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California Federal Savings & Loan Association v. Guerra: The State of California Has Determined that Pregnancy may be Hazardous to your Job

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NOTES

CALIFORNIA FEDERAL SAVINGS &
LOAN ASSOCIATION V. GUERRA:
THE STATE OF CALIFORNIA
HAS DETERMINED THAT PREGNANCY
MAY BE HAZARDOUS TO YOUR JOB

I. INTRODUCTION

In California Federal Savings & Loan Association v. Guerra, the United States Court of Appeals for the Ninth Circuit upheld the facial validity of California Government Code section 12945(b)(2). The court vehemently rejected a federal preemption argument and held that a law setting a minimum


2. CAL. GOV'T CODE § 12945(b)(2) (West 1980). Section 12945(b)(2) provides that:

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

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

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

   Id. See infra note 71 for discussion of the significance of the law's specific application to medical disabilities of pregnancy.

3. The employer argued that the state law was preempted because it created a disparity between the number of total disability leave days allowed for female and male employees in job settings where medical disability leaves were not available at all or were not available for as long as four months or where guaranteed reinstatement was not available as California required in its application of the state law. Brief of Appellees at 5, Cal. Fed. Sav. & Loan Ass'n, 758 F.2d 390. The employer further claimed that federal
leave for pregnancy disabilities did not, on its face, discriminate against men or conflict with the purpose of Title VII of the Civil Rights Act of 1964 as amended in 1978 by the Pregnancy Discrimination Act (PDA).  

The issue of whether the PDA allows any different treatment for pregnancy has divided the feminist community. All agree that the PDA prevents employers from treating pregnant employees less favorably than other temporarily disabled employees. The disputed question, however, is whether or not the PDA allows employers to treat pregnant employees more favorably than other temporarily disabled employees. Supporters of the California law claim favorable treatment is necessary to negate the harsh impact childbearing places on women when employers fail to provide sick leave which is adequate for either recovery from normal childbirth or for common medical compli-


(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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


7. Representatives of the medical community report that "the usual period of disa-
cations of pregnancy. Those who oppose the state law insist that the PDA compels employers to treat pregnant employees absolutely the same as other temporarily disabled employees. Taking that position, the National Organization for Women (NOW), the National Women's Political Caucus, the League of Women Voters, and others, filed an amicus brief supporting the saving and loan's argument for preemption. In sharp contrast, California Women Lawyers and Equal Rights Advocates filed an amicus brief supporting appellant Guerra's (the

8. Some of the medical complications of pregnancy are toxemia, marked by high blood pressure and other symptoms, occurring to some degree in five to ten percent of pregnant women; placenta praevia, caused by low implantation of the placenta, occurring in approximately one in 500 pregnancies; and abruptio placentae, pre-birth separation of the placenta, occurring in approximately one in 100 pregnancies. ENCYCLOPAEDIA BRITANNICA, MACROPAEDIA 14, at 981-82 (15th ed. 1975). Any multiple birth also significantly complicates pregnancy. J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS 529 (15th ed. 1976). Approximately 12.2 births in 1000 are twin and bed rest is sometimes recommended as a method of increasing fetal growth in women carrying multiple fetuses. Id. at 531, 545.

9. Under this view, the minimum disability leave available to pregnant employees under the PDA is also the maximum. The length of the leave cannot exceed that which is available to disabled male employees.

10. California Federal Savings and Loan Association, a federally chartered savings and loan association, was joined in its complaint by plaintiff Merchants and Manufacturers Association, a non-profit California corporation which is a trade association representing employers, and plaintiff California Chamber of Commerce, a non-profit California corporation which represents business entities throughout the state including California Federal Savings and Loan Association. Complaint for Declaratory and Injunctive Relief at 3, Cal. Fed. Sav. & Loan Ass'n.

11. The pro-preemption amici claimed that the PDA prohibited any difference in treatment of employees based on pregnancy. They argued that any sex-based distinction, even well intended, had the effect of limiting women's role in the workplace. Brief for Amici Curiae at 5, Cal. Fed. Sav. & Loan Ass'n. However, they markedly differed from the employer, whose interpretation of the PDA they supported, in urging the court to construe section 12945(b)(2) as requiring employers to provide up to four months of disability leave to employees of both sexes as an effective cure to any fatal sex-based distinction within the law. Id. at 43. See generally BABCOCK, FREEMAN, NORTON & ROSS, SEX DISCRIMINATION AND THE LAW 19-53, 268-72 (1975) (how protective legislation has impacted on women in the workplace).

12. Equal Rights Advocates, Inc. is a San Francisco-based public interest law firm engaged in women's advocacy and specializing in the area of sex discrimination. This firm argued that the California law was consistent with the legislative intent behind passage of the PDA which was to prevent working women who are also childbearers from being denied equal employment opportunities. Brief for Amicus Curiae at 5, Cal. Fed. Sav. & Loan Ass'n.

13. Mark Guerra is the State of California's Director of the Department of Fair Em-
state's) contention that section 12945(b)(2) was not inconsistent with Title VII and that states could lawfully mandate leaves to prevent pregnant workers from being fired as a consequence of the inadequate sick leave policies of employers, whether or not similar disability leaves were available to other employees.\footnote{Under this view, the PDA defines only the minimum disability leave available to pregnant employees. They must be treated at least as well as male workers who become temporarily disabled; however, a greater benefit is permissible to mitigate the burden childbearing places only on female workers.}

\section*{II. BACKGROUND}

\subsection*{A. \textit{Federal Law}}

Title VII of the Civil Rights Act of 1964 made it unlawful to discriminate in employment on the basis of sex.\footnote{42 U.S.C. § 2000e (1981).} However, in 1976 the Supreme Court held in \textit{General Electric Co. v. Gilbert} that an otherwise comprehensive benefit plan which excluded pregnancy coverage was not unlawful sex discrimination under Title VII.\footnote{429 U.S. 125 (1976).} Outraged by the Court's conclusion that discrimination on the basis of pregnancy was not discrimination on the basis of sex although only women get pregnant, Congress responded with the enactment of the PDA\footnote{See S. Rep. No. 331, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 948, 95th Cong., 2nd Sess. (1978).} which unequivocally defined discrimination on the basis of pregnancy as sex discrimination.\footnote{42 U.S.C. § 2000e(k) (1981). It provides:
\begin{quote}
(k) 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.
\end{quote}}

\begin{flushright}
\textit{Id.}
\end{flushright}
The only Supreme Court case interpreting the PDA is *Newport News Shipbuilding & Dry Dock v. EEOC*. The Equal Employment Opportunity Commission cited the employer for failing to provide maternity health benefits to spouses of male employees that were equal to the maternity health benefits provided to female employees. The Court held that giving a less complete benefit package to male workers was discrimination against men on the basis of sex and that the greater cost of providing comparable maternity benefits for spouses of male employees did not justify the inequity in coverage. The test of whether the employment benefits given to male and female employees by an employer were equal was not a comparison of the number of dollars spent on employees of each sex but rather a comparison of the comprehensiveness of the benefit package provided for employees of each sex.

B. STATE LAW

California responded to the *Gilbert* decision by passing Government Code section 12945(b)(2) requiring employers subject to Title VII to provide a reasonable leave of up to four months to employees disabled by pregnancy, childbirth, or related conditions. As construed by the state, the law requires employers to reinstate such workers to the same or a similar position unless the employer can show a business necessity which reasonably justifies noncompliance. However, the law does not

23. Id.
24. CAL. GOV'T CODE § 12945(b)(2) (West 1982). Assembly Bill 1960 (1977-78 Reg. Sess.) created a statute which preceded Government Code section 12945(b)(2) and was intended to protect all pregnant employees from inadequate leave policies. Such protection was formerly only available to employees of school districts. Cal. Summary Digest at 374.
25. Government Code section 12945(e) makes section 12945(b)(2) applicable to employers such as Cal Fed that are subject to Title VII. “The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964.” CAL. GOV'T CODE § 12945(e) (West 1982) (emphasis added). Title VII applies to employers who have 15 or more employees and who are engaged in interstate commerce. 42 U.S.C. § 2000e-(b) (1981).
26. The California Department of Fair Employment and Housing, an appellant in the instant case, interpreted and enforced this law for the state. See supra note 13.

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require paid leaves for pregnant employees greater than those available to other disabled employees. Moreover, pregnant workers are not automatically entitled to the maximum four month leave because employers affected by the law are only required to provide that leave which pregnant employees medically require up to a maximum of four months.

C. FACTS OF CASE

In 1982 Lillian Garland, a receptionist/PBX operator employed by California Federal Savings and Loan Association (Cal Fed), took a four month maternity leave. In spite of her request to return to work at the end of the leave, Cal Fed did not reinstate her for an additional seven months. When California's Department of Fair Employment and Housing served a complaint on Cal Fed alleging a violation of section 12945(b)(2), Cal Fed filed a suit for declaratory relief claiming that Title VII preempted the law because the California statute required different treatment of male and female employees on the basis of pregnancy. On cross-motions for summary judgment, Cal Fed prevailed. The district court held that Title VII preempted the California law because it discriminated against males on the basis of pregnancy. The state appealed the ruling to the United

28. Questions and Answers on Pregnancy, California's Dep't of Fair Empl. and Hous., Question 23.
29. Id. at Question 1.
30. The district court denied Garland's motion to intervene as a defendant. She appealed that decision to the Ninth Circuit which found that the issues raised by her appeal did not go to the merits of the case. These issues were addressed in a separate, unpublished memorandum. Cal. Fed. Sav. & Loan Ass'n, 758 F.2d at 393.
31. Cal Fed's leave policy was gender-neutral on its face but did not guarantee reinstatement of employees on pregnancy disability leave to the same or a similar position as required under the state's interpretation of section 12945(b)(2). Opening Brief of State Appellants at 4, Cal. Fed. Sav. & Loan Ass'n. Under its policy, "Cal Fed reserve[d] the right to terminate an employee on leave of absence if a similar and suitable position [was] not available . . . ." Cal. Fed. Sav. & Loan Ass'n, 758 F.2d at 392 n.4.
32. California interprets the leave requirement as, by inference, creating a presumption of reinstatement to the same or a similar position at the end of the leave period, unless not doing so is justified by business necessity. Brief of Appellees at 5, Cal. Fed. Sav. & Loan Ass'n.
33. Because Cal Fed did not guarantee reinstatement to other temporarily disabled employees, the state law compelled the employer to treat employees disabled by pregnancy differently than other temporarily disabled employees.
34. Cal. Fed. Sav. & Loan Ass'n, 758 F.2d at 393.
III. THE COURT’S REASONING

To determine whether California Government Code section 12945(b)(2) was preempted by Title VII as amended by the PDA, the Ninth Circuit first explored the scope of Title VII preemption. The court looked to Title VII’s own preemption provisions and found that the plain language of Title VII did not preclude additional state anti-discrimination laws unless they were inconsistent with any of the purposes of Title VII. It concluded, therefore, that the scope of Title VII preemption was very narrow and that state law was only preempted when it promoted an employment practice which was inconsistent with Title VII’s goal of equality in employment opportunity.

The court thus had to determine whether the state statute was detrimental to that goal. Here the court avoided a broad

35. Id. at 392.
36. Title VII’s preemption provisions state:
   Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.
   Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.
37. The court looked to the plain language and legislative history of Title VII using the approach followed by the Supreme Court in determining whether the Employee Retirement Income Security Act (ERISA) preempted state disability law in Shaw v. Delta Airlines, 463 U.S. 85, 95-100 (1983). The Supreme Court noted in Shaw that “Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII . . . .” Id. at 103.
ruling either on whether Title VII itself mandated adequate pregnancy disability leaves\(^4\) or whether section 12945(b)(2) might be discriminatory as applied in some factual settings.\(^4\) The court decided only the permissibility of the state action in light of Title VII as amended by the PDA.\(^4\) Citing recent Supreme Court decisions that recognized the authority of states to freely legislate in non-preempted areas without any substitution by the judiciary of its judgment for that of elected lawmakers,\(^4\) the court also avoided an inquiry into whether extant leave policies actually justified the state action. It decided only the facial validity of section 12945(b)(2).

Before turning its focus to the effect of the PDA on employment discrimination law,\(^4\) the Ninth Circuit first distinguished pregnancy disability from unlawful employment classifications which are based on sex stereotypes\(^4\) and not actual biological differences.\(^4\)

The court then recognized the history of the PDA as a congressional response to the Supreme Court’s failure in General

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40. The state urged this position. Opening Brief of State Appellants at 21, Cal. Fed. Sav. & Loan Ass’n (inadequate leave policy is a prima facie violation of Title VII).

41. Cal Fed urged this position. Brief of Appellees at 30, Cal. Fed. Sav. & Loan Ass’n (California law requires a four month pregnancy disability leave when the employer does not provide a four month disability leave for other medical conditions). See supra note 3 for discussion of Cal Fed’s argument.

42. This was the narrow issue raised by the district court’s conclusion that section 12945(b)(2) was impermissible as a matter of law on cross-motions for summary judgment. Cal. Fed. Sav. & Loan Ass’n, 758 F.2d at 394. “We need not determine, as the litigants would have us do, whether Title VII compels employers to grant reasonable pregnancy disability leave to protect women from the potentially disparate impact of facially neutral, but inadequate, disability leave policies; we need only decide whether section 12945(b)(2) is permissible under Title VII.” Id.

43. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1015 (1985) (city transit system not exempt from federal wage regulations); Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321, 2328-31 (1984) (where a state found a substantial reason for exercising its power to pass a law redistributing ownership in land, courts should defer to the judgment of the state legislature).

44. This was the issue at the heart of the feminist controversy.

45. Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) (archaic stereotyped assumptions such as viewing women and not men as dependent spouses cannot be used to justify dissimilar treatment of women and men).

46. The Ninth Circuit noted, “[B]ecause section 12945(b)(2) deals with a condition that is unique to women—pregnancy disability rather than, say, parenting—our decision has no bearing on the lawfulness of state statutes or employment practices that classify on the basis of purportedly sex-linked factors that are actually less biological than stereotypical.” Cal. Fed. Sav. & Loan Ass’n, 758 F.2d at 395.
Electric Co. v. Gilbert\(^4\) to require employers to provide pregnancy benefits in otherwise complete healthcare packages. It concluded that while the language of the PDA is ambiguous as to whether any distinction based on pregnancy is permissible,\(^4\) the PDA was intended to adopt the Gilbert dissent\(^4\) which did allow the recognition of pregnancy in employment policies.\(^5\)

The court also relied on Newport News Shipbuilding & Dry Dock Co. v. EEOC\(^6\) to determine whether equality of treatment compelled employers to give the same total number of disability leave days to both men and women. In Newport News, the Supreme Court explained that the cost of the employee’s benefit package was not the appropriate measure of equality.\(^6\) Rather, it was necessary to look at the comprehensiveness of the benefit coverage offered to both sexes to see if equal treatment was achieved.\(^7\) In Newport News, although it cost more for employers to provide wives of male employees with the same health benefits available to female employees, the additional cost of the male benefit package was a necessary means of achieving equally complete benefits for employees of both sexes. The Ninth Circuit, by analogy, concluded that the number of disability leave days offered by the employer, like the number of dollars spent by the employer, was not the appropriate measure of equality of employment opportunity. Looking instead to the completeness of the benefit offered to employees of both sexes, the court found that offering pregnancy leaves only to female workers did not deprive the male employees of a benefit that they too required.\(^8\) Since men do not get pregnant, the court reasoned that

\(^4\) 429 U.S. 125 (1976).
\(^4\) The court recognized “a tension between the PDA’s first clause, which subjects pregnancy to the same types of discrimination analysis to which it subjects sex, and its second clause, which appears to demand pregnancy-neutral policies at all times.” Id. at 396. See supra note 19 for relevant language.
\(^4\) Gilbert, 429 U.S. at 146 (Brennan, J., dissenting).
\(^5\) Id. at 159. “A realistic understanding of conditions found in today’s labor environment warrants taking pregnancy into account in fashioning disability policies.” Id.
\(^7\) Newport News, 462 U.S. at 676 (comparison of the comprehensiveness of protection afforded to female and male employees is proper test of discrimination).
\(^8\) The Ninth Circuit concluded that “equality under the PDA must be measured in employment opportunity, not necessarily in amounts of money expended—or amounts
denying them pregnancy leaves did not result in a less complete benefit package and thus did not discriminate against men. Therefore, the Ninth Circuit held that the state law was not preempted because it did not on its face promote an illegal employment practice inconsistent with Title VII.

The court concluded that requiring the law to be totally blind to pregnancy made no sense. It determined that because Title VII protects employees from sexual discrimination resulting from the disparate impact of facially neutral employment policies, employees must be afforded the same protection from pregnancy discrimination which was incorporated into Title VII by the PDA. Thus the state could act prophylactically to prevent the disparate impact of facially neutral but inadequate disability leave policies on pregnant workers.

IV. CRITIQUE

In rejecting the district court's holding that a state law guaranteeing minimal pregnancy disability leaves discriminated against men, the Ninth Circuit admonished the lower court for reaching a conclusion that defied common sense. Fortunately,
rational thinking prevailed in the Ninth Circuit opinion. The Ninth Circuit appropriately applied analogous case law, but also displayed a healthy reliance on common sense for its crucial interpretation of the PDA where guidance was limited.

The court confronted the fact that blindly requiring the same treatment for female and male employees in every situation leads to an intuitively incorrect result when, as here, a distinction is made based on an inherent sexual difference. Depriving women of a benefit necessary for them to achieve employment equality essentially because men don’t happen to need it is illogical as well as unjust. That result reveals the flaw in an inflexible interpretation of the PDA. Rather than offering women employment equality, such an interpretation subtly undermines it by perpetuating the use of male needs as the determinant of women’s benefits.

The court adopted a more humanistic approach. Newport

\[\text{supra}\] note 46 for Ninth Circuit’s discussion of the distinction.

62. See Kreiger & Cooney, \textit{supra} note 6, at 544-57, who discuss the flaws in the “same treatment” model of equality. That model causes inequitable results not only because it is based on the erroneous assumption that the sexes are the same, but also because men provide the normative standard by which both men and women are measured. \textit{Id.} at 545. The authors stress the need to focus on equality in effect rather than equality in treatment. \textit{Id.} at 557.

63. The flaw will become more dramatic if there is a revival of anti-abortion laws. In that event, women who become pregnant will be compelled to bear a child, yet states will be unable to pass laws to safeguard their jobs when they become temporarily disabled by the birth.

64. This results from adherence to a rigid model of equality which cannot take into account the most basic sexual difference, pregnancy. If the PDA requires employers to give women only those benefits that male workers get, women are wrongly hindered by benefits that reflect the demands of an anachronistic, male-dominated workforce.

Realistically, employers such as Cal Fed resist any expansion of benefits that increase their cost of doing business. Note, as the Ninth Circuit did, that the instant suit was brought by employers asserting their own interests and not by male employees. \textit{Cal. Fed. Sav. & Loan Ass’n}, 758 F.2d at 393 n.6. If the Supreme Court finds the state statute preempted as a matter of law, employers will then use the rigidity of the PDA to avoid any additional expenditure to accommodate childbirth. If Cal Fed is any example, employers will not voluntarily expand benefits to employees of both sexes to accommodate female employees without creating differences in treatment. They will strongly oppose future legislation that mandates such broad expansion and claim that it makes the cost of doing business unnecessarily high.

65. The court concluded that by enacting the PDA "Congress intended to reverse
News, although a different factual setting, compels a comparison of the ultimate effects of employment benefits or practices on employees to determine whether men and women are being treated equally. The controlling factor is not the cost to the employer but the impact on the employees. In Newport News, both male and female employees who had children had to meet the medical expenses of childbirth, so the issue as to whether an employee or the spouse of an employee literally bore the child was irrelevant. Therefore, employees of both sexes shared the same need and had to be treated alike. In contrast, pregnancy disability leave is only necessary for the employee actually giving birth, who will always be a woman. Since only women can become pregnant, mandating pregnancy disability leaves does not discriminate against men because men are not being deprived of a benefit they need. That result makes sense.

Gilbert, to require employers to include pregnancy disability leave in their otherwise comprehensive benefit packages, and thus to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." Id. at 396. Although the court did not mention Williams, supra note 6, at 196, this language seems to be a direct response to her “same treatment” argument that “[t]he equality approach to pregnancy (such as that embodied in the PDA) necessarily creates not only the desired floor under the pregnant woman’s rights but also the ceiling . . . .” Id. The Ninth Circuit disagreed with the proposition that the benefit floor must also be the ceiling. Cal. Fed. Sav. & Loan Ass’n, 758 F.2d at 396.

In a more recent article defending the “same treatment” model of equality, Williams agreed that disparate impact analysis should be available to prove pregnancy discrimination as it is to prove other kinds of Title VII discrimination. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1985). However, she argued that because the PDA proscribes laws that make any distinction based on pregnancy, a state cannot pass a law such as section 12945(b)(2) to prevent the possible disparate impact on pregnant women of neutral leave policies. Id. at 348, 368. Rather, a female employee can only make use of disparate impact analysis to prove an individual claim brought under Title VII. Id. at 372-73. Her approach maintains the purity of the “same treatment” model but offers little real help to working women harmed by inadequate leave policies. Costly individual law suits involving the inherent discovery and proof problems of disparate impact claims are hardly a practical solution for most workers disabled by pregnancy.

67. Id. at 685 n.26.
68. See supra note 55 for the Ninth Circuit’s explanation.
69. As the Ninth Circuit aptly explained:
Each side in the feminist controversy over whether the PDA allows a more favorable disability policy for pregnant workers points to the wording of the PDA for support. \(^7\) The court wisely distanced itself from the futile scrutiny of the language of the PDA and looked to the broad context of both the PDA and Title VII to determine the compatibility of section 12945(b)(2).

The Ninth Circuit accurately distinguished pregnancy from impermissible stereotypical assumptions. \(^7\) Sensibly, the court then recognized that an interpretation of the PDA requiring total blindness to pregnancy was inconsistent with the PDA's own history, \(^7\) with Title VII, and with common knowledge. \(^7\) The PDA extended the safeguards of Title VII to pregnancy. \(^7\) Title

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equality of benefits by the sameness of coverage despite differences in need.

*Cal. Fed. Sav. & Loan Ass'n*, 758 F.2d at 393.

70. One side claimed that the wording “same treatment” should be taken literally. *See supra* note 17 for the text of the PDA. The other claimed that defining discrimination on the basis of sex as including “on the basis of pregnancy or childbirth” entitled these conditions to the remedial treatment available to other Title VII-protected classifications when a disparate impact is shown. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. at 429-31 (1971) (eliminated test requirement applied to all employees but which was not related to job performance and acted to perpetuate discrimination); Nashville Gas Co. v. Satty, 434 U.S. 136, 140-43 (1977) (neutral seniority plan unlawful because loss of seniority by women on pregnancy leave imposed a substantial burden on women). A disparate impact justifies different treatment to prevent the unjust result. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979) (Title VII does not prohibit affirmative action plans). However, if the PDA specifically forbids greater disability leaves for pregnancy than are available for other disabilities, this remedy is not available to prevent pregnancy discrimination. *See supra* note 56 for further discussion of *Griggs*.

Studying the language of the PDA to resolve the controversy is futile because the language is self-contradicting: the first clause seemingly giving pregnancy the same “privileges” as other protected classifications and the second clause seemingly restricting those “privileges” in the case of pregnancy. *See supra* note 48 for the Ninth Circuit’s description of the ambiguity.

71. It is significant that section 12945(b)(2) does not require maternity leaves for all pregnant workers. Doing so would impermissibly assume that all pregnant women need a long leave. This would distort the true biological difference, changing the distinction to an overbroad stereotyped assumption. Because the law only requires leaves when medically necessary, it is clear that only the biological difference is being addressed; the time is required for childbirth or medical complications, but not for providing childcare—a role that can be undertaken by either sex.

72. *See supra* notes 49-50 and accompanying text.

73. While some argue that pregnancy should be treated the same as any physical disability, it is common knowledge that pregnancy is different. If it must be distinguished more specifically, it is at least different in the large number of workers affected by it, *see* infra note 78, its status as a fundamental right, and in its likely “result,” a new life. None of these distinctions is insignificant.

VII provides protection from the disparate impact on one sex of facially neutral employment policies. It would be inconsistent and illogical to deny disparate impact protection to pregnant women when it is available to other groups protected under Title VII. In fact, to deny disparate impact protection to pregnancy would itself be discrimination against pregnancy.

Notably absent from the Ninth Circuit’s inquiry into whether the state law was permissible were public policy considerations. States have a strong interest in preventing the termination of pregnant workers. Laws such as section 12945(b)(2) are especially important because of the likelihood that inadequate leave policies are most prevalent in the very kind of non-unionized positions traditionally held by women. With an increasing number of households supported solely or to a significant extent by women, many of whom are likely to get pregnant, the termination of pregnant workers can have a devastating financial effect on families and on state welfare programs. In addition to


76. While the number of women in the labor force has increased in the last few years, four out of five of these new jobs have been in the service area. Most women work in low-paying jobs without opportunities for advancement, such as waitressing or food service, health care, clerical or child care work. San Francisco Examiner, Dec. 29, 1985, at H8, col. 1.

77. Families headed by female householders with no spouse present: 1970, 10.8%; 1980, 14.5%; 1983, 15.4%. USA Statistics in Brief, U.S. Dep’t of Commerce, Bureau of the Census, Supp. 1985. Married couple families with husband and wife employed: 1970, 29.4%; 1980, 44.8%; 1984, 48.7%. Id. at 399. Of married couple families with husband unemployed, the percent having only wife employed: 1970, 33.4%; 1980, 39.5%; 1984, 41.7%. Id. The census bureau reported these additional findings for 1984: 28% of the births by 18 to 24 year olds were to unmarried women; of women past age 30 who gave birth, 52% were working or looking for work, up from 28% in 1976; women with no high school diploma had the highest birth rate at 81.9 per 1000; women with three years of college or more had the lowest rate with 54.8 per 1000; women with family incomes of less than $10,000 had a rate of 88.5 births per 1000; the rate dropped to 46 per 1000 for women in families with an income above $35,000 a year. San Francisco Chronicle, Dec. 4, 1985, at 2, col. 5.

78. “Eighty-five percent of working women are likely to become pregnant at least once during their working lives.” Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, supra note 6, at 930 n.7 (citing S. Kamerman, A. Kahn & P. Kingston, Maternity Policies and Working Women 25 (1983)).

79. In a study conducted for the congressional Joint Economic Committee, it was reported that “the share of national income going to families with children has dropped 19 percent since 1973.” San Francisco Chronicle, Dec. 26, 1985, at 8, col. 1. The statistics indicated that families with single female heads had a mean income last year of $13,257, less than 40% of the $34,379 average income for two-parent families. Id. See supra note 63 suggesting the possible impact of anti-abortion legislation.
self-reliant families, procreation is also an important government interest. The value of children both to families who want them and to society should not be ignored. Pregnancy should be accommodated, not punished.

V. CONCLUSION

California Government Code section 12945(b)(2) protects pregnant workers from possible termination as a result of disability leave policies that fail to take pregnancy into account. It mitigates the additional burden faced by female employees because of their unique biological role as childbearers. Title VII and the PDA were intended to further equality of the sexes in employment opportunity. The California law is consistent with that goal because removing a barrier that confronts only women does not create an injustice to men. An interpretation of the PDA that prohibits recognition of pregnancy as an inherent and exclusively female characteristic refutes common knowledge and perpetuates the use of a male normative standard in employment policies. It illogically forbids a specific state intervention to remedy pregnancy discrimination, while failure to take pregnancy into account results in harm which states have an interest in preventing. The Ninth Circuit’s rebuke of the preemption attack on section 12945(b)(2) was a victory both for women’s equality and for common sense.

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