



Who's the Judge? – Why Women Should Care About Judicial Appointments

Judges are charged with the responsibility to interpret and help administer our nation's laws. Judges' decisions govern our lives in many areas, such as the question of when women may bring suit to challenge and change unequal pay practices, and whether health plans and providers impermissibly discriminate against women when they refuse to cover or offer certain reproductive health services. We rely on judges to be fair and impartial, and to apply the law faithfully without regard to politics, biases, or personal agendas or philosophy. Judges, in effect, are on the front lines – we look to them to protect our most cherished freedoms and to give equal consideration to all sides in a dispute, whether rich or poor, powerful or vulnerable.

In recent years, courts have been called upon to decide the scope and meaning of these and other important legal protections for women. At times, some have let women down:

- ❑ ***The Family and Medical Leave Act (FMLA)*** has been instrumental in helping women and men take time off to care for sick family members or to deal with their own illness. The law provides 12 weeks of job-protected leave, but these protections are not automatic. On a regular basis, federal court judges decide whether a worker is eligible to use the FMLA, whether the worker has met the notification and certification requirements of the act, and whether the worker is entitled to be reinstated to her or his job. Some judges have ruled, for example, that the FMLA does not cover state employers, and thus state employees have been denied certain FMLA protections. Other judges have ruled that if an employer honestly believes that the employee is misusing FMLA leave, *even if that belief is factually incorrect*, the employer can fire an employee without violating the FMLA.
- ❑ ***Title VII of the Civil Rights Act of 1964***, among other things, prohibits sex discrimination in employment and has helped to tear down barriers that kept many women out of good jobs. It is also the law that prohibits sexual harassment in the workplace. Judges are frequently asked to decide what type of conduct constitutes sexual harassment and whether that conduct was severe enough to violate the law. Some judges have applied an unreasonably high bar in determining unlawful conduct, denying relief to women who have been subjected to blatant sexually-motivated harassment. For example, one court found insufficient evidence of sexual harassment when a plaintiff's supervisor rubbed his hand on her upper thigh, put his hand on her knee several times, tried to kiss her, and leapt out from behind some bushes and attempted to grab her.
- ❑ ***The Pregnancy Discrimination Act of 1978*** prohibits discrimination in employment on the basis of pregnancy. The law not only bars adverse actions against pregnant employees and applicants – such as terminating an employee due to her pregnancy or refusing to hire a pregnant applicant – but also requires that employers treat pregnant women the same as other workers who are temporarily disabled. The law has been critical in securing equal employment opportunities for women by ensuring that they do not endure discrimination

because they are or may become pregnant. Some judges, however, have cut back the law's protections by applying unduly restrictive readings of the law that limit the ability to prove pregnancy discrimination. For example, some courts have refused to apply the protections of the Pregnancy Discrimination Act to cases involving fertility treatments and birth control, and to cases that determine whether pregnant women will have access to light duty assignments.

- **The Equal Pay Act** requires employers to pay women and men equally for equal work. Judges often play a key role in deciding what types of jobs can be compared when evaluating whether male and female employees are being paid fairly. But some judges have made it very hard for women to win such cases by limiting the types of jobs that can be compared. For example, some courts have refused to allow a woman worker to compare herself to the man who replaced her — even when the man is performing substantially the same work.
- **The Due Process Clause of the U.S. Constitution's 14th Amendment** protects the privacy rights of women who are deciding whether or not to have an abortion. The courts have played a significant role in defining the scope of this protection. When Pennsylvania legislators passed a law that would have imposed onerous reporting and consent requirements around provision of abortions, the Supreme Court reaffirmed that there is a Constitutional right to abortion. However, at the same time, it lowered the standard by which restrictions on abortion are judged to one in which only “undue burdens” upon the right to abortion are prohibited. Under this standard, courts have approved numerous restrictions that make it much more difficult for women to exercise their right to choose abortion.
- **Title IX of the Education Amendments of 1972** prohibited sex discrimination in education programs or activities that receive federal funds. This law has been critical to eliminating gender bias in education, opening up new opportunities for women in non-traditional careers and on the athletic fields. The law also helps to ensure that students and teachers are not sexually harassed. But it is judges who decide if schools will be held liable for harassment of students and the standard has been set incredibly high. As a result, students who claim that they have been sexually harassed frequently lose their cases simply because the “right” school official was not informed.

Judges play a central role in making decisions about how our workplaces function, the type of health care we receive, the extent of our financial obligations, our home life and living conditions, and the well-being of our families. Women have an enormous stake in appointing judges who are fair, open-minded, and committed to equal justice. It is critical that women make their voices heard when judicial nominees are considered, to ensure that our most precious freedoms are respected and preserved.