Comments

FIGHTING COLLECTIVELY FOR CONTRACEPTIVE EQUITY: CLASS ACTION LITIGATION AND EMERGING LABOR UNION SUPPORT FOR CONTRACEPTIVE COVERAGE

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I. INTRODUCTION

When Robin Llewellyn, a maritime worker in Seattle, learned that her health insurance plan did not cover contraceptives, she began pursuing legal remedies to force her employer to cover her pills.¹ Yet before Llewellyn had to go as far as filing suit, her labor union intervened on her behalf. The Masters, Mates and Pilots (MM&P) Union added contraceptives to its health insurance plan as of February 2, 2006.² As a result, the union’s nearly 7,000 members and their spouses now have insurance coverage for their contraceptives.³

This Comment argues that a higher level of labor union support for contraceptive equity⁴ will help secure contraceptive coverage for more

2. Id. MM&P’s plan is a Taft-Hartley plan that management and unions administer jointly. Unions generally do not have unilateral authority to amend health plans, but are in a position to negotiate with management to include contraceptives.
3. Id.
American women. Contraceptives are a significant expense for millions of American women and their families. The majority of women in the United States between the ages of fifteen and forty-four are using some form of contraception, and nine in ten sexually active women do not wish to become pregnant. Women need contraception for a good part of their lifetime: women who wish to have only two children generally use contraceptives for at least twenty years. Insurance coverage for contraceptives improves access to contraceptives; in doing so it can more effectively prevent unplanned pregnancies and sexually transmitted diseases, ensure that women and families can control the number and spacing of their children, and provide women with contraceptives that are often necessary for their health.

Labor unions are an important sector through which contraceptive coverage can be secured. Indeed, unions are not as powerful as they once were: membership has been declining for the past several decades, and globalization of labor resources has weakened labor’s bargaining power to a certain extent. However, unions in the United States still represent an estimated 15.4 million people, of which about 6.7 million are women. Most labor unions possess Taft-Hartley benefit plans that provide health insurance to union members, their spouses, and dependents.

5. Breena M. Roos, The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives, 82 B.U. L. REV. 1289, 1295 (2002) (explaining that a monthly prescription of oral contraceptives costs between $35 and $125; birth control injections generally cost about $50 for monthly injections or $75 for twelve-week injections. Skin implantation devices like Norplant can cost up to $600; removing them can cost up to $200); see also Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), S. 1214, 109th Cong. (2005) available at http://thomas.loc.gov (then follow “Bills, Resolutions; then follow “Search Bill Text”) (referring to studies showing that women spend 68% more than men for health care, primarily due to reproductive health care costs).


7. Id.

8. Lowell, supra note 6 at 444-45.


Though lawsuits and state statutes mandating contraceptive coverage have been enormously successful for more than a decade, these strategies may be limited in what they can achieve for the near future. The Eighth Circuit Court of Appeals ruled on March 15, 2007 that a plan's failure to cover prescription contraceptives even when it covers other prescription drugs and devices is not discriminatory; the Eighth Circuit is the first federal appellate court to rule on the issue. In light of this, unions are an important and largely untapped alternative through which contraceptive equity can be achieved for more American women.

Recent scholarship regarding contraceptive equity focuses primarily on the failure of insurance programs to cover contraceptives, or the Constitutional implications of requiring employers to cover contraceptives. By contrast, this Comment examines contraceptive equity as a labor and employment issue. Part II will summarize the current legal landscape of contraceptive equity and how, in the absence of union support, Title VII class action suits have been an effective tool for collective action. It will also discuss the Eighth Circuit Court of Appeals decision that could undercut much of this progress. Part III will discuss emerging union support for contraceptive coverage, focusing on how longtime feminist union activists are carving inroads within the labor movement to achieve support for this issue. The conclusion of this Comment will summarize why litigation may be less effective for the near future, and how unions can be better integrated into the fight for contraceptive equity.

II. THE LEGAL LANDSCAPE: ERICKSON V. BARTELL DRUG CO. AND SUBSEQUENT CASES

Thus far, the primary means by which working women have acquired insurance coverage for their contraceptives is through litigation, as well as through the passage of state laws mandating coverage. This section will discuss the past six years of progress for contraceptive equity law, as well

2007) (citing K. Regan et al., Smoking Cessation in a Blue-collar Population: Results from an evidence-based pilot program, 42 AM. J. OF INDUS. MED. at 367-77) (indicating that ten million construction and transportation workers, along with their spouses and dependents, are covered by Taft Hartley plans).


14. Roos, supra note 5 at 1301. See also Lowell, supra note 6 at 441; Sylvia Law, Sex Discrimination and Insurance for Contraception, 73 WASH. L. REV. 363 (1998) (arguing that the failure to cover contraceptives violates the Title VII of the Pregnancy Discrimination Act of 1978).
as how the Court of Appeals for the Eighth Circuit may undermine this progress.

A. Erickson v. Bartell Drug Company

Employers in the United States are generally free to determine what health insurance benefits, if any, they choose to provide. The Employee Retirement Income Security Act (ERISA) is a federal statute passed in 1974 that preempts state lawsuits against “self-insured” employers. Even though 23 states have passed legislation mandating employers to cover contraceptives, ERISA usually inoculates self-insured employers from these state mandates. There is a bill in Congress that would amend ERISA to mandate coverage of contraceptives: The Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC) would mandate all health insurance plans, including self-insured plans, to cover contraceptives if they cover other prescription drugs, devices, and outpatient services. This bill has been buried in Congress since it was first introduced in 1997. EPICC may have a better chance of eventually being enacted if the new party leadership in the House of Representatives and the United States Senate in November 2006 remains steadfast for several election cycles; however, EPICC currently does not seem to be a legislative priority.

The ERISA roadblock to contraceptive equity was broken down substantially in 2001, when the Western District of Washington ruled on Erickson v. Bartell Drug Company. Erickson held that because Bartell Drug Company’s self-insured employer health plan covers some


16. See National Women’s Law Center, Contraceptive Equity Laws in Your State: Know Your Rights—Use Your Rights, ii (2003), available at http://www.nwlc.org/pdf/concovstateguide2003.pdf (“If you receive your insurance through an employer who insures its employees through a ‘self-funded’ or ‘self-insured’ plan—that is, where employer uses its own funds to pay the health care claims of its employees rather than buying an insurance plan from an outside insurer—the state contraceptive equity law will not apply (even if an outside firm is hired by the employer to administer the plan).”); see also Cover My Pills!, In the States, http://www.covermypills.org/facts/statelaw (last visited Mar. 27, 2007).

17. Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), S. 1214, 109th Cong. (2005), available at http://thomas.loc.gov (then follow “Bills, Resolutions; then follow “Search Bill Text”). Though this bill has been buried in Congress since it was first introduced in 1997, EPICC may have a better chance of being enacted as a result of the change in party leadership in the House of Representatives and the United States Senate in November 2006.

prescription drugs and preventative medications but excludes prescription contraceptives, it discriminates on the basis of sex in violation of Title VII of the Civil Rights Act of the 1964. Specifically, the court held that this plan violates the Pregnancy Discrimination Act (PDA), which outlaws discrimination against female employees on the basis of pregnancy. Because ERISA does not preempt federal antidiscrimination laws, showing that the exclusion of contraceptives violates Title VII is a more successful route to force self-insured plans to cover contraceptives.

_Erickson_ relied heavily on a policy decision issued by Equal Employment Opportunity Commission (EEOC) in December 2000. The EEOC decision held that the PDA’s prohibition on discrimination on the basis of “pregnancy, childbirth, or related medical conditions” includes pregnancy prevention methods and applies to fringe benefit plans. While the EEOC policy position is not binding on any jurisdiction, courts can look to the EEOC as persuasive authority, as the Western District of Washington did in _Erickson_.

The plaintiffs in _Erickson_ raised both disparate treatment and disparate impact claims. The court granted summary judgment based on disparate treatment but did not address the disparate impact claim. A disparate treatment claim is raised when “an employer treats some people less favorably because of their . . . sex.” The court agreed with plaintiffs’ contention that Bartell Drug Company’s selective exclusion of coverage of prescription contraceptives is disparate treatment based on women’s

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19. _Id._
20. The PDA states, in pertinent part:

   The terms ‘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 employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

23. _Id._
24. _Erickson_, 141 F. Supp. 2d at 1268 n.2.
25. _Id._ at 1277. Disparate impact sex discrimination claims assert that a facially neutral policy can still result in discrimination if it has a “significant adverse impact” on women. _See_ Cooley v. Daimler-Chrysler, 281 F. Supp. 2d 979, 986 (E.D. Mo. 2003).
“unique, sex-based characteristics, such as the capacity to bear children.”

The plaintiffs convinced the Court that even though neither Title VII nor the PDA explicitly mentions contraceptive drugs and devices, the passage of the PDA is evidence that Congress “embraced a broader interpretation of Title VII.”

The court also noted that in enacting the PDA, Congress emphasized that an employer cannot use cost as an excuse for failing to take measures to ensure gender equality.

Erickson has resonated in other jurisdictions: at least four other federal courts have agreed that failure to insure contraceptives discriminates on the basis of sex under Title VII. All of these cases have held that while exclusion of contraceptives may appear to be a facially neutral policy, the exclusion still constitutes disparate treatment. At least two cases have held that the exclusion also raises disparate impact claims. By contrast, only two unpublished federal district court opinions have rejected the Title VII argument.

B. Class Action as Collective Action

Significantly, Bartell Drug Company was unionized, and its union—to which Erickson plaintiffs did not belong—had already secured contraceptive coverage for its members before Erickson was ruled upon.

27. Erickson, 141 F. Supp. 2d at 1271.
28. Id. at 1270.
30. Stocking v. AT&T Corp., 436 F. Supp. 2d 1014 (W.D. Mo. 2006) (holding that exclusion of contraceptives from employee health plan violated the PDA); In re Union Pac. R.R., 378 F. Supp. 2d 1139 (D. Neb. 2005) (holding that employee health plan that excluded contraceptives discriminated on the basis of sex under Title VII as amended by the PDA); Cooley v. Daimler Chrysler Corporation, 281 F. Supp. 2d 979 (E.D. Mo. 2003) (agreeing with EEOC that failure to cover contraceptives raises both disparate treatment and disparate impact claims); EEOC v. United Parcel Service, 141 F. Supp. 2d 1216 (D. Minn. 2001) (holding that failure to cover contraceptives discriminates on the basis of sex under both disparate treatment and disparate impact theories, but refusing to discuss the implications of the Pregnancy Discrimination Act (PDA) as it was not raised in the complaint).
31. See Cooley, 281 F. Supp. 2d at 984 (“Under the PDA, seemingly neutral classifications that in fact burden women constitute facial sex discrimination.”).
32. Id. at 986; United Parcel Service, 141 F. Supp. 2d at 1220. Disparate impact sex discrimination claims assert that a facially neutral policy can still result in discrimination if it has a “significant adverse impact” on women. Cooley, 281 F.Supp.2d at 986.
34. Email conversation with Roberta Riley, (January 20 2006). Jennifer Erickson and
In the absence of union support, employees have historically turned to Title VII to assert their rights. The high number of sex discrimination complaints filed following the passage of Title VII in 1964 seems to indicate that the union grievance system was not effectively representing and accounting for women.\textsuperscript{35} As scholar Dennis DeSlippe writes, “[t]he massive number of Title VII-based complaints and lawsuits brought by rank and file workers against their unions and employers was key to the ascendency of support for gender equality between 1964 and 1975.”\textsuperscript{36}

Some Title VII class action suits for contraceptive equity have settled out of court.\textsuperscript{37} Even Wal-Mart, America’s largest private employer whose sparse health plans have drawn heavy criticism, agreed to include contraceptives within its health benefit plan in December 2006.\textsuperscript{38}

Similarly, in February, 2004, the Albertsons grocery and pharmacy chain settled out of court with a class of plaintiff employees who demanded contraceptive coverage.\textsuperscript{39} Albertsons agreed to cover the contraceptives of all of its female employees and the female dependents of its employees.\textsuperscript{40} The settlement resulted in hundreds of thousands of women receiving coverage for their contraceptives. Stephanie Nieves Thune, the lead plaintiff in \textit{Stephanie Nieves et al v. Albertsons, Inc., et al},\textsuperscript{41} was a pharmacy student at Midwestern University in Glendale, Arizona when she decided to file suit against Albertsons. Thune worked full time as a pharmacy technician for an Albertson’s location in Phoenix, Arizona. She did not belong to a union.

Thune examined her health benefit plan and noticed that contraceptives were not covered. She contacted an attorney at Planned Parenthood of Southern Arizona (PPSAZ).\textsuperscript{42} When neither a letter from Thune to Albertsons’ corporate office in Boise, Idaho nor negotiation attempts by her lawyer could compel Albertsons to change its policy, Thune filed a complaint with the Equal Employment Opportunity Commission (EEOC) stating that the denial of contraceptives violated Title VII. A class of employees formed by the summer of 2002, consisting of all

\textsuperscript{36} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} Stephanie Nieves et al v. Albertsons, Inc., Consent Decree No. CIV 03-2045-PHX-RCB.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
female Albertson's employees as well as female dependants of all Albertson's employees. Albertsons agreed to a settlement in Fall 2003, and in Spring 2004 the District Court for the District of Arizona signed the settlement consent decree.

According to Joshua Konecky, the attorney who handled the class action aspect of the Albertson's case, filing suit as a class is a more powerful way for plaintiffs to assert their individual rights. "Without a class action, the number of people who step forward on their own is substantially less than the number of people whose rights are actually being violated." Significantly, Title VII prohibits employers from retaliating against non-union employees like Thune who choose to file suit. Thune was not afraid to sue her employer. She had a solid family network that assured her their financial support so that she could finish her studies at Midwestern University even in the event that she were forced to leave her job. Also, Thune's lawsuit did not affect her relationship with her immediate coworkers. Her complaint implicated Albertson's corporate headquarters in Boise, Idaho.

Employers may resist settling out of court due to their concerns about soaring health care costs. This is a burden that employers increasingly bear, so much so that health care expenses are blamed for preventing American businesses from being globally competitive. According to Roberta Riley, the trailblazing reproductive rights attorney who successfully defended the plaintiffs in *Erickson v. Bartell Drug Co.*, "Our health care system is a patchwork that doesn't make any sense, and

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43. Stephanie Nieves et al v. Albertsons, Inc., Consent Decree No. CIV-03-2045-PHX-RCB, at 7. The consent decree states, "During the term of the consent decree, Albertson's agrees to provide coverage to their employees, their spouses and their non-spouse dependants who participate in, or are covered by, the subject health care plans . . . for those FDA approved prescription drugs and devices . . . and for all related medical services including the initial visit to the prescribing Qualified Health Care Professional and any medically-necessary follow-up visits to each person. Prescription contraceptive drugs and devices, and related medical services, shall be covered in each particular subject health care plan according to the same general terms and conditions as under which other Preventative Prescriptions, Preventative Devices, and Preventative medical services are covered in said plan."

44. Telephone interview with Joshua Konecky (Nov. 15, 2005).


employers are caught in the squeeze. The struggle over contraceptive coverage is one example of the deep flaws within the American health care patchwork.\footnote{47} The cost of health care is a legitimate concern that necessitates national health care reform. However, covering contraceptives has not shown to substantially increase health insurance costs.\footnote{48} Further, employers can save a great deal of money through avoiding legal battles if they agree to settle as Albertsons did. As Konecky says, “What it comes down to is, do [employers] want to spend money on their employees or their attorneys?”\footnote{49}

C. \textit{In re Union Pacific Railroad Company}

Unlike Albertsons, Union Pacific Railroad Company (Union Pacific) has decided to continue paying its attorneys, and it has been victorious: the Court of Appeals for the Eighth Circuit heard oral arguments in the case against Union Pacific in November 2006 and ruled in favor of the employer on March 15, 2007.\footnote{50}

In this Title VII class action suit, Union Pacific employees allege that Union Pacific Railroad Company’s collective bargaining agreement with the United Transportation Union (UTU) refuses to cover their contraceptives while it covers other treatments such as “blood-pressure and cholesterol lowering prescription drugs to prevent heart disease . . . drugs used exclusively by males to prevent benign prostatic hypertrophy; and drugs used exclusively by males for erectile dysfunction.”\footnote{51} Defendant Union Pacific argued to the District Court of Nebraska that the exclusion of contraceptives is facially neutral as “what contraception actually controls is

\footnotesize{47. Telephone interview with Roberta Riley (November 21, 2005).}  
\footnotesize{49. Telephone interview with Joshua Konecky (Nov. 15, 2005).}  
\footnotesize{50. \textit{In re Union Pac. R.R. Employment Practices Litig.}, 479 F.3d 936 (8th Cir. 2007); \textit{See also} \textit{Oral Arguments, Brandi Standridge vs. Union Pacific}, case number 061706 (Nov. 16, 2006) available at http://www.ca8.uscourts.gov/oralargs/oaFrame.html (reflecting the 8th circuit judges’ disagreement that exclusion of contraceptives violates the PDA or constitutes sex discrimination).}  
fertility—the ability to conceive." The district court agreed with plaintiffs and determined that conception—fertilization of the ovum—can only happen to women, and therefore denial of drugs and devices that would prevent fertilization of the ovum constitutes disparate treatment. The court granted plaintiffs' motion for partial summary judgment on the disparate treatment claim.

By contrast, the Eighth Circuit found that there is no discrimination in this plan. With respect to the PDA, the Eighth Circuit held that contraceptives do not relate to pregnancy because contraceptives are only relevant "prior to pregnancy." The Eighth Circuit was not persuaded that Congress intended for the PDA to cover contraceptives.

The Eighth Circuit also ruled that failure to cover contraceptives does not discriminate based on sex under Title VII under plaintiffs' disparate treatment theory, because Union Pacific's plan does not cover contraceptives for women or men.

In his dissenting opinion, Judge Kermit Edward Bye pointed out that even exclusion of male contraceptives such as vasectomies still discriminates against women under Title VII, as women bear the burden of this exclusion because they are the only sex that can become pregnant. He also held that the PDA was in fact intended to be broadly construed as it is a remedial statute, and that the "related" clause of the PDA should be read to include contraceptives.

Jackie Fitzgerald, the lead plaintiff in the Union Pacific case, first approached her union when she learned that her insurance plan did not cover contraceptives. Unfortunately, the United Transportation Union (UTU) would not assist her. Fitzgerald decided to sue Union Pacific in federal court. She also revoked her membership from the UTU.

53. Id.
54. Id. at 1149. "Union Pacific's policy of excluding prescription contraceptives and related outpatient services from its Plans violates Title VII, as amended by the PDA, because it treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees' health than is pregnancy." Id. The only federal contraceptive equity case to have ruled that exclusion of contraceptives constitutes disparate impact discrimination under Title VII is Cooley v. Daimler-Chrysler, 281 F. Supp. 2d 979 (E.D. Mo. 2003).
55. In re Union Pac. R.R. Employment Practices Litig., 479 F.3d at 942. The Eighth Circuit relied substantially on Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 679 (8th Cir. 1996), which held that infertility treatments do not need to be covered by insurance pursuant to the PDA because they do not relate to pregnancy.
56. In re Union Pac. R.R. Employment Practices Litig., 479 F.3d at 942
57. Id. at 944-45.
58. Id. at 945 (Bye, J. dissenting).
59. Id.
60. Telephone interview with Jackie Fitzgerald (Jan. 9, 2006).
Notably, the UTU has since changed its policy: it convinced the major railroad carriers with whom it bargains to amend their employee health care plan to include contraceptive coverage, effective January 1, 2006. This amendment applies to the UTU’s master contract, which provides coverage for 70% of the UTU’s membership.

Jackie Fitzgerald’s experience illustrates why contraceptive coverage is crucial for working families. Fitzgerald worked as a trainman for Union Pacific, driving locomotives to service stations. She worked sixty to seventy hours per week, and commuted three hours daily. In 2001, after settling down with a steady boyfriend, Fitzgerald decided she should start taking birth control pills. When she learned that her insurance did not cover the pill, she started paying $39 per month for her prescription. The expense began to pinch her budget. “It was getting tough,” she says, “[i]t came down to deciding, should I pay for my pills, or do I fill up my gas tank?” Fitzgerald decided to stop using the pill, and she became pregnant. She gave birth to her son in 2002. Fitzgerald contacted Roberta Riley, and Riley agreed to take her case.

Since Union Pacific won its appeal at the Eighth Circuit, the UTU could choose to cut the contraceptive equity provision from its master contract. The Eighth Circuit’s decision could also lead other employers to roll back existing contraceptive coverage provisions, or discourage employers from adopting such provisions for their employee health plans. Before the Eighth Circuit’s ruling, the 2000 EEOC policy decision, Erickson, and other district court decisions were indicia of the legal trend toward contraceptive coverage and have helped persuade employers like Wal-Mart and Albertsons and other employers to settle out-of-court. The Eighth Circuit’s decision has the power to reverse this trend.

The absence of contraceptive coverage can be particularly difficult for women like Fitzgerald who work in fields such as railroading. Fitzgerald described the particular challenges that her line of work presents:

Contraceptive coverage is essential for women in non-traditional

62. Telephone interview with Jackie Fitzgerald (Jan. 9, 2006).
63. Telephone interview with James Brunkenhoefer, UTU Legislative Director (Jan. 10, 2007); telephone interview with Kevin Brodar, UTU Counsel (Jan. 26, 2007).
64. Telephone interview with James Brunkenhoefer, UTU Legislative Director (Jan. 10, 2007). Though it is unclear why this change took place, it may be that the major railroad carriers who bargain with the UTU recognized that adding contraceptives may stem future litigation costs. However, if the Eighth Circuit rules that there is no legal obligation to cover contraceptives, the UTU health plan could theoretically be rolled back to exclude contraceptives; the fact that Union Pacific Railroad Company has appealed the District Court decision seems to indicate that they may choose to roll back the plan if they win their appeal.
65. Telephone interview with Jackie Fitzgerald (Jan. 9, 2006).
66. Id.
jobs such as railroading. An unexpected pregnancy could end a woman’s career in train service due to the demands of working around the clock, without scheduled days off. With the exception of a devoted spouse, a railroad mother could be away from her child for two-thirds of that child’s life with current industry demands. It is unfeasible for a mother to pay for childcare for 2/3 of the time, and unfair to the child as well. For these reasons, many new mothers who work on the railroad end up resigning. Entry scale pay rates, which apply to most of the younger workers would not be enough to support full-time, on call, daycare. Many women who work in train service have older children, or remain childless.67

Fitzgerald’s experience crystallizes why increased union support for contraceptive equity is a crucial next step for contraceptive equity. Unfortunately, Fitzgerald’s union did not secure contraceptive coverage for its membership until after she felt compelled to sue her employer. Part III discusses the current status of labor union activism in the fight for contraceptive equity.

III. LABOR UNION ACTIVISM AND CONTRACEPTIVE EQUITY

Some unions throughout the United States are taking a proactive stance in support of contraceptive equity. Union support for this issue is crucial for working people who may not be able to afford their contraceptives on their own.68 Unions that have secured contraceptive coverage in their health plans69 have made an enormous difference in the lives of many union members and their families. This progress is largely the result of the careful and dedicated activism of longtime union organizers who are also deeply committed to women’s rights.

This section will briefly discuss the challenges feminist union activists have historically faced when trying to integrate gender equality into the labor movement, and how this history sets the tone for union support of contraceptive equity. This section will then focus on the strategies of feminist union activists who have successfully convinced union leadership to make contraceptive coverage a priority.

67. Email from Jackie Fitzgerald (Jan. 9, 2006) (on file with author).
68. See Roos, supra note 5.
A. Labor Unions and Gender Equality

Historically, American labor unions have had a tenuous relationship with the movement for gender equality.70 In the mid-twentieth century, there was general resistance among unions toward both the inclusion of women within the workforce and to their particular needs within collective bargaining.71 Some unions that were active before World War II (WWII) developed deliberate policies of exclusion. For example, the American Federation of Labor (AFL) advocated a "family wage" ideology, which defined "women's role as homemakers and caretakers and men's role as waged workers."72 This policy, and ones like it, served to divide the working class along gendered lines.73

Even though WWII brought more women into the workforce, sexist union policies were entrenched due to predominantly male union leadership as well as the fact that women tended to work in unorganized sectors.74 Even in sectors where women were organized, unions were slow to support issues like child care, equal pay, flex time, and prohibitions on sexual harassment.75 Gloria Johnson, the immediate past president of the Coalition of Labor Union Women (CLUW), corroborates this theory: "There were some unions that couldn't care less about [CLUW's] issues because they were not regarded as bread and butter issues."76

Notably, the AFL-CIO did support pay equity as early as the 1960s.77 Former AFL-CIO president George Meany, a venerable figure within the American labor movement, was generally supportive of issues affecting labor union women during his tenure.78 However, this seems to be the exception to the rule. Marion Crain and Ken Matheny describe unions' failure to proactively fight for gender equality as an outgrowth of the "united front ideology" that ignores the particular issues affecting a workforce that has become diversified along racial and gender lines.79

Identity caucuses within labor unions (e.g. women's groups, and

70. See Deslippe, supra note 35.
71. Id.
73. Id.
74. Id.
75. Id. at 1945. "[I]n 1992, only 3.4 percent of workers had contracts dealing with child care, seven percent were covered by contract provisions granting equal pay for work of comparable worth, fourteen percent enjoyed flexible hour provisions, and less than fifty percent had the protection of clauses prohibiting sexual harassment." Id.
76. Telephone interview with Gloria Johnson (Dec. 4, 2006).
77. Deslippe, supra note 35, at 52.
78. Telephone interview with Gloria Johnson (December 4, 2006).
groups representing people of color) have worked hard for the past several decades to create a more inclusive labor movement.\footnote{See Ruben J. Garcia, New Voices At Work: Race And Gender Identity Caucuses In The U.S. Labor, 54 HASTINGS L.J. 79, 112 (2002) (defining an identity caucus, Ruben says "The one thing that all these groups have in common is their specific appeal to racial, gender, or other identities in addition to unionism. Thus, any definition of identity caucuses would have to include this as a starting point. Typically, caucuses are thought of as subunits within a larger body").} CLUW has advocated for women's issues within labor unions since its founding in 1974.\footnote{Id. at 84. However, the passage of Title VII and the level of discrimination complaints that it spawned seems to indicate that the union grievance system was not effectively representing and accounting for people of color or women. See DESLIPPE, supra note 35.} CLUW aims to merge the concept of "solidarity" with feminist groups' policy priorities so that labor unions will better represent their female members.\footnote{Much like the gender disparity in government, the gender disparity in union leadership can affect the labor movement's priorities. There is scholarly dispute as to the extent to which a legislator's gender affects her policy priorities. See Anne Marie Cammisa & Beth Reingold, Women in State Legislatures and State Legislative Research: Beyond Sameness and Difference, 4 ST. POL. & POL'Y Q. 181-210 (2004); 10 Peterson & Runyan at 66, n. 17 (The authors discuss biological essentialism).}

Consistent with its historic advocacy for women, the emerging support for contraceptive equity within labor unions is primarily the result of CLUW's work. The next part of this section discusses the strategies and successes of CLUW's national office and its Philadelphia chapter.

B. CLUW and National Level Activism

In 2001, lifetime labor and women's rights activist Carolyn Jacobson left her position at the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union to join CLUW, where she established CLUW's Contraceptive Equity Project (CEP).\footnote{See Coalition of Labor Union Women, Contraceptive Equity Roll of Honor, supra note 69.} The CEP's objective is to encourage unions to take official positions in support of contraceptive equity as well as to cover contraceptives through their health and welfare plans.\footnote{See supra note 12.}

Jacobson was quickly victorious: in 2001 CLUW persuaded the United Food and Commercial Workers Union to submit a resolution to the AFL-CIO in support of contraceptive equity.\footnote{Resolution 37, American Federation of Labor-Congress of International Organizations (December 6, 2001) available at www.aflcio.org/aboutus/thisistheafclio/convention/2001/resolutions/upload/res37.pdf. The AFL-CIO is still the largest coalition of labor unions in the United States, even after seven unions split off in 2005 to form their own coalition known as Change to Win. In 1990, the AFL-CIO passed a more general resolution about reproductive issues. The 2001 resolution
union activists, Jacobson presented a “bundle” of progressive resolutions before the national AFL-CIO board at the 2001 AFL-CIO convention that included the contraceptive equity resolution. They explained to the delegates that the bundle consisted of policies that were consistent with AFL-CIO objectives. The lobbying worked. “It just sailed through,” Jacobson said.

The AFL-CIO’s resolution is an important victory, but according to Jacobson, it has not yielded sufficient results. “In the end, [the resolution] is just a piece of paper,” she said. “The federation needs to publicize this policy and inform their state and local bodies that it is their policy, as they are supposed to promote the national AFL-CIO policy.”

However, the resolution can be helpful in persuading more unions and union locals throughout the United States to support contraceptive coverage. Even though the AFL-CIO is technically a federation—meaning that policy and initiatives begin with their locals and trickle upward to

on contraceptive coverage states in relevant part:

BE IT RESOLVED that the AFL-CIO urge its affiliates to communicate with their members about contraceptive equity; and be it further

RESOLVED that the AFL-CIO urge affiliates to work quickly and vigorously to secure full contraceptive coverage under union-negotiated health care plans for union members and their dependents, and that such plans:

Cover all FDA-approved prescription methods, including oral contraceptives; injections; implants; intrauterine devices; barrier methods; and emergency contraception;

Cover annual office visits with an obstetrician or gynecologist for preventive tests, counseling on contraception, and other gynecological issues;

Require the same co-payments or deductibles that apply to other medical services.

Protect patient confidentiality; and be it further

RESOLVED that the AFL-CIO work with state and local governments to ensure that state, county, and local governments include contraceptive coverage in their health care plans; and be it finally

RESOLVED that the AFL-CIO work with appropriate entities toward enactment of a national law that codifies the EEOC and District Court rulings, making coverage for contraceptives available under health care plans on the same terms that the plans cover other drugs, devices, and preventive care for employees.

Id.

86. Telephone interview with Carolyn Jacobson (January 11, 2006).
87. Id.
89. Id.
90. Id.
become official AFL-CIO positions—union locals tend to wait for the national body to take positions on many issues before they adopt their own stance.\footnote{Id.\ The CEP has developed a “Contraceptive Equity Honor Roll” in praise of the unions and locals throughout the United States that have advocated for and secured contraceptive coverage for its members. \textit{See} Coalition of Labor Union Women, Contraceptive Equity Roll of Honor, \textit{supra} note 69. While this directory is not exhaustive, it provides a fairly comprehensive listing of unions and union locals that are advocating for contraceptive equity. \textit{Id.}\ “Since the labor movement is so dispersed there is really no structure or organization,” Jacobson says, indicating that the information on the CLUW website may not be honoring all of the unions who are actually advocating for contraceptive equity.” Telephone interview with Carolyn Jacobson (Jan. 11, 2006).}

Due to Jacobson’s efforts as well as the efforts of local activists throughout the United States, at least twenty unions and union locals have advocated for or decided to pay for their members’ contraceptives through their Taft-Hartley health and welfare plans.\footnote{2. \textit{See} Coalition of Labor Union Women, Contraceptive Equity Roll of Honor, \textit{supra} note 69.} This list includes the Service Employees International Union (SEIU), a union that boasts 1.8 million members and added contraceptive coverage to its national plan; the New York State Public Employee Federation, which secured contraceptive coverage for its 54,000 members; the United Steelworkers of America (USWA), who persuaded the International Steel Group to cover contraceptives; and the International Longshore and Warehouse Union (ILWU), whose decision to cover contraceptives affects its 10,000 West Coast members and their families.\footnote{3. \textit{Id.}\ These unions’ Taft-Hartley health plans are co-administered by unions and employers. The Labor Management Relations Act requires that employee benefit trust funds—which include health plans—be administered by an equal number of union trustees and employer trustees under a trust agreement.\footnote{4. Labor Management Relations Act, 29 U.S.C. § 186(c)(5) (2000). This provision “permits employers and unions to create employer-financed trust funds for the benefit of employees so long as employees and employers are equally represented by the trustees of the funds.” National Labor Relations Board v. Amax Coal, 453 U.S. 322, 325 (1981) (illustrating that unions and employers can select their own trustees).} Thus, unions normally do not have unilateral power to change a health plan. As trustees of the plan, their role is to ensure that the funds “are legitimate trust funds, used actually to the specified benefit of the employees of the employers who contribute to them . . . .”\footnote{5. \textit{Id.} at 331 (citing 93 CONG. REC. 4678 (1947)).} Taft-Hartley benefit plans are not duty-bound to include particular health care provisions or provide any health care at all; rather, their duty is to ensure that plan participants receive the benefits that are promised to them by the plan.\footnote{6. \textit{See} Coalition of Labor Union Women, Contraceptive Equity Roll of Honor, \textit{supra} note 69.}
However, the equal split of union-appointed trustees and employer-appointed trustees puts unions in a position to convince the employer-appointed trustees to amend their health plan to include contraceptives; in doing so, they can help employers and employees avoid litigation.

Robin Llewellyn’s experience with the Masters, Mates and Pilots Union (MM&P) is a prime example of this. Llewellyn’s profession makes contraceptive coverage especially important. She is a safety inspector for Horizon Lines, a job that keeps her at sea for long periods of time.97

The cost of contraception was beyond what Llewellyn could afford.98 After Llewellyn found out from her health plan administrator that birth control is not covered, she contacted CLUW, the National Women’s Law Center and Planned Parenthood of Western Washington.99 She planned to appear before the health plan’s board of trustees in Baltimore to discuss the issue. Ten days before she was scheduled to address the board, CLUW successfully intervened: Jacobson discussed the issue with a contact at the Transportation Trades Department, of which MM&P is a member. She explained that contraceptive coverage is not “some extremist feminist issue” and pointed out that the AFL-CIO has adopted a resolution in support of contraceptive equity.100 As a result of Llewellyn’s effort and Jacobson’s lobbying, the MM&P now covers “all forms of contraception, including oral contraceptives, tubal ligations, vasectomies, etc. for (all 6,800) members and their spouses.”101

Despite these important victories, Jacobson is frustrated at the resistance she has experienced from many unions. Convincing unsupportive unions to support contraceptive coverage is a delicate task of presenting the issue to union leadership as a practical health care concern for its membership. A union will resist supporting contraceptive equity if it believes that the issue is “some nut job feminist issue.”102 The fact that Jacobson persuaded a well-known and respected union activist to intervene was crucial to persuading the MM&P leadership to secure coverage. “It really was the fact that [MM&P] trusted the person who intervened that made all the difference.”103

The gender composition of a union’s membership also affects whether the union will proactively support contraceptive coverage. According to James Brunkenhoefer, legislative director for the UTU, the UTU did not

98. Id.
99. Id.
100. Telephone interview with Carolyn Jacobson (Jan. 5, 2007).
101. Coalition of Labor Union Women, Contraceptive Equity Roll of Honor, supra note 69.
102. Telephone interview with Carolyn Jacobson (January 2006).
103. Id.
originally cover contraceptives because 95% of its membership is male. In stark contrast to the UTU, fifty-six percent of the SEIU’s members are women. Unions that represent a higher percentage of women tend to be more likely to take a proactive stance in support of contraceptive equity.

Achieving gender equality within the ranks of union leadership and health plan administration can also determine whether a union will support contraceptive coverage. Ray Scannell, Director of Education and Research for the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, corroborates this theory. “If you look at management of most of these [health] plans, you will find that most management consists of guys,” Scannell said. “My sense is, once the issue [of contraceptive coverage] is raised, people look around and say, why aren’t we covering contraceptives? And they usually agree to cover it.”

C. CLUW Philadelphia

The Philadelphia chapter of CLUW has spearheaded a contraceptive equity agenda in Pennsylvania. Led by Kathy Black, a longtime union organizer and Health and Safety Director for the American Federation of Federal, State and Municipal Employees (AFSCME) Local 47, CLUW’s Philadelphia chapter has successfully persuaded many Pennsylvania union locals to support contraceptive coverage.

Black’s chapter of CLUW built a coalition of unions that supported the issue, including the Pennsylvania AFL-CIO, the Pennsylvania state council of the SEIU, and the United Food and Commercial Workers Local 1776 (UFCW). In 2002, the Pennsylvania AFL-CIO sponsored a union women’s conference that yielded additional union support for contraceptive equity in Pennsylvania. Some of the unions Black mobilized have decided to cover contraceptives through their Taft-Hartley health and welfare plans. Black’s local, ASFCME Local 47, secured contraceptive coverage for its members in 1995.

CLUW-Philadelphia also participated in a coalition of local women’s rights organizations that advocated for contraceptive equity throughout Philadelphia. The coalition included supportive union locals, the National

104. Telephone interview with James Brunkenhoefer, Legislative Director, United Transportation Union (January 10, 2007).
106. Telephone interview with Ray Scannell, Director of Research and Education, Bakery, Confectionery and Tobacco Workers Union (Jan. 16, 2007).
107. Id.
108. Interview with Kathy Black (Jan. 20, 2006).
109. Id.
110. Id.

Armed with their collective passion and resources, the coalition set out to lobby other Pennsylvania unions, employers and the statute legislature to support contraceptive equity. The WLP sent letters to Pennsylvania union affiliates outlining the legal arguments supporting contraceptive equity, as well as why contraceptive coverage benefits both women and men. One of the coalition’s biggest victories was persuading Temple University to cover its employees’ contraceptives.111 WLP coordinated and funded the campaign and worked with local unions to find plaintiffs.112 The coalition engaged AFSCME Local 1723 as well as the Temple University faculty union, an affiliate of the American Federation of Teachers (AFT).113 After about five months of coalition members hounding the university with phone calls and letters, Temple agreed to coverage on June 1, 2002.114

The coalition spent years lobbying for a state contraceptive equity law. Twenty-three states currently have contraceptive equity statutes,115 and Black’s coalition worked hard to add Pennsylvania to this list. Even though they often do not apply to self-insured employers, state statutes are non-litigious means of achieving coverage for many women. Often, state contraceptive equity mandates can pass with ease because the statutes do not require state expenditures--they are simply a mandate on employers.116 However, due to the more conservative politics of Pennsylvania’s legislature, the bill Black’s coalition drafted never got out of committee.117

The failed attempt at enacting a state law has frustrated Black and her coalition, so much so that CLUW Philadelphia has paused its contraceptive equity campaign for the time being.118 Gender dynamics that tend to divide unions and women’s groups have also stymied the effort. Black faced particular obstacles organizing the building trades unions around the issue of contraceptive equity. When Black presented the issue to a meeting room full of male union leaders and explained that many insurance plans covered

112. Id.
113. Id.
114. Id.
115. Cover My Pills, In the States, supra note 16. These states are: Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Mexico, New York, Nevada, North Carolina, Rhode Island, Vermont, Washington, and West Virginia. Arizona and Georgia boast the most comprehensive contraceptive equity statutes. Washington State’s law was not passed by the legislature; rather, it is an administrative rule issued by the Insurance Commissioner. See NATIONAL WOMEN’S LAW CENTER, supra note 16.
116. Arizona Contraceptive Equity Statute. 20 Ariz. § 2329.
117. Interview with Kathy Black (Jan. 20, 2006).
118. Id.
Viagra but excluded contraceptives, they responded by referring to her publicly as the "Viagra Lady" and dismissed the issue completely.119 "Things have deflated," Black says, "We did as much as we can do in the labor unions in Pennsylvania."120

Despite her frustration, Black's efforts have made significant inroads for contraceptive equity in Pennsylvania. The slim Democratic majority in the Pennsylvania House of Representatives resulting from the November 2006 elections may revive this issue and the coalition's work.121 Additionally, this coalition is an important step for the relationship between labor unions and women's rights groups.

IV. CONCLUSION

Contraceptive equity has been a quiet victory for the reproductive rights movement over the past fifteen years. However, as the Eighth Circuit has shown, there is much potential for the federal courts to undercut this progress. In light of this, labor union support for contraceptive equity is crucial for securing coverage for more American women.

Aside from the Eighth Circuit ruling, the legal foundation for contraceptive equity is bound to evolve given changes in medical technology and the development of prescription contraceptives for men.122 Access to such drugs would require reproductive rights attorneys to reframe the legal argument as a disparate impact issue, for a disparate treatment argument would, arguably, be undercut if male prescription contraceptives are excluded from health plans along with female prescription contraceptives.

Regardless of how the law ultimately unfolds, the movement for contraceptive equity can only be aided by increased union support. Unlike litigation, union activism does not carry the burden of constructing a sound legal argument to further the contraceptive equity cause. It requires effective lobbying, which Carolyn Jacobson, Kathy Black and other feminist union activists have been engaging in for the past several years. Union activism is a less adversarial option that can help employers and employees avoid litigation. Unions are highly organized bodies that are strong vehicles for community organizing and coalition building. Their various identity caucuses have the capacity to present the issue to

119. McClear, supra note 111.
120. Interview with Kathy Black (Jan. 20, 2006).
121. Telephone interview with Kathy Black (Jan. 5, 2006). Even though the House Speaker is a Republican, committee chairships and other important issues will probably be determined by the Democrats.
employers as a practical health care need that deserves to be included within union health plans.

True, union membership is at a historic low, and the split in the AFL-CIO that took place during the summer of 2005 may hinder broad-based union support. The spin-off organization, Change to Win, consists of seven former subparts of the AFL-CIO and represents six million workers. Unlike the AFL-CIO, Change to Win has not yet taken an official position on contraceptive equity. Yet unions still represent millions of working women, men, and their families, all of whom are affected by the cost of contraception. Unions have the power to improve the lives of women like Jackie Fitzgerald and Robin Llewellyn whose professions make access to contraception especially important.

Finally, contraceptive equity is a feasible meeting point for the labor movement and the feminist movement, two camps whose varying cultures and agendas have historically hindered cooperation. Contraceptive equity is a practical and relatively non-controversial issue, and its capacity to improve the lives of working families resonates with both labor and feminist activists. Unions, union locals, and women’s rights groups throughout the United States should follow the example of CLUW leaders like Carolyn Jacobson and Kathy Black. They ought to build coalitions, lobby employers and local and state governments to enact contraceptive equity statutes, and work to elect more women to union leadership positions. A strong coalition of national unions and women’s rights groups could also help enact EPICC or amend the PDA.

Cross-pollination of these two movements can lead to stronger ties among all stakeholders. As Kathy Black said, “The coalition that we built around the issue of contraceptive equity became a way to organize with the women’s groups in town. Now, we come to each other’s events, and we’ve helped each other out[;] . . . good relationships were built out of this struggle.”

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124. Telephone interview with Carolyn Jacobson (Jan. 11, 2006).


126. Id.