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UNITED STATES COURT OF APPEALS — Cyanamid
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

ROBERT H. BORK
UNITED STATES CIRCUIT JUDGE

October 5, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I submit this letter in answer to questions from Senator Robert C. Byrd dated October 1, 1987.

I want to thank you for this opportunity to respond to the frustrating inaccuracies and outright distortions concerning my opinion for a unanimous court in Oil, Chemical and Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). Neither then-Judge Scalia nor Senior District Judge Williams nor myself, ever "endorsed" or "approved of" an employer's policy of requiring women to undergo sterilization as a condition of employment. In what can only be described as a heart-wrenching case, we were asked to construe a statute which simply did not cover the company policy before us. As your letter points out, we specifically noted that the company's action might have constituted an "unfair labor practice" under the National Labor Relations Act or a forbidden sex discrimination under Title VII of the Civil Rights Act. See 741 F.2d at 450 n.1. Before I respond to your specific questions, I would like to put the case in its proper factual perspective.

In 1978, American Cyanamid determined that it could not reduce lead levels in the lead pigment department of one of its plants to a level that would be safe for the fetuses of pregnant workers. The Occupational Safety and Health Administration ("OSHA") has taken the position that the Occupational Safety and Health Act (the "Act") requires employers to protect employees from harm to their fetuses, and the Court of Appeals for the District of Columbia Circuit has said that OSHA has authority to impose this requirement. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1256 n.96 (D.C. Cir.), cert. denied, 453 U.S. 913 (1981).

Accordingly, the employer adopted a policy that only sterile women (or women past childbearing age) would be employed in this department. The employer informed the women who worked in the department of this policy, and of the availability of surgical sterilization as a way of complying with that policy. Faced with loss of their jobs or with transfer to lower-paying jobs, five of the women elected surgical sterilization in 1978. Subsequently, the women and their union brought a Title VII suit alleging that the sterilization policy constituted sex discriminaton, and raising state law claims for intentional infliction of emotional harm and invasion of privacy. A federal district court dismissed the state law claims as barred by the state statute of limitations, Christman v. American Cyanamid Co., 578 F. Supp. 63 (N.D. W. Va. 1983), and the employer eventually settled the Title VII suit with the women and their union.

The litigation at issue commenced when OSHA issued a citation to the employer seeking a fine of $10,000 on the grounds that the employer's policy exposed the women to "recognized hazards" in violation of the Act. The Occupational Safety and Health Review Commission ("OSHRC") rejected OSHA's contention that the employer's policy constituted a "hazard" within the meaning of this particular statute. The Secretary of Labor could have petitioned the Court of Appeals for review of the Commission's decision on behalf of OSHA, but the Secretary declined to do so. The appeal was brought instead by the union as an intervenor. The Secretary of Labor did not file a brief.

When the case came before me and my colleagues in 1983, the situation was this: the women had undergone sterilization some five years previously, and there was no prospect that any other women would be subjected to that policy. The sterilized women had obtained a favorable settlement of their Title VII suit. All that was at issue, from a practical standpoint, was whether the employer would have to pay a $10,000 fine to the federal government. And all that was at issue from a legal standpoint was whether the employer's policy violated the Act -- not whether that policy violated other federal or state law.

Cognizant of the gravity of the harm these women had suffered, my colleagues and I carefully examined every legal and factual point in the case. As to the lead levels in the Cyanamid pigments department, we had before us the finding of an Administrative Law Judge ("ALJ") indicating that it was economically infeasible to reduce the lead content of the air in the plant. For this reason, the ALJ had vacated an earlier OSHA complaint against American Cyanamid based on lead exposure itself.

We also scrutinized the history of OSHA's lead standard for the pigment industry. In 1978, OSHA issued new rules designed to protect workers from exposure to airborne lead in the workplace. The rules were reviewed by the Court of Appeals in a lengthy opinion written by Judge J. Skelly Wright. See United States Steelworkers, 647 F.2d 1189.

For the lead pigment industry, the new OSHA rules required employers to reduce lead levels to 100 micrograms of lead per cubic meter of air within three years, and finally to achieve a level of 50 micrograms per cubic meter of air within five years. Judge Skelly Wright's opinion vacated the new OSHA rules, holding that, "OSHA has not presented substantial evidence for the technological feasibility of the standard for this industry." Id. 1294. Even if lead levels could have been reduced to the lowest proposed OSHA standard, the agency's own medical data indicated that almost one-third of women in the pigment industry would still have ingested enough lead to cause fetal damage. Id. 1250-57. The Supreme Court declined to review Judge Wright's conclusions. See 453 U.S. 913 (1981). After considering these precedents, my colleagues and I concluded that we were dealing with an industry which simply could not be made safe for fertile women.

Faced with the physical impossibility of lowering lead levels, the company had several alternatives. It was clear that the company could not have been charged under the Act if it had closed down the entire department or discharged all thirty female employees. Moreover, the union conceded at oral argument in the case that the company could have lawfully stated that "only sterile women" would be employed in the department. See 741 F.2d at 449-50. In sum, the union's objection boiled down to the fact that the employer "pointed out the option and provided information about it." Id. at 450. Thus, the precise legal issue presented for our review was a narrow one: Did Cyanamid's policy of advising women of the option of sterilization constitute a breach of its duty under the Act to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injury . . . ." 29 U.S.C. § 654(a)(1) (1982).

It should be emphasized that we did not confront this issue on a clean slate. The ALJ and the OSHRC, both expert in the area of employment safety law, had found that Cyanamid's policy did not constitute a "recognized hazard" under the Act. During the pre-hearing conference in the case, the ALJ told the parties:

> The thing[] that's hit my eye about this whole case, I think we're under the wrong law here. I really do. I don't see where Congress had any thought whatever in passing the OSHA Act in treating the female as opposed to the male segment of the working force.
>
> They were talking about employees across the board. Now, if the Secretary can make out a discrimination case, he's not going to make it out under the OSHA Act. There's a law that covers this, and it's not the Occupational Safety and Health Act.
>
> Now again, it would seem to me that we are operating under the wrong law here. There is the National Labor Relations Act and other labor laws to prevent employers from engaging in unfair labor practices. This is perhaps a matter of collective bargaining.
>
> And your view is that the recognized hazard is a sterilization. And you have got a really difficult burden, Mr. Berger [counsel for the Secretary]. Because I have seen nothing in the law, in the legislative history or of any case decided under section 5A1, that could be convoluted to include sterilization under the situation that we face here as a recognized hazard. No way.

The ALJ subsequently dismissed the claim, and the OSHRC affirmed that decision, stating:

> [I]t is clear that Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.
>
> The fetus protection policy is of a different character altogether. It is neither a work process nor a work material, and it manifestly cannot alter the physical integrity of employees while they are engaged in work or work-related activities. An employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social

> factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials. For these reasons we conclude that the policy is not a hazard within the meaning of the general duty clause.

American Cyanamid Co., 9 O.S.H. Cas. (BNA) 1596, 1600 (1981) (footnote omitted).

Our own independent review of the text and legislative history of the OSHA Act confirmed the conclusions reached by the ALJ and the OSHRC. In the Preamble to the Act, Congress refers to "personal injuries and illnesses arising out of work situations" and "safe and healthful working conditions." See 29 U.S.C. §§ 651(a) & (b) (1982). In discussing the very provision at issue in the Cyanamid case, the Senate Report states "[e]mployers have primary control of the work environment and should insure that it is safe and healthful." S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), 10 reprinted in 1970 U.S. Code Cong. & Ad. News 5186 (emphasis added). The Report lists a host of work hazards that the Act was designed to address; all of them involve physical dangers in the workplace itself. See id. at 2-4; 5178-79 (listing such hazards as carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides, etc.). My colleagues and I reviewed this history carefully, and concluded that the OSHRC was correct in not extending the Act to Cyanamid's policy of providing information concerning the option for medical sterilization in a facility unconnected with the company.

As I noted in my opinion, this conclusion was further supported by the Supreme Court's decision in Corning Glass Workers v. Brennan, 417 U.S. 188 (1974). There, in interpreting the phrase "working conditions" in the Equal Pay Act, the Court looked to "the language of industrial relations." Id. at 202. The Court found that the phrase was limited to workplace "surroundings" and "hazards" and did not cover differences between day and night shifts. Id. Both the Fourth and Fifth Circuits had applied the Supreme Court's reasoning in Corning Glass to the OSHA Act, holding that its coverage was limited to physical hazards in the work environment. See Southern Pacific Transportation Co. v. Usery, 539 F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976).

Thus, the evidence before us overwhelmingly indicated that Congress intended to limit the scope of the Act to "recognized hazards" in the environment of the workplace. As I stated in my opinion, [t]he women involved in this matter were put to a most unhappy choice." 741 F.2d at 450. But to hold that a policy providing such a choice was a work hazard under the Act would have run directly counter to congressional intent, Supreme Court precedent, the considered judgment of two other federal circuits and the specific findings of the ALJ and the OSHRC. We were powerless to aid these women based on the statute upon which the union sued -- we could award neither damages, nor back-pay, nor alternative employment to them. The best we could do was issue a warning to Cyanamid and other employers, that:

> The case might be different if American Cyanamid had offered the choice of sterilization in an attempt to pass on to its employees the cost of maintaining a circumambient lead concentration higher than permitted by law.

741 F.2d at 450.

In short, the case presented was very narrow in scope, both as a legal and factual matter. These women had already chosen the sterilization procedure and the plant had already been closed even before I became a member of the appellate court. There was no legal claim in our court seeking to modify or develop alternatives to the company policy by way of injunctive relief or compensatory damages. Neither of the relevant laws dealing with employment policies -- Title VII and the NLRA -- were before us. The only statute at issue was a law that allowed for fines in response to actual safety hazards in the workplace. As the legislative history, administrative agency interpretation and precedent from the Supreme Court and other appellate courts, demonstrated, the OSHA statute simply did not apply to employment policies. Thus, any suggestion that Justice Scalia, Judge Williams or I failed to prevent or failed to remedy the trauma suffered by these women is false, misleading and most unfair. One might just as easily level such a charge against Judge Wright who decided the lead standard case, or the Supreme Court which declined to review his decision.

Having set out that important background, let me turn now to any of your specific questions which I may have left unanswered.

1. In a footnote to your opinion and in your testimony before the Judiciary Committee, you referred to the fact that the petitioners had brought another case under Title VII of the Civil Rights Act of 1964, which they had settled with the company.

(a) Did the fact that you had been told of this settlement affect your decision in the case before you?

(b) If so, how?

(c) If not, why not?

1. No, the existence and settlement of this particular Title VII suit did not affect my decision. As a judge, my duty is to consider the law and facts before me, not the outcome of prior litigation between the parties. As I stated above, however, since Title VII prohibits employment policies that discriminate as the basis of sex and pregnancy, it more directly governed the situation faced by the women employees than did the OSHA Act. Moreover, if liability were established, backpay and reinstatement would be available under Title VII, to women in a situation like this one. These remedies are not in any way available under the OSHA Act.

2. In your opinion you wrote that "Congress may be presumed to have legislated about industrial relations 'with the language of industrial relations' in mind." Considering your stated philosophy of judicial restraint and deference to the will of the Congress:

(a) Why did you presume that Congress intended to have the plain words of the statute read under the language of industrial relations, rather than that they be given their ordinary meaning?

(b) What research, if any, did you do to determine the actual intent of Congress in its use of the statutory language?

(c) If you did research the actual intent of Congress with respect to its use of the statutory language, what was the result of such research?

2(a). In so doing, I was following a rule well-established by Supreme Court precedent. In the Corning Glass case, cited in my opinion, the Supreme Court stated:

> where Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they are appropriate.' Greenleaf v. Goodrich, 101 U.S., 278, 284 (1880) . . . .
>
> While a layman might well assume that time of day worked reflects one aspect of a job's 'working conditions,' the term has a different and much more specific meaning in the language of industrial relations.

417 U.S. at 201-202. This rule is in full conformity with a theory of judicial restraint and deference to Congressional will. Where Congress deliberately uses a well-defined term of art, it would flout Congressional will to give the term dictionary meaning out of its special context.

I believe I have substantially responded to questions (b) and (c) in the body of my letter. As I indicated there, my review of the language and history of the OSHA Act was quite thorough, and uniformly supported the conclusions reached by the ALJ, OSHRC and other courts of appeals.

3. On Friday, September 18, you testified that "the company did not achieve safety at the expense of women." Considering that five women were sterilized and can never have children, please explain why you consider that safety was not achieved "at the expense of women."

3. I think my remarks have been taken somewhat out of context. In no way did I intend to denigrate the suffering of these women. I was referring to the fact that it was not only economically but technologically infeasible for the company to lower lead levels. Thus the company was not passing off safety costs to its employees to save money. As I stated in my opinion, if this had been the situation, we would have had a quite different case.

4. On Friday, September 18, in referring to the five women who were sterilized in order to retain their jobs at the plant, you testified: "I suppose that they were glad to have the choice -- they apparently were -- that the company gave them." Later that same day, the Committee received a telegram from one

of the women, which read in part: "I cannot believe that Judge Bork thinks we were glad to have the choice of getting sterilized or being fired. Only a judge who knows nothing about women who need to work could say that. I was only 26 years old, but I had to work, so I had no choice."

(a) What evidence led you to assume that the petitioners were apparently glad to have had the choice?

(b) Was information, such as that contained in the telegram, to the effect that the plaintiffs may not have considered themselves as having had a realistic choice, presented to you in the course of the consideration of the case?

4. I obviously was not suggesting that anyone would be glad to choose between continued employment and sterilization. In my opinion I emphasized that the women faced a "distressing" and "most unhappy choice." However, given the technological infeasibility of eliminating the health threat to fetuses, the child-bearing women could not have been safely employed in the pigment plant -- thus creating this distressing situation. I'm quite sure everyone involved was most disturbed about this technological reality and the unhappy choices it engendered.

My statement refers only to the fact that the Company could have, without violating the OSHA Act, closed the plant or fired all the women without consulting with them in any way. In this way, the company alone would have decided the employment future of these women. Although the choice presented was a horrible one, the company did attempt to allow these women some control over their own destiny. While that may not have been the best policy for the company to pursue, the act of enhancing the women's options cannot in and of itself, be viewed as a violation of OSHA.

5. On Saturday, September 19, you testified that "Our court did not endorse the policy of the company." You then quoted extensively from your opinion, discussing the company's policy in detail. If your statements both in the opinion and to the Committee did not constitute an endorsement of the company's policy, do you believe that they constitute a defense of the policy? Please explain.

5. I have never, in my opinion for the court or before your Committee "endorsed" or "defended" this policy. My duty as a judge was to decide whether or not this policy constituted a "recognized hazard" under the OSHA Act. Given the language and history of that Act I could not in good conscience come to the conclusion that a violation had occurred. I specifically indicated that I thought the policy may have violated two other federal statutes which were not before me. On a personal level, I thought that the company demonstrated serious insensitivity, although perhaps in a misguided effort to allow some women to keep their jobs.

6(a). In hearing the case, did you consider or inquire whether the company could have made efforts other than sterilization to assist the women in maintaining their standard of living, including but not limited to: offering them jobs of equal pay at another plant, offering them retraining for jobs of equal or higher pay, offering them severance pay and assistance in obtaining jobs at similar pay elsewhere, etc.?

(b). If you did not consider or inquire about such other options, please explain why not.

(c). If you did consider or inquire about such other options, did you consider remanding the case? Please explain.

6. Unfortunately, the Supreme Court has made it clear that under the OSHA Act neither a court nor the agency has the power to order severance pay, damages, or any other economic remedy. In American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), the Court struck down a provision of OSHA's cotton dust standard which guaranteed the wages and other employment benefits of employees transferred out of the workplace because of their inability to wear a respirator. Justice Brennan left no doubt about the limitations on the Act, when he wrote:

> Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions. Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health, and safety, we conclude that OSHA acted beyond statutory authority when it issued the wage guarantee regulation.

452 U.S. at 540. Again Senator, our power to help these women was severely limited by the statute under which the union sued. As the ALJ put it, the OSHA Act was simply the "wrong law" for this case.

7. In your opinion, you quoted from 43 Federal Register 54, 422 (1978) that OSHA's lead standard states the agency's belief that "the fetus is at risk from exposure to lead throughout the gestation period." In considering the case, what information, if any, did you have that the exposure to lead could adversely effect the reproductive abilities of both men and women.

7. As I understand it, in its rulemaking process, OSHA heard testimony that lead levels also affected male fertility. See 43 Fed. Reg. 54,388-92 (1978). Although the effects on males were not as firmly documented as those on females, one study suggested that male exposure to high lead levels could have negative effects on sperm potency and male sex drive. This evidence, although highly relevant to a sex discrimination action, was not relevant to defining a "recognized hazard" under the OSHA Act. For this reason, the information did not receive significant discussion in the briefs or oral argument in the case before us.

I believe that both OSHA and the Equal Employment Opportunity Commission ("EEOC") had previously taken the position that the exclusion of females from this type of employment presented sex discrimination issues, not worker safety concerns. Thus, in the context of lead exposure, OSHA referred to this evidence as presenting "equal employment opportunity considerations." See 48 Fed. Reg. 52,960 (1978). In a "Statement on Hazardous Substances and Equal Opportunity" issued in 1978, the EEOC stated:

> EEOC will continue the vigorous enforcement of Title VII as to all employment practices or policies that unlawfully exclude women of childbearing capacity and any other person from the workplace or otherwise adversely affect the economic opportunities of any individuals protected by Title VII.

Again the OSHA Act was simply the wrong statute under which to address the possibility of discriminatory exclusion of women from the lead pigment plant.

8. Before deciding the case, what information, if any, did you have as to whether:

(a) the Inorganic Pigments Department of the plant, in which the petitioners had been employed, was still in operation;

(b) any of the petitioners were no longer employed at the plant.

8. As best I can recall, the record revealed that the plant was closed in January of 1980 and perforce none of the petitioners were employed there at the time the appeal was heard.

Sincerely,

Robert H. Bork

RHB/cah

cc: Senator Robert C. Byrd
Senator Strom Thurmond