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MANDATORY MATERNITY LEAVE: TITLE VII AND EQUAL PROTECTION

Many school boards have instituted mandatory maternity leave policies which require pregnant teachers to commence maternity leave at predetermined times during their pregnancy.¹ The teachers contend that the question of when to begin maternity leave is an individual decision to be made by the mother with the advice of her physician.² On the other hand, the school boards argue that these policies are necessary for administrative convenience,³ educational continuity,⁴ and protection of the mother and child.⁵ Lacking a statutory remedy until recently, pregnant teachers have attacked mandatory maternity leave policies as violative of the equal protection clause of the fourteenth amendment. This constitutional argument has prevailed in a majority of the jurisdictions which have considered the question,⁶ but several

1. The time at which a teacher has been required to terminate employment has varied from the fourth to eighth month of pregnancy. *See, e.g.,* *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973) (leave after five months violated equal protection); *La Fleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973) (leave after four months violated equal protection); *Schattman v. Texas Employment Comm'n*, 459 F.2d 32 (5th Cir. 1972), *rev'g* 330 F. Supp. 328 (W.D. Tex. 1971), *cert. denied*, 41 U.S.L.W. 3372 (U.S. Jan. 8, 1973) (leave after seven months did *not* violate equal protection); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972) (leave after seven months violated equal protection); *Monell v. Department of Social Serv.*, 4 EPD ¶ 7765 (S.D.N.Y. 1972) (leave after seven months violated equal protection).

2. *E.g.,* *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir., Jan. 29, 1973); *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir., Jan. 15, 1973), *rev'g* 326 F. Supp. 1159 (E.D. Va. 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973).

3. See notes 81-84 *infra* & accompanying text.

4. See note 85 *infra* & accompanying text.

5. See note 86 *infra* & accompanying text.

6. *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973) (leave after five months violated equal protection); *La Fleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973) (mandatory leave after four months violated equal protection); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972) (leave after seven months violated equal protection); *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972) (discharge of a pregnant WAF violated due process); *Pocklington v. Duval County School Bd.*, 345 F. Supp. 163 (N.D. Fla. 1972) (leave after four and a half months violated equal protection); *Bravo v. Board of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972) (leave after five months violated equal protection); *Monell v. Department of Social Serv.*, 4 EPD ¶ 7765 (S.D.N.Y. 1972) (leave after seven months violated equal protection); *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501 (S.D. Ohio 1972)

courts have found no constitutional infirmity.⁷ Therefore, at present the success of a constitutional attack on mandatory maternity leave policies necessarily depends upon the jurisdiction in which an action is brought.

Recently, Title VII of the Civil Rights Act of 1964 was amended;⁸ as a consequence, teachers are no longer excluded from its coverage,⁹ and future actions alleging that mandatory maternity leave policies constitute sex discrimination under the Act are likely.

This Comment will analyze the Title VII and equal protection challenges to mandatory maternity leave and will conclude that possible procedural and substantive limitations on the statutory scheme may necessitate a resolution of the issue on equal protection grounds. Accordingly, particular emphasis will be given to a resolution of the existing conflict of authority over the constitutionality of mandatory maternity leave policies.

THE EFFECT OF TITLE VII UPON MANDATORY MATERNITY LEAVE POLICIES

Title VII of the Civil Rights Act of 1964 was an attempt to eliminate discrimination based upon race, color, religion, sex, or national origin.¹⁰ Although the Act was a significant step toward the elimina-

(leave after five months violated equal protection); *Cerra v. East Stroudsburg Area School Dist.*, 5 EPD ¶ 8410 (Pa. Sup. Ct. Jan. 19, 1973) (No. 359), *rev'g* 3 Pa. C'm'w'lth 665, 285 A.2d 206 (1971) (leave after five months was sex discrimination).

7. *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir., Jan. 15, 1973), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973) (leave after five months did not violate equal protection); *Schattman v. Texas Employment Comm'n*, 459 F.2d 32 (5th Cir. 1972) (leave after seven months did not violate equal protection); *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of mootness*, 41 U.S.L.W. 3346 (U.S. Dec. 18, 1972) (discharge of pregnant WAF did not violate equal protection).

8. Pub. L. No. 92-261, 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e (1970).

9. See notes 11-15 *infra* & accompanying text.

10. 42 U.S.C. § 2000e-2(a) (1970) provides in part that:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin (emphasis supplied).

The primary purpose of the Act was the elimination of racial discrimination in hiring

tion of discriminatory practices, it did not provide complete protection against discrimination in the employment field. For example, coverage did not extend to governmental employers.¹¹ Hence, a Title VII action by an aggrieved state employee could not be maintained. Although there were early attempts to revise Title VII,¹² it was not until the Equal Employment Opportunities Act of 1972¹³ was enacted that teachers were given standing¹⁴ to challenge the employment practices of educational institutions.¹⁵ Clearly, discrimination by a school board may now be attacked; however, invalidation of maternity leave policies under Title VII requires a determination that such policies constitute sex discrimination.

Sex Discrimination Guidelines

Implementing the various provisions of Title VII, the Equal Employment Opportunities Commission (EEOC) has promulgated inter-

and promotion policies. It seems clear that the prohibition against sex discrimination was not included to protect women, but rather was an attempt by the opponents of the Act to complicate its provisions and thus assist in its defeat. The inclusion of "sex" in Title VII was proposed by Cong. Smith (D-Va.) in the House Rules Committee. The only Congressmen vocally supporting the amendment all voted *against* the final bill. 110 CONG. REC. 2804-05 (1964). However, every Congressman voicing opposition to the sex amendment voted *for* the Civil Rights Act. *Id.* at 2804. *See also* Comment, *Sex Discrimination in Employment or Can Nettie Play Professional Football?*, 4 U. SAN FRAN. L. REV. 323, 334 (1970); 32 OHIO ST. L.J. 923, 929 (1971); Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 677.

11. 42 U.S.C. § 2000e(b) (1970): "The term 'employer' . . . does not include . . . a State or political subdivision thereof. . . ." Another problem with the Act was that the Equal Employment Opportunities Commission did not have direct enforcement powers. This was a result of a filibuster by southern Senators. *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 66-68 (1964). *See also* 78 HARV. L. REV. 684 (1965); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965). Under the final version, primary responsibility for enforcement was left to the individual complainant, and only in a case of general public import could the Attorney General intervene. 42 U.S.C. § 2000e-5(e) (1970).

12. *See generally* the bills introduced by Senator Jacob Javits (R-NY), 111 CONG. REC. 13472-73 (1965); 112 CONG. REC. 6091 (1966).

13. Pub. L. No. 92-261, 86 Stat. 103 (1972). For a general discussion of the 1972 Act see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

14. Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e(b) (1970). This inclusion has added over 10 million employees to the jurisdiction of the EEOC.

15. Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e-1 (1970).

pretive guidelines.¹⁶ Recently devised Sex Discrimination Guidelines¹⁷ support the contention that mandatory maternity leave policies discriminate against female teachers. The EEOC has determined that "a written or unwritten employment practice which excludes from employment applicants or employees because of pregnancy is a prima facie violation of Title VII."¹⁸ Thus, it is arguable that mandatory leave policies "exclude" pregnant teachers from employment in violation of the EEOC directive. In addition, the guidelines provide that pregnancy should be treated like any other temporary disability.¹⁹ Normally, an individual's doctor determines when a leave of absence should be taken; in maternity cases, however, the school board independently establishes a time at which all pregnant teachers must take their leave.²⁰ Such practice arguably contravenes the guidelines.

Prior to the issuance of the present directives, the EEOC considered a regulation which required termination of employment during the sixth month of pregnancy and concluded that it constituted sex discrimination.²¹ This decision, viewed as an expression of EEOC intent, supports the contention that the prohibitions against sex discrimination in the new guidelines extend to maternity leave policies. Further, the Supreme Court has held that the EEOC interpretation of Title VII is entitled to "great deference."²² This is consistent with a

See also 118 CONG. REC. 3461 (daily ed. March 6, 1972) (explanation of provisions by Sen. Williams).

16. The duties and powers of the EEOC are enumerated in 42 U.S.C. § 2000e-4(f) (1970).

17. 29 C.F.R. § 1604.10(a) (1972).

18. *Id.*

19. 29 C.F.R. § 1604.10(b) (1972).

20. See cases cited in notes 6-7 *supra*.

21. EEOC Decision No. 70-360, Case No. YAU 9-026 (Dec. 16, 1969).

22. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971): "The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." (Citations omitted).

The amount of deference which the courts will give the revised EEOC guidelines raises heretofore unrepresented questions about additional consequences of the guidelines. In its 1972 revisions, the Commission inserted its opinion that disabilities due to pregnancy are temporary disabilities and should be treated as such. 29 C.F.R. § 1604.10(b) (1972). Prior to the recent revisions, some teachers challenging the maternity leave policies presented the argument that pregnancy should be regarded as any other temporary disability. See *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir. Jan. 15, 1973), *rev'g* 326 F. Supp. 1159 (E.D. Va. 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973); *Danielson v. Board of Higher Educ.*, 4 EPD ¶ 7773 (S.D.N.Y. 1972); *Cerra v. East Stroudsburg Area School Dist.*, 3 Pa. Cmwlth. 665, 285 A.2d 206

general policy of statutory construction—deference to agency expertise.²³ However, it has been suggested that the Court may have weakened this policy when it recently refused to apply the EEOC guidelines to a questionable employment practice.²⁴ Nevertheless, the EEOC guidelines appear to control all cases involving mandatory maternity leave.

Two methods do exist, however, by which mandatory termination policies could be upheld regardless of the weight to be ascribed to the guidelines. First, the guidelines do not forbid mandatory maternity leave policies explicitly. In a recent labor dispute,²⁵ the arbitrator, after reviewing the Sex Discrimination Guidelines, asserted:

The EEOC guidelines [regarding pregnancy] do not require that an employee be permitted to work until any particular time prior to the birth of her child, or that she must be permitted to return to work at any particular time after birth of her child. All the guidelines require is that pregnancy be treated like any other temporary disability, which would appear to permit the employer some latitude. . . .²⁶

This type of "latitude" in construction of the guidelines provides a basis for subsequent holdings to the effect that mandatory leave policies are valid under Title VII.

(1971). The courts have not been inclined to accept the argument. However, in the cases now on appeal, medical testimony alone supported the teachers' argument; the revised guidelines now strengthen their contentions. The mandatory maternity leave policies currently under challenge provide for leaves of absence without pay. If the courts defer to the Commission's opinion that pregnancy should be treated as any other temporary disability, the guideline would appear to support the proposition that a teacher on maternity leave is entitled to the same salary benefits as any other teacher who suffers a temporary disability.

23. See generally *Udall v. Tallman*, 380 U.S. 1 (1965); *Power Reactor Dev. Co. v. Electricians Union*, 367 U.S. 396 (1961); *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143 (1946).

24. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 (1971). The Supreme Court remanded for a determination of whether the refusal to hire women with pre-school age children was a bona fide occupational qualification, and thus an exception to the protection under Title VII. For a further discussion of *Phillips* see notes 52-55 *infra* & accompanying text. See also Comment, *Sex Discrimination in Employment Under the Civil Rights Act of 1964*, 32 OHIO ST. L.J. 923, 924 (1971).

25. Board of Educ., Union Free School Dist. No. 7 and Depew Teacher's Org. 1 CCH EMPL. PRAC. ¶ 5092 (May 17, 1972).

26. 1 CCH EMPL. PRAC. ¶ 5092, at 3172.

Moreover, the guidelines do not have the force of law, and deference to agency expertise notwithstanding, a court is not bound by administrative interpretation. This proposition is supported by language in *Cohen v. Chesterfield County School Board*,²⁷ where a teacher was required to commence maternity leave four months prior to the expected birth of her child.²⁸ She challenged the school board regulation²⁹ as violative of the equal protection clause,³⁰ but the regulation was upheld. Although the decision was based on constitutional grounds,³¹ the court, by stating that the mandatory maternity leave regulation was not an "invidious discrimination based upon sex,"³² necessarily suggested that the same result may have obtained had the action been brought under Title VII.³³

Assuming, *arguendo*, that the courts will follow the EEOC guidelines and conclude that mandatory maternity leave policies are unlawful sex discrimination, teachers still must confront two problems presented by Title VII itself. The first obstacle is procedural; the second relates to the major exception to Title VII coverage—the bona fide occupational qualification, which permits discrimination in specified situations.

27. No. 71-1707 (4th Cir. Jan. 15, 1973), *rev'g* 326 F. Supp. 1159 (E.D. Va. 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973).

28. Mrs. Susan Cohen informed the School Board on or about November 2, 1970, that she was pregnant and that her estimated date of delivery was April 28, 1971. With the consent of her obstetrician she requested a maternity leave to commence on April 1, 1971. The school board regulation, however, required women teachers to take a leave of absence at the end of the fifth month of pregnancy, and leave was granted effective December 18, 1970. *Cohen v. Chesterfield County School Bd.*, 326 F. Supp. 1159 (E.D. Va. 1971).

29. The applicable provisions of the Chesterfield County School Board regulations provide:

- a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.
- b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent determines that an extension will be in the best interest of the pupils and school involved.

No. 71-1707, at 3 (4th Cir. Jan. 15, 1973).

30. 326 F. Supp. at 1159.

31. No. 71-1707 (4th Cir. Jan. 15, 1973) (no equal protection violation because the leave policy served a reasonable state interest).

32. *Id.* at 5 (emphasis supplied).

33. It should be noted that in *Cohen* the statement concerning sex discrimination was dicta. If the court had had under consideration the more explicit language of the guidelines, the mandatory maternity leave policies may have been found to constitute sex discrimination within the meaning of Title VII.

EEOC Procedural Difficulties

Title VII requires prompt action by an aggrieved employee. The Civil Rights Act of 1964 stipulated that an action had to be commenced within 90 days of the alleged discriminatory practice.³⁴ Although the 1972 amendment extends this period to 180 days,³⁵ the essential problem remains—if an employee, either through neglect or ignorance, fails to file a complaint shortly after the alleged violation occurs, relief may be denied. While many courts have interpreted the time period quite liberally,³⁶ one district court has denied relief on this basis.³⁷ The difference in result appears to hinge upon whether the discriminatory action was a continuing practice or a single event. If the objectionable practice is non-recurring, actions brought after the statute has run will be barred. More leeway is afforded, however, when the action is predicated on continuing violations.³⁸ Since mandatory leave arguably is a non-continuing discriminatory act, teachers who fail to bring timely actions may be denied Title VII protection.

Another procedural difficulty is the Act's requirement that the EEOC defer charges of discrimination to the appropriate state or local agency in those jurisdictions which have provided a statutory vehicle to redress discriminatory employment practices.³⁹ Such deferral encourages the application of varying standards, thus inhibiting uniform enforcement of the Act. Furthermore, requiring an employee to exhaust his state remedies delays appropriate federal relief.

34. 42 U.S.C. § 2000e-5(d) (1970).

35. Pub. L. No. 92-261, § 4(a), 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e-5(d) (1970).

36. *See, e.g.,* Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971), where the court stated that "[i]t is settled law that the ninety day limitation is no bar when a *continuing* practice of discrimination is being challenged rather than a single, isolated discriminatory act" (emphasis supplied). *See also* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).

37. Austin v. Reynolds Metals Co., 327 F. Supp. 1145 (E.D. Va. 1970) (failure to file an action within 90 days in regard to an alleged discriminatory lay-off prevented plaintiff from suing for damages):

38. *Id.* at 1153.

39. 42 U.S.C. §§ 2000e-5(b)-(c) (1970), *as amended*, Pub. L. No. 92-261 § 4(a), 86 Stat. 103 (1972). The deferral to a state or local agency does not preclude eventual EEOC action. The charge is deferred for a "reasonable time" which cannot be less than 60 days; after such period, the EEOC can take action with respect to the charge.

Bona Fide Occupational Qualification

The bona fide occupational qualification (BFOQ) exception contained in Title VII creates a second potential obstacle for pregnant teachers seeking relief under the Act. If the courts determine that pregnancy is a bona fide occupational disqualification, protection from sex discrimination in employment will be denied. The BFOQ exception permits discrimination "in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ." ⁴⁰ Although the provisions specifically exempt discriminatory practices only in the initial hiring process, recent court decisions,⁴¹ statements of commentators,⁴² and interpretations by the EEOC⁴³ indicate that the exemption is applicable to the terms of employment as well.

Courts which have considered the BFOQ exception have accepted the EEOC position that it be narrowly construed.⁴⁴ Clearly, such a construction comports with congressional intent as expressed in the legislative history of the Act.⁴⁵ In *Weeks v. Southern Bell Telephone*

40. 42 U.S.C. § 2000e-2(e) (1) (1970).

In construing the BFOQ exception, the Commission has taken notice of state laws which limit the employment of women at certain periods of time before and after childbirth. The EEOC guidelines include the Commission's opinion that "such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and therefore discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." 29 C.F.R. § 1604.2(b) (1) (1972).

41. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (BFOQ applied to sex discrimination in promotion policies); *Staten v. East Hartford Bd. of Educ.*, 1 CCH EMPL. PRAC. ¶ 5055 (Connecticut Comm'n on Human Rights, 1972) (Board of Education has to prove pregnancy is a BFOQ to justify mandatory leave after five months). See also *Schattman v. Texas Employment Comm'n*, 330 F. Supp. 328 (W.D. Tex. 1971); *Doe v. Osteopathic Hosp.*, 333 F. Supp. 1357 (D. Kan. 1971).

42. Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L.J. 344, 362 (1967); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 265 (1972).

43. See Brief for EEOC as Amicus Curiae, *Schattman v. Texas Employment Comm'n*, 330 F. Supp. 328 (W.D. Tex. 1971).

44. 29 C.F.R. § 1604.2(a) (1972).

45. A memorandum introduced in the Senate by Senators Clark and Case stated that the BFOQ exception was to be only a "limited exception." 110 CONG. REC. 7213 (1964). At the time that the two floor sponsors offered their memorandum, the word "sex" had not been added to the characteristics which the Act prohibited as a basis for discrim-

and *Telegraph*,⁴⁶ the Court of Appeals for the Fifth Circuit, defining the limits of the BFOQ exception, held that "in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."⁴⁷ Moreover, in *Diaz v. Pan American World Airways, Inc.*,⁴⁸ the same court stated that discriminatory practices "reasonably necessary to the normal operation of . . . [a] business"⁴⁹ will be tested by a "business necessity" rather than a "business convenience" standard.⁵⁰ Therefore, it appears that in order to justify employment discrimination as a bona fide occupational qualification, an employer faces a difficult burden of proof. He must demonstrate that substantially all women would be unable to perform the job efficiently, that the qualification is necessitated by compelling business factors, and that the classification based on sex is not the result of a stereotyped image.⁵¹

The Fifth Circuit's interpretations of the BFOQ exception suggest that it presents no obstacle to a pregnant teacher's recovery under the Act. However, a recent decision by the Supreme Court involving sex discrimination raises the possibility that the BFOQ exception might create such an obstacle. In *Phillips v. Martin Marietta Corp.*,⁵² the Court remanded for a determination of whether the fact that a woman had pre-school age children was a sufficient BFOQ to deny her employment.⁵³ This decision would seem to weaken the impact of the EEOC guidelines and also place a lesser burden of proof on the employer.⁵⁴

ination in employment. "Sex" was subsequently added to the provisions of the statute, and there is no reason to believe that the construction given the BFOQ exception by the memorandum does not apply to a BFOQ exception based on sex discrimination.

46. 408 F.2d 228 (5th Cir. 1969). See also *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

47. 408 F.2d at 235.

48. 442 F.2d 385 (5th Cir. 1971).

49. 29 C.F.R. § 1604.1(a) (1972).

50. 442 F.2d 385, 388 (5th Cir. 1971).

51. See generally Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); Note, *Sex as a Bona Fide Occupational Qualification*, 1968 UTAH L. REV. 395 (1968).

52. 400 U.S. 542 (1971), *vacating and remanding per curiam* 411 F.2d 1 (5th Cir. 1969) (the BFOQ was never raised as a possible defense, but was suggested by the Court).

53. *Id.*

54. *Id.* at 544-47 (Marshall, J., concurring).

One commentator believes "[i]t is possible that by ignoring the EEOC guidelines and suggesting the possibility of a BFOQ exception, the Court thereby undermined the protection of the Act in a manner which could leave women in the position they were in under the Constitution before the passage of the Act."⁵⁵ It is also possible that the BFOQ exception may apply when pregnancy is involved. Were the courts to determine that having pre-school age children comes within the BFOQ exception, the argument that pregnancy also constitutes a bona fide occupational disqualification would be strengthened.

This possible interpretation of the BFOQ exception, coupled with the procedural difficulties under Title VII, may limit the protection afforded pregnant teachers under the Act. Thus, it becomes imperative that a final determination as to the status of mandatory maternity leave policies be made in light of the fourteenth amendment's guarantee of equal protection under the law.

CONSTITUTIONAL CONSIDERATIONS

Equal Protection

The mere classification of people into separate groups for the purpose of enforcing a particular law is not prohibited by the fourteenth amendment.⁵⁶ However, the equal protection clause does require that any such grouping be justified. In the past, justification has been found if a classification system met either of two tests.⁵⁷

Traditionally, courts have presumed that a classification is constitutional unless it can be shown that it is based upon grounds "wholly irrelevant"⁵⁸ to the realization of a valid state purpose. Under the traditional test, a classification is invalidated only when the complainant demonstrates that such classification lacks any "rational basis" or reasonable relation to the achievement of a permissible state objective.⁵⁹

55. Note, *Sex Discrimination in Employment Under the Civil Rights Act of 1964*, 32 OHIO ST. L.J. 923, 924-25 (1971).

56. For a detailed consideration of mandatory maternity leave policies as violative of the equal protection guarantee see Comment, *Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis*, 45 TEMP. L.Q. 240 (1972); 38 BROOKLYN L. REV. 789 (1972); 40 U. CIN. L. REV. 857 (1971).

57. See generally Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

58. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

59. The Supreme Court expressed the rationale for the traditional test as follows:

1. The equal protection clause of the Fourteenth Amendment does not take

A second test is applied, however, in cases where the classification threatens certain "fundamental rights"⁶⁰ or where it is based upon certain "suspect" criteria.⁶¹ In such situations, the courts examine the grouping with stricter judicial scrutiny, and in those cases where fundamental rights are involved, a "compelling state interest"⁶² must be demonstrated for the classification to be upheld. That mandatory maternity leave regulations place a pregnant teacher in a class separate from all other teachers is clear. Whether this classification violates the equal protection clause, and more importantly, whether the constitutionality of mandatory maternity leave can be resolved adequately by applying either of the present tests must be considered.

Most courts which have examined mandatory maternity leave policies have applied the rational basis test to determine their constitutionality.⁶³ Under this test, the burden is on the complainant to demonstrate that the classification lacks a rational basis. Were the challenged policies judged by the stricter standard, the burden would fall on the defendant to prove that the state interests which support the discriminatory

from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Morey v. Doud, 354 U.S. 457, 463-64 (1957), *citing* *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

60. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

61. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964).

62. *See* *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Kramer v. Union School Dist.*, 395 U.S. 621, 627 (1969).

63. *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir. Jan. 15, 1973), *rev'g* 326 F. Supp. 1159 (E.D. Va. 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973); *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972), *rev'g* 326 F. Supp. 1208 (N.D. Ohio 1971), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973); *Pocklington v. Duval County School Bd.*, 345 F. Supp. 163 (N.D. Fla. 1972); *Bravo v. Board of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501 (S.D. Ohio 1972).

classification are compelling. Understandably, aggrieved teachers have sought judicial acceptance of the compelling state interest test. One theory advanced to support its adoption is that maternity leave regulations violate the teacher's fundamental right to work.⁶⁴ Although language in an early Supreme Court decision is cited occasionally in support of the right to work,⁶⁵ the Court has not recognized such a right specifically. Support for the proposition is lacking in the lower courts as well. Consequently, judicial approval of the compelling state interest test on the basis of this questionable fundamental right seems doubtful.

A stronger argument for stricter judicial scrutiny of mandatory leave regulations is that a classification based upon sex is inherently suspect.⁶⁶ This proposition finds support in two recent decisions. In *United States ex rel. Robinson v. York*,⁶⁷ a federal district court noted that classifications based upon race were acknowledged to be suspect and suggested that no logical reason could be discerned for providing women any less protection.⁶⁸ The California Supreme Court drew the analogy between classification based upon race and sex in *Sail'er Inn, Inc. v. Kirby*,⁶⁹ and likewise concluded that sex should be included among the criteria which are recognized as suspect classifications.⁷⁰ Moreover,

64. *Green v. Waterford Bd. of Educ.*, No. 72-1676, (2d Cir. Jan. 29, 1973); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972).

65. Speaking for the Court, Justice Hughes stated: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

66. *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973) at 1727. See generally Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U.L. Rev. 481 (1971).

67. 281 F. Supp. 8 (D. Conn. 1968) (statute requiring longer sentences for women than for men convicted of the same crime).

68. "While the Supreme Court has not explicitly determined whether equal protection rights of women should be tested by this rigid standard, it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group." *Id.* at 14.

69. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (statute restricting bartending by women).

70. Ari analysis of classifications which the Supreme Court has previously designated as suspect reveals why sex is properly placed among them.

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

the Supreme Court presently has under review a case in which the issue of sex as a suspect criteria may be resolved.⁷¹ The analogy of sex to the inherently suspect classifications based upon race has merit. The judicial acceptance of the analogy supports the efforts of teachers who propose the use of the compelling state interest test in cases involving maternity leave policies. Whether the "state interest" or "rational basis" test controls the equal protection inquiry, however, may now be of less significance.

Recent Supreme Court decisions indicate that equal protection analysis should not be regarded as an application of two separate tests but rather as an effort to answer fundamental questions inherent in all equal protection cases. In *Weber v. Aetna Casualty & Surety Co.*,⁷² Mr. Justice Powell, after reviewing the cases which depict separate degrees of judicial scrutiny, concluded that the "essential inquiry" in all equal protection cases is "inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"⁷³ In *Police Dep't v. Mosley*⁷⁴ the Court found the "crucial question" to be "whether there is an appropriate governmental interest suitably furthered by the differential treatment."⁷⁵ The Court's emphasis on a common approach to all equal protection questions evidences a shift to a greater balancing of state and personal interests. The suggestion that the Court places increased emphasis on a balancing approach in equal protection cases finds further support in other language utilized by the Court during the 1971 term. In both *Weber* and *Reed v. Reed*,⁷⁶ the Court stressed that a classification by which the law treats people differently must have a significant or substantial relation to an appropriate state purpose.⁷⁷ The require-

71. *Frontiero v. Laird*, 341 F. Supp. 201 (N.D. Ala. 1972) (3-judge court), *prob. juris. noted*, 41 U.S.L.W. 3165 (U.S. Oct. 10, 1972), argued before the Supreme Court on January 14, 1973, and now *sub judice* (female uniformed military officer alleges she is entitled to receive the same quarters allowance and medical and dental benefits for her spouse that a male member of the uniformed services would receive for his spouse).

72. 92 S. Ct. 1400 (1972) (state workmen's compensation law which discriminated against dependent, illegitimate children).

73. *Id.* at 1405.

74. 92 S. Ct. 2286 (1972) (city ordinance restricting certain types of peaceful picketing because of subject matter).

75. *Id.* at 2290.

76. 404 U.S. 71 (1971) (statute which discriminated against women in the appointment of an administrator of decedent's estate).

77. In *Weber*, the Court concluded that the challenged classification had "no significant relationship to those recognized purposes" for which workmen's compensation statutes are enacted. 92 S. Ct. 1400, 1406 (1972). The Court in *Reed*, stated: "A classifi-

ment of a "substantial relation" indicates that the presumption of validity inherent in the rational basis test has been weakened. Seemingly, whichever test is now applied, sufficient rationale must be advanced to justify the classifications imposed by the state.

Striking a Balance

It is submitted that whether mandatory maternity leave regulations violate the fourteenth amendment is an issue best resolved by balancing the state's need for such policies against the teacher's right to equal protection of the laws. To better understand what individual rights and public interests are involved, it is necessary to analyze the arguments advanced by the teachers and by the school boards.

The teachers' basic claim has been that a law which fails to consider the physical capability of the individual and which treats pregnancy differently from other temporary disabilities, deprives the pregnant teacher of rights guaranteed by the fourteenth amendment.⁷⁸ In support of the contention that pregnancy should be treated like other temporary disabilities, the teachers have produced substantial medical evidence indicating that women four or five months pregnant are capable of full-time employment.⁷⁹ However, it should be noted that some

cation 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .' 404 U.S. 71, 76 (1971), *citing* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

78. See, e.g., *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973); *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir. Jan. 15, 1973), *cert. granted*, 41 U.S.L.W. 3565 (U.S. Apr. 24, 1973); *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972).

Although beyond the scope of this Comment, the question of procedure involving an *unwed* pregnant teacher raises additional considerations of social attitudes and the type of example the teacher is expected to set for her students. The problem is particularly acute since an unwed father is not restricted in any way. There is a recent case which held that the discharge of an unmarried, pregnant office worker after her fifth month was a violation of equal protection. *Doe v. Osteopathic Hosp.*, 333 F. Supp. 1357 (D. Kan. 1971). It is submitted, however, that barring a change in social custom and attitude, the courts may well uphold a mandatory leave provision directed to unwed teachers.

79. See *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973) at 1731-32; *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184, 1187-89 (6th Cir. 1972); *Bravo v. Board of Educ.*, 345 F. Supp. 155, 158 (N.D. Ill. 1972); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438, 440 (N.D. Cal. 1972). The doctors testifying for the teachers in these cases have found no medically justifiable reason for terminating a teacher's employment after four, five or even seven months of pregnancy. The physicians have stressed the need to determine a woman's pre- and post-delivery absence from employment on a case by case basis.

medical evidence exists which indicates that a working woman's efficiency is decreased as pregnancy becomes more advanced.⁸⁰

School boards have suggested a number of interests to justify their policy of classifying pregnant teachers for purposes of mandatory leave, while not similarly classifying any other group of temporarily disabled teachers. One argument urges that because women comprise the overwhelming majority of teachers, a rule directing mandatory maternity leave is necessary for administrative convenience.⁸¹ The Supreme Court has acknowledged that administrative efficiency is a legitimate state objective;⁸² however, the Court has emphasized that, when weighed against constitutional rights and guarantees, the latter must prevail.⁸³ In *Reed*, after striking down a policy of sex discrimination in the appointment of an administrator for an intestate's estate, the Court concluded that a mandatory preference based on sex "merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."⁸⁴ It is submitted that the selection of an arbitrary termination date many months before a teacher is medically unable to perform efficiently also is an "arbitrary legislative choice" and cannot of itself justify mandatory maternity leave.

80. *Schattman v. Texas Employment Comm'n*, 459 F.2d 32, 39 (5th Cir. 1972). The doctor in this case testified that a woman after seven months of pregnancy becomes irritable, and difficult to employ, has frequent headaches, and extensive swelling of the limbs. For these reasons the doctor opined that a pregnant woman's efficiency was reduced in the eighth and ninth month of pregnancy and termination of employment at that time was reasonable.

81. See, e.g., *Cohen v. Chesterfield County School Bd.*, No. 71-1707, at 12 (4th Cir. Jan. 15, 1973); cf. *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184, 1187 (6th Cir. 1972).

82. In *Reed v. Reed*, the Court recognized that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy." 404 U.S. 71, 76 (1971). The Supreme Court acknowledged the value of administrative efficiency in another case during the same term: "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication." *Stanley v. Illinois*, 92 S. Ct. 1208, 1215 (1972). See also *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

83. 92 S. Ct. 1208 (1972). The Court stated: "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Id.* at 1215.

84. 404 U.S. 71, 76 (1971).

School boards also have maintained that without a specified departure date, continuity in the students' education will be disrupted.⁸⁵ It is argued that continuity requires permanent replacements rather than temporary substitutes and that fixed termination dates afford a school board sufficient lead time to find a permanent replacement and to ensure certainty of the replacement date. However, the purported need for a specified date of departure could be satisfied through individual arrangements which consider the interests of *both* the school and the teacher. Finally, school boards have asserted that concern for the health and safety of both the teacher and her child justifies terminating employment at a specified time.⁸⁶ This argument is advanced primarily by urban school boards where violence in schools is most prevalent. However, the boards fail to indicate why pregnant teachers should be protected from this violence while pregnant students are allowed to remain in school for as long as they are physically capable.⁸⁷

The arguments advanced by the teachers *and* those urged by school boards have found judicial acceptance.⁸⁸ Due to this obvious clash of apparently valid interests, courts should balance the alternatives and find an equilibrium point satisfactory to both. It is suggested that such an approach is appropriate for at least two reasons. First, the validity of the state's interests is a function of time—state interests become more compelling in each succeeding month of pregnancy. Moreover, the Supreme Court in its recent decisions on state abortion regulations employed a time-frame approach to balance state and individual interests.⁸⁹ Although these cases were argued on due process grounds, the conclusions of the Court are sufficiently analogous to the maternity leave situation to support the contention that pregnancy-related problems likewise

85. See, e.g., *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir. Jan. 15, 1973) at 11-12; *Bravo v. Board of Educ.*, 345 F. Supp. 155, 158 (N.D. Ill. 1972).

86. See, e.g., *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973) at 1732; *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184, 1187 (6th Cir. 1972) *rev'g* 326 F. Supp. 1208, 1210-11 (N.D. Ohio 1971).

87. This inconsistency is recognized in Comment, *Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis*, 45 TEMP. L.Q. 240, 245 (1972). The Cleveland School Board required teachers to take mandatory maternity leave after the fourth month of pregnancy but had no comparable regulation for pregnant students.

88. Compare *Cohen v. Chesterfield County School Bd.*, No. 71-1707 (4th Cir. Jan. 15, 1973) and *Schattman v. Texas Employment Comm'n*, 459 F.2d 32 (5th Cir. 1972) with *Green v. Waterford Bd. of Educ.*, No. 72-1676 (2d Cir. Jan. 29, 1973) and *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972).

89. *Doe v. Bolton*, 41 U.S.L.W. 4233 (U.S. Jan. 22, 1973); *Roe v. Wade*, 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973).

should be treated in stages when such treatment will aid in balancing state interests and individual rights.

To strike the proper balance between the conflicting interests of the state and the pregnant teacher, the following approach is suggested:

1. In the first seven months of pregnancy, the decision when to terminate employment should be left to the individual teacher with the advice of her physician. To protect the school board, reasonable advance notice of this decision should be required.
2. In the eighth month of pregnancy, the state may regulate the termination date of pregnant teachers in a manner shown to be reasonably related to a legitimate state interest.
3. From the end of the eighth month to term, it should be assumed that the interests of the state in the health of the pregnant teacher and in the continuity of education become compelling. Therefore, enforcement of mandatory maternity leave regulations during this period should be permitted.

The proposed solution takes cognizance of valid competing interests; more importantly, it recognizes the varying weights to be given those interests as a pregnancy approaches term. In the first seven months of pregnancy, the teacher is afforded treatment similar to any other temporarily disabled teacher. In order to require a teacher to take maternity leave in the eighth month of pregnancy, a state must show that its regulation is reasonably related to a legitimate state interest. When its interests become compelling, however, the state is given maximum freedom to regulate. A mandatory leave regulation after the eighth month will enable the state to establish a definite date for the purpose of hiring a permanent replacement, will provide certainty in the administrative process, and will safeguard sufficiently the health of both teacher and child.