Speech for Medical Directors
Club of Chicago

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WOMEN IN THE WORKPLACE

I. Today, two-fifths of the entire work force is female.

II. Despite the attempt of some feminists and employment discrimination agencies to ignore the physiological differences between men and women, in fact, the unique role women play in the reproductive process has created problems for the working woman, her employer, her fetus and for society as a whole.

III. One problem is the management of the pregnant female in the working environment.

A. A medical director's initial inquiries with respect to this problem should be:

1. What is the state of the health of pregnant employee

2. What is the nature of her working environment

B. Courts have repeatedly struck down broad policies involving mandatory discharge or mandatory leave for pregnant employees where such policies are based on presumptions regarding the pregnant employee's ability to perform her job duties.

1. For example, in the case of Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974), the United States Supreme Court held that a mandatory maternity leave policy which required pregnant teachers to go on unpaid leave five months before the expected childbirth and not return until three months after childbirth was unconstitutional. The Supreme Court concluded that such cutoff dates were unconstitutional because they were arbitrary and created conclusive presumptions regarding an individual's ability to continue or to resume her job duties.

C. However, unless a collective bargaining agreement expressly provides otherwise, an employer is not precluded from doing the following:

1. An employer may require a pregnant employee to report her pregnancy and provide a certificate from her doctor as to her fitness to continue working.

2. An employer may also have its medical director review the certificate of the employee's personal physician.

3. An employer has the right to have the employee examined by a company doctor at its own expense.

4. If the company doctor disagrees with the employee's personal physician as to the pregnant employee's fitness to continue working, the employer should

follow its own doctor's advice because the company doctor will have a greater understanding of the stresses of the particular working environment.

a. Arbitration law, that is the principles derived from grievances brought pursuant to a particular collective bargaining agreement which have been adjudicated in the arbitration forum, provides that where a genuine conflict in expert medical opinion exists, an employer has the right to rely on any bona fide opinion, even the most conservative, so long as such opinion appears to have been fairly, reasonably and nondiscriminatorily derived.

b. EEO, i.e., equal employment opportunity or employment discrimination, law requires the employer to show that a "business necessity" standard has been satisfied before an employer will be permitted to exclude from employment--either through leave or termination--a pregnant employee. Business necessity is defined as "necessary for the safe and efficient operation of the business".

1) Meeting this standard places a greater burden on the employer than the arbitration law standard because he must show not only that his doctor's opinion is fairly, reasonably and nondiscriminatorily derived but also that there is no available alternative short of mandatory maternity leave which will have a lesser discriminatory impact on the pregnant employee.

2) For example, the EEOC, the Equal Employment Opportunity Commission, has addressed itself to two cases involving pregnant X-ray technicians. The EEOC is the federal agency which administers and enforces Title VII of the Civil Rights Act of 1964. Title VII is the 1964 law which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. In the first of the two pregnant X-ray technician cases, the employer's policy required the employee's resignation as soon as she was aware she was pregnant. In the second case, the employer's policy required the employee to go on an unpaid

maternity leave as soon as she was aware she was pregnant. (See, CCH EEOC Decs. ¶6442 and ¶6443.)

a) Employers sought to justify the policies on the ground that radiation exposure could cause fetal damage, and thus, the policies were necessary to preserve the health of the unborn child.

b) The EEOC never addressed itself directly to the question of whether or not protection of the fetus was sufficient justification for the policies because it, instead, struck down the policies on the theory that lesser discriminatory alternatives were available. In the first case, instead of resignation, a pregnant employee should have been permitted a leave. In the second case, instead of leave, transfer opportunities should have been explored.

IV. Another, more subtle problem, is the effect of the working environment on the employee's reproductive capability.

A. This problem is particularly acute in environments where toxic substances are present.

B. It is a problem which could have its effect either preconception or post-conception, depending if the substance is a mutagen, teratogen or transplacental carcinogen.

V. Pre-conception Concerns

A. If the substance in the workplace is a mutagen, an employer's first inquiry should be, does it affect males in the same or in a comparable manner as it affects females?

1. EEOC officials have indicated to me that any employment policy which prohibits or otherwise restricts the employment of women because of the presence of a mutagen in the working environment will be considered in violation of Title VII of the Civil Rights Act of 1964 if it can be shown that the mutagen underlying the policy also affects men not subject to the policy's restrictions.

B. Another question the employer should explore if the substance in the workplace is a mutagen, is can the employer sufficiently control the female employee's exposure short of prohibiting her employment entirely?

1. For example, are there minor or practicable work assignment adjustments available which will eliminate the opportunity for exposure to the mutagen?

2. Are there engineering controls available to prevent exposure, e.g., improved ventilation, system enclosures, etc.?

3. Will the use of personal protective equipment be sufficient to prevent exposure? For example, if exposure to the mutagen occurs through inhalation, will the use of respiratory protective devices sufficiently prevent such exposure? Or, if exposure occurs through skin absorbtion, will the use of protective clothing protect the employees?

   a. Unfortunately, respirators cannot be worn by a substantial portion of the working population for both psychological and physiological reasons such as

      1) Claustrophobia
      2) Heart problems
      3) Skin irritations
      4) Severe headaches

   b. OSHA's own respirator expert at the vinyl chloride hearings described all respirators as "instruments of torture"

   c. My personal experience with the vinyl chloride and polyvinyl chloride industry has revealed that employees refuse to wear respirators, jimmy them for greater comfort, or simply cannot wear them.

1) This problem is exacerbated when the substance involved does not give the exposed employee immediate physical discomfort, such as vinyl chloride which is a colorless, odorless, tasteless gas at room temperature and pressure.

2) The employee has, therefore, no immediate incentive to keep wearing the excessively uncomfortable respirator.

d. Protective clothing is similarly uncomfortable, hot and bulky. Employees find that protective clothing severely hinders them in performing their job functions.

e. Indeed, both respirators and protective clothing can themselves create hazards for the employees by obstructing their ability to see and move.

C. Employers are obviously concerned regarding their liability for consequences of a workplace mutagen.

1. Renslow v. Mennonite Hospital, 67 Ill.2d 348 (August 8, 1977). Illinois Supreme Court held that a child not conceived at the time its mother was negligently transfused with incompatible blood will have a cause of action against, i.e., a right to sue, the negligent hospital and doctor for its injuries resulting from their negligent conduct.

a. Mother was 13 years old when, on two occasions, she was negligently transfused with Rh-positive blood. Mother's Rh-negative blood was incompatible with, and was sensitized by, the Rh-positive blood.

b. At the time, the 13-year old had no knowledge of an adverse reaction from the improper transfusion.

c. First discovered during pregnancy, 9 years later.

d. Improper transfusion and resulting sensitization of mother's blood allegedly caused prenatal damage 9 years after transfusions took place.

2. What is the significance of the Renslow decision to employers? Should the Renslow decision be applicable to the employment context (and there is no legal reason why it should not be) a child born damaged as a result of his mother's or even his father's exposure to an occupational mutagen may have a cause of action against the parent's employer or former employer.

3. The applicability of the Renslow decision to the employment context raises serious and complex medical and legal questions. Since

the legal questions are rather esoteric and, obviously, not of primary concern to you, I will not burden you with a discussion of them here.

4. However, one element in a negligence case is foreseeability, i.e., whether it was foreseeable that a particular act would result in harm.

5. Here the role of the company medical director is crucial. If the medical director suspects that a substance has or could have a mutagenic or other toxic effect, he must warn the company. This is obvious and clearly falls within a doctor's medical code of ethics.

6. A more subtle problem is whether the medical director and the company has an obligation in the first instance to determine whether a substance has any toxic effects before they even allow any employee to be exposed to the substance.

7. It is not inconceivable that in the not-too-distant future a court will hold that, in light of the ever-growing evidence of the toxic effects of occupational chemicals, an employer is obligated to determine these effects before allowing its employees to be exposed, not just controlling exposure after

the toxic effects come to light.

8. One large problem with the Renslow decision is that it, in effect, permits the accrual of liability over decades.

   a. A minor has usually 2 to 3 years after reaching its majority to initiate a lawsuit.

   b. Thus, for example, if a mutagenic exposure occurred 10 years prior to conception, and a lawsuit was brought by an affected child when he reached the age of 20, the employer would be accruing liability for 30 years!

   c. Naturally, this time lapse creates tremendous legal and medical problems for the parties involved such as finding evidence, reconstructing events, remembering circumstances, preserving medical data . . .

VI. Post-conception Concerns

   A. Particularly involves teratogens and transplacental carcinogens.

   B. Problem currently exemplified by the experience of the vinyl choride - polyvinyl chloride industry.

      1. In 1974 the Medical Director of B.F. Goodrich's Louisville PVC plant discovered that over the

years several of the company's PVC workers had died of a rare form of liver cancer.

2. This was reported to OSHA and NIOSH in January 1974 and, almost concurrently, laboratory tests began to produce results indicating that VCM, a gas at room temperature and pressure which is the basic element of the widely used plastic PVC, was a carcinogen producing angiosarcoma of the liver in persons exposed.

3. Hearings were held during 1974 and in that year both an emergency temporary standard and a final standard regulating occupational exposure to VCM were promulgated by OSHA.

4. Among its recommendations to OSHA in March 1974, NIOSH made the following recommendation:

> "In view of the preliminary results of animal toxicology studies, it is recommended that no woman who is pregnant or who expects to become pregnant should be employed directly in vinyl chloride monomer operations."

The basis for this NIOSH recommendation probably were the early reports from the VCM experiments being conducted by Dr. Cesare Maltoni in Bologna, Italy. Dr. Maltoni's studies were the most advanced experimentation on the carcinogenic effects of VCM. His experiments showed that offspring of pregnant rats who were exposed to VCM for only 7 days during their pregnancy developed angiosar-

comas; however, the mothers of such offspring revealed no such tumors. From these experiments Dr. Maltoni concluded that VCM is a transplacental carcinogen and, also, the fetuses who come into contact with VCM through their mother's exposure are probably more susceptible to the carcinogenic effects of VCM than are adults.

[Maltoni, Cesare and Lefemine, Guiseppe, "Carcinogenicity Bio-Assays of Vinyl Chloride: Current Results", 249 Annals of New York Academy of Sciences, 195-218 (1975)].

5. Despite the recommendation of NIOSH and subsequent testimony at the OSHA hearings by Dr. Irving Selikoff to the same effect, OSHA made no reference whatsoever to VCM's transplacental carcinogenic properties in the final standard.

6. Nevertheless, as a result of the Maltoni data and some German experiments conducted by Dr. Gerhard Volkheimer, several PVC manufacturers concluded that they were obligated to exclude women capable of becoming pregnant from jobs involving direct VCM exposure.

7. Employers concluded that this policy was necessary because there does not now appear to be available an alternative policy or practice which would have a lesser discriminatory impact on females while still protecting them or their fetuses:

a. State of technology is such that you cannot control or guarantee against periodic VCM exposure.

b. For the reasons discussed earlier, employers can't keep female employees in respirators constantly.

c. Can't merely transfer an employee when she becomes pregnant because an exposure could occur before the pregnancy is even detected.

1) Indeed, the very young fetus is most susceptible to toxins because of rapid cell turnover, the relative lack of detoxification mechanisms, and the immature biological barriers in the very young fetus.

d. Amoco Oil instituted a policy for its toxic substances division whereby all women had to check in monthly to certify they were menstruating or otherwise had no reason to believe they were pregnant. In one case, an employee went three months before her pregnancy was detected. See, 64 LA 511 (1975).

8. Consequences that have arisen thus far from the decision of one of my clients to prohibit the employment of women of child-bearing ability in

direct VCM exposure jobs have been the following:

a. A grievance was filed and went to arbitration. The arbitrator found in the Company's favor on the ground that the exclusionary policy was a reasonable safety rule which the employer has the right to proscribe under the terms of the collective bargaining agreement.

b. My client also has an EEOC sex discrimination class action currently pending.

c. Additionally, my client has had the Office of Federal Contract Compliance Programs, the agency responsible for enforcing the non-discrimination restrictions on government contractors, institute a compliance investigation of the company because of this policy. If the OFCCP concludes that the policy is discriminatory, the company could be debarred from all government contracts.

d. This client has, as have other employers which have instituted a comparable policy, decided that it would prefer to face an EEO action now rather than a damages action

down the road should a child of an employee be born with or develop angiosarcoma.

9. Unfortunately, the problems engendered in dealing with this matter have been exacerbated by federal agencies continually passing the buck on this issue. For example, with respect to VCM, a meeting was held in Washington, D.C. in March 1977, at which one of my clients, myself, and 40 government agency representatives met to discuss the problem of the employment of women in the VCM industry.

a. OSHA representatives stated that the OSHA standard does not cover the problem.

b. EEOC representatives claimed that their agency has no capability to evaluate the medical data provided by the company.

c. Although Dr. John Finklea of NIOSH stated to those at the meeting that a transplacental carcinogen is probably not as dangerous in the first trimester as later in the pregnancy, he would not provide the company with a letter that it is safe to employ women in VCM exposure jobs and transfer them when a pregnancy is discovered.

To say the least, this meeting accomplished nothing.

VII. Clearly, the problem of the female employee working in an environment which may have potentially deleterious effects upon her reproductive capability is complex and pervasive. At this juncture, the conflicting objectives of different federal agencies as well as the dearth of relevant scientific and medical data have seriously hampered the development of a reasonable and consistent response to the problem which government, industry, organized labor and the medical community can live with.

VIII. Until such time as a viable policy can be developed, company Medical Directors should keep the following in mind.

A. A mother cannot waive the right of her fetus or ultimately born child to sue for damages.

B. OSHA standards currently do not address themselves to the problem of the susceptible fetus or the susceptible adult for that matter.

C. Comparative consequences of a damages lawsuit vs. an EEO action should be carefully considered.

1. Public relations from a damages lawsuit involving an injured child can be quite devastating for a company.

2. Liability from such a damages lawsuit can be astronomical as compared with an EEO backpay award.

D. If a policy is deemed to be medically necessitated, make sure it is well-drawn so as to avoid excluding any more persons than must necessarily be excluded.

1. For example, do not exclude all women or even women "in the child-bearing age". Instead, exclude only women "who are or who can reasonably expect to become pregnant" or who are "capable of becoming pregnant".

E. Consider the company's response to women who are willing to be sterilized to obtain or retain a job.

1. At a GM lead plant, a woman became sterilized to retain her job. The media and unions publicized the incident in a manner which was embarrassing for the company.

2. A client of mine informed a woman applicant that she could not have a certain job and described its policy and explained the reasons underlying it. The woman offered to have tubal ligation.

3. My advice to that client was to:

a. develop a policy statement that the company in no way advocates, encourages or endorses such a serious medical and social step;

b. that such a step should be seriously discussed with a personal physician as well as with family.

IV. Conclusion.

Clearly, the problem of dealing with the actually pregnant female in an average workplace is far simpler than dealing with the female of child-bearing ability in a workplace involving toxic substances. In the former circumstance a company should base its decision with respect to the continued employment of a pregnant employee on the state of her health and the demands her workplace will make on her pregnancy. Broad policies which make generalizations about a pregnant employee's health or fitness to continue working should be avoided. Instead, each pregnant employee should be evaluated individually to determine her fitness to continue performing her job duties.

With regard to the problem of the female of child-bearing ability in a working environment involving toxic substances, the employer should make every effort to determine (1) the effect of the particular occupational toxic substance on the reproductive process and the fetus, (2) whether the substance affects the reproductive capability of its male employees, its female employees or both, and (3) whether exposure to the toxic substance which affects the reproductive process can be controlled or eliminated entirely. Only if the medical and scientific data shows that the mother's exposure could lead to fetal damage and that there is no way to control this exposure should women be excluded from such employment. Thus, for example, no woman of child-bearing ability should be permitted to work in an envoronment where she could be exposed to a teratogen or transplacental carcinogen. Clearly,

only a pregnant mother's exposure can be the vehicle for a fetus' exposure to such substances. By contrast, a mutagen may affect either the mother or the father. If the mutagenic effect can be carried by males, a policy which restricts only females will be held to be sexually discriminatory.

The dearth of scientific and medical data relating to the mutagenic, teratogenic or transplacental carcinogenic effects of substances currently prevalent in the workplace has created a serious dilemma for industry and the medical community. If one suspects a substance is a mutagen, teratogen or transplacental carcinogen, but the research demonstrating the effect is sparse, then to act on that suspicion to the detriment of feminine employment opportunities will probably result in a variety of legal and administrative challenges. However, not to act on the suspicion -- but instead to wait until the data is sufficient if not conclusive -- may be to wait too long for confirmation. As a professor of pediatrics who acted as an expert witness for me in a case involving this problem in the vinyl chloride industry testified, she did not want to wait around for 10 to 20 years to see if the two available animal studies were confirmed by the children of female VCM and PVC workers developing angiosarcoma.

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