From Bartell to Erickson to Mauldin: Title VII's Effect on Insurance Coverage of Contraceptives

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What started out as a joke to undermine the entire Civil Rights Act of 1964 has developed into a powerful tool to help women throughout the country. When the Civil Rights Act was proposed, its goal was to help alleviate the black/white problems that the Civil Rights movement brought to a head. The issue of gender equality was not one that many legislators were concerned about at the time. But somehow, over many objections, when the law did pass, women were included. Despite its bumpy start the law has provided women not only with better access to employment, but also to better terms and conditions once in the labor force.

While at first the ways in which Title VII would benefit women were unclear, as demonstrated in the Supreme Court’s 1976 decision in General Electric Company v. Gilbert, Congress and the Supreme Court have both taken a role in defining the protections afforded to women by Title VII. In response to the Supreme Court’s holding in Gilbert, Congress amended Title VII

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1 Emily Rushing, So Much for Equality in the Workplace: The Ever-Changing Standards for Sexual Harassment Claims Under Title VII, 45 ST. LOUIS U. L.J. 1389, 1392 n.23 (2001). Discrimination based on sex “was not included in the original codification, it was added at the last minute on the floor of the House of Representatives.” Id. at 1392. In addition, the inclusion of sex as a protected class under the bill was a joke or “an accident, at best. It was added as an amendment one day before House passage of the Civil Rights Act; its proponents included a number of Congressmen opposed to the Act, who hoped that the inclusion of ‘sex’ would highlight the absurdity of the effort as a whole, and contribute to its defeat.” Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 816-17 (1991).

2 See Rushing, supra note 1, at 1392.

3 General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (holding that General Electric Company’s policy excluding pregnancy benefits was not discriminatory).
in 1978 to include pregnancy as a protected class.\textsuperscript{4} Given this status, discrimination based on pregnancy, childbirth or a related medical condition is considered discrimination based on sex.\textsuperscript{5} This important modification to the law revoked the majority decision in \textit{Gilbert}.\textsuperscript{6} The opinion of the three dissenting Justices in the \textit{Gilbert} decision, Justices Brennan, Marshall and Stevens, was instrumental in encouraging reform to Title VII.\textsuperscript{7}

In a dissent to Justice Rehnquist’s majority decision Justice Brennan criticized the oversimplification of General Electric’s insurance plan.\textsuperscript{8} The majority conveniently ignored the finding of the District Court that a motivating factor in the disability plan was a discriminatory attitude toward women.\textsuperscript{9} It is clear that the goal of Title VII is to end discriminatory employment practices so it boggles the mind that this would slip through the cracks when the case was decided by the Supreme Court. Further, the denial of coverage for pregnancy was “neutral neither on its face nor in its intent.”\textsuperscript{10} In addition, as Justice Brennan’s dissent asserts, “[s]urely it offends common sense to suggest ... that a classification revolving around pregnancy is not, at the minimum, strongly ‘sex related.’”\textsuperscript{11}

The dissent by Justice Stevens further emphasizes the discriminatory nature of General Electric’s rule regarding absenteeism.\textsuperscript{12} This rule excludes disabilities arising from pregnancy from General Electric’s “disability plan which pays weekly nonoccupational sickness and accident benefits.”\textsuperscript{13} As Justice Stevens points out, General Electric’s rule in and of itself

\textsuperscript{5} Id.
\textsuperscript{6} See id.
\textsuperscript{8} \textit{Gilbert}, 429 U.S. at 146 (Brennan, J., dissenting).
\textsuperscript{9} Id. at 150.
\textsuperscript{10} Id.
\textsuperscript{11} Id. at 149.
\textsuperscript{12} \textit{Gilbert}, 429 U.S. at 161 (Stevens, J., dissenting).
\textsuperscript{13} \textit{Gilbert}, 429 U.S. at 127.
discriminates on the basis of sex. If the rule is based on the ability to become pregnant, which is something only women can do, then the rule is based solely on sex and, as such, should be declared in violation of Title VII. The notion seems simple today; women can get pregnant, men cannot. Therefore, discrimination based on pregnancy must be discrimination against women. Unfortunately, this is not how the Supreme Court saw the situation in the late 1970’s when they made the decision in Gilbert.

Within the last few years employer-based health insurance programs have continued to be tested under Title VII. One of the most prominent cases in this area was Erickson v. Bartell Drug Company. Erickson was seen as a victory for employees, since it declared, “Bartell’s prescription drug plan discriminates against Bartell’s female employees by providing less complete coverage than that offered to male employees.” In Erickson, employees of Bartell Drug Company were denied coverage of prescription contraceptives, such as birth control pills, Norplant, Depo-Provera, intra-uterine devices, and diaphragms. As a result of this denial of coverage, a group of women brought suit against their employer to declare the policy a violation of Title VII of the Civil Rights Act of 1964. Based on the Pregnancy Discrimination Act (PDA), the District Court for Washington declared the policy to be a violation of Title VII. This holding shows a distinct change in attitudes toward women’s rights under Title VII.

In reaching this conclusion, the District Court cites the specific language of the PDA, which grew in part out of the dissenting opinions in General Electric Company v. Gilbert. With the implementation of the PDA in 1978 it became easier for courts to determine the limitations on the powers granted in the

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14 Gilbert, 429 U.S. at 161 (Stevens, J., dissenting).
15 Id. at 162.
16 Erickson, 141 F.Supp.2d at 1266.
17 Id. at 1276-77.
18 Id. at 1268.
19 Id.
20 Id. at 1276-77 (finding that insurance coverage of prescription drugs must provide equally comprehensive coverage for both men and women).
21 Id. at 1270.
Civil Rights Act regarding discrimination because of or on the basis of sex.

Perhaps in an effort to bring the holding in *Erickson* to other jurisdictions, a complaint was filed in the Central District of California with very similar allegations. The case, *Alexander v. American Airlines, Inc.*, which was moved to the District Court for the Northern District of Texas, turned out to have an opposite result to *Erickson*, despite their factual similarities. One of the problems that led to this result was that the plaintiff in *Alexander* was seeking coverage for infertility treatments in addition to pap smears and contraceptives. Infertility treatments were not mentioned in the relief sought by the plaintiffs in *Erickson*, and the court in *Alexander* did not see a parallel that would link these treatments to contraceptives.

The plaintiff in *Alexander* was a flight attendant employed by American Airlines. American Airlines had a number of different medical plans available to its employees which include “four standard plans, a Point-of-Service Plan and an HMO.” Plaintiff alleged that American Airlines discriminated against women because the standard health plans do not cover annual pap smear tests, infertility treatments or contraceptives. According to plaintiff, this denial of coverage was in violation of the Civil Rights Act, the Pregnancy Discrimination Act and the Americans with Disabilities Act.

In response to the plaintiff’s allegations, American Airlines asserted that since the health plans are “equally accessible to all employees, it does not discriminate as a matter of law.”

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23 *Id.* (holding in part that the insurance policy that did not cover annual pap smear exams, contraceptive medications or devices, or infertility treatments was not a violation of Title VII).
24 *Id.* at *1.
25 *See id.* at *3.
26 *Id.* at *1.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* at *2.*
According to the provisions of the health plan, "annual routine physical exams are not covered," whether they are for men or women.\(^{31}\) This also excludes the routine screening for prostate cancer that the plaintiff had alleged was available to men.\(^{32}\) The health plan clearly states that pap smears and prostate cancer screenings are covered if medically necessary, but not if routine.\(^{33}\) This belies the plaintiff's claim for disparate treatment since the treatment is clearly the same for both sexes. While it is unfortunate that these important screenings are denied universally, it is not a violation of Title VII.

Another problem faced by the plaintiff in Alexander was the fact that she had never actually suffered an injury under the portion of the policy that denied coverage for contraceptives.\(^{34}\) Since the plaintiff never actually "sought benefits under the plan for contraceptives," she was not injured by the policy, whether or not it was discriminatory.\(^{35}\) Since she was never injured by the policy, she has no standing to pursue the claims based on denial of contraceptive coverage.\(^{36}\)

The most recent attempt to define women's rights in the realm of health insurance coverage is the case of Mauldin v. Wal-Mart Stores, Inc.\(^{37}\) This case is still in the very early stages and could end up settling out of court. However, the plaintiff's motion for class certification has been granted, which will allow her to bring her case as a class-action lawsuit against her employer, Wal-Mart Stores, Inc. (Wal-Mart).\(^{38}\) The plaintiff, Lisa Smith Mauldin, a Wal-Mart employee since August 29, 1996.\(^{39}\) According to Mauldin's complaint, she pays $29.84 per month for birth control pills.\(^{40}\) The plaintiff's basis for her claim of sex discrimination

\(^{31}\) Id. at *3.

\(^{32}\) Alexander, 2002 WL 731815, at *3.

\(^{33}\) Id.

\(^{34}\) Id. at *2.

\(^{35}\) Id.

\(^{36}\) Id.


\(^{38}\) Id. at *1.

\(^{39}\) Id.

\(^{40}\) Id.
includes a claim for disparate treatment on the basis of sex and a "claim for disparate impact, on the ground that Wal-Mart's facially neutral policy of excluding coverage for prescription contraceptives in the Plan has an adverse disparate impact on women, because only women use prescription contraceptives."\(^{41}\)

The approval of the plaintiff's class certification is promising, but it is only one small step in the battle that must be fought. In order to change Wal-Mart's policy of denial of coverage for contraceptives, the court would have to declare this policy a violation of Title VII of the Civil Rights Act. However, even if this policy was found to be discriminatory under Title VII, there still may be appeals available to Wal-Mart that would allow the company to delay any change in their health insurance plans. In addition, if Wal-Mart could find a non-discriminatory reason for denying coverage of contraceptives, they would be able to escape the violation of Title VII.

One of the few encouraging pieces for the plaintiff is the Equal Employment Opportunity Commission's (EEOC) December 2000 decision, concluding that failure to cover prescription contraceptives constitutes sex discrimination if other comparable prescriptions are covered.\(^ {42}\) Clearly there can be some argument as to what is considered a "comparable prescription," but overall this decision could prove helpful for the plaintiff in *Mauldin*. While the final decision as to the issues in *Mauldin* is yet to be determined, it will be interesting to see the way that Wal-Mart defends its policy of excluding contraception from insurance coverage. Wal-Mart has been notoriously against contraception, as shown by their refusal to carry and fill prescriptions for emergency contraception, commonly known as the "morning after pill."\(^ {43}\)

Since the amendment to Title VII which added the Pregnancy Discrimination Act in 1978 the Supreme Court has had

\(^{41}\) *Id.*


the dubious task of determining when employment policies and insurance plans discriminate on the basis of pregnancy, childbirth, or related medical conditions. In many cases these decisions have helped women throughout the country have greater access to prescription contraceptives. If nothing else, this statute allows some women to stand on a more equal footing with men which is always a step in the right direction. There will always be critics in employers who feel they should not have to pay for these types of programs. However, these same employers may be benefiting from the labor of women on prescription contraceptives, as the women can then work a greater percentage of the time since they are not getting pregnant as often as they would without prescription contraceptives.