The Burger Court Opinion Writing Database

General Electric Co. v. Gilbert

429 U.S. 125 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 22, 1976

Re. No. 74-1589 and 74-1590 General Electric Co. v. Gilbert

Dear Bill:

I join your opinion dated November 8.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 20, 1976

MEMORANDUM TO: Mr. Justice Marshall
Mr. Justice Stevens

RE: Nos. 74-1589 & 1590 General Electric v. Gilbert

My records show that the three of us are in dissent in the above. I'll be happy to take this one.

W.J.B. Jr.

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 2, 1976

RE: No. 74-1589 & 1590 General Electric Co. v. Gilbert

Dear Bill:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Justice Marshall
Justice Blackmun
Justice Powell

1st DRAFT

11/20/76

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioners, 74–1589 *v.* Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 *v.* General Electric Company.	

[November —, 1976]

MR. JUSTICE BRENNAN, dissenting.

The Court holds today that without violating Title VII of the Civil Rights Act, 42 U. S. C. § 2000e, a private employer may adopt a disability plan that compensates employees for all temporary disabilities except one affecting exclusively women, pregnancy. I respectfully dissent. Today's holding not only repudiates the applicable administrative guideline promulgated by the agency charged by Congress with implementation of Act, but also rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question. See *Communication Workers of America* v. *A. T. & T. Co.*, 513 F. 2d 1024 (CA2 1975), petition for cert. pending, No. 74–1601; *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F. 2d 199 (CA3 1975), vacated on juris. grounds, 424 U. S. 737 (1976); *Gilbert* v. *General Electric Co.*, 519 F. 2d 661 (CA4), cert. granted, 423 U. S. 822 (1975); *Tyler* v. *Vickery*, 517 F. 2d 1089, 1097–1099 (CA5 1975); *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850 (CA6 1975), petition for cert. pending, No. 75–536; *Hutchison* v. *Lake Oswego School Dist.*, 519 F. 2d 961 (CA9 1975), petition for cert. pending, No. 75–1049.

Pp 7, 10

Style changes throughout

12/2/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioner, 74–1589 *v.* Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 *v.* General Electric Company.	

[November —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court holds today that without violating Title VII of the Civil Rights Act, 42 U. S. C. § 2000e, a private employer may adopt a disability plan that compensates employees for all temporary disabilities except one affecting exclusively women, pregnancy. I respectfully dissent. Today's holding not only repudiates the applicable administrative guideline promulgated by the agency charged by Congress with implementation of the Act, but also rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question. See *Communication Workers of America* v. *A. T. & T. Co.*, 513 F. 2d 1024 (CA2 1975), petition for cert. pending, No. 74–1601; *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F. 2d 199 (CA3 1975), vacated on juris. grounds, 424 U. S. 737 (1976); *Gilbert* v. *General Electric Co.*, 519 F. 2d 661 (CA4), cert. granted, 423 U. S. 822 (1975); *Tyler* v. *Vickery*, 517 F. 2d 1089, 1097–1099 (CA5 1975); *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850 (CA6 1975), petition for cert. pending, No. 75–536; *Hutchison* v. *Lake Oswego School Dist.*, 519 F. 2d 961 (CA9 1975), petition for cert. pending, No. 75–1049.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 8, 1976

No. 74-1589 and 74-1590
General Electric Co. v. Gilbert

Dear Bill,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P. S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 22, 1976

Re: No. 74-1589 - General Electric Co. v. Gilbert
No. 74-1590 - Gilbert v. General Electric Co.

Dear Bill,

It seems to me that Harry Blackmun's suggestions are all good ones, and I hope you will be agreeable to adopting them.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copy to Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell

I am still with you, although I would be happy to accept the changes suggested by Harry.

There is a good deal to be said for a solid majority in a case of this importance.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: NOV 24 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioner, 74–1589 *v.* Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 *v.* General Electric Company.	

[December —, 1976]

MR. JUSTICE STEWART, concurring.

I join the opinion of the Court holding that General Electric's exclusion of benefits for disability during pregnancy is not a *per se* violation of § 703 (a)(1) of Title VII, and that the respondents have failed to prove a discriminatory effect. Unlike my Brother BLACKMUN, I do not understand the opinion to question either *Griggs* v. *Duke Power Co.*, 401 U. S. 424, specifically or the significance generally of proving a discriminatory effect in a Title VII case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

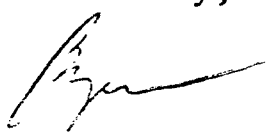
November 10, 1976

Re: Nos. 74-1589 & 74-1590 - General Electric Co. v. Gilbert

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 9, 1976

Re: Nos. 74-1589 and 74-1590, General Electric Co. v. Gilbert

Dear Bill:

I shall wait for the dissent in this one.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 23, 1976

Re: No. 74-1589 -- General Electric Co. v. Gilbert

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 22, 1976

Re: No. 74-1589 - General Electric Co. v. Gilbert
No. 74-1590 - Gilbert v. General Electric Co.

Dear Bill:

I have some reservations about your recirculation of November 8. You may not wish to make changes, but if the following could be effected I would join:

1. Change the last few words of the paragraph at the top of page 10 from "is not a gender-based discrimination at all" to "is not, per se, a gender-based discrimination."

OK HAB

This is a good addition.

2. Generally reverse the order of the first two sentences of the first paragraph beginning on page 10, and eliminate the balance of the paragraph. As so revised, the paragraph would read:

> The Court of Appeals expressed the view that the decision in Geduldig had actually turned on whether or not a conceded discrimination was "invidious," but we think that in so doing it misread the quoted language from our opinion. There is no more showing in this case than there was in Geduldig that the exclusion of pregnancy benefits is a mere "pretext designed to effect an invidious discrimination against the members of one sex or the other."

I don't have one way or the other about this.

3. On page 11, line 11, change the sentence to eliminate the cite to McDonnell so that it reads along the lines: "Assuming that such proof of effect is sufficient, respondents have not made the requisite showing of gender-based effects. 14/"

With added the McDonnell cite to your proposed change.

This seems to me to cover fairly our initial concerns. But wording is my view preferable.

Current draft reads: Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of §703(a)(1).

4. On page 14, footnote 18, delete the last sentence and the cite to Jefferson.

5. On page 19, 3rd paragraph, 7th line, change the sentence to read "we should not readily infer that it meant to obviate, as the EEOC guideline does, the necessity of a demonstration of a discriminatory effect."

If these proposed changes are not acceptable, I shall write a short separate concurrence joining the judgment. You probably will have a court in any event.

Sincerely,

Mr. Justice Rehnquist

cc: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell ✓

3, 4, and 5: These changes do a fine job of hitting exactly what I was initially concerned about. PS has apparently circulated a suggestion to WHR that he adopt them, and I would recommend that you do the same.

Gene
11/22/76.

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Supreme Court of the United States
Washington, D. C. 20543

November 23, 1976

Re: No. 74-1589 - General Electric Co. v. Gilbert
No. 74-1590 - Gilbert v. General Electric Co.

Dear Bill:

Herewith for your information is a copy of a short concurrence I am sending today to the Printer. The printed copy, I assume, will be around very shortly.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

No. 74-1589 - General Electric Co. v. Gilbert
No. 74-1590 - Gilbert v. General Electric Co.

MR. JUSTICE BLACKMUN, concurring.

I join the judgment of the Court and concur in its opinion insofar as it holds (a) that General Electric's exclusion of disability due to pregnancy is not, per se, a violation of § 703(a)(1) of Title VII; (b) that the plaintiffs in this case therefore had at least the burden of proving discriminatory effect; and (c) that they failed in that proof. I do not join any inference or suggestion in the Court's opinion -- if any such inference or suggestion is there -- that effect may never be a controlling factor in a Title VII case, or that Griggs v. Duke Power Co., 401 U.S. 424 (1971), is no longer good law.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 11/23/76

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioners, 74–1589 *v.* Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 *v.* General Electric Company.	

[November —, 1976]

MR. JUSTICE BLACKMUN, concurring.

I join the judgment of the Court and concur in its opinion insofar as it holds (a) that General Electric's exclusion of disability due to pregnancy is not, *per se*, a violation of § 703 (a)(1) of Title VII; (b) that the plaintiffs in this case therefore had at least the burden of proving discriminatory effect; and (c) that they failed in that proof. I do not join any inference or suggestion in the Court's opinion—if any such inference or suggestion is there—that effect may never be a controlling factor in a Title VII case, or that *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), is no longer good law.

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 8, 1976

No. 74-1589 General Electric v. Gilbert
No. 74-1590 Gilbert v. General Electric

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 2 3 1976

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioners, 74–1589 *v.* Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 *v.* General Electric Company.	

[November —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, General Electric Company,[1] provides for all of its employees a disability plan which pays weekly non-occupational sickness and accident benefits. Excluded from the plan's coverage, however, are disabilities arising from pregnancy. Respondents, on behalf of a class of women employees, brought this action seeking, *inter alia*,[2] a declaration that this exclusion constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as

[1] All the parties to the suit joined in petitioning for a writ of certiorari. General Electric was the moving party before the Court of Appeals, where the judgment of the District Court was affirmed. The parties have agreed that General Electric is to be deemed the petitioner for purposes of briefing and oral argument, a convention we adopt for the writing of this opinion.

[2] Respondents also represent a class of women employees who have been denied such benefits since September 14, 1971, and seek damages arising from this denial.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioners, 74–1589 v. Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 v. General Electric Company.	

[November —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, General Electric Company,[1] provides for all of its employees a disability plan which pays weekly non-occupational sickness and accident benefits. Excluded from the plan's coverage, however, are disabilities arising from pregnancy. Respondents, on behalf of a class of women employees, brought this action seeking, *inter alia*,[2] a declaration that this exclusion constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as

[1] All the parties to the suit joined in petitioning for a writ of certiorari. General Electric was the moving party before the Court of Appeals, where the judgment of the District Court was affirmed. The parties have agreed that General Electric is to be deemed the petitioner for purposes of briefing and oral argument, a convention we adopt for the writing of this opinion.

[2] Respondents also represent a class of women employees who have been denied such benefits since September 14, 1971, and seek damages arising from this denial.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 22, 1976

Re: Nos. 74-1589 and 74-1590 - General Electric Co. v. Gilbert, et al.

Dear Harry:

I have received your letter of November 22nd, suggesting five changes in the draft opinion in these cases. While your letter doesn't spell out the purpose of the proposed changes, I gather that the first suggestion would permit a Court to find in some other case that exclusion of pregnancy benefits, or some other differentiated treatment with respect to pregnancy, would be a discrimination under Title VII if some sort of additional facts were shown. It seems to me that the present draft, with its language relating to pretext and subterfuge further along on page 10, does allow for a finding of a Title VII violation where pregnancy exclusion is a pretext, but the reason for doing so would be the pretext and not the exclusion of pregnancy benefits.

Your third, fourth, and fifth suggestions, designed as they apparently are to restrict the test of violation to "effect" alone, run more of a risk than I want to do of deciding sub silentio that effect alone is sufficient under all of the various provisions of Title VII.

If I have not properly apprehended the reasons for the suggestions, I will be glad to take a second look; if I am correct in my ascription of reasons, I would prefer not to make the changes you suggest.

Sincerely,

Mr. Justice Blackmun

Copies to: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

Circulated: _____

3rd DRAFT Recirculated: NOV 24 1976

SUPREME COURT OF THE UNITED STATES

Nos. 74–1589 AND 74–1590

General Electric Company, Petitioner, 74–1589 *v.* Martha V. Gilbert et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Martha V. Gilbert et al., Petitioners, 74–1590 *v.* General Electric Company.	

[November —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, General Electric Company,[1] provides for all of its employees a disability plan which pays weekly non-occupational sickness and accident benefits. Excluded from the plan's coverage, however, are disabilities arising from pregnancy. Respondents, on behalf of a class of women employees, brought this action seeking, *inter alia*,[2] a declaration that this exclusion constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as

[1] All the parties to the suit joined in petitioning for a writ of certiorari. General Electric was the moving party before the Court of Appeals, where the judgment of the District Court was affirmed. The parties have agreed that General Electric is to be deemed the petitioner for purposes of briefing and oral argument, a convention we adopt for the writing of this opinion.

[2] Respondents also represent a class of women employees who have been denied such benefits since September 14, 1971, and seek damages arising from this denial.

Supreme Court of the United States
Washington, D. C. 20543

75-536

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 30, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 74-1589 - General Electric Co. v. Gilbert, and No. 74-1590 - Gilbert v. General Electric Co.

(1) American Telephone & Telegraph Co. v. Communications Workers of America, No. 74-1601. Petitioners brought this suit as a class action challenging provisions of petitioner's disability benefits plan as violative of Title VII. The plan is similar to General Electric's in that it excludes from coverage absences resulting from normal pregnancy and childbirth, although, unlike General Electric's plan, it includes absences resulting from disabling complications of pregnancy and from abnormal pregnancies. After some discovery, the District Court for the Southern District of New York dismissed the complaint on the authority of the then-recently announced decision in Geduldig v. Aiello, 417 U.S. 484. The Second Circuit reversed, holding that Geduldig was not dispositive because it rested on constitutional and not statutory grounds. The court held that respondents stated a good cause of action under Title VII and remanded for further proceedings, as the ultimate merits were not ripe for determination. If there are to be any "further proceedings," they should include consideration of the decision in General Electric. I will vote to grant, vacate, and remand for reconsideration in light of General Electric.

(2) Social Service Employment Union v. Women in City Gov't United, No. 75-70, and United Federation of Teachers v. Women in City Gov't United, No. 75-71. Fourteen male and female employees brought an action in the Southern District of New York against, inter alia, the City of New York, the mayor, some municipal and private corporations, and several unions. The moving papers are a bit unclear as to what the fringe benefits program under challenge involves, but it appears that the disability benefits plan covers neither pregnancy nor pregnancy-related conditions. The District Court dismissed on the authority of Geduldig, and the Second Circuit reversed for further proceedings not inconsistent with its decision in AT&T, supra. As in AT&T, supra, I will vote to grant, vacate, and remand for reconsideration in light of General Electric.

(3) Nashville Gas Co. v. Satty, No. 75-536. Petitioner company in this case has a policy that pregnant employees who are on maternity leaves may not receive any accumulated sick pay, although such employees may be paid their accumulated vacation time during this absence. Further, an employee taking a maternity leave does not retain accumulated seniority for the purpose of bidding on a permanent position (although priority is given over non-employees). Once rehired for a permanent position the employee gets back the seniority accumulated prior to the maternity leave. In this case, respondent, after having her child, sought three permanent positions, but was outbid in each case by an employee who had less seniority than respondent would have had had she been given credit for her pre-maternity leave seniority. She brought this suit claiming that the refusal to allow her to use accumulated sick leave, as well as the refusal to allow seniority for purposes of bidding on a permanent position at the conclusion of the maternity leave, violated Title VII. The District Court agreed, and the Sixth Circuit affirmed. The Sixth Circuit noted that this case

was different than Liberty Mutual Insurance Co. v. Wetzel, 511 F.2d 199 (CA 3 1975), vacated, 424 U.S. 737, AT&T, supra, and General Electric, in that petitioner in this case had no disability benefits plan for its employees. The Sixth Circuit did agree with those cases both in distinguishing Geduldig and in following the EEOC guidelines. As I see no reason to grant this case to consider these factual twists until the lower courts have had an opportunity to digest General Electric, I will vote to grant, vacate, and remand for reconsideration in light of General Electric.

(4) Lake Oswego School Dist. No. 7 v. Hutchison, No. 75-568 (together with a cross-petition, Hutchison v. Lake Oswego School Dist. No. 7, No. 75-1049.) Respondent was employed as a part-time junior high school teacher for petitioner school district. She was absent for 15 days while giving birth to a child, and sought sick leave benefits for her absence. This request was refused on the ground that normal pregnancy was not an "illness or injury" within the meaning of petitioner's sick leave policy. Respondent filed an action in the District Court for Oregon, challenging this practice as violative of both the Equal Protection Clause and Title VII. The District Court sustained both of respondent's challenges. The Ninth Circuit, with the benefit of Geduldig, reversed the constitutional violation, but affirmed on the statutory violation, holding that Geduldig did not control in Title VII cases. I will vote to grant, vacate, and remand for reconsideration in light of General Electric.[1/]

1/ The cross-petition presents only issues as to petitioner's entitlement to attorney's fees and/or costs upon appeal. Petitioner was awarded back pay, costs, and attorney's fees against the School Board as an entity. The Ninth Circuit affirmed these awards, but awarded appellate costs to the Board. This award of appellate costs is the only issue raised in the cross-petition. It appears consistent with Fed. R. App. P. 39(a). I will vote to deny the cross-petition.

(5) Richmond Unified School Dist. v. Berg, No. 75-1069. Petitioner's maternity leave policy required all teachers to take a leave of absence when they began their seventh month of pregnancy, and denied such persons the accumulated sick pay available for absence due to other disabilities. In November of 1973, respondent filed a complaint with the EEOC; in December, petitioner changed its policy to permit the Assistant Superintendent to make exceptions to the seven-month rule based on medical evidence.[2/] Respondent asked for such an exception, with a letter from her doctor. The Assistant Superintendent asked her to undergo an examination by a doctor appointed by petitioner. She refused. She filed suit, alleging a violation of Title VII, as well as §1983, prior to receiving her right to sue letter from the EEOC. The District Court granted summary judgment in favor of respondent's class on the Title VII claim. The Ninth Circuit affirmed, on the basis of its earlier decision in Hutchison, supra. While this case, again, is somewhat different than General Electric, these differences are ones that the lower courts should first explore. I will vote to grant, vacate, and remand for reconsideration in light of General Electric.

Sincerely,

2/ Later changed so that the mandatory leave period commenced one month before childbirth, unless the Assistant Superintendent made an exception.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

Circulated: [redacted] DEC 1 '76

Nos. 74–1589 AND 74–1590

Recirculated: _____

General Electric Company, Petitioner,
74–1589 *v.*
Martha V. Gilbert et al.

Martha V. Gilbert et al., Petitioners,
74–1590 *v.*
General Electric Company.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[December —, 1976]

MR. JUSTICE STEVENS, dissenting.

The word "discriminate" does not appear in the Equal Protection Clause.[1] Since the plaintiffs' burden of proving a prima facie violation of that constitutional provision is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination,[2] the constitutional holding in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), does not control the question of statutory interpretation presented by this case. And, of course, when it enacted Title VII of the Civil Rights Act of 1964, Congress could not possibly have relied on language which this Court was to use a decade later in the *Geduldig* opinion.3/ We are, therefore, presented with a fresh, and rather simple, question of statutory construction: Does a contract between a company and its employees which treats the risk of absenteeism

[1] The word does, however, appear in a number of statutes, but has by no means been given a uniform interpretation in those statutes. Compare *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37, 44–45 (1948) (Robinson-Patman Act) with *NLRB* v. *Great Dane Trailers, Inc.,* 388 U. S. 26, 32–35 (1967) (National Labor Relations Act).

[2] *Washington* v. *Davis,* No. 74–1492 (June 7, 1976), Slip op., at 7–18.

3/ Quite clearly Congress could not have intended to adopt this Court's analysis of sex discrimination because it was six years after the statute was passed that the Court first intimated that the concept of sex discrimination might have some relevance to equal protection analysis. See Reed v. Reed, 404 U.S. 71 (1971).