

LAW OFFICES OF JANICE GOODMAN
350 Seventh Avenue, Ste. 1800
New York, New York 10001
212-869-1940
jg@janicegoodmanlaw.com

EVOLUTION OF THE PREGNANCY DISCRIMINATION ACT AND FUTURE ENFORCEMENT

With the steady increase of women in the workforce, including increasing numbers in what are defined as “non-traditional” jobs (i.e. higher paying jobs), there is a need to reevaluate and reexamine the Pregnancy Discrimination Act (“PDA”), and whether it fully provides women with equal opportunities in employment. A look backward will help better understand the present status of the law protecting pregnant or to become pregnant women and sets the stage from which future protections can be molded.

A. HISTORICAL PERSPECTIVE

The legal underpinning for employment laws protecting pregnant women is found in the case that made Louis Brandeis and the Brandeis’ brief¹ famous, *Mueller v State of Oregon*, 208 U.S. 412, 28 S. Ct. 324 (1908). Following the Supreme Court’s rejection of state laws protecting workers in general, *See, Lochner v New York*, 198 U.S. 45, 25 S. Ct. 539 (1905), *Muller* was the first challenge to a law that limited protections to women. Oregon had enacted a statute which prohibited employment of women in various mechanical and factory jobs or in laundries for in excess of 10 hours. The Court, accepting Brandeis argument, upheld the protective law finding that,

[W]oman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of mother-hood are upon her. *Muller* at 208 U.S. 422.

¹ A brief incidentally written by an accomplished non-lawyer, Josephine Goldmark, Brandeis sister-in-law.

Following *Muller* an overwhelming number of states adopted protective labor laws which, as Justice Ginsburg observed, “were in many instances protecting [women] from better paying jobs and opportunities for promotion.”² Twenty-six (26) states excluded women totally from certain jobs including mining, bartending, retail liquor stores, bellhop, gas and electric meter readers, operating baggage elevators if doors are not automatic.³ Many states prohibited women from working nights on jobs. In criticizing such legislation, Congresswoman St. George noted “Women are protected—they cannot run an elevator late at night and that is when the pay is higher...but what about the offices, gentlemen, that are cleaned every morning about 2 or 3 o’clock.”⁴ Seven (7) state laws forced women to quit work when pregnant or to stay away from work after childbirth.

Women continued to be denied equal protection under the Constitution until the case of *Reed v. Reed*, 404 U.S. 71, 925. Ct. 251 (1971). More often than not treating women differently, and presumably protectively, was justified by their procreative abilities. See, *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) a law precluding women from mandatory service on juries because she is “the center of the home and family life.”

B. TITLE VII AND PROTECTIVE LABOR LAWS

The history of protective labor legislation and its impact on limiting women’s access to jobs and depressing their wages is important because it informs the development of the laws regarding pregnancy.

It is well documented that the addition of women as a protected class under Title VII, 42 U.S.C. 2000e (1964) was the result of efforts to defeat the legislation. Although the proposal to add sex as a protected class was initially defeated by the House Rules Committee, Rep. Howard Smith, the then Chair of the Rules Committee and a strong opponent of the bill, introduced the

² Ruth Bader Ginsburg, *Muller v State of Oregon: One Hundred Years Later*, 45 Willamette L. Rev. 359, 370 (internal quotes omitted)

³ U.S. Department of Labor, *Summary of State Labor Laws for Women* (1969)

⁴ C. Bird, *Born Female: The High Cost of Keeping Women Down* (1969) at 6-7.

amendment on the floor. Under those circumstances, even Rep. Edith Green, a strong proponent for women's employment rights, spoke out against the amendment. The proposal was ridiculed in many quarters as the "Bunny Bill."⁵ However, the bill passed with the inclusion of sex as a protected classification.

As a result of the late and thought to be misbegotten inclusion of women as a classification protected under Title VII, the newly created U.S. Equal Employment Opportunity Commission ("EEOC") was ill prepared to take on sex discrimination cases and was, in some cases, disparaging of them. For example, in an early guidance, the EEOC found that segregation of help-wanted ads by color was a violation of the law, but sex segregation of job listings was found permissible.⁶ The EEOC grappled with the issue of whether the state laws which treated women differently, and supposedly more favorably, were *bone fide* occupational qualifications under the law. ("BFOQ"). Ultimately, the Commission adopted guidelines which upheld laws having the "effect of, protecting women against exploitation and hazard."⁷ The Commission, however, made a distinction between those laws which protected women and those which were discriminatory, although it was never clear how that distinction operated. Moreover, at first the Commission took a "hands off" position and would not litigate any of these issues.

This left to the private bar, mainly lawyers associated with the Now Legal & Educational Defense Fund, to challenge the protective laws restricting employment opportunities for women. After several successful challenges, enforcement of protective legislation all but disappeared, though sex segregated jobs continued. *Weeks v. Southern Bell Telephone and Telegraph*, 277 F. Supp. 177 (S.D. Ga. 1967); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp.1219 (C.D. Cal. 1968) aff'd 444 F. 2d. 1219 (9th Cir. 1971); *Bowe v Colgate-Palmolive*, (D. Ind. 1967).

⁵ *Id* at 12-14

⁶ EEOC subsequently changed its position

⁷ 29 CFR 1604.1 (b) (c)in many quarters. 1967

C. PREGNANCY IS A GENDER NEUTRAL STATE

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

Anatole France.

The United States Supreme Court, in two seminal cases, *Geduldig v. Aiello*, 417 U.S. 484, 94 S. Ct. 2485 (1974) and *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1976), established majestic equality when it held that where pregnant men and women are treated equally, there is no impermissible discrimination. This set the scene for the ultimate passage of the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (“PDA”).

Geduldig was a 14th Amendment challenge to California’s disability insurance system which provided benefits for all medically related disabilities, including voluntary disabilities such as cosmetic surgery, or disabilities related to only one group such as sickle cell anemia. The only medical disability not covered was the temporary disability resulting from a normal pregnancy. In upholding the constitutionality of the law, the Court found it was not invidious discrimination because

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. *Id* 484 U.S. at 496-497

In other words, since men are not protected against pregnancy related discrimination, it is not discriminatory to preclude women from such coverage.

Two years later, the Court upheld a similar disability plan which excluded pregnancy against a challenge brought pursuant to Title VII. In *Gilbert* the court reaffirmed the suspect logic of *Geduldig*: *Id* 429 U.S. at 138

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex based classification like those considered in *Reed*, and *Frontiero*. *Id* at 429 U.S. at 134

Congress acted promptly in 1978 reversing the Supreme Court’s position with the passage

of the PDA amending Title VII by expanding the definition of sex discrimination to include pregnancy. The PDA provides, in pertinent part:

The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to 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 benefit programs, as other persons not so affected but similar in their ability or inability to work...
42 U.S. C. 2000e(k)

Those who were involved in the drafting of the PDA were very cognizant of the long history and deleterious effect of the protective labor laws on women’s ability to obtain employment opportunities. Although the need for legislation to protect pregnant women in the workforce was clear, there was an equal concern that legislation may be viewed as providing special benefits for women, thus making women more costly employees ultimately resulting in the failure to hire women. The language was crafted with this goal in mind—women should be treated no differently than similarly situated men—to wit men with disabilities. The law did not encompass the position, later evolving, of the need for special accommodation for pregnancy.⁸

A full blown debate on these theories (equal treatment versus special accommodation) erupted among and between feminists advocates and theorists within and outside of the legal community around the case of *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 107 S. Ct. 683 (1987).⁹ Cal Fed’s disability policy allowed the company to terminate any employee attempting to return to work after a disability leave, if there was no similar position open. A female employee, Lillian Garland, who was terminated after returning from a pregnancy leave, pursued a

⁸ Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1985)

⁹ For full discussion see, Patricia A. Shiu and Stephanie M. Wildman, “Pregnancy and Discrimination and Social Change,” 21 Yale J. L. & Feminism 119 (2009), Stephanie M. Wildman, Women and the Law Stories, Foundation Press, edited by Schneider, & Wildman, 2011, 253-276

State claim under the California Fair Employment law, arguing that her termination was in violation of the State law which required employers to provide at least 4 months of pregnancy leave, and to grant reinstatement at the conclusion. The State enforcement agency upheld Ms. Garland's claim of discrimination. Cal Fed subsequently moved for declaratory relief in federal court claiming that its policy treated all disabilities the same, and to grant leave to pregnant women would be preferential treatment in violation of federal law. Therefore, Cal Fed argued, the equal treatment of men and women under its policy was in full compliance with the PDA, which pre-empted the State law.

The lower court upheld the challenge finding that allowing preferential treatment of women for pregnancy would lead to reverse discrimination claims brought by men who lost their jobs after a disability leave. In reversing that decision, the Ninth Circuit took aim at the Supreme Court, commenting that the PDA was a direct response to the Supreme Court's "false logic" in finding that pregnancy discrimination was not sex discrimination. *Cal. Fed. Sv. & Loan Ass'n v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985).

The Supreme Court granted cert, which led to the debate among feminists as to how the anti discrimination laws should treat pregnancy under the PDA.¹⁰ On the one hand, many who had been closely involved in the passage of the PDA held to the position that all the law did or should require was equal treatment. They feared that the re-institution of any laws which smacked of protectionism would ultimately be detrimental to the general purpose of securing jobs for women.¹¹ On the other side were those who argued that the "equal treatment" analysis was insufficient to fully protect women's ability for equal employment opportunities.. The test, it was argued, must be whether the policy denies women equal opportunities, not equal treatment. The argument was essentially that equality of opportunity was not possible without recognition of the fact that pregnancy was unique, not comparable to any other medical condition, and that accommodation

¹⁰ For a full explication of the debate see Shiu & Wildman, *Supra* n.8

¹¹ See, Williams, *Supra*

had to be made to assure that women, like men, could have a family without having to sacrifice a job or career.

Ultimately, the Supreme Court, in a decision by Justice Marshall, a dissenter in *Geduldig* and *Gilbert*, upheld the Ninth Circuit. The Court walked a very narrow line. It did not overrule *Geduldig* and *Gilbert*, but it upheld the California Statute by interpreting the PDA as setting a “floor beneath which pregnancy disability benefit may not drop—not a ceiling above which it may not rise.” *Cal Fed*, 479 U.S. at 280.

D. DOES THE EQUAL TREATMENT THEORY AND THE PDA DENY WOMEN EQUAL EMPLOYMENT OPPORTUNITIES

The debate has now come full circle. For women to have equal footing in the workforce, must accommodations be made during pregnancy. Normal pregnancy is not a recognized disability; nor is it considered an “illness.” Except for the final period of child birth, or in the case of major medical complications, normal pregnancy is not covered by disability programs. However, there are a wide range of jobs such as police officer, truck driver, nurse, housekeeper, which from the outset or at some point prior to delivery, pregnant women are temporarily unable to fully perform because of their condition. Yet, because they are denied job accommodations such as light duty assignments, or modified schedules, women often confront the dilemma of having to chose between work and family.

There have been profound changes in female participation in the workforce, even since the passage of the PDA.¹² Women comprise 46% of the workforce, 81 % of whom have children. 85% of the female workforce will become pregnant at some point in their career.¹³ Women today

¹² For an excellent analysis of the problem and breakdown of the present workforce see, Joanna L. Grossman and Gillian L. Thomas, *Making Pregnancy Work* , 21 *Yale J. L. & Feminism* 15

¹³ Grossman & Thomas at 15

comprise 23% of the workers in production, transportation, and material moving occupations. 38 % of all working women labor in occupations where they may be unable to perform their job during pregnancy without risking their health.¹⁴ This includes an increase of women in the uniformed forces. In 2000 Women comprised 10.6% of local law enforcement officers and 14.4% of federal officers.¹⁵ The question is, would these numbers be even greater, if accommodations were available.

Enforcement of the PDA to date has been mainly limited to the narrow protection of women against adverse actions such as termination or failure to promote because of pregnancy, relying on the traditional *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (973) method of proof. *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 210, (5th Cir.), cert denied 525 U.S. 1000 , rehearing denied 525 U.S. 1117 (1998);(pregnancy under the PDA is analyzed like Title VII discrimination claims in general); *Paraino v. International Orientation Resources, Inc.*, 137 F. 3d 987 (7th Cir. 1998)(plaintiff must show she was treated less favorably than non pregnant employee under identical circumstances).

With this major workforce shift, courts and litigants are re-evaluating the PDA and re-analyzing the meaning of equal opportunities in the context of pregnancy. In analyzing the language of the PDA more closely, some Courts are concluding that the traditional *McDonnell Douglas* test is inappropriate in a disparate treatment pregnancy discrimination claim. Moreover, Courts are increasingly looking to a disparate impact theory to determine whether policies not accommodating pregnancy have a disparate impact on women. In addition, there have been movements, national and local, for new legislation to recognize the need for accommodation, particularly for women, for paid sick and family leave with commitments for retaining positions.

¹⁴ *Id* at n. 19

¹⁵ Fabrice Czarnecki, M.D. Clinics In Occupational and Environment Medicine, Vol. 3, Issue 3, p 641-648, August 2003.

E. EXPANSION OF THE INTERPRETATION OF THE PDA

a. Disparate Treatment:

The Sixth Circuit in the case of *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) broke new ground with its decision regarding accommodation that must be made for pregnant women. The case involved a female postal employee who worked as a mail handler, a job requiring physical strength. When she became pregnant she was granted “limited” duty but denied “light duty.” Light duty assignments had greater benefits, but were reserved for those who were injured on the job. The lower Court awarded summary judgment to Defendant applying the *McDonnell Douglas* theory that there must be absolute comparability between jobs to meet the *prima facie* burden.

The Circuit in *Ensley-Gaines* held that strict comparability, of the type required in other Title VII actions, was a misreading of the PDA. Parsing the language, the Court held:

As recognized by the United States Supreme Court, “the second clause [of the PDA] could not be clearer: it mandates that pregnant employees ‘shall be treated the same for all employment-related purposes’ as nonpregnant employees *similarly situated with respect to their ability to work.*” As such, the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases. While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated “in all respects”, the PDA requires only that the employee be similar in his or her “ability or inability to work.” *Id.* 100 F.3d at 1226 (internal citations omitted).

Under this reading of the PDA, a pregnant woman is comparable to any other person with a disability, without regard to how the disability was acquired. A significant number of Courts have adopted this reading of the PDA. See, *Villanueva v. Christiana Care Health Services*, No. 04-258-JJF, 2007 U.S. Dist. LEXIS 4760, at *14 n.4 (D. Del. Jan. 23, 2007) (pregnant Patient Care Technician denied light duty satisfied *prima facie* case even though her medical restrictions differed

from those of employees granted light duty); *Sumner v. Wayne County*, 94 F. Supp. 2d 822, 826 (E.D. Mich. 2000) (police officer fired for violating department's no-leave policy for probationary employees after taking time off to give birth was "similarly situated" to male officer granted longer probationary period after sick leave for on-the-job injury; both were "temporarily disabled while on probation"); *Germain v. County of Suffolk*, 2009 WL 1514 (E.D.N.Y. May 29, 2009); (police officer denied light duty limited to only those who were injured on the job stated a cause of action under both disparate treatment and disparate impact theory). The Court in *Germain* rested its finding on the Supreme Court holding that the "second clause [of the PDA] could not be clearer: it mandates that pregnant employees shall be treated the same for all employment related purposes as non pregnant employees similarly situated *with respect to their ability to work*" Id at * emphasis in original) citing *Int'l Union v. Johnson Controls*, 499 U.S. 187, 204-205 (1991).¹⁶ The Court went so far as to give a jury instruction based on Cal Fed, saying it was not a violation of the PDA to provide greater benefits for pregnancy since the PDA is only a floor not a ceiling to the protection afforded pregnant women.¹⁷

b. Disparate Impact

The disparate impact theory has also opened doors to challenging policies denying or limiting a woman's ability to obtain accommodation when pregnant. A claim of discrimination can be supported where there are facially neutral employment practices which in fact "fall more harshly on one group than another and cannot be justified by a business necessity." *International Broth. of Teamsters v. U. S.*, 431 U.S. 324, 335 fn 15 (1977). Title VII proscribes not only overt discrimination, but also "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971). Proof of intent is not required under a disparate impact theory. *Id*, See also, *Robinson v. Metro-North Commuter R.R. Co.*, 267 F. 3d 147, 160 (2d Cir. 2001). Although statistics are a traditional method of proof of impact, it is not the only method.

¹⁶ For an outstanding analysis of the development of this disparate treatment theory see, Grossman & Thomas, 21 Yale J.L. & Feminism 15 (2009)

¹⁷ Since there was no appeal there is no opinion on this, but as the attorney of record, I am aware of the charge.

Claims of violation of Title VII based on pregnancy may proceed under a disparate impact theory. The Montana Supreme Court was early to rule that a company policy which provided no leave for the first year of employment had a disparate impact on women. *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P. 2d 1243 (Mont 1984). The Seventh Circuit also recognized that a disparate impact theory may be appropriate in a pregnancy discrimination case. *Maganuco v Leyden Community High School Dist.* 212, 939 F. 2d 440, 445 (7th Cir. 1991). In *Garcia v. Woman's Hosp. of Texas*, 97 F. 3d 810 (5th Cir. 1996) the Court found that disparate impact would be created if a physical lifting job requirement disfavors all, or substantially all, pregnant women; in both *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996) and *Germain v County of Suffolk, supra*, the Court held that a policy of providing light duty to police officers injured on the job, but not off the job constituted a *prima facie* disparate impact discrimination claim.

CONCLUSION AND FORECAST

The United States law to date has been one of the least family friendly among the western developed countries. Job protection and paid leaves, in some cases for substantial periods of time, are not uncommon in Europe. Women, as the child bearers and those who are still socially expected to carry the major child rearing responsibilities, are the ones primarily impacted by the failure to accommodate pregnancy and family responsibilities. Our anti-discrimination laws, wedded as they have been to the "equality of treatment" mold, have not met the challenge of affording equality of opportunity to women in the work force. Women, unlike men, have been the one's forced to decide between work and family; and between promotion or job advancement and family.

With the increasing number of women entering the workforce and demanding better paying jobs, there will undoubtedly be an increase in the development in the law relating to accommodation for women. There has already been activity at the State level to provide greater benefits, including paid leaves. Given the pressures now being placed on the Courts and legislatures, I suggest that the development of the law regarding pregnancy will be significantly expanded over the next decade.