10-1977

Nashville Gas Company v. Satty

Lewis F. Powell Jr.

for
Liberty Mutual
(altho it may not be resolved by that case)

Q involved is not excluding ~~from~~ of pregnant women from disability plans but ~~has~~ bars of certain seniority rights ~~during~~ re pregnancy leave.

DISCUSS

Preliminary Memorandum

Conference for December 5, 1975

List 1, Sheet 3

No. 75-536-CFX

NASHVILLE GAS CO.

v.

SATTY

Cert. to CA6 (Miller, Taylor (sitting by designation)*

Federal/Civil

Timely

1. Summary. Petitioner challenges CA6's invalidation of two of its employment policies relating to the treatment of pregnant women.

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*Judge Engel was listed as a member of the panel that heard this case but he did not participate in the consideration of the decision.

Hold for Liberty Mutual etc.

I would think that if the EEOC can require pregnancy to be included in income maintenance plans, it can require this. Therefore this case (See Sachs,

Yes

2. Facts. Respondent became pregnant while she was employed by petitioner. Pursuant to company regulations, she was forced to take a leave of absence 25 days before the expected birth date of her child. This forced leave of absence is not at issue.

Petitioner provides each employee with a number of sick leave days based on seniority. Pregnant employees who are on maternity leaves may not receive any accumulated sick pay but may be paid their accumulated vacation time during their absence. Moreover, a woman taking a maternity leave does not retain her seniority for the purpose of bidding on a permanent position (when she is ready to return to work) although she is given priority over non-employees. Once she is rehired for a permanent position, she gets back the seniority she had accumulated before her maternity leave.

In this case, after respondent had her child, she attempted to return to work. She bid for three permanent permanent positions but was outbid in each case by an employee who did not have her seniority because her seniority is not restored until she obtains a permanent position.

Respondent filed a complaint with the EEOC which eventually issued a right to sue letter. The district court found that the petitioner's refusal to permit respondent to use her accumulated sick leave during her maternity leave and its refusal to permit respondent to retain her seniority for the purpose of bidding on a permanent position after her maternity leave violated Title VII. CA6 affirmed on the basis of an EEOC regulation.*

3. Contentions. Petitioner contends that the decision of CA6 conflicts with this Court's decision in Geduldig v. Aiello, 417 U.S. 484 (1974), presents issues similar to those presented

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*29 C.F.R. § 1604.10(b) provides in pertinent part: "(b) Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any . . . sick leave plan available in connection with employment. Written and unwritten employment policies and prac-

by Liberty Mutual Insurance Co. v. Wetzel, No. 74-1245 (cert. granted, May 27, 1975), and raises distinct issues of fundamental importance in the administration of Title VII. The basic contention of petitioner is that Geduldig settled that "the exclusion of normal pregnancy from a disability benefits plan does not constitute sex based discrimination . . . ." Petition at 6.

4. Discussion. Geduldig is not controlling because it rested on an interpretation of the Equal Protection Clause. This case (Satty) was distinguished by CA6 from Wetzel and from General Electric Co. v. Gilbert and Gilbert v. General Electric Co., Nos. 74-1589 & 74-1590 (cert. granted October 6, 1975), and from American Telephone & Telegraph Co. v. Communications Workers of America, No. 74-1601 (held for Gilbert) on the grounds that petitioner, unlike the companies in those cases, has no disability income protection plan for its employees. It is unclear whether the plan at issue in Soc. Service Employees Union, Local 371 v. Women in City Gov. United, No. 75-70, and United Fed. of Teachers v. Women in City Gov. United, No. 75-71, both being held for Gilbert, is similar to that in AT&T. CA6, nevertheless, followed Wetzel, Gilbert and AT&T in distinguishing Geduldig and in following the EEOC guidelines.

This case is distinguishable from the granted cases

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tices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any . . . sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

because the policy attacked is not a disability income protection plan. Instead, the only question is whether a pregnant employee may be denied the use of her accrued sick leave when she is compelled to take a maternity leave or whether she can use only her accrued vacation leave. Whether this petition is a hold for Gilbert or a possible grant and consolidate depends on whether the distinctive features of the plan are crucial, and whether the Court will hold that the EEOC exceeded its grant of authority when it made a determination that pregnancy distinctions are sex-based distinctions.

If 29 C.F.R. §1604.10(b) is within the EEOC's authority, the court of appeals' decision would appear to be correct. Apparently, the petitioner-employer gave no justification to CA6 for treating pregnancy-related leaves differently from other disability-related leaves with respect to retaining seniority for the purpose of bidding for a permanent position when the employee is able to return to work or with respect to use of accrued sick leave.

There is no response.

11/18/75 Murasky Ops in petn appx.

Heretofore held for Nos. 74-1589 and 74-1590, General Electric v. Gilbert and Gilbert v. General Electric Co.

(3) Nashville Gas Co. v. Satty, No. 75-536. G.V.+R.
Petitioner company in this case has a policy that pregnant employees who are on maternity leaves may not receive any accumulated sick pay, although such employees may be paid their accumulated vacation time during this absence. Further, an employee taking a maternity leave does not retain accumulated seniority for the purpose of bidding on a permanent position (although priority is given over non-employees). Once rehired for a permanent position the employee gets back the seniority accumulated prior to the maternity leave. In this case, respondent, after having her child, sought three permanent positions, but was outbid in each case by an employee who had less seniority than respondent would have had had she been given credit for her pre-maternity leave seniority. She brought this suit claiming that the refusal to allow her to use accumulated sick leave, as well as the refusal to allow seniority for purposes of bidding on a permanent position at the conclusion of the maternity leave, violated Title VII. The District Court agreed, and the Sixth Circuit affirmed. The Sixth Circuit noted that this case was different than Liberty Mutual Insurance Co. v. Wetzel, 511 F.2d 199 (CA 3 1975), vacated, 424 U.S. 737, AT&T, supra, and General Electric, in that petitioner in this case had no disability benefits plan for its employees. The Sixth Circuit did agree with those cases both in distinguishing Geduldig and in following the EEOC guidelines. As I see no reason to grant this case to consider these factual twists until the lower courts have had an opportunity to digest General Electric, I will vote to grant, vacate, and remand for reconsideration in light of General Electric.

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-536

Submitted ....., 19... *Announced* ....., 19...

NASHVILLE GAS CO.

VS.

SATTY

Heretofore held for Nos. 74-1589 and 74-1590, GEC v. Gilbert and Gilbert v. GEC

This is close case. It is different from GE.

Relist for all of us to take closer look.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.			✓										
Rehnquist, J.				G		V	+ R						
Powell, J.				G		V	+ R						
Blackmun, J.		✓		●									
Marshall, J.			✓										
White, J.		●	✓										
Stewart, J.				G		V	+ R						
Brennan, J.			✓										
Burger, Ch. J.				G		V	+ R						

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

1st DRAFT

Circulated: 1-18-77

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

NASHVILLE GAS COMPANY *v.* NORA D. SATTY

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

No. 75-536. Decided January —, 1977

MR. JUSTICE WHITE, dissenting.

The Court grants the petition for a writ of certiorari, vacates the judgment below and remands the case for reconsideration in light of our decision in *General Electric Co.* v. *Gilbert*, — U. S. L. W. —. Because the case involves an important issue as to which *Gilbert* is unilluminating, I would simply grant the petition.

As I understand our decision in *Gilbert*, it rests on the simple factual proposition that the failure to include pregnancy in the health benefit plans provided by the General Electric Co. for its employees has neither the purpose nor the effect of discriminating against women. See *Richmond Unified School District* v. *Berg*, No. 75-1069 (WHITE, J., dissenting). Under petitioner's policy involved in this case, employees who take pregancy leaves lose their seniority for the purpose of bidding on permanent positions. Since men do not get pregnant, the policy impacts women differently than it impacts men; and since, as a result of the policy, they may not receive permanent positions, the policy has the effect of disadvantaging women as compared with their male coemployees in obtaining jobs. A discriminatory effect is thus clearly shown here. I would grant the petition and consolidate this case with *Richmond Unified School Board* v. *Berg*, *supra*, for oral argument.

I'm now inclined to join Byron

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1977

Re: No. 75-536 - Nashville Gas Company v. Satty

Dear John:

When this case appears on the order list would you please note the following:

"Mr. Justice Blackmun would grant certiorari and set the case for argument."

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1977

RE: No. 75-536 Nashville Gas Co. v. Satty

Dear Byron:

Please join me.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 21, 1977

Re: No. 75-536, Nashville Gas Company v. Satty

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 21, 1977

Re: 75-536 - Nashville Gas Co. v. Satty
75-1069 - Richmond Unified School Dist. v. Berg

Dear Byron:

Although I do not read the General Electric opinion the way you and those who have joined your dissent do, I nevertheless am persuaded that we should grant certiorari in these two cases.

Respectfully,

John

Mr. Justice White

Copies to the Conference

January 21, 1977

No. 75-1069 Richmond Unified School Dist.
v. Sonja Lynn Berg

No. 75-536 Nashville Gas Company v. Satty

Dear Byron:

Your dissenting opinions have persuaded me. I now agree that we should grant petitions in both of these cases and consolidate them for oral argument.

In any event, please join me in your dissents.

Sincerely,

Mr. Justice White

Copies to the Conference

LFP/lab

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-536

Submitted ....., 19... *Announced* ....., 19...

NASHVILLE GAS CO.

vs.

SATTY

Heretofore held for Nos. 74-1589 and 74-1590, GEC v. Gilbert and Gilbert v. GEC.

G. V. + R. on Gen Electric

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Stevens, J.				G V + R				on G.E.					
Rehnquist, J.				G V + R									
Powell, J.				G V + R									
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.			✓										
Stewart, J.				G V + R									
Brennan, J.			✓										
Burger, Ch. J.				G V + R									

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-536

Submitted ....., 19... *Announced* ....., 19...

NASHVILLE GAS CO.

vs.

SATTY

Heretofore held for Nos. 74-1589 and 74-1590 - GEC v. Gilbert and Gilbert v. GEC
RELISTED for Mr. Justice Stevens.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.		✓											
Rehnquist, J.		✓	V	V & R									
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.		✓											
White, J.		✓											
Stewart, J.		✓											
Brennan, J.		✓											
Burger, Ch. J.			✓										

Conference 2-20-76

Court CA - 6 | Voted on ....., 19... | No. 75-536

Argued ....., 19... | Assigned ....., 19...

Submitted ....., 19... | Announced ....., 19...

NASHVILLE GAS COMPANY, Petitioner

vs.

NORA D. SATTY

10/7/75 Cert. filed.

Raises "set dividing" issue we split on in GE case.

Relist for Blackmun

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
STEVENS, J.														
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
~~Douglas, J.~~														
Burger, Ch. J.														

Court .... Voted on ...., 19...
Argued ...., 19... Assigned ...., 19... No. 75-536
Submitted ...., 19... Announced ...., 19...

Nashville Gas Company

vs.

Satty

Is a close but not identical with Liberty Mutual. This was denial of seniority to pregnant women. I am inclined grant. (The problem of Harris's disqualification remains)

Relist for Rehnquist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.													
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.		✓											
Brennan, J.		✓											
Burger, Ch. J.													

Conference 3-5-76

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-536

Submitted ....., 19... *Announced* ....., 19...

Nashville Gas Co.

VS.

Sattly Relist

Hold for Liberty Mutual

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-536

Submitted ....., 19... *Announced* ....., 19...

Nashville Gas Co.

vs.

Satty

Heretofore held for Liberty Mutual v. Wetzel

Hold for G.E.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Stevens, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

LFP/vsl
7/26/77

No. 75-536, Nashville Gas Co. v. Satty

This is dictated after reviewing the briefs in the above case. It is merely an "aid to memory" rather than an analysis. Any view expressed or implied is quite tentative.

* * * * *

Here on certiorari from CA6, this case was a "hold" for Gilbert v. General Electric. Although one of the issues decided by CA6 is now controlled by GE (see below), the facts are sufficiently different to present an issue not necessarily controlled by GE.

After complying with EEOC procedures, respondent -- a clerk with Nashville Gas (petitioner) -- brought this suit under Title VII alleging sex discrimination. Respondent was granted "pregnancy leave" on December 29, 1972, 25 days before her child was born. Petitioner did not have a disability plan as such, but did have a sick leave plan for the benefit of employees absent from work due to non-occupational sickness or injury for a specified number of days based on seniority. When such an employee is able to resume work, he or she customarily is returned to the job

previously held although the company does not concede any obligation to hold jobs open for extended periods of time. Moreover, an employee who returns to work from sick leave retains full seniority.

Pregnancy is not treated as sickness or injury under the company's sick leave plan. Rather, a pregnant employee is granted a leave of absence that the company states is similar to leaves of absence granted employees (apparently optionally) for causes other than sickness or injury (e.g., to complete education).

Without checking the record more carefully, it is not clear to me whether the company's policy with respect to treatment accorded women returning from pregnancy leave is formalized. There is no dispute as to the treatment accorded respondent. When she was placed on pregnancy leave, her position was not filled in view of the converting of certain accounting functions to computers. Some six weeks after her child was born, the company did provide respondent with temporary work for one month. Thereafter, in order to collect unemployment insurance, respondent requested the company to change her employment status from pregnancy leave to termination, which the company did (appendix 31). Before she was terminated, and following the birth of her child, respondent applied for three full-time positions which became available. In each case, a permanent female employee with seniority was awarded the position, although if respondent had retained her job-bidding seniority, she would have been entitled to the position (appendix 33).

CA6 decided this case, affirming the DC's judgment in favor of respondent, before Gilbert was decided. It distinguished

Geduldig. Respondent now concedes that "petitioner's sick leave plan is for all intents and purposes the same as the plan examined in Gilbert." (Brief p.8.) Thus, denial of sick pay is no longer an issue.

But respondent argues that "disparate treatment" in other respects, following pregnancy, constitutes discrimination violative of Title VII. Respondent contrasts the difference in treatment accorded employees who return from "sick leave" with the treatment accorded a woman returning -- or attempting to return -- from pregnancy leave. In the former situation, the returnee is "generally" placed in the same position, receives any pay raises that may have taken effect during the absence, and is entitled to the same seniority which he or she had earned prior to the absence (appendix 17-19).

A woman returning from pregnancy leave, however, is not entitled to resume her prior position. She is "permitted to return to work when a permanent position for which she is qualified becomes available and when no employee then permanently employed is bidding on the opening." (Pet. brief p. 4; cf. resp. brief p. 13.) If a woman returning from pregnancy leave is re-employed, she retains previously accumulated seniority with respect to pensions, vacations, and certain other benefits. She does not retain "accumulated seniority for job-bidding purposes."

Petitioner views the issue as being limited to whether failure to provide "job-bidding" seniority constitutes sex discrimination. Respondent views it somewhat more expansively: whether the

total disparity of the treatment of employees returning from sick leave and women returning from pregnancy leave constitutes unlawful discrimination. Respondent also argues that company policy is a pretext to discriminate.

It is not clear to me, from a preliminary reading of the briefs, whether respondent claims any right to re-employment following pregnancy. Apparently there is no such enforceable right following sick leave, although company policy is to re-employ. Apparently the company is not obligated to re-employ in either case. The essence of respondent's claim of discrimination is loss of seniority (brief p.9). Thus, if full seniority had been accorded respondent when job vacancies occurred, she would have been re-employed.

Petitioner argues, as would be expected, that the rationale of Gilbert is controlling as to the seniority issue just as respondent concedes it to be controlling as to sick pay itself. If there is no discrimination in classifying pregnancy differently for purposes of sick pay, petitioner argues with a good deal of logic that there can be no discrimination with respect to re-employment.

But the issue certainly is not free from doubt. Indeed, we granted certiorari because of this factual distinction. I intend to examine the briefs more carefully, and to re-read Gilbert and Geduldig.

I also will welcome the thoughts of my clerk.

Hold for Liberty Mutual (altho it may not be resolved by that case)

Q involved is not exclusion of pregnant women from disability plans but loss of certain seniority rights as a result of pregnancy leave.

DISCUSS

Preliminary Memorandum

Conference for December 5, 1975

List 1, Sheet 3

No. 75-536-CFX

NASHVILLE GAS CO.

v.

SATTY

Cert. to CA6 (Miller, Taylor (sitting by designation)*

Federal/Civil

Timely

1. Summary. Petitioner challenges CA6's invalidation of two of its employment policies relating to the treatment of pregnant women.

---

*Judge Engel was listed as a member of the panel that heard this case but he did not participate in the consideration of the decision.

Hold for Liberty Mutual etc.

I would think that if the EEOC can require pregnancy to be included in income maintenance plans, it can require this. Therefore this case (See Bath)

WP

will be a fortiori if the EEOC is sustained in the other cases. If the EEOC is not sustained a close look can be taken at this case to see if different principles govern. A grant might then be in order, but now I see no point in a consolidation.

Carl

BENCH MEMO

To: Mr. Justice Powell Date: Sept. 30, 1977
From: Sam Estreicher

No.75-536, Nashville Gas Co. v. Satty;
No. 75-1069, Richmond Unified School Dist. v. Berg

I. THRESHOLD QUESTIONS

The threshold questions relate only to the Berg case.

A. Subject Matter Jurisdiction (Berg case)

Petrs raise a number of technical arguments challenging the DC's assumption of jurisdiction in this case. Chronology is important here, and I offer the following table for your guidance:

Nov. 15, 1975--Berg filed a charge with the EEOC.
Dec. 13, 1972--Petr school dist.'s governing bd approved a proposed interim maternity leave policy.
Dec. 14, 1972--Berg notified petr that she was pregnant and requested a pregnancy leave to begin February 23, 1973, one month before expected due date.
Dec. 20, 1972--Berg submitted a further request supported by a statement from her physician.
Dec. 27, 1972--School Dist. responded by requesting that Berg submit to a physical examination by the school dist. doctor.
Jan. 12, 1973--Berg's counsel requests "right to sue" letter from EEOC.
February 5, 1973--Berg brought suit in DC, raising claims under §§1981, 1983, 14th Amendment and Title VII, with jurisdiction under 28 U.S.C. §§1331, 1343(3) and 42 U.S.C. §2000(e)-5(f)
February 8 1973--Berg moved for a prelim inj.
February 21, 1973--Berg received a "right to sue" letter.
February 22, 1973--DC granted resp's motion for a prelim inj.
April 23, 1973--Berg filed a motion styled "Supplement to Complaint".
June 8, 1973--DC granted Berg's "Supplement to Complaint."

July 30, 1973--DC denied motion to dismiss on jurisdictional grounds.
August 31, 1973--DC granted summary judgment and perm inj.
December 14, 1973--DC granted judgment certifying class action.

Petr argues that the DC lacked subject matter jurisdiction because the EEOC charge was filed prematurely, 42 U.S.C. §2000e-5(e); (2) the charge was not made under oath, id. §2000e-5(b); and (3) resp instituted a Title VII action without meeting the statutory prerequisite of receipt of a "right to sue" letter from the EEOC, id. §2000e-5(f).

CA9 affirmed the DC's assumption of jurisdiction on three, alternative grounds. (1) The DC had independent subject matter jurisdiction to issue a prelim inj under 28 U.S.C. §1343(3) and §1983, in light of resp's substantial constitutional claim. Hagans v. Lavine, 415 U.S. 528, 537 (1974); Goosby v. Osser, 409 U.S. 512, 518 (1973). (2) The DC had jurisdiction under Title VII itself to issue a prelim inj pending disposition by the EEOC of the underlying charge of discrimination. Drew v. Liberty Mutual Insur. Co., 480 F.2d 69, 72-76 (CA5 1973). (3) Finally, the later issuance of the "right to sue" letter coupled with the filing of a supplemental complaint operated to cure any initial jurisdictional defect. Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258, 260 (CA 4 1972), cert. denied, 410 U.S. 912 (1973).

In my view, ground (2) is inconsistent with the statutory design, but it is unnecessary to the result. It would seem that the DC had jurisdiction to issue the prelim inj on the basis of the §§1983, 1981 claims. The prelim inj issued on February 22, 1973, a day after resp received the "right to sue" letter, but

apparently no motion was made at that time to amend or supplement the complaint. The February 22 inj was not premised on Title VII jurisdiction (Petn, App. C, at 32), although intervening §1983 cases in this Court (City of Kenosha v. Bruno) led the DC to reexamine its §1983 jurisdiction and develop the pendente lite theory as a post-hoc rationalization (id. at 37). The other relief in the case was awarded after the motion to supplement the complaint had been granted. Petr offers no direct authority that under the circumstances, the DC should have entered a formal dismissal and required commencement of a new action.

B. Should Berg be "DIG'd"?

I am not "DIG"-happy, but I cannot understand why cert. was granted in Berg. First, a Calif. statute effective January 1, 1976 requires that pregnancy be treated in the same fashion as any other temporary disability for all job-related purposes. (see Petn, App.D, at 52-53). Second, shortly before resp filed her complaint in DC, petr had formulated an interim maternity leave policy to replace what was an inflexible, LaFleur-like policy. (The interim policy is set out at Petn, App.A, at 2-3). This is not a case where the school district imposed a mandatory maternity leave several months in advance of the expected due date. As I read the record, petr school dist. indicated that it might extend the 30-day period established in the interim policy, but insisted that resp submit to an examination by a school dist. physician. Resp refused to do so. The maternity leave issue in this case boils to the question of whether a school district may condition an extension of a

30-day mandatory maternity leave upon submission to a physical examination by the district's physician. Third, in addition to the jurisdictional quagmire that I have just whizzed through, the record is poorly developed at points. For example, notwithstanding the DC's contrary finding (Petn, App.C, at 34), I find it hard to disbelieve petr school dist.'s assertion that it also subjects employees suffering certain non-pregnancy disabilities to examination by its own physician. Fourth, the maternity leave issue as present in this case is not particularly interesting, and seems answered by dicta in Cleveland Board of Educ. v. LaFleur (at least as a matter of due process). The other issue in the case --denial of sick leave pay-- is present in Nashville Gas.

II. THE MERITS

A. The Impact of Gilbert

The Nashville Gas and Berg cases turn, of course, on the reach of General Electric Co. v. Gilbert, No. 74-1589 (decided December 7, 1976), 429 U.S. 125. There are many ways of reading Gilbert. As in the poem of love, let me count the ways:

1. The uniqueness of pregnancy. There is much reliance in Gilbert, 429 U.S. at 136, 139, and its intellectual forebear, Geduldig v. Aiello, 417 U.S. 484, 496-97 & n.20 (1974), on the view that pregnancy is different, because it is a gender-specific condition as to which there is no comparable class of males. Consequently, it might be argued, pregnancy classifications can never constitute "sex discrimination" or "discrimination based on sex."

This concept of uniqueness, however, cannot be taken to its

logical extreme. I doubt whether the Court would uphold a public school board's decision to discharge permanently a teacher solely because of the onset of pregnancy. Refusals to hire, rehire, train, promote, etc. solely on grounds of a previous pregnancy similarly would be suspect. The law is fairly clear that the fact that an employer's discriminatory practice affects only a subclass of one sex does not bar a finding of discriminatory purpose or effect. See, e.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) (refusal to hire mothers of pre-school age children); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (CA 7), cert. denied, 404 U.S. 991 (1971) (discharge of woman for getting married). These cases did not involve a gender-specific condition, but I believe they stand for broader proposition asserted above. These practices, if perpetrated by public officials, would not pass muster under "rational basis" scrutiny. See Cleveland Board of Educ. v. LaFleur, 414 U.S. 634, 651 (1974) (Powell, J., concurring in the result). And, in my view, Gilbert does not shield such practices.

2. An insurance, cost-justification case. At the other extreme, there is the view, shared by resps in Nashville Gas and Berg, that Gilbert is to be confined to its narrow facts. Thus, Gilbert is said to hold that an employer's disability insurance program which is underinclusive with respect to the risk of pregnancy is lawful under Title VII as a "cost-justified employment practice". Undoubtedly, this was the operative setting for both Gilbert and Geduldig, and insurance concepts pervade much of the discussion in both decisions. See Gilbert,

429 U.S. at 130-31 & n.9, 134, 135-36, 138; Geduldig, 417 U.S. at 493-97. While insurance concepts and cost considerations were important to the outcome of each case, and the absence of these factors in a case might yield a different result, Gilbert rests on a somewhat broader rationale.

Somewhat Broader basis than court

3. Pregnancy classifications as not per se discriminatory, whether in purpose or effect. As I read Gilbert, the Court held that classifications based on pregnancy -- a sex-specific condition -- do not, without more, constitute sex-based discrimination. Such classifications, standing alone, are discriminatory neither in purpose nor effect, even though only women are affected. A successful Title VII action requires an independent showing of discriminatory purpose or disparate, detrimental impact on women. J. Rehnquist stated this point with fair clarity:

> We recognized in Geduldig, of course, that the fact that there was not sex-based discrimination as such was not the end of the analysis should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex on the other.
>
> * * * *
>
> Since gender-based discrimination had not been shown to exist either by the terms of the plan or by its effect, there was no need to reach the question of what sort of standard would govern our review had there been such a showing.

429 U.S. at 135 (emphasis supplied).

No finding of pretext

The Gilbert Court found no record support for a finding of "pretext" or effect. As to the former, the exclusion of pregnancy from insurance coverage did not constitute a sub rosa sex discrimination because pregnancy is a unique disability. "But we have here no questions of excluding a disease or disability comparable in all respects to covered diseases or

disabilities and yet confined to the members of one race or sex." 429 U.S. at 136.

Similarly, "resps [had] not made the requisite showing of gender-based effects," 429 U.S. at 137. "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this case simply because women disabled as a result of pregnancy do not receive benefits...." Id. at 138.

Now for the more difficult task of applying Gilbert to the cases at hand. Nashville Gas and Berg present three different practices: (1) denial of accumulated job-bidding seniority (Washington), (2) denial of accumulated paid sick leave, and (3) a requirement of mandatory maternity leave.

B. Denial of Accumulated Job-Bidding Seniority (Nashville Gas)

In Nashville Gas Co. v. Satty, petr maintained an essentially two-tier leave policy: (1) "sick leave," and (2) "leave of absence." (There may also have been a leave policy for disability due to on-the-job injury, which is not pertinent here). As to the former, the DC found, "defendant maintains a policy of allowing leave in connection with non-work related illness or injury without loss of seniority or other indicia of good standing on the part of an employee where the non-work related disability does not concern pregnancy. It is only in the case of pregnancy that an employee is denied the opportunity to take 'sick leave.'" (App. 44). As to the latter, petr enforces a mandatory maternity leave policy (not directly in issue in this case). While some provision is made for reemployment of a returning mother on a temporary basis until a low-seniority permanent position opens up and

retention of seniority for purposes of vacations and pensions, the returning mother loses her job-bidding seniority and is denied accumulated sick leave pay. Notwithstanding what seems to be a contrary finding by the DC (App. 45), it appears that employees seeking a leave for education, travel or other personal, non-disability reason are treated in the same fashion as pregnant women.

The DC held that Title VII had been violated because:

> (1) only pregnant women are required to take leave and thereby lose job bidding seniority and no leave is required in other non-work related disabilities; and
> (2) only pregnant women are denied sick leave benefits while in all other cases of non-work related disability sick leave benefits are available.

(App. 51).

The court also found that "[petr] has introduced no proof of any business necessity in support of these discriminatory policies. The court must therefore assume no justification exists" (App. 51).

Petr contends that its policy is one of "favor[ing] those employees who are actively working for the company at the time a job opening becomes available to the detriment of those employees on leave of absence, including maternity leave" (Br. 26), and that, unlike Gilbert, the impact of its practice does not fall exclusively upon women (id. 24). In response to the argument that this justification does not explain the differential treatment accorded employees with other non-occupational disabilities, petr falls back on Geduldig's characterization of pregnancy as a "voluntary" condition, not a true disability. "[A]n employer may rationally favor those employees who do not absent themselves for education, travel or

other reasons of personal preference over those who do so absent themselves. Such absences are disruptive and need not be encouraged by the employer.(Reply Br. 3).

Petr's justification is certainly not without reason, but I doubt whether it rises to the level of "business necessity" needed to overcome a prima facie Title VII case. Griggs v. Duke Power Co., 401 U.S. 424 (1971). I say this because the policy is not based on cost or efficiency considerations. Indeed, it would usually cut against efficiency to hire or promote an inexperienced employee over a senior worker. At bottom, petr's concern is an "ideological" one: he wants to reward employees who exhibit loyalty and do not take leaves for personal junkets. This type of rationale is ordinarily not thought sufficient to justify a disparate impact on a protected class. See, e.g., Sprogis v. United Air Line, Inc. It also offends my common sense to equate absence on account of pregnancy with leaves for travel and education. The condition of pregnancy may be voluntarily assumed in the first instance, but, as implicitly recognized by petr's own mandatory maternity policy (App. 43), at some point that condition ripens into a genuine disability.

The question then becomes whether resp Satty has made out a prima facie cases consistent with Gilbert. It must be remembered that the decisions were below were handed down prior to Gilbert, and the courts proceeded on the assumption that the usual Title VII principles would apply to pregnancy classifications.

Although resp and amici make the argument that petr's policy is merely a "pretext" for stereotypical thinking about

female employees (e.g., that their devotion to the job terminates with the onset of pregnancy, or that their need for employment ceases with the birth of children). I do not think that the record supports this position. The argument here is that there is a complete absence of justification for a policy which is irrational and overbroad. A woman on mandatory maternity leave loses here job-bidding seniority "regardless of the length of her absence, and regardless of whether her absence was solely due to disability or included some period when she could have worked but preferred, for personal reasons including care of the infant, to remain at home." (AFL-CIO and UAW as Amici Br.16). Of course, the absence of a reasonably plausible justification can be evidence of improper motivation, cf. Washington v. Davis, 426 U.S. 229, 242 (1976); NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1966); Gomillion v. Lightfoot, 364 U.S. 339 (1969). But I doubt whether a finding of pretextual sex-based discrimination can be squared with the fact that petr has asserted a plausible, if ultimately unpersuasive, justification, that employees returning from maternity leave receive temporary employment until a permanent position opens up and retain vacation and pension seniority, and that female employees are present in petr's workforce and in this case were the immediate beneficiaries of resp Satty's loss of job-bidding seniority.

I am inclined, however, to think that a classification denying job-bidding seniority to women returning from a (mandatory) maternity leave presents a prima facie case of disparate impact under Gilbert. Since the facts were developed

in a pre-Gilbert setting, the briefs do not offer aggregate statistics, setting forth, in some systematic fashion, the impact of the denial of job-bidding seniority on petr's female workforce. I am not sure such a showing is essential in this case. Unlike Griggs, we can be certain that the employer's maternity leave policy impacts only women. And unlike Gilbert, female employees as a class are likely to suffer an aggregate detriment, in terms of their relative seniority position vis-a-vis male employees. Moreover, some women may be discouraged from returning to their jobs because of the prospect of having to bid for low-seniority positions. There is support for the conclusion that petr's policy "is in fact worth more to men than to women," Gilbert, 429 U.S. at 138, and that it has "worked to discriminate against an identifiable group or class," Geduldig, 417 U.S. at 496. Thus, petr's failure to demonstrate "business necessity" dooms the job-bidding seniority restriction.

I'm inclined to agree

It is true that non-pregnant female employees will themselves suffer no detriment, and indeed women replaced resp in two positions which she would have gotten had she not been deprived of her job-bidding seniority. However, Gilbert need not be read as declaring "an 'anything goes' approach to personnel policies regarding pregnancy" (ACLU Br. 29), simply because there will always be a subset of women who are not disadvantaged by the particular policy. Although I think a prima facie case can be presumed on the record of this case, the Court may wish to remand for further factual development on the question of whether petr's female employees have suffered,

in the aggregate, a disadvantage relative to petr's male workforce.

ACLU, as amicus, also argues that EEOC regulations on the seniority issue are entitled to deference because, unlike the portion of the regulations effectively disregarded in Gilbert, the EEOC has consistently taken the view that pregnancy classifications impinging seniority rights violate Title VII, and that other federal agencies have not taken a contrary view (ACLU Br. 30-33). Petr disputes this characterization (Reply Br. 7-11), but some of the quotations referred to by petr belie its position (see, e.g., p. 11).

I have not discussed the "vested rights" concept, because I do not think it withstands analysis. Seniority or sick leave pay is no more "vested" than income insurance. They are all terms or conditions of employment, obtained either through the unilateral largesse of the employer or individual or collective negotiations, defined by the limitations arrived at in the employment agreement, and subject to revision or even elimination in future agreements.

C. Denial of Accumulated Paid Sick Leave (Nashville Gas; Berg)

1. The Nature of the Plans. The Nashville Gas sick leave plan is, in effect, a substitute for a disability insurance plan (App. 13). Employees "earn" a given number of sick leave days for use in the future, depending on how long they remain continuously employed, and how often they use sick leave while employed. An employee may not accumulate unused sick leave from one year to the next. But for each year he uses no sick leave, he can add one week of full pay leave, up to double the full

pay to which he is otherwise entitled (App. 97). Apparently, unused sick leave cannot be applied to vacation time. Pregnant employees can draw upon their sick leave until "pregnancy leave" commences.

The plan in Berg follows Calif. Educ. Code §13468 which essentially provides an entitlement of "10 days' leave of absence for illness or injury" for every full-time employee, with accumulation of unused leave from one year to the next. Pursuant to Calif. Educ. Code §13456, which states that the section does not require school boards to grant sick leave pay to pregnant teachers, petrs in Berg adopted a policy of denying sick leave to employees who are not working as a result of the mandatory maternity leave then in effect.

2. Similarity to Gilbert. A pregnancy classification with respect to sick leave pay is very close to the facts in Gilbert.

The employer's interest in avoiding the cost of coverage for pregnancy -- to limit the number of occasions that may give rise to paid sick leave liability -- is similar to GE's in Gilbert. However, there are differences. Generally speaking, actuarial criteria of risk selection govern disability insurance, not sick leave policies. Moreover, as the AFL-CIO and UAW point out in their amici brief in Nashville Gas, Gilbert plan did not set an absolute limit set upon the number of sick days that could be taken in one year, but, rather, limited the number of days for which payments would be made for any single disability. See 429 U.S. at 128. In the Nashville Gas plan, by contrast, there is little likelihood that female employees will receive an extra benefit on account of

pregnancy, because the employer sets a ceiling governing the allowance for each employee (Amici Br. 30-31). The Calif. plan in Berg has a similar structure, although the school board is given discretion to increase the allowance in a particular case.

A disparate impact argument is more difficult to make in this context than in the case of denial of job-bidding seniority. As in Gilbert, men and women are likely to incur roughly the same number of reimubursible disabilities over the course of a year. Therefore, exclusion of pregnancy coverage, standing alone, does not disadvantage female employees as a class. On the other hand, at least in Nashville Gas, inclusion of pregnancy "does not destroy the presumed parity of the benefits accruing to men and women alike,. which results from the facially evenhanded inclusion of risks." Gilbert, 429 U.S. at 139 & n.17 (emphasis in original).

3. Viewing the employer's maternity policy as a whole. Resps in both cases argue that any perceived similarity between the sick leave plans in Nashville Gas and Berg and the Gilbert situation disappears when the denial of paid sick leave is viewed in the context of the employer's maternity policy as a whole. In part, this a "pretext" argument. Resp in Berg makes much of the inconsistent posture of the school board -- treating pregnancy as a disability for purposes of mandatory maternity leave, while denying disability status for purposes of sick leave pay. And resps in both cases stress the stereotypical thinking underlying their respective employer's overall policy. I do not think that the Court will deem inconsistency in the labeling of pregnancy to be sufficient

proof of "pretext." Nor does the record support the view that the policies in Nashville Gas and Berg are explainable soley by reference to invidious stereotyping of female employees. The Berg plan also involves a one-day, "have a cigar" paternity leave. This is undeniably unjust, but hardly a linchpin for establishing discriminatory intent. The employer has an easy answer: a one-day leave is simply not as expensive as a pregnancy leave of several months' duration.

The better argument here -- one which is not clearly made in any of the briefs and which may require a remand for factual development -- is that, as a factual matter, female employees in the aggregate will receive less compensation than the class of male employees because a significant number of the former, but not the latter, must endure forced discontinuity of work without sick leave pay. (I believe J. White made this point in his dissent from the initial vote to deny cert. in Berg). I would add that inclusion of pregnancy will not lead to "unjust enrichment" of female employees as a class, because the paid sick leave ceilings will remain the same notwithstanding the inclusion of pregnancy as a reimbursible disability. Moreover, the employer's cost justification is somewhat more attenuated than in Gilbert because he has presumably budgeted for the allowable number of sick leave payments. And the employer's interest in continuity of employment is undercut by his willingness to permit disability leave generally.

D. Mandatory Maternity Leave (Berg)

As a theoretical matter, mandatory maternity leave policies should be subject to Title VII scrutiny, in terms of the

disparate impact analysis outlined above. Women are more likely than men to be subject to mandatory leave and thereby suffer relative loss of pay and other benefits (see J. White's dissent from the initial vote to deny cert. in Berg).

However, in the Berg case, the school district's interim policy, which became effective before resp brought suit in DC, established a flexible 30-day maternity leave, subject to extension upon a showing that an employee can continue working beyond that point without endangering health or interfering with job performance. Resp's challenge is reduced to (1) an attack on the requirement of any mandatory maternity leave at all, and (2) petr school district's decision to condition an extension in resp's case upon submission to a medical examination by petr's physician.

Petrs' policy would seem to satisfy a "business necessity" test. The interim policy provides for an individualized determination of disability or fitness to teach. Petrs' insistence that resp submit to an examination by the school board's doctor follows the suggestion made by way of dictum in Cleveland Board of Educ. v. LaFleur. The LaFleur Court noted that school boards "could require the pregnant teacher to submit to medical examination by a school board physician." 414 U.S. at 647 n.14. The failure to require a similar procedure with respect to other disabilities --a point which petr does not concede (Petrs' Br. 44), but which the DC decided against petr (Petn, App. C, at 34)-- would seem a justifiable classification in light of the fairly widespread, but by no means consensus, medical opinion concerning the disabling

effect of pregnancy on a teacher's job performance during the last few weeks of a pregnancy. LaFleur, 414 U.S. at 647 n.13; see petrs' evidence on this point (App. 56). And few other disabilities are as identifiable and as predictable as pregnancy. In this sense, pregnancy is unique. This also answers the contention that pregnant women are the only employees who are forced to take a mandatory leave even though the woman and her doctor believes she is physically capable of working up to the expected due date. Putting to aside the DC's contrary finding, I would think that employers often require employees to undergo a company-doctor examination, and on occasion such an examination can result in a mandatory leave of absence. It would seem that resp's real complaint is with the the routine nature of petr's requirement in the case of pregnancy.

E. The Desirability of a Remand?

Since both cases were decided before Gilbert, when the courts fairly uniformly held, following the EEOC regulations on point, that any disability plan which treated pregnancy differently than other disabilities is per se violative of Title VII, the Court may wish to vacate and remand for further factual development. Gilbert rejects any per se approach, and requires the plaintiff to show that the plan under attack has the effect, in the aggregate, of providing greater benefits for men than for women. Such a factual showing in terms does not seem to be present in either Nashville Gas or Berg. While I think aggregate disadvantage to female employees can be presumed in the case of a mandatory maternity leave policy

which denies affected female employees job-bidding seniority and paid sick leave, the Court may find a remand for factual development appropriate. A reversal, however, would not be in order. In Gilbert, the Court reversed in the absence of the requisite showing of discriminatory purpose or effect. There, the record evidence showed that actual benefits provided to women and the cost of those benefits were equal to or greater than the benefits, and the attendant cost, to men. See 429 U.S. at 130 & n.9. Here, the inferences from the record are to the contrary.

III. CONCLUSION

I think a DIG is appropriate in No. 75-1069, Richmond Unified School Dist. v. Berg. In any event, I believe the DC had jurisdiction to issue the prelim inj. And I would affirm on the sick leave issue but reverse and remand on the mandatory maternity leave question.

With respect to No. 75-536, Nashville Gas Co. v. Satty, I would affirm on both seniority and sick leave pay.

S.E.

75-536 NASHVILLE GAS CO. v. SATTY Argued 10/5/77

Two alleged discriminations:
1. Sick leave policy
2. Seniority for job bidding.

Title VII case.

1. As to sick leave, Resp's brief concedes Petr's plan is essentially the "same" as General Electric's - p. 8.

Petr. had a "two-tier" system: (a) sick leave, and (b) leave of absence ("travel" + "pregnancy").

There is no business reason conceivable for equating "travel" with "pregnancy."

If I can distinguish GE, I'll affirm.

2. As to job bidding, I'd affirm.

This was discriminatory and unsupported by any showing of business purpose.

Wray (for Petr)

~~The only detriment for the resulting~~ pregnancy ~~leave for pregnancy~~.

Policy of Co. was that pregnancy leave ~~was~~ should be treated as neither sickness nor accident; it was more analogous to leave of absence for travel, education, etc.

Conceded no "cost basis" justification here for seniority rule as in Gen. Electric. The "seniority" issue does not involve ~~the~~ cost to Co.

As to sick-leave, Gen El. does control. Cost to Co. is involved. (But is the differential justified)

Weisenfeller (for Resp).

Policy of placing Resp on pregnancy rather than sick leave has various adverse effects.

Resp. lost her job bidding seniority forever - whether or not she was reemployed

Weismueller (for Reich)

Seniority is preserved only for vacations & pensions.

If one returns from sick-leave (as defined) retains all benefits.

See A 96 for Co's Employee's Manual.

No business necessity was shown here – as in GE.

(No collective bargaining agt & hence no "contractual" rights. But this is irrelevant to this case)

As to sick-leave issue, Byron commented that real Q is who had burden of proof. (Weismueller argued that there was ~~no~~ cont justification shown as in GE – but not in this case).

Memorandum to: Mr. Justice Powell
From: Sam Estreicher
Date: October 6, 1977

Re: No. 75-536, Nashville Gas Co. v. Satty; No. 75-1069, Richmond Unified School Dist. v. Berg

I omitted to mention in my bench memorandum that Congress is presently considering bills to overrule General Electric Co. v. Gilbert. The Senate has reported out of committee S. 955, which amends Section 701 of the Civil Rights Act of 1964 (Title VII) to define the terms "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions," and provides that "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...." The intent of the Senate Comm. on Human Resources (which I believe is the old Senate Comm. on Labor and Public Welfare) is a broad one, to eradicate the concept of "uniqueness" underlying this Court's decisions in Aiello and Gilbert. S. Rep. 95-331, 95th Cong., 1st Sess. (July 6, 1977).

The Senate referred S.995 to the House, but the House has decided to work on its own bill, H.R. 5055. This bill has not yet been reported out of the House Comm. on Education and Labor.

I am not suggesting mootness, but the likelihood of Congressional action makes a Sup. Ct. decision in these cases less pressing than before.

Affirm
Remand

75-536 NASHVILLE GAS CO. v. SATTY Conf. 10/7/77

The Chief Justice Affirm on Job Bidding Issue
~~Aff~~ Remand on Sick Leave " in light of G E.

Mr. Justice Brennan Affirm
loss of seniority so permeates the entire "plan" as to invalidate ~~the~~ all elements of plan.

Mr. Justice Stewart Affirm on Bidding Issue
(Violation of Title VII)
But sick-leave issue is indistinguishable from G E - altho could Remand as C J suggests.

Mr. Justice White Affirm as to Job Bidding
But sick-leave issue in hard to distinguish - but would like to do so.
Can say there is no sex discrimination

Mr. Justice Marshall Affirm all issues

Mr. Justice Blackmun Affirm as Seniority
Remand on Sick-Leave.

Mr. Justice Powell Affirm as to board is my first vote.

But I could join Remand on sick-leave issue.

Mr. Justice Rehnquist Affirm on job seniority.

There is a high probability of pretextual conduct here as to sick-leave plan. GE can be distinguished. Could therefore vote Remand on GE.

Mr. Justice Stevens

As to sick-leave, GE controls. GE holds that sex discriminations are not per se invalid. This makes the job bidding issue difficult to distinguish.

Reverse as to sick leave

Affirm as to job bidding under A 2 of Title VII

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 17, 1977

RE: No. 75-536 Nashville Gas Co. v. Satty

Dear Lewis:

The vote in the above is unanimous on the issue of loss of seniority for promotional purposes but 6 to 3 on the question of sick leave. Thurgood, you and I are to Affirm and our 6 colleages to Reverse. If a dissent is indicated after Bill Rehnquist circulates his opinion would you be interested in taking it on?

Sincerely,

Bill

Mr. Justice Powell

cc: Mr. Justice Marshall

October 17, 1977

No. 75-536 Nashville Gas Co. v. Satty

Dear Bill:

Thank you for note about the above case.

As you suggest, if a dissent is indicated after Bill Rehnquist circulates his opinion, I will be glad to draft one.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 28, 1977

Re: No. 75-536 - Nashville Gas Co. v. Satty

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 28, 1977

No. 75-536, Nashville Gas v. Satty

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 31, 1977

Re: No. 75-536 - Nashville Gas Co. v. Satty

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference