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Chioma Kanu Agomo

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WORK ENVIRONMENT AND WOMEN: U.S. PRACTICE

Chioma Kanu Agomo

The word "environment" refers to the totality of physical, chemical and biotic factors that influence or affect an ecological community in such a manner as to determine its form and survival. On the individual plane, it describes the aggregate of social and cultural conditions that impact the life of an individual or class. Work environment straddles both definitions and as it concerns women, it refers to those conditions that bear on them as workers. Obviously, there are so many issues that affect their working lives. However, this is not the place to consider them. Instead, the focus here is on reproductive health policies and their effect on women's employment with special reference to the practice of the United States.

The aim is to show that reproductive health policies under present circumstances constitute a denial of equal rights to work granted to women since 1964, and therefore a denial of their human rights. It is also intended to show further that there is insufficient scientific evidence to support present policy, which is merely a pretext for shying away from the larger...
issue of safe and healthy environment for all workers and their families present and future.

This is not new territory. It is but a contribution to ideas and views on a theme that is as important as it is topical, but which has perhaps become trapped in the quagmire of the general movement for equality in which the rules dictate the outcome, which in turn create unsatisfactory consequences constantly in need of solution. Who knows, perhaps the dawn of a new century might infuse fresh ideas and produce real solutions.

I. WOMEN, WORK AND THE COURTS BEFORE 1964

In 1873, the United States Supreme Court in Bradwell v. Illinois denied a woman the equal protection guaranteed under the Fourteenth Amendment. The Court expressly declared that the paramount destiny and mission was to fulfill the noble and benign offices of wife and mother. Thus her biological make up was used to define her role in society. The court went further to state:

The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of the Citizens of the United States ... assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life.

Thirty-five years later, in 1908, in Muller v. Oregon, the Supreme Court again used “the physical structure and the performance of maternal functions” to uphold the constitution-

3. See generally, Robert H. Blank, Fetal Protection in the Workplace (1993); Emily Buss, Getting Beyond Discrimination, 95 Yale L.J. 554-577 (1986); Hannah A. Furnish, Prenatal Exposure to Toxic Work Environment, 66 Iowa L. Rev. 63 (1980); Wendy W. Williams, Firing the Woman to Protect the Fetus, 69 Geo. L.J. 641-704 (1981); Yvonne Sor, Fertility or Unemployment, 1 Journal of Law and Health 141-228 (1986-87).
4. 16 Wall 130 (1873).
5. Id. at 138-9.
ality of the Oregon Statute which prohibited the employment of women in any mechanical establishment or factory or laundry in the State for more than ten hours in any 24 hour period. The U.S. Supreme Court made what is believed to be a prophetic statement that has been fulfilled and will continue to be relevant. It said:

Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right . . . her physical structure and a proper discharge of her maternal functions - having in view not merely her own health, but the well-being of the race - justify legislation to protect her . . . .

In 1920, women were granted the right to vote by virtue of the 19th Amendment of the U.S. Constitution. In 1963, Congress passed the Equal Pay Act that requires companies to pay equal wages to both men and women for equal work done. Then came 1964 and the Civil Rights Act with its Title VII. They all go to substantiate the observation of the Supreme Court in 1908 on the constant need for legislation to protect women.

II. WOMEN, WORK AND THE COURTS AFTER 1964

Title VII of the 1964 Civil Rights Act proscribed discrimination in employment on grounds inter alia of sex. The floodgate of litigation that followed shows just a glimpse into the nature and extent of discrimination women face in the work place. It has been said that the inclusion of “sex” in Title VII was “without even a minimum of congressional investigation

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7. Id. at 412, 421.
8. Id. at 422.
into an area which implications that are only beginning to pierce the consciousness and conscience of America."\(^{11}\) The linking of reproductive health and workplace environment with Title VII is perhaps one of the unforeseen implications "that are only beginning to pierce the consciousness and conscience of America."

Before 1978, this was not so because the courts sanctioned the exclusion of pregnancy from Title VII coverage. In *General Electric Co. v. Gilbert*,\(^{12}\) the Supreme Court held that an employer's failure to compensate women for pregnancy-related disabilities did not destroy the presumed parity of the benefits accruing to men and women which resulted from the facially evenhanded inclusion of risks.\(^{13}\) The Court's decision, which was a majority decision, was based on *Geduldig v. Aiello*,\(^{14}\) in which the Supreme Court had held that the exclusion of pregnancy from a disability insurance plan by an employer was not a violation of the equal protection clause of the Fourteenth Amendment. The Court noted that even though only women can get pregnant, it did not mean that every legislative classification concerning pregnancy was a sex-based classification unless it could be shown to be mere pretext designed to effect an invidious discrimination against members of one sex or the other.\(^{15}\)

In 1978, Congress again stepped in to bolt the stable door after another horse had escaped. The Pregnancy Discrimination Act (PDA)\(^{16}\) amended the definition of sex in Title VII to outlaw employment discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions." Women so affected are to be "treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, and other persons not so affected but similar in their ability or inability to work." The provision signified Congress' readiness to block further break-outs, but whether it

\(^{11}\) *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

\(^{12}\) 429 U.S. 125 (1976).

\(^{13}\) Id. at 139.


\(^{15}\) Id. at 496-497.

\(^{16}\) 41 U.S.C. § 2000e(K).
does guarantee future readiness to continue to legislate to protect women's right to work without discrimination is anybody's guess in the light of present mood of Congress in relation to affirmative action. Only time will tell.

III. REPRODUCTIVE HEALTH, WOMEN AND WORK

The problem is not longer whether women can work. That was settled long ago. The emphasis has not shifted from public interest in the maternal and reproductive role of women to private legislation by employment policies that draw the line between what women can do and what women should do.17 Implicit in this discussion shift is an interest that goes beyond the individual well-being of the woman worker to the general health and welfare of society. This is really the gravamen of the reproductive health policy issues. Before looking at judicial attitude towards such policies, we need to examine some of the issues affecting the general work environment; without such examination, reproductive health issues and women would become subsumed in the general assumptions about women's issues.

It is estimated that there are no less that 90,000 chemicals in commerce in the United States. Approximately 4,000 of these chemicals have been tested for reproductive and/or developmental toxicity in experimental animals. Studies that have explored the relevance of animal testing for development toxicants suggest that such studies are just as relevant for human hazard identification.18 According to the same publication, the October 1991 U.S. Senate Committee on Governmental Affairs hearing on federal regulation of reproductive hazards, which addressed the actions taken by the Consumer Product Safety Commission (CPSC), the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) to identify and regulate exposures to environmental contaminants hazardous to reproductive health came up with

17. ALVA MYRDAL AND VIOLA KLEIN, WOMEN'S TWO ROLES (1956).
some revealing facts. For example, the General Accounting Office (GAO) testimony showed that at the time of the report only 3 percent of human reproductive disease could be directly attributed to environmental chemicals because of lack of toxicity test information for most chemicals in commerce. Most exposures are said to be hard to measure and most outcomes are not easily linked directly to an environmental agent. This is the basic problem with occupation diseases in general. The disease may manifest long after the victim has been removed from the site of exposure and can no longer be directly linked with the earlier contact. It seems that there are now at least 30 chemicals currently identified as capable of causing reproductive or developmental disease in both males and females and many of them have been the subject of some regulatory actions since 1980. 19

Ten years ago, in 1985, the Office of Technology Assessment of the U.S. Congress in response to a request from the Committee on Science and Technology of Congress issued a report on the then existing knowledge of hazards to the reproductive health of American workers. The report made it clear that what was known about reproductive health hazards was far outweighed by what was unknown; that there were not reliable estimates of the basic measures of reproductive risk in the workplace - the number of workers exposed to such hazards, their levels of exposure, and the toxicity of the agents to which they were exposed; and that a number of hazardous agents have been associated in varying degrees with impairment of male and female reproductive function and the health of the developing embryo fetus. 20 The recommendation was that employers and policymakers must attempt to provide as safe a work place as is feasible even though they may never have complete information regarding the full extent of reproductive dysfunction and its causes. 21 It is against this background that we must examine some of the cases that have reached the courts on the issue of reproductive health policies.

19. Id..
20. Id..
21. Id..
IV. FETAL PROTECTION POLICIES, WOMEN AND THE COURTS

Wright v. Olin Corporation\textsuperscript{22} was the first case to reach any appeal court in the United States on the issue of reproductive health and fetal protection policies. The employer in Olin classified certain jobs into three groups. Women of child bearing capacity between ages 15 and 63 were excluded completely from jobs in category 1 tagged “restricted jobs” because of fear of exposure to suspected or known suspected abortifacient or teratogenic\textsuperscript{2} agents. Women who were not affected were those medically certified as infertile. Jobs in category 2 which required limited contact with harmful chemicals were open to women only on individual case-by-case evaluation, but non-pregnant women who wished to work in such jobs were required to sign a form stating that they were of “some risk although slight.” Jobs in category 3 were open to all women because they did not present any hazards.

Reversing the trial court, the Court of Appeal, 4th Circuit, acknowledged that the fact situation presented by the case did not fit with absolute precision into any of the developed theories of discrimination and the available defenses under Title VII. Nonetheless, the court opined that in appropriate circumstances an employer may as a matter of business necessity impose otherwise impermissible restrictions on employment opportunities of women where they were reasonably required to protect the health of unborn children of women workers against hazards of the workplace,\textsuperscript{23} provided there was expert scientific evidence to back up such policy, and provided also that the risk was substantially confined to women workers as opposed to men. However, such policy could be rebutted by evidence suggesting acceptable alternative policies which would better accomplish the business purpose of the employer.\textsuperscript{24}

In Hayes v. Shelby Memorial Hospital,\textsuperscript{25} a female X-ray

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\item \textsuperscript{22} 697 F.2d 1182 (4th Cir. 1982).
\item \textsuperscript{23} \textit{Id.} at 1190.
\item \textsuperscript{24} \textit{Id.} at 1191.
\item \textsuperscript{25} 726 F.2d 1543 (11th Cir. 1984).
\end{itemize}
\end{footnotesize}
A technician was dismissed when she informed her employer that she was pregnant. In ruling that the action of the employer violated Title VII of the Civil Rights Act 1964 as amended, the court adopted an analytical and legal framework that would allow employers in appropriate circumstances to rely on the more lenient defense of business necessity by approaching the case on both the facial discrimination and disparate impact theories.  

In *U.A.W. v. Johnson Controls Inc.*, the only case so far to reach the U.S. Supreme Court on the issue of the legality of fetal protection policies under Title VII, as amended, a policy whereby Johnson Controls excluded “women who are pregnant or who are capable of bearing children,” from “jobs involving lead exposures or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights” was declared to be violative of Title VII. The Court pointed out the obvious bias in the policy in that fertile men but not fertile women were given a choice as to whether they wished to risk their reproductive health for a particular job.

The Supreme Court disagreed with the Court of Appeal on the applicable framework for analyzing fetal protection policies, and held that only the bona fide occupational qualification defense (bfoq) can avail the employer in such cases. “Fertile women,” the Court said, “as far as appear in the records, participate in the manufacture of batteries as efficiently as anyone else,” and added that “decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”

It is significant that the Court pointed out Johnson Controls’ failure to protect the unconceived children of all its employees despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system. One

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26. *Id.* at 1548-1554.
28. *Id.* at 197.
29. *Id.* at 206.
30. *Id.* at 198.
of the plaintiffs in the class action against Johnson Controls was a man who asked for permission to take leave of absence in order to lower his lead level which was over the recommend­
ed maximum exposure of 30 micrograms per deciliter.\textsuperscript{31} His application for leave was rejected even though he made it clear that he wished to become a father. Does it then mean that Johnson Controls cared more about the health of the unborn children of female employees than of those of its male employ­ees? Or was it merely applying the age-old tactic of playing the benevolent pater over women by restricting their right to work because of their biological functions? Tuttle, Senior Circuit Judge, hit the nail on the head in his opening sentence in Hayes v. Shelby Memorial Hospital where he pointed out: "[H]istorically, an effective means for employers, legislature and courts to limit the equal employment opportunities of women was to restrict their employment out of a professed concern for the health of women and their offspring."\textsuperscript{32} Fetal protection policies are merely another side of the same coin - employment restrictive practices against women.

V. CONCLUSION

No one can pretend that the issue has been laid to rest by U.A.W. v. Johnson Controls. The ratio decidendi of the case is relevant only in relation to Title VII. It does not pretend to deal with the concomitant issue of health hazard in the work­environment. It does not deal with the issue of how best to protect, not just the unborn which in itself is fundamentally important, but also the health and reproductive functions of men and women both of whom have direct interests and roles in the health of the unborn. The issue should not be presented as one of conflict of interest between the woman who carries the pregnancy and the unborn who may be harmed by a woman's decision to work. It is not the decision to work that is harmful. What threatens the health of the fetus is unhealthy

\textsuperscript{32} 726 F.2d 1543, 1546 (11th Cir. 1984) (citing Muller v. Oregon, supra note 6, in support of his statement).
and toxic work environment. This is entirely man-made and cannot, like a women's ability to procreate, be blamed on nature.

Indeed it is an established consensus that employers of women workers in establishments with preponderance of female workers do not operate fetal protection policies in such establishments. Nurses and nursing aids in hospitals face daily risks of infection and other dangers. They suffer from repeated trauma associated with constant lifting and bending. Staff in dry-cleaning establishments work with chemicals that pose health risks to reproductive organs. Surely, fetuses of women in such jobs are entitled to protection as much as fetuses of women in male dominated, high wage employments where such policies operate; unless there is another reason, it is not immediately clear as to why employers prefer to regulate employment of women in some jobs but not in others.

There is not a doubt that no easy answer can be found to the problems posed by women and the work environment. The multiplicity of functions by the various agencies charged with responsibility for the regulation of the work environment has not helped matters. The Equal Employment Opportunity Commission (EEOC) has been accused of timidity at critical times. At best of times it has tended to be consistently inconsistent. For example, its first statement on reproductive and fetal hazards in October 1988 favored business necessity defense. This was revised in 1990 in favor of the bfoq defense and in reaction to the decision of the Seventh Circuit in Johnson Controls. The self-limiting role of the EEOC is therefore a limiting factor in the search for effective solution.

33. BLANK, supra note 3, at 154.
34. Id.
35. Id. at 118-120.
36. See, EQUAL OPPORTUNITIES REVIEW 23, 35 (1989); See also, 1993 HANDBOOK ON WOMEN WORKERS, supra note 18, at 17b. It is noted in the handbook that "in the fiscal year 1990, EEOC filed a lawsuit against Chevron U.S.A. alleging that the company violated Title VII of the Civil Rights Act of 1964 as amended, by maintaining a fetal protection policy that applied only to female employees." But of course, that is just one out of the many policies by members of Fortune 500 companies which have been affected by the decision in AUW v. Johnson Control, supra note 27.
The Toxic Substances Control Act which established the Environmental Protection Agency (EPA) has had seventeen years of existence, and should have greater impact in the control and regulation of reproductive hazards, but like other agencies, it has also been accused of inaction in the general regulation of the environment.  

At present women face discrimination and a denial of their rights to employment, while neither their reproductive ability nor the health of the fetus are well protected. A myriad of chemicals and other toxic substances continue to flood the work environment. In the short run it may serve employers' purposes to exclude women without actually clearing up the work environment, but in the long run only a fundamental reappraisal of the unique position of women in society will lead to realistic solutions to perennial problems associated with women and work.

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37. BLANK, supra note 3, at 121.  
38. Id. at 155.  
39. WILLIAMS, supra note 3, at 643.  
40. One piece of legislation that is clearly inadequate is the Family and Medical Leave Act of 1993. Leave without pay is almost meaningless for the majority of minimum wage workers who really need the protection. It is almost certain anyway that many of them fall outside the purview of the Act. A good maternity leave policy is indispensable to the needs of working women in general. The present legislative tone forbids such on the assumption that it goes against the spirit of equality of treatment that has been the battle cry of the women's movements over the past three decades. The question in my view however is: by whose standard is this equality to be measured? the men's or whose? As Judith Baer pointed out in CHAINS OF PROTECTION, supra note 2, feminists appear to have fallen into the trap of using the traditionally male norm as the standard for testing equality in the workplace. The result is a denial of real equity by allowing for special recognition of what distinguishes women from men and accommodating them, so as to allow women to fulfill both functions without necessarily having to choose between them.