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NOTE

AFFIRMATIVE ACTION FOR WORKING MOTHERS: DOES *GUERRA*'S PREFERENTIAL TREATMENT RATIONALE EXTEND TO CHILDREARING LEAVE BENEFITS?

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INTRODUCTION

Recognizing the increased burden faced by pregnant women and new mothers in the workplace,[1] Congress enacted the Pregnancy Discrimination Amendment of 1978 ["PDA"][2] to establish that discrimination based on pregnancy is by definition a form of illegal sex discrimination.[3] Under the PDA, women "affected by pregnancy" must be treated by

1. The presence of women in the work force has grown dramatically over the last forty years. Perhaps the most striking feature of this transition has been the increase in the labor force participation rate of women—especially those who potentially fulfill dual roles as both employee and mother. In 1970, only half the women between 18 and 24 years old were in the work force; by 1995, it is projected that more than 80% of the women in this age range will be working. *See* BNA, *Work & Family: A Changing Dynamic* 13 (1986) [hereinafter BNA, *Work & Family*]. In addition, in 1940, 8.6% of women with children under 18 were in the labor force, as compared to nearly 60% in 1985. *See id.* at 15. Similarly, as of 1987, roughly 50% of married women with children one year of age or younger were in the labor force, as compared to about 30% in 1975. *See* BNA, *Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health and Safety* 3 (1987) [hereinafter BNA, *Pregnancy & Employment*]; *see also* Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 Fordham L. Rev. 699, 705 (1986) (discussing disparate labor force participation rates for women based on family status) [hereinafter Dowd, *Maternity Leave*]; Hayghe, *Children in 2-Worker Families and Real Family Income*, Monthly Lab. Rev., Dec. 1989, at 48, 49 (discussing proliferation of dual-career families and displaying data in Table 1); Shaw & Shapiro, *Women's Work Plans: Contrasting Expectations and Actual Work Experience*, Monthly Lab. Rev., Nov. 1987, at 10 ("Having more children reduces labor force participation"). *See generally* Freedman, *The Changing Composition of the Family and the Workplace*, in The Parental Leave Crisis 23-33 (E. Zigler & M. Frank eds. 1988) (discussing the rapid trend away from the traditional family unit with mother at home and father at work); Schwartz, *Management Women and the New Facts of Life*, Harv. Bus. Rev., Jan.-Feb. 1989, at 65-68 (referring to conflict between career dedication and family balance) [hereinafter Schwartz, *Management Women*].

2. 42 U.S.C. § 2000e(k) (1988) (amending 42 U.S.C. § 2000e (1978)). 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 benefits programs, as other persons not so affected but similar in their ability or inability to work . . . .

3. *See* H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978), *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 150 (1979) [hereinafter *House Report*]; S. Rep. No. 331, 95th Cong., 1st Sess. 3-4 (1977), *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 40-41 [hereinafter *Senate Report*].

their employers "the same for all employment-related purposes" as other employees who are "similar in their ability or inability to work."[4]

Despite the PDA's seemingly straightforward language—which appears to require equal treatment of pregnant employees—the Supreme Court has recently construed the PDA to ensure more than equal treatment of women affected by pregnancy. In *California Federal Savings and Loan Association v. Guerra*,[5] the Court upheld a California statute requiring employers to provide up to four months of leave to female employees disabled by pregnancy, even though the statute does not require employers to grant leaves of similar duration to men with equally debilitating conditions.[6] Significantly, the Court offered a broad, yet vague, endorsement of preferential treatment for women workers affected by pregnancy, with the aim of ensuring equal opportunity for women in the labor market.[7] In the wake of *Guerra*, however, federal courts have disagreed on whether such preferential treatment should extend beyond the period of actual physical disability due to pregnancy to encompass the childrearing years.[8]

This Note considers whether, after *Guerra*, women may be provided with childrearing leave benefits on a preferential basis, and analyzes how the resolution of this question affects employer policies, current state laws, and proposed legislation regarding parental leave. Part I briefly reviews the background and development of federal legislation prohibiting sex discrimination in employment, focusing on the 1978 PDA. Part II examines how the Supreme Court's decision in *Guerra* raises the question of whether working women may be provided with childrearing leave benefits to the exclusion of working fathers. Part III analyzes how the competing perspectives of equal treatment and equal opportunity are implicated in the debate over childrearing leave, discussing recent federal court decisions applying these competing views. This Part concludes that, under either perspective, working men must be afforded the same childrearing benefits as women if the purposes of federal sex discrimination legislation are to be advanced. Part IV explores a range of possibili-

4. 42 U.S.C. § 2000e(k) (1988).

5. 479 U.S. 272 (1987).

6. *See* Cal. Gov't Code § 12945(b)(2) (West 1980 & Supp. 1991).

7. 479 U.S. at 289 ("The entire thrust . . . behind [the PDA] is to guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life" (quoting 123 Cong. Rec. 29,658 (1977) (remarks of Sen. Williams)).

8. *Compare Schafer v. Board of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) (denying such preferential treatment) *with Harness v. Hartz Mountain Corp.*, 877 F.2d 1307 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 728 (1990) (granting such preferential treatment). *See infra* notes 64-72, 93-98 and accompanying text. *See generally* Remmers, *Pregnancy Discrimination and Parental Leave*, 11 Indus. Rel. L.J. 377, 400 (1989) ("issue whether Title VII should invalidate parental/child-rearing leaves for women only is not without controversy") [hereinafter Remmers, *Parental Leave*]; M. Zimmer, C. Sullivan, & R. Richards, Cases and Materials on Employment Discrimination 354 (1988) (questioning whether fathers must be offered childrearing leave when women receive such leave).

ties for defining what is meant by "pregnancy disability," a term not clearly defined by the *Guerra* Court. Part V suggests how employer policies, state laws, and proposed federal legislation should address the issue of allowing childrearing leave to both sexes. Finally, this Note concludes that courts must distinguish between childbearing leave and childrearing leave in order to remain consistent with the goals of Title VII.

I. BACKGROUND AND DEVELOPMENT OF SEX DISCRIMINATION LEGISLATION AND THE PDA

Title VII provided the first comprehensive protection against sex discrimination in the workplace.[9] As originally enacted, the legislation viewed discrimination in the workplace as a "series of isolated and distinguishable events, for the most part due to ill will" on the part of the employer.[10] Subsequently, the Supreme Court recognized two separate theories of discrimination under Title VII: disparate treatment, where an employer treats an employee less favorably because of membership in a protected class such as women or minorities; and disparate impact, where a facially neutral employer policy operates in practice to the disadvantage of members of a protected class.[11]

Discrimination based on pregnancy, however, did not squarely fit the type of discrimination that Congress originally contemplated when enacting Title VII, as Congress did not explicitly refer in the statute to discrimination based on pregnancy. Initially, the Supreme Court invoked a narrow definition of "sex discrimination" under Title VII: In *General Electric Co. v. Gilbert*,[12] the Court let stand an employer policy that excluded pregnancy disability from otherwise comprehensive disability coverage, reasoning that the policy distinguished not between men and women, but between "pregnant women and non-pregnant persons."[13] The Court determined that differential treatment based on pregnancy did not on its face amount to discriminatory treatment based on sex, since gender and pregnancy are not synonymous.[14] As a result of *Gilbert*, pregnant employees claiming discrimination were forced to challenge employer policies under a disparate impact theory. Accordingly, plaintiffs had to show that employer policies, while facially neutral, were applied in a discriminatory fashion to exclude a disproportionate number

9. 42 U.S.C. §§ 2000e-2000e-17 (1988).

10. *See* S. Rep. No. 1137, 91st Cong., 2d Sess. 4 (1970), *reprinted in* B. Schlei & P. Grossman, Employment Discrimination Law 2 n.7 (2d ed. 1983); *see also Slack v. Havens*, 522 F.2d 1091, 1095 (9th Cir. 1975) (using direct evidence of differential treatment to show discriminatory motive).

11. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 & n.15 (1977).

12. 429 U.S. 125 (1976).

13. *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974) (upholding similar public employment disability plan against a fourteenth amendment challenge, reasoning that "pregnancy" was not the equivalent of "sex")).

14. *See Gilbert*, 429 U.S. at 136.

of women from employment opportunities or employment-related benefits.[15]

Responding to public outcry over *Gilbert*, Congress effectively overruled the *Gilbert* holding by passing the PDA.[16] The PDA, which amended various definitions set forth in section 2000e of Title VII, makes clear that the term "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions."[17] It further adds that women "affected by pregnancy, childbirth, or related medical conditions shall be treated the same [for employment-related purposes as] other persons not so affected but similar in their ability or inability to work."[18] The amendment relieves aggrieved employees of the burden of having to prove disparate impact[19] to invalidate employer policies that facially discriminate against women based on pregnancy.

Courts initially interpreting the PDA were divided on whether the new amendment mandated mere neutrality of treatment for pregnant employees, or whether it required that pregnancy be treated specially in some way by employers.[20] In *California Federal Savings and Loan Association v. Guerra*,[21] the Supreme Court resolved this debate to a limited extent.[22]

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15. *See, e.g.*, Nashville Gas Co. v Satty, 434 U.S. 136, 141-43 (1977) (invoking disparate impact analysis in pregnancy discrimination case); *see also House Report, supra* note 3, at 3, *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, 149 (1979) (explaining that *Satty* applied disparate impact approach to pregnancy).

16. *See Senate Report, supra* note 3, at 3-4, *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 40-41 (1979).

17. *See* 42 U.S.C. § 2000e(k) (1988).

18. *Id.*

19. *See House Report, supra* note 3, at 3, *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 149 (1979). *See generally* B. Schlei & P. Grossman, Employment Discrimination Law 98-102, 112-16 (1983) (discussing plaintiff's burden in proving disparate impact case).

20. Some courts found that women affected by pregnancy need only be treated the same, based on their ability to work, as other employees. *See, e.g.*, Conners v. University of Tenn. Press, 558 F. Supp. 38, 40-41 (E.D. Tenn. 1982) (facially neutral leave policy insufficient for childbearing held not discriminatory despite harsh impact on pregnant employees); Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, 214 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005, 1007 (8th Cir. 1983) (same); Barone v. Hackett, 28 Fair Empl. Prac. Cas. (BNA) 1765, 1770 (D.R.I. 1982) (PDA requires only comparable treatment). Other courts held that pregnancy must be recognized as a condition unique to women and thus must be treated with special consideration to ensure fairness to women. *See, e.g.*, Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819-20 (D.C. Cir. 1981) (facially neutral leave policy nonetheless discriminatory because inadequate for maternity purposes); Brown v. Porcher, 502 F. Supp. 946, 957 (D.S.C. 1980) (prohibiting denial of benefits to women disabled by pregnancy, regardless of how employer treats employees with other disabilities), *aff'd*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983); Miller-Wohl Co. v. Comm'r of Labor & Indus., 214 Mont. 238, 259, 692 P.2d 1243, 1255 (1984) (neutral policy prohibiting leaves to new employees held discriminatory because of disparate impact on women), *vacated*, 479 U.S. 1050, *aff'd on rehearing*, 228 Mont. 505, 744 P.2d 871 (1987).

21. 479 U.S. 272 (1987).

22. See *infra* notes 23-45 and accompanying text for discussion of *Guerra*'s resolution of this debate.

II. *GUERRA*'S REASONING AND ITS UNCERTAIN IMPLICATIONS FOR CHILDREARING LEAVE

In *Guerra* the Supreme Court reasoned that the PDA was enacted to promote equal opportunity for pregnant women in the workplace, insofar as the statute applies to women physically disabled due to pregnancy.[23] This equal opportunity goal, the *Guerra* Court found, justified the preferential treatment granted to female employees by a California statute requiring employers to provide up to four months of unpaid disability leave to pregnant or postpartum women.[24] In limiting its holding to situations involving actual pregnancy disability, however, the Court did not address whether considerations of equal opportunity should extend beyond the point of pregnancy disability to the subsequent childrearing context. Accordingly, it is still unclear after *Guerra* whether preferential treatment akin to that found in the California statute may be afforded to female employees in the provision of childrearing leave.

A. *Employer Policy at Issue in* Guerra

Guerra involved Lillian Garland, a woman employed by a savings and loan institution, who took a pregnancy disability leave in 1982. When Garland tried to return to work three months later, immediately following her pregnancy disability, she was informed that her job had been filled and that no similar positions were available. She filed a state administrative complaint charging that her employer had violated a state statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy.[25]

The statute, which essentially mirrored the PDA, prohibited employers from "refus[ing] to allow a female employee affected by pregnancy . . . [t]o take a leave on account of pregnancy" for up to four months.[26] The employer policy in *Guerra*, which addressed only disability leaves, provided such leave on a gender-neutral basis and established no maximum duration for disability leaves.[27] The policy failed to afford female employees the four months of leave that the statute required, however, because it provided no immediate reinstatement right to a pregnant female at the conclusion of her pregnancy disability leave.[28] The main issue in *Guerra*, therefore, was whether the California pregnancy

23. *See Guerra*, 479 U.S. at 284-85.

24. *See id.* at 288.

25. *See id.* at 278.

26. Cal. Gov't Code § 12945(b)(2) (West 1980 & Supp. 1991). Both the California and the federal statutes protect pregnant employees from discrimination in the workplace. *Compare* Cal. Gov't Code § 12945(b)(2) (West 1980 & Supp. 1991) (unlawful for employer to refuse to provide pregnancy leave) *with* 42 U.S.C. § 2000e(k) (1988) (unlawful to discriminate based on pregnancy).

27. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 34 Fair Empl. Prac. Cas. (BNA) 562, 565 (C.D. Cal. 1984), *rev'd*, 758 F.2d 390, 397 (1985), *aff'd*, 479 U.S. 272, 292 (1987).

28. *See id.*

discrimination statute was inconsistent with, and thus pre-empted[29] by, Title VII as amended by the PDA.

The *Guerra* Court upheld the California statute, finding that even though it effectively allowed employers to provide greater leave benefits to women than to men, such treatment is not in violation of Title VII's prohibition against sex discrimination because it ultimately serves the Title VII goal of equality of employment opportunity for protected classes.[30] Significantly, the Court adopted the Ninth Circuit's interpretation of the PDA, agreeing that the PDA provides "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[31] Accordingly, the Court reasoned that the PDA provides minimum guarantees for employees affected by pregnancy, and does not limit the scope of benefits allowable to affected employees.

B. *Equal Opportunity Goals Advanced*

The *Guerra* Court held that although neither the words of the PDA nor the legislative history of the amendment indicated express Congressional intent to provide preferential treatment for pregnant employees,[32] the notion of favoring pregnant employees under the PDA was consistent with the overarching goals of Title VII. As the Court observed, the aim 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.' "[33]

The *Guerra* Court also found the concept of preferential treatment for pregnant women to be consonant with prior Supreme Court precedent endorsing voluntary employer affirmative action as a means of breaking down barriers to employment for members of protected classes.[34] In *United Steelworkers of America v. Weber*,[35] one case relied on by the *Guerra* Court, the Supreme Court had recognized that Congress did not "intend[ ] to prohibit the private sector from taking effective steps to ac-

29. The *Guerra* Court explained its pre-emption analysis succinctly. Congress, it said, may pre-empt state law by express terms, by leaving "no room" for state legislation, or by passing federal laws such that in practice compliance with both federal and state law may not be possible. The Court determined that *Guerra* presented the third possible basis for pre-emption, but found that compliance with both federal and state law was possible. *See Guerra*, 479 U.S. at 280-81.

30. *Id.* at 288-90.

31. *Id.* at 285 (quoting Court of Appeals decision, 758 F.2d at 396).

32. *See id.* at 286-87.

33. California Fed. Sav. & Loan v. Guerra, 479 U.S. 272, 288 (1987) (quoting Griggs v. Duke Power Co., 401 U.S 424, 429-30 (1971)).

34. See *infra* notes 35-44 and accompanying text for discussion of the precedent upon which the *Guerra* Court relied.

35. 443 U.S. 193 (1979). In *Weber*, the Court upheld, against a reverse discrimination claim, an employer's collectively-bargained affirmative action plan which required that minority workers be given half of all open slots in an in-plant craft training program until black employees' proportional representation in skilled craft positions mirrored the percentage of blacks in the local labor force.

complish the goal that Congress designed Title VII to achieve."[36] Justice Brennan's concurring opinion in *Weber* concluded that Title VII's prohibition against discrimination "does not condemn all private, voluntary, race-conscious affirmative action plans."[37] Thus, the *Weber* Court approved the employer's affirmative action plan as preferential treatment designed to "eliminate manifest racial imbalances in traditionally segregated job categories."[38] The *Weber* Court did, however, stress that several factors should confine the scope of such a plan: 1) the plan must not "unnecessarily trammel the interests" of white employees (for instance, by requiring replacement of white employees with black employees); 2) it must not "create an absolute bar to the advancement of white employees;" and 3) it must be a temporary measure not intended to maintain a racial balance, but "simply to eliminate a manifest racial imbalance."[39]

The *Guerra* Court also cited a number of other civil rights cases in support of its conclusion that limited preferential treatment for protected groups of employees was consistent with Title VII.[40] In approving such preferential treatment, the Court invoked the principle, previously articulated by a minority of the Court, that a " 'realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies.' "[41]

In a case decided later in the same Term as *Guerra*, *Johnson v. Transportation Agency*,[42] the Supreme Court continued its endorsement of preferential treatment as a means of ensuring equal opportunity in the labor market, thus solidifying the approach taken in *Guerra*. The *Johnson* Court upheld, against a Title VII challenge, a county agency's affirmative action plan that took gender into account when promoting female employees to various transportation dispatcher positions over male employees with superior test scores. The plan was explicitly designed to eliminate underrepresentation of women in traditional job categories. Reaffirming the principles set forth in *Weber*, the *Johnson* Court held that as long as such a plan was limited by the factors established in *Weber*, it is "fully consistent with Title VII."[43]

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36. *Id.* at 204.

37. *Id.* at 208. *But see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 485 (1989) (imposing limits on use of voluntary affirmative action in awarding of government contracts).

38. *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979).

39. *Id.* at 208.

40. *See Guerra*, 479 U.S. at 288 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Lau v. Nichols, 414 U.S. 563, 568 (1974)).

41. *Guerra*, 479 U.S. at 289 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)).

42. 480 U.S. 616 (1987).

43. *Johnson*, 480 U.S. at 640-42.

Although affirmative action, as the embodiment of the equal opportunity approach, remains highly controversial today, federal court decisions have consistently upheld a number of applications of preferential treatment in the workplace, and the doctrine seems secured as a fact of modern employer practices. *See, e.g.*, Sheetmetal Workers' Int'l

Significantly, although the *Guerra* Court relied on the affirmative action principles enunciated in *Weber* and later endorsed in *Johnson*, it did not examine whether the preferential treatment afforded pregnant women by the California statute "unnecessarily trammeled" the interests of male employees. Nor did the Court question whether the statute created an "absolute bar" to the advancement of non-pregnant employees, or whether it existed simply to eliminate a "manifest imbalance" in the work force.[44] Therefore, *Guerra* can arguably be read to broaden the circumstances under which preferential treatment could be afforded to employees affected by pregnancy, since it endorsed such treatment without imposing upon it the limits supposedly required by the prior decision in *Weber* and endorsed by the subsequent ruling in *Johnson*.[45]

C. *The Imprecise Definition of "Pregnancy Disability"*

Significantly, the *Guerra* Court expressly limited its holding to situations involving actual physical disability due to pregnancy,[46] noting that both the PDA and the challenged California statute confined their coverage to benefits related to "actual physical disability"[47] due to pregnancy. The PDA, however, does not define "actual physical disability" beyond simply requiring that employees affected by pregnancy be treated the same as "other persons not so affected but similar in their *ability or inability to work*."[48] Unfortunately, the Court also made no attempt to define this key phrase, thereby offering no guidance for determining when pregnancy disability ends.

As this Note suggests in Part IV, the ambiguity surrounding the term "actual physical disability" frustrates a determination of when a woman's pregnancy disability ends, and, consequently, when childrearing begins. Assuming that some agreement can be reached as to what constitutes the beginning and end of the pregnancy disability period, the central question is still whether women may be afforded preferential treatment in the provision of childrearing leave benefits after the actual pregnancy disability period has officially ended.

Ass'n v. EEOC, 478 U.S. 421, 475 (1986) (Title VII does not preclude district court from ordering preferential relief to eliminate effects of past discrimination); International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1988) (Title VII does not preclude entry of consent decree giving preferential treatment to eliminate effects of past discrimination). *But see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 485 (1989) (imposing limits on use of voluntary affirmative action in awarding of government contracts).

44. *See Guerra*, 479 U.S. at 288-90. The Court, in approving the California statute's scheme of "taking pregnancy into account," 479 U.S. at 289, makes no mention of the limiting criteria set forth in *Weber* and subsequently required in *Johnson*.

45. *See id.*

46. *See id.* at 290.

47. *Id.*

48. 42 U.S.C. § 2000e(k) (1988) (emphasis added).

III. EQUAL OPPORTUNITY VERSUS EQUAL TREATMENT: DOES *GUERRA*'S PREFERENTIAL TREATMENT RATIONALE EXTEND TO THE CHILDREARING LEAVE CONTEXT?

Whether *Guerra*'s preferential treatment rationale should be extended to apply to pure childrearing leave benefits hinges on which of two competing doctrines interpreting Title VII—equal opportunity or equal treatment[49]—is adopted as a starting point for analysis. The equal opportunity doctrine has as its goal the provision of equal opportunities for women and other minorities to participate and advance in the labor market.[50] Equal treatment analysis, on the other hand, requires that members of protected classes be treated on par with other participants in the labor market.[51] As the following analysis illustrates, the two doctrines, although frequently consonant with one another, collide when applied to employer policies involving leave benefits for childrearing purposes.[52]

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49. The equal opportunity versus equal treatment debate has raged for years and has spawned a terminology all its own. *See, e.g.*, Dowd, *Maternity Leave*, *supra* note 1, at 715-20 (comparing equal treatment view with "sex differences" view); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1143-48 (1986) (summarizing "special treatment" versus equal treatment debate) [hereinafter Finley, *Equality Theory*]; Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. Rev. L. & Soc. Change 381, 381 (1984) (discussing "special treatment"/"positive action" approach and "equal treatment"/"comparative treatment" approach) [hereinafter Taub, *Nurturing Leaves*].

50. *See, e.g.*, Dowd, *Maternity Leave*, *supra* note 1, at 718 (sex differences approach argues that pregnancy must be taken into account to achieve equality of opportunity); Finley, *Equality Theory*, *supra* note 49, at 1147 (special treatment approach seeks positive action to take childbearing into account to break down barriers to workplace success); Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 Tex. L. Rev. 41, 63 (1986) (distinguishing between equality of opportunity and equality of results).

51. *See, e.g.*, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 932 (1985) ("parity" approach demands that hiring and firing practices and leave requirements be administered on an equal basis) [hereinafter Note, *Employment Equality*]; Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 Colum. L. Rev. 690, 704-09 (1983) ("assimilationist" view requires that pregnant employees, like any other disabled employee, be treated according to their "ability to work") [hereinafter Note, *Sexual Equality*].

52. For a general discussion of the equal treatment/equal opportunity debate as applied to pregnancy disability benefits, see Dowd, *Maternity Leave*, *supra* note 1; Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U.L. Rev. 513 (1983) [hereinafter Krieger & Cooney, *The Miller-Wohl Controversy*]; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984) [hereinafter Williams, *Equality's Riddle*]. The debate was ultimately resolved to some extent by *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987). *See supra* notes 23-45 and accompanying text. The present discussion, however, takes the preferential treatment of pregnancy-disabled employees as a starting point and considers whether that preference should extend beyond the disability period.

A. *Equal Treatment View*

1. Legislative and Judicial Bases

The equal treatment approach to employment discrimination takes the view that protected categories of employees must be treated the same as other employees for all employment-related purposes, without regard to the distribution of minorities or women in particular job categories.[53] Proponents of this approach believe that eradication of discrimination in the workplace requires only that employers evaluate employees for hire, promotion, or benefits eligibility without regard to their sex, race, age, religion, or handicap, and that employers ensure that all employment policies are applied in a neutral fashion.[54]

The legislative basis for the equal treatment approach is the plain language of Title VII itself, which prohibits employers from "discriminat[ing] 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."[55] According to the equal treatment view, this language means that employers may not take sex, race, or other prohibited factors into account in employment-related decisions, because to do so would be to "discriminate" based on that factor. Accordingly, even if an employer desired a racially balanced work force and thus lowered hiring standards to achieve this goal, such an action would constitute discrimination—no matter how small the differential in hiring standards and regardless of the employer's beneficent motive—because it would not treat different categories of employees in exactly the same manner.

Federal court decisions have adopted an equal treatment approach in a variety of employment discrimination contexts. The underlying theme of such decisions has been that despite the policy arguments for, or emotional appeal of, providing some special treatment for women, blacks, or other protected groups in the labor market, the facial requirements of Title VII prohibit such favoritism, and only Congress, through legislative amendment, can provide otherwise.[56]

2. Application to Childrearing Leave

A starting point for analysis of the childrearing leave question under

53. *See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (discriminatory differential pension contributions based on sex); MacDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 (1976) (Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees") (emphasis in original).

54. *See* Williams, *Equality's Riddle*, *supra* note 52, at 331-34; Finley, *Equality Theory*, *supra* note 49, at 1143-46.

55. 42 U.S.C. § 2000e-2(a) (1988). *See also* sources cited *supra* note 51 (discussing equal treatment interpretation of the PDA).

56. For further discussion of the "facial requirements" interpretation of Title VII, see cases cited *supra* note 53.

an equal treatment approach is the language of Title VII and of the PDA itself. Title VII provides that it shall be unlawful for an employer to "discriminate against any individual . . . because of such individual's . . . sex."[57] The PDA, amending Title VII, clarifies that discrimination "because of sex" includes, but is not limited to, "because of or on the basis of pregnancy, childbirth, or related medical conditions."[58] The PDA further provides, however, that "women affected by pregnancy . . . shall be treated *the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[59]

Applying the language of the PDA coupled with that of Title VII, the equal treatment view would require that men and women under a single employer policy receive exactly the same access to childrearing leave.[60] Although the Supreme Court in *Guerra*[61] condoned special treatment for women disabled due to pregnancy, the equal treatment view holds that such a preference should not apply to childrearing leave because men may just as easily utilize these benefits. According to an equal treatment view, not only must men be given access to such benefits in the form of paternity leave, but they must also receive the same rights as women under a given employer policy with respect to eligibility requirements, duration of leave, and reinstatement after leave.[62]

3. *Schafer v. Board of Public Education of the School District of Pittsburgh*[63] as an Application of Equal Treatment Principles to Childrearing Leave

A recent Third Circuit decision, *Schafer v. Board of Public Education of the School District of Pittsburgh*, applied an equal treatment approach to the question of discrimination in providing childrearing leave bene-

57. 42 U.S.C. § 2000e-2(a) (1988).

58. 42 U.S.C. § 2000e(k) (1988).

59. *Id.* (emphasis added).

60. Of course, the phrase "affected by pregnancy" could be broadly construed to include women who have already given birth and who desire childrearing leave even after their disability period. Clearly, one way in which women are "affected" by pregnancy is that they have new infants to care for. The legislative history of the PDA seems to reject this broader definition, however, as evidenced by House Report language indicating that the PDA was "intended to be limited to effects upon the woman who is herself pregnant, bearing a child, or has a related medical condition." *House Report*, *supra* note 3, at 5, *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 151 (1979).

Moreover, other passages of the PDA's legislative history suggest that childrearing leave benefits must be afforded on an equal treatment basis. The Senate Report states that employers providing voluntary childrearing leave could continue providing it "as long as it is done on a nondiscriminatory basis"—meaning, presumably, an equal treatment basis. *See Senate Report*, *supra* note 3, at 4, *reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978, at 41.

61. 479 U.S. 272 (1987).

62. Eligibility for leave, duration of leave, and reinstatement after leave are all doubtless considered "compensation, terms, conditions, or privileges of employment," discrimination with respect to which is prohibited. *See* 42 U.S.C. § 2000e-(2)(a)(1) (1988).

63. 903 F.2d 243 (3d Cir. 1990).

fits.[64] Schafer, a male teacher, requested from his school board an unpaid leave of absence for the purpose of childrearing. Unable to locate suitable child care, Schafer wanted to care for his son personally, and told the Board that he would be forced to resign if his leave were denied because there would be no one to care for his child. When Schafer's request was denied, he challenged as discriminatory the school board's policy, which provided childrearing leave of up to a year for female employees only.[65] In particular, the policy stated that " *'leaves without Board pay for personal reasons relating to childbearing or childrearing . . . shall be available to female teachers and other female personnel.'* "[66] Significantly, the policy did not require documentation of continuing disability as a condition of eligibility for maternity leave.[67]

The district court dismissed the case, finding the Board's policy to be precisely the kind of preferential treatment for female employees that the Supreme Court had endorsed in *Guerra*.[68] A unanimous Third Circuit reversed, however, emphasizing the key distinction between "childbearing" leave, enjoyed only by women, and pure childrearing leave, which men can enjoy as well as women. According to the Third Circuit, the *Guerra* decision, with its holding expressly limited to cases involving "actual physical disability" due to pregnancy, meant that female employees who have recently given birth to a child may only receive preferential treatment upon a "simultaneous showing of a continuing disability related to either the pregnancy or to the delivery of the child."[69] The *Schafer* court found that the employer policy under challenge provided leave to female employees, but not to men, "without a showing of a disability related to pregnancy or childbearing."[70] Accordingly, it held that *Guerra* was not controlling, as that decision was confined to leaves related to childbearing only.[71]

The *Schafer* court acknowledged the *Guerra* equal opportunity rationale but refused to extend it to the childrearing leave context, stating specifically that preferential treatment was meant only to accommodate pregnancy disability and is thus "per se void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth or related medical conditions."[72] Although the *Schafer* court

64. *Id.*

65. *Id.* at 245.

66. *Id.* at 245 n.1 (emphasis in original).

67. *Id.* at 248.

68. *See* Schafer v. Board of Pub. Educ., 732 F. Supp. 565, 566 (W.D. Pa. 1989).

69. *Schafer*, 903 F.2d at 248.

70. *Id.* It is noteworthy that the Third Circuit did not attempt to define "pregnancy disability." It did, however, point out that "[t]here is no evidence in the record that suggests that the normal maternity disability due to 'pregnancy, childbirth, or related medical conditions' extends to one year." *Id.* (quoting PDA, 42 U.S.C. § 2000e(k) (1988)).

71. *Id.*

72. *Id.*

did not fully articulate the policy reasons underlying its decision, several rationales support the court's holding.

4. Policy Rationales Underlying Application of the Equal Treatment View to Childrearing Leave

Several policy rationales support the application of the equal treatment view to the question of childrearing leave benefits. First, a father's presence during infant care provides immeasurable support to the family. Even though present data suggest that very few men take advantage of available parental leave benefits,[73] there is strong evidence that participation of the father in childrearing activities contributes tremendously to a family's overall well-being.[74] Moreover, a father sharing infant care responsibilities may well reduce the postpartum stress experienced by the mother, speeding her return to the work force.[75] Finally, a father's participation has even been found to minimize marital stress[76] and maximize on-the-job productivity.[77]

In addition, as feminist scholars have observed, requiring that men be granted childrearing leave benefits on equal footing with women avoids perpetuating the stereotype of women as primary caregivers and thus marginal labor force participants.[78] Admittedly, preference for pregnant employees may be acceptable because it takes into account actual biological differences between men and women. As proponents of the equal treatment view counter, however, no justification exists for policies offering childrearing leave to women only, because men may participate equally in this activity and because restricting this role to women workers reinforces the idea that women are mothers first, career-holders second.[79]

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73. *See* Pleck, *Fathers and Infant Care Leave*, in The Parental Leave Crisis 181 (E. Zigler & M. Frank, eds. 1988); Lawson, *Baby Beckons: Why Is Daddy at Work?*, N.Y. Times, May 16, 1991, at C1, col. 1.

74. *See* Brazelton, *Issues for Working Parents*, in The Parental Leave Crisis 47-50 (E. Zigler & M. Frank, eds. 1988) [hereinafter Brazelton, *Working Parents*]; Pleck, *Fathers and Infant Care Leave*, in The Parental Leave Crisis 180-90 (E. Zigler & M. Frank, eds. 1988); Lawson, *supra* note 73, at C8, col. 6.

75. *See* Harwood, *Parental Stress and the Young Infant's Needs*, in The Parental Leave Crisis 55-71 (E. Zigler & M. Frank, eds. 1988) (exploring positive effects of father's child care participation on family and mother well-being).

76. *See id.*

77. *See id.*

78. *See* Dowd, *Maternity Leave*, *supra* note 1, at 708 & n.40; O'Brien & Madek, *Pregnancy Discrimination and Maternity Leave Laws*, 93 Dick. L. Rev. 311, 331 (1989); Note, *Childbearing and Childrearing: Feminists and Reform*, 73 Va. L. Rev. 1145, 1180-82 (1987).

79. *See* International Union v. Johnson Controls, Inc., — U.S. —, —, 111 S. Ct. 1196, 1210 (1991). In *Johnson Controls*, the Supreme Court expressly rejected an employer policy which took biological differences into account by excluding fertile female workers from certain jobs with high lead exposure. The Court directly confronted the notion of recognizing and accommodating biological differences, noting that such a stereotypical approach "historically has been the excuse for denying women equal employ-

Finally, an equal treatment approach to childrearing leave provides clear guidance for employers in designing and administering leave policies. While employers might occasionally prefer to offer leave benefits on a selective basis to the most productive employees,[80] an equal treatment rule leaves no room for the uncertainties or inequities that may result from granting an employer such discretion.

B. *Equal Opportunity View*

1. Legislative and Judicial Bases

The equal opportunity approach to employment discrimination takes the view that in order to eradicate the long-term effects of societal discrimination in the workplace, protected categories of employees who have traditionally been victims of that discrimination may receive special or preferential treatment in the workplace.[81] Preferential treatment, it is argued, allows women and minorities to compete on an equal footing with other employees and removes discriminatory barriers to full participation in the labor market.[82]

The legislative bases for the equal opportunity approach find their origin in Title VII, which Congress enacted primarily to eradicate the effects of discrimination in the workplace and to provide an equal chance for protected categories of employees to succeed in the labor market. As the legislative history of Title VII shows, for Congress "[t]he crux of the problem [was] to open employment opportunities for [traditionally segregated groups] in occupations which have been traditionally closed to them."[83] Given the ultimate goals of Title VII and, hence, the PDA, equal opportunity proponents argue that preferential treatment is permissible and even desirable in many instances to achieve "equal results"—not just equal treatment—in the workplace.[84]

2. Application to Childrearing Leave

In applying an equal opportunity approach to the issue of childrearing leave benefits, it must first be recognized that while typical affirmative action cases have involved preferential treatment in hiring or promo-

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ment opportunities." *Id.* at —, 111 S. Ct. at 1210. For further discussion of the perpetuation of unfavorable female stereotypes, see sources cited *supra* note 78.

80. *See generally* BNA, *Pregnancy and Employment*, *supra* note 1, at 10 (explaining employer motives in providing benefits).

81. *See* Krieger & Cooney, *The Miller-Wohl Controversy*, *supra* note 52, at 519; Williams, *Equality's Riddle*, *supra* note 52, at 353.

82. For discussion of discriminatory labor market barriers, see *supra* note 81.

83. 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

84. *See* Johnson v. Transp. Agency, 480 U.S. 616, 620-22, 639-40 (1987); United Steelworkers of America v. Weber, 443 U.S. 193, 203-04 (1979). *But see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-506 (1989) (placing further limits on use of voluntary affirmative action in awarding of government contracts to remedy discrimination).

tions,[85] favoring women for childrearing leave benefits may serve to accomplish the same goals as preferential hiring and promotion. It is quite common that women, who are still overwhelmingly the caretakers of newborn infants,[86] are unable to continue working because they do not receive sufficient employer-provided childrearing leave benefits to allow them to care for infants at home for a desired time period.[87] Further, even when such leave exists, reinstatement rights may be so restrictive as to provide virtually no job security.[88] Although in theory men could as easily fill the role of infant-care provider, this is rarely the case in practice, as demonstrated by historical data showing that women almost exclusively have assumed the primary role as postpartum care providers.[89] Moreover, as long as men continue to earn higher salaries than their wives, making it economically more sensible for women to take time off from work, women are forced to yield to pressing economic considerations and remain home during the early months of infant care.[90] Thus women are disproportionately affected by any employer policy that denies or severely limits childrearing leave because it is they who are most likely to demand such leave.

It follows, then, that to the extent that inadequate childrearing leave policies create underrepresentation of women in particular job categories, employers might seek to correct this underrepresentation by providing adequate childrearing leave to women. Appropriate measures would allow women to remain in the work force after childbirth and would entice future mothers to accept career positions secure in the knowledge that childrearing leave will be available when needed.

Furthermore, employers, when faced with the economic costs of providing childrearing leave,[91] may well decide to provide these leave benefits where they are most needed and where they are most cost-effective—to women who may be disadvantaged and who may become underrepresented in the work force if childrearing leave is not provided.[92]

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85. *See Johnson*, 480 U.S. at 621; *Weber*, 443 U.S. at 197-98.

86. *See* Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. Rev. 55, 56-57 & nn.13-16, 58 & n.29 (1979) [hereinafter Frug, *Labor Market Hostility*].

87. *See generally* Dowd, *Maternity Leave*, *supra* note 1, at 712 (citing studies showing that many employer policies are inadequate in duration, benefits, or disability).

88. *See id.* at 714.

89. For discussion of women's role as care providers, see *supra* note 86 and accompanying text.

90. *See* Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 409 (1990).

91. *See* BNA, *Work & Family*, *supra* note 1, at 23.

92. It may appear at first blush that employers are not forced to choose between employees in providing childrearing leave benefits in the same way that they must choose between candidates when making hiring or promotion decisions, and that therefore employers have no need to choose women to the exclusion of men as recipients of childrearing leave benefits. In fact, however, employers are faced with such a choice in economic terms. Providing leave benefits costs money—in replacement, training and continued health benefits. *See* Family and Medical Leave Act of 1989: Hearings on H.R. 770

3. *Harness v. Hartz Mountain Corp.*[93] as an Application of Equal Opportunity Principles to Childrearing Leave

A recent Sixth Circuit decision, *Harness v. Hartz Mountain Corp.*, applied an equal opportunity approach in deciding whether an employer may provide extended leave to women for "maternity related reasons" without providing similarly extended leave to a disabled male employee.[94] Harness, a male employee disabled by a heart attack, sought an extended leave of absence beyond the ninety-day period allowed under the employer policy for most disabilities.[95] When his request was rejected, Harness brought a reverse discrimination suit based on his employer's maternity leave policy, which allowed female employees an extended leave for "maternity related reasons" for up to one year, with reinstatement rights. The phrase "maternity related reasons" was left undefined in the employer policy. Specifically, the policy provision stated: "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 days."[96]

The challenged maternity leave policy did not specify whether this leave was solely for actual physical *disability* related to pregnancy, nor did it require new mothers to show a continuing physical disability to remain eligible for the extended leave. These ambiguous features, along with the realistic acknowledgment that a typical pregnancy disability lasts at most a few months, indicated that the employer's policy allowed female employees to take a pure childrearing leave immediately following disability due to childbirth.

Male employees suffering from physical disabilities, however, were required to document their continuing physical impairment in order to remain eligible for disability status. In any case, male employees could receive a maximum of ninety days' leave, regardless of the severity of the disability.[97] As Harness argued, the disparate policies militated unfairly against male employees, who were faced with a maximum ninety-day leave for disability reasons while female employees could take up to a year for *non*-disability reasons.

The *Harness* court, relying solely on *Guerra*, permitted the "preferential treatment accorded pregnant employees by the [employer's] pol-

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Before the House Committee on Education and Labor, 101st Cong., 1st Sess. 124-26 (1989) (statement of the National Federation of Independent Business). Any employer must place limits on the extent to which it will cover such costs. Especially considering that males generally earn more and are more expensive to replace temporarily, *see supra* note 90, an employer with limited resources may well decide to provide childrearing leave benefits where they are needed most and where they are most cost-effective—to women.

93. 877 F.2d 1307 (6th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 728 (1990).

94. *Id.*

95. *See id.* at 1308.

96. *Id.* at 1308-09.

97. *See id.* at 1308.

icy."[98] Although the court did not attempt to define "pregnancy disability," the Sixth Circuit undoubtedly recognized that the employer's "maternity related" leave policy went beyond the period of actual physical disability due to pregnancy to include non-disability childrearing leave. The employer policy at issue in *Harness* did not confine itself to actual physical disability, and it extended new mothers' leave to a full year—well beyond the average expected disability period.

Thus, the court seemed to extend the *Guerra* rationale and apply it to a childrearing situation that did not involve actual physical disability due to pregnancy. Although it may be argued that the Sixth Circuit simply misconstrued the employer policy in *Harness* and viewed it solely as a pregnancy disability leave, this seems unlikely in light of the fact that it was a year-long leave period that did not require new mothers to provide documentation of continuing disability. Instead, the court seems to have adopted the preferential treatment principle set forth in *Guerra* and to have applied it broadly to encompass leaves that combine pregnancy disability leave with childrearing leave. In effect, the court's holding provides that women seeking leave for childrearing purposes may be allowed to take substantially longer leave than men who seek leave for disability-related reasons. In other words, a woman who does *not* suffer from a disability may receive preferential treatment relative to a man who *does* suffer disability if the woman's purpose for leave is to care for her newborn infant. Thus, although the *Harness* court was not specifically faced with a man's claim to childrearing leave, its decision fully endorses preferential treatment for women seeking childrearing leave and is clearly based upon underlying principles of equal opportunity.

4. Policy Rationales Underlying Application of the Equal Opportunity View to Childrearing Leave Benefits

Several interlocking policy rationales support the application of an equal opportunity view to the question of childrearing leave benefits. First, an equal opportunity approach recognizes that even though women need not be the exclusive providers of infant care in our society, they in fact constitute practically all employees who choose to take childrearing leave benefits.[99] As such, women are harmed most by policies excluding such leave. In order to continue full participation in the workplace, women may require the assistance of voluntary employer "affirmative action" in the form of childrearing leave. In this sense, an equal opportunity view fulfills the goal of "eliminat[ing] manifest . . . imbalance in traditionally segregated job categories."[100]

Second, an equal opportunity approach allows employers to undertake voluntary action to assist women in the work force when childrearing

98. *Id.* at 1310.

99. *See* Frug, *Labor Market Hostility*, *supra* note 86; Lawson, *supra* note 73, at C1, col. 1, C8, col. 3-6.

100. United Steelworkers of America v. Weber, 443 U.S. 193, 207-08 n.7 (1979)

leave benefits are necessary to ensure continued employment. Moreover, if employers are required to provide childrearing leave to both sexes, businesses might do away with childrearing leave altogether, out of fear that too many men might choose such leave, driving the costs of such benefits beyond acceptable levels and disrupting the workplace to an unmanageable extent.[101]

C. *Resolving the Debate With Respect to Childrearing Leave Benefits*

Ultimately, if one accepts the notions that childrearing leave benefits are a legitimate tool for achieving affirmative action goals and that the policy rationale of *Guerra* extends beyond situations involving actual pregnancy-related disability, the debate must be resolved on policy grounds.

Fortunately, such a basis for resolution does emerge from a juxtaposition of the equal opportunity and equal treatment views. It is an inescapable conclusion that if an equal opportunity approach were invoked to allow employers to provide childrearing leave benefits to women only, such a practice would only harm women in the future by perpetuating the stereotype of women as the caretakers of our society's infants. Certainly, working mothers benefit in the short run from policies providing childrearing leave exclusively to them; however, over time such special treatment can only reinforce the time-worn idea that women have two jobs: one in the home and one at work.

Ironically, the equal treatment view, in avoiding the stereotype, achieves a better position for women only by providing a benefit right to men; that is, in order for women to be viewed as equals of men in the workplace, fathers must be given equal rights to childrearing leave so that mothers are not locked into their caretaking roles—and thus cyclical employment—indefinitely. It would seem a rare instance where, in order to advance opportunities for working women, a particular benefit must be provided to working men.

The implications of this resolution for childrearing leave policies are clear. While under *Guerra* female employees disabled due to pregnancy may receive preferential treatment, once the disability period has passed[102] a new mother may not be granted childrearing leave unless men covered by the same policy may also receive such leave. In addition, men and women must receive leaves of the same duration and must be eligible for reinstatement on the same basis.

Very recently, the EEOC has concurred with this conclusion in an

101. On the other hand, employers who choose to provide no childrearing leave at all may be open to challenges that such a practice has a discriminatory disparate impact on women.

102. Of course, as described *infra* Part IV, "pregnancy disability" is not easily definable, which complicates the problem.

internal agency interpretation.[103] Under the EEOC's view, childbirth-related leaves granted to women that do not directly depend on the disability of the new mother would be considered "facially discriminatory" unless extended to new fathers as well.[104] In short, the EEOC has concluded that "the employer must justify any disparity [between men and women] in parental leave by proving that [such disparity] is attributable to the women's disability."[105] Clearly, this interpretation adopts an equal treatment approach, and is designed to protect mothers from perpetuated societal discrimination while at the same time protecting fathers against deprivation of their family rights. Equally clear is the fact that the multitude of employer policies that admittedly favor women in the provision of childrearing leave benefits are open to challenge.[106]

IV. DEFINING "PREGNANCY DISABILITY"

As noted in Part II above, the Supreme Court in *Guerra* confined its decision to situations involving "actual physical disability" due to pregnancy, yet the Court failed to define this key phrase. In order to determine when pregnancy disability ends and when pure childrearing begins, however, pregnancy disability itself must be precisely defined.

Consider a typical employer policy that provides twelve weeks of maternity leave for new mothers. Under a narrow definition of pregnancy disability, actual disability might be defined as only that period during which an expectant or new mother is totally incapacitated due to her pregnancy. Accordingly, under such a restrictive definition, the portion of overall maternity leave attributable to physical disability would be relatively short—because the period of total incapacity due to pregnancy is relatively short—and the portion attributable to childrearing would be correspondingly long. Conversely, under a broader definition of pregnancy disability in which physical impairment less than total incapacity might still be considered pregnancy disability, the disability period would be relatively long and the childrearing portion correspondingly shorter. Thus, the amount of childrearing leave available to women under maternity leave policies of fixed duration depends on the precise definition of pregnancy disability, since childrearing leave does not begin until pregnancy disability leave ends. Moreover, the precise definition of pregnancy disability potentially affects men by influencing the length of the childrearing leave to which new fathers may be entitled, since a man's

103. *See Programs Limited to New Mothers Open to Challenge of Bias*, Pens. Rep. (BNA) No. 49, at 2009-10 (Dec. 3, 1990).

104. *Id.* at 2010.

105. *Id.* (quoting Commission's internal notice to agency personnel in August 1990).

106. *See id.*; *see also* The Family and Medical Leave Act of 1989: Hearing on H.R. 770 Before the House Committee on Education and Labor, 101st Cong., 1st Sess. 183 (1989) (1988 survey conducted by American Society for Personnel Administration reporting that while 44% of employer respondents provided unpaid childrearing leave to women, only 19% offered a similar leave benefit to men).

right to childrearing leave, if it exists, begins when a female fellow employee's pregnancy disability leave ends.

Courts considering claims alleging discrimination based on pregnancy have seldom explicitly defined the scope and duration of actual pregnancy disability. These courts have, however, implicitly recognized or rejected various approaches as legitimate methods of measuring, describing, or defining pregnancy disability. Therefore, examining judicial treatment of the term "pregnancy disability" may inform a determination of when actual physical disability ends and pure childrearing begins.

Overall, a number of possible approaches for delineating the pregnancy disability period are suggested by court decisions, employer policies, and psychological literature. Yet no coherent definition has emerged, and it seems likely that this uncertainty will plague courts, employers, and employees alike in implementing and evaluating policies.[107]

A. *Disability Status Determined by Employee's Physician*

One obvious method of determining pregnancy disability status is to defer to the physician of the pregnant or postpartum employee. In *Franco v. Phelps Dodge Corp.*,[108] for example, an employee claimed that she had been illegally forced to take maternity leave despite her protests that she was still able to work. The central dispute was whether she was actually physically unable to work due to her pregnancy. In holding for defendant employer, the district court afforded great deference to the determination by plaintiff's physician that she was unable to work, even though plaintiff herself felt that she could continue on the job.[109] As the court noted, "if [p]laintiff's doctor initiated the leave, the [allegedly forced] maternity leave would not be unlawful."[110]

Relying solely on a physician's recommendation to determine pregnancy disability, however, leaves great uncertainty for employer and employee alike. Some physicians may be quite strict in their diagnoses, while others may allow the employee affected by pregnancy to take leave or return to work whenever she feels ready.[111] In addition, an employee eager to extend her maternity leave may be able to "shop around," or draw upon her personal ties to a doctor, to obtain a medical certification of disability even after certification is no longer warranted.[112]

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107. For discussion of various interpretations of pregnancy disability, see *infra* notes 108-26 and accompanying text.

108. 53 Fair Empl. Prac. Cas. (BNA) 116 (D.N.M. 1990).

109. *See id.* at 120 n.4.

110. *Id.* at 120 n.4.

111. *Cf.* BNA, *Pregnancy and Employment*, *supra* note 1, at 203 (listing medical guidelines for employment during pregnancy disability, thus revealing range of discretion for physicians when advising patients affected by pregnancy disability).

112. *See id.*

B. *Disability Determined According to Employer's Business Needs*

Under another approach to defining when pregnancy disability begins, it is the employer who determines when the pregnant employee is sufficiently disabled, based on the employer's business judgments about the employee's ability to perform efficiently, safely, or to customers' satisfaction.[113] Courts have seemingly endorsed the employer's use of discretion in determining that pregnant employees jeopardize customer safety[114] or in deciding that a pregnant employee's "appearance and accompanying clumsiness" leads to "distress for [the employer's] customers."[115]

Clearly, allowing an employer to determine when an employee is or is not disabled due to pregnancy is fraught with difficulty and is potentially unfair to the employee herself. An employer's determination that an employee is too unstable or too unsightly for the workplace is hardly synonymous with the employee's actual physical disability due to pregnancy. Therefore, total reliance on the employer's determination of an employee's disability status, even though it is work-related, seems to disregard an employee's actual *ability* to work—a factor that the PDA explicitly emphasizes.[116]

C. *Disability in Relation to Flexibility of Job Definitions*

Another variant on how pregnancy disability is defined relates to whether an employer chooses to accommodate a pregnant or postpartum employee by changing job requirements or schedules.[117] Clearly, an employee who is so accommodated—for example, by an employer's decision to do away with the heavy lifting requirements of a pregnant employee's

113. *See infra* notes 117-18 and accompanying text. *But see* Ponton v. Newport News School Bd., 632 F. Supp. 1056, 1065 (E.D. Va. 1986) (no school business justification for requiring unmarried pregnant teacher to take leave of absence); Gardner v. National Airlines, Inc., 434 F. Supp. 249, 259-66 (S.D. Fla. 1977), *aff'd*, 905 F.2d 1457 (11th Cir. 1990) (business necessity rejected for mandatory leave during first two trimesters); Newmon v. Delta Airlines, Inc., 374 F. Supp. 238, 246-47 (N.D. Ga. 1973) (no business justification for mandatory leave even after fifth month of pregnancy). *See generally* Remmers, *Parental Leave*, *supra* note 8, at 386 (reviewing business necessity decisions).

114. For instance, in *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), the Ninth Circuit upheld an employer policy requiring that flight attendants be placed on leave automatically upon becoming pregnant in order to ensure customer safety. *See id.* at 678-79.

115. *See EEOC v. Chateau Normandy, Inc.*, 658 F. Supp. 598, 604 (S.D. Ind. 1987) (dismissing motion for preliminary injunction against employer policy). *But see* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(iii) (1990) (customer preference does not justify discrimination); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388-89 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (same).

116. *See* 42 U.S.C. § 2000e(k) (1988).

117. The subject of employer accommodation of disabled employees is beyond the scope of this Note. For a general discussion of the topic, however, see generally B. Schlei & P. Grossman, Employment Discrimination Law, *supra* note 19, at 287-89 (discussing employer obligations to reasonably accommodate).

job[118]—will be able to work longer before needing to take leave due to pregnancy disability, and will be able to return to work sooner after giving birth. If an employee disabled due to pregnancy is not so accommodated, however, her disability would force her to leave work sooner or further delay her return from leave after childbirth.[119]

Whether employer accommodation is required is thus crucial in determining when pregnancy disability leave should properly be deemed to have commenced or terminated. Until courts clarify this question, the duration of employees' pregnancy disability leaves will vary drastically from employer to employer depending on the leave policies involved.

D. *"Quasi-" Disabilities*

Yet another pressing question in properly characterizing pregnancy disability is whether post-delivery phenomena such as breastfeeding and postpartum depression should be included in the calculation of the disability period. The few courts that have addressed this aspect of pregnancy disability appear to have been skeptical.

The Pennsylvania Supreme Court, for instance, held that although breastfeeding, postpartum anxiety, and other stressful conditions following delivery may be considered logical and natural extensions of childbirth-related disability, they are nonetheless outside the scope of pregnancy disability as contemplated by typical employer policies.[120] Similarly, the court in *Barrash v. Bowen*[121] found that a female employee with a newborn child was not entitled to an extended pregnancy leave, despite her doctor's recommendation that such a leave be taken for medical and psychological reasons and to allow for breastfeeding of the infant. As the Fourth Circuit stated in *Barrash*, limitations upon maternity leave

118. In *Fields v. Bolger*, 723 F.2d 1216 (6th Cir. 1984), the Sixth Circuit determined that the United States Postal Service was not required to give "light duty" assignments to a pregnant employee. As the court pointed out, "[n]othing in Title VII compels an employer to prefer for alternative employment an employee who, because of pregnancy, is unable to perform her full range of duties." *Id.* at 1220. In a more recent case, however, the Eighth Circuit held that a pregnant employee whose physician recommended that she "refrain from pushing or lifting without assistance" should have been accommodated by her employer rather than forced out on maternity leave. *See Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 644, 649 (8th Cir. 1987).

119. Interestingly, the Equal Employment Opportunity Commission's [hereinafter EEOC] "Guidelines on Discrimination Because of Sex" suggest that some accommodation may in fact be required for pregnant or postpartum employees. Question and Answer 12 of the guidelines states that "[a]n employer cannot refuse to hire a women [sic] because of her pregnancy-related condition so long as she is able to perform *the major functions necessary to the job.*" *See* 29 C.F.R. § 1604 (1990) (emphasis added). Extending the principle set forth by this EEOC statement to the context of maternity leave policies, it is a logical inference that an employer may likewise not discriminate against a pregnant employee by forcing her to commence leave as long as she is able to perform the *major* functions—not *all* the functions—necessary to a job.

120. *See* Board of School Directors of Fox Chapel Area School Dist. v. Rosetti, 488 Pa. 125, 411 A.2d 486 (1979).

121. 846 F.2d 927, 928-30 (4th Cir. 1988).

"would have an adverse impact upon young mothers wishing to nurse their babies for six months, but that is not the kind of disparate impact that would invalidate [a policy], for it shows no less favorable treatment of women than of men."[122]

Despite such court determinations, research on postpartum conditions of new mothers suggests that psychological factors may be as disabling as physical ailments related to childbirth.[123] Moreover, postpartum stress affects a substantial proportion of new mothers,[124] whose condition may be aggravated by a premature return to work[125] and who may continue to suffer its effects well beyond the period of physical recovery from pregnancy.[126] These findings would seem to compel a conclusion that any realistic maternity leave policy should take psychological factors into account in determining the actual post-pregnancy disability period of an employee.

E. *A Realistic Model*

Any useful definition of pregnancy disability must respond to practical demands. First, because the ability of women to return to work after childbirth varies widely, some weight must be given to the judgment of the individual employee and her physician in determining when disability has ceased. On the other hand, employers must have some assurance that employees are not abusing pregnancy leave benefits, and, accordingly, a useful standard for determining the bounds of pregnancy disability should also incorporate a mechanism that enables employers to independently monitor a continuing disability claimed by an employee on leave. This might be achieved by requiring the employee to submit to examination by an employer-sponsored doctor for verification. Finally, because it is in the best interests of employee and employer alike for the employee who so desires to resume productivity as soon as possible after childbirth, the determination of pregnancy disability should take into account an employer's ability to accommodate a postpartum employee by

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122. *Id.* at 932.

123. *See generally* Hopkins, Marcus, & Campbell, *Postpartum Depression: A Critical Review*, 95 Psychological Bull. 498, 501-03 (1984) (reviewing research findings of "maternity blues," postpartum psychosis, and postpartum depression).

124. *See* Whiffen, *Vulnerability to Postpartum Depression: A Prospective Multivariate Study*, 97 J. Abnormal Psychology 467, 471 (1988) [hereinafter Whiffen, *Vulnerability to Postpartum Depression*]; O'Hara, Neunaber, & Zekovski, *Prospective Study of Postpartum Depression: Prevalence, Course, and Predictive Factors*, 93 J. Abnormal Psychology 158, 163 (1984) [hereinafter O'Hara, et al., *Prospective Study*].

125. *See generally* Whiffen, *Vulnerability to Postpartum Depression*, *supra* note 124, at 472 (life stress accounts for some variance in postpartum symptom levels); O'Hara, et al., *Prospective Study*, *supra* note 124, at 165 (life stress accounts for sizeable share of postpartum depression).

126. *See* Whiffen, *Vulnerability to Postpartum Depression*, *supra* note 124, at 471 (16.5 percent of new mothers were diagnosed with depression at eight weeks postpartum); O'Hara, et al., *Prospective Study*, *supra* note 124, at 163 (some percentage of women suffer depression even six months postpartum).

implementing flexible job assignments, part-time work schedules, and phased return from leave. In other words, courts and employers should recognize that if an employee's job requirements or work schedule can be modified temporarily to minimize fatigue and physical demands, that employee may be able to continue working longer before leave commences—and may be able to return sooner from disability leave. Such a balanced approach would take into account the business needs of the employer while recognizing that the bounds of pregnancy disability inevitably vary from individual to individual.

V. IMPLICATIONS OF THE DEBATE'S RESOLUTION FOR FEDERAL AND STATE PARENTAL LEAVE LAWS

In recognition of the growing demand for childrearing leave benefits, a number of states have passed—and Congress has repeatedly attempted to enact—laws requiring some type of parental leave.[127] Such legislative action attempts to provide equal opportunity for women in the workplace as well as, in some instances, equal treatment for new fathers.[128]

Many of the current and proposed laws, however, do not necessarily carry through on their promises of equal treatment. Specifically, some state laws provide leave provisions only for new mothers;[129] others, along with proposed Congressional legislation of the past several years, require that employers provide a set number of weeks of leave to men and women alike, yet make no distinction between the period of leave attributable to pregnancy disability and that attributable to pure childrearing.[130] As a result, some laws seem to discriminate against new fathers by omitting them from leave consideration.[131] Others, however, tend to favor

127. *See* The Family and Medical Leave Act of 1989: Hearing on H.R. 770 Before the House Committee on Education and Labor, 101st Cong., 1st Sess. 1-2 (1989); Cal. Gov't Code § 12945(b)(2) (West 1980); Conn. Gen. Stat. Ann. § 5-248a (West Supp. 1991); Mass. Ann. Laws ch. 149, § 105D (Law. Co-op. 1989 & Supp. 1991); Mont. Code Ann. §§ 49-2-310 to -311 (1989). *See also Family Leave Bills Introduced; Sponsors Expect Passage in 1991*, Ben. Today (BNA) No. 2, at 29 (Jan. 25, 1991) (describing newly-introduced legislation); *House Labor Committee Approves Proposed Family, Medical Leave Bill*, Ben. Today (BNA) No. 7, at 100 (Apr. 5, 1991) (same); *Senator Dodd, Administration Official to Discuss Family Leave Legislation*, Ben. Today (BNA) No. 9, at 131 (May 3, 1991) (same).

128. For examples of state provisions and proposed federal legislation, see sources cited *supra* note 127.

129. *See* Cal. Gov't Code § 12945(b)(2) (West 1980); Mass. Ann. Laws ch. 149, § 105D (Law. Co-op. 1989 & Supp. 1991); Mont. Code Ann. §§ 49-2-310 to -311 (1989).

130. *See* The Family and Medical Leave Act of 1989: Hearing on H.R. 770 Before the House Committee on Education and Labor, 101st Cong., 1st Sess. 1-2 (1989); Conn. Gen. Stat. Ann. § 5-248a (West Supp. 1991); *see also Family Leave Bills Introduced; Sponsors Expect Passage in 1991*, Ben. Today (BNA) No. 2, at 29 (Jan. 25, 1991) (describing newly-introduced legislation); *House Labor Committee Approves Proposed Family, Medical Leave Bill*, Ben. Today (BNA) No. 7, at 100 (Apr. 5, 1991) (same); *Senator Dodd, Administration Official to Discuss Family Leave Legislation*, Ben. Today (BNA) No. 9, at 131 (May 3, 1991) (same).

131. *See supra* note 129.

working fathers because, for example, under some statutes a woman might use up six or eight weeks of her statutorily-mandated leave in a condition of pre- and/or post-pregnancy disability, and have only four or six weeks of leave remaining to devote to childrearing. New fathers, on the other hand, would receive a full twelve weeks of childrearing leave under some statutes,[132] thus receiving obvious but apparently unintended preferential treatment.

If equal treatment with respect to childrearing leave is to be embodied in state and federal parental leave laws, legislators must take note, as the Supreme Court did in *Guerra*, of the distinction between leaves due to pregnancy disability and leaves taken solely for child care purposes. Pregnancy disability leaves, available only to women, are designed to accommodate new mothers during periods of actual physical disability when work for an employer is precluded. Childrearing leave, however, is a matter of personal and family choice, and men and women must have equal access to it under the same employer policy in order for the purposes of Title VII to be fully implemented.

CONCLUSION

Although male employees have seldom challenged childrearing leave policies favoring working women, employers must be aware that such policies—although perhaps designed to accommodate working mothers—may well be found to be discriminatory. Courts should anticipate increased challenges to employer policies—given the prevalence of dual career couples and the growing interest of men in family participation—and must be prepared to distinguish between leaves based on pregnancy disability and those based purely on childrearing. Policies that do not attempt to draw a line between these two types of leave may conceal elements of preferential treatment that are fundamentally inconsistent with the purposes of Title VII.

132. *See supra* note 130.