COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant	:	
v.	:	Docket No. E-14454
OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	

STIPULATION OF FACTS

The following facts are admitted by the parties and shall constitute the full evidentiary record in lieu of hearing in the above-captioned matter:

1. The Complainant herein is Vickie L. Miller, an adult individual, who resides at R.D. #2, Linesville, Pennsylvania 16424.

2. The Respondent herein is Ohio Rubber Company, an unincorporated division of Eagle-Picher Industries, Inc., an Ohio corporation, having a facility located in Conneautville, Crawford County, Pennsylvania 16406, and is an employer of four or more persons within the Commonwealth of Pennsylvania.

3. The Complainant, on or about August 23, 1978, filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Docket No. E-14454, alleging that Respondent had discriminated against

her and similarly situated females by denying them equal disability payments for pregnancy related disabilities. A copy of the formal complaint is attached hereto as Appendix "A".

4. The Complaint was served upon Respondent on September 8, 1978.

5. In correspondence dated December 29, 1980, the Commission notified the Respondent that an investigation had been conducted and that probable cause to credit the allegations of the complaint had been found.

6. Attempts to conciliate the complaint and obtain relief for the Complainant and five other females employees - Patricia A. Henry, Connie Miller, Sharon H. Blood, Carol Hoagland and Judith Schneider - were unsuccessful.

7. On June 16, 1981 the Respondent was given notice that the Commission approved the case for public hearing.

8. Vickie L. Miller, Patricia A. Henry, Connie Miller, Sharon H. Blood, Carol Hoagland and Judith Schneider were employed by Respondent at all times relevant hereto.

9. At all times relevant hereto Vickie L. Miller, Patricia A. Henry, Connie Miller, Sharon H. Blood, Carol Hoagland and Judith Schneider were members of the bargaining unit of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 346, which union represented certain of Respondent's employees.

10. For the period February 24, 1978, to midnight February 23, 1981, there was in effect between Respondent and Local Union No. 346 a collective bargaining agreement and supplemental insurance agreement (a copy of which is attached

hereto as Exhibit 1) which established the terms, conditions and benefits applicable to the employment of Vickie L. Miller, Connie Miller and Judith Schneider.

10a. For the period February 24, 1975 to February 23, 1978 there was in effect between Respondent and Local Union No. 346 a collective bargaining agreement and supplenental insurance agreement (a copy of which is attached hereto as Exhibit 2) which established the terms, conditions and benefits applicable to the employment of Patricia A. Henry, Sharon H. Blood and Carol Hoagland.

11. The agreements (Exhibit 1 and 2) limited payments for any one pregnancy related disability to six (6) weeks while all other disabilities could be compensated up to a maximum of twenty-six (26) weeks.

12. Respondent has provided to the Commission a list of employees to whom it paid disability benefits for reasons other than pregnancy for the period August 1977 - August 1978 a copy of which list is attached hereto as Exhibit 3.

13. Vickie L. Miller's treating physician certified her as disabled for reasons related to pregnancy for the period July 3, 1978 to April 2, 1979. However, Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Miller is entitled to receive an additional $1500 in disability benefits.

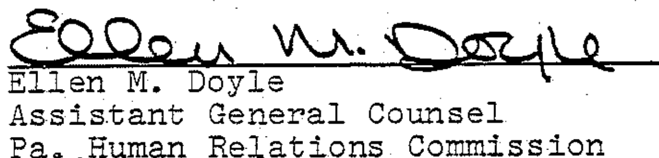
14. Patricia A. Henry's treating physician certified her as disabled for reasons related to pregnancy for the period January 28, 1976 to October 11, 1976. However, Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Henry is entitled to receive an additional $1500 in disability benefits.

15. Connie Miller's treating physician, certified her as disabled for reasons related to pregnancy for the period July 10, 1978 to January 29, 1979. Respondent paid her only for six (6) weeks of disability in anount of $450.00. The Commission is not seeking benefits for the period from July 10, 1978 to August 23, 1978 as Ms. Miller received unemployment benefits for that time. The Unemployment benefits were discontinued due to Ms. Miller's hospitalization. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Miller is entitled to receive an additional $1200 in disability benefits.

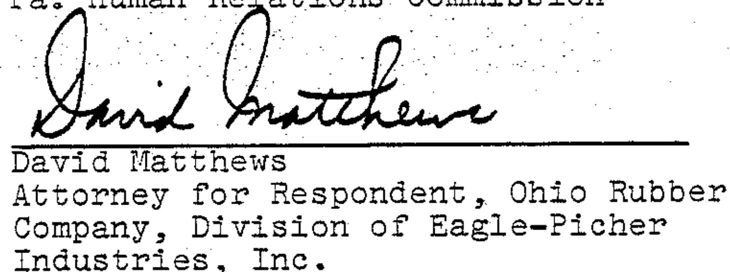
16. Sharon H. Blood's treating physician certified her as disabled for reasons related to pregnancy for the period September 5, 1975 to November 10, 1975. Respondent paid her only for six (6) weeks of disability in an amount of $420.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Blood is entitled to receive an additional $170 in disability benefits.

17. Carol Hoagland's treating physician certified her as disabled for reasons related to pregnancy for the period May 10, 1976 to August 24, 1976. Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Hoagland is entitled to receive an additional $610 in disability benefits.

18. Judith Schneider's treating physician certified her disabled for reasons related to pregnancy for the period November 14, 1977 to August 7, 1978. Respondent paid her only for six (6) weeks of disability in an amount of $420.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Schneider is entitled to receive an additional $1500 in disability benefits.



Ellen M. Doyle
Assistant General Counsel
Pa. Human Relations Commission



David Matthews
Attorney for Respondent, Ohio Rubber Company, Division of Eagle-Picher Industries, Inc.

<u>CERTIFICATE OF SERVICE</u>

AND NOW, to wit this 14th day of April, 1982, Ellen M. Doyle, Assistant General Counsel, Pennsylvania Human Relations Commission, hereby certify that I this day served the Stipulation of Facts by depositing same in the U.S. Mail, postage prepaid, at Pittsburgh, PA in accordance with the requirements of 1 Pa. Code §33.32 (relating to service by a participant) addressed to:

David W. Matthews, Esq.
Eagle-Picher Industries, Inc.
P.O. Box 779
Cincinnati, Ohio 45201

Ellen M. Doyle
Ellen M. Doyle
Assistant General Counsel
Pa. Human Relations Commission
11th Floor State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
(412) 565-7979

SWORN TO and subscribed
before me this 14th day
of April, 1982.

Marie J. Koller
NOTARY PUBLIC

MARIE J. KOLLER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES NOV. 28, 1985
Member, Pennsylvania Association of Notaries

CONCLUSIONS OF LAW

1. Complainant Vickie L. Miller is an adult individual residing at R.D. #2, Linesville, PA., 16424, and an "employee" within the meaning of the Act.

2. Respondent Ohio Rubber Company, an unincorporated division of Eagle-Picher Industries (an Ohio corporation), which has a facility at Conneautville, Crawford County, PA., 16406, is an "employer" within the meaning of the Act.

3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this action.

4. The parties and the Commission have complied with all procedural prerequisites to a public hearing in this matter.

5. Respondent's admitted policy of treating temporary disability relating to pregnancy in a different manner from any other temporary disability constitutes sex discrimination in violation of Section 5(a) of the Act.

6. Respondent is not insulated from liability for its discriminatory disability plan by the "bona fide group or insurance plan" exclusion of Section 5(a)(3) of the Act.

7. The Employee Retirement Income Security Act of 1974 does not preempt the Human Relations Act insofar as the latter prohibits discrimination in the terms of a plan subject to ERISA.

8. The employee benefit plan here challenged is subject to the provisions of ERISA.

9. The Commission is empowered to award back pay relief, with interest, including lost disability benefits following a finding that an unlawful discriminatory practice has occurred.

10. The Commission may award relief to persons other than the named complainant where it is alleged that other persons were affected by the practice complained of and such other persons may be described with specificity.

11. The Commission may order relief to properly described class members who were injured by a continuing discriminatory policy, where such injury occurred more than ninety days and within three years prior to the filing of a complaint.

OPINION

This case arises on a complaint filed by Vickie L. Miller ("Complainant") against the Ohio Rubber Co., Division of Eagle - Picher Industries, Incorporated ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on August 28, 1978. Complainant alleged that Respondent discriminated against her and other similarly situated females because of their sex by denying them full accident and sickness benefits for disabilities related to pregnancy, by limiting benefit payments for disabilities related to pregnancy to a period of six weeks for any given pregnancy. It was alleged that this practice violated Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, as amended, 43 P.S. 951 et seq. ("Act").

An investigation was conducted into the allegations of the complaint by Commission staff, who determined that probable cause existed to credit the allegations. The Commission attempted to eliminate the practices complained of by conference, conciliation, and persuasion. When these efforts were unsuccessful the case was approved for public hearing.

At a pre-hearing conference held on March 23, 1982, the parties agreed to stipulate to all facts and exhibits in lieu of public hearing. A stipulation of facts with exhibits was executed by Ellen Doyle, Esquire, Assistant

General Counsel, on behalf of Complainant, and David W. Matthews, Esquire, on behalf of Respondent. Briefs were submitted by both parties.

The Hearing Panel originally assigned to this case included Commissioners Elizabeth Scott, Chairperson, John Wisniewski, and Mary Dennis Donovan. Following Commissioner Donovan's resignation from the Commission, Commissioner Rita Clark was assigned to replace her on the panel. Edith E. Cox, Esquire, Assistant General Counsel, served as legal advisor to the panel.

The facts to which the parties stipulated constitute the entire evidentiary record in this case, and are incorporated herein as the Commission's complete Findings of Fact. Our decision requires resolution of four disputed legal issues:

1. Whether limitation of the benefits available for pregnancy-related disability, when benefits available for other disabilities are not so limited, constitutes discrimination on the basis of sex in violation of the Act;

2. Whether the exclusion section of Section 5 (a)(3) of the Act insulates Respondent from liability in this matter;

3. Whether the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144 ("ERISA") preempts the Act insofar as the Act prohibits discrimination in the terms of a benefit plan subject to the provisions of ERISA;

4. Whether the Commission may order relief for members of the class of women who suffered a loss of benefits more than ninety days but less than three years prior to the filing of Ms. Miller's complaint.

A. Section 5(a) of the Act provides in relevant part that:

> It shall be an unlawful discriminatory practice...
> (a) For any employer because of the ... sex ... of any individual to ... discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...

While acknowledging that its benefit plan treated pregnancy in a different manner than any other disability (S.F. 11), Respondent asserts that such treatment is not sex discrimination prohibited by the cited provision. Reliance is placed on General Electric v. Gilbert, 429 U.S. 125 (1976), which held that discrimination based on pregnancy was not sex discrimination prohibited by Title VII of the 1964 Civil Rights Act.

The unpersuasive reasoning of Gilbert was expressly rejected by Pennsylvania's Commonwealth Court in Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 130 (1977). The court there held that refusal to allow a female employee to apply accumulated sick leave to the total time she was absent as a result of pregnancy violated Section 5(a) of the Act.

In support of its decision, the court referred to a pre-Gilbert decision of the Pennsylvania Supreme Court, Cerra v. East Stroudsburg Area School District, 299 A.2d 277 (1973), which held that a school district regulation requiring pregnant teachers to resign at the end of their fifth month of pregnancy was "sex discrimination pure and simple". 229 A.2d at 280. The Anderson court noted as well that all six federal Circuit Courts of Appeals which addressed the

issue prior to Gilbert found that exclusion of pregnancy related disability from a disability plan violated Title VII.

Finally, the Anderson court relied on regulations passed by this Commission in 1975 which require employers to treat disability due to pregnancy on the same terms and conditions as any other temporary disability. 16 Pa. Code §41.103(a).

As the Anderson court noted, Sections 2000e-7 and 2000h-4 of Title VII expressly provide that state laws defining discrimination more comprehensively than the Civil Rights Act of 1964 are not preempted or superseded by Title VII. 373 A.2d at 130.

We therefore conclude that Respondent, by limiting the disability benefits available to pregnant women while not limiting benefits for other temporary disabilities, violated Section 5(a) of the Act.

B. Section 5(a)(3) of the Act provides that "(t)the provisions of this paragraph shall not apply to...(3) operation of the terms or conditions of any bona fide group or employe insurance plan."

> Respondent argues that even if it is found to have discriminated against complainant, the cited passage insulates it from liability. This argument has also been rejected by a Pennsylvania Court.

In Lukus v. Westinghouse Electric Corporation, 419 A.2d 431 (Pa. Super. 1980), the identical argument was advanced by Westinghouse and rejected by the Court. Finding that Section 5(a)(3) was enacted to separate the jurisdictional realms of the Commission and Pennsylvania Insurance Commissioners, Superior Court held:

> Section 955(a)(3) ensures that discriminatory practices by insurance companies will be regulated by the agency with broad oversight of the insurance industry, and that employers will not be held responsible for those practices under the PHRA, which governs relations between employers and employees, not third parties... Nothing in Section 955(a)(3) suggests that by enacting it, the Legislature intended to relieve an employer of legal responsbility for employment decisions that restrict the availability of insurance benefits on equal terms to all its employees.
>
> Id. at 446

We therefore find that Section 5(a)(3) of the Act does not insulate Respondent from liability for its violation of the Act.

C. Section 514(a) of ERISA provides in relevant part:

> ...(T)he provisions of this subchapter and subschapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...
>
> 29 U.S.C. §1144(a)

Section 514(d) provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States... or any rule or regulation issued under any such law.

The parties vigorously dispute the effect of these sections upon the facts of this case. The applicability of ERISA to Respondent's disability plan is not disputed. Preliminarily, we find that the plan is subject to the provisions of ERISA.

29 U.S.C. §1002(1) provides:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or

> by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment...

29 U.S.C. §1003 provides in part:

> (a) Except [as otherwise provided], this subchapter shall apply to any employee benefit plan if it is established or maintained -
>
> (1) by any employer engaged in commerce of in any industry or activity affecting commerce; or
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
> (3) by both.

The parties have stipulated (S.F. 10, 10a) that the benefits here at issue were established by a collective bargaining agreement and supplemental insurance agreement between Respondent and the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 346.

Having determined that ERISA is applicable to the benefit plan challenged here, we must determine whether ERISA preempts the Act insofar as the latter prohibits discrimination in the provisions of employee benefit plans.

Pennsylvania's Supreme Court has not decided this issue. In _Lukus v. Westinghouse_, _supra_, Superior Court found that ERISA did not preempt the Act's regulation of Westinghouse's employee disability plan. Subsequently, Commonwealth Court reached a contrary conclusion in _International Ladies' Garment Workers' Union v. Allentown Human Relations Commission_,

53 Pa. Cmwlth. 229, 417 A.2d 1279 (1980). The Supreme Court denied allocatur in Lukus on June 1, 1980; a petition for allowance of appeal was granted in ILGWU but the appeal was discontinued by agreement of the parties.

Appeals from final orders of this Commission lie with Commonwealth Court. In the absence of controlling decisions by a higher court we are of course bound by Commonwealth Court's rulings. However, in this instance we find that decisions of the United States Surpeme Court prohibit us from following the Commonwealth Court decision in ILGWU.

In two recent cases, the United States Supreme Court has dismissed appeals, for want of a substantial federal question, from state supreme court decisions holding that state laws prohibiting pregnancy discrimination in the provision of employee disability benefits were not preempted by ERISA. Minnesota Mining & Manufacturing Co. v. Minnesota, 444 U.S. 1041 (1980), dismissing appeal from 289 N.W.2d 396 (Minn. 1979); Mountain States Telephone and Telegraph Co. v. Commissioner of Labor and Industry, 445 U.S. 921 (1980), dismissing appeal from 608 P.2d 1047 (Mont. 1979). These summary dismissals may not be ignored. Each involved the Court's exercise of its obligatory appellate jurisdiction under 28 U.S.C. 1257(2); in the absence of further enlightenment from the Court, they stand as decisions on the merits of the federal questions presented to the Court and necessarily decided by it in disposing of the appeal. Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). They are consequently

binding upon lower courts until such time as the Supreme Court indicates, expressly or by way of doctrinal developments, that the dismissal may no longer be followed. Hicks v. Miranda, 422 U.S. 332 (1975). It is noteworthy that, while Commonwealth Court's decision in ILGWU followed the summary dismissals in Minnesota and Mountain States, that decision does not decide the effect of those summary dismissals upon lower tribunals.

Minnesota and Mountain States have not been expressly overruled by the United States Supreme Court. The second Circuit Court of Appeals has however found that they are deprived of precedental value by an intervening Supreme Court decision. In Delta Airlines, Inc. v. Kramarsky, 666 F.2d 21 (2d Cir. 1980), appeal docketed ________U.S.__________, 50 U.S.L.W. 3717 (February 22, 1982) (No. 81-1578), the Second Circuit held that Mountain States and Minnesota were deprived of precedental weight by Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). A number of factors persuade us that Alessi should not be so interpreted, and that we continue to be bound by the summary dismissals in Minnesota and Mountain States.

Alessi did not deal with the effect of ERISA upon state fair employment legislation, as did Minnesota and Mountain State. Alessi found that ERISA preempted New Jersey legislation which eliminated one method of calculating pension benefits - integration - that federal law permitted. 451 U.S. at 514-517. Before holding that the New Jersey

statute was preempted, the Court explicitly held that the subject matter in question (integration of pension benefits with workers' compensation benefits) was regulated by ERISA. New Jersey had thus impermissibly attempted to regulate an area of direct concern to ERISA.

On the other hand, ERISA is silent on the subject of discrimination. State fair employment statutes such as those at issue in Minnesota, Mountain States, and the instant case, do not have the same relationship to ERISA as did the New Jersey statute in Alessi. We consequently conclude that the "doctrinal development" of Alessi is not sufficiently clear to overcome the unquestionably binding precedent of Minnesota and Mountain States.

Further, we note that the Supreme Court has agreed to hear the appeal from the Second Circuit's decision in Kramarsky, supra (probable jurisdiction noted, 50 U.S.L.W. 3831, April 20, 1982), drawing into question that Court's interpretation of Alessi.

Finally, Alessi did not address the interaction of Sections 514(a) and 514(d) of ERISA, cited above. The New Jersey statute there invalidated was not expressly protected by a federal statute. State fair employment laws, by contrast, are specifically preserved by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., §§2000e-7, 2000h-4.

Therefore, in the absence of clarification from either the United States Supreme Court or a Pennsylvania appellate

court, we believe that we continue to be bound by the summary dismissals in Minnesota and Mountain States. We consequently find that ERISA does not preempt the Act insofar as the Act prohibits discrimination in the provision of employee disability benefits.

D. When it finds that an unlawful discriminatory practice has occured, the Commission is empowered by Section 9 of the Act to order "such affirmative action including but not limited to...backpay...as, in the judgment of the Commission, will effectuate the purposes of this act..." 43 P.S. 959. A back pay award need not be lost earnings, but may include lost benefits such as disability pay. West Middlesex Area School District v. PHRC, Pa. Cmwlth., 394 A.2d 1301 at 1304 (1978). Back pay liability may accrue for no more than three years prior to the filing of a complaint. 43 P.S. 962(c).

The parties have stipulated that Ms. Miller's complaint was filed on August 23, 1978 (S.F. No. 3), and that the policy challenged by her was in effect for over three years prior to the filing of her complaint (S.F. No. 10, 10a, 11). It is further stipulated that Ms. Miller and five other named individuals, by operation of the policy, received disability benefits for a six week period when they were disabled for reasons related to pregnancy, although in each case a treating physician certified that the period of actual disability was longer than six weeks; each identified instance occurred during the three year period preceding the filing of Ms. Miller's complaint. (S.F. No. 13, 14, 15, 16, 17, 18).

Complainant urges that each of these named individuals is entitled to relief; Respondent, citing the Act's 90 day filing period, argues that claims which arose more than ninety days prior to Ms. Miller's filing are time barred. Having determined that the challenged policy violated the Act, we must decide whether relief may be ordered for members of a class of women who suffered a loss of benefits more than ninety days but less than three years prior to the filing of Ms. Miller's complaint.

It is beyond question that relief may be ordered for persons other than the named complainant. In PHRC v. Freeport Area School District, 350 A.2d 721 (1976) Pennsylvania's Supreme Court approved an award of relief for such person where:

> (1) the complainant alleges that such other persons have been affected by the alleged discriminatory practice and (2) such other persons entitled to relief may be described with specificity.
>
> 350 A.2d at 728

Those conditions have been met in this case.

We find as well that the challenged policy constituted a constant state of affairs which began at least in February of 1975 and continued unabated into the filing period. The Commission's regulations provide:

> The complaint shall be filed within 90 days from the date of the occurrence of the alleged unlawful discriminatory practice. If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of such practice shall be deemed to be any date subsequent to the occurrence of such practice up to and including the date upon which the unlawful discriminatory practice shall have ceased.
>
> 16 Pa. Code §42.11(a)

The complaint in this matter may thus properly challenge applications of Respondent's discriminatory policy where the applications occured more than ninety days prior to filing but during the period of the policy's continuing effect; persons similarly affected by the policy are entitled to relief where, as here, the conditions of Freeport, supra., are met.

Numerous decisions interpreting Title VII of the Civil Rights Act of 1964, the federal analogue to the Act (General Electric v. PHRC, Pa., 365 A.2d 649 at 654, 1976), support this construction of the Act and the validity of the cited regulation. In Satz v. ITT Financial Corp., 619 F.2d 738, 8th Cir. 1980, the Eighth Circuit reversed a dismissal for untimeliness of a complaint alleging that the charging party and similarly situated females were denied equal pay and opportunities for advancement. The Court there emphasized that the relevant inquiry is whether there has been a continuously maintained illegal policy with an instance of application of the policy within the filing period. Id. at 744. The Court further found that "...the allegation of a presently maintained policy of discrimination may state a claim under Title VII even if the last specific act pursuant to that policy occurred [prior to the filing period]". Id., citing Bethel v. Jendoco Construction Co., 570 F.2d 1168, 1174-75 (3d Cir. 1978). SEE ALSO: Acha v. Beame, 570 F.2d 57 (2d Cir. 1978) and Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. den. 434 U.S. 1086 (1978).

A continuing violation allegation determined the scope of the class in Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975). The Court there rejected the company's attempt to limit the class and approved a class excluding only women who had left the company's employ more than 210 days before the EEOC charge was filed. The Court reasoned that the complaint had alleged maintenance of discriminatory policies up to the time of filing, policies which were continuing violations of Title VII and would permit filing of charges at any time by present employees.

Therefore, and consistently with our opinion in Voiner v. PPG Industries, Inc., E-10702 and E-12471, we find that we may order relief for those women who lost benefits as a result of Respondent's unlawful discriminatory policy more than ninety days but less than three years prior to the filing of Ms. Miller's complaint. The parties have stipulated to the amounts lost by each of the women previously identified. Relief shall therefore be provided for those women as specified in the Order which follows.

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant vs. OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	DOCKET NO. E-14454

RECOMMENDATION OF HEARING PANEL

Upon consideration of the full record in this matter, the Hearing Panel recommends that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted and entered by the full Pennsylvania Human Relations Commission.

BY:

January 24, 1983 DATE	ELIZABETH M. SCOTT, Chairperson
January 24, 1983 DATE	JOHN WISNIEWSKI, Commissioner
January 24, 1983 DATE	RITA CLARK, Commissioner

COMMONWEALTH OF PENNSYLVANIA
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VICKIE L. MILLER, Complainant vs. OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	DOCKET NO. E-14454

FINAL ORDER

AND NOW, this 2nd day of February, 1983, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, and therefore

O R D E R S:

1. That Respondent Ohio Rubber Co. cease and desist from discriminating on the basis of sex in the provision of employee disability benefits;

2. That Respondent pay to each of the following individuals the amount designated following the individual's name, plus interest of six per cent (6%) per annum, calculated from the last day of each individual's disability leave as

specified in the Stipulations of Fact:

a. Vickie L. Miller - $1500.00

b. Patricia A. Henry - 1500.00

c. Connie Miller - 1200.00

d. Sharon H. Blood - 170.00

e. Carol Hoagland - 610.00

f. Judith Schneider - 1500.00

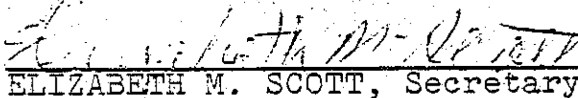
Payment shall be by check payable to each individual and delivered in care of Michael Foreman, Esquire, Assistant General Counsel, Pennsylvania Human Relations Commission, 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222.

3. That Respondent provide the Commission with satisfactory written proof of compliance with the terms of this Order within thirty days of the date found on the Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:
JOSEPH X. YAFFE, Chairperson

ATTEST:


ELIZABETH M. SCOTT, Secretary

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
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2. The Respondent herein is Ohio Rubber Company, an unincorporated division of Eagle-Picher Industries, Inc., an Ohio corporation, having a facility located in Conneautville, Crawford County, Pennsylvania 16406, and is an employer of four or more persons within the Commonwealth of Pennsylvania.

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12. Respondent has provided to the Commission a list of employees to whom it paid disability benefits for reasons other than pregnancy for the period August 1977 - August 1978 a copy of which list is attached hereto as Exhibit 3.

13. Vickie L. Miller's treating physician certified her as disabled for reasons related to pregnancy for the period July 3, 1978 to April 2, 1979. However, Respondent paid her only for six (6) weeks of disability in an amount of \$450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Miller is entitled to receive an additional \$1500 in disability benefits.

14. Patricia A. Henry's treating physician certified her as disabled for reasons related to pregnancy for the period January 28, 1976 to October 11, 1976. However, Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Henry is entitled to receive an additional $1500 in disability benefits.

15. Connie Miller's treating physician, certified her as disabled for reasons related to pregnancy for the period July 10, 1978 to January 29, 1979. Respondent paid her only for six (6) weeks of disability in anount of $450.00. The Commission is not seeking benefits for the period from July 10, 1978 to August 23, 1978 as Ms. Miller received unemployment benefits for that time. The Unemployment benefits were discontinued due to Ms. Miller's hospitalization. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Miller is entitled to receive an additional $1200 in disability benefits.

16. Sharon H. Blood's treating physician certified her as disabled for reasons related to pregnancy for the period September 5, 1975 to November 10, 1975. Respondent paid her only for six (6) weeks of disability in an amount of $420.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Blood is entitled to receive an additional $170 in disability benefits.

17. Carol Hoagland's treating physician certified her as disabled for reasons related to pregnancy for the period May 10, 1976 to August 24, 1976. Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Hoagland is entitled to receive an additional $610 in disability benefits.

18. Judith Schneider's treating physician certified her disabled for reasons related to pregnancy for the period November 14, 1977 to August 7, 1978. Respondent paid her only for six (6) weeks of disability in an amount of $420.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Schneider is entitled to receive an additional $1500 in disability benefits.

Ellen M. Doyle
Ellen M. Doyle
Assistant General Counsel
Pa. Human Relations Commission

David Matthews
David Matthews
Attorney for Respondent, Ohio Rubber Company, Division of Eagle-Picher Industries, Inc.

CERTIFICATE OF SERVICE

AND NOW, to wit this 14th day of April, 1982, Ellen M. Doyle, Assistant General Counsel, Pennsylvania Human Relations Commission, hereby certify that I this day served the Stipulation of Facts by depositing same in the U.S. Mail, postage prepaid, at Pittsburgh, PA in accordance with the requirements of 1 Pa. Code §33.32 (relating to service by a participant) addressed to:

David W. Matthews, Esq.
Eagle-Picher Industries, Inc.
P.O. Box 779
Cincinnati, Ohio 45201

Ellen M. Doyle

Ellen M. Doyle
Assistant General Counsel
Pa. Human Relations Commission
11th Floor State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
(412) 565-7979

SWORN TO and subscribed
before me this 14th day
of April, 1982.

Marie J. Koller
NOTARY PUBLIC

MARIE J. KOLLER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES NOV. 28, 1985
Member, Pennsylvania Association of Notaries

CONCLUSIONS OF LAW

1. Complainant Vickie L. Miller is an adult individual residing at R.D. #2, Linesville, PA., 16424, and an "employee" within the meaning of the Act.

2. Respondent Ohio Rubber Company, an unincorporated division of Eagle-Picher Industries (an Ohio corporation), which has a facility at Conneautville, Crawford County, PA., 16406, is an "employer" within the meaning of the Act.

3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this action.

4. The parties and the Commission have complied with all procedural prerequisites to a public hearing in this matter.

5. Respondent's admitted policy of treating temporary disability relating to pregnancy in a different manner from any other temporary disability constitutes sex discrimination in violation of Section 5(a) of the Act.

6. Respondent is not insulated from liability for its discriminatory disability plan by the "bona fide group or insurance plan" exclusion of Section 5(a)(3) of the Act.

7. The Employee Retirement Income Security Act of 1974 does not preempt the Human Relations Act insofar as the latter prohibits discrimination in the terms of a plan subject to ERISA.

8. The employee benefit plan here challenged is subject to the provisions of ERISA.

9. The Commission is empowered to award back pay relief, with interest, including lost disability benefits following a finding that an unlawful discriminatory practice has occurred.

10. The Commission may award relief to persons other than the named complainant where it is alleged that other persons were affected by the practice complained of and such other persons may be described with specificity.

11. The Commission may order relief to properly described class members who were injured by a continuing discriminatory policy, where such injury occurred more than ninety days and within three years prior to the filing of a complaint.

O P I N I O N

This case arises on a complaint filed by Vickie L. Miller ("Complainant") against the Ohio Rubber Co., Division of Eagle - Picher Industries, Incorporated ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on August 28, 1978. Complainant alleged that Respondent discriminated against her and other similarly situated females because of their sex by denying them full accident and sickness benefits for disabilities related to pregnancy, by limiting benefit payments for disabilities related to pregnancy to a period of six weeks for any given pregnancy. It was alleged that this practice violated Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, as amended, 43 P.S. 951 et seq. ("Act").

An investigation was conducted into the allegations of the complaint by Commission staff, who determined that probable cause existed to credit the allegations. The Commission attempted to eliminate the practices complained of by conference, conciliation, and persuasion. When these efforts were unsuccessful the case was approved for public hearing.

At a pre-hearing conference held on March 23, 1982, the parties agreed to stipulate to all facts and exhibits in lieu of public hearing. A stipulation of facts with exhibits was executed by Ellen Doyle, Esquire, Assistant

General Counsel, on behalf of Complainant, and David W. Matthews, Esquire, on behalf of Respondent. Briefs were submitted by both parties.

The Hearing Panel originally assigned to this case included Commissioners Elizabeth Scott, Chairperson, John Wisniewski, and Mary Dennis Donovan. Following Commissioner Donovan's resignation from the Commission, Commissioner Rita Clark was assigned to replace her on the panel. Edith E. Cox, Esquire, Assistant General Counsel, served as legal advisor to the panel.

The facts to which the parties stipulated constitute the entire evidentiary record in this case, and are incorporated herein as the Commission's complete Findings of Fact. Our decision requires resolution of four disputed legal issues:

1. Whether limitation of the benefits available for pregnancy-related disability, when benefits available for other disabilities are not so limited, constitutes discrimination on the basis of sex in violation of the Act;

2. Whether the exclusion section of Section 5 (a)(3) of the Act insulates Respondent from liability in this matter;

3. Whether the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144 ("ERISA") preempts the Act insofar as the Act prohibits discrimination in the terms of a benefit plan subject to the provisions of ERISA;

4. Whether the Commission may order relief for members of the class of women who suffered a loss of benefits more than ninety days but less than three years prior to the filing of Ms. Miller's complaint.

A. Section 5(a) of the Act provides in relevant part that:

> It shall be an unlawful discriminatory practice... (a) For any employer because of the ... sex ... of any individual to ... discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...

While acknowledging that its benefit plan treated pregnancy in a different manner than any other disability (S.F. 11), Respondent asserts that such treatment is not sex discrimination prohibited by the cited provision. Reliance is placed on General Electric v. Gilbert, 429 U.S. 125 (1976), which held that discrimination based on pregnancy was not sex discrimination prohibited by Title VII of the 1964 Civil Rights Act.

The unpersuasive reasoning of Gilbert was expressly rejected by Pennsylvania's Commonwealth Court in Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 130 (1977). The court there held that refusal to allow a female employee to apply accumulated sick leave to the total time she was absent as a result of pregnancy violated Section 5(a) of the Act.

In support of its decision, the court referred to a pre-Gilbert decision of the Pennsylvania Supreme Court, Cerra v. East Stroudsburg Area School District, 299 A.2d 277 (1973), which held that a school district regulation requiring pregnant teachers to resign at the end of their fifth month of pregnancy was "sex discrimination pure and simple". 229 A.2d at 280. The Anderson court noted as well that all six federal Circuit Courts of Appeals which addressed the

issue prior to Gilbert found that exclusion of pregnancy related disability from a disability plan violated Title VII.

Finally, the Anderson court relied on regulations passed by this Commission in 1975 which require employers to treat disability due to pregnancy on the same terms and conditions as any other temporary disability. 16 Pa. Code §41.103(a).

As the Anderson court noted, Sections 2000e-7 and 2000h-4 of Title VII expressly provide that state laws defining discrimination more comprehensively than the Civil Rights Act of 1964 are not preempted or superseded by Title VII. 373 A.2d at 130.

We therefore conclude that Respondent, by limiting the disability benefits available to pregnant women while not limiting benefits for other temporary disabilities, violated Section 5(a) of the Act.

B. Section 5(a)(3) of the Act provides that "(t)the provisions of this paragraph shall not apply to...(3) operation of the terms or conditions of any bona fide group or employe insurance plan."

> Respondent argues that even if it is found to have discriminated against complainant, the cited passage insulates it from liability. This argument has also been rejected by a Pennsylvania Court.

In Lukus v. Westinghouse Electric Corporation, 419 A.2d 431 (Pa. Super. 1980), the identical argument was advanced by Westinghouse and rejected by the Court. Finding that Section 5(a)(3) was enacted to separate the jurisdictional realms of the Commission and Pennsylvania Insurance Commissioners, Superior Court held:

> Section 955(a)(3) ensures that discriminatory practices by insurance companies will be regulated by the agency with broad oversight of the insurance industry, and that employers will not be held responsible for those practices under the PHRA, which governs relations between employers and employees, not third parties... Nothing in Section 955(a)(3) suggests that by enacting it, the Legislature intended to relieve an employer of legal responsbility for employment decisions that restrict the availability of insurance benefits on equal terms to all its employees.
>
> Id. at 446

We therefore find that Section 5(a)(3) of the Act does not insulate Respondent from liability for its violation of the Act.

C. Section 514(a) of ERISA provides in relevant part:

> ...(T)he provisions of this subchapter and subschapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...
>
> 29 U.S.C. §1144(a)

Section 514(d) provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States... or any rule or regulation issued under any such law.

The parties vigorously dispute the effect of these sections upon the facts of this case. The applicability of ERISA to Respondent's disability plan is not disputed. Preliminarily, we find that the plan is subject to the provisions of ERISA.

29 U.S.C. §1002(1) provides:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or

by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment...

29 U.S.C. §1003 provides in part:

> (a) Except [as otherwise provided], this subchapter shall apply to any employee benefit plan if it is established or maintained -
>
> (1) by any employer engaged in commerce of in any industry or activity affecting commerce; or
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
> (3) by both.

The parties have stipulated (S.F. 10, 10a) that the benefits here at issue were established by a collective bargaining agreement and supplemental insurance agreement between Respondent and the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 346.

Having determined that ERISA is applicable to the benefit plan challenged here, we must determine whether ERISA preempts the Act insofar as the latter prohibits discrimination in the provisions of employee benefit plans.

Pennsylvania's Supreme Court has not decided this issue. In Lukus v. Westinghouse, supra, Superior Court found that ERISA did not preempt the Act's regulation of Westinghouse's employee disability plan. Subsequently, Commonwealth Court reached a contrary conclusion in International Ladies' Garment Workers' Union v. Allentown Human Relations Commission,

53 Pa. Cmwlth. 229, 417 A.2d 1279 (1980). The Supreme Court denied allocatur in Lukus on June 1, 1980; a petition for allowance of appeal was granted in ILGWU but the appeal was discontinued by agreement of the parties.

Appeals from final orders of this Commission lie with Commonwealth Court. In the absence of controlling decisions by a higher court we are of course bound by Commonwealth Court's rulings. However, in this instance we find that decisions of the United States Surpeme Court prohibit us from following the Commonwealth Court decision in ILGWU.

In two recent cases, the United States Supreme Court has dismissed appeals, for want of a substantial federal question, from state supreme court decisions holding that state laws prohibiting pregnancy discrimination in the provision of employee disability benefits were not preempted by ERISA. Minnesota Mining & Manufacturing Co. v. Minnesota, 444 U.S. 1041 (1980), dismissing appeal from 289 N.W.2d 396 (Minn. 1979); Mountain States Telephone and Telegraph Co. v. Commissioner of Labor and Industry, 445 U.S. 921 (1980), dismissing appeal from 608 P.2d 1047 (Mont. 1979). These summary dismissals may not be ignored. Each involved the Court's exercise of its obligatory appellate jurisdiction under 28 U.S.C. 1257(2); in the absence of further enlightenment from the Court, they stand as decisions on the merits of the federal questions presented to the Court and necessarily decided by it in disposing of the appeal. Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). They are consequently

binding upon lower courts until such time as the Supreme Court indicates, expressly or by way of doctrinal developments, that the dismissal may no longer be followed. Hicks v. Miranda, 422 U.S. 332 (1975). It is noteworthy that, while Commonwealth Court's decision in ILGWU followed the summary dismissals in Minnesota and Mountain States, that decision does not decide the effect of those summary dismissals upon lower tribunals.

Minnesota and Mountain States have not been expressly overruled by the United States Supreme Court. The second Circuit Court of Appeals has however found that they are deprived of precedental value by an intervening Supreme Court decision. In Delta Airlines, Inc. v. Kramarsky, 666 F.2d 21 (2d Cir. 1980), appeal docketed ________U.S.__________, 50 U.S.L.W. 3717 (February 22, 1982) (No. 81-1578), the Second Circuit held that Mountain States and Minnesota were deprived of precedental weight by Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). A number of factors persuade us that Alessi should not be so interpreted, and that we continue to be bound by the summary dismissals in Minnesota and Mountain States.

Alessi did not deal with the effect of ERISA upon state fair employment legislation, as did Minnesota and Mountain State. Alessi found that ERISA preempted New Jersey legislation which eliminated one method of calculating pension benefits - integration - that federal law permitted. 451 U.S. at 514-517. Before holding that the New Jersey

statute was preempted, the Court explicitly held that the subject matter in question (integration of pension benefits with workers' compensation benefits) was regulated by ERISA. New Jersey had thus impermissibly attempted to regulate an area of direct concern to ERISA.

On the other hand, ERISA is silent on the subject of discrimination. State fair employment statutes such as those at issue in Minnesota, Mountain States, and the instant case, do not have the same relationship to ERISA as did the New Jersey statute in Alessi. We consequently conclude that the "doctrinal development" of Alessi is not sufficiently clear to overcome the unquestionably binding precedent of Minnesota and Mountain States.

Further, we note that the Supreme Court has agreed to hear the appeal from the Second Circuit's decision in Kramarsky, supra (probable jurisdiction noted, 50 U.S.L.W. 3831, April 20, 1982), drawing into question that Court's interpretation of Alessi.

Finally, Alessi did not address the interaction of Sections 514(a) and 514(d) of ERISA, cited above. The New Jersey statute there invalidated was not expressly protected by a federal statute. State fair employment laws, by contrast, are specifically preserved by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., §§2000e-7, 2000h-4.

Therefore, in the absence of clarification from either the United States Supreme Court or a Pennsylvania appellate

court, we believe that we continue to be bound by the summary dismissals in Minnesota and Mountain States. We consequently find that ERISA does not preempt the Act insofar as the Act prohibits discrimination in the provision of employee disability benefits.

D. When it finds that an unlawful discriminatory practice has occured, the Commission is empowered by Section 9 of the Act to order "such affirmative action including but not limited to...backpay...as, in the judgment of the Commission, will effectuate the purposes of this act..." 43 P.S. 959. A back pay award need not be lost earnings, but may include lost benefits such as disability pay. West Middlesex Area School District v. PHRC, Pa. Cmwlth., 394 A.2d 1301 at 1304 (1978). Back pay liability may accrue for no more than three years prior to the filing of a complaint. 43 P.S. 962(c).

The parties have stipulated that Ms. Miller's complaint was filed on August 23, 1978 (S.F. No. 3), and that the policy challenged by her was in effect for over three years prior to the filing of her complaint (S.F. No. 10, 10a, 11). It is further stipulated that Ms. Miller and five other named individuals, by operation of the policy, received disability benefits for a six week period when they were disabled for reasons related to pregnancy, although in each case a treating physician certified that the period of actual disability was longer than six weeks; each identified instance occurred during the three year period preceding the filing of Ms. Miller's complaint. (S.F. No. 13, 14, 15, 16, 17, 18).

Complainant urges that each of these named individuals is entitled to relief; Respondent, citing the Act's 90 day filing period, argues that claims which arose more than ninety days prior to Ms. Miller's filing are time barred. Having determined that the challenged policy violated the Act, we must decide whether relief may be ordered for members of a class of women who suffered a loss of benefits more than ninety days but less than three years prior to the filing of Ms. Miller's complaint.

It is beyond question that relief may be ordered for persons other than the named complainant. In PHRC v. Freeport Area School District, 350 A.2d 721 (1976) Pennsylvania's Supreme Court approved an award of relief for such person where:

> (1) the complainant alleges that such other persons have been affected by the alleged discriminatory practice and (2) such other persons entitled to relief may be described with specificity.
>
> 350 A.2d at 728

Those conditions have been met in this case.

We find as well that the challenged policy constituted a constant state of affairs which began at least in February of 1975 and continued unabated into the filing period. The Commission's regulations provide:

> The complaint shall be filed within 90 days from the date of the occurrence of the alleged unlawful discriminatory practice. If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of such practice shall be deemed to be any date subsequent to the occurrence of such practice up to and including the date upon which the unlawful discriminatory practice shall have ceased.
>
> 16 Pa. Code §42.11(a)

The complaint in this matter may thus properly challenge applications of Respondent's discriminatory policy where the applications occured more than ninety days prior to filing but during the period of the policy's continuing effect; persons similarly affected by the policy are entitled to relief where, as here, the conditions of Freeport, supra., are met.

Numerous decisions interpreting Title VII of the Civil Rights Act of 1964, the federal analogue to the Act (General Electric v. PHRC, Pa., 365 A.2d 649 at 654, 1976), support this construction of the Act and the validity of the cited regulation. In Satz v. ITT Financial Corp., 619 F.2d 738, 8th Cir. 1980, the Eighth Circuit reversed a dismissal for untimeliness of a complaint alleging that the charging party and similarly situated females were denied equal pay and opportunities for advancement. The Court there emphasized that the relevant inquiry is whether there has been a continuously maintained illegal policy with an instance of application of the policy within the filing period. Id. at 744. The Court further found that "...the allegation of a presently maintained policy of discrimination may state a claim under Title VII even if the last specific act pursuant to that policy occurred [prior to the filing period]". Id., citing Bethel v. Jendoco Construction Co., 570 F.2d 1168, 1174-75 (3d Cir. 1978). SEE ALSO: Acha v. Beame, 570 F.2d 57 (2d Cir. 1978) and Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. den. 434 U.S. 1086 (1978).

A continuing violation allegation determined the scope of the class in Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975). The Court there rejected the company's attempt to limit the class and approved a class excluding only women who had left the company's employ more than 210 days before the EEOC charge was filed. The Court reasoned that the complaint had alleged maintenance of discriminatory policies up to the time of filing, policies which were continuing violations of Title VII and would permit filing of charges at any time by present employees.

Therefore, and consistently with our opinion in Voiner v. PPG Industries, Inc., E-10702 and E-12471, we find that we may order relief for those women who lost benefits as a result of Respondent's unlawful discriminatory policy more than ninety days but less than three years prior to the filing of Ms. Miller's complaint. The parties have stipulated to the amounts lost by each of the women previously identified. Relief shall therefore be provided for those women as specified in the Order which follows.

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant	:	
vs.	:	DOCKET NO. E-14454
OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	

RECOMMENDATION OF HEARING PANEL

Upon consideration of the full record in this matter, the Hearing Panel recommends that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted and entered by the full Pennsylvania Human Relations Commission.

BY:

January 24, 1983 DATE	ELIZABETH M. SCOTT, Chairperson
January 24, 1983 DATE	JOHN WISNIEWSKI, Commissioner
January 24, 1983 DATE	RITA CLARK, Commissioner

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant vs. OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	DOCKET NO. E-14454

FINAL ORDER

AND NOW, this 2nd day of February, 1983, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, and therefore

O R D E R S:

1. That Respondent Ohio Rubber Co. cease and desist from discriminating on the basis of sex in the provision of employee disability benefits;

2. That Respondent pay to each of the following individuals the amount designated following the individual's name, plus interest of six per cent (6%) per annum, calculated from the last day of each individual's disability leave as

specified in the Stipulations of Fact:

a. Vickie L. Miller - $1500.00

b. Patricia A. Henry - 1500.00

c. Connie Miller - 1200.00

d. Sharon H. Blood - 170.00

e. Carol Hoagland - 610.00

f. Judith Schneider - 1500.00

Payment shall be by check payable to each individual and delivered in care of Michael Foreman, Esquire, Assistant General Counsel, Pennsylvania Human Relations Commission, 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222.

3. That Respondent provide the Commission with satisfactory written proof of compliance with the terms of this Order within thirty days of the date found on the Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: ______________________
JOSEPH X. YAFFE, Chairperson

ATTEST:

____
ELIZABETH M. SCOTT, Secretary

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant v. OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	Docket No. E-14454

STIPULATION OF FACTS

The following facts are admitted by the parties and shall constitute the full evidentiary record in lieu of hearing in the above-captioned matter:

1. The Complainant herein is Vickie L. Miller, an adult individual, who resides at R.D. #2, Linesville, Pennsylvania 16424.

2. The Respondent herein is Ohio Rubber Company, an unincorporated division of Eagle-Picher Industries, Inc., an Ohio corporation, having a facility located in Conneautville, Crawford County, Pennsylvania 16406, and is an employer of four or more persons within the Commonwealth of Pennsylvania.

3. The Complainant, on or about August 23, 1978, filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Docket No. E-14454, alleging that Respondent had discriminated against

her and similarly situated females by denying them equal disability payments for pregnancy related disabilities. A copy of the formal complaint is attached hereto as Appendix "A".

4. The Complaint was served upon Respondent on September 8, 1978.

5. In correspondence dated December 29, 1980, the Commission notified the Respondent that an investigation had been conducted and that probable cause to credit the allegations of the complaint had been found.

6. Attempts to conciliate the complaint and obtain relief for the Complainant and five other females employees - Patricia A. Henry, Connie Miller, Sharon H. Blood, Carol Hoagland and Judith Schneider - were unsuccessful.

7. On June 16, 1981 the Respondent was given notice that the Commission approved the case for public hearing.

8. Vickie L. Miller, Patricia A. Henry, Connie Miller, Sharon H. Blood, Carol Hoagland and Judith Schneider were employed by Respondent at all times relevant hereto.

9. At all times relevant hereto Vickie L. Miller, Patricia A. Henry, Connie Miller, Sharon H. Blood, Carol Hoagland and Judith Schneider were members of the bargaining unit of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 346, which union represented certain of Respondent's employees.

10. For the period February 24, 1978, to midnight February 23, 1981, there was in effect between Respondent and Local Union No. 346 a collective bargaining agreement and supplemental insurance agreement (a copy of which is attached

hereto as Exhibit 1) which established the terms, conditions and benefits applicable to the employment of Vickie L. Miller, Connie Miller and Judith Schneider.

10a. For the period February 24, 1975 to February 23, 1978 there was in effect between Respondent and Local Union No. 346 a collective bargaining agreement and supplenental insurance agreement (a copy of which is attached hereto as Exhibit 2) which established the terms, conditions and benefits applicable to the employment of Patricia A. Henry, Sharon H. Blood and Carol Hoagland.

11. The agreements (Exhibit 1 and 2) limited payments for any one pregnancy related disability to six (6) weeks while all other disabilities could be compensated up to a maximum of twenty-six (26) weeks.

12. Respondent has provided to the Commission a list of employees to whom it paid disability benefits for reasons other than pregnancy for the period August 1977 - August 1978 a copy of which list is attached hereto as Exhibit 3.

13. Vickie L. Miller's treating physician certified her as disabled for reasons related to pregnancy for the period July 3, 1978 to April 2, 1979. However, Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Miller is entitled to receive an additional $1500 in disability benefits.

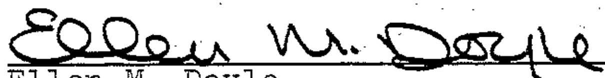
14. Patricia A. Henry's treating physician certified her as disabled for reasons related to pregnancy for the period January 28, 1976 to October 11, 1976. However, Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Henry is entitled to receive an additional $1500 in disability benefits.

15. Connie Miller's treating physician, certified her as disabled for reasons related to pregnancy for the period July 10, 1978 to January 29, 1979. Respondent paid her only for six (6) weeks of disability in anount of $450.00. The Commission is not seeking benefits for the period from July 10, 1978 to August 23, 1978 as Ms. Miller received unemployment benefits for that time. The Unemployment benefits were discontinued due to Ms. Miller's hospitalization. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Miller is entitled to receive an additional $1200 in disability benefits.

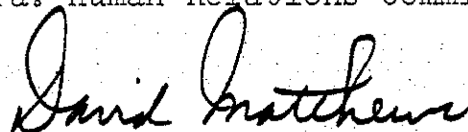
16. Sharon H. Blood's treating physician certified her as disabled for reasons related to pregnancy for the period September 5, 1975 to November 10, 1975. Respondent paid her only for six (6) weeks of disability in an amount of $420.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Blood is entitled to receive an additional $170 in disability benefits.

17. Carol Hoagland's treating physician certified her as disabled for reasons related to pregnancy for the period May 10, 1976 to August 24, 1976. Respondent paid her only for six (6) weeks of disability in an amount of $450.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Hoagland is entitled to receive an additional $610 in disability benefits.

18. Judith Schneider's treating physician certified her disabled for reasons related to pregnancy for the period November 14, 1977 to August 7, 1978. Respondent paid her only for six (6) weeks of disability in an amount of $420.00. If the Commission finds that Respondent engaged in an unlawful discriminatory practice, Ms. Schneider is entitled to receive an additional $1500 in disability benefits.



Ellen M. Doyle
Assistant General Counsel
Pa. Human Relations Commission



David Matthews
Attorney for Respondent, Ohio Rubber Company, Division of Eagle-Picher Industries, Inc.

CERTIFICATE OF SERVICE

AND NOW, to wit this 14th day of April, 1982, Ellen M. Doyle, Assistant General Counsel, Pennsylvania Human Relations Commission, hereby certify that I this day served the Stipulation of Facts by depositing same in the U.S. Mail, postage prepaid, at Pittsburgh, PA in accordance with the requirements of 1 Pa. Code §33.32 (relating to service by a participant) addressed to:

David W. Matthews, Esq.
Eagle-Picher Industries, Inc.
P.O. Box 779
Cincinnati, Ohio 45201

Ellen M. Doyle

Ellen M. Doyle
Assistant General Counsel
Pa. Human Relations Commission
11th Floor State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
(412) 565-7979

SWORN TO and subscribed
before me this 14th day
of April, 1982.

Marie J. Koller
NOTARY PUBLIC

MARIE J. KOLLER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES NOV. 28, 1985
Member, Pennsylvania Association of Notaries

CONCLUSIONS OF LAW

1. Complainant Vickie L. Miller is an adult individual residing at R.D. #2, Linesville, PA., 16424, and an "employee" within the meaning of the Act.

2. Respondent Ohio Rubber Company, an unincorporated division of Eagle-Picher Industries (an Ohio corporation), which has a facility at Conneautville, Crawford County, PA., 16406, is an "employer" within the meaning of the Act.

3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this action.

4. The parties and the Commission have complied with all procedural prerequisites to a public hearing in this matter.

5. Respondent's admitted policy of treating temporary disability relating to pregnancy in a different manner from any other temporary disability constitutes sex discrimination in violation of Section 5(a) of the Act.

6. Respondent is not insulated from liability for its discriminatory disability plan by the "bona fide group or insurance plan" exclusion of Section 5(a)(3) of the Act.

7. The Employee Retirement Income Security Act of 1974 does not preempt the Human Relations Act insofar as the latter prohibits discrimination in the terms of a plan subject to ERISA.

8. The employee benefit plan here challenged is subject to the provisions of ERISA.

9. The Commission is empowered to award back pay relief, with interest, including lost disability benefits following a finding that an unlawful discriminatory practice has occurred.

10. The Commission may award relief to persons other than the named complainant where it is alleged that other persons were affected by the practice complained of and such other persons may be described with specificity.

11. The Commission may order relief to properly described class members who were injured by a continuing discriminatory policy, where such injury occurred more than ninety days and within three years prior to the filing of a complaint.

OPINION

This case arises on a complaint filed by Vickie L. Miller ("Complainant") against the Ohio Rubber Co., Division of Eagle - Picher Industries, Incorporated ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on August 28, 1978. Complainant alleged that Respondent discriminated against her and other similarly situated females because of their sex by denying them full accident and sickness benefits for disabilities related to pregnancy, by limiting benefit payments for disabilities related to pregnancy to a period of six weeks for any given pregnancy. It was alleged that this practice violated Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, as amended, 43 P.S. 951 et seq. ("Act").

An investigation was conducted into the allegations of the complaint by Commission staff, who determined that probable cause existed to credit the allegations. The Commission attempted to eliminate the practices complained of by conference, conciliation, and persuasion. When these efforts were unsuccessful the case was approved for public hearing.

At a pre-hearing conference held on March 23, 1982, the parties agreed to stipulate to all facts and exhibits in lieu of public hearing. A stipulation of facts with exhibits was executed by Ellen Doyle, Esquire, Assistant

General Counsel, on behalf of Complainant, and David W. Matthews, Esquire, on behalf of Respondent. Briefs were submitted by both parties.

The Hearing Panel originally assigned to this case included Commissioners Elizabeth Scott, Chairperson, John Wisniewski, and Mary Dennis Donovan. Following Commissioner Donovan's resignation from the Commission, Commissioner Rita Clark was assigned to replace her on the panel. Edith E. Cox, Esquire, Assistant General Counsel, served as legal advisor to the panel.

The facts to which the parties stipulated constitute the entire evidentiary record in this case, and are incorporated herein as the Commission's complete Findings of Fact. Our decision requires resolution of four disputed legal issues:

1. Whether limitation of the benefits available for pregnancy-related disability, when benefits available for other disabilities are not so limited, constitutes discrimination on the basis of sex in violation of the Act;

2. Whether the exclusion section of Section 5 (a)(3) of the Act insulates Respondent from liability in this matter;

3. Whether the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144 ("ERISA") preempts the Act insofar as the Act prohibits discrimination in the terms of a benefit plan subject to the provisions of ERISA;

4. Whether the Commission may order relief for members of the class of women who suffered a loss of benefits more than ninety days but less than three years prior to the filing of Ms. Miller's complaint.

A. Section 5(a) of the Act provides in relevant part that:

> It shall be an unlawful discriminatory practice...
> (a) For any employer because of the ... sex ... of any individual to ... discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...

While acknowledging that its benefit plan treated pregnancy in a different manner than any other disability (S.F. 11), Respondent asserts that such treatment is not sex discrimination prohibited by the cited provision. Reliance is placed on General Electric v. Gilbert, 429 U.S. 125 (1976), which held that discrimination based on pregnancy was not sex discrimination prohibited by Title VII of the 1964 Civil Rights Act.

The unpersuasive reasoning of Gilbert was expressly rejected by Pennsylvania's Commonwealth Court in Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 130 (1977). The court there held that refusal to allow a female employee to apply accumulated sick leave to the total time she was absent as a result of pregnancy violated Section 5(a) of the Act.

In support of its decision, the court referred to a pre-Gilbert decision of the Pennsylvania Supreme Court, Cerra v. East Stroudsburg Area School District, 299 A.2d 277 (1973), which held that a school district regulation requiring pregnant teachers to resign at the end of their fifth month of pregnancy was "sex discrimination pure and simple". 229 A.2d at 280. The Anderson court noted as well that all six federal Circuit Courts of Appeals which addressed the

issue prior to Gilbert found that exclusion of pregnancy related disability from a disability plan violated Title VII.

Finally, the Anderson court relied on regulations passed by this Commission in 1975 which require employers to treat disability due to pregnancy on the same terms and conditions as any other temporary disability. 16 Pa. Code §41.103(a).

As the Anderson court noted, Sections 2000e-7 and 2000h-4 of Title VII expressly provide that state laws defining discrimination more comprehensively than the Civil Rights Act of 1964 are not preempted or superseded by Title VII. 373 A.2d at 130.

We therefore conclude that Respondent, by limiting the disability benefits available to pregnant women while not limiting benefits for other temporary disabilities, violated Section 5(a) of the Act.

B. Section 5(a)(3) of the Act provides that "(t)the provisions of this paragraph shall not apply to...(3) operation of the terms or conditions of any bona fide group or employe insurance plan."

> Respondent argues that even if it is found to have discriminated against complainant, the cited passage insulates it from liability. This argument has also been rejected by a Pennsylvania Court.

In Lukus v. Westinghouse Electric Corporation, 419 A.2d 431 (Pa. Super. 1980), the identical argument was advanced by Westinghouse and rejected by the Court. Finding that Section 5(a)(3) was enacted to separate the jurisdictional realms of the Commission and Pennsylvania Insurance Commissioners, Superior Court held:

> Section 955(a)(3) ensures that discriminatory practices by insurance companies will be regulated by the agency with broad oversight of the insurance industry, and that employers will not be held responsible for those practices under the PHRA, which governs relations between employers and employees, not third parties... Nothing in Section 955(a)(3) suggests that by enacting it, the Legislature intended to relieve an employer of legal responsbility for employment decisions that restrict the availability of insurance benefits on equal terms to all its employees.
>
> Id. at 446

We therefore find that Section 5(a)(3) of the Act does not insulate Respondent from liability for its violation of the Act.

C. Section 514(a) of ERISA provides in relevant part:

> ...(T)he provisions of this subchapter and subschapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan...
>
> 29 U.S.C. §1144(a)

Section 514(d) provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States... or any rule or regulation issued under any such law.

The parties vigorously dispute the effect of these sections upon the facts of this case. The applicability of ERISA to Respondent's disability plan is not disputed. Preliminarily, we find that the plan is subject to the provisions of ERISA.

29 U.S.C. §1002(1) provides:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or

by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment...

29 U.S.C. §1003 provides in part:

> (a) Except [as otherwise provided], this subchapter shall apply to any employee benefit plan if it is established or maintained -
>
> (1) by any employer engaged in commerce of in any industry or activity affecting commerce; or
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
> (3) by both.

The parties have stipulated (S.F. 10, 10a) that the benefits here at issue were established by a collective bargaining agreement and supplemental insurance agreement between Respondent and the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 346.

Having determined that ERISA is applicable to the benefit plan challenged here, we must determine whether ERISA preempts the Act insofar as the latter prohibits discrimination in the provisions of employee benefit plans.

Pennsylvania's Supreme Court has not decided this issue. In Lukus v. Westinghouse, supra, Superior Court found that ERISA did not preempt the Act's regulation of Westinghouse's employee disability plan. Subsequently, Commonwealth Court reached a contrary conclusion in International Ladies' Garment Workers' Union v. Allentown Human Relations Commission,

53 Pa. Cmwlth. 229, 417 A.2d 1279 (1980). The Supreme Court denied allocatur in Lukus on June 1, 1980; a petition for allowance of appeal was granted in ILGWU but the appeal was discontinued by agreement of the parties.

Appeals from final orders of this Commission lie with Commonwealth Court. In the absence of controlling decisions by a higher court we are of course bound by Commonwealth Court's rulings. However, in this instance we find that decisions of the United States Surpeme Court prohibit us from following the Commonwealth Court decision in ILGWU.

In two recent cases, the United States Supreme Court has dismissed appeals, for want of a substantial federal question, from state supreme court decisions holding that state laws prohibiting pregnancy discrimination in the provision of employee disability benefits were not preempted by ERISA. Minnesota Mining & Manufacturing Co. v. Minnesota, 444 U.S. 1041 (1980), dismissing appeal from 289 N.W.2d 396 (Minn. 1979); Mountain States Telephone and Telegraph Co. v. Commissioner of Labor and Industry, 445 U.S. 921 (1980), dismissing appeal from 608 P.2d 1047 (Mont. 1979). These summary dismissals may not be ignored. Each involved the Court's exercise of its obligatory appellate jurisdiction under 28 U.S.C. 1257(2); in the absence of further enlightenment from the Court, they stand as decisions on the merits of the federal questions presented to the Court and necessarily decided by it in disposing of the appeal. Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). They are consequently

binding upon lower courts until such time as the Supreme Court indicates, expressly or by way of doctrinal developments, that the dismissal may no longer be followed. Hicks v. Miranda, 422 U.S. 332 (1975). It is noteworthy that, while Commonwealth Court's decision in ILGWU followed the summary dismissals in Minnesota and Mountain States, that decision does not decide the effect of those summary dismissals upon lower tribunals.

Minnesota and Mountain States have not been expressly overruled by the United States Supreme Court. The second Circuit Court of Appeals has however found that they are deprived of precedental value by an intervening Supreme Court decision. In Delta Airlines, Inc. v. Kramarsky, 666 F.2d 21 (2d Cir. 1980), appeal docketed ________U.S.________, 50 U.S.L.W. 3717 (February 22, 1982) (No. 81-1578), the Second Circuit held that Mountain States and Minnesota were deprived of precedental weight by Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). A number of factors persuade us that Alessi should not be so interpreted, and that we continue to be bound by the summary dismissals in Minnesota and Mountain States.

Alessi did not deal with the effect of ERISA upon state fair employment legislation, as did Minnesota and Mountain State. Alessi found that ERISA preempted New Jersey legislation which eliminated one method of calculating pension benefits - integration - that federal law permitted. 451 U.S. at 514-517. Before holding that the New Jersey

statute was preempted, the Court explicitly held that the subject matter in question (integration of pension benefits with workers' compensation benefits) was regulated by ERISA. New Jersey had thus impermissibly attempted to regulate an area of direct concern to ERISA.

On the other hand, ERISA is silent on the subject of discrimination. State fair employment statutes such as those at issue in Minnesota, Mountain States, and the instant case, do not have the same relationship to ERISA as did the New Jersey statute in Alessi. We consequently conclude that the "doctrinal development" of Alessi is not sufficiently clear to overcome the unquestionably binding precedent of Minnesota and Mountain States.

Further, we note that the Supreme Court has agreed to hear the appeal from the Second Circuit's decision in Kramarsky, supra (probable jurisdiction noted, 50 U.S.L.W. 3831, April 20, 1982), drawing into question that Court's interpretation of Alessi.

Finally, Alessi did not address the interaction of Sections 514(a) and 514(d) of ERISA, cited above. The New Jersey statute there invalidated was not expressly protected by a federal statute. State fair employment laws, by contrast, are specifically preserved by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., §§2000e-7, 2000h-4.

Therefore, in the absence of clarification from either the United States Supreme Court or a Pennsylvania appellate

court, we believe that we continue to be bound by the summary dismissals in Minnesota and Mountain States. We consequently find that ERISA does not preempt the Act insofar as the Act prohibits discrimination in the provision of employee disability benefits.

D. When it finds that an unlawful discriminatory practice has occured, the Commission is empowered by Section 9 of the Act to order "such affirmative action including but not limited to...backpay...as, in the judgment of the Commission, will effectuate the purposes of this act..." 43 P.S. 959. A back pay award need not be lost earnings, but may include lost benefits such as disability pay. West Middlesex Area School District v. PHRC, Pa. Cmwlth., 394 A.2d 1301 at 1304 (1978). Back pay liability may accrue for no more than three years prior to the filing of a complaint. 43 P.S. 962(c).

The parties have stipulated that Ms. Miller's complaint was filed on August 23, 1978 (S.F. No. 3), and that the policy challenged by her was in effect for over three years prior to the filing of her complaint (S.F. No. 10, 10a, 11). It is further stipulated that Ms. Miller and five other named individuals, by operation of the policy, received disability benefits for a six week period when they were disabled for reasons related to pregnancy, although in each case a treating physician certified that the period of actual disability was longer than six weeks; each identified instance occurred during the three year period preceding the filing of Ms. Miller's complaint. (S.F. No. 13, 14, 15, 16, 17, 18).

Complainant urges that each of these named individuals is entitled to relief; Respondent, citing the Act's 90 day filing period, argues that claims which arose more than ninety days prior to Ms. Miller's filing are time barred. Having determined that the challenged policy violated the Act, we must decide whether relief may be ordered for members of a class of women who suffered a loss of benefits more than ninety days but less than three years prior to the filing of Ms. Miller's complaint.

It is beyond question that relief may be ordered for persons other than the named complainant. In PHRC v. Freeport Area School District, 350 A.2d 721 (1976) Pennsylvania's Supreme Court approved an award of relief for such person where:

> (1) the complainant alleges that such other persons have been affected by the alleged discriminatory practice and (2) such other persons entitled to relief may be described with specificity.
>
> 350 A.2d at 728

Those conditions have been met in this case.

We find as well that the challenged policy constituted a constant state of affairs which began at least in February of 1975 and continued unabated into the filing period. The Commission's regulations provide:

> The complaint shall be filed within 90 days from the date of the occurrence of the alleged unlawful discriminatory practice. If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of such practice shall be deemed to be any date subsequent to the occurrence of such practice up to and including the date upon which the unlawful discriminatory practice shall have ceased.
>
> 16 Pa. Code §42.11(a)

The complaint in this matter may thus properly challenge applications of Respondent's discriminatory policy where the applications occured more than ninety days prior to filing but during the period of the policy's continuing effect; persons similarly affected by the policy are entitled to relief where, as here, the conditions of Freeport, supra., are met.

Numerous decisions interpreting Title VII of the Civil Rights Act of 1964, the federal analogue to the Act (General Electric v. PHRC, Pa., 365 A.2d 649 at 654, 1976), support this construction of the Act and the validity of the cited regulation. In Satz v. ITT Financial Corp., 619 F.2d 738, 8th Cir. 1980, the Eighth Circuit reversed a dismissal for untimeliness of a complaint alleging that the charging party and similarly situated females were denied equal pay and opportunities for advancement. The Court there emphasized that the relevant inquiry is whether there has been a continuously maintained illegal policy with an instance of application of the policy within the filing period. Id. at 744. The Court further found that "...the allegation of a presently maintained policy of discrimination may state a claim under Title VII even if the last specific act pursuant to that policy occurred [prior to the filing period]". Id., citing Bethel v. Jendoco Construction Co., 570 F.2d 1168, 1174-75 (3d Cir. 1978). SEE ALSO: Acha v. Beame, 570 F.2d 57 (2d Cir. 1978) and Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. den. 434 U.S. 1086 (1978).

A continuing violation allegation determined the scope of the class in Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975). The Court there rejected the company's attempt to limit the class and approved a class excluding only women who had left the company's employ more than 210 days before the EEOC charge was filed. The Court reasoned that the complaint had alleged maintenance of discriminatory policies up to the time of filing, policies which were continuing violations of Title VII and would permit filing of charges at any time by present employees.

Therefore, and consistently with our opinion in Voiner v. PPG Industries, Inc., E-10702 and E-12471, we find that we may order relief for those women who lost benefits as a result of Respondent's unlawful discriminatory policy more than ninety days but less than three years prior to the filing of Ms. Miller's complaint. The parties have stipulated to the amounts lost by each of the women previously identified. Relief shall therefore be provided for those women as specified in the Order which follows.

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant vs. OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	DOCKET NO. E-14454

RECOMMENDATION OF HEARING PANEL

Upon consideration of the full record in this matter, the Hearing Panel recommends that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted and entered by the full Pennsylvania Human Relations Commission.

BY:

January 24, 1983 DATE	ELIZABETH M. SCOTT, Chairperson
January 24, 1983 DATE	JOHN WISNIEWSKI, Commissioner
January 24, 1983 DATE	RITA CLARK, Commissioner

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICKIE L. MILLER, Complainant vs. OHIO RUBBER COMPANY, DIVISION OF EAGLE-PICHER INDUSTRIES, INC., Respondent	:	DOCKET NO. E-14454

FINAL ORDER

AND NOW, this 2nd day of February, 1983, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, and therefore

O R D E R S:

1. That Respondent Ohio Rubber Co. cease and desist from discriminating on the basis of sex in the provision of employee disability benefits;

2. That Respondent pay to each of the following individuals the amount designated following the individual's name, plus interest of six per cent (6%) per annum, calculated from the last day of each individual's disability leave as

specified in the Stipulations of Fact:

a.	Vickie L. Miller	-	$1500.00
b.	Patricia A. Henry	-	1500.00
c.	Connie Miller	-	1200.00
d.	Sharon H. Blood	-	170.00
e.	Carol Hoagland	-	610.00
f.	Judith Schneider	-	1500.00

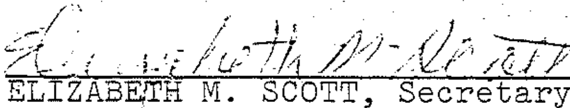
Payment shall be by check payable to each individual and delivered in care of Michael Foreman, Esquire, Assistant General Counsel, Pennsylvania Human Relations Commission, 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222.

3. That Respondent provide the Commission with satisfactory written proof of compliance with the terms of this Order within thirty days of the date found on the Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:
JOSEPH X. YAFFE, Chairperson

ATTEST:


ELIZABETH M. SCOTT, Secretary