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In the

Supreme Court of the United States

General Electric Company, Petitioner, v. Martha V. Gilbert, et al., Respondents.	)	No. 74-1589
and	)	
Martha V. Gilbert, et al., Petitioners v. General Electric Company, Respondent.	)	No 74-1590

Washington, D. C.
January 19, 1976

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

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GENERAL ELECTRIC COMPANY, :

Petitioner, :

v. : No. 74-1589

MARTHA V. GILBERT, et al., :

Respondents. :

- - - and - - - - - - - - - - - - - - - :

MARTHA V. GILBERT, et al., :

Petitioners, :

v. : No. 74-1590

GENERAL ELECTRIC COMPANY, :

Respondent. :

- :

Washington, D. C.,

Monday, January 19, 1976.

The above-entitled matters came on for argument at 2:36 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 P. STEVENS, Associate Justice

APPEARANCES:

THEOPHIL C. KAMMHOLZ, ESQ., Vedder, Price, Kaufman, Kammholz & Day, 1750 Pennsylvania Avenue, N.W., Washington, D. C. 20006; on behalf of General Electric Company.

MISS RUTH WEYAND, 1126 Sixteenth Street, N. W., Washington, D. C. 20036; on behalf of Martha V. Gilbert, et al.

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1589 and No. 74-1590, regarding General Electric Company and Gilbert.

Mr. Kammholz, you may proceed whenever you're ready.

ORAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

ON BEHALF OF GENERAL ELECTRIC COMPANY

MR. KAMMHOLZ: Mr. Chief Justice, members of the Court:

I do not wish to appear here with an undue lack of modesty, but I should like to note that, in our view, the articulation of EEOC guideline history is set forth fully and, hopefully, effectively in the General Electric brief in this case, in Appellant's brief at pages 12 to 15 and 42 to 48.

Perhaps I should note at this point also that we do not agree with counsel for Liberty, in his assertion that in the initial views of the Commission pregnancy exclusions were considered as discriminatory, but, nonetheless, permitted. Indeed, the history of the EEOC guidelines and opinions demonstrates precisely the contrary.

Thus, in 1966, the General Counsel of EEOC, Charles Duncan, who testified at the trial in the district court, issued an opinion letter, and he said this -- at page 43 of our brief: "An insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion

would not in our view be discriminatory."

His testimony also noted that in 1966 the EEOC had carefully considered all of the aspects of exclusion, had considered what little legislative history there was, and had come to the conclusion that in the light of the legislative history underlying Title VII, and consciously and deliberately viewing that history, the Commission was of the view that maternity benefits were, in effect, sui generis and could properly be excluded.

Now, the relevance of this history --

QUESTION: You said maternity benefits. Do you equate maternity benefits with pregnancy disability?

MR. KAMMHOLZ: What I'm dealing with here is a broad context of disability, yes. Including -- including maternity disability payments, which are at issue in this case, and I --

QUESTION: You think maternity benefits and pregnancy disability payments under a disability insurance policy are synonymous, do you?

MR. KAMMHOLZ: For the purposes of this --

QUESTION: For the purposes of this?

MR. KAMMHOLZ: Yes.

QUESTION: Okay.

MR. KAMMHOLZ: I should note that there is not involved in this case the payment of hospital surgical

coverage. This is not in dispute. We're dealing only with income maintenance on account of pregnancy and childbirth. Specifically, the General Electric plan provides for 60 percent income maintenance after the first eight days, for a maximum of $150 in earnings, and for a maximum period of 26 weeks.

Pregnancy, childbirth disabilities excluded.

The record also shows in our case that on the American industrial scene at the time of trial approximately 40 percent of the American industrial work force was covered by one form or another of insurance. Virtually all of those plans limited applicable maternity leave income maintenance to six weeks; a few exceptions.

Now, what we're dealing with here is a problem that cuts across all of these plans and if the Court should find that there may be no differentiation, then each and every one of these plans would be subject to attack on the theory that there is a different treatment for maternity benefits and illness and sickness otherwise.

The other 60 percent of the American work force is not covered by disability plans, and, as one who has been active on the scene over the many years, it is my view, and I represent to the Court that there would be a serious inhibiting impact on other employers to get involved in the first place. Because this is not a social welfare program applicable to all. We're talking about a private plan, paid

entirely, in our case, by an employer; and the question is: Must these benefits be equated?

I would like very briefly to put into focus the history of the GE plan. It was adopted in 1950. It now is financed entirely by employer contributions.

The underlying reason for the pregnancy exclusion, pregnancy disability exclusion, is shown in the record. GE concluded that for a number of reasons it would be appropriate not to cover this kind of income maintenance.

Thus, under GE's experience, 40 percent of females who leave the job because of pregnancy do not return. This contrasts with a return well up in the 90 percentile range for sickness and accident absence otherwise.

So to pay income maintenance would, in effect, be providing a form of severance pay.

Secondly, the GE experience indicated that the median absence for sickness and accident generally was two weeks; for maternity, 13 weeks.

QUESTION: Mr. Kammholz, are there other disabilities for which your experience indicates that at least 40 or more percentile do not return after they acquire the disability?

MR. KAMMHOLZ: None whatever, Mr. Justice Stevens.

QUESTION: None like heart attacks, or anything like that?

MR. KAMMHOLZ: No. No, indeed not.

The record is undisputed that, as to those who leave on a temporary disability and return, everybody comes back, for all practical purposes.

And as to the more serious kind, the return rate is still well up into the 90 percent range.

QUESTION: Has this been a subject of collective bargaining over the years?

MR. KAMMHOLZ: Yes, Your Honor. I think in rough figures, perhaps half of the GE employees covered are covered by collective bargaining agreements.

QUESTION: Unh-hunh.

MR. KAMMHOLZ: The others not, the salaried not, basically.

QUESTION: But -- and has the plan been the subject of collective bargaining negotiating, in the bargaining itself?

MR. KAMMHOLZ: Yes, it's been at the bargaining table.

QUESTION: And has the plan been amended at all over the years, as a result of --

MR. KAMMHOLZ: Not in recent years.

QUESTION: -- collective bargaining contracts?

MR. KAMMHOLZ: Not in -- not within -- not during the last bargaining.

QUESTION: Not during the last --?

MR. KAMMHOLZ: Not during the negotiations of three

years ago.

QUESTION: Unh-hunh.

MR. KAMMHOLZ: The contracts are open again this spring.

QUESTION: Unh-hunh.

QUESTION: Mr. Kammholz, could you deal with the problem of return by conditioning the availability of benefits on actual return for a specific period of time, or something like that?

I'm a little puzzled as to where your argument fits into the statutory scheme. I don't see how it shows that it's either nondiscriminatory or whether it's an affirmative defense within the -- contemplated by the statute is what I mean.

MR. KAMMHOLZ: It fits into the nonpretextual aspect.

QUESTION: But do you -- do you take the same position that counsel in the prior case did, that there's no discrimination unless it's a pretext?

MR. KAMMHOLZ: This is our position, precisely.

QUESTION: So that you would not violate the statute if you said in words, "We would rather pay the female employee somewhat less"? Does that avoid a violation of the statute?

MR. KAMMHOLZ: "somewhat less" is a counterbalance.

QUESTION: Or have lesser benefits for females --

MR. KAMMHOLZ: I would be much concerned about that, Your Honor, as bordering on the pretext. We're not taking here the view that business considerations, the bona fide occupational qualification exemption, is applicable. We're saying simply that for sound ans solid business reasons, this exclusion was written into the law. And, if I may, there are several other aspects of this.

Next, the practice of the insurance industry has been to exclude coverage for this kind of risk.

The theory of sickness and accident coverage is to protect against the unexpected, the unforeseen.

Pregnancy and childbirth can be planned. Indeed, in society today, as the New York Times noted last week, we're practically at the point of a contraceptive society where all children are planned.

The medical record shows that pregnancy is indeed a voluntary condition, that contraceptive methods are, for all practical purposes, 100 percent effective; that abortion is legal; that in the early stages, as referenced by one of the medical experts, it's an in-and-out noon-hour treatment, menstrual extraction.

The techniques, the pill, for example, according to another medical expert, is virtually failsafe; it -- according to the record, one incidence of pregnancy in 100 years

of exposure to intercourse.

Now, beyond -- beyond these considerations, GE's actual experience in terms of cost in 1970 show that the average cost for female absence, with no income maintenance included, ran $82 a year as contrasted with $42 a year for males.

The next year the cost range was from $112 for females to $62 for males.

The actuarial testimony at trial showed that the average of insurance plans in effect in this country at the time of trial result in a payment of 170 percent of premium cost attributable to females. That with a six-week pregnancy income maintenance program, this would increase by roughly one-third to 230 percent, and that for equated coverage, no matter how long the absence, the percentile cost would rise to somewhere between 300 and 330 percent of the cost of male coverage.

QUESTION: Did you -- do I understand you to say that under the existing system, with the present exemptions, --

MR. KAMMHOLZ: Yes.

QUESTION: -- pregnancy exemptions, this plan which is totally financed by the company, as I understand it, --

MR. KAMMHOLZ: Yes, Your Honor.

QUESTION: -- noncontributory --

MR. KAMMHOLZ: Noncontributory.

QUESTION: Under this plan, the company -- and it's self-insured, is it not?

MR. KAMMHOLZ: It's self-insured in the sense that there is an initial premium paid for the handling by the insurance company. It's insurance, nonetheless; but it's self-covered.

QUESTION: I see. I see.

But that under the existing plan, with the present exemptions, that women as a class get substantially more, a higher percentage of the total benefits than do men as a class of employees?

MR. KAMMHOLZ: This is precisely what I am saying.

QUESTION: And what were the percentages?

MR. KAMMHOLZ: Percentage, 170 currently.

QUESTION: 170 what?

MR. KAMMHOLZ: 170 percent of the male cost.

QUESTION: Well, 70 percent more than the male?

MR. KAMMHOLZ: 70 percent more, yes.

QUESTION: Unh-hunh.

QUESTION: Did any of your experts, Mr. Kammholz, testify about the comparative cost of life annuities for women as against men? Which are, of course, much more expensive, because they live longer.

MR. KAMMHOLZ: We -- Mr. Strauss has handed me a note here. Well, this is the information I referenced.

No, we did not get into the life insurance area.

QUESTION: But it -- I suppose we could take judicial notice of the American experience table of mortality --

MR. KAMMHOLZ: Yes, I would --

QUESTION: -- on which annuities of life insurance companies are based, which are much more expensive for women than for men.

MR. KAMMHOLZ: Yes.

QUESTION: That's one of the good things women have going for them, isn't it?

MR. KAMMHOLZ: Yes; among others, Your Honor.

[Laughter.]

MR. KAMMHOLZ: I should like to note, in passing, that a number of amici have covered the cost aspect in some depth. The experience of Cellanese Corporation, for example. American Telephone and Telegraph Company and the Bell Systems, all supporting the statistical figures that I have noticed here and referenced.

And it is interesting, also, that in Geduldig, the State of California, California's experience indicated that an exclusion -- an inclusion of income maintenance would result in a 15 percent rise in cost.

Well, may I leave the justification, the business justification for GE's policy, and touch briefly on Geduldig?

Geduldig arose in a context of the Fourteenth

Amendment.

And it has been suggested, indeed argued, in brief by opposing counsel that, for some reason, Title VII should be dealt with differently than a Fourteenth Amendment question.

There is nothing in the decided cases to suggest this, if the Court please.

The Congress, as had been noted in the prior case, and as I agree, could adopt legislation which would impose the kind of coverage to which we're objecting here.

But the fact of the matter is, we respectfully urge that the Congress did not. The legislative history is very brief, indeed, on the inclusion of sex, and I don't want to burden the Court with it, but you may recall that Representative Howard Smith of Virginia was the original author of the s-e-x inclusion. And every one of the Members of the Congress who voted for that inclusion ultimately voted against Title VII.

QUESTION: As of the -- of the male members of Congress?

MR. KAMMHOLZ: Yes, Your Honor, of the male members. Yes.

[Laughter.]

QUESTION: Mr. Kammholz, while you're interrupted, let me just get a thought that's been troubling me off my mind.

The burden of your argument on cost is that to

eliminate what your opponents contend is a discriminatory feature of your plan would impose a cost on your client of maybe 15 or 20 percent, whatever it is, to make everything equal in their terms.

Isn't it fair to assume that eliminating the wage differential that the statute required -- I think we must assume there was a wage differential before the statute was passed, imposed a comparable cost on the company?

On industry generally. And how is this really different in over-all policy terms?

MR. KAMMHOLZ: Well, I suppose, Mr. Justice Stevens, the -- in terms of the wage approach, we're dealing with a sex stereotype. We're dealing with all women.

But we must bear in mind that when we're dealing with pregnancy-maternity, we're dealing only with some women, some of the time, in the work force.

QUESTION: Well, the cost feature is really irrelevant to the basic dispute, isn't it?

MR. KAMMHOLZ: It's irrelevant if we don't get beyond the "no discrimination because of gender" under Aiello.

We stress it here to evidence the -- well, to negate any claim of pretextual motivation, and to establish that this was done in good faith and on the basis of sound business considerations.

But, underlying all of this, our position is that

the Congress never intended this kind of a result, that it --

QUESTION: You would agree, would you not, that Congress did impose -- did intend to impose some cost on industry in order to achieve the objective of the statute?

MR. KAMMHOLZ: Yes, Your Honor.

But not this cost.

QUESTION: And that's because you say this is not a sex discrimination case?

MR. KAMMHOLZ: Precisely, because pregnancy is unique, it's sui generis, and the exclusion here does not exclude men or women from a risk so as to result in indiscrimination.

QUESTION: Mr. Kammholz, I did not read the voluminous record in full, the Appendix; does it contain any information from any source about rates of disability insurance generally as between men and women?

MR. KAMMHOLZ: I think the -- several of the amici deal with this. As far as our record is concerned, Mr. Chief Justice, the answer is no.

Now, with regard to the disparity points that you touched on, Mr. Justice Stevens, I think it should be borne in mind that the Equal Pay Act, which is referenced in the earlier discussion, permits payment of premiums which will produce different results, male versus female. It's one or the other. An employer may pay the same premium rate, and

even though this results in different benefits, it's perfectly legal and proper under EPA.

The Office of Federal Contract Compliance and the Department of Labor, in administering the provisions of Executive Order 11246, the contract with government Executive Order, for, since its inception, has permitted precisely this kind of application. Same amount of premium. That's fine, even though the benefits that result are disparate.

In 1973, and I should like to note particularly that the Solicitor referred to this in his brief, in 1973 a proposal was made for a change in the OFCC guidelines, but that has been on the back burner, so to speak, ever since that time, and there have been statements from OFCC that we should await the final adjudication of this question in the courts.

QUESTION: Mr. Kammholz, earlier you were asked whether this particular plan had been the subject of collective bargaining.

MR. KAMMHOLZ: Yes, Mr. Justice --

QUESTION: And my question is, I think you said it had been.

MR. KAMMHOLZ: Yes.

QUESTION: Did those negotiations ever result in the incorporation of any provision respecting this pregnancy disability plan in a court to bargaining agreements?

MR. KAMMHOLZ: By cross-reference, yes.

QUESTION: In what respect?

MR. KAMMHOLZ: The collective agreements provide that the provisions of the plan -- the collective bargaining agreement, by cross-reference, includes General Electric's insurance plan.

QUESTION: I see.

And I think you answered earlier that there have been provisions of that plan, as it's in that larger pamphlet, which have been changed in consequence of court bargaining?

MR. KAMMHOLZ: Have been changed, yes.

QUESTION: But has this one on pregnancy or maternity disability, has that ever been?

MR. KAMMHOLZ: This has not been changed.

QUESTION: Has it been accepted, then, by the unions in collective bargaining?

MR. KAMMHOLZ: Yes.

QUESTION: Unh-hunh. I gather -- I think you've told us, at least in recent years, perhaps always, it's been exclusively company-financed?

MR. KAMMHOLZ: Yes, Mr. Justice Brennan, at least in recent years I -- it goes back at least 14, 15 years that it's been entirely company-financed.

QUESTION: Do you make any point of the fact that it's been the subject of collective bargaining?

MR. KAMMHOLZ: Well, an adverse decision here would,

of course, obliterate whatever might happen at the collective arena. And not particularly, no.

It's -- I think in some and, in short, some do and some don't. This is true in plans across the land.

But the significance of what we're talking about here today is the impacting on not only plans in existence but those that have never come to fruitition and which, well, might not.

Thank you very much. I would like to reserve what little time I have left.

MR. CHIEF JUSTICE BURGER: Very well.

Miss Weyand, I don't think we'll ask you to fragment your argument with two minutes now. We'll let you do it all tomorrow.

MISS WEYAND: Thank you very much.

[Whereupon, at 2:58 o'clock, p.m., the argument in the above-entitled matter was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, January 20, 1976.]

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Washington, D. C.,

Tuesday, January 20, 1976.

The above-entitled matters were resumed for argument at 10:04 o'clock, a.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 P. STEVENS, Associate Justice

APPEARANCES:

[Same as heretofore noted].

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in 1589 and 90.

Miss Weyand, you may proceed whenever you're ready.

ORAL ARGUMENT OF MISS RUTH WEYAND,

ON BEHALF OF MARTHA V. GILBERT, ET AL.

MISS WEYAND: Mr. Chief Justice, and may it please the Court:

In this case, unlike the Liberty Mutual case preceding it, as attorneys for the Plaintiffs, we elected -- made a deliberate choice -- to make as full a record as we possibly could to prove as a matter of fact and as a matter of evidence that to fail to maintain the income of women who were disabled by childbirth or complication of pregnancy was, in fact, discrimination because of sex within the meaning of Title VII of the Civil Rights Act.

We went into and introduced the full history of the plan. We gave and we produced annual reports of General Electric, going back to 1928. The plan was voluntarily instituted as part of a large insurance program, including life insurance, in 1925.

We have speeches in the record of Gerald Swope, who was then president of GE, who explained that the whole life insurance program was not offered to women because they did not understand the responsibilities of life; they just got

married and had children.

We have that from his biographer, we have it from his speech at the Annals of the American Academy.

QUESTION: That's quite a while ago, isn't it?

MISS WEYAND: Yes. Yes, I'm bringing it down to date, however. We went through what they said in annual reports and speechs of Owen DeYoung and later presidents and so on, and came down to date.

The plan, as it stands, as it stood in 1950, when the union first became the bargaining agent, which was not the beginning of the plan, but was the first year in which the International Union of Electrical, Radio and Machine Workers bargained, it was the first year in which any union in the United States was accepted as a bargaining representative with regard to fringe benefits.

You may remember the Inland Steel case, as cited here; it was decided in 1948, in the Seventh Circuit, and this Court denied certiorari as to the fringe benefit issue. There were other issues, on non-Communist affidavit in the case, which were reviewed here; but the fringe benefit, that was the first year.

And the International Union at that time pointed out to GE that this exclusion of women who were disabled by childbirth and pregnancy was discriminatory as to women; that General Motors, one of the large competitors of GE, did pay for

six weeks; that many of the other companies paid. And this demand was repeated at the bargaining table down through the years. And GE refused to discuss the cost of this item with the IUE.

We have a decision in the United States Court of Appeals, Second Circuit, in 1969, which is cited in our record, where we have in the record where we asked about maternity; the company said, "That's the most costly item." The union said, "What does it cost?" GE said, "We don't bargain cost, we bargain level of benefits. We do what's right." And we have the minutes down through the years where that has been the position of GE.

In the last round of negotiations, which occurred after this suit was begun, and the record of what happened there is in the record, GE gave the union an indemnity agreement, going back through the preceding two agreements. The idea -- our position was that as a matter of law we were entitled to this and there was no need to disrupt commerce by a strike or anything to get it. And GE recognized it would be settled by the court.

There is no element of estoppel about the union acquiescing in this, it was understood at the bargaining table we were trying it out in court, we thought we had a right to it as a matter of law. The case was -- this suit was instituted in the court below prior to the guidelines.

The EEOC had, from the very beginning, taken the position -- it's in its first annual report, which is cited in our record -- that discrimination because of pregnancy was discrimination because of sex, and it issued decisions prior to the guidelines, holding that failure to pay disability benefits were -- and this case was filed on March 15th, 1972, in the Federal District Court in Virginia prior to the issuance of guidelines.

The plant itself discriminates with regard to pregnancy, not only by failing to pay any benefits for normal childbirth, any benefits for any complication of childbirth, but it also discontinues all coverage when a woman leaves the plant because of pregnancy.

One of the plaintiffs here, Emma Furch, left the plant because of a miscarriage, and went home from the hospital. She had a pulmonary embolism. Her doctor certified it had nothing to do with pregnancy. GE accepted it had nothing to do with pregnancy, but pulled out some fine language of the plan -- which I am a little bit embarrassed, I didn't have in my complaint; I didn't realize that there was fine language which cancelled the whole plan. But they do cancel the whole disability coverage.

And the examination by Judge Merhige is very clear here, and the company admits that if a male goes off on a holiday, or a vacation, and he has an automobile accident

two days later and gets disabled, he is covered; but a woman who leaves the plant because of pregnancy, she is not covered until she returns to work for anything, not even related to pregnancy.

The coverage here of the plan for males is all-inclusive. Gerald Swope, in GE's annual reports coming right down past 1966, we have '69 ones, '70, '72 ones in, explain GE's theory that it increases productivity if employees do not have to worry about any vicissitude of life, which they may not be able to meet.

Gerald Swope had been president of GE International before he became president of GE USA, and he tells in his speeches how he had been impressed by the higher productivity of the European worker, Italy, Germany and so on, because they had the full social security coverage.

But he didn't want social security coverage from the government, he distrusted politicians, he thought they'd always up the benefits.

He thought companies hsoud introduce it, and that the consumer, the dollar benefit, the marketplace would determine how much you could pay for benefits. You wouldn't run up the cost like a politician to get elected promised an increase in social security.

And so he instituted a cradle-to-grave plan that followed what they had in Europe. It covers old age, it covers

-- supplements unemployment insurance, it supplements workmen's compenation, it supplements social security, it supplements military benefits, it supplements everything that happens from cradle to grave, except when a woman has a baby.

It covers all the expenses of a male who has a baby, it covers the hospital, medical expenses of a woman, too; but the record, the number of males that have babies is one and one-third times that of the females, that the rate we find it costs to have babies today -- I find in cases I've been trying around the country, in Stromberg-Carlson, the personnel director said $850 in Rochester, combined hospital and medical.

If it cost 850, and you took the figures on the one and one-third more babies per male in the record here in 1972, you could pay the women disability for six weeks and the company would still save money on the maternity costs of the women here. You can sit down and get the figures on it. Because of the increased costs to males.

So the company has never offered any figures as to what disability will cost GE. It's offered figures, what it thinks it's going to cost all of industry, but we're not here trying that; we don't know what other industry does.

As a matter of fact, it's on actuaries, and it's in the record, GE Exhibit 13 we cite in our brief, 60 percent of the women covered by disability plans are today covered for an average of six weeks on disability; and the record here

is that -- and GE's own position is, that 99 percent of the women have only a normal childbirth. Their figures in their brief is one-tenth to two-tenths of one percent of women have complications, is the way they read the record. Which means 99 percent of the women have a normal childbirth.

In all of the evidence, the findings of the court below, that normal childbirth is disabling for not more than six weeks. In fact, GE's medical, Dr. Wilbanks testified that most women could return in two weeks. He had internes that did, that they were back doing their housework, that normal women were -- today that social economic conditions are so increased that there's been a change in the whole physical structure of women in the way they respond to childbirth, and the time with which their organs respond because of the increased medical and socio-economic conditions and so on.

So we have a very full record here on which the court below found that this was discriminatory, it was motivated by a discriminatory attitude toward women, it was discriminatory. There are 21 different findings. It was discriminatory as to voluntarism to females not to males. They pay for voluntary hair transplants, they pay for voluntary trick knees, they pay for voluntary cosmetics. They maintain disability -- they maintain income for everything that happens to the man. After I went through and asked about emphysema and alcoholism,

alcohol cures and drugs, they kept saying -- I asked them, Have you ever paid? If you paid once, is it your practice to pay? If it's not your practice to pay, why did you pay them and not here?

Every one, they paid every one. I finally got to say, Is there anything a man was ever disabled for that you didn't pay for? No.

In collective bargaining, the first round, they -- '66, the first post-Civil Rights Act bargaining session -- GE claimed that the majority of the women didn't return, and that was their statement of why, to the union, they did not think it was appropriate to include sickness and accident benefits.

They did not make any such claim in 1969, and their record here shows that the majority of women do return. In fact, even though the company, and the record here in their findings, up until May of 1973, required women to go on mandatory leave three months, in most of its plans, before expected due date, and remained out two months after -- a five-month time, which forces many women to look for other jobs -- like in Turner, they had to look for other jobs; you may recall the woman in Turner v. Employment, had gotten a clerical job.

Even with all of that, 60 percent of the women came back in '70 and '71; 40 percent didn't.

The turnover rate in the record is 40 percent failure of turnover.

I want to turn my attention now to giving you the facts, the basic facts here, to Geduldig vs. Aiello, and it's, in fact, on this case.

Title VII has much broader language. We're concerned here with a question of statutory construction. And the language in Title VII with which we are concerned is very, very broad.

I want to turn my attention just for a moment to the language under which we -- this Court must determine, which the courts below determined that the guidelines were proper. We had a decision by the EEOC in this case, which the courts below gave deference to, and which seven Courts of Appeals, fifteen district court judges, have indicated there's no unreversed decision of any court, 24 State FEP agencies, four highest courts of States, have said it constitutes sex discrimination not to pay sickness and accident benefits under similar State statutes.

The language in 703(a) is Congress made it unlawful, in (a)(1), to discriminate with respect to compensation, terms, conditions, or privileges of employment.

And in (2), to limit, segregate, or classify in any way which would deprive or tend to deprive -- tend to deprive -- or adversely affect. You hardly get broader language than

that.

The EEOC, when it came to dealing with what to do with pregnancy -- and it mentions it in its first annual report, its first annual report tells of having found that discrimination because of pregnancy is discrimination.

It says: "The prohibition against sex discrimination is especially difficult to apply with respect to female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment."

Then it says: "The Commission decided that to carry out the congressional policy of providing truly equal employment oppoertunities, including career opportunities for women, policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy."

During 1975, there were 37 million working -- women working in the United States. GE's Exhibit 13, the same exhibit, shows 60 percent of the women covered by disability benefits have coverage for six weeks, shows that 40 percent of the pregnant women in the United States were in jobs outside the home, in gainful employment, in 1968.

Studies of why women have low wage rates, why they have poorer jobs, have focused on the lack of continuity of employment.

And although this Court, in <u>Cleveland Board of</u>

Education vs. LaFleur, dealt with State action on the due process basis, that does not apply to private employers. And unless -- unless it's sex discrimination under Title VII, the employer may discharge a women the minute she gets pregnant. There's nothing to protect her.

This Court has repeatedly said that an employer can fire for any reason ro no reason, unless there's a statute. It said it in the Jones & Laughlin case. Unless --

QUESTION: Well, unless there's a statute -- unless he's contractually bound.

MISS WEYAND: That's right. That's right.

Now, I must say that unions, over the years, and our union with GE has gotten protection with GE on everything except sickness and accident. Over the years, it's in the contract, it has said what we treat as illness.

The arbitrators have regularly, when the issues come up and there's no contract provision that makes it different, have treated them the same as any other temporary disability. They have done it. We have the cases and have said it, sex discrimination not to.

But a woman, as the Court in Cheatwood said -- you just take the highlight of Title VII, if you say when a woman comes in for a job, "We think you're going to get pregnant one of these days, therefore we don't hire you."

QUESTION: Well, that's not this case.

MISS WEYAND: It's not this case. But if you look at -- if you think, honestly -- there are many, many career jobs where they say --

QUESTION: But not to that.

MISS WEYAND: There are many career jobs where you don't hire them because you -- you ask them, as they do in Wetzel; in Wetzel they ask the women: "Do you expect to have babies? Are you using birth control?"

The first charge filed in Wetzel raised the issue at the outset: "What are your plans for a family?"

Now, this is what women meet when they go get a job.

Now, is that employer -- if he finds out they plan to have babies -- discriminating against them because they're women or because they're going to be out of the work force for a period of time?

This issue is one that comes right down -- in each case, when you come to it.

Now, if you can -- if it's not sex discrimination, -- let's take the woman who is pregnant in the plant. The employer says, "We don't think we ought to have pregnant women in the plant. We don't like the way they look. We think other workers are worried about them."

Now, if -- he can sent them home unless this Act protects them, unless that's sex discrimination under this

statute, or tends to deprive them of jobs, as I think it tends to deprive them of opportunities.

No question at all the administrative agencies, all the courts -- as a matter of fact, the subject of discrimination because of pregnancy has listed thousands of charges, and the first year of the EEOC, where you had the contention yesterday that it was sort of a fluke that got in, actually, there was no record vote in either the House or the Senate -- there's no record that the people who voted against the Act voted for the amendment. There's no roll call vote in either the House or Senate.

But the first year of EEOS, its annual report shows there were 3,000 charges of discrimination because of black, and 2,000 charges because of sex.

And the bulk of these charges revolve around pregnancy. And the annual reports to Congress have regularly reported if a woman -- she loses her seniority. Now, if it's not discrimination because of pregnancy, because of sex, -- they can take seniority away. There's no way to say they take it away because she's pregnant. That's been the practice in many plants.

They send them home, which means they have to go get other jobs. And the studies that in getting a job, your seniority is all important, and your continuous work history. Employers in this country place nothing as much on, as someone

coming in for a recommendation: Have you had a continuous work history?

The woman, the reason she hasn't had a continuous work history in this country, in many, many instances, is because there was no protection against her losing her job -- she had no right to come back, because the employer said, "Well, you were pregnant, and we don't have to -- we can discharge you when you're pregnant." Can deprive you of seniority.

Unless it's sex discrimination within this statute, there does not exist that protection. And that has been the basis problem of women. Women get 60 percent of the wages of men in this country today. GE, when it comes to the cost, you look at these benefits we have in our brief, the average number of days a man was off because of a disability in '70 was 48 days; women 51.

And for his 48 days, he got a third again as much as the women got. He got around $600 and she got around $400; the exact figures are in here.

Because his wage rate is so much higher. We have in the record that 43 percent of the women working for GE got less than the janitor.

These rates --

QUESTION: Miss Weyand, does that 51-day figure -- is that including pregnancy disability or --

MISS WEYAND: No, these are the disability claims that were --

QUESTION: So that if you included the pregnancy disability, what would the comparative figures be? Does the record show?

MISS WEYAND: Well, the -- you don't know whether they would be the same women or not. You average the number of women.

If the findings of the court below are correct, and in all the evidence the average time they're going to be off is six weeks, that's 42 days.

QUESTION: So, then, would you add the 42 to the 51?

MISS WEYAND: Well, it would not be the same ones; if you're adding to the number off. Now, you just don't know to what extent women who had 42 days might also have another day. You wouldn't -- you don't know, in terms of frequency or so on.

Now, the figures -- I remember I looked up the figures. Mr. Justice Rehnquist, during the oral arguments in Cleveland vs. LaFleur, asked: Why did days of respiratory loss compare with other losses?

And the figures which were -- are in the record here, and which were secured for the purpose of studying by the agencies, the EEOC, the Women's Commission -- there were 1.2 days lost in 1968 because of respiratory conditions, while

the Public Health Service -- eight-tenths of a day, taking all the women in the labor force, lost time because of pregnancy.

So when these agencies, EEOC and so on, began considering how you deal with this serious problem of women being disrupted, their whole continuity of employment, their seniority being disrupted, by pregnancy, they look to see -- when men's lives are disrupted by disabilities, is it the same amount of time? How comparable is it?

And they found, in terms of what happens to men in terms of the amount of time, that it was an entirely comparable thing. They accepted -- the consequences didn't happen to men. The men have four times as many heart attacks. The recent studies which deal with the difference of life expectancy, with the difference of disability, show that men -- the disparity between men and women in length of life has been increasing, because they -- there have been books written on why are women living longer than men.

And, of course, here the same program covers life insurance.

Now, to get back to -- this Court there was dealing with a social welfare program, it was dealing with the power of a sovereign State to determine what kind of a fund it wanted to set up and run to take care of problems in its State. And it held there that it could make a judgment, that it could

cover certain disabilities and not cover others. They had, by the time the case got here, covered complications, which, our records show that complications of pregnancy are very often due solely to a pre-existing diabetes condition, thyroid condition, or something would be increased -- the same complication would occur if a man gained weight. There's nothing about pregnancy except the weight gain it causes; half the complications of pregnancy in those cases.

The State of California covered all of those. It did not cover normal childbirth, which, again, our medical evidence shows really is not different as a medical problem. There are medical procedures in connection with normal childbirth that parallel -- they go to the hospital, they have an episiotomy which involves surgery, they have stitches and so on. It's really not different from any other disability.

But not only that this Court was not concerned with the employment situation -- we are here concerned with an employment situation. We are also concerned with the power of an agency of government, which has been vested with the authority to solve this very serious problem, which is facing the nation today, of the number of women, of the 37 million women I told you were working in the labor force, 24 million of those women worked from dire economic necessity. They had no source of support of over $4,000 from a husband or anybody else.

And the studies have shown that these women when they are put out -- as we have in this case; as the court below pointed out -- a case of economic disaster. Sherrie O'Steen, when GE put her on mandatory unpaid leave, was forced to go on welfare, and before she got her welfare check, her electricity was cut off, she had no oil, she was waiting for the birth of the child in an unheated, unlighted house with no refrigeration.

And this is not an unusual situation, in that the figures -- and I've got them; they're in the footnote -- 44,000 unborn fetuses received under the AFDC program in 1973.

And this -- this type of thing is what happens to women, and they are competing with men for jobs, in terms of what happens to them during the period they're disabled. If, during the period they're disabled, they are not able to maintain income, continuity of employment, they have to go look for another job -- as in Turner, she went and got clerical jobs during unemployment.

In Stromberg-Carlson, cases I tried, all say -- and the company said, "You go on mandatory leave, because we put you on mandatory leave", they never certified her as able for other jobs, and she went to look for other jobs. She wanted to take another job, she was an honest woman, she wanted a job, but they're going to have to say: "Is it going to be permanent or not?" You change jobs.

The problem of what happens to women in the -- 85 percent of the married women in this country have babies. They have two babies. They work on an average of 25 years. They're out six weeks for each baby. It's a very slight cost to industry.

Here the cost to GE -- it hasn't put any figures in that you take -- the figures we have here on -- less than $10 a day for a woman, on the last year you had on disability. A man was 12 or 13, because of the higher pay rate.

If you take that, that's $70 a week. For six weeks, it's $420.

If you take this and multiply it by all the women that are pregnant, and multiply it for six weeks, it comes to a million dollars; they spent $200 million on their insurance program in 1972.

When we negotiate wage increases, we negotiate a ten-cent wage increase, that, for 300,000 employees, is $3 billion a year.

This is chickenfeed compared -- talk about a million eleven -- 1,100,000 or 1,500,000; just chickenfeed.

In fact, I think the reason that you have this array of ten amicus briefs, with all of industry lined up here on one side, the AFL/CIO, the State of New York, and the NEA, National Education Association, APLU on our side, is that industry is not concerned about the chickenfeed, of paying this

little bit, it's concerned that women cease to be that new cheap force of labor in this country, which they save $140 billion a year if they were paid the same rate as women (sic). There are 37 million women in the labor force. They get 60 percent of the wages of men. If you take that 37 -- take the difference between the wage rate, you up the whole labor market -- now, there are cheap, lower-paying jobs, and the men might not have some, there are other things to go in it, but if they would make that up there would be $140 billion a year more wages paid in this country.

And this matter of making women transient workers --

QUESTION: Well, there's other legislation that requires equal pay for equal work.

MISS WEYAND: If it's equal, --

QUESTION: Yes.

MISS WEYAND: -- it has to be on the same job --

QUESTION: And if you had a wholly male work force, some would be paid more than others.

MISS WEYAND: Oh, yes, there's no question about that.

QUESTION: That is, some would be in higher-paying jobs than others.

MISS WEYAND: That's right.

QUESTION: And if you had a wholly female work force, the same thing would be true.

MISS WEYAND: That's absolutely correct.

QUESTION: And there's plenty of legislation requiring equal pay for equal work. So I don't really see the point of what you're now telling us.

MISS WEYAND: But the women don't go into those jobs a great deal, here at GE. GE here has traditionally -- it did not pay women equally. It had a job evaluation system. When you evaluate a job, you put the same number of points on a male job and a female job. And the book said that you pay two-thirds of the rate for the same number of points to women that you pay for men.

And this, as I say, they had 43 percent as a -- the women get the lower-paid jobs. I was saying, when I mentioned before that, when I said 140 billion more, of course, the women -- there wouldn't be the same jobs, because women have had to go into the lower-paid jobs, because the company was able to say, "You haven't had a continuous work history." "You've been off having a baby."

You won't have a continuous work history, probably, in all probability, because you'll probably have a baby and that will interrupt your work history.

And this is the problem that the agencies have had to deal with. And the reason I see this in -- as a different problem than Aiello vs. Geduldig: can the agencies, which have been vested by Congress with the power to deal with the

power to deal with the problem of sex discrimination, deal with pregnancy and treat it as all the doctors say, it is actually not different than any other disability? In terms of medical terms, it's no different than an appendectomy, it's like a Caesarian operation, or like a gall bladder, the men have it, and the women have one discipline. There should be no difference.

And here the medical evidence from distinguished doctors, in this record, and their findings; there is no rational basis for making a difference in terms of employment, in terms of disability.

GE's plan purports to protect your income during disability. These other plans purport to protect you for income during disability.

There is no -- the finding of both the courts below is that there is no rational basis for making a difference. They found that pregnancy discriminations, a unique characteristic of women; and to discriminate because of it is a discrimination because of sex.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Weyand. Do you have anything further, Mr. Kammholz?

REBUTTAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

ON BEHALF OF GENERAL ELECTRIC COMPANY

MR. KAMMHOLZ: Yes, Mr. Chief Justice, members of the Court:

If I may very briefly touch on several points here.

Counsel for respondents failed to note that the GE job evaluation manual relating to rates for men and women applied only to a GE plant in Erie, New York, and this manual was prepared in 1937.

The Gerald Swope dialogue, to which attention had been called, occurred in 1931. These, of course, were different times.

Counsel noted, I believe, that the average rate of earnings for females in the country is approximately 60 percent that of males. At General Electric, as the record shows, that rate is 75 percent. And General Electric has never had an equal pay charge sustained against it, in terms of discrimination in rates of employment.

Counsel noted that what we're talking about, as she charaaterized it, is chickenfeed.

Well, the record, without dispute, shows that the cost to American industry at the time of trial for the 40 percent of the work force covered by plans -- no regard to the other 60 percent -- would run, at the time of trial, at the rate of $1,353 billion dollars a year. And of course, with inflation,

that figure would be higher today.

In counsel's brief there is considerable reference to GE's alleged discriminatory attitude. I think that contention was obliterated here in the oral argument by counsel's statement that GE provides cradle-to-grave protection, and may I note this is for men and women, with the sole exception of pregnancy-related disabilities.

And with that kind of protection, it would be difficult to say, I suggest, that GE has a discriminatory attitude toward women generally.

QUESTION: Mr. Kammholz, what we're ultimately concerned with in this case, I think you would agree, is the problem of statutory construction.

MR. KAMMHOLZ: Yes, Your Honor.

QUESTION: The interpretation of a law enacted by the Congress of the United States, not with the question of Congress's constitutional power or with any constitutional inhibition, but simply a matter of statutory construction.

You would agree, as a matter of power, I suppose, that Congress could provide, if it were so minded, --

MR. KAMMHOLZ: Yes, I agree.

QUESTION: -- explicitly provide that no employer in interstate commerce shall discriminate between the sexes in his employment practices, as Congress has provided in this Act, and then to go on to say, explicitly, "and this means that

if an employer in interstate commerce has a disability benefit program, the employer shall not exclude the disability of women occasioned by their pregnancy"; would you have any doubt of Congress's power to enact such legislation?

MR. KAMMHOLZ: I have no doubt as to Congress's power.

QUESTION: So the question is, here, whether the law enacted by Congress, as construed by the Commission, is equivalent to the enactment that I just hypothesized; would you say that's the basic question before us?

MR. KAMMHOLZ: Yes. This is the underlying question, Your Honor.

Or, to put it differently, when the Congress, in 1964, enacted Title VII, did it contemplate the obliteration of the pregnancy disability differences that existed in virtually every insurance plan in effect on the American industrial scene?

And I think apropos of the root question here is the fact that EEOC not until 1972 articulated this point of view. From the beginnings -- although the Act was enacted in '64, it wasn't effective until July 1, '65 -- but from the early days, as I noted yesterday, the opinions of the EEOC's General Counsel, the view was that this kind of an exclusion was not discriminatory because pregnancy and disabilities related were sui generis.

And not until '72 did the complete about-face occur. And we suggest to you, if the Court please, that this being a non-contemporaneous determination by the Commission, it is not entitled to deference, as your dissent, Mr. Justice Stevens, suggested in Sprogas ? in the Seventh Circuit.

It's perfectly clear -- and I'm going full circle now -- that the folks with whom you spent your evening last night have the right to do it. We say simply they have not done it, and with a matter of this impact on the American industrial scene, we say simply that they are the one who ought to do it.

QUESTION: What more could they have done than to say that this applies to disability benefits for pregnancy?

MR. KAMMHOLZ: They could have said precisely that.

QUESTION: Well, why would they single out one phase? They didn't propose it, they used very general and very broad language; do you agree?

MR. KAMMHOLZ: Yes. I agree. But I note again that the Equal Employment Opportunities Commission, from 1966 until 1972, --

QUESTION: And this is '76.

MR. KAMMHOLZ: This is '76, but the Congress hasn't changed the law.

QUESTION: I didn't say Congress had changed the law.

MR. KAMMHOLZ: Well, here again, we're going full

circle, and it gets back to the matter of legislative intent.

One final note --

QUESTION: Has there been any proposed legislation to make this specific? As a matter of law.

In the wake of the Geduldig case, particularly.

MR. KAMMHOLZ: I am aware of none, Your Honor. But this leads to another point which I think is relevant, and which I should like to touch on.

The legislative history of the Equal Rights Amendment, deals with this problem. Indeed, in our main brief, we have documented in depth that legislative history.

The majority report of the Senate Commission on -- of the Judiciary, re ERA, had this to say:

Equality does not mean sameness. As a result the resolution -- this is the ERA resolution -- would not prohibit reasonable classifications based on characteristics that are unique to one sex.

And in the legislative debate, Congresswoman Griffiths, who I noted was quoted in the Star last night, had this to say: ERA wouldnot affect laws dealing with a physical characteristic unique to one sex, such as child-bearing, sperm donation, or criminal acts capable of being committed by members of only one sex.

So I suggest, in terms of what the thinking may be

in the Halls of Congress, this distinction has been kept in mind, and there's thorough awareness of it.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kammholz.

Thank you, Miss Weyand.

The case is submitted.

[Whereupon, at 10:42 o'clock, a.m., the case in the above-entitled matters was submitted.]

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