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Mandatory Maternity Leave Policy in the School Systems - A Survey of Cases

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COMMENTS

Mandatory Maternity Leave Policy in the School Systems — A Survey of Cases

> IN ALMOST ALL SOCIETIES birth seems to have been culturally converted into a very much more complex, difficult, and handicapping process than it in fact is. In general it would seem that the more complex a society becomes, the more it tends to complicate the process of birth; . . . In some nonliterate societies some women take much less than [four or five days] to return to their normal household chores. In food-gathering cultures, such as those of the Bushman of South Africa and the Australian Aborigines, the fact that a woman is pregnant or that an hour ago she gave birth to a child is generally responsible for no deviation whatever from her customary manner of living, except for the additional task of nursing.[1]

Thus, it has been suggested that mandatory maternity leave regulations, which are in force in many American school systems today, are a ". . . manifestation of [this] cultural sex role conditioning . . . ."[2] It is only recently that the power of the school boards to make these rules requiring teachers to take leaves of absence after a certain month of pregnancy have been challenged in our courts. The first two cases raising this issue were *La Fleur v. Cleveland Bd. of Educ.*[3] and *Cohen v. Chesterfield County School Bd.*[4] in May 1971. Since then, there have been a steady flow of cases testing the legality of these regulations.

The school board regulations in question not only affect the time when a pregnant teacher must leave her teaching duties, but they also stipulate a period after childbirth when the teacher can return and a means of reassignment. Notice of pregnancy to the school board is also normally required by these regulations. The time period of the leave varies with each school system. Generally, school systems require their teachers to take leave of absence after their fifth month of pregnancy and require them to return not

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[1] A. MONTAGU, THE NATURAL SUPERIORITY OF WOMEN 32 (8th ed. 1967); *see* Heath v. Westerville Bd. of Educ., 345 F.Supp. 501, 505 n.1 (S.D. Ohio 1972).

[2] Heath v. Westerville Bd. of Educ., 345 F.Supp. 501, 505-06 n.1 (S.D. Ohio 1972).

[3] 326 F.Supp. 1208 (N.D. Ohio 1971), *rev'd*, 465 F.2d 1184 (6th Cir. 1972), *petition for cert. filed* 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 777).

[4] 326 F.Supp. 1159 (E.D. Va. 1971), *aff'd*, 467 F.2d 262 (4th Cir. 1972), *rev'd on rehearing*, ____ F.2d ____ (4th Cir. 1973).

earlier than two or three months after the child is born,[5] all without pay. Reassignment is usually to a vacancy for which the teacher is qualified.

The only issue that the courts have really dealt with is the right of the school board to set a time when the pregnant teacher must take her leave of absence. This right has been upheld in *Cerra v. East Stroudsburg Area School Dist.*,[6] by the lower court in *La Fleur v. Cleveland Bd. of Educ.*,[7] and upon rehearing in *Cohen v. Chesterfield County School Bd.* by the Fourth Circuit Court of Appeals sitting en banc.[8] In all other cases, the courts have found the school board regulations unconstitutional as a violation of the equal protection clause of the fourteenth amendment. *(La Fleur* has been reversed on appeal.[9]) Although the trend seems to be that mandatory maternity leave regulations enacted by the school systems are unconstitutional, it is unfair to conclude that they are uncon-

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[5] An example of some of the maternity leave provisions of the school boards are as follows: Amster v. Board of Educ., 55 Misc. 2d 961, 286 N.Y.S. 2d 687, 689 (Sup. Ct. Nassau County 1967), teacher could not teach after four months of pregnancy and could return six months after confinement; Bravo v. Board of Educ., 345 F.Supp. 155, 157 (N.D. Ill. 1972), teacher could not teach past her sixth month of pregnancy and could not return until child was two months old; Cerra v. East Stroudsburg School Dist., 3 Pa. Cmwlth. 665, 285 A.2d 206, 207 (1971), teacher could not teach beyond her fifth month of pregnancy; Cohen v. Chesterfield County School Bd., 326 F.Supp. 1159, 1160 (E.D. Va. 1971), *aff'd*, 467 F.2d 262 (4th Cir. 1972), *rev'd on rehearing*, ... F.2d ..... (4th Cir. 1973), teacher could not teach past her fifth month of pregnancy, but this could be extended by the school board; Heath v. Westerville Bd. of Educ., 345 F.Supp. 501, 503-04 (S.D. Ohio 1972), teacher could not teach past her fifth month of pregnancy and could not return until the child was a year old; La Fleur v. Cleveland Bd. of Educ., 326 F.Supp. 1208, 1209-10 (N.D. Ohio 1971), *rev'd*, 465 F.2d 1184 (6th Cir. 1972), teacher could not teach past her fourth month of pregnancy and could not return earlier than three months after childbirth; Pocklington v. The Duval County School Bd. 345 F.Supp. 163, 164 (M.D. Fla. 1972), teacher could take her maternity leave not later than five full months prior to her expected date of confinement; Williams v. San Francisco Unified School Dist., 340 F.Supp. 438, 439-40 (N.D. Cal. 1972), teacher must leave her teaching duties at least two months before expected date of birth and could not return until one month after childbirth.

[6] 3 Pa. Cmwlth. 665, 285 A.2d 206 (1971).

[7] 326 F. Supp. 1208 (N.D. Ohio 1971), *rev'd*, 465 F.2d 1184 (6th Cir. 1972).

[8] 326 F.Supp. 1159 (E.D. Va. 1971), *aff'd*, 467 F.2d 262 (4th Cir. 1972), *rev'd on rehearing*, ... F.2d ..... (4th Cir. 1973). On January 15, 1973, the decision in *Cohen v. Chesterfield County School Bd.* was reversed upon rehearing by the Fourth Circuit Court of Appeals sitting en banc. In a divided decision, Judge Haynesworth wrote the majority opinion which is almost verbatim from his dissenting opinion when this court heard this case previously. The court sees two reasons why the Chesterfield County School District's maternity leave policy should be upheld. First, they find that this maternity leave policy is not an invidious discrimination based upon sex. Judge Haynesworth sees pregnancy and maternity as *sui generis* and does not equate them to other physical disabilities. Secondly, this court finds that it is the school board's responsibility to maintain continuity in the classroom, thus they have the right to set a reasonable date for the commencement of maternity leaves. The necessity of this policy was further illustrated by this court as they note that eighty percent of the teachers in the Chesterfield County school system are women.

[9] The La Fleur case was reversed July 27, 1972 by the United States Court of Appeals for the Sixth Circuit.

stitutional *per se*.[10] Even though all of these regulations have failed as being a violation of the equal protection clause, the arguments have varied and there are still many questions that have been left open for future decisions. In addition, Congress has recently amended the Civil Rights Act of 1964 to include public schools.[11] Thus a teacher can now bring action under Title VII of this Act, which prohibits discrimination in employment on the basis of sex.[12] In order to fully understand the impact of the various decisions concerning mandatory maternity leave for teachers, a detailed survey of what has happened in the courts will follow.

Fourteenth Amendment and Sex Discrimination Cases

In 1905, in the case of *Lochner v. New York*,[13] the Supreme Court struck down a New York statute regulating hours in bakeries as being ". . . an unreasonable, unnecessary and arbitrary interference with the right and liberty . . . to contract . . . ."[14] There was recurring due process language in this case as the court discussed means rationally related to an end and a legitimate end, although the equal protection argument was never used. Three years later, the *Lochner* decision was limited to regulating the number of working hours for women in *Muller v. Oregon*.[15] The Supreme Court found that the state's power to regulate the working hours for women rested on its police power and the right to preserve the health of women and was not at all affected by women's right to contract. This was the first case where the legislative classification for women was sustained by the courts in a right to work case. After the *Muller* decision, other challenged legislation involving classification according to sex was held valid and constitutionally permissible by the courts.[16] The equal protection argument, though,

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[10] The author perceives this recent decision, not as a reversal of a trend invalidating mandatory maternity leave policy in the school districts, but as a further indication that this entire area remains unsettled, and will probably remain so until the U.S. Supreme Court has ruled on the issue.

[11] Act of March 24, 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. § 2000e et seq. (1970).

[12] 42 U.S.C. § 2000e-2(a), as amended, (1972). "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .", *Id.*

[13] 198 U.S. 45 (1905).

[14] *Id.* at 45.

[15] 208 U.S. 412 (1908).

[16] Some cases that followed the *Muller* decision that upheld statutes restricting working hours for women and providing minimum wages for women were: Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915); Radice v. New York, 264 U.S. 292 (1924); Riley v. Massachusetts, 232 U.S. 671 (1914); and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

was not used until 1948 in *Goesaert v. Cleary*,[17] where the courts were determining the validity of a Michigan statute that allowed only wives and daughters of bar owners to act as bartenders. The court upheld the statute as valid and Frankfurter, delivering the opinion of the court, stated that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."[18] The use of the equal protection argument did not alter the situation for women as laws based on sex classification continued to be upheld by the courts.[19] Thus, the courts were still recognizing two distinct classes — men and women. The historic breakthrough in sex discrimination cases came in 1971 with the Supreme Court's decision in *Reed v. Reed*.[20] Here the court found that an Idaho statute giving preference to men over women in administering decedent's estates was violative of the equal protection clause. This was the first time that the Supreme Court ever invalidated a state statute involving classification by sex using the equal protection argument. Because of this decision, the courts are willing to apply the equal protection argument to the mandatory maternity leave cases to determine whether sex discrimination has taken place.

The fourteenth amendment to the Constitution states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[21] It must be realized that laws are usually enacted to protect or regulate a class of persons or property, and therefore are often inherently unequal. Consequently, the courts have set up a test of reasonableness to determine whether legislation is in violation of the equal protection clause.[22]

The traditional test for reasonableness sets up three standards. First, the classification must be based on a necessary and unarbi-

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[17] 335 U.S. 464 (1948).

[18] *Id.* at 466.

[19] Examples of statutes upheld under the equal protection clause involving sex classification: Clarke v. Redeker, 259 F.Supp. 117 (S.D. Iowa 1966), *aff'd in* 406 F.2d 883 (8th Cir. 1969), *cert. den.* 396 U.S. 862 (1969); Hoyt v. Florida, 368 U.S. 57 (1961); Miskunas v. Union Carbide Corporation, 399 F.2d. 847 (7th Cir. 1968), *cert. denied*. 393 U.S. 1066 (1969).

[20] 404 U.S. 71 (1971).

[21] U.S. CONST. amend. XIV, § 1. This constitutional guarantee is made possible through the Civil Rights Act of 1871 stated in 42 U.S.C. § 1983 (1970) which provides that "Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[22] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

trary distinction ("rational basis").[23] Next, the classification must have a reasonable relationship to a proper legislative purpose.[24] Finally, all persons within the class must be treated equally.[25] When using this traditional test, there is a presumption that the legislation is reasonable. Therefore, it is incumbent upon the assailing party to show that the classification is arbitrary and unreasonable.[26]

A stricter test is used by the courts where the classification involves a fundamental right, such as voting,[27] or a suspect class, such as race.[28] Here the classification must not only be reasonable but there must also be a compelling government interest in enacting the classification. There is no presumption that the classification is reasonable, so the burden of proof lies with the defendant to show that a compelling government interest exists.[29]

To date, only two courts have found sex as a suspect classification, thereby justifying the use of the stricter test. The California Supreme Court, in *Sail'er Inn Inc. v. Kirby*,[30] applied the strict standard of review in determining whether a statute prohibiting women from tending bar, with certain exceptions, violated the equal protection clause of the State and Federal Constitution. They found two reasons why sex should be a suspect of class: 1) Sex, like race and lineage, is a category into which one is born and frequently bears no relation to ability to perform; 2) Similar to blacks, there is a stigma of inferiority and second class citizenship associated with women.[31] In *U.S. ex rel. Robinson v. York*,[32] the court granted a female prisoner's petition for habeas corpus, where it was found that a statute prescribed an indefinite sentence of specified minimum duration for women felons, while there was no such rule for men. In applying the compelling government interest test, the court found no reason why adult women should have less protection as a class than a racial group.[33]

The courts' reluctance to apply the stricter standard to sex discrimination cases is understandable, although not justifiable, as

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[23] McLaughlin v. Florida, 379 U.S. 184 (1964); Morey v. Doud, 354 U.S. 457 (1957); Power Mfg. Co. v. Saunders, 274 U.S. 490, 493 (1927).

[24] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[25] *Id.*

[26] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[27] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[28] Hunter v. Erickson, 393 U.S. 385 (1969).

[29] Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[30] 485 P.2d 529 (Cal. 1971).

[31] *Id.* at 540.

[32] 281 F.Supp. 8 (D. Conn. 1968).

[33] *Id.* at 14.

it is only recently that women have been recognized to be entitled to equal rights with men by the judicial system. In some of the mandatory maternity leave cases the possibility of applying the stricter standard has been discussed, but it has never been used. Thus, the question of whether to consider the right to work and the right to bear children as fundamental rights has been eluded to by the courts in these decisions. Therefore, in all the mandatory maternity leave cases brought under the fourteenth amendment, the plaintiff teacher has had the burden of proving that the school board regulations were arbitrary and unreasonable.

Mandatory Maternity Leave Cases Involving the School Boards

Prior to May, 1971, the courts took little notice of mandatory maternity leave policies. In 1967, in a New York court, a teacher challenged a school board rule that required a teacher to stay at home for six months following the birth of her child.[34] The court upheld the rule as justified for administrative ease. The Federal Court for the Western District of Texas, in February of 1971, in *Schattman v. Texas Employment Comm'n.*,[35] awarded back pay and injunctive relief for reemployment to an employment interviewer for the commission. Unlike the school board cases, Mrs. Schattman brought suit under Title VII of the Civil Rights Act of 1964, as well as under the equal protection clause. Under Title VII, the employer has the burden of showing that the policy "is a bona fide occupational qualification reasonably necessary to normal operation of that particular business or enterprise."[36] At this time the court found that the Texas Employment Commission had not sustained the burden of showing that Mrs. Schattman would not be able to perform her job safely and efficiently and that her employment was terminated because of a condition attendant to her sex. This case was later reversed as the court found that the Texas Employment Commission was not an employer as defined under Title VII,[37] and that the maternity leave policy was reasonable.[38] The Schattman case can be distinguished from the school board cases as Mrs. Schattman was an office worker and the commission's maternity leave

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[34] Amster v. Board of Educ., 55 Misc.2d 961, 286 N.Y.S.2d 687 (Sup. Ct. Nassau County 1967).

[35] 330 F.Supp. 328 (W.D. Tex. 1971).

[36] 42 U.S.C. § 2000e-2(e) (1970).

[37] 42 U.S.C. § 2000e(b) (1970): "The term 'employer' . . . does not include . . . a State or political subdivision thereof . . ."; *see* Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972); *petition for cert. denied*, 41 U.S.L.W. 3376 (U.S. Jan 8, 1973) (No. 474).

[38] The commission brought in medical testimony to the effect that releasing a woman after her seventh month of pregnancy was reasonable. The court also felt that they only had to treat men and women equally if they were similarly situated. They found that pregnant women and men were not similarly situated.

policy allows them to work until the end of their seventh month of pregnancy.

The challenge by teachers as to the constitutionality of mandatory maternity leave policies began with *La Fleur v. Cleveland Bd. of Educ.*[39] and *Cohen v. Chesterfield County School Bd.*[40] Both cases had almost the identical facts, but the courts reached opposite results.

In *La Fleur,* the school board contended that its mandatory maternity leave regulation was enacted to protect the teacher and to maintain continuity in the classroom.[41] The board had adopted its maternity leave policy in the early 1950's because of numerous reports of children pointing, giggling, laughing, and making snide remarks causing interruption in the classroom. There were instances where a teacher refused to quit teaching until she practically gave birth in the classroom. The board also discussed the increased violence in the Cleveland schools. This seemed to be the distinguishing factor between this case and all the following cases; however, one must question whether a man or woman who is not pregnant is safer in the Cleveland schools than a pregnant woman. In discussing the health of a pregnant teacher, the board brought in evidence that complications could arise during the late months of pregnancy and that the resulting effects could be serious. It was further shown that pregnant women urinate more during their last months of pregnancy and that the woman's agility is impaired during this time also.

Mrs. La Fleur, seeking a permanent injunction, attempted to convince the court that there had been a violation of her fundamental rights and that the stricter compelling government interest test should be used. The court rejected this argument on the basis that the rights weigh more heavily with the students. Consequently, the court adopted the traditional reasonable basis test in determining whether the school board's policy was in violation of the equal protection clause. In sustaining the school board's rule, the court held: 1) The regulations were reasonable. 2) No discrimination as to women whose condition is attendant to their sex existed. 3) There was reasonable basis for the rule. 4) There was no violation of any constitutional rights. 5) The regulation in question furthers the design for quality education and serves the important interests of students implementing this fundamental right.[42] Thus, the court felt

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[39] 326 F.Supp. 1208 (N.D. Ohio 1971), *rev'd,* 465 F.2d 1184 (6th Cir. 1972).

[40] 326 F.Supp. 1159 (E.D. Va. 1971), *aff'd,* 467 F.2d 262 (4th Cir. 1972), *rev'd on rehearing,* ..... F.2d ..... (4th Cir. 1973).

[41] 326 F.Supp. 1208, 1211 (N.D. Ohio 1971).

[42] *Id.* at 1213-14.

that the distractions, the teacher's health and the violence in the schools were all valid concerns of the school board in making its policy.

In a decision five days after the *La Fleur* case was decided, the U.S. District Court of the Eastern District of Virginia found the Chesterfield County School Board's mandatory maternity leave rule discriminatory and without rational basis.[43] In Chesterfield County, unlike Cleveland, the termination date could be extended by the superintendent of the schools upon recommendation from the teacher's physician and her principal. Mrs. Cohen requested an extension so she might teach until the end of her eighth month of pregnancy. Her request was denied by the school board because they had a replacement available for the position. Mrs. Cohen thus brought this action asking for back pay and the status she would have had had she been allowed to teach until the end of her eighth month of pregnancy. The court here, unlike the court in the *La Fleur* case, rejected the health and safety argument by the defendant on the basis that there was no empirical data to back it up. In fact, it was stated that a pregnant teacher would be more likely to be incapacitated during her early months of pregnancy than her later months. The court went on to say, "since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor."[44] It must also be noted that the Chesterfield County School System is located in a predominantly rural area, so the Board was not faced with the violence in its schools as in the Cleveland school system. An additional argument was raised in *Cohen* by the defendant school board that was not raised in the *La Fleur* case. The defendant argued that since the instant case was solely a matter of contract between parties, Mrs. Cohen waived her constitutional rights when she signed her employment contract. The court also rejected this argument. In deciding that this school board's policy had no rational basis, the court found that because the school board treated pregnancy differently than other medical disabilities, it was violative of the equal protection clause. Mrs. Cohen was awarded her back salary for three months and her seniority had she been able to continue teaching until the end of her eighth month of pregnancy.

The next few cases that appeared in the courts concerning mandatory maternity leave did not attempt to invalidate the regulations, but questioned certain issues relating to maternity leave. About the same time *La Fleur* and *Cohen* were decided, a California court ruled that a pregnant teacher could not use accrued sick leave when

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[43] Cohen v. Chesterfield County School Bd., 326 F.Supp. 1159 (E.D. Va. 1971).
[44] *Id.* at 1160.

on maternity leave,[45] even though the county had an ordinance allowing a male employee to use sick leave when his child was born. The court found that this difference of treatment was not violative of the equal protection clause. Three months later, a Washington Superior Court, quoting the district court's majority opinion in *Cohen*, held that where a teacher was denied reemployment after a maternity leave, she was discharged without due process.[46] The school board policy provided that a teacher was only entitled to preference as to vacancies when she returned, not guaranteed reemployment.

In *Jinks v. Mays*,[47] an untenured teacher sought an injunction against a school board where mandatory maternity leave was granted only to tenured teachers. The injunction was granted, finding that the board's policy was arbitrary and not relevant to the Georgia Teachers Tenure Act, as the only distinction the court found was "maternity." Mrs. Jinks was later awarded attorneys fees by the United States District Court, Northern District of Georgia, even though she never requested reemployment or reinstatement after the birth of her child.[48]

Although not involving a school board, the next case challenging a maternity regulation was *Struck v. Secretary of Defense*.[49] Here the Ninth Circuit upheld an Air Force regulation requiring discharge from the Service of any woman officer who becomes pregnant. This case holds little precedent for any of the school board cases, as the rationale for the decision seemed to be that "judges are not given the task of running the Army."[50] None of the Constitutional arguments were accepted, reasoning that the hospital was in a combat zone and the nurse might suffer a miscarriage; however, the court failed to discuss the possibility of moving the nurse to another hospital. After giving birth to her child, Susan Struck gave the child up for adoption, and has recently been reinstated by the Air Force.[51]

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[45] Lombardo v. County of Sonoma, Civil No. 65815 (Cal. Super Ct., Sonoma County, May 21, 1971), *See* Koontz, *Childbirth and Childrearing Leave: Job Related Benefits*, 17 N.Y.L. FORUM 480 (1971).

[46] Truax v. Edmonds School Dist. #15, Docket No. 107915 (Wash. Super. Ct., Snohomish County, July 30, 1971), *See* Koontz, *Childbirth and Childrearing Leave: Job Related Benefits*, 17 N.Y.L. FORUM 480 (1971).

[47] 332 F.Supp. 254 (N.D. Ga. 1971), *aff'd in part*, 464 F.2d 1223 (5th Cir. 1972).

[48] ____ F.Supp. ____ (N.D. Ga. 1972).

[49] 460 F.2d 1372 (9th Cir. 1971).

[50] *Id.* at 1376.

[51] Memo for respondent suggesting mootness, (Dec. 1972). The case has recently been vacated and remanded to the Court of Appeals (9th Cir.) to decide the issue of mootness, 41 U.S. L.W. 3346 (U.S. Dec. 18, 1972).

Cerra v. East Stroudsburg Area School District[52] involved the same issue that faced the courts in the *La Fleur* and *Cohen* cases. The Pennsylvania court found the school board's regulation barring teachers from teaching beyond their fifth month of pregnancy reasonable, refusing, in a short opinion, to be persuaded by *Cohen* and *La Fleur*. Here the teacher argued that pregnancy was an illness and that it would be discriminatory to treat it otherwise. Unfortunately, the teacher's own medical expert testified otherwise, stating that pregnancy was physiological. The court felt that since Mrs. Cerra could show no other Pennsylvania case where pregnancy was treated as an illness or any other reason why the regulations was unreasonable, the regulation had to stand. If the plaintiff in this case had brought in good evidence to counter the board of education's evidence or had supported another type of treatment for maternity leave, this case might had been decided differently.

In an excellent opinion, the district judge in *Williams v. San Francisco Unified School District*[53] invalidated that school board's maternity leave policy. The plaintiff in contending that the policy was arbitrary and discriminatory focused her argument on the point that among all illnesses or physiological conditions, the District had singled out pregnancy for restrictive provisions. This was the point that the district court in *Cohen* had used in turning that case for the plaintiff teacher. The teacher here went into greater detail than Mrs. Cohen by arguing that all other leaves of absence did not begin until the employee desired it or because of medical necessity. These other leaves of absence were paid leaves, while mandatory maternity leaves were not. The plaintiff here produced two medical testimonies that supported her claim that medically she was able to work until the date of delivery. The defendant school district contended that they were not discriminating against women because women far advanced in pregnancy were a permissible category to regulate. They also raised the health and safety argument, stating that the injury-prone nature of pregnant women increased the district's chance of tort-liability. The health and safety argument in *La Fleur* was argued differently. There the court stated that the school board was trying to protect the teacher while in *Williams* the school district was concerned about the possibility of tort-liability.

The court in deciding *Williams* not only answered the defendants' issues, but went further in answering others not raised. They found that there was no increased tort-liability as the teacher was still held to a "reasonable man" standard of care. It has also been contended by other school boards, although not in this case, that

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[52] 285 A.2d 206 (Pa. Cmwlth Ct. 1971).

[53] 340 F.Supp. 438 (N.D. Cal. 1972).

allowing women to decide when they would want to take their maternity leave would cause administrative problems. The *Williams* court believed that it is easier to plan for a substitute teacher when a teacher decides to leave for maternity purposes than for someone who unexpectedly becomes ill. The opinions of the husband of the pregnant teacher were considered for the first time in this case. The court felt that if a husband wanted his wife to take a maternity leave, it should be at their option when it should begin. In striking down the San Francisco school board's policy, the court stated that "the methods of dealing with pregnancy are draconian with respect to the disabilities posed thereby . . . [and the objectives of the school board] could be served by means less restrictive than those now employed."[54]

The cases that follow *Williams* to the present time have not raised any new arguments in favor of invalidating mandatory maternity leave in the school systems. In *Pocklington v. Duval County School Bd.*,[55] after considering past decisions, the court turned the case in favor of the plaintiff after the school board failed to supply medical testimony in favor of their mandatory maternity leave policy. The teacher in this case, furnished the necessary medical testimony that a pregnant teacher could work until delivery.

In *Heath v. Westerville Bd. of Educ.*,[56] the board presented no persuasive evidence to the court that its mandatory maternity leave policy was medically, psychologically, or administratively justified. This was the first case that discussed the possibility of sex as a suspect classification. The court continued by stating that since the board had failed to satisfy the traditional reasonableness test, it would not have to decide the issue of whether sex was a suspect class. Ironically, it seems the court here has shifted the burden of proof to the board of education to prove its policy as reasonable, even though the court has employed the traditional test.

Soon after this case was decided, an Illinois court instructed the Chicago Board of Education to treat mandatory maternity leave as it treats other sick leave in respect to sick pay, seniority, and placement for returning.[57] The Illinois court raised similar arguments as in the past. This was the first decision that required the school board to revise its regulations to include sick pay. *La Fleur*

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[54] *Id.* at 449.

[55] 345 F.Supp. 163 (M.D. Fla. 1972).

[56] 345 F.Supp. 501 (S.D. Ohio 1972).

[57] Bravo v. Board of Educ., 345 F.Supp. 155 (N.D. Ill. 1972).

has recently been reversed on appeal,[58] but the Cleveland Board of Education in attempting to uphold its mandatory maternity leave policy has petitioned for certiorari to the U.S. Supreme Court.[59] The decision in the *Cohen* case was affirmed by the Fourth Circuit Court but recently has been reversed upon rehearing.[60] This is where mandatory maternity leave policies in the school systems stand today in the courts.

Conclusion

The school boards have basically raised three arguments in favor of mandatory maternity leave: 1) administrative convenience; 2) medical safeguards; 3) safety of teacher (liability of school board). The administrative argument has failed as the courts have found that it is easier to find substitute teachers for a pregnant teacher who gives some notice than for a teacher who unexpectedly becomes ill. Medical testimony has shown that if there are no complications, a teacher can perform her duties until delivery. In fact, it seems that the first months of pregnancy are often more dangerous than the last months of pregnancy. It also appears that the school boards are having difficulty finding medical testimony to support their maternity leave policy. Thus, the medical argument, too, has failed as the courts have accepted the lower court's decision in *Cohen*, that no two pregnancies are alike and that it should be the teacher's decision (with her doctor's approval) when she should quit working. The safety argument has not won much support in the courts as no school board has brought in conclusive evidence that pregnant teachers are more accident prone, and thus more likely to subject the board to increased tort liability.

The teachers, on the other hand, have brought in medical evidence to substantiate their claims that they can work until delivery. The most convincing argument posed by the teachers is that mandatory maternity leave is discriminatory as it is distinguished from all other sick leaves and all other leaves of absence without rational basis.

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[58] La Fleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972). The Court of Appeals in finding the Cleveland Board of Education's Mandatory Maternity leave policy arbitrary and unreasonable in its overbreadth quoted from the school board's own medical testimony where the doctor stated that he didn't always advise his pregnant patients to stop working. The court could not conclude from the medical evidence presented any medical reason why the board's maternity leave policy should be upheld.

They also stated that basic rights involved in the employment relationship would not be relinquished because of possible embarrassment in the classroom. It was also noted by this court that pregnant students were allowed to continue attending classes without any detriment to the educational system.

[59] *Peition for cert. filed,* 41 U.S.L.W 3315 (U.S. Nov. 27, 1972) (No. 777).

[60] Cohen v. Chesterfield County School Bd., 467 F.2d 262 (4th Cir. 1972), *rev'd on rehearing,* ..... F.2d ..... (4th Cir. 1973). *See,* discussion in notes 8 and 9.

Thus far, during the past year and a half since the lower court decisions in *La Fleur* and *Cohen*, there has been a great victory in the courts for teachers in invalidating mandatory maternity leave provisions.[61] There is no guarantee that the courts will continue to construe mandatory maternity leave policies by the school boards as unconstitutional;[62] a court could easily accept the position in *Cerra* and not use any of the past cases as precedent for their decision. A Supreme Court ruling could help rectify the problem.

Also, many questions have not been answered, as most courts have only ruled on the issue of when a teacher can resign but not on the questions of reemployment and sick pay, which are not yet equivalent to other leaves of absence. The Chicago Board of Education was the only school system that was forced to treat maternity leave the same as all other sick leaves.[63] The Washington Superior Court, in *Truax v. Edmonds School District*,[64] was the only court that dealt with the reemployment problem. It must also be considered that many school systems are still maintaining their mandatory maternity leave policy where it is not being challenged in a court.

The future for striking out mandatory maternity leave policies from school boards' regulations looks even better now that Congress has amended Title VII of the Civil Rights Act of 1964 to make it applicable to public schools.[65] Although Title VII has never been used by teachers in this situation, it is a potential vehicle to invalidate these rules. Teachers are now able to bring suit under Title VII and it will be incumbent upon the school board to show that the pregnant teacher cannot carry out the duties of her job efficiently and safely. Looking at the *Schattman* decision, where the lower court found that the Texas Employment Commission was covered by Title VII, its maternity leave policy failed as not being a bona fide occupational qualification. On appeal, where the fourteenth amendment argument was argued, the court found the commission's regulation reasonable and valid. This might suggest that a teacher would have a better chance of winning in court if she brings an action under Title VII, rather than under the fourteenth amendment.

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[61] How "great" this victory has been is now called into question by virtue of the recent reversal upon rehearing in *Cohen*. *See*, notes 8 and 9.

[62] *See* notes 8 and 9.

[63] Bravo v. Board of Educ., 345 F.Supp. 155 (N.D. Ill. 1972).

[64] Docket No. 107915 (Wash. Super. Ct., Snohomish County, July 30, 1971), *see* Koontz, *Childbirth and Childrearing Leave: Job Related Benefits* 17 N.Y.L. FORUM 480 (1971).

[65] Act of March 24, 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. § 2000e et seq. (1970).

In respect to Title VII, Congress appears to have enacted this law as a means to eliminate arbitrary sex classification. *The Guidelines on Sex Discrimination Because of Sex* adopted by the Equal Employment Opportunity Commission specifically outlaw mandatory maternity leave regulations in Section 1604.10(a), which states "A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII,"[66] and in Section 1604.10(b), requiring employers to treat disabilities caused by childbirth and pregnancy like other temporary disabilities.[67] It can only be hoped that the judiciary will adopt the attitude of the legislature toward sex discrimination by invalidating mandatory maternity leave regulations challeneged in the courts in the future.

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[66] 20 C.F.R. §1604.10(a) (1972).

[67] 29 C.F.R. § 1604.10(b) (1972).

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