

RESPONSES

MYRNA MARTINEZ: I don't have a prepared text, but I do have some observations, comments, and questions based on my reading of the two articles. One of the first things that I question about the special treatment mode is the fact that by characterizing pregnancy as unique it echoes Justice Rehnquist's reasoning in the *Gilbert* case. The Supreme Court simply said that pregnancy was a disability unique to women and that where women were receiving the same benefits as men, this additional disability was not discrimination on the basis of sex. So it seems to me that we are really going back to that kind of reasoning. I was wondering, Wendy, how Linda Krieger is able to use the same characterization of pregnancy as uniqueness, but still come out on the other side.

WENDY WILLIAMS: She views men and women as being fundamentally the same, except for pregnancy, just as Justice Rehnquist does. I said that to her once, but we never could quite agree about it. When you get right down to it, I think what she is really looking at, and what she really senses, is that pregnancy means that women as a class are going to suffer more disabilities than men. Therefore any workplace policy is going to affect women as a group more adversely than men as a group. I think that is what she is really trying to say.

MYRNA MARTINEZ: The equal treatment mode has challenged the laws and regulations that codified stereotypes of women as being mothers and of women's place as being in the home. Going back to a special treatment mode is actually turning back the clock. I don't think we've reached a point where we can say that in this society there are no acts of discrimination on the basis of sex or that the Pregnancy Disability Act (PDA) has reached the limit of its potential. From a historical perspective, ten years in the development of civil rights is too short a period of time to know whether one approach is ineffective.

WENDY WILLIAMS: Yes and trade it for one that only a decade ago was yielding all kinds of horrendous results. I am a little hesitant on that basis as well as the others I outlined.

MYRNA MARTINEZ: Also, as a sole practitioner, if I am representing a woman who has a claim against an employer for violation of the Pregnancy Disability Act, and if I am able to prevail on that act of discrimination, then I want to fashion some affirmative relief. If I adopt a special treatment mode, would that mean that I would require as part of the affirmative relief that the employer enact special treatment, or would a declaratory statement that the em-

ployer shall not discriminate on the basis of sex be sufficient? Just as a nuts and bolts issue, how do you fashion the affirmative relief when you prevail on an individual claim of discrimination?

WENDY WILLIAMS: One of the interesting things about the pregnancy problem is that it arrives in all kinds of manifestations which are then challenged under Title VII and the PDA. It would depend on the particular situation. If it were a termination because a woman became pregnant, presumably we would be talking reinstatement and back pay. If it were an across-the-board rule that a woman had to quit in her fourth month of pregnancy, which was the standard provision of only a decade ago, but which is by and large now handled by the PDA and Title VII, then you're talking about a situation where the provision is invalidated and the class gets some kind of monetary relief for the period of time that they were forced off the job, and so on and so on. So, I think the question for practitioners has to be asked in the context of a particular provision and its consequences for the individual plaintiff class.

JOAN BERTIN: I want Wendy to tell us, as a practical matter, what to do for women in female intensive industries, where there is essentially no comparable male work force, who are denied all disability leaves. I'm thinking now of a hospital work force, which is an area that we get a lot of calls about. How do we work the impact analysis in a context in which there is no comparative statistical pool?

WENDY WILLIAMS: It's a good question because Title VII, like any non-discrimination provision, is much more about what you can't do than what you have to do. I think the point I was trying to make at the end is that there is no rose garden here. To the extent we want to institute certain guarantees, we're at the point where we are now going to have to go out and affirmatively fashion them. And the question is, what kind of guarantees do we want to see enacted? Do we want a special treatment model or an equal treatment model?

I find your question very important for the following reason. Miller-Wohl is a company in the retail clothing business, and guess what the work force looks like? It is a very much female-dominated work force with low pay, high turnover, all the terribles. Terrible benefits, and other classic female-intensive workplace rules. No leave during the first year is the kind of policy they have in those jobs. It underscores for me how limited the view is that approaches the question in terms of what we do for pregnant women in that situation. We're talking about a work force that is being treated unfairly in general, and we're talking predominantly about women with other disabilities also not getting what they need and deserve. So, when we're talking about solving problems we're going to have to say sometimes, "Yes, it's time to talk to our legislature," and then the question becomes whether to use the equal treatment model or special treatment model in the affirmative mode.

JOAN BERTIN: I have no problem with the answer to that question, but I do see another problem. I don't think that it's always so obvious in these female intensive work forces that all of the disabilities are related to pregnancy or childbirth; in fact, the incidence of those disabilities may be fairly low.

NADINE TAUB: But isn't that a question of what the age composition of the work force is? My guess is that back at a time when there were no-marriage rules, and when the model of the work force was that single women dropped out either when they married or when they had their first child, then in the high-turnover as well as in other jobs employing women, workers were predominantly young women. Disabilities would have been primarily from mostly pregnancy. Now, however, you have much greater participation in the work force at all ages. Even though there are higher turnover jobs, they're not necessarily going to be filled by women of childbearing age, so pregnancy is not necessarily going to be the main reason for disability.

WENDY WILLIAMS: It underscores again that we need to look broadly at these questions. I don't think it's true in many situations that the main problem for women is pregnancy. Nadine's point on that reflects my own experience, which is that pregnancy was a very small part of a very large problem. The larger problem is what to do after the child arrives, when the kid gets sick, when the kid has to see the pediatrician or when the child care person is sick. In the little towns in Montana and where I grew up, it's the older women who were often working in the retail establishments, for example. So, I'm not willing to conclude "off the bat" who is injured in any particular workplace setting. The disparate impact analysis answers that question. It looks at the particular work setting and asks who a rule affects.

NADINE TAUB: But it doesn't deal with the problem when you have basically a female work force. My question about who is in the work force has to do with whether a legislative remedy should be designed to take care of all disabilities.

JOAN BERTIN: But what is the interim relief until you have the legislative remedy? There are very significant problems.

WENDY WILLIAMS: It's exactly what I said. If the legislation is not there, and if it's an all female work force, you don't have the interim relief. And that underscores the point. Lawyers can't hang out in the courts and expect all our problems to get solved.

AUDIENCE REMARK: Interim relief is to organize.

WENDY WILLIAMS: Right. Right. Those of you who are interested in creative ways of writing collective bargaining agreements to reflect some of these concerns should talk to Marley Weiss who has been in the business of doing

just that for the UAW for a couple of years. She has been a real inspiration to me in thinking about these problems. Some of the stuff she came up with is great stuff that brings workers together and gets them to see their commonalities, rather than dividing men from women and parents from nonparents.