THE IMPLICATIONS OF INADEQUATE MATERNITY LEAVE POLICIES UNDER TITLE VII

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INTRODUCTION

Women as a class have not succeeded in the workplace. In large part this failure reflects the fact that the workplace has not accommodated the demands of childbirth and parenting. Pregnancy impedes women's progress because employers still believe that pregnant women are unable to work, or that once women have children, they will stay at home to raise them and will not continue to work. Childcare, still primarily the responsibility of women, impedes their progress because employers still believe that women are not as dedicated, as available, or as reliable when they have children as when they do not. If women were able to embrace the values and priorities associated with men — putting work before family — then women, as a class, would probably achieve as men do.[1] The reality is that women, as a class, are not able to do so once they have dependent children.[2] Inadequate maternity leave policies play an important role in compounding difficult choices faced by women.

The most egregiously inadequate maternity leave policies are those which fail to guarantee any leave for childbirth, provide inadequate leave or leave without a guarantee of job reinstatement, or require a woman to choose between short paid periods and

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1. *E.g., Profile, Diane Legge*, TODAY'S CHICAGO WOMAN, November 1990, at 1. Ms. Legge, a nationally recognized consultant in architectural design explains:

> In architecture, if you're able to hold the same values and priorities as your male counterparts, the sky's the limit. As long as you put your work before your family, there's no problem. As long as you're willing to travel all the time and put your marriage on hold, there's no problem. Obviously, there's a problem.

Id.

2. The focus of this article is on childbirth. The topics of adoption and dependent care are not specifically addressed. *See generally* Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984-85) where the author argues "for a comprehensive, nationally-funded system of compassionate or nurturing work leaves to permit and support a variety of increasingly needed caregiving services." *Id.* at 381.

longer unpaid periods of leave. Often a support staff person or an airline attendant is told that she must take an unpaid leave immediately after discovering that she is pregnant.[3] Another example is the pregnant production line worker who is told that after she uses her ten sick days for childbirth, she had better return to work or she will have no job.[4] There is the pregnant surgery resident who is told she must return to work within three weeks of childbirth or risk being expelled from the program.[5] Finally, there is the pregnant school teacher who is informed that she must choose between paid sick leave for six weeks and unpaid maternity leave for a longer period with no right to combine both types of leaves.[6]

In all of these situations, the employer's failure to provide a job guarantee may not violate the law.[7] Yet it would appear that leave policies for pregnancy disability which do not comport with the requirements of good medical practice and which fail to address the physical, emotional and financial needs of pregnant employees violate Title VII of the Civil Rights Act of 1964 (Title VII) because they have a significant adverse impact on women.

The purpose of this article is to examine the implications of inadequate leave policies for pregnancy disability under Title VII.[8]

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3. Leonard v. Pan American World Airways, Inc. (*In re* Pan American World Airways, Inc., Maternity Leave Practices & Flight Attendant Weight Program Litigation), 905 F.2d 1457, 1459 (11th Cir. 1990). In *Pan American*, the court struck down the airline's maternity leave policy which required the pregnant flight attendant, upon learning that she was pregnant, give notice of pregnancy, take unpaid leave for the duration of her pregnancy, and return to work within 60 days of delivery. *See also* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980) (striking down airline mandatory leave policy for flight attendants during the first 13 weeks of pregnancy); *but see* Harriss v. Pan American World Airways, Inc. 649 F.2d 670 (9th Cir. 1980) (upholding policy requiring commencement of unpaid leave within twenty-four hours of learning of pregnancy and continuation of leave for sixty days after birth).

4. *See* Abraham v. Graphic Arts Int'l Union, 660 F.2d 811 (D.C. Cir. 1981).

5. Interview with experienced investigator for the Equal Employment Opportunity Commission, stating that this is a normal practice at a number of medical schools around the nation.

6. *See* Scherr v. Woodland School Community Consol. Dist. No. 50, 867 F.2d 974 (7th Cir. 1988).

7. *See infra* notes 109-166 and accompanying text.

8. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

This article will distinguish between inadequate leave policies for pregnancy disability and inadequate leave policies for parenting purposes. It does not specifically examine the implications of Title VII for inadequate parental leave policies, except where the policy deals with pregnancy-disability leave. While parental leave is not specifically addressed in this article, issues relating to parental leave and work/family conflicts are referred to in many instances due to the interrelationship of maternity leave, parental leave and work/family issues.

This article uses the Equal Employment Opportunity Commission (EEOC)[9] definition of "pregnancy disability" and "maternity leave" as "the type of leave taken by female employees to cover the period of their own actual physical inability to work as a result of pregnancy, childbirth, or related medical conditions."[10] The term "inadequate leave" means an inappropriate period of time for such leave or an unreasonable policy respecting such leave.[11] The specific focus of this article is whether, and to what extent, inadequate leave policies violate Title VII under disparate treatment and disparate impact analyses.

A proper examination of the implications under Title VII of an inadequate leave policy for pregnancy disability requires an ap-

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Parental leave is typically composed of three parts: (1) disability leave which is related to pregnancy; (2) paid childcare leave; and (3) unpaid childcare leave. A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, LAWYERS AND BALANCED LIVES: A GUIDE TO DRAFTING AND IMPLEMENTING WORKPLACE POLICIES FOR LAWYERS, pt. I at 2 (1990) [hereinafter LAWYERS AND BALANCED LIVES]. The ABA explains that whereas the goal of disability leave is to enable the woman to recover from childbirth, the goal of childcare leave is to provide new parents with a period of adjustment to the new baby. *Id.*

For an in-depth discussion of the work/family conflict, see Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L.L. REV. 79 (1989) [hereinafter *Gender Paradox*]; Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699 (1985-86) [hereinafter *Maternity Leave*]. Dowd argues that the workplace should be restructured to accommodate maternity leave from a "special treatment" point of view. For a discussion of "equal treatment/special treatment" see *infra* notes 109-119 and accompanying text.

For a discussion of maternity and parental leave see Note, *Pregnancy and Employment: Three Approaches to Equal Opportunity*, 68 B.U.L. REV. 1019 (1988); Note, *Childbearing and Childrearing: Feminists and Reform*, 73 VA. L. REV. 1145 (1987); Recent Developments, *Beyond* Cal Fed: *Parenting Leave Possibilities*, 10 HARV. WOMEN'S L.J. 294, 297-301 (1987); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1986); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

9. The EEOC is the agency designated to enforce the provisions of Title VII. 42 U.S.C. § 2000e-4 (1988).

10. Maternity Leave, 2 EEOC Compl. Manual (BNA) No. 92, § 626.5 (July 1986) [hereinafter EEOC Compliance Manual]. Maternity leave does not include paternity leave, discussed *infra* notes 88-92 and accompanying text.

It is technically incorrect to treat pregnancy as a disability. The typical female is not disabled when she is pregnant in the sense that she is ill and, except for a time period after an uncomplicated delivery, she is not ill while her body recovers from childbirth. This supports the view that pregnancy should not be viewed as a disability but should receive special treatment. *See infra* notes 109-150 and accompanying text.

11. Although this article defines "inadequate leave" narrowly, focusing solely on the period of time immediately after childbirth, it may be more broadly interpreted to mean inadequate leave for personal reasons related to maternity. Examples of such reasons are infant care, breastfeeding, and bonding.

preciation of three interrelated topics. These topics are: 1) the demographics of the workplace and the different types of pregnancy disability leave policies in the United States; 2) medical policy relating to pregnancy disability; and 3) the rulings of the United States Supreme Court and the conclusions articulated by the EEOC.

Part I of this article will examine pregnancy disability leave policies in the context of statistical analyses of the workplace, policies regarding proper medical practice, and legislative actions and proposals. Part II will discuss pregnancy leave disability as it relates to Title VII and the regulations, guidelines, and interpretations of the Supreme Court and the EEOC. Finally, Part III will argue that, under disparate treatment and disparate impact analyses, employers discriminate on the basis of pregnancy when their pregnancy disability policies ignore the medical needs of pregnant workers or cause pregnant employees to surrender benefits.

I. Background

A. A Statistical Picture of the Workplace

Women of childbearing age work and work in great numbers. In nonagricultural industries in 1988, approximately 45% of workers were female.[12] Seventy-two percent of all women who worked in nonagricultural industries were under age 45.[13] Sixty-three percent of working men and 55% of working women were married and living with their spouses.[14] Eighty-five percent of all working women are expected to become pregnant at least one time during their working life.[15] Thus, the workplace has a significant percentage of women of childbearing age who work and who will become pregnant while they work.

The dynamics of the family are also significant. Less than 10% of families are composed of a married couple with children where

12. Bureau of Labor Statistics, U.S. Dep't of Labor, 35 Employment & Earnings 23 (Oct. 1989) (Table 7).

13. *Id.* at 30 (Table A-23).

14. *Id.* at 35 (Table A-30).

15. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 468 (1977) (statement of American Nurses Association), *cited in Maternity Leave*, *supra* note 8, at 702 n.22.

the husband is the sole provider.[16] In 1987, "[t]he median annual income for families was $40,422 when the wife was in the labor force and $26,652 when she was not."[17] Further, single-parent households have increased because of the high rate of divorce and out-of-wedlock births. In 1987, 19% of mothers aged 18-44 were single.[18] These statistics demonstrate that parents in most families work, and most do so because they must.

B. Standards for Pregnancy Disability (and Parental Leave) in the Workplace

1. Policy Statements Issued by the American College of Obstetricians and Gynecologists

The American College of Obstetricians and Gynecologists (the College) has articulated a policy on sound medical practice regarding postnatal recovery.[19] The Standards of Obstetric-Gynecologic Services, Postpartum Evaluation, provide:

> Based on the outcome of the postpartum examination, the physician can determine whether the woman is ready both physiologically and psychologically to resume working. Most women may return to work several weeks after an uncomplicated delivery. A period of 6 weeks is generally required for a woman's physiologic condition to return to normal, but the physician should base recommendations regarding the time at which the patient can resume full activity on the patient's individual circumstances.[20]

Further, the College made clear in its 1974 Statement of Policy

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16. CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, ORDER CODE IB86132, PARENTAL LEAVE: LEGISLATION IN THE 101ST CONGRESS, CRS-2 (December 11, 1990) [hereinafter CRS ISSUE BRIEF].

17. *Id. See also*, McMillion, *Family Leave Revived in Congress*, 76 A.B.A. J. 118 (Nov. 1990) [hereinafter *Family Leave Revived*].

18. CRS ISSUE BRIEF at CRS-2.

19. The American College of Obstetricians and Gynecologists is the volunteer membership organization which issues policies and guidelines for this specialty. Telephone interview with Ann Allen, Esq., General Counsel for the College (April 26, 1991).

20. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE ON PROFESSIONAL STANDARDS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 21-22 (1989). The College makes clear that the standards are to be used as "recommendations and general guidelines rather than as a body of rigid rules." *Id.* at i. The College states that the standards "are intended to be adapted to many different situations, taking into account the needs and resources particular to the locality, the institution, and the type of practice. Variations and innovations that demonstrably improve the quality of patient care are to be encouraged rather than restricted." *Id.*

that:

> Pregnancy is a physiologic process. All pregnancy patients, however, have a variable degree of disability, on an individual basis, as indicated below, during which time they are unable to perform their usual activities.
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> 1. In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the puerperium. The process of labor, and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks.[21]

Disability policies that do not provide for such a period may not withstand Title VII scrutiny because, unlike the employer's other disability policies, such policies do not conform with accepted medical practice.[22]

2. *The Current Legal Picture*

a. National Standards

The United States has never adopted a national standard for leave from employment for maternity or adoption. At least seventy-five other countries, including all other major industrial nations, have adopted national standards for job-protected leaves for maternity or adoption.[23] These benefits may include maternity leave for a specified time before and after birth, job protection during the worker's absence, and wage replacement or a cash subsidy.[24] In addition, some countries provide a paid or unpaid paren-

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21. *Id.* at 22. The Policy continues:

> 2. Complications of pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy and abortion.
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> 3. A woman with pre-existing disease which in itself is not disabling, may become disabled with the addition of pregnancy. Certain patients with heart disease, diabetes, hyperintensive cardiovascular disease, renal disease and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.
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> The onset, termination and cause of the disability as related to pregnancy can only be determined by a physician.

Id.

22. *See generally infra* notes 157-166 and accompanying text.

23. *Id.*

24. The following reflects some of the policies in other countries: Austria (maternity leave of 20 weeks at full salary, with up to a year off); Canada (maternity leave of 15 weeks at 60% salary, with up to 41 weeks off); Finland (maternity leave of 35 weeks at full salary); France (maternity leave of 16 weeks at 90% salary); Germany (maternity leave of 14 weeks

tal leave, which is a leave granted for childcare to either parent and unrelated to physical disability resulting from childbirth.[25]

The United States has thus lagged far behind other developed countries in adopting a policy that reflects the increasing number of women with children in the labor force.[26] The current law in the United States governing pregnancy-related issues is the Pregnancy Discrimination Act (the Act).[27] The Act amended Title VII and expanded the scope of discrimination "on the basis of sex" to include pregnancy.[28] The Act, however, falls short of providing a national pregnancy leave policy.

Employers' policies before the Act generally either failed to provide for leave where leave was granted for other disabilities, or imposed mandatory unpaid leave during pregnancy and after childbirth.[29] Pregnancy, therefore, forced women to choose between losing their job or their income. Where leave was granted, it was without a guarantee of reinstatement and at the cost of seniority and fringe benefits.[30] These leave policies were based on stereotypical notions about women: that it was socially inappropriate or even physically harmful for a woman to work once she became visibly pregnant and that, after childbirth, she would assume primary responsibility for childrearing.[31] Pregnant women thus had little

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at full salary, with up to 6 months at a reduced subsidy and job guarantee for 6 months); Great Britain (maternity leave of 6 weeks at 90% salary, with 12 additional weeks, a stipend and job guarantee for 40 weeks); Hungary (maternity leave of 6 months at full salary, with stipend for 2 ½ years and job guarantee for 3 years); Italy (maternity leave of 22 weeks at 80% salary with up to 48 weeks off); Japan (maternity leave of 12 weeks at 60% salary); Sweden (parental leave of 9 months at 90% salary, job guarantee for 18 months; option available to men). B. OLMSTED & S. SMITH, CREATING A FLEXIBLE WORKPLACE: HOW TO SELECT AND MANAGE ALTERNATIVE WORK OPTIONS 257 (1989).

25. *Id.* For a discussion of current maternity-related policies and practices in the United States and overseas, see CRS REPORT 85-148 GOV, *Maternity and Parental Leave Policies: A Comparative Analysis.*

26. *See generally* S. KAMERMAN & A. KAHN, THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE (1987) [hereinafter KAMERMAN, WORKPLACE].

27. 42 U.S.C. § 2000e(k) (1988).

28. *See infra* notes 78-87 and accompanying text.

29. S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 35-38 (1983) [hereinafter KAMERMAN, MATERNITY].

30. *Id.* at 33.

31. S. REP. No. 95-331, 95th Cong., 1st Sess., 3-4, 6 (1977).

Concern for "physical harm" to a woman is an important and recurring issue with respect to fetal protection policies. Employers have created these policies out of concern for fetal health and development. This concern must be balanced against a woman's freedom to work in the conditions she chooses. UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd* 59 U.S.L.W. 4209 (U.S. March 20, 1991) (fetal protection policies are

protection under Title VII before the Act.

Two beliefs have proven major impediments to the adoption of a national pregnancy leave policy: first, that compliance would be too costly to employers; and second, that the policy would intrude on the private sector's autonomy.[32] A substantial increase in costs is not, however, a certainty, particularly where disability leave is unpaid, or where such costs are outweighed by savings realized by retaining good employees.[33] A national pregnancy leave policy, moreover, will not force employers to provide pregnancy leave, for employers may provide the benefits they choose, if any. Where leave is provided, however, it must be done without regard to sex.[34]

b. Standards in the States

Many state and federal laws and regulations address issues of medical and family leave and/or job reinstatement. Twenty-five states and Puerto Rico have laws or regulations[35] that guarantee

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susceptible to disparate treatment and disparate impact analyses including the BFOQ and business necessity defenses). Also, the "appropriateness" and "caregiver" reasons were validated in Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) (teacher's contract was not renewed after she became pregnant because of the employer's wish that mothers remain at home with pre-school age children).

32. *CRS Issue Brief* at CRS-2. *See* H.R. 770, 101st Cong., 2d Sess., 136 CONG. REC. H2118 (1990), *infra* notes 50-52 and accompanying text; *see also Family Leave Revived, supra* note 17, at 118, where it was reported that President Bush emphasized a preference for voluntary implementation of family and medical leave by employers when he vetoed legislation on federally-mandated family and medical leave.

33. *See infra* notes 163-165 and accompanying text.

34. In addition, many employee benefits are now subject to national standards mandating nondiscrimination. *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988) (ERISA). *See also* Retirement Equity Act of 1984, Pub. L. No. 98-3897, 98 Stat. 1426 (1988), which provided, among other things, that, for vesting purposes, employees on maternity or paternity leave are allowed to be absent from a job for up to five (5) years and to retain credit for their initial period of employment if they return to the same employer. This Act amended the vesting provisions of the ERISA. *See* 29 U.S.C. § 1053(b)(3)(E) (1988).

35. The following are the state laws or regulations which guarantee employees their jobs after family and medical leaves. The medical leaves are usually unpaid and the laws indicate the identity of covered employers: CAL. GOV'T CODE, §§ 12945(1)-(2), 12960-75 (West 1980 and Supp. 1991) and CAL. ADMIN. CODE §§ 7420-460 (1983) (employers with five or more employees); State Personnel Act, CONN. GEN. STAT. ANN. § 5-248a (West 1988 and Supp. 1990), and 1989 Conn. Pub. Acts 89-382 (State and agencies, employers with three or more employees with certain family businesses exempted, and employers with 250 or more employees and phased in stages to 75 by 1993); FLA. STAT. ANN. § 110.221 (West 1982) and FLA. ADMIN. CODE ANN. r.22A-8.016 (1988) (State agencies except service, select exempt and senior management employees); Haw. Dept. of Industrial and Labor Relations, Sex and

state or private employees their jobs if they must be out of work temporarily for family, personal, or medical reasons.[36] While many states provide for pregnancy leave as either a general or pregnancy disability, the permitted durations of such leave vary widely.[37] No

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Marital Status Discrimination Regulations, 12-23-1 to 22, 12-23-58, FAIR EMPL. PRAC. MANUAL (BNA) 453:2301 to 2308, 453:2328 (1983) (employers with one or more employee(s)); IOWA CODE ANN. §§ 601A.6(2), 601A.15-.17 (West 1988 and Supp. 1990) (employers with four or more employees); Kansas Commission on Civil Rights, Guidelines on Discrimination Because of Sex, §§ 21-32-6(D), 21-41 to 45-25, FAIR EMPL. PRAC. MANUAL (BNA) 453:3311, 453:3318 to 3337 (1977) (employers with four or more employees); KY. REV. STAT. ANN. § 337.015 (Michie/Bobbs-Merrill 1983) (employers with one or more employee(s)); LA. REV. STAT. ANN. § 1008 (West Supp. 1991) (employers with 26 or more employees); ME. REV. STAT. ANN. tit. 26 § 843 (1988) (employers with 25 or more employees); MASS. GEN. L. ch. 149, § 105D (1988) and ch. 151B §§ 1(5), 4(11A) (1988) and MASS. ADMIN. CODE tit. 804, § 8.01 (1987) (employers with six or more employees); MINN. STAT. ANN. §§ 181.940-.944 (West Supp. 1991) (employers with 21 or more employees); MONT. CODE ANN. §§ 49-2-310 to 311, 49-2-501 to 509 (1987) and Mont. Admin. Reg. 24.9.202-.264, 24.9.1201-.1207 (1990) (employers with one or more employee(s)); North Carolina State Personnel Manual § 8, 19.2-19.3 (state agencies); N.D. CENT. CODE § 54-52.4 (state and its agencies); N.H. REV. STAT. ANN. § 354-A:9 (Supp. 1990) and N.H. CODE ADMIN. R. HUM. § 402.03 (1989) (employers with six or more employees); N.J. REV. STAT. 34:11B-1 (Supp. 1990) (employers of 100 or more for 1991 to 50 employees in 1994); OKLA. STAT. tit. 74 § 840.7B (West Supp. 1991) (state agencies); OR. REV. STAT. §§ 659.010-.121, 659.360 (1989) (employers with 25 or more employees); Pennsylvania Management Directive 505.7 §§ 30.101-30.115 (1986) (state and its agencies); P.R. LAWS ANN. tit. 29, §§ 467-72 (1985) (employers with one or more employee(s)); R.I. GEN. LAWS §§ 28-48-1 to 9 (Supp. 1990) (private employers with 50 or more employees; any city, town or municipal agency with 30 or more employees; state and state agencies); TENN. CODE ANN. § 4-21-408 (Supp. 1990) (employers with 100 or more full-time employees); VT. STAT. ANN. §§ 471-74 (Supp. 1990) (employers with 10 or more employees); WASH. REV. CODE ANN. § 49.78.010-80 (1990), WASH. ADMIN. CODE § 162-30-020 (1986) (employers with 100 or more employees); W. VA. CODE § 21-5D-2 (1989) (state employees); WIS. STAT. ANN. § 103.10 (Supp. 1990) (employers with 50 or more employees). *See* WOMEN'S LEGAL DEFENSE FUND, *State Laws and Regulations Guaranteeing Employees Their Jobs After Family and Medical Leaves*, (January 8, 1990) [hereinafter *State Laws*] and Vincinanza, *New Family Leave Legislation Forces Employers to Plan Ahead*, NAT'L LAW J. 20 (October 15, 1990).

36. Connecticut, Maine, and Wisconsin guarantee jobs after family and medical leaves. New Jersey guarantees jobs after family leave. Minnesota, Oregon, Rhode Island, and Washington guarantee jobs after parental leaves. Kentucky guarantees jobs only after leave for adoption. California, Hawaii, Iowa, Kansas, Louisiana, Massachusetts, Montana, New Hampshire, Puerto Rico, Tennessee and Vermont guarantee jobs only during periods of pregnancy and childbirth-related disability or only for women after childbirth. Florida, North Carolina, North Dakota, Oklahoma, Pennsylvania, and West Virginia provide some form of job-guaranteed family or medical leave for state employees. *See State Laws*, *supra* note 35. *See also* CRS ISSUE BRIEF, *supra* note 16 at CRS-3.

37. Some examples of leave provisions adopted by states are: reasonable leave up to six months (Florida) or four months (California, Louisiana, North Dakota and Tennessee); a total of twelve weeks for parental and pregnancy disability leave for women (Oregon, Vermont and West Virginia) or twelve or thirteen weeks in a twenty-four month period (Connecticut, Washington, and Rhode Island) or eight weeks (Iowa, Maine, Massachusetts, and Puerto Rico) or six weeks (Minnesota). Other states provide for leave for a reasonable period of time (Hawaii, Kansas, and Montana) or for the period of physical disability (New Hampshire and North Carolina). *State Laws*, *supra* note 35.

state except Minnesota,[38] however, provides for less than eight weeks leave. At the federal level, employees are accorded certain maternity and parental benefits under the Civil Service leave system.[39]

c. Standards in the Private Sector

Private employers make available, through employee benefit plans, a variety of benefits permitting parents to take leaves. These benefits include annual leave, temporary disability leave, sick leave, and leave without pay.[40]

Unfortunately, there is a lack of available data about employment-related maternity and parental benefits. The information available, moreover, tends to focus on large and middle size firms.[41] The existence of maternity leave, including reinstatement in the same or a comparable job and protection of seniority, is therefore overstated, for such leave is most common in large companies.[42] The likelihood of a firm adopting maternity leave provisions decreases with the size of the firm.[43] The data show also that most firms limit the duration of pre-delivery and post-delivery leave to a total of two to three months, but that some firms restrict leave to as little as four to six weeks.[44] Thirty-seven percent of women return to work less than eight weeks after childbirth and another thirty-two percent return after nine to eighteen weeks.[45] While seniority and pension benefits usually continue to accrue during maternity leave,[46] disability benefits covering the actual incapacity

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38. MINN. STAT. ANN. § 181.941 (West Supp. 1988) (maximum leave is six weeks; employers with 21 or more employees).

39. The guidelines regarding maternity and parental benefits issued by the Office of Personnel Management do not include a separate policy for such leave. Leave for childbirth is chargeable to a combination of sick leave, annual leave, or leave without pay, while parental leave may be charged to annual leave or leave without pay with the permission of the agency affected. CRS ISSUE BRIEF, *supra* note 16 at CRS-3.

40. *Id.* at CRS-2.

41. *Id.* at CRS-4 (citing CATALYST, CORPORATE GUIDE TO PARENTAL LEAVE (1986) and KAMERMAN, MATERNITY, *supra* note 29).

42. Maternity leave policies are much less common in firms with 26 to 99 employees and least common in firms with fewer than 25 employees. Further, maternity leave policies are more common in the banking, insurance and financial industries and less so in retail trade and service industries. *See* CRS ISSUE BRIEF, *supra* note 16, at CRS-2.

43. *Id.* at CRS-4.

44. *Id.*

45. *Id.*

46. CRS ISSUE BRIEF, *supra* note 16, at CRS-4. *See* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (divestment of a woman's accumulated seniority merely because she takes mater-

due to pregnancy are paid for an average of 7.5 weeks although the average duration of a temporary disability insurance plan is twenty-six weeks.[47] Inadequate policies are self-defeating in light of the fact that women return to work after childbirth at a rate that correlates positively with the quality of benefits and leave offered by employers.[48]

3. *Proposed Legislation*

Interest in a national standard for employee leave benefits for maternity and childcare has intensified over the past decade. This heightened interest stems from changes in the composition of the workforce, the economics of the family, and the public policy concerns of Congress.[49]

In 1990, Congress passed legislation requiring an employer with fifty or more employees to grant leave of up to twelve weeks a year to a worker to care for a newborn, a newly adopted child, or a seriously ill child or parent.[50] The legislation also granted leave to temporarily disabled workers, including those disabled because of pregnancy.[51] The President vetoed the bill.[52] A similar proposal

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nity leave violates the sex discrimination provisions of Title VII).

47. CRS ISSUE BRIEF, *supra* note 16, at CRS-5 (data regarding the availability of paid maternity leave comes from the Social Security Administration, which monitors cash benefits for short-term sickness).

48. *Lawyers and Balanced Lives*, pt. I, at 1-2 (citing U.S. BUREAU OF THE CENSUS, SERIES P-23, No. 165, WORK AND FAMILY PATTERNS OF AMERICAN WOMEN 11-27 (1990)). "Between 1961 and 1985, almost twice as many women with paid leave or other benefits returned to work within six months of childbirth, compared to the return rate for women without benefits." *Id.* at 1 (citation omitted). Workplace policies "that address the needs and concerns of pregnant workers result in a high level of job satisfaction and productivity, fewer sick days, and working later into the pregnancy." *Id.* at 2 (citing NATIONAL COUNCIL FOR JEWISH WOMEN CENTER FOR THE CHILD, ACCOMMODATING PREGNANCY IN THE WORKPLACE (1987)). Despite these positive correlations, employers are reluctant to adopt such policies on grounds of increased costs.

49. CRS ISSUE BRIEF, *supra* note 16, at CRS-2.

50. The proposed legislation, H.R. 770, 101st Cong., 2d Sess., 136 Cong. Rec. H2118 (1990), was passed by the House of Representatives on May 13, 1990, and by the Senate on June 14, 1990. *See* CRS ISSUE BRIEF, *supra* note 16, at CRS-1; *see also Family Leave Revived*, *supra* note 17, at 118.

51. *See* CRS ISSUE BRIEF, *supra* note 16, at CRS-1; *see also Family Leave Revived*, *supra* note 17, at 118.

Eligible workers were defined as those who had been employed for one year. The bill required continuation of an employee's health insurance benefits during leave and reinstatement in the same or a similar job at the end of leave. An employer was allowed to deny reinstatement to the highest paid ten percent of employees. CRS ISSUE BRIEF, *supra* note 16, at CRS-1.

52. The President vetoed the measure on June 29, 1990 and the House failed to over-

was reintroduced shortly thereafter.[53] While these proposals reflect Congressional views on adequate minimum leave periods, their limited scope offers no relief to tens of thousands of employees of smaller firms.

In the absence of a legislative mandate, courts must look to Title VII and the regulations and holdings of the EEOC for guidance. The following section will examine the analysis used by the courts and EEOC in dealing with discrimination in the context of pregnancy leave.

II. Title VII as Interpreted by the Courts and the EEOC

A. An Overview of Title VII

Courts may analyze discrimination under Title VII in any of three ways. First, evidence that the employer intentionally discriminated against an individual because of her race, color, religion, sex, or national origin (protected status) constitutes "individual disparate treatment."[54] Intentional limitation, segregation or classification of an employee or applicant which deprives her of an employment opportunity due to protected status is termed "systemic disparate treatment."[55] Finally, other adverse effects on an individual's status as an employee because of her protected status are called "disparate impact."[56]

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ride the veto on July 26, 1990. *See* CRS Issue Brief, *supra* note 16, at CRS-1. *See also Family Leave Revived*, *supra* note 17, at 118.

53. On August 3, 1990, family leave legislation was reintroduced in both chambers. *See* H.R. 5500 101st Cong., 2d Sess. (1990), and S. 2973, 101st Cong., 2d Sess. (1990). These bills will constitute the most important family and medical leave legislation before Congress in 1991. *See* CRS Issue Brief, *supra* note 16, at CRS-1; *see also Family Leave Revived*, *supra* note 17, at 118.

54. 42 U.S.C. § 2000(e)-2(a) provides:

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

42 U.S.C. § 2000e-2(a) (1988).

55. *Id.*

56. *Id.*

Under the individual disparate treatment theory, the plaintiff must demonstrate by a preponderance of the evidence that the employer intentionally discriminated against the plaintiff because of his or her protected status.[57] The plaintiff may prove intent by either direct or circumstantial evidence. In the former case, where, for example, there is a "smoking gun" or facial discrimination, the burden of proof shifts to the employer to prove nondiscriminatory intent.[58] In the latter case, the burden of proof does not shift and remains with the plaintiff.[59] Where a case involves both discriminatory and permissible motives, the plaintiff must demonstrate that stereotyping or discrimination played a motivating role in an employment decision, and the employer must then show by a preponderance of the evidence that its decision would have been the same in the absence of the impermissible motive.[60]

Under systemic disparate treatment analysis, if the plaintiff proves that the employer intentionally uses a policy, practice, or classification that limits opportunities for members of a protected class, the employer is liable to the victims in that class.[61] Plaintiffs must prove that actual victims suffered discrimination. Statistics may be used as evidence but are not sufficient in themselves.[62]

Disparate impact, according to *Wards Cove Packing Co. v. Atonio*,[63] requires the plaintiff to prove a prima facie case by demonstrating that a facially neutral practice caused a statistical disparity between qualified persons in the relevant labor market and

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57. Hishon v. King & Spalding, 467 U.S. 69 (1984). The Court held that plaintiff's complaint stated a claim cognizable under Title VII where a law firm, in rejecting her for partnership, had failed to consider her on a fair and equitable basis.

58. Trans World Airlines v. Thurston, 469 U.S. 111 (1985) (TWA's transfer policy allowing captains who became disqualified for any reason other than age to "bump" less senior flight engineers held discriminatory on its face).

59. The test for circumstantial evidence was set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The *McDonnell Douglas-Burdine* test requires the plaintiff to show that he or she belonged to a class protected by Title VII, applied and was qualified for an available position, and, after rejection, the position remained open and the employer continued to seek applicants from persons matching the complainant's qualifications. *McDonnell Douglas Corp.*, 411 U.S. at 802. The defending employer need only produce evidence which demonstrates a legitimate, nondiscriminatory reason for rejection of the complainant. *Burdine*, 450 U.S. at 252-56. The plaintiff then bears the burden of persuading the trier of fact that the employer's nondiscriminatory reason was merely a pretext for discrimination. *Id.* at 256.

60. Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989).

61. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

62. *Id.* at 339-40.

63. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

the persons holding at-issue jobs.[64] After the plaintiff establishes such a case, the employer must produce evidence of a business justification for this practice;[65] the burden of persuasion, however, remains with the plaintiff.[66]

If the plaintiff fails to persuade the trier of fact that the employer's justification is illegitimate, the plaintiff may still prevail by persuading the factfinder that the employer's defense is pretextual. The plaintiff must show that other selection devices, without similarly undesirable discriminatory effects, would be at least equally effective in achieving the employer's legitimate goals.[67] In determining the effectiveness of selection devices, factors to be considered include the costs and other burdens of such devices.[68] If the plaintiffs can show that the employer was aware of less restrictive alternatives, and refused to adopt these alternatives, the employer's justification is seriously undermined.[69] Employers have no defense that the bottom line result of the policy yields an appropriate balance.[70]

The employer may avoid liability by proving that the classification or limitation is protected by a statutory exception,[71] or, in

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64. In *Wards Cove*, former salmon cannery workers brought a class action suit alleging employment discrimination on the basis of race. *Id.* at 647-48. Noncannery jobs were classified as skilled positions, commanded greater pay than any of the cannery positions, and were filled predominantly with white workers. *Id.* at 647. The Court ruled that the proper statistical comparison is generally "between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." *Id.* at 650 (brackets and ellipsis in original) (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977)). Thus a comparison between the percentage of nonwhite cannery workers and the percentage of the nonwhite noncannery workers was inappropriate. *Id.* at 651. In addition, the Court commented that in "cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics — such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs — are equally probative for this purpose." *Id.* at 651 (citation omitted).

65. *Id.* at 2126.

66. *Id.*

67. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989).

68. *Id.* at 661.

69. *Id.* at 660-61.

70. *See* Connecticut v. Teal, 457 U.S. 440 (1982). In *Teal*, the Court found plaintiffs suffered racial discrimination from the statistical disparate impact which an examination had on promotion. An employer had no defense in the argument that the "bottom line" statistical result of the promotion practice was an appropriate racial balance. *Id.* at 452-56. The Uniform Guidelines on Employee Selection Procedures sets forth uniform guidelines regarding the use of tests and other employee selection procedures used by the Equal Employment Opportunity Commission. 29 C.F.R. § 1607.1 (1990).

71. 42 U.S.C. § 2000e-2(h) (1988) provides:

(h) Notwithstanding any other provision of this subchapter, it shall not be an

the case of disparate treatment, is a bona fide occupational qualification (BFOQ).[72] The Supreme Court clarified how narrowly it interprets the BFOQ defense in pregnancy discrimination cases in the recent case *UAW v. Johnson Controls, Inc.*[73] The Court emphasized that a BFOQ is limited to situations where sex discrimination is " 'reasonably necessary' to the 'normal operation' of the 'particular' business."[74] The Court then ruled that such a policy could not be justified as a BFOQ because fertile women work as

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unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such diffeerences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability tests provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

72. 42 U.S.C. § 2000e-2(e)(1) (1988) provides:

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

73. UAW v. Johnson Controls, Inc., 59 U.S.L.W. 4209 (U.S. March 20, 1991).

The Court first ruled that a facially discriminatory fetal protection policy that precluded women with childbearing capacity from lead-exposed jobs is sex discrimination unless the employer can establish that sex is a BFOQ. *Id.* at 4212. The first issue the Court addressed was whether sex-specific fetal protection policies involve facial discrimination. *Id.* at 4211-12. The Court concluded that such a policy is not neutral. The policy did not affect the company's male employees in the same way as it did female employees because the reproductive capacities of the sexes were treated differently. *Id.* at 4212. Further, the "beneficence of an employer's purpose" does not transform the facially discriminatory policy into a neutral policy with a discriminatory effect. *Id.* The Court then cited favorably the internal policy guidance notice of the EEOC, promulgated on January 24, 1990, that BFOQ is the better approach. *Id*; *see also EEOC Won't Rely on Broad Fetal Protection Plan Endorsed in 7th Circuit's* Johnson Controls *Ruling*, 1990 Daily Lab. Rep. (BNA) 18 at A-10 (January 26, 1990).

74. *Id.* at 4212 (citing 42 U.S.C. § 2000e-2(e)(1)).

efficiently as anyone else in the workplace and because the safety exception to the BFOQ does not apply.[75] Regarding the safety argument, the Court explained that the employer's concern about the safety of the fetus was misplaced because these third parties were not indispensable to the essence of the particular business.[76] The Court then concluded: "[i]n other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[77]

In sum, a plaintiff may bring a successful claim for discrimination under individual disparate treatment, systemic disparate treatment, or disparate impact analyses. The following section will examine the ways in which these analyses may enable plaintiffs to prove employment discrimination on the basis of pregnancy.

B. Discrimination on the Basis of Pregnancy under Title VII

In 1978, Congress enacted the Pregnancy Discrimination Act to amend Title VII in order to clarify that discrimination on the basis of pregnancy, childbirth, or related medical condition is prohibited by the terms "because of sex" and "on the basis of sex."[78] This amendment reversed the Supreme Court's holding in *General Electric Co. v. Gilbert* that discrimination on the basis of pregnancy did not violate Title VII because a comparison of the class of pregnant women with the class of men and nonpregnant women did not demonstrate discrimination on the basis of sex.[79] The Act

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75. *Id.* at 4213.

76. *Id.* The Court also noted that the Act itself contained a BFOQ standard of its own: "unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.' " *Id.* (quoting 42 U.S.C. § 2000e-(k)).

77. UAW v. Johnson Controls, Inc., 59 U.S.L.W. 4209, 4213 (U.S. March 20, 1991).

78. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-2(k) (1988)).

79. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The Court concluded that a health insurance plan that provided coverage for all disabilities but excluded pregnancy-related benefits did not violate Title VII. The Court reasoned that since not all women become pregnant, the potential beneficiaries of the insurance program were nonpregnant women and men. *Id.* at 133-46.

The other Title VII case that predated the Pregnancy Discrimination Act was Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), where the Court invalidated an employer's policy denying pre-leave accumulated seniority benefits to employees returning from education or pregnancy-related leaves. The Court found that, based on a disparate impact analysis, the policy was neutral on its face but was discriminatory in effect. *Id.* at 140-41. The Court also stated that the policy in *Satty*, unlike the one in *Gilbert*, imposed the substantial burden of forfeiture of seniority rights on women but not men. *Id.* at 141-42.

nullified that interpretation. It provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[80]

The underlying principle of the Act is that pregnancy must be treated like other physical disabilities, and that pregnant women must be judged on the basis of their ability or inability to work.[81]

The Court has interpreted the Act three times. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Court invalidated a health insurance plan that provided less extensive pregnancy-related benefits to the spouses of male employees than to the spouses of female employees.[82] The Court also ruled, in *California Federal Savings & Loan Association v. Guerra*, that the Act does not pre-empt a state statute that requires employers to provide unpaid pregnancy disability leave of up to four months and a right of reinstatement unless the job is no longer available due to business necessity.[83] Finally, as discussed above, the Court in *Johnson Controls*[84] ruled that a facially discriminatory fetal protection policy that excluded women with childbearing capacity from lead-exposed jobs is sexually discriminatory unless the employer can establish that sex is a BFOQ.[85] The Court then held

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Other Supreme Court decisions before the Act split on the issue of whether discrimination on the basis of pregnancy constituted discrimination under the Fourteenth Amendment. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1972), the Court struck down a public school policy that placed teachers on mandatory unpaid maternity leave in the early months of pregnancy, reasoning that the pregnant woman has a due process right to freedom of personal choice in matters of marriage and family life. *Id.* at 643-48. In Geduldig v. Aiello, 417 U.S. 484 (1974), however, the Court ruled that no violation of the equal protection clause occurred where a state excluded pregnancy from a state-financed disability insurance system for private employees because the potential beneficiaries of the insurance program were the class of nonpregnant women and men. *Id.* at 494-97.

80. 42 U.S.C. § 2000e(k) (1988).

81. *See* Questions and Answers on the Pregnancy Discrimination Act; 29 C.F.R. § 1604 app. at 204 (1990) (Introduction).

82. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

83. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

84. UAW v. Johnson Controls, Inc., 59 U.S.L.W. 4209 (U.S. March 20, 1991). *See supra* notes 73-77 and accompanying text.

85. *Id.* at 4213-14.

that the employer could not demonstrate a BFOQ because fertile women work as efficiently as anyone and because protection of the fetus did not establish a BFOQ of female sterility.[86] As discussed below, the Court has yet to rule on the issue of inadequate leave policies for pregnancy-related disabilities.[87]

C. Interpretations of the Equal Employment Opportunity Commission

The EEOC's policy regarding maternity and parental leave imparts a valuable perspective on the issue of insufficient pregnancy leave. Also, recent EEOC findings in the area of pregnancy discrimination provide the context within which the issue of insufficient pregnancy leave can be analyzed.

The EEOC draws an important distinction between maternity[88] and parental leaves.[89] The EEOC's definition of "maternity leave" covers only the period of actual physical inability to work as a result of pregnancy, childbirth or related medical conditions.[90] The term does not include leave for personal reasons related to maternity, such as breastfeeding, bonding, or preparation for childbirth, where there is no accompanying disability.[91] The term also does not include paternity leave.[92] Rather, to the EEOC, maternity

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86. *Id. See supra* notes 73-77 and accompanying text.

87. *See infra* notes 120-166 and accompanying text.

88. EEOC Compliance Manual, *supra* note 10, at § 626.5.

89. EEOC Policy Guidance on Parental Leave, 1990 Daily Lab. Rep. (BNA) No. 224 (Nov. 20, 1990).

90. *See* EEOC Compliance Manual, *supra* note 10, at § 626.5, and accompanying text for the EEOC definition of maternity leave. The term "fringe benefits" found in the statute includes "leave." 29 C.F.R. § 1604.9(b) (1990).

91. The EEOC distinguishes between "child-care and related leave" and "maternity leave." Maternity leave relates only to the actual physical inability to work based on medical reasons. EEOC Compliance Manual, *supra* note 10, at §§ 626.5, 626.7 (April 1985). The EEOC concludes that it is therefore not a violation of Title VII to deny childcare leave when the employer limits all types of disability leave to the period of actual physical inability to work based on medical reasons and applies its personal leave policy to male and female employees alike on the same terms and conditions. *Id.* Where the employer permits personal leave to care for the child, however, the leave must be available to both males and females on the same terms and conditions. *Id. See infra* notes 104-108 and accompanying text regarding the EEOC's Policy on Parental Leave.

92. The EEOC describes paternity leave as leave for the expectant or new father of a child. EEOC Compliance Manual, *supra* note 10, at § 626.6. When an employer allows maternity leave for disabilities related to pregnancy, it does not violate Title VII by denying male employees "paternity leave." The EEOC reasons that since the father cannot become pregnant or give birth, he can not be physically disabled as the result of pregnancy or child-

leave is a form of disability or sick leave.

The EEOC's distinction between maternity and parental leave establishes a framework for its substantive findings on pregnancy discrimination. Focusing on women's rights to maternity and parental leave, the EEOC has found that employment policies which exclude or otherwise limit employees because of pregnancy, childbirth or related medical conditions are prima facie violations of Title VII.[93] According to the EEOC, when an employer allows leave

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birth. *Id.*

The EEOC has also stated that when an employer allows leave for disabilities not related to pregnancy, the employer may not lawfully refuse to grant paternity leave or apply different terms or conditions to such leave. Where, for example, an employer chooses to accommodate the personal or childcare needs of female employees by allowing them to take "extended maternity leave," the employer may not deny paternity leave to male employees for similar purposes. Extended maternity leaves must be granted on the same terms to both male and female employees. If, for example, the female is permitted to take accumulated sick leave or personal leave as extended maternity leave, then the employer must use the same standard for paternity leave. The EEOC concludes that, with respect to extended maternity leave, to accommodate the female and not the male would constitute unlawful disparate treatment of males on the basis of their sex. *Id.*

93. 29 C.F.R. § 1604.10 (1990). Section 1604.10, Employment Policies Relating to Pregnancy and Childbirth, provides in relevant part as follows:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities . . . .
>
> (c) 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.
>
> (d)(1) Any fringe benefit program, or fund, or insurance program . . . which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) . . . . In order to come into compliance with the provisions of § 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978 . . . .
>
> (2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation.

Id.

for disabilities not related to pregnancy, it may not deny leave for pregnancy-related disabilities or apply different or additional terms or conditions to such leaves.[94] For example, an employer may not require a pregnant employee to go on leave when she is able to work,[95] prohibit an employee from returning to work for a predetermined length of time after childbirth,[96] or require a female disabled by pregnancy or related conditions to exhaust vacation leave or sick leave before taking disability leave.[97]

An employer must also hold the employee's job open while she is on pregnancy disability leave on the same terms as those held open for employees on sick or disability leave for nonpregnancy reasons.[98] Further, an employer may not impose minimum or maximum time limits on the duration of maternity leave where no such time limits are imposed on other types of disability leaves, and must provide income maintenance benefits on the same basis as for other temporary disabilities.[99]

In addition, the employer may not condition the availability of maternity leave on an employee's marital status.[100] Such a policy or practice, according to the EEOC, constitutes disparate treatment based on sex and may result in a disparate impact on

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94. 29 C.F.R. § 1604 app. at 204 (1990).

95. *Id.* at 205-06 (Questions 6, 8).

96. *Id.* at 206 (Question 7).

97. *Id.* at 206 (Question 18).

98. 29 C.F.R. § 1604 app. at 206 (Question 9) (1990).

99. *Id.* at 206 (Questions 6, 7, 15).

Compliance with state law does not necessarily mean that the employer complies with the Act. Question 19 at 29 C.F.R. § 1604 app. at 207 provides:

> Q. If state law requires an employer to provide disability insurance for a specified period before and after childbirth, does compliance with the state law fulfill the employer's obligation under the Pregnancy Discrimination Act?
>
> A. Not necessarily. It is an employer's obligation to treat employees temporarily disabled by pregnancy in the same manner as employees affected by other temporary disabilities. Therefore, any restrictions imposed by state law on benefits for pregnancy-related disabilities, but not for other disabilities, do not excuse the employer from treating the individuals in both groups of employees the same. If, for example, a state law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.

29 C.F.R. § 1604 app. at 207 (Question 19) (1990).

100. *Id.* at 206 (Question 13); EEOC Compliance Manual, *supra* note 10, at § 626.5.

women.[101] Likewise, the termination of an employee who is temporarily disabled by pregnancy as a result of a policy providing for no or insufficient leave "violates the Act, if it has a disparate impact on employees of one sex and is not justified by business necessity."[102]

Leave for childcare purposes after the new mother is medically able to return to work is not required. An exception exists where an employer allows all its employees to take accrued annual leave or leave without pay for reasons unrelated to the job.[103] The em-

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101. EEOC Compliance Manual, *supra* note 10, at § 626.5. The EEOC explains that even a facially neutral policy, such as a policy that denies disability leave to an employee who has not been employed for a set period of time, may be unlawful where it adversely affects female employees and is not justified by overriding business necessity. *Id. See also* the discussion concerning the method by which disparate impact claims are proven under Title VII after *Wards Cove*, 490 U.S. 642 (1989), *supra* notes 63-70 and accompanying text.

102. 29 C.F.R. § 1604.10(c) (1990). *See also* 29 C.F.R. § 1604 app. at 204-09 (1990) where related matters are addressed. For example:

> 15. Q. For what length of time must an employer who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?
>
> A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.
>
> 16. Q. Must an employer who provides benefits for long-term or permanent disabilities provide such benefits for pregnancy-related conditions?
>
> A. Yes. Benefits for long term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long-term or permanent disability.
>
> 17. Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving or profit sharing plans, must the same benefits be provided for those on leave for pregnancy-related conditions?
>
> A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

29 C.F.R. § 1604 app. at 206 (Questions 15-17) (1990).

103. 29 C.F.R. § 1604 app. at 206-07 (Question 18A) (1990). The EEOC explains:

> Q. Must an employer grant leave to a female employee for childcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?
>
> A. While leave for childcare purposes is not covered by the Pregnancy Discrimination Act, ordinary Title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.

ployer must justify any inequality in parental leave favoring pregnant women by proving that the disparity is attributable to the woman's pregnancy-related disability,[104] or by arguing that Title VII permits preferential treatment of women with regard to childcare.[105]

Finally, discriminatory parental leave policies in favor of pregnant women may also cause disparate treatment and cannot be justified as bona fide occupational qualifications.[106] Policies may cause disparate impact where they have an adverse impact on either females or males.[107]

III. The Application of Title VII to Inadequate Maternity Leave Policies

Part III will demonstrate that employers who provide inade-

Id. See also the discussion regarding the EEOC's Policy on Parental Leave, *infra* at notes 104-108 and accompanying text.

104. EEOC Policy Guidance on Parental Leave, 1990 Daily Lab. Rep. (BNA) No. 224, at F-1 (Nov. 20, 1990) (LEXIS, Labor library, Dlabrt file). The EEOC cautions that the "safe harbor" for employers is to separate the issue of pregnancy disability leave from the issue of parental leave. *Id.* Thus, pregnancy related disability leave would be treated like other medical disability leave, and parental leave would be a uniform standard for both males and females. *Id.*

105. *Id.* The Supreme Court has not yet ruled on the issue of whether a private employer can, without the umbrella of a state statute, provide preferential treatment of women. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987), *infra* notes 142-148 and accompanying text.

106. The EEOC does not consider sex a bona fide occupational qualification for childcare because the female employee is more likely to be primarily responsible for raising children. EEOC Policy Guidance on Parental Leave, 1990 Daily Lab. Rep. (BNA) No. 224, at F-1 (Nov. 20, 1990) (LEXIS, Labor library, Dlabrt file). This defense applies only to criteria for employment, not to benefit claims, and can be justified only if the essence of the business would be undermined without its use. *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).

The EEOC cautions that stereotypical assumptions about a woman's role as the primary childcare giver will not establish the defense. *Id.* Employers who conclude that only female employees should have the opportunity to participate in the childrearing process discriminate against males who want to take a more active role. *Id.* The employer's policy assumption or stereotype about gender roles thus violates the Title VII principle that employees are to be treated as individuals. *Id.* (citing Manhart v. City of Los Angeles, Dept. of Water & Power, 435 U.S. 702, 708 (1978)).

107. *Id.* The EEOC illustrates: "if an employer limits available parental leave only to those employees with working spouses, or to married employees whose income is less than half of the household income, or to employees whose working spouse is not also on leave, male employees will tend to be precluded from leave benefits." *Id.* After impact is shown, then the inquiry becomes whether the policy serves the legitimate employment goals of the employer in a significant way. *Id.* (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989)).

quate maternity leave policies violate Title VII. In cases where the policy is challenged as disparate treatment, the violation occurs because men and women are not treated equally. In cases where the policy is challenged as having a disparate impact, the violation occurs precisely because women are treated exactly like men. Many of the arguments raised in the cases reflect the "equal treatment/special treatment" theories debated among feminists. In Part III, it is argued that Title VII mandates, in some cases, equal treatment, and, in other cases, special treatment to ensure that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[108]

A. Feminist Jurisprudence

The issue of inadequate pregnancy leave policies may be examined in the context of feminist jurisprudence. Although feminist theories are not the focus of this article, many courts make reference to the arguments raised by feminists. Thus a brief overview of this jurisprudence may provide a valuable perspective on these issues.

Feminists generally seek to empower women and reduce the dominance of men in the political hierarchy in order to achieve equality between the sexes. Feminist literature in the area of pregnancy discrimination focuses on the extent to which sex-based classifications should be tolerated. This is known as the "special treatment/equal treatment" debate.

Supporters of the "special treatment" model argue that sex-based classifications are acceptable where the classifications benefit women.[109] These feminists argue that women make unique contributions to the workplace through their ability to nurture and express vulnerability.

Critics of this model argue that laws that appear to give pregnant women preferential treatment are likely to jeopardize the hiring of women due to the potential increase in costs to the employer. They add that such laws may cause resentment by

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108. *Id.*

109. *See, e.g.*, Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1163-82 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 78-87 (1985).

nonpregnant co-workers.[110]

Supporters of the "equal treatment" model, on the other hand, argue that women should be treated no differently than men.[111] They argue that pregnant workers share similar experiences with other disabled workers, and that the focus therefore should be on the similarities between the experiences of both genders and not narrowly on motherhood.[112]

Critics of the "equal treatment" model argue that it fails to account for the real physical differences between the sexes, in that only women can become pregnant.[113] Further, they argue that pregnant women's needs are not met to the same degree as those of other temporarily disabled workers.[114]

Some reject the equal treatment model because it erroneously presupposes neutrality and objectivity.[115] They argue that since society is the political expression of male dominance, maleness is the norm of what is human and the context within which decisions are made.[116] Therefore, gender should be viewed as hierarchical. Where men dominate women, and the domination is sexual, a model that treats the sexes equally is inherently flawed.[117]

Finally, there is the "equality as acceptance" model.[118] This

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110. Taub, *supra* note 2, at 382.

111. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85). The author argues that too much emphasis is placed on gender differences because most behavioral and attitudinal tests show substantial similarities between the sexes. *Id.* at 380-81. *See also* Taub, *supra* note 2, at 382.

112. Taub, *supra* note 2, at 382. The equality model has been favored in most pregnancy discrimination cases. *See* notes 78-87 and accompanying text. *But see* California Fed. Sav. & Loan Ass'n v. Guerra, *infra* at notes 142-148 and accompanying text.

113. Taub, *supra* note 2, at 392.

114. *Id.*

115. *See* C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, 32-45 (1987). The author contends that gender should be viewed as hierarchical and that inequality is sexual in nature. *See also* Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1561-62 (1987). *See generally* Olsen, *Feminist Theory in Grand Style* (Book Review), 89 COLUM. L. REV. 1147, 1151-54 (1989) (review of FEMINISM UNMODIFIED).

116. C. MACKINNON, *supra* note 115, at 40-45 (1987).

117. *Id.* at 117-18.

118. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1323-37 (1987); Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1052-59 (1987).

Some feminists challenge the questions asked about sex discrimination and their differences from conventional questions about women and the law. *See* Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985). *See also*, Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*,

model recognizes women's biological and cultural differences, regardless of whether they are "natural" or "constructed," as real and significant. Inequality, it is argued, results when society devalues women because they differ from the male norm. Society should therefore reassess the value it accords to traditionally "female" behavior, such as childbearing and childrearing, and value it fairly.[119]

B. Analysis

An employer violates Title VII when its pregnancy-related disability leave policy does not comport with good medical practice or when it is administered in a fashion that does not address the needs of pregnant women. Title VII claims arise in three ways. First, an employer's policy may require mandatory unpaid leave during pregnancy and following childbirth (mandatory leave). Second, a policy may require a woman to choose between paid sick leave and unpaid maternity leave (sick v. maternity leave). Finally, a policy may provide insufficient sick leave where the time provided is less than medical experts deem adequate. These claims can be raised under either disparate treatment or disparate impact theories, assuming disparate impact claims of pregnancy discrimination are cognizable under Title VII.[120] Under either theory, the standards of the College are persuasive as to what constitutes good medical practice[121] and the interpretations of the EEOC are entitled to great deference.[122]

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3 BERKELEY WOMEN'S L.J. 1 (1987-88); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

119. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1324-37 (1987).

120. There are many cases alleging discrimination on the basis of pregnancy that do not involve issues regarding leave. For example, in EEOC v. Vucitech, 842 F.2d 936 (7th Cir. 1988), an employer's policy of providing baby bonuses to male employees in lieu of maternity benefits was held to violate the Act because *Newport News*, which forbade discrimination with respect to benefits for pregnant dependents of male employees, applied retroactively). In Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987), the court dismissed a Title VII action brought by an unmarried staff member of a private social club for girls following her discharge under the club's "negative role model" policy. The policy prohibited continued employment of unmarried staff members who either became pregnant or caused pregnancy because they were not a good role model for the girls. The court reasoned that the role model rule was a BFOQ because it was reasonably necessary to the club's operations and, also, that the rule was justified by business necessity because there was a manifest relationship between the club's fundamental purpose and the rule. In Carrington v. Frank, CV No. 87-0-349, (D. Neb. 1989) (LEXIS, Genfed Library, Dist file), the court held that denial of light duty following announcement of pregnancy constituted disparate treatment.

121. *See supra* notes 20-22 and accompanying text.

122. The Supreme Court has stated that the interpretations of the EEOC are entitled

1. Disparate Treatment

Under Title VII, an individual may claim that disparate treatment occurs when an employer's policy requires that pregnant employees take mandatory unpaid leave, medical leave early in pregnancy, or involuntarily make a choice between short-term paid sick leave and longer-term unpaid maternity leave. This section will scrutinize such policies under a disparate treatment analysis. It will show that these policies violate Title VII, and that the defenses commonly invoked do not exculpate the employer.

a. Mandatory Leave Policies

In mandatory unpaid leave situations, an employer typically places the pregnant woman on mandatory unpaid leave, with the result that she is forced from the workplace at a time when she is willing and able to perform the job with, perhaps, some minimal physical assistance.[123] A plaintiff may offer direct evidence of discrimination by showing that her employer's policy improperly required her to take pregnancy-related leave. Facially neutral terms such as "related medical condition" do not save the policy.[124] Dis-

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to great deference when such interpretations comport with the purposes of the Act. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), where the Court said the EEOC's guidelines "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . ." *Id.* at 65 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).

Occasionally, the Court has disagreed with the interpretations of the EEOC. *See* Public Employees Retirement System v. Betts, 109 S. Ct. 2854 (1989). There, the Court held that § 4(f)(2) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1982) exempts age-based provisions in bona fide employee benefits plans from the purview of the Act regardless of whether such provisions are cost-justified, unless the plan is a subterfuge for discrimination in the non-fringe benefit aspects of the employment relationship. *Id.* at 2860-69. The Court refused to adopt the EEOC's interpretation that such benefit plans did violate the ADEA. *Id.* at 264-65. *Betts* was nullified by the Older Workers Benefit Protection Act (October 16, 1990), Pub. Law No. 101-433, 104 Stat. 978 (1990) (to be codified as amended at 29 U.S.C. § 623 (f)(2)), which is a legislative enactment that parallels the EEOC's original interpretation.

123. *E.g.*, Carney v. Martin Luther Home, Inc., 824 F.2d 643 (8th Cir. 1987) (employer's placing of pregnant employee on mandatory unpaid leave constituted disparate treatment); *see also* EEOC v. AT&T Technologies, Inc., Nos. 78 C 3951, 82 C 1542, 45 Fair Empl. Prac. Cas. (BNA) 568 (N.D. Ill. 1987) (plaintiffs' partial motion for summary judgment granted where employer's policy required mandatory unpaid maternity leave by pregnant employees following the sixth month of pregnancy, denial of seniority accrual and denial of reinstatement to job because such policy has disproportionate impact on women).

124. *Carney*, 824 F.2d at 648. Of course, if a facially neutral policy is intentionally ap-

crimination is proven where there is no satisfactory medical reason why she should be placed on leave, the leave is not consistent with medical standards, or the policy rests on a stereotypical assumption about a pregnant woman's inability to work.[125] A finding of discrimination in such circumstances judges women on their actual ability and willingness to work, one of the purposes of Title VII. Such an application is consistent with the EEOC Guidelines prohibiting policies which exclude women from employment because of pregnancy.[126] The pregnant worker in these circumstances is arguing for "equal treatment" as long as she is able to perform the job.

The defendant then has an opportunity to demonstrate that placing the woman on leave was justified by a bona fide occupational qualification.[127] Where the employer demonstrates a factual basis for believing it is reasonably necessary to the essence of the business, the policy of placing a woman on mandatory leave can be justified.[128] Such a defense, however, cannot rest on a claimed concern for a pregnant woman's well-being or unfounded notions

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plied in a discriminatory manner, intent can be demonstrated either by direct evidence or pursuant to the *McDonnell Douglas-Burdine* formulation and *Price Waterhouse*. *See supra* notes 57-60 and accompanying text. In many cases, however, the policy itself is facially discriminatory and intended to be that way.

125. As *Price Waterhouse v. Hopkins* teaches, employment decisions may not be based on stereotypes. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). *See supra* note 60 and accompanying text.

126. *See* 29 C.F.R. § 1604.10(a), *supra* at note 93.

127. 42 U.S.C. § 2000e-2(e). *See* UAW v. Johnson Controls, Inc., 59 U.S.L.W. 4209 (U.S. March 20, 1991).

128. An example of such a purported BFOQ would be the stamina and agility required in flight attendants for the safe transportation of passengers. As a result of their condition, pregnant flight attendants arguably are unable to give necessary assistance to passengers during flight emergencies. Leonard v. Pan American World Airways, Inc. (*In re* Pan American World Airways, Inc., Maternity Leave Practices & Flight Attendant Weight Program Litigation), 905 F.2d 1457, 1459 (11th Cir. 1990). In *Pan American*, the airline's maternity leave policy required that the pregnant flight attendant, upon learning that she was pregnant, give notice of pregnancy, take unpaid leave for the duration of her pregnancy, and return to work within 60 days of delivery. The court held that the policy was discriminatory as to the "stop" portion and could not be justified as a BFOQ serving passenger safety. The court stated that the lower court's remarks were to assist the parties in constructing a new stop provision to replace the one struck down. *Id.* at 1459-60. *See also* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980) (airline's mandatory leave policy for flight attendants during the first 13 weeks of pregnancy violated female flight attendants' Title VII rights because such policy was not necessary to safe transportation of passengers); *but see* Harriss v. Pan American World Airways, Inc. 649 F.2d 670 (9th Cir. 1980) (policy requiring commencement of unpaid leave within twenty-four hours of learning of pregnancy and continuation of leave for sixty days after birth justified as business necessity based on safety considerations and a BFOQ).

about her abilities because such concerns or notions are based upon stereotypes.[129]

b. Sick Leave v. Maternity Leave

An individual may also argue that an employer's policy of requiring a pregnant female to choose between sick leave and maternity leave constitutes disparate treatment. For example, an employer would require a pregnant school teacher to choose between paid sick leave accrued during her tenure, and unpaid maternity leave for a longer period of time, such as a school year, with no right to combine both types of leaves.[130] The result is that most teachers take the longer maternity leave. First, the accrued sick leave may be less than the six to eight week period advised by the medical profession. Second, the taking of sick leave may mandate a return to full-time employment after six weeks with no flexibility to take maternity leave for infant care. In either event, these women do not use paid sick days for the portion of their leave related to disability. And, in many cases, the same choice is not required for other types of disability leave.

Such a policy raises two issues under a disparate treatment analysis. First, women who have babies are treated differently than nonpregnant persons with disabilities. During the six to eight week period when pregnant women are disabled they do not receive a benefit, paid sick leave, that a nonpregnant person would have received. This is particularly harsh for pregnant women who cannot return to work before the end of their sick leave for health reasons.

Second, even where the same choice is given to all employees, in reality pregnant women take disability leave much more frequently than nonpregnant employees. Such policies, therefore, may reflect a community bias that women with newborns should not

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129. *See* UAW v. Johnson Controls, Inc., 59 U.S.L.W. 4209, *supra* notes 73-77 and accompanying text; *see* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

130. These were essentially the facts in Scherr v. Woodland School Community Consol. Dist. No. 50, 867 F.2d 974 (7th Cir. 1988). The court reversed a summary judgment on the issue of whether Woodland's "no combination" policy was legitimate. A legitimate policy may prohibit the combination of paid sick leave and unpaid maternity leave, if it is applicable to nonpregnant teachers. Such a policy was upheld in a companion case because no teacher could ever take paid sick leave immediately prior to the beginning of a general unpaid leave of absence, which had to conform with the school year. *See also* United States v. Bd. of Educ., No. 88 C 3113 (N.D. Ill. June 27, 1990) (summary judgment motion denied where policy provided that paid sick leave could not be taken in conjunction with unpaid maternity leave even though no other leaves were subject to a similar requirement).

work and should stay at home.[131] When such a policy is instituted because of community stereotyping, it may be challenged under a systemic disparate treatment theory.

Such a policy may also be designed as a cost-saving measure to address the "high cost" of pregnant workers. In the case of school teachers, the costs saved include the amount of sick pay and the difference between the pregnant teachers' salary and the lower salary paid to their substitutes. In light of this, a school district intent on cutting costs would logically focus on pregnant workers. In such circumstances, the employer may argue that a "cost-saving" measure constitutes a "business necessity."

Cost savings do not, however, justify intentional discrimination or constitute a business necessity. Compliance with the civil rights laws often involves increased costs. This type of policy is the kind of employer action that creates barriers for pregnant workers; the Act was designed to prohibit such barriers. Where a policy is applied almost always to pregnant women, the policy articulated as a "cost-saving" measure may be a policy designed to exploit the class of pregnant women in the workplace. Such a policy therefore constitutes systemic disparate treatment regarding benefits.

c. Conclusion

Summarizing, pregnant women utilize disability policies at a rate much higher than nonpregnant employees. Policies reflecting community bias or designed to take advantage of pregnant women discriminate against women on account of pregnancy and cannot be justified as BFOQs or business necessities. Such a conclusion is consistent with the purpose of Title VII, which is to provide equal opportunity in the workplace, including benefits. Further, it is consistent with the regulations of the EEOC, particularly section 1604.10.[132] Therefore, if a woman can show intent, she can show individual or systemic disparate treatment where the employer's policy requires a pregnant employee either to take mandatory un-

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131. This community bias reflects the stereotype that once women have children, they do not and should not want to work and, when they do, they are transient, unreliable and uncommitted. This stereotype is contradicted *supra* notes 54-108 and accompanying text. *See also* Schafer v. Bd. of Pub. Educ., 903 F.2d 243 (3rd Cir. 1990), where, in a related context, the Third Circuit has held that a provision in a collective bargaining agreement allowing only female (and not male) teachers leave for childrearing contravened Title VII.

132. *See* 29 C.F.R. § 1604.10(d), *supra* at note 93.

paid leave while she is able to perform the job or to choose between short-term paid sick leave and longer-term unpaid maternity leave.[133]

2. *Disparate Impact*

Before a plaintiff can raise a successful claim of disparate impact, she may have to prove, first, that disparate impact claims are cognizable under Title VII. Then, she must meet the difficult burden imposed by *Wards Cove*.[134] The following will discuss disparate impact and the standards imposed by each of these criteria.

a. Are Disparate Impact Claims Cognizable?

The first issue is whether disparate impact claims can be legitimately raised under the Act.[135] Those who argue that they cannot claim that the Act demands equal treatment because the language of the statute provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated *the same* for all employment-related purposes."[136] They argue that both the plain meaning and the legislative intent of the Act is to prohibit intentional discrimination on the basis of pregnancy and not to address policies that have a disparate impact on women because of pregnancy.

Such an argument fails to recognize that the Act was an amendment to define further the phrases "because of sex" and "on the basis of sex" to include pregnancy following *Gilbert*.[137] As an

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133. Policies that impose conditions on females returning from pregnancy-related disability leave that differ from those imposed on men returning to work from disability leave are also subject to Title VII challenge. *See* Harper v. Thiokol Chemical Corp., 619 F.2d 489 (5th Cir. 1980) (employer's policy of requiring women who had been on pregnancy leave to have sustained a normal menstrual cycle before they could return to work imposed on female employees a burden which male employees need not suffer and, absent business justification, constituted unlawful employment practice).

134. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

135. The United States, as amicus curiae, has argued this unsuccessfully. Scherr v. Woodland School Community Consol. Dist. No. 50, 867 F.2d 974, 977-78 (7th Cir. 1988) (claim by female school teachers that the district's maternity leave policy requiring women to take either paid disability leave for six weeks or unpaid maternity leave for a longer period of time raised material issue of fact under the disparate impact theory).

136. 42 U.S.C. § 2000e(k) (1988) (emphasis added). For partial text of the statute, *see supra* note 80 and accompanying text.

137. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). *See supra* note 79 and accompanying text.

amendment to a definition, the Act itself has no substantive force.[138] Further, the Act amended a statute which has been interpreted to allow disparate impact challenges since 1971.[139] In addition, the Act's legislative history recognizes the possibility of disparate impact claims.[140] Therefore, the mere use of the term "same" in a definitional amendment does not logically lead to the conclusion that disparate impact claims should be precluded.[141]

Another issue that is frequently raised is whether the term "same" in the Act requires equal treatment or permits an employer to take sex differences into account. In *California Federal Savings & Loan v. Guerra*,[142] the Supreme Court ruled that a state could

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138. *Scherr*, 867 F.2d at 978-81.

139. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also Scherr*, 867 F.2d 974, 978-81 (7th Cir. 1988).

140. The relevant legislative history reads: "[b]y making it 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*." H.R. REP. No. 95-948, 95th Cong., 2d Sess. 3 (1978) (citing Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4751.

141. Many courts have ruled that pregnancy claims can be raised under a disparate impact analysis. It is recognized that following *Johnson Controls*, fetal protection policies are subject to a disparate treatment analysis. For information purposes, see cases prior to *Johnson Controls*. UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd* 59 U.S.L.W. 4209 (U.S. March 20, 1991) (fetal protection policies are susceptible to disparate impact analysis including the business necessity defense); Scherr v. Woodland School Community Consol. Dist. No. 50, 867 F.2d 974 (7th Cir. 1988); Chambers v. Omaha Girls Club, 834 F.2d 697, 700-01 (8th Cir. 1987) ("role model" rule of a private social club for girls that prohibited continued employment of unmarried staff members who either become pregnant or cause pregnancy could be challenged under a disparate impact theory but was justified by business necessity because there was a manifest relationship between club's fundamental purpose and the rule); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984) (policy requiring termination of an X-ray technician when she became pregnant could be analyzed under both the disparate treatment and disparate impact theories); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 989 (5th Cir. 1982) (policy requiring termination of pregnant X-ray technician analyzed as disparate impact); Wright v. Olin Corp., 697 F.2d 1172, 1186 (4th Cir. 1982) (fetal protection policy analyzed as a facially neutral policy under a disparate impact theory); Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. Cir. 1981) (summary judgment dismissing a former employee's Title VII suit reversed because a policy of ten days of sick leave to full-time temporary employees caused an impact on women employees of childbearing age that no male would encounter for such a policy was tantamount to dismissal to a pregnant employee). *But see* Grant v. General Motors Corp., 908 F.2d 1303, 1310 (6th Cir. 1990) (fetal protection policy challengeable only under the disparate treatment theory).

For a recent overview of the issues relating to fetal protection policies, see Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of* International Union, UAW v. Johnson Controls, Inc., 75 CORNELL L. REV. 1110 (1990).

142. 479 U.S. 272 (1987) (the Act does not pre-empt a state statute that requires employers to provide "special treatment" in the form of unpaid pregnancy disability leave of

pass legislation providing for "special treatment" for pregnancy, holding that "Congress intended the PDA [Pregnancy Discrimination Act] to be a floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they may not rise."[143] The Court explained that Congress passed the Act after hearing substantial evidence of discrimination against pregnant women, especially in disability and health insurance.[144] The Court noted that the opposition to the Act came from those concerned about the increased costs of including pregnancy in health and disability benefit plans and not from those who favored special accommodation of pregnancy.[145] Further, both the House and the Senate suggested that state laws providing for preferential treatment for pregnant workers would continue to have effect under the Act.[146]

The Court concluded that the clear congressional purpose was "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[147] The Court limited its decision to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions, and only those statutes that are not based on stereotypical assumptions about the abilities of pregnant women.[148] Therefore the Act permits special treatment of pregnancy in spite of the use of the term "same" in the Act where state statutes are not based on stereotypes.

The issue then arises whether the term "same" in the Act permits an employer to take sex differences into account when an employer is not acting in accordance with the requirements of state law or regulation. In other words, can employers legally take actions that address the needs of pregnant workers?

The *California Federal* analysis would be equally applicable in this case because the Court's examination of the Act was not based

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up to four months and a right of reinstatement to the job the employee held before leave unless the job is no longer available due to business necessity).

143. *Id.* at 285 (quoting California Fed. Sav. & Loan Ass'n v. Guerra 758 F.2d 390, 396 (9th Cir. 1985)).

144. *Id.*

145. *Id.* at 286.

146. *Id.* at 288.

147. 123 Cong. Rec. 29658 (1977) (quoted with approval in *California Federal*, 479 U.S. 272, 289). For a more thorough discussion of whether the "same" treatment language allows special treatment, see Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 38-45 (1987).

148. *California Federal*, 479 U.S. 272, 290.

on the issue of whether a state law or regulation existed. Although the holding in the case was limited,[149] the Court construed the Act to permit employers to take actions that guarantee women the ability to participate fully and equally in the workforce and in family life. "Special treatment" policies that address women's needs regarding pregnancy-related disability are not prohibited by the Act even though the language of the statute uses the term "same." The Act permits special treatment so long as actions are limited to the period of actual disability and are not based on stereotypes about the ability of women to work.[150]

b. Disparate Impact Claims

Policies which require women to choose between sick leave and unpaid maternity leave, or to return to work within a period inconsistent with medical standards, may also cause a disparate impact on women on the basis of pregnancy because of the policies' focus on sex. As discussed above,[151] when women take leave follow-

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149. *Id.*

150. *See infra* notes 109-12 and accompanying text. Where, however, the leave follows the actual disability, as with leave for childrearing, the answer is not quite so clear. At some point employers' "special treatment" policies must be viewed as voluntary affirmative action plans and treated as such. The defense of a valid affirmative action plan is raised in reverse discrimination, disparate treatment suits under Title VII. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

In *Weber*, the majority upheld the employer's adoption and use of a voluntary affirmative action plan negotiated with the union to create a training program for incumbent unskilled black workers to fill skilled job categories. The Court reasoned that the plan was valid because it was designed to break down old patterns of racial segregation and hierarchy and was structured to open employment opportunities for blacks in occupations which had been traditionally closed to them. The plan did not unnecessarily trammel the interests of the white employees because it did not require the discharge of white workers or create an absolute bar to the advancement of white employees. Further, the plan was a temporary measure not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. 443 U.S. at 208. A similar analysis was used in *Johnson*, a sex discrimination case. In *Weber*, the Court specifically distinguished between discrimination against members of the protected class and special preference in favor of members of that class. *California Federal*, 479 U.S. at 294 (Stevens, J., concurring).

An affirmative action analysis is beyond the scope of this paper. It is suggested, however, that with respect to women of childbearing age, where there is a firm factual showing of the employer's prior discriminatory acts or of traditionally segregated job markets, an employer may lawfully adopt a plan that is designed to break that pattern and is structured to open employment opportunities for women of childbearing age in occupations which have been traditionally closed to them. Such a plan must not unnecessarily trammel the interests of nonpregnant employees and must be a temporary measure not intended to maintain balance but simply to eliminate an imbalance.

151. *See supra* notes 130-133 and accompanying text.

ing childbirth, they frequently are restricted to less than six weeks when leave is a function of annual sick days. They may take leave with no job guarantees, and their leave may be unpaid. When they return, it is often to a different job and sometimes to a job with less prestige, less pay, less chance of promotion, or one without flexibility for infant care.

In considering a disparate impact challenge, the central inquiry should be identification of the needs of pregnant workers and comparison of those needs to the actual coverage under the relevant policy. In some cases, district courts have required plaintiffs to present evidence of hypothetical nonpregnant teachers who would want to combine paid and unpaid leave.[152] This evidence is relevant in a disparate treatment analysis, but not to a disparate impact case because the focus in impact cases is on statistical disparity and on explanations for those disparities.[153] In these cases, therefore, district courts should require proof of the needs of pregnant teachers and compare those needs to actual coverage by the benefit plan or policy.[154] Proof of the prima facie case may differ from the proof required when the issue is a policy that impacts on the hiring of a certain race, as in *Wards Cove*.

Disparate impact claims may arise when an employer provides inadequate leave or forces a choice between sick leave and maternity leave. This section will examine each of these situations, and then turn to problems of proof and employer defenses in disparate impact cases.

i. Inadequate Leave Policies

Short or inadequate leave policies, for instance those limiting leave to accrued sick days, have a disproportionate effect on women because the policies require women to return to work when they may still be disabled from pregnancy. Such a disability policy may work well for other purposes, for example, in a workplace where many disabilities involve a leave of a few days or two weeks.

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152. *See* Scherr v. Woodland Community Consol. Dist. No. 50, 867 F.2d 974, 983 (7th Cir. 1988).

153. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1990); *Scherr*, 867 F.2d at 983.

154. *See Scherr*, 867 F.2d at 983, citing *California Federal*, 758 F.2d 390, 396 (9th Cir. 1985), *aff'd* 479 U.S. 272 (1987), where the court emphasized that a determination of equality in the disability context requires a comparison of coverage to actual need, and not coverage to hypothetical identical needs.

In a typical workplace, however, the need for longer disability leave is experienced chiefly by pregnant women.

Under typical disability policies unrelated to pregnancy, one is considered disabled when one is unable to perform the job, and deemed recovered when able to perform the job once again. Under a short or inadequate leave policy, the class of pregnant women is substantially affected because they are still disabled according to the College's Standards and Policy, and yet are required to return to the job.[155] As a class, pregnant women have a medical need for disability leave for a period of six to eight weeks following childbirth. The medical needs, however, of nonpregnant workers usually involve a much shorter time period. Therefore, while a disability policy providing for short leaves may meet the average needs of nonpregnant workers, such a policy does not meet the medical needs of pregnant workers.

A plaintiff may also show that a short or inadequate leave policy causes disparate impact where employees with other disabilities are permitted to return to work only after having fully recovered from the disabling illness. An analysis of such a policy may show a significant disparity between the treatment of workers disabled by pregnancy and those disabled by other factors. The need for full recovery before resuming work is not met when a worker is required to return to work less than six to eight weeks after childbirth. Such a policy forces some pregnant women, unlike other disabled men and women, to terminate their employment.

ii. Sick Leave v. Maternity Leave Policies

Policies which require women to choose between sick leave and maternity leave may have a disparate impact on women because pregnant women lose the benefit of paid sick leave. Even where the same choice is given to all employees, the impact of such a disability policy on pregnant women is usually substantial. As a class, pregnant women need at least six weeks disability leave. When a choice is forced between paid sick leave and unpaid maternity leave, the medical need for longer pregnancy-related disability leave is not addressed. By comparison, the medical needs of those whose disabilities are not related to pregnancy are normally addressed by the sick-leave policy.

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155. *See supra* notes 20-22 and accompanying text.

The impact is disproportionately borne by workers following childbirth because these workers usually have a much greater need for extended unpaid leave than workers on leave for other disabilities. Formerly-pregnant workers are usually the persons who take unpaid leave, and, certainly, unpaid maternity leave. A policy requiring the paid sick-leave v. unpaid maternity-leave choice does not address the disability need of pregnant women because workers who have been pregnant usually must choose extended leave and thereby lose the benefit of paid sick leave.[156]

3. *Discussion*

Policies which provide for inadequate leave or require a choice between sick leave and maternity leave are, then, susceptible to challenge on a disparate impact theory. This conclusion is consistent with the purposes of Title VII, which was designed to remove barriers to equal opportunity of employment, as well as the policy of the EEOC as reflected in regulation 1604.10.[157]

Disparate impact must, of course, be demonstrated. Under *Wards Cove*, plaintiffs must first show that the policy results in or produces a statistically significant disparity.[158] In the case of pregnancy-related disability, the focus of the statistical inquiry would be on a comparison between the needs of workers disabled by pregnancy and other disabled workers, and the way that those needs are addressed in the particular workplace and the policy's effects. Such a disparity probably can be shown where the policy does not address the medical needs of formerly-pregnant women, whether that policy denies them paid sick leave or requires a return to work before medical standards would allow.

It should be kept in mind that bottom-line statistics are no defense to claims of disparate impact.[159] The comparison may reveal that many more women than men drop out of work, are excluded from competition for a job, promotion, or advancement, or lose benefits. The result may be that persons who have not been

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156. This impact of such policies is measured using statistical techniques. *See supra* note 153 and accompanying text. The statistical proof required of plaintiffs should focus on the medical needs of pregnant workers, the way those needs have been addressed in the workplace or in the community, and the effects that have resulted.

157. *See* 29 C.F.R. § 1604.10(c) at note 93.

158. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1990).

159. *See supra* note 70 and accompanying text.

pregnant or are not of childbearing age receive a significantly disproportionate share of jobs, advancements and benefits.

Defendants may claim that plaintiffs are not able to demonstrate that the policies cause a disparate impact on women because of pregnancy because such policies impact men just as much as they impact women, or because not all women need pregnancy leave and some men need parental leave. Defendants may also contend that they have a legitimate "business justification." This justification may be either to save costs, in the case of paid sick leave v. unpaid maternity leave, or to minimize the impact of losing the employee for a long period.

The facts belie these justifications: for a period of six to eight weeks after childbirth, a woman is disabled and needs leave; women are the only sex that need pregnancy-related disability leave; and pregnancy may be the only disability in the workplace where the standards of good medical practice are not always followed. Further, so long as there is a statistically significant inference that a disparate impact exists, it is not necessary that every member of a protected class be adversely affected by a policy.[160] In addition, when employers justify inadequate leave policies with a business necessity defense, serious inquiry should be made, for such justifications may shelter the very actions Title VII was designed to eliminate.

Even where the defendant has shown a business justification, the plaintiff may prevail by persuading the factfinder that alternative adequate leave policies have no undesirable discriminatory effects and involve no significant additional costs.[161] For example, an acceptable alternative may be to let all disabled employees, including pregnant workers, take sick leave during disability, or to let all disabled employees return to work only after the disability/condition has ceased. These alternatives are no less effective in achieving the employer's legitimate profit-making and client-service goals.[162] There is no viable reason why an adequate policy addressing the needs of the pregnant worker could not be designed for

160. *Wards Cove*, 490 U.S. 642 (1990).

161. *Id.* at 660-61.

162. An example of a business justification is that of a policy requiring a medical resident to return to the residency program in less than six weeks because too much work in the program would be missed. A "less restrictive alternative" would be to permit her to take her leave and to require her either to extend the program for six weeks or to obtain the experience she missed otherwise.

almost every situation.

Adequate policies may in fact result in reduced costs, even when sick leave is paid to all disabled persons. One economist recently concluded that the costs of the Act to business has been eighty cents per week, a "relatively modest cost."[163] Adequate policies reduce litigation costs virtually to zero. Also, employee turnover is reduced, resulting in lower unemployment compensation claims and retention of skilled employees. Costs for interviewing, hiring, and training new or replacement employees are also significantly reduced.[164]

The plaintiff should not limit her evidence to direct costs; indirect and programs costs should also be included in the record.[165] The factfinder may then analyze whether the employer's reason for refusing to adopt adequate policies is legitimate and determine whether refusal to adopt adequate leave policies is proof of a pretext for discrimination.

CONCLUSION

Employment policies that mandate leave upon discovery of pregnancy, fail to guarantee any leave for childbirth, grant inadequate leave, provide leave without a guarantee of job reinstatement, or require women to choose between short paid leaves and longer unpaid leaves have serious Title VII implications. Such policies may be challenged under either a disparate treatment or a disparate impact theory.

Under a disparate treatment analysis, employer policies fail to comport with the requirements of Title VII when there is no medical reason for an enforced leave, policies are not in keeping with

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163. *Pregnancy Discrimination Act Cost-Effective, Advocates Say*, 1991 Daily Lab. Rep. (BNA) No. 1, at A-6 (Jan. 2, 1991). The article noted that Spalter-Roth, deputy director of research at the Institute for Women's Policy Research, reports, in a work to be published entitled *The 10-Year Economic and Legal Impact of the Pregnancy and Discrimination Act of 1978*, that chief executive officers found that when disability benefits were given to pregnant women, employee turnover decreased, employee's longevity increased and the skill level of the workforce rose. *Id.* Conversely, those who offered no short-term disability benefits experienced increased unemployment costs. *Id.*

164. *Id.*

165. The three major cost areas which should be analyzed include: direct costs (base salary and benefits); indirect costs (administrative, overhead, training, supervision and facilities); and program costs (absenteeism, turnover, coverage, recruitment and productivity). B. OLMSTED & S. SMITH, CREATING A FLEXIBLE WORKPLACE 71-82 (1989).

medical standards, or the policies are based on stereotypical assumptions about pregnant women's ability to work. Likewise, where a woman is forced to choose between a short paid leave and a longer unpaid leave, a challenge to the policy can be mounted. The policy underlying Title VII, the holdings of the courts, and the guidelines of the EEOC all require that such policies be abandoned.

Leave policies can also be challenged under a disparate impact theory. Where the needs of pregnant workers are not met, but employers provide adequately for other disabled workers, the policies cannot withstand analysis under the standard of *Wards Cove*.[166]

There is rarely a true business necessity or legitimate, nondiscriminatory reason constituting a bona fide occupational qualification to justify such policies. Savings are minimal or nonexistent, and in any case do not excuse violation of Title VII. Other business justifications are inadequate because acceptable alternatives are available. Many of the barriers to equal opportunity for women of childbearing age in the workplace could be overcome by policies that provide for "equal treatment" and "special treatment." In some cases, the employer's medical disability policy, which usually addresses the medical needs of the nonpregnant workers, should be rewritten to address the medical needs of pregnant workers so that "equal treatment" results. In other cases, employers' disability leave policies should provide for "special treatment" in order to comply with Title VII. The employer's medical disability policy may require rewriting to deal with the needs of pregnant women without regard to the medical needs of other employees. Where state law requires, parenting policies will have to be drafted to apply to both parents except perhaps for the period required for the medical needs of women. Some of the barriers have been and will be eliminated by law. Discrimination is eliminated most effectively, however, when employers treat their employees as valuable human resources and address their needs. These employers preserve their resources while doing what is right. These employers are the ones who will survive quite handsomely in this competitive world.

166. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1990).