Risk & Responsibility: The Working Woman Makes the Choice, Not the Employer

*Carol Docan**

Introduction

In a case commonly known as "Johnson Controls,"[1] an employer had established a policy of refusing to employ fertile females in jobs which would expose them to lead. A federal appellate court upheld the company's Fetal Protection Plan but a state court found the plan unlawful.[2]

While the case against Johnson Controls was making its way through the court system, many people speculated that when the case reached the Supreme Court women would be on the losing end of the decision. These speculations were based on the court's shift, in the last few years, to a conservative philosophy as a result of the appointments made by Presidents Reagan and Bush to the court. Justice Souter, President Bush's most recent appointee had only been on the bench one day when the case was argued before the Supreme Court in October 1990. But in March 1991, much to the surprise of all concerned, the court issued an opinion which declared that employers may not exclude women from jobs which could expose a fetus to toxic substances.

The decision is one of the most significant sex discrimination rulings in many years. Reactions have varied depending on perspective. Civil rights advocates were surprised and delighted by the Court's "strong affirmation of womens' rights in the work-

*J.D. Loyola University of Law; B.A. UCLA. Ms. Docan is currently Distinguished Professor of Business Law, California State University, Northridge.

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

[2] International Union, UAW v. Johnson Controls, Inc., 886 F2d 871 (CA7 1989); Johnson Controls, Inc. v. Fair Employment & Housing Commission, 218 Cal App 3d 517 (1990).

place." But, groups opposed to abortion were disappointed. Manufacturing groups said that they fear new lawsuits over deformed or brain-damaged children.[3]

The courts which reviewed this case took very different approaches. At the federal appellate court level, 11 justices of the Seventh Circuit, sitting en banc, analyzed and argued at length over issues they saw being raised by this case. The majority issued a 57-page opinion and four dissenting justices countered with 40 pages of argument. The Supreme Court did not have as much difficulty reaching a decision. All nine justices agreed to overturn the appellate court. Five justices joined in a 22-page majority opinion written by Justice Blackmun, and the other four justices issued two short concurring opinions. Some of the issues debated at length by the appellate court were seen by the majority of the Supreme Court as simple and not nearly as convoluted as the prior opinion had made them out to be.

The Seventh Circuit opinion dealt at great length with such questions as: was there a risk to the fetus from being exposed to lead at the levels which existed at the Johnson Controls' battery manufacturing plant; if there was a risk, at what stage of pregnancy; should all fertile women be excluded from these positions or only certain groups of fertile women; who had the duty to protect the offspring—the parents, the employer or the government; what exception to the federal law prohibiting sex discrimination in the workplace could be used by an employer to exclude fertile women from certain jobs and could an offspring be harmed by the exposure of a father to high levels of lead?

The Supreme Court did not debate most of these issues. Its decision focused on three areas: whether federal law would allow employers to exclude fertile females from certain jobs which could be hazardous to fetuses while allowing males to retain these jobs; who had the responsibility to decide the welfare of "future children"; and whether an employer would have tort liability for fetal injuries caused by a parent's exposure to work-site hazards. Although each of these issues is in fact complex, the Court's opinion was written clearly and concisely. The Supreme Court opinion focused on historical facts surrounding the employer which

[3] "Court Rejects Limiting Jobs to Protect Fetuses" Los Angeles Times, March 21, 1991 p 1.

had not been discussed, in any depth, by the appellate court. The court also raised some new issues.

Although the focus of this article will be on the opinion of the majority of the Supreme Court, keep in mind that even though all nine justices agreed to reverse the summary judgment granted by the lower courts, they did have disputes over some of the material issues presented in the case.

HISTORICAL FACTS ABOUT THE EMPLOYER AND THE PLAINTIFFS

Prior to the enactment of the Civil Rights act of 1964, the employer in this case, Johnson Controls, Inc., had not hired any women in its battery manufacturing plants. After hiring women, in 1977, it issued its first policy regarding female employees who were working in lead-exposed jobs. The policy stated that prospective parents are responsible for the health of unborn children and that it appeared to be illegal sex discrimination to treat all women as if they are capable of becoming pregnant or as if they would become pregnant. The policy suggested that women considering pregnancy not select certain jobs. Females were required to sign a statement acknowledging the work-related risks.[4]

Between 1979 and 1983 eight females working in the battery plant became pregnant. Each had an elevated lead blood level, but none of their children were born with birth defects. Thereafter in 1982, Johnson completely reversed its initial 1977 policy. It implemented a policy of excluding all fertile females from certain jobs which would expose them to critical levels of lead.[5]

Thereafter, a class action suit was filed against Johnson alleging that such a policy was a violation of Title VII, the federal law which prohibits sex discrimination in employment. The class was represented by three plaintiffs: a female employee who underwent a sterilization procedure to retain her job, a 50-year-old, divorced, female employee who was forced to transfer to a lower paying job, and a male employee who was denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father.[6]

[4] International Union, UAW v. Johnson Controls, Inc., 111 S Ct (1991).
[5] Id.
[6] Id. at p 3.

The federal trial court granted a motion for summary judgment in favor of Johnson Controls Inc. and the Seventh Circuit Appellate Court upheld that decision. The court concluded that industrial safety was part of the "essence of defendant's business" and that the goal of protecting fetuses was within that safety definition. It also found that the plaintiffs had not proven that the father's exposure to lead affects the fetus or that less discriminatory alternatives were available to the employer to minimize worksite hazards.[7] A majority of the Supreme Court disagreed. What follows is a review of the highlights of the opinion.

OVERT DISCRIMINATION AGAINST WOMEN MUST MEET THE "BFOQ" TEST

Unlike the Seventh Circuit, the Supreme Court found that Johnson's Fetal Protection Policy was not "facially neutral" but discriminated against women on its face.[8] The court stated that the "bias is obvious," fertile men are given a choice as to whether they wish to risk their reproductive health to keep a job—fertile women are not. The court went on to conclude that in order to overcome the prohibition of such disparate treatment of women, the employer would need to establish the elements of the Bona Fide Occupational Exception (BFOQ), which Johnson Controls Inc. was unable to establish.

Under Title VII,[9] an employer may discriminate on the basis of sex in certain instances where sex is a "bona fide occupational qualification, reasonably necessary to the normal operation of that particular business or enterprise."[10] The court pointed out that this exception has been interpreted narrowly by the court in the past. It emphasized the words "certain instances," "reasonably necessary," "normal operation," "particular business," and "occupational qualification." In deciding that Johnson Control's policy did not fit into the exception, it stressed that the most important word, "occupational," meant that the exclusion of fertile women had to be related to job skills and aptitudes.[11] From that analysis it was easy for the court to conclude that pregnant women have the same

[7] Id. at p 5.
[8] Id. at p 7.
[9] 42 USC §2000e-2(e)(1), Civil Rights Act of 1964.
[10] Id. at §703(e)(1) of Title VII.
[11] International Union, UAW v. Johnson Controls, Inc., 111 S Ct 1196 (1991).

skills and aptitudes to make batteries as nonpregnant employees. Their physical condition had no effect on their "ability to do the job."[12]

Continuing its analysis of the BFOQ issue, the court noted that safety of employees and third parties has been considered by the courts in the past as part of the "essence" of particular businesses. For example, in one BFOQ case the court upheld a state decision which excluded women from guard positions in male maximum security prisons. The reasoning in that case was that women generally would be physically unable to maintain prison security thus risking the safety of other guards as well as prisoners.[13] Women simply did not have the required skill. In another case, a lower court upheld a decision by an airline to lay off its pregnant stewardesses during the first five months of pregnancy, on the basis of "passenger risk."[14]

The Supreme Court refused to extend the so-called "BFOQ safety exception" to the facts of this case, stating that although injury to a future fetus is a "deep social concern," the BFOQ is not so broad as to make that issue an "essential" aspect of battery making.[15] In the two prior cases, the third parties, who were the prisoners and passengers, were indispensable to the business being undertaken. But here, fetuses have nothing to do with battery making.

In further support of its conclusion that the Johnson plan did not meet the BFOQ test, the court referred to the Pregnancy Discrimination Act, an amendment to Title VII.[16] That act provides that the only time a pregnant woman can be treated differently than any other employee is when her physical condition is affecting her ability to perform her job. Pregnant women or potentially pregnant women are to be treated the same as any other ablebodied employee if they are able to work. Although Congress was aware of studies which showed that employment late in pregnancy imposes risks on the unborn, it clearly instructed

[12] Id.
[13] Dothard v. Rawlinson, 433 US 321 (1977).
[14] Harriss v. Pan American World Airways, Inc., 649 F2d 670 (CA9 1980).
[15] International Union, UAW v. Johnson Controls, Inc., 111 S Ct 1196 (1991).
[16] 42 USC §2000e(k).

employers not to take pregnancy into consideration unless it affected an employee's ability to perform a job.[17]

WHO DETERMINES THE WELFARE OF CHILDREN OR 'FUTURE CHILDREN'?

As part of its defense, Johnson Controls raised moral and ethical concerns about the welfare of offspring whose mothers would be exposed to dangerous levels of lead. The court agreed that this situation posed some serious social issues, but it clearly stated that decisions about the welfare of children cannot be left only to the discretion of employers. In what will perhaps be viewed as the most controversial statement made by the court in this case, it poignantly stated that:

> "Decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them rather than the employers who hire those parents."[18]

The court's interpretation of Title VII and the Pregnancy Discrimination Act support this conclusion: the "essence of business" does not include the "welfare of the next generation."

The facts presented in this particular case also support the court's conclusion. First, there was evidence, which was ignored by the appellate court, of injury to the male reproductive system from exposure to lead. From this evidence the conclusion is drawn that harm to offspring can come from either parent's exposure to lead. These dangers need to be explained and considered by both male and female employees. Second, Johnson Controls showed no birth defects in the eight children born of female employees who were exposed to lead. So the question arises as to whether this particular lead exposure was really dangerous in the first place and whether the employer's concern for the welfare of offspring was really a ruse for keeping women out of these jobs. Third, national statistics show that only 2% of blue collar female employees become pregnant each year.[19] Keeping all fertile women out of these positions appears to be a gross exaggeration of the potential risk.

[17] International Union, UAW, v. Johnson Controls, Inc., 111 S Ct 1196 (1991).
[18] Id. at p 17.
[19] Id. at p 18.

WILL THE EMPLOYER HAVE TORT LIABILITY FOR INJURIES TO THE OFFSPRING?

In the situation where the offspring of employees may be injured by exposure to work-site hazards a serious financial question arises for the employer. The Supreme Court was very straightforward in addressing this problem. It's conclusion should ease the minds of anxious employers who are fearful of the costs which could result from tort litigation.

Although the court noted that 40 states allow a right to recover for prenatal injury based on negligence, it went on to state that employers who follow the safety standards set by the federal Occupational Safety and Health Administration (OSHA) should have no liability for negligence.[20] OSHA requirements include blood testing, proper air circulation and supplying employees with safety gear. If the employer complies with OSHA regulations and gives an adequate warning to its employees, a tort action against the employer would be unsuccessful.[21] The court noted that Title VII does not prevent "an employer from having a conscience."

The justices on the Supreme Court were not in agreement on this liability issue. In a concurring opinion, written by Justice White,[22] he disagreed with the majority. He cited cases which have stated that compliance with OSHA is not a defense in a tort or criminal action. He argued that parents cannot waive a cause of action on behalf of their children. He also concluded that the parent's negligence could not be imputed to the children in an action against the employer. He further argued that instead of using negligence as the basis for a suit, an offspring might be successful in extending the doctrine of strict liability.[23] In that case the employer would presumably have no defense against the offspring's suit.

Even though Johnson Controls had not argued that it faced any tort litigation costs, the majority decided to address the issue of cost in response to the concerns raised by Justice White. The court pointed out that even though it might cost more to hire women (hypothetically because of litigation brought by injured

[20] Id. at p 19.
[21] Id.
[22] International Union, UAW v. Johnson Controls, Inc., 111 S Ct 1196 (1991).
[23] Id. at p 3.

offspring), that argument is not an affirmative defense to Title VII. The court went on to reason that if the costs of hiring women were so prohibitive as to "threaten the survival of the employer's business" that was "another issue."[24] In other words, if in fact tort liability is established, especially under a strict liability theory, and an employer's business would be destroyed by the cost of such litigation, it might be able to exclude fertile women. This thought leads to some interesting conjecturing. If tort liability is established against the employer and the evidence is correct regarding the detrimental effects on the male reproductive system, the offspring of both male and female employees would be suing. Then who would the employer hire in these position? Only sterilized persons? Who would really want these jobs, if the risk was so great? Would this eventually force the employer to change procedures altogether to make the work-place safer? Would that be better for all concerned in the long run?

Conclusion

The issues raised in this case require the delicate balancing of many interests: the well-being of children yet-to-be born; the right of employees of both sexes to be advised of work hazards and to work in safe environments; the costs involved in making the work-place safe; and the elimination of sexually discriminatory policies in employment. These are issues which will continue to be debated in years to come.

The outcome in future cases dealing with these issues is unpredictable because the composition of the Supreme Court is changing dramatically. Justice Marshall, who was among the majority in this opinion has announced his retirement and will undoubtedly be replaced by a conservative Republican presidential appointee. Justice Souter had been on the bench only one day when the case was argued before the court. He had not established any track record yet. Justice Blackmun, the author of the majority opinion is nearing retirement age. He was also the author of the majority opinion in Roe v. Wade, which may be overturned in the near future.

But for now the decision stands. Employers cannot discriminate against fertile women on the basis of protecting future

[24] International Union, UAW v. Johnson Controls, Inc., 111 S Ct 1196 (1991).

offspring. Parents are the individuals responsible for deciding what risks will be taken regarding their children. As long as employers fully advise their employees of risks at work, and comply with established governmental safety standards, they should not be liable for injuries to the offspring of their employees. In some ways both sides won in this case. Employers won because they need not fear tort litigation as long as they operate openly and safely. Women, as a group, won because a barrier which had been placed in their struggle for equal treatment in the work-place was knocked down. The rights of the "unborn" still remain a social concern, but responsibility for their welfare is now in the hands of their parents.[25]

[25] Lead and Your Kids, Newsweek, July 15, 1991, pp 42–48.