In the

Supreme Court of the United States

CLEVELAND BOARD OF EDUCATION, et al.,

Petitioners,

v. No. 72-777

JO CAROL LA FLEUR, et al.,

Respondents.

Washington, D.C.
October 15, 1973

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v.	:	No. 72-777
JO CAROL LA FLEUR, ET AL., Respondents.	:	

Washington, D. C.
Monday, October 15, 1973

The above-entitled matter came on for argument at 11:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES

CHARLES F. CLARKE, ESQ., 1800 Union Commerce Building, Cleveland, Ohio 44115; for the Petitioners.

MRS. JANE M. PICKER, 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio 44115; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-777, Cleveland Board against La Fleur.

Mr. Clarke, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES F. CLARKE, ESQ.

ON BEHALF OF THE PETITIONERS

MR. CLARKE: Mr. Chief Justice, may it please the Court:

In January, 1952, the Cleveland Board of Education, in response to a request by its then superintendent, enacted the maternity rule, which is challenged here today as being in violation of the equal protection rights of two female schoolteachers. The rule was enacted, as the record shows, in response to a felt need. It was something more than girls giggling in class at the teacher that brought about the enactment of this rule.

Q This rule was enacted back in --

MR. CLARKE: January, 1952, sir.

I might add that from January, 1952 until the filing of this case, no question had ever been raised as to its application or its validity. It had never been challenged by either of the two unions that teachers have in the Cleveland public school system, nor had any individual teacher, to the memory of the superintendent who testified

by deposition, ever challenged or in any way raised any question about it.

Q Can you tell us precisely what the rule provides?

MR. CLARKE: Yes, Your Honor, the rule in substance provides that at the end of the fourth month of pregnancy a teacher must take a mandatory maternity leave.

Q Unpaid?

MR. CLARKE: Unpaid, yes, sir. And she is not thereafter permitted to return until the semester beginning after three months after the birth of her baby.

At that time she is permitted to return with all of the privileges and prerogatives and status that she theretofore had had, and into any position for which she is or was at the time she left qualified. There is one exception to that rule. And it applied in this case.

If the teacher, and one of the teachers in this case, had been teaching for less than a year, then the rule at that time stated that she would not be entitled to mandatory leave. She would be discharged at the end of the year. Since that particular amendment had been enacted after the teacher had been employed, it was my position at the trial court, and I conceded that that was in effect an attempt by the Board to change her contract, and she was placed on the mandatory maternity leave.

Q When you talk about contracts, were these

individual written contracts with each teacher, or were they covered by a collective bargaining contract or what?

MR. CLARKE: In Ohio, teachers' contracts are largely governed by statute. These two teachers are what is termed non-tenured teachers. They had not taught a sufficient period of time to be recommended by the administrative superintendent as being qualified for teacher tenure. Once they are tenured teachers, they gather certain additional contract rights, as the name tenure implies. Neither of these teachers had that tenure.

Their want of tenure is not really an issue in this case.

Q This same rule would have applied to tenured teachers, would it not?

MR. CLARKE: Yes, Your Honor, yes, Mr. Justice Stewart.

Q So, tenure is not really relevant.

MR. CLARKE: I do not think either side has treated their non-tenured status as giving the school board any more rights than if they were tenured.

Q Then, to go back to my question, did they have individual contracts?

MR. CLARKE: Yes, sir.

Q Or contracts that were based upon what the State legislature said they would be or what was it?

MR. CLARKE: No, Mr. Justice Stewart, each teacher has an individual contract, an individual written contract. It is on a printed form, of course, but it is a matter of individual contract. Once the teacher becomes tenured, then that contract is automatically renewed sometime in the spring of each year.

If she is not tenured, as these teachers were not, then --

Q There is an annual renewal?

MR. CLARKE: Yes, there is not an annual renewal in the absence of tenure, there is an annual appraisal by the superintendent as to whether or not the teachers qualify.

Q There has to be a new contract each year?

MR. CLARKE: Yes, sir.

Q For a non-tenured teacher?

MR. CLARKE: Yes, Mr. Justice Stewart.

Q In the contract was there any specific mention of this provision?

MR. CLARKE: No, sir. The provision appears in the teachers handbook, which is a guide that is distributed each year at certain sessions that are held prior to the beginning of the school year. One of the plaintiffs in the case at bar said that she did not know about the handbook; the other said that she did. The rule does appear in the teachers handbook. It is a matter I think of wide general

knowledge.

Q But nothing in the employment contract as such?

MR. CLARKE: No, sir. No, sir.

Q Mr. Clarke?

MR. CLARKE: Yes, Mr. Justice Blackmun.

Q I suppose there is no answer to this, but I am a little curious as to why the five-month provision in the Cleveland Board rule, the next case, does not focus on that particular date. Was there a reason for it at the time?

MR. CLARKE: Mr. Justice Blackmun, the only reason given by the superintendent at the time his deposition was taken, as the reason for the rule, was that at that time it became apparent that the teacher was pregnant. I suspect that just as you pointed out in the Roe case, medieval theology and Christian theology took quickening to be at about around the 16th, 18th, 20th week. And there is really no single medical justification for picking the 5th month. It is our position that whether it be the 5th month or the 6th month or the 7th month, or for that matter, the 3rd or the 4th month, it is a matter to be left in the administrative discretion of the Board, and does not in and of itself raise a constitutional issue.

Q Does it go to one month?

MR. CLARKE: Sir, that is what the teachers themselves have suggested. In cross-examination of one of

the witnesses, it was suggested well, suppose we have a notice, a notice requirement that within a month or two months of the time that the teacher herself, on the advice of her doctor, decided to leave, why would not that take the place of the rule. The short answer to that is, first, that would then be substituting an 8th-month or a 7th-month mandatory maternity leave rule for a 5-month mandatory maternity leave rule. And that would be subject to the same medical problems that we are faced with today. And that is to say that while nearly all pregnancies start out as normal pregnancies, only 60 to 70 percent of them continue that way. And the problems of complications, disorders, and discomforts of pregnancy are questions which are in great dispute in this case. But on this record they were not in dispute. There was substantial medical testimony by the most distinguished OBGYN doctor that we could find in Cleveland, the former Professor OBGYN at Case Western Reserve Medical School. And he testified that in his opinion this rule, and the entire rule, not just the first part --

Q Did you ever go over that testimony when you made up this rule?

MR. CLARKE: No, sir.

Q Of course, you did. You just picked 5 out of the clear blue, did you not?

MR. CLARKE: The only reason that Dr. Shepherd

gives is that that is when she began to swell and it became apparent to him. I do think, sir, that that is the only reason there is in the record. However, of course it is unnecessary for me to point out to this Court --

Q I am not inviting you to go outside the record.

MR. CLARKE: I am not trying to go outside the record. What I am trying to say is that this rule today should be judged as a developed thing and not in terms of its origins only. To take from the rules of logic, the fallacy of origins is to judge a thing in terms of its origin only. And today in the environment of the Cleveland public school system, I do not really think it matters why the rule was originally enacted. The important thing is whether or not it fills a felt need today. And we think that the record completely demonstrates that it does.

Q Is there anything else in that handbook about health?

MR. CLARKE: About health, sir?

Q Yes.

MR. CLARKE: Yes, sir, it deals with sick leave, all different kinds of sick leave, leave for sabbatical purposes. There are two different types of sick leave. Each teacher each year --

Q A sabbatical is sick leave?

MR. CLARKE: No, sir. A sabbatical is not a sick

leave. But it can be treated as such. A sabbatical time off for further study --

Q Is there any other mandatory leave provision involving health?

MR. CLARKE: Yes, sir, because there is one that reflects a statutory mandatory leave, and that is when a teacher -- when her health has failed to a degree that she in the eyes of the administration is no longer able to teach properly -- we have had cases where teachers have become blind or deaf and insisted on keeping on teaching.

Q Is there a rule there?

MR. CLARKE: Yes, sir, because it is also in the statute.

Q What is the rule?

MR. CLARKE: The rule is --

Q Would you read it to me?

MR. CLARKE: Yes, sir, if you will bear with me for a moment. Personal illness leave, it is on page 19. The original of this document is of course in the record, although it is not in the transcript.

> "Teachers who are unable to perform satisfactorily the duties of their position because of personal illness or other disability and who have exhausted accumulated sick leave, may be granted leave of absence without pay

for the remainder of the school year or for a full school year. Such leave of absence may be renewed for an additional school year from the date of the granting of the first year's leave."

There is then a procedure for an application, a procedure for an assignment.

Q Why could not that be used to permit the pregnant teacher to take leave? Why do you need the additional one? Is not the difference that one is may and one is shall? That says she may take a leave, as I heard you.

MR. CLARKE: Yes, Your Honor, but --

Q Is there testimony that pregnancy is not a disability?

MR. CLARKE: Mr. Chief Justice Burger, there is such testimony on the part of the respondents in this case. It is our contention that it is a disability. And it is also relevant, Mr. Justice Marshall, to certain statutes. The Ohio legislature at its last session just concluded enacted a law which will not become effective until November, making pregnancy a grounds for disability and sick leave pay. So that as of November of this year a teacher going on a mandatory maternity leave in the Cleveland school system will be able to use up her accumulated sick leave and will be paid of course for that. And that accumulates at the rate of 15 days a year. There is a 120-day limit on that, unless the

school board has agreed to the contrary so that it is 180 days.

As a matter of fact, one of the briefs of amici quote a contract of which I had no knowledge, a union contract that says it is 220 days.

Q What has that to do with this case?

MR. CLARKE: It has nothing, sir, I brought it out only because of the question.

Q And that is a State-wide law?

MR. CLARKE: Yes, sir, a great many of the regulations in the teachers handbook are in there because of State law. But Mr. Justice Marshall is correct, the maternity leave is not.

Q Is this rule in the Cleveland system typical of rules in the various school systems in Ohio or is this unique?

MR. CLARKE: It is typical, Your Honor. There is an excellent brief amicus opposed to my position by the National Educational Association, containing detailed statistical analyses of this rule, stating that it is typical in 49 percent of the school systems of the United States having more than 25,000 students in the school system these rules apply either for the 5th month or the 6th month. So, we are talking about a rule of widespread application.

Q They are of widespread application, at least in

the larger urban districts.

MR. CLARKE: Yes, Mr. Justice Stewart, I --

Q That is all right. We have the information in that amicus brief.

MR. CLARKE: The problem that brought about the original enactment of the rule was that teachers, when asked to leave, would not do so; not one, but according to the record, many of them. They would be asked to leave at the end of the 6th month or the 7th month or the 8th month, and they just would not do it. And rather than take the very strenuous statutory method of terminating them, the then superintendent asked the Board to enact this rule so that there would be a uniform rule. And he was concerned about the continuity of the educational process, which is as true today, if not more true today, than it was then. And I can demonstrate the continuity, the importance of the continuity of the educational process in no way better than by the record in this case of Mrs. La Fleur herself. Mrs. La Fleur was and still is an extraordinarily good teacher. She was a well trained teacher not only in English but under one of the title I Federal grants. She had been trained to teach under-achievers, particularly in the inner city of Cleveland. She had taken special courses in that, she was well qualified for that. It is a little different from the average kind of teaching. Her class consisted of 25 girls,

girls, girls who were not mentally retarded -- these were educable girls -- but who were not motivated and who, because of background or one reason or another needed some extra personal help.

She was sort of a home room teacher in a way. These were called transition classes at the 7th Grade to prepare them, and she put it, for the mainstream of the 8th Grade. She was not the only teacher who taught these children. A math teacher would come in in the mornings, a science teacher would come in in the mornings. They would go to home economics class where there would be another teacher. They would go to gym class, where there would be another teacher. But she was always there.

On December 17, 1970 she advised her principal that she was pregnant. Up until that time she had been teaching English. She had not been in the transition class, but both she and her principal contemplated that she would go there. Her principal expressed some dismay and told her because of the mandatory maternity leave rule she would have to leave in a couple of months and then took it up with Mr. Tanczos who testified in this case.

Bear in mind, because of the maternity leave rule the administration thus became aware of this lady's pregnancy. Mr. Tanczos then advised that there was no one available at that time but that it was important to have

somebody there to be trained by Mrs. La Fleur. So, if she would take over the transition class at the end of the Christmas holiday knowing that she would have to leave in March, she did take it over, and a month before she left, a Miss Sutter who had been trained in the same way in title I, came in and was there observing for a month how successful Mrs. La Fleur had been. I submit it would be hard to find a better example of the importance of the rule in establishing the continuity of the educational process than in this record right before you today.

But it is true with 5,000 teachers teaching different kinds of classes -- and, of course, this is not always true. The other plaintiff was teaching a French class, teaching different people in French during the day. The replacement for her came in -- there was a dispute in the evidence as to whether it came in a week before or a day before. But the necessity for having a well trained teacher existed in Mrs. La Fleur's case.

Q Mr. Clarke, is it accurate to say that without the rule she might have finished the term without any difficulty?

MR. CLARKE: That is what she wanted to do, Mr. Justice Blackmun, and she would then have been -- you see, there was a little mistake in just when she became pregnant. She originally thought she had become pregnant at such a

time that the baby would be born in mid-August. In point of fact -- this is in the record -- she later learned and so testified that the baby was due in mid-July. She said that she wanted to continue teaching, which would have meant that she taught until around the first week in June, which would have made her about 8 months pregnant. This was her desire had there been no rule.

Q At least there would have been no discontinuance?

MR. CLARKE: There would have been no discontinuance in that case. But you would have had an 8-month-pregnant schoolteacher on your hands. Your Honor, there is a sharp dispute in the briefs of the parties as to what the record contains. With all due respect to my sisters at the bar, I do not believe that their brief fairly nor candidly summarizes the evidence as to the medical questions. And it certainly attempts to say that we made concessions which we did not make and do not make today. The evidence is undisputed on Dr. Weir's testimony that a schoolteacher, 4 months pregnant, is not an able-bodied person. Dr. Weir has delivered babies for 25 or 30 years. I might say it is in the record that he delivered one of mine. And he had a distinguished career. In the latter stages of his career he became concerned about problems of infertility. He is described only as an infertility expert in the respondents' brief. That is not the case. He had specialized

in infertility but along with a general obstetrical practice and a teaching position at Case Western Reserve University.

I think it is fair to say from a reading not only of the briefs of the parties but reading the briefs of amici, that there are today in the medical profession strong differences of opinion as to how long a pregnant lady should be permitted to continue to work. There is testimony in one of the amici briefs from the International Union of Electrical Radio Workers and in the appendix where a doctor testifies that he thinks a pregnant woman is capable of teaching until the day of delivery or until the hour of delivery, and there is some evidence about nurses doing their tasks until that time.

Q Is there not some medical testimony in this record that it depends upon the individual?

MR. CLARKE: Of course, it does, sir. We do not dispute that. The point is not --

Q But this rule does not depend upon the individual.

MR. CLARKE: That is right, sir. The rule is for the administrative convenience of the school to furnish quality education, that is the purpose of the rule. The rule was not enacted for the welfare of the teachers. The rule was enacted to furnish quality education and to prevent the school board from being subject to the disruptions that

will occur, as the medical evidence shows can and do occur in 30 to 40 percent of the cases from the complications of pregnancy.

We do not say, sir, that pregnancy is not an individual matter. Of course it is. But our concern is not really in this case with the welfare of those teachers. Our concern is to give the best quality education to the children in the city of Cleveland that we can, and it was for that reason that the rule was enacted, and it is for that reason that I am standing here today to support it.

I would like very briefly to summarize what those disabilities are. A pregnant woman, more than four months pregnant, changes her center of gravity. Her shoulders go back. She is more susceptible to falls than she was before. She has a weight gain of approximately 20 pounds. As a matter of fact, in this month's issue of the American Medical Journal it says it should be 25 pounds. She urinates more frequently because of the pressure of the fetus on her bladder. She is more susceptible to headaches. She has the three classic fears of pregnancy, of a miscarriage, of her own death, of having a deformed child. These are, in the opinion of our expert, exacerbated by the environment, the school environment, in which she finds herself -- not to the degree and not with the interest that it hurts her but that it prevents her from being as competent a teacher as she was

before. And that is the sole justification for the medical testimony.

I would like to reserve, if I may, some of the remainder of my time.

Are there any further questions, sir?

MR. CHIEF JUSTICE BURGER: Very well, Mr. Clarke.

MR. CLARKE: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mrs. Picker?

ORAL ARGUMENT OF MRS. JANE M. PICKER

ON BEHALF OF THE RESPONDENTS

MRS. PICKER: Mr. Chief Justice, and may it please the Court:

We are here today in our view to present to you the issue of whether a woman is both able and willing to work is to be permitted to continue working as long as she is medically able to or only until her condition of pregnancy becomes visible to the eye. We feel that the record amply demonstrates first that there is no question that was ever raised as to whether the plaintiffs in this case could carry their duties out until the end of the school year. Both babies -- although Mr. Clarke certainly correctly stated -- there was some lack of certainty as to whether Mrs. La Fleur's baby was to be expected in August or in mid-July. Indeed, the baby was born on July 28. There was no question raised that she would not be able to teach until the first

of June.

There is no question that the other plaintiff in this case, Mrs. Nelson, would not equally have taught to the end of the school year. Her baby indeed was born in August. The reason for the rule, as I believe it is admitted on the part of everyone, was cosmetic and not medical in nature. "We do not want our children to see women who are visibly pregnant."

The respondents contend that this particular rule is one which embodies an invidious classification which is based on sex alone. The petitioners appeared to contend in their briefs, although it has not been raised in argument today, that pregnancy is a condition which is unique to women and that therefore there is no discrimination in a rule which deals with pregnancy, which obviously do not occur in all women simultaneously although it may well occur in almost every woman at sometime during their lives.

We feel that the use of the word competition is out of place here. Surely there can be no question but what there is no competition in the child-bearing function. Women indeed must bear this burden alone. There is however a great deal of competition in the working world and, let us face it, this exists among and between men and women as it does as well among members of each sex separately. The issue in this case in truth is whether or not women are going to

be permitted to compete equally in the working world.

If indeed our brothers are correct and the fact that pregnancy is unique to women is a valid reason for discriminating against them in the terms of their employment, then the guarantee of equal employment opportunity to women must be a futile promise. I believe the briefs which have been submitted by the various amici in this case have pointed to the statistics with respect to the effects of employment discrimination against women, the differences in salary level that exist among and between the races and the sexes. And I think it is rather clear that employment discrimination which is based on pregnancy is one which ultimately can affect each woman to her detriment.

Woman's frail nature historically has been an excuse for protecting her in ways which have affected her adversely. We are all familiar with the old cases in this Court where the issue was whether or not women could be protected from working certain hours, for receiving certain types of wages. In fact, if pregnancy is a valid reason for discriminating, we can discriminate in such a manner as to protect all women out of jobs.

Q Mrs. Picker, if an employer said to the men in his employ no beards and no mustaches, would you regard this as a discrimination based on sex?

MRS. PICKER: Your Honor, I think we have seen

some cases -- and certainly the Raffert case has been cited in one brief against us in Florida. I recognize most women do not have beards or mustaches. Most men do have hair on their heads as do women. And I think that if we start getting into distinctions on the basis of the place where hair grows, we are really getting into ludicrous questions.

Q I was wondering whether you can distinguish the suppositicious case I gave you from the pregnancy situation.

MRS. PICKER: I think indeed that --

Q Other than by saying the one is ludicrous and the other is not.

MRS. PICKER: I think that the question of where the hair grows is ludicrous. In other words, I think that when you have cases that say that it is all right to impose a regulation on a man's beard and mustache because of the fact that women cannot grow them but it is not all right to do it on the length of their hair on the head because that constitutes sex discrimination, that indeed that is ludicrous. Therefore, I say yes, I do not think that the fact that men alone have beards and mustaches is a sufficient reason for being able to say that you can therefore say as an employer you cannot have this and you cannot have that, that it is the same sort of thing.

But I think that the question which has been raised generally in the cases on this issue have wrongly

really been theorized on the basis of the pregnancy decisions.

Q Let me extend that hypothetical a little bit. Suppose it is an industrial operation, the rule of the factory is that no man working on particular machines may be employed in that type of work if they have beards because experience of the insurance company shows that 30 percent of the men who have beards have special accidents.

MRS. PICKER: I think, Your Honor, that generally speaking the safety regulations which have been involved in a lot of these industrial cases have been ones which, as it turned out when one looked at them, were not pertinent because of the fact that they treated one sex only.

In other words, I do not think that it is relevant if a man has a beard that, say, comes to his chin, if a woman is permitted to work on those machines and she has hair that extends to her shoulder. I think that we have to recognize that safety is an adequate reason for insuring that certain accidents cannot occur but we are all too well familiar, I think, with the fact that in most swimming pools boys must wear caps, girls need not. We all know today the length of hair is surely not based on sex. And a bathing cap rule should relate to the length of a person's hair, not whether it is men's hair or women's hair. As far as we know, there are no distinct qualities in the hair of one sex as opposed to the hair of another sex. I think that any rule which

relates to safety, if it is applied across the board, is fair. But I think one which goes to beards and does not affect hair on other parts of the body which also can interfere with the machinery is not an appropriate one at all.

Q Let us make the rule any hair on the face or the head that goes more than X distance from the chin line as a safety reason. You have no question about upholding that?

MRS. PICKER: No, it does not disturb me.

Q As to beards, it would not affect women though.

MRS. PICKER: I really do not like to raise it, but of course some women do have beards.

Q But it is not a generality in the experience of human beings.

MRS. PICKER: No, it is not, no. No.

The mandatory maternity leave is how the rule in this case has been labeled, and I would like to point out a couple of things. First of all, it is in fact a euphemism to call it a leave. It is a termination. It is a discharge policy. And Mr. Clarke recently referred to the fact that the woman may return after child birth, but I would like to point out that the language of the rule refers only to priority in reassignment if there is a vacancy.

Q Would you make this same argument if a new statute were effective now?

MRS. PICKER: The new statute, I believe that in fact it does not apply in this case. It applies to county and State employees.

Q Suppose it were effective now, would you be making this argument?

MRS. PICKER: You mean as far as the case itself is concerned?

Q If these leaves were paid leaves.

MRS. PICKER: If the leave was a paid leave, my feeling is that a woman still has a right to work rather than take --

Q It would still be a discharge.

MRS. PICKER: It would still be, yes, I believe so. Because, as you may know, often there are reasons why a woman would prefer to work even if she received the same pay over taking a leave. There are matters such as one's progress in one's profession, one's accumulation of seniority, one's ability to stay current in one's field, all of which are adversely affected by time away from the job, even if one continues to get a pay check. I think, in fact, in most instances the issue would not be raised. Most women would not, I think, feel compelled to go into court in a situation where they were continued on the payroll if indeed the opportunity to return was a real one and they knew that they could go back to their job. There is no guarantee, of course,

even if the women is allowed to return, that she will be assigned to teach the same subject that she taught before or even in the same school. So that it is a very risky business as to whether she will be satisfied by what she receives at the other end of the trip to the hospital as far as her employment rights are concerned today.

The policy, as far as the new law is concerned, does not I think help the teachers in this case. It could, with proper interpretation of other provisions of State law. But this particular provision refers only to the State and county employees, not the School Board employees.

I think also that if we are going to say that a woman can be terminated because she is pregnant, that there is really very little logic to where one draws the line. If a woman can be terminated because she is pregnant, can she also be either not hired or terminated because she may become pregnant? I think every woman in certain types of work is aware of instances where she has been barred from work because of the fear of that employer that she may become pregnant, may leave, may not return, and therefore she will not get the job in the first place. Pregnancy is such a widespread phenomenon, it is potentially there in the case of every woman. And if one finds that on the basis of it being any condition that one can regulate it at one's will, I am not quite sure where one then can draw the line

to insure the protection of women.

And I might add that although of course now there is that particular provision which protects State and county employees, that the Board of Education in this case, while it claimed to be concerned with the welfare of the teachers, that it had absolutely no concern with respect to their financial welfare. The teachers in this case were put on an unpaid leave. I believe that the NEA takes a position that really this is just another step in a very pervasive history on the part of school boards of their discrimination first against married women, now against pregnant women, and I believe that the International Union of Electrical Workers' brief points out the very great importance to the well being both of the mother and of her child of having adequate financial resources during the period of pregnancy when a woman's diet is very important and when she may be required to follow a particular medical regimen.

So, I do not think the lack of concern for the financial situation of the teacher who is terminated at the end of her 4th month of pregnancy is one which is of no importance because it is money only.

I think that we should also notice the contrast in the situation with respect to the plaintiffs in this case and that of the students whom they teach. At one time, of course, both married and pregnant students were barred from

the classroom. By the Attorney General's opinion in 1961, Ohio schools were no longer permitted to bar married students. In 1968 an Ohio Attorney General opinion provided that unless school attendance would be detrimental to her physical safety and well being, that a pregnant student could not be taken away from classes.

Indeed, I believe the situation here where the plaintiff, Mrs. La Fleur, taught pregnant students -- it is in the record -- and where one of the witnesses, another teacher who had been permitted by the School Board to work until her 8th month of pregnancy but at no pay, Mrs. Tucker, after she had been terminated, that these situations are the rule rather than the exception. In the Williams case, which is cited in the brief, Northern District of Ohio case in 1972, the person being terminated there was a social worker who was an employee of the Board of Education whose only job was advising and counseling pregnant students. What kind of a rule is it that finds it perfectly permissible for pregnant students to sit in the classroom but not their teachers?

The School Board in ignoring the precedent of the situation with respect to pregnant students stresses instead the need for classroom continuity. Mr. Clarke said today that this case was the perfect example of why the rule promotes classroom continuity. It requires the fingers

of only one hand to see that indeed the students in the transition program who were educable but slow learners and who were being prepared to enter into main stream classes as a result of this rule had three teachers during the school year. They could have had only two if Mrs. La Fleur had not been permitted to teach them in December. But knowingly the School Board put a pregnant teacher in there who they knew would be terminated in March, thereby insuring that these students would have three teachers and not two during the course of the school year.

I think that makes virtually a mockery of the claim that the purpose of the rule is to insure classroom continuity. There is no similar rule with respect to any other medical condition if a teacher knows that he is going to have surgery for a heart condition or any other and will be out of work for a month or two, there is no rule whatsoever which insures that he will take a mandatory leave and that classroom continuity will be protected. It is protected, so to speak, only in the case of pregnancy. And, of course, we submit that the record here clearly proves that it is the very opposite of a rule promoting pregnancy that does the opposite. Neither Mrs. La Fleur nor Mrs. Nelson would have been required to leave school at all.

Q May the school have any rule about pregnancy?

MRS. PICKER: I am not sure. I think that if you

want to be requiring a medical certificate, for example, with respect to a person's ability to work, that if a person has any kind of a known medical condition which requires a doctor's attention, that one could require such a certificate. But I think that it would have to be an across-the-board rule which would say that a man with a heart condition would also have to have his doctor provide a statement saying that he could teach.

Q So the same argument would go no matter what the enforced period was or even with respect to a medical certificate?

MRS. PICKER: I think so. I cannot see any reason for singling out pregnancy.

Q Mrs. Picker, there is one thing about pregnancy and that is this, that everybody knows there is going to be a period when the woman is not going to be available to work, at least a period of a few days. One can argue about how long it is, but on the day that she gives birth to the baby she is not going to be at school. So, would you not concede the possibility of a regulation that required advanced notice to the Board of Education that the teacher was not going to be available during a certain period?

MRS. PICKER: Your Honor, I think there are really two questions that you are asking and two answers.

Q At least two.

MRS. PICKER: The first is that we cannot assume that schools are in session all year, seven days a week. We all know that the summer vacation period is a quarter of the year. Both our teachers were giving birth then. There is no need whatsoever for them to miss any time.

As far as the notice is concerned, we have never objected to a notice provision as long as it is a notice provision which applies to anyone with a known medical condition which is likely to take them out of the classroom.

Q Pregnancy is not likely to take you out of the classroom; it inevitably will, will it not if the birth takes place on a week day during the school year?

MRS. PICKER: It will inevitably take you out if it is on a week day of the school year. But, as we well know, not every pregnancy is a successful one. And there are instances -- there is a recent case in which a woman miscarried and was not permitted to teach after the miscarriage. Now, miscarriage may only remove you from work for one or two days if it is at an early stage. It may not affect your employment rights at all. And while this particular school board rule is one at the end of the 4th month of pregnancy,there are of course many, many rules. The NEA brief cites all kinds of rules which are earlier than this one. I think we have no problem with the notice requirement. Indeed, the superintendent of

secondary education testified in the record that he felt a one-month rule would be totally satisfactory to the school board. He had been employed in the school system for over 20 years at the time he testified, and he agreed that there was no need for a mandatory leave if only he had a month's notice of when a teacher was going to leave.

Mr. Clarke has assumed, I think very interestingly enough, in argument today that if there was only a one month's notice ruling, every teacher would work until she was eight months pregnant. I think it is interesting that he feels that all teachers obviously not only are capable but would want to work until that period of time. And that is the reason for the School Board's problem in this case.

But I cannot understand, if you know when a teacher is going to leave, how there is a problem. And I do not know of any teacher who would object to giving a date at least a month in advance as to when they were going to leave. But the School Board, as they have stated here today, is not satisfied with that solution. And that is why we are in Court.

Q But at least the answer you gave to Justice White, as I understand, you now qualify. You would concede the constitutional validity of a rule that required a teacher who was pregnant to give some sort of notice to her employer that she was not going to be available, at least for a

period of time, so far as she could anticipate. I know that there might be a miscarriage unanticipated.

MRS. PICKER: I do not have any objection to it, but I do feel that there remains a violation of equal protection if anybody else who knows that they are going to have surgery is not required to give notice, if they know it in advance. If you know you are going to be out for an operation, why do you not have an obligation also to give notice? It is as much a problem to the School Board, regardless of the reason for the hospital stay, and no school board has ever required that of any person.

Q I was not suggesting that anybody who was expected to be out and not available to teach would not be covered by the same rule.

MRS. PICKER: Then I have no objection whatsoever.

Q It is not whether or not you have an objection nor I have an objection but whether or not the Constitution has an objection.

MRS. PICKER: Exactly, which even us at the bar must attempt to interpret in our arguments.

I would like to just make mention of the fact that the case before us, in our view, is really a corner-stone case. Because what happens to our pregnant teachers, once they are forced to leave their jobs, all too often they do indeed have financial problems and they go and try to

get unemployment compensation. In Ohio today they, as a result of the lawsuit, will be given it. But in most States they will not. And for the reason, of course, that these laws too are viewed to be sexually discriminatory, there is a great deal of litigation in the Court today on this issue. And we feel, therefore, that the 14th Amendment argument is still a most important one, despite the fact that we now have legislation both at State and Federal level which goes to this same type of question. While Title VII of the Civil Rights Act now covers State and local government employees, there are very, very few cases which have even come out of District Courts interpreting that legislation with respect to mandatory maternity leaves, and none have reached appellate level. So we feel that it is really quite premature to attempt to see the interpretation of legislation and how it will affect this particular issue at this time.

And I think also the Court should be aware of the fact as to why these cases continue to be brought under the 14th Amendment even now that there is Federal legislation. And that is because we have of course a 180-day waiting period under Title VII, and babies do not wait for anyone. So that if you seek injunctive relief, it is only under the 14th Amendment that it is possible, even today, for any teacher to attempt to get relief. For this reason,

although Title VII is there, I think we can only anticipate that a great many of these cases will continue to be brought under the 14th Amendment.

I think finally that it is proper for us to comment on the principal precedent which our opponents have cited in favor of their position, and that is the Rodriguez case. The situation in Rodriguez, we argue, is totally different from the case at bar. IN that case there was no discernible discrimination against any protected group. That was I think a very first and obvious distinction between our case and Rodriguez.

We also read that this Court mentioned there and has earlier found that classifications with respect to tax matters are treated most leniently under the 14th Amendment. Even in tax matters there have recently been cases in which amendment violations of the 5th Amendment have been found in the Moritz case. In the 10th Circuit, for example, a classification was found to be sexually discriminatory and was therefore invalidated. So, I think that we have again an important distinction with respect to the classification here, which is not a fiscal one at all and which deals solely with individuals solely of the female sex.

The point which the School Board makes is that Rodriguez guarantees an ability on the part of local government to control educational policy. We do not disagree with

that. We have no dispute with that whatsoever. But we sharply contend that the maternity rule here in question is a matter of educational policy. It is not, in our view. Curricular matters are. But what we are talking about is employment policy on which there is a national policy now, not educational policy, which is properly left to local government.

Indeed, we feel that the argument of the petitioners is almost backward here and that their argument favors us. Because since the Court in Rodriquez found that there is no fundamental right to an education, that that very reason gives the students, the employees of a school board, no greater disability than employees of other employers. Classroom continuity can hardly be a reason for denying women employment rights when employees of other employers do not get treated in that manner.

Consequently, in our view, Frontiero was far more applicable than Rodriquez. There, using petitioners' analysis, we are dealing with an area of military policy. If ever there is an area in which we have found that individual rights have received less protection than in other areas, it is in the area of military policy. Yet again in that case, the position of the women was found vindicated.

There is not truly any collision in this area between State and national policy. Mr. Clarke has pointed

to the legislation which has been effective since the first of August. It does relate at this time only to State and county employees. However, I might point out that effective August 13 of this year, there were State personnel regulations which related to State and county employees which indeed gave them the same rights subsequently given to them by newly enacted legislation.

In other words, the State government of Ohio felt that it could, pursuant to the old law, give them these rights. The language of the old law is little different from the language of the law relating to employees of boards of education; and I think it is therefore susceptible to the same interpretation. Therefore, we do not find any particular conflict at all, and we feel that the argument of administrative convenience which has been presented to you today by petitioners is the same argument that you have heard again and again in Reed v. Reed, Stanley, and Frontiero, and that it can have no more validity in the present case than it did in those.

I do not think that any of us feel that persons' employment rights should be taken away from them in order to shield children from the facts of life, and that indeed is what has been done here and has consistently been done by school boards with mandatory maternity leave rules in the past.

Q Mrs. Picker, you have referred to the 14th Amendment. Do you view this case as exclusively involving the Equal Protection Clause?

MRS. PICKER: Yes, we do, Your Honor.

Q You do not view it as involving the Due Process Clause at all?

MRS. PICKER: Well, Your Honor, we did not think to plead that originally, and I am not sure that that is particularly detrimental to our case. We have learned a lot since the pleadings were originally filed in this case. It was prior to Stanley of course, and indeed prior to Reed v. Reed. It seems to me as though we indeed had a violation here of Due Process as well as Equal Protection, but we did not plead it. And therefore we have not argued it.

I feel on the basis of Stanley, of course, that perhaps we are not precluded. I gather that in that case one was pleaded and that the case indeed was found to turn on both. But it is clearly our position that there is a violation of Due Process here as well, although we have felt precluded from arguing it in this instance.

Q Very well.

MR. CHIEF JUSTICE BURGER: Mr. Clarke, you have a few minutes left.

REBUTTAL ARGUMENT OF CHARLES F. CLARKE, ESQ.

MR. CLARKE: Thank you, Mr. Chief Justice Burger. I can understand my sister's confusion over the statute, but she is simply in error. There were two statutes passed at the last session of the Ohio legislature. One limited the State employees. The other, the amendment to Section 3319.141 of the Ohio Revised Code, specifically states:

> "Each person who is employed by any board of education in this State shall be entitled to 15 days sick leave with pay. Teachers and non-teaching school employees, upon approval of the responsible administrative officer of the school district, may use sick leave for absence due to personal injury, pregnancy" --

And pregnancy is the word that was added to the statute.

I was unable to get a certified or enrolled copy of the bill, but I do have a Xerox copy of it. I would be glad to furnish it to the Clerk's Office.

MR. CHIEF JUSTICE BURGER: Would you give it to the Clerk and give Mrs. Picker a copy of it, of course.

MR. CLARKE: Yes, Your Honor.

One or two brief comments. The parties are in agreement that the Equal Employment Opportunities Act provisions are not relevant in this case. That is to say, whether or not the guidelines passed one week after the

enactment of the 1972 Civil Rights Act, are relevant in this case. The only grounds for relevancy that I can see is that they demonstrate another remedy for the schoolteacher if the case were to be filed today.

Yes, Mr. Justice Powell?

Q Before you leave that subject, have those guidelines been accepted by the Cleveland Board or not? They have not been applied to supersede the rule.

MR. CLARKE: At the present time, yes, Your Honor, Mr. Justice Powell, the rule is being held in abeyance pending the decision of this Court and in compliance with the guidelines. Yes, sir.

The long hair issue, Mr. Justice Blackmun, there is a series of cases in the 6th Circuit Court of Appeals culminating in Giffell v. Rickleman and Jackson v. Dorier. I am familiar with them because Giffell is my case. It held that School Board regulations which required male students to cut their hair did not rise to the dignity of any constitutional question and that such regulation was not discriminatory against males. That is to say, it was not a constitutional question, and this Court has denied certiorari in I think 25 or 30 long hair cases. The only Justice on this Court who has expressed a view on it was Mr. Justice Black in one very short opinion in which he too held that he did not find any constitutional issue.

I would like to point out that obviously through oversight and inadequate scholarship there is one leading case that I did not mention in my brief and which I think is of extraordinary importance in this case, and that is Dandridge v. Williams. In 397 United States 471, speaking for the Court, Mr. Justice Stewart had, among other things, the following to say, and I think it is applicable here when you consider whether this rule should be a 4-month or 5-month or 6-month or 7-month or an 8-month rule.

> "In the area of economics and social welfare a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If a classification has some reasonable basis, it does not offend the Constitution. The problems of Government are practical ones and may justify, if they do not require, rough accommodations. Illogical as it may be and unscientific, a statutory discrimination will not be set aside if any state of facts reasonably made can be conceived to justify it."

I am sorry that that was not in our brief. It should have been.

Lastly, it seems to petitioners, Your Honor, that

the basic issue before you, as many commentators have suggested, particularly in an article, in 86 Harvard Law Review, "Developments of the law, a model for new equal protection," that Your Honors have before one of the most evasive issues that this Court has to determine. And that is, What is the future of the Equal Protection Clause? It is by and large an important basic and fundamental question that I think with all due respect to my sisters at the bar does go somewhat beyond the narrow issue in this case.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, the case is submitted.

(Whereupon, at 12 o'clock, noon, the case was submitted.)

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