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WIMBERLY AND BEYOND: ANALYZING THE REFUSAL TO AWARD UNEMPLOYMENT COMPENSATION TO WOMEN WHO TERMINATE PRIOR EMPLOYMENT DUE TO PREGNANCY

MARY F. RADFORD*

In Wimberly v. Labor & Industrial Relations Commission, the Supreme Court interpreted section 3304(a)(12) of the Federal Unemployment Tax Act (FUTA), which requires that states not deny unemployment benefits "solely on the basis of pregnancy," as an antidiscrimination statute, rather than one requiring preferential treatment for pregnant and formerly pregnant women. Professor Mary Radford argues that given the ambiguous legislative history and other Supreme Court precedent in the area of unemployment compensation, Wimberly could just as easily have held that FUTA's language requires preferential treatment to pregnant and formerly pregnant women. She further argues that given the current realities that women with children are a major component of the workforce and that women generally have no guarantee of job reinstatement when they try to return to work, women should not be disqualified from receiving unemployment benefits, nor should they be presumed ineligible for benefits merely because they were or currently are pregnant. Disqualifying pregnant or formerly pregnant women from receiving unemployment benefits, or presuming them ineligible for such benefits, forces them to make the difficult decision between having income and having children. Professor Radford concludes that pregnant and formerly pregnant women should be granted special treatment in the context of unemployment benefits.

INTRODUCTION

On January 21, 1987, the Supreme Court of the United States handed down its decision in *Wimberly v. Labor & Industrial Relations Commission*.¹ The Court held that the refusal to award unemployment compensation to a woman who terminated employment due to pregnancy did not violate the prohibition on denial of unemployment benefits "solely on the basis of pregnancy" found in the Federal Unemployment Tax Act (FUTA) at section 3304(a)(12).² The claimant in *Wimberly*, a Missouri resident, took a leave of absence in order to give birth to her child.³ Upon becoming physically able to work again, she was informed that her former job was no longer available, and she was unable to find

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¹ 479 U.S. 511 (1987).

² 26 U.S.C. § 3304(a)(12) (1982).

³ *Wimberly*, 479 U.S. at 512.

other employment.⁴ She was denied unemployment benefits because she had left her prior job due to pregnancy, and not, as required by the Missouri statute, for a cause directly attributable to her employer.⁵ The claimant argued that the denial violated FUTA section 3304(a)(12), a provision the states must comply with in order for employers within the state to receive tax credits under the federal unemployment compensation system.⁶ Ms. Wimberly claimed that she was denied benefits "solely on the basis of" her pregnancy.⁷ The United States Supreme Court interpreted FUTA section 3304(a)(12) as a nondiscrimination statute, prohibiting any treatment of pregnant women that is different from the treatment of other persons similarly situated, but not mandating preferential treatment for such women.⁸ The Court found that the claimant was treated under the Missouri law in the same manner as other persons who terminated employment for non-work-related causes and thus was properly disqualified from receiving unemployment benefits.⁹

This interpretation of FUTA section 3304(a)(12) reflected the Supreme Court's decision in *California Federal Savings & Loan Association v. Guerra*,¹⁰ announced a week prior to *Wimberly*, in which the Court construed another statute concerning pregnancy. *Guerra* involved a challenge to a California statute mandating maternity leave with a guarantee of job reinstatement at the end of the leave. Opponents of the statute claimed that it was pre-empted by Title VII of the Civil Rights Act of 1964,¹¹ as amended by the Pregnancy Discrimination Act of 1978 (PDA),¹² since the California statute mandated preferential treatment for women while Title VII and the PDA mandate the equal treatment of men and women.¹³ The Supreme Court agreed that the PDA was a non-discrimination statute, not a statute providing for the special treatment of pregnant women, but held that the PDA did not pre-empt state statutes which provide preferential treatment for pregnant women.¹⁴

These two cases focused renewed attention on the national debate concerning the treatment of pregnant women in the workforce. People on both sides of this debate agree that the ultimate goal of any preg-

⁴ Id.

⁵ Id. Under the applicable Missouri unemployment compensation statute, a worker who leaves employment voluntarily, without a good cause directly attributable to the employer, is disqualified from receiving unemployment compensation. Mo. Rev. Stat. § 288.050.1 (1986).

⁶ 26 U.S.C. § 3302(a) (1982).

⁷ *Wimberly*, 479 U.S. at 514.

⁸ Id. at 522.

⁹ Id.

¹⁰ 479 U.S. 272 (1987).

¹¹ 42 U.S.C. §§ 2000e to 2000e-17 (1982).

¹² Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

¹³ *Guerra*, 479 U.S. at 279.

¹⁴ Id. at 292.

nancy-related policy is the equalization of the participation and competitive ability of women in the workforce.¹⁵ However, they disagree as to the means which should be used to attain this end. "Equal treatment" proponents assert that pregnant workers should be treated in the same manner as other disabled workers, in an attempt to shatter preconceived stereotypes of women as bound to the home and to encourage employers to consider women as "normal" workforce participants, rather than participants who require preferential treatment.¹⁶ Proponents of the "special treatment" approach, on the other hand, argue that certain real differences between the sexes, particularly those related to the reproductive function, must be accommodated in the workforce in order to enable women eventually to compete equally with men.¹⁷ In this context, it can be said that *Wimberly* underlined the notion of equal treatment under federal statutes, while *Guerra*, although affirming an equal treatment interpretation of the PDA, permitted states to follow the route of special treatment.

Wimberly must be examined within both the context of the national debate on pregnancy issues and the context of the American unemployment compensation system and its treatment of pregnant workers. The unemployment system contemplates an interaction between federal and state statutes, rules, and agency rulings. Part I of this Article introduces the statutory framework within which this system operates. This Part also contains an extensive overview of state court interpretations of unemployment statutes dealing with the granting or denial of benefits to pregnant and formerly pregnant women.¹⁸ Included in this overview are discussions of two pivotal cases that preceded *Wimberly* and contributed to the development of both statutory and case law in this area. In the first of these cases, *Turner v. Department of Employment Security*,¹⁹ the United States Supreme Court struck down a Utah unemployment statute that contained a blanket disqualification from the receipt of unemployment benefits for a period surrounding the date of childbirth. This case came before, but was closely aligned with, the enactment of FUTA sec-

¹⁵ See notes 521-22 and accompanying text *infra*.

¹⁶ See text accompanying notes 524-30 *infra*.

¹⁷ See text accompanying notes 531-36 *infra*.

¹⁸ As many of those cases deal with attempts by women to return to work *after* childbirth, the description "pregnant and formerly pregnant women" will be used in this Article to describe that class of women who are denied unemployment compensation either during pregnancy (when they are still physically able to work but unable to find employment) or after childbirth or some other termination of pregnancy (when they are again available to work). This Article does not address the question of whether women should receive some type of compensation during the time when they are actually physically disabled due to pregnancy or childbirth; that question relates more to medical and disability insurance mechanisms than to unemployment compensation.

¹⁹ 423 U.S. 44 (1975).

tion 3304(a)(12). In the second case, *Brown v. Porcher*,²⁰ the United States Court of Appeals for the Fourth Circuit found that a South Carolina statute, construed to disqualify pregnant women from the receipt of unemployment benefits because they had left their most recent work voluntarily and without "good cause," violated FUTA section 3304(a)(12) since it resulted in the denial of benefits solely on the basis of the claimant's pregnancy. This statute is of the same type as that upheld by the United States Supreme Court in *Wimberly*.

Part II of this Article contains a detailed examination of the Court's reasoning in *Wimberly*, as well as an examination of an alternative scheme of reasoning that would have resulted in a holding similar to that of *Brown v. Porcher*. Part III discusses the *Wimberly* case in the context of the equal treatment/special treatment debate surrounding legislation pertaining to pregnant workers. After analyzing *Wimberly* in light of both sides of the debate, it concludes that, absent immediate restructuring of the workforce to reflect the ideals of the equal treatment proponents, the benefits of equal treatment are outweighed by the potential social and financial costs of not giving special accommodation to pregnant and formerly pregnant women in the unemployment context.

I

THE BACKGROUND OF *WIMBERLY*

The American unemployment compensation system has been in existence since 1935.²¹ As the system itself is governed by both federal and state laws, its evolution has taken place on a variety of statutory, judicial, and administrative levels. This Part briefly describes the statutory framework of the unemployment compensation system and then examines in detail those judicial and administrative developments pertaining to the treatment of pregnant and formerly pregnant workers within the system.

A. Statutory Framework: Federal and State Laws Relating to Unemployment Compensation

The unemployment compensation system in the United States has been referred to as "an historical product rather than a logical conception."²² Some states began discussing the enactment of unemployment

²⁰ 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983).

²¹ See Witte, Development of Unemployment Compensation, 55 Yale L.J. 21, 31-32 (1945).

²² Id. at 21. Edwin Witte's article contains an excellent discussion of the history of the unemployment compensation system in the United States. The author served as Executive Director of the Committee on Economic Security, created in 1934 by President Franklin D. Roosevelt to make recommendations concerning the entire social security system. See T. Bro-

compensation legislation as early as 1916, following the country's economic depression of 1914-1915.²³ The depression of the early 1920s focused national attention on unemployment, but the idea of unemployment insurance did not become popular until the beginning of the Great Depression in the early 1930s.²⁴ During this period, a variety of federal and state commissions were created for the purpose of studying and making recommendations regarding unemployment insurance.²⁵ The Democratic national platform upon which Franklin D. Roosevelt was elected stressed "unemployment insurance through state action."²⁶ By 1933, as many as sixty-eight bills relating to unemployment insurance had been introduced in twenty-five states.²⁷ However, when none of these bills were enacted into law,²⁸ it became apparent to Congress that federal legislation would be necessary to induce states to set up systems of unemployment compensation.²⁹ Thus, within the broader context of the Social Security Act of 1935,³⁰ Congress enacted the federal framework for the unemployment compensation system.

The bulk of federal legislation relating to unemployment compensation is now codified in chapter 23 of the Internal Revenue Code of 1986.³¹ This chapter is referred to as the Federal Unemployment Tax Act (FUTA).³² FUTA contemplates an interaction between the federal and state governments in the operation of the unemployment compensa-

den, *Law of Social Security and Unemployment Insurance* § 1.01, at 2 (1962).

²³ Witte, *supra* note 21, at 22-23. American academics had begun discussion of the unemployment insurance issue as early as 1907. *Id.* at 22. Great Britain passed a national unemployment act in 1911. *Id.* The first legislative proposal for unemployment insurance in the United States was introduced in Massachusetts in 1916; it was virtually identical to the British act. *Id.* at 23.

²⁴ See *id.* at 23-25.

²⁵ *Id.* at 26-27.

²⁶ *Id.* at 27.

²⁷ *Id.*

²⁸ *Id.* Although a variety of reasons were voiced to explain the reluctance of states to pass these laws, the overwhelming factor leading to their defeat seemed to be the fear that a state that enacted such a law would hamper the competitiveness of its employers by burdening them with costs that employers in other states would not have to bear. *Id.* at 28; see also Hight, *Unemployment Insurance: Changes in the Federal-State Balance*, 59 *J. Urb. L.* 615 (1982) (discussing federal-state relationship with regard to unemployment insurance laws).

²⁹ See Witte, *supra* note 21, at 28-29.

³⁰ Pub. L. No. 74-271, 49 Stat. 620. For a brief history of the events leading up to the enactment of the Social Security Act of 1935, see T. Broden, *supra* note 22, §§ 1.01-.05.

³¹ 26 U.S.C. §§ 3301-3311 (1982). The taxing provisions of Title IX of the Social Security Act were transferred to the Internal Revenue Code in 1939. Pub. L. No. 76-379, 53 Stat. 1381 (1939). Other provisions relating to unemployment compensation appear in the Social Security Act, 42 U.S.C. §§ 301-1397(f) (1982), principally at subchapter III, 42 U.S.C. §§ 501-504 (grants to states for unemployment compensation administration) and subchapter IX, 42 U.S.C. §§ 1101-1108 (provisions relating to Federal Unemployment Trust Fund).

³² 26 U.S.C. § 3311 (1982). Chapter 23 of the Internal Revenue Code of 1986, which contains the Federal Unemployment Tax Act, is found at 26 U.S.C. §§ 3301-3311 (1982).

tion system. FUTA initially imposes a tax on all employers.³³ The Act then grants a credit against the tax for certain contributions paid by an employer into an unemployment fund maintained under a state unemployment compensation law, provided that the state scheme has been certified by the Secretary of Labor.³⁴ FUTA also allows an employer an additional credit for any reduction in contributions permitted by a state's "experience rating system," a system that reduces contributions based on an employer's past experience with unemployment.³⁵

Under this system, consequently, an employer must be concerned with the payment of two "taxes"—one to the federal government and one to the appropriate state. The current federal tax rate is 6.2% of the wages paid by an employer.³⁶ However, due to the application of the state credits, few employers pay the full federal rate. Credits for payments under state law are limited to 90% of the federal tax.³⁷ As FUTA makes no provision for the actual payment of unemployment benefits to claimants, the federal taxes are used primarily for the administration of the federal unemployment system. In this way, FUTA delegates to the states the basic task of setting up and operating unemployment compensation systems.³⁸

³³ 26 U.S.C. § 3301 (Supp. II 1984). For purposes of FUTA, the term "employer" includes any employer who during any calendar quarter in the current or preceeding calendar paid wages of \$1,500 or more, or any employer who employed at least one individual in employment for 20 weeks (at least part of one day per week) during a calendar year. 26 U.S.C. § 3306(a) (1982).

³⁴ 26 U.S.C. § 3302(a)(1) (1982).

³⁵ *Id.* § 3303(a)(1). All states have some form of reduction in an employer's contributions based on that employer's experience with unemployment. There are basically four "experience rating" systems under which a state may operate: the reserve-ratio system, the benefit-ratio system, the benefit-wage-ratio system, and the payroll variation formula. These systems are discussed in detail at 1B Unempl. Ins. Rep. (CCH) ¶ 1120 (Feb. 13, 1986). See generally Arnold, *Experience Rating*, 55 Yale L.J. 218 (1945) (discussing history, objectives, and different methods of experience rating); Schmidt, *Experience Rating and Unemployment Compensation*, 55 Yale L.J. 242 (1945) (weighing advantages and disadvantages of experience rating); Wagman, *The Mythology of Experience Rating in Unemployment Compensation*, 59 J. Urb. L. 631 (1982) (tracing evolution of experience rating principles through review of factors used in various state systems).

³⁶ 26 U.S.C. § 3301(1) (Supp. II 1984). The rate is 6.0% for employment that began prior to 1976. *Id.* § 3301(2).

³⁷ 26 U.S.C. § 3302(c) (1982).

³⁸ Wisconsin was the only state that actually had an unemployment compensation system in place prior to the passage of the Social Security Act of 1935. Witte, *supra* note 21, at 26-27. However, motivated by the 90% tax credit and the fact that federal law made no provision for the payment of benefits, every state enacted an unemployment compensation law by 1937. *Id.* at 34. Many of these states chose to enact laws which mirrored a draft bill issued by the Social Security Board. *Id.* at 33-34. Consequently, similar language and structure appear in the laws of these states. See Harrison, *Eligibility and Disqualification for Benefits—Forenote: Statutory Purpose and "Involuntary Unemployment,"* 55 Yale L.J. 117, 118 (1945); Witte, *supra* note 21, at 34. See generally Hight, *supra* note 28 (discussing federal-state relationship in unemployment insurance).

Certification of a state's system by the United States Department of Labor is dependent upon the state's unemployment compensation law meeting a number of requirements set out in FUTA.³⁹ In particular, FUTA requires that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."⁴⁰

While, as noted above, FUTA requires a payment of taxes by employers to the federal government, subject to the state credits,⁴¹ it is through the state rather than the federal government that unemployment compensation is paid to individuals. In order to receive unemployment benefits, an individual must, under the appropriate state law, either have earned a specified amount of wages or have worked for a certain time, or both, in a period prior to the time of payment.⁴² This initial qualifying period is often referred to as the base period.⁴³

All states have provisions relating to the "eligibility" of a claimant for unemployment benefits and to "disqualifications" resulting in the denial or deferral of benefits.⁴⁴ In addition to requiring registration with

³⁹ These requirements are found at 26 U.S.C. § 3304 (Supp. II 1984). These provisions require, for instance, that compensation not be denied any individual who is in job training with the approval of the appropriate state agency, 26 U.S.C. § 3304(a)(8) (1982), that compensation not be paid to instructional, research, and administrative personnel in an educational institution during the period between two successive academic years if such individuals are reasonably assured of a job with the institution in the following year, *id.* § 3304(a)(6), and that athletes not be paid unemployment compensation between two successive sport seasons if there is reasonable assurance that the athletes will perform in the later season. *Id.* § 3304(a)(13).

⁴⁰ 26 U.S.C. § 3304(a)(12) (1982).

⁴¹ See text accompanying notes 33-38 *supra*.

⁴² See, e.g., D.C. Code Ann. § 46-110(2) (1987).

⁴³ The base period is typically the first four of the five quarters preceding the quarter in which the claim for unemployment benefits is made. The amount of the benefit paid is usually based upon the average wages earned by the claimant in all or some portion (such as the quarter in which highest wages were earned) of the base period. See 1B Unempl. Ins. Rep. (CCH) ¶ 1901 (Mar. 4, 1986).

⁴⁴ See, e.g., D.C. Code Ann. § 46-110 (1987) (eligibility); *id.* § 46-111 (disqualification). In this context, courts often use the terms "ineligible" and "disqualified" interchangeably. For purposes of this Article, the term "eligibility" and related terms shall refer to those positive criteria relating to the claimant's readiness to re-enter the workforce that are required as a condition of receiving benefits, such as the ability to work and availability for work. The term "disqualification" and related terms shall refer to those situations where the circumstances surrounding an employee's termination of his or her prior employment—for misconduct, for example—result in the denial of benefits.

Eligibility questions—those related to an individual's ability to and availability for work—are most logically associated with the periods of pregnancy or recuperation immediately thereafter. Disqualification questions—those related to an individual's reasons for leaving work—can be relevant during those same periods, but also arise when a formerly pregnant woman applies for and is refused reinstatement to her old position. The period for which benefits are sought is an alternate way to categorize the cases examined in this Article, see Annotation, Termination of Employment Because of Pregnancy as Affecting Right to Unemployment Compensation, 51 A.L.R.3d 254 (1973), but it is not the route taken here. This

the appropriate state unemployment agency, state laws generally require that, in order to be eligible to receive benefits, an individual must be currently "able to work" and "available for work."⁴⁵ A claimant is typically not considered "available for work" unless that individual has been and is "actively and earnestly seeking work,"⁴⁶ and thus "is *bona fide* in the labor market."⁴⁷ The latter concept, often referred to as "labor market attachment,"⁴⁸ reflects the theory that the American unemployment insurance system is "a restricted system whose object is to provide payments based upon past earnings to a carefully selected group of workers for a limited period during occasional lay-offs,"⁴⁹ as opposed to a system providing "the major protection against income loss due to unemployment, covering all or almost all workers and paying, for a significant period of time, benefits that for the vast majority are sufficient to cover subsistence without resort to supplementary public aids."⁵⁰ In short, the eligibility requirements are satisfied "when an individual is willing, able, and ready to accept suitable work which he does not have good cause to refuse."⁵¹

States also have a variety of provisions which disqualify an individual who has left work "voluntarily" without "good cause" or without cause that is "directly attributable" to the employer or to the individual's work.⁵² States also generally disqualify claimants who have been termi-

categorization is avoided because cases often ignore or confuse the period for which benefits are being sought. See note 269 *infra*. While the eligibility-disqualification distinction has also led to confusion, it is a more desirable method of categorization since it is clearly enunciated in the relevant statutes.

⁴⁵ See, e.g., Ind. Code Ann. § 22-4-15-2 (West 1981).

⁴⁶ See, e.g., Mo. Rev. Stat. § 288.040 (Supp. 1986).

⁴⁷ See, e.g., Ga. Code Ann. § 34-8-151 (Supp. 1987).

⁴⁸ The lack of "labor market attachment" has been a preferred rationale for disqualifying from the receipt of unemployment benefits women who left work due to pregnancy. See text accompanying notes 141-50 *infra*.

⁴⁹ Burns, Unemployment Compensation and Socio-Economic Objectives, 55 Yale L.J. 1, 8 (1945).

⁵⁰ *Id.*; see Rosettenstein, Unemployment Benefits and Family Policy in the United States, 20 Fam. L.Q. 393, 393 (1986).

⁵¹ Freeman, Able to Work and Available for Work, 55 Yale L.J. 123, 124 (1945). Under this conception, the availability requirement often overlaps with the disqualifying condition that a claimant must accept suitable work when offered. See text accompanying notes 54, 216 *infra*.

⁵² A recent survey of state laws indicates that 29 jurisdictions use the broad "without good cause" formula, while 23 jurisdictions restrict "good cause" to cause directly attributable to or connected with employment. The District of Columbia, Puerto Rico, and the Virgin Islands are included in these statistics, while the state of Colorado has not adopted either of these approaches. Rosettenstein, *supra* note 50, at 396. But see *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511, 515-16 (1987) (only "[a] few States" require that cause for termination be directly attributable to the employer); *Porcher v. Brown*, 459 U.S. 1150, 1152 (1983) (White, J., dissenting from denial of cert.) (only nine jurisdictions use the "without good cause" formula).

nated from employment due to misconduct,⁵³ refusal to accept suitable work,⁵⁴ or a labor dispute.⁵⁵ All of these disqualification provisions support the generally accepted notion that unemployment benefits should be paid only in the event of involuntary unemployment incurred through no fault of the claimant.⁵⁶

The term disqualification is perhaps misleading in that most states do not disqualify the claimant from ever receiving benefits or even force the claimant to repeat the initial base period requirements.⁵⁷ Rather, most state disqualification provisions postpone the receipt of benefits either for a specified period of time after termination of employment⁵⁸ or until the claimant has been re-employed and has earned a specified amount of wages, usually a multiple of the weekly amount that would have been received as unemployment benefits.⁵⁹

Most of the issues pertaining to unemployment benefits for pregnant and formerly pregnant women have arisen in the context of the eligibility criteria and the conditions for disqualification. Prior to discussing these issues, however, it is important to outline the evolution of the statutory and case law framework relating expressly to unemployment due to pregnancy.

As noted above,⁶⁰ the federal unemployment law contains certain criteria that state unemployment laws must meet in order to make employers of that state eligible for the credit for state unemployment taxes paid. The original Social Security Act contained only minimal limita-

⁵³ See Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 *Yale L.J.* 147, 160-66 (1945).

⁵⁴ See Menard, *Refusal of Suitable Work*, 55 *Yale L.J.* 134 (1945). As was noted earlier, this disqualification provision may overlap with the eligibility requirement that a claimant be able and available to accept suitable work. See note 51 *supra*.

⁵⁵ See Lesser, *Labor Disputes and Unemployment Compensation*, 55 *Yale L.J.* 167 (1945).

⁵⁶ Harrison, *supra* note 38, at 118-19. The preamble of the Social Security 1936 Draft Bill stated that "persons who are unemployed through no fault of their own" should qualify for benefits. *Id.* at 118 (quoting Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Type* (1936)). This language was integrated into many states' laws. See Harrison, *supra* note 38, at 118.

⁵⁷ See note 43 and accompanying text *supra* (discussing base period requirements).

⁵⁸ See, e.g., Ga. Code Ann. § 34-8-158(2) (Supp. 1987) (up to eleven weeks after a discharge for misconduct); Vt. Stat. Ann. tit. 21, § 1344(a)(1) (1987) (six to twelve weeks after a discharge for misconduct); W. Va. Code § 21A-6-3(2) (1985) (six weeks following discharge for misconduct).

⁵⁹ See, e.g., Mo. Rev. Stat. § 288.050(1) (Supp. 1986) (claimant must earn ten times the weekly benefit amount); Okla. Stat. Ann. tit. 40, § 2-404 (West 1986) (claimant who leaves voluntarily without good cause connected to work must earn ten times weekly benefit amount); Vt. Stat. Ann. tit. 21, § 1344(a)(2) (1987) (claimant who leaves work voluntarily without good cause attributable to work or is discharged for gross misconduct must earn six times weekly benefit amount).

⁶⁰ See text accompanying notes 39-40 *supra*.

tions on states.⁶¹ In the 1970s, however, Congress added new requirements, particularly in the Unemployment Compensation Amendments of 1976.⁶² Those amendments extended the coverage of FUTA to agricultural workers, household workers, and state and local government workers;⁶³ raised the federal unemployment tax rate and wage base;⁶⁴ and added five new requirements for state laws necessary for employers to qualify for the federal tax credit.⁶⁵ Included among these requirements was that codified at FUTA section 3304(a)(12), which mandates that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."⁶⁶

Two important events occurred just prior to the enactment of the 1976 amendments to FUTA. The first of these events was the decision by the United States Supreme Court in *Turner v. Department of Employment Security*.⁶⁷ In that case, the Court struck down a state statute which conclusively presumed that a pregnant woman was unable to work, and therefore ineligible for unemployment benefits, for twelve weeks prior to childbirth.⁶⁸ Although reports from both the House and the Senate indicate that Congress was aware of the *Turner* decision and intended to codify that decision in its 1976 amendment of FUTA,⁶⁹ this could not have been the initial impetus for the bills which became the Unemployment Compensation Amendments of 1976, since the bills were actually introduced a month before the Supreme Court's decision in *Turner*.⁷⁰ The legislative history of section 3304(a)(12) can be read to sup-

⁶¹ These consisted mainly of the requirements that unemployment compensation be paid through public agencies and that benefits could not be denied to workers who refused to take a job which had become vacant due to a strike, which required or prohibited the joining of a union, or which paid lower wages or had lower working conditions than the prevailing community standards for comparable work. See Hight, *supra* note 28, at 616.

⁶² Pub. L. No. 94-566, 90 Stat. 2667 (codified in scattered sections of U.S.C.).

⁶³ Id. §§ 111, 112, 113, 115, 90 Stat. at 2667-70 (codified at 26 U.S.C. § 3306 (1982)).

⁶⁴ Id. § 211, 90 Stat. at 2676 (codified at 26 U.S.C. §§ 3301, 3306 (1982)).

⁶⁵ Id. §§ 312, 314, 90 Stat. at 2679-80 (codified at 26 U.S.C. § 3304(a) (1982)).

⁶⁶ Id. § 312, 90 Stat. at 2679 (1976) (codified at 26 U.S.C. § 3304(a)(12) (1982)). In addition to the requirement that an individual not be denied benefits solely on the basis of pregnancy, the 1976 amendments added the requirements that benefits not be paid to professional athletes between seasons, that benefits not be paid to aliens not legally admitted to the United States for permanent work or residence purposes, that benefits be reduced by the amount of retirement benefits received, and that the records of state unemployment agencies be made available to welfare agencies for determining eligibility for aid to families with dependent children. These requirements were codified at 26 U.S.C. §§ 3304(a)(13), (14), (15), and (16) respectively.

⁶⁷ 423 U.S. 44 (1975).

⁶⁸ See text accompanying notes 323-30 *infra* (discussing *Turner*).

⁶⁹ See S. Rep. No. 1265, 94th Cong., 2d Sess. 19, reprinted in 1976 U.S. Code Cong. & Admin. News 5997, 6013 [hereinafter S. Rep. No. 1265]; H.R. Rep. No. 755, 94th Cong., 1st Sess. 50 (1975) [hereinafter H.R. Rep. No. 755].

⁷⁰ H.R. 10210 was introduced in October of 1975. H.R. 10210, 94th Cong., 1st Sess.

port both the argument that the section was meant merely as a codification of *Turner* and the argument that Congress intended that this amendment have a broader scope. On the one hand, the report of the Senate Finance Committee, issued several months after the *Turner* decision, included the broad statement that, "in a number of States, an individual whose unemployment is related to pregnancy is barred from receiving any unemployment benefits."⁷¹ This seems to indicate that the portion of the bill which became section 3304(a)(12) was meant to allow pregnant and formerly pregnant employees to receive unemployment benefits without meeting the eligibility and qualifications requirements. On the other hand, the same Report went on to quote the Supreme Court's decision in *Turner*.⁷² The Report summarized the action of Congress as follows:

The committee bill includes, without modification, the provision of the House bill which would prohibit States from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.⁷³

The House report on the bill seems to indicate that Congress intended a broader focus for section 3304(a)(12), beyond just those statutes containing a presumptive period of ineligibility. This report states: "At the present time, 19 States have provisions which, in effect, deny benefits because of pregnancy. They vary from State to State, but they are all inequitable in that they deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work."⁷⁴

The reference in the House report to the nineteen states is apparently a reference to those states listed in a 1975 Unemployment Insurance Program Letter, in which the Department of Labor listed a variety

(1975). The United States Supreme Court's decision in *Turner* was handed down on November 17, 1975. The petitioner in *Wimberly* considered this timing as an important indication that § 3304(a)(12) was not meant merely as a codification of *Turner*. Brief for Petitioner at 20, *Wimberly v. Labor and Indus. Relations Comm'n*, 479 U.S. 511 (1987) (No. 85-129). However, the respondent, as well as the American Civil Liberties Union and others as amicus curiae, dismissed this timing as unimportant, asserting that the legislative history following the *Turner* decision indicates that the case itself was consistently proffered as the rationale behind § 3304(a)(12). Brief for Respondent at 32, *Wimberly v. Labor and Indus. Relations Comm'n*, 479 U.S. 511 (1987) (No. 85-129); Brief of the American Civil Liberties Union, National Women's Political Caucus, and Cost Employment Project, as Amicus Curiae, at 10-11, *Wimberly v. Labor and Indus. Relations Comm'n*, 479 U.S. 511 (1987) (No. 85-129).

⁷¹ S. Rep. No. 1265, supra note 69, at 19-21, 1976 U.S. Code Cong. & Admin. News at 6013-15.

⁷² Id.

⁷³ Id. at 21, 1976 U.S. Code Cong. & Admin. News at 6015.

⁷⁴ H.R. Rep. No. 755, supra note 69, at 50.

of state statutes that discriminate on the basis of pregnancy, marital obligations, and dependents' allowances.⁷⁵ The issuance of this Letter was the other important event surrounding the enactment of section 3304(a)(12). The Letter listed nineteen state statutes that expressly and conclusively named pregnancy as a condition that would result in the denial of unemployment benefits based either on ineligibility or disqualification. As will become clear in the discussions that follow,⁷⁶ this listing has remained a focal point of judicial interpretations of the prohibition in section 3304(a)(12) against the denial of unemployment benefits "solely on the basis of pregnancy."

B. Treatment of Pregnancy Within the Unemployment Compensation System

Whether pregnant or formerly pregnant women should receive unemployment benefits is a question that arises in a variety of contexts in the application of both the federal and state unemployment insurance laws. Prior to the enactment of section 3304(a)(12) of FUTA, many state laws expressly denied pregnant or formerly pregnant women unemployment benefits for reasons related solely to their pregnancy. In addition, both administrative agencies and state courts have denied, and continue to deny, unemployment benefits to women who have separated from employment due to pregnancy.⁷⁷

It is difficult to provide a coherent structure to the multitude of statutes, cases, and administrative rulings that have dealt with pregnancy in the context of unemployment compensation. Despite the fact that some of the statutes and cases use the concepts of "ineligibility" for unemployment benefits and "disqualification" from the receipt of such benefits interchangeably, this discussion will be divided into two such sections. The first section will discuss those sources that deal with the eligibility of pregnant or formerly pregnant women for benefits, and the second will examine those sources that determine whether leaving work due to pregnancy results in disqualification for receipt of unemployment benefits.

Each of these sections will begin with a review of those state statutes and administrative policies that expressly designated pregnancy as a basis for the denial of unemployment benefits. As discussed above,⁷⁸ in conjunction with the congressional hearings on the enactment of FUTA section 3304(a)(12) and the publicity surrounding the United States

⁷⁵ United States Dep't of Labor, Unemployment Insurance Program Letter No. 33-75 (Dec. 8, 1975), reprinted in [1975-1979 Transfer Binder] 1B Unempl. Ins. Rep. (CCH) ¶ 21,482 [hereinafter UIPL No. 33-75].

⁷⁶ See text accompanying notes 407-09, 458-62, 471-75 *infra*.

⁷⁷ See notes 103-38, 160-293 and accompanying text *infra*.

⁷⁸ See text accompanying notes 75-76.

Supreme Court's decision in *Turner*, the United States Department of Labor released two Unemployment Insurance Program Letters whose purpose was "[t]o inform the States of the U.S. Supreme Court's decision in the *Turner* . . . case and its implications for State law provisions, interpretations, and policies which provide for blanket disqualification or ineligibility of pregnant women."⁷⁹ Letter No. 33-75 consisted of a summary of discriminatory state provisions relating to pregnancy, domestic and marital obligations, and dependents' allowances. Among the forty-two state statutes listed were the statutes of nineteen states that expressly referred to pregnancy as a condition for the denial of unemployment benefits.⁸⁰ These included both statutes that rendered pregnant women per se

⁷⁹ United States Dep't of Labor, Unemployment Insurance Program Letters No. 1-76 (Feb. 4, 1976), reprinted in [1975-1979 Transfer Binder] 1B Unempl. Ins. Rep. (CCH) ¶ 21,482 [hereinafter UIPL No. 1-76]; UIPL No. 33-75, *supra* note 75.

⁸⁰ On May 4, 1976, a Department of Labor opinion letter was published containing a synopsis of several state laws regarding pregnancy and eligibility for unemployment benefits. UIPL No. 33-75, *supra* note 75. In the ensuing 11 years, many of those statutes have either been repealed entirely or changed significantly. The following is a list of the states mentioned in the letter with the laws as they were in 1976 and the current version of the laws, if any: ALABAMA. Under the former law, a claimant was eligible for benefits 10 weeks after maternity leave. Beyond that, a claimant had to give three weeks' notice of her desire to return to work and must not have refused reinstatement to suitable work in order to remain eligible. Ala. Code § 214(B) (1975). The current law is the same. Ala. Code § 25-4-78(2) (1986). ARKANSAS. Under the former law, a claimant was disqualified if she voluntarily and without good cause connected with work left her employment. The disqualification continued until she had completed at least 30 days of paid work. No claimant could be disqualified because she voluntarily left work due to pregnancy if the claimant made reasonable efforts to preserve her job. See Ark. Stat. Ann. § 81-1106(a) (1976 & Supp. 1985). The current law is the same. Ark. Stat. Ann. § 11-10-513 (1987). CALIFORNIA. UIPL No. 33-75 did not mention a former California law that authorized benefits for women denied maternity leave after giving birth who had voluntarily quit employment. See Cal. Unempl. Ins. Code § 1264.2 (West 1986). This section was repealed in 1978. *Id.* COLORADO. Under the former law, if claimant left voluntarily prior to childbirth, she was disqualified until termination of pregnancy; if she left involuntarily, she was eligible until 30 days before birth. After childbirth, a claimant was disqualified until she had worked 13 weeks, unless she was the sole supporter of a child, in which case she was eligible 30 days after childbirth. Col. Rev. Stat. 8-73-108. This law was repealed in 1984. See Colo. Rev. Stat. 8-73-108(8) (1986). DELAWARE. Under the former law, a claimant was disqualified for any week she was unable to work or unavailable for work because of pregnancy; to establish availability after childbirth, a doctor's certificate was required. Del. Code Ann. tit. 19, § 3315(9). Under the current law, sub-section nine no longer relates to pregnancy. The current law disqualifies anyone who leaves work voluntarily without good cause attributable to the work. Del. Code Ann. tit. 19, § 3315 (1985). DISTRICT OF COLUMBIA. Under the former law, a claimant was disqualified six weeks before and six weeks after childbirth. D.C. Code Ann. § 46-310(h) (1973). Under the current law, the eligibility of pregnant or formerly pregnant women is to be determined under the same standards as for any other claimant. D.C. Code Ann. § 46-111(b) (1987). INDIANA. Under the former law, a claimant was disqualified from the time of separation until she earned 10 times the weekly benefit amount, but only if she failed to apply for or accept leave under the employer's plan. See Ind. Code Ann. § 22-4-15-1 (West 1981). Under the current law, a person is ineligible for benefits if she fails without good cause to apply for work, to accept an offer of work, or to return to her customary self-employment. The ineligibility continues until the individual

ineligible for unemployment benefits and statutes that expressly *disqualified* women who had terminated their employment due to pregnancy. The Utah statute struck down by the Supreme Court in *Turner* fell into

earns an amount equal to eight times the benefit amount. *Id.* § 22-4-15-2. KANSAS. Under the former law, a claimant was deemed unavailable for work 90 days before and 30 days after birth. Kan. Stat. Ann. § 44-705(c) (1949). This law has been repealed. See Kan. Stat. Ann. § 44-705(c) (1986). KENTUCKY. The current law does not specifically mention pregnancy, though disqualification applies to any employee who voluntarily leaves work without good cause attributable to the employment. Ky. Rev. Stat. Ann. § 341.370(1)(c) (Michie/Bobbs-Merrill 1983). MARYLAND. Under the former law, the claimant was disqualified for any period of disability as a result of pregnancy. Md. Ann. Code art. 95A, § 6(f). This statute has been repealed. See Md. Ann. Code art. 95A, § 6(f) (1985). MINNESOTA. Under the former law, a claimant was disqualified from the date of separation until she had had two weeks of insured work. Minn. Stat. § 268.09(2) (1959). This statute was repealed in 1977. See Minn. Stat. § 268.09(2) (Supp. 1988). MISSISSIPPI. Under the former law, an individual was disqualified from the receipt of benefits until she had earned at least eight times the weekly benefit amount, if she left work for marital, domestic, or filial circumstances and obligations. Miss. Code Ann. § 71-5-513(1) (1972). The current law is the same, except the state has added a sentence saying pregnancy shall not be deemed to be a marital, filial, or domestic circumstance for the purposes of this provision. Miss. Code Ann. § 71-5-513(1) (Supp. 1987). MONTANA. Under the former law, a claimant was disqualified if she left her job during and due to pregnancy, and was then ineligible for two months, both before and after childbirth. Mont. Code Ann. § 39-51-2302 (1973). This statute has been repealed. See Mont. Code Ann. § 39-51-2302 (1987). NEVADA. Under the former law, an individual was disqualified if unemployed due to pregnancy. Nev. Rev. Stat. § 612.435 (1973). This statute has been repealed. See Nev. Rev. Stat. § 452 (1973). NEW JERSEY. Under the former law, an individual was deemed unavailable for work four weeks before and four weeks after childbirth. N.J. Stat. Ann. § 43:21-4(c)(1) (West 1962). The current law no longer mentions pregnancy. N.J. Stat. Ann. § 43:21-4(c)(1) (West Supp. 1987). OHIO. Under the former law, an individual was not entitled to benefits if she quit work due to pregnancy. Ohio Rev. Code Ann. § 4141.29(D)(2)(c) (Anderson 1973). The reference to pregnancy has been deleted under the current law. Ohio Rev. Code Ann. § 4141.29(D)(2)(c) (Anderson 1980). OREGON. Under the former law, an individual was presumed unable to work if unemployed because of pregnancy. Or. Rev. Stat. Ann. § 657.155 (1973). This statute has been repealed. See Or. Rev. Stat. Ann. § 657.155 (1987). RHODE ISLAND. Under the former law, there existed a rebuttable presumption of inability to work from four months before, to six weeks after childbirth. R.I. Gen. Laws § 28-44-6(B) (1972). This statute has been repealed. See R.I. Gen. Laws § 28-44-12 (1986). TENNESSEE. Under the former law, an individual was disqualified due to pregnancy from the date of separation until 20 days after claimant was able to work. Tenn. Code Ann. § 50-1324(a) (1974). Under the current law, pregnancy is to be treated like other disabilities. Tenn. Code Ann. § 50-7-303(1) (1983). TEXAS. Under the former law, by administrative policy, claimant was deemed unavailable for work from the date of separation until six weeks after childbirth. See UIPL No. 33-75, *supra* note 75. Under the current law, a claimant is disqualified if she left employment voluntarily without good cause connected with work. No claimant still available for work is disqualified for leaving due to pregnancy. Tex. Rev. Civ. Stat. Ann. art. 5221b-3 (Vernon 1987). UTAH. Under the former law, a claimant was disqualified for twelve weeks before and six weeks after childbirth, or for any week of unemployment due to pregnancy. Utah Code Ann. § 35-4-5(h) (1953). This statute was repealed in 1976. See Utah Code Ann. § 35-4-5 (Supp. 1987). WEST VIRGINIA. Under the former law, a claimant was disqualified from the time of separation until she worked 30 days in covered employment. Disqualification would be for no more than six weeks before and six weeks after childbirth with medical evidence of ability to work. W. Va. Code § 2366(78)(6) (1961). Under the current law there are no express references to pregnancy. See W. Va. Code § 21A-6.3(6) (1985).

this category of statutes that discriminated expressly on the grounds of pregnancy. Obviously, as a result of the *Turner* decision and the enactment of section 3304(a)(12), most of the statutes that singled out pregnancy for discriminatory treatment are no longer in effect. However, vestiges of this attitude—the treatment of pregnancy as a unique unemployment situation—remain both in administrative rulings and in cases.

The sections on eligibility and disqualification each then deal with the construction and application of “neutral laws”—those that do not expressly name pregnancy as a condition that would result in the denial of unemployment benefits. Into this latter set of laws falls the type of statute examined by the Fourth Circuit in *Brown v. Porcher*,⁸¹ and later by the United States Supreme Court in *Wimberly v. Labor & Industrial Relations Commission*.⁸²

A final section discusses those cases decided before *Wimberly* that examined the validity of statutes which resulted in the denial of unemployment benefits to pregnant or formerly pregnant women. It discusses both constitutional challenges, such as the challenge upheld in *Turner*, and challenges made under FUTA section 3304(a)(12), such as those in *Brown* and *Wimberly*.

1. *Eligibility of Pregnant or Formerly Pregnant Women for Unemployment Benefits*

As discussed above,⁸³ an individual generally is deemed to be “ineligible” to receive unemployment benefits unless he or she is both “able” to work and “available” for work. As one court has noted, the purpose of requirements such as these is “to make sure that compensation is not paid to those who choose not to work, that the compensation law does not encourage idleness, and that it does not weaken the willingness of the individual to provide for himself through employment.”⁸⁴

a. *State statutes expressly naming pregnancy as grounds for ineligibility.* Many of the state statutes listed in Department of Labor Letter No. 35-75⁸⁵ automatically defined pregnant women who left their jobs as unable to work or unavailable for work. Some of these statutes delineated certain pre- and post-childbirth periods as periods of automatic ineligibility.⁸⁶ A statute of this type was struck down as unconstitutional in the Supreme Court’s per curiam opinion in *Turner v. Department of Em-*

⁸¹ 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983).

⁸² 479 U.S. 511 (1987).

⁸³ See text accompanying notes 45-51 *supra*.

⁸⁴ *Algiers Homestead Assoc. v. Brown*, 246 La. 738, 743, 167 So. 2d 349, 351 (1964).

⁸⁵ Note 75 *supra*.

⁸⁶ See note 80 *supra*.

*ployment Security.*⁸⁷

In contrast to the statutes that delineated periods of presumed ineligibility for unemployment benefits, another type of state statute created a rebuttable presumption that a woman who had left employment due to pregnancy was not able to work and therefore not eligible for unemployment benefits. Under this type of statute, a woman was ineligible until she had proof, usually in the form of a doctor's certificate, that she was able and available to resume employment.⁸⁸ Courts were somewhat lenient in construing such statutes in cases where an employee was forced by the employer to discontinue work due to her pregnancy.⁸⁹ For example, in *Guerra v. Archie*,⁹⁰ an employee was discharged when her employer found out from another employee that she was two months pregnant.⁹¹ The employee was denied unemployment benefits on the basis of a Nevada statute providing that an individual was disqualified for benefits from the point in time in which the individual was "separated from work because of pregnancy" until the individual submitted proof of ability to work following childbirth.⁹² The Nevada statute also contained a section which provided that "a claimant's unemployment shall be deemed to be due to pregnancy if such unemployment existed within sixty days of expected confinement."⁹³ Considering the two sections together, the court concluded that the only time in which a pregnancy-related termination was a per se disqualification for benefits was during the sixty days immediately preceding the expected birth.⁹⁴ Otherwise, the court directed that

⁸⁷ 423 U.S. 44 (1975); see text accompanying notes 323-30 *infra*.

⁸⁸ The Department of Labor recorded the existence of such statutes in Delaware, Maryland, Montana, Nevada, Ohio, and West Virginia. See UIPL No. 33-75, *supra* note 75.

⁸⁹ Such mandatory leave policies have been subjected to increased scrutiny since the enactment of the Pregnancy Discrimination Act (PDA) in 1978. See Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)). One of the most important purposes of the PDA, as noted in the legislative history, was to prohibit employers from forcing pregnant women who were actually able to work to take maternity leaves of absence. H.R. Rep. No. 948, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4754. A recent example of this scrutiny appears in *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987), in which a home for mentally retarded persons placed an employee who was four and one half months pregnant on unpaid maternity leave. The employer realized the employee was still fully able to work but claimed that the leave was justified by its concern for the employee's health and its own potential liability if the employee or a patient was injured. *Id.* at 647. The Court of Appeals for the Eighth Circuit found that the employer had not established that its considerations concerning the employee's pregnancy constituted a bona fide occupational qualification. *Id.* at 649. But see note 114 *infra* (discussing airlines' mandatory maternity leave policies that have been successfully defended on grounds of passenger safety).

⁹⁰ 88 Nev. 172, 494 P.2d 957 (1972).

⁹¹ *Id.* at 172, 494 P.2d at 958.

⁹² Nev. Rev. Stat. § 612.435 (1967) (repealed 1973).

⁹³ *Id.* § 612.440(2). These two statutes seem to have confused the distinction between disqualification for benefits and ineligibility for benefits. See note 44 *supra*.

⁹⁴ *Guerra*, 88 Nev. at 173, 494 P.2d at 958.

the unemployment commission should decide eligibility and qualification based upon the facts and circumstances of each case.⁹⁵ The court concluded, consequently, that the employee was not automatically disqualified from receiving employment benefits at any time other than the sixty days prior to childbirth.⁹⁶

A similar result was reached earlier in *Kugler v. Unemployment Compensation Board of Review*.⁹⁷ There, an employee had been discharged when she was six weeks pregnant because her employers were concerned about her personal safety.⁹⁸ The Pennsylvania unemployment compensation law provided that a claimant for unemployment benefits would be "conclusively presumed to be unavailable for work with respect to any weeks of unemployment attributable to pregnancy."⁹⁹ The *Kugler* court, however, refused to apply that provision of the statute to this particular claimant, finding her both willing and able to perform her usual work at the time she was separated from employment.¹⁰⁰ The court concluded:

If the legislature had intended to make pregnancy *per se* a disqualification for benefits, it would undoubtedly have said so in explicit language. However, it did not, and in view of the purpose of the act to relieve the rigors of involuntary unemployment, the only logical construction to be placed upon "attributable to pregnancy" is that if pregnancy affected the work or health of an employee and as a result she was either discharged or left her employment, she would not be entitled to benefits.¹⁰¹

In addition to these two types of statutes which rendered pregnant women *per se* unavailable for work, a third set of state statutes and administrative policies dictated that a woman on a maternity leave of absence was automatically ineligible for unemployment benefits.¹⁰² Under these statutes, if a woman left on maternity leave, whether voluntarily or due to a mandate by her employer, she was automatically considered, while on that leave, to be unavailable for work. These statutes, therefore,

⁹⁵ *Id.* The Court based its decision on an interpretation of a similar statute by the Supreme Court of Kansas in *Boeing Co. v. Kansas Employment Sec. Bd. of Review*, 193 Kan. 287, 392 P.2d 904 (1964). *Guerra*, 88 Nev. at 173, 494 P.2d at 958.

⁹⁶ *Guerra*, 88 Nev. at 173, 494 P.2d at 958.

⁹⁷ 177 Pa. Super. 550, 112 A.2d 453 (1955).

⁹⁸ *Id.* at 551, 112 A.2d at 453.

⁹⁹ Act approved Aug. 24, 1953, No. 396, § 3, 1953 Pa. Laws 1397 (repealed 1971).

¹⁰⁰ 177 Pa. Super. at 553, 112 A.2d at 454.

¹⁰¹ *Id.* at 552, 112 A.2d at 454. The court in this case used the term disqualification but seems to be referring to an eligibility statute.

¹⁰² According to the Department of Labor Letter, the following states considered a woman ineligible for unemployment benefits from the "date of separation" from work with her employer: Arkansas, Colorado, Indiana, Minnesota, Ohio, Tennessee, Texas, and West Virginia. UIPL No. 33-75, *supra* note 75.

allowed employer policies to dictate periods of unavailability for pregnant workers, since the length of an employee's maternity leave of absence was determined not by statute but rather by the employer's leave policy.

b. Eligibility under neutral statutes. Even when statutes do not single out pregnancy for special treatment, the unemployment agencies of some states consider women who are on maternity leaves of absence to be unavailable for work simply by virtue of the nature of the leave. This presumption applies both to pregnant women and women who have recently given birth; it applies despite the fact that the state statute does not delineate pregnancy as a condition imposing ineligibility.

The application of this rule to pregnant women who terminated employment with one employer but were seeking less physically taxing employment prior to childbirth was explained in *Lauderdale v. Division of Employment Security*.¹⁰³ In this case, the claimant, under her doctor's orders, took a leave from work five months prior to the date of delivery of her child.¹⁰⁴ The claimant's doctor, however, agreed that she was physically able to do lighter work during the months prior to childbirth.¹⁰⁵ The claimant contacted at least two potential employers per week in her unsuccessful search for such employment.¹⁰⁶ The state unemployment commission denied her application for benefits, however, determining that "she was ineligible for benefits because she was on maternity leave of absence and was not considered available for work."¹⁰⁷ The Missouri Court of Appeals affirmed the commission's decision, stating:

[T]he [Labor and Industrial Relations] Commission could find that the claimant was not genuinely attached to the labor market since by accepting the leave of absence she limited her availability for work because the very conditions limiting her availability for her regular employment also substantially limited her from performing suitable work for other employers, and her intention to return to her regular job, which her employer admittedly was holding for her, after the birth of the child limited her employment opportunities.¹⁰⁸

Under this theory, because the employee was not able to work for her *current* employer, she was found to be unavailable for any work with *any*

¹⁰³ 605 S.W.2d 174 (Mo. Ct. App. 1980).

¹⁰⁴ *Id.* at 175.

¹⁰⁵ *Id.* at 176. The claimant's current employment as a cashier and stock clerk involved too much heavy lifting and prolonged periods of standing. Her physician had given her a note permitting her to do light work not involving excessive walking. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 178.

employer.¹⁰⁹

Women with the least amount of training and job skills are apt to suffer the most under this theory. For example, in *Petty v. University of Delaware*,¹¹⁰ a custodian was forced to leave work due to medical complications early in her pregnancy that resulted in her inability to continue heavy lifting and prolonged standing.¹¹¹ Due to her physical condition and her lack of training in secretarial or clerical work, the unemployment board found, and the court affirmed, that the claimant was unable to perform *any* job functions for which she was qualified and thus was ineligible to receive unemployment benefits.¹¹²

On the other hand, most courts that have examined "neutral" state eligibility laws in the case of a pregnant woman who wishes to continue to work have concluded that pregnancy alone does not automatically render a woman unavailable for work. For example, in *Baeza v. Pan American/National Airlines*,¹¹³ a Florida court refused to hold that flight attendants who were not allowed to fly when pregnant, and who were receiving accumulated sick pay during their maternity leaves, were automatically unable to work and thus ineligible for benefits.¹¹⁴ The *Baeza* court distinguished these flight attendants, who had "not been shown to be unavailable for other work in positions that do not require flying,"¹¹⁵ from the claimant in *Monsanto v. Florida Department of Labor & Employment Security*,¹¹⁶ who, the evidence clearly indicated, was not able to work during the period of her company-approved maternity leave.¹¹⁷

¹⁰⁹ But see Freeman, *supra* note 51, at 126. Although the Freeman article was written long before the decision in the *Lauderdale* case, Freeman noted that:

[U]nemployment compensation was never intended to be used for the purpose of restricting the mobility of workers, nor was the availability requirement intended so to restrict the workers. The purpose of the availability requirement is to test a claimant's attachment to a labor market, not his attachment to one occupation or to one employer.

Id.

¹¹⁰ 450 A.2d 392 (Del. 1982).

¹¹¹ *Id.* at 394.

¹¹² *Id.* at 397. This author finds it extremely difficult to believe that the only jobs for which a person lacking secretarial skills is qualified are those involving heavy lifting and prolonged standing. This reasoning indicates, among other things, that an individual who uses a wheelchair and has no secretarial skills is not qualified to perform *any* job.

¹¹³ 392 So. 2d 920 (Fla. Dist. Ct. App. 1980).

¹¹⁴ *Id.* at 924. The mandatory maternity leave policies of airlines have been upheld against challenges that they violate the Pregnancy Discrimination Act on the grounds they are necessary for insuring passenger safety. See *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980). But see *Battersby v. Caldwell*, 1B Unempl. Ins. Rep. (CCH) ¶ 1950 (N.D. Ga. Mar. 11, 1981) (union agreement rendering pregnant airline attendants ineligible for unemployment benefits by categorizing maternity leaves as "voluntary" violates equal protection principles).

¹¹⁵ *Baeza*, 392 So. 2d at 924.

¹¹⁶ 371 So. 2d 594 (Fla. Dist. Ct. App. 1979).

¹¹⁷ *Id.* at 595; see *Baeza*, 392 So. 2d at 924; see also *School Bd. of Volusia v. Florida Dept.*

In *Gols v. Ross*,¹¹⁸ a claimant was discharged by her employer due to pregnancy.¹¹⁹ In the last weeks of her pregnancy she made several unsuccessful attempts to find work.¹²⁰ She was then denied unemployment benefits by the state agency on the ground that she was not available for work.¹²¹ The New York court reversed the denial, stating that "[t]he fact that a woman is pregnant . . . does not automatically disqualify her from the availability of benefits."¹²²

The state of Pennsylvania has established through case law that "a woman may not be presumed unavailable for work simply because she was placed on a pregnancy leave of absence."¹²³ However, the additional question of whether the leave of absence is "voluntary" will have a bearing on eligibility for unemployment benefits. For example, in both *Wincek v. Commonwealth, Unemployment Compensation Board of Review*¹²⁴ and *Bogucki v. Commonwealth, Unemployment Compensation Board of Review*,¹²⁵ the claimants, in the later months of their pregnancies, took maternity leaves of absence when they found they could not perform the ordinary duties of their jobs. Each employee offered a note from her doctor indicating that she was still able to do less physically taxing work. In both cases, the court rejected as a matter of law a presumption that an individual on a maternity leave is unavailable for work.¹²⁶ However, the court distinguished between cases in which the leave of absence was voluntary and cases in which it was involuntary.¹²⁷ In *Bogucki*, the facts indicated that the claimant had requested lighter work from her employer and had taken a leave of absence only when such work was not available.¹²⁸ The court stated that "the preg-

of Labor & Employment Sec., 393 So. 2d 70 (Fla. Dist. Ct. App. 1981) (teacher on maternity leave admittedly was unable to work and did not actively seek work during period for which she was denied benefits).

¹¹⁸ 59 A.D.2d 994, 399 N.Y.S.2d 337 (1977).

¹¹⁹ Id. at 994, 399 N.Y.S.2d at 338.

¹²⁰ See id.

¹²¹ Id.

¹²² Id. at 995, 399 N.Y.S.2d at 338.

¹²³ *Wincek v. Commonwealth, Unemployment Compensation Bd. of Review*, 50 Pa. Commw. 237, 412 A.2d 699, 701 (1980); see also *Pennsylvania Elec. Co. v. Commonwealth, Unemployment Compensation Bd. of Review*, 69 Pa. Commw. 214, 450 A.2d 779 (1982) (pregnant woman placed on unpaid sick leave, rather than maternity leave, cannot automatically be presumed unavailable for work).

¹²⁴ 50 Pa. Commw. 237, 412 A.2d 699 (1980) (remanded to Unemployment Compensation Board of Review for factual determination of "voluntariness"), aff'd on reh'g, 64 Pa. Commw. 201, 439 A.2d 890 (1982).

¹²⁵ 54 Pa. Commw. 419, 421 A.2d 528 (1980).

¹²⁶ *Bogucki*, 54 Pa. Commw. at 423, 421 A.2d at 530; *Wincek*, 50 Pa. Commw. at 239, 412 A.2d at 701.

¹²⁷ *Bogucki*, 54 Pa. Commw. at 423, 421 A.2d at 530; *Wincek*, 50 Pa. Commw. at 240, 412 A.2d at 701.

¹²⁸ *Bogucki*, 54 Pa. Commw. at 420, 421 A.2d at 529.

nant woman's acceptance of a leave of absence is not voluntary and . . . she cannot for this reason alone be held ineligible under [Pennsylvania unemployment law]."¹²⁹ On the other hand, in *Wincek*, the court remanded the case to the Unemployment Compensation Board to determine whether the claimant's leave of absence was voluntary or involuntary.¹³⁰

Some courts that have applied the presumption of unavailability have extended it beyond pregnancy to the time following childbirth when a new mother may still be technically on a maternity leave of absence. For example, in *Southern Bell Telephone and Telegraph Co. v. Department of Industrial Relations*,¹³¹ an Alabama appellate court affirmed the denial of benefits to a claimant on maternity leave under a company policy that required leaves to begin sixty days prior to the probable date of childbirth¹³² and allowed an employee additional time after childbirth up to a maximum of two years.¹³³ Further, it was the company's policy that "as a general rule a woman should not return to work earlier than six to eight weeks after giving birth to a child."¹³⁴ When the claimant, who originally had requested a one year leave of absence, returned to work two months after the birth of her child, she was informed by the company that there was no work available for her. In upholding the board's denial of benefits, the court held that in requesting the maternity leave for one year the claimant had "voluntarily" removed herself from the labor force and therefore did not meet the availability requirement.¹³⁵

The *Southern Bell* court distinguished the case from those in which an employee is required to take a leave for a minimum amount of time. For example, in *Allegretti v. Commonwealth, Unemployment Compensa-*

¹²⁹ *Id.* at 421, 421 A.2d at 530. The question of voluntariness is often a difficult one to prove. For example, in *Hamelers v. Commonwealth, Unemployment Compensation Bd. of Review*, 48 Pa. Commw. 121, 408 A.2d 1198 (1979), the claimant testified that she had requested lighter work during the later months of her pregnancy, but that her employer was unable to provide such work and placed her on a leave of absence. *Id.* at 123, 408 A.2d at 1199. Despite this evidence, the board determined that her leave was "voluntary," based only on the fact that her doctor had advised her to take a leave of absence. *Id.* at 123-24, 408 A.2d at 1199. The reviewing court reversed the board's determination, finding that the board had "capriciously disregarded" the claimant's testimony and reached its conclusion on less than "a scintilla" of evidence. *Id.* at 124, 408 A.2d at 1199.

¹³⁰ 50 Pa. Commw. at 240, 412 A.2d at 701. In addition, the court asked the board to determine whether there was other work available with the claimant's employer and the time at which the employee did in fact become unavailable for any type of work. *Id.*

¹³¹ 42 Ala. App. 351, 165 So. 2d 128 (1964).

¹³² See note 114 and accompanying text *supra* (discussing mandatory maternity leave policies).

¹³³ *Southern Bell*, 42 Ala. App. at 354, 165 So. 2d at 130-31.

¹³⁴ *Id.* at 354, 165 So. 2d at 131.

¹³⁵ *Id.* at 356-57, 165 So. 2d at 133.

tion Board of Review,¹³⁶ the claimant's employer had a policy whereby a mother could not be reemployed until at least two months after the birth of her child. The claimant originally requested a one year leave of absence; however, approximately thirty days after the birth of her child, she attempted to return to work.¹³⁷ The court held that the claimant was eligible for unemployment compensation since she was not reemployed solely because of her employer's required leave policy.¹³⁸

Under some of the cases described above, a woman may be found ineligible to receive unemployment benefits on the basis of a presumption that she does not meet the eligibility requirements of ability and availability, regardless of her actual ability and availability. However, presumed ineligibility is only part of the problem. At the time of the enactment of FUTA section 3304(a)(12), there existed a variety of statutes that focused not on the *eligibility* of a pregnant or formerly pregnant woman to receive benefits, but on whether the manner of her termination from her prior employment *disqualified* her from receiving unemployment benefits.

2. *Disqualification of Pregnant and Formerly Pregnant Women from the Receipt of Unemployment Benefits*

As was noted above,¹³⁹ an individual who is able to, and available for, work—"eligible" to receive unemployment benefits—may still be disqualified from receiving benefits due to the circumstances under which she left her previous employment. This Section will examine the statutes and cases dealing with disqualification, beginning, as in the preceding Section, with those statutes which disqualify expressly on the basis of pregnancy and then proceeding to facially neutral statutes and their subsequent judicial interpretations.

a. State statutes expressly naming pregnancy as grounds for disqualification. Prior to, and at the time of, the United States Supreme Court's decision in *Turner v. Department of Employment Security*,¹⁴⁰ a number of state statutes expressly disqualified women from receiving unemployment benefits if the termination of their previous employment was due to pregnancy.¹⁴¹ The rationale for such statutes was grounded in the

¹³⁶ 14 Pa. Commw. 576, 324 A.2d 860 (1974).

¹³⁷ Id. at 577, 324 A.2d at 860.

¹³⁸ Id. at 577, 324 A.2d at 860. The same result was reached in *Polk County Intermediate Educ. Dist. v. Employment Div.*, 24 Or. App. 169, 544 P.2d 1073 (1976). In that case, a school teacher sought to return to her teaching position one month after the birth of her child, even though her employer's leave policy entailed a six month leave.

¹³⁹ See text accompanying notes 45-59 *supra*.

¹⁴⁰ 423 U.S. 44 (1975).

¹⁴¹ Statutes of this type existed in Colorado, Indiana, Minnesota, Montana, Nevada, and

notion that child-bearing women were not deemed to be among those active, "attached" members of the workforce for whom unemployment compensation, as income replacement in the event of temporary unemployment, was designed.¹⁴²

In some of the state statutes which disqualified an employee if her separation from employment was due to pregnancy, an exception was made for employees who applied for and obtained a leave of absence from their employers.¹⁴³ The rationale behind this exception was that employees who make an attempt to preserve their employment are not abandoning the work force when they take leaves of absence; thus, they maintain the necessary labor market attachment.¹⁴⁴ In *Auger v. Administrator, Unemployment Compensation Act*,¹⁴⁵ the court examined a Connecticut statute¹⁴⁶ which required an employee who left work due to pregnancy to earn wages of at least \$100 before she again became qualified to receive unemployment benefits. The statute contained an exception covering situations "where an employer has, by collective bargaining agreement, provided for reemployment for such woman after childbirth, and she has, within two months, applied without restrictions, for reem-

Ohio. See UIPL No. 33-75, *supra* note 75. One statute not included on the Department of Labor's list, but which would clearly fall into this category was the Florida statute discussed in *General Tel. v. Board of Review*, 356 So. 2d 1357 (Fla. App. 1978). This statute defined "good cause" for leaving employment as "only such cause as is attributable to the illness or disability of the individual, other than pregnancy." See Fla. Stat. Ann. § 443.101(1)(a) (1975) (repealed 1977). A disqualification for benefits usually takes the form of a deferral of eligibility until the claimant has been reemployed for a stated period of time or has earned a set amount of wages. See text accompanying notes 57-59 *supra*.

¹⁴² *Curry v. Administrator, Unemployment Compensation Act*, 20 Conn. Supp. 428, 138 A.2d 805 (Conn. Super. Ct. 1957). The *Curry* court noted that

[a] pregnant woman, although not ill in the ordinary sense of the word and not physically unable to work, is in a distinct category of workers. Her condition generally requires that she be treated with greater care than the ordinary employee. Her dependability as to attendance on the job generally may be doubtful. Her ability to work is always temporary for the reason that it will terminate on a predetermined date, unlike the ordinary employee.

... It is doubtful whether a person in such physical condition is genuinely attached to the industrial labor market. It is doubtful also in the light of her tenuous attachment to the industrial labor market whether her loss of income when unemployed is due to the lack of available employment in the market place. The solution of her problem lies in the field of maternity benefits, which the unemployment compensation act does not provide.

Id. at 432-33, 138 A.2d at 808.

¹⁴³ See, e.g., Ark. Stat. Ann. § 81-1106(a) (1976 & Supp. 1985); Ind. Code Ann. § 22-4-15-1 (West 1981). It should be remembered, however, that a maternity leave of absence sometimes may render an employee *ineligible* to receive benefits during the course of the leave. See text accompanying notes 102-12, 131-35 *supra*.

¹⁴⁴ See *Gilooly v. Unemployment Compensation Bd. of Review*, 76 Pa. Commw. 20, 462 A.2d 958, 959 (1983).

¹⁴⁵ 19 Conn. Supp. 184, 110 A.2d 645 (Conn. Super. Ct. 1954).

¹⁴⁶ Conn. Gen. Stat. § 2315c (1953).

ployment in the same job or a comparable job.”¹⁴⁷ The claimant in the *Auger* case left her employment under a leave of absence negotiated in accordance with a collective bargaining agreement.¹⁴⁸ However, when she was able to return to work, she discovered that the company had closed down permanently.¹⁴⁹ The court affirmed the decision of the unemployment commission to award benefits to the claimant, finding that her taking of a leave of absence indicated that she desired to work and had set up no restrictions as to hours of work, type of work, or wages.¹⁵⁰

A somewhat different result was reached in the case of *Southwestern Bell Telephone Co. v. Thornbrough*.¹⁵¹ In this case, the employee requested a leave of absence under her employer's policy of granting one year pregnancy leaves.¹⁵² At the time she took the leave, and again, soon after the birth of her child, the claimant expressed a desire to return to work within a much shorter period. However, when she applied for work, she was told that there would be no job available for her for three or four more months.¹⁵³ The Arkansas statute provided that a woman who left work due to pregnancy would have to be reemployed for thirty days in order to qualify for unemployment benefits.¹⁵⁴ This statute explicitly excepted individuals who obtained a leave of absence from the employer and applied for reinstatement, but were not reinstated “at the termination of such leave.”¹⁵⁵ Narrowly construing the statutory language, the court held that the claimant was not qualified to receive unemployment benefits because her leave of absence had not been “terminated.”¹⁵⁶ This case illustrates the overlap that exists between cases dealing with disqualification and those dealing with eligibility. Although the statute at issue was clearly a disqualification statute, the effect of the court's decision is to render the claimant presumptively “unavailable” for work—and thus ineligible for benefits—during the term of the leave of absence.¹⁵⁷

b. Disqualification under neutral statutes. In addition to construing statutes that expressly delineated termination due to pregnancy as a cause for disqualification, courts have examined the effect of neutral dis-

¹⁴⁷ *Id.*

¹⁴⁸ *Auger*, 19 Conn. Supp. at 185, 110 A.2d at 646.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 186-87, 110 A.2d at 647.

¹⁵¹ 232 Ark. 929, 341 S.W.2d 1 (1960).

¹⁵² *Id.* at 930, 341 S.W.2d at 2.

¹⁵³ *Id.*

¹⁵⁴ Ark. Stat. Ann. § 81-1106(e) (2) (Supp. 1957).

¹⁵⁵ *Id.*

¹⁵⁶ *Thornbrough*, 232 Ark. at 935, 341 S.W.2d at 5.

¹⁵⁷ See text accompanying notes 103-38 *supra*.

qualification statutes on pregnant and formerly pregnant workers. These statutes are "neutral" in the sense that they do not name pregnancy as a disqualifying condition. Rather, under these statutes, women who leave work due to pregnancy may be denied benefits because they are deemed to have quit work voluntarily or without an acceptable "cause." This is the type of statute that was examined by the Fourth Circuit in *Brown v. Porcher*¹⁵⁸ and by the United States Supreme Court in *Wimberly v. Labor & Industrial Relations Commission*.¹⁵⁹

These "neutral" state statutes can be divided into three groups, prohibiting benefits to employees who have left "voluntarily without good cause," "voluntarily without cause of a necessitous and compelling nature," or "voluntarily without good cause directly attributable to the employer."

(i) *"Voluntary" leaving.* The concept of denying benefits to individuals who leave their employment voluntarily has existed since the earliest state unemployment laws. The draft bill which served as the model for so many of these state laws contained the "public policy" statement that the purpose of the unemployment law was "the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own'.¹⁶⁰ Soon after the enactment of these statutes, courts began a long debate over whether the involuntariness concept was restricted solely to those actions not performed by the employee's own motion—for example, the employee was discharged and thus left "involuntarily"—or included actions in fact performed by the worker but compelled by external factors—for instance, the employee resigns because the job endangers her physically.¹⁶¹ As expressed by one advocate of the broader reading, "the test of what is voluntary is more than what is done on the worker's own motion which, like the short journey to the electric chair of the man who walks erect, may be the product

¹⁵⁸ 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983).

¹⁵⁹ 479 U.S. 511 (1987). These neutral statutes pervasively affect women (and men, as well), since they may lead to disqualification when an employee leaves work for a variety of personal reasons, including illness and the marital and domestic circumstances of the employee. Included in the list of discriminatory laws compiled in UIPL No. 33-75 by the Department of Labor were 14 state statutes that expressly denied unemployment benefits to workers who left their employment due to domestic or marital obligations. See UIPL No. 33-75, *supra* note 75. In a letter accompanying this list, the Department of Labor urged states "to take the opportunity to seek to change by legislation all discriminatory provisions in their unemployment insurance laws." UIPL No. 1-76, *supra* note 79.

¹⁶⁰ Harrison, *supra* note 38, at 118 (quoting Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Type (1936)). The voluntariness question has also been used in determining eligibility for unemployment compensation in Pennsylvania. See text accompanying notes 124-30 *supra*.

¹⁶¹ See Kempfer, *supra* note 53, at 154-55.

of impelling circumstances.”¹⁶²

The fine line between voluntary and involuntary actions was examined in the following oft-quoted passage from *Bliley Electric Co. v. Unemployment Compensation Board of Review*:¹⁶³

“Voluntarily” and “involuntarily” are antonyms and therefore irreconcilable words, but the words are merely symbols of ideas, and the ideas can be readily reconciled. Willingness, wilfulness, volition, intention reside in “voluntary,” but the mere fact that a worker wills and intends to leave a job does not necessarily and always mean that the leaving is voluntary. Extraneous factors, the surrounding circumstances, must be taken into account, and when they are examined it may be found that the seemingly voluntary, the apparently intentional, act was in fact involuntary. A worker’s physical and mental condition, his personal and family problems, the authoritative demand of legal duties—these are circumstances that exert pressure upon him and imperiously call for decision and action.¹⁶⁴

The same conclusion—that external factors may affect voluntariness—was reflected in another early construction of a state unemployment statute in *Fannon v. Federal Cartridge Corp.*¹⁶⁵ In this case, the court expounded on the meaning of Minnesota’s “public policy” statement, which was identical to that in the Social Security draft bill:¹⁶⁶

There is nothing in this language to justify the conclusion that benefits under the act accrue only when unemployment is the result of some *wrongful act or fault* of an employer. . . . While [the claimant] intended to terminate her employment, and to this extent it may be argued that such termination was voluntary, on the other hand, it is clear that her health and personal welfare made it imperative for her to stop without further delay An act of necessity may not be a voluntary act. We cannot escape the conclusion that where, as here an employe [sic] is impelled because of sickness and disease to terminate unemployment because continuance thereof would endanger his health and personal welfare, such termination is an involuntary rather than a voluntary act of the employee within the meaning of [the state statute].¹⁶⁷

¹⁶² Harrison, *supra* note 38, at 122.

¹⁶³ 158 Pa. Super. 548, 45 A.2d 898 (1946).

¹⁶⁴ *Id.* at 556-57, 45 A.2d at 903.

¹⁶⁵ 219 Minn. 306, 18 N.W.2d 249 (1945).

¹⁶⁶ See note 56 *supra*.

¹⁶⁷ 219 Minn. at 311-12, 18 N.W.2d at 252 (citations omitted) (emphasis in original). When a woman leaves work due to pregnancy, in most cases it can be argued that she is doing so “voluntarily” because she chose to have a child. On a broader level, however, it must be remembered that only women are physically capable of bearing children. Therefore, to the extent propagation of our species remains a priority, and until scientific advances lead to an alternative method of child-bearing, the “voluntariness” of pregnancy is somewhat doubtful. Professor Wendy Williams has stated:

In contrast, the word "voluntarily" was read narrowly in *State v. Hix*.¹⁶⁸ In that case, three claimants who left work for health reasons were denied unemployment benefits because they were deemed to have left work "voluntarily."¹⁶⁹ The court defined that term in the limited sense of "the free exercise of the will."¹⁷⁰

Some states define voluntary leaving by reference to other words in the statute. Massachusetts has a statutory provision stating that an employee's leaving is voluntary unless the "reasons for leaving were [of] an urgent, compelling and necessitous nature."¹⁷¹ In Missouri, using an *ejusdem generis* type of approach, the term "voluntarily" has been limited to leaving "without good cause attributable to her work or her employer"—another provision of the statute.¹⁷² This has been interpreted to mean that "one terminates employment involuntarily only if there is a legally sufficient reason for leaving work which is causally connected to the work or the employer."¹⁷³

(ii) *Leaving without "good cause"*. In addition to using the word "voluntarily," state statutes require that an employee show "cause" for leaving her previous employment. The most liberal of these statutes deny benefits only to claimants who left their prior employment voluntarily and "without good cause." As noted in *Bliley Electric Co. v. Unemployment Compensation Board of Review*,¹⁷⁴ this juxtaposition of terms gives rise to the paradox "that an employee who *voluntarily* leaves his work

Individual pregnancies may be and often are voluntary in the sense that the individual woman made a conscious choice to become pregnant. But, as a social matter, pregnancy is not meaningfully voluntary any more than eating or sleeping is voluntary. All are basic functions of the human animal necessary to survival. . . . There is considerable wisdom in the comment, whose source I no longer recall, that "if pregnancy is voluntary, it's a very good thing that women volunteer." Without such "volunteers," there would be no labor force at all.

Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 354 n.114 (1984-85).

¹⁶⁸ 132 W. Va. 516, 54 S.E.2d 198 (1949).

¹⁶⁹ Id. at 522-23, 54 S.E.2d at 201.

¹⁷⁰ Id. at 522, 54 S.E.2d at 201. The harshness of this precedent was mitigated somewhat in *Gibson v. Rutledge*, 298 S.E.2d 137 (W. Va. 1982). Although ostensibly adopting the *Hix* court's definition of the word "voluntarily," the *Gibson* court held that the West Virginia unemployment benefits system covered an employee who left work due to a health-related problem, but upon recovery found that his employment had been terminated during his absence. See text accompanying notes 212-18 *infra*.

¹⁷¹ Mass. Gen. Laws Ann. ch. 151A, § 25(c)(1) (West 1982), construed in *Dohoney v. Director of Div. of Employment Sec.*, 377 Mass. 333, 336, 386 N.E.2d 10, 13 (1979).

¹⁷² *Duffy v. Labor & Indus. Relations Comm'n*, 556 S.W.2d 195, 198 (Mo. App. 1977); see text accompanying notes 174-250 *infra* (discussing statutes requiring this causal connection).

¹⁷³ *Duffy*, 556 S.W.2d at 198.

¹⁷⁴ 158 Pa. Super. 548, 45 A.2d 898 (1946).

with good cause is *involuntarily* unemployed.”¹⁷⁵ *Bliley* was the first case in which the Pennsylvania “good cause” provision was examined after being enacted in 1942.¹⁷⁶ In *Bliley*, the court reviewed the legislative history of the 1942 act to determine the breadth of the “good cause” requirement. The court noted that the “good cause” provision was enacted when other states were restricting the availability of benefits by requiring that good cause be “connected with the work” or “attributable to the employer,” and that the legislature was aware of these changes.¹⁷⁷ The court reasoned that since the legislature enacted the broad “good cause” requirement with knowledge of the changes in other states, it must have intended that purely personal reasons be included in the phrase “good cause.”¹⁷⁸

Based on this analysis, the court construed good cause to “connote as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.”¹⁷⁹ Applying this definition of good cause to the facts in *Bliley*, the court held that, in some circumstances, marital obligations, such as leaving work to join a spouse who was stationed by the Armed Forces in another location, can constitute good cause.¹⁸⁰

In *Flannick v. Unemployment Compensation Board of Review*,¹⁸¹ the same court, under the same Pennsylvania statute, considered the status of an employee who left due to pregnancy. The claimant neither requested a leave of absence before leaving nor attempted to be reinstated with her former employer after she gave birth and became available for work.¹⁸² The court began its analysis by observing that, “it cannot be

¹⁷⁵ Id. at 556, 45 A.2d at 903 (emphasis added).

¹⁷⁶ The Pennsylvania statute, 43 Pa. Cons. Stat. Ann. § 802(b) (Purdon 1964 & Supp. 1987), has undergone several transformations since its original enactment. In 1953, a provision that marital and domestic circumstances did not constitute “good cause” was added. Act approved Aug. 24, 1953, No. 396, § 4, 1953 Pa. Laws 1397, 1405 (repealed 1980). In 1955, the term “good cause” was replaced by “cause of a necessitous and compelling nature.” Act approved Mar. 30, 1955, No. 5, § 5, 1955 Pa. Laws 6, 15. In 1959, a paragraph stating that pregnancy was *not* a “cause of a necessitous and compelling nature” was added. Act approved Dec. 17, 1959, No. 693, § 8, 1959 Pa. Laws 1893, 1909 (repealed 1974). This provision relating to pregnancy was deleted in 1974. Act approved Dec. 5, 1974, No. 261, § 3, 1974 Pa. Laws 769, 770.

¹⁷⁷ *Bliley*, 158 Pa. Super. at 554-55, 45 A.2d at 902.

¹⁷⁸ Id. at 555, 45 A.2d at 902.

¹⁷⁹ Id. at 556, 45 A.2d at 903.

¹⁸⁰ Id. at 558-59, 45 A.2d at 904. Later versions of the Pennsylvania statute disqualified claimants who terminated their employment to meet marital obligations. Act approved Aug. 24, 1953, No. 396, § 4, 1953 Pa. Laws 1397, 1405 (repealed 1980).

¹⁸¹ 168 Pa. Super. 606, 82 A.2d 671 (1951).

¹⁸² Id. at 607, 82 A.2d at 672.

asserted dogmatically and without reservation, that a pregnant woman who leaves her employment does so voluntarily and without good cause."¹⁸³ The court advocated a case-by-case approach, noting that pregnancy had varying effects on an individual's employment, depending upon the nature of the work, the mother's health, and the childcare situation in the household.¹⁸⁴ The court, however, accepted the state's argument that benefits should be denied if the claimant failed to request a leave of absence or failed to offer to return to work within a reasonable time after giving birth.¹⁸⁵ The court was swayed against the claimant because she misrepresented her reason for leaving on her application for unemployment benefits.¹⁸⁶ The court determined that the claimant "was not animated by good faith"¹⁸⁷ and thus affirmed the denial of benefits.¹⁸⁸

As the concept of "good cause" is now generally construed by unemployment agencies to include pregnancy, few recent cases have arisen under this type of statute.¹⁸⁹ However, a "good cause" statute served as the basis for the South Carolina practice of denying unemployment benefits to pregnant women found to violate FUTA section 3304(a)(12) in *Brown v. Porcher*.¹⁹⁰ Also, a court in New Jersey found that certain pregnancy-related terminations of employment do not constitute leaving for "good cause." The result in *Medwick v. Board of Review, Division of Employment Security*,¹⁹¹ however, seemed to be based on a more individ-

¹⁸³ Id. at 608, 82 A.2d at 672.

¹⁸⁴ Id. at 608-09, 82 A.2d at 672-73.

¹⁸⁵ Id. at 609-10, 82 A.2d at 673.

¹⁸⁶ Id. at 608, 82 A.2d at 672-73.

¹⁸⁷ The court appears to have drawn upon the *Bliley* court's definition of "good cause." See text accompanying notes 174-80 supra.

¹⁸⁸ 168 Pa. Super. at 611, 82 A.2d at 673. The *Flannick* court affirmed the unemployment board's requirement that an individual who leaves employment due to a temporary disability must apply for a leave of absence or in some other way manifest her intention not to abandon the labor force in order to be eligible to receive benefits. Id. at 610, 82 A.2d at 673; see text accompanying notes 251-93 infra.

¹⁸⁹ The breadth of the term "good cause" in the Nebraska statute is apparent in *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979), where an increased workload was found to constitute "good cause" for leaving employment. Id. at 41, 281 N.W.2d at 223. The court limited its holding by stating:

We do not say that any time an employee decides he or she does not like the job or that it is burdensome or requires more skill than is possessed by the employee, voluntary termination can be for "good cause." However, we do state that when an *employee* accepts employment in good faith and through no fault or deficiency on his or her part the workload becomes an increasingly unreasonable burden so as to affect the health or sense of well-being of the employee, voluntary termination does have some justifiably reasonable connection with or relation to conditions of employment and may be deemed for "good cause."

Id.

¹⁹⁰ 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983); see text accompanying notes 341-52 infra.

¹⁹¹ 69 N.J. Super. 338, 174 A.2d 251 (N.J. Super. Ct. App. Div. 1961).

ualized determination. In this case, a claimant who left her job when she was five months pregnant, even though company policy allowed her to work through her sixth month, was held to have left under no compelling personal, health-related, or family circumstances, and thus to have left "without good cause."¹⁹²

(iii) *Leaving without "cause of a compelling and necessitous nature"*. A somewhat more restrictive statutory standard than "good cause" is the requirement that "cause of a compelling and necessitous nature" be present. In *Howell v. Commonwealth, Unemployment Compensation Board of Review*,¹⁹³ a Pennsylvania court held that the Pennsylvania statute¹⁹⁴ containing this language applied to pregnancy only to the extent that pregnancy "is to be treated as any other disease that is claimed to be cause of a necessitous and compelling nature for leaving work."¹⁹⁵ In *Howell*, the claimant did not carry her burden of showing that continuing to work in her ninth month of pregnancy posed a threat to her own or her unborn baby's health.¹⁹⁶ Therefore, she was found to have left work without having met the appropriate cause requirement.¹⁹⁷ Although the court conceded that a woman in her ninth month of pregnancy might be "uncomfortable," it declined to set up what it characterized as "a presumption that a woman in the ninth month of pregnancy cannot work."¹⁹⁸

¹⁹² Id. at 343-45, 174 A.2d at 254-55. The New Jersey statute under which this case was decided, N.J. Stat. Ann. § 43:21-5(a) (West 1962 & Supp. 1987), was later amended to restrict "good cause" to that directly attributable to the employer. Act approved June 3, 1961, ch. 43, 1961 N.J. Laws 416, 423.

In Mississippi, the statute expressly states that marital and domestic circumstances do not constitute good cause for leaving. Miss. Code Ann. § 71-5-513 A(1) (1987). Although judicial interpretations of this statute have made it clear that pregnancy falls within marital and domestic circumstances, see, e.g., *Mississippi Employment Sec. Comm'n v. Corley*, 246 Miss. 43, 148 So. 2d 715 (1963); *Franklin v. Mississippi Employment Sec. Comm'n*, 254 Miss. 447, 136 So. 2d 197 (1961); *Luke v. Mississippi Employment Sec. Comm'n*, 239 Miss. 292, 123 So. 2d 231 (1960), a 1986 amendment to the law expressly excludes pregnancy from this category. Act approved Mar. 13, 1986, ch. 316, § 2, 1986 Miss. Laws 23, 23.

¹⁹³ 51 Pa. Commw. 26, 413 A.2d 782 (1980).

¹⁹⁴ Pa. Stat. Ann. § 802(6) (Purdon 1964 & Supp. 1987).

¹⁹⁵ 51 Pa. Commw. at 29-30, 413 A.2d at 783.

¹⁹⁶ Id. at 30-31, 413 A.2d at 784.

¹⁹⁷ Id. at 31, 413 A.2d at 784.

¹⁹⁸ Id. at 30, 413 A.2d at 784. The claimant had originally been turned down for benefits on the ground that she was unavailable for work. At her hearing before the referee, the claimant contended that she was in fact available for part-time work. Id. at 28-29, 413 A.2d at 783. The referee determined that she was still ineligible because she had left work voluntarily without good cause. Id. at 29, 413 A.2d at 783. This is another example of the confusion between the eligibility criteria and the disqualifying conditions, which in this case appears in the Pennsylvania statute. Section 801(d) of the statute requires that a claimant be "able" and "available" for suitable work to avoid disqualification, while section 802(b) states that a claimant who leaves work without compelling cause is "ineligible" to receive benefits. 43 Pa. Cons. Stat.

The compelling and necessitous circumstances language also appears in the Massachusetts statute's definition of "involuntary" unemployment.¹⁹⁹ In *Dohoney v. Director of Division of Employment Security*,²⁰⁰ the court noted that while pregnancy may in fact be a compelling personal circumstance, a claimant still must prove that pregnancy was in fact the cause of her leaving her employment.²⁰¹ In this case, the court determined that the actual cause of claimant's termination was that she had failed to make the appropriate efforts to preserve her job, such as requesting a leave of absence.²⁰² The court reasoned that

not every "urgent, compelling and necessitous" absence requires termination. Normally, a worker who anticipates a legitimate absence from work can take steps to preserve her employment. When a worker fails to take such steps and severance results, it is the worker's own inaction rather than compelling personal reasons that cause the leaving.²⁰³

The *Dohoney* case construed a Massachusetts statute that disqualifies employees who left their jobs "voluntarily without good cause attributable to the employing unit."²⁰⁴ The statute provides, however, that an employee will not be disqualified if "his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary."²⁰⁵ As discussed in *Director of Division of Employment Security v. Fitzgerald*,²⁰⁶ this statute thus contains "dual conditions of disqualification"—a cause which is *not* attributable to the employer and voluntariness—both of which must be met before an individual can be denied benefits.²⁰⁷ In *Fitzgerald*, a pregnant welder terminated her employment when no lighter work was available for her.²⁰⁸ The court found that the "employee was not unreasonable in deciding to abandon

§§ 801-02 (Purdon 1964 & Supp. 1987).

¹⁹⁹ Mass. Gen. Laws Ann. ch. 151A, § 25(e) (West Supp. 1987). The Massachusetts law also restricts good cause to that attributable to the employer, but it allows a claimant who left under "urgent, compelling and necessitous" circumstances to receive benefits by deeming separation from employment in these circumstances "involuntary." *Id.*; see text accompanying notes 203-11 *infra*.

²⁰⁰ 377 Mass. 333, 386 N.E.2d 10 (1979).

²⁰¹ *Id.* at 335-36, 386 N.E.2d at 13.

²⁰² See *id.* at 338, 386 N.E.2d at 14.

²⁰³ *Id.* at 336, 386 N.E.2d at 13. For a discussion of the requirement that an employee request a leave of absence, see text accompanying notes 251-69 *infra*. The *Dohoney* court was unpersuaded by the claimant's contention that the repeal of a statute delineating a statutory period of ineligibility for benefits during the eight weeks surrounding the birth of a child meant that all women who left work due to pregnancy were now qualified for unemployment compensation. 377 Mass. at 337, 386 N.E.2d at 13-14. The court characterized the statutory period and the voluntariness question as "distinct" issues. *Id.* at 337, 386 N.E.2d at 14.

²⁰⁴ Mass. Gen. Laws Ann. ch. 151A, § 25(e) (West Supp. 1987).

²⁰⁵ *Id.*

²⁰⁶ 382 Mass. 159, 414 N.E.2d 608 (1980).

²⁰⁷ *Id.* at 161, 414 N.E.2d at 610.

²⁰⁸ *Id.* at 159-60, 414 N.E.2d at 609.

her regular job by the reason of her pregnancy,"²⁰⁹ and observed that "pregnancy . . . may be a compelling personal circumstance not unlike other disabilities that legitimately require absence from work, neither of which condition is viewed as causing a 'voluntary' departure from work."²¹⁰ Since the pregnant individual's departure from her job was deemed to be involuntary, one of the dual conditions of disqualification had not been met and thus she qualified for benefits.²¹¹

(iv) *Leaving with a "good cause attributable to the employer."* The question of dual conditions has arisen in many states that have adopted statutes requiring an employee to have left work "voluntarily with good cause attributable to the employer" in order to be eligible for benefits. While this is a restrictive formulation, some courts have used a dual conditions approach to broaden the limited application of provisions requiring an employee's termination of employment to be causally connected to her employment. For example, in *Gibson v. Rutledge*,²¹² the court refused to disqualify an individual who left work for several months (and had been replaced) after sustaining a back injury while performing his job.²¹³ Despite the work-related nature of the injury, the state unemployment commission determined that the employee's reason for leaving did not meet the extremely narrow condition of "voluntarily without good cause involving fault on the part of the employer."²¹⁴ However, the court determined that the individual had left work *involuntarily* and thus was entitled to benefits.²¹⁵ The court noted that under the statutory provision requiring an unemployed individual to accept available suitable work, an individual cannot be forced to accept work that would involve a significant risk to her health, safety, and morals.²¹⁶ It would be strikingly inconsistent, the court reasoned, to disqualify from the receipt of unemployment benefits an individual who has been forced to leave work for the same reasons.²¹⁷ The court concluded as follows: "In order to remove this inconsistency, we must hold that when an employee is forced

²⁰⁹ Id. at 161, 414 N.E.2d at 610.

²¹⁰ Id. at 161 n.6, 414 N.E.2d at 610 n.6.

²¹¹ See id. at 161-62, 414 N.E.2d at 610-11.

²¹² 298 S.E.2d 137 (W. Va. 1982) (discussed at note 170 supra).

²¹³ Id. at 139, 141.

²¹⁴ Id. at 141 (citing W. Va. Code § 21A-6-3(1) (1978)).

²¹⁵ Id.

²¹⁶ Id.

²¹⁷ Id. The same reasoning was used in *Fannon v. Federal Cartridge Corp.*, 219 Minn. 306, 314, 18 N.W.2d 249, 252 (1945). See text accompanying notes 165-67 supra, note 227 infra. This concept has been integrated into some unemployment statutes, such as that of Arkansas, which requires consideration of health and safety risks in determinations of both suitable work and good cause for termination. Ark. Stat. Ann. § 11-10-513 (1987).

to quit his job for a health problem, he has not done so voluntarily.”²¹⁸ Focusing on the voluntariness condition, the *Gibson* court broadened the application of the West Virginia statute to include any health-related situation, apparently even those not directly attributable to the claimant’s employer or work. Under the *Gibson* court’s analysis, a termination due to pregnancy would not disqualify an individual from receiving unemployment benefits.

The dual conditions approach was rejected by the Missouri Court of Appeals in *Duffy v. Labor & Industrial Relations Commission*,²¹⁹ as “a judicial abrogation of the specific provisions of [the state’s unemployment compensation law].”²²⁰ Following its earlier decision in *Bussmann Manufacturing Co. v. Industrial Commission*,²²¹ the Missouri court refused to read the statutory provision—“voluntarily without good cause attributable to his work or to his employer”—as imposing two conditions, both of which had to be met in order for disqualification to occur.²²² Stating that focusing on the voluntariness provision independently would “render superfluous” the other words of the statute, the *Duffy* court affirmed the denial of benefits to a claimant who had left her employment due to a personal illness unrelated to her employment.²²³ The *Bussman* court, using the same reasoning, had disqualified a pregnant employee, finding that her termination in order to give birth to her child had no causal connection with her work or her employer.²²⁴

In the absence of a dual conditions interpretation, pregnancy is typically treated like other illnesses in the application of statutory provisions requiring “good cause attributable to the employer.”²²⁵ Unless otherwise provided in the statute,²²⁶ some courts have held that an illness meets the

²¹⁸ *Gibson*, 298 S.E.2d at 141. The *Gibson* case overruled the portion of an earlier decision, *State v. Hix*, 132 W. Va. 516, 54 S.E.2d 198 (1949), discussed at text accompanying notes 168-70 *supra*, that had held that an individual who ceases work due to illness, fear of illness, or any other cause not involving fault on the part of the employee is disqualified from receiving benefits under the state statute. *Gibson*, 298 S.E.2d at 142.

²¹⁹ 556 S.W.2d 195 (Mo. Ct. App. 1977).

²²⁰ *Id.* at 198.

²²¹ 335 S.W.2d 456 (Mo. Ct. App. 1960).

²²² *Duffy*, 556 S.W.2d at 198.

²²³ *Id.*

²²⁴ *Bussman*, 335 S.W.2d at 461; see also *Davis v. Labor & Indus. Relations Comm’n*, 554 S.W.2d 541 (Mo. Ct. App. 1977) (court upheld disqualification of pregnant employee who terminated employment after she was denied maternity leave due to her poor work record).

²²⁵ The Equal Employment Opportunity Commission has determined that the denial of unemployment benefits to pregnant or formerly pregnant women may violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), if a state unemployment agency treats pregnant or formerly pregnant women differently from the way it treats other medically disabled persons. EEOC Compl. Man. (BNA) § 626.11, at 69 (July 1986).

²²⁶ See, e.g., Fla. Stat. § 443.101(1)(a) (1985) (defining such cause as including “illness or disability of the individual requiring separation from his employment”); Iowa Code

limitations of these provisions only if it is caused, not just aggravated, by the employment.²²⁷ As shown by the decision of the Iowa Supreme Court in *Moulton v. Iowa Employment Security Commission*,²²⁸ pregnancy is not directly attributable to one's employment and therefore is not "good cause" for termination under this theory.²²⁹ The same result was reached in *Brooks v. District of Columbia Department of Employment Services*,²³⁰ in which a pregnant security guard was denied unemployment benefits when she terminated employment because the belt she was required to wear pressed on her stomach and made her sick.²³¹ The *Brooks* court concluded that "[t]here was nothing in the work itself which gave her cause for leaving. Nothing in the record suggests that her resignation was other than voluntary, and it cannot be argued that pregnancy is a work-related illness."²³²

Other courts, however, have construed "good cause attributable to the employer" to include illness aggravated by employment, even if not directly caused by it.²³³ Following this theory, pregnancy may in fact constitute good cause for termination. For example, in *South Central Bell Telephone Co. v. Gerace*,²³⁴ a pregnant employee who was advised by her physician that, due to related health problems, she should not drive the long distance to and from work, was found by the Louisiana Court of Appeals to have terminated employment with good cause connected with her employment.²³⁵

The Louisiana disqualification statute requiring good cause attributable to the employer²³⁶ has been the focus of several cases applying the statute to pregnant women. First, in *Algiers Homestead Association v.*

§ 96.5(1)(d) (1987) (providing that employee shall not be deemed to have left employment voluntarily without good cause attributable to employer if employee left due to illness, injury, or pregnancy upon doctor's orders, with employer's consent, and attempted to return to same job upon recovery). The Iowa statute is discussed in *Area Residential Care, Inc., v. Iowa Dep't of Job Serv.*, 323 N.W.2d 257, 258 (Iowa 1982).

²²⁷ See, e.g., *Oxford v. Daniels*, 2 Ark. App. 200, 618 S.W.2d 171 (1981) (benefits allowed to individual who terminated employment after transfer to different machine caused various physical infirmities); *Fannon v. Federal Cartridge Corp.*, 219 Minn. 306, 18 N.W.2d 249 (1945) (benefits allowed to employee who developed allergy to substances with which she worked).

²²⁸ 239 Iowa 1161, 34 N.W.2d 211 (1948); see also *Shontz v. Iowa Employment Sec. Comm'n*, 248 N.W.2d 88, 91 (Iowa 1976) (discussing *Moulton*).

²²⁹ 239 Iowa at 1165, 34 N.W.2d at 213.

²³⁰ 453 A.2d 812 (D.C. 1982).

²³¹ *Id.*

²³² *Id.* at 813.

²³³ See, e.g., *Department of Indus. Relations v. Henry*, 42 Ala. App. 573, 172 So. 2d 374 (1964) (benefits allowed to claimant who left work when lifting and other physical exertion aggravated his conditions).

²³⁴ 394 So. 2d 657 (La. Ct. App. 1980).

²³⁵ *Id.* at 658.

²³⁶ La. Rev. Stat. § 23:1601 (West 1985).

Brown,²³⁷ the Louisiana Supreme Court held that a pregnant woman who left work after she developed pregnancy-related illnesses was disqualified from receiving unemployment benefits because the cause of her termination "was in no way connected with her employment."²³⁸ An exception to this ruling was made in *Southern Bell Telephone & Telegraph Co. v. Administrator, Division of Employment Security*,²³⁹ which permitted the conferral of benefits upon an employee who was required to take a maternity leave of absence under a collective bargaining agreement.²⁴⁰ In response, the Louisiana legislature "decided it would be unfair to pay benefits only to those women employees covered by such agreements. Hence, it adopted [an amendment to the statute] which [sic] makes benefits available to all women employees who cease work because of pregnancy, whether they do so under a contract or otherwise."²⁴¹ Under this amended statute, in *King v. Louisiana Department of Employment Security*,²⁴² a woman was allowed unemployment benefits when she found her old job unavailable due to an economic slowdown when she returned after her pregnancy. In 1977, the legislature repealed the exception relating to pregnancy, and the qualification condition again became that applied in *Algiers Homestead*.²⁴³

Most recently, in *Martin Mills, Inc. v. Department of Employment Security*,²⁴⁴ the court further restricted the rights of pregnant women when it held "that a female employee is disqualified for unemployment benefits as a matter of law for the duration of a leave of absence voluntarily requested by her and granted by her employer because she is pregnant, for the reason that such condition is not *connected with her employment*."²⁴⁵ The claimant had requested a leave of absence, but then was told by her doctor that she could do light work.²⁴⁶ The employer offered to allow her to return to the same job, but had no other, lighter work available.²⁴⁷ The court, swayed by the fact that her employer had offered her work which she refused, declared her to be disqualified for benefits.²⁴⁸ The court distinguished the case before it from

²³⁷ 246 La. 738, 167 So. 2d 349 (1964).

²³⁸ Id. at 743, 167 So. 2d at 351.

²³⁹ 252 La. 519, 211 So. 2d 634 (1968).

²⁴⁰ Id. at 519, 211 So. 2d at 634.

²⁴¹ *King v. Louisiana Dep't of Employment Sec.*, 229 So. 2d 387, 389 (La. Ct. App. 1969); see La. Rev. Stat. Ann. § 23:1601(6) (West 1964) (repealed 1977).

²⁴² 229 So. 2d 387 (La. Ct. App. 1969).

²⁴³ See *South Central Bell Co. v. Department of Employment Sec.*, 389 So. 2d 790, 791 (La. Ct. App. 1980).

²⁴⁴ 391 So. 2d 56 (La. Ct. App. 1980).

²⁴⁵ Id. at 59.

²⁴⁶ Id. at 57.

²⁴⁷ Id. at 59.

²⁴⁸ See id.

earlier cases where women had sought unsuccessfully to be rehired *after* the termination of their leaves of absence.²⁴⁹ The court could have more easily distinguished those earlier cases by noting that all of them had been decided when the statutory amendment relating to pregnancy was in effect.²⁵⁰

Even in those states which have construed the requirements of an "involuntary" leaving and "good cause attributable to the employer" so broadly as to allow unemployment benefits to women who leave work due to pregnancy, the employee typically must show that she did not intend to abandon the labor force when she left to give birth. In *Gilooly v. Commonwealth, Unemployment Compensation Board of Review*,²⁵¹ a pregnant employee trained a replacement, did not request a leave of absence, and told her employer that she did not intend to work for at least six months after her child was born.²⁵² When she asked to be reinstated in a part-time position less than two months after delivering her baby and found that no positions were available, she applied for unemployment benefits.²⁵³ She was denied benefits, even though Pennsylvania courts considered pregnancy a necessitous and compelling cause which made leaving work "involuntary."²⁵⁴ Benefits were denied because the employee had not in any way manifested an intention to remain in the work force.²⁵⁵ Citing *Flannick v. Unemployment Compensation Board of Review*,²⁵⁶ the court noted that, in the case of a temporary disability, the employee must indicate in some way an intent to return to work, particularly "where the leaving is an equivocal act, as where a pregnant woman leaves her employment and the leaving can be construed either as a temporary absence or an abandonment of the labor force."²⁵⁷

The same reasoning was used by a North Carolina court as the basis for denying unemployment benefits in *Sellers v. National Spinning Co.*²⁵⁸ In this case, the claimant took a one month medical leave of absence early in her pregnancy, but neither returned to work nor requested an

²⁴⁹ *Id.*

²⁵⁰ See text accompanying note 243 *supra*.

²⁵¹ 76 Pa. Commw. 20, 462 A.2d 958 (1983).

²⁵² *Id.* at 21, 462 A.2d at 959.

²⁵³ *Id.* at 21-22, 462 A.2d at 959.

²⁵⁴ See text accompanying notes 163-64 *supra*.

²⁵⁵ *Gilooly*, 76 Pa. Commw. at 23, 462 A.2d at 959.

²⁵⁶ 168 Pa. Super. 606, 82 A.2d 671 (1951); see text accompanying notes 181-88 *supra*.

²⁵⁷ *Gilooly*, 76 Pa. Commw. at 23, 462 A.2d at 959 (citing *Flannick*, 168 Pa. Super. at 610, 82 A.2d at 673). Pennsylvania has also applied this rule in other cases of temporary disability. See *Benitez v. Unemployment Compensation Bd. of Review*, 73 Pa. Commw. 241, 458 A.2d 619 (1983) (employee who left work to go into hospital, never requested leave of absence, and never contacted employer, denied benefits on ground that his termination was "voluntary").

²⁵⁸ 64 N.C. App. 567, 307 S.E.2d 774 (1983), review denied, 310 N.C. 153, 311 S.E.2d 293 (1984).

extension when the one month period expired.²⁵⁹ Agreeing that acceptance of a maternity leave is not a "voluntary" termination,²⁶⁰ the court nevertheless found that benefits should be denied since the claimant had not even taken "the necessary minimal steps to preserve the employment relationship."²⁶¹ In *Dohoney v. Director of Division of Employment Security*,²⁶² a pregnant bank employee left to have her baby without indicating either a desire to return or a time she planned to return.²⁶³ She even declined her former position when she again became available for work.²⁶⁴ The court affirmed her disqualification, stating that it did not believe that "the Legislature intended that a claimant who failed to take steps to preserve her job should be paid unemployment benefits."²⁶⁵

Some states have incorporated the concept of manifesting an intent not to abandon the workforce into the disqualification provisions of their unemployment compensation laws. For example, the Iowa statute provides that a claimant will not be disqualified on the ground of voluntarily leaving previous employment without good cause attributable to the employer if the individual left upon doctor's orders, notified the employer, and, upon recovery, returned to the employer and offered to perform the same or comparable services.²⁶⁶ A claimant must carefully follow these statutory procedures in order to avoid disqualification. For example, in *Butts v. Iowa Department of Job Services*,²⁶⁷ an individual left her employment when 5½ months pregnant and sought to return to work a month after the child was born.²⁶⁸ Her request for unemployment benefits was denied because of her failure to submit the doctor's certificates, both before her leave and after her recovery, as required by the statute.²⁶⁹

²⁵⁹ *Id.* at 568, 307 S.E.2d at 775.

²⁶⁰ *Id.* at 570, 207 S.E.2d at 776. The court cited *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), as authority for this position. See text accompanying notes 341-45 *infra*.

²⁶¹ *Sellers*, 64 N.C. App. at 570, 307 S.E.2d at 776.

²⁶² 377 Mass. 333, 386 N.E.2d 10 (1979); see text accompanying notes 200-03 *supra*.

²⁶³ 377 Mass. at 334, 386 N.E.2d at 12.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 336, 386 N.E.2d at 13.

²⁶⁶ Iowa Code Ann. § 96.5(1)(d) (West 1984).

²⁶⁷ 328 N.W.2d 515 (Iowa 1983).

²⁶⁸ *Id.* at 516.

²⁶⁹ *Id.* at 516-17; see Iowa Code Ann. § 96.5(1)(d) (1984). The court seems to have been confused about the time for which benefits were requested. The court notes at one point that the only dispute was over the denial of benefits during the time the claimant was pregnant and recovering from the birth. *Butts*, 328 N.W.2d at 516. When her job was unavailable upon her request for reinstatement, the state unemployment agency began paying benefits, ruling that "she had then met the requalifying factors under [the statute]." *Id.* Yet later the court speaks of her actions *after* recovery (not submitting the required certification of recovery and waiting too long before offering her services again) as two of the three factors which were the basis for the denial. *Id.* at 517.

In some of the cases described immediately above, the taking of a leave of absence constituted "leaving" employment, and this leaving was treated as either voluntary or involuntary. Other cases take a somewhat different approach, treating the employee on leave as still employed until the time she returns from the leave and finds her position no longer available.²⁷⁰ Under this theory, the individual's unemployment can be thought of as due to a condition other than pregnancy that is involuntary, and that may be directly attributable to the employer. For example, in *Southern Bell Telephone & Telegraph Co. v. Division of Employment Security*,²⁷¹ an employee took a maternity leave of absence and was told upon her request to return that no openings in her status were available.²⁷² The court found that there was no termination of employment during her leave, stating:

[T]he fundamental and underlying cause of [her] unemployment following her application for reinstatement was not her prior condition of pregnancy but the then existing unavailability of work on the part of the employer, and it was only at this time that she "left (her) employment" and accordingly, such leave was for "good cause connected with her employment."²⁷³

Quoting *Southern Bell*, the Supreme Court of Mississippi, in *Smith v. Mississippi Employment Security Commission*,²⁷⁴ found that a pregnant employee whose job was terminated while she was on maternity leave had only "temporarily suspended" her employment during the leave.²⁷⁵ She actually lost her job because of a reduction in her employer's work force, and thus was not disqualified from receiving benefits.²⁷⁶ This theory has also been followed by Florida courts.²⁷⁷

The Missouri Court of Appeals adopted this theory in *Trail v. Industrial Commission*,²⁷⁸ a case in which a pregnant employee had been

²⁷⁰ As discussed in note 358 *infra*, it is not uncommon for an employee to be granted a "leave of absence" that does not include any guarantee of job reinstatement.

²⁷¹ 252 La. 519, 211 So. 2d 634 (1968).

²⁷² *Id.* at 520-21, 211 So. 2d at 634-35.

²⁷³ *Id.* at 526, 211 So. 2d at 636. Compare this characterization of the "cause" for the claimant's unemployment with that in *Dohoney v. Director of Div. of Employment Sec.*, 377 Mass. 333, 386 N.E.2d 10 (1979), in which the employee's failure to request a leave of absence was deemed to be the "cause" of her unemployment.

²⁷⁴ 344 So. 2d 137 (Miss. 1977).

²⁷⁵ *Id.* at 139.

²⁷⁶ *Id.* at 140; see also *Whitehead v. Mississippi Employment Sec. Comm'n*, 349 So. 2d 1048 (Miss. 1977) (employee's termination caused not by maternity leave, but by bankruptcy of employer).

²⁷⁷ See *Swavely v. Industrial Relations Comm'n*, 345 So. 2d 399 (Fla. Dist. Ct. App. 1977); *Fisher v. State of Fla. Dep't of Commerce, Div. of Employment Sec.*, 333 So. 2d 513 (Fla. Dist. Ct. App. 1976); *Robinson v. Industrial Relations Comm'n*, 329 So. 2d 401 (Fla. Dist. Ct. App. 1976).

²⁷⁸ 540 S.W.2d 179 (Mo. Ct. App. 1976).

granted a leave of absence but had received no assurance that she would be reemployed at the end of her leave.²⁷⁹ Relying on the California case of *Lewis v. California Unemployment Insurance Appeals Board*,²⁸⁰ which was concerned with a leave of absence for personal reasons unrelated to pregnancy, the *Trail* court concluded that the employer effectively laid off the employee by being unable to rehire her, and, "as a result, her unemployment was caused not by her own fault for having taken the voluntary leave of absence but by the fact that the employer had no job available."²⁸¹ This holding was contrary to previous Missouri cases, particularly *Neeley v. Division of Employment Security*.²⁸² In *Neeley*, an employee who had been granted a maternity leave with no guarantee of job reinstatement was found to be disqualified for the purposes of unemployment benefits when she attempted unsuccessfully to regain her job prior to the expiration of the leave.²⁸³ The Missouri Court of Appeals endeavored to reconcile these contrary holdings in *Division of Employment Security v. Labor & Industrial Relations Commission*,²⁸⁴ in which it denied benefits to a woman who had been put on a personal leave of absence so that she might care for her ailing spouse.²⁸⁵ Noting the *Trail* court's reliance on *Lewis*, the court in *Division of Employment Security* pointed out that *Lewis* had distinguished between a "termination with conditional rehire" and a "true leave of absence"—which includes a reemployment guarantee—granting unemployment benefits only in the latter case.²⁸⁶ The court found this distinction to constitute a "sound approach" and used it to resolve the case before it.²⁸⁷ In attempting to explain the fact that the employee in *Trail* had gone on leave with no reemployment guarantee, and thus did not take a "true leave of absence," the *Division of Employment Security* court concluded somewhat weakly:

[T]his court must find that the court in *Trail* concluded that the leave agreement contemplated that any rehiring would be at the same job and not just any job. This has to be the result in order for the rationale in *Lewis* to be applicable and relied upon by the court in *Trail*.²⁸⁸

²⁷⁹ *Id.* at 182-83.

²⁸⁰ 56 Cal. App. 3d 729, 128 Cal. Rptr. 795 (1976).

²⁸¹ *Trail*, 540 S.W.2d at 183.

²⁸² 379 S.W.2d 201 (Mo. Ct. App. 1964).

²⁸³ *Id.*

²⁸⁴ 617 S.W.2d 620 (Mo. Ct. App. 1981).

²⁸⁵ See *id.* at 622, 628.

²⁸⁶ *Id.* at 626-27 (citing *Lewis*, 56 Cal. App. 3d at 737, 128 Cal. Rptr. at 803).

²⁸⁷ *Id.* at 627.

²⁸⁸ *Id.* The Missouri Court of Appeals examined this line of cases again in *Wimberly v. Labor & Indus. Relations Comm'n*, No. WD 34909 (Mo. Ct. App. Apr. 17, 1984), but concluded that the enactment of FUTA section 3304(a)(12), 26 U.S.C. § 3304(a)(12) (1982), and the decision by the Fourth Circuit Court of Appeals in *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), should alter the state's traditional analysis of

It is important to note that although the characterization of a leave of absence as a temporary suspension rather than a termination of employment may serve to broaden the circumstances under which a pregnant or formerly pregnant employee may be *qualified* for benefits, this same characterization may narrow the circumstances under which a woman on maternity leave may be *eligible* for benefits.²⁸⁹ For example, if a pregnant woman whose job involves heavy lifting takes a maternity leave when no alternative work is available, she may in fact be physically able to do lighter work, and thus eligible for unemployment benefits if she is unsuccessful in finding such work. However, if the leave is deemed to be merely a suspension of employment, she is technically not unemployed, and thus not eligible to receive unemployment benefits. A variation on this argument was used by the court in *Lauderdale v. Division of Employment Security*²⁹⁰ as the basis for denying benefits to a stock clerk on maternity leave. The clerk left when four months pregnant under an agreement with her employer that she could return to the same job after her child was born.²⁹¹ During the early part of the leave she sought lighter work from other employers, and applied for unemployment benefits when unable to find such work.²⁹² The court found that she was ineligible for benefits during this time—that is, not “able and available” for work—“since by accepting the leave of absence she limited her availability for work because . . . her intention to return to her regular job, which her employer admittedly was holding for her, after the birth of her child limited her employment opportunities.”²⁹³

On the other hand, some courts have taken a less rigid approach to the question of whether an individual on a leave of absence is “unemployed” for eligibility purposes. In Pennsylvania it is “well established” that “‘it may not be presumed as a matter of law that a person on a leave of absence from his previous job is unavailable for work. It follows . . . that a woman may not be presumed unavailable for work, simply because she was placed on a pregnancy leave of absence.’”²⁹⁴ In *Pennsylvania*

maternity leaves of absence. This decision was reversed by the Missouri Supreme Court. *Wimberly v. Labor & Indus. Relations Comm’n*, 688 S.W.2d 344 (1985). The Missouri Supreme Court’s decision was affirmed by the United States Supreme Court. *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511 (1987), which did not mention the *Neeley*, *Trail*, or *Division of Employment Security* cases.

²⁸⁹ See text accompanying notes 123-38 *supra*.

²⁹⁰ 605 S.W.2d 174, 178 (Mo. Ct. App. 1980); see text accompanying notes 103-09 *supra*.

²⁹¹ *Id.* at 175-76.

²⁹² *Id.* at 176.

²⁹³ *Id.* at 178. The court did not discuss the relationship between this holding and the holding in the case of *Trail v. Industrial Comm’n*, that a leave of absence is merely a suspension of employment. 540 S.W.2d 179, 183 (Mo. Ct. App. 1976).

²⁹⁴ *Pennsylvania Elec. Co. v. Commonwealth, Unemployment Compensation Bd. of Review*, 69 Pa. Commw. 214, 218, 450 A.2d 779, 781 (1982) (quoting *Wincek v. Unemployment*

Electric Co. v. Commonwealth, Unemployment Compensation Board of Review,²⁹⁵ a pregnant woman on leave was considered eligible for unemployment benefits even though her employer-provided life insurance and hospital coverage continued during her leave.²⁹⁶ The court looked to the Pennsylvania statute's definition of the term "unemployed,"²⁹⁷ and determined that the claimant met the statutory criteria in that she had not performed any services for, nor received any remuneration from, the employer.²⁹⁸ Under a similarly worded statute,²⁹⁹ the District Court of Appeal of Florida, in *General Telephone Co. v. Board of Review*,³⁰⁰ found that an employee who took leave in her seventh month of pregnancy was technically "unemployed."³⁰¹

It would not, perhaps, be inconsistent for a state to view a leave of absence as "unemployment" for eligibility purposes, but as a suspension of employment for disqualification purposes. There are jobs that a woman may be unable to perform while she is pregnant, forcing her to discontinue performing services for, and receiving pay from, her current employer, and thus be technically unemployed. During portions of the leave, however, she could well be ready, willing, and able to perform lighter work for another employer, making her eligible for unemployment benefits if she searched in good faith, but was unable to find such work. To deny unemployment benefits to a pregnant or formerly pregnant woman in such a situation would not only amount to a presumption that pregnant women are unable to work, but also that an employee who is unable to work in one job is unable to work in *any* job. If the woman applies for reinstatement with her previous employer, again, in good faith, after recovering from the birth, but finds no positions available, it would not seem to abrogate the purpose of the unemployment compensation law³⁰² to allow her to qualify for benefits on the ground that her employer was unable to provide a position that was promised.

Perhaps all that can be said to summarize the two preceeding subsections is that courts in different jurisdictions and, sometimes, courts within the same jurisdiction, have differed in interpreting identical or

Compensation Bd. of Review, 50 Pa. Commw. 237, 239, 412 A.2d 699, 701 (1980)).

²⁹⁵ Id.

²⁹⁶ Id. at 219-20, 450 A.2d at 782.

²⁹⁷ 43 Pa. Cons. Stat. Ann. § 753(u) (Purdon 1964).

²⁹⁸ *Pennsylvania Elec.*, 69 Pa. Commw. at 219, 450 A.2d at 782.

²⁹⁹ Fla. Stat. Ann. § 443.06(1) (West 1975).

³⁰⁰ 356 So. 2d 1357 (Fla. Dist. Ct. App. 1978).

³⁰¹ Id. at 1359. However, the court found the individual *disqualified* from receiving benefits under a statute that defined "good cause" for leaving as cause attributable to the employer or to an illness other than pregnancy, Fla. Stat. Ann. § 443.06(a) (West 1975). Id.

³⁰² This purpose is to support persons who are genuinely attached to the labor market, but temporarily unemployed through no fault of their own. See text accompanying notes 48-51 *supra*.

similar statutory language. Therefore, it is difficult to make generalizations as to what circumstances will make a claimant ineligible for or disqualified from the receipt of unemployment benefits, even when the statutory requirements are the same.

3. *Cases Challenging the Validity of Statutes Which Deny Unemployment Benefits to Pregnant or Formerly Pregnant Women*

Even prior to the decision of the United States Supreme Court in *Turner v. Department of Employment Security*,³⁰³ courts had begun to examine the constitutionality of state statutes which denied pregnant or formerly pregnant women unemployment benefits. In *Miller v. Industrial Commission*,³⁰⁴ a Colorado statute which provided only a limited "special award" of unemployment benefits for workers who had separated from a job due to pregnancy³⁰⁵ was challenged as an unreasonable discrimination against women. The court concluded, however, that this classification and particular treatment of pregnant workers was not a classification that discriminated based upon gender alone.³⁰⁶ Three years after *Miller*, the Supreme Court of Washington held in *Hanson v. Hutt*³⁰⁷ that a statute providing that a woman who voluntarily quits work because of pregnancy³⁰⁸ will be presumed unable to work was unconstitutional.³⁰⁹ In reaching this conclusion, which was opposite to that of the

³⁰³ 423 U.S. 44 (1975).

³⁰⁴ 173 Colo. 476, 480 P.2d 565 (1971).

³⁰⁵ Colo. Rev. Stat. § 82-4-8(8)(f) (Supp. 1965) (repealed 1984).

³⁰⁶ 173 Colo. at 483, 480 P.2d at 568. But see *Sylvara v. Industrial Comm'n*, 191 Colo. 92, 550 P.2d 868 (1976) (striking down statute in question). The United States Supreme Court reached a conclusion similar to that in *Miller* in *Geduldig v. Aiello*, 417 U.S. 484 (1974), where the Court examined a decision of the State of California not to insure pregnancy under its disability insurance system. The Court noted that the system divided employees into two groups, but that those groups did not divide along gender lines. See *id.* at 496 n.20. Rather, the system divided workers into pregnant women and nonpregnant persons (including both men and women), and thus was not unlawful gender discrimination in violation of the equal protection clause. See *id.* at 497 n.20. Two years later, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), the Supreme Court, following *Geduldig*, confirmed that classifications based on pregnancy were *not* to be deemed gender-based classifications. *Id.* at 133-35. As noted by one commentator, criticism of the conclusions reached by the Court in these decisions has since become a cottage industry. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 983 (1984) (citing some two dozen law review articles criticizing *Geduldig*). In 1978, Title VII of the Civil Rights Act of 1964 was amended by the Pregnancy Discrimination Act, which made clear that discrimination "because of sex" included discrimination on the basis of pregnancy, childbirth, or related medical conditions. Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)).

³⁰⁷ 83 Wash. 195, 517 P.2d 599 (1974).

³⁰⁸ Wash. Rev. Code Ann. § 50.20.030 (1962) (repealed 1975).

³⁰⁹ 83 Wash. at 202, 517 P.2d at 603.

Miller court, the Washington Supreme Court stated:

While it is overly simplistic, it is true that only women become pregnant. It is equally clear that only women must remain barren to be eligible for and to receive unemployment compensation. This requirement of [the Washington statute] not only applies to only one sex but places a heavier burden upon women who seek unemployment benefits. We hold that the statute discriminates against women on the basis of sex.³¹⁰

The court went on to examine the standard by which the Washington statute should be judged. After analyzing the decision of the United States Supreme Court in *Frontiero v. Richardson*,³¹¹ the court decided that the Washington statute was inherently suspect and should be subject to strict judicial scrutiny.³¹²

The State of Washington had asserted three justifications for the statutory classification based upon pregnancy. The first justification was that pregnant women are not genuinely attached to the labor market.³¹³ The court noted, however, the testimony of five doctors at the initial unemployment hearing for the claimant to the effect that ninety percent of pregnant women are able to continue working in their normal occupation

³¹⁰ Id. at 198, 517 P.2d at 601-02.

³¹¹ 411 U.S. 677 (1973). In *Frontiero*, the Court struck down a federal statute that automatically deemed spouses of male servicemen "dependents" for purposes of certain employee benefits, while simultaneously requiring female members of the Armed Forces to prove the dependency status of their spouses. Id. at 688. The Court found that this statute resulted in a denial of the due process rights of the women members. Id. at 690-91. Justices Brennan, Douglas, White, and Marshall concluded that classifications based on sex are inherently suspect, and thus subject to strict judicial scrutiny. Id. at 682 (plurality opinion). Justices Powell, Burger, and Blackmun felt it was inappropriate to decide at that time whether sex was a suspect classification. Id. at 691 (Powell, J., concurring in the judgment).

³¹² *Hanson*, 83 Wash. at 201, 517 P.2d at 603. The *Hanson* court characterized the approaches of the different Justices in *Frontiero* to the question of the proper level of scrutiny as follows:

In *Frontiero*, four justices expressly found that "classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny." They found "at least implicit support for such an approach" in *Reed v. Reed* [404 U.S. 71 (1971)]. Mr. Justice Stewart concurred in the *Frontiero* judgment, agreeing that the statutes in question worked an invidious discrimination. Three other justices agreed that the statute constituted an unconstitutional discrimination against service women. They did not feel, however, that it was necessary or proper to hold that classifications based upon sex are inherently suspect. They reasoned that since the Equal Rights Amendment is presently before the various state legislatures for adoption, the Supreme Court should defer categorizing sex classifications as suspect, pending an expression of the will of the people.

83 Wash. at 200, 517 P.2d at 602-03 (quoting *Frontiero*, 411 U.S. at 688). In cases after *Frontiero*, the Supreme Court has applied an intermediate standard of review to gender classifications, requiring that a gender-specific law bear a substantial relationship to an important governmental objective. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 199-200 (1976).

³¹³ *Hanson*, 83 Wash. at 201, 517 P.2d at 603.

between five days and four weeks after delivery of their children.³¹⁴ Based on this testimony, the court concluded that there was ample evidence that pregnant women were in fact attached to the labor market.³¹⁵

The state next asserted that employers may be reluctant to hire women who are in the later stages of pregnancy.³¹⁶ The court pointed out, however, that the statute itself sets forth conditions by which claimants are to become eligible for unemployment compensation.³¹⁷ The court noted that none of these statutory conditions referred to the attitudes of employers with regard to the hiring of a certain class of employees.³¹⁸

Finally, the court turned to the state's argument that pregnant women voluntarily caused or contributed to their unemployment by becoming pregnant.³¹⁹ The court's response to this argument was as follows: "Assuming *arguendo* that pregnancy is voluntary, this does not mean that unemployment resulting therefrom is necessarily voluntary. While a woman may wish to become pregnant, she may not, and often does not wish to become unemployed as a result thereof."³²⁰ The court went on to conclude that there was no compelling state interest which justified the statute's discriminatory division.³²¹ Consequently, the statute violated the equal protection clause of the United States Constitution.³²²

The United States Supreme Court addressed the constitutionality of statutes that delineate an express period during which pregnant women are deemed ineligible for unemployment benefits in *Turner v. Department of Employment Security*.³²³ The Utah statute at issue provided that a pregnant woman was ineligible to receive unemployment benefits for the period between twelve weeks before and six weeks after childbirth.³²⁴ The Court contrasted this "blanket disqualification" with another Utah statute which provided a more "individualized determination of ineligibility."³²⁵ Under the second statute, a woman could not receive unemployment benefits "during any week of unemployment when it is found by the commission that her total or partial unemployment is due to preg-

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at 201-02, 517 P.2d at 603.

³²¹ *Id.* at 202, 517 P.2d at 603.

³²² *Id.*

³²³ 423 U.S. 44 (1975) (per curiam).

³²⁴ Utah Code Ann. § 35-4-5(h)(1) (1974).

³²⁵ 423 U.S. at 45.

nancy.”³²⁶ Relying on its earlier decision in *Cleveland Board of Education v. LaFleur*,³²⁷ the Court held that the “Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake.”³²⁸ Therefore, the Utah statute’s “conclusive presumption of incapacity”³²⁹ was constitutionally invalid.³³⁰

³²⁶ Utah Code Ann. § 35-4-5(h)(2) (1974).

³²⁷ 414 U.S. 632 (1974). In *LaFleur*, the Supreme Court declared that a school policy that required teachers to take a mandatory leave of absence after the fourth or fifth month of pregnancy violated a person’s freedom of choice regarding family life, as protected by the due process clause of the United States Constitution. *Id.* at 643-48. Significantly, the Supreme Court in *LaFleur* did not address the question of whether a classification based on pregnancy is a sex-based classification. *LaFleur* was a consolidation of two cases; these reflected the different opinions of the Fourth and Sixth Circuits on the sex-based classification issue. Compare *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972) (discrimination based on pregnancy was sex-based discrimination) with *Cohen v. Chesterfield County School Bd.*, 474 F.2d 395, 398 (4th Cir. 1973) (discrimination based on pregnancy *not* sex-based discrimination). See generally Kay, *Equality and Difference: The Case of Pregnancy*, 1 *Berkeley Women’s L.J.* 1, 3-5 (1985) (developing new “episodic analysis” approach to “conceptualizing the legal significance of biological reproductive conduct”). It was not until the Court’s decision five months later in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that the Court answered the sex-based classification question. See note 306 *supra*.

³²⁸ *Turner*, 423 U.S. at 46.

³²⁹ The *LaFleur* case and, consequently, the *Turner* case, were both decided on due process, rather than equal protection, grounds. The Court in *LaFleur* focused on the fact that a conclusive, or irrebuttable, presumption of incapacity violated a pregnant woman’s due process rights because of its conclusiveness. See 414 U.S. at 644-48. Subsequent decisions relied on this analysis until the Court decided *Weinberger v. Salfi*, 422 U.S. 749 (1978). The *Salfi* case involved a widow who was denied social security benefits under the Social Security Act, 42 U.S.C. § 416(c) (1982). *Id.* at 753-54. The Act imposed a mandatory nine month duration-of-the-marriage period before commencement of benefit eligibility, 42 U.S.C. § 416(c) (1982), in order to avoid so-called sham marriages. See *id.* at 754 n.2. Mrs. Salfi’s husband died unexpectedly after less than six months of marriage. *Id.* at 753. Mrs. Salfi complained that the arbitrary waiting period in the Act violated her constitutional rights. See *id.* at 755. The lower court agreed with Mrs. Salfi, relying on *LaFleur*, as well as certain other cases. *Id.* at 755-56. The Supreme Court reversed and explained *LaFleur*’s conclusive presumption analysis. The Court found that classifications which are made in noncontractual social welfare settings, and which are not arbitrary, are not invalid as long as they bear a rational relationship to the state’s goals. See *id.* at 770-72. The Court held that rational presumptions do not violate either the due process clause or the equal protection clause. See *id.* at 772, 785. While not directly overruling *LaFleur*, the Court distinguished it because it involved a contractually based claim. *Id.* at 771-72. The Court found that where noncontractual claims are concerned there is “no constitutionally protected status.” *Id.* at 772. The Court expressed the concern that *LaFleur* was being used as a “virtual engine of destruction” for rationally based legislative enactments. *Id.*

³³⁰ *Turner*, 423 U.S. at 46. Once again, as in *LaFleur*, the Court ignored the question of whether this pregnancy-based classification was a gender-based classification and whether this classification was in turn a denial of equal protection. See note 327 *supra*. The *per curiam* opinion in *Turner* was rather terse, with little discussion of the constitutional issues at stake. The Court found merely that the statute’s blanket disqualification of pregnant women was “constitutionally invalid under the principles of the *LaFleur* case.” 423 U.S. at 46; see note

In the years following *Turner*, states began to reexamine their unemployment compensation statutes in light of *Turner* and the addition of section 3304(a)(12) to FUTA.³³¹ In *Sylvara v. Industrial Commission*,³³² for example, the Colorado Supreme Court struck down a statute³³³ that disqualified women who left work due to pregnancy from the receipt of unemployment benefits until they had worked for thirteen weeks following the termination of pregnancy.³³⁴ Finding that the statute contained "a conclusive presumption that any woman who has been pregnant is unable to work until she *has* worked for thirteen weeks following the termination of her pregnancy," the court held that the statute violated the due process clause of the fourteenth amendment.³³⁵ The court cited both *LaFleur* and *Turner* as dispositive in the case.³³⁶

In 1979, the Court of Appeals for the Seventh Circuit examined whether an Indiana unemployment statute denied equal protection to pregnant or formerly pregnant women. In *International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Indiana Employment Security Board*,³³⁷ the Seventh Circuit examined an Indiana statute which provided that: (a) an individual whose unemployment was due to pregnancy was deemed unavailable and therefore ineligible to receive unemployment benefits; and (b) a woman who left employment because of pregnancy was disqualified from receiving such benefits.³³⁸ Ignoring the fact that the Supreme Court's *Turner* decision had dealt only with a statute that involved a statutory period of ineligibility, the Seventh Circuit held that the Indiana statute violated the fourteenth amendment pursuant to the Supreme Court's decision in *Turner*.³³⁹ The court stated that "[a] statute that denies unemployment benefits to all women who are unemployed because of pregnancy without regard to whether individual pregnant women have the physical capacity to continue work is invalid under [the holding in *Turner*]." ³⁴⁰

³²⁷ *supra*.

³³¹ 26 U.S.C. § 3304(a)(12) (1982).

³³² 191 Colo. 92, 550 P.2d 868 (1976).

³³³ Colo. Rev. Stat. § 8-73-108(8)(d)(IV) (1973) (repealed 1984). The court had previously upheld the statute in *Miller v. Industrial Comm'n*, 173 Colo. 476, 480 P.2d 565 (1971). See text accompanying notes 304-06 *supra*.

³³⁴ *Sylvara*, 191 Colo. at 94-95, 550 P.2d at 869-70.

³³⁵ *Id.*

³³⁶ *Id.* at 94-95, 550 P.2d at 870.

³³⁷ 600 F.2d 118 (7th Cir. 1979).

³³⁸ See Ind. Code Ann. § 22-4-14-3(d) (West 1981) (historical note indicating repeal of former § 22-4-14-3(d) in 1975); Ind. Code Ann. § 22-4-15-1 (West 1981) (historical note indicating repeal of former subsection (4) in 1977).

³³⁹ *International Union*, 600 F.2d at 120.

³⁴⁰ *Id.* In a somewhat different vein, the California Court of Appeal was asked to examine the constitutionality of the state unemployment department's procedure for adjudging the benefits due pregnant women. In *Gunn v. California Employment Dev. Dep't*, 94 Cal. App. 3d

The first challenge to a neutral state unemployment statute under FUTA section 3304(a)(12) was addressed by the Fourth Circuit in *Brown v. Porcher*.³⁴¹ At issue was a South Carolina statute that disqualified from the receipt of unemployment benefits individuals who had left their most recent work voluntarily, without good cause.³⁴² The court noted that although the statute did not expressly mention pregnancy, it had been construed to disqualify women who left work due to pregnancy.³⁴³ The court struck down this application of the statute because it violated FUTA section 3304(a)(12), stating that section 3304(a)(12) was remedial in nature and that it should be broadly construed.³⁴⁴ Answering the argument that section 3304(a)(12) was intended to be merely a codification of the *Turner* decision, the court stated that if "Congress had intended . . . only to codify the *Turner* decision and . . . [bar] discrimination on the basis of pregnancy, it could easily have drafted a statute reflecting those limited purposes."³⁴⁵

As noted earlier, in order for a state's employers to qualify for the federal unemployment tax credit, the state's unemployment law must be certified by the United States Department of Labor as meeting a number of standards, including that set out in FUTA section 3304(a)(12).³⁴⁶ Responding to the argument that South Carolina's law had been certified—since it did not expressly mention pregnancy it was facially valid—the *Brown* court noted that the certification "makes no reference to the interpretation that the South Carolina Commission has placed on the state law."³⁴⁷ Furthermore, the court was not impressed with a letter from the Department of Labor, solicited during the litigation, which stated that FUTA section 3304(a)(12) has been interpreted to prohibit only discrimination against pregnancy.³⁴⁸ The court gave this letter little weight, re-

658, 156 Cal. Rptr. 584 (1979), a claimant applied for benefits and was asked several questions related to pregnancy after the department personnel had concluded that she was pregnant. *Id.* at 661-62, 156 Cal. Rptr. at 586-87. Assuming that under California constitutional law inquiries about pregnancy discriminate against women, the court found that the department's procedure was an unjustified invasion of the claimant's right to privacy. *Id.* at 662-63, 156 Cal. Rptr. at 587-89.

³⁴¹ 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983). An excellent discussion of this case can be found in Note, Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act, 82 Mich. L. Rev. 1925, 1927, 1932-35, 1941, 1954-57 (1984).

³⁴² S.C. Code Ann. § 41-35-120(1) (Law. Co-op. 1986).

³⁴³ *Brown*, 660 F.2d at 1003. The court also noted that there was an exception to this disqualification made for women who left on maternity leaves of absence or who had been discharged because of pregnancy. *Id.* at 1003 n.2.

³⁴⁴ *Id.* at 1004.

³⁴⁵ *Id.*

³⁴⁶ See text accompanying notes 39-40 *supra*.

³⁴⁷ *Brown*, 660 F.2d at 1004.

³⁴⁸ *Id.*

sponding that the administrator "accepts the premise that pregnancy should be treated like any other illness without explaining how this premise can be reconciled with the exceptional treatment of pregnancy embodied in section 3304(a)(12)."³⁴⁹ The court concluded that the practice of the state's unemployment commission contravened section 3304(a)(12), and affirmed the lower court's order of retroactive payments to claimants who had been denied benefits under this practice.³⁵⁰ The United States Supreme Court denied certiorari,³⁵¹ although three dissenting justices would have granted certiorari because, in their opinion, the conflict between the positions of the Department of Labor and the Fourth Circuit would remain a source of substantial uncertainty for pregnant women.³⁵² The matter was not to be addressed again by the Supreme Court until three years later, when certiorari was granted in *Wimberly v. Labor & Industrial Relations Commission*.³⁵³

³⁴⁹ Id. at 1005.

³⁵⁰ Id. at 1005-06.

³⁵¹ 459 U.S. 1150 (1983).

³⁵² Id. at 1151-53 (White, J., dissenting from denial of cert.). Justice White, joined by Justices Powell and Rehnquist, noted that the issue was one of concern to the states (citing South Carolina's \$1.5 million increase in benefits paid due to the result in the case), large numbers of pregnant women, and the Department of Labor. Id. at 1152-53. He also stated that another issue should be resolved on Supreme Court review: whether the court of appeals violated the eleventh amendment's prohibition on federal courts entering judgments which would be satisfied out of a state's general revenues. Id. at 1153.

³⁵³ 475 U.S. 1118 (1986). Before discussing *Wimberly*, it should be noted that, in addition to the standards for eligibility and disqualification, one other area of state unemployment law has been challenged by pregnant women. In *Buchanan v. Director of the Division of Employment Sec.*, 393 Mass. 329, 471 N.E.2d 345 (1984), three public school teachers who were terminated from their positions were denied unemployment benefits because they had not satisfied the "base period" requirements under Massachusetts law. Id. at 330, 471 N.E.2d at 346; see text accompanying note 43 supra. The teachers had been on unpaid maternity leave and had not earned the wages sufficient to entitle them to unemployment compensation. Id. at 331-32, 471 N.E.2d at 346. The teachers asserted that the statutory requirement on its face, and in its application to these claimants, violated the Massachusetts Equal Rights Amendment. Mass. Const. Amends. art. 106 (prohibiting a denial of "equality . . . because of sex"). The court found the statute to be facially constitutional, as it contained no explicit sex-based distinction. *Buchanan*, 393 Mass. at 334, 471 N.E.2d at 348. The court also found no evidence that application of the statute resulted in any disparate impact on women. Id. at 335, 471 N.E.2d at 349. The teachers then took the case to federal court, claiming that the statute and its application violated FUTA section 3304(a)(12) and the due process and equal protection clauses of the United States Constitution. *Buchanan v. Demong*, 654 F. Supp. 139 (D. Mass. 1987). As *Wimberly* had been decided by that time, the court found that the statute clearly did not violate FUTA section 3304(a)(12). Id. at 142-43. Regarding the constitutional challenges, the court stated that "the connection between plaintiffs' procreational and privacy rights and the base earnings requirement is so attenuated that it cannot be reasonably said that the base earnings requirement impinges on the exercise of those rights." Id. at 143.

II

*WIMBERLY V. LABOR AND INDUSTRIAL RELATIONS
COMMISSION*

On January 21, 1987, the Supreme Court of the United States decided the case of *Wimberly v. Labor and Industrial Relations Commission*.³⁵⁴ Justice O'Connor, delivering the opinion of the Court, stated that certiorari had been granted because the decision of the Missouri Supreme Court conflicted with that of the Fourth Circuit in *Brown v. Porcher*.³⁵⁵ on a question of "practical significance in the administration of state unemployment compensation laws."³⁵⁶

In 1980, Linda Wimberly, an employee of the J.C. Penney Company, requested a leave of absence from her job in order to give birth to her baby.³⁵⁷ Her leave was granted, but without a guarantee of job reinstatement when she recovered from the birth.³⁵⁸ Within a month after the birth of her child, Ms. Wimberly notified her employer that she wished to return to work.³⁵⁹ However, she was informed that there were no positions available for her at that time.³⁶⁰

After Ms. Wimberly filed a claim for unemployment benefits with the Missouri Division of Employment Security, the Division determined that she had "quit because of pregnancy."³⁶¹ The Missouri unemployment compensation statute disqualifies a claimant for unemployment benefits if that individual "has left work voluntarily without good cause attributable to his work or to his employer."³⁶² Since Ms. Wimberly's

³⁵⁴ 479 U.S. 511 (1987).

³⁵⁵ 660 F.2d 1001 (1981), cert. denied, 459 U.S. 1150 (1983).

³⁵⁶ 479 U.S. at 512.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 513. Many employers offer "leaves of absence" which include no guarantee of job reinstatement. As has been noted in one study on national parental leave policies, "[t]he existence of some type of job guarantee is critical to employees taking parental leaves. Without promise of reinstatement, taking a leave is tantamount to quitting." Catalyst, Report on a National Study of Parental Leaves 29 (1986). Surveys indicate that 75 to 88% of employers who offer maternity leaves include some measure of job protection—reinstatement to the same or a similar job—as a part of their leave policy. See M. Radford, Parental Leave—Judicial and Legislative Trends: Current Practices in the Workplace 20 (Int'l Found. of Employee Benefits Research Report No. 87-3, June, 1987).

³⁵⁹ *Wimberly*, 479 U.S. at 513.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² Mo. Rev. Stat. § 288.050.1 (1986). The statute provides in relevant part:

Notwithstanding the other provisions of this law, a claimant shall be disqualified for waiting week credit or benefits until after he has earned wages for work insured under the unemployment compensation laws of any state equal to ten times his weekly benefit amount if the deputy finds:

(1) That he has left his work voluntarily without good cause attributable to his work or to his employer . . .

Id. As is evident from the statute, the disqualification of a claimant under these circumstances

pregnancy was not considered good cause attributable to her work or her employer, she was denied unemployment benefits.³⁶³ After pursuing the appropriate administrative appeals,³⁶⁴ Ms. Wimberly sought review in the courts. The Circuit Court of Jackson County, Missouri concluded that the application of the Missouri statute to Ms. Wimberly's situation was inconsistent with FUTA section 3304(a)(12), as construed in *Brown v. Porcher*.³⁶⁵ The circuit court stated that the FUTA amendment had "banned the use of pregnancy or its termination as an excuse for denying benefits to otherwise eligible women."³⁶⁶ This decision was affirmed by the Missouri Court of Appeals.³⁶⁷ However, the court of appeals stated that it had "reservations concerning the soundness of the ruling in *Brown*."³⁶⁸

The Missouri Supreme Court reversed the holding of the Missouri Court of Appeals, holding that it was not bound by the Fourth Circuit's decision in *Brown v. Porcher*.³⁶⁹ Instead, the Missouri Supreme Court relied on previous state appellate decisions interpreting the Missouri statute to disqualify any claimant who left work for a reason that was not causally connected to the claimant's work or employer.³⁷⁰ The Missouri

continues until the claimant has earned an amount equal to ten times the amount she would have received in unemployment compensation benefits. *Id.* The "weekly benefit amount" under Missouri law is equal to 4.5% of the total wages paid to the claimant during that quarter of the five quarters preceding the time unemployment benefits began in which the claimant received the highest amount in wages. *Id.* § 288.038. The current limit on the "weekly benefit amount" is \$150. *Id.* § 288.038.6.

³⁶³ *Wimberly*, 479 U.S. at 513.

³⁶⁴ The Division's appeals tribunal held a full evidentiary hearing and affirmed the initial decision. *Id.* The Labor and Industrial Relations Commission denied review. *Id.*

³⁶⁵ *Id.* In *Brown v. Porcher*, 660 F.2d 1001, 1004 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), the Fourth Circuit held that a state could not disqualify a woman from unemployment benefits solely because she left work on account of her pregnancy. See notes 341-52 and accompanying text *supra*.

³⁶⁶ *Wimberly*, 479 U.S. at 513.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Wimberly v. Labor & Indus. Relations Comm'n*, 688 S.W.2d 344 (Mo. 1985) (en banc).

³⁷⁰ See *Wimberly*, 479 U.S. at 514 (construing *Wimberly*, 688 S.W.2d at 346). The Missouri Supreme Court cited the following cases as support for its ruling: *Fifer v. Missouri Div. of Employment Sec.*, 665 S.W.2d 81 (Mo. Ct. App. 1984) (absent evidence that illness was caused or contributed to in some manner by employment, it could not be said that claimant "left work involuntarily with good cause attributable to her work"); *Division of Employment Sec. v. Labor & Indus. Relations Comm'n*, 617 S.W.2d 620 (Mo. Ct. App. 1981) (employee taking leave of absence, with a right to return contingent on availability of a job, had voluntarily left her job without good cause attributable to employer); *Duffy v. Labor & Indus. Relations Comm'n*, 556 S.W.2d 195 (Mo. Ct. App. 1977) (claimant who terminated employment due to personal illness unrelated to employment did so voluntarily without good cause attributable to her work); *Neeley v. Industrial Comm'n*, 379 S.W.2d 201 (Mo. Ct. App. 1964) (affirming denial of benefits to claimant who was granted one year pregnancy leave, who sought, but was for three weeks denied, permission to return to work after the birth, and who was then permitted to return to work); *LaPlante v. Industrial Comm'n*, 367 S.W.2d 24 (Mo. Ct. App. 1963)

Supreme Court concluded that section 3304(a)(12) did not mandate preferential treatment for pregnancy; rather, the court found that this statute only prohibited states from "singling out pregnancy for unfavorable treatment."³⁷¹ The United States Supreme Court affirmed the decision of the Missouri Supreme Court.³⁷²

The Court began its analysis with a succinct review of the history and structure of FUTA. The Court noted that FUTA leaves the actual administration of unemployment compensation programs to state discretion.³⁷³ Although such programs vary, the Court observed that all states require individuals applying for unemployment benefits to satisfy some version of a three-part test.³⁷⁴ First, the number of hours a claimant worked, or the amount of wages she earned, must meet a statutory minimum.³⁷⁵ Second, a claimant must be "eligible"—in other words, both able to work and available for work.³⁷⁶ Third, a claimant must not be "disqualified" from receiving benefits by any provisions of the various state laws.³⁷⁷ The Court observed that "most states" treat pregnancy as voluntary termination for good cause.³⁷⁸ The Court noted, however, that Missouri is among the few states that define good cause narrowly, to include only those terminations that occur for reasons directly attributable to the work or the employer.³⁷⁹

According to the Court, Ms. Wimberly recognized that the Missouri statute was neutral in that it treated pregnancy in the same manner as any other type of temporary disability.³⁸⁰ The Court stated that Ms. Wimberly's position was that section 3304(a)(12) is a federal requirement that states allow women who have left work because of pregnancy to

(affirming denial of benefits to slaughterhouse laborer who claimed, unsuccessfully, that his job was injurious to his back and holding that he left voluntarily without good cause attributable to work); *Bussmann Mfg. Co. v. Industrial Comm'n*, 335 S.W.2d 456 (Mo. Ct. App. 1960) (reversing grant of benefits to claimant who left work because of pregnancy but was refused leave of absence as well as opportunity to return to work after birth); *Bussmann Mfg. Co. v. Industrial Comm'n*, 327 S.W.2d 487 (Mo. Ct. App. 1959) (affirming grant of benefits to employee who, upon returning to work after a leave of absence, was offered work only on machine her doctor had advised would cause her ill effects).

³⁷¹ *Wimberly*, 688 S.W.2d at 349.

³⁷² 479 U.S. at 514.

³⁷³ *Id.* at 515.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*; see also text accompanying notes 42-59 *supra* (discussing three requirements).

³⁷⁸ *Wimberly*, 479 U.S. at 515. The Court divided the states that employ this type of treatment into those which specifically enumerate pregnancy as "good cause" in the statute—such as Arkansas, South Dakota and Tennessee—and those states that have reached the same result by way of administrative determination—such as California. *Id.* at 515 & n.1.

³⁷⁹ *Id.* at 515-16. But see Rosettenstein, *supra* note 50, at 396 (discussing contrary findings of recent survey).

³⁸⁰ *Wimberly*, 479 U.S. at 516.

receive unemployment benefits when they become available and able to work, "regardless of the State's treatment of other similarly situated claimants."³⁸¹

The Court, however, concluded that section 3304(a)(12) of FUTA merely prohibited states from singling out pregnancy for unfavorable treatment.³⁸² The Court first noted that the focus of the statutory language of section 3304(a)(12) was the *state's basis* for its decision, not the *claimant's reason* for leaving a job.³⁸³ The state of Missouri adopted a neutral rule that had the effect of "incidentally" disqualifying pregnant claimants "as part of a larger group."³⁸⁴ The Court stated that, to apply Missouri law, "it is not necessary to know that petitioner left because of pregnancy: all that is relevant is that she stopped work for a reason bearing no causal connection to her work or her employer."³⁸⁵ For this reason the Court found that pregnancy could not possibly have been the sole basis for the decision to deny benefits.³⁸⁶

The Court relied on three other arguments to support its conclusion. First, according to the Court, its construction of FUTA section 3304(a)(12) was consistent with the Court's prior construction of similarly worded statutes.³⁸⁷ Second, the Court concluded that the legislative history of FUTA section 3304(a)(12) indicates no intent on the part of Congress to enact a law requiring preferential treatment.³⁸⁸ Finally, the Court emphasized that the Department of Labor has interpreted section 3304(a)(12) as an antidiscrimination statute.³⁸⁹

In connection with the first argument, the Court noted its interpretation of other similarly worded statutes designed to protect certain groups. In *Monroe v. Standard Oil Co.*,³⁹⁰ it had concluded that a provision of the Vietnam Era Veterans' Readjustment Assistance Act of 1974³⁹¹ guaranteed members of the nation's reserve forces "the same treatment afforded their co-workers without military obligations," but did not require an employer to make special arrangements to accommodate the employee's obligations.³⁹² The *Wimberly* Court characterized the de-

³⁸¹ Id.

³⁸² Id.

³⁸³ Id.

³⁸⁴ Id. at 517.

³⁸⁵ Id.

³⁸⁶ Id.

³⁸⁷ Id. at 517-18.

³⁸⁸ Id. at 581-21.

³⁸⁹ Id. at 521-22.

³⁹⁰ 452 U.S. 549 (1981).

³⁹¹ 38 U.S.C. § 2021(b)(3) (1982).

³⁹² See *Monroe*, 452 U.S. at 560-62. The statute interpreted in *Monroe* provided that a person "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of

cision in *Monroe* as an occasion where it had construed a statute as "prohibiting disadvantageous treatment rather than as mandating preferential treatment."³⁹³

The *Wimberly* Court also compared its construction of FUTA section 3304(a)(12) with its interpretation of section 504 of the Rehabilitation Act of 1973³⁹⁴ in *Southeastern Community College v. Davis*.³⁹⁵ The Court, in holding that section 504 required only "evenhanded treatment," pointed out that another section of the Rehabilitation Act of 1973 indicated that Congress recognized the difference between even-handed treatment and "affirmative efforts to overcome the disabilities caused by handicaps."³⁹⁶ The Court noted further that section 504 of the Act did *not* specifically refer to affirmative action.³⁹⁷ The *Davis* Court concluded that section 504 did not require an educational institution to lower or modify its standards to accommodate handicapped persons.³⁹⁸ Quoting

the Armed Forces." 38 U.S.C. § 2021(b)(3) (1982). The petitioner in *Monroe* was a full-time employee in an Ohio refinery. *Monroe*, 452 U.S. at 551. Because the refinery was always open, employees were scheduled to work five eight-hour days in a row each week, but in a different five-day sequence each week. *Id.* The petitioner, a reservist, had to attend reserve training sessions one weekend a month and for two weeks each summer. *Id.* at 551-52. This had caused the petitioner to reschedule a number of his shifts in order to be available for reserve duty on the required weekends. *Id.* at 552. On some occasions, however, the petitioner was unable to arrange a switch with another employee. *Id.* At other times, the employer had used substitute employees to replace petitioner, often paying these substitutes overtime wages. *Id.* at 552. The petitioner argued that the company was obligated under 38 U.S.C. § 2021(b)(3) to make special efforts to schedule his hours so that he could avoid any lost income by reason of his reserve obligations. *Id.* at 560. The Supreme Court characterized the petitioner's request as requiring work assignments unavailable to non-reservist employees at the respondent's refinery. *Id.* at 561. After examining the legislative history of the statute, the Supreme Court concluded that the congressional purpose was "to protect employee reservists from discharge, denial of promotional opportunities, or other corporate *adverse* treatment solely by reason of the military obligations; there was never any suggestion of employer responsibility to provide preferential treatment." *Id.* at 562.

³⁹³ *Wimberly*, 479 U.S. at 517.

³⁹⁴ 29 U.S.C. § 794 (1982). Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." *Id.*

³⁹⁵ 442 U.S. 397 (1979). In *Davis*, a student seeking training as a registered nurse was denied admission to a state program because it was believed that her hearing disability made it impossible for her to participate in the program and to operate safely as a registered nurse. *Id.* at 401. The student contended that the Rehabilitation Act compelled the state institution to "undertake affirmative action that would dispense with the need for effective oral communication" in the nursing program. *Id.* at 407. The student suggested, for example, that she be given individual supervision by faculty members when she was attending patients and that certain of her required courses be dispensed with altogether. *Id.*

³⁹⁶ *Id.* at 410. Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. § 791(b) (1982), requires an affirmative action plan for the hiring of handicapped persons by the federal government.

³⁹⁷ *Davis*, 442 U.S. at 411.

³⁹⁸ *Id.* at 413.

from its earlier *Davis* opinion, the *Wimberly* Court noted that that construction of the statutory language was "intended to eliminate discrimination against otherwise qualified individuals," and was thus comparable to its current interpretation of section 3304(a)(12) of FUTA.³⁹⁹

The second portion of the Supreme Court's analysis in *Wimberly* primarily responds to Ms. *Wimberly*'s reliance upon the legislative history of FUTA section 3304(a)(12).⁴⁰⁰ Ms. *Wimberly* argued that the language of section 3304(a)(12) manifested a clear intent on the part of Congress to prohibit *any* denial of unemployment benefits based solely on a claimant's pregnancy.⁴⁰¹ She pointed out that Congress typically used the word "discrimination" in statutes which were intended merely to prohibit discrimination,⁴⁰² citing as an example Title VII of the Civil Rights Act of 1964.⁴⁰³ Ms. *Wimberly* noted further that the Pregnancy Discrimination Act of 1978, which expands the meaning of sex discrimination in Title VII to include discrimination on the basis of pregnancy, provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work"⁴⁰⁴ Ms. *Wimberly* compared this language to that of the original draft of section 3304(a)(12), which provided as follows:

No person shall be denied compensation under such State law solely on the basis of pregnancy *and determinations under any provision of such State law relating to voluntary termination of employment, availability for work, active search for work, or refusal to accept work shall not be made in a manner which discriminates on the basis of pregnancy.*⁴⁰⁵

Ms. *Wimberly* argued that this change, reflecting a deletion of the antidiscrimination language, demonstrated "legislative intent to enact broad remedial legislation more comprehensive than the anti-discrimination provision which appeared in the initial bill."⁴⁰⁶ The Supreme Court disagreed with her conclusion, stating that it found it difficult to believe that the *deletion* of language could *expand* the scope of a statute.⁴⁰⁷ The Supreme Court suggested that "Congress intended simply to eliminate a

³⁹⁹ *Wimberly*, 479 at 517-18 (quoting *Davis*, 442 U.S. at 410).

⁴⁰⁰ *Id.* at 418-21.

⁴⁰¹ Brief for Petitioner at 18, *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511 (1987) (No. 85-129) [hereinafter Brief for Petitioner].

⁴⁰² See *id.* at 15-16.

⁴⁰³ See 42 U.S.C. § 2000e-2(a) (1982).

⁴⁰⁴ 42 U.S.C. § 2000e(k) (1982).

⁴⁰⁵ Brief for Petitioner, *supra* note 401, at 19 (citing H.R. 8366, 94th Cong., 1st Sess. § 8(a) (1975); S. 2079, 94th Cong., 1st Sess. § 8(a) (1975)) (emphasis in brief).

⁴⁰⁶ *Id.* at 20.

⁴⁰⁷ *Wimberly*, 479 U.S. at 519.

lengthy and redundant phrase, without intending to change the meaning of the provision.”⁴⁰⁸

The Court went on to examine Ms. Wimberly’s reliance on other portions of the legislative history of section 3304(a)(12). Ms. Wimberly argued that section 3304(a)(12) applied to more than just the nineteen states listed in the House Report as having “ ‘special disqualification provisions pertaining to pregnancy.’ ”⁴⁰⁹ Missouri was not one of these states, but Ms. Wimberly argued that Missouri was not included because its policy was not apparent from its statute.⁴¹⁰ The Supreme Court responded by asserting that “Missouri does not have a ‘policy’ specifically relating to pregnancy; it neutrally disqualifies workers who leave their jobs for reasons unrelated to their employment.”⁴¹¹ The Court also noted that the Senate Report⁴¹² focused almost exclusively on its intent to prohibit the type of statute struck down in *Turner v. Department of Employment Security*⁴¹³ as unconstitutional.⁴¹⁴ The Court concluded that

petitioner can point to nothing in the Committee Reports, or elsewhere in the statute’s legislative history, that evidences congressional intent to mandate preferential treatment for women on account of pregnancy. . . . Indeed, the legislative history shows that Congress was focused only on the issue addressed by the plain language of § 3304(a)(12): prohibiting rules that single out pregnant women or for-

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* (quoting H. Rep. No. 755, *supra* note 69, at 7). For a discussion of the House Report and UIPL No. 33-75, see notes 71-73 and accompanying text *supra*. The Court divided the listed state statutes into three categories: (a) those which disqualified pregnant women from receiving unemployment compensation for a specified period surrounding the date of childbirth; (b) those which specifically disqualified women who terminated work because of pregnancy; and (c) those which had “miscellaneous provisions” singling out pregnancy for discriminatory treatment. *Wimberly*, 479 U.S. at 520.

⁴¹⁰ *Wimberly*, 479 U.S. at 520.

⁴¹¹ *Id.*

⁴¹² S. Rep. No. 1265, *supra* note 69.

⁴¹³ 423 U.S. 44, 46 (1975).

⁴¹⁴ *Wimberly*, 479 U.S. at 520-21; see text accompanying notes 323-30 *supra* (discussing *Turner*). The Court did not seem concerned by the fact emphasized in Ms. Wimberly’s brief that the *Turner* decision was not handed down until a month *after* the introduction of the bills which included the initial versions of section 3304(a)(12). Brief for Petitioner, *supra* note 401, at 20. Perhaps the Court was swayed by the argument made in both the Respondent’s brief and the brief of the American Civil Liberties Union, National Women’s Political Caucus, and Coal Employment Project as Amicus Curiae, that, regardless of the original impetus for the bill, after *Turner* it was consistently stated in the legislative history that section 3304(a)(12) was intended as a codification of that decision. Brief for Respondent at 33, *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511 (1987) (No. 85-129); Brief for ACLU, National Women’s Political Caucus and Coal Employment Project as Amicus Curiae at 10-11, *Wimberly v. Labor & Indus. Relations Comm’n*, 479 U.S. 511 (1987) (No. 85-129) [hereinafter Brief for ACLU].

merly pregnant women for disadvantageous treatment.⁴¹⁵

The final portion of the Supreme Court's analysis relied on the Department of Labor's interpretation of section 3304(a)(12). The Department of Labor had informed the states that it interpreted section 3304(a)(12) as requiring only that a pregnant individual not be treated differently from other unemployed individuals, and that benefits be based only on whether the individual met the state's conditions for receipt of such benefits.⁴¹⁶

In summary, the Supreme Court of the United States based its decision that section 3304(a)(12) did not require preferential treatment for pregnant or formerly pregnant women on three basic premises. First, the Court looked to its interpretation of similar statutes and asserted that section 3304(a)(12) should be interpreted to mandate only nondiscriminatory treatment, as had the other statutes. Second, the legislative history of section 3304(a)(12) indicated no intention on the part of Congress to strike down facially neutral state laws. Finally, according to the Court, great deference should be given to the continuing interpretation of the Department of Labor, the agency designated to enforce the statute.

The clear and concise nature of Justice O'Connor's opinion, combined with the fact that she was joined in that opinion by all of the participating Justices,⁴¹⁷ would seem to indicate that the Court's analysis is unassailable. The Court's conclusion was simple: the Missouri statute is a neutral rule that incidentally disqualifies pregnant claimants, but treats these claimants no differently than others similarly situated.⁴¹⁸ To apply the Missouri rule, it is not even necessary to know that pregnancy was the cause of the unemployment.⁴¹⁹ Therefore, the neutral application of such a rule cannot be characterized as a decision made solely on the basis of pregnancy.⁴²⁰ A reader of the Court's decision is left either with a secure feeling that equal treatment has once again been upheld and, to some degree, applauded by the Supreme Court or conversely, that through some semantic sleight-of-hand, the interpretation of a "neutral" rule and the term "solely on the basis of pregnancy" have hampered the emerging participation and economic force of women in the workplace.

A closer examination of the *Wimberly* opinion indicates that the

⁴¹⁵ *Wimberly*, 479 U.S. at 521.

⁴¹⁶ *Id.* at 521-22. After the *Wimberly* decision, the Department of Labor issued another Program Letter informing the states that the case had implicitly overruled *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), and thus that section 3304(a)(12) "may no longer be said to require preferential treatment." Unemployment Insurance Program Letter No. 14-37, 1B Unempl. Ins. Rep. (CCH) ¶ 21,856-57 (Apr. 21, 1987).

⁴¹⁷ Justice Blackmun took no part in the decision. *Wimberly*, 479 U.S. at 522.

⁴¹⁸ *Id.* at 516-17.

⁴¹⁹ *Id.* at 517.

⁴²⁰ *Id.*

Supreme Court's reasoning is not as solidly based as the unanimous vote of the Justices might make it appear. For example, the Court compares its interpretation of section 3304(a)(12) of FUTA with its interpretation of similarly worded statutes concerning reservists⁴²¹ and handicapped persons.⁴²² However, this comparison is not apt. In both *Monroe* and *Davis*, the Supreme Court addressed situations in which an employer or institution was asked to make accommodations that were both inconvenient and costly. In *Monroe*, the employer was asked to juggle shifts and pay overtime to other employees in order to guarantee a forty hour week for the reservist.⁴²³ In *Davis*, the educational institution essentially was asked to hire interpreters, provide special faculty assistance, and make exceptions to its normal schedule in order to put the handicapped student in the same position she would have been in had she not been hearing-impaired.⁴²⁴ In both of these cases, the members of the protected groups were requesting a form of "affirmative action" to secure for themselves results equal to those that accrued to individuals who did not possess their special characteristics. Both of these cases involved more than a demand that the group not be denied certain privileges merely because of their differentiating characteristics.

It is arguable that in *Wimberly*, the petitioner was not asking for an additional benefit to put her in the same position as those not exhibiting her differentiating characteristic: pregnancy. Ms. Wimberly was not asking that she be paid unemployment benefits during the time in which she was in fact unable to and unavailable for work.⁴²⁵ Rather, she was requesting simply that she not be refused unemployment benefits at that point in time when, being both available and able to work, she was unable to find employment.⁴²⁶

⁴²¹ *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).

⁴²² *Southeastern Community College v. Davis*, 442 U.S. 379 (1979); see text accompanying notes 394-99 *supra*.

⁴²³ *Monroe*, 452 U.S. at 560.

⁴²⁴ *Davis*, 442 U.S. at 407-08.

⁴²⁵ See *Wimberly*, 479 U.S. at 513.

⁴²⁶ *Id.* This distinction bears a certain resemblance to the benefit/burden analysis used by the United States Supreme Court in examining whether certain employee policies related to pregnancy violated the prohibition against discrimination on the basis of sex contained in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a)(1) (1982). In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court examined the employee benefits package of a private employer that did not include pregnancy among the disabilities covered by its nonoccupational sickness and accident plan. *Id.* at 127. The Court noted that discrimination in Title VII cases "can be established in some circumstances upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." *Id.* at 137. The Court held, however, that the disability plan did not have a discriminatory effect on women and that the insurance package was not shown to be worth more to men than it was to women simply because it did not insure against all risks. *Id.* at 138-39.

The Court based its opinion in *Gilbert* on its earlier decision in *Geduldig v. Aiello*, 417

The question of whether an employer must provide additional accommodation has frequently been examined in cases arising under Title VII of the Civil Rights Act.⁴²⁷ Title VII prohibits employment discrimination against individuals on the basis of their race, color, religion, sex, or national origin.⁴²⁸ In 1972, Title VII was amended to require an employer to make "reasonable accommodations" for an employee's religious beliefs if such accommodation would not create "undue hardship" for the employer.⁴²⁹ In *Trans World Airlines, Inc. v. Hardison*,⁴³⁰ however, under facts somewhat resembling those of the *Monroe* case, the United States Supreme Court apparently limited the application of the reasonable accommodation requirement. The employee in *Hardison* was discharged from a job requiring a seven day work week because he would not work on Saturday due to his religious beliefs.⁴³¹ The Supreme Court found that the reasonable accommodation provision of Title VII did not require an employer to violate a collective bargaining agreement by compelling an employee to change shifts with the religious employee, to pay

U.S. 484 (1974). In *Geduldig*, the Court found that the exclusion of pregnancy from the disabilities which were covered by a state disability insurance program did not violate the equal protection clause. *Id.* at 492-97. In fact, the Court concluded that, under the system, "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97.

The *Gilbert* decision was soon followed by *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). In that case, the employer's leave policy required pregnant employees to take a formal leave of absence. *Id.* at 137. The employees did not receive sick pay while on such leave. *Id.* Additionally, the employees lost all accrued job seniority, so that as a result they were not guaranteed a permanent position upon their return. *Id.* The Court distinguished the forfeiture of accrued seniority from the denial of sick pay because the denial of sick pay was merely a refusal to extend a benefit to pregnant employees, while the forfeiture of seniority "imposed on women a substantial burden that men need not suffer." *Id.* at 142. The Court refused to interpret Title VII in a manner which would allow an employer to "burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.*

The state statute examined in *Wimberly* could arguably be said to impose a burden on pregnant or formerly pregnant women, rather than merely deny them a benefit. However, it is important to note that *Wimberly* differs from *Geduldig*, *Gilbert*, and *Satty* in that the unemployment statute applies to all individuals who leave their jobs, not just pregnant individuals.

⁴²⁷ 42 U.S.C. § 2000e (1982).

⁴²⁸ *Id.* § 2000e-2(a)(1).

⁴²⁹ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j) (1982)). This amendment adopted the language of the Equal Employment Opportunity Commission guidelines originally promulgated in 1967. See 29 C.F.R. § 1605.2(b) (1987).

⁴³⁰ 432 U.S. 63 (1977).

⁴³¹ See *id.* at 67-79. Pursuant to a collective bargaining agreement, the Saturday shift was assigned to employees based on their accrued seniority. *Id.* at 67. Lacking the requisite seniority, Hardison was assigned a Saturday shift and was unable to trade shifts with another employee. *Id.* at 68. TWA refused to let him work only four days due to the resulting impairment of its business operations and the high cost of filling the shift with another employee. *Id.* at 68-69.

extra wages to a voluntary substitute, or to run the shift with less than a full contingent of employees.⁴³² Thus, even when interpreting a statute expressly requiring additional accommodation, the Court seemed to affirm the premise of *Monroe* and *Davis* that anti-discrimination statutes do not mandate preferential treatment.

However, the *Wimberly* Court failed to mention that the Court had addressed the accommodation issue in two earlier decisions involving the interaction between an employee's religious beliefs and the application of state unemployment laws.⁴³³ It should be noted that these two cases were decided under the first amendment rather than Title VII, as they were not cases relating to discrimination in employment.⁴³⁴ However, given the fact that these cases, like *Wimberly*, concerned a denial of unemployment benefits, the Court's analysis is useful in understanding the deficiencies in *Wimberly*. These two cases point to a possible distinction between decisions construing anti-discrimination statutes such as Title VII, and those addressing the treatment of individuals under state unem-

⁴³² *Id.* at 76-81. The Court seemed particularly concerned with the fact that TWA was bound by the seniority system set up in its collective bargaining agreement, which hampered it from working out a job switch for Hardison. The Court noted that seniority systems are "afforded special treatment" under section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982), which exempts from the definition of "unlawful employment practice" those practices carried out pursuant to a "bona fide seniority or merit system." 432 U.S. at 81-82. In a strong dissent, Justice Marshall pointed out that "if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and statute [requiring reasonable accommodations], while brimming with 'sound and fury,' ultimately 'signif[y] nothing.'" *Id.* at 87. (Marshall, J., dissenting).

In a more recent case, the Court of Appeals for the Sixth Circuit found that an employer had violated Title VII by failing to accommodate an employee who had religious convictions against working on Sundays. *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987). In *Smith*, the employer allowed employees to trade shifts. *Id.* at 1083. However, the employee in question stopped asking other employees to work on Sundays since he did not wish to ask others to do what was, in his mind, a sin. *Id.* at 1084. The employee was fired after his third unexcused Sunday absence. *Id.* The Court found that soliciting replacements would not have been an undue hardship for the employer, and thus that the employer had not fulfilled its obligation of reasonable accommodation. *Id.* at 1089. On the other hand, in *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519 (4th Cir. 1987), the Court of Appeals for the Fourth Circuit found that an employee who refused categorically to work on Sundays precluded the employer from making reasonable accommodations for his religious beliefs. *Id.* at 521-22. The employer selected employees for the Sunday shift on the basis of the number of hours each employee worked during the preceding week and whether the employee had worked on previous Sundays. *Id.* at 521. The Court found that the religious employee's absolutist position forced the employer either to discharge him or to discriminate against other employees. See *id.* at 521-22.

⁴³³ See *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁴³⁴ See generally Ratter, *The Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees*, 11 Colum. Hum. Rts. L. Rev. 63, 66-74 (1979) (discussing congressional intent to have Title VII require more of employers than is constitutionally required of the government).

ployment statutes.⁴³⁵

Both of these first amendment cases involved facially neutral provisions in state unemployment statutes. In *Sherbert v. Verner*,⁴³⁶ an employee who was discharged because she refused on religious grounds to work on Saturday was unable to obtain other employment due to this religious belief.⁴³⁷ The state of South Carolina found her ineligible for unemployment benefits because she failed to accept suitable work and thus did not meet the requirement that she be "able to work . . . and available for work."⁴³⁸ The United States Supreme Court reversed the denial of benefits, finding that it clearly imposed an unconstitutional burden on the free exercise of the claimant's religion.⁴³⁹

In *Thomas v. Review Board of Indiana Employment Security Division*,⁴⁴⁰ an employee quit his job when he was transferred to a division engaged in the manufacture of components for military tanks; he claimed that working on weapons would violate the principles of his religion.⁴⁴¹ The state of Indiana denied his claim for benefits because his termination was not based upon good cause attributable to his employer.⁴⁴² The state argued that its law contained "neutral objective standards" for awarding

⁴³⁵ In embarking upon this analysis, the author remains fully aware of the Supreme Court's doctrine "that we ought not to pass upon questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. Co. v. McLaughlin*, 323 U.S. 101, 105 (1944). The *Wimberly* decision rested on a finding that the Missouri law did not violate FUTA section 3304(a)(12) and did not address whether the law denied pregnant and formerly pregnant women rights guaranteed them under the due process and equal protection clauses. However, the scant legislative history of FUTA section 3304(a)(12), see notes 69-75 and accompanying text *supra*, combined with the contention that the statute was meant to be a codification of *Turner*, see note 69 *supra*, a case decided on constitutional grounds, mandates that this Article explore the relevant issues from a constitutional perspective.

⁴³⁶ 374 U.S. 398 (1963).

⁴³⁷ *Id.* at 399.

⁴³⁸ S.C. Code Ann. §§ 68-113, 68-114(3) (Law. Co-op. 1986); see *Sherbert*, 374 U.S. at 400-01.

⁴³⁹ 374 U.S. 403-06. The Court then considered whether the state had advanced a compelling interest that would justify this burden on the claimant's religious rights. The only interest suggested by the state was the protection against "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work . . ." *Id.* at 407. The Court found no evidence to support this interest and, in any event, if evidence were produced, the Court did not think the interest would be of such magnitude to justify the infringement on first amendment rights. See *id.* at 407-09. The Court also discussed whether its holding fostered the "establishment" of the claimant's religion in violation of the establishment clause of the first amendment. *Id.* at 409-10. The Court found that "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . ." *Id.* at 409.

⁴⁴⁰ 450 U.S. 707 (1981); see Note, Unemployment Benefits and the Religion Clauses: A Recurring Conflict, 36 U. Miami L. Rev. 585 (1982) (discussing *Thomas*).

⁴⁴¹ *Thomas*, 450 U.S. at 709-11. The claimant discovered upon investigation that all other in-plant job openings were also weapons-related, so he asked to be laid off. *Id.* at 710. When that request was denied, he resigned. *Id.*

⁴⁴² *Id.* at 712.

unemployment benefits.⁴⁴³ The Court concluded, as it did in *Sherbert*, that the application of the statute in this case imposed an undue burden upon the free exercise of the claimant's religion.⁴⁴⁴

The analysis used in both of these cases is also applicable to the circumstances of *Wimberly*. The Court in *Sherbert* stated that the denial of benefits "forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."⁴⁴⁵ The Court in *Thomas* found that conditioning the receipt of benefits "upon conduct proscribed by a religious faith . . . [puts] substantial pressure on an adherent to modify his behavior and to violate his beliefs"⁴⁴⁶ Similarly, one could argue that disallowing unemployment benefits for terminations due to pregnancy forces a working woman to choose between having children, thereby forfeiting unemployment income, or remaining childless. The Supreme Court has made it clear that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."⁴⁴⁷ Thus, the Missouri statute arguably constituted an unacceptable infringement on this liberty, making the statute constitutionally invalid, as well as in violation of FUTA.⁴⁴⁸

⁴⁴³ Id. at 717 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 271 Ind. 223, 237, 391 N.E.2d 1127, 1130 (1979)).

⁴⁴⁴ Id. at 718. The Court noted that the lower court, in affirming the denial of benefits, put undue reliance on the fact that the claimant seemed uncertain about his beliefs and that another follower of the claimant's religion had stated that he would find such work religiously acceptable. Id. at 715. The Supreme Court opined that "[c]ourts are not arbiters of spiritual interpretation" and that "courts should not undertake to dissect religious beliefs because the . . . beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." Id. at 715-16. The Court rejected the state's argument that it had an interest in protecting its unemployment fund by noting that there was no evidence that the number of people who left their jobs for religious reasons would have any substantial effect on the fund. Id. at 718-19. The Court also found no evidence to support the state's argument that the law avoided detailed probing by employers into job applicants' religious beliefs. Id. Finally, the Court held that its *Sherbert* reasoning was determinative with regard to the argument that granting the benefits "established" the claimant's religion in Indiana. Id. at 719-20.

⁴⁴⁵ *Sherbert*, 374 U.S. at 404.

⁴⁴⁶ *Thomas*, 450 U.S. at 717-18.

⁴⁴⁷ *Turner v. Department of Employment Sec.*, 423 U.S. 44, 46 (1975) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974)).

⁴⁴⁸ The freedom of personal choice in family matters has been recognized in a variety of other cases examined by the United States Supreme Court, including *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child-rearing and education of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same).

Dicta in two cases interpreting *Roe v. Wade* might be used in an attempt to refute the theory that Missouri's disqualification of pregnant women from receiving unemployment bene-

Moreover, *Sherbert* uses language which is quite relevant when applied to the *Wimberly* facts. The *Sherbert* Court found it "apparent that appellant's declared ineligibility for benefits derives *solely from the practice of her religion . . .*"⁴⁴⁹ It is exceedingly difficult to reconcile this statement with the statement of the *Wimberly* Court that the "neutral application" of the Missouri unemployment statute—an application which resulted in the disqualification of women who left work to give birth—"cannot be readily characterized as a decision made *solely on the basis of pregnancy*."⁴⁵⁰

One of the essential elements upon which Ms. Wimberly and the Supreme Court disagreed was the group of similarly situated claimants to whom Ms. Wimberly should be compared in order to determine if the statute was applied neutrally. The Supreme Court indicated that Ms. Wimberly was treated in the same manner as any other claimant who left her job voluntarily without good cause that was directly attributable to her work or to the employer.⁴⁵¹ In other words, the Supreme Court included Ms. Wimberly in the category of persons who leave work due to another type of physical disability, a death in the family, or the transfer of the other spouse. Ms. Wimberly, on the other hand, would have preferred to have been compared to other sexually active employees who had not been forced to forfeit unemployment benefits as a result of this

fits directly impinges on protected freedoms relating to marriage and family life. See *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maier v. Roe*, 432 U.S. 464, 474 (1977). For example, in *Maier*, the Court stated that a state's choice not to fund abortions "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Maier*, 432 U.S. at 474. In *Harris*, the Court noted:

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

Harris, 448 U.S. at 316. Adherents of this line of reasoning would argue that the denial of unemployment benefits does not directly hinder a woman's choice to have a child, and thus is not a direct infringement on her due process liberty. Such a conclusion, however, would not only be contrary to the implicit conclusion in *Sherbert*, *Turner*, and *Thomas*—that a denial of benefits is a direct infringement—but it would also be an attenuation of the language of *Maier* and *Harris* beyond the precepts upon which these cases were based. It is difficult to imagine the Court upholding a state or federal decision limiting the extent to which pregnancy and childbirth expenses are covered by Medicaid as severely as the coverage for abortion expenses has been limited.

⁴⁴⁹ 374 U.S. at 404 (emphasis added). In his dissent, Justice Rehnquist characterized the *Thomas* Court's holding as requiring a state "to provide financial assistance to a person solely on the basis of his religious beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting).

⁴⁵⁰ 479 U.S. at 517 (emphasis added).

⁴⁵¹ *Id.* at 516.

activity.⁴⁵² Ms. Wimberly argued that "[p]regnancy is not an illness. It is a normal condition experienced by millions of healthy women."⁴⁵³ While it may have been preferable for Congress to have also prohibited disqualifications based on all illness-related separations from employment, she noted that section 3304(a)(12) specifically addressed pregnancy, thus distinguishing that physical condition from other medical conditions.⁴⁵⁴ Placing pregnancy in the category of voluntary terminations without good cause attributable to the employer denies benefits solely on the basis of pregnancy, just as placing religious-based terminations in this category denies benefits solely on the basis of religious beliefs.⁴⁵⁵ In other words, had Ms. Wimberly not been pregnant she would

⁴⁵² As Amici Curiae, the Equal Rights Advocates, California Women Lawyers, San Francisco Women Lawyers Alliance, and Tracy Goudy argued that pregnant women should be compared for discrimination purposes to men who have also taken part in "procreative activities." They argued that

[t]he appropriate comparison to make in cases involving pregnancy-related discrimination is between women who have engaged in reproductive conduct and men who have engaged in reproductive conduct. These groups are similarly situated because both participate in the procreative process. Only these groups can exercise personal choice in matters of reproduction. Pregnant women and all other disabled claimants do not share any such similarities.

Brief for Equal Rights Advocates, California Women Lawyers, San Francisco Women Lawyers Alliance, and Tracy Goudy as Amici Curiae at 8, *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511 (1987) (No. 85-129) [hereinafter Brief for Equal Rights Advocates]. The amici argued that, in order to ensure the equality of men and women in the workplace, the procreative role of women must be accommodated. *Id.* at 7.

This same approach is taken by Professor Herma Hill Kay in her "episodic analysis" approach to the treatment of pregnancy. See Kay, *supra* note 327, at 21-37. She argues that male and female workers should always be treated equally except during those times when a woman is pregnant. See *id.* at 26-27. At that point, Professor Kay argues, the workplace should accommodate the woman's needs to ensure that she will experience no employment disadvantage, compared to her male counterparts, as a result of her pregnancy. See *id.* at 27.

⁴⁵³ Brief for Petitioner, *supra* note 401, at 26.

⁴⁵⁴ *Id.* As will be discussed in Part III of this Article, the approach advocated by Ms. Wimberly could be characterized as a "special treatment" approach in that she asked the Court to view pregnancy as a unique condition, *sui generis*, which should be accommodated in the workplace, rather than as a disability that should be treated like all other disabilities. See text accompanying notes 533-36 *infra*.

⁴⁵⁵ An approach to pregnancy based upon the *Sherbert* and *Thomas* rationale would be more akin to the due process approach employed by the Court in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (singling out reproductive function as fundamental liberty) than the equal protection approach used by the *Wimberly* Court (comparing pregnant women with other workers suffering from disabling conditions). See Williams, *supra* note 167, at 341. In this context, one argument which could have been presented by Ms. Wimberly concerns the timing of the enactment of FUTA section 3304(a)(12). As mentioned above, see note 69 *supra*, this amendment had already been introduced in Congress at the time the Supreme Court handed down the decision in *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975). The holding in *Turner* was based upon the *LaFleur* reasoning. In *LaFleur*, pregnancy was treated as part and parcel of a constitutionally protected right—the right of reproductive choice—and not as a condition to be compared with other disabilities. See *LaFleur*, 414 U.S. at 639-40. If, in fact, section 3304(a)(12) was meant only to codify *Turner*, see text accompa-

not have terminated her employment and been forced to seek unemployment benefits. When she sought benefits, she was able and available for work. She had applied to her employer for reinstatement. The only reason she was denied benefits was because she had left her previous employment to have a child. Thus, upon a close analysis of *Wimberly*, there appears a double-edged sword. On the one hand, Missouri offers no protection against termination for a woman who must take time off to deliver her baby—mandated job reinstatement⁴⁵⁶—while on the other hand, when she is denied reinstatement, the state does not deem her qualified for unemployment benefits. Many women in Missouri, therefore, must choose between having a family and being treated as active, “attached” members of the workforce.

Another weakness in the Supreme Court’s analysis in *Wimberly* is its reliance upon the Department of Labor’s interpretation of FUTA section 3304(a)(12), and the letter listing the nineteen states which, prior to *Turner*, had laws that discriminated “solely on the basis of pregnancy.”⁴⁵⁷ Included among the statutes listed in the letter is Oregon’s, which the letter described as follows: “Pregnancy — Presumed unable to work if unemployed because of a disability, including pregnancy, until administrator determines she is able to work.”⁴⁵⁸ Although the *Wimberly* Court stated that neither Missouri “nor any state with a rule like Missouri’s” is included in the list of the nineteen states,⁴⁵⁹ it is difficult to differentiate the Oregon statute from the Missouri statute. The only real difference between the two statutes is that, while the Missouri statute treats pregnancy as it treats other disabilities, it does not specifically mention the word pregnancy. On the other hand, the Oregon statute, which is included on the Department of Labor’s list and thus considered discriminatory, specifically states that pregnancy is treated as any other disability.⁴⁶⁰ Evidently, the word pregnancy in the Oregon statute was a fatal flaw, for without this unfortunate choice of words, the Oregon stat-

nying notes 412-15 *supra*, then the codification arguably was of a rule mandating *special* rather than equal treatment.

⁴⁵⁶ Some state statutes require employers to grant unpaid maternity leaves with a guarantee of job reinstatement for periods ranging from six weeks to four months. See, e.g., Cal. Gov’t Code § 12945(b)(2) (West 1980); Mont. Code Ann. § 49-2-311 (1987). The California statute was recently upheld by the United States Supreme Court in *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987), against a challenge that its mandate of special treatment for pregnant women was preempted by Title VII of the Civil Rights Act of 1964. See text accompanying note 110 *supra* (discussing mandated maternity leaves). See generally M. Radford, *supra* note 358, at 2-14 (describing state and federal statutes concerning parental leave, as well as relevant court decisions).

⁴⁵⁷ See *Wimberly*, 479 U.S. at 520; text accompanying note 79 *supra*.

⁴⁵⁸ UIPL No. 33-75, *supra* note 75; see Or. Rev. Stat. § 657.155(2) (1976).

⁴⁵⁹ *Wimberly*, 479 U.S. at 520.

⁴⁶⁰ See Or. Rev. Stat. § 657.155(2) (1976).

ute too would have been deemed a "neutral" rule.⁴⁶¹

A connected matter, which is discussed superficially in *Wimberly*, is the weight that the interpretation of a statute by the governmental agency assigned to enforce it will be given by the Court. The *Wimberly* Court noted that the Department of Labor's interpretation of section 3304(a)(12) confirmed its view of the statute.⁴⁶² However, in a case cited by the *Wimberly* Court for other purposes, *Southeastern Community College v. Davis*,⁴⁶³ the Court refused to defer to the interpretation of a federal statute by the Department of Health, Education, and Welfare (HEW) which took the form of regulations promulgated under the statute. Citing *Teamsters v. Daniel*,⁴⁶⁴ the *Davis* Court noted that the deference given to an agency interpretation is limited by the obligation "to honor the clear meaning of a statute, as revealed by its language, purpose, and history."⁴⁶⁵ The Court in *Wimberly* explained its deference to the Department of Labor's interpretation of section 3304(a)(12) by noting that "the agency's interpretation of the statute, like its legislative history, confirms what is clear from the statute's plain language."⁴⁶⁶

However, the Fourth Circuit in *Brown v. Porcher*,⁴⁶⁷ did not find that deference to a similar Department of Labor statutory interpretation was warranted. In *Brown*, the court had been asked to defer to the Department's view that FUTA section 3304(a)(12) was intended only to

⁴⁶¹ It is also interesting to note that UIPL No. 33-75, *supra* note 75, includes another seemingly "neutral" set of rules which would result in the denial of benefits to a woman who terminates her job on the basis of pregnancy. The list includes laws denying benefits on the basis of domestic and marital obligations and dependency allowances. Several of the states listed—California, Colorado, Idaho, Kansas, Kentucky, Mississippi, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, and West Virginia, for example—apparently had statutes that disqualified a claimant if the claimant quit employment for the purpose of marrying or performing some marital, parental, or other family business. For example, the Mississippi statute, as described in the Department of Labor letter, stated that "[m]arital, domestic and filial circumstances and obligations shall not be deemed good cause and [the] individual [is] disqualified for benefits until he has earned remuneration of not less than 8 times his weekly benefit amount." UIPL No. 33-75, *supra* note 75 (citing Miss. Code Ann. § 71-5-513(1) (1972)). In *Franklin v. Employment Sec. Comm'n*, 242 Miss. 447, 136 So. 2d 197 (1961) (overruled in *Smith v. Employment Sec. Comm'n*, 344 So. 2d 137 (Miss. 1977)), the Mississippi Supreme Court held that quitting work because of pregnancy is not good cause because it arises out of marital, filial, and domestic circumstances and obligations, as set out in the law. Thus, another facially neutral rule would deny unemployment benefits to a woman who leaves employment due to pregnancy. In its letter, the Department of Labor seemed to classify all laws which explicitly disqualified individuals on the basis of marital and domestic obligations as "discriminatory." See Rosettenstein, *supra* note 50, at 398-99.

⁴⁶² *Wimberly*, 479 U.S. at 521.

⁴⁶³ 442 U.S. 397 (1979); see text accompanying notes 394-98 *supra*.

⁴⁶⁴ 439 U.S. at 551 (1979).

⁴⁶⁵ *Davis*, 442 U.S. at 411 (citing *Teamsters*, 439 U.S. at 566 n.20).

⁴⁶⁶ *Wimberly*, 479 U.S. at 522.

⁴⁶⁷ 660 F.2d 1001 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983); see text accompanying notes 341-50 *supra*.

prohibit discrimination on the basis of pregnancy.⁴⁶⁸ The court of appeals quoted the Supreme Court for the criteria by which such an interpretation should be weighed, stating that the "amount of deference due an administrative agency's interpretation of a statute . . . 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements'"⁴⁶⁹ Using this test, the *Brown* court gave little weight to the Department's interpretation, finding "neither authority nor legislative history" to support the interpretation.⁴⁷⁰

This reasoning would have been equally applicable in *Wimberly*. Not only is there no legislative history to support the Labor Department's interpretation, but one of the letters relied upon by the *Wimberly* Court—Program Letter No. 33-75⁴⁷¹—shows little evidence of "thoroughness" in approach, and is internally inconsistent. The preparation of the list of "discriminatory" statutes merely seemed to entail a search for statutes which contained the word "pregnancy."⁴⁷² Not only did this list include statutes, such as that of Oregon,⁴⁷³ which said virtually the same thing as the Missouri statute upheld in *Wimberly*, it also was incomplete in that it did not include statutes, such as that of Florida, which expressly mention pregnancy as a disqualifying condition.⁴⁷⁴ The Letter was also inconsistent in that it listed as "discriminatory" the relatively neutral laws of several states in which disqualified individuals left jobs due to marital or domestic circumstances.⁴⁷⁵ In short, the Department of Labor's interpretations of FUTA section 3304(a)(12) and the state laws it addresses did not possess enough authority, thoroughness, or consistency to justify the weight accorded them by the *Wimberly* Court.

One final criticism of the *Wimberly* Court's reasoning relates to the statement by the Court that "Missouri does not have a 'policy' specifically relating to pregnancy"⁴⁷⁶ That this is not an entirely accurate

⁴⁶⁸ This view was expressed in a Department of Labor letter solicited during the *Brown* litigation. See text accompanying note 348 *supra*.

⁴⁶⁹ *Brown*, 660 F.2d at 1004-05 (quoting *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783 (1981)).

⁴⁷⁰ *Id.* at 1005.

⁴⁷¹ See note 75 *supra*.

⁴⁷² See text accompanying notes 458-60 *supra*.

⁴⁷³ See Or. Rev. Stat. § 657.155(2) (1976); note 458 *supra*.

⁴⁷⁴ See Fla. Stat. Ann. § 443.06(1) (1975) (repealed 1977) (described in *General Tel. Co. v. Board of Review*, 356 So. 2d 1357 (Fla. Dist. Ct. App. 1978)). This statute defined "good cause" for leaving employment as "only such cause as is attributable to the employer or consists of illness or disability of the individual, other than pregnancy." *Id.*; see note 141 *supra*.

⁴⁷⁵ See UIPL No. 33-75, *supra* note 75.

⁴⁷⁶ *Wimberly*, 479 U.S. at 520. This comment was in response to Ms. *Wimberly's* argument that Missouri and other states' neutral disqualification statutes had not been included on the Department of Labor's list because the policies of those states were not apparent from a mere reading of the statutes themselves. See *id.* It is important to note that in *Brown*, the Fourth

statement becomes apparent when it is studied in light of the Missouri cases that have examined this issue.⁴⁷⁷ These cases show a tendency to interpret the Missouri unemployment law narrowly in cases involving pregnant or formerly pregnant women.

In *Bussman Manufacturing Co. v. Industrial Commission*,⁴⁷⁸ for example, a Missouri appellate court held that Missouri's disqualification statute should be "strictly construed" and that there was no basis for focusing on the "voluntariness" of a pregnant woman's leaving work as a separate requirement under the statute.⁴⁷⁹ Other states have taken a more liberal view and found that leaving employment to have a child is involuntary.⁴⁸⁰ In *Lauderdale v. Division of Employment Security*,⁴⁸¹ a Missouri court found that a woman on a maternity leave remained too attached to her employer to be "available" for work with other employers, and thus was ineligible for benefits. Courts of other states applying similar statutes have allowed a woman on maternity leave, who is available for lighter work, to receive unemployment benefits when unable to find such work.⁴⁸²

In *Trail v. Industrial Commission*,⁴⁸³ a Missouri court found that a pregnant woman who was not re-employed after her maternity leave was deemed to be laid off at the time she applied for reinstatement and therefore her termination of work was directly attributable to her employer.⁴⁸⁴ However, this decision conflicted with the court's earlier decision in *Neely v. Division of Employment Security*,⁴⁸⁵ and was later narrowed to apply only to certain leaves of absence in *Division of Employment Secu-*

Circuit struck down the state's practice of finding pregnant women ineligible under South Carolina's neutrally worded statute. See *Brown v. Porcher*, 660 F.2d at 1001, 1005 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983). It was argued in the Brief for ACLU that "[i]ntentional discrimination against pregnant women and new mothers can occur even in states which do not impose blanket disqualifications." Brief for ACLU, supra note 414, at 25. The Brief cited cases from New York and Connecticut that indicated that the states had practices of treating pregnant or formerly pregnant unemployment claimants differently from other claimants in that they scrutinized these women's claims more meticulously, refused to refer them for job interviews, and required greater proof of availability than that required of other claimants. *Id.* at 25-27 (citing *Connecticut NOW v. Peraro*, 23 Empl. Prac. Dec. (CCH) ¶ 31,169 (D. Conn. 1980); *Feehan v. Levine*, 11 Empl. Prac. Dec. (CCH) ¶ 10,773 (S.D.N.Y. 1976)).

⁴⁷⁷ See text accompanying notes 219-24, 278-93 supra.

⁴⁷⁸ 355 S.W.2d 456 (Mo. Ct. App. 1960).

⁴⁷⁹ *Id.* at 460-61; see text accompanying notes 220-24 supra.

⁴⁸⁰ See text accompanying notes 209-11, 221-32 supra.

⁴⁸¹ 605 S.W.2d 174 (Mo. Ct. App. 1980); see text accompanying notes 103-09, 290-93 supra.

⁴⁸² See text accompanying notes 118-30 supra.

⁴⁸³ 540 S.W.2d 179 (Mo. Ct. App. 1976); see text accompanying notes 278-81 supra.

⁴⁸⁴ *Trail*, 540 S.W.2d at 183.

⁴⁸⁵ 379 S.W.2d 201 (Mo. Ct. App. 1964); see text accompanying notes 282-83 supra.

rity v. Labor & Industrial Relations Commission.⁴⁸⁶ Thus, in virtually every case involving the rights of unemployed pregnant or formerly pregnant women, Missouri has construed its statute to preclude benefits, even though other states have shown that equally sound reasoning exists for a more liberal construction. To the degree these judicial constructions constitute a "policy," it is clear that Missouri has a consistent one aimed at denying unemployment benefits to pregnant and formerly pregnant women.

Part II has shown that the result in *Wimberly* is not as clearly correct as the Supreme Court would make it appear. Part III examines some of the broader issues implicated by the *Wimberly* decision, and argues that, statutory interpretation aside, it is not wise to deny women unemployment benefits because of pregnancy.

III

BEYOND *WIMBERLY*: THE NATIONAL DEBATE ON THE TREATMENT OF PREGNANT AND FORMERLY PREGNANT WOMEN IN THE WORKPLACE

As the above discussion indicates, the treatment of pregnant and formerly pregnant women under state unemployment laws can vary widely under statutes which themselves may be virtually identical. For example, courts have answered the question of whether a woman who has left work due to pregnancy is eligible for unemployment benefits, that is, "able and available for work," by using a broad spectrum of theories. Courts have chosen to interpret a maternity leave as a voluntary withdrawal from the workplace, indicating that the claimant is not available for work;⁴⁸⁷ as an indication that a woman is not serious about seeking lighter work, because she has chosen to remain attached to her employer;⁴⁸⁸ and as an indication that the woman is not in fact "unemployed," and therefore should not be receiving unemployment benefits.⁴⁸⁹ On the other hand, many courts have rejected the conclusion that a woman on maternity leave is automatically ineligible to receive benefits.⁴⁹⁰ A pregnant woman's request to perform work of a less strenuous nature has been interpreted as a sign of availability for work,⁴⁹¹ and a request for a maternity leave has been interpreted as evidence of a

⁴⁸⁶ 617 S.W.2d 620 (Mo. Ct. App. 1981); see text accompanying notes 284-88 *supra*.

⁴⁸⁷ See text accompanying notes 102-12 *supra*.

⁴⁸⁸ See text accompanying notes 103-09 *supra*.

⁴⁸⁹ See text accompanying notes 131-57 *supra*.

⁴⁹⁰ See text accompanying notes 113-30 *supra*.

⁴⁹¹ *Id.*

woman's sincere intent to return to the workplace.⁴⁹²

The wide range of interpretations is even more evident in the context of disqualification statutes. For example, some courts have interpreted leaving to give birth as "voluntary" leaving,⁴⁹³ while others have seen this type of termination of employment as so compelling and necessary as to be "involuntary."⁴⁹⁴ Still other courts, while admitting that a woman who leaves work to have a child may not be doing so "voluntarily," refuse to read the requirement of voluntariness independently of other statutory requirements, such as the requirement that an applicant not leave without good cause directly attributable to her employer.⁴⁹⁵ According to some courts' interpretations, a woman who takes a maternity leave terminates her employment at the time she takes the leave, making her termination "due to pregnancy" and thus disqualifying her for unemployment benefits.⁴⁹⁶ For other courts, the actual termination does not occur until the woman returns to work after childbirth and is denied job reinstatement.⁴⁹⁷ At that point, the woman is deemed to have been laid off and, consequently, because her termination was attributable to her employer, she is qualified to receive benefits. Some states have specifically included pregnancy as "good cause" for leaving employment⁴⁹⁸ while other states have, through judicial interpretations, determined that pregnancy is not good cause.⁴⁹⁹ Some courts have concluded that a woman who did not ask for a leave of absence prior to having her child has abandoned her position in the workforce, and is thus not qualified to receive unemployment compensation.⁵⁰⁰ Some courts have mitigated the requirement that a woman leave "with good cause attributable to her employer" by including circumstances in which the work aggravated the physical condition rather than caused it.⁵⁰¹ In each of these cases, it is clear that the court could have made the decision either to award or to deny unemployment benefits with support both in logic, and to some degree, precedent.

Similarly, it is apparent that in *Wimberly v. Labor & Industrial Re-*

⁴⁹² See text accompanying notes 143-44 *supra*.

⁴⁹³ See text accompanying notes 230-32 *supra*.

⁴⁹⁴ See text accompanying notes 199-211.

⁴⁹⁵ See text accompanying notes 220-24 *supra*.

⁴⁹⁶ See text accompanying notes 244-50 *supra*.

⁴⁹⁷ See text accompanying notes 270-81 *supra*.

⁴⁹⁸ See, e.g., Ark. Stat. Ann. § 81-1106(a) (1985); S.D. Codified Laws Ann. § 61-6-3 (1978); Tenn. Code Ann. § 50-7-303(a)(1) (Supp. 1986).

⁴⁹⁹ See text accompanying notes 190-92 *supra*.

⁵⁰⁰ See text accompanying notes 251-65 *supra*. In none of these states is a person who leaves employment due to an illness other than pregnancy required to prove that he or she is in fact not abandoning the workforce.

⁵⁰¹ See text accompanying notes 233-35 *supra*.

*lations Commission*⁵⁰² the Supreme Court could have logically, and with ample precedent, decided the case either in favor of or against the claimant. The Court based its decision to affirm the denial of benefits on the theory that the term "solely on the basis of pregnancy" was a term demanding nondiscrimination, but not mandating preferential treatment.⁵⁰³ This theory was based on the sparse legislative history of FUTA section 3304(a)(12), on sporadic interpretations of that section by the Department of Labor, and on earlier decisions of the Supreme Court interpreting similarly worded statutes.⁵⁰⁴ As has been noted, the legislative history of FUTA lends itself to both arguments,⁵⁰⁵ the interpretations by the Department of Labor tend to be internally inconsistent, lacking in thoroughness, and devoid of authority,⁵⁰⁶ and previous decisions of the Supreme Court dealing specifically with unemployment compensation and religious beliefs used the term "solely on the basis of" to indicate special accommodation rather than nondiscriminatory treatment.⁵⁰⁷

The decision of the United States Supreme Court in *Wimberly* reflects some of the reasoning of another pregnancy-related decision reached by the Court a week earlier. In *California Federal Savings and Loan Association v. Guerra*,⁵⁰⁸ the Supreme Court upheld a California statute which required that a pregnant employee be given up to four months unpaid maternity leave with a reinstatement guarantee upon her return to work. Opponents of the statute claimed that it was pre-empted by Title VII of the Civil Rights Act of 1964,⁵⁰⁹ since the state statute mandated preferential treatment for female employees, and Title VII requires equal treatment.⁵¹⁰ While agreeing that the California statute contemplated special treatment of pregnant women, the Court noted that Congress intended Title VII, as amended by the Pregnancy Discrimination Act,⁵¹¹ "to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"⁵¹² Although the practical effect of the Court's decision in *California Federal* was the protection of a state-imposed right for pregnant women, the Court's interpretation of Title VII made it clear that federal law required

⁵⁰² 479 U.S. 511 (1987).

⁵⁰³ *Id.* at 522.

⁵⁰⁴ *Id.* at 517-22.

⁵⁰⁵ See text accompanying notes 71-74 *supra*.

⁵⁰⁶ See text accompanying notes 457-75 *supra*.

⁵⁰⁷ See text accompanying notes 449-50 *supra*.

⁵⁰⁸ 479 U.S. 272 (1987).

⁵⁰⁹ 42 U.S.C. §§ 2000e-17 (1982).

⁵¹⁰ *California Federal*, 479 U.S. at 284.

⁵¹¹ 42 U.S.C. § 2000e(k) (1982).

⁵¹² 479 U.S. at 285 (quoting *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

only that women not be discriminated against due to pregnancy.⁵¹³ Similarly, the *Wimberly* Court concluded that FUTA section 3304(a)(12) required only that pregnant women be treated equally—it did not mandate special treatment for them. In light of these two decisions, it is logical to assume that if the state of Missouri had decided to exempt pregnant and formerly pregnant women from the “good cause attributable to the employer” requirement, the Supreme Court would have upheld this preferential treatment. However, neither FUTA section 3304(a)(12) nor Title VII would be held to mandate such an exemption.

The *Wimberly* and *California Federal* cases cast a light on what has become a national debate on the treatment of pregnant women in the workplace. The debate extends far beyond the question of whether pregnancy can be used as a blanket disqualification for benefits or as a ground for firing an individual. The combination of *Cleveland Board of Education v. LaFleur*,⁵¹⁴ *Turner v. Department of Employment Security*,⁵¹⁵ and the Pregnancy Discrimination Act, among others, indicate that the mere condition of pregnancy cannot be used as an excuse for treating pregnant women less favorably than men or nonpregnant women.⁵¹⁶ These cases and the statute reject the traditional “negative” view of the role of women in our society. For religious, social, or biological reasons, the proponents of this negative (sometimes referred to as “protective”) treatment agree with Justice Bradley’s classic statement that the roles of women in society are the “noble and benign offices of wife and mother.”⁵¹⁷

The voices of these proponents can still be heard in the decisions of those courts which hold that women who have babies are not genuinely

⁵¹³ See *id.* at 286.

⁵¹⁴ 414 U.S. 632 (1974).

⁵¹⁵ 423 U.S. 44 (1975).

⁵¹⁶ For a discussion of these and other factors that have led to the demise of blanket disqualifications and firings based on pregnancy, see Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 *Fordham L. Rev.* 699, 705-09 (1986); Williams, *supra* note 167, at 333-51.

⁵¹⁷ *Bradwell v. The State*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring). Justice Bradley noted:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which will properly belong to the domain and functions of womanhood

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is law of the Creator. And the rules of civil society must be adapted to the general constitution of things

Id.

attached to the workforce, and therefore are not eligible to receive unemployment benefits. Recent statistics, however, indicate that women with children are a major component of the current American workforce. Approximately forty-five percent of the American workforce is female.⁵¹⁸ Many of these women are also mothers. In what has been termed "the most significant labor force development the country experienced" in the period from 1950 to 1981, the participation rate in the workforce of women with children under age eighteen more than tripled, rising from 18.4% in 1950 to 58.1% in 1981.⁵¹⁹ Additionally, statistics show that at least sixty-five percent of American women in their child-bearing years are currently members of the workforce.⁵²⁰ In light of these facts, whether or not they "belong" there, women have become genuinely attached to the workforce.

Among those who think that women are, in fact, a viable component of the American workforce, a more sophisticated and complex debate is taking place on the question of how pregnant women and new mothers should be treated. This debate has been referred to as "the equal treatment/special treatment debate" since the main question is whether pregnancy should be treated in the same manner as other disabilities, or as a unique physical condition.⁵²¹ The proposed answers to that question are complex, but in all cases, the goal is to achieve complete participation in the workplace by women.⁵²² This Part will not attempt to refine or embellish this debate but will discuss the *Wimberly* case within its context. In addition, this discussion will focus primarily upon the debate as

⁵¹⁸ United States Dep't of Labor, Employment and Earnings 18 (Dec. 9, 1986) (statistics as of Nov. 1986).

⁵¹⁹ United States Dep't of Labor, Bull. No. 298, Time of Change: 1983 Handbook on Women Workers 17, 20.

⁵²⁰ *Id.* at 7.

⁵²¹ It is difficult to pinpoint the origin of the terminology "equal treatment/special treatment." Commentators such as Ronald Dworkin have long focused on the question of whether the concept of equality refers to the right to equal treatment or the right to treatment which results in equality of effect. R. Dworkin, *Taking Rights Seriously* 223-39 (1978). Professor Ann Scales included these dual visions of equality in her identification of the various models of equality which have emerged in feminist jurisprudence. See generally, Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L.J. 375 (1980-81) (arguing for further examination and application of feminist jurisprudence). As discussed at note 523 *infra*, the two concepts of sexual equality have led to a number of variant subspecies and related categories.

⁵²² Among the many outstanding studies published in the area are the following: S. Hewlett, *A Lesser Life* (1986); S. Kamerman, A. Kahn & P. Kingston, *Maternity Policies and Working Women* (1983); Dowd, *supra* note 516; Freedman, *Sex Equality, Sex Differences, and The Supreme Court*, 92 Yale L.J. 913 (1983); Kay, *supra* note 327; Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U.L. Rev. 513 (1983); Law, *supra* note 306; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983); Scales, *supra* note 521; Williams, *supra* note 167; Note, *Toward a Redefinition of Sexual Equality*, 95 Harv. L. Rev. 487 (1981).

it relates to pregnancy and childbirth on the assumption that, while only women are physically able to bear children, the role of child-rearing is not dependent upon gender.⁵²³

Proponents of the equal treatment approach base their legal theories on two propositions. The first proposition is that "sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man."⁵²⁴ The second proposition is that statutes which are ostensibly "neutral," in that they do not expressly classify on the basis of sex, may still have a disproportionate negative impact upon one gender.⁵²⁵ In such a case, the burden of justification should be placed on the party defending the statute.⁵²⁶ The attitude contemplated by advocates of the equal treatment approach is that, in the workforce, pregnancy should be treated in the same manner as any other physical disability.⁵²⁷ This attitude is based upon the fundamental theory that an androgynous rather than a male prototype should be the model for the workplace.⁵²⁸ The dangers seen by equal treatment advo-

⁵²³ The separation between child-bearing and child-rearing may not be acceptable to some proponents of the special treatment argument. Proponents of the equal treatment argument insist upon separating childbirth and child-rearing in an attempt to undermine stereotypes about women's traditional roles as wife and mother. See Williams, *supra* note 167, at 354-55. On the other hand, for some proponents of the special treatment argument, it is important that the workforce recognize that women in our society remain the primary child-rearers and, consequently, that special treatment may be needed to accommodate women in this role, particularly in the months immediately following childbirth. See S. Hewlett, *supra* note 522, at 177-96. In this regard, the author's position perhaps most accurately reflects the theory of "episodic analysis" developed by Professor Herma Hill Kay, which confines special treatment to those limited periods of time when the physical needs of pregnant women may be greater than the needs of men—"during the episode of pregnancy itself." Kay, *supra* note 327, at 32-37. Professor Kay views this episodic analysis "as a basis for harmonizing some of the views of the opposing participants in the so-called 'equal treatment/special treatment' debate." *Id.* at 32-33.

⁵²⁴ Williams, *supra* note 167, at 329.

⁵²⁵ *Id.* at 330.

⁵²⁶ *Id.*

⁵²⁷ See *id.* at 355-56.

⁵²⁸ See *id.* at 369. Two bills treating parents in a gender-neutral manner have been introduced in the United States Congress. See H.R. 925, 100th Cong., 1st Sess. (1987); S. 249, 100th Cong., 1st Sess. (1987). These bills provide for *parental* leaves to be used by either parent upon the birth or adoption of a child or upon a serious health condition of a dependent child or parent. H.R. 925, 100th Cong., 1st Sess. §§ 103, 201 (1987); S. 249, 100th Cong., 1st Sess. §§ 103, 201 (1987).

It should be noted that, although equal treatment proponents assert that their focus is an androgynous rather than male prototype in the workplace, proponents of the special treatment approach have criticized equal treatment advocates for taking exactly the opposite approach. Professor Nancy Dowd, for example, says of the equal treatment approach: "[I]t appears to assume that the level of equal treatment required is defined by the treatment of males. In other

cates in a special treatment approach to pregnancy are: (a) the return of protectionist legislation that resulted in the removal of pregnant women from the workplace;⁵²⁹ and (b) the increased possibility that women will become less desirable employees because of the special accommodations due pregnancy in the workplace.⁵³⁰

Advocates of the special treatment approach argue that real biological differences between men and women cannot be ignored if women are ever to achieve equality in the workplace. The focus of this argument is not on the actual treatment of men and women, but rather on the desired result of equality in today's workplace. In pursuit of this result, it is not only permissible, but at times preferable, to have policies that favor one gender over the other.⁵³¹ Under some versions of this theory, the "real" differences between men and women which should be considered include certain psychological as well as physiological traits, such as those traditionally "female" assets of nurturing and caring. Under this theory, the workplace should be structured to ease the dual burden that women bear as members of the workforce and as the primary child-rearers.⁵³²

Other proponents of this view advocate a much narrower focus for special accommodations. Their theory, which has also been characterized as an alternative to the equal treatment and special treatment theories,⁵³³ envisions an approach which calls for special accommodation for women only in those situations in which the actual reproductive function is involved.⁵³⁴ Under this approach, pregnant women are not compared with disabled persons, but with men who also have exercised their reproductive capacities.⁵³⁵ Laws and employment programs promulgated in accordance with this view would enable a woman to enter and compete

words, discrimination is defined by the existing structure of employee benefits, which are premised on a male model." Dowd, *supra* note 516, at 719.

⁵²⁹ For a discussion of this protectionist legislation, see Williams, *supra* note 167, at 333-35. Professor Williams also views the judicial results in the pre-Pregnancy Discrimination Act pregnancy cases as indicative of the types of decisions that a special treatment approach may command. She points out that in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), see notes 306, 327, 426 *supra*, the Court treated as unique and "extra" the reproductive function of women. See Williams, *supra* note 167, at 343. In *LaFleur*, according to Williams, the result was positive, resulting in the striking down of a blanket exclusion of women from the workplace during their pregnancies. But in *Geduldig*, and again in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), see note 426 *supra*, the characterization of pregnancy as a unique and special condition foreclosed the argument that women workers were entitled to the same coverage for this debilitating condition as were their male counterparts for other disabilities. See Williams, *supra* note 167, at 341-44.

⁵³⁰ See Williams, *supra* note 167, at 367.

⁵³¹ Dowd, *supra* note 516, at 719-20.

⁵³² S. Hewlett, *supra* note 522, at 142-44.

⁵³³ Kay, *supra* note 327, at 22; Law, *supra* note 306, at 969.

⁵³⁴ Kay, *supra* note 327, at 22.

⁵³⁵ *Id.* at 31.

in the workforce "without fear of encountering obstacles to her decision to bear a child."⁵³⁶

The maternity leave statute examined in the *California Federal* case became a focal point for the equal treatment/special treatment debate. For equal treatment advocates, such mandated maternity leaves exemplified the type of accommodation that could foster a reluctance on the part of employers to hire women workers.⁵³⁷ The remedy under the equal treatment theory would be to expand the mandate for childbirth and adoption related leaves to include leaves for parents of both genders.⁵³⁸

For proponents of the special treatment approach and the episodic analysis approach, mandated maternity leave is a "legally valid means to restructure the workplace."⁵³⁹ These commentators find that the absence of maternity leave policies "has a devastating impact on women's employment opportunities by continuing to impose serious employment detriments on the basis of pregnancy, as well as reinforcing the primary parenting role of women."⁵⁴⁰

From this discussion it should be obvious that the *Wimberly* Court's approach to FUTA section 3304(a)(12) reflects an adherence to the equal treatment philosophy. Under the Missouri statute, a woman who leaves work due to pregnancy is treated in the same manner as any individual who leaves work due to a temporary disability that is not caused by the employer. However, if the analyses of *Sherbert v. Verner*⁵⁴¹ and *Thomas v. Review Board of Indiana Employment Security Division*⁵⁴² were followed, an interpretation of the term "solely on the basis of pregnancy" would have reflected a special treatment approach to pregnancy.

Under the special treatment approach, a woman who leaves work

⁵³⁶ *Id.* at 36.

⁵³⁷ See Williams, *supra* note 167, at 370-74 (discussing a similar Montana statute interpreted in *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 515 F. Supp. 1264 (D. Mont. 1981), vacated, 685 F.2d 1088 (9th Cir. 1982).

⁵³⁸ See note 528 *supra* (discussing proposed bills mandating family leave). In this regard, equal treatment advocates do not dispute that the proper policies for today's workplace and proper workplace policies for the ideal world may not always be the same. Professor Wendy Williams has stated:

There is one sense in which I feel the attraction of "special treatment." Visions of equality are one thing; ability to realize a particular vision at a particular historical moment and place is another. It has always been easier to wrench from the jaws of the political system special provisions for women in the name of motherhood rather than general provisions aimed at the realignment of sex roles in the family and restructuring of the workplace. Urgent problems cry out for immediate solutions. Half the proverbial loaf (provisions like Montana's or California's) sometimes seem better than none.

Williams, *supra* note 167, at 380.

⁵³⁹ Dowd, *supra* note 516, at 700.

⁵⁴⁰ *Id.* at 715.

⁵⁴¹ 374 U.S. 398 (1963); see notes 436-50 and accompanying text *supra*.

⁵⁴² 450 U.S. 707 (1981); see text accompanying notes 440-50 *supra*.

due to pregnancy would not be disqualified from receiving unemployment benefits, because of the special accommodation of pregnancy authorized by FUTA section 3304(a)(12). Applying the criticism set forth by Professor Wendy Williams, it is clear that a special treatment interpretation of FUTA section 3304(a)(12) could entail a number of the costs feared by equal treatment advocates.⁵⁴³ First, due to the experience-rating methods used to calculate employer contributions to the unemployment system,⁵⁴⁴ it is possible that women who are likely to become pregnant will become less desirable employees, and suffer discrimination during the initial hiring process.⁵⁴⁵ Second, the special treatment of pregnancy in the unemployment compensation context might shift attention from the fact that, in Missouri and other states, disabled employees are subject to a complete loss of income if their disability is not directly attributable to the employer.⁵⁴⁶ In other words, if the statutes are judicially changed as to pregnant employees, their injustice towards all employees might go unremedied. Finally, it is possible that a special treatment interpretation of FUTA section 3304(a)(12) could perpetuate the stereotype of women as bearing a special reproductive and child-rearing role.⁵⁴⁷ By thus making women the target of special protection, their ability to compete in the workplace may be hampered.⁵⁴⁸

On the other hand, a practical analysis of the effects of the Missouri unemployment compensation law upheld in *Wimberly* demonstrates the adverse consequences for a worker who becomes pregnant. Obviously, it is physiologically necessary for a woman to take some time off from work in order to bear her child. Missouri, however, has no law which mandates that an employer grant a pregnant woman a leave of absence with a job reinstatement guarantee. Furthermore, when she is physically able to resume working, she is disqualified from receiving unemployment compensation if her former job is unavailable and she is not able to find another position.

Under the Missouri law, the same predicament would face an employee who, for example, broke his leg in a skiing accident. That employee may be required to take some time off if he has to remain in a hospital. If reinstatement is not guaranteed after this leave and the employee is unable to find employment with his former or with some other employer when he becomes physically able to work again, he too would

⁵⁴³ See Williams, *supra* note 167, at 371.

⁵⁴⁴ See text accompanying note 35 *supra*.

⁵⁴⁵ See Williams, *supra* note 167, at 371.

⁵⁴⁶ See *id.*

⁵⁴⁷ See *id.*

⁵⁴⁸ See *id.*

be denied unemployment compensation.

However, a subtle but very real difference exists between the fate of the pregnant worker and the fate of the worker who was injured in an accident. The latter worker did not have to make a "choice" between having a job and being physically disabled. For him, the disability was purely an "accident."⁵⁴⁹ The woman who is pregnant, on the other hand, has in many cases "chosen" her fate in choosing to bear a child, and incurring the accompanying loss of income. Herein lie questions of major importance in the application of unemployment laws: to what degree do we as a society force women to make this unpleasant choice between bearing children and maintaining a steady stream of income, and to what degree is this notion of "choice" actually illusory.

In other words, by denying pregnant and formerly pregnant women unemployment benefits, society at best forces a difficult choice. Furthermore, while the decision to have a child remains the choice of each sexually active female, the "decision" to propagate the species is not a voluntary one for women.⁵⁵⁰ Only women can bear children. Forcing working women out of their jobs by providing no guarantee of job reinstatement, and then denying them a source of replacement income when they engage in an activity of primary importance to the continued existence of our species would perhaps do more to hamper the participation of women in the workplace than any legislation which made accommodations for pregnancy. The forced loss of income that occurs in a state which lacks mandatory reinstatement after maternity leave and denies unemployment compensation to those women who are not reinstated, will indeed result in a lack of genuine attachment to the workplace for women who choose to bear children. Additionally, it will perpetuate the already unequal economic condition of women. The vision of a workplace in which men and women are both treated equally and perceived as equal contributors is idyllic, but unrealistic. Until the workplace is structured to accommodate all working parents, the special treatment of pregnant women in the context of the unemployment compensation laws seems necessary to prevent the devastating effects of forcing women to choose between having income and having children.

⁵⁴⁹ Of course, this employee was not required to go skiing and therefore in some sense contributed to his own fate. However, for that matter, the employee could just as easily have been injured in an automobile accident while crossing the street in his neighborhood. At one extreme, we are all "responsible" for our fates in the sense that we make conscious choices, such as the choice to cross the street, that lead to the ensuing results. Without attempting a philosophical discourse on the concepts of "accident" as opposed to "responsibility," this author will assume that some results occur that an individual would not have chosen had he foreseen the consequence of his actions.

⁵⁵⁰ See Williams, *supra* note 167, at 354 n.114.

CONCLUSION

Conclusions in this area are not easily reached. The foregoing summary of the various interpretations and treatments of pregnancy under state unemployment compensation laws indicates that pregnancy can be accommodated within these laws. As the discussion shows, courts in many states have found pregnant and formerly pregnant women to be both eligible for the receipt of unemployment compensation and not to be disqualified from these benefits.⁵⁵¹ However, the United States Supreme Court in *Wimberly* chose not to require this type of interpretation. It saw its choice as one between equal, nondiscriminatory treatment, and special, unique accommodations for pregnant women. It found the Missouri approach to pregnancy in the unemployment context to be a valid, nondiscriminatory approach. Within the confines of the question of law presented, it perhaps could have done no more without mandating a special treatment interpretation of FUTA section 3304(a)(12). The fact remains, however, that the Court's decision forces women in that state, and any other state which follows the same interpretation, to run the risk of forfeiting their income when they decide to bear a child.

Enactment of the proposed family leave acts,⁵⁵² which would force employers to offer parental leave with job reinstatement guarantees to all employees, would potentially resolve the disqualification question.⁵⁵³ However, this solution bears both tangible and intangible costs of its own.⁵⁵⁴ Meanwhile, continued application of the equal treatment ap-

⁵⁵¹ See text accompanying notes 77-302 *supra*.

⁵⁵² See note 528 *supra*.

⁵⁵³ The problem of *disqualification* from the receipt of unemployment benefits arises when a woman who has had a child finds her former position, or a comparable position, unavailable when she is ready to return to work. She is then denied unemployment compensation because she left work due to pregnancy. Under the proposed family leave acts, she would be guaranteed job reinstatement upon her return to work and therefore would not need unemployment compensation. See H.R. 925, 100th Cong., 1st Sess. §§ 103, 201 (1987); S. 249, 100th Cong., 1st Sess. §§ 103, 201 (1987). However, the fact that she is on a leave of absence may affect her *eligibility* for benefits if she wishes to perform, but is unable to find, lighter work. In this circumstance, some courts have chosen to interpret the leave of absence as a limitation on her availability for work, thus rendering her ineligible for unemployment benefits. See text accompanying notes 103-12, 289-293 *supra*.

⁵⁵⁴ The United States Chamber of Commerce has released what it characterizes as a "conservative estimate" of \$16.2 billion as the increased costs employers would face upon the enactment of the family leave acts. F. Shane, Statement of the Chamber of Commerce of the United States on S. 249, The Parental and Medical Leave Act of 1987, at 8 (Feb. 19, 1987) (on file at New York University Law Review). These figures would include the cost of temporarily replacing an employee who was on leave, the operational cost of using an inexperienced worker in the employee's position, and the cost of employing an additional 1,000 federal workers to oversee enforcement of the new law. *Id.* The Chamber of Commerce also performed a "micro level cost assessment" of the costs involved in giving one typical worker four and a half months of unpaid parental leave. The study used the amount of \$6,882.65 for the 4.5 months of the leave as the base pay plus costs directly linked to the employee, such as Social Security and

proach in the case of unemployment benefits will result in devastating effects for many women in Missouri and other states that interpret their laws similarly. Therefore, the practical cost to women of denying special treatment at this point in time may well outweigh the benefits of treating pregnant women like other disabled workers.⁵⁵⁵

workers' compensation. *Id.* at 10. When this amount was subtracted from the estimated salary of a trained replacement (\$11,936.87) and the cost of continuing benefits to the employee on leave (\$666.76), the study showed that the unpaid leave would cost the employer \$5,722.98. *Id.* The cost of replacing an employee who was on paid leave was estimated at \$12,605.63. *Id.* The figures in this study were somewhat high as they were based on Washington D.C. salaries. *Id.* A seven city survey by the Chamber showed that the average cost to the employer of 18 weeks of unpaid leave would be \$2,050.42 and the average cost of the same amount of paid leave would be \$9,018.63. *Id.* at 11. In analyzing this data it must not be forgotten that several companies are already offering some form of maternity leave and thus the costs projected in this study have to some extent already been incurred. It must also be noted that even if the family leave bills are enacted the majority of parental leaves will probably still be taken by women rather than by men. Recent surveys of employer attitudes toward parental leave indicate that while over 65% of employers deem parental leave as "reasonable" for women, the majority feel that such leave is "unreasonable" for men. See M. Radford, *supra* note 358, at 29-30. Some employers even express open hostility to the concept of parental leave for fathers. See *id.* at 26-27.

⁵⁵⁵ An interesting cost assessment in the unemployment context was pointed out by Justice Marshall in his dissenting opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1976); see text accompanying notes 430-32 *supra*. The Supreme Court held in that case that an employer is not required to provide preferential treatment to an employee whose religious convictions prevent her from working on certain days. Observing that many employees would possibly be unable to find or retain work as a result of the decision, Justice Marshall noted that the societal costs of supporting these people on welfare could well exceed the cost of requiring employers to make special accommodations. *Hardison*, 432 U.S. at 97 n.14 (Marshall, J., dissenting). In the case of employees such as Ms. Wimberly, the result of new mothers being denied unemployment compensation could be to force many of these women on welfare. This result would save the government little or no money and would serve to perpetuate the inferior financial status of women in our society.

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