In the

Supreme Court of the United States

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner

v.

SANDRA WETZEL ET AL

No. 74-1245

Washington, D.C.
January 19, 1976

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LIBERTY MUTUAL INSURANCE COMPANY, Petitioner	:	
v.	:	No. 74-1245
SANDRA WETZEL ET AL	:	

Washington, D. C.

Monday, January 19, 1976

The above-entitled matter came on for argument at 1:42 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KALVIN M. GROVE, ESQ., Sears Tower, Suite 7916, 233 South Wacker Drive, Chicago, Illinois 60606
For Liberty Mutual Insurance Company, Petitioner

HOWARD A. SPECTER, ESQ. 1320 Grant Building, Pittsburgh, Pennsylvania 15219
For Petitioners

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 No. 74-1245, Liberty Mutual Insurance Company against Sandra Wetzel et al.

Mr. Grove, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KALVIN M. GROVE, ESQ.

ON BEHALF OF PETITIONER

MR. GROVE: Mr. Chief Justice and may it please the Court:

This case comes to you today on review from the United States Court of Appeals for the Third Circuit which, reviewing Liberty Mutual Insurance Company's disability program for its employees determined that that plan violates Title VII of the Civil Rights Act of 1964.

I think it is important for this Court to know just exactly what that plan is and what they provide.

First of all, besides excluding from coverage disability due to pregnancy and complications from pregnancy, that plan has numerous other exclusions.

It does not cover disabilities due to self-inflicted wounds. It does not cover disabilities unless the employee is under the care of a licensed physician. It does not cover acts of suicide. It does not cover acts which are the cause of declared or undeclared war and it does

not cover emotional disorders, alcoholism or narcotics or drug addiction unless, again, the employee is under the care of a licensed physician.

The plan provides that contributions are made by the employees, no matter what their sex, in equal amounts and Liberty Mutual Insurance Company, in turn, contributes to the plan equally no matter what the person's sex is.

The Third Circuit held that this Court's decision in Geduldig versus Aiello was not applicable because of the fact that that case arose under the 14th Amendment and that this case arises under Title VII.

We submit to this Court that the Court's reasoning in Aiello is directly in line with Title VII and there is no reason why that thinking should not be applied to a Title VII case.

The question is, is it discrimination? No matter what the standard is, that is the question that has to be determined and this Court in a similar situation, in fact, the California Disability Plan is very similar to the Liberty Plan, held that absent a showing that the exclusion of a risk was, for a pretext to engage in invidious discrimination, you could do such.

And Liberty Mutual here, because of valid and cogent reasons, has cited to exclude certain disabilities under its plan and I submit to this Court that under your

thinking, that is not discrimination based on sex.

The Court of Appeals said that you could not apply Aiello because of the fact, again, as I repeated, that is a 14th Amendment case and Title VII cannot apply. I suggest that that is improper and should not be the holding.

This Court specifically, in response to, I believe, Mr. Justice Brennan's dissent and Mr. Justice Marshall's dissent, in a footnote indicated that the policy was lawful and it seems to me that if this Court is going to review Aiello, then Aiello should be affirmed and the Court should say that that case is applicable to Title VII.

QUESTION: Well, you wouldn't suggest that Congress couldn't go further in prohibiting employment practices than the 14th Amendment if it so chose, would you?

MR. GROVE: I agree with that statement, if Congress so chose. But we submit that Congress did not so choose.

If Aiello is not applied, you are going to have a result of, at least in those states, where the state is the carrier, such as California and other states, the insurance carrier where the state, under the umbrella of Aiello will not need to provide this benefit, but the state as an employer would have to provide the benefit to its employees.

You are going to have one standard for the state as insurance carrier and another standard for the state as

an employer and to me that result is not what Title VII or the 14th Amendment is supposed to accomplish. I think that we, as practitioners in this area, are looking for some guidance from the courts because there are, as you know by the numerous briefs that have been filed in this case, the parties are squarely on one side or the other.

Everyone is citing that the 14th Amendment says that you didn't mean what you said and therefore you need to come up with a new standard and the other side, the Liberty side, if you will, says that what you meant is exactly applicable to Title VII and I don't think that we should have different standards for the determination of what is discrimination.

The Court of Appeals, after summarily dismissing Aiello with one very quick, brief sentence, then went on and said that because of three things, number one, that because the EEOC has come down with guidelines which indicate that this policy is violated and since they have some expertise in the area, the Court should defer to them.

I suggest in this situation that the EEOC guidelines, as in Espinosa, should not be given deference to.

For, as the Court is well-aware and it is stated in the briefs, from 1965 when Title VII became applicable until after this lawsuit was filed, the Commission was on record as stating that a policy such as Liberty Mutual was

not in violation of Title VII and absent any hearings, requests from experts if you will, requests for interested employer associations or anyone else, the EEOC all of a sudden came down and changed its position but yet in the Aiello case before you, the EEOC's amicus brief clearly indicated that what you were going to hold in Aiello could be dispositive of Title VII cases.

Of course, now the EEOC comes down with their guidelines and says just exactly the opposite and I suggest that they should not be entitled to the deference normally granted to an agency because you have a shifting sands situation here and they are no more expert in this situation than, I submit, this Court.

The Third Circuit then went on to say that because Liberty Mutual has so many coverages under its policy that it is unreasonable for it to exclude pregnancy and disabilities due to pregnancy, therefore, they cannot sustain that exclusion and I respectfully submit that I think the Third Circuit read the plan wrong because, as I have just read to you, the plan does have numerous situations where disabilities are excluded.

QUESTION: Mr. Grove, how old is the plan, the insurance plan?

MR. GROVE: I don't know exactly, your Honor. I would say at least it is prior to 1972 -- prior to the

guidelines issued --

QUESTION: Has it always had the exclusions and exemptions in it that it now has?

MR. GROVE: Yes, it has, always.

QUESTION: Have there been any changes?

MR. GROVE: No, there have not been any changes as far as I know. If there were changes, and I submit I do not know, they were to include more as opposed to taking out some -- more disabilities would be included as being excluded from the plan's coverage.

QUESTION: Has there been that evolution, do you know?

MR. GROVE: I can't respond. I really don't know. I think there have been but I am unfamiliar with -- over the years the Liberty Mutual Insurance Company has been in business for, I can't tell you how many years and I am sure that over the years there have been some changes but I am frankly unfamiliar with all of them.

QUESTION: Is there any legislative history, so to speak, and any explanation in the record anywhere as to these -- I don't mean now -- post hoc explanation or rationalization -- but any historic explanation for the exclusions and exemptions in this plan?

MR. GROVE: No, there it not. It was just this plan that was litigated and there was no attempt by either

side, if you will, to go back into history to determine those questions.

Lastly, the Court of Appeals indicated that the proper standard to determine this case, again, was not Aiello but Griggs versus Duke Power and we submit that under Griggs versus Duke Power, you don't have a violation in this type of situation.

You must remember that all women and all men at Liberty Mutual Insurance Company under this plan receive exactly the same contribution from the company. They make the same contribution and the benefits to all are exactly the same. For every disability that a man may have, a woman has the same coverage under the plan and I submit to this Court that there are rational basises for Liberty Mutual's plan, and the record so indicates.

First of all, as long as there is no evidence that the plan was instituted or the exclusion was instituted as a pretext to engage in invidious discrimination, any employer is free to exclude whatever he wants from the disability plan.

I submit to you that this record does not sustain a showing that Liberty Mutual Insurance Company engaged in a pretext or excluded maternity in a pretext to engage in invidious discrimination.

The plan is such so that the Liberty Mutual

Insurance Company can pay to its employees the maximum benefits. The company has determined, based upon statistics that it had, that if it was to cover the disability of maternity and complications due to maternity, that that would be the greatest number of claims, it would be the greatest drain on the plan and therefore, it felt that it would either have to revise its plan, it would have to contribute more, require the employees to contribute more and therefore, it did not desire to do such and that is exactly what this Court discussed in Aiello; that is exactly the same thing that the State of California was desirous of maintaining the integrity and sanctity of its plan and the state felt in its wisdom that it covered the disability and in Aiello it was normal pregnancy, it could distort the plan and said that that was perfectly legitimate.

QUESTION: Mr. Grove, sometime during your argument, would you comment on why you think the District Court's order was appealable to the Third Circuit? As I read the complaint, the Plaintiffs sought injunctive relief. They sought damages. The District Court gave them neither but nonetheless said it was entering a final judgment and the Third Circuit said, "We have jurisdiction under 1291."

Now, certainly in a personal injury action, if the Plaintiff sues and gets a judgment on liability and the District Court says, "This is a final judgment," the

defendant can't appeal that without certification and it strikes me that this is somewhat the same.

MR. GROVE: Well, I think what the district court did in this instance, your Honor, is that it split the issue of liability and remedy and determined liability and then said that there is no reason to delay an appeal in this situation under the rules, which he had the right to do and then submitted it to the Third Circuit, which took it under that situation.

QUESTION: Well, what authority do you have for the proposition that a judgment on liability only separated from remedy is, indeed, a final judgment?

MR. GROVE: Well, I can't give you any authority right now but in my knowledge this is a very common situation that occurs in the trial courts. Many of the cases -- in fact, Title VII is the exact situation where it is being practiced heavily, where the judges are splitting the issue of liability and damages, only hearing the matter of liability because determining damages in these cases, as you know, is extremely complicated and the courts are issuing determinations on liability, letting those go to the court of appeals and then coming back.

QUESTION: Well, but they can let them go only if Congress has permitted them to go, I take it --

MR. GROVE: Yes.

QUESTION: -- and if you can't do it in a personal injury action, why can you do it under Title VII?

MR. GROVE: I don't have a good answer for you. All I am suggesting is that it happened. The judge indicated that there was no reason to delay an appeal in this situation and it happened.

I do not think, again, to repeat myself, I do not think that there is any reason why this Court needs to tamper with its prior ruling in Geduldig versus Aiello and I do not think that there is any reason why this Court needs to say that there is a different standard to Title VII cases than there are for the 14th Amendment.

QUESTION: Mr. Grove, you make reference to the prior position of the EEOC as having changed and I couldn't find it in your brief, maybe it is. Did the prior opinions of the EEOC indicate that they were based on the ground that there was no discrimination in the first instance, no sex discrimination or, alternatively, were they based more or less on the ground that it might have been discrimination but it was justified?

MR. GROVE: The second, the way I read the guidelines.

QUESTION: Of course, your argument in this case realized just on the first proposition.

MR. GROVE: That is right, that there is an

absence in this record that shows that Liberty Mutual excluded the disability that we are talking about as a pretext to engage in invidious discrimination.

QUESTION: So, really, the prior EEOC history is quite irrelevant to the issue you present to us.

MR. GROVE: Well, I suggest it is, except for the fact that all employers during the first seven years of Title VII relied upon that and then all of a sudden, lawsuits like this came along where the Commission then switched their position and came along with the Plaintiffs, as in this case, to try to substantiate their guidelines.

I would like to reserve the balance of my time for rebuttal.

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

Mr. Specter.

ORAL ARGUMENT OF HOWARD A. SPECTER, ESQ.

ON BEHALF OF RESPONDENTS

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

My name is Howard Specter. I have the privilege of representing the Respondents, Mrs. Wetzel and Mrs. Ross in the matter now before the Court.

It was not my intention to track in any way the arguments made by or on behalf of the Petitioner but it may be that I can answer to some extent at least one of the

questions posed by the Court.

Mr. Justice Stewart asked a question concerning the age of the plan here in question and whether any explanations for the evolution of the plan and the exclusions was ever given below.

Contained in the joint Appendix are a series of exhibits. They begin at page 90. They were exhibits to the Plaintiffs' brief for summary judgment below and they were made part of the record by affidavit. The affidavit which describes them begins at page 86 and reveals that the exclusion with which we are concerned was in existence at least as early as March, 1964.

The subsequent exhibits deal with later changes in the plan but to the extent that there were changes, those changes generally didn't relate to changes in coverage but rather to --

QUESTION: Waiting periods and things like that?

MR. SPECTER: Changes in premiums, primarily and things like that.

Now, in addition, to the extent that Mr. Grove talks about the fact that there are other exclusions in the plan and has described those exclusions, it is imperative to note that many of the exclusions to which he made reference are nowhere in the record below.

The plan which he has described is the plan which

is annexed as an appendix to the Petitioner's brief. It is a plan which was never made part of the record in the district court or the court of appeals and which as far as anyone in this case knows, was never in existence until the day that I saw their brief for the first time.

With respect to the contention that the plan also excludes coverage for complications due to pregnancy, some clarification is in order.

The court of appeals did indeed state that the plan excluded complications and of course, that wasn't the case in Aiello, where only normal pregnancy was involved.

I think it is a bit unfair for the court of appeals, however, to state -- as did the Petitioner in its brief -- that it misconstrued the plan by assuming that there was no coverage for complications. There is on file with this Court a transcript of the argument which was held before the court of appeals in October of 1973 or '74, I have forgotten which at this point, where there was a colloquy between various members of the court and Mr. Grove, who argued for the Petitioner and after repeated questions in which Mr. Grove acknowledged that complications were not covered and where they discussed specific complications such as hypertension, blood poisoning, and others, the Court asked, "But it is clearly understood --" and this is at page 6 of the transcript, "But it is clearly understood that

if we have a normal pregnancy or a pregnancy with complications, neither are covered?"

And the response was, "That is correct. Under my client's policy that is in issue here today."

QUESTION: Now, that, you say, was colloquy in the Court of Appeals?

MR. SPECTER: Yes, sir.

Now, in enacting Title VII as part of the Civil Rights Act of 1964, Congress had several objectives and of course there was the objective of guaranteeing equal employment opportunity without regard to sex; to guaranteeing also, in the employment context, the preservation of the individual employee's dignity as a person, as an employee, without regard to sex, among other criteria and the objective of maximizing the utilization of the human resources of this country by not discriminating on the basis of sex or otherwise.

And I don't think it takes prolonged argument to demonstrate the extent to which this Court, in recent opinions, has recognized the evolution of women's role in American commerce since Mr. Justice Bradley wrote in Bradwell versus Illinois that "in the divine nature of things, women are unfit to engage in the ordinary occupations of civil life."

This Court has long since recognized that those days are over.

Notwithstanding the Petitioner's longstanding practice of segregating job classifications by sex, as the trial and appellate courts found that it did in this case, I expect that very few people would suggest today that men and women are not similarly situated in the employment context and that women are not able to hold virtually every job that men are, with the possible exception of the narrow, bona fide occupational qualification test which is specifically set forth in the statute and which was not raised here.

Now, even though they are similarly situated in the employment context, of course it is fundamental that men and women are, in many ways, different -- as, indeed, they must be.

And perhaps the most fundamental difference lies in the fact that only women can become pregnant and when they do, to one extent or another, and for one period of time or another, they become disabled and men don't get pregnant and to that extent they are different.

But so long as employers, like the Petitioner in this case, are permitted to fire employees -- women employees simply because they are pregnant without regard to disability and so long as they are permitted to impose mandatory unpaid leaves of absence without regard to ability to work, just because they are pregnant, and so long as practices like the one involved here, where comprehensive

income protection benefits are provided for virtually every disability to which a man can be subjected and none for the one disability unique to the woman, then those guarantees that Title VII was intended to protect, of equal employment opportunity and human dignity are, in fact, unachievable today.

I think Mr. Grove accurately stated the question as, did Congress intend to go that far?

I think it should be pointed out that there are any number of aids to statutory construction in dealing with the precise issues here today.

It would require a remarkable lack of candor on my part, however, if I were to argue that the specific legislative history dealing with the addition of the word "sex" to Title VII was very enlightening in and of itself. It is clearly not.

But it must be remembered that one year before the enactment of Title VII, the same Congress, the 88th Congress, enacted the Equal Pay Act and there is copious legislative history concerning the Equal Pay Act and copious legislative history involving the practice which is in question here because the opponents of the Act went to Congress, as they are now coming to this Court, and took the position that because it costs a certain amount of money to employ women because they become pregnant and disabled

and disability benefits sometimes have to be provided and, in fact, they were provided to most women, that employers should be permitted to pay women less. They should be permitted to take into account the fact of pregnancy and the cost of pregnancy-related disabilities in order to pay them less.

The legislative history -- and, in fact, a bill and an amendment were introduced which would have provided just that and they were rejected.

There is an extensive treatment of that legislative history and I won't dwell on it but it can be found in the brief of the Respondents in the next case to be argued at pages 121 to 128.

Now, certain things happened after the enactment of Title VII in Congress, too. We became involved with the Equal Rights Amendment upon which many of the Petitioners amici and this Petitioner rely. They rely upon the legislative history of that Act and they assert that the legislative history of Equal Rights Amendment supports the contention that the practice involved here should survive a Title VII attack.

I would only point out that there was a Law Review article perpared by a number of scholars entitled, "A Constitutional Basis for Equal Rights for Women." It was published at 80 Yale Law Journal 871 and it was submitted to

every member of Congress in connection with the consideration of Equal Rights Amendment and it was deemed by Congress to be primary legislative history in connection with that amendment and the authorsof that article, in response to General Electric's brief, have submitted an amicus curiae brief to this Court in the General Electric case in which they track the legislative history of the Equal Rights Amendment and point out the way in which it has been portrayed to the Court and reached the conclusion that the challenged practice here today would not survive.

It is also important to note that the Equal Employment Opportunity Commission, whose guidelines were sustained or upheld by the Court below didn't adopt a new position overnight in 1972. As pointed out in our brief and the brief of the various amici in support of our position, as early as 1970, before Congress had an opportunity to amend the Act in 1972, the EEOC had developed -- not the guidelines but the principle, the premise which has evolved into the guidelines and had published various decisions which made it clear that from the EEOC's point of view, disparate treatment based upon the fact of pregnancy was condemned by the Act.

QUESTION: Mr. Specter.

MR. SPECTER: Yes, your Honor.

QUESTION: Where, in your view, in the many

briefs filed with us is the evolution of the Commission's attitude most clearly and pictorially and thoroughly and intelligibly set out?

MR. SPECTER: Again, I think credit is to be given to the counsel for the Respondents in Gilbert, at pages 106 through 119, there --

QUESTION: 106 to 119 --

MR. SPECTER: Yes.

QUESTION: In the Gilbert case --

MR. SPECTER: Yes.

QUESTION: -- Respondent's brief.

MR. SPECTER: Yes, that is the fat yellow one, your Honor.

Now, even after that -- and perhaps most significantly because the Petitioner has not responded to it, the Educational Amendments Act of 1972 and 1974 were enacted and provided for prohibitions against sex discrimination in federally-funded educational projects and delegated to the Secretary of Health, Education and Welfare the authority to promulgate regulations to carry out those amendments and Congress provided that, unlike the EEOC's guidelines, HEW would have to publish regulations in advance of an effective date and submit them to Congress and that if Congress didn't reject them or alter them within 45 days, they would be self-executing.

They were published. They were transmitted and they became effective and they are virtually identical to the guidelines involved here today and they certainly would indicate the current view of Congress and I think under the philosophy enunciated by Mr. Justice Cardozo in Burnett versus Guggenheim demonstrate what it is that Congress would have done back in 1964 were it considering the issue and I think that is the choice which has to be made.

I'd like to endeavor, Mr. Justice Rehnquist, to respond to your question.

QUESTION: Sorry to have interrupted you, Mr. Specter, but do I understand by what you just told us that the question is here whether, if asked today whether Congress might -- a majority of Congress might be persuaded to enact legislation that would say that no employer in interstate commerce could have a group insurance policy that excluded pregnancy as among the disabilities covered? Is that the question?

MR. SPECTER: No, I am sorry. It is apparent that I didn't articulate well.

QUESTION: Well, perhaps I --

MR. SPECTER: Or as clearly as I should have, Mr. Justice Stewart.

QUESTION: My error, I suppose.

MR. SPECTER: No.

QUESTION: But I just wanted to be sure what you would tell us on the question.

MR. SPECTER: It is my understanding that in the area of statutory construction it is appropriate to look, I don't think there is any question, to statutes and legislative history which were enacted or were involved prior to and subsequent to the particular statute involved to determine some continuing philosophy which would indicate what it was that Congress had in mind back when it enacted the particular statute and what we have here, I believe, is a steady pattern which is reflective of an intention in 1964 to prohibit disparate treatment based on pregnancy as a characteristic unique to females.

I think the question is, what would they do if presented with the question today?

I hope that answers your Honor's question.

Mr. Justice Rehnquist, you raised the question of appealability and I am not sure that I can answer it adequately but I hope that I can.

We considered that question when the appeal was taken to the Court of Appeals and of course, what we did is no authority, but I assure you we would have gone kicking and screaming to the Court of Appeals just as we opposed coming here after winning the case, but in my view, a declaratory judgment was entered which could be considered to

be final as --

QUESTION: Is that true -- I can certainly see your point. There is a declaration of rights as to the parties but what about a personal injury case where you have a split trial as to liability and damages? Couldn't you say the court's determination in the first phase of the trial on the issue of liability is likewise a declaratory judgment and would that then be appealable?

Because that would change a lot of law.

MR. SPECTER: Well, the most candid answer I can give the Court is, I don't believe that would be appealable and I believe it is different. We have a situation here where we are dealing with a uniform practice applied to a class of persons which, under this Court's decision in Sosna versus Iowa has a kind of jural existence of its own but I am not sure that totally answers the question.

QUESTION: Well, I am not sure it answers it at all.

[Laughter.]

MR. SPECTER: As I said, I would do the best that I can. You raised an issue that I don't think anyone fully anticipated.

QUESTION: But he did direct that a judgment be entered.

MR. SPECTER: He certainly did.

QUESTION: And he did enter the judgment.

MR. SPECTER: He certainly did, Mr. Justice, and I would analogize it, if it is appropriate to do so, to what happened in Gilbert, the next case to be argued, where an injunction was issued.

QUESTION: Well, do you think it is arguable that all that the judge did when he said, "I enter the judgment and there really isn't any reason for delay." Do you think that is equivalent to certifying a controlling question of law in fact to --

MR. SPECTER: Yes, your Honor, I think it is that and something else.

QUESTION: That is another argument, isn't it?

MR. SPECTER: Yes. Well, he was asked to certify it and he was asked by the Petitioner to certify it under 1292B and the Court -- and I believe this is in the record because there was colloquy on the record. I believe the Court concluded that rather than have to await the discretion of the Court of Appeals, 54B would be a more appropriate and expeditious way of resolving a very important question.

QUESTION: So he didn't certify it.

MR. SPECTER: Not under 1292B.

QUESTION: He thought he was doing something

even more effective.

MR. SPECTER: Yes, and I hope he was right.

That is why we are here.

[Laughter.]

QUESTION: Although it was said in the Aiello case, do you intend to give us more than one sentence, as the Court of Appeals did on it?

MR. SPECTER: Yes, I do. Yes, I do. I would like to make just one more comment, if I may --

QUESTION: Go on.

MR. SPECTER: -- concerning the capability because I believe it is analogous to the Gilbert situation where an injunction was entered and then stayed. In this case, the trial judge, Judge Webber, said that this was an appropriate case for injunctive relief, but he would withhold the entry of the injunction pending disposition of the appeal and I think that functionally we have the same situation and it may be a question of form over substance, although I am reluctant to make an argument like that with respect to a jurisdictional question, if, indeed, it is jurisdictional.

QUESTION: Just one little detail. He did purport to make a 54B finding, though, in the language of the rule.

MR. SPECTER: Oh, expressly yes, your Honor.

That is in the Appendix.

QUESTION: Yes. Well, don't look for it. I just wanted to --

MR. SPECTER: There is no question about that one.

QUESTION: If he had made a 54B finding at the close of the liability phase of a personal injury case, do you think that would have solved the problem in a case like that?

MR. SPECTER: I hate to say no. I am not sure. But I expect that the answer is no, Mr. Justice Rehnquist.

QUESTION: The problem under Rule 54B is whether it is a multiple-claim case or not, isn't it?

MR. SPECTER: That is certainly the situation here, where there were three separate claims brought on behalf of the class.

QUESTION: Which, if any, of those three is finally adjudicated now?

MR. SPECTER: Well, hopefully, this one. The two --

QUESTION: Well, but is the damage issue resolved?

MR. SPECTER: The damage issue has not been resolved.

QUESTION: So this claim is not finally

adjudicated.

MR. SPECTER: The damage issue is before the trial court in one of the other claims, the claim of discrimination in hiring and in promotion, your Honor.

QUESTION: Let me just repeat, because I have the same problem Mr. Justice Rehnquist does. Which claim, if any, do you contend has been finally adjudicated?

MR. SPECTER: The claim that the pregnancy-related practices are violative of Title VII and the claim which is not before this Court that the Petitioner discriminated against women as a class in hiring and promotion, even though the issue of back pay has not been resolved.

QUESTION: And the unresolved issue was the remedy?

MR. SPECTER: Yes, your Honor. In those two claims.

QUESTION: And the entitlement to an injunction or entitlement to --

MR. SPECTER: Back pay.

QUESTION: Back pay.

MR. SPECTER: Yes.

QUESTION: You got no part of your prayer for relief. You asked for an injunction. You didn't get it. You asked for damages and you didn't get it.

MR. SPECTER: That is absolutely correct, Mr. Justice Rehnquist.

We also asked for a declaratory judgment, however.

QUESTION: Didn't you pray for such other relief --

MR. SPECTER: Yes.

QUESTION: -- as might be just and proper?

MR. SPECTER: Yes, we did. And that is at page 19 of the Appendix.

The very troublesome Aiello case --

A number of things can be said about Aiello which distinguish it from this case, aside from the obvious fact that it was a 14th Amendment case dealing with a state's social welfare policy and not a Title VII case involving a relationship between an employer and an employee under a statute.

One is, that unlike the situation here, California saw fit to come into court and explain why the plan contained the exclusions that it did and, in fact, when an effort was made to ascertain why the Petitioner in this case excluded the benefits that we are talking about today, the only explanation ever proffered was, on advice of counsel, and as a matter of statutory construction, "It is not required."

There was never any justification given in terms of, "Well, it was done because it will cost us this much," or

"It was done because we are concerned about the welfare of certain of our employees," or "It was done because we don't have enough money to do it," or for any other explanation.

The position was that this case, on the facts, on the language of the plan, was ripe for summary judgment and no explanation for the reason behind the plan was required.

Now, I think you get into the question of burden of proof to some extent when you reach that point because in the previous opinions of this Court, in Title VII situations, relatively light burdens have been imposed upon employees for making out prima facie tests and the test has been declared, in other cases, to be one of basic fairness and it has been stated that, of course, the standard varies from case to case.

But I would point out only that in this situation, no one but the employer knows why it did what it did and why it excluded whatever it excluded and once it was demonstrated under the standards enunciated by this Court that only women were affected by this program, the burden, in fairness, then shifted to the employer to come forward with whatever simple or complex explanation it might have had for the plan.

And with respect to any other defenses which have been suggested in the brief or today at oral argument, I would only comment very briefly that there were absolutely

no defenses suggested, raised, briefed or argued below and it is fundamental that this is neither the time nor the place to assert them.

QUESTION: But until -- one does not get to defenses until or unless there is a finding of discrimination based upon sex. Isn't that correct?

MR. SPECTER: Of course, your Honor, and it was the petition of the Petitioner below that there was none as a matter of statutory construction.

QUESTION: Right.

MR. SPECTER: And under all of the tests enunciated by this Court, the question is basically one of impact and where does the impact fall? And if it falls on a protected class such as --

QUESTION: Under all of the decisions of this Court, including Aiello?

MR. SPECTER: Title VII cases, your Honor. Title VII cases.

I am not sure, quite sincerely, what the burden of proof was in Aiello, even assuming -- well, not assuming, it is apparent that Aiello required a showing of pretext, at least within the context of that case and I am not sure where the burden of proof would fall to demonstrate the presence or lack of a pretext in the first instance.

The burdens generally imposed by this Court in

the Title VII cases have been light ones and in many of those cases where the burdens of proof were enunciated, ultimately the employees did not prevail, but I think there has been a clear recognition that, in fairness, once an impact is shown, the party who is in possession of the knowledge concerning the practice ought to come forward and explain it and perhaps cooincident with that, the test enunciated by Mr. Justice Stevens in his dissenting opinion in Sprogis is an appropriate one because I think it dovetails with the impact test enunciated by this Court in Title VII cases and --

QUESTION: May we have the citation?

MR. SPECTER: Yes, it is at 444 Fed. 2nd, your Honor.

QUESTION: 444?

MR. SPECTER: 444, Fed. 2nd and I think it's 1194.

QUESTION: Thank you.

QUESTION: Mr. Specter, where is the plan? Is it in the big one or the joint Appendix?

MR. SPECTER: It is in the joint Appendix and it is supplemented -- it begins at page -- that preliminary description begins at 86, the affidavit and then the --

QUESTION: I am not interested in the description. I want to know where the plan is.

MR. SPECTER: The plan is --

QUESTION: Verbatim plan, what we are talking about.

MR. SPECTER: -- is set forth -- it begins at page 88, your Honor and on page 89 is the statement, pregnancy policy: "No income protection benefits are payable for absences due to pregnancy."

QUESTION: What is this, a regulation or something?

MR. SPECTER: It is an inter --

QUESTION: It is not the policy, is it?

MR. SPECTER: No, it is not an insurance policy. To some extent it is funded by insurance. Some of the benefits --

QUESTION: I am still trying to find out what we have been talking about for the last hour.

MR. SPECTER: I apologize. Some of the benefits are paid by -- through insurance. Therefore the --

QUESTION: Where is the language that you say is bad?

MR. SPECTER: Well --

QUESTION: The whole thing?

MR. SPECTER: Taking the most recent plan, the one which we know was in effect in June of 1970, if we look at page 99 of the joint appendix, there is the statement,

"Limitations on insurance benefits: Benefits are not payable for disability due to pregnancy or any cause related to pregnancy," and that is what we say is wrong, Mr. Justice Marshall, because the impact falls solely upon women.

QUESTION: And that is the one that is now in existence.

MR. SPECTER: That is the one which the record demonstrates was in existence at the time of the adjudication and as far as I know, it is the only plan. That exclusion is also included in the plan which was annexed as an appendix to the Petitioner's brief but it is no part of the record and I can't fairly address myself to its existence or when it came into being.

I believe that my time is up and unless your Honor has another question, thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Grove.

REBUTTAL ARGUMENT OF KALVIN M. GROVE, ESQ.

QUESTION: Mr. Grove, do you agree that on 99 is what we are talking about?

MR. GROVE: Your Honor, what is on page 99 appears to be only a portion of the plan, the limitations. What is in the record or in our brief before you includes other exclusions that do not appear at page 99 of the record.

QUESTION: Other pregnancy ones?

MR. GROVE: No, the other disabilities that they

talk about.

QUESTION: Is this the pregnancy one we are talking about? This one on 99?

MR. GROVE: As far as it goes, it is accurate, the one that you are referring to on page 99.

QUESTION: But you say the policy actually had other exclusions in addition to those set out here?

MR. GROVE: Well, the one right before you --

QUESTION: Well, it does, I know.

MR. GROVE: Yes.

QUESTION: But you say the one in effect --

MR. GROVE: Yes.

QUESTION: -- had even more, other exclusions than this?

MR. GROVE: That is right.

QUESTION: Well, where is it in the record?

MR. GROVE: Well, I am not sure that it is in the record. Bear in mind the material that is presented here, I find it somewhat of a shock that Mr. Specter now says that he has never seen the plan because the discovery in this case has been extensive but the plan that is attached to our brief is the actual plan and it does have exclusions over and above that which appears on page 99.

QUESTION: Is it in the transcript?

MR. GROVE: My recollection is that it is, but --

QUESTION: Is it on trial here?

MR. GROVE: It should be.

QUESTION: I can't help on "should be." Don't you know?

MR. GROVE: Well, I -- yes, it is.

I would like to draw the Court's attention to the comments concerning the Equal Pay Act that Mr. Specter made and the Wage and Hour Administrator has said, "If employer contributions to a plan providing insurance for similar benefits to employees are equal for both men and women, no wage differential prohibited by the Equal Pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other."

So, according to the Administrator of the Equal Pay Act, Liberty Mutual's policy making equal contributions is in total and full compliance with the Equal Pay Act.

I think that also, when Mr. Specter indicates that we gave no reason why we have excluded these disabilities, I think the Court, and it said it in Aiello, is that it is evident that a program or a totally comprehensive program is going to cost substantially more than one without these disabilities and I think that cost situation can be assumed.

I submit, though, and I believe that Mr. Justice Stewart asked the question, the burden always remains on the

plaintiff to show that the reason for the exclusion is a pretext and they have not done that in this case. There is nothing in the record to indicate that the reason for the exclusion was a pretext.

QUESTION: They argue you don't get to the pretext question until you have raised an affirmative defense. If, on its face, the plan is discriminatory, why do we have to talk about pretext?

MR. GROVE: Well, Aiello says to us that exclusion of this disability is not discrimination per se until it is shown that the reason for the exclusion is a pretext to engage in invidious discrimination.

QUESTION: Well, by like reasoning, is there any reason to talk about costs in this case? Could you, for example, would it be relevant if there were a difference in pay between males and females to say, well, it would cost more to increase the female's salary level? Would that be relevant?

MR. GROVE: Well, I don't think you get to the question of cost unless the Plaintiff has sustained its initial burden.

QUESTION: So isn't this whole case turned on whether or not this is a prima facie case, a discrimination within the meaning of the statute?

MR. GROVE: And Aiello says it is not.

If I were -- I would like to --

QUESTION: Do you agree with your opponent's analysis of my dissent in Sprogis? Have you read that case?

MR. GROVE: Yes, your Honor. Well, I agree with your dissent.

[Laughter.]

QUESTION: You agree?

MR. GROVE: Obviously.

QUESTION: Do you agree -- that is not the question -- do you agree that if one applies the test that I applied there to this case, he has made out a prima facie case?

MR. GROVE: Absolutely not.

QUESTION: Why not?

MR. GROVE: I agree that the test that you applied -- if your test, your dissent in Sprogis was applied, you wouldn't because you don't have discrimination between substantially similarly-situated people.

QUESTION: But would not these Plaintiffs not face a particular risk if they were male?

MR. GROVE: "Would not these Plaintiffs --"?

QUESTION: Would they not avoid the risk of being hospitalized for a short period of time with no income if they were males?

MR. GROVE: I have some difficulty in

understanding just exactly what you are saying, even though you are saying it very plainly.

QUESTION: Well, then, I won't try to rephrase it.

MR. GROVE: What is important, though, is the plan. Mr.Specter argues about the impact. But this plan, if you look at it, has impact in disproportionate statistics against others. Statistically, I presume that one might be able to show that males attempt suicide in a greater rate than women. So, because we exclude that, I suppose we are discriminating against males.

One might legitimately argue, I suppose, that statistically men have alcoholic problems greater than women. I don't know if you can prove that, but just assume. So we don't cover that unless there is a licensed physician so we are probably discriminating against men in that situation.

I think the whole thing goes to say, really, in summary, that an employer such as Liberty Mutual or anybody else can exclude in his wisdom anything under its disability program as long as it cannot be proven that that is a pretext to engage in invidious discrimination and that is the thing that is missing in this case and I would just like to say, to indicate to the Court that I think Judge Widdener in the Fourth Circuit in his dissent in the G. E. case which, of course, is again the next case, really said it and I might

end, and I will sit down on that -- he said, "The inquiry in this case must therefore focus initially on whether exclusion of pregnancy-related disability on the disability benefits plan is sex discrimination. If it is not sex discrimination, then regardless of what test is applied, there is no Title VII violation."

Absent a showing of sex discrimination, Title VII, even if its reach were broader than the Equal Protection Clause, would not render unlawful a pregnancy exclusion such as that involved here.

Thank you.

QUESTION: Suppose the statement said that women should not be eligible for payments as a result of illness from alcohol? Would that be all right?

MR. GROVE: Women should not be eligible for payments due to alcohol. I think that in that type of situation, the burden would be on the employer to explain, does it have a rational basis for excluding that?

QUESTION: That is because they used the word "woman."

MR. GROVE: That is right.

QUESTION: Well, they used the word "pregnant" here. Is there any difference?

MR. GROVE: Well, I don't mean just the use of the word.

QUESTION: Is there any difference? Is there any difference?

MR. GROVE: Not if you are just using word semantics, not if you are just putting women and pregnancy --

QUESTION: Semantics? It is fact.

When you say pregnancy, you say women.

MR. GROVE: Absolutely.

QUESTION: All right.

MR. GROVE: I don't disagree with you on that at all. At least, right now, standing here I don't. It has never been shown otherwise.

QUESTION: You don't have any evidence to the contrary.

MR. GROVE: None.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:35 o'clock p.m., the case was submitted.]