COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GOVERNOR'S OFFICE

CAROLE B. ANDERSON, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative, Complainants	:	
vs.	:	DOCKET NO. E-6641
UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Respondent	:	

HISTORY OF THE CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW, COMMISSION'S DECISION AND FINAL ORDER

HISTORY OF THE CASE

On February 1, 1974, Carole B. Anderson filed a complaint with the Pennsylvania Human Relations Commission at Docket No. E-6641 alleging that the Upper Bucks County Area Vocational Technical School "refused to allow her to apply her accumulated sick leave to the total time she was required to be absent from her employment as a school teacher as a result of her pregnancy and that this refusal was based on the Complainant's sex, female". On January 30, 1975, the complaint was amended when the Pennsylvania State Education Association, Dale Moyer, Uni-Serv. Representative, joined Ms. Anderson as a Complainant alleging that "Respondent refused to allow Carole B. Anderson to utilize her accumulated sick leave during the period she was disabled and unable to work because of pregnancy." Complainants alleged that these actions violate Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq.

An investigation into the allegations contained in the complaint was made by representatives of the Commission and a determination was made that probable cause existed to credit the allegations of the complaint. Thereupon, the Commission

endeavored to eliminate the unlawful practices complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and a pre-hearing conference was held on May 9, 1975. Subsequent to this conference, Attorneys for Complainants and Respondent agreed, in lieu of a hearing on the merits of the complaint, to enter factual stipulations. These stipulations together with briefs by both parties were submitted to Hearing Panel Commissioners Alvin Echols, Jr., R.J. Smith and Benjamin Loewenstein. The Hearing Panel upon consideration of the stipulations and the briefs presented to it by both parties recommended that the Commission find in favor of the Complainants.

FINDINGS OF FACT

Attorneys for Complainants and Respondent stipulated that:

1. On February 1, 1974, Carole B. Anderson filed a complaint with the Pennsylvania Human Relations Commission in which she alleged that the Upper Bucks County Area Vocational Technical School "refused to allow her to apply her accumulated sick leave to the total time she was required to be absent from her employment as a school teacher as a result of her pregnancy and that this refusal is based on the Complainant's sex, female." (See Exhibit "A" attached hereto and made a part hereof.)

2. In early 1975, the complaint was amended to include the Pennsylvania State Education Association, the collective bargaining unit for Upper Bucks County Area Vocational Technical School, Dale Moyer, Uni-Serv. Representative, as an additional Complainant. The amended complaint contains the following allegation: "The Respondent refused to allow Carole B. Anderson to utilize her accumulated sick leave during the period she was disabled and unable to work because of pregnancy. Complainants allege that this refusal constitutes sex discrimination in the terms and the conditions of Carole B. Anderson's employment in violation of the Pennsylvania Human Relations Act." (See Exhibit "B" attached hereto and made a part hereof.)

3. The Upper Bucks County Technical School Joint Board and the Upper Bucks County Vocational Technical School Education Association executed, after negotiations, a collective bargaining agreement effective July 1, 1973, to June 30, 1975.

4. The collective bargaining agreement contains the following provisions regarding sick leave:

> Sick Leave. In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave shall be cumulative from year to year. No employe's salary shall be paid

if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties. Additional days may be approved by the School Board as the exigencies of the case may warrant.

All compensation required to be paid under these provisions shall be paid to the employe in the same manner and at the same time said employe would have received his salary if actually engaged in the performance of his duties.

5. The collective bargaining agreement contains the following provisions regarding maternity leave:

Maternity Leave. All female employes who become pregnant are entitled to a period of childbirth leave from their duties in the School District pursuant to the following provisos:

a. No employe shall be required to leave employment prior to childbirth unless she can no longer satisfactorily perform the duties of her position as determined by her Physician.

b. In the seeking of Maternity Leave, the employe shall submit written notification to her immediate Supervisor stating the anticipated duration of her leave. The notification shall be at least four (4) weeks in advance of the anticipated leave.

c. All employes have the right to return to the same position in the same classification held prior to childbirth leave if available. If the position is not available she shall be retained in an equivalent position.

d. All employes shall retain seniority and retirement rights which had accrued up to the time of the leave being granted.

e. All periods of childbirth leave shall be deemed leave without pay; during which period sick leave and/or other benefits will not accrue.

f. Upon return from childbirth leave, the employe's wages shall be set at the step appropriate for her years of teaching experience and/or service to the District on the then existing Salary Schedule. Any employe completing more than one- half year's service shall be entitled to an increment.

g. Return to employment must occur no later than the 2nd September after the leave was granted.

6. The collective bargaining agreement contains the following severability clause:

Severability.

> If any of this Agreement or any application of this Agreement to any employe or group of employes is held to be contrary to law, then such provisions or application shall be proper subjects for immediate negotiation or rewording until a comparable settlement is reached, if possible, but all other provisions or applications of this Agreement shall continue in full force and effect.

7. From March 12, 1970 to April 10, 1975, twelve employes of Respondent received sick leave pay while absent due to illness or accidental injury. A list of the aforesaid employes is attached hereto, made a part hereof and marked Exhibit "C".

8. As a result of her pregnancy, Complainant, Carole B. Anderson, a teacher at Upper Bucks County Area Vocational Technical School, requested that she be granted sick leave from December 17, 1973, to February 22, 1974.

9. Respondent denied Complainant's request pursuant to the maternity leave provisions of the collective bargaining agreement.

10. Complainant's physician, Jesus E. Omana, M.D., in his report dated May 20, 1975, stated that Complainant "was disabled from December 18, 1973, through February 2, 1974, due to intrauterine pregnancy".

11. Complainant's contract salary for the school year 1973-74 was $9,400 or $49.73 per day (based upon a 189-day school year).

12. The total number of school days Complainant missed due to her pregnancy was 27.

13. The total number of accumulated sick days at the time of Complainant's request for sick leave was 40 days.

14. Complainant's salary for 27 school days is $1,342.71.

15. There are presently a total of 43 professional employes employed by Respondent, of whom seven are females of childbearing age between the ages of 18 and 50 with an average salary of $11,595.71.

16. There are presently 23 non-professional employes employed by Respondent, of whom 12 are females of childbearing age between the ages of 18 and 50 with an average salary of $6,284, who receive the same benefits as the professional employes of Respondent.

17. Respondent will have to pay the resultant increase in sick leave benefits should pregnancy be included as an illness or accidental injury under the sick leave provisions of the collective bargaining agreement.

18. The Respondent presently maintains a Group Income Protection Plan coordinated with Respondent's Sick Leave policy. Under said Plan a disabled employe is paid $7 per school day for total disability resulting from an accident or sickness. Payments start on the first day of disability due to accident and the third day of disability due to sickness and continue until all accumulated Sick Leave has been used at which time an amount of $14 to $28 per school day, depending upon the number of sick days accumulated prior to disability, is paid to the employe following termination of Sick Leave paid by Respondent and continuing for as long as two calendar years for any one continuous period of accident or illness disability.

19. Under the aforesaid Group Income Protection Plan, no coverage is afforded for any loss caused by pregnancy, childbirth or miscarriage.

20. It is agreed that as the insurance company underwriting the Group Income Protection Plan is not a party to this action and as the said Plan does not cover loss caused by pregnancy, childbirth, etc., Respondent will not be liable to the Complainant for $7 per day under said Group Income Protection Plan, should a decision be rendered against Respondent.

21. In addition to the increased costs of sick leave benefits (i.e. payment of full salary), Respondent will be required to pay an additional premium of $139.26 per month or a total of

$1,671.12 per year in order to provide accident and sickness income benefits for Maternity Leave equivalent to that presently afforded for Sick Leave (See Exhibit "D" attached hereto and made a part hereof).

22. It is the policy of Respondent that a female employe on Maternity Leave retains the same seniority and retirement rights as those granted employes on Sick Leave (See Exhibit "E" attached hereto and made a part hereof).

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CAROLE B. ANDERSON (Complainant)	:	
vs. UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL	:	DOCKET NO. E-6641
(Respondent)	:	

C O M P L A I N T

[X] Employment [ ] Housing [ ] Public Accommodations [ ] Education ... Because of the [ ] Race, [ ] Color, [ ] Religious Creed, [ ] National Origin, [ ] Ancestry, [ ] Age, or [X] Sex, of the complainant.

1. The Complainant herein is CAROLE B. ANDERSON F 107 Quakertown West Apartments, Quakertown, Pennsylvania 18951

2. The Respondent herein is UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL Star Route, Perkasie, Penna. 18944

3. The Complainant alleges that the respondent has refused to allow her to apply her accumulated sick leave to the total time she was required to be absent from her employment as a school teacher as a result of her pregnancy and that this refusal is based on the complainant's Sex, Female.

EXHIBIT "A"

4. The Complainant alleges that the alleged unlawful discriminatory practice:

[xx] took place on or about December 13, 1973

[xx] is of a continuing nature which has persisted up to and including the present time.

5. No other action based on these allegations has been instituted by the Complainant in any Court or before any other Commission within the Commonwealth of Pennsylvania except as follows:

[xx] None

[ ] _____

6. Such action complained of is a violation of:

[xx] Section 5(a) of the Pennsylvania Human Relations Act (Act of October 27, 1955, P.L. 744, as amended by the Act of February 28, 1961, P.L. 47 and as further amended by the Act of July 9, 1969, P.L. 133).

[ ] Section _____ of the Pennsylvania Fair Educational Opportunities Act (Act of July 17, 1961, P.L. 776).

* * * * * * * * * * *

COMMONWEALTH OF PENNSYLVANIA :
SS
COUNTY OF PHILADELPHIA :

CAROLE B. ANDERSON, of full age, being duly sworn according to law deposes and says: that she is the Complainant herein; that she has read the foregoing complaint and knows the content thereof; that to the best of her knowledge, information and belief the facts alleged therein are true.

Carole B. Anderson
(Signature of Complainant)

Sworn to and subscribed :
before me this 1st day :
of Feb., 1974 :

Date: Feb. 1, 1974

Sonia M. Haliday
Notary Public
My Commission Expires

SONIA M. HALIDAY
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 11, 1977

HRC I

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 1 Pa. Code §33.32 (relating to service by a participant).

Dated at this 13th day of February, 1974.

[signature]
(Signature)

Of counsel for

____

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CAROLE B. ANDERSON
PENNSYLVANIA STATE EDUCATION ASSOCIATION
DALE MOYER, UNI SERV. REPRESENTATIVE

(Complainant)

vs.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL

(Respondent)

DOCKET NO. E-6641

AMENDED COMPLAINT

☒ Employment ☐ Housing ☐ Public Accommodations ☐ Education ... Because of the ☐ Race, ☐ Color, ☐ Religious Creed, ☐ National Origin, ☐ Ancestry, ☐ Age, or ☒ Sex, of the complainant.

1. The Complainants herein is CAROLE B. ANDERSON
823 Jefferson Avenue
Scranton, Pennsylvania 18510
PENNSYLVANIA STATE EDUCATION ASSOCIATION DALE MOYER, UNI SER. REPRESENTATIVE
106 West Butler Avenue New Britain, Pennsylvania 18901

2. The Respondent herein is UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL
Star Route, Perkasie, Pennsylvania 18944

3. The Complainants alleges that respondent refused to allow Carole B. Anderson to utilize her accumulated sick leave during the period she was disabled and unable to work because of pregnancy. Complainants allege that this refusal contitutes sex discrimination in the terms and the conditions of Carole B. Anderson's employment in violation of the Pennsylvania Human Relations Act.

EXHIBIT "B"

4. The Complainant alleges that the alleged unlawful discriminatory practice:

☒ took place on or about DECEMBER 18, 1973

☐ is of a continuing nature which has persisted up to and including the present time.

5. No other action based on these allegations has been instituted by the Complainant in any Court or before any other Commission within the Commonwealth of Pennsylvania except as follows:

☒ None

☐ _____

6. Such action complained of is a violation of:

☒ Section 5(a) of the Pennsylvania Human Relations Act (Act of October 27, 1955, P.L. 744, as amended by the Act of February 28, 1961, P.L. 47 and as further amended by the Act of July 9, 1969, P.L. 133).

☐ Section _____ of the Pennsylvania Fair Educational Opportunities Act (Act of July 17, 1961, P.L. 776).

* * * * * * * * * *

COMMONWEALTH OF PENNSYLVANIA :

SS

COUNTY OF Philadelphia :

CAROLE B. ANDERSON
DALE MOYER

_____, of full age, being duly sworn according to law deposes and says: that they are the complainants herein; that they have read the foregoing complaint and know the content thereof; that to the best of their knowledge, information and belief the facts alleged therein are true.

Dale Moyer 1-30-75
(Signature of Complainant)
Carole Anderson 2-21-75

Sworn to and subscribed :
before me this 30th day :
of January , 1975 :

Sonia M. Haliday
Notary Public
My Commission Expires:

SONIA M. HALIDAY
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 11, 1977

Date: _____

Sworn to and subscribed before me this 21 day of February 1975.

Robert F. Ryder
NOTARY PUBLIC
My Commission Expires [illegible], 1977
Scranton, Lackawanna Co., Pa.

EXHIBIT "C"

Employee	Position	Dates of Absence	Reason	Accumulated Sick Leave Prior To This Absence
Hilda B. Andrew	Instructor	3/12 to 3/23/70 -(8 days)	Auto Accident	17 days
Anna N. Bauman	Secretary	3/24/75 to unknown at present	Hysterectomy	80 days
Roseanne S. Clemens	Instructor	1/14 to 1/26, 1/31, 2/1/72 -(10 days)	Back Problem	10 days
Chester T. Derstine	Custodian	4/24 to 6/30/72 -(50 days)	Heart Attack	35 days
Edward T. Fehr	Custodian	1/8 to 4/6/75 -(65 days)	Back Operation	13 days
Gladys L. Fehr	Secretary	4/23 to 6/8/73 -(34 days)	Hysterectomy	70 days
		6/10 to 7/9/74 -(21 days)	Knee Operation	43 days
Gordon A. Grant	Instructor	12/1 to 12/4, 12/21 to 12/23/70, 1/4 to 1/25/71 -(23 days)	Gall Bladder	20 days
William A. Hampton	Instructor	8/27 to 9/7/74 -(9 days)	Appendicitis	30 days
William Houston	Custodian	4/1 to 4/11/74 -(9 days)	Hernia	56 days
Orville K. Meyer	Custodian	2/6 to 4/10/75 -(47 days)	Hand in Snow Blower	67 days
Vivian M. Preuss	Instructor	11/15 to 12/20/74 -(26 days)	Lump Removed	71-1/2 days
Camille J. Villiard	Instructor	3/12 to 4/13/73 -(25 days)	Back Operation	18 days

School employees receive their contract salary while absent for illness for the number of "sick days" accumulated. The board allows 10 sick days per year, to be accumulated.

The income protection policy pays $7 per day while the board coverage is in effect (after the 3rd day out). When board coverage expires, the income protection policy then pays on a sliding scale, based on the number of sick days that employee had accumulated prior to the illness. (See attached.)

Washington National
INSURANCE COMPANY
EVANSTON, ILLINOIS 60201
Founded 1911

SAMUEL F. HELLER - GROUP MANAGER
RICHARD E. COFF - STEVEN J. DERALEAU
1405 LOCUST STREET - SUITE 1607
PHILADELPHIA, PENNSYLVANIA 19102
545-4424

August 5, 1975

Mr. John Hart, Attorney
Power, Bowen & Valimont
64 North Main Street
Sellersville, Pennsylvania 18960

RE: UPPER BUCKS COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL
MATERNITY DISABILITY RATES

Dear Mr. Hart:

We have received a request to provide you with the monthly cost to include disability due to maternity in the provisions of the Group Disability Income Insurance program in force at the above school district.

Our Home Office underwriters have come up with a tentative rate of $139.26 per month to insure the 66 eligible employees of the district.

We must admit that we are in somewhat of an experimental area here, since it would be very difficult to determine just how long disability might last in various maternity cases. It is our understanding that if we are to include benefits due to maternity in the program, we would then be liable for benefits at the rate of $7.00 per day, 5 days per week, during the time the employee is using sick leave, and then our liability would increase to a scheduled benefit ranging from $14.00 per school day to $28.00 per school day. Then, upon the arrival of a vacation period, if the insured was still disabled, benefits would be again payable at $7.00 per day, 5 days per week. We could, theoretically, thus be liable for benefits during the entire length of time that the insured has sick leave accumulated plus two full additional years.

These rates would be subject to review upon acceptance of this benefit revision by the district, and our rates are, of course, periodically reviewed and studied.

We would appreciate your letting us know if we can be of further service to you.

Sincerely,

Samuel F. Heller
Group Manager

SFH/dlh
cc: J. A. Davis, Jr., CLU

EXHIBIT "D"

Serving:
Palisades
Pennridge
Quakertown

UPPER BUCKS COUNTY
AREA VOCATIONAL TECHNICAL SCHOOL

R.R. 2 - Box 207, Perkasie, Pennsylvania 18944 (215) 795-2911

October 9, 1975

Mr. John J. Hart
Power, Bowen & Valimont
64 N. Main St.
Sellersville, Pa. 18960

Dear Mr. Hart:

This is to reaffirm our previous position regarding provisions for female employees at the Upper Bucks County Area Vocational School concerning senority and retirement rights under the Collective Bargaining Agreement.

During the ten years existence of the Upper Bucks County Area Vocational Technical School, not a single female employee has ever been denied seniority or retirement rights due to maternity leave under the sick leave provisions of the Collective Bargaining Agreement.

If you require any further information, please do not hesitate to contact me.

Sincerely,

Joseph J. Vallone

Joseph J. Vallone
Director

JJV:amb

EXHIBIT "E"

EXHIBIT "E"

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainants, the Respondent and the subject matter of the complaint under the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq.

2. Pregnancy-related disability is a temporary disability which must be treated in the same manner as any other temporary disability. Since pregnancy-related disability is a disability common only to women, to treat it differently from other disabilities by extending inferior compensation, terms, conditions and privileges of employment constitute sex discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act.

3. Respondent Upper Bucks County Area Vocational Technical School's denial of Complainant Carole B. Anderson's use of her accumulated sick leave for pregnancy-related disability, thereby treating her differently from employes suffering from non-pregnancy-related disabilities constitutes a violation of Section 5(a) of the Pennsylvania Human Relations Act.

4. The provisions of Respondent Upper Bucks County Area Vocational Technical School's collective bargaining agreement which exclude sick leave benefits to employes on maternity leave violate Section 5(a) of the Pennsylvania Human Relations Act.

By providing for a separate and discriminatory policy for pregnancy related disability, the maternity leave provisions of the collective bargaining agreement is "contrary to law" and is therefore subject to the severability clause of the collective bargaining agreement.

5. Respondent Upper Bucks County Area Vocational Technical School's denial of Complainant Carole B. Anderson's use of her accumulated sick leave for pregnancy-related disability pursuant to the collective bargaining provisions violates Section 5(a) of the Pennsylvania Human Relations Act. Respondent is liable for its discriminatory actions, even when those actions are

incorporated into and follow a collective bargaining agreement.

6. Respondent Upper Bucks County Area Vocational Technical School is liable to Complainant Carole B. Anderson for $1,342.71 in back pay for the twenty-seven (27) days that Complainant missed due to her pregnancy-related disability for which Respondent did not allow Complainant to apply her accumulated sick days.

7. The Pennsylvania Human Relations Commission has the authority under Section 9 of the Pennsylvania Human Relations Act to order Respondent Upper Bucks County Area Vocational Technical School to compensate Complainant Carole B. Anderson for the wages she lost due to Respondent's unlawful discrimination in compensation, terms, conditions and privileges of employment, because of her sex, and to add simple interest at the rate of six (6) percent per year to the amount.

8. The issue of the Group Income Protection Plan is not a proper issue in this case for two reasons:

a. Complainant Carole B. Anderson never claimed benefits from this plan; and

b. The insurance company which provides the plan was never joined as a Respondent.

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this 28th day of March, 1976, upon consideration of the facts stipulated to by the Attorneys for Complainants and Respondent, the History of the Case, the briefs presented by both sides and the Findings of Fact and Conclusions of Law, the Hearing Commissioners recommend to the entire Commission that an Order be entered against the Respondent Upper Bucks County Area Vocational Technical School holding it in violation of Section 5(a) of the Pennsylvania Human Relations Act and providing for appropriate relief.

ALVIN ECHOLS, Jr., Esquire
Presiding Commissioner

Robert Johnson Smith
Hearing Commissioner

Benjamin S. Loewenstein, Esquire
Commissioner

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GOVERNOR'S OFFICE

CAROLE B. ANDERSON, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative, Complainants	:	
vs.	:	DOCKET NO. E-6641
UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Respondent	:	

COMMISSION'S DECISION

AND NOW, this 28th day of March, 1976, upon consideration of the facts stipulated to by the Attorneys for Complainants and Respondent, the History of the Case, the briefs presented by both sides and the Findings of Fact and Conclusions of Law, the Pennsylvania Human Relations Commission finds and determines that Respondent Upper Bucks County Area Vocational Technical School engaged in an unlawful discriminatory practice in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, in that Respondent Upper Bucks County Area Vocational Technical School discriminated on the basis of sex by denying Complainant use of her accumulated sick leave for the days she was required to be absent from work because of her pregnancy-related disability.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

Elizabeth M. Scott,
Secretary

By: Joseph X. Yaffe
Chairperson

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GOVERNOR'S OFFICE

CAROLE B. ANDERSON, AND PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative, Complainants	:	
vs.	:	DOCKET NO. E-6641
UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Respondent	:	

FINAL ORDER

AND NOW, this 28th day of March, 1976, upon consideration of the facts stipulated to by the Attorneys for Complainants and Respondent, the History of the Case, the briefs presented by both sides, the Findings of Fact and Conclusions of Law and the Commission's Decision and pursuant to Section 9 of the Pennsylvania Human Relations Act, as amended, the Pennsylvania Human Relations Commission hereby

O R D E R S:

1. Respondent Upper Bucks County Area Vocational Technical School shall cease and desist from discriminating on the basis of sex by treating pregnancy-related disability differently from other temporary disabilities and extending inferior compensation, terms, conditions and privileges of employment to women with a pregnancy-related disability.

2. Respondent Upper Bucks County Area Vocational Technical School shall pay Complainant, Carole B. Anderson, $1,342.71, the sum representing the pay lost by her because of Respondent's refusal to allow her to use her accumulated sick leave for the twenty-seven (27) days that she was required to be absent from work because of her pregnancy-related disability, plus simple interest at the rate of six (6) percent per year.

3. Respondent Upper Bucks County Area Vocational Technical School shall, within thirty (30) days of the date of this Order, submit to the Pennsylvania Human Relations Commission notice and proof that the actions required by this Order have been performed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

Elizabeth M. Scott,
Secretary

By: Joseph X. Yaffe
Chairperson

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 727 C.D. 1976

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATIONAL ASSOCIATION, DALE MOYER, UNI-SERV. REPRESENTATIVE,
Appellee

v.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL,
Appellant

BRIEF FOR APPELLEE

Appeal from Final Order of the Pennsylvania Human Relations Commission at Docket No. E-6641

ANNE FARRER
Assistant General Counsel
SANFORD KAHN
General Counsel
Attorneys for Appellee

711 State Office Building
1400 Spring Garden Street
Philadelphia, Pennsylvania 19130
(215) 238-7205

INDEX TO BRIEF

Page

Counter-Statement of the Questions Involved..... 1

Counter-History of the Case..... 2

Argument:

1. Appellant violated Section 5(a) of the Pennsylvania Human Relations Act by denying Carole B. Anderson use of her accumulated sick leave for absence from work caused by pregnancy-related disability.

   a. The exclusion of only pregnancy-related disabilities from the coverage of a sick leave policy constitutes sex discrimination with respect to terms, conditions or privileges of employment in violation of Section 5(a) of the Pennsylvania Human Relations Act..... 5

   b. Cost is not a defense to a finding of sex discrimination in violation of the Pennsylvania Human Relations Act.....10

2. The Commission's order may be sustained under the scope of judicial review applied to decisions rendered by administrative agencies.

   a. The Commission's order does not require the revision of Appellant's group income protection plan.....14

   b. By declining to assert jurisdiction over Appellant's group income protection plan, the Commission has not offended the standards it must meet to have its order upheld on review.....15

Conclusion.....17

TABLE OF CITATIONS

CASES:

Page

Black v. School Committee of Malden, 8 EPD 9659 (Mass. Sup.Jud.Ct. 1975), rev'd on other grounds, 341 N.E.2d 896 (Mass. Sup.Jud.Ct. 1976).....8

Board of Education, City of New York v. State Division of Human Rights, 42 A.D.2d 854, 346 N.Y.S.2d 843, _____ A.2d _____ (1973), aff'd, 35 N.Y.2d 675, _____ N.Y.S.2d _____, _____ A.2d _____ (1974).....8

Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973).....9

Communications Workers of America v. American Telephone and Telegraph Co., Long Lines Department, 513 F.2d 1024 (2d Cir. 1975).....8

Dessenberg v. American Metal Forming Company, 8 EPD 9575 (N.D. Ohio 1973).....8

Farkas v. Southwestern City School District, 506 F.2d 1400 (6th Cir. 1974).....8

Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Cmwlth Ct. 400, 335 A.2d 873 (1975).....10

Geduldig v. Aiello, 417 U.S. 484 (1974).....11, 12

General Electric Corporation v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, _____ Cmwlth Ct. _____, 344 A.2d 817 (1975).....15

Gilbert v. General Electric Company, 519 F.2d 661 (4th Cir. 1975), cert. granted, 96 S.Ct. 36 (1975).....8

Griggs v. Duke Power Company, 401 U.S. 424 (1971).....11

Head v. Timken Rolling Co., 486 F.2d 870 (6th Cir. 1973).....11

Holthaus v. Compton & Sons, Inc., 514 F.2d 681 (8th Cir. 1975).....8

Hutchinson v. Lake Oswego School District, 519 F.2d 961 (9th Cir. 1975).....8

Leechburg Area School District v. Pennsylvania Human Relations Commission, 19 Pa. Cmwlth Ct. 639, 339 A.2d 850 (1975).....10

Lillo v. Plymouth Board of Education, 8 EPD 9510 (N.D. Ohio 1973).....8

Liss v. School District of Ladue, 396 F.Supp. 1035 (E.D. Mo. 1975).....8

Oakland Federation of Teachers v. Oakland Unified School District, 10 EPD 10,322 (N.D. Cal. 1975).....8

Polston v. Metropolitan Life Insurance Company, 11 EPD 10,826 (W.D. Ky. 1975).....8

Sale v. Waverly-Shell Rock Board of Education, 390 F.Supp. 784 (D. Ia. 1975).....8

Satty v. Nashville Gas Company, 522 F.2d 850 (6th Cir. 1975).....8

Seaman v. Spring Lake Park Independent School District, 387 F.Supp. 1168 (D. Minn. 1974)...11, 12

Unemployment Compensation Board of Review of the Commonwealth of Pennsylvania v. Perry, _____ Pa. Cmwlth Ct. _____, 349 A.2d 531 (1975).....10

Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 675, _____ N.Y.S.2d _____, _____ A.2d _____ (1974).....8, 12

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).....11

Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974).....8

Wetzel v. Liberty Mutual Insurance Company, 511 F.2d 199, 206 (3rd Cir. 1975), cert. granted, 421 U.S. 987, dismissed on other grounds, 44 U.S.L.W. 4350 (March 23, 1976).....7, 8, 11

Wisconsin Telephone Company v. Department of Industry and Human Relations, 68 Wis.2d 345, 228 N.W.2d 649 (1975).....8

Zichy v. City of Philadelphia, 312 F.Supp. 338 (E.D. Pa. 1975).....8

STATUTES:

Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq.....11

Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955 et seq.....2, 5, 9

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Did Appellant violate Section 5(a) of the Pennsylvania Human Relations Act by denying Carole B. Anderson the use of her accumulated sick leave for absence from work caused by pregnancy-related disability?

   a. Does the exclusion of only pregnancy-related disabilities from the coverage of a sick leave policy constitute sex discrimination with respect to terms, conditions or privileges of employment in violation of Section 5(a) of the Pennsylvania Human Relations Act?

   b. Is cost a defense to a finding that an unlawful discriminatory practice has occurred in violation of the Pennsylvania Human Relations Act?

2. May the Commission's order be sustained under the scope of judicial review applied to decisions rendered by administrative agencies?

   a. Does the Commission's order require the revision of Appellant's group income protection plan?

   b. By declining to assert jurisdiction over Appellant's group income protection plan, did the Commission offend the standards it must meet in order to have its order upheld on appeal?

COUNTER-HISTORY OF THE CASE

On February 1, 1974, Carole B. Anderson properly filed a complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Docket No. E-6641 alleging that the Upper Bucks County Area Vocational Technical School (hereinafter "Appellant") had "refused to allow her to apply her accumulated sick leave to the total time she was required to be absent from her employment as a school teacher as a result of her pregnancy and that this refusal was based on the Complainant's sex, female." On January 30, 1975, the complaint was amended when the Pennsylvania State Education Association, Dale Moyer, Uni-Serv. Representative, joined Ms. Anderson as a Complainant in alleging that Upper Bucks County Area Vocational Technical School had "refused to allow Carole B. Anderson to utilize her accumulated sick leave during the period she was disabled and unable to work because of pregnancy. Complainants allege that this refusal constitutes sex discrimination in the terms and the conditions of Carole B. Anderson's employment in violation of the Pennsylvania Human Relations Act." Carole B. Anderson and the Pennsylvania State Education Association, Dale Moyer, Uni-Serv. Representative, alleged that the action of Upper Bucks County Area Vocational Technical School violated Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955(a).

An investigation into the allegations of the complaint was made by staff of the Commission and a determination was made that probable cause existed to credit the allegations of the complaint. Thereupon, Commission staff endeavored to eliminate the unlawful practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and a prehearing conference was held on May 9, 1975. As a result of this conference, counsel agreed, in lieu of a full hearing before three members of the Commission, to enter factual stipulations.

Upon consideration of the stipulations and briefs submitted by counsel, the Commission found, inter alia, that at the time she requested use of sick leave for absence from work due to pregnancy-related disability, Carole B. Anderson had accumulated forty (40) days of sick leave; Ms. Anderson missed twenty-seven (27) days of work because of pregnancy-related disability; and Appellant denied Ms. Anderson's request to apply twenty-seven (27) of her forty accumulated days of sick leave to her absence caused by pregnancy-related disability. The Commission found that Appellant based its denial of Ms. Anderson's request on the provision of the collective bargaining agreement then in effect which stated, "All periods of childbirth leave shall be deemed leave without pay."

Based on these findings, the Commission concluded, as a matter of law, that exclusion of pregnancy-related disabilities from Appellant's sick leave policy constituted sex discrimination with respect to terms, conditions or privileges of employment in

violation of Section 5(a) of the Pennsylvania Human Relations Act. The Commission further concluded that the issue of Appellant's group income protection plan was not properly before it because (1) in neither of her complaints had Ms. Anderson claimed benefits from this plan and (2) the insurance company which provides this plan was never joined in proceedings before the Commission.

Thereupon, the Commission entered an order requiring that Appellant cease and desist from discriminating on the basis of sex by treating pregnancy-related disability differently from other temporary disabilities and extending inferior compensation, terms, conditions and privileges of employment to women disabled by pregnancy. The Commission further ordered Appellant to pay Carole B. Anderson $1,342.71, "the sum representing the pay lost by her because of (Appellant's) refusal to allow her to use her accumulated sick leave for the twenty-seven (27) days that she was required to be absent from work because of her pregnancy-related disability, plus simple interest at the rate of six (6) percent per year."

From this final order of the Commission, Upper Bucks County Area Vocational Technical School has appealed.

ARGUMENT

1. APPELLANT VIOLATED SECTION 5(a) OF THE PENNSYLVANIA HUMAN RELATIONS ACT BY DENYING CAROLE B. ANDERSON USE OF HER ACCUMULATED SICK LEAVE FOR ABSENCE FROM WORK CAUSED BY PREGNANCY-RELATED DISABILITY.

   a. The exclusion of only pregnancy-related disabilities from the coverage of a sick leave policy constitutes sex discrimination with respect to terms, conditions or privileges of employment in violation of Section 5(a) of the Pennsylvania Human Relations Act.

Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955(a) provides:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
>
> (a) For any employer because of the... sex...of any individual...to...discriminate against such individual with respect to the compensation, hire, tenure, terms or privileges of employment....

Appellant's denial of Carole B. Anderson's request to use her accumulated sick leave for absence from work caused by pregnancy-related disability clearly violated Section 5(a) of the Pennsylvania Human Relations Act.

The policy which Appellant invoked in denying Ms. Anderson's request was incorporated into a collective bargaining agreement executed by the Upper Bucks County Area Vocational

Technical School and the Pennsylvania State Education Association.[1] This agreement, in effect from July 1, 1973, to June 30, 1975, contained the following policy regarding sick leave:

> Sick Leave. In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave shall be cumulative from year to year. No employe's salary shall be paid if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties. Additional days may be approved by the School Board as the exigencies of the case may warrant.
>
> All compensation required to be paid under these provisions shall be paid to the employe in the same manner and at the same time said employe would have received his salary if actually engaged in the performance of his duties.

The only disabling medical condition expressed excepted from this sick leave policy was incapacity caused by pregnancy. Section (e) of the maternity leave provision stated:

> All periods of childbirth leave shall be deemed leave without pay, during which period sick leave and/or other benefits will not accrue.

Clearly, the purpose of Appellant's sick leave policy is to assure a continuing income for employes unable to work

---

[1]By joining Carole B. Anderson as a complainant, the Pennsylvania State Education Association has taken the position that the maintenance of a separate and discriminatory policy for pregnancy-related disability is contrary to law and is therefore subject to the severability clause of the collective bargaining agreement.

because of a physical condition. In this respect, a woman whose incapacity is caused by pregnancy is no different from a male who is physically prevented from working by a hernia.[2] As the Third Circuit Court of Appeals has persuasively stated:

> Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination.... Employers offer (sick leave plans) to their employes to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home. Wetzel v. Liberty Mutual Insurance Co., supra, at 206.

Courts and fair employment practice agencies have required employers to treat temporary disabilities which accompany pregnancy in the same manner as any other incapacitating physical condition. Authority, federal and state, is overwhelming in holding that denial of sick leave or other

---

[2]Appellant's assertion that "pregnancy is now virtually a planned event throughout the United States" and therefore entirely voluntary is simply incorrect. As the Third Circuit Court of Appeals noted in Wetzel v. Liberty Mutual Insurance Company:

> ...pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception, short of surgery, and for health reasons many women cannot use the pill. 511 F.2d 199, 206 (3rd Cir. 1975), cert. granted, 421 U.S. 987, dismissed on other grounds, 44 U.S.L.W. 4350 (March 23, 1976).

Moreover, it should be noted that disability resulting from pregnancy is no more voluntary than lung cancer suffered by cigarette smokers.

benefits for absence from work caused by pregnancy-related disability discriminates against women and denied them equal terms, conditions and benefits of employment.[3]

Pennsylvania law requires that pregnancy-related disability be treated as any other physically disabling condition. In

---

[3] Wetzel v. Liberty Mutual Insurance Co., supra; Gilbert v. General Electric Company, 519 F.2d 661 (4th Cir. 1975), cert. granted, 96 S.Ct. 36 (1975); Communications Workers of America v. American Telephone & Telegraph Co., Long Lines Department, 513 F.2d 1024 (2d Cir. 1975); Hutchinson v. Lake Oswego School District, 519 F.2d 961 (1975); Holthaus v. Compton & Sons, Inc., 514 F.2d 681 (8th Cir. 1975); Satty v. Nashville Gas Company, 522 F.2d 850 (6th Cir. 1975); Farkas v. South Western City School District, 506 F.2d 1400 (6th Cir. 1974); Zichy v. City of Philadelphia, 393 F.Supp. 338 (E.D. Pa. 1975); Oakland Federation of Teachers v. Oakland Unified School District, 10 EPD 10,322 (N.D. Cal. 1975); Sale v. Waverly-Shell Rock Board of Education, 390 F.Supp. 784 (D.C. Iowa 1975); Polston v. Metropolitan Life Insurance Company, 11 EPD 10,826 (W.D. Ky. 1975); Liss v. School District of Ladue, 396 F.Supp. 1035 (E.D. Mo. 1975); Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974); Lillo v. Plymouth Board of Education, 8 EPD 9510 (N.D. Ohio 1973); Dessenberg v. American Metal Forming Company, 8 EPD 9575 (N.D. Ohio 1973).

On the state level, the New York State Division on Human Rights has been particularly active in vindicating the rights of pregnant employes. See, e.g., Board of Education, City of New York v. State Division of Human Rights in which the Appellate Division held:

> We are of the opinion that the determination that petitioner is guilty of discriminatory practices in its maternity leave policies has been established and that a pregnant teacher who goes on maternity leave should be permitted to use sick leave and sabbatical leave to the same extent as other teachers suffering from a temporary disability for the duration of such disability.

42 A.D.2d 854, 346 N.Y.S.2d 843, _____ A.2d _____ (1973), aff'd, 35 N.Y.2d 675, _____ N.Y.S.2d _____, _____ A.2d _____ (1974); Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, _____ N.Y.S.2d _____, _____ A.2d _____ (1974). See also, Wisconsin Telephone Company v. Department of Industry and Human Relations, 68 Wis.2d 345, 228 N.W.2d 649 (Wis.S.Ct. 1975); Black v. School Committee of Malden, 8 EPD 9659 (Mass. Sup.Jud.Ct. 1975), rev'd on other grounds, 341 N.E.2d 896 (Mass. Sup.Jud.Ct. 1976).

Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973), the Pennsylvania Supreme Court held that discharge because of pregnancy constituted sex discrimination in violation of the Pennsylvania Human Relations Act and stated:

> ...Ms. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the quality of her services as a teacher was or would be affected as a result of the pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. Id. at 280.

After the decision in Cerra, the Attorney General issued Opinion No. 9, 1974, concerning several provisions of the Unemployment Compensation Law which governed pregnant employes. Applying the holding and rationale of Cerra the Attorney General declared that, since it is illegal under the Human Relations Act for an employer to treat pregnant employes differently from employes otherwise temporarily disabled, the Human Relations Act impliedly repeals those sections of the Unemployment Compensation Law allowing differential treatment for pregnancy-related disability. Henceforth,

> ...a pregnant woman should be treated exactly the same as any other member of the work force. When she is physically able to work, she should be considered 'able and available,' and when she is not, she should be treated the same as

any other ill or disabled person. Office of the Attorney General, Opinion No. 9, Pennsylvania Bulletin, Vol. 4, No. 8, February 23, 1974.

Subsequent to Attorney General Opinion No. 9, the General Assembly eliminated and revised sections of the Unemployment Compensation Law applicable to pregnant employes, thereby adopting the Cerra rationale.

In two recent cases this Court has held that "pregnant women may not be treated differently from any other employee suffering under a physical disability." Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Cmwlth Ct. 400, 335 A.2d 873, 877 (1975), Leechburg Area School District v. Pennsylvania Human Relations Commission, 19 Pa. Cmwlth Ct. 639, 339 A.2d 850 (1975). See also, Unemployment Compensation Board of Review of the Commonwealth of Pennsylvania v. Perry, _____ Cmwlth Ct. _____, 349 A.2d 531 (1975).

The rationale of Cerra, Freeport, Leechburg and Perry clearly prohibits Appellant's denial of Carole B. Anderson's request to use her accumulated sick leave for absence from work caused by pregnancy.

b. Cost is not a defense to a finding of sex discrimination in violation of the Pennsylvania Human Relations Act.

Appellant raises cost as a defense for its discriminatory sick leave policy. Yet, Appellant points to no provision of the Pennsylvania Human Relations Act which allows such a defense and the cases cited in Appellant's brief do not support this contention.

The legislature specified the defenses available to a party charged with discrimination, e.g., if the employment practice is based upon a bona fide occupational qualification or a security regulation of state or federal government. Nowhere in the Act is a cost defense provided.[4]

The federal cases which Appellant cites do not support its defense of cost. Although Appellant invokes Wetzel v. Liberty Mutual Insurance Company, surpa, the Third Circuit Court of Appeals in that case flatly held that "cost is no defense under Title VII to this particular issue." 511 F.2d at 206. The majority of court decisions have agreed with the Wetzel court and have explicitly or implicitly held that cost is no defense to a differential treatment of pregnancy-related disabilities under an employer's benefit plan.[5]

Seaman v. Spring Lake Park Independent School District, 387 F.Supp. 1168 (D. Minn. 1974) and Geduldig v. Aiello, 417 U.S. 484 (1974) are irrelevant and inapplicable to the instant

---

[4]This parallels case law under Title VII of the Civil Rights Act of 1964. The only statutory defense to a charge of sex discrimination under Title VII is the bona fide occupational qualification set forth in 42 U.S.C. 20000e-2(e). Cost is not a defense to an overt act of discrimination but may be raised as a defense only where the alleged discrimination arises from an employment practice which is neutral on its face. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Head v. Timken Rolling Co., 486 F.2d 870 (6th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971). Appellant, by treating Carole B. Anderson's pregnancy-related disability differently from other disabilities, has engaged in "sex discrimination pure and simple," Cerra, supra, an overt action to which cost is not a defense.

[5]See cases cited in footnote 3, supra.

case. Plaintiffs Seaman and Aiello contended that treating pregnancy-related disabilities differently from other disabilities constituted discrimination based on sex in violation of the equal protection clause of the United States Constitution. Complainants Anderson and the Pennsylvania State Education Association raise no constitutional challenges but allege a violation of the Pennsylvania Human Relations Act.

The standards applied in equal protection cases are less strict than those applied under fair employment practices statutes, such as the Pennsylvania Human Relations Act. The New York State Court of Appeals clearly set forth this distinction in deciding that pregnancy-related disabilities must be treated as any other disabilities under a school district's sick leave plan:

> New York (has) adopted a statute expressly forbidding discrimination based on sex, a classification which while not foreclosed by constitutional prohibition could be proscribed by legislative enactment. The question we (face) then (is) whether the personnel policies and practices in the cases before us (transgress) our statutory proscription. That they might not be constitutionally forbidden (is) irrelevant.... In sum, what the constitution does not forbid may nonetheless be proscribed by statute. Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, _____ N.Y.S.2d _____, _____ A.2d _____ (1974).

The standard utilized by the Geduldig and Seaman Courts was the lax rational relationship test often applied to sex discrimination complaints brought under the equal protection clause. Clearly, the Court should be guided by decisions of

the New York Courts, decided under a fair employment statute similar to the Pennsylvania Human Relations Act. Federal constitutional cases, such as Geduldig and Seaman, are of no precedential value to this proceeding.

2. THE COMMISSION'S ORDER MAY BE SUSTAINED UNDER THE SCOPE OF JUDICIAL REVIEW APPLIED TO DECISIONS RENDERED BY ADMINISTRATIVE AGENCIES.

a. The Commission's order does not require the revision of Appellant's group income protection plan.

Any order entered by the Commission must be read within the context of the findings of fact and conclusions of law upon which it is based. Read in conjunction with the conclusions of law upon which it is based, the Commission's final order in this matter cannot be construed to require the revision of Appellant's group income protection plan.

In paragraph one of its conclusions of law, the Commission states that it may exert jurisdiction only over "the Complainants, the Respondent and the subject matter of the complaint under the Pennsylvania Human Relations Act...." The Commission concludes that it may not decide issues not presented in the subject matter of the complaint before it. This conclusion virtually mandates the result reached in paragraph eight, i.e., that the issue of Appellant's income protection plan was not properly before it because (1) in neither of her complaints filed with the Commission had Ms. Anderson claimed benefits from this plan and (2) the insurance company which provides this plan to Appellant was never joined in the proceedings before the Commission.

Paragraphs one and eight are consistent with paragraph six where the Commission found Appellant liable only for payment of twenty-seven (27) sick days to Carole B. Anderson.

The Commission's final order corresponds to the Commission's conclusions of law in that payment is awarded for the twenty-seven (27) sick days but payment of benefits from the income protection plan is not required.

The Commission concluded that the issue of Appellant's group income protection plan was not properly filed before it. Therefore, the Commission's final order cannot be construed as requiring revision of the income protection plan, over which the Commission did not assert jurisdiction.

b. By declining to assert jurisdiction over Appellant's group income protection plan, the Commission has not offended the standards it must meet to have its order upheld on review.

This Court has summarized the scope of review it applies to orders entered by the Commission:

> Our scope of review in these cases is limited and the Commission will be sustained unless its adjudication is based upon facts or conclusions not supported by evidence or unless it has committed a clear abuse of discretion, violated the constitutional rights of the parties, exceeded its power or based its conclusions upon an erroneous interpretation of the law. General Electric Corporation v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, _____ Cmwlth Ct. _____, 344 A.2d 817 (1975).

The Commission's order entered against Appellant meets each of the criteria set forth by this Court.

The order entered by the Commission requiring both monetary relief for Carole B. Anderson and revision of Appellant's sick leave policy is supported by substantial evidence. The

only disabilities specifically exempted from Appellant's sick leave policy were those caused by pregnancy. Stipulations presented to the Commission established that Carole B. Anderson was certified by her doctor as disabled by pregnancy and that the actual period of time she could not work because of this disability was twenty-seven (working) days.[6]

By entering the order here in issue, the Commission did not abuse its discretion, violate the constitutional rights of the parties or exceed its authority.[7] Indeed, the Commission has limited, rather than expanded, the scope of its order by concluding that failure to join a party and failure to claim a particular benefit precluded its review of Appellant's group income protection plan. By declining to assert jurisdiction over Appellant's group income protection plan, the Commission has not offended the standard it must meet to have its order upheld on review.

---

[6]Since Appellant did not raise before the Commission the issue of whether its group income protection plan is a bona fide group or employe insurance plan, no evidence was presented on this issue. Such evidence would be unnecessary since the Commission declined, on other grounds, to review the operation of Appellant's group income protection plan.

[7]Appellant contends that the Commission abused its discretion in the manner it dealt with the group income protection plan. The basis for Appellant's contention is not clear since the Commission's order does not require Appellant to pay increased insurance premiums or otherwise modify the plan.

CONCLUSION

Appellant violated Section 5(a) of the Pennsylvania Human Relations Act by denying Carole B. Anderson the use of her accumulated sick leave for absence from work caused by pregnancy-related disability. The Commission's order requiring payment of sick leave to Carole B. Anderson and modification of Appellant's sick leave policy is sustainable under the scope of judicial review applied to decisions rendered by administrative agencies.

Accordingly, the appeal of Upper Bucks County Area Vocational Technical School should be dismissed and the order of the Commission should be affirmed.

Respectfully submitted,

ANNE FARRER
Assistant General Counsel
Pa. Human Relations Commission
711 State Office Building
1400 Spring Garden Street
Philadelphia, Pennsylvania 19130
(215) 238-7205

SANFORD KAHN
General Counsel
Pa. Human Relations Commission
100 North Cameron Street
Second Floor
Harrisburg, Pennsylvania 17101
(717) 787-4416

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 727 C.D. 1976

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATIONAL ASSOCIATION, DALE MOYER, UNI-SERV. REPRESENTATIVE,

Appellee

v.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL,

Appellant

BRIEF FOR APPELLEE

Appeal from Final Order of the Pennsylvania Human Relations Commission at Docket No. E-6641

ANNE FARRER
Assistant General Counsel
SANFORD KAHN
General Counsel
Attorneys for Appellee

711 State Office Building
1400 Spring Garden Street
Philadelphia, Pennsylvania 19130
(215) 238-7205

INDEX TO BRIEF

Page

Counter-Statement of the Questions Involved..... 1

Counter-History of the Case..... 2

Argument:

1. Appellant violated Section 5(a) of the Pennsylvania Human Relations Act by denying Carole B. Anderson use of her accumulated sick leave for absence from work caused by pregnancy-related disability.

   a. The exclusion of only pregnancy-related disabilities from the coverage of a sick leave policy constitutes sex discrimination with respect to terms, conditions or privileges of employment in violation of Section 5(a) of the Pennsylvania Human Relations Act..... 5

   b. Cost is not a defense to a finding of sex discrimination in violation of the Pennsylvania Human Relations Act.....10

2. The Commission's order may be sustained under the scope of judicial review applied to decisions rendered by administrative agencies.

   a. The Commission's order does not require the revision of Appellant's group income protection plan.....14

   b. By declining to assert jurisdiction over Appellant's group income protection plan, the Commission has not offended the standards it must meet to have its order upheld on review.....15

Conclusion.....17

TABLE OF CITATIONS

CASES:

Page

Black v. School Committee of Malden, 8 EPD 9659 (Mass. Sup.Jud.Ct. 1975), rev'd on other grounds, 341 N.E.2d 896 (Mass. Sup.Jud.Ct. 1976).....8

Board of Education, City of New York v. State Division of Human Rights, 42 A.D.2d 854, 346 N.Y.S.2d 843, _____ A.2d _____ (1973), aff'd, 35 N.Y.2d 675, _____ N.Y.S.2d _____, _____ A.2d _____ (1974).....8

Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973).....9

Communications Workers of America v. American Telephone and Telegraph Co., Long Lines Department, 513 F.2d 1024 (2d Cir. 1975).....8

Dessenberg v. American Metal Forming Company, 8 EPD 9575 (N.D. Ohio 1973).....8

Farkas v. Southwestern City School District, 506 F.2d 1400 (6th Cir. 1974).....8

Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Cmwlth Ct. 400, 335 A.2d 873 (1975).....10

Geduldig v. Aiello, 417 U.S. 484 (1974).....11, 12

General Electric Corporation v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, _____ Cmwlth Ct. _____, 344 A.2d 817 (1975).....15

Gilbert v. General Electric Company, 519 F.2d 661 (4th Cir. 1975), cert. granted, 96 S.Ct. 36 (1975).....8

Griggs v. Duke Power Company, 401 U.S. 424 (1971).....11

Head v. Timken Rolling Co., 486 F.2d 870 (6th Cir. 1973).....11

Holthaus v. Compton & Sons, Inc., 514 F.2d 681 (8th Cir. 1975).....8

Hutchinson v. Lake Oswego School District, 519 F.2d 961 (9th Cir. 1975).....8

Leechburg Area School District v. Pennsylvania Human Relations Commission, 19 Pa. Cmwlth Ct. 639, 339 A.2d 850 (1975).....10

Lillo v. Plymouth Board of Education, 8 EPD 9510 (N.D. Ohio 1973).....8

Liss v. School District of Ladue, 396 F.Supp. 1035 (E.D. Mo. 1975).....8

Oakland Federation of Teachers v. Oakland Unified School District, 10 EPD 10,322 (N.D. Cal. 1975).....8

Polston v. Metropolitan Life Insurance Company, 11 EPD 10,826 (W.D. Ky. 1975).....8

Sale v. Waverly-Shell Rock Board of Education, 390 F.Supp. 784 (D. Ia. 1975).....8

Satty v. Nashville Gas Company, 522 F.2d 850 (6th Cir. 1975).....8

Seaman v. Spring Lake Park Independent School District, 387 F.Supp. 1168 (D. Minn. 1974)...11, 12

Unemployment Compensation Board of Review of the Commonwealth of Pennsylvania v. Perry, _____ Pa. Cmwlth Ct. _____, 349 A.2d 531 (1975).....10

Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 675, _____ N.Y.S.2d _____, _____ A.2d _____ (1974).....8, 12

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).....11

Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974).....8

Wetzel v. Liberty Mutual Insurance Company, 511 F.2d 199, 206 (3rd Cir. 1975), cert. granted, 421 U.S. 987, dismissed on other grounds, 44 U.S.L.W. 4350 (March 23, 1976).....7, 8, 11

Wisconsin Telephone Company v. Department of Industry and Human Relations, 68 Wis.2d 345, 228 N.W.2d 649 (1975).....8

Zichy v. City of Philadelphia, 312 F.Supp. 338 (E.D. Pa. 1975).....8

STATUTES:

Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq.....11

Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955 et seq.....2, 5, 9

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Did Appellant violate Section 5(a) of the Pennsylvania Human Relations Act by denying Carole B. Anderson the use of her accumulated sick leave for absence from work caused by pregnancy-related disability?

   a. Does the exclusion of only pregnancy-related disabilities from the coverage of a sick leave policy constitute sex discrimination with respect to terms, conditions or privileges of employment in violation of Section 5(a) of the Pennsylvania Human Relations Act?

   b. Is cost a defense to a finding that an unlawful discriminatory practice has occurred in violation of the Pennsylvania Human Relations Act?

2. May the Commission's order be sustained under the scope of judicial review applied to decisions rendered by administrative agencies?

   a. Does the Commission's order require the revision of Appellant's group income protection plan?

   b. By declining to assert jurisdiction over Appellant's group income protection plan, did the Commission offend the standards it must meet in order to have its order upheld on appeal?

COUNTER-HISTORY OF THE CASE

On February 1, 1974, Carole B. Anderson properly filed a complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Docket No. E-6641 alleging that the Upper Bucks County Area Vocational Technical School (hereinafter "Appellant") had "refused to allow her to apply her accumulated sick leave to the total time she was required to be absent from her employment as a school teacher as a result of her pregnancy and that this refusal was based on the Complainant's sex, female." On January 30, 1975, the complaint was amended when the Pennsylvania State Education Association, Dale Moyer, Uni-Serv. Representative, joined Ms. Anderson as a Complainant in alleging that Upper Bucks County Area Vocational Technical School had "refused to allow Carole B. Anderson to utilize her accumulated sick leave during the period she was disabled and unable to work because of pregnancy. Complainants allege that this refusal constitutes sex discrimination in the terms and the conditions of Carole B. Anderson's employment in violation of the Pennsylvania Human Relations Act." Carole B. Anderson and the Pennsylvania State Education Association, Dale Moyer, Uni-Serv. Representative, alleged that the action of Upper Bucks County Area Vocational Technical School violated Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955(a).

An investigation into the allegations of the complaint was made by staff of the Commission and a determination was made that probable cause existed to credit the allegations of the complaint. Thereupon, Commission staff endeavored to eliminate the unlawful practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and a prehearing conference was held on May 9, 1975. As a result of this conference, counsel agreed, in lieu of a full hearing before three members of the Commission, to enter factual stipulations.

Upon consideration of the stipulations and briefs submitted by counsel, the Commission found, inter alia, that at the time she requested use of sick leave for absence from work due to pregnancy-related disability, Carole B. Anderson had accumulated forty (40) days of sick leave; Ms. Anderson missed twenty-seven (27) days of work because of pregnancy-related disability; and Appellant denied Ms. Anderson's request to apply twenty-seven (27) of her forty accumulated days of sick leave to her absence caused by pregnancy-related disability. The Commission found that Appellant based its denial of Ms. Anderson's request on the provision of the collective bargaining agreement then in effect which stated, "All periods of childbirth leave shall be deemed leave without pay."

Based on these findings, the Commission concluded, as a matter of law, that exclusion of pregnancy-related disabilities from Appellant's sick leave policy constituted sex discrimination with respect to terms, conditions or privileges of employment in

violation of Section 5(a) of the Pennsylvania Human Relations Act. The Commission further concluded that the issue of Appellant's group income protection plan was not properly before it because (1) in neither of her complaints had Ms. Anderson claimed benefits from this plan and (2) the insurance company which provides this plan was never joined in proceedings before the Commission.

Thereupon, the Commission entered an order requiring that Appellant cease and desist from discriminating on the basis of sex by treating pregnancy-related disability differently from other temporary disabilities and extending inferior compensation, terms, conditions and privileges of employment to women disabled by pregnancy. The Commission further ordered Appellant to pay Carole B. Anderson $1,342.71, "the sum representing the pay lost by her because of (Appellant's) refusal to allow her to use her accumulated sick leave for the twenty-seven (27) days that she was required to be absent from work because of her pregnancy-related disability, plus simple interest at the rate of six (6) percent per year."

From this final order of the Commission, Upper Bucks County Area Vocational Technical School has appealed.

ARGUMENT

1. APPELLANT VIOLATED SECTION 5(a) OF THE PENNSYLVANIA HUMAN RELATIONS ACT BY DENYING CAROLE B. ANDERSON USE OF HER ACCUMULATED SICK LEAVE FOR ABSENCE FROM WORK CAUSED BY PREGNANCY-RELATED DISABILITY.

   a. The exclusion of only pregnancy-related disabilities from the coverage of a sick leave policy constitutes sex discrimination with respect to terms, conditions or privileges of employment in violation of Section 5(a) of the Pennsylvania Human Relations Act.

Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955(a) provides:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
>
> (a) For any employer because of the... sex...of any individual...to...discriminate against such individual with respect to the compensation, hire, tenure, terms or privileges of employment....

Appellant's denial of Carole B. Anderson's request to use her accumulated sick leave for absence from work caused by pregnancy-related disability clearly violated Section 5(a) of the Pennsylvania Human Relations Act.

The policy which Appellant invoked in denying Ms. Anderson's request was incorporated into a collective bargaining agreement executed by the Upper Bucks County Area Vocational

Technical School and the Pennsylvania State Education Association.[1] This agreement, in effect from July 1, 1973, to June 30, 1975, contained the following policy regarding sick leave:

> Sick Leave. In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave shall be cumulative from year to year. No employe's salary shall be paid if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties. Additional days may be approved by the School Board as the exigencies of the case may warrant.
>
> All compensation required to be paid under these provisions shall be paid to the employe in the same manner and at the same time said employe would have received his salary if actually engaged in the performance of his duties.

The only disabling medical condition expressed excepted from this sick leave policy was incapacity caused by pregnancy. Section (e) of the maternity leave provision stated:

> All periods of childbirth leave shall be deemed leave without pay, during which period sick leave and/or other benefits will not accrue.

Clearly, the purpose of Appellant's sick leave policy is to assure a continuing income for employes unable to work

---

[1]By joining Carole B. Anderson as a complainant, the Pennsylvania State Education Association has taken the position that the maintenance of a separate and discriminatory policy for pregnancy-related disability is contrary to law and is therefore subject to the severability clause of the collective bargaining agreement.

because of a physical condition. In this respect, a woman whose incapacity is caused by pregnancy is no different from a male who is physically prevented from working by a hernia.[2] As the Third Circuit Court of Appeals has persuasively stated:

> Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination.... Employers offer (sick leave plans) to their employes to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home. Wetzel v. Liberty Mutual Insurance Co., supra, at 206.

Courts and fair employment practice agencies have required employers to treat temporary disabilities which accompany pregnancy in the same manner as any other incapacitating physical condition. Authority, federal and state, is overwhelming in holding that denial of sick leave or other

---

[2]Appellant's assertion that "pregnancy is now virtually a planned event throughout the United States" and therefore entirely voluntary is simply incorrect. As the Third Circuit Court of Appeals noted in Wetzel v. Liberty Mutual Insurance Company:

> ...pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception, short of surgery, and for health reasons many women cannot use the pill. 511 F.2d 199, 206 (3rd Cir. 1975), cert. granted, 421 U.S. 987, dismissed on other grounds, 44 U.S.L.W. 4350 (March 23, 1976).

Moreover, it should be noted that disability resulting from pregnancy is no more voluntary than lung cancer suffered by cigarette smokers.

benefits for absence from work caused by pregnancy-related disability discriminates against women and denied them equal terms, conditions and benefits of employment.[3]

Pennsylvania law requires that pregnancy-related disability be treated as any other physically disabling condition. In

---

[3] Wetzel v. Liberty Mutual Insurance Co., supra; Gilbert v. General Electric Company, 519 F.2d 661 (4th Cir. 1975), cert. granted, 96 S.Ct. 36 (1975); Communications Workers of America v. American Telephone & Telegraph Co., Long Lines Department, 513 F.2d 1024 (2d Cir. 1975); Hutchinson v. Lake Oswego School District, 519 F.2d 961 (1975); Holthaus v. Compton & Sons, Inc., 514 F.2d 681 (8th Cir. 1975); Satty v. Nashville Gas Company, 522 F.2d 850 (6th Cir. 1975); Farkas v. South Western City School District, 506 F.2d 1400 (6th Cir. 1974); Zichy v. City of Philadelphia, 393 F.Supp. 338 (E.D. Pa. 1975); Oakland Federation of Teachers v. Oakland Unified School District, 10 EPD 10,322 (N.D. Cal. 1975); Sale v. Waverly-Shell Rock Board of Education, 390 F.Supp. 784 (D.C. Iowa 1975); Polston v. Metropolitan Life Insurance Company, 11 EPD 10,826 (W.D. Ky. 1975); Liss v. School District of Ladue, 396 F.Supp. 1035 (E.D. Mo. 1975); Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974); Lillo v. Plymouth Board of Education, 8 EPD 9510 (N.D. Ohio 1973); Dessenberg v. American Metal Forming Company, 8 EPD 9575 (N.D. Ohio 1973).

On the state level, the New York State Division on Human Rights has been particularly active in vindicating the rights of pregnant employes. See, e.g., Board of Education, City of New York v. State Division of Human Rights in which the Appellate Division held:

> We are of the opinion that the determination that petitioner is guilty of discriminatory practices in its maternity leave policies has been established and that a pregnant teacher who goes on maternity leave should be permitted to use sick leave and sabbatical leave to the same extent as other teachers suffering from a temporary disability for the duration of such disability.

42 A.D.2d 854, 346 N.Y.S.2d 843, _____ A.2d _____ (1973), aff'd, 35 N.Y.2d 675, _____ N.Y.S.2d _____, _____ A.2d _____ (1974); Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, _____ N.Y.S.2d _____, _____ A.2d _____ (1974). See also, Wisconsin Telephone Company v. Department of Industry and Human Relations, 68 Wis.2d 345, 228 N.W.2d 649 (Wis.S.Ct. 1975); Black v. School Committee of Malden, 8 EPD 9659 (Mass. Sup.Jud.Ct. 1975), rev'd on other grounds, 341 N.E.2d 896 (Mass. Sup.Jud.Ct. 1976).

Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973), the Pennsylvania Supreme Court held that discharge because of pregnancy constituted sex discrimination in violation of the Pennsylvania Human Relations Act and stated:

> ...Ms. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the quality of her services as a teacher was or would be affected as a result of the pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. Id. at 280.

After the decision in Cerra, the Attorney General issued Opinion No. 9, 1974, concerning several provisions of the Unemployment Compensation Law which governed pregnant employes. Applying the holding and rationale of Cerra the Attorney General declared that, since it is illegal under the Human Relations Act for an employer to treat pregnant employes differently from employes otherwise temporarily disabled, the Human Relations Act impliedly repeals those sections of the Unemployment Compensation Law allowing differential treatment for pregnancy-related disability. Henceforth,

> ...a pregnant woman should be treated exactly the same as any other member of the work force. When she is physically able to work, she should be considered 'able and available,' and when she is not, she should be treated the same as

any other ill or disabled person. Office of the Attorney General, Opinion No. 9, Pennsylvania Bulletin, Vol. 4, No. 8, February 23, 1974.

Subsequent to Attorney General Opinion No. 9, the General Assembly eliminated and revised sections of the Unemployment Compensation Law applicable to pregnant employes, thereby adopting the Cerra rationale.

In two recent cases this Court has held that "pregnant women may not be treated differently from any other employee suffering under a physical disability." Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Cmwlth Ct. 400, 335 A.2d 873, 877 (1975), Leechburg Area School District v. Pennsylvania Human Relations Commission, 19 Pa. Cmwlth Ct. 639, 339 A.2d 850 (1975). See also, Unemployment Compensation Board of Review of the Commonwealth of Pennsylvania v. Perry, _____ Cmwlth Ct. _____, 349 A.2d 531 (1975).

The rationale of Cerra, Freeport, Leechburg and Perry clearly prohibits Appellant's denial of Carole B. Anderson's request to use her accumulated sick leave for absence from work caused by pregnancy.

b. Cost is not a defense to a finding of sex discrimination in violation of the Pennsylvania Human Relations Act.

Appellant raises cost as a defense for its discriminatory sick leave policy. Yet, Appellant points to no provision of the Pennsylvania Human Relations Act which allows such a defense and the cases cited in Appellant's brief do not support this contention.

The legislature specified the defenses available to a party charged with discrimination, e.g., if the employment practice is based upon a bona fide occupational qualification or a security regulation of state or federal government. Nowhere in the Act is a cost defense provided.[4]

The federal cases which Appellant cites do not support its defense of cost. Although Appellant invokes Wetzel v. Liberty Mutual Insurance Company, surpa, the Third Circuit Court of Appeals in that case flatly held that "cost is no defense under Title VII to this particular issue." 511 F.2d at 206. The majority of court decisions have agreed with the Wetzel court and have explicitly or implicitly held that cost is no defense to a differential treatment of pregnancy-related disabilities under an employer's benefit plan.[5]

Seaman v. Spring Lake Park Independent School District, 387 F.Supp. 1168 (D. Minn. 1974) and Geduldig v. Aiello, 417 U.S. 484 (1974) are irrelevant and inapplicable to the instant

---

[4]This parallels case law under Title VII of the Civil Rights Act of 1964. The only statutory defense to a charge of sex discrimination under Title VII is the bona fide occupational qualification set forth in 42 U.S.C. 20000e-2(e). Cost is not a defense to an overt act of discrimination but may be raised as a defense only where the alleged discrimination arises from an employment practice which is neutral on its face. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Head v. Timken Rolling Co., 486 F.2d 870 (6th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971). Appellant, by treating Carole B. Anderson's pregnancy-related disability differently from other disabilities, has engaged in "sex discrimination pure and simple," Cerra, supra, an overt action to which cost is not a defense.

[5]See cases cited in footnote 3, supra.

case. Plaintiffs Seaman and Aiello contended that treating pregnancy-related disabilities differently from other disabilities constituted discrimination based on sex in violation of the equal protection clause of the United States Constitution. Complainants Anderson and the Pennsylvania State Education Association raise no constitutional challenges but allege a violation of the Pennsylvania Human Relations Act.

The standards applied in equal protection cases are less strict than those applied under fair employment practices statutes, such as the Pennsylvania Human Relations Act. The New York State Court of Appeals clearly set forth this distinction in deciding that pregnancy-related disabilities must be treated as any other disabilities under a school district's sick leave plan:

> New York (has) adopted a statute expressly forbidding discrimination based on sex, a classification which while not foreclosed by constitutional prohibition could be proscribed by legislative enactment. The question we (face) then (is) whether the personnel policies and practices in the cases before us (transgress) our statutory proscription. That they might not be constitutionally forbidden (is) irrelevant.... In sum, what the constitution does not forbid may nonetheless be proscribed by statute. Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 371, _____ N.Y.S.2d _____, _____ A.2d _____ (1974).

The standard utilized by the Geduldig and Seaman Courts was the lax rational relationship test often applied to sex discrimination complaints brought under the equal protection clause. Clearly, the Court should be guided by decisions of

the New York Courts, decided under a fair employment statute similar to the Pennsylvania Human Relations Act. Federal constitutional cases, such as Geduldig and Seaman, are of no precedential value to this proceeding.

2. THE COMMISSION'S ORDER MAY BE SUSTAINED UNDER THE SCOPE OF JUDICIAL REVIEW APPLIED TO DECISIONS RENDERED BY ADMINISTRATIVE AGENCIES.

a. The Commission's order does not require the revision of Appellant's group income protection plan.

Any order entered by the Commission must be read within the context of the findings of fact and conclusions of law upon which it is based. Read in conjunction with the conclusions of law upon which it is based, the Commission's final order in this matter cannot be construed to require the revision of Appellant's group income protection plan.

In paragraph one of its conclusions of law, the Commission states that it may exert jurisdiction only over "the Complainants, the Respondent and the subject matter of the complaint under the Pennsylvania Human Relations Act...." The Commission concludes that it may not decide issues not presented in the subject matter of the complaint before it. This conclusion virtually mandates the result reached in paragraph eight, i.e., that the issue of Appellant's income protection plan was not properly before it because (1) in neither of her complaints filed with the Commission had Ms. Anderson claimed benefits from this plan and (2) the insurance company which provides this plan to Appellant was never joined in the proceedings before the Commission.

Paragraphs one and eight are consistent with paragraph six where the Commission found Appellant liable only for payment of twenty-seven (27) sick days to Carole B. Anderson.

The Commission's final order corresponds to the Commission's conclusions of law in that payment is awarded for the twenty-seven (27) sick days but payment of benefits from the income protection plan is not required.

The Commission concluded that the issue of Appellant's group income protection plan was not properly filed before it. Therefore, the Commission's final order cannot be construed as requiring revision of the income protection plan, over which the Commission did not assert jurisdiction.

b. By declining to assert jurisdiction over Appellant's group income protection plan, the Commission has not offended the standards it must meet to have its order upheld on review.

This Court has summarized the scope of review it applies to orders entered by the Commission:

> Our scope of review in these cases is limited and the Commission will be sustained unless its adjudication is based upon facts or conclusions not supported by evidence or unless it has committed a clear abuse of discretion, violated the constitutional rights of the parties, exceeded its power or based its conclusions upon an erroneous interpretation of the law. General Electric Corporation v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, _____ Cmwlth Ct. _____, 344 A.2d 817 (1975).

The Commission's order entered against Appellant meets each of the criteria set forth by this Court.

The order entered by the Commission requiring both monetary relief for Carole B. Anderson and revision of Appellant's sick leave policy is supported by substantial evidence. The

only disabilities specifically exempted from Appellant's sick leave policy were those caused by pregnancy. Stipulations presented to the Commission established that Carole B. Anderson was certified by her doctor as disabled by pregnancy and that the actual period of time she could not work because of this disability was twenty-seven (working) days.[6]

By entering the order here in issue, the Commission did not abuse its discretion, violate the constitutional rights of the parties or exceed its authority.[7] Indeed, the Commission has limited, rather than expanded, the scope of its order by concluding that failure to join a party and failure to claim a particular benefit precluded its review of Appellant's group income protection plan. By declining to assert jurisdiction over Appellant's group income protection plan, the Commission has not offended the standard it must meet to have its order upheld on review.

---

[6]Since Appellant did not raise before the Commission the issue of whether its group income protection plan is a bona fide group or employe insurance plan, no evidence was presented on this issue. Such evidence would be unnecessary since the Commission declined, on other grounds, to review the operation of Appellant's group income protection plan.

[7]Appellant contends that the Commission abused its discretion in the manner it dealt with the group income protection plan. The basis for Appellant's contention is not clear since the Commission's order does not require Appellant to pay increased insurance premiums or otherwise modify the plan.

CONCLUSION

Appellant violated Section 5(a) of the Pennsylvania Human Relations Act by denying Carole B. Anderson the use of her accumulated sick leave for absence from work caused by pregnancy-related disability. The Commission's order requiring payment of sick leave to Carole B. Anderson and modification of Appellant's sick leave policy is sustainable under the scope of judicial review applied to decisions rendered by administrative agencies.

Accordingly, the appeal of Upper Bucks County Area Vocational Technical School should be dismissed and the order of the Commission should be affirmed.

Respectfully submitted,

ANNE FARRER
Assistant General Counsel
Pa. Human Relations Commission
711 State Office Building
1400 Spring Garden Street
Philadelphia, Pennsylvania 19130
(215) 238-7205

SANFORD KAHN
General Counsel
Pa. Human Relations Commission
100 North Cameron Street
Second Floor
Harrisburg, Pennsylvania 17101
(717) 787-4416

Filed 11/4/77

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 727 COMMONWEALTH DOCKET 1976

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, UNI-SERVE REPRESENTATIVE

v.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL,
Appellant

PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellee

SUPPLEMENTAL BRIEF FOR APPELLEE

JAMES D. KEENEY, Assistant General Counsel
Pennsylvania Human Relations Commission

SANFORD KAHN, General Counsel
Pennsylvania Human Relations Commission

Attorneys for Respondent

Pennsylvania Human Relations Commission
Headquarters Office
100 North Cameron Street
Harrisburg, Pennsylvania 17101
(717) 783-8268 or (717) 787-4416

INDEX TO BRIEF

	Page
COUNTER-STATEMENT OF QUESTIONS INVOLVED	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Neither the supremacy clause of the United States Constitution nor the doctrine of federal preemption requires this court to follow the decision of the United States Supreme Court in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)	4
II. The reasoning of the United States Supreme Court's plurality opinion in General Electric Co. v. Gilbert cannot properly be applied to construction of the Pennsylvania Human Relations Act	8
A. The General Electric Co. v. Gilbert opinion adopts an analysis which has already been considered and properly rejected by this Honorable Court	8
B. The General Electric Co. v. Gilbert opinion is based upon the legislative history of Title VII, which differs greatly from that of the Pennsylvania Human Relations Act	14
C. The General Electric Co. v. Gilbert opinion rests partly on analysis of the applicable EEOC Guideline which cannot be applied to the applicable PHRC Regulations . .	19
CONCLUSION	21

TABLE OF CITATIONS

CASES	PAGE
Associated General Contractors, Inc. v. Altshuler, 361 F. Supp. 1293, (D. Mass. 1973) aff'd., 490 F.2d 9 (1st Cir. 1974), cert. den., 416 U.S. 957	5
Brooklyn Union Gas Co. et al. v. State Human Rights Appeal Bd. et al., ____ NY2d ____ (1976)	7
Cerra v. East Stroudsburg Area School District, 229 A.2d 277, 450 Pa. 207 (1973)	2, 9
Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), 7 EPD ¶9072	8
Com., Human Relations Commission v. Feeser, 364 A.2d 1324, ____ Pa. ____ (1976)	20
Freeport Area School District v. PHRC, 335 A.2d 873, 18 Pa. Cmwlth. Ct. 400 (1975)	9, 10
Geduldig v. Aiello, 417 U.S. 484 (1974)	8, 9, 13, 14
General Electric Corp. v. Com., Human Relations Commission, 365 A.2d 649, ____ Pa. ____, (1976)	6
General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)	2, 4, 7, 9, 12, 13 14-15, 19, 20, 21
Leechburg Area School District v. PHRC, 339 A.2d 850, 19 Cmwlth. Ct. 614 (1975)	10, 11
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, aff'g 293 F. Supp. 1219 (9th Cir. 1971)	6
Unemployment Compensation Board of Review v. Latifah Perry, 349 A.2d 531, 22 Cmwlth. Ct. 429 (1974)	11, 12

STATUTES — PAGE

Civil Rights Act of 1964 (July 2, 1964, P.L. 88-352, 78 Stat. 253, 42 U.S.C. §2000e et seq.) 4, 17, 18

§703(a)(1) (42 U.S.C. §2000e-2(a)(1)) 7, 12, 15
§_____ (42 U.S.C. §2000e-2(f)) 5
§_____ (42 U.S.C. §2000e-2(h)) 2, 5, 15
§708 (42 U.S.C. §2000e-7) 4
§_____ (42 U.S.C. §2000e-11) 5
§701 (42 U.S.C. §2000e(b) 5
§1104 (42 U.S.C. §2000h-4) 5

Equal Pay Act, 29 U.S.C. §206(d) 2, 20

Pennsylvania Human Relations Act, (Act of Oct. 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq.) 3, 16, 17

§2, 43 P.S. §952 17
§4(b), 43 P.S. §954(b) 5
§12, 43 P.S. §962 17
§7(d), 43 P.S. §957(d) 3

REGULATIONS

29 C.F.R. §800.116(d) (1975) 3, 20
29 C.F.R. §1604.10(b) 12
16 Pa. Code §41.101-104 19
Pa. B. Doc. No. 70-703, Amended Pa. B. Doc. No. 71-2413 §2(D) 19

CONSTITUTION

Const. Art. I, §28 18

ARTICLES

Miller, "Sex Discrimination and Title VII of the Civil Rights Act of 1964," 51 Minn. L. Rev. 877 (1967) 16

Note, "Classification on the Basis of Sex and the 1964 Civil Rights Act," 50 Iowa L. Rev. 778 (1965) 16

MISCELLANEOUS

110 Cong. Rec. 2577 (1964) 16
110 Cong. Rec. 2581 (1964) 16
110 Cong. Rec. 13363-13364 (1964) 15
House Bill 567 of 1969 18
House Bill 1678 of 1969 18
Op. A.G. No. 71, Oct. 15, 1971 6
Op. A.G. No. 82, Nov. 17, 1971 6
Op. A.G. No. 9, Feb. 23, 1974 . . . . 3, 20

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Does either the Supremacy Clause of the United States Constitution or the Doctrine of Federal Preemption require this Honorable Court to follow the decision of the United States Supreme Court in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)?

(Suggested answer in the negative.)

II. Can the reasoning of the United States Supreme Court's plurality opinion in General Electric Co. v. Gilbert, supra, be properly applied to this Honorable Court's construction of the Pennsylvania Human Relations Act?

(Suggested answer in the negative.)

SUMMARY OF ARGUMENT

There is no conflict between Title VII as construed by the United States Supreme Court's decision in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976), and a state law which defines sex discrimination more comprehensively. In adopting Title VII, Congress expressly provided that more comprehensive state statutes be neither preempted nor superceded.

The reasoning of the plurality opinion in Gilbert should not be adopted by this Honorable Court for several reasons. First, the federal opinion adopts the analysis that treating pregnancy-related disabilities differently from all other disabilities is a disability-based discrimination, not a gender-based discrimination, and therefore not unlawful. That analysis has already been rejected three times by this Honorable Court, and properly so, in light of our Supreme Court's ruling in Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 450 Pa. 207 (1973).

Secondly, the Gilbert opinion is based upon the legislative history of Title VII, which indicates that sex was only grudgingly included as a prohibited basis for discrimination in employment, and upon the Bennett Amendment, 42 U.S.C. §2000e-2(h), which permits the continuation of certain discrimination against women already deemed allowable under the Equal Pay Act, 29 U.S.C. §206(d). The available

evidence indicates that the intent underlying both the General Assembly of Pennsylvania's adoption of the Pennsylvania Human Relations Act in 1955 and its amendment of that Act in 1969 to include sex as a prohibited basis of discrimination was far more liberal.

Finally, the Gilbert opinion rests partly on the fact that the applicable EEOC Guideline was not adopted pursuant to any particular statutory authority, "flatly contradicts the position which the agency had enunciated at an earlier date" and also contradicts regulations adopted by the Wage and Hour Administrator, 29 C.F.R. §800.116(d) (1975). The applicable Pennsylvania Human Relations Commission regulation, in contrast, was adopted pursuant to express statutory authority, 43 P.S. §957(d), is entirely consistent with the Commission's earlier guidelines on the same subject, and is fully in harmony with the applicable Opinion of the Attorney General, Op. No. 9, 4 Pa. B. ____, Feb. 23, 1974.

ARGUMENT

I. NEITHER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION NOR THE DOCTRINE OF FEDERAL PREEMPTION REQUIRES THIS COURT TO FOLLOW THE DECISION OF THE UNITED STATES SUPREME COURT IN GENERAL ELECTRIC CO. V. GILBERT, ____ U.S. ____, 45 USLW 4031 (DEC. 7, 1976).

In General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976), the United States Supreme Court has interpreted Title VII not to prohibit employers from excluding pregnancy-related disabilities from otherwise comprehensive employe sick pay plans. There is no conflict between this and a state law which does prohibit such an exclusion.

In enacting Title VII of the Civil Rights Act of 1964 (July 2, 1964, P.L. 88-352, 78 Stat. 253, 42 U.S.C. §2000e et seq.), Congress explicitly set forth its intent not to preempt the field of employment discrimination and not to create a law supreme over any existing or future state law except to the extent that such a state law might permit or require discrimination prohibited by the Civil Rights Act of 1964:

> §708. Effect on State laws
>
> Nothing in this title [VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. (July 2, 1964, P.L. 88-352, Title VII, §708, 78 Stat. 262, 42 U.S.C. §2000e-7.)

> §1104. State Laws not Preempted
>
> 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 of the purposes of this Act, or any provision thereof. (July 2, 1964, P.L. 88-352, Title XI, §1104, 78 Stat. 268, 42 U.S.C. §2000h-4.)

The purpose of these sections is plainly to foster and protect the efforts of those states which have chosen to attack employment discrimination more vigorously than the federal government.[1] Associated General Contractors, Inc. v.

---

1. In the field of employment discrimination, Pennsylvania's statutory prohibitions have frequently been more stringent than those of the federal law. Pennsylvania adopted the Pennsylvania Human Relations Act in 1955, fully nine years before Congress adopted Title VII. The Pennsylvania Human Relations Act initially applied to employers with twelve or more employees, Act of Oct. 27, 1955, P.L. 744, §4, and now applies to all employers with four or more employees, Act of Oct. 27, 1955, P.L. 744, as amended by Act of Jan. 24, 1966, P.L. (1965) 1525, §1, 43 P.S. §954(b), while the scope of Title VII was initially limited to persons having one hundred or more employees and is now limited to persons employing fifteen or more employees. 42 U.S.C. §2000e(b), July 2, 1964, P.L. 88-352, §701, 78 Stat. 253; March 24, 1972, P.L. 92-261, §2, 86 Stat. 103.

The Pennsylvania Human Relations Act has always applied to the Commonwealth of Pennsylvania and all its political subdivisions, authorities, boards and commissions, Act of Oct. 27, 1955, P.L. 744, §4(b) 43 P.S. §954(b), while Title VII specifically exempted states and political subdivisions of states until as recently as 1972, 42 U.S.C. §2000e(b), (Mar. 24, 1972, P.L. 92-261 §2, 86 Stat. 103), and still exempts the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject to Civil Service regulations. Id.

Title VII also contains numerous other exemptions not found in the Pennsylvania Human Relations Act, including discrimination against individuals who are members of certain Communist or Communist-front organizations, 42 U.S.C. §2000e-2(f), discrimination pursuant to a bona fide seniority or merit system, 42 U.S.C. §2000e-2(h), and discrimination pursuant to veterans' preference statutes, 42 U.S.C. §2000e-11.

Altshuler, 361 F. Supp. 1293, (D. Mass. 1973) aff'd., 490 F. 2d 9 (1st Cir. 1974), cert. den., 416 U.S. 957.

A state law which defines sex discrimination more comprehensively than Title VII defines it is not in conflict with the purposes or provisions of Title VII, but merely attacks the problem of irrational discrimination more vigorously.[1] This Honorable Court, therefore, is free to construe the law of Pennsylvania so as to define the exclusion of pregnancy-related disabilities from comprehensive employe sick-pay plans to be sex-discrimination, even though such an exclusion is not considered to be sex discrimination under Title VII. Only a reciprocal pair of state and federal interpretations would be prohibited by the Supremacy Clause or by the doctrine of federal preemption.

---

1. There are, of course, certain areas in which the Pennsylvania Human Relations Act or other Pennsylvania statutes might arguably be interpreted to place lesser burdens on employers than Title VII or to require discrimination prohibited by Title VII. In those instances, the Pennsylvania law must yield and federal law will control. General Electric Corp. v. Com., Human Relations Commission, 365 A.2d 649, ____ Pa. ____, (1976); Op. A.G. No. 71, Oct. 15, 1971 [Pa. Child Labor Law bar to employment of female minors as newspaper carriers must yield to Title VII]; Op. A.G. No. 82, Nov. 17, 1971 [record-keeping required by federal affirmative action guidelines although arguably prohibited by §5(b), Pennsylvania Human Relations Act]. (Cf. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, aff'g 293 F. Supp. 1219 (9th Cir. 1971)) [California hours-and-weights law held inconsistent with Title VII].

This conclusion is buttressed by a recent decision of the well respected New York Court of Appeals. In Brooklyn Union Gas Co. et al. v. State Human Rights Appeal Bd. et al., ____ NY2d ____ (1976), [Slip Opinion reproduced as Addendum to Record in the present case], three cases decided on December 20, 1976, that Court reaffirmed its own prior holding that disability due to pregnancy or childbirth must be treated the same as disability due to other causes, after considering and rejecting the contrary conclusion reached in General Electric Co. v. Gilbert, supra. In the words of the Court's majority opinion:

> We are aware, of course, that the United States Supreme Court has recently reached a contrary result in construing §703(a)(1) of Title VII of the federal Civil Rights Act of 1964 (General Electric Co. v. Gilbert, ____ U.S. ____, decided December 7, 1976). The pertinent provisions of that statute are substantially identical to those of section 296 of the Executive Law of the State of New York. The determination of the Supreme Court while instructive, is not binding on our Court . . . . Id., at ____ NY2d ____. [Addendum to Record, 1, fn. 1.]

Even the dissent in Brooklyn Union Gas Co., supra, agreed that General Electric Co. v. Gilbert, supra, was not controlling, and found it not even persuasive:

> The General Electric Company case, decided differently by the United States Supreme Court (General Elec. Co. v. Gilbert, ____ U.S. ____, 45 US Law Week 4031 [U.S. Dec. 7, 1976]), of course, is not determinative or even influential in consideration of the issues in these appeals. General Electric involved a different statute . . . . On the other hand, these appeals arise from the state statute governing discrimination, the Human Rights Law (Executive Law, §296) . . . . Id., at ____ NY2d ____ [Addendum to Record, 8]. [Breitel, C.J., dissenting].

II. THE REASONING OF THE UNITED STATES SUPREME COURT'S PLURALITY OPINION IN GENERAL ELECTRIC CO. V. GILBERT CANNOT PROPERLY BE APPLIED TO CONSTRUCTION OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

A. The Gilbert opinion adopts an analysis which has already been considered and properly rejected by this Honorable Court.

In applying the analysis of its Equal Protection decisions -- particularly Geduldig v. Aiello, 417 U.S. 484 (1974) -- to its consideration of what constitutes sex discrimination under Title VII, the Gilbert Court has apparently settled upon the characterization of pregnancy-based distinctions as disability classifications rather than sex classifications.[1]

---

1. This development may perhaps be traced back to the concurring opinion of Mr. Justice Powell in Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), 7 EPD ¶9072, a case in which the majority held the mandatory pregnancy leave policies of two school districts to be unlawful as denials of Due Process. In a thoughtful concurring opinion, Justice Powell argued that Equal Protection rather than Due Process was the proper frame of reference. In a footnote, he identified the distinction upon which the Court's decision in two subsequent pregnancy cases -- Geduldig v. Aiello, supra and General Electric Co. v. Gilbert, supra -- would turn:

> "2. I do not reach the question whether sex-based classifications invoke strict judicial scrutiny, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973), or whether these regulations involve sex classifications at all. Whether the challenged aspects of these regulations constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest." 7 EPD ¶9072, at 6535. [Emphasis supplied.]

In Geduldig v. Aiello, supra, and now again in General Electric Co. v. Gilbert, supra, the United States Supreme Court has held that "exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all." General Electric Co. v. Gilbert, 45 USLW 4034.

This narrow reading of the term "sex-discrimination" is directly contrary to the more liberal construction of the same term already adopted by our own highest Court in its judicial interpretation of the Pennsylvania Human Relations Act:

* * *

> [P]regnant women are singled out and placed at a disadvantage . . . on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 280, 450 Pa. 207 (1973). [Emphasis supplied.]

Moreover, this Honorable Court has repeatedly construed Cerra to require that disability related to pregnancy or childbirth be treated the same as disability related to any other sickness or disease, not only for purposes of the Pennsylvania Human Relations Act, but for Unemployment Compensation purposes as well.

In Freeport Area School District v. PHRC, 335 A.2d 873, 18 Pa. Cmwlth. Ct. 400 (1975), President Judge Bowman stated the Pennsylvania rule succinctly:

> . . . [P]regnant women may not be treated differently from any other employee suffering under a physical disability. Id., at 18 Cmwlth. Ct. 407.

The analysis made by the United States Supreme Court, that the classification provisions in question were disability classifications and not sex classifications, was considered and rejected by this court in Freeport, as Judge Mencer's dissent plainly shows:

> I respectfully dissent . . . .
> First: I believe the classification provisions in question here, contrary to the majority's analysis, are disability classifications and not sex classifications. Id., at 335 A.2d 882, 18 Cmwlth. Ct. 417.

In Leechburg Area School District v. PHRC, 339 A.2d 850, 19 Cmwlth. Ct. 614 (1975), Judge Crumlish put it this way:

> . . . The underlying basis of Cerra v. East Stroudsburg Area School District, supra, and Freeport Area School District v. Pennsylvania Human Relations Commission, supra, is that pregnancy is a physical disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees.

Indeed, the federal analysis was again implicitly rejected in Leechburg, when the following language was quoted with approval:

> "Similarly, in Hutchinson v. Lake Oswego School District No. 7, 374 F. Supp. 1056 (D. Or. 1974) a failure to allow accumulated sick leave to be applied to a pregnancy leave was held to be sex discrimination in violation of Title VII of the Civil Rights Act of 1964 because males were entitled to apply such sick leave to all disabilities." Id., at 19 Cmwlth. Ct. 622.

Dissenting in Leechburg from the majority's decision that denying pregnancy leave benefits to unmarried female

school teachers constituted a violation of the Pennsylvania Human Relations Act, President Judge Bowman, in an opinion joined by Judge Mencer, attempted to distinguish that case from the Pennsylvania pregnancy rule, in the following language:

> The subject of maternity leave employment practices and their conditions as being within the parameters of Section 5 of the [Pennsylvania Human Relations] Act has developed not because only women become pregnant but because employment practices peculiar to that biological condition may not be accorded different treatment than that accorded to males suffering from other physical disabilities, as such disabilities, pregnancy or otherwise, affect performance of their responsibilities in their field of employment. Id.

It appears, therefore, that the dissenters in Leechburg did not disagree with the majority's statement that "the underlying basis" of Cerra and Freeport "is that pregnancy is a physical disability . . . which may not be treated differently from other long-term physical disabilities suffered by all employees," supra, 10.

Most recently, this Court has considered whether discrimination because of pregnancy constitutes discrimination because of sex in the context of an unemployment compensation appeal. Unemployment Compensation Board of Review v. Latifah Perry, 349 A.2d 531, 22 Cmwlth. Ct. 429 (1975). In that case Judge Wilkinson stated for a unanimous Court:

> . . . [W]e think the law is quite clear.

> . . . The Attorney General's opinion [No. 9, dated February 7, 1974] correctly sets forth the law to be that the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., requires that pregnancy be treated as any other disease. 349 A.2d, at 533.

This Honorable Court has, therefore, three times rejected the analysis that pregnancy-related disabilities are sui generis and that treating them differently from all other disabilities is not sex discrimination. The federal plurality opinion, which rejected the unanimous conclusion of all six United States Courts of Appeal that had addressed the question, General Electric Co. v. Gilbert, supra, at 45 USLW 4037 [Brenman & Marshal, J.J., dissenting], contains nothing that should cause this Court to reverse its own well-reasoned prior decisions.

In particular, the Gilbert opinion contains little argument to justify its basic conclusion that exclusion of pregnancy-related disabilities is not sex-discrimination per se. The major portions of the Opinion, rather, are devoted to a description of the particular benefits program maintained by General Electric, the legislative history of Title VII, whether the female employe respondents had demonstrated the existance of any gender-based discriminatory effect resulting from exclusion of pregnancy disabilities from coverage, and whether the EEOC Guidelines on pregnancy and childbirth disability, 29 CFR §1604.10(b), ought to be followed.

With regard to its basic conclusion, the High Court relies almost exclusively on the rationale of its earlier decision in Geduldig v. Aiello, supra. Quoting Geduldig, the Opinion argues:

* * *

> The . . . program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. 45 USLW 4034.

Significantly, the federal plurality opinion makes no attempt whatsoever to answer the virtual flood of cogent arguments against this analysis which were found persuasive in the district and circuit courts below. Among these are the difficulty of distinguishing disabilities related to pregnancy from other "voluntary," "planned," or "intended," disabilities such as those related to smoking, venereal diseases, injury incurred from self-inflicted wounds or dangerous sporting activities, etc., and from risks specific to the reproductive systems of men (e.g. prostatectomies, vasectomies, and circumcisions); the fact that this analysis does not at all explain or justify exclusion of disabilities arising from unexpected complications of pregnancy; the fact that in light of the religious and moral convictions of many with respect

to birth control and abortion, pregnancy can hardly be termed a "planned event;" etc.

In short, the Gilbert opinion reaches its basic result by "cursory analysis," General Electric Co. v. Gilbert, supra, at 45 USLW 4034, and its conclusion should not therefore be persuasive upon this Honorable Court.

B. The General Electric Co. v. Gilbert opinion is based upon the legislative history of Title VII, which differs greatly from that of the Pennsylvania Human Relations Act.

That the United States Supreme Court decision in General Electric Co. v. Gilbert does no more than interpret Title VII is clear from the language of the plurality opinion of Mr. Justice Rehnquist. Part I of the opinion notes, "We granted certiorari to consider this important issue in the construction of Title VII." 45 USLW, at 4033. Part II considers the meaning of the term "discrimination" in Section 703(a)(1) of the 1964 Civil Rights Act and whether Congress, in adopting this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment. 45 USLW at 4033. Finding its Equal Protection decisions a "useful starting point," Id., the Court concludes that its decision in Geduldig v. Aiello, 417 U.S. 484 (1974) "is precisely on point in its holding that an exclusion of pregnancy from a disability benefits plan is

not gender-based discrimination at all." 45 USLW at 4034. Part III of the opinion deals with the argument that " . . . this analysis of the congressional purpose underlying Title VII is inconsistent with the guidelines of the EEOC." 45 USLW at 4036. The opinion concludes: "We therefore agree with petitioner that its disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities." 45 USLW at 4037.

The concurring opinions of the two additional justices who helped to make up the 6-3 majority also explicitly characterize the majority holding as being that "General Electric's exclusion of benefits for disability during pregnancy is not a per se violation of §703(a)(1) of Title VII . . . ." Id.

In reasoning toward its conclusion, the plurality opinion expressly refers to the Bennett Amendment,[1] which the floor manager of the bill said was added to Title VII in order to "make it 'unmistakably clear' that 'differences of treatment in industrial benefit plans, including earlier retirement plans for women, may continue in operation if this bill becomes law.' 110 Cong. Rec. 13663-13664 (1964)." 45 USLW 4036.

---

1. "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29" 42 U.S.C. §2000e-2(h).

While it is not expressly reflected in the plurality opinion, the Gilbert Court was also undoubtedly aware of the peculiar legislative history underlying the inclusion of "sex" as a prohibited basis of discrimination in Title VII.

After almost two weeks of passionate floor debate in the House and just one day before the Civil Rights Act of 1964 was passed, Representative Smith, a principal opponent of the original bill, offered an amendment to include sex as a prohibited basis for unemployment discrimination, with the words, "I do not think it can do any harm to this legislation; maybe it will do some good." 110 Cong. Rec. 2577 (1964); See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, (1967); Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 791 (1965). Supporters of the original bill opposed the amendment because they feared that it would prevent passage of the basic legislation being considered. Id.; See e.g., 110 Cong. Rec. 2581 (1964).

Thus relying upon a legislative history which indicated only a grudging inclusion of sex as a prohibited basis of discrimination, it is not surprising that the Gilbert majority decided upon an equally grudging construction of the term "sex discrimination."

The apparent intent underlying both the Pennsylvania General Assembly's adoption of the Pennsylvania Human Relations Act in 1955 and its amendment of the Act in 1969 to include sex as a prohibited basis of discrimination, on the other hand, is far more liberal.

The Pennsylvania General Assembly's original intent is apparent in Sections 2 and 12 of the Pennsylvania Human Relations Act:

> Section 2. Findings and Declaration of Policy.
>
> (a) . . . The denial of equal employment . . . and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts . . . ."
>
> (b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . sex . . . and to safeguard their right to obtain and hold employment without . . . discrimination . . . ." (43 P.S. §952)
>
> Section 12. Construction and Exclusiveness of Remedy.
>
> (a) The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply. (43 P.S. §962)
>
> * * *

Significantly, no such language is contained in the Civil Rights Act of 1964.

The same Pennsylvania General Assembly that voted to amend the Pennsylvania Human Relations Act in 1969 to add "sex" as a prohibited basis for discrimination, Act of July 9, 1969, P.L. 133, also unanimously adopted the Pennsylvania

Equal Rights Amendment less than a year later.[1] The 1969 amendment was reported out of committee without alteration a mere six weeks after being introduced and was adopted by both the House and Senate with no debate and only four dissenting votes less than two months later.[2]

The intent of the Pennsylvania General Assembly in adopting the Pennsylvania Human Relations Act, therefore, is clearly independent of the intent of the United States Congress in adopting the Civil Rights Act of 1964. Since the Gilbert analysis is based upon the latter, it cannot properly be applied to the former.

---

1. House Bill 1678, a Joint Resolution proposing to an amendment to Article I of the Constitution of the Commonwealth of Pennsylvania prohibiting the denial or abridgment of rights because of sex, was passed by a vote of 190-0 in the House on December 2, 1969 and, as amended, passed by a vote of 39-0 in the Senate on March 17, 1970. On April 29, 1970, the House concurred in the Senate amendments by a vote of 180-0. History of House Bills and Resolutions, 1969-70, at A-231.

As finally adopted May 18, 1971, the Equal Rights Amendment reads:

> "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Const. Art. I, §28.

2. House Bill 567, Pr. No. 654 was introduced March 11, 1969, Reported by the Labor Relations Committee as committed April 29, 1969, passed by the House (190-2) on May 6, 1969, and passed without amendment by the Senate (44-2) on June 24, 1969. History of House Bills and Resolutions, 1969-70, at A-77.

C. The General Electric Co. v. Gilbert opinion rests partly on analysis of the applicable EEOC Guideline which cannot be applied to the applicable PHRC Regulations.

The Gilbert opinion, in reaching its conclusion despite the existence of an EEOC Guideline adopting a contrary interpretation, makes much of the fact that the EEOC Guideline was not adopted pursuant to any particular statutory authority and "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." General Electric Co. v. Gilbert, supra, at 45 USLW 4036.

No such difficulty exists at the state level in Pennsylvania. On the contrary, the Pennsylvania Human Relations Commission's present regulation on Employment Policies Relating to Pregnancy, Childbirth, and Childrearing, 16 Pa. Code §41.101 - 41.104 (5 Pa. B. 1299, May 17, 1975), was adopted pursuant to express statutory authority to "adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of [the Pennsylvania Human Relations] Act," 43 P.S. §957(d); and is wholly consistent with the Commission's initial guideline on the same subject, Pa. B. Doc. No. 70-703, amended Pa. B. Doc. No. 71-2413, §2(D), adopted shortly after the Pennsylvania Human Reltions Act was amended in 1969 to include "sex" as a prohibited basis of discrimination.

Moreover, while the EEOC Guidelines differed from the regulations adopted by the Wage and Hour Administrator under the Equal Pay Act, 29 CFR §800.116(d) (1975), General Electric Co. v. Gilbert, supra, at 45 USLW 4036, the Pennsylvania Human Relations Commission's regulations are uncontradicted by other state regulations and are fully in harmony with opinion of the Attorney General, Op. No. 9, 4 Pa. B. ____, Feb. 23, 1974.

In the present case before this Honorable Court, therefore, the regulations of the Pennsylvania Human Relations Commission should be given substantial deference. See Com., Human Relations Commission v. Feeser, 364 A.2d 1324, ____ Pa. ____ (1976), at 364 A.2d 1327, notes 9-10.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the plurality opinion of the United States Supreme Court in General Electric Co. v. Gilbert, supra, is not binding upon this Honorable Court, and should not disturb the consistent and well reasoned analysis of the basic issue in the present case already adopted by the Supreme Court of Pennsylvania, this Honorable Court, the Attorney General of Pennsylvania, and the Pennsylvania Human Relations Commission.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 727 COMMONWEALTH DOCKET 1976

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, UNI-SERVE REPRESENTATIVE

v.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL,
Appellant

PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellee

SUPPLEMENTAL BRIEF FOR APPELLEE

JAMES D. KEENEY, Assistant General Counsel
Pennsylvania Human Relations Commission

SANFORD KAHN, General Counsel
Pennsylvania Human Relations Commission

Attorneys for Respondent

Pennsylvania Human Relations Commission
Headquarters Office
100 North Cameron Street
Harrisburg, Pennsylvania 17101
(717) 783-8268 or (717) 787-4416

INDEX TO BRIEF

	Page
COUNTER-STATEMENT OF QUESTIONS INVOLVED	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Neither the supremacy clause of the United States Constitution nor the doctrine of federal preemption requires this court to follow the decision of the United States Supreme Court in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)	4
II. The reasoning of the United States Supreme Court's plurality opinion in General Electric Co. v. Gilbert cannot properly be applied to construction of the Pennsylvania Human Relations Act	8
A. The General Electric Co. v. Gilbert opinion adopts an analysis which has already been considered and properly rejected by this Honorable Court	8
B. The General Electric Co. v. Gilbert opinion is based upon the legislative history of Title VII, which differs greatly from that of the Pennsylvania Human Relations Act	14
C. The General Electric Co. v. Gilbert opinion rests partly on analysis of the applicable EEOC Guideline which cannot be applied to the applicable PHRC Regulations . .	19
CONCLUSION	21

TABLE OF CITATIONS

CASES	PAGE
Associated General Contractors, Inc. v. Altshuler, 361 F. Supp. 1293, (D. Mass. 1973) aff'd., 490 F.2d 9 (1st Cir. 1974), cert. den., 416 U.S. 957	5
Brooklyn Union Gas Co. et al. v. State Human Rights Appeal Bd. et al., ____ NY2d ____ (1976)	7
Cerra v. East Stroudsburg Area School District, 229 A.2d 277, 450 Pa. 207 (1973)	2, 9
Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), 7 EPD ¶9072	8
Com., Human Relations Commission v. Feeser, 364 A.2d 1324, ____ Pa. ____ (1976)	20
Freeport Area School District v. PHRC, 335 A.2d 873, 18 Pa. Cmwlth. Ct. 400 (1975)	9, 10
Geduldig v. Aiello, 417 U.S. 484 (1974)	8, 9, 13, 14
General Electric Corp. v. Com., Human Relations Commission, 365 A.2d 649, ____ Pa. ____, (1976)	6
General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)	2, 4, 7, 9, 12, 13 14-15, 19, 20, 21
Leechburg Area School District v. PHRC, 339 A.2d 850, 19 Cmwlth. Ct. 614 (1975)	10, 11
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, aff'g 293 F. Supp. 1219 (9th Cir. 1971)	6
Unemployment Compensation Board of Review v. Latifah Perry, 349 A.2d 531, 22 Cmwlth. Ct. 429 (1974)	11, 12

STATUTES — PAGE

Civil Rights Act of 1964 (July 2, 1964, P.L. 88-352, 78 Stat. 253, 42 U.S.C. §2000e et seq.) 4, 17, 18

§703(a)(1) (42 U.S.C. §2000e-2(a)(1)) 7, 12, 15
§_____ (42 U.S.C. §2000e-2(f)) 5
§_____ (42 U.S.C. §2000e-2(h)) 2, 5, 15
§708 (42 U.S.C. §2000e-7) 4
§_____ (42 U.S.C. §2000e-11) 5
§701 (42 U.S.C. §2000e(b) 5
§1104 (42 U.S.C. §2000h-4) 5

Equal Pay Act, 29 U.S.C. §206(d) 2, 20

Pennsylvania Human Relations Act, (Act of Oct. 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq.) 3, 16, 17

§2, 43 P.S. §952 17
§4(b), 43 P.S. §954(b) 5
§12, 43 P.S. §962 17
§7(d), 43 P.S. §957(d) 3

REGULATIONS

29 C.F.R. §800.116(d) (1975) 3, 20
29 C.F.R. §1604.10(b) 12
16 Pa. Code §41.101-104 19
Pa. B. Doc. No. 70-703, Amended Pa. B. Doc. No. 71-2413 §2(D) 19

CONSTITUTION

Const. Art. I, §28 18

ARTICLES

Miller, "Sex Discrimination and Title VII of the Civil Rights Act of 1964," 51 Minn. L. Rev. 877 (1967) 16

Note, "Classification on the Basis of Sex and the 1964 Civil Rights Act," 50 Iowa L. Rev. 778 (1965) 16

MISCELLANEOUS

110 Cong. Rec. 2577 (1964) 16
110 Cong. Rec. 2581 (1964) 16
110 Cong. Rec. 13363-13364 (1964) 15
House Bill 567 of 1969 18
House Bill 1678 of 1969 18
Op. A.G. No. 71, Oct. 15, 1971 6
Op. A.G. No. 82, Nov. 17, 1971 6
Op. A.G. No. 9, Feb. 23, 1974 . . . . . 3, 20

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Does either the Supremacy Clause of the United States Constitution or the Doctrine of Federal Preemption require this Honorable Court to follow the decision of the United States Supreme Court in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)?

(Suggested answer in the negative.)

II. Can the reasoning of the United States Supreme Court's plurality opinion in General Electric Co. v. Gilbert, supra, be properly applied to this Honorable Court's construction of the Pennsylvania Human Relations Act?

(Suggested answer in the negative.)

SUMMARY OF ARGUMENT

There is no conflict between Title VII as construed by the United States Supreme Court's decision in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976), and a state law which defines sex discrimination more comprehensively. In adopting Title VII, Congress expressly provided that more comprehensive state statutes be neither preempted nor superceded.

The reasoning of the plurality opinion in Gilbert should not be adopted by this Honorable Court for several reasons. First, the federal opinion adopts the analysis that treating pregnancy-related disabilities differently from all other disabilities is a disability-based discrimination, not a gender-based discrimination, and therefore not unlawful. That analysis has already been rejected three times by this Honorable Court, and properly so, in light of our Supreme Court's ruling in Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 450 Pa. 207 (1973).

Secondly, the Gilbert opinion is based upon the legislative history of Title VII, which indicates that sex was only grudgingly included as a prohibited basis for discrimination in employment, and upon the Bennett Amendment, 42 U.S.C. §2000e-2(h), which permits the continuation of certain discrimination against women already deemed allowable under the Equal Pay Act, 29 U.S.C. §206(d). The available

evidence indicates that the intent underlying both the General Assembly of Pennsylvania's adoption of the Pennsylvania Human Relations Act in 1955 and its amendment of that Act in 1969 to include sex as a prohibited basis of discrimination was far more liberal.

Finally, the Gilbert opinion rests partly on the fact that the applicable EEOC Guideline was not adopted pursuant to any particular statutory authority, "flatly contradicts the position which the agency had enunciated at an earlier date" and also contradicts regulations adopted by the Wage and Hour Administrator, 29 C.F.R. §800.116(d) (1975). The applicable Pennsylvania Human Relations Commission regulation, in contrast, was adopted pursuant to express statutory authority, 43 P.S. §957(d), is entirely consistent with the Commission's earlier guidelines on the same subject, and is fully in harmony with the applicable Opinion of the Attorney General, Op. No. 9, 4 Pa. B. ____, Feb. 23, 1974.

ARGUMENT

I. NEITHER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION NOR THE DOCTRINE OF FEDERAL PREEMPTION REQUIRES THIS COURT TO FOLLOW THE DECISION OF THE UNITED STATES SUPREME COURT IN GENERAL ELECTRIC CO. V. GILBERT, ____ U.S. ____, 45 USLW 4031 (DEC. 7, 1976).

In General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976), the United States Supreme Court has interpreted Title VII not to prohibit employers from excluding pregnancy-related disabilities from otherwise comprehensive employe sick pay plans. There is no conflict between this and a state law which does prohibit such an exclusion.

In enacting Title VII of the Civil Rights Act of 1964 (July 2, 1964, P.L. 88-352, 78 Stat. 253, 42 U.S.C. §2000e et seq.), Congress explicitly set forth its intent not to preempt the field of employment discrimination and not to create a law supreme over any existing or future state law except to the extent that such a state law might permit or require discrimination prohibited by the Civil Rights Act of 1964:

> §708. Effect on State laws
>
> Nothing in this title [VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. (July 2, 1964, P.L. 88-352, Title VII, §708, 78 Stat. 262, 42 U.S.C. §2000e-7.)

> §1104. State Laws not Preempted.
>
> 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 of the purposes of this Act, or any provision thereof. (July 2, 1964, P.L. 88-352, Title XI, §1104, 78 Stat. 268, 42 U.S.C. §2000h-4.)

The purpose of these sections is plainly to foster and protect the efforts of those states which have chosen to attack employment discrimination more vigorously than the federal government.[1] Associated General Contractors, Inc. v.

---

1. In the field of employment discrimination, Pennsylvania's statutory prohibitions have frequently been more stringent than those of the federal law. Pennsylvania adopted the Pennsylvania Human Relations Act in 1955, fully nine years before Congress adopted Title VII. The Pennsylvania Human Relations Act initially applied to employers with twelve or more employees, Act of Oct. 27, 1955, P.L. 744, §4, and now applies to all employers with four or more employees, Act of Oct. 27, 1955, P.L. 744, as amended by Act of Jan. 24, 1966, P.L. (1965) 1525, §1, 43 P.S. §954(b), while the scope of Title VII was initially limited to persons having one hundred or more employees and is now limited to persons employing fifteen or more employees. 42 U.S.C. §2000e(b), July 2, 1964, P.L. 88-352, §701, 78 Stat. 253; March 24, 1972, P.L. 92-261, §2, 86 Stat. 103.

The Pennsylvania Human Relations Act has always applied to the Commonwealth of Pennsylvania and all its political subdivisions, authorities, boards and commissions, Act of Oct. 27, 1955, P.L. 744, §4(b) 43 P.S. §954(b), while Title VII specifically exempted states and political subdivisions of states until as recently as 1972, 42 U.S.C. §2000e(b), (Mar. 24, 1972, P.L. 92-261 §2, 86 Stat. 103), and still exempts the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject to Civil Service regulations. Id.

Title VII also contains numerous other exemptions not found in the Pennsylvania Human Relations Act, including discrimination against individuals who are members of certain Communist or Communist-front organizations, 42 U.S.C. §2000e-2(f), discrimination pursuant to a bona fide seniority or merit system, 42 U.S.C. §2000e-2(h), and discrimination pursuant to veterans' preference statutes, 42 U.S.C. §2000e-11.

Altshuler, 361 F. Supp. 1293, (D. Mass. 1973) aff'd., 490 F. 2d 9 (1st Cir. 1974), cert. den., 416 U.S. 957.

A state law which defines sex discrimination more comprehensively than Title VII defines it is not in conflict with the purposes or provisions of Title VII, but merely attacks the problem of irrational discrimination more vigorously.[1] This Honorable Court, therefore, is free to construe the law of Pennsylvania so as to define the exclusion of pregnancy-related disabilities from comprehensive employe sick-pay plans to be sex-discrimination, even though such an exclusion is not considered to be sex discrimination under Title VII. Only a reciprocal pair of state and federal interpretations would be prohibited by the Supremacy Clause or by the doctrine of federal preemption.

---

1. There are, of course, certain areas in which the Pennsylvania Human Relations Act or other Pennsylvania statutes might arguably be interpreted to place lesser burdens on employers than Title VII or to require discrimination prohibited by Title VII. In those instances, the Pennsylvania law must yield and federal law will control. General Electric Corp. v. Com., Human Relations Commission, 365 A.2d 649, ____ Pa. ____, (1976); Op. A.G. No. 71, Oct. 15, 1971 [Pa. Child Labor Law bar to employment of female minors as newspaper carriers must yield to Title VII]; Op. A.G. No. 82, Nov. 17, 1971 [record-keeping required by federal affirmative action guidelines although arguably prohibited by §5(b), Pennsylvania Human Relations Act]. (Cf. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, aff'g 293 F. Supp. 1219 (9th Cir. 1971)) [California hours-and-weights law held inconsistent with Title VII].

This conclusion is buttressed by a recent decision of the well respected New York Court of Appeals. In Brooklyn Union Gas Co. et al. v. State Human Rights Appeal Bd. et al., ____ NY2d ____ (1976), [Slip Opinion reproduced as Addendum to Record in the present case], three cases decided on December 20, 1976, that Court reaffirmed its own prior holding that disability due to pregnancy or childbirth must be treated the same as disability due to other causes, after considering and rejecting the contrary conclusion reached in General Electric Co. v. Gilbert, supra. In the words of the Court's majority opinion:

> We are aware, of course, that the United States Supreme Court has recently reached a contrary result in construing §703(a)(1) of Title VII of the federal Civil Rights Act of 1964 (General Electric Co. v. Gilbert, ____ U.S. ____, decided December 7, 1976). The pertinent provisions of that statute are substantially identical to those of section 296 of the Executive Law of the State of New York. The determination of the Supreme Court while instructive, is not binding on our Court . . . . Id., at ____ NY2d ____. [Addendum to Record, 1, fn. 1.]

Even the dissent in Brooklyn Union Gas Co., supra, agreed that General Electric Co. v. Gilbert, supra, was not controlling, and found it not even persuasive:

> The General Electric Company case, decided differently by the United States Supreme Court (General Elec. Co. v. Gilbert, ____ U.S. ____, 45 US Law Week 4031 [U.S. Dec. 7, 1976]), of course, is not determinative or even influential in consideration of the issues in these appeals. General Electric involved a different statute . . . . On the other hand, these appeals arise from the state statute governing discrimination, the Human Rights Law (Executive Law, §296) . . . . Id., at ____ NY2d ____ [Addendum to Record, 8]. [Breitel, C.J., dissenting].

II. THE REASONING OF THE UNITED STATES SUPREME COURT'S PLURALITY OPINION IN GENERAL ELECTRIC CO. V. GILBERT CANNOT PROPERLY BE APPLIED TO CONSTRUCTION OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

A. The Gilbert opinion adopts an analysis which has already been considered and properly rejected by this Honorable Court.

In applying the analysis of its Equal Protection decisions -- particularly Geduldig v. Aiello, 417 U.S. 484 (1974) -- to its consideration of what constitutes sex discrimination under Title VII, the Gilbert Court has apparently settled upon the characterization of pregnancy-based distinctions as disability classifications rather than sex classifications.[1]

---

1. This development may perhaps be traced back to the concurring opinion of Mr. Justice Powell in Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), 7 EPD ¶9072, a case in which the majority held the mandatory pregnancy leave policies of two school districts to be unlawful as denials of Due Process. In a thoughtful concurring opinion, Justice Powell argued that Equal Protection rather than Due Process was the proper frame of reference. In a footnote, he identified the distinction upon which the Court's decision in two subsequent pregnancy cases -- Geduldig v. Aiello, supra and General Electric Co. v. Gilbert, supra -- would turn:

> "2. I do not reach the question whether sex-based classifications invoke strict judicial scrutiny, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973), or whether these regulations involve sex classifications at all. Whether the challenged aspects of these regulations constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest." 7 EPD ¶9072, at 6535. [Emphasis supplied.]

In Geduldig v. Aiello, supra, and now again in General Electric Co. v. Gilbert, supra, the United States Supreme Court has held that "exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all." General Electric Co. v. Gilbert, 45 USLW 4034.

This narrow reading of the term "sex-discrimination" is directly contrary to the more liberal construction of the same term already adopted by our own highest Court in its judicial interpretation of the Pennsylvania Human Relations Act:

* * *

> [P]regnant women are singled out and placed at a disadvantage . . . on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 280, 450 Pa. 207 (1973). [Emphasis supplied.]

Moreover, this Honorable Court has repeatedly construed Cerra to require that disability related to pregnancy or childbirth be treated the same as disability related to any other sickness or disease, not only for purposes of the Pennsylvania Human Relations Act, but for Unemployment Compensation purposes as well.

In Freeport Area School District v. PHRC, 335 A.2d 873, 18 Pa. Cmwlth. Ct. 400 (1975), President Judge Bowman stated the Pennsylvania rule succinctly:

> . . . [P]regnant women may not be treated differently from any other employee suffering under a physical disability. Id., at 18 Cmwlth. Ct. 407.

The analysis made by the United States Supreme Court, that the classification provisions in question were disability classifications and not sex classifications, was considered and rejected by this court in Freeport, as Judge Mencer's dissent plainly shows:

> I respectfully dissent . . . .
> First: I believe the classification provisions in question here, contrary to the majority's analysis, are disability classifications and not sex classifications. Id., at 335 A.2d 882, 18 Cmwlth. Ct. 417.

In Leechburg Area School District v. PHRC, 339 A.2d 850, 19 Cmwlth. Ct. 614 (1975), Judge Crumlish put it this way:

> . . . The underlying basis of Cerra v. East Stroudsburg Area School District, supra, and Freeport Area School District v. Pennsylvania Human Relations Commission, supra, is that pregnancy is a physical disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees.

Indeed, the federal analysis was again implicitly rejected in Leechburg, when the following language was quoted with approval:

> "Similarly, in Hutchinson v. Lake Oswego School District No. 7, 374 F. Supp. 1056 (D. Or. 1974) a failure to allow accumulated sick leave to be applied to a pregnancy leave was held to be sex discrimination in violation of Title VII of the Civil Rights Act of 1964 because males were entitled to apply such sick leave to all disabilities." Id., at 19 Cmwlth. Ct. 622.

Dissenting in Leechburg from the majority's decision that denying pregnancy leave benefits to unmarried female

school teachers constituted a violation of the Pennsylvania Human Relations Act, President Judge Bowman, in an opinion joined by Judge Mencer, attempted to distinguish that case from the Pennsylvania pregnancy rule, in the following language:

> The subject of maternity leave employment practices and their conditions as being within the parameters of Section 5 of the [Pennsylvania Human Relations] Act has developed not because only women become pregnant but because employment practices peculiar to that biological condition may not be accorded different treatment than that accorded to males suffering from other physical disabilities, as such disabilities, pregnancy or otherwise, affect performance of their responsibilities in their field of employment. Id.

It appears, therefore, that the dissenters in Leechburg did not disagree with the majority's statement that "the underlying basis" of Cerra and Freeport "is that pregnancy is a physical disability . . . which may not be treated differently from other long-term physical disabilities suffered by all employees," supra, 10.

Most recently, this Court has considered whether discrimination because of pregnancy constitutes discrimination because of sex in the context of an unemployment compensation appeal. Unemployment Compensation Board of Review v. Latifah Perry, 349 A.2d 531, 22 Cmwlth. Ct. 429 (1975). In that case Judge Wilkinson stated for a unanimous Court:

> . . . [W]e think the law is quite clear.

> . . . The Attorney General's opinion [No. 9, dated February 7, 1974] correctly sets forth the law to be that the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., requires that pregnancy be treated as any other disease. 349 A.2d, at 533.

This Honorable Court has, therefore, three times rejected the analysis that pregnancy-related disabilities are sui generis and that treating them differently from all other disabilities is not sex discrimination. The federal plurality opinion, which rejected the unanimous conclusion of all six United States Courts of Appeal that had addressed the question, General Electric Co. v. Gilbert, supra, at 45 USLW 4037 [Brenman & Marshal, J.J., dissenting], contains nothing that should cause this Court to reverse its own well-reasoned prior decisions.

In particular, the Gilbert opinion contains little argument to justify its basic conclusion that exclusion of pregnancy-related disabilities is not sex-discrimination per se. The major portions of the Opinion, rather, are devoted to a description of the particular benefits program maintained by General Electric, the legislative history of Title VII, whether the female employe respondents had demonstrated the existance of any gender-based discriminatory effect resulting from exclusion of pregnancy disabilities from coverage, and whether the EEOC Guidelines on pregnancy and childbirth disability, 29 CFR §1604.10(b), ought to be followed.

With regard to its basic conclusion, the High Court relies almost exclusively on the rationale of its earlier decision in Geduldig v. Aiello, supra. Quoting Geduldig, the Opinion argues:

> * * *
> The . . . program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. 45 USLW 4034.

Significantly, the federal plurality opinion makes no attempt whatsoever to answer the virtual flood of cogent arguments against this analysis which were found persuasive in the district and circuit courts below. Among these are the difficulty of distinguishing disabilities related to pregnancy from other "voluntary," "planned," or "intended," disabilities such as those related to smoking, venereal diseases, injury incurred from self-inflicted wounds or dangerous sporting activities, etc., and from risks specific to the reproductive systems of men (e.g. prostatectomies, vasectomies, and circumcisions); the fact that this analysis does not at all explain or justify exclusion of disabilities arising from unexpected complications of pregnancy; the fact that in light of the religious and moral convictions of many with respect

to birth control and abortion, pregnancy can hardly be termed a "planned event;" etc.

In short, the Gilbert opinion reaches its basic result by "cursory analysis," General Electric Co. v. Gilbert, supra, at 45 USLW 4034, and its conclusion should not therefore be persuasive upon this Honorable Court.

B. The General Electric Co. v. Gilbert opinion is based upon the legislative history of Title VII, which differs greatly from that of the Pennsylvania Human Relations Act.

That the United States Supreme Court decision in General Electric Co. v. Gilbert does no more than interpret Title VII is clear from the language of the plurality opinion of Mr. Justice Rehnquist. Part I of the opinion notes, "We granted certiorari to consider this important issue in the construction of Title VII." 45 USLW, at 4033. Part II considers the meaning of the term "discrimination" in Section 703(a)(1) of the 1964 Civil Rights Act and whether Congress, in adopting this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment. 45 USLW at 4033. Finding its Equal Protection decisions a "useful starting point," Id., the Court concludes that its decision in Geduldig v. Aiello, 417 U.S. 484 (1974) "is precisely on point in its holding that an exclusion of pregnancy from a disability benefits plan is

not gender-based discrimination at all." 45 USLW at 4034. Part III of the opinion deals with the argument that " . . . this analysis of the congressional purpose underlying Title VII is inconsistent with the guidelines of the EEOC." 45 USLW at 4036. The opinion concludes: "We therefore agree with petitioner that its disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities." 45 USLW at 4037.

The concurring opinions of the two additional justices who helped to make up the 6-3 majority also explicitly characterize the majority holding as being that "General Electric's exclusion of benefits for disability during pregnancy is not a per se violation of §703(a)(1) of Title VII . . . ." Id.

In reasoning toward its conclusion, the plurality opinion expressly refers to the Bennett Amendment,[1] which the floor manager of the bill said was added to Title VII in order to "make it 'unmistakably clear' that 'differences of treatment in industrial benefit plans, including earlier retirement plans for women, may continue in operation if this bill becomes law.' 110 Cong. Rec. 13663-13664 (1964)." 45 USLW 4036.

---

1. "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29" 42 U.S.C. §2000e-2(h).

While it is not expressly reflected in the plurality opinion, the Gilbert Court was also undoubtedly aware of the peculiar legislative history underlying the inclusion of "sex" as a prohibited basis of discrimination in Title VII.

After almost two weeks of passionate floor debate in the House and just one day before the Civil Rights Act of 1964 was passed, Representative Smith, a principal opponent of the original bill, offered an amendment to include sex as a prohibited basis for unemployment discrimination, with the words, "I do not think it can do any harm to this legislation; maybe it will do some good." 110 Cong. Rec. 2577 (1964); See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, (1967); Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 791 (1965). Supporters of the original bill opposed the amendment because they feared that it would prevent passage of the basic legislation being considered. Id.; See e.g., 110 Cong. Rec. 2581 (1964).

Thus relying upon a legislative history which indicated only a grudging inclusion of sex as a prohibited basis of discrimination, it is not surprising that the Gilbert majority decided upon an equally grudging construction of the term "sex discrimination."

The apparent intent underlying both the Pennsylvania General Assembly's adoption of the Pennsylvania Human Relations Act in 1955 and its amendment of the Act in 1969 to include sex as a prohibited basis of discrimination, on the other hand, is far more liberal.

The Pennsylvania General Assembly's original intent is apparent in Sections 2 and 12 of the Pennsylvania Human Relations Act:

> Section 2. Findings and Declaration of Policy.
>
> (a) . . . The denial of equal employment . . . and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts . . . ."
>
> (b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . sex . . . and to safeguard their right to obtain and hold employment without . . . discrimination . . . ." (43 P.S. §952)
>
> Section 12. Construction and Exclusiveness of Remedy.
>
> (a) The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply. (43 P.S. §962)
>
> * * *

Significantly, no such language is contained in the Civil Rights Act of 1964.

The same Pennsylvania General Assembly that voted to amend the Pennsylvania Human Relations Act in 1969 to add "sex" as a prohibited basis for discrimination, Act of July 9, 1969, P.L. 133, also unanimously adopted the Pennsylvania

Equal Rights Amendment less than a year later.[1] The 1969 amendment was reported out of committee without alteration a mere six weeks after being introduced and was adopted by both the House and Senate with no debate and only four dissenting votes less than two months later.[2]

The intent of the Pennsylvania General Assembly in adopting the Pennsylvania Human Relations Act, therefore, is clearly independent of the intent of the United States Congress in adopting the Civil Rights Act of 1964. Since the Gilbert analysis is based upon the latter, it cannot properly be applied to the former.

---

1. House Bill 1678, a Joint Resolution proposing to an amendment to Article I of the Constitution of the Commonwealth of Pennsylvania prohibiting the denial or abridgment of rights because of sex, was passed by a vote of 190-0 in the House on December 2, 1969 and, as amended, passed by a vote of 39-0 in the Senate on March 17, 1970. On April 29, 1970, the House concurred in the Senate amendments by a vote of 180-0. History of House Bills and Resolutions, 1969-70, at A-231.

As finally adopted May 18, 1971, the Equal Rights Amendment reads:

> "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Const. Art. I, §28.

2. House Bill 567, Pr. No. 654 was introduced March 11, 1969, Reported by the Labor Relations Committee as committed April 29, 1969, passed by the House (190-2) on May 6, 1969, and passed without amendment by the Senate (44-2) on June 24, 1969. History of House Bills and Resolutions, 1969-70, at A-77.

C. The General Electric Co. v. Gilbert opinion rests partly on analysis of the applicable EEOC Guideline which cannot be applied to the applicable PHRC Regulations.

The Gilbert opinion, in reaching its conclusion despite the existence of an EEOC Guideline adopting a contrary interpretation, makes much of the fact that the EEOC Guideline was not adopted pursuant to any particular statutory authority and "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." General Electric Co. v. Gilbert, supra, at 45 USLW 4036.

No such difficulty exists at the state level in Pennsylvania. On the contrary, the Pennsylvania Human Relations Commission's present regulation on Employment Policies Relating to Pregnancy, Childbirth, and Childrearing, 16 Pa. Code §41.101 - 41.104 (5 Pa. B. 1299, May 17, 1975), was adopted pursuant to express statutory authority to "adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of [the Pennsylvania Human Relations] Act," 43 P.S. §957(d); and is wholly consistent with the Commission's initial guideline on the same subject, Pa. B. Doc. No. 70-703, amended Pa. B. Doc. No. 71-2413, §2(D), adopted shortly after the Pennsylvania Human Reltions Act was amended in 1969 to include "sex" as a prohibited basis of discrimination.

Moreover, while the EEOC Guidelines differed from the regulations adopted by the Wage and Hour Administrator under the Equal Pay Act, 29 CFR §800.116(d) (1975), General Electric Co. v. Gilbert, supra, at 45 USLW 4036, the Pennsylvania Human Relations Commission's regulations are uncontradicted by other state regulations and are fully in harmony with opinion of the Attorney General, Op. No. 9, 4 Pa. B. ____, Feb. 23, 1974.

In the present case before this Honorable Court, therefore, the regulations of the Pennsylvania Human Relations Commission should be given substantial deference. See Com., Human Relations Commission v. Feeser, 364 A.2d 1324, ____ Pa. ____ (1976), at 364 A.2d 1327, notes 9-10.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the plurality opinion of the United States Supreme Court in General Electric Co. v. Gilbert, supra, is not binding upon this Honorable Court, and should not disturb the consistent and well reasoned analysis of the basic issue in the present case already adopted by the Supreme Court of Pennsylvania, this Honorable Court, the Attorney General of Pennsylvania, and the Pennsylvania Human Relations Commission.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 727 COMMONWEALTH DOCKET 1976

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, UNI-SERVE REPRESENTATIVE

v.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL,
Appellant

PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellee

SUPPLEMENTAL BRIEF FOR APPELLEE

JAMES D. KEENEY, Assistant General Counsel
Pennsylvania Human Relations Commission

SANFORD KAHN, General Counsel
Pennsylvania Human Relations Commission

Attorneys for Respondent

Pennsylvania Human Relations Commission
Headquarters Office
100 North Cameron Street
Harrisburg, Pennsylvania 17101
(717) 783-8268 or (717) 787-4416

INDEX TO BRIEF

	Page
COUNTER-STATEMENT OF QUESTIONS INVOLVED	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Neither the supremacy clause of the United States Constitution nor the doctrine of federal preemption requires this court to follow the decision of the United States Supreme Court in General Electric Co. v. Gilbert, ___ U.S. ___, 45 USLW 4031 (Dec. 7, 1976)	4
II. The reasoning of the United States Supreme Court's plurality opinion in General Electric Co. v. Gilbert cannot properly be applied to construction of the Pennsylvania Human Relations Act	8
A. The General Electric Co. v. Gilbert opinion adopts an analysis which has already been considered and properly rejected by this Honorable Court	8
B. The General Electric Co. v. Gilbert opinion is based upon the legislative history of Title VII, which differs greatly from that of the Pennsylvania Human Relations Act	14
C. The General Electric Co. v. Gilbert opinion rests partly on analysis of the applicable EEOC Guideline which cannot be applied to the applicable PHRC Regulations . .	19
CONCLUSION	21

TABLE OF CITATIONS

CASES	PAGE
Associated General Contractors, Inc. v. Altshuler, 361 F. Supp. 1293, (D. Mass. 1973) aff'd., 490 F.2d 9 (1st Cir. 1974), cert. den., 416 U.S. 957	5
Brooklyn Union Gas Co. et al. v. State Human Rights Appeal Bd. et al., ____ NY2d ____ (1976)	7
Cerra v. East Stroudsburg Area School District, 229 A.2d 277, 450 Pa. 207 (1973)	2, 9
Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), 7 EPD ¶9072	8
Com., Human Relations Commission v. Feeser, 364 A.2d 1324, ____ Pa. ____ (1976)	20
Freeport Area School District v. PHRC, 335 A.2d 873, 18 Pa. Cmwlth. Ct. 400 (1975)	9, 10
Geduldig v. Aiello, 417 U.S. 484 (1974)	8, 9, 13, 14
General Electric Corp. v. Com., Human Relations Commission, 365 A.2d 649, ____ Pa. ____, (1976)	6
General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)	2, 4, 7, 9, 12, 13 14-15, 19, 20, 21
Leechburg Area School District v. PHRC, 339 A.2d 850, 19 Cmwlth. Ct. 614 (1975)	10, 11
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, aff'g 293 F. Supp. 1219 (9th Cir. 1971)	6
Unemployment Compensation Board of Review v. Latifah Perry, 349 A.2d 531, 22 Cmwlth. Ct. 429 (1974)	11, 12

STATUTES — PAGE

Civil Rights Act of 1964 (July 2, 1964, P.L. 88-352, 78 Stat. 253, 42 U.S.C. §2000e et seq.) 4, 17, 18

§703(a)(1) (42 U.S.C. §2000e-2(a)(1)) 7, 12, 15
§_____ (42 U.S.C. §2000e-2(f)) 5
§_____ (42 U.S.C. §2000e-2(h)) 2, 5, 15
§708 (42 U.S.C. §2000e-7) 4
§_____ (42 U.S.C. §2000e-11) 5
§701 (42 U.S.C. §2000e(b) 5
§1104 (42 U.S.C. §2000h-4) 5

Equal Pay Act, 29 U.S.C. §206(d) 2, 20

Pennsylvania Human Relations Act, (Act of Oct. 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq.) 3, 16, 17

§2, 43 P.S. §952 17
§4(b), 43 P.S. §954(b) 5
§12, 43 P.S. §962 17
§7(d), 43 P.S. §957(d) 3

REGULATIONS

29 C.F.R. §800.116(d) (1975) 3, 20
29 C.F.R. §1604.10(b) 12
16 Pa. Code §41.101-104 19
Pa. B. Doc. No. 70-703, Amended Pa. B. Doc. No. 71-2413 §2(D) 19

CONSTITUTION

Const. Art. I, §28 18

ARTICLES

Miller, "Sex Discrimination and Title VII of the Civil Rights Act of 1964," 51 Minn. L. Rev. 877 (1967) 16

Note, "Classification on the Basis of Sex and the 1964 Civil Rights Act," 50 Iowa L. Rev. 778 (1965) 16

MISCELLANEOUS

110 Cong. Rec. 2577 (1964) 16
110 Cong. Rec. 2581 (1964) 16
110 Cong. Rec. 13363-13364 (1964) 15
House Bill 567 of 1969 18
House Bill 1678 of 1969 18
Op. A.G. No. 71, Oct. 15, 1971 6
Op. A.G. No. 82, Nov. 17, 1971 6
Op. A.G. No. 9, Feb. 23, 1974 . . . . . 3, 20

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Does either the Supremacy Clause of the United States Constitution or the Doctrine of Federal Preemption require this Honorable Court to follow the decision of the United States Supreme Court in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976)?

(Suggested answer in the negative.)

II. Can the reasoning of the United States Supreme Court's plurality opinion in General Electric Co. v. Gilbert, supra, be properly applied to this Honorable Court's construction of the Pennsylvania Human Relations Act?

(Suggested answer in the negative.)

SUMMARY OF ARGUMENT

There is no conflict between Title VII as construed by the United States Supreme Court's decision in General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976), and a state law which defines sex discrimination more comprehensively. In adopting Title VII, Congress expressly provided that more comprehensive state statutes be neither preempted nor superceded.

The reasoning of the plurality opinion in Gilbert should not be adopted by this Honorable Court for several reasons. First, the federal opinion adopts the analysis that treating pregnancy-related disabilities differently from all other disabilities is a disability-based discrimination, not a gender-based discrimination, and therefore not unlawful. That analysis has already been rejected three times by this Honorable Court, and properly so, in light of our Supreme Court's ruling in Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 450 Pa. 207 (1973).

Secondly, the Gilbert opinion is based upon the legislative history of Title VII, which indicates that sex was only grudgingly included as a prohibited basis for discrimination in employment, and upon the Bennett Amendment, 42 U.S.C. §2000e-2(h), which permits the continuation of certain discrimination against women already deemed allowable under the Equal Pay Act, 29 U.S.C. §206(d). The available

evidence indicates that the intent underlying both the General Assembly of Pennsylvania's adoption of the Pennsylvania Human Relations Act in 1955 and its amendment of that Act in 1969 to include sex as a prohibited basis of discrimination was far more liberal.

Finally, the Gilbert opinion rests partly on the fact that the applicable EEOC Guideline was not adopted pursuant to any particular statutory authority, "flatly contradicts the position which the agency had enunciated at an earlier date" and also contradicts regulations adopted by the Wage and Hour Administrator, 29 C.F.R. §800.116(d) (1975). The applicable Pennsylvania Human Relations Commission regulation, in contrast, was adopted pursuant to express statutory authority, 43 P.S. §957(d), is entirely consistent with the Commission's earlier guidelines on the same subject, and is fully in harmony with the applicable Opinion of the Attorney General, Op. No. 9, 4 Pa. B. ____, Feb. 23, 1974.

ARGUMENT

I. NEITHER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION NOR THE DOCTRINE OF FEDERAL PREEMPTION REQUIRES THIS COURT TO FOLLOW THE DECISION OF THE UNITED STATES SUPREME COURT IN GENERAL ELECTRIC CO. V. GILBERT, ____ U.S. ____, 45 USLW 4031 (DEC. 7, 1976).

In General Electric Co. v. Gilbert, ____ U.S. ____, 45 USLW 4031 (Dec. 7, 1976), the United States Supreme Court has interpreted Title VII not to prohibit employers from excluding pregnancy-related disabilities from otherwise comprehensive employe sick pay plans. There is no conflict between this and a state law which does prohibit such an exclusion.

In enacting Title VII of the Civil Rights Act of 1964 (July 2, 1964, P.L. 88-352, 78 Stat. 253, 42 U.S.C. §2000e et seq.), Congress explicitly set forth its intent not to preempt the field of employment discrimination and not to create a law supreme over any existing or future state law except to the extent that such a state law might permit or require discrimination prohibited by the Civil Rights Act of 1964:

> §708. Effect on State laws
>
> Nothing in this title [VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. (July 2, 1964, P.L. 88-352, Title VII, §708, 78 Stat. 262, 42 U.S.C. §2000e-7.)

> §1104. State Laws not Preempted.
>
> 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 of the purposes of this Act, or any provision thereof. (July 2, 1964, P.L. 88-352, Title XI, §1104, 78 Stat. 268, 42 U.S.C. §2000h-4.)

The purpose of these sections is plainly to foster and protect the efforts of those states which have chosen to attack employment discrimination more vigorously than the federal government.[1] Associated General Contractors, Inc. v.

---

1. In the field of employment discrimination, Pennsylvania's statutory prohibitions have frequently been more stringent than those of the federal law. Pennsylvania adopted the Pennsylvania Human Relations Act in 1955, fully nine years before Congress adopted Title VII. The Pennsylvania Human Relations Act initially applied to employers with twelve or more employees, Act of Oct. 27, 1955, P.L. 744, §4, and now applies to all employers with four or more employees, Act of Oct. 27, 1955, P.L. 744, as amended by Act of Jan. 24, 1966, P.L. (1965) 1525, §1, 43 P.S. §954(b), while the scope of Title VII was initially limited to persons having one hundred or more employees and is now limited to persons employing fifteen or more employees. 42 U.S.C. §2000e(b), July 2, 1964, P.L. 88-352, §701, 78 Stat. 253; March 24, 1972, P.L. 92-261, §2, 86 Stat. 103.

The Pennsylvania Human Relations Act has always applied to the Commonwealth of Pennsylvania and all its political subdivisions, authorities, boards and commissions, Act of Oct. 27, 1955, P.L. 744, §4(b) 43 P.S. §954(b), while Title VII specifically exempted states and political subdivisions of states until as recently as 1972, 42 U.S.C. §2000e(b), (Mar. 24, 1972, P.L. 92-261 §2, 86 Stat. 103), and still exempts the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject to Civil Service regulations. Id.

Title VII also contains numerous other exemptions not found in the Pennsylvania Human Relations Act, including discrimination against individuals who are members of certain Communist or Communist-front organizations, 42 U.S.C. §2000e-2(f), discrimination pursuant to a bona fide seniority or merit system, 42 U.S.C. §2000e-2(h), and discrimination pursuant to veterans' preference statutes, 42 U.S.C. §2000e-11.

Altshuler, 361 F. Supp. 1293, (D. Mass. 1973) aff'd., 490 F. 2d 9 (1st Cir. 1974), cert. den., 416 U.S. 957.

A state law which defines sex discrimination more comprehensively than Title VII defines it is not in conflict with the purposes or provisions of Title VII, but merely attacks the problem of irrational discrimination more vigorously.[1] This Honorable Court, therefore, is free to construe the law of Pennsylvania so as to define the exclusion of pregnancy-related disabilities from comprehensive employe sick-pay plans to be sex-discrimination, even though such an exclusion is not considered to be sex discrimination under Title VII. Only a reciprocal pair of state and federal interpretations would be prohibited by the Supremacy Clause or by the doctrine of federal preemption.

---

1. There are, of course, certain areas in which the Pennsylvania Human Relations Act or other Pennsylvania statutes might arguably be interpreted to place lesser burdens on employers than Title VII or to require discrimination prohibited by Title VII. In those instances, the Pennsylvania law must yield and federal law will control. General Electric Corp. v. Com., Human Relations Commission, 365 A.2d 649, ____ Pa. ____, (1976); Op. A.G. No. 71, Oct. 15, 1971 [Pa. Child Labor Law bar to employment of female minors as newspaper carriers must yield to Title VII]; Op. A.G. No. 82, Nov. 17, 1971 [record-keeping required by federal affirmative action guidelines although arguably prohibited by §5(b), Pennsylvania Human Relations Act]. (Cf. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, aff'g 293 F. Supp. 1219 (9th Cir. 1971)) [California hours-and-weights law held inconsistent with Title VII].

This conclusion is buttressed by a recent decision of the well respected New York Court of Appeals. In Brooklyn Union Gas Co. et al. v. State Human Rights Appeal Bd. et al., ____ NY2d ____ (1976), [Slip Opinion reproduced as Addendum to Record in the present case], three cases decided on December 20, 1976, that Court reaffirmed its own prior holding that disability due to pregnancy or childbirth must be treated the same as disability due to other causes, after considering and rejecting the contrary conclusion reached in General Electric Co. v. Gilbert, supra. In the words of the Court's majority opinion:

> We are aware, of course, that the United States Supreme Court has recently reached a contrary result in construing §703(a)(1) of Title VII of the federal Civil Rights Act of 1964 (General Electric Co. v. Gilbert, ____ U.S. ____, decided December 7, 1976). The pertinent provisions of that statute are substantially identical to those of section 296 of the Executive Law of the State of New York. The determination of the Supreme Court while instructive, is not binding on our Court . . . . Id., at ____ NY2d ____. [Addendum to Record, 1, fn. 1.]

Even the dissent in Brooklyn Union Gas Co., supra, agreed that General Electric Co. v. Gilbert, supra, was not controlling, and found it not even persuasive:

> The General Electric Company case, decided differently by the United States Supreme Court (General Elec. Co. v. Gilbert, ____ U.S. ____, 45 US Law Week 4031 [U.S. Dec. 7, 1976]), of course, is not determinative or even influential in consideration of the issues in these appeals. General Electric involved a different statute . . . . On the other hand, these appeals arise from the state statute governing discrimination, the Human Rights Law (Executive Law, §296) . . . . Id., at ____ NY2d ____ [Addendum to Record, 8]. [Breitel, C.J., dissenting].

II. THE REASONING OF THE UNITED STATES SUPREME COURT'S PLURALITY OPINION IN GENERAL ELECTRIC CO. V. GILBERT CANNOT PROPERLY BE APPLIED TO CONSTRUCTION OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

A. The Gilbert opinion adopts an analysis which has already been considered and properly rejected by this Honorable Court.

In applying the analysis of its Equal Protection decisions -- particularly Geduldig v. Aiello, 417 U.S. 484 (1974) -- to its consideration of what constitutes sex discrimination under Title VII, the Gilbert Court has apparently settled upon the characterization of pregnancy-based distinctions as disability classifications rather than sex classifications.[1]

---

1. This development may perhaps be traced back to the concurring opinion of Mr. Justice Powell in Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974), 7 EPD ¶9072, a case in which the majority held the mandatory pregnancy leave policies of two school districts to be unlawful as denials of Due Process. In a thoughtful concurring opinion, Justice Powell argued that Equal Protection rather than Due Process was the proper frame of reference. In a footnote, he identified the distinction upon which the Court's decision in two subsequent pregnancy cases -- Geduldig v. Aiello, supra and General Electric Co. v. Gilbert, supra -- would turn:

> "2. I do not reach the question whether sex-based classifications invoke strict judicial scrutiny, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973), or whether these regulations involve sex classifications at all. Whether the challenged aspects of these regulations constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest." 7 EPD ¶9072, at 6535. [Emphasis supplied.]

In Geduldig v. Aiello, supra, and now again in General Electric Co. v. Gilbert, supra, the United States Supreme Court has held that "exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all." General Electric Co. v. Gilbert, 45 USLW 4034.

This narrow reading of the term "sex-discrimination" is directly contrary to the more liberal construction of the same term already adopted by our own highest Court in its judicial interpretation of the Pennsylvania Human Relations Act:

* * *

> [P]regnant women are singled out and placed at a disadvantage . . . on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple. Cerra v. East Stroudsburg Area School District, 299 A.2d 277, 280, 450 Pa. 207 (1973). [Emphasis supplied.]

Moreover, this Honorable Court has repeatedly construed Cerra to require that disability related to pregnancy or childbirth be treated the same as disability related to any other sickness or disease, not only for purposes of the Pennsylvania Human Relations Act, but for Unemployment Compensation purposes as well.

In Freeport Area School District v. PHRC, 335 A.2d 873, 18 Pa. Cmwlth. Ct. 400 (1975), President Judge Bowman stated the Pennsylvania rule succinctly:

> . . . [P]regnant women may not be treated differently from any other employee suffering under a physical disability. Id., at 18 Cmwlth. Ct. 407.

The analysis made by the United States Supreme Court, that the classification provisions in question were disability classifications and not sex classifications, was considered and rejected by this court in Freeport, as Judge Mencer's dissent plainly shows:

> I respectfully dissent . . . .
> First: I believe the classification provisions in question here, contrary to the majority's analysis, are disability classifications and not sex classifications. Id., at 335 A.2d 882, 18 Cmwlth. Ct. 417.

In Leechburg Area School District v. PHRC, 339 A.2d 850, 19 Cmwlth. Ct. 614 (1975), Judge Crumlish put it this way:

> . . . The underlying basis of Cerra v. East Stroudsburg Area School District, supra, and Freeport Area School District v. Pennsylvania Human Relations Commission, supra, is that pregnancy is a physical disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees.

Indeed, the federal analysis was again implicitly rejected in Leechburg, when the following language was quoted with approval:

> "Similarly, in Hutchinson v. Lake Oswego School District No. 7, 374 F. Supp. 1056 (D. Or. 1974) a failure to allow accumulated sick leave to be applied to a pregnancy leave was held to be sex discrimination in violation of Title VII of the Civil Rights Act of 1964 because males were entitled to apply such sick leave to all disabilities." Id., at 19 Cmwlth. Ct. 622.

Dissenting in Leechburg from the majority's decision that denying pregnancy leave benefits to unmarried female

school teachers constituted a violation of the Pennsylvania Human Relations Act, President Judge Bowman, in an opinion joined by Judge Mencer, attempted to distinguish that case from the Pennsylvania pregnancy rule, in the following language:

> The subject of maternity leave employment practices and their conditions as being within the parameters of Section 5 of the [Pennsylvania Human Relations] Act has developed not because only women become pregnant but because employment practices peculiar to that biological condition may not be accorded different treatment than that accorded to males suffering from other physical disabilities, as such disabilities, pregnancy or otherwise, affect performance of their responsibilities in their field of employment. Id.

It appears, therefore, that the dissenters in Leechburg did not disagree with the majority's statement that "the underlying basis" of Cerra and Freeport "is that pregnancy is a physical disability . . . which may not be treated differently from other long-term physical disabilities suffered by all employees," supra, 10.

Most recently, this Court has considered whether discrimination because of pregnancy constitutes discrimination because of sex in the context of an unemployment compensation appeal. Unemployment Compensation Board of Review v. Latifah Perry, 349 A.2d 531, 22 Cmwlth. Ct. 429 (1975). In that case Judge Wilkinson stated for a unanimous Court:

> . . . [W]e think the law is quite clear.

> . . . The Attorney General's opinion [No. 9, dated February 7, 1974] correctly sets forth the law to be that the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., requires that pregnancy be treated as any other disease. 349 A.2d, at 533.

This Honorable Court has, therefore, three times rejected the analysis that pregnancy-related disabilities are sui generis and that treating them differently from all other disabilities is not sex discrimination. The federal plurality opinion, which rejected the unanimous conclusion of all six United States Courts of Appeal that had addressed the question, General Electric Co. v. Gilbert, supra, at 45 USLW 4037 [Brenman & Marshal, J.J., dissenting], contains nothing that should cause this Court to reverse its own well-reasoned prior decisions.

In particular, the Gilbert opinion contains little argument to justify its basic conclusion that exclusion of pregnancy-related disabilities is not sex-discrimination per se. The major portions of the Opinion, rather, are devoted to a description of the particular benefits program maintained by General Electric, the legislative history of Title VII, whether the female employe respondents had demonstrated the existance of any gender-based discriminatory effect resulting from exclusion of pregnancy disabilities from coverage, and whether the EEOC Guidelines on pregnancy and childbirth disability, 29 CFR §1604.10(b), ought to be followed.

With regard to its basic conclusion, the High Court relies almost exclusively on the rationale of its earlier decision in Geduldig v. Aiello, supra. Quoting Geduldig, the Opinion argues:

* * *

> The . . . program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women become pregnant, it does not follow that every . . . classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. 45 USLW 4034.

Significantly, the federal plurality opinion makes no attempt whatsoever to answer the virtual flood of cogent arguments against this analysis which were found persuasive in the district and circuit courts below. Among these are the difficulty of distinguishing disabilities related to pregnancy from other "voluntary," "planned," or "intended," disabilities such as those related to smoking, venereal diseases, injury incurred from self-inflicted wounds or dangerous sporting activities, etc., and from risks specific to the reproductive systems of men (e.g. prostatectomies, vasectomies, and circumcisions); the fact that this analysis does not at all explain or justify exclusion of disabilities arising from unexpected complications of pregnancy; the fact that in light of the religious and moral convictions of many with respect

to birth control and abortion, pregnancy can hardly be termed a "planned event;" etc.

In short, the Gilbert opinion reaches its basic result by "cursory analysis," General Electric Co. v. Gilbert, supra, at 45 USLW 4034, and its conclusion should not therefore be persuasive upon this Honorable Court.

B. The General Electric Co. v. Gilbert opinion is based upon the legislative history of Title VII, which differs greatly from that of the Pennsylvania Human Relations Act.

That the United States Supreme Court decision in General Electric Co. v. Gilbert does no more than interpret Title VII is clear from the language of the plurality opinion of Mr. Justice Rehnquist. Part I of the opinion notes, "We granted certiorari to consider this important issue in the construction of Title VII." 45 USLW, at 4033. Part II considers the meaning of the term "discrimination" in Section 703(a)(1) of the 1964 Civil Rights Act and whether Congress, in adopting this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment. 45 USLW at 4033. Finding its Equal Protection decisions a "useful starting point," Id., the Court concludes that its decision in Geduldig v. Aiello, 417 U.S. 484 (1974) "is precisely on point in its holding that an exclusion of pregnancy from a disability benefits plan is

not gender-based discrimination at all." 45 USLW at 4034. Part III of the opinion deals with the argument that " . . . this analysis of the congressional purpose underlying Title VII is inconsistent with the guidelines of the EEOC." 45 USLW at 4036. The opinion concludes: "We therefore agree with petitioner that its disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities." 45 USLW at 4037.

The concurring opinions of the two additional justices who helped to make up the 6-3 majority also explicitly characterize the majority holding as being that "General Electric's exclusion of benefits for disability during pregnancy is not a per se violation of §703(a)(1) of Title VII . . . ." Id.

In reasoning toward its conclusion, the plurality opinion expressly refers to the Bennett Amendment,[1] which the floor manager of the bill said was added to Title VII in order to "make it 'unmistakably clear' that 'differences of treatment in industrial benefit plans, including earlier retirement plans for women, may continue in operation if this bill becomes law.' 110 Cong. Rec. 13663-13664 (1964)." 45 USLW 4036.

---

1. "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29" 42 U.S.C. §2000e-2(h).

While it is not expressly reflected in the plurality opinion, the Gilbert Court was also undoubtedly aware of the peculiar legislative history underlying the inclusion of "sex" as a prohibited basis of discrimination in Title VII.

After almost two weeks of passionate floor debate in the House and just one day before the Civil Rights Act of 1964 was passed, Representative Smith, a principal opponent of the original bill, offered an amendment to include sex as a prohibited basis for unemployment discrimination, with the words, "I do not think it can do any harm to this legislation; maybe it will do some good." 110 Cong. Rec. 2577 (1964); See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, (1967); Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 791 (1965). Supporters of the original bill opposed the amendment because they feared that it would prevent passage of the basic legislation being considered. Id.; See e.g., 110 Cong. Rec. 2581 (1964).

Thus relying upon a legislative history which indicated only a grudging inclusion of sex as a prohibited basis of discrimination, it is not surprising that the Gilbert majority decided upon an equally grudging construction of the term "sex discrimination."

The apparent intent underlying both the Pennsylvania General Assembly's adoption of the Pennsylvania Human Relations Act in 1955 and its amendment of the Act in 1969 to include sex as a prohibited basis of discrimination, on the other hand, is far more liberal.

The Pennsylvania General Assembly's original intent is apparent in Sections 2 and 12 of the Pennsylvania Human Relations Act:

> Section 2. Findings and Declaration of Policy.
>
> (a) . . . The denial of equal employment . . . and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts . . . ."
>
> (b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . sex . . . and to safeguard their right to obtain and hold employment without . . . discrimination . . . ." (43 P.S. §952)
>
> Section 12. Construction and Exclusiveness of Remedy.
>
> (a) The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply. (43 P.S. §962)
>
> * * *

Significantly, no such language is contained in the Civil Rights Act of 1964.

The same Pennsylvania General Assembly that voted to amend the Pennsylvania Human Relations Act in 1969 to add "sex" as a prohibited basis for discrimination, Act of July 9, 1969, P.L. 133, also unanimously adopted the Pennsylvania

Equal Rights Amendment less than a year later.[1] The 1969 amendment was reported out of committee without alteration a mere six weeks after being introduced and was adopted by both the House and Senate with no debate and only four dissenting votes less than two months later.[2]

The intent of the Pennsylvania General Assembly in adopting the Pennsylvania Human Relations Act, therefore, is clearly independent of the intent of the United States Congress in adopting the Civil Rights Act of 1964. Since the Gilbert analysis is based upon the latter, it cannot properly be applied to the former.

---

1. House Bill 1678, a Joint Resolution proposing to an amendment to Article I of the Constitution of the Commonwealth of Pennsylvania prohibiting the denial or abridgment of rights because of sex, was passed by a vote of 190-0 in the House on December 2, 1969 and, as amended, passed by a vote of 39-0 in the Senate on March 17, 1970. On April 29, 1970, the House concurred in the Senate amendments by a vote of 180-0. History of House Bills and Resolutions, 1969-70, at A-231.

As finally adopted May 18, 1971, the Equal Rights Amendment reads:

> "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Const. Art. I, §28.

2. House Bill 567, Pr. No. 654 was introduced March 11, 1969, Reported by the Labor Relations Committee as committed April 29, 1969, passed by the House (190-2) on May 6, 1969, and passed without amendment by the Senate (44-2) on June 24, 1969. History of House Bills and Resolutions, 1969-70, at A-77.

C. The General Electric Co. v. Gilbert opinion rests partly on analysis of the applicable EEOC Guideline which cannot be applied to the applicable PHRC Regulations.

The Gilbert opinion, in reaching its conclusion despite the existence of an EEOC Guideline adopting a contrary interpretation, makes much of the fact that the EEOC Guideline was not adopted pursuant to any particular statutory authority and "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." General Electric Co. v. Gilbert, supra, at 45 USLW 4036.

No such difficulty exists at the state level in Pennsylvania. On the contrary, the Pennsylvania Human Relations Commission's present regulation on Employment Policies Relating to Pregnancy, Childbirth, and Childrearing, 16 Pa. Code §41.101 - 41.104 (5 Pa. B. 1299, May 17, 1975), was adopted pursuant to express statutory authority to "adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of [the Pennsylvania Human Relations] Act," 43 P.S. §957(d); and is wholly consistent with the Commission's initial guideline on the same subject, Pa. B. Doc. No. 70-703, amended Pa. B. Doc. No. 71-2413, §2(D), adopted shortly after the Pennsylvania Human Reltions Act was amended in 1969 to include "sex" as a prohibited basis of discrimination.

Moreover, while the EEOC Guidelines differed from the regulations adopted by the Wage and Hour Administrator under the Equal Pay Act, 29 CFR §800.116(d) (1975), General Electric Co. v. Gilbert, supra, at 45 USLW 4036, the Pennsylvania Human Relations Commission's regulations are uncontradicted by other state regulations and are fully in harmony with opinion of the Attorney General, Op. No. 9, 4 Pa. B. ____, Feb. 23, 1974.

In the present case before this Honorable Court, therefore, the regulations of the Pennsylvania Human Relations Commission should be given substantial deference. See Com., Human Relations Commission v. Feeser, 364 A.2d 1324, ____ Pa. ____ (1976), at 364 A.2d 1327, notes 9-10.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the plurality opinion of the United States Supreme Court in General Electric Co. v. Gilbert, supra, is not binding upon this Honorable Court, and should not disturb the consistent and well reasoned analysis of the basic issue in the present case already adopted by the Supreme Court of Pennsylvania, this Honorable Court, the Attorney General of Pennsylvania, and the Pennsylvania Human Relations Commission.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 727 COMMONWEALTH DOCKET 1976

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, UNI-SERVE REPRESENTATIVE

v.

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL,
Appellant

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

ADDENDUM TO RECORD

JAMES D. KEENEY, Assistant General Counsel
Pennsylvania Human Relations Commission

SANFORD KAHN, General Counsel
Pennsylvania Human Relations Commission

Attorneys for Respondent

Pennsylvania Human Relations Commission
Headquarters Office
100 North Cameron Street
Harrisburg, Pennsylvania 17101
(717) 783-8268 or (717) 787-4416

State of New York
Court of Appeals

2 No. 495
The Brooklyn Union Gas Company,
Respondent,
vs.
New York State Human Rights
Appeal Board, et al.,
Appellants.

1 No. 496
American Airlines, Inc.,
Respondent,
vs.
State Human Rights Appeal Board
et al.,
Appellants.

4 No. 497
State Division of Human Rights
on the complaint of Carolyn
Jane Armbruster,
Respondent,
vs.
Crouse-Irving Memorial
Hospital,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(495)Ann Thacher Anderson & Beverly Gross for appellant.
John E. Murphy & Harry G. Hill, Brooklyn, for respondent

(496)Ann Thacher Anderson & Beverly Gross for appellant.
James B. McQuillan, NY City. for respondent.

(497)John F. Lawton, Syracuse, for appellant.
Ann Thacher Anderson & Beverly Gross for respondent.

JONES, J.:

We hold that the provisions of § 205(3) of our State's Disability Benefits Law do not operate to shelter employment practices in the private sector that would otherwise be impermissibly discriminatory under our Human Rights Law. The imperative of the latter overrides the permissiveness of the former.

We have held that an employment personnel policy which singles out pregnancy and childbirth for treatment different from that accorded other instances of physical or medical impairment or disability is prohibited by the Human Rights Law (Union Free School Dist. No. 6, Towns of Islip and Smithtown v New York State Human Rights Appeal Bd., 35 NY2d 371; Board of Educ. of Union Free School Dist. No. 2, East Williston, Town of North Hempstead v New York State Div. of Human Rights, 35 NY2d 673; Matter of Board of Educ. of City of N. Y. v State Div. of Human Rights, 35 NY2d 675).[1] In

1. We are aware, of course, that the United States Supreme Court has recently reached a contrary result in construing § 703(a)(1) of Title VII of the federal Civil Rights Act of 1964 (General Electric Co. v Gilbert, ___ US ___, decided December 7, 1976). The pertinent provisions of that statute are substantially identical to those of section 296 of the Executive Law of the (Cont.)

each of these cases the employment was in the public sector and we concluded that a practice of differentiated treatment of pregnancy-related disability came within the statutory ban.

In the present cases we confront conceptually indistinguishable personnel practices but now for the first time the employment is in the private sector. This is said to call for a different consequence because the assertedly discriminatory practice is with respect to benefits within the ambit of the Disability Benefits Law (DBL), which is applicable to private but not to public employment. Under the DBL, disability "caused by or arising in connection with a pregnancy" is excepted from the minimum benefits mandated by that law (§ 205[3]). We are urged to hold that the provisions of the DBL rather than those of the Human Rights Law (HRL) establish the minimum performance to be required of private employers -- in effect that compliance with the minimum standards of the DBL will excuse failure to comply with the mandate of the HRL. We reject this conclusion.

There is an evident incongruity between the DBL and the HRL, and the determinative issue is which law shall be held to be operatively controlling. Initially we note that the DBL (Workmen's Compensation Law, Art. 9), adopted in 1949, was enacted as socioeconomic legislation designed to assure economic support for working men and women temporarily unable to continue their employment because of sickness or injury unconnected with that employment, and thus to bridge the gap between workmen's compensation and unemployment insurance (see Flo v General Electric Co., 7 NY2d 96, 99; Report of Joint Legislative Committee on Industrial and Labor Conditions, Leg. Doc. No. 67 [1949] at p 44). The new statute fixed a floor, not a ceiling; it contained no prohibition against granting disability benefits in excess of those mandated by the DBL, thereby to supplement and to exceed the legislatively mandated minimum. Public employers were not required to conform to the requirements of the DBL (§ 201[4]) although they were authorized voluntarily to elect to be covered (§ 212[2]). Various factors, including considerations of the cost of providing benefits, went into

---

Fn. 1 (Cont.)
State of New York. The determination of the Supreme Court, while instructive, is not binding on our Court as we now confront the contention of private employers that the provisions of our State's Disability Benefits Law excuse their failure to conform to the standard that we have held our Human Rights Law demands of public employers.

the determination of benefit coverage and benefit levels (see Report of the Joint Legislative Committee on Industrial and Labor Conditions, Leg. Doc. No. 67 [1949], p 44).

In 1965 the Human Rights Law (Executive Law, Art. 15) was amended to prohibit discrimination in employment on account of sex. The new law laid down a blanket proscription applicable to all employers, public and private, with more than three employees (E.L. § 292[5]); its objective was quite different from, though not necessarily at odds with, the objective of the DBL. "It shall be a discriminatory practice * * * for an employer, because of the * * * sex of any individual * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (Exec. Law, § 296[1][a].)

In the effort to reconcile the HRL and the DBL much attention has been devoted in the courts below to the principle and mechanics of the so-called doctrine of "implied repeal". In our view it advances neither analysis nor comprehenison to treat the statutory relationship of the 1965 HRL to the 1949 DBL in the category of implied repeal. Indeed argument in that formulation has been abandoned by the Human Rights Division in our Court. However the issue may be verbalized, the question is whether the earlier and still existing sections of the DBL now relieve private employers from the necessity of compliance with the mandate of the HRL. It does not have to be concluded that the HRL articulates a superior command, or that it reflects a worthier public policy than does the DBL; it suffices if it be recognized that the HRL expresses a <u>different</u> command.

Analysis of the statutory predicament we confront may be aided by resort to another discipline and to the geometric concept of "skew lines" -- two nonparallel lines which do not intersect however far extended and which accordingly do not lie in the same plane. So, too, here there is no collision between the HRL and the DBL; they pass each other without

intersection.[2] Each law is cast in terms of minimum requirements, but from different perspectives. As in other instances of concurrent independent minima, one set of minimum requirements will be operative in one circumstance, the other set in another circumstance. That this is so involves no contradiction or logical difficulty. Thus, at present for employers with three or fewer employees, the operative minimum is only that of the DBL; for all others it is that of the HRL. Or by way of another perspective, if the HRL were to be repealed -- a contingency realistically unthinkable, but perhaps illustratively useful -- the DBL would once again become operative for all covered employment without the necessity of reenactment. We do not hold, then, that the HRL struck down the DBL; rather in areas within the reach of both statutes the HRL rendered the DBL dormant. In sum, the DBL and the HRL each lay down minimum demands on employers. Whichever statute imposes the greater obligation is the one which becomes operative. In the cases before us it is the HRL.

To determine whether the DBL survived the enactment of the 1965 amendment to the HRL, or whether the latter impliedly repealed the former, or whether, as we hold, the two statutes are to be read together as resulting in the imposition of two concurrent independent minimum standards is no arrogation of a legislative prerogative. It is rather, whatever may be the outcome, the ordinary discharge of a familiar judicial responsibility. There can be no escape from what the dissent characterizes as the "ranking of statutes" if it is thereby intended to refer to the fact that the provisions of either the HRL or the DBL must be held to be operative. The dissent would hold that the DBL sets the operative standard; we hold that in this instance it is the HRL.

---

2. The situation would have been otherwise had the existing statute (the DBL), instead of setting a floor, contained provisions barring employers from treating pregnancy-related disability the same as nonpregnancy-related disabilities. Then, indeed, the two statutes would have been repugnant. They could not have continued to exist side by side; one would have had to give way to the other.

The private employers argue that it is significant that the preexisting differentiated treatment permitted with respect to pregnancy disabilities under the DBL was not prohibited by explicit provision in the 1965 amendment of the HRL. This contention misconceives the thrust and design of the HRL; it was intended as a blanket proscription. Surely it cannot be accepted that each discriminatory practice in use in 1965, whether existing by legislative grace or in consequence of employment custom or usage, should have been marked for explicit demise. Indeed, no discriminatory practice was identified -- the very purpose of the HRL was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised. To contend that, absent explicit condemnation, any preexisting discriminatory practice which might be said to have had legislative blessing prior to 1965 was assured continued acceptability would be largely to emasculate the new statute, intended as it was to eradicate all discrimination. What is significant is the fact that with the means so readily available to it the Legislature chose not to exempt the benefits commanded by the DBL from the prohibition of the HRL. That, as the dissent points out, there was specific tailoring with respect to certain exceptions underscores the point.

We agree with the dissent that there are differences, significant economic and policy differences, between public and private employment. We agree, too, that, absent issues of constitutional dimension (of which there are none with respect to the question now before us), the Legislature may take such differences into account in making different provision with respect to the two types of employment. Indeed that is what it did in the instance of disability benefit standards. Contrariwise, and this is critical in our view, this is precisely what the Legislature did not do when it enacted the Human Rights Law, and particularly when in 1965 it added sex as an impermissible basis for discrimination. In the absence of a clearly expressed and explicitly manifested legislative

intention we could not accept the conclusion that employees in the private sector are to be permitted to suffer discrimination from which employees in the public sector are protected.

It remains to make two other observations. In the first place, with an awareness of the realities of legislative activity and inactivity and particularly the variety of reasons which may be ascribed thereto, we attach no determinative significance to the failure of persisting attempts at explicit legislative integration of these two statutes. Questionable as may be any reliance on legislative inactivity, we would distinguish instances in which the legislative inactivity has continued in the face of a prevailing statutory construction. Thus, "[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence" (Engle v Talarico, 33 NY2d 237, 242). Such is not the circumstance here, however, for it is not until the announcement of our decision in the present cases that there may be said to be a final judicial determination as to the operative relation between the Disability Benefits Law and the Human Rights Law, with respect to which future inactivity may someday arguably be said to be significant.

Second, we set aside the spectres of assertedly prohibitive cost predicted to accompany any provision of equal benefits for pregnancy-related disability. A court cannot responsibly be wholly indifferent to the economic impact likely to attend its decisions, but neither can the prospect of financial impact dictate the judicial outcome. We do not doubt that the eradication of sexual discrimination, as well as of impermissible discrimination in other categories, will normally be expensive at least in the short run. We would violate our judicial responsibility, however, were we to accept the proposition pressed on us by some that while implementation of the Human Rights Law may proceed apace where cost can be said to be acceptable, some erosion of the blanket prohibition

must be tolerated where compliance may be expected to work serious economic distress. The very proper relevance of cost consideration enters the picture when determinations are to be made as to the particulars of implementation of the statutory mandate. In its presentation to us on these appeals the Human Rights Division acknowledged its awareness of very great responsibility in this regard.

Finally, entirely aside from the core issue in these cases as to whether the provisions of the DBL operate to cut back what would otherwise be the responsibility of the employers under the HRL, in two of the cases there was impermissible discrimination in the denial of sick leave, a benefit area outside the scope of the DBL. In both Brooklyn Union Gas and Crouse-Irving Memorial Hospital, the Commissioner determined that denial of sick leave benefits constituted impermissible discrimination in the circumstances. Accordingly, quite apart from any question as to the impact of the DBL, the orders of the Human Rights Appeal Board should be sustained to the extent that payment of sick leave was directed.[3] In cases in which the DBL was not involved we have previously held that a personnel policy which singles out pregnancy and childbirth for treatment different from that accorded other forms of disability is prohibited by the HRL (see authorities cited, supra, p 1).

In Brooklyn Union Gas and in American Airlines, the respective orders of the Appellate Divisions should be reversed, and the orders of the Human Rights Appeal Board confirmed; in Crouse-Irving the order of the Appellate Division should be affirmed.

3. We were informed on the application for leave to appeal in Crouse-Irving Memorial Hospital that the complainant's right to sick leave benefits was no longer at issue and that she had been paid such benefits.

BREITEL, Ch. J. (dissenting):

I dissent and would affirm the judgments of the Appellate Division in the Gas Company and the Airlines cases, and reverse the judgment in the Hospital case and annul the determination.

The General Electric Company case, decided recently by the United States Supreme Court (General Elec. Co. v. Gilbert, ____ US ____, 45 US Law Week 4031 [US Dec. 7, 1976]), of course, is not determinative or even influential in consideration of the issues in these appeals. General Electric involved a different statute and a disability insurance program not affected, in any way, by any federal statute concerned with disability insurance for employees in either public or private employment. On the other hand, these appeals arise from the state statute governing discrimination, the Human Rights Law (Executive Law, §296), and under the state statute providing for disability benefits for disabilities unconnected with employment (Workmen's Compensation Law, art 9). The two sets of appeals share in common the absence of a constitutional limitation proscribing one result or mandating the other. The last is key to these appeals. The question is purely legislative and the standards to be applied are those appropriate to judicial review and not those appropriate to initiating social-economic policy or projecting, however right, the social-economic preferences of the court's members.

I dissent not because I accept any license in public or private employment to discriminate invidiously against women. I do so because, as the majority would undoubtedly recognize, and it is but a truism, differences among human beings, either as individuals or as members of a class, may be acknowledged and acted upon without legal or moral vulnerability, provided the action is neither based on nor the effect of a concept of inferiority or the imposition of a disadvantage inappropriate to the difference. More important, I do so because the Legislature, the body responsible for making such policy decisions, has explicitly sanctioned the exclusion of pregnancy benefits from disability benefits coverage.

The Human Rights Law (Executive Law, §296, esp. subd 1, par [a]) makes illegal in private and public employment invidious discrimination based on race, national origin, creed, sex, marital status, disability, and age. But the statute's proscriptions are not absolute, and it does not purport, as indeed it could not properly, to be a higher law outranking all other statute law.

Exceptions appear in the Human Rights Law itself. The young may be denied access to liquor (id., subd 1, par [f]). Neither the very young nor the aged are entirely protected against employment discrimination (see, id., subd 3-a). Religious institutions may employ only those of their own faith (id., subd 11).

Other statutory exceptions, not expressed in the Human Rights Law, are equally well established. For example, public employee retirement plans discriminate on the basis of age, even for those not yet 65, by imposing a minimum age requirement (Retirement and Social Security Law, §2, subd 18; §70, subd a; §71, subd a). And this court has recognized that even race and ethnic origin may be given a preliminary preference in recruitment or selection in order to accommodate for discriminatory wrongs of the past or present (Alevy v. Downstate

Med. Center, 39 NY2d 326, 336-337; see Broidrick v. Lindsay, 39 NY2d 641, 647, 649).

Hence, even if Human Rights Law §296 were the only statute to which the court was bound to look, the issue in these cases would be troublesome. Complicating the matter is the unique character of pregnancy and all its incidents.

There is no longer any question that pregnancy-based classifications of the type challenged in these cases pose no constitutional difficulties (Geduldig v. Aiello, 417 US 484, 486-487, 496-497). And as the Supreme Court has recently decided, pregnancy-related disability exclusions are permissible under Title VII of the Federal Civil Rights Act, a similar antidiscrimination statute (General Elec. Co. v. Gilbert, ____US____, 45 US Law Week 4031, 4033-4035 [US Dec. 7, 1976], supra; US Code, tit 42, §2000e-2).

To be sure, in cases involving public school employment, this court, interpreting section 296, has held that pregnant teachers may not be compelled either to take a disability leave before they are in fact disabled or to extend their leave beyond the period during which they were actually disabled (Board of Educ. of Union Free School Dist. No. 2, East Williston v. New York State Div. of Human Rights, 35 NY2d 673; Board of Educ. of Union Free School Dist. No. 22, Towns of Oyster Bay and Babylon v. New York State Div. of Human Rights, 35 NY2d 677). Of course, these cases involved archaic discriminations against women, mandating involuntary disemployment, which, on the one hand, regarded obvious pregnancy as indelicate for young children to behold, and on the other hand, paternalistically required mothers to tend their newborn personally. The effect was impermissible, even if unintended or based on out-dated concepts of propriety.

Then, in another public school case, this court determined that so long as teachers generally were entitled to use sick and

sabbatical leaves to cover periods of temporary physical disability, the same could not be denied if by chance the period of disability were caused by pregnancy (Matter of Board of Educ. of the City of New York v. State Div. of Human Rights, 35 NY2d 675). In light of the City of New York case, it might be argued that denial of disability benefits in this case would work a discrimination between public school employment and other, private, employment. And, in fact, it would. But public and private employment are different in many respects, and the Legislature is entitled to recognize those differences. It has done so.

Because public employment and private employment are different, a discrimination in policy between them is not necessarily an invidious one, obviously the only kind prohibited by the Human Rights Law, although not so expressed. The costs of benefits in public employment are borne by the general taxpayer; they are not in private employment. Most important, private employers, except for regulated monopolies, are competitive with one another, not only within the state but within the federal union, and often, for a state like New York particularly, within the trading world. Then, too, there is a substantially greater risk in the case of private employment as compared with public employment that certain burdens may discourage, beyond effective detection, the employment of the members of the benefited class. This does not mean that the choice to provide coverage, onerous though it may be to private employment, should not be made, as was done with child labor and, within legislated limits, discrimination for age, sex, race, creed, or national origin. The point is that the choice is a legislative one to be made deliberately and should not be the product of judicial extrapolation based on social and economic preferences, whether in the majority or minority of this court.

The Legislature made that choice by providing that the Disability Benefits Law should apply only to private employment, and then only to certain private employments. Hence, the Human Relations Law is not the only statute involved in the cases now before the court. On the contrary, these cases must be resolved by reference to explicit provisions in the Disability Benefits Law (Workmen's Compensation Law, §205):

> No employee shall be entitled to benefits under this article:
>
> * * * *
>
> 3. for any period of disability caused by or arising in connection with a pregnancy . . . .

This provision, not involved in any of the previous pregnancy-related cases, should be dispositive of the issue now presented. It reflects the legislative choice, whether that choice was right or wrong on social-economic grounds.

In 1949 the State adopted an innovative and forward-looking program to provide disability benefits for disabled workmen not entitled to workmen's compensation (Workmen's Compensation Law, art 9). The counterpart to Workmen's Compensation in the proper sense of the word, it was to cover illness or disease and the consequences of accidents not arising in or out of the course of private employment. It was not to take care of "disabilities" due to other conditions which prevented one from engaging in compensated employment. It did not cover public employment. (See, generally, Governor's memorandum on approval of Workmen's Compensation Law, art 9, NY Legis Ann, 1949, pp 263-264.) Thus pregnancy was deliberately and explicitly excepted from coverage, and that has been the law since 1949 (see 1949 Report of the Joint Legislative Committee on Industrial and Labor Conditions, Leg Doc No 67, p 44). Even since 1965, when the Human Rights Law was amended to prohibit sex discrimination,

repeated efforts in the Legislature to eliminate the pregnancy exclusion of section 296 have failed, undoubtedly because the change would not conform with the Legislature's view of the pattern and philosophy of the Disability Benefits Law (see 1965 Assembly Intro. No. 856; 1971 Assembly Intro. No. 4000; 1972 Assembly Intro. No. 4000 and 11269; 1972 Senate Intro. No. 9370; 1973 Assembly Intro. No. 1286, 4871 and 5286; 1973 Senate Intro. No. 2041; 1974 Assembly Intro. No. 1286 and 5286; 1974 Senate Intro. No. 2041). The bills and the efforts to amend were controversial, debated by legislative supporters and opponents to the liberalizing measures. These were not bills merely filed and printed to mollify noisy proponents (compare New York Civil Liberties Union, Legislative Memorandum No. 8, Jan. 28, 1972, with Commerce & Industry Association of New York, Inc., Newsletter 72:8, Feb. 24, 1972). The bills were never passed, or even brought out of committee, despite publicity and strenuous efforts.

It is of interest, and relevant analytically, that while the Disability Benefits Law was first being considered, and later as amendments were being proposed, it was noted in legislative studies that there were some states in which there were statutes providing for pregnancy disability benefits (see 1948 Report of the Joint Committee on Industrial and Labor Relations, Leg Doc No 53, pp 35, 69-71; N.J. Stat. Ann. §§43:21-29, 43:21-39[e]; R.I. Gen. Laws §28-41-8). There were even a few states that required that pregnant employees for periods before and after delivery not be employed (Summary of State Labor Laws for Women, U.S. Department of Labor, March 1969). In this State unemployment insurance benefits were denied to pregnant women unless they could show that they were still available for employment (Matter of Steiner v. Catherwood, 31 AD2d 669, affd 25 NY2d 819).

These differences in treatment show that there are many choices to be made in providing for pecuniary benefits for pregnant working women. These are legislative choices, influenced by all sorts of economic and social factors, not excluding that which determines whether fellow employees, employers, the consumers of particular goods and services, or the general taxpayers should bear the financial burden of whatever costs such benefits entail. Influencing the choice of factors, of course, is the competitive consequence on industries in a state which adopts one policy or another. It is not the function of the court to decide which legislative choices were wise or unwise, or right or wrong, by moral, economic, or social standards.

The majority's attempt to circumvent the clear expression of the legislative will by appealing, implicitly if not expressly, to the "higher law" values of the Human Rights Law is analytically unsound. The approach engenders a dangerous trend toward judicial arrogation of the legislative function.

It matters not how the majority characterizes its approach. The fact is that the only way to reach its conclusion, other than by adopting the properly rejected implied repeal argument, is by engaging in a ranking of statutes. For the virtual nullity the majority makes of the pregnancy exclusion can be explained only by subordinating the specific provisions of the Disability Benefits Law to the general policies of the Human Rights Law.

By finding a basis for ranking statutes as higher or lower, the majority engages in a jurisprudentially and intellectually dangerous excursion. I had always supposed, and still believe, that it is the exclusive function of the Legislature, within constitutional limits, to rank statutes, establish priorities, repeal or modify

(impliedly or expressly), and determine what is and should be the legislative policy of the State. Indeed, I had always supposed, and still believe, that, putting aside controversial concepts of "natural law" and, in the Anglo-American jurisprudence, the unique tradition of the common law, there were only three ranks of law, constitutions, statutes, and local law or regulations authorized by statute or constitution. I cannot accept judicial subranking within these categories, substituting, as it does, the subjective or transitory views of a particular majority of a court for the mandates of those entrusted with legislating state policy. The danger posed by the majority's analysis is not to the purity of terminology, classification, or concept, but to the integrity of a judicial process which does not recognize its limits.

In section 205 of the Disability Benefits Law, the Legislature has spoken with clarity and precision. It has been informed repeatedly of the purportedly discriminatory effect of the pregnancy exclusion, yet it has never acted to change the provision. Under these circumstances, the result rendered by the majority is nothing less than a direct and unwarranted overruling of legislative directions. If there is no repeal, there must be implication, and if there is neither the "law-making" function of a court is abused.

Accordingly, I dissent.

* * * * * * * * * * * * * * * *

In Brooklyn Union Gas Co. v. Human Rights Appeal Board:
Order reversed, with costs, the order of the Human Rights Appeal Board confirmed and cross motion for enforcement granted. Opinion by Jones, J. All concur except Breitel, Ch. J., who dissents and votes to affirm in an opinion in which Jasen, J., concurs.

In American Airlines v. State Human Rights Appeal Board:
Order reversed, with costs, and the order of the Human Rights Appeal Board confirmed. Opinion by Jones, J. All concur except Breitel, Ch. J., who dissents and votes to affirm in an opinion in which Jasen, J., concurs.

In State Division of Human Rights v. Crouse-Irving Memorial Hospital:
Order affirmed, with costs. Opinion by Jones, J. All concur except Breitel, Ch. J., who dissents and votes to reverse in an opinion in which Jasen, J., concurs.

Decided December 20, 1976

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative :

v. : NO. 727 C. D. 1976

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Appellant :

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Party Appellee :

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

ISSUED - MARCH 8, 1977 - HARRISBURG

O P I N I O N

OPINION BY JUDGE ROGERS FILED: MAY 5, 1977

This is an appeal from an adjudication of the Pennsylvania Human Relations Commission holding that the appellant Upper Bucks County Area Vocational Technical School had discriminated against an employe because of her sex in violation of Section 5(a) of the Pennsylvania Human Relations Act (PHRA)[1], 43 P.S. §955(a).

Carole B. Anderson, a teacher, asked the appellant School to apply her accumulated sick leave to the total time she was absent from her employment as a result of her pregnancy.[2] The appellant refused Anderson's request because a provision of the collective bargaining agreement between it and its teachers excluded from "Sick Leave" any benefits for pregnancy. The pertinent parts of said provisions are:

> "Sick Leave. In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave

---

1. Act Of October 27, 1955, P.L. 744, as amended.

2. Appellee had accumulated 40 days of sick leave at the time of the request. She was absent from work due to pregnancy for 27 days. The total sick leave benefits for 27 days at Anderson's daily rate of $49.73 amounted to $1,342.41.

shall be cumulative from year to year. No employe's salary shall be paid if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties. Additional days may be approved by the School Board as the exigencies of the case may warrant.

. . . .

"Maternity Leave. All female employes who become pregnant are entitled to a period of childbirth leave from their duties in the School District pursuant to the following provisos;

. . . .

e. All periods of childbirth leave shall be deemed leave without pay; during which period sick leave and/or other benefits will not accrue." (Emphasis in original.)

Anderson filed a complaint with the Commission alleging that the appellant's refusal of sick leave benefits for her pregnancy was sexually based and that it violated Section 5(a) of the PHRA. Following unsuccessful efforts at conciliation, the parties entered into a stipulation of facts. The Commission thereupon decided that:

"2. Pregnancy-related disability is a temporary disability which must be treated in the same manner as any other temporary disability. Since pregnancy-related disability is a disability common only to women, to treat it differently from other disability by extending inferior compensation, terms, conditions and privileges of employment constitute sex discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act."

and ordered the appellant to pay Anderson the amount of money she would have received if her request for sick leave had been

granted. The School has appealed.

Our review of appeals of a Commission order is limited to determining whether they are in accordance with law; whether substantial evidence supports findings of facts necessary to sustain the order; and whether the Commission properly exercised its discretion. Leechburg Area School District v. Human Relations Commission, 19 Pa. Commonwealth Ct. 614, 339 A.2d 850 (1975). The facts having been stipulated, our duty is only to decide whether the appellant's sick leave policy as it applies to pregnancy is an unlawful discriminatory practice with respect to the privileges of Anderson's employment.

Section 5(a) of the PHRA, 43 P.S. §955(a) pertinently declares that:

> "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .
>
> (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the service required. The provision of this paragraph shall not apply, to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operation of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement, (3) operation of the terms or conditions of any bona fide group or employe insurance plan." (Emphasis added.)

We first observe that it has been decided that the exclusion of disability from pregnancy from the coverage of a State employment compensation disability insurance program does not amount to "invidious discrimination" under the Equal Protection Clause but that such an exclusion is a rationally supportable stopping point for benefits. Geduldig v. Aiello, 417 U.S. 484 (1974). We are, of course, also mindful that the United States Supreme Court has recently held, with heavy reliance on Aiello, that such an exclusion in a private employer's disability plan is not violative of Section 702(a)(1) of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1).[3] General Electric Co. v. Gilbert, ____ U.S. ____, 50 L. Ed. 2d 343 (1976). We are not constrained to reach in this case the result reached in either Aiello or Gilbert.

Discriminatory practices not constitutionally prohibited may nevertheless be statutorily proscribed. The instant case is one of statutory interpretation, not one for constitutional analysis. Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y. 2d 371, 320 N.E. 2d 859, 362 N.Y.S. 2d 139 (1974).

---

3. Section 702(a)(1) reads:

"(a) It shall be an unlawful employment practice for an employer -

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

This Court is not compelled by Gilbert's construction of Title VII of the Federal Civil Rights Act of 1964 to construe the Pennsylvania Human Relations Act in the same fashion. Eisenstadt v. Baird, 405 U.S. 438 (1972); Commonwealth of Pennsylvania v. The First School, ____ Pa. ____, ____ A.2d ____ (No. 17 May Term, 1977, filed February 28, 1977). Congress has expressly provided that State statutes defining sex discrimination more comprehensively than the Civil Rights Act of 1964 shall not be preempted or superseded by Title VII of the Civil Rights Act of 1964.[4] 42 U.S.C. §2000e-7; 42 U.S.C. §2000h-4.

In addressing the challenge, based on statute, to the disability plan in Gilbert, the Supreme Court adopted the same rationales it used in Aiello in deciding whether the plan there under consideration offended the Equal Protection Clause; to wit, (1) that the exclusion of pregnancy related disability is not a prima facie case of sex or gender classification, but rather a disability classification, and (2) that the complainant, Gilbert, failed to carry the additional burden of proving that the effect of this facially neutral classificati

---

4. Nor does the preemption provision of the Employe Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1144(a), prevent a result different from that of Gilbert, because that provision is not applicable to benefit plans established by a State or its political subdivisions. See 29 U.S.C. §§1144(a), 1003(b)(1) and 1002(32). Furthermore, there is no evidence in this record that the appellant's regulations are qualified under ERISA.

was to discriminate against members of the female sex.[5] In interpreting the anti-discrimination provision of Section 5(a) of the PHRA, we disagree, as did all pre-Gilbert Federal Circuit Court opinions addressing Title VII issues, with the premise that the exclusion of pregnancy related disability is not sex classification.[6] We believe that since pregnancy is unique to women, a disability plan which expressly denies benefits for disability arising out of pregnancy is one which discriminates against women employes because of their sex.

---

5. Mr. Justice Stevens dissenting in Gilbert wrote that "the . . . burden of proving a prima facie violation [of the Equal Protection Clause] is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination [and thus], the constitutional holding in Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974), does not control the question of statutory interpretation presented by this case." Gilbert, supra, ____ U.S. at ____, 50 L.Ed.2d at 369. Post-Geduldig, pre-Gilbert, Federal Circuit cases dealing with Title VII make the same distinction as Mr. Justice Stevens.

6. Mr. Justice Brennan also dissenting in Gilbert wrote:

> "Today's holding not only repudiates the applicable administrative guideline promulgated by the agency charged by Congress with implementation of the Act, but also rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question. See Communication Workers of America v. A. T. & T. Co. 513 F2d 1024 (CA2-1975), petition for cert pending, No. 74-1601; Wetzel v. Liberty Mutual Ins. Co. 511 F2d 199 (CA3 1975), vacated on juris grounds, 424 US 737, 47 L Ed 2d 435, 96 S Ct 1202 (1976); Gilbert v. General Electric Co. 519 F2d 661 (CA4), cert granted, 423 US 822, 46 L Ed 2d 39, 96 S Ct 36 (1975); Tyler v. Vickery, 517 F2d 1089, 1097-1099 (CA5 1975); Satty v. Nashville Gas Co. 522 F2d 850 (CA6 1975), petition for cert pending, No. 75-536; Hutchinson v. Lake Oswego School Dist. 519 F2d 961 (CA9 1975), petition for cert pending, No. 75-1049." Gilbert, supra, ____ U.S. at ____, 50 L. Ed. 2d at 361.

Turning now to Pennsylvania law, we find ample support for our belief just stated in cases holding that pregnancy based discrimination constitutes sex discrimination proscribed by Section 5(a) of the PHRA. In Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973), the Supreme Court of Pennsylvania held that a school district regulation requiring pregnant teachers to resign at the end of their fifth month of pregnancy was contrary to Section 5(a) of PHRA. Mr. Justice (now Chief Justice) Eagen there wrote:

> "Mrs. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the penalty of her services as a teacher was or would be affected as a result of the pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple." Cerra v. East Stroudsburg Area School District, supra at 213, 299 A.2d at 280. (Emphasis supplied.)

In Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Commonwealth Ct. 400, 407, 335 A.2d 873, 877 (1975), this Court, in addressing the validity of a collective bargaining agreement's provision for compulsory unpaid maternity leave 3-1/2 months prior to the predicted date of birth, likewise held that:

> "The amendment to section 5(a), adding discrimination on the basis of sex as an unlawful activity upon which this action is predicated, . . . mean[s] that pregnant women may not be treated differently from any other employee suffering under a physical disability." (Emphasis supplied.) (Footnotes omitted.)

In Freeport, we also held that the fact that the discriminatory practice was, as here, incorporated in a collective bargaining agreement was no impediment to a challenge to its legality under Section 5(a) of PHRA.

In Leechburg Area School District, supra, where we struck down a pregnancy leave provision much like that in Freeport with the additional feature that it was applicable only to married pregnant teachers, we said:

> "[P]regnancy is a physical disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees. In the instant case, Appellant's policy of limiting maternity leave to married teachers, although facially differentiating only between married and unmarried female teachers, has the effect of creating a condition precedent to the eligibility of an employee for disability leave which must only be met by female teachers, and, as such, constitutes sex discrimination under Section 5(a)." 19 Pa. Commonwealth Ct. 619, 339 A.2d at 853.

Further support for our interpretation of Section 5(a) is to be found in the Commission's regulations which provide:

> "Temporary disability due to pregnancy or childbirth. Written and unwritten employment practices and policies regarding job benefits and job security, including, but not limited to, commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[7] 16 Pa. Code §41.103(a). (Emphasis in original.)

Thus we conclude that the appellant's practice of excluding from disability coverage a disability unique to women, violates Section 5(a) of PHRA.

The appellant says that even if it is unlawful to exclude disability as the result of pregnancy from a plan providing benefits for disability for other causes, Anderson is not entitled to benefits under this plan which gives benefits only for "illness or accidental injury." Pregnancy, it says, is neither an illness nor an accidental injury. The argument is captious. If accepted, we would be forced to commit the absurdity of deciding that the appellant's exclusion in its Marital Leave regulations of pregnancy

---

7. The Supreme Court, in Gilbert, supra, refused to follow a similar EEOC guideline. One reason given for this refusal to follow the guideline, which otherwise would be given "great deference", was that it was not adopted pursuant to any particular statutory grant of authority. Here, the Commission regulation was adopted pursuant to express statutory authority to "adopt, promulgate, amend, and rescind rules and regulations to effectuate the policies and provisions of "[the Pennsylvania Human Relations Act]." Section 7(d) of PHRA, 43 P.S. §957(d).

from disability coverage is discriminatory, while holding that Anderson, an apparent victim of discrimination, is not entitled to benefits because her disability is not from illness or accidental injury. Unemployment Compensation Board of Review v. Perry, 22 Pa. Commonwealth Ct. 429, 431-32, 349 A.2d 531, 533 (1975), is instructive. We there held that an unemployment compensation claimant who quit work because of pregnancy was, just as claimants quitting because of other disabilities, required to provide a doctor's statement that her health required her to terminate her employment. We there, by Judge Wilkinson, said:

> "Somehow appellant insists that a voluntary quit for reasons of pregnancy is a leaving for a necessitous and compelling reason under a recent opinion of the Attorney General of Pennsylvania. Quite the contrary. The Attorney General's opinion correctly sets forth the law to be that the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., requires that pregnancy be treated as any other disease. Just as the employer may not discharge the employee for pregnancy without a showing that in her particular case, the pregnancy made her incapable of satisfactorily fulfilling her assigned tasks, so the employee may not voluntarily quit because of pregnancy and be eligible for unemployment compensation benefits without a showing that her decision was based on medical advice."

So here, while pregnancy may not be illness or accidental injury, it must under Pennsylvania law be treated as any other physical infirmity.

Appellant finally says that the Commission's decision

affects the operation of the terms or conditions of a bonafide group insurance plan and therefore falls within the exemption in Section 5(a) for plans having such effect. The appellant's reference is to its Group Income Protection Plan (GIPP) which is coordinated with its sick leave benefits[8] and is described in the parties' stipulation as follows:

> "Under said Plan a disabled employe is paid $7 per school day for total disability resulting from an accident or sickness. Payments start on the first day of disability due to accident and the third day of disability due to sickness and continue until all accumulated Sick Leave has been used at which time an amount of $14 to $28 per school day, depending upon the number of sick days accumulated prior to disability, is paid to the employe following termination of Sick Leave paid by Respondent and continuing for as long as two calendar years for any one continuous period of accident or illness disability."

GIPP does not provide coverage for pregnancy related disability. Hence, the appellant says that the Commission's order will require it to change the terms or conditions of its group insurance plan. We disagree. The Commission's order in this case does not affect GIPP benefits. First, the appellee never claimed benefits from GIPP; and second, the amount of $1,342.71 which the Commission ordered the appellant to pay Anderson is the exact amount she would be entitled to on account of sick leave and includes no GIPP benefits.

---

8. GIPP benefits are apparently paid from the proceeds of an insurance policy. Sick leave benefits are paid by the appellant.

Accordingly, we enter the following:

O R D E R

AND NOW, this 5th day of May , 1977, it is ordered and decreed that the decision, order and award of the Pennsylvania Human Relations Commission be and it is hereby affirmed and that the appeal of the Upper Bucks County Area Vocational Technical School be and is hereby dismissed.

Theodore O. Rogers, J.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Univ. Repr. ntative	:	
v.	:	NO. 727 C.D. 1976
UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Appellant	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Party Appellee	:	

ORDER

AND NOW, this 5th day of May, 1977, it is ordered and decreed that the decision, order and award of the Pennsylvania Human Relations Commission be and it is hereby affirmed and that the appeal of the Upper Bucks County Area Vocational Technical School be and is hereby dismissed.

Theodore O. Rogers, J.

ENTERED FROM THE RECORD

MAY 5 1977

Francis C. Barbush
CHIEF CLERK

Supreme Court of Pennsylvania

Eastern District

Catherine E. Lyden
PROTHONOTARY

PHILADELPHIA, 19107

May 3, 1978

John J. Hart, Esq.,
Power, Bowen & Valimont
64 North Main Street
Sellersville, Pa. 18960

In re: Carole B. Anderson et al. v. Upper Bucks County Area Vocation Technical School
Petitioner, v. Commonwealth of Penna. etc.
No. 3055 Allocatur Docket

Dear Mr. Hart:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"Petition Denied this 2nd day of May, 1978
Per Curiam"

Very truly yours,

Sally Mrvos
Prothonotary

SM:mb

CC: James D. Keeney, Esq.,
CC: Cleckner & Fearen, Esqs.

Legal file

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative :

v. : NO. 727 C. D. 1976

UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Appellant :

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Party Appellee :

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

ARGUED - MARCH 8, 1977 - HARRISBURG

O P I N I O N

OPINION BY JUDGE ROGERS FILED: MAY 5, 1977

This is an appeal from an adjudication of the Pennsylvania Human Relations Commission holding that the appellant Upper Bucks County Area Vocational Technical School had discriminated against an employe because of her sex in violation of Section 5(a) of the Pennsylvania Human Relations Act (PHRA)[1], 43 P.S. §955(a).

Carole B. Anderson, a teacher, asked the appellant School to apply her accumulated sick leave to the total time she was absent from her employment as a result of her pregnancy.[2] The appellant refused Anderson's request because a provision of the collective bargaining agreement between it and its teachers excluded from "Sick Leave" any benefits for pregnancy. The pertinent parts of said provisions are:

> "Sick Leave. In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave

---

1. Act Of October 27, 1955, P.L. 744, as amended.

2. Appellee had accumulated 40 days of sick leave at the time of the request. She was absent from work due to pregnancy for 27 days. The total sick leave benefits for 27 days at Anderson's daily rate of $49.73 amounted to $1,342.41.

shall be cumulative from year to year. No employe's salary shall be paid if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties. Additional days may be approved by the School Board as the exigencies of the case may warrant.

. . . .

"Maternity Leave. All female employes who become pregnant are entitled to a period of childbirth leave from their duties in the School District pursuant to the following provisos;

. . . .

e. All periods of childbirth leave shall be deemed leave without pay; during which period sick leave and/or other benefits will not accrue." (Emphasis in original.)

Anderson filed a complaint with the Commission alleging that the appellant's refusal of sick leave benefits for her pregnancy was sexually based and that it violated Section 5(a) of the PHRA. Following unsuccessful efforts at conciliation, the parties entered into a stipulation of facts. The Commission thereupon decided that:

"2. Pregnancy-related disability is a temporary disability which must be treated in the same manner as any other temporary disability. Since pregnancy-related disability is a disability common only to women, to treat it differently from other disability by extending inferior compensation, terms, conditions and privileges of employment constitute sex discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act."

and ordered the appellant to pay Anderson the amount of money she would have received if her request for sick leave had been

granted. The School has appealed.

Our review of appeals of a Commission order is limited to determining whether they are in accordance with law; whether substantial evidence supports findings of facts necessary to sustain the order; and whether the Commission properly exercised its discretion. Leechburg Area School District v. Human Relations Commission, 19 Pa. Commonwealth Ct. 614, 339 A.2d 850 (1975). The facts having been stipulated, our duty is only to decide whether the appellant's sick leave policy as it applies to pregnancy is an unlawful discriminatory practice with respect to the privileges of Anderson's employment.

Section 5(a) of the PHRA, 43 P.S. §955(a) pertinently declares that:

> "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .
>
> (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the service required. The provision of this paragraph shall not apply, to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operation of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement, (3) operation of the terms or conditions of any bona fide group or employe insurance plan." (Emphasis added.)

We first observe that it has been decided that the exclusion of disability from pregnancy from the coverage of a State employment compensation disability insurance program does not amount to "invidious discrimination" under the Equal Protection Clause but that such an exclusion is a rationally supportable stopping point for benefits. Geduldig v. Aiello, 417 U.S. 484 (1974). We are, of course, also mindful that the United States Supreme Court has recently held, with heavy reliance on Aiello, that such an exclusion in a private employer's disability plan is not violative of Section 702(a)(1) of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1).[3] General Electric Co. v. Gilbert, ____ U.S. ____, 50 L. Ed. 2d 343 (1976). We are not constrained to reach in this case the result reached in either Aiello or Gilbert.

Discriminatory practices not constitutionally prohibited may nevertheless be statutorily proscribed. The instant case is one of statutory interpretation, not one for constitutional analysis. Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y. 2d 371, 320 N.E. 2d 859, 362 N.Y.S. 2d 139 (1974).

---

3. Section 702(a)(1) reads:

"(a) It shall be an unlawful employment practice for an employer -

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

This Court is not compelled by Gilbert's construction of Title VII of the Federal Civil Rights Act of 1964 to construe the Pennsylvania Human Relations Act in the same fashion. Eisenstadt v. Baird, 405 U.S. 438 (1972); Commonwealth of Pennsylvania v. The First School, ____ Pa. ____, ____ A.2d ____ (No. 17 May Term, 1977, filed February 28, 1977). Congress has expressly provided that State statutes defining sex discrimination more comprehensively than the Civil Rights Act of 1964 shall not be preempted or superseded by Title VII of the Civil Rights Act of 1964.[4] 42 U.S.C. §2000e-7; 42 U.S.C. §2000h-4.

In addressing the challenge, based on statute, to the disability plan in Gilbert, the Supreme Court adopted the same rationales it used in Aiello in deciding whether the plan there under consideration offended the Equal Protection Clause; to wit, (1) that the exclusion of pregnancy related disability is not a prima facie case of sex or gender classification, but rather a disability classification, and (2) that the complainant, Gilbert, failed to carry the additional burden of proving that the effect of this facially neutral classificati

4. Nor does the preemption provision of the Employe Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1144(a), prevent a result different from that of Gilbert, because that provision is not applicable to benefit plans established by a State or its political subdivisions. See 29 U.S.C. §§1144(a), 1003(b)(1) and 1002(32). Furthermore, there is no evidence in this record that the appellant's regulations are qualified under ERISA.

was to discriminate against members of the female sex.[5] In interpreting the anti-discrimination provision of Section 5(a) of the PHRA, we disagree, as did all pre-Gilbert Federal Circuit Court opinions addressing Title VII issues, with the premise that the exclusion of pregnancy related disability is not sex classification.[6] We believe that since pregnancy is unique to women, a disability plan which expressly denies benefits for disability arising out of pregnancy is one which discriminates against women employes because of their sex.

---

5. Mr. Justice Stevens dissenting in Gilbert wrote that "the . . . burden of proving a prima facie violation [of the Equal Protection Clause] is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination [and thus], the constitutional holding in Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974), does not control the question of statutory interpretation presented by this case." Gilbert, supra, ____ U.S. at ____, 50 L.Ed.2d at 369. Post-Geduldig, pre-Gilbert, Federal Circuit cases dealing with Title VII make the same distinction as Mr. Justice Stevens.

6. Mr. Justice Brennan also dissenting in Gilbert wrote:

> "Today's holding not only repudiates the applicable administrative guideline promulgated by the agency charged by Congress with implementation of the Act, but also rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question. See Communication Workers of America v. A. T. & T. Co. 513 F2d 1024 (CA2-1975), petition for cert pending, No. 74-1601; Wetzel v. Liberty Mutual Ins. Co. 511 F2d 199 (CA3 1975), vacated on juris grounds, 424 US 737, 47 L Ed 2d 435, 96 S Ct 1202 (1976); Gilbert v. General Electric Co. 519 F2d 661 (CA4), cert granted, 423 US 822, 46 L Ed 2d 39, 96 S Ct 36 (1975); Tyler v. Vickery, 517 F2d 1089, 1097-1099 (CA5 1975); Satty v. Nashville Gas Co. 522 F2d 850 (CA6 1975), petition for cert pending, No. 75-536; Hutchinson v. Lake Oswego School Dist. 519 F2d 961 (CA9 1975), petition for cert pending, No. 75-1049." Gilbert, supra, ____ U.S. at ____, 50 L. Ed. 2d at 361.

Turning now to Pennsylvania law, we find ample support for our belief just stated in cases holding that pregnancy based discrimination constitutes sex discrimination proscribed by Section 5(a) of the PHRA. In Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973), the Supreme Court of Pennsylvania held that a school district regulation requiring pregnant teachers to resign at the end of their fifth month of pregnancy was contrary to Section 5(a) of PHRA. Mr. Justice (now Chief Justice) Eagen there wrote:

> "Mrs. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the penalty of her services as a teacher was or would be affected as a result of the pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple." Cerra v. East Stroudsburg Area School District, supra at 213, 299 A.2d at 280. (Emphasis supplied.)

In Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Commonwealth Ct. 400, 407, 335 A.2d 873, 877 (1975), this Court, in addressing the validity of a collective bargaining agreement's provision for compulsory unpaid maternity leave 3-1/2 months prior to the predicted date of birth, likewise held that:

> "The amendment to section 5(a), adding discrimination on the basis of sex as an unlawful activity upon which this action is predicated, . . . mean[s] that pregnant women may not be treated differently from any other employee suffering under a physical disability." (Emphasis supplied.) (footnotes omitted.)

In Freeport, we also held that the fact that the discriminatory practice was, as here, incorporated in a collective bargaining agreement was no impediment to a challenge to its legality under Section 5(a) of PHRA.

In Leechburg Area School District, supra, where we struck down a pregnancy leave provision much like that in Freeport with the additional feature that it was applicable only to married pregnant teachers, we said:

> "[P]regnancy is a physical disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees. In the instant case, Appellant's policy of limiting maternity leave to married teachers, although facially differentiating only between married and unmarried female teachers, has the effect of creating a condition precedent to the eligibility of an employee for disability leave which must only be met by female teachers, and, as such, constitutes sex discrimination under Section 5(a)." 19 Pa. Commonwealth Ct. 619, 339 A.2d at 853.

Further support for our interpretation of Section 5(a) is to be found in the Commission's regulations which provide:

> "Temporary disability due to pregnancy or childbirth. Written and unwritten employment practices and policies regarding job benefits and job security, including, but not limited to, commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[7] 16 Pa. Code §41.103(a). (Emphasis in original.)

Thus we conclude that the appellant's practice of excluding from disability coverage a disability unique to women, violates Section 5(a) of PHRA.

The appellant says that even if it is unlawful to exclude disability as the result of pregnancy from a plan providing benefits for disability for other causes, Anderson is not entitled to benefits under this plan which gives benefits only for "illness or accidental injury." Pregnancy, it says, is neither an illness nor an accidental injury. The argument is captious. If accepted, we would be forced to commit the absurdity of deciding that the appellant's exclusion in its Marital Leave regulations of pregnancy

---

7. The Supreme Court, in Gilbert, supra, refused to follow a similar EEOC guideline. One reason given for this refusal to follow the guideline, which otherwise would be given "great deference", was that it was not adopted pursuant to any particular statutory grant of authority. Here, the Commission regulation was adopted pursuant to express statutory authority to "adopt, promulgate, amend, and rescind rules and regulations to effectuate the policies and provisions of "[the Pennsylvania Human Relations Act]." Section 7(d) of PHRA, 43 P.S. §957(d).

from disability coverage is discriminatory, while holding that Anderson, an apparent victim of discrimination, is not entitled to benefits because her disability is not from illness or accidental injury. Unemployment Compensation Board of Review v. Perry, 22 Pa. Commonwealth Ct. 429, 431-32, 349 A.2d 531, 533 (1975), is instructive. We there held that an unemployment compensation claimant who quit work because of pregnancy was, just as claimants quitting because of other disabilities, required to provide a doctor's statement that her health required her to terminate her employment. We there, by Judge Wilkinson, said:

> "Somehow appellant insists that a voluntary quit for reasons of pregnancy is a leaving for a necessitous and compelling reason under a recent opinion of the Attorney General of Pennsylvania. Quite the contrary. The Attorney General's opinion correctly sets forth the law to be that the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., requires that pregnancy be treated as any other disease. Just as the employer may not discharge the employee for pregnancy without a showing that in her particular case, the pregnancy made her incapable of satisfactorily fulfilling her assigned tasks, so the employee may not voluntarily quit because of pregnancy and be eligible for unemployment compensation benefits without a showing that her decision was based on medical advice."

So here, while pregnancy may not be illness or accidental injury, it must under Pennsylvania law be treated as any other physical infirmity.

Appellant finally says that the Commission's decision

affects the operation of the terms or conditions of a bonafide group insurance plan and therefore falls within the exemption in Section 5(a) for plans having such effect. The appellant's reference is to its Group Income Protection Plan (GIPP) which is coordinated with its sick leave benefits[8] and is described in the parties' stipulation as follows:

> "Under said Plan a disabled employe is paid $7 per school day for total disability resulting from an accident or sickness. Payments start on the first day of disability due to accident and the third day of disability due to sickness and continue until all accumulated Sick Leave has been used at which time an amount of $14 to $28 per school day, depending upon the number of sick days accumulated prior to disability, is paid to the employe following termination of Sick Leave paid by Respondent and continuing for as long as two calendar years for any one continuous period of accident or illness disability."

GIPP does not provide coverage for pregnancy related disability. Hence, the appellant says that the Commission's order will require it to change the terms or conditions of its group insurance plan. We disagree. The Commission's order in this case does not affect GIPP benefits. First, the appellee never claimed benefits from GIPP; and second, the amount of $1,342.71 which the Commission ordered the appellant to pay Anderson is the exact amount she would be entitled to on account of sick leave and includes no GIPP benefits.

---

8. GIPP benefits are apparently paid from the proceeds of an insurance policy. Sick leave benefits are paid by the appellant.

Accordingly, we enter the following:

O R D E R

AND NOW, this 5th day of May , 1977, it is ordered and decreed that the decision, order and award of the Pennsylvania Human Relations Commission be and it is hereby affirmed and that the appeal of the Upper Bucks County Area Vocational Technical School be and is hereby dismissed.

Theodore O. Rogers, J.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative	:	
v.	:	NO. 727 C.D. 1976
UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Appellant	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Party Appellee	:	

O R D E R

AND NOW, this 5th day of May , 1977, it is ordered and decreed that the decision, order and award of the Pennsylvania Human Relations Commission be and it is hereby affirmed and that the appeal of the Upper Bucks County Area Vocational Technical School be and is hereby dismissed.

Theodore O. Rogers, J.

CERTIFIED FROM THE RECORD

MAY 5 1977

Francis C. Barbieri
CHIEF CLERK

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROLE B. ANDERSON and PENNSYLVANIA STATE EDUCATION ASSOCIATION, DALE MOYER, Uni-Serv. Representative	:	
v.	:	No. 727 C. D. 1976
UPPER BUCKS COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Appellant	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Party Appellee	:	

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Argued: March 8, 1977 - Harrisburg

DISSENTING OPINION BY JUDGE MENCER Filed: May 5, 1977

I respectfully dissent. The pertinent part of the collective bargaining agreement in question reads:

> "Sick Leave. In any school year whenever a professional or temporary professional employe is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employe for each day of absence the full salary to which the employe may be entitled as if said employe were actually engaged in the performance of duty for a period of ten days. Such leave shall be cumulative from year to year. No employe's salary shall be paid if the accidental injury is incurred while the employe is engaged in remunerative work unrelated to school duties. Additional days may be approved by the School Board as the exigencies of the case may warrant."

Carole B. Anderson, a teacher, requested her employer, Upper Bucks County Area Vocational Technical School, to pay her under the above sick leave provisions for the days she was absent from her employment as a result of her pregnancy. When her employer refused to do so, she filed a complaint with the Pennsylvania Human Relations Commission, alleging that her employer had violated Section 5(a) of the Pennsylvania Human Relations Act,[1] 43 P.S. § 955(a).

I agree that the instant case is one of statutory interpretation, not one for constitutional analysis, and that the cases of Geduldig v. Aiello, 417 U.S. 484 (1974), and General Electric Co. v. Gilbert, U.S. , 50 L. Ed. 2d 343 (1976), are not controlling here. Yet the following reasoning and logic of those decisions have

---

[1] Act of October 27, 1955, P. L. 744, as amended, 43 P.S. §§ 951-963.

relevance to this case.[2]

A reading of the collective bargaining agreement discloses that there is no illness or accidental injury from which men are protected and women are not. Likewise, there is no illness or accidental injury from which women are protected and men are not.

Pregnancy-related disabilities constitute an additional risk, unique to women, and the failure here of the employer to compensate them for work loss due to this risk's becoming a reality does not destroy the parity of benefits accruing to men and women alike by the terms of the sick leave provision under attack in the instant case. The majority holds that the employer in this case is guilty of sex discrimination in not providing compensation for pregnancy-related disabilities, although an employer who provided no sick leave benefits at all would not have discriminated on the basis of sex.

While it is true that only women can become pregnant, it does not follow that every classification concerning pregnancy is a sex-based classification. Geduldig v. Aiello, supra. Here the employe simply contends that, although she has received sick leave benefits equivalent to that provided all other employes, she has suffered discrimination because she encountered a risk that was outside the protection of sick leave provisions in the collective bargaining agreement.

---

[2] In General Electric Corp. v. Human Relations Commission, Pa. , 365 A. 2d 649 (1976), our Supreme Court based its decision primarily on certain principles of fair-employment law which have emerged relative to the interpretation of Title VII of the Civil Rights Act of 1964 and utilized them to construe Section 5(a) of the Pennsylvania Human Relations Act.

I do not view such facts to constitute, under the Pennsylvania Human Relations Act, sex discrimination for which the employer may be held accountable.[3]

Glenn E. Mencer

J.

President Judge Bowman joins in this dissent.

CERTIFIED FROM THE RECORD

MAY 5 - 1977

Frances C. Barbuch
CHIEF CLERK

[3]The majority relies heavily on Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A. 2d 277 (1973); Unemployment Compensation Board of Review v. Perry, 22 Pa. Commonwealth Ct. 429, 349 A. 2d 531 (1975); Leechburg Area School District v. Human Relations Commission, 19 Pa. Commonwealth Ct. 614, 339 A. 2d 850 (1975); and Freeport Area School District v. Human Relations Commission, 18 Pa. Commonwealth Ct. 400, 335 A. 2d 873 (1975). However, besides being factually distinguishable from the instant case in that they did not involve payment under a sick leave plan, they are distinguishable since they involved arbitrary and capricious rules and are lacking in any cost considerations. Cost considerations of employe disability plans are significant, legally as well as financially. General Electric Co. v. Gilbert, supra.