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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-129

TITLE LINDA WIMBERLY, Petitioner V. LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI, ET AL.

PLACE Washington, D. C.

DATE December 9, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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LINDA WIMBERLY, :

Petitioner, : No. 85-129

v. :

LABOR AND INDUSTRIAL RELATIONS :

COMMISSION OF MISSOURI, ET AL. :

- :

Washington, D.C.

Tuesday, December 9, 1986

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

APPEARANCES:

JULIE S. LEVIN, ESQ., Kansas City, Missouri; on behalf of the petitioner.

MICHAEL L. BOICOURT, ESQ., Assistant Attorney General of Missouri; on behalf of the respondents.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting respondents.

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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

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: The first case for argument this morning is Number 85-129, Linda Wimberly, Petitioner, versus Labor and Industrial Relations Commission of Missouri.

Ms. Levin, you may proceed whenever you are ready.

ORAL ARGUMENT OF JULIE S. LEVIN, ESQ.

ON BEHALF OF THE PETITIONER

MS. LEVIN: Mr. Chief Justice, and may it please the Court:

The issue in this case involves the question of whether Missouri is violating a federal statute, 26 United States Code 3304(a)(12) by denying unemployment compensation benefits to women like Mrs. Wimberly who have left their jobs because of their pregnancy and are then denied reinstatement in those jobs when they are able to return to work. The statute provides in part that no person shall be denied compensation under state law, solely on the basis of pregnancy or termination of pregnancy.

On August 23rd, 1980, Mrs. Wimberly, who was then seven months pregnant, went to her employer of three years, J. C. Penney Company, and asked her

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supervisor if she could have a maternity leave of absence because she was physically unable to continue working.

At that time, her supervisor told her she could have a leave of absence but that the policy of the company was that it did not guarantee the reinstatement of an employee in the event that no positions were available when the employee was ready to return to work.

Mrs. Wimberly took her leave of absence and on November 5th, 1980, she had her baby daughter. Three and a half weeks later she called her supervisor and told her that she was ready to return to work. At that time she was told that, "There are no jobs available and you'll have to quit."

Mrs. Wimberly then applied for unemployment compensation benefits with the State of Missouri and a deputy for the Division of Employment Security held that she was disqualified because she quit because of pregnancy, and under Missouri law that's deemed a voluntary quit without good cause attributable to the work or the employer.

After administrative appeals and lower court decisions, the Missouri Supreme Court held that the administrative decision was correct and that Section 3304(a)(12) is merely an antidiscrimination statute that

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requires pregnancy to be treated the same as disability, and the pregnancy cannot be disadvantaged.

But, the Missouri Supreme Court misinterpreted the federal statute. It is not just an antidiscrimination statute, but rather it is a broad, comprehensive prohibition of pregnancy related disqualifications of eligible women.

The language and the legislative history and the whole purpose behind this statute establishes that this was what Congress intended. The purpose of the statute was to provide economic security for eligible women who were forced to leave their jobs because of pregnancy and childbirth.

Congress was aware of the prevalence of women in the work force. There are 21 million women of childbearing age in the work force. Eighty-five percent of these women will have at least one child during their working lives.

Congress was aware of the tremendous hardship that these women and their families suffer when the women are denied reinstatement in their jobs after childbirth and also denied unemployment compensation. Without a source of income to aid and support themselves and their families while they are actively seeking re-employment, and also to provide necessary expenses

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such as child care cost and transportation to facilitate their re-entry into the work force, women are at a tremendous dsadvantage in competing in the employment process.

Congress recognized this problem and in the interest of prcmoting childbirth, protecting the economic security of families, and also preventing family disintegration due to unemployment and lack cf income, Congress enacted the statute. The statute is not an antidiscrimination statute.

QUESTION: May I ask, Ms. Levin --

MS. LEVIN: Yes.

QUESTION: I gather the State Supreme Court said that this disability was treated by Penney no differently than it treated any other disability that the woman suffered?

MS. LEVIN: There is no ruling on that, Your Honor. J.C. Penney was named as a party merely because it's required by statute in a Petition for Review in an administrative case. But there was no decision as to whether or not J.C. Penney had entertained discrimination in its policies.

QUESTION: Well, what was the State Court's rationale, then?

MS. LEVIN: The State Court's rationale was

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that the voluntary quit statute in Missouri is a neutral statute and therefore they can use that statute to disqualify benefits to Mrs. Wimberly and to women who leave their job because of pregnancy, as long as they do the same treatment to people who leave their job because of disability.

QUESTION: And as far as this case was concerned the employer did treat any disability the same as it treated the pregnancy?

MS. LEVIN: That's not a matter of record, Your Honor.

QUESTION: We don't know otherwise, though. It was not alleged -- I mean, that was not the basis of the claim?

MS. LEVIN: That's correct, Your Honor.

QUESTION: And really, your challenge here is to the state's unemployment system, and is not to what J.C. Penney did?

MS. LEVIN: That is correct, Your Honor. We have no claim against J.C. Penney.

QUESTION: And do you dispute the -- is it a fact that the Missouri Unemployment Compensation system is administered in a way so as to treat pregnancy as other similar disabilities are treated?

MS. LEVIN: Do we dispute that that's -- do we

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dispute the fact, Your Honor?

QUESTION: Well, is it a fact, because I'm not sure it is.

MS. LEVIN: It is a fact, Your Honor. We don't dispute that they treat pregnancy and disability the same. Both -- if you leave your job because of pregnancy or disability, you will be denied unemployment compensation because it will be deemed a voluntary quit without good cause attributable to the work or the employer.

And, there is no dispute on that, Your Honor. But the language of the statute is not --

QUESTION: Whatever might be the state rule, the federal law treats pregnancy specially and differently, is that it?

MS. LEVIN: That's correct, Your Honor. In this statute Congress addressed pregnancy. It did not address disability. And the language of the statute is not that of an antidiscrimination statute.

Typically, when Congress intends to enact an anti-discrimination statute, it will use the word "discriminate" or a derivative of that term to explicitly state its prohibition. Another method that Congress has used to state an antidiscrimination statute can be found in the Pregnancy Discrimination Act where a

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comparison is made of two groups of people and there is a prohibition that these people be treated dissimilarly.

QUESTION: Ms. Levin, suppose Missouri has a provision, as I understand many states do, that you are not entitled to unemployment compensation unless you are available for work. Now, that would mean that an individual who is incapacitated for some reason and cannot work would not be entitled to unemployment compensation?

MS. LEVIN: That's correct, Your Honor.

QUESTION: Is it your assertion here that by reason of the federal statute, Missouri nonetheless as to pay unemployment compensation to a woman who was unavailable to work because she is in the last few weeks of her pregnancy?

MS. LEVIN: No, Your Honor, on the contrary. Mrs. Wimberly is asserting that she was only entitled to benefits when she requested reinstatement and was able to work and available for work.

QUESTION: Well, how do you draw that line? I mean, it seems to me that you're treating pregnancy like other disabilities for the provision that I just described, and they are treating pregnancy like other disabilities for the provision that you are challenging here.

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Where in the federal statute does it say, only for reinstatement shall pregnancy mandatorily be treated differently from other disabilities?

MS. LEVIN: The federal statute, Your Honor, only addresses pregnancy disqualification. It does not address eligibility. And in the absence of any statement concerning eligibility, the state law would apply.

And as we previously noted in Missouri, in order to be eligible you must be able to work and available for work. Additionally, Section --

QUESTION: I don't understand what you're saying. The federal statute says no person shall be denied compensation, is what it says.

MS. LEVIN: That's correct, Your Honor. In the legislative history, additionally, the Congress was very clear that they only wanted eligible women to be able to get benefits, that if a woman was unable to work or unavailable for work, she should not be able to get benefits.

QUESTION: Well, what is -- I mean, "eligible" is a very broad word. You are ineligible because you are not available for work. You are also ineligible because you voluntarily quit your prior job.

MS. LEVIN: No, Your Honor, you're not --

you're disqualified if you voluntarily quit your prior job. In the unemployment compensation system it's a three-tiered test.

The first question is whether you are an insured worker, you have sufficient wage credits and work credits. The second question is, are you eligible; in other words, are you able to work and available for work.

And then the third question, even if you are eligible, are you disqualified for a certain reason. You can be disqualified because you voluntarily quit your job without good cause connected to the employment. You can be disqualified for misconduct on the job.

So, there is a distinction there between eligibility and the respondents --

QUESTION: You would say, then, that if someone is fired because of misconduct on the job which for some reason a woman could attribute to the fact of her pregnancy, all right, or termination of pregnancy, that that misconduct would have to be excused?

MS. LEVIN: It's hard to attribute -- it's hard to imagine a situation where the misconduct would be attributed to the pregnancy. If a pregnant woman --

QUESTION: She claims some temporary mental

condition due to post-partum depression or to the pregnancy.

MS. LEVIN: And therefore engages in some misconduct on the job?

QUESTION: That's right.

MS. LEVIN: Typically, if someone is pregnant and she is fired for misconduct, it's not related at all to her pregnancy and she would not be qualified.

QUESTION: I understand, typically, but this woman alleges that that's the case, just as the woman in this case alleges that the reason she quit was because of her pregnancy.

MS. LEVIN: I think that if she could --

QUESTION: You would logically have to say she couldn't be fired, wouldn't you --

MS. LEVIN: I think if she could fully establish that the misconduct was directly attributable to her pregnancy, then she may be able to be qualified. I don't think it's that clear.

QUESTION: Why is it not clear? On the principle you're arguing, it has to be clear, doesn't it?

You're drawing the line between disqualification and ineligibility. This is a disqualification.

MS. LEVIN: That's correct, Your Honor, but

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the disqualification has to be as a result of her pregnancy. In other words, if she leaves her job because of pregnancy or if her unemployment as a result of her pregnancy and the misconduct situation -- if she can establish that her unemployment is a result of her pregnancy, then I think she would definitely be eligible and qualified for benefits.

QUESTION: Well, the language of the statute appears to speak in terms of the reasons that the state itself denies the unemployment compensation. It doesn't appear to relate to the reasons that went into the employee's decision to leave work voluntarily, does it?

MS. LEVIN: Yes, Your Honor. The language of the statute talks about the disqualification by the state of the employee, but in this situation Mrs. Wimberly left her job solely because of her pregnancy.

QUESTION: Well, solely on the basis is -- refers to the denial by the state of the benefits.

MS. LEVIN: Yes, Your Honor, but the state denied her benefits because they deemed her leaving because of pregnancy a voluntary quit.

QUESTION: Well, suppose she came in and applied for unemployment compensation benefits and the employee working for the state said, did you leave for reasons related to the job or your employer, and she

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says no, and that's all the state knows and they denied benefits.

Does that violate the statute?

MS. LEVIN: The state had no information that she left because of her pregnancy?

QUESTION: Yes.

MS. LEVIN: If the state has no information that she left because of her pregnancy, I don't think it would violate the statute.

QUESTION: Well, how can it change because of what the state knows? You have to look at the language of the statute, and it refers to the state denying benefits on the basis of pregnancy. And if they deny it because she left work voluntarily, how have they violated the statute?

MS. LEVIN: Well generally they're violating the statute by automatically presuming that when you leave your work because of pregnancy it's a voluntary quit that's not connected to the employment. And therefore, because they're making that determination, that they are deeming any leaving or absence of your job due to pregnancy as a voluntary quit without good cause attributable to the work, that then becomes the basis for the denial.

QUESTION: They are not deeming it that. It

is that. I mean, they didn't make that up. It is in fact, objectively, a voluntary quit for a reason that has nothing to do with the work, isn't it?

MS. LEVIN: That's correct, Your Honor, but it's also --

QUESTION: I mean, don't blame the state for putting it in that category. It is objectively in that category.

MS. LEVIN: It isn't a category, but Congress did not intend for states to use neutral statutes or, quote, "neutral" statutes to turn around and do the same prohibited practices that Congress was abolishing. In the legislative history it is clear that Congress intended to abolish pregnancy-related disqualifications that disqualify a woman because she left her job on account of pregnancy, or whose unemployment was a result of pregnancy.

QUESTION: But I thought you told Justice O'Connor that it would not violate the statute simply to dismiss somebody for a voluntary quit having nothing to do with the job, if that's all you know.

MS. LEVIN: If that's all you know, Your Honor.

QUESTION: And step two is that this is a voluntary quit unrelated to the job. Suppose the state has a reporting system that is set up in such a way that

all it ever knows from the employer, or from the applicant, is that the person left the job for a reason unrelated to the job. It doesn't have any box that says, you know, nature of reason unrelated to the job.

So long as the state doesn't acquire this knowledge that it's pregnancy, is it all right?

MS. LEVIN: Well, Your Honor, if they never acquire the knowledge. In other words, through the appeal procedure if the woman is then denied benefits and she requests an appeal of the determination and it comes out at the hearing that no, she didn't just leave her job, she left because of her pregnancy, then I think that the state when they disqualify her on the higher administrative level, then I think they are violating the statute.

But, if the information never comes out, then of course the state can't be responsible for something that they have no knowledge of and that's not been brought to their attention by the claimant.

The legislative history also establishes that this is not an antidiscrimination statute. The initial bill, prior to the enactment of the final language of the statute, was written in an antidiscrimination manner and had that bill been enacted, the Missouri Supreme Court would have been correct.

But that language was discarded. The language provided in part that determinations of voluntary terminations of employment shall not be made in a manner which discriminates on the basis of pregnancy. But, that language was totally discarded by Congress in preference for the broad, comprehensive language which it finally enacted.

QUESTION: So, it's not an antidiscrimination statute; it's a discrimination statute in the sense that it does single out pregnancy for special treatment?

MS. LEVIN: Well, Your Honor, it's not --

QUESTION: It does, doesn't it?

MS. LEVIN: It singles out --

QUESTION: In your view --

MS. LEVIN: It singles out pregnancy for special treatment.

QUESTION: For special treatment as compared with other -- as compared with other disabilities which cause a lady to leave work?

MS. LEVIN: That's right, Your Honor. Disability is not covered by the statute. But it's only preferential treatment or --

QUESTION: Suppose the state takes your view and says, yes, we understand the federal statute to command this, and then some other woman with a

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disability who leaves her work for a while and then is denied workers' compensation, unemployment compensation, says that the state is violating Title 7, or a man leaves his work on a disability, because you're treating -- because pregnancy is deemed to be discrimination based on sex, isn't it, in Title 7 now?

MS. LEVIN: Well, it is in Title 7, yes, Your Honor.

QUESTION: So, wouldn't this require the state to treat everybody else the same as they treat pregnant women?

MS. LEVIN: With the current -- with the federal statute at issue in this case requires states to treat everybody else -- is that --

QUESTION: Well, wouldn't Title 7 require it to extend its compensation law to everybody else with a disability?

MS. LEVIN: No, Your Honor, because unemployment compensation is not covered by Title 7. Title 7 and this statute --

QUESTION: Specifically excludes it, is that it?

MS. LEVIN: Well, it's not a specific exclusion, but case law has held that it is not covered by Title 7, and Title 7 has no applicability to

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3304(a)(12). They're totally different statutes with different purpcses and different intents.

Congress can legislate on behalf of pregnancy or against pregnancy. As this Court held in Geduldig, Congress or a state can legislate on behalf of pregnancy or against pregnancy for any legitimate basis, and because of this compelling prcblem that Congress was aware of, Congress chose to legislate on behalf of pregnancy and yes, maybe it would have been preferable to have legislation that covered disability and pregnancy also, but that was not addressed.

QUESTION: Your view, then, is that Title 7 would address J.C. Penney's practices, but it doesn't address the State of Missouri's administration of its unemployment compensation?

MS. LEVIN: That's correct, Your Honor. That's exactly correct.

The legislative history establishes that Congress intended that all pregnancy related disqualifications be abolished. In a House report it was stated that 19 states have special disqualification spertaining to pregnancy.

Several of these states have conclusive presumptions that a woman is unable to work or unavailable for work during certain stages of her

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pregnancy, such as the type that this Court held were unconstitutional in the Turner versus Emplcyment Security case. But the House report continued to say that the remainder of the states have disqualifications of a woman because she left her job on account of pregnancy or because her unemployment is a result of her pregnancy.

The Commission has suggested that Congress review the statutory provisions of these 19 states and determine that pregnancy and disability were being different -- were receiving different treatment, and therefore as a result of that Congress enacted the statute.

But, that's just not correct. We know that at least two states, Arkansas and Oregon, those states had policies similar to the policy that is at issue in this case, in that those states treated pregnancy and disability either the same as in the case of Oregon, or very similarly as in the case of Arkansas.

The legislative history says nothing about a comparison of pregnancy disqualifications and disability disqualifications. The only reference in the legislative history to ability has to do with eligibility determinations, the availability of someone for work, and the ability of someone to work.

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The purpose -- the language and the legislative history establish that Congress intended to prohibiot pregnancy related disqualifications of all otherwise eligible women.

If there are no further questions I would like to --

QUESTION: I have a question, if I may.

MS. LEVIN: Yes, sir.

QUESTION: Did I correctly understand you to say that if the bill in its earlier form, which included the second clause about determinations under any provision and so forth, if that bill had been enacted, that you would have -- your claim would fail?

MS. LEVIN: Yes, Your Honor. I think that they initially considered an antidiscrimination statute.

QUESTION: Well, if you concede that, it seems to me you're in trouble because the first clause of that bill is exactly the same as the bill that was enacted.

MS. LEVIN: No, it's not, Your Honor. The first clause says, "No state shall deny compensation solely on the basis of pregnancy."

The statute as enacted was, "No person shall be denied compensation solely on the basis of pregnancy or termination of pregnancy."

QUESTION: Do you think the addition of the

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words, "or termination of pregnancy" --

MS. LEVIN: I think that Congress considered --

QUESTION: To change it from a discrimination statute to a preferential statute?

MS. LEVIN: I believe that's what happened, Your Honor. Yes, I do.

QUESTION: I find that kind of hard to follow, frankly.

QUESTION: Before you step down, could you clarify why it is that you think the legislative history establishes a distinction that you've drawn between ineligibility and disqualification -- or even before that, a question.

Suppose a state says, no person is ineligible for workers' compensation or unemployment compensation who is pregnant. No pregnant person shall be eligible for unemployment compensation.

You say that the statute doesn't cover that?

MS. LEVIN: The statute covers it, Your Honor, but as a result of the Turner case it was a disqualification based on the ineligibility. In the legislative history, the House report that I previously referred to concerning the 19-state statutory provisions, that House report said that all of these disqualifications are inequitable in that they do not

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take into account a woman's ability to work, her availability for work or her efforts to find work.

Those terms are all part of every state eligibility provision. Every state requires that you be able to work, available for work, and actively seeking employment in order to be eligible, and other references in the legislative history say that you must be eligible in order to get benefits.

QUESTION: I understand, but I'm talking about a state that establishes a new eligibility requirement, you have to be non-pregnant.

MS. LEVIN: That provision would violate the statute, Your Honor.

QUESTION: But then you have to answer my earlier question differently about why is it that a woman who can't work because she is pregnant is not entitled to get compensation. You said that the reason she's not entitled, just as all other people who are disabled from working are not entitled, is that you said, that was a disqualification rather than an ineligibility.

Now, I'm making pregnancy an ineligibility and now the next time you tell me the ineligibility is covered.

MS. LEVIN: I realize it's confusing, but --

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QUESTION: It's not confusing. It's inconsistent. It's quite clear but --

MS. LEVIN: The disqualification is based on the ineligibility. In other words, she is disqualified because of her ineligibility.

QUESTION: She is not ineligible. The state says it's not an ineligibility. It's a disqualification.

MS. LEVIN: If the state said that, it would noit only violate the Turner decision in this case but it would also violate the statute and that is because the legislative history says that any disqualification, that presumes that a woman is unable to work or unavailable for work during certain stages of her pregnancy, should be abolished.

QUESTION: So, it does cover -- well, I am sorry.

You are insisting that it only covers disqualifications and not ineligibilities?

MS. LEVIN: It's phrased in terms of a disqualification but the disqualification pertains to the ineligibility and that's how it's phrased in the legislative history.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Levin. We'll hear now from you, Mr. Boicourt.

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ORAL ARGUMENT OF MICHAEL L. BOICOURT, ESQ.

ON BEHALF OF THE RESPONDENTS

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

In Missouri, applicants for unemployment compensation benefits are disqualified if they left their last places of employment for reasons which were not attributable to their work or to their employment. It makes no difference how good their reason is, from a personal standpoint. If the reason is not work-related, they are disqualified.

In this case, if Mrs. Wimberly had left to recover from an automobile accident. She would have been disqualified. If she left work because her husband was transferred to a different city, she would be disqualified.

On the record of this case there is absolutely no suggestion whatsoever that Missouri does not apply this work related standard in an entirely nondiscriminatory way, neutrally applying to all non-work related separations from employment. A temporary physical disability of any kind in Missouri, if not work related, is disqualified, just as any other good but not work related reason is disqualified.

This suggests the legislative intent for the

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program, the Unemployment Compensation program in the State of Missouri, be related to actual emplcyment conditions, to the actual conduct of employers, to the actual economic realities that cause emplcment.

The issue in this case, then, is simple. Does the federal standard enacted by Congress in 1976, providing that states may not deny unemployment compensation benefits solely by reason of pregnancy or termination of pregnancy, preclude the state from continuing to apply this neutral rule to pregnant applicants?

We respectfully submit that it dces not.

QUESTION: What did the federal statute -- what troubles me about your case is that I don't see much that the federal statute did, if it did no more than prevent discrimination as you say. How many states had, prior to the enactment of the federal statute, singled out pregnancy as disqualifying somebody from unemployment ccmpensation?

MR. BOICOURT: During the time Congress was deliberating, Mr. Justice, the Department of Labor provided Congress with the list of 19 states which had pregnancy specific, either presumptive ineligibility requirements or presumptive disqualificatiCn requirements, written into their law. And Congress

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referred to those specific 19 state statutes in the legislative history surrounding the enactment of this particular law.

What Turner did, and the legislative history is clear that Congress was reacting to Turner, was just find that presumptive ineligibility; that is, for a period of 12 weeks before until six weeks after birth, was unconstitutional for so long a period of time. There were many other state laws that had presumptions of ineligibility and this was an ineligibility subject, inability to work, for shorter periods of time.

There were also several states who had specific statutes, pregnancy specific with respect that distinct treatment was to be afforded to pregnant applicants, or recently pregnant applicants.

QUESTION: How many of those statutes were changed after Turner and before this statute was passed?

MR. BOICOURT: I don't know the precise answer to that question, Your Honor. I know at least two states after Turner and after this legislation was passed specifically enacted statutes which said on their face that pregnancy would be treated just like all other disabilities for purposes of unemployment compensation, and both of those states' programs have been approved by the Department of Labor since that time.

The states that changed in that way, I believe, were Tennessee and -- well, actually I said states -- Tennessee and the District of Columbia which is not a state, Mr. Justice Brennan.

In the briefs filed on behalf of petitioner, it is suggested that unemployment compensation programs are insurance programs. In a way they are, but it's employers who pay the premiums in the form of taxes.

In Missouri those employers are insuring against the risk of paying unemployment compensation benefits to their former employees who left work because of the manner in which the employers conducted their business. They were not insuring against the risk that their former employees would be paid compensation benefits because they left work for personal reasons.

The focus of the federal law, as pointed out in a soliloquy between my opposing counsel and Justice O'Connor, is the reason for the state's denial of benefits. The benefits will not be denied solely by reason of pregnancy or termination of pregnancy. The focus of the federal law is on the reason for the denial, not upon the motivation of the applicant.

The petitioner wants the Court to read this statute as providing that no one may be denied unemployment compensation benefits if she solely left

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her work only because she was pregnant. As pointed out in the soliloquy between Mr. Justice Scalia and opposing counsel, it is entirely inconsistent to assume, based upon that particular interpretation of law, that the state can require a pregnant woman to be physically able to work but cannot require her separation from employment to be work related.

In both cases, the reason she left work was because she was pregnant. The federal statute does not speak to that. The federal statute speaks to the reason she was denied benefits.

Mrs. Wimberly was denied benefits because the reason she left work was not work related. All persons suffering a temporary physical disability with no guaranteed reinstatement are denied benefits in Missouri.

The plain language of the statute suggests an intent on the part of Congress to single out -- to prohibit states from singling out pregnancy for specific treatment, for distinctive treatment, for treatment different than it treats other conditions that applicants may fall under.

We must impute, I think, to Congress the ability to use precision in its language. In effect, Congress said states may not, for the sole cause of pregnancy, deny benefits.

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QUESTION: Well, do you think under this provision, a state could give preference to pregnancy over other disabilities?

MR. BOICOURT: On the basis of this statute alone, it is clear that it doesn't prohibit a state from preferring pregnancy. I think this creates other problems that are being addressed by the court in the California case.

QUESTION: So, it really isn't totally a nondiscrimination statute?

MR. BOICOURT: No, it's an equality of treatment statute. That's what mandated. It doesn't mandate that states not do more. It mandates that pregnance by treated equally.

Not only does the plain language of the statute suggest an intent that pregrancy specific disqualifications or findings of ineligibility -- and clearly this law was designed both for problems of eligibility and disqualification, both are reasons for denying benefits.

An applicant, in order to get benefits in any state must have worked for a specified period of time at a specified wage, must be able and available to work, must not be disqualified for state law reasons, or be denied on the basis of any of those reasons. So,

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eligibility and disqualification was both the subject of the statute.

Congress was acting in a specific context when it enacted this law. I have already referred to the information provided to Congress by the Department of Labor about the 19 states that had pregnancy specific statutes on their books.

It was also replying to this Court's decision, 1975 decision in Turner versus Department of Employment Security. In effect, all the information available to Congress, and the legislative history is clear that these are the things they were considering, were concerned with states that discriminate.

I submit it is illogical to assume that Congress intended to replace discriminatory state laws with a mandate, discriminatory state laws unfavorable to pregnant women, with a mandate that states have to prefer state women. It did not intend to replace discrimination detrimental to women with discrimination favorable to women.

I think the only assumption is that when Congress acts to eradicate discrimination or distinctive treatment by sex or by pregnancy, it intends to legislate the quality of treatment.

Two years after it enacted this particular

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standard, it enacted the amendments to Title 7, Pregnancy Discrimination Act. Its language there specifically said that in the work place, the terms and conditions of employment, pregnant women are to be treated the same as others similarly situated.

It is entirely inconsistent that Congress intended to legislate equality of treatment for pregnant women in the workplace with preferential treatment for pregnant women once they left the workplace and applied for unemployment compensation.

Both are employment related. I think the assumption must be that when Congress acts so close in time, that they intended to act consistently, to in fact require the states to treat pregnant women the same way they treat other applicants for benefits, which in Missouri is what occurs.

I have been representing the State of Missouri and its agencies, departments and officers for some 15 years, and for the first time in my experience the American Civil Liberties Union has entered a case supporting my position on the law. And I think the American Civil Liberties Union has stated the problem in this case very succinctly.

QUESTION: Makes you worry, does it?

(Laughter.)

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MR. BOICOURT: When I saw it, it made me sweat a little bit, Mr. Justice Scalia.

Given the potential for pregnancy or sex based distinctions to deprive women of benefits provided others in similar situations, an intent to create a special category of entitlement in favor of pregnant women should not be lightly inferred. I think that is exactly what we have in this case.

I assure you that if the State of Missouri starts tomorrow preferring the applications of pregnant women as against others with other disabilities, we will at least be some years down the road applying to this Court for review under Title 7 of the Equal Protection Clause, because in effect there would be sex based discrimination.

Only women are physically capable of bearing children. So, if we require a preference for women by the construction of this particular statute, we are requiring a sex based preference. That would be the issue which would really challenge the Court on a discrimination bases.

QUESTION: Well, that wouldn't be hard to -- it would just require treating everybody else the same?

MR. BOICOURT: Except, Your Honor, traditionally in matters administered under the Federal

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Unemployment Tax Act, the states are given great latitude in the manner in which they operate their programs.

There is absolutely no suggestion anywhere in that Act or any of the amendments to the Act that Congress ever intended to take away from the states their ability to have such a neutral standard as is involved in this case, that all separations from employment be work related.

And if, in fact, Congress by enacting equal treatment requires the states to change their entire program, this becomes not a program where the details are left to the states which Congress hs always said is the case, it becomes a program where Congress dictates all the details of the program. That's simply not the intent.

In Missouri all claimants are subject to the same pre-existing, non-sex based eligibility and qualification requirements. Pregnancy is treated exactly the same as any other temporary disability.

We submit that Congress did not intend to preclude Missouri from continuing to enforce such a neutral provision of state law.

QUESTION: May I ask you a question about the history? If the prior bill had been enacted, the one

where the language was taken cut, who would you say would win this lawsuit?

MR. BCICOURT: Your Honor, I don't think it makes any difference at all. I think the previous version of the bill says exactly the same thing this version says.

QUESTION: It's interesting that the Missouri Supreme Court seems to think it would have made a difference, but just the opposite difference --

MR. BCICOURT: Just the opposite difference. This is Levin, yes, I agree.

I think it makes no difference at all. The original language is just more lengthy without adding anything to the content. It does include discrimination as a word used in the particular statutory language, but it also refers specifically tc his qualifications based upon work related requirements.

I think the result is exactly the same. They were dealing with, as in the first clause of both versions, decisions of states solely on the basis of pregnancy.

I respectfully submit that the Missouri Supreme Court should be affirmed in this case and that it be found that Missouri can in fact continue to enforce this neutral standard in such a way which will

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apply, as it does to all other persons who left their jobs for non-work related reasons, to Mrs. Wimberly.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Boicourt.

We'll hear from you, Mr. Wright.

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.

AS AMICUS CURIAE, SUPPORTING RESPONDENTS

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

This is an appropriate case to defer to the Department of Labor's interpretation of the statute. The Department has consistently stated that Section 3304(a)(12) bars states from singling out women for unfavorable treatment on the basis of pregnancy, but does not mandate preferential treatment.

Congress has directed the Secretary to certify each year the states that are in compliance with the requirements of the federal Unemployment Tax Act. Because of its central role in administering the statute, the Department participated in the proceedings that led to the enactment of Section 3304(a)(12).

At a hearing on the unemployment compensation laws in 1975, a representative of the Department testified that some states treated inability to work

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because of pregnancy differently from any other kind of physical disability, and that that different treatment was undesirable.

Shortly after the enactment of Section 3304(a)(12), the Department sent the states instructions on its implementation. The Department first noted that any provision of state law specifically relating to pregnancy in the determination of entitlement to benefits must be deleted.

The Department then explained that the statute, quote, "requires that the entitlement to benefits for pregnant claimants be determined on the same basis and under the same provisions applicable to all other claimants." It does not mean that pregnant claimants are entitled to benefits without meeting the requirements of the law for the receipt of benefits. It requires only that a pregnant claimant not be treated differently under the law from any other unemployed individual, and that the benefits be paid or denied not on the basis of pregnancy but on the basis of whether she meets the statute's condition for the receipt of benefits."

In a supplement to those instructions, also in 1976, the Department noted that some states denied benefits to claimants who must leave their jobs because

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of illness or injury, including pregnancy. The Department stated that the new law permits preferential treatment of pregnant claimants, but does not mandate preferential treatment.

The Department specifically reaffirmed the views it expressed in 1976, in 1980 in a letter solicited during the litigation of Brown v. Porcher. The letter addressed the validity of a South Carolina rule which was essentially indistinguishable from the statute at issue here, the rule at issue here.

The Department concluded that the South Carolina rule was not inconsistent with federal law because, quote, "It does not distinguish between pregnant claimants or any other unemployed individuals whose separation is due to illness," unquote.

The Department of Labor's 1976 statement regarding the statute and its submission to the Court in Porcher in 1980 accurately summarized the federal government's position in this case. The United States agrees with Missouri that it may enforce neutral rules in determining who will receive unemployment compensation benefits, even though women who left work because of pregnancy are denied benefits as a result.

The Department's interpretation of the statute it administers, which is based on its involvement in the

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proceedings leading to the enactment of the statute, which it announced shortly after the enactment of the provision and to which it has adhered through three administrations, is entitled to considerable deference.

Petitioner argues primarily that the Department of Labor's interpretation of Section 3304(a)(12) is not entitled to deference because it conflicts with the statute's unambiguous language which, in her view, is that a woman who leaves work solely because she is pregnant cannot be denied benefits.

In our view the statute plainly invalidates only state laws that single out women for unfavorable treatment on the basis of pregnancy, for the reasons stated by Justice O'Connor earlier. The language of the statute makes that clear because it focuses on the state's basis for the denial of benefits, not on the claimant's reason for leaving work, and prohibits denials based solely on pregnancy.

But assuming that it is not clear on the face of the statute that it only invalidates rules that single out pregnant women for unfavorable treatment, it is nevertheless clear that the statute does not mean what petitioner says it means.

As Justice Scalia noted earlier, petitioner admits as she must that states are free to enforce a

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number of neutral rules that lead to the denial of benefits to women who left work because of pregnancy, such as rules that claimants must be available for work and able to work. Thus, petitioner acknowledges that states may apply neutral rules that lead to the denial of benefits to women who left work because of pregnancy.

We pointed this flaw in petitioner's argument out in our brief, and petitioner replies, as she did earlier today, that the language of Section 3304(a)(12) addresses only disqualification, not eligibility, so neutral eligibility rules that lead to the denial of benefits to women who left work because of pregnancy are permissible while neutral rules looking to disqualification are not.

There is simply no basis for petitioner's argument. Neither the word "eligibility" nor the word "disqualification" appears in Section 3304(a)(12). Rather, the statute is addressed to the basis for the state's denial of benefits.

Moreover, as Justice Scalia pointed out, logically under petitioner's reading of the statute a state could pass a law that says, all women who leave work because of pregnancy are ineligible for benefits. That can't be what the statute means.

Since the language of the statute does not

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mean what petitioner says it plainly means, this Court must conclude either that it plainly means what the Department of Labor in Missouri says it means, or conclude that the language of the statute does not plainly resolve the question presented.

If the Court concludes that the language plainly means that states may not single out women for unfavorable treatment on the basis of pregnancy, then the decision below should be affirmed.

If the Court concludes that the language of the statute does not resolve the issue, it is still clear that the opinion below should be affirmed because in that event the Department of Labor's consistent interpretation of the statute it administers, which it announced contemporaneously with the enactment of the statute, and which it based in part on its involvement in proceedings leading to the enactment, is entitled to considerable deference.

If there are no questions, thank you.

QUESTION: -- legislative history that might undermine the Department's position, or do you say that a statute, ambiguous on its face, must be construed by this Court as the Department does despite the legislative history?

MR. WRIGHT: I would imagine that there could

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be legislative history so plain that it might lead to a contrary conclusion. That's certainly not the case here.

QUESTION: Mr. Wright, what is your understanding of the number of states in which this problem might arise, you know, the same kind of scheme that --

MR. WRIGHT: Currently?

QUESTION: Yes.

MR. WRIGHT: I am not absolutely sure. I think that there are five. That's what we stated in our submission to the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

Ms. Levin, do you have something more? You have six minutes remaining.

MS. LEVIN: Yes, I do, Your Honor.

ORAL ARGUMENT OF JULIE S. LEVIN, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MS. LEVIN: The Solicitor General has stated that he does not understand how the eligibility provisions that we found can apply under the statute. But on page 12 of his brief he acknowledges that the eligibility provisions do apply because of the legislative history.

I just wanted to note that, in reference to

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the earlier point that we were making. This Court should not defer to the Department of Labor interpretation. First of all, the Unemployment Insurance Service, according to the Solicitor General, has been the entity or the unit that has been making these interpretations.

There has been no cited statutory or regulatory authority for this unit to make interpretations of a federal statute. Additionally, there has been no official interpretation of this statute by the Department of Labor.

There has been no regulation, no adjudication. All we have are letters and memoranda, and under the -- even if we had an official interpretation, under the Chevron standards the precise issue of this case has been dealt with in the statute.

The legislative history is very clear, that the statute was to abolish disqualifications of women who left their job on account of pregnancy. Mrs. Wimberly left her job on account of pregnancy. That's the only reason she was unemployed. And that was the basis of her denial for unemployment compensation.

The construction and the interpretation of the Department of Labor is not a permissible interpretation. It does not make sense that Congress

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would have told states to abolish their statutory disqualifications of women based on pregnancy, but that the states could go ahead and use their neutral statutes to continue the same prohibited practices.

The whole purpose of the statute was to get benefits to women who were leaving their jobs because of pregnancy, because it was such a burden and a hardship for these women and their families that Congress needed to address the issue, and Congress would not have intended that states use neutral statutes to continue these same practices they told the states to abolish.

Moreover, the Department of Labor has no special expertise or technical knowledge that's necessary to interpret this statute. In the Chevron case the EPA had knowledge, special knowledge necessary to interpret the Clean Air Act standards. But no such knowledge is necessary in this case.

The Commission has suggested that Title 7 will take care of the problems of discrimination and that this case -- that a holding in this case is going to conflict with Title 7. But as we stated earlier, Title 7 is not involved in this case.

Congress could very easily have decided to give benefits to women in this situation over disability, and not to give benefits to women over

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disability in Title 7, because Title 7 is all-encompassing. It's a heavier burden on the employer in Title 7.

In 3304(a)(12) the burden is much greater on the employee. Unemployment is comparable to death. It's the final act. Whereas in Title 7, problems that you have and you experience in employment are not as great as the final act of unemployment.

The hardship to the woman and to the family when she's unemployed, especially right after having a baby, is so tremendous that Congress could very easily have decided to enact this statute here and continue having similar treatment under Title 7.

Additionally, the Solicitor General and the Commission have suggested that equal protection -- I'm sorry, the Solicitor General did not suggest this. The Solicitor General agrees that there are no equal protection problems if this Court rules in our favor.

The Commission, however, still seems to see some equal protection problems. But this Court, in the Michaelam case and in the Rotzger case, this Court held that men and women are not always similarly situated and men and women are not similarly situated in matters of pregnancy and childbirth.

A man can never experience the same burden

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that a woman has in having to leave your job because of pregnancy and being denied reinstatement. And when men and women are not similarly situated, Congress can enact statutes that distinguish between the two of them.

Mrs. Wimberly left her job only because of her pregnancy. She became unemployed only because of her pregnancy and only because -- and she was denied reinstatement by the State of Missouri solely on the basis of her pregnancy.

QUESTION: Well, is that quite right? Had there been a job available, she would have received the job, wouldn't she?

MS. LEVIN: I'm sorry, Your Honor, if there were a job available would she have been reinstated in her job? Well, that was my understanding from the record.

QUESTION: Well, then she was not denied solely by reason of her pregnancy. It was her pregnancy, plus the fact that somebody else had her job.

MS. LEVIN: But at the time she became -- that's correct -- at the time she became unemployed, the time when she --

QUESTION: When do you say she became unemployed?

MS. LEVIN: I said that she became unemployed

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at the time she was denied reinstatement. It was at that time that she no longer had a job that she could return to.

QUESTION: She was also no longer pregnant.

MS. LEVIN: That's correct, Your Honor. She was denied on the basis of her pregnancy, because she left because of her pregnancy.

QUESTION: Her past pregnancy, of her former pregnancy?

MS. LEVIN: That's correct, Your Honor.

QUESTION: Plus the fact there was no vacancy?

MS. LEVIN: Well, she was -- right, she was denied not only because of -- well, there was no available position for her but that has nothing to do with the denial of the state of her unemployment compensation.

If she had a job, she would not be --

QUESTION: Is that true? If there had been a position available and they hadn't given it back to her, wouldn't it be a different case? She'd be ready, able and willing to work and they say, we're sorry.

MS. LEVIN: If she had been ready and able --

QUESTION: If there had been a position available and she came back and said, I want to come back, my leave of absence is over, and they'd say, well,

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we're sorry, we just don't think we want to employ you.

Would she not have gotten compensation then?

MS. LEVIN: She would not, Your Honor, because the State of Missouri makes a distinction between a bona fide leave of absence and a regular leave of absence. In a bona fide leave of absence the State of Missouri says, if you're guaranteed reinstatement in your job, and then there's no job available, then you'll be able to get benefits.

But, if you get a conditional leave of absence, then you won't get benefits.

QUESTION: Even if there is a job available?

MS. LEVIN: Even if there's a job available, Your Honor. That's correct.

QUESTION: All right.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Levin.

The case is submitted.

(Whereupon, at 10:58 o'clock a.m., the case in the above entitled matter was submitted.)

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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