

COMMENTS

The Impact of Pregnancy Discrimination on Retirement Benefits: A Present Violation of Title VII or a Claim Belonging to History?

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INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ prohibits employment discrimination based on race, religion, national origin, or sex. In 1978, Congress extended Title VII's protection to pregnancy, requiring that employers treat pregnant employees the same as other employees who are similarly able or unable to work.² Now, thirty years later, the Pregnancy Discrimination Act of 1978³ (PDA) has created a complex, important, and unsettled legal question.

Imagine the following scenario: Anne, an employee of Company X, took pregnancy leave in 1976. According to the company policy at the time, Anne received seniority credit for only the first thirty days of her pregnancy leave, but employees taking temporary disability leave received credit for their entire leave. In 1978, Congress passed the PDA, requiring companies to grant equal benefits for pregnancy leave as for disability leave. Throughout her career, Anne was periodically notified of her accrued seniority credit, which did not include credit for her entire pregnancy leave. In 1995, Company X offered a retirement incentive program, where employees with twenty-five years of seniority credit (as calculated by the previous system) could qualify for early retirement, instead of needing thirty years as required by the regular policy. This retirement incentive program was only available until December 31, 1995. As of December 31, Anne was ten days short of the requirement, but if she had received full credit for her pregnancy leave, Anne would have been able to participate in the program.

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¹ Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000e et seq (2000).

² See id.

³ Pub L No 95-555, 92 Stat 2076, codified as amended at 42 USC § 2000e(k).

Courts are split over whether Anne's situation gives rise to liability for discrimination. Title VII prohibits employment discrimination on the basis of sex (or pregnancy) but contains an explicit provision partially exempting seniority systems. Under § 703(h), an employer is liable if it uses a seniority system that is facially discriminatory, but is not liable if the seniority system indirectly and unintentionally affects a protected group more harshly.⁴ The Ninth Circuit has held that this type of early retirement system is facially discriminatory—and a current violation of Title VII—because it incorporates seniority calculations that do not include full credit for pre-1979 pregnancy leave. The Sixth and Seventh Circuits have held that the retirement system is not a current violation because the new benefits offered are facially neutral, and any challenge to the failure to grant credit is time-barred. The circuit courts' confusion is spurred in part by two lines of Supreme Court precedent: one holding that each issuance of a paycheck based on a discriminatory system does violate Title VII,⁵ and another holding that present effects of past discrimination do not violate Title VII.⁶

This dilemma affects large numbers of women. According to congressional estimates, over one million working women were pregnant during 1978 alone.⁷ Because the Supreme Court had previously held that refusing to grant seniority for pregnancy leave was not discrimination, it is likely that many of these women were not granted full seniority credit for their pregnancy leaves.⁸ For example, the Bell Companies, which employed large numbers of women, did not grant seniority credit for pregnancy leave taken prior to 1978. Already, settlements involving the Bell successor companies' liability for discriminatory seniority policies have affected over 37,000 women.⁹ Moreover, this continues to be a

⁴ See 42 USC § 2000e-2(h). The original PDA referred to § 703(h) of the Civil Rights Act, and this numbering is used in the text throughout this Comment. The law is now codified at 42 USC § 2000e, however, as reflected by the citations.

⁵ See *Bazemore v Friday*, 478 US 385, 386–87 (1986) (per curiam); *id.* at 395 (Brennan concurring in part). The per curiam opinion simply stated the holding, Justice Brennan's concurring opinion, joined by all other members of the Court, explained the reasoning for the holding.

⁶ See *Delaware State College v Ricks*, 449 US 250, 262 (1980); *United Air Lines, Inc v Evans*, 431 US 553, 557 (1977).

⁷ See *The Coming Decade: American Women and Human Resources Policies and Programs*, Hearings before the Senate Committee on Labor and Human Resources, 96th Cong, 1st Sess 619 (1979).

⁸ Note that, according to the PDA, employers are only required to provide equal benefits for pregnancy and disability leave. See 42 USC § 2000e(k). Thus, a company would not be liable for failing to grant seniority for pregnancy leave if it did not grant seniority credit for temporary disability leave.

⁹ See, for example, Equal Rights Advocates, Press Release, *Major Victory for Women Who Worked for AT&T* (Aug 17, 2007), online at <http://www.equalrights.org/media/HulteenPR081707.pdf> (visited June 8, 2008) (describing a victory in a class action brought in the Ninth Circuit, involving “an estimated 15,000 former and current female employees nationwide who were denied

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relevant issue. In 2007, there were two circuit court decisions relating precisely to this issue that rendered opposite outcomes.¹⁰

This Comment examines the relevant statutory text and seeks to determine the applicable line of Supreme Court precedent. Part I of this Comment describes the antidiscrimination statutes and background Supreme Court case law. Part II describes the current circuit split over calculation of pre-1979 pregnancy leave, as well as the EEOC's position on the issue. In examining the case law, it becomes clear that the outcome turns on whether there is facial discrimination—whether two similarly situated groups are treated differently. In Part III, this Comment explores the meaning of “similarly situated” groups and its precise impact on the current dispute. Finding that precedent provides little guidance for recognizing a facially discriminatory policy, Part III proposes a principled and methodical way to identify similarly situated groups, a necessary step for determining whether there is facial discrimination. This Comment then applies this proposed method and finds that the policies at issue are not facially discriminatory. A finding of no facial discrimination is fatal to the plaintiffs' claims in this instance because Congress has created unique statutory protections for seniority systems. This Comment then addresses the implications of this outcome on policy and suggests that while it bears negative consequences for the women currently bringing claims, it may have a positive impact on as yet unprotected groups.

I. BACKGROUND

These pregnancy discrimination claims are brought under the major employment antidiscrimination statute: Title VII of the Civil Rights Act of 1964. The Civil Rights Act of 1964 outlawed employment discrimination on the basis of race, sex, and national origin. The PDA refined the definition of sex discrimination to clarify that dis-

service credit for pregnancy leaves in the calculation of their retirement and pension benefits”); EEOC, Press Release, *Class of Women to Receive \$48.9 Million in EEOC-Verizon Pregnancy Bias Settlement* (June 5, 2006), online at <http://www.lawmemo.com/eeoc/press/6-05-06a.htm> (visited June 8, 2008) (stating that a settlement between the EEOC and Verizon affected a class of 12,326 current and former female employees); EEOC, Press Release, *EEOC and Cincinnati Bell Settle Class Pregnancy Bias Suit* (June 12, 2000), online at <http://www.eeoc.gov/press/6-15-00-a.html> (visited June 8, 2008) (reporting that a settlement between the EEOC and Cincinnati Bell affected 458 female employees); Joyce E. Cutler, *Pregnancy Discrimination: Judge Approve [sic] \$25 Million Settlement of Suit against Pacific Telesis Group*, 132 BNA Daily Labor Rep A-11 (July 12, 1999) (describing the settlement of two Ninth Circuit cases affecting over 10,000 female employees).

¹⁰ See *Hulteen v AT&T Corp.*, 498 F3d 1001, 1004 (9th Cir 2007) (en banc) (holding that failure to grant credit for pre-1979 pregnancy leave is a violation of Title VII); *Leffman v Sprint Corp.*, 481 F3d 428, 429 (6th Cir 2007) (holding that failure to grant credit for pre-1979 pregnancy leave is *not* a violation of Title VII).

crimination on the basis of pregnancy is discrimination on the basis of sex. Thus, pregnancy discrimination claims can be brought under Title VII and are subject to its statutory provisions and interpretive case law.

After discussing both Title VII and the PDA, this Part analyzes the foundational Supreme Court cases, in which the Court has attempted to define the precise acts that constitute an unlawful employment practice. One line of precedent holds that each paycheck based on a discriminatory pay system is a current violation of Title VII. Another line of precedent holds that present effects of past discrimination, even if they are lower wages, are not violations of Title VII.

A. The Civil Rights Act of 1964 and Title VII

Congress passed the Civil Rights Act of 1964 to eliminate segregation and prevent discrimination. Title VII specifically prohibits employment discrimination: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex or national origin.”¹¹ However, § 703(h) creates an exception, allowing differential treatment “pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.”¹² This provision operates to protect employers who implement facially neutral seniority systems in good faith, even if these systems have a negative disparate impact on protected groups. By contrast, employers who adopt facially discriminatory systems cannot invoke the protection of § 703(h). Likewise, employers who implement facially neutral policies with the intent that they will have a particularly harsh impact on a protected group also violate Title VII and cannot rely on § 703(h). In summary, employers will be liable if they treat protected groups differently (either via a facially discriminatory policy or via a facially neutral policy intended to discriminate) but will not be liable if a facially neutral system unintentionally has a disparate impact on a protected group.

The Supreme Court has at times construed § 703(h) to offer wide protection to employers with seniority systems that extend the effects of past discrimination. In *International Brotherhood of Teamsters v United States*,¹³ the Court held that “an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.”¹⁴ However, the Court

¹¹ 42 USC § 2000e-2(a)(1).

¹² 42 USC § 2000e-2(h).

¹³ 431 US 324 (1977).

¹⁴ *Id.* at 353–54.

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was careful to note that this protection only applies to bona fide seniority systems—it does not apply to systems that are facially discriminatory or that were adopted or perpetuated with discriminatory intent.¹⁵

The Civil Rights Act of 1991¹⁶ further amended Title VII and expanded the definition of an unlawful employment practice. This amendment extended the time in which to file a claim based on a discriminatory seniority system. A violation of Title VII occurs when a discriminatory seniority system “is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system . . . whether or not that discriminatory purpose is apparent on the face of the seniority provision.”¹⁷ A cause of action accrues (and the limitations period begins anew) each time an individual is subject to or injured by a facially or intentionally discriminatory seniority system. In conclusion, Title VII accords greater deference to seniority systems than other mechanisms for distinguishing between employees, but this deference is certainly not unlimited.

B. Pregnancy Discrimination

Pregnancy discrimination was not considered sex discrimination for the first decade of Title VII.¹⁸ In *General Electric Co v Gilbert*,¹⁹ the Supreme Court held that discrimination based on pregnancy was not a violation of Title VII. Then-Justice Rehnquist, writing for the majority, noted that “[p]regnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The district court found that it is not a ‘disease’ at all, and is often a voluntarily undertaken and desired condition.”²⁰ The majority held that General Electric’s policy was facially neutral because there was no mutually applicable risk for which one sex was protected and the other was not.²¹ Further, the Court refused to infer, and the plaintiffs failed to prove, that there was discriminatory intent.²² Justice Brennan,

¹⁵ See *id* at 353.

¹⁶ Pub L No 102-166, 105 Stat 1071, codified as amended at 42 USC § 2000e et seq.

¹⁷ Civil Rights Act of 1991 § 112(2), 105 Stat at 1079.

¹⁸ See, for example, *Geduldig v Aiello*, 417 US 484, 496–97 (1974) (holding that an insurance program that does not cover pregnancy costs is not discriminatory). But see Prohibition of Sex Discrimination Based on Pregnancy, House Committee on Education and Labor, HR Rep No 95-948, 95th Cong, 2d Sess 2 (1978), reprinted in 1978 USCCAN 4749, 4750 (“Eighteen Federal district courts and all seven Federal courts of appeals which have considered the issue have rendered decisions prohibiting discrimination in employment based on pregnancy.”).

¹⁹ 429 US 125 (1976).

²⁰ *Id* at 136.

²¹ See *id* at 138, citing *Geduldig*, 417 US at 496–97.

²² See *Gilbert*, 429 US at 136.

dissenting, pointed out that General Electric had not attempted to exclude other “so-called ‘voluntary’ disabilities, including sports injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery.”²³

In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act.²⁴ The PDA modified the Title VII definition of sex discrimination to include discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.”²⁵ The PDA requires that “women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected . . . and nothing in section [703(h)] of this title shall be interpreted to permit otherwise.”²⁶ The PDA became effective immediately upon enactment, except that its terms did not apply to “any fringe benefit program or fund, or insurance program . . . until 180 days after enactment.”²⁷ In one swift move, pregnancy discrimination was sex discrimination, and *Gilbert* was no longer good law.

C. Supreme Court Precedent Defining a Discriminatory Practice

In applying Title VII, the Supreme Court has repeatedly been asked to resolve what constitutes an “unlawful employment practice.” This issue is complicated by the use of pay scales and seniority systems, which give present and future effect to otherwise discrete acts.

1. *Bazemore v Friday*:²⁸ each paycheck is a continuing violation of Title VII.

One line of Supreme Court precedent holds that a violation occurs every time an employee is compensated less as a result of discrimination. In *Bazemore*, an employer maintained a segregated workforce and compensated Caucasian workers more than non-Caucasian

²³ Id at 151 (Brennan dissenting) (quotation marks omitted).

²⁴ See HR Rep No 95-948 at 2 (cited in note 18) (describing the Committee’s view that the dissenting justices in *Gilbert* correctly interpreted Title VII and that the PDA was an effort to clarify Congress’s intent with regard to the treatment of pregnant employees).

²⁵ 42 USC § 2000e(k).

²⁶ Id.

²⁷ PDA 1978 § 2, 92 Stat at 2076. The PDA was passed and became effective on October 31, 1978; its applicability to benefit plans became effective on April 29, 1979. There is some debate about on which date the statute became applicable to seniority systems. Compare *EEOC v Ameritech Services, Inc.*, 129 Fed Appx 953, 954 (6th Cir 2005) (implying that the PDA became applicable to seniority systems in April 1979), with EEOC Compliance Manual § 616.25(b)(1) at 3348 (CCH 2007) (listing October 31, 1978 as “the effective date of the PDA”).

²⁸ 478 US 385 (1986) (per curiam).

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workers.²⁹ When Title VII took effect, the employer merged the two divisions³⁰ and reduced, but did not eliminate, the pay disparities.³¹

The circuit court held that the employer had no duty to eliminate pay disparities that originated prior to Title VII,³² but the Supreme Court unanimously rejected this view, stating that “[t]he error of the Court of Appeals . . . is too obvious to warrant extended discussion.”³³ In a much quoted line, the Court held that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.”³⁴ The Court was careful to note that its holding did not punish actions taken prior to applicability of Title VII but rather “focuse[d] on the present salary structure, which is illegal if it is a mere continuation of the [] discriminatory pay structure.”³⁵

2. *United Air Lines, Inc v Evans*³⁶ and *Delaware State College v Ricks*:³⁷ present effects of past discrimination are not a violation.

Another line of Supreme Court case law holds that the statute of limitations begins when a discriminatory act occurs, even if the effects of that act are not felt until later. The bedrock case for this line of precedent is *Evans*, decided nine years before *Bazemore*. In *Evans*, the plaintiff was a flight attendant who was forced to resign when she got married pursuant to United’s “no marriage” policy.³⁸ Evans was eventually rehired as a new employee but was not given seniority credit pursuant to a rule that employees lose all seniority credit if they resign or are terminated for just cause.³⁹ Evans sued, claiming that United’s refusal to grant her seniority credit was a continuing violation of Title VII because it was “perpetuating the effect of past discrimination.”⁴⁰

²⁹ See *id.* at 390–91 (Brennan concurring in part).

³⁰ The employer maintained segregated work forces until 1972, when Title VII became applicable to public employers. See *id.* at 394.

³¹ *Id.* at 390–91.

³² See *id.* at 386–87 (“[T]he Court of Appeals . . . [held that] the Extension Service had no duty to eradicate salary disparities between white and black workers that had their origin prior to the date Title VII was made applicable to public employers.”). See *United Air Lines v Evans*, 751 F.2d 662 (4th Cir. 1984), *revd.*, *Bazemore*, 478 US 385.

³³ *Bazemore*, 478 US at 395 (Brennan concurring in part).

³⁴ *Id.* at 395–96. Note that the Court did not provide guidance for how to identify which white and nonwhite workers were “similarly situated.”

³⁵ *Id.* at 396–97 n. 6.

³⁶ 431 US 553 (1977).

³⁷ 449 US 250 (1980).

³⁸ *Evans*, 431 US at 554.

³⁹ See *id.* at 555–56 and n. 6.

⁴⁰ *Id.* at 556 n. 8, quoting *Evans v United Air Lines, Inc*, 12 FEP Cases (BNA) 287 (ND Ill. 1975).

The Supreme Court disagreed and held that United's present denial of seniority credit was not a violation of Title VII, continuing or otherwise.⁴¹ The Court noted that Evans's forced resignation was discriminatory but that "United was entitled to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination."⁴² The Court stated that § 703(h) of Title VII was "an additional ground for rejecting [the] claim" because there was no evidence, or even allegation, that the seniority system was discriminatory.⁴³ The Court stated that the seniority system was facially neutral because "both male and female employees . . . who resigned or were terminated for a nondiscriminatory reason (or an unchallenged discriminatory reason) . . . receiv[ed] no seniority credit for their prior service."⁴⁴ Thus, the system did not treat two similarly situated groups differently on the basis of sex. The Court opined that "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer."⁴⁵

Building on the reasoning in *Evans*, the Court in *Ricks* rejected a national origin employment discrimination claim.⁴⁶ Columbus Ricks, a college professor, alleged that he was denied tenure due to discrimination based on his national origin. Ricks was informed of the rejection of his tenure application in March 1974 and was offered a one-year terminal contract that extended until June 1975. Ricks accepted the terminal contract and filed an employment discrimination charge in April 1975. Because a charge must be filed within 180 days of the alleged Title VII violation,⁴⁷ it became critical to determine whether his continued employment on less favorable terms formed the basis of a cause of action.

The Supreme Court explicitly rejected Ricks's contention that his employment pursuant to the one-year terminal contract was a continuing violation.⁴⁸ The Court held that "the only alleged discrimination oc-

⁴¹ See 431 US at 558 ("United's seniority system does indeed have a continuing impact on [] pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. . . . In short, [this] system is neutral in its operation.").

⁴² *Id.* ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.").

⁴³ *Id.* at 559–60.

⁴⁴ *Id.* at 557.

⁴⁵ *Id.* at 560.

⁴⁶ See *Ricks*, 449 US at 260–62.

⁴⁷ *Ricks*, 449 US at 253–56.

⁴⁸ Notwithstanding the presence of dissenting opinions, no member of the Court held that Ricks's continued employment rendered the denial of tenure a continuing violation. See *id.* at 257 (majority), 263 (Stewart dissenting), 266 (Stevens dissenting).

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curred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks . . . even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later.”⁴⁹ The Court noted that “[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.”⁵⁰ In other words, continued employment does not extend the life of a claim.

In a similar case decided in 2007, *Ledbetter v Goodyear Tire & Rubber Co.*,⁵¹ the Supreme Court held that a sex discrimination claim was time-barred even though the pay disparity was continuing. The plaintiff, Lilly Ledbetter, alleged that her manager gave her inferior reviews as a result of her sex in the early 1980s and the mid-1990s.⁵² These inferior reviews resulted in smaller pay raises, which compounded to create a large pay disparity.⁵³ Ledbetter brought suit in 1998, although she did not allege that any intentionally discriminatory act had occurred in the previous 180 days.⁵⁴ Rather, paraphrasing *Bazemore*, Ledbetter asserted that “[e]ach paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII.”⁵⁵

The Supreme Court rejected Ledbetter’s claim, and distinguished *Bazemore* from *Evans* and *Ricks*. The Court explained that *Evans* and *Ricks* related to employment practices that were facially neutral (or at least were not challenged as facially discriminatory),⁵⁶ whereas the system in *Bazemore* was facially discriminatory.⁵⁷ The Court, with a nod to *Evans* and *Ricks*, held that the charging period⁵⁸ began “when the discrete act of alleged intentional discrimination occurred, not . . . when the effects of this practice were felt.”⁵⁹ The Court justified this

⁴⁹ Id at 258.

⁵⁰ Id (emphasis added in *Ricks*), quoting *Abramson v University of Hawaii*, 594 F2d 202, 209 (9th Cir 1979).

⁵¹ 127 S Ct 2162 (2007).

⁵² Id at 2165–66.

⁵³ Id.

⁵⁴ Id at 2167.

⁵⁵ Id, quoting Brief for Petitioner, *Ledbetter v Goodyear Tire & Rubber Co, Inc.*, No 05-1074, *13 (filed Sep 7, 2006), available on Westlaw at 2006 WL 2610990.

⁵⁶ See id at 2168–69.

⁵⁷ See id at 2173.

⁵⁸ An individual wishing to bring an employment discrimination suit must first file a charge with the EEOC before bringing suit. EEOC, *Filing a Charge of Employment Discrimination*, online at http://www.eeoc.gov/charge/overview_charge_filing.html (visited June 8, 2008). A “charging period” is the time in which a claim must be filed with the EEOC in order to preserve the individual’s rights, much like a statute of limitations for filing a suit.

⁵⁹ Id at 2168.

approach by noting the legislative compromises that led to the enactment of the Civil Rights Act of 1964.⁶⁰

In summary, the Supreme Court has developed two lines of reasoning. In *Bazemore*, the Court stressed that a continuation of prior discrimination is a violation of Title VII. In *Evans, Ricks, and Ledbetter*, the Court held that present effects of past discrimination do not form the basis for a Title VII claim.

II. DIFFERENT APPROACHES TO THE PRESENT DILEMMA

The recent slew of pregnancy discrimination claims have all involved AT&T's Net Credited Service (NCS) seniority system. Under this system, each employee is assigned an NCS date, which is the employee's start date adjusted forward for any noncredited leave.⁶¹ Returning to the hypothetical scenario described in the introduction, if Anne began working on November 15, 1970 her original NCS date would be November 15, 1970. After Anne took ninety days of pregnancy leave in 1976 (thirty credited and sixty noncredited according to company policy at the time⁶²), her NCS date would have been shifted forward to January 14, 1971. Thus, she would not have accumulated twenty-five years of service by December 31, 1995, the deadline for taking advantage of the retirement incentive program described in the hypothetical above.

Circuit courts disagree as to whether this scenario constitutes a present violation of Title VII. The Ninth Circuit has held that a company violates Title VII if it calculates retirement benefits using an NCS date that does not grant full credit for pre-PDA pregnancy leave.⁶³ The Equal Employment Opportunity Commission (EEOC) endorsed the

⁶⁰ See *id.* at 2170 (stating that courts must strictly adhere to the text of Title VII and not extend charging deadlines out of respect for the compromises that were part of the legislative process).

⁶¹ See, for example, *Hulteen v AT&T Corp.*, 498 F3d 1001, 1003 (9th Cir 2007) (en banc); *Ameritech Benefit Plan Committee v Communication Workers of America*, 220 F3d 814, 817 (7th Cir 2000); *EEOC v Bell Atlantic Corp.*, 1999 WL 386725, *1 (SDNY); *Pallas v Pacific Bell*, 940 F2d 1324, 1326 (9th Cir 1991).

⁶² See *Hulteen*, 498 F3d at 1003 (stating that prior to 1977, AT&T employees taking pregnancy leave "received a maximum of thirty days NCS credit").

⁶³ See *Hulteen*, 498 F3d at 1015; *Pallas*, 940 F2d at 1327. A similar case was also filed in the Southern District of New York. See *Bell Atlantic Corp.*, 1999 WL 386725. The court denied summary judgment to the defendants, who alleged that the claim was time-barred. See *id.* at *1. Although this could appear to be an implicit holding that adoption of a retirement system is a violation, it is important to note that the court was required to construe every fact in favor of the plaintiffs. The court stated, "[P]laintiffs allege that defendants' adoption and implementation of the [retirement plan] . . . is a discrete discriminatory act. At this stage in the litigation, I must accept the allegation as true." *Id.* at *4. This case was later combined with a case against another predecessor of Verizon and then settled for \$48.9 million, affecting 12,326 employees. EEOC, Press Release, *Class of Women to Receive \$48.9 Million* (cited in note 9).

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Ninth Circuit's approach in its Compliance Manual. In contrast, the Sixth and Seventh Circuits have found that the calculation of benefits using an NCS system is not a violation of Title VII, and that any violation (if one occurred) is time-barred.

A. The Ninth Circuit: Current Use of the Seniority System Is a Violation of Title VII

The Ninth Circuit has held that the application of a seniority system that does not grant credit for pregnancy leave taken prior to the PDA is a violation of Title VII. In *Pallas v Pacific Bell*,⁶⁴ the plaintiff had taken pregnancy leave in 1972 and later failed to qualify for the employer's "Early Retirement Opportunity" because she was a few days short of the seniority requirement.⁶⁵ The district court, relying on *Evans*, dismissed the claim, but the Ninth Circuit reversed the dismissal.⁶⁶

The Ninth Circuit held that *Evans* was distinguishable from the present case because Pacific Bell had adopted a discriminatory system—the Early Retirement Opportunity—after enactment of the PDA.⁶⁷ The court held that the Early Retirement Opportunity was not facially neutral because it “distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.”⁶⁸ Because the new policy was facially discriminatory, the court reasoned, the claim was “not a belated attempt to litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program.”⁶⁹ The court, quoting *Bazemore*, held that “[e]ach week’s paycheck . . . is a wrong actionable under Title VII.”⁷⁰

Judge Dumbauld’s dissent presented a thorough and instructive picture of the opposing viewpoint.⁷¹ Judge Dumbauld stated that the Equal Retirement Opportunity system was facially neutral because it

⁶⁴ 940 F2d 1324 (9th Cir 1991).

⁶⁵ See *id* at 1326.

⁶⁶ See *id* at 1325.

⁶⁷ See *id* at 1326–27.

⁶⁸ *Id* at 1327. Unfortunately, the court failed to articulate why these two groups should be viewed as “similarly situated.” The dissent contended that these two groups were not similarly situated but likewise failed to provide analysis to support its own selection of similarly situated groups. See *id* at 1329 (Dumbauld dissenting in part) (arguing that the similarly situated groups are “[currently] pregnant and non-pregnant women” or “pregnant women and men with a sex-specific ailment”).

⁶⁹ *Id* at 1327 (majority).

⁷⁰ *Id*, quoting *Bazemore*, 478 US at 395–96.

⁷¹ Although the Sixth and Seventh Circuits took a view opposing the Ninth Circuit, their opinions were relatively narrow, focusing mainly on the temporal element of the claim. Thus, it is useful to look at the two rigorous dissents in the Ninth Circuit in order to gain a full picture of the different viewpoints.

categorically allows credit for medical leave and denies it for personal leave.⁷² The dissent noted that the employer in *Bazemore* was engaged in a current discriminatory practice—providing lower wages to non-Caucasian employees in violation of Title VII—while AT&T currently treats pregnancy leave in accordance with the PDA. Judge Dumbauld acknowledged that the seniority system prolonged the impact of the pre-PDA policy, but noted that “[w]e cannot . . . alter or falsify the past.”⁷³

In *Hulteen v AT&T Corp.*,⁷⁴ decided in 2007, the Ninth Circuit revisited and affirmed its holding in *Pallas*.⁷⁵ The Ninth Circuit reiterated its view that an employer “engages in intentional discrimination *each time it applies the policy* in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA.”⁷⁶ The court argued that AT&T violated the PDA’s mandate to treat “women affected by pregnancy” the same as other employees, because *Hulteen* was “affected by pregnancy” when the company calculated her seniority benefits.⁷⁷ Relying on language in a letter from AT&T to one plaintiff, the court inferred that AT&T had reexamined each employee’s service history prior to granting retirement benefits.⁷⁸ Thus, failure to grant credit upon retirement was a fresh violation of Title VII.

The Ninth Circuit highlighted two other key points. The court stressed that it was not applying the PDA retroactively because the discriminatory act at issue was the use of the seniority system to calculate retirement benefits, not the failure to grant seniority credit in the

⁷² See *Pallas*, 940 F2d at 1328–29 (Dumbauld dissenting in part). Prior to the PDA, Pacific Bell treated pregnancy leave as personal leave. See *id.* at 1328.

⁷³ *Id.* at 1328 (“[A]ll that the telephone company is currently doing is applying a bona fide seniority system, which . . . consists simply of examination of the company’s records and adding up the time the employee has worked for the company. . . . Neither we nor the telephone company can erase or change history.”).

⁷⁴ 498 F3d 1001 (9th Cir 2007) (en banc). Note that *Hulteen* is the only case in this circuit split that was decided after the Supreme Court’s recent opinion in *Ledbetter*.

⁷⁵ See *id.* at 1003. A three-judge panel had held that *Pallas* was no longer good law because it was inconsistent with intervening Supreme Court precedent. See generally *Hulteen v AT&T Corp.*, 441 F3d 653 (9th Cir 2006). The panel had held that *Pallas* “gave the PDA impermissible retroactive effect under controlling law today” but later withdrew its opinion and the case was rededicated en banc. *Hulteen*, 498 F3d at 1005.

⁷⁶ *Id.* at 1007.

⁷⁷ *Id.* at 1010–11.

⁷⁸ See *id.* at 1011–12. The dissent challenged the accuracy of this presumption. See *id.* at 1024 (O’Scannlain dissenting). In addition, the contention is inconsistent even with *Hulteen*’s appellate brief, which states that “AT&T continued to use the NCS date previously computed for leave taken before April 29, 1979.” Appellee’s Brief, *Hulteen v AT&T Corp.*, No 04-16087, *10 (filed Dec 15, 2004), available on Westlaw at 2004 WL 3140347. See also Reply Brief of Petitioner for Writ of Certiorari, *Hulteen v AT&T Corp.*, No 04-16087, *4 (filed Jan 2, 2008), available on Westlaw at 2008 WL 65145 (highlighting the above language in Appellee’s Brief).

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1970s.⁷⁹ Because the court found that the retirement system was discriminatory, the adoption, application, or injury caused by the seniority system each violated Title VII.⁸⁰ The Ninth Circuit further held that the protections of § 703(h) for bona fide seniority systems do not apply in cases of alleged sex discrimination. The court pointed to language in the PDA stating that “nothing in [§ 703(h)] shall be interpreted to permit” discrimination based on sex, although § 703(h) states that a bona fide seniority system is permitted “[n]otwithstanding any other provision of this subchapter.”⁸¹ The court found that the later enacted, more specific text of the PDA trumped the general language of § 703(h).⁸²

Judge O’Scannlain, dissenting, argued that the majority gave impermissible retroactive effect to the PDA.⁸³ The dissent asserted that the language in the PDA referencing § 703(h) was enacted in order to supersede *Gilbert*, not to remove protection for seniority systems in all sex discrimination suits.⁸⁴ The dissent also opined that the policy at issue was facially neutral. Judge O’Scannlain conceded that the policy treated employees who took pregnancy leave prior to 1979 differently than employees who took disability leave, but “because it was then lawful to distinguish between the two reasons for leaves prior to the PDA, the two groups were not similarly situated.”⁸⁵

Judge O’Scannlain further argued that a determination of no liability would be consistent with the Supreme Court cases governing this issue. He asserted that the distinction between *Bazemore* and *Ricks* was the existence of discrimination within the charging period.⁸⁶ Thus, “Hulteen’s case turns on whether AT&T calculated her benefits in 1994 with the requisite discriminatory intent (*Bazemore*) or whether that calculation simply gave effect through the NCS date of past, uncharged discriminatory acts (*Evans-Ricks-Ledbetter*).”⁸⁷ According to Judge O’Scannlain, the plaintiffs had not met their burden of proving intentional discrimination within the charging period.⁸⁸

⁷⁹ See 498 F3d at 1007.

⁸⁰ See *id.* at 1011. See also 42 USC § 2000e-5(e)(2) (stating that a seniority system that is facially or intentionally discriminatory constitutes a violation of Title VII when adopted, applied, or causing injury).

⁸¹ *Hulteen*, 498 F3d at 1013.

⁸² See *id.* at 1013–14.

⁸³ See *id.* at 1022–23 (O’Scannlain dissenting).

⁸⁴ See *id.* at 1028–29.

⁸⁵ *Id.* at 1023.

⁸⁶ See *id.* at 1021.

⁸⁷ See *id.*

⁸⁸ See *id.* at 1018–19.

In summary, the Ninth Circuit has twice held that the use of a seniority system that does not grant full credit for pre-1979 pregnancy leave is a violation of Title VII. Therefore the calculation of retirement benefits itself, not the original failure to grant seniority credit, constitutes a Title VII violation. Because the retirement policy is facially discriminatory, *Bazemore* is the controlling Supreme Court precedent.

B. The Sixth and Seventh Circuits: Current Use of the Seniority System Is Not a Violation of Title VII

In contrast, two circuits have determined that application of a seniority system that does not credit prior pregnancy leave is *not* a current violation of Title VII. The Sixth and Seventh Circuits have refused to hold that such retirement systems are facially discriminatory, at least based on the evidence before them. Without a facially discriminatory policy to continually renew the statute of limitations, and in the absence of demonstrated discriminatory intent, both courts found that the claims were time-barred.

In *Ameritech Benefit Plan Committee v Communication Workers of America*,⁸⁹ the Seventh Circuit held that application of a seniority system using the NCS date was not a violation.⁹⁰ The court stated that the plaintiffs had failed to show that the seniority system was facially discriminatory and noted that the Supreme Court “has held [that] the fact that a seniority system perpetuates pre-Act discrimination does not preclude it from being bona fide.”⁹¹ The Seventh Circuit also held that plaintiffs had failed to prove intentional discrimination especially because, in light of *Gilbert*, “Ameritech would have had no reason to think it had to reshuffle its [seniority calculations] after the [PDA] was passed.”⁹² In other words, because the Supreme Court had specifically authorized differential treatment and the PDA was void of retroactive language, a company would not have had reason to believe that its prior actions were made unlawful by the superseding statute.

The Seventh Circuit observed that *Evans* appeared to be more applicable than *Bazemore* because *Evans* specifically deals with “computation of . . . seniority . . . followed by a neutral application of a benefit package to all employees with the same amount of time.”⁹³ However, the court acknowledged that “the line between continuing violations that arise with each new use of the discriminatory act (for

⁸⁹ 220 F3d 814 (7th Cir 2000).

⁹⁰ See *id.* at 823.

⁹¹ *Id.*, citing *Teamsters*, 431 US at 352–53.

⁹² *Ameritech Benefit Plan*, 220 F3d at 823.

⁹³ *Id.*

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example, the *Bazemore* paychecks) and past violations with present effects (for example, the *Evans* seniority) is subtle at best.”⁹⁴ Finally, the court noted that the employees had periodically received notice of their NCS dates and that “[t]he time for bringing a complaint was therefore long ago.”⁹⁵ The Sixth Circuit, in a later case also involving Ameritech, adopted the Seventh Circuit’s reasoning in full without analysis.⁹⁶

The Sixth Circuit subsequently provided independent analysis supporting this rule in *Leffman v Sprint Corp.*,⁹⁷ decided in 2007. The court held that the seniority system was not facially discriminatory because there was no allegation that Sprint “treats employees who have taken noncredited maternity leave differently from employees who have taken other kinds of non-credited leave.”⁹⁸ Thus, the claim was time-barred.⁹⁹ All three of the Sixth Circuit and Seventh Circuit cases postdated the Ninth Circuit’s decision in *Pallas*, but none of the opinions referenced that case.

In conclusion, the Sixth and Seventh Circuits have held that the application of a prior seniority calculation is not an independent violation of Title VII. These courts have held that the retirement systems are facially neutral and that *Evans* is the relevant Supreme Court precedent. As such, the calculation of benefits today is merely an “effect” of past discrimination, and any potential claim is time-barred absent discriminatory intent.

C. The EEOC’s Position

The EEOC posits that calculation of retirement benefits using a system that does not grant credit for pregnancy leave taken prior to 1979 is a violation of Title VII. In fact, the EEOC has endorsed the Ninth Circuit’s decision in *Pallas* and criticized the Seventh Circuit’s decision in *Ameritech Benefit Plan*.¹⁰⁰ The EEOC Compliance Manual blandly states that “employers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in evaluating an employee’s eligibility for a pension or for early retirement.”¹⁰¹ The EEOC then provides an example, which essentially repeats the facts of *Pallas*, and states that “[w]hile the denial of service credit to women on maternity leave was not unlawful when

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *EEOC v Ameritech Services, Inc.*, 129 Fed Appx 953, 955 (6th Cir 2005).

⁹⁷ 481 F3d 428 (6th Cir 2007).

⁹⁸ *Id.* at 433.

⁹⁹ *Id.*

¹⁰⁰ See EEOC Compliance Manual § 3-V.III(B) at 5841 n 98 (cited in note 27).

¹⁰¹ *Id.* § 3-V.III(B) at 5840.

[the employee] took her leave in 1979, the employer's decision to incorporate that denial of service credit in calculating seniority . . . is discriminatory."¹⁰² The EEOC does not reference § 703(h) or explain why the exemption in § 703(h) would not apply to this seniority system.

III. SOLUTION

In order to resolve this circuit split, it is necessary first to examine whether congressional or EEOC guidance dictates an answer to this dilemma. Part III.A examines whether the EEOC's interpretation is entitled to deference as binding or persuasive authority, and concludes that in this case it is not. Part III.B briefly examines the legislative history to see if there is clear guidance pointing to one solution or another, only to find that different congressional interests point in opposite directions. Because neither the EEOC nor Congress provides an answer, it becomes crucial to determine whether the retirement system is facially discriminatory.¹⁰³ The answer to this question is the difference between (probably) no liability at all and liability arising with every application of the seniority system, even if the discrimination was unintentional.¹⁰⁴ Part III.C examines precedent dealing with facial discrimination and finds that courts consistently describe a facially discriminatory policy as one that treats similarly situated people differently. Unfortunately, there is little guidance for determining which two groups are "similarly situated." Part III.D develops a reasoned and logically consistent method for identifying the similarly situated groups to be compared. Part III.D then applies this new method to the facts of the recent pregnancy discrimination claims and finds that the seniority policies do not treat similarly situated employees differently. Thus, the seniority and retirement systems at issue are not facially discriminatory. Part III.E examines the legal implications of this finding. The AT&T seniority system is most likely immune from suit because § 703(h) of Title VII protects facially neutral seniority systems that unintentionally have a disparate impact on protected groups. Part III.F examines the policy implications of this outcome, noting that it will certainly have a negative impact on women currently bringing

¹⁰² *Id.* § 3-V.III(B) at 5841.

¹⁰³ It is worth noting that, in most of these cases, there are two policies at issue: the leave policy prior to the PDA and the seniority policy, often adopted later.

¹⁰⁴ A seniority system is the basis for a valid claim if it is facially discriminatory or if it is adopted and maintained with discriminatory intent. See EEOC Compliance Manual § 616.25(b)(1) at 3348 example 2 (cited in note 27); 42 USC § 2000e-5(e)(2). See also text accompanying note 80. Because discriminatory intent is an issue of fact particular to each case, this Comment only deals with whether the existence of a policy itself constitutes discrimination.

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claims, but may also have a positive impact on as yet unprotected groups.

A. The EEOC's Position Is Not Dispositive

In its Compliance Manual, the EEOC endorses the outcome of *Pallas*. If the EEOC's position is entitled to *Chevron* deference,¹⁰⁵ then courts would almost certainly be required to follow the Ninth Circuit. However, the Supreme Court has repeatedly stated that EEOC guidance—including the EEOC Compliance Manual—is not entitled to *Chevron* deference. Although the EEOC's position is not controlling, it can be persuasive depending on its analytical strength and the agency's consistency in advocating that position. The EEOC guidance falls short on these criteria and therefore should have little persuasive authority. First, the EEOC's endorsement of *Pallas* is somewhat oblique, is not supported by adequate reasoning, and seems to conflict with its guidance elsewhere in the Compliance Manual. Second, the EEOC's first statement of this position was not contemporaneous with the PDA and is arguably inconsistent with its earlier position toward AT&T's NCS system. For these reasons, the EEOC's position as stated in its Compliance Manual is not persuasive in this case, although it may have more weight in other situations.

1. The EEOC's position is not entitled to *Chevron* deference but can be persuasive in some cases.

The EEOC Compliance Manual is not entitled to *Chevron* deference, but it can be persuasive authority. The Supreme Court has repeatedly refused to treat EEOC guidance with *Chevron* deference.¹⁰⁶ The Court has pointed out that “Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title” and thus that *Chevron* deference would be inappropriate.¹⁰⁷ Recently, in *Ledbetter*, the Supreme Court reasserted that the EEOC Compliance Manual in particular does not warrant *Chevron* deference.¹⁰⁸

Although the Compliance Manual is not authoritative, it is not irrelevant. According to *Skidmore v Swift & Co.*,¹⁰⁹ an agency position is

¹⁰⁵ In *Chevron U.S.A. Inc v Natural Resources Defense Council*, the Supreme Court held that an agency's interpretation of an ambiguous statute is entitled to deference if based on a permissible construction of the statute and that considerable weight must be accorded an agency's construction of the statutory scheme. See 467 US 837, 843 (1984).

¹⁰⁶ See, for example, *National Railroad Passenger Corp v Morgan*, 536 US 101, 110–11 n 6 (2002).

¹⁰⁷ *Gilbert*, 429 US at 141.

¹⁰⁸ See *Ledbetter*, 127 S Ct at 2177 n 11.

¹⁰⁹ 323 US 134 (1944).

entitled to consideration, but only to the extent that it is persuasive.¹¹⁰ The Supreme Court has held that EEOC guidance should be evaluated under this *Skidmore* framework. EEOC guidance, “while not controlling,” does constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹¹¹ The *Gilbert* Court noted, “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹¹² Because the EEOC’s guidance for pre-PDA pregnancy leave credit is analytically faulty and is inconsistent with its prior position, this guidance is not entitled to much weight under the standard enunciated in *Skidmore*.

2. The EEOC guidance in this area lacks characteristics that would make it persuasive.

The EEOC’s position could warrant respect under *Skidmore* if it is found to be persuasive. The persuasiveness of the EEOC’s position is determined by (a) the thoroughness and validity of the agency’s reasoning; (b) the agency’s consistency in opinion across time; and (c) any “other factors” that might add or detract from the persuasiveness of the EEOC’s position. The EEOC’s guidance is lacking in each one of these areas, demonstrating that it is not entitled to persuasive weight.

a) *The EEOC’s position is not supported by adequate reasoning.* As described above, the EEOC’s acceptance of *Pallas* takes the form of general statements, devoid of statutory analysis. The EEOC does not reference § 703(h) or explain why it would not apply to the seniority system in *Pallas*. In short, the EEOC’s position is merely a statement of opinion, is not grounded in statutory text, and fails to reference any legal authority other than *Pallas* and *Ameritech*, which are only acknowledged in a footnote.

Further, the EEOC’s oblique acceptance of *Pallas* appears inconsistent with its much more comprehensive treatment of pregnancy leave and seniority systems in § 616.25 of the Compliance Manual. According to § 616.25, a neutral practice that perpetuates past discrimination (such as calculating retirement benefits) will be a violation of Title VII unless the seniority system is “bona fide.”¹¹³ Whether a

¹¹⁰ See *id.* at 140.

¹¹¹ *Gilbert*, 429 US at 141–42, quoting *Skidmore*, 323 US at 140.

¹¹² 429 US at 142, quoting *Skidmore*, 323 US at 140. See also *Morgan*, 536 US at 110–11 n 6 (stating that the EEOC guidelines are only “entitled to respect” if they have persuasive power).

¹¹³ EEOC Compliance Manual § 616.25(b) at 3347–48 (cited in note 27).

system is bona fide depends on (1) when the policy was discontinued and (2) whether the differential treatment is intentionally discriminatory.¹¹⁴ If the leave policy distinguishing pregnancy from temporary disability was in force after the PDA, then this policy is not neutral and “the seniority system of which it is a part is not bona fide.”¹¹⁵ If the leave policy was discontinued prior to the PDA, then the seniority system is facially neutral.¹¹⁶ A facially neutral seniority system may still be a violation of Title VII if it is adopted and maintained with discriminatory intent.¹¹⁷ The Compliance Manual provides an instructive example to illustrate these principles. In this example, an employee took pregnancy leave and was forced to forfeit all of her accumulated seniority.¹¹⁸ This policy requiring forfeiture of credit was discontinued prior to the PDA. The employee was subsequently laid off due to her low seniority, but there was no evidence of discriminatory intent. The Compliance Manual states that this layoff did not violate Title VII.¹¹⁹ In contrast, there would be a violation of Title VII if the forfeiture policy were instituted and maintained with discriminatory intent.¹²⁰

Applying § 616.25 to the facts of the AT&T cases leads to the conclusion that the AT&T system is bona fide, not discriminatory. First, AT&T’s pregnancy leave policy was modified before the effective date of the PDA. Therefore, the seniority system would not be vulnerable to challenge unless there was intentional discrimination. In the recent series of AT&T cases, there has been no evidence of discriminatory intent.¹²¹ Thus, § 616.25 of the EEOC Compliance Manual indicates that this is not a violation of Title VII, directly contrary to the EEOC’s endorsement of *Pallas* in a different section of the same Manual.¹²²

The EEOC seeks to distinguish *Pallas* based on the creation of an early retirement program, but this position is inconsistent with the example provided in § 616.25. The EEOC apparently considers the crea-

¹¹⁴ See id § 616.25(b), (b)(1) at 3348.

¹¹⁵ See id § 616.25(b)(2) at 3348.

¹¹⁶ See id § 616.25(b)(1) at 3348.

¹¹⁷ See id § 616.25(b)(1) at 3348 example 2 (describing a facially neutral seniority system that was instituted with discriminatory intent and stating that such a system is a violation of Title VII notwithstanding the fact that its terms are facially neutral).

¹¹⁸ See id § 616.25(b)(1) at 3348 example 1.

¹¹⁹ See id.

¹²⁰ See id § 616.25(b)(1) at 3348 example 2.

¹²¹ Although the Ninth Circuit declared that the seniority policy adopted in 1987 was facially discriminatory and perpetuated discrimination, the court failed to point to any specific evidence of intentional discrimination.

¹²² This outcome is further supported by § 626.15(c)(2) of the Compliance Manual, which states that the EEOC should make a determination of no discrimination when an employer denied “equal benefits for pregnancy under a fringe benefit program prior to [the PDA], but such denial was not a pretext for sex discrimination.” Id § 626.15(c)(2) at 4019.

tion of the early retirement incentive program to be a discriminatory practice in itself, even if the only retirement provisions changed are unrelated to credit for pregnancy leave.¹²³ However, it is difficult to understand why the EEOC would view a policy firing workers with a certain amount of seniority as facially neutral (example 1 in § 616.25(b)), and a policy granting additional retirement benefits to employees with a certain amount of seniority credit as facially discriminatory (*Pallas*).

In conclusion, the EEOC's endorsement of *Pallas* is not supported by adequate analysis. Further, this position is inconsistent with the EEOC's better articulated approach described in § 616.25. These factors undermine the credibility of the EEOC's position.

b) *The EEOC's position is arguably inconsistent with its prior position toward AT&T's NCS system.* One could also argue that the EEOC's position is temporally inconsistent. From 1973 until the end of 1979, AT&T was subject to a consent decree with the EEOC.¹²⁴ During that time, AT&T corrected nearly 5,000 deficiencies identified by the EEOC¹²⁵ at a projected cost of \$38 million.¹²⁶ Two of the many requirements were that AT&T grant back pay to employees who possibly suffered from wage discrimination and that AT&T use "overrides" to promote qualified female or minority candidates even if there were a more senior or more qualified candidate.¹²⁷ This history raises the question: if the EEOC was extensively overseeing AT&T's employment practices, including correction for past discrimination, why did it not require the company to correct its seniority calculations upon enactment of the PDA?

The EEOC's failure to act was not a bureaucratic oversight. The EEOC was certainly aware of the pregnancy leave policy because a union challenged the consent decree on the basis that it failed to provide benefits for pregnancy leave equal to those for temporary disability leave.¹²⁸ In fact, the consent decree contained a proviso explicitly stating that an "absence in excess of thirty days [due to pregnancy leave] will be deducted from net credited service."¹²⁹ Although the consent decree was first entered into prior to the PDA, the EEOC continued to

¹²³ See *id.* § 3-V.III(B) at 5840. As described in note 121, there is no evidence in the recent cases that the AT&T seniority system is intentionally discriminatory. Thus, the EEOC presumably means that the policy is facially discriminatory.

¹²⁴ See Marjorie A. Stockford, *The Bellwomen: The Story of the Landmark AT&T Sex Discrimination Case* 205–06 (Rutgers 2004).

¹²⁵ See Carol J. Loomis, *AT&T in the Throes of "Equal Employment,"* *Fortune* 45, 50 (Jan 15, 1979).

¹²⁶ See *EEOC v AT&T*, 365 F Supp 1105, 1125 (ED Pa 1973).

¹²⁷ Loomis, *AT&T in the Throes*, *Fortune* at 46–47, 48 (cited in note 125).

¹²⁸ See *AT&T*, 365 F Supp at 1125.

¹²⁹ *Id.* at 1126.

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monitor AT&T after the PDA's passage. The EEOC's behavior strongly suggests that it did not regard the failure to grant retroactive credit as a violation of Title VII at the time the PDA was passed. The temporal inconsistency of the EEOC's position is an additional factor that undermines the persuasiveness of the current EEOC position.

c) "*Other factors*" also point to a finding that the EEOC's position is not persuasive in this case. In *Gilbert*, the Court refused to defer to the EEOC's interpretation, in part because it was not contemporaneous with the statute.¹³⁰ The EEOC's assertion in this situation (that failing to grant credit for pre-1979 pregnancy leave is a violation of Title VII) came in 2000, over twenty-one years after the PDA was passed.¹³¹ The *Gilbert* Court also highlighted that the EEOC had taken a contrary position shortly after passage of the relevant statute.¹³² As described above, the EEOC's position around the PDA's passage was arguably contrary to its endorsement of *Pallas*. These additional factors further emphasize that the EEOC's position lacks persuasiveness.

In conclusion, the EEOC Compliance Manual is sometimes entitled to respect and deference under *Skidmore*. However, this provision of the EEOC Compliance Manual falls short due to its almost nonexistent reasoning, its inconsistency with other statements by the EEOC, and the timing of the pronouncement. Thus, the EEOC's position is not dispositive and should not even be viewed as persuasive in this case. It is therefore necessary to turn to other sources to determine the proper outcome.

B. Conflicting Congressional Interests

Unfortunately, the congressional history does not provide a clear answer to the current dilemma, in part because there are conflicting legislative purposes at issue. On one hand, it is clear that Congress wanted to protect workers from discrimination. On the other hand, Congress has expressed its intent to grant special protections to seniority systems and to secure timely resolution of claims.

One obvious congressional goal was to protect pregnant employees from discrimination, evident by the passage of the PDA and its legislative history. The House Committee Report for the PDA stated that "[i]n enacting Title VII, Congress mandated equal access to em-

¹³⁰ See 429 US at 142–43.

¹³¹ Although the determination was not printed in the manual until 2000, the EEOC had warned AT&T in the mid-1990s that its calculation of seniority credit in regards to pregnancy leave was discriminatory. See *AT&T v EEOC*, 270 F3d 973, 974–75 (DC Cir 2001).

¹³² *Gilbert*, 429 US at 142–43 (explaining that a 1966 opinion by the EEOC Commissioner suggested that the exclusion of pregnancy- and childbirth- related disabilities from an insurance program would not violate Title VII).

ployment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment."¹³³ This remark suggests that perhaps courts should construe Title VII and the PDA broadly in order to give effect to the congressional purpose of nondiscrimination.

However, there is countervailing evidence that Congress did not intend to allow (or create) claims for seniority decisions first made prior to the PDA. First, the PDA is devoid of retroactive language and explicitly granted employers 180 days to bring their benefit provisions into compliance.¹³⁴ Second, the Civil Rights Act of 1964 was passed in part because it provided a relatively short charging period.¹³⁵ The short charging period was both a compromise and a way to ensure quick adjudication while evidence remains accessible.¹³⁶ This quick adjudication of claims may be defeated if employees were allowed to bring claims years later, when the impact of the discrimination is made more acute via application of a seniority system. Finally, Congress reaffirmed its intention to protect bona fide seniority systems and pension system when it passed the Civil Rights Act of 1991, thirteen years after the PDA. Although this most recent amendment to Title VII expanded the timeframe in which to sue for a violation based on a seniority system, this extended liability only applies to "a seniority system that has been adopted for an intentionally discriminatory purpose."¹³⁷ In other words, there has been a consistent congressional practice of carving out an exception for facially neutral seniority systems that have been adopted free of discriminatory intent.

In summary, there are conflicting congressional purposes at work here. There is clear congressional intent to protect individuals from discrimination—and to protect pregnant employees in particular—which points to a finding of liability. However, Congress has created an explicit exemption for neutral seniority systems and there is a long-standing judicial interpretive principle of avoiding retroactive application of legislation absent clear congressional intent. These factors, com-

¹³³ HR Rep No 95-948 at 3 (cited in note 18).

¹³⁴ See PDA § 2, 92 Stat at 2076.

¹³⁵ See *Mohasco Corp v Silver*, 447 US 807, 819–20 (1980) (describing the "Dirksen compromise," which changed the charging period from six months to ninety days and generated sufficient support to effect passage of the Civil Rights Act of 1964).

¹³⁶ See *Ledbetter*, 127 S Ct at 2171 n 4 (emphasizing the importance of timely charges for gathering evidence). In *Ledbetter*, the plaintiff brought a discrimination claim several years after the alleged discriminatory act that affected her wages. By the time the case went to trial, the supervisor accused of discrimination had died, thus preventing his testimony. See *id.*

¹³⁷ 42 USC § 2000e-5(e)(2).

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bined with congressional interest in prompt resolution of claims, point to a resolution that claims are either nonexistent or time-barred.¹³⁸

C. Identifying “Similarly Situated” Groups

Because the EEOC’s guidance is not controlling or even persuasive and the congressional history is unclear, it becomes necessary to examine whether the policy is facially discriminatory. Courts agree that a facially discriminatory policy is one that treats two similarly situated individuals differently, but it is not clear how to determine which two individuals are similarly situated.

An employment practice is discriminatory if it treats two similarly situated individuals differently on the basis of a protected characteristic.¹³⁹ In *Evans*, the Court observed that the seniority policy was neutral because all employees who had previously resigned or been terminated were denied seniority credit upon reemployment, regardless of sex.¹⁴⁰ On the other hand, the Court held that the pay system in *Bazemore* was facially discriminatory because it distinguished between similarly situated employees on the basis of race.¹⁴¹

Unfortunately, courts have not developed a consistent approach to identifying discrimination. The Supreme Court has enunciated a but-for test, under which a practice violates Title VII if it treats a person “in a manner which but for that person’s sex would be different.”¹⁴² However, this approach does not appear to have been broadly applied.¹⁴³ Most courts look for discrimination by comparing two similarly situated groups, but there is little concrete guidance for how to identify which groups are similarly situated and exactly how similar they must be. There appears to be a consensus that “the individuals compared [need not be] identical in all respects” in order to be similarly situated,¹⁴⁴ but must be “comparable in all respects” that are rele-

¹³⁸ Note that the Pennsylvania legislature has adopted a solution that allows women to purchase seniority credit, thus resolving the situation without a judicial determination of rights. See 24 Pa Cons Stat Ann § 8304(a), (b)(7)(i)–(ii) (West 2006). This approach is limited in its application because it requires either voluntary action by the employer or congressional action. In this scenario, the government was both the rulemaker and the employer, thus removing any possible challenges to its authority to implement the policy on a third-party employer.

¹³⁹ See, for example, *Lorance v AT&T Technologies, Inc.*, 490 US 900, 912 (1989).

¹⁴⁰ 431 US at 557–58.

¹⁴¹ See 478 US at 395.

¹⁴² *Los Angeles Department of Water & Power v Manhart*, 435 US 702, 711 (1978) (quotation marks omitted).

¹⁴³ For an example of one of the few cases applying this test, see *Newport News Shipbuilding & Dry Dock Co v EEOC*, 462 US 669, 682–83 (1983).

¹⁴⁴ *Miller-El v Dretke*, 545 US 231, 247 n 6 (2005). Thomas Joe Miller-El was petitioning for a writ of habeas corpus from the Supreme Court after being convicted of capital murder. Miller-El claimed that the prosecutor had made peremptory strikes of jurors based on race. In evaluat-

vant to the case.¹⁴⁵ There may be considerable difference of opinion in individual cases as to which characteristics are “relevant.”¹⁴⁶

The EEOC also defines a facially discriminatory policy as treating two similarly situated workers differently. In reference to age discrimination, “[a] similarly situated younger worker is an employee who is the same as an older worker in all ways that are relevant to receipt of the benefit.”¹⁴⁷ In regards to a seniority system, a sixty-five year old worker with four years of experience is not similarly situated to a fifty-five year old worker with ten years of experience.¹⁴⁸ In relation to the Americans with Disabilities Act,¹⁴⁹ the EEOC has stated that a health plan is not discriminatory if it applies to a variety of dissimilar conditions and it constrains both individuals with and individuals without disabilities.¹⁵⁰

Unsurprisingly, there is significant disagreement about which two groups are similarly situated in reference to the AT&T seniority policy. Some courts and judges compare employees who took noncredited pregnancy leave prior to the PDA to employees who took credited temporary disability leave prior to the PDA.¹⁵¹ Others assert that the proper comparison is between employees who took noncredited pregnancy leave prior to the PDA and employees who took other types of noncredited leave prior to the PDA.¹⁵² Still others assert that the correct comparison is between employees taking pregnancy leave today and employees taking temporary disability leave today.¹⁵³ How-

ing the prosecutor’s neutral explanations for his peremptory strikes, the Court analyzed whether the race neutral explanations would have been equally applicable to similarly situated white jurors, against whom the prosecutor had not used a peremptory challenge. See also *id* at 291 (Thomas dissenting) (agreeing that group members need not be identical).

¹⁴⁵ *Id* at 291 (Thomas dissenting).

¹⁴⁶ See, for example, *id* (arguing that “‘similarly situated’ does not mean merely matching any one of several reasons the prosecution gives for striking a potential juror,” but rather that the “jurors must be comparable in all respects that the prosecutor proffers as important”).

¹⁴⁷ EEOC Compliance Manual § 3-III.II(B) at 5808 (cited in note 27). While it is true that this explanation covers violation under the Age Discrimination in Employment Act, 29 USC § 621 et seq (2000) rather than Title VII or the PDA, claims brought under the ADEA and the Americans with Disabilities Act are sometimes treated consistently with application of Title VII. The EEOC also endorsed the result in *Pallas*. See note 100.

¹⁴⁸ See EEOC Compliance Manual § 3-III.II(B) at 5808 (cited in note 27).

¹⁴⁹ 42 USC § 12101 et seq (2000).

¹⁵⁰ EEOC Compliance Manual § 3-IV.III at 5835 (cited in note 27).

¹⁵¹ See, for example, *Pallas*, 940 F2d at 1327; *Hulteen*, 498 F3d at 1006. But see *id* at 1023 (O’Scannlain dissenting) (stating that employees taking pregnancy leave prior to 1979 are *not* similarly situated to employees taking disability leave prior to 1979).

¹⁵² See, for example, *Leffman*, 481 F3d at 433.

¹⁵³ See, for example, *Pallas*, 940 F2d at 1329 (Dumbauld dissenting in part) (stating that the relevant comparisons are “between pregnant and non-pregnant women, [] between pregnant women and men with a sex-specific ailment . . . , or men with other mutually available medical reasons for absence from work”).

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ever, there is little, if any, analysis in the opinions to support the selection of the groups to be compared.

D. A New Approach to Identifying Similarly Situated Groups

Determining which two groups are similarly situated is a crucial but difficult task. Drawing the lines improperly can lead to two types of errors, each bearing serious consequences for the parties involved.

First, comparing two groups who are not similar enough may lead to a false positive—a determination of discrimination when none existed. For example, in a claim alleging discrimination based on national origin, comparing native-born Americans (who speak English) to foreign-born Americans (with little or no English skills) could be inaccurate. These two groups of workers are different in two ways: national origin and English language skills. This could lead a court to find that there was discrimination based on national origin, even if the distinguishing characteristic was command of the English language, which could be a legitimate employment qualification for some jobs. Requiring a greater degree of similarity between the groups—for example, that the native-born and foreign-born workers have similar language skills—would demonstrate that the employer was distinguishing based on a job-related characteristic (language skills), not a protected characteristic (national origin).

On the other hand, defining the groups too narrowly by requiring exact similarity would lead to a false negative due to the uniqueness of individuals and the sheer number of characteristics of each employee. For example, in *Bazemore*, the Court found that the policy was facially discriminatory—that it treated similarly situated employees differently. However, the non-Caucasian employees had only been allowed to serve certain clients, and thus had narrower work experience than the Caucasian employees.¹⁵⁴ Defining the similarly situated groups narrowly would suggest that paying the non-Caucasian employees less was not racially discriminatory because the non-Caucasian employees had inferior work experience, even though the breadth of experience was directly tied to race. In short, requiring that every single factor be identical (except for the discriminatory factor) could drain Title VII of its force.

This Comment proposes a new approach for determining which two groups are similarly situated: the “characteristic removal” method. The key to this inquiry is to isolate the factor that is motivating the employer’s differential treatment. The first step is to identify two groups

¹⁵⁴ See 478 US at 390 (Brennan concurring in part).

who are being treated differently. The second step is to remove the discriminatory factor, and then to remove any other factors that are dependent upon this discriminatory factor. This should be repeated until each group contains some individuals with the discriminated-against characteristic and some without. If there is only one group after removing all of the factors tied to discrimination, then the protected characteristic was the distinguishing factor. If there are still two groups, but neither one is comprised solely of employees with the protected characteristic, then there is some other distinguishing factor. Thus, the policy is not discriminatory *on its face*.

This characteristic removal approach is consistent with Supreme Court case law and with the EEOC's explanation of facial discrimination. The core of the characteristic removal approach—isolating the factor causing differential treatment—is also consistent with the but-for test described in *Los Angeles Department of Water & Power v Manhart*.¹⁵⁵ For example, if sex were found to be the only factor distinguishing between the groups, then but for the employee's sex, her treatment would be different. This approach is also consistent with language in *Evans*, which described a facially discriminatory policy as one that creates a “disparity . . . [as] a consequence of [] sex.”¹⁵⁶ It finds further support in the EEOC Compliance Manual, which states that two similarly situated employees are “the same . . . in all ways that are relevant” except for the protected characteristic.¹⁵⁷ In sum, this new approach offers a principled and unbiased way to give effect to the consensus opinion that similarly situated individuals are similar in all relevant aspects (and thus merit the same treatment), except that one group has the protected characteristic.

Applying the characteristic removal method to a few examples demonstrates that this method produces the correct result. Consider the hypothetical case above involving alleged national origin discrimination. First remove citizenship from the equation, making the two groups “those who speak English” and “those who do not speak English.” The employer clearly treats the two groups differently. However, there are some foreign-born Americans who would fall in the group who speak English, and some native-born Americans in the group who do not speak English. Thus, it becomes clear that the employer is not treating the groups differently because of national origin, but rather because of another factor—the ability to speak English. If English language skills are a legitimate employment qualification for the

¹⁵⁵ 435 US 702, 711 (1978).

¹⁵⁶ 431 US at 557.

¹⁵⁷ EEOC Compliance Manual § 3-III.II(B) at 5808 (cited in note 27).

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job at issue, then the employer is not in violation of Title VII. The employer is permitted to distinguish based on legitimate employment qualifications. In *Griggs v Duke Power Co.*,¹⁵⁸ the Supreme Court noted that “Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications.”¹⁵⁹ If, however, the employer were using the language requirement to disguise intentional discrimination, then the employer would be violating Title VII.¹⁶⁰ This violation would stem from the employer’s discriminatory intent, not the facial characteristics of the policy.¹⁶¹

Applying this “characteristic removal” method to the *Bazemore* facts would lead to a determination of facial discrimination, consistent with the Supreme Court’s holding. Removing race from the equation would leave Group A, with exposure to all types of clients, and Group B, with exposure to only non-Caucasian clients. However, all members of Group A are Caucasian, and all members of Group B are not Caucasian, and client exposure was determined by race. Because client exposure is tied to race, it should also be removed from the equation. Thus, we have only one group, and within this group members with equal years of work experience should be receiving equal pay. In short, the employer is creating a distinction based on race when no legitimate distinction actually exists.

Applying the “characteristic removal” method to the pregnancy discrimination cases would demonstrate that the seniority systems are not facially discriminatory. Removing pregnancy (as a proxy for gender), the two groups are: “employees who took noncredited leave that today would qualify as credited leave” and “employees who took credited leave.” The first group will most likely contain members other than women. For example, individuals taking leave for drug or alcohol rehabilitation, psychological illnesses, or even family obligations may not have received credit in 1978, but today would be granted credit, either by law or by company policy.¹⁶² The second group—employees

¹⁵⁸ 401 US 424 (1971).

¹⁵⁹ *Id.* at 430.

¹⁶⁰ Because this is not a seniority system and therefore is not protected by § 703(h), the policy would be vulnerable to a disparate impact claim.

¹⁶¹ See Part III.E.2 for a more complete discussion of facial discrimination and intentional discrimination.

¹⁶² See, for example, Kathryn Tyler, *Mind Matters: Reducing Mental Health Care Coverage Today May Cost You More Tomorrow*, HR Magazine 54, 60 (Aug 1, 2003) (noting that some states have adopted “[p]arity laws [that] require employers to provide the same level of benefits for mental illness and substance abuse as they provide for physical illness”). See generally Lehr, Middlebrooks & Proctor, *Alabama Employer Successful in Disability Discrimination Case*, Alabama Employment Law Letter, vol 6 (Aug 1995) (describing an instance where an employer granted a six-month paid disability leave for an employee suffering from depression).

who took credited leave—would certainly contain women. The employer is creating a distinction, but this distinction is not based on sex.

This scenario looks similar to the facts in *Evans*. The *Evans* seniority system injured both women and men who had been terminated or resigned, much like the seniority system at issue that injures all employees who took leave on less favorable terms than would be granted today. Although the employer's initial action (terminating the employee in *Evans*, or failing to grant credit for pregnancy leave in these cases) is arguably discriminatory, the employer's background policy (the seniority system) is neutral. As the Supreme Court held in *Evans*, "a challenge to a neutral system may not be predicated on the mere fact that a past event . . . has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer."¹⁶³ Thus, the seniority system at issue should be viewed as facially neutral even though it is tied to an earlier action that is arguably discriminatory.

One possible critique of the characteristic removal approach is that it could allow employers to evade liability by creating policies that include at least one employee without the protected characteristic. This critique is not valid. This facially neutral policy would be intentionally discriminatory, and the discriminatory intent would be a violation of Title VII. The ability to bring a disparate impact claim would act as a further backstop to prevent employers from utilizing facially neutral policies that have a disproportionately negative impact on a protected group and are not supported by a legitimate employment reason.¹⁶⁴ It is true, however, that § 703(h) immunizes bona fide seniority systems—systems that were adopted free of discriminatory intent—from disparate impact claims. Therefore, there is a potential loophole for a bona fide seniority system that (unintentionally) disproportionately burdens a protected group, but this loophole was expressly created by Congress.

E. Implications of a Facially Neutral Policy

The determination that the seniority policy is facially neutral has several important implications. First, it affects whether § 703(h) of Title VII, which protects seniority systems from discrimination claims in some circumstances, applies. Second, the characterization of the system affects the timing of the violation and the statute of limitations,

¹⁶³ 431 US at 560.

¹⁶⁴ An employer would be liable under the disparate impact theory unless the employer could demonstrate that the policy or hiring qualifications are "job-related." See generally Lex K. Larson, *2 Employment Discrimination* § 20.02 (Lexis 2d ed 2007).

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which in turn impacts the ability to bring suit today. It is first necessary to resolve the disputed question of whether § 703(h) can apply to sex discrimination cases at all.

1. Section 703(h) of Title VII applies to sex discrimination cases.

Contrary to the Ninth Circuit's opinion in *Hulteen*,¹⁶⁵ § 703(h) does apply to sex discrimination cases. The Ninth Circuit asserted that seniority systems were not protected because the PDA directs that "nothing in [§ 703(h)] of this title shall be interpreted to permit [pregnancy discrimination]."¹⁶⁶ On the other hand, § 703(h) states that bona fide seniority systems are protected "[n]otwithstanding any other provision of this title."¹⁶⁷ The *Hulteen* court resolved this conflicting language by asserting that the PDA language is controlling because it is more recent and more specific.¹⁶⁸

Despite the attractive simplicity of this argument and the seemingly clear language of the PDA, it is reasonably apparent that Congress did *not* intend to invalidate § 703(h) in all sex discrimination claims. As the dissent in *Hulteen* noted, the key to understanding the PDA's reference to § 703(h) lies in the last sentence of § 703(h): "It shall not be an unlawful employment practice . . . to differentiate upon the basis of sex . . . if such differentiation is authorized by the provisions of section 206(d) of [the Equal Pay Act]."¹⁶⁹ The Equal Pay Act¹⁷⁰ authorizes some differentiation based on sex; it does not authorize any distinction based on race, color, religion, or national origin. The language in the PDA referring to § 703(h) was meant to clarify that the Equal Pay Act could not be used to justify a result such as that reached in *Gilbert*, not to extend additional benefits to litigants claiming sex discrimination.¹⁷¹

The House of Representatives Committee Report supports this reading of the PDA. The Committee noted that the reference to § 703(h) of the PDA

was necessitated by the Supreme Court's reliance in the *Gilbert* case on Section 703(h) of Title VII ("the Bennett amendment")

¹⁶⁵ *Hulteen*, 498 F3d at 1013. Because the *Hulteen* court found that the seniority policy was facially discriminatory, § 703(h) would be inapplicable, so this portion of the opinion is dicta.

¹⁶⁶ 42 USC § 2000e(k).

¹⁶⁷ 42 USC § 2000e-2(h).

¹⁶⁸ See 498 F3d at 1013.

¹⁶⁹ 42 USC § 2000e-2(h). See also HR Rep No 95-948 at 1 (cited in note 18) ("The purpose of [the PDA] is to amend Title VII . . . [to] clarif[y] that the prohibitions against sex discrimination in the act include discrimination in employment based on pregnancy.").

¹⁷⁰ 29 USC § 206(d) (2000).

¹⁷¹ See *Hulteen*, 498 F3d at 1029 (O'Scannlain dissenting).

which in effect provides that certain practices authorized by the Equal Pay Act . . . do not violate Title VII. . . . While the *Gilbert* opinion is somewhat vague . . . it does appear that the Court regarded the Bennett amendment and the Equal Pay Act regulation, taken together, as somehow insulating pregnancy-based classifications from the proscriptions of Title VII. Therefore, the committee determined that it was necessary to expressly remove the Bennett amendment from the pregnancy issue in order to assure the equal treatment of pregnant workers.¹⁷²

The purpose of the PDA was to clarify that pregnancy discrimination is a form of sex discrimination; the purpose was not to expand the scope of sex discrimination to afford even more protection than other types of discrimination.¹⁷³

Congress, the Supreme Court, and the EEOC all indicate that § 703(h) still applies to sex discrimination. In *Lorance v AT&T Technologies, Inc.*,¹⁷⁴ the Supreme Court applied the protection of § 703(h) to a facially neutral seniority system that was used to discriminate based on sex.¹⁷⁵ Congress was critical of the Court's application of § 703(h) to a system used to intentionally discriminate, but did not assert that § 703(h) was inapplicable to all sex discrimination claims.¹⁷⁶ In addition, the EEOC Compliance Manual specifically notes that a seniority system that affects employees taking pregnancy leave may be protected under § 703(h).¹⁷⁷ Thus, it seems clear that § 703(h) protects bona fide seniority systems even for claims alleging sex discrimination. Thus the seniority policies at issue are protected from a discrimination claim unless there is specific evidence of discriminatory intent.

¹⁷² HR Rep No 95-948 at 7 (cited in note 18).

¹⁷³ See *id* at 4 (“Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination *proscribed in the existing statute.*”) (emphasis added). Consider also that § 703(h) still operates to protect seniority systems from racial challenges. It is implausible that Congress intended for bona fide seniority systems to be vulnerable to a claim of sex discrimination but immune from a claim of racial discrimination, without engaging in any discussion to that extent. It is much more plausible that Congress passed the PDA to close a perceived gap, while retaining the same general structure for discrimination claims.

¹⁷⁴ 490 US 900 (1989).

¹⁷⁵ See *id* at 912.

¹⁷⁶ See Civil Rights Act of 1991, House Committee on the Judiciary, HR Rep No 102-40 (II), 102d Cong, 1st Sess 3 (1991), reprinted at 1991 USCCAN 694, 695.

¹⁷⁷ See EEOC Compliance Manual § 616.25(b)(1) at 3348 (cited in note 27). Although the discussion in Part III.A suggested that the EEOC Compliance Manual may not be persuasive, it only evaluated the arguments for one small section of the Compliance Manual. The EEOC Compliance Manual may in some cases be persuasive, especially when it is consistent with other sources, as here.

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2. There has been no violation of Title VII.

The characterization of the seniority system has a direct impact on when (and if) a violation occurred, and thus when a plaintiff may bring suit. Because the seniority system is facially neutral and § 703(h) applies, the seniority system is immune from suit absent proof of intentional discrimination. By contrast, if a seniority system is facially discriminatory or was adopted with discriminatory intent, there is a violation of Title VII when that system is adopted, when it is applied to an individual, or when an individual is injured by the system.¹⁷⁸

Applied to the facts of the pregnancy discrimination claims, the finding that the seniority system is facially neutral is dispositive of the action.¹⁷⁹ If the seniority system were facially discriminatory, then the calculation of retirement benefits would be a violation of Title VII, just as the Ninth Circuit declared in *Pallas* and *Hulteen*.¹⁸⁰ However, this seniority policy is bona fide, as it is both facially neutral and free of discriminatory intent, so it is protected by § 703(h). Thus, there has been no violation at any point. The failure to grant credit prior to the PDA was not a violation of Title VII because granting credit was not yet legally required. The seniority system is not a violation of Title VII, because a bona fide policy is not subject to a disparate treatment claim, and seniority systems are immune to a disparate impact claim under § 703(h).¹⁸¹ The Sixth and Seventh Circuits held only that there was no violation of Title VII within the charging period,¹⁸² but it is clear that there was no violation at any point.

F. Policy Implications

As described above, a finding of no discrimination is most consistent with legal precedent. This outcome certainly has an unfortunate

¹⁷⁸ See 42 USC § 2000e-5(e)(2).

¹⁷⁹ This statement assumes that there is no specific evidence of discriminatory intent, which is consistent with the facts of the cases at issue.

¹⁸⁰ See *Pallas*, 940 F2d at 1327; *Hulteen*, 498 F3d at 1003. See also EEOC Compliance Manual § 616.25(b)(2) at 3348 (cited in note 27). Likewise, if the plaintiffs could demonstrate that the company acted with discriminatory intent, then the adoption and application of even a facially neutral seniority system would be considered a violation of Title VII. See 42 USC § 2000e-5(e)(2); EEOC Compliance Manual § 616.25(b)(1) at 3348 example 2 (cited in note 27).

¹⁸¹ See *American Tobacco Co v Patterson*, 456 US 63, 75 (1982) (“In *Teamsters* . . . we held that § 703(h) exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices.”).

¹⁸² See *Ameritech Benefit Plan*, 220 F3d at 823 (“The time for bringing the complaint therefore was long ago.”); *EEOC v Ameritech Services, Inc.*, 129 Fed Appx 953, 955 (6th Cir 2005) (agreeing with the district court that any potential claim arose “no later than 1979,” and adopting the reasoning of *Ameritech Benefit Plan*); *Leffman*, 481 F3d at 429 (implying that the proper date to bring a claim was when the employee was notified that she would not receive credit for the leave).

impact on the women currently bringing suit. It does, however, have some policy benefits that may at least partially counteract these drawbacks. A finding of no liability has one unexpected consequence: it does not encourage employment discrimination against as yet unprotected groups, as a finding of liability might do. In addition, this rule would only protect employers who have been respecting legal mandates and would not protect those employers who have intentionally discriminated.

Ironically, a finding of no liability may actually help groups facing discrimination who have not yet been protected by statute. If an employer knew that his present actions would later be judged according to a more demanding standard, he might be less willing to hire members of groups facing discrimination. If this group was currently unprotected by Title VII, the employer's refusal to hire would not violate Title VII. However, if the employer hired a member of this group but failed to grant benefits that would, at a later point, be considered mandatory, the employer may be later held liable. This rule may not encourage employers to extend *equal* benefits prior to a legal mandate, but it would protect employers who extended *some* unrequired benefits if their past actions are later perceived as inadequate by current standards.

Consider the present slate of cases relating to pregnancy discrimination. All of these cases have been brought against former Bell companies, in part because AT&T employed hundreds of thousands of women—more women than many other companies.¹⁸³ Even as recently as the mid-1970s, “[e]mployers routinely fire[d] pregnant workers, refuse[d] to hire them, strip[ped] them of [previously earned] seniority rights, and den[ied] them sick leave and medical benefits given other workers.”¹⁸⁴ AT&T offered pregnancy leave, granted thirty days of seniority credit, and in some cases reserved the employee's position. In 1970, AT&T voluntarily created a task force to “study the status of women in management” and to make recommendations.¹⁸⁵ Compared to many employers, AT&T was progressive in its treatment of female

¹⁸³ See Loomis, *AT&T in the Throes*, *Fortune* at 45 (cited in note 125). Women comprised 55 percent of AT&T's work force in 1970. See *id.* at 46.

¹⁸⁴ Discrimination on the Basis of Pregnancy, Hearings before the Senate Subcommittee on Labor, 95th Cong, 1st Sess 117 (1977) (testimony of Susan Deller Ross, Co-chair of the Campaign to End Discrimination against Pregnant Workers).

¹⁸⁵ Lois Kathryn Herr, *Women, Power & AT&T: Winning Rights in the Workplace* 29–30 (Northeastern 2003). In fact, AT&T was “shocked” when the EEOC called it the “largest oppressor of women.” *Id.* It was understood that the “[g]overnment had challenged the best, not the worst, and raised expectations for all businesses.” *Id.*

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workers. However, by today's standards, AT&T's failure to grant seniority credit would be blameworthy.¹⁸⁶

It is entirely possible that this current pregnancy discrimination litigation is only capturing law-abiding, moderately progressive employers. Employers who were truly ahead of their time were already granting seniority credit for pregnancy leave prior to the PDA.¹⁸⁷ Employers who were refusing to grant pregnancy leave,¹⁸⁸ and thereby forcing resignation, are presently immune from suit under *Evans* even if the refusal to grant leave was actionable at a prior point. Thus, it is only the employers who were treating employees pursuant to the law at that time, or possibly slightly better than required, who may possibly be liable today.

The reason for this anomaly is based on the continuous nature of seniority systems, not the nature of the violation. A refusal to grant leave or seniority credit is a discrete discriminatory practice. According to *Evans*, a later refusal to modify the determination would not be an independent violation of Title VII. However, according to the Ninth Circuit, the subsequent use of that determined seniority renders an employer liable to suit every time the seniority system is applied to that employee. Ironically, employers who tried to accommodate groups facing discrimination will be punished because their behavior does not match up to the standards of today, while employers refusing to be flexible will be immune from suit, especially if their inflexibility causes vulnerable employees to stop working.¹⁸⁹

¹⁸⁶ For a more recent example, consider the implications of a recent congressional bill forbidding employment discrimination on the basis of sexual orientation. See Employment Nondiscrimination Act of 2007, HR 3685, 110th Cong, 1st Sess (Sep 27, 2007), in 153 Cong Rec H 13228 (Nov 7, 2007). Ironically, employers who allowed gay partners of employees to participate in a pension program may face suits by heterosexual employees who allege sexual orientation discrimination for not previously including heterosexual unmarried partners. However, employers who declined to include gay partners, until required by statute, will be immune from suit. See generally Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles while Staying in Tune with the Changing Definition of the Family*, 16 Whittier L Rev 737 (1995) (discussing the often unforeseen legal complexities of domestic partner benefits).

¹⁸⁷ See, for example, Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy Part Two, Hearings before the House Subcommittee on Employment Opportunities of the Committee on Education and Labor, 95th Cong, 1st Sess 172 (1977) (written statement of J.C. Smith, Manager of Government and Community Relations, Cummings Engine Co, Inc) (stating that Cummings's policy in 1977 granted equal terms for pregnancy leave as for temporary disability leave and that seniority continued to accumulate even for personal leave taken after the birth of a child that was unrelated to physical disability).

¹⁸⁸ See, for example, *St. John v G.W. Murphy Industries, Inc*, 407 F Supp 695, 699-701 (WD NC 1976) (holding that an employer's refusal to grant pregnancy leave was discriminatory because the employer typically granted leave for other reasons). However, if the company (prior to the PDA) had a strict no-personal-leave policy, the failure to grant pregnancy leave would not be prohibited.

¹⁸⁹ Note that this applied to groups who have been discriminated against but were not protected by law at the time of the employment practice. If these groups later become protected,

This conundrum is not new. Compare the employer in *Bazemore*, who paid lesser salaries to non-Caucasian workers,¹⁹⁰ with the employer in *Hazelwood School District v United States*,¹⁹¹ who hired very few non-Caucasian workers.¹⁹² Both employers clearly behaved in a harmful and discriminatory way. Both employers would likely be paying their non-Caucasian workers less—either because of a discriminatory pay scale or because of lower seniority due to discriminatory hiring—but only one would be subject to liability for this unequal pay. Employers who had failed to hire non-Caucasian employees at all were not required to grant retroactive seniority to equalize the salaries, but companies that had hired non-Caucasian employees for lesser pay were required to eliminate disparities resulting from the former discriminatory pay scale.¹⁹³ Although the distinction between these two scenarios is certainly coherent, the outcome is that the employer who failed to hire members of a discriminated-against group escapes liability while the employer who hired members of that group under less favorable terms is liable for every paycheck.

It is important to note that determining that a seniority policy is facially neutral does not mean that there can be no successful claim. *Employers who choose to discriminate will still be held liable.* A company that adopts or maintains a facially neutral policy with discriminatory intent will be subject to liability every time that policy is applied or injures an individual.¹⁹⁴ The only employers who will benefit from this rule are those who, in good faith, implement a facially neutral policy that has some relation to acts that, if taken today, would be discriminatory but for some reason are not actionable.¹⁹⁵ In other words, under this rule, the “bad guys” will not escape liability; the “good guys” have no basis for liability; and only the “semi-good guys,” who are not acting with discriminatory motives, are protected.

or the protections are extended, then behavior taken prior to the protection could be viewed as inadequate by the later legal standard even if it were generous by the present standards.

¹⁹⁰ 478 US at 386–87.

¹⁹¹ 433 US 299 (1977).

¹⁹² See *id.* at 303.

¹⁹³ See *Bazemore*, 478 US at 396–97 n 6 (Brennan concurring in part) (distinguishing *Hazelwood*). In an earlier case, the Supreme Court had held that victims of a discriminatory refusal to hire were entitled to retroactive seniority from the date of their job application, notwithstanding § 703(h). See *Franks v Bowman Transportation Co.*, 424 US 747, 758 (1976) (“Section 703(h) certainly does not expressly purport to qualify or proscribe relief *otherwise appropriate* under . . . Title VII.”) (emphasis added). Note, however, that the employer had engaged in discrimination following the effective date of Title VII’s prohibition on racial discrimination. See *id.* at 758 n 10.

¹⁹⁴ See 42 USC § 2000e-5(e)(2).

¹⁹⁵ For example, the claim could be time-barred or the action at the point it was taken could have been legal.

CONCLUSION

The Sixth and Seventh Circuits were correct to find that the retirement systems are facially neutral. However, their reasoning left two significant gaps. First, the Sixth and Seventh Circuits held only that any possible claim that might exist would be time-barred, instead of examining the retirement policy in light of the statutory text and determining that there never was a claim. Second, none of the circuit courts proposed a structured and consistent way to determine which similarly situated groups should be compared. This Comment proposes a structured method—the “characteristic removal” approach—that will identify facially discriminatory policies by removing characteristics in order to identify similarly situated groups. This method isolates the factor that leads to disparate treatment, allowing the evaluator to determine whether this is a legitimate or discriminatory employment practice.

The fact that previously legal (now-illegal) distinctions based on pregnancy have an impact on retirement benefits today has created a dilemma for the courts. The most legally and logically consistent solution to this dilemma is to find that there has been no violation of Title VII. As described above, bona fide seniority systems are protected by § 703(h). Applying the characteristic removal approach to the current pregnancy discrimination claims shows that the seniority systems at issue are facially neutral. Because the policies are facially neutral, they are protected by § 703(h) unless there is proof of intentional discrimination, which is lacking in the present cases. In short, the solution for these particular cases is nothing more than a default rule: in the absence of intentional discrimination, facially neutral seniority systems relying on then-legal seniority calculations do not constitute a violation of Title VII.