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OPENING THE FLOODGATES: PREFERENTIAL TREATMENT FOR PREGNANT EMPLOYEES IS NOT REVERSE DISCRIMINATION

*Harness v. Hartz Mountain Corp.*¹

I. INTRODUCTION

In 1978, Congress enacted the Pregnancy Discrimination Act² (PDA) to establish clearly that sexual discrimination includes discrimination based on pregnancy, childbirth, or related medical conditions. Nine years later, in *California Savings & Loan Association v. Guerra*,³ the United States Supreme Court held that the PDA does not prohibit employment practices that favor pregnant women.⁴ *Guerra* could have opened the floodgates for the preferential treatment of pregnant employees. Yet, the Sixth Circuit decision in *Harness v. Hartz Mountain Corp.*⁵ is the only case thus far in which a court relies upon *Guerra* in approving a more favorable maternity leave policy than that granted to male employees suffering from other similar, temporary disabilities. This Note will discuss the decisional background of Title VII sexual discrimination and the PDA. It will also explain the *Harness* decision and discuss its implications on future PDA disputes.

1. 877 F.2d 1307 (6th Cir. 1989).

2. 42 U.S.C. § 2000e(k) (1982). The Pregnancy Discrimination Act provides in pertinent 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 . . . as other persons not so affected but similar in their ability or inability to work

Id.

3. 479 U.S. 272 (1987).

4. *Id.* at 286-88.

5. 877 F.2d 1307 (6th Cir. 1989).

II. DECISIONAL BACKGROUND OF PREGNANCY DISCRIMINATION BEFORE *HARNES*

Historically, plaintiffs brought pregnancy discrimination suits under two basic theories: rights as guaranteed by equal protection and due process⁶ and rights protecting against sexual discrimination as guaranteed by Title VII of the Civil Rights Act of 1964.⁷ Of the two theories, Title VII redress proved the most common.⁸ This was due partially to the requirement that a plaintiff show both state action⁹ and a discriminatory purpose or intent on behalf of the employer¹⁰ to prevail in the equal protection/due process context. Yet, because situations existed in which Title VII was inapplicable as a remedial measure, courts developed basic modes of analysis in some early constitutional cases.¹¹

In *Geduldig v. Aiello*,¹² the United States Supreme Court held that disability plans which exclude disability resulting from normal pregnancy from coverage do not violate the equal protection clause.¹³ The court reasoned that such a disability plan does "not discriminate with respect to the persons or groups which are eligible for . . . protection under the [disability] program."¹⁴ It stated that pregnancy-based classifications were not discriminatory against women.¹⁵ In a footnote, the Court explained that such classifications divided potential recipients into two groups: pregnant women and non-pregnant persons, with the latter group including members of both sexes.¹⁶ Thus, there existed no gender-based discrimination. Furthermore, because the exclusion of normal pregnancy disability simply was "underinclusive" in

6. See Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591, 592-96 (1982).

7. *Id.* Title VII of the Civil Rights Act, 42 U.S.C. §2000e-e6 (1982), generally prohibits discrimination on the basis of race, color, religion, sex, or national origin by any employer with fifteen or more employees.

8. Wald, *supra* note 6, at 593.

9. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (fourteenth amendment requires state action).

10. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 281 (1979) (plaintiff must demonstrate that the law "reflects a purpose to discriminate on the basis of sex").

11. See *infra* notes 12-25 and accompanying text.

12. 417 U.S. 484 (1974).

13. *Id.* at 494-97.

14. *Id.* at 494.

15. *Id.* at 496 n.20.

16. *Id.*

classification, the court applied a "rational relation" test, rather than the more stringent "suspect class" test.¹⁷ With that analysis, the Court easily found no violation of the equal protection clause.¹⁸

Two years later in *General Electric Co. v. Gilbert*,¹⁹ the United States Supreme Court clarified any ambiguity concerning the impact of Title VII on pregnancy-based discrimination. In *Gilbert*, female employees were denied disability benefits under their employer's disability plan while they were absent from work because of pregnancy.²⁰ They brought an action alleging discrimination in violation of Title VII.²¹ The Court held that the exclusion of pregnancy-related disabilities was not a violation of Title VII unless there was an indication that the exclusion was a pretext for discriminating against women.²² The Court stated that a prima facie violation of Title VII exists "upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another."²³ In finding that the women plaintiffs did not establish such an effect, the Court reiterated the reasoning in *Geduldig* by concluding that "underinclusiveness" is not necessarily gender-based discrimination.²⁴ Additionally, the Court stated that the plan "is nothing more than an insurance package, which covers some risks, but excludes others."²⁵ Thus, once again the Supreme Court upheld the exclusion of pregnancy-related disabilities from employers' disability plans despite a constitutional challenge.

In direct response to the Supreme Court's decisions,²⁶ and, more specifically, to overrule the decision in *Gilbert*,²⁷ Congress enacted the

17. *Id.* at 494-96.

18. *Id.* at 494-97.

19. 429 U.S. 125 (1976).

20. *Id.* at 129.

21. *Id.*

22. *Id.* at 136. To reach this holding, the Court applied a disparate impact analysis. Such analysis applies when an otherwise facially neutral policy, has a disproportionate impact on a group protected by Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

23. *Gilbert*, 429 U.S. at 137.

24. *Id.* at 138-39.

25. *Id.* at 138.

26. H.R. REP. NO. 948, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4751-52.

27. See H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750-51 (the committee formally recognized that the dissenting Justices in *Gilbert* correctly interpreted the Act).

It was recognized that the *Gilbert* majority had "ignored the congressional intent in enacting Title VII of the Civil Rights Act-that intent was to protect all individuals from unjust employment discrimination, including pregnant

PDA in 1978.²⁸ The PDA acts as a supplement to the definitional section of Title VII by declaring pregnancy-related discrimination as discrimination "on the basis of sex."²⁹ The Act clarifies that "distinctions based on pregnancy are *per se* sex discrimination violations of Title VII."³⁰ In effect, the PDA entitles pregnant women to the same disability benefits as men.³¹

While the language of the PDA appeared clear and unambiguous, the statute expressly mandated only equal treatment.³² Thus, the question whether the PDA required, or even allowed, preferential treatment to be afforded pregnant employees remained unanswered—until the Supreme Court decision in *California Federal Savings & Loan Association v. Guerra*.³³

In *Guerra*, the issue presented was whether Title VII, as amended by the PDA, preempted a California statute³⁴ requiring employers to provide leave and re-instatement to pregnant employees. The issue arose when a female employee was denied re-instatement upon returning from pregnancy disability leave.³⁵ The employee filed a complaint with the Department of Fair Employment and Housing, alleging that her employer, California Federal Savings and Loan Association (Cal Fed), was in violation of section 12,945(b)(2) of the Fair

workers." 123 CONG. REC. 7539 (1977) (Senator Williams' introduction of the bill), *reprinted in* STAFF OF SENATE COMM'N OF LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 2 (1979).

28. For text of the Pregnancy Discrimination Act, see *supra* note 2.

29. 42 U.S.C. § 2000e(k) (1982).

30. H.R. REP. NO. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4751.

31. However, it is also clear that employers who are not presently providing temporary disability requirements to any workers are not required to begin providing benefits to pregnant employees. See, e.g., H.R. REP. NO. 948, *supra* note 26, at 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4751.

32. *Id.* at 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4751.

33. 479 U.S. 272 (1987).

34. CAL. GOV'T CODE § 12,945(b)(2) (West 1980 & Supp. 1986). California's Fair Employment and Housing Act provides in pertinent part:

It shall be unlawful employment practice unless based upon a bona fide occupational qualification . . . [f]or any employer to refuse to allow a female employee affected by pregnancy . . . [t]o take a leave on account of pregnancy for a reasonable period of time. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions

Id.

35. *Guerra*, 479 U.S. at 278-79.

Employment and Housing Act.³⁶ In response, Cal Fed brought an action seeking a declaratory judgment that section 12,945(b)(2) was inconsistent with and preempted by the PDA.³⁷

Of the ways in which a federal law may preempt a state law,³⁸ the United States Supreme Court found that in this case the federal law would preempt state law only if the state law was in actual conflict with the federal law.³⁹ The Court further noted that sections 708 and 1104 of the Civil Rights Act "severely limit[ed] Title VII's preemptive effect."⁴⁰ Thus, the Court recognized that the PDA preempts only those state laws which either require or permit employers to violate Title VII or those which are inconsistent with the purposes of the statute.⁴¹

In applying this standard to section 12,945(b)(2), the Court concentrated on states' rights. Specifically, the issue was whether the PDA prohibited the states from requiring employers to re-instate pregnant workers, with no regard given to their policy for disabled workers generally.⁴² The Court reasoned that "if Congress had

36. *Id.* at 278. An employer violates section 12,945(b)(2) if he or she refuses to allow an employee to take a reasonable pregnancy leave, not to exceed four months. *Id.* at 275 n.1.

37. *Id.* at 279. For the text of section 12,945(b)(2) of the FEHA see *supra* note 34. For the text of the PDA, see *supra* note 2.

38. Federal law may pre-empt state law in three ways:

- 1) Congress may pre-empt by stating so expressly;
- 2) Congress may pre-empt "impliedly" by allowing no room for supplementary state regulation; and
- 3) federal law will pre-empt state law when it is in conflict with the federal law.

Id. at 280-81; see *Jones v. Roth Packing Co.*, 430 U.S. 519 (1977) (express pre-emption); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (implied pre-emption).

39. *Guerra*, 479 U.S. at 281.

40. *Id.* at 282. Section 708 of Title VII provides that nothing in Title VII exempts any person from liability or duty from any state laws except for "such law[s] which purport to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7 (1982). Section 1104 of Title VII provides in pertinent part:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4 (1982).

41. *Guerra*, 479 U.S. at 283-84.

42. *Id.*

intended to *prohibit* preferential treatment [of pregnant employees], it would have been the height of understatement to say only that the legislation would not *require* such conduct.⁴³ The Court noted further that it is ridiculous to think that Congress, if in fact its intent was to prohibit preferential treatment, would have instead limited its extensive discussion only to its intent not to require such treatment.⁴⁴ Furthermore, the Court asserted that the purpose of the PDA was to establish a minimum level of pregnancy benefits rather than a maximum level.⁴⁵ Thus, section 12,945(b)(2) was not contrary to the purposes of the PDA in that the statute did not compel employers to treat pregnant workers preferentially; the statute merely provided the minimum benefits that employers must provide to their pregnant workers.⁴⁶ The employer was free to provide similar benefits to male employees and, thus, was not compelled by state law to violate federal law.⁴⁷ Since compliance with both the state statute and the PDA was possible, the Court held that preemption of the state law was not necessary.⁴⁸ More importantly, however, *Guerra* clearly established that the PDA does not prohibit employment practices that favor pregnant women.

Commentators have stated that the impact of the *Guerra* decision on pregnancy discrimination is yet to be seen.⁴⁹ Two years after the *Guerra* decision, the Sixth Circuit Court of Appeals, in its two-to-one decision in *Harness v. Hartz Mountain Corp.*,⁵⁰ decided the first case in which *Guerra* is cited in approving a more favorable maternity leave policy.

III. THE INSTANT DECISION

In *Harness v. Hartz Mountain Corp.*,⁵¹ a divided Sixth Circuit Court of Appeals held that an employer did not violate a Kentucky law⁵² identical to the PDA by granting female employees more

43. *Id.* at 287.

44. *Id.*

45. *Id.* at 285.

46. *Id.* at 291.

47. *Id.*

48. *Id.* at 292.

49. See Note, *Title VII's Limited Preemptive Effect Allows State Laws Mandating Pregnancy Leave and Reinstatement*, 9 U. ARIZ. L. REV. 669, 680-81 (1987).

50. 877 F.2d 1307 (6th Cir. 1989).

51. 877 F.2d 1307 (6th Cir. 1989).

52. KY. REV. STAT. ANN. § 344.030(6) (Michie 1983). This statute is Kentucky's statutory counterpart to the federal PDA. For the text of the PDA, see *supra* note 2.

extensive unpaid maternity leave than male employees who were suffering from other disabilities.⁵³

In *Harness*, a male employer of Hartz Mountain Corp., Bill Harness, brought suit against Hartz alleging reverse discrimination in violation of sections 344.030(6)⁵⁴ and 344.040(1)⁵⁵ of the Kentucky Revised Statutes.⁵⁶ The dispute arose when Harness suffered a heart attack⁵⁷ and was placed on unpaid leave pursuant to company policy.⁵⁸ The policy, applicable to illness or non-work injury only, provided for an initial thirty-day leave with two additional thirty-day extensions. This plan allowed a maximum leave of absence of ninety days.⁵⁹ The company granted Harness the two thirty-day extensions, but he was unable to return to work within the ninety-day maximum allowance.⁶⁰ In accordance with company policy, Hartz considered Harness resigned as of the ninety-day expiration date,⁶¹ and later refused to re-instate Harness upon his healthy return.⁶²

Based on these facts, Harness filed suit.⁶³ He argued that Hartz' alternative leave policy, which was specifically for maternity-related disabilities, granted more favorable treatment to pregnant employees, thus discriminating against male employees.⁶⁴ Hartz' maternity leave policy provided for an initial ninety-day leave, coupled with a possible two-year extension,⁶⁵ as compared to the ninety-day maximum leave allowed for other disabilities. Upon cross-motions for summary judgment, the district court granted the motion in favor of Hartz.⁶⁶

In a two-to-one ruling, the Sixth Circuit affirmed the dismissal.⁶⁷ The Court of Appeals stated that the *Guerra* decision established that the federal PDA allows more favorable treatment of employees taking

53. *Harness*, 877 F.2d at 1310.

54. See *supra* note 52 for explanation of section 344.030(6).

55. KY. REV. STAT. ANN. § 344.040(1) (Michie 1983). A violation of this statute occurs when an employer discriminates against an employee on the basis of race, color, religion, national origin, sex, or age. *Id.*

56. *Harness*, 877 F.2d at 1308.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1308-09.

66. *Id.* at 1309.

67. *Id.* at 1310.

leave for pregnancy-related conditions.⁶⁸ Since no Kentucky state court had construed the state law, which was identical to the PDA, any differently the Sixth Circuit said *Guerra* was persuasive authority that Hartz did not discriminate by granting more liberal leave for "maternity-related reasons."⁶⁹ The court stated that "[s]ince the *Guerra* Court held . . . that such preferential treatment is permissible under the PDA, it follows that the preferential treatment accorded pregnant employees under the Hartz policy is permissible under [the Kentucky statute]."⁷⁰

In a vigorous dissent, Judge Nelson urged that the court follow the plain language of the Kentucky law, and he provided several arguments supporting his contention.⁷¹ First, he emphasized that the statute is unambiguous in mandating that pregnant employees "*be treated the same* for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work, and [that] *nothing in this section shall be interpreted to permit otherwise.*"⁷² Judge Nelson noted that by ignoring such an express mandate, the judges have, in effect, violated the law themselves by abusing their power.⁷³ He argued that precedent will be deemed trivial if judges use their power to amend unambiguous statutory text solely because it may result in consequences un contemplated by its makers.⁷⁴ Furthermore, Judge Nelson quoted Chief Justice Burger's statement that "[we should] beware the 'good result,' achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means."⁷⁵

Second, Judge Nelson criticized the approach used by the *Guerra* Court in concluding that the PDA does not intend to mean what it

68. *Id.*

69. *Id.* at 1309. The Court cites to Kentucky Comm'n on Human Rights v. Commonwealth, 586 S.W.2d 270, 271 (Ky. Ct. App. 1979) ("The Kentucky statute . . . is . . . identical to the corresponding section of the . . . Civil Rights Act. . . . Therefore, . . . Supreme Court decisions regarding the federal provisions are most persuasive, if not controlling, in interpreting the Kentucky statute.").

70. *Harness*, 877 F.2d at 1310.

71. *Id.* at 1310-11 (Nelson, J., dissenting).

72. *Id.* It is most apparent that Judge Nelson agrees with Justice White's dissenting opinion in *Guerra*. Justice White states that the language of the identical federal provision "could not be clearer [and thus] leaves no room for [the] preferential treatment of pregnant workers." *Guerra*, 479 U.S. at 297 (White, J., dissenting).

73. *Harness*, 877 F.2d at 1312 (citing B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921)).

74. *Id.*

75. *Id.* (quoting *Steelworkers v. Weber*, 443 U.S. 193, 219 (Burger, J., dissenting)).

appears literally to say.⁷⁶ The *Guerra* Court cited the familiar rule that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."⁷⁷ Judge Nelson firmly rejected the application of that rule.⁷⁸ He explained that such a rule teaches judges that it is not necessary to follow the express mandate of a statute if they believe that under the circumstances the legislature would have acted differently upon more careful thought.⁷⁹ According to Judge Nelson, if such were the case, the roles of the judiciary and the legislature would become intertwined, and judges are not in the proper position to adopt a legislative function so as to change an unambiguous statute.⁸⁰

Third, while acknowledging *Guerra* as the most persuasive authority, Judge Nelson stressed that the real issue the court should have resolved was the legislative intent behind the Kentucky statute.⁸¹ He substantiated this conclusion by emphasizing that while *Guerra* allows (but does not compel) a state to provide for the preferential treatment of pregnant employees, the Supreme Court did not decide *Guerra* until well after the Kentucky statute was enacted.⁸² Therefore, the court should have looked solely to the purposes and intentions of the Kentucky legislature in enacting the statute.⁸³ Summarily, he argued that the general purpose of the Kentucky legislature was to safeguard all individuals from sex discrimination, and not just those individuals who are pregnant.⁸⁴

Fourth, Judge Nelson stressed that according to Kentucky case law, unless the plain reading would result in an "absurd" or "wholly unreasonable conclusion," the court should give effect to the plain words of the Kentucky statute.⁸⁵ Thus, the application of this standard would have resulted in the obvious dismissal of the contention that the statute results in an "absurd" or "wholly unreasonable conclusion." As

76. *Id.* at 1311.

77. *Id.* (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

78. *Id.* at 1312.

79. *Id.*

80. See *infra* text accompanying notes 87-91.

81. *Harness*, 877 F.2d at 1312-13.

82. *Id.* at 1312.

83. *Id.* at 1313.

84. *Id.*; see also *supra* note 27 (intent in enacting Title VII, upon which the Kentucky statute is based, was to protect all individuals from unjust employment discrimination).

85. *Harness*, 877 F.2d at 1313 (citing *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984)).

Judge Nelson pointed out, what judge could hold in good conscience that equal treatment is "absurd or wholly unreasonable?"⁸⁶

Last, Judge Nelson stressed that it is the job of the legislators to change a statute which they feel is unjust.⁸⁷ That is precisely what Congress did after *Gilbert* when it realized that the Civil Rights Act did not say what Congress had intended it to say.⁸⁸ The congressional response was the enactment of the PDA.⁸⁹ Judge Nelson scolded the court for taking such a responsibility upon themselves by saying, "Kentucky legislators get paid for that sort of thing. Kentucky judges do not."⁹⁰ To him, the court lost sight of its assigned judicial role.⁹¹

IV. ANALYSIS

Although he was alone in his dissent, Judge Nelson was correct in his approach in *Harness*. He criticized the court's inquiry into the legislative history of the statute beyond the express, unambiguous language of the law.⁹² The clause "shall be treated the same" arguably mandates that disparate treatment of employees, whatever their temporary disability, is prohibited by the Kentucky statute. Further, the Kentucky statute provides "nothing in this section [of the statute] shall be interpreted to permit otherwise."⁹³ The intent of the Kentucky legislature is clear: to protect *all* individuals from sexual discrimination.

Nonetheless, the court of appeals held that legislative history mandates an opposite conclusion. In doing so, the court overstepped its boundaries and encroached upon the legislative function. The possible impact of this encroachment is two-fold. First, it casts doubt upon whether a legislature can ever confidently draft a statute. Surely a statute that provides expressly that "nothing shall be interpreted to permit otherwise" is clear in its meaning. Yet, the *Harness* court chose to overlook this express, unambiguous language. What more can a legislature do? The hands of the legislature are tied; they must only hope that courts respect the unambiguous statutory language which they have so painstakingly drafted.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1313-14.

92. See *supra* notes 71-91 and accompanying text.

93. KY. REV. STAT. ANN. § 344.030(6) (Michie 1983). For the text of the PDA, which is identical to section 344.030(6), see *supra* note 2.

Second, by circumventing the express language of the statute, the *Harness* court made possible discriminatory practices against employees suffering from non-pregnancy disabilities. Since it is conceivable that employers will buckle under societal pressure and provide preferential treatment for female employees,⁹⁴ it follows that courts and legislators will find themselves consumed in a vicious circle. That is, after attempting to achieve equality of opportunity for females by allowing preferential treatment, they may then find themselves discriminating against males. This constant circular remedying of disparate treatment could continue forever.

A similar controversy to the dispute in Kentucky could arise in Missouri. Section 213.055(1) of the Missouri Revised Statutes provides that an employer will be in violation of the section if he or she discriminates on the basis of sex against an employee with respect to employment privileges.⁹⁵ Additionally, Missouri has no statutory definition of the term "on the basis of sex" as did Kentucky.⁹⁶ Furthermore, section 213.101 states that the provisions "shall be construed to accomplish the purpose thereof."⁹⁷

Thus, with that statutory background, Missouri legislators may find themselves in the same position as did the Kentucky legislators. That is, a Missouri court could conceivably follow the *Guerra* and *Harness* logic and allow the preferential treatment of female employees, regardless of the express language of sections 213.055(1) and 213.101⁹⁸ mandating equal treatment. State legislatures, including Missouri, may find themselves not only helpless with regard to their courts' interpretations of their respective anti-discrimination statutes, but also confronted with results they may never have intended.⁹⁹

94. Employers may also be pressured to provide preferential treatment to avoid the possibility of a judicially-compelled affirmative action plan. Yet, although employers may be wary of the negative connotations of such an enactment, it may serve as a defense against a subsequent discrimination allegation. See 42 U.S.C. § 2000e-12(b) (1982).

95. MO. REV. STAT. § 213.055(1) (1986).

96. See *supra* note 52 and accompanying text.

97. MO. REV. STAT. § 213.101 (1986).

98. See *supra* notes 95-97 and accompanying text for an explanation of sections 213.101 and 213.055.

99. This apparently has caught the attention of some Missouri legislators. At the time of this writing, Senator Jay Nixon had proposed to the Missouri legislature a bill which would require that a three-month mandatory maternity leave be granted to female employees. This proposal, however, has been weakened by amendments. The current proposal is to simply adopt the language of the federal Pregnancy Disability Act, which requires no mandatory leave. S. 542, 85th Gen. Assembly, 2d Sess. (1990).

Not only will the decision in *Harness* have an impact on future statutory interpretation and drafting, it also will have a detrimental societal impact. While some may argue that this decision is a step forward for women in business, in reality this decision inures to no one's benefit. First, the court's interpretation in *Harness* simply perpetuates the myth that women need or desire special treatment. On the contrary, the women's movement has directed its efforts toward only equal treatment, not preferential treatment. As a result, this decision may cause resentment among the workforce: men who feel discriminated against for the lack of similar paternity benefits and the preferential treatment afforded to their female counterparts; females who are unable to take advantage of such preferential treatment because they choose to adopt or are otherwise unable to become pregnant; and females who simply resent the granting of preferential treatment. This resentment and conflict among an employee's workforce may have serious effects upon worker morale, productivity, and job turnover, all of which may lead to a detrimental economic impact on the employer's business.

Second, in approving preferential treatment for pregnant employees, *Harness* may lead legislatures to bow to societal pressure and expressly provide for preferential treatment in state statutes. This, too, could be devastating to employers. Employers may be less likely to hire females because they are forced to provide better health benefits than those benefits provided for males. Such practices, although motivated by economics rather than discriminatory intent, will still provide a cause of action for sex discrimination for females who are not hired. Furthermore, smaller companies with limited capital and resources may find themselves unable to compete against the larger corporations in the market because of such mandatory benefit laws. This would be true especially for those smaller companies who have offices or warehouses in more than one state, because attempts to comply with various statutes mandating lengthy leaves or special benefits may result in financial difficulties and a subsequent inability to continue operating. Thus, although the decision may have attempted to represent a good faith effort to remedy past discrimination of women, that effort is misplaced in that *Harness* results only in consequences that are adverse not only to men and employers, but to females as well.

In addition to Judge Nelson's criticism of the use of legislative history and the adverse societal impact of *Harness*, the approach in the dissent was correct in another regard. There is uncertainty and confusion surrounding both the PDA and similar state anti-discrimination pregnancy statutes. Although some argue that *Guerra* is too expansive, others argue that a facial requirement of absolute parity of

treatment is too restrictive.¹⁰⁰ Judge Nelson provides a middle ground approach that may satisfy both sides of the spectrum. It must be remembered that while *Guerra* allows preferential treatment for pregnant employees, it does not compel such disparate treatment.¹⁰¹ Judge Nelson argues that, given an unambiguous, facially-neutral statute, a court must remember its proper role in the judicial system and it must not abuse its powers by acting legislatively.¹⁰² The judiciary's responsibilities do not include changing the application of the statute because it behooves them to do so.¹⁰³ Judge Nelson does not urge the express prohibition of preferential treatment for pregnant employees. He simply emphasizes that the Kentucky legislators are the proper parties to make the decision of whether to allow such treatment.¹⁰⁴ Thus, the expansiveness of *Guerra* that incites apprehension in so many may be tempered by legislative action. This solution satisfies the two conflicting viewpoints; yet, it will be a viable solution only if the judiciary adheres to its proper function and respects the legislature. Until the courts do so, the confusion surrounding the PDA and the impact of *Harness* will persist.

IV. CONCLUSION

In 1978, the United States Supreme Court in *Guerra* held that the Pregnancy Discrimination Act does not preempt state laws which allow the preferential treatment of pregnant employees regarding disability benefits. The reaction to the decision was mixed, and the implications of the decision were unknown. One author noted that the decision would provide an opportunity for state legislatures to explicitly provide for preferential treatment.¹⁰⁵ If so, the effect would be to burden small businesses in their attempts to comply with statutes mandating such lengthy leaves.¹⁰⁶ One thing that remains, however, is the potential for a flood of state laws preferentially treating women.

In *Harness v. Hartz Mountain Corp.*, the Sixth Circuit Court of Appeals cited to *Guerra* in the first case to uphold a leave policy affording the preferential treatment of pregnant employees. It has taken two years for a court to cite *Guerra* for that distinct proposition

100. See Note, *State Laws Permitting Preferential Treatment of Pregnant Employees Are Valid Under the Pregnancy Discrimination Act*, 15 FLA. ST. U.L. REV. 549, 565 (1987).

101. See *supra* text accompanying notes 42-48.

102. *Harness*, 877 F.2d at 1313-14.

103. *Id.*

104. *Id.* at 1313.

105. Note, *supra* note 100, at 567.

106. *Id.*

and with this decision comes controversy. Although construed as an attempt to compensate women for past discrimination in the work place by improving employment opportunities through Title VII, *Harness* may have taken one step too far. Unfortunately, it has the effect of ratifying discriminatory practices against those in the work force who suffer from disabilities other than pregnancy. As Judge Nelson noted in his dissent, the Kentucky statute, which is identical to the PDA, mandates that "[w]omen . . . shall be treated the same for all employment-related purposes."¹⁰⁷ Yet, the Sixth Circuit Court of Appeals in *Harness* has circumvented the express language of the state law identical to the PDA and approved such favorable treatment. Thus, while the potential for favorable treatment of pregnant employees arose after *Guerra*, with the decision in *Harness* it seems as if the full impact of *Guerra* is just beginning to surface.

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107. *Harness*, 877 F.2d at 1310 (Nelson, J., dissenting).