ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-411

TITLE NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, Petitioner v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PLACE Washington, D. C.

DATE April 27, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner

v. No. 82-411

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C.

Wednesday, April 27, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:54 a.m.

APPEARANCES:

ANDREW M. KRAMER, ESQ., Washington, D.C.; on behalf of the Petitioner.

MRS. HARRIET S. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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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

CHIEF JUSTICE BURGER: Mr. Kramer, I think you may proceed when you're ready.

ORAL ARGUMENT OF ANDREW M. KRAMER, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Court today is revisiting an area that it has visited in such cases as Geduldig v. Aiello, General Electric Company v. Gilbert, Nashville Gas Company v. Satty, and to a somewhat lesser degree, the decision of Los Angeles Department of Water and Power v. Manhart.

Unlike those cases, however, the claim of discrimination here is not being brought on behalf of female employees. This case involves male employees and the question of what benefits are to be provided their spouses for hospitalization costs incurred as a result of childbirth.

In deciding this question the Court for the first time is asked to analyze the scope of the Pregnancy Discrimination Act of 1978, an act passed as a direct result of this Court's decision in Gilbert.

The Shipyard in this case has a comprehensive group health insurance plan. The plan covers employees, their spouses, and unmarried children up to the age of

19 years.

Prior to the passage of the PDA, the Shipyard covered female employees and the spouses of male employees identically with respect to preganancy hospitalization costs. Under that plan, the Shipyard provided hospitalization costs incurred as a result of normal childbirth of up to $500 with full prenatal expenses taken care of, physician and anesthesiologist costs, and major medical coverage in the event of pregnancy complications.

As a result of the PDA, however, the Shipyard removed the $500 cap with respect to its female employees, but retained the cap with respect to the spouses of its male employees. It is the failure to remove this cap which the Government alleges constitutes intentional compensation discrimination against male employees under Section 703(a) of Title VII.

At the outset it's important to note that the Government's position here has not been a model of consistency, indeed has been ever-changing. When Congress considered the PDA, Drew Days, then Assistant Attorney General for Civil Rights, and the Deputy General Counsel of the EEOC testified in House hearings, pursuant to a question, that they did not believe that the PDA was intended to govern the question of

dependents or their coverage.

The EEOC, when it promulgated its very question and answers dealing with the issue of dependent coverage for male employees, stated that the issue was not resolved by the PDA, but rather had to be resolved under existing Title VII principles.

We contend, as submitted in our briefs, that both the language of the statute and its legislative history show that the PDA itself does not govern this issue, and that the PDA itself does not make this Shipyard's insurance plan unlawful on its face.

In amending Title VII with respect to the PDA, Congress did not add a new substantive provision or make it a new separate act, but rather chose to amend the definitional section, and added as a definition under Section 701, 701(k), the first clause of which reads "that the terms because of sex or on the basis of sex include, but are not limited to, because of on the basis of pregnancy, childbirth or related medical conditions."

Except for the Fourth Circuit in the Instant case, all other courts which have construed this language have interpreted this provision to be simply definitional, and that it must be read into the substantive provisions of Title VII. Indeed, Drew Days in the same testimony that he gave to the House as

Assistant Attorney General in support of the PDA noted that in fact on pages 171 and I believe 172 of the House hearings that in fact what Congress was doing with those terms was putting them into the substantive provisions of Title VII.

If Congress had felt otherwise, it is curious why Congress would have put the terms "because of sex or on the basis of sex" in quotation marks, since those terms, while not the specific language, but the terms "because of" and "on the basis of" are found throughout Section 703 of Title VII, which are the very sections requiring employers, labor organizations, other individuals to take certain affirmative steps with respect to equal opportunity.

QUESTION: Mr. Kramer --

MR. KRAMER: Yes, Justice O'Connor.

QUESTION: -- On your argument you're asking us to -- to look back at the provisions of Title VII, basically, to see the answer to this inquiry. And let me ask you whether you think it would be a violation of Title VII for an employer to furnish medical coverage for wives of employees but not for husbands.

MR. KRAMER: Well, I think that would be --

QUESTION: Is that a Title VII violation?

MR. KRAMER: I think that's a Title VII sex

discrimination claim, Your Honor. And I think clearly there are cases -- in fact, cases prior to Gilbert -- dealing with spousal benefits where --

QUESTION: Well, if that's so, then how does this case differ? I mean you can forget the pregnancy problem and just tell me how this differs from that situation.

MR. KRAMER: Because the Government says that on its face, Your Honor, in this case we are required to provide, even where we provide spousal benefits to the spouses of males -- males and females, that we have an additional affirmative obligation. If we provide those benefits, we must also provide for hospitalization benefits for pregnancy.

As in this case, hospitalization benefits happen to be provided to a substantial degree. The Government says that degree isn't enough because the PDA requires you to cover it fully. Our position is that doesn't violate Title VII. The employees' compensation is the same in this case. There is no showing in this record that a male employee is receiving less compensation than his female counterpart.

Now, the Government's position is not the one you articulated, Justice O'Connor. The Government's position is not having to do with providing one sex or

the other no benefits or some benefit. The Government's position is if you provide equal benefits, as we contend are provided with respect to pregnancy, you have to provide additional coverage, additional risk coverage. And I think that's -- but we would believe that you look to Title VII. We're not contending this isn't a Title VII case. We're simply saying it's not governed by the PDA.

In fact, interestingly enough, Your Honor, if you take a look at the second clause of the PDA, which we believe amplifies congressional intent, it also to some degree answers your question. That clause says, "Women affected by pregnancy shall be treated the same for fringe benefit purposes or employment-related purposes, including the receipt of fringe benefits, as other persons not so affected but similar in their ability and inability to work."

The Government would have us believe that for the first time Congress has made an express mandate in Title VII that the term "other persons" and "women affected" are not terms limited to employees or applicants to employment. For the first time Congress, according to the Government, has revolutionized Title VII by directly affecting spousal behavior or employer obligations with respect to spouses and dependents.

We contend, Your Honor, that the PDA cannot be read that way; that the PDA in terms of a logical document within Title VII itself and its legislative history cannot support that.

Now, what is remaining, however, is the question of -- and by the way, it's cited in both briefs; they're replete with references to the legislative history. And I would just note when deciding Gilbert, the Court noted that the legislative history with respect to the sex discrimination ban original in Title VII was relatively sparse. I would contend with all the documents that are cited in the brief, the legislative history with respect to the PDA was anything but sparse. And that in fact Congress clearly evidenced its concern that this Court's decision in Gilbert operated as a direct barrier to women workers in the work force.

And the second clause was put in, I believe, and if one reads the legislative history by Congress, for the fact that Gilbert was more than one holding. Gilbert did not just go off on gender. Gilbert also went off on the question of whether or not there was discriminatory effects, whether the given health insurance plan in that case actually provided more or less benefits.

The evidence as found in the record in that case was that women were receiving -- that is, the case of Gilbert -- that women were receiving more benefits.

Well, interestingly enough, the second clause says whether or not the value is equal, Mr. Employer, you have a comprehensive program, you have to provide it. I would contend that the similarity between a female spouse of a male employee and the working woman that Congress was concerned about when it passed the PDA are entirely dissimilar, and the individuals are not only similarly situated, but the individuals and the policy considerations with respect to them are quite varied and distinct.

The hearings on the PDA in fact emphasized this fact -- the cost added -- that is now relied upon by the Government so extensively in its brief. It is interesting to me that the Government in its brief cites the Senate report indicating -- and this is at pages 32 and 33 of the Government's brief, Note 32 -- indicating support for the proposition that Congress in considering the cost of the PDA obviously considered the cost of both dependents as well as employees. And it cites the fact that the Senate report in a footnote noted that it found certain plans to be perfectly legal and other plans to be discriminatory. And it said in their brief

that those plans encompass both employees, dependents and spouses.

The Government, however, forgot to add the following words that fit in that footnote: "What percentage of women employees are covered by such discriminatory plans cannot be calculated." The focus of Congress when it came to cost, when it came to concern as to why there was a need for the PDA, was not male employees.

The Senate report expressly noted that the issue of dependent coverage of male employees would have to be decided not on the basis of the PDA but on existing Title VII principles -- a position earlier adopted by the EEOC but subsequently changed during the course of this and other litigation.

Now the -- and one other point I would make. One significant colloquy during the Senate debates occurred between Senators Hatch and Senator Williams. Senator Williams, of course, was the chairman of the committee having primary responsibility for the bill. Senator Williams was probably the primary sponsor and member of the Senate's conference committee team.

Senator Williams was asked directly by Senator Hatch whether if the terms "women affected by pregnancy" only refers to employees and no -- or women employees

and no one else. Senator Williams said "Exactly."

QUESTION: Does that mean that job applicants are not covered?

MR. KRAMER: Under that reading it would be, Your Honor.

QUESTION: Is that your -- is that your reading?

MR. KRAMER: It's not our position, no. Our position was that perhaps the term "other person" -- excuse me -- could applicants for employment within the meaning of 703(a)(2).

QUESTION: I thought your emphatic reliance on this meant women employees only and not applicants.

MR. KRAMER: Well, our emphatic reliance is because I think it's a pretty direct quote on the issue. I think with respect to applicants, whether Senator Hatch considered them to be having a nexus in the employment process or not, I'm not sure. But it seems to me clearly the first clause governs applicants, because the first clause directly goes into 703(a)(2).

703(a)(2) by its very terms speaks not just with respect to employees but of applicants for employment. So regardless of whether or not the mandate -- and by the way, it is possible, Your Honor, that the second clause does not in fact cover applicants, since

applicants would probably never enjoy a disability or fringe benefit until they became an employee.

So I think Senator Williams might have given the exact answer with respect to that clause, since that clause is specifically tied to fringe benefits, something that would normally not be enjoyed by an applicant.

I think then the critical question for the Court is what principles should the Court apply and what are the principles if the PDA doesn't govern, because we have a Title VII case. We have a case where Congress has expressly rejected, at least in part, the notion that pregnancy should be unprotected with respect to Title VII. So the question is what remains, and how do we fashion in this case a remedy.

Well, first of all, I think it's important to recognize that this Court has never held that pregnancy classifications are without protection. What this Court has held in cases such as Satty, and in Gilbert, is that pregnancy classifications on its face is not per se discriminatory. In Gilbert there were at least two concurring Justices who noted, in fact, that their concurrences were on the basis that it was not a per se violation and that therefore the Government had the burden, or in that case private plaintiffs, of proof.

Now, the Government here, interestingly enough, in its complaint alleges not a violation of 701(k), but rather alleges a violation of 703(a) of Title VII, and most specifically the compensation provisions of 703(a)(1), and goes on to allege intentional discrimination, of which there is absolutely no proof in this record.

So what do we have from the principles of this Court that can be applied to resolve this case? First, this Court has recognized, as I said before, that the issue was not simply whether pregnancy is made a classifying factor, but whether discrimination has occurred.

The Court has never held that a limitation or exclusion of pregnancy itself constitutes a per se violation of the act. As shown in such cases as Gilbert, Satty and Manhart, there is a need for a plaintiff to show that there is in fact a difference in compensation.

QUESTION: Mr. Kramer, may I interrupt you with one question?

MR. KRAMER: Yes, Justice Stevens.

QUESTION: In view of the legislative history of the Pregnancy Disability Act, to what extent is it proper -- and I'm not sure one way or another on this --

but to what extent do you think it's proper to rely on the Gilbert case as authority, because they expressly said they thought Gilbert had misread the statute.

MR. KRAMER: To me, Your Honor, I think it's proper to read Gilbert from the standpoint of saying that there is still a burden -- that pregnancy per se with respect to dependents we're talking about, is not a per se classification, and that there must be a showing that in fact discrimination occurred. And we put an example -- for an example, because I think this ties in to how the Court evolved from Gilbert; it went from Gilbert to Satty -- where, for example, Justice Powell in his concurring opinion in a footnote noted he thought Gilbert dealt with the question of equality of compensation.

Manhart related the fact that in Gilbert there was no showing that the plan was worth more to men than to women. And to me I think that portion of Gilbert still stands.

QUESTION: Well, to the extent that there's a conflict between Justice Brennan's opinion and Justice Rehnquist's in Gilbert, which should we follow in this case?

MR. KRAMER: Well, I would say Justice Rehnquist, because it seems to me the portions of

Justice Brennan's opinion which were followed, just as your dissent in Gilbert was followed, was followed for the policy reason that working women were the ones being disadvantaged.

I'm not sure what the result would have been, and I certainly would be the last person to guess, if it was a male employee who was contending that his spouse was being discriminated when Gilbert came up.

The fact of the matter is I think the policy considerations are entirely different. You noted in your dissent in Gilbert that the risk -- it was an equal risk coverage because the woman would still be absent from work with no income.

Those types of considerations have no application, from my perspective, to the spouse of a male.

QUESTION: Well -- well, I understand -- I understand -- I understand the argument, but it presents a very interesting problem of statutory interpretation where you have Congress -- we have a decided case interpreting Title VII, and Congress said they disagreed with it. And I don't know -- I mean I -- I -- it's just a very difficult --

MR. KRAMER: I think, Your Honor --

QUESTION: -- And unusual problem.

MR. KRAMER: Yes, it is. But I think, Your Honor, there's one part of the legislative history you can look at. Congress felt that portions of the Satty decision were in fact consistent with what they were doing. And I think Satty, as I said, evolves better framework.

What I'm contending here is the Government in this case alleged intentional discrimination. They didn't allege the PDA per se. They alleged under Section 703(a), intentional discrimination, of which, Your Honor, there is no proof.

The Shipyard's insurance program covers a number of risks. It also includes a number of risks. As in the case of pregnancy benefit, it limits certain coverage of certain risks.

As recognized in Manhart, when insurance risks are grouped, the better risk always subsidizes the poorer ones, the healthy versus the unhealthy, the single versus the married, the individual with smaller family size will subsidize the individuals with larger family size.

The monetary value of this plan is perceived by the Government and the court below to essentially be the fact that Mr. McNulty had to go into his pocket, pull out some money because of the fact that this plan

only covered pregnancy for $500 for hospital expenses, but as shown in the appendix, certain individuals received far more because the plan is more generous than just $500, and that a female employee with a spouse would never have to do it.

Well, it's true. A female employee with a spouse probably never has to face the risk of pregnancy for that spouse. That is clearly true. But the plan being offered here covers risk identically. The same plan that Mr. McNulty has is the same one given to a female employee. The risk coverage and the benefit coverage of these plans are equal except for one fact: when it comes to the spousal component of this plan, male employees with pregnant spouses are covered for an additional risk.

The $1,000 that someone alleges in the appendix he already received for pregnancy benefits is a $1,000 that some other group of employee is subsidizing. Pregnancy in this case is an additional covered risk under this plan.

Now, does that mean that Mr. McNulty got more compensation? No. The value of the plan is as to the risks that are covered. They will fall regardless of sex. Some will be sex-related -- a vasectomy in the case of a male -- but there's probably a comparable

situation with respect to a female. Those things will fall not because of sex per se, but because of factors of illness, age and health.

Unlike the Fourteenth Amendment cases so heavily relied upon by at least the AFL-CIO in its amicus brief and the Government to some degree in its own brief, those cases, to us, have no application.

First of all, Frontiero was expressly distinguished by this Court in Geduldig v. Aiello, as well as Reed v. Reed. But more importantly, first of all, there was either a total denial of benefits in those cases, such as the hypothetical Justice O'Connor gave, or the individuals were -- not only a total denial, but the individuals were similarly situated.

Here, I would strongly contend that the individual employee and the individual spouse, female employee, female spouse, are not simililarly situated.

The EEOC's position with respect to this case cannot be given any weight. First of all, it's been an ever-changing position. They now look to, in the appendix, letters sent of Senator Javits to support what might be existing Title VII principles. This can only be analogous to private correspondence. There is no reference by Senator Javits on the floor debates of which he participated, nor is there any reference by

Senator Javits or any other member of the committee in the committee report to this correspondence.

And interestingly enough, the Court might pay attention to the first letter that was sent to Senator Javits, since in that letter the Commission said under their view Title VII would be satisfied if an employer simply provided the female employee the same medical cost benefit as the male spouse -- a position which Congress did not adopt, but equally a position that the Shipyard was in prior to passage of the PDA.

The policies behind Title VII are not being vindicated by the Government's position in this case. Since the PDA requires or gives an employer an option to reduce benefits to come into compliance, the employer, assuming the Court found the violation, could then choose to reduce benefits which go to all employees regardless of sex, and would take away benefits when we're only talking about in this case an additional risk, a risk that is already being covered.

I'll reserve the rest of my time.

Thank you very much.

CHIEF JUSTICE BURGER: Mrs. Shapiro.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO, ESQ.,
ON BEHALF OF THE RESPONDENT

MRS. SHAPIRO: Mr. Chief Justice, and may it

please the Court:

First, I want to summarize briefly our theory of the case which is based on our reading of the Pregnancy Discrimination Act as establishing that discrimination based on pregnancy is discrimination based on sex. Having done that, I will then discuss why we believe that is the correct way to read the statute.

Title VII requires that employees must be paid without discrimination on the basis of sex. Fringe benefits are part of that pay, including, of course, insurance plans that reimburse employees for their family medical expenses.

An employer cannot offer its male employees less health insurance than its female employees. Therefore, an insurance plan that provides less generous coverage to male employees for their families than is provided to female employees for their families violates Title VII, because on its face it discriminates between male and female employees on the basis of sex. That principle, we submit, is the one that was established in cases like Frontiero, Wiesenfeld and Wengler.

For example --

QUESTION: So even without the Pregnancy Disability Act you take the position that it's covered under Title VII?

MRS. SHAPIRO: Well, only if the discrimination based on sex is discrimination based on -- I mean discrimination based on pregnancy is discrimination based on sex.

For example, a plan that covers 25 days of hospitalization for husbands but only 20 days for wives would violate Title VII, because male employees, the only ones who have wives, would get smaller fringe benefits than female employees. But a plan that covered 25 days for sons and 20 days for daughters wouldn't violate Title VII, because both male and female employees may have daughters, so that plan would affect male and female employees equally.

A plan that singles out spousal pregnancies and provides less generous coverage for them than for other dependent medical expenses has precisely the same effect as an express limitation on benefits for wives and violates Title VII for precisely the same reason if distinctions based on pregnancy are distinctions based on sex. We submit that that's what the PDA was enacted to establish.

The plain language of the statute supports that view. The Pregnancy Discrimination Act amended the general definition section of Title VII, providing expressly that discriminations because of pregnancy are

discriminations because of sex.

Nothing in the language of the statute suggests that general principle applies only to female employees. Indeed, in explaining the effect of the new definition, the statute says that women affected by pregnancy, not female employees affected by pregnancy, shall be treated the same for all employment-related purposes, including fringe benefits, as other persons, not employees, not so affected.

If Congress had intended to limit the new definition to women employees, it surely would not have referred to -- it would have referred to employees instead of to women and persons.

Petitioner argues that "because of pregnancy" is simply to be read into the substantive provisions that prohibit discrimination on the basis of such individual sex, but that substitution argument is unpersuasive for several reasons.

First, it turns Title VII into a statute that requires special treatment for women workers, although the fundamental purpose of Title VII has always been to provide for the equality of treatment of all workers. And it's particularly significant that in enacting the Pregnancy Discrimination Act, Congress emphasized that it was not intended to change the basic principles of

Title VII law regarding sex discrimination, and also that it was not intended to require special benefits for women workers.

Second, petitioner's argument assumes that Congress meant to say that the denial of benefits for pregnancies of female workers was sex-based, while the denial of benefits for the pregnancies of spouses was gender neutral. And that's not the kind of common sense view of pregnancy that Congress said that it was enacting in the Pregnancy Discrimination Act.

Third, petitioner is asking for a narrowly literal reading of the first clause of the Pregnancy Discrimination Act, but such a narrow literal reading makes no sense, because, in fact, the substantive provisions of Title VII nowhere contain the precise phrase "because of sex" or "on the basis of sex." So there -- if you read it as literally as he wishes us to, there is nowhere to substitute the new language.

Finally, even if you can read an ellipsis into the statute, the substitution approach would mean that only the federal government would be precluded from limiting spousal pregnancy benefits, because only Section 717 of Title VII, which applies to the federal government, prohibits discrimination on the basis of sex rather than on the basis of such individual's sex.

Turning to the second clause, petitioner has never attempted to explain the reference to women and persons rather than employees. Instead, he focuses on the reference to "similar in their ability or inability to work" and argues that that phrase must be read as a restriction of the Pregnancy Discrimination Act to female employees, as if it read "similar in their ability or inability to work for the particular employer involved." Of course, it doesn't say that.

We submit that in context that phrase must be read as a functional description of the way pregnancy is to be treated, like any other condition that affects a person's ability to do whatever work she normally performs, whether that's housework or any other work. Indeed, the legislative history shows that a major aim of the Pregnancy Discrimination Act is to require that pregnancy be treated like any other functionally comparable disabling condition. It may not be singled out for special limitations.

I'd like to turn now to the legislative history, particularly the discussion in the Senate report of the effect of the Pregnancy Discrimination Act's amendment of Title VII on medical benefits for dependents.

That discussion recognizes that at some future

date the kind of question now involved in this case may arise; that is, whether an employer health insurance plan that covers dependents of employees may limit pregnancy coverage for those dependents.

Instead of providing a direct answer to that question, the report says that it is to be decided by applying existing Title VII principles. We submit that that means Title VII principles as clarified by the Pregnancy Discrimination Act.

You don't have to look very far for a concise summary of some of those principles.

QUESTION: If that was the -- if that was -- excuse me for interrupting you. If that was the -- if that was their purpose, don't you think they could have said that a little more plainly, if they thought that the new statute was taking care of the problem?

MRS. SHAPIRO: Well, they -- they -- I certainly don't contend they spoke with absolute clarity. But I think that in -- you have to -- in looking at the legislative history in the context in which they used those words, I think that you -- the best reading of them is what they were saying was that they didn't know -- they didn't think that this problem existed at the time that the Pregnancy Discrimination Act was enacted -- and, in fact, it probably didn't

exist -- that this was a problem to be faced down the road, and that when the courts had to face it, they were to apply existing Title VII principles, existing when they faced it.

QUESTION: Rather than existing today when we're speaking.

MRS. SHAPIRO: That's right.

I think it's also significant, though, that even if you say it meant existing at the day they were speaking, what they thought were existing Title VII principles, in fact, in that -- that -- the discussion of the medical benefits is at pages 5 -- page 5 of the legislative history, 5 and 6. But then at page 3 of the -- I mean of the Senate report -- on page 3 of the Senate report, just a few pages before, there's a section that is entitled "The Basic Principles." And that section starts out, it says, "This bill is intended to make plain that under Title VII of the Civil Rights Act of 1964 discrimination based on pregnancy, childbirth and related medical conditions is discrimination based on sex. Thus, the bill defines 'sex discrimination' as proscribed in the existing statute to include those physiological occurrences peculiar to women. It does not change the application of Title VII to sex discrimination in any other way.

"By defininging sex discrimination to include discrimination against pregnant women, the bill rejects the view that employors may treat pregnancy and its incidence as sui generis without regard to the functional -- functional comparability to other conditions."

Now, if they were saying apply Gilbert, Gilbert says pregnancy is sui generis. Congress didn't -- was saying in the -- precisely in the Pregnancy Discrimination Act don't treat pregnancy as sui generis.

So I think that it's fairly clear from the entire legislative history that what the PDA was intended to do was to establish at least two principles, and these principles the Congress indeed had thought were always part of Title VII: first, that pregnancy discrimination is sex discrimination; and second, that pregnancy may not be treated as sui generis.

Those principles, together with the fundamental pre-existing Title VII principles not affected by the Pregnancy Discrimination Act, that neither sex is to be favored over the other and that health insurance benefits for dependents are compensation for the employee, are the principles to be applied here.

There's no basis in the legislative history

for petitioner's claim that the reference to existing Title VII principles was an invitation to the courts to apply the rationale of Gilbert to spousal pregnancy benefits.

The legislative history is in fact remarkably consistent in rejecting the rationale of Gilbert. The reason for the enactment of the Pregnancy Discrimination was to adopt the rationale of the dissenters in Gilbert, and that pregnancy discrimination is, on its face, sex discrimination for all Title VII purposes.

Petitioner has claimed that the EEOC and the Government have been inconsistent in their interpretations of the effect of Title VII on -- and the Pregnancy Discrimination Act on spousal pregnancies. In fact, the EEOC has been inconsistent throughout. I think petitioner's problem probably is that they see the -- the Pregnancy Discrimination Act as somehow in conflict with Title VII, whereas in fact it is an amendment of Title VII. Congress consistently said that it was -- that Title VII -- that it was to be interpreted harmoniously and that they were not intending to put in through the Pregnancy Discrimination Act anything that would require special treatment for women employees.

The discussion of why the petitioner believes

that compensation is the same is also answered by the legislative history, the Senate report. In talking about medical benefits in terms of the applicability to female employees, the Senate report says, "Discrimination against female employees in medical plans by excluding pregnancy coverage has, of course, precisely the same impact as discrimination in disability plans. A woman who is obliged to apply her own income to doctor and hospital bills although male employees are not is obviously earning less for the same work."

Our submission is simply that the same thing applies to male employees. So that as far as the equality of costs and the -- argument that -- and, again, petitioner is simply asking this Court to apply Gilbert even though, as we submit, the Pregnancy Discrimination Act has said that the principles to be applied are those of the dissenters in Gilbert rather than of Gilbert -- the Gilbert majority.

Finally, the petitioner claims that the EEOC didn't -- did not -- well, that the EEOC alleged intentional discrimination. I think that is simply incorrect. The complaint on the Joint Appendix at page 30 is -- and the paragraph 11 states simply that the petitioner has discriminated and is discriminating

against its male employees. It doesn't say anything about intentional discrimination. And, clearly, our submission is that the discrimination is facial discrimination.

The -- finally, the -- the Javits correspondence to which petitioner refers we think is quite significant precisely because the -- this was the statement by the officials who were responsible for interpreting the PDA as in the Title VII which it amended, stating what they thought was the correct interpretation of the statute.

And as petitioner himself points out, when the Senate report disagreed with the interpretation that was given, it said so. It didn't say that it disagreed with the interpretation that was presented there, which is consistent with the one we're arguing here. And, therefore, we think it's a fair inference that they agreed with that interpretation.

That's -- unless there are further questions.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kramer?

ORAL ARGUMENT OF ANDREW M. KRAMER, ESQ.,

ON BEHALF OF THE RESPONDENT -- REBUTTAL

MR. KRAMER: Just a few points, Your Honor.

First of all, I'd just point out on page 29 of

the Appendix the following paragraph is in a complaint since at least July 2nd, '65 and continuing up to the present time, "Defendant Newport News Shipbuilding and Drydock has intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII."

QUESTION: Mr. Kramer, this argument puzzles me. If this is discrimination, it's clearly intentional. The question is whether it's discrimination or not.

MR. KRAMER: Well, first of all --

QUESTION: Because they know -- you know what -- your client knows what it's doing.

MR. KRAMER: Our client knows what it's doing, but as said in cases like Pullman v. Swint, there has to be motive or proof. What our client did was act in compliance with what it thought was a congressional mandate under the Pregnancy Discrimination Act. There is no showing that the original --

QUESTION: Well, the statute wouldn't have prohibited you from -- from changing both sides of the plan.

MR. KRAMER: No. Absolutely not. There's --

QUESTION: And you know exactly what you did. Either it's legal or it isn't. I don't -- I just don't understand either side's concern about the intentional

point.

MR. KRAMER: Going to the question, though, you raised both of myself and counsel for the Government about essentially the impact of Gilbert, I would just like to leave one point.

The second clause of the PDA clearly mandated that employer fringe benefit programs put pregnancy benefits, whether they're equal of value or not equal of value, treat pregnancy the same as you would treat any other fringe benefit. That removed any of the value issues or valuation questions with respect to employees that the Court dealt with in Gilbert.

The Government now says we don't address the terms "other persons." I would point out in our brief we note that the Senate committee report, the House committee report, and the Conference committee report when using the terms "other persons" actually don't use those terms; they use the term "employees."

QUESTION: Well, I take it your argument is that -- that the -- discrimination has to be against an employee on account of his or her sex.

MR. KRAMER: That's right, Your Honor.

QUESTION: Not on the sex of somebody who -- for whom he or she is responsible.

MR. KRAMER: That's right. And there also has

to be proof of such discrimination in terms of one of the prohibitory effects of Title VII -- in this case the Government alleges compensation discrimination -- on the basis of that person's sex.

QUESTION: But even if this isn't discrimination against the employee based on his or her sex, based on his sex, it is a discrimination based on sex.

MR. KRAMER: Not to me, Your Honor, and I guess that's --

QUESTION: Well --

MR. KRAMER: -- That's -- that's our problem.

QUESTION: -- I know, but that's a -- that's -- that would be still another argument.

MR. KRAMER: Yes. The question you get to there is is whether or not the pregnancy classification itself is a sex-based classification, which means you're discriminating, whether you discriminate against the spouse or the employee.

Our position here as to why it is not sex discrimination within the meaning of Title VII goes a little further, because it's not just the question -- position of the Government here that there is a classification of pregnancy which they contend is sex discrimination. It's that that classification has

resulted in less compensation.

Now, I would say and submit to this Court that the plan that is before this Court results not in less compensation to the male employee, including the male employee with a spouse, because the same risks are covered for under the health insurance package. The Government is saying the problem is that you don't go far enough in covering that risk.

Now, to me I don't think there's any support under Title VII's sex discrimination law with respect to it. This is not a case of less generous benefits as alleged by Government counsel. This is a question where the plan covers all risk equally whether you have a pregnant spouse, whether you don't have a pregnant spouse, whether you're male, you're female, you're black or white.

The question is is whether Congress now by the PDA has changed the method or the methodology of the Court to analyze compensation so as to automatically include pregnancy while it might not otherwise include anything else under the ambit of sex discrimination. And I think that's the heart of the Government's position.

Thank --

QUESTION: Well, certainly the language in the

Senate report that says it's intended to treat pregnancy, discrimination on account of pregnancy like any other discrimination on account of sex goes against you.

MR. KRAMER: It goes against us if it was looked in isolation, I would submit, Justice O'Connor, to the purposes behind that particular statute. And one has to query whether or not the female spouse is so similarly situated as the female employee for purpose of an insurance plan like this which already provides an additional risk coverage for pregnancy of that spouse to that employee, as to whether or not Congress' general observation would apply equally as well. And, in fact, if Congress had so intended, it would have been easy for Congress to put in the second clause not just women affected by pregnancy, but men and women affected by pregnancy. And that was essentially suggested by the Departments of Justice, the EEOC, and the Department of Labor in that first letter to Senator Javits. Congress chose not to do so.

I would submit that it has to be looked at within the entire ambit of what Congress was grappling with, but I still say the Government bears the burden. It is not a per se case. They have the burden for getting intent of at least showing the fact that the

compensation plan here was worth less to the male.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

We will hear arguments next in United States against Ptasynski.

(Whereupon, at 11:39 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
Newport News Shipbuilding and Dry Dock Company, Petitioner
v. Equal Employment Opportunity Commission -- No. 82-411

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BY _____
(REPORTER)