10-1972

Struck v. Secretary of Defense

Lewis F. Powell Jr.

Grant?

[72]
10/13/82--LAH

Air Force pregnancy rule case.

DISCUSS

No. 72-178 OT 1972
Struck v. Sec of Defense
Cert to CA 9 (Madden, Chambers, Duniway) (rehearing en banc denied by an 8-5 vote--Duniway, Ely, Hufstedler, Browning, Goodwin)

SEX DISCRIMINATION

Petr was an officer in the nurse unit of the Air Force. While serving in Vietnam in 1970 she became pregnant and was returned to the United States. Shortly thereafter, the Air Force ordered that she be given an involuntary honorable discharge in conformance with the following Air Force regulation:

> "Comm'n of a woman officer shall be terminated with the least practical delay when it is determined that one of the conditions . . . below exist . . .
> (a) A woman officer shall be discharged from the service with the least practical delay when a determination is made by a medical officer that she is pregnant."

Petr filed suit for injunctive and declaratory relief in the USDC WD Washington asking the DC to hold the regulation unconstitutional. The DC ruled that the regulation was valid and dismissed her complaint. The CA9 aff'd. On petn for rehearing en banc 5 judges voted to rehear the case, including the author of the dissent from denial of rehearing (Judge Duniway) who had joined in the prior panel decision. During the pendency of the litigation Petr's discharge has been stayed and she is still in service. She raises three arguments: (1) equal protection; (2) fundamental rights; (3) freedom of religion.

(1) Equal protection

Petr points out that pregnancy is the only temporary disability that leads to involuntary discharge. For all others--broken legs, head colds, etc--the officer is simply given leave or at least taken out of combat zones. The SG explains the purpose of the regulation is to discourage officers from becoming pregnant ~~women from~~ while in the service and to encourage the use of contraceptives. He distinguishes all other classes of temporary injuries on the basis that pregnancy is easier to prevent since it is usually planned for in advance or is preventable by contraception. He also argues that the regulation is a rational effort to meet the problem that 9% of all Air Force women ahve been pregnant in the last three years. He argues that the primary function of the military is fighting and support and that pregnancy "impairs the readiness and effectiveness of the fighting force."

Petr points out there is a growing body of law on the question of sex-based employment discrimination centered on pregnancy. Recently the CA6 and the CA4 struck down state rules requiring teachers to take involuntary leave without pay for several months preceding birth. The CA5 (in a 2-1 opinion with Judge Wisdom dissenting) has held the other way. The issue in these cases is very similar to the instant case in that each involves the question whether the state may discriminate against women in terms of required leave when they do not impose the same requirements on other temporary disabilities. Petr also cites a recent Equal Employment Opportunity Comm'n ruling that employers must treat pregnancy disabilities "like other temporary disabilities." Also, a USDC in Colorado has struck down the Air Force's identical rule governing enlisted, non-officer, women who become pregnant. That case is on appeal to the CA10.

(2) Fundamental right

Petr contends that a woman has a fundamental right to control her own reproductive and procreative decisions and that the state or federal government may not burden that decision in the absence of some compelling justification. Petr would argue that the justification of maintaining a ready and functioning military is not a compelling justification since the government may simply make replacements available during the period of temporary leave much as they do for other temporary disabilities. In fact, arguably, it would be easier for the Air Force to plan for pregnancy leaves than for other disabilities because more lead time is provided.

The SG counters that military service connotes some relinquishment of privacy and that the Air Force's interest is legitimate and compelling.

(3) Freedom of religion

Petr is a Roman Catholic who, because of her religious beliefs, could not obtain an abortion. One of the regs stipulates that if pregnancy is "terminated" the order of discharge may be revoked. She says that this reg allows discrimination against those women who, for moral or religios reasons, cannot obtain an abortion. She relies on the cases that say the government may not require a person to forego one constitutional right (religous freedom) to obtain a governmental benefit (employment). See e.g., Sherbert v. Verner, 374 U.S. 368.

RECOMMENDATION

This is a difficult case that has divided the lower courts. My personal view is that under the equal protection clause any "run-of-the-mill" sex discrimination (such as preference of male administrators over females in Reed v. Reed) must meet a rationale basis test. But where the sex discrimination touches upon some aspect of the procreative process a higher standard of scrutiny should be applied. Only women bear children: the disabilities associated with pregnancy only befall women. Apart from the 14th Amendment argument, I find the freedom of religion argument unpersuasive and the fundamental rights argument treacherous as a practical matter since it is still an uncharted sea. The case is

important: each of the military branches has such a regulation. The cts are divided.

GRANT LAH

Conf. 10/20/72

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 72-178

Submitted ....., *19*... *Announced* ....., *19*...

STRUCK

vs.

SECRETARY OF DEFENSE

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	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....			✓											
Rehnquist, J.			✓											
Powell, J.		✓												
Blackmun, J.		✓												
Marshall, J.		✓												
White, J.		✓												
Stewart, J.		✓												
Brennan, J.		✓												
Douglas, J.		✓												
Burger, Ch. J.			✓											