PREGNANCY IN THE WORKPLACE: SPECIAL VERSUS EQUAL TREATMENT

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INTRODUCTION

In December of 1987, the Bureau of Labor Statistics reported that 50.9 million women having a total of 35.1 million children

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Author's Note: On June 5, 1989, the United States Supreme Court, in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989), reexamined and reallocated the burden of proof in Title VII claims that rely on a disparate impact analysis. More specifically, the Court substantially increased the proof required to establish a prima facie case of discrimination. The Court held that the burden of persuasion in making out an initial prima facie case remained with the plaintiff throughout the claim to “demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.” Id. at 2124. Thus a mere statistical showing of discriminatory or disproportionate effect, without a further showing that a specific employment practice primarily caused the harm, is no longer sufficient to establish a prima facie case of discrimination under the disparate impact analysis.

Wards Cove concurrently reduced the employer's proof requirements in two ways. First, it significantly diluted the burden on an employer setting forth business necessity as an affirmative defense or justification of its employment practice. The Court merely required that the challenged practice serve a legitimate business purpose or employment goal. Id. at 2125. Second, the Court forced the plaintiff to bear the burden “of disproving an employer’s assertion that the adverse employment... practice was based solely on a legitimate... consideration.” Id. at 2126. The employer thus no longer bears the burden of persuading the trier of fact that a discriminatory employment practice is related to the ability to perform a particular job. See infra note 38. In effect, the Court changed the rule regarding burdens of production and persuasion in disparate impact cases so that it more closely conforms to the rule regarding burdens of proof in disparate treatment cases. 109 S. Ct. at 2126.

Wards Cove thus effectively overrules those parts of both Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), and Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984), insofar as they place a burden of proof on employers asserting a business necessity defense in Title VII cases. See infra notes 44-51 and 81-83. The discussion of those cases continues to be relevant, however, in the light of congressional legislation currently underway and sponsored by Senator Edward Kennedy to restore the pre-Wards Cove proof requirements in Title VII cases.

worked either full or part-time. Projections indicate that by 1990, women will comprise half of the labor force in the United States.\(^3\)

As increasing numbers of women enter the workplace, more employers will have to develop and implement benefit and leave policies that include pregnancy.

The crucial question to be faced when evaluating the legality of such policies is whether they should be examined under a special treatment analysis or an equal treatment analysis.\(^4\) Under a special treatment model, valid employment policies may treat pregnant women preferentially. Under an equal treatment model, however, such policies would have to be facially neutral, treating women and men the same.

Critics of the special treatment model believe that the preferential treatment of pregnant women will slow the process of attaining gender equality, by reinforcing the notion that if women must be treated differently, then they are not equal to men. Critics of the equal treatment model, on the other hand, believe that it fails to recognize the uniqueness of a woman's capacity to bear children.

The equal treatment model, however, provides the most effective means of protecting pregnant women in the workplace while creating a standard framework for attaining equality of the sexes. This model separates the issues of pregnancy and childbirth from the issue of childrearing. This separation allows employers to develop general leave and disability plans for pregnancy and childbirth, in addition to parental leave policies for childrearing from which both mothers and fathers can benefit. Furthermore, the equal treatment model gives courts the greatest degree of flexibility as they struggle to define a consistent analytical approach in pregnancy discrimination cases.

After an overview of the relevant federal statutory provisions,\(^5\) this article discusses three topics dealing with employment policies affecting pregnant women, examining each under both

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4. Alternatively, the inquiry is whether pregnancy should be treated as unique to women or as comparable to all other physical conditions that affect both men and women. For a thorough discussion of the equal treatment/special treatment debate, see Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-85).

5. See infra notes 10-19 and accompanying text (discussing Title VII of the
the special treatment model and the equal treatment model. First, this article discusses fetal vulnerability programs, programs which are developed by employers to protect unborn fetuses from toxic work environments. Next, it explores the availability of unemployment benefits to women who are not rehired after taking maternity leave and evaluates leave and reinstatement policies for pregnant women. Finally, the article discusses legislation that would establish a national parental leave program.

I

BACKGROUND: TITLE VII AND THE PREGNANCY DISCRIMINATION ACT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. However, it does not explicitly prohibit discrimination on the basis of pregnancy. In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA") which amended Title VII to prohibit discrimination on the basis of pregnancy, childbirth, and related medical conditions. The goal of


6. See infra notes 22-103 and accompanying text.
7. See infra notes 104-133 and accompanying text.
8. See infra notes 134-192 and accompanying text.
9. See infra notes 193-212 and accompanying text.
11. Title VII provides in part: (a) It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Id. § 2000e-2(a).

12. It can be argued, however, 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." Senate Comm. on Labor & Human Resources, 96th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 23 (Comm. Print 1980) (introductory remarks of Mr. Hawkins on H.R. 6075) [hereinafter Legislative History of the PDA].

14. The added subsection provides in part:
(k) 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
the PDA is to prevent employers from treating female employees differently from male employees because of the women's actual or potential pregnancies.15

The PDA mandates the equal treatment of pregnant women in the workplace based on their ability or inability to work, not on the condition of pregnancy.16 This approach is useful, because in a majority of cases, pregnant women are able to work for most of their pregnancy. However, there is a period of time during pregnancy and childbirth when women are physically unable to work. The PDA mandates that during this time, pregnant women are entitled to the same rights, leave privileges, and benefits that are accorded to other employees with temporary disabilities.17

In enacting the PDA, Congress apparently embraced an equal treatment analysis. On its face, the PDA speaks of the equal treatment of pregnant women in the workplace.18 Although the legislative history of the PDA includes discussion of both the special treatment and the equal treatment model, a complete reading of the statute and its legislative history indicates that Congress intended to follow the equal treatment approach.19

Recently, however, courts have struggled to develop a consistent analytical approach to Title VII and the PDA in pregnancy discrimination cases. Some courts have interpreted the PDA to

related medical conditions shall be treated the same for all employment-related purposes . . .

Id.

15. The legislative history of the PDA indicates that it was enacted in direct response to two Supreme Court decisions, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In Gilbert, the Court held that General Electric's disability plan, which failed to cover pregnancy-related disabilities, was not gender-based discrimination and therefore did not violate Title VII. 429 U.S. at 145-46. In Satty, the Court held that Nashville Gas Company's policy of denying women their accumulated seniority following pregnancy left violated Title VII. 434 U.S. at 139-40. Although Satty appears to contradict Gilbert, the Satty Court upheld the validity of Nashville Gas Company's sick leave policy under Title VII. Id. at 143-46. Because of the inconsistency in these decisions and Congress' concern that women were viewed as secondary wage earners, Congress enacted the PDA to ensure that women who are, or who may become, pregnant are treated the same as men for all employment related purposes.


17. Id. (introductory remarks of Mr. Hawkins on H.R. 6075).


19. Legislative History of the PDA, supra note 12.
require equal treatment of women in the workplace, while others have allowed special treatment of women. The following sections focus on three topics concerning pregnancy discrimination that trigger the debate between equal treatment and special treatment advocates.

II
FETAL VULNERABILITY PROGRAMS

As more women enter the workforce, they are increasingly exposed to potentially hazardous work environments. Scientific evidence demonstrates that a causal link exists between exposure to certain toxic chemicals and fetal damage. Only recently have employers recognized these potential hazards and attempted to develop fetal vulnerability programs. Such programs have been challenged on the ground that they discriminate against women on the basis of sex. Two circuits addressed this issue in *Wright v. Olin Corp.* and *Hayes v. Shelby Memorial Hospital.*

*Wright v. Olin Corp.*—Olin was the first case to address a Title VII challenge to a fetal vulnerability program. In *Olin,* the Court of Appeals for the Fourth Circuit held that in certain circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on women’s employ-

23. Fetal vulnerability programs are designed by employers to bar fertile or pregnant women from specific jobs or workplace environments because of the risk of fetal harm through the mother’s exposure to toxic materials. See *Wright v. Olin Corp.,* 697 F.2d 1172, 1182 (4th Cir. 1982). Employers establishing fetal vulnerability programs are also concerned about their potential liability if an employee’s child is born with defects. Id. at 1190 n.26; *Hayes,* 726 F.2d at 1552-53 n.15.
24. Case law addressing fetal vulnerability programs is limited. For additional discussion, see generally Comment, Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection — But Can They Succeed?, 20 J. Marshall L. Rev. 747 (1986-87); Comment, Gender Specific Regulations in the Chemical Workplace, 27 Santa Clara L. Rev. 353 (1987).
25. 697 F.2d 1172 (4th Cir. 1982).
26. 726 F.2d 1543 (11th Cir. 1984).
27. The *Olin* court did not state whether it was applying pre- or post-PDA principles.
ment in order to protect the health of unborn children from workplace hazards.28

In February of 1978, Olin Corporation (hereinafter "Olin") instituted a "female employment and fetal vulnerability" program which created three job classifications: restricted jobs, controlled jobs, and unrestricted jobs.29 Olin excluded fertile women from "restricted" jobs because the work required contact with known or suspected abortifacient30 or tetratogenic31 (toxic) agents. After individual evaluations, Olin allowed pregnant women to work in "controlled" jobs, which involved only limited contact with harmful chemicals. Olin opened "unrestricted" jobs to all women because these jobs posed no threat either to pregnant women or their fetuses.32

As a result of this categorization, two employment discrimination actions were brought against Olin.33 The actions charged the company with race and sex discrimination in all aspects of its employment practices, including hiring, promotion, termination, and seniority benefits.34 The District Court for the Western District of North Carolina ruled in favor of Olin on all the claims in both actions.35 The court held that Olin's fetal vulnerability program was justified by sound medical evidence, and that Olin did not intend to discriminate against women on the basis of sex.36 The Court of Appeals for the Fourth Circuit affirmed the district court's judgment on every issue except the fetal vulnerability is-

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28. See 697 F.2d at 1189-90.
29. Id. at 1182.
31. A tetratogen is a chemical or other agent that interferes in some way with the development of the fetus after conception by entering the mother's bloodstream and reaching the fetus by way of the placenta. Even if the mother is unharmed, the harmful agent may cause abnormal development of the fetus, resulting in miscarriage or birth defects. Comment, Employment Rights of Women in the Toxic Workplace, 65 Calif. L. Rev. 1113, 1116 (1977).
32. 697 F.2d at 1182.
33. The plaintiffs in the first action, the Equal Employment Opportunity Commission (EEOC), filed suit under 42 U.S.C.A. § 2000e-5(f)(1) (West 1983). Olin employees Theresa Wright and William Howell, the plaintiffs in the second action, raised similar claims in a class action partially certified by the district court. 697 F.2d at 1175-76.
34. Id. at 1176.
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sue, vacating that portion of the decision and remanding it for further proceedings.37

The court of appeals first debated which type of Title VII analysis should be used in evaluating fetal vulnerability programs.38 Because the plaintiffs failed to prove that Olin's reason for establishing the program was pretextual, the court rejected

37. 697 F.2d at 1176.

38. In Title VII cases, courts apply one of two basic theories, disparate treatment or disparate impact, to analyze allegedly discriminatory employment policies. Disparate treatment cases have two forms. First, where an employment policy obviously discriminates against a suspect class, Title VII provides an affirmative statutory defense, the bona fide occupational qualification (hereinafter "BFOQ"). 42 U.S.C.A. § 2000e-2(e) (West 1981). If a court finds the employment policy facially discriminatory, the employer can establish a BFOQ defense by proving the specific trait that the employer relies on when hiring employees is "reasonably necessary to the normal operation of that particular business or enterprise." Id. See Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977); Hardin v. Stynchcomb, 691 F.2d 1364, 1370-71 (11th Cir. 1982). In a second type of disparate treatment case, the employer establishes a facially neutral policy but there is a discriminatory motive behind the policy. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (corporation's refusal to rehire black employee was pretext if shown that white employees with similar illegal activities were rehired). In pretext discrimination cases, the plaintiff claims that the facially neutral employment policy is a pretext for the discrimination, carries the initial burden of proving a prima facie case of discrimination and has the burden of persuasion at all times. However, after a prima facie case is established, the burden of production shifts to the employer to show a "legitimate nondiscriminatory reason" for the policy; the production burden then shifts back to the employee to show that this justification is merely a "pretext" for discrimination. Id. at 802-06.

In disparate impact cases, the employer establishes a neutral policy but there is a disproportionate impact on a specific group of individuals protected under Title VII. See, e.g., Griggs v. Duke Power, 401 U.S. 424 (1971). Proof of a discriminatory motive need not be demonstrated in a disparate impact case; a discriminatory effect is sufficient to establish a prima facie case of discrimination under this analysis. General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976). In disparate impact cases, an employer can establish a "business necessity" defense. Griggs, 401 U.S. at 424. This defense is broader than the BFOQ defense and hinges on the relationship between the employment practice and the employee's job performance. To establish a business necessity defense, an employer must show that a discriminatory employment practice is related to the ability to perform a particular job. Id. at 432. More recently, the business necessity defense has been expanded to include considerations of workplace safety. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977); Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir. 1971).

In analyzing pregnancy discrimination cases under Title VII as amended by the PDA, courts have struggled to apply the most appropriate analysis. The trend has been to focus on the disparate impact theory, although most courts also mention the disparate treatment analysis.
Olin's contention that the disparate treatment analysis was proper. The court also rejected the plaintiffs' overt discrimination argument. The court determined that the disparate impact analysis was proper because Olin's fetal vulnerability program, although facially neutral, had a disproportionate impact on women. The court also determined that, under a disparate impact analysis, Olin's policy established a prima facie case of Title VII discrimination.

The court next considered whether an employer could rebut a prima facie case by demonstrating business necessity. In evaluating this issue, the court contemplated expanding the business necessity defense to include safety and efficiency, analogizing unborn children to business invitees, licensees, and personal service customers who are on the employer's premises. Indeed, the court viewed the safety of workers' unborn children as no less a matter of business concern than the safety of the traditional business licensee or invitee. Because the court evaluated the

39. 697 F.2d at 1183.
40. Under this analysis, the plaintiffs claimed that Olin should be confined to a "BFOQ defense." The court, however, noted that under Title VII, Olin was entitled to assert other defenses based on business necessity. Id. at 1185-86 n.21.

It is difficult to assert the BFOQ defense in pregnancy discrimination cases because it demands a strict relationship between job performance and trait. In fetal vulnerability programs, the safety of the fetus is at issue, not the woman's ability or inability to perform a job. Under a strict statutory interpretation of the defense, BFOQ would not be allowed in fetal vulnerability cases because "'potential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the BFOQ issue.'" Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 (11th Cir. 1984) (quoting Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 264 (N.D. Ala. 1982)).

41. In finding Olin's fetal vulnerability program to be "facially neutral," the court resolved potential challenges to this finding by focusing on the underlying principle that is the basis for this Title VII theory, "the consequences of employment policies, rather than the 'neutrality' with which the policies happen to be formally expressed." 697 F.2d at 1186.
42. Id.
43. Id. at 1187.
44. Id. at 1188.
45. Id. at 1188-89. In Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), the court stated that the test is whether there exists an overriding legitimate purpose such that the practice is necessary to further the safe and efficient operation of the business. Id. at 798. The Supreme Court has also held that business necessity runs to "safe and efficient job performance." Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977).
46. 697 F.2d at 1189.
47. Id. The court also noted that it was unlikely that Congress intended
business necessity defense in terms of providing a safe workplace for employees’ unborn children, it rejected the argument that the potential liability and economic loss from harm to unborn children alone could establish a business necessity defense.\textsuperscript{48} The court concluded that, as a matter of business necessity, in order to protect the health of unborn children from workplace hazards, an employer could impose otherwise impermissible restrictions on employees.\textsuperscript{49} The court, however, remanded the case to the district court for a determination of whether Olin’s restrictions were justified by business necessity.\textsuperscript{50}

The circuit court also provided guidelines for the district court to apply on remand when considering the business necessity defense. First, the burden of persuasion should lie with the employer to show that exposure to toxic substances poses a risk of harm significant enough to warrant a fetal protection program. To carry this burden, the employer must provide independent and objective evidence indicating that the risk to the fetus applies only to women, that the protective measures are therefore confined to women, and that the fetal protection programs will be effective. These findings must be supported by expert opinions in relevant scientific fields. The employer needs only to show that enough evidence exists that an informed employer could not responsibly fail to act on the assumption that there is a significant risk to the fetus. This proof would establish a prima facie business necessity defense.\textsuperscript{51}

The appellate court further explained that the employee may rebut this defense by proof that acceptable alternative policies exist which would better accomplish the employer’s business purpose. This rebuttal evidence would either have to negate the prima facie proof of business necessity, or persuade the court that, behind the prima facie case of justified disparate impact, there was discriminatory intent.\textsuperscript{52}

On remand, the District Court for the Western District of North Carolina found that Olin had established a business necessity for its fetal vulnerability program by showing through scientific evidence that the exposure of female employees to hazardous

\begin{thebibliography}{9}
\bibitem{48} Id. at 1190 n.26.
\bibitem{49} Id. at 1189-90.
\bibitem{50} Id. at 1187.
\bibitem{51} Id. at 1190-91.
\bibitem{52} Id. at 1191-92.
\end{thebibliography}
substances created a substantial risk of harm to their unborn children. The district court also determined that the plaintiffs failed to rebut this defense. The Court of Appeals for the Fourth Circuit, however, vacated the district court's decision without opinion.

It is unclear why the appellate court in Olin did not find Olin's fetal vulnerability program facially discriminatory and instead analyzed the facts under a disparate impact theory. Clearly, fetal vulnerability programs have a disparate impact on women because they affect only women. Olin's policy was also facially discriminatory because it explicitly treated women differently than men. Had the circuit court applied a facial discrimination analysis, the court would likely have found that Olin's program violated Title VII. Although Olin then could have asserted the bona fide occupational qualification defense ("BFOQ defense"), it is unlikely that Olin could have proven that its fetal vulnerability program was related to job performance.

In rejecting the facial discrimination theory, the Fourth Circuit did not focus on the facially discriminatory language of Olin's policy, but rather on the defenses allowed by Title VII. In its analysis of the case, the court worked backwards from the desired result, finding that Olin should not be confined to the BFOQ defense, because it was entitled to assert other defenses under Title VII such as business necessity.

While the court failed to address the question of facial discrimination adequately, it did attempt to address the difficult legal and social problems associated with creating and implementing fetal vulnerability programs. By analyzing the case under the disparate impact theory instead of the facial discrimination and BFOQ theory, the court adopted the business necessity defense in fetal vulnerability cases. The court also suggested guidelines that employers should follow when creating fetal vulnerability programs.

54. 585 F. Supp. at 1453.
55. 767 F.2d 915 (4th Cir. 1984).
56. See supra note 38 (explaining the BFOQ defense). In the case, Olin did not attempt to present a BFOQ defense.
57. See supra note 40.
58. Id.
59. The circuit court also noted that the facts of Olin failed to comport with either the facial discrimination or the disparate impact theories under Title VII.

697 F.2d at 1184-85.
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programs.\textsuperscript{60} Such programs should balance the need for equal treatment of women and men in the workplace against the concern for fetal health and safety.

By establishing new principles for the business necessity defense in fetal vulnerability cases, the \textit{Olin} court advocated an equal treatment model. These principles provide that unless employers can produce scientific evidence that only women need the special protection of fetal vulnerability programs, the employer must establish gender-neutral policies to protect both women and men. Absent such evidence, fetal vulnerability programs may violate Title VII.

Scientific proof of the connection between fetal harm from exposure to hazards in the workplace and fetal vulnerability programs is necessary to prevent employers from singling out female employees for special treatment because of out-dated notions of their physical capabilities. When employers are forced to rely on such evidence to support their fetal vulnerability programs, men also will be protected. The evidence will show either that men do not need to be included in fetal vulnerability programs because their ability to reproduce is not harmed by the toxic environment, or that men too need protection because they are also adversely affected by the environment.

\textit{Hayes v. Shelby Memorial Hospital}.—The Court of Appeals for the Eleventh Circuit explored similar issues in \textit{Hayes v. Shelby Memorial Hospital}.\textsuperscript{61} In \textit{Hayes}, the court of appeals held that Shelby Memorial Hospital ("Hospital") violated the PDA.\textsuperscript{62} In August 1980, the Hospital hired Sylvia Hayes, a certified x-ray technician.\textsuperscript{63} Two months later, after Hayes informed her supervisor that she was pregnant, the Hospital fired her, allegedly to protect her fetus from potentially harmful radiation.\textsuperscript{64}

Hayes filed suit charging, in part, that the Hospital had violated Title VII and the PDA.\textsuperscript{65} The Hospital asserted both the business necessity and the BFOQ defenses.\textsuperscript{66} The District Court for the Northern District of Alabama ruled that the Hospital had

\textsuperscript{60} Id. at 1190-91.
\textsuperscript{61} 726 F.2d 1543 (11th Cir. 1984).
\textsuperscript{62} Id. at 1546.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Hayes also charged that the Hospital had denied her constitutional rights and her civil rights guaranteed under 42 U.S.C.A. § 1983 (West 1983). Id.
\textsuperscript{66} Id.
violated Title VII.\textsuperscript{67} The Court of Appeals for the Eleventh Circuit affirmed on appeal.\textsuperscript{68}

As in \textit{Olin}, the court of appeals in \textit{Hayes} first sought to determine what theory to apply under Title VII and the PDA. The court found that a facial discrimination analysis was appropriate because the Hospital intended for its policy\textsuperscript{69} to apply only to pregnant x-ray technicians and admitted to firing Hayes because of her pregnancy.\textsuperscript{70} However, to "ensure complete fairness" to the Hospital,\textsuperscript{71} the court also analyzed the facts under the disparate impact theory.\textsuperscript{72}

Initially, the court stated that if the Hospital could establish through scientific evidence that its policy was neutral because it effectively and equally protected the offspring of all employees,\textsuperscript{73} then the Hospital could rebut the presumption that the policy was facially discriminatory.\textsuperscript{74} Under this standard, the court found the Hospital's policy to be facially discriminatory because the Hospital could not prove that Hayes would be exposed to unreasonably harmful levels of radiation that would place her unborn child at risk.\textsuperscript{75} Because the Hospital failed to rebut the presumption of facial discrimination, its only defense was BFOQ.\textsuperscript{76} The Hospital, however, failed to show the necessary connection between its policy and the ability of pregnant or fertile women to perform their jobs.\textsuperscript{77} Accordingly, the court rejected this defense.\textsuperscript{78}

The court then turned to the disparate impact analysis.\textsuperscript{79} It found that even if the Hospital could rebut Hayes' proof of facial

\textsuperscript{68} 726 F.2d at 1546.
\textsuperscript{69} The court noted that it was unclear whether the Hospital actually had a "policy" in effect regarding pregnant x-ray technicians when it fired Hayes. Nonetheless, the court treated the Hospital's actions towards Hayes as an ongoing policy decision. Id. at 1549-50 & n.10.
\textsuperscript{70} Id. at 1547.
\textsuperscript{71} Id. at 1548.
\textsuperscript{72} See id. at 1552-54.
\textsuperscript{73} An employer can demonstrate that its policy is neutral if it proves through scientific evidence that the policy is not necessary to protect male employees. Id.
\textsuperscript{74} Id. at 1548.
\textsuperscript{75} Id. at 1551.
\textsuperscript{76} See id.
\textsuperscript{77} Id. at 1549.
\textsuperscript{78} Id.
\textsuperscript{79} See id. at 1552-54.
discrimination by showing that its policy was neutral, the Hospital could still be held liable because its policy clearly had a disproportionate impact on women.\textsuperscript{80}

Under the disparate impact theory, an employer is allowed to assert a business necessity defense.\textsuperscript{81} The appellate court, however, did not discuss this defense at any significant length, merely noting that the business necessity defense applied to fetuses.\textsuperscript{82} The court found that even if the Hospital could establish that its policy was justified by business necessity, Hayes had successfully rebutted this defense by showing that the Hospital did not pursue acceptable alternatives to its fetal vulnerability program that would have had a less discriminatory impact.\textsuperscript{83} Consequently, the court of appeals affirmed the district court's decision that, in firing Hayes, the Hospital violated Title VII and the PDA.\textsuperscript{84}

Although the \textit{Hayes} court could have reached its decision by applying the facial discrimination analysis alone, it also chose to analyze the case under the disparate impact theory.\textsuperscript{85} This decision was sound because, by discussing the disparate impact theory, the court provided additional guidance\textsuperscript{86} for employers who want to establish, subsequent to \textit{Olin} and \textit{Hayes}, policies to protect women, men, and their offspring in toxic work environments.

By focusing on both facial discrimination and disparate impact, the \textit{Hayes} court also established an effective step-by-step method for reviewing Title VII actions involving fetal health. Namely, if an employee challenges a fetal vulnerability program as being facially discriminatory, the employer can rebut this presumption with scientific evidence that the program is neutral.\textsuperscript{87} If the employer fails to do so, its only remaining defense is BFOQ. If the employer cannot then establish a nexus between its policy and the job performance of women, the challenged program violates Title VII.

Alternatively, if the challenged program is alleged to have a disparate impact on female employees, the employer may assert a business necessity defense, as set forth in \textit{Olin}.\textsuperscript{88} The employee

\begin{itemize}
\item \textsuperscript{80} Id. at 1552.
\item \textsuperscript{81} Id. (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
\item \textsuperscript{82} See id. at 1552 n.14.
\item \textsuperscript{83} Id. at 1553-54.
\item \textsuperscript{84} Id. at 1554.
\item \textsuperscript{85} See supra notes 79-84 and accompanying text.
\item \textsuperscript{86} See supra notes 51-53 and accompanying text.
\item \textsuperscript{87} See supra notes 73-75 and accompanying text.
\item \textsuperscript{88} See supra notes 51-53 and accompanying text.
\end{itemize}
then has an opportunity to rebut the business necessity defense by showing that there are acceptable alternatives to a fetal vulnerability program which will ensure fetal health without having an adverse impact on women alone. If the employee succeeds, then the challenged program falls under Title VII.

Although the Hayes court laid out this effective analytical framework, its interpretation of the business necessity defense in fetal vulnerability cases is too narrow. In its brief discussion of business necessity, the Hayes court rejected the Hospital's contention that potential liability for fetal damage, including litigation costs, should be the basis for establishing a business necessity defense. Courts need to recognize employers' fears of potential future liability and include litigation and liability costs as factors in evaluating the business necessity defense when there is a strong correlation between a toxic work environment and fetal damage. This model of the business necessity defense balances both the concern for fetal health and the potential liability costs to an employer. If courts continue to construe the business necessity defense narrowly, employers who cannot establish fetal vulnerability programs without violating Title VII could face liability for children born with defects. This is an unfair result.

Ultimately, the court's analysis in Hayes supports the equal treatment model. The court mandated that the Hospital establish a gender-neutral policy designed to protect both female and male x-ray technicians from radiation unless the Hospital could demonstrate a sufficient nexus between the hazard and fetal damage to allow the risk to be borne by one sex. This approach prevents employers from singling out female employees for special treatment and encourages them to develop policies that protect the offspring of all employees, both men and women alike.

Comparison of Olin and Hayes.—Olin and Hayes demonstrate the inconsistent outcomes which can result even when courts apply similar analytic frameworks. The Hayes court initially relied on the facial discrimination analysis. The Olin court, on the other hand, rejected the facial discrimination analysis on the ground that it allowed only a BFOQ defense. The Hayes court modified

89. 726 F.2d at 1552 n.15. The Olin court also rejected the claim that potential liability, standing alone, could support a business necessity defense. 697 F.2d 1172, 1190 n.26 (4th Cir. 1982).
90. The court referred to the possibility that radiation can also cause damage to men and their offspring. 726 F.2d at 1552.
91. See id. at 1548-52. See also supra notes 69-78 and accompanying text.
92. See 697 F.2d at 1185-86.
this deficiency by providing that an employer could rebut the presumption of facial discrimination by showing that its policy was neutral, addressing a harm not affecting men. The *Hayes* court determined that an employer could demonstrate that its policy was neutral by relying on the *Olin* court’s guidelines for a business necessity defense. Applying this framework, the *Hayes* court determined that the Hospital’s policy violated Title VII. Applying a disparate impact analysis that included the business necessity defense, the district court in *Olin* determined on remand that Olin’s fetal vulnerability program was valid under Title VII.

The pivotal factor in both cases was the nexus between the hazards of the workplace and the potential harm to the employee and her unborn child. In *Olin*, potential harm to the fetus was sufficiently established, but in *Hayes*, the Hospital failed to prove that Hayes would be exposed to hazardous levels of radiation. In addition, both opinions carefully devised analytical frameworks for subsequent courts to follow in determining whether or not fetal vulnerability programs violate Title VII.

To avoid litigation over fetal vulnerability programs, employers could develop alternative programs taking one of three forms. First, employers might require that women who work in hazardous environments sign release forms acknowledging the risks of such work and agreeing to forego legal remedies if fetal damage occurs. Second, employers might allow only women and men who choose not to have children or are past childbearing age to work in toxic environments. Third and ideally, employers could render work environments safe so that neither men nor women would be at risk.

Each of these solutions, however, has some drawbacks. The first option is unlikely to prevent employer liability. Although courts are reluctant to recognize prenatal torts and the burden of establishing a causal link between a particular chemical and fetal damage is often prohibitive, parents cannot waive liability for injuries to their unborn children. The second alternative might

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93. See 726 F.2d at 1548.
94. Recently, in International Union v. Johnson Controls, 680 F. Supp. 309 (E.D. Wis. 1988) cert. granted, 110 S. Ct. 1522 (1990), a district court relied on the analytical framework set forth in *Olin* and *Hayes* and rejected a Title VII challenge to an employer’s fetal protection program which prohibited women of childbearing age from working in positions where their blood lead levels would exceed a specified minimum. Id.
95. Furnish, supra note 22, at 85 n.90.
96. Id. at 85-86.
97. Williams, Firing the Woman to Protect the Fetus: The Reconciliation of
create problems if employees who have been granted permission to work in a toxic environment because they choose not to bear children or believe that they are past childbearing age, subsequently bear children. The third alternative is unrealistic considering the ambiguities of scientific research and the high cost of maintaining a completely safe work environment. Despite these limitations, employers must continue to strive for maximum safety conditions in toxic work environments.

Olin and Hayes illustrate the difficulties of designing fetal vulnerability programs that protect the interests of three disparate groups of people: employers, female employees, and the offspring of female employees. The primary reason these programs exist is to protect unborn children, but the practical, yet unfortunate, consequence of such programs is to force women to choose between the economic needs of their family and the health of their children.

Such programs exist because of the commonly held belief that the only way to protect fertile women in a toxic workplace is through special treatment. Under a special treatment model, employers could develop and implement employment policies that would prohibit fertile women from working in certain hazardous areas in order to protect the unborn fetus. However, this model reinforces the idea that women have special needs and therefore need special accommodation. Both courts addressed this concern and the necessity, therefore, of implementing strict guidelines that employers can follow when designing fetal vulnerability programs.

Alternatively, if fetal vulnerability programs are evaluated under an equal treatment model, women and men alike would benefit from gender-neutral policies designed to protect the reproductive capabilities of both sexes. Neutral policies rest on the assumption that, until proven otherwise, all workers could be hurt by workplace hazards, so women should not be treated differently. If an employer could point to scientific evidence that demonstrates that the hazards of the workplace affect women alone, the employer would then be allowed to adopt a suitable policy

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98. Additionally, if special treatment policies are permitted, employers might exclude women from hazardous environments as a cheaper alternative to cleaning up the workplace.

99. See supra notes 51-52 and accompanying text (discussing the guidelines established in Olin).
aimed solely at women.\textsuperscript{100} Recent scientific evidence, however, fails to indicate that only women are adversely affected by toxic work environments.\textsuperscript{101}

Under an equal treatment model, the focus shifts from the protection of pregnant women to the protection of offspring "as affected by the exposure to toxic substances of both men and women."\textsuperscript{102} Fetal protection policies derived from the equal treatment model would have two distinct advantages: the policies would be based on health, not gender, and would further the goal of equality between women and men in the labor force. Employers have a responsibility to treat women and men equally in the workplace and a "moral obligation to protect the next generation from injury."\textsuperscript{103} Fetal vulnerability programs based on equal treatment models would effectively accomplish these goals.

III

UNEMPLOYMENT BENEFITS

Another area of the law that triggers the debate between special treatment and equal treatment arises where women who are not rehired after taking maternity leave are denied unemployment benefits. In \textit{Wimberly v. Labor & Industrial Relations Commission},\textsuperscript{104} the United States Supreme Court held that a Missouri statute\textsuperscript{105} which denied unemployment benefits to women not rehired after maternity leave was not inconsistent with the Federal Unemployment Tax Act\textsuperscript{106} ("FUTA"). FUTA provides that no state participating in a federal-state compensation program shall deny compensation under state law "solely on the basis of pregnancy or termination of pregnancy."\textsuperscript{107}

In August 1980, after three years of employment with J.C. Penney, Linda Wimberly took leave to have a child, without guar-

\textsuperscript{100} Wright v. Olin Corp., 697 F.2d 1172, 1190-92 (4th Cir. 1982).
\textsuperscript{102} Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 (11th Cir. 1984).
\textsuperscript{104} 479 U.S. 511 (1987).
\textsuperscript{107} Id.
Wimberly thereafter sought review in the Circuit Court of Jackson County, Missouri. That court held that the Missouri statute conflicted with FUTA and accordingly reversed the Commission's decision. The Missouri Court of Appeals affirmed. However, the Missouri Supreme Court reversed, holding that the Missouri statute was consistent with FUTA because the state law did not explicitly isolate pregnancy, but rather denied benefits to all employees who left work for reasons not causally related to their employer or their work. The court also noted that the Department of Labor, the federal agency in charge of enforcing FUTA, had consistently interpreted the federal statute as prohibiting unfavorable treatment of pregnant women, rather than mandating preferential treatment. The United States Supreme Court affirmed the decision of the Missouri Supreme Court.

Justice O'Connor, writing for the majority, examined the requirements of FUTA. In order to be a part of the federal-state unemployment compensation program, states must comply with the minimum federal standards set forth in FUTA. The stan-

109. Id. at 513.
110. Id.
112. 479 U.S. at 513.
113. Id.
115. 688 S.W.2d at 348-49.
116. 479 U.S. at 522.
117. Justice O'Connor delivered the opinion of the Court, in which all other members joined, except Justice Blackmun, who took no part in the decision of the case.
118. 26 U.S.C.A. § 3304(a) (West 1988). Apart from these standards, FUTA leaves it to the states' discretion to administer the program. Most states require a claimant to satisfy some version of a three part test: (1) the claimant
standard at issue in Wimberly forbids states from denying benefits because of "pregnancy or termination of pregnancy.""  

As in other states, the Missouri unemployment compensation statute denied benefits to any claimant who voluntarily left a job without good cause. However, while some states define good cause to include pregnancy, Missouri defines good cause narrowly, treating both maternity leaves and other types of job leaves as leaves "without good cause."  

Wimberly argued that FUTA mandates the preferential treatment of pregnant women, thereby requiring states to provide them with unemployment benefits. The Court rejected this argument, finding that Congress intended only to prohibit unfavorable treatment of pregnant women. Because the Missouri statute is neutral, and because the state's decision to deny benefits to Wimberly could have been made without knowledge of her pregnancy, the Court found the Missouri statute to be consistent with FUTA. In support of its position, the Court noted that in two prior decisions, it had construed language similar to that of FUTA as "prohibiting disadvantageous treatment [of employees], rather than as mandating preferential treatment."
Finally, the Court stated that the legislative history of FUTA indicated Congress' desire to prohibit "rules that single out pregnant women or formerly pregnant women for disadvantageous treatment."127 The Court also examined the Department of Labor's interpretation of FUTA and determined that the agency did not interpret the statute as mandating preferential treatment of pregnant women.128 The Court concluded that because FUTA does not mandate preferential treatment of pregnant women, and because the Missouri statute is neutral, "incidentally disqualifying pregnant or formerly pregnant claimants as part of a larger group,"129 the state statute was consistent with FUTA.130

Wimberly is a logical decision when examined under an equal treatment analysis. There is no indication in the legislative history of FUTA that Congress intended to mandate the preferential treatment of pregnant women.131 Rather, the facially neutral language of the statute and its legislative history support the argument that FUTA prohibits states from singling out pregnancy for disadvantageous treatment. Because Congress intended to eliminate pregnancy as a determinative factor in unemployment compensation decisions, a state cannot deny benefits to pregnant women workers while providing benefits to employees who experience comparable disabling conditions. A state must either provide benefits or deny them to all employees who are similarly situated. Because the Missouri statute denies benefits to all employees who leave work for reasons not causally related to that work, the Court was justified in finding that the statute does not violate FUTA.

Although the Wimberly holding may seem logical, Missouri's statutory definition of good cause is unfair.132 Missouri's narrow
reading of good cause is detrimental to all women in the labor force who decide to have children. The statute disregards the importance of income to women who must support themselves and their families, and defeats attempts to further equality in the workplace.

Including pregnancy in Missouri’s statutory definition of good cause would benefit women laborers who decide to have children. Women could take voluntary leaves from work for pregnancy and childbirth, knowing that they would receive unemployment benefits during their leave. Under an equal treatment analysis, the addition of pregnancy to the definition of good cause would also require the addition of other temporary disabilities. If only pregnancy were added, the statute would single out pregnant women for special treatment. Moreover, a broader definition of good cause would benefit employees of both sexes who take leaves because of disabling conditions or other compelling reasons which are currently excluded from Missouri’s narrow definition of good cause.

Thus, a valid statutory scheme could be enacted that would include pregnancy as good cause for leaving employment, thereby providing pregnant women with unemployment benefits during maternity leave. Increasing support for the equal treatment of women and men in the workplace, and vigorous advocacy for comprehensive benefit programs may help advance a broader definition of good cause.

IV

REINSTATEMENT PROGRAMS

Another problem facing pregnant employees is whether, after taking maternity leave, their employers will allow them to return to their jobs. The United States Supreme Court addressed this issue in California Federal Savings & Loan Association v. Guerra. In Guerra, the Supreme Court examined California’s Fair Employment and Housing Act (“FEHA”), which requires employ--

133. For instance, states would also need to include illness and compelling personal reasons.
ers to provide leave and reinstatement to employees disabled by pregnancy. The Court, embracing a special treatment approach, held that FEHA is not inconsistent with the PDA\(^{136}\) because the PDA does not prohibit employment practices that favor pregnant women.\(^{137}\)

In January 1982, Lillian Garland, a receptionist for several years with the California Federal Savings and Loan Association ("Association"), took a pregnancy disability leave.\(^{138}\) In April of that year, Garland wanted to return to work, but the Association told her that neither her previous job nor any similar position was available.\(^{139}\) Garland filed a complaint with the Department of Fair Employment and Housing, which issued an administrative accusation on her behalf, charging the Association with violating FEHA.\(^{140}\)

Prior to her hearing before the Fair Housing and Employment Commission, the Association, joined by the Merchants and Manufacturers Association and the California Chamber of Commerce, filed suit in the District Court for the Central District of California.\(^{141}\) They sought a declaration that the 1978 FEHA amendment was inconsistent with, and therefore preempted by, Title VII and an injunction against enforcement of the amendment. The district court ruled against Garland, granting the petitioners' motion for summary judgment.\(^{142}\)

The Court of Appeals for the Ninth Circuit reversed, holding that because the California law promotes equal employment op-

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\(^{136}\) Id. at 292.
\(^{137}\) Id. at 284-90.
\(^{138}\) Id. at 278.
\(^{139}\) Id.
\(^{140}\) Id.
\(^{141}\) Id. at 278-79.
\(^{142}\) 34 Fair Empl. Prac. Cas. (BNA) 562 (1984), rev'd, 758 F.2d 390 (9th Cir. 1985), aff'd, 479 U.S. 272 (1987). "California state law and the policies of interpretation and enforcement . . . which require preferential treatment of female employees disabled by pregnancy, childbirth or related medical conditions are pre-empted by Title VII and are null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution." 34 Fair Empl. Prac. Cas. (BNA) at 568, quoted in 479 U.S. at 278-79.
portunity for women, it is "neither inconsistent with, nor unlawful under, Title VII." The court found that Congress intended the PDA "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." The United States Supreme Court affirmed the Ninth Circuit's decision.

Justice Marshall, writing for a plurality, stated that the issue in Guerra was whether Title VII as amended by the PDA preempts "a state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy." The Court began its analysis by addressing the question of federal preemption under the supremacy clause of the Constitution.

The Court first noted that because Congress had explicitly stated that it did not intend to completely control the field of employment discrimination law, the Court could not infer federal preemption of a state statute. The Court then turned to the language of Title VII's preemption provisions, sections 708 and 1104, noting that if actual conflicts existed between Title VII

143. 758 F.2d 390, 396 (9th Cir. 1985), aff'd, 479 U.S. 272 (1987).
144. 758 F.2d at 396.
145. 479 U.S. at 280.
147. 479 U.S. at 274-75.
148. The Court noted that federal law may preempt state law in one of several ways. First, Congress may state in express terms that it is preempting state law, as long as Congress acts within constitutional limits. Second, preemption of state law may be inferred where federal regulation is so comprehensive that it leaves no room for state regulation. Finally, federal law may preempt state law where state law conflicts with federal law. A conflict exists if it is physically impossible to comply with both state and federal law, or if the state law hampers the full achievement of congressional goals. Id. at 280-81.
149. Id. at 281.
150. Section 708 provides:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.
151. Section 1104 provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of
and FEHA, the federal statute would preempt state law.\textsuperscript{152} To determine whether such a conflict existed, the Court examined whether the PDA prohibits states from requiring employers to provide reinstatement for pregnant workers.\textsuperscript{153}

The petitioners argued that the PDA prohibits California's "special treatment" of pregnant women because such treatment is discriminatory.\textsuperscript{154} The Court, however, decided that the PDA did not prohibit preferential treatment.\textsuperscript{155}

The Court first evaluated the language of the PDA in the context of its legislative history and historical context, finding that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers.\textsuperscript{156} The Court also found that the legislative history contained no indication of concern about the preferential treatment of pregnant women, whereas abundant discussion existed concerning discrimination against pregnant women.\textsuperscript{157} The Court concluded that if Congress had wanted preferential treatment to be prohibited, it would have used stronger language, rather than merely saying that preferential treatment was not required.\textsuperscript{158} Furthermore, the Court noted that when Congress passed the PDA, Congress knew of laws similar to FEHA, but failed to note any inconsistency between such laws and the PDA.\textsuperscript{159}

The Court then examined whether there was an inconsistency between the goals of the PDA and FEHA. The Court noted that Congress intended the PDA to "guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life."\textsuperscript{160} Accordingly, the Court concluded that the PDA and FEHA share the common goal of attaining equal employment opportunities for all employees regardless of gender.\textsuperscript{161}

\begin{itemize}
\item State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.
\item 152. 479 U.S. at 281.
\item 153. Id. at 283-84.
\item 154. Id. at 284.
\item 155. Id.
\item 156. Id. at 285-86.
\item 157. Id.
\item 158. Id. at 287.
\item 159. Id.
\item 160. Id. at 289 (quoting 123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams, sponsor of the PDA)).
\item 161. Id. at 288.
\end{itemize}
The Court also emphasized that FEHA benefits cover only "the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions." Thus, the Court distinguished California's law from earlier laws based on "archaic" ideas about pregnant women and their ability to work. The court noted that, unlike FEHA, a statute based on those "archaic" assumptions would be inconsistent with Title VII's goal of equal employment opportunity.

Thus, the Court found that there was no inevitable collision between state and federal law because the California law did not require preferential treatment only for pregnant women. Nothing prevented employers from giving similar disability benefits to nonpregnant workers who were similarly disabled. Accordingly, the Court concluded that the PDA did not preempt the state statute.

In a concurring opinion, Justice Stevens agreed with Justice Marshall that the PDA allows preferential treatment of pregnant workers if it furthers the goal that Title VII was designed to achieve—"equality of employment opportunities." He further concluded that this reading would also allow an employer to follow FEHA, even without giving the same benefits to similarly disabled men.

Justice Scalia also concurred, but believed that the Court decided more than was necessary. Justice Scalia felt that under Section 708 of Title VII, which provides that Title VII shall not exempt a person from state law unless state law requires or permits an act proscribed by Title VII, the California statute could not be preempted because it in no way required or permitted violation of the PDA. He worried that the majority used a more

162. Id. at 290 (emphasis in original).
163. Id.
165. Id. at 291.
166. Id.
167. Id. at 292.
169. Id. at 295.
170. Id. at 295-96.
171. See supra note 150.
172. 479 U.S. at 296.
generalized preemption analysis without good reason.\textsuperscript{173}

In a dissenting opinion, Justice White first examined the actual language of the second clause of the PDA which states that pregnant workers "shall be treated the same for all employment-related purposes."\textsuperscript{174} He concluded that the state statute should be preempted because the preferential treatment of pregnant workers by the state statute was in "square conflict" with the plain meaning of the PDA and therefore "not saved" by section 708.\textsuperscript{175}

The dissent then addressed the majority's position that the PDA forbids the enactment of statutes that are less favorable to pregnant women, but allows programs that are more favorable.\textsuperscript{176} The dissent found that the express language of the PDA was contrary to this view and that the legislative history indicated no intent to put pregnancy in a separate class within Title VII.\textsuperscript{177}

In response to the argument that Congress knew of state laws similar to the California law and failed to supercede them, the dissent argued that Congress neither conducted a careful analysis of such statutes nor distinguished the two statutes on which the majority relied from the other statutes mentioned.\textsuperscript{178} Thus, the dissent argued that a passing reference to those two statutes, without an express endorsement, was not enough to support the argument that Congress intended the PDA to allow preferential treatment.\textsuperscript{179}

The dissent also found fault with the majority's argument that even if the PDA prohibits preferential treatment, the employer can comply with both the PDA and FEHA by providing the same disability benefits to all workers. The dissent argued that this scheme would impose a "significant burden" on California employers and that, in enacting FEHA, the California legislature did not intend to require that employers expand these benefits to the entire workforce.\textsuperscript{180} Moreover, the dissent argued that in order to comply with both statutes, employers would have to create new programs which, according to the legislative history of the PDA, was clearly not Congress' intention.\textsuperscript{181} The dissent con-

\begin{thebibliography}{99}
\item Id.
\item 479 U.S. at 297 (quoting 42 U.S.C.A. § 2000e(k) (West 1981)).
\item Id. at 298.
\item Id.
\item Id. at 298-99.
\item Id. at 301-02.
\item Id. at 302.
\item Id. at 302-03.
\item Id.
\end{thebibliography}
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cluded, therefore, that preferential treatment is prohibited by Title VII, as amended by the PDA, and thus that FEHA is preempted.\textsuperscript{182}

The dissent in \textit{Guerra} presents a compelling evaluation of the legislative history of the PDA and a strong challenge to the notion that employers can comply with both FEHA and the PDA.\textsuperscript{183} In evaluating the legislative history of the PDA, the dissent found that Congress did not intend to allow preferential treatment of women under the PDA.\textsuperscript{184} The House Report supports this interpretation, stating that the PDA defines standards that "require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."\textsuperscript{185} While the majority pointed to specific passages in the legislative history to support the notion that preferential treatment is allowed, a complete reading of the legislative history favors the opposing argument.

As for complying with both state and federal law, the majority argued that employers are not compelled to treat pregnant workers better than other disabled employees because they are free to provide comparable benefits to other employees.\textsuperscript{186} However, as the dissent points out, in enacting the PDA, Congress did not intend to impose these extra burdens on employers. The House Report on the bill states that the PDA "in no way requires the institution of any new programs where none currently exist."\textsuperscript{187} The majority failed to recognize that its interpretation practically mandates that employers provide comparable benefits to other workers to ensure that pregnant women are treated equally. The majority argued that it was "theoretically possible" for employers to comply with both the state statute and the PDA; however, this approach is impractical.

In \textit{Guerra}, the Supreme Court adopted a special treatment model in deciding that the PDA allows preferential treatment of pregnant women. This approach may appear necessary to protect pregnant women in the workplace. However, preferential treatment policies similar to the California maternity leave statute create problems for women struggling to attain equal employment

\textsuperscript{182} Id. at 304.
\textsuperscript{183} See supra notes 174-82 and accompanying text (discussing dissenting opinion of Justice White).
\textsuperscript{184} 479 U.S. at 298.
\textsuperscript{185} Id. at 299 (quoting H.R. Rep. No. 948, 95th Cong., 1st Sess. 4 (1978)).
\textsuperscript{186} Id. at 291.
\textsuperscript{187} Id. at 303 (quoting H.R. Rep. No. 948, 95th Cong., 1st Sess. 4 (1978)).
\textsuperscript{188} Id. at 291 (quoting transcript of oral argument at 6).
opportunities. If employers know that pregnant women must receive additional benefits, employers might discriminate against women in the hiring process.

In addition, preferential treatment policies are underinclusive. They fail to recognize other important disability and leave needs, such as paternity leave. A focus solely on the preferential leave and reinstatement policies of pregnant women shifts attention away from the inadequate leave policies that exist for other employees. State governments and the federal government need to protect pregnant women and other employees by developing disability and leave policies that guarantee reasonable benefits to all temporarily absent employees.

As more women enter the labor force, those women who decide to bear children need the protection of disability benefits as well as paid or unpaid parental leave. Local governments or the federal government can accomplish this goal by establishing facially neutral leave policies that consider the physical effects of pregnancy as a disability, rather than the pregnancy itself. Additionally, the policies should allow equal leave time for both mothers and fathers, thereby supporting both parents' roles in raising a family and being care-takers of children. Gender-neutral policies would eliminate preferential treatment schemes which not only evoke negative responses from many employers and employees but also promote outdated ideas of women's abilities to actively participate in the labor force. At the same time, the adoption of such policies would stress that pregnancy, childbearing, and childrearing are unique, special, and important to the future success of our society.

The question remains whether Guerra and Wimberly can be reconciled. In Wimberly, the question facing the court was whether FUTA mandates preferential treatment of women. In Guerra, the Court had to determine whether the PDA prohibits preferential treatment of women or, using the same construction as in Wimberly, whether the PDA permits preferential treatment of women. The Court in each case looked at the language and legislative history of the statutes to reach its decision.

In Wimberly, the Court evaluated a state statute in the context of FUTA, and found that FUTA does not mandate preferential treatment of pregnant workers.\footnote{189. 479 U.S. 511 (1987) (discussed supra notes 104-33 and accompanying text).} In contrast, the Court in Guerra evaluated a state statute in the context of the PDA, and
determined that the PDA allows the preferential treatment of women. Based on the Supreme Court's analysis of the statutory language and legislative history in each case, the cases can be distinguished in that they pose different issues in dissimilar statutory contexts.

*Wimberly* involved a facially neutral state policy which did not single out pregnant women or formerly pregnant women in determining benefits. *Guerra* dealt with a state statute, which was clearly a preferential treatment statute. In each case, the Court agreed that employers could not single out pregnant women for disadvantageous treatment. The differences in the state statutes, however, forced the Court in each case to ask dissimilar questions under the applicable federal statutes which arguably share similar language. In *Wimberly*, the Court had to decide whether FUTA mandates preferential treatment. If the *Wimberly* Court had declared that FUTA mandated preferential treatment, the Missouri statute would have had to include pregnancy in its definition of good cause in order to guarantee unemployment benefits to women on pregnancy leave. The state statute would have withstood challenges, however, even if the Court had decided that FUTA allowed preferential treatment, because it is a neutral policy and does not discriminate against pregnant women.

Alternatively, in *Guerra*, the state statute was sex-specific and required special treatment of pregnant women. Because the statute provided for preferential treatment, the Court was forced to decide whether the PDA prohibited this special treatment, rather than whether the PDA mandated special treatment. Even if the Court in *Guerra* had addressed whether the PDA mandates preferential treatment, it is unlikely that the Court would have held that it does. The language of the PDA is ambiguous with respect to its stand on preferential treatment. Moreover, there is no strong indication in the PDA's legislative history that Congress intended that the PDA mandate preferential treatment of pregnant women.

Finally, the Missouri unemployment compensation statute would probably withstand a challenge under the PDA. The PDA's language is similar to that of FUTA and the Court could have

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191. Id. at 275-76.
found that the PDA does not mandate that the Missouri statute grant special status to women. Moreover, the legislative history of the PDA focuses on the disadvantageous treatment of pregnant women, rather than on whether pregnant women require preferential treatment. Because the Missouri statute is neutral, incidentally disqualifying pregnant women, it would not conflict with the PDA.

Under this analysis, the *Wimberly* and *Guerra* decisions do not conflict. Each decision should be read narrowly, applicable only to the unique facts of each case. The Court in *Wimberly* confined its opinion to construing FUTA and the Missouri tax statute. The Court in *Guerra* limited its decision to the California maternity leave statute and the PDA. The Supreme Court applied consistent reasoning in each case when analyzing the statutory language and legislative histories.

V

PARENTAL LEAVE LEGISLATION

During 1988, Congress considered two bills that would provide parental leaves for both men and women.¹⁹³ The bills not only dealt with pregnancy leave, but leave for adoption, childrearing, and family illness as well.¹⁹⁴

The House legislation was a facially neutral policy that would have required businesses employing fifteen or more employees to offer unpaid leave to either parent for the birth or adoption of a child, or to care for a seriously ill child or parent.¹⁹⁵ The bill required an employer to allow an employee who had worked for his or her employer for three or more months to take up to eighteen work weeks off for family leave within any two-year period.¹⁹⁶ The legislation also guaranteed employees reinstatement to the same or a similar job following the leave.¹⁹⁷ The purpose of the bill was "to balance the demands of the workplace with the needs

¹⁹⁶. Id. The House later modified the bill, making it applicable only to employers with 50 or more employees and reducing the family leave period to 10 weeks. Wall St. J., Oct. 12, 1987, § 2, at 92, col. 4. As with the House Bill, the Senate bill was also amended so as to affect only employers with 50 or more employees and reduce the unpaid leave period to 10 weeks. N.Y. Times, Sept. 28, 1988, at 28, col. 1.
of families, and to promote stability and economic security in families," while accommodating employers' interests.198

While Congress considered these measures but failed to act, many states have introduced or passed legislation for family or medical-leave. At least six states passed laws governing maternity or parental leave during 1987, including Minnesota, Oregon, and Connecticut.199 At least twenty-six other states have considered similar legislation.200

Under the Minnesota law,201 either parent who has been employed for at least one year by a company having twenty-one or more employees is entitled to six weeks unpaid leave following the birth or adoption of a child.202 Under the Oregon law,203 a person employed for at least ninety days by an employer of twenty-five or more persons can take up to twelve weeks unpaid leave immediately after the birth of a child; however, only one parent at a time may take the parental leave.204 Connecticut's law allows twenty-four weeks of unpaid leave for care of a child or sick family member, but applies only to state employees.205 In all three states, the returning employee is entitled to reinstatement to the same or a similar position.

Some businesses oppose this type of legislation arguing that it will be expensive to implement.206 Employers will incur the start-up costs of new employees who fill in for employees on leave, as well as the unemployment costs of temporary employees who are terminated when the protected employee returns from leave. The United States Chamber of Commerce estimates that parental leave privileges could cost $2.6 billion dollars annually.207 However, the General Accounting Office believes that this estimate is "highly inflated."208

Critics also argue that parental leave programs inhibit employers' flexibility.209 Businesses do not want the government to play personnel manager and mandate what employers can or can-
not do. Employers also express concern that unpaid leave may be the first step towards mandatory paid leave programs or mandatory health insurance. Women, who are working parents, view parental leave programs as a necessary component to their success in the job market and express surprise at the adamant opposition to unpaid leave programs.

Both arguments have merit, and with the growing numbers of women in the labor force and the resultant increase in the numbers of working parents, it is imperative that a balance be struck between society’s concern for the economic stability of working families, and the potentially adverse impact of parental leave policies on employers. The parental leave legislation would make a strong statement in favor of the position that because economic realities often necessitate that both parents work outside the home, it is crucial that parents be given leave time to care for their children. Society’s need for familial stability demands this compromise.

As the number of women entering the workplace continues to grow, parental leave legislation is necessary to accommodate the needs of working women and men who want to take an active role in raising and caring for their families. The United States govern-

210. Id.

211. According to the U.S. Bureau of Labor Statistics, 52.6% of married women with children under one year of age are employed. Id.

212. While employers in the United States continue to oppose parental leave policies, it is important to note that other industrialized countries have established childbearing and childrearing programs. One hundred and seventeen other countries have some form of statutory maternity leave. Many industrialized Western countries have already implemented extensive, progressive childrearing programs. For example, Italy has enacted a special treatment policy whereby women are allowed five months paid leave at 80% of their salary. An additional six months is available at 30% of their salary. During either period, the women’s jobs are held open for them. A woman is also permitted to be absent from work if she has a sick child under the age of three. Each time a female employee gives birth to a child, she is entitled to two years credit toward seniority. S. Hewlitt, A Lesser Life 96 (1986). Sweden provides an ideal example of a workable parental leave program based on an equal treatment scheme. In Sweden, since 1975, the father or mother of a child is entitled to nine months leave after the birth of their child with an allowance of 90% of their current income (up to a specified maximum). This parental insurance scheme guarantees seniority on the job, maintains fringe benefits and mandates that a parent be able to return to the same or an equivalent position. While statistically more women than men utilize these programs, the Swedish government encourages men to take advantage of the leave time. Unlike the United States, Sweden also provides disabled workers with job protection and partial wage replacement at 90% of income. Id.
ment and employers nationwide must be willing to work towards establishing parental leave programs that protect the needs of both women and men in the workplace.

CONCLUSION

It is evident from the issues raised in cases considering the validity of fetal vulnerability programs, unemployment benefit policies, and maternity-leave policies, that the debate continues as to whether pregnancy should be evaluated under a special treatment or equal treatment standard. The equal treatment model, if applied in each of these instances, would ensure that women and men receive similar protection from toxic work environments and similar benefits in terms of disability benefits programs and parental leave policies.

Currently, it is difficult for women to participate fully in the labor force while bearing children and raising families. However, progress is being made in those states that recognize the value of pregnancy, childbearing, and childrearing to the future success of our society and are therefore developing and implementing employment, benefit, and leave policies that support working parents. Equality will not be achieved in the workplace until legislative and judicial decision-makers recognize the rights of women to equal treatment in the workplace and the need for policies that encourage both women and men to participate in raising families.