Improving Employment Opportunities for Women Workers: An Assessment of the Ten Year Economic and Legal Impact of the Pregnancy Discrimination Act of 1978

by

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INTRODUCTION

Issues of rights or equity for working women (and men) promise to continue to be as hotly contested in the 1990s as these issues were in the 1970s and 1980s. Organizations representing women workers have been active over the last two decades in seeking policies that address equity issues for working women along with more traditional demands for better wages and benefits. The context for these issues is the increasing number of women with responsibilities for earning wages while simultaneously bearing or caring for children and other family members. The new policies that have emerged serve four purposes: to prevent discrimination against women (e.g., equal pay for equal work), to affirmatively hire or promote them (e.g., affirmative action), to re-value their work (e.g., pay equity), or to redistribute the costs of caring for the current or next generation of workers and enable them to integrate paid work and family life (e.g., family and medical leave). In response to the demands of organizations representing working women, private enterprise, and especially small business, has been equally active in opposing these new policies. Organizations representing business warn that these policies will create excessive costs for business, reduce their competitiveness and result in discrimination against women workers--the very group these policies are intended to protect.

In this study, we examine the economic and legal effects of one such policy--the Pregnancy Discrimination Act of 1978 (PDA). The PDA is an amendment to Title VII of the 1964 Civil Rights Act designed to prevent discrimination against pregnant women. Unlike other equity policies, the PDA is not designed to require employers to affirmatively hire or promote women workers, or to re-value their skills. Unlike traditional labor standards, the PDA does not set a minimum floor of wages, benefits, or working conditions for all affected workers. It is, however, a first step in redistributing the costs of integrating paid work and family care between employers and employees.

At the time of its passage, opponents of the PDA claimed that it would result in catastrophic costs to business, especially those that provided some form of disability benefits, and might even lead to disemployment for women workers. In their turn, supporters of the bill argued that it would have a positive effect on women's employment and earnings. The more than ten years that have elapsed since the passage and implementation of the PDA provide an opportunity to conduct an in-depth case study of the impact of one federal policy designed to extend rights to women workers. This report investigates the economic, legal and political effects of the PDA. It is a cross-disciplinary policy research effort that examines a coalition's effort to pass legislation designed to protect women's rights to employment and the relation between the legislation that was passed and its actual benefits for working women.

The study concludes that the PDA is a cost-effective policy because the benefits to women workers outweigh the costs to business. The PDA did not have negative effects on the employment of women of childbearing age, nor did it result in catastrophic costs to business. The PDA neither increased nor decreased the proportion of women workers of childbearing age covered by short-term disability insurance. But childbearing workers in companies with short-term disability insurance, earn substantially higher wages than childbearing workers without this benefit. For women without benefits there are substantial losses in earnings and employment.

In terms of the PDA's legal impact, the study concludes that the PDA provides a measure of protection against discrimination despite the perplexity of courts as to how to analyze the condition of pregnancy and an unwillingness by the courts and the Equal Employment Opportunity Commission (EEOC) to consistently treat pregnancy discrimination as prima facie discrimination, with exemptions requiring a bona fide occupational qualification (BFOQ) defense. Had the PDA not been passed by Congress, the rights of pregnant women to continue to work and to retain equal benefits and "terms and conditions of employment" would almost certainly be non-existent, at least at the federal level. Two controversial issues remain, however, those of "special treatment" and "fetal protection."

The study concludes that as a model of policymaking the PDA is limited in that it is solely an anti-discrimination policy and does not also mandate a minimum labor standard. It did, however, provide a political model for rectifying Supreme Court interpretations of Congressional intent. And the PDA, while demonstrating the importance of anti-discrimination policies designed to protect women as individuals, can be seen as a first step towards new labor standards such as family and medical leave which go beyond the notion of the detached individual.

Finally, the passage of the PDA is an example of the effectiveness of the first major coalition of labor, civil rights, church and women's groups. This coalition served as a precedent for future coalitions, but while the Campaign to End Discrimination Against Pregnant Women was successful in obtaining passage of the PDA, succeeding coalitions faced more difficult political circumstances, especially the threat of presidential vetoes under three succeeding Republican administrations.

These conclusions are the result of a multi-method, cross-disciplinary research effort that will be described next. Following the overview of the study's methodology, we first examine the events leading to the passage of the PDA and its objectives. We then present our findings concerning its economic impact, followed by an assessment of its legal impact. We conclude with a discussion of the PDA as a model of policy making to improve working women's status. Throughout the report, we will include commentary from representatives of the Campaign to End Discrimination Against Pregnant Workers (Campaign).

OVERVIEW OF STUDY METHODOLOGY

Reliable and generalizable data that would directly answer the question, "What was the specific impact of the PDA?" are not readily available. To conduct this investigation, we use a wide variety of data sources and quantitative and qualitative research techniques to derive

measures of the economic, legal and political effects of the PDA. These include:

(1) Historical census data to examine secular trends in employment and unemployment for different age and gender cohorts prior to and after the implementation of PDA;

(2) Time series regression analysis to determine the relative importance of factors, including the passage of the PDA, in explaining changes in the employment rates for women of childbearing age;

(3) Estimates of the numbers and percentage of workers covered by short-term disability insurance prior to and after the implementation of the PDA;

(4) Cross-sectional logistic regression analysis to determine the relative likelihood that each of a variety of demographic and job characteristics will increase or decrease the chances that a worker has short-term disability insurance;

(5) Estimates of the annual costs to business of providing short-term disability insurance for women of childbearing age, the percentage of these costs that can be attributed to the PDA and the offsetting benefits to business;

(6) Estimates of the annual payments to pregnant workers under short-term disability insurance and the percentage of these costs that can be attributed to the PDA;

(7) Ordinary least squares regression analysis to determine the relative importance of factors, including the availability of short-term disability insurance, in explaining the wages of women workers who gave birth to a child;

(8) Estimates of the annual earnings bonus to working women with short-term disability insurance who gave birth to a child in the current year relative to those without short-term disability;

(9) Selection and analysis of the most widely cited legal cases relating to the PDA. (It should be noted that we did not examine all cases brought under the PDA);

(10) Historical analysis of Equal Employment Opportunity Commission (EEOC) guidelines;

(11) Trends in the number of pregnancy discrimination charges filed with the EEOC; and

(12) A group interview with representatives from the coalition of groups that worked for the passage of the PDA.

A more detailed description of these methodological techniques, as well as a list of data sources, can be found in the Appendices to this report.

BACKGROUND: THE PREGNANCY DISCRIMINATION ACT

Events Leading to the PDA

The enactment of the PDA was precipitated by a 1976 Supreme Court decision which followed its reasoning in a 1974 case. In 1974, the Supreme Court ruled in Geduldig v. Aiello[1] that a California state employee disability insurance program did not unconstitutionally discriminate on the basis of sex by excluding pregnancy-related disability from coverage. The Court ruled that the classification did not differentiate on the basis of gender but between "pregnant and non-pregnant"[2] persons. The Aiello decision eliminated constitutional equal protection grounds as a basis for bringing a pregnancy discrimination suit.

In 1976, the Supreme Court applied its Aiello reasoning and ruled in Gilbert v. General Electric Company[3] that the exclusion of pregnancy-related disabilities from a company's disability plan was not sex discrimination. In Gilbert v. General Electric the Supreme Court upheld a General Electric sickness and accident insurance policy which excluded pregnancy from coverage. The circumstances in Gilbert were similar to those in Aiello. The temporary disability plan at issue covered several medical conditions particular to men such as vasectomies and prostatectomies but excluded a condition particular to women. The Supreme Court, however ruled that the plan did not constitute a pretext for discrimination against women.

The response to the Supreme Court decision was a sense of outrage, according to those interviewed for this report. The announcement of a coalition meeting occurred within a day of the Gilbert decision and a coalition of women's, labor, civil rights and church organizations was formed--the Campaign to End Discrimination Against Pregnant Workers (Campaign). This was the first major coalition between "second wave" women's groups and labor groups and the first time that women labor lobbyists were able to work with other women's groups in an attempt to evolve legal principals that would make a difference for women workers.

Supported by friendly insiders in the Carter Administration (the EEOC, for example, was filing supportive briefs in the Gilbert case), the Campaign lobbied Congress to pass the PDA as an amendment to the Civil Rights Act of 1964 (Gelb and Palley, 1981; Huckle, 1982; Kolker, 1983). Supporters of the bill argued that employers used women's role as child bearers as the central justification of and support for discrimination against women workers (Deller Ross, 1977:151) and that depriving women of coverage for pregnancy disability not only reduced these women's income but also reduced their children's ability to survive (Kennedy, 1977:226).

Groups opposing the PDA included the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Retail Federation, and the Health Insurance Association of America. Opponents argued that the bill would substantially increase the cost of existing employee benefit plans, thereby creating an unfair economic burden for those industries that provided benefits to workers.

Testifying against the bill, Francis T. Coleman, of the National Association of Manufacturers, stated that the details of disability coverage were best left to the joint determination of employers and employees and that the PDA would impose a "drastically disparate burden" on employers who provided liberal disability coverage. These employers, Coleman went on to argue, would now be required to provide liberal coverage for pregnancy, "increasing their overall fringe benefit costs vis a vis those employers who provided no disability coverage whatsoever" (1977:82). Coleman also argued that since a "substantial portion" of women who take pregnancy leave never return to work, employers would, in reality, be providing these workers with an extended form of severance pay. As a result of these increased costs, opponents suggested, the PDA might actually lead to an increase in discrimination against women of childbearing age.[4]

In the end, the coalition of women's, labor and civil rights groups carried the day, and on October 31, 1978, two years after the Supreme Court decision, Congress enacted the Pregnancy Discrimination Act (PDA)[5] as an amendment to Title VII of the Civil Rights Act of 1964.

Objectives of PDA

The intent of the PDA was to ensure that women affected by pregnancy and related medical conditions must be treated the same as other employees, i.e., on the basis of their ability or inability to work, in all areas of employment including hiring, firing, seniority rights and the receipt of fringe benefits. PDA amends and clarifies the definition of "sex" discrimination already prohibited in Title VII. PDA does not add additional enforcement powers or add a new category of discrimination to those already covered in Title VII.

In response to the Gilbert decision, the PDA broadened equal opportunity protection for working women by specifically requiring employers who offered health insurance and/or temporary disability plans to extend this coverage to women for pregnancy, childbirth, and related medical conditions. The PDA established the standard of ability or inability to work as the means of judging a disability. The PDA states:

> 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 condition 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 work...[6]

Like the Civil Rights Act itself, the PDA focused on non-discrimination and equal treatment. It did not set new standards for basic insurance coverage, other than the standard of non-discrimination. It simply required employers to treat pregnancy, childbirth or related medical conditions as they treated other persons "not so affected but similar in their ability to work" (Public Law 95-555, October 1, 1978). Thus if employers grant disability leave to men for conditions including, in the words of Senator Harrison J. Williams Jr.'s "sport injuries and hair transplants," they must grant comparable leave to pregnant women (1977: 1).

ECONOMIC EFFECTS OF THE PDA

What have been the economic effects of the PDA? Did it improve employment opportunities, wages and benefits for women by requiring that pregnancy be treated as just another short-term disability, as its supporters suggested? Alternatively, did it result in increased costs to business and increased discrimination against women workers as its opponents predicted? No systematic research evaluating the economic effects of the PDA exists. The lack of systematic research can be explained, at least in part, by the lack of consistent data covering the period before and after the passage of the PDA.

We used a variety of data sets and a variety of methodological techniques to measure the impact of the PDA and to answer the following specific research questions. What was the impact of the PDA on:

--the employment, unemployment and part-time rates of women of childbearing age compared to other workers?

--the coverage of women of childbearing age under temporary disability insurance?

--the costs and benefits to employers?

--the tenure and wages of women who recently gave birth to a child?

The Impact of the PDA on Employment Rates

Opponents of the PDA, as well as mainstream economists such as Mitchell and Mikaloukus (1987), would suggest that by raising the costs to employers of women workers of childbearing age, employers would be less likely to hire such women and more likely to fire them. If the fear of greater costs resulted in employers' refusal to hire women workers of childbearing age, or to substitute other age and gender groups, we would expect their employment rates to increase less or to decrease more than those of other categories of

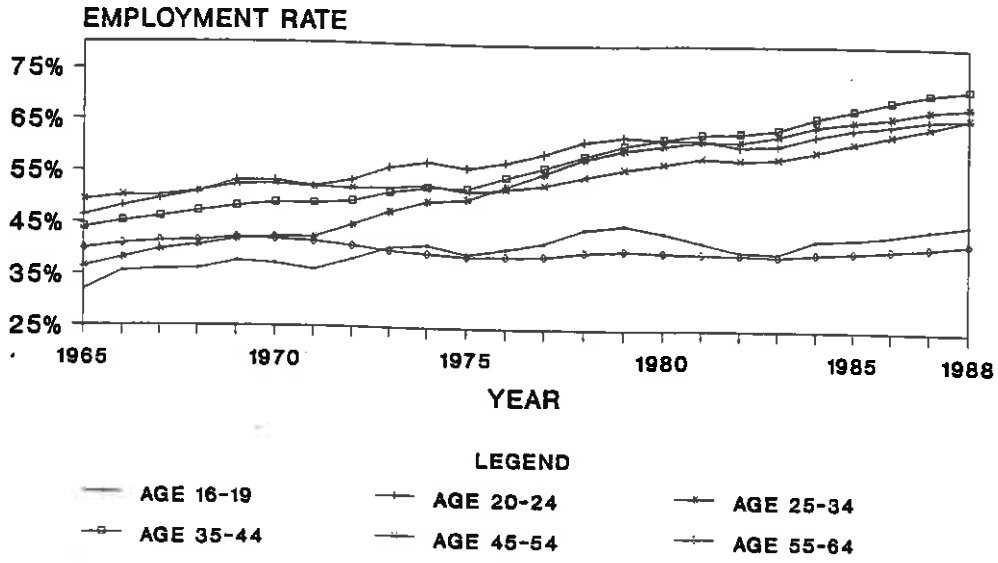
workers. Graphs 1 and 2 show the employment rates of men and women of different age groups, and allow us to compare these trends before, during and after the implementation of the PDA. The years of particular importance are 1979 and 1980, since 1979 is the year in which all aspects of the PDA were to be implemented and 1980 is the first full year after implementation.

What do the trends show? In general, we find the well-known secular trend that over the last 20 years women's employment participation has increased while men's has decreased. With the exception of a dip in employment rates for women ages 16-19 starting in 1979, the employment rate for all women increased (from 37.1 percent in 1965 to 53.4 percent in 1988), while men's employment rate decreased (from 77.5 percent in 1965 to 72.0 percent in 1988) (U.S. Department of Labor, 1989). Each of the age groups, in general, follows these gender trends, with the oldest age group of men (55-64) showing the clearest decline and women in the peak childbearing years (25-34) showing the greatest increase. These findings do not indicate that employers were wary of hiring women of childbearing age and do not indicate that they substituted other groups of women or men as an alternative work force.

To further test whether the PDA had a negative impact on the employment rates of women of childbearing age, we estimated a series of ordinary least squares, time series, regression models with the employment rate of women between the ages of 16 and 34 in the years 1966 through 1988 as the dependent variable. Among the independent variables included in the models were: an indicator for whether or not the PDA had been implemented (pre-1979 was categorized as 0 and post 1979 was categorized as 1); a lag variable--the employment rate of women ages 16-34 in the previous year; and variables to measure a variety of factors that are thought to explain the labor force participation of women of childbearing age, such as fertility rates, wage levels, education, industrial structure and the lack of substitute labor forces. (See Appendix I for a discussion of the method and the results.)

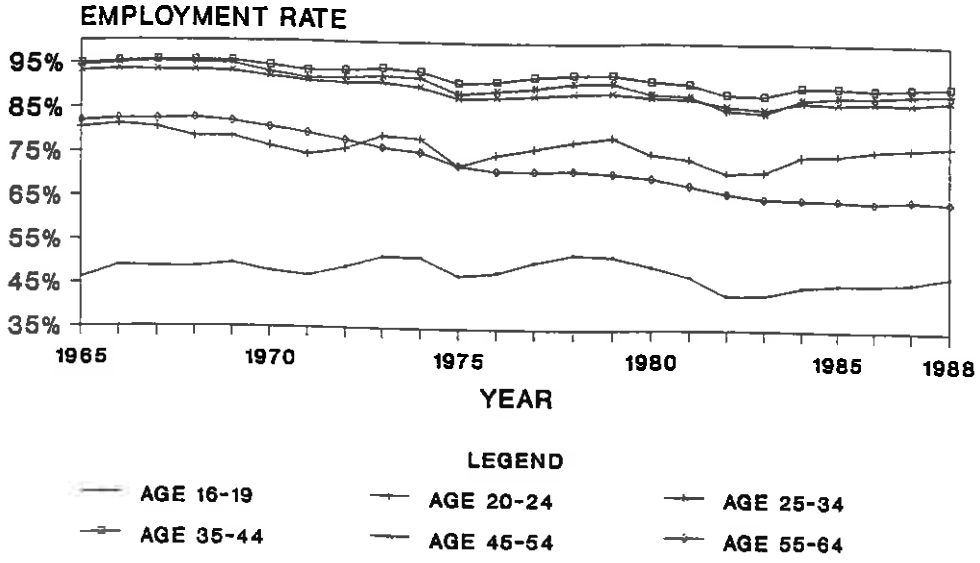
We consistently found that the effect of the lag variable--the employment rates of women in the previous year--explained approximately 98 percent of the variance in the

GRAPH 1
EMPLOYMENT RATES FOR WOMEN
BY AGE



SOURCE: IWPR Calculation based on data from the U.S. Dept. of Labor, (BLS) 1989 Handbook of Labor Stat., Table 16.

GRAPH 2
EMPLOYMENT RATES FOR MEN
BY AGE



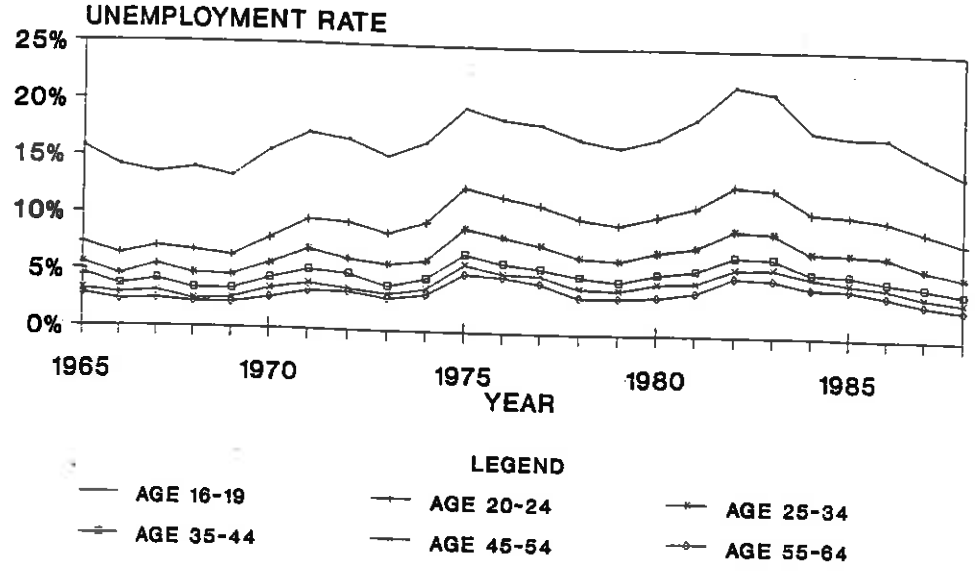
SOURCE: IWPR Calculation based on data from the U.S. Dept. of Labor, (BLS) 1989 Handbook of Labor Stat., Table 16.

dependent variable. In other words, the growth in the proportion of women in the workforce this year is strongly related to the proportion of women working last year, and this trend is the strongest predictor of employment. This suggests the presence of what commentators have called an "inexorable movement of women into the labor force" or "a quiet revolution" that becomes more powerful as more and more women of childbearing age move into the labor force and seek employment. This social trend is stronger than, and appears to overcome, any single legal or economic trend. This "inexorable" social movement of women into the workforce does not mean that policies that curtail employer discrimination in the area of occupational choice, wages, and benefits and policies such as the PDA do not improve the lives of these women workers (as we will see later).

The Impact of PDA on Unemployment Rates

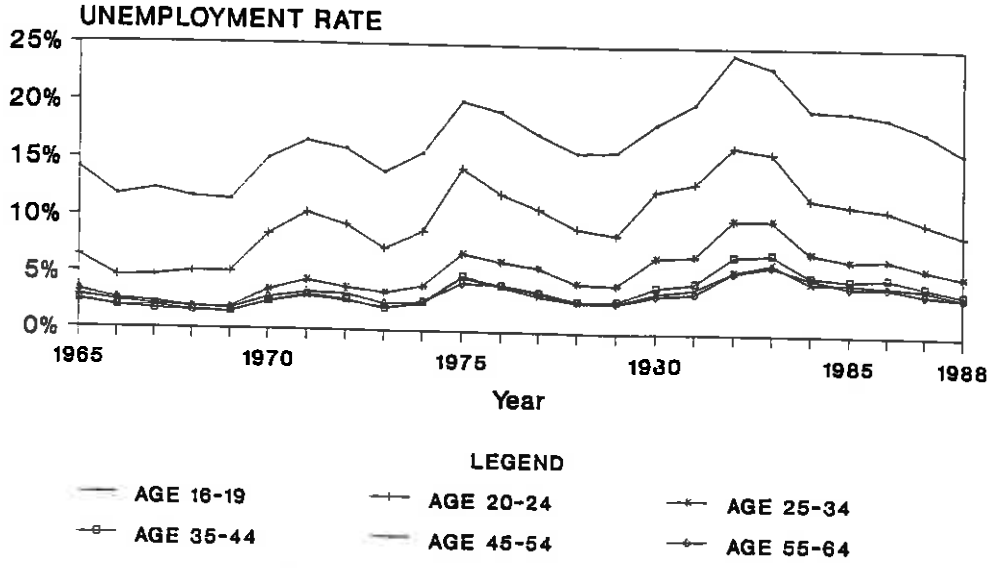
The converse side of employment is unemployment. While women may enter the labor force, they may not find jobs or they may be fired from the jobs they have. Although many employers clearly continued to hire women of childbearing age, despite the PDA, did other employers fire them? Prior to the passage of the PDA (1975-1978), unemployment rates for women of childbearing age were decreasing, but from 1979 through 1982 they increased. Does this finding indicate a massive firing of women of childbearing age? Apparently not, since the unemployment rates of women of non-childbearing age also first decreased (before 1979) and then increased during this period (1979-82) as did the unemployment rates of men in all age categories. In fact the unemployment rates for men increased more sharply after 1979 than those of women. (See Graphs 3 and 4.) Economic trends of the period such as stagflation, recession and deindustrialization are probably better explanations for unemployment rates during this period than is the PDA.

GRAPH 3
UNEMPLOYMENT RATES FOR WOMEN
BY AGE



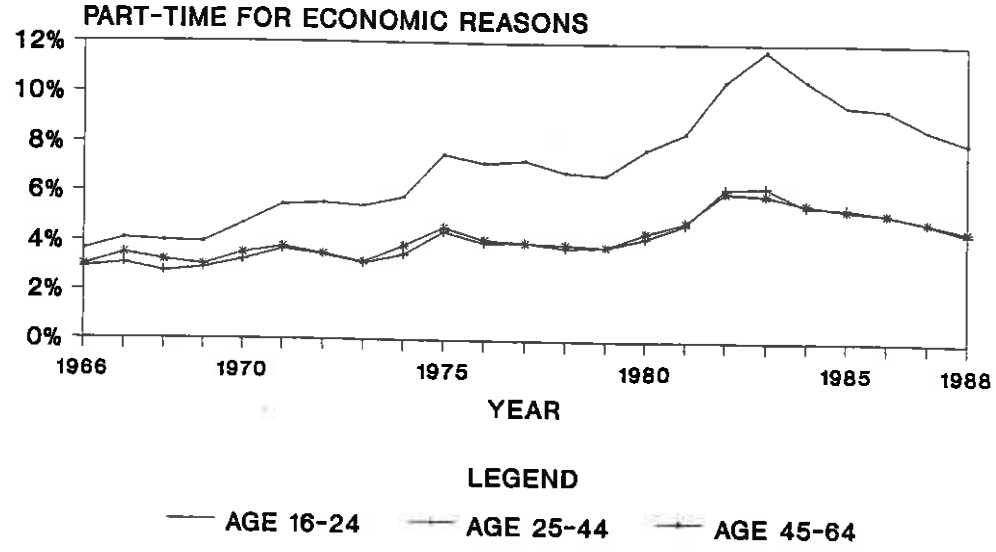
SOURCE: IWPR Calculations based on data from the U.S. Dept. of Labor, (BLS) 1989 Handbook of Labor Stat., Table 28.

GRAPH 4
UNEMPLOYMENT RATES FOR MEN
BY AGE



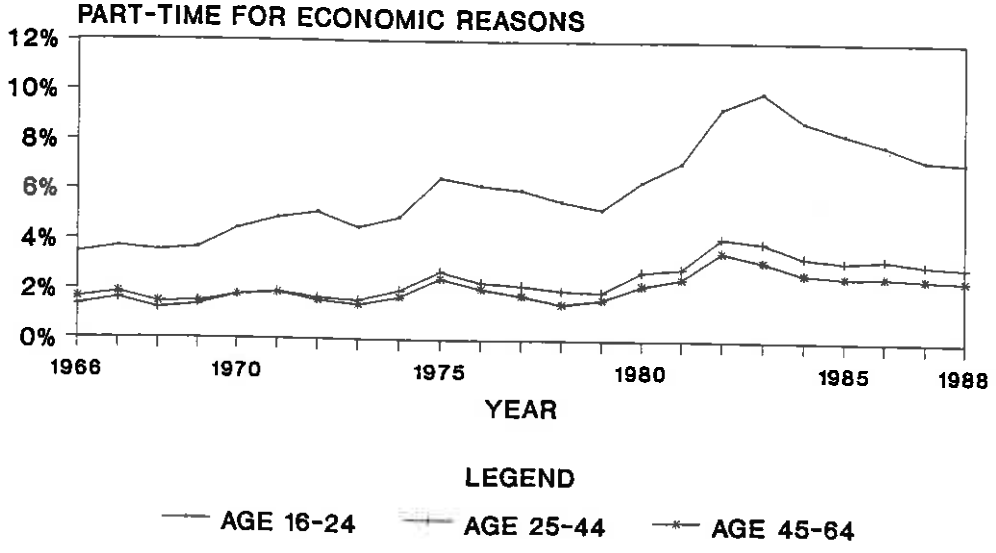
SOURCE: IWPR Calculations based on data from the U.S. Dept. of Labor, (BLS) 1989 Handbook of Labor Stat., Table 28.

GRAPH 5
PERCENT OF WOMEN ON PART-TIME
SCHEDULES FOR ECONOMIC REASONS



SOURCE: IWPR Calculations based on data from the U.S. Dept. of Labor, (BLS) 1989 Handbook of Labor Stat., Tab. 15/24

GRAPH 6
PERCENT OF MEN ON PART-TIME
SCHEDULES FOR ECONOMIC REASONS



SOURCE: IWPR Calculations based on data from the U.S. Dept. of Labor, (BLS) 1989 Handbook of Labor Stat., Tab. 15/24

The Impact of the PDA on Part-Time Work

In the absence of hiring alternative age groups, perhaps employers instead developed a strategy of hiring women of childbearing years at part-time jobs, jobs that are less likely to have health and disability benefits attached to them (Du Rivage, 1986). If part-time job creation was developed as a response to the rising cost of female labor as a result of the PDA, then we would expect that in 1979 and beyond, the portion of women of childbearing years working at part-time jobs would increase at a greater rate than it would for other groups of workers.

In Graphs 5 and 6, we disaggregate the trends in the percent of employees "working part-time for economic reasons" by gender and age. We choose to include only the category of working part-time for economic reasons because this category includes those who desire full-time jobs but cannot find them, rather than those who are "voluntarily" working part time. If employers used a strategy of substituting part-time for full-time workers, involuntary part-time workers are the unwitting victims of this employer strategy. The graphs show that a relatively small percentage of all workers are classified as unwilling part-time workers, but that this rate did increase after the 1973 recession and again after the recessions of the early 1980s (to a maximum of 12 percent for men, ages 16-24). Among women workers, the youngest age group (16-24) are most likely to be involuntary part-time workers. The rate of involuntary part-time employment for women of prime childbearing age is similar to that of the older women workers and to that of men of the same age group. The trends do indicate the growth of an involuntary part-time work force, but they do not indicate that women workers of childbearing age were singled out as the designated victims of a post-PDA employer strategy to reduce benefit levels by hiring them as part-time rather than full-time workers.

Coverage Of Women Workers by Short-Term Disability

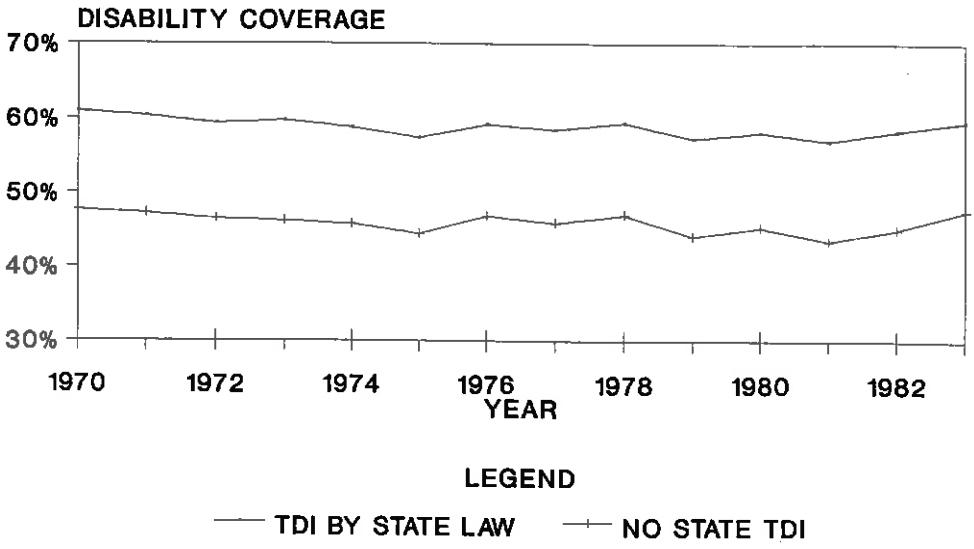
Trend Analysis

At the time that the PDA was passed it was estimated that 40 percent of women workers had short-term disability insurance although a much smaller percentage appeared to be able to use it for disabilities that resulted from pregnancy (Kamerman et al., 1983: 65; Gelb and Palley, 1987: 164). Here again, there is no single data that allow us to measure the impact of the PDA on the coverage of pregnant women under short term disability policies. Instead, we use a number of data sets to estimate the PDA's effects. The result of using more than one data set to estimate the number of women of childbearing age with this form of protection is a disparity in our estimates of who has coverage.

Short term disability insurance plans, also referred to as sickness or accident insurance, provide employees with protection against temporary loss of income due to illness or accident. According to a 1986 survey by the Health Insurance Association of America (n.d.), nearly three-quarters of covered employees begin receiving this benefit on the first day of an accident or the eighth day of an illness. Sick leave usually provides 100 percent of the worker's normal earnings, where as sickness and accident insurance usually replaces 50 to 67 percent of pay (U.S. DOL, 1989). According to the Health Insurance Association of America three-quarters of covered workers are allowed up to 26 weeks of leave; but, as we will see, estimates vary as to the percentage of the work force who are covered.

Did the percentage of pregnant workers covered by temporary or short-term disability insurance increase or decrease since the passage of the PDA? Graph 7 displays estimates by Price (1986), then of the Social Security Administration, showing the percentage of all private sector wage and salary workers covered by temporary disability insurance (men and women workers were not disaggregated). The lower line on the graph includes only those private sector workers covered by disability insurance who are not residents of the five states with state-level

GRAPH 7
WORKERS COVERED BY DISABILITY INSURANCE IN PRESENCE/ABSENCE OF STATE LAW



SOURCE: Social Sec. Bulletin May 1986
Vol 49, No. 5, "Cash Benefits for
Short-term Sickness 35 Yrs. of Data"

temporary disability insurance benefits (referred to as the TDI states). The upper line includes those who are residents of TDI states. (Because our own estimates, using two U.S. Bureau of Labor Statistics data sets, are lower, we think that the Price estimates, which are based on data from the Health Insurance Association of America and from state administrative agencies are high estimates; they may include sick leave and health insurance benefits as well as short-term disability insurance.)

Examining the rates, we find that about 59 percent of workers in all states (including TDI states) and about 46 percent of workers in non-TDI states were covered in 1977, the last year prior to the passage of the PDA. During the years immediately after the PDA's passage (1979,1980,1981) coverage rates declined slightly. In 1982 rates began to increase slightly; and by 1983 rates for private sector workers in all states (including TDI states) as well as those in non-TDI states increased slightly above the 1977 rates.

These findings indicate that, in general, the percentage of workers covered by short term disability benefits has remained relatively stable. It does appear that some employers may have dropped temporary disability coverage in anticipation that the PDA would make this insurance more expensive. Others, bound by union bargaining agreements (most likely in the manufacturing sector, the sector in which workers are most likely to have this benefit), were probably not able to do so. Most employers do not appear to have either dropped or taken on coverage. Although passage of the PDA did not have a clear positive impact on the percentage of all workers covered by temporary disability insurance (since it did not mandate that employers provide this benefit but mandated only that pregnancy be covered as a disability if the employer provided insurance), neither did it appear to cause any wholesale dropping of this benefit.

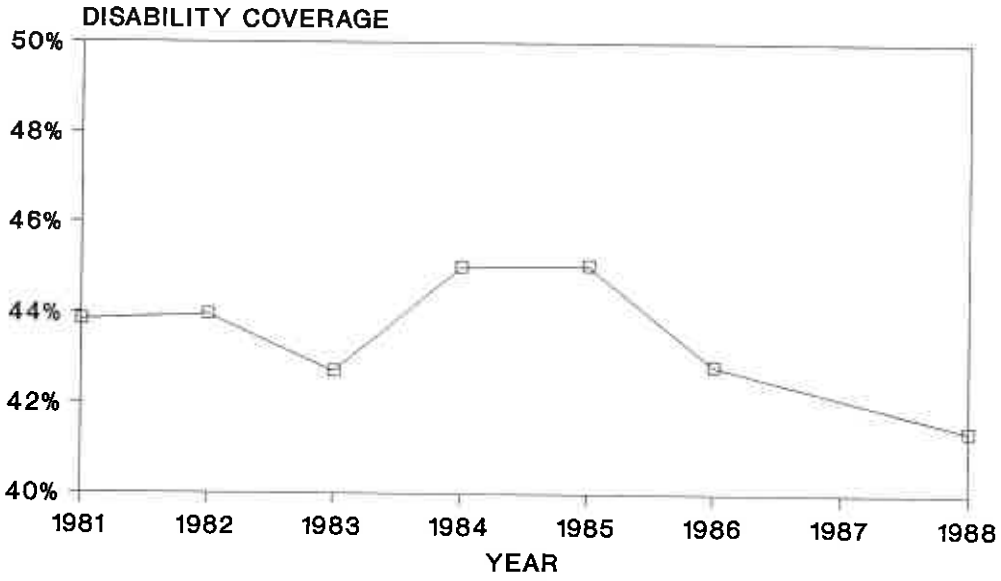
No existing data set provides trend data on the portion of women workers of childbearing age covered for pregnancy disability, under short term disability insurance, before and after the passage of the PDA. In the absence of any nationally-representative trend data to

answer this question, we developed estimates of the percentage of women of childbearing age with such coverage. The method for developing these estimates is described in Appendix II. Due to the lack of available data, we cannot definitely determine whether coverage increased or decreased after the implementation of the PDA.

The estimates, shown in Graph 8, show a relatively stable pattern of coverage from 1981 (the first year for which data was available from the U.S. Department of Labor's Survey of Benefits in Medium and Large Firms) through 1988, with an average of about 41 percent of women of childbearing age covered by short-term sickness and accident insurance in each year from 1986--down a few points from the 1984 and 1985 highs. These estimates include workers in the five TDI states. Using the same technique, we estimate that 47 percent of male workers were covered by short-term disability insurance in 1988. Thus, women are less likely to be covered by short term disability than are men (presumedly because they work disproportionately for employers who do not carry this benefit at all).

According to other researchers, the PDA did have a positive effect for those workers working in firms that already had disability coverage. A study by O'Connell (1990) of maternity leave arrangements from 1961-1985, using a retrospective module of the Survey of Income and Program Participation, supports the conclusion that the PDA did serve as a source of maternity leave coverage to women workers. O'Connell found that the percentage of women giving birth to their first child who reported having some form of paid maternity leave or sick leave increased from 23 percent in 1971-75 to 34 percent in 1976-1980 to 47 percent in 1981-85. The leave that these women reported probably included discretionary leave granted by supervisors, sick leave as well as short-term sickness and accident insurance. Nonetheless, O'Connell's findings indicate a trend to paid maternity/sick leave, a trend that was not dampened but rather increased as a result of the passage of the PDA. Short term disability insurance is still the most likely source of paid maternity leave in the U.S. (Trzcinski, 1989). Although our estimates indicate that about 41 percent of women of childbearing age are covered by short-term disability

GRAPH 8
ESTIMATED PERCENT OF WOMEN (AGES 18-44) COVERED BY SHORT-TERM DISABILITY



SOURCE: IWPR Calculations based on data from CPR P-20 No. 436 Table 2, and BLS Table "Short-term Disability Coverage"

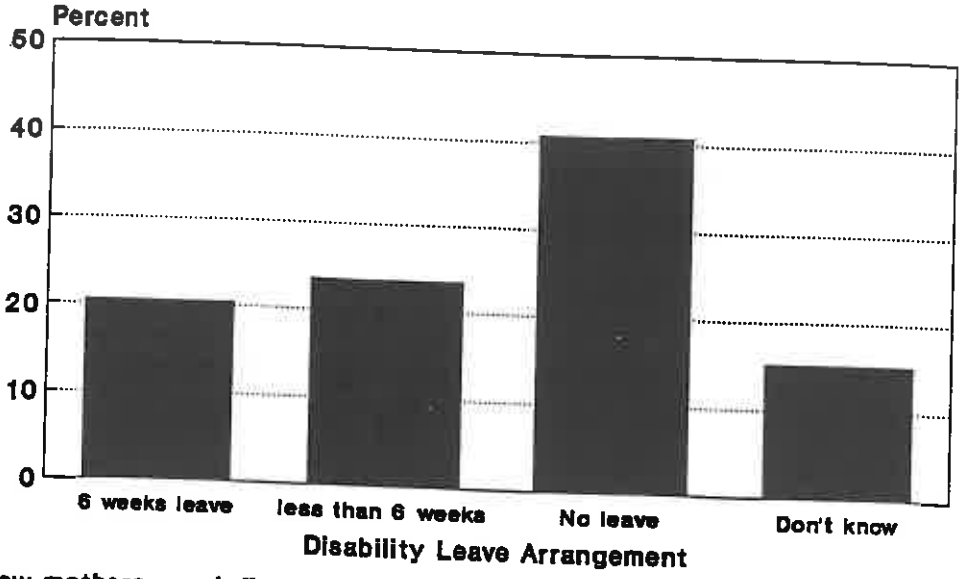
insurance and O'Connell's findings indicate that a somewhat higher percentage of women, who gave birth to a first child, report having some form of maternity leave (probably short-term disability leave), neither provides estimates of the length of leave available to pregnant workers for childbirth.

At the 1977 Congressional hearings on the PDA, the Women's Bureau of the U.S. Department of Labor estimated that an average disability leave for pregnancy was 7.5 weeks--close to other estimates made at the time (Kamerman et al, 1983). Our findings indicate that these length of leave estimates are overly optimistic from the perspective of pregnant women workers. Figure 1 shows that in 1988 approximately 44 percent of employed new mothers (defined as those who had a child in the last year) reported some form of paid leave as a result of sick leave policies or sickness or accident insurance, but only half of these (20.5 percent) report that this paid leave was received for six weeks or more. Thus, only one in five women workers who experienced childbirth have this coverage for six weeks or more. An additional 15 percent did not know the length of leave to which they were entitled, indicating the discretionary nature of much pregnancy disability leave. These findings indicate that less than half of all women workers of childbearing age are currently covered by some form of short-term disability insurance, and the percentage of women receiving at least six weeks of leave appears to be substantially less. Further, the percentage of women covered does not appear to be increasing.

Determinants of Coverage

Which women of childbearing age are likely to have at least six weeks of sickness or accident insurance that covers pregnancy disability? To answer this question, we turn from trend to logistic regression analysis. Previous research on the availability of paid maternity leave (most likely short-term disability) has indicated that married women over the age of 45, covered by union contracts, working full-time in male-dominated industries, earning higher

Figure 1.
Percent of Employed New Mothers
with Disability Leave, 1988



• New mothers are defined as those who had a baby in the last year.
Source: IWPR calculations using 1988 CPS

wages are significantly more likely to be covered by this benefit. Findings on the impact of race, education and firm size were mixed (Trzcinski, 1989; O'Connell, 1990).[7]

Our findings, using data from the May, 1988 Current Population Survey, replicate those of previous researchers. Our dependent variable was whether or not a worker had at least six weeks of paid sick leave or sickness insurance. (This was the way the question was phrased in the CPS interview). Our independent variables were: (1) Age in years; (2) Race/Ethnicity (White=0); (3) Industry (Workers in industries that are more than 50 percent female, Yes=1); (4) Weekly earnings; (5) Establishment size; (6) Employed Full or part-time (Full-time=1); (7) Lives in a state with state disability coverage (Yes=1) and (8) Covered by union contract (Yes=1).

We estimated two models, one for all workers and one for women of childbearing age.[8] In the all workers model, shown in Table 1, we found that increasing age, working in large firms, union membership, higher wages and working full-time are positively and significantly related to coverage, other factors being equal. Race was not significant. Working in a small firm, in an industry with a high percentage of women workers, and being female were negatively related to having coverage. Living in a state which mandates temporary disability insurance was also negatively related to coverage. Although this finding seems contradictory, it is not. Many workers in TDI states are, in general, covered by state-administrated insurance plans to which employers and employees contribute. Hence workers in these states are less likely to have coverage through their firms.

The findings are much the same for women of childbearing age. (See Table 2.) These findings show that women of childbearing age are less likely to be covered by short-term disability, especially those who are younger, lower-wage workers employed in small, non-union firms in industries with a high percentage of female workers. They further indicate that the women who need paid disability the most do not have such coverage and that employers in the firms and industries (such as retail trade) who fretted most about the potentially negative effects

of the PDA do not provide this benefit to their employees.

Costs to Business of the PDA

Costs to employers of providing temporary disability to pregnant workers was a major issue in the debates surrounding the PDA. The estimates of these additional costs varied widely (as cited in Kamerman et al., 1983: 45 ff). The Health Insurance Association of America estimated $571 million in additional costs to cover pregnant workers, while the AFL-CIO estimate was only $130 million in additional costs. The U.S. Department of Labor (DOL) estimates, made by Emily Andrews, were $355.3 million (in 1976 dollars) in total costs (including 20 percent for administrative costs) for pregnancy and childbirth for all covered workers (for 7.5 weeks of disability coverage). Andrews estimated that employers were already paying $163.8 million, resulting in additional costs to employers of $191.5 million per year.

What are the current costs to business that can be attributed to the PDA? Owing to the lack of actual cost data, we used the U.S. Department of Labor's methodology (Herman, 1979) to develop current cost estimates. We estimate that in 1988 employers were paying about $1.14 billion in disability insurance premiums for all women of childbearing age. This amounts to $1.49 per week, per covered female employee. Based on the percentage that DOL estimated was the percentage of cost mandated by PDA--54 percent--we estimate that $618 million in costs (or 80 cents per week, per covered female employee) were mandated by the PDA. (See Chart 1.)

In contrast to the insurance premiums paid by employers for all women of childbearing age, we estimate that in 1988, $988 million was paid out to women workers who had a child, of which an estimated $534 (or 54 percent) million were costs that were mandated by the PDA. The method for these estimates, also based on an updating of the U.S. DOL's methodology, is outlined in Chart 2.

CHART 1

ESTIMATED COSTS TO BUSINESS OF SHORT-TERM DISABILITY INSURANCE FOR ALL WOMEN OF CHILDBEARING AGE

Estimated Number of Employed Women (16-45) Covered by Short-Term Disability in 1988	14.7 million
x Median Weekly Earnings *	$315
x Number of weeks	52
	$240.8 billion
x Ratio to Payroll **	.00475
TOTAL	$1.14 billion
x Estimated Percentage of Costs Mandated by PDA ***	54 percent
TOTAL	$618 million

* This Figure is a weighted average based on data from the U.S. Department of Labor 1989 Handbook of Labor Statistics, Table 41

** The ratio to payroll is based on the amount of payroll estimated by the U.S. DOL in 1976. Based on U.S. Chamber of Commerce data, short-term disability costs as a percentage of payroll have not appeared to increase.

*** The estimated percentage of cost mandated by the PDA is based on 1976 U.S. DOL estimates.

Source: IWPR calculations

TABLE 1

LOGISTIC REGRESSION RESULTS FOR ALL WORKERS WITH HAVING AT LEAST SIX WEEKS OF PAID LEAVE OR SICKNESS INSURANCE AS THE DEPENDENT VARIABLE

Variable	Estimate	Standard Error	p-value
INTERCEPT	- 2.82	0.21	.00
AGE	0.04	0.00	.00
SMALL	- 0.26	0.10	.01
LARGE	0.69	0.07	.00
EARNINGS	0.00	0.00	.00
UNION	0.21	0.07	.00
FEMDOM	- 0.40	0.07	.00
FEMSTA	0.39	0.16	.02
MINORITY	- 0.01	0.09	.87
STAIND	- 0.29	0.16	.07
FULLTIME	0.76	0.14	.06
STATEDIS	- 0.79	0.12	.00
FEMALE	- 0.20	0.07	.00

Number of observations	6,348
Percent with six weeks of leave	59.9
Percent estimated correctly with leave	81.1
Percent estimated correctly without leave	51.4

SOURCE: IWPR calculations based on the 1988 May Supplement of the Current Population Survey, U.S. Bureau of the Census.

TABLE 2

LOGISTIC REGRESSION RESULTS
FOR FEMALE WORKERS OF CHILDBEARING AGE
WITH HAVING AT LEAST SIX WEEKS OF
PAID LEAVE OR SICKNESS INSURANCE
AS THE DEPENDENT VARIABLE

Variable	Estimate	Standard Error	p-value
INTERCEPT	- 2.46	0.27	.00
AGE	0.02	0.01	.00
SMALL	- 0.39	0.15	.01
LARGE	0.69	0.09	.00
EARNINGS	0.00	0.00	.00
UNION	0.11	0.10	.24
FEMDOM	- 0.42	0.08	.00
MINORITY	- 0.07	0.12	.52
FULLTIME	0.75	0.15	.00
STATEDIS	- 0.19	0.11	.09

Number of observations	3,091
Percent with six weeks of leave	51.3
Percent estimated correctly with leave	69.3
Percent estimated correctly without leave	60.4

SOURCE: IWPR calculations based on the 1988 May Supplement of the Current Population Survey, U.S. Bureau of the Census.

CHART 2

ESTIMATED 1988 COSTS PAID TO PREGNANT WORKERS UNDER SHORT-TERM DISABILITY INSURANCE

Number of Employed Women Workers who Gave Birth in 1988	1.7 million
x Estimated % Covered by Disability	41 percent
x 1988 Median Weekly Earnings of Women of Childbearing Age *	315 dollars
x Estimated Wage Replacement Rate	60 percent
x Weeks of Coverage	7.5 weeks
TOTAL	$988 million
x Estimated Percentage of Costs Mandated by PDA **	54 percent
TOTAL	$534 million

* This figure is a weighted average based on data from the U.S. Department of Labor 1989 Handbook of Labor Statistics, Table 41.

** The estimated percentage of cost mandated by the PDA is based on 1976 U.S. DOL estimates.

Source: IWPR calculations.

Assuming that 41 percent of new mothers have 7.5 weeks of partially paid disability coverage may result in over-estimates of the pay-out to women workers for pregnancy disability. If we assume that only 20 percent of pregnant workers have 7.5 weeks of partially paid leave (estimates consistent with our earlier findings using the 1988 CPS), then the pay-out would only be $482 million dollars, of which approximately $260 million was mandated by PDA.

We estimate that the cost of TDI coverage for pregnancy amounts to 10 percent or less of the total cost of TDI coverage for all employees in 1988. (See Appendix III for the method for calculating this estimate.) The additional costs mandated by the PDA, then, amount to slightly less than five percent of the total costs of TDI coverage. These costs to employers do not appear to be catastrophic, and, like most business costs, they are tax deductible.

Benefits to Business of the PDA

Although we emphasize the costs to business of the PDA, many employers institute sick and disability leave policies because it is cost effective to do so. Providing disability insurance helps employers to hire and retain workers. The results of available surveys indicate that employers themselves believe that fringe benefits encourage longevity and reduce turnover, allowing employers to benefit from the skills, experience and institutional knowledge that workers with long job tenure have gained. According to a nationally projectable survey of corporate benefit executives (conducted by Wyatt in 1985, cited in Parkington, 1987), the primary reasons that employers sponsor employee benefits are to attract and to retain valued human resources. This finding is validated by other surveys of CEOs by Roper and Mercer-Mendinger (cited in Parkington, 1987) and the U.S. Chamber of Commerce (1986).

Much of the firm level data concerning the actual benefits to employers in terms of recruitment, training, and retention costs of various fringe benefits are proprietary. There are, however, several nationally-representative sample surveys of workers that provide data to answer

questions about the benefits to employers of providing some form of pregnancy disability coverage. For example, O'Connell (1990) found that women who gave birth to a first child between 1981 and 1984 who had maternity leave (probably short-term disability in most cases) were one and a half times (1.5) as likely to return to work within six months of childbirth as women without such a benefit. O'Connell concludes that this benefit is of primary importance in understanding why some women return to work faster than others. These policies, he states, "benefit employers by reducing potential costs and time associated with funding new replacement workers" (1990: 38).

Using another nationally-representative data set--the Panel Study of Income Dynamics--we find that women workers who gave birth to a child but who did not have any pregnancy disability/maternity leave received an additional $172 (in 1988 dollars) in unemployment insurance benefits in the year of birth compared to women workers who gave birth but did have some form of leave benefit. If we generalize this cost to the approximately 1.02 million women workers who gave birth but did not have disability insurance (and this is a low estimate of those without disability insurance) then we find that the cost of additional unemployment insurance benefits is $175 million. (See Chart 3.)

Since unemployment insurance is financed through a tax levied on employers based on a portion of payroll, adjusted by actual firm unemployment rates, then the lower unemployment benefits paid to women workers with disability insurance can be considered as an offset to the cost of short-term disability insurance.

Those employers who do not already provide short-term disability insurance may therefore find that they will gain economically from providing workers with this benefit. While providing the benefit is not costless, the costs are not high and they may be made up by economic gains associated with easier recruitment, lower turnover, lower unemployment insurance payments, decreased training costs and increased longevity.

For those employers who base their labor policies on a high turnover, low-wage strategy,

CHART 3

ESTIMATED ADDITIONAL UNEMPLOYMENT INSURANCE COSTS OF NEW MOTHERS WITHOUT SHORT-TERM DISABILITY INSURANCE

Estimated Number of Employed Women Who Gave Birth Without Coverage in 1988	1.02 million
x Additional Unemployment Insurance Benefits Paid Out	$172 (1988 $)
TOTAL	$175 million

Source: IWPR Calculations based on original tabulations from the Panel of Income Dynamics.

the additional cost of 80 cents per week per woman worker to cover pregnancy disability, or for that matter, any cost, might be considered too high. According to Judith Lichtman, Director of the Women's Legal Defense Fund and member of the Campaign Against Pregnancy Discrimination, part of the resistance of employers is based on antipathy to workers. In Lichtman's words,

> A real class double standard exists, a fear that workers will abuse benefits but a lack of fear that high-level management will abuse a much higher level of benefits.

Benefits to Workers of the PDA

Compared to the costs to business, what are the benefits to women workers? Job tenure and increased wages are hypothesized to be the most likely gains to women workers as a result of anti-discrimination policies. We use several indicators to examine the effects of short-term disability (or sickness and accident) insurance on the job tenure of women workers with a child less than one year old--the group of women workers who would have availed themselves of short-term disability insurance, if they had it. All three indicators show that the availability of six weeks or more of disability insurance has a positive effect on pregnant workers/new mothers' employment status or their ability to keep their job.

The first indicator is weeks spent looking for work. Currently employed new mothers who report having no disability insurance spent at least one week (on the average) looking for work during the previous year in contrast to currently employed new mothers with at least six weeks of short-term disability who spent no weeks looking for work. This finding suggests that the consequence of lack of disability coverage for some portion of pregnant workers is job loss. This suggestion is borne out by the second indicator--the number of employers for whom currently employed new mothers worked during the previous year. For those new mothers who had six or more weeks of disability, 95 percent had only one employer during the year, while 85

percent of those reporting no disability insurance had only one employer--in other words, 10 percent of these women had to spend time and effort at job search, possibly because they lost their jobs.

The result of lack of disability coverage and consequent job search is fewer weeks worked during the year. In contrast to new mothers with six or more weeks of disability who worked an average of 51 weeks during the year (the weeks of leave are included in this total), the third indicator shows that new mothers without disability worked 41 weeks and new mothers without disability who changed employers worked only 37 weeks. These findings indicate that disability does result in worker retention from the employer's perspective, increased productivity from society's perspective, and, as shown next, increased earnings from the worker's perspective.

If we assume that the new mothers who worked only 37 weeks earned an average of $315 per week and would have remained employed for 51 weeks, 7.5 weeks of which were at 60 percent of full pay, these women lost approximately $530 million in wages that they would not have lost had they had disability coverage. (See Chart 4 for estimating technique). This loss almost matches the estimated cost that employers pay for short-term disability for all women of childbearing age mandated by PDA ($618 million).

Next, we investigate the issue of the wage effects of disability coverage for women workers through the use of an ordinary least squares regression model, using data from the May 1988 Current Population Survey. In this model, weekly earnings of women workers is the dependent variable and the independent variables are as follows: (1) Age in years; (2) Race; (3) Paid sick leave or sickness insurance for six weeks or more (Yes=1); (4) In female dominated industry (Finance, Insurance and Real Estate; Retail, Service, Yes=1); (5) Years of education; (6) Establishment size; (7) Full or part-time worker and (8) Covered by union contract (Yes=1).

With the exception of short-term disability coverage, these are standard independent variables in wage equations. We estimated this model for working women who had a child less

CHART 4

EARNINGS LOSSES TO NEW MOTHERS WITHOUT SHORT-TERM DISABILITY INSURANCE (TO NEW MOTHERS WHO CHANGED EMPLOYERS)

New Mothers without Disability who Changed Employers in 1988	153,000
x Weeks Lost of Full Pay	6.5
x Average Pay	$315.00
+ Weeks Lost of Partial Pay	7.5
x Average Pay (60% of $315)	$189.00
TOTAL	$530 million

Source: IWPR Calculations based on original tabulations from the 1988 Current Population Survey

than one year old on the assumption that this was the group of women whom the PDA was designed to benefit--they are working women who are likely to have availed themselves of their paid sick and accident insurance for pregnancy and childbirth-related disabilities.

Table 3 shows that these women experience high returns in dollars for being a white rather than a minority worker, for having a college degree and for working full-time. What is more controversial is the wage bonus of $66.20 that comes from living in a state with TDI (although this finding is not significant) or the $57.40 weekly bonus (significant at the 6 percent level) for having at least six weeks of paid sick leave or sickness and accident insurance.

If these women work full time/full year (and they do on the average), the availability of this paid sick leave/sickness insurance increases their earnings by about $3,000 per year, when other factors are held constant. An estimated 38 percent of this earnings benefit can be attributed to the pay-out from short-term disability insurance.[9] This finding indicates that the availability of pregnancy disability benefits to workers who gave birth to a child has a positive effect on their earnings, when other factors are held constant.

If we generalize these findings to all women workers who gave birth in 1988 who were covered by pregnancy disability, the results are almost $2.1 billion in additional earnings if we assume that 41 percent were covered by this benefit and $1.0 billion if we assume that only 20 percent were covered. (See Chart 5.) This finding indicates that the wage benefit to working women who do give birth is almost as great, at the minimum, and twice as great, at the maximum, as the cost to employers (1.1 billion) of providing pregnancy benefits under short-term disability insurance to workers of childbearing age. Unfortunately, as we noted earlier, the majority of women do not have this benefit and the women workers who may need this benefit the most are without it. This finding agrees with those of other researchers (e.g. Dalto, 1987; Trzcinski,1988) who found that increased access to maternity policy can result in higher age-earnings profiles because workers with such policies can accrue tenure or seniority and do not have to bear the costs of finding new jobs. IWPR's earlier study of family and medical leave

TABLE 3

REGRESSION RESULTS
FOR WOMEN WITH A CHILD UNDER ONE YEAR
WITH WEEKLY EARNINGS AS THE DEPENDENT VARIABLE

Variable	Estimate	Standard Error	p-value
INTERCEPT	-146.6	114.3	.20
AGE	11.0	3.9	.01
MINORITY	-103.9	43.2	.02
SMALL	- 28.5	46.7	.54
LARGE	39.5	35.4	.27
TEN	2.8	4.5	.54
UNION	- .4	37.8	.99
FEMDOM	- 7.3	33.4	.83
FULLTIME	126.9	42.4	.00
SIXWEEKS	57.4	29.8	.06
COLLEGE	131.3	32.0	.00
STATEDIS	66.2	46.4	.16

Adjusted R-square = 0.3117

SOURCE: IWPR calculations based on the 1988 May Supplement of the Current Population Survey, U.S. Bureau of the Census.

CHART 5

BENEFITS IN ADDITIONAL EARNINGS TO WORKING WOMEN WHO GAVE BIRTH WHO WERE COVERED BY SHORT-TERM DISABILITY IN 1988

Panel A: Assuming that 41% of new mothers were covered by short-term disability for six or more weeks

Weekly Earnings Bonus	$57.40
x Weeks per Year	52 weeks
x Number of Women Who Gave Birth Who Had Benefit	697,000
TOTAL	$2.08 billion

Panel B: Assuming that 20% of new mothers were covered by short-term disability for six or more weeks

Weekly Earnings Bonus	$57.40
x Weeks per Year	52 weeks
x Number of Women who Gave Birth Who Had Benefit	340,000
Total	$1.014 billion

Source: IWPR calculations.

(Spalter-Roth and Hartmann, 1988; 1990) also found that women with some form of job-protected leave, even unpaid leave, experience less earnings loss as a result of childbirth than do women without job-protected leave. These findings lead us to conclude that a policy that encouraged short-term disability leave for all employees, including pregnant workers, as a minimum labor standard would most likely have a positive effect on women's earnings, not only during their childbearing years but throughout their working lives.

LEGAL AND POLITICAL IMPLICATIONS

The evaluation of the economic impact of the PDA indicates minimal, if any, negative employment effects, relatively small costs to employers, and positive benefits in terms of earnings and reduced job loss to women with disability coverage. The purpose of the PDA was to protect pregnant women's rights to these economic benefits. The passage of the PDA clarified the right of women to challenge discrimination based on stereotypical assumptions about pregnancy and childbirth. Thus, women are protected from arbitrary exclusions based on their childbearing capacity, as least to the extent that the PDA has been followed by employers and enforced by the courts and the Equal Employment Opportunity Commission (EEOC).

Women's groups that provide direct legal services report success in dealing with basic cases of discrimination against clients based on pregnancy. Many of these cases can be handled through letters or phone calls to employers rather than through litigation.[10] The next section reviews the outcome of "cutting edge" discrimination cases that have been brought under the PDA. It also reviews the role of the EEOC in implementing this policy and the PDA as a model of policymaking.

Title VII and Sex Discrimination

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964, which was passed to ensure that women and racial, ethnic and religious minorities would be afforded the same opportunities in the labor market enjoyed by white males, if they had the same talents, qualifications and other characteristics. Title VII prohibits discrimination in employment decisions on the basis of race, color, religion, sex, and national origin. The PDA clarifies the definition of sex discrimination to include classifications based on pregnancy and the ability to become pregnant. As an amendment to Title VII, the PDA derives its substantive force from those sections of the statute which delineate proscribed practices.[11]

Accordingly, cases brought under the PDA involve one of two situations: disparate treatment (which is legal only if justified by a bona fide occupational qualification); and disparate impact (which is legal only if justified by business necessity). These theories are detailed in Chart 6.

PDA Case Analysis

Since the passage of the Pregnancy Discrimination Act in 1978, both the disparate treatment and disparate impact theories of discrimination have been alleged in cases brought by working women. Chart 7 lists the relevant major cases related to the PDA and the issues raised in those cases. An expanded version of this chart is contained in Appendix IV. These cases provide a snapshot of how the federal courts have resolved basic issues surrounding pregnancy discrimination since the passage of the Act, and accordingly, how the PDA has been used to challenge the denial of employment rights to women. It is fair to say that the cases reflect the ambivalence of the courts about pregnancy and about women in the workplace, notwithstanding the prohibitions against pregnancy-based exclusions found in the PDA. The result of this

CHART 6

DISCRIMINATION UNDER TITLE VII

(1)**"Disparate treatment"** - those cases where an employee claims to have been differently treated by a policy. There are two types of disparate treatment cases--facial discrimination and pretext cases. Both types of cases require proof of intent to discriminate.

a. **Facial discrimination** - those cases where the policy explicitly discriminates on the basis of sex. Thus, the employer acknowledges that its policy discriminates on the basis of sex, but asserts that being male or female is a necessary qualification for the job.[1]

In cases involving facial discrimination, Title VII explicitly recognizes the concept of a **"bona fide occupational qualification" (BFOQ)** defense. This employer defense requires proving that individuals of a particular gender are required for a job, that is, that gender is a **BFOQ** for the job at issue.[2] This defense may be asserted where all or substantially all women will be unable to perform the job duties safely or efficiently or where there is no other way to determine who is unable to perform the job.[3]

b. **Pretext** - those situations where the employee alleges that the employer's proffered reason is a pretext for sex or race discrimination. In such cases, the employer can assert that there was no discrimination and that there was a **"legitimate nondiscriminatory reason"** for the treatment accorded an employee.[4]

(2)**"Disparate impact"** - those cases where an employee claims that a neutral policy or practice has a disparate impact on her and other members of her group. The courts have recognized that there are employment practices that may appear neutral on their face, but exclude a large proportion of women.[5]

Until last year, the Supreme Court had established that where plaintiffs had shown that a policy or practice has a "disparate impact" on women or people of color, the employer must justify such practices by showing that they are a **"business necessity"**, that is, that the practices are substantially related to job performance.[6] In 1989, however, the Court substantially changed the analysis of disparate impact cases, placing the entire burden of proving discrimination on workers challenging these employment practices to prove that employers have no business justification for that practice.[7]

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1 42 U.S.C. 2000e-2(e) (1989).

2 The BFOQ defense has been interpreted very narrowly by the courts and the Equal Employment Opportunity Commission and is generally difficult for an employer to establish.

3 Dothard v. Rawlinson, 433 U.S. 321 (1977).

4 Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5 Dothard v. Rawlinson, supra n. 3. Thus, the use of a height and weight requirement or strength tests for police or fire fighter jobs may exclude a majority of women applicants.

6 Griggs v. Duke Power, 401 U.S. 424 (1971).

7 Wards Cove v. Atonio, 490 U.S. _____, 109 S. Ct. 2115 (1989). In Wards Cove, the Supreme Court held that the plaintiff must identify a particular employment practice and show that practice "has a significantly disparate impact" on men and women. 109. S.Ct. at 2124-25. If the plaintiff is able to establish a prima facie case , the employer must produce evidence of a business justification for the disputed practice. There is no requirement that the practice be "essential" or "necessary" to the employer's business. 109 S. Ct. at 2125-26. The plaintiff must prove the lack of a business justification. If the plaintiff fails to prove the lack of such a justification, she still may prevail by showing alternatives that are "equally effective" to the employer's practices that reduce the disparate impact on women, and defendant's refusal to adopt these alternatives. 109 S.Ct. 212

CHART 7

Summary of Cases Relevant to the Pregnancy Discrimination Act of 1978

CASE	YEAR	ISSUE(S)
1. GEDULDIG v. AIELLO	1974	DISABILITY INSURANCE
2. GENERAL ELECTRIC v. GILBERT	1976	SICK/ACCIDENT INSURANCE
3. NASHVILLE GAS v. SATTY	1977	SENIORITY BENEFITS
4. HARRISS v. PAN AM	1980	MANDATORY MATERNITY LEAVE
5. BURWELL v. EASTERN	1980	MANDATORY MATERNITY LEAVE
6. ABRAHAM v. GRAPHIC ARTS INT'L UNION	1981	NEUTRAL LEAVE POLICY
7. WRIGHT v. OLIN	1982	FETAL PROTECTION
8. ZUNIGA v. KLEBERG COUNTY HOSP	1982	FETAL PROTECTION
9. NEWPORT NEWS S&D v. EEOC	1983	SPOUSAL BENEFITS
10. HAYES v. SHELBY MEM HOSP	1984	FETAL PROTECTION
11. CALIFORNIA FEDERAL S&L v. GUERRA	1987	PREFERENTIAL TREATMENT/PREGNANCY
12. MILLER WOHL v. COMM/L&I	1987	PREFERENTIAL TREATMENT/MT. MAT. LEAVE ACT
13. WIMBERLY v. L&I REL COMM	1987	UNEMPLOYMENT BENEFITS
14. UAW v. JOHNSON CONTROLS	1989	FETAL PROTECTION

CASE	FACTS
1. GEDULDIG	Calif. employee disability ins. program excluded temporary disability due to pregnancy
2. GENERAL ELECTRIC	Gen. Elec. policy excluded pregnancy from coverage in a sick/accident insurance program
3. NASHVILLE GAS	Sick pay policy excluded preg; mandatory maternity leave forfeited seniority
4. HARRISS	Flight attendant mandatory unpaid maternity leave w/in 24 hrs of knowledge of pregnancy
5. BURWELL	Flight attendant mandatory unpaid maternity leave w/in 24 hrs of knowledge of pregnancy
6. ABRAHAM	Employer refused to rehire employee after she returned from maternity leave
7. WRIGHT	Olin policy barred all fertile women from jobs w/hazardous chemical exposure
8. ZUNIGA	X-ray technician fired-company felt exposure might harm fetus/expose hospital to liability
9. NEWPORT NEWS	Newport News health plan excluded pregnancy for male employees' spouses
10. HAYES	X-ray technician fired due to pregnancy, the hospital claimed fetal harm
11. CAL FED	Calif law. req'd reasonable preg. leave of up to 4 mos./no leave req'd for other disabilities
12. MILLER WOHL	Employer challenged Mont. Mat. Leave Act's req'mt of "reasonable" preg Leave
13. WIMBERLY	Neutral law construed to prevent benefits to women who quit due to pregnancy
14. JOHNSON CONTROLS	Company policy bans all fertile women from jobs with high lead exposure

CASE	HIGHEST STANDING COURT DECISION*
1. GEDULDIG	[b]Calif. insurance prog. did not discriminate against women-only excl. one disability (preg.)
2. GENERAL ELECTRIC	[b]Policy did not violate Title VII-pregnancy discrimination is not sex discrimination
3. NASHVILLE GAS	[b]Rejected per se sex discrimination/ruled disparate impact w/no business necessity
4. HARRISS	[a]Upheld mandatory maternity leave policy/business necessity of passenger safety
5. BURWELL	[a]For 1-28 wks the leave decision is up to woman/her doctor; 28+ wks. co. may req. leave
6. ABRAHAM	[a]Policy violates PDA. Disparate impact on women tantamount to dismissal
7. WRIGHT	[a]Vacated/remanded on issue of fetal protection-apply business necessity analysis
8. ZUNIGA	[a]Policy was a pretext for sex discrim., hospital failed to follow guaranteed leave policy
9. NEWPORT NEWS	[b]Health plan violated Title VII/rejected argument that PDA applies only to employees
10. HAYES	[a]Policy was per se sex discrim, hospital failed to show exposure=substantial risk
11. CAL FED	[b]Employment policies that favor preg. do not violate PDA-which provided a floor, not ceiling
12. MILLER WOHL	[b]Vacated/remanded in light of Guerra--on remand MT Supreme Ct. reinstated the MMLA
13. WIMBERLY	[b]Denial of benefits NOT a violation of FUTA-preferential treatment not required by PDA
14. JOHNSON CONTROLS	[a]Upheld comp. pol./NOT sex discrimination/safety of fetus-legitimate business necessity

* [a]=Circuit Court decision
[b]=Supreme Court decision

ambivalence is that, on the one hand, women workers have found the PDA to be a valuable tool for challenging most straightforward pregnancy based exclusions, particularly with regard to the right to equal benefits. On the other hand, in cases involving women's access to certain jobs based on their ability to perform those jobs, lower federal courts have displayed a willingness to go beyond traditional Title VII analysis in order to reach decisions that reflect stereotypical assumptions about pregnancy. Moreover, notwithstanding the language of the PDA requiring that pregnancy be treated the same as other conditions, the Supreme Court has interpreted the PDA to accommodate state laws that provide benefits for disability based on pregnancy but not on the other conditions that equally disable workers.

The majority of cases brought under the PDA involve a disparate treatment rather than disparate impact analysis, although pregnancy discrimination may be challenged under either Title VII theory. In disparate treatment cases, the facts at issue have involved allegations of a specific exclusion relating to pregnancy or a pregnancy-related benefit or a particular kind of treatment based on pregnancy or the ability to become pregnant. For example, an employer that guarantees reinstatement to an employee who takes a disability leave unrelated to pregnancy must guarantee reinstatement to an employee who takes leave to bear a child.[12] And the Supreme Court has held that the Pregnancy Discrimination Act requires that an employer must provide the same insurance benefits for employees' spouses' pregnancies as it provides for other medical conditions.[13] But, an employer who refuses to hire a pregnant applicant who will need to take an immediate leave for child birth during the time when she would be in training does not violate Title VII where the employer has demonstrated that he would not hire any applicant who would require such a leave at the beginning of his or her employment.[14] Unfortunately federal courts also have interpreted Title VII to allow airlines to establish blanket "stop work" policies that prevent flight attendants from flying after a certain period in their pregnancy. Courts have done so by construing the BFOQ standard to include passenger safety as "reasonably necessary" to the essence of the business of the airline.[15]

A few cases decided since passage of the Pregnancy Discrimination Act have involved a traditional disparate impact theory analysis. Most have involved the issue of lack of adequate leave, and its impact on pregnant women. Thus, in Abraham v. Graphic Arts International Union[16] the D.C. Circuit Court of Appeals held that the provision of insufficient leave may have a disparate impact on pregnant women and thus violates the PDA. The union in Abraham established leave policies for regular full time employees. However, the plaintiff was a temporary full time employee, and was eligible only for ten days sick leave. The court held that pregnancy effectively amounted to a dismissal.[17] And in Miller-Wohl Co. v. Commissioner of Labor and Industry [18] the Montana Supreme Court found that a no leave policy for employees with less than one year of tenure has a disparate impact on women who become pregnant, a hardship never faced by men.

Two issues related to pregnancy discrimination remain especially controversial. The first is the extent to which the PDA permits treatment of pregnancy that is better than that accorded to other health conditions.[19] The second is how the PDA's standard criteria of the employee's ability to work will be reconciled with so-called "fetal protection" policies which exclude women from certain jobs.[20]

Treatment of Pregnancy in the PDA

Special versus Equal Treatment

The PDA was advanced by a coalition of advocates who supported an "equal treatment" approach to pregnancy. Advocates of "equal treatment" battled against maternity-leave only provisions and instead supported an approach in which pregnancy is viewed as the same as other temporary disabilities which may affect an employee's ability to do the job. In the words of Wendy Williams, currently associate Dean at Georgetown University Law School and member of the Campaign,

> One could envision a workplace structure in which workers have basic needs in common and those needs ought to be met. In a context...in which workers have a right to leave when they are sick obviously that should be extended to pregnant workers. One can talk about equality in that context as establishing a basic right and that it is sex discrimination in a formal equality sense to say that X has that right, but Y does not have it.

Although these advocates are persuaded that singling women out based on their reproductive capacity historically has resulted in the restriction of women's employment rights, they have failed, in Williams' view, to offer the public a convincing explanation of their standpoint on the treatment of pregnancy in the workplace. In Williams' words,

> The first thing that anyone says is "but pregnancy is different, pregnancy is not a disability". I reply "different than other experiences - yes, but is it different in a workplace setting where I have a basic physiological condition which can affect my work?" The answer is no. Workers have a myriad of very different things that can happen to them, all of which ought to be realistically handled in the workplace. The human condition in the workplace is one of commonality, of bottom-line protection.

This vision of the meaning of pregnancy in the workplace, although written into the legislation to prevent discrimination against women because of their childbearing functions, was disputed at the time and is still disputed today even within the feminist community.

In contrast to equal treatment advocates, advocates of the "special treatment" or the "equal results" approach posit that pregnancy is not a disability and that it is demeaning to women to so treat it. From this perspective women workers cannot gain equality in the workplace without recognition of the unique status of pregnancy, and the development of public policy that reflects this recognition. (For an excellent analyses of this debate, see Vogel (1990)).

As Winn Newman, who was the lawyer for the International Union of Electrical, Radio, and Machine Workers in the Gilbert case noted, even the union members of the Campaign viewed the PDA as ensuring the special treatment of women as women. In Newman's words,

> When the issue was first brought up it was very popular -- the unions loved it. In contrast, they were less enthusiastic about wage discrimination issues. I came to the conclusion that the difference was that men also had wives and as long as the issue was in terms of women as women, who could get pregnant, who could get paid a benefit, it was okay. But when they thought of women doing what we do as men and getting paid what we get paid, there was resentment.

The landmark case involving the debate of special versus equal treatment was California Federal Savings & Loan v. Guerra, decided in January 1987. In this case, the Supreme Court considered whether a California law granting employees disabled by pregnancy, but not disabled by other conditions, up to four months job-protected leave would be preempted by the PDA requirement that pregnant workers be treated the same as other workers. The plaintiff, Lillian Garland, was a receptionist at California Federal Savings and Loan. Because of a difficult pregnancy and delivery, Garland required several months disability leave. She expected to return to a job protected by a state law requiring that employers grant workers temporarily disabled by pregnancy up to four months of unpaid leave with job security. However, her employer claimed that receptionist jobs or similar jobs were not available. Garland sought redress under the state law before the appropriate state agency. The bank then brought a lawsuit in federal court challenging the state law, claiming that it was invalidated by the PDA. The bank did not provide job-protected leaves for other disabilities, and wished to treat pregnancy in the same manner. Special treatment advocates argued that the state law was consistent with Title VII. In contrast, equal treatment advocates would have found Garland's case to be covered under the state law and would have extended its coverage to all workers similarly situated in terms of their ability to work.

The Supreme Court determined that the California statute would not be preempted by the Pregnancy Discrimination Act; the state law was not inconsistent with the purposes of Title VII, as amended by the PDA, nor did it require actions unlawful under Title VII. The Court decided that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise." [21] The Court held further that the California law "... does not compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers".[22] Thus, pregnancy may be treated better, but not worse, than other physical disabilities. The Supreme Court indicated that states could enact

legislation that accorded better treatment to pregnancy; however, the Court in CalFed did not provide specific guidance regarding challenges to all employer policies regarding pregnancy.[23]

The Supreme Court's decision in CalFed sparked legislative activity on the state and local levels. Most of these states did not pass disability legislation but rather passed more gender-neutral parental and family medical leave. The case also spurred efforts at the national level to introduce legislation that would go beyond the PDA to establish new rights for workers. The proposed federal family and medical leave legislation is gender-neutral, and establishes a minimum benefit for all workers[24] (Lenhoff and Becker, 1989). The proposed FMLA would require an unpaid job-protected leave for male and female workers to care for their children, parents, and spouses, and for their own serious health conditions, including pregnancy.[25]

A Note on Abortion

By the time Gilbert v. General Electric Company was heard by the Supreme Court in 1976, the Supreme Court had struck down restrictive anti-abortion laws in Roe v. Wade (in 1973) by holding that the "right of privacy" includes the decision to have an abortion, although the state's compelling interest in regulating abortion increased after the first trimester. The Court rejected the posture that the fetus has a constitutional "right to life" (Gelb and Palley, 1987:130).

The argument made by General Electric in the Gilbert case was that, unlike other disabilities, pregnancy was elective because women had a right to abortion and could elect this option rather than delivering a child. According to Linda Dorian, now executive director of BPW/USA, then at EEOC, who represented the plaintiffs in an amicus brief,

> GE argued this position so callously that they actually shocked the court. The feminist lawyer's rebuttal [consistent with a "choice" position of women's right to control their bodies] was that women could not be forced to trade off their right to bear or not to bear children.

The PDA, however, was supported not only by an array of pro-choice groups, but by a number of so-called "pro-life" groups, who wished to protect pregnant women from having

abortions in order to keep their jobs and to protect the fetus' "right to life". The Bishop's Committee for Pro-Life Activities went beyond the protection of women workers and sought language that would exclude elective abortion from coverage of pregnancy-related disabilities under the PDA. While defeated in the Senate this amendment was passed by the House, and debated in conference committee.

The final language approved by the conference committee, and ultimately included in the PDA, exempted employers from having to provide health insurance coverage or disability packages for abortion procedures except if the woman's life is threatened or if medical complications result from the abortion. Employers who have sick leave and disability policies are required to provide disability and sick benefits to women recovering from abortions.

The desire to protect the right to life of the fetus, while resulting in support of the PDA and pregnant workers' right to keep their jobs, can also be used to keep pregnant workers (or potentially pregnant workers) from specific jobs thought to endanger fetuses.

"Fetal Protection" Policies

The second controversial issue under the PDA concerns policies that exclude fertile women on the basis of claimed reproductive hazards--so-called "fetal protection" policies. Women continue to be excluded from jobs based on such policies, which have generally forbidden women of childbearing age from jobs involving contact with toxic substances. Excluding women from such jobs is based on the assumption that toxic substances, such as lead, affect employees' offspring only through the mother. Employers view the issue as a conflict between the rights of women workers and the rights of the fetus[26] (Williams, 1981).

Because only women have been excluded from jobs because of employer concern regarding reproductive hazards, such policies have been challenged as sex discrimination under Title VII. But even where federal courts have held that these exclusionary policies violate Title VII, they have refused to acknowledge such policies as facial discrimination. Rather, the

appellate courts appear to be striking a balance between the rights of women workers and their view of the "rights of the fetus," when they choose to analyze fetal protection policies by ignoring the language of the PDA.

Thus, the Fourth Circuit in Wright v. Olin [27] looked at an employer policy that excluded all fertile women from jobs requiring exposure to certain chemicals. All women to age 63 were considered fertile unless the company's medical staff confirmed their inability to have children. The Fourth Circuit declined to hold that the policy was facially discriminatory, even though it was clearly a gender based exclusion, and asserted as its reason the fact that the employer could not possibly meet the BFOQ defense that would be appropriate to such an analysis.[28] The court chose instead to use a form of disparate impact analysis. The court noted that the concept of business necessity had already been extended to embrace workplace safety in other contexts, and it analogized the employer's interest in the safety of the fetus with its interest in protecting the safety of customers.[29] An employer could thus establish a business necessity defense based on the need to protect the health of unborn children. The court remanded the case to the trial court for a determination of whether business necessity was shown.

In Hayes v. Shelby Memorial Hospital,[30] the Eleventh Circuit held that a hospital violated Title VII when it fired an x-ray technician who became pregnant. The court ruled that an employer seeking to exclude a woman based on a fetal protection policy must first prove that the risk was gender related.[31] If the employer was successful in establishing such a defense, the issue of liability would not be resolved, but reframed. The policy's impact on women only would afford the employee a "... prima facie case of disparate impact."[32] The employer thus had the opportunity to establish a business necessity for the exclusion; however, the plaintiff was entitled to demonstrate that there were less exclusionary means of implementing the employer's policy.[33] The Eleventh Circuit summarized the impact of its decision as follows: "[T]o avoid Title VII liability for a fetal protection policy, an employer must adopt the most effective policy available, with the least discriminatory impact possible.[34]

Fetal protection policies have recently been debated in oral argument before the Supreme Court in UAW v. Johnson Controls Inc.[35] In Johnson Controls, the Seventh Circuit Court of Appeals upheld a fetal protection policy which barred all fertile women from positions the employer determined to have hazardous levels of lead exposure; fertile women were also barred from entry level jobs with low lead exposures where the lines of progression would lead to higher lead jobs. The policy exempted only those women who could medically document their sterility. The company's alleged justifications for its policy were a desire to protect the health of future generations as well as an interest in avoiding the liability which may result from future lawsuits claiming pre-natal harm.

The Seventh Circuit majority held that the employer's policy would survive both a disparate impact (business necessity) and a disparate treatment (BFOQ) analysis. The court asserted that the disparate impact approach was proper under Title VII because "neither the text of Title VII nor Supreme Court pronouncements mandate a holding that all forms of facial discrimination are justifiable only with a bona fide occupational qualification defense," [36] and "the components of the business necessity defense...balance the interests of the employer, the employee, and the unborn child in a manner consistent with Title VII."[37]

Indeed, the Seventh Circuit majority indicated that the policy could be upheld under a BFOQ analysis. However, the court blurred the business necessity and BFOQ defense; the majority concluded that the BFOQ defense is "similar to and overlaps with" the business necessity defense and used similar language to discuss both approaches. Thus, in language almost identical to that used in analyzing its business necessity approach, the majority asserted that the BFOQ must be viewed "in a manner which gives consideration to the interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child." [38] The majority in Johnson Controls did not even attempt to reconcile its analysis with the PDA.

The PDA was designed to operate within an equality framework by employing a

workplace standard in which women and men are judged by their ability or inability to work. Moreover, the PDA made it clear that pregnancy based distinctions were gender discrimination. However, the cases involving reproductive hazards signal the courts' willingness to move away from the equality framework of PDA to a result-oriented, protectionist framework designed to protect fetuses, rather than workers.

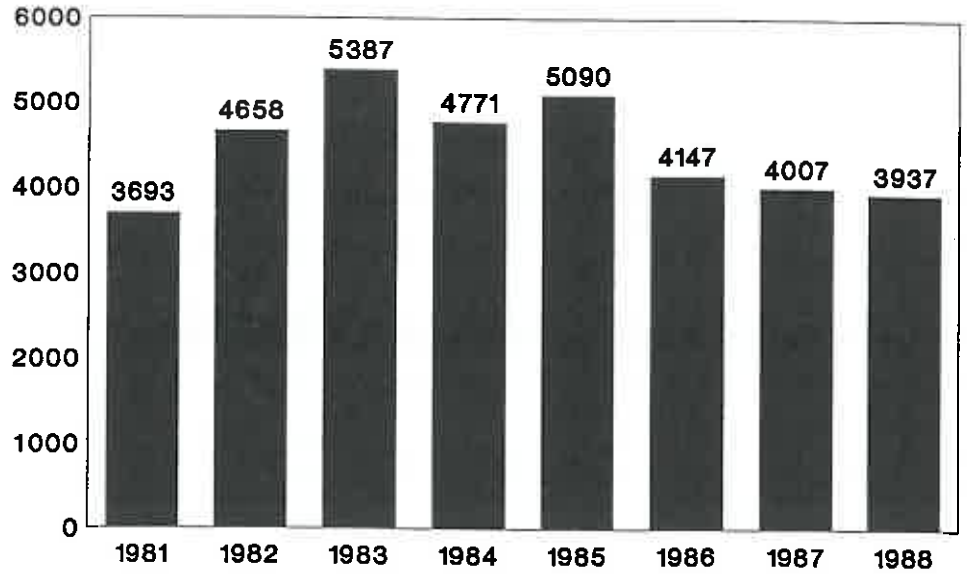
Role of the Equal Employment Opportunity Commission in Implementing Public Policy

The Equal Employment Opportunity Commission (EEOC) is charged by Congress with enforcing Title VII of the Civil Rights Act of 1964.[39] Under Title VII, an employee who thinks that she has been the victim of discrimination must file a timely charge with the EEOC. The EEOC will investigate the charge and will determine whether there is "cause" to believe that discrimination has occurred. The employee may file suit in federal court after exhausting her administrative remedies.[40] The Commission has played a critical role in the implementation of equal employment policy for the nation.

The EEOC first included pregnancy in its guidelines on sex discrimination in 1972. The guidelines provided generally that employment policies which discriminate on the basis of pregnancy constitute facial sex discrimination and are a violation of Title VII. Immediately following the enactment of the PDA, the EEOC updated the guidelines and appended a series of questions and answers which have served as a useful framework for analyzing most pregnancy discrimination claims under Title VII.[41]

The number of charges involving pregnancy discrimination filed with the EEOC rose in the early years after the implementation of PDA but showed a decline in the later years between 1983 and 1988. (See Figure 2.) The reasons for this downward trend are not clear; the decline in the number of charges may be the result of fewer incidents of pregnancy discrimination in the workplace, or it may reflect the growing number of charges filed at the

Figure 2
NUMBER OF EEOC CHARGES FILED
BETWEEN 1981-1988



SOURCE: EEOC Annual Reports for the years 1981 - 1988.

local and state level; in addition to implementing Title VII, such agencies often implement local anti-discrimination laws which may provide broader remedies.

In contrast, the downward trend in charges filed may be attributed to less confidence in the EEOC. Observers of the agency assert that during the Reagan administration, the EEOC failed to fulfill its role as the lead federal agency for coordinating EEO enforcement policies.[42] We assume that perceptions of the EEOC's unwillingness to enforce EEO policies would have a negative impact on the number of charges filed.

In litigation, as in its regulations, the EEOC generally has taken a position in support of equality of benefits for pregnancy and related medical conditions. Thus, as reflected in Newport News Shipbuilding & Dry Dock v. EEOC, the EEOC had long taken the position ultimately favored in this case by the Supreme Court. The EEOC's position largely has worked to benefit workers; however, in CalFed, the government took the narrow position that the California law was preempted by PDA and thus that the employer was required to provide no leave at all rather than extending benefits to all workers based on their ability or inability to work. Moreover, in the area of fetal protection, the EEOC's policy has been inconsistent and therefore has provided little guidance regarding its position on exclusionary policies. Concerns about the enforcement record of the agency remain.

In 1980, the EEOC proposed "Interpretive Guidelines on Employment Discrimination and Reproductive Hazards."[43] The guidelines took the position that an employer could not have a plan to protect employees from reproductive hazards if that plan negatively affected their employment opportunities based on gender. Such policies would be deemed discriminatory on their face.[44] The EEOC never issued final regulations; the proposed guidelines were the subject of many critical comments and were subsequently withdrawn. The agency concluded that it would deal with reproductive health hazards on a case by case basis.[45]

In October 1988, without notice or an opportunity for public comment, the EEOC issued a new internal policy guidance on reproductive health hazards.[46] In contrast to their 1980

guidelines stating that "fetal protection" policies which exclude women should be considered facial discrimination and analyzed under the BFOQ defense, the 1988 policy guidance chose to follow the decisions in Wright v. Olin and Hayes v. Shelby Memorial [47] Moreover, the EEOC adopted discriminatory assumptions in considering the evaluation of scientific evidence (allowing the paucity of research concerning the harm of toxic substances to men to be ignored, if there is evidence of risk to women).[48] The approach sanctioned by the EEOC's 1988 policy guidance was adopted by the majority in the Seventh Circuit in Johnson Controls.

In 1990, the EEOC began to confront the issue of reproductive hazards as facial discrimination, under the PDA. On January 24, 1990, the agency issued another set of internal policy guidelines. This document took issue with the decision in Johnson Controls, and acknowledged that the BFOQ approach was more appropriate,[49] although the EEOC was unwilling to say that "no possible defense is available to an employer that has a fetal protection policy".[50]

Although cases decided under the PDA indicate that it has provided a useful tool to challenge discrimination in terms of employment and benefits, and women workers are better off with it than without it, two controversial issues--separate treatment of pregnancy and fetal protection--could have long-run negative effects on the employment rights and benefits of women of childbearing age, depending on how the Courts interpret the protection offered in the PDA.

The PDA as a Model of Policymaking

The PDA is an example of one kind of new equal rights or equity policy sought by organizations representing the needs of women workers. It is an anti-discrimination policy designed to protect women against employer policies that use women's role as child bearers as a justification for discrimination in the provision of employment, wages and benefits. Unlike

minimum labor standards, the PDA did not establish a minimum floor for benefits or working conditions for all affected workers. Unlike other equity policies, such as pay equity or affirmative action, the PDA did not require employers to affirmatively hire or promote pregnant women workers or to re-value their skills. It did, however, anticipate labor standards designed to aid workers to integrate paid employment and family care, such as family and medical leave. And it did serve as an example of the effectiveness of a coalition of women's, labor, civil rights and church groups in persuading Congress to reverse a Supreme Court ruling. This is a valuable precedent for current efforts to gain Congressional approval for new Civil Rights legislation in the wake of the Supreme Court's Wards Cove decision. As Linda Dorian stated,

> Part of the benefit of the PDA is not economic but is a political benefit. We can go in to Congress and credibly argue that the Civil Rights Act of 1990 is rectifying the Supreme Court's incorrect interpretation of what Congress intended, and by the way, you shouldn't be so concerned about doing this, because we've done it before with the PDA.

The same coalition of groups supporting the prepared Civil Rights legislation and the FMLA face a more difficult political task, however. Unlike the PDA, which did not have to face the possibility of a Presidential veto, the legislation supported by the current coalition has been vetoed by President Bush.

Impact at the State Level

Once the PDA, a federal policy, was passed it also acted as an impetus at the state level for the issuing and interpreting of guidelines, for new legislation and for the filing of charges, according to members of the Campaign. The PDA also had a positive impact for pregnant workers in the five states with state level TDI plans. For example, Susan Deller Ross, while working at the U.S. Department of Justice was successful in obtaining back pay for pregnant workers in Rhode Island who, unlike other workers, had received lump sum payments for their disability because Rhode Island had not amended their disability policy to meet the requirements of the PDA. During periods of reluctance by the EEOC to treat pregnancy

discrimination as facial discrimination, members of the Campaign utilized state laws to obtain remedies for pregnant workers.

We will conclude this section of PDA as a model of policy making with a discussion of the unfinished issues raised by the PDA.

Desirability of Universal Benefits

Recall that those women workers who recently had a child and who had six weeks of sickness and accident insurance benefited from $57.40 in increased weekly earnings (38 percent of which could be attributed to the PDA) compared to those women who recently had a child but did not have this benefit, other factors being equal. Because the PDA was not a minimum labor standard, it did not increase the percentage of women who were covered by this benefit. Except where regulated by the five states with universal TDI coverage, or by collective bargaining, employers are still free not to provide this benefit to workers. As a result, only 41 percent of all working women of childbearing age, and only one-fifth of those who gave birth in the last year (compared to 47 percent of working men), currently have this benefit; and those women who need the benefit the most are most likely to be without it.

In a recent examination of the cost outlook for employer-provided benefits in the context of the "need to manage labor costs tightly", Gagliardi (1987) found that the basic characteristic of disability benefits as compared to other types of benefits (such as health insurance), is that the cost is moderate to provide a reasonable level of benefits. There is little to be gained, she concludes, from cutting this benefit. Based on findings of the cost effectiveness of short-term disability benefits for pregnant workers, we would suggest that this benefit be enacted as a minimum labor standard available to workers in all but the smallest firms, and implemented through state-run systems, using the five current TDI states as a model. (All of these state TDI systems are operating in the black.) This proposal would benefit business as well as workers. In so far as government policy regulates competition between businesses, the failure to mandate

universal coverage does place a potentially unfair burden on businesses that already provide disability benefits to their workers, albeit a relatively modest one and one that is at least potentially offset by other gains to employers. A universal benefit would mitigate this unfair competition to businesses already providing benefits to their workforces as well as provide job tenure and wage benefits to workers.

Importance of Implementation and Enforcement

How well legislation is implemented or enforced is always an important political issue. The courts and the EEOC are the principal enforcement mechanisms for the PDA. Vigilant monitoring of these enforcement mechanisms is essential in order to prevent significant new legislation from being weakened by ineffectual enforcement or unfavorable regulations.

Courts have used both the disparate treatment and disparate impact theories of discrimination in cases decided under the PDA, and the findings have often been in pregnant workers' favor, especially when disparate treatment is the basis of the findings. Two important issues related to pregnancy discrimination remain controversial.

The first issue is the extent to which the PDA permits special treatment of pregnancy different from that accorded to other health conditions. The CalFed case was a setback to "equal treatment" advocates who would cover pregnancy, but who would extend coverage to all workers similarly situated in terms of their ability to work. The second controversial issue is how the PDA's standard of the employee's ability to work will be reconciled with "fetal protection" policies which exclude women from certain jobs. Since only women have been excluded from jobs because of employer concern regarding reproductive hazards, such policies have been challenged as sex discrimination under Title VII. Even when federal courts have held that fetal protection policies violate Title VII, they consistently have refused to acknowledge such policies as facial discrimination. A Supreme Court Decision is not expected to fully resolve the issue, and will probably put the BFOQ defense in service of justifying "fetal protection",

according to members of the Campaign who assume that they will resume educating the public on reproductive health hazards.

The EEOC is charged by Congress with enforcing the PDA as part of its charge to enforce Title VII of the Civil Rights Act of 1964. EEOC guidelines, which generally hold that employment policies that discriminate on the basis of pregnancy constitute facial sex discrimination and are a violation of Title VII, have served as a basic framework for analyzing most pregnancy discrimination claims. The EEOC generally has taken a position in support of equality of benefits for pregnancy and related medical conditions rather than special treatment of pregnancy. In the area of fetal protection the EEOC's policy has been inconsistent. Only recently has EEOC policy grudgingly recognized that fetal protection policies are facial discrimination. Even so, the agency refuses to acknowledge that employers will never be able to mount a defense of such gender-based exclusion.

The failure of the courts and the EEOC consistently to view current "fetal protection" policies as cases of facial discrimination makes us question the wisdom of relying on these enforcement mechanisms during political periods when women's rights may not be a priority. Both the EEOC and the courts are subject to the political power plays that are inherent in public policy. The political agenda of the administration in power determines the nature of appointees to both institutions and the agendas and priorities pursued. The conservative agenda of the 1980s appears to have had a negative effect on the enforcement of PDA as a women's rights policy.

We would suggest, therefore, that during political periods when women's rights are not a priority, participants in the policy making process must pursue additional strategies to achieve their objectives, including collective bargaining, grassroots organizing,state and local politics, along with the federal policy making process. As Judy Lichtman commented,

> You don't win and have it over. It's never over. [Policymaking] is a circular relation between organizing strategies, litigation, lobbying, enforcement, and public education, and you can't afford to walk away from one piece of it.

Effectiveness of the Equal Treatment Model

As an amendment to Title VII of the Civil Rights Act, the PDA was formulated in the context of equal opportunity law. Thus, the PDA mandated the equal rather than the special treatment of pregnant workers. Our findings concerning the economic benefits of the PDA to women workers assumed that the policy was applied under an equal treatment model. As a result of these findings, we recommend that short-term disability insurance that covers pregnant workers on the basis of their ability or inability to work, be universally mandated as a minimum labor standard. This study does not, however, provide direct evidence as to whether a universal TDI benefit would be more beneficial to women workers than a universal maternity benefit (a TDI benefit that is limited to pregnancy and childbirth, and, therefore, is for women only).

A recent study by Trzcinski (1990) does provide such evidence. Trzcinski found that state statutes that allow disability leave for pregnancy and child birth but not for other disabilities have negative effects on women's wages and employment in contrast to state statutes that provide universal TDI benefits in which pregnancy is treated the same as other disabilities. Likewise, findings from a recent IWPR study on the costs and benefits of a proposed federal family and medical leave policy (Spalter-Roth and Hartmann, 1990) indicate that because pregnancy is an infrequent event in individual women's lives, a more comprehensive policy such as family and medical leave or universal short-term disability leave would be most beneficial for women's economic well-being.

SUMMARY AND IMPLICATIONS

The Pregnancy Discrimination Act of 1978 was directed to the needs of women workers who were being discriminated against as a result of actual or potential pregnancy. As an amendment to Title VII of the Civil Rights Act, the PDA was formulated in the context of

equal opportunity law. The underlying assumption of this law is that women and minority workers, who have the same talents, aspirations and conditions as white male workers should not be discriminated against in terms of hiring, wages, benefits and promotions (Palmer and Spalter-Roth, 1988). This study examined the economic and legal effects of the law ten years after its implementation.

Economic Effects

Proponents of the PDA expected the legislation to have positive effects for women workers in terms of employment and benefits. Opponents argued that the high costs to business of implementing the law could result in failure to hire women of childbearing age. Our analysis of the economic effects of the PDA indicated that this legislation did not have a negative effect on the employment of women of childbearing age, who continued to enter the workforce in record numbers. Although it does cost employers an additional $618 million per year (in 1988 dollars), this amounts to only five (5) percent of total short-term disability payments. The costs to business of the PDA do not appear to be catastrophic and they are offset by savings of $175 million in reduced unemployment insurance benefits and premiums, plus uncounted additional savings in hiring, training, and recruitment costs, because women workers with disability benefits return to work more and sooner. The PDA does not appear to have either increased or decreased the coverage of workers under short-term disability policies (since it did not mandate that employers provide new coverage, only that those who already provided coverage not discriminate in its provisions). Those women workers who did have coverage and who gave birth, gained an additional $57.40 per week or at least $1 billion per year in wage benefits. Those women without these benefits lose an estimated $530 million per year in earnings as a result of job loss. The relatively low estimated costs of disability for women of childbearing age to business (offset by savings in unemployment, recruitment, and training costs) compared to the

wage benefits to women workers who gave birth lead us to conclude that the PDA is a cost-effective policy.

Legal Effects

An overall evaluation of the Pregnancy Discrimination Act must include its protection of women's access to work. Although the PDA created no new substantive rights for women, it has provided a necessary tool to challenge discrimination based on pregnancy--a tool that has successfully been used in basic pregnancy discrimination cases. Had the PDA not been passed by Congress, and the law according to Gilbert been allowed to stand, the rights of pregnant women to continue to work, and to retain equal benefits and "terms and conditions of employment" with men, would be nonexistent (Vogel, 1990). Women need protection against discrimination, and the PDA, if strongly enforced by the EEOC and consistently interpreted by the courts can provide that. The most troublesome remaining issues in providing protection against discrimination are maternity-only and fetal protection policies.

Moving Beyond the PDA as a Model of Policymaking

Unlike other policies that address equity issues for women workers, the PDA did not require that pregnant women workers be treated affirmatively (as in affirmative action policies), nor did it require a re-valuing of their work or skills (as in pay equity policies). It did, however, begin to redistribute the costs of caring for the next generation of workers, enabling women to integrate paid work and family responsibilities. But because PDA is an equality standard, not a minimum standard, additional policies such as a national family medical and leave policy are still needed.

The PDA, by introducing the notion of the rights of the childbearing or pregnant worker,

moved beyond the traditional liberal notion of the individual as a detached self. It moved to a notion of an attached individual situated within networks of relations (especially domestic ones), relations that are not easily left behind in a private world detached from the world of work and citizenship (Benhabib and Cornell, 1987: 10ff). The notion of equally treating the childbearing worker has led to the notion of equal treatment of the child-rearing worker and the question of how to accommodate, and even value, an attached worker. Answering this question requires going beyond equal opportunity law with its assumption of men who leave their attachments in a private world.

The PDA can be seen as a successful step towards new labor standards such as family and medical leave, which do redefine the notion of an adult worker as one with family responsibilities. The work of the Campaign to End Discrimination Against Pregnant Workers to avoid maternity-only disability coverage implemented in the language of the PDA anticipated new policies such as family and medical leave.

Answering the question of how to accommodate and even value attached workers goes beyond the stereotype that women alone have special needs because of their childbearing capacity or because of their nurturant activities. Going beyond this stereotype raises deeply held prejudices and hostility toward the notion of male parenting and nurturing. This hostility is manifested in the actions of policymakers who would support maternity-only legislation, but see no reason to include men in new labor standards because "it is not the way they lived their lives," according to Linda Dorian who worked for both the passage of the PDA and the Family Medical Leave Act.

The Johnson Controls case is an example of a return to the male model of a worker--a model of a worker who cannot bear children. The expectation that women have to become men in order to be accepted in the workplace dismisses the intentions of the PDA. Concern over issues of health and safety in the workplace should result in the mitigation or elimination of dangerous substances or work hazards. Rather than removing certain members of the

workforce jobs should be made compatible with workers' health and safety.

The Johnson Controls case also shows the dangers of seeing women only as encumbered workers, with no individual rights, interests or needs--with rights only for their encumbrances. It shows the importance of seeing women (and men) as both individuals and members of families (and other relational networks) and not conflating the two. This means that those policies protecting the rights of the individual not to be discriminated against are still necessary, along with additional new labor standards that value attached workers by helping them combine their job and family responsibilities.

APPENDIX I

TIME SERIES REGRESSIONS FOR EMPLOYMENT RATES

To determine the labor force participation rate at time *t* for women of childbearing age, we performed an ordinary least square regression using t (a time trend variable) and a lagged dependent variable LAGRATE (employment rate at time *t-1*) as shown below:

$$\text{Rate}_t = B_0 + B_1 t + B_2 \text{LAGRATE}_t + e. \qquad \text{(Model A.1)}$$

We used the employment rates for the years 1966 through 1988 in the model (BLS Table 5). The estimated regression parameters and statistics are given in Appendix Table 1.A. As the table shows, the adjusted R^2 is 0.9869 which is very close to 1 implying that almost all of the variance in employment rates for this group of workers can be explained by the model.

Appendix Table 1.A

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	2	0.01721139	0.008605694	793.121	0.0001
ERROR	19	0.000206158	0.000010850		
C TOTAL	21	0.01741755			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEPT	1	0.04752715	0.05426940	0.876	0.3921
YEAR	1	0.000320247	0.000688994	0.465	0.6474
LAGRATE	1	0.88682664	0.14930759	5.940	0.0001

R-SQUARE	0.9882
ADJ R-SQ	0.9869
DURBIN-WATSON D	1.459
1ST ORDER AUTOCORRELATION	0.244

We next repeated the model with the introduction of a dummy variable to distinguish the time periods prior (LEGIS=0) and following (LEGIS=1) the passage of the Pregnancy Discrimination Act. These results are shown on Appendix Table 1.B. We find that although LEGIS is positive, it is not significant in the model. The other estimates in the model are similar to those found in model A.1.

Even though the remaining unexplained variance is very small, we decided to examine further the stability of the parameter estimates by introducing other variables into the model. Each of the following variables were introduced one at a time into the above model:

Appendix Table 1.B

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	3	0.007502883	0.002500961	256.318	0.0001
ERROR	12	0.000117087	.00000975726		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEP	1	0.02956396	0.07019536	0.421	0.6811
YEAR	1	-0.000087330	0.000868429	-0.101	0.9216
LAGRATE1	1	0.94238065	0.19251235	4.895	0.0004
LEGIS	1	0.000724920	0.003453653	0.210	0.8373

R-SQUARE	0.9846
ADJ R-SQ	0.9808
DURBIN-WATSON D	1.389
1ST ORDER AUTOCORRELATION	0.300

EARNINGS - The median annual earnings (in constant dollars) for female full-time wage and salary workers in year t (CPR, Table A).

CHGEARN - The percent change in median annual earnings (in constant dollars) for female full-time wage and salary workers in year t (CPR, Table A).

FERT - Fertility rates for women of childbearing age in year t (number of children ever born per 1000 women in the age range) (Census, Table 2).

SUBSTI - The pool of substitute women of non-childbearing age (ages 16-24 and 46-69) as a percentage of total women (BLS, Table 15).

INDUST - The ratio of number of wage and salary workers in female-dominated industries (retail, finance, insurance, and real estate, and service) and the total workers in all industries (BLS, Table 68).

COLLEGE - Percent of women of childbearing age with four or more years of college education (Census, Table 2).

The results of these regression are reported in Appendix Table 2A-2E. The comparisons of the results of these new models with the results of the above models are based on simple comparisons of the parameter estimates (taking into account the standard error of these estimates) and not rigorous statistical tests.

By introducing EARNINGS into the model, (Table 2.A, below), we find some differences in the parameter estimates. The coefficient for the lagged participation rate has decreased and the intercept, LAGRATE and EARNINGS are significant in the model but YEAR and LEGIS is not significant. The coefficient estimate for earnings is negative. This may reflect that with the increase in employment we are seeing many new entrants into the labor force who are earning the entry level salaries and wages. We further explored the effects of earnings on Model 1.A by entering the annual percent change in earnings (constant dollars) into Model 1.A instead of earnings, (See Table 2.A2 below). In this new model, we find another set of results still different than the first model (Model 1.A). We find that the coefficient estimate for CHGEARN is negative implying that as earnings decease, employment rates increase; however, this estimate is not significant in the model.

Appendix Table 2.A

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	4	0.007543949	0.001885987	272.895	0.0001
ERROR	11	0.000076021	.00000691103		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEP	1	0.21519314	0.09637980	2.233	0.0473
YEAR	1	0.001934467	0.001105483	1.750	0.1079
LAGRATE1	1	0.65995607	0.19918255	3.313	0.0069
EARNINGS	1	-.0000056322	0.0000023105	-2.438	0.0330
LEGIS	1	-0.004061964	0.003507795	-1.158	0.2714

R-SQUARE	0.9900
ADJ R-SQ	0.9864
DURBIN-WATSON D	1.591
1ST ORDER AUTOCORRELATION	0.135

Appendix Table 2.A2

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	4	0.007515789	0.001878947	198.390	0.0001
ERROR	11	0.000104181	.00000947098		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR H0: PARAMETER=0	PROB > |T|
INTERCEP	1	0.01184606	0.07080382	0.167	0.8702
YEAR	1	-0.000086353	0.000855595	-0.101	0.9214
LAGRATE1	1	0.98710713	0.19349832	5.101	0.0003
CHGEARN	1	-0.04725444	0.04047977	-1.167	0.2677
LEGIS	1	-0.001179381	0.003773441	-0.313	0.7605

R-SQUARE	0.9863
ADJ R-SQ	0.9814
DURBIN-WATSON D	1.860
1ST ORDER AUTOCORRELATION	0.050

The coefficient estimate for the fertility rate is negative, as we would expect although not significant, (See Table 2.B below). That is, as the fertility rate increases, we see a decrease in the employment rates. We also find that the set of parameter estimates have not changed much when comparing to the results of Model 1.B.

Appendix Table 2.B

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	4	0.007505809	0.001876452	180.806	0.0001
ERROR	11	0.000114161	0.000010378		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEP	1	0.04300906	0.07669540	0.561	0.5862
YEAR	1	0.000037700	0.000926077	0.041	0.9683
LAGRATE1	1	0.91863643	0.20351795	4.514	0.0009
FERT	1	-.0000023025	.00000433643	-0.531	0.6060
LEGIS	1	0.000880917	0.003573961	0.246	0.8098

R-SQUARE	0.9850
ADJ R-SQ	0.9796
DURBIN-WATSON D	2.065
1ST ORDER AUTOCORRELATION	-0.108

By introducing the size of the pool of substitute women into the model (Table 2.C below), the results are very different than earlier ones. The coefficient estimate for LAGRATE is much smaller while the estimate for LEGIS is much larger. The variable SUBSTI is significant and positive. This contradicts what might be expected if employers are substituting women of non-childbearing age for those of childbearing age. All parameter estimates are significant in the model except LEGIS.

Appendix Table 2.C

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	4	0.007561756	0.001890439	357.210	0.0001
ERROR	11	0.000058215	.00000529224		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEP	1	-0.28140495	0.10660860	-2.640	0.0230
YEAR	1	0.005210787	0.001712414	3.043	0.0112
LAGRATE1	1	0.50594300	0.19293572	2.622	0.0237
SUBSTI	1	0.66536980	0.19949254	3.335	0.0066
LEGIS	1	0.002720835	0.002612964	1.041	0.3201

R-SQUARE	0.9924
ADJ R-SQ	0.9896
DURBIN-WATSON D	0.207
1ST ORDER AUTOCORRELATION	0.683

The variable for industrial composition (the percent of workers in the female dominated industries) is not significant in the model and the coefficient is negative, the opposite of what we would have expected (See Table 2.D, below). We also find a large increase in the value of the estimate for the intercept. This increase is balances with the large decrease in the model due to the introduction of INDUST. LEGIS is not significant in this model either.

Appendix Table 2.D

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	4	0.007517044	0.001879261	200.842	0.0001
ERROR	11	0.000102926	.00000935691		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEP	1	0.14678628	0.11749280	1.249	0.2375
YEAR	1	0.002277818	0.002102233	1.084	0.3018
LAGRATE1	1	0.84648203	0.20400225	4.149	0.0016
INDUS	1	-0.25304349	0.20568953	-1.230	0.2443
LEGIS	1	-0.000806746	0.003603944	-0.224	0.8270

R-SQUARE	0.9865
ADJ R-SQ	0.9816
DURBIN-WATSON D	1.753
1ST ORDER AUTOCORRELATION	0.044

The last variable entered into Model 1.A is the percent of women of childbearing age with college educations. Again we find little change in the model. We do see a sign change for the time trend, however the time trend is insignificant in the model and the parameter estimate contributes little to the final participation rate (See Table 2.E, below).

Appendix Table 2.E

ANALYSIS OF VARIANCE

SOURCE	DF	SUM OF SQUARES	MEAN SQUARE	F VALUE	PROB>F
MODEL	4	0.007513794	0.001878449	194.610	0.0001
ERROR	11	0.000106176	.00000965237		
C TOTAL	15	0.007619970			

PARAMETER ESTIMATES

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	T FOR HO: PARAMETER=0	PROB > |T|
INTERCEP	1	0.08028217	0.08455775	0.949	0.3628
YEAR	1	-0.000095856	0.000863786	-0.111	0.9136
LAGRATE1	1	0.78419792	0.24248277	3.234	0.0080
COLLEGE	1	0.11355189	0.10680165	1.063	0.3105
LEGIS	1	0.001957023	0.003625251	0.540	0.6001

R-SQUARE	0.9861
ADJ R-SQ	0.9810
DURBIN-WATSON D	2.121
1ST ORDER AUTOCORRELATION	-0.113

In conclusion, LAGRATE remained significant in all the models we tested and LEGIS was not significant in any of the models. This finding implies that no significant change in employment rate for women of childbearing age is directly attributable to the passage of the PDA. Likewise, passage of the PDA has no significantly negative effect on the women's rates. The series of regression shows that the growth in the proportion of employed women in the workforce is strongly related to the proportion of the previous year--it is the strongest predictor of employment.

APPENDIX II

ESTIMATES OF PERCENTAGES OF WOMEN (AND MEN) COVERED BY SHORT-TERM DISABILITY INSURANCE

To develop estimates of the number and percentage of women covered by short-term disability insurance, we used data from two major sources: (1) published data from the U.S. Bureau of the Census series on the fertility of American women (Census, Table 2) to obtain data on the number of women between the ages of 16 and 44 in three major occupational categories and (2) published data from the U.S. Department of Labor's (DOL) Bureau of Labor Statistics series to obtain data on the availability of short-term disability insurance (or sickness and accident insurance as it is called in this survey) in medium and large firms (BLS/FIRMS). This later survey of employers provides information on the availability of benefits by gross occupational category. Because both data series provide occupational rates rather than rates for the total workforce, we were able to use them in our estimates. Unfortunately the U.S. DOL began this survey only in 1981 and as a result we could not develop before and after estimates that would allow us to judge the impact of the PDA. We can, however, develop estimates to examine the trends in coverage for the years following the implementation of the PDA.

To develop these estimates, we had to make the following assumptions: (1) that the percentage of women in each occupational category in each age group covered by short-term sickness and accident insurance was the same as that of all private-sector, full-time workers in the occupation as a whole (so, for example, we had to assume that women of childbearing years working in professional and administrative occupations were as likely to have this benefit as were all full-time, private sector professional and administrative workers); (2) that women of childbearing age were covered at the same rate as private sector workers in medium and large firms (Other researchers have indicated that this is not the case, that small firms are less likely to provide benefits than large firms); (3) that women workers in states with TDI plans and women employed in the public sector are covered at the same rates as women in the private sector. (In fact the coverage rates of these women may be higher.) The result of these assumptions which would lead in some cases to overestimate and in others to underestimate coverage may be awash with the resulting estimates accurately reflecting rates of coverage.

The procedure for making the estimates is as follows:
For each year from 1981 through 1988, we multiplied the number of women ages 18-24, 25-34 and 35-44 in each of three broad occupational categories (professional and administrative, technical and clerical, and production and service) by the estimated percentage of women with sickness and accident insurance in each of these occupational categories (based on the percentage of all workers with sickness and accident insurance in each broad occupational category in medium an large firms). As a result of this multiplication, we obtained an estimate of the number of women with sickness and accident insurance in each of the three age groups in each of the occupational categories. We then produced a total of covered women workers for each of the age groups and divided these totals by the total number of women in each age group in the occupation. We then produced a weighted average (by age and occupation) of the percentage of all employed women of childbearing age with sickness and accident insurance for each year.

We also did an estimate of the percentage of men covered by short-term disability insurance in 1988, using this same technique. We used data on the number of men in each occupational category in 1988 from the U.S. DOL's 1989 Handbook of Labor Statistics (BLS, Table 68) and otherwise followed the procedure described above.

APPENDIX III

ESTIMATED TOTAL COSTS OF TDI COVERAGE 1988

The estimated cost of TDI coverage for pregnancy disability for all women of childbearing age ($1.14 billion) amounts to 10 percent of the total cost of TDI coverage for all employees in 1988. The estimated total cost of TDI was in the range of 11.4 billion dollars. (It should be noted that those costs include states with mandatory TDI laws and also include costs under formal sick leave plans. The estimates cover the private sector only, i.e., excluding government employees.)

The estimated total cost of 11.4 billion dollars (Estimate A) was derived as follows:

Estimate A was obtained by projecting the DOL estimate for 1974.

a. DOL estimated a cost of $137 per covered employee for 1974.[1]

b. The cost per covered employee for 1988 was obtained by projecting the 1974 cost in accordance with the change in average weekly earnings. Average weekly earnings in 1988 were 208 percent of the 1974 figure. ($322.36 compared with $154 as per Table 83 of the 1989 Handbook of Labor Statistics (BLS)). The cost per covered employee for 1988 is thus estimated as $285.

$137 (1974 estimate) x 2.08 = $285

c. As a final adjustment, following the DOL procedure, we increase this cost by 3.5 percent to allow for pregnancy coverage. The cost per worker is thus estimated at $295 per year for 1988.

d. The number of covered workers for 1988 is obtained by multiplying the total number of private employees by 44 percent--our estimate (see Appendix II) of the percentage of workers covered by short-term disability.

The total number of private employees--88,212,000--is from Table 68 of the 1989 Handbook of Labor Statistics (BLS). The estimated number of covered workers for 1988 is thus 38,813,000 (assuming 44 percent covered).

The estimated cost is obtained as follows:

38,813,000 workers x $295 per worker = $11,449,000,000

An alternate higher estimate (Estimate B) was obtained by projection from the 1983 estimate in the Price article (Social Security Bulletin, May 1986 (SSB)).

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[1] The testimony by Alexis Herman, Women's Bureau U.S. Department of Labor on H.R. 5055 and H.R. 6075. Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy. Hearing Before the Subcommittee on Education and Labor, House of Representatives, April 6, 1977, pp. 180-187.

Estimate B -

a. The cost per covered worker implicit in the Price estimates is $239 annually for 1983. This figure was derived as follows:

Cost of Premiums $5,894,000,000 (SSB, Table 7)
Cost of Sick Leave 4,899,000,000 (SSB, Table 9)

Total $10,793,000,000

Number of Covered workers 45,200,000

Cost per worker $239

b. Average weekly earnings increased from $281 in 1983 to $322 in 1988 or by 14.8 percent. (Table 83, 1989 Handbook of Labor Statistics (BLS).)

c. Applying the 14.8 percent increase to the 1983 estimate of $239, we obtain an estimate of $274 per worker for 1988. The estimated cost, therefore, is

50,300,000 workers x $274 per worker = $13,782,000,000

If we use Estimate B, then the costs to employers of pregnancy disability would be lower than the 10 percent figure estimated in Estimate A.

Note:

It should be noted that the Price (1986) estimates show insurance premiums of $5.9 billion and benefit payments of $3.7 billion. The difference of $2.2 billion represents the cost of administration, profit, etc. for insurance plans. The $2.2 billion is approximately 20 percent of the total cost of TDI coverage in 1983 ($10.8 billion) but it is a substantially higher proportion of the cost of insurance premiums.

APPENDIX IV

Summary of Cases Relevant to The Pregnancy Discrimination Act

CASE	CITE	CIR.	YEAR	ISSUE(S)	HIGHEST DECISION FOR/AGAINST PREG WOMAN
1 GEDULDIG v. AIELLO	417 U.S. 484 (1974)	N. CA	1974	DISABILITY INS	AGNST
2 GEN. ELECTRIC v. GILBERT	429 U.S. 125 (1976)	4	1976	SICK/ACCIDENT INS	AGNST
3 NASHVILLE GAS v. SATTY	434 U.S. 136 (1977)	6	1977	SENIORITY BENEFITS	PART
4 HARISS v. PAN AM	649 F.2d 670 (9th Cir. 1980)	9	1980	MANDATORY MAT LEAVE	AGNST
5 BURWELL v. EASTERN	633 F.2d 361 (4TH Cir. 1980)	4	1980	MANDATORY MAT LEAVE	PART
6 ABRAHAM V. GRAPHIC ART INT'L UNION	660 F2d 811 (DC CIR 1981)	DC	1981	NEUTRAL LEAVE POL.	FOR
7 BROWN v. PORCHER	660 F2d 1001(4th Cir 1981)	4	1981	UNEMPLOY. BENEFITS	FOR
8 WRIGHT v. OLIN	697 F2d 1172 (4TH CIR 1982)	4	1982	FETAL PROTECTION	AGNST
9 ZUNIGA v. KLEBERG COUNTY HOSP	692 F2d 986 (5th CIR 1982)	5	1982	FETAL PROTECTION	FOR
10 NEWPORT NEWS S&D v. EEOC	462 U.S. 669 (1983)	4	1983	SPOUSAL BENEFITS	FOR
11 HAYES V. SHELBY MEM HOSP	732 F2d 944 (1984)	11	1984	FETAL PROTECTION	FOR
12 CAL FED S&L v. GUERRA	479 U.S. 272 (1987)	9	1987	PREF TREATMENT/PREG	FOR
13 MILLER WOHL v. COMM/L&I	479 U.S. 1050 (1987)	MT	1987	PREF TREATMENT/MMLA	FOR
14 WIMBERLY v. L&I REL COMM	479 U.S. 511 (1987)	MI	1987	UNEMPLOY. BENEFITS	AGNST
15 UAW v. JOHNSON CONTROLS	886 F2d 871 (7th Cir 1989)(en banc)		1989	FETAL PROTECTION	AGNST

CASE	FACTS
1 GEDULDIG v. AIELLO	Calif. employee disab ins program excluded temp disability due to preg
2 GEN. ELECTRIC v. GILBERT	Gen Elec policy excluded preg from coverage in a sick/accident ins prog
3 NASHVILLE GAS v. SATTY	Sick pay policy excluded preg; mandatory mat leave forfeited seniority
4 HARISS v. PAN AM	Flight Attn mandatory unpaid maternity leave w/in 24 hrs of knowledge of preg
5 BURWELL v. EASTERN	Flight Attn mandatory unpaid maternity leave w/in 24 hrs of knowledge of preg
6 ABRAHAM V. GRAPHIC ART INT'L UNION	Employer refused to rehire employee after maternity leave
7 BROWN v. PORCHER	Neutral law construed to deny unemp. benefits to women who quit for preg
8 WRIGHT v. OLIN	Olin policy barred all fertile women from jobs w/haz chemical exposure
9 ZUNIGA v. KLEBERG COUNTY HOSP	X-ray technician fired-exposure might harm fetus, expose hospital to liab
10 NEWPORT NEWS S&D v. EEOC	N.N. health plan excluded preg for male employees spouses
11 HAYES V. SHELBY MEM HOSP	X-ray technician fired due to pregnant claiming fetal harm
12 CAL FED S&L v. GUERRA	Calif law req'd reasonable preg leave up to 4 mos/no other leave req'd
13 MILLER WOHL v. COMM/L&I	Employer challenged Mont Mat Leave Act requirement of "reasonable" preg leave
14 WIMBERLY v. L&I REL COMM	Neutral law construed to prevent benefits to women who quit due to preg
15 UAW v. JOHNSON CONTROLS	Company policy banning fertile women from jobs w/high lead exposure.

CASE	CIRCUIT COURT DECISION
1 GEDULDIG v. AIELLO	Exclusion of preg was a violation of Equal Protection Clause
2 GEN. ELECTRIC v. GILBERT	Exclusion of preg constituted sex discrimination under Title VII
3 NASHVILLE GAS v. SATTY	Policies violated Title VII
4 HARISS v. PAN AM	Upheld mandatory mat leave policy/bus. necessity of passenger safety
5 BURWELL v. EASTERN	For 1-28 wks leave is up to woman/doctor; 28+ company may require leave
6 ABRAHAM V. GRAPHIC ART INT'L UNION	Policy violates PDA. Disparate impact on women tantamount to dismissal.
7 BROWN v. PORCHER	Denial of benefits due to preg WAS violation of Fed Unempl Tax Act
8 WRIGHT v. OLIN	Vacated/remanded on issue of fetal protection-apply bus nec analysis
9 ZUNIGA v. KLEBERG COUNTY HOSP	Pretext for sex discrim, hosp failed to follow guar leave policy
10 NEWPORT NEWS S&D v. EEOC	Health plan violated Title VII (discriminated against men)
11 HAYES V. SHELBY MEM HOSP	Policy was per se sex discrim, hosp failed to show expos=substan risk
12 CAL FED S&L v. GUERRA	Employmnt policies that favor preg do not violate PDA-floor, not ceiling
13 MILLER WOHL v. COMM/L&I	Montana Maternity Leave Act valid under PDA
14 WIMBERLY v. L&I REL COMM	Denial of benefits due to preg was NOT violation of Fed Unempl Tax Act
15 UAW v. JOHNSON CONTROLS	Upheld comp. pol./not sex discrmination/safety of fetus-legit bus nec

CASE	SUPREME COURT DECISION
1 GEDULDIG v. AIELLO	Calif prog did not discrim against women-only excluded one disab (preg)
2 GEN. ELECTRIC v. GILBERT	Policy did not violate Title VII-preg discrim is not sex discrimination
3 NASHVILLE GAS v. SATTY	Rejected per se sex discrim/ruled disparate impact w/no bus. necessity
4 HARISS v. PAN AM	N/A
5 BURWELL v. EASTERN	Cert denied
6 ABRAHAM V. GRAPHIC ART INT'L UNION	N/A
7 BROWN v. PORCHER	Cert. denied
8 WRIGHT v. OLIN	N/A
9 ZUNIGA v. KLEBERG COUNTY HOSP	N/A
10 NEWPORT NEWS S&D v. EEOC	Health plan violated Tit. VII/rej. argument that PDA applies only to employees.
11 HAYES V. SHELBY MEM HOSP	N/A
12 CAL FED S&L v. GUERRA	Employmnt policies that favor preg do not violate PDA-floor, not ceiling
13 MILLER WOHL v. COMM/L&I	Vacated/remanded in light of Guerra--on remand MT Supreme Ct. reinstated
14 WIMBERLY v. L&I REL COMM	Denial of benefits not a violation of FUTA-pref. treatment not required.
15 UAW v. JOHNSON CONTROLS	Cert. granted Mar. 1990

APPENDIX V

CAMPAIGN TO END DISCRIMINATION AGAINST PREGNANT WORKERS

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APPENDIX VI

SOURCES USED ON THE TEN YEAR STUDY OF THE ECONOMIC AND LEGAL IMPACT OF THE PREGNANCY DISCRIMINATION ACT

BLS	U.S. Department of Labor, Bureau of Labor Statistics, 1989 Handbook of Labor Statistics, Bulletin 2340, Tables 3, 5, 15, 16, 17, 24, 28, 41, 68, and 83. Washington, D.C.: U.S. Government Printing Office, August.
BLS/FIRMS	U.S. Department of Labor, Bureau of Labor Statistics, Employee Benefits in Medium and Large Firms, 1981-88, Summary Table: "Percent of Full-time employees by participation in employee benefit programs, private industry," for the years 1981-1988.
CENSUS	Bureau of the Census Current Population Reports Fertility of American Women Series P-20 No. 436 for the years 1981 - 1988 Table 2, "Children Ever Born per 1000 Women and Percent Childless, by Selected Characteristics, and Children Ever Born per 1,000 Women 15 to 44 Years Old, By Age and Selected Socioeconomic Characteristics".
CPI	Economic Report of the President, January 1989, Table B- 58, "Consumer Price Indexes, Major Expenditure Classes, 1946-88".
CPR	Current Population Reports, Series P-60, No. 162, Money Income of Households, Families, and Persons in the United States: 1987, Table A, "Comparison of Income Summary Measures Between 1986-1987, by Selected Characteristics".
EEOC	Equal Employment Opportunity Commission, Annual Reports, 1981-1988.
SSB	Social Security Bulletin May 1986, Vol. 49 No. 5, "Cash Benefits for Short-term Sickness: 35 Years of Data," Tables 2, 7, 9.

APPENDIX VII

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END NOTES

1. 417 U.S. 484 (1974)

2.Id.

3.429 U.S. 125 (1976)

4. Along with the interest group debates, there are relevant debates in the literature among economists and sociologists. These debates are not specifically on the costs and benefits of the PDA but rather on other government mandated policies affecting the wages, benefits, occupational health and safety, and rights to return to jobs after maternity leave. For example, Mitchell and Mikaloukus (1987) in a review of a variety of regulatory policies suggest that each of these policies serves to increase the costs of labor to the firm. In response, firms will try and offset these increases by trying to substitute less expensive factors of production. The results of an inability to substitute can be increased costs to consumers, decreased output and ultimately decreased employment and wages, often for the very group that the legislation is designed to help.

On a more optimistic note, research by Dalto (1987), Trzcinski (1988) and O'Connell (1990) indicate that differential access to maternity leave benefits determine why some women have continuous and other women have more intermittent labor force participation and rising earnings profiles. O'Connell also notes that maternity leave policies can benefit employers by reducing potential costs and lost time associated with finding new replacement workers. Beller (1979) concludes that Title VII policies, at least in the short run, benefitted women workers by decreasing the male/female earnings gap.

5.Public Law 95-555, Oct. 31, 1978.

6. 429 U.S. 125 (1976)

7. Trzcinksi's (1988) findings are based on the 1978 and 1983 Current Population Survey and O'Connell's (1990) are based on a special retrospective fertility module of the 1985 Survey of Income and Program Participation.

8. The percentage of workers with six weeks of leave is substantially higher than the percentage with short-term disability. This is because those workers with six weeks of leave include those with paid sick leave as well as those with short-term disability benefits.

9. Assuming that those working women who gave birth in 1988 were covered by short-term disability insurance and that they received 60 percent of their average weekly earnings ($315) for 6 weeks, each women would receive an average of $1134 or 38 percent of the estimated $3,000 wage benefit.

10. This conclusion is based on conversations with Nancy Davis of Equal Rights Advocates and Donna Lenhoff of the Women's Legal Defense Fund.

11. Section 703(a)(1) makes it unlawful for an employer "to fail to refuse to hire or to discharge ... or otherwise to discriminate... with respect to ...compensation, terms, conditions, or privileges of employment, because of...sex" Section 703(a)(2) makes it unlawful for an employer "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 an employee, because of...sex" 42 U.S.C. §2000e-2 (198__).

12. EEOC v. Western Electric Co., 28 FEP Cases 1122 (M.D.N.C. 1982).

13. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). The Equal Employment Opportunity Commission had consistently taken the position that employer insurance plans that provided greater benefits to female employees than to the spouses of male employees violated Title VII.

14. Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, (E.D. Mo. 1982).

15. In Harriss v. Pan American World Airways, 649 F. 2d 670 (9th Cir. 1980), the Ninth Circuit upheld on the basis of alleged "customer safety" a policy that required pregnant flight attendants to put themselves on unpaid maternity leave within twenty-four hours of learning they were pregnant. The courts have consistently upheld policies such as Pan Am's on customer safety grounds. See also Burwell v. Eastern Airlines, 633 F. 2d 361 (4th Cir. 1980), cert denied, 450 U.S. 965 (1981), and Levin v. Delta Air Lines, 730 F. 2d 994 (5th Cir. 1984).

16. 660 F. 2d 811 (D.C. Cir. 1981).

17. The Fourth Circuit applied similar reasoning in Brown v. Porcher, 660 F. 2d 1001 (1981). The court found that the South Carolina Employment Security Commission's policy of denying unemployment compensation to women solely because they left their last employment on the basis of pregnancy violated federal unemployment law regardless of how the commission treated other employees. The holding in Brown was overruled by the Supreme Court in Wimberly v. Labor & Industrial Relations Commission, 479 U.S. 511 (1987). In Wimberly, the Supreme Court held that denying unemployment compensation to women who left their employment because they became pregnant did not violate the Federal Unemployment Tax Act (FUTA), found at 26 U.S.C. §3304(a)(12). The Court interpreted the statute as prohibiting any treatment of pregnant women that is different from the treatment of other persons similarly situated, but not mandating preferential treatment for those women. Id at 522. The Court's analysis of the FUTA statute would appear to be at odds with its analysis in California Federal Savings & Loan v. Guerra of a similar issue under the PDA.

18. 692 P. 2d 1243 (1987), vacated and remanded, 479 U.S. 1050. The decision in Miller-Wohl was based on the state court's construction of the Montana Maternity Leave Act, which provided for "reasonable pregnancy leave". The Miller-Wohl decision was vacated and remanded by the United States Supreme Court in light of its decision in California Federal Savings & Loan v. Guerra. Upon remand, the Montana Supreme Court reinstated its earlier decision. 744 P. 2d 871 (1987).

19. California Federal Savings & Loan v. Guerra, 479 U.S. 272 (1987).

20. UAW v. Johnson Controls, 886 F. 2d 871 (7th Cir. 1989) (en banc).

21. 479 U.S. 272, at 287.

22. 479 U.S. 272, 290-291 (1987).

23. Cases decided since CalFed suggest that courts are approving leave and benefits specifically associated with pregnancy, but will not allow preferential treatment for leave to take care of children. In Harness v. Hartz Mountain Corp. 877 F. 2d 1307, (6th Cir. 1989), the Sixth Circuit interpreted a Kentucky statute modelled after the PDA to permit preferential treatment of pregnant employees. The plaintiff in Harness was a male heart attack victim who challenged his employer's provision of more generous leave for pregnancy as being discriminatory. See also, Aubrey v. Aetna Life Ins. Co., 50 FEP Cases 1414 (6th Cir. 1989) (Court construed employer's benefits plan to allow coverage for pregnancy even where it was a "pre-existing condition"; other pre-existing conditions were not covered.) However, in Schafer v. Board of Public Education of the Pittsburgh School District,52 FEP Cases 1073 (3d Cir. 1990), the Third Circuit held that a

collective bargaining agreement that allows females, but not males, to take one year of childrearing leave violates the PDA.)

24. For a discussion of the legislative activity around the country on the issue of family and medical leave, and a proposal for how such legislation ought to be structured, See generally, Lenhoff and Becker, Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach,26 Harv. J. On Legis. 403 (Summer 1989).

25. Federal legislation, first introduced as H.R. 2020, the Parental and Disability Leave Act by Congresswoman Patricia Schroeder in 1985, has now evolved into the Family and Medical Leave Act, H.R. 770, and S.345. H.R. 770 was introduced on February 2, 1990 by Representatives Patricia Schroeder of Colorado and William L. Clay of Missouri; S. 345 was introduced in February 1990 by Senators Christopher Dodd of Connecticut and Edward Kennedy of Massachusetts. The legislation passed the House of Representatives and the Senate, but was vetoed by President Bush.

26. Williams, Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII 69 Geo. L. J. 641 (1981) (hereafter referred to as "Williams")

27. 697 F. 2d 1172 (4th Cir. 1982).

28. Id. at 1185, n. 21. The court noted that the inappropriateness of applying the overt discrimination/bfoq theory of claim and defense--or, more accurately, of treating it as the exclusively applicable, hence dispositive,theory--is that, properly applied, it would prevent the employer from asserting a justification defense which under developed Title VII doctrine it is entitled to present. (emphasis supplied)

29. Id. at 1188.

30. 726 F. 2d 1543 (11th Cir. 1984). The facts in Hayes were essentially the same as in Zuniga v. Kleberg County Hospital, 692 F. 2d 986 (5th Cir. 1982), a case brought before passage of the PDA.

31. 726 F. 2d 1543, 1548.

32. Id. at 1552.

33. Id. at 1548. The less exclusionary alternatives discussed in Hayes included (a) assigning the plaintiff to other duties within the hospital and (b) rearranging the plaintiff's duties within her own department.

34. Id. at 1553.

35. 886 F. 2d 871 (7th Cir. 1989) (en banc).

36. Id., at 886

37. Id., In applying the business necessity defense, the Seventh Circuit followed the approach established by the Supreme Court in Wards Cove Relying on the relaxed standard established in Wards Cove, the majority held that the plaintiff bore the ultimate burden of proving discrimination. In Johnson Controls the Seventh Circuit held that the burden on the defendant was only to articulate a defense reasonably related to business purposes, and then required the plaintiff to present "evidence sufficient to permit the district court to conclude that Johnson's business necessity [could] not be factually supported. (Emphasis added.)

38. Id. at 893, (emphasis in the original).

39. The EEOC is also responsible for enforcing a variety of other statutes including the Equal Pay Act, the Age Discrimination in Employment Act, Section 501 of the Rehabilitation Act of 1973 (which prohibits discrimination based on handicap status), Section 717 of Title VII (dealing with EEO for federal employees), and the Fair Labor Standards Act Amendments of 1974 (which prohibits age discrimination for federal employment). Executive Order 12067 (1978) gave the EEOC responsibility for providing "leadership and coordination to the efforts of Federal departments and agencies to endorse all Federal Statutes, Executive orders, regulations and policies which require equal employment opportunity."

40. For a comprehensive description of the administrative filing process, see Sex Discrimination in the Workplace: A Legal Handbook, Women's Legal Defense Fund, Washington, D.C. 1988.

41. EEOC Guidelines on Pregnancy, 29 C.F.R. §1604.10. (1990).

42. See One Nation, Indivisible: The Civil Rights Challenge for the 1990's Report of the Citizens' Commission on Civil Rights, August 1989, at p. 200. Several factors are enumerated as contributing to the EEOC's lack of leadership. First, there was a substantial turnover in the leadership of the EEOC. Second, many of those appointed to leadership positions had little or no expertise in EEO law, or commitment to the agency. Third, management systems to ensure the resolution on a timely basis were dismantled and were not replaced by other effective programs. Fourth, EEOC Chairman Clarence Thomas, permitted the Department of Justice unilaterally to direct federal EEO policy.

43. 45 Fed. Reg. 7514 (1980). The proposed guidelines were the result of a joint effort by the EEOC, the Office of Federal Contract Compliance Programs (OFCCP) and the Occupational Safety and Health Administration (OSHA)in the Department of Labor.

44. 45 Fed. Reg. at 7516.

45. 46 Fed. Reg. 3916 (Jan. 16, 1981).

46. EEOC Policy Guidance on Reproductive and Fetal Hazards, Daily Labor Report (BNA) No. 193 at D-1 (Oct. 5, 1988).

47. Id.

48. The policy guidance stated that where there is "reliable evidence on both sides of the question of risk of harm through women" the Commission would proceed as if "substantial risk were proven." With regard to reproductive harm to men, however, the guidelines stated that "[i]f there is inconclusive evidence due to, among other things, the paucity of research," the Commission would proceed as if the risk was "substantially confined to female employees." Daily Labor Report (BNA) at D-2 (October 5, 1988).

49. See Daily Labor Report (BNA) at D-1 (Jan. 26, 1990)

50. Id.