

TITLE VII AND GENDER EXCLUSIONARY POLICIES: A BRIEF HISTORY

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On March 20, 1991, the U.S. Supreme Court ruled that Johnson Controls, a battery manufacturing company, violated the rights of its female employees through its fetal protection policy.¹ Prior to this ruling, there was a conflict between the appellate courts as to whether fetal protection policies were allowable under Title VII. The concept of fetal protection focused on women as especially susceptible individuals in the workplace. Their potential fertility made them the target of medically protective policies. Due to the economic limitations such policies imposed, women began to challenge the policies in court.

The *Johnson Controls* case began in the United States District Court for Wisconsin, where the employer's fetal protection policy was challenged and upheld.² The decision was also affirmed on appeal. In the lower court opinion, the court granted summary judgment for the employer determining that the fetal protection policy did not violate Title VII. The policy excluded women presumed capable of bearing children from working in jobs where their blood lead level would rise above 30 micrograms. Lead is the main ingredient in the material used to make batteries which are made in fourteen of the defendant's factories. The plaintiffs' allegations were many:

Based on this policy the plaintiffs allege that there is sex discrimination in recruitment and hiring, job assignments, wages, promotions and transfers within the bargaining unit,

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¹International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991).

²international Union v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D.Wis. 1988).

seniority, overtime, layoff and recall, demotions, on-the-job training, maternity policies, on-the-job harassment, fringe benefits, and health and safety conditions.³

The medical evidence presented by the experts was varied and contradictory. However, the court found that if the case was viewed under a disparate treatment analysis the conclusion would have to be that the plaintiffs established a prima facie case of discrimination. The fetal protection policy excluded women from positions while men were not excluded from them. Therefore, the policy appeared on its face to be discriminatory to women. However, the court did not stop the review at this point. The judges chose to look at the medical evidence which indicated that the fetus would be damaged if a woman got pregnant while being exposed to lead. Although the court acknowledged that medical evidence indicated lead could also affect the reproductive abilities of men, the court felt the medical evidence that fetuses are subject to a greater risk was determinative of the issue. The court stated:

The fetus deserves special protection from lead. If women always knew when they were going to become pregnant, the mother could remove herself from the lead environment; this predictability does not always occur with accuracy....Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory.⁴

The court in a footnote appended at this point explained that any consideration of bona fide occupational qualification (hereinafter BFOQ) was unnecessary since the court determined that the lead fetal protection policy was not facially discriminatory. After determining that the policy was facially neutral, the court reviewed the disparate impact argument. With the most cursory examination of the issue, the court stated that there was a business necessity to protect the fetus. A key statement for the employer was made by the court in its recognition of the need for the business to protect itself:

In view of the fact that a significant risk exists for fetuses exposed to lead, the fetuses safety cannot be ignored. A business would not expose its customers to lead. Furthermore, although not of primary importance, a business

³*Id.* at

⁴*Id.* at

should be able to protect itself from future lawsuits which may arise because a child was prenatally exposed to lead.

Thus, the business necessity defense applies to a lead fetal protection policy. There is a general societal interest in protecting the health of fetuses and children.³

The court recognized plaintiffs' argument that the Toxic Substance Control Act (TSCA) relegates fetal protection to the Environmental Protection Agency, but the court felt, as a practical matter, such protection would leave fetuses at risk. Due to the lengthy process used by the EPA in regulating toxic chemicals, and the fact that the TSCA is gender neutral, the court felt it would fail to protect fetuses from lead exposure. The court determined that the plaintiffs did not show an acceptable alternative that would have a lesser impact on females and that lead was still necessary in the creation of batteries. Therefore, the court found the protective policy valid.

On appeal, the seventh circuit followed the lead of the district court in recognizing the steps taken by the defendant company in minimizing the risk to workers:

The steps that Globe Union and Johnson Controls have taken to regulate lead exposure have not been focused merely on complying with governmental safety regulations, but originate from their longstanding corporate concern for the danger lead poses to the health and welfare of their employees, their employees' families and the general public.⁶

The court explained in detail for approximately five pages what had been done by the employer to protect employees and what the philosophy and position of the company had been on this issue. Only after thoroughly reviewing the company history in this area did the court address the medical aspects of the case. Then after consideration of the medical testimony, the court finally reviewed the legal precedents and arguments. The court stated that rigid principles could not be applied in a case of this nature:

Any proof scheme a federal court applies is useful only if it assists the court in properly identifying the employment practices Congress intended to prohibit under Title VII.

These concerns are particularly important in a case of this nature where the interest in financial reward is balanced

³at 317.

⁶International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 875 (7th Cir. 1989).

against a medically established risk of the birth of a medically or physically deprived baby and where the challenged distinction is based upon the reality that only the female of the human species is capable of childbearing.⁷

The court used the analysis of the United States Supreme Court as articulated in *Wards Cove Packing Co. v. Atonio*⁸ to address the issue of an employer's business necessity defense. The court cited language from *Wards Cove* demonstrating that the burden of persuasion is on the plaintiff once the business necessity argument is raised. Therefore the court limited its inquiry to the established record to see if the summary judgment granted by the lower court was appropriate. The court found that the UAW was required to present sufficient facts for the trial judge to conclude that the risk of harm to the fetus was not substantially confined to female employees. The court felt that UAW's medical evidence was not sufficient to prove that the father's exposure to lead presented the same danger to the unborn child that the mother's exposure presented. Therefore, the court felt UAW failed to meet its burden of proof.

The court also found that UAW failed to preserve on appeal the issue of whether there were acceptable alternative policies or practices which could have accomplished the business purpose with less of a differential impact between men and women workers. However, the court went on to say that even had this issue been preserved, UAW still failed to present sufficient facts at the lower court level to sustain a finding for them on this issue. Of important note to business owners is the court's statement:

Finally, in resolving this issue we must act with an awareness of the Supreme Court's warnings that "[c]ourts are generally less competent than employers to restructure business practices," and that "the judiciary should proceed with care before mandating that an employer must adopt a plaintiffs [proposed alternative employment policy] in response to a Title VII suit." In light of these policies, the UAW has not met its evidentiary burden at the summary judgment phase of presenting facts from which a trier of fact could determine that an alternative policy would be equally as effective as Johnson Controls' fetal protection policy in preventing risk of harm to unborn children from lead exposure.⁹

⁷Id. at 883.

⁸*Wardt Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

⁹*International Union*, at 893.

Although this would appear an ending point for the court's opinion, it is not. The court then addressed the BFOQ question stating:

The bona fide occupational qualification defense, like other Title VII defenses, must be construed in a manner which gives meaningful and thoughtful consideration to the *interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child...* In the context of the Pregnancy Discrimination Act, application of the bona fide occupational qualification defense requires a court to consider the special concerns which pregnancy poses.¹⁰

The court recognized in this case the need for seeing real differences between men and women and not just stereotypes or our own "culturally induced proclivities."¹¹ The court in resolving the question whether the fetal protective policy was a BFOQ reasonably necessary to industrial safety considered the argument established in *Dothard v. Rawlinson*¹² that:

"[I]n the *usual case*, the argument that a particular job is too dangerous for *women* may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the *individual woman* to make that choice for herself." *Dothard*, 433 U. S. at 335, 97 S.Ct. at 2729 (footnote omitted, emphasis added). *It is important to remember, however, that while Dothard established these propositions as general rules, the Supreme Court determined that Dothard was an unusual case justifying a departure from this general maxim.*³

In *Dothard*, the Court was concerned with whether or not women could be excluded from work in a 'contact' position in a maximum security prison in Alabama. The Court felt that a BFOQ existed to keep women from holding such positions due to the risk of sexual assaults which would undermine prison security. The court in the case *sub judice*, takes a similar position that more is at stake than " '...an individual woman's decision to weigh and accept the risks of employment."¹⁴ Due to the very real risks to the fetuses of women serving in areas where they would face exposure to lead, the court

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¹⁰H at 894. Citing from *Torres v. Wisconsin Dept. of Health & Social Services*, 639 F. Supp. u²⁷⁸ (E D. Wis. 1986).

¹¹**Dothard** v. Rawlinson, 433 U.S. 321 (1977).

¹²*International Union*, 886 F.2d at 897.

W. at 897. Quoting from *Dothard*, 433 U.S. at 335.

held that Johnson proved its fetal protection plan reasonably necessary to industrial safety. The court also stated:

We are also of the opinion that Johnson Controls' well reasoned and scientifically documented decision...constitutes a bona fide occupational qualification. The evidence presented concerning the lingering effects of lead in a woman's body, combined with the magnitude of medical difficulties in detecting and diagnosing early pregnancy, lead us to agree with Johnson Controls that there exists a reasonable basis in fact to conclude that an extension of this policy to all fertile women is proper and reasonably necessary to further the industrial safety concern of preventing the unborn child's exposure to lead.¹⁵

The court defended Johnson Controls exclusive policy based in part on their documented expenditure of \$15 million dollars in lead control policies. The court felt Johnson Controls had a legitimate interest in protecting the health of the unborn and that no suitable alternative had been found and documented in the record. Based on the arguments discussed herein, the court upheld the district court's entry of summary judgment in favor of Johnson Controls.

A more recent opinion was issued on this topic in *Johnson Controls, Inc. v. California Fair Employment and Housing Commission*,¹⁶ In this case, the court strongly disagree with the 1989 opinion by the seventh circuit which supported Johnson Control's fetal protection policy. The plaintiff, Queen Elizabeth Foster (hereinafter Foster) applied for and was denied employment with Johnson Control's plant located in Fullerton, California. She did not provide proof that she was a sterile female and therefore was denied employment under Johnson's blanket prohibition against hiring for production jobs any females capable of bearing children. The case arose because Foster filed a complaint with the California Fair Employment and Housing Commission (hereinafter Commission), which ruled that the fetal **protection** policy constituted unlawful sex discrimination. The Commission also **found** that the Company failed to prove a BFOQ. According to the appellate court opinion, The Commission also found that the Company could not justify exclusion of Ms. Foster on the grounds of 'business necessity' since that defense is available *only to excuse a facially neutral practice having only an incidental adverse affect on women.*¹⁷

¹⁵*Id.* at 898-899.

¹⁶*Johnson Controls, Inc. v. California Fair Employment & Housing Comm'n*, 267 Cal. Rp*^f 158 (1990).

¹⁷*Id.* at 163.

The Company's response to the Commission's ruling was to seek and to receive a writ of mandamus from the trial court that the Commission's decision was contrary to law. The trial court ruled in favor of the Company based on the business necessity defense and remanded the case to the Commission to consider whether or not an alternative policy would better accomplish the fetal protection purpose with less impact on females. The Commission then applied to the court of appeals who issued this favorable opinion reinstating the Commission's findings. The court reviewed applicable law:

California Code of Regulations, title 2, section 7291.0, subdivision (c) provides, "It is unlawful to refuse to hire a female because she is of child bearing age." Government Code section 12945.5, states, "It shall be an unlawful employment practice for an employer to require any employee to be sterilized as a condition of employment."

The evidence here is uncontradicted: Before a woman could obtain work under the Fetal Protection Program, she must demonstrate, in effect, there is medical certainty that she is sterile.¹⁸

The court felt the law and precedents were clear and were violated by the fetal protection policy which only applied to women. Female applicants had to produce a certificate of sterility in order to be hired.

In addition, the court reviewed the findings of the Commission. One finding noted that fertile women were excluded from all production jobs even though only 34.89 percent of these jobs were unacceptable in terms of the blood lead results. The court found that the fetal protection policy further violated California law and regulations because "*Lead in the blood at certain levels creates risk to the offspring of both male and female employees.*"¹⁹ The court reviewed the conflicting medical evidence in this area and stated:

Whether lead in a mother's blood, *at levels to which the Company exposes its employees*, endangers the fetus is a subject on which there is dispute, as well a total lack of evidence of harm to any fetus in the Company's experience....The medical evidence does not reveal when and to what extent lead crosses the placenta.²⁰

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The court then reviewed the meaning of BFOQ and the business necessity defense to determine that the business necessity defense did not apply:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any gender impact. The BND [business necessity defense] is concerned with facially neutral rules, standards, and criteria, rather than with class-based exclusion.²¹

The court disagreed with other cases that found fetal protection policies gender neutral on their face. The court recognized that the policy would only apply to women and therefore could not be considered gender neutral. The court also rejected the contention that a BFOQ applied:

The facts do not satisfy the BFOQ test. There is no evidence that fertile women cannot efficiently perform jobs involving contact with lead at the Company's facilities. Although *some* women have become pregnant while working there, thus creating the *possibility* of harm to their offspring, this fact falls far short of a showing that "all or substantially all" female workers create such a risk. Significantly, there was no evidence of any harm to a single child.²²

The court cited to the EEOC reaction to *International Union, UAW v. Johnson Control* as support for its opinion. The EEOC issued policy guidance rules criticizing the decision and refusing to follow it. The court gave some strong arguments explaining its position:

...the Company's FPP does not discriminate on the basis of "objective differences" between men and women; it discriminates on the basis of unfounded, unscientific stereotypic notions of women...It is not the abstract biological fact that women are *capable* of becoming pregnant which supposedly requires the exclusion of women, but rather the chance that they will *become* pregnant—a factor

²¹*Id.* at

²²*Id.*

speaking more about the ability of women to control their lives and their bodies than about biological distinctions.²⁵

The court then expressed its concern that the employer made unfounded assumptions about women. The court included the assumptions that unmarried females are sexually active with fertile men; that women cannot be trusted to use appropriate pregnancy prevention methods; and that women cannot weigh the hazards involved should they become pregnant. In a footnote, the court stated:

We would suggest that women may or may not want children, may or may not be bound by an oath to strict chastity, or may or may not have sexual preferences that do not include males or the possibility of pregnancy. We are in an era of *choice*.*

The court found the Commission's ruling to be legally correct. The court felt the Company's policy to be an assumption that the employer was best qualified to protect unborn children. Other options would be to fix the workplace, or to inform women and let them decide what to do. "However laudable the concern by businesses such as the Company for the safety of the unborn, they may not effectuate their goals in that regard at the expense of a woman's ability to obtain work for which she is otherwise qualified."²⁵

After this decision was rendered in February of 1990, the sixth circuit issued an opinion on a fetal protection policy in *Grant v. General Motors Corporation*.²⁶ In *Grant*, the policy under discussion had excluded all fertile female employees from foundry jobs involving exposure to specified concentrations of airborne lead. The lower court had granted summary judgment in favor of the employer from which the appeal was taken.²⁷ The appellate court vacated the judgment of the district court on the Title VII claim and remanded it for further consideration.^{28*}

The court disagreed with the lower court's decision for two main reasons. The first area of disagreement concerned the lower court's decision that the Policy was not facially discriminatory and therefore was defensible as a business necessity. The sixth circuit determined that all fetal protection

²⁵U at 177.

*U. at n.16.

²⁶W. at 178.

*Grant v. General Motors Corporation, 908 F.2d 1303 (6th Cir. 1990). The court does a 'trough analysis of previous decisions in the area of fetal protection. It is an excellent source ^{or} gaining an understanding of the litigation history prior to the Supreme Court's ruling in *Johnson Controls* in 1991.

²⁷Grant v. General Motors Corporation, 743 F. Supp. 1260 (N.D. Ohio 1989).

Grant, *supra* note 26, at 1311.

policies must be characterized as facially discriminatory under Title VII. Secondly, the court found the policy could not be upheld unless a BFOQ was proven.²⁹ The court also determined the parameters of the BFOQ defense relying on its interpretation of U.S. Supreme Court decisions and the dissent in *International Union, UAW v. Johnson Controls*.^x

In determining that the policy created overt gender-based discrimination, the court relied on the Pregnancy Discrimination Act (hereinafter PDA). The court quoted from the PDA and stated that it encompasses all distinctions based on pregnancy, childbirth, or related conditions. Thus, "...the PDA transforms distinctions based on pregnancy or potential pregnancy into overt sex discrimination violative of Title VII absent a showing that infertility is a bona fide occupational qualification."³¹ The court felt that the PDA makes it clear that any policy based on fertility is on its face, sex discrimination. The court relied on the language in the PDA itself, the legislative history of the PDA and the Supreme Court's decision in *Newport News Shipbuilding A Dry Dock Co. v. EEOC*.³²

The policy clearly distinguished between male and female employees, because none of the standards or limitations in regard to exposure to airborne lead were applied to male workers.³³ The plaintiff had been reassigned to a lower paying job due to the fetal protection policy. She had been working as an iron pourer and had sought licensure as a hot metal crane operator. She sued under Title VII after her attempts through administrative claims failed. In addition, she sued under the Equal Pay Act, but the court disposed of the claim under the Equal Pay Act because it was inapplicable to her situation. She received the same pay as males for the work she performed, and always had. Therefore, the court found that the employer's decision to transfer her to a lower paying job by itself did not support a claim under the Equal Pay Act. However, the court clearly stated that the decision regarding the plaintiffs Title VII claim and their decision on her Equal Pay Act claim were completely unrelated.³⁴

Once the court determined that the policy was in violation of Title VII absent proof of a BFOQ, the court established the criteria for showing a BFOQ exists. The court relied on the language in Title VII which states that the BFOQ must be "...reasonably necessary to the normal operation of [a] particular business or enterprise[.]" 42 U.S.C. section 2000e-2(e)(1).^M The

at 1304.

^x*Id.*, 906 F.2d at 1310. *See also*, *International Union*, 680 F. 2d. 871 (7th Cir. 1989).

^{*}*I*-*L* at 1307.

"*Newport News Shipbuilding A Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

^{*}Grant, *supra* note 26, at 1305.

^{**}// at 1311.

¹⁵*Id.* at 1310.

court also followed Judge Cudahy's dissent in *Johnson Controls* as the proper standard to follow:

"We find that the straight-forward BFOQ test defined by Judge Cudahy aptly takes into account the interests of all parties affected by fetal protection policies, and we adopt that standard as the method for resolving this case on remand".³⁶

The standard Judge Cudahy applied required the employer to show 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."³⁷ Based on the court's conclusion that the district court had erred in deciding the case in respect to the Title VII claim, they vacated the judgment on the Title VII issue and remanded it for consideration under the BFOQ standard they adopted.

The last word in the area of fetal protection occurred in March of 1991 when the U.S. Supreme Court ruled on the issue of fetal protection in the *Johnson Controls* case.³⁸ Basically, the Court followed the lead of the sixth circuit by striking down the fetal protection policy established by Johnson Controls. The Court found that the Seventh Circuit Court of Appeals had erred in finding the policy facially neutral and agreed with the sixth circuit that a policy discriminating on the basis of fertility had to be sex discrimination under Title VII, absent proof of a BFOQ. The Supreme Court also relied on the language in the PDA in finding that policies founded upon capability of bearing children had to be discriminatory on their face.³⁹

In addition, the Court found that Johnson Controls did not document sufficiently to create a BFOQ. There was no proof that substantially all women employees would be affected nor that the employer would face crippling costs. The policy was too broad in that it targeted all women yet men were not affected by the policy. Medical evidence at the lower level had shown that the reproductive systems of both genders were affected by concentrations of lead in the bloodstream.

Based on all these factors, the Court found that the employer failed to establish a BFOQ. The court also viewed the BFOQ as being a defense used only in narrow circumstances. They found that the women would have to be incapable of performing their jobs and that the safety of the fetus was not the essence" of the job.⁴⁰ The essence of the job was making batteries. The

³⁶W. at 1311.

³⁷Johnson Controls, *supra* note 6, at 902 n.1
(Cudahy, J., dissenting). Johnson Controls, *supra*
U. at 1200.

⁴⁰r. at 1206.

Court distinguished the safety to third parties exception found in *Dothard*⁴¹ and *Criswell*⁴² by establishing that in those cases safety to third parties was included in the essence of the business. The Court found safety to unborn fetuses was not part of the business of making batteries.

The Supreme Court decision answers for employers the questions posed by fetal protection policies to a large degree. However, there are still unresolved questions. Tort liability for employers will still be a huge concern. The concurring opinion raises issues which indicate that perhaps an employer could establish a fetal protection policy that would withstand scrutiny under Title VII. However, the employer would have to carefully document the need for the policy, show that substantially all women would be affected, narrowly tailor the policy and possibly prove crippling costs in order to establish a BFOQ.

⁴¹Dothard, *supra* note 12.

⁴²Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985).