South Carolina Law Review

Volume 28 | Issue 2 Article 5

Summer 6-1-1976

# Employment Law--Sex Discrimination--Fourth Circuit Holds Private Employer's Denial of Pregnancy-Related Disability Benefits Sex Discrimination and Violative of Title VII. Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), cert. granted, 423 U.S. 822 (1975)

W. H. Boyd

# COMMENT

EMPLOYMENT LAW—SEX DISCRIMINATION—Fourth Circuit Holds Private Employer's Denial of Pregnancy-Related Disability Benefits Sex Discrimination and Violative of Title VII. *Gilbert v. General Electric Co.*, 519 F.2d 661 (4th Cir.), *cert. granted*, 423 U.S. 822 (1975).

Appellees, female employees of Appellant General Electric, brought a class action[1] seeking affirmative injunctive relief under title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.[2] Appellees contended that General Electric's denial of pregnancy-related disability benefits[3] constituted sex discrimination in violation of section 2000e-2(a) of title VII and the Equal Employment Opportunity Commission (EEOC) Guidelines[4] issued thereunder. The United States Dis-

1. Each of the original named plaintiffs was a G.E. employee who became pregnant during 1971. Each made claims for sickness and accident (S & A) benefits which were denied. Several of the plaintiffs filed charges with the Equal Employment Opportunity Commission and, upon waiting the requisite period, brought this suit with their local and national unions, International Union of Electrical Radio and Machine Workers, Local 161, and International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, as co-plaintiffs.

The original personal plaintiffs were representatives of two classes: all females who were or had been employed by G.E. on or after September 14, 1971 or who became so employed during the pendency of this action, and all female employees who became pregnant and were denied S & A benefits or would be denied S & A benefits therefor from September 14, 1971. The class numbered approximately 100,000 women employed at hundreds of G.E. plant locations across the nation.

2. 42 U.S.C. § 2000e-2(a) (Supp. II, 1972) provides:

It shall be an unlawful employment practice for an employer —

(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; or

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

3. G.E. provided weekly nonoccupational S & A benefit payments to all its employees in an amount equal to 60 percent of an employee's straight time weekly wage, to a maximum benefit of $150 per week for each week the employee is unable to work because of a disability resulting from a nonoccupational accident or sickness. The benefit payments could continue for a maximum total of 26 weeks for any one continuous period or successive periods of disability due to the same or related cause. The coverage, however, did not include sickness and other disabilities arising from pregnancy, miscarriage or childbirth.

4. 29 C.F.R. § 1604.9 (1975) provides in pertinent part:

trict Court for the Eastern District of Virginia held that the denial of pregnancy-related disabilities violated title VII and granted Appellees the relief requested.[5] Upon appeal by General Electric, the Fourth Circuit, with one judge dissenting, affirmed,[6] holding that General Electric's exclusion of pregnancy-related disability from its program was prohibited by title VII.

Title VII of the Civil Rights Act of 1964 was enacted to ensure equality of employment opportunity, and specifically to eliminate discrimination in employment based upon race, color, sex, religion, or national origin.[7] The EEOC was created by Congress to accomplish the purposes of the title and was empowered to issue the guidelines necessary to end discriminatory practices.[8] Pursuant to this authority, the EEOC has issued guidelines relating to sex discrimination, two of which are of critical importance to an analysis of the issues presented in *Gilbert*.[9] While agency guidelines have usually been accorded great deference by the court where the promulgating agency has been charged by Con-

---

(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.

29 C.F.R. § 1604.10(b) (1975) 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. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

5. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974).

6. Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir.), *cert. granted*, 423 U.S. 822 (1975).

7. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). The legislative history pertaining to the addition of "sex" is sparse. Apparently, the word was added to the language of the title as a tongue-in-cheek gesture by a Southern Congressman whose apparent intent was to undermine the title and bring about its defeat. *See* 110 CONG. REC. 2577-85 (1964).

8. *See* 42 U.S.C. § 2000e-4 (1964).

9. For the content of the two guidelines pertinent here, see note 4 *supra*. In amending the title in 1972, Congress made no substantive changes regarding sex discrimination, which has been interpreted as an indication of Congressional satisfaction with the administration of the title by the EEOC. *See* Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 204 (3d Cir. 1975).

gress to enforce a specific statute,[10] the authority of the EEOC guidelines in sex discrimination situations was substantially jeopardized by the Supreme Court's opinion in *Geduldig v. Aiello*.[11]

In *Aiello*, four female plaintiffs[12] brought an action challenging the constitutionality of a provision of the California disability insurance program. That program provided benefits to private employees temporarily disabled from working by an injury or illness not covered by workmen's compensation,[13] but excluded from its coverage those disabilities which were pregnancy-related.[14] A three-judge district court upheld the plaintiffs' contentions.[15] The Supreme Court, after holding that a decision of a California appellate court[16] striking down the exclusion of abnormal pregnancies from the program rendered moot the claims of the three plaintiffs who had suffered disability from other than normal pregnancy and delivery,[17] reversed as to the remaining plaintiff, holding that California's decision not to insure the risk of disability resulting from normal pregnancy does not constitute an invidious discrimination violative of the Equal Protection Clause.[18] Stressing the legitimate concerns of the state in (1)

10. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

11. 417 U.S. 484 (1974).

12. The plaintiffs-appellees, each of whom had paid sufficient amounts into the State's Disability Fund to be eligible for benefits under the program, became pregnant and suffered employment disabilities as a result of their pregnancies. The disabilities of three of the appellees, Carolyn Aiello, Augustina Armendariz and Elizabeth Johnson, were attributed to abnormal complications encountered during their pregnancies. The fourth, Jacqueline Jaramillo, experienced a normal pregnancy, which was the sole cause of her disability.

13. *See* CAL. UNEMP. INS. CODE § 100 *et seq.* (West 1972). Under the provisions of the California Act, employees contributed to an Unemployment Compensation Disability Fund one percent of their salary up to an annual maximum of $85. No disability lasting less than eight days was compensable, except when the employee was hospitalized. Benefits were not paid for a single disability exceeding twenty-six weeks. The only other disabilities not compensable under the California program were those resulting from an individual's court commitment as a dipsomaniac, drug addict or sexual psychopath, and certain disabilities resulting from pregnancy.

14. The challenged provisions defined "disability" to exclude from coverage certain disabilities resulting from pregnancy: "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." CAL. UNEMP. INS. CODE § 2626 (West 1972).

15. *See* Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973).

16. Rentzer v. California Unemp. Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).

17. 417 U.S. at 492.

18. In his opinion for a 6-3 majority, Justice Stewart stated:

> We cannot agree that the exclusion of this disability from coverage amounts

maintaining the self-supporting nature of its program, (2) adequately compensating those disabilities that are included rather than inadequately protecting against all risks, and (3) maintaining a contribution rate not unduly burdensome on low-income employees,[19] Justice Stewart held:

> These policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.[20]

Although *Aiello* was decided upon Equal Protection grounds, Justice Stewart, in responding to the dissent of Justice Brennan, included language in a footnote which, although not essential to the holding of the majority opinion, nevertheless provoked a storm of controversy in the title VII area:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71 (1971) . . . and *Frontiero v. Richardson*, 411 U.S. 677 . . . (1973) involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does

---

to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure . . . . 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 others . . . ." Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the Courts will not interpose their judgment as to the appropriate stopping point. "[T]he 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."

*Id.* at 494-95 (citations omitted).

19. *Id.* at 496.

20. *Id.* at 496-97.

> not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero* . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. 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 lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divided 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 . . . .[21]

Justice Brennan, writing for the dissent, assailed the majority's retreat from *Reed* and *Frontiero*, asserting that those cases mandated stricter scrutiny than the "traditional" equal protection analysis where a state's legislative classification is gender-based.[22] He argued that California's disability insurance program established a double-standard, under which men are compensated for all disabilities and women are not.[23] In support of his argument, Justice Brennan cited the EEOC guidelines relating to pregnancy disabilities and forcefully reasserted the plurality holding in *Frontiero*, that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[24] Under such an analysis, he maintained, the State had clearly failed to sustain its burden of showing that the suspect classification served a compelling state interest.[25]

Although title VII was not mentioned in the *Aiello* majority

---

21. *Id.* n.20 (citations omitted).

22. *Id.* at 498.

23. *Id.* at 501. "Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." *Id.*

24. *Id.* at 503, (Brennan, J. dissenting), *quoting* Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

25. *Id.* at 504. "[T]he State's interest in preserving the fiscal integrity of its disability insurance program simply cannot render the State's use of a suspect classification constitutional." *Id.* Especially is this true, the dissent concluded, where "California's legitimate interest in fiscal integrity could easily have been achieved through a variety of less drastic sexually neutral means." *Id.* at 505.

opinion, several commentators, in light of the controversial language in footnote 20, have characterized the decision as a retreat from the groundbreaking opinions in *Reed* and *Frontiero* and have expressed concern about the possible effects of *Aiello* in subsequent title VII litigation.[26] Since the opinion in *Aiello* was handed down, the Supreme Court has not rendered a decision on the merits in a case involving denial of pregnancy-related disability benefits.[27] Thus there remains considerable confusion as to what impact *Aiello* will have upon the validity of the EEOC guidelines relating to pregnancy-related disability benefits. If, as Justice Stewart remarked in footnote 20 of *Aiello*, a legislative classification concerning pregnancy is not sex-based,[28] then it would seem that a private employer who excludes pregnancy-related disability benefits from an employee insurance plan would not be subject to an attack under title VII, since the statute prohibits only discrimination *based upon* sex. Although the language of footnote 20 in *Aiello* was dictum, and Equal Protection, not title VII, questions were at issue there, it is not clear that the Supreme Court, when faced with a choice between the EEOC guidelines and Justice Stewart's reasoning in *Aiello*, will necessarily adhere to the former. Since the Supreme Court has granted certiorari in *Gilbert*,[29] a resolution of the controversy engendered by footnote 20 may be forthcoming.

In view of *Gilbert* and other recent circuit court opinions,[30] it appears that at least the intermediate federal courts have had little difficulty in disposing of the apparent conflict between

26. Bartlett, *Pregnancy and the Constitution; The Uniqueness Trap*, 62 CAL. L. REV. 1532 (1974); Erickson, *Women and the Supreme Court: Anatomy Is Destiny*, 41 BROOK. L. REV. 209 (1974); Johnston, *Sex Discrimination and the Supreme Court — 1971-74*, 49 N.Y.U.L. REV. 617 (1974); Larson, *Sex Discrimination As To Maternity Benefits*, 1975 DUKE L.J. 805; Note, *Waiting For The Other Shoe — Wetzel and Gilbert in The Supreme Court*, 25 EMORY L.J. 125 (1976); Note, *Kahn v. Shevin and the "Heightened Rationality Test": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases?*, 32 WASH. & LEE L. REV. 275 (1975).

27. The Supreme Court granted certiorari in *Wetzel v. Liberty Mut. Ins. Co.*, ___ U.S. ___, 96 S.Ct. 1202 (1976) but vacated the circuit court's decision on the grounds that the district court's order was not appealable as a final decision under 28 U.S.C. § 1291, nor was it appealable under 28 U.S.C. § 1292 as an interlocutory appeal.

28. *See* text accompanying note 21 *supra*.

29. 423 U.S. 822 (1975).

30. *See, e.g.*, Holthaus v. Compton & Sons, 514 F.2d 651 (8th Cir. 1975); Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on other grounds*, ___ U.S. ___, 96 S.Ct. 1202 (1976).

*Aiello* and the EEOC guidelines. The Third Circuit, in *Wetzel v. Liberty Mutual Insurance Company*,[31] was the first circuit court to be presented with the question of what impact *Aiello* should have in a suit under title VII. Liberty Mutual maintained employment policies which excluded pregnancy benefits from the company's income protection plan and required female employees to return to work within three months after childbirth or face termination.[32] Plaintiffs, female employees of the company, brought a class action,[33] alleging that the company's employment policies violated title VII. Relying primarily on *Aiello*, Liberty Mutual argued that title VII did not require it to include pregnancy benefits in the income protection plan.[34]

Writing for a unanimous court, Judge Staley held *Aiello* was not dispositive of the case, and could be distinguished on several grounds: (1) the Equal Protection analysis of the sex discrimination in *Aiello* was inapposite to the title VII statutory analysis that *Wetzel* presented; (2) *Aiello* involved public social welfare interests under a state legislative program, not a private employer's policies with regard to its employees; and (3) the California program excluded only disability resulting from normal pregnancy, while Liberty Mutual excluded all pregnancy-related disabilities from its plan.[35] The court subsequently found Liberty Mutual's plan defective, citing the EEOC guidelines and the deference to which they are entitled from the courts when not found to conflict with congressional intent.[36]

The court summarily rejected the company's argument that pregnancy could be excluded from coverage because the disability

31. 511 F.2d 199 (3d Cir. 1975).

32. Liberty Mutual, a national insurance underwriting business, provided its employees with an income protection plan. The plan was a fringe benefit and provided employees with the payment of income during periods of disability. Funding of the plan was partially through employee contributions. After an employee was out of work eight days because of an illness requiring the care of a doctor, the employee received a percentage of his salary for the duration of his leave. Liberty Mutual, however, did not pay any benefits under the income protection plan for disability related to or caused by pregnancy. Leaves or temporary absences due to pregnancy-related disabilities were not covered by the plan. *Id.* at 203.

33. Named plaintiffs, Sandra Wetzel and Mari Ross, were employees of Liberty Mutual, and in this class action represented all female employees of defendant-appellant. *Id.* at 201.

34. *Id.* at 203.

35. *Id.*

36. *Id.* at 204-05, *citing* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92-95 (1973), and Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

is voluntary, whereas "illnesses" are not.[37] Noting that Liberty Mutual in fact covered other disabilities which resulted from "voluntary" activities (*e.g.*, drinking, smoking, skiing, etc.), Judge Staley held that voluntariness was not a justification for disparate treatment of pregnancy, especially in light of his doubts that pregnancy is in fact voluntary.[38] The court also rejected the company's argument that the plan covered only disabilities arising from sickness and that pregnancy is not a sickness.[39] Judge Staley was unable to distinguish disabilities due to pregnancy from those arising out of illness, and held that Liberty's plan, if so based, discriminated against women.[40] Equally ineffective in the court's view was the company's contention that its plan was not violative of title VII because of its legitimate interest in maintaining the financial integrity of the plan. Citing the EEOC guidelines and the lack of statistical proof offered by the company, the court held that increased costs were not a defense to a charge of sex discrimination.[41] Finally, the court held the company's mandatory maternity leave policies to be discriminatory and invalid.[42]

In *Communications Workers of America v. American Telephone & Telegraph Co.*,[43] the plaintiff union brought a class action suit on behalf of all female employees and past female employees of defendant's Long Lines Department, alleging sex discrimination by the department for refusing to provide the same

37. 511 F.2d at 206. Except for pregnancy disabilities, Liberty Mutual purported to include all other disabilities under its plan except those voluntarily inflicted. The court noted, however, that some voluntary disabilities were in fact covered under the plan. *Id.*

38. Judge Staley elaborated:

> Even if we were to accept appellant's argument of voluntariness, we find that some voluntary disabilities are covered while one voluntary disability that is peculiar to women is not so covered. Either way we find no support for appellant's argument. Moreover, pregnancy itself may not be voluntary . . . . This court will not accept "voluntariness" as a reasonable basis for excluding pregnancy from appellant's income protection plan.

*Id.*

39. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.

*Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 208.

43. 379 F. Supp. 679 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975).

rights, benefits and privileges to its female employees under temporary disability due to pregnancy or childbirth and resulting complications, as are made available to its temporarily disabled male employees. The United States District Court for the Southern District of New York dismissed the complaint with leave to replead for failure to state a claim upon which relief could be granted under title VII and certified to the Second Circuit the question "whether *Aiello* has established . . . that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment."[44]

In answering this question[45] in the negative, the Second Circuit ruled that *Aiello* did not require the conclusion reached by the district court noting that

> footnotes or other "marginalia" in Supreme Court opinions . . . should be read "within the context of the holding of the court and the text to which it is appended" . . . . In view of the wide differences between *Aiello* and the case at bar, these warnings are particularly apposite here.[46]

Writing for the court, Judge Bryan further noted that footnote 20 of the *Aiello* opinion, upon which the district court primarily relied, "deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more."[47] The court additionally emphasized that nowhere in the *Aiello* majority opinion is title VII or the EEOC guidelines mentioned. Moreover, Judge Bryan stated:

> If, as the district court below thought, *Aiello* was a definitive holding that, absent mere pretext, disparity of treatment of pregnancy-related disabilities could not constitute a violation of Title VII, *Aiello* would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to

44. 379 F. Supp. at 684.

45. On appeal, the Second Circuit rephrased the question presented by the district court:

> [W]hether Aiello required dismissal of the complaint in this action as a matter of law for failure to state a claim on which relief could be granted under Title VII.

513 F.2d at 1027.

46. *Id.* at 1028 (citations omitted).

47. *Id.* at 1030.

> treatment of pregnancy disabilities issued by the EEOC. It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines.[48]

In line with the *Wetzel* court, Judge Bryan noted that the statutory analysis under title VII of disparate treatment in private employment is different from the constitutional analysis under the Equal Protection Clause of disparate treatment in government employment. The court therefore held *Aiello* was not dispositive of the legality of the defendant's policies under title VII.[49]

Shortly after *Wetzel* and *Communications Workers of America* were decided, the Fourth Circuit handed down its decision in *Gilbert* on June 27, 1975. Judge Russell, writing for a divided court, followed a now familiar pattern of citing the EEOC guidelines dealing with pregnancy-related disabilities and quoting *Griggs v. Duke Power Co.*[50] for the proposition that such guidelines are entitled to great deference from the courts. Further, the court noted, these guidelines are "merely expressive of what is the obvious meaning and purpose of the Act."[51] General Electric argued that because the EEOC had initially indicated that pregnancy benefits were not within the protection of the statute, the Commission's present position that denial of pregnancy-related benefits is sex discrimination constituted "waffling" by the EEOC and courts should therefore give minimal weight to the guidelines.[52] The Fourth Circuit rejected this argument,[53] which had been previously raised and rejected in *Wetzel*.[54] General Electric additionally argued, as had Liberty Mutual in *Wetzel*,[55] that exclusion of pregnancy-related disabilities from its benefit plan could not be deemed discriminatory since its plan covered only sickness. Arguing that pregnancy is a voluntary condition, General Electric maintained that confinement resulting from pregnancy could not be considered a sickness. In response, Judge Russell stated that such a defense was inconsistent with the manner in which General Electric administered its program. He noted the fact that General Electric had

48. *Id.*
49. *Id.* at 1031.
50. 401 U.S. 424, 433-34.
51. 519 F.2d at 664-65, n.12.
52. *Id.*
53. *Id.*
54. 511 F.2d at 204-06.
55. *Id.* at 206.

extended coverage to other disabilities which are essentially voluntary, and had raised the "voluntarism" defense only with respect to disability resulting from childbirth. Therefore, the court determined, General Electric was precluded from relying upon such an argument as a defense to a charge of sex discrimination.[56]

General Electric, as had the earlier defendants, placed the bulk of its defense squarely on the argument that *Aiello* had conclusively established that disparity in treatment between pregnancy-related and other disabilities is not sex discrimination violative of either title VII or the Constitution. Following the lead of the Second and Third Circuits, the court likewise rejected this argument. In distinguishing *Aiello*, Judge Russell relied upon the premise that *Aiello* had involved a constitutional attack under the Equal Protection Clause against a legislatively created social welfare program, whereas the present case was one brought against a private employer under title VII. Judge Russell noted that *Aiello* had simply held that

> a legislative classification incorporating a pregnancy-childbirth classification was "rationally supportable" in a social welfare program under the Fourteenth Amendment and that it did not amount to an "invidious discrimination" under the Equal Protection Clause.[57]

He further observed that the *Aiello* majority did not hold that California's program was non-discriminatory, but simply held such discrimination was not "invidious," and was "rationally supportable."[58] Judge Russell emphasized that in *Gilbert* the issue was not "whether the exclusion of pregnancy benefits under

---

56. 519 F.2d at 665. Judge Russell wrote:

> [W]hether pregnancy disability was within the coverage offered by the plan would be an issue that would turn largely on the construction of the plan as followed by the defendant itself. The record appears clear that, other than for childbirth disability, the defendant had never construed its plan as eliminating *all* so-called "voluntary" disabilities. It has, as the District Court stated, applied its plan to "*all* disability, including cosmetic surgery, disabilities arising from attempted suicides, etc." except those occurring during childbirth. In short, the defendant raises this defense of "voluntarism" only against a disability that is unique to women and disregards it in connection with any claim for disability submitted by male employees. Whatever facile plausability there might be to the argument that its plan does not cover "voluntary" disabilities accordingly disappears in the face of the manner in which the defendant itself has construed and applied its plan.

*Id.*

57. *Id.* at 666.

58. *Id.* at 666-67.

a social welfare program is 'rationally supportable' or 'invidious' but whether Title VII, the Congressional statute, in language and intent, prohibits such exclusion."[59] Distinguishing Equal Protection analysis from statutory construction he stated:

> Title VII, however, authorizes no such "rationality" test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. It is not concerned with whether the discrimination is "invidious" or not. It outlaws *all* sex discrimination in the conditions of employment.[60]

General Electric made no assertion based upon a bona fide occupational qualification, an exception to title VII's prohibition of sex discrimination.[61] Thus, the court concluded that "[i]ts denial of pregnancy-related disability from the application of its employee disability benefit program . . . falls clearly within the prohibitions of Title VII, and *Aiello* confers no immunity for such denial."[62]

In dissent, Circuit Judge Widener maintained *Aiello* was controlling, despite the fact that it involved the Equal Protection Clause and not title VII. He argued that the sanctions of title VII only apply once there has been a finding of discrimination based on sex, and that *Aiello* stands for the proposition that the exclusion of pregnancy-related disability from an employee disability benefits program is not sex discrimination. Thus Judge Widener asserted that the majority erroneously invoked the sanctions of title VII against General Electric.[63] Citing *United States v. Ches-*

---

59. *Id.* at 667.

60. *Id.*

61. 42 U.S.C. § 2000e-2(e) (1964) which reads in part:

> Notwithstanding any other provisions of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

The court erroneously treated the bona fide occupational qualification and the business necessity test, a second defense recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), as being synonymous and thus incorrectly asserted that business necessity was the sole exception to the title VII prohibition. 519 F.2d at 667 & n.23.

The EEOC guidelines, 29 C.F.R. § 1604.9(e) (1975) state: "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."

62. 519 F.2d at 667.

63. *Id.* at 668. Contrary to the majority opinion, Judge Widener interpreted *Aiello* as

*terfield County School District*,[64] he argued that the tests under title VII and under the Equal Protection Clause are the same with regard to discrimination in employment, especially in the Fourth Circuit.[65]

Despite the relative ease with which the majority in *Gilbert* disposed of *Aiello*, as had the *Wetzel* and *Communications Workers of America* courts previously, the ultimate disposition of these cases remains seriously in doubt. The Supreme Court has not dealt with this issue in a sex-discrimination case under title VII since *Aiello* was decided, and it remains to be seen whether the Court will adopt an analysis similar to that of Judge Russell in *Gilbert*. Although a discussion of the Supreme Court's record in sex discrimination cases is beyond the scope of this comment, it has been noted by other commentators that the Court has not been able to settle on a consistent approach to cases in this area.[66] Further, the Court has not discussed the merits of a sex-discrimination case in light of the EEOC's latest guidelines (which weighed so prominently in the discussions of *Gilbert* and

---

holding that such an exclusion is not sex-based absent a showing that distinctions involving pregnancy were mere pretexts designed to effect an invidious discrimination against one sex, and that the plaintiffs in *Gilbert* had failed to make such a showing. He relied upon the language of footnote 20 in *Aiello* to buttress this assertion, refusing to narrowly limit that language as did the Second Circuit in *Communications Workers of America:*

> Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a "lack of identity between the excluded disability and gender as such," the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause . . . . [N]o reason appears why a collective bargaining agreement may not lawfully do by contract what a state may do by legislation.

*Id.* at 668-69.

64. 484 F.2d 70 (4th Cir. 1973).

65. 519 F.2d at 669. To illustrate dissatisfaction with the different standards applied by the majority, Judge Widener suggested the problem which would result where a state-operated disability plan open to private employees excluded pregnancy benefits. The plan would be upheld under the Equal Protection Clause, as a valid state disability insurance program under *Aiello*, while a similar plan for state employees would be invalidated under title VII. Judge Widener accused the majority opinion of espousing the view of the dissenters in *Aiello*, which he asserted was rejected pointedly in footnote 20. He also argued that *Aiello*

> was written with an eye to Title VII cases certain to come, not in a vacuum and not with self-imposed blinders, and came to the only result possible when we consider that the Court must be the even handed arbiter in all cases, not only those involving equal protection.

*Id.*

66. *See* note 26 *supra*.

*Wetzel*), nor in view of its holding in *Aiello*. There is also the question of how the Court will treat the language of footnote 20 in *Aiello*, and particularly, whether it will so casually brush it aside as did Judge Bryan in *Communications Workers of America*. Although both the *Gilbert* and *Wetzel* opinions distinguished *Aiello* on the ground that constitutional analysis is unlike statutory interpretation, it remains for the Supreme Court to determine whether the test of validity under title VII is so different from the Fourteenth Amendment test as to justify the widely-divergent results in *Gilbert* and *Wetzel*, and *Aiello*. Many observers view *Aiello* as a retreat by the Court from its earlier stand on sex-discrimination as exhibited by *Reed* and *Frontiero*.[67] Since *Aiello* was decided, the only decisions rendered by the Court in the sex discrimination area have not clarified the confusion of what standard is appropriate for review under the Equal Protection Clause, and none have dealt with the question of exclusion of pregnancy-related benefits and the EEOC guidelines relating thereto.[68]

Against a background as uncertain as this, the fate of *Gilbert* as well as the EEOC guidelines, seems tenuous at best. Although the opinion in *Gilbert* is persuasive, the dissent of Judge Widener raises troubling questions, which hopefully will soon be resolved by the Supreme Court. The law in the area of sex discrimination is in a state of near chaos, and the result of the Supreme Court's review of *Gilbert* could alleviate the confusion. The Court could adhere to its holding in *Aiello* while nevertheless affirming *Gilbert*.[69] However, such a result would not yield any of the badly needed consistency in the equal employment sphere which the lower courts require. The proper solution would be a decision by the court either to adhere to the language in footnote 20 of the *Aiello* opinion and overrule the conflicting guidelines promulgated by the EEOC, or to overrule *Aiello* and uphold the interpretation of the Commission. If denial of pregnancy-related benefits is sex discrimination, it should not be allowed to persist under the

67. *See* note 26 *supra* and accompanying text.

68. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

69. *See* Washington v. Davis, ___ U.S. ___, 96 S. Ct. 2040 (1976) where the Court distinguished proof of racial discrimination in the title VII context from the analysis appropriate under the Equal Protection and Due Process Clause. The court might adopt similar reasoning in *Gilbert*, although the impact of *Washington* on the sex discrimination area has not yet been determined.

Equal Protection Clause of the Fourteenth Amendment, and if it is not sex discrimination, employers should not be penalized for employment policies which are valid under the Constitution.*

*W. Howard Boyd, Jr.*

*EDITOR'S NOTE: On December 7, 1976, the United States Supreme Court reversed the Fourth Circuit Court of Appeals' holding in *Gilbert*. General Elec. Co. v. Gilbert, 45 U.S.L.W. 4031 (1976).