



10-1977

# Recent Decisions - State and Federal: No Sick Leave for Pregnancy

John Jeffrey Ross

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

### Recommended Citation

Ross, John Jeffrey (1977) "Recent Decisions - State and Federal: No Sick Leave for Pregnancy," *University of Baltimore Law Forum*: Vol. 8 : No. 1 , Article 18.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol8/iss1/18>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

# No Sick Leave For Pregnancy

by John Jeffrey Ross

The Commonwealth Court of Pennsylvania recently considered an action under the Pennsylvania Human Relations Act (PHRA, 43 P.S. §§951-963), in which the complainant, a teacher, alleged that the refusal to grant her sick leave benefits during a maternity absence amounted to a discriminatory practice by the school which employed her. *Anderson v. Upper Bucks County Area V. T. School*, \_\_\_ Pa. Cmwlth. \_\_\_, 373 A.2d 126 (1977).

In affirming a Human Relations Commission determination that this exclusion of benefits (compelling the teacher to endure a leave without pay status) was discriminatory under Section 5(a) of the Act (43 P.S. §955(a)), the court reaches some conclusions about the nature of sex discrimination with regard to pregnancy that are inconsistent with those made by the United States Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

In *Geduldig*, the Supreme Court upheld a California employees' disability plan which, because it excluded maternity-disability benefits, had been subject to constitutional attack. The general philosophy affecting the decision was that the exclusion of pregnancy was a rational limit to the reach of such a plan; it was a "voluntary" condition; and coverage of maternity related disability would upset the fiscal symmetry of a plan where the income to the disability fund was fixed to a certain percentage of the employees' salaries—a finite amount—and thus fairly well matched payments for all disabilities common to both women and men exclusive of pregnancy. 417 U.S. at 494.

*Gilbert* involved an employee disability plan administered by the General Electric

Company which denied recovery for maternity related disability. In this case, the challenge arose pursuant to Title VII of the Federal Civil Rights Act of 1964.

The compensation plan in *Gilbert* was analyzed by the Court in terms of what it included in its coverage, i.e. all disabilities common to both sexes. 429 U.S. at 137-139. The Court reasoned that because the plan "cover[ed] exactly the same categories of risk" for both, it was not discriminatory in the sense "that there was no risk from which men are protected and women are not." 429 U.S. at 138, quoting in part from *Geduldig*, 417 U.S. at 496-497. Once again, as in *Geduldig*, the Court distinguished pregnancy from other disabling conditions because it was considered to be a "voluntary and desired condition." 429 U.S. at 136.

Justice Brennan's dissenting opinion in *Gilbert* highlights a conceptual error on the part of the majority which is marked by the failure to elaborate all of the effects of the compensation plan's exclusion of pregnancy benefits. In noting that the only test applied by the Court to the General Electric plan would fail to discover discrimination (absent evidence that "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination [majority opinion,

429 U.S. at 135]"), Justice Brennan states:

General Electric's disability program has three divisible sets of effects. First, the plan covers all disabilities that mutually afflict both sexes. \*\*\*Second, the plan insures against all disabilities that are male-specific or have a predominant impact on males. Finally, all female-specific and -impacted disabilities are covered, except for the most prevalent, pregnancy. The Court focuses on the first factor—the equal inclusion of mutual risks—and therefore understandably can identify no discriminatory effect arising from the plan.

429 U.S. at 155.

In light of *Gilbert* and *Geduldig*, the result reached by the Commonwealth Court is interesting for a number of reasons.

First, the court was not constrained to follow either of these cases because the discrimination before it was proscribed by Pennsylvania law, which reads in relevant part:

It shall be an unlawful discriminatory practice . . . (a) For any employer because of sex . . . [to] discriminate against [an] individual with respect to compensation, hire, tenure, conditions or privileges of employment . . . PHRA §5(a), 43 P.S. §955(a).

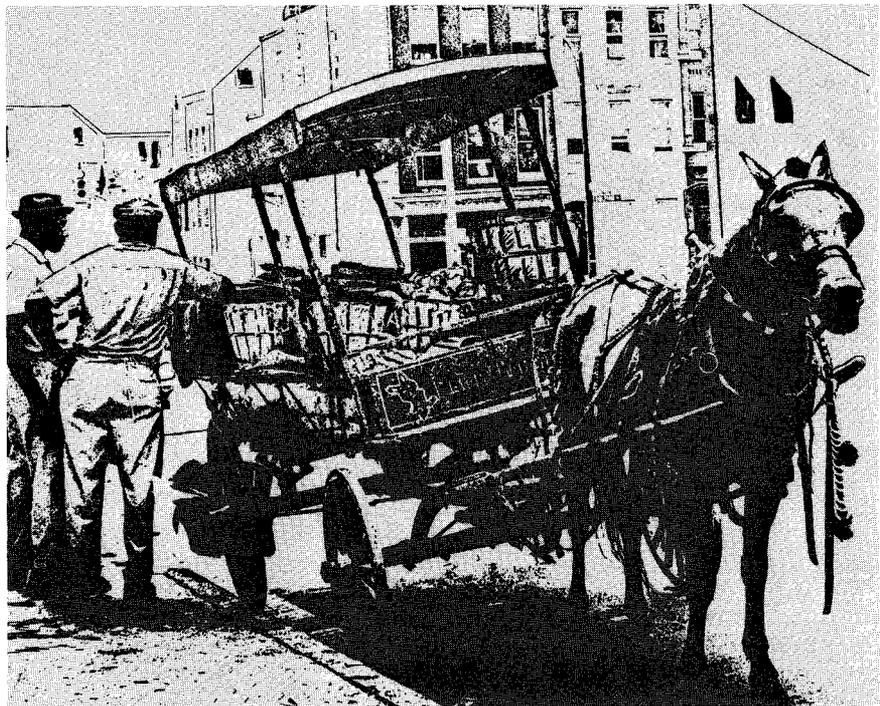


photo by John Clark Mayden

In noting that the case was one of "statutory interpretation," and not "constitutional analysis," the *Anderson* court also reminds us that "[s]tate statutes defining sex discrimination more comprehensively than the Civil Rights Act of 1964 shall not be preempted or superseded by Title VII of the Civil Rights Act." \_\_\_ Pa. Cmwlth. at \_\_\_, 373 A.2d at 129.

Second, under the aegis of the interpretation of state law, the court is free to reach conclusions rejected by the majority in *Gilbert*. While *Gilbert* held that the "exclusion of pregnancy related disability is not a prima facie case of sex or gender classification" the Commonwealth Court held that "since pregnancy is unique to women, a disability plan which expressly denies benefits for disability arising out of pregnancy is one which discriminates against women employees because of their sex." *Id.* at \_\_\_, 373 A.2d at 129-130.

Finally, the court refused to distinguish pregnancy from other disabling conditions because it is "voluntary." Both the Pennsylvania Supreme Court and the Commonwealth Court have repeatedly stated that pregnancy may not be treated differently from other physical dis-

abilities. Even in this case, where a collective bargaining agreement provided for the exclusion, the distinction of maternity from other conditions for purposes of the application of benefits incident to



employment offends the Human Relations Act. See *Cerra v. East Stroudsburg Area School District*, 450 Pa. 207, 299 A.2d 277 (1973); *Unemployment Compensation Board of Review v. Perry*, 22 Pa. Cmwlth. 429, 349 A.2d 531 (1973);

*Leechburg Area School District v. Human Relations Commission*, 19 Pa. Cmwlth. 614, 339 A.2d 850 (1975) cited in *Anderson, supra*, at \_\_\_, 373 A.2d at 130-131.

It is apparent that the court adopts the view advanced by Justice Brennan in his dissent to the majority in *Gilbert*, which emphasizes the examination of a plan by what it *excludes* from coverage, rather than what it embraces.

Not affected by the decision in *Anderson* was a Group Income Protection Plan which also excludes benefits to those who are pregnant. Ms. Anderson did not claim benefits under this plan, and it appears that the gravamen of the court's sanction of withholding sick leave benefits was the conclusion that sick leave policy is a direct incident to employment policy. Further, the Human Relations Act provides, as do other states' acts, an exception for *bona fide group insurance plans*. The clause in Section 5(a) which provides this exception appears, in spirit, to follow the concept that a plan which includes coverage for disabilities common to both sexes has a bona fide and rational limit (absent supervening discriminatory intent). See also, Md. Ann. Code., Art. 49B §19(g)(4).

# TITLE INSURANCE and JUDGMENT REPORTS

Our Owners' or Mortgagee  
Title Insurance policies are  
available to you and your clients  
in the following:

Alabama, Arkansas, Delaware, District of Columbia,  
Florida, Georgia, Indiana, Kentucky, Louisiana,  
Maryland, Mississippi, New Jersey, New Mexico, North  
Carolina, Ohio, Pennsylvania, Rhode Island, South  
Carolina, Tennessee, Texas, Utah, Virginia, West  
Virginia, Puerto Rico and the Virgin Islands.

Since 1884

THE  
**Title**  
**Guarantee**  
COMPANY

An affiliate of Fidelity & Deposit Company of Maryland

St. Paul & Lexington Sts., Baltimore, Md. 727-3700  
406 Mercantile Towson Building, Towson, Md. 825-4435



## **Skiing isn't just fun, glamour and excitement. It's health, fitness and happiness too.**

Skiers really know how to live.

And knowing how to live is one of the secrets of a long life. To live better... to live longer, means taking the simple care to exercise well. Because regular exercise is the only way to keep all of your 600 muscles in shape. Especially the most important one — your heart.

Try skiing for winter exercise. It's fun, it's glamorous and it's exciting. You'll find that it's invigorating too.

So, check into skiing at a ski area or shop near you. Or go on a hike, ride a bike, play squash, or swing a tennis racket. Join the millions of other healthy people going for the good life.



Public Service Advertisement  
for the President's Council on Physical Fitness

# UNIVERSITY OF BALTIMORE

# LEGAL RESEARCH SERVICE

## A NEW PROGRAM SPONSORED BY THE STUDENT BAR ASSOCIATION OF THE SCHOOL OF LAW

**PURPOSE:** The purpose of the Research Service is to provide practicing attorneys and judges with quality legal research on a non-profit basis. In return, student members are given the opportunity to apply principles learned in the classroom to practical problems, aiding the developing of legal research, writing and analysis skills.

**ADMINISTRATION:** The Research Service is student administered and operated in conjunction with the Student Bar Association. The faculty advisor is Professor Charles Rees. Directing the program are the executive director, managing editor, and two writing directors.

**PROCEDURES:** Any project received is assigned to a member of the managing board who assigns the project to two other students, who research the issue and prepare the requested memorandum. Their work is then examined by the writing director who prepares a final draft. The draft is once again edited before it is typed in final form and sent to the attorney or judge. Since the Research Service is new to the students, school and legal community, it is anticipated that our faculty advisor will assist in the final edit of projects during initial implementation.

**FORMAT:** While the Research Service wishes to remain flexible and will at all times follow the advice and wishes of an attorney concerning a particular project, the expected format of legal memoranda is as follows: (1) an objective analysis of the law involved; (2) application of the law to the facts submitted; (3) conclusions as to the most likely disposition of the case.

**TIME:** The time needed to complete the memorandum depends upon the complexity of the problem involved. The Research Service will attempt to accommodate any reasonable request, but as a general guideline three to four weeks should be allowed.

**FEE:** The Research Service provides work on a non-profit basis. However, a charge of \$5.00 per page to the recipient is necessary to defray the cost of materials, secretarial help and other expenses.

Legal Problems should be submitted to: Executive Director  
University of Baltimore  
Legal Research Service  
1420 North Charles Street  
Baltimore, Maryland 21201

For further information please call the executive director, Tim Hogan, at 727-6350, extension 322.



photo by George Martin Kripner

looking for information about  
**THE BAR EXAM**  
&  
**THE BEST  
BAR REVIEW  
COURSE?**

contact your UB student representatives:

**day:**

<b>Gary Crawford</b>	<b>366-3475</b>
<b>Cathy Howard</b>	<b>764-6326</b>
<b>Carol Robertson</b>	<b>268-5729</b>
<b>Mark Epstein</b>	<b>922-0993</b>
<b>Jerry Vahle</b>	<b>532-7184</b>

**eve:**

<b>John Currier</b>	<b>744-1878</b>
<b>Bob Lazzaro</b>	<b>889-6729</b>
<b>Jerry Fenzel</b>	<b>788-4448</b>
<b>Barry Steelman</b>	<b>265-1247</b>

**bri/modern bar review**

802 Mercantile Bldg. • Balto., Md. • 752-2473

John Wayne, Honorary Crusade Chairman.



Maybe we'll  
cure cancer  
without your help,  
but don't bet  
your life on it.

The way it stands today, one American out of four will someday have cancer. That means it will strike some member in two out of three American families.

To change those statistics we have to bring the promise of research to everyday reality. And to expand our detection program and techniques. And that takes money. Lots of money. Money we won't have — unless you help us.

The American Cancer Society will never give up the fight. Maybe we'll find the answers even without your help. But don't bet your life on it.

We want to cure cancer in your lifetime.

**American Cancer Society** 

This space contributed by the publisher as a public service.

# FORUM WRITING CONTEST RULES

1. Cash prizes of \$100.00 and \$50.00, and a \$25.00 savings bond will be awarded by a committee of faculty member judges.
2. The contest is open to all U. of B. law students, except FORUM staff members and their families.
3. Any type of writing is eligible (casenotes, articles, poems etc.)
4. Copy should be submitted in finished form, on 8½ x 11 paper, triple spaced, and casenotes should be accompanied by a copy of the case.
5. Copy should be submitted at the FORUM office in the East Mount Royal Building. The final deadline will be March 17, 1978. Deadlines for individual issues may be obtained at the office.
6. Entries should be submitted with a cover sheet showing title, author's name and social security number. The first page of copy should contain the title, and social security number.
7. Any inquiries may be directed to: John Crabbs (523-3055), Jan Riker (465-7437), or Andy Katz (323-5373).
8. All entries become the property of the FORUM LAW JOURNAL.