

ADMINISTRATIVE MEMORANDUM

SUBJECT Pregnancy Leave and Benefit Policies

NUMBER 76

DATE January 13, 1977

By this memorandum, I wish to re-emphasize to you the importance of continuing to provide certain kinds of pregnancy leaves and benefits for women employees, particularly faculty. My recommendation is occasioned by the Supreme Court's December 7, 1976, opinion in General Electric Co. v. Gilbert, which has clouded the status of requirements in these regards under federal nondiscrimination provisions.

Federal policy has been that all disabilities related to pregnancy must be treated no differently from any other temporary disabilities in all matters of sick leave, health insurance, sick pay, and dates of leaving and returning to work, and that failure to afford such treatment constitutes sex discrimination in employment. This mandate is contained in separate but substantially similar regulations under Title VII of the 1964 Civil Rights Act (by the Equal Employment Opportunity Commission), Executive Order 11246 (by the Department of Labor), and Title IX of the 1972 Education Amendments (by H.E.W.) Substantially similar policies are required for SPA employees by the State Personnel Commission. Those same federal and state policies have required provision of unpaid pregnancy leave even where the employer otherwise maintains no formal sick leave policy (which has been particularly important in faculty employment, where there is often no explicit disability leave policy). These concepts are also applied to students under the Title IX regulations.

Additionally, in 1974 the Supreme Court ruled that a public employer violates substantive due process guarantees if it adopts arbitrary presumptions about when a pregnant employee must leave work and can return to it, even in education where the continuity of classroom instruction may be important. In Cleveland Board of Education v. LaFleur, 414 U. S. 632, the Court ruled that public employers must treat each individual woman's potential pregnancy-related disability on its own merits, leaving the determination of when pregnancy is disabling primarily to the woman and her physician, and accommodating classroom instruction needs by practices such as use of substitute teachers. This constitutional mandate for

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public employers coincides with the requirements discussed above, applicable to both public and private employers, that pregnancy leaves must be given, and that their timing and duration are principally for the employee to determine.

These various requirements have been important in assuring women employees, particularly teachers at all levels, that they will not be professionally penalized for becoming pregnant, and that their personal decisions as to whether and when to become pregnant will not be dictated by institutional controls. Our affirmative action plans should comply with the federal requirements described above.

The Supreme Court's divided decision in Gilbert challenges one basis of this favorable treatment by holding, in essence, that the E.E.O.C. Title VII regulation diverges from the intent of Congress, and that failure to provide health insurance benefits for pregnancy is not sex discrimination even where all other disabilities are insured. But Gilbert leaves unanswered a number of questions about the pattern of federal regulation, and the possible discriminatory effect of failure to provide pregnancy benefits:

1. Two members of the six-member majority of the Supreme Court filed concurring opinions stating that a factual demonstration of discrimination through the absence of benefits could be made, but that the plaintiffs simply had failed to do so; that is, limiting Gilbert to holding only that lack of benefits is not per se a Title VII violation.
2. Because Executive Order 11246 is an executive contracting requirement, the Department of Labor would appear able to continue its requirements even if they require actions which the Supreme Court held that Congress did not intend under Title VII.
3. The Education Amendments of 1972 require that Congress be afforded an opportunity to disapprove all education-related regulations before they take effect. Pursuant to these provisions, Congress in 1975 acquiesced in the Title IX pregnancy regulation, issued subsequent to and essentially duplicating the Title VII rules at issue in Gilbert, although other sections of the Title IX regulation were negated by statutory amendment. Thus a stronger presumption of rightness may attach to the H.E.W. rules than the Court's plurality gave to those of the E.E.O.C. H.E.W. has announced it will continue to enforce the Title IX rules.
4. For constitutional due process reasons, the timing of pregnancy-related leaves for a public employee must still be left substantially to the employee and her physician under LaFleur, supra, even though as a matter of sex discrimination the analogous Title VII rules have been struck down.

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5. Gilbert does not negate the State Personnel Commission's rules for SPA employees. Unless the Commission changes them, any changes in our standards for faculty and other EPA employees would result in different treatment between the two groups.

Whatever the precise scope of this opinion, an attempt to offset Gilbert legislatively will be made in the Congress which has just convened.

Pregnancy leave and benefit policies are of the utmost practical and symbolic importance in assuring full opportunity for women. Against this background, I believe it is important to re-emphasize our legal and institutional commitments to the pregnancy policies still mandated by the State Personnel Commission, Executive Order 11246, and Title IX.

cc: Andrew A. Vanore, Jr., Esq., Senior Deputy Attorney General
Affirmative Action Officers
Title IX Officers

A handwritten signature in black ink, appearing to read "A. Vanore", is located in the lower right quadrant of the page.