The Burger Court Opinion Writing Database

Phillips v. Martin Marietta Corp.
400 U.S. 542 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

To; The Chief Justice

From: David Bickart

Re: Draft p.c., Phillips v. Martin Marietta Corp., No. 73

Petitioner Mrs Ida Phillips commenced an action in the United States Disctict Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964, alleging that she had been denied employment because of her sex. The District Court granted summary judgment for Martin Marietta (Martin) on the basis of the following showing: (1) In 1966 Martin told Mrs. Phillips that it was not accepting job applications from women with pre-school age children; (2) as of the time of the motion for summary judgment, Martin employed men with pre-school age children; (3) at the time

1. Section 703 of the Act, 42 U.S.C. § 2000e-2, provides as follows:

   (a) It shall be an unfair employment practice for an employer--
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 5, 1971

Re: No. 73 - Phillips v. Martin Marietta Corporation

MEMORANDUM TO THE CONFERENCE:

Enclosed is proposed per curiam remand.

Regards,

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: JAN 5 1971

Recirculated: _____

No. 73 -- Phillips v. Martin Marietta Corp.

PER CURIAM.

Petitioner Mrs. Ida Phillips commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964[1/] alleging that she had been denied employment because of her sex. The District Court granted a summary

---

1/ Section 703 of the Act, 42 U.S.C. § 2000e-2, provides as follows:

(a) It shall be an unfair employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin : : :

(e) Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel or particular religion.

Notwithstanding any other provision of this subchapter (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ...

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1971

Re: No. 73 - Phillips v. Martin Marietta Corp.

MEMORANDUM TO THE CONFERENCE:

I enclose another "try" at the above. Our risk is saying too much too cryptically, but I hope this draft combines the best of various ideas advanced.

I consider it very important to keep treatment of 703(a) and 703(e) separate for they deal with quite different factors.

Regards,

WEB

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

No. 73 - Phillips v. Martin Marietta Corp. Circulated: _____

Recirculated: JAN 7 1971

PER CURIAM.

Petitioner Mrs. Ida Phillips commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964 [1/] alleging that she had been denied employment because of her sex. The District Court granted a summary

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1/ Section 703 of the Act, 42 U.S.C. § 2000e-2, provides as follows:

(a) It shall be an unfair employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel or particular religion.

Notwithstanding any other provision of this subchapte (1) it shall not be an unlawful employment practice for an employer to h and employ employees . . . on the basis of his religion, sex, or nation origin in those certain instances where religion, sex, or national origi is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ...

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated:

Recirculated: JAN 13 197

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1970

Ida Phillips, Petitioner, *v.* Martin Marietta Corporation. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1971]

Per Curiam.

Petitioner Mrs. Ida Phillips commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964* alleging that she had been denied employment because of her sex. The District Court granted a summary judgment for Martin Marietta (Martin) on the basis of the following showing: (1) in 1966 Martin informed Mrs.

*Section 703 of the Act, 42 U. S. C. § 2000e–2, provides as follows:

"(a) Employer practices.

"It shall be an unfair employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or [*sic*] employment, because of such individual's race, color, religion, sex, or national origin . . . .

"(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

"Notwithstanding any other provision of this subchaper, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 6, 1971

Dear Chief,

Re: No. 73 - Phillips v. Martin Marietta Corporation.

I agree to your proposed

Per Curiam.

Sincerely,

H. L. B.

The Chief Justice

cc: Members of the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

January 14, 1971

Dear Chief,

Re: No. 73- Phillips v. Martin Marietta Corp. (PC)

I agree.

Sincerely,

H. L. B.

The Chief Justice

cc: Members of the Conference

January 6, 1971

Dear Chief:

I agree of course with your Per Curiam in No. 73 - Phillips v. Martin Marietta Corporation.

But on page 2 beginning with the second sentence of the second full paragraph "The existence of a woman's possibly conflicting family obligations" to the end of the opinion, there seems to be some ambiguity.

Perhaps it is merely a problem of typing.

But to understand the problem as we discussed it in Conference, I undertook to [redacted]hrase the above sentence and the following one. I attach hereto the revision as a suggestion for your consideration.

W. O. D.

The Chief Justice

January 6, 1971

Dear Chief:

Since I wrote you about No. 73 - Phillips v. Martin Marietta Corp., a copy of John Harlan's memorandum to you has reached my desk.

He has a different suggested replacement for the last two sentences of the text in the Per Curiam, and his suggestion is quite agreeable with me.

W. O. D.

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

January 6, 1971

Re: No. 73 - Phillips v. Martin Marietta Corp.

Dear Chief:

I am happy to join your proposed per curiam in this case with one suggestion, namely, that the last two sentences of the text be replaced with something like the following:

> "The Court of Appeals therefore erred in holding lawful Martin's alleged policy of hiring men with pre-school age children but not women in the identical position. The record is too thin for us to adjudicate the remaining important issues which are urged upon us. See Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257 (1948). Accordingly we vacate the judgment below and remand for a fuller development of the record."

Sincerely,

J.M.H.

The Chief Justice

CC: The Conference

January 8, 1971

Re: No. 73 - Phillips v. Marietta

Dear Chief:

Your recirculated *per curiam* of yesterday in this case is perfectly satisfactory to me, and I am glad to join.

Sincerely,

J. M. H.

The Chief Justice

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1971

RE: No. 73 - Phillips v. Martin Marietta Corporation

Dear Chief:

I agree with the Per Curiam you have prepared in the above case.

Sincerely,

W.J.B.Jr.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 6, 1971

73 - Phillips v. Martin Marietta Corp.

Dear Chief,

I am glad to join the Per Curiam you have circulated in this case, and would have no objection to John Harlan's proposed amendment to it.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 5, 1971

Re: No. 73 - Phillips v. Martin Marietta Corp.

Dear Chief:

Please join me in your per curiam disposition in this case.

Sincerely,

B.R.W.

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 73.—October Term, 1970

Circulated: JAN 14 1971

Recirculated:

Ida Phillips, Petitioner,
v.
Martin Marietta Corporation.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1971]

Mr. Justice Marshall, concurring.

While I agree that this case must be remanded for a full development of the facts, I can not agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business is proved if it could be shown that some women, even the vast majority, with preschool age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards and he can try to insure compliance by requiring parents to provide for the care of their children so that job performance is not interfered with.

But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.

By adding [1] the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress in-

[1] The ban on discrimination based on sex was added to the Act by an amendment offered during the debate in the House by Congressman Smith of Virginia. 110 Cong. Rec. 2577 (1964).

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1970

Ida Phillips, Petitioner, v. Martin Marietta Corporation. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1971]

Mr. Justice Marshall, concurring.

While I agree that this case must be remanded for a full development of the facts, I can not agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with preschool age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.

But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.

By adding [1] the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress in-

[1] The ban on discrimination based on sex was added to the Act by an amendment offered during the debate in the House by Congressman Smith of Virginia. 110 Cong. Rec. 2577 (1964).

January 7, 1971

Re: No. 73 - Phillips v. Martin Marietta Corp.

Dear Chief:

I, of course, agree with the reversal and remand suggested in the proposed per curiam.

The case has a somewhat peculiar posture for me. The exception which is embraced in § 703 of the Act is phrased in positive terms and provides for justified discriminatory qualification, e.g., in a proper case, sex. Yet, in a sense, what we are concerned with here is a negative, that is, a justified discriminatory disqualification, namely, motherhood for a time. I realize that qualifying one defined group has the same end result as disqualifying the oppositely defined group. Superficially, however, and at first glance, and because so much depends on the accuracy of the definitions, the two seem to exude different odors.

What this nit-picking on my part comes down to is that I feel the less we say by way of explanation, the better. Thus I would be happier if the last paragraph of the opinion could terminate in the middle of the fifth line with the word "evidence" and then be concluded with the short sentence "Summary judgment was therefore improper" or something equivalent, and let it go at that. Counsel on both sides are knowledgeable and will know precisely what the [illegible] what the issue is, and what each must do.

May I also make an additional minor suggestion? I think the footnote would be more easy to read if, in its final paragraph, the latter part of line 3, all of lines 4 - 7, inclusive, and the first part of line 8 were to be omitted.

With or without your adoption of these suggestions, or either of them, I go along with your opinion.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

January 8, 1971

Re: No. 73 - Phillips v. Martin Marietta Corp.

Dear Chief:

Please join me in the revised draft of a proposed per curiam which you circulated on January 7.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference