For Opinion See 111 S.Ct. 1196 , 110 S.Ct. 1522

Supreme Court of the United States.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., Petitioners,
v.
JOHNSON CONTROLS, INC.
No. 89-1215.
Wednesday, October 10, 1990

CONTENTS

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

Oral Argument

Appearances:MARSHA S. BERZON, ESQ., San Francisco, California; on behalf of the Petitioners.STANLEY S. JASPAN, ESQ., Milwaukee, Wisconsin; on behalf of the Respondent.
***3** PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-1215, United Automobile Workers Union v. Johnson Controls.

Ms. Berzon.

Is it BER-zon or Ber-ZON?

MS. BERZON: Ber-ZON.

QUESTION: Ber-ZON.

ORAL ARGUMENT OF MARSHA S. BERZON ON BEHALF OF THE PETITIONERS

MS. BERZON: Mr. Chief Justice, and may it please the Court:

The issue before the Court today is the validity under title VII of a policy that bans from lead-exposed jobs because of fetal health concerns any woman who cannot provide medical evidence that she is physically incapable of bearing a child. The policy applies regardless of the woman's age, marital status, the fertility of her spouse, her intent to have a child, her use of contraception, and how careful she is in using the hygiene practices that the company has prescribed and which, according to the company, should keep blood lead levels if properly used below the level safe for fetuses.

And the company applies this policy as well ***4** despite evidence that lead at the same levels, blood lead levels, produces in men reproductive injury, including infertility, and produces in people generally cardiovascular disease and neurological harm.

Our position is that this policy violates title VII because it explicitly and broadly excludes women and, as such, violates -- basic title VII principles and because for three independent reasons the policy does not come within the only available defense under title VII, the defense that this Court has called the narrowest of exceptions in Dothard v. Rawlinson, section 703(e), the bona fide occupational qualification defense, known as the BFOQ defense.

First, the policy that Johnson Controls is seeking to justify today is fundamentally inconsistent with the basic precepts and principles of title VII, especially as title VII was amended in 1978 by the Pregnancy Discrimination Act. This Court stated emphatically in a number of cases, including the City of Los Angeles v. Manhart, Price Waterhouse v. Hopkins last term, Arizona Governing Committee v. Norris, that an employer cannot disadvantaged a woman simply because of her membership in the group of women -- because she is a woman.

And here, the overwhelming number of the women ***5** who are being excluded because of the policy at issue present no risk to the health of any child either because they have no intention to have a child or any more children, or because they will delay having children until they are safely removed or out of lead-exposed job, or because they will keep their lead levels down, blood lead levels down through efficient hygiene.

QUESTION: Ms. Berzon, correct me if I'm wrong. As I understand your position, that's true and -- and -- and I suppose that could be one basis on which we decided this case.

But -- but your position really is that it wouldn't matter if the policy were limited to women who actually were pregnant.

MS. BERZON: Our -- our --

QUESTION: It wouldn't matter for your analysis if the policy said a pregnant woman may not work in this unit.

MS. BERZON: That is true with respect to the broadest of the three propositions that we have before the Court.

QUESTION: Indeed, it wouldn't matter if it said a woman more than -- more than 4 months pregnant or 6 months pregnant would not work?

MS. BERZON: That is true with respect to the ***6** broadest of the three positions that we have before the Court today.

However --

QUESTION: The position that Judge Easterbrook took in the --

MS. BERZON: That's correct. However, I -- I would like to admonish the Court of three things in that regard.

First of all, there are two other reasons which I will discuss later which would not necessarily implicate a pregnancy-limited policy and which are more than sufficient to require reversal of the policy before the Court today.

In addition, though, and quite importantly, I don't think this is a case in which the most extreme hypothetical should determine the issue before the Court in this -- for the following reasons:

First of all, a pregnancy-limited policy would be -- could be devised in a way that is nondiscriminatory in the first place because if the employer treated pregnancy-related harms similarly to other temporary instances of hypersusceptibility, one might have a nondiscriminatory policy. That is more or less what OSHA has done in its lead standard.

QUESTION: Are you saying that there would be ***7** reasonable nondiscriminatory alternatives that would be much easier to identify if it were a policy that applied just to people that were pregnant?

MS. BERZON: Yes, because one could remove the people temporarily. That's not an option in this case. And if a temporary removal of that kind was applied across the board to similar temporary hypersusceptible situations, we might have a nondiscriminatory policy. But, in addition, the science of the situation--

QUESTION: Excuse me. Other -- other -- other disabilities, temporary disabilities, don't have the benefit of the pregnancy act which was adopted. I mean, doesn't that reflect a congressional determination that that particular disability, if you want to consider it that, is not to be the basis of -- of special treatment?

MS. BERZON: Yes, but what I'm saying --

QUESTION: Unlike that of --

MS. BERZON: -- is that if it isn't special treatment -- that is, if men who have reproductive -- possible reproductive harm as well as women who are pregnant are treated similarly as the OSHA --

QUESTION: But it's special treatment with respect to all other workers who don't have that particular disability, if you consider it a disability, ***8** right? And I thought the purpose of the pregnancy act was to prevent precisely that, to treat --

MS. BERZON: That's -- that's true. What I'm saying is that that was -- would presents another question that's not here.

But in addition, the science of the situation is such that it is at least unlikely that one would have an injury which in fact affects pregnant women only and not others. So there are a number of reasons why the pregnancy hypothetical is not one which we feel ought to be driving this case because this involves a much more egregious and central infringement of title VII values and principles.

The -- indeed, the policy that we have -- actually have before the Court is based not on -- so much on a biological risk difference as on a negative behavioral -- behavioral stereotype about how women who are faced with pos-

sible fetal harm will behave. That is, in today's day and age, women in general can control whether or not they are going to have children, and, therefore, in supposing that they will not the policy is incorporating a negative behavioral -- behavioral stereotype.

QUESTION: Ms. Berzon, I have only one factual question, and maybe the record doesn't disclose it.

Does the record indicate how long unacceptable lead levels remain in the bloodstream --

MS. BERZON: We --

QUESTION: -- or do we know much about that?

MS. BERZON: We know that it is for some time period after a person is removed from lead exposure, and there are various estimates in the record.

What is not in the record is any precise indication of how long one has to be in a lead-exposed job before those blood lead levels build up. The reason that's --

QUESTION: Well, on the first part of the equation, how many months are the estimates for the removal of the -- of the contaminant?

MS. BERZON: Some of the estimates were two to three times as long as it took to build up. One person said 100 days. Another person said that he wasn't sure whether a removal of 2 months would be sufficient. Somebody said as much as a year.

In any event, at some point a woman who is being adequately warned could remove herself, let her blood lead levels go down, and then have a child.

In addition, the policy embodies a stigmatic harm of the kind that Justice O'Connor said was at the core of title VII in her concurring opinion in Price ***10** Waterhouse v. Hopkins, because it subjects women, as the complaint said, to embarassment and humiliation because of their private reproductive functions being made public. That is, everyone in the plant knows which women are fertile and which women are not fertile by which jobs they are placed in.

Finally, a central purpose of the Pregnancy Discrimination Act and of title VII was to prevent practices that, as Senator Williams explained --

QUESTION: Excuse me. That last argument would apply, as well, to a pregnancy-limited rule as well, wouldn't it?

MS. BERZON: The very last one I'm not sure would, because people can see who's pregnant.

QUESTION: Well, they'd know which woman was pregnant and which not pregnant as soon as she --

MS. BERZON: Yes, but there are other ways to know which woman are -- is pregnant.

QUESTION: Well, eventually, but not -- not -- not too much.

MS. BERZON: That's true, but it seems to me to be substantially less severe.

In any event, the purpose of title VII and the Pregnancy Discrimination Act was to prevent practices that, in the words of Senator Williams, a chief proponent ***11** of the Pregnancy Discrimination Act, "because she might become pregnant, relegate women in general to a second-class status with regard to career advancement and continuity of employment and wages, render women marginal workers and oust them from the workplace."

The fetal-risk policies of this kind -- that is, those that apply to all fertile women -- if upheld, would keep women from a broad range of jobs because there are, in fact, a broad range of jobs that present potential fetal risks due to toxics, but also due to disease, stress, noise, radiation, and also to ordinary physical accidents, like car accidents, falls, et cetera.

One example of this is that there was a recent study which showed that doctors have four times the prematurity rate -- women doctors -- of other women, and as we understand the arguments that Johnson Controls is making today, that might well be sufficient -- studies of those kind -- to ban women from being doctors.

The net effect of upholding a policy of this type, therefore, would be to sanction the resegregation of the work force, particularly because the economics of the situation are that employers are going to instill fetal protection policies in instances in which they are not dependent on women workers for their work force and not instigate them where they are highly dependent on women ***12** workers, because then they would have nobody to do the job.

So the effect is that women will end up in the jobs where they began before title VII was passed -- that is, in child care centers, hospital nurses, teachers -- not because there are fewer fetal risks in those jobs but because those are the jobs in which they are indispensable. The net effect is that this policy, if upheld, would cut the heart out of title VII and out of the Pregnancy Discrimination Act.

The question, then, is whether Congress intended to nonetheless allow employers to pursue policies of this kind within the language of the bona fide occupation qualification exception which reads very narrowly. It says that it applies in those certain instances in which sex is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business.

Johnson Controls argues that despite this extraordinarily narrow language and the vast damage done to title VII, this has to be a BFOQ, because otherwise one couldn't protect fetal health.

I will proceed in a moment to outline the three reasons why we think that that is simply wrong, but first I'd like to respond briefly to the emotional content of ***13** Johnson Control's argument. That is, by placing this case in its real context as part of the social problem of protecting fetal health.

First of all, the issue of fetal health is far more complicated than the employer admits. To understand why, let's consider two possible scenarios. First of all, the Pregnancy Discrimination Act history demonstrates that women work because they have to, and it demonstrates as well and emphatically, and this was discussed at some length on the floor and also in the hearings, that there is a major danger to fetal health due to maternal poverty and also due to an inability of women to have prenatal care if they're unemployed, and that those dangers are similar to the sorts of dangers Johnson Controls is claiming here. They are dangers of retardation, neurological damage, and so on.

If many employers adopt fetal protection policies, as I've suggested they might if Johnson Controls' principles were upheld here today, the net result will be that many women will not have adequate income and will be releg-

ating their children to precisely those fetal harms which Congress was in fact trying to prevent in passing the Pregnancy Discrimination Act.

The other possibility is that many -- some employers protect these -- won't institute fetal ***14** protection policies for reasons of the sort I alluded to earlier. That is, because they are the employers who are dependent on female workers. If that happens, women may have jobs in those workplaces, but they are traditionally lower paid, and also they do not necessarily have lesser fetal risks. They simply have different fetal risks.

A related point about the social context of this case, or the larger context of this case, is that the issue here really, therefore, is not whether fetal health is going to be protected, but how and by whom. Obviously, an employer is welcome and ought to be protecting fetal health to the highest degree possible, as long as he doesn't exclude women from the workplace, but in addition, there are two other decision makers here. There's the woman, and there's the Government.

The Government in this instance, in OSHA -- the Occupational Safety and Health Administration -- deciding the lead standard in 1978 emphatically decided, under its own statute -- section 38 of its own statute -- that it is not reasonably necessary for employers to exclude all fertile women from the workplace because of occupational safety and health concerns.

Interestingly, note that the language of OSHA is the same -- section 38 of OSHA -- as the BFOQ: reasonably necessary. So what OSHA decided is really exactly the ***15** same issue that is before the Court today. OSHA decided that it is not reasonably necessary to have an exclusion of this kind.

QUESTION: Excuse me. How does that come within OSHA's charter? I don't -- I'm just not familiar with enough -- I thought OSHA set standards for -- for levels of toxic substances in the workplace. Does it also prescribe who may be allowed in the workplace and who may not?

MS. BERZON: It does prescribe in certain instances that certain people should be removed, at least temporarily, because of a medical problem. The -- OSHA said in the preamble to its lead standard that no issue was discussed more completely in the thousands of pages of testimony than the question of women and lead.

There were specific proposals before OSHA to either apply or allow the exclusion of fertile women, and thereby to have the higher overall lead standard, and OSHA rejected that proposition emphatically and decided that it was not reasonably necessary to occupational safety and health for women to -- fertile women to be excluded from the workplace.

QUESTION: Ms. Berzon, this is tied into that. One of the things that troubles me about -- about the case is that it seems to me unlikely that Congress is going to ***16** adopt a standard that whipsawed the -- the employer, that put him between a rock and a hard place. That is to say, if he allows the women to take the jobs he is subject to enormous suits for damages, and maybe even punitive damages, if the child is born deformed, and if he doesn't he's punished under title VII.

Does the OSHA law -- ruling that you just spoke of in your view prevent State damage suits by the child when the child is born deformed, against the employer for --

MS. BERZON: I think it well might, but I think that title VII itself prevents it, for the following reason. What -- the proposition that the employer, as I understand it, is putting before the Court on the liability or legal duty

question, is that it could be held liable strictly for employing the woman in a lead-exposed job.

I mean, I assume we would all agree that if they were -- actually negligent in how lead was controlled in the workplace, or gave inadequate warnings, that title VII should not protect them, and therefore the only possibility is that they are being -- could be held liable simply from hiring the woman.

That is -- so they are positing a State rule that they may not hire women in this job. There were lots ***17** of rules like that before title VII was passed. They were statutes that were called protective laws, and they were held invalid under title VII. In other words, there were laws that said, you may not hire women in jobs that have too much lifting, or you may not hire women in other sorts of jobs.

QUESTION: I don't think that's how the suit would -- would be framed. I think the suit would be framed saying that he was negligent in not reducing the lead level even further so that it would -- would have been safe for even pregnant women. That's how the suit would be formulated, I think. Now, would OSHA preempt that?

MS. BERZON: I would suppose that --

QUESTION: Would OSHA preempt the State from establishing as a rule of tort law that you were negligent in not reducing your lead level even further?

MS. BERZON: It would seem to me that it would be extremely good evidence as to what a reasonable person would do.

On the other hand, one of the reasons that we're all speculating here is that there has never been a case like this; and the fact that there's never been a case like this is itself somewhat indicative of the fact that it is not reasonably necessary to the normal operation of ***18** the business for an employer to turn somersaults in order to avoid a theory of liability that does not yet exist.

More than that, I -- I really do think that if the employer is actually negligent in the way in which he is running the workplace according to a reasonable person's standard, there is absolutely no way that title VII's BFOQ ought to absolve him. It's both bad law in terms of the way the statute is written. It's also very poor occupational health policy, because it means that an employer is allowing -- being allowed to discriminate in order to avoid being -- responsible as to its occupational health responsibilities.

QUESTION: Ms. Berzon --

MS. BERZON: It's as if the employer said I would rather have hired blacks because if I hire them I'm going to have to have -- act toward them in a nonnegligent fashion.

QUESTION: Ms. Berzon, is there anything in the record to tell us whether insurance is available to the company against this perceived risk or, if so, how much it would cost?

MS. BERZON: There is absolutely nothing in the record that deals with that question.

QUESTION: Did they defend on the ground of potential tort liability?

***19** MS. BERZON: Not really, and the reason is because liability as such -- that is, the cost that they might have to pay -- they understand and we understand as a monetary factor cannot be a bona fide occupational qualifica-

tion.

The argument that's being made now, as I understand it, is somewhat different. It's not the economics as such. It is, rather, some notion that there is a perceived legal duty flowing from a hypothetical common law rule which, as I say, doesn't exist because no case exists. No one has yet --

QUESTION: Well, I don't think it's bizarre to assume that a State court in a tort suit would impose very severe liability on an employer for knowingly placing the woman in the position where the fetus is injured if the fetus is actually injured.

If we can assume that for the moment, is it your position that any such liability should be preempted --

MS. BERZON: It's my position --

QUESTION: -- by reason of a decision that's in your favor here?

MS. BERZON: That is precisely what a series of cases that this Court has affirmatively cited held --

QUESTION: But is it your position --

MS. BERZON: -- and it is my position, and it's ***20** also the employer's position, by the way.

QUESTION: So your -- your position is that a failure to find a BFOQ and a requirement that the employer be placed -- that the employee have the position should preempt any tort liability for any injury to the fetus?

MS. BERZON: It's my position, and it is also the employer's position. Not any tort liability. Any tort liability for behavior which is not negligent or the warning --

QUESTION: Not negligent, yes.

MS. BERZON: Yes. Which is not negligent and where there were adequate warnings.

QUESTION: So that in your position, the fetus should not be able to recover, or the newly born child, absent negligence?

MS. BERZON: That's correct.

QUESTION: You'd allow recovery against the mother who -- who put the fetus in that position, I presume?

MS. BERZON: That assumes that the mother would be negligent if she put the fetus in that position, and, for the reasons that I stated earlier, that is an extremely unlikely context.

And it's also true that the, again, the theory in which the mother could become liable does not yet ***21** exist, and I would argue strongly against it largely because -- and as I was about to say -- the woman herself is a decision maker in this situation, and the woman is --

QUESTION: So there's -- so there's no possible grounds for recovery for the injured child under your view?

MS. BERZON: I think that would be correct. On the other hand, as I was about to say, we are assuming a level of fetal injuries here that excludes the fact that women are going to act responsibly, and that society in general,

as this Court said emphatically in Parham v. J.R., places in the hands of parents the responsibility to save their children from risk, recognizing that sometimes -- occasionally they will make mistakes, but that if they do make mistakes or if a problem develops along that way, one does not put in the hands of a private individual the decision whether they ought to be overridden.

It's the Government that ordinarily has the power to override parental decisions, not the Government. Nothing in this case implicates that relationship and would prevent OSHA or some other agency or the Congress from making determinations of that kind.

The only issue here is whether the employer can ***22** do it; and what's noteworthy is that the employer's position here is really, as Judge Easterbrook said below, a not-on-our-watch position. In other words, we don't want to be tied into this harm. What happens to this fetus and the rest of the world is just not our problem. And that's why the woman is a much more, both traditional but also completely informed decision maker. She also knows her own personal situation as to whether she is likely to have a child or not.

QUESTION: May I ask you if you are asking for a judgment in your favor without a trial, or do you think the case should be tried?

MS. BERZON: We do not move for summary judgment; and, therefore, the net result of a reversal would be a remand to the trial court.

I would like to reserve the remainder of my time.

QUESTION: Thank you, Ms. Berzon.

Mr. Jaspan.

ORAL ARGUMENT OF STANLEY S. JASPAN ON BEHALF OF THE RESPONDENT

MR. JASPAN: Mr. Chief Justice, and may it please the Court:

The central issue in this case -- excuse me -- is whether Congress intended through title VII to require ***23** an employer to knowingly expose the offspring of its employees to a toxic substance which causes permanent harm to the child's developing brain and central nervous system.

Petitioners claim that whenever such an exclusion treats men and women differently, it is, per se, illegal. However, every Federal court of appeals to have addressed the issue, along with the EEOC, and now the United States as amicus in this case, has rejected petitioners' position. Neither the statutory language, nor sound public policy, supports such an approach.

The legal issue must be evaluated in this case against one overriding, undisputed fact: exposure of the fetus to the lead levels regarded as safe under the current OSHA lead standard poisons the fetus and causes permanent brain damage. Every expert in this case --

QUESTION: Let me just interrupt you there. How often does this happen? Does the record tell us?

MR. JASPAN: The record doesn't give specific --

QUESTION: It says it may poison some fetus some time.

MR. JASPAN: The record indicates, Your Honor, that the studies, epidemiological studies comparing children and fetuses, mothers with -- the cord blood of the mother -- with different levels of lead, shows that an ***24** increasing quantity of lead in the system will cause deficiency and behavioral disorders, learning disabilities and other such problems --

QUESTION: Right, and the question is, can you reduce the lead level enough so you can avoid that risk in a substantial number of cases?

MR. JASPAN: And the answer --

QUESTION: The answer -- the record doesn't tell us how many cases there are, how many women work in the factory, or what the history has been, does it?

MR. JASPAN: No, the record does show that the company attempted a voluntary program. Approximately 1977 to 1982, the company advised women of the --

QUESTION: How many women?

MR. JASPAN: The exact number isn't in the record. There is in evidence in the record from a UAW affidavit that in the UAW plants, which is the majority of the plants, 2 years later there were 275 women, that number. That would not totally reflect what was there at the time of this policy, but the company attempted during that period to advise women of the dangers and indicated to them that if there was any chance that they might become pregnant, they should remove themselves from high-lead areas. The company went further, and had each woman sign a statement saying that she understand that the ***25** company recommends that she not work in that high-lead area if she might become pregnant.

The total -- in the last 3-1/2 years of that policy, a total of eight women -- at least eight women became pregnant with blood leads in excess of 30 micrograms, the level set by the Centers for Disease Control as the level at which lead poisoning occurs in a small child.

QUESTION: May occur, or always occurs?

MR. JASPAN: That it was an unsafe level. It would -- it's not --

QUESTION: Well, why doesn't OSHA consider it an unsafe level? Why doesn't OSHA require a higher -- a lower level, or require pregnant women to be excluded? I mean, I'm a little troubled by the notion that the district court is supposed to evaluate all these medical experts on its own.

Usually, when you're reviewing OSHA, you -- it's easy for a district judge and for the appellate court on review to say whether -- whether it seems reasonable, what OSHA has done, given all the expert evidence. But you're asking district courts to figure out whether -- you know, such questions as what the safe level is, and whether -- whether males are subject to exactly the same risk. I don't think we're very good at that.

***26** MR. JASPAN: I think Congress has asked the district courts to do that in adopting the bona fide occupational qualification defense.

QUESTION: Well --

MR. JASPAN: This Court --

QUESTION: Maybe if we accept your interpretation of it, Congress has, but one thing that makes me reluctant to accept your interpretation is that very fact, that it puts us in a very unusual position of becoming medical experts on some very difficult questions.

MR. JASPAN: But prior decisions of this Court, such as Criswell and Dothard, in the bona fide occupational qualification field, have certainly put the district courts in that position.

QUESTION: Well, what about OSHA? Why wouldn't OSHA -- if what you say is true, how do you explain OSHA's rule?

MR. JASPAN: OSHA, as the statute makes clear, sets a floor, not a ceiling, for occupational health. The OSHA statute encourages voluntary programs beyond the actual standards. The OSHA lead standard itself, adopted in 1978, required part of the standard is silent as to fetal health.

In the preamble to the standard, OSHA says that we have not adopted a separate standard for women ***27** because -- and explains that silence. It specifically finds, as the experts in this case have said, that a fetus exposed to lead, blood lead above 30 micrograms, is in danger of serious permanent injury to the developing central nervous system.

QUESTION: Mr. Jaspan, I -- it seems to me that you are not coming to grips with the effect of the Pregnancy Discrimination Act -- the PDA -- which says that female employees affected by pregnancy shall be treated the same for all employment-related purposes as other persons not affected but similar in their ability or inability to work. And I think you have to address that act and its effect on your position, and I think also the effect of this Court's holding in the Dothard opinion, which certainly points in the direction of saying that safety concerns are not going to rise to the level of a defense under BFOQ, in essence.

MR. JASPAN: Let me address both issues --

QUESTION: Yes.

MR. JASPAN: -- Justice O'Connor.

As to the PDA, ability to work certainly includes the ability to perform a job safely and efficiently. No employer goes out and hires employees who may be able to produce the product in some rapid fashion, but if it causes injury to fellow employees, to the ***28** employee who's doing the work, to neighbors, to other third parties, certainly that individual does not have the ability to perform the job. So the language of ability to perform the job, as expressed in the Pregnancy Discrimination Act, certainly includes the ability to perform it safely as well efficiently.

We think when Congress adopted the Pregnancy Discrimination Act, it made clear that the existing title VII analysis, other than this Court's decision in Gilbert, would remain in effect; that all defenses, including the bona fide occupational qualification defense, would remain available to an employer under that act.

QUESTION: But I thought the policy reviewed here applies to women who are not pregnant and --

MR. JASPAN: The purpose of the policy is to protect the health of the fetus.

QUESTION: Who can -- who can perform the work.

MR. JASPAN: This Court in Criswell made clear that a bona fide occupational qualification defense is available when all, or substantially all, of the employees cannot perform the job safely, and also when the employer is unable to determine which employees in the excluded class possess the trait that creates the safety problem. In this case, the employer is not able to determine which employees will become pregnant.

***29** The only way an employer could attempt to do so, first of all a voluntary program, which was attempted and failed in this company, and second would be some constant monitoring of the sex lives of the employees, which even Petitioners agree would be inappropriate.

QUESTION: Mr. Jaspan, in interpreting the Pregnancy Discrimination Act, as you just have, that is, as making an exception, or considering it part of the job qualification that you not harm the fetus' health -- it seems to me you're making a dead letter of it. That was always the justification used for discriminating against pregnant women, that they shouldn't work extra long hours because it would be bad for the fetus.

I mean, to -- to -- to continue to allow that exception is to make a farce of the Pregnancy Discrimination Act. What -- what other bases of treating pregnant women specially were there, except that? It's bad for the child. You're -- You're making it a ridiculous piece of legislation.

MR. JASPAN: Well, Justice Scalia, with all due respect, I disagree. I think clearly the Pregnancy Discrimination Act took care of such concerns as benefits, it took care of such concerns that were raised in this Court's Gilbert decision. But I think it's clear that the Pregnancy Discrimination Act was not intended to overrule ***30** the other defenses and the existing analysis contained in title VII, the legislative history, indicates that there's nothing in the language that indicates otherwise. The Pregnancy Discrimination Act is an amendment to the definition of sex discrimination. It certainly -- it excludes some specific affirmative defenses involving the Equal Pay Act. It has no exclusion in its language for the bona fide occupational qualification defense.

To take such an approach as is taken by petitioners here and as is suggested by Judge Easterbrook in effect says that an employer can never exclude a woman based upon her pregnancy, no matter how dangerous it is to her fetus, that that woman has the absolute right.

Because the legal analysis if one accepts that position is that even -- for example, in a nuclear power plant if there were a room or an -- a specific area where the radiation through medical evidence is clear that it's safe for adults and not for the fetus and you have a woman who is pregnant, the employer under that analysis would be precluded from denying that woman that position. It would be odd, in fact, for the Pregnancy Discrimination Act to be treated -- to be interpreted in such a manner.

One of the purposes of the Pregnancy Discrimination Act was fetal health. The legislative history is replete with the concern for fetal health. To ***31** interpret that act as requiring an employer to knowingly expose the offspring of its employees to injury, permanent injury to the central nervous system, would be contrary to that intent.

Moreover, that same Pregnancy Discrimination Act specifically states that an employer shall not be required to pay for an abortion. Now, if Congress went out of its way to say the employer shouldn't be required to pay for an abortion, it wasn't also saying that the employer should be required to injure the child. I think that's an improper interpretation of the Pregnancy Discrimination Act certainly not called for by its language or its legislative history.

QUESTION: Mr. Jaspan, can I ask this. One of the reasons this case is so hard is because at each end of the spectrum there seem to be an impossible -- an impossible hypothetical such as the one you pose.

Would you comment on the other end of the spectrum that Judge Easterbrook argued so -- strongly about, the zero-risk business? If there is any risk, no matter how infinitesimal, that one out of 100,000 workers might get this very -- if the harm does arise, it's very serious. Everybody agrees to that.

What -- what is your position on that? Is it -- is the slightest quantified risk enough to justify ***32** your policy?

MR. JASPAN: No, it's not, and we haven't suggested that, Your Honor.

QUESTION: How do you -- how do we decide what's enough?

MR. JASPAN: I think in this case there was no reason for the courts to address it because the parties stipulated, conceded at the court of appeals -- it's in the petitioners' brief -- that there was substantial risk.

QUESTION: Well, it's a substantial harm when it occurs. They didn't -- they did not concede, as I understand the papers, that it occurs with sufficient frequency to be considered substantial in a quantifiable sense. Or am I wrong about that?

MR. JASPAN: I believe you're wrong on that, because the court, the district court and the court of appeals adopted the existing case law from the Fourth and Eleventh Circuit. They talked about a three-factor test. The first factor was substantial risk of harm to the offspring.

In its brief to the court of appeals, petitioners said we do not challenge that harm. The, I think, specific language is we concede that -- that factor, language to that effect. But it was clear there was no discussion of that factor. That was never ***33** developed beyond that. It wasn't developed at the district court level because all the experts agreed that it's substantial risk.

And the question of frequency simply didn't come up because the risk was so great, and I think to that extent --

QUESTION: Well, how --

MR. JASPAN: I think that their concession went beyond that. So in this case, I don't think it's an issue that really has to be addressed.

QUESTION: Well, I'm still concerned about it, because if we approve the result of this case, what are we saying about the frequency that would cross the threshold? One in a million; one in a thousand; one in ten?

MR. JASPAN: I think what we're saying is that a court in evaluating what is the first prong, as recognized by all the parties, and it's recognized by the lower courts that have addressed the issue, must determine whether the risk is so substantial that whether it -- in terms of the severity and the frequency and has to measure both. I think that's consistent with Tamiami and this Court's direction in Criswell.

In this case there were two factors present that -- why it was not addressed more fully. One was the voluntary program. It wasn't theoretical here. There ***34** were at least eight women in a 3-1/2-year period.

QUESTION: Who got pregnant but no evidence that -- that the fetuses were harmed.

MR. JASPAN: No. Women who were pregnant with blood leads at -- in excess of --

QUESTION: Right, but there is no evidence --

MR. JASPAN: -- 30 milligrams. There were additional pregnancies --

QUESTION: There is no evidence that their children were harmed.

MR. JASPAN: That's not true. There is evidence, the testimony of Dr. Fishburn in the record identifying that he was aware on at least one of those where there --

QUESTION: One of them was not a totally normal child, but he didn't say it was totally attributable to this cause, did he?

MR. JASPAN: And what he did say is we're dealing with an -- epidemiological studies that are the basis for the entire concern with childhood lead, is that if a child's IQ is reduced by 10 or 20 points, we don't know -- if it's reduced, we don't know what it would have been. We can't prove that the child would have been that much smarter or that much better behaved or had lesser problems in school if he didn't have this permanent ***35** damage. That's why you can't prove it with any single individual. And the studies that are relied upon by the experts, by the Centers for Disease Control are the epidemiological studies dealing with thousands of children.

We must remember that we're dealing in this case with such a severe and substantial danger that the Centers for Disease Control in 19 --

QUESTION: Well, does that one case -- identify the severity of the danger that we're talking about?

MR. JASPAN: I don't think the single case does. I think we have to look at the larger studies, such that the Centers for Disease Control in 1985 made the unequivocal statement that women of childbearing age should be excluded from working at jobs where significant lead exposure occurs. It was an unequivocal statement by the Centers for Disease Control, and the basis for the statement was their study or restudy of the dangers and the problems with childhood lead poisoning.

QUESTION: Well, they -- they should -- women -- women in that condition should not smoke cigarettes and drink substantial amounts of alcohol, either, but the Government does not have laws that take the judgment of whether to do it or not away from them.

And do you know how this risk compares to the ***36** risk of harm to the fetus from heavy smoking?

MR. JASPAN: I don't know the exact comparison, Your Honor, but there's a difference here between the Government prohibiting it and insisting that a -- private employer do it. We don't provide cigarettes to our pregnant employees or fertile employees or any other employees.

QUESTION: Or make an exception from the employers -- from the prohibition of the employers otherwise controlling the -- the lives of the employees by prohibiting them from employment. That's what we're talking about, an exception to the general rule.

What I'm suggesting is that the Government has not shown in other indications an unwillingness to leave the health of the fetus up to the judgment of the mother, including situations where the fetus might be placed at sub-

stantial risk, maybe greater risk than would occur from lead poisoning.

MR. JASPAN: And I -- I agree with you on that point. However, we are not dealing with whether the Government puts a restriction on an individual. Here, we're dealing whether an employer, a manufacturer, is required to expose the individual, to expose the child.

QUESTION: Do you take the position that you could refuse to sell cigarettes to pregnant women ***37** employees?

MR. JASPAN: Certainly. I think the employer takes the position that, consistent with its entire health and safety program, that it won't sell cigarettes to anyone.

QUESTION: No, but that wasn't my question.

(Laughter.)

MR. JASPAN: Could it single out pregnant employees? If selling cigarettes were part of its normal business and --

QUESTION: No, it's in your company cafeteria and it's been done for 20 years, let's assume.

MR. JASPAN: An assumption that's not true. I assume they could do so, yes, but I don't think that's the facts here.

QUESTION: You assume they could --

MR. JASPAN: They could prohibit that sale, and I think --

QUESTION: I think that's consistent with the theory of your case.

MR. JASPAN: And that's why I suggest that.

(Laughter.)

MR. JASPAN: But it's not the facts here.

I think what we're dealing with here is the question of occupational health. I think it is clear that ***38** employers, manufacturers, have now long been told that they are responsible for the consequences of their manufacturing substances. Manufacturers are liable, responsible if they injure their employees, they injure the children of their employees, their customers, their neighbors, and the environment.

QUESTION: Surely not if the Government made them do it. Isn't -- Isn't the Government made me do it always a good defense? I thought we, you know --

MR. JASPAN: It arguably should be a defense. However, bona fide occupational qualification defense doesn't talk about the employer may do something if it's required to do it by law. The question under the bona fide occupational qualification defense is whether it is reasonably necessary to the normal operation. The normal operation of manufacturers today is to provide for the health and safety of their employees, the children of their employees, and their neighbors and other third parties.

The issue under title VII, going back to the language of the statute, bona fide occupational qualification language, is what is the normal operation of the employer. To suggest that normal operation does not include concern for health and safety would certainly be a strange notion to most manufacturers today. It certainly ***39** is true here.

You have a manufacturer who for years, before OSHA and beyond what OSHA requires, has provided extensive health and safety protection, lead protection, to its employees and the children of its employees. The company spends substantial sums of money lowering the blood -- the air leads in the plant through use of engineering controls, through use of make-up air units, through ventilation systems. The district court found, and it was unchallenged, the company is doing all it can to clean up and to reduce the lead exposure.

We're not dealing with a situation where the company is saying I'm going to exclude the women as a way of avoiding cleaning up the workplace. This is a clean workplace. But the acceptable lead levels are so low as determined by the various agencies, as determined by -- agreed by all the experts here, that it is impossible to do so, and that was a finding unchallenged of the district court.

QUESTION: Mr. Jaspan, is lead level in the ambient air something that can be monitored constantly, like temperature or humidity or something like that, or is it you have to --

MR. JASPAN: It's monitored on an individual -- on an 8-hour time-weighted average basis, so it can be ***40** monitored daily. It wouldn't be looking at a particular point in time --

QUESTION: But you don't look -- you can't look at the instrument at 6:00 and say the lead level has now reached a point where we've got to get out of the plant or something like that?

MR. JASPAN: No. Typically, it's a pump that's attached to the individual employee or stationary pump that would filter air through it, and it would be -- it's an 8-hour time-weighted average, the OSHA lead standard for air --

QUESTION: Is an average rather than a -- than amount at a fixed point in time.

MR. JASPAN: Yes. That's the way that works.

QUESTION: I see.

MR. JASPAN: But we're dealing not only with the engineering controls this company put in but the biological monitoring. Employees are monitored regularly. They're subject to medical examinations, blood testing, the effects of lead. They also get paid wash-up time and work clothing provided by the employer. The purpose of that is to make sure the lead is not taken home with the employee so that the family is not exposed.

This fetal protection policy is not a policy that was adopted in isolation from the health and safety ***41** concerns of this employer. On the contrary, the impetus for this program came -- exclusively from the medical consultants of the company. The medical consultants unanimously said, look, you're doing all of these other things, you're being irresponsible in exposing these children to these levels of lead.

Now OSHA does not prohibit that. I think the -- that issue came up before. OSHA explained that the -- that it was its desire, notwithstanding the silence in the standard itself, to have all children or fetuses not exposed to any level above 30 micrograms. They agreed with the findings on which this study is based.

QUESTION: Mr. Jaspan, suppose we agree with your theory. How does the Court go about determining what level of protection for fetuses is enough?

I'm not concerned about this case. You answered that for this case by saying here it's conceded that it was a substantial risk. But in -- in another case, suppose you have an employer who says I am so concerned for fetal health I don't want any risk, I want zero risk. And he can show that, you know, that -- that there is a very, very tiny risk.

MR. JASPAN: I think the --

QUESTION: The workplace is full of risks. What -- how is a court to determine how careful the ***42** employer may be without violating title VII?

MR. JASPAN: I think the language of the statute talks about reasonably necessary. That doesn't provide much more guidance on that. But I think what's clear from this Court in Criswell is that it becomes a case -- case-by-case analysis. What clearly must be shown and the reason why the abuse that seems to be suggested by petitioners that might occur from a decision affirming the court of appeals simply is not true is that we're dealing with sound medical evidence. We're not dealing with stereotypes. We're not dealing with situations --

QUESTION: This doesn't sound -- I'm not talking about the medical evidence. I'm talking about how many deformities is worth letting women work in the department. How many is worth it? Let's assume the medical evidence is uncontradicted. There will be one in a million. Is that too many?

MR. JASPAN: I don't think that we can put a precise number. I think what has to be measured is how serious is the deformity, how likely it is, if it's one in a million, is there another way of avoiding it --

QUESTION: I'm just trying to figure out how courts are going to manage this -- this rule that you're urging us to take onto ourselves. How are we to determine what the proper balance of risk to fetus and freedom for ***43** the women to work in the marketplace is?

MR. JASPAN: I think that it's going to depend on the specific facts, but there's no percentage --

QUESTION: Well, I know that, but I don't know what standards we apply. I don't know --

MR. JASPAN: Well, I think the standards we should talk about is substantial risk and whether it's reasonably necessary for the particular operation and to provide the safety --

QUESTION: It has to be substantial risk?

MR. JASPAN: I think in most cases --

QUESTION: So one -- one in a million wouldn't be enough?

MR. JASPAN: I don't know where the numbers would fall. If --

QUESTION: I see. So long as you can put the label substantial on it, you're sure what the answer is?

(Laughter.)

MR. JASPAN: Justice Scalia, I think what we'd have to do is look in terms of the individual fact situation. It was suggested in petitioners' brief that Criswell should be limited to mass catastrophe, and it comes out of the Tamiami case of the Fifth Circuit suggesting that it is okay if there's a bus accident that injures 10 or 20 people and that's -- Criswell formula is ***44** appropriate, but if we're dealing with an injury that only affects 5 or 10 children it may not be.

I don't think we're in a position or any employer is in a position or should be in a position to make the decision that will allow 5 serious injuries but not 10. I think the tort law and I think those type of considerations, I think you have to look at the entire set of circumstances --

QUESTION: He has to make those decisions. He has to make those decisions.

MR. JASPAN: That's right, and I think in this case we are so far beyond where that line should be drawn, as both parties conceded, that it's not an issue that this Court has to face in this case, and it's not an issue that the district court or the court of appeals needed to face because it was a conceded issue here. Difficult question, I totally agree with you.

Let me go on that zero-risk point just for a moment. There is no zero risk. The studies indicate that for adults generally the 50-microgram blood lead level is safe, especially if the effects, individual effects are monitored. For the fetus, we're dealing with 30 or 25 micrograms. Women are allowed to work below that. It's conceivable, notwithstanding the likelihood and past experience, that an -- accident will occur and the blood ***45** lead of an individual woman who's fertile may shoot up. It's not zero risk here.

We do exclude men and unfertile women from areas as well, a zero risk, because the OSHA standard imposes those risks on the employer, those limits on the employer. So we're not dealing with the comparison of zero risk versus in one case and not -- and a different type of risk in another case.

Let me also go back to the OSHA standard for a moment. Appendix C of that OSHA standard is very explicit. It assumes that company physicians --

QUESTION: Does this appear in the -- in the materials that we have here? Is it in your brief?

MR. JASPAN: It is referenced in the brief. It is referenced in the brief. It's not spelled out in the brief. Its response --

QUESTION: It's not set forth anywhere in any of the papers?

MR. JASPAN: No. It's in -- it's in response to the argument that OSHA in some way preempts this position that we're taking here.

Appendix C assumes broad flexibility by a company physician in dealing with pregnancy and potential pregnancy. It talks about explicitly -- the OSHA's appendix talks about companies going beyond what the OSHA ***46** limit requires. It encourages that particularly in dealing with pregnancy and potential pregnancy.

The Department of Labor has taken the position, approved by one court of appeals, the D.C. Circuit, that if an employer knows that an occupational -- an OSHA standard is insufficient to provide adequate protection, the employer is required to take additional steps.

Here, we had our medical consultants telling us that we must take additional steps. The Department of Labor would take the position that all this was mandatory.

Finally, I call your attention to the Solicitor General's brief. In there, they make clear that as far as the U.S., the United States, is concerned, the 1978 OSHA conclusions are in no way dispositive of this case. In fact, the analysis in the Solicitor General's brief representing the EEOC as well as the United States is consistent with the analysis taken by the company here. Our only disagreement with that brief is on the issue of whether or not the court of appeals adequately examined the issue of male mediation.

The court of appeals found that a rational trier of fact could not come to an unspeculative -- nonspeculative decision that male mediation is similar to the female mediation, that the risks to the offspring of the male employees is substantially similar to the risks ***47** to the female, the offspring of female employees.

The Solicitor General suggests that it's not clear that the court of appeals decided that issue with the burden on the employer. We think it is. We think that's an issue where the EEOC possesses no special expertise, and this Court can certainly review the decision of the court of appeals.

Beyond that, though, the legal analysis, we're in agreement with the Solicitor General that occupational health --

QUESTION: Well, if it's a motion for summary judgment, how much -- what is the effect of placing the burden of proof on something like that?

MR. JASPAN: In this case it would not have any effect, Your Honor, because in this case the Court addressed it both with the burden of proof on the plaintiffs under their interpretation of business necessity in light of Wards Cove and burden of proof on the employer in bona fide occupational qualification.

And on this particular issue, the Court found that a trier -- a rational trier of fact could not come to a nonspeculative conclusion that the risk to -- through the male to the offspring was similar to that to the female.

QUESTION: Even though the burden of proof was ***48** on the defendant?

MR. JASPAN: In either case, because a rational trier of fact could not come to that -- that conclusion, it wouldn't make any difference where the burden is. But they did look at it both ways, and they looked at it both with the burden of proof on the plaintiff and the burden on the defendant. That's where the Solicitor General claims that it's not sufficiently clear, and his suggestion is to remand to the court of appeals for that purpose. We don't think that purpose exists.

But, beyond that, the interpretation given the statute -- consistently given the statute, by the way -- by the EEOC that such policies as this are permissible is the appropriate one and is consistent with the case law as previously set down by this Court.

In Price Waterhouse this Court indicated that we're not to leave common sense at the doorstep when interpreting title VII. It would violate common sense and the overriding interest in occupational health and safety to require an employer to damage unborn children.

Johnson's policy, part of a longstanding policy of concern for the health and safety of its employees, strikes the appropriate balance. And that's what we're talking about, balancing, as required by Price Waterhouse, the interests involved of the employer, the ***49** employee and the woman. An employer, a manufacturer that creates a

hazard, has an obligation to protect against injury from that hazard.

The employer here is simply exercising its -- its obligations and its rights consistent with its normal operations as permitted by the bona fide occupational qualification defense. That's what's at stake here.

Thank you.

QUESTION: Thank you, Mr. Jaspan.

Ms. Berzon, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF MARSHA S. BERZON ON BEHALF OF THE PETITIONERS

MS. BERZON: Several comments.

First of all, we certainly do not concede that the brisk comparison here was done properly. The -- our contention is that in order to adequately assess the risk involved, one has to look at the class of people who are being excluded and not simply the question of whether, if there are actual fetuses, which is what we were talking about when we said there was a substantial risk, is -- is injured.

In other words, while we did agree that the kind of injury to fetuses as to actually pregnant women if the risk occurred was substantial, and we certainly did not ***50** concede that looking at fertile women as a whole, the likelihood that any injury would actually occur would be any greater than the level of adult risk accepted in the workplace.

And in answer to Justice Scalia's questions about how one should tell how much risk is enough, we suggest that the best test is what does the employer normally accept in the workplace as to health risks generally. That comparative standard is not factored into the test that was applied by the court of appeals here to the test -- or to the test that the company here suggests.

In other words, there is absolutely nothing in this record to indicate that adult risks are being perfectly protected, but the company is insisting on perfectly protecting fetal risks. For example --

QUESTION: Of course, on what you -- on the basis of what you've just -- we would have a different case, in other words, if the employer adopted a different policy which simply said as soon as -- as soon as you are pregnant you are out of this job?

MS. BERZON: On -- on that aspect of -- that defect in their BFOQ policy, yes. In other words, if one were to cite only that there was that defect and not go on to our broader proposition based upon the occupational qualification requirement -- that is, the notion that ***51** because of the language of the BFOQ, the focus on occupational qualifications, because of the language of the PDA, the reference to the ability or inability to work, the fact that Dothard, as Justice O'Connor said, indicates that the woman's own health is not a safety -- is not a BFOQ and the fact that the PDA, it seems to us, indicates that this case is to be treated like a Dothard case and not, for example, like a Criswell case in which the safety concern was the essence of the business, as the Court greatly stressed both in that case and in Dothard.

QUESTION: Did you -- did you move for summary judgment?

MS. BERZON: We do not move for summary judgment, and we are not asking --

QUESTION: What do you think our judgment should be here? To get it back to the district court?

MS. BERZON: Yes, to get it back to the district court.

QUESTION: For a trial?

MS. BERZON: At that point, it appears that we -- we would look at the record, and we would decide whether to -- for us to move for summary judgment at that point. But --

QUESTION: Of course -- of course, if we agree ***52** with your first argument, I suppose summary judgment would be -- would -- you would have good ground for summary judgment?

MS. BERZON: That's right, but we also think we would have good ground for summary judgment in our other two arguments as well --

QUESTION: Yes, I know.

MS. BERZON: -- because --

QUESTION: It would be a foregone conclusion under your first position --

MS. BERZON: I think that is probably correct. But I'm suggesting as well that --

QUESTION: So in effect, we would be saying as a matter of law you're entitled to judgment in the case?

MS. BERZON: Yes, but the -- the actual disposition would simply be a remand.

QUESTION: To trial -- for trial?

MS. BERZON: To the trial court for further proceedings.

QUESTION: Yes, to find the -- all right.

MS. BERZON: I was going to say that the -- so on the one hand, this -- the standard which Johnson Controls is arguing does not factor in any comparative risk notion or any reason why an employer cannot insist upon perfect protection for fetal health while not ***53** protecting adult health perfectly, not to say adequately, but not perfectly.

There is -- and contrary to what the company has been suggesting, here there is clear evidence in the record of cardiovascular dangers, neurological dangers and male fertility dangers -- which, by the way, are conceded -- with respect to adult health, and those are not being perfectly protected against.

In addition, this policy fails for another reason, which is that it does not -- it excludes a class all or substantially all of whom are not within the group that actually presents the risk. Criswell doesn't apply here or, if applied here, leads to an opposite conclusion, not for the reason that Mr. Jaspan suggested but because this is not a situation in which it is impossible to individualize the risk assessment. It's just impossible for the employer to individualize the risk assessment because the employer doesn't want to ask the private questions.

The woman, herself, knows what her situation is, and, therefore, we're not dealing, as I said before, with a biological fact. We're dealing with a behavioral fact which cannot be presumed against the woman.

In addition and connected to that is that the extreme case hypothetical which Mr. Jaspan suggested ***54** assumes that if one went to an actually pregnant woman in a nuclear power plant and said the following five things are going to happen to you if you stay in this workplace and also, for example, provided her with another comparable job that she would stay there, there is absolutely no basis for that; and in any event, if there is one woman like that in the world, we are talking about an extremely minuscule risk.

In addition and again related, Mr. Jaspan suggests that this company tried that. Well, the fact is the company didn't try it. Justice Posner said in his dissent below that the warning that the company gave to women was more likely to allay than to arouse concern. I think if the Court reads that warning --

QUESTION: Thank you, Ms. Berzon.

MS. BERZON: -- it would agree with that proposition.

CHIEF JUSTICE REHNQUIST: Your time has expired.

The case is submitted.

(Whereupon, at 10:55 a.m., the case in the above-entitled matter was submitted.)

International Union v. Johnson Controls, Inc.
1990 WL 601346 (U.S.) (Oral Argument)

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