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# AT&T v. HULTEEN: THE GHOST OF THE SUPREME COURT ON PREGNANCY DISCRIMINATION AND PAY EQUALITY FOR WOMEN'S PENSION BENEFITS IN AMERICA

Walakewon Blegay\*

## I. Introduction

Title VII of the Civil Rights Act of 1964 (Civil Rights Act) was enacted to eliminate discriminatory employment practices on the basis of race, color, religion, sex or national origin.<sup>1</sup> In 1978, Congress elaborated on Title VII by enacting the Pregnancy Discrimination Act (PDA), requiring that employers treat pregnant employees the same as employees who were not pregnant.<sup>2</sup> In *AT&T v. Hulteen*, the Supreme Court ruled on whether it is permissible to penalize retiring women by lowering their retirement pension benefits for taking pregnancy-related disability leave before the enactment of the PDA.<sup>3</sup>

Consider this scenario: In 1976, Company H had a policy that distinguished disability leave based on whether it was pregnancy-related. Employees who took pregnancy-related disability leave only received pension benefits credit for thirty days of leave. Employees taking non-pregnancy-related disability leave received unlimited credit for their pension benefits.<sup>4</sup> After the enactment of the PDA, Company H allowed the same credit for both pregnancy and non-pregnancy-related disability leave. However, it refused to adjust its credit system for the employees who took pregnancy-related disability leave before the PDA.<sup>5</sup> Lilly, an employee of Company H, took pregnancy-related disability leave in 1976, before the Act, and received smaller pension benefits than her colleagues who took non-pregnancy-related disability leave.<sup>6</sup> Under the holding of *AT&T v. Hulteen*, Lilly is not entitled to recover this discrepancy because Company H's pension benefits calculation is facially neutral. The PDA would have to be retroactive to find this action discriminatory.<sup>7</sup>

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Historically, discrimination against women concerning childbirth and pregnancy was legally sanctioned and resulted in fewer advantages for women in the workforce.<sup>8</sup> Pregnancy was treated less favorably than other physical conditions that affected an employee's performance in the workplace.<sup>9</sup> Most employers discharged a woman as soon as she became noticeably pregnant, and if she returned, she was considered a new, rather than a returning employee.<sup>10</sup>

Before 1978, many employers would give female employees a maximum of thirty days of credited pregnancy-related disability leave, while non-pregnant employees would receive unlimited credit for disability leave.<sup>11</sup> Laws such as Title VII and the PDA were enacted to protect pregnant women from this practice.<sup>12</sup> These laws forced many employers to change their policies to allow unlimited credit for pregnancy-related disability leave.<sup>13</sup> However, PDA women who took pregnancy-related disability leave prior to the Act, were unable to receive full credit for leave lasting longer than thirty days.<sup>14</sup> Consequently, these women not only received smaller pension benefits, but also were ineligible for new early retirement programs.<sup>15</sup>

In *AT&T v. Hulteen*, the Supreme Court considered whether limiting the pregnancy-related benefits credit where leave was taken before the PDA, was a Title VII violation of the PDA.<sup>16</sup> The Court held that employer AT&T did not violate Title VII when it limited pension benefits based on this criteria.<sup>17</sup> The Court ruled that AT&T's actions were facially neutral and qualified for the bona fide seniority system exception.<sup>18</sup> To create a Title VII violation, the Court concluded that the PDA would have to apply retroactively.<sup>19</sup>

This Note argues that the reasoning in *Hulteen* was flawed because AT&T's pension benefits calculation was intentionally discriminatory. Furthermore, the PDA does not have to be retroactive for AT&T's pension benefits calculation to be a Title VII violation.<sup>20</sup> Part II examines the congressional intent behind the PDA, the tests for determining a discriminatory action under Title VII, and the background of *Hulteen*.<sup>21</sup> Part III argues that AT&T's pension benefits calculation was intentionally discriminatory and a current Title VII

violation. The Court should have given the Equal Employment Opportunity Commission's position deference.<sup>22</sup> Part IV proposes that, in response to *Hulteen*, Congress should amend the Lilly Ledbetter Fair Pay Act to decrease the employee's burden of proof in fringe benefit discrimination claims.<sup>23</sup> Part V concludes that *Hulteen* penalizes women that are protected by law for taking pregnancy-related disability leave and the law must be changed to provide relief to these women.<sup>24</sup>

## II. Background

### A. *The Civil Rights Act's Protection of Pregnant Women in the Workplace and the Supreme Court's Deference to the Equal Employment Opportunity Commission*

The Civil Rights Act requires employers to provide equal opportunities to all employees.<sup>25</sup> Title VII of the Civil Rights Act prohibits discriminatory employment practices on the basis of race, color, religion, sex or national origin.<sup>26</sup> To meet this end, Title VII created the Equal Employment Opportunity Commission (EEOC) and delegated to it the primary responsibility of preventing and eliminating unlawful employment practices.<sup>27</sup> Employment discrimination based on pregnancy continued after the passage of the Civil Rights Act. In 1973, the EEOC responded by developing guidelines that prohibited employment policies that discriminated against pregnant employees.<sup>28</sup>

The Supreme Court has given deference to the EEOC interpretation guidelines. The Court gives deference to an agency's interpretation of an ambiguous statute, if the agency has the authority to promulgate rules on that statute.<sup>29</sup> Congress gave the EEOC the power to issue regulations on Title VII and provided in Section 713(b) of Title VII that a reliance on the EEOC interpretations would absolve an employer from liability.<sup>30</sup> The Court gave the EEOC guidelines "great deference" in *Phillips v. Martin Marietta Corp.* because the EEOC was charged with administering Title VII.<sup>31</sup> The Supreme Court also gave the EEOC guidelines "great deference" in *Griggs v. Duke Power Co.*, because the Civil Rights Act itself and the legislative history supported the EEOC interpretation.<sup>32</sup> The Court has given the EEOC interpretations great deference, because the EEOC has been given authority by Congress to administer the principles of Title VII.<sup>33</sup>

### B. *The Development of the PDA*

Congress enacted the PDA in response to *General Electric Company v. Gilbert*, where the Court held that the exclusion of pregnancy-related disabilities from a company's comprehensive disability program did not constitute sex discrimination under Title VII.<sup>34</sup> Congress

elaborated on the purpose of Title VII by enacting the Pregnancy Discrimination Act that prohibited discrimination based on pregnancy, childbirth, or any related medical conditions.<sup>35</sup> Congress disagreed with the *Gilbert* decision and concluded that the company's employment practice was sex discrimination because men in the comprehensive disability program did not get the same treatment as women for involuntary or voluntary medical procedures.<sup>36</sup>

The PDA requires that pregnant employees receive equal treatment as other employees with respect to their benefits, and their ability to work.<sup>37</sup> The plain language of the PDA defines discrimination "because of sex" or "on the basis of sex" to include discrimination based on pregnancy, childbirth, or pregnancy-related medical condition.<sup>38</sup> The statute also directly covers the receipt of benefits under a fringe benefit program.<sup>39</sup>

At the time Congress enacted the PDA, over eighty million women were working to support their children. The employment practice upheld in *Gilbert* would have had a devastating effect on families.<sup>40</sup> Therefore, Congress enacted the PDA to repudiate the *Gilbert* decision, and prohibit employment decisions on the basis of pregnancy.<sup>41</sup>

### C. *The Bona Fide Seniority System Exception Under Title VII Section 703(h)*

Congress exempted bona fide seniority systems from Title VII and the PDA if the discriminatory effect is facially neutral.<sup>42</sup> A bona fide seniority system determines an employee's compensation, conditions or privileges of employment by the quantity or quality of production without intentionally discriminating based on race, color, religion, sex, or national origin.<sup>43</sup> Under Section 703(h) of Title VII, a seniority system is facially neutral if it unintentionally affects a protected group.<sup>44</sup> Employers seeking exemption must also show that their policies are implemented in good faith.<sup>45</sup>

The Court has interpreted Section 703(h) to protect employers that have unintentionally extended the effect of past discrimination.<sup>46</sup> In *International Brotherhood of Teamsters v. United States*, Black and Hispanic employees brought a cause of action against their employer. Servicemen and city drivers, who were predominately Black and Hispanic, were paid less than line drivers, who were predominately White.<sup>47</sup> The city drivers or servicemen who transferred to line driver jobs started at the bottom of all line drivers, forfeited all of their competitive seniority.<sup>48</sup> The Court ruled that this seniority system was bona fide and exempt from Title VII under Section 703(h) because the system applied equally to all races.<sup>49</sup> Most of the city drivers and servicemen who were discouraged

Congress enacted the PDA in response to *General Electric Company v. Gilbert*, where the Court held that the exclusion of pregnancy-related disabilities from a company's comprehensive disability program did not constitute sex discrimination under Title VII.

from transferring to line driver jobs were White.<sup>50</sup> Therefore, the seniority system was not a violation of Title VII, because there was no discriminatory intent.<sup>51</sup>

#### D. *When a Violation Occurs Under Title VII*

The Civil Rights Act of 1991, states that a Title VII violation occurs when a discriminatory seniority system actually deprives an employee of benefits.<sup>52</sup> In addition, President Obama signed recently signed the Lilly Ledbetter Fair Pay Act that states that an employer violates Title VII if its employee receives benefits that are based on discriminatory intent.<sup>53</sup> The Civil Rights Act of 1991, states that a Title VII violation occurs when a discriminatory seniority system actually deprives an employee of benefits.<sup>54</sup> The Lilly Ledbetter Fair Pay Act was a response to the *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*<sup>55</sup> decision that ruled that an unlawful employment practice occurs each time an individual is paid or receives benefits that are subject to a discriminatory compensation decision.<sup>56</sup> Therefore, an employer violates Title VII when their employee receives benefits that are affected by a discriminatory decision.<sup>57</sup>

#### E. *Title VII Disparate-Impact Claims*

The Supreme Court uses three tests to determine the legality of employment practices under Title VII.<sup>58</sup>

##### 1. *The Similarly Situated Rule: Any Benefit that Delivers Less to a Similarly Situated Employee Is a Violation of Title VII*

The Court developed the similarly situated rule in *Bazemore v. Friday*. According to this rule, a Title VII violation occurs every time an employee's compensation is affected by discrimination, regardless of whether the pattern began prior to the effective date of Title VII.<sup>59</sup> A Title VII violation occurs when similarly situated employees receive different pay. Liability may be imposed to the extent that the discrimination was perpetuated after the enactment of Title VII.<sup>60</sup>

The Ninth Circuit applied the *Bazemore* rule in *Pallas v. Pacific Bell*, holding that Pacific Bell's pension benefits calculation violated Title VII.<sup>61</sup> In 1987, the aggrieved party was deemed ineligible for her company's early retirement program, because she took pregnancy leave in 1972.<sup>62</sup> The retirement program was facially discriminatory because it denied early retirement to women on the sole basis that they took pregnancy-related leave prior to the PDA.<sup>63</sup> The EEOC uses the fact pattern from *Pallas* as an example of an unlawful employment practice under Title VII.<sup>64</sup>

##### 2. *The Present Violation Rule: A Seniority System Is Facially Neutral When It Gives Present Effect to Past Discrimination*

The Supreme Court also evaluates Title VII disparate-impact claims using the present violation rule derived from *United Airlines v. Evans*.<sup>65</sup> This rule ensures that employers are not found liable under Title VII for facially neutral actions that are merely present effects of past discrimination.<sup>66</sup> In *Evans*, the Court held that the discriminatory effects of United Airlines' seniority system were solely the result of past discrimination, therefore no present violation existed.<sup>67</sup> The complaining party, worked as a flight attendant for United Airlines, which had a policy that flight attendants had to be unmarried females.<sup>68</sup> The airline forced her to resign in 1968 after she got married, then rehired her in 1972 without giving her any credit for her prior service.<sup>69</sup>

The Court ruled that United Airlines' policy was non-discriminatory for two reasons. First, the claim was based on present effects of past discrimination, because the claim was brought in 1977, based on discrimination that occurred in 1968 and was corrected in 1972. Second, the policy applied to employees equally.<sup>70</sup> For these reasons, no Title VII violation had occurred.<sup>71</sup>

##### 3. *The Ledbetter Rule: Title VII Disparate-Impact Claims Must Show Unlawful Employment Practice and Discriminatory Intent.*

In *Ledbetter v. Goodyear Tire & Rubber Co. Inc.* the Court introduced another rule to use when evaluating Title VII disparate impact claims. The *Ledbetter* Rule requires that a disparate-impact claim consist of an unlawful employment practice and discriminatory intent.<sup>72</sup> In *Ledbetter*, the aggrieved party claimed that employer evaluated her poorly because of her gender, which resulted in lower pay than her male colleagues.<sup>73</sup> The Supreme Court reasoned that a fresh violation takes place when an unlawful employment practice is committed with intentions to discriminate.<sup>74</sup> A Title VII disparate-impact claim must include an unlawful employment practice and intentional discrimination.<sup>75</sup>

#### F. *AT&T v. Hulteen*

The *Hulteen* Court evaluated whether AT&T's pension benefits calculation policy violated Title VII.<sup>76</sup> The policy denied full pension benefits to employees who took pregnancy-related disability leave prior to the PDA. However, the policy gave full pension benefits to employees that took other temporary non-pregnancy-related disability leave.<sup>77</sup> The Court held that AT&T's pension benefits calculation was a bona fide seniority system that was facially neutral and exempt from liability under Section 703(h).<sup>78</sup> The PDA would have to be retroactive to find AT&T's pension benefits calculation discriminatory.<sup>79</sup>

##### 1. *Facts*

The AT&T pension plan was inherited from its predecessor Pacific Telephone and Telegraph's (PT&T).<sup>80</sup> The PT&T pension plan was based on a net credit system, which calculated benefits based on an employee's period of service at the company minus his or her unaccredited leave.<sup>81</sup> Employees who took pregnancy leave received the maximum service credit for six weeks of leave, while those on disability leave earned full service credit for their entire periods of absence.<sup>82</sup> PT&T adopted an Anticipated Disability Plan (ADP) that granted service credit for pregnancy-related disability leave on the same basis as leave taken for other temporary disabilities.<sup>83</sup> When PT&T transferred its ownership to AT&T, AT&T retained its predecessor's policy and made no adjustments to the ADP for the credit lost by employees that took pregnancy-related disability leave prior to the PDA.<sup>84</sup>

The aggrieved parties in this case took pregnancy-related disability leave before the PDA and did not receive credit for the leave taken over thirty days.<sup>85</sup> The parties filed a complaint with the EEOC between 1994 and 2002, and the EEOC issued a Letter of Determination finding reasonable cause to believe that AT&T discriminated against the respondents.<sup>86</sup>

##### 2. *En Banc Review*

On *en banc* review, the Ninth Circuit held that based on the similarly situated rule in *Bazemore* and *Pallas*, AT&T's pension benefits calculation

violated Title VII because it distinguished between similarly situated employees based on pregnancy.<sup>87</sup> AT&T violated Title VII because it excluded from the pension benefits calculation pregnancy-related disability leave lasting more than thirty days and taken prior to the PDA.<sup>88</sup> Holding that AT&T's policy was discriminatory was aligned with the Congressional intent behind the PDA.<sup>89</sup>

The court reasoned that the present violation rule in *Evans* did not apply because AT&T's pension benefits calculation was neither a past violation with present effect nor facially neutral.<sup>90</sup> In fact, the Ninth Circuit held that the respondents' claim was a present violation of the PDA.<sup>91</sup> Under the Civil Rights Act of 1991, the complaining parties were harmed when their pregnancy-related disability leave taken prior to the PDA was excluded from the pension benefits policy.<sup>92</sup> AT&T's pension benefits calculation was intentionally discriminatory and a present Title VII violation.<sup>93</sup>

### 3. *The Supreme Court's Decision*

On May 18, 2009, the Supreme Court overturned the Ninth Circuit's decision by ruling that AT&T's pension benefits calculation was facially neutral and not a violation of Title VII.<sup>94</sup> The Court held that the pension benefits in question were the current effects of AT&T's net credit system, which was considered lawful prior to the enactment of the PDA.<sup>95</sup> The similarly situated rule in *Bazemore* did not apply to this case.<sup>96</sup> The Court distinguished *Bazemore* because *Bazemore* did not involve a seniority system and that discriminatory action occurred prior to enactment of the .<sup>97</sup>

The Supreme Court concluded that AT&T had a bona fide seniority system that is protected under Section 703(h), because it was not internationally discriminatory.<sup>98</sup> The only way to conclude that Section 703(h) does not protect AT&T's seniority system is to apply the PDA retroactively, which was not a clear Congressional intent.<sup>99</sup>

In a dissenting opinion, Justice Ginsberg agreed with the Ninth Circuit's decision that AT&T's pension benefits calculation was intentionally discriminatory because it distinguished between the respondents and other similarly situated employees based on pregnancy.<sup>100</sup> Justice Ginsberg reasoned that while the PDA does not require redress for past discrimination, it was enacted to end sex-based discrimination from and after 1978.<sup>101</sup>

## III. Analysis

### A. *The Supreme Court Erred in Ruling that AT&T's Pension Benefits Calculation Was Facially Neutral and Exempt from Liability Under the Bona Fide Seniority System Exception*

The Supreme Court wrongly held that AT&T's pension benefits policy was exempt from liability under the bona fide seniority system exception. The policy violated Title VII because AT&T's benefits calculation was intentionally discriminatory according to the plain text and Congressional intent of the PDA, as well as judicial precedent.<sup>102</sup>

#### 1. *AT&T's Pension Benefits Policy Is Intentionally Discriminatory According to the Plain Reading of the Pregnancy Discrimination Act, and Thus Violates Title VII.*

The Court incorrectly held that AT&T's pension benefits calculation was facially neutral. AT&T's pension benefit calculation is intentionally discriminatory according to the plain text of the PDA.<sup>103</sup> Because the effect of the pension calculation was to reduce benefits based on sex, the plain text of the policy was intentionally discriminatory.<sup>104</sup> The PDA requires that the respondents be treated the same as other employees in their pension benefits, regardless of whether pregnancy-related disability leave was applied before the PDA.<sup>105</sup> The act of calculating the respondents' pension benefits is "based on" or "because of" sex because AT&T deliberately chose to use the credit application of the pregnancy-related disability leave from prior to the enactment of the PDA to calculate the complaining parties' pension benefits.<sup>106</sup>

AT&T's pension benefits calculation was intentionally discriminatory because it violated the core principles of the PDA that require that employers treat "women affected by pregnancy" the same for all employment-related purposes.<sup>107</sup> The complaining parties were pregnant women affected by AT&T's pension benefits calculation because they were treated differently than other similarly situated employees who did not take pregnancy-related disability leave.<sup>108</sup> AT&T's pension benefits calculation awarded lesser pension benefits to the individuals who took pregnancy-related disability leave before the PDA was enacted than it awarded to other similarly situated employees that took non-pregnancy-related disability leave.<sup>109</sup> Therefore, the Court incorrectly held that AT&T's pension benefits calculation was facially neutral because the calculation was intentionally discriminatory according to the plain text of the PDA.<sup>110</sup>

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“AT&T’s intent to discriminate was further evinced when it agreed to award full credit to one female employee that took pregnancy-related disability leave before the PDA, without changing the net credited system for all affected employees.”

2. *AT&T’s Pension Benefits Policy Is Intentionally Discriminatory According to the Congressional Intent of the Pregnancy Discrimination Act, and Thus Violates Title VII.*

Additionally, the Court incorrectly held that AT&T’s pension benefits calculation was facially neutral because the calculation is intentionally discriminatory according to the congressional intent of the PDA.<sup>111</sup> Congress intended for the PDA to prohibit companies from reducing employees’ pension benefits because of pregnancy.<sup>112</sup>

Congress enacted the PDA to reestablish the principle of Title VII as it had been understood prior to the *Gilbert* decision.<sup>113</sup> *Gilbert* upheld principles contrary to the EEOC interpretation guidelines on Title VII, which protected pregnant women from unjust employment discrimination.<sup>114</sup> The legislative history of the PDA endorsed EEOC’s 1972 guidelines, that prohibited AT&T from reducing employees’ pension benefits based on pregnancy.<sup>115</sup> The EEOC guidelines require an employer to calculate pension benefits and disability credit on the same terms for all employees.<sup>116</sup>

The PDA clarified that discrimination based on pregnancy and childbirth was sex discrimination and prohibited under Title VII.<sup>117</sup> After the PDA, employment practices such as General Electric’s disability program, at issue in *Gilbert*, and AT&T’s pension benefits calculation are considered sex discrimination under Title VII.<sup>118</sup> Therefore, the Supreme Court incorrectly held that AT&T’s pension benefits calculation was facially neutral because Congress intended for the PDA to require that pension benefits calculations provide the same benefits to all employees whether pregnant or not.<sup>119</sup>

3. *AT&T’s Pension Benefits Calculation Is Intentionally Discriminatory According to the Bazemore Rule and Ledbetter Requirements, and Therefore Violates Title VII*

Under *Bazemore*’s similarly situated rule, the Court incorrectly held that AT&T’s pension benefits calculation was facially neutral. Similar to the seniority system in *Bazemore*, where Black employees were paid less than White employees for the same position, AT&T granted full pension benefits for retiring employees who took non-pregnancy related disability leave and only granted partial credit to employees who took pregnancy-related leave.<sup>120</sup> AT&T’s intent to discriminate was further evinced when it agreed to award full credit to one female employee that took pregnancy-related disability leave before the PDA, without changing the net credited system for all affected employees.<sup>121</sup> Following

*Bazemore*, courts have held, as in *Pallas* and *Hulteen*, that seniority systems awarding pensions disparately based on pregnancy are Title VII violations.<sup>122</sup> AT&T’s pension benefits calculation is similar to the system in *Pallas*.<sup>123</sup> In *Pallas*, Pacific Bell’s new retirement program disqualified female employees because of pregnancy leave. Likewise, AT&T made no adjustments to PT&T’s net credit system causing employees that took pregnancy-related disability leave before the enactment of the PDA to suffer smaller pensions.<sup>124</sup> The previous analysis demonstrating that AT&T’s employment practice violated the *Bazemore* rule also demonstrates that the practice violates the Ledbetter standard for disparate-impact claims.<sup>125</sup> The Court wrongly held that AT&T’s pension benefits calculation was facially neutral because AT&T’s pension benefits calculation is intentionally discriminatory according to *Bazemore*’s similarly situated rule and *Ledbetter*’s disparate-impact claim requirements.<sup>126</sup>

4. *AT&T’s Pension Benefits Calculation Does Not Qualify for the Bona Fide Seniority System Exception in Teamster and Section 703(h), and Thus Violates Title VII.*

The Court erred in applying *Teamsters* and the Section 703(h) exemption to AT&T’s pension benefits calculation.<sup>127</sup> Unlike the seniority system in *Teamsters* that applied to all races equally, AT&T’s seniority system did not apply to all employees equally.<sup>128</sup> Here, the complaining parties had sufficient evidence that the differential treatment resulting from AT&T’s pension benefits calculation was rooted in discriminatory intent.<sup>129</sup> The Supreme Court erred in applying *Teamsters* and the Section 703(h) exemption, and therefore AT&T violated Title VII.<sup>130</sup>

B. *The Court Erred in Holding that the PDA Would Have to Be Retroactive For It To Apply to AT&T’s Pension Benefits Calculation*

The PDA would not require a retroactive effect for it to apply to the AT&T case for two reasons.<sup>131</sup> First, the *Evans* present violation rule does not apply to this case. Second, AT&T’s pension benefits calculation is a present violation according to the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act.

1. *Evans’ Present Violation Rule Does Not Apply to AT&T’s Pension Benefits Calculation Because the Calculation Is a Present Title VII Violation*

AT&T’s discriminatory act is different from the United Airlines’ seniority system in *Evans*.<sup>132</sup> Unlike *Evans*, AT&T’s discriminatory act was a new Title VII violation because it distinguished between similarly situated employees.<sup>133</sup> *Evans*’ present violation

rule does not apply to this case because the AT&T employees were affected by both a decision to apply only thirty days of credit for their pregnancy-related disability leave, and the calculations of their pension benefits.<sup>134</sup>

This case is not a present violation because AT&T's policy was not a violation continuing from prior to the enactment of the PDA. Each pension benefits calculation for each aggrieved party was a discriminatory compensation decision and a separate Title VII violation.<sup>135</sup> Therefore, the PDA would not have to be applied retroactively for AT&T's pension benefits calculation to constitute a present Title VII violation.<sup>136</sup>

## 2. AT&T's Pension Benefits Calculation Is a Present Violation According to the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act Because the Employees Were Harmed When They Received Smaller Pension Benefits Based on Pregnancy Discrimination.

According to the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act, the PDA would not have to be applied retroactively for a Title VII violation because employees were harmed by the deprivation of benefits when they received smaller pension benefits based on pregnancy discrimination.<sup>137</sup> Both statutes allowed the complaining party to file a claim with the EEOC within 180 days of AT&T awarding reduced benefits based on pregnancy.<sup>138</sup>

Under the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act, the employees were harmed because they received reduced benefits.<sup>139</sup> Therefore, the respondents had the right under Title VII to file a charge with the EEOC each time they received a pension benefit based on pregnancy status.<sup>140</sup> In conclusion, the Supreme Court erred in holding that the PDA would have to be retroactive for the respondents to recover.<sup>141</sup>

### C. The Court Should Have Given Deference to the Equal Employment Opportunity Commission's Endorsement of the Pallas Decision

The EEOC's endorsement of the Pallas decision was entitled to deference by the Court.<sup>142</sup> If the Court had heeded the EEOC interpretation, it would have held that AT&T must allow women who were on pregnancy-related disability leave to accrue seniority in the same way as those who were on leave for reasons unrelated to pregnancy.<sup>143</sup> The EEOC deserved "great deference" in this case, similar to the level of deference in *Phillips* and *Griggs*.<sup>144</sup>

EEOC is charged with administering Title VII.<sup>145</sup> Section 713(a) of Title VII grants the EEOC the power to issue regulations on Title VII.<sup>146</sup> Furthermore, Congress gave the EEOC authority to issue regulations defining unlawful employment practices under Title VII. Therefore, the Court should have given deference to any reasonable interpretation of the Title VII by the EEOC.<sup>147</sup>

The Court should have given the EEOC guidelines "great deference" in determining a Title VII violation as it did in *Griggs*, because the EEOC's endorsement of the Pallas decision supports the principles of the Civil Rights Act and contains valid reasoning.<sup>148</sup> The factual similarities between *Hulteen* and *Pallas* make the EEOC's endorsement well-reasoned.<sup>149</sup>

The EEOC's endorsement of the Pallas decision supports the principles of the Civil Rights Act because it required that women that are affected by pregnancy are treated the same as their colleagues who are not or cannot become pregnant.<sup>150</sup> Furthermore, the Pallas decision followed the principles of the PDA in clarifying that discrimination based on pregnancy and childbirth was sex discrimination and prohibited under Title VII.<sup>151</sup> Therefore, the Supreme Court should have given the EEOC great deference.<sup>152</sup>

## IV. Policy Recommendation

### A. Congress Should Decrease Employees' Burden of Proof of Intent to Discriminate in Fringe Benefit Discrimination Cases

The Court's decision in *AT&T v. Hulteen* is a setback in the fight for women's equality and will result in smaller pension and retirement benefits for women.<sup>153</sup> Congress must respond to the Court's decision, as it did in *Gilbert*, to protect these women from discriminatory employment practices.<sup>154</sup> Congress should amend the Lilly Ledbetter Fair Pay Act by decreasing the burden on employees to prove an employer's intent to discriminate.<sup>155</sup>

While the Lilly Ledbetter Fair Pay Act made it easier for employees to win Title VII disparate-impact claims, employees still have a hefty burden of proof.<sup>156</sup> It is very difficult for an employee to prove the employer's intent to discriminate, especially when the practice originated years ago.<sup>157</sup> Congress should include clarifying language that an employee can prove a "discriminatory compensation decision" by showing that she is a member of the protected class and was treated differently than a similarly situated person.<sup>158</sup>

According to the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act, the PDA would not have to be applied retroactively for a Title VII violation because employees were harmed by the deprivation of benefits when they received smaller pension benefits based on pregnancy discrimination.

## V. Conclusion

The Court holding in *AT&T v. Hulteen* was erroneous because AT&T's pension benefits calculation was intentionally discriminatory, a present Title VII violation, and failed to give the EEOC deference.<sup>159</sup> AT&T's pension benefits calculation should not have been allowed to prevail as a bona fide seniority system.<sup>160</sup> This decision penalizes women for taking pregnancy-related disability leave in their earlier careers, and creates another obstacle in work place equality.<sup>161</sup>

Congress should respond to this decision by amending the Lilly Ledbetter Fair Pay Act to decrease the burden on employees proving employer's intent to discriminate in fringe benefit discrimination.<sup>162</sup> Congress' response will prevent unfair treatment of retirement mothers.<sup>163</sup>

<sup>1</sup> See Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 *et seq.* (2006)) (defining unlawful employment practices under the Civil Rights Act).

<sup>2</sup> See Pub. L. No. 95-555, 952 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)(2006)) (prohibiting employers' policies that discriminate against women based on pregnancy).

<sup>3</sup> 129 S. Ct. 1962, 1971 (2009) (determining that PDA would have to be retroactive for retiring women to recover their pension benefits).

<sup>4</sup> See *id.* at 1967 (noting that AT&T's policy for pregnancy-related disability leave only permitted six weeks of credited personal leave for female employees).

<sup>5</sup> See *id.* (recognizing that after the enactment of PDA, AT&T adopted a leave policy that applied identically to both pregnant and non-pregnant employees).

<sup>6</sup> See *id.* (mentioning that aggrieved employees received smaller pensions because of the pregnancy-related disability leave taken prior to the enactment of PDA).

<sup>7</sup> See *id.* at 1973 (holding that AT&T's pension benefits calculation was a bona fide seniority system that was facially neutral and exempt from liability under Title VII).

<sup>8</sup> See *id.* at 1974 (Ginsburg, J., dissenting) (acknowledging that societal attitudes about pregnancy and motherhood have severely impeded women's employment opportunities).

<sup>9</sup> See CONGRESSIONAL RESEARCH SERVICE, JUDICIAL AND LEGISLATIVE TREATMENT OF PREGNANCY: A REVIEW OF DEVELOPMENTS FROM UNPROTECTED STATUS TO ANTI-DISCRIMINATION-EQUAL TREATMENT DEVELOPMENTS AND SPECIAL TREATMENT 4 (Library of Congress) (1987) (providing examples of state laws that prohibit pregnant women from working or receiving benefits, under the rationale that pregnant women and healthy babies need protection).

<sup>10</sup> See S. COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., *LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978*, Pub. L. No. 95-555, at 25 (Comm. Print 1980) [hereinafter *LABOR AND HUMAN RESOURCES*] (establishing that women in this situation lose comprehensive pension benefits due to this policy).

<sup>11</sup> See Shannon Barrows Bjorklund, *The Impact of Pregnancy Discrimination on Retirement Benefits: A Present Violation of Title VII or Claim Belonging to History*, 75 U. CHI. L. REV. 1191, 1192 (2008) (asserting that this dilemma has affected a large number of women by causing a loss of retirement benefits).

<sup>12</sup> See Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e *et seq.* (2006)) (prohibiting unlawful employment practices against female employees); see Pub. L. No. 95-555, 952 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)(2006)) (protecting women that have been affected by pregnancy from discriminatory employment practices).

<sup>13</sup> See *LABOR AND HUMAN RESOURCES*, *supra* note 10, at 12 (explaining that PDA and Title VII require that all employers provide the same leave and benefit policies to all employees).

<sup>14</sup> See Bjorklund, *supra* note 11, at 1192 (highlighting employers such as Bell Companies that refused to grant full credit for pregnancy-related disability leave taken over thirty days).

<sup>15</sup> See *Hulteen*, 129 S. Ct. at 1966; *Leffman v. Sprint Corp.*, 481 F.3d 428, 432 (6th Cir. 2007); *Ameritech Benefit Plan Comm. v. Comm'n Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000); *Pallas v. Pac. Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991) (adjudicating claims against employers that refuse to adjust the credit of female employees that took pregnancy-related disability leave prior to the enactment of PDA).

<sup>16</sup> See 129 S. Ct. 1962; Bjorklund, *supra* note 11, at 1192 (explaining how Section 703(h) exempts seniority systems that limit pension benefits based on pregnancy from liability if they are facially neutral).

<sup>17</sup> See *Hulteen*, 129 S. Ct. at 1970 (holding that the actual credit application was a past action that was lawful prior to the enactment of PDA).

<sup>18</sup> See *id.* (reasoning that AT&T's pension benefit calculation was not intentionally discriminatory because AT&T changed its policy to apply to all employees equally after the enactment of PDA).

<sup>19</sup> See *id.* at 1971 (recognizing that there is no congressional intent showing that PDA is retroactive).

<sup>20</sup> See *id.* at 1980 (Ginsburg, J., dissenting) (arguing that AT&T's pension benefits calculation is intentionally discriminatory according to congressional intent and the Supreme Court's precedent).

<sup>21</sup> See *infra* Part II (explaining the evolution in jurisprudence for the calculation of pregnancy-related disability leave taken prior to the enactment of PDA under Title VII).

<sup>22</sup> See *infra* Part III (concluding that AT&T's pension benefits calculation does not qualify for the bona fide seniority system exception in Section 703(h)).

<sup>23</sup> See *infra* Part IV (addressing the implications of this policy and its impact on women).

<sup>24</sup> See *infra* Part V (recognizing that *AT&T v. Hulteen* leaves an obstacle in the workplace).

<sup>25</sup> See H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4717, 4751 (prohibiting discrimination against an employee because of his or her race, color, religion, sex, or national origin).

<sup>26</sup> See *LABOR AND HUMAN RESOURCES*, *supra* note 10, at 12 (enacting the Civil Rights Act to protect all individuals from unjust employment discrimination, including pregnant women).

<sup>27</sup> See H.R. REP. NO. 86-187, at 151 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2183, 2355 (assigning the task of upholding the principles of Title VII to the EEOC).

<sup>28</sup> See 29 C.F.R. § 1604.10 (1973) (providing that all employment practices, such as the duration of leave, accrual of seniority benefits, privileges, and payment under any health or temporary disability insurance or sick leave plan, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other disabilities).

<sup>29</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (holding that an agency interpretation of an ambiguous statute is entitled to agency deference where the grant of authority was ambiguous and the interpretation was reasonable or permissible).

<sup>30</sup> See John S. Moot, *An Analysis of Judicial Deference to EEOC Interpretation Guidelines*, 1 ADMIN. L.J. 213, 223 (1987) (recognizing that the EEOC has the authority to issue interpretations of Title VII); 42 U.S.C. § 2000e-12(a) (2006) (giving the EEOC the authority to issue procedural regulations in administering the provisions of Title VII).

<sup>31</sup> 400 U.S. 542, 545 (1971) (following the interpretation of the EEOC for defining Title VII's exception for employment decisions based on a bona fide occupational qualification).

<sup>32</sup> 401 U.S. 434 (1971) (holding that the EEOC interpretation precludes that use of employment testing procedures unless they are substantially job related).

<sup>33</sup> See Moot, *supra* note 30, at 224 (proving the Supreme Court's willingness to share the responsibility with the EEOC to construe Title VII).

<sup>34</sup> See 429 U.S. 125, 136 (1976) (reasoning that this exclusion does not discriminate against women because not all women are pregnant).

<sup>35</sup> See *LABOR AND HUMAN RESOURCES*, *supra* note 10, at 1 (describing the *Gilbert* decision as a serious setback to women's rights and the development of Title VII).

<sup>36</sup> See *id.* at 17 (considering that many male disabilities such as vasectomies, circumcisions, prostatectomies and sports injuries were covered, while pregnancy was the only disability excluded).

<sup>37</sup> See *id.* at 25 (rejecting the view that employers may treat pregnancy

and its incidents with disregard to its functional comparability to other conditions).

<sup>38</sup> See 42 U.S.C. § 2000e(k) (2006) (prohibiting employment practices that are based on anything relating to sex and nothing in the statute can be interpreted otherwise).

<sup>39</sup> See *id.* (clarifying that PDA applies to all employment-related purposes).

<sup>40</sup> See LABOR AND HUMAN RESOURCES, *supra* note 10, at 3 (acknowledging that decisions such as *Gilbert* will have the detrimental effect of keeping women at the lowest rung of the job ladder).

<sup>41</sup> See *Hulteen*, 129 S. Ct. at 1976 (Ginsburg, J., dissenting) (arguing that PDA also prohibits pension payments that treat women affected by pregnancy disadvantageously).

<sup>42</sup> See 42 U.S.C. § 2000e-2(h) (2006) (indicating that it is not discriminatory for a bona fide seniority system to distinguish between similarly situated employees based on sex).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* (stating that a seniority system that intentionally discriminates based on sex is not exempt under Title VII).

<sup>45</sup> See Bjorklund, *supra* note 11, at 1194 (explaining that the seniority system exception is provided even if a system has a negative disparate-impact on protected groups).

<sup>46</sup> See *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353 (1977) (emphasizing that the seniority system perpetuates the effects of pre-Act discrimination).

<sup>47</sup> See *id.* at 329 (showing the disparate-impact on the minority community).

<sup>48</sup> See *id.* at 344 (recognizing that the seniority system locks Black and Hispanic Americans in non-line driver job because of the loss of seniority).

<sup>49</sup> See *id.* at 356 (arguing that an overwhelming majority of workers that are discouraged from transferring to line driver jobs are White).

<sup>50</sup> See *id.* (noting that the practice of placing different jobs in separate bargaining units is in accord with industry practice and consistent with the National Labor Relation Board).

<sup>51</sup> See *id.* (determining that the disparate-impact on the minority employees was just the present effects of past discrimination).

<sup>52</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (1991) (codified as amended at U.S.C. § 2000e-5(e)(2) (2006)) (applying to seniority systems that have been adopted for an intentionally discriminatory purpose).

<sup>53</sup> See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5(e) (2006)) (clarifying that an employee is harmed by the deprivation of benefits every time they receive a paycheck that is subject to discriminatory intent).

<sup>54</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (1991) (codified as amended at U.S.C. § 2000e-5(e)(2) (2006)) (applying to seniority systems that have been adopted for an intentionally discriminatory purpose).

<sup>55</sup> 550 U.S. 618, 621 (2007)

<sup>56</sup> See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5(e) (2006)) (allowing the aggrieved person to obtain relief, including recovery of back pay from their employer).

<sup>57</sup> See Bjorklund, *supra* note 11, at 1196 (analyzing congressional intent to bar all challenges to present day application of discriminatory practices that were in existence when Title VII became law).

<sup>58</sup> See *id.* (acknowledging that the Supreme Court had to specifically resolve what constituted a present violation of Title VII in the use of pay scales and seniority systems that have continued their patterns from before the enactment of Title VII).

<sup>59</sup> See *Bazemore v. Friday*, 478 U.S. 385, 396 (1986) (indicating that it is the duty of the employer to eliminate pre-Act discriminatory practices).

<sup>60</sup> See *id.* (ensuring that employees of all races are protected from unlawful employment practices).

<sup>61</sup> See *Pallas*, 940 F.2d at 1327 (discussing the perpetuation of the discrimination that occurred prior to the enactment of PDA).

<sup>62</sup> See *id.* at 1326 (observing that the respondent was three to four days short of the necessary amount of service credit).

<sup>63</sup> See *id.* (reasoning that this was not an attempt to litigate the discriminatory impact of a program initiated before the enactment of PDA).

<sup>64</sup> See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EMPLOYEE BENEFITS*,

EEOC COMP. MAN. § 3-VIII(B)(Oct. 3, 2000).

<sup>65</sup> 431 U.S. 553, 558 (1977) (defining present or past violations under Title VII).

<sup>66</sup> *Id.* at 558.

<sup>67</sup> See *id.* at 556 (indicating that the emphasis should not be on a continuing violation that began prior to the enactment of Title VII but proving that a present violation exists).

<sup>68</sup> See *id.* at 554.

<sup>69</sup> See *id.* at 555 (mentioning that United Airlines entered a new collective bargaining agreement which ended the “no marriage” rule” but the respondent was not covered under that agreement).

<sup>70</sup> See *id.* at 557 (arguing that United Airlines had a bona fide seniority system because the policies applied to all employees equally).

<sup>71</sup> See *id.* (concluding that unlike the no-marriage policy, having less seniority is not the consequence of sex discrimination).

<sup>72</sup> See *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618, 621 (2007) (explaining that the EEOC charging period is triggered when a discrete unlawful practice takes place).

<sup>73</sup> See *id.* at 621 (mentioning that the petitioner submitted a questionnaire to the EEOC alleging certain sex discrimination).

<sup>74</sup> See *id.* at 628 (defining “employment practice” as a discrete act or single occurrence).

<sup>75</sup> See *id.* at 634 (characterizing the similarly situated violation in *Bazemore* as an obvious discriminatory act).

<sup>76</sup> See *Hulteen*, 129 S. Ct. at 1966 (determining whether AT&T’s pension benefits calculation was set under a bona fide seniority system).

<sup>77</sup> See *id.* (determining whether AT&T’s pension benefits calculation was set under a bona fide seniority system).

<sup>78</sup> See *id.* at 1971 (recognizing that AT&T’s alleged discriminatory action was lawful under *Gilbert*).

<sup>79</sup> See *id.*

<sup>80</sup> See *Hulteen v. AT&T Corp.*, 2003 WL 25777891, at \*3 (N.D. Cal. Aug. 11, 2003), *rev’d*, 441 F.3d 653 (9th Cir. 2006), *rev’d en banc*, 498 F.3d 1001 (9th Cir. 2007) (suggesting the transfer would have been an ideal time for AT&T to apply full credit for the female employees that took pregnancy-related disability leave prior to the enactment of PDA).

<sup>81</sup> See *Hulteen*, 2003 WL 25777891, at \*1 (explaining that this calculation is the basis for determining early retirement, qualification for certain voluntary termination packages, job bidding and shift preference).

<sup>82</sup> See *id.* at \*3 (observing that before 1977, AT&T had a “forced leave” policy that required pregnant women to take personal leave before they were rendered disabled).

<sup>83</sup> See *id.* at \*2 (noting that the ADP superseded the Pregnancy Payment Plan, where the employee could begin pregnancy-related disability leave at any time but could only be eligible for disability benefits for up to thirty days).

<sup>84</sup> See *id.* (explaining that the lack of adjustment in service credit resulted in loss of eligibility for early retirement and smaller pension benefits).

<sup>85</sup> See *id.* at \*1 (discussing their argument that AT&T had a fiduciary duty to treat all employees equally).

<sup>86</sup> See *Hulteen*, 498 F.3d at 1004 (acknowledging that the Communications Workers of America also filed a charge of discrimination with the EEOC).

<sup>87</sup> See *id.* at 1015 (reasoning that liability was imposed on AT&T perpetuating pre-Pregnancy Discrimination Act discrimination in their pension benefits calculation).

<sup>88</sup> See *id.* at 1011 (holding that AT&T’s pension benefits calculation was obviously discriminatory and too apparent to warrant discussion).

<sup>89</sup> See *id.* at 1010 (asserting the importance of interpreting according to the ordinary meaning of the statute).

<sup>90</sup> See *id.* at 1006 (distinguishing the seniority system in *Evans* from the systems in *Pallas* and *Hulteen* that developed early retirement programs using intentionally discriminatory pension benefits calculations).

<sup>91</sup> See *id.* at 1011 (dismissing AT&T’s argument that PDA is being applied retroactively).

<sup>92</sup> See *Hulteen*, 498 F.3d at 1011. (establishing that it was well within AT&T’s control to add the pregnancy-related disability leave taken prior to the enactment of PDA in the pension benefits calculation).

<sup>93</sup> See *id.* (indicating that the plain reading of Title VII supports this holding).

<sup>94</sup> See *Hulteen*, 129 S. Ct. at 1969 (recognizing that seniority systems receive special treatment under Title VII).

<sup>95</sup> See *id.* at 1966 (concluding that AT&T's net credit system was consistent with the rule of *Gilbert*)

<sup>96</sup> See *Bazemore v. Friday*, 478 U.S. 385, 396 (1986) (holding that a Title VII violation occurs every time an employee's compensation delivers less to a similarly situated employee because of discriminatory intent).

<sup>97</sup> See *id.* (acknowledging that the discriminatory action in *Bazemore* began before the enactment of Title VII and continued after Title VII was enacted).

<sup>98</sup> See *Hulteen*, 129 S. Ct. at 1970 (indicating that AT&T's pension benefits calculation was not considered gender discrimination).

<sup>99</sup> See *id.* at 1971 (concluding that Congress intended that PDA take effect on the day of its enactment, except in its application to certain benefits programs, as to which effectiveness was retroactive 180 days).

<sup>100</sup> See *id.* at 1976 (Ginsburg, J., dissenting) (confirming that the repetition of pregnancy-based disadvantageous treatment is prohibited under Title VII).

<sup>101</sup> See *id.* at 1974 (Ginsburg, R., dissenting) (pointing out the history of discrimination against women concerning childbirth and pregnancy that was legally sanctioned and resulted in fewer advantages for women in the workforce).

<sup>102</sup> See *Hulteen*, 498 F.3d at 1015 (reasoning that liability was imposed on AT&T because of AT&T's intent to discriminate).

<sup>103</sup> See *id.* at 1010 (supporting the legal conclusion that the plain reading of Title VII prohibits AT&T's pension benefits calculation for the respondents).

<sup>104</sup> See *id.* at 1011 (recognizing that AT&T deliberately lowered the respondents' pension benefits because they were pregnant).

<sup>105</sup> See *Hulteen*, 129 S. Ct. at 1980 (Ginsburg, J., dissenting) (declaring that PDA is to be understood as establishing that no woman's pension benefits are to be diminished based on pregnancy).

<sup>106</sup> See *Hulteen*, 498 F.3d at 1011 (recognizing that it was well within AT&T's control to account for the full pregnancy-related disability leave from prior to the enactment of PDA in the pension benefits calculation).

<sup>107</sup> See 42 U.S.C. § 2000e(k) (2006) (including that employers are required to provide the same benefits to all of their employees for employment purposes).

<sup>108</sup> See *Hulteen*, 498 F.3d at 1010 (adopting the dictionary definition which defines "affect" as acted upon, influenced, or changed).

<sup>109</sup> See *id.* at 1011 (arguing that the respondents were affected by AT&T's actions during two separate events: the credit application and the pension benefits calculation).

<sup>110</sup> See *id.* at 1010 (concluding that AT&T continued its systematic discrimination, which was illegal under PDA).

<sup>111</sup> See *Hulteen*, 129 S. Ct. at 1980 (Ginsburg, J., dissenting) (confirming that Congress repudiated employment practices similar to AT&T's pension benefits calculation by enacting PDA).

<sup>112</sup> See H.R. REP. NO. 95-948, at 2 (1978), as reprinted in 1978 U.S.C.A.N. 4717, 4750 (prohibiting discrimination based on pregnancy, childbirth and related medical conditions).

<sup>113</sup> See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675-76 (1983) (mentioning that when Congress amended Title VII, it unambiguously expressed its disapproval of both the holding and reasoning of the Supreme Court in the *Gilbert* decision).

<sup>114</sup> See LABOR AND HUMAN RESOURCES, *supra* note 10, at 12 (asserting that *Gilbert* destroyed the hard work of the EEOC in eliminating pregnancy discrimination).

<sup>115</sup> See H.R. REP. NO. 94, at 2 (confirming that the guidelines rightly implemented Title VII by prohibiting employment practices based on pregnancy or pregnancy-related medical conditions).

<sup>116</sup> See 29 C.F.R. § 1604.10 (1973) (requiring that seniority benefits that affect disability leave should also be applied to all employees equally).

<sup>117</sup> See LABOR AND HUMAN RESOURCES, *supra* note 10, at 12 (amending Title VII so that there can be no doubt of congressional intent to prohibit pregnancy discrimination).

<sup>118</sup> See *id.* at 39 (recognizing that the core principle under Title VII would consider a classification involving pregnancy as strongly "sex related"); See *Hulteen*, 129 S. Ct. at 1970 (comparing AT&T's seniority system to the system in *Gilbert*).

<sup>119</sup> See *Hulteen*, 129 S. Ct. at 1975-76 (arguing that the Supreme Court erroneously upheld *Gilbert* as law today, after Congress clearly stated *Gilbert*

was wrongly decided).

<sup>120</sup> See *Hulteen*, 498 F.3d at 1004 (recognizing that the limitation of the credit for the respondents resulted in reduced pension benefits).

<sup>121</sup> See *id.* at 1011-12 (referencing a letter that the employee received from AT&T voluntarily offering to credit thirty days of pregnancy-related disability leave taken in 1974 to her pension benefits).

<sup>122</sup> See *id.* at 1007 (establishing that liability is imposed each time similarly situated employees are treated differently based on pregnancy).

<sup>123</sup> See *id.* at 1015 (denying AT&T's claim that Pallas should be overruled).

<sup>124</sup> See *id.* at 1003 (implying that the respondents would have had more favorable retirement benefits if they had taken non-pregnancy-related disability leave).

<sup>125</sup> See *Ledbetter*, 550 U.S. at 633 (recognizing the employment practice in *Bazemore* as obviously unlawful according to Title VII).

<sup>126</sup> See *Hulteen v. AT&T*, 498 F.3d 1001, 1006-07 (9th Cir. 2007) (en banc) (concluding that an employer who adopts and retains a pay structure such as the one in *Bazemore* is intentionally discriminating against its employees).

<sup>127</sup> See *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1977 (2009) (Ginsburg, J., dissenting) (implying that it would be difficult to conclude that AT&T's scheme was neutral on its face and discriminated against women only in effect).

<sup>128</sup> See *id.* (describing the seniority system in *Hulteen* as unequal in its application); see also *Teamsters v. United States*, 431 U.S. 324, 356 (1977) (arguing that the workers that are discouraged from transferring to line driver jobs are White, Black and Hispanic).

<sup>129</sup> Cf. *Teamsters*, 431 U.S. at 358 (reasoning that the petitioners were unable to provide sufficient evidence of discriminatory intent).

<sup>130</sup> See *id.* at 1980 (concluding that Congress did not intend the reduction of women's pension benefits attributable to their placement on pregnancy-related disability leave to result from employer's discriminatory practices).

<sup>131</sup> See *Hulteen v. AT&T*, 498 F.3d 1001, 1006-07 (9th Cir. 2007) (en banc) (affirming that each paycheck that violates *Bazemore*'s similarly situated rule is a separate Title VII violation).

<sup>132</sup> See *Evans*, 431 U.S. at 557 (recognizing that the *Evans* claim was brought in 1972, which is four years after United Airlines' discriminatory act).

<sup>133</sup> See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 (2007) (confirming that a new Title VII violation occurs when an unlawful employment practice and discriminatory intent is proven).

<sup>134</sup> See *id.* at 1010 (arguing that the respondents were affected by an employment decision made on the basis of pregnancy which is prohibited by PDA).

<sup>135</sup> See *Bazemore*, 478 U.S. at 398 (reasoning that a violation occurs every time an unlawful Title VII employment practice is applied).

<sup>136</sup> See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630-31631 (2007) (noting that a new EEOC charging period commences when a new Title VII violation occurs).

<sup>137</sup> See *Hulteen*, 498 F.3d at 1011 (ruling that the respondents were injured by the deprivation of benefits by AT&T in 1994).

<sup>138</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat.

1071, 1079 (1991) (codified as amended at 42 U.S.C. § 2000e-5(e)(2) (2006)) (clarifying that the injury occurs at the time the seniority system is applied to the aggrieved party); see also Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5(e) (2006)) (stating that an unlawful employment practice occurs when an individual is subject to a discriminatory compensation decision).

<sup>139</sup> See *Bazemore*, 478 U.S. at 395398 (holding that liability may be imposed on an employer for perpetuating pre-Title VII discriminatory employment decisions in the present day).

<sup>140</sup> See *Ledbetter*, 550 U.S. at 636 (reasoning that the existence of past discriminatory acts does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory).

<sup>141</sup> See *Hulteen*, 498 F.3d at 1011 (concluding that AT&T's pension benefits calculation violated PDA).

<sup>142</sup> See *Pallas v. Pac. Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991) (holding that Pacific Bell's early retirement program was facially discriminatory because it treated employees differently based on pregnancy).

<sup>143</sup> See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EMPLOYEE BENEFITS*, EEOC COMP. MAN. § 3-V.III(B)(Oct. 3, 2000) (requiring that employers

treat pregnancy-related disability leave the same as other medical leave in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement).

<sup>144</sup> See Moot, *supra* note 30, at 224 (noting that the EEOC's main authority is to investigate charges and file lawsuits relating to the Title VII).

<sup>145</sup> See *id.* at 223 (explaining that Justice Marshall's deference to the EEOC in *Phillips* supports a broader principle of deferring to the EEOC interpretation where reasonable).

<sup>146</sup> See 42 U.S.C. § 2000e-12(a) (2006) (giving the EEOC the authority to issue procedural regulations in administering the provisions of Title VII).

<sup>147</sup> See H.R. REP. NO. 86-187, at 151 (1964), as reprinted in 1964 U.S.C.C.A.N. 2183, 2355 (assigning the task of upholding the principles of Title VII to the EEOC).

<sup>148</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (characterizing the EEOC as the "enforcing agency" for Title VII).

<sup>149</sup> *Contra* Bjorklund, *supra* note 11, at 1207 (arguing that EEOC's position lacks consistency and persuasiveness).

<sup>150</sup> See *Pallas v. Pac. Bell*, 940 F.2d 1324, 1326-27 (9th Cir. 1991) (emphasizing the purpose of the Civil Right Act in protecting pregnant employees from employment discrimination based on sex).

<sup>151</sup> See *id.* at 12 (establishing that Title VII was intended to prohibit pregnancy discrimination).

<sup>152</sup> *Contra* Bjorklund, *supra* note 11, at 1207 (arguing that the EEOC is not entitled to the *Chevron* deference but can be a persuasive authority).

<sup>153</sup> See *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1978 (2009) (Ginsburg, J., dissenting) (explaining the historical perception of women as mothers and not workers).

<sup>154</sup> See Bjorklund, *supra* note 11, at 1192 (determining that the Ninth Circuit decision in *Pallas* affected over 37,000 women).

<sup>155</sup> See *id.* (emphasizing the Supreme Court's high regard for employees demonstrating the existence of an "intentionally" discriminatory decision).

<sup>156</sup> See Mark H. Meyerhoff & Elizabeth A. Avedikian, *The Impact of AT&T v. Hulteen*, LAW 360, June 10, 2009, at 4, available at [http://www.lcwlegal.com/newspublications/Articles/Law360\\_0611\\_AvedikianMeyerhoff.pdf](http://www.lcwlegal.com/newspublications/Articles/Law360_0611_AvedikianMeyerhoff.pdf) (concluding that *Hulteen* will toll the length of time within which employees may bring pay discrimination charges).

<sup>157</sup> See *id.*, at 4 (noting that even with the accomplishments of the Lilly Ledbetter Fair Pay Act, it will be very difficult for an employee to prove that an employer intentionally discriminated against them for years).

<sup>158</sup> See *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (establishing that the employees were protected under Title VII and proved that their employer treated them differently than other similarly situated employees based on race).

<sup>159</sup> See *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1970 (2009) (holding that AT&T's pension benefits calculation was not intentionally discriminatory and is a bona fide seniority system).

<sup>160</sup> See *id.* (holding that AT&T's pension benefits calculation was facially neutral).

<sup>161</sup> See *id.* at 1976 (Ginsburg, J., dissenting) (stressing that this decision confirms societal attitudes about pregnancy and motherhood).

<sup>162</sup> See Meyerhoff & Avedikian, *supra* note 157, at 4 (indicating that decreasing the employee's burden in proving intent to discrimination will satisfy the necessity of demonstrating the existence of an "intentionally" discriminatory decision).

<sup>163</sup> See *Hulteen*, 129 S. Ct. at 1980 (Ginsburg, J., dissenting) (recognizing that the respondents will continue to experience the impact of a "*Gilbert-blessed-plan*" for the rest of their lives).