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All Things Being Equal..General Electric Co. v. Gilbert: An Analysis

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ALL THINGS BEING EQUAL . . . *GENERAL ELECTRIC CO. v. GILBERT:* AN ANALYSIS

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> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.[1]

It is debatable whether the Equal Rights Amendment, if ratified, will change the application of the United States Supreme Court's decision in *General Electric Co. v. Gilbert.*[2] Regardless, the Court on December 7, 1976,[3] held that General Electric's disability benefits plan is *not* discriminatory on the basis of sex because of its *failure* to cover pregnancy-related disabilities.

Section 703(a)(1) of Title VII of the 1964 Civil Rights Act provides in relevant part that it shall be an unlawful employment practice for an employer

> . . . 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. (Emphasis added)[4]

Section 703(a)(2) proscribes classifications by an employer which would "limit, segregate, or classify his employees . . . in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."[5]

In *General Electric,* female employees brought an action against their employer, citing a violation of only section 703(a)(1), asserting that the employer's disability plan discriminated on the basis of sex in denying benefits for disabilities arising from pregnancy. The Supreme Court decision reversed both the judgments at the trial and appellate levels.[6]

The Court, in its decision, heavily relied upon its earlier decision of

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[1] Proposed twenty-seventh amendment to the U.S. CONST.

[2] —U.S.—, 97 S.Ct. 401 (1976).

[3] Ironically, the 35th anniversary of the bombing of Pearl Harbor.

[4] Section 703(a)(1) was part of the 1972 amendments which extended Title VII coverage over state and local governmental employees.

[5] 42 U.S.C. 2000e-3.

[6] 375 F.Supp. 367 (E.D. Va. 1974); 519 F.2d 661 (2nd Cir. 1975).

Geduldig v. Aiello[7], in stating that "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan like petitioner's providing general coverage is not a gender-based discrimination at all."[8] The Court of Appeals considered *Geduldig,* but the majority felt that it was *not* controlling, because it arose under the equal protection clause of the fourteenth amendment and *not* under Title VII.[9] On this basis, the Supreme Court granted *certiorari.*

General Electric was a private employment complaint, whereas *Geduldig* was one of public employment. It has been generally accepted, however, that *General Electric* is applicable to public education employment whereas this decision might be dispositive of all arguments to the effect that a teacher's sick leave must be made available to teachers absent because of pregnancy and child birth. Prior decisions in this regard had almost uniformly held that a school board policy which denies such paid benefits during maternity leave violates Title VII and more specifically, the Equal Employment Opportunity Commission (EEOC) regulations.[10] The issue, however, is *not* necessarily settled, as now, the Supreme Court has accepted certiorari in two cases involving job discrimination on the basis of pregnancy.[11] "Even in face of *General Electric,* nevertheless, pregnant women in both cases argue identically to those issues previously raised in *General Electric.*"[12]

More recently, the U.S. Court of Appeals at Chicago, determined that the *General Electric* ruling does not preclude a finding of unlawful sex discrimination if, though facially neutral, the paid sick leave plan which excludes pregnancy, has a discriminatory effect on one sex *and* if the added costs of inclusion would be minimal.[13] *General Electric,* as will be explored herein, dealt somewhat indirectly with "costs" which represents a critical denominator, more so than that found in public employment and more specifically, within a school district.

The applicability of *General Electric* to public employment can, perhaps, be surmised by an analysis of the case itself.

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[7] 417 U.S. 484 (1974); for a more extensive discussion of this case, *see* French, *LaFleur, Cohen and Aiello: An Aftermath,* 4 NOLPE LAW JOURNAL 160 (1974).

[8] 97 S.Ct. at 408; in *Geduldig, supra.*, the disability insurance system was funded entirely from contributions deducted from the wages of participating employees, at a rate of 1% of the employee's salary up to an annual maximum of $85. In all other relevant respects, the operation of the program was similar to General Electric's disability benefits plan, in that General Electric provided and financed a plan for all employees which paid weekly non-occupational sickness and accident benefits. Excluded, however, were *disabilities arising from pregnancy.*

[9] 519 F.2d 661, 666-667; see also the dissent at 668-669.

[10] Vineyard v. Hollister School District, 64 F.R.D. 580 (N.D. Cal. 1974), 43 L. W. 2217.

[11] Satty v. Nashville Gas Co., 522 F.2d 850, 11 FEP 1 (6th Cir. 1975); Berg v. Richmond Univ. Sch. Dist., 11 FEP 1285 (9th Cir. 1975); *see* 46 LW 3135 (Sept. 13, 1977).

[12] In each case the lower court told the employer that (1) denying sick pay for pregnancy-occasioned absences from work and (2) requiring a pregnant worker to begin maternity leave at a time determined by the employer violate Title VII. Additionally, in one case, the employer's denial of all previously accumulated seniority for purposes of bidding on job openings upon return to work was held unlawful.

[13] Love v. Waukesha Joint School District.

In his opinion for the majority,[14] Mr. Justice Rehnquist relied not only upon *Geduldig,* but referred to *Reed v. Reed*[15] and *Frontiero v. Richardson*[16] as well, noting that these two cases involved discrimination based upon "gender", while *Geduldig* and *General Electric* did not exclude *anyone* from benefit eligibility on the basis of gender, but merely removed one physical condition, *i.e.*, pregnancy. Conclusively, the Court stated as follows:

> The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability benefits plan was not in itself discrimination based on sex.[17]

The Court emphasized that there had been no showing of gender-based discrimination and that such a showing must be found to "trigger" the finding of an unlawful employment practice under Title VII.

The Court further distinguished "pregnancy" from other diseases or disabilities, by relying upon the District Court's language, "(pregnancy) is not a 'disease' at all, and is often a voluntarily undertaken and desired condition."[18] Although pregnancy is confined to women, it is not *comparable* in all other respects to covered diseases or disabilities.[19] The Court noted that the petitioners *failed* to meet the established burden of raising a question of discrimination, and even though the "effect" of the plan "tends" to create a distinction among the sexes, it was not so devised nor intended.

The Court proceded to recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another.[20] Notwithstanding proof or nonproof of "intent" to discriminate, the rule of the *General Electric* case is "absent a showing of gender-based discrimination, there can be no violation of §703 (a) (1) of Title VII."[21]

The Cost Factor

The *Geduldig* "test" of gender-based discrimination first alludes to a showing that "the fiscal and actuarial benefits of the program . . . accrue to members of both sexes."[22] In this regard, the Court stated as follows:

> . . . (t)here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. As

[14] *General Electric* was a 6-3 decision with Mr. Justice Brennan writing for himself and Mr. Justice Marshall in dissent, and Mr. Justice Stewart writing his own dissent.

[15] 404 U.S. 71 (1971).

[16] 411 U.S. 677 (1973).

[17] 97 S.Ct. at 407.

[18] 375 F.Supp. at 375, 377.

[19] 97 S.Ct. at 408.

[20] *See* Washington v. Davis, —U.S.—, 96 S.Ct. 2040, 2051 (1976); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), wherein it was held that the burden placed on the employers "of showing that any given requirement must have a manifest relationship to the employment in question, does not arise until the discriminatory effect has been shown.

[21] *See* n.15, 97 S.Ct. at 409.

[22] 417 U.S. at 497, n.20.

> there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, *gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.*[23](emphasis added)

The Court followed by saying:

> For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks.[24]

The "choice" of an employer to provide any type of program at all was discussed by the Court by saying that the "underinclusion" problem might *well* be a violation of Title VII.[25] This particular inquiry strongly resembles the holding in *Dandridge v. Williams*,[26] wherein the Court stated that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[27] While respondent Gilbert admitted that General Electric had no obligation to establish any fringe benefit program, she argued that once established, the program must not "cause" her greater expenditure for coverage than that expended by her male counterpart.[28]

The EEOC guidelines[29] broadly define the term "fringe benefits", and

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[23] 97 S.Ct. at 409.

[24] *Id.*

[25] *See* n. 18 in this regard, 97 S.Ct. at 410.

[26] 397 U.S. 471 (1970).

[27] *Id.* at 486–487.

[28] *See* n. 17 and n. 18, 97 S.Ct. at 409–410.

[29] C.F.R. §1604.9 (1975) provides:

"(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

"(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the 'head of the household' or 'principal wage earner' in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that 'head of household' or 'principal wage earner' status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.

"(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

"(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

specifically overrule any defense as to "cost" to one sex, as opposed to the other.[30] There is a distinction, however, as between the cost to the employee and the cost to the employer. The District Court relied heavily on the premise that "all things being equal (and they typically are not), the economic *benefit* factor must be of equal force in its application to either sex."[31]

The Regulation Factor

The EEOC's Guideline at issue herein,[32] however, which was said *not* to be a procedural guideline at all, (contrary to Congressional enactment,[33]) was taken to task by the Court.[34]

In an effort to determine the "deference" to be given in the construction of the EEOC Guidelines[35] the Court made the following findings a matter of record:

1. The guideline was promulgated eight years after the enactment of Title VII:
2. The guideline contradicts an earlier position taken by the EEOC;
3. The guideline somewhat conflicts with the Equal Pay Act, section 6(d);
4. The guideline is devoid of recent legislative history.[36]

From the foregoing findings, the Court considered *Skidmore v. Swift & Co.*[37] to be conclusive, wherein it was said:

> We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[38]

"(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn."

[30] *See* n.23, *supra.*

[31] 375 F.Supp. at 383.

[32] 29 CFR §1604.10(b), provides:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all 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.

[Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

[33] 42 U.S.C. §2000e-12(a) which provides the EEOC "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter (§ 713(a)).

[34] 97 S.Ct. at 410–413.

[35] *Griggs, supra.* at 433–434.

[36] 97 S.Ct. at 412; see also §703(h) of Title VII.

[37] 323 U.S. 134 (1944).

[38] *Id.* at 140.

In concluding its "indictment" of the guideline in question, the Court embraced something reminiscent, perhaps, of Congressional intent when the fourteenth amendment was drafted.

> The concept of 'discrimination', of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . . ' without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant. . . . There is surely no reason for any such inference here.[39]

One might find that the position of the majority in regard to discriminatory "effect" is somewhat contradictory to the premise of provision of benefits commensurate with the employees' needs. Factually, pregnancy is a common "temporary" disability of a female and because it is unique only as to females, such does not necessarily eliminate the "desirability" factor because the "effect" does appear to create a unilateral benefit which lessens the package value to women.

Essentially, the disposition of *General Electric* has resulted in the elimination of Title VII as a protective force for women who are denied certain employee benefits even though similar benefits are readily provided for the men. The female employee is now advised to recognize that pregnancy itself, does not entitle her to any unique employment rights.[40]

THE DISSENT: An Indictment of Geduldig

Both Justices Brennan and Marshall dissented having previously dissented in *Geduldig*. Accordingly, their arguments remain the same.[41] It is noteworthy to mention that the *General Electric* decision, in effect, rejected the conclusions of six Courts of Appeal that had previously addressed the question.[42] Justice Stevens, however, noted that the word "discriminate" does not appear in the equal protection clause.[43] Further, he "simplified" the

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[39] 97 S.Ct. at 412–413; it is further noteworthy that *Griggs, supra,* involved an employer who had required a high school education or the passing of a standardized general intelligence test as a condition of employment in or transfer to jobs. These standards, challenged by thirteen blacks, were found unlawful by the Court as not significantly related to job performance and operating to disqualify blacks at a substantially higher rate than white applicants. The Court found that there was a "racially discriminatory purpose" while in *Washington, supra.*, note 20, such a "purpose" was not found.

[40] SCHLEI, GROSSMAN, EMPLOYMENT DISCRIMINATION LAW ch. 12, pp. 319–320 (B.N.A. 1976).

[41] Mr. Justice Douglas as well dissented in *Geduldig,* 417 U.S. 495.

[42] 97 S.Ct. at 413. *See* Communication Workers of America v. A.T. & T. Co., 513 F.2d 1024 (2nd Cir. 1975), *petition for cert. pending,* No. 74–1601; Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3rd Cir 1975), *vacated on juris grounds,* 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir.), *cert. granted,* 423 U.S. 822, 96 S.Ct. 36, 46 L.Ed.2d 39 (1975); Tyler v. Vickery, 517 F.2d 1089, 1097–1099 (5th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *petition for cert. pending,* No. 75–536; Hutchinson v. Lake Oswego School District., 519 F.2d 961 (9th Cir. 1975), *petition for cert. pending,* No. 75–1049.

[43] 97 S.Ct. at 420.

matter in terms of one necessitating "statutory construction."[44] In reliance upon the principle of contract law, he seemingly "shifted" the burden of proof to the company herein, by first requiring justification of the disparate treatment of pregnant women in certain situations.[45] Additionally, he argued what might be termed as the "rule and risk" test, *i.e.*, "the *rule* at issue places the *risk* of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex."[46] Conclusively, he remarked that *Geduldig* simply does not apply herein.[47]

Justices Brennan and Marshall, in addition to their "indictment" of *Geduldig*,[48] determined that the Court had simply disregarded the history of General Electric practices that have served "to undercut the employment opportunities of women who become pregnant while employed."[49] The dissent rejected the Court's reasoning that pregnancy may be excluded from benefits because it is a "voluntary" condition, pointing out that the plan covers sports injuries, attempted suicides, venereal disease treatment, injuries received in a fight and elective cosmetic surgery.[50]

The real issue, the dissent argued, was whether the social policies and aims of Title VII "fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women, but not to men."[51] The dissent further chided the Court for its treatment of the EEOC guidelines, saying it was bitter irony that "the care that preceded promulgation of the 1972 guideline is today, condemned by the Court as tardy indecisiveness, [EEOC's] unwillingness irresponsibly to challenge employers' practices during the formative period is labelled as evidence of inconsistency, and this indecisiveness and inconsistency are bootstrapped into reasons for denying the Commission's interpretation its due deference."[52]

The dissent, in distinguishing *Geduldig*, alluded to the point that the California regulation in question, was one of legislative action and the "presumption of validity" factor, coupled with California's legitimate fiscal concerns, satisfied the Court in regard to non-denial of equal protection.[53]

In contending that the Court here did "not grapple with *Geduldig* on its own terms", the dissent determined an exclusion test composed of (1) a product of neutral, persuasive actuarial considerations, or (2) a policy that purposefully downgraded the women's role in the labor force. The dissent chose the latter, saying that the Court disregarded *General Electric's* past practices

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[44] *Id.*

[45] Contra perhaps to the "establishment of discrimination requirement of Title VII itself"; *see* n.3, 97 S.Ct. at 420.

[46] *See* n.5, *Id.*

[47] *See* n.3, *Id.*

[48] *See* dissent, 97 S.Ct. at 413–420.

[49] 97 S.Ct. at 415; *see also* n.1.

[50] *Id.* at 416.

[51] *Id.* at 418.

[52] *Id.* at 419.

[53] *Id.* at 415; "This Court has held that, consistently with the Equal Protection Clause, a *State* 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the other . . .'" Geduldig v. Aiello, 417 U.S. at 495.

as to employment opportunities of pregnant women.[54] In this regard, the dissent referred to the "irrebutable presumption" rule in *Cleveland Board of Education v. LaFleur,*[55] Even so, the invalidation of maternity leave policies pursuant to Title VII, requires a determination that such policies constitute sex discrimination.[56]

Geduldig was contested upon "equal protection" grounds alone:[57] *General Electric,* like *Wetzel*[58] which had gone before it, followed the administrative process of the EEOC pursuant to the statutory authority of Title VII. The guideline, if adhered to, leaves no doubt as to a determination in this type of litigation, if followed.[59] Obviously, then, the Court *had* to distinguish away the guideline in order that its finding could embrace the premise of *Geduldig, i.e.,* the nondenial of equal protection. The dissent, then, vehemently argued the "great deference" doctrine and in this regard, stated:

> These policy formulations are reasonable responses to the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force. . . . In dictating pregnancy coverage under Title VII, EEOC's guideline merely settled upon a solution now accepted by every other Western industrial country.[60]

Previously, the dissent had, in no uncertain terms, stated its interpretation of the majority's "inclination" by saying:

> ...the Court today abandons this [great deference] standard in order squarely to repudiate the 1972 Commission guideline providing that '(d)isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities...[under] any health or temporary disability insurance or sick leave plan....29 CFR §1604.10(b).[61]

Justice Blackman noted that he concurred in the Court's holding that the exclusion of pregnancy disability benefits was not per se a violation of section 703(a) (1) and that plaintiffs had the burden of proving discrimination, which they had not carried. He added that he did not join in any suggestion, if there was one, in the Court's opinion that a discriminatory effect may never be the controlling factor or that *Griggs,*[62] is no longer good law. *Griggs* held that the discriminatory effect of an employment test establishes a prima facie case of discrimination.

Justice Stewart noted that he did not read the Court's opinion as casting any question on the validity of *Griggs.*

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[54] 375 F.Supp. 367, 382, 383.

[55] 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *see* n.4, *supra.*

[56] French, *Pregnant Teachers,* 41 HANDBOOK ON CONTEMPORARY EDUCATION 206, 210 (1976).

[57] French, *Wetzel v. Liberty Mutual Insurance Co.: An Analysis,* PREGNANT TEACHERS: ANNOTATED (1977).

[58] Wetzel v. Liberty Mutual Insurance Co., 511 F.2d. 199 (3rd Cir. 1975), *vacated on juris. grounds,* 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d. 435 (1976).

[59] *See* n.32, *supra.*

[60] 97 S.Ct. at 419.

[61] *Id.* at 418; see also at 410 and n.19.

[62] *See* n.35, supra.

The Criteria Factor

The "sick leave" question, has existed as a problem for school districts in recent years. Notwithstanding the dictate of the EEOC guideline at issue herein, typically, state statutes did *not* authorize such expenditures for pregnancy. To grant maternity leave without pay to a female employee when she and her doctor determined same and permitting her subsequent return accordingly,[63] is one thing; paying out school district funds for something *not* authorized by state statute,[64] is quite another.

Although most "persuasive" litigation[65] has been federal in nature, some state courts have found themselves amidst the controversy. The Supreme Judicial Court of Massachustts held that categorical disallowance of all sick pay for disabilities related to pregnancy was improper, when such pay was allowed for other disabilities whether "voluntary, predictable, normal or unique."[66]

More recently, *General Electric* was construed by a Federal Court in South Carolina,[67] which held that a school's policy of nonrenewal of teacher contracts, where a *predicated* period of absence is indicated, does *not* constitute "gender-based discrimination."

The Court stated:

> While *General Electric* held that a distinction that is not sex related on its face could be a violation of the Equal Protection Clause and of Title VII if it is a "pretext designed to effect an invidious discrimination against the members of one sex," no sex-related distinctions are present here. The school board's policy is applicable to all absences, whether related to gender-linked physical disabilities or not.[68]

Accordingly, a "sick leave" policy, so long as it is applicable to all "sickness-related" absences, could stand, whether related to gender-linked physical disabilities or not.

The Supreme Court, in previously interpreting Title VII, has held that employment criteria which have a disparate impact on the *hiring* or *promotion* of minorities must be ". . . demonstrably a reasonable measure of job performance."[69] Obviously including termination as a suspect category,

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[63] *See LaFluer, supra.* in which the Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after childbirth violated the fourteenth amendment. The Court noted that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause", 414 U.S. at 639, 94 S.Ct. at 796; accordingly, the case was *not* one of "equal protection".

[64] Prior to 1976, Oklahoma, as well as several states, had no statutory authorization for pregnancy (maternity) leave with pay. Title 70, O.S. 1976 §6-104 now provides, in part, "The plan (sick leave) *shall* provide that a teacher may be absent from his or her duties due to personal accidental injury, illness or pregnancy . . . without the loss of salary . . ."

[65] 97 S.Ct. at 413.

[66] *See* Black v. School Committee of Malden, 310 N.E.2d 330 (Mass. 1974); the same conclusion was reached by the Supreme Court of Iowa in *Cedar Rapids Community School District v. Parr*, 227 N.W.2d. 486 (Iowa 1975).

[67] Mitchell v. Board of Trustees, 46 L.W. 2113.

[68] *Id.*

[69] *Griggs, supra.* at 436; *see also* Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J OF L. & EDUC. 429, 439 (Oct. 1976).

General Electric's facts do not fall within any of the three. It is clear that the rule that statutory classifications, which are either based on certain "suspect" criteria, or affect certain "fundamental rights," will be held to deny equal protection unless justified by a "compelling government interest."[70] Further, "a reasonable basis for state action ought to dispose of the suspect standard and need not require proof of a compelling governmental interest."[71]

Conclusion

The fourteenth amendment requires that unemployment compensation boards, no less than school boards,[72] must achieve legitimate state ends through more individualized means, when basic human liberties are at stake.[73] Accordingly, a presumption of incapacity and unavailability for employment,[74] differs from "the exclusion of pregnancy-related disabilities from coverage."[75]

It has been said that the Equal Rights Amendment will reinforce Title VII, making it more difficult for employers to circumvent the guidelines established by the EEOC, and that compliance with Title VII will be accelerated.[76] All things being equal, however, the Supreme Court has held that a disability benefits plan does *not* violate Title VII because of its failure to cover pregnancy-related disabilities.[77]

Pending a determination by the high court in *Nashville Gas* and *Rickman*,[78] it will be difficult to ascertain the alleged "finality" of *General Electric*. Additionally, Title IX of the Education Amendments to the 1964 Civil Rights Act[79] may be the alternative remedy available to the public education employee, as the regulations[80] include a provision as to public employee "fringe benefits"[81] and "pregnancy".[82] Title IX, which bans sex discrimination in "any education program or activity receiving Federal financial assistance, "has been held not to create a private individual right of action for sex discrimination,[83] and accordingly, would be of no relief to General Electric employees or others in a similar situation.

[70] Mr. Justice Harlan speaking in *Levy v. Louisiana*, 391 U.S. 68 (1968); LaBine v. Vincent, 401 U.S. 532 (1971); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[71] Dandridge v. Williams, 397 U.S. 471 (1970); *cf.* also Richardson v. Belcher, 404 U.S. 78 (1971).

[72] *LaFluer, supra.*

[73] Turner v. Dept. of Employment Security & Board of Review of the Industrial Commission of Utah, 96 S.Ct. 249, 251 (1975).

[74] In *LaFluer, supra.*, the "forced" commencement of leave was referred to as a "conclusive presumption" and the return restriction was classified as an "irrebuttable presumption", previously noted by the Court in *Vlandis v. Kline*, 412 U.S. 441, 446.

[75] 97 S.Ct. at 408.

[76] *See* DELSMAN, EVERYTHING YOU NEED TO KNOW ABOUT ERA* 212 (Meranza Press, 1975).

[77] 97 S.Ct. at 413; the judgment of the Fourth Circuit Court of Appeals (519 F.2d. 661) was reversed and accordingly, the distinction herein is now permissive.

[78] *See* n.11, *supra.*

[79] *See* 20 U.S.C. §1681 *et seq.*

[80] 40 Fed. Reg. 108 (June 4, 1975).

[81] Reg. #86.56, *Id.*

[82] Reg. #86.57, *Id.*

[83] Cannon v. University of Chicago, 46 LW 2118.