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ERICKSON V. BARTELL DRUG CO. 141 F. SUPP. 2D 1266 (W.D. WASH. 2001)

District court rules that a private employer's failure to cover prescription contraceptives violates Title VII.

INTRODUCTION

On June 12, 2001, Washington District Court Judge Robert S. Lasnik made headlines with his landmark decision in *Erickson v. Bartell Drug Company*,[1] which held that Bartell Drug Company's failure to cover prescription contraceptives in its employee health plan constituted sex discrimination under Title VII of the Civil Rights Act of 1964.[2] This was a case of first impression for the federal court that brought with it important implications regarding the future of women's health care.[3]

FACTS

Jennifer Erickson began working for Bartell Drug Company ("Bartell") as a pharmacist in 1999.[4] Although Bartell, a Seattle-based drug store chain, provided its employees with a fairly comprehensive health plan, it was missing the one prescription that Erickson required – birth control pills.[5] As a pharmacist filling

1. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

2. *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (precluding an employer from discriminating against an "individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin"). The Pregnancy Discrimination Act was added to Title VII to prohibit sex discrimination based on "pregnancy, childbirth, or related medical conditions." *See* Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)).

3. *See Erickson*, 141 F. Supp. 2d at 1268 (noting that this case "raised an issue of first impression" for the federal court).

4. *See* Adam Bryant, *Paying for The Pill; A Birth-Control Ruling Signals a Shift for Women*, NEWSWEEK, June 25, 2001, at 38 (discussing the genesis of Erickson's suit against Bartell).

5. *See Erickson*, 141 F. Supp. 2d at 1268 n.1 (describing Bartell's benefit plan as "including a number of preventative drugs and devices, such as . . . hormone replacement therapies, prenatal vitamins, and drugs to prevent . . . breast cancer," but "[t]he plan specifically excludes from coverage a handful of products, including contraceptive devices"). In addition to contraceptives, the plan excluded drugs prescribed for weight reduction, smoking cessation drugs, drugs for cosmetic purposes, and experimental drugs. *See id.*; *see also* Bryant, *supra* note 4, at 38 (relaying Erickson's frustration that the one prescription that she required was not

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prescriptions, Erickson was reminded daily that many employee prescription plans did not include contraceptives, something Erickson considered a basic health need for many women.[6] Consequently, she asked Bartell to start paying for her pills.[7] When the company refused, Erickson filed a class action lawsuit on behalf of all Bartell non-union employees who had been enrolled in Bartell's Prescription Benefit Plan and were using prescription contraceptives.[8]

In her complaint, Erickson asserted that Bartell's Prescription Benefit Plan for non-union employees violated Title VII and the Pregnancy Discrimination Act for failing to cover a variety of prescription contraceptives.[9] Erickson argued that the Pregnancy Discrimination Act's definition of sex discrimination[10] precludes an employer from providing less complete prescription drug coverage for its female employees than its male employees.[11]

HOLDING

Based on several Supreme Court cases interpreting the Pregnancy Discrimination Act and its legislative history, Judge Lasnik held that "Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses."[12] He ordered Bartell to cover prescription contraceptives "to the same extent, and on the same terms, that it covers other [prescription] drugs, devices, and preventative care."[13]

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covered by her employee health plan).

6. *See* Bryant, *supra* note 4, at 38 (reiterating Erickson's frustration with the fact that many employers excluded contraceptives from their insurance coverage plans).

7. *See id.*

8. *See Erickson*, 141 F. Supp. 2d at 1268 n.2 (indicating that Erickson filed a motion for summary judgment based on claims of disparate treatment and disparate impact under Title VII).

9. *See id.* at 1268 (listing a variety of prescription contraceptives not covered under the benefit plan, including birth control pills, Norplant, Depo-Provera, intra-uterine devices, and diaphragms).

10. *See* 42 U.S.C. § 2000e(k) (defining sex discrimination as discrimination based on a medical condition related to "pregnancy, childbirth, or related medical conditions").

11. *See Erickson*, 141 F. Supp. 2d at 1276-77.

12. *Id.* at 1277. Judge Lasnik also found that "[a]lthough the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered." *Id.*

13. *Id.*

ANALYSIS

A. The Genesis of Title VII and the Pregnancy Discrimination Act

The *Erickson* decision began by examining the legislative history of the Civil Rights Act of 1964, to better understand Congress' intent when it added "sex" as a protected class of persons.[14] Finding the legislative history on its own largely unhelpful, Judge Lasnik understood the general purpose of the law to be a product of subsequent congressional action, which would thwart any attempt by the judiciary to restrict Title VII's application to women as a class.[15]

To better understand the scope of what constitutes "sex discrimination," Judge Lasnik next discussed the evolution of the Pregnancy Discrimination Act. The Pregnancy Discrimination Act was created in response to a United States Supreme Court case in which Congress felt the Court erroneously interpreted Title VII.[16] In *General Electric Co. v. Gilbert*,[17] the majority created a distinction between pregnancy discrimination and gender discrimination. Applying an Equal Protection analysis,[18] the Court held that because pregnancy discrimination does not affect all women, it is not sex discrimination for the purposes of Title VII.[19] The majority viewed the two categories of persons in the short-term disability plan as "pregnant women and nonpregnant persons."[20] Because the latter group contained members of both sexes, differentiating between the two groups could not constitute sex discrimination.[21]

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14. *See id.* at 1268-69 (noting that because the amendment was apparently added merely to stall the passage of the Civil Rights Act of 1964, the legislative history of Title VII was not helpful).

15. *See Erickson*, 141 F. Supp. 2d at 1268-69 (summarizing the goal of Title VII as attempting to provide men and women with equal opportunities in the workforce regardless of their race, color, religion, or national origin).

16. *See id.* at 1269-70 (discussing *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), as a catalyst to the creation of the Pregnancy Discrimination Act).

17. 429 U.S. 125, 145-46 (1976) (finding that a private employer's short-term disability plan excluding disabilities related to pregnancy did not constitute sex discrimination).

18. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) (asserting that because both men and women are affected by protesters at abortion clinics, women as a class were not discriminated against and therefore did not sustain a claim of sex-based discrimination under the Equal Protection clause); Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that under an Equal Protection analysis "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

19. *See Gilbert*, 429 U.S. at 132 (reviewing *Geduldig v. Aiello*, 417 U.S. 484 (1974), which held that exclusion of pregnancy from a disability-benefits plan was not gender-based discrimination based upon the Equal Protection Clause of the Fourteenth Amendment).

20. *Id.* at 135.

21. *See id.* (acknowledging the tenuous relationship between the excluded disability and gender).

Two years later, Congress overturned *Gilbert* when it amended Title VII to include the Pregnancy Discrimination Act.[22] Expanding the definition of sex discrimination to include pregnancy, the Act states, "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[23]

Although the amendment does not explicitly include prescription contraceptives, Judge Lasnik found that it supported Erickson's arguments because, "Congress embraced the dissent's broader interpretation of Title VII which not only recognized that there are sex-based differences between men and women employees, but also required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."[24] In addition, he argued that "mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."[25]

Cases argued after the Pregnancy Discrimination Act have reinforced a fundamental principle garnered from the Act, that differential treatment based on characteristics unique to one particular sex constitutes sex discrimination.[26] From this principle, Judge Lasnik extended the scope of the Pregnancy Discrimination Act to cover prescription contraceptives.[27] He reasoned that failure to cover healthcare needs based on "a woman's unique sex-based characteristics" was sex discrimination.[28]

Although failure to cover a particular type of health care benefit or

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22. Members in both the Senate and the House of Representatives remarked that the dissenters in *Gilbert* correctly interpreted Title VII. *See, e.g.*, H.R. REP. NO. 95-948, at 2 (1978) ("It is the committee's view that the dissenting Justices correctly interpreted the Act."); S. REP. NO. 95-331, at 39-40 (1977) (agreeing that the dissenting opinions "correctly express both the principle and the meaning of [T]itle VII"). The dissenting Justices in *Gilbert* reasoned that the ability to become pregnant is what differentiates men and women, and therefore to exclude pregnancy disability coverage is discrimination based on sex. *See Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting).

23. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994).

24. *Erickson*, 141 F. Supp. 2d at 1270.

25. *Id.* at 1271.

26. *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (finding that the capacity to bear children, in and of itself, is enough to constitute sex discrimination, regardless of whether the woman is pregnant); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (invalidating a health insurance plan that failed to provide pregnancy related coverage to the spouses of male employees although it provided the same care to its female employees).

27. *See Erickson*, 141 F. Supp. 2d at 1274 (interpreting the Pregnancy Discrimination Act and Title VII together as protecting all women, pregnant or not, from discrimination based on their sex).

28. *Id.* at 1271.

prescription drug is not a *per se* violation of Title VII, Judge Lasnik found that an employer who "cover[s] everything except a few specifically excluded drugs and devices . . . has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."[29]

B. Bartell's Arguments

Bartell asserted several arguments defending its decision to exclude prescription contraceptives from its employee health benefit plan.[30]

1. Prescription contraceptives are preventative and therefore may be treated differently than other prescription medications.[31]

Judge Lasnik responded by examining the impact that contraceptives have on the health and well-being of women and children. He specifically stressed the importance of prescription contraceptives in preventing unwanted pregnancies.[32] By providing women with the ability to utilize prescription contraceptives, insurance policies and employee benefit plans would lessen the negative social and economic impact of unwanted pregnancies.[33]

In addition, Judge Lasnik found it contradictory that Bartell's prescription drug policy actually covered many preventative drugs.[34] He also suggested that contraception is a primary health care need for many women "and, is in many instances, of more immediate importance to her daily healthcare situation than most other medical

29. *Id.* at 1272.

30. *See id.* at 1272 (enumerating Bartell's defenses including such arguments as contraceptives do not treat illness and therefore may be treated differently from other prescription drugs; fertility control does not fall within the language of the Pregnancy Discrimination Act and hence does not receive protection under the Act; and no case law supports the proposition that excluding contraceptives constitutes sex discrimination).

31. *See id.*

32. *See Erickson*, 141 F. Supp. 2d at 1273 (indicating that unintended pregnancies result in higher abortion rates, low birthweight and unwanted babies, and a negative economic impact on women); *see also Good Morning America: Interview: Jennifer Erickson Wins Federal Court Ruling Stating that Company Must Pay for Contraceptive Prescriptions* (ABC News television broadcast, June 13, 2001) (stating that "without contraception, your average woman would become pregnant approximately twelve to fifteen times in her life").

33. *See Erickson*, 141 F. Supp. 2d at 1273 (stating that failure to use birth control results in a high rate of unintended pregnancies in the United States).

34. *See id.* at 1268 n.1 (noting several preventative drugs that Bartell's prescription plan covered, including "blood-pressure and cholesterol-lowering drugs, hormone replacement therapies, prenatal vitamins, and drugs to prevent allergic reactions, breast cancer, and blood clotting").

needs."[35]

2. Prescription contraceptives do not fall within the definition of "pregnancy, childbirth, or related medical conditions."[36]

Acknowledging that Congress did not specifically intend for the Pregnancy Discrimination Act to apply to prescription contraceptives, Judge Lasnik argued that the issue is broader than the definition set forth in the Act.[37] Citing Congress' decision to overrule *General Electric Co. v. Gilbert*,[38] Judge Lasnik found that Bartell's exclusion of prescription contraceptives ran contrary to the intent of Congress.[39]

3. Employers should be able to control costs by limiting the scope of employment benefits.[40]

Dismissing this argument, Judge Lasnik cited case law and statutes that stand for the proposition that "[c]ost is not . . . a defense to allegations of discrimination under Title VII."[41] Although employers are legally permitted to cut benefits to control costs, it must not be done in a discriminatory manner.[42] Judge Lasnik held that Bartell's exclusion of prescription contraceptives from its benefit plan has a discriminatory impact on women resulting in a violation of Title VII.[43]

4. Exclusion of all "family planning" drugs is facially neutral.[44]

Bartell argued that by excluding all "family planning" drugs from its benefit plan, failure to cover prescription contraceptives did not

35. *Id.* at 1273-74.

36. *See id.* at 1275 (arguing that excluding drugs which prevent pregnancy from the employee prescription benefit plan does not constitute prohibited sex discrimination).

37. *See id.* at 1270, 1274 (finding that ultimately the legality of Bartell's prescription drug plan depends on how sex discrimination is defined under Title VII, which the Pregnancy Discrimination Act merely clarifies).

38. *See Erickson*, 141 F. Supp. 2d at 1269. The Supreme Court first recognized Congress' intent to overrule *Gilbert* in its first case dealing with the Pregnancy Discrimination Act. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 679 (1983) (reporting that Congress intended to overturn the specific holding of *Gilbert*).

39. *See Erickson*, 141 F. Supp. 2d at 1274-75 (suggesting that, in light of the Pregnancy Discrimination Act, Title VII should be interpreted broadly with regards to what constitutes sex discrimination).

40. *See id.* at 1274.

41. *Id.* (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) and 29 C.F.R. § 1604.9(e)).

42. *See Erickson*, 141 F. Supp. 2d at 1274 (stating that even though Bartell is permitted to cut costs, it is not permitted to do so in a manner that penalizes female employees).

43. *See id.* (arguing that, when one sex alone bears the burden of a cost-saving measure, the action rises to the level of sex discrimination under Title VII).

44. *See id.* at 1274-75.

single out women as a class and was therefore non-discriminatory.[45] However, the court found neither an explicit nor implicit "family planning" exclusion in the benefit plan.[46] In fact, while the benefit plan excluded several "family planning" methods such as infertility drugs and contraceptive devices, it covered prenatal vitamins and abortions.[47] This lack of neutrality regarding "family planning" devices and drugs is further enforced by the fact that exclusion of prescription contraceptives reduces the coverage that female employees enjoy while leaving the coverage afforded males unaffected.[48]

5. Past precedent does not address the coverage of prescription contraceptives under Title VII.[49]

While agreeing with the proposition that there existed no judicial precedent addressing coverage of contraceptives under Title VII, Judge Lasnik responded that since this issue is being "properly raised as a matter of statutory construction, this Court is constitutionally required to rule on the issue before it."[50] In addition, while a court had not previously heard this issue, the Equal Employment Opportunity Commission ("EEOC") considered a similar issue.[51] Because the EEOC has the primary responsibility of enforcing Title VII, the Supreme Court has ruled that courts should give deference to the EEOC's interpretations of Title VII.[52]

The EEOC interpreted Title VII to mean that "exclusion of prescription contraceptives from a generally comprehensive insurance policy constitutes sex discrimination under Title VII."[53] It found that fewer treatment options offered to women than men

45. *See id.* at 1275.

46. *See id.* (maintaining that the plan's inclusion of some family planning drugs and exclusion of others suggests that there is no standard exclusion).

47. *See Erickson*, 141 F. Supp. 2d at 1275 n.13 (asserting that this inconsistency precludes the finding of a "family planning" exception within the Bartell benefit plan).

48. *See id.* at 1275 (finding that these inequities have a negative impact on women and therefore constitute sex discrimination under Title VII).

49. *See id.*

50. *Id.*

51. *See id.* at 1275-76 (observing that although the EEOC's analysis in *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107 (1988), focused mainly on the Pregnancy Discrimination Act, it considered several of the same arguments Erickson raised in her complaint); *see also* EEOC v. United Parcel Serv., Inc., 141 F. Supp. 2d 1216, 1219-20 (D. Minn. 2001) (holding that plaintiffs properly alleged disparate treatment and disparate impact claims based on a prescription benefit plan that excluded coverage of oral contraceptives).

52. *See Erickson*, 141 F. Supp. 2d at 1276 (citing *Commercial Office Prod. Co.*, 486 U.S. at 115).

53. *Id.*

constituted sex discrimination.[54]

6. This is an issue for the legislature, not the courts.[55]

Recognizing the possible social impact of his decision, Judge Lasnik found nonetheless that the issues raised in Erickson's complaint were based on the interpretation of a statute and, therefore, a federal court was the proper forum for such claims.[56] In addition, Judge Lasnik noted that the court's jurisdiction over Erickson's claims was not diminished by pending proposals in Congress and some state legislatures that would require employee insurance plans to cover prescription contraceptives.[57]

IMPLICATIONS AND ISSUES

The most immediate and obvious impact of this decision is its effects on female employees at Bartell.[58] Pursuant to Judge Lasnik's decision, the company is required to cover prescription contraceptives in its prescription benefit plan.[59] However, the decision's impact on future cases and pending legislation is of greater importance.[60] For instance, advocates of a pending Utah bill that would require an insurance company to cover prescription contraceptives if it currently covers prescription drugs, hope that the

54. *See id.* (noting that under Title VII unequal treatment rises to the level of an unlawful employment practice).

55. *See id.*

56. *See id.* ("Contrary to defendant's suggestion, it is the role of the judiciary, not the legislature, to interpret existing laws and determine whether they apply to a particular set of facts.").

57. *See Erickson*, 141 F. Supp. 2d at 1276 n.16 (indicating that the scope of the proposed legislation would extend beyond Title VII); *see also infra* note 60 (discussing proposed federal and state legislation).

58. *See* Rita Rubin, *State Lawmakers Revive Contraceptive Coverage Fight*, USA TODAY, June 18, 2001, at D6 (noting that "[a]lthough [the] ruling directly affects only the 1,600 employees of the Seattle-based Bartell Drugs chain," advocates hope that the decision will serve as a possible catalyst to revive efforts that would require employers to cover prescription contraceptives in their employee benefit plans).

59. *See supra* text accompanying note 13.

60. *See, e.g.*, Rubin, *supra* note 58, at D6 (citing statistics regarding legislation that requires insurance companies to cover contraceptives). On the state level, bills are pending in at least thirteen states, two of which are awaiting governors' signatures. *See id.* On the federal level, Senator Snowe, a Republican from Maine, along with forty-one co-sponsors, has introduced the Equity in Prescription Insurance and Contraceptive Coverage Act that would require employers to cover prescription contraceptive drugs and devices in their health plans. Equity in Prescription Insurance and Contraceptive Coverage Act of 2001, S. 104, 107th Cong. (2001). A companion bill has also been introduced in the House of Representatives. *See* Equity in Prescription Insurance and Contraceptive Coverage Act of 2001, H.R. 1111, 107th Cong. (2001).

Utah Legislature might be influenced by the *Erickson* decision.[61] Others predict that the *Erickson* decision will force employers who do not cover prescription contraceptives to reevaluate their prescription benefit plans.[62] Finally, because the *Erickson* decision was a case of first impression in the federal courts, it is likely to bring with it new opportunities for the judiciary to reexamine the scope of sex discrimination under Title VII.

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61. *See Ruling Boosts Efforts in Utah to Have Insurance Cover Contraceptives*, ASSOC. PRESS NEWSWIRES, June 18, 2001 (commenting on how difficult it has been to pass the Equity in Prescription Insurance and Contraceptive Coverage bill because the Legislature has not been willing to listen to the public).

62. *See* James T. Mulder, *Many Local Firms Cover Birth Control, Companies See Paying for Contraception as an Attractive Benefit for Women*, THE POST-STANDARD, June 16, 2001, at A1 (reporting that in light of the *Erickson* decision, Onodoga County's Director of Risk Management is considering reviewing its health care policy).