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Can Employers Exclude Women Because of Concerns for the Health and Safety of Potential Fetuses?

Mary E. Becker

Can employers exclude women because of concerns for the health and safety of potential fetuses?

by Mary E. Becker

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.,
v.
Johnson Controls, Inc.
(Docket No. 89-1215)

Argument Date: Oct. 10, 1990

This is the first time the Court has reviewed an employer policy limiting women's employment opportunities because of health risks to the next generation. Six lower federal or state courts have considered such cases, and the ultimate legal rules could affect women's access to millions of hazardous jobs.

ISSUE

Does an employer policy excluding from certain hazardous jobs all women who cannot show sterility violate Title VII of the Civil Rights Act of 1964?

FACTS

In 1977, Johnson Controls adopted a policy recommending that women who wanted to have children in the future should avoid lead-exposed jobs. All jobs were, however, open to women. Women, but not men, were warned of reproductive risks associated with lead; women were told that, in posing fetal risks, lead exposure was like smoking. Despite these warnings, between 1977 and 1982, eight women (out of an unknown number) became pregnant while holding lead-exposed jobs. Although there were no birth defects or apparent abnormalities or identifiable problems as a result of these pregnancies, one child did have an elevated blood-lead level.

In 1982, Johnson Controls modified its policy to exclude all women who could not show sterility from jobs involving a certain level of lead exposure. Under this policy, in effect, women who cannot show sterility are banned from all manufacturing and some non-manufacturing jobs in Johnson Controls' lead battery plants. These plants are in the Globe Battery Division of Johnson Controls, Inc., and are located in a number of states.

Women holding production jobs in these plants at the time the policies were enacted were transferred without loss of benefits or base wages unless they could keep their blood-lead levels below a specified level or show sterility. Since then, women have not been hired for such jobs unless they can show sterility.

This lawsuit challenging Johnson Control's policy at these plants was filed in the U.S. District Court in the Eastern District of Wisconsin on April 6, 1984, by eight named plaintiffs and their union, the UAW. The plaintiffs have been certified as representing a class of similarly situated employees at the following Globe Battery plants: Garland, Texas; Holland, Ohio; Fullerton, Calif.; Owosso, Mich.; Louisville, Ky.; Texarkana, Ark.; Bennington, Vt.; Middletown, Del.; and Atlanta, Ga.

One of the eight named plaintiffs is a male employee, Donald Penny (a resident of Middletown, Del.), who lost his job at Johnson Controls' Middletown, Del., plant when he requested a transfer to a low-lead area while he and his wife tried to conceive. The transfer was denied and Donald Penny quit, according to the plaintiffs' complaint, because of the harassment and intimidation he faced after making this request. Donald Penney's wife, Anna May Penney, is also a named plaintiff who worked at the Middletown, Del., plant. She objected to being required to wear a respirator at lower blood-lead levels than men.

Another plaintiff, Elsie Nason (a resident of Hoosick Falls, N.Y.), was 50 years old and divorced when she was removed from her job as a site terminal welder at the Bennington, Vt., plant. Although she was transferred without loss of base wages, she did lose incentive wages and, according to her affidavit, the satisfaction of a welding job she had enjoyed. Another plaintiff, Mary Craig (a resident of Newark, Del.), elected sterilization rather than the insecurity of trying to retain her job by maintaining blood lead levels below the specified level at the Middletown, Del., plant. Shirley Jean Mackey (a resident of Atlanta, Ga.) was transferred from a job as a "COS loader" at the Atlanta, Ga., plant to a job as a container punch operator. Other named plaintiffs are Lois Sweetman (a resident of Golts, Md., who worked at the Middletown, Del., plant), Linda Burdick (a resident of Pound, Vt., who worked at the Bennington, Vt., plant), and Mary Estelle Schmitt (a

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resident of Cambridge, N.Y., who worked at the Bennington, Vt., plant).

After discovery, the district court granted the company's motion for summary judgment. The district court held that the company policy was gender neutral and its disparate impact justified by business necessity. 680 F.Supp. 309.

The Court of Appeals for the Seventh Circuit, sitting *en banc*, affirmed. 886 F.2d 871. Although the Seventh Circuit did not agree that the policy could be characterized as gender neutral on its face, the court did agree that the business necessity defense was available. Once the employer had shown risk of fetal harm through maternal exposure, the burden shifted to the employees to show that the risks associated with paternal exposure were as serious as the risks associated with maternal exposure (and that differential standards were therefore inappropriate). In addition, the court regarded the policy as justified by the bona fide occupational qualification ("BFOQ") defense available in Title VII disparate treatment cases.

Four of the 11 judges on the Court of Appeals for the Seventh Circuit dissented, including two conservative Reagan appointees, Judges Posner and Easterbrook. Judges Posner and Cudahy dissented on the ground that, although Johnson Controls might prevail on a BFOQ defense, the ruling for Johnson Controls on summary judgment was inappropriate and premature given the conflicting evidence in the record on paternal reproductive risk. Judges Easterbrook and Flaum dissented on the ground that policies excluding all women who cannot show sterility are necessarily violations of Title VII; no defense is available in such cases.

After the Seventh Circuit's decision, a California appellate court ruled for the employee in a case challenging Johnson Control's policy as implemented at its Fullerton, Calif., plant. The employee, Queen Elizabeth Foster, applied for a protected job and was denied employment when she did not produce evidence of sterility. The California Court of Appeals for the Fourth District, Division Three, held that Johnson Controls' policy violates California antidiscrimination law. This decision is now final; the California Supreme Court has declined review. *Johnson Controls, Inc. v. California Fair Employment & Housing Commission*, 267 Cal. Rptr. 158 (Cal. App. 4 Dist. 1990), *review denied* (Calif. S.Ct., May 17, 1990). Thus, there are now inconsistent legal rules applicable to Johnson Controls' battery plants in California and elsewhere.

BACKGROUND AND SIGNIFICANCE

The United States Supreme Court's decision will be important on two levels: policy and statutory construction. The decision will determine whether many hazardous jobs (estimates run as high as 20 million) are open to women who cannot show sterility. The Court's Title VII holding will determine how sex-specific employment restrictions are analyzed under Title VII.

The Supreme Court's decision will not, however, affect the legality of policies in California under California law. Regardless of how *Johnson Controls* is decided at the federal level, California employers will not be able to exclude women to preserve potential fetal health.

On the level of policy, the employer argues that reasonable restrictions on the employment of women to ensure fetal safety are desirable. Johnson Controls tried a less restrictive policy (in 1978–1982, when it warned women of risks) and that policy was ineffective (fertile women continued to work in high-lead areas and eight women in such areas became pregnant).

The employees argue that employers are not the appropriate decisionmakers in this area because employers tend to exclude women from hazardous jobs only when women are "marginal" workers. Policies excluding all fertile women have not tended to arise when women are "essential" workers, i.e., when most workers are women. Yet such jobs are often as hazardous as men's job. The employees argue that if employers can decide when to restrict women's job opportunities because of fetal risks, women will continue to face identical or equivalent risks in women's jobs, but for the lower pay and weaker medical benefits typically associated with women's jobs.

In deciding that the risks to future potential fetuses are outweighed by the advantages of a hazardous job, a woman must weigh, not only her own needs for income and medical insurance, but also those of her living children and her other economic responsibilities. According to the employees, when an employer assumes that fetal health should be protected by exclusionary policies, it fails to appreciate women's economic responsibilities to their living and unconceived children.

The employees also note that Congress has designated OSHA as the appropriate decisionmaker on questions of workplace safety. After extensive hearings on a new lead standard in the seventies, OSHA determined that there was no scientific basis for creating differential occupational lead exposure standards for women and men.

Johnson Controls points out that it has a duty, recognized in tort, to avoid harm to future generations. But the employees argue that employer decisions are unlikely to protect future generations when the danger arises from low-paid women's jobs with weak medical benefits. It is not in the interest of living or potential children to have their mothers working in low-paid hazardous women's jobs with weak medical benefits rather than higher-paying hazardous men's jobs with more robust medical benefits.

In addition, the workers say employers should be concerned about tort liability as a result of *paternal*, as well as maternal, exposure. Such suits would be difficult to win (no child has ever won a litigated case alleging harm through parental occupational exposure). But there have been more documented allegations of harm in general associated with paternal occupational exposure than with maternal occupational exposure. And for lead, many experts (some of whose affidavits are in the record) regard current evidence of reproductive risk to be as serious for men as for women.

The statutory questions are complex. The initial question is whether one should analyze Johnson Controls' policy as a form of "disparate treatment" or "disparate impact." Disparate treatment refers to differential treatment of people on the basis of their race or sex. This type of case is based on the language of the statute, which provides that an employer cannot "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Title VII § 703(a), 42 U.S.C. § 2000e-2(a)(2).

There is a single statutory defense to a differential treatment case of sex discrimination, the so-called "BFOQ" defense: such discrimination is permissible "in those certain instances where. . . sex. . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Title VII § 703(e), 42 U.S.C. § 2000e-2(e). This defense has been rather narrowly interpreted.

A disparate impact case is a challenge to a facially neutral policy or practice which has a disparate impact on women or a minority group. Most disparate impact cases have challenged tests, educational qualifications, or similar "objective" criteria. This cause of action is not grounded explicitly in any precise statutory language, but is based on a 1971 Supreme Court case recognizing this cause of action and describing a defense: business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Business necessity is a relatively flexible defense. In recent cases, the Supreme Court has indicated that the employer need only articulate a legitimate business reason. See, e.g., *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989).

What is at stake in deciding whether to use disparate treatment or disparate impact to analyze Johnson Controls' fetal vulnerability policy? The burden on the employer is much lighter in a disparate impact case. In a treatment case, once the plaintiff establishes that the employer actually treats women and men differently, the employer cannot merely justify a legitimate business purpose but must establish that sex is a BFOQ for the job in question.

Although the Johnson Controls policy overtly treats women and men differently (only women are required to show sterility to hold certain jobs), the district court analyzed the case as disparate impact rather than disparate treatment. It explained that when a policy applies to only women, there is only a presumption that it is facially discriminatory, and that presumption can be rebutted by showing that there are risks of harm to the next generation as a result of maternal occupational exposure. After determining that disparate impact applied, the district court found that the employer had borne the burden of establishing a defense of business necessity.

The Court of Appeals for the Seventh Circuit agreed with this result—the application of the business necessity defense to Johnson Controls' policy—but rejected the characterization of the policy (which applied only to women) as facially neutral. Instead, the Seventh Circuit held that the business necessity defense was available in disparate treatment cases challenging fetal vulnerability policies. In addition, the Seventh Circuit held that sex was justified as a bona fide occupational qualification for the jobs in question.

It seems unlikely that the Supreme Court will hold that the policy is not facially discriminatory when it so clearly discriminates on its face between women and men. (It is also unlikely that the Court will allow the business necessity defense in a treatment case.) Indeed, in their briefs the parties agree that the Johnson Controls' policy is overt disparate treatment and that the key question is the availability of the BFOQ defense.

Thus, in the Supreme Court, the key question is the scope of the BFOQ defense. How the Court will rule on this issue is not clear. In the past, sex has been recognized as a legitimate BFOQ in narrow circumstances somewhat different from Johnson Controls' situation. In one of the rare cases recognizing sex as a BFOQ on safety grounds, the jobs were contract positions as guards in a high-security male prison, 20 percent of whose occupants were sex offenders. In that case, the Supreme Court regarded sex (male) as a BFOQ because a woman's "very womanhood" could threaten prison security in the event a sex offender or other prisoner attacked her. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977). The Court indicated that "an employer could rely on the bfoq exception. . . by proving 'that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'" Id. at 333 (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

Although the existing cases do not recognize a BFOQ defense in circumstances precisely like Johnson Controls, there is some support for extending the BFOQ to this situation. In a 1985 age discrimination case, the Court recognized age (less than 60) as a BFOQ defense for flight engineers. In that case, arising under the Age Discrimination in Employment Act ("ADEA"), the Court explained that the BFOQ analysis must "'adjust[] to the safety factor'" where "'reasonably necessary' to further the overriding interest in public safety." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)(quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)). The Court concluded that "[i]n adopting [the BFOQ] standard, Congress did not ignore the public interest in safety." Id. at 419.

The language of the basic BFOQ provisions in Title VII and the ADEA are identical: Sex or age discrimination is permissible "where [sex or age]. . . is a bona fide occupational qualification reasonably necessary to the normal operation of the [or that] particular business." ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1); Title VII § 703(e), 42 U.S.C. § 20002-2(e). But Title VII does include additional language that might be interpreted as limiting the availability of the BFOQ in the context of fetal vulnerability policies. In 1978, Congress amended Title VII to include pregnancy and related medical conditions as forms of sex discrimination. (This amendment was designed to overrule *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Court had held that distinctions based on pregnancy were not forms of sex discrimination.)

The Pregnancy Discrimination Act goes on to state that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes. . . as other persons not so affected but similar in their ability or inability to work." Title VII § 701(k), 42 U.S.C. 2000e(k). This language, read literally, states that female fertility (a medical condition related to pregnancy) cannot be the basis for limiting women's employment opportunities unless fertile women are treated like others who are similar in ability *to do the work*.

The Court is most likely to take one of two approaches: hold that all policies limiting the employment of fertile women are impermissible distinctions based on sex, or hold that some policies are permissible (under the BFOQ provision) if supported by sufficient evidence. The Court is less likely to affirm the Seventh Circuit's holding that once the employer shows evidence of fetal risk through maternal exposure, the burden is on the employees to show identical risk through paternal exposure. In imposing this burden on the employees, the Seventh Circuit relied on *Wards Cove Packing Co. v. Atonio*, 109 S.Ct 2115 (1989), a Supreme Court case describing the business necessity defense in a disparate *impact* case. *Johnson Controls* is, however, a disparate *treatment* case. The Supreme Court placed a somewhat similar burden on the employer in a case in which the employee had shown that differential *treatment* on the basis of sex was *a* significant factor in an employment decision. See *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

In reaching its decision on the meaning of Title VII, the members of the Court are likely to be strongly influenced by their views on the underlying policy question: Should individual employers be able to determine whether to close hazardous jobs to women because of the risk of fetal harm? In the end, a number of perceptions are likely to be key: perceptions about the hazards associated with women's (low-paying) jobs and the importance of women's economic responsibilities; about the likelihood of women's hazardous jobs being closed to women to protect fetal health; about the likelihood of tort liability being imposed on employers for children of female (but not male) workers; about the relative risks associated with maternal and paternal occupational exposure; and about the nature of risk and our ability to avoid it entirely.

ARGUMENTS

For International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. *(Counsel of Record, Marsha S. Berzon, 177 Post Street, San Francisco, CA 94108; telephone (415) 421-7151):*

1. Johnson Controls' fetal protection policy constitutes facial discrimination on the basis of sex.
2. Johnson Controls' fetal protection policy cannot be justified as a bona fide occupational qualification within the meaning of Section 703(e) of Title VII.

For Johnson Controls, Inc. *(Counsel of Record, Stanley S. Jaspan, Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202; telephone (414) 271-2400):*

1. Title VII allows an employer to adopt a gender-drawn fetal protection policy in certain narrow circumstances under the bona fide occupational qualification defense of Section 703(e); Johnson Controls' policy meets this standard.
2. The judgment below should be affirmed because a) there were no issues of fact with respect to risks associated with paternal exposure so disputed that reasonable fact-finders could disagree; and b) the protesting employees had not suggested any less restrictive alternatives to the challenged policy.

AMICUS BRIEFS

In Support of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.

1. The United States *(Counsel of Record, Kenneh W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217)* and the Equal Employment Opportunity Commission *(Charles A. Shanor, General Counsel, EEOC, Washington, DC 20507)* filed a brief arguing that the only defense to the overt disparate treatment challenged in this case is the bona fide occupational qualification defense of Section 703(e) and that Johnson Controls had not met its burden of justifying this policy under the bona fide occupational qualification defense.
2. The NAACP Legal Defense and Educational Fund, Inc. and the National Black Women's Health Project *(Counsel of Record, Ronald L. Ellis, 99 Hudson St., 16th Floor, New York, NY 10013; telephone (212) 219-1900)* filed a brief arguing, among other things, that minorities are particularly vulnerable to policies that protect health by excluding certain classes or workers from the workplace, and that good-paying jobs (with good health insurance) are essential for the well-being of minority women and the living children for whom they are economically responsible.
3. American Public Health Association; American Nurses

Association; American Society of Law and Medicine; Association for Women in Science; Department of Public Health, Commonwealth of Massachusetts; Environmental Defense Fund; Executive Office of Labor, Commonwealth of Massachusetts; Occupational and Environmental Reproductive Hazards Clinic and Education Center; Society of American Law Teachers; Toxics Use Reduction Institute; and 20 individuals *(Counsel of Record, Nadine Taub, Rutgers University School of Law, 15 Washington St., Newark, NJ 07102; telephone (201) 648-5637).*

4. Equal Rights Advocates, the NOW Legal Defense and Education Fund, National Women's Law Center, and Women's Legal Defense Fund *(Counsel of Record, Susan Deller Ross, Georgetown University Sex Discrimination Clinic, 600 New Jersey Ave., N.W., Washington, DC 20001; telephone (202) 662-9640).*
5. American Civil Liberties Union and the American Civil Liberties Union-Wisconsin; Amalgamated Clothing and Textile Workers Union; and 46 other organizations and 18 individual workers *(Counsel of Record, Joan E. Bertin, ACLU Foundation, 132 West 43rd St., New York, NY 10036; telephone (212) 944-9800).*
6. Natural Resources Defense Council, Inc. *(Counsel of Record, Thomas O. McGarity, University of Texas School of Law, 727 E. 26th St., Austin, TX 78705; telephone (512) 471-5151).*
7. Trial Lawyers for Public Justice *(Counsel of Record, Arthur H. Bryant, 1625 Massachusetts Ave., N.W., Suite 100, Washington, DC 20036; telephone (202) 797-8600).*
8. Association of the Bar of the City of New York, the Association of Black Women Attorneys, the Committee on Women's Rights of the New York County Lawyer's Association, and the New York City Commission on Human Rights *(Counsel of Record, Arthur Leonard, 42 West 44th St., New York, NY 10036; telephone (212) 382-6600).*
9. State of California and the California Fair Employment and Housing Commission *(Counsel of Record, Manuel M. Medeiros, Deputy Attorney General, P.O. Box 944255, Sacramento, CA 94244–2550; telephone (916) 324-7851).*
10. Massachusetts, Arizona, Connecticut, Delaware, Florida, Louisiana, Maine, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oklahoma, Puerto Rico, Texas, Vermont, the Virgin Islands, and Washington *(Counsel of Record, Marjorie Heins, Assistant Attorney General, One Ashburton Place, Boston, MA 02108; telephone (617) 727-2200).*

In Support of Johnson Controls, Inc.

1. Industrial Hygiene Law Project *(Counsel of Record, Jack Levy, 19-21 Warren St., New York, NY 10007; telephone (212) 732-3358).*
2. National Safe Workplace Institute *(Counsel of Record, James D. Holzhauer, Mayer, Brown & Platt, 190 South LaSalle St., Chicago, IL 60603; telephone (312) 782-0600).*
3. Equal Employment Advisory Council and the National Association of Manufacturers *(Counsel of Record, Garen E. Dodge, McGuiness & Williams, 1015 Fifteenth St., N.W., Suite 1200, Washington, DC 20005; telephone (202) 789-8600).*
4. Concerned Women for America *(Counsel of Record, Jane E. Hadro, 370 L'Enfant Promenade, S.W., Suite 800, Washington, DC 20024; telephone (202) 488-7000).*
5. Pacific Legal Foundation *(Counsel of Record, Anthony T. Caso, 2700 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833; telephone (916) 641-8888)* and New England Legal Foundation *(Stephen S. Ostrach, 150 Lincoln St., Boston, MA 02111; telephone (617) 695-3660).*
6. Chamber of Commerce of the United States of America *(Counsel of Record, Timothy B. Dyk, Jones, Day, Reavis & Pogue, 1450 G St., N.W., Washington, DC 20005–2088; telephone (202) 879-3939).*
7. Washington Legal Foundation *(Counsel of Record, John C. Scully, 1705 N St., N.W., Washington, DC 20036; telephone (202) 857-0240).*
8. United States Catholic Conference *(Counsel of Record, Mark E. Chopko, 3211 4th St., N.E., Washington, DC 20017–1194; telephone (202) 541-3300).*