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Selected Developments in California Law

California Federal Savings and Loan Association v. Guerra: The United States Supreme Court Upholds California's Mandatory Job Protection For Pregnant Workers

In California, an employer must provide job protection for an employee who becomes pregnant.¹ Under the California Fair Employment and Housing Act (FEHA), an employer must provide medically necessary disability leave of up to four months for pregnant employees and must reinstate the employee to the same or similar position when the employee is ready to return to work.² California requires employers to grant disability leave and reinstatement for pregnant workers even when no similar benefits are provided for

1. CAL. GOV'T CODE § 12945(b)(2) (West 1982). *See generally id.* §§ 12900-12996 (West 1982) (known as the Fair Employment and Housing Act, codifying California fair employment law) [hereinafter FEHA]. *Compare id.* at § 12926(c) with 42 U.S.C. § 2000e(b) (1981) (the FEHA applies to employers of 5 or more employees while Title VII of the Federal Civil Rights Act of 1964 applies to employers who have 15 or more employees and who are engaged in interstate commerce).

2. CAL. GOV'T CODE § 12945(b)(2) (West 1982). Section 12945 of the California Government Code provides in relevant part:

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 . . . To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions An employer may require any employee who plans to take a leave pursuant to this section to give reasonable notice of the date such leave shall commence and the estimated duration of such leave.

Id.

other disabled workers.³ Recently, in *California Federal Savings and Loan Association v. Guerra*,⁴ California Federal Savings and Loan Association (Cal. Fed.) challenged the validity of FEHA section 12945(b)(2) (all references to section 12945(b)(2) are to California Government Code section 12945(b)(2)).⁵ Cal. Fed. claimed Title VII of the Federal Civil Rights Act of 1964⁶ pre-empted⁷ section 12945(b)(2).⁸ The Pregnancy Discrimination Act (PDA),⁹ an amendment to Title VII, defines sex discrimination to include discrimination on the basis of pregnancy and states that pregnant workers must be treated the same as other workers for all employment purposes.¹⁰

In *California Federal Savings & Loan Association v. Guerra*, the Supreme Court upheld the right of California, as a state, to provide job protection for pregnant workers, even though section 12945(b)(2) gives preferential treatment to pregnant workers and provides more extensive protection than Title VII.¹¹ Part I of this note summarizes the legal background of Title VII, the Pregnancy Discrimination Act,

3. *Id.* See also CAL. GOV'T CODE § 12930 (West 1982) (establishing the California Fair Employment and Housing Commission as the state agency empowered to enforce California fair employment law). The Commission interprets section 12945(b)(2) of the California Government Code to require reinstatement of pregnant workers who take disability leave. *In re Dep't of Fair Employment & Hous. v. Travel Express*, Case No. FEP80-81 A7-0992sN18709 83-17 (Aug. 4, 1983).

4. 107 S. Ct. 683 (1987).

5. *Id.* 107 S. Ct., at 683 (Cal. Fed. challenged the validity of California Government Code section 12945(b)(2) because the California legislature specifically made section 12945(b)(2) applicable to Title VII employers while the remainder of section 12945 applies only to non-Title VII employers). California Government Code section 12945(e) states: "The provisions of . . . section [12945], 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) (1982).

6. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000f-17 (West 1981).

7. Federal pre-emption means the federal law on a given subject will control over the state law. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 689. The pre-emption issue in *California Federal Savings & Loan Association v. Guerra* arose because Congress had not completely displaced state regulation in the area of fair employment law; therefore, a state fair employment law consistent with federal law is valid, whereas a state law in conflict with federal law would be pre-empted. *Id.* See also BLACK'S LAW DICTIONARY 315 (5th ed. 1983) (definition of federal pre-emption).

8. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 688.

9. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1981) [hereinafter PDA].

10. *Id.* The PDA provides:

The terms "because of sex" or "on the basis of sex" [of Title VII] 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.

Id.

11. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 693-95.

and section 12945(b)(2) of the California Fair Employment and Housing Act.¹² The *California Federal Savings & Loan Association* opinion is examined in part II.¹³ Finally, part III discusses the legal ramifications of the *California Federal Savings & Loan Association* decision.¹⁴

I. LEGAL BACKGROUND

A. Federal Law

Title VII of the Federal Civil Rights Act of 1964 is the principal federal prohibition against employment discrimination.¹⁵ The purpose of Title VII is to protect workers from discriminatory employment practices in hiring, termination, compensation, terms of employment, and working conditions.¹⁶ The Equal Employment Opportunity Commission (EEOC) is the agency charged with enforcing Title VII provisions.¹⁷ The function of the EEOC is to investigate and conciliate charges of employment discrimination.¹⁸ When conciliation efforts fail to bring about a settlement between the plaintiff and employer, the EEOC issues a right to sue letter granting the plaintiff a cause

12. See *infra* notes 15-89 and accompanying text (discussion of legal background).

13. See *infra* notes 90-136 and accompanying text (analysis of the *California Federal Savings & Loan Association v. Guerra* opinion).

14. See *infra* notes 137-55 and accompanying text (discussion of the legal ramifications of the *California Federal Savings & Loan Association v. Guerra* opinion).

15. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (West 1981). Title VII provides in relevant part:

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.

Id. at § 2000e-2(a) (1981).

16. *Id.* See generally Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983) (comparative analysis of FEHA and Title VII) [hereinafter Gelb & Frankfurt].

17. 42 U.S.C. §§ 2000e-4-2000e-5 (1981).

18. *Id.* § 2000e-5(d) (1981). Section 2000e-5(b) states in relevant part:

If the [Equal Opportunity Employment] Commission determines after . . . investigation that there is reasonable cause to believe that the charge [of engaging in an unlawful employment practice] is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

Id.

of action in federal court.¹⁹ Thus, Title VII is enforced primarily through private action.

Under Title VII there are two basic legal theories used to prove discrimination: The disparate treatment theory, and the disparate impact theory.²⁰ The disparate treatment theory is designed to end employment practices which discriminate by treating members of a protected class differently than other employees. Disparate treatment is evidenced by less favorable treatment of plaintiffs on the basis of race, color, religion, sex or national origin.²¹ In contrast, the disparate impact theory seeks to end employment practices which treat all employees the same, yet effect members of a protected class in a discriminatory manner.²² Under the disparate impact theory, the plaintiff may challenge facially neutral employment practices which adversely impact a group identifiable by race, color, religion, sex or national origin.²³ Title VII prevents two types of discriminatory employment practices, those which discriminate in treatment and those which discriminate in effect.

The history of pregnancy discrimination under Title VII is marked by conflicting judicial decisions attempting to determine whether discrimination on the basis of sex includes discrimination on the basis of pregnancy.²⁴ Prior to 1976, many federal circuit courts interpreted Title VII to prevent discrimination on the basis of preg-

19. *Id.* § 2000e-5(f)(1) (1981).

20. Gelb & Frankfurt, *supra* note 16, at 1067-68.

21. *Id.* See also International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (recognizing disparate treatment as the most obvious type of employment discrimination Congress intended to correct when it enacted Title VII).

22. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (disparate impact theory created when plaintiff was permitted to challenge a facially neutral job requirement of a high school diploma or standardized test, the court held the test was unrelated to job performance and effectively screened out almost all black applicants).

23. *Id.*

24. See, e.g., Communications Workers v. A.T.&T., 513 F.2d 1024, 1031 (2d Cir. 1975) (disparate treatment of pregnancy related disabilities in employment violates Title VII); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199, 201 (3d Cir. 1975) *vacated on other grounds*, 424 U.S. 737 (1976) (employment practices of excluding pregnancy benefits from company income protection plan and requiring female employees to return to work three months after childbirth or be terminated discriminatory against women in violation of Title VII); Gilbert v. General Elec. Co., 519 F.2d 661, 668 (4th Cir. 1975) (exclusion of pregnancy related disabilities from employee disability benefit plan violates Title VII); Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 652 (8th Cir. 1975) (defendant's discharge of plaintiff due to temporary pregnancy disability, when others temporarily disabled were not discharged, constituted discrimination against pregnant women in violation of Title VII.); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961, 966 (9th Cir. 1975) (sick leave policy excluding pregnancy disabilities found to violate Title VII); Berg v. Richmond Unified School Dist., 528 F.2d 1208, 1213 (1975) (school district policy denying sick leave pay to pregnant employees while requiring mandatory leave of absence for pregnancy violates Title VII).

nancy.²⁵ Then, in *General Electric Co. v. Gilbert*,²⁶ the United States Supreme Court upheld a comprehensive employee disability benefit plan which expressly excluded pregnancy from coverage.²⁷ The Supreme Court held that employers could exclude pregnancy benefits because sex discrimination under Title VII did not include classification on the basis of pregnancy.²⁸ The disability benefits plan in *Gilbert* divided beneficiaries into two groups: pregnant women and non-pregnant persons. Non-pregnant persons included both men and women.²⁹ Pregnancy, the court reasoned, was merely an additional risk faced by some women, so excluding pregnancy did not discriminate on the basis of sex.³⁰

Congress, in reaction to *Gilbert*, amended the definitional section of Title VII to unequivocally state that discrimination on the basis of pregnancy is sex discrimination for purposes of Title VII.³¹ The 1978 amendment, known as the Pregnancy Discrimination Act (PDA), is made up of two clauses. The first clause includes pregnancy and related medical conditions in the meaning of "on the basis of sex" as used in Title VII.³² The second clause requires employers to treat pregnant workers the same as other workers for all employment purposes including receipt of fringe benefits.³³

The wording of the PDA is ambiguous, however, when applied to allegations of disparate impact. The second clause of the PDA specifies that pregnant workers be treated the same as other workers.³⁴

25. See *supra* note 24 and accompanying text (cases interpreting sex discrimination under Title VII to include pregnancy discrimination).

26. 429 U.S. 125 (1976).

27. *Id.* at 128. The plan in *Gilbert* provided benefits in the form of 60% of an employee's normal wages for absences from work resulting from nonoccupational sickness or accident, paid through a maximum of 26 weeks for any one period of disability. *Id.* The plan excluded from coverage any absence from work as a result of pregnancy. *Id.*

28. *Id.* at 135.

29. *Id.*

30. *Id.* at 139.

31. 42 U.S.C. § 2000e(k) (1981). See 123 CONG. REC. S29387 (1977) (remarks of Senator Javits). Senator Javits stated: [The PDA] does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in [*Gilbert*]. *Id.* See also Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 930-39 (1980) (legislative history of the PDA expresses criticism of the *Gilbert* opinion); Krieger & Cooney, *The Miller-Wohl Controversy; Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 528-31 (1983) (discussion of the PDA as reactionary legislation) [hereinafter Krieger & Cooney].

32. 42 U.S.C. § 2000e(k) (1981). See also *supra* note 10 (text of PDA).

33. 42 U.S.C. § 2000e(k) (1981).

34. *Id.*

Yet, according to the disparate impact theory, treating pregnant workers the same as other workers results in discrimination on the basis of pregnancy.³⁵ The resolution of the disparate impact problem depends on the relationship between the first and second clauses of the PDA. If the second clause of the PDA, requiring the same treatment for pregnant workers, is interpreted as an illustration of how to remedy pregnancy discrimination, then pregnant workers may maintain a disparate impact remedy under the PDA. But, if the second clause of the PDA, is interpreted to limit the first clause, then employers are obligated to treat pregnant workers the same as other employees, regardless of disparate impact.³⁶

Although the language of the PDA is ambiguous, the legislative history shows that Congress intended the PDA to function within the framework of Title VII as a whole, preventing pregnancy discrimination in both treatment and effect.³⁷ Congress reviewed extensive evidence of employment discrimination against pregnant workers in the United States.³⁸ Congress was aware of existing state laws which granted preferential treatment to pregnant workers.³⁹ When enacting the PDA, Congress did not expressly override or invalidate such laws.⁴⁰ Further, Congress expressly endorsed the pre-Gilbert EEOC guidelines for the treatment of pregnant workers. The guidelines specify that an employer violates Title VII if the employer fails to provide adequate pregnancy leave and then fires an employee for missing work due to a pregnancy disability.⁴¹ Endorsement of the

35. Krieger & Cooney, *supra* note 31, at 529.

36. *Id.*

37. See *infra* notes 38-42 and accompanying text (legislative history of the PDA).

38. See *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy, Hearings on H.R. 5055 and H.R. 6075 before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 1, 1-177 (1977)* (prevalent practices of discrimination against pregnant workers include: immediate termination upon notice of pregnancy; stop-work policies requiring unpaid maternity leave to begin when pregnancy is discovered; denial of health care benefits and sick leave pay for pregnancy disability; pregnancy benefits conditioned on marital status; start-work policies prohibiting return to work until weeks or months after delivery; loss of seniority upon return; and conditional or no guaranteed reinstatement).

39. H.R. Rep. No. 948, 95th Cong., 2d Sess. 11, *reprinted in* 1978 U. S. CODE CONG. & ADMIN. NEWS 4749, 4754. States then including pregnancy in their fair employment laws include: Alaska, Connecticut, Maryland, Minnesota, Oregon, and Montana. *Id.*

40. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 693 (1987).

41. H.R. Rep. No. 95-948, *supra* note 39, at 2. The EEOC guidelines state:

Employment policies relating to pregnancy and childbirth: 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 [PDA] if it has a disparate impact on employees of one sex and is not justified by business necessity.

29 C.F.R. § 1604.10(c) (1984).

EEOC guidelines demonstrates Congressional approval of preferential treatment for pregnant workers. Finally, Congress placed the PDA in the definitional section of Title VII; thus, pregnancy discrimination is included in the general Title VII prohibition against sex discrimination in treatment and effect.⁴²

The ambiguous wording of the PDA resulted in a split of authority over the class of pregnant people protected by the PDA.⁴³ In *EEOC v. Lockheed Missiles & Space Co.*,⁴⁴ the court narrowly interpreted the PDA as preventing pregnancy discrimination solely against *women employees*.⁴⁵ Accordingly, health care plans denying pregnancy benefits to the spouses of male employees did not violate the PDA.⁴⁶ In contrast, the court in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,⁴⁷ held that a health plan discriminating against spouses of male employees in providing pregnancy benefits was in violation of the PDA.⁴⁸ The U.S. Supreme Court affirmed the *Newport News* decision,⁴⁹ and held that the health care plan of the employer discriminated against men by conditioning the receipt of pregnancy benefits on the sex of the employee.⁵⁰ As interpreted by the United States Supreme Court, the PDA prevents employers from using discriminatory classifications based on pregnancy regardless of employment status.⁵¹

In *Newport News*, the Supreme Court directly addressed the relationship between the first and second clause of the PDA. The Court held that the second clause, which provides for equal treatment of pregnant workers, was not intended as a limitation on the first clause which incorporates pregnancy within sex discrimination.⁵² Rather, the Court interpreted the second clause as one example of how pregnancy discrimination could be remedied.⁵³ The Court rejected the class distinctions between pregnant and non-pregnant persons made in

42. 42 U.S.C. § 2000e(k) (1981).

43. See *infra* notes 44-50 and accompanying text (comparison of conflicting cases interpreting the PDA).

44. 680 F.2d 1243 (9th Cir. 1982).

45. *Id.* at 1246.

46. *Id.* at 1247.

47. 677 F.2d 448 (4th Cir. 1982), *aff'd per curiam*, 682 F.2d 113 (4th Cir. 1982). See generally Note, *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 61 DET. J. URBAN L. 663 (1984) (comprehensive analysis of the *Newport News* decision).

48. *Newport News*, 667 F.2d at 451.

49. 462 U.S. 676 (1983).

50. *Id.* at 683.

51. *Id.*

52. *Id.* at 678 n.14.

53. *Id.*

Gilbert, choosing instead a test based on the Title VII prohibition against discrimination on the basis of sex.⁵⁴ In *Newport News*, the test set forth to determine pregnancy discrimination is the same test used to determine sex discrimination: A Title VII violation occurs whenever an employee is treated in a way which, but for the sex of the person, would be different.⁵⁵ In adopting the sex discrimination test, the Supreme Court determined that the second clause of the PDA, requiring the same treatment for pregnant workers as given to other workers, did not limit the remedy for pregnancy discrimination to disparate treatment.⁵⁶ Rather, the two clauses of the PDA are intended to function together to prevent pregnancy discrimination in both treatment and effect.

In *Newport News*, the Supreme Court defined the scope and function of the PDA within the framework of Title VII. *Newport News* also determined that pregnancy could be the basis of sex discrimination against male workers, but only in the context of discrimination against the pregnant spouses of male workers. The question of whether preferential treatment of pregnant workers constitutes sex discrimination against male workers remained unanswered until *California Federal Savings & Loan Association v. Guerra*.⁵⁷

B. California Law

The state of California began regulating discriminatory employment practices in 1959 with the passage of the Fair Employment Practices Act.⁵⁸ The Act barred employment discrimination on the basis of race, creed, color, national origin, or ancestry.⁵⁹ The Act was revised

54. *Id.* at 685. In *Newport News* the Supreme Court stated:

The pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's 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.

Id. at 684.

55. *Id.* at 683. See also *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 n.21 (1978) (origin of the test for sex discrimination used in *Newport News*).

56. *Newport News*, 462 U.S. 676 at 678.

57. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987). See *Miller-Wohl Co., Inc. v. Commission of Labor & Indus.*, 685 F.2d 670 (9th Cir. 1982). (Montana statute granting preferential treatment to pregnant workers in disability and reinstatement benefits was challenged as pre-empted by Title VII, case dismissed for lack of subject matter jurisdiction).

58. 1959 Cal. Stat. ch. 121, sec. 1, at 1999 (enacting CAL. LABOR CODE §§ 1410-1433 (West 1971)). See generally *Gelb & Frankfurt*, *supra* note 16 (historical analysis of California fair employment law).

59. 1959 Cal. Stat. ch. 121, sec. 1, at 2000 (amending CAL. LAB. CODE § 1412).

and amended reaching its present form, the Fair Employment and Housing Act (FEHA), in 1977.⁶⁰ The FEHA is administered by the Fair Employment and Housing Commission (the Commission).⁶¹ The Commission asserts broad remedial powers to enforce California fair employment laws, including the power to hold hearings,⁶² issue injunctions,⁶³ and make precedential decisions⁶⁴ granting reinstatement, back pay, promotion, hiring, and compensatory and punitive damages.⁶⁵

The Federal Equal Opportunity Employment Commission (EEOC) which administers Title VII operates with comparatively less power.⁶⁶ The EEOC may either investigate claims and issue a right to sue letter for private enforcement in federal court or take cases to court directly.⁶⁷ Due to lack of resources, however, most cases are handled through private action rather than directly by the EEOC.⁶⁸

The California FEHA applies to a broader range of employers than does Title VII. The FEHA applies to employers of five or more,⁶⁹ labor organizations,⁷⁰ employment agencies,⁷¹ state & civil divisions and municipalities,⁷² and permits prosecution of any person who aids and abets another to violate the FEHA.⁷³ In contrast, Title VII applies to employers of fifteen or more and contains no express provision regarding aiding and abetting.⁷⁴

Further, the California FEHA provides greater procedural flexibility than Title VII. For example, the Commission substantively

60. CAL. GOV'T CODE §§ 12900- 12996 (West 1980 & Supp. 1983).

61. *Id.* §§ 12901-12903 (West 1980 & Supp. 1983).

62. *Id.* at §§ 12967-12968 (West 1980 & Supp. 1983). *See also*, Administrative Procedure Act, CAL. GOV'T CODE §§ 11500-11529 (West 1980 & Supp. 1983) (grants authority for the Commission to hold hearings).

63. CAL. GOV'T CODE § 12964 (West 1980 & Supp. 1983).

64. *Id.* § 12935(h) (West 1980 & Supp. 1983).

65. *Id.* § 12970(a) (West 1980 & Supp. 1983).

66. 42 U.S.C. § 2000e-5(g) (1981). Section 2000e-5(g) states:

If the court finds that the respondent has intentionally engaged in . . . [the] unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order . . . reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

Id. *See also*, Gelb & Frankfurt, *supra* note 16, at 1065 n.80 (citing cases limiting the language of 42 U.S.C. § 2000e-5(g) to awards of back pay only).

67. 42 U.S.C. § 2000e-5(f)(1) (1981).

68. Gelb & Frankfurt, *supra* note 16, at 1058 n.21.

69. CAL. GOV'T CODE § 12926(c) (West 1980).

70. *Id.* § 12940(b) (West 1980).

71. *Id.* § 12940(d) (West 1980).

72. *Id.* § 12926(c) (West 1980).

73. *Id.* § 12940(f) (West 1980).

74. 42 U.S.C. § 2000e(b) (1981).

reviews the evidence as a whole in determining violations of the FEHA.⁷⁵ Under Title VII, a plaintiff must pursue either a disparate treatment or disparate impact theory and must cope with complex evidentiary requirements.⁷⁶

The California FEHA includes a prohibition against discrimination on the basis of sex.⁷⁷ Section 12945 provides express protection against pregnancy discrimination.⁷⁸ Aware of the impending passage of the PDA, the state legislature expressly exempted all portions of section 12945 from application to Title VII employers with the sole exception of section 12945(b)(2).⁷⁹ Section 12945(b)(2) requires employers to provide disability leave of up to four months for pregnant workers and reinstatement to the same or similar position when the employee is able to return to work.⁸⁰

Section 12945(b)(2) is controversial because the provision requires special treatment for pregnant workers. Even if an employer provides no disability leave to other disabled workers an employer must provide leave and reinstatement to pregnant workers.⁸¹ Under section 12945(b)(2), employers need only provide pregnancy leave for the period of time, up to four months, of actual physical disability due to pregnancy or related medical conditions.⁸² Leave with pay is not

75. See Gelb & Frankfurt, *supra* note 16, at 1070.

76. Gelb & Frankfurt, *supra* note 16, at 1068. The procedural process of a Title VII case was summarized as follows: Analysis of disparate treatment cases under Title VII usually require plaintiff to show that plaintiff belonged to a protected group, applied for an unfilled position, was qualified, was rejected and that the employer continued to seek applicants with plaintiff's qualification. If the plaintiff succeeds, the burden shifts to the defendant to show valid reasons for plaintiff's rejection. If the defendant meets this burden, the plaintiff, who retains the burden of persuasion throughout, must show a discriminatory reason motivated the employer. *Id.* at 1068-69.

77. CAL. GOV'T CODE § 12926(g) (West 1980). Section 12926(g) states: "As used in . . . connection with unlawful practices . . . 'on the basis' . . . refers to discrimination on the basis of . . . sex." *Id.*

78. *Id.* § 12945(b)(2). See *supra* note 2 (text of California Government Code section 12945(b)(2)).

79. CAL. GOV'T CODE § 12945(e) (West 1980).

80. *Id.* § 12945(b)(2) (West 1980 & Supp. 1983). See *supra* notes 2-3 (text and interpretation of California Government Code section 12945(b)(2)).

81. See *supra* notes 2-3 (text and interpretation of California Government Code section 12945(b)(2)).

82. *Id.* See also Note, *California Federal Savings and Loan Association v. Gilbert: The State of California has Determined that Pregnancy May be Hazardous to Your Job*, 16 GOLDEN GATE U.L. REV. 515, at 520 (1986) (explaining that employers must grant pregnancy leave only when medically necessary). Pregnancy related medical conditions include: toxemia, high blood pressure, placenta praevia caused by low implanatation of the placenta, pre-birth separation of the placenta, multiple births, diabetes, and surgical procedures such as cesarian section. *Id.* at 517 n.8.

required by section 12945(b)(2) unless the employer provides paid leave for other disabled workers.⁸³

In structure and effect, section 12945(b)(2) differs from past stereotypical legislation which assumed that all pregnant women were unfit to work.⁸⁴ Past legislation excluded women from the workforce by requiring mandatory maternity leave regardless of individual capacity to continue work. As job protection in the form of guaranteed reinstatement was seldom available, mandatory maternity leave in effect forced a women to choose between bearing a child and keeping her job.⁸⁵ Section 12945(b)(2) is structured to include women in the workforce by providing leave on an individual basis and preserving the jobs of those workers who find it medically necessary to discontinue work.⁸⁶

The PDA of Title VII clearly differs from section 12945(b)(2). The PDA guarantees a pregnant worker cannot be treated less favorably than other workers. If an employer provides no disability leave or reinstatement to workers generally, however, pregnant workers are not entitled to such benefits.⁸⁷ Statistics project that women will make up half the workforce in the United States by the year 1990,⁸⁸ and that 85% of working women will become pregnant at least once in their working career.⁸⁹ Thus, pregnancy is the main impediment to women achieving equality in the workforce because employment practices failing to offer affirmative job protection, in the event of pregnancy, have a disparate impact on women as a class. Under section 12945(b)(2), the state of California goes beyond Title VII by

83. Note, *supra* note 82, at 520.

84. See Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 334 (1985) (discussing 1952 United States Labor Department recommendation of mandatory maternity leave for the protection of pregnant workers and the states which adopted mandatory maternity leave legislation). See also Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1123-24 (1986) (mandatory maternity leave unrelated to desire or ability to work adversely affects job prospects of women).

85. See WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEPARTMENT OF LABOR, BULLETIN No. 240, MATERNITY PROTECTION OF EMPLOYED WOMEN 7 (1952) (bulletin recommended mandatory maternity leave policy to protect pregnant women, but admitted that such a policy could cause a woman to lose her job). See also Williams, *supra* note 84, at 335 (discussion of United States Department of Labor mandatory maternity leave policy).

86. See Finley, *supra* note 84, at 1174 (discussion of how legislation can be structured to include or exclude women from the workforce).

87. 42 U.S.C. § 2000e(k) (1981).

88. Catalyst, *Preliminary Report on a Nationwide Survey of Maternity/Paternity Leaves* (June 1984).

89. See Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 930 n.7 (1984) (sources of statistical data on the incidence of pregnancy among working women).

granting pregnant workers an affirmative right to disability leave with job protection.

II. THE CASE

A. The Facts

Cal. Fed. is a federally chartered savings and loan association based in Los Angeles.⁹⁰ As an employer, Cal. Fed. is regulated by both Title VII of the Federal Civil Rights Act of 1964⁹¹ and the California FEHA.⁹² Cal. Fed. provided a facially neutral⁹³ leave policy which permitted employees to take unpaid leaves of absence for disability and pregnancy.⁹⁴ Cal. Fed., however, reserved the right to terminate any employee on leave, if a similar position was unavailable when the employee was ready to return to work.⁹⁵

Lilian Garland was employed by Cal. Fed. as a receptionist for several years.⁹⁶ Garland applied for and was granted pregnancy leave.⁹⁷ Four months later, Garland notified Cal. Fed. of her ability to return to work. At that time, Garland was informed that her position was filled and no similar jobs were available.⁹⁸ Garland filed a complaint with the Department of Fair Employment and Housing.⁹⁹ An accusation was issued by the Commission charging Cal. Fed. with violating section 12945(b)(2).¹⁰⁰ Section 12945(b)(2) requires employers to provide necessary disability leave of up to four months to all pregnant employees and to reinstate the employee in the same or

90. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 687-88 (1987).

91. 42 U.S.C. §§ 2000e-2000e-17 (1981).

92. CAL. GOV'T CODE §§ 12900-12996 (1980) (Fair Employment and Housing Act).

93. See BLACK'S LAW DICTIONARY 305 (5th ed. 1983) (Facially neutral means the wording of a document shows no discriminatory intent or effect).

94. Cal. Fed. Sav. & Loan Ass'n, 107 S. Ct. at 688.

95. *Id.* (Cal. Fed. reserves the right to terminate an employee on leave of absence if a similar position is unavailable).

96. *Id.*

97. *Id.*

98. *Id.* Garland was reinstated by Cal. Fed. in a receptionist position in November of 1982, seven months after she gave notice of her ability to return to work. *Id.* at 688 n.7. The action brought by Cal. Fed. against the Department of Fair Employment and Housing went to trial on the issue of the validity of California Government Code section 12945(b)(2). *Id.* at 688.

99. *Id.* at 688.

100. *Id.* See *supra* notes 1-4 (text and background of California Government Code section 12945(b)(2)).

similar position unless a position is no longer available due to business necessity.¹⁰¹

Cal. Fed., joined by the Merchants and Manufacturers Association and the California Chamber of Commerce,¹⁰² responded to the accusation by bringing suit in federal district court against the Commission.¹⁰³ Cal. Fed. sought an injunction against the enforcement of section 12945(b)(2) and a declaratory judgment that section 12945(b)(2) was inconsistent with Title VII of the Civil Rights Act of 1964 and, was therefore, preempted by Title VII.¹⁰⁴ Cal. Fed. argued that section 12945(b)(2) authorized preferential treatment for pregnant workers, in violation of Title VII, because employers were required to give leave and reinstatement to pregnant workers regardless of their policy toward disabled workers generally.¹⁰⁵ The district court granted summary judgment in favor of Cal. Fed. The court reasoned that preferential treatment of pregnant workers is discrimination against males on the basis of pregnancy.¹⁰⁶ On appeal, in a highly critical opinion, the Court reversed the decision of the district court and granted summary judgment in favor of the Commission.¹⁰⁷

The court held that Congress intended Title VII to provide a minimum level beneath which pregnancy benefits could not fall.¹⁰⁸ Further, although section 12945(b)(2) uses pregnancy as the basis for different treatment, the court ruled such treatment consistent with one of the goals of Title VII, that is, equal employment opportunity for women.¹⁰⁹ The United States Supreme Court affirmed the decision and held the California law consistent with Title VII, and, therefore, not federally pre-empted.¹¹⁰

101. See *supra* note 3 (the Commission interprets California Government Code section 12945(b)(2) to include reinstatement of pregnant workers).

102. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 688. Merchants and Manufacturers Association is a trade association that represents numerous employers within California. *Id.* at 688 n.8. The California Chamber of Commerce also represents many California businesses. *Id.* Both the Chamber of Commerce and Merchants and Manufacturers Association have members with disability leave policies similar to Cal. Fed. *Id.* at 688.

103. *Id.* at 688.

104. *Id.*

105. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985), *aff'd*, 107 S.Ct. 683 (1987). See generally Note, *supra* note 82 (analysis of the Ninth Circuit decision).

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

107. *Id.* To illustrate, the appellate court noted: "The district court's decision that section 12945(b)(2) discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA." *Id.* at 396.

108. *Id.* at 396.

109. *Id.*

110. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 695.

B. *The Opinion*

Justice Marshall authored the majority opinion.¹¹¹ The Supreme Court first determined that federal pre-emption is based solely on Congressional intent.¹¹² Next, the Court found that in creating Title VII, Congress had no intent to categorically pre-empt the field of employment discrimination law to the exclusion of the states.¹¹³ Rather, Congress intended pre-emption to occur only when state law is in direct conflict with federal law, or when compliance with state law would defeat the purpose of Title VII.¹¹⁴ The Supreme Court found that Congress attached great importance to state antidiscrimination laws in achieving the goals of Title VII.¹¹⁵

By analyzing the legislative history of the PDA,¹¹⁶ the Court identified the purpose of the PDA: to prevent discrimination against pregnant workers, thereby promoting equal employment opportunity for women.¹¹⁷ Because section 12945(b)(2)¹¹⁸ shares the same goal, the Supreme Court found that section 12945(b)(2) was not in conflict with the PDA.¹¹⁹ The Court, therefore, concluded that Title VII does not pre-empt section 12945(b)(2).¹²⁰

111. *Id.* at 686 (6-3 decision, Brennan, J., Blackmun, J., Stevens, J., O'Connor, J., Marshall, J., majority; Scalia, J., concurring; White, J., dissenting, joined by Rehnquist, C.J., and Powell, J.).

112. *Id.* at 689.

113. *Id.*

114. *Id.* at 690. The Court cited Title VII section 708 which contemplates an interlocking system of state and federal protection where state anti-discrimination laws are valid unless the state law requires or permits an act which is illegal under Title VII. *Id.* Title VII section 708 states in relevant part:

Nothing in this title 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 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 title.

42 U.S.C. § 2000e-7 (1981). The Court also cited Title XI section 1104 of the Civil Rights Act of 1964 which directly addresses the intent of Congress on the issue of pre-emption:

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, [Title VII] or any provision thereof.

Cal. Fed. Sav. & Loan Ass'n, 107 S. Ct. at 690 (citing 42 U.S.C. § 2000h-4 (1981)).

115. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 690.

116. 42 U.S.C. § 2000e(k) (1981).

117. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 691.

118. CAL. GOV'T. CODE § 12945(b)(2) (West 1980).

119. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 694.

120. *Id.* at 695.

The Supreme Court, interpreted the language of the PDA in the light of the legislative history and historical context from which it evolved.¹²¹ Congress created the PDA in reaction to the *General Electric Co. v. Gilbert* decision.¹²² The second clause of the PDA expressly provides for equal treatment of pregnant workers in the receipt of fringe benefits, which was the issue before the court in *Gilbert*.¹²³ Congress, however, placed the PDA within the definition of sex discrimination for Title VII purposes, thus, the PDA functions within general Title VII prohibitions against discrimination on the basis of gender.¹²⁴

The Supreme Court noted that the legislative history of the PDA contains a thorough account of discrimination against pregnant workers.¹²⁵ The history also shows that laws providing preferential treatment existed in a number of states.¹²⁶ The Supreme Court acknowledged clear statements in the legislative history, that Congress did not intend to require employers to provide preferential treatment for pregnant workers under the PDA.¹²⁷ Despite these statements, the Court found no Congressional intent to prohibit the states from providing preferential treatment for pregnant workers.¹²⁸ State preferential treatment laws, the Court reasoned, are consistent with the goal of ending discrimination against pregnant workers.¹²⁹ As a result, under the PDA, Title VII employers are not required to implement new benefit programs for pregnant workers, but the states are free to mandate Title VII employers adopt preferential benefit programs.¹³⁰

Theoretically, the possibility exists for an employer in California to comply with both section 12945(b)(2) and the exact language of the PDA by providing all workers with disability leave and reinstate-

121. *Id.* at 691. Justice Marshall stated:

We must examine the PDA's language against the background of its legislative history and historical context . . . 'it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' (citations omitted).

Id.

122. 429 U.S. 125 (1976).

123. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 691.

124. *Id.*

125. *Id.* at 687-89.

126. *Id.* at 692.

127. *Id.*

128. *Id.* at 692-93.

129. *Id.* at 693-94.

130. *Id.* at 692-93.

ment.¹³¹ To the majority, the fact that an employer could theoretically comply with both the state and federal statutes is proof that the two statutes do not conflict, and thus, Title VII does not pre-empt section 12945(b)(2).¹³² The Supreme Court noted that Title VII, however, cannot be the basis for reverse discrimination suits to force employers to offer co-extensive state and federal benefits to all workers.¹³³ Using Title VII to extend state preferential benefits to other workers is a remedial device implemented to resolve conflicts between state and federal law.¹³⁴ In *California Federal Savings & Loan Association v. Guerra*, however, no conflict exists between the state and federal law, so no remedial action is necessary or possible.¹³⁵ Title VII employers who are required to implement preferential benefit programs for pregnant workers under state law are, thus, protected from potential Title VII actions by workers who are not granted similar benefits.¹³⁶

III. RAMIFICATIONS

In *California Federal Savings and Loan Association v. Guerra*, the United States Supreme Court held that the PDA of Title VII and section 12945(b)(2) share the common goal of ending discrimination against pregnant workers.¹³⁷ Title VII, therefore, did not pre-empt a California state law which provides preferential treatment for a traditionally disadvantaged class, pregnant workers.¹³⁸ A broad reading of the holding of the Court approves state action that enforces the goals of federal civil right legislation, even regulation granting broader and more specific protections than federal law. The implications of a broad reading could result in other disadvantaged classes seeking preferential treatment under state law without the fear of reverse discrimination suits by members of the advantaged class.¹³⁹

131. *Id.* at 695.

132. *Id.*

133. *Id.* The dissent reasoned that finding California Government Code section 12945(b)(2) consistent with the PDA meant Title VII requires extension of disability leave and reinstatement benefits to all workers. *Id.* at 701.

134. *Id.*

135. *Id.* at 695 n.31.

136. *Id.* at 695.

137. *Id.* at 694.

138. *Id.*

139. See Krieger & Cooney, *supra* note 31, at 553-55 (analysis of the *Regents of the University of California v. Bakke*, 432 U.S. 265 (1978)) decision and the implications of preferential treatment in the area of affirmative action).

Thus, the ability of the states to combat all forms of discrimination covered by the Civil Rights Act of 1964 is enhanced.¹⁴⁰

Conversely, a narrow reading of *California Federal Savings & Loan Association* could restrict the holding to the facts. The issue in *California Federal Savings & Loan Association* is the specific meaning, purpose, and scope of the PDA, and the relationship between the PDA and state laws seeking to end discrimination against pregnant workers.¹⁴¹ A narrow reading, therefore, might result in limiting state laws granting preferential treatment for a disadvantaged class to the area of pregnancy discrimination.

California Federal Savings & Loan Association clarifies the intended scope of the PDA. The Supreme Court held that the second clause of the PDA is not a limitation on the first clause.¹⁴² As a result, the reasoning of *General Electric Co. v. Gilbert*¹⁴³ is no longer valid. The PDA is intended to prevent employers from using classifications on the basis of pregnancy which disadvantage women as a class.¹⁴⁴

Finally, in *California Federal Savings & Loan Association*, equal opportunity of employment for women does not mean that women must be treated the same as men in the area of pregnancy disability where the sexes are inherently different.¹⁴⁵ The holding of the Supreme Court attempts to resolve a controversy which exists in the legal community. Known as the equal treatment/special treatment debate, the conflict centers around the meaning of equality of the sexes.¹⁴⁶

The equal treatment or same treatment side of the debate takes the position that equality of the sexes is equality in the treatment of men and women. Women and men must be treated the same because

140. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 690 (emphasizing the importance Congress attaches to state antidiscrimination law in achieving goals of civil rights legislation).

141. See *supra* notes 111-36 and accompanying text (analysis of the *California Federal Savings & Loan Association v. Guerra* opinion).

142. *Cal. Fed. Sav. & Loan Ass'n*, 107, S. Ct. at 691.

143. 429 U.S. 125 (1976).

144. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 692.

145. *Id.* at 694 (pregnancy should be taken into account in creating employment policies and legislation).

146. See generally Kreiger & Cooney, *supra* note 31, at 513-72 (detailed analysis of the equal treatment/special treatment controversy and various theoretical models of sexual equality underlying the different positions); Note, *supra* note 31, at 929-56 (advocating special treatment to accommodate pregnancy). But see Williams, *supra* note 84, at 325 (supports equal treatment approach); Finley, *supra* note 84, at 1121-22 (criticizing both equal treatment and special treatment approaches as fundamentally flawed because built around male norms; commentator advocates re-examination of basic societal values which have separated the world of work from the world of the home, and adoption of a responsible position which recognizes the interdependency of both spheres and fosters interaction between both spheres).

stigmatic discrimination is an inherent danger in gender based classifications.¹⁴⁷ By emphasizing the commonalities between men and women, the equal treatment approach hopes to overcome the assumption that pregnancy is a woman's problem. The traditional equality model treats similarly situated individuals alike, and doing so in the pregnancy context lessens the danger of biases and stereotypes becoming the basis of employment decisions.¹⁴⁸ Further, in the past, laws treating pregnant women differently than men "protected" women right out of their jobs.¹⁴⁹ Treating both sexes the same and working for disability benefits and reinstatement for all workers is the solution urged by the equal treatment approach.

The special treatment approach advocates that equality of the sexes is equality in effect. True equality is obtained when legislation places women and men on equal footing in the workforce.¹⁵⁰ Special treatment laws take into account the differences between the sexes and provide for those differences accordingly.¹⁵¹ The same treatment approach is criticized because it provides only as much protection for women as is granted to their male counterparts. If an employer fails to provide disability benefits or reinstatement to other temporarily disabled workers no benefits need to be provided to pregnant workers. The need for pregnancy benefits and job protection is apparent given that eighty-five percent of the women in the workforce will become pregnant at least once in their working career.¹⁵² Thus, the special treatment approach advocates immediate legislative protection for pregnant workers, reasoning that similar benefits can be extended to all workers as society begins to recognize the interdependency of the home and work environment.¹⁵³ Preferential treat-

147. See Note, *supra* note 82, at 517 n.11 (the National Organization for Women (NOW), the League of Women Voters and the National Women's Political Caucus support equal treatment approach).

148. See Finley, *supra* note 84, at 1146 (summarizes the equal treatment position).

149. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1873) (justifies the exclusion of a woman from the legal profession asserting "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."). See also Finley, *supra* note 84, at 1174 (examples of protective legislation, restrictions on the hours or times women can work, height and weight restrictions, lifting restrictions, all designed to exclude women from the workforce, especially when pregnant).

150. See Note, *supra* note 82, at 517 n.12 (California Women Lawyers, and Equal Rights Advocates, among others, support special treatment approach).

151. See also *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 694 (1987) (discussion of the need to take pregnancy into account in fashioning legislation to end sex discrimination).

152. See *supra* notes 88-89 and accompanying text (discussion of statistical data on the likelihood of pregnancy among women in the workforce).

153. Finley, *supra* note 84 at 1174-75 (discussion of the need for immediate legislation for pregnant workers while working toward social change).

ment provides needed protection which seeks to include women in the workforce, as distinguished from past stereotypical legislation which aimed at forcing women out of the workforce.¹⁵⁴ The California Federal Savings & Loan Association decision supports special treatment for pregnant workers as a remedy for past discrimination and as a means to effectively advance the equality of the sexes in the workplace.¹⁵⁵

CONCLUSION

Title VII and the PDA do not provide affirmative federal rights to pregnant workers. The California Federal Savings & Loan Association decision upholds the ability of states to provide an affirmative remedy for past discrimination against pregnant workers in the form of preferential treatment in disability leave and reinstatement benefits.

As a result of *California Federal Savings & Loan Association* Title VII employers in California must provide disability leave and job protection for pregnant workers regardless of their policy toward disabled workers generally. Employers providing preferential benefits to pregnant workers in accordance with state law are protected from reverse discrimination suits under Title VII by disabled workers not so preferred. Finally, the greater ease and flexibility of the Fair Employment and Housing Act procedures over those of Title VII, should result in more employment discrimination grievances resolved under state law, thus, strengthening an already formidable tool for enforcing equal opportunity of employment in California.

N. Erin Rose Brewer

154. *Id.* at 1174.

155. *Cal. Fed. Sav. & Loan Ass'n*, 107 S. Ct. at 694-95.

