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I. Introduction

Title VII of the Civil Rights Act of 1964[1] is described generally as outlawing discrimination in employment based on race, color, sex, religion, and national origin. Indeed, one of the critical provisions of the Act specifically provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate against* any individual."[2]

American courts have struggled with the question of what it means to discriminate, not only in the context of Title VII litigation but also in cases involving the equal protection and due process clauses of the United States Constitution[3] and the National Labor Relations Act.[4] Even when courts have been able to define discrimination, the law has developed in such a fashion that discrimination against some interests and groups receives a scrutiny different from similar conduct directed against different groups and interests.[5]

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1. 42 U.S.C. § 2000e-2000e-17 (1976).
2. 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added).
3. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.
4. 29 U.S.C. §§ 151-69 (1976).
5. *See, e.g.*, Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (racial and ethnic distinctions inherently suspect and call for the most exacting judicial examination); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (classification based on age does not "impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class"); Craig v. Boren, 429 U.S. 190 (1976) (classification involving sex subject to intermediate scrutiny); Geduldig v. Aiello, 417 U.S. 484 (1974) (disability program which fails to include pregnancy not facially discriminatory against women); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (state may not deprive dependent illegitimate children of workers' compensation death benefit because of "fundamental personal rights" endangered by classification and invidiousness of discrimination resting on "status of birth"); Dandridge v. Williams, 397 U.S. 471 (1970) (strict scrutiny not applicable to state welfare scheme); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel interstate); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation is fundamental

While the notion of discrimination is central to Title VII, Congress failed to define the term. The parameters of the Act thus have been shaped by courts deciding the issue on a piecemeal basis.

Title VII does not distinguish among the types of discrimination prohibited, and it is logical to assume that all discriminatory employment conduct, whether based on race, color, sex, religion or national origin, would be analyzed identically. That has not been the case. In particular, instances of sex discrimination have been treated less generously by the United States Supreme Court than race discrimination cases.[6] The Court frequently seemed to rely on the very stereotypes about women that it assiduously asserted were no longer worthy of consideration and then applied the most narrow legal reasoning to uphold practices that common sense would deem clearly discriminatory.

During the summer of 1983, the Court decided a Title VII sex discrimination case which may indicate change to a more realistic approach to instances of sex discrimination. Ironically, the immediate beneficiaries of the decision were men. This brief article focuses on that decision, *Newport News Shipbuilding & Dry Dock Company v. Equal Employment Opportunity Commission (EEOC).*[7]

II. The Court's Decision in *Newport News*

The question raised in *Newport News* concerned the validity of an employer's employee health insurance program. The plan provided hospitalization and medical-surgical coverage for a defined category of employees and a defined category of employee dependents. The coverage for male and female employees was identical.[8]

For spouses of employees, the plan "paid in full for a semi-private hospital room for up to 120 days and for surgical procedures; covered the first $750 of reasonable and customary charges for hospital services . . . ; and paid 80 percent of the charges exceeding $750 for such services up to a maximum of 120 days."[9] Although for hospitalization caused by an uncomplicated pregnancy of the wife of a male employee, the plan paid 100 percent of reasonable and cus-

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right; strict scrutiny applied to statutory classification providing for sterilization for certain convicted felons).

6. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977) (Title VII is not violated by the state of Alabama's refusal to employ women as correctional counselors in male, maximum security penitentiaries); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), discussed *infra* notes 22-29 and accompanying text; General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), discussed *infra* notes 15-21 and accompanying text; Phillips v. Martin Marietta, 400 U.S. 542 (1971) (it is at least arguable that an employer's policy of refusing to employ women with pre-school age children while employing similarly situated men is justified as a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business).

7. 103 S. Ct. 2622 (1983).

8. *Id.* at 2625.

9. *Id.* at 2625 n.6.

tomary physicians' charges for delivery and anesthesiology, the plan only covered up to $500 of hospital charges.[10] Thus, as the United States Court of Appeals for the Fourth Circuit observed, "[t]o the extent that the hospital charges in connection with an uncomplicated delivery may exceed $500 . . . a male employee receives less complete coverage of spousal disabilities than does a female employee."[11]

The Supreme Court majority concluded that the fringe benefit program discriminates against men because "such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' "[12] The test used by the Court to find discrimination was entirely different from that which it previously had used in Title VII cases dealing with pregnancy. The impetus for the change in analysis was a 1978 amendment to Title VII, the Pregnancy Discrimination Act,[13] which provides that the terms in Title VII prohibiting discrimination "because of sex" or "on the basis of sex" include "because of or on the basis of pregnancy, childbirth, or related medical conditions."[14] That amendment was passed in direct response to the Supreme Court's 1976 decision in *General Electric Co. v. Gilbert.*[15]

Gilbert presented a Title VII challenge to an employer's disability benefit program that provided compensation to employees during periods of disability resulting from nonoccupational causes. The plan provided coverage for virtually all disabilities, including those that were male specific, yet excluded pregnancy and pregnancy-related disabilities.[16] The *Gilbert* majority concluded that such an exclusion did not violate Title VII because "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."[17]

Justice Rehnquist wrote the majority opinion, which quoted with approval a footnote from *Geduldig v. Aiello*,[18] a case that upheld the constitutionality of excluding pregnancy coverage under the State of California's insurance program for state employees. The note stated:

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning preg-

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10. *Id.*
11. Newport News Shipbldg. & Dry Dock Co. v. EEOC, 667 F.2d 448, 449 (4th Cir. 1982).
12. 103 S. Ct. at 2631 n.23 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).
13. Pub. L. 95-555, 92 Stat. 2076 (1978).
14. 42 U.S.C. § 2000e(k) (Supp. III 1979).
15. 429 U.S. 125 (1976).
16. *Id.* at 129.
17. *Id.* at 136.
18. 417 U.S. 484 (1974).

> nancy is a sex-based classification. . . . The program [in question] divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.[19]

The Court in *Gilbert* seemed to say that, for discrimination to occur, the dividing line between favored and disfavored groups must be drawn strictly on the basis of gender. Since all women were not affected by the exclusion because some were not pregnant, the dividing line was not drawn strictly on the basis of gender, even though the affected group was exclusively female.

Justice Stevens' dissent analyzed General Electric's program as classifying employees into two groups: those who face the risk of pregnancy, a class composed exclusively of women, and those who face no such risk, a class consisting entirely of men.[20] Justices Brennan and Marshall's dissent argued that, since the plan provided comprehensive coverage for males but did not provide comprehensive coverage for females, sex discrimination had been established.[21]

The year following *Gilbert* the Court decided *Nashville Gas Co. v. Satty*.[22] The employer in *Satty* refused to provide sick leave pay for women on pregnancy leave, although it did for employees with other disabilities. The employer also denied women returning from pregnancy leave all accumulated job seniority, but did not deny seniority to other returning employees.[23] With Justice Rehnquist again writing for the majority, the Court concluded that denial of accrued seniority violated § 703(a)(2)[24] of Title VII. Although it was not on its face a discriminatory policy, the denial acted to deprive employees of "employment opportunities" and adversely affected their status as employees.[25] In comparing this practice with that in *Gilbert*, the Court stated that in *Gilbert* "[n]o evidence was produced to suggest that men received more benefits from General Electric's disability insurance fund than did women,"[26] and in *Satty* the employer "has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial bur-

19. *Id.* at 496-97 n.20.
20. 429 U.S. 125, 161-62 n.5 (Stevens, J., dissenting).
21. 429 U.S. 125, 152 (Brennan, J., dissenting).
22. 434 U.S. 136 (1977).
23. *Id.* at 138.
24. 42 U.S.C. § 2000e-2(a)(2) (1976). Section 703(a)(2) provides as follows:
> It shall be an unlawful employment practice for an employer . . . (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.
25. 434 U.S. at 141.
26. *Id.*

den that men need not suffer."[27]

Turning to the denial of sick leave pay to pregnant employees, the Court said the practice was "legally indistinguishable from the disability insurance program upheld in *Gilbert*."[28] Additionally, the program did not "deprive any individual of employment opportunities" or otherwise adversely affect his status as an employee in contravention of § 703(a)(2).[29] Thus, the denial of sick leave pay did not violate Title VII.

In 1978 Congress passed the Pregnancy Discrimination Act in response to the *Gilbert* decision. The amendment quite clearly states that plans like those in *Gilbert* and *Satty* no longer are considered lawful, and the litigants in *Newport News* so acknowledged. The problem for the Court, however, was to determine whether the treatment, under the employer's program, of pregnancy related expenses of employees' spouses was addressed by the amendment. If not, and the Court analyzed the question as it had in *Gilbert* and *Satty*, the employer's plan would not violate Title VII because the group allegedly discriminated against, male employees with pregnant spouses, would have to be compared with those receiving benefits, all other employees with disabled spouses, and the latter class was not exclusively female. Thus, under the *Gilbert* rationale, no discrimination against men would have occurred.[30] Additionally, if the denial of sick leave pay to pregnant employees in *Satty* was not deemed to adversely affect employment status or to deprive of opportunities, then it could hardly be said that limiting insurance coverage for pregnant spouses would violate § 703(a)(2).

The *Newport News* Court did not conclude specifically that the language of the Pregnancy Discrimination Act applied to the plan before it. Instead the Court decided that, although clearly not adding a specific definition of discrimination to Title VII, the amendment was a "rejection of the premises of *General Electric v. Gil-*

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27. *Id.* at 142.

28. *Id.* at 143.

29. *Id.* at 144-45.

30. *See* EEOC v. Emerson Electric Co., 539 F. Supp. 153, 158-59 (E.D. Mo. 1982). *But see* Note, *Dependents' Pregnancy-Related Medical Benefits and the Pregnancy Discrimination Act*, 1983 DUKE L.J., 134, 148-49, which suggests that

> the two categories of employees to be compared would be married men and married women. Only married male employees would be in the disfavored group and only married female employees in the favored group because females would receive full coverage for spouses while male employees would not. Therefore, the plan could be shown to discriminate against males within the affected class of married persons.

Although at first blush that characterization is plausible, it is not accurate. Those male employees with spouses unable to bear children would also be in the favored class and the categories would not meet the strict sex-based categorization of favored and disfavored groups required by *Gilbert*.

bert"[31] which mandated striking the employer's plan. In the Court's view, "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding *and the reasoning* of the Court in the *Gilbert* decision."[32] The amendment was seen as "not only overturn[ing] the specific holding in *General Electric v. Gilbert* . . . but also reject[ing] the test of discrimination employed by the Court in that case."[33]

The Court's conclusion was based on portions of the legislative history accompanying the Pregnancy Discrimination Act, including a House Report which stated: "It is the Committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted the Act"[34] and quotations in the Senate Report citing "passages from the two dissenting opinions, stating that they 'correctly express both the principle and the meaning of Title VII.' "[35] The Court also observed that the issue of differential coverage for dependents had arisen during congressional deliberations and the Senate Committee "indicated that it should be resolved on the basis of existing Title VII principles."[36]

The test of discrimination applied in *Newport News* was one which the Court first had enunciated five years earlier in *Los Angeles Department of Water & Power v. Manhart*:[37] whether the male employee with dependents was treated "in a manner which but for that person's sex would be different." Applying the standard, the Court determined that the *Newport News* plan was unlawful because it "gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees."[38] Although the Court recognized that "[t]he cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees," it stated, "[N]o such [cost] justification is recognized under Title VII once discrimination has been shown."[39] Discrimination in the employer's plan was apparent because

> [t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's

31. 103 S. Ct. at 2632.
32. *Id.* at 2628 (emphasis added).
33. *Id.* at 2627.
34. *Id.* at 2628 (citing HOUSE COMM. ON EDUC. AND LABOR, 95th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 2 (Comm. Print 1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750).
35. *Id.* (citing S. REP. NO. 331, 95th Cong., 1st Sess. 2-3 (1977)).
36. *Id.* at 2629.
37. 435 U.S. 702 (1978).
38. 103 S. Ct. at 2631.
39. *Id.* at 2632 n.26.

> pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.[40]

Justice Rehnquist wrote a dissenting opinion, which was joined by Justice Powell. It focused on the language of the Pregnancy Discrimination Act and on Justice Rehnquist's perception that congressional intent was to address *Gilbert's* result only. Justice Rehnquist argued that the language and spirit of the amendment was addressed only to pregnant employees and that if Congress had intended to override the *Gilbert* Court's mode of analysis regarding discrimination generally, it would have been quite specific in doing so.[41]

IV. Remaining Issues

When the Court overruled both the holding and reasoning in *Gilbert* and *Satty*, many of the previously unanswered questions about the applicability of the pregnancy discrimination provision of Title VII were resolved. The Court accepted the interpretation of the 1978 amendment that the Equal Employment Opportunity Commission[42] had urged in its guidelines, published soon after the amendment was passed.[43] Included in those guidelines were the EEOC's approach to employer plans which provide different pregnancy benefits for women employees and male employees' wives and that exclude, entirely, nonspousal dependent pregnancy coverage. According to the guidelines, it is not necessary "to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees."[44] The critical inquiry is the level of coverage provided spouse dependents generally. "[T]he level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees."[45] The guidelines also provide that the pregnancy-related conditions of nonspouse dependents do not have to be covered "as long as it excludes the pregnancy-related conditions of such non-spouse de-

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40. *Id.* at 2631.
41. *Id.* at 2636-37 (Rehnquist, J., dissenting).
42. The Equal Employment Opportunity Commission is a federal agency responsible for implementing Title VII. Although the EEOC does have the authority to promulgate procedural regulations, 42 U.S.C. § 2000e-12(a) (1976), it does not have authority to promulgate substantive regulations. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975)). EEOC interpretations of substantive aspects of Title VII neither have the force of law nor supply the basis for imposing liability. *Id.*
43. *See* 29 C.F.R. § 1604 app. (1982).
44. *Id.*
45. *Id.*

pendents of male and female employees equally."[46]

While the Court in *Newport News* did not address directly either type of benefit plan, it provided strong language to support the conclusion that the EEOC's interpretation will be followed.[47] Even though pregnant employees and pregnant spouses may not receive equal benefits, if spouses of female employees are not fully covered, there is no difference in treatment of dependents and therefore no discrimination against employees. Similarly, if nonspousal dependents are excluded from pregnancy coverage, the benefits package is equally underinclusive for both male and female employees.

Two other conspicuous pregnancy benefits issues were not addressed in *Newport News* and warrant comment. Section 1604.10(c) of the EEOC Guidelines provides as follows: "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."[48]

In 1971, the Supreme Court determined that facially neutral employment practices which have disparate impact on members of protected groups may establish a prima facie violation of Title VII.[49] Section 1604.10(c) would appear to represent merely an approach consistent with previously developed Title VII principles. When the pregnancy amendment was considered, however, it was clear that Congress did not intend to require employers to institute programs to provide pregnancy benefits when other employees received no benefits. The House Report specifically states:

> [The bill] does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H.R. 6075 in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to

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46. *Id.*

47. *See* 103 S. Ct. at 2631 n.25.

48. 29 C.F.R. § 1604.10(c) (1982).

49. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Supreme Court has articulated two alternative analytical modes of establishing a prima facie case of a Title VII violation, the disparate treatment and disparate impact theories. The former involves allegations that the employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . . " Teamsters v. United States, 431 U.S. 324, 355-56 n.15 (1977). The latter involves "employment practices that are facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another. . . . Proof of discriminatory motive . . . is not required under a disparate- impact theory." *Id.*

work.[50]

Later the report stated: "This bill does not require an employer to have a medical benefit plan."[51]

Apparently the congressional intent was to remedy the difference in treatment afforded women disabled by pregnancy and that afforded employees disabled by other circumstances. If an employer paid only for a portion of a disabled employee's hospitalization expense, the amendment would not be violated if only a part of pregnancy-related hospitalization costs were covered. Similarly, if an employer had no disability benefit plan for employees, failure to institute one after the effective date of the amendment would not constitute a violation of Title VII.

Employer provision of insufficient or no leave may have a harsh effect on pregnant women, and if that impact is substantially greater than the leave program's impact on men under Section 1604.10(c) of the Guidelines, a prima facie case of a Title VII violation would be established. Only a "business necessity" would avoid employer liability.[52] In the event of no justifiable business necessity, an employer hoping to avert Title VII problems might provide a leave program for pregnant employees or increase the number of days of leave available to pregnant employees. Yet such activity appears inconsistent with the amendment's history which indicates that similarly situated employees must be treated equally and that no new programs need be instituted.[53] Can that articulated congressional desire and disparate impact analysis be reconciled?[54]

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50. H.R. REP. NO. 948, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S. CODE & AD. NEWS 4749, 4752.

51. *Id.* at 5, *reprinted in* 1978 U.S. CODE & AD. NEWS at 4754.

52. Exactly what may constitute a "business necessity" has never been specifically addressed by the Supreme Court. The Court has stated that the burden is on the employer to show that the practice has "a manifest relation to the employment in question," Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), or that it bears "a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 432. A federal district court asserted that expense and inconvenience to the employer unrelated to job performance does not establish business necessity. Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495 (C.D. Cal. 1971). *See also* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

53. *See* Comment, *The Pregnancy Discrimination Act of 1978 and the EEOC Guidelines: A Return to "Great Deference"?*, 41 U. PITT. L. REV. 735, 757, 758 (1980).

54. A relatively easy reconciliation would be to conclude that fringe benefit programs may not be subjected to disparate impact analysis, as suggested by Justice Rehnquist in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), when he distinguished forfeiture of seniority from a practice of excluding pregnancy from sick leave programs. *See supra* note 27. As pointed out by Justice Stevens in that same case,

> Differences between benefits and burdens cannot provide a meaningful test of discrimination since, by hypothesis, the favored class is always benefited, and the disfavored class is equally burdened. The grant of seniority is a benefit which is not shared by the burdened class; conversely, the denial of sick pay is a burden which the benefited class need not bear.

Id. at 154 n.4 (Stevens, J., concurring).

There is support for the argument that one of the main concerns of Congress in asserting that employers would not be required to institute new programs was minimization of costs.[55] Section 1604.10(c) does not mention *compensated* leave. If §1604.10(c) is only applied to situations that fall within its literal terms, it may be argued that to provide leave or additional leave really will not cost an employer more, but merely guarantees a pregnant employee a position when she seeks to return to work. Thus, although an employer may be required to institute a leave program to avoid a disparate impact on women, the congressional concern for costs is accommodated.

Whether disparate impact analysis should be applied more generally regarding pregnancy benefits poses an interesting issue. Assume that an employer provides hospitalization insurance which covers 50 percent of hospitalization costs for all employees. If the employer has a work force which is primarily young and female, it is likely that this disability program's effect on women as a group might be considerably greater than its effect on men. More women than men would be required to rely on personal resources to offset the costs of the disability, yet the employer would have satisfied the congressional mandate of treating all employees equally.

The House Report, after discussing concerns with the benefits/burdens distinctions approach of *Nashville Gas Co. v. Satty*, asserted: "By making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*."[56] Is disparate impact analysis thus inapplicable to pregnancy benefit plans?

To remove a well developed theory of discrimination analysis from Title VII would represent a startling change, but may be appropriate. The Supreme Court has said that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another . . . . [T]his Court has never held that discrimination must always be inferred from such consequences."[57] In the area of pregnancy benefits, disparate impact analysis may very well be inappropriate when financial equal treatment is established.

The pregnancy amendment's second prominent remaining area of concern involves abortion benefits. The amendment specifically

55. *See* H.R. REP. No. 948, 95th Cong. 2d Sess. (1978), *reprinted in* 1978 U.S. CODE & AD. NEWS 4749; S. REP. No. 331, 95th Cong., 1st Sess. (1977).

56. H.R. REP. No. 948, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S. CODE & AD. NEWS 4749.

57. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 n.20 (1978) (emphasis in original).

provides that an employer is not required to provide "health insurance benefits for abortions except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion."[58] By expressly excluding health insurance benefits, the amendment can be interpreted logically to indicate that other benefits, for example, sick leave pay, must be provided for all abortions.[59] Further, the assertion that nontherapeutic abortions need not be encompassed within a health insurance plan also implies that therapeutic abortions must be provided for.[60]

The abortion provisions present several problems. To require an employer to provide insurance benefits for therapeutic abortions while not requiring the employer to provide health insurance benefits for other employees would be inconsistent with the legislative purpose to insure equal treatment. Women would have greater protection than men. The identical argument can be made about requiring an employer to provide sick leave pay and other nonhealth insurance benefits to women who have undergone nontherapeutic abortions when other disabled employees are not similarly compensated.

Just as important is the concern for employers who have sincere religious beliefs and thus oppose all abortions, but are required by the statute to provide benefits that may make it easier for such procedures to occur. Such statutory compulsion is arguably contrary to the free exercise provisions of the first amendment.[61] Even providing sick leave or other benefits to employees who have nontherapeutic abortions may contravene some employers' religious beliefs.

V. Conclusion

The resolution of these issues undoubtedly will take several years and perhaps even will require congressional action. Whatever the outcome, these problems will be intelligently resolved if the decisionmakers demonstrate as much insight as the *Newport News* majority when it decisively treated sex discrimination in employment as an evil equivalent to racial discrimination.

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58. 42 U.S.C. § 2000e(k) (Supp. III 1979). Abortions undertaken when the life or health of the mother would be endangered if the fetus were carried to term will be referred to as therapeutic abortions. Abortions when the mother's life or health is not threatened will be referred to as nontherapeutic abortions.

59. This assertion is supported by the EEOC Guidelines. *See* 29 C.F.R. § 1604 app. (1982).

60. *Id.*

61. U.S. CONST. amend. I. In 1979, the National Conference of Catholic Bishops and the United States Catholic Conference, Inc. brought an action challenging the abortion provisions of the 1978 Pregnancy Discrimination Act. It was dismissed for failing to present a case or controversy. National Conference of Catholic Bishops v. Bell, 490 F. Supp. 734 (D.D.C. 1980), *aff'd sub nom.* National Conference of Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981).