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SEX DISCRIMINATION IN EMPLOYEE FRINGE BENEFITS

While it is clearly unlawful to pay men and women unequal wages for equal work,¹ or to exclude women from any job solely on the basis of sex (except in the limited circumstance where sex is a bona fide occupational qualification),² the law concerning sex discrimination in the more subtle form of unequal employee fringe benefits is less clear. As the use of fringe benefits as compensation has increased dramatically in recent years³ to the point where fringe benefits now constitute an average of 25 percent of the cost to employers of all payrolls,⁴ the significance of discrimination in their conferral has increased correspondingly. Although the effort to eliminate sex discrimination in hiring and wages is still of primary importance,⁵ Congress,⁶ the courts,⁷

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970). See 29 C.F.R. § 1604.2 (1975) for an interpretation of bona fide occupational qualification.

2. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970).

3. Foust, *The Total Approach Concept*, in *THE TOTAL APPROACH TO EMPLOYER BENEFITS* 10 (A. Deric ed. 1967). The author notes that the growth of fringe benefits was spurred in World War II by the Stabilization Act of 1942, which essentially froze all wages and salaries while permitting reasonable increases in employee benefits. *Id.*

4. *Id.* at 26. The increase in the use of fringe benefits has been stimulated by the nation's tax laws which allow exclusion of employer payments to retirement, health, and accident programs from the taxable income of the employee, despite their clear nature as compensation. For example, section 106 of the Internal Revenue Code provides that an individual's gross income does not include contributions by the employer to accident and health plans which compensate employees' personal injuries and sickness. INT. REV. CODE OF 1954, § 106.

5. Employment statistics and earnings figures not only reflect the effects of past and present discrimination against women but also reflect the failure of current prohibitions against discrimination. As of 1970, women were three times more likely than men to earn less than \$5,000 for year round, full-time work. The difference between median earnings of full-time male and female employees remained at 58 percent from 1966 through 1968, a more than \$3,000 differential per individual. Though the number of women in professional and technical fields has increased, the proportions of women in those fields dropped from 45 percent in 1940 to 37 percent in 1969. U.S. DEPARTMENT OF LABOR, WOMEN'S BUREAU, *UNDERUTILIZATION OF WOMEN WORKERS* 1-9 (1971).

More recent Department of Labor statistics cited by the Supreme Court in *Kahn v. Shevin*, 94 S. Ct. 1734, 1736 (1974), indicate that the above figures have changed substantially. See note 78 *infra* & accompanying text.

6. See, e.g., Employee Retirement Income Security Act of 1974, No. 93-406, 88 Stat. 829.

7. See, e.g., *Geduldig v. Aiello*, 94 S. Ct. 2485 (1974); *Wetzel v. Liberty Mutual*

and several administrative agencies⁸ recently have demonstrated concern for discriminatory conferral of fringe benefits. The case law confronting this issue, however, has demonstrated that the standards and remedies under various federal laws, notably Title VII of the Civil Rights Act of 1964,⁹ the Equal Pay Act of 1963,¹⁰ Executive Order 11246,¹¹ and the fourteenth amendment to the United States Constitution,¹² are fragmented, confusing, and sometimes contradictory. Prerequisites to the reduction or elimination of discrimination in employee benefits are a precise definition of equality of treatment and a uniform federal policy to implement existing laws. The initial step toward this goal must be an examination of the present legal standards proscribing sex discrimination.

SEX DISCRIMINATION UNDER FEDERAL LAW: THE CONFLICT OF DIFFERING STANDARDS

An examination of the various statutory sources of federal law prohibiting discrimination on the basis of sex reveals several different and conflicting standards.

Title VII

As amended by the Equal Employment Opportunity Act of 1972,¹³

Insurance Co., 511 F.2d 199 (3d Cir. 1975), *cert. granted*, 43 U.S.L.W. 3624 (U.S. May 27, 1975).

8. See, e.g., EEOC Decision No. 71-1474, CCH EEOC DECISIONS (1973) ¶ 6221 (Mar. 19, 1971); Wage and Hour Opinion Letter No. 484, CCH EMPL. PRAC. GUIDE § 1208.315 (Aug. 3, 1966).

9. 42 U.S.C. § 2000e (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).

10. 29 U.S.C. § 206(d) (1970).

11. 3 C.F.R. § 169 (1975).

12. U.S. CONST. amend. XIV.

13. 42 U.S.C. §§ 2000e to 2000h-2 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e to 2000h-6 (1970).

The 1972 amendment significantly enlarged the coverage of Title VII by including employers with 15 or more employees rather than employers with 25 or more as required by the original Act. The law now reads: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" 42 U.S.C. § 2000e(b) (Supp. II, 1972). Employees of the federal government and the District of Columbia were extended protection from discriminatory action by the 1972 amendment, but the Civil Service Commission, rather than the Equal Employment Opportunity Commission, was granted enforcement powers. *Id.* § 2000e-16(b). The separate treatment accorded these employees has been attributed to a vigorous effort on the part of the Civil Service Commission to prevent losing its jurisdiction in these areas to the EEOC. See Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUMAN RIGHTS L. REV. 311, 318 (1973).

Title VII of the Civil Rights Act of 1964,¹⁴ with some exceptions,¹⁵ prohibits discrimination by employers,¹⁶ employment agencies, and labor unions on the basis of race, color, religion, sex, or national origin¹⁷ and covers a broad spectrum of employment practices.¹⁸

Under section 703(a)(1), discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." is an unlawful employment practice,¹⁹ and it is clear that the terms "compensation" and "privileges of employment" encompass employee benefit plans.²⁰

Among the various remedies afforded by Title VII against sex discrimination is the provision in section 706(g),²¹ allowing injunctive

14. 42 U.S.C. §§ 2000e to 2000h-6 (1970), as amended, 42 U.S.C. §§ 2000e to 2000h-2 (Supp. II, 1972).

15. The Act permits discrimination on the basis of religion, sex, or national origin (but not race or color) where the religion, sex, or national origin is a bona fide occupational qualification. *Id.* § 2000e-2(e). See note 1 *supra*. Further, employers may discriminate: against members of the Communist party, *id.* § 2000e-2(f); in the interests of national security, *id.* § 2000e-2(g); according to bona fide seniority, merit, or piece work systems, *id.* § 2000e-2(h); or on the basis of the results of any "professionally developed ability test" provided such test is not used or designed to discriminate. *Id.*

16. To be covered by the Act an employer must be "engaged in an industry affecting commerce." *Id.* § 2000e(b). See note 13 *supra*. The term "industry affecting commerce" is broader than it might appear initially. It includes "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce. . . ." 42 U.S.C. § 2000e(h) (1970). This definition was borrowed from labor legislation, see Labor Management Reporting and Disclosure Act, 29 U.S.C. § 402(c) (1970), and has been given the broadest meaning possible under the Civil Rights Act. Once an employer is found to be one affecting commerce, all his employees, no matter what their jobs may be, are covered.

17. 42 U.S.C. §§ 2000e-2(a)-(c) (1970).

18. The Act covers hiring, discharges, compensation, employment referrals, membership and expulsion from membership, classification, training, promotion, and term, conditions, and privileges of employment. *Id.*

19. *Id.* § 2000e-2(a)(1) (1970).

20. See EEOC Decision No. 70-75, CCH EEOC DECISIONS (1973) ¶ 6049 (Aug. 13, 1969).

21. Section 706(g) provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

The section limits injunctive (as opposed to declaratory) relief to cases of "intentional" violation. The phrase "intentionally engaged in" has been construed to mean only that the defendant meant to do what he did, that his act was not accidental. No showing of malice or discriminatory intent is required, but such intent is inferred from

relief as well as affirmative relief, such as hiring and reinstatement awards, with or without back pay.²² There is also a statutory provision calling for payment of attorney's fees to the prevailing party.²³ Back pay awards, coupled with attorney's fees, create a potent remedy especially where fringe benefit discrimination is involved. Because lengthy court actions can lead to substantial accrual of back pay, which would include a substantial accrual of fringe benefits as well, and because class actions involving a number of employees are frequently the vehicle used to litigate discrimination cases,²⁴ a back pay award is likely to involve a large sum of money.

Equal Pay Act

The Equal Pay Act,²⁵ which predates the Civil Rights Act of 1964, prohibits paying different wages to men than are paid to women for

a practice continued after discriminatory effects are made known. *See* Local 189, AFL-CIO v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court, in rejecting an employer's good faith defense, stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . [Rather] Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* at 432. For a detailed study of treatment by the Federal Courts of the intent requirement, *see* Comment, *Back Pay for Employment Discrimination Under Title VII—Role of the Judiciary in Exercising Its Discretion*, 23 CATHOLIC U. L. REV. 525 (1974), which concluded that the courts have made it easy to demonstrate this requisite in a desire to give Title VII a deterrent effect as well as a compensatory one.

22. 42 U.S.C. § 2000e-5(g) (1970). The 1972 amendment to Title VII provides that back pay liability may extend to two years before the original filing of the complaint with the Equal Employment Opportunity Commission (EEOC).

Though within a court's discretion, a back pay award is allowed as a matter of course where the employee has shown some compensable damage. In one case a court has issued a back pay award where the plaintiffs did not even plead for that relief. *Robinson v. Lorillard Corp.*, 319 F. Supp. 835 (1970), *aff'd in part & rev'd in part on other grounds*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971). Thus, when an employer is found guilty of discrimination in employee benefits, most of which involve monetary payments, he can expect a court to award those benefits in back pay to the employees discriminated against.

23. 42 U.S.C. § 2000e-5(k) (1970).

24. The federal courts look favorably on class actions in Title VII cases. *See, e.g.,* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir., 1968), in which the court stated: "Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order." The same logic would apply as well to sex discrimination.

25. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 28 U.S.C. § 206(d) (1970), and embodied in the Fair Labor Standards Act, 29 U.S.C. § 206 (1970)).

performing similar work.²⁶ Protection extends to employees "engaged in commerce or in the production of goods for commerce, or [who are] employed in an enterprise engaged in commerce or in the production of goods for commerce."²⁷ Under this statutory language an individual employee is covered if he is engaged in commerce even though the enterprise may not be.²⁸ While the coverage by Title VII of employers affecting commerce is broader than that by the Fair Labor Standards Act (which encompasses the Equal Pay Act),²⁹ there is no corresponding limitation of coverage in the latter act based on the number of workers employed by a particular employer.³⁰ Although this broad coverage was limited by specific exemptions,³¹ the 1974 amendments³² to the Equal Pay Act eradicated the most significant of these exclusions by bringing state, local, and most federal government employees under the purview of the Act.³³

26. Section 206(d) (1) provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

29 U.S.C. § 206(d) (1) (1970).

27. 29 U.S.C. § 206(a) (1970). The term "enterprise" is itself broadly defined, the Act making it clear that coverage is not confined to a single unit of a multi-unit business where one of the units is involved in commerce: "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose" 29 U.S.C. § 203(r) (1970). For a more complete discussion of the enterprise concept, see 29 C.F.R. §§ 779.202, 779.204 (1975). "Related activities" is discussed at *id.* §§ 779.205-779.211. The enterprise concept was upheld as constitutional in *Maryland v. Wirtz*, 392 U.S. 183 (1968).

An "enterprise engaged in commerce or in the production of goods for commerce" is also broadly defined. It means "any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person" 29 U.S.C. § 203(s) (1970).

28. Cf. *Snelling v. O.K. Service Garage, Inc.*, 311 F. Supp. 842 (E.D. Ky. 1970).

29. See note 25 *supra*.

30. See note 13 *supra*.

31. See 29 U.S.C. § 213 (1970).

32. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974 U.S. CODE CONG. & AD. NEWS 615).

33. See *id.* § 6. Prior to 1966, state employees were exempted from coverage by the Fair Labor Standards Act. See 29 U.S.C. § 203(d) (1970). The Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, provided exceptions to this rule in the case of certain hospital, school, and railroad employees. *Id.* § 102(b). When a group of state employees brought suit against the state to recover overtime pay under section 16(b), the Supreme Court held that such an action could not be brought by state

Remedies, as well as coverage, under the Equal Pay Act are determined by the general provisions of the Fair Labor Standards Act. Recovery of back wages can be accomplished through a suit either by the individual employee or by the Secretary of Labor.³⁴ Section 16(b) of the Act allows an employee to sue for the amount that he was underpaid, or for an equal amount in liquidated damages, and further provides for payment of attorney's fees and costs to a prevailing plaintiff.³⁵ As amended in 1974, section 16(c) now permits an employee to be awarded the same damages in a suit brought by the Secretary of Labor.³⁶ In suits for back wages, the statute of limitations runs for two years in the case of nonwillful violations;³⁷ in the case of willful violations, which also carry the possibility of fine and imprisonment, the limitation period is three years.³⁸ Significantly, this limitation period is of minor import in sex discrimination cases involving fringe benefits, be-

employees in federal court because of immunity granted to the state by the eleventh amendment. *Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, Missouri*, 411 U.S. 279 (1973). See note 87 *infra* & accompanying text. The Court noted that, although coverage of some state employees had been granted, Congress had not lifted sovereign immunity from the states in the Fair Labor Standards Act. The Secretary of Labor nonetheless maintained enforcement authority against the state in federal court; and the Supreme Court left open the question of whether the employees could sue the state in a state court. The majority of the Court apparently felt that Congress could lift the constitutional immunity of the states simply by putting a specific provision in section 16(b). 411 U.S. at 285-86. In addition to providing coverage to a larger group of public employees, the 1974 amendment included a section specifically waiving sovereign immunity in Fair Labor Standards Act cases. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(6)(d)(1), 88 Stat. 55.

34. 29 U.S.C. § 216(b), (c) (1970).

35. *Id.* § 216(b). The Portal to Portal Pay Act, 29 U.S.C. § 255 (1970), amended this remedy to allow an employer to raise good faith as a defense to a liquidated damage demand.

36. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, 88 Stat. 55. Formerly, under section 16(c) the Secretary of Labor was precluded from bringing suit on behalf of an employee when there was an unsettled issue of law. Additionally, the Secretary could bring suit only when the employee had made a written request for him to do so. 29 U.S.C. § 216(c) (1970). The Secretary could avoid the additional prerequisites of section 216(c) by bringing suit under the injunctive process provided for by section 17. *Id.* § 217. Although the back pay award was the same under section 17, no liquidated damages were prescribed. By changing section 16(c) to eliminate the need for a written request from the complainant and to permit a suit by the Secretary when unsettled areas of law are at issue, the 1974 amendment made suit by the Secretary under section 16(c), and therefore recovery of liquidated damages, more likely. Pub. L. No. 93-259, § 26, 88 Stat. 55.

37. 29 U.S.C. § 255(a) (1970).

38. *Id.* §§ 216(a), 255(a).

cause violations in such cases are of a continuing nature.³⁹ Only where an employer has changed the benefit program to correct prior inequality and the time period has run would an employee be barred by limitations.

Executive Order 11246

Pursuant to the federal government's power to set its own terms and conditions when negotiating with private parties,⁴⁰ Executive Order 11246⁴¹ was issued to prohibit discrimination by government contractors. The order mandates that each government contractor agree to "not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin."⁴² Equality of treatment in rates of pay and other forms of employee compensation is specifically covered by the order.⁴³ Further, the ambit of the order is far-reaching, extending, with a few exemptions, to all subcontracts and purchasing orders made by prime contractors.⁴⁴

Enforcement power under the order was given to the Secretary of Labor, who delegated this responsibility to the Director of the Office of Federal Contract Compliance (OFCC).⁴⁵ Unlike Title VII and the Equal Pay Act, suits by individual plaintiffs to recover compensatory damages are not authorized. Further, the OFCC does not have power under the order to bring a court action against a contractor; remedial action is limited to sanctions and penalties. The major penalty provision authorizes cancellation, suspension, or termination of the contract, and prohibits any violator from securing future government contracts in the absence of the Secretary's approval.⁴⁶ These measures, and their attendant deterrent effect, encompass the order's total enforcement scheme, leaving aggrieved individuals without redress. To alleviate this inadequacy, the order allows the OFCC to recommend that proceedings

39. In the context of a Title VII case, the Court of Appeals for the Seventh Circuit noted that "[i]t is settled law that the . . . limitation [period] is no bar when a continuing practice of discrimination is being challenged rather than a single, isolated discriminatory act." *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188 (7th Cir. 1971), *citing* *Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969).

40. *See* *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

41. 3 C.F.R. § 169 (1974). Executive Order 11375, 32 Fed. Reg. 14303 (1967), added sex as a basis for discrimination under the original order.

42. 3 C.F.R. § 170 (1974).

43. *Id.*

44. *Id.* § 171.

45. 31 Fed. Reg. 6921 (1966).

46. 3 C.F.R. at § 174.

be instituted against the employer under Title VII.⁴⁷ Thus while the executive order bars discrimination in fringe benefit compensation, it may add little to the development of nondiscriminatory practices because of inadequate enforcement mechanisms.

Fourteenth Amendment

Aside from Title VII, the fourteenth amendment to the Constitution of the United States, prohibiting the states from depriving any person of the equal protection of the laws and from denying due process to any person within its jurisdiction,⁴⁸ has been the most frequently used basis for sex discrimination actions. The equal protection clause,⁴⁹ and more recently the due process clause,⁵⁰ have proven useful tools for plaintiffs in such cases and have major relevance to discrimination in employee fringe benefits.

Nevertheless, the Supreme Court consistently has ruled that the equal protection clause of the fourteenth amendment allows the states to provide different classes of people with different treatment under the law.⁵¹ The Court merely requires that the classification be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."⁵² This two-part "ra-

47. *Id.* See Maroze, *Back Pay Awards: A Remedy Under Executive Order 11296*, 22 BUFFALO L. REV. 439 (1973), for a view that the executive order permits enforcing agencies to obtain back pay awards.

48. The fourteenth amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

49. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973); *LeFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 414 U.S. 632 (1974); *Cohen v. Chesterfield County School Bd.*, 326 F. Supp. 1159 (E.D. Va. 1971), *rev'd*, 474 F.2d 395 (4th Cir. 1972), *rev'd*, 414 U.S. 632 (1974); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966).

50. See note 85 *infra*. See also *Stanley v. Illinois*, 405 U.S. 645 (1972). For a treatment of the distinction between the equal protection clause and the due process clause in sex discrimination cases, see Comment, *Due Process and the Pregnant Worker: the New Weapon in the Equal Rights Arsenal*, 23 EMORY L.J. 787 (1974).

51. See, e.g., *McDonald v. Board of Election Comm'rs*, 396 U.S. 802 (1969); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911); *Barbier v. Connolly*, 113 U.S. 27 (1885).

52. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also *McGowan v. Maryland*, 366 U.S. 420 (1961); *Lotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947).

tional basis test" presumes that the classification in question is constitutional⁵³ and gives the states great latitude in proving that it is reasonable.⁵⁴ Mere reasonableness, however, will not support a suspect classification,⁵⁵ or one which affects a fundamental interest.⁵⁶ Such a classification is subject to "strict scrutiny"; the state bears "a far heavier burden of justification"⁵⁷ in that it must show that the classification is a necessary means of achieving a legitimate state purpose.⁵⁸ The pre-

53. *McGowan v. Maryland*, 366 U.S. 420 (1959); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911).

54. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

55. Cases finding or strongly intimating that suspect classifications were under review include: *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Harper v. Virginia Bd. of Elections*, 383 U.S. 410 (1966) (wealth); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (alienage); *Korematsu v. United States*, 323 U.S. 214 (1944) (national ancestry).

Although the Court has never given a strict definition of "suspect class," such classes are generally based upon congenital and unalterable traits, with the exception of wealth, which also may be determined in large part by the circumstances of birth. A likely distinction between these classifications and those not declared suspect is that persons in the former category are disadvantaged politically to the extent that the courts may be their only recourse. Mr. Justice Stewart suggested this reasoning in *United States v. Carolene Products Co.*, when he stated that "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 152 n.4 (1938).

56. Those interests arguably declared "fundamental" by the Supreme Court are: voting, see *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); marriage, see *Loving v. Virginia*, 388 U.S. 1 (1967) and *Griswold v. Connecticut*, 381 U.S. 479 (1965); procreation, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942); rights in the criminal process, see *Griffin v. Illinois*, 351 U.S. 12 (1956); education, see *Brown v. Board of Educ.*, 347 U.S. 483 (1954); and interstate travel, see *Shapiro v. Thompson*, 394 U.S. 618 (1969). Like the cases involving suspect classifications, the Court's reasoning is not stated explicitly, but one can conjecture that these rights are either very personal or are related to maintaining democratic ideals. See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), where the Court, discussing the right to vote, stated that "[s]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 626 quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1969).

57. *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964). In declaring unconstitutional a law which prohibited cohabitation by a man and woman of different races, the Court found that the state had not successfully carried this burden. See also *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (an antimiscegenation statute created a "very heavy burden of justification"); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (emergency legislation ordering the exclusion of all persons of Japanese ancestry from large portions of the West Coast required "the most rigid scrutiny").

58. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (a suspect classification required a showing that it was "necessary to the accomplishment of some permissible state objec-

sumption of validity arising under the rational basis test is not applied.⁵⁹

Although a majority of the Supreme Court has never ruled that sex is an inherently suspect classification,⁶⁰ the Court nonetheless has barred certain classifications based on sex, developing a "strict rational basis" test, a standard of inquiry situated between the extremes of the "strict scrutiny" and "rational basis" tests.⁶¹ The first tentative statement by the Supreme Court of the strict rational basis test was made in *Reed v. Reed*,⁶² a unanimous decision in which the Court declared unconstitutional as a violation of the equal protection clause a state statute⁶³ creating a preference for men over women as administrators of estates. The Court's reasoning began with the finding that because the statute "provides that different treatment be accorded to . . . applicants on the basis of their sex . . . it . . . establishes a classification subject to scrutiny under the Equal Protection Clause."⁶⁴ Use of the word "scrutiny," however, was not meant to imply inquiry under the strict scrutiny test for the Court turned to the rational basis test,⁶⁵ holding that the means employed in the statute lacked a demonstrably rational relationship to the stated purpose of the legislation.⁶⁶ Imposition of the "scrutiny" element was to negate the presumption of validity which prevails under the rational basis test, and to shift the burden of proving rationality to the state.

tive, independent of . . . racial discrimination"); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (a suspect classification should be upheld only if it was "necessary, and not merely rationally related, to the accomplishment of a permissible state policy").

59. See *Loving v. Virginia*, 388 U.S. 1, 9 (1964), in which the Court rejected the state's argument that the classification should be upheld if there was any possible basis for concluding that it served a "rational purpose." The Court distinguished nonsuspect classifications which led the courts to defer to the legislative judgment. *Id.* at 8-9.

60. For state court decisions declaring sex a suspect classification under state and federal equal protection clauses, see *Hanson v. Hutt*, 83 Wash. 2d 195, 517 P.2d 599 (1973); *Sail'r Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

61. See Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 29-36 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1075-79 (1974); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1507-08 (1972).

62. 404 U.S. 71 (1971).

63. IDAHO CODE § 15-312,-314 (1948).

64. 404 U.S. at 75.

65. *Id.* at 76, citing *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

66. *Id.* at 76-77. The stated purpose of the statute was to ease the workload of state courts in choosing administrators. The Court held, however, that as applied, the statute was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . ." *Id.* at 76.

In *Weber v. Aetna Casualty & Surety Co.*,⁶⁷ the Supreme Court enunciated more clearly the strict rational basis test, although not in the context of sex discrimination. The challenged statute⁶⁸ in *Weber* barred illegitimate children from recovering death benefits under a workman's compensation claim. Declaring the statute unconstitutional under the equal protection clause of the fourteenth amendment, the Court reasoned that the "essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"⁶⁹ The first question is substantially a statement of the rational basis test, which is then modified by the inquiry in the second question, embodying the concept of scrutiny where fundamental individual interests are jeopardized. Under this test, the Court focuses primarily on the statutory means adopted to accomplish the stated legislative purpose, and imposes a positive showing of rationality between the two as a requirement of constitutionality.

The first major Supreme Court decision in a sex discrimination case following *Reed* was *Frontiero v. Richardson*,⁷⁰ wherein the Court invalidated, under the equal protection clause of the fifth amendment, federal statutes which established markedly different standards for men and women in the armed services for receiving allowances for dependent spouses.⁷¹ The decision was diluted, however, by the filing of separate opinions. Four justices⁷² relied on *Reed*, applying the strict rational basis test as a foundation for a holding of unconstitutionality.⁷³ Four concurring members⁷⁴ applied the strict scrutiny test, declaring sex to be a suspect classification.⁷⁵

Following *Frontiero*, the strict rational basis test was employed in

67. 406 U.S. 164 (1971).

68. LA. REV. STAT. § 23:1021(3) (1964).

69. 406 U.S. at 173.

70. 411 U.S. 677 (1973).

71. The statutes required an affirmative showing by female members that their husbands in fact were dependent for more than one half of their support. No such showing was required of male servicemen. 10 U.S.C. § 1072(2)(c) (1970); Pay and Allowances of Uniformed Services Act § 401, Pub. L. No. 87-649, 76 Stat. 469 (1962), as amended 37 U.S.C. § 401(3) (1973).

72. The four justices were Chief Justice Burger, and Justices Powell, Blackmun, and Stewart.

73. 411 U.S. at 691.

74. The concurring justices were Justices Brennan, Douglas, White, and Marshall; Justice Rehnquist dissented.

75. 411 U.S. at 682.

Kahn v. Shevin,⁷⁶ wherein the Court held valid a state statute⁷⁷ granting a \$500 property tax exemption to widows but not to widowers. The Court in *Kahn*, noting that the object of the statute was to ease the widow's financial burden, held that, given the documented earnings differential between men and women,⁷⁸ the classification had a "fair and substantial relation to the object of the legislation."⁷⁹

Recently, in *Weinberger v. Wiesenfeld*,⁸⁰ the Court declared section 402(g) of the Social Security Act⁸¹ a violation of the equal protection clause of the fifth amendment. This section provided survivor's benefits to a widow and minor children based on the earnings of a deceased husband and father, but allowed benefits based on the earnings of a deceased wife and mother to flow solely to her minor children. Although the Government attempted to justify the classification on economic grounds, the Court chose not to follow the analysis used in *Kahn*,⁸² and approached this problem utilizing a *Frontiero* rationale, holding that "the gender based distinction of [the section] is entirely irrational"⁸³ and unrelated to the stated purpose of the statute.⁸⁴

Reed, *Frontiero*, *Kahn*, and *Weinberger*, viewed together, reflect the Court's present attitude toward classifications based upon sex. That attitude is expressed in the strict rational basis test which essentially probes the objective of the legislation under review and questions whether the classification substantially furthers that end.⁸⁵

76. 94 S.Ct. 1734 (1974).

77. FLA. STAT. ANN. § 196.191(7) (1971) (\$500 property tax exemption for females but not males).

78. The Court took a realistic look at the earnings difference between men and women finding that women in 1972 earned 57.9 percent of the median income of men. 94 S. Ct. at 1736. The statistics cited were convincing: "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man While the widower can usually continue the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly in a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." *Id.* at 1736-37. The Court also relied on the fact that this was tax legislation, an area in which states are given a large degree of freedom in making classifications to produce reasonable systems of taxation. *Id.* at 1737.

79. *Id.* at 1737.

80. 95 S. Ct. 1225 (1975).

81. Social Security Act § 202(g), 42 U.S.C. § 402(g) (1970).

82. See notes 76-79 *supra* & accompanying text.

83. 95 S. Ct. at 1235.

84. The Court saw the main purpose of the statute as providing the parent the opportunity to stay home and care for the children instead of working. *Id.* at 1233.

85. Equal protection, however, is not the sole constitutional ground for attacking

All suits brought under the fourteenth amendment must of course involve "state action,"⁸⁶ and once this prerequisite is met, it must be decided against whom suit can be maintained. The Supreme Court has held that under the eleventh amendment "an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state."⁸⁷ This protection, however, does not extend to state employees.

In *Ex Parte Young*,⁸⁸ for example, an injunction was sought against a state attorney general, rather than the state, to restrain enforcement of a statute allegedly in violation of the Federal Constitution. The Supreme Court held that the doctrine of sovereign immunity did not protect this official because he was acting outside the permissible scope of authority in violating the Constitution.⁸⁹ Similarly, when a state or state agency is administering an employee benefit program which discriminates on the basis of sex, at the very least a suit can be brought against a state official to enjoin the use of such a program.

There exists, however, an apparent judicial reluctance to award full damages when an employee of a state is sued as an individual. In *Edelman v. Jordan*⁹⁰ the Supreme Court held that a welfare recipient was not entitled to sue for retroactive benefits which were withheld in violation of federal law. Although the action was brought against a

sex discrimination. In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), school board rules requiring pregnant teachers to terminate their employment at least four months prior to delivery was held unconstitutional under the due process clause of the fourteenth amendment. The majority of the Supreme Court found that the rules expressed an "irrebuttable presumption of physical incompetency" for all pregnant teachers and thereby denied submission of medical evidence to the contrary. *Id.* at 644. Similar reasoning was used in *Stanley v. Illinois*, 405 U.S. 645 (1972), to invalidate a statute which contained an irrebuttable presumption that unmarried fathers are unfit to take custody of their children at the death of the children's mother.

Arguably, these cases should have been decided solely on equal protection grounds. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651-53 (Powell, J., concurring). Reliance upon due process as a basis of decision was vigorously criticized in the dissents of both *LaFleur* and *Stanley*. 414 U.S. at 657-60 (Rehnquist, J., dissenting); 405 U.S. at 659 (Burger, C.J., dissenting). See also Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1502-05 (1972).

86. See, e.g., Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974). When alleged discrimination involves a state employee there rests a cause of action under the fourteenth amendment. In addition, some employee benefit programs are administered by the states, thereby satisfying the requisite for state action even though the employer is not a governmental unit.

87. *Edelman v. Jordan*, 94 S. Ct. 1347, 1355 (1974).

88. 209 U.S. 123 (1908).

89. *Id.* at 159-60.

90. 94 S. Ct. 1347 (1974).

state official, the Court felt that any monetary recovery in reality would come from the state treasury:

These funds will obviously not be paid out of the pocket of petitioner Edelman The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself . . . than it does the prospective injunctive relief awarded in *Ex Parte Young*.⁹¹

Distinguishing the monetary consequences of prospective relief brought about by an injunction from an outright monetary award for retroactive benefits, the Court realized that some monetary expenditure was unavoidable with an injunction: "Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young* . . ." ⁹² The majority reasoned that retroactive payments, though perhaps a type of "equitable restitution," were sufficiently different in form from such restitution prohibited by the eleventh amendment.⁹³

To summarize what may happen when an action for discrimination in employee benefits is brought under the equal protection clause: (a) the action cannot be brought against the state in its name but rather must be brought against a state official;⁹⁴ (b) recovery generally will be limited to injunctive relief against that state official barring the discriminatory practice;⁹⁵ (c) monetary relief from the state treasury will not be permitted, and where recovery is sought from a state official in

91. *Id.* at 1356-57. Denial of benefits in *Edelman* hinged on the fact that the plaintiff was in reality seeking payment from the state. In a very limited number of cases, actions brought under the fourteenth amendment have permitted recovery from a state official. In *Scheuer v. Rhodes*, 94 S. Ct. 1683 (1974), the Supreme Court faced the question of whether a federal district court properly had dismissed an action filed against state officials seeking damages as a result of shootings by National Guardsmen at Kent State University. Holding that there was an improper dismissal, the Court determined that the eleventh amendment did not protect state officials from all possible recovery, noting that "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Id.* at 1687, citing *Myers v. Anderson*, 238 U.S. 368 (1915). These cases which allow recovery from individual public officials spring from exceptional circumstances where injunctive relief would be meaningless. Significantly, in *Scheuer* the Court was persuaded by the fact that the plaintiffs were seeking only to hold the state officials, and not the state, liable for the actions at Kent State.

92. 94 S. Ct. 1347, 1358 (1974).

93. *Id.*

94. See notes 87 and 88 *supra* & accompanying text.

95. See note 91 *supra* & accompanying text.

his individual capacity, liability will be imposed only when that official practices a knowledgeable abuse of federal rights.⁹⁶ In this latter case, the size of recovery may be limited where a large class of plaintiffs seeks a monetary award from an individual defendant.

APPLICATION OF STANDARDS TO SPECIFIC EMPLOYEE BENEFITS

The varying federal standards pertaining to sex discrimination have created problems for the employer in the choice and funding of employee benefits. Notably, even a good faith attempt at nondiscriminatory treatment may result in liability depending on the standard by which the employer's actions are judged.⁹⁷ An examination of pregnancy coverage in disability insurance, retirement benefits, death benefits, and life insurance illustrates the problems confronted by employers in dealing with these fringe benefits.

Pregnancy-Related Disabilities in Company Insurance Plans

The propriety of including or excluding pregnancy-related disabilities from coverage in company insurance plans is an issue acutely evidencing lack of uniformity by federal courts and agencies in coping with sex discrimination problems. Both the OFCC guidelines⁹⁸ and the Wage

96. See, e.g., *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973). Therein the plaintiff brought a section 1983 action, 42 U.S.C. § 1983 (1970), challenging a rule of the South Carolina legislature that permitted only males to serve that body. The court of appeals found discrimination in violation of the Constitution, subjecting only the clerk of the legislature to possible liability. The court then accepted a good faith defense stating:

In the area of sex discrimination, the inchoate state of legal guidelines suggest that good faith, coupled with reasonable grounds to believe one is acting within the law, should be sufficient to preclude liability. . . . Properly applied, such a test, based on the circumstances of each case, maintains the effectiveness of 1983 actions while providing conscientious state officials with some protection against the cutting edge of a rapidly developing legal doctrine.

476 F.2d at 229. Note that in *Eslinger* after disposing of the question of recovery on good faith grounds, it was unnecessary for the court to decide whether in reality the recovery of damages would be coming from the state and therefore barred by the eleventh amendment. *Id.* at 229 n.3.

97. See note 21 *supra*.

98. The OFCC guidelines provide in pertinent part: "The employer must not make any distinction based upon the sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal." 41 C.F.R. § 60-20.3(c) (1974). The guidelines also provide that women are "not [to] be penalized in their conditions of

and Hour guidelines⁹⁹ state that, with respect to insurance coverage, an employer will not be found to have practiced sex discrimination if his contributions are the same for men and women, or if the resulting benefits are equal. These standards apparently allow an employer to exclude pregnancy-related disabilities from a group insurance plan.¹⁰⁰ Similarly, the Supreme Court in *Geduldig v. Aiello*¹⁰¹ held that under the equal protection clause of the fourteenth amendment a state need not include coverage of pregnancy in its disability insurance system. A contrary result would be reached under section 1604.10(b) of the EEOC guidelines¹⁰² which states that pregnancy is a temporary disability

employment because they require time away from work on account of childbearing." *Id.* § 60-20.2(g)(1)-(2).

99. The wage and hour division has determined that wages for equal pay purposes cover "all payments made to or on behalf of the employee as remuneration for employment," 29 C.F.R. § 800.100 (1975), and this includes compensation bearing no direct relation to hours of employment or particular jobs performed. *Id.* § 800.113. The guidelines state:

If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees are greater for one sex than the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate the employer's payments are in violation . . . if the resulting benefits are equal for such employees.

Id. § 800.116(d). The guidelines also specifically exclude "payments related to maternity" as not within the term "wages" for equal pay purposes.

It should be noted that application of the Equal Pay Act to health insurance plans is uncertain under the current guidelines. One court, for instance, in rejecting an employer's valuation of fringe benefits in computing employees' wages, stated: "We note also that it is far from clear that standard types of fringe benefits are eligible for inclusion in 'equal pay' determinations." *Hodgsor v. Brookhaven General Hospital*, 436 F.2d 719, 723 n.1 (5th Cir. 1970).

Although an employer's subjective valuation of fringe benefits should not be allowed to defeat the purposes of the Equal Pay Act, fringe benefits are an integral part of an employer's total wage costs and logically should be included in determining equality of pay.

100. It would appear that as long as an employer designates that his lump sum payment to an insurance company is to cover all employees, he has made equal contributions and has satisfied both guidelines regardless of whether pregnancy-related disabilities are included in the plan.

101. 94 S. Ct. 2485 (1974). Commentary on *Aiello* may be found in: Erickson, *Women and The Supreme Court: Anatomy is Destiny*, 41 BROOKLYN L. REV. 209, 267-82 (1974); Note, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974); Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975) [hereinafter cited as *Pregnancy Classifications*]; 3 HOFSTRA L. REV. 141 (1975); 13 J. FAMILY L. 867 (1973-74).

102. 29 C.F.R. § 1604.10(b) (1973).

ity and as such "payment under any health or temporary disability insurance or sick leave plan . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."¹⁰³ Title VII then, as construed by the EEOC, requires an employer with a short-term disability plan to include coverage of pregnancy-related disabilities.

Section 703(a)(1) of Title VII¹⁰⁴ does not, on its face, dictate the conclusion set forth in the EEOC guidelines. The Act merely states that an employer may not discriminate against any individual with respect to compensation, terms, conditions or privileges of employment on the basis of sex. The weight of authority, however, has followed section 1604.10(b), relying upon the general principle that the interpretation of a statute by an agency entrusted with its enforcement is to be accorded great deference.¹⁰⁵ Such deference is questionable because the administrative history of the guidelines affords "no factual basis upon which these regulations were drawn."¹⁰⁶ Further "[v]irtually all Title VII violations fit an equal protection definition of sex discrimination—dissimilar treatment for similarly situated men and women,"¹⁰⁷ and it is therefore arguable that the Supreme Court's hold-

103. *Id.* The guidelines also stand in contrast to those of the OFCC and Wage and Hour Division in stating: "It shall not be a defense under Title VIII (*sic*) to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." *Id.* § 1604.9(e).

104. 42 U.S.C. § 2000e-2(a)(1) (1970).

105. *See, e.g.,* Gilbert v. General Electric Co., 519 F.2d 661, 664 n.12 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975), *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (agency guidelines to be given "great deference" in construction of Act it is to enforce); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199, 204 (3d Cir. 1975), *cert. granted*, 43 U.S.L.W. 3624 (U.S. May 27, 1975), *citing* Griggs v. Duke Power Co., *supra*; Communications Workers of America v. A.T.&T., 513 F.2d 1024, 1030 (2d Cir. 1975), *quoting* Griggs v. Duke Power Co., *supra*.

106. Newman v. Delta Airlines, Inc., 374 F. Supp. 238, 245 (N.D. Ga. 1973). *See also* Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DEPAUL L. REV. 127, 129-31 (1974) [hereinafter cited as *Pregnancy Benefits*]. Utilizing this rationale the Newman court rejected section 1604.10(b) and made an independent finding that pregnancy is not a sickness or disability "in the usual sense of the word." 374 F. Supp. at 246. *See* Ray-O-Vac v. Wisconsin Dep't of Industry, Labor and Human Relations, 8 E.P.D. ¶ 9656 (Wis. Cir. Ct. 1974). It is difficult, however, to accept the Newman finding that "upon examining the actual wording of the guidelines it is not apparent that they actually equate pregnancy with disability or sickness," 374 F. Supp. at 245, because section 1604.10(b) points so conclusively to a contrary conclusion.

107. Rofford v. Randle Eastern Ambulance Serv., Inc., 348 F. Supp. 316, 319 (S.D. Fla. 1972). *See* Gilbert v. General Electric Co., 519 F.2d 661, 668-69 (4th Cir. 1975) (Widener, J., dissenting), *cert. granted*, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975). States one

ing in *Aiello* may be extended beyond an equal protection clause context, signalling the demise of section 1604.10(b).¹⁰⁸

In *Aiello*, the plaintiff argued that California's employee-financed disability insurance program violated the equal protection clause of the Constitution by excluding coverage for disabilities attributable to pregnancy. Other disabilities for which relief was unavailable included dipsomania, drug addiction and sexual psychopathia. The program, designed to be self-supportive, compensated temporarily disabled private employees not covered by workman's compensation. Benefits were funded exclusively from a one percent tax on employees not protected by a state-approved private plan, and payments extended up to 26 weeks.¹⁰⁹ The defendant argued that inclusion of pregnancy would significantly increase the program's costs and thereby force the state to raise the contribution rate or decrease the benefits allowable. The Court concluded that California could exclude coverage of pregnancy related disabilities.

In *Satty v. Nashville Gas Co.*,¹¹⁰ an early district court case confronting the interpretational issue of whether *Aiello* should be extended to Title VII, it was stated that "[t]he dispute within the [*Aiello*] Court . . . does not appear to be whether California's statute discriminates on the basis of sex, but rather the dispute focuses on whether that discrimination is permissible under the fourteenth amendment, i.e., it is a question of legislative reasonableness."¹¹¹ Though *Satty's* phrase-

commentator: "If [*Aiello*] is correct in its analysis that California's exclusion of disability benefits for pregnancy is not discrimination based upon sex, the analysis would be expected to be the same in the context of a Title VII employer-employee case. Surely sex discrimination cannot mean one thing for equal protection purposes and another for Title VII." 3 HOFSTRA L. REV. 141, 147 (1975).

108. See, e.g., *Pregnancy Classifications*, *supra* note 101, at 442, 456 n.84, 462-67.

109. 94 S. Ct. at 2487-88.

110. 384 F. Supp. 765 (M.D. Tenn. 1974).

111. *Id.* at 771 n.1. In making this statement, the court was reviewing an employer's mandatory maternity leave policy, which it found to be discriminatory. Yet the court did not find sex discrimination in a group health insurance plan which provided for the complete cost of hospitalization for all disabilities except pregnancy, for which a 50 percent coverage was afforded both to female employees and the wives of male employees. In validating this plan the court looked solely to section 1604.9(a) of the EEOC guidelines, which states that the same benefits must be available to female employees as are available to the wives of male employees. *Id.* at 767, quoting 29 C.F.R. § 1604.9 (1975).

It is probable that in reaching this result the *Satty* court simply overlooked section 1604.10(b). Another interpretation of the decision, however, suggested more for its novelty than for its soundness, is that the case holds *sub silentio* that section 1604.9 pre-empts section 1604.10(b) when the two clash. Arguably, when a wife of a male employee receives partial disability coverage for pregnancy, such a benefit naturally

ology in posing the interpretational issue it confronted is somewhat less than objective, presupposing that discrimination of some degree did indeed exist in *Aiello*, the court, in confining the scope of *Aiello* to the fourteenth amendment, logically supported its conclusion by quoting the following language from the Supreme Court decision:

This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . ." Particularly with respect of social welfare programs, *so long as the line drawn by the State is rationally supportable*, the courts will not interpose their judgment as to the appropriate stopping point.¹¹²

Following this rationale, three courts of appeals, confronting a company plan excluding pregnancy-related disabilities from insurance coverage, held *Aiello* inapplicable to a determination of whether sex discrimination under Title VII was being practiced. In *Wetzel v. Liberty Mutual Company*,¹¹³ the Court of Appeals for the Third Circuit distinguished *Aiello* by noting: "our case is one of statutory interpretation rather than one of constitutional analysis;"¹¹⁴ this language was quoted with approval by the Fourth Circuit in *Gilbert v. General Electric Company*.¹¹⁵ Finally, in *Communication Workers of America v. A.T.&T.*,¹¹⁶ the Court of Appeals for the Second Circuit stated that *Aiello* "deals with the constitutional validity of legislative classifications

flows to the husband, warranting no greater coverage for female employees. Such a construction presupposes a policy judgment in the guidelines that, in the absence of a scale which can balance male employee interests against the interests of female employees, the latter are to receive full benefits in the area of pregnancy-related disabilities, but when the interests of male employees are placed on the scale by receiving benefits through coverage to their wives, such a receipt of benefits to the male justifies only like coverage to female employees. States *Satty*:

[T]he insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee

384 F. Supp. at 766-67.

112. 384 F. Supp. at 769 (emphasis supplied by *Satty* court), quoting 94 S. Ct. at 2491.

113. 511 F.2d 199 (3d Cir. 1975), cert. granted, 43 U.S.L.W. 3624 (U.S. May 27, 1975).

114. *Id.* at 203.

115. 519 F.2d 661, 667 (4th Cir. 1975), cert. granted, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975).

116. 513 F.2d 1024 (2d Cir. 1975).

under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more.”¹¹⁷

Such a narrow interpretation of *Aiello*, though reasonable, is not necessarily correct. *Aiello*, in its now often quoted footnote 20, stated in regard to the California plan:

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.¹¹⁸

In the body of the text, it was further stated:

There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.¹¹⁹

Footnote 20, unrestricted in its phraseology, may readily be interpreted as holding that sex discrimination *per se* does not exist when pregnancy is excluded from coverage under *any* insurance plan.¹²⁰ Acceptance of this interpretation leads, through the use of a simple syllogism, to the conclusion that section 1604.10(b) of the EEOC guidelines imposes a stricter standard upon Title VII than the face of the statute demands: (1) The Supreme Court has declared that exclusion of pregnancy from an insurance program is not sex discrimination; (2) Title VII, on its face, does not impose a stricter mandate upon an employer than the prohibition that he is not to discriminate on the basis of *sex*, and therefore, (3) exclusion of coverage for pregnancy-related disabilities from an insurance program does not violate Title VII. Utilizing this rationale it is arguable that section 1604.10(b) may be rejected as “there are ‘compelling indications that it is wrong.’”¹²¹

117. *Id.* at 1030.

118. 94 S. Ct. at 2492 n.20.

119. *Id.* at 2492.

120. See notes 107-08 *supra* & accompanying text.

121. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

It should be noted that the approach taken in *Aiello* was not novel. In both *Reed* and *Frontiero* the Court defined sex discrimination as "dissimilar treatment for men and women who are . . . *similarly* situated."¹²² In the context of group insurance coverage this test simply demands that there must be no risk from which one sex is protected and the other is not. Such a "risk-oriented" doctrine recognizes that sex-linked disabilities simply cannot be computed in any equation balancing equality of rights among the sexes.¹²³ Mandating coverage of pregnancy-related disabilities, with their attendant high costs, necessarily deprives males of coverage they would otherwise receive. On the other hand, mandating exclusion of such coverage forces women to assume the costs of a condition created solely by the happenstance of their sex. Preference of one cause over the other necessarily involves an arbitrary decision. Paradoxically, either course apparently discriminates against one sex or the other. Such a paradox suggests the government and courts choose neither mandate, but rather leave the decision of excluding or including coverage of pregnancy-related disabilities to individual employers. Notions of fundamental fairness, however, would seem to dictate that the government and courts prevent an employer from offering an insurance plan which excludes coverage for the unique disabilities of one sex only.

Retirement Plans

Retirement plans, which seek to provide an income for retirees, also pose acute problems when examined for discriminatory features. Two basic types of retirement plans are used currently: the "thrift" or "savings" plan involving employee contributions to a retirement fund which are matched on some scheduled basis by the employer, and the pension plan or annuity set up by the employer individually or in conjunction with an insurer. Upon retirement, the employee receives a lump sum under the savings plan, or begins to receive monthly payments under the annuity.¹²⁴ Many pension plans also provide an option for the employee to draw a lump sum rather than monthly installments.¹²⁵

122. 411 U.S. at 688 (emphasis supplied), *quoting* 414 U.S. at 77.

123. See note 111 *supra*.

124. See generally L. BURGESS, WAGE AND SALARY ADMINISTRATION IN A DYNAMIC ECONOMY 126-27 (1968).

125. See *Hearings in the Matter of OFCC Sex Discrimination Guidelines, Section 60-20.3(c) Before the Employment Standards Administration of the Dept. of Labor*, pt. 2, at 34. (Sept. 9 and 10, 1974) [Hereinafter cited as *OFCC Hearings*].

Assuming that the matching contributions by the employer under a savings plan are made at the same rate for male and female employees, no problem of discrimination arises when the employees receive lump sums at retirement. Where pensions or annuities are offered as benefits, however, there may be unavoidable discriminatory results. If equal contributions are made by an employer to the plan, there is an equal amount available for both male and female employees at retirement.¹²⁶ But insurers administering these plans make payouts based upon the life expectancy of the employee after retirement. Since women outlive men by an average of seven years, their individual payments are less than those of their male counterparts.¹²⁷

This clearly discriminates against those women who do not meet their projected life expectancy, and it treats every individual woman as having a characteristic attributed to women as a group by providing a lower monthly benefit than a man in a comparable position. To satisfy the EEOC requirement that benefits be equal,¹²⁸ the employer must make a greater proportionate contribution for his female employees. But this weighted contributory scheme fails to eliminate discrimination where the pension plan offers a lump sum option to the employee. The female employee then has a greater lump sum available to her at retirement than her male colleague, yet both have worked for identical periods of time.¹²⁹ This situation would seem also to violate the EEOC standard.¹³⁰ The fault may lie with the use of sex-based actuarial tables,¹³¹ but it is contended that the basic position taken by the EEOC, that Title VII demands provision of equal benefits in this area, needs to be reconsidered.¹³²

126. A concise explanation of annuities is presented in D. BICKELHAUPT & J. MAGEE, *GENERAL INSURANCE* 725-52 (8th ed. 1972).

127. See J. TURNBULL, C. WILLIAMS, & E. CHEIT, *ECONOMIC AND SOCIAL SECURITY* 29-38 (4th ed. 1973).

128. See note 103 *supra*, quoting 29 C.F.R. § 1604.9(e) (1975).

129. The male is also penalized by his shorter life expectancy where the pension plan offers an optional early retirement age. Even though the employer has contributed unequally to the plan so that equal benefits will be available at the mandatory retirement age, should a male and a female decide to take advantage of the early retirement feature of such a plan, the male will draw a smaller monthly benefit than the female. See Haneberg, *The EEOC and Employee Benefit Plans*, 111 *TRUSTS & ESTATES* 726, 728 (Sept. 1972).

130. See generally Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 *COLUM. L. REV.* 1203 (1974).

131. Cf. notes 145-46 *infra* & accompanying text.

132. An EEOC interpretation, while entitled to "great deference," *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), may not withstand judicial scrutiny "where there are

The principal factor suggesting a need for close scrutiny of the pension question is the cost involved to the employer. Retirement plans are presently the most expensive fringe benefits,¹³³ requiring an employer to adjust his contributions upward to provide equal benefits could result in an 11 to 15 per cent increase in that cost.¹³⁴ Where unrestricted by existing contracts, an employer could simply reapportion his overall contributions to equalize benefits, thus eliminating the benefit advantage enjoyed by males. Until some means of adjustment is adapted by the employer, however, he is exposed to significant potential liability in the event of litigation. In *Rosen v. Public Service Electric & Gas Co.*,¹³⁵ for example, the Court of Appeals for the Third Circuit, reviewing a plan whereby men were subject to higher optional and mandatory retirement ages before they could receive full benefits, held that the

'compelling indications that it is wrong.' " *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973), quoting *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 381 (1969).

While there has been administrative enforcement of the EEOC guidelines, see, e.g., EEOC Dec. No. 74-118 (April 26, 1974) reported in 2 CCH EMPL. PRAC. GUIDE ¶ 6431 (1974), litigation is now initially reaching the courts. In *Manhart v. City of Los Angeles*, 387 F. Supp. 980 (C.D. Cal. 1975), an injunction was issued preventing the defendant employer from requiring female employees to contribute a greater amount than male employees in order to receive the same monthly benefits upon retirement. Though there was not a complete hearing on the merits of the sex discrimination claim, in ordering the injunction, the court had to rule that the plaintiffs would likely prevail on the merits in the later hearing, relying on the EEOC guidelines to make that determination. The court also found that the actuarial treatment given men and women "involves the application of characteristics that may be true of a class of people to individuals within the class for which the characterization may or may not be true." *Id.* at 983.

133. *OFCC Hearings*, *supra* note 125, pt. 1, at 155. "For the employer, a retirement program represents by far the most costly fringe benefit. In our experience retirement programs cost over sixteen times as much as any other insurance benefit program for the same employee." Statement by Robert Duncan, executive vice president and actuary of Teacher's Insurance and Annuity Association of America—College Retirement Equities Fund (TIAA-CREF), the major insurer of college professors and administrators. *Id.*

134. In the case of TIAA-CREF, see note 133 *supra*, retirement plan costs were approximately 12.5 percent of payroll. Bringing retirement benefits of women up to the existing level of men would result in a 13.5 percent cost increase. See *OFCC Hearings*, *supra* note 125, pt. 1, at 154-55.

The predicted increase cited by TIAA-CREF is typical. Ms. Barbara La Utzenheiser, representing the Health Insurance Association of America and the American Life Insurance Association, stated that "the estimates of increased costs for female pension benefits is between 13 and 15 percent." See *OFCC Hearings*, *supra*, note 125, at 21. See also Haneberg, *supra* note 129, at 728. This figure represents the increase for an individual employee. An employer's overall increase in costs for a pension plan may be lower depending on the percentage of women employed.

135. 477 F.2d 90 (3d Cir. 1973).

employer was required to equalize benefits by paying damages to the aggrieved male retirees. The court specifically ruled that the employer could not lower the benefits accruing to female retirees to effect the equalization.¹³⁶

The Wage and Hour Division and the OFCC approval of equal contributions¹³⁷ allow an employer to avoid this potential liability. Any resultant discrimination would be the consequence of insurance industry practice, rather than the conscious design of employers. The EEOC rule, however, conceivably could result in discrimination in any event, if the object is to insure equal monthly installments (assuming an option to receive a lump sum is offered).

Where a state-administered program is challenged under the equal protection clause, the distinction between men and women as to monthly benefits should be upheld. This sex-based differentiation should withstand the rational basis test as applied by the Supreme Court,¹³⁸ since it bears a reasonable and substantial relationship to a permissible state objective,¹³⁹ a solvent, self-sustaining retirement program maintained by a low level of contribution.

Death Benefits and Life Insurance

A third major type of employee benefit is payment relating to the death of the employee - company death benefits and life insurance. An employer's policy of paying out company death benefits to surviving spouses of male employees but not to the surviving spouses of female employees has been held to be a violation of Title VII.¹⁴⁰ Although such benefits are not explicitly covered by the Equal Pay Act, they also appear to be within the ambit of the Wage and Hour Division interpretation of wages which includes "insurance or similar benefits."¹⁴¹

136. *Id.* at 96. Subsequent to the initiation of the suit, the EEOC regulations were amended to prohibit the type of plan reviewed by the court in *Rosen*. 29 C.F.R. § 1604.9(f) (1975). There is no substantive distinction between differing benefit levels caused by differing retirement ages and those resulting from the plan structure itself. Hence any employer offering a plan which pays unequal benefits may be forced to pay the difference. *Accord*, *Chastang v. Flynn & Emrich Co.*, 365 F. Supp. 957, 968-69 (D. Md. 1973). *But cf.* *Fitzpatrick v. Bitzer*, 8 E.P.D. ¶ 9685 (D. Conn. 1974) (injunctive relief granted but award of damages denied because of 11th amendment barrier).

137. See notes 98 and 99 *supra*.

138. See, e.g., *Weinberger v. Wiesenfeld*, 95 S. Ct. 1225 (1975); *Kahn v. Shevin*, 94 S. Ct. 1734, 1737 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

139. *Cf.* *Reed v. Reed*, 404 U.S. 71, 76 (1971). The lesser benefits are not a product of overbroad generalization as was evident in the cases cited in note 138 *supra*.

140. EEOC Decision No. 70-513 (Feb. 4, 1970), CCH EMPL. PRAC. GUIDE ¶ 1208.69.

141. 29 C.F.R. § 800.116(d) (1975). Such benefits also seem to be included by the

Life insurance has become a significant employee benefit with the advent of group life insurance policies, which in 1973 totaled \$708.3 billion, constituting 40 per cent of all life insurance in effect in the United States.¹⁴² Employers are able to secure insurance much more inexpensively than could individual employees because of lower administrative expenses and a better risk selection process.¹⁴³

There has been no definitive administrative resolution of the inequalities attendant group life insurance, nor has there been any significant litigation raising this issue. Life insurance, if offered by the employer as a benefit, clearly must be made equally available to employees of both sexes;¹⁴⁴ but again, as in annuities, sex-based mortality tables produce discriminatory results. The lower life expectancy of men means that, for policies of equal value, men must pay higher premiums than do women of the same age. The contribution made by an employer under a group plan, though equal on a per capita basis, effectively purchases more coverage for men than they could otherwise secure for that amount, since they enjoy a portion of the advantage accorded females under the present actuarial system.

The culprit, if there is one, seems to be the sex-based mortality table. It has been suggested that this instrument be replaced by a unisex mortality table which groups men and women together for purposes of calculating mortality probability at various ages.¹⁴⁵ Mandatory industrywide use of such a table can be achieved only by federal legislation, because use of the table by independent insurers would place such insurers at a competitive disadvantage in the pricing of insurance. Industry spokesmen have criticized the idea of a unisex table as being likely to produce inflexibility in insurance plans and to increase costs to all purchasers of insurance.¹⁴⁶

Even a unisex table would not remove all sex-related risk considerations. Prior to writing a large group plan, the insurance carrier looks at an employer's past experience under its present policy, or under a previous policy, to evaluate claims and other costs involving the policy.

OFCC interpretation which prohibits distinctions made on the basis of sex in employer contributions "for insurance . . . and other similar 'fringe benefits.'"

142. See INSTITUTE OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 30 (1974).

143. For a more detailed explanation of group insurance, see D. BICKELHAUPT & J. MAGEE, GENERAL INSURANCE 673-92 (8th ed. 1970).

144. See 29 C.F.R. § 1604.9(b) (1975); *Id.* § 800.116(d); 41 C.F.R. § 60-20.3(c) (1974).

145. See Note, *Sex Discrimination and Sex-based Mortality Tables*, 53 B.U.L. REV. 624 (1973).

146. See *OFCC Hearings*, *supra* note 125, at 1-60.

"This means that the premium costs for a particular risk are related to the accumulated claims and expense results of that risk and that, with favorable experience, dividends or premium rate reductions may be earned."¹⁴⁷ This experience rating enables the insurer to maintain a competitive rate.¹⁴⁸ Thus, an insurer who has underwritten a group life plan with an employer of primarily female employees would adjust the premium according to the mortality rate of that group. Though the premium would not be computed expressly on the basis of the sexual makeup of the group, it nonetheless would reflect the greater longevity of the female employees. The same result is obtained in any type of group plan where sex influences the claims experience. Thus the unisex table cannot erase all distinctions based on sex in insurance coverage and benefits.

Toward Uniformity in the Federal Standards

Although actions by congress, state and federal courts, and the executive branch have attempted to eradicate discrimination, failure to uniformly apply the standards created by these bodies has resulted in confusion and duplication of effort. As previously noted, the EEOC guidelines conflict with those of the OFCC and Wage and Hour Division with regard to the administration of life insurance and retirement plans: the former demand equality of benefits, while the latter two guidelines allow either equality of benefits or contributions.¹⁴⁹ A similar dichotomy of standards has been illustrated with regard to the omission of coverage for pregnancy-related disabilities in an employer's group insurance plan.¹⁵⁰

Since these varying and therefore confusing federal standards provide, each in its own area of proscription, for judicial and administrative relief, the employer faces not only uncertainty as to the propriety of his actions,¹⁵¹ but also the possibility of incurring heavy losses for vio-

147. D. GREGG, *GROUP LIFE INSURANCE* 117 (1962).

148. See generally D. Cody & H. Boothroyd, *Group Premiums, Experience Rating and Reserves*, in *THE AMERICAN COLLEGE OF LIFE UNDERWRITERS, READINGS IN GROUP INSURANCE* 810 (1973).

149. See notes 98, 99 and 137 *supra* & accompanying text.

150. See notes 98-123 *supra* & accompanying text.

151. Though the various sex discrimination statutes do not on their faces conflict, and in fact attempt to foster inter-agency regulation, the agencies themselves have set forth conflicting standards of permissible conduct. Compare 29 C.F.R. § 1604.9(e) (1975) with 41 C.F.R. § 60.20.3(c) (1975).

On a practical level, it is possible for an employer charged with an equal pay violation in which he makes an out of court settlement to be charged again with a Title

lation of any one standard.¹⁵²

Along with the dangers of facing a large award in a discrimination suit, the employer further confronts the possibility that an agency or court may increase payroll costs by adjusting the distribution of employee benefits to comport with the federal standard under review.

VII violation for the same employment practice. Interview with David Richeson, practicing attorney, in Miami, Florida, December 6, 1974.

Section 703(h) of Title VII provides that an employer may lawfully differentiate between the pay of men and women "if such differentiation is authorized by the provisions of section 206(d)" of the Equal Pay Act. 42 U.S.C. § 2000e-2(h) (1970). The regulations issued by the Equal Employment Opportunity Commission (EEOC) interpreting Title VII, however, are less explicit. In explaining the relationship of Title VII to the Equal Pay Act, the EEOC has said: "(b) By virtue of section 703(h), a defense based on the Equal Pay Act *may be raised* in a proceeding under title VII. (c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, *but will not be bound thereby*." 29 C.F.R. § 1604.8 (1975) (emphasis supplied). Thus, while the legislation itself establishes an absolute defense under the Equal Pay Act, the regulations limit the effect of the Equal Pay Act depending on the discretion of the EEOC and the courts.

Without making a specific reference to Title VII, the Wage and Hour Division of the Department of Labor does make some deference to other federal legislation. The regulations state:

No provisions of the Fair Labor Standards Act will excuse noncompliance with any State or other law establishing equal pay standards higher than the equal pay standards provided by section 6(d) of the Fair Labor Standards Act. On the other hand, compliance with other applicable legislation will not excuse noncompliance with the equal pay provisions of the Fair Labor Standards Act.

Id. at § 800.160. What a "higher equal pay standard" is, presents a difficult interpretational problem. One case which indicated that this regulation will not be read literally by the courts if the stricter standards of Title VII can be considered as a "higher equal pay standard" is *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973), which illustrates the type of conflict that exists between Title VII and the Equal Pay Act. In *Hodgson*, an employer hired only males to work in the men's clothing department and only females to work in the women's department. The males received a greater salary due to the greater profit margin and productivity of the men's department. The court upheld this practice under the Equal Pay Act even though the men and women were performing "equal work." Economic benefit to the employer was considered a factor, other than sex, which justified the pay differential. *Id.* at 597.

Title VII would bar the segregation of male and female workers into their respective departments because customer preference clearly does not qualify as a bona fide occupational qualification. See 29 C.F.R. § 1604.2(a)(1)(iii) (1975). Further, economic benefit to the employer would not justify differing wage rates unless each individual employee was paid by commission based on the clothing which he sold. See 42 U.S.C. § 2000e-2(h) (1970).

152. See, e.g., *EEOC v. A.T.&T.*, 8 E.P.D. ¶ 9442. Pursuant to a consent agreement A.T.&T. must pay over \$15 million to women and minorities who were denied equal pay and promotional opportunities. *Id.*

Faced with such potential liabilities, an employer may choose not to finance those benefits which are accorded varying federal standards. To alleviate the present confusion and move toward a uniform application of federal standards, a closer liaison must be established between the OFCC and EEOC.

Under the Executive Order, which in language and scope bears a resemblance to Title VII, the OFCC refers individual grievances to the EEOC.¹⁵³ Therefore, the OFCC should consult and coordinate the regulation of compliance standards with that body. At present, the only established liaison is between the OFCC and the Wage and Hour administrator regarding matters concurrently covered by the Executive Order and the Equal Pay Act.¹⁵⁴

Title VII, the most comprehensive legislation presently dealing with sex discrimination, extends beyond the Equal Pay Act in requiring not only equality of compensation, but also equality in all types of employer activities that are actually or potentially discriminatory against women.¹⁵⁵ Unlike the equal protection clause or Executive Order 11246, Title VII affects all employers having some effect upon interstate commerce, limited only by the size of the employer's work force.¹⁵⁶ Increasing the jurisdiction of Title VII, which may portend a wider application of the strict "equal benefits" rule to employee benefits, has already been used as a method of promoting uniformity in employment practices.¹⁵⁷ Moreover, increasing the jurisdiction of the EEOC, with a corresponding decrease in the jurisdiction of other agencies, may be used for the same purpose in the future.¹⁵⁸

153. See note 47 *supra* & accompanying text.

154. 41 C.F.R. § 60-20.5 (c) (1974).

155. See note 19 *supra* & accompanying text.

156. See note 13 *supra* & accompanying text.

157. Federal employees were brought within Title VII coverage by the 1972 Amendments, but administration of Title VII within the realm of governmental employment was delegated to the Civil Service Commission. 42 U.S.C. §§ 2000e-16 (a)-(b) (Supp. II, 1972).

158. The Civil Service Commission has been criticized sharply in its performance of anti-discrimination functions. *Oversight Hearings on Unemployment and Discrimination in Employment before the General Subcommittee on Labor of the House Committee on Education and Labor*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Oversight Hearings*]. See *id.* at 50-64 (testimony of Joseph Connor, Regional Director of the Civil Service Commission); *id.* at 157-59 (testimony of Donald Jones, President of American Federation of Government Employees, Local 1395). Despite significant increases in the hiring of minorities and women, the absence of these groups in upper level government positions has been noted as a failure of the Commission. See *id.* at 50-64 (testimony of Joseph Connor). The dual role of the Commission both as an

Governance by the EEOC of all discriminatory action by employers was indeed considered during the development of the Equal Employment Opportunities Act of 1972. The bill as it was approved by the House provided that "a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization."¹⁵⁹ The Senate version expressly would have transferred Civil Service Commission and OFCC anti-discrimination functions to the EEOC.¹⁶⁰ The principal argument against conferring upon the EEOC the powers of these other agencies turned upon its existing administrative backlog, which was already causing significant delays in granting relief to aggrieved employees. Ultimately, sentiment favoring consolidation of enforcement functions resulted in the EEOC being given authority to bring court actions in discrimination cases,¹⁶¹ jurisdiction to initiate patterns and practice suits (transferred from the authority of the Attorney

employer and as the judge of whether discriminatory conduct has occurred within federal agencies is likely to cause a transfer of the latter function to the EEOC.

The OFCC has also been criticized for failing to enforce its anti-discrimination guidelines. As stated by Representative Hawkins during the *Oversight Hearings*, "the law is not being complied with by federal contractors, in spite of the new regulations in the Office of Federal Contract Compliance. The guidelines have been strengthened to call for contract termination when a Government contractor is found twice to be in violation . . . but we know the law is being violated. The Office of Federal Contract Compliance knows that is not being upheld, and yet no sanctions are being invoked." *Id.* at 31. This problem may be explained by a lack of staff members in the agency. In 1972, the total staff of the OFCC numbered 119 people. *Id.* at 24. Furthermore, in hearings held by the OFCC to consider changing the current guidelines to require equality of benefits in retirement plans, it was apparent that members of the panel considering the change favored the EEOC approach. *See OFCC Hearings, supra*, note 125.

159. H.R. 1746, 92d Cong., 1st Sess. § 3(b) (1971). *See Hearings on S. 2515, S. 2617 & H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 92d Cong., 1st Sess. 43 (1972) [hereinafter cited as *Senate Hearings*].

160. Section 11 of the Senate bill provided: "All functions of the Civil Service Commission which the Director of the Office of Management and Budget determines relate to nondiscrimination in Government employment are transferred to the Equal Employment Opportunity Commission." S. 2515, 92d Cong., 1st Sess. § 11 (1972).

Section 10 also provided: "All authority, functions, and responsibilities vested in the Secretary of Labor pursuant to Executive Order 11246 relating to nondiscrimination in employment by Government contractors and subcontractors and nondiscrimination in federally assisted construction contracts are transferred to the Equal Rights Employment Opportunity Commission. . . ." *Id.* § 10.

Testimony given at the Senate hearings on the Title VII amendments generally favored the proposed extension of EEOC power. *See, e.g., Senate Hearings, supra* note 159 at 230, 269, 272-78.

161. 42 U.S.C. § 2000e-5 (f) (Supp. II, 1972).

General)¹⁶² and jurisdiction of actions brought against state and local employers (formerly available only under the equal protection clause).¹⁶³ Vigorous efforts by the OFCC and the Civil Service Commission prevented the transfer of their anti-discrimination functions to the EEOC.¹⁶⁴

Although the provisions eliminating the Civil Service Commission and the OFCC from the anti-discrimination arena were defeated, the final 1972 enactment amending Title VII established a multi-agency council, the Equal Employment Opportunity Coordinating Council (EEOCC),¹⁶⁵ which offers hope for a uniform federal policy in the area of sex discrimination in the future.¹⁶⁶ Heads of the major federal agencies charged with responsibility for enforcing anti-discrimination laws are the members of this council.¹⁶⁷ The Council is designed to promote agreements between the federal agencies which will "eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government" ¹⁶⁸ While the Council

162. *Id.* § 2000e-6(c).

163. *Id.* § 20003-(f).

164. See Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUMAN RIGHTS L. REV. 311, 317-18 (1973).

165. 42 U.S.C. § 2000e-14 (Supp. II, 1972).

166. *Id.*

167. Members of the Council include the Secretary of Labor, Chairman of the EEOC, Attorney General, Chairman of the U. S. Civil Service Commission, and Chairman of the U.S. Civil Rights Commission. *Id.*

168. *Id.* In its first report submitted to Congress and the President, the Equal Opportunity Coordinating Council described one of its major functions as:

[T]he design implementation of additional inter-agency agreements, policies and practices, and the improvement of existing arrangements, for the purpose of achieving improved effectiveness and efficiency in the operation of Federal equal employment opportunity programs, and for the purpose of *unifying and simplifying to the extent possible the requirements placed on those seeking to comply with the federal regulations.*

Equal Employment Opportunity Coordinating Council, Report to Congress and the President (June 25, 1972).

In the two succeeding years the Council has indicated that its major function has been directed toward compiling a uniform set of guidelines to avoid the discriminatory effect of tests. See *Equal Employment Opportunity Coordinating Council, Report to Congress and the President* (June 29, 1973 and July 1, 1974). The most recent letter indicated that the Council next would focus its efforts on conflicts among the federal laws concerning reporting and record keeping. *Id.*

While its efforts thus far have been less than substantial, the Council may be the body best able to unify the law of employee benefits by coordinating the substantive provisions of the Executive Order, Equal Pay Act, and Title VII through development of an all-inclusive and consistent set of guidelines.

may fall short of the expectations, it clearly affords an opportunity for the OFCC, the EEOC, and the Wage and Hour Division to cooperate in formulating standards acceptable to all three agencies, consistent with the broad standards of equality in the laws that these agencies are designated to enforce.¹⁶⁹ Furthermore, while an EEOCC standard would not necessarily comport with the equal protection standard as determined by the courts, it is likely that the administrative standard would dominate the law of sex discrimination in the area of fringe benefits, because in all likelihood, it would be less liberal than the constitutional standard, thereby inducing plaintiffs to sue under the laws of Congress rather than the Constitution.¹⁷⁰

Conclusion

Employers and other affected parties are in need of clear and definitive guidelines setting out the requirements necessary for fringe benefit plans to conform to existing law on sex discrimination. In particular, there is a need for a consistent policy regarding disability insurance coverage of pregnancy, and for a resolution of the presently existing equal benefits—equal contributions dichotomy in the treatment of pension plans and life insurance. The substantive provisions in present laws fail to provide specific guidelines, and the regulations of the various enforcing agencies have added to the confusion. Only cooperation among these agencies, guided by a coordinating council can resolve the current uncertainty, and at present, the EEOCC appears to be the best-equipped and most appropriate vehicle for achieving the goals of clarity and uniformity of standards.

169. Another factor favoring the eventual predominance of the EEOC is the Equal Rights Amendment (ERA) which, if ratified, will establish sex as a constitutionally suspect standard. Since the 1972 passage of the ERA by Congress, 33 of the necessary 38 states have ratified it. Griffiths, *ERA Projections*, 60 *Women Lawyers J.* 16, 17 nn.1 & 2 (1974). Agencies, as well as courts, will be required to examine the results of sex-based differentiations in employee benefit plans more carefully than before. Further, actuarial classification by sex will be invalid, much as is classification by race presently. This does not necessarily preclude premium adjustment based upon prior claims experience, which may, in fact, reflect the sexual makeup of the work force covered.

170. The 1972 amendments to Title VII bring federal employees within the ambit of Title VII, thereby affording these persons an alternative means of redress preferable to an equal protection action. 42 U.S.C. § 2000e-16(a) (Supp. II, 1972). Only in the exceptional case of a state-administered, employee-financed benefit plan will an individual be forced to use solely the equal protection clause as a basis for relief.