Civil Rights—Sex Discrimination—Pregnancy Must Be Treated as a Temporary Disability for Job Related Purposes. *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

Liberty Mutual Insurance Company's employment benefit plan treated employee pregnancies differently from other employee temporary disabilities in two ways. First, as part of its employment benefits, Liberty Mutual maintained a disability protection plan that provided a percentage payment of the employee's normal income during any disability-related leave of absence exceeding 8 days.[1] Pregnancy and pregnancy-related leaves of absence, however, were excluded from its coverage. Second, the company's employment benefit plan provided that a person on leave of absence due to a temporary disability could return to work upon recovery.[2] The company's maternity leave policy, however, provided that when a leave of absence was due to or related to pregnancy, Liberty Mutual would automatically terminate the employee unless she returned to work within 3 months of the delivery date or 6 months from the time leave commenced, whichever came first. Female employees of Liberty Mutual filed a class action suit alleging that the company's employment benefit plan impermissibly discriminated against women on the basis of sex. The district court found[3] that the plan in question violated section 703 of Title VII of the Civil Rights Act of 1964.[4] The Third Circuit Court of Appeals affirmed its judgment[5] and held that section 703 required that a company's employment benefit plan treat pregnancy on the same basis as other temporary

1. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 203 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

2. *Id.* at 207.

3. Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974).

4. 42 U.S.C. § 2000e-2(a) (1970), *as amended*, 42 U.S.C. § 2000e-2(a)(2) (Supp. II, 1972) provides:

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 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.

5. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir.) *cert. granted*, 95 S. Ct. 1989 (1975).

disabilities.[6]

The court of appeals, in *Wetzel v. Liberty Mutual Insurance Co.*,[7] first considered whether the disability protection plan violated Title VII of the Civil Rights Act of 1964. The defendant initially argued that the case was governed by *Geduldig v. Aiello*[8] in which the Supreme Court had ruled that California could exclude normal pregnancies from its disability insurance program. The Third Circuit found that *Geduldig* did not apply because it had been based on an equal protection analysis under the Constitution, not on an interpretation of a statute.[9] The court also concluded that the guidelines formulated by the Equal Employment Opportunity Commission (EEOC)[10] in furtherance of Congressional policy, and upon which plaintiffs relied, were entitled to due deference by the court in interpreting Title VII.[11] The court noted that the relevant EEOC

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6. *Id.* The court also held that jurisdiction of the trial court to hear the claim was not lost by failure of the charging party to comply with the procedural technicalities in filing a statutory charge with the EEOC. *Id.* at 202. *See* Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

7. 511 F.2d 199 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

8. 417 U.S. 484 (1974).

9. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 203 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

10. The regulations provide, in part:

29 C.F.R. 1604.9—Fringe benefits

(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

. . . .

(d) It shall be an unlawful employment practice for an employer to make available benefits . . . for the wives of male employees which are not available for female employees . . . . An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

29 C.F.R. 1604.10—Employment policies relating to pregnancy and childbirth

. . . .

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment . . . .

11. Liberty Mutual contended that regulation 1604.10(b), see note 10 *supra*, was inconsistent with the EEOC's earlier position and with the intent of Congress. Therefore, in light of Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), it argued that the regulation should be rejected. The Third Circuit disagreed, noting that in *Espinoza* the Supreme Court found that the regulations were inconsistent with Congressional intent. Here, however, the regulations represented evolving policy decisions consistent with the meaning of the statute and the

guidelines, sections 1604.10(b) and 1604.9(a) and (b),[12] respectively provided that pregnancy should be treated as any other temporary disability under an employer's fringe benefit plan,[13] and that an employer may not discriminate between men and women with regard to fringe benefits.[14] Liberty Mutual attempted to justify its plan by showing that the incapacitating conditions covered by its disability protection plan were illness-related disabilities and that pregnancy was not an illness. The court reasoned, however, that the disability protection plan was designed to help alleviate the economic burden resulting from loss of work. In this respect, the court concluded that pregnancy was so much like an illness that it was inconsistent with the purpose of the plan to exclude it from coverage.[15] The court also pointed out that a disability that would be covered by the plan if suffered by a non-pregnant woman was excluded from coverage if suffered by a pregnant woman.[16] The defendant further argued that, assuming pregnancy could be treated as an illness, it was, unlike other disabilities, a voluntary condition.[17] In response to this assertion, the court stated that the voluntariness of the pregnancy did not change the result. It pointed out that not all pregnancies were voluntary,[18] and asserted that some voluntary conditions[19] not peculiar to one sex were covered by the plan.[20] Finally, the court rejected Liberty Mutual's contention that inclusion of pregnancy within the disability protection plan would destroy the plan's financial integrity. The court found that Liberty Mutual had offered insufficient evidence to support this claim, and noted that section 1604.9(e) of the EEOC guidelines provides that cost is no defense under Title VII to a charge of discrimination.[21] The disability protection plan, therefore, that covered nearly all temporary disabilities, but that excluded pregnancy, was found to discriminate

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legislative purpose of the Act, and were therefore entitled to due deference. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 205 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975). *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Udall v. Tallman, 380 U.S. 1 (1965).

12. See text accompanying note 10 *supra*.

13. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206-07 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

14. *Id.* at 207.

15. *Id.*

16. *Id.* at 203.

17. *Id.* at 206.

18. *Id.*

19. For example, disabilities resulting from playing tennis, smoking or skiing. *Id.* at 206.

20. *Id.*

21. *Id.*

impermissibly against women and thus to violate Title VII.[22]

The court next considered whether Liberty Mutual's maternity leave policy was impermissible. The court again noted that due deference would be given the EEOC guidelines[23] and concluded that the maternity leave policy, by treating pregnancy differently from other temporary disabilities, appeared to violate Title VII.[24] The contention that the time limitation was permissible because most women did not return to work after childbirth, and that in any event, most women recovered within 6 weeks of childbirth, was rejected by the court as being based on a sex generalization. Such a generalization, the court stated, is exactly what Congress had intended to eliminate when it passed the 1964 Civil Rights Act.[25]

Section 703 of the 1964 Civil Rights Act provides that to discriminate against an individual with respect to employment opportunities and benefits, on the basis of that individual's race, color, religion, sex, or national origin, is an unlawful employment practice.[26] The Congressional intent to end discriminatory employment practices based on sex, although supported by passage of section 703, is not reflected in the Congressional hearings and debates.[27] Indeed, it appears that the term "sex" was added to the Act in an attempt to marshall a coalition against passage of the entire bill. After an attempt to include "sex" in the list of protected classes failed in the House Rules Committee on an 8-7 vote, it was added to the list following 2 hours of floor debate, 1 day before passage of the Act in the House.[28] Although there is a lack of meaningful legislative history concerning the prohibition of sexual discrimination in employment, the EEOC was given the duty to interpret and to apply the mandate of the Act.[29]

The first EEOC guideline promulgated under Title VII regard-

22. *Id.* at 207.

23. *Id.*

24. *Id.*

25. *Id.* at 207-08.

26. 42 U.S.C. § 2000e-2(a) (1970), *as amended*, 42 U.S.C. § 2000e-2(a)(2) (Supp. II, 1972). See text accompanying note 4 *supra*.

27. *See generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967) (hereinafter cited as Miller); Comment, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671.

28. Miller, *supra* note 27, at 882.

29. 42 U.S.C. § 2000e-2(a) (1970), *as amended*, 42 U.S.C. § 2000e-2(a)(2) (Supp. II, 1972).

ing the treatment of pregnancy in employment benefit plans was section 1604.9(d) which provided that "a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits"[30] would be an unlawful employment practice.[31] By negative implication, under this guideline it appears that an employer who does not offer maternity benefits to the wives of male employees would be justified in not providing its female employees with such benefits. In 1972, however, the EEOC promulgated section 1604.10(b),[32] which provides that:

> disabilities caused or contributed to by pregnancy . . . are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.[33]

When this guideline was adopted, however, the apparently conflicting language of section 1604.9(d) was not amended. The result has been some confusion in the courts in applying these EEOC guidelines to specific employment practices. For example, *Satty v. Nashville Gas Co.*[34] applied section 1604.9(d) and sustained an employment insurance plan that paid only 50 percent of the medical fees incurred in connection with pregnancy, but that made the benefit available to both female employees and wives of male employees.[35] Because its limitation of payment to 50 percent of the medical fees was applied only to pregnancies, however, and not to other temporary disabilities,[36] the insurance plan appears to violate section 1604.10(b).

Judicial interpretation of Title VII as it relates to sex discrimination suffers from a similar lack of consistency. When an employment practice is clearly sexually discriminatory, for example, a refusal to hire a man because he is a man, the courts have had little difficulty in striking it down.[37] When a practice is not so blatantly sexually discriminatory, but rather affects collateral issues, such as employment benefit plans, contradictory decisions have been

30. 29 C.F.R. 1604.9(d) (1973).
31. *Id.*
32. 37 Fed. Reg. 6837 (1972).
33. 29 C.F.R. 1604.10(b) (1973).
34. 384 F. Supp. 765 (M.D. Tenn. 1974).
35. *Id.* at 767.
36. *Id.*
37. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

reached.[38]

Whether a particular employment benefit plan's treatment of pregnancy is classified as sexually discriminatory under Title VII depends on what aspect of the plan the courts have focused on.[39] One court reasoned that disability protection plans are designed to protect the employee who becomes ill and thus suffers an involuntary condition.[40] Because pregnancy is neither an illness nor always involuntary, the court did not reach the question of whether excluding pregnancy from the plan's coverage was discriminatory.[41] A second court, however, went beyond the involuntary illness classification scheme and noted that loss of work is common to both illnesses and pregnancies.[42] Because pregnancy is a temporarily incapacitating condition, the exclusion of pregnancy from an employment benefit plan designed to alleviate the economic results of work lossage is sex discrimination under Title VII.[43] Finally, a third court concluded[44] that disparate treatment[45] of pregnant female employees is permissible under Title VII.[46] This court found that, rather than being impermissibly based on sex, the classification was drawn between pregnant females and non-pregnant employees (both males and non-pregnant females).[47]

This last method of analysis finds some support in the Supreme Court's decision in *Geduldig v. Aiello*.[48] Although that case was not based on Title VII, the Supreme Court ruled in *Geduldig* that it was constitutionally permissible to exclude women suffering temporary disabilities due to normal pregnancies from a state-sponsored dis-

38. *Cf.* Gilbert v. Gen. Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974); Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973); Godwin v. Patterson, 363 F. Supp. 238 (M.D. Ala. 1973).

39. Cases cited note 38 *supra*.

40. Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238, 245 (N.D. Ga. 1973).

41. *Id.* at 246.

42. Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 381 (E.D. Va. 1974).

43. *Id.; see* Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Ore. 1974), *aff'd*, 519 F.2d 961 (9th Cir. 1975); Vineyard v. Hollister Elementary School Dist., 64 F.R.D. 580 (N.D. Cal. 1974); Scott v. Opelika City Schools, 63 F.R.D. 144 (M.D. Ala. 1974).

44. Godwin v. Patterson, 363 F. Supp. 238 (M.D. Ala. 1973).

45. Although other employees were not fired when they became temporarily disabled, the plaintiff, a female employee, was fired when she reached her fifth month of pregnancy. *Id.* at 240.

46. *Id.* at 241.

47. *Id.*

48. 417 U.S. 484 (1974).

ability insurance plan.[49] The Court found that the program did not "exclude anyone from benefit eligibility because of gender but merely removed one physical condition—pregnancy—from the list of compensable disabilities."[50] Because *Geduldig* was decided in the context of constitutional interpretation, however, lower courts have had little difficulty in distinguishing it from Title VII actions.[51]

The *Wetzel* decision was the first case dealing with the problem of pregnancy benefits and Title VII to reach a federal court of appeals.[52] In finding that the disability protection plan violated Title VII and the EEOC guidelines promulgated thereunder, the Third Circuit reasoned that pregnancy was really no different from any other temporary disability that resulted in loss of work.[53] The court compared pregnancy to an injury sustained while playing tennis and found that the activities involved in both (sexual intercourse and tennis) were voluntary. Because a disability resulting from playing tennis was included within the coverage of the disability protection plan while a disability resulting from sexual intercourse was not, the court concluded that "voluntariness" was not a valid justification for excluding pregnancy from the plan.[54] In its discussion of "voluntariness," however, the court ignored the distinction between the voluntariness of an activity and the voluntariness of its result. Its failure to recognize this distinction permitted the court to assert that some voluntary disabilities were compensated under Liberty Mutual's plan while one—pregnancy—was not.[55]

Liberty Mutual's plan did exclude certain "voluntary result" disabilities.[56] In addition to pregnancies, other such disabilities might include sterilizations and cosmetic surgery.[57] The EEOC guidelines provide only that pregnancy be treated the same as any

49. *Id.* at 497.

50. *Id.* at 496.

51. *See* Satty v. Nashville Gas Co., 384 F. Supp. 765, 771 (M.D. Tenn. 1974). *Contra*, Communications Workers of Am. v. Am. Tel. & Tel. Co., 379 F. Supp. 679 (S.D.N.Y. 1974).

52. Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Ore. 1974), *aff'd*, 519 F.2d 961 (9th Cir. 1975).

53. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

54. *Id.*

55. *Id.*

56. The court, in its statement of the facts, indicated that Liberty Mutual excluded "voluntarily inflicted" disabilities. It went on to say, however, that Liberty Mutual included some voluntary disabilities, such as those resulting from tennis, smoking, etc. *Id.*

57. *Id.*

other disability.[58] In this regard, voluntary pregnancies were treated the same as other voluntary result disabilities. By failing to differentiate between voluntary and involuntary pregnancies, however, *Wetzel* exceeded EEOC requirements for avoiding sex discrimination.

The court should have concentrated on the voluntariness of the result. If a disability protection plan excludes all "voluntary result" disabilities from its coverage, the cause of the disability should not affect the coverage. The *Wetzel* decision, if it stands, would effectively compel an employer (and, in the case of "contributing" employment benefit plans, fellow employees) to subsidize certain voluntary actions of its employees, namely, sexual intercourse, when the employer has chosen not to subsidize similar voluntary actions.

To minimize the impact of such a result, an employer has at least two alternatives. If including pregnancy within a disability protection plan's coverage drastically increases its costs, an employer might extend the uncompensated preliminary disability period. If this period is extended too far, however, so that although neutral on its face, the effect is totally to exclude pregnancies from coverage, the plan might be found to violate Title VII.[60] Another possibility is a plan that provides a decreased amount of payments initially, but that increases payments on a graduating scale according to the total time away from work. Because both proposed disability protection plans would apply to men and women equally, it appears that neither would be sexually discriminatory.

In addition to the possible financial impact of the *Wetzel* decision on disability protection plans, the portion of the decision dealing with the maternity leave policy[61] could result in a radically different treatment of pregnant women. *Wetzel* concluded that pregnancy must be treated as any other temporary disability for purposes of computing the amount of time available for leave.[63] Thus, if a woman is unable to return to work within a certain time because of pregnancy-related complications, she may no longer be

58. 29 C.F.R. 1604.10(b) (1973). See text accompanying note 10 *supra*.

59. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 207 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

60. *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

61. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 207 (3d Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

62. *Id.*

63. *Id.* at 208.

arbitrarily terminated. Instead, the employer must ascertain the actual work capability of each temporarily disabled employee before terminating that employee for a failure to return to work.[64] The decision, however, forecloses an option previously available to pregnant women. Under Liberty Mutual's maternity leave policy, the duration of the leave was not based on a woman's physical ability to work. Thus, in the event of a normal pregnancy, a woman could take as much as 6 months leave even though she was unable to work for only a portion of that time. Under *Wetzel*, it appears that this option is no longer available unless it is extended on an equal basis to temporarily disabled men.

In connnection with the maternity leave policy, a problem left for future litigation is how the duration of the leave is to be measured. Specifically, if a doctor certifies that the woman is physically able to return to work, but because she chooses to breast feed her child she does not return, would an employer be justified in terminating her employment? If not, would an employer who provided a disability protection plan be required to compensate the non-disability-related leave of absence? These issues were not before the court, but as a result of *Wetzel v. Liberty Mutual Insurance Co.*, they will eventually have to be decided.

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64. *Id.*