




10-1982

Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission (EEOC)

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Civil Rights and Discrimination Commons](#), [Insurance Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission (EEOC).
Supreme Court Case Files Collection. Box 101. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Grant
(5 square
conflict
with CA4)

PRELIMINARY MEMORANDUM

December 3, 1982 Conference
List 1, Sheet 2

No. 82-411

ok NEWPORT NEWS SHIPBUILDING

v. (former casual
client but Co. is
now a sub. of
Tenneco.)

EEOC

Cert to CA4 (En Banc)
(Butzner, Phillips, Murnaghan,
Sprouse, Ervin) (Diss: Widener,
Hall, Chapman)
Federal/Civil Timely

1. SUMMARY: Petr contends that Title VII, as amended by
the Pregnancy Discrimination Act of 1978, is not violated where
an employer provides full pregnancy-related benefits to female

Grant / mn

employees, but only limited coverage for pregnancy-related benefits to male employees' wives.

2. FACTS AND DECISION BELOW: In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this Court held that Title VII was not violated by an employer's disability plan that provided nonoccupational sickness and accident benefits to all its employees, but excluded disabilities arising from pregnancy. Following that decision, Congress enacted the "Pregnancy Discrimination Act" of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076, amending the "Definitions" section of Title VII by adding subsection (k). Subsection (k) provides in relevant part:

Title VII amended in 1978

"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" 42 U.S.C. §2000e(k) (Supp. IV 1980).

Shortly after passage of the PDA, the EEOC revised its guidelines, providing that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." 24 C.F.R. §1604 & App. (1982).

Petr's hospitalization and medical-surgical health insurance plan extends coverage to employees, their spouses, and unmarried children. It provides coverage for dependents to the same extent as for employees, except with regard to pregnancy-

related expenses. Female employees are given full pregnancy benefits; spouses of male employees are given full benefits for physicians' expenses, but, in a delivery without complications, only up to \$500 for hospital charges. In September, 1979, an employee of petr filed an EEOC charge claiming that this scheme was contrary to the PDA and the EEOC guidelines for enforcement of the PDA; a month later a similar charge was filed by the United Steelworkers. The EEOC found in favor of the employees and filed an enforcement action in the DC. In the meantime, petr filed suit in the DC against the Commission seeking declaratory relief. After consolidating the cases, the DC granted summary judgment in favor of petr, finding that the PDA carved out only a narrow exception to General Electric Co. v. Gilbert that applied to claims of pregnancy discrimination submitted by female employees or applicants for employment.

A divided panel of the CA4 reversed. The majority found that the PDA was intended to prevent discrimination on the basis of pregnancy "for all employment-related purposes," and that when an employer extends medical benefits to spouses of employees, it does so with an "employment-related" purpose just as it does when it considers the extension of such benefits to employees. The majority concluded that the language requiring similar treatment "as other persons not so affected but similar in their ability or inability to work" did not compel a contrary result. The majority said: "[t]he statutory reference to 'ability or inability to work' denotes disability and does not suggest that the spouse must be an employee of the employer providing the

coverage. In fact, the statute says 'as other persons not so affected'; it does not say 'as other employees not so affected.'" In turning to the legislative history, the majority conceded that the Senate Report indicates that the issue presented by this case is not resolved by the PDA, but the court noted that Senators Bayh and Cranstron, while speaking on the floor of the Senate, felt otherwise. The majority determined that the latter view was more sound, saying "[w]e cannot read the statute so narrowly as to overturn the specific holding in Gilbert without affecting the reasoning upon which that holding was based. The language of the new statute strongly indicates a purpose to equate pregnancy, childbirth and related medical conditions with sex. Distinctions based on pregnancy, the Congress said, are distinctions based on sex. Since the company's health insurance plan contains a distinction based on pregnancy ... it is impermissible under the statute."

In one page, the dissent explained that the court had *Dissent* ignored the "similar in their ability or inability to work" language of the PDA. The dissent concluded: "[t]o determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must be an employee." "Had Congress intended to completely eviscerate Gilbert, it could have easily done so without references to a woman's ability or inability to work."

upheld panel

On rehearing en banc, a majority of the full court upheld the panel's ruling for the reasons set forth in the panel's opinion; the en banc dissent adopted the panel dissent's opinion.

3. CONTENTIONS: On the merits, petr argues that the CA4 has ignored both the ¹⁰plain language and the ⁷²legislative history of the PDA. Petr contends that the PDA applies only to pregnancy-related benefits for female employees. The issue presented here, petr argues, is controlled by Gilbert, not by the PDA. As to why cert should be granted, petr notes that two weeks after the decision below, the CA9 reached the contrary conclusion in EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (CA9), petition for rehearing denied, No. 81-4542 (Sept. 27, 1982). Petr also notes that the issue is pending in several other cases.

Conflict

The SG supports the decision below, but agrees that cert should be granted because of the conflict between the CA9 and the CA4. The SG also cites to several cases, in addition to those cited by petr, where this issue is pending.

4. DISCUSSION: The conflict with the CA9 decision and this decision is square; the SG has noted that the government also will petition for cert in the CA9 decision, arguing that the case should be held for this case. In light of the number of pending decisions where this question is at issue, it seems clear that the question is of considerable importance.

I recommend that the petn be granted.

There is a response by the SG. The United States Chamber of Commerce has filed an amicus brief in support of petr.

1/22/82

Blunt

Op. in Petn

Voted on....., 19...

Assigned, 19...

No. 82-411

Submitted, 19...

Announced 19...

NEWPORT NEWS SHIPBLDG.

vs.

EEOC

Grant

[illegible]

Sex-Discrimination Suit May Force Big Changes in Retirement Benefits

By STEPHEN WERMIEL

Staff Reporter of THE WALL STREET JOURNAL
PHOENIX—In April 1978, the U.S. Supreme Court ruled that employers can't require women to pay more for pension benefits than men. That same day, Nathalie Norris filed a suit in federal court here charging that a voluntary retirement plan for state employees illegally discriminated by paying women lower monthly payments than men.

Mrs. Norris won, and now her case is before the Supreme Court. If she wins again this spring, insurance and pension executives say it will revolutionize their businesses. "The whole industry would have to be restructured," says J. Michael Low, Arizona director of insurance. Whichever way the ruling goes, it will affect cases filed around the country involving millions of workers and billions of dollars in pension benefits. The Arizona plan is similar to one offered to public employees in all 50 states.

At the heart of the controversy are life-expectancy tables used by the insurance and pension industries to predict risks and to set benefits and rates. These tables show that women as a class live longer than men as a class. Indeed, the gap is widening. The American Academy of Actuaries says the life expectancy of women increased from 54.6 years for those born in 1920 to 78.3 years for those born in 1981. Life expectancy for men born in 1920 was 53.6 years; for those born in 1981, it was 70.7 years.

How the Tables Affect Benefits

Because women are expected to collect longer than men, life annuities—pensions that pay a periodic benefit for life—pay women less per month. But women who buy an annuity that also covers a surviving spouse are paid more than men who buy such an annuity because the women policy-buyers are less likely to be outlived by their spouses. Women also pay less for life insurance because they are better risks.

Employment benefits are covered by Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination on the job. Defenders of actuarial tables say the benefits even out, so there isn't any discrimination. But critics of pension plans say many women don't outlive men their age and as a result, their pensions are less.

That's the way it seemed to 58-year-old Nathalie Norris, a manager in the Arizona Department of Economic Security. She is surprised her case has gone to the Supreme Court and is quick to admit, "My main concern was myself. I definitely wanted a good retirement."

A divorced mother who found herself on her own at age 40 with three teen-agers to raise, she has learned to make the most of work-related benefits. A decade ago, she got

tractive to retirees because it promises income for life.

Mrs. Norris, who lives in suburban Scottsdale, chose the life annuity. But she soon discovered that based on the life expectancy tables she would be paid \$320.11 a month at age 65 while a man who had contributed the same amount would get \$354.07.

"I suggested to many people that this just isn't right," she says. "How the heck do I know how long I'm going to live?"

In her behalf, the Arizona Center for Law in the Public Interest, a small, nonprofit firm in Phoenix, sued and won. The plan, said a federal appeals court panel in San Francisco last March, "discriminates against women because it looks at them as a class instead of as individuals." Arizona appealed to the Supreme Court.

Carried to its extreme, a broad sex-discrimination ruling by the high court could

be acceptable under federal civil rights law, or at least falling within an exception to the court's 1978 decision. But the legal trend since the 1978 ruling has been almost entirely in favor of suits charging that traditional pension plans discriminate against women, and sometimes against men.

New York Insurance Superintendent Albert Lewis has said that if courts require, as some have, that public employee pension benefits be made equal retroactively for men and women, the cost could be \$20 billion to state governments.

And Richard Minck, acting president of the American Council of Life Insurance, says that if the Supreme Court declares the Arizona plan illegal, "I think every employer will have to rewrite its pension plan."

The consequences of the Supreme Court case and other suits depend somewhat on the type of plan involved. Most immediately affected would be "defined contribution" plans—those in which employers and-or employees make set payments into retirement accounts. The payments are usually the same for men and women, but the benefits vary. The Employee Benefit Research Institute, a nonprofit research center in Washington, D.C., says there are 450,000 such pension and profit-sharing plans with 25 million members.

Less directly affected would be "defined benefit" plans, of which the institute says there are 378,000. There, employers promise a benefit to employees that is the same for men and women.

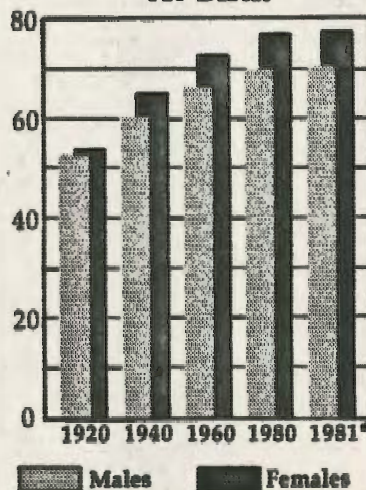
Other Lawsuits

After public-employee plans, the largest number of lawsuits has been aimed at Teachers Insurance and Annuity Association and College Retirement Equities Fund, a nonprofit insurer. More than 3,400 colleges, private schools and nonprofit think tanks have signed up 650,000 members to this defined contribution plan.

The plan was challenged by Diana Spirt, a professor at Long Island University in New York, because monthly annuities provided by the insurer pay women 11.3% less than men. A federal court and federal appeals court in New York said the college and the insurance company had violated Title VII.

The appeals court issued a nationwide order, which hasn't yet been put into effect, barring the fund from using actuarial tables that distinguish between men and women. The ruling also says the insurer must bring current male and female contributors up to equal levels, either with an infusion of capital from cash-starved colleges or by shifting funds from men to women. "It means a transfer of income from males to females of in excess of \$1 billion," says William Slater,

Life Expectancy At Birth



Source: Census Bureau

*Estimate

force the insurance industry to abandon the use of life expectancy tables and other risk calculations based on sex, that would eliminate lower pension benefits for women as well as cheaper health-insurance plans for men which are based on calculations that women have more medical expenses.

On Friday, in a consent agreement settling a discrimination suit, Massachusetts Indemnity & Life Insurance Co. of Los Angeles agreed to stop charging a group of Pennsylvania women higher rates than men for disability policies. Pennsylvania's insurance commissioner announced.

"What it means," says Dean Wolberg, a vice president of Minnesota Mutual Life Insurance Co., "is males will get less than they have been and females will get

Reviewed - Another excellent memo.

men 04/25/83

Mark's analysis of the language of Pregnancy Discrimination Act, ^{and} its Reg. hist. (esp. the Senate Committee Report) make clear that the plain language is limited to assuming pregnancy benefits to women employees - not the wives of male employees.

EEOC's interpretation is based on its own "principles of ~~EEO~~ Title VII" - not on any construction of the new Act.

Nor do Gilbert's rationale support the 56.

BENCH MEMORANDUM

No. 82-411:

Newport News Shipbuilding & Dry Dock Co. v. EEOC

From: Mark

April 25, 1983

Questions Presented

Whether Title VII, as amended by the Pregnancy Discrimination Act of 1978, prohibits an employer that provides health insurance benefits to employees' dependents from providing only limited coverage for pregnancy-related expenses incurred by male employees' wives.

I.

In 1976 this Court held that Title VII did not preclude an employer from excluding from an employees' disability plan various disabilities arising from pregnancy. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). In response Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), providing that the definition of sex discrimination includes discrimination on the basis of pregnancy. Clearly, the Act requires employers offering disability plans to cover the pregnancy-related expenses of female employees. ^(much less) Less clear, however, is the effect of the Act on coverage of pregnancy-related expenses of the wives of male employees. clearly

Petr, a self-insurer, offers a medical benefits plan to all employees, spouses, and unmarried minor children between ages 14 days and 19 years. Up until the PDA, the plan had the same pregnancy coverage for female employees and wives of male employees: 100% of reasonable charges for delivery and anesthesiologists and up to \$500 for other hospital charges. The \$500 limitation on hospital charges is substantially more stringent than the general hospitalization coverage of the plan. After enactment of the PDA, petr eliminated the \$500 limitation as to female employees' pregnancies, but not as to the pregnancy-related expenses of wives of male employees.

One of petr's male employees filed a complaint with the EEOC, asserting that the plan discriminated against him on the basis of his sex because it limited the hospitalization coverage available for his wife's pregnancy. The Steelworkers Union filed

a similar charge on behalf of other individuals. The EEOC informed petr that the limitation was unlawful. Petr filed suit in ED Va. seeking a declaratory judgment that EEOC's regulations were ultra vires. EEOC filed a Title VII complaint in the same court. The DC (Clarke, J.) granted summary judgment for petr in its case and dismissed EEOC's complaint.

CA4 reversed, holding that the \$500 limitation violated the PDA. Judge Haynsworth, joined by Judge Butzner, stated that "[w]e cannot read the statute so narrowly as to overturn the specific holding in Gilbert without affecting the reasoning upon which that holding was based. ... Distinctions based on pregnancy, the Congress said, are distinctions based on sex." Pet. App. at 7a. Judge Hall dissented. He argued that the statutory language could be read only as applying to pregnant employees. "Had Congress intended to completely eviscerate Gilbert, it could have easily done so without reference to a woman's ability or inability to work." Id., at 8a.

CA4 heard the case en banc and reached the same result. Judges Butzner, Phillips, Murnaghan, Sprouse, and Ervin were in the majority, relying on Judge Haynsworth's panel opinion. Judges Widener, Hall, and Chapman dissented on the basis of Judge Hall's panel dissent.

This Court granted cert in light of a clear conflict with CA9. There are numerous amicus briefs, with employer groups supporting petr, and labor, public interest, and woman's groups supporting EEOC.

II

The validity of petr's plan depends on the PDA and Title VII. I conclude that the PDA does not, of its own force, prohibit employers from limiting the pregnancy benefits of wives of male employees. A more difficult question is whether Title VII, as informed by the purpose underlying the PDA, should be construed to prohibit such a limitation. I conclude that if Congress intends to extend the principle of the PDA to spousal pregnancy benefits, it should do expressly. Therefore, CA4 should be reversed.

A.

The first question is whether the PDA itself prohibits the type of spousal disability plan used by petr. I have divided the analysis into three familiar categories: (i) plain meaning, (ii) legislative history, (iii) administrative construction. I conclude that the PDA does not address the question of spousal disability benefits. *Yes*

1. The PDA added §701(k) to Title VII:

"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" 42 U.S.C. §2000e(k).

This section appears in §2000e, which is entitled "Definitions."

Petr construes this language as follows. It notes first that the second clause in §701(k) clearly refers to pregnant

workers. ^{yes} This is made clear by the fact that the comparison is between "women affected by pregnancy" and "other persons not so affected but similar in their ability or inability to work." As to the first clause, petr notes that it simply clarifies the definition of certain terms. Those terms -- "because of sex" or "on the basis of sex" -- occur in §703(a)(1), Title VII's basic prohibition on discrimination. Section 703(a)(1) provides that it shall be unlawful for an employer "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." 42 U.S.C. §2000e-2(a)(1). Petr emphasizes that this section prohibits discrimination on the basis of the individual employee's sex, and that §701(k) adds that discrimination on the basis of the individual employee's pregnancy also is forbidden. But a male employee cannot become pregnant. Therefore, a benefits plan such as petr's does not discriminate against the male employee on the basis of his sex.

The SG responds that petr's reading makes the second clause superfluous, contrary to normal principles of statutory construction. In the SG's view, the first clause of §701(k) sets forth a general rule that discrimination on the basis of pregnancy is forbidden. The second clause provides the primary, but not the only, illustration of the application of this principle.

I think petr's construction is more reasonable. The SG would read the first clause of §701(k) as a substantive provision ^{yes} in its own right, even though it was placed in the definitional

section of the statute. But the claim in this case is that male employees have suffered discrimination. That claim must be based on §701(a)(3). It therefore makes sense to consider how §701(k)'s definition fits into §703(a)(1).

In any event, at the least there is ambiguity over the meaning of the statute, making resort to the legislative history necessary. That history makes clear that the PDA did not address the question of dependents' benefits. *Congress did not address*

2. Petr's brief contains a detailed and convincing analysis of the PDA's legislative history. See Brief for Petr at 13-29. Petr shows that the concern of the sponsors of the PDA was to overturn the result in Gilbert, i.e., to forbid plans that limited or excluded coverage of pregnancy expenses of female employees. More important, there were many indications that Congress recognized that the PDA did not address the question at issue in this case. A prime illustration is the Report of the Senate Committee on Human Resources:

"[T]he basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore, the question in regard to dependents' benefits would be determined on the basis of existing title VII principles. ...

... This bill would not mandate that women dependents be compared with woman employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.

On the other hand, the question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide compre-

Senate Report

hensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 95-331, pp. 5-6 (1977).

This leaves me with no doubt that the Senate committee understood that the PDA did not address coverage for dependents' pregnancies.

CA4 relied on statements by Senators Cranston and Bayh, two of the PDA's many sponsors, concerning plans that exclude pregnancy-related expenses of male employees' wives. Sen. Cranston stated:

"[T]he committee did not directly answer the question of whether such plans would be discriminatory under title VII. Mr. President, I would like to express for the record my own view that [a spousal exclusion plan] would indeed be discriminatory, and would be prohibited by the title VII sex discrimination ban." 123 Cong. Rec. 29663.

Sen. Bayh stated:

"[T]here remains the question ... of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees." 123 Cong. Rec. 29642.

Plainly, these statements represent the two senators' views about how Title VII should be interpreted, not about what the PDA itself required. Indeed, the two senators acknowledged that the PDA did not resolve the issue.

3. The SG suggests that the EEOC's guidelines constitute an authoritative administrative construction of the PDA and therefore are entitled to deference. These "Question and Answer" guidelines, issued in 1979, seven months after passage of the PDA, provide the legal basis for the EEOC's position in this case. Answer 21 states that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." Answer 22 states that

*EEOC
guide
lines
- 7 mo
after
enact-
ment*

"where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employees spouse must be covered at the 50 percent level." 44 Fed. Reg. 23807-08.

Thus, the guidelines expressly prohibit petr's \$500 limitation. *True*

It is clear, however, that these guidelines do not represent a contemporaneous construction of the PDA itself. The introduction to the guidelines states: "To the extent that a specific question is not directly answered by a reading of the Pregnancy

EEOC relies on
"principles of VII"
not on the new Act's
language or history.
Discrimination Act, existing principles of Title VII must be applied to resolve that question. The legislative history of the [PDA] states explicitly that existing principles of Title VII law would have to be applied to resolve this question of benefits for dependents." 44 Fed. Reg. 23804 (1979). Accordingly, the guidelines represent only EEOC's view as to the proper interpretation of the "existing principles" of Title VII.

B
Act
It thus is clear that the PDA does not prohibit spousal exclusion plans. The issue then becomes what are the "existing Title VII principles" that control. Petr's view is that the principles announced in Gilbert control except insofar as expressly limited by the PDA. Gilbert found that the classification based on pregnancy created two categories: (i) pregnant employees, and (ii) nonpregnant employees. Because women are members of both groups, the Court held that the classification was not discriminatory on its face. Under this analysis, there is no discrimination in this case either: the classification creates two categories: (i) male employees with pregnant wives, and (ii) all other employees. Males are in both categories, and therefore there is no facial discrimination against male employees.

The SG's principal response is that the PDA repudiated all of the reasoning of Gilbert. This was the basis of CA4's decision below: "We cannot read the statute so narrowly as to overturn the specific holding in Gilbert without affecting the rea-

soning upon which that holding was based. ... Distinctions based on pregnancy, the Congress said, are distinctions based on sex." Pet. App. at 7a. Thus, "existing Title VII principles" include the principle of the PDA, which repudiated the reasoning in Gilbert.

I find this argument somewhat persuasive. I do think that many congressmen were trying to repudiate Gilbert entirely, as there were many broad statements of disagreement ^(bidding for women's vote) with the Court's analysis and agreement with the dissent's analysis. Moreover, the committees and sponsors indicated that, although the PDA did not decide the question of pregnancy benefits for spouses, they believed that Title VII forbids discrimination of the type involved in this case. There would be some incongruity in retaining Gilbert's principle for some purposes when the statute expressly repudiated that principle for another purpose.

^{But} There is, however, one major problem with the SG's position: If it was so clear to everyone that the rationale of Gilbert was being repudiated, and therefore that a dependents' disability plan such as that offered by petr was invalid, why did Congress leave this question to the courts? Nothing barred Congress from legislating directly on the question of dependents' disability benefits, but it did not do so. One might speculate that Congress simply did not bother to include such a specific provision, but this seems unlikely given that the existence of the issue clearly was recognized by the sponsors and committees.

I therefore think the question becomes whether there may have been some reason that the dependents' benefits issue was not

addressed (e.g., because the proponents of the PDA were afraid either that they did not have the votes to extend the PDA to cover dependents' benefits or that adding this issue to the debate would risk defeat of the PDA). If the discrimination involved in this case has the same effects as the discrimination involved on the facts of Gilbert, then it would make sense to apply the principle of the PDA to both cases, despite Congress' failure to so provide. But if the two situations are different, so that there may be legitimate reasons why Congress would not decide to extend the PDA principle beyond the specific Gilbert context, then the Court should not apply the PDA principle to this case. In my judgment, the two situations are significantly different.

A principal argument of the plaintiffs in Gilbert was that GE's plan was "a sex-conscious process expressive of the secondary status of women in the company's labor force." 429 U.S., at 153 (BRENNAN, J., dissenting). The dissent also argued that EEOC's regulations, which the Court rejected, should have been followed because they were "reasonable responses to the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force." Id., at 158. The proponents of the PDA expressed similar concerns about the effect of the pregnancy exclusion on the status of women in the work force.

I think these concerns about the effect on women who have

both jobs and babies differ considerably from the concerns about discrimination suffered by a male employee who is required to pay for some or all of the expenses resulting from his wife's pregnancy. It hardly can be said that the status of males in the work place will be diminished if their wives are not given full pregnancy coverage. Rather, the concern can only be that there is unequal compensation, i.e., that female employees receive greater health benefit compensation than male employees. It may well be that Congress would consider this sufficiently discriminatory to deserve prohibition under Title VII. But it also may be that Congress would view this as sufficiently removed from the core concerns of sex discrimination under Title VII that it should not be prohibited.

In sum, because the underlying situations are not analogous, the Court need not assume that Congress necessarily intended to treat the Gilbert situation as the same as the one in this case. It would have been reasonable for Congress to prohibit discrimination in both cases, and perhaps this was the intention of many congressmen. But Congress should legislate by express provision, not by enacting general principles.

III

CA4's decision below should be reversed. Neither the Pregnancy Discrimination Act nor Title VII precludes petr from limiting the pregnancy coverage for employees' wives.

Mark

82-411 NEWPORT NEWS v. EEOC

Argued 4/27/83

Whether amend. to EE Act in '78
require the same pregnancy benefits
for wife of a male employee as ~~the~~
are provided by a Plan for female
employees.

Kramer (Patt)

Here the employee positions are the same.

The Govt contends, & court below held, that the wife of a male employee must be provided same pregnancy benefits as those provided for female ~~employees~~ employees.

Relies on leg. history.

See colloquy bet. Senators Hatch and Williams.

Complaint by EEOC alleges intentional violation. No ev. of this whatever.

Allegation was under 703

If ~~Gov~~ EEOC wins, other employees will subsidize the payments to the male employees' wife.

(next page |

Mrs. Shapiro (SG)

A plan cannot offer ^{male} ~~female~~ employees less than female employees.

Petr. is arguing for a "narrow, literal reading" of the relevant provision. (Why shouldn't the plain language govern?)

Leg. history - discussion of in Senate Report. It didn't answer her Q explicitly but said Title VII principles should apply.

JPS questioned Shapiro's reliance on the language, saying Senate report should have been more explicit.

note
JPS's
reservation

Kramer (Reply)

82-411 Newport News (Pur. Cl.
4/28)

Reverse

1. Pregnancy Disc Act - added
to Title VII, § 701(k)
This is in "definition" section.

2. Language

Clearly refers to
pregnant workers - not
to pregnant wives of
male workers.

Leg. hist. is
ambiguous at best.
Senators this time not involved
(Pushed it to Court)

3. EEOC interpretation
was based on its own
"principles" of Title VII
- not on any construction
of the new language

4. Gilbert's rationale
doesn't support ~~the~~ EEOC

Aff'm 6-3

No. 82-411

Newport News v. EEOC

Conf. 4/29/83

The Chief Justice

Aff'm

~~Distinction~~ Distinction based on sex are invalid
Insurance plan gives less coverage
to wives employed than to husband
employees

Justice Brennan

Aff'm

Gilbert controls.

The 1978 Act intended this result

Justice White

Aff'm

~~Act doesn't~~

all dependents not treated alike

(After discussion agreed new
Act doesn't control)

Justice Marshall

Aff'm

Justice Blackmun

Aff'm

Amendment is in deposition section

Justice Powell

Rev.

See my notes

Justice Rehnquist *Rev.*

Justice Stevens *Rev. (changed to affirm)*

an extremely close case. - but Congress
The Pregnancy Act doesn't decide this issue
- agree with LFP on this.

But on basis of what J.P.S. wrote
in Gilbert, ~~so~~ can't invalidate this

All fed cts - before CA 4 - went the
other way.

Congress identified this problem &
refused to answer. ~~at~~ Congress was incompetent
(diver)

Justice O'Connor *Affirm.*

Difficult case. Agree the Act doesn't
~~address~~ address this.

We therefore should decide case
under Title VII w/out regard to
the Act.

*Pregnancy Act
doesn't
cover this case*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 2, 1983

Re: 82-411 - Newport News Shipbuilding & Dry
Dock Co. v. EEOC

Dear Chief:

After further reflection, I have decided that I will vote to affirm. I am still troubled by the way the legislative process worked during the enactment of this statute, but I have concluded that the proper standard for identifying discriminatory employment practices requires a finding of discrimination in this case. The terms and conditions of employment for a male employee would be improved if he traded places with an otherwise similarly situated female employee. For she has complete insurance coverage for her spouse but he does not.

Although we did not discuss the point at conference, given the ambiguity in the legislative history together with the magnitude of the potential liability, I wonder if we should at least consider the possibility of making our holding nonretroactive. It seems to me that this action might be justified on the theory that Congress in effect delegated to us the lawmaking task.

Respectfully,

John P. Stevens

The Chief Justice

Copies to the Conference .

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

File

May 2, 1983

Re: 82-411 - Newport News Shipbuilding & Dry
Dock Co. v. EEOC

Dear Chief:

After further reflection, I have decided that I will vote to affirm. I am still troubled by the way the legislative process worked during the enactment of this statute, but I have concluded that the proper standard for identifying discriminatory employment practices requires a finding of discrimination in this case. The terms and conditions of employment for a male employee would be improved if he traded places with an otherwise similarly situated female employee. For she has complete insurance coverage for her spouse but he does not.

Although we did not discuss the point at conference, given the ambiguity in the legislative history together with the magnitude of the potential liability, I wonder if we should at least consider the possibility of making our holding nonretroactive. It seems to me that this action might be justified on the theory that Congress in effect delegated to us the lawmaking task.

Note

Respectfully,

John P.S.

The Chief Justice

Copies to the Conference .

This leaves you & WHR in dissent. (If IPS' view prevails, it will the dissent even easier to write, for the Court itself will have to concede that Congress made a mess of things.) *you* *Mark*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 2, 1983



No. 82-411 Newport News Shipbuilding &
Dry Dock Co. v. EEOC

Dear Chief,

John has suggested that we consider the possibility of making our holding in this case nonretroactive. I agree that such action should be considered and I would be inclined to agree with the suggestion.

Sincerely,

A handwritten signature in cursive script, reading "Sandra", is written below the word "Sincerely,".


The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1983



Re: No. 82-411-Newport News v. EEOC

Dear John:

I do not favor making our holding in this case prospective only. I believe that any unfairness that may result from awarding retroactive relief in particular cases should be addressed by the district courts in applying the general principles governing the award of such relief in Title VII cases, rather than by our taking the unusual step of making our holding prospective only.

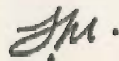
In my view, there are no exceptional circumstances warranting a departure from the general rule that decisions declaring what the law is have retroactive effect. Once the Pregnancy Discrimination Act went into effect, an employer would not have been justified in relying on Gilbert as authority for implementing this plan. In my opinion, it would not have been particularly difficult for competent counsel to determine that Title VII, as amended by the PDA, requires employers to treat pregnancy like any other medical condition, whether an employee or an employee's spouse is involved. I think it would have been reasonably clear that the PDA rejected the basic idea underlying Gilbert--that discrimination on the basis of pregnancy is not discrimination on the basis of sex--and that therefore the only question presented by a plan such as this is whether an employer may provide lower fringe benefits to male employees than to female employees.

But even if I am wrong that competent counsel could have predicted the outcome of this case, counsel certainly would not have been justified in assuming, after the passage of the PDA, that a plan such as this was legal. Whatever else may be said of the PDA, there is plainly nothing in that statute that affirmatively suggests approval of such a

plan, and at the very least the statute called into question all prior statements by this Court that discrimination on the basis of pregnancy is not discrimination on the basis of sex. At worst employers faced a situation of uncertainty. Our decision will not constitute "a sharp break in the line of earlier authority or on avulsive change which cause[s] the current of the law thereafter to flow between new banks." Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 499. There is nothing unusual about having to face uncertainty following the passage of a new statute, and so far as I know such uncertainty has not generally been thought to be a sufficient basis for making a decision prospective only. Although it might well have been preferable for Congress to anticipate the question that has arisen in this case, for better or worse Congress frequently establishes general principles and leaves it to the courts to apply them to particular situations.

It may be that in some cases certain forms of retroactive relief will be unwarranted. In my view, this problem can be dealt with by the district courts in the exercise of their equitable discretion to fashion such remedies "as may be appropriate." 42 U.S.C. §2000e-5(g). We recognized in Albemarle Paper Co. v. Moody, 422 U.S. 405, that special circumstances may overcome the presumption in favor of making individuals whole for injuries suffered as a result of past discrimination. The district courts can be trusted to prevent any unfairness to employers by deciding on a case-by-case basis whether there are special circumstances that justify the denial of retroactive relief.

Sincerely,



T.M.


Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 4, 1983

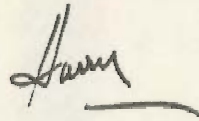


Re: No. 82-411 - Newport News v. EEOC

Dear John:

I would leave to the equitable discretion of the district courts the fairness of applying our construction of the statute retroactively, rather than following the approach you proposed in your May 2 letter to the Chief. Our decision here is not surprising. The PDA is at worst ambiguous on the point, and the EEOC's published interpretation of that Act clearly prohibited the kind of plan employed by petitioner. In these circumstances, I would apply the general rule that a decision declaring the meaning of a statute has retroactive effect, except in unusual circumstances where such relief would not be "appropriate" under Title VII.

Sincerely,



Justice Stevens

cc: The Conference

Sally - White
John - I will await
the dissent
2

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: 31 83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-411

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER v. EEOC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

In 1978 Congress decided to overrule our decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), by amending Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy."¹ On the effective date of the act, petitioner amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions.² The plan continued, however, to

¹Pub. L. 95-555, 92 Stat. 2076 (quoting title of 1978 Act). The new statute (the Pregnancy Discrimination Act) amended the "Definitions" section of Title VII, 42 U. S. C. § 2000e (1976), to add a new subsection (k) reading in pertinent part as follows:

"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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . ."

²The amendment to Title VII became effective on the date of its enactment, October 31, 1978, but its requirements did not apply to any then-existing fringe benefit program until 180 days after enactment—April 29, 1979. 92 Stat. 2076. The amendment to petitioner's plan became effective

2 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

provide less favorable pregnancy benefits for spouses of male employees. The question presented is whether the amended plan complies with the amended statute.

Petitioner's plan provides hospitalization and medical-surgical coverage for a defined category of employees³ and a defined category of dependents. Dependents covered by the plan include employees' spouses, unmarried children between 14 days and 19 years of age, and some older dependent children.⁴ Prior to April 29, 1979, the scope of the plan's coverage for eligible dependents was identical to its coverage for employees.⁵ All covered males, whether employees or dependents, were treated alike for purposes of hospitalization coverage. All covered females, whether employees or dependents, also were treated alike. Moreover, with one relevant exception, the coverage for males and females was identical. The exception was a limitation on hospital coverage for pregnancy that did not apply to any other hospital confinement.⁶

tive on April 29, 1979.

³On the first day following three months of continuous service, every active, full-time, production, maintenance, technical, and clerical area bargaining unit employee becomes a plan participant. App. to Pet. for Cert. 29a.

⁴For example, unmarried children up to age 23 who are full-time college students solely dependent on an employee and certain mentally or physically handicapped children are also covered. *Id.*, at 30a.

⁵An amount payable under the plan for medical expenses incurred by a dependent does, however, take into account any amounts payable for those expenses by other group insurance plans. An employee's personal coverage is not affected by his or her spouse's participation in a group health plan. *Id.*, at 34a-36a.

⁶For hospitalization caused by uncomplicated pregnancy, petitioner's plan paid 100% of the reasonable and customary physicians' charges for delivery and anesthesiology, and up to \$500 of other hospital charges. For all other hospital confinement, the plan paid in full for a semi-private room for up to 120 days and for surgical procedures; covered the first \$750 of reasonable and customary charges for hospital services (including general nursing care, x-ray examinations, and drugs) and other necessary services

After the plan was amended in 1979, it provided the same hospitalization coverage for male and female employees themselves for all medical conditions, but it differentiated between female employees and spouses of male employees in its provision of pregnancy-related benefits.⁷ In a booklet describing the plan, petitioner explained the amendment that gave rise to this litigation in this way:

"B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement as described in question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.

"C. Maternity benefits for the wife of a male employee will continue to be paid as described in part 'A' of this question." App. to Pet. for Cert. 37a.

In turn, Part A stated, "The Basic Plan pays up to \$500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges." *Ibid.* As the Court of Appeals observed, "To the extent that the hospital charges in connection with an uncomplicated delivery may exceed \$500, therefore, a male employee receives less complete coverage of spousal disabilities than does a female employee." 667 F. 2d 448, 449 (CA4 1982).

After the passage of the Pregnancy Discrimination Act, and before the amendment to petitioner's plan became effective, the Equal Opportunity Employment Commission issued "interpretive guidelines" in the form of questions and an-

during hospitalization; and paid 80 percent of the charges exceeding \$750 for such services up to a maximum of 120 days. *Id.*, at 31a-32a (question 16); see *id.*, at 44a-45a (same differentiation for coverage after the employee's termination).

⁷Thus, as the EEOC found after its investigation, "the record reveals that the present disparate impact on male employees had its genesis in the gender-based distinction accorded to female employees in the past." App. 37.

4 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

swers.⁸ Two of those questions, numbers 21 and 22, made it clear that the EEOC would consider petitioner's amended plan unlawful. Number 21 read as follows:

"21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

"A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally." 44 Fed. Reg. 23804, 23807 (April 20, 1979).⁹

⁸Interim interpretive guidelines were published for comment in the Federal Register on March 9, 1979. 44 Fed. Reg. 13278-13281. Final guidelines were published in the Federal Register on April 20, 1979. *Id.*, at 23804-23808. The EEOC explained, "It is the Commission's desire . . . that all interested parties be made aware of the EEOC's view of their rights and obligations in advance of April 29, 1979, so that they may be in compliance by that date." *Id.*, at 23804. The questions and answers are reprinted as an appendix to 28 CFR § 1604 (1982).

⁹Question 22 is equally clear. It reads:

"22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

"A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male

On September 20, 1979, one of petitioner's male employees filed a charge with the EEOC alleging that petitioner had unlawfully refused to provide full insurance coverage for his wife's hospitalization caused by pregnancy; a month later the United Steelworkers filed a similar charge on behalf of other individuals. App. 15-18. Petitioner then commenced an action in the United States District Court for the Eastern District of Virginia, challenging the Commission's guidelines and seeking both declaratory and injunctive relief. The complaint named the EEOC, the male employee, and the United Steelworkers of America as defendants. App. 5-14. Later the EEOC filed a civil action against petitioner alleging discrimination on the basis of sex against male employees in the company's provision of hospitalization benefits. App. 28-31. Concluding that the benefits of the new Act extended only to female employees, and not to spouses of male employees, the District Court held that petitioner's plan was lawful and enjoined enforcement of the EEOC guidelines relating to pregnancy benefits for employees' spouses. 510 F. Supp. 66 (1981). It also dismissed the EEOC's complaint. App. to Pet. for Cert. 21a. The two cases were consolidated on appeal.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, reasoning that since "the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute." 667 F. 2d

employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level." 44 Fed. Reg., at 23807-23808.

448, 451 (1982). After rehearing the case en banc, the court reaffirmed the conclusion of the panel over the dissent of three judges who believed the statute was intended to protect female employees "in their ability or inability to work," and not to protect spouses of male employees. App. to Pet. for Cert. 1a. Because the important question presented by the case had been decided differently by the United States Court of Appeals for the Ninth Circuit, *EEOC v. Lockheed Missiles and Space Co.*, 680 F. 2d 1243 (1982), we granted certiorari. — U. S. — (1982).¹⁰

Ultimately the question we must decide is whether petitioner has discriminated against its male employees with respect to their compensation, terms, conditions, or privileges of employment because of their sex within the meaning of § 703(a)(1) of the Act.¹¹ Although the Pregnancy Discrimination Act has clarified the meaning of certain terms in this section, neither that Act nor the underlying statute contains a definition of the word "discriminate." In order to decide whether petitioner's plan discriminates against male employees because of *their* sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric v. Gilbert*, *supra*, but also rejected the test of discrimination employed by the Court in that case. We believe it did. Under the proper test petitioner's plan is unlawful,

¹⁰ Subsequently the Court of Appeals for the Seventh Circuit agreed with the Ninth Circuit. *EEOC v. Joslyn Mfg. & Supply Co.*, No. 82-1634 (decided May 9, 1983).

¹¹ Section 703(a), 42 U. S. C. § 2000e-2(a) (1976), provides in pertinent part:

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

"(1) to fail or refuse to hire or 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; . . ."

NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC 7

because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees.

I

At issue in *General Electric v. Gilbert* was the legality of a disability plan that provided the company's employees with weekly compensation during periods of disability resulting from nonoccupational causes. Because the plan excluded disabilities arising from pregnancy, the District Court and the Court of Appeals concluded that it discriminated against female employees because of their sex. This Court reversed.

After noting that Title VII does not define the term "discrimination," the Court applied an analysis derived from cases construing the Equal Protection Clause of the Fourteenth Amendment to the Constitution. 429 U. S., at 133. The *Gilbert* opinion quoted at length from a footnote in *Geduldig v. Aiello*, 417 U. S. 484 (1974), a case which had upheld the constitutionality of excluding pregnancy coverage under California's disability insurance plan.¹² "Since it is a

¹²This portion of the quotation, 429 U. S., at 134-135, is illustrative:

"While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.' *Id.*, at 496-497, n. 20."

8 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under § 703(a)(1)," the Court added, "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U. S., at 186.

The dissenters in *Gilbert* took issue with the majority's assumption "that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII." *Id.*, at 154, n. 6 (BRENNAN, J., dissenting); *id.*, at 160-161 (STEVENS, J., dissenting).¹³ As a matter of statutory interpretation, the dissenters rejected the Court's holding that the plan's exclusion of disabilities caused by pregnancy did not constitute discrimination based on sex. As JUSTICE BRENNAN explained, it was facially discriminatory for the company to devise "a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or heavily male dominated." *Id.*, at 160. It was inaccurate to describe the program as dividing potential recipients into two groups, pregnant women and non-pregnant persons, because insurance programs "deal with future *risks* rather than historic facts." Rather, the appropriate classification was "between persons who face a risk of pregnancy and those who do not." *Id.*, at 161-162, n. 5 (STEVENS, J., dissenting). The company's plan, which was intended to provide employees with protection against the risk of uncompensated unemployment caused by physical disability, discriminated on the basis

The principal emphasis in the text of the *Geduldig* opinion, unlike the quoted footnote, was on the reasonableness of the State's cost justifications for the classification in its insurance program. See n. 13, *infra*.

¹³ As the text of the *Geduldig* opinion makes clear, in evaluating the constitutionality of California's insurance program, the Court focused on the "non-invidious" character of the State's legitimate fiscal interest in excluding pregnancy coverage. 417 U. S., at 496. This justification was not relevant to the statutory issue presented in *Gilbert*. See n. 24, *infra*.

of sex by giving men protection for all categories of risk but giving women only partial protection. Thus, the dissenters asserted that the statute had been violated because conditions of employment for females were less favorable than for similarly situated males.

When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision. It incorporated a new subsection in the "definitions" applicable "[f]or the purposes of this subchapter." 42 U. S. C. § 2000e-2 (1976 ed., Supp. V.). The first clause of the Act states, quite simply: "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." § 2000e-(k). The House Report stated, "It is the Committee's view that the dissenting Justices correctly interpreted the Act."¹⁴ Similarly, the Senate Report quoted passages from the two dissenting opinions, stating that they "correctly express both the principle and the meaning of title VII."¹⁵ Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted Congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision. Many of them expressly agreed with the views of the dissenting Justices.¹⁶

¹⁴ H. R. Rep. No. 95-948, 95th Cong., 2d Sess. 2 (1978), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), Ser. No. 96-2, p. 148 (1979) (hereinafter Leg. Hist.).

¹⁵ S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977), Leg. Hist. at 39-40.

¹⁶ S. Rep. No. 95-331, *supra* n. 15, at 7-8 ("the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts"); H. R. Rep. No. 95-948, 95th Cong., 2d Sess. 8 (1978) (same); 123 Cong. Rec. 10582 (1977) (remarks of Rep. Hawkins) ("H. R. 5055 does not really add anything to title VII as I and, I believe, most of

10 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

As petitioner argues, congressional discussion focused on the needs of female members of the work force rather than spouses of male employees. This does not create a "negative inference" limiting the scope of the act to the specific problem that motivated its enactment. See *United States v. Turkette*, 452 U. S. 576, 591 (1981). Cf. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273, 285-296 (1976).¹⁷ Con-

my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy."); *id.*, at 29387 (remarks of Sen. Williams) ("this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert* . . ."); *id.*, at 29647; *id.*, at 29655 (remarks of Sen. Javits) ("What we are doing is leaving the situation the way it was before the Supreme Court decided the *Gilbert* case last year."); 124 Cong. Rec. 21436 (1978) (remarks of Rep. Sarasin) ("This bill would restore the interpretation of title VII prior to that decision").

For statements expressly approving the views of the dissenting Justices that pregnancy discrimination is discrimination on the basis of sex, see Leg. Hist., pp. 18 (remarks of Sen. Bayh, March 18, 1977); 24 (remarks of Rep. Hawkins, April 5, 1977, 123 Cong. Rec. 10582); 67 (remarks of Sen. Javits, Sept. 15, 1977, 123 Cong. Rec. 29387); 73 (remarks of Sen. Bayh, Sept. 16, 1977); 134 (remarks of Sen. Mathias, Sept. 16, 1977, 123 Cong. Rec. 29663-29664); 168 (remarks of Rep. Sarasin, July 18, 1978, 124 Cong. Rec. 21436). See also *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. 13 (1977) (statement of Sen. Bayh); *id.*, at 37, 51 (statement of Assistant Attorney General for Civil Rights Drew S. Days).

"In *McDonald*, the Court held that 42 U. S. C. § 1981 (1976), which gives "all persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," protects whites against discrimination on the basis of race even though the "immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves." 427 U. S., at 289.

gress apparently assumed that existing plans that included benefits for dependents typically provided no less pregnancy-related coverage for the wives of male employees than they did for female employees.¹⁸ When the question of differential coverage for dependents was addressed in the Senate Report, the Committee indicated that it should be resolved "on the basis of existing title VII principles."¹⁹ The legislative context makes it clear that Congress was not thereby referring to the view of Title VII reflected in this Court's *Gilbert* opinion. Proponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers.²⁰ Against

¹⁸ This, of course, was true of petitioner's plan prior to the enactment of the statute. See pp. —, *supra*. See S. Rep. No. 95-331, *supra* n. 15, at 6, Leg. Hist. at 43 ("Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans."); 123 Cong. Rec. 29,663 (1977) (remarks of Senator Cranston); Brief for the Equal Employment Opportunity Commission 31-33, n. 31.

¹⁹ "Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles." Leg. Hist. at 42-43; S. Rep. No. 95-331, *supra* n. 15, at 6.

This statement does not imply that the new statutory definition has no applicability; it merely acknowledges that the new definition does not itself resolve the question.

²⁰ See, e. g., 123 Cong. Rec. 7539 (1977) (remarks of Sen. Williams) ("the Court has ignored the congressional intent in enacting title VII of the Civil Rights Act—that intent was to protect all individuals from unjust employment discrimination, including pregnant workers"); *id.*, at 29385, 29652.

12 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

this background we review the terms of the amended statute to decide whether petitioner has unlawfully discriminated against its male employees.

II

Section 703(a) makes it an unlawful employment practice for an employer 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. . . ." 42 U. S. C. § 2002e-2(a) (1976). Health insurance and other fringe benefits are "compensation, terms, conditions, or privileges of employment." Male as well as female employees are protected against discrimination. Thus, if a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII.²¹ Such a

In light of statements such as these, it would be anomalous to hold that Congress provided that an employee's pregnancy is sex-based, while a spouse's pregnancy is gender-neutral.

During the course of the Senate debate on the Pregnancy Discrimination Act, Senator Bayh and Senator Cranston both expressed the belief that the new act would prohibit the exclusion of pregnancy coverage for spouses if spouses were otherwise fully covered by an insurance plan. See 123 Cong. Rec. 29642, 29663 (1977). Because our holding relies on the 1978 legislation only to the extent that it unequivocally rejected the *Gilbert* decision, and ultimately we rely on our understanding of general Title VII principles, we attach no more significance to these two statements than to the many other comments by both Senators and Congressmen disapproving the Court's reasoning and conclusion in *Gilbert*. See n. 16, *supra*.

²¹ Consistently since 1970 the EEOC has considered it unlawful under Title VII for an employer to provide different insurance coverage for spouses of male and female employees. See Guidelines On Discrimination Because of Sex, 29 CFR 1604.9(d); Commission Decision No. 70-510, 1973 E.E.O.C. Dec. (CCH) ¶ 6132 (Feb. 4, 1970) (accident and sickness insurance); Commission Decision No. 70-513, 1973 E.E.O.C. Dec. (CCH) ¶ 6114 (Feb. 4, 1970) (death benefits to surviving spouse); Commission Decision No. 70-660, 1973 E.E.O.C. Dec. (CCH) ¶ 6133 (Mar. 24, 1970) (health in-

practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Department of Water & Power v. Manhart*, 435 U. S. 702, 711 (1978), for it would treat a male employee with dependents "in a manner which but for that person's sex would be different."²² The

surance); Commission Decision No. 71-1100, 1973 E.E.O.C. Dec. (CCH) ¶ 6197 (Dec. 31, 1970) (group insurance).

Similarly, in our Equal Protection Clause cases we have repeatedly held that, if the spouses of female employees receive less favorable treatment in the provision of benefits, the practice discriminates not only against the spouses but also against the female employees on the basis of sex. *Frontiero v. Richardson*, 411 U. S. 677, 688 (1973) (opinion of BRENNAN, J.) (increased quarters allowances and medical and dental benefits); *id.*, at 691 (POWELL, J., concurring in the judgment); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 645 (1975) (Social Security benefits for surviving spouses); see also *id.*, at 654-655 (POWELL, J., concurring); *Califano v. Goldfarb*, 430 U. S. 199, 207-208 (1977) (opinion of BRENNAN, J.) (Social Security benefits for surviving spouses); *Wengler v. Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980) (workers' compensation death benefits for surviving spouses).

²²The *Manhart* case was decided several months before the Pregnancy Discrimination Act was passed. Although it was not expressly discussed in the legislative history, it set forth some of the "existing title VII principles" on which Congress relied. Cf. *Cannon v. University of Chicago*, 441 U. S. 677, 696-698 (1979). In *Manhart* the Court struck down the employer's policy of requiring female employees to make larger contributions to its pension fund than male employees, because women as a class tend to live longer than men.

"An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' It constitutes discrimination and is unlawful unless exempted by the Equal Pay Act of 1963 or some other affirmative justification." 435 U. S., at 711.

The internal quotation was from *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971).

14 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

same result would be reached even if the magnitude of the discrimination were smaller. For example, a plan that provided complete hospitalization coverage for the dependents of female employees but did not cover dependents of male employees when they had broken bones would violate Title VII by discriminating against male employees.

Petitioner's practice is just as unlawful. Its plan provides limited pregnancy-related benefits for employees' wives, and affords more extensive coverage for employees' spouses for all other medical conditions requiring hospitalization. Thus the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for pregnancy-related conditions. This policy is analogous to the exclusion of broken bones for the dependents of male employees, except that only women may become pregnant. *Gilbert* concluded that, because of this distinction, the exclusion of pregnancy-related benefits was nondiscriminatory on its face. Congress has unequivocally rejected that reasoning; the 1978 Act makes clear that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan. Thus petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees.

There is no merit to petitioner's argument that the prohibitions of Title VII do not extend to discrimination against pregnant spouses because the statute applies only to discrimination in employment. A two-step analysis demonstrates the fallacy in this contention. The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also dis-

crimination against male employees. Cf. *Wengler v. Drug-gists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980).²³ By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.

In short, Congress' rejection of the premises of *General Electric v. Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex. Petitioner's plan is the mirror image of the plan at issue in *Gilbert*. The pregnancy limitation in this case violates Title VII by discriminating against male employees.²⁴

The judgment of the Court of Appeals is

Affirmed.

²³ See n. 21, *supra*. This reasoning does not require that a medical insurance plan treat the pregnancies of employees' wives the same as the pregnancies of female employees. For example, as the EEOC recognizes, see n. 9, *supra* (Question 22), an employer might provide full coverage for employees and no coverage at all for dependents. Similarly, a disability plan covering employees' children may exclude or limit maternity benefits. Although the distinction between pregnancy and other conditions is, according to the 1978 Act, discrimination "on the basis of sex," the exclusion affects male and female employees equally since both may have pregnant dependent daughters. The EEOC's guidelines permit differential treatment of the pregnancies of dependents who are not spouses. See 44 Fed. Reg. 23804, 23805, 23807 (1979).

²⁴ Because the 1978 Act expressly states that exclusion of pregnancy coverage is gender-based discrimination on its face, it eliminates any need to consider the average monetary value of the plan's coverage to male and female employees. Cf. *Gilbert*, 429 U. S., at 137-140.

The cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees. But although that type of cost differential may properly be analyzed in passing on the constitutionality of a State's health insurance plan, see *Geduldig v.*

Aiello, supra, no such justification is recognized under Title VII once discrimination has been shown. *Manhart, supra*, 435 U. S., at 716-717; 29 CFR § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.")

May 31, 1983

82-411 Newport News Shipbuilding v. EEOC

Dear John:

I will await the dissent.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference

May 31, 1983

82-411 Newport News v. EEOC

Dear Bill:

You and I are the only dissenters in this case.
Would you do me the favor of preparing a brief dissent?

I did some legal work for Newport News Ship on a case-by-case basis before it was acquired about a dozen years ago by Tenneco. I do not think that my firm has any ongoing relationship, but I would feel a little more comfortable not writing myself.

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

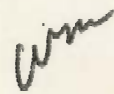
June 1, 1983

Re: No. 82-411 Newport News Shipbuilding v. EEOC

Dear John:

I will prepare a dissent in this case.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

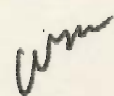
June 1, 1983

Re: No. 82-411 Newport News Shipbuilding v. EEOC

Dear John:

I will prepare a dissent in this case.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1983

✓

No. 82-411

Newport News Shipbuilding
and Dry Dock Co. v. EEOC

Dear John,

I agree.

Sincerely,

Bul

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

✓
June 1, 1983

Re: No. 82-411-Newport News Shipbuilding & Dry
Dock Company v. EEOC

Dear John:

Please join me.

Sincerely,

T.M.

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

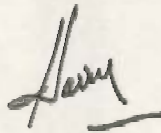
June 3, 1983

Re: No. 82-411 - Newport News Shipbuilding and Dry Dock Co.
v. Equal Employment Opportunity Commission

Dear John:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a horizontal line underneath.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1983

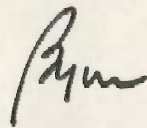
Re: 82-411 -

Newport News Shipbuilding and
Dry Dock Co. v. EEOC

Dear John,

I agree.

Sincerely yours,



Justice Stevens

cc: The Conference

cpm

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**
JUN 8 1983

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-411

**NEWPORT NEWS SHIPBUILDING AND DRY DOCK
COMPANY, PETITIONER v. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

[June —, 1983]

JUSTICE REHNQUIST, dissenting.

In *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), we held that an exclusion of pregnancy from a disability-benefits plan is not discrimination "because of [an] individual's . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, § 703(a)(1), 78 Stat. 255, 42 U. S. C. § 2000e-2(a)(1).¹ In our view, therefore, Title VII was not violated by an employer's disability plan that provided all employees with non-occupational sickness and accident benefits, but excluded from the plan's coverage disabilities arising from pregnancy. Under our decision in *Gilbert*, petitioner's otherwise inclusive benefits plan that excludes pregnancy benefits for a male employee's spouse clearly would not violate Title VII. For a different result to obtain, *Gilbert* would have to be judicially overruled by this Court or Congress would have to legislatively overrule our decision in its entirety by amending Title VII.

¹ In *Gilbert* the Court did leave open the possibility of a violation where there is a showing "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other." 429 U. S. 125, 135 (1976) (quoting *Geduldig v. Aiello*, 417 U. S. 484, 496-497 n. 20 (1974)).

Received

WHR

*in
plainly
right.*

Join

2 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

Today, the Court purports to find the latter by relying on the Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 42 U. S. C. §2000e(k), a statute that plainly speaks only of female employees affected by pregnancy and says nothing about spouses of male employees.² Congress, of course, was free to legislatively overrule *Gilbert* in whole or in part, and there is no question but what the Pregnancy Discrimination Act manifests congressional dissatisfaction with the result we reached in *Gilbert*. But I think the Court reads far more into the Pregnancy Discrimination Act than Congress put there, and that therefore it is the Court, and not Congress, which is now overruling *Gilbert*.

In a case presenting a relatively simple question of statutory construction, the Court pays virtually no attention to the language of the Pregnancy Discrimination Act or the legislative history pertaining to that language. The Act provides in relevant 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. . . ."

Pub. L. 95-555, 92 Stat. 2076, 42 U. S. C. §2000e(k).

The Court recognizes that this provision is merely definitional and that "[u]ltimately the question we must decide is whether petitioner has discriminated against its male

² By referring to "female employees," I do not intend to imply that the Pregnancy Discrimination Act does not also apply to "female applicants for employment." I simply use the former reference as a matter of convenience.

NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC 3

employees . . . because of their sex within the meaning of § 703(a)(1) of Title VII. *Ante*, at 6. Section 703(a)(1) provides in part:

"It shall be an unlawful employment practice for an employer . . . 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. . . ."
42 U. S. C. § 2000e-2(a)(1).

It is undisputed that in § 703(a)(1) the word "individual" refers to an employee or applicant for employment. Thus, as modified by the first clause of the definitional provision of the Pregnancy Discrimination Act, the proscription in § 703(a)(1) is for discrimination "against any individual . . . because of such individual's . . . pregnancy, childbirth, or related medical conditions." This can only be read as referring to the pregnancy of an *employee*.

Yes

That this result was not inadvertent on the part of Congress is made very evident by the second clause of the Act, language that the Court does not once deal with in its opinion.³ When Congress in this clause further explained the proscription it was creating by saying that "women affected by pregnancy . . . shall be treated the same . . . as other per-

³ While in the final analysis not even the seemingly broad statement in the first clause of the definitional section of the Pregnancy Discrimination Act helps the Court, the Court at least recognizes its existence. See *ante*, at 9. But except for when it quotes the Pregnancy Discrimination Act in the margin to its opinion, *ante*, at 1 n. 1, the only mention made by the Court of the language in the second clause is where it notes that the Court of Appeals' dissent "believed the statute was intended to protect female employees 'in their ability or inability to work,' and not to protect spouses of male employees." *Ante*, at 6. Even then the Court fails to note that the dissent so believed because the Pregnancy Discrimination Act plainly says so.

4 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

sons not so affected but *similar in their ability or inability to work*" it could only have been referring to *female employees*. Until today, the Court of Appeals below stood alone in thinking otherwise.⁴

The plain language of the Pregnancy Discrimination Act leaves little room for the Court's conclusion that the Act was intended to extend beyond female employees. The Court concedes that "congressional discussion focused on the needs of female members of the work force rather than spouses of male employees." *Ante*, at 10. In fact, the singular focus of discussion on the problems of the *pregnant worker* is striking.

When introducing the Senate Report on the bill that later became the Pregnancy Discrimination Act, its principal sponsor, Senator Williams, explained:

"Because of the Supreme Court's decision in the *Gilbert* case, this legislation is necessary to provide fundamental protection against sex discrimination for our Nation's 42 million *working women*. This protection will go a long way toward insuring that American women are permitted to assume their rightful place in our Nation's economy.

⁴See *EEOC v. Joslyn Manufacturing & Supply Co.*, — F. 2d —, — (CA7 1983); *EEOC v. Lockheed Missiles & Space Co.*, 680 F. 2d 1243, 1245 (CA9 1982).

The Court of Appeals' majority, responding to the dissent's reliance on this language, excused the import of the language by saying: "The statutory reference to 'ability or inability to work' denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says 'as other persons not so affected'; it does not say 'as other *employees* not so affected.'" 667 F. 2d 448, 450-451 (CA4 1982); App. to Petn. for Cert. a1. This conclusion obviously does not comport with a commonsense understanding of the language. The logical explanation for Congress' reference to "persons" rather than "employees" is that Congress intended that the amendment should also apply to applicants for employment.

"In addition to providing protection to *working women* with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other employment policies which adversely affect *pregnant workers*." 124 Cong. Rec. S18,977 (daily ed. Oct. 13, 1978) (emphasis added).⁵

As indicated by the examples in the margin,⁶ the Congress-

⁵ Reprinted in Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978, at 200-201 [hereinafter referred to as "Leg. Hist."]. In the foreword to the official printing of the Act's legislative history, Senator Williams further described the purpose of the Act, saying:

"The Act provides an essential protection for working women. The number of women in the labor force has increased dramatically in recent years. Most of these women are working or seeking work because of the economic need to support themselves or their families. It is expected that this trend of increasing participation by women in the workforce will continue in the future and that an increasing proportion of working women will be those who are mothers. It is essential that these women and their children be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy." Leg. Hist., at iii.

⁶ See 123 Cong. Rec. S4403 (daily ed. March 18, 1977), Leg. Hist., at 21 (remarks of Sen. Bayh) (bill will "help provide true equality for working women of this Nation"); 123 Cong. Rec. S14,969 (daily ed. Sept. 15, 1977), Leg. Hist., at 62-63 (remarks of Sen. Williams) ("central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work"); 124 Cong. Rec. S18,978 (daily ed. Oct. 8, 1978), Leg. Hist., at 203 (remarks of Sen. Javits) ("bill represents only basic fairness for women employees"); 124 Cong. Rec. S18,979 (daily ed. Oct. 13, 1978), Leg. Hist., at 204 (remarks of Sen. Stafford) (bill will end "major source of discrimination unjustly afflicting working women in America"); 124 Cong. Rec. H6865 (daily ed. July 18, 1978), Leg. Hist., at 172 (remarks of Rep. Green) (bill "will provide rights working women should have had years ago"); 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist., at 177 (remarks of Rep. Quie) (bill is "necessary in order for women employees to enjoy equal treatment in fringe benefit programs"); 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist., at 178 (remarks of Rep. Akaka) ("bill simply requires that pregnant workers be fairly and equally treated").

6 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

sional Record is overflowing with similar statements by individual members of Congress expressing their intention to insure with the Pregnancy Discrimination Act that working women are not treated differently because of pregnancy. Consistent with these views, all three committee reports on the bills that led to the Pregnancy Discrimination Act expressly state that the Act would require employers to treat pregnant employees the same as "other employees."⁷

The Court tries to avoid the impact of this legislative history by saying that it "does not create a 'negative inference' limiting the scope of the act to the specific problem that moti-

See also 123 Cong. Rec. S4144 (daily ed. March 15, 1977), Leg. Hist., at 7 (remarks of Sen. Brooke); 123 Cong. Rec. S4145, S15,058 (daily ed. March 15, Sept. 16, 1977), Leg. Hist., at 8, 134 (remarks of Mathias); 123 Cong. Rec. S14,992 (daily ed. Sept. 15, 1977), Leg. Hist., at 71 (remarks of Sen. Kennedy); 123 Cong. Rec. S15,056 (daily ed. Sept. 16, 1977), Leg. Hist., at 126 (remarks of Sen. Biden); 123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist., at 132 (remarks of Sen. Cranston); 123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist., at 132 (remarks of Sen. Culver); 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist., at 178 (remarks of Rep. Corrada); 124 Cong. Rec. H6863, H13,495 (daily ed. July 18, Oct. 14, 1978), Leg. Hist., at 168, 207 (remarks of Rep. Hawkins); 124 Cong. Rec. H13,495-96 (daily ed. Oct. 14, 1978), Leg. Hist., at 208-209 (remarks of Rep. Sarasin); 124 Cong. Rec. H6868 (daily ed. July 18, 1978), Leg. Hist., at 180 (remarks of Rep. Chisholm); 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist., at 181 (remarks of Rep. LaFalce); 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist., at 182 (remarks of Rep. Collins); 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist., at 184 (remarks of Rep. Whalen); 124 Cong. Rec. H6870 (daily ed. July 18, 1978), Leg. Hist., at 185 (remarks of Rep. Burke); 124 Cong. Rec. H6870 (daily ed. July 18, 1978), Leg. Hist., at 185 (remarks of Rep. Tsongas).

⁷See Report of the Senate Committee on Human Resources, S. Rep. No. 33, 95th Cong., 1st Sess. (1977), Leg. Hist., at 38-53; Report of the House Committee on Education and Labor, H. R. Rep. No. 948, 95th Cong., 2d Sess. (1978), Leg. Hist., at 147-164; Report of the Committee of Conference, H. R. Rep. No. 1786, 95th Cong., 2d Sess. (1978), Leg. Hist., at 194-198.

NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC 7

vated its enactment." *Ante*, at 10. This reasoning might have some force if the legislative history was silent on an arguably related issue. But the legislative history is not silent. The Senate Report provides:

"Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. . . . [T]he question in regard to dependents' benefits would be determined on the basis of existing title VII principles. . . . [T]he question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 331, 95th Cong., 1st Sess. 5-6 (1977), Leg. Hist., at 42-43 (emphasis added).

This plainly disclaims any intention to deal with the issue presented in this case. Where Congress says that it would not want "to encourage" plans such as petitioner's, it cannot plausibly be argued that Congress has intended "to prohibit" such plans. Senator Williams was questioned on this point by Senator Hatch during discussions on the floor and his an-

swers are to the same effect.

"MR. HATCH: . . . The phrase 'women affected by pregnancy, childbirth or related medical conditions,' . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant.

"Indeed under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. . . .

"Could the sponsors clarify exactly whom that phrase intends to cover?

"MR. WILLIAMS: . . . I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, *let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. . . .*

"MR. HATCH: So the Senator is satisfied that, though the committee language I brought up, 'woman affected by pregnancy' seems to be ambiguous, what it means is that *this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?*"

"MR. WILLIAMS: *"Exactly."* 123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist., at 80 (emphasis added).⁸

⁸ The only indications arguably to the contrary are found in two isolated

It seems to me that analysis of this case should end here. Under our decision in *General Electric Co. v. Gilbert* petitioner's exclusion of pregnancy benefits for male employee's spouses would not offend Title VII. Nothing in the Pregnancy Discrimination Act was intended to reach beyond female employees. Thus, *Gilbert* controls and requires that we reverse the Court of Appeals. But it is here, at what should be the stopping place, that the Court begins. The Court says:

"Although the Pregnancy Discrimination Act has clarified the meaning of certain terms in this section, neither that Act nor the underlying statute contains a definition of the word 'discriminate.' In order to decide whether petitioner's plan discriminates against male employees because of *their* sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric v. Gilbert*, *supra*, but also rejected the test of discrimination employed by the Court in that case. We believe it did." *Ante*, at 6.

It would seem that the Court has refuted its own argument by recognizing that the Pregnancy Discrimination Act only

remarks by Senators Bayh and Cranston. 123 Cong. Rec. S15,037, S15,058 (daily ed. Sept. 16, 1977), Leg. Hist., at 75, 131. These statements, however, concern these two Senators' views concerning Title VII sex discrimination as it existed prior to the Pregnancy Discrimination Act. Their conclusions are completely at odds with our decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), and are not entitled to deference here. We have consistently said that "[t]he views of members of a later Congress, concerning different [unamended] sections of Title VII . . . are entitled to little if any weight. It is the intent of the Congress that enacted [Title VII] in 1964 . . . that controls." *Teamsters v. United States*, 431 U. S. 324, 354 n. 39 (1977). See also *Southeastern Community College v. Davis*, 442 U. S. 397, 411 n. 11 (1979).

10 NEWPORT NEWS SHIPBUILDING & DRY DOCK v. EEOC

clarifies the meaning of the phrases "because of sex" and "on the basis of sex," and says nothing concerning the definition of the word "discriminate."⁹ Instead the Court proceeds to try and explain that while Congress said one thing, it did another.

The crux of the Court's reasoning is that even though the Pregnancy Discrimination Act redefines the phrases "because of sex" and "on the basis of sex" only to include discrimination against female employees affected by pregnancy, Congress also expressed its view that in *Gilbert* "the Supreme Court . . . erroneously interpreted Congressional intent." *Ante*, at 9. See also *ante*, at 14. Somehow the Court then concludes that this renders all of *Gilbert* obsolete.

In support of its argument, the Court points to a few passages in congressional reports and several statements by various members of the 95th Congress to the effect that the Court in *Gilbert* had, when it construed Title VII, misperceived the intent of the 88th Congress. *Ante*, at 9-10 and n. 16. The Court also points out that "[m]any of [the members of 95th Congress] expressly agreed with the views of the dissenting Justices." *Ante*, at 9. Certainly *various members of Congress* said as much. But the fact remains that *Congress as a body* has not expressed these sweeping views in the Pregnancy Discrimination Act.

Under our decision in *General Electric Co. v. Gilbert*, petitioner's exclusion of pregnancy benefits for male employee's spouses would not violate Title VII. Since nothing in the Pregnancy Discrimination Act even arguably reaches beyond female employees affected by pregnancy, *Gilbert* requires that we reverse the Court of Appeals. Because the Court concludes otherwise, I dissent.

⁹The Court also concedes at one point that the Senate Report on the Pregnancy Discrimination Act "acknowledges that the new definition [in the Act] does not itself resolve the question" presented in this case. *Ante*, at 11 n. 19.

June 9, 1983

82-411 Newport News Shipbuilding v. Equal Employment

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 10, 1983

Re: No. 82-411 Newport News Shipbuilding and Dry
Dock Company v. EEOC

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

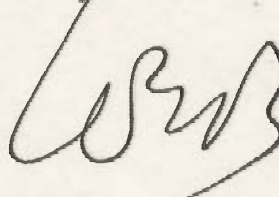
June 13, 1983

Re: 82-411, Newport News Shipbuilding & Dry Dock Co.
v. EEOC

Dear John:

I join.

Regards,

A handwritten signature in dark ink, appearing to be "Stevens", written over the typed word "Regards,".

Justice Stevens

Copies to the Conference

82-411 Newport News Shipbuilding v. EEOC (Mark)

JPS for the Court

1st draft 5/31/83

2nd draft 6/6/83

3rd draft 6/9/83

4th draft 6/14/83

Joined by CJ, WJB, BRW, TM, HAB, SOC

WHR dissent

1st draft 6/8/83

2nd draft 6/13/83

3rd draft 6/15/83

Joined by LFP