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LEGISLATIVE NOTE

EMPLOYMENT DISCRIMINATION—"SEX DISCRIMINATION" UNDER TITLE VII INCLUDES DIFFERENTIAL TREATMENT OF PREGNANCY RELATED DISABILITIES

*Public Law 95-555*¹

In Title VII of the Civil Rights Act of 1964 Congress expressly made it an unlawful employment practice for an employer to discriminate on the basis of sex.² Since then, employers, legal scholars, and the courts have struggled in attempts to define sex discrimination as it relates to pregnancy.³ Frequently the definitional problem arose in sex discrimination challenges to employment disability programs which excluded pregnancy related disabilities. One such challenge was *General Electric Co. v. Gilbert*,⁴ in which the Supreme Court held that differential treatment of pregnancy by denying benefits to pregnant women in an otherwise comprehensive disability plan did not constitute sex discrimination. In response to *Gilbert*, Congress enacted Public Law 95-555⁵ which expands the definition of sex discrimination under Title VII to include differential treatment "because

1. Pregnancy Discrimination Amendment—Civil Rights Act of 1964, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (partially codified as 42 U.S.C.A. § 2000e(k) (West Supp. 1974-1978) (signed into law October 31, 1978)).

2. The specific provision is found in 42 U.S.C. § 2000e-2 (a) (1976), which reads:

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment 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.

3. For a discussion of judicial treatment of gender-unique characteristics other than pregnancy, see Callis, *Minimum Height and Weight Requirements As a Form of Sex Discrimination*, 25 LAB. L.J. 736 (1974); Comment, *Long Hair and the Law: A Look at Constitutional and Title VII Challenges to Public and Private Regulation of Male Grooming*, 24 KAN. L. REV. 143 (1975).

4. 429 U.S. 125 (1976).

5. H.R. REP. NO. 948, 95th Cong., 2d Sess. 5, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4749, 4753; S. REP. NO. 331, 95th Cong., 1st Sess. 3 (1977).

of or on the basis of pregnancy, childbirth or related medical conditions."⁶ Thus, Congress expressly made discrimination because of, or on the basis of, pregnancy an unlawful employment practice for employers who are covered by the provisions of Title VII.⁷

The definitional clarification resolves many of the controversial questions regarding sex discrimination as it relates to pregnancy disability. At the same time, the Act raises questions as to the interrelationship between resolving pregnancy based sex discrimination challenges under Title VII and under the equal protection clause. While the Act expands the definition of prohibited sex discrimination under Title VII, sex discrimination under the equal protection clause is presumably unaffected. It is clear that treatment of the new provision by the Supreme Court in decisions involving Title VII and constitutional sex discrimination challenges could significantly influence the effectiveness of the expanded definition by allowing women to overcome the effect of differential treatment of pregnancy by employers. The provisions of Public Law 95-555 and its implications will be examined in this note.

Although the definitional change was enacted as a reaction to judicial treatment of employer disability and insurance programs that excluded pregnancy, it has broader ramifications. It not only has the effect of requiring pregnancy to be treated as any other disabilities under fringe benefit programs, but also prohibits terminating or refusing to hire or promote a woman simply because she is pregnant, bars mandatory leave for pregnant women based on factors other than their ability to work, protects the reinstatement rights of women on leave for pregnancy, and requires that women be given credit for previous service, accrued retirement benefits, and accumulated seniority when they return to work from preg-

6. The Act provides in part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions, shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C.A. § 2000e (k) (West Supp. 1974-1978).

7. For purposes of Title VII, "employer" is defined in 42 U.S.C. § 2000e (b) (1976), as 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, and any agent of such a person." Since the new provision expands the reach of sex discrimination under Title VII, rather than creating a new type of discrimination action, traditional procedural and remedial provisions will apply to actions challenging differential treatment of pregnancy by employers under the Act. The provisions are set out in 42 U.S.C. § 2000e-5 (g) (1976). They allow a court to "enjoin the respondent from engaging in unlawful employment practice, and order such affirmative action as may be appropriate." Relief in appropriate situations can include reinstatement of an employee and also payment of back pay that is due. *Id.* See also *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (damages recoverable for Title VII discrimination).

nancy leave.⁸ An exception to the definition allows employers to avoid paying health insurance benefits for abortions except where the life of the mother would be endangered if the baby were carried to term.⁹ The Act, however, does not prohibit employers from paying for non-therapeutic abortions, and an employer with a disability or medical insurance plan must include coverage for complications which arise from an abortion, whether or not the abortion was covered.¹⁰

It is important to note that Public Law 95-555, enacted as an amendment to the definitional subchapter of Title VII, does not mandate that an employer provide for employees a disability or other fringe benefit program. It only requires that if such a program is provided, it must be nondiscriminatory with regard to pregnancy. Where benefit programs are provided, the House and Senate reports clearly indicate that an employer can require that women be examined by a physician before being declared disabled because of pregnancy. In essence, the test for pregnancy disability is the same as that applied to other forms of disability: the employee is unable to work.¹¹

Employers are given a six month grace period in which to put disability and insurance programs into compliance with the Act.¹² However, the Act, as it applies to hiring, firing, and mandatory leaves, became effective on enactment.¹³ Employers are prohibited from reducing benefits

8. 8 LAB. REL. REP. (BNA) *Fair Employment Practices Manual* ¶ 421:601 (1979). Prior to enactment of Public Law 95-555, denial of accumulated seniority to an employee forced to take leave of absence because of pregnancy was declared to be sex discrimination under Title VII in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Mandatory leave requirements for pregnant employees not related to their ability to work were held to be sex discrimination under the equal protection clause in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

9. The abortion exclusion was the product of political maneuvering between pro and anti-abortion forces. The original House bill contained the exclusion; the original Senate bill did not. The exclusion was designed to assure the right of employees to refuse to pay for abortion when it is contrary to their religious beliefs. As passed, however, employers cannot refuse to hire applicants because they have exercised their right to have an abortion. H.R. REP. NO. 948, *supra* note 5, at 7, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 4755, and the dissenting views of Mr. Weiss at 15, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 4761; S. REP. NO. 331, *supra* note 5, at 12, and the supplemental views of Senator Eagleton at 17.

10. 42 U.S.C.A. § 2000e (k) (West Supp. 1974-1978).

11. H.R. REP. NO. 948, *supra* note 5, at 5, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 4753; S. REP. NO. 331, *supra* note 5, at 4.

12. Section 2 of the Act reads:

(a) Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act.

Pregnancy Discrimination Amendment—Civil Rights Act of 1964, Pub. L. No. 95-555 § 2, 92 Stat. 2076 (1978).

13. *Id.*

to comply with the definitional change for a period of one year,¹⁴ but the Act has no provision regarding benefit reductions after the one year period; presumably reductions after one year would be permissible. The reports of the congressional committees raise doubts as to the propriety of such reductions.¹⁵

Passage of the definitional clarification by Congress indicates disagreement between the judicial and legislative branches in their perceptions of the meaning of "sex discrimination" as it applies to pregnancy. The Supreme Court has rejected the contention that differential treatment of pregnancy in disability programs constitutes sex discrimination under Title VII¹⁶ or the equal protection clause.¹⁷ Congress, on the other hand, adopted Public Law 95-555 with a clear intent that differential treatment of pregnancy constitutes sex discrimination under Title VII. The reports of the congressional committees make it clear that those committees consider the Supreme Court to have misconstrued the original purpose and meaning of sex discrimination under Title VII, and that the new definition was perceived to "reflect no new legislative mandate nor effect changes in practices, costs, or benefits beyond those intended by Title VII of the Civil Rights Act."¹⁸ A review of the Supreme Court's recent treatment of

14. Section 3 of the Acts reads in part:

Until the expiration of a period of one year from the date of enactment of this Act or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person . . . shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee. . . : *Provided*, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion; *And provided further*, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act.

Pregnancy Discrimination Amendment—Civil Rights Act of 1964, Pub. L. No. 95-555 § 3, 92 Stat. 2076 (1978).

15. H.R. REP. No. 948, *supra* note 5, at 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4757 states: "It must be emphasized . . . that the one year limitation . . . must *not* be construed as permission for employers who do not comply immediately to reduce benefits because of the bill simply because the time limit period has run." S. REP. No. 331, *supra* note 5, at 8, indicates the one-year period is included to prevent the bill from interfering with the "legitimate expectation of employees as regards their current fringe benefit coverage, or result[ing] in instability in labor-management relations." It would seem that an employer could, therefore, reduce benefits after expiration of the one-year period as long as the reduction did not interfere with the legitimate expectations of employees under existing programs.

16. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

17. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

18. H.R. REP. No. 948, *supra* note 5, at 3-4, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 4751-52. The report also declares that "[t]he Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment." *Id.* at 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 4752. *See also* S. REP. No. 331, *supra* note 5, at 2-3.

disability and insurance plans that exclude pregnancy will reveal the basis of the differing legislative and judicial views.

In *Geduldig v. Aiello*,¹⁹ the Supreme Court rejected an equal protection challenge to a California unemployment insurance program that excluded pregnancy. The Court declared, in frequently discussed "footnote 20," that the program did "not exclude anyone from benefit eligibility because of gender, but merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities."²⁰ Two years later, the Court adhered closely to this language in rejecting a Title VII challenge to General Electric's disability plan in *General Electric v. Gilbert*.²¹ Although *Geduldig* was decided on equal protection grounds, the Court borrowed language from that decision when it observed in *Gilbert* that "[t]here 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."²² The Court considered sex discrimination under Title VII to be closely related to sex discrimination under the equal protection clause.²³

The Supreme Court later, in *Nashville Gas Co. v. Satty*,²⁴ held that the denial of accumulated seniority to a female worker forced to take leave from employment because of pregnancy constituted sex discrimination under Title VII. It had reached a similar decision a few years earlier under

19. 417 U.S. 484 (1974).

20. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). For discussions of "footnote 20," see *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Communications Workers v. American Tel. & Tel. Co.*, 513 F.2d 1034 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Berg v. Richmond Unified School Dist.*, 528 F.2d 961 (8th Cir. 1975); Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805; Comment, *Pregnancy and Employment Benefits*, 27 BAYLOR L. REV. 767 (1975); Comment, *Geduldig v. Aiello: Pregnancy Classification and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); Note, *Exclusion of Pregnancy from Coverage of Disability Benefits Does Not Violate Equal Protection*, 12 HOUS. L. REV. 488 (1975); Note, *Sex Discrimination in Employment Fringe Benefits*, 17 WM. & MARY L. REV. 109 (1975).

21. 429 U.S. 125 (1976).

22. *Id.* at 138.

23. A number of courts of appeals decisions had refused to rely on *Geduldig* as authority in Title VII actions since that case was decided on equal protection grounds. See, e.g., cases cited note 20 *supra*. In *Gilbert*, the Supreme Court took the opposite view:

While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from the court decisions construing the Equal Protection Clause . . . , the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. . . . We think, therefore, that our decision in *Geduldig v. Aiello* . . . is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex.

429 U.S. at 133.

24. 434 U.S. 136 (1977).

the equal protection clause.²⁵ The Court indicated, however, that denial of sick pay to a pregnant worker was "legally indistinguishable from the disability program upheld in *Gilbert*."²⁶ The Court distinguished accumulated seniority from disability and sick pay coverage, and found a significant difference between conduct that imposes a burden on women not imposed on men (denied seniority) and conduct that merely denies women a benefit that men cannot receive (disability and sick pay coverage for pregnancy disability). The distinction between the denial of benefits and the imposition of a burden, the Court claimed, "is more than one of semantics,"²⁷ but nevertheless provided no guidance in determining the boundaries of the distinction.

It appears that under the new Act employers covered by the provisions of Title VII will be effectively prohibited from discriminating against pregnancy. However, employers not covered by the provisions of Title VII²⁸ and not subject to contrary state laws²⁹ would seem to be able to continue to treat pregnancy differently than other disabilities.

In some instances the equal protection clause may provide relief to pregnant employees subjected to differential treatment. Whether relief will be available will depend on the effect, if any, that the new definition has on judicial treatment of sex discrimination as it relates to pregnancy under the equal protection clause. Since the Supreme Court has traditionally treated sex discrimination as it relates to pregnancy similarly under both the equal protection clause and Title VII,³⁰ relief might be available in circumstances similar to those where relief is available under the new law and the requirements of state action are met.³¹ More likely, however,

25. In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), the Court held that mandatory leave requirements for pregnant employees not based on their ability to work constituted sex discrimination under the equal protection clause. See note 8 *supra*.

26. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977).

27. *Id.* at 142. See H.R. REP. NO. 948, *supra* note 5, at 3, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 4751, for a discussion of the semantic problems involved in distinguishing burdens from benefits.

28. See note 7 *supra*.

29. At least 22 states have employment discrimination laws that prohibit differential treatment of pregnancy disability by employers. These laws take the form of express statutory provisions and judicial and agency interpretation of state statutes prohibiting discrimination on the basis of sex. H.R. REP. NO. 948, *supra* note 5, at 11, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 4759; S. REP. NO. 331, *supra* note 5, at 3. In Missouri, employment laws have been interpreted by state enforcement agencies to require equal treatment of a pregnant worker. H.R. REP. NO. 948, *supra* note 5, at 11, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 4759.

30. See note 23 and accompanying text *supra*.

31. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (discussing the requirements of state action); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (discussing the requirements of a sex discrimination claim based on 42 U.S.C. § 1983 (1976)).

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the Court will retain traditional sex discrimination definitions in regard to pregnancy.³²

The report of the Senate Human Resources Committee suggests that female dependents of male employees need not be treated similarly to female employees.³³ The Act was designed to help women employees, overcome the barrier that differential treatment of pregnancy creates in employment; the report indicates that the question of proper treatment of pregnant dependents of male employees, where male dependents of female employees are provided comprehensive disability coverage, is left to "existing title VII principles."³⁴ The quoted language could be found by the Court to suggest the application of the *Nashville Gas* benefit/burden test. If so held, differential treatment of pregnancy in employee-dependent benefit plans would be permissible because *Nashville Gas* upheld the equivalent treatment of women employees. Based on the language in the report, it is also possible that the Court would hold that the new definition applies only where employees themselves are concerned and that the definition's effect on employee-dependent benefits need not be considered.

A literal reading of the Act indicates that the crucial consideration is whether pregnancy is treated differently than other disabilities by employers, and not whether employees themselves as opposed to their dependents are concerned. This would seem to indicate that the exclusion of pregnancy from dependent benefits would constitute differential treatment by an employer "because of or on the basis of pregnancy," and thus be unlawful.

An extremely narrow interpretation of the Act might not only allow exclusion of employee dependents from its coverage, but also significantly curtail its impact on the benefits accorded employees. Past treatments of pregnancy based sex discrimination claims under Title VII and the equal

32. The Court has generally treated sex discrimination under Title VII and the equal protection clause similarly. See note 23 *supra*. Therefore, it could be that relief under the equal protection clause will be available where the treatment challenged is considered a burden under the *Nashville Gas Co.* benefits/burdens test applied to Title VII actions. See text accompanying notes 24, 26 & 27 *supra*. For challenges to differential treatment of pregnancy brought under the equal protection clause, see *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). See also notes 19, 20 & 25 *supra*.

33. S. REP. No. 331, *supra* note 5, at 6, indicates that the bill "would not mandate that women dependents be compared with women employees."

34. *Id.* The report also stated:

Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans; It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of sex as regards the extent of coverage for their dependents.

Id. For Equal Employment Opportunity Commission guidelines referring to employer treatment of dependents under fringe benefit programs, see 29 C.F.R. §§ 1604.9 (b), (c), (e) and 800.116 (d) (1978).

protection clause have focused consideration on the effects of the disparate treatment of women.³⁵ The evaluation, however, has been limited to comparing the dollar value of benefits actually accruing to women under the plan to the value of those accruing to men. Both the *Gilbert* and *Geduldig* decisions emphasized that the dollar values of the disability plans accruing to women were greater than those accruing to men, even though pregnancy was excluded from coverage.³⁶ In telling language, the *Gilbert* Court concluded that, "As there is no proof that the package is in fact worth more to men than women, it is impossible to find any gender-based discriminatory effect."³⁷ In *Gilbert* the Court went on to conclude that, under Title VII, it would not be improper for an employer to dissolve fringe benefit programs and replace them with increased wages to each employee in the amount of the cost of existing benefit coverage.³⁸ The Court stated:

[T]here would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy.³⁹

If disability insurance were replaced with equivalent wages, Public Law 95-555 would apparently present no obstacle; collective bargaining agreements⁴⁰ and the Equal Pay Act,⁴¹ however, might present obstacles. Addi-

35. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 140-41 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136-38 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

36. In *Gilbert*, 429 U.S. at 130-31 n.9, the value of the benefits accruing to male and female employees was provided in tabular form. Female employees had a significantly greater claim rate per 1,000 employees in both 1970 and 1971 under the General Electric plan even though pregnancy was not covered. The cost per insured employee was also higher for female employees than male employees in both years. In *Geduldig*, 417 U.S. at 497 n.21, similar statistics were found under the California plan. Further, "[s]everal amici curiae . . . represented to the court that they have had a similar experience under private disability insurance programs." *Id.* See also Note, *Constitutional Law—Equal Protection—Exclusion of Pregnancy-Related Disabilities for State Salary Compensation Insurance Program Denies Equal Protection to Pregnant Employees*, 27 *VAND. L. REV.* 551 (1974). There is some disagreement as to whether the statistics indicate a disproportionate consumption of benefits by women or just variances based on the low contribution rate of women in low paying jobs. See Comment, *Waiting for the Other Shoe—Wetzel and Gilbert in the Supreme Court*, 25 *EMORY L.J.* 125 (1976).

37. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 138 (1976).

38. *Id.* at 139 n.17.

39. *Id.*

40. See *NLRB v. Katz*, 369 U.S. 736 (1962).

41. 29 U.S.C. § 206(d)(1) (1976) reads in part:

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

tionally, increasing wages could serve to bypass only some of the area of differential treatment of pregnancy. Seniority, reinstatement, sick leave, and vacation benefits, if discriminatorily awarded on the basis of pregnancy, would still be violative of the Act.

Employers might further limit the impact of the new law by structuring a plan for disability benefits, or for that matter any benefits, which although not specifically mentioning pregnancy provides coverage which as a practical matter will confer only minimal benefits—and thus incur minimal expense to the employer—on account of pregnancy. Such a plan, even though facially neutral, might be subject to attack if proven to disparately award benefits to males over females and found to be a sham to disguise employer discriminatory intent.⁴²

In essence, the new Act has one effect. It legislatively reverses the judicial determination that pregnancy is not a sex based attribute; under the Act and Title VII, a pregnancy based classification is now without doubt a sex based one. Judicial energy in application of the new definition, and the extent to which it influences future consideration of pregnancy classification cases under the equal protection clause, will significantly influence the development of this area of employment discrimination law.

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For possible exceptions to the Equal Pay Act, see 42 U.S.C. § 2000e-2 (h) (1976) which, by express provision of Public Law 95-555, is not to be treated as altering or diminishing the effect of the new Act. For EEOC guidelines regarding equal wages and fringe benefit programs, see 29 C.F.R. §§ 800.116 (d) and 1604.9 (b), (e) (1978). See also S. REP. No. 331, *supra* note 5, at 7; H.R. REP. No. 948, *supra* note 5, at 7, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 4755.

42. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).