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DISCRIMINATION IN THE WORKPLACE: ARE MEN AND WOMEN NOT ENTITLED TO THE SAME PARENTAL LEAVE BENEFITS UNDER TITLE VII?

Kathryn Frueh Patterson

I. INTRODUCTION

AMERICAN society has changed significantly in the last decade. Traditional families comprised of a working father and a homemaker mother are no longer commonplace. Increasing numbers of men desire, or are forced, to assume a more active role in the rearing of their children. Consequently, employers and legislatures are beginning to debate and address men's rights to parental leave.

This comment addresses whether providing male and female employees with different parental leave benefits violates Title VII of the Civil Rights Act of 1964 (Title VII).¹ The first part of the comment provides an overview of the applicable legislation and case law concerning the right of a member of a majority group, such as a white male, to sue under the Civil Rights Act.² This right is limited by court sanctioned affirmative action plans.³ The comment then specifically addresses case law pertaining to employer-provided maternity leave in the United States.⁴

In determining whether women are given better leave benefits than men upon the birth of a child, time off to care for the child must be distinguished from leave to allow the woman to recover from childbirth. As only women are disabled from childbirth, leave given to women during the recovery period, but denied to men, should not be considered preferential treatment. The second section of the comment addresses what is considered to be the period of disability after giving birth to a child.⁵ This period is compared to the typical amount of leave offered to men and women by employers.⁶

The third section addresses policy considerations behind requiring equal

1. 42 U.S.C. § 2000e (1988); *see also infra* notes 15 and 42.

2. *See infra* notes 13-31 and accompanying text.

3. *See infra* notes 32-33 and accompanying text.

4. *See infra* notes 34-42 and accompanying text.

5. *See infra* parts III.A.-B.

6. *See infra* part III.C.

parental leave policies for men and women upon the birth of a child.⁷ This section considers the economic cost and benefit to businesses of requiring men and women to be given time off when a child is born.⁸ Also, the benefits to the family from increased participation by fathers in child-rearing is examined.⁹ Lastly, the recently passed Family and Medical Leave Act (FMLA) is examined to evaluate whether men need protection under Title VII now that men and women are guaranteed leave after the birth of a child under the FMLA.¹⁰

II. HISTORY OF PARENTAL LEAVE

A. STATUTORY PROTECTION AGAINST DISCRIMINATION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex and national origin.¹¹ The statute states:

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.¹²

1. Reverse Discrimination

Title VII was enacted specifically to address race discrimination against African-Americans and other racial minorities and sex discrimination against women. The statute, however, has been judicially interpreted to prohibit all race and sex discrimination including discrimination against white men.¹³ Title VII reverse discrimination cases arise when a white male alleges that he has been treated differently than similarly situated women or minorities.¹⁴ In these cases, the white male must show that he was treated

7. See *infra* part IV.

8. See *infra* part IV.A.

9. See *infra* part IV.B.

10. See *infra* part IV.C.

11. 42 U.S.C. § 2000e-2(a) (1988).

12. *Id.* (emphasis added).

13. *E.g.*, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 501-02 (1986) (providing relief to minority individuals who were not actual victims of employer's discrimination practices is not precluded by Title VII); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII prohibits racial discrimination in private employment against white persons as well as non-whites).

14. *E.g.*, *McDonald*, 427 U.S. at 280 (holding that white employees' discharge was based on their race and, therefore, violated Title VII); *Loeffler v. Carlin*, 780 F.2d 1365, 1367 (8th Cir. 1985), *rev'd on other grounds sub nom.*, *Loeffler v. Frank*, 486 U.S. 549 (1988) (finding that a male employee's discharge was an act of discrimination based on his sex).

differently because of his race or sex.¹⁵

In *McDonald v. Santa Fe Transportation Co.*,¹⁶ the defendant transportation company terminated two white, male employees for stealing property, while a black, male employee, who was also charged with stealing property, was not discharged. The discharged employees brought suit alleging that the company violated Title VII by firing the white employees, but not the black employee. The district court dismissed the complaint on the basis that no claim was stated under Title VII.¹⁷ The court of appeals affirmed the district court's decision.¹⁸

The United States Supreme Court then heard the case.¹⁹ Commenting that the Equal Employment Opportunity Commission's (EEOC) interpretations are entitled to great deference from the judiciary,²⁰ the Supreme Court noted that the EEOC interpreted Title VII to prohibit racial discrimination against whites in the same manner in which racial discrimination against non-whites is prohibited.²¹ Additionally, the Court noted that the legislative history of Title VII contemplated that Title VII would apply to both whites and non-whites.²² In reversing the lower courts' decisions, the Court held that Title VII prohibits racial discrimination against whites on the same standards as would be applicable were they minorities.²³

In another successful reverse discrimination case, *Loeffler v. Carlin*,²⁴ a white, male postal employee sued the Postmaster General after the employee was discharged for violating a postal service rule regarding the way that mail was sorted prior to delivery. The plaintiff showed that two female mail carriers violated the same rule with similar frequency and were not fired. The *Loeffler* court found that the plaintiff had been discharged because of his sex and, accordingly, had been discriminated against in violation of Title VII.²⁵

These reverse discrimination cases place employers in a precarious situation. In the words of Justice Blackmun, allowing whites to seek redress under Title VII puts the employer on a "high tightrope without a net beneath [it]."²⁶ Justice Blackmun, elaborating on the employer's predicament,

15. *McDonald*, 427 U.S. at 282; *Loeffler*, 780 F.2d at 1369.

16. 427 U.S. 273 (1976).

17. *Id.* at 275.

18. *Id.*

19. *Id.* at 273.

20. The EEOC is the agency responsible for enforcing Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-4(g) (1988). Interpretations of the agency charged with administering the statute are given great deference by the judiciary. *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847 (1992); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

21. *McDonald*, 427 U.S. at 279.

22. *Id.* at 280. The legislative history indicates that Title VII was intended to "cover white men and white women and all Americans." *Id.* (quoting 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler)).

23. *Id.*

24. 780 F.2d 1365 (8th Cir. 1985), *rev'd on other grounds sub nom.*, *Loeffler v. Frank*, 486 U.S. 549 (1988).

25. *Id.* at 1370.

26. *United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (quoting *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)).

stated that “[i]f Title VII is read literally, on the one hand they [the employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.”²⁷ To solve this dilemma, the Court has allowed employers to implement affirmative action plans which discriminate against one in a majority group, such as white males, in preference for one in a minority group, such as women or African-Americans.²⁸

a. Affirmative Action Plans

In *United Steelworkers v. Weber*²⁹ a white, male worker sued his employer after he was denied a place in his company’s training program. The company’s plan gave preference to minority workers to enter the program to be trained for skilled jobs. Fifty percent of all slots in the training program were guaranteed to be filled by African-Americans. The program was to continue until the percentage of African-Americans in skilled positions approximated the percentage of African-Americans in the local work force. Approving the company’s plan, the Court established a two part test to determine the validity of affirmative action plans: (1) the purpose of the plan must be to eliminate imbalances in the employer’s workforce based on traditionally segregated job categories; and (2) the plan must not “unnecessarily trammel the interests of the white employees.”³⁰ The second component of the test, requiring white employees to be minimally impacted by the plan, appears to be a key factor in determining whether the Court will allow employers to discriminate against white workers.³¹

Refining the test in a later case, the Court noted that

[t]he purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination.³²

Under this view, affirmative action plans may be implemented to eliminate racial inequities in “traditionally segregated job categories” regardless of the

27. *Id.*

28. *E.g.*, *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 617-18 (1987) (holding that the employer did not violate Title VII by taking the female employee’s sex into account as the decision was made pursuant to an affirmative action plan designed to remedy underrepresentation of women and minorities in traditionally segregated job categories); *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421 (1986) (allowing preferential relief for individuals who were not actual victims of discrimination is not precluded by Title VII); *Weber*, 443 U.S. at 193 (upholding a temporary plan which did not unnecessarily trammel the interests of white employees and which was designed to eliminate racial imbalance in job categories).

29. 443 U.S. 193 (1979).

30. *Id.* at 208.

31. George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution & Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 501-02 (1988).

32. *Local 28, Sheet Metal Workers’ Int’l Ass’n*, 478 U.S. at 474.

occurrence of past discrimination.³³ This view continues to prevail and allows affirmative action plans to counter the effect of societal attitudes which have limited entry by certain races or sexes into a particular type of job.

B. PREGNANCY IS COVERED UNDER TITLE VII

Initially, the United States Supreme Court held that an employer-sponsored disability plan, which covered most temporary disabilities but excluded pregnancy and childbirth, did not violate the equal protection clause of the Fourteenth Amendment³⁴ or Title VII.³⁵ In *General Electric Co. v. Gilbert*³⁶ the Court acknowledged that pregnancy only applied to women, but considered pregnancy "significantly different from the typical covered disease or disability . . . [because] it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition."³⁷

In response to *Gilbert*, Congress amended Title VII to specifically provide that sex discrimination includes discrimination on the basis of pregnancy.³⁸ The Pregnancy Discrimination Act (PDA) states:

because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work.³⁹

The PDA classifies pregnancy as a disability such that if an employer provides disability leave to employees, the employer must also provide disability leave to pregnant women.⁴⁰ Employers are not required to provide women with maternity leave unless they provide employees with disability leave for

33. *Johnson*, 480 U.S. at 620 (1987); *Weber*, 443 U.S. at 209 (1979). In *Johnson*, Justice Scalia opposed the majority view which allowed racial or sexual discrimination in the workplace absent a showing of past discrimination. 480 U.S. at 664-68 (Scalia, J., dissenting). Justice Scalia considered the majority view contrary to Title VII's purpose as it "convert[s] Title VII] from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often will." *Id.* at 658. Justice Scalia's view has not prevailed in subsequent Title VII cases.

34. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (denying benefits for work lost as a result of pregnancy does not violate the equal protection clause). The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. To date, the Court has not changed its position that laws governing pregnancy do not raise an equal protection issue. The Court's reasoning on the equal protection issue accepts biological differences as sufficient justification for treating men and women differently. For further discussion of equal protection and pregnancy laws see Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed*, 77 CAL. L. REV. 171 (1989).

35. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that the employer's disability benefits plan did not violate Title VII because of its failure to cover pregnancy-related disabilities, absent any indication that the exclusion of pregnancy disability benefits was a pretext for discriminating against women).

36. 429 U.S. 125 (1976).

37. *Id.* at 136.

38. 42 U.S.C. § 2000e(k) (1988).

39. *Id.*

40. *Id.*

other types of disabilities.⁴¹ Providing women with leave beyond the period of actual disability might be considered discriminatory against men as women would be getting compensation, in the form of child-rearing leave, which would be denied to men.⁴² The Supreme Court has not specifically addressed whether the gender-based policy described above violates Title VII.

C. PREFERENTIAL TREATMENT FOR WOMEN NOT PROHIBITED UNDER THE PDA

In *California Federal Savings & Loan Ass'n. v. Guerra*⁴³ the United States Supreme Court examined a California statute⁴⁴ which required employers to provide female employees with unpaid pregnancy disability leave of up to four months and, upon the employee's return, to reinstate the employee in

41. *Id.*

42. The Society of Human Resource Management (SHRM) conducted a nationwide survey of 1600 employers in 1988 and discovered a great disparity between the amount of non-disability related leave that companies offered new mothers and new fathers. *Leave Programs Limited to New Mothers are Open to Challenge of Sex Bias, EEOC Says*, 224 Daily Lab. Rep. A-3 (Nov. 20, 1990). SHRM surveyed 1600 employers concerning the amount of paid and unpaid leave allowed a new mother to be with her child even though the mother was healthy and able to work. *Id.* Paid leave was provided by 10 percent of the companies surveyed; unpaid leave was provided by 44%. *Id.* In contrast, only three percent of the responding companies offered paid leave to fathers and 19 percent offered unpaid leave. *Id.*

Part-time work options also exhibited a disparity in what was offered women versus what was offered men. SHRM found that 17% of the surveyed companies offered part-time return to work for mothers, while only two percent of the employers offered part-time work for new fathers. *Id.* Additionally, nine percent of the responding companies offered flexible time off to mothers, while only five percent offered flexible time off to the new fathers. *Id.*

Other surveys also indicate a disparity in the amount of leave offered men and women. For example, the Department of Labor conducted a survey in 1989 and found that 37% of full-time employees in the large and medium-size firms included in the survey could take unpaid maternity leave averaging 20 weeks, but only 18% could take paternity leave averaging 19 weeks. Spencer Rich, *Maternity Leave Benefits Increase: More Companies Surveyed also Offer Paternity, Child Care Aid*, WASH. POST, Apr. 8, 1990, at H9. As discussed below, six weeks is the period of disability traditionally believed to follow childbirth. *Infra* note 97 and accompanying text. If the average amount of time allowed off is 20 weeks, a portion of that time must be attributed to child rearing, rather than recovery from childbirth.

43. 479 U.S. 272 (1987).

44. The statute provided:

It shall be an unlawful employment practice unless based on a bona fide occupational qualification:

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions . . .

(2) To take a leave on account of pregnancy for a reasonable period of time; provided such period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. . . .

An employer may require any employee who plans to take a leave pursuant to this section to give reasonable notice of the date such leave shall commence and the estimated duration of such leave.

Id. at 276; see also CAL. GOV'T CODE ANN. § 12945(b)(2) (West 1980). The California statute was enacted prior to the PDA in order to reverse, with respect to California employees, the Supreme Court decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). See *supra* text accompanying note 36 for a discussion of *Gilbert*.

the job she previously held unless neither the job nor a substantially similar one were available. An employee of California Federal Savings & Loan Association (Cal Fed) brought a lawsuit against Cal Fed after being denied reinstatement to her former job upon her attempt to return from pregnancy disability leave. As a defense against the subsequent lawsuit, Cal Fed claimed that the statute was inconsistent with, and was therefore preempted by, Title VII. Cal Fed argued that the California statute provided for special treatment of pregnant employees by requiring job security which was not required for other disabled workers. Cal Fed further argued that the special treatment was inconsistent with Title VII as the PDA prohibits employers from treating pregnant employees differently than other disabled employees.

Rejecting Cal Fed's argument, the Court noted that the purpose of Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."⁴⁵ The PDA extended Title VII to cover pregnancy and "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."⁴⁶ The Court held that the California statute was consistent with the purpose of Title VII, as amended by the PDA, as it ensures that women and men can have families without fear of losing their jobs.⁴⁷ The Court also emphasized that the California statute did not require special treatment of pregnant employees as the employer could give comparable benefits to all disabled employees.⁴⁸

Although the California statute did not require special treatment of pregnant employees, the Court in *Guerra* indicated that preferential treatment of pregnant employees may be allowed under the PDA.⁴⁹ The Court quoted the legislative history of the PDA which stated that the proposed legislation "does not require employers to treat pregnant employees in any particular manner."⁵⁰ The Court further stated:

if Congress had intended to prohibit preferential treatment, it would have been the height of understatement to say only that the legislation would not require such conduct. It is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment.⁵¹

The Court also noted that Congress, at the time the PDA was enacted, knew of state statutes, such as the California statute evaluated in *Guerra*, which gave pregnant employees special treatment compared with other disabled

45. *Guerra*, 479 U.S. at 288 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

46. *Id.* at 288-89 (quoting 123 CONG. REC. 29658 (1977)).

47. *Id.* at 289.

48. *Id.* at 291.

49. *Id.* at 287.

50. *Id.* at 286-87 (quoting H.R. REP. NO. 948, 95th Cong., 2d Sess. 4 (1978)). Passage of the PDA did not require employers to extend benefits to pregnant women which were not already being provided to other disabled employees. *Id.* at 286; see also *supra* text accompanying notes 40-42.

51. *Id.* at 287.

employees.⁵² Congress did not consider those laws inconsistent with the PDA.⁵³ Based on these justifications, the Supreme Court held that the PDA did not prohibit preferential treatment of pregnant employees.⁵⁴ In reaching its decision, the Court emphasized that the benefits provided under the California statute were limited to cover only the period of actual physical disability related to pregnancy, childbirth, or related medical conditions.⁵⁵ The Court did not specifically address whether a statute which provided women with leave beyond the period of actual disability would violate Title VII.⁵⁶

D. FEDERAL COURTS RESPONSE TO *GUERRA*

Since *Guerra*, federal district courts addressing the issue have reached conflicting conclusions as to whether the PDA requires equal treatment of both sexes, or whether preferential treatment of pregnant employees is allowed.⁵⁷ In *Schafer v. Board of Public Education*⁵⁸ the plaintiff, a male, claimed that he was improperly denied a one-year childrearing leave which was available to female employees. The *Schafer* court interpreted *Guerra* as allowing preferential treatment for pregnant employees, but limiting the period of allowable preferential treatment to the period of actual physical disability during pregnancy and following childbirth.⁵⁹ In reaching this conclusion, the *Schafer* court noted that the California statute addressed in *Guerra* allowed benefits to cover only the period of actual physical disability on account of pregnancy.⁶⁰ The *Schafer* court held that a "simultaneous showing of a continuing disability related to either the pregnancy or to the delivery of the child" must be shown in order for preferential treatment to be allowed.⁶¹ The *Schafer* court determined that a leave for up to one year for childrearing was not a medical condition related to the condition of pregnancy.⁶² As such, the school's leave policy violated Title VII. The *Schafer* court adhered to the equal opportunity reading of the PDA.⁶³ By limiting preferential treatment to the period of actual disability of the pregnant employee, the court prevented preferential treatment of female workers at the

52. *Id.*; *Guerra*, 479 U.S. at 287.

53. *Id.*

54. *Id.* at 287.

55. *Id.* at 290.

56. However, the Court stated that a statute which was based on "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers" would be inconsistent with, and therefore invalidated by, Title VII. *Id.*

57. Melissa B. Kessler, Note, *Civil Rights — Childrearing Leave Policy and Employment Discrimination Under Title VII — Schafer v. Board of Public Education*, 903 F.2d 243 (3d Cir. 1990), 64 TEMP. L. REV. 1047, 1047 (1991) (concluding that conflicting decisions have been reached in the lower courts because of differences in interpretations of the PDA. One interpretation requires equal treatment of the sexes, while the other interpretation allows preferential treatment of pregnant employees in order to promote equal opportunity in the workforce).

58. 903 F.2d 243 (3d Cir. 1990).

59. *Id.* at 248.

60. *Id.*

61. *Id.*

62. *Id.*

63. Kessler, *supra* note 57, at 1060.

expense of male workers.⁶⁴

In contrast, the Sixth Circuit adhered to a broader reading of the *Guerra* decision and allowed preferential treatment of pregnant employees without a showing of disability.⁶⁵ In *Harness v. Hartz Mountain Corp.*,⁶⁶ a male employee took disability leave after suffering a heart attack. In accordance with his employer's disability leave policy, the employee was terminated when he was not able to return to work after being absent ninety days. The employee filed suit against the company based on sex discrimination as the company allowed women to take up to one year leave for maternity related reasons.⁶⁷ The case was brought under a Kentucky statute with identical language to the PDA. The *Harness* court acknowledged that the company policy gave pregnant employees preferential treatment, but held that preferential treatment is allowed, although not required, under the PDA according to the Supreme Court's decision in *Guerra*.⁶⁸ The *Harness* court did not address whether the preferential treatment must be limited to the period of actual disability following childbirth. The employer's policy which was upheld did not require the preferential treatment given to women to be limited to the period of disability after childbirth. In light of that fact, the *Harness* court appears to have allowed preferential treatment beyond the period of disability.

E. THE EEOC RESPONSE TO *GUERRA*

In 1990, the EEOC published policy guidelines reflecting the agency's view of gender discrimination related to requests for parental leave.⁶⁹ First, the EEOC distinguished leave related to the period of time when a woman is recuperating from childbirth from leave allowed to care for the new baby.⁷⁰ Pregnancy disability leave is a "form of medical leave allowed to female employees who cannot work because of pregnancy or related medical conditions."⁷¹ In contrast, parental leave means "leave to care for a child of any

64. *Id.* For further discussion of the detrimental effects on male employees when new mothers are allowed leave in excess of the period of actual disability, see *infra* text accompanying notes 168-80.

65. *E.g.*, *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119 (6th Cir. 1989) (holding that pregnancy expenses were covered even though pregnancy commenced prior to the effective date of insurance coverage on the basis that preferential treatment for pregnant employees is allowed); *Harness v. Hartz Mountain Corp.*, 877 F.2d 1307 (6th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990) (determining that preferential treatment of pregnant employees was allowed under Kentucky's counterpart to the federal Pregnancy Discrimination Act).

66. 877 F.2d 1307 (6th Cir. 1989).

67. The company's policy states: "If your leave is for maternity related reasons, you are entitled to a 90-day leave to be used before and after the date of delivery. This type of leave may be extended up to one (1) year, provided a written request is made each sixty (60) days." *Id.* at 1308-09. Significantly, the provision does not require the employee to demonstrate continuing disability, or inability to work in order to extend her maternity leave.

68. *Harness*, 877 F.2d at 1310.

69. *EEOC Policy Guidelines on Parental Leave*, 224 Daily Lab. Rep. F-1 (Nov. 20, 1990) [hereinafter *EEOC Policy Guidance*].

70. *Id.*

71. *Id.* Technically, pregnancy is not a disability. Maureen E. Lally-Green, *The Implications of Inadequate Maternity Leave Policies Under Title VII*, 16 VT. L. REV. 223, 225 n.10 (1991). Generally, women are not ill during pregnancy. *Id.* Even following childbirth, most

age, or to develop a healthy parent-child relationship, or to help a family adjust to the presence of a newborn or adopted child."⁷²

The EEOC then concluded that Title VII prohibits employers from establishing policies that treat male and female employees differently when the employee requests time off to care for a newborn child.⁷³ The EEOC based its conclusion on its Sex Discrimination Guidelines whereby it stated, "it shall be unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."⁷⁴ The EEOC found further support for its decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*⁷⁵ where the Supreme Court stated that "fringe benefits are part of the compensation, terms, conditions and privileges of employment which must be provided on a non-discriminatory basis."⁷⁶

As noted above, some courts have interpreted *Guerra* to mean that women may be granted more generous childcare leave policies because the benefit is a form of preferential treatment of a pregnancy-related condition.⁷⁷ The EEOC specifically refuted that interpretation of *Guerra*.⁷⁸ Focusing on the Supreme Court's language which emphasized that the applicable statute in *Guerra* covered only the period of actual disability, the EEOC stated "the Supreme Court's decision is not authority for the idea that women may be provided with more generous child care leave opportunities than men."⁷⁹

To illustrate their position, the EEOC provided the following hypothetical:

An employer's written policy states that women may take sixteen weeks of unpaid "maternity leave" after child birth for purposes of recovering from pregnancy and child care, but male employees may take no more than two weeks "paternity leave" for care of a newborn child. A woman suffering from a pregnancy-related complications [sic] may obtain an extended medical leave, if medical documentation is provided. Medical documentation is not required for females returning to work within the sixteen week period.⁸⁰

In this example, the employer's policy is facially discriminatory as the female employee is given fourteen more weeks leave than the male employee. However, the policy might not violate Title VII.⁸¹ Because the employer did not distinguish between pregnancy disability leave and parental leave,⁸² it is difficult to determine if the policy is actually discriminatory against men. If the above policy provides women with fourteen weeks of pregnancy disabil-

women would not be considered ill during the period that their bodies are recovering from the birth. *Id.*

72. *EEOC Policy Guidance*, *supra* note 69.

73. *Id.*

74. *EEOC Policy Guidance*, *supra* note 69 (quoting 29 C.F.R. § 1604.9 (1992)).

75. 462 U.S. 669 (1983).

76. *EEOC Policy Guidance*, *supra* note 69 (quoting *Newport News*, 462 U.S. at 682).

77. *See supra* notes 65-68 and accompanying text.

78. *EEOC Policy Guidance*, *supra* note 69.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See supra* text accompanying notes 70-72.

ity leave and two weeks of parental leave, the employer passes the first hurdle in determining whether the policy treats male and female employees equally. However, if women are given fourteen weeks of disability leave after giving birth and are not required to document the disability, but all other disabled employees are required to document their disability, pregnant and non-pregnant workers are not being treated equally and the employer will have a difficult time justifying the inequality of treatment.⁸³

F. THE SUPREME COURT'S POTENTIAL EXTENSION OF *GUERRA*

The Supreme Court has not yet addressed the question of whether preferential treatment may be given to pregnant employees without regard to a period of disability following pregnancy, childbirth, or pregnancy complications. The Court's decision in *Guerra* came close to answering that question. The Court, however, limited its holding by emphasizing that its decision pertained to a state statute which limited the preferential treatment of pregnant employees to the period of disability following pregnancy.⁸⁴

When addressing the issue, the Court is likely to consider the EEOC's position described above.⁸⁵ The administrative agency charged with enforcing a statute is given great deference to interpret the statute.⁸⁶ Before following the agency's interpretation, however, the Court must determine whether it has previously determined the statute's meaning.⁸⁷ If the Court has previously interpreted the statute, the Court will adhere to its prior interpretation, under the doctrine of *stare decisis*, and the agency's subsequent interpretation will be judged against the Court's earlier determination of the statute's meaning.⁸⁸

The Court addressed the issue of whether pregnant women could be given preferential treatment under Title VII and the PDA and answered affirmatively.⁸⁹ The Court did not answer the question of whether the preferential treatment may relate only to the period of actual disability caused by pregnancy or childbirth, or whether the allowance of preferential treatment is broader and allows pregnant employees to be treated specially notwithstanding their physical health.⁹⁰ Interpreting the PDA and its legislative history, the Court determined that pregnancy may be treated better, but not worse, than other disabilities.⁹¹ In reaching its decision, the Court examined the legislative history of the PDA and considered Congress' knowledge, at the

83. *EEOC Policy Guidance*, *supra* note 69.

84. *See supra* notes 43-56 and accompanying text.

85. *See supra* notes 69-81 and accompanying text.

86. *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 847 (1992); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

87. *Lechmere*, 112 S.Ct. at 847.

88. *Id.* at 847-48.

89. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *see also supra* notes 43-56 and accompanying text.

90. As discussed above, the federal courts of appeals have reached differing conclusions on the meaning of the Court's decision in *Guerra*. *See supra* notes 57-68 and accompanying text.

91. *Guerra*, 479 U.S. at 285.

time the PDA was enacted, of certain state statutes which mandated benefits for pregnant employees.⁹² The state statutes in effect at the time of the PDA's passage shared the goal of the California statute which was to ensure that women would not lose their jobs due to pregnancy disability.⁹³ The Court emphasized that its decision was limited to statutes covering the period of actual disability following pregnancy.⁹⁴ The Court also noted, however, that the PDA itself does not prohibit different treatment of women.⁹⁵ As the Court has not addressed leave beyond the period of actual disability, it is likely that the Court will follow the EEOC's interpretation. As noted above, however, the Court is not bound to the EEOC's interpretation. Therefore, the question remains open.

III. THE PERIOD OF DISABILITY FOLLOWING CHILDBIRTH

Under the EEOC's interpretation of Title VII and the PDA, women would be allowed preferential treatment only if the leave related to pregnancy disability. Accordingly, the period of time a woman is disabled following childbirth must be ascertained. Recent studies indicate that the traditional measurement of incapacity may not be appropriate.

A. TRADITIONAL MEASUREMENT OF THE PERIOD OF DISABILITY FOLLOWING CHILDBIRTH

In determining the period of recovery from childbirth, the medical profession generally concentrates on the healing of the woman's reproductive organs.⁹⁶ Medical textbooks indicate that physical recovery of reproductive organs after childbirth takes approximately six weeks and imply that the woman is fully recovered from childbirth at that time.⁹⁷ Although some obstetricians recommend that the mother not return to work for several weeks, no medical evidence exists that returning to work earlier would cause the mother any physical harm.⁹⁸

Williams also stated that "[i]deally the care and nurturing of [the baby] should be provided by the mother with ample help from the father. For the mother to provide this care, her presence at home with the infant precludes her early return to full-time work or school."⁹⁹ This statement reflects another factor traditionally considered when determining whether the mother is able to return to work: the effect of the mother's absence on the child.

92. *Id.* at 286-89.

93. *Id.* at 289.

94. *Id.* at 290.

95. *Id.* at 290 n.29.

96. JACK A. PRITCHARD, M.D., *WILLIAMS OBSTETRICS* 255 (18th ed. 1989).

97. Lorraine Tulman & Jacqueline Fawcett, *Return of Functional Ability after Childbirth*, *NURSING RESEARCH*, March/April 1988, at 77; see also Lally-Green, *supra* note 71, at 227-28 (quoting the American College of Obstetricians and Gynecologists' policy on postnatal recovery).

98. PRITCHARD, *supra* note 96.

99. *Id.* This consideration reflects a concern for the baby's well-being, rather than the mother's health. Therefore, this factor should be classified as a justification for parental leave and should entitle either a man or a woman to remain at home following the birth of a child.

Many people assume that women are biologically suited to the job of child-rearing and that a bond develops between the mother and child at birth which may be impaired if the mother leaves the child and returns to work when the child is young.¹⁰⁰ No scientific data exists, however, indicating that mothers are naturally better suited to raise children than fathers.¹⁰¹ Studies also indicate that babies can establish intimate relationships with more than one primary caregiver¹⁰² and that very young infants can readily form a new and additional attachment to a nonparent caregiver.¹⁰³ These studies support the notion that women are not the only parent able to bond with infants, such that if women are given leave after recovering from childbirth, men should be given comparable time off.

One benefit that a mother can provide, which a father or caregiver cannot, is breast feeding the new baby. Nutritionally, breast milk is designed for infants and is, therefore, better for new babies than formula.¹⁰⁴ Breast milk can, however, be expressed and stored in bottles.¹⁰⁵ The courts which have addressed the issue have agreed that refusing a woman leave time to breastfeed is not sexually discriminatory.¹⁰⁶

B. CONSIDERATION OF NON-TRADITIONAL FACTORS IN DETERMINING A WOMAN'S COMPLETE RECOVERY FROM CHILDBIRTH

Recently, a study focused on new mothers' recovery of full functional ability to determine the period of disability following childbirth.¹⁰⁷ Tulman and Fawcett's study included seventy women who had delivered full-term infants within five years of being surveyed.¹⁰⁸ The study inquired about the women's resumption of household, social, community and occupational activities that had been engaged in before childbirth and assumption of infant

100. See *infra* notes 133-34 and accompanying text.

101. Linda Haas, *Equal Parenthood and Social Policy: Lessons from a Study of Parental Leave in Sweden*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 375, 392 (Janet S. Hyde & Marilyn J. Essex eds., 1991).

102. *Id.*

103. Marsha Weinraub & Elizabeth Jaeger, *Timing the Return to the Workplace: Effects on the Mother-Infant Relationship*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 307, 308 (Janet S. Hyde & Marilyn J. Essex eds., 1991).

104. *Food for Thought: Is Breast Milk Best, or is the Bottle Just as Good? Some Research Validates Some Old Ideas*, CHI. TRIB., Nov. 20, 1985, at 44. Breastfeeding is thought to provide the following benefits to the baby: (1) protection against various types of illnesses and allergies; (2) provision of necessary nutrients for the first six months of life; (3) enhancement of an infant's dental health; and (4) reduction of the risk of jaundice. Glenn Singer, *La Leche Sends Message on Breastfeeding Benefits, League Plans Events for National Week*, SUN SENTINEL, Aug. 1, 1992, at 4B.

105. Suzanne Dolezal, *More Working Mothers Join La Leche, Cause A Split*, DET. FREE PRESS, Sept. 26, 1989, at 1B.

106. See *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1987) (refusing an employee's request for time off work to breastfeed her new baby is not discriminatory); *Board of Sch. Directors v. Rossetti*, 411 A.2d 486, 488 (Pa. 1979) (holding that plaintiff was not sexually discriminated against when her employer failed to allow her discretionary leave to nurse her child).

107. Tulman & Fawcett, *supra* note 97, at 77.

108. *Id.*

care.¹⁰⁹ The length of time before regaining the usual level of physical energy was used as an overall index of functional ability.¹¹⁰ The study concluded the following:

Of the forty-five women who were employed during pregnancy, twenty-nine (sixty-nine percent) had returned to work by the time of the survey, twenty-one part time and eight full time. The overall mean number of weeks until return to work was 18.6. Those [women] who had returned full time did so at a mean of twenty weeks after delivery, and those who returned on a part-time basis did so at a mean of eighteen weeks after delivery, although these differences were not statistically significant. Of the fifteen women employed full time during pregnancy, seven returned to work full time and eight [returned] part time. Women who returned to work after delivery did not differ in resumption of household or social activities from women who did not return to work.¹¹¹

The study also distinguished between the recuperative periods for women who had cesarean deliveries and those who had normal deliveries.¹¹² Tulman and Fawcett found that slightly more than fifty percent of the women surveyed reported that they had regained their usual level of energy six weeks after the birth of their child.¹¹³ Seventy-two percent of the women who experienced normal deliveries reported regaining their physical strength within this period, but only thirty-four percent of the women who had cesarean deliveries had done so.¹¹⁴

The authors noted that their survey was unique in exploring the recovery of functional ability after childbirth.¹¹⁵ Currently, very little research has been performed in that area. If employers must distinguish between childrearing leave and disability leave when formulating the company's maternity leave policy, this information is critical.¹¹⁶ A standard period of time for maternity leave, such as six weeks, may not sufficiently cover the time necessary for a woman's recovery.

C. CURRENT STATUS OF MATERNITY AND PATERNITY LEAVE POLICIES IN THE UNITED STATES

Most companies offer infant care leave plans to their female employees.¹¹⁷ The length of leave varies depending on the company, but it generally con-

109. *Id.*

110. *Id.*

111. *Id.* at 79.

112. Tulman & Fawcett, *supra* note 97, at 77.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See supra* text accompanying notes 69-83.

117. Randy Sheinberg, *Parental Leave Policies of Large Firms*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 211, 213 (Edward F. Zigler & Meryl Frank eds., 1988). A 1986 Catalyst survey found that 76% of the largest United States' firms offered maternity leave with a guarantee of the same or similar job upon return from leave. Eileen Trzcinski, *Employers' Parental Leave Policies: Does the Labor Market Provide Parental Leave?*, in *PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA* 209, 216 (Janet S. Hyde & Marilyn J. Essex eds., 1991). When firms that do not

sists of two portions: (1) disability leave and (2) unpaid leave of absence for childcare and bonding with the new infant.¹¹⁸ The 1986 Catalyst survey indicated that women generally receive three months or less total leave time.¹¹⁹ Generally, the employee is paid only for the portion of leave which relates to the period of disability following childbirth.¹²⁰

When inquiring about leave for men, the Catalyst survey found that only thirty-seven percent of large companies offered unpaid parenting leave with a job guarantee to their male employees.¹²¹ The paternity leaves generally parallel what is offered to the female employees of the company.¹²² The only difference between paternity and maternity leave is the period related to disability which is appropriately granted to women employees only.¹²³

Few men, however, take advantage of their company's paternity leave policy.¹²⁴ One explanation for male employees' hesitation to take paternity leave might be the attitude of their employers. In a follow-up to their survey of American companies' paternity leave policies, Catalyst surveyed employers' perceptions of paternity leave.¹²⁵ The majority of employers surveyed indicated that they did not approve of men taking paternity leaves.¹²⁶ Ninety percent of the companies offering paternity leaves called the leaves personal leaves and did not publicize that they were related to paternity.¹²⁷ Additionally, Catalyst asked companies what they would consider reasonable paternity leave and sixty-three percent of the companies responded that no time at all was considered reasonable.¹²⁸ Seventeen percent, however,

provide a job guarantee are considered, Catalyst found that 95% of the responding firms offered maternity leave. *Id.*

118. Sheinberg, *supra* note 117, at 214.

119. *Id.* Sheinberg noted that the length of a typical leave period varies depending on the survey. *Id.* In addition to the Catalyst survey, Sheinberg provided statistics from a Columbia University study which indicated that a two to three month leave was offered by 61% of its respondents. *Id.* Another study indicated that almost half of the respondents had a maximum leave of four to six months. *Id.*

120. *Id.* at 215.

121. *Id.* at 217. A 1990 survey of the nation's largest companies indicated that 31% of the respondents offered some form of paternity leave. Shari Rudavsky, *New Fathers Reluctant to Take Time Out: Fearing the 'Daddy Track,' Few Opt to Accept Paternity Leave*, WASH. POST, July 7, 1992, at A3. In contrast, a 1989 survey of medium and large-size companies found that only 18% of the responding companies offered paternity leave to their full-time employees. Spencer Rich, *Maternity Leave Benefits Increase: More Companies Surveyed Also Offer Paternity, Child Care Aid*, WASH. POST, April 8, 1990, at H9. The significant decrease in the number of employers offering paternity leave could be attributed to the inclusion of medium size companies in the survey.

122. Sheinberg, *supra* note 117, at 217.

123. *Id.*

124. Rudavsky, *supra* note 121, at A3. The survey indicated that only one percent of eligible employees took advantage of paternity leave. *Id.*

125. Ann Curran, *Why Men Don't Take Paternity Leaves*, HEALTH, Jan., 1989, at 47.

126. *Id.*

127. *Id.* By not specifically identifying the leaves as related to paternity, but rather grouping it with other leave of absences, the employer might be sending a message to its male employees that paternity leave is not truly sanctioned. Sheinberg, *supra* note 117, at 218.

128. Curran, *supra* note 125, at 49. Paternity leave still carries a stigma in American society. A common view is that men should not reduce their commitment to their jobs and should always remember that their primary responsibility is to earn an income and support their families. Rudavsky, *supra* note 121, at A3. Older managers tend to reinforce the younger

indicated that a maximum of two weeks paternity leave would be acceptable.¹²⁹ Few studies explore men's attitudes toward taking parental leave and their reasons for not using the leave.¹³⁰ Catalyst's survey indicated that men still hesitate to take paternity leave because of fear of the unknown and sex-role stereotyping.¹³¹

One scholar attempted to clarify men's hesitancy to participate in child care and take paternity leave by grouping possible barriers to participation in four categories: (1) biology; (2) social psychology; (3) lack of social support; and (4) economics.¹³² Biological obstacles include the belief that women are better suited to care for children than men.¹³³ This rationale has been refuted in studies which show that a father's response to his baby's signals for assistance is comparable to the mother's response.¹³⁴ Social and psychological obstacles represent the father's attitudes toward gender roles and will be affected by the man's upbringing, his level of education and his exposure to different methods of fathering.¹³⁵ Fathers may believe that unpaid work in the home is less valued in society than paid employment and that the man is responsible for supporting his family.¹³⁶ The third factor, lack of social support, will prevent a father from taking parental leave if his friends and family will consider him strange for taking the leave.¹³⁷ If the man's employer and co-workers discourage the leave of absence, the man will probably not take the leave. Finally, economic factors might influence a man's decision to take paternity leave.¹³⁸ Economic barriers include inflexible jobs which are difficult to leave, and loss of income if the leave is not fully paid.¹³⁹

The acceptability of paternity leave seems to depend on the level of the first male employee to take paternity leave.¹⁴⁰ For example, a production

employees' hesitation to take paternity leave by reluctantly granting the leave and viewing employees who take paternity leave as less serious about their jobs. *Id.*

129. Curran, *supra* note 125, at 49.

130. Marilyn J. Essex & Marjorie H. Klein, *The Wisconsin Parental Leave Study: The Roles of Fathers*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 280, 281 (Janet S. Hyde & Marilyn J. Essex eds., 1991).

131. Curran, *supra* note 125, at 49. Another study indicated that men's attitudes did not significantly effect whether the leave was taken. Essex & Klein, *supra* note 130, at 283. Rather, men's use of leave was influenced by the availability of leave and whether or not the leave was paid. *Id.*

132. Haas, *supra* note 101, at 391. Although the discussion is based on a study of why Swedish fathers do not take advantage of the government offered paternity leave, the logic is applicable to American fathers also. For a further discussion of Sweden's parental leave policy, see *infra* text accompanying notes 188-94.

133. Haas, *supra* note 101, at 392.

134. *Id.*

135. *Id.* at 393-94. In a survey of 45 American men, 95 percent agreed that women should have a right to job-guaranteed maternity leaves. Essex & Klein, *supra* note 130, at 282. In contrast, only 60 percent agreed that men should have a right to job-guaranteed paternity leaves and 22 percent disagreed that men should have job-guaranteed paternity leave. *Id.* This survey reflects the attitude that childcare responsibility is still primarily considered to be a woman's job.

136. Haas, *supra* note 101, at 394.

137. *Id.* at 395-96.

138. *Id.* at 396.

139. *Id.* at 396-98.

140. Curran, *supra* note 125, at 86.

company which employed approximately twenty-five employees had an informal paternity leave policy, but no maternity leave policy.¹⁴¹ This particular company had never needed a maternity policy because no employee had ever requested maternity leave.¹⁴² A paternity leave policy had been implemented, however, as three male employees, one of whom was the vice president of finance, had become new fathers while employed at the company.¹⁴³

IV. POLICY CONSIDERATIONS FOR PROVIDING GENDER NEUTRAL PARENTAL LEAVE POLICIES

A. ECONOMIC ANALYSIS OF PROVIDING MEN WITH LEAVE

1. *Cost of Providing Men with Maternity Leave*

Little data exists as to the employer's cost of providing paternity leave to men. Research, however, has been done on the cost of providing parental leave under the Family and Medical Leave Act (FMLA).¹⁴⁴ The cost of the FMLA, developed in a study by the United States General Accounting Office (GAO), will be used to estimate the probable cost of providing paternity leave for men.

Most women who receive maternity leave beyond the period of actual disability related to childbirth or pregnancy are not paid for the period of leave which exceeds the period of disability.¹⁴⁵ Therefore, most men receiving paternity leave are likely to be unpaid for their period of absence.¹⁴⁶ Accordingly, the estimated cost and methodology of the study of the FMLA should provide a reasonable estimate of the cost of paternity leave.¹⁴⁷

When leave is unpaid, the primary costs to the employer are continuation of the employee's benefits, such as health care, and the cost of replacement workers or the decrease in productivity if the absent worker is not replaced.¹⁴⁸ The GAO discovered that less than one-third of workers who took extended medical or family leave were replaced by their employers during their absence.¹⁴⁹ Additionally, the cost of replacing workers was typically less than the wages and benefits which would have been paid to the

141. Barbara Butler & Janis Wasserman, *Parental Leave: Attitudes and Practices in Small Businesses*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 223, 226 (Edward F. Zigler & Meryl Frank eds., 1988).

142. *Id.*

143. *Id.*

144. UNITED STATES GENERAL ACCOUNTING OFFICE, GAO'S COST ESTIMATE OF THE FAMILY AND MEDICAL LEAVE ACT OF 1989 (H.R. 770) (GAO/HRD-89-68-Parental Leave) (1989) [hereinafter GAO REPORT]. The Family and Medical Leave Act was recently passed by Congress and signed by President Clinton. See *infra* text accompanying notes 199-215 for a discussion of the Act.

145. Sheinberg, *supra* note 117, at 215.

146. This proposition is supported by a 1989 survey conducted by the Department of Labor which found that paid paternity leave was rare in medium and large-size companies in the United States. Spencer Rich, *Maternity Leave Benefits Increase: More Companies Surveyed Also Offer Paternity, Child Care Aid*, WASH. POST, April 8, 1990, at H9.

147. For differences between the Family and Medical Leave Act and Title VII see *infra* notes 206-13 and accompanying text.

148. GAO REPORT, *supra* note 144, at 1-2.

149. *Id.* at 3.

absent worker.¹⁵⁰ The firms typically dealt with employee leaves by reallocating the work among the remaining employees.¹⁵¹ If firms are not replacing most workers that take leave, additional costs related to leave will be minimal.¹⁵²

The GAO also calculated the cost of continuing health care benefits for employees on child care leave.¹⁵³ Interestingly, the GAO based its calculations on the number of women who would have been eligible to take leave if the FMLA had been implemented in 1986.¹⁵⁴ The GAO estimated that the cost of continuing health benefits for women on leave to care for new children would be \$90 million annually.¹⁵⁵ As the GAO's estimate was based on 840,000 eligible employees, the cost per employee per year would be \$107.¹⁵⁶

As noted above, few men take paternity leave when it is available.¹⁵⁷ An estimated 15 to 30 percent of all fathers will take leave for a few days or weeks when the FMLA becomes effective.¹⁵⁸ The cost to the employer of these leaves will be small because the estimated number of employees taking leave is low and the estimated length of the leave is short.¹⁵⁹

2. *Benefits of Providing Paternity Leave*

Providing leave to employees may also benefit employers by helping the employer hire and retain workers.¹⁶⁰ Employers generally provide employee benefits in order to attract, hire and retain quality employees.¹⁶¹ Research indicates that benefits encourage longevity, reduce turnover¹⁶² and increase

150. *Id.*

151. *Id.*

152. *Id.*

153. GAO REPORT, *supra* note 144, at 4.

154. *Id.* The GAO calculated the cost of leave based on the number of eligible women after a determination that leave to care for new children is taken almost exclusively by women. *Id.* For a further discussion on the societal views that create this situation see *supra* text accompanying notes 124-43.

155. GAO Report, *supra* note 144, at 4. The calculation is based on information that 2.2 million working women gave birth or adopted a child in 1986. *Id.* Only 840,000 of these women would have been eligible for unpaid leave under the FMLA as it only applies to employees who had worked for a company, which employs more than 50 employees, for at least one year prior to taking leave. *Id.* The GAO estimated that women would take the full 10 weeks of leave allowed by the proposed Act. *Id.* Additionally, the GAO considered the proportion of women who had some form of paid disability leave, paid vacation or sick leave available and reduced the cost of unpaid leave under the FMLA accordingly. *Id.*

156. The GAO additionally calculated that the cost to the employer would be \$102 million if the legislation covered firms employing 35 employees. *Id.* As this estimate was based on 931,000 eligible women, the cost per employee would be approximately \$110. *Id.*

157. See *supra* note 124 and accompanying text.

158. *Statements on Parental Leave Legislation (HR 925) Before House Labor Subcommittee on Labor-Management Relations*, 43 Daily Lab. Rep. F-1 (Mar. 6, 1987) (statements of Dr. Joseph H. Pleck, the Henry R. Luce Professor of Families, Change & Society at Wheaton College, in Norton, MA).

159. *Id.*

160. Roberta M. Spalter-Roth et al., *Improving Employment Opportunities for Women Workers: An Assessment of the Ten Year Economic and Legal Impact of the Pregnancy Discrimination Act of 1978* 18 (Sept. 1990) (on file with the SMU Law Review).

161. *Id.*

162. *Id.*

overall job satisfaction.¹⁶³

Tulman and Fawcett noted in their survey that whether the woman had maternity leave from her job was significantly related to whether she planned to return to work after her child was born.¹⁶⁴ Of the twenty-four women surveyed who had maternity leaves, twenty-one planned to return to work after delivery.¹⁶⁵ In contrast, only four of the nine women who did not have maternity leaves planned to return to work.¹⁶⁶ Women who did not have maternity leave returned to work an average of five weeks after delivery, whereas women with maternity leave returned to work an average of twenty-one weeks after delivery.¹⁶⁷

B. SOCIETAL EFFECTS OF A GENDER-NEUTRAL POLICY

1. *Stereotyping Men and Women's Professional and Family Responsibilities*

Debate exists as to whether the PDA allows preferential treatment of pregnant employees when the purpose is to further equal employment opportunities for women.¹⁶⁸ Opponents of allowing preferential treatment argue that "[w]hile protecting women's jobs during their unique disability period will further this goal . . . providing child-rearing/parental leave exclusively to women only reinforces stereotypes and discourages equal employment opportunities, since both men and women can care for children."¹⁶⁹ Proponents of granting preferential treatment contend that if women do not have special child-rearing protection, women will be disadvantaged in the workplace since women tend to assume the majority of family responsibilities and society continues to view child-rearing as a predominately female role.¹⁷⁰

An employment policy which provides parental leave just to women effectively discriminates against both women and men.¹⁷¹ Men are discriminated against because they are denied the opportunity to become involved in child-rearing while their female colleagues are given the opportunity.¹⁷² Women are discriminated against because "they are in effect being told that their

163. Stuart Silverstein, *Family Leave Law Costs Them Little, Employers Find*, L.A. TIMES, Sept. 15, 1992, at D1.

164. Tulman & Fawcett, *supra* note 97, at 79.

165. *Id.*

166. *Id.*; see also Lally-Green, *supra* note 71, at 233 n.48 (citing U.S. BUREAU OF THE CENSUS, Series P-23, No. 165, *Work and Family Patterns of American Women* (1990) (finding that between 1961 and 1985, almost twice as many women who had paid leave or other benefits returned to work within six months of childbirth when compared to women without benefits)).

167. Tulman & Fawcett, *supra* note 97, at 79.

168. Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 INDUS. REL. L.J. 377, 400 (1989).

169. *Id.*

170. *Id.*

171. Elizabeth I. Freedman, *Parental Leaves of Absence for Men*, 31 BUFF. L. REV. 273, 280 (1982).

172. *Id.*

proper place is in the home with the children."¹⁷³

For example, several European countries have generous parental leave policies, but these countries also have high unemployment rates for women of child bearing years and women have remained primarily in menial, low-skilled jobs.¹⁷⁴ Of eighteen western European countries,¹⁷⁵ only six provide leave for both the new mother and father.¹⁷⁶ Even in the countries which provide leave for both fathers and mothers, women still use parental leaves more frequently than men,¹⁷⁷ women do not earn the same pay for the same jobs as men,¹⁷⁸ women experience declines in future earnings as a result of being out of the workforce for maternity related reasons,¹⁷⁹ and women generally believe they face discrimination in the workforce.¹⁸⁰ These figures suggest that providing parental leave is not enough, especially when it is accompanied with an attitude that only women need parental leave. Societal attitudes regarding the responsibilities of raising children must be changed before women will experience full equality in the workplace.

2. *Effects of Increased Participation by Men in Childcare*

In the United States, childcare is still seen as primarily the woman's responsibility. This attitude is reflected in the percentage of men who take paternity leave when it is offered to them.¹⁸¹ Few studies have been done on the effects of paternity leaves on men, their wives and children.¹⁸²

Studies have shown that "many fathers spend only 15 to 20 minutes a day with their children."¹⁸³ Fathers seemed to spend more time with their chil-

173. *Id.*

174. Remmers, *supra* note 168, at 410.

175. The 18 countries considered to be western Europe are Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany (FRG), Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland. Shannon L. Antle, Note, *Parental Leave: An Investment in our Children*, 26 J. FAM. L. 579, 594 n.112 (1987-88).

176. *Id.* at 595-96. The six countries which provide leave for either parent are Denmark, Portugal, Spain, Greece, Italy and Sweden. *Id.*

177. In Sweden, 98% of the total number of days available for parental leave are taken by women. Joseph P. Allen, *European Infant Care Leaves: Foreign Perspectives on the Integration of Work and Family Roles*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 245, 264 (Edward F. Zigler & Meryl Frank eds., 1988). The men who take leave typically take a shorter amount of time off than the women. *Id.* These patterns suggest that women are still seen as the primary caretaker of young children. *Id.*

178. In Sweden, considered one of the world's most progressive nations in term of gender equality, women earn only 81% of men's salaries for performing similar jobs with similar job qualifications. *Id.* at 260.

179. A survey of Swedish women found that the loss in average future earnings resulting from a full year out of the workforce was two percent. *Id.* at 262. No data was collected on women who took less than one year, but the study indicated that the effect of being out of the work force on future earnings was generally linear. *Id.* The survey also found that women who temporarily worked part-time experienced the same loss in future earnings as if they had been out of the workforce completely. *Id.*

180. *Id.* at 260.

181. See *supra* note 124 and accompanying text.

182. Essex & Klein, *supra* note 130, at 281.

183. David Milofsky, *The Baby v. the Corporation*, *WORKING WOMAN*, June 1985, at 136; see also Essex & Klein, *supra* note 130, at 285 (describing a survey which indicated that fathers spend approximately 25 minutes per day caring for their children).

dren immediately following the birth of the child, with the time decreasing after the child's first birthday.¹⁸⁴ A five-year study of children from role-reversed families¹⁸⁵ indicated that children from these families were more sociable and more persistent in adaptive-skills tests than children being raised in traditional homes.¹⁸⁶ Another study indicated that infants with stay-at-home fathers averaged six to twelve months ahead of their peers in problem-solving tasks.¹⁸⁷ These studies indicate that children benefit from active participation by both the mother and father in their care and upbringing.

3. Sweden's Solution to the Childcare Crisis

A review of Sweden's parent-insurance program indicates that paternity leave can become a viable option for men. Sweden's program was established in 1974.¹⁸⁸ Under the program, the father and mother have fifteen months of paid leave in order for one parent to remain home to care for a newborn or adopted child.¹⁸⁹ Ninety percent of the employee's salary is paid for the first twelve months of the leave and approximately ten dollars a day is paid if the leave is extended an additional three months.¹⁹⁰ During the first year the leave was allowed, only three percent of male employees took advantage of the leave.¹⁹¹ By 1980, twenty-two percent of male em-

184. Essex & Klein, *supra* note 130, at 285-86. A month after the baby's birth, the fathers reported spending approximately five hours with their babies each day. *Id.* at 285. A year after their baby's birth, the fathers reported spending approximately three hours with their babies. *Id.* at 286.

185. Role-reversed families are defined as those families in which the father assumes the predominate role in raising the children, either through part-time work, working out of the home, or quitting work completely. Milofsky, *supra* note 183, at 136.

186. *Id.*

187. *Id.*

188. Joseph H. Pleck, *Fathers and Infant Care Leave*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 177, 181 (Edward F. Zigler & Meryl Frank eds., 1988). The Swedish government developed the parental leave plan as a result of concerns about a low birth rate in the country, a need to encourage employment of women and a desire to change gender stereotypes. Haas, *supra* note 101, at 377. Since the mid-1960's, Sweden had been involved in public debate about gender roles. *Id.* at 381. Debate centered on the dual role of women in society as housewife-mother and wage-earner. *Id.* One side advanced the theory that men's role in society should change, rather than burdening women with multiple roles. *Id.* at 382. One person noted

[t]he concept of double roles [for women] can have an unhappy effect in the long run. It perpetuates the idea that woman has an inherent main task, the care and upbringing of children, homemaking, and keeping the family together. . . . Both men and women have one main role, that of being human beings.

Id. (quoting Eva Moberg, Swedish journalist). For further discussion of the effect of gender stereotyping, see *supra* text accompanying notes 168-80.

189. Haas, *supra* note 101, at 375.

190. *Id.*

191. *Id.* at 388. Haas does not consider the low response rate surprising as the program was new and society's acceptance of the paternal role in childraising was in its infancy. *Id.* Also, Swedish women were under strong pressure to breastfeed for the first six months after the child was born and the time allowed for parental leave in Sweden was less than seven months in 1974. *Id.* at 388-89. As only one parent could take leave under the Act, it is reasonable that few men would have taken advantage of the leave in order to allow the mother to remain home and breastfeed. *Id.* at 389. Additionally, Haas felt the statistics might have

ployees took parental leave¹⁹² and in 1985, twenty-seven percent of eligible men took some form of the parental leave.¹⁹³ The evolution of Sweden's insurance program indicates that once parental leave becomes socially acceptable for male employees, it can be a desirable and used benefit.¹⁹⁴

C. AMERICA'S RESPONSE TO THE CHILDCARE CRISIS — THE FAMILY MEDICAL & LEAVE ACT

Today, only eight percent of all families would be considered traditional families comprised of a working father and a homemaker mother.¹⁹⁵ Seventy-three percent of women twenty to thirty-four years of age are employed outside the home.¹⁹⁶ Fifty-one percent of new mothers are back in the workforce prior to their child's first birthday.¹⁹⁷ In response to the changed composition of the American workforce, numerous states have passed legislation to provide workers with increased rights to take leave for family-related reasons while maintaining their job security.¹⁹⁸ On the national level, a gender-neutral parental and family medical leave act was recently passed by Congress and signed by President Clinton.¹⁹⁹

Under the FMLA, employers who employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" are subject to the FMLA.²⁰⁰ Generally, employees who have been employed by the covered employer for at least

been misleading: at the inception of the program, many men were not eligible because eligibility depended on employment of the mother at the time the baby was born. *Id.*

192. Haas, *supra* note 101, at 389. The increase may be attributed to the extension of parental leave to 12 months. Haas noted that 27 percent of fathers took leave during the first year and a half of their children's lives. *Id.*

193. *Id.* at 390.

194. Although men in Sweden increasingly participate in the parental leave program, the number of male participants is still much lower than the number of women participants. Eighty-five percent of Swedish fathers took an average of eight-and-one-half days off immediately following the birth of their child. *Id.* In contrast, new mothers took an average of eight-and-one-half months leave following the birth of their child. Pleck, *supra* note 188, at 184. Fathers who take extended leave under Sweden's parental leave act typically take the leave for about three months starting when the baby is five or six months old. *Id.* Haas suggested that one reason Swedish fathers are hesitant to take extended parental leave is that the leave involves a complete role reversal whereby the mother returns to work while the father stays home with the baby. Haas, *supra* note 101, at 391. When the father takes a small number of days immediately following the birth of the child, the mother is usually home also and the time off can be viewed as merely helping the mother adjust to the new baby. *Id.* As can be seen from Sweden's implementation of a policy designed to reduce some of the gender stereotyping associated with childraising, improvements can be made, but they take substantial time.

195. *Work and Family: Most Women Not Offered Child Care, Maternity Leave Benefits, Report Finds*, 16 Pens. Rep. (BNA) 771 (May 1, 1989).

196. *Id.* In 1950, only 35% of women in that age group were employed outside the home. *Id.*

197. *Id.*

198. Spalter-Roth, *supra* note 160, at 28-29. Most of the states that enacted legislation at this time passed parental and family leave acts designed to protect both male and female employees. *Id.* Spalter-Roth attributes much of this legislative activity to the Supreme Court's decision in *Guerra*. *Id.*; see *supra* notes 43-56 and accompanying text for further discussion of the Court's decision.

199. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

200. *Id.* § 101(4)(A).

twelve months and for at least 1,250 hours of service during the previous twelve month period benefit under the FMLA.²⁰¹ The statute allows an employee to take up to twelve weeks unpaid leave during a one year period.²⁰² Leave is allowed for either male or female employees upon the birth, adoption or receipt for foster care of a child.²⁰³ The employee is guaranteed the same or similar job upon return to work.²⁰⁴ Additionally, the employer is required to continue health insurance coverage for the employee during the employee's absence from work.²⁰⁵

With the passage of the FMLA, male employees are entitled to leave, with a job guarantee upon their return to work, following the birth of a child. A male employee's ability to sue successfully under Title VII of the Civil Rights Act will still be important as rights under Title VII are broader than the rights guaranteed by the FMLA.²⁰⁶ First, as discussed above, the FMLA applies only to those employers who employ at least fifty employees.²⁰⁷ Of those employees, only employees who have worked for the employer for a proscribed number of hours are covered.²⁰⁸ In contrast, Title VII applies to any employer employing "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."²⁰⁹ Additionally, a one-year tenure with the employer is not required before the employee has rights under Title VII; an employee is defined as "an individual employed by an employer."²¹⁰ Therefore, an employee who has no recourse under the FMLA may be able to sue under Title VII by meeting the less stringent requirements.

In addition, potential damages may be greater under Title VII than under the FMLA as a result of the passage of the Civil Rights Act of 1991, which allows punitive and compensatory damages for civil rights violations.²¹¹ Under the FMLA, damages are limited to wages, salary, employment benefits, or other compensation lost by the employee as a result of a violation of the Act.²¹² Equitable relief, including employment, reinstatement and promotion is also provided for under the FMLA.²¹³ Under both Title VII²¹⁴ and the FMLA,²¹⁵ the prevailing party, other than the United States, may be

201. *Id.* § 101(2)(A).

202. *Id.* § 102(a)(1).

203. *Id.*

204. Family and Medical Leave Act of 1993, § 104(a)(1)(A).

205. *Id.* § 104(c)(1).

206. *See supra* part II.A.1 for a discussion of reverse discrimination lawsuits.

207. *See supra* text accompanying note 200.

208. *Id.*

209. 42 U.S.C. § 2000e(b) (1988).

210. *Id.* § 2000e(f).

211. *Id.* § 1981b (Supp. III 1991). Punitive damages are limited to situations in which the complaining party is able to demonstrate that the employer engaged in a discriminatory practice with malice or with reckless indifference to the rights of the aggrieved party. *Id.* Additionally, compensatory damages under § 1981b do not include relief authorized under Title VII. *Id.*

212. Family and Medical Leave Act of 1993, § 107(a)(1)(A).

213. *Id.* § 107(a)(1)(B).

214. 42 U.S.C. § 2000e-5(k) (1988).

215. Family and Medical Leave Act of 1993, § 107(b)(3).

awarded reasonable attorneys' fees in addition to other relief awarded.

V. CONCLUSION

With the passage of the Family Medical and Leave Act, men are guaranteed the same right to unpaid leave as women upon the birth of a baby. Under Title VII, however, the question remains unanswered as to whether men and women are guaranteed the same right to employment leave after the birth of a child. Although the United States Supreme Court hinted in *Guerra* that the preferential treatment allowed to women for maternity related reasons was limited to the period of disability following childbirth, the Court neglected to expressly make that limitation. Conflicting lower court decisions indicate that the Court's holding in *Guerra* can be interpreted broadly or narrowly.

If this issue reaches the Supreme Court, the Court will likely determine that preferential treatment allowed women must be limited to the period of disability. Allowing women leave beyond that period will only strengthen the stereotype that women should be the primary caretakers of children. Reinforcing the stereotypical view of women will prevent men and women from becoming truly equal in the workplace. Employers will be hesitant to hire or promote potential mothers for fear that the women will leave the workforce after having children.

A broad reading of *Guerra* deprives men of the opportunity to actively participate in raising their children and reinforces the stereotype of men as their family's primary breadwinner. In a society that views women as the primary caretaker of children, men face discrimination when they attempt to take an active role in the upbringing of their children. Guaranteeing that men and women have equal rights to leave beyond the period of disability will reduce discrimination in the workforce and allow both men and women to actively partake in childrearing.

If the preferential treatment allowed to women is limited to the period of disability following childbirth, the time that a woman is disabled needs to be accurately determined. Most current studies have not focused on the recuperative period following childbirth to determine when a woman may return to work. Tying the amount of leave allowed to a woman's disability period might require individualized determinations, rather than a standard amount of leave.

As an increasing number of women enter the workforce, society has recognized the need to reevaluate the employer's response to his employees' families. The Family Medical and Leave Act is a direct response to the changing face of the American family. Recognition must also be given to men's rights under Title VII in order for both men and women to gain true equality in the workplace and in society.

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Meloney Cargil

Jim Jenkins

