1978 S.C. Op. Atty. Gen. 22 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-10, 1978 WL 27773

Office of the Attorney General

State of South Carolina
Opinion No. 78-10
January 9, 1978

***1** Everett N. Dean
Superintendent
Florence County School District No. 2

QUESTION:

Under the Act to provide sick leave for full-time public school employees, is a school district required to provide sick leave pay to those full-time employees who are on maternity leave?

STATUTES, CASES, ETC:

1976 S.C.Acts and Joint Resolutions, Act No. 628 (May 31, 1976);

1974 S.C.Acts and Joint Resolutions, Act No. 1111 (June 28, 1974);

1972 S.C.Acts and Joint Resolutions, Act No. 1367 (June 12, 1972);

1968 S.C.Acts and Joint Resolutions, Act No. 1173 (May 10, 1968);

S.C.Code Ann., § R 97–28 (1976);

S.C.Code Ann., § R 97–28.4 (1976)

42 U.S.C.A. § 2000e–2 and 29 C.F.R. § 1604.10

Nashville Gas Company vs. Satty, 46 U.S.L.W. 4026 (U.S. Dec. 6, 1977);

School District vs. Berg, 46 U.S.L.W. 4032 (U.S. Dec. 6, 1977);

General Electric Company vs. Gilbert, 375 F.Supp. 367, aff'd., 519 F.2d 661, cert. granted, 423 U.S. 822, rev'd. 50 L.Ed.2d 343 (1976);

Gilbert vs. General Electric Company, 519 F.2d 661 (4th Cir.1975);

Geduldig vs. Aiello, 417 U.S. 484 (1974);

1975–76 Ops.Atty.Gen., No. 4441, p. 296, 297;

Sutherland, Statutory Construction, § 48.03 (1973).

DISCUSSION:

In the 1976 session, the General Assembly enacted a law to provide minimal sick leave benefits to all full-time employees of public schools. In part this Act states:
All full-time employees of public schools shall accrue sick leave on the basis of one and one-fourth days of sick leave for each month of active service or twelve days for nine months of active service. Sick leave which is accrued but not used may be accumulated up to sixty days provided that such employees do not violate their respective contracts.

1976 S.C.Acts and Joint Resolutions, Act No. 628 (May 31, 1976).

This Act does not provide any definition of what constitutes "sick leave". In a 1976 Atty.Gen's Op., it was stated that the term "sick leave" currently was used by the Legislature in the sense that it is commonly understood, referring specifically to the actual sickness of an employee, rather than in a liberal or technical sense. See 1975–76 Ops.Atty.Gen., No. 4441, p. 296, 297.

However, the opinion stated that "school districts should treat absences for maternity purposes the same as sick leave". This statement was based in part on the then current holding of the Fourth Circuit in Gilbert vs. General Electric Company, 519 F.2d 661 (4th Cir.1975), and on the EEOC Guidelines concerning employment policies relating to pregnancy and childbirth promulgated pursuant to the Civil Rights Act of 1964. See 42 U.S.C.A. § 2000e–2 and 29 C.F.R. § 1604.10. However, three subsequent decisions by the United States Supreme Court concerning the issue of providing maternity leave benefits (including a reversal of the Fourth Circuit in the Gilbert decision) have modified the legal bases of our earlier opinion. Therefore, we are reviewing the question of whether sick leave provided by the Public School Employees Sick Leave Act includes maternity leave.

***2** In Gilbert, the General Electric Company provided a disability plan for all of its employees which paid weekly sickness and accident benefits. However, disabilities arising from pregnancy were excluded from the plan's coverage. Both the District Court for the Eastern District of Virginia, and the Fourth Circuit Court of Appeals, held that the exclusion of such pregnancy—related disability benefits from General Electric's employee disability plan violated that portion of Title VII (42 USCA 20003–2[a][1]) which states that it is an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin".

However, the United States Supreme Court agreed to review the Fourth Circuit Gilbert decision and subsequently reversed the Court of Appeals, holding that General Electric's disability benefits plan did not violate Title VII. See General Electric Company vs. Gilbert, 375 F.Supp. 367, aff'd., 519 F.2d 661, cert. granted 423 U.S. 822, rev'd. 50 L.Ed.2d 343 (1976). The thrust of the reasoning in Gilbert was that exclusion of pregnancy from coverage under a disability benefits plan was not in itself discrimination based on sex. [1] The Court found that the financial benefits provided by the G.E. package, in terms of the risks that it covered, treated men and women equally and was "facially non-discriminatory":
For all that appears, pregnancy-related disabilities constitute an additional risk, unique to woman, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed inclusion of risks.

General Electric Company vs. Gilbert, supra, 50 L.Ed.2d at 356.

Additionally, the Supreme Court in Gilbert held that the EEOC Guidelines, which state that "[Benefits] shall be applied to disability due to pregnancy or child birth on the same terms and conditions as they are applied to other temporary disabilities", (cited in our 1976 Opinion) were contradictory and conflicted with legislative intent. The Supreme Court,

therefore, declined to follow these particular administrative guidelines, thereby undercutting any reliance which might be placed upon them.

Two recent Supreme Court decisions have utilized the Gilbert approach. In Nashville Gas Company vs. Satty, 46 U.S.L.W. 4026 (U.S. Dec. 6, 1977), the Supreme Court utilized the same logic employed in Gilbert to hold that the policy of Nashville Gas Company of not awarding sick leave pay to pregnant employees was not a per se violation of Title VII. Nonetheless, the Court concluded that the Nashville Gas Company's policy of denying accumulated seniority to female employees returning from pregnancy leave violated Title VII, and left open the question for decision on remand as to whether the sick leave policy concerning pregnant employees could be shown by the plaintiff to be discriminatory.

***3** On the same day, the Supreme Court in Richmond Unified School District vs. Berg, 46 U.S.L.W. 4032 (U.S. Dec. 6, 1977), vacated the decision of the 9th Circuit Court of Appeals, which had held that a school district violates Title VII if it denied sick leave pay during pregnancy-occasioned absences, and remanded the case for further consideration in light of Gilbert and Satty.

Each of these Supreme Court decisions post-dating our 1976 opinion clearly indicate that a sick leave plan, or an employees' benefit plan, which differentiates between pregnancy-occasioned absences and other temporary disabilities, is not per-se unlawful. Thus, had the Legislature in the 1976 Sick Leave Act specifically denied sick leave pay during pregnancy-occasioned absences, it appears now that the courts would not find such a provision unlawful on its face.

But because it is now apparent that the General Assembly could have excluded maternity leave from the sick leave plan does not mean that it did so. The question remains as to whether the Legislature intended to include maternity leave as a basic benefit under the general term “sick leave” as used when this legislation was passed.

Although there is nothing in the House and Senate Journals which provides any insights into legislative intent with regard to the 1976 legislation, there is preenactment history for similar legislation concerning sick leave benefits for State employees that provides some evidence of the legislative intent concerning the relationship between maternity leave and sick leave. As stated in Sutherland, Statutory Construction, § 48.03 (1973):
It is a well established practice in American legal processes to consider relevant information about the historical background of the enactment of a statute in the course of making decisions about how it is to be construed and applied.

....

The legal history of a statute, including prior statutes on the same subject, is an especially valuable guide for determining what object an act is suppose to achieve.

In 1968, the General Assembly passed the first sick leave plan for State employees, without defining the term “sick leave”. See 1968 S.C.Acts and Joint Resolutions, Act No. 1173 (May 10, 1968). This Act empowered each State agency to utilize its own discretion in defining the term sick leave. However, there obviously was some subsequent concern about the disparity in treatment of maternity leave by the different State agaicies, because, in 1972, the General Assembly enacted legislation specifically authorizing maternity leave for all State employees on a uniform basis. See 1972 S.C.Acts and Joint Resolutions, Act No. 1367 (June 12, 1972).

All of this prior legislation was supplanted in 1974 by the current Sick Leave Act for State employees. See 1974 S.C.Acts and Joint Resolutions, Act No. 1111 (June 28, 1974). This 1974 Act provided authority to the Budget and Control Board to define the term “sick leave” (as opposed to each State agency providing its own definition) and, concurrently, repealed the 1972 Maternity Leave Act. The Budget and Control Board, through the State Personnel Division, immediately issued

regulations defining the term "sick leave" to include "sickness or temporary disability due to pregnancy". See S.C.Code Ann. § R 97–28 (1976).

***4** Because of the fact that maternity leave for State employees was provided special legislative treatment by the General Assembly, and was subsequently included in 1974 under the Sick Leave Act for State employees, there exists sufficient evidence to conclude that the term "sick leave", when used by the General Assembly in this 1976 legislation, was understood to include any sickness or temporary disability associated with pregnancy. Of course, the General Assembly may expressly exclude pregnancy-related disabilities from a sick leave plan, if it so desires, in accordance with Gilbert, Satty, and Berg, supra. But, in the absence of such an express exclusion, we believe that our initial opinion in 1976 was correct in adjudging that absences for maternity purposes should be treated in the same manner as sick leave. Each school district operating under the 1976 legislation may enact any reasonable regulations which it deems necessary to define when a sickness or temporary disability resulting from pregnancy commences, and when it ends, and to provide for control of other such administrative matters under a sick leave plan. For example, see such rules set out by the Budget and Control Board under S.C.Code Ann. R 97–28.4 (1976).

CONCLUSION:

Under the 1976 Act to provide sick leave for full-time public school employees, a teacher who is taking maternity leave for a requested period of time is entitled to be paid as if she were taking sick leave, assuming she is a full-time employee with accrued sick leave as required pursuant to the Act. The school districts may enact reasonable regulations governing when sick leave for pregnancy-related disabilities commences and ends.

Nathan Kaminski, Jr.
Assistant Attorney General

APPROVED:

Frank K. Sloan
Deputy Attorney General

Footnotes

1 However, an affirmative showing of the existence of "gender-based discrimination", through intent or effect, could be sufficient to establish a violation of Title VII, or of the Equal Protection Clause. Such a showing was not made in Gilbert although the Court did not preclude the possibility that such a showing could be made in some future case. See General Electric Co., supra, at 50 L.Ed.2d at 355. Also see Geduldig v. Aiello, 417 U.S. 484 (1974), where a California state plan providing a disability insurance program excluding normal pregnancy-related disabilities from coverage (as a cost saving measure) was found by the U.S. Supreme Court to be constitutionally sound. Nonetheless, the Court did indicate that any such plan could run afoul of the 14th Amendment if it were shown that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other. 417 U.S. at 496, n. 20.

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