse effect of an employment practice on that class in order to shift to the employer the burden of showing a legitimate, nondiscriminatory reason for the practice in question.

The burdens of proof alone demonstrate the consequences of implementing the different standards.[25] The defendant in a Title VII action cannot rely on generalizations and stereotypes in support of its exclusion,[26] for Title VII "represents a flat and absolute prohibition against all sex discrimination in conditions of employment,"[27] and this requires consideration of individual characteristics. While the requisite proof of invidious discrimination in constitutional challenges implies a necessity for proof of intentional discrimination,[28] no such burden is imposed on the Title VII plaintiff. Rather, since policies under scrutiny in Title VII actions carry no such presumption of validity, it would be more correct to say that they are presumed invalid if they have a disparate effect on a group protected under the statute.

Although maintaining separate tests for validity, *i.e.*, one for constitutional claims and another for Title VII claims, appears to be anomalous when the same subject matter is involved, there is legitimate support for this approach when dealing with sexual discrimination. The fourteenth amendment was originally treated as

21. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

22. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23. Sex has not been so designated despite recent leanings in that direction, as demonstrated by Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973).

24. *See, e.g., Geduldig v. Aiello*, note 7 *supra*.

25. *E.g.*, in the area of racial discrimination recent Supreme Court cases indicate that for a classification to violate the equal protection clause, it must involve race on its face, while a showing of discriminatory *impact* is sufficient to show a Title VII violation: *compare* Jefferson v. Hackney, 406 U.S. 535 (1972) *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

26. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Justice Marshall, concurring).

27. Gilbert v. General Elec. Co., 519 F.2d 661, 667 (4th Cir. 1975); *see also* 42 U.S.C. § 2000e-2; there is one exception to this absolute prohibition: the bona fide occupational qualification (BFOQ) contained in 29 C.F.R. § 1604.2(a)(1975).

28. Zichy v. City of Philadelphia, 9 CCH E.P.D. ¶ 10,211 (E.D. Pa. 1975).

a specific constitutional weapon against racial discrimination.[29] Despite recent trends towards demanding stricter scrutiny towards sex classification,[30] the rational basis test is still employed.[31] Section 5 of the fourteenth amendment[32] and the commerce clause,[33] however, form a sound constitutional basis for Congress' enactment of legislation mandating a stricter standard in cases of sexual discrimination in employment.[34] By-passing the traditional method of awaiting decisional law to interpret the Constitution in relation to sex discrimination, Congress can, under its broad commerce powers,[35] regulate conduct which does not violate the express terms and purposes of the fourteenth amendment.[36] Using this argument, the Supreme Court could affirm the Third Circuit's decision in *Wetzel*, without retreating from its *Geduldig* position.

B. *Factual Distinction*

Although the *Wetzel* court indicated that the distinction between statutory interpretation and constitutional analysis alone was sufficient to dispel reliance on *Geduldig*, it elaborated on the factual differences between the two cases.[37] The California insurance plan in *Geduldig* was totally supported by deductions from the wages of participating employees. Each employee, unless protected by a voluntary private plan approved by the state, was required to contribute one percent of his/her salary up to an annual maximum.[38] The Supreme Court relied heavily on the financial consequences the state would encounter should pregnancy be included. With these

29. *See, e.g.*, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

30. *Reed v. Reed*, note 23 *supra; Frontiero v. Richardson*, note 23 *supra*.

31. *Geduldig v. Aiello*, note 7 *supra*.

32. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

33. U.S. CONST. art. I, § 8, cl. 3.

34. The first post-*Geduldig* case that declined to extend *Geduldig* to Title VII actions, Vineyard v. Hollister School Dist., 64 F.R.D. 580 (N.D. Cal. 1974), utilized this argument to justify its decision; *but see* United States v. Chesterfield County School Dist., 484 F.2d 70, 73 (4th Cir. 1973).

35. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

36. *See* Wickard v. Filburn, 317 U.S. 111 (1942); Perez v. United States, 402 U.S. 146 (1971). The advance notices of the proceedings at Wetzel's oral argument show that Mr. Justice Rehnquist seemed concerned that Liberty Mutual appeared to be contending that Congress could go no further than the prohibitions of the fourteenth amendment in declaring particular actions unconstitutional. The Supreme Court resolved this question long ago in Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966) holding *inter alia* that Congress' power is not limited to situations where the judiciary has already acted for § 5 of the fourteenth amendment gives Congress enforcement powers. *See* 44 U.S.L.W. 3421 (U.S. Jan. 27, 1976).

37. 511 F.2d at 203.

38. Geduldig v. Aiello, 417 U.S. 484, 487 (1974).

considerations to contend with, the Court proceeded to balance the interests in compliance with the rational basis test. In contrast, Liberty Mutual's plan derives its funds from both employee and employer; therefore the maintenance cost could be spread over a wider area without overburdening any one source. The Third Circuit concluded that the two plans could not be compared and that the balancing test was inapplicable.[39]

Because the *Geduldig* decision rested primarily on the cost of the plan, the *Wetzel* panel could have drawn a further distinction. The EEOC has determined that it is not a defense "to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."[40] In addition, Liberty Mutual excluded disabilities resulting from *all* pregnancy-related conditions while the California plan excluded only the disabilities resulting from normal pregnancy.[41] The court could have added the distinction that the plan in *Geduldig* was a legislative classification, entitled to greater deference than a classification drafted by a private employer which existed in *Wetzel.*

Although the above differential terms existed and the *Wetzel* court used the factual differences only as reinforcement for its statement that *Geduldig* was not dispositive, the two plans themselves were not as different as the court implied. The California plan was in fact very similar to Liberty Mutual's in terms of its exclusions: the only group denied payments, other than pregnant employees, consisted of those individuals judicially confined to institutions for alcoholism, drug addiction and sexual psychopathy.[42] The varieties of illness and injury that were included in the plan ranged from such voluntary surgical procedures as hair transplants and sex-change operations and injuries sustained in fights to such sex- or race-related disorders as prostate disease and sickle cell anemia.[43] Since Liberty Mutual's plan also protected against the above-stated illnesses and injuries, the two plans were in fact quite similar in scope.

C. *An Omission by the Wetzel Court*

Although the Third Circuit's treatment of *Geduldig's* applica-

39. 511 F.2d at 203.

40. 29 C.F.R. § 1604.9(e)(1975).

41. The California plan did exclude disabilities from abnormal pregnancies until the court in Rentzer v. Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 366 (2d App. Dist. 1973) construed the statute to preclude only compensation for disabilities resulting from normal pregnancies.

42. CAL. UNEP. INS. CODE § 2678 (1972).

43. *See* Brief for Appellees at 21, 23, 26; Geduldig v. Aiello, 417 U.S. 484 (1974).

bility appeared to be a logical analysis, it was not totally comprehensive. The *Wetzel* court did not take issue with the meaning and impact of footnote 20[44] in the *Geduldig* opinion, inserted as a rebuttal to the dissenting justices' position that *Reed v. Reed* and *Frontiero v. Richardson*[45] mandate a stricter standard of scrutiny in sex discrimination actions. Viewed in a certain way, the footnote can be seen as having impliedly invalidated the EEOC's guidelines pertaining to pregnancy-related disabilities which in turn implies the stripping away of the EEOC's powers granted to it by Congress. This would be the result if the footnote's intended meaning was that the regulation of pregnancy is not discriminatory, for if there is no discrimination, Title VII is simply not applicable. The different interpretations given the footnote and the inferences drawn by some examiners[46] display the significance such a discussion by the *Wetzel* panel would have had.

IV. EEOC GUIDELINES

A. *Did EEOC Comply with the Intent of the Civil Rights Act?*

In further support of its holding that Liberty Mutual had violated Title VII, the *Wetzel* court analyzed the guidelines beginning with the legislative history of the Civil Rights Act:

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44. 417 U.S. at 496 n.20:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from its list of compensable disabilities. While it is true that only women can become pregnant, *it does not follow that every legislative classification concerning pregnancy is a sex-based classification* like those considered in Reed, supra, and Frontiero, supra. . .Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. . . . The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program accrue to members of both sexes. (Emphasis added.)

45. Note 23 *supra*.

46. *See, e.g.*, 75 COLUM. L. REV. 441 (1975). Judge Widener in his dissent in Gilbert v. General Elec. Co., 519 F.2d 661, 669 (4th Cir. 1975), opined that the footnote is dispositive of Title VII claims, *i.e.*, that the *Geduldig* decision was "written with an eye to Title VII cases certain to come." In Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975), the court stated that footnote 20 does not say that discrimination on the basis of pregnancy is never sex-based, but merely that not every legislative classification concerning pregnancy is sex-based. On the basis of *Geduldig* and footnote 20, the district court in Communications Workers of America v. American Tel. & Tel. Co., 379 F. Supp. 679 (S.D.N.Y. 1975), dismissed the Title VII action, but the appellate court, 513 F.2d 1024 (2d Cir. 1975), reversed and remanded, refusing to permit a footnote to rule an entire case.

> The legislative history pertaining to the addition of the word "sex" is indeed meager. It appears that the amendment to the Act was offered in a tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat.[47]

Regardless of the motivation for this addition, the Act was passed and discrimination on the basis of sex was specifically prohibited. While lack of legislative history does not affect the validity of prohibition of sexual discrimination, it does enhance the difficulty of delineating congressional intent with respect to the scope and construction of Title VII. Couched in broad terms, the Title was designed to reach and "eliminate any artificial or arbitrary impediments to employment"[48] and to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[49]

In 1972, Congress extensively amended Title VII but chose to by-pass an opportunity to expand or limit the Act's treatment of sex. To the *Wetzel* court, this indicated "congressional satisfaction with the operation and administration of the Act."[50] Counsel for Liberty Mutual agreed that Congress was displaying this satisfaction, but contended that the absence of substantive change militates against the court's interpretation, since "multiple federal administrative agencies charged with the responsibility of preventing sex discrimination in employment uniformly approved the type of insurance plan here at issue."[51] The Third Circuit did not attempt

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47. 511 F.2d at 204; 110 CONG. REC. 2484-85 (1964).

48. 511 F.2d at 204; H. REP. No. 914, 1964; 1964 U.S. Code Cong. & Ad. News 2401.

49. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

50. 511 F.2d at 204.

51. Brief for Appellants at 12. The brief describes several conditions which existed at the time of the 1972 amendments: the standard of legality under the Equal Pay Act (29 U.S.C. § 206(d)(1) (1970)) is whether employer contributions are equal for both men and women, not whether the benefits which accrue are greater for one sex than for the other; the Office of Federal Contract Compliance (O.F.C.C.) also uses this equal contributions test (*see* Executive Order 11246, 3 C.F.R. § 169 (Supp. 1974), as amended, and 42 U.S.C. § 2000e-3 for sources of O.F.C.C.'s authority); various federal agencies differentiated pregnancy under collective bargaining agreement health insurance policies; *e.g.*, 1973 Nat'l Ass'n of Letter Carriers Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance and Occupational Health, Form 41-51, Jan. 1973) and the 1973 American Fed'n of Gov't Employees Health Benefit Plan (U.S. Civ. Serv. Health, Form 41-26, Jan. 1973).

The appellant concluded that having shown no intention to erase this test in 1972, Congress permitted Title VII to remain unamended in this area.

Appellant chose to ignore, however, the more recently proposed guidelines which have been published, but not yet adopted, by O.F.C.C. These state that pregnancy and pregnancy-related disabilities must, under an employer's insurance plan or sick leave policy, be treated as a temporary disability, subject to the same treatment as all other temporary disabilities. 38 FED. REG. 35338.

to analyze these comments.

The court next examined the EEOC's guidelines. Congress, in § 2000e-12 of Title VII, authorized the EEOC to issue guidelines and regulations in an effort to comply with the statute. Due to the agency's expertise and ability to research the field, and the fact that Congress vested it with issuance power, courts have usually held that the administrative guidelines are entitled to "great deference."[52] The prestigious status of these guidelines, however, does have limitations. Where the application of the guidelines would be contrary to an obvious congressional intent, the congressional intent must prevail.[53] Liberty Mutual took this position, and further argued that the guidelines directly conflicted with the EEOC's prior position regarding the exclusion of pregnancy disability benefits.[54] In response to Liberty Mutual's contentions, the court referred to its former statement that there appeared to be no specific intention of Congress regarding this issue, other than to strike directly at the pervasive discrimination existing in employment. The broad language of the Act, the court continued, vests the EEOC with a wide latitude of interpretive powers provided these powers are exercised within the plain meaning of the statute. Any radical change of position adopted by the EEOC, therefore, providing it is not contrary to the legislative intent, is merely reflective of the conceptual transformations of our society of which an agency must keep abreast. "This evolutionary process is a necessary function of our legal system. . . ."[55]

B. *Did the Guidelines Comply with the Administrative Procedure Act?*

While the court's analysis of the homage due the guidelines appears convincing, it overlooked a technicality which could have been sufficiently dealt with and justified, without affecting the *Wetzel* decision. The provision giving the EEOC authority to issue guidelines contains the statement: "Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."[56] The Administrative Procedure

52. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

53. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973).

54. By arguing that the guidelines were inconsistent with congressional intent, Liberty Mutual contradicted its previous position that there was no legislative history concerning the addition of the word "sex."

The EEOC's prior position will be discussed p. 205 *infra*.

55. 511 F.2d at 205.

56. 42 U.S.C. § 2000e-12(a) (Supp. III, 1973).

Act[57] requires an agency broaching a rule to publish the proposed regulation in the *Federal Register* and to give notice of the time, place and nature of proceedings to furnish concerned parties an opportunity to petition for or against the rule.[58] The EEOC did not follow this procedure, and consequently an argument can be made[59] that since the guidelines were improperly issued, they should be totally disregarded by the court.[60] The *Wetzel* court chose not to take issue with this argument, possibly because of the exception to the notice requirements contained in the Administrative Procedure Act. The applicability of the exception to this set of facts is disputable. The Act itself draws a distinction between interpretative rules and substantive rules; the latter require notice while the former do not.[61] Obviously aware of this, the EEOC prefaced its 1972 guidelines with the declaration that since the material contained therein was interpretative in nature, the notice procedures of the Administrative Procedure Act were inapplicable. However, the label given to a rule by an administrative agency is not determinative,[62] for it is the substance of what the agency purports to submit that is decisive. Applying the factors weighed in *Pharmaceutical Manufacturers Association v. Finch*[63] to the guidelines pertaining to the exclusion of pregnancy, a strong argument can be made for the position that the guidelines were indeed substantive changes and the EEOC was obliged to comply with the Administrative Procedure Act's notice requirements.

The *Wetzel* court had at its disposal a variety of ways by which it could have attacked this position. Since the guidelines do not

57. 5 U.S.C. § 551 *et seq.* (1970).

58. 5 U.S.C. § 553(b) (1970).

59. This argument was offered by Liberty Mutual.

60. In addition to the fact that public hearings were not held, there is also a question of whether medical or financial studies concerning the necessity or possible impact of the guidelines were conducted prior to the issuance of the guidelines. See Comment, *Current Trends In Pregnancy Benefits—1972 E.E.O.C. Guidelines Interpreted*, 24 DEPAUL L. REV. 127, 130 (1974). *But see* Koontz, *Child Birth and Child-rearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480, 481 (1971).

61. 5 U.S.C. § 553(b)(A)(1970); *see* 24 DEPAUL L. REV. 127, 131 (1974).

62. Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 416 (1942); *see also* National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90, 95-97 (D.D.C. 1967), *aff'd*, 393 U.S. 18 (1968).

63. 307 F. Supp. 858 (D. Del. 1970), concluding that notice and opportunity for comment should be provided where the proposed regulation of general applicability has a substantial impact on the regulated industry. The court weighed: (1) the complexity and pervasiveness of the rules issued; (2) the drastic changes effected in existing law by the rules; (3) the degree of retroactivity and its impact; and (4) the confusion and controversy engendered by the practical difficulties of compliance with the new rules. 307 F. Supp. at 863. *See also* Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970).

have the force of law and are simply the agency's interpretation of Title VII, deference can be given them only as instructive materials despite the fact that they were not issued properly. Under the power of judicial review, the court is then free to determine whether the guidelines are reasonable constructions of congressional intent. The *Wetzel* court, as previously mentioned, concluded that they did display this intent.

Alternatively, the court could have discredited the contention that the guidelines were in fact drastic substantive changes from the EEOC's prior stance. Although the EEOC General Counsel Opinion letters[64] in early 1966, stated that pregnancy could be treated uniquely since the condition had no male counterpart, its present position became established in 1969[65] and was later reaffirmed in 1971.[66] The 1969 decision held that EEOC policy requires that pregnant employees be granted leaves of absence whether or not such leaves were granted for illnesses.[67] The 1971 decision dealt specifically with exclusion of benefits for pregnancy. Plans that included all other non-occupational disabilities but excluded pregnancy were held to be sexually discriminatory within the meaning of the statute. Therefore, it can be asserted that the guidelines, although different from the EEOC's position of 1966, were merely the embodiment of recent agency decisions.

This discussion suggests a course of action that the *Wetzel* court should have utilized to refute an argument based on the EEOC's noncompliance with the notice requirements. By deeming the guidelines interpretative rather than substantive, the court could have circumvented the necessity of such a discussion. This determination could have been justified by the prior EEOC decisions[68] and by subsequent congressional acquiescence demonstrated by its failure to amend or limit Title VII in 1972.

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64. E.E.O.C. General Counsel, Opinion Letter G.C. 588-65 (Jan. 28, 1966), cited in E.E.O.C. FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS 5 (Jan. 1-Mar. 31, 1966).

65. Decision No. 70-360, CCH (1973) EEOC Dec. ¶ 6084 (Dec. 16, 1969).

66. Decision No. 71-1474, CCH (1973) EEOC Dec. ¶ 6221 (March 19, 1971).

67. The Commission's rationale stemmed from the assumption that since pregnancy is a temporary disability unique to the female sex, there must be some special recognition for absence due to pregnancy in order to provide substantial equality in employment opportunities. This policy was also expressed in E.E.O.C. General Counsel Letters of November 15, 1966 (B.N.A.F.E.P. Rep. at 401:3032).

68. Notes 65 and 66 *supra*. Prior to the issuance of the guidelines, a gradual change of policy from the EEOC's prior position to that of the guidelines can be seen: Decision No. 71-562, CCH (1973) EEOC Dec. ¶ 6184 (Dec. 4, 1970) (conditioning eligibility for maternity leave on two years of employment violated Title VII); Decision No. 71-1474, CCH (1973) EEOC Dec. ¶ 6221 (March 19, 1971) (program that specifically denied female employees disabled due to pregnancy weekly benefits for 13 weeks violated Title VII): Decision No. 71-308, CCH

V. Should Pregnancy be a Compensable Disability?

Departing from a discussion of Title VII itself, the court went on to consider the basic characteristics of pregnancy and whether it should be a compensable disability. Liberty Mutual argued that pregnancy differs from covered illnesses and injuries in terms of its nature, severity, duration and frequency: it is neither a sickness nor a disability; it is not influenced by a motivation to recover; it is a voluntary condition; and it results in absences from employment substantially longer than any actual inability to work.[69] Generally speaking, leaves of absence and disability benefits provide the employee an opportunity to offset medical expenses and wage loss until (s)he is again capable of returning to work. Following Liberty Mutual's logic, the pregnant employee, while incurring similar medical expenses and wage loss, should be told that these forfeitures are somehow different simply because she is a female and because her pregnancy is a "natural" and "voluntary" occurrence. She should be further informed, it was argued, that since pregnancy is a uniquely female condition, rules and regulations regarding it cannot be discriminatory since, having no comparable male counterpart, all possibility of competition between the sexes is removed in this area. These arguments have some semantic and technical substance, for no one would deny the fact that men cannot become pregnant. Title VII and the EEOC certainly do not attempt to refute the idea that some groups have certain unique characteristics. Title VII and the guidelines, however, are aimed at the heart of discrimination, for they prohibit sex-based assumptions and stereotypes of comparative employment characteristics of women.[70]

The voluntariness defense is illustrative in this regard, for employers "assume" that all pregnancies are voluntary. This "assumption" runs contrary to today's trend toward increased numbers of abortions, religious prohibitions against contraceptives and abortions, and the fact that there is presently no means of contraception, short of surgery, that is 100 percent effective. It also ignores the mandate to consider individuals as individuals.[71] Even if one were to assume that voluntariness was a valid presupposition, what is the

(1973) EEOC Dec. ¶ 6170 (Sept. 17, 1970) (in absence of showing that denial of leaves of absence was a business necessity, employer's maintenance of the policy and discharge of employee in sixth month was a violation of Title VII).

69. Brief for Appellant at 18.

70. 29 C.F.R. § 1604.2(a)(1)(i)(1975).

71. 29 C.F.R. § 1604.2(a)(1)(ii)(1975): "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

justification for plans, like Liberty Mutual's, which include other voluntary disabilities such as cosmetic surgery and hair transplants? The voluntariness argument clearly appears to be directed at the pregnant woman unless it can be said that pregnancy is similar to the other excluded disabilities, namely attempted suicides and injuries resulting from war-related activities.

An explanation is also wanting for plans, again like Liberty Mutual's, which provide compensation for disabilities resulting from voluntary activities such as sports events, or uniquely male-related disabilities such as prostatectomies, race-linked diseases such as sickle-cell anemia, and illnesses whose incidence among males is predominant such as gout.[72] Can it be seriously argued that a plan excluding sickle-cell anemia from coverage would be upheld as justifiable or non-discriminatory? The *Wetzel* court specifically thought not by stating, "We believe that pregnancy should be treated as any other temporary disability."[73] The Commission, too, feels that while pregnancy may not be a disability or a sickness, it should be *treated* as such for job-related purposes since the financial results between it and other temporary disabilities are sufficiently similar.[74] The EEOC does not demand that companies extensively expand their plans but simply requires that they treat pregnancy as other temporary disabilities.[75]

Inherent in the policies that now exist, lies an assumption that a pregnant woman is incapable of working for certain periods of time before and after childbirth. Such policies ignore individual circumstances and characteristics, along with the woman's actual physical condition. As an example, the woman who brought suit in *Seaman v. Spring Lake Park Independent School District No. 16*[76] taught school up until the day before delivery and resumed her job responsibilities fifteen working days later. Plans assuming inability to work for extended periods, then, treat similarly situated persons, *i.e.*, employees, differently on the basis of sex, for only women can become pregnant. "[W]omen, to be treated without discrimina-

72. Ratio of males to females is 19 to 1. Merch Manual (10th ed. 1961).

73. 511 F.2d at 206.

74. 29 C.F.R. § 1604.10(b)(1975); see note 6 *supra*.

75. *But see* 29 C.F.R. § 1604.10(c)(1975) where termination caused by an employment policy having insufficient or no leave violates the Act if it has a disparate effect on one sex and is not justified by business necessity. There is no definition of a "sufficient" leave within the guidelines. This creates the possibility that an employer may be required to provide such a plan.

76. 387 F. Supp. 1168 (D. Minn. 1974) holding that treating pregnancy-related disabilities differently from other kinds of disabilities with respect to eligibility for sick pay does not constitute discrimination under the due process or equal protection clauses.

tion, must be permitted to be women,"[77] and this means the right to be women without having to bear the burden of disparate employment wages and fringe benefits.

Liberty Mutual also raised the defense of cost, *i.e.*, that the company had a legitimate interest in maintaining the financial integrity of its plan. The court again respected the EEOC's guidelines[78] and refused to consider cost a justifiable defense. Even the exemption granted to bona fide occupational qualifications in the guidelines[79] appears, by a reading of the section and by judicial interpretation,[80] to apply only to the hiring of employees and not to benefits provided. The threat of devastating or increasing cost, the very defense that was upheld in *Geduldig*, was held to be immaterial by the *Wetzel* court.

VI. CONCLUSION

The Supreme Court's treatment of this issue will be interesting to witness, for it must keep in mind not only the very definite trend of judicial adjudications and the specific interpretation rendered by the EEOC's own decisions and guidelines, but also the realities of modern day society. Past holdings[81] of the Court itself lean toward an affirmance of the *Wetzel* conclusion, and its ruling in *Cleveland Board of Education v. LaFleur*,[82] demonstrated that more than a cursory glance will be afforded regulations concerning pregnancy. Affirmance, though, would mean more than concurrence with these authorities for it could translate into a theoretical retreat from its *Geduldig* position.

When Congress enacted Title VII and created the EEOC, that body, elected as representative of the people, put on record the fact that discrimination in employment, be it against race, religion, national origin or sex, no longer has a place and will not be tolerated in American society. To enforce this view, the EEOC was given the power to establish guidelines and set forth regulations to carry out the intentions of Congress. Should the Supreme Court reverse the *Wetzel* ruling, it may very well simultaneously strip the EEOC of

77. Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 721-22.

78. 511 F.2d at 204.

79. 29 C.F.R. § 1604.2(a)(2)(1975).

80. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

81. See cases cited note 23 *supra*.

82. 414 U.S. 632 (1974) holding that arbitrary termination dates for pregnant employees have no valid relationship to the state's interest and therefore violate the due process clause.

its viability and powers as an administrative agency. A reversal could begin a rule of law that totally ignores and subordinates the economic needs of pregnant women. In the international picture, the United States presently stands as one of a decreasing number of countries throughout the world which makes no provision to compensate women who must temporarily cease employment because of pregnancy.[83]

While reversal may destroy the financial stability of pregnant employees, affirmance, too, could take its toll. Without legislation requiring private employers to provide disability plans, companies could, in an effort to avoid "prohibitive" costs, eliminate these plans altogether. While this is a possibility, it does not seem to be a realistic probability for company health and insurance plans have developed into such an integrated part of the total employment package that elimination of these plans could not only result in possible economic depression for those who become ill or disabled, but it could also affect the morale of company employees.

The declaration from Congress, made nearly twelve years ago, a matter which concerns over one half of the United States' population, will soon be tested and considered by the United States Supreme Court. For all practical purposes, the decision will be the final word, until legislation states differently, on whether a woman must actually choose between motherhood and career opportunities or whether she will be given the necessary encouragement to contribute equally with her male counterpart.

Mary H. Egger

83. United States Dep't of Labor, Int'l Rep. No. 6, WOMEN IN THE WORLD TODAY: MATERNITY PROTECTION AND BENEFITS IN 92 COUNTRIES (1963). This report indicates that 72 countries provide at least six weeks of paid leave for maternity purposes; *see* Conlin, Equal Protection vs. Equal Rights Amendment—Where Are We Now?, 24 DRAKE L. REV. 259, 304, n.366 (1975).