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ERICKSON v. BARTELL: THE “COMMON SENSE” APPROACH TO EMPLOYER-BASED INSURANCE FOR WOMEN

We do not want special privileges. We do not need special privileges. We outlast you—we outlive you—we nag you to death. So why should we want special privileges?

I believe we can hold our own. We are entitled to this little crumb of equality.

The addition of that little terrifying word “s-e-x” will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right.¹

I. INTRODUCTION

Over eighty years ago American women received the right to vote.² Forty-nine years ago Congress declared sex-based employment discrimination unlawful in Title VII.³ Twenty-nine years ago a woman’s right to make her own decisions about her reproductive health was buttressed by *Roe v. Wade*.⁴ In 2001, two women, Roberta Riley and Jennifer Erickson, were added to Ms. Magazine’s “Woman of the Year” list,⁵ and for good reason: they helped to continue this trend. In the spring of 2001, a district court aided that effort by deciding that commonly used prescription contraceptives must be covered by employer-based prescription drug plans.⁶ Indeed, in an ongoing effort to

1. 110 CONG. REC. H2581 (daily ed. Feb. 8, 1964) (statement of Rep. St. George). This is a brief excerpt of the argument made by Representative St. George to the House of Representatives to include “sex” in Title VII.

2. U.S. CONST. amend. XIX. (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of Sex.”).

3. 42 U.S.C. § 2000e-2(a)(1) (2000).

4. 410 U.S. 113 (1973).

5. *Woman of the Year*, MS. Dec. 2001-Jan. 2002, available at <http://www.msmagazine.com/dec01/woty.html> (last visited Jan. 21, 2002). Roberta Riley was the attorney for Jennifer Erickson, the class representative for the non-union female employees of Bartell Drug Company in *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). Though this effort to mandate prescription contraceptive coverage did not begin, nor will it end, with these two women, their case prompted a court, for the first time in our history, to mandate this coverage in the context of employer-based prescription plans. *See id.*

6. This holding was directed only at employer-based insurance plans that covered prescription drugs. *Erickson*, 141 F. Supp. 2d 1266, 1277 (W.D. Wash. 2001). In *Erickson*, the

achieve a greater degree of equality in all facets of their lives, American women have persevered to take control of their bodies, health and reproduction.⁷ Riley and Erickson's active pursuance of this goal has brought to women⁸ the benefit of mandatory prescription drug coverage, but has also opened the door for further movement toward a truer sex equality in the workplace.⁹ As Margaret Graham Tebo wrote, "Margaret Sanger would be thrilled."¹⁰

On June 12, 2001, the United States District Court for the Western District of Washington, in *Erickson v. Bartell Drug Company*,¹¹ held that an employer's prescription drug plan must provide at least partial coverage to contraceptive devices such as birth control pills, intra-uterine devices, diaphragms, the Depro-Provera shot and implants such as Norplant.¹² This case of first impression¹³ marked a major step in the lengthy struggle to thwart

prescription drug coverage was comprehensive. *Id.* at 1268. However, the *Erickson* holding does not apply to insurance plans that exclude prescription drug coverage completely. *Id.* at 1272.

7. While the problems in prescription drug coverage set forth by *Erickson* were solely legal questions, the legal team behind the plaintiff realized that the public needed to hear about the case. To accomplish this goal, they hired the P.R. firm of Douglas Gould & Co. to create "a proactive strategic media campaign" for the case in order to spread the word to many national newspapers, most (if not all) of the major television networks, and other media. Douglas Gould & Co., *Erickson v. Bartell—Reproductive Rights and Contraceptive Policy*, at <http://www.douglasgould.com/pages/reprorights.htm> (last visited May 13, 2002).

8. *Erickson*, a district court case, only applies to women and employers in the State of Washington.

9. Planned Parenthood created a web site to answer questions about *Erickson* and its effect on other states and employers. See Planned Parenthood, *Cover My Pills: Fair Access to Contraceptives*, at <http://www.covermypills.org.htm> (last visited Sept. 13, 2002). As of Fall 2001, however, sixteen states had laws that required "insurance companies that cover prescriptions to also include full contraceptive coverage": California, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Missouri, New Mexico, Nevada, New Hampshire, North Carolina, Rhode Island, Texas and Vermont. Sierra Club, *Senate Committee Discusses Domestic Insurance Contraceptive Coverage*, POPULATION REPORT, Fall 2001, at 1, available at <http://www.sierraclub.org/population>. See also Susan A. Cohen, *Federal Law Urged As Culmination of Contraceptive Insurance Coverage Campaign*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Oct. 2001, at 11.

10. Margaret Graham Tebo, *Power to the Pill*, A.B.A. J., Sept. 2001, at 22, 22 (2001). Thrilled, indeed. "Nearly a century after the women's rights advocate began her crusade to overturn laws banning contraception for women, a federal District Court has ruled that excluding prescription birth control coverage from health insurance plans is a violation of the Pregnancy Discrimination Act." *Id.* For a short description of the social causes that Margaret Sanger supported, see Planned Parenthood, *About Us: Margaret Sanger*, at <http://www.plannedparenthood.org/about/thisispp/sanger.html> (last visited Feb. 25, 2003).

11. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

12. *Id.* at 1277.

13. See U.S. Equal Employment Opportunity Commission, Decision on Coverage of Contraception (Dec. 14, 2000), available at <http://www.eeoc.gov/docs/decision-contraception.html> (last visited Sept. 18, 2002). While *Erickson* was the first court to hold that

sex discrimination in the workplace stemming from inequitable employer-based prescription drug plans.

Erickson is a welcome addition to the body of law surrounding Title VII and its subsequent amendment, the Pregnancy Discrimination Act (PDA). Undoubtedly, the coverage it provides will make contraception more affordable and accessible to women and greatly reduce the costs—physical, emotional and financial—associated with the thousands of unintended and unplanned pregnancies occurring each year.¹⁴ Before celebrating this long-awaited step, however, there is a need to examine the long road of law leading up to *Erickson*, as well as its many possible effects. To be sure, the effects of *Erickson* involve, at the least, both practical and legal concerns.

The practical effects of *Erickson* are quite impressive. *Erickson's* interpretation of Title VII sex discrimination will impose new obligations on employers with respect to the medical benefits they choose to extend to their employees. In addition, *Erickson* will have second-hand effects on both the insurers utilized by employers as well as the masses of paying beneficiaries. The cost of this new statutory requirement must be absorbed somewhere. And finally, the social, political and economic impacts of the holding will affect all citizens, as women and families are given a greater opportunity to prevent unanticipated pregnancies. It goes without saying that a degree of uncertainty will unquestionably accompany any estimates on the true ramifications of *Erickson*.

While working women and spouses of working men nationwide will, without doubt, welcome the new benefit of partial coverage of contraceptive

prescription contraceptives must be covered by employer-based prescription plans in accordance with Title VII, the EEOC has come to that same conclusion at least twice. *Id.* The EEOC Decision of December 14, 2000 was in response to two women who were denied coverage for prescription birth control, despite the fact that the plans covered prescription drugs, preventative care, vaccinations and surgical means of contraception such as vasectomies and tubal ligations. *Id.* The EEOC concluded that in order for an employer to avoid violating Title VII, employers “must cover the expenses of prescription contraceptives to the same extent, and on the same terms, that they cover the expenses of the types of drugs, devices and preventative care . . . [and the employer’s] coverage must extend to the full range of prescription contraceptive choices.” *Id.* A similar issue was pending in another case, *EEOC v. United Parcel Service, Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001) (hereinafter “*UPS*”). *UPS* focused on allegations of disparate treatment and disparate impact under Title VII when the UPS employee was denied coverage for his wife’s prescription oral contraceptive, which was prescribed to treat a hormonal disorder, not to prevent pregnancy. *Id.* at 1217.

14. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364-65 (1998). “Almost sixty percent of the 6.3 million pregnancies that occur annually in the United States are unintended.” *Id.* at 364. Professor Law also described the costs and consequences of unintended pregnancies: “Unintended pregnancy: (1) increases infant mortality and morbidity; (2) generates financial costs for childbirth and the care of distressed newborns; (3) leads to high rates of abortion; and (4) limits women’s abilities to perform and contribute to society and undermines national economic stability.” *Id.* at 364-65.

devices in their prescription benefit plans, the holding seems to predict a massive resource shift between insurance companies and their beneficiaries, yielding resistance from insurers and employers. In addition, the applicability of *Erickson* may be questioned; it is difficult to assess, at this point, whether more women will utilize these contraceptive measures or if the result will be a reduction of costs for the women currently taking the medications, or both. In any case, the medical and economic benefits of *Erickson* for men, women and children, *as well as* their insurers and employers, should far outweigh its negative effects.

This Note will examine *Erickson* in the context of a continually developing body of law championing the procurement of true sex equality in the workplace. It will begin by discussing the theories of discrimination argued by the plaintiff in *Erickson*: disparate treatment and disparate impact under Title VII and the PDA. It will also retrace the development of the statutes and the case law comprising this body of law, including Title VII sex discrimination before and after its amendment by the addition of the PDA. Finally, this Note will discuss the issues, arguments, reasoning and holding of *Erickson*, and its significance and impact for female employees, and conclude with an elaboration of responses to Bartell's arguments.

II. THEORIES OF TITLE VII DISCRIMINATION: DISPARATE TREATMENT AND DISPARATE IMPACT

Before discussing the application of Title VII to the facts in *Erickson* and cases preceding it, an overview of the different ways in which Title VII may be violated must be presented. The code created by the 1964 Civil Rights Act, governing Title VII discrimination, provides that

(a) Employer Practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁵

15. 42 U.S.C. §§ 2000e-2(a)(1)-(2) (2000). Section 2000e-2(a)(1) corresponds with the disparate treatment theory of discrimination, while section 2000e-2(a)(2) corresponds with the disparate impact theory of discrimination.

Title VII may be violated by the performance of acts that discriminate in two ways: through disparate treatment,¹⁶ which is intentional discrimination, and disparate impact,¹⁷ which involves discriminatory effects stemming from a facially neutral policy. Both theories of discrimination were argued by the employee-claimant in *Erickson*.¹⁸ The Supreme Court noted the differences between these two theories in *International Brotherhood of Teamsters v. United States*:

“Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” . . . [that] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.¹⁹

A. *Disparate Treatment under Title VII*

Under the disparate treatment theory “[a] plaintiff alleging a claim of disparate treatment must establish that the employer intended to discriminate against the protected group. If direct evidence²⁰ of discriminatory intent is not available, a plaintiff may present circumstantial evidence from which an inference of intentional discrimination may be drawn.”²¹ The Supreme Court established the burden-shifting framework for Title VII discrimination claims

16. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See also *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (holding that an employment practice requiring all female employees to contribute more money than male employees into a benefits fund exhibited disparate treatment when it “[did] not pass the simple test of whether the evidence show[ed] ‘treatment of a person in a manner which but for that person’s sex would be different.’”) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (holding that an employer’s treatment of employees less favorably due to their race, color, religion, sex or national origin constituted disparate treatment in violation of Title VII).

17. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Int’l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

18. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 n.2 (W.D. Wash. 2001).

19. *Int’l Bhd. of Teamsters*, 431 U.S. at 335 n.15 (emphasis added) (citations omitted).

20. Cases involving direct evidence of discrimination do not require the burden-shifting framework. One case involving a showing of direct evidence of race-based employment discrimination is *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572 (1st Cir. 1999).

21. *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1313 (11th Cir. 1994) (citing *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994)).

alleging disparate treatment in *McDonnell Douglas Corp. v. Green*,²² this evidentiary burden-shifting requirement may be broken down into three steps.

First,

[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.²³

This initial burden, which rests solely on the employee, constitutes the plaintiff's prima facie case²⁴ and creates a rebuttable presumption²⁵ that the Title VII prohibited discrimination occurred. Second, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason

22. 411 U.S. 792 (1973); *See generally* *Armstrong*, 33 F.3d 1308. The sex discrimination alleged, though not proven, in *Armstrong*, was for the loss of a position of employment due to sex, when a pregnant nurse was terminated from her job after refusing to treat an HIV positive patient. *Id.* at 1310-11. She felt that the patient's high risk for contracting opportunistic diseases would put her fetus at risk. *Id.* Her termination was not found to be discriminatory. *Id.* at 1318.

Though *Armstrong* was based on an allegation of sex discrimination via unlawful termination, and was not based on a differential in employee benefits based on sex, these prima facie elements are still more applicable to the sex discrimination claims in *Erickson* than the race-based prima facie elements from *McDonnell Douglas*. Furthermore, though *Armstrong* is not a Supreme Court case, it explained the theories of disparate treatment and disparate impact particularly well and, therefore, applied the statutory requirements (as opposed to the common law requirements predating codification) for a showing of disparate impact. For these reasons *Armstrong* is a helpful source in understanding disparate treatment and disparate impact in Title VII sex discrimination cases.

Under the disparate treatment theory in *Armstrong*, the elements of a prima facie Title VII sex discrimination claim required the claimant to show that:

- (1) the plaintiff [was] a member of a group protected by Title VII;
- (2) the plaintiff was qualified for the position;
- (3) the plaintiff suffered an adverse effect on her employment; and
- (4) the plaintiff suffered from differential application of work or disciplinary rules.

Armstrong, 33 F.3d at 1314 (citing *Armstrong v. Flowers Hosp. Inc.*, 812 F. Supp. 1183, 1189 (M.D. Ala. 1993)).

23. *McDonnell Douglas*, 411 U.S. at 802.

24. *Id.*

25. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). *Burdine* elaborated on the plaintiff's prima facie case and the presumption it created. *Id.* "The prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Id.* (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978)).

for the employee's rejection."²⁶ "The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . ."²⁷ Finally, the employee must be afforded a chance to show that the employer's stated legitimate reason was in reality "a pretext for the sort of discrimination prohibited by [Title VII]."²⁸ This burden—to show that the defendant's justification was merely a pretext—belongs to the claimant,²⁹ thereby vesting the "ultimate burden of persua[sion]" on the claimant.³⁰

B. *Disparate Impact under Title VII*

Again, the statutory language governing disparate impact under Title VII was laid out in 42 U.S.C. § 2000e-2(a)(2):

(a) It shall be an unlawful employment practice for an employer

. . . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³¹

26. *McDonnell Douglas*, 411 U.S. at 802.

27. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). *See also Burdine*, 450 U.S. at 254. In *Burdine*, the Court concluded that this was not a permissive finding for the jury to make, but instead a mandatory one, if the defendant failed to rebut the presumption. *Id.* "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.*

28. *McDonnell Douglas*, 411 U.S. at 804. In *McDonnell Douglas*, the employer's excuse for not re-hiring the former employee was that the employee engaged in disruptive and illegal demonstrations against the employer—a "lock-in" and "stall-in"—as a participant in a civil rights organization protesting against the employer. *Id.* at 795. While *McDonnell Douglas* held that an employee-complainant in a Title VII claim must have the opportunity to show that the employer-defendant's legitimate reasons were pretextual, it also pointed out that an employer "may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.* at 804. The *McDonnell Douglas* Court also set forth some examples of evidence an employee could use to reveal that an employer's legitimate excuse was really a pretext for discrimination: "facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment." *Id.* at 804-05.

29. *Id.* at 804; *St. Mary's Honor Ctr.*, 509 U.S. at 516 (quoting *Burdine*, 450 U.S. at 256).

30. *St. Mary's Honor Ctr.*, 509 U.S. at 516 (quoting *Burdine*, 450 U.S. at 256).

31. 42 U.S.C. § 2000e-2(a)(2) (2000). *See Connecticut v. Teal*, 457 U.S. 440, 457 (1982) (Powell, J., dissenting).

The Supreme Court first addressed the theory of disparate impact—unintentional discrimination—in *Griggs v. Duke Power Co.*, when it stated that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”³² Disparate impact focuses on the *effect* of policies implemented by employers, and the greater “*impact*” that facially neutral policies may have on groups protected by Title VII as compared to the effect and impact policies may have on non-protected groups.³³ The Court’s goal in *Griggs* was to adhere to the provisions in the statutes promulgated by Congress in its enactment of Title VII.³⁴ “Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”³⁵ While “the Act *does not* command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group,”³⁶ it *does* require “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”³⁷ The Court points out, however, that if the questionable classification or test can be legitimately and rationally based on a business need of the employer, then the act will be

32. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Griggs*, the Supreme Court held that an employer’s requirements of a high school diploma or achievement of “satisfactory scores on two professionally prepared aptitude tests” to qualify for a promotion to the company’s different departments discriminated against the employee-plaintiffs, African-American men. *Id.* at 427-28.

33. *See id.* at 424. *See also* Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *Teal*, 457 U.S. 440. *See generally* *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1314-15 (11th Cir. 1994).

34. *Griggs*, 401 U.S. at 429-30.

35. *Id.* at 430. The employer in *Griggs* relied in part upon Section 703(h) of Title VII, which allowed for nondiscriminatory employment tests:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) (2000).

36. *Griggs*, 401 U.S. at 430-31 (emphasis added).

37. *Id.* at 431. The *Griggs* court noted that the high school completion and professional aptitude test requirements were discriminatory against African-American employees because they had “long received inferior education in segregated schools.” *Id.* at 430. Data from the employer revealed that “‘whites register[ed] far better on the Company’s alternative requirements’” than African-Americans did. *Id.* at 430 (quoting *Griggs v. Duke*, 420 F.2d 1225, 1239 n.60 (4th Cir. 1970)). What made the “alternative requirements” ultimately discriminatory, however, was the determination that “neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.” *Id.* at 431.

tolerated.³⁸ “The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”³⁹

Over time, the framework set forth by the Supreme Court in disparate impact cases would eventually make it more difficult for an employee-plaintiff to succeed. First, the Court increased the plaintiff’s prima facie burden,⁴⁰ and, second, the Court included in the plaintiff’s prima facie burden the requirement of invalidating a business necessity defense asserted by the employer.⁴¹ The plaintiff’s burden to establish a prima facie in a Title VII disparate impact claim was complicated as the Court decided that something more than statistical evidence of a discriminatory effect is required for a plaintiff to meet this burden.⁴²

Watson v. Fort Worth Bank & Trust set forth the initial evidentiary framework for disparate impact cases.⁴³ First, it is the burden of the plaintiff to identify a particular employment practice that is effecting a discriminatory impact on a protected class of employees.⁴⁴ Next, “causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”⁴⁵ The defendant then has the opportunity to challenge the statistics set forth by the plaintiff.⁴⁶ “If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.”⁴⁷ The employer may also buttress his position by showing that the employment action causing the discriminatory effect is justified by “business necessity,” though the “ultimate burden” of proof “remains with the plaintiff at all times.”⁴⁸ Once the employer meets this burden, however, the plaintiff can counter by “show[ing] that other tests or selection devices, without a similarly

38. *Griggs*, 401 U.S. at 431-32.

39. *Id.* at 431. In *Griggs*, the thing that made the “alternative requirements” ultimately discriminatory, however, was the Court’s determination from the evidence that “neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.” *Id.*

40. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

41. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

42. See *Watson*, 487 U.S. at 991-94.

43. See generally *id.*

44. *Id.* at 994. The *Watson* court focused this point particularly on subjective employment practices versus objective employment practices. One major objective of *Watson* was to determine if subjective practices would be applicable to a disparate impact critique; the Court held that they would. *Id.* at 1010-11.

45. *Id.* at 994.

46. *Watson*, 487 U.S. at 996.

47. *Id.* at 996 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977)).

48. *Id.* at 997.

undesirable racial effect, would also serve the employer's legitimate interest"⁴⁹

The Supreme Court discussed the heightened statistical requirement of the plaintiff's burden in *Watson*: "[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force."⁵⁰ *Watson* also elaborated upon the reasoning behind requiring more than statistical evidence in plaintiff's prima facie burden:

Respondent insists, and the United States agrees, that employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case.

We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . .

. . . .

. . . Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that the legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII."⁵¹

The "business necessity" component of disparate impact, as the most convenient way to establish a defense to practices causing discriminatory effects, was greatly utilized by employers, and its parameters were, over time, stretched by the Court ultimately to make it quite difficult for employees to succeed in Title VII disparate impact claims. The Supreme Court reached its limit, however, in *Wards Cove Packing Co. v. Atonio*.⁵² In *Wards Cove*, the Court reiterated the plaintiff's prima facie requirements stated in *Watson*. Particularly, the Court required a showing of "a specific or particular employment practice that has created the disparate impact under attack." It also required that the plaintiff meet a "specific causation requirement."⁵³ To achieve this, the plaintiff was instructed to use employment "records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable

49. *Id.* at 998 (quoting *Ablemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

50. *Id.* at 994.

51. *Watson*, 487 U.S. at 992-93 (citations omitted).

52. 490 U.S. 642 (1989).

53. *Id.* at 657.

race, sex, or ethnic group[s]”⁵⁴ to show “a causal link between challenged employment practices and racial imbalances in the work force.”⁵⁵

Wards Cove departed from prior holdings in its discussion of the business necessity defense. Though “the employer carries the burden of producing evidence of a business justification for his employment practice. . . . The burden of persuasion . . . remains with the disparate-impact plaintiff.”⁵⁶ The plaintiff’s burden *does not* end after the plaintiff “established a prima facie case of disparate impact.”⁵⁷ On the contrary, the plaintiff would still retain the burden to persuade the trier of fact that the business justification stated by the defendant was “insubstantial.”⁵⁸ This was akin to the plaintiff’s burden in a disparate treatment case to persuade the trier of fact that an employer’s legitimate reason was a pretext to discrimination,⁵⁹ but in the context of disparate impact jurisprudence, it was a new and troubling standard for employees.

Finally, *Wards Cove* altered the prong of disparate impact allowing a plaintiff to prevail with a showing of a suitable alternative to the business practice effecting a discriminatory impact. Instead of this “alternative” showing allowing a plaintiff to prevail under the disparate impact theory, the *Wards Cove* court used this alternative showing instead to detect and prove that a business practice was really a “‘pretext’ for discrimination,” as one would find in a disparate treatment action.⁶⁰ In this way, *Wards Cove* appeared to blur the lines between the frameworks of disparate treatment and disparate impact, two closely related, but quite distinct concepts.

The 1991 Civil Rights Act addressed the theory of disparate impact that had evolved in the courts and culminated in *Wards Cove* in 1989. Particularly, Congress intended to clarify the original disparate impact theory set forth in *Griggs*, from which the courts had departed in many ways, resulting in making it more difficult for Title VII claimants to state a valid claim under the disparate impact theory.⁶¹ To achieve this, the 1991 Civil Rights Act codified the prima facie requirements for a showing of disparate impact in violation of Title VII. This amendment states that:

54. *Id.* at 658 (quoting Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(A) (1988)) (alteration in original).

55. *Id.*

56. *Id.* at 659.

57. *Wards Cove Packing Co.*, 490 U.S. at 659.

58. *Id.* at 659-60

59. *See id.* at 660.

60. *Id.* at 660 (quoting *Ablemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

61. *See* H.R. REP. NO. 102-40 (II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 1991 WL 87020, at *2 (West 2002). The Civil Rights Act of 1991 sought to address Supreme Court decisions that placed more difficulties on the claimants suing under Title VII disparate impact claims. *See also* H.R. REP. NO. 102-40 (I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 1991 WL 70454 (West 2002).

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(1) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .⁶²

The statute also mandates that “business necessity may not be used as a defense against a claim of intentional discrimination”⁶³ and that any employment decision premised on “race, color, religion, sex, or national origin” is “an unlawful employment practice . . . even though other factors also motivated the practice.”⁶⁴

III. TITLE VII AND PRE-PDA CASE LAW

Though Title VII sex discrimination is discussed in many cases, there is barely a mention of the topic in the statute’s legislative history.⁶⁵ For example, nothing in the Senate Report or the House of Representatives Report preceding the adoption of the 1964 Civil Rights Act discussed or explained the protected class of “sex.”⁶⁶ The reports showed that the Congressional focus for the 1964 Civil Rights Act was primarily, if not solely, on race.⁶⁷ As a result of this absence of explanatory materials about “sex,” in some instances prior to 1978, the courts misconstrued the intent of Congress in including “sex

62. 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

63. 42 U.S.C. § 2000e-2(k)(2) (2000).

64. 42 U.S.C. § 2000e-2(m) (2000).

65. 88 CONG. REC. H2577 (daily ed. Feb. 8, 1964) (statement of Rep. Smith). *See, e.g.*, Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1965-66); Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991). *See* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268-69 (W.D. Wash. 2001). It is a widely disputed anecdote of American history. Some scholars believe that the inclusion of “sex” in Title VII legislation was not an original intention of its sponsors, but was a roundabout occurrence and even perhaps the result of a backfiring of a conservative congressman’s tactic in arguing his point. The point is, however, that “sex” was added as an eleventh-hour attempt by a conservative lawmaker to convince his colleagues of the ridiculousness Title VII as a whole by illustrating such ridiculousness through the addition of “sex.” The senator’s attempt backfired, and “sex” was included in Title VII as a legitimate category of prohibited discrimination. Due to this apparently unplanned inclusion of “sex” in Title VII, the legislative history of discussions and debates of sex discrimination are sparse to say the least. *See also* Megan Colleen Roth, Note, *Rocking the Cradle with Erickson v. Bartell Drug Co.: Contraceptive Insurance Coverage Takes a Step Forward*, 70 UMKC L. REV. 781, 783 (2002).

66. *See* H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 1963 WL 4735; S. REP. NO. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 1964 WL 4755.

67. *See* H.R. REP. NO. 88-914 (1964); S. REP. NO. 88-872 (1964).

discrimination” in Title VII. The most prevalent example of this was the 1976 Supreme Court case of *General Electric Co. v. Gilbert*.⁶⁸ In response to the courts’ handling⁶⁹ of Title VII sex discrimination cases, and particularly in response to *Gilbert*,⁷⁰ Congress addressed this discrepancy by amending and explicating Title VII sex discrimination with subsequent legislation, namely the Pregnancy Discrimination Act (“PDA”) in 1978.⁷¹

Gilbert prompted Congress to restate and clarify its intent in including “sex discrimination” within Title VII twelve years earlier, particularly in the context of pregnancy.⁷² In *Gilbert*, the Supreme Court, disagreeing with “eighteen federal district courts and all seven federal courts of appeals”⁷³ that had previously grappled with this question,⁷⁴ held that an employer’s “disability-benefits plan [did] not violate Title VII because of its failure to cover pregnancy-related disabilities.”⁷⁵ In other words, to the *Gilbert* court, a comprehensive plan excluding coverage for pregnancy, a condition felt only by women, did not discriminate against women. Under *Gilbert*, the condition of pregnancy did not equate to sex, and refusing to cover pregnancy in a comprehensive disability insurance plan did not equate to refusing to cover women in general. “The Court concluded that this exclusion in the company’s benefits policy was not gender-related but condition-related” and “[b]ecause the plan did not exclude any disability that could be incurred by both men and women, it was not discriminatory.”⁷⁶ To explain and illustrate its holding, the Supreme Court in *Gilbert* aligned its analysis with a case it handled two years prior, *Geduldig v. Aiello*.⁷⁷

The issue contemplated in *Geduldig* was based on a disability insurance system administered by the State of California and funded by private

68. 429 U.S. 125 (1976).

69. And apparent mishandling, at least from Congress’ perspective.

70. H.R. REP. NO. 95-948 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 1978 WL 8570, at *2 (West 2001).

71. *Id.*; Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

72. *Gilbert*, 429 U.S. 125.

73. H.R. REP. NO. 95-948 at *2.

74. *Gilbert*, 429 U.S. at 147. *Gilbert* cited six of these appellate court holdings: *Communications Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661 (4th Cir. 1975); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975); *Hutchinson v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d. 961 (9th Cir. 1975).

75. *Gilbert*, 429 U.S. at 145-46.

76. H.R. REP. NO. 95-948 at *2.

77. *Geduldig v. Aiello*, 417 U.S. 484 (1974). Though nearly thirty years old, *Geduldig* is still relevant in current law topics. See generally Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59 (1997).

employees to benefit those employees when they became temporarily unable to work due to disabilities that were not covered by worker's compensation.⁷⁸ Particularly at issue was the plan's refusal to cover costs for disabilities associated with normal pregnancy and childbirth.⁷⁹ The *Geduldig* court held that the decisions made by the California insurance plan did not "amount[] to invidious discrimination under the Equal Protection Clause" and further stated that "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program."⁸⁰ An important element to the *Geduldig* decision was the cost-factor of this state-sponsored welfare program; the Supreme Court had previously addressed this element.

[A] State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting others. . . ." Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."⁸¹

Therefore, since the employee had received coverage under the California plan that was no different from anyone else covered by the plan (meaning that *all* women with normal pregnancies were denied coverage, not just the appellee-employee), the *Geduldig* court concluded that the act of exempting coverage for *all* normal pregnancies was not discriminatory towards the employee.⁸²

What the *Geduldig* court saw in Aiello's claim was the simplified assertion that she had "suffered discrimination because she encountered a risk that was outside the program's protection," and this was a claim that was "not . . . valid . . . under the Equal Protection Clause of the Fourteenth Amendment."⁸³ Furthermore, *Geduldig* contended that there was no evidence that

78. *Geduldig*, 417 U.S. at 486.

79. *Id.* It is interesting to note that three of the original four plaintiffs in this action had arguments that were deemed moot by the Supreme Court. Just ten days prior to this holding, the case of *Rentzer v. California Unemployment Insurance Appeals Board*, 108 Cal. Rptr. 336 (Cal. Ct. App. 1973), held that the statute should apply only to pregnancies with abnormal complications. In other words, normal pregnancies could be excluded from the plan coverage. As a result, the three other plaintiffs in *Geduldig*, who each had complications during pregnancy, all of which resulting in either termination of the pregnancy or miscarriage, received coverage under the plan, leaving the sole appellee with the normal pregnancy. *Geduldig*, 417 U.S. at 489.

80. *Geduldig*, 417 U.S. at 494.

81. *Id.* at 495 (omissions in original) (citations omitted).

82. *See id.* at 496-97.

83. *Id.* at 497.

the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.⁸⁴

Boiled down to the bottom line, this reasoning from *Geduldig* separated the beneficiaries of the California plan into two groups: pregnant women, who were refused coverage, and nonpregnant persons, who were not refused coverage.⁸⁵ The discriminatory effect of this division (that was ignored as “sex discrimination” by both *Geduldig* and *Gilbert* on a “condition-based” coverage theory) was that the *only* sex that could be omitted from coverage for pregnancy, of course, was women.

Though *Geduldig* constitutionally justified the refusal of coverage for normal pregnancy-related disabilities under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court saw it fit for comparison with *Gilbert*, which was based instead on Title VII sex discrimination.⁸⁶ The Equal Protection Clause of the Fourteenth Amendment, that was relied upon in *Geduldig*, states that “[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁸⁷ The Title VII language applicable in *Gilbert* stated that “it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁸⁸ The Supreme Court aligned *Gilbert* with *Geduldig* based on its belief that the Equal Protection Clause could be utilized “as a useful starting point” to interpret the definition of the term “discrimination” as used in Title VII.⁸⁹ The Court, in *Gilbert*, explained why the Fourteenth Amendment and Title VII should be read together:

While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term “discrimination,” which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a

84. *Id.* at 496-97.

85. *Geduldig*, 417 U.S. at 496 n.20.

86. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976).

87. U.S. CONST. amend. XIV, § 1.

88. 42 U.S.C. § 2000e-(a)(1) (2000).

89. *Gilbert*, 429 U.S. at 133.

legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.⁹⁰

The Equal Protection Clause and Title VII share the similar goals of promoting equality, by requiring equal protection of the laws in the former, and by requiring equal treatment of employees in the latter. This seems to suggest, then, that the equality in employment that is demanded by Title VII is also tied to the idea that one can avoid committing the act of discriminating by applying equal treatment to all persons.⁹¹

Similar law was not the only characteristic the Supreme Court felt *Gilbert* shared with *Geduldig*; more striking was the similar issue of an employment-associated⁹² health care benefits plan withholding coverage for disabilities that stemmed from pregnancy. The plan disputed in *Gilbert* was offered by the employer, General Electric Company (General Electric) as a part of the company's "total compensation package."⁹³ This package provided "nonoccupational sickness and accident benefits to all employees under its Weekly Sickness and Accident Insurance Plan . . . in an amount equal to 60% of an employee's normal straight-time weekly earnings."⁹⁴ Though General Electric's plan made payments "to employees who [became] totally disabled as a result of a nonoccupational sickness or accident,"⁹⁵ it repeatedly refused to "provide disability-benefit payments for any absence due to pregnancy."⁹⁶

The Eastern District of Virginia, while handling *General Electric Co. v. Gilbert*, found that "normal pregnancy, while not necessarily either a 'disease' or an 'accident,' was disabling for a period of six to eight weeks."⁹⁷ Accordingly, it found that General Electric "discriminated on the basis of sex

90. *Id.*

91. For a more complete discussion on the connection between the Equal Protection Clause of the 14th Amendment and Title VII, see *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973), which, in regards to discriminatory statutes stated, "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'" *Id.* at 690 (quoting *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (omission in original)). It appears that the *Gilbert* court applied this principle to employers acting in a discriminatory nature, and not just to discriminatory actions of governments.

92. This distinction is made because the plan in *Geduldig* was funded by private employees and administered by the State of California for coverage of privately employed persons, while the *Gilbert* plan was a part of the compensation package that General Electric provided for its employees.

93. *Gilbert*, 429 U.S. at 128.

94. *Id.*

95. *Id.*

96. *Id.* at 129.

97. *Id.* at 130 (quoting *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 377 (E.D. Va. 1974)).

in the operation of its disability program in violation of Title VII.”⁹⁸ On appeal, the Fourth Circuit in *General Electric Co. v. Gilbert*, affirmed the District Court by a divided vote, deciding that *Geduldig* should not apply since it concerned the Equal Protection Clause and not Title VII.⁹⁹

The Supreme Court, however, saw the *Gilbert* controversy in a different light and disagreed with the Fourth Circuit determination that *Geduldig* did not apply:

Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under [Title VII], *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.¹⁰⁰

Despite the different law applied in *Gilbert* and *Geduldig*, the Supreme Court felt that neither claimant had “attempted to meet the burden of demonstrating a gender-based discriminatory effect resulting from the exclusion of pregnancy-related disabilities from coverage.”¹⁰¹ The “burden” that the claimant in *Gilbert* was required to meet constituted a showing of a prima facie violation of Title VII; thus, the plaintiff in *Gilbert* failed to make the requisite initial showing under Title VII of an inference of sex discrimination.¹⁰²

A. *Disparate Treatment in the Context of Gilbert*

Gilbert addressed the questions of whether an insurance plan that targeted pregnancy, a condition vested solely upon women, discriminated against women, either intentionally, through disparate treatment, or unintentionally, through a disparate impact on women in violation of Title VII.¹⁰³ The Court handled the initial question of disparate treatment easily, as much of its discussion of whether discrimination had occurred worked to rely upon, and replicate, the kind of reasoning it had used previously in *Geduldig*,¹⁰⁴ rather than performing an independent analysis of the facts of *Gilbert* in the disparate treatment framework established in *McDonnell Douglas v. Green*.¹⁰⁵ First, the Court examined the statute to determine whether General Electric “discriminate[d] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s

98. *Gilbert*, 429 U.S. at 132 (citing *Gilbert*, 375 F. Supp. at 385-86).

99. *Id.* at 132; *Gilbert v. Gen. Elec. Co.* 519 F.2d 661, 666 (4th Cir. 1975).

100. *Gilbert*, 429 U.S. at 136.

101. *Id.* at 137.

102. *Id.* at 136-37. See *supra* notes 15-31 and accompanying text.

103. *Gilbert*, 429 U.S. at 137.

104. See *id.* at 132-36.

105. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See also *supra* notes 15-31 and accompanying text.

race, color, religion, sex, or national origin.”¹⁰⁶ The Court found that the plaintiff-employee failed to meet her prima facie burden. “Since gender-based discrimination had not been shown to exist either by the terms of the plan or by its effect, there was no need to reach the question of what sort of standard would govern our review had there been such a showing.”¹⁰⁷

In further support of its decision, the Court turned to its prior holding in *Geduldig* “that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based [sic] discrimination at all” and found that it was directly on point with *Gilbert*. Again, the Court aligned the two cases despite *Geduldig*’s sole basis on the Equal Protection Clause of the Fourteenth Amendment, and *Gilbert*’s foundation of Title VII. This alignment was justified by the Court because cases based on either Title VII or the Equal Protection Clause dealt with the “concepts of discrimination,” and because the policies of insurance at play in *Geduldig* and *Gilbert*, as well as the operation of each program, were quite similar:¹⁰⁸

Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under § 703(a)(1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all.¹⁰⁹

Therefore, the Supreme Court felt that neither of these plans discriminated against women.

Furthermore, the Supreme Court found that, as in *Geduldig*, General Electric’s exclusions were not “pretexts designed to effect an invidious discrimination against the members of one sex or the other.”¹¹⁰ In *Geduldig*, the *Gilbert* court noted, this “pretext” question was framed in different terms: “[A] distinction which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination.”¹¹¹ The Court believed that General Electric’s exclusion of pregnancy-related disability coverage did not impermissively discriminate against women, though the Court noted that the condition was “confined to women,”¹¹² because it was “different from the typical covered

106. *Gilbert*, 429 U.S. at 133 (quoting 42 U.S.C. § 2000e-2(a)(1)).

107. *Id.* at 135.

108. *Id.* at 133-34.

109. *Id.* at 136.

110. *Id.* (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 666 (4th Cir. 1975)). This point was originally made by the Supreme Court in *Geduldig*, and was brought up again by the Supreme Court in *Gilbert* in response to the Fourth Circuit in *Gilbert*.

111. *Gilbert*, 429 U.S. at 136.

112. *Id.*

disease or disability.”¹¹³ “[Pregnancy] is not a ‘disease’ at all, and is often a voluntarily undertaken and desired condition.”¹¹⁴ For these reasons, the Court chose not to view General Electric’s “exclusion of pregnancy disability benefits”¹¹⁵ as a “simple pretext for discriminating against women”¹¹⁶ and held, accordingly, that the employee did not prove disparate treatment in violation of Title VII.¹¹⁷

B. Disparate Impact in the Context of Gilbert

Under the disparate impact theory of Title VII, the *Gilbert* Court required “proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another.”¹¹⁸ The standard used by *Gilbert* was, from *Griggs*, whether “even absent proof of intent, the consequences of the [plan] were ‘invidiously to discriminate on the basis of racial or other impermissible classification.’”¹¹⁹ The Court determined that the prima facie standard for disparate impact had not been fulfilled by the claimant, relying on the fact that the District Court neither found, nor had sufficient evidence to find, “that the financial benefits of the Plan ‘worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.’”¹²⁰ Since the claimant in *Gilbert* failed to fulfill the prima facie standard for disparate impact, the Court held that there was no violation of Title VII under the disparate impact theory.¹²¹

The Court’s conclusion was based on its belief that not all women employed by General Electric would become pregnant and utilize pregnancy benefits, thereby justifying its interpretation of “pregnancy related disabilities” as “additional risk[s].” Echoing its analysis in *Geduldig*, *Gilbert* described the insurance plan as “nothing more than an insurance package, which covers some risks, but excludes others,”¹²² adding that a disability plan’s “underinclusion” of risks, or lack of comprehensiveness will not bring about Title VII violation.¹²³ The Court permitted this exclusion because it was an

113. *Id.*

114. *Id.* (citing *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 375, 377 (E.D. Va. 1974)).

115. *Id.*

116. *Gilbert*, 429 U.S. at 136.

117. *Id.* at 137.

118. *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 246-248 (1976)).

119. *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

120. *Id.* at 138 (quoting *Geduldig v. Aiello*, 471 U.S. 484, 496 (1974)).

121. *Gilbert*, 429 U.S. at 137.

122. *Id.* at 138 (citing *Geduldig*, 471 U.S. at 494).

123. *Id.*

“additional risk,”¹²⁴ that happened to vest itself on *some* women, and therefore it was lawful to exclude it from the disability plan:

For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits accruing to men and women alike, which results from the facially evenhanded inclusion of the risks.¹²⁵

General Electric did not simply remove coverage from its women employees that its male employees received, as that most certainly would have constituted sex discrimination under Title VII in 1976.¹²⁶ General Electric employees—men and women—did receive the coverage for “exactly the same categories of risk.”¹²⁷ Rather, the exclusion was a cost-controlling decision that did not remove from women benefits received by men, but instead removed benefits from women that men did not also utilize,¹²⁸ thereby justifying the exclusion in the eyes of 1976 Title VII jurisprudence.

The Supreme Court’s conclusion in *Gilbert* meant that an otherwise comprehensive plan that deliberately excluded pregnancy coverage was, in the Court’s eyes, facially neutral and without a discriminatory effect on women. In essence, the Court did not equate “pregnancy” with “sex”; under Title VII in 1976 the Court found that discrimination based on pregnancy was not the same thing as discrimination based on sex. This disparity was corrected by the Pregnancy Discrimination Act amendment to Title VII in 1978.

124. *Id.* at 139.

125. *Id.*

126. One example this author can think of is coverage for disabilities associated with heart attacks. Since both men and women have heart attacks, a health insurance policy that covered heart attacks for men but not women would be clearly in violation of Title VII. Here, however, since the condition of pregnancy does not happen to men, it is considered an “additional risk.”

127. *Gilbert*, 429 U.S. at 138.

128. *See id.* at 152 (Brennan, J., dissenting). Interestingly, the majority seems to suggest that the coverage was exactly the same for male and female employees of General Electric, meaning that excluding exclusively-female health care needs such as pregnancy was justified by the fact that exclusively male health care needs were also excluded by the plan. The *Gilbert* majority stated that “[General Electric’s benefits plan] covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that ‘[t]here is no risk from which men are protected and women are not . . . [and] no risk from which women are protected and men are not.’” *Id.* at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)) (second alteration in original). In fact, there was coverage provided for exclusively-male needs, particularly “risks such as prostatectomies, vasectomies, and circumcisions.” *Id.*

III. THE PREGNANCY DISCRIMINATION ACT OF 1978

A. *The Dissent of Gilbert: A Foundation for the PDA*

Rather than understanding the different sex-based health care needs of women and men, the *Gilbert* court looked instead to a “common denominator” of coverage needs: all men and women would be covered for the same conditions. Since male employees did not get pregnant, General Electric’s refusal to cover disabilities related to the condition of pregnancy was not discriminatory towards women. Instead, *Gilbert* deemed pregnancy-related disabilities “‘extra’ disabilities”¹²⁹ that were mere “additional risk[s]”¹³⁰ occurring outside of General Electric’s disability benefits plan. *Gilbert* believed that “it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; . . . gender-based discrimination does not result simply because an employer’s disability-benefits plan is less than all-inclusive.”¹³¹ General Electric’s benefits exclusion did not affect all women employees (since not all women were pregnant), thereby assuming two things: first, that for a group to be discriminated against, it must be a “uniform discrimination,”¹³² and second, that “pregnant women” did not constitute a class protected under Title VII. These assumptions were taken up in the dissent of *Gilbert* as well as the PDA. The *Gilbert* majority was rebutted by the strong dissent of Justice Brennan, and even more importantly, by the Congressional amendment to the Title VII provision for sex discrimination via the Pregnancy Discrimination Act of 1978.

The dissent of Justice Brennan in *Gilbert*, in which Justice Marshall concurred, interpreted the applicability of Title VII to General Electric’s disability plan exclusion in a much different manner. The disparity, Justice Brennan noted, between the majority and his dissent¹³³ hinged largely on the “conceptual framework” that each side used to analyze the question. The two sides differed on whether General Electric’s plan concerned “a gender-free assignment of risks,”¹³⁴ or something more, an omission of coverage that was propelled by an intent to discriminate, and that carried with it a discriminatory effect.¹³⁵ Initially the dissent rejected the majority’s decision since the six

129. *Id.* at 139 n.17.

130. *Id.* at 139.

131. *Id.* at 138-39.

132. This means that Title VII sex discrimination would only occur if the employer discriminated against *all* female employees. In *Gilbert*, however, General Electric’s disability plan only discriminated against *pregnant* women. 429 U.S. at 147 (Brennan, J., dissenting).

133. The majority, again, also departed from the stances of the lower courts of *Gilbert*, the women plaintiffs and the EEOC.

134. *Gilbert*, 429 U.S. at 147.

135. *Id.*

appellate courts dealing with the same issue had “unanimous[ly] conclu[ded]” that the type of disability benefits plan exclusion utilized by General Electric violated Title VII.¹³⁶ Furthermore, Brennan’s dissent took issue with the majority’s “repudiat[ion] [of] the applicable administrative guideline promulgated by the agency charged by Congress with implementation of the Act,” the EEOC.¹³⁷

Brennan’s dissent began by comparing the EEOC’s argument in its brief as amicus curiae with the response of the majority. The EEOC believed that General Electric’s disability plan violated Title VII “because the omission of pregnancy from the program ha[d] the intent and effect of providing that ‘only women [were subjected] to a substantial risk of total loss of income because of temporary medical disability.’”¹³⁸ The majority, on the other hand, felt that Title VII had not been violated because “it view[ed] General Electric’s plan as representing a gender-free assignment of risks in accordance with normal actuarial techniques.”¹³⁹ Also, to counter the EEOC’s interpretation of the purpose of Title VII, the majority wrote extensively about the proper place of the EEOC decisions in the context of statutory interpretation, particularly that:

[I]n enacting Title VII, [Congress] did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that the courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law.¹⁴⁰

In response to this, Justice Brennan concluded that the correctness of the Court’s opinion, and the determination of the proper “conceptual framework” through which to interpret Title VII rested in a two-fold analysis. First, Justice Brennan addressed the “soundness of the Court’s underlying assumption that the plan is the untainted product of a gender-neutral risk assignment process.”¹⁴¹ He concluded that this assumption, based on the “historical backdrop of General Electric’s employment practices,”¹⁴² as well as “the existence or nonexistence of gender-free policies governing the inclusion of

136. *Id.*

137. *Id.* at 146-47.

138. *Id.* at 147 (quoting Brief of Amicus Curiae Equal Employment Opportunity Commission at 12, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (No. 74-1589)).

139. *Gilbert*, 429 U.S. 125 at 147.

140. *Id.* at 141 (citations omitted). A large part of *Gilbert*’s majority opinion and Brennan’s dissent was devoted to the EEOC’s position and its guidelines in *Gilbert*. The majority and dissent disagreed on the extent to which the EEOC decisions and guidelines should have shaped and influenced the Court when answering this question. While this was significant in *Gilbert*, it played less of a role in *Erickson*.

141. *Id.* at 148 (Brennan, J., dissenting).

142. *Id.*

compensable risks,”¹⁴³ was “purely fanciful.”¹⁴⁴ Second, Justice Brennan addressed the question of whether “the resulting pattern of risks insured by General Electric can then be evaluated in terms of the broad social objectives promoted by Title VII.”¹⁴⁵ By viewing *Gilbert* in terms of whether it satisfied the goals of Title VII, Brennan concluded that “the EEOC’s interpretation that the exclusion of pregnancy from a disability insurance plan is incompatible with the overall objectives of Title VII has been unjustifiably rejected.”¹⁴⁶

Getting to the core of the issue, Justice Brennan’s dissent examined the acts of General Electric in the contexts of disparate treatment and disparate impact under Title VII. First, under disparate treatment, Justice Brennan criticized the majority’s reliance on *Geduldig*, commenting that *Geduldig* could apply to *Gilbert* only in its determination “that a pregnancy classification standing alone cannot be said to fall into the category of classifications that rest explicitly on ‘gender as such.’”¹⁴⁷ The dissent remarked that “it offend[ed] common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly ‘sex related.’”¹⁴⁸ In addition, Justice Brennan looked to the central question in *Geduldig*, which was “whether the exclusion of a sex-linked disability . . . was actually a product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women’s role in the labor force.”¹⁴⁹ In *Geduldig*, Justice Brennan noted that, since the defendant was the State of California, it received “the normal presumption favoring legislative action” in Equal Protection Clause challenges.¹⁵⁰ However, first, in *Gilbert*, the defendant was a private company being sued under Title VII, *not* a state being challenged under the Fourteenth Amendment.¹⁵¹ Second:

[T]he Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed. Moreover, the Court studiously ignores the undisturbed conclusion of the District Court that General Electric’s “discriminatory attitude” toward women was a “motivating factor in its policy,” and that the pregnancy exclusion was “neutral (neither) on its face” nor “in its intent.”¹⁵²

143. *Id.*

144. *Gilbert*, 429 U.S. 125 at 148.

145. *Id.*

146. *Id.*

147. *Id.* at 148-49.

148. *Id.* at 149.

149. *Gilbert*, 429 U.S. at 149.

150. *Id.* (citing *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974)).

151. *Id.*

152. *Id.* at 149-50 (citations omitted).

Justice Brennan also criticized the decision of the majority based on the assertion that pregnancy differs from other disabilities due to its “voluntary” nature.¹⁵³ The district court found that pregnancy was “often a voluntarily undertaken and desired condition,” to which the majority felt marked a distinction between pregnancy and the other disabilities covered in General Electric’s plan.¹⁵⁴ Justice Brennan, however, felt that the “voluntary” distinction was not persuasive, “for as the Court of Appeals correctly noted, ‘other than for childbirth disability, [General Electric] had never construed its plan as eliminating all so-called “voluntary” disabilities,’ including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery.”¹⁵⁵ While not devoting a large portion of its opinion to this concept, the Court felt that this was another reason General Electric’s exclusion was not a “pretext for discriminating against women.”¹⁵⁶ Interestingly, this same argument was also asserted by the defendant in *Erickson* and was rejected by the court.¹⁵⁷

Justice Brennan then utilized the “framework” explicated in *Geduldig* to counter the Court’s arguments in *Gilbert*. The *Geduldig* court stated that “[t]here is no risk from which men are protected and women are not . . . [and] no risk from which women are protected and men are not.”¹⁵⁸ As Justice Brennan pointed out, however, General Electric’s disability plan covered risks such as “prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan.”¹⁵⁹ This left pregnancy to be “the only disability, sex-specific or otherwise, that is excluded from coverage.”¹⁶⁰ This finding prompted Brennan to suggest that the Court’s belief that the plan was based on “a mere underinclusive assignment of risks in a sex-neutral fashion”¹⁶¹ as being “simplistic and misleading.”¹⁶² Ultimately, Brennan agreed with the District Court’s holding that “General Electric’s ‘discriminatory attitude’ toward women was ‘a motivating factor in its policy’¹⁶³ and that the pregnancy exclusion was ‘neutral neither on its face’ nor

153. *Id.* at 151.

154. *Gilbert*, 429 U.S. at 136 (citing *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 377 (E.D. Va. 1974)).

155. *Id.* at 151 (quoting *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 665 (4th Cir. 1975)).

156. *Id.* at 136.

157. *See Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1272-73 (W.D. Wash. 2001).

158. *Gilbert*, 429 U.S. at 152 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (Brennan, J., dissenting)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Gilbert*, 429 U.S. at 150 (quoting *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 383 (E.D. Va. 1974)) (citation omitted).

‘in its intent.’”¹⁶⁴ Clearly, to Justice Brennan, General Electric had discriminated against its female employees under the disparate treatment theory of Title VII.

Justice Brennan then analyzed the Court’s decision under the disparate impact theory. He particularly urged the Court to apply the legal theory of disparate impact in violation of Title VII that each of the appellate courts had previously applied when dealing with this issue: that “a prima facie violation of Title VII . . . [could be] established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class.”¹⁶⁵ Justice Brennan noted three distinct discriminatory effects of General Electric’s coverage exclusion: (1) “the plan covers all disabilities that mutually afflict both sexes;”¹⁶⁶ (2) the plan insures against all disabilities that are male-specific or have a predominant impact on males;”¹⁶⁷ and (3) “all female-specific and female-impacted disabilities are covered, except for the most prevalent, pregnancy.”¹⁶⁸ Brennan then concluded that the Court incorrectly focused on only the first effect of General Electric’s plan, while the EEOC aimed to prevent “the unequal exclusion manifested in effects two and three,” which represented a disparate impact on women in violation of Title VII.¹⁶⁹

This disparity between the Court and its dissenting justices over which discriminatory effects were to be recognized led Brennan and Marshall to depart from their majority counterparts. Brennan and Marshall believed that it was well-settled law¹⁷⁰ that “a prima facie violation of Title VII, whether under [theories of disparate treatment or disparate impact], also is established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class.”¹⁷¹ The dissent arguments provided a helpful framework not only for the PDA, but also cases following it, including *Erickson*.

164. *Id.* (quoting *Gilbert*, 375 F. Supp. at 382).

165. *Id.* at 155.

166. *Id.*

167. *Id.*

168. *Gilbert*, 429 U.S. at 155.

169. *Id.* In *Gilbert*, Justice Brennan also discussed the reasons why the EEOC regulations should be followed. *Id.* at 155-59.

170. *Id.* at 154. Brennan felt that it was particularly well settled due to the findings of the six appellate courts, which accepted a position opposite to the majority’s.

171. *Id.*

B. A Legislative Response: The PDA Amendment to Title VII

In a direct response to the Supreme Court holding in *Gilbert*,¹⁷² Congress decided it was time to clarify what the Title VII prohibition against sex discrimination was meant to do¹⁷³ and redefined the scope of the law by redefining “sex discrimination” in Title VII.¹⁷⁴ The PDA added the following language to Title VII:

(k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work¹⁷⁵

Unlike the absence of legislative history elaborating on the scope and proper application of sex discrimination under the 1964 version of Title VII,¹⁷⁶ the PDA *did* have accompanying legislative history to explain the Congressional intent and purpose for adopting the law. A large part of that history came directly from Justice Brennan’s dissenting opinion in *Gilbert*. Congress’ purpose for the PDA was to “clarify [its] intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment.”¹⁷⁷ The House Report discussing the creation of the PDA showed that the law was created not to “reflect [a] new legislative mandate of the Congress . . . [but] to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination . . . [and] to clarify its original intent.”¹⁷⁸ With the PDA, Congress was restating its intent behind Title VII, and assisting the Supreme Court to get back on track with the legislative intent

172. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675-76 (1983); H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750.

173. The PDA would provide an opportunity for the 1978 Congress to show its intent for Title VII sex discrimination. The intent of the 1964 Congress with regard to sex discrimination under Title VII is unclear, due largely to the lack of legislative history. See *supra* note 65. Congress felt that the Supreme Court reached the wrong result in *Gilbert*, and, therefore, Congress wanted to set the courts straight by stating its vision of prohibited sex discrimination.

174. 42 U.S.C. § 2000e(k) (2000). See also *Newport News Shipbuilding*, 462 U.S. at 678; *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269-70 (W.D. Wash. 2001); H.R. REP. NO. 95-948, at 1-18.

175. 42 U.S.C. § 2000e(k).

176. The Pregnancy Discrimination Act was created to solidify, explain and make consistent the judicial interpretation of the Title VII sex discrimination. Indeed, the PDA itself does much to explain the intent of Title VII, and the legislative history of the PDA only helps interpreters to allow the law to reach its full potential. See H.R. REP. NO. 95-948 at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750.

177. *Id.* at 1.

178. *Id.* at 3.

for the law.¹⁷⁹ This tweaking of Title VII, Congress asserted, was to limit confusion regarding its policy on sex discrimination in the workplace and to prevent “an intolerable potential trend in employment practices.”¹⁸⁰

Part of the problem with *Gilbert* was the extent to which the Court needed to interpret “sex discrimination”—a difficult task, particularly in light of the lack of legislative history of “sex discrimination” in Title VII. Accordingly, the PDA was created to reduce the amount of interpretation necessary in the courts, thereby reducing both the discretion of the courts and, as the result of such discretion,¹⁸¹ problematic holdings such as *Gilbert*. This was a necessary clarification, because “the Supreme Court’s narrow interpretations of Title VII tend[ed] to erode our national policy of nondiscrimination in employment.”¹⁸²

Newport News Shipbuilding & Dry Dock Co. v. EEOC marked one of the first judicial applications of the newly adopted PDA amendment to Title VII.¹⁸³ Prior to the PDA, Newport News’ plan provided equal coverage for pregnancy-related hospitalizations of female employees and spouses of male employees; this coverage, however, was limited in comparison to all other hospitalizations covered by the plan.¹⁸⁴ After the employer made adjustments to its benefits plan in compliance with the PDA, female employees were provided coverage for their pregnancy-related hospitalizations without the prior limitation.¹⁸⁵ The spouses of male employees, however, were subject to a limitation of coverage of 100% of *reasonable and customary* delivery and anesthesiologist charges, and \$500 for the hospital stay, marking a discrepancy in treatment of Newport News’ female employees and the spouses of its male employees.¹⁸⁶

Newport News provided the test central to determining PDA compliance. “Under the proper test [Newport News’] plan is unlawful because the protection it affords to married male employees is *less comprehensive* than the protection it affords to married female employees.”¹⁸⁷ This case marked the distinction between pre-PDA and post-PDA versions of Title VII. The pre-PDA holdings such as *Gilbert* allowed employers to refuse coverage for exclusively female health care needs, using a unisex definition of “comprehensive.” For example, *Gilbert* indicated that if the same coverage was provided for men and women, then the coverage would not discriminate,

179. *Id.*; *Newport News Shipbuilding*, 462 U.S. at 676; *Erickson*, 141 F. Supp. 2d at 1269.

180. H.R. REP. NO. 95-948, at 3.

181. An example of one such result is when the courts interpreted the law in ways not intended by Congress.

182. H.R. REP. NO. 95-948, at 3.

183. 462 U.S. 669 (1983).

184. *Id.* at 672.

185. *Id.*

186. *Id.* at 672-73.

187. *Id.* at 676 (emphasis added).

despite the different sex-based healthcare needs of men and women. This “unisex” definition allowed for the “additional risk” concept of pregnancy that was central to *Gilbert*.¹⁸⁸ Post-PDA courts would continue to recognize the different medical needs of women and men but recognize that, in order to provide comprehensive benefits to all employees, the plans would have to provide for sex-based healthcare needs.¹⁸⁹

The Supreme Court commented on the use of the “business decision” excuse available to employers when rebutting a presumption of discriminatory treatment in one post-PDA case, *UAW v. Johnson Controls, Inc.*¹⁹⁰ In *Johnson Controls*, the Court held that the policy of prohibiting women from working in areas of a battery manufacturing plant that could produce complications in their fertility and pregnancy was discriminatory under Title VII and the PDA.¹⁹¹ The employer utilized a cost-based defense, arguing that if the women allowed to work in these dangerous areas encountered complications in their fertility or future pregnancies as a result of the materials they encountered while working, the tort awards these women would garner would greatly damage the employer.¹⁹² In short, if women would be allowed to work near harmful materials, the resulting tort liability would make it more expensive for the employer to employ women.¹⁹³

The employer argued that its tort-liability would be salvaged through the employer’s prohibition of women working in dangerous areas. This argument for a business justification warranting discrimination was rejected by the Court on the grounds that it violated the PDA.¹⁹⁴ The employment policy specifically stated that women “capable of bearing children” would be barred from working in areas where they could be exposed to lead.¹⁹⁵ “Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. [The employer] has chosen to treat all of its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.”¹⁹⁶ Finally, the *Johnson Controls* Court clarified that the employment policy at bar should have been analyzed under the disparate treatment framework and not the disparate impact theory since it

188. *See supra* notes 122-28 and accompanying text.

189. *See* *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 677-78 (1983).

190. 499 U.S. 187 (1991).

191. *Id.* at 204-05.

192. *Id.* at 210-11.

193. *Id.*

194. *Id.* Note that this determination also included consideration of “sex” as a bona fide occupational qualification (BFOQ), which requires certain particular defenses to it; this topic falls far outside the scope of this note. For the purpose of this Note, *Johnson Controls* brings forth an example of the pre-1991 Civil Rights Act failure of a “cost” defense to disparate treatment under Title VII.

195. *Johnson Controls*, 499 U.S. at 198-99.

196. *Id.*

“[was] not neutral because it [did] not apply to the reproductive capacity of the company’s male employees in the same way as it applie[d] to that of the females.”¹⁹⁷

V. THE FACTS OF ERICKSON

When the *Erickson* case arose, Jennifer Erickson was twenty-six years old, married for one year and had just begun her career as a pharmacist at Bartell Drug Company.¹⁹⁸ As a young woman just getting started in her career, she was not yet ready to begin having children, and she prevented pregnancy with the most common form of reversible birth control, oral contraceptive pills.¹⁹⁹ After Bartell’s employee prescription drug plan refused Erickson’s initial request for coverage of her oral contraceptives, she wrote to the benefits department requesting a change in the plan, but she was once again denied.²⁰⁰

197. *Id.* The Court went on to recognize the premise in Title VII jurisprudence that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. . . . Nor did the arguably benign motives lead to consideration of a business necessity defense.” *Id.* at 199. It should be noted that this use of a cost-based business necessity defense in a disparate treatment action in *Johnson Controls* pre-dated the Civil Rights Act of 1991 that flatly prohibited this defense in this context, but for cases involving a bona fide occupational qualification. See 42 U.S.C. §2000e-2(k)(2) (2000).

198. Plaintiff’s Amended Complaint at 9-10, *Erickson* (No. C00-1213L).

199. Kelly Dowhower Karpa, *For Women Only*, DRUG TOPICS, Jan. 15, 2001, at 51. “Of U.S. women using contraception, 17% reportedly rely upon [oral contraceptive pills]” *Id.* at 51. Law’s article suggests otherwise, that OCP’s are used by “twenty-seven percent of women who practice contraception in the United States.” Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 369 (1998) (citing Linda J. Piccinino & William D. Mosher, *Trends in Contraceptive Use in the United States: 1982 – 1995*, 30 FAM. PLAN. PERS. 4, 4-5 (1998)). Regardless of which figure is correct, the birth control pill is the choice contraceptive device for women trying to prevent pregnancy.

Ms. Erickson recently testified before the Senate Committee on Health, Education, Labor and Pensions to urge Congress to improve coverage for contraception:

I consider myself in many ways a typical American woman. My husband Scott and I have been married for two years. We both have full time jobs in the Seattle area and are working hard to save money. We recently bought our first house and we spent a lot of time this summer painting and fixing it up.

My husband and I are both looking forward to starting a family. However, we want to be adequately prepared for the financial and emotional challenges of parenting. Someday when we feel ready, Scott and I would like to have one or two children.

But we know we could not cope with having twelve to fifteen children, which is the average number of children women would have during their lives without access to contraception. So I, like millions of other women, need and use safe, effective prescription contraception.

Improving Women’s Health: Why Contraceptive Insurance Coverage Matters?: Hearing Before the Senate Committee on Health, Educ., Labor and Pensions, 107th Cong. (2001) (statement of Jennifer Erickson, Class Representative, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001)).

200. Plaintiff’s Amended Complaint at 11, *Erickson* (No. C00-1213L).

Finally, after filing a charge with the EEOC in late 1999 and receiving a right-to-sue letter, Erickson filed suit in the Western District of Washington with only an EEOC decision²⁰¹ and a cognizable interpretation of Title VII – though not yet established in common law or statute – on her side.²⁰²

Erickson did not make her claim solely for herself, but also as the class representative in a class action suit, the members consisting of female, non-union Bartell employees.²⁰³ Surely she realized that this victory would have a much more widespread effect, warranting employers nationwide to think twice about their prescription plans, and leading women to once again reconsider their rights, their “realized” equality and their conditions in the workplace. It would also prompt female employees and their employers to re-assess the possible discriminatory effects of their employment policies and benefit plans. One could imagine that, as a pharmacist, Mrs. Erickson was reminded on a daily basis of the effects of the injustices of discriminatory employer-based prescription plans for all women. It is highly probable that Ms. Erickson commonly encountered patients with the same complaint that she pursued in *Erickson*.²⁰⁴

The court’s holding in *Erickson* responded to the parties’ cross motions for summary judgment. Erickson claimed that Bartell violated Title VII of the Civil Rights Act of 1964,²⁰⁵ as amended by the Pregnancy Discrimination Act

201. U.S. Equal Employment Opportunity Commission, Decision on Coverage of Contraception, (Dec. 14, 2000), available at <http://www.eeoc.gov/docs/decision-contraception.html> (last visited Sept. 18, 2002).

202. See generally *id.*; Plaintiff’s Amended Complaint at 12, *Erickson* (No. C00-1213L).

203. Plaintiff’s Amended Complaint at 4, *Erickson* (No. C00-1213L).

204. In her testimony during a Senate hearing, Ms. Erickson commented on her perspective as a pharmacist on employers’ refusals to cover contraceptives:

Personally, it was very disappointing for me [to find that my employer did not cover prescription contraceptives], since contraception is my most important, ongoing health need at this time. For many women, it may be the only prescription she needs. But it was also troubling to me professionally, as a health care provider. . . .

Contraception is one of the most common prescriptions I fill for women. I am often the person who has the difficult job of telling a woman that her insurance plan will not cover contraceptives. It is an unenviable and frustrating position to be in, because the woman is often upset and disappointed, and I am unable to give her an acceptable explanation. . . .

. . . .

I finally got tired of telling women “no this one prescription your insurance won’t cover.” So I took the bold step of bringing a lawsuit against my employer to challenge its unfair policy. I did it not just for me, but for the other women who work at my company who are not so fortunate.

Improving Women’s Health: Why Contraceptive Insurance Coverage Matters?: Hearing Before the Senate Committee on Health, Educ., Labor and Pensions, 107th Cong. (2001) (statement of Jennifer Erickson, Class Representative, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash 2001)).

205. *Erickson*, 141 F. Supp. 2d at 1268 (citing 42 U.S.C. § 2000e-2).

of 1978,²⁰⁶ under two theories of discrimination: disparate treatment and disparate impact.²⁰⁷ Though this was a Title VII case, there was less discussion of the plaintiff's prima facie burden or the framework set forth in *McDonnell Douglas Corp. v. Green*²⁰⁸ and more of an effort to justify the court's alignment of *Erickson* with prior Supreme Court decisions on sex discrimination.

Though the court in *Erickson* turned to prior case law instead of performing an independent disparate treatment analysis, Erickson's arguments are important because they elucidate the employee's position and also work against Bartell's defenses to sex discrimination. Under its theory of disparate treatment, or intentional discrimination, Erickson made two arguments. First, she noted the disparity of coverage between preventative medications and treatments that were included and excluded in the prescription plan. Specifically, Bartell *refused to cover* prescription contraceptives in its "employee benefit plan while *including* benefits for other preventative medical services, including other preventative prescription medications and devices."²⁰⁹ Erickson then argued that Bartell's exclusion applies only to females, because males did not use the contraceptive drugs and devices excluded from the plan. "Prescription contraception, which is available for use only by women, is basic medical care for women who have the potential to become pregnant but who wish to control that potential by reversible means."²¹⁰ In connecting these two arguments, Erickson concluded that "[t]he failure to provide coverage for prescription contraception treat[ed] medication needed for a pregnancy-related condition less favorably than medication needed for other medical conditions"²¹¹ and evidenced disparate treatment of Bartell's female employees.

Erickson's argument under the disparate impact theory—or unintentional discrimination—was similar to the disparate treatment argument. Put simply in the complaint, "[b]ecause prescription contraceptives are available for use only by women, Bartell's failure to provide coverage for prescription contraception forces its female employees to choose between paying their own out-of-pocket prescription costs, or bearing the physical, emotional and financial costs of unplanned pregnancy."²¹² Even if there could be shown no subjective intent of Bartell to discriminate against its female employees, a

206. *Id.* (citing 42 U.S.C. § 2000e-2(k)). The Pregnancy Discrimination Act amended Title VII to confirm that discrimination based on sex also included discrimination based on pregnancy.

207. *Id.* at 1268 n.2.

208. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

209. Plaintiff's Amended Complaint at 2, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (No. C00-1213L) (emphasis added).

210. *Id.*

211. *Id.*

212. *Id.* at 3.

showing under Title VII that Bartell's prescription plan exclusion worked to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex," would lead the court to find that Bartell's prescription plan was discriminatory.²¹³

Bartell sought summary judgment in its favor on the same claims²¹⁴ and posited numerous arguments in its defense including:

- (1) treating contraceptives differently from other prescription drugs is reasonable in that contraceptives are voluntary, preventative, do not treat or prevent an illness or disease, and are not truly a "healthcare" issue;
- (2) control of one's fertility is not "pregnancy, childbirth or related medical conditions" as those terms are used in the PDA;
- (3) employers must be permitted to control the costs of employment benefits by limiting the scope of coverage;
- (4) the exclusion of all "family planning" drugs and devices is facially neutral;
- (5) in the thirty-seven years Title VII has been on the books, no court has found that excluding contraceptives constitutes sex discrimination; and
- (6) this issue should be determined by the legislature, rather than the courts.²¹⁵

The *Erickson* court began its discussion by retracing the legislative history of Title VII and the PDA.²¹⁶ The court held for Erickson and against Bartell on the first count of disparate treatment in violation of Title VII and as a result did not elaborate on the plaintiff's second claim of disparate impact or the defendant's defense to it.²¹⁷ In holding for Erickson, the court stated first that "[m]ale and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception."²¹⁸ *Even if* Bartell denied coverage of contraceptives without an intent to discriminate against women, the court noted that an employer's decision to cover all drugs and devices, except a few, created a legal obligation for that employer under

213. 42 U.S.C. § 2000e-2(a)(2) (2000).

214. *Erickson*, 141 F. Supp. 2d at 1268 n.2.

215. *Id.* at 1272.

216. *Id.* at 1269-71.

217. *Id.* at 1277.

218. *Id.* at 1271.

Title VII²¹⁹ to ensure that the otherwise comprehensive benefits plan would “provide[] equally comprehensive coverage for both sexes,”²²⁰ and also would “not discriminate based on sex-based characteristics.”²²¹ Since a large number of the excluded drugs and devices from Bartell’s plan would *only* be prescribed to women, the plan was deemed facially discriminatory, showing disparate treatment of male and female employees covered under Bartell’s prescription drug plan.

A. *Disparate Treatment in the Context of Erickson*

Erickson’s disparate treatment claim centered on the premise of the PDA that pregnancy discrimination is equivalent to sex discrimination.²²² Erickson claimed:

Contraception is “pregnancy-related” within the meaning of the PDA because it is medical treatment that provides women with the ability to control their biological potential for pregnancy. Exclusion of contraception from a health plan is sex discrimination in violation of the PDA because it treats women differently on the basis of their potential to become pregnant. The exclusion of contraception from [Bartell’s plan] is, therefore, sex discrimination on its face in violation of Title VII, as amended by the PDA.²²³

As a case of first impression, *Erickson*’s facts differed from those of any prior case and presented a new focus through which the courts could recognize and analyze Title VII sex discrimination.²²⁴ While *Erickson* involved the exclusion of coverage for contraceptive drugs and devices,²²⁵ prior cases focused on the refusal to cover the disabling effects of pregnancy.²²⁶ Nonetheless, the Western District of Washington examined *Erickson* in terms of the legal

219. *Erickson*, 141 F. Supp. 2d at 1272.

220. *Id.*

221. *Id.*

222. For a more extensive discussion of the PDA, see *infra* notes 175-85 and accompanying text. For the purposes of analyzing *Erickson*’s disparate treatment claim and *Bartell*’s response thereto, it is necessary to understand that the PDA helped to define “sex discrimination” in Title VII by including decisions based on “pregnancy, childbirth, or related medical conditions” with regard to both medical benefits plans and benefits for disability due to pregnancy. 42 U.S.C. § 2000e(k) (2000).

223. Plaintiff’s Amended Complaint at 39, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (No. C00-1213L).

224. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

225. *Erickson*, 141 F. Supp. 2d at 1268.

226. See, e.g., *Gilbert*, 429 U.S. at 125; *Newport News Shipbuilding*, 462 U.S. at 672-73 (holding that spouses of male employees are entitled to the same coverage for pregnancy-related disabilities as were female employees; the PDA did extend to the spouses of employees and not just employees themselves).

principles established by *Gilbert* and the PDA.²²⁷ The court noted, “[a]lthough this litigation involves an exclusion for prescription contraceptives rather than an exclusion for pregnancy-related disability costs, the legal principles established by *Gilbert* and its legislative reversal [by the PDA] govern the outcome of this case.”²²⁸ Particularly, the court noted that under the *Gilbert* requirements, because Bartell’s plan involved “no risk from which men [were] protected and women [were] not,” Bartell’s plan shared the same “facial parity” as General Electric’s plan had in *Gilbert*.²²⁹

However, much had changed in the law between *Gilbert*, decided in 1976, and *Erickson*. Instead of focusing on *Gilbert*, *Erickson* was appropriately based on more current law, specifically, the PDA and two tenets of law reaffirmed by it—“relative comprehensiveness of coverage” and “sex-based classifications” for coverage.²³⁰ The first tenet, relative comprehensive coverage, as explicated by *Newport News*, was that “equality under Title VII [was] measured by evaluating the relative comprehensiveness of coverage offered to the sexes”²³¹ The *Erickson* court focused on the actual disparity of comprehensive coverage benefits between men and women instead of the deceptively “sex-neutral” identical lists of treatment for men and women that provided the facial parity upon which *Gilbert* was based.²³² “Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception.”²³³ The court decided, accordingly, that this tenet should apply to coverage for prescription contraception no differently than it applies to coverage for costs associated with pregnancy itself.

The second tenet of the PDA, “that discrimination based on any sex-based characteristic is sex discrimination,”²³⁴ was described in *UAW v. Johnson Controls, Inc.*,²³⁵ which further explained “that classifying employees on the basis of their childbearing capacity, regardless of whether they are, in fact, pregnant, is sex-based discrimination.”²³⁶ Furthermore, the *Erickson* court noted “[t]he special or increased healthcare needs associated with a woman’s unique sex-based characteristics must be met to the same extent, and on the

227. *Erickson*, 141 F. Supp. 2d at 1270.

228. *Id.*

229. *Id.* at 1270-71 (quoting *Gilbert*, 429 U.S. at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974))).

230. 42 U.S.C. § 2000e-2(k) (2000). See *Erickson*, 141 F. Supp. 2d at 1270-71.

231. *Erickson*, 141 F. Supp. 2d at 1271.

232. *Id.* at 1271. See also *Gilbert*, 429 U.S. at 138-40.

233. *Erickson*, 141 F. Supp. 2d at 1271.

234. *Id.*

235. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

236. *Erickson*, 141 F. Supp. 2d at 1271 (citing *Johnson Controls*, 499 U.S. at 197-98).

same terms, as other healthcare needs.”²³⁷ Therefore, Bartell’s plan caused disparate treatment of its female employees as prohibited under Title VII.

Regardless of whether Bartell’s plan was *intentionally* discriminatory (and the court doubted this intention),²³⁸ it did, on its face, discriminate against women due to the facts that, first, the plan was not comprehensive for the specific health care needs of women (it was not relatively comprehensive),²³⁹ and, second, Bartell’s choice of exclusions followed the lines of sex-based needs (it was based on a sex-based classification).²⁴⁰ Ultimately, after reviewing “the legislative history of Title VII and the PDA, the language of the statute itself, and the relevant case law,”²⁴¹ the court found Bartell’s prescription plan exclusions to be “inconsistent with the requirements of federal law.”²⁴²

B. Bartell’s Defenses to Disparate Treatment: Same Exclusions for Female Employees and Dependents; Facial Neutrality

In response to Erickson’s claim of disparate treatment, Bartell argued that “its prescription plan [was] not discriminatory because the female dependents of male employees [were] subject to the same exclusions as [were] female employees.”²⁴³ Particularly, Bartell argued that the prescription contraceptive drugs and devices were excluded since they belonged to the “family planning” classification prescriptions, all of which were excluded from the plan.²⁴⁴ Since all family planning drugs such as infertility drugs and contraceptives were excluded, according to Bartell, this resulted in a facially neutral provision.²⁴⁵

However, the court noted that no specific family planning exclusion was stated in the plan, and further, other drugs that could be classified as family

237. *Id.*

238. *Id.* at 1271-72 n.7. *Erickson* doubts that the plan was intentional in its discrimination against women:

The most reasonable explanation for the current state of affairs is that the exclusion of women-only benefits is merely an unquestioned holdover from a time when employment-related benefits were doled out less equitably than they [were] today. The lack of evidence of bad faith or malice toward women does not affect the validity of plaintiffs’ Title VII claim. Where a benefit plan is discriminatory on its face, no inquiry into subjective intent is necessary.

Id. (citing *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1080-86 (1983)).

239. *Erickson*, 141 F. Supp. 2d at 1271-72.

240. *Id.* at 1272.

241. *Id.* at 1271.

242. *Id.*

243. *Id.* at 1272 n.8.

244. *Erickson*, 141 F. Supp. 2d at 1275.

245. *Id.* at 1272.

planning, such as prenatal vitamins, were covered.²⁴⁶ The court ultimately rejected Bartell's facial neutrality argument because:

First, discriminating against a protected class cannot be justified through consistency. Second, Bartell ignore[d] the clear import of Congress' repudiation of *Gilbert*: a policy which use[d] sex-based characteristics to limit benefits, thereby creating a plan which [was] less comprehensive for one sex than the other, violate[d] Title VII.²⁴⁷

The court also responded that *even if* there was a family planning exclusion, and assuming that the exclusion of infertility drugs affects the sexes without parity, this particular exclusion of contraceptives in *Erickson* still affected women much more than men, and was *still* discriminatory.²⁴⁸

[T]here is at least an argument that the exclusion of infertility drugs applie[d] equally to male and female employees, making the coverage offered to all employees less comprehensive in roughly the same amount and manner. The additional exclusion of prescription contraceptives, however, reduces the comprehensiveness of the coverage offered to female employees while leaving the coverage offered to male employees unchanged.²⁴⁹

Ultimately, Bartell was unable to provide a legitimate, non-discriminatory reason for its exclusion of coverage for contraceptive drugs and devices. This was enough for the *Erickson* court to conclude that Bartell's plan discriminated against its female employees. Bartell's use of the "facial neutrality"²⁵⁰ defense, however, cuts against the employer since the concept is often a characteristic of (note, *not* a defense to) claims of disparate impact.

C. *Disparate Impact in the Context of Erickson*

Erickson's argument of disparate impact in violation of Title VII was also based on the PDA amendment of Title VII. *Erickson* alleged:

The exclusion of contraception from [Bartell's plan] also [had] an adverse disparate impact on women in violation of Title VII because it force[d] them either to pay for prescription contraceptives out of pocket, despite having

246. *Id.* at 1275.

247. *Id.* at 1272 n.8.

248. *Id.* at 1275.

249. *Erickson*, 141 F. Supp. 2d at 1275.

250. *Id.* at 1274-75. The defendant was in a truly tough position in *Erickson*. While Bartell needed to contend that its policy exclusion was facially neutral to rebut the intentional discrimination allegation, this contention would, at the same time, help *Erickson* prove her case of disparate impact since most disparate impact cases are characterized by facially neutral employment practices. The court found that the plan was *not* facially neutral and, instead, was discriminatory on its face, so Bartell ended up losing on the issue of disparate treatment. *See id.* at 1275. However, the court's discussion appears to imply that there was also a claim of disparate impact despite the lack of facial neutrality in the policy, as facial neutrality is not an absolute statutory requirement to a finding of disparate treatment. *See* 42 U.S.C. § 2000e-2(k)(1) (2000).

prescription insurance coverage, or to bear the physical, emotional and financial burdens of unplanned pregnancy. Bartell's policy of excluding contraceptive coverage [could not] be justified as job-related and consistent with business necessity.²⁵¹

The 1991 Civil Rights Act added the prima facie requirements for disparate impact to Title VII, requiring that a claimant show that his or her employer utilized "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is . . . consistent with business necessity."²⁵² But, as stated in *International Brotherhood of Teamsters*, a disparate impact claim typically "involve[s] employment practices that are *facially neutral*."²⁵³ As we have seen in the discussion of the disparate treatment theory under Title VII, Bartell's policy was *not* facially neutral and *did* exhibit disparate treatment in its classification of benefit exclusions based on sex as well as its lack of relative comprehensiveness.²⁵⁴ For these reasons *Erickson* did not directly discuss the plaintiff's allegation of disparate impact since a finding of disparate treatment rendered it moot. However, the court did discuss Bartell's defense to disparate impact: that the plan was justified by a business decision to control costs.²⁵⁵

D. Bartell's Defense to Disparate Impact: Business Decision to Control Costs

Bartell argued that "it should be permitted to limit the scope of its employee benefit programs in order to control costs."²⁵⁶ However, it is well settled law that "cost is not . . . a defense to allegations of discrimination under Title VII."²⁵⁷ This concept was codified by the Civil Rights Act of 1991: the employer must show "that the challenged practice is job related for the position in question *and* consistent with business necessity."²⁵⁸ Bartell failed to satisfy either of these statutory requirements.

251. Plaintiff's Amended Complaint at 40, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (No. C00-1213L).

252. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

253. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977) (emphasis added).

254. *Erickson*, 141 F. Supp. 2d at 1271-72. See *supra* notes 20-30 and accompanying text.

255. *Erickson*, 141 F. Supp. 2d at 1274.

256. *Id.*

257. *Id.* (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-18 (1978) (policy requiring female employees to contribute more to pension plan than their male counterparts, based on the assumption that women cost more than men to insure, violated Title VII)). See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991). See also, 29 C.F.R. §1604.9(e) (2000).

258. 42 U.S.C. § 2000e-2(k)(1)(A) (2000) (emphasis added).

In addition, though typically utilized as a defense to disparate impact, the 1991 Civil Rights Act also made clear that “business necessity” fails in the disparate treatment arena. Cost controlling devices that an employer attributes to a business necessity, regarding “[a] demonstration that an employment practice is required by business necessity, *may not* be used as a defense against a claim of intentional discrimination”²⁵⁹

Furthermore, in its Guidelines on Discrimination Because of Sex, the EEOC stated that “[i]t shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.”²⁶⁰ An important distinction should be made here in order to better understand the legal statement made by *Erickson*: although cost was not a defense to Title VII violations,²⁶¹ *Erickson* recognized that entities were free to assert control of the scope of their enterprise, so long as the method to “curb costs” was not discriminatory.²⁶² Particularly, the court stated that

Title VII does not require employers to offer any particular type or category of benefit. However, when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes.²⁶³

Nonetheless, the court recognized that “Bartell offer[ed] its employees an admittedly generous package of healthcare benefits, including both third-party healthcare plans and an in-house prescription program” and that “[t]he cost savings Bartell realize[d] by excluding prescription contraceptives from its healthcare plans [were] being directly borne by only one sex in violation of Title VII.”²⁶⁴ Therefore, if somehow disparate treatment was not proven, and disparate impact was, Bartell’s defense of “cost,” in terms of a “business necessity” issue, would have been rejected by the court. “Even if one were to assume that Bartell’s prescription plan was not the result of intentional discrimination, the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII.”²⁶⁵ In

259. *Id.* § 2000e-2(k)(2) (emphasis added).

260. 29 C.F.R. § 1604.9(e). For a discussion of the cost defense in terms of disparate impact cases, see 42 U.S.C. § 2000e-2(k)(2). *See also supra* notes 138-46 and accompanying text.

261. *Johnson Controls*, 499 U.S. at 210; *Manhart*, 435 U.S. at 716-18. The “cost defense” to disparate treatment is handled in case law; however cost, in terms of business necessity is rejected as a defense to disparate impact in Title VII language. *See* 42 U.S.C. § 2000e-2(k)(2).

262. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1274 (W.D. Wash. 2001).

263. *Id.* at 1272 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983)).

264. *Id.* at 1274.

265. *Id.* at 1271-72.

addition, there was no showing that the exclusion was, in any way “job related for the position in question.”²⁶⁶ This showing, in addition to a satisfactory showing of “business necessity,” would be necessary for a finding in favor of Bartell on the disparate impact claim.²⁶⁷ Without going into a detailed analysis of disparate impact under Title VII, the *Erickson* court suggested that *even if* Erickson had not proved her disparate treatment claim, a disparate impact claim could have also secured her victory.

E. The PDA in the Context of Erickson

As noted in the discussion of *Erickson*’s finding of disparate treatment, the court relied largely on the PDA in its analysis. *Erickson* also contributed to Title VII jurisprudence by interpreting the PDA to include conditions and treatment prior to impregnation, and not just pregnancy itself. “Read in the context of Title VII as a whole, it is a broad acknowledgement of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees.”²⁶⁸ This was an interpretation that Bartell flatly disputed.

F. Bartell’s Defense to PDA Applicability

1. Incorrect Interpretation of the Scope of the PDA

Bartell argued that the PDA did not discuss discrimination in terms of pregnancy *prevention*, and its exclusion of prescription contraceptives thereby did not violate the PDA.²⁶⁹ Particularly, Bartell argued that the exclusion of prescription contraceptives did not fall under the umbrella of “pregnancy, childbirth or related medical conditions,” to trigger PDA applicability.²⁷⁰ In other words, Bartell relied on the assertion that control of one’s fertility, what *Erickson* sought, was “not ‘pregnancy, childbirth, or related medical conditions’ as those terms are used in the PDA.”²⁷¹ While the court conceded that the PDA did not *specifically* comment on prescription contraceptives, it did note that “the decision to exclude drugs made for women from a generally comprehensive prescription plan is sex discrimination under Title VII, with or

266. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

267. *See id.* § 2000e-2(k)(1)(A)(i). Or, in the alternative, Bartell’s defense to disparate impact would fail if “the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.” *Id.* § 2000e-2(k)(1)(A)(ii).

268. *Erickson*, 141 F. Supp. 2d at 1271.

269. *Id.* at 1274.

270. *Id.* (quoting 42 U.S.C. § 2000e-2(k)).

271. *Id.* at 1272.

without the clarification provided by the PDA.”²⁷² In addition, *Erickson* found that “regardless of whether the prevention of pregnancy falls within the phrase ‘pregnancy, childbirth, or related medical conditions,’ Congress’ decisive overruling of [*Gilbert*], evidence[d] an interpretation of Title VII which necessarily preclude[d] the choices Bartell [made].”²⁷³ The *Erickson* court also replied that “the relevant issue”²⁷⁴ was whether Title VII was violated regardless of the definition of “sex” (either from the PDA or pre-PDA) used; this was a settled issue to the court, again, because Bartell’s plan constituted a classification by sex and lacked relative comprehensiveness in coverage for sex-based medical needs.²⁷⁵

2. Contraceptives Not a Health Care Need

Bartell’s most provocative argument, however, was that its refusal to cover “prescription contraceptive devices is not a violation of Title VII because . . . treating contraceptives differently from other prescription drugs [was] reasonable in that contraceptives are voluntary, preventative, [did] not treat or prevent an illness or disease, and [was] not truly a ‘healthcare’ issue.”²⁷⁶ The court framed its response to this defense around two ideas: (1) the similarity of fertility control to other diseases treated by prescription medications,²⁷⁷ and (2) the “irrelevant distinction” of the preventative nature of contraceptives.²⁷⁸

First, the court recognized that “[a]n underlying theme in Bartell’s argument is that a woman’s ability to control her fertility differs from the type of illness and disease normally treated with prescription drugs in such significant respects that it is permissible to treat prescription contraceptives differently than all other prescription medicines.”²⁷⁹ It noted, however, that a similar distinction was made in the majority opinion of *Gilbert*.²⁸⁰ The court clearly disagreed with this distinction, and cited to many sociological reports in its argument that unintended pregnancies “carry enormous costs and health consequences for the mother, the child, and society as a whole.”²⁸¹ Furthermore, the court felt that “[t]he availability of a reliable, affordable way to prevent unintended pregnancies would go a long way toward ameliorating the ills [associated therewith].”²⁸²

272. *Id.* at 1274.

273. *Erickson*, 141 F. Supp. 2d at 1274.

274. *Id.*

275. *Id.*

276. *Id.* at 1272.

277. *Id.*

278. *Erickson*, 141 F. Supp. 2d at 1273.

279. *Id.* at 1272.

280. *Id.* at 1272 n.9.

281. *Id.* at 1273.

282. *Id.* at 1273.

Finally, the court determined that Bartell's argument that prescription contraception was of a "preventative nature" was "irrelevant" because "Bartell cover[ed] a number of preventative drugs under its plan."²⁸³ This was a "distinction without a difference" because "[p]rescription contraceptives, like all other preventative drugs, help the recipient avoid unwanted physical changes."²⁸⁴ Furthermore, due to the fact that "obtaining an effective method of contraception is a primary healthcare issue throughout much of a woman's life,"²⁸⁵ the court found that any "distinction[] that can be drawn between prescription contraceptives and . . . other prescription drugs,"²⁸⁶ would not be "substantive or otherwise justif[y] the exclusion of contraceptives from a generally comprehensive healthcare plan."²⁸⁷

G. Bartell's Legislative Arguments

Finally, Bartell set forth two arguments endorsing a rigid legal system, and these arguments replicated the state of the legal system at the time of *Gilbert*. Bartell essentially asked the court "why now" and questioned Erickson's interpretation of Title VII.

1. New Interpretation of an Old Law

Bartell argued that Title VII had been law for thirty-seven years, and it seemed questionable that the court was formulating this holding at this point and not sooner.²⁸⁸ The court's reply was simple. "[U]ntil this case, no court had been asked to evaluate the common practice of excluding contraceptives from a generally comprehensive health plan under Title VII."²⁸⁹ Furthermore, the *Erickson* court, when faced with this question, was "constitutionally required to rule on the issue before it."²⁹⁰

In addition, while the judicial system had never before been faced with this issue, the EEOC had previously made statements to its merit, most recently in December, 2000.²⁹¹ The December 2000 EEOC Decision, like *Erickson*,

283. *Erickson*, 141 F. Supp. 2d at 1273 (emphasis added). Particularly, Bartell's plan covered preventative medications such as "blood-pressure and cholesterol-lowering drugs, hormone replacement therapies, prenatal vitamins, and drugs to prevent allergic reactions, breast cancer, and blood clotting." *Id.* at 1268 n.1.

284. *Id.* at 1273.

285. *Id.* at 1273-74.

286. *Id.* at 1274.

287. *Id.*

288. *Erickson*, 141 F. Supp. 2d at 1275.

289. *Id.*

290. *Id.*

291. *Id.* at 1275-76. See also U.S. Equal Employment Opportunity Commission, Decision on Coverage of Contraception, (Dec. 14, 2000), available at <http://www.eeoc.gov/docs/decision-contraception.html> (last visited Sept. 18, 2002).

interpreted the PDA to apply to prescription contraceptives, regardless of the intended use of those medications.²⁹² The *Erickson* court could have followed in the footsteps of *Gilbert*, and completely discounted the EEOC Decision.²⁹³ However, the dissent of Justice Brennan in *Gilbert*, as affirmed by the legislative history of the PDA, advocated according more weight to the EEOC.²⁹⁴ Whether this affirmation encouraged *Erickson* not to repeat the mistakes of *Gilbert* is unclear; more likely, what drew the court's attention to the EEOC Decision of December 2000 was its determination that comprehensive insurance policies that denied prescription contraception "circumscribed the treatment options available to women, but not to men," thereby violating Title VII.²⁹⁵

2. Legislative Issue

Bartell argued that the legislature, not the judiciary, should be reviewing this question.²⁹⁶ It is probably the most well settled proposition in American legal history that "[i]t is emphatically the province and duty of the judicial department to say what the law is."²⁹⁷ Even though, at the time of *Erickson*, "Congress and some state legislatures [were] considering proposals to require insurance plans to cover prescription contraceptives, that fact [did] not alter [the] Court's constitutional role in interpreting Congress' legislative enactments in order to resolve private disputes."²⁹⁸

VI. CRITICAL EVALUATIONS OF *ERICKSON V. BARTELL*

A. *Erickson's* Argument: Sex Discrimination Under Title VII

Erickson argued that, by its refusal to cover contraceptive drugs and devices under its otherwise comprehensive prescription drug plan, Bartell discriminated based on sex, as prohibited under the PDA amendment to Title VII. *Erickson's* mere *ability* to make her arguments, not to mention her success in the outcome of the case, was made possible by the long line of cases and statutes initiated by the 1964 Civil Rights Act. The laws upon which *Erickson* relied did not appear overnight but were instead the results of years of trial and error—seemingly continuous adjustments of the parameters of Title

292. *Id.*

293. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-46 (1976); *see also supra* notes 136-40 and accompanying text.

294. *See Gilbert*, 429 U.S. at 155-59.

295. *Erickson*, 141 F. Supp. 2d at 1276 (quoting U.S. Equal Employment Opportunity Commission, Decision on Coverage of Contraception, (Dec. 14, 2000), available at <http://www.eeoc.gov/docs/decision-contraception.html> (last visited Sept. 18, 2002)).

296. *Erickson*, 141 F. Supp. 2d at 1276.

297. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

298. *Id.* at 1276.

VII sex discrimination—in both Congress and in the courts. Clearly, change is the only constant of Title VII, even *after* the legislative clarifications achieved by the PDA and the 1991 Civil Rights Act.

To understand *Erickson*'s place in the law today requires an understanding of the concept of "sex discrimination" and an overview of its continual redefinition in the law. This journey began with the determination in *Gilbert* that, in effect, pregnancy did not equate to sex, and the disabilities associated with pregnancy could be excluded on an "additional risks" basis.²⁹⁹ It is an interesting idea that a woman's "extra" reproductive organs which allow her to carry a child and give birth would be construed as "additional," given that such organs seem quite fundamental to the definition of "woman."³⁰⁰ This permitted discrimination against not *all* women, but only *pregnant* ones reaching their biological potential, in reproductive terms. Justice Brennan's dissent revealed that the difference in opinion rested not on whether pregnancy was "sex related"—clearly it was.³⁰¹ Instead, the distinction fell upon whether the Court should equate pregnancy with a disease. It was clearly a medical condition, but since it could be deemed an intended and *favorable* medical condition, did this make it different from other diseases? The *Gilbert* majority felt that it did; Justice Brennan and Congress disagreed.

The PDA clarified the intent of Congress that the "sex discrimination" it included in Title VII also meant "pregnancy discrimination," since only women could become pregnant, and, therefore, the condition affected and was confined to the protected class of women.³⁰² The PDA should not, however, be viewed as a *victory* for women—that occurred when "sex" was included in Title VII in 1964. Instead, the *Gilbert*—PDA situation showed the legislature clarifying its purpose, a purpose which, as the 1964 Title VII legislative history showed, had been unclear. Nonetheless, it secured the proposition that Brennan and the lower courts touted: Pregnancy discrimination *is* Title VII sex discrimination.³⁰³

The final step in this journey—and the biggest hurdle for *Erickson*—was convincing a court to interpret the PDA also to include drugs and devices used to prevent pregnancy. *Erickson*'s argument had to be framed in the context of women's role in American society in the year 2001. While many women at this time continued to choose the role of stay-at-home mom, many others were working to gain an education and career, to be recognized as successful businesspersons. These women understood that becoming pregnant early on in

299. See *Gilbert*, 429 U.S. at 138-40.

300. This is only *one* definition of "woman"—the biological one.

301. *Gilbert*, 429 U.S. at 149.

302. H.R. REP. NO. 95-948 at 3-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 1978 WL 8570.

303. See *supra* note 74 and accompanying text.

their lives, perhaps during their education, or early in their career, could prevent or hinder them in reaching their professional goals. Erickson argued, on behalf of herself and these women, that they should be able to fulfill their professional goals before choosing to start a family,³⁰⁴ and delaying pregnancy would be best achieved by utilizing contraceptive drugs and devices.

There is more to the coverage of contraceptive drugs and devices than a simple medical issue. Because having a child is an event that can change a woman's entire life, denial of contraceptive coverage becomes much larger than a mere health concern, as its consequences affect all aspects of a woman's life. In a woman's professional life, in particular, denial of coverage hampers the realization of "equality" in the workplace by not insuring medications that help women maintain their status and progress in the professional sphere. It is a biological condition that is, by definition, different for men and women; and that pregnancy is sex-based makes it, *as well as its prevention*, subject to Title VII compliance. Furthermore, refusing to cover drugs that prevent a condition solely confined to women, such as pregnancy, that ultimately limits women in their life goals *does* constitute sex discrimination. Indeed, *Erickson's* greatest contribution to the law of sex discrimination is not only its clarification of the meaning of the PDA, but the "equality effect" that this holding provides for women in the professional sphere.

B. *Bartell's Defenses to Title VII Sex Discrimination*

1. Analysis: Defense of Facial Neutrality

Bartell argued that since its prescription plan was "facially neutral," and excluded the same medications from men and women, it did not discriminate based on sex. This, of course, denies the fact that men and women have different health care needs, and takes us back in time to *Gilbert*, where the Court deemed a disability plan nondiscriminatory because "there is no risk from which men are protected and women are not," and "no risk from which women are protected and men are not."³⁰⁵ The flaw in this reasoning—that only women get pregnant—was addressed and corrected by the PDA. Bartell also attempted to show that the plan was neutral in that it excluded all "family planning" measures.³⁰⁶ Though this defense was intended to defeat the claim of disparate treatment, the *Erickson* court took it in a different direction, using

304. Though Erickson intended to delay pregnancy until after she had worked some time, this is really an issue about *planning*. Not all women decide to have children after they have a career—some do it beforehand. The point is that requiring employers to cover prescription contraceptive drugs and devices in their otherwise comprehensive plans gives women and their spouses the tools to plan their families.

305. *Gilbert*, 429 U.S. at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

306. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1275 (W.D. Wash. 2001).

it to imply that *men*, as well as women, could be discriminated against in the context of comprehensive employer-based health insurance exclusions.³⁰⁷

Bartell made a point of showing that Viagra was also excluded from its prescription plan.³⁰⁸ Even though the issue of Viagra coverage was not at bar in *Erickson*, the court noted, at least initially, that the argument for Viagra coverage would be the same as Erickson's, and could state a claim for violation of male employees' rights under Title VII.³⁰⁹ That Bartell's plan did not cover Viagra, though unfortunate for the individuals needing it, puts *Erickson* and its message about sex discrimination under Title VII in an even better position. Particularly, that women alleging a sex discrimination case for denial of contraceptive coverage do not need their employer to provide Viagra coverage to bolster their arguments for coverage of birth control. Further, it allows those following the law to not mistake the reasoning behind *Erickson*. Under *Erickson*, female employees are entitled to prescription contraceptive drug coverage because Title VII and the PDA demand it, not because men receive coverage for sex-based prescription drugs, namely Viagra. Without Viagra in the equation, individuals studying the law can use *Erickson* as a tool to explain further the scope of the PDA and Title VII. This reduces the tendency of the reader to see *Erickson* as a mere battle of the sexes by a simple comparison of Bartell's sex-based benefits. Finally, *even if* Bartell's improvised "family planning" exclusion had the facial parity it contended it had, this would have had little effect on the determination of a Title VII violation, since adverse disparate impact could have easily stemmed from a facially neutral policy.³¹⁰

2. Analysis: Business Decision to Control Costs

Bartell's argument that its choice to deny contraceptives was a business decision aimed to control costs clearly failed because of its facially discriminatory effect on its female employees. Even a *cost-based* decision to exclude prescription contraception that caused sex-based disparate treatment of Bartell's employees violates Title VII. If an employer wants to control its costs, it must be conscious in handling that task, realizing that any "cost-controlling mechanism" must not treat employees differently due to their

307. *See id.* at 1274-75.

308. *Id.* at 1275 n.12. For a discussion of Viagra's position in the dispute over contraceptive coverage and Title VII, see Kathryn Kindell, *Prescription for Fairness: Health Insurance Reimbursement for Viagra and Contraceptives*, 35 TULSA L.J. 399 (2000); Lisa A. Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171 (1999).

309. *Erickson*, 141 F. Supp. 2d at 1275 n.12.

310. *Id.* at 1271-72.

sex.³¹¹ Bartell's "cost-controlling mechanism" was clearly an impermissible one, since the method it used to cut costs negatively affected one sex—women.³¹² As *Erickson* noted, Bartell could not control its costs legally by "penaliz[ing] female employees in an effort to keep its benefit costs low."³¹³

Moving away from the legal principles in *Erickson* that prohibit cost-based business justifications that discriminate against women and viewing them in another light, this holding against the Bartell Drug Company may actually be *beneficial* for it. Though employers who offer comprehensive health benefits plans will be forced to at least partially cover prescription contraceptive drugs and devices, this will reduce the number of pregnancies and the health care costs associated therewith. Furthermore, these new costs are not anticipated to be significant:

New AGI estimates—based on the actual experience of plans that cover the cost of oral contraceptives (information obtained from pharmacy benefit managers administering plans covering over half the U.S. population) and on national data on use of other methods by privately insured women—show that the cost of covering the full range of FDA-approved reversible contraceptive methods is minimal. . . . Providing coverage for the full range of reversible contraceptive methods would result in a total cost of \$21.40 per employee per year. Assuming standard cost-sharing between employers and employees, employers would pay \$17.12, which translates into a monthly cost of \$1.43 per employee. This would increase employers' overall insurance costs by only 0.6%.³¹⁴

In addition, contraceptive coverage will allow female employees an enhanced ability to plan their families and improve their health in general by limiting unintended pregnancies while also offering some of the positive side effects of these drugs (such as birth controls providing more tolerable menstrual symptoms). Improving the health and family planning abilities of female employees could conceivably promote a more effective workplace, too. If workers feel better, they will most likely *work* better. As the Planned Parenthood Web site, established to answer questions about contraceptive coverage, has noted:

A recent study calculated that for an average employer, the total indirect cost of pregnancy-related absences per year per 1,000 covered female employees would be \$542,000. It is estimated that the average cost to replace female

311. *Id.* at 1272 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983)).

312. *Id.* at 1274.

313. *Id.*

314. Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, GUTTMACHER REP. ON PUB. POL'Y (Aug. 1998), at <http://www.agi-usa.org/pubs/journals/gr010405.html> (last visited Oct. 2, 2002).

employees who quit each year due to pregnancy is an additional \$14,000 per employee.³¹⁵

Similarly, workers who are not suffering the mental and emotional anguish over an unplanned pregnancy, not to mention the physical limitations, will also likely perform better in the workplace.

3. Analysis: Incorrect Interpretation of the Scope of the PDA Not to Include Contraceptives

In re-examining the court's response to Bartell's PDA argument, one can see that this boils down to differing legal interpretations: Bartell interpreted the language of the PDA as to only include currently pregnant women; Erickson believed that it should include women with the *ability* to become pregnant. This is where *Erickson* departed from prior case law and went out on a limb, extending the PDA to include birth control coverage, ultimately changing the law. *Erickson* framed its arguments on what it saw as the intent of Congress in legislatively overturning *Gilbert* with the PDA. Though the EEOC had decided in December of 2000 to take the PDA as far as *Erickson* had, this was the first time for a *court* to apply it in this manner. So this issue of interpreting Congressional intent for the PDA, as a case of first impression, understandably did not receive much citation-laden discussion. It was instead a struggle between tradition and innovation, and this time the latter won.

The *Erickson* holding is similar to other post-PDA holdings, except that it formally stated that the protections by the PDA should also apply to contraceptive drugs in addition to coverage for the condition of pregnancy and disabilities caused by pregnancy. *Erickson* was made possible in part due to the determination by *UAW v. Johnson Controls* that the PDA applied not only to policies excluding coverage for pregnant women but also to policy exclusions which "classif[ied] on the basis of gender and childbearing capacity."³¹⁶ This removed the "pregnant" element from claimants suing under the PDA amendment to Title VII; now the PDA would be triggered not just by pregnancy, but also by the policy exclusions that were based on sex and the woman's inherent ability to bear children.

4. Analysis: Contraceptives Not a Health Care Need

Again, Bartell argued that refusal to cover "prescription contraceptive devices [was] not a violation of Title VII because . . . treating contraceptives differently from other prescription drugs [was] reasonable in that contraceptives are *voluntary, preventative, do not treat or prevent an illness or disease*, and are *not truly a 'healthcare' issue*."³¹⁷ This is a loaded argument

315. Planned Parenthood, *supra* note 9.

316. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991).

317. *Erickson*, 141 F. Supp. 2d at 1272 (emphasis added).

and rests on at least three concepts that stretch it across not only the question of medical coverage but social and moral spectra as well. These concepts are: (1) the legitimacy of pregnancy prevention as a true “healthcare” issue and the validity of contraceptives as preventative medicine; (2) the voluntary aspect of contraception; and (3) external control over the sexual behavior (and lives) of women.

This first concept is the adequacy of “pregnancy-prevention” as a true healthcare issue. Bartell argued that pregnancy does not qualify as an illness or disease, and prevention of pregnancy via contraceptives is not a “healthcare” issue at all.³¹⁸ Birth control pills, Depro-Provera, Norplant, and the IUD are indeed medical treatments, drugs and devices manufactured by the pharmaceutical companies and tested by the FDA. It is important here to note that this coverage would not extend to over-the-counter contraceptive therapies, such as condoms, spermicidal ointments or the female sponge, but only to medications prescribed by *doctors*. In order to obtain a prescription for these medications, a patient would have to discuss it with her physician, and together the two would make a medical decision in the best interests of the patient. Furthermore, as it has been seen in some cases, these medications are not only prescribed for pregnancy prevention, but also treat other health conditions, particularly hormonal disorders.³¹⁹

Bartell also argued that the preventative nature of contraceptive drugs and devices de-classify them as truly legitimate medications. This label “preventative” is not inaccurate. Indeed, it is a preventative measure that is not unlike many other preventative measures that *are* considered legitimate healthcare issues such as vaccines, annual gynecological exams and yearly physicals. In fact, the condition that contraception works to prevent, pregnancy, carries with it both very serious physically disabling side effects, as well as an immense long-term life-changing occurrence—a child.

Recently, there has been an effort in the medical field towards encouraging preventative measures in health care. Consider the popularity of taking aspirin daily to avoid heart attacks, the necessity of pre-natal care, and the information about monthly breast self-exams and the importance of mammograms constantly displayed on all advertising media. Not only are these preventative medicine practices believed to be advantageous to patients’ health, but they are also good for the pocketbooks of insurers. For example, in the area of contraception, one source reported that the care for a mother and child for pregnancy costs \$10,000 and a first trimester abortion costs \$450, but a one-

318. *Id.* at 1272.

319. *See supra* note 13; EEOC v. United Parcel Serv., Inc., 141 F. Supp. 2d 1216 (D. Minn. 2001). For a more comprehensive discussion of the sex-based prescription needs of women, including contraception and treatment for hormonal disorders like PMDD, see Karpa, *supra* note 199.

year supply of birth control pills costs \$300.³²⁰ Clearly, it is much less expensive for an insurer to cover the medications than the abortion or the pregnancy. And these figures do not take into account the mental, emotional and physical costs undertaken for the first two options.³²¹ Not unlike other insured preventative treatments, contraceptives prevent a defined health condition, “pregnancy,” and the many other health problems associated therewith.

The most dramatic prevention, of course, is that of a new life that if not desired by the mother could end up, sadly, aborted. “Half of all pregnancies are unintended; 28% of women aged 15-44 have had an unplanned birth and 30% have had an abortion; 60% of women in their 30s have had an unplanned birth or an abortion.”³²² On the other hand, the child could be born to a mother who is not prepared financially, emotionally or psychologically for parenthood, yielding a devastating situation for both mother and child.

In 1988, 56% of pregnancies were unintended, either mis-timed or unwanted at conception. The consequences of unintended pregnancy are thought to be substantial: Unintended pregnancy has been shown to be associated with late prenatal care, maternal smoking during pregnancy, low birth weight, infant mortality, child abuse, and developmental delay. . . . “[T]he consequences of unintended pregnancy are serious, imposing appreciable burdens on children, women, men and families.”³²³

Studies have also shown that a woman’s intention to have a child affects the woman’s prenatal behaviors:³²⁴ “That mothers of unintended births are slower to recognize their pregnancy and to obtain medical attention increases their health risks and those of their baby.”³²⁵ The Center for Disease Control has found that:

320. *Planned Parenthood Los Angeles Hosts Presentation on Growing Movement for Employers to Cover Contraception*, PR NEWSWIRE, Oct. 23, 2001, at 2.

321. This is assuming it is an unwanted, unanticipated pregnancy. This may be an appropriate time to note that the author does not suggest by showing a comparison of the cost of a first-trimester abortion to pregnancy and birth control pill costs, that she advocates the extension of the PDA to warrant coverage of abortions by employer-based health insurance plans. That, indeed, is a topic outside the scope of this Note, though it may come into the scope with respect to medical treatments such as the “morning-after” pill and other, pill-form abortion methods. However, when comparing these three possible consequences: abortion, carrying an unwanted, unintended child or preventing the pregnancy altogether, it is clear that the last option is the best option with respect to physical and emotional trauma and economic costs.

322. Stanley K. Henshaw, *Unintended Pregnancy in the United States*, FAM. PLAN. PERSP. Jan.-Feb. 1998, at 24, 29.

323. Theodore J. Joyce et al., *The Effect of Pregnancy Intention on Child Development*, 37 DEMOGRAPHY 83, 83 (2000) (citations omitted). See Law, *supra* note 14, at 364-68.

324. Kathryn Kost et al., *Predicting Maternal Behaviors During Pregnancy: Does Intention Status Matter?*, FAM. PLAN. PERSP. Mar.-Apr. 1998, at 79, 79.

325. *Id.* at 86.

Unintended pregnancy is associated with increased morbidity and mortality for the mother and infant. Lifestyle factors (for example, smoking, drinking alcohol, unsafe sex practices, and poor nutrition) and inadequate intake of foods containing folic acid pose serious health hazards to the mother and fetus and are more common among women with unintended pregnancies. In addition . . . approximately half of women with unintended pregnancies do not start prenatal care during the first trimester.³²⁶

Clearly, an employer's exclusion of "preventative" measures will not always limit its expenditures for medical insurance. Most important, however, is not that these contraceptive devices are "preventative" measures, but that they are also, and to a greater degree, *responsible* measures taken by sexually active women to avoid devastating consequences in their lives. Perhaps it is this self-imposed responsibility, and attempted self-sufficiency of women that bothers insurers and employers, that has kept this issue undecided for so long.

Second, the defendant questioned the voluntary aspects of the medications. Men and women in the U.S. take "voluntary" medications every day.³²⁷ Take, for example, allergy medications and acne treatments. These are prescriptions for conditions that are not necessarily "life threatening," but the drugs make us feel better. It is an inconvenience for a patient to suffer from a runny nose every time she steps out the door in the spring, so she will go to the doctor for an antihistamine. Similarly, when a patient wants his skin to clear up, he will see the dermatologist for a topical treatment. In comparison to the contraceptive medications at issue that will be taken to prevent a pregnancy—quite possibly the most monumental life experience a woman will encounter—the argument that they are "voluntary" seriously and misleadingly underestimates the effects of the condition they prevent. Further, when comparing the effects of different medications that can be deemed "voluntary"—antihistamines, acne topical treatments and birth control—it is plain that the latter has the largest potential to affect a patient's life.

Another way to examine the "voluntary" argument is that since women are voluntarily engaging in sex, contraception is not a medical necessity since the woman could easily alleviate the need for contraception by refraining from sexual behavior. This brings into light all of the conditions that occur from sexual intercourse—particularly sexually transmitted diseases.³²⁸ Does this

326. *CDC on Infant and Maternal Mortality in the United States: 1900-99*, 25 POPULATION & DEV. REV. 821, 824-25 (1999).

327. This argument was made by Justice Brennan in his dissent in *Gilbert*. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 151 (1976) (Brennan, J., dissenting). See also *supra* notes 153-57 and accompanying text.

328. It also brings into light the question of voluntary acts—either voluntary medical acts like vasectomies or cosmetic surgery or injuries from voluntary acts such as sports. In *Gilbert*, these voluntary acts and procedures were covered, while the pregnancy risk associated with voluntary sex was not. This issue goes back at least as far as the lower court decisions in *Gilbert*. See

“voluntary” argument suggest that when a patient contracts HIV³²⁹ from a sexual partner there should be no obligation to cover the patient since the behavior she exhibited in contracting the virus was “voluntary?” Is this argument also to extend to coverage of an HIV inoculation, if one is ever created? Since sex is a voluntary activity, a participant should be wholly responsible for the side effects it causes, even if *preventative*; refusing prescription contraception coverage inhibits both this responsibility and the freedoms that accompany it.

The last concept of this argument expresses an overarching “pretext” of the defendant’s basis for refusing to cover prescription contraceptives. It concerns the apparent control women assert over their bodies and fertility when using contraceptive drugs and devices—that contraceptives are “voluntary and preventative” measures, and that her fertility, since it is controllable, is different from other health care concerns.³³⁰ The court discussed this concept in terms of the consequences occurring when women were not able to control their fertility, particularly in terms of unwanted pregnancies and in the woman’s change of appearance.³³¹ *Erickson* summarized these consequences:

A woman with an unintended pregnancy is less likely to seek prenatal care, more likely to engage in unhealthy activities, more likely to have an abortion, and more likely to deliver a low birthweight, ill, or unwanted baby. Unintended pregnancies impose significant financial burdens on the parents in the best of circumstances. If the pregnancy results in a distressed newborn, the costs increase by tens of thousands of dollars. In addition, the adverse economic and social consequences of unintended pregnancies fall most harshly on women and interfere with their choice to participate fully and equally in the “marketplace and the world of ideas.”³³²

With or without the Court’s discussion of the sad results and heavy impacts on the lives of both mother and child in unintended pregnancies, it is not difficult to understand or to defend women in this all-too-often devastating situation.

However, just as relevant to this discussion is the *principle* of the matter. Clouded by a “cost benefit” argument and a strict interpretation of the PDA, insurers and employers, by excluding contraceptives from prescription plans, are in effect asserting heavy-handed paternalism. They are asserting control over the sexual behavior and general health of their female beneficiaries in

Gilbert, 429 U.S. at 136, 151; *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 665 (4th Cir. 1995); *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 381-82 (E.D. Va. 1974).

329. For a discussion of the effects of Title VII, the ADA and other federal anti-discrimination statutes on health insurance policies, see Sharona Hoffman, *Aids Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes’ Applicability to Health Insurance*, 23 CARDOZO L. REV. 1315 (2002).

330. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001).

331. *Id.* at 1273-74.

332. *Id.* at 1273 (citations omitted).

excluding coverage and reducing accessibility to these medications. So it comes down to this question: Who should have the control over women's fertility? Until *Erickson*, it was the employers and insurers. Now, thankfully, that control will move into the hands of women themselves.

This principle is especially relevant today when women are having sex at early ages and are planning their marriages and children around professional careers.

Adolescents in the United States have a higher proportion of pregnancies that are unintended and that end in abortion than do adults. Moreover, adolescents who have initiated sexual intercourse have some of the highest age-specific rates of sexually transmitted diseases (STDs) which along with unintended pregnancy impose enormous costs in human pain and suffering, in social and economic opportunity, and in social welfare and health care.³³³

Now, as more women are increasingly sexually active and increasingly present in the professional spheres, this control over their health and life-path is even more vital.³³⁴ The notion of controlling one's fertility (i.e., by not engaging in sex) is reminiscent of a moral code that is admirably traditional and noble in some societies, and archaic and inequitable in others. While many modern women are working to assert control while using mechanisms (prescription contraceptives) to control their fertility, insurers are faced with establishing their own moral code of coverage.³³⁵ Family planning is nothing to be ashamed of—it is a positive benefit that is the result of growing medical technology and helps people to maximize their pursuits in life to, in effect, have better and more fulfilling lives.

333. John S. Santelli et al., *Adolescent Sexual Behavior: Estimates and Trends From Four Nationally Representative Surveys*, FAM. PLAN. PERSP., July-Aug. 2000, at 156, 156 (footnotes omitted).

334. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Erickson*, 141 F. Supp. 2d at 1273 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

335. See generally Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You To Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119 (1998); Kandice Engle, *Pregnancy Discrimination in the Insurance Industry 1994*, 34 U. LOUISVILLE J. FAM. L. 177 (1995-96).

5. Analysis: Legislative Issues—New Interpretation of an Old Law

Erickson marked the first time that an employee asked a court to require her employer to cover her prescription contraceptives.³³⁶ The *Erickson* court cited to Professor Sylvia Law's article to set forth reasons why this question has taken so long to arrive in the courts.³³⁷ Law noted that "[f]irst, women affected by this exclusion, and indeed responsible employers, have difficulty obtaining even basic information about insurance coverage. Second, there are few lawyers available who are willing to take the financial risk necessary to raise these claims."³³⁸ These reasons do not only explain why the question had not been brought before, but also may show why *Erickson* was so successful. Specifically, *Erickson* was a pharmacist working for a drug company; these are two parties that are more likely to know a bit more about the health insurance industry than others. In addition, *Erickson* was a class action suit brought on behalf of all female, non-union employees of Bartell by attorney Roberta Riley and Planned Parenthood; this definitely helped defray the costs to the plaintiff and very likely provided resources to Riley throughout the litigation.

6. Analysis: The Question of Contraceptive Coverage Under the PDA Is a Legislative Issue

Bartell contended that the *Erickson* court should not answer the question of whether the PDA involves contraceptive coverage and should leave it to the legislature. The court refused this request, however, noting its constitutional obligation to interpret the laws.³³⁹ If history would repeat itself, and had the *Erickson* court held for Bartell, the issue may have actually been heard by the legislature, not unlike the events of *Gilbert* and its legislative overturning in the PDA. Yet even an *incorrect* interpretation of the law, would be better than *no* interpretation at all. The legislature has, in fact, taken a step in this direction by introducing the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), which "would secure, as a matter of federal law, universal coverage for all women with insurance throughout the United States."³⁴⁰

VII. CONCLUSION

The *Erickson* holding, as a case of first impression, should serve as a beginning—a first step in the expansion of a "truer" phase of sex equity in the workplace. There is a range of positive possible impacts, beginning with improved economic and physical well-being for women. Overall, *Erickson*

336. See *Erickson*, 141 F. Supp. 2d at 1275.

337. *Id.* at 1275 (citing Law, *supra* note 14, at 386-91).

338. Law, *supra* note 14, at 386.

339. See *Erickson*, 141 F. Supp. 2d at 1276.

340. Cohen, *supra* note 9, at 10. See Roth, *supra* note 65, at 793.

will prove to benefit employers and employees. As prescription contraceptive drugs and devices are covered, they will be more accessible to all women, and hopefully this means that more will utilize them. This will result in fewer unintended pregnancies, which will benefit women who are not yet prepared for motherhood. Further, because many prescription plans extend to the spouses and children of employees, and since the *Johnson Controls* holding that female employees and spouses of male employees must enjoy the same coverage, this holding will affect entire families. The holding will also benefit families in allowing for more convenient family planning. While not a complete remedy to the problem of unintended pregnancy, especially for highly impoverished women, it still will have an effect on the reproductive behavior of a large group of women. This in turn could have a positive effect on government programs when women who cannot afford birth control continue to have children. It will also benefit the employers and insurers sponsoring coverage. Though the monthly pay-outs (or periodic pay outs, depending on the drug or device chosen) will rise for insurers, the high costs of pregnancies will drop as they are prevented.

Looking at the dynamic economy of risk management, we see that costs of coverage spread out so that all pay for the treatment of some. This means that after *Erickson* the cost of prescription contraceptive coverage will be spread out over all beneficiaries. This author cannot see a more appropriate way of doing things, especially since it is typically the woman who feels the brunt of not only pregnancy but of unwanted pregnancy, regardless of what she decides. Despite the fact that it has taken so long for a federal court to decide this issue, it was well worth the wait. The *Erickson* holding will benefit in countless ways virtually all individuals and entities involved—women and men, children and families, insurers and employers.

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341. J.D. Candidate, Saint Louis University School of Law, 2003; B.A., Vanderbilt University. I would like to thank Professor Sidney Watson for first directing me to the case of *Erickson v. Bartell*; Professor Melissa Cole for her invaluable guidance and insight during the course of writing this Note; and my parents, Bruce and Michele Bruzina, and brother Michael, for their unending encouragement and love. This note is dedicated to my grandmothers, Wanda Stephens, in memoriam, and Mary Bruzina, who have both taught me to not be afraid to speak my mind for things that I believe in.