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# GERMANY'S LEGAL PROTECTION FOR WOMEN WORKERS VIS-À-VIS ILLEGAL EMPLOYMENT DISCRIMINATION IN THE UNITED STATES: A COMPARATIVE PERSPECTIVE IN LIGHT OF *JOHNSON CONTROLS*

Carol D. Rasnic\*

*a girly, womanly, female, feminine dame . . . .*

—Oscar Hammerstein, II<sup>1</sup>

To what extent, if any, is it ever appropriate to distinguish the female in the workplace and to treat her differently precisely because of her gender? This practice is mandated by law and is indeed widely accepted without significant opposition in many of the world's more industrialized countries. The Federal Republic of Germany, for example, applies a long-standing legislative policy of treating female workers — especially pregnant women or new mothers — decidedly differently from their male counterparts, despite the unambiguous constitutional dictate for equality between the sexes.<sup>2</sup>

In contrast, the U.S. Supreme Court's recent decision in *UAW v. Johnson Controls*<sup>3</sup> removed any remaining doubt as to the breadth of Congress's mandate against sex discrimination in employment.<sup>4</sup> In *Johnson Controls*, the defendant company's exclusionary policy regarding a work environment with dangerously high levels of lead applied only to those persons capable of bearing children — that is, only to women. A unanimous Court held that such a rule violates Title VII, as amended by the Pregnancy Disability Act.<sup>5</sup> To be sure, the

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1. *There is Nothin' Like a Dame*, from *SOUTH PACIFIC* (Columbia 1949).

2. See GRUNDGESETZ [GG] (Germany's Constitution, or "Basic Law") art. 3.

3. 111 S. Ct. 1196 (1991).

4. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2000e-17 (1988), prohibits discrimination in employment by reason of sex.

5. Section 701(k), added to Title VII in 1978, reads in part:

"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; and women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employ-

legal communities in some of the world's major nations, including Germany, will look with disdain on this pronouncement and will regard it as the U.S. government's failure to assure women workers a healthy and safe work environment.

This article will review the major German laws affecting women in the workplace, including clarification of the rationales of the German *Bundestag* (parliament). Comparative remarks regarding U.S. law and an analysis of *Johnson Controls* will place the two bodies of law in juxtaposition. Finally, an explanatory historical overview will allow the reader to draw his or her own conclusions as to the preferred view of the legal status of the working woman.

## I. GERMAN LAW AFFECTING WOMEN'S EMPLOYMENT RIGHTS

### A. Constitution

The German Constitution — the *Grundgesetz*, or Basic Law — was adopted by the Federal Republic of Germany on May 23, 1949. Although Germany's Constitution came some 150 years after the U.S. Constitution, it was, nonetheless, the culmination of the experience of a people who had established an identity and a regional pride centuries before. From Karl the Great's coronation as Emperor of the Holy Roman Empire in Aachen in the eighth century through the defeat of Napoleon in the early nineteenth century, Germany evolved into a nation ruled by local princes. This process of decentralization was exacerbated by the religious struggles the country had endured, such as the Thirty Years' War, which pitted Martin Luther's Protestantism against Catholic imperial restoration.<sup>6</sup> The First German Empire — or First Reich — was a constitutional monarchy<sup>7</sup> led by Otto von Bismarck, which introduced the most advanced social welfare legislation of its time.<sup>8</sup> This protective stance is still a significant characteristic of the German federal government.<sup>9</sup> The First Empire collapsed during

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ment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.

Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. 2000e(k) (1988)) (emphasis added).

6. *The Legal System of Germany*, in MODERN LEGAL SYSTEMS CYCLOPEDIA 3.110.7, 3.110.8, § 1.1(C) (Kenneth R. Redden ed., 1990). Rule by succession rather than by a democratically elected leader has never been the U.S. method of governance. The significance is the evolution of today's Germany from an ancient governmental structure compared to the United States, which has had democratic rule since its inception. The dominance of religion and its influence on legislation remain today. See *infra* notes 193-210 and accompanying text.

7. Manfred Weiss, *Federal Republic of Germany*, in V INTERNATIONAL ENCYCLOPEDIA FOR LABOUR RELATIONS AND INDUSTRIAL RELATIONS, at 14 (R. Blanpain ed., 1987) [hereinafter INTERNATIONAL ENCYCLOPEDIA].

8. MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 6, at 3.110.8, § 1.1(C).

9. Germany's mandatory "social insurance" is public law and is not part of labor law. The

World War I, after which the Second Reich — the Weimar Republic — introduced the principles of democracy and parliamentarianism.<sup>10</sup> The demise of the Second Reich came with the ultimately tragic Nazi dictatorship of Adolph Hitler's Third Reich which resulted in Germany's defeat and destruction in 1945. World War II left Germany with 50 million people dead and its cities and landscapes ravaged.<sup>11</sup> It was in this setting that the postwar effort, following the Potsdam conference in 1945, produced the *Grundgesetz*. The Third Reich and World War II made it imperative that the new constitution incorporate those ideals that would ensure at last a German government accepted into the community of world nations. Thus, the *Grundgesetz* was a document designed to rectify the recent past and, at the same time, articulate and preserve the fundamental concepts that had been embraced by the German peoples. At the observation of the law's forty-year anniversary, it was referred to retrospectively as a "reactive" document that constituted a response to a past with "two faces: an ill-functioning, weak, and helpless democracy on the one hand and a cruel despotism on the other."<sup>12</sup> One of the conclusions of the drafters was that it must be an effective protector of individual rights.<sup>13</sup>

The introduction to an English translation of the *Grundgesetz* published by the federal government in Bonn described the document's basic elements as

cover[ing] all aspects of the political and social life of the Federal Republic of Germany . . . [and] creat[ing] a system of values within which protection of *individual freedom and human dignity* is the highest principle of law . . . *not perceiv[ing] the citizen as an individual apart* from the rest but as a person living in the community and linked with it in many ways.<sup>14</sup>

It is in this responsive environment — one that strived to retain the cultural and social undergirding established many years before, while eradicating the errors of the two World Wars — that the German view of its socially acceptable minimum should be gauged.

The *Grundgesetz* contains two sections — both placed in the critical first nineteen articles designated "Basic Rights" — that directly

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insurances provided by the state include health, workers compensation, retirement, and unemployment insurance. INTERNATIONAL ENCYCLOPEDIA, *supra* note 7, at 24.

10. *Id.* at 1.

11. MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 6, at 3.110.8, sec. 1.1(D).

12. Peter G. Kielmansegg, *The Basic Law — Response to the Past or Design for the Future?*, in FORTY YEARS OF THE GRUNDGESETZ 5, 6 (German Historical Institute Occasional Paper No. 1, Hartmut Lehmann & Kenneth F. Ledford eds., 1990).

13. *Id.*

14. Public Document printed in the Federal Republic of Germany by Roco-Druch GmbH, D-3340 Wolfenbüttel, at 4 (1989) (emphasis added).

affect the female worker. Article 3 reads in part as follows: "(1) All persons shall be equal before the law. (2) *Men and women shall have equal rights.* (3) No one may be prejudiced or favoured because of his sex . . . ."<sup>15</sup> Article 6 reads in part as follows:

- (1) Marriage and family shall enjoy the special protection of the state.
- (2) The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. *The national community shall watch over their endeavors* in this respect. . . . (4) *Every mother shall be entitled to the protection and care of the community.*<sup>16</sup>

These two sections appear contradictory upon an initial reading, since the special position Article 6 assures to mothers would necessarily at times effect a preferential treatment for females that would violate the equality provisions of Article 3. It is both interesting and significant that most German legal scholars, however, do not perceive this as a dichotomy. The employment laws protective to women<sup>17</sup> are regarded by German legislators and scholars alike as the lawmakers' quite logical consideration of the biological differences between men and women and the special place of women in society, with the aim of providing for the expectant mother a particularly special status.<sup>18</sup> Because of the assurance in the *Grundgesetz* of equal treatment between the sexes, this view accepts that to ignore these biological differences would in fact result in unequal treatment.<sup>19</sup>

### B. *German Statutory Protective and Preferential Provisions for the Female Worker*

As a civil law country grounded in the Roman law tradition rather than the common law English tradition of the United States,<sup>20</sup> Germany's statutory law is predictably voluminous. Similarly, its 146-article *Grundgesetz* is massive, relative to the seven-article U.S. document.<sup>21</sup> There is far more extensive and explicit enumeration of rights in German law, leaving the courts for the most part with the duty simply to apply the law, rather than also to interpret it. Consequently,

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15. GG art. 3 (official translation published by the Press and Information Office of the Government of the Federal Republic of Germany, 1977) (emphasis added).

16. *Id.* art. 6 (emphasis added).

17. See *infra* notes 20-90 and accompanying text.

18. J. VON STAUDINGER, 2 KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, Recht der Schuldverhältnisse, sec. 611-15, at para. 79 (Reinhard Richardi & Dieter Reuter eds., 12th ed. 1989) [hereinafter KOMMENTAR].

19. PETER MEISEL, ARBEITSSCHUTZ FÜR FRAUEN UND MÜTTER 2-3 (1980).

20. See JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 30-31 (1985).

21. Even after more than 200 years, the U.S. Constitution has been amended only 26 times, so that the document in its entirety is composed of only 33 articles.

most of the sources for German law are constitutional or statutory, rather than judicial.

German statutes affecting working women fall into two general groupings: (1) those applicable to all women generally, and (2) those applicable to pregnant workers or new mothers. Foremost in the first group are the statutes forbidding women to perform certain jobs. These include positions in mines,<sup>22</sup> iron and steel industries,<sup>23</sup> coking plants,<sup>24</sup> and the construction industry if the activity is particularly strenuous or health-endangering.<sup>25</sup>

Rather than deeming these proscriptions violative of the equality provision of Article 3, the German *Bundestag* rationalized that the terms actually fulfill the charge of Article 3. Some of the physical differences between the sexes that are cited to justify these protective laws include the average woman's sixty percent lower arm strength and twenty-five percent lower lung capacity than the average man's.<sup>26</sup> The conclusion is that these differences in physical constitutions render women "unsuited" (in German, "*ungeeignet*") for jobs that require exceptionally heavy physical labor.<sup>27</sup> Therefore, these limitations are considered to be for the necessary purpose of protecting women from unhealthy or moral dangers, not to effect a hindrance to their achieving equal opportunity in employment.<sup>28</sup>

There is some work prohibited in a manner which is sex-neutral, but which is generally acknowledged as affecting more women workers than men.<sup>29</sup> For example, an employer is prohibited from employing an individual in any capacity for which the employee has obtained written affirmation from a physician that he or she should not be so employed.<sup>30</sup> German statutory law provides extensive protection from discharge<sup>31</sup> and generally requires the approval of an employee work council before an employer can implement a planned transfer of an employee.<sup>32</sup> The German works councils are comprised of employees elected by their peers to participate in management to a degree uncom-

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22. ARBEITSZEITORDNUNG [AZO] § 16, ¶ 1.

23. Nr. 20 Ausführungsverordnung zur AZO.

24. AZO § 16 ¶ 2.

25. Compare AZO § 16 ¶ 2 with Nr. 20 satz 2 Ausführungsverordnung zur AZO.

26. MEISEL, *supra* note 19, at 11.

27. *Id.*

28. KOMMENTAR, *supra* note 18, at para. 797.

29. *Id.* at para. 799.

30. ARBEITSTOFFVERORDNUNG [ARBSTOFFV] § 21.

31. KÜNDIGUNGSSCHUTZGESETZ [KSCHG] § 1. Essentially, all employment contracts in Germany are regarded as terminable only for cause. KSCHG § 1(2).

32. BETRIEBSVERFASSUNGSGESETZ [BETRVG] § 102.

mon in the United States. Therefore, to the extent that women workers are proportionately more affected by this medical provision than are male workers, it is occasionally referred to as a protective law for women.<sup>33</sup>

Women workers in the "blue collar" category<sup>34</sup> are afforded preferential treatment regarding mandatory times for breaks. The legally required break time for male blue collar workers is either one thirty-minute or two fifteen-minute breaks per six hours of work.<sup>35</sup> The female worker, on the other hand, must be given a break at the end of four and one-half hours' work. The mandatory break duration for her is no less than twenty minutes for working between four and one-half hours and six hours, and no less than one-half hour for working six to eight hours.<sup>36</sup> Blue collar female workers also may not be employed between the hours of 8:00 p.m. and 6:00 a.m., and they may work no later than 5:00 p.m. on a day preceding a Sunday or a holiday.<sup>37</sup> Although the usual work day for all German workers is eight hours,<sup>38</sup> there are exceptions providing for overtime work. However, such overtime is limited so that female workers work no more than ten hours per workday.<sup>39</sup>

Four of the *Länder* (states) — Bremen, Hamburg, Niedersachsen, and Nordrhein-Westfalen — formerly had set aside domestic work in homes exclusively for women,<sup>40</sup> but the constitutional court (*Bundesverfassungsgericht*) declared this to be incompatible with the equality provision of Article 3.<sup>41</sup>

Germany, as a member of the European Community,<sup>42</sup> is also subject to the laws of the legislative body of that group, the Council of Ministers. Thus, Germany is bound by the interpretations of such laws by the European Community's Court of Justice.<sup>43</sup> European

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33. KOMMENTAR, *supra* note 18, at para. 799.

34. German law distinguishes between "blue collar" (*Arbeiterinnen*) and "white collar" (*Angestellterinnen*) workers. This is similar to the same separation within the workforce in the United States. See HERBERT KRONKE, *REGULIERUNGEN AUF DEM ARBEITSMARKT: KERNBEICHE DES ARBEITSRECHTS IN INTERNATIONALEN VERGLEICH* 172 (1990).

35. AZO § 12(2).

36. *Id.* § 18(1).

37. *Id.* § 19(1).

38. *Id.* § 3.

39. *Id.* § 17.

40. Article 28 of the *Grundgesetz* provides the *Länder* with the power to legislate in areas where the federal parliament (*Bundestag*) has not done so.

41. Judgment of Nov. 13, 1979, 52 *Entscheidungen des Bundesverfassungsgericht* 357, 367.

42. The twelve Member States are Belgium, Denmark, Germany, France, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, and United Kingdom.

43. This court has jurisdiction to hear charges of treaty infringements and to make prelimi-

Community Directive 75/117/EEC, dated February 10, 1975, requires the elimination of all discrimination on the grounds of sex with regard to all aspects and conditions of remuneration for the same work, or for work to which equal value is attributed.<sup>44</sup> The German Labor Court (*Arbeitsgericht*) interpreted this directive in *Gisela Rummeler v. Dato-Drück GmbH*. It ruled that when classifying jobs for the purpose of determining compensation, an employer could consider not only the extent of muscular effort required and whether such work is heavy, but also whether it is regarded as particularly heavy with respect to women employees.<sup>45</sup> The E.C. directive imposes upon the German courts the "comparable worth" doctrine, widening the possibilities of claims of equal pay violations far beyond those available to plaintiffs under the U.S. counterpart, the Equal Pay Act.<sup>46</sup>

Germany is also one of over 100 signatory nations which have ratified the U.N. Convention for the Elimination of All Forms of Discrimination Against Women.<sup>47</sup> This document prohibits "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>48</sup> Considerable debate has ensued over why the United States has yet to ratify the Convention despite its introduction at Senate hearings on two different occasions.<sup>49</sup> Two recurring views of its opponents that have emerged are (1) that the United States already has forged as far as the Convention would require in the area of equality between the sexes, and (2) that ratification would drastically and negatively affect U.S. law.<sup>50</sup> It is perhaps germane that the Convention does in fact provide for policies which protect female workers such as the one held unlaw-

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nary rulings when requested by a court of a Member State in order to assure uniform application of common law. *Case Law I*, INTERNATIONAL ENCYCLOPEDIA, *supra* note 7, at 5.

44. 1975 O.J. (L 45) 19.

45. Case 237/85, 1 July, 1986, referred from *Arbeitsgericht Oldenburg*, reprinted in *Case Law II*, INTERNATIONAL ENCYCLOPEDIA, *supra* note 7, at COJ-1177.

46. See *infra* notes 89-95 and accompanying text for comparative remarks.

47. Convention for the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14, 19 I.L.M. 33 (entered into force Sept. 3, 1981).

48. *Id.* art. 1, 1249 U.N.T.S. at 16, 19 I.L.M. at 36.

49. Sarah C. Zearfoss, Note, *The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable, or Reactionary?*, 12 MICH. J. INT'L L. 903, 904 (1991).

50. See *id.* at 905, n.13 for an elaboration of this latter view. Those in support of this position believe it would prohibit exempting women from combat duty, outlaw all single-sex schools and private clubs with male-only membership, and prohibit punishing women who have engaged in reckless drug use during pregnancy. *Id.*



ful in *Johnson Controls*<sup>51</sup> and that this factor is reminiscent of the German stance that, guarantees of gender equality notwithstanding, there are inherent differences between the sexes that must be respected.

Regarding the second grouping of protective laws, the sanctity of motherhood under German law is unparalleled in U.S. law. The *Bundestag*'s position on abortion provides an overview of the reverence with which childbirth and child-bearing are regarded. The legislature has made abortions criminally punishable both by fine and imprisonment ranging from six months to five years, depending upon the circumstances.<sup>52</sup>

There are very strict exceptions where abortions are allowed. These are generally limited to cases where it is necessary to save the woman from death or serious health impairment,<sup>53</sup> where the woman has been the victim of a rape that has resulted in the pregnancy,<sup>54</sup> or where it is likely that the child will sustain grave uncorrectable defects or deformities at birth.<sup>55</sup> Even in these instances, medical certification is necessary to assure that the circumstances contemplated by the legislature do in fact exist. Also, unless there is an urgency as to time, the woman must first be referred to a counselor at least three days before the abortion is performed so that the counselor can answer her questions regarding all possible private and public assistance available to mother and child to facilitate the pregnancy or to alleviate a pregnancy complicating condition.<sup>56</sup> Those abortions necessary for the protection of the life or health of the child must be performed no later than twenty-two weeks into the pregnancy, and those necessary to save the woman from danger or to prevent her from having to endure childbirth resulting from rape must be performed no later than twelve weeks into the pregnancy.<sup>57</sup>

Even an *attempt* to perform an abortion is punishable.<sup>58</sup> It is the individual who performs the abortion who is prosecuted. Only if the woman causes the abortion is she herself subject to punishment,<sup>59</sup> and her maximum punishment is one year. Also, if her pregnancy was not beyond twenty-two weeks at the time, and if she had in fact been ad-

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51. *Id.* at 938.

52. STRAFGESETZBUCH [StGB] §§ 218, 218b, 219, 219a, 219b, & 219c.

53. *Id.* §§ 218a(1) & 218a(2)(3).

54. *Id.* § 218a(2)(2).

55. *Id.* § 218a(2)(1).

56. *Id.* § 218b.

57. *Id.* § 218a(3).

58. *Id.* § 218(4).

59. *Id.* § 218(3).

vised by a physician that an abortion was necessary, she will have committed no criminal offense.<sup>60</sup>

The position of the German legislature regarding abortion is far more restrictive than that of the individual state's laws in the United States.<sup>61</sup> The prospective employer in Germany might ask the female job applicant if she is presently pregnant in order that the employer might be sure of any legal responsibilities to her, should she become an employee.<sup>62</sup> The employer is also permitted by law to require that she be subjected to a preemployment physical examination by a doctor selected by management in order to determine whether or not she is then pregnant.<sup>63</sup> He may not, however, ask her personal questions, such as whether she presently takes birth control pills or whether she is living with a man out of wedlock. Although a prospective employee is not required to respond to this type of question, if she does respond, she must answer truthfully. Should she be deceptive in this regard, it can later be grounds for dismissal.<sup>64</sup>

The first law in Germany that provided for special protection for working mothers (*Mutterschutzgesetz*, or "law protecting mothers") was enacted in 1877. New mothers were prohibited under this law from working for at least three weeks after the birth of the child. In 1890, this was increased to four weeks, and, with a doctor's recommendation, to six weeks. As of 1903, a six-week postbirth leave was the general rule. There were no laws protecting working women during pregnancy, however, until 1908, when a statute was passed requiring a total leave — before and after the birth — of eight weeks. In October 1919, participants at an international conference in Washington, D.C. recommended various workplace improvements for women. Germany ratified these recommendations in 1927, resulting in improved pay for women, more time off, and required breaks for mothers who were nursing. Discharge during a mother's mandatory time off before and after childbirth was prohibited.<sup>65</sup>

The presently effective *Mutterschutzgesetz* in Germany was enacted in 1952. It provides for special treatment during both pregnancy and nursing time, and for both mother and child.<sup>66</sup> The beginning section

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60. *Id.*

61. See *infra* notes 135-38 and accompanying text.

62. MEISEL, *supra* note 19, at 12.

63. *Id.* at 13.

64. *Id.* at 12-13.

65. *Id.* at 6.

66. KOMMENTAR, *supra* note 18, para. 802 (citing MUTTERSCHUTZGESETZ [MUSCHG] §§ 3(1), (2) & 6(3)).

lists jobs that are absolutely prohibited for pregnant women. For example, a pregnant woman cannot be employed in work that requires: regular lifting of more than five kilograms (eleven pounds); occasional lifting of more than ten kilograms without the provision of mechanical hand-operated equipment; frequent stretching, bending, or squatting; using machines operated with the forceful use of foot or feet; or wood peeling. She cannot work in a job characterized by occupational illnesses such that the employer is required to obtain insurance (in the nature of workers' compensation), or that is commonly characterized as having an increased danger of accidents, particularly the danger of slipping or falling. Additionally, she may not engage in work that might have an adverse effect because of dangerous exposure to radiation, dust, gas, steam, heat, cold, dampness, vibration, or noise. After three months of pregnancy, she may not work with conveyances, and after five months, she may not engage in work requiring more than four hours of standing per day. A pregnant woman cannot engage in piecework where her pay is gauged by her total productivity.<sup>67</sup>

Pregnant women in Germany may not work for six weeks before the anticipated delivery date, and they cannot work for eight weeks after delivery.<sup>68</sup> This latter prohibition is increased to twelve weeks for premature and/or multiple births.<sup>69</sup> The nursing mother who returns to work is entitled to time off for this purpose,<sup>70</sup> and overtime work for pregnant women and nursing mothers is forbidden.<sup>71</sup> Should the employer violate these provisions and consequently endanger the mother's health, the employer is subject to payment of a fine.<sup>72</sup> Also, since this is regarded as private rather than public law, the employee has a right to refuse performance without loss of pay if the employer is guilty of a violation.<sup>73</sup>

During this mandatory time off, the working woman is paid twenty-five *Deutsche Mark* per calendar day by the German federal government.<sup>74</sup> Even had she been unemployed and thus not covered by the workers' social insurance, the government nonetheless pays maternity compensation (*Mutterschaftsgeld*) in the total amount of four

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67. MuSCHG § 4(2); ARBSTOFFV § 14(4).

68. MuSCHG §§ 3(2) & 6(1).

69. *Id.* § 6(1).

70. *Id.* § 7.

71. *Id.* § 8.

72. *Id.* § 21.

73. KOMMENTAR, *supra* note 18, at para. 804.

74. As of summer 1991, this equalled slightly more than 14 U.S. dollars. MuSCHG § 13(1); REICHVERSICHERUNGSORDNUNG [RVO] §§ 200(1)-200(3).

hundred *Deutsche Mark*.<sup>75</sup> In the case of the working woman, her employer is liable to her for the difference between the amount paid by the State social insurance and what she would have earned had she not been on leave.<sup>76</sup>

She is entitled to the assurance that she will not be discharged during her pregnancy and up to four months following delivery.<sup>77</sup> The federal labor court (*Bundesarbeitsgericht*) has held that this special protection terminates should the pregnancy end in miscarriage.<sup>78</sup> In the event of a stillbirth, however, she is entitled to the four-month after-delivery protection from discharge.<sup>79</sup> The employer is deemed to have violated this no-termination provision if he knew about the pregnancy at the time of the termination, or if he learned of it within two weeks after the adverse employment action.<sup>80</sup> This latter provision implies that she must be reinstated should the employer learn of the pregnancy within such time. It is sufficient to invoke this job assurance protection if the employer knows only that there is the possibility of the employee's pregnancy. The employer can then require her to produce medical certification, and her failure to comply with this request within a reasonable time will result in her losing this protection.<sup>81</sup>

Since its inception in 1952, the law provides the mother the right to remain at home until the child has reached the age of one year without any resulting loss of employment.<sup>82</sup> Since December 6, 1985, this right has been discretionary so that the parents can choose that the father exercise the right of work leave.<sup>83</sup> A parent of children born after June 30, 1990, is entitled to eighteen months of postbirth work leave during which the job is secure.<sup>84</sup> Whichever parent has chosen to take the leave not only has his or her job secured for the length of the leave, but also receives 600 *Deutsche Mark* per month from the German federal government.<sup>85</sup> It is interesting to compare these legal

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75. As of summer 1991, this was slightly more than 235 U.S. dollars. MuSCHG § 13(2). If the doctor had calculated incorrectly and the child is born earlier than anticipated, her pay after the birth is prolonged accordingly. RVO § 200(3).

76. MuSCHG §§ 11 & 14.

77. *Id.* § 9.

78. Judgment of Feb. 16, 1973, 25 Entscheidungen des Bundesarbeitsgerichts 70; MuSCHG § 9.

79. KOMMENTAR, *supra* note 18, at para. 808.

80. MuSCHG § 9(1)(1).

81. KOMMENTAR, *supra* note 18, at para. 809.

82. BUNDESERZIEHUNGSGELDGESETZ [BERZGG] § 4(1).

83. *Id.*

84. *Id.*

85. The employer is not liable for this payment. As of summer 1991, this equaled nearly 352

provisions with a bill approved by the U.S. Congress in summer 1990, which would have provided for mandatory leave of up to twelve weeks for the working mother or father without loss of employment. However, the bill would provide no compensation from either the employer or the government.<sup>86</sup> President Bush vetoed this bill. Thus, there is no federal law in the United States requiring employers to provide parental leave for working parents.

The text of the German statute providing for this State-subsidized payment during the parental leave, interestingly, speaks not of the *vater* (father) but of the *ehegatte* (husband).<sup>87</sup> The statute does not address the issue of illegitimate birth, but the *Grundgesetz* assures that "[i]llegitimate children shall be provided by legislation with the same opportunities for their physical and mental development and for their place in society as are enjoyed by legitimate children."<sup>88</sup> The payments, thus, are made without respect to the marital unions of the parents, regardless of the wording of the statute.

These pervasive legislative protections for mothers are perhaps underscored by the recurring German word the statutes use to refer to the pregnant employee. Some sections, indeed, refer to the *schwangere* (literally "the pregnant one"),<sup>89</sup> but the *Mutterschutzgesetz* refers consistently to the *werdene Mutter* ("one becoming a mother").<sup>90</sup> This term places the emphasis on the expected event, rather than on the employee and her individual rights.

## II. PROSCRIPTIONS AGAINST SEX DISCRIMINATION IN THE UNITED STATES: CONSTITUTIONAL, STATUTORY, AND JUDICIAL

### A. Fourteenth Amendment

The Fourteenth Amendment to the U.S. Constitution assures all persons equal protection under the law. Although the amendment was enacted after the Civil War, and was intended to address racial inequality,<sup>91</sup> it has long been held applicable also to charges of unequal

U.S. dollars. This amount was paid only for the first 10 months of the leave for children born before December 31, 1987, but it is for the full 12 months for those born after this date.

86. H.R. 770, 101st Cong., 1st Sess. (date). President Bush's June 29, 1990, veto was sustained by the House on July 25, 1990.

87. BErzGG §§ 3(2), 5(2), 6(1), 15(2).

88. GG art. 6(5).

89. See, e.g., the sections in the criminal code (*Strafgesetz*) restricting abortion; see also *supra* notes 47-55 and accompanying text.

90. See, e.g., MuSCHG §§ 2-5 & 8.

91. See *Palmer v. Thompson*, 403 U.S. 217, 220 (1970).

treatment based on gender.<sup>92</sup>

The Fourteenth Amendment, however, applies only in the public sector,<sup>93</sup> so it has no bearing on employee rights in the private employment setting. The counterpart under German law is the constitutional assurance of equality between the sexes,<sup>94</sup> which makes no distinction between the public and private sectors.

### B. *Equal Pay Act*

In 1963, Congress amended the Fair Labor Standards Act of 1938<sup>95</sup> by enacting the Equal Pay Act of 1963.<sup>96</sup> This statute prohibits pay disparity between the sexes for equal work. The plaintiff must establish the "substantial equality"<sup>97</sup> of the two jobs being compared according to four criteria listed in the statute: (1) skill, (2) effort, (3) responsibility, and (4) working conditions.<sup>98</sup> The employer then has four defenses which might justify any discrepancy in pay between the sexes. Such pay disparity does not violate the law if it is based on (1) quantity or quality of work, (2) seniority, (3) merit, or (4) any other factor(s) other than sex.<sup>99</sup>

Despite some support for employing the "comparable work" — rather than the "equal work" — standard,<sup>100</sup> the federal legislature determined the latter to be the gauge by which compensation is to be measured.<sup>101</sup>

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92. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971).

93. See *The Civil Rights Cases*, 109 U.S. 3, 36 (1883); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

94. GG art. 3; see *supra* notes 15-19 and accompanying text.

95. Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-19 (1988)).

96. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1988)).

97. See *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 449 (D.C. Cir. 1976) (construing "equal" to mean substantially equal, rather than identical); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

98. 29 U.S.C. § 206(d) (1988).

99. *Id.*

100. Much has been written about the wisdom, or lack of it, in considering the adoption of the "equal pay for comparable work" standard, but the Congress expressly rejected this standard when the 1963 act was passed. See, e.g., Janice R. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 680-89 (1984); George T. Floros, *Comparable Worth Theory of Title VII Sex Discrimination in Compensation*, 47 MO. L. REV. 495 (1982); Penny Kahn, *The Bennett Amendment: Reaching Beyond Equal Pay to Encompass the Doctrine of Comparable Worth*, 56 FLA. B.J. 843 (1982).

101. Compare this with Germany's use of a concept far broader than even the "comparable work" standard, i.e., the "comparable worth" standard, by virtue of its being subject to directives of the European Community's Council of Ministers. See *supra* notes 42-45 and accompanying text. Thus, courts must not only compare the jobs, but also must evaluate their relative merits or value to the employer in determining appropriate compensation.

### C. Title VII

The year following the adoption of the Equal Pay Act, Congress passed the most comprehensive of all antidiscrimination laws to date. The 1964 Civil Rights Act<sup>102</sup> prohibits discrimination based on race, color, sex, religion, or national origin. Title VII<sup>103</sup> is the subsection specifically applicable to employment.

The inclusion of sex as one of the protected bases was not one thoughtfully or easily achieved. Indeed, the original bill contained only the other four bases. Sex was added as a last-minute measure one day prior to passage in an aborted effort to defeat the bill in its entirety.<sup>104</sup> This hurried addition provided little, if any, time for debate. As a consequence, the determination of what Congress intended as "sex discrimination" has been the source of a veritable spate of litigation.<sup>105</sup> The 1978 Pregnancy Discrimination Act<sup>106</sup> was one legislative effort Congress deemed necessary to clarify its intent.<sup>107</sup>

Title VII forbids discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment"<sup>108</sup> because of sex, and, as such, is considerably broader than the Equal Pay Act directive, which relates only to compensation. The acquisition of positions traditionally reserved exclusively for one sex only has been greatly facilitated by Title VII. Exclusion of one sex can only be justified by an employer's proof that sex is a bona fide occupational qualification (BFOQ).<sup>109</sup>

This statute has become the basis for claims challenging lack of access to jobs because of one's sex. The resulting employment opportunities for women that would otherwise have been foreclosed are le-

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102. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1988).

103. 42 U.S.C. §§ 2000e-2000e-17 (1988).

104. The eleventh-hour insertion of the word "sex" was apparently a futile effort by Representative Smith (Va.) to defeat passage of the bill by making it unacceptable. See 110 CONG. REC. 2577-82 (1964).

105. For example, the U.S. Supreme Court has not determined whether or not the Congress intended unlawful sex discrimination under Title VII to include discrimination by reason of sexual orientation, but the federal appellate courts have held that Congress did not. See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979). The issue of whether or not the statute was intended by Congress to apply to sexual identity also has not reached the Supreme Court, but the appellate courts have also held this to be beyond the reach of the statutory protection. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). The Supreme Court has determined that the statute does, however, extend to charges of sexual harassment. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1989).

106. 24 U.S.C. § 2000e(k) (1988).

107. See *infra* notes 139-232 and accompanying text regarding the Pregnancy Discrimination Act.

108. 42 U.S.C. § 2000e-2(a) (1988) (emphasis added).

109. See *infra* notes 166-82 and accompanying text regarding the bona fide occupational qualification defense.

gion. For example, federal courts have held illegal such employer policies as those that exclude women from positions as telephone switch operators responsible for equipment maintenance,<sup>110</sup> workers in strenuous factory jobs,<sup>111</sup> athletic directors,<sup>112</sup> and bartenders.<sup>113</sup>

Under Title VII, a male plaintiff successfully challenged an airline's stereotyping of all flight attendants as female in *Diaz v. Pan American World Airways*.<sup>114</sup> The primary issue involved the airline's defense that being a female was a bona fide occupational qualification reasonably necessary to the normal operation of Pan American's business.<sup>115</sup> Although the trial court held sex to be a BFOQ,<sup>116</sup> the circuit court of appeals reversed. The lower court's decision was based on Pan American's historical use of females as flight attendants, the overwhelming preference of passengers for female attendants, the underlying psychological reasons for this preference, and the "actualities of the hiring process" that made it particularly difficult to find the relatively few males with the requisite qualities.<sup>117</sup> The latter factor emphasized what the airline referred to as "nonmechanical" aspects of the job, such as reassuring anxious passengers and dispensing courteous service.<sup>118</sup> Finding the primary function of the airline to be the safe transportation of passengers, the appellate court saw no connection between that function and the presence of male attendants. The so-called "nonmechanical" aspects were viewed by the court of appeals as tangential, rather than critical, to the airline's function.<sup>119</sup> Finally, the court noted that, despite some expected initial difficulty in public acceptance of males as flight attendants, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."<sup>120</sup>

The Act also has provided avenues for advancement in employ-

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110. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

111. *Ruckel v. Essex Int'l, Inc.*, 14 Fair Empl. Prac. Cas. (BNA) 403, 411 (N.D. Ind. 1976).

112. *Morris v. Bianchini*, 43 Fair Empl. Prac. Cas. (BNA) 674 (E.D. Va. 1987).

113. *Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973).

114. 442 F.2d 385 (5th Cir. 1971).

115. See *infra* notes 166-70 and accompanying text for discussion of sex as a BFOQ.

116. 311 F.Supp. 559 (S.D. Fla. 1970).

117. *Id.* at 566-67.

118. *Id.* at 567.

119. 442 F.2d at 388-89.

120. *Id.* at 389. Compare this statement with the practice in Germany of expressly prohibiting certain jobs for women because of the danger factor. See *supra* notes 23-28 and accompanying text.



ment for women. For example, the female litigant in *Hishon v. King & Spaulding*<sup>121</sup> was held to have stated a cause of action when she sued after being denied partnership status in a law firm, allegedly because of her sex. After six years as an associate at the defendant partnership, a large Atlanta law firm with more than fifty partners and about fifty associates, the plaintiff had been twice considered and twice rejected for advancement to partnership status. The plaintiff filed her suit for damages in lieu of reinstatement and promotion to partnership, opting not to try to return to the setting where she had been viewed as an unacceptable partner. The federal district court dismissed her claim on the ground that Title VII had no application to a partnership's selection of its partners, and the Circuit Court of Appeals for the Eleventh Circuit affirmed.<sup>122</sup> Reversing, the Supreme Court held consideration of partnership status to be one of the "terms, conditions, or privileges of employment" to which Title VII refers.<sup>123</sup> *Hishon* is particularly significant because of the Court's refusal to exempt decisions with respect to partnership status from judicial scrutiny. King & Spaulding had never had a female law partner,<sup>124</sup> and, whether or not this in fact had been the result of unlawful discrimination, the Court made it clear that these determinations may not lawfully be based on the sex of the member under consideration. The fact that elevation to partner arguably would change the candidate's status from employee to employer meant only that an invitation to partnership, thus, would not actually be an offer of employment.<sup>125</sup> The *Hishon* Court reasoned that the "term or condition" to which Title VII refers need not actually have accrued as a benefit before it falls within the statute.<sup>126</sup> *Hishon* presented an effective deterrent to covert sex discrimination in the form of impeding advancements to a realm beyond the level of employee. The holding sent the message that law, accounting, or investment firms cannot deem themselves different from other employers so that they might hang out shingles reading "No blacks, no jews, no women need apply."<sup>127</sup>

Similarly, a female accountant in *Price-Waterhouse v. Hopkins*<sup>128</sup> who had been denied her bid for partner in a major accounting firm

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121. 467 U.S. 69 (1984).

122. 678 F.2d 1022 (11th Cir. 1982).

123. 467 U.S. at 74-75.

124. *Id.* at 71.

125. *Id.* at 77.

126. *Id.*

127. Ellen Goodman, 'Rescued Right' to Face Courts' Double Standard, MEM. COM. APPEAL, May 29, 1984, at A-7.

128. 490 U.S. 1228 (1989).

was successful in her Title VII action. Since she proved that sex had, in fact, played some role in the decision, the Supreme Court held that the burden then shifted to the employer to prove that, absent the illegal factor of sex discrimination, other legitimate factors would have caused the firm to render the same decision.<sup>129</sup>

The professional credentials of the plaintiff in *Hopkins* had been lauded by the partners in her office, but she had also been characterized as "overly aggressive, unduly harsh, difficult to work with and impatient to staff."<sup>130</sup> One partner's written comment about the plaintiff had included his opinion that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."<sup>131</sup> These overt sex-based remarks indicated that her gender had indeed been one of the factors in the decision not to promote her. The "mixed-motive" decision — one influenced both by legitimate factors and illegal, discriminatory factors — was viewed by the Court to have been lawful only if the sex-based factor was not the operative reason for the negative decision, and only if other reasons, standing alone, would have resulted in the same determination. Both *Hopkins* and *Hishon* have been widely viewed as boons for women aspiring to promotions to management positions.

The only time the U.S. Supreme Court has addressed the propriety of a sex-based affirmative action program, the practice was approved. In *Johnson v. Transportation Agency*,<sup>132</sup> the Court found no Title VII violation by a county's having taken a female employee's sex into account and promoting her over a male colleague who had scored higher on an ability test. Because of the traditional classification of the job category in question as segregated and closed to women, the Court viewed the preference given the female — who was in fact qualified — as appropriate. The Court in *Johnson*, then, held lawful an affirmative action program that paved the way for the promotion of a female worker apparently less qualified than her male colleague who had also applied for the position.

The message conveyed by both the federal legislature and the U.S. courts is that there are no employment opportunities — either with respect to hiring, or with respect to promotion or advancement — inaccessible to women because of their gender, provided they have the

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129. On remand, the accounting firm was held to have been motivated primarily by unlawful reasons, and the federal trial court ordered that the plaintiff be given partnership status. *Hopkins v. Price Waterhouse*, 52 Fair Empl. Prac. Cas. (BNA) 1275 (D.D.C. 1990).

130. *Hopkins v. Price-Waterhouse*, 618 F.Supp. 1009, 1113 (D.D.C. 1985).

131. *Id.* at 1117.

132. 480 U.S. 616 (1987).

ability and skills to perform the job successfully. Conversely, special or protective treatment reserved for female employees, or in particular, for pregnant female employees,<sup>133</sup> is patently violative of Title VII. Thus, the clarion call from both the Equal Pay Act and Title VII is for the provision of equal pay and equal opportunity and for the proscription of preferential treatment.<sup>134</sup>

Regarding the U.S. view on abortion rights, it is submitted that this debate will recur and continue indefinitely with no real consensus. The seminal case, *Roe v. Wade*,<sup>135</sup> held that the decision to terminate a pregnancy belonged completely to the woman, at least during the first trimester. There are no conditions required as to the reasons for her choice, unlike those required by German law.<sup>136</sup> The most recent pronouncements of the Supreme Court limit the range of *Roe*, but do not overrule it. The Court apparently will allow the states wide discretion as to the regulation of abortions.<sup>137</sup> Further, a recent decision prohibits any clinic that receives federal funding from discussing or counseling a patient regarding her legal rights to an abortion.<sup>138</sup> Thus, any woman in the United States who has the financial means may decide to terminate a pregnancy simply by going to another state for the procedure, if her jurisdiction's laws are too restrictive. There is no national proscription or limitation upon the right to obtain an abortion, even though the Court has considerably narrowed the means to acquire resources to finance the procedure.

### III. THE *UAW ET AL. V. JOHNSON CONTROLS* CASE

The *Johnson Controls*<sup>139</sup> holding articulated the preeminent posi-

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133. *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (where male employees in a class action suit successfully challenged under the PDA an employer's health benefits program that provided full maternity benefits for female employees and full medical coverage for their spouses, and full medical coverage for male employees, but only limited maternity benefits for their spouses).

134. Exceptions to this proscription would be the voluntary affirmative action programs such as that in *Johnson*, 480 U.S. at 616, designed to remedy underrepresentation of one sex in a traditionally segregated job category. These preferences, however, merely broaden employment opportunities in positions where the same job demands and expectations are imposed thereafter for male and female employees alike. They do not sanction special benefits or special treatment once employed or promoted.

135. 410 U.S. 113 (1973).

136. See *supra* notes 52-60 and accompanying text.

137. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), where the Court upheld the constitutionality of a Missouri statute stating that all life begins at conception, and which required physicians to determine the viability of a fetus before performing an abortion, and prohibited the use of public (state) funds or facilities to perform abortions not necessary to save the life of the mother.

138. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

139. *UAW et al. v. Johnson Controls*, 111 S. Ct. 1196 (1991).

tion under U.S. law of the woman's right to determine whether she will work, and, if so, in what capacity, during a pregnancy. The decision culminated a much-publicized and controversial battle involving working women, advocates for the rights of unborn (and perhaps as yet unconceived) children, and management concerned with liability for possible birth defects resulting from unsafe working conditions.

The Supreme Court applied the clear and unambiguous directive of Title VII's prohibition of discrimination in the workplace on the basis of sex.<sup>140</sup> In particular, the Supreme Court looked to the 1978 Pregnancy Discrimination Act's express inclusion within the statute's proscription of discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions."<sup>141</sup>

#### A. *Facts*

The employer-defendant, Johnson Controls, is a manufacturer of batteries, a product containing a high level of lead as one of its primary ingredients. The parties did not dispute the consequential risk of harm to a fetus carried by a female occupationally exposed to lead.<sup>142</sup> The company had no female employees in manufacturing positions prior to the effective date of Title VII, and it did not announce an official position with respect to women in such jobs until 1977. This initial statement emphasized the responsibility of prospective parents to protect the health of an unborn child, but it also explicitly announced that excluding all women who might become pregnant from positions hazardous to a fetus would be tantamount to illegal sex discrimination.<sup>143</sup> Accordingly, any woman requesting consideration for employment in lead-contact jobs was required to sign a statement acknowledging that she had been fully informed of the potential for injury to a fetus and that she had chosen to assume this risk. In 1982, the company changed the warning policy to an exclusionary policy, prohibiting all women who were "pregnant or who are capable of bearing children" from holding all such jobs.<sup>144</sup>

The policy further defined the category of fertile women as including all women "except those whose inability to bear children is medically documented."<sup>145</sup> This shift in policy was prompted by the pregnancy of eight Johnson Controls manufacturing employees be-

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140. 42 U.S.C. § 2000e-2(e) (1988).

141. 42 U.S.C. § 2000e(k) (1988); see *Johnson Controls*, 111 S. Ct. at 1203 n.3.

142. *Johnson Controls*, 111 S. Ct. at 1199.

143. *Id.*

144. *Id.* at 1200.

145. *Id.*

tween 1979 and 1983, each having recorded lead levels exceeding thirty micrograms per deciliter. Such a level had been designated by the Occupational Safety and Health Administration (OSHA) as critical for employees who will conceive children.<sup>146</sup>

The class action challenging the policy included one petitioner who had opted for voluntary sterilization in order to retain her job, one fifty-year-old divorced female worker whose required transfer from a lead-exposing job had placed her in a lower paying position, and one male employee who had been denied his request for a leave because of his fear of lead exposure to the child he and his wife hoped to conceive.<sup>147</sup>

### B. *Appropriate Defense: "Business Necessity" or BFOQ?*

The federal district court granted summary judgment for the employer,<sup>148</sup> and the Circuit Court of Appeals for the Seventh Circuit affirmed.<sup>149</sup> Although both courts held the "business necessity" defense to be the appropriate standard the defendant must meet, the appellate court continued further in its seven to four *en banc* decision and held that the defendant had also met the more stringent BFOQ standard.<sup>150</sup> Significantly for U.S. management, which bemoaned the decision, the rationale of the Supreme Court's reversal was its holding that the lower courts had erroneously applied the "business necessity" standard rather than the BFOQ defense.<sup>151</sup> The "business necessity" defense is available for those employers in disparate impact claims<sup>152</sup> where there is no charge of intentional discrimination, but, rather, where the charge is that the implementation of a facially neutral practice has had a discriminatory effect. In disparate treatment claims, on the other hand, where the plaintiff has alleged that the defendant's practice is facially discriminatory, the employer may defend only on the BFOQ principle. The significance for management lies in the relative difficulty for a defendant to establish these two defenses. According to the Court's holding in *Ward's Cove Packing Co. v. Atonio*,<sup>153</sup> the burden is on the *plaintiff* to prove the defendant's employment prac-

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146. *Id.* at 1200 (citing 29 C.F.R. § 1910.1025 (1990)).

147. *Id.*

148. 680 F.Supp. 309 (E.D. Wisc. 1988).

149. 886 F.2d 871 (7th Cir. 1989).

150. *Id.* at 893-94.

151. *Johnson Controls*, 111 S. Ct. at 1203-04 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)).

152. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

153. 490 U.S. 642 (1989).

tice was *not* a "business necessity."<sup>154</sup> The burden of establishing a BFOQ defense, however, is entirely on the defending employer. Therefore, the standard under the "business necessity" doctrine is considerably more lenient for the employer.<sup>155</sup>

The appellate court holding in *Johnson Controls* that the defendant also had met the BFOQ burden was based on its rationale that industrial safety is indeed related to the "normal operation" of the defendant's business and that its fetal protection policy was "reasonably necessary"<sup>156</sup> to further this concern.<sup>157</sup>

The Supreme Court unanimously agreed that the BFOQ defense was the appropriate one and that the lower courts' use of the "business necessity" defense had been in error.<sup>158</sup> Inasmuch as the fetal protection policy explicitly applied only to women,<sup>159</sup> it was facially discriminatory solely on the basis of sex.

Regarding the classification of the charge as disparate treatment rather than disparate impact, the Court emphasized that the defendant's presumably benign motives were not relevant.<sup>160</sup> *Johnson Controls* had not passed the test pronounced by the Court in *Los Angeles Department of Water & Power v. Manhart*,<sup>161</sup> that is, that the defendant's treatment of the plaintiffs would have been different but for their sex.<sup>162</sup>

The Court mentioned only cursorily the plaintiff's claim that the differentiation by reason of sex was intensified due to the plaintiffs' proffered evidence that lead exposure is also harmful to the male reproductive system.<sup>163</sup> The requirement that female, but not male, employees submit to the employer medical proof that they are not fertile was held, without proof of this factor, to be facially discriminatory and to violate the Pregnancy Discrimination Act.<sup>164</sup>

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154. *Id.* at 658.

155. *See Johnson Controls*, 111 S.Ct. at 1203.

156. 42 U.S.C. § 2000e-2(e)(1) (1988) (defining BFOQ defense).

157. 886 F.2d at 898.

158. *Johnson Controls*, 111 S. Ct. at 1204; *id.* at 1211 (White, J., concurring); *id.* at 1216 (Scalia, J., concurring).

159. "The bias in *Johnson Controls*' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job." *Id.* at 1202.

160. This determination, said the Court, is not governed by "why the employer discriminates but rather . . . [by] the explicit terms of the discrimination." *Id.* at 1204 (emphasis added).

161. 435 U.S. 702, 711 (1978).

162. *Johnson Controls*, 111 S. Ct. at 1204 (citing *Manhart*, 435 U.S. 702 (1978)).

163. *See, e.g., id.* at 1203 ("Johnson Controls' policy classifies on the basis of gender, and childbearing capacity, rather than fertility.").

164. *Id.*

### C. Proving the BFOQ

#### 1. "Occupational"

Turning to the question of whether the defendant had met the burden of proving a BFOQ sufficient to sustain the trial court's summary judgment, the Court looked first to the congressional meaning of the word "occupational."<sup>165</sup> Title VII allows discrimination based on sex, religion, or national origin in those instances where such discrimination is a "bona fide *occupational* qualification reasonably necessary to the normal operation of that particular business or enterprise."<sup>166</sup> The narrowness of the BFOQ defense had been recognized by the Court for claims under both Title VII<sup>167</sup> and Age Discrimination in Employment Act (ADEA)<sup>168</sup> claims. Additionally, the *Johnson Controls* court held "occupational" to mean only those characteristics directly related to the job and to the plaintiff's ability to perform the duties.<sup>169</sup> The possibility of resulting harm to the employee herself, the Court explained, is irrelevant,<sup>170</sup> provided she in fact has the ability to perform.

#### 2. "Normal Operations" of the Business

The defendant relied on *Dothard v. Rawlinson*<sup>171</sup> and *Western Airlines v. Criswell*<sup>172</sup> in asking the Court to consider the rights of third parties (for example, both viable and potential fetuses borne by female employees) in determining what is "reasonably necessary" to Johnson Controls' "normal operations." The Court, however, distinguished the facts in the instant case from those in *Dothard* and *Criswell*. In both those cases, the Court indeed had considered the interests of third parties.<sup>173</sup> *Dothard* involved a female plaintiff who challenged the Alabama state prison system's refusal to consider her application for the position of guard in an all-male maximum security prison.

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165. *Id.* at 1204.

166. 42 U.S.C. § 2000e-2(e)(1) (1988) (emphasis added).

167. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977), *cited in Johnson Controls*, 111 S. Ct. at 1204.

168. The Age Discrimination in Employment Act is codified at 29 U.S.C. § 623(f)(1) (1988). For a discussion of the BFOQ defense, *see, e.g., Western Airlines v. Criswell*, 472 U.S. 400 (1985), *cited in Johnson Controls*, 111 S. Ct. at 1204.

169. *Johnson Controls*, 111 S. Ct. at 1206.

170. *Id.* at 1205 (citing *Dothard*, 433 U.S. at 335).

171. 433 U.S. 321.

172. 472 U.S. at 400.

173. The defendant met the burden of proof in *Dothard*, but not in *Criswell*. However, in both cases the Court had deemed third-party interests to be relevant in determining what was reasonably necessary to the normal operation of the business.

Finding the essence of the job — the “normal operation” — to be the maintenance of prison security,<sup>174</sup> the Court accepted the defendant’s claim that a woman in such a position would clearly jeopardize this security and endanger other prison personnel and inmates.<sup>175</sup> In *Criswell*, an ADEA action, the plaintiffs challenged the use of age as a criterion for the position of flight engineer. Finding the essence of the defendant airline’s business to be the safe transportation of passengers, the Court then considered the potential for risking that safety by the employment of older persons as flight engineers.<sup>176</sup> The majority in *Johnson Controls* recognized that concern for third parties — inmates and other prison security personnel in *Dothard*, and passengers in *Criswell* — “went to the core of the employee’s job performance,”<sup>177</sup> but viewed the possibility of female employees’ excessive exposure to lead as having no impact on their ability successfully to perform their job duties. Quoting from the dissent in the court of appeals’ decision, the Court observed that “‘It is word play to say that the ‘job’ at Johnson [Controls] is to make batteries without risk to fetuses in the same way ‘the job’ at Western Air Lines is to fly planes without crashing.’”<sup>178</sup> The Court viewed the language of the 1978 Pregnancy Discrimination Act’s BFOQ language — the requirement that pregnant employees be “treated the same” as other employees “for all employment-related purposes” unless they in fact differ from these others “in their ability or inability to work”<sup>179</sup> — as making this mandate clear.<sup>180</sup> With regard to the defendant’s concern about the health and well-being of persons yet unborn, the majority unequivocally stated that “[d]ecisions about the welfare of future children *must be left to the parents* who conceive, bear, support, and raise them,”<sup>181</sup> a choice Congress had required by the unambiguous language of Title VII and the Pregnancy Discrimination Act.

### 3. “Reasonably Necessary”

The Court noted two problems with the defendant’s attempted jus-

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174. 433 U.S. at 335.

175. The rationale in *Dothard* was the “jungle atmosphere” created by inadequate staffing and facilities and the large percentage of sex offenders imprisoned there. The deprivation of these prisoners of a normal heterosexual environment would encourage assaults on any woman in such a contact position, resulting in riots and violence. *Id.* at 334-36.

176. 472 U.S. at 406-07, 420-21.

177. *Johnson Controls*, 111 S. Ct. at 1206.

178. *Id.* at 1207 (quoting *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 913 (7th Cir. 1989)) (Easterbrook, J., dissenting).

179. 42 U.S.C. § 2000e(k) (1988).

180. *Johnson Controls*, 111 S. Ct. at 1206.

181. *Id.* at 1207 (emphasis added).



tification of the policy as "reasonably necessary": (1) the broadness of the language, and (2) the emphasis placed on possible resulting costs to the defendant unless the rule is enforced. Regarding the first problem, the policy was applicable to all fertile women, whether or not pregnant or planning to become pregnant.<sup>182</sup> This classification on the basis of one's ability to reproduce had no logical connection with a woman's ability to perform her job duties.<sup>183</sup> The majority remarked that there was no evidence proffered by the defendant that there was any birth abnormality in the offspring of those eight employees of Johnson Controls who had become pregnant,<sup>184</sup> and that only nine percent of all fertile women in the United States indeed become pregnant each year.<sup>185</sup> The Court assessed the employer's concern as one for only a very small minority of its employees and, as such, unjustifiable.<sup>186</sup>

With regard to the second problem, the Court considered the employer's concern for future tort liability as insignificant because such potential liability for a prenatal injury must be based on proven negligence of the defendant.<sup>187</sup> The company's compliance with OSHA's lead standard, and its having fully warned all female employees of the risk involved, in the majority's view, would preclude any such liability. To rule otherwise, the majority reasoned, would punish employers because they had in fact fully complied with Title VII's mandates.<sup>188</sup> Consequently, the Court held that the preemption doctrine applied. The Court adhered to the general rule that when it is impossible to comply with both state (tort) law and federal (Title VII) law, the federal law will preempt the state law.<sup>189</sup>

In his concurring opinion, Justice White did not fully subscribe to the majority's view that the preemption doctrine applied.<sup>190</sup> He disagreed with the assumption that compliance with OSHA's require-

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182. Justice Scalia's concurring opinion considered this irrelevant, because he would hold even a narrowly drafted plan applicable to pregnant women as violative of the PDA. *Id.* at 1216 (Scalia, J., concurring).

183. *Id.* at 1208.

184. Justice Scalia viewed this, too, as irrelevant, because he perceived the PDA as effectively allowing all women, and all men, to put their children at risk because of occupational hazards. *Id.* at 1216 (Scalia, J., concurring).

185. *Id.* at 1208.

186. *Id.*

187. *Id.*

188. *Id.* at 1209.

189. *Id.*

190. *Id.* at 1211 n.2 (White, J., concurring) (citing, *inter alia*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)).

ments precluded any showing of negligence,<sup>191</sup> adding that what might constitute future negligence is not always presently ascertainable. White also believed the Court had not addressed the possibility of the employer's being held responsible under a strict liability theory.<sup>192</sup> He pointed out that parents may not waive any rights of the children,<sup>193</sup> and that the statement signed by Johnson Control's female employees before the company instituted the fetal protection exclusionary policy, therefore, was a waiver only of the *employees'* later right to sue.<sup>194</sup>

With respect to additional costs imposed upon the defendant in compliance with Title VII, the majority dismissed the possibility of any cost justification — future damage awards against the defendant — as proof of a BFOQ, citing *Manhart*.<sup>195</sup> The concurring opinions of both Justice White and Justice Scalia deemed this as a serious misreading of *Manhart*.<sup>196</sup> Instead, White and Scalia would consider cost (which, for example, might threaten a company's financial survival)<sup>197</sup> as entirely relevant in evaluating whether a BFOQ had been proven. Even the concurrence agreed with the majority, however, that Johnson Controls had not presented any evidence of such prohibitive costs.<sup>198</sup>

The three-member concurring opinion<sup>199</sup> expressed concern about the majority's narrow reading of the BFOQ defense. In particular, they felt congressional intent included concern over increased costs within the concept of "necessary" to a business, and factors involving workplace safety within the scope of "normal operation."<sup>200</sup> They also disagreed with the majority's conclusion that the Pregnancy Discrimination Act had altered the standards for an employer's defenses under Title VII, including the BFOQ.<sup>201</sup> The Pregnancy Discrimination Act, in Justice White's view, was enacted to overrule the Court's decision in *General Electric v. Gilbert*,<sup>202</sup> not to narrow or restrict the

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191. *Id.* at 1211 n.2 (White, J., concurring) (citing Nat'l Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 680 n.9 (7th Cir. 1990)).

192. *Id.* at 1211.

193. *Id.*

194. *Id.*

195. *Id.* at 1204 (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

196. *Id.* at 1211 (White, J., concurring); *id.* at 1216 (Scalia, J., concurring).

197. *Id.* at 1216 (Scalia, J., concurring).

198. *Id.* at 1215 (White, J., concurring); *id.* at 1216 (Scalia, J., concurring).

199. Justice White was joined by the Chief Justice and Justice Kennedy. *Id.* at 1210.

200. *Id.* at 1212 (White, J., concurring).

201. *Id.* at 1213 (White, J., concurring); *contra id.* at 1206.

202. 429 U.S. 125 (1976). Here, the Court held that discrimination by reason of sex as proscribed by Title VII did not encompass discrimination by reason of pregnancy.

defendant's defenses.<sup>203</sup>

The Court's holding that Title VII as amended "forbids sex-specific fetal-protection policies" and that this simply recognizes that "the Pregnancy Discrimination Act means what it says,"<sup>204</sup> signals the death knell for most — and quite possibly all — fetal protection rules. Justice Scalia's position in particular (although he deems cost to a defendant as relevant in determining whether such a rule is "reasonably necessary") perhaps expounds the strictest rule. Apparently, he would regard even those fetal protection policies that might be applicable to fertile employees regardless of gender as violative of the Pregnancy Discrimination Act<sup>205</sup> unless the defendant could meet the difficult burden of justifying it on a prohibitive cost basis.

The Justices' views on four major characteristics of fetal protection policy litigation might be summarized as follows:

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203. It is interesting to note that, although the Chief Justice here joined in Justice White's opinion viewing the PDA as having overruled *Gilbert*, he dissented in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). In that dissent, he stated:

Congress, of course, was free to legislatively overrule *Gilbert* in whole or in part, and there is no question but what the Pregnancy Discrimination Act manifests congressional dissatisfaction with the result we read in *Gilbert*. But I think the Court reads far more into the Pregnancy Discrimination Act than Congress put there, and that therefore it is the Court, and not Congress, which is now overruling *Gilbert*.

*Id.* at 686 (Rehnquist, J., dissenting) (emphasis added).

204. *Johnson Controls*, 111 S. Ct. at 1210.

205. *Id.* at 1216 (Scalia, J., concurring). Viewing any evidence whatsoever of similar harm to male employees' reproduction systems from lead exposure as irrelevant, Justice Scalia takes the position that "it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so." *Id.* (emphasis added).

*Table*  
SUMMARY OF JUSTICES' VIEWS

1. Applicable defense: "business necessity" or "BFOQ"?
2. Congressional intent regarding "occupational" and "normal operation" of business.
3. Congressional intent regarding "reasonably necessary."
4. Title VII's preemption of state tort liability for employers in prenatal injury actions.

|   | 1    | 2  | 3   | 4   |
|---|------|--|---|-----|
| JJ. Blackmun<br>O'Connor,<br>Marshall, Stevens,<br>and Souter | BFOQ | Narrow—only<br>directly related to<br>ability to perform<br>duties of job  | Resulting cost to<br>defendant is<br>irrelevant | Yes |
| JJ. White,<br>Rehnquist, and<br>Kennedy                       | BFOQ | Broader—includes<br>safety factors, e.g.,<br>avoidance of all<br>"substantial<br>risks," without<br>distinguishing<br>those related to<br>pregnancy from<br>others | Cost to defendant<br>is relevant                | No  |
| J. Scalia   | BFOQ | Narrow—only<br>directly related to<br>ability to perform<br>duties of job  | Cost to defendant<br>is relevant                | No  |

#### IV. HISTORICAL AND SOCIAL GENESES AND EVOLUTION

The essential elements of *Johnson Controls* are contrary to the German concepts of justice and morality. These elements are (1) the total disregard of any fetal rights to protection,<sup>206</sup> and (2) the view that the female employee might elect to harm herself, but the employer cannot make an employment decision to prevent such harm, if his decision is based on her sex.<sup>207</sup>

German law contains four provisions that make a decision such as *Johnson Controls* impossible in that country. First, Article 6(1) of the *Grundgesetz* confers a special status upon the family,<sup>208</sup> which implies that one member may not intentionally place himself or herself in a

206. See *id.* at 1205, where the Court held potential harm to an unborn child to be unrelated to the "essence" (citing *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977)), or the "central mission" (citing *Western Airlines v. Criswell*, 472 U.S. 400, 414 (1985)) of the defendant's business, and thus irrelevant in determining whether a BFOQ had been proven.

207. *Id.* at 1205 (citing *Dothard*, 433 U.S. at 335).

208. GG art. 6(1); see *supra* note 16 and accompanying text.

position of harm which might disrupt the unit. Secondly, Article 6(4) of the *Grundgesetz* recognizes a unique and special position for mothers and guarantees that they shall be entitled to the care and protection of the community, namely, the government. Third, the seemingly interminable listing of special treatments for the expectant or new mother in the *Mutterschutzgesetz*<sup>209</sup> provides legislative assurance for her well-being. Finally, the statutory restrictions regarding time, duration, place, and type of work for women in general<sup>210</sup> espouse an underlying commitment to shielding the female employee from hazards, irrespective of her personal choice. With respect to fetal protection, the same provisions are pertinent. The collective concern contained in German law for women and children presupposes a type of *parens patriae*<sup>211</sup> principle applicable to both the woman and the fetus from the time of conception.

In an attempt to analyze the reasons for the two countries' opposing views on how the law should protect and/or restrict the rights of working women, it should be noted at the outset that Germany is by-and-large a homogenous land comprised of Germans. For the most part, German citizens share a common heritage and long-standing traditions with which they all identify. The United States, on the other hand, is a fledgling country, comparatively speaking. The United States is a conglomerate of nationalities virtually all traceable to other origins. To be a U.S. citizen is to be one whose forebears — some more recently than others — chose to sever their residences and citizenships elsewhere. Many are indeed of German extraction; others may have ancestries which are Irish, British, Scandinavian, Spanish, French, middle or eastern European, African, or Asian. It is axiomatic that the less recently one's predecessors arrived on U.S. soil, the more likely it is that his or her heritage is a mixed one by virtue of perhaps several marriages between persons with different national or ethnic origins. Thus, it is probable that the fundamental philosophies among U.S. citizens about what is morally or ethically acceptable vary considerably more than do those among Germans.

An additional, and perhaps more significant consideration is the influence of religion on official government directives in Germany. The First Amendment to the U.S. Constitution assures all persons freedom of religion and guarantees that there shall be no establishment

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209. See *supra* notes 66-90 and accompanying text.

210. See *supra* notes 22-39 and accompanying text.

211. *Parens patriae* is the common law principle that the State has the prerogative to stand in the position of a guardian to all persons with legal disabilities, such as minor children, within their jurisdiction. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

of religion by the government.<sup>212</sup> To be sure, the *Grundgesetz* also ensures religious tolerance,<sup>213</sup> but conspicuously absent is language similar to the U.S. Establishment Clause. An example of the U.S. Supreme Court's interpretation of the restriction this provision imposes is *Illinois ex rel. McCollum v. Board of Education*.<sup>214</sup> In this case, a local public school district's permission for Christian religious teachers to conduct weekly thirty to forty-five minute classes for its students was held to violate the Establishment Clause, even though the teachers were not paid with public funds, and those students who preferred not to attend the classes were permitted to engage in other activities. In contrast such religious activity in the state school system in Germany is routine.

A vast majority of Germany's people are Christian. Some forty-five percent are Catholic, and forty-two percent are Protestant.<sup>215</sup> Those Germans who are Protestant are primarily Lutheran,<sup>216</sup> unlike the many and diverse Christian denominations the term connotes in the United States.<sup>217</sup> The comparable proportion of those in the United States professing a belief in Christianity is less than two-thirds, and approximately two-thirds of all Christians are members of the many Protestant denominations.<sup>218</sup>

This German adherence to Christianity, and to essentially only two Christian denominations, permeates their legislative turf. Although "blue laws" requiring Sunday closing of businesses in the United States have been held to be a constitutionally invalid delegation of legislative power at the county level — thus violating the U.S. Constitution<sup>219</sup> — the German *Bundestag* has expressly prohibited most businesses from opening for a twenty-four hour period on Sunday and designated Christian holidays.<sup>220</sup> For Sundays that are special Christian holidays,<sup>221</sup> this closure must be for thirty-six hours.<sup>222</sup> The stat-

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212. U.S. CONST. amend. I.

213. Article 3 of the *Grundgesetz* reads in part: "No one may be prejudiced or favoured because of . . . his faith, or his religious . . . opinions." GG art. 3.

214. 333 U.S. 203 (1948).

215. 8 THE WORLD BOOK ENCYCLOPEDIA 151 (1988). After the end of World War II, there were only about 30,000 Jews in Germany. The percentages in the text are for the former western sector. In the east, 17% are Catholic, and 45% are Protestant (i.e., Lutheran). *Id.*

216. *Id.*

217. See generally J. GORDON MELTON, THE ENCYCLOPEDIA OF AMERICAN RELIGIONS xvi (3d ed. 1989).

218. 20 THE WORLD BOOK ENCYCLOPEDIA 53 (1978).

219. See, e.g., *Arlan's Dept. Stores, Inc. v. Kelley*, 130 N.W.2d 892 (Mich. 1964).

220. GEWERBEORDNUNG [GewO] sec. 105b (Trade Regulations).

221. For example, Christmas, Easter, Ascension Day, and Pentecost (the celebration of the Holy Ghost) would be in this category.

ute specifies exceptions, such as hospitals and businesses that must retain night watchmen.<sup>223</sup> However, for the employee who must work for longer than three hours on these Sundays or religious holidays, the employer must provide him or her with either a thirty-six hour break each third Sunday, or in the alternative, time off on each second Sunday between the hours of 6:00 a.m. and 6:00 p.m. expressly for the purpose of allowing him or her to attend *Gottesdienst*, or church services.<sup>224</sup> In the United States, Title VII's proscription against employment discrimination by reason of religion<sup>225</sup> is somewhat comparable to the latter provision in German law, but an employer may defend against such a claim by showing that the employee's demands for an accommodation of his religion are "unreasonable" and, as such, impose an "undue hardship" on the employer.<sup>226</sup> The statutory directive to the German employer to accommodate an employee's religion contains no such exceptions.

German law also allows the individual *Länder* to add to these holidays,<sup>227</sup> and virtually all have done so.<sup>228</sup> There is no apparent objection to these mandatory closings and official recognition of Christian practice.<sup>229</sup>

One might logically conclude that this same deference to one religious doctrine — namely, Christianity — was the impetus for legisla-

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222. GEWO sec. 105b.

223. *Id.* sec. 105(1).

224. *Id.* sec. 105c(3).

225. See generally 42 U.S.C. § 2000e-2 (1988).

226. See, e.g., *TWA v. Hardison*, 432 U.S. 63 (1977), where an employer who had offered an alternate shift to an employee so that he might have Saturdays off to practice his religious beliefs successfully defended the employee's Title VII charge. The employee had by his own volition bid for and accepted another position with the employer, thereby losing his seniority. The collective bargaining agreement assured employees schedule preferences based on seniority. The Supreme Court held that to require the employer to impose on the contractual rights of others to accommodate the plaintiff would breach the employer's contract, and that to require the employer to use persons with more seniority than the plaintiff, who therefore earned a higher wage, would impose an "undue hardship" on the employer. *Id.*

227. GEWO sec. 105h.

228. A summary of these includes *Fronleichnam* (an extension of the Pentecost celebration of the Holy Ghost) in six of the predominately Catholic *Länder*; All Saints' Day in five of the *Länder*, and Protestant Atonement Day and Good Friday (*Karfreitag*) in all ten of the *Länder* in the former western sector. The five new *Länder* from the eastern sector added by the October 1990 unification include Reformation Day for those areas predominantly Protestant. See ARBEITSGESETZE 82-83 (Reinhard Richardi ed., 41st ed. 1990), for a chart indicating observations of holidays in all the *Länder*.

229. It is conceded that all Germans are not active in church attendance and do not in fact use this time off to attend services. For example, when one German woman from Stuttgart working as a marketing executive was asked why her *Land* — Baden-Württemberg, which is predominantly Protestant — nonetheless had officially elected to observe the closing mandates for the additional Catholic holidays, she smilingly replied, "Because we like the time off from work."

tive restrictions on abortions<sup>230</sup> and for the protection of children and expectant mothers.<sup>231</sup> In contrast, the rationale for the statutory workplace protections for women in general is both the statistical evidence of difference between the sexes<sup>232</sup> and the deduction that such protection is indeed necessary in order to afford women workers the equality assured by Article 3 of the *Grundgesetz*.

### CONCLUSION

The female worker in Germany — in particular, the pregnant female worker or one who is a new mother — unquestionably is afforded extensive statutory differential treatment from her male colleague expressly because of her gender and/or her condition. The U.S. Congress has adopted a diametrically opposite view, prohibiting any workplace discrimination whatsoever based on sex, including discrimination by reason of pregnancy. In *Johnson Controls*, the U.S. Supreme Court applied a strict rule to any management attempting to introduce and enforce a fetal protection policy. Only if the employer can meet the difficult burden of proving the gender-based regulation to be a bona fide occupational qualification will it be upheld as lawful.

These are concededly antithetical positions as to how management is to treat female employees. In any discourse as to which is the more reasoned view, no victor is likely to emerge. It is submitted that neither legislative body — not the *Bundestag* in Germany, nor the Congress in the United States — will even consider altering the present posture so as to adopt the stance of the other on this issue. It has recently been noted that there is not now, nor has there ever been, any serious demand for any fundamental reform to the *Grundgesetz*.<sup>233</sup> Indeed, a commission organized in the 1970s found the Basic Law of Germany to be effective as is and recommended no large-scale constitutional changes.<sup>234</sup> And the conclusion of renowned English scholar Norman Tone, Professor of Modern History at Oxford, is indicative of the reputation of the *Grundgesetz* in the rest of Europe: "She [Germany] fulfills the role that we [Great Britain] used to fulfil of combining economic efficiency, educational excellence, and all-round seriousness with political liberalism and *respect for people's rights*; she

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230. See *supra* notes 52-60 and accompanying text.

231. See *supra* notes 66-85 and accompanying text.

232. See *supra* notes 18, 27-28, and accompanying text.

233. Kielmansegg, *supra* note 12, at 15.

234. *Id.* at 15-16. Kielmansegg views the only two provisions in the *Grundgesetz* that bear even the possibility of alteration to be Germany's unique constitutional posture of granting immediate and unconditional asylum to political refugees, and the question of instituting a direct democracy rather than a representative one.



is now in my own opinion, the model European country.”<sup>235</sup>

In the United States, on the other hand, the women's liberation movement has fought long and diligently and has forged toward a goal of achieving equal opportunity irrespective of gender in areas including, but not limited to, the workplace.<sup>236</sup> The Equal Pay Act, Title VII, and decisions by the Supreme Court such as *Johnson Controls* are indisputable evidences of the inroads these efforts have made.

One noted German professor of labor law at Universität Erlangen-Nürnberg simplistically, but perhaps realistically, explained the two countries' acceptance of their disparate manners of dealing with women's rights issues in the workplace. Dr. Wolfgang Blomeyer views this basic dichotomy not as anomalous, but rather, reflective of the fundamentally different historical and social concepts and the different perceptions of acceptable mores between Germany and the United States.<sup>237</sup> These basic philosophical distinctions perhaps permit advocates of both views to advance persuasive and meaningful arguments regarding their respective countries' positions. The cultural diversities suggest that neither approach is the only correct one, each having its particular merits in the society it is designed to serve and protect.

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235. Gordon A. Craig, *Democratic Progress and Shadows of the Past*, in FORTY YEARS OF THE GRUNDGESETZ, *supra* note 12, at 19, 31-32 (emphasis added).

236. One example is the establishment of the gender bias commissions in at least nine states. See Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 184 (1990).

237. Conversation with Dr. Blomeyer, Erlangen, Germany (June 25, 1991).