

LIBRARY
SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

NASHVILLE GAS COMPANY,)
)
 PETITIONER,)
)
 V.)
)
 NORA D. SATTY,)
)

No. 75-536

Washington, D. C.
October 5, 1977

Pages 1 thru 50

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Hoover Reporting Co., Inc.

*Official Reporters
Washington, D. C.*

546-6666

Petitioner,

v. 2

No. 75-536

Respondent.

Washington, D. C.,

Wednesday, October 5, 1977.

The above-entitled matter came on for argument at
11:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES :

CHARLES K. WRAY, ESQ., Bass, Berry & Sims, 2700 First
American Center, Nashville, Tennessee 37238; on
behalf of the Petitioner.

ROBERT W. WEISMUELLER, JR., ESQ., 18th Floor, Life
and Casualty Tower, Nashville, Tennessee 37219;
on behalf of the Respondent.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Charles K. Wray, Esq., for the Petitioner	3
Robert W. Weismueller, Jr., Esq., for the Respondent	26
<u>REBUTTAL ARGUMENT OF:</u>	
Charles K. Wray, Esq., for the Petitioner	49

[Afternoon Session - pg. 47]

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-536, Nashville Gas against Satty.

Mr. Wray, I think you may proceed when you're ready.

ORAL ARGUMENT OF CHARLES K. WRAY, ESQ.,

ON BEHALF OF THE PETITIONER

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

I am here today representing the petitioner, Nashville Gas Company, in this case.

This case presents for consideration by the Court the question of whether certain employment policies of the Nashville Gas Company, which treated pregnancy differently from the treatment afforded sickness and accident, constituted unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

As such, it is a sequel, I believe, to the case of General Electric Company vs. Gilbert, decided by this Court in December of last year.

Both the District Court and the Court of Appeals ruled against my client on the issues here presented, essentially on the grounds that since only women became pregnant, and they were treated differently from employees suffering from sickness and accident generally, that was sex discrimination, unlawful sex discrimination.

I submit that that rationale was rejected by this Court in the General Electric case -- both the lower court decisions preceded this Court's decision in General Electric.

Thus, I think we are here today to determine whether the holding and the underlying rationale of General Electric extend to the factual situations presented by this case, which are admittedly somewhat different from the factual situation of the General Electric case.

There are really two factual circumstances involved here.

The first is that the Nashville Gas Company has a sick leave policy, wherein it permits employees a certain number of days of absence with pay from covered sickness and accident. This plan differs from the General Electric plan in that seniority is an element of the number of sick leave days to which the employee is entitled. That element was not present in General Electric.

Also the gas company policy has a specific exclusion for illnesses brought about by the employee's willful act. In this case, Mrs. Satty, the plaintiff, had been an employee of the gas company for several years at the time she became pregnant. When she was no longer able to work, she was placed on pregnancy leave, and had she been absent as a result of sickness and accident rather than pregnancy she would have been paid for a portion of the time that she was absent from

work.

The other factual circumstance at issue here is the company's treatment of seniority for job bidding purposes, as it affects pregnancy leave.

When Mrs. Satty went on pregnancy leave, the company was contemplating converting certain of the clerical functions in the department in which she was employed to computers, and, as a consequence, it was decided that the job she had held would not be filled, that the job would be abolished.

Thereafter, when Mrs. Satty was able to return to work after the birth of her child, she was given a temporary job by the company; that job lasted approximately one month, and at the end of that time the temporary work was completed. During that month she bid on three permanent job openings with the company. Now, in each case, the job was awarded to another employee, another female employee, I might add, whose initial date of hire was more recent than Mrs. Satty's.

But the company policy was such that when you had been absent on pregnancy leave, you were not permitted to retain your previously accumulated seniority for job-bidding purposes.

QUESTION: At that point, Mr. Wray, had she been taken back, then would she regain her prior seniority?

MR. WRAY: Your Honor, the record does not reflect -- I cannot answer that question, and I don't think it

is reflected in the record.

QUESTION: Are these provisions, Mr. Wray, in any way the result of collective bargaining, or are they all just employer policy unilaterally devised?

MR. WRAY: Well, the record does not reflect that, and I am not sure of the answer. Mrs. Satty was not an employee covered by a collective bargaining agreement. There are certain employees of the company who are, and I don't know to what extent the policy, as applied to non-union employees, may be the same as negotiated for the union employees. I just do not know the answer to that question.

QUESTION: You don't know, and the record does not show?

MR. WRAY: That's correct. The record does not show that.

QUESTION: Well, wasn't Mrs. Satty employed for a brief period after her pregnancy?

MR. WRAY: As a temporary employee.

QUESTION: Yes, but did she have any job-bidding rights during that period?

MR. WRAY: Well, Your Honor, I'm not sure whether in that context her seniority would run from the date her temporary work started or not, but the people who were awarded the permanent jobs in preference to Mrs. Satty had a -- their employment predated the time of her temporary work.

QUESTION: Well, it's not clear to me then what the job-bidding seniority issue really is. I think you -- I understood you to say you didn't know whether or not, if she had been re-employed, that she would have had seniority.

MR. WRAY: Well, no, I understood Mr. Justice Blackmun's question -- perhaps I misunderstood it -- was, had she gotten back a permanent position, would her seniority have started running at the time she got that new permanent position back, or would she then be restored to her previous accumulated seniority. That's what I said is not clear from the record.

QUESTION: So the issue here relates to her not having been taken back at all on a permanent basis?

QUESTION: Not being able to bid on those two vacancies. Successfully.

MR. WRAY: Well, if she had bid successfully, yes.

QUESTION: While she was not employed?

MR. WRAY: Well, not employed in a permanent position. I mean, she was bidding on those positions while she was in this temporary status.

QUESTION: Mr. Wray, do I correctly understand that she not only did not receive seniority for the period of her pregnancy, but she also, because she lost her job there, lost all her seniority that she had accumulated up to the time of her pregnancy?

MR. WRAY: For job-bidding purposes, Your Honor, that is correct. She did not lose it for pension and vacation purposes.

QUESTION: Right.

MR. WRAY: But for job-bidding purposes, that is correct.

QUESTION: Well, she couldn't have a vacation if she wasn't working.

MR. WRAY: Well, when she went on the pregnancy leave, had she been entitled to any vacation, having an accrued vacation at that time, it would have been paid. And had she come back -- I think she had been employed for approximately three and a half years at the time she went on pregnancy leave -- had she come back and gotten a permanent job, the vacation to which she would have then been entitled would have been based on those three and a half years.

QUESTION: So that the only penalty was on job bidding?

MR. WRAY: That's correct, Your Honor.

QUESTION: Mr. Wray, enlighten me, what is the business justification for the deprivation of seniority rights?

MR. WRAY: Your Honor, I think that the rationale underlying that policy is this: I think it is rational for an employer to have a seniority policy, I think such a policy rewards loyalty and continuity of service; that absences are

disruptive to an employer and need not be encouraged. And within that context I think it is rational for the employer to provide favorite treatment for those persons who remain on the job rather than absenting themselves from work, whether it is to pursue additional education, to take another job, to go home and do nothing for a while; those people who --

QUESTION: Well, yes, but the distinction is between one who is absent because of pregnancy or one who is absent for other types of illnesses, is it not?

MR. WRAY: Well, that is the position which the lower courts took, and that is the argument of the respondent in this case. Yes, Your Honor. But --

QUESTION: Well, am I not correct that had she been out because of appendicitis, acute appendicitis, she would not have lost her seniority rights?

MR. WRAY: Your Honor, the only -- this policy, in this respect, is not a written policy. And I don't really mean to suggest that the answer to that question is that she would have lost it, but the only examples in the record of absences which are permitted without loss of seniority are: I believe they are heart attack, back trouble, and automobile accident.

QUESTION: According to the District Court, the answer to Mr. Justice Blackmun's question is yes, she would have lost -- or she would have retained her seniority; she

wouldn't have lost it.

MR. WRAY: I think that is a fair inference, yes, sir. I mean, appendicitis does not happen to be one of the examples covered in the record, and this is not pursuant to a written statement of policy.

QUESTION: Mr. Wray, may I ask: If her job had not been abolished, she would have gone on with it on return from her pregnancy leave, would she?

Her old job, if it had not been abolished?

MR. WRAY: I'm not sure of the answer to that question, Your Honor. They might have put the job -- they didn't regard themselves as obligated to hold a job open. So even if it were a job that was not being abolished, it might have been put up for bidding, and presumably someone else, during her absence or after her return to temporary status, if it had been put up for bidding someone else might well have gotten it.

QUESTION: And she, without seniority, couldn't have bumped that person?

MR. WRAY: That's correct.

QUESTION: But I thought you said that this loss of seniority status is only for purposes of promotion, or bidding for a job.

MR. WRAY: Well, --

QUESTION: But what you've told me now is that her

pregnancy, she lost all seniority for all purposes, including reinstatement in her former job. Is that right?

MR. WRAY: The position of the company is, I believe, Your Honor, that when an employee goes on pregnancy leave, educational leave, some form of personal leave, the company does not necessarily hold the job open.

QUESTION: Well, suppose the job was still open -- I gather, from what you say, that they need not have rehired her after she -- after her pregnancy leave; they could have filled it with some new employee from outside. Is that right?

MR. WRAY: At such -- no, Your Honor. If, at the time she was able to return to work, that job was open and it had been put up for bid, and some other employee --

QUESTION: Suppose it had not been. I know you have said if it had been put for bid, then she would have lost it. But suppose it was still open?

MR. WRAY: Excuse me, Your Honor, if it was still open, I assume the company has the right simply to put her back in that position, and without any bidding.

But if it had been put up for bids -- I want to make this point very clear -- she would have been given priority over a nonemployee. I think that's a very important distinction. Now, if some person already employed with the company were bidding on it, presumably that person --

QUESTION: Well, if no one else had bid on it, it

was still open, I gather you're telling me she'd have got it back?

MR. WRAY: Yes, Your Honor.

QUESTION: All right. Now, suppose she had been in it for another year, and she wanted to bid on some new job opening, what would her seniority for purposes of bidding, after she had been back at the job another year, be?

MR. WRAY: I do not know the answer to that question. It would be at least a year, and this goes on --

QUESTION: I know, but what about the three and a half years that she already --

MR. WRAY: Your Honor, the record does not reflect whether her previously accumulated seniority would have been restored had she gotten a permanent position or not.

QUESTION: Do you really think that is so here, that the record doesn't show, or that -- you say the answer to that question, we just can't assume, we can't -- it might be one way or it might be the other? I thought she simply lost her seniority for job-bidding purposes.

MR. WRAY: The only reason -- I've had the question asked of me before, and I did not know the answer.

QUESTION: Well, it certainly would have been to the company's interest to put it in the record, if she didn't lose her seniority.

MR. WRAY: Proceeding with the question of the

rationale underlying this policy, --

QUESTION: Well, Mr. Wray, before you get away from this, you said a minute ago that when she came back after her pregnancy, quote, "the company had the right to give her her job back". What right did she have?

MR. WRAY: Your Honor, she had -- would be given preference over persons who had not been employed by the company. In other words, if there was a job there and she wanted it and there was someone who had never been employed by the company who wanted it, Mrs. Satty would have gotten the job.

QUESTION: And she also had a right to the job if nobody in the world wanted it, too, didn't she?

MR. WRAY: Yes, sir.

QUESTION: Well, what other right did she have?

[Laughter.]

MR. WRAY: She had the previously -- she retained her seniority for vacation and pension purposes, and she did have the right, she was given preference for temporary work when it was available.

QUESTION: If it was available.

MR. WRAY: Yes. As it was in this case.

QUESTION: Is that the end of her rights?

MR. WRAY: I believe -- that's all that occur to me, yes, Your Honor.

QUESTION: And yet if somebody was out for illness -- any other illness other than pregnancy -- what would the rights be?

MR. WRAY: Your Honor, in so far as those other illnesses were heart attack, back trouble, automobile accident, the person --

QUESTION: Well, let's take heart attack.

MR. WRAY: Okay, we'll take the heart attack. That person would come back and presumably the company would endeavor to restore that person to the former position if it was available; if not, to give them a comparable position, and would let them retain that previously accumulated seniority for job-bidding purposes.

QUESTION: And the difference, the reason for the difference is?

MR. WRAY: The reason for the difference is, Your Honor, I think explaining what I feel to be the rationale underlying a seniority policy, that is, to encourage continued employee attendance, you can --

QUESTION: Well, there are two people that couldn't work; --

MR. WRAY: That's right.

QUESTION: A woman delivering a baby and a man having a heart attack.

MR. WRAY: That is correct, Your Honor.

QUESTION: Both of them equally can't work.

MR. WRAY: I think the difference, Your Honor, is why were they not on the job working. And I submit that --

QUESTION: Because they were unable to.

MR. WRAY: Well, but I submit that the person who has had the heart attack has been subjected to, essentially, an involuntary, unfortunate accident. I submit that it's fair to assume that that employee would rather be on the job than in the hospital, retaining seniority, with a heart attack. And I think that distinguishes it from pregnancy, which, I submit, is essentially a voluntary condition, it is subject to the control of the employee, both before and after the fact of conception.

And I submit it reflects an employee's sense of values, priorities, whatever you want to call it, wherein the employee is, in the case of pregnancy, exalting her personal life choice decision above the interest of the employer having -- and the interested employee being to have a person stay on the job and not be absent.

QUESTION: You said automobile accident was another exception, did you?

MR. WRAY: I did, sir.

QUESTION: Suppose the injuries suffered in the automobile accident, without question, were entirely the employee's own fault, the grossest kind of negligence?

MR. WRAY: Your Honor, even viewed as a gross negligence situation, I still don't think it's something that the employee would ever say he intended to have happen. I think that distinguishes it from pregnancy, in my opinion.

QUESTION: Suppose he got drunk and also smoked reefers and injected heroin and, as a result, crashed his car?

MR. WRAY: I still submit that that is significantly different from a typical pregnancy, in that it is --

[Laughter.]

MR. WRAY: -- something an employee would not choose or intend to have happen. And I don't think the same can be said of pregnancy.

QUESTION: But from just the point of view of the economic self-interest of your client, the employer, what is the rationale behind this?

MR. WRAY: Your Honor, --

QUESTION: Wouldn't you rather have an experienced employee bidding on the job?

MR. WRAY: Your Honor, I don't --

QUESTION: Rather than a less-experienced one.

MR. WRAY: I don't think that there is that cost justification --

QUESTION: I mean, the person bidding the job.

MR. WRAY: I don't think that -- the opposing briefs have certainly pointed out, there is no cost justifica-

tion, at least readily identifiable in this case, as there is in General Electric. But --

QUESTION: I just wondered what the economic self-interest justification would be.

MR. WRAY: Well, I'm not -- I can't put it in dollars-and-cents terms, I think the interest is having these employees continue on the job without absenting themselves for reasons of personal preference.

Now, within that framework, the gas company does provide -- a person like Mrs. Satty has experience, which is valuable to the company, and I would submit that it is in the company's interest to have her return to work; and I submit the company offers certain incentives to get --

QUESTION: And have her in a vacancy rather than somebody less experienced, wouldn't it be in the employer's interest?

MR. WRAY: No, Your Honor, I don't think so. I mean, they offer the incentives, namely, temporary work, accrued seniority for a vacation and pension, and, most important, priority over nonemployees. I mean, I think that is an incentive whereby the company would try to take benefit of that prior valuable experience.

But the company is not going to extend that incentive at the expense of those employees who have stayed on the job --

QUESTION: Who did not get pregnant?

MR. WRAY: Right.

And it is stipulated here, for example, that this is the same -- the pregnancy treatment is the same treatment that would be afforded to someone who is taking an educational leave for example. They would come back with preference over non-employees, --

QUESTION: Is that for example, or is that just it? An educational leave.

MR. WRAY: Well, --

QUESTION: You limited the physical disability to heart attack, automobile accident, and one other. In the record, it's just educational leave, isn't it?

MR. WRAY: I believe those are the only -- that is the only other type of leave where they've had employees go out for that reason.

QUESTION: Yes.

QUESTION: Mr. Wray, supposing that Mrs. Satty, instead of having been absent for pregnancy, had had a heart attack and had then come back to the company after the same period of time, how would she have been treated differently under the company's policy? I get the impression it's not quite as precise as I had thought.

MR. WRAY: Well, when she came back, I think the company first would have endeavored to keep the job open for her, if it were not -- I'm getting away from the situation

where the job was abolished, but --

QUESTION: Well, assume the job was abolished.

MR. WRAY: Okay, I think she would have come back and she would have had, retained her previously accumulated seniority for job-bidding purposes, and when one of those three jobs on which she bid came up, she would have been awarded the job.

QUESTION: Well, are you talking in terms of what the company would have done, or what the company was obliged to do?

MR. WRAY: Well, the --

QUESTION: We're talking about the rights of the employee, enforceable rights of an employee here, not what the company might give them as a matter of grace.

MR. WRAY: Well, I think the answer is that it would be the company policy to endeavor to do what I have said. I think, in answer to some interrogatories that are in the record, the company tried to take the position, and I think properly, that they were not obligated to do so, but that was their policy, not in any contractual sense but just in a practical factual sense, that is what would happen.

I'd like also to address in a little more detail the absence of the cost justification, which has already been cited in the opposing briefs and has been brought up by Mr. Justice Stewart.

I think the difference in the treatment of pregnancy on the one hand and these other accidents and illnesses we have identified on the other hand, is basically that the company, I submit, rationally views pregnancy differently from sickness and accident. And I submit that this Court explicitly did the same thing in the General Electric case.

QUESTION: Well, why -- you're going on to explain why including pregnancy would cost the company money?

MR. WRAY: Not in the seniority context, no. I'm trying to saying why I don't think the absence of that justification is material.

QUESTION: Well, how about on the -- you aren't to back pay yet or to sick leave pay?

MR. WRAY: Well, Your Honor, briefly on the question of sick leave pay, I think that General Electric is just clearly controlling. The only difference --

QUESTION: So how would it cost the company money?

MR. WRAY: They would be permitting more days of absence without pay.

QUESTION: Well, there's a limit on the number of -- on sick leave, I take it?

MR. WRAY: Yes, Your Honor, but the only situation in which you can envision that it would not cost the company more to cover pregnancy is if you assumed that every woman who became pregnant would have used up all of her sick leave

days for other reasons.

QUESTION: Well, how about as compared with men, though?

MR. WRAY: There is no evidence in the record as to the extent to which men, as a group, receive sick leave days with pay --

QUESTION: Well, the argument here, though, is sex discrimination.

QUESTION: That's the whole argument; that's the whole issue. Is it or is it not?

QUESTION: And it seems to me that -- don't you -- suppose every man in the company exceeded his sick leave every year, and none of the women ever did, as long as you exclude pregnancy?

MR. WRAY: Your Honor, I think that would -- General Electric would have called that a disparate impact, that would be sex discrimination based on effect or impact. And there is simply no evidence in this record that the effect of the company's policy was to give men more days absent with pay than women.

I think it's directly analogous to the analysis in General Electric in that respect.

QUESTION: But to say that it would cost them money, at least must assume that women will be out on sick leave more often, pregnancy included, and that they -- and that men

wouldn't be taking so much sick leave.

MR. WRAY: Well, to me, there are two points there. I think if you covered pregnancy where you had not covered it before, you would be paying more sick leave than previously; unless you assumed that women already use up all of their sick leave for other reasons.

Now, as to whether, notwithstanding what happens to the women, if the men somehow get more benefits out of this plan, it would be sex discrimination; but there is no evidence in this record that men get more benefits out of the plan, any --

QUESTION: Mr. Wray, on strictly money, you say that the pregnant woman, when she comes back, can get vacation pay. Right?

MR. WRAY: She retains her seniority for --

QUESTION: And she gets vacation pay. Yes or no?

MR. WRAY: Your Honor, when she comes back, she is treated as having three and a half years of service and is then entitled to whatever vacation --

QUESTION: Which costs the company money.

MR. WRAY: That's right.

QUESTION: Yet, if they give her a job, it doesn't cost them any money.

MR. WRAY: Well, let me answer it this way --

QUESTION: Am I right?

MR. WRAY: It does not cost them -- the seniority for job-bidding purposes --

QUESTION: So where is your economic argument?

MR. WRAY: Your Honor, as applied to seniority for job-bidding purposes, I do not think it is an economic argument. We pay the women who go on pregnancy leave accumulated vacation time, for example. Now, if we didn't do that, we could stand up here and say we have a cost justification.

The only way we can correct our policy -- change our policy as it applies to seniority for job-bidding purposes, is not by absorbing any additional cost to ourselves, we can only do it by penalizing those other employees who choose not to go on pregnancy leave, or cannot, because of biological reasons, be pregnant.

And viewed in that way, I think there is even less reason to infer any pretext in this situation than there would be if we could sit up with a dollar-and-cents justification.

QUESTION: Mr. Wray, on your theory, could Nashville Gas discharge a woman because she became pregnant?

MR. WRAY: No, Your Honor, I don't believe they could. I am not saying that that would necessarily be unlawful, but the rationale for our seniority policy, which I have advanced here today, would not support a termination.

And I think these facts are different, in that she clearly has priority over nonemployees coming back, I think that distinguishes it from a termination situation.

QUESTION: Mr. Wray, may I ask you this question: I understood you to answer a question posed by one of my brethren earlier, to the effect that under General Electric if the evidence showed that the men as a class got more sick leave than women had received, that that might be sex discrimination. Is that so?

MR. WRAY: Yes, Your Honor.

QUESTION: Well, do you understand General Electric to hold that if a review of the facts shows that one sex, members of one sex get more benefits than the members of the other sex, that then the disfavored sex automatically has a claim? Is that your view of the holding?

MR. WRAY: I don't know that it would necessarily go to that --

QUESTION: But it seems to follow from your other analysis. If you just prove that more leave is granted to males than females, or vice versa, it's discrimination against the other class. It seems to me you read General Electric that way.

MR. WRAY: Well, I read the proof in -- I don't know the proof in General Electric, I --

QUESTION: Well, it doesn't make any difference how

the allocation of benefits actually works out; is that relevant at all?

MR. WRAY: I would say it is relevant. If we could establish that --

QUESTION: Then all of those who get the lesser amount always have a claim then; right?

MR. WRAY: I really have not thought the question through to that point. I submit that there is no evidence in this case that these policies provide more benefits to men as a group than to women as a group.

QUESTION: You seem to concede that if such evidence were present, it might be controlling.

MR. WRAY: I would concede, if there was evidence that women as a group were receiving less benefits from the plan, that under General Electric that might be --

QUESTION: Where is the burden of proof?

MR. WRAY: I think General Electric very clearly says that the burden is on the plaintiff.

QUESTION: Don't you think there's a pretty good probability that the benefits do lean one way or the other?

MR. WRAY: Not any more than they would have been in the General Electric case.

QUESTION: Well, I realize that.

MR. WRAY: I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Weismueller.

ORAL ARGUMENT OF ROBERT W. WEISMUELLER, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

[sic]

The respondents have today admitted that they do not believe that they should fire Mrs. Satty for getting pregnant. That they believe this would be a violation of Title VII.

We believe that the record is clear that that is what the petitioner did, and its effect on Mrs. Satty was more devastating than if they had just come out and said: "You're fired".

Instead, they constructively terminated her and made it very hard for her to ever get back to Nashville Gas Company.

Their policy of placing pregnant employees on pregnancy leave, rather than sick leave, had the following effects:

It caused Mrs. Satty immediately and forever -- and I believe that the record does reflect that it is forever -- that Mrs. Satty would lose all competitive seniority that she had previously earned. In the affidavit of Mr. Henson, who is the vice president for personnel, he makes the very clear statement that an employee who is placed on pregnancy

leave and returns to permanent employment retains seniority she had previously accumulated for purposes of pension and vacation, but does not retain such seniority for the purpose of bidding on jobs.

There is no qualifier in there about if she gets the job back she gets her seniority back, or anything else. I think that we can take this plain language to mean that this is gone forever. She can never retain the seniority. If she is lucky enough to get a job with Nashville Gas Company, she has to work for three and a half years --

QUESTION: Is this reflected in a collective bargaining contract?

MR. WEISMUELLER: Your Honor, the Employee Manual, where this was the collective bargaining contract, was never made a part of the record, it was never made a part of the trial.

Now, whether the Employee Manual and the employee policies reflected in that --

QUESTION: Well, most seniority -- most collective bargaining contracts deal with seniority, don't they?

MR. WEISMUELLER: Yes, Your Honor, they do, but Mrs. Satty was not a union member.

QUESTION: Well, was she in the unit represented by a union?

MR. WEISMUELLER: No, Your Honor, she was not.

Once Mrs. Satty returned to work, after the birth of her child, she was placed at the bottom of the seniority ladder.

I would also like to point out to the Court that she was placed at the bottom of the salary ladder. She was making \$130.80 when she returned, as opposed to \$140.80 when she left. The differences can be seen in the pay scale which is found in the record, at page 99 of the Appendix, \$140.80 is what she was making when she left, which is commensurate with her seniority that she had at that time; \$130.80 is commensurate with entrance. That is, she started over again, it seems to us, from the record, not only in job-bidding seniority but also longevity pay raises, which she might have had previously, were taken away from her.

QUESTION: Do you agree with your friend's statement of the record that seniority is preserved for only vacation purposes and pension?

MR. WEISMUELLER: Yes, Your Honor.

QUESTION: No other benefits?

MR. WEISMUELLER: No other benefits.

QUESTION: - Well, that is as applicable to pregnancy leave.

QUESTION: Yes. This case.

MR. WEISMUELLER: Yes, in this case.

QUESTION: I mean, if one was out on ordinary sick

leave, is that true?

MR. WEISMUELLER: No, Your Honor. If one returns --

QUESTION: Only pregnancy leave.

MR. WEISMUELLER: That's right. If one returns from sick leave, not only does one retain his seniority, but actually accrues seniority while sick, and if there are any across-the-board pay raises during the time that that employee is absent, they are entitled to them.

QUESTION: Well, that's perhaps not all that clear. At least -- but it is clear with respect to heart attack or an automobile accident or one other kind of disability. Back trouble.

MR. WEISMUELLER: Now, the company's general statement of their sick leave policy is that when an employee is absent because of --

QUESTION: What are you reading from?

MR. WEISMUELLER: Excuse me. Page 96 of the Appendix, Exhibit 1, Employee Policy Manual, Sick Leave and Pregnancy Leave Sections.

Where it states that, "When an employee is absent because of illness, or non-compensable injury, he will receive pay depending upon his length of service" et cetera.

Now, there are no qualifiers there. The only qualifier is in a separate part of the Employee Manual, where they talk about pregnancy leave.

QUESTION: Where is that?

MR. WEISMUELLER: That -- let's see, pregnancy --

QUESTION: Page 98?

Bottom of 98, is that it?

MR. WEISMUELLER: Let's see. Yes, sir, bottom of 98. That's correct.

Where they state that they may request leave of absence for up to one year. However, the district court found, and I think it's clear from the testimony, that there is no requesting to it, you're forced under pregnancy leave. The only request involved is: Can you keep these few illusory rights of vacation and pension for that year? And --

QUESTION: Is a pregnant employee required to leave at least five months prior to the expected birth?

MR. WEISMUELLER: That is the written policy; however, that is not as the company implemented it in this case. However, the company did reserve the right to be the final arbiter of when she would leave. The company would make that decision, not Mr. Satty, not Mrs. Satty's doctor.

QUESTION: How long before the child's birth was she required to leave?

MR. WEISMUELLER: She was required to leave 25 days prior to the birth of the child.

QUESTION: But that's not an issue in this case?

MR. WEISMUELLER: That's not an issue in this case, no, Your Honor.

QUESTION: Mr. Weismueller, may I ask what may be an awfully obvious question, but it doesn't seem to me you've addressed it yet.

Let's assume you've demonstrated that your client was discriminated against because she got pregnant.

MR. WEISMUELLER: Yes, sir.

QUESTION: And let's assume, as some people do, that the General Electric case holds that discrimination against people who get pregnant is not discrimination on account of sex.

Now, if you make those two assumptions, how can you win?

MR. WEISMUELLER: Well, Your Honor, I think we are factually distinguishable from the case of Gilbert. Actually, under the holding of Gilbert, I believe we can prevail.

Gilbert did not say all pregnancy-related actions of an employer are free from violation of Title VII.

QUESTION: No, but it did hold, as I understand it, that if a pregnancy-related -- proving a pregnancy-related discrimination doesn't establish a prima facie case of violation of the statute.

MR. WEISMUELLER: No, Your Honor.

QUESTION: Now, how do you establish a prima facie case?

MR. WEISMUELLER: First of all, by showing that there was no business necessity in this case, there was no business reason at all, as there was in the Gilbert case.

Secondly, the Court in the Gilbert case held that there was an even-handed inclusion of risks; that is, all risks that were covered, both sexes could claim under them. And once these risks were given, they were never taken -- or, excuse me, these benefits were given, they were never taken away.

In this case, Mrs. Satty earned seniority, she had something, and it's taken away. There is --

QUESTION: Well, she didn't have it as a matter of right, did she? If there was no collective bargaining agreement and no written employment contract, she had it as a matter of her employer's largesse.

MR. WEISMUELLER: Well, I believe the Employee Manual, Your Honor, would --

QUESTION: But that's a unilateral manual. This is no collective bargaining agreement and, I gather, no individual contractual right, was it?

MR. WEISMUELLER: No, there was no individual employment contract between her and the employer.

QUESTION: You take the position that the Manual

created duties, enforceable duties and obligations on the part of the employee and conferred corresponding rights on the employee, enforceable rights?

MR. WEISMUELLER: We take the position that if they have a policy set out in the Employee Manual, and do not enforce it fairly against all persons -- and the reason they don't enforce it fairly is because of sex -- this gives rights.

QUESTION: Well, I know, but that's not the issue. The issue is --

QUESTION: The application of Title VII.

MR. WEISMUELLER: Yes, sir.

QUESTION: And that makes it an unlawful employment practice for an employer to do certain things.

QUESTION: It's employer conduct, --

MR. WEISMUELLER: Yes.

QUESTION: -- it's not a matter of contractual rights.

QUESTION: Yes, that's the issue. And the issue here is whether this conduct constitutes a violation of Title VII, isn't it?

QUESTION: That's right.

QUESTION: This doesn't depend on whether the union contracts or written contracts or anything else. Does it?

MR. WEISMUELLER: No, Your Honor, it does not. This

is a Title VII case.

QUESTION: In other words, isn't the Employee Manual almost irrelevant here, except as it sheds some light on what their practices were, as distinguished from what duties they had?

We're dealing with a statutory matter.

MR. WEISMUELLER: That's correct, Your Honor. In that focus, it is. Yes.

Also they changed Mrs. Satty's status, in violation of 703(a)(2), by changing her status from one with three and a half years' seniority to one with no seniority.

In doing that, they violated Title VII. Because the whole point of Title VII is to protect people from arbitrary barriers to employment or arbitrary status changes which are a barrier to employment.

And we maintain this is totally arbitrary.

One of the reasons that this can be shown to be arbitrary is that seniority stripping really doesn't take effect until the employee is ready to return to work. When she is a healthy employee again, and in every way similar to a male who has broken his leg, been out for a period of time and returned, or any other employee who has done so.

Finally, we see that 12 women have been forced to take pregnancy leave. No men have been forced to take pregnancy leave -- in fact, no other employees, period, have

been forced to take pregnancy leave.

QUESTION: Well, is that in issue here?

QUESTION: No.

QUESTION: I mean, is the validity of that question, or that fact here? Or that policy here?

MR. WEISMUELLER: Well, I think it shows impact upon one group, Your Honor.

QUESTION: Well, I know, but is it -- what did the district court find? Or what did the lower court find?

MR. WEISMUELLER: As to what, Your Honor? I'm sorry, I don't understand the question.

QUESTION: As to the validity of that practice. Of requiring people to take pregnancy leave.

MR. WEISMUELLER: Of requiring them to take pregnancy leave, it was no problem. But the only way that employees can lose seniority is by either taking leave of absence or pregnancy leave. And pregnancy leave is the only situation where employees are forced to lose seniority.

QUESTION: I have great difficulty in your statement that the employer made her take leave. She had to take leave, at least for an hour or so, didn't she?

MR. WEISMUELLER: Yes, sir.

[Laughter.]

QUESTION: Well, why do you keep saying they made her take the leave? That's not before us at all.

Is it?

MR. WEISMUELLER: Well, the involuntariness --

QUESTION: Didn't she need a leave?

MR. WEISMUELLER: Oh, yes, sir. We don't --

QUESTION: Well, why do you keep arguing about they forced her to take a leave?

MR. WEISMUELLER: Well, this is the only situation where they force her to lose her seniority, then, possibly I should state it in those terms.

QUESTION: Did she object to -- did she challenge their leave 25 days before the delivery?

MR. WEISMUELLER: Yes, Your Honor, I believe the record shows that she felt like she had recovered sufficiently to come back to work at the time that --

QUESTION: Well, 25 days before the delivery.

MR. WEISMUELLER: Yes, sir. She was out for five days with water retention.

QUESTION: Yes, but in the district court you challenged that requirement as arbitrary, in violation of Title VII, and the district court ruled against it.

MR. WEISMUELLER: Yes, sir, they did.

QUESTION: And held squarely that it doesnot appear to be arbitrary and in violation.

MR. WEISMUELLER: That's correct, but in trying --

QUESTION: You didn't bring that issue here.

MR. WEISMUELLER: No, sir, we didn't, but Mr. Chief Justice asked me if she --

QUESTION: Yes, but --

MR. WEISMUELLER: We understood his question to be, was she ready to come back to work at that time; and, yes, she was. If indeed that was the question.

QUESTION: Well, the issue^{of}/forcing her to take maternity leave is not here. Is that right?

Isn't that right?

MR. WEISMUELLER: Well, we are not objecting today to forcing her to take pregnancy leave. What we do object to is forcing her to lose seniority.

QUESTION: When she came back.

MR. WEISMUELLER: That's correct. Well, actually, it was triggered at the time that she left, under their policy.

QUESTION: Let me ask a question that may shed some light, for me at least, on your basic proposition.

What if the company -- a company, an employer had a fixed policy of not employing a woman who was pregnant at the time she applied, would that violate Title VII, in your view?

You seem to say that any disparate treatment because
a
of pregnancy is/violation of Title VII. So what about my question?

MR. WEISMUELLER: Well, if I have given the Court that impression, I do not mean to. If the employer can show a valid business reason for not employing a woman because she is pregnant, then I don't believe they violate Title VII.

But if they can show no business necessity, then I believe that it would be a violation, because if that were the only reason they didn't employ her.

QUESTION: Then your answer to the question is that the company had a flat policy of not employing, it would be a violation of Title VII?

MR. WEISMUELLER: Unless they could show that that flat policy was a business necessity.

QUESTION: Well, the question assumes that they simply have the policy and take the position that they don't have to show anything. What about that?

MR. WEISMUELLER: Then I believe that that would be a violation of Title VII, yes, sir.

QUESTION: You're talking about business necessity as the term is used in the statute, as an affirmative defense?

MR. WEISMUELLER: Yes, Your Honor.

QUESTION: General Electric didn't turn on that, did it?

MR. WEISMUELLER: No, because the Court never found effect, Your Honor.

QUESTION: Right.

MR. WEISMUELLER: But we believe that here, in changing her status, we have shown discriminatory effect. That is, they have, strictly because of her sex, changed her from someone with three and a half years' seniority to no year's seniority.

QUESTION: Mr. Weismueller, --

MR. WEISMUELLER: Yes, sir?

QUESTION: -- are you going to address the sick leave policy issue? You've devoted your argument up to this point, I think, to the seniority issue.

MR. WEISMUELLER: Yes, sir.

As to the sick leave --

QUESTION: I am particularly interested in how you distinguish General Electric with respect to the sick leave issue.

MR. WEISMUELLER: All right, sir.

In the General Electric case, my understanding of the facts are that the only limitation was 26 weeks per illness. In this case the policy is to give a certain amount of time, depending upon the seniority that you have, for sick leave, after which you have no further sick pay benefits.

Since there is a finite amount of time that can be taken for pregnancy leave and only that amount of time, the employer's liability is limited and without the employer's

showing that more money is -- or at least equal money is given to women under the benefits of this program, then I don't believe that this Court can assume that equal money or more money is paid to women than men, and, as I understand it, that was one of the major concerns of this Court in the Gilbert case.

I believe that if this --

QUESTION: Well, it sounds like, then, that the real issue is who has got the burden of proving this matter. The record doesn't show, I take it?

MR. WEISMUELLER: That's correct. The record does not show, Your Honor. When we took this record, we had no idea.

QUESTION: Excuse my interruption.

MR. WEISMUELLER: Also, when this sick leave policy is viewed in the over-all context of the treatment of women, we maintain that this is just the first stage, in an over-all program of discriminating against women, and possibly standing by itself it would be more akin to the Gilbert situation; but when taken in context of the seniority issue, we believe that it should be upheld.

QUESTION: Well now, you say possibly. I thought, from reading your briefs, that you had conceded that if the sick leave aspect were here in a solitary posture, Gilbert would control.

Am I mistaken as to that?

MR. WEISMUELLER: No, sir, you're not mistaken that that's in the brief. We've re-thought the question since we wrote the brief, I guess is my basic answer to that.

One thing I would like to point out to the Court before getting away from the seniority issue. The company maintains that it also may put someone on sick leave -- or, excuse me, leave of absence, and therefore they would lose seniority if they over-ran their sick leave. But this just simply is not the case.

QUESTION: Do you or don't you concede that if pregnancy were included, the employer would be paying out more sick leave money than he is now? I guess --

MR. WEISMUELLER: Well, certainly seven hundred and --

QUESTION: Well, forget the comparison with men, but is it that it may be or maybe not?

MR. WEISMUELLER: Certainly \$789-something, because that's what we're claiming in this case, and if pregnancy -- if this Court should find that pregnancy should be included in the sick pay, then certainly they are going to be out at least that much money.

QUESTION: So I take it that your clients at least hadn't used all their sick leave, and that there's some --

MR. WEISMUELLER: That's correct, Your Honor. She

was entitled to sick leave.

However, the case of Mrs. Dixon I think is very instructive as to the company's policy toward anyone except pregnant women. Mrs. Dixon had 18 years' seniority --

QUESTION: What page are you looking at?

MR. WEISMUELLER: Excuse me. Page 24, Your Honor, beginning with response to interrogatory 90. Mrs. Dixon was absent for ten months, essentially, in one period, and then another period of five months.

She had built up 18 years' seniority with the company. As a result of that, she would have been entitled to 26 -- no, excuse me, 23 weeks' sick pay. Yet, upon returning to work, Mrs. Dixon was granted seniority from date of hire. It didn't even freeze during the time she was gone, even though she had gone well beyond her six leave, which was allowed.

QUESTION: In other words, your point is the seniority continued to accrue during those absences?

MR. WEISMUELLER: Yes. It certainly did.

QUESTION: Let's assume that without including pregnancy, that the benefits for men and woman, the average benefits for men and women, sick leave benefits for men and women in terms of pay are about equal. Let's just assume that.

MR. WEISMUELLER: All right.

QUESTION: And now with the pregnancy included, it's going to cost the employer substantially more for women.

Now, you would -- assuming those facts, would you still argue that there's a sex discrimination because that sick leave is not paid to women for pregnancy?

MR. WEISMUELLER: Your Honor, under the holding of Gilbert, I might argue it, but I don't believe that I would be successful.

Now, this company has never shown business necessity. The district court held they didn't even try to make a showing of business necessity for the seniority stripping policy.

It was only in their reply brief to this Court, which we received Friday, that they first came -- or articulated at least, this policy of, well, we want to reward employees who stay around and don't voluntarily leave to do other things.

We feel that that simply does not get to the problem, because an employee's leaving when they're pregnant, as Mr. Justice Marshall pointed out, is not because they want to go, it's because they have got to go, they are unable to work. And also the company, in light of its sick leave policy of holding jobs open for very long periods of time for people who are out, has shown that they prefer experienced employees.

QUESTION: Well, do they -- does the company hold jobs open and grant sick leave and retain seniority for those,

for example, who have what might be called voluntary surgery, say, cosmetic surgery?

MR. WEISMUELLER: Although that specific question cannot be found in the record, their statement about sick leave is that when an employee is absent because of an illness or non-compensable injury, now, without qualifiers, I assume that that would be covered. If there were to be any qualification, I believe the burden of proof would be upon the company to show that they don't pay for voluntary surgery or elective surgery. I believe that the burden of proof would be theirs and not ours to show that.

QUESTION: Did the district court make any findings? I'm impressed both from your opponent's argument and yours, that this Manual is less than precise in addressing some issues. Did the district court make any finding on that point?

MR. WEISMUELLER: On what specific issue, Your Honor?

QUESTION: Well, the question that Justice White asked, whether the -- what would be the treatment of an employee who undergoes voluntary cosmetic surgery?

MR. WEISMUELLER: There was no specific finding of fact on that, Your Honor.

QUESTION: Was any requested?

MR. WEISMUELLER: No, Your Honor, there was not.

QUESTION: What -- how many employees are there?

About?

From its title, it looks like a public utility.

MR. WEISMUELLER: There are 350. Yes, it is.

Mr. Wray informed me 350, I don't know of my own knowledge.

QUESTION: And what is its business?

MR. WEISMUELLER: Its business is the installation, maintenance of natural gas in the Nashville, middle Tennessee area.

QUESTION: It sells gas itself?

MR. WEISMUELLER: Yes.

QUESTION: Don't you think it would have been helpful to the Court if the Manuals had been made part of the record?

MR. WEISMUELLER: Your Honor, I'm as surprised as you are that the entire Manual isn't in there. When we made up the Appendix --

QUESTION: Well, I understood -- I was basing my question on the proposition that it was not put in evidence.

MR. WEISMUELLER: The entire Manual was put into evidence, Your Honor.

QUESTION: Then we have it.

MR. WEISMUELLER: I don't believe so. I checked the record yesterday and I believe it's as limited as what we have here. When we made the Appendix, or when we made the record for the appeal, the appellants called me -- I honestly

do not remember whether we agreed that it should all be in there or not. I know there's gentlemen that --

QUESTION: Well, didn't they --

MR. WEISMUELLER: I beg your pardon?

QUESTION: Wasn't the entire record sent up here? It may not have been printed.

QUESTION: It should be in the Clerk's office.

MR. WEISMUELLER: Well, the record I checked in the Clerk's office did not have it all. I hope it is here. I think it would be instructive. Certainly we would be -- we have a copy of the Manual and would be happy to -- if there were any way to include it, be happy to do it.

But certainly the entire Employee Policy Manual was placed into evidence in the district court.

MR. CHIEF JUSTICE BURGER: We'll resume at one o'clock, you will have a few minutes left at that time.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Weismueller, you have a few minutes remaining.

ORAL ARGUMENT OF ROBERT W. WEISMUELLER, JR., ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

MR. WEISMUELLER: Yes, Your Honor.

In the few minutes that I have remaining, I would like to use that time to summarize our position.

In stripping Mrs. Satty of seniority, the gas company put her in the position of someone beginning new with the company, as far as what we consider the important accretions of her job were. She was at the bottom of the seniority scale, she was at the bottom of the pay scale, once again, even though she had worked for them for three and a half years. This work meant nothing to the employer once she was placed on pregnancy leave.

They have changed her status from an employee with three and a half years' seniority to an employee with no seniority.

As a result of this, she lost three jobs, which she bid on, with the company. The company concedes if she had had her previously accumulated seniority, she would have had any or all of those jobs. She would presently be an employee of Nashville Gas Company.

Such a change of status is permanent, we believe we have shown under the facts in this record.

And it is an impediment to Mrs. Satty ever being rehired by the gas company, and, if she is rehired, to her whole future advancement. It will take her three and a half years to return to the position she was in prior to being pregnant.

In contrast to this, we have employees who are sick or injured, and out for considerable length of time in excess of the time that Mrs. Satty was out, who not only retained their seniority and their rate of pay but actually accumulated seniority while they are on their sick leave, and if any across-the-board raises are made during that time, they get the advantage of this.

All this was done by the Nashville Gas Company without a business necessity, nor a reason which is consistent or able to withstand logical scrutiny.

They claim they want experienced employees. Their sick pay policy shows they want experienced employees. And yet there is a pool of experienced employees in women who become pregnant that they, for no apparent reason to us at least, shun.

On sick leave, it is our position that when viewed in the total context of the company's entire policies toward pregnant women, it is discriminatory. When this is done -- when you look at this policy in light of their total policy

toward women, you see that this is just the beginning step in the total policy designed to discriminate against pregnant women.

Also, since there are a finite number of sick days in it.

Thank you for your time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

We'll hear arguments next -- oh, excuse me, Mr. Wray, you -- I don't have the time slip here -- you have a minute left.

You may proceed.

REBUTTAL ARGUMENT OF CHARLES K. WRAY, ESQ.,

ON BEHALF OF THE PETITIONER

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

I submit that the General Electric case controls here. General Electric stands for the proposition that a distinction based on pregnancy is facially neutral, it is not, per se, sex discrimination. It may, nevertheless, be unlawful if the effect of the policy is to have a disparate impact on women as a group, as opposed to men as a group.

There is no evidence in the record to that effect, and the plaintiff has the burden of proof on that point.

It may also constitute unlawful sex discrimination

if the policy is not in fact a pregnancy policy but a men versus women policy, if it is a subterfuge, if it is not what it appears to be on its face. There is no evidence in this record that this policy is anything other than a straightforward pregnancy policy, and there is nothing to suggest that the burden of proof has been shifted from the typical position of that burden being on the plaintiff in civil litigation.

For all of these reasons, I submit that the ruling of the Court of Appeals should be reversed, and the case dismissed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:04 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -

RECEIVED
SUPREME COURT U.S.
MARSHAL'S OFFICE

1977 OCT 14 AM 9 24