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Recent Developments: International Union, UAW v. Johnson Controls, Inc.: Employer May Not Bar Women from Employment Which Might Expose Unborn Child to Harm

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Recent Developments

International Union, UAW v. Johnson Controls, Inc.: **EMPLOYER MAY NOT BAR WOMEN FROM EMPLOYMENT WHICH MIGHT EXPOSE UNBORN CHILD TO HARM.**

Rejecting a manufacturer's concerns over "the welfare of the next generation," the Supreme Court has held that employers may not exclude women from positions which could pose harm to their unborn children. *International Union, United Auto., United Aero. and Agric. Implement Workers of America v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1207 (1991). Upon determining that exclusion of women was a facially discriminatory practice to which there was no lawful exception, the Court held that such discrimination constituted a violation of the Civil Rights Act § 703(a) (1964), *as amended by* 42 U.S.C. § 2000e *et seq.* (1988) ("Title VII").

Johnson Controls, Inc. ("Johnson") manufactures batteries, a commodity in which lead is a primary ingredient. Lead exposure can cause health problems, including harm to unborn children. Johnson initially instituted a policy of warning female employees and potential female employees of the risks of lead, and had them sign a statement indicating they were so warned. Johnson altered its policy in 1982, however, excluding all women capable of bearing children from jobs exposing them to lead. A class action challenging the policy was filed in 1984 by a number of unions and individuals, including one woman who chose to undergo sterilization to avoid losing her job.

The United States District Court for the Eastern District of Wisconsin analyzed Johnson's policy using the three prong "business necessity defense" originally used in the Fourth and Eleventh Circuit Courts of Appeal. *Johnson*, 111 S. Ct. at 1200. The elements of the test were as follows: (1) the activity's health risk to the fetus; (2) whether the hazard was transmitted only through women; (3) whether a less discriminatory alternative to prevent the health risk exists. *Id.* at 1201. The court found that the activity of batterymaking did involve a substantial fetal health risk and that fetuses were vulnerable to lead levels which would not affect adults. The Petitioners presented no alternative policy to protect fetuses, and the court granted summary judgment in favor of Johnson.

The district court further opined that because Johnson had met the business necessity defense test, it would not have to utilize a "bona fide occupational qualification" ("BFOQ") analysis. *Id.* A BFOQ exception would allow an employer to "discriminate on the basis of 'religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'" *Id.* at 1204 (citing Title VII § 703(e)(1)).

The district court grant of summary judgment was affirmed by the Court of Appeals for the Seventh Circuit, sitting en banc. The court of appeals concluded that the district court correctly applied the business necessity defense, which "balance[s] the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." *Id.* at 1201 (quoting *International Union, United Auto., etc. v. Johnson Controls, Inc.*, 886 F.2d 871, 886 (1989)). The court of appeals further concluded that had the BFOQ been the proper standard, it too would have been satisfied. The court explained that "industrial safety is part of the essence of respondent's business, and . . . the fetal-protection policy is reasonably necessary to further that concern." *Id.* at 1201.

Because the seventh circuit's holding that fetal protection policies qualify as a BFOQ conflicted with Fourth and Eleventh Circuit decisions, the Supreme Court granted certiorari to resolve the issue. Justice Blackmun, speaking for the majority, initially determined that the seventh circuit was wrong in "assum[ing] that because the asserted reason for the sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination." *Id.* at 1203.

The Court first assessed evidence indicating that lead exposure has debilitating effects upon both male and female reproductive systems. From this evidence, the Court determined

that regardless of benign intent, Johnson's policy of treating male and female employees differently was facially discriminatory. To bolster its conclusion, the Court cited the Pregnancy Discrimination Act of 1978, which provides that sex-based discrimination "includes discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions.'" *Id.* at 1203 (quoting 42 U.S.C. § 2000e(k)).

Finding Johnson's policy discriminatory, the Court proceeded to determine whether the policy could be excused as a BFOQ. After examining the statutory basis of the BFOQ standard, the Court emphasized that the defense, particularly for safety exceptions, "reaches only special situations." *Id.* at 1204-05. Such special situations recognized by the Court included permitting a prison to hire only male guards in areas of maximum security prisons housing males, and attempting to ensure airline safety by approving age restrictions for airline flight engineers.

To qualify as a BFOQ, however, the "job qualification must relate to the 'essence,' or to the 'central mission of the employer's business.'" *Id.* at 1205 (citations omitted). Relating the Johnson facts to the BFOQ standards, the Court concluded that the standard was not met because a genuine concern for future generations cannot be recast as an "essential aspect of batterymaking." *Id.* at 1206.

The Court also engaged in legislative history analysis of the Pregnancy Discrimination Act, which has its own BFOQ criterion. The Act provides that, unless pregnant employees differ in their ability to perform, they must be treated the same as any other employee. Further, the Act's legislative history revealed Congress's decision to reserve to women the right to work while pregnant, or while capable of so becoming. Because the record indicated that pregnant women are as efficient as other employees in the manufacture of batteries, the Court concluded that the standard for upholding a BFOQ had not been met. Having failed to establish either a business necessity defense or a BFOQ, the Court held that Johnson's policy constituted forbidden sex discrimination. *Id.* at 1207.

The Court briefly addressed the issue of tort liability. Because "Title VII bans sex-specific fetal-protection policies," the Court felt the risk of liability of an employer who follows OSHA guidelines, informs women as to the risk, and is not otherwise negligent to be "remote at best." *Id.* at 1208.

Justice White, joined by Justice Kennedy and Chief Justice Rehnquist, concurred with a portion of the majority's rationale, as well as with the judgment. The concurrence disagreed, however, "that the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy." *Id.* at 1210. White indicated that one justification for a BFOQ would be the avoidance of substantial tort liability. As pertaining to the facts, White felt that it was not clear that Title VII would preempt state tort liability. He further stated that even if employees were precluded from making claims for injury, their children still might be able to do so because "the general rule is that parents cannot waive causes of action on behalf of their children." *Id.* at 1211.

In holding that an employer may not discriminate against a woman on the basis of her pregnancy or capability to become pregnant, the Supreme Court has furthered the beneficient goal of eradicating sex-based discrimnation Bound only by moral and ethical regulation, however, expectant parents will be forced to engage in a most difficult balancing test, positing pecuniary interests against the interest in insuring a healthy child.

- Howard Cohen

Owens-Illinois v. Zenobia: MARYLAND RESTRUCTURES THE LAW OF PUNITIVE DAMAGES IN NON-INTENTIONAL TORT CASES.

In *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992), the Court of Appeals of Maryland pronounced sweeping changes respecting awards of punitive damages in non-intentional tort actions. In the first of three revolutionary changes to Maryland law, the court abolished the longstanding "arising out of contract" test for punitive damages in tort actions where the parties enjoy a contractual relationship. Second, the court reformulated the standard for determining whether punitive damages may be awarded by rejecting the established "implied malice" standard and adopting the exacting "actual malice" standard of conduct in its place. Third, the court announced that in all tort cases, plaintiffs must meet the heightened burden of proof of "clear and convincing" evidence when seeking punitive damages.

As a result of exposure to asbestos, plaintiffs William L. Zenobia ("Zenobia") and Louis L. Dickerson ("Dickerson") developed pleural and parenchymal asbestosis. Zenobia alleged that he had been exposed to asbestos while employed at various locations over a twenty-five month period from 1948 to 1968. Dickerson claimed exposure to asbestos during his employment with the Bethlehem Steel Corporation at Sparrows Point from 1953 until 1963.

Both plaintiffs filed claims in the Circuit Court for Baltimore City seeking damages for their asbestos related injuries and the complaints were consolidated for purposes of trial and appeal. At trial, the plaintiffs abandoned all theories of liability except for strict liability under Section 402 of the Restatement (Second) of Torts. The defendants included six companies that had either manufactured or supplied and installed products containing asbestos.

The jury awarded Zenobia com-