ORIGINAL

In the

Supreme Court of the United States

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

Washington, D. C.
October 13, 1976

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GENERAL ELECTRIC COMPANY, Petitioner, v. MARTHA V. GILBERT, et al., Respondents.	No. 74-1589
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MARTHA V. GILBERT, et al., Petitioners, v. GENERAL ELECTRIC COMPANY, Respondent.	No. 74-1590

Washington, D. C.,

Wednesday, October 13, 1976.

The above-entitled matter came on for argument at 11:00 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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL 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, ESQ., 1126 Sixteenth Street, N.W., Washington, D. C. 20036; on behalf of Gilbert, et al.

J. STANLEY POTTINGER, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-1589, General Electric against Gilbert, and 74-1590, Gilbert against General Electric.

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

ORAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

ON BEHALF OF GENERAL ELECTRIC COMPANY

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

The issue here on reargument, as it was the issue last January, is whether the exclusion of pregnancy-related disabilities fomr an employer's disability income protection plan is violative of the sex proscription of Title VII of the Civil Rights Act.

General Electric, in its comprehensive insurance program, has an income protection plan,in effect since prior to 1950, which provides benefits to employees who, on account of sickness or accident, non-occupationally incurred, are absent from work.

The benefits continue for a maximum of 26 weeks, and commence on the 8th day in the event of sickness, the first day in the event of accident; the maximum is 60 percent of earnings, with a ceiling of $150 per week.

This plan, incidentally, dovetails with a long-term

disability plan for the catastrophic kind of accident or illness.

The plan excludes pregnancy-related disabilities, and the reasons, the historical reasons therefor, and which apply today, can be summarized in this fashion:

Sickness and accident involves the unforeseen, the unexpected. Pregnancy, basically, is a planned event, neither sickness nor accident.

At General Electric, the return rate of employees absent because of sickness or illness is in the 90 percent-plus percentile, except for pregnancy, where the return rate is about 40 percent. So, in a sense, to provide this kind of disability payment for pregnancy disability would be providing a kind of severance pay to women only.

Additionally, and the statistics are basically the same at General Electric as across the land under insurance plans, the cost of S&A coverage for females on the industrial scene, with exclusion of pregnancy-related disabilities, runs about 170 percent of male costs; or, to put it another way, for every $100 expended for male S&A coverage, $170 is expended for female coverage.

If, as the undisputed actuarial testimony at the trial indicates, if this pregnancy exclusion were extended to six weeks' coverage, the percentage total would run about 210 percent, or $210 expended for every female on the average,

as contrasted with the male; and if there were unlimited ceiling on pregnancy disability coverage, the total would run between 300 and 330 percent.

Again, at trial, the undisputed testimony indicated that to strike down the kind of elimination that we are talking about here would add annually to the plans currently in effect in the country $1,353,000,000 in cost.

QUESTION: What do you understand unlimited coverage for pregnancy disability to be?

MR. KAMMHOLZ: No ceiling, as contrasted with any other sickness or illness. Under GE, for example, 26 weeks of coverage.

QUESTION: Well, that's not unlimited, that's limited to 26 weeks.

MR. KAMMHOLZ: Perhaps the characterization is inaccurate, but it would be in the same category as other benefits under the plan.

Currently, the coverage of S&A applies to perhaps 40 percent of the American industrial work force, according to the record. We are talking only about those plans, because there is no requirement that General Electric or any other employer impose a plan, with or without pregnancy disability.

Now, of the 40 percent plan coverage, the record again demonstrates that only 40 percent of those plans, 40 percent of the 40 percent, provides some kind of maternity,

pregnancy disability coverage. And, almost without exception, the ceiling on it is six weeks.

Now, if the EOC is right in this situation, that six-week ceiling falls by the wayside. There can be no distinction as to total amount available. And this is one of the difficult cost implications that give rise to deep concern.

The insurance industry practice, with respect to individual insurance policies, S&A policies, is a very simple one: it excludes pregnancy-related disabilities. On the simple theory that if such an individual plan were available, to females, the insurance would be procured after marriage or when the pregnancy was planned, and this would obliterate the underlying concept of what insurance in this area is all about, to protect against the unforeseen, the unplanned, the unexpected.

QUESTION: Mr. Kammholz, let me be sure about this. The insurance industry, then, excludes all pregnancy-related disabilities, even those that are complications of normal pregnancy?

MR. KAMMHOLZ: Under individual --

QUESTION: Is that what you are saying?

MR. KAMMHOLZ: -- policies, yes.

With respect to group coverage, this is not the case, Your HOnor. There are, as I noted, 40 percent of the policies in effect provide some kind of pregnancy disability

coverage. The general standard is six weeks.

QUESTION: Is there any other medical condition that is generally eliminated?

MR. KAMMHOLZ: Generally speaking, no. As a practical matter, and I don't want to encumber the record here with cosmetic surgery, for example, where there is no coverage under the GE policy with respect to the hospital surgical aspect of it.

QUESTION: There is no coverage under the GE policy for cosmetic surgery?

MR. KAMMHOLZ: For cosmetic surgery as far as hospital medical expense is concerned.

There is coverage for the in-and-out of the hospital, but with respect to cosmetic surgery, this runs a day or two. The heavy cost is what the physicians charge, the surgeons charge in that regard.

The decision for exclusion of this kind of coverage is, as I noted, further buttressed by the unique nature of pregnancy. Essentially it's a voluntary thing. As the record again points out without dispute, and as an expert for the union testified, it would be a strange commentary, indeed, if the survival of the human race depended upon sickness.

Contraceptive contraception in this society, which the New York Times recently characterized as one having reached almost a 100 percent level of contraceptive control of

birth, is such that it's the planned pregnancy that almost invariably applies.

To equate then the pregnancy-related situation with sickness and accident generally, would be a non sequitur. And now we come to Geduldig v. Aiello, this Court's decision in 1974 in the California insurance case where, under the Fourteenth Amendment, the Court held that pregnancy is unique, and that there was involved not a situation of dissimilar treatment of persons similarly situated, but, rather, the dealing with a unique situation, a sui generis situation, pregnancy with respect to which there can be no discrimination, vis-a-vis males.

I should like to come back to Geduldig in a moment. I'd like to touch now on why we are here. Whether the Congress, in 1964, in the enactment of the Civil Rights Act, contemplated the obliteration of this kind of exclusion.

Your Honors recall, I am sure, that the sex proscription surfaced for the first time in the House of Representatives the day before the House adopted Title VII. Ironically, the sex amendment came about as the result of the proposal by Representative Howard Smith of Virginia, who was an opponent of the Civil Rights Act.

And, finally, all of the male Representatives who voted for the sex amendment ultimately voted against Title VII.

The legislative history is very sparse, indeed, as

the Fifth Circuit pointed out in Willingham, and, if I may, I think I can put in focus more precisely the point I am trying to make here by giving this quote.

Last year, Willingham, in a sex-plus case, a hair length case, the Court said:

"We find the legislative history regarding sex discrimination inconclusive at best" -- and may I say this appears at page 13 of our Supplemental Brief dated September 15, 1976 -- "We find the legislative history regarding sex discrimination inconclusive at best and draw but one conclusions, and that by way of negative inference. Without more extensive considerationn, Congress in all probability did not intend to its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger congressional mandate."

Upon the adoption of Title VII, the Equal Employment Opportunities Commission, beginning in 1965, and continuing for six and one-half years, articulated the precise view that we are espousing here this morning: the view that because pregnancy is different, the proscriptions of Title VII on the sex subject were not intended to reach pregnancy exclusions.

Now, I submit that that contemporaneous interpretation by EEOC should be given great weight, and the change which occurred in 1972 with a 180-degree reversal in the

agency's views should be ignored.

To put it another way, we suggest that they were right in the first place.

QUESTION: Mr. Kammholz.

MR. KAMMHOLZ: Yes, Your Honor?

QUESTION: Would there be any impediment that you can suggest to having the collective bargaining agreement between the parties, General Electric and its bargaining agents, provide for all these things explicitly? In other words, getting the respondents everything they are seeking in this litigation?

MR. KAMMHOLZ: No, indeed not. The parties could so bargain; indeed, as I am sure you will hear from my distinguished opponent, the union has asked for such a change during the course of bargaining over the years. And the union, of course, has asked for many other things, their demands have been innovative, to say the least.

No, I think clearly this is a matter for collective bargaining, if the parties elect to distribute a portion, a larger portion of the benefit dollar to this area, they could so do. But this would be on the basis of consideration as to what is appropriate in terms of dividing the benefit dollar.

If I may return briefly now to Geduldig v. Aiello. Footnote 20 in that decision, which articulates the sui generis nature of pregnancy and pregnancy-related disabilities, has

been the subject of a great deal of consideration and writing, not only by the courts but in the law schools. And very recently, also, Arthur Larson, a former Under Secretary of Commerce, and now James B. Duke Professor of Law at Duke University, has published a book, not available at the time of the original argument, in which he expresses, I think expresses very succinctly, the considerations that are involved here.

As he puts it, a Supreme Court adoption of the EEOC rule would, on the strength of a statute aimed at -- aimed not at social or private insurance reform, but at employment discrimination, would change all this, rearrange insurance priorities and categories and markedly alter the allocation of the limited resources available for wage loss, hospital and medical benefits, away from both the creators and the beneficiaries of those plans.

Very often the view is suggested that in smoke-filled rooms decisions are made which discriminate, the fact of the matter is in collective bargaining and in decision-making on the part of management in unorganized operations, what is the appropriate allocation of the benefit dollar? Indeed, how does one divide the pie, if you will, in terms of fringe benefits, wage increases, cost of living adjustments, et cetera?

And these decisions are arrived at in this sector as

the result of careful consideration, no effort at discrimination, but a desire to do what's best for the largest number.

And, as Professor Larson points out, the ultimate decision here, the non-extension of pregnancy benefits to women, really relates to the family unit. There is a father for every child, the head of the household perhaps, and it's the allocation of that money applied for the greatest benefit for all involved, that's the underlying decision. And because the family unit is in the majority, obviously, any decision that can be characterized as discriminatory is --

QUESTION: Mr. Kammholz, does the collective bargaining representative of the entire work force have a position on how this money should be distributed?

MR. KAMMHOLZ: No, this is hammered out on a case-by-case, contract-by-contract basis, sir.

QUESTION: Haven't they made a demand that these benefits be included?

MR. KAMMHOLZ: In this instance? In this case?

QUESTION: Well, isn't that the position of the union in this?

MR. KAMMHOLZ: Oh, sure. This demand has been made over the years, along with many other demands. As I noted, the union is mostly the one --

QUESTION: Aren't they the one who is most directly interested in the proper allocation throughout the work force?

MR. KAMMHOLZ: And they have participated in these decisions, because ultimately the panoply of what is asked for is so broad and all-encompassing, it is what finally is hammered out that really counts. And with respect to what is finally hammered out, the union's signature is on the line.

QUESTION: But it seemed to me the argument you were making was that what you are doing is for the benefit of the work force as a whole, but --

MR. KAMMHOLZ: Precisely, yes.

QUESTION: But the union takes the contrary position on that.

MR. KAMMHOLZ: Yes, sir.

I might add, finally, that under the Equal Pay Act and under Executive Order 11246, the rule that EEOC here strives for is not recognized. Equal contributions under benefit plans suffice. And may I note again that with respect to pregnancy disability, it's not only a matter of equal contribution, but the amount that goes to females very substantially exceeds that which is available to males.

QUESTION: If the collective bargaining agreement provided for larger contributions from women employees, based on actuarial studies, would that violate any federal statute or EEO regulation that you know of?

In other words, suppose the effort was to make the people who are benefitted bear the --

MR. KAMMHOLZ: Bear the cost.

QUESTION: -- bear the cost.

MR. KAMMHOLZ: I suspect the argument would surface very swiftly that this was discriminatory.

I should add that earlier this year -- and again not available at the time of the original argument -- the New York State Department of Insurance issued an in-depth report on insurance costs. We have lodged it with the Court, it's available here, and it demonstrates several things.

No. 1, it supports clearly and precisely the position we initially articulated, that female cost is much higher. This the report finds.

It notes also, for example, that because of the longer life of females on the average, pension costs, annuity costs run about 25 percent higher for females than for males.

Thank you very much.

QUESTION: Mr. Kammholz, you haven't mentioned an intervening decision since you last argued here. Washington v. Davis.

MR. KAMMHOLZ: Yes, Your Honor.

QUESTION: I wondered what you had to say about that.

MR. KAMMHOLZ: Washington v. Davis was a race case.

QUESTION: But the statute treats race and sex the same.

MR. KAMMHOLZ: Right. But this Court has never held

sex as a suspect classification.

QUESTION : No, no. But I'm talking about -- this is a statutory case, isn't it?

MR. KAMMHOLZ: Yes.

We think that footnote 20 clearly points out that there is no discrimination, no sex discrimination in our case; therefore, the reach of Washington v. Davis simply could not apply. And again I note that there -- we suggest, as I am sure is in the minds of Your Honors, the proposition that sex is not inherently suspect.

QUESTION: But that really doesn't have much to do with this statutory case, does it?

MR. KAMMHOLZ: It doesn't; if you agree with our initial concept, there is no discrimination involved.

Thank you.

QUESTION: Mr. Kammholz, before you sit down, let me ask you to help me a little bit.

Could a plan, such as GE's, exclude generally sickle cell anemia?

MR. KAMMHOLZ: I think sickle cell anemia would be in a different category from what I know about the medical writings on the subject. This is a disease suffered only by blacks.

QUESTION: Could it exclude such a disease as pemphigus, which, as I understand it, is more observant among

Jewish people than others?

MR. KAMMHOLZ: I am not familiar with that one, but I think the same answer would apply.

QUESTION: Could it exclude circumcision?

MR. KAMMHOLZ: Oh, I think it could, yes.

QUESTION: You would put that in the same category as pregnancy?

MR. KAMMHOLZ: I will give the short answer: Yes.

[Laughter.]

QUESTION: Mr. Kammholz, I didn't hear the answer. Could you tell me, what was your answer with respect to sickle cell anemia? You said it was a disease that could only be suffered by blacks.

MR. KAMMHOLZ: By blacks.

QUESTION: But, therefore, could it be excluded or could it not be?

MR. KAMMHOLZ: Could not.

QUESTION: Could not be excluded?

MR. KAMMHOLZ: Could not. And we --

QUESTION: Then why do you come to a different conclusion on pregnancy, which can only be suffered by women?

MR. KAMMHOLZ: Because we are dealing, on the one hand, with race and on the other with sex.

QUESTION: But does the statute draw a difference between sex discrimination and race discrimination?

MR. KAMMHOLZ: The Court has. Your Honors have found sex to be a suspect classification.

QUESTION: But those are constitutional cases. And under the statute, is that --

MR. KAMMHOLZ: In the light of legislative history, Title VII, I suggest that the identical rule should apply.

QUESTION: Also, one is an illness and the other is not. Isn't that it?

MR. KAMMHOLZ: Yes.

QUESTION: That's what you told us in the earlier part of your argument.

MR. KAMMHOLZ: Yes.

QUESTION: Isn't that your basic position?

MR. KAMMHOLZ: That's the underlying position, that childbirth, pregnancy is a natural thing. Medical testimony on the record indicated that in most instances it contributes to the well-being of the mother. It's not a disease, as Dr. Hellegers pointed out, because it would be sad, indeed, if we all survived on the basis of sickness. It's a sui generis, unique,different unto itself kind of condition.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: Mr. Kammholz, one lastquestion: Who has the burden of proof in this case? In your estimation.

MR. KAMMHOLZ: In my view, we have -- there is no prima facie burden, we establish a rational relationship, we establish the sex aspect of it, and there is no burden of proof on us.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kammholz. Miss Weyand.

ORAL ARGUMENT OF MISS RUTH WEYAND, ESQ.,

ON BEHALF OF GILBERT, ET AL.

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

I want to address myself first to the question which has been raised as to the relationship of collective bargaining to the issue of inclusion or exclusion.

This Court, as a matter of law, has recognized in cases involving collective bargaining agreements, which discriminate because of race, way before the enactment of Title VII, that in _____ vs. Louisville-Nashville, that unions sometimes do enter into discriminatory contracts, and that they violate their constitutional duty when they do so.

More recently, under Title VII, Title VII is directed at the fact that both with regards to race and sex many unions have not, in dealing with employers, acted in a non-discriminatory matter. And the existence of a collective bargaining agreement is no excuse.

Furthermore, as the record here shows, since the time that fringe benefits became, by law, a bargaining subject land... with the Inman vs. NLRB decision of the Seventh Circuit in 1948, was affirmed on another point here. The next bargaining session, the first one was IUE, between GE and the IUE, was in 1950. The record here shows without dispute that 1950, the union pointed out that General Motors paid six weeks, which is usually enough to take care of it, in fact with changing medical practices, many of the women get back in less time. We have two, the first witness for in our case, from Tyler, Texas, was certified back in four weeks. GE would not take her back.

Mary Williams went back in four weeks -- another witness here, six weeks. And my estimation on cost is that the companies that now pay six weeks, if they begin letting employees come back when they are physically certified back are going to have a reduction in cost, not an increase in cost.

But the IUE went to the employer in 1950, 1955, 1960, 1963, 1966, repeatedly, and asked that they bargain and include the six-weeks' benefit which is traditional, which is present in 40 percent of the industry, in fact, Bailey, the company's actuary, fixes it at 60 percent of the industry pays six weeks' benefits.

QUESTION: Miss Weyand, would you consider that a six-week benefit would comply with the statute if all other

illnesses had a benefit of up to 26 weeks?

MISS WEYAND: No, I do not. And we have cases, I have pending a case against General -- I just wanted to say costwise --

QUESTION: They would not have solved their problem then, would they?

MISS WEYAND: They would not, because we think that the individual who has a complication, she really has a disease, no question of illness, she needs the more; and it is discriminatory to limit this one area to six weeks, no question about it.

But I was just saying, in terms of the union's effort here over the years, to get something for these women, as the union has wanted to spend it, and the union, of course, in the last two rounds of negotiations, has asked that it be treated exactly the same. You have the record here, that there be no limit whatsoever, that it not only go on for 26 weeks, but it go on under the permanent. And we have the IUE as a plaintiff in a suit against General Motors involving the six weeks' plan, which I mentioned, has filed suits and had findings that that is discriminatory.

But I just wanted to say that the union has tried to get this. And there is an assumption that seems to be implied in some people's minds, that if the union asked for something like this, the company is going to be willing to

give it.

In fact, this demand was on the bargaining table during the long strike. There are certain things that companies have principles about. GE had a principle about job posting for years and years. It has recently changed because of Title VII. They bought a new plant, had a job posting agreement, we had a 15-week strike when they took it out of that plant, they wouldn't.

GE has a principle about not paying sickness and accident benefits. Now, it pays for everything, and I'm afraid the record -- the answers to the questions may not have made it clear. It pays for the time that a man is disabled by cosmetic surgery.

Mr. Kammholz was merely making the point that they don't pay the medical expense of it.

There is not a single thing that a man gets disabled by that GE does not cover fully. But GE, and it appears in this record with the testimony, in the testimony insurance, is firmly of the view that when you pay disability benefits for pregnancy you're not paying for the period a woman is disabled, its figures are not based on the period she's disabled. This Court upset a statute that had a six-week -- Turner vs. Utah, that had a six-week return date as against -- we know people are able to come back earlier than that.

In Cleveland vs. LeFleur, you agreed they could

come back then.

QUESTION: But that involved a government.

MISS WEYAND: A government. But you took judicial notice of the fact that many women are not physically disabled for six weeks.

And GE has never portended here, their doctor, the medical testimony, their doctor, Dr. Hellegers, Dr. Forrest, no dispute. That most women, in fact the numerical majority, come out of the hospital in two or three days now, and within two weeks, within two weeks their doctor -- Dr. Wilbanks said eleven days for internment. The entire time, from the time she went into labor until she was back on the job.

Testimony of both their doctors was that two weeks today is the majority of women are back at home, doing their homework, taking care of their children, which is harder work than their job in the office.

That the medical position has changed. And I've cited the point.

But the reason their actuary, when he figures this billion, he figures that every woman under the 13-week plan is going to be out 13 weeks, every woman under the 26-week plan is going to be out 23 weeks, every woman under the 52-week is going to be out 30 weeks. And he says, why, not because they are disabled, they have never made a pretense it's because they are disabled, because women

malinger. And you will find in the findings here, the court found they don't malinger. But their actuary, who explains the insurance position of why this isn't covered by insurance, is that women have a natural desire to take it easy, they may have heard that someone had a miscarriage, and therefore they are going to want to sit at home. And they have a natural desire, after the child is born, to stay home with him.

Now, if you knew these women that have to have that paycheck, they don't want to sit home, they want a baby sitter there who establishes the routine the day they come back, and they want that check to pay it, because they have got to get back.

There are 37 million women working in the United States today, and, as the figures of the Department of Labor, as of April, the last figures came out in July of 1976 for the quarter ending April 1975, 21 million women either were single, divorced, widowed or had husbands who made less than $7,000.

Also, one out of ten babies is born to a woman who is single, divorced or widowed. One out of ten babies. This is a serious -- the largest poor group in this country are the women. The figures are in here, the simple justice.

These women, this matter of Sherrie O'Steen here, when she didn't have her check, had to go on welfare. Her

light, her heat was turned off. One of the plaintiffs who testified without dispute. She lived in the country area. She had to walk two miles with a two-year-old daughter. Her husband had left here. To get food. Until she got on welfare. She awaited the birth of her child in an unlighted, unheated house.

And GE, in this stereotype, well, they didn't think anything would happen. The record showed she was a married woman. In their view, she has a husband who is going to take care of her.

The testimony here on the amount of time that women are going to be off, and why GE does not pay this, is that women are going to malinger and abuse it. Their whole figures on the cost -- now, if you take the six weeks, which Mr. Bailey says that -- as the record hows, that he said that 60 percent of the women are covered for six weeks. And another one of their actuaries figured how much it cost to cover the women in this country for six weeks. He said he deducted the amount of the present cost, based on it, and he deducted -- it cost $225 million to cover 60 percent of the women for six weeks, which is what is covered.

It will only cost $150 million for every company in the United STates to make up that other 40 percent. If 60 percent costs $225 million, another 40 percent is only $150 million. And that's for six weeks.

The figures he based it on, and GE's position at the bargaining table is that the women want to stay home and they are going to malinger. And it has never tried to count out -- it refused to figure -- we asked for figures on how many -- his record on women returning. It refused to find them. It didn't provide them. Never provided any figure on its return rate. The number of weeks or days that women were out.

It did -- and I think there was a slight misstatement, I'm sure Mr. Kammholz did not mean to state that there was a return rate of 40 percent. The return rate is 50 percent at GE on their figures. I mean, there's no dispute in the record.

GE, in its objections to interrogatories, why it didn't want to provide me the figures I wanted on the expense for pregnancy and so on, it had a 40 percent turnover rate of both males and females. Forty percent turnover each year.

Now, with that turnover rate, the fact that 40 percent of the women didn't come back is no different than the man may have come back from an injury or something, or a sickness that he is not going to be in the labor force, any more chance he will, weeks or months later than these.

But GE and many companies have this position, and they get a position that women are going to malinger.

Now, it may be this is because, and they admit they

have no evidence on it, they -- you know, I pressed their actuary, why, when he explained the whole insurance business, they don't cover them in individual policies, is based on the fact that women are going to want to stay home before and after. They are going to malinger. This is an abuse. Because they are not subject to the same controls that occur in the case of a man. A man won't say out when he's sick or injured, because he wants a merit increase, he wants a promotion, he's going to get back as fast as he should.

But this doesn't work with women. This is straight sex stereotyping right down the line. It's straight stereotyping, because they weren't concerned about Sherrie O'Steen, because the record shows she was married. It's a stereotype that's contrary to the facts of the United States as they exist in life today.

And it goes much further than merely pregnancy. Because this attitude shapes the practices of the companies. The payment of sickness and accident benefits in American industry does not serve as a benefit welfare system entirely. GE didn't put it in with that in mind; it put it in because its whole sickness statute says we get productivity if people aren't going to worry about what is going to happen to them in the future.

It says it is part of compensation. And it says -- and it uses this as a control lever on when a person goes

out and when they come back. Sixty percent of their wages.

A man, a woman, who has their budget geared -- and these are not high-paid, the figures at the time here -- we have got the figures here on the hourly rate, it was 6,000 a year for a woman, 7,000 or 8,000 for a man on the average. I mean, a lot of them get less than that, even females married to GE males, you have trouble raising a family and making a budget on these kind of figures today.

They don't -- they work just the last minute until they drop, the men that even have S&A, because they don't want just 60 percent, they want 100 percent. And they get back as soon as they can.

And the supervisor doesn't want to put them out if he can find anything else for them to do. The chairman of our GE board broke an arm, and I was asking him about, you know, do they put people on light work? Oh, yes, I was a tool and die maker, they didn't send me home on sickness and accident benefits, they had me answering a phone. They find light work for them.

They haven't found light work for women. They send them home without any pay. There's not the disincentive to the management to send a person home if they have to pay sickness and accident benefits. They want to send women home as soon as they begin to show.

The court below said that Title VII intended that

the employment relations be sex-blind as well as color-blind. And, while there has been remarks about how sex got into Title VII here, in 1972, when Congress, for the first time, provided enforcement powers, it said that sex discrimination is of the same concern as race discrimination. And the courts have agreed that there is no difference between the two.

The -- I hope -- I see -- I promised to save some of -- divided my time with the Assistant Attorney General. I do want to ask leave to file a supplemental brief, because on Friday I was served with the Reply Brief which very, very seriously misstates the record in a number of respects, and I do not have time at the oral argument to answer them, and I would, of course, limit it to putting -- correct the record. And with the permission of the Court, I would like to ask leave.

MR. CHIEF JUSTICE BURGER: You may respond to the Reply Brief.

MISS WEYAND: Thank you.

QUESTION: Miss Weyand, let me ask you a question.

You are asking to file another brief. You have already filed two, haven't you? Of 250 pages total.

Do you expect that we can absorb that with the energy that you would like us to?

MISS WEYAND: I very much regret that, but it is

going to be limited to answering inaccurate facts which are stated in the Reply Brief, which I do think this Court should be put straight on several inaccuracies.

I regret the length of the briefs --

QUESTION: Are you going to file another 100 pages?

MISS WEYAND: Oh, no, it will be only five or ten pages, I can assure you. It's just going to answer -- put straight the inaccurate facts. I don't intend to re-brief them, you know. This is --

QUESTION: Let me ask you another question.

Our rule as to briefs says "a concise statement of the case", and yet you have 61 pages of facts.

MISS WEYAND: I regret that you haven't found the brief helpful. The problem is, if I may make a little bit of an excuse, that this is the first case in which this Court has dealt with anything like this aspect of Title VII. It was a case of first impression in the lower courts.

After we develop the law, you can focus. Now, there are points which I haven't dealt with here that are very important, but nobody -- because it's new, it hasn't focused. We have four Courts of Appeals now have gone our way, and 18 district judges.

But each one of them emphasized what's completely different.

Now, the courts below here -- here the finding of

the EEOC was that this is -- the EEOC finding was that there is an impact -- the EEOC finding is set out in the back of the petition for certiorari -- there is an impact on this class because of denying them coverage.

The Court of Appeals here emphasized all women as a class lose compensation, because they would have to buy their own, as a class. They did not focus on an individual woman who was pregnant, they said all women were denied compensation. And two or three of the other courts, Poston? and Situend?, on all women denied compensation.

Another person looks at the irrelevance of the difference between the disabilities they pay for and the ones they don't.

Uniformly the courts have held that cost is completely irrelevant, and we think it is here.

I'm sorry.

MR. CHIEF JUSTICE BURGER: Very well, Miss Weyand.

Mr. Attorney General.

ORAL ARGUMENT OF J. STANLEY POTTINGER, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. POTTINGER: Mr. Chief Justice, and may it --

QUESTION: Mr. Pottinger, do you interpret our rule to permit, in a case like this, the government to argue amicus, without an order of the Court?

MR. POTTINGER: Your Honor, I have not addressed

the rule specifically. It was my understanding that we were permitted to argue amicus, and by letter to the Clerk of the Court were granted that permission.

If we have --

QUESTION: I just wondered, is that the government's interpretation of the rules?

MR. POTTINGER: Certainly it is, if not by direction, by indirection, yes, sir.

Mr. Chief Justice, may it please the Court:

What we have presented today is the following fact situation, against which Title VII must be measured.

We have a disability plan by General Electric, which seeks to cover virtually all disabilities for men and women except one. A great deal has been said about the voluntariness of pregnancy.

Let us examine for a moment, however, the coverage of voluntary as well as involtunary disabilities for men. Virtually every disability, including voluntary disability, as they affect men, are covered by this plan. That includes everything from cosmetic surgery, as noted, to suicide, to felonies, or the results of felonies, to voluntary sports activities, to falling off ladders --

QUESTION: Well, most of that is covered for women, too, isn't it?

MR. POTTINGER: Yes, it is. There's no distinction,

in other words, as to voluntariness or involuntariness in this plan. With the exception -- and, therefore, I think to say that the plan is directed toward -- misdirected toward voluntariness of pregnancy is clearly misleading.

The purpose of Title VII, however, is to provide equal opportunity in the job market by excluding invidious forms of discrimination, including sex. And we believe that, given the legislative history and interpretations of the Court, clearly two different theories would sustain a prima facie case of sex discrimination in this case.

First, the exclusion in this particular case is not neutral on its face, it does single out a condition which is so inextricably sex linked to women that it is tantamount to a policy of excluding women from this otherwise total coverage.

QUESTION: Well, in light of Geduldig v. -- the Geduldig case, I never knew how to pronounce the respondent, Aiello -- ["eye-lee-able"]

MR. POTTINGER: I have been calling it Geduldig v. Aiello ["eye-yellow"].

QUESTION: Yes.

MR. POTTINGER: But I'm not sure that's right, either.

Well, in footnote 20, Your Honor, --

QUESTION: Well, not only footnote 20, the whole judgment and the opinion.

MR. POTTINGER: Because that was based on a Fourteenth Amendment therry, not on a statutory theory, we think that that's persuasive distinction, and that this Court itself has recognized it in Washington v. Davis.

QUESTION: Wasn't the actuarial element an important factor in that holding?

MR. POTTINGER: Definitely. And I would like to address that same issue in this case, if I may.

The actuarial issue in Aiello, however, was set in the context of a State social welfare program, where the Court found that it was rational.

QUESTION: But that case held that the pregnancy exclusion was not a sex discrimination.

QUESTION: That's right.

MR. POTTINGER: Well, it did --

QUESTION: Well, that's what this statute forbids, sex discrimination. Aiello said it wasn't one. Now, what is --

MR. POTTINGER: No, I don't -- I believe that Aiello said that under those circumstances it was rational to conclude that it was not sex discrimination. Yet, under Title VII, this Court also found, in a very similar situation, that it is rational under Griggs. The Griggs case made it clear that if there is an impact, the consequences, predictable consequences of a policy of exclusion, if it falls on a

protected class, here women, does constitute --

QUESTION: Well, Griggs was talking about testing, thought, it wasn't talking about this type of thing.

MR. POTTINGER: No, I believe that it was talking more broadly, was it not, about --

QUESTION: Well, the holding of Griggs dealt with testing, didn't it?

MR. POTTINGER: The holding did, but Griggs has been --

QUESTION: And with race.

MR. POTTINGER: And with race. Griggs has been cited, however, as precedent both for sex cases, in answer to your question, and, more broadly, it has been properly cited as precedent for any device or selection activity or exclusion activity, not just from hiring, but device or employment device or its standard or criteria, which excludes or has an adverse impact on a protected class.

I think it goes beyond hiring --

QUESTION: Well, when you say properly cited, then, you mean that it's proper to cite a case for something other than its holding?

MR. POTTINGER: I think that its holding does apply beyond the issue of hiring, is what I am saying.

QUESTION: But it's not a holding, then?

MR. POTTINGER: Well, I understand that the facts make the holding applicable in that case to hiring, but the

principle stated by the Court in Griggs clearly goes to the issue of what constituted discrimination in hiring. And what --

QUESTION: But there is nothing about impact or effect in the statute, is there?

MR. POTTINGER: There is not.

QUESTION: And the only place that appears is the gloss that is put on the statute, or the way the statute is construed by the EEOC and by this Court in Griggs.

MR. POTTINGER: Well, I -- that's correct. And the progeny of Griggs. However, I would not characterize it as only a gloss. It seems to me that both the EEOC practice, administrative guidelines, and the deference that we pay to those, and this Court's decision in Griggs are all sensible.

QUESTION: Do you -- is the EEOC authorized to issue regulations?

MR. POTTINGER: Yes, it is.

QUESTION: And not just guidelines?

MR. POTTINGER: Well, pardon me, guidelines in this particular case.

However, the Court has held that deference should be paid to the guidelines, and we think that that is sensible.

Either under a theory which would state that there is an inextricable relationship between race and the exclu-

sionary factor, or sex and the exclusionary factor. For instance, sickle cell anemia.

Or under the impact theory of Griggs. In either case a prima facie case has been made out.

Now, I notice that counsel concedes before you today that if sickle cell anemia were before the Court, that could not be excluded. I would submit that there is no logical or rational distinction under Title VII, not under Aiello, not under the Fourteenth Amendment, but under Title VII, between an exclusion of sickle cell anemia, which we admit could not lawfully take place, and the exclusion of sex-related practices or disabilities, such as pregnancy.

I fail to see the distinction.

Therefore, we have -- we are faced with only two defense, or, rather, arguments in defense.

One is Aiello, which we have just -- I have attempted to deal with here.

The other is the business necessity or cost factor. And, if I may, I would like to point out that in this particular case cost cannot be a controlling factor in this decision.

First of all, in the courts below, General Electric refused to present a business necessity defense, either in the district court or in the Court of Appeals. It presented cost factors, not for purposes of showing that the cost would be

too high, and, indeed, the admission that 40 percent of those industries that do provide these benefits have not gone broke, have not shut down their plants, seems to me to give the lie to the theory that they ever could be too high.

So that business necessity defense is not even presented to the Court.

However, it comes in the back door right now, it seems to me, by arguing in this fashion that cost, by raising the horrors of cost. Yet, clearly, we do not need to find that this program, in order to be sustained, must provide a cost that would literally shut down the plant. That is not an issue, it's a red herring here.

As for the notion that the six-week coverage would have to be extended, clearly what we are talking about and what counsel for appellees is talking about is a coverage that arises from sickness or an involuntary disability arising after a normal pregnancy.

No one is suggesting, nor is counsel for General Electric suggesting, that there would be up to 26 weeks of benefits for a normal pregnancy. Yet, under the General Electric plan, even an involuntary illness, an unpredictable illness, that is pregnancy-related, would not be covered at all, much less would it be covered on a basis that is similar to that which men have under the disability program.

They are excluding both the voluntary, if you will,

aspects of pregnancy and the normal aspects, and the involuntary or abnormal aspects of pregnancy alike. Yet it presents no cost figures whatsoever on how often abnormalities would arise and how much they would cost. Instead it refers to industrywide figures, that we would submit are in aposite to the problems faced by GE or, indeed, by the 40 percent of companies that have done this successfully.

There are ways, in fact, of dealing with the coset issue. The courts have held that cost itself is not a defense to discrimination, where a case is made out. We agree with that. We also agree that the cost factors could be raised only in the event that a business necessity defense couldbe raised, and again, that has not either been tendered before this Court this morning or in either of the courts below, despite ample opportunity to do so.

What we are faced with is a situation where General Electric has provided, has sought to provide an umbrella of coverage, and yet it has plucked out one single activity from that umbrella and placed it in the rain.

What we are talking about here is an activity which is not -- or, rather, a disability which is not shown to be more expensive, for instance, than one that males face, and, indeed, the record will indicate that in the insurance area, as opposed to disability coverage, men in GE cost the company much more than women. The insurance program costs

them more.

If we were to find that respiratory diseases or heart diseases or other specific diseases were actuarily defined, and the company wanted to take those into account to keep the integrity of cost factors at a minimum, that would be another issue. But that is not what they propose to do in this case.

And we believe that once the company undertakes, as General Electric has, to create a broad umbrella of coverage --

QUESTION: Mr. Attorney General, when you said men cost more, did you mean in the life insurance program as opposed to the medical insurance program?

MR. POTTINGER: Yes. That is correct.

QUESTION: Yes.

MR. POTTINGER: However, I think that counsel's use of the 170 percent figure is itself a bit of a red herring. The male coverage figures that he presents are not related directly to the cost factors that would arise in GE on a comparative basis with pregnancy that was normally judged, as opposed to this 26 or open-ended judgment.

QUESTION: But your basic position is that the cost really doesn't make any difference, anyway?

MR. POTTINGER: No, I think the cost could make a difference, but clearly in this case it does not make a difference, and has not made a difference.

QUESTION: When would cost make a difference?

MR. POTTINGER: I would use the Lorillard test that states that in a business necessity way if the safety or efficiency of the company were at stake --

QUESTION: It's just different if it was a matter of bankrupting the company?

MR. POTTINGER: Well, but --

QUESTION: And if a business necessity defense is interposed.

MR. POTTINGER: And if it's interposed, which it was not interposed in this case.

QUESTION: It wasn't here.

MR. POTTINGER: Even though there was ample opportunity to do so.

QUESTION: What's the statutory basis for a business necessity defense?

MR. POTTINGER: In, I believe it's 703(e) and (j), I believe the statute allows for what amounts to a business necessity result, or, rather, argument.

But may I simply say that with regard to the cost factor, the business n-cessity defense itself makes clear that only if it's necessary to -- only if the one cost interposed is necessary, and would result in the disabling of the company, would this factor arise.

Here there are other ways in which the company

could cover normal and even abnormal pregnancies without the necessity for eliminating this entire program. It could, for instance, reduce the amount of payments elsewhere, it could, for instance, eliminate coverage that runs across sex lines, such as respiratory diseases arising from smoking of men and women alike, it could reduce the amount of payment in terms of the time it pays, it could take any number of innovative approaches to cover pregnancies.

QUESTION: How realistic do you think those alternative proposals are, in the face of the realities of collective bargaining, if there's going to be any reduction in the benefits?

MR. POTTINGER: Well, I think that in light of -- as long as this Court sits, and as long as this Court is able to recognize or will, if it does recognize that this form of discrimination cannot go forward, I think they are realistic.

I think, in the absence of a ruling, --

QUESTION: We can't -- I'm talking about the realities of collective bargaining.

MR. POTTINGER: But the collective bargaining --

QUESTION: Do you think the union is going to agree to reduction in the benefits?

MR. POTTINGER: No, I'm saying that --

QUESTION: They already have?

MR. POTTINGER: -- it seems to me that if -- yes, I think so if the company can show that the absence of such a reduction is to close down the plant or otherwise disable the company, I would say that that's a possibility that is reasonable.

And what I am saying further is that that is, in fact, in law, the only basis upon which the company can go, either to court or to the union in the collective bargaining system, and say, we must make a change in order to accommodate pregnancy disability programs.

In the absence of showing that high standard of need, it seems to me that the chances are not great, but, on the other hand, they need not be great, because the company will not be faced with a disabling cost factor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Kammholz.

REBUTTAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,
ON BEHALF OF GENERAL ELECTRIC COMPANY

MR. KAMMHOLZ: Several very quick comments. And I should like to address the observations of counsel regarding what happens at the collective bargaining table.

Members of the Court, in the real world out there, you don't take it away. And the reference is inapropos.

Now, secondly, as we note in the Supplemental Brief dated September 15, 1976, the position of Deputy Solicitor General Lawrence Wallace, when he appeared before you in oral argument in Fitzpatrick v. Bitzer seems rather clearly to embrace the view of Aiello, which we have articulated here this morning.

He says the -- well, I am not going to bore you with reading what we quote, but on pages 8 and 9 of this Supplemental Brief we note what the Solicitor's office says there, and I suggest it is quite different from what we heard here this morning.

Finally, a very brief reference, Mr. Justice Blackmun, to sickle cell anemia. This is an area that we have not covered in any of our briefs, and I should like to note again that pregnancy is the only physical condition which is unique to one sex. And, as I understand the sicle cell situation, it's inaposite, because most blacks are immune to it, and finally, its sickness, as I understand it, is not a unique condition like pregnancy.

Thank you very much.

QUESTION: Well, of course, there are many medical conditions that are more -- seen more frequently in one sex than another.

MR. KAMMHOLZ: Yes.

QUESTION: Some to a 80 or 90 percent to ten or

twenty percent ratio.

MR. KAMMHOLZ: Yes.

QUESTION: Okay.

MR. KAMMHOLZ: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 12:00 noon, the case in the above-entitled case was submitted.]

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