EMPLOYMENT TOPICS AND COMMENTARIES

The Journal of the Committee on Equal Employment and Collective Bargaining

Katherine Savers McGovern
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To Our Readers:

The Council on Labor Law and Labor Relations is combining the Labor Law Forum and the Equal Employment Topics and Commentaries into one quarterly publication which will be known as Employment Topics and Commentaries.

I am constantly interested in receiving articles relating to labor issues, and seek the readers' input. If you have any comments or suggestions, please let me hear from you. Correspondence will reach me through the Federal Bar Association's offices, 1815 H Street, N.W., Suite 420, Washington, D.C. 20006.

This issue of Employment Topics and Commentaries contains two articles. The first article is by Josephine Trevathan, Esq., who has written a provocative article discussing the interrelationship of Title VII and OSHA, and the difficult questions facing employers and the government when OSHA standards produce sex discriminatory results.

Robert Coulson has written remarks concerning the establishment of arbitration as a primary American system resolving grievances between labor and management. His remarks were delivered at the Federal Bar Association Annual Convention in San Juan, Puerto Rico, November, 1977.

The 1978 Equal Employment Practice Guide will be available from the Federal Bar Association in June. The 1978 Guide will be a one volume edition, approximately 250 pages in length. It will be divided into two parts, Substance and Procedures. A limited number of copies will be available from the Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. Contact the FBA if you wish to reserve a copy.

The 1978 Equal Employment Conference will be held June 5-6, 1978 at the Hyatt Regency in Washington, D.C. Those of you who missed the 1977 Conference should mark your calendar so you will be able to attend the 1978 Conference. For further information please contact the Conference Secretary, Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006.

THE "CONTROLLING" POINT IN THE HAZARDOUS WORKPLACE FOR THE NON-VIABLE FETUS: EEOC AND OSHA CONSIDERATIONS. 1/

by

Josephine Anderson Trevathan*

Introduction:

Title VII of the Civil Rights Act of 1964, as amended in 1972 (Supp. V), 42 U.S.C. §2000-3, et seq., and the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. 651, et seq., have an underlying legislative concern, viz., employment conditions.

Title VII, administrered by the Equal Employment Opportunity Commission (EEOC) has as its mandate the elimination of unlawful employment practices based on race, color, religion, sex or national origin which discriminate against a person in compensation or the terms, conditions and privileges of employment. It also prohibits any employment practice which limits, classifies or excludes a person within its protected class from equal opportunities with other workers or which adversely affects their classification status. Congress made only one exception to the applicability of Title VII and it is known as a bona fide occupational qualification (BFOQ) which permits sex discrimination where the employee's "genuineness" is essential to and inherent in the job to be performed, e.g., an actor, an actress, a wet nurse. 2/ The EEOC 3/ and the courts have construed this exception narrowly, as a rule.

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1/ President Carter addressed occupational health hazards in his environmental message to Congress on May 23, 1977 and said:

> "The presence of toxic chemicals in our environment is one of the grimmest discoveries of the industrial era ... health hazards in the work places cause at least 390,000 new cases of diseases and perhaps as many as 100,000 deaths annually ... [and he pledged] to examine the full range of reforms that might be undertaken to assure adequate compensation for occupationally induced diseases."

2/ See Section 703(a).

3/ But see General Electric Co. v. Gilbert, ___ U.S. ___, 97 S. Ct. 401 (1976) and the majority and dissenting opinions relative to the Equal Employment Opportunity Commission's Guidelines on Pregnancy, 29 CFR 1604.01 et seq.

The narrow exception to the proscription against sex discrimination reflects the intention of Congress to strike at the entire spectrum of disparate treatment between working men and women which operates invidiously to discriminate on the impermissible basis of sex classification. Compare Griggs v. Duke Power Co., 401 U.S. 421 (1971).

The Act, administered by the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), has as its purpose "...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions to preserve our human resources ... . 4/ It also contains provision for standards which may require that no employee dealing with toxic materials or harmful physical agents will suffer material impairment of health or functional capacity, even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life, Section 6(b)(5). Cf. Bureau of National Affairs, Inc., Occupational Safety & Health Reporter, reference file 71:.202. To effect the purpose of the Act, the employer's general duty is to furnish each employee employment and places of employment, free from recognized hazards causing harm, or likely to cause, death or serious physical harm. 5/ OSHA makes the necessary inspections based upon its list of priorities, at the top of which is imminent dangers. This priority inspection includes health hazards if there is a reasonable expectation that exposure to toxic substances of dangerous fumes, dusts, mists or gases are present and such exposure will cause irreversible harm to such a degree as to shorten life or cause a reduction in physical or mental efficiency, even though the resulting harm is not immediately apparent. 6/ However, when OSHA promulgates standards to regulate the level of toxic exposure in the occupational work place, it does not distinguish between the needs of men and women workers. It is reported that all OSHA standards are set to preserve the health of the white, Anglo-Saxon, protestant male, approximately 26 to 28 years old.

Where women have tried to exercise their Title VII opportunities to perform the more traditional male jobs, and are exposed to known or suspected toxic health hazards, they have run into exclusionary policies which perpetuate past sex discrimination based on protective laws and attitudes.

The most complex situation arises when a woman who is pregnant or of child-bearing age and capability, seeks a job, transfer, or promotion where she will be exposed to hazardous substances at levels which are unhealthy for her as well

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4/ 29 U.S.C. Section 651 2(b).

5/ 29 U.S.C. Section 651 5(a).

6/ Protection for Workers in Imminent Danger. Job Health Hazards Series. U.S. Department of Labor. Occupational Safety and Health Administration. April 1975. OSHA 2205.

as the embryo, fetus, and, possibly, future offspring. The problem poses enormous health concerns in Title VII enforcement for women. 7/

Applicability of Title VII and the Act:

A. Title VII

Proliferating scientific research on the development of a health embryo, or non-viable fetus, where the mother (or father as discussed infra) suffers occupational toxic exposure, and the accompanying exclusionary policies of employers to protect themselves against prenatal tort litigation, has created the newest impediments to women's opportunities for equal access with men to the job market. Many employers now exclude all women; others have policies which discriminate on the basis of fertility or pregnancy. Among the more flagrant practices which are sexually discriminatory in the terms and conditions of employment are these: requiring proof from a physician that the female applicant or incumbent does not have childbearing capability, discharging incumbent females who become pregnant

7/ Beyond the precise issue explored in this article, women and minorities are subject to particular carcinogenic susceptibilities which may or may not be among the health hazards to which they are occupationally exposed.

Black men, historically subjected to the dirtiest and least desirable jobs, have higher rates of cancer of the esophagus, lung, colon-rectum and prostate; stomach cancer is common to the Japanese; and white women have more breast and endometrial cancer than do blacks but black women have a significantly higher rate of uterine-cervical cancer. Skeptic. May/June 1977. p. 39. Sickle cell anemia is reported only among blacks and it is adversely affected by occupational accumulation of blood lead levels. In a statement presented to OSHA's hearings on Proposed New Lead Standards when one witness offered this fact he coupled it with the recommendation that employers should make certain to exclude blacks from such health hazard exposure. S. Piomelli, M.D. Draft of Presentation circulated by OSHA. Testimony at OSHA's hearings on Proposed New Lead Standards. March 1977. p. 21. Additionally, blacks have a significantly higher susceptibility to hypertension which is adversely affected by lead poisoning.

It is also reported that "Government's top health score keeper said that the 'most startling, most important' rise in cancer deaths in the last quarter century occured among black and other non-white adult males ... at least part of the answer lay in the heavy migration of blacks from rural areas into industrialized cities where in higher proportion than whites, they took jobs that exposed them to cancer causing chemicals." Cf. The Washington Post. June 15, 1977. p. A2.

8/ According to the Detroit Free Press (April 15, 1976), a mother of four who was employed at a lead storage battery plant of General Motors of Canada, Ltd., had herself sterilized in order to keep her job.

Andrea Hricko, with Melanie Brunt. Working for Your Life: A Woman's Guide to Job Health Hazards. 1976. p. A-40.

without wage, seniority or job retention rights but which benefits are extended to men who are temporarily away from the job for health reasons, transfering pregnant females to healthier occupational surroundings but to lower paying jobs, requiring females to sign "informed consent" statements to establish their assumption of risk, requiring fertile females to regularly report any irregularity in their menses as well as possibilities of conception, inter alia. (Obviously, some practices raise the further question of an invasion of privacy.) And where the exposure to hazardous chemicals are known or suspected to have a cardinogenic or mutagenic effect on the male reproductive system but the exclusionary policy is only directed to women, then the Title VII violation is all the clearer.

This has been true particularly in the area of the heavier, dirtier, more physically tiring, late-shift or hazardous (both in terms of physical safety as well as exposure to toxic chemicals) jobs. This arose out of industry's paternalistic wisdom that it knew best what work was suitable for women and what women were best suitable for. "Woman" should not lift heavy materials because she was not as strong as men; 9/ she, perhaps, should not work when she had pre-school age children if it is shown that conflicting job and family obligations exist and they are demonstrably more relevant to job performance for a woman than for a man; 10/ marriage per se divested her of skills she possessed as a single woman when she wanted to continue to perform the same job; 11/ and she should not be subjected to night work, even on a highly speculative and occasional basis, since she might be accosted and harmed in going to and from work. 12/

In Weeks v. Southern Bell Telephone & Telegraph Company, 408 F.2d 228 (5th Cir. 1969), these types of pervasively discriminatory policies were observed memorably by District Court Judge Johnson as follows:

> "...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." (Emphasis added)

Whether such policies were intended imperiously or altruistically for the protection of "woman's" procreative capabilities or slyly for the enhancement of the man's paycheck (since, coincidentally, "male" jobs paid more than the stereotypical "female" jobs) is irrelevant. The good intent or absence of discriminatory

9/ Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

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

11/ Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). Certiorari denied, 404 U.S. 991.

12/ Weeks v. Southern Bell Telephone & Telegraph Co., supra.

intent held by those who adopted such policies does not redeem them since sex-gendered considerations operate as "built-in headwinds" for women including the subsumed classes of those who are of child bearing age and capability, pregnant or lactating. Compare, Griggs v. Duke Power Co., supra.

Exclusionary policies erode the remedial and humanitarian purposes of Title VII. Their adoption by employers, for whatever protective reason, means that the economic needs of many women continue to be unmet solely because of their sex. Most women work because of necessity.

An AFL-CIO study by Ann Draper shows that of the 37.8 million women in the labor force in March, 1976, 16 million or 43% were single, widowed, separated or divorced. The study refutes arguments that a woman's decision to work or not to work is largely voluntary by showing that 84% of the women in the labor force last year (1976) either supported themselves or were married to men whose 1975 income was under $15,000. 13/ Moreover, since 1940 to the 1970's, the number of working mothers (women with children under 18) increased approximately nine-fold and now numbers 13.0 million (approximately), with an increase of 3.7 million in the last decade. 14/ It has been projected that the number of women of child-bearing age will continue to increase and there will be, probably, over 22 million women in 1980 from the age 20 to 44 in the workforce of approximately 41 million women, with over an expected one million births per year if only 5% of the 22 million become pregnant. 15/

Where these women wish to exert their working choices relative to male jobs exposing them to hazardous substances, if fertile or pregnant, it has been proposed that there be a balancing of health and economic implications with the informed decision being made by the woman. 16/ While this is fair and establishes parity between men and women workers in their choices, it imposes an onus akin to cruel and inhuman punishment on the woman - an onus and condition of employment not yet placed on fertile males. It is Hobson's choice for women to be forced to select on one hand economic survival with their offspring exposed to congenital defect risks or, in the alternative, economic penurity to protect the offspring from toxic occupational exposure.

Another recommended resolution of the problem, is to establish maternity benefits which would include wage rate and seniority retention for those women who would be moved to healthier jobs and a guarantee of their former job with those retained benefits upon return to work after the end of pregnancy. 17/

13/ The Wall Street Journal. May 23, 1977. p. 1.

14/ Hricko and Brunt, supra, p. A-10.

15/ Vilma R. Hunt. Testimony at OSHA's lead hearings, supra, pp. 2, 3. (Based on U.S. Department of Commerce, Bureau of the Census, Current Population Reports. Series P-20 Nos. 263 and 269.) (Udry 1975.)

16/ Just as Congress provides financial aid under certain conditions to miners suffering black lung disease, a plan to implement these goals might be developed within President Carter's concept of "adequate compensation" for occupational health hazards. See f.n. 1, supra.

17/ Catherine East. Testimony at OSHA's lead hearings, supra, p. 14.

While acceptable as far as it goes, it is inadequate to assure the health of fertile women (and men) and the development of a health viable fetus, in many cases, as discussed infra.

To exclude these women, for the one biological characteristic distinguishing the sexes as though it were a BFOQ, mocks the intent of Congress. Indeed, if we do not find a way to eliminate fertility and pregnancy as disqualifications for women to freely exercise their Title VII employment choices, the intent of Congress may evaporate while the fetus takes us back full circle to "grand-pere" paternalism this time.

B. The Act

To date, OSHA has not acknowledged a statutory duty to promulgate standards which protect the occupational health of women in general, and certainly not the health of those who are of childbearing age and capabilities or pregnant. The Act requires otherwise.

When Congress acted to protect the health of working men and women, it was aware of toxic chemicals as hazards to be controlled or eliminated. It was aware, further, that six years earlier it had acted to give women the opportunity to compete equally with men for employment unless the job was within the BFOQ exception. Significantly, Congress did not revoke or modify that opportunity when it passed the Act or amended Title VII in 1972. The Act reaffirms Title VII's intent to eliminate sex-gendered discrimination particularly where health hazards exist as its purpose clause testifies. The beneficiaries of the legislation are deliberately identified with unambiguous specificity as "...every man and woman ...". Except for "every", no modifying adjectives are used. The beneficiaries could have been identified collectively as "employees" (as Congress does so throughout most of the remainder of the Act) or "workers" or "...every man and woman except women who are, or have the capability to become, fertile, gravid or lactating...", but it did not. Thus, giving each word in the phrase its plain and ordinary meaning, all men and all women, including women in their total and unique biological, functioning capacity as child bearers, are protected from occupational health hazards even if their requirements are lower than necessary for other workers. Moreover, the statutory language of the Act in Section 6(b)(5), supra, at p. 2, contemplates that OSHA standards shall not only protect the status quo health of incumbent workers but the exposure standards must be promulgated in terms of the prevention of material impairment of all workers' physical efficiency and functional capacity.

Fertile workers have reproductive capabilities as one of their bodily systems, a fact well known to Congress. Since that system is not exempted from the legislation, OSHA's standards must protect the procreative systems of every man and woman according to the individual functional capacity for which it was designed. 18/

This is required for the further reason that the purpose clause states its intention to preserve our human resources. A dual responsibility inheres in that mandate; first, to every incumbent worker as individuals and, second, to the general welfare of the public's health interest in those workers since their offsprings are our future human resources. Absent that construction, the Act's general provision on unimpaired functional capacities of all workers would be meaningless where they are fertile. To preserve our human resources requires protective health measures in the workplace on a continuing basis while they are non-viable fetuses and before they become workers.

Toxic Health Hazards as they Affect the Non-Viable Fetus:

Until there is a "quickening" or the embryo fetus becomes "viable, it is not a person within the meaning of the 14th Amendment of the U.S. Constitution. It has no rights." Roe v. Wade, 410 U.S. 113, 158 (1973). The embryo is the fetus in the earliest state of development, but the expression "viable" means the child has reached a stage of development where it can live outside the female body as well as within it. A fetus generally becomes a viable child between the sixth and seventh months, cf. Wendt v. Lillo, 182 F.Supp. 56 (1960), even though it may need artificial help. 410 U.S. at p. 160. Thus, "...since the unborn have never been recognized in the law as persons in the whole sense ...", cf. 410 U.S. at p. 162, where it enters the workplace with the mother and is exposed to hazardous fumes, dusts, mists, or gases vis-a-vis her host body, even if this is in a state which now permits redress of torts as prenatal injuries, it appears that recovery would be limited to a viable fetus which was viable at the time of injury. See, 410 U.S. at pp. 161, 162. This evidentiary standard places an inordinately difficult burden of proof on the plaintiff suing for fetal injury since the necessary research is so complex and only beginning to emerge from these toxic Pandora Boxes. What is known with certainty, however, is that thousands of toxic agents are spread throughout the various workplaces and a substantial number constitute health hazards to the developing embryo-fetus.

18/ Whether fertile or pregnant women are allowed their rightful place with men in the workplace harboring health hazards, fertile male workers should be concerned about risks to their future offspring since their toxic exposure represents accumulative risks. Dr. Kenneth Bridbord reports that these risks to the health of the mother and the non-viable fetus exist not only at work but through toxic exposure in the home as well as the environment.

As Dr. John Kinklea said, "The first thing is to get all of us male chauvinist pigs thinking about this problem."

Both men made their observations at a 1976 conference on the subject of women who are occupationally exposed to hazardous substances. See fn. _______, p. 12, infra.

It is further known that the reproductive systems of not only females but males may be genetically changed or harmed by toxic exposure from mutagenic and carcinogenic substances. 19/

Where this occurs, with either the male or female, the development of the embryo into a healthy fetus is impaired. Where the male sperm or the female egg cells have been permeated by mutagenic chemicals, and any one of the germ cells is genetically changed and subsequently involved in the fertilization process, the mutation may result in death of the fetus before birth (spontaneous miscarriage), 20/ or, if it survives, it may develop into a fetus with a genetic defect in all of its cells. Id. Mental retardation, congenital defects, or other physical or mental abnormalities may result in the child, and, again, if the child survives, the defect may be passed on to all of its children. Id.

Where men are exposed to certain health hazards on the job, e.g., lead, vinyl chloride, anesthetic gases, estrogen, inter alia, their reproductive systems may be affected in ways which will cause a decrease of male potency, testicular atrophy, alterations of the spermatozoa, an increased number of first year deaths of children conceived by them, Id., increased numbers of children with birth defects, 21/ and sterility. 22/

19/ Hricko and Brunt, supra, Id.; see also Hunt, supra, p. 4. So far, OSHA has designated 14 hazardous substances as carcinogens, including asbestos and vinyl chloride and issued standards on that basis for their permissible levels. In doing so, however, the standards have not been determined with the needs of fertile workers or the non-viable fetus in mind.

20/ Joana Lanckranjan, M.D. Testimony at Lead Hearings, supra., p. 4. See also, comments by Peter Infante, M.D. Society for Occupational and Environmental Health: A Summary on Women and the Workplace., Washington, D.C., June 17-19, 1976., p. 55. Studies reveal that even slightly increased lead absorption can cause damage to sperm cells.

21/ Hricko and Brunt, supra, p. C-10 - C-14. Where males are exposed to anesthetic gases in the operating room, their wives have an unusually high number of babies with birth defects.

22/ Wilma R. Hunt, supra, p. 4. Lead exposure can cause sterility but after withdrawal normal pregnancy may follow. In the case of vinyl chloride, exposure to it by male workers can cause genetic changes in the sperm. Hricko and Brunt, supra, p. 15. As proven with many toxic chemicals to which only the male worker is exposed, studies have shown marked increases of miscarriages and still-births by their wives. Id.

OSHA designed vinyl chloride as a suspected carcinogen on the basis of the finding by the National Institute of Health for Occupational Safety and Health (NIOSH) (pursuant to the studies of Dr. Cesare Maltoni, Institute of Oncology and Tumor Centre, Bologna, Italy) that the offspring of pregnant rats exposed to vinyl chloride developed angiosarcoma of the liver; NIOSH recommended "...that no woman who is pregnant or who expects to become pregnant should be employed directly in vinyl chloride monomer operations", but OSHA did not find the evidence sufficient enough to modify the standard. Wilma R. Hunt. Occupational Health Problems of Pregnant Women. Department of Health, Education and Welfare. April 30, 1975. p. 72. An EEOC charge of sex discrimination is pending against an employer using vinyl chloride since women are excluded from working in that division.

Men's occupational exposure to hazardous substances, therefore, is a demonstrably contributing factor to statistics which show that one-third of the beds in children's hospitals are occupied by congenitally defective persons and that congenital disease is the third most common cause of death in the newborn. 23/ Nevertheless, not only have the standards not been reduced appropriately to protect the healthy functional capacities of fertile males relative to future human resources, many of whom may be expected to become the workers of the next generation, but men are permitted freely to work subject to such exposure while women are excluded. 24/

Thus, by the terms and effect of the exclusion against all women, the policy is sex-gendered. The protective employment practice for the benefit of women in general, and especially so in regard to gravid or fertile women, must be viewed as a pretextual policy to continue to discriminate in favor of men on the basis of sex, since the health of all men is similarly subject to risks from occupational exposure. See General Electric Co. v. Gilbert, __U.S.__, 97 S.Ct. 401 (1976).

Industry's Exclusionary Policy Rationale:

Since accepted research establishes the nexus between toxic occupational exposure to prenatal injuries, industry believes its exclusionary policies are necessary for the protection of the mother and the developing fetus. It has acted at the risk of vulnerability to Title VII charges on the basis that Title VII and the Act are on a collision course.

Industry argues that since the health of the developing fetus and the mother may be impaired by toxic job exposure, and because it is difficult to monitor the commencement of pregnancy and exercise other employment procedures to assure healthy fetal progress, the exclusionary policy is morally required. The policy, then, becomes one of health and not sex discrimination. Therefore, the argument continues, when OSHA has established standards for the industry, compliance with those standards is all that is required of the employer even if they are inadequate for the total protection of the pregnant worker, i.e., workers may be justifiably excluded where the levels of toxicity are unsafe. There is no "either-or" conflict between the relevant laws.

23/ Hricko and Brunt, supra, p. B-8.

24/ EEOC has published two decisions based on exclusionary discriminatory practices because of radiation exposure by pregnant females. In both, it employed the business necessity defence, Robinson v. P. Lorillard Co., 444 F.2d 791 (4th Cir. 1971), requiring a showing that the discriminatory practice is necessary to the safe and efficient operation of the business. It requires, also, a showing that the policy effectively carries out the business purpose for which it is designed, as well as proof that no alternative policies are available which would accomplish the purpose with a lesser differential impact upon the affected female. Testimony of Constance Dupre on behalf of EEOC at the OSHA Lead Standard Hearing, March 1977. Tr. pp. 4097-98. See also EEOC Decisions 75-072 and 75-005.

Unless it can be shown that healthy occupational environments for Title VII class members were excluded from the Act, the two statutes must be harmoniously interpreted and enforced if at all possible. It is not difficult to do so.

The employer's duty to protect the health of every man and woman worker is a facially neutral employment condition created by the Act. OSHA's standards and the exclusionary policies of industry have implemented the Act in a way to cause a disparate impact on women which is sex gendered. Since compliance with the Act will eliminate the problem, a business necessity defense can never prevail and Title VII should be enforced without exception. See Robinson v. P. Lorillard Co., 444 F.2d 791 (4th Cir. 1971).

Any other interpretation of these discriminatory policies against women makes Title VII irrelevant. It suggests the repeal of Title VII by implication which, of course, violates the "cardinal rule...that repeals by implication are not favored." Posedas v. National City Bank, 296 U.S. 497, 503 (1963). Cf. Morton v. Mancari, 417 U.S. 535 (1974).

There is nothing in the Act or its legislative **history to show an affirmative** intention to effect repeal of Title VII's proscription against sex discrimination. And to so imply is inconsistent with other legislation to similarly benefit women in the employment market, e.g. the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1970; and also Executive Order No. 11246. 25/ The Act expresses the same concern; thus, construed together, these laws reveal a continuing sentiment to uplift women through an established legislative pattern. Nor can it be implied that it was the "clear and manifest" intention of Congress to repeal Title VII's sex proscription since each law prior and subsequent to it have conferred substantial rights on women. Compare United States v. Borden Co., 308 U.S. 188, 189 (1939). Cf. Morton v. Mancari, supra.

On the contrary, this pattern constitutes independent evidence that the legislative intent of the Act cannot now, because of surfacing medical and scientific research, be viewed as the repeal of longstanding remedial Title VII purposes. Therefore, Title VII and the Act are clearly capable of co-existence. Any hint of conflict or implied repeal is inappropriate. When read together, their harmonious interpretation is simply that every man and woman, except in the case of a BFOQ, have the equal opportunity to do the same job based only on their individual job related qualifications and when any worker chooses a job requiring toxic exposure, such health hazards shall not be maintained at levels to impair their physical efficiency and functional capacity. (Even under the Gilbert decision, pregnant women have Title VII protection.) This reconciliation is compatible with each statute and does not make either subservient or repugnant to or exclusive of the other. It establishes the complementary nature between them relative to an employment condition, viz., the health of all workers.

25/ Executive Order No. 11246 prohibits discrimination based on race, color, sex, religion, or national origin by contractors doing business with the federal government. It is enforced by the U.S. Department of Labor, Office of Contract Compliance.

The "Controlling" Point for Protection of the Non-viable Fetus:

Where the pregnant worker is occupationally exposed to toxic substances, the health of the non-viable fetus must be protected, not because of any inherent or legal right it enjoys as a constitutional person, but merely because protection is the natural, although secondary, benefit afforded by the Act where workers are capable of having children. It is the exercise of this capability which is the source of the protection, not conception, per se. But to give meaning to that functional system in the qualitative way contemplated by Congress, research has established that healthy offsprings require the lowest exposure level for healthy developmental environments. The first trimester of pregnancy is considered generally, as the most critical for healthy fetal development, 26/ the natural consequence of the mother's child bearing functional capacity.

With Roe as the frame of reference, the required recognizable and enforceable statutory justification for toxic protection of pregnant workers is evident in the Act and Title VII; similarly, the biological and logical reasons which support it. And, thus, the "controlling" point which triggers the public's general welfare interest in the pregnant worker's health is her initial occupational exposure as soon as conception occurs even if unknown to her. The permissible toxic levels must always be set for the protection of the non-viable fetus.

This is so for two reasons. First, this is the only way to assure the integrity of all fertile workers' reproductive systems and fertile women's child bearing functional capacities. 27/ Second, this is the only point which will effect the purpose of Title VII to give women non-sex-gendered employment choices and simultaneously fulfill the purposes of the Act.

To require protection of the childbearing capacity to its natural conclusion, is not to veer from the rule that the non-viable fetus is not a person. The two applications are legally distinguishable, and the determinative selective criteria for the "controlling" points are as well.

The right of the state to legislate in the private matter of the termination of a pregnancy is not triggered until there is viability since it is only the protection of the potentiality of life which vests an interest in the state in this otherwise private matter. Roe. When Congress however, passed the Act under its power to legislate for the general welfare of the people which includes health as a valid public interest, — Congress did not choose, as states may do in abortion matters, the protection of life as the absolute, but rather, the quality of present and future life as the absolute. That is, the assurance of health, not the assurance of life. Moreover, the Act triggers standards across the board for the health totality of every worker irrespective of whether conception occurs. But, with the state, conception is necessary as a condition precedent to the possible ripening of a future interest. Also, Congress has said that the healthy functional capacity of the fertile male worker and his future offspring as human resources are desirable goals for the general welfare, but in abortions the father's health is irrelevant to the state's interest.

26/ Hricko and Brunt, supra, p. B-9.

27/ The acceptable alternative would be to set levels protective of fertile men and women and maintain a surveillance program to detect pregnancy within ten days, at which time, equitable procedures would be implemented immediately to eliminate the risk to the non-viable fetus while the mother's economic position is totally protected.

Thus, the rationale of each "controlling" point is predicated on the purpose to be effected in the public interest. In each case the earliest determinative event for the legislated purpose — protection of life or health — was selected according to that point when the purpose and the means coalesced. Here, coalescense occurs when the non-viable fetus is first subjected to occupational health hazards.

In the Act, Congress has provided the legislative broom to swiftly sweep aside the pretextual considerations which exclude pregnant females from working in male jobs. OSHA is obligated to use it to fully protect her total health.

POISON IVY IN A POT: GRIEVANCE ARBITRATION IN THE FEDERAL SECTOR

by Robert Coulson*

In the private sector, grievance arbitration has become an integral part of the labor contract. It was relatively easy to persuade private employers that contract grievance procedures, ending in binding arbitration, were a better way to settle grievances than through strikes. That was good management. By eliminating strikes over grievances, the American labor relations system has shown a marked advantage over such countries as England and Australia.

Taft-Hartley and subsequent favorable court decisions helped to establish grievance arbitration as the primary American system. Grievance arbitration is recognized as an important American management innovation, eliminating strikes over grievances and providing a mechanism through which workers can obtain realistic decisions as to their employment disputes. It has accomplished this, without burdening the courts or the regulatory agencies.

Federal collective bargaining had quite different roots. Bargaining in the Federal sector is not the all-encompassing engine for change that it has been in the private sector. Consequently, Federal contractual grievance systems have been less important.

In the beginning, Congress determined wages and working conditions in Federal employment. The primary function of Federal unions was to lobby for their members.

The Pendleton Act, in 1883, created the Civil Service system, to set the basic rules for hiring, dismissal and promotion, under the banner of the Merit System.

With the Kennedy Executive Order in 1962, the serpent of collective bargaining was released into this cozy garden. Now, contract negotiations could occur within the confines of the Federal womb. The scope of bargaining was intentionally narrow. Neither the Assistant Secretaries nor some of the union leaders were ecstatic with this new game. They regarded it for what it was: Poison ivy in a pot.

Subsequent Executive Orders extended the scope of bargaining and the Pay Comparability Act shifted the authority for fixing wages from Congress to the President. But collective bargaining in the Federal sector is still a modest part of the action. Local union leaders and agency labor relations personnel do not yet play a major role in Federal labor relations, although they seem to be moving in that direction. In time, collective bargaining may come to shape the important labor relations decisions of the Federal Government.

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* President, American Arbitration Association. Remarks delivered by Michael Hoellering, Vice President, American Arbitration Association at the Federal Bar Association, Annual National Convention, Program of Council on Labor Law and Labor Relations, San Juan, Puerto Rico - November 11, 1977

Not yet. The Federal employee still looks to the Administration and to Congress for ultimate rewards. Only for on-the-job protection does the worker look to the union, and only where there is a union. Some 52% of the Federal employees are covered by collective bargaining contracts. For those workers, the grievance process now gives unions an opportunity to serve their members.

In the private sector, the strike gave both parties a reason to accept grievance arbitration. But in the Federal sector, things were different. Federal employees did not have the legal right to strike. Nor did they much desire that right. Arbitration was not to be a quid pro quo for giving up the right to strike. Rather, it was a system created by Executive Order, recommended by a study commission. Considering its source, it is not surprising that Federal grievance arbitration is a sickly cousin of its private sector counterpart.

In the Federal sector, contractual grievance procedures must operate in the narrow space between other established grievance channels. It is subject to rules and regulations governing arbitrability. There are established procedures for selecting between appropriate remedies. The Federal sector is a cat's cradle of procedures designed by government lawyers.

In spite of all that, Federal sector grievance arbitration has been growing. For those Federal employees who are covered by collective bargaining contracts, binding arbitration has become the normal way to resolve certain categories of disputes between employees and agency management.

By 1972, the trend was obvious, as then Associate Solicitor for Labor Relations in the Department of Labor, William J. Kilberg wrote in the Monthly Labor Review: "Grievance arbitration procedures in the Federal sector have made many advances since their inception. The refinements in Federal labor relations made by Executive Order 11616 strongly indicate that Federal labor-management relations should continue to evolve into a fair and effective means of dispute resolution."

The Executive Orders and the Civil Service regulations determined the scope of Federal grievance arbitration. The Executive Orders authorized the use of contract arbitration. The availability of procedures for dispute resolution under the Civil Service regulations lessened the need for such mechanisms.

The first Executive Order, passed in January 1962 by President Kennedy, following the recommendations of a Task Force on Employee Management Relations of the Federal sector. That Executive Order 10988, authorized grievance and arbitration procedures if they conformed to Civil Service standards and did not impair the rights that employees already had. Arbitration provisions could be negotiated, but only if they were advisory rather than binding and only if they dealt with the interpretation or application of agreements or of agency policy. The Federal employee had to select between an applicable agency procedure or the grievance procedure negotiated by the bargaining agent. In any case, since the arbitrator's decision was merely advisory, the decision was still in the hands of the agency head.

By 1967, 19% of Federal employees were covered by some type of negotiated grievance procedure. But everyone was finding the dual system confusing and unsatisfactory. At that point, a second Task Force on Labor Relations in the Federal Sector was established. In 1969, it was recommended that grievance procedures established by the parties and meeting Civil Service standards should be the exclusive remedy available to employees. The Task Force encouraged the arbitration of grievances, subject to appeal in the courts. Private sector labor-management relations was to be the model.

In October 1969, President Nixon issued Executive Order 11491, which partially codified the Task Force recommendations. The negotiated procedure was to be the exclusive remedy available to employees where the agreement so provided. Executive Order 11491 authorized the negotiated grievance procedure to be exclusive for the life of the contract. But the underlying conflict continued between rights established by law or regulation and rights established by the collective agreement. In August of 1971, it became necessary for the President to issue Executive Order 11616, which made it clear that negotiated grievance arbitration procedures must restrict their application to the interpretation or application of the negotiated agreement.

Under Executive Order 11616, the use of binding arbitration continued to grow. A recent report on <u>Grievance Arbitration in the Federal Service</u>, published by the Civil Service Commission in July 1977, surveys 1,135 arbitration awards rendered in the past ten years, on file with the Labor Agreement Information Retrieval System (LAIRS) as of February 1, 1977.

The annual case load in the Federal sector has been increasing. Moreover, advisory arbitration has been substantially replaced by binding arbitration. In 1970, only 15% of the 67 awards rendered were binding. In 1976, only 4% of the 254 awards were advisory.

Arbitration in the private sector is more binding than binding arbitration in the Federal sector. Under Section 301 of Taft-Hartley the arbitrator's award is virtually impregnable, only subject to a motion to vacate in the Federal courts on limited statutory grounds. In the Federal service, the Labor Relations Council will grant a petition for review of an arbitration award whereever the award violates applicable law or appropriate regulations of Executive Order 11491.

On July 2, 1976, the Council issued the following guidelines clarifying the acceptable terms for review: (1) the award violates applicable law; (2) the award violates appropriate regulations; (3) the award violates Executive Order 11491; (4) the arbitrator exceeds his authority; (5) the award does not draw its essence from the negotiated agreement; (6) the award is incomplete, ambiguous and contradictory so as to make implementation impossible; (7) the award is based on non-fact; (8) the award was biased or partial; (9) the arbitrator refused to hear pertinent and material evidence.

These are relatively broad grounds for review. From 1970 through 1975, ninety-two appeals from arbitration awards were filed with the Council, a percentage of appeal far in excess of that found in the private sector.

The Comptroller General of the United States may also review third-party awards as they relate to the propriety of Federal expenditures authorized by a third party. LAIRS files contain 400 decisions from the Comptroller General. These were also reviewed in the July 1977 study.

Where appeals to the Federal Labor Relations Council are based on assertions that an award violated applicable laws, regulations or the Executive Order, the Council has required the agency to identify the provision violated and explain how it was violated. For example, in one case, the Council stated that "A contention that an arbitrator has failed to consider and decide, in the course of fashioning a remedy in a grievance arbitration, whether an unfair labor practice has been committed under Section 19 of the Order does not state a ground upon which the Council will accept a petition for review of an arbitration award." FLRC No. 74A-76, Rep. No. 76 (Office of Economic Opportunity and AFGE 2677-6/26/75).

Sometimes, the Council will seek an interpretation from the Civil Service Commission or the Comptroller General. This further complication to the system has the modest benefit of creating a case law as arbitrators' awards are tested against the boundaries of the applicable regulations. Hopefully, published reports will disclose whether an arbitrators award is likely to be upheld, thereby reducing the need for so many appeals.

A major source of controversy in Federal arbitration is whether the decision of the arbitrator must be based solely upon the provisions of the negotiated contract, or whether the arbitrator may also interpret external laws, Civil Service regulations or the administrative policies of the agency involved. The Civil Service Report of July 1977 concludes that arbitrators do not hesitate to interpret laws, CSC regulations or the Executive Order itself.

Often, the legal issue relates to the remedy. One such case is FLRC 75A-104 (Army Depot & AFGE, 2185-7/7/76) in which an arbitrator ruled that a promotion roster violated the negotiated agreement because names under special consideration and promotion condidates were combined. On appeal, the Council found that the arbitrator was entitled to overturn the agency's actions since they were not in accordance with the contract, but that the arbitrator was not authorized to award a promotion with retroactive back pay.

In the private sector, traditional wisdom is that arbitrators' decisions should be final, binding and enforceable. In the Federal sector, we see a higher rate of review and of over-turning awards. The grounds for appeal are more extensive. The Council has more actively tended to reverse the arbitrators' judgement, at least as to questions of external law.

Whether this aspect of the Federal sector grievance arbitration system will continue or whether a Federal labor relations law will strengthen the arbitrator's authority is difficult to forecast.

If arbitrators serving on Federal cases are expected to make determinations as to external law, they need to be familiar with the legal framework within which Federal grievances arise. Relatively few labor arbitrators have such expertise. The bulk of their experience has been in the private sector, and more recently in state and local public arbitration cases. The Federal sector is substantially different.

Labor arbitrators must be quick studies of a wide variety of legal environments. Some Federal parties may be willing to rely upon their arbitrator's ability to quickly absorb the gist of the Federal scene. But in other cases, parties may wish to select an arbitrator who is experienced and knowledgeable in Federal labor relations law. Such arbitrators are available and can be identified.

But, as the Federal case load continues to expand, there will be a need for more qualified arbitrators. I would encourage the Federal labor-management community to sponsor training programs for active labor arbitrators, to help prepare them for Federal sector cases.

The Executive Orders carve out certain areas where arbitration is not to be used. For example, appeals from "advance actions" cannot be arbitrated. They are subject to Civil Service appeal procedures. Adverse actions include discharge, suspension for more than thirty days, furlough without pay or reduction in rank or pay. Many of these disputes are traditionally arbitrated in the private sector. Discipline and discharge cases form the largest category of grievances in private industry. But they are excluded from Federal sector grievance arbitration.

Other issues are excluded by contract. According to a report from the Office of Naval Research, AD-775 866, <u>Grievance Arbitration in the Federal Service</u> by Michael E. Sparrough, Wharton School of Finance and Commerce, the following items are typically excluded from negotiated grievance procedures in Navy contracts:

1. violation of reemployment priority rights
2. reduction-in-force actions
3. violation of reemployment or reinstatement rights
4. violation of military restoration rights
5. performance ratings
6. job grading decisions
7. salary retention decisions
8. allegations of discrimination
9. adverse actions for political acts
10. an adverse action under 752(b) of CSC regulations
11. fitness-for-duty examination decisions
12. health benefit decisions
13. actions taken at direction of the Civil Service Commission

14. adverse actions under Executive Order 10450, and failure to be cleared for sensitive duties

15. action taken under any statute which authorizes any agency to take suspension or separation action without regard to 5 USC or the provisions of any other law

16. separation for failure to satisfactorily complete a trial or probationary period

17. decisions by an official of another activity

18. questions concerning the interpretation of any Department of the Navy of higher authority regulation or policy

19. a matter which is subject to final administrative review outside of the agency under law or the regulations of the Commission

20. the content of published agency policy

21. nonselection for promotion from a group of properly ranked and certified candidates.

This situation may change. The 1975 amendment to Executive Order 11491 permitted parties to extend the arbitration procedure to disputes over agency regulations. If the parties wish to do so, they now have the power to expand the jurisdiction of arbitration over such matters.

In practice, questions about the scope of the arbitration clause are usually resolved by the arbitrator. Ambiguous language generally will be interpreted in favor of arbitrability. As one arbitrator stated in LAIRS 10451 (FAA Honolulu, HI & PATCO 3/5/76), "The interests of the collective bargaining process as provided under Executive Order 11491 appear best served where grievances are not defeated upon technicalities but are ultimately resolved or settled on their merits."

In the Federal sector, the Assistant Secretary determines whether a matter is subject to arbitration under the agreement. Not many such cases have been heard by the Assistant Secretary. In one, the Assistant Secretary ruled that dispute was arbitrable and that even when an agency regulation covered the same subject, the arbitrator could consider it relevant in resolving the grievance.

Arbitrators are frequently called upon to interpret time limits. As in the private sector, arbitrators often give the grievant the benefit of any reasonable doubt but feel bound by specific time limits where failure to observe them appears inexcusable. Since many arbitration provisions in the Federal sector are newly drafted, novel questions are raised as to whether ambiguous time limits should be enforced.

The Federal arbitrator's authority to fashion remedies is circumscribed under interpretations of Civil Service regulations by the Federal Labor

Relations Council and of the Comptroller General, both of whom have authority to modify or vacate arbitration awards. These decisions frequently relate to the Back-pay Act as it applies to arbitral remedies.

On March 30, 1977, the Comptroller General published a manual of available remedies. This has been a valuable and timely resource for arbitrators in the preparation of their awards.

The promotion process is the source of many arbitration cases in the Federal sector. Almost one-quarter of the awards filed with LAIRS deal with promotion-related issues. Here, there is frequently a problem with selecting an appropriate remedy.

Report No. 72 of the Federal Labor Relations Council, issued on April 27, 1976 contains detailed guidelines on arbitral authority. For example, an arbitrator may not select a particular candidate from a list, except where that candidate would have been promoted but for the violation. In such cases, the promotion should be retroactive and the employee accorded back pay.

Many of the remedies employed by arbitrators in the private sector are not available in the Federal cases. In order to understand these differences, a labor arbitrator must be familiar with the rulings of the Federal Labor Relations Council or briefed on that subject in some detail by the parties.

Other familiar issues arbitrated in the Federal sector concern paid-leave time, dues withholding and such terms and conditions of employment as safety clothing, parking and job assignments.

The July 1977 Grievance Arbitration in the Federal Service report of the U.S. Civil Service Commission contains a detailed analysis of Federal cases. A breakdown of the arbitration cases by subject category shows that the two major categories are promotion and discipline. A box score indicates that 554 grievances were denied, compared to 432 sustained. Of the latter, 97 contained "make whole" orders, 71 required reparation by management, 68 ordered reinstatement with backpay and 13 reinstatement without backpay.

Grievance arbitration in the Federal sector invites further research. Statistical reports are needed to show how arbitration is actually working in Federal cases. It is not enough to read the awards or the determinations upon appeal. Practitioners also need to know whether their case will be heard and decided by an informed arbitrator, within a reasonable period of time and at a realistic cost.

In the private sector and in state and local government, parties have a variety of arbitration systems from which to choose. They may utilize the services of the Federal Mediation and Conciliation Service. But there are other choices.

The American Arbitration Association is one such choice. It provides comprehensive administrative services. In the private sector, many parties prefer such administration because they can select arbitrators on a local basis who are familiar with their problems. Under American Arbitration Association procedures, tribunal administrators monitor the performance of the arbitrator and handle the case in an impartial manner.

A large number of state and local contracts refer to AAA administration for the same reasons: independence from the employer government, professional administration, well-tested rules of procedure and a first-rate local panel of arbitrators.

In grievance arbitration, it is often helpful to have a matter heard swiftly, at a reasonable cost. The Expedited Labor Arbitration Rules of the American Arbitration Association can be useful. These procedures eliminate unnecessary transcripts and briefs and shorten the period between arbitrator selection and the issuance of an award. Most negotiated agreements in the Federal sector involve relatively small bargaining units. For these parties, it makes good sense to streamline the arbitration procedure.

Some Federal parties might prefer to have lists of arbitrators prepared by a private agency rather than one which is part of the Federal structure. The Executive Order does not require parties to use the FMCS.

The Postal Service Unions designate the American Arbitration Association for many of their cases, using AAA hearings rooms and administrative services. Federal sector cases are showing up with increasing frequently in our monthly publication, Labor Arbitration in Government, a summary of arbitration awards. In future years, more parties in the Federal sector may come to rely upon AAA administration.

In summary, the use of grievance arbitration in the Federal sector is growing, in spite of limitations imposed upon it by the Executive Order and Civil regulations. Although a higher rate of cases is being appealed than in the private sector, most authorities agree that grievance arbitration will serve an ever more useful purpose.

In view of the very complicated structure in which arbitration operates in the Federal sector, it would seem sensible to encourage education and training programs for advocates and for arbitrators. Professional organizations in the Federal sector should continue to exert leadership in sponsoring such programs.

Arbitrators who establish reputations for competence in the Federal sector will be able to expand their practice into other fields of arbitration if they so desire. People such as Howard Gamser, Robert Howlett and Jacob Seidenberg are living examples of the interchangeability of such skills between the Federal and other sectors. Lawyers and representatives in the Federal sector today will be handling cases in other sectors in future years. For both arbitrators and advocates, the American Arbitration Association can provide helpful career services. This should also be a growing area of interest for government attorneys.

It is my hope that labor arbitration will continue to perform a useful function in the Federal sector and that parties will use it in a responsible fashion. Federal grievance arbitration may break out of its present confines and will expand in the Federal sector as it has in private industry. By then, practitioners will no longer regard it as poison ivy. Rather, it will be a flourishing part of their practice.