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Geduldig v. Aiello

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RECENT DEVELOPMENTS

Geduldig v. Aiello

SEX DISCRIMINATION—State disability insurance program—pregnancy-related disabilities—equal protection—exclusion of pregnancy and childbirth disabilities from state disability insurance program does not violate the equal protection clause. ___ U.S. ___, 94 S.Ct. 2485 (1974).

Disability and sick-leave programs have for some time been a common “fringe” benefit enjoyed by numerous American employees. While programs vary in scope, often with the size of the subscribing employer, many have gotten so comprehensive that employees are covered for even voluntarily-induced disabilities. Many of the programs cover employees who have chosen to have selective surgery including anything from rhinoplasty to a vasectomy. Yet one disabling condition is frequently excluded from disability coverage. It is unique to women and, statistically speaking, renders the average woman disabled for approximately six to eight weeks about three times in her lifetime. The disability is pregnancy.

Over the course of the past two years a number of courts have considered whether the common exclusion of disability or paid leave for pregnant employees is unlawfully discriminatory. Most of these courts have looked to Title VII of the Civil Rights Act of 1964, with its express statutory mandate upon employers requiring equal treatment of all employees regardless of sex.


It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise 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 . . . .
statutes, or constitutional principles, nearly all have agreed that programs which discriminate against pregnant women are unlawful. Few decisions have questioned the relationship between pregnancy and sex. Courts have found the link to be clear; the disability "inextricably sex-linked." Even one of the few courts which have denied benefits on the ground that pregnancy is not a sickness did not question this relationship. The reason for this paucity of inquiry is no doubt reflected by the words of Judge Brown, dissenting in an earlier case involving discrimination in the hiring of women with pre-school-age children:

The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.


But the "simplest biology" is, legally speaking, not as simple as it appeared to Judge Brown and a host of other judges who considered charges of sex discrimination based on pregnancy discrimination prior to June 17, 1974. For on that day the Supreme Court of the United States, in a 6 to 3 decision, decided that it is clear, upon the most cursory analysis, that there is a lack of identity between pregnancy and gender as such—at least under a state disability program which excluded benefits for pregnancy. As viewed by the Court,\(^9\)

[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons.

The ramifications of the Court's reasoning in *Geduldig v. Aiello*\(^{10}\) are clear upon an equally cursory analysis. Taken literally, the decision means that classification or discrimination based on pregnancy is not sex discrimination. Since such discrimination is not sex discrimination, an aggrieved woman cannot even raise a Title VII claim since the applicable statute deals with "sex" discrimination, not "pregnancy" discrimination.\(^{11}\) One court has already so held.\(^{12}\) But it is questionable whether the *Aiello* decision must be taken so literally as to deny Title VII relief to women discriminated against because they are pregnant. This note will examine *Aiello*'s assumption that special treatment of pregnant women is not sex-based discrimination, and in particular, will consider whether such assumption should be considered a definitive holding for purposes of Title VII litigation.

In *Aiello* the Supreme Court considered a disability insurance system which has been administered for nearly thirty years by the state of California. The program pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation. The system is funded entirely from contributions deducted from the wages of participating employees. Participation in the program is mandatory unless the employees are protected by a voluntary private plan approved by the state.\(^{13}\) The plan is set up to be entirely self-supporting with no need for subsidization from gen-


\(^{10}\) ___ U.S. ___, 94 S.Ct. 2485 (1974).


\(^{12}\) CWA v. A.T.& T. Co., Long Lines Dep't, 8 FEP Cas. 529 (S.D.N.Y. July 30, 1974).

eral state revenues. The annual contribution rate is set at 1% of income up to a maximum of $85. Benefits vary widely depending on the income of the participating employee and are discontinued at the end of 26 weeks. Stated exclusions include disabilities that result from an individual’s court commitment as a dipsonomiac, drug addict, or sexual psychopath. Nor are disabilities compensable if they result from normal pregnancy and childbirth. It was this latter exclusion which was attacked as violative of the equal protection clause.

The fact that Aiello came to the Supreme Court in an equal protection context is significant because the Court has been quite explicit in its response to claims that the equal protection clause requires changes in government spending programs so as to benefit a group or classification which believes itself unfairly deprived. It seems quite clear that the Supreme Court will not substitute its opinion for that of state legislatures on questions of how state-controlled funds should be apportioned, at least in the absence of blatant discrimination against racial or other identifiable groups. Dandridge v. Williams, a case involving a limit on how much any one family could get through the Aid to Families with Dependent Children program, regardless of the size of the family, set forth the Court’s position. The tenor of that position was stated at the very beginning of the opinion:

This case involves the validity of a method used by Maryland, in the administration of an aspect of its public welfare program, to reconcile the demands of its needy citizens with the finite resources available to meet those demands.

A paraphrase of that sentence might well have fit the opening paragraph of the Aiello opinion. California had chosen a method to reconcile the needs of its disabled citizens with the finite resources available to meet those demands. The opinion, read as a whole, clearly indicates that the Court perceived the problem as

14. Id. at __, 94 S.Ct. at 2490.
15. Id. at __, 94 S.Ct. at 2487.
16. In the event the employee suffers a compensable disability, he can receive a weekly benefit amount of between $25 and $119, depending on the amount earned during the highest quarter of the base period (one year base period prior to disability). Id. at __, 94 S.Ct at 2487, 2487 n.6.
17. Id. at __, 94 S.Ct. at 2488.
18. Id.
19. Id.
21. Id. at 472.
a Dandridge-type problem. The focus was on the welfare-type aspects of the fact pattern. Thus the majority acknowledged that the program could be changed to cover the increased cost of pregnancy benefits by making reasonable changes in the contribution rate, the maximum benefits allowable, and other variables, but noted that each of these "variables" represents a policy determination by the state. 22 Such policies include not only the protection of disabled employees, but the self-supporting nature of the program, and the desire to provide the broadest possible disability protection at a cost affordable by all employees, including those with very low incomes. 23 The "essential issue" was cast in terms of "whether the equal protection clause requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery." 24

The Court concluded that the excluded classification was a "risk"—a thing to spend money on—not a group or class. 25 The Court's focus was clearly on the welfare aspects of the case: 26

Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 486-487 (1970).

The focus in Aiello was most certainly not on whether this was or was not a question of sex discrimination. The majority dealt very summarily with the issue 27 and the only real explana-

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23. Id. at ----, 94 S.Ct. at 2491-92.
24. Id. at ----, 94 S.Ct. at 2491.
25. Id. at ----, 94 S.Ct. at 2492.
26. Id. at ----, 94 S.Ct. at 2491.

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tion appears in footnote 20, which claims a "lack of identity be-
tween the excluded disability and gender as such . . . clear upon
the most cursory analysis." The analysis was indeed cursory, for
it consisted of a recitation that the "program divides potential
recipients into two groups—pregnant women and nonpregnant
persons. While the first group is exclusively female, the second
includes members of both sexes."29

The Court's analysis is disappointing because it looks only to
the superficial form of the California program. Since both men
and women are entitled to benefits for those risks which are cov-
ered,30 the Court is satisfied that no discrimination against
women exists. The opinion touched on the question of whether
the selection of risks worked to discriminate against any definable
group or class in terms of the aggregate risk protection derived by
the group or class from the program. It concluded that there was
no evidence that this was the case and that indeed, women con-
tribute 28 per cent of the total disability insurance fund and
receive back 38 per cent of the fund in benefits.31 But the statistic
relied on is misleading, because the amount contributed by
women, based on a fixed percentage of their income, may simply
be reflective of past discriminatory employment practices against
women. In any event, the relevant inquiry should be not to com-
parative amounts derived from the program, but to equality of
coverage in light of the purpose of the program. That purpose,
very simply, is to protect all eligible employees from economic
hardships suffered as a result of not being able to work. The
exclusion of pregnancy benefits leaves a large gap in that purpose
—and the only ones in that gap are women. One must wonder
what the Court's reaction would have been had the only major
exclusion been sickle cell anemia. Would the Court have been

(1974) (noted "the Supreme Court's intentional restraint" from making sex a suspect
classification in Frontiero).

During the 1973-74 Term, the Court has exhibited a clear reluctance to reconsider the
applicable standard for sex-based classification. In Cleveland Bd. of Educ. v. LaFleur,
414 U.S. 632 (1974), for instance, the Court invalidated school board requirements that
pregnant teachers go on unpaid maternity leaves several months before expected child-
birth. But the Court based its decision on a due process approach of hostility to "irrebutta-
ble presumptions," 414 U.S. at 648, in spite of the fact that the issue in the lower courts
was a denial of equal protection.

29. Id.
30. But in fact, as pointed out in the Aiello dissent, the program covers certain
disabilities unique to men. Id. at ___, 94 S.Ct. at 2493 (Brennan, J., dissenting).
31. Id. at ___, 94 S.Ct. at 2492 n.21.
satisfied that there was a lack of identity between the excluded disability and race as such merely because Blacks were entitled to benefits for those disabilities which were covered by the program? Would they be satisfied if Blacks received as much or more than they contributed? One might say that in such a case, the exclusion would be a mere pretext designed to effect an invidious discrimination against the members of one race. But does discrimination require an improper motive?

In the Title VII context, where Congress has explicitly prohibited discrimination in employment practices, the Court has found that the proper standards require more than practices "neutral on their face." The Congressional mandate for employers proscribes "not only overt discrimination but also practices that are fair in form but discriminatory in operation." The thrust is directed "to the consequences of employment practices, not simply the motivation." In perceiving the Aiello issue as simply a question of how a state chooses to spend limited funds, the Court's inquiry was confined to whether practices were neutral on their face, fair in form, and purely motivated.

If the Court is correct in its analysis that California's exclusion of disability benefits for pregnancy is not discrimination based upon sex, the analysis would be expected to be the same in the context of a Title VII employer-employee case. Surely sex discrimination cannot mean one thing for equal protection purposes and another for Title VII. One should consider how Aiello might have been decided had it come to the Supreme Court as a Title VII case.

Title VII of the Civil Rights Act of 1964 deals explicitly with

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32. Cf. footnote 20 in Aiello:
Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id. at ___, 94 S.Ct. at 2492 n.20.

33. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (Title VII held to prohibit tests and other requirements for employment which discriminate against certain racial groups and which have no relation to job performance, regardless of employer's intent in using such tests).

34. Id. at 431.

35. Id. at 432.

36. Aiello did not come to the Supreme Court in a Title VII context because it did not involve an employer within the meaning of the Act. See 42 U.S.C. § 2000e-2(a) (1970), as amended, (Supp. II, 1972). While a state may be an employer within the meaning of Title VII, Aiello did not involve a complaint by state employees.
the employment relationship. The relevant section mandates that covered employers must not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's 

. . . sex . . . ."37 The Act established the Equal Employment Opportunity Commission for the purpose of administering the law.38 Guidelines promulgated by the E.E.O.C. are only interpretative, but the Supreme Court has held that they are entitled to "great deference."39 In applying Title VII's mandate for employers, the courts have fashioned standards which permit some discriminatory practices if such practices can be justified by business necessity. Thus to take the classic example, it is acceptable for an employer to fill secretarial positions by hiring only applicants who can type, even though it may be much more difficult, for instance, for Blacks than whites to obtain the necessary training and experience.40 But "business necessity" has been narrowly construed and the test is not merely whether there exists a business purpose for adhering to a challenged practice.41 Although Title VII refers to the intent of an employer,42 the Supreme Court has held that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."43 Thus courts have held that an employer must show the existence of "an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."44 No acceptable alternative policies or practices can be available which would better accomplish the business purpose advanced,

39. Udall v. Tallman, 380 U.S. 1, 16 (1965). In exercising its interpretative function, the E.E.O.C. has found that:
   Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.
29 C.F.R. § 1604.10(b) (1973).
41. Id. at 798.
or accomplish it equally well with a lesser discriminatory impact. The burden, under Title VII, is upon the employer to show that the policy complained of is not violative of the Act.

An employer does not, under Title VII, necessarily insulate himself from a violation based on sex discrimination merely by showing that a majority of employees hired for a given position are women. Thus, in Phillips v. Martin Marietta Corporation, an employer denied a charge of sex discrimination based upon a policy of not hiring women with pre-school-age children. The employer had prevailed in the District Court on a showing that at the time the complainant had applied, 70-75% of the applicants for the position she sought were women, and 75-80% of those hired for the position were women. Hence it was contended that no question of bias against women as such was presented. But the Supreme Court found that the Civil Rights Act "requires that persons of like qualifications be given employment opportunities irrespective of their sex." The employer had engaged in one hiring policy for women having preschool age children, and another for those men who were similarly situated.

Martin Marietta is interesting because there was a lack of identity between the group excluded from employment and gender as such. The employer didn't discriminate against women per se; it discriminated against women with pre-school-age children. But since there are, in fact, men with preschool age children, the Court was able to find discrimination. In effect, the Court looked at a definable group (people with preschool age children) and found different standards for men than for women in that group. An identical analysis would seem quite impossible where the group consists of pregnant persons.

Assuming that some comparison is necessary in order to establish discrimination, it is still possible to make comparisons by defining the applicable group as something more expansive than

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47. Closely related to the business necessity defense is the concept of bona fide occupational qualifications (b.f.o.q.) which is a comparable defense in sex discrimination cases involving refusal to hire members of one sex for certain jobs. The courts have likewise narrowly construed this exception to the Act. See Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), rehearing denied, 471 F.2d 650 (5th Cir. 1973); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971).
"pregnant persons." *Gilbert v. General Electric Company* did just that. The case involved a question of whether the employer had violated Title VII by providing disability benefits for all disabilities except pregnancy. In finding against the employer, the court noted:

> While pregnancy is unique to women, parenthood is common to both sexes, yet under G.E.'s policy, it is only their female employees who must, if they wish to avoid a total loss of company induced income, forego the right and privilege of this natural state. . . . Thus, women are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience. The disability is undisputed and inextricably sex-linked. To isolate such a disability for less favorable treatment in a scheme purportedly designed to relieve the economic burden of physical incapacity is discrimination by sex.

Men can become parents without a direct loss of income. Women apparently cannot. Thus one sex is treated differently by society than the other, though both are similarly situated—*i.e.*, in the process of becoming parents. This is sophistry, of course, because it is a "biological fact" that only the female parent is disabled and hence receives no income. But it is no more sophistic than the proposition that there is no sex discrimination where pregnant women receive no benefits while nonpregnant persons do. Although it can, in most cases, be said that both parents suffer a loss of income and financial deprivation in the process of becoming parents, the mutual loss is because *her* employer refuses to treat *her* disability as a disability.

52. While beyond the scope of this note, it is interesting to note that the Supreme Court failed even to consider the proposition that the California disability program places women in the position of having to choose between employment and pregnancy, thus curtailing their interest in having children. Such an interest has been recognized by the Supreme Court as constitutionally protected. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), Mr. Justice Douglas, writing for seven members of the Court, found the interest in procreation to be a basic one within the protection of the fourteenth amendment:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.

*Id.* at 541. This principle, so eloquently enunciated by Mr. Justice Douglas more than thirty years ago, has proven to be a lasting one, for two years ago the Court noted:

> If the right to privacy means anything, it is the right of the individual, married
having children out of wedlock, the disparity of treatment toward people becoming parents is manifest.

Likewise the “group” may be defined as all employees, and in fact, Title VII of the Civil Rights Act of 1964 mandates that all employees receive the same “terms, conditions, or privileges” of employment without regard to sex. Since courts must look at consequences as well as form, the relevant inquiry would seem to be what it is that one group has which another group does not. In many large corporations, a male employee starting with the company has an expectation that whatever disability may jeopardize his livelihood, he will be protected from both ruinous financial loss and jeopardization of career potential by company rules which pay his income and protect his seniority rights while he is necessarily out of work. But a female employee cannot enjoy the same expectation if she is of child-bearing age. If she becomes pregnant (and a statistically verifiable number of American women will become pregnant) she will forfeit her income and possibly her seniority rights. The relevant question, in the words of Title VII, is whether she is discriminated against with respect to compensation, terms, conditions, or privileges of employment because of her sex. One court, in Wetzel v. Liberty Mutual Ins.

or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.


A recent decision concerning the validity of a school system’s policy of terminating a teacher’s employment at the end of the sixth month of pregnancy took into consideration the principle espoused in these two Supreme Court cases and, in addition, considered an even more recent Supreme Court decision, which held that a woman has a constitutional right to terminate her pregnancy. Roe v. Wade, 410 U.S. 113 (1973). In light of all the relevant precedents, the court concluded:

If the right to maintain freedom from interference with terminating a pregnancy is a right of the magnitude described by the Supreme Court . . . certainly the interests here involved is [sic] entitled to at least similar recognition.

Buckley v. Coyle Public School System, 476 F.2d 92, 96 n.3 (10th Cir. 1973). See also Black v. School Comm., ___ Mass. ___, 310 N.E.2d 330 (1974), where the court held that teachers were entitled to sick pay whether or not one bases the holding on a theory of sex discrimination or on a notion that denial burdens fundamental freedom of choice in marriage and family life.

But considerations such as those were not even considered by the Court in Aiello, which perceived discrimination not against “persons or groups,” but only an “asserted under-inclusiveness of the set of risks that the State has selected to insure.” Geduldig v. Aiello, ___ U.S. ___, ___ 94 S.Ct. 2485, 2491 (1974). Had the Court approached the issue from the standpoint set out above, it is presumed that the burden would have shifted, with the State being required to show a compelling interest for its interference with so fundamental a right as whether to bear or beget a child.

Co., heard the argument that exclusion of pregnancy benefits did not constitute sex discrimination because pregnancy is *sui generis*. The court responded by taking judicial notice of the fact that pregnancy is certain to occur in a statistically expectable number of employees and that pregnancy is a condition limited to women by "biological law." One may infer that the court found discrimination in the fact that the employer's plan was intended to cover all disabled employees but excluded a sizeable number of women who, statistically speaking, would in fact be disabled.

In the disability plan at issue in *Wetzel*, and in many large disability plans, a "term, condition, or privilege" of employment is the expectation that disabilities, incurred for whatever reason, will not be financially ruinous. This is, however, an expectation for male employees, not female employees. It could be said that an employer who covered every conceivable disability except pregnancy, and who included both men and women equally as recipients of the benefits therein, was "neutral," that said policy is "fair in form," and that no improper motivation is evidenced. The Supreme Court believed California's disability insurance plan to be such. The context in which *Aiello* came before the Court was such that considerations of whether the Court should tell a state how to spend its money were paramount in the minds of the majority. But the Civil Rights Act of 1964 requires more than neutrality, more than fairness in form, and more than pure motivation. Employment practices which cover male employees for whatever disability, yet deny coverage to females for a condition to which they alone are heir, are inherently discriminatory. The consequence of these practices is to perpetuate a history of inequality based on inherent physical characteristics and indeed to penalize certain employees for being women.

56. The discriminatory nature of employer policies which single out pregnancy for special treatment is even more obvious in the case of "sick pay." Frequently, employees will be entitled to a certain number of "sick days" per year and these are often cumulative, so that an employee who has remained healthy for several years will be well covered should he become temporarily disabled. Since each employee is guaranteed so many days sick leave per year, it should make no difference to the employer why an employee wishes to use his sick days—so long as the employee is genuinely disabled and unable to work. Yet here again, pregnancy has frequently been an excluded disability. *See In re Bd. of Educ. v. State Div. of Human Rights, 42 App. Div.2d 854, 346 N.Y.S.2d 843 (2d Dep't 1973).*
Pregnancy Disability

It is unfortunate that the majority included footnote 20 in the Aiello decision, since the narrow view expressed therein as to what constitutes sex discrimination is at odds with the broader and more enlightened view articulated by the Supreme Court in interpreting the mandate of the Civil Rights Act of 1964. The Aiello decision can and already has proven stultifying to federal courts considering cases arising under Title VII of that Act. Even had the majority admitted that California's policy did discriminate against women, it might have found, on a Reed v. Reed analysis, that the challenged classification was reasonable and substantially related to the object of the legislation.

Courts, in considering the validity of comprehensive disability or paid sick leave programs which exclude disability due to pregnancy, should not consider footnote 20 of Aiello to be the definitive word on whether pregnancy discrimination is sex discrimination. They should look to the consequences of such an exclusion: that male employees are covered for all disabilities while female employees are not; that female employees are expected to drop out of the work force once they become parents while male employees are not; and the fact that women are penalized financially because they alone get pregnant. Read as a whole, Aiello indicates that the Court's focus was on the similarity of California's program to other welfare-type programs. The

59. See CWA v. A.T.& T. Co., Long Lines Dep't, 8 FEP Cas. 529 (S.D.N.Y. July 30, 1974) where the court interpreted Aiello to mean that denial of pregnancy benefits is not sex discrimination. The court "illustrated" the Supreme Court's point by stating that "a woman's organization (e.g. a woman's club or actresses' workshop) could hardly be taxed with discriminating on grounds of sex (or gender) if its medical insurance policies provided no coverage for pregnancy-related disabilities." Id. at 531 n.1. But then neither would there be racial discrimination in a land where all were one race.
61. One recent case, Vineyard v. Hollister School Dist., 8 FEP Cas. 1009 (N.D. Cal. Nov. 1, 1974), has indeed taken this tack and distinguished Aiello on the ground that it was decided in a different analytical framework than that faced by courts in Title VII cases.
62. It is a common sexual stereotype that a woman's place is in the home with her children. One may infer that this stereotype is one of the reasons why pregnancy has not been thought of as just another disability by employers. For example, in Gilbert v. General Elec. Co., 375 F. Supp. 367, 378 (E.D. Va. 1974), the employer believed that 40% of its women employees who take maternity leave do not return. It contended, therefore, that disability benefits would be the equivalent of giving women termination pay benefits not available to non-pregnant employees. But the court pointed out that the termination pay problem exists with all workers who do not return to work following sickness or accident.
focus was certainly not on whether such a program is or is not sex discrimination.

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