



## POSTPARTUM RECESSION

By Charlotte Fishman

Many a parent has admonished a child with “See these gray hairs? You’ve taken years off my life!” But how would you react if your mother complained that you had taken a bite out of her pension?

Well, that’s what happened to mothers who spent their entire careers in the telecommunications industry. Women who got pregnant before the passage of the Pregnancy Discrimination Act in 1978 were treated differently than employees who were temporarily disabled for other reasons.

Under AT&T’s seniority system, pregnant women were forced to go on “personal” leave while still able to work. When they returned to work after the birth, they received a total of 30 days “service” credit, regardless of the actual duration of the leave.

By contrast, employees temporarily disabled by conditions other than pregnancy continued to accrue “service” credit during their leaves, and retained full seniority when they returned to work. AT&T kept track of the new mothers’ loss of seniority by moving their “date of hire” forward — as if they had joined the company at a later time than they did — in order to create a Net Credited Service date.

After the Pregnancy Discrimination Act made clear that discrimination against

pregnant employees is sex discrimination prohibited by Title VII, AT&T changed its leave policy to treat pregnant women the same way as other temporarily disabled employees. It did not, however, restore seniority to the women who had been discriminated against in the past.

Even worse, AT&T continued to use the Net Credited Service date for making employment decisions based on seniority, subjecting these women to a lifetime of job discrimination. Since the mothers had less seniority than other employees who began on the same day and had taken the same amount of time off for disabilities other than pregnancy, they were disadvantaged at every turn for competitive benefits — shift preferences, overtime, promotional opportunities — and burdens, like layoffs.

Adding insult to the injury of laboring under this unjust system for the duration of their careers, AT&T used the new date of hire to calculate end-of-employment benefits, such as early retirement programs and pensions. The present day use of this discriminatory measure of seniority forced these mothers to work longer or accept less money than employees whose dates of hire were not affected by pregnancy discrimination.

When Noreen Hulteen retired, she sued AT&T for reducing her pension benefits because of pregnancy leaves she took long ago,

arguing that using her Net Credited Service date to calculate retirement benefits violated Title VII’s prohibition against sex discrimination. AT&T vigorously defended its practice. When it lost at the trial court level on summary judgment, AT&T appealed. After a three-judge panel ruled in AT&T’s favor, the 9th U.S. Circuit Court of Appeals decided to rehear the case *en banc*.

AT&T urged the full court to dismiss Hulteen’s lawsuit as an unfortunate, but legally irrelevant, relic of the past to be filed away in the “life is unfair” category. Its use of the Net Credited Service date was not a discriminatory act, not at all — it was a mere “effect” of past discrimination that was not challenged in a timely manner.

In fact, AT&T argued, it would be unfair to the company if it were forced to pay these women the same pensions as other employees who worked the same amount of time because (1) its actions were legal at the time, and (2) forcing it to credit these mothers with lost seniority when calculating present day benefits would amount to illegal retroactive application of the Pregnancy Discrimination Act.

These are dubious propositions, at best. Title VII made discrimination on the basis of sex illegal in 1964, and the Equal Employment Opportunity Commission issued guidelines requiring equal treatment of pregnancy related disabilities in 1972.

AT&T relied on the Supreme Court’s 1976 opinion by Justice William Rehnquist, *General Electric Co. v. Gilbert*, 429 U.S. 125, which led Congress to enact the Pregnancy Discrimination Act. But *Gilbert* held only

that pregnancy discrimination is not necessarily sex discrimination, and *Gilbert* was decided in the context of not providing paid disability benefits to pregnant employees. One year later, in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), Justice Rehnquist wrote that imposing burdens on pregnant employees by taking away seniority is sex discrimination.

In a concurring opinion, Justice John Paul Stevens explained the difference between *Gilbert* and *Satty* in very concrete, easy-to-understand terms: Not providing disability benefits for pregnancy leave creates a one time financial “hit” for the affected employee that is over with the pregnancy. Losing seniority, on the other hand, has consequences beyond the term of the pregnancy, because it affects ongoing employment benefits and relationships. This describes AT&T’s policy precisely.

Of course, arguing over whether or not AT&T’s facially discriminatory policy of not crediting women on pregnancy leave with the same seniority as other temporarily disabled employees constituted a violation in the 1960s and 1970s begs the question. The issue before the court was whether AT&T violates Title VII when it continues to use unadjusted Net Credited Service dates to calculate retirement benefits in 2007.

In the 30 years since the discrimination act was enacted, there have been a spate of lawsuits and settlements within the telecommunications industry addressing this very issue. It’s remarkable that AT&T didn’t alter its practice 16 years ago, when the 9th Circuit ruled that Pacific Bell violated Title

VII by using an unadjusted Net Credited Service date to deny Lana Pallas eligibility for early retirement. *Pallas v. Pacific Bell*, 940 F.2d 1324 (1991), cert. denied 502 U.S. 1050 (1992). Suffice it to say that the *en banc* majority was not amused by this flouting of the court’s authority.

It’s hard to understand why AT&T is fighting so hard not to pay these women their due. While “grandfathering in” benefits for older workers is a well-established practice, what’s the business case for “grandmothering in” discriminatory treatment for women who had babies between 1964 and 1978?

Indeed, the issue at stake goes well beyond the retiring mothers of AT&T. It poses the larger question of whether Title VII provides redress to employees whose employers choose to retain facially discriminatory systems that perpetuate past discrimination, or whether employers like AT&T will escape accountability for their actions.

The 9th Circuit *en banc* majority is surely correct in reaffirming the validity of the *Pallas* decision and holding that AT&T’s practice of excluding pre-discrimination-act pregnancy leave time when making present-day retirement calculations violates Title VII. *Hulteen v. AT&T*, 2007 U.S. App. LEXIS 19586. After all, the purpose of Title VII is to eliminate discrimination, not enshrine it in law.

**Charlotte Fishman** is a San Francisco employment attorney and executive director of Pick Up the Pace, a nonprofit organization that aims to eliminate barriers to women’s advancement in the workplace.

## Sentencing Guidelines Meant to Crack Down on Drugs are Aiding Traffickers

By Kara Gotsch

This month, the Supreme Court heard a case that touched on a 20-year-old controversy involving justice and crack cocaine. The court will rule early next year in *Kimbrough v. United States* whether a federal district

judge’s more lenient sentencing decision, based on his disagreement with policy that punishes crimes involving crack cocaine more harshly than those involving powder cocaine, is reasonable. The case will help judges determine their ability to sentence below an advisory guideline range. Unfortunately,

the outcome will leave in place the excessive mandatory penalties that the *Kimbrough* judge found unjust.

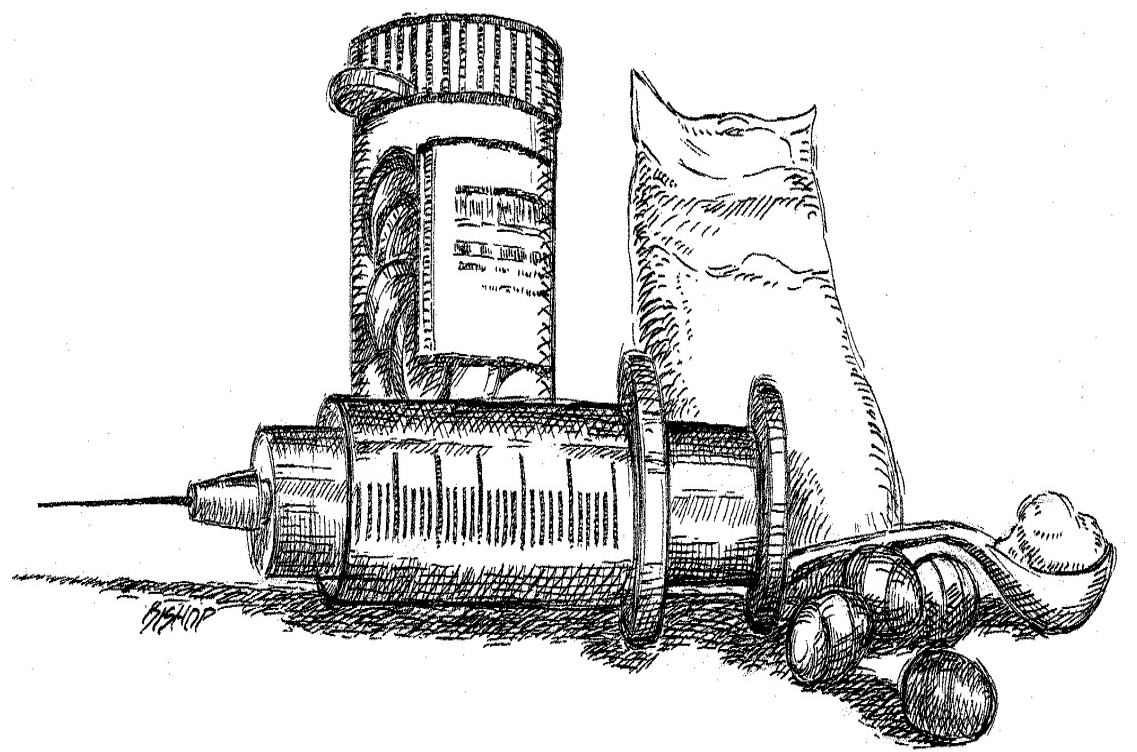
The case of Derrick Kimbrough stems from his 2005 guilty plea in Virginia for possession with intent to distribute 56 grams of crack cocaine and possession of a firearm. Kimbrough, a Desert Storm veteran with no previous felony convictions, was prosecuted in federal court, where penalties involving crack cocaine are harsher than in state systems. As a result, instead of receiving a sentence of about 10 years under Virginia law, he faced a federal sentencing guideline range between 19 and 22 years.

Federal District Judge Raymond A. Jackson, who presided over Kimbrough’s case, called the recommended guideline sentence “ridiculous” and instead sentenced Kimbrough to 15 years, the minimum required by mandatory sentencing laws.

The sentencing range in this case and many other drug-related cases is tied to mandatory minimum sentences passed by Congress in the 1980s. Lawmakers intended to impose tough penalties on high-level drug market operators, such as heads of drug organizations and major drug traffickers.

However, the small quantities that trigger mandatory minimum sentences for crack cocaine offenses largely entangle defendants with bit roles in the crack trade. In 2006, more than 60 percent of federal crack cocaine defendants had only low-level involvement in drug activity, such as street-level dealers, couriers or lookouts.

State criminal justice systems are well equipped to handle these kinds of cases, but are unable to pursue the importers and international traffickers who bring drugs into the country. Stopping drugs from crossing America’s borders is the domain of federal law enforcement, but federal



resources are being misdirected.

Had the drugs Kimbrough possessed been solely powder cocaine, the amount would not have triggered a mandatory minimum sentence or the lengthy sentencing guideline range. Indeed, it takes 5,000 grams of powder cocaine, 100 times the amount of crack cocaine Kimbrough possessed, to warrant a 10-year mandatory. This dramatic sentencing disparity exists despite the fact that the drugs are pharmacologically identical — crack is made by cooking powder cocaine with baking soda and water. Both drugs produce equally harmful effects on the body.

Is 10 years in prison for a non-violent drug offense money well spent? The U.S. Justice Department says yes, but many in Congress disagree and a bipartisan group is seeking to change the crack cocaine sentencing law.

Since May, three proposals to reform sentencing laws have been introduced in the Senate. Each bill would reduce the quantity disparity between crack and powder cocaine necessary to trigger a mandatory minimum sentence. One proposal that would equalize the penalties for crack and powder cocaine goes the furthest to shift federal law enforcement focus from street level dealers, like Kimbrough, toward high-level traffickers.

The momentum in Congress is buoyed by a recent report from the U.S. Sentencing Commission, which finds that the penalties for cocaine offenses “overstate the relative harmfulness of crack cocaine” and “sweep too broadly and apply most often to lower-level offenders.” The commission has recommended statutory reforms to Congress and has proposed an amendment to decrease the

guideline offense level for crack cocaine offenses. The amendment could reduce crack sentences by 15 months on average and would go into effect Nov. 1, as long as Congress does not act to reject it. However, it would not change the statutory mandatory minimums.

The Supreme Court’s consideration of the magnitude of discretion afforded to federal judges is a step toward creating a more just sentencing system. However, regardless of the court’s action on this case, without Congress altering the harsh mandatory penalties for crack cocaine offenses, America’s sentencing policy will remain unreasonable.

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