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PFIZER INC., EASTERN POINT ROAD, GROTON, CONNECTICUT 06340
203-445-5611

LEGAL DIVISION

May 8, 1978

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T. C. MILLS, JR.

ROSS-BFS
Mr. Thorley C. Mills
Assistant Counsel
Firestone Tire & Rubber Co.
1200 Firestone Parkway
Akron, Ohio 44317

Dear Mr. Mills:

Enclosed please find a copy of the memorandum which
we discussed today by telephone.

Very truly yours,

William D. Huhn

WDH:rn
Enclosure

BFS

005923

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210



cc: Mr. McClellan
Mr. O'Sullivan
Atty. Mills

MEMORANDUM FOR THE SECRETARY

FROM : CARIN ANN CLAUSS
Solicitor of Labor

SUBJECT : Executive Order 11246 Implications
of Firestone's Policy Excluding
Women of Childbearing Capacity
from Employment in Production
Jobs Exposing them to Vinyl
Chloride Monomer

I. BACKGROUND

The Firestone Plastics Company Division of the Firestone Tire & Rubber Company manufactures polyvinyl chloride resins at plants located in Pottstown, Pennsylvania and Perryville, Maryland. The Company, which is a Government contractor subject to the requirements of Executive Order 11246, as amended, maintains a policy of excluding women of childbearing capacity from production jobs involving exposure to vinyl chloride monomer (VCM). The Company, relying primarily on a study the results of which were reported in 1975, states in its affirmative action plan that "[c]urrent medical restrictions prohibit the employment of females of childbearing capacity in areas where they would be exposed to vinyl chloride monomer."

The Interior Department recently completed a compliance review of the Pottstown plant under Executive Order 11246, and the Company has yet to be notified of its EEO status. Because of the relative novelty and complexity of the Company's exclusionary policy towards women of childbearing capacity, we are working with Interior on this matter. No notices of deficiency or show cause notices have been issued to Firestone to commence the enforcement process. Accordingly, the

discussion of Firestone's defenses is not based upon its response to enforcement proceedings but upon a recent meeting with Firestone officials in the office of Congressman Richard Schulte; an analysis of an internal Firestone memorandum from Walter B. Connolly, Firestone attorney, to Donald W. Talmon, Firestone EEO Officer; and the Company's affirmative action program.

Vinyl chloride has been produced in many countries for more than 30 years. In the United States there are three main components of the vinyl chloride industry. 1/ First, there are the manufacturers of vinyl chloride monomer (VCM) which is synthesized in a small number of large outdoor production plants which resemble oil refineries and which are located primarily in the South. 2/ Because of the large degree of automation involved in the manufacturing process, only approximately 1,500 workers are employed in VCM production. Second, there are the manufacturers of polyvinyl chloride (PVC), of which Firestone is one. 3/ Virtually all vinyl chloride is polymerized into thermoplastic PVC resin which serves as the basis for a wide variety of plastic products. There are 37 PVC plants in this country operated by 21 companies. PVC plants are not open-air facilities and are generally located in colder climates. They employ approximately 5,000 workers. Third, there are the fabricators of products which use PVC resins; there are many of these firms throughout the country employing thousands of workers. In fabrication, residual VCM which has been entrapped in the PVC resin escapes during a heating process, thus exposing fabrication workers to vinyl chloride.

1/ The following discussion of the vinyl chloride industry is taken from Society of Plastics Industries Inc. v. Occupational S & H.A., 509 F.2d 1301 (2nd Cir. 1975).

2/ The leading producers of VCM are Shell, Dow, B. F. Goodrich, and PPG Industries, Inc. Other producers of VCM include Union Carbide, Goodyear, Conoco, Ethyl Corp., Allied Chemical, Monochem, American Chemical.

3/ Other PVC producers are Air Products, American Chemical, Borden, Conoco, Diamond Shamrock, Ethyl Corp., General Tire, B. F. Goodrich, Goodyear, Great American, Hooker Chemical, Keysor-Century, Pantasote, Robintech, Stauffer, Tenneco, Olin, Union Carbide and Uniroyal.

Conclusive proof of the carcinogenic character of VCM emerged in 1974 as a result of the death of three workers in a B. F. Goodrich PVC plant from a rare liver cancer (angiosarcoma). Later additional angiosarcoma deaths were reported among workers in plants operated by Union Carbide Corporation, Firestone Plastics Corporation, and Goodyear Tire and Rubber Company. As a result of information which became available at that time, OSHA issued an emergency temporary standard which reduced the permissible exposure level from a ceiling of 500 ppm to a 50 ppm ceiling and established other requirements, including monitoring and respiratory protection. After the issuance of the emergency standard OSHA received preliminary results of a study which indicated that mice developed angiosarcoma of the liver when exposed to VC concentrations of 50 ppm.

Thus in May, 1974 OSHA issued a notice of proposed rulemaking. The proposal called for limitation of employee exposure of VC to "no detectable level" as measured by a sampling and analytical method sensitive to 1 ppm. This level was to be reached through the institution of engineering controls and work practices as soon as feasible, but respiratory protection was to be provided where the goal could not be achieved. Hearings on the proposed standard were held in June and July, 1974, and on October 1, 1974, the final standard was promulgated, effective January 1, 1975. The main provisions are as follows:

- (1) The standard applies to manufacturers of VCM and PVC and to fabricators of PVC, but excludes those merely handling or using already-fabricated products. 29 CFR §1910.93q(a)(2).

(2) In place of the potentially obscure "no detectable level" standard, a permissible exposure limit not greater than 1 ppm averaged over an eight-hour period is set, but allows for peaks of VCM exposure up to 5 ppm during periods not exceeding 15 minutes. 29 CFR §1910-93q(c).

(3) All employers are required to conduct an initial program of monitoring and measurement of exposure levels, but need not continue monitoring if initial levels are below the so-called "action level" of 0.5 ppm averaged over the eight-hour work day. 29 CFR §1910.93q(d).

(4) The standard requires that "feasible engineering and work practice controls" be employed to reduce exposure below the permissible exposure wherever possible or to the lowest practicable level if not possible, supplemented by respiratory protection. 29 CFR §1910-93q(f)(2).

(5) Where respiratory protection is required under the standard, suitable equipment, as indicated by a chart in the standard, shall be provided, and use shall be required of employees unless the VCM level is below 25 ppm measured over any 15 minute period, in which case the use of respiratory equipment was optional with the employee until January 1, 1976. 29 CFR §1910.93q(g)(1).

(6) Employees working in certain hazardous operations, especially those involved in physically cleaning the interiors of PVC manufacturing reactors, shall be provided protective garments and respiratory equipment. 29 CFR §1910-93q(h).

(7) A medical surveillance program is required for all employees exposed to VCM in excess of the action level of 0.5 ppm. 29 CFR §1910.93 q(k).

(8) Finally, in addition to certain record-keeping requirements, all entrances, work-areas, and containers related to VCM or PVC manufacture and PVC fabrication are required to be labeled with the warning legend: "Cancer-Suspect Agent". 29 CFR §1910.93p(1).

The new standard was upheld following a petition for review filed by VC manufacturers in the Second Circuit, Society of Plastics Industries, Inc. v. Occupational S. & H. A., 509 F.2d 1301 (2d Cir., 1975).

In March of 1976 Firestone Plastics Company applied for a temporary variance and an interim order pending a decision on its application for a temporary variance from 29 CFR 1910.1017(g)(1) which, effective April 1, 1976, required employers to provide and assure the use of respirators for each employee exposed to vinyl chloride in excess of the permissible exposure limit. The interim order was denied, 41 FR 9634. Subsequently Firestone withdrew its request for the temporary variance.

Currently the Company is involved in litigation with OSHA (handled by Philadelphia Regional Solicitor's Office) contesting the issuance of a citation for the use of improper respirators. According to the OSHA Philadelphia Area Office, Firestone has not succeeded in reducing its exposure level to the permissible limit of 1 ppm. Its present exposure level varies from 0 to several hundred ppm; although it is usually below 25 ppm. Consequently, it is required to assure the use of respirators by its exposed employees. Because the required full-face respirator is burdensome and uncomfortable for the employees, the Company has been using a locally produced half-face piece respirator. It is OSHA's position that this respirator does not afford adequate protection to the employees.

The study 4/ on which Firestone relies in support of its policy of excluding fertile women from PVC production jobs involved 60 pregnant rats who were exposed to VCM in dosages of 10,000 and 6,000 ppm for seven days during the pregnancy. Two of the 86 offspring of the exposed rats developed malignant tumors. The mothers of the offspring showed no tumors. From this experiment it was concluded that VCM is a transplacental carcinogen and that fetuses who come in contact with VCM are probably more susceptible to its carcinogenic effects than are adults. Based on this same study NIOSH recommended to OSHA that pregnant women and women who expect to become pregnant be excluded from employment in VCM operations. 5/ It is Firestone's position that all fertile women be excluded rather than just pregnant women, because of the fact that damage could occur in the early stages of pregnancy before the woman became aware that she is pregnant.

It is to be noted that the rats in the Maltoni study were exposed to VC in dosages of 10,000 and 6,000 ppm, considerably higher than the 1 ppm exposure level permitted by the OSHA standard and the 25 ppm exposure level which is the usual maximum in the Firestone plant. 6/ Whether fetuses could develop malignancies as a result of exposure at these low levels is not known.

4/ Maltoni, Cesare and Lefemine, Giuseppe, "Carcinogenicity Bio-Assays of Vinyl Chloride: Current Results," 246 Annals of New York Academy of Sciences 195-218 (1975).

5/ OSHA did not act on this recommendation.

6/ As will be discussed *infra*, the actual level of exposure can be further reduced through the use of respirators.

While this discussion focuses primarily on the situation of Firestone and other VC manufacturers which exclude fertile women from production jobs, it is to be noted that the issue has ramifications in other industries as well. The health of fetuses could be affected by many industrial substances and conditions, including viruses and bacteria, chemicals, drugs, and radiation. 7/

There are three primary ways in which offspring can be affected by industrial exposure of parents to harmful substances. ROSS V. BFS Some chemicals or other agents, known as mutagens, cause mutations in the sperm or ova of exposed persons, which can result in the death of the fetus before birth (miscarriage or spontaneous abortion) or the birth of a child with a genetic defect such as mental retardation, congenital defects, or other physical or mental abnormalities. 8/ Mutations can result from exposure of either the male or the female parent; the harm to the fetus results from effects on the sperm or ova which occurred prior to conception.

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7/ Hricko and Brunt, Working For Your Life: A Woman's Guide to Job Health Hazards (1976) A-35-A-37.

8/ Id. at B-5.

Other sources of harm to the fetus are carcinogens -- that is chemicals or other agents which induce or promote cancer. Many industrial chemicals have never been tested to see if they are carcinogens; others that have been shown to have cancer-causing properties are still used without any controls at all. OSHA's carcinogen standard of January, 1974 regulated only 14 substances. Recently, however, OSHA has proposed a comprehensive policy for the identification, classification and regulation of potential carcinogens in the work place [see 42 F.R. 54148, October 4, 1977].

A fetus can be harmed by the exposure of its mother to a transplacental carcinogen--that is a cancer-causing substance which is able to cross the placenta and reach the fetus. Since the length of time between exposure to a carcinogen and the appearance of cancer could be as much as 40 years, it is often difficult to make the connection between a particular carcinogen and the cancer it caused. 9/

A teratogen is a chemical or other agent that interferes in some way with the development of the fetus after conception. It may result in miscarriage or birth defects. Thalidomide is an example of a teratogen. 10/

9/ Id. at B-6-B-7.

10/ Id. at B-7-B-9.

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As we have seen, of the three ways in which offspring can be affected by their parents' exposure to harmful substances, only mutagens affect both male and female parents and cause damage through exposure prior to conception. Both carcinogens and teratogens affect offspring only through exposure of the mother after conception and before birth.

Lead is a substance widely used in industry which has been shown to have harmful effects on fetuses which have been exposed. Thus women have been excluded from many jobs involving lead exposure. ^{11/} However, there is also some evidence to indicate that lead poisoning of the father can affect the development of the fetus. ^{12/} Anesthetic gases have also been shown to have harmful effects on the offspring of both male and female hospital operating room workers who are exposed to them on a regular basis. ^{13/} Organic solvents such as benzene, carbon tetrachloride, chloroform, methylene chloride, dimethylformamide, xylene, and acetone, have also been shown to have the potential of causing harm to offspring. ^{14/} Although no studies have been conducted of the effects of estrogen on the children of

^{11/} Id. at C-5-C-6.

^{12/} Id. at C-6.

^{13/} Id. at C-10-C-14.

^{14/} Id. at C-18-C-22.

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women who have been exposed occupationally, there is evidence that estrogen is both carcinogenic and teratogenic. 15/ Likewise radiation has been shown to have harmful effects on fetuses. 16/ Other chemicals for which there is evidence that harm may occur to unborn children include pesticides, methyl mercury, carbon monoxide, and polychlorinated biphenyls (PCB's). 17/

Of course some employees of companies that produce and fabricate these substances are subject to exposure. In addition, there are many other industries, not usually thought of as dangerous, in which exposure to mutagenic, carcinogenic or teratogenic substances may occur. For example, the garment industry, which employs over 1,500,000 women 18/, can involve exposure to organic solvents, dyes, and fire retardant chemicals, some of which may have harmful effects on fetuses. 19/ Beauticians, of which there are 425,000 women, 20/ are regularly exposed to harmful chemicals including dyes which have been shown to be carcinogenic. 21/ Other industries in which exposure to mutagenic, carcinogenic, or teratogenic substances could occur include the drycleaning industry (108,000 women); 22/ the electronics industry (203,250 women); 23/ hospital and healthcare (2.2 million women); 24/ and laboratory facilities (125,000 women). 25/

15/ Id. at C-23-C-25.

16/ Id. at C-26-C-29.

17/ Id. at C-30-C-42.

18/ Id. at D-10.

19/ Id. at D-13-D-16.

20/ Id. at D-19.

21/ Id. at D-21-D-22.

22/ Id. at D-25.

23/ Id. at D-30.

24/ Id. at D-36.

25/ Id. at D-44

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According to an article appearing in the Wall Street Journal on November 7, 1977, a number of chemical companies are instituting policies to ban fertile women from jobs involving exposure to toxic substances which they claim may harm a fetus. American Cyanamid Co. has announced such a policy for ten plants. Other companies who are drawing up such policies include Dow Chemical Co., Union Carbide Corp., Eastman Kodak Co., DuPont Co., and Celanese Corporation.

In addition to the Firestone situation, OFCCP is aware of potential problems encountered by three of the compliance agencies: Department of Defense, ERDA, and Department of the Interior. DOD has indicated that there may be problems involving exposure to lead in the Delco Division of General Motors and in National Lead Industries. ERDA has indicated problems with a number of chemical companies including BF Goodrich, Borden, Dow, and BASF-Wyandotte Chemical Company, as well as problems involving exposure to radiation.

According to recent contacts with the EEOC, it is not aware of how many complaints it has at present which involve this issue. In its testimony before the OSHA Lead Standard Hearings on March 15, 1977, the Commission indicated that it accepts the position that the health of an employee's unborn child is a legitimate business concern. It cited two EEOC decisions [75-072 and 75-055, CCH EEOC Decisions ¶¶6442 and 6443 (1974)] in which the employers' policy of requiring pregnant women to resign was not upheld because alternative practices were available to protect the fetus without requiring the mother's resignation. It appeared, however, to accept the availability of a business necessity defense in cases involving exclusion of fertile women if the employer were able to prove that there was no feasible alternative means to protect the fetus.

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While the Commission is continuing to study the matter, the position set forth at the OSHA Lead Standard hearings remains in effect.

Thus it is essential that OSHA develop a position on this issue, not only in response to the Firestone situation but as guidance to the compliance agencies for the handling of the problem as it arises in connection with other Federal contractors. As discussed supra, it has already arisen in a number of instances. As more substances are found to have harmful effects and as more women seek nontraditional jobs, one can expect to see many more instances where employers will try to exclude fertile women from entire departments or job categories. Since the majority of employed women are in their child-bearing years (69.6% of all women workers are between the ages of 16 and 44), 26/ the effect of the exclusion of fertile women from occupations involving such exposure to toxic substances would be devastating to the employment opportunities of women.

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26/ Figures computed from Bureau of Labor Statistics, Employment and Earnings Vol. 24 No. 11 (November, 1977).

II. LEGAL DISCUSSION

A. THE POLICY OF EXCLUDING FERTILE WOMEN IS SEX DISCRIMINATION.

The fact that Firestone excludes fertile women from PVC production jobs but does not exclude fertile men is disparate treatment which, absent a valid defense, would constitute illegal sex discrimination. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

The only possible defenses of such a policy would be the bona fide occupational qualification (BFOQ) defense and the defense of business necessity. As the following discussion will show, the BFOQ defense is inapplicable. The business necessity defense, while novel in this context, would appear to have some merit. However, in order to prevail the Company would have to show that no acceptable nondiscriminatory alternative is available. As will be discussed infra, alternatives are available. One alternative, of course, would be to exclude fertile workers of both sexes from the production jobs in question. Other alternatives would involve accommodations to make the work place safe for pregnant workers and/or to provide alternative work for them during their pregnancies.

B. THE COMPANY'S POLICY IS NOT BASED ON A BONA FIDE OCCUPATIONAL QUALIFICATION.

While both Title VII 27/ and the Executive Order 11246 regulations 28/ provide for an exception from the prohibition against discrimination on the basis of sex in cases in which sex is a bona fide occupational qualification (BFOQ), there are very few instances in which the BFOQ exception applies. The standard of proof an employer must meet in order to defend its use of the BFOQ exception was set forth in Weeks v. Southern Bell, 408 F.2d 228 (5th Cir. 1969), where the court said that the employer must present actual evidence, not evidence of its beliefs, that no or virtually no women are capable of safely and efficiently performing the job involved.

27/ 42 USC 2000e-2(e)

28/ 41 CFR 60-20.2(a) and 20.3(b)

Recently in Dothard v. Rawlinson, 45 USLW 4888 (6/28/77), the Supreme Court applied the BFOQ exception in upholding the exclusion of women from jobs as guards in certain Alabama prisons. The Court made clear, however, that its decision was confined to the particular facts of that case, which revolved around the horrendous conditions found in Alabama prisons, 45 USLW 4891. Because of the nature of the prison and prisoners, the Court held that "[t]he employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." 45 USLW 4892. Thus the decision focused, not on the issue of the woman's own safety, but that of the inmates and other guards.

Likewise in Gardner v. National Airlines, ___ F. Supp. ___, 14 FEP Cases 1795 (S.D. Fla. 1977), the Court held that the issue of the safety of the fetus of a pregnant employee was not material to the issue of whether a BFOQ existed. 29/

Thus the BFOQ exception is not applicable here, since the Company is not claiming that women are incapable of performing the work in a safe fashion. Rather the Company's approach resembles the paternalistic policy inherent in various state protective laws which, inter alia, limited the employment of women in certain occupations in jobs requiring the lifting of weights exceeding maximums, involving work during certain hours of the night and/or for more than a specific number of hours per day.

29/ See also 14 FEP Cases 1815, ftn. 15.

These laws were invalidated by Title VII, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971). Courts have interpreted Title VII to prohibit employment policies which limit women's job opportunities based on a desire to protect them from dangerous activities:

"Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing." Weeks v. Southern Bell Telephone & Telegraph Co., supra 408 F.2d at 236 (emphasis added).

Of course there is a difference between Firestone's exclusionary policy and most state protective laws in that the former is based only on concern for the health of the fetus, not that of the woman employee. The Company has not alleged that women suffer any different effects from exposure to VCM than men, other than the possibility of injury to a fetus.

C. THE COMPANY'S POLICY IS NOT JUSTIFIED BY BUSINESS NECESSITY

An employment practice which operates to exclude a disproportionate percentage of a protected class absent a BFOQ must be eliminated unless the employer

can demonstrate that it is justified by business necessity. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Business necessity requires more than a showing that the policies serve management functions. "Necessity connotes an irresistible demand." U. S. v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2nd Cir. 1971). Under the business necessity doctrine, the test is "... whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. * * * [t]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential impact." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), cert. denied, 404 U. S. 10006.

While the Company raises the business necessity defense in its internal memorandum, it does not argue that its practice is necessary to the safe and efficient operation of its business in the sense in which that defense has been recognized by the courts, i.e., a practice or policy necessary for successful job performance. Albermarle Paper Co. v. Moody, supra; Griggs v. Duke Power Co., supra; Papermakers Local 189 v. U.S., 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975); Robinson v. Lorillard Corp., supra; Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Taylor v. Armco Steel Corp., 373 F. Supp 885 (S.D. Texas 1973). Arguably, therefore, since the Company's exclusionary standard cannot be justified by successful job performance, it does not come within the business necessity defense.

Title VII and Age Discrimination Act cases permitting the grounding of pregnant stewardesses, job qualification standards for pilots which have a disparate impact on blacks, and age restrictions on the hiring of intercity bus drivers are clearly distinguishable. They are predicated upon the theory that an employer has a lighter burden in demonstrating that its employment criteria are job-related when the economic and human risks to business patrons are great, as with airline or bus passengers, than when such risks are insignificant. Condit v. United Airlines, 13 FEP Cases 689 (E.D. Va. 1976), affirmed, 525 F.2d 1414 (4th Cir. 1977) 14 [CCH] EPD ¶152; Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972); Hodgson v. Greyhound Lines, Inc. 499 F.2d 859 (7th Cir. 1974); cert. denied, 419 U. S. 1122; Cf Usery v. Tamiami Trail Tours, 531 F.2d 244 (5th Cir. 1976). See also Dothard v. Rawlinson, supra.

In MacLennan v. American Airlines, 15 [BNA] FEP Cases ¶1684 (E.D. Va. 1977), the court held that the airline's mandatory maternity leave policy for flight attendants was discriminatory since the airline had not borne its burden of showing the policy was necessary to the normal operation of its business. The court found that the airline failed to show a significant safety-related nexus. See also Gardner v. National Airlines, supra. But see Condit v. United Airlines, supra, and Harriss v. Pan American World Airways, 15 [BNA] FEP Cases 1663 (N.D. Calif. 1977).

These cases would not be controlling in any event, however, since here the alleged risks are not to business patrons, other employees, or the general public; they are to the pregnant employee's fetus. Thus it would appear likely that any business necessity defense asserted by the Company would have to be based either on (1) a general humanitarian concern for the health of its employees' future children, perhaps made relevant to the operation of the Company through a contention that bad publicity resulting from the

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birth of children with cancer would hurt future business; or (2) a concern for a possibility of financial liability to injured offspring. Both of these contentions are novel defenses that have not yet been considered by the courts.

1. The Humanitarian Concerns

There are several reasons for questioning whether the humanitarian concerns asserted are genuine. First of all, it appears that women have been excluded from the production jobs in question for a number of years. In its internal document the Company dates the scientific concern for the health of the fetus back to 1974. Thus the obvious question arises as to why women were excluded prior to 1974.

Secondly, there is scientific evidence which shows that the wives of male workers exposed to VCM experience a significant rate of abortions, still births, and miscarriage. ^{30/} Thus if the Company's humanitarian concerns are real, one can question why fertile males are not excluded from production jobs as well.

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^{30/} Infante, McMichael, Wagoner, Waxweiler and Falk, "Genetic Risks of Vinyl Chloride," The Lancet, April 3, 1976, at 734.

Furthermore, as stated supra, in order for a business necessity defense to succeed, it must be proven that there is no less burdensome alternative. Assuming, arguendo, the legitimacy of the humanitarian defense hypothesized here, there are less burdensome alternatives to the exclusion of fertile women. These will be discussed infra.

2. Fear of lawsuits by injured fetuses.

Clearly a major concern of Firestone and other PVC manufacturers is the possibility of being exposed to tort liability in lawsuits brought by employees' children who were injured by PVC prior to birth. This financial concern does not apply in the same way to injured workers since Workers' Compensation programs would cover them in most instances.

Since there has been, insofar as we have been able to determine, only one reported case in which an employer was sued for prenatal injury to an employee's child, 31/ the possibility of such lawsuits is highly speculative. However, the development of the law in this area would indicate that such lawsuits may be a possibility.

Before 1946 almost all courts in which the matter was raised denied the right of a child to recover for prenatal injuries. Since that time, however, the law has developed to the point where every jurisdiction permits such recovery if the child is born alive. Some jurisdictions maintain a distinction between injuries which occurred after the fetus was viable [that is capable of living outside the uterus - usually after 20 weeks] and those which occurred before this time,

31/ Dillon v. SS Kresge Co., 35 Mich. App. 603, 192 NW 2d 661 (1971). This case involved a pregnant store employee who claimed she contracted rubella as a result of her employer's negligence in failing to maintain sanitary conditions. As a result of rubella, injury occurred to her child. The appeals court held that plaintiff stated a cause of action against the employer and remanded the case for trial.

allowing recovery only for the former. The trend, however, is to allow a surviving child to recover for any prenatal injury, whether before or after viability. 32/

Slightly different problems are encountered in connection with recovery for the wrongful death of an injured fetus. Most jurisdictions allow recovery if a viable unborn child is injured, born alive, and then dies. 33/ Furthermore, there are some cases allowing recovery in a situation where a nonviable child is injured, born alive, and subsequently dies, see e.g. Wolf v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973); Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E. 2d 826 (1967). There are also cases permitting recovery when a viable child was injured and then stillborn, see e.g. Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Stidham v. Ashmore, 109 Ohio App. 431, 167 N.E. 2d 106 (1959); Mitchell v. Couch, 285 S.W. 2d 901 (Ky. 1955). Many courts have refused recovery under this fact situation, however. 34/ There is only one case in which recovery was permitted for the wrongful death of a child injured when non-viable and subsequently stillborn, Porter v. Lassiter, 91 Ga. App. 712, 87 S.E. 2d 100 (1955).

32/ Prosser, Law of Torts, 337-338 (1971).

33/ Note, "Tort Recovery for the Unborn Child", 15 J. Family Law 276 (1976-77) at 285.

34/ Id. at 290.

It is important to note that the development of the law permitting recovery for prenatal injuries has, until recently, been confined to cases involving injury to the fetus itself after conception. There have been two cases, however, in which it was held that recovery may be possible for a tortious act which occurred prior to conception. Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973), involved a suit against a pharmaceutical company brought by the father of Mongoloid twins who claimed that the children's Mongoloidism resulted from genetic damage caused by their mother's taking of birth control pills manufactured by the defendant. The district court dismissed the action for failure to state a claim, 336 F. Supp. 961 (W.D. Okla. 1972), and the plaintiff appealed. The Tenth Circuit vacated the judgment, holding that it was not beyond doubt that the plaintiff could provide no set of facts in support of his claims which would entitle him to relief.

In Renslow v. Mennonite Hospital, 40 Ill. App. 3d 234, 351 N.E. 2d 870 (1976), the court considered a complaint by a mother on behalf of her minor daughter for a preconception tort. The mother alleged that the defendants were negligent in giving her a transfusion of blood with the wrong Rh factor when she was thirteen years old, and that this in turn caused the sensitization of her blood which resulted in the premature birth of her daughter a number of years later and permanent damage to the daughter's nervous system and brain. The trial court dismissed the action because the plaintiff was not conceived at the time of the infliction of the injury. The appellate court reversed, holding that while the tortious act occurred before conception, the injury to the fetus occurred after conception.

Since Illinois law permits a minor to recover for prenatal injuries if born alive, the child should be able to recover if she could prove the facts alleged.
35/

Thus we see that the Company's concern for the possibility of future tort liability, while speculative, has some basis in the law. Furthermore, there is some reason for the Company to be more concerned about the exposure of pregnant women to VCM than the exposure of of men and nonpregnant women since it is only in the former case that there is a possibility of suit based on a postconception tortious act. As we have seen, the chance of recovery in a suit based on a preconception tort is remote, as there have been only two reported cases in which a court held that such recovery is possible.

Moreover, the scientific evidence indicates that exposure of males to VCM may result in increased incidence of still births, miscarriages, and spontaneous abortions, whereas the exposure of pregnant women may result in increased chance of cancer in the exposed fetus. Thus a suit on behalf of an injured child of a male worker, in addition to be based on a tortious act occurring prior to conception, would most likely be a suit for wrongful death. As we have seen there are many jurisdictions which do not permit recovery for wrongful death when the injury occurred before the fetus was viable; we have found no reported cases allowing recovery in a wrongful death action when the tort occurred

35/ This decision was affirmed on 8/8/77 by the Illinois Supreme Court. 46 USLW 2116 (8/30/77).

rior to conception. Thus the possibility of tort liability to the offspring of male workers is more remote than to the offspring of pregnant female workers, since in the latter case the suit could be brought by a living child for a tortious act occurring after conception and possibly even after viability.

There is another distinction between the liability risked in the exposure of pregnant workers and that risked in the exposure of fertile males, based on the nature of the wrongful death statutes themselves. While the right of recovery for prenatal injury to a living child is a common law right rather than statutory in most jurisdiction, ^{36/} the right of recovery for wrongful death is statutory. There are two types of wrongful death statutes: the "death acts" which create a new cause of action for the death in favor of the decedent's personal representative for the benefit of certain designated persons, and the "survival acts" which proceed upon the theory of preserving the cause of action vested in the decedent at the time of death and enlarging it to include the damages resulting from his death. ^{37/} In some death act jurisdictions the contributory negligence, consent, or assumption of risk of a beneficiary is held to preclude the action, at least on behalf of that beneficiary. ^{38/} Thus in those jurisdictions the fact that a parent had knowingly subjected him or herself to the risk of miscarriage by working in a PVC manufacturing plant could defeat an action based on the wrongful death of the miscarried fetus.

^{36/} For examples of cases based on statute see Norman v. Murphy, 124 Cal App.2d 95, 268 P.2d 178 (1954) and Cooper v. Blanck, 39 So.2d 352 (La. App. 1923).

^{37/} Prosser, supra, at 902.

^{38/} Id. at 913-914. supra at 913-914.

The defense of contributory negligence on the part of the parent would not be available, however, in wrongful death actions brought in survival act jurisdictions or in actions brought by a living child for prenatal injury. This is the case, of course, because the plaintiff is the child not the parent and normally a plaintiff's action will not be barred by the negligence of a third person. 39/

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There was a time when most jurisdictions held that a parent's negligence could be imputed to the child thereby barring the child's recovery, but this has been overtuned by statute or by decision in every state except Maine. 40/ Likewise, while a mother may waive her own right to recover for injury to a fetus, she cannot waive the right of the child to sue after birth.

39/ Id. at 488.

40/ Id. at 490.

Thus it is clear that the Company's fear of lawsuits has basis in the law. Furthermore, there is some reason to single out fertile women as an area of concern since there is a greater chance that an employer would be held liable for post-conception damage to a fetus subsequently born alive. Of course for this to constitute a business necessity defense the Company would have to show not only that employing fertile women would result in an increased risk of being sued, but also that there was a significant likelihood of plaintiffs recovering in such suits. ^{41/} It is our position that by complying with the OSHA standard and taking certain other steps discussed infra the Company could reduce the risk of recovery by a plaintiff to the point where it would be highly unlikely.

Since we know of no instances in which suits have been brought in factual situations similar to that at issue here, it is not possible to say whether a court would apply a strict liability or a negligence standard. ^{42/} Assuming that a negligence standard were used, the plaintiff, of course, could not recover unless negligence was proved. Consequently the Company could present as a defense the fact that it has met its duty of due care. Adherence to the OSHA standard would in itself be evidence of due care, although it would not be conclusive evidence since the standard is a minimum requirement and a court could hold that under special circumstances the Company was required to do more. ^{43/} The Company could guard against this possibility by taking such additional steps as warning all employees of the hazards of VCM exposure; making voluntary pregnancy tests available so that women could determine their pregnancy at the earliest possible date and

^{41/} The Company would also have the burden of showing a likelihood that such recoveries would result in severe economic consequences.

^{42/} Dillon v. SS Kresge, supra note 31, was brought under a negligence theory. It can be distinguished from our situation, however, since it did not involve the manufacture of a hazardous substance.

^{43/} Prosser, supra at 203. See also Moore, "Radiation and Preconception Injuries: Some Interesting Problems in Tort Law", 28 Southwestern LJ 414 (1974).

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take further precautions; advising women who were risking pregnancy to use respirators at all times; and offering to all pregnant workers paid maternity leave and/or the option of transferring to a safe job for the duration of the pregnancy without loss of pay or seniority. 44/

It would appear from the evidence available that if the Company took all these steps it would greatly reduce, if not eliminate, the risk of transplacental carcinogenesis. While respirators have their drawbacks, 45/ they would appear to effectively eliminate exposure to VCM. 46/ Thus the use of respirators by women who were risking pregnancy should protect them from fetal exposure prior to the time they are aware of the pregnancy. Offering facilities to assist women in detecting their pregnancies and creating a situation where women would not be under economic pressure to remain on a job where there was danger of exposure during the pregnancy, should be sufficient to constitute due care on the part of the Company.

The Company may be concerned, however, about the possibility of women negligently failing to avail themselves of the above precautions. As we have seen, contributory negligence on the part of the mother would not bar the child from recovering against the employer. However, under a negligence standard recovery is only possible if the employer has indeed been negligent. If the employer exercised due care and the injury resulted from the mother's negligence, the liability would be hers. Furthermore, even if there were negligence on the part of the employer, the failure of the mother to take reasonable precautions, assuming she was made aware of the dangers, could be regarded by a court as an intervening cause of the injury to the child and

44/ See the OSHA statement in connection with its notice of additional comment period and informal public hearing regarding the lead standard, 42 F.R. 46547 (September 16, 1977).

Footnotes 45 and 46 are on page 27.

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result in no recovery against the Company. 47/

Strict liability is imposed in some cases where the defendant is engaged in abnormally dangerous activities. When strict liability is imposed a defendant may be held liable even though he or she has not departed in any way from a reasonable standard of care. 48/

Even under strict liability, however, a defendant can avoid liability where the plaintiff has voluntarily and unreasonably encountered a known danger, 49/ or through the independent act of a third person. 50/

While it is not necessary to prove negligence in order to recover under a strict liability theory, it is necessary to prove causation. If the injury to the fetus was caused by the mother's negligence--for example, in failing to use the respirator when she knew she might have been pregnant--the child may not be able to recover against the Company.

45/ Firestone in its application for the variance discussed supra lists many problems employees experience with respirators such as increased fatigue, discomfort, danger of tripping, facial itching, hair loss, difficulty with eyeglasses.

46/ Society of Plastics Industries Inc. v. Occupational S. & H.A., supra at 1310.

47/ Prosser, supra at 288-289.

48/ Id. at 494.

49/ Id. at 523.

50/ Id. at 521.

III. CONCLUSION

As we have seen, Firestone's exclusion of fertile women from PVC production jobs is sex discrimination which is not justified by a bona fide occupational qualification. While the Company may be justified in its concern for the health of its employees' offspring, it would be feasible for it to institute steps which could greatly reduce, if not eliminate, the likelihood of transplacental carcinogenesis. Such steps would also provide a defense in the event of a lawsuit by an employee's child. Thus the Company can not make out a showing of business necessity and is in violation of the nondiscrimination and affirmative action obligations of Executive Order 11246, as amended.

We therefore recommend that the Company be notified of its noncompliance with the Executive Order and that enforcement action be instituted if necessary. In addition we recommend that notification be issued to all compliance agencies of the position OFCCP is taking in this matter so that appropriate action can be instituted against other contractors who have similar exclusionary policies.

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