RECENT CASES

AMES V. NATIONWIDE MUTUAL INSURANCE COMPANY: 
BREASTFEEDING BATTLEGROUNDS AND THE FIGHT AGAINST 
PREGNANCY DISCRIMINATION

I. Introduction

Under what circumstances can an employer send a lactating employee home? In Ames v. Nationwide Mutual Insurance Company, Angela Ames, a new mother, was prevented from accessing a workplace lactation room two months after the birth of her second child. When Ames turned to her department head for assistance she responded by handing Ames a piece of paper and pen, telling her it was best that she “go home to be with [her] babies,” and verbally dictating what she should write in her resignation letter. Finding that Ames did not provide sufficient evidence to prove her pregnancy discrimination claim, the district court granted summary judgment in favor of Ames’s employer. Appealing to the Eighth Circuit and the Supreme Court, she unfortunately fared no better. The Eighth Circuit affirmed the lower court’s ruling, and the Supreme Court denied certiorari, thereby upholding a misguided Eighth Circuit opinion. This case note explores how the Eighth Circuit’s faulty reasoning places unreasonable burdens on employees, undermines the purpose of the Pregnancy Discrimination Act (“PDA”), and furthers the image of pregnant women as overly emotional and unreasonable employees.

II. Facts


2. Id.
4. Id. at 771.
6. Ames, 760 F.3d at 765.

377
the birth of her first child.\textsuperscript{7} Five months later, Ames discovered she was pregnant with her second child and, due to pregnancy complications, her doctor ordered her to begin bed rest in early April 2010.\textsuperscript{8} Ames’s need to go on bed rest was not well received by her immediate supervisor, Brian Brinks, or the head of her department, Karla Neel. When Ames spoke about her need to go on bed rest, Neel rolled her eyes and said she never had to go on bed rest when she was pregnant and had never suffered from complications herself.\textsuperscript{9} Previously, Neel had told Ames that she believed women should not have baby showers because the fetus could die in utero.\textsuperscript{10} When discussing Ames’s maternity leave with others in the office, Brinks stated, “Oh yeah, I’m teasing her about only taking a week’s worth of maternity leave. We’re too busy for her to take off that much work.”\textsuperscript{11} While Ames was on maternity leave, Nationwide trained a new employee to fill her position.\textsuperscript{12}

Initially, Nationwide informed Ames that her maternity leave under the Family Medical Leave Act (“FMLA”) would expire in early August 2010.\textsuperscript{13} On June 16, 2010, Neel called Ames to inform her about a mistake in its calculation that meant Ames’s FMLA leave would instead expire in mid-July 2010.\textsuperscript{14} This gave Ames two months to recover from her difficult pregnancy and childbirth. Ames was told that if she took additional time, it would raise “red flags” and could cause “issues down the road.”\textsuperscript{15} Ames and Neel eventually agreed on a one-week extension of Ames’s maternity leave.\textsuperscript{16}

When Ames returned to work in July, she was breastfeeding her two-month old son every three hours.\textsuperscript{17} During her maternity leave, Ames had spoken to a Nationwide disability case manager who told her she could express milk in a company lactation room.\textsuperscript{18} By the time Ames arrived to work on her first day back at Nationwide, it had already been more than three hours since she had expressed milk.\textsuperscript{19} When Ames reached out to Neel about using a lactation room, Neel told Ames it wasn’t her
responsibility to provide her with one. A Nationwide security guard directed Ames to the company nurse who informed her that she needed to fill out paperwork to access a lactation room, and that it would take three days to process her request. A copy of this policy was available on Nationwide’s employee intranet, however, this was the first time Ames was made aware of it. The company nurse told Ames she could use the wellness room, but that it was currently occupied by a sick employee and therefore she needed to return in fifteen or twenty minutes. The nurse also informed Ames that expressing milk in that room could expose her milk to germs.

As she waited for the wellness room, Ames met with Brinks to discuss her work. Brinks explained that Ames needed to put in overtime to get up to speed and warned her that she would be disciplined if she failed to do so. After this meeting, Ames again requested Neel’s assistance with finding a location to express milk and was rebuffed. Seeing Ames “visibly upset and in tears,” Neel handed Ames a piece of paper, pen, and verbally dictated a resignation letter for Ames, saying, “You know, I think it’s best that you go home to be with your babies.”

### III. Procedural History and the Eighth Circuit’s Reasoning

Ames sued Nationwide alleging: (1) sex and pregnancy discrimination under the Iowa Civil Rights Act (“ICRA”), (2) pregnancy and sex discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”), and (3) violation of Section 207 of the Fair Labor Standards Act (“FLSA”). The district court granted summary judgment in favor of Nationwide on all three counts. Ames appealed her Title VII and ICRA claims. Reviewing the grant of summary judgment de novo, the Eighth Circuit affirmed the lower court’s ruling.

Because ICRA and Title VII have parallel pregnancy discrimination provisions, and Ames’s argument was the same under both, the court...
analyzed the claims under the Title VII framework. In order to succeed on a Title VII claim, a plaintiff can produce direct evidence of discrimination or create the inference of discrimination under the *McDonnell Douglas* burden-shifting framework. Under either theory, the plaintiff must demonstrate that she suffered an adverse employment action (in this case a constructive discharge) as a consequence of the illegal behavior. The court’s opinion focused primarily on this element.

Beginning its analysis, the Eighth Circuit stated that in order to succeed on a constructive discharge claim, an employee must show that the “employer deliberately created intolerable working conditions with the intention of forcing her to quit” and that the employee gave her employer “a reasonable opportunity to resolve a problem before quitting.” These requirements can be satisfied through “direct evidence or through evidence that the employer could have reasonably foreseen that the employee would quit as a result of its actions.” After listing the various difficulties Ames faced during and after her pregnancy, the court nevertheless found that Nationwide’s “several attempts to accommodate Ames” displayed its intent to maintain its employment relationship with Ames. The court highlighted the one-week maternity leave extension, as providing an accommodation for Ames by allowing her over thirty days to prepare to return to work. Furthermore, the court found that Nationwide’s denial of lactation room access was based solely on the fact that she had not completed the paperwork required of all nursing mothers. Additionally, Brink’s expectation that Ames work extra hours to get up to speed was also something that was expected of every employee. Therefore, the court concluded that because Nationwide treated Ames as they would all nursing mothers, she did not prove her constructive discharge claim.

The court held that Neel’s declaration that Ames would be better off with her babies and her dictation of Ames’s resignation letter would not support a finding that Nationwide desired Ames to resign. Assuming

32. *Id.* at 767.
33. *Id.* (“[T]he employee may create an inference of discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), by showing that: (1) she is a member of a protected group; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination.”)
34. *Id.*
35. *Id.* at 767-68 (internal quotation marks omitted).
36. *Id.* at 768 (internal quotation marks omitted).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 769.
arguendo that it would, Ames’s constructive discharge would still be unsuccessful because she failed to provide a reasonable opportunity for her employer to address and ameliorate the conditions.\footnote{Id.} Despite not having immediate access to a lactation room, the court found that Ames had an “obligation not to jump to the conclusion” that the wellness room would not be adequate and that her only reasonable option was to quit.\footnote{Id.} The court also cited Nationwide’s Compliance Statements that provide that if an employee believes that Nationwide is not complying with its legal requirements, she should contact human resources or various internal offices.\footnote{Id.} By not doing so, Ames acted unreasonably and “failed to provide Nationwide with the necessary opportunity to remedy the problem she was experiencing.”\footnote{Id.}

\textit{IV. Analysis}

As delineated by the court, Ames stands for the proposition that the following facts are not enough to survive a motion for summary judgment on a constructive discharge claim: 1) an employee’s supervisors make negative statements about the employee’s pregnancies, 2) the employer miscalculates the maternity leave and insists that the employee return earlier than expected to avoid raising “red flags,” 3) the employer trains another employee to fill the employee’s role while she is on maternity leave, 4) after returning from maternity leave, the employee is not given access to a lactation room and is told she has to wait three days for access, 5) the supervisor explains that none of the employee’s work had been completed while she was gone, that she needs to work overtime to get caught up, and that failure to do so would require work discipline, and 6) in an additional attempt to secure a lactation room, the employee appeals to her department head, who says she can do nothing to help and suggests it was for the “best that [she] go home to be with [her] babies,” thereafter handing the employee a paper and verbally dictating to her a letter of resignation.\footnote{Id. at 768.} In so holding, the court is concluding that no reasonable juror could find that these circumstances reflect pregnancy discrimination as prohibited under the PDA. This deeply undermines the purpose of the PDA, shifts attention away from the employer’s poor behavior, and places unreasonable burdens on the employee.

In response to the Supreme Court’s holding in \textit{General Electric Co. v. Gilbert}, wherein the Court held that pregnancy related discrimination is not
sex discrimination, Congress passed the PDA. The PDA amended Title VII to include a new subsection which states sex discrimination encompasses discrimination on the basis of pregnancy, childbirth, or related medical conditions. As the Eighth Circuit has previously held, Congress’s purpose in prohibiting discrimination on the basis of sex was to protect women in the workplace and assure equality among the sexes. By enacting the PDA, “Congress rejected the outdated . . . policies which often resulted from attitudes about pregnancy and the role of women who become pregnant which are inconsistent with the full participation of women in our economic system, and which perpetuated women’s second class status in the workplace.” Unfortunately, Neel’s declaration that Ames would be better off with her babies precisely denies Ames her full participation in the workplace and perpetuates the notion of pregnant women as second-class workers. The Eighth Circuit’s finding that it is doubtful that this statement demonstrates Nationwide’s desire to have Ames resign ignores the fundamental goals of the PDA in protecting pregnant employees from sex discrimination and sex stereotyping in the workplace.

Instead of focusing on Ames’s experience, the Eighth Circuit framed its opinion almost exclusively from Nationwide’s perspective. Even before discussing the facts in the case, the court noted that “completion of work is central to [Ames’s] position” and “a high priority” for the entire loss-mitigation department. In some ways, the affirmation that an employee should be expected to complete one’s work is so benign as to be unremarkable. However, by beginning in this way, the court made clear that its priorities were Nationwide’s needs and not Ames’s. The opinion is devoid of any reference to the pain or suffering Ames felt during the hours she attempted to negotiate with her employer about a lactation room. Breast engorgement from inability to express milk can be a very painful experience that could potentially lead to blocked milk ducts or infections. Further, instead of understanding what happened on the morning of Ames’s resignation in light of her past experiences, the court chose to analyze it in a vacuum and generalize her situation to that of “every nursing mother” or “all of [Brink’s] employees.” However, the court did not consider whether every nursing mother had also been told by the head of her

49. Id. at 678.
51. Id. (internal quotation marks omitted).
52. Ames, 760 F.3d at 765.
54. Ames, 760 F.3d at 768.
department that bed rest is not necessary for pregnant women, that her child could die in utero, and that she would be better off at home with her babies.

Pursuant to the Eighth Circuit’s reasoning, the onus is on the employee to be thoroughly acquainted with all employee related policies, follow through with these policies despite never being informed of their existence, and have the legal acumen to know whether her rights were being violated in order to file a complaint with human resources, all while being in physical pain. Ames testified that during her maternity leave she had specifically asked one of Nationwide’s disability case managers about lactation room access and was told that she would be able to pump in a lactation room.55 No paperwork or prerequisites were explained.56 However, according to the court’s reasoning, the fact that Nationwide posted pregnancy-related policies somewhere on its intranet and held quarterly maternity meetings was sufficient to fulfill its responsibility.57 It is, therefore, the employee’s obligation to conduct thorough research on an employer’s pregnancy policy in search of potentially contradictory information, despite specifically discussing the matter with a human resources representative. Furthermore, if the company has a policy that directs employees to raise any legal violations to the company’s human resources department, the employee is responsible for knowing both the policy and their rights. However, as a loss mitigation specialist, how is Ames supposed to know what her legal rights are in any given situation? Is she expected to consult with an attorney before deciding that something she experienced at work violated Nationwide’s legal obligations? While the Eighth Circuit did not directly address these questions, under the court’s reasoning, it appears the answer is yes. Construing this as a reasonable requirement of employees misunderstands the power imbalance between employees and employers and the dynamic nature of many workplace disputes.

Lastly, it is difficult to ignore the possibility that the court engaged in its own form of pregnancy discrimination by sex stereotyping pregnant women. In deciding the seminal Title VII sex discrimination case Price Waterhouse v. Hopkins, the Supreme Court held that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”58 However, the Eighth Circuit’s opinion depicted Ames as being an unstable, hasty individual who is unable to behave as the archetypal reasonable person should. The court emphasized that Ames approached Nationwide’s

55. Id. at 767.
56. Id.
57. Id. at 766.
58. 490 U.S. 228, 251 (1989).
customer service, and her department head (twice), about her lactation needs “all on the morning that Ames resigned.” While this is true, instead of concluding that these facts speak more to Ames’s urgency and level of physical discomfort, the court found that they display her unwillingness to give Nationwide a “reasonable opportunity” to address the situation. Further, the court held that “Ames had an obligation not to jump to the conclusion” that her only “reasonable option was to resign.” It is difficult to understand how the court concluded that Ames jumped to any conclusions at all. Nothing in the factual record displays any hasty decisions on Ames’s part. In increasing physical pain, Ames’s focus was on finding a safe and private way to express milk. Additionally, after initially discussing the matter with the company nurse, Ames took advantage of that waiting time to chart out her work with her immediate supervisor. Ultimately, it was Neel who told Ames she should resign and even went so far as to verbally dictate a resignation letter for her. This series of events does not suggest an employee who was eager or desiring to quit.

V. Conclusion

The Eighth Circuit’s message in *Ames* is clear—pregnant workers are failing themselves. Negative workplace rhetoric, inaccessible accommodations, and dictated resignation letters are not cause for judicial concern. Instead pregnant women must act more reasonably. Ames’s case provided an opportunity for the court to engage with the underlying tensions between the realities of motherhood, profit margins, and stereotypical ideas about pregnant employees. Instead the court chose to minimize Ames’s experience, thereby invalidating this common struggle for many similarly situated pregnant women. While Congress attempted to even the playing field for women by enacting the PDA, *Ames* makes it clear that this protection is not enough. Until workplaces are free from gender discrimination, provide sufficient leave for all pregnant employees, and afford them a chance to recover from childbirth and nursing, the struggle for women’s equality in the workplace continues.

*Laura Iris Mattes, J.D. 2015 (U.C. Berkeley)*

59. *Ames*, 760 F.3d at 769.
60. *Id.*
61. *Id.*
INTEGRITY STAFFING SOLUTIONS, INC. V. BUSK: HOW THE SUPREME COURT INADVERTENTLY REFORMED THE FAIR LABOR STANDARDS ACT

I. Introduction

During the 2014 term, the Supreme Court heard Integrity Staffing Solutions, Inc. v. Busk.1 The case presented one issue: whether warehouse employees were entitled to compensation for the time spent waiting to go through anti-theft screenings at the end of each shift under the Fair Labor Standards Act ("FLSA")2 as amended by the Portal-to-Portal Act.3 In a troubling unanimous decision,4 the Court said no.

Although the Court clarified the proper test for compensability under the Portal-to-Portal Act, its application in Integrity Staffing raises two concerns. First, by answering this question without an opportunity for discovery, the Court foreclosed the factual development that would ordinarily guide a court’s analysis of this issue. As a result, district courts have been given the green light to dismiss such cases without permitting claimants the chance to obtain and present evidence that might otherwise dispose of the issue. Second, by deeming anti-theft screenings non-compensable as a matter of law, the Court has converted what was meant to be a legislative fix5 into a major overcorrection. While the Portal-to-Portal Act was intended to correct the Court’s prior permissiveness towards questions of compensability,6 the Court’s interpretation in Integrity Staffing converted a simple statutory amendment into major reform.

5. See 29 U.S.C. §§ 251(a)-(b).
6. See id.
II. Facts and Procedural History

Integrity Staffing Solutions contracts with Amazon.com to provide staffing for its U.S. warehouses. At the end of each shift, the staffing company requires that warehouse workers pass through anti-theft screenings before they may leave the facility. When Nevada workers were forced to wait up to twenty-five minutes to be searched, without compensation, plaintiffs Jesse Busk and Laurie Castro filed a putative class action to recover damages for that unpaid time. According to the complaint, these uncompensated anti-theft searches were “necessary to the employer’s task of minimizing ‘shrinkage’ or loss of product from warehouse theft.” Before the parties could proceed to discovery, however, the staffing company moved to dismiss for failure to state a claim, which the district court granted. The Ninth Circuit reversed, holding that the screenings were “necessary to employees’ primary work as warehouse employees and done for Integrity’s benefit” and thus compensable under the FLSA. Despite the deference typically afforded to plaintiffs on Rule 12(b)(6) motions, the Supreme Court vacated the Ninth Circuit’s reversal, reinstating the lower court’s dismissal. In an opinion written by Justice Thomas, the Court concluded that regardless of what discovery might have uncovered, the post-shift anti-theft screenings are non-compensable as a matter of law.

III. The Portal-to-Portal Act

Instead of focusing on the statutory text, Justice Thomas deferred to congressional intent in applying the Portal-to-Portal Act. Prior to the Act’s passage, the Supreme Court had recognized a broad definition of “work” under the FLSA. In 1946, the Court decided Anderson v. Mt. Clemens Pottery Co., and held that certain “preliminary activities” performed after one’s arrival on the jobsite, but before engaging in primary job duties,
constituted “work” under the FLSA. The Anderson test deemed that such time was compensable so long as the activity was (1) “controlled or required by the employer” and (2) “pursued necessarily and primarily for the employer’s benefit.” According to Congress, such a broad construction created “wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers.” Lawmakers “responded swiftly,” passing the Portal-to-Portal Act the following year.

The legislative fix carved out two types of work-related activities that would no longer be compensable under the FLSA: (1) commuting time to and from the workplace and (2) the “preliminary” and “postliminary” activities. The statute defines pre- and postliminary activities as those that occur either before or after the employee performs the “principal activity or activities” that she was employed to perform.

IV. Legal Reasoning

To determine whether the screenings fell within this latter category, the Court first had to determine the principal activities of an Integrity Staffing warehouse worker. Somewhat circularly, the Supreme Court previously defined “principal activities” as “embrac[ing] all activities which are an ‘integral and indispensable part of the principal activities.’” Here, the Court further specified that an employee activity is considered integral and indispensable if it satisfies two conditions. First, the task must be an “intrinsic element” of the employee’s principal activities. Second, it must be an activity “with which the employee cannot dispense” to complete those principal activities.

To illustrate its integral and indispensable test, the Court used the example of a chemical plant worker putting on protective clothing. In that instance, changing clothes would only be compensable if the employee was unable to complete his duties as a chemical plant worker without putting on those protective garments. Changing as “merely a convenience to the employee,” by contrast, would not be compensable. Notably, federal

17. Anderson, 328 U.S. at 692-93.
18. Id. at 693.
20. Integrity Staffing, 135 S. Ct. at 516-17.
22. Id.
24. Integrity Staffing, 135 S. Ct. at 517.
25. Id.
26. Id. at 518.
27. Id.
28. Id.
regulations categorize “checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks” as non-compensable “preliminary” and “postliminary” activities—but only “when performed under the conditions normally present.”

Because of these regulations, the Court concluded that the screenings themselves could not possibly be a principal activity. Warehouse workers were not hired to go through anti-theft screenings all day; they were hired to locate, package, and ship merchandise to Amazon customers. But the Court’s subsequent finding that the screenings were not integral and indispensable to the activities that these employees were hired to complete is not so readily apparent. After all, the chemical plant workers were not hired to change in and out of their protective clothing. And yet, the Court deemed that time compensable because protective clothing was integral and indispensable to the job that the workers were hired to perform.

V. Analysis

The Court’s reasoning is beset by two analytical pitfalls. First, the Court ignored the deferential standard appropriate for Rule 12(b)(6) motions. Though the Court thought it self-evident that dispensing with the screenings would not have impaired an Integrity Staffing employee’s ability to complete her work, a contrary argument appears equally plausible. Given the nature of the service that Integrity Staffing provides, it is plausible that preventing inventory loss is necessary to a warehouse worker’s ability to do her job, and to Integrity Staffing’s continued business relationship with Amazon. In other words, assuming the veracity of the complaint’s claim that Integrity Staffing has the “task of minimizing . . . theft,” it reasonably follows that warehouse workers share that responsibility. For employees, this means taking steps that the company deems necessary to minimize product loss, including post-shift anti-theft screenings. If Integrity Staffing has elected to mandate anti-theft checks before employees can leave the warehouse at the close of the workday, one might reasonably consider this an admission that such checks are in fact indispensable to the discharge of their duties. Thus, for the purposes of a motion to dismiss, where a plaintiff only needs to plead enough facts for a court to reasonably infer liability in order to reach

29. 29 C.F.R. § 790.7(g) (2013).
30. Integrity Staffing, 135 S. Ct. at 518.
31. Id.
32. Id. at 517.
33. See Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525, 527, 530-31 (9th Cir. 2013).
discovery, a dismissal here seems inconsistent with even the most stringent pleading standards. Second, the Court offered scant support for its finding that the screenings were not integral and indispensable to the warehouse workers’ principal activities. The Court relied exclusively on a 1951 opinion letter issued by the Department of Labor, in which the agency found that pre- and post-shift security checks for workers at a rocket-powder plant were non-compensable. In the letter, the agency drew no distinction between the pre-shift safety searches and the post-shift anti-theft searches at issue in that case. Aside from overstating the limited legal weight of an opinion letter, the Court in its analysis neglected a more salient point. Specifically, the opinion letter pertained to an employer that handled substances posing a clear public risk when not subjected to strict controls. While it is true that post-shift screenings at the rocket-powder facility were also done “for the purpose of preventing theft,” their purpose is readily distinguishable from that of the screenings at issue in *Integrity Staffing*. Unlike the screenings addressed in the opinion letter, theft from Amazon by Integrity Staffing employees does not serve the clear public safety interest in limiting the proliferation of explosive materials. Instead, the screenings serve Integrity Staffing’s interest in maintaining a business relationship with Amazon—a partnership that would be impossible to maintain without employing warehouse workers to manage, ship, and ensure the integrity of its inventory. More importantly, the complaint alleged that inventory security is closely tied to the duties of an Integrity Staffing warehouse worker. The varying duties of rocket-powder plant employees do not readily manifest such a strong connection.

To be sure, the Supreme Court was right to clarify that compensability does not turn on the employer’s control of—or benefit from—the task at issue as it once did under the *Anderson* framework. The proper test for compensability under the Portal-to-Portal Act focuses on “the productive work that the employee is employed to perform.” The statute requires that courts look not to the employee-employer relationship in isolation, but to the relationship of the employee to her work as it relates to the employer’s commercial purpose. Thus, the adoption of an *Anderson*-like test would have rendered the Act a nullity, “sweep[ing] into ‘principal activities’ the

37. Id.
38. Id.
39. Id.
40. Id. at 519.
41. See id.
very activities that the Portal-to-Portal Act was designed to address.”42 But in this particular instance, applying the proper test should have yielded the same result as the Anderson test: namely, the time at issue was compensable under the FLSA.

VI. Conclusion

Though it was meant to correct the Supreme Court’s permissive definition of compensable work,43 the Portal-to-Portal Act was not intended to be the overcorrection portrayed in Integrity Staffing. By equating the commuting time of any employee to the time that a warehouse worker at a company enlisted to reduce inventory theft must spend in post-shift security screenings,44 the Court has given the Act a new, expansive meaning. The separate problem of long wait times aside, it remains troubling that the Supreme Court has allowed a question so dependent on the unique context of the individual case to be decided without a single interrogatory served or deposition taken. In doing so, the Court has drawn categorical lines that now threaten to prevent close questions of law from reaching the critical fact-finding that is meant to shed light on such ambiguity.

Matthew Stanford, J.D. 2017 (U.C. Berkeley)

42.  Id.
44.  Integrity Staffing, 135 S. Ct. at 519.