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May 5, 1977

Health Hazards To Women In The Workplace: OSHA And Title VII Considerations

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I. Introduction

A topic of increasing interest and importance to employers in general is that of exposure of women of child bearing age to substances which may have harmful effects not only upon the woman herself but also upon her offspring. While certain substances with carcinogenic, mutagenic or teratogenic effect(s) have been so recognized for several decades, others have been identified only within the past several years. Still other substances at the present time are merely suspected of having such qualities. With the exception of those substances with an abortifacient action, there exists at least suspicion if not some evidence that certain of the substances may cause fetal damage not only through the mother by transplacental transmission, but also by the mother's, or the father's exposure prior to conception.

With the vast majority if not with all substances causing fetal damage, the scientific evidence to date is based upon studies of reproductive functions of women who have been exposed. These studies have not examined the effect upon reproductive functions of similarly exposed men. While the standards which have been adopted pursuant to section 6(b) of the Occupational Safety and Health Act,[1/] are not sex-specific as to exposure levels but rather are neutral, in practice several employers have determined that women of child bearing age will be excluded completely from jobs in which exposure to substances known to cause fetal damage is possible. Some of the considerations in adopting such a policy are explored in the following sections of this memorandum.

II. <u>The Occupational Safety and Health of 1970</u>

The now oft-cited purpose of the Occupational Safety and Health Act ("the Act")[2/] "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" in practice may result not only in conflicts with Title VII but also in labor-management relations problems.

A. <u>Specific Standards</u>

The Act provides its purpose is to be accomplished in part, by standards based upon "medical criteria which will assure insofar as practical that no employee will

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1/ 29 U.S.C. §656(b)

2/ 29 U.S.C. §651 *et seq.*

suffer diminished health, functional capacity, or life expectancy as a result of his work experience". In setting standards through the section 6(b) rulemaking procedures, the Occupational Safety and Health Administration consistently has invited interested parties to submit written data, views and arguments relating to the proposed standards. This is to provide the Secretary with the information necessary to fulfill the obligation imposed by section 6(b)(5) of the Act[3] that

> in promulgating standards dealing with toxic materials or harmful physical agents, under this subsection [the Secretary] shall set the standard which most adequately assures, to the extent feasible, on the basis of the best evidence available, that no employee 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.

(The term "feasible" has been construed to include both economic and technological feasibility. AFL-CIO v. Brennan, 530 F.2d 109 (3d. Cir. 1975); Industrial Union Department, AFL-CIO v. Brennan, 499 F.2d 467 (D.C. Cir. 1974)).

In the recent standards hearings on the proposed lead standard, the notice of hearing specifically requested from all interested parties information relating to the

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3/ 29 U.S.C. §655(b)(5)

role of a sex-specific standard.[4] The response of industry, despite the existence of some evidence indicating greater susceptibility of even non-pregnant females than males, was to address only the issue of a neutral standard. Under the section 6(b)(5) criteria, it is not inconceivable that the Secretary could adopt as the standard an exposure level that would protect the most susceptible employee. Any attack upon such a standard in the context of economic feasibility in a particular case would in all likelihood be difficult to establish before the Review Commission or a Court of Appeals.

The Review Commission previously has ruled that an employer may not defend against a citation due to a lack of funds to achieve abatement,[5] the OSHA Area Director's failure to consider the cost of abatement,[6] the cost of compliance exceeding the expenses resulting from job injuries,[7] the standard being impractical

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4/ The October 3, 1975 publication of the proposed lead standard in the Federal Register, 40 F.R. 45934, listed as one of the ten major issues of significance the following: "To what extent are there groups with increased susceptibility to lead in the working population, such as women of child-bearing age, and should such susceptibility, if it exists, be considered in establishing a standard for occupational exposure to any substance, in this case lead. . . ."

5/ Intermountain Block & Pipe Corporation, OSHRC Docket No. 298, 1 OSHC 3145 (Administrative Law Judge, 1972).

6/ Chief Freight Lines, Inc., OSHRC Docket No. 6483, 3 OSHC 2083 (1976)

7/ Arkansas-Best Freight System, Inc., OSHRC Docket No. 2375, 2 OSHC 1620, aff'd sub nom., v. OSAHRC and Secretary of Labor, 529 F.2d 649, 3 OSHC 1910 (8th Cir. 1976).

because of being overly expensive[8/] or very costly,[9/] or where the cost of compliance will be passed on to customers.[10/]

The one type of case in which the lack of economic feasibility has been accepted by the Review Commission is for violation of the noise standard.[11/] The preeminent decision in this area is Continental Can Company,[12/] in which the Review Commission held that both technological and economic feasibility were to be considered in deciding whether engineering and administrative controls were feasible to reduce noise levels. Chairman Barnako's lead opinion, however, specifically noted that with noise,

> the hazard is not life threatening . . . and although it will produce serious loss of hearing in some cases we must consider the fact that the harm in other cases will be little if any hearing loss. The situation, therefore, is distinguishable from life threatening hazards such as those posed by carcinogenic substances. (citations omitted) (emphasis supplied)[13/]

Thus, the Review Commission not only has exhibited little receptibility to the economic feasibility defense,

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8/ The Jos. Bucheib & Sons Company, OSHRC Docket No. 295, I OSHC 3106 (Administrative Law Judge, 1972).

9/ Mandell, Corsini, Inc., OSHRC Docket No. 2856, I OSHC 3310 (Administrative Law Judge, 1944).

10/ Reedy Tank Erectors, Inc., OSHRC Docket No. 5574, 2 OSHC 3310 (Administrative Law Judge, 1975).

11/ 29 C.F.R. §1910.95.

12/ OSHRC Docket Nos. 3973 et al., 4 OSHC 1541 (1976)

13/ 4 OSHC at 1547.

it has rather clearly indicated that its applicability may well be limited to other than "life threatening hazards."[14/]

Nor have the courts been receptive to challenges to standards based upon economic infeasibility of compliance. In Industrial Union Department AFL-CIO v. Brennan, supra, there is a thorough analysis by Judge McGowan of the Secretary's authority to consider the economic impact associated with a standard in which he specifically states:

> Standards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. 3 OSHC at 1829.

In subsequent cases, the courts have chosen to defer to the Secretary's determinations made in the rulemaking proceeding . AFL-CIO v. Brennan, supra. The Society of the Plastics Industry, Inc. v. OSHA, 509 F.2d 1301, 2 OSHC 1496, 1502 (2d Cir. 1975).

14/ In fact, where the "adoption of a [safety] precaution would clearly threaten the economic viability of the employer" the Review Commission has indicated that the preferred method of proceeding would be for the Secretary to "propose the precaution by way of promulgated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause." National Realty & Construction Company, Inc. v. OSHRC, 489 F.2d 1257, 1 OSHC 1422, 1427 n.37 (D.C.Cir. 1973).

Thus, once a standard has been promulgated, the possibility of having it overturned on the basis of economic infeasibility is limited at best.

Moreover, even viewing economic feasibility as only one portion of a defense based upon impossibility of compliance, the perception of the Act as a technology forcing mechanism indicates that little success can be expected by such a challenge. Thus, in The Society of the Plastics Industry, Inc. v. OSHA, supra, Justice Clark rejected just such a defense, noting:

> In the area of safety, we wish to emphasize, the Secretary is not restricted by the status quo. He may raise standards which require improvements in existing technologies or which require the development of new technology, and he is not limited to issuing standards based solely on devices already fully developed. (citations omitted) 2 OSHC at 1502.

Finally, OSHA clearly has indicated that in setting standards for exposure for known and suspect carcinogens, it will adhere to the policies followed in issuing its previous health standards.[15/] These include

> an assumption that an animal carcinogen poses a cancer risk to man, that there is no "safe" level of exposure for a carcinogen, that the standard should be set at the lowest level feasible, and that employees should be apprised of the hazards of exposure to a carcinogen. BNA Daily Labor Report, December 22, 1976, at E-4.

15/ Asbestos (1972), the fourteen carcinogens standard (1973), Vinyl Chloride (October 1974), and the Coke Oven Emissions standard (October 1976). See, also, Proposed Benezine Standard, 42 F.R. 22516 (May 3, 1977), setting exposure level at 1 ppm/8 hours.

OSHA personnel have conceded that achieving the lowest feasible level will be by engineering controls, and where a "suitable substitute" exists, the standard will provide for no occupational exposure. Therefore, it is reasonable to anticipate that OSHA will be receptive to suggestions that exposure levels to hazardous substances with a disparate impact upon women of childbearing capability be established at levels which will assure their safety and health. For purposes of discussion, however, there are three distinct alternatives from which OSHA may choose in setting standards.

1. If OSHA adopts the position that the exposure level which is feasible is that which provides protection to the most susceptible employee, and that level can be attained immediately, there would be no conflict with Title VII and an employer would be hard pressed to establish a business necessity defense for his exclusion of women.

2. If an OSHA standard which would provide a safe level of exposure for women, whether or not it is sex-specific, is not immediately attainable, at least arguably the business necessity defense could be raised to justify temporary exclusion of women during any abatement period permitted by OSHA, i.e., until compliance with the OSHA standard is achieved.

3. If OSHA should determine that there is no safe level of exposure for women or that such level cannot feasibly be attained, but there is a safe level attainable for men, an employer would have a substantial argument that the business necessity defense would permit it to exclude women.

The applicability of the Title VII business necessity defense as well as other aspects of Title VII implications of restrictive employment policies are discussed infra, Part III.

B. General Duty Clause

The section 5(a)(1) general duty clause[16/] provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." (emphasis supplied). The question inherent in this section is if it can be demonstrated that a "recognized" hazard exists for only one sex, must both sexes be protected equally or may greater protection be afforded the sex for which the greater hazard exists.[17/]

In order to analyze an employer's potential liability under the general duty clause for exposure of his employees

16/ 29 U.S.C. §651(a).

17/ For example, it is now well known that radiation may affect the reproductive functions of both men and women, but when a woman is pregnant, under the general duty clause does an employer incur an obligation to afford her greater protection than that afforded non-pregnant employees. Or is his duty of care to provide a safe and healthful workplace to be construed to require him at all time to provide an environment that will be safe for the most susceptible of his employees as appears to be the position of OSHA with respect to exposure levels set through the standards setting process.

to hazardous substances, it is necessary to examine the legislative purpose of section 5(a)(1) and how the Review Commission and the courts have interpreted employer obligations thereunder.

Perhaps the most frequently quoted portion of the legislative history addressed to the meaning of the general duty clause is that which was cited by the Court of Appeals for the District of Columbia in the landmark case of National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257, 1 OSHC 1422 (D.C. Cir. 1973). Therein, an employer was cited for a serious violation of section 5(a)(1) after a foreman riding on the running board of a frontend loader was killed when it toppled over on him. Construing the term "recognized" in light of the statements contained in the legislative history, the court concluded that the intent of the section was directed to "known" hazards.

> An activity may be a "recognized hazard" even if the defendant employer is ignorant of the activity's existence or its potential for harm. The term received a concise definition in a floor speech by Representative Daniels when he proposed an amendment which became the present version of the General Duty Clause:
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> > "A recognized hazard is a condition that is known to be hazardous and is known not necessarily by each and every individual employer but is known taking into account the

> standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it." 116 Cong. Rec. (Pt. 28) 3877 (1970). The standard would be the common knowledge of safety experts who were familiar with the circumstances of the industry or activity in question. 1 OSHA at 1426, n. 32.

After noting that it thought "that Congress did not intend unpreventable hazards to be considered 'recognized' under the clause," 1 OSHA at 1427, the court pointed out in footnote 37:

> This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation. The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Similarly, a precaution does not become infeasible merely because it is expensive.

Where toxic substances are involved, under the *National Realty* standard, the employer cited for a violation need not have actual knowledge of the hazard in order for there to be a violation due to the existence of a recognized hazard. Rather, as stated by the Eighth Circuit, the legislative history "clearly indicates that the term recognized was chosen by Congress not to exclude actual knowledge but to include the generally recognized knowledge of the industry as well." *Brennan v. OSAHRC and Vy Lactos Laboratories, Inc.*, 494 F.2d 460, 1 OSHC 1623, 1625 (8th Cir. 1974).

Although most cases to date involving general duty clause violations have been concerned with safety as opposed to health issues, and have involved more readily detectable hazards, there have been several section 5(a)(1) citations issued for health hazards, including the Vy Lactos case, noted above. Therein, the company was engaged in manufacturing animal feed concentrates which used proteinaceous fish soluables. These fish soluables were stored in tanks in the basement in liquid "slurry" form which was treated with sulphuric acid to retard decomposition. When a tank of slurry overflowed into another room overnight, the next morning it was first pumped out and then some employees were told to clean up the remainder of the slurry and repair some pumps that had been damaged. When they entered the basement they were almost immediately overcome by hydrogen sulfide gas as were other employees who attempted to rescue them.

The employer had no emergency breathing apparatus and had not otherwise taken safety precautions to deal with accumulations of hydrogen sulfide gas. Three employees died and two others were seriously injured as a result of this incident.

The Review Commission affirmed the Administrative Law Judge's report and recommendations dismissing the citation and proposed penalty on the theory that the hydrogen sulfide gas accumulation was the result of an unforeseeable chemical reaction between the acid in the slurry and the iron sulfide particles which dropped into the slurry when an emergency ventilation hole was cut through to the basement room from the floor above.

What is interesting about the case is that the Review Commission majority clearly indicated that in its judgment proof of actual knowledge on the part of the cited employer of the conditions and their hazardous nature was not enough to sustain the Secretary's burden of proving that a recognized hazard existed.

> [T]he question under section 5(a)(1) is not whether Respondent personally recognized the hazard. Rather, the question is whether the hazard is recognized by the industry of which Respondent is a part. 1 OSHC 1141, 1143.

The Eighth Circuit reversed and remanded the case to the Review Commission holding, "the Commission erred to the extent that it ignored the Secretary's evidence of actual knowledge in determining whether or not the hazard involved here had been recognized." 1 OSHC 1626.

Under the Vy Lactos rationale, an employer's actual knowledge of the existence of a hazard, whether or not otherwise recognized in the particular industry, is sufficient to establish a general duty clause violation. Actual knowledge vitiates the requirement of the hazard being recognized in the particular industry. Absent the Secretary proving either actual knowledge on the part of a cited employer or industry recognition of a condition as being hazardous, no general duty clause violation can be established. State, Inc., 4 OSHC 1806 (1976); Penrod Drilling Company, 4 OSHC 1654 (1976).

There is only one section 5(a)(1) health hazard case in which the affects of exposure to a recognized hazard were not immediate but rather were of a long-term nature. In American Smelting and Refining Company, OSHRC Docket No. 10, 1 OSHC 1256 (1973), the company was cited for a general duty clause violation for allowing airborne concentrations of inorganic lead which significantly exceeded the ANSI standard levels that were generally recognized as being safe.

The employer's basic argument was that the term "recognized hazard" was intended to apply only to hazards detectable by the basic human senses and that hazards detectable only by use of testing devices are not within the purview of the general duty clause. The Review Commission majority summarily rejected this position stating:

> Clearly, it was thought that the readily apparent hazards test only covered those hazards that are obvious, i.e., those which can be detected by the basic human senses. It is also clear that the Congress by rejecting the readily apparent hazards test and accepting the recognized hazards test in its place intended that non-obvious hazards be within the scope of the general duty requirements. There can be no question that non-obvious hazards include those that can only be detected by instrumentation.
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> Moreover, acceptance of Respondent's argument requires a conclusion that Congress did not intend the general duty to cover known health hazards which are of a serious nature, which can only be detected by instrumentation, and for which a standard does not exist. We cannot so conclude. The Congress itself recognized the existence of health hazards which are of a serious nature and which are detectable only by instrumentation. For example, both the Senate and the House recognized that industry and medical practitioners have known for years that employees exposed to asbestos have incurred serious physical harm and death by virtue of their exposure.(footnote omitted)
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> Respondent would have us say that health hazards of this kind are outside the scope of the general duty. We will not agree. 1 OSHC 1257.

On appeal, the Eighth Circuit affirmed that hazards detectable only by instrumentation could be the subject of general duty clause citations in rather strong terms.

> We further think that the purpose and intent of the Act is to protect the health of the workers and that a narrow construction of the general duty clause would endanger this purpose in many cases. To expose workers to health dangers that may not be emergency situations and to limit the general duty clause to dangers only detectable by the human senses seems to us to be a folly. Our technological age depends on instrumentation to monitor many conditions of industrial operations and the environment. Where hazards are recognized but not detectable by the senses, common sense and prudence demand that instrumentation be utilized. Certain kinds of health hazards, such as carbon monoxide and asbestos poisoning, can only be detected by technical devices. 29 C.F.R. Secs. 1918.83(a) and 1910.93a. The Petitioner's contention, though advanced by arguable but loose legislative interpretation, would have us accept a result that would ignore the advances of industrial scientists, technologists, and hygienists, and also ignore the plain wording, purpose, and intent of this Act. The health of workers should not be subjected to such a narrow construction. (footnote omitted). 2 OSHC 1046-47.

Whether hazards are detectable by the human senses or only by instrumentation, the fundamental issue which arises is what quantum of information constitutes "knowledge" by an employer so that a hazard can be deemed to be "recognized". Clearly, actual knowledge will constitute the requisite showing to sustain a general duty clause citation as will "the common knowledge of safety experts who were familiar with the circumstances of the industry or activity in question." National Realty, supra, 1 OSHC at 1426, n. 33.

However, the fact that a hazard is recognized in one industry does not establish per se that it is a recognized hazard for any other industry. Republic Creosoting Co., 1 OSHC 1124 aff'd sub nom, Brennan v. OSAHRC and Republic Creosoting Company, 501 F.2d 1196, 2 OSHC 1109 (7th Cir. 1974). But, two recent Review Commission decisions seem to indicate that if the cited employer had actual knowledge of the cited condition being a "recognized hazard" in another industry, that is sufficient to sustain the violation. In Sugar Can Growers Cooperative of Florida, 4 OSHC 1320 (1976), the employer was cited under section 5(a)(1) for transporting employees in a stake-body truck that lacked seating. Testimony and documentary evidence establish that the employer had been put on notice that the practice was recognized as hazardous by the general public, other government agencies, transportation experts, and the Employment and Training Administration (formerly the Manpower Administration) of the U.S. Department of Labor. Notice was effected both by correspondence from the Manpower Administration to the Florida Fruit and Vegetable Association which in turn distributed copies to its members, of which the cited employer was one and by speeches and meetings at which the cited employer was present and the hazard of seatless trucks was discussed. On th· .ısis of these facts, the Commission affirmed the admin .rative law judge's holding that the hazard was recognized within the meaning of section 5(a)(1).

The same result was reached in Atlantic Sugar Association, 4 OSHC 1355 (1976), which involved the same hazard and which specifically relied upon the Sugar Can Growers Cooperative case.

It should be emphasized that in both cases it is unclear whether the employer's "actual knowledge" of the condition being hazardous or whether it was his "actual knowledge" of recognition by another industry was the basis for the citation. In either event, the hazard under consideration i.e., transportaton of field workers by trucks without seats, was both easily identifiable and readily correctable, which often is not the case with toxic substances. And, in the general duty clause context of health hazards created by toxic materials, from what sources will an employer be deemed to have knowledge of a hazard to sustain a general duty clause citation? Clearly, actual knowledge will support a section 5(a)(1) violation, American Smelting and Refining Company, supra, as will industry knowledge, National Realty, supra. In addition, OSHA's recently issued Industrial Hygiene Field

Operations Manual uses standards developed by the American Conference of Government Industrial Hygienists (ACGIH) as guidance for issuance of citations when no OSHA standard exists for a particular substance. Any citation issued under such circumstances would of necessity be a general duty clause citation and the employer's knowledge of the recognized hazard would have to be established. Whether the mere existence of the ACGIH standards will be sufficient to support such a citation has yet to be litigated but it is reasonable to anticipate that this argument will be advanced by the Secretary.

Assuming that an employer has evidence of a recognized hazard, constituting actual knowledge and that evidence indicates a greater susceptibility of women to the hazard at the level of exposure in his workplace, his obligation under section 5(a)(1) remains to "furnish to each of his employees employment and a place of employment which are free from recognized hazards...." Further, assuming the non-existence of evidence with respect to adverse affects upon men at the concentrations at which the substance has been found, can the employer avoid a general duty clause citation by an exclusionary policy toward women. Prior case law involving the question of employee access to a hazardous area might support such a position, but it is a virtual certainty that a conflict exists with Title VII. The following section discusses these issues in the context of exclusion of women from jobs based upon considerations other than OSHA standards. Additionally, because it is inconceivable that an OSHA violation could be demonstrated by an employer adopting a more stringent health or safety standard than promulgated by OSHA, but could well provide a basis for a Title VII claim, this issue also is discussed in the following section.

III. Title VII Implications

For purposes of the Civil Rights Act of 1964 and Executive Order 11246, it is helpful to distinguish between those toxic and hazardous substances whose major impact is on workers themselves and those whose major impact is on the offspring of the workers.

A. Danger To Workers

The law with respect to substances hazardous mainly to workers is relatively clear. The prohibitions against sex discrimination in Title VII (and by implication Executive Order 11246) have generally been interpreted to bar any policy excluding women from any job where that policy is designed to "protect" women workers from dangers to themselves. 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).

> "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 remumeration 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."18/

18/ Weeks v. Southern Bell Telephone & Telegraph Co., supra 408 F.2d at 236 (emphasis added).

Indeed, even where a state "protective" law prohibits the employment of women in certain dangerous jobs, an employer violates Title VII if he excludes women from those jobs on the basis of the state "protective" law. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

These cases, however, arguably involved situations where the dangers were not sex-specific, i.e., men and women were both exposed to similar hazards, albeit in different degrees.19/ It is possible, therefore, that a different result might obtain if, for example, exposure to a particular substance created a significant risk of cancer in female workers but little or no carcinogenic risk in male workers. An employer who wished to exclude women from jobs where the hazards to the worker were sex-specific might argue that, while it may be unlawful to treat women differently where the hazards existed for both men and women, it would not be unlawful to treat women differently where they faced demonstrably unique hazards.20/

19/ Both Weeks and Bowe involved lifting of weights over 30 pounds and Rosenfeld involved heavy physical effort.

20/ Needless to say, an employer could not in good faith make such an argument if some of its jobs posed sex-specific hazards to males but he continued to employ men in those jobs. The singling out of women would clearly be disparate treatment in violation of Title VII.

In such a case, before adopting a policy of excluding women, the employer should first carefully review the relevant medical and scientific literature to determine if there is any substantial risk, albeit non-carcinogenic, in exposure of males. For example, there is some evidence that exposure to certain estrogens may cause cancer in women. While there is little evidence of carcinogenic effect on males exposed to estrogens, there is substantial evidence of other adverse effects on males. Under these circumstances, an employer who barred only women from exposure to estrogens would likely be held to have violated Title VII.

The more troublesome situation is one in which the only recognized dangers to the workers are sex-specific (i.e., only women workers or only male workers run a substantial risk if exposed). This might be the case with lead, where there is some evidence that the toxic exposure level for women might be significantly lower than for men. Thus, male workers could be safely employed at exposure levels which might pose a recognized hazard for women.

An employer would, in such circumstances, have three options. First, he could reduce the exposure level low enough to eliminate the hazard to women. This is the general recommendation of unions and civil rights groups. Second, he could continue to employ women at hazardous exposure levels after carefully and fully warning them of the risks. Third, he could refuse to employ women in the jobs in question.

Option number one would satisfy any question of compliance with OSHA and Title VII and therefore ought to be given prime consideration. It will not be a realistic alternative, however, if a reduction of exposure level safe to women is not technically feasible or the cost is prohibitive. The cost of such a reduction in exposure level may be relevant under OSHA, as discussed earlier; its relevance to Title VII questions will be discussed below.

Option number two raises serious questions under OSHA, noted above, as well as some questions regarding tort liability. The risk of tort liability for injury to female workers, however, can be significantly reduced, if not entirely eliminated, by a full and adequate warning. Therefore, the main problem with option two is its questionable status under OSHA's "general duty" clause.

The only problem with option number two under Title VII arises if a reduction in exposure levels is technically feasible. If it is, female workers may well be able to argue successfully that it is unlawful sex discrimination for the employer to provide safer working conditions for men than for women. Therefore, if it is technically and economically feasible to reduce the level of exposure to one safe for women workers, option number one would appear to be preferable.

Similarly, option number three--barring employment of females--presents grave Title VII problems if the employer could reduce exposure levels to provide a safe workplace for women. In those cases where it is not technically feasible or the cost is clearly prohibitive Title VII may nevertheless require that individual female workers, rather than the employer, be given the choice of employment in a hazardous job.

Weeks, Bowe, and Rosenfeld all involved employer claims that females particularly were endangered by the hazards of the jobs involved even though the hazards were not, in fact, sex-specific. While the employers' claims may have been based on unproven assumptions, the cases appear to rest on the premise that women workers are to be given completely equal opportunities, including the freedom to choose a job particularly dangerous to women. Given the uniformity with which the courts have rejected employer claims in this area, companies cannot expect a hospitable reception, even when there is significant clinical evidence of the health hazards unique to one sex. 21/

In conclusion, if it is technically and economically feasible, an employer should reduce all recognized hazards to a level safe for both female and male workers. If such a reduction is not feasible, he should fully inform all workers of the risks involved and allow them to accept or decline employment in the hazardous jobs.

B. Danger to Offspring

1. Introduction. Offspring of workers can be damaged by exposure of a parent (male or female) to a hazardous substance prior to conception, by exposure of the mother after conception, and by direct exposure of the embryo or fetus after conception. For obvious reasons, the vast majority of research studies related to hazards to offspring have involved women. 22/ Consequently, substantially more medical evidence exists with respect to

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21/ An employer could raise a claim that sex was a "bona fide occupational qualification". However, where such a claim is based on potential harm to the employee, and the employee is willing to assume the risk, Weeks would require that she be given the opportunity. An ingenious employer might argue that his policy of excluding women is simply the fortuitous result of a "neutral" rule which excluded all persons potentially endangered by exposure. A court would have little difficulty in seeing through this argument. Moreover, even a "neutral" rule whose impact was solely on women would have to be justified by "business necessity". See discussion infra.

22/ Health, A Workshop Guide, National Commission on the Observance of International Women's Year, 1976, p. VII-3.

the potential damage to offspring because of exposure of women workers to hazardous substances than exists with respect to male workers. Nevertheless, a growing body of evidence indicates that exposure of male workers to certain mutagens may result in genetic damage to the offspring of the workers' wives. 23/

Needless to say, where reliable medical evidence indicates that comparable risks to offspring exist irrespective of the sex of the parent exposed to a particular mutagen, an employer could not bar only women workers from jobs exposed to the substance. Weeks v. Southern Bell Telephone & Telegraph Co., supra; Bowe v. Colgate-Palmolive Co., supra; Rosenfeld v. Southern Pacific Co., supra.

In addition, even where the medical evidence exists only with respect to exposure of female workers, company policy with respect to those workers must be uniform. For example, an employer could not properly exclude women workers from benzene production positions in a petrochemical plant while employing women in clerical positions in offices adjacent to the manufacturing facility if the exposure level in the clerical offices were not significantly lower

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23/ Hricko, A. & Brunt, M., Working for Your Life: A Woman's Guide to Job Health Hazards, 1976, p. B-5, et seq.; See also, Testimony of Andrea Hricko, OSHA Lead Standard Hearings, March 17, 1977 (Tr. pp. 701-704).

(in a medical sense) than in the manufacturing facility. An employer would need compelling medical evidence to sustain a policy of excluding women from some, but not all, jobs where there was similar exposure to a hazardous substance. This would be especially true if the jobs in which women were employed were traditionally female jobs and those from which they were excluded were higher-paying, traditionally male jobs.

2. Exclusion of Pregnant Females. Significant medical evidence indicates that there is a substantial risk to offspring where the mother is exposed during pregnancy to certain substances, e.g., lead, anesthetic gases, vinyl chloride, methyl mercury, and radiation. 24/ This risk can be caused either by direct exposure of the fetus, e.g., radiation, or through the transplacental transfer of a teratogen from the mother's bloodstream to the fetus, e.g., lead.

Companies at which there is possibly a substantial risk of exposure of pregnant females to situations dangerous to the embryo or fetus should examine the relevant medical evidence carefully. In a number of unreported decisions, the Equal Employment Opportunity Commission has rejected claims by various airlines, that the employment of pregnant flight personnel presented a danger to the fetus, because

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24/ Hricko & Brunt, supra.

of the lack of convincing medical evidence concerning the alleged risk. Implicit in these decisions is the conclusion that the opposite result might obtain if adequate medical evidence were available.

Not only should the employer have adequate medical evidence of the risk to the fetus through exposure of the pregnant female, but he should also examine the evidence relative to the mutagenic effect on exposure of male workers. As noted above, if comparable risks to the fetus occur through exposure of the father prior to conception, an employer could not reasonably single out pregnant women and bar only them from employment. This may possibly be the situation at vinyl chloride facilities, since recent studies have shown that the wives of male vinyl chloride workers have a higher rate of miscarriages and stillbirths than women whose husbands were not exposed to vinyl chloride.25/

Assuming, however, that the only known risk to the fetus is through direct exposure or transplacental transfer,26/ an employer has basically the same three options discussed above. First, the employer should consider lowering exposure levels or otherwise protect pregnant workers from

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25/ Hricko & Brunt, supra, p. C-16.

26/ This is a reasonable assumption since OSHA's Threshhold Limit Values do not take into account teratogenic effects. Hricko & Brunt, supra, p. C-3.

exposure at levels dangerous to the fetus. If this is technically feasible and not cost prohibitive, this option has much to recommend it since there would be no doubt about compliance with either OSHA or Title VII. 27/ However, given the extreme sensitivity of embryos and fetuses to even very low level exposure to most teratogens, option number one may only rarely be viable.

Second, the employer could continue to employ the pregnant female at the potentially dangerous exposure levels after providing her with ample notice of the risks to the fetus. Although the provision of notice to the employee may terminate any tort liability toward the mother, a question would remain regarding liability for any damage done to the child, if it is born alive. Because the financial liability for damage to the child is potentially astronomical, and because of society's interest in protecting the health of its progeny (discussed more fully below), employers cannot realistically be expected to allow pregnant women to work in areas which may be dangerous to the embryo or fetus where the risk is solely through exposure of the mother and not through exposure of the father prior to conception. Therefore, option number two might not ever be a viable alternative.

27/ Apparently the recent recommendation of NIOSH regarding anesthetic gases would require employers to reduce exposure to levels safe to the fetus. Testimony of Hricko, supra, Tr. p. 690.

Difficult questions arise, however, in the application of option number three--the exclusion of pregnant women from jobs where exposure levels threaten the embryo or fetus--because of ambiguities in sex-discrimination law following the Supreme Court's decision in Gilbert v. General Electric Co.[28/]

An employer's exclusion of pregnant workers from jobs hazardous to embryos or fetuses can be defended on three different theories: (a) the exclusion is not based upon sex; (b) the exclusion, although it is based upon sex, is compelled by business necessity; and (c) the exclusion, although it is based upon sex, is also based upon a bona fide occupational qualification.

a. Exclusion Based on Sex? Assuming a straight-forward reading of Justice Rehnquist's opinion in Gilbert, an employer would be justified in excluding pregnant workers from any job since, according to the Justice, an employment decision based on pregnancy is not based upon sex. However, the anatomical absurdity of this conclusion renders reliance on the broad language in Rehniquist's opinion somewhat questionable. An alternative interpretation would limit Gilbert to its facts, *i.e.*, cases involving disability benefits.

28/ ____ U.S. ____, 50 L.Ed.2d 343 (1976).

Not surprisingly, the EEOC has adopted a narrow interpretation of Gilbert.[29] So have the Sixth and Ninth Circuits.[30] The breadth of Gilbert may be substantially clarified in the two pregnancy-related cases pending before the Supreme Court: Satty v. Nashville Gas Co.[31] and Richmond Unified School District v. Berg.[32]

Moreover, the Gilbert defense is currently being litigated in a host of airline cases where employers have barred pregnant stewardesses from flying during the term of their pregnancy.[33] In addition, the airlines claim that high altitude flight can be injurious to a fetus. As noted above, the EEOC has rejected the medical claim in the airline cases as well as the Gilbert defense. Finally, the Gilbert defense is involved in Tuniga v. Kleberg

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29/ EEOC Compliance Manual, §3200, Dec. 30, 1976.

30/ Jacobs v. Martin Sweets Co., ___ F.2d ___, 13 EPD ¶11,537 (6th Cir. 1977); Manhart v. City of Los Angeles, ___ F.2d ___, 13 EPD ¶______ (9th Cir. 1977).

31/ 522 F.2d 850 (6th Cir. 1975); cert. granted, ___ U.S. ___ (1977). In Satty, the employer was found to have violated Title VII by refusing pregnant employees equal seniority and sick leave benefits.

32/ 528 F.2d 1208 (9th Cir. 1975), cert. granted, ___ U.S. ___ (1977). In Berg the employer was found to have violated Title VII by virtue of its mandatory leave policy and by denying pregnant workers sick leave.

33/ See, e.g. Gardner v. National Airlines, Civil Action No. 75-1968-CIV-NCR (S.D. Fla.); Harris v. Pan American World Airways, Civil Action No. C74-1884 W.W.S. (N.D. Calif.); Mauzy v. Delta Airlines, Inc., Civil Action No. 75-H-619 (S.D. Tex.); and EEOC v. Delta Airlines, Civil Action No. C76-9068 (N.D. Ga.).

County Hospital, a case in which the plaintiff is challenging her discharge from employment as an x-ray technician after she became pregnant.[34/]

Whatever the Supreme Court does in Satty and Berg, however, may soon be rendered moot by Congress. H.R. 6075 and S.995 would not only reverse Gilbert on the disability benefits issue, but they would explicitly place a decision based on pregnancy in the same prohibited category as a decision based on sex.

If the Supreme Court reads Gilbert narrowly or if Congress reverses the decision, the two other possible defenses, which are discussed in the following sections, should be examined.

b. Business Necessity. There are a host of decisions which indicate that, at least theoretically, an employment practice which would otherwise be unlawful under Title VII would be permissible if it were compelled by business necessity. The most frequently cited case establishing the elements of the defense is Robinson v. Lorillard Corp.:[35/]

34/ Civil Action No. 76-B138 (S D. Tex.).

35/ 444 F.2d 791, 798 (4th Cir. 1971), cert. denied, 404 U.S. 1006 (1971).

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.

While at first blush, the "business necessity" defense may appear to offer employers a reasonable chance of defending policies excluding pregnant women from jobs which may be dangerous to an embryo or fetus, a more careful examination of the defense indicates that its availability in such cases is far from clear. First, it has rarely been successfully invoked. Moreover, it is generally conceded to be available only in cases where the challenged practice is neutral on its face, such as a seniority system.36/

The EEOC has repeatedly opined that a business necessity defense cannot be used to justify any practice which overtly distinguished between male/female or black/white workers. For example, the EEOC General Counsel wrote to

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36/ See, e.g., Schlei, B.L. and Grossman P., Employment Discrimination Law, 1976, at pp. 292-293.

the Atomic Energy Commission on August 29, 1974 indicating that the business necessity defense would not be available to insulate a policy setting lower radiation exposure levels for pregnant females.[37]

Nevertheless, a claim of business necessity may well be available in certain instances, even where the suspect employment practice overtly distinguishes between pregnant females and all other workers. The EEOC's General Counsel conceded as much in his 1974 letter to the AEC when he concluded that any decision must be the result of a "balancing test," balancing the risks against alternative safeguards.[38] The two reported EEOC decisions on the subject indicate that a business necessity defense would be sustained if its various elements were adequately proved.[39] Much more recently, at the OSHA hearings on proposed lead standards, the EEOC unequivocally affirmed

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37/ Letter from EEOC General Counsel William Carey to Counsel for Environment and Safety, Stephen Greenleigh, August 29, 1974.

38/ The EEOC's advocacy of a "balancing test" is wholly inconsistent with its simultaneous rejection of the business necessity defense. The EEOC General Counsel's letter to the AEC did not advert to this glaring gap in logic.

39/ See EEOC Decisions 75-072 (Nov. 14, 1974) and 75-005 (Oct. 29, 1974), CCH EEOC Decisions, ¶¶6442 & 6443. In both cases, the employer's exclusionary policies were found wanting because of the availability of alternative, less restrictive policies.

the availability of a business necessity defense in cases involving danger to embryos and fetuses.[40/]

Assuming that the overt nature of the employer's practices does not automatically eliminate the business necessity defense, an employer would need to establish convincingly each of the elements in the defense. Initially, the employer must show the existence of a compelling business purpose. Presumably the employer's interest in preventing pregnant women from working in situations which threaten her offspring stems from society's general interest in the health of future generations and from potential tort liability to a child damaged by exposure of the mother during pregnancy.

Support for the legitimacy of a general concern for the health of the offspring can be found in the Supreme Court's decision in Roe v. Wade,[41/] the EEOC's testimony

40/ Testimony of Constance Dupre, OSHA Lead Standard Hearings, March , 1977, Tr. pp. 4097, 4103, 4112-4113.

41/ 410 U.S. 113, 154-156, 162-166 (1973). See also, Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972); Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976). These cases involve general public safety considerations in the employment of airline pilots and interstate bus drivers and are, thus, not directly relevant to the issue of danger to the fetus. They do, however, indicate that the public interest in health and safety considerations are important factors in evaluating the lawfulness of a restrictive employment practice.

before the lead hearings,[42/] at least one reported EEOC decision,[43/] and at least one arbitration case.[44/] Concern for future tort liability to any child, although alluded to in one arbitration case,[45/] is considerably more speculative not only because of the difficulty in proving a causal relationship between the exposure and any birth defect but also because of questions surrounding any assumption of the risk by the mother.

While the emotional and moral questions surrounding the issue are quite real, it is not *a fortiori* clear that a court would hold that an employer's interest was so compelling as to override the pregnant worker's desire to be employed in a given job, whatever the risk to the fetus. For example, the testimony of the National Commission on the Observance of International Women's Year at the recent OSHA lead hearings recognized the need to balance the

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42/ Testimony of Constance Dupre, *supra*, at 4098.

43/ EEOC Decision 75-072, *supra*.

44/ *In re Amoco Oil Co. & OCAW*, 64 LA 511 (Brown, 1975).

45/ *In re Amoco Oil Co. & OCAW*, *supra*.

various interests, but concluded that the pregnant female should do the balancing, not the employer.46/

It seems likely, however, especially given the recognition of its legitimacy by the EEOC,47/ that the courts will agree that an employer's interest in protecting the embryo or fetus of pregnant workers is a compelling business interest. Assuming, therefore, that the purpose is legitimate, the employer must show that its exclusionary practice effectively carries out that purpose.

In most cases, such a showing could be routinely made. However, inconsistent policies for different

46/ Testimony of Catherine East, March 23, 1977. Ironically, thirty years ago, the Women's Bureau of the Department of Labor urged the transfer of all pregnant women exposed to substances dangerous to the fetus. Hricko & Brunt, supra, at p. A-5. The employer might plausibly argue that it would be contrary to public policy to allow women to choose employment hazardous to the fetus since their choice might well be foreclosed by family economic pressures. By analogy, the employer could refer to those cases which hold that a worker cannot waive the protection afforded by OSHA. However, an employer who was seriously concerned about removing financial pressure from women's decision-making process could offer pregnant women alternative employment without loss of income.

47/ Indeed, as the discussion later indicates, the EEOC has consistently refused to challenge in court the exclusion of all fertile women from jobs where exposure to lead might be injurious to an embryo. The EEOC is challenging, however, Delta Airlines' policy of excluding pregnant workers from in-flight service jobs. EEOC v. Delta Airlines, supra. Apparently, the different positions taken by the EEOC in these cases is based upon its view of the strength of the medical evidence supporting the employer's exclusionary practices.

categories of female workers may completely negate the employer's defense. In the benzene example discussed earlier, the continued employment of pregnant women in clerical jobs where exposure was at hazardous levels would defeat the employer's claim that exclusion of pregnant women from benzene production jobs effectively served the employer's interest in protecting the fetus. Such inconsistent policies ought to be eliminated if the employer desires to defend his exclusionary practices with any real hope of success.

Even if the employer can demonstrate that his policies effectuate his purpose, the employer will have to demonstrate the unavailability of equally effective, but lesser restrictive alternative policies. This requirement is the hurdle at which most business necessity defenses fall.

Obviously, if it is both technically and economically feasible to reduce exposure levels so that pregnant women could be safely employed, an employer's business necessity defense would be non-existent. Although the burden of the fabled "cosmic search" for alternatives is soundly criticized by employers, it remains clear that the employer has a heavy burden to justify his practices. If it is technically feasible to provide safe employment to pregnant women, but the employer feels that the cost would be prohibitive, the EEOC indicates it would find a Title VII violation unless the employer could show convincingly that it absolutely would go bankrupt if it had to reduce the expousre level.[48/] While this is probably an extreme reading of the business necessity standard, at least one District Court has ruled that expense is no defense to an otherwise discriminatory policy.[49/]

43/ Testimony of Constance Dupre, supra, Tr. 4112-4115. See also the EEOC General Counsel's 1974 letter to the Atomic Energy Commission, supra. In this respect, EEOC's policy is somewhat less stringent than the position taken by the courts with respect to implementation of engineering controls to protect employees from hazards of exposure to toxic substances. The fact that marginal employers may be forced out of business has been recognized by the courts, but the objective of safety and health of employees has been deemed to outweigh this consideration. See, e.g., Industrial Union Dept., AFL-CIO v. Hodgson, supra; Continental Can Company, Inc., OSHRC Docket No. 3973 et al., 4 OSHC 1541 (1976); U.S. Department of Labor, Occupational Safety and Health Administration, Field Operations Manual, §X-G6c-2.

49/ Johnson v. Pike Corp. of America, 332 F.Supp. 490 (C.D. Cal. 1971). While Robinson v. Lorillard Corp., supra, indicates that [illegible] might be a relevant factor in some cases, another case has held that "Necessity connotes an irresistible demand." U.S. v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971). See also the original District Court opinion in Gilbert v. General Electric Co., 375 F.Supp. 367 (E.D.Va. 1974), where the Court stated that "it is doubtful in the first instance if cost alone would constitute a proper defense." 7 EPD ¶9282, at pp. 7297-7298.

An employer resting its business necessity defense on lack of economic feasibility must be prepared to show that he has made a reasonably diligent (exhaustive?) search for less expensive alternatives and that the cost is, in fact, exorbitant.

The employer will also have a heavy burden to show the lack of technically feasible alternatives. Claims by the plastics industry that it was impossible to reduce the level of vinyl chloride exposure were found to be "exaggerated" and the industry has been admonished to have "more faith in their own technological potentialities . . . ."50/ In cases involving exposure to lead, for example, plaintiffs can be expected to suggest numerous alternatives which they claim are technically feasible.51/

If the business necessity standards can be met, the employer's Title VII problems are by no means resolved. As to prospective employees, the restrictive employment policy must clearly be limited to the jobs where the dangerous exposure levels exist and be limited to pregnant

50/ Society of Plastics Industry v. OSHA, supra, 509 F.2d at pp. 1309, 1310. See also Reserve Mining Co. v. EPA, 514 F.2d 492, 503 (8th Cir. 1975) (en banc), where the court found that it was technically feasible for the company to eliminate the dangers caused by its waste disposal system.

51/ Testimony of Hricko, supra, at Tr. 692-695.

women. More difficult problems arise in the case of incumbent female workers who become pregnant while employed in the jobs in question.

Must the employee be given the opportunity to transfer to another, safe position? What if there are no other safe positions available at the facility? Must the employee be given wage protection through red circling and seniority carry-over? Must the employee be assured of the right to return to her regular job after the child is born? Upon her return to employment, must her seniority be bridged?

If another safe job is available, it seems reasonable to require the employer to offer the affected employee the alternative job. This has been the consistent position of the EEOC[52/] and the employer's only chance of avoiding this obligation lies in a combination of favorable decisions by the Supreme Court in Satty and Berg and a refusal by Congress to pass legislation reversing Gilbert.

Although the EEOC recently indicated that rate-retention and seniority protection might not be required

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52/ EEOC Decisions 75-072 and 75-005, supra. See also Testimony of Constance Dupre, supra, Tr. 4097, 4103; EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.10(c).

in all cases,[53/] it is hard to believe that a court applying the business necessity doctrine would not require the employer to take every possible measure to minimize the impact of the exclusionary policy on the affected employee.[54/] Since alternative employment with seniority and wage protection are certainly possible (in most cases), it seems likely that Title VII will be interpreted as requiring them. Similarly, the employer should ordinarily offer the employee her original position when she returns to work after giving birth and bridge her seniority.

c. Bona Fide Occupational Qualification?

Although Section 703(e) of Title VII provides that employers may differentiate on the basis of sex where sex is a "bona fide occupational qualification," it is generally agreed that "the EEOC has quite literally interpreted the BFOQ exception on sex out of existence."[55/] Although there are subtle differences between the standards applied in Weeks, Bowe and Rosenfeld, as well as differences in the opinions

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53/ EEOC testimony p. 4103.

54/ This is certainly the position of unions and civil rights groups. See, *e.g.*, testimony of Catherine East, *supra*. The EEOC has taken the position that the employer must apply the same policies to pregnant women as applied to other temporarily disabled employees. Thus, if an employer routinely provides alternative employment for other disabled employees, he should clearly do the same for pregnant workers.

55/ Schlei & Grossman, *supra*, p. 279.

of the Supreme Court in Phillips v. Martin Marietta Corp.,[56/] the BFOQ defense is likely to be reserved for those jobs, such as wet nurse, where the sex of the employee is a biological prerequisite for successful performance. The EEOC has certainly taken this position with respect to health hazards to pregnant women.[57/]

Thus, the BFOQ defense is not likely to be available when an employer seeks to exclude only a sub-group of women. The employer must rely instead on the business necessity defense.

3. Exclusion of All Fertile Women. If the employer cannot lawfully exclude pregnant women from jobs where there is a substantial risk to the offspring, *a fortiori*, an employer could not exclude *all* fertile women from those jobs. However, if a business necessity defense exists under certain circumstances for the exclusion of pregnant workers based on danger to the fetus, it may be possible for an employer to justify a policy of excluding all fertile women from some jobs.

Obviously such a policy has far greater impact than one limited to pregnant females since well over half of all

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56/ 400 U.S. 542 (1971).

57/ See EEOC General Counsel letter to the AEC, *supra*, and EEOC Testimony, *supra*, at Tr. 4108, 4110. See also *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971); *Usery v. Tamiami Trail Tours*, *supra*.

female workers are in their child-bearing years. Given the substantial impact of a policy barring all fertile females from employment in a category of jobs, it is reasonable to expect vigorous resistance in most cases from the EEOC and microscopic scrutiny from the Courts.

The EEOC successfully convinced the AEC to reject the National Council on Radiation Protection's recommendation that lower radiation exposure levels be established for fertile women.58/ OSHA has also refused to bar employment to fertile women from vinyl chloride production despite the recommendation of the National Institute for Occupational Safety and Health.59/

Furthermore, in at least one unreported decision, the EEOC found that an employer had unlawfully excluded all fertile women from employment in battery plant jobs where they would be exposed to air borne lead at levels which the employer claimed would damage an embryo.60/ In another lead case, the state OSHA in California has recently backed off its proposed prohibition on employment of fertile women at a major battery plant.

58/ Hricko & Brunt, supra, p. A-45; EEOC General Counsel letter to AEC, supra.

59/ Hricko & Brunt, supra, p. C-17.

60/ Conspicuously, however, the EEOC has refused to litigate the issue despite at least two clear opportunities. See e.g., the discussion of Toomer v. General Motors, infra.

In Pittsburgh, Pa., the St. Joe Minerals Co. recently barred employment of fertile women at its lead smelter. The Pennsylvania Human Relations Commission found a violation of the state's anti-discrimination law and has scheduled the case for hearing.[61] Although the company has agreed to settle a private Title VII action without changing its policy, the state agency proceeding will proceed.[62]

General Motors has recently been sued because of its policy of excluding fertile women from jobs at its Delco battery facility in Muncie, Indiana.[63] Significantly, however, the EEOC refused to join the suit challenging GM's practice, but instead chose to sue on behalf of a single woman over child-bearing age whom the agency claimed was unlawfully refused employment.[64]

61/ Read v. St. Joe Minerals Corp., Docket Nos. E-8113PD, E-9654PD and E-9754.

62/ Read v. St. Joe Minerals Corp., Civil Action No. IP76-75-1473 (Stipulated Motion to Compromise and Dismiss the Action filed Feb. 23, 1977).

63/ Toomer v. General Motors, Civil Action No. IP76-101-C (S.D. Indiana).

64/ EEOC v. General Motors, Civil Action No.___(S.D. Indiana). Strangely, the UAW, which has been no outspoken on the issue, was joined as a defendant by the EEOC. The union has recently moved to be realigned as a plaintiff.

Finally, the Solicitor's Office at the Department of Labor has under active review a federal contractor's prohibition against fertile women being employed in a vinyl chloride production facility.

In the longrun, assuming the availability of a business necessity defense, these cases will probably turn on the ability of the employer to show substantial medical opinion that risk to the fetus is significant and that the significant risk occurs during the first tri-mester when it is, as a practical matter, impossible to identify the fact of conception prior to the occurrence of the risk.[65/]

The risk involved will probably be balanced against the impact of the restrictive policy. Where the potential damage to even a few children would be significant, there is strong support for an employer's complete exclusion of fertile women. Usery v. Tamiami Trail Tours, supra; Hodgson v. Greyhound Lines, supra. Both cases permitted

65/ This may well be the case with lead where the rate of decline of lead in the bloodstream is quite slow and the fetus would likely be exposed to dangerous levels through transplacental transfer even if the mother stopped working in the exposed areas at the moment of conception. Several major women's rights groups conceded as much at the recent lead hearings. See Testimony of Amanda Hawes on behalf of the Women's Legal Defense Fund, Women Organized for Employment, Women in Apprenticeship and ACLU's Women's Rights Project, OSHA Lead Standard Hearings, March , 1977.

employment bans affecting older bus drivers upon a showing of "a minimal increase in risk" of death to a single person.[66]

Courts appear to be particularly sensitive to carcinogenic substances and have given wide latitude to government regulations related to dangers as "sensitive and frightladened as cancer."[67] On the other hand, where any risk of damage is quite remote, a policy forbidding employment of all fertile women may not be justified.[68]

While an employer may be able to rely on its own medical advisors when there is a genuine conflict in scientific opinion,[69] it appears likely that the medical evidence of the employer's position would need to be substantial. An employer could not rely on "hunches or

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66/ See also Spurlock v. United Airlines, supra, where the court balanced the risks and the impact of the employment practice.

67/ Environmental Defense Fund v. EPA, 456 F.2d 528, 538 (D.C.Cir. 1972); Certified Color Manufacturers v. Mathews, 543 F.2d 284, 297-298 (D.C. Cir. 1976); Reserve Mining Co. v. EPA, supra.

68/ See also General Counsel's letter to the AEC, supra.

69/ In re Lamson & Sessions Co., 43 LA 61 (Kates, 1964).

wild guesses."70/ However, since most occupational health issues are "on the frontiers of scientific knowledge,"71/ where "speculation, conflicts in evidence and theoretical speculation" abound,72/ good faith reliance on rationally justified, reasonable medical concern should be sufficient basis for a restrictive employment policy.73/ Here, too, the risk involved would be inversely related to the amount of scientific certainty required to justify an exclusionary policy.

Having demonstrated the substantial risk involved, the employer would still be under a significant burden to prove the absence of alternative, less restrictive policies. Assuming it was not feasible to reduce the exposure to a safe level relative to an embryo, the employer would have to show that it is not feasible to identify the fact of pregnancy prior to the embryonic exposure. Since pregnancy can now arguably be determined

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70/ Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976).

71/ Industrial Union Division v. Hodgson, supra, 499 F.2d at 474.

72/ Ethyl Corp. v. EPA, supra, 541 F.2d at 24.

73/ In addition to the cases cited immediately above, see Reserve Mining Co. v. EPA, supra, 514 F.2d at 407 (n. 20); Society of Plastics Industry v. OSHA, supra, 509 F.2d at 1308; Certified Color Manufacturers v. Mathews, supra, 543 F.2d at 297-298; Hodgson v. Greyhound Lines, supra.

with 100% certainty within one week of conception,[74/] employers should exclude fertile women only in those situations where there is a likelihood of dangerous exposure during the first week of pregnancy or when the toxic levels in the mother's bloodstream could not be rapidly reduced to a safe level for the embryo.

Where it is not possible to protect the embryo on the basis of the prompt identification of pregnancy, an employer would be justified in excluding all fertile women. Hodgson v. Greyhound Lines, supra; Usery v. Tamiami Trail Tours, supra.

Finally those companies which currently employ fertile women in jobs where there is potential damage to an embryo and where it may not be possible to identify the pregnancy prior to the onset of substantial risk, must carefully evaluate the impact of any change in policy. If a company decides to change its practice and bar fertile females, it will be under the same obligations to incumbent female workers discussed above.

74/ See Testimony of Hricko, supra, Tr. 699-700. Frequent mandatory pregnancy tests would, of course, be the only way for the employer regularly to check on the dangers to fertile women in most cases.