GENDER EQUITY IN THE WORKPLACE:

A Comparative Look at Pregnancy Disability Leave Laws in California and the United States Supreme Court

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INTRODUCTION TO PREGNANCY DISCRIMINATION IN THE UNITED STATES

Pregnant women have historically faced barriers in being recognized as a special class of people in the workplace in need of greater protections. Until the last half-century, legislatures in the United States "protected" women by 1) systematically encouraging their total exclusion in the workplace except as teachers, secretaries, nurses and nannies and 2) regulating the

number of hours that pregnant women could work.[1] But this "protection" was often a pretext for preserving better jobs for men and keeping women out of certain roles.[2] The challenge we face today is how to protect women's access to the modern labor market without ignoring the difficulties and disabilities that affect women only. Many legislatures and employers do not recognize pregnancy as a valid "disability" condition that sometimes requires reasonable accommodations, temporary leave from work or other workplace protections. State and circuit courts are split regarding the idea of whether facially neutral laws violate the Pregnancy Discrimination Act (PDA) when they fail to recognize a disparate impact on pregnant women. I will discuss laws such as the PDA of Title VII of the Civil Rights Act of 1964 that was enacted to protect pregnant women, as well as California and federal case law that give women increasing protections in the workplace.

This paper will comparatively present the evolution of cases from the federal courts as well as California courts on the subject of job-protected pregnancy leave and reasonable-accommodation laws. I will also discuss how the history of cases affects women and families in their daily lives and what this means for the future of sex jurisprudence. The way that the United States Supreme Court has interpreted how the status of pregnancy fits into sex discrimination has evolved over the past forty to fifty years. Due to the Americans with Disabilities Act — which provides for reasonable accommodations in the disability rights context — groups have advocated for similar protections for women. However, the Supreme Court has been reluctant to accept this comparative approach. There are many explanations of how the law should protect pregnant women in the workplace. In this paper, I argue that when courts fail to recognize a lack of pregnancy

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[1] Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 Duke J. Gender L. & Pol'y 67, 71–72 (2013); 208 U.S. 412, 422 (1908).

[2] *See, e.g.,* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1237–38, 1239 (1986) (observing that "[f]etal vulnerability policies excluding all fertile women have been adopted only in male-dominated industries," while "women are generally allowed to work in women's jobs without restrictions based on fetal safety"); David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality,* 34 Wm. & Mary L. Rev. 101, 115 (1992) ("Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn . . .").

leave or reasonable accommodations in the workplace as having a disparate impact on women, it furthers sex discrimination. It may seem obvious that lack of reasonable accommodation leads to a disparate impact for women, but surprisingly, California courts and the United States Supreme Court have been slow to make this recognition explicit. In order to establish statutorily reasonable accommodations, the courts must first recognize the disparate impact.

Lack of proper leave laws and reasonable accommodations put women at risk of losing their livelihood, medical benefits, career trajectory and sense of security. It is important that when deciding cases that interpret the PDA, our federal judiciary should act in a way that will allow pregnant women to get reasonable accommodations that are necessary in the workplace. In California, there are more protective laws than those in the federal system. However, the California judiciary also has great potential for improvement in pregnancy discrimination jurisprudence.

II. HOW TO RECONCILE TITLE VII WITH MORE ADVANCED STATE LAWS: PDA AND PREGNANCY DISCRIMINATION LAWS

A. FEDERAL STATUTORY AND CASE LAW

Pregnancy-discrimination jurisprudence in the United States made some significant strides over the past fifty years. Early cases about pregnancy decided that pregnancy discrimination was not considered sex discrimination and pregnancy was not considered a disability.[3] A brief overview of the progress that our legislature and judiciary have made will be presented.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, this was not always the case. In *Geduldig v. Aiello,* in 1974, the U.S. Supreme Court held that there was no equal protection violation for denying

[3] Martinez v. NBC Inc., 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.").

normal pregnancy disability benefits from the California state disability insurance program.[4] The four plaintiffs in *Geduldig* argued that being denied disability insurance for pregnancy although they were otherwise qualified for the program was a violation of the Equal Protection Clause because the policy adversely affected women. Regarding the Equal Protection Clause arguments, the Court reasoned that "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[5] The Court was quick to dismiss the gender discrimination issue in a footnote — reasoning that the potential recipients of disability funds are either pregnant women or non-pregnant persons.[6] While the first group is all-female, the second group consists of males and females and therefore members of one sex only were not discriminated against.[7] At this time, the Supreme Court was not ready to accept pregnancy discrimination as sex discrimination but did not say so explicitly.

Two years later, In *General Electric v. Gilbert,* the Supreme Court addressed the issue of whether a disability policy that excluded pregnant women was a violation of Title VII.[8] In *Gilbert,* the Court stated that the *Geduldig* equal protection rationale was directly on point to the Title VII discrimination claims in the present case. The Court held that discrimination based on pregnancy was not sex discrimination, as prohibited by Title VII.[9] *Gilbert* was the first instance in which the Court held explicitly that Title VII of the Civil Rights Act did not protect women from pregnancy-based discrimination.[10]

In *Nashville Gas Co. v. Satty,* decided only one year after *Gilbert,* the Supreme Court invalidated an employer policy forcing pregnant women to take leave from work and then denying them their previously accumulated seniority when bidding for new positions thereafter.[11] As the Court reconciled this position with *Gilbert,* employers were not required to provide

4 Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

5 *Id.* at 485.

6 *Id.* at 496 n.20.

7 *Id.*

8 General Electric Co. v. Gilbert, 429 U.S. 135–36 (1976).

9 *Id.*

10 *Id.*

11 Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).