WOMEN IN THE WORKPLACE - LEGAL IMPLICATIONS

Ralph E. Allan

Department of Community and Environmental Medicine
School of Medicine
University of California, Irvine
Irvine, California

I appreciate the opportunity to participate here in Denver at this joint meeting of the American Academy of Occupational Medicine and the American Academy of Industrial Hygiene. As a member of the American Academy of Industrial Hygiene, I feel honored to be asked to address this combined meeting.

The subject matter that we are addressing here at this meeting, I believe, is a good example of the application of the interrelationship of law and science in an attempt to resolve the problem facing employees in their pursuit of equal employment opportunity in work situations involving potentially harmful exposures to a developing fetus or which otherwise affects childbearing capacity. It also, I might add, is the type of situation which, I feel, intensifies my own interest in both law and industrial health and provides me with my own justification, which I occasionally need, for intermingling the two disciplines.

We are dealing with a subject matter which has very little scientific information available for rapid resolution of the issue of insuring a healthy place of employment for protection of employees' reproductive capability. There simply is not a great deal of information related to industrial exposures to physical and chemical stresses and their effect on the reproduction process. Examples of the lack of knowledge in this area continue to appear. A most recent example is the DBCP (1,2 dibromo-3-chloropropane) case where exposures to this chemical which is used as a fumegant to control nematodes, are alleged to have caused oligospermia and aspermia (sterility).(1) (2)

Prior to discussing some of the more specific legal implications related to our subject, I'd like to develop for you, just briefly, the general circumstances that lead us to the existing climate we find ourselves in relative to occupational safety and health law and equal employment opportunity law each, of which, presents difficulties in extending full protection to women of child bearing capability who work with hazardous substances which may affect the fetus.

The beginning of what I consider the new era for occupational safety and health began with the Coal Mine Health and Safety Act of 1969.[3] The act initially established a standard of 3.0 mg/M^3 of respirable coal dust exposure followed

Recd 11/10/77

three years later by requiring a 2.0 mg/M^3 of respirable coal dust exposure during each shift to which a coal miner was exposed. The samplings required under the Act were to be repeated periodically based upon the exposure levels found in the coal mines. In addition, regulations under the Act required repeated personnel noise evaluations obtained in a similar manner as required under the coal mine respirable dust exposure requirements. The Act also established medical provisions including a compensation schedule for coal miners having identified coal miners pneumoconioses.

I recall my own concern, at the time of implementation of the law, for adequate immediate implementation of the regulations promulgated under the Act.

The requirements of the Act, however, left no doubt this was the beginning of a new era in occupational safety and health law since no previous legislation or other mandate had been so demanding and encompassing in occupational safety and health matters. A year later (in 1970) the Occupational Safety and Health Act(4) was passed and I need not go into all of the implications of that legislation. Everyone here knows its signficance for occupational safety and health. Generally speaking, the Occupational Safety and Health Act multiplied the requirements included in the Coal Mine Health and Safety Act and, of course, multiplied the implications for the health of employees for all industry in the United States.

Since the implementation of these two acts, specifically related to worker health, there have been a number of additional pieces of legislation which relate, at least from the standpoint of indicating general mood of our society for health and safety matters. Some of the legislation includes the Toxic Substances Act(5) and the California Carcinogen Act(6) to name but a couple. This wave of legislation indicating societies desire for health and safety protection is accompanied by an equally strong surge in health and safety related litigation. Society's interest in responsible action in protecting their health and safety is also of course reflected in judicial decisions. In addition, attorneys are becoming more aware and informed of the occupational health issues which also accounts to some extent for the increasing litigation in health and safety matters.

In a recent edition of Trial,(7) the National News Magazine published by the Association of Trial Lawyers of America, five out of ten articles comprising the edition related to the discussion of litigation of occupational health matters. Within this framework of societal interest and scientific discovery of health related occupational problems, legal theories and decisions tend to change and the injured or diseased individual is more easily identified and more readily compensated. In reflection, it is only eight short years ago that the Coal Mine Health and Safety Act was enacted beginning the current emphasis on worker health and safety.

It has just bee. .he last twelve years that emp. ,ment discrimination remedies appeared; spearheaded by Title VII of the Civil Rights Act of 1964. Prior to the Civil Rights Act of 1964, with the exception of a few pertinent doctrines attempting employment equality, tradition in this country resulted in a common law rule that unless specifically restrained, individuals were free to act as their will directed. This liberty resulted in great freedom to use and enjoy property, hindered only by nuisance concepts. Historically, under this legal philosophy, an employer was free to establish the terms and conditions of employment including the rules he desired employees to follow. He could discriminate as he wished. There was essentially no legal interference. The common law, although it could have, did not evolve tort or property concepts to protect employees as economic and social conditions changed. The courts did not limit employers in their absolute freedom of discrimination. No actionable tort evolved. But for a few exceptions, what was true for the common law yesterday remains true today. Unless such activity is limited by contract or statute, the private employer is free to conduct his affairs without judical interference.[8]

But there has been, however, a continuous stream of enacted statues and and opinions. Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 bans all irrgeularities in compensation on account of sex for persons performing substantially equal work. Executive Order No. 11246 as amended by Executive Order No. 11375 bans discrimination by government contractors on the same grounds as Title VII. These executive orders have been expanded to cover handicapped individuals under The Rehabilitation Act of 1973 and disabled veterns under the Vietnam Era Veteran Readjustment Act of 1974.[9]

In addition to the specific federal statutes and regulations dealing with employment discrimination, there are other federal regulatory statues such as the National Labor Relations Act as amended and the Railway Labor Act that have been interpreted to preclude various aspects of employment discrimination. Many federal agencies have promulgated Equal Employment Opportunity regulations.[9] No federal entity is sacred, as reported on September 5, of this year, a coalition of civil rights groups is attacking one of the last bastions of job discrimination, the U.S. Congress,[10] a group that should perhaps be the first to eliminate job discrimination.

In addition most states and many municipalities have fair employment practice statutes or ordinances - also many state regulatory agencies are following the federal standard and applying equal employment opportunity principles to the various industries they regulate.[9]

In addition, there is some tendency to enlarge the area of protection or the number of protected categories in employment. In the District of Columbia, Regulations under Title 34, employment discrimination is precluded based on race, color, religion, sex, national origin, age, marital status, personal appearance, sexual orientation, physical handicap, matriculation or political affiliation.[9]

At this point I'd like to just briefly highlight some aspects of the Civil Rights Act in order to give you an insight into its more specific implications in the occupational safety and health arena.

Section 703 of Title VII of the Civil Rights Act of 1964 which was amended by the Equal Employment Opportunities Act of 1972 states:

a) It shall be unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin, or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex or national origin.

The most obvious form of proscribed discrimination is based on an employment classification expressly made upon a person's sex which adversely affects the status as an employee i.e. men's work v. women's work.[11]

Under an express classification an employer may not deny employment or employment opportunties by imposing one set of rules for women and another set of rules for men - women may not be excluded from jobs determined to be dangerous, undersirable or unladylike. Weeks v Sou. Bell Tel. & Tel. Co. (5th Circuit, 1969) decided that it is impermissible for women as a class to be denied jobs that require lifting of certain weights or performing certain tasks.[12]

The defense to express classification relative to hiring policies include a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. There must be a connection between discriminating classifications and the job to be performed. Romantic, historic, paternalistic or otherwise stereotype notions in the area of sex discrimination do not fulfill this connection.[13]

There are two possible theories on establishing BFOQ. The first, as in the Martin Marietta[14] case is the existence of a conflicting family obligation. If the confliction were demonstrated to be more relevant to job performance for a woman than for a man, there would be a basis for distinction in employment. The second approach offered in the same decision indicated that the defense must be limited to job situations that require specific physical characteristics necessarily possessed by one sex.[15]

Both defense theories have been used in lower court decisions. One court reasoning that a BFOQ would be established by demonstrating that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. The burden of proving substantially all members of a class are unable to perform a job is a very formidable task.[16]

In Cleveland Bd. of Education v. La Fleur, 414 U.S. 632, under the 14th Amendment, the court struck down a rule disqualifying pregnant teachers from teaching as being a rule based on an assumption concerning pregnant women that is not "necessarily or universally true;" therefore, each individual case should be considered on its own merits.[17]

In reference to this area, a recent 4th U.S. Circuit Court of Appeals case in Virginia ruled that an airline can refuse to let a pregnant stewardess fly on the basis that she could jeopardize the safety of the passengers.[18].

In essence under Title III of the Civil Rights Act of 1964, as amended, employees may not take either the pregnancy or the childbearing capability of an employee into consideration upon hiring, training, assigning, promoting or laying off, unless it can be proved that it is needed based upon overwhelming business necessity.

The declared congressional purpose and policy of the Occupational Safety and Health Act[4] is to assure, as far as possible, every working man and woman in the Nation, safe and healthful working conditions and to preserve our human resources. However, information on allowable levels of exposure to protect women in the reproduction stages of life or the reproduction capability of man is not readily available.

Traditional allowable levels of exposure to substances in industry have been based upon airborne concentrations of substances which will protect nearly all workers - a small percentage of workers will experience discomfort from some substances at concentration below the allowable level - a still smaller percentage may be affected more seriously by aggravation of a pre-existing condition or by development of an occupational illness - where human data has been used to establish these criteria it has been based primarily upon the average, healthy male worker.[8]

For the most part, the health standards that are incorporated under OSHA have been established under these guidelines - based on a healthy male worker. Generally without consideration for women and the developing fetus or childbearing capacity of an employee.

The employer currently finds himself in a dilemma. Equal Employment Opportunity regulations require him to employ indiscriminately in some instances where there is little or no information concerning the work stress and resulting strain on a developing fetus or the general reproductive capability of the employee.

The existing legislation provides a very broad basis for reference for balancing social regulatory goals. Since science, in this situation, does not have immediate answers, society and the law has to resolve the conflicts that develop in protecting reproduction and childbearing capability versus employment rights.

There are currently no simple solutions. Let's now review some of the more specific legal issues.

If an employer were required to obtain information as to the reproductive status of an employee or one seeking employment, it appears based upon Roe v. Wade[19] and Doe v. Bolton[20] the Supreme Court abortion decisions, that there may be an invasion of privacy issue involved. Although legal reviewers[21] of the decision consider the decision to be extremely vague concerning the constitutional foundation of the decision, the reviewers consider the decision unusually explicit about issues not directly before the court. The Supreme Court indicated in these cases that although the Constitution does not mention any right of privacy; the right has some extension to activities related to marriage, procreation, contraception, family relationships and child rearing and education. In the Roe and Doe decisions, the Supreme Court determined the right to privacy to be broad enough to encompass a woman's right whether or not to terminate pregnancy. The Court said that the detriment that the state would impose on the pregnant woman by denying her this choice is apparent in reference to a distressed life and future, psychological trauma and accompanying distress associated with an unwanted child...The court goes on to say however that they also recognize the states important interest in safeguarding health, maintaining medical standards and protection of prenatal life. At some point in pregnancy, the states interest becomes sufficiently - compelling to sustain regulation of the factors that govern the abortion decision. Based on this decision the woman's privacy right does not become absolute or unlimited. At some point the state's interest in protecting health, medical standards and prenatal life becomes dominant over woman's personal interest.

In the Roe and Doe cases, the court said that the states interest becomes dominant at viability of the fetus or when the fetus is capable of life outside the womb. In the employment situation, however, the states interest in knowing about the reproduction status of women or men may become more dominant prior to viability, since occupational stresses may affect the man or woman prior to conception or the woman at some specific time during the term of pregnancy depending upon the specific stress involved. The question becomes - does the right of privacy protecting the revelation of any information on activities related to marriage, procreation, contraception, etcetra, by the man or woman, as discussed in the Roe and Doe cases apply to an employment inquiry concerning such matter? There appears to be no clear answer to this question.

Another area of interest to the employer would be Worker's Compensation, which provides a compulsory and exclusive scheme of employer liability without fault for employees injured or otherwise disabled for such condition arising out of employment and in the course of employment.(22)

The important question here is: At what point and under what conditions, does the fetus of the working mother become a third party? The significance of the fetus becoming a third party lies in the extent of the potential liability for any irresponsible act impinging on the fetus. Where the law recognizes the fetus as an existing person, in terms of liability for negligence the amount of damages recoverable by the injured is essentially unlimited as opposed to damages to an injured employee under the worker's compensation procedure.

The tort law is changing rapidly in this particular area. If a child is born alive, a child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interest in event of its subsequent birth.(23) In most jurisdictions, a child can recover for injuries caused anytime from conception to birth if he is born alive. For example, if a developing fetus were wrongly stressed during the first semester, resulting in a defect at live birth, the defect is recoverable by the newborn. A couple of jurisdictions have gone further and awarded decisions based on stillbirth if the fetus was viable.(23) It would appear then that if the fetus is not recognized as a person by the law of the jurisdiction involved, any damages sustained defers to the mother who is the employee and if the loss of the fetus is AOE-COE, it becomes a workers compensation matter.

A recent Ohio Supreme Court case decided that an "unconceived" child is not a "person" and is therefore not eligible to sue for damages.

The case involved a baby girl born, four years after her RH negative mother was given an RH positive blood transfusion. The child was born with severe brain and spinal cord defects (erythroblostosis) and the mother sued the hospital for damages on behalf of her child, which of course, had not been conceived at the time of the blood transfusion.(24)

Under this case, it would therefore follow that if an employee were stressed by an agent that subsequently produces a deformed child, the employer is not liable to the child for the damages incurred.

In another related area, a recent OSHA based case, Dunn v Brimer,(25) decided that defendant's unexcused violation of federal OSHA regulations is some evidence of negligence when he is sued in a state court tort action and defendant's liability for OSHA violations extends to and encompasses 3rd persons such as non-employees. We could apply this to a situation concerning a developing fetus. It would appear that a violation of a health standard under OSHA would assist in an action initiated by a subsequently born child who may have been allegedly damaged due to his parent or parents' employment stress.

Another legal concept of interest in reference to this matter is the continued lengthening of the statute of limitations in tort law. The statue of limitations refers to the time allowed for filing a claim for damages after the occurrence of the injury or illness or when one knew or should have known of the injury or illness. In an Illinois Appellate Court decision in Renslow v. Mennonite Hospital, June 10, 1976, a cause of action was permitted on behalf of a child born 8 years after an allegedly negligent blood transfusion given to the infant's mother. The case has gone to the Supreme Court. The decision could have significant implications relative to this subject matter since an abnormality may not be discovered for many years after the industrial exposure.

One final legal concept although relatively insignificant but worth mentioning is that of outrage and emotional distress which is taking a new direction in tort law. A recent case in Arizona - Ron Munshower v. Dr. Robert L. Lock - the plaintiff received a $50,000 award for her emotional anguish and for costs of psychiatric treatment as a result of a radiologist informing the pregnant plaintiff that she had been exposed to x-radiation that increased her risk that her child would be born malformed, mentally retarded, or with leukemia and therefore she should seek a therapeutic abortion. The plaintiff decided not to have her abortion and the award was based on the anxiety and other damage she suffered, concerning the doctor's warnings, although the child was born without any apparent defects. It was shown that the plaintiff continued to suffer with the knowledge that the baby had been exposed to an increased risk of leukemia or sterility in the future.[26] Under this case a negligent warning of an employee about an exposure that may cause an effect but, in fact, did not cause an effect may result in liability for damages.

In addition, I might add just one general consideration. It is expected that the near future will see a broadening of the concept of strict liability concerning chemicals which have not been properly tested and no warning issued concerning their potential health problems. The Toxic Substances Act, of course, will accentuate this kind of duty. The question may arise as to what extent is it reasonable to expect testing to involve the human reporduction process? Should the tough requirements[27] encompassing fetal research be reviewed to determine necessity for providing more scientific input for better decision making in protecting our human resources?

As I mentioned, I have discussed only some of the considerations. Other issues include: if a woman were to agree to assume the risk and work in an environment where there may be a stress which does, in fact, affect the subsequent born child,

1) Should she have the right?
2) Does her husband have any right in her decision to risk the baby's health?
3) Will the child have any rights against mother, father, employer if upon birth there is resulting damage?
4) Could she agree to an abortion and continue working? Would she need her husband's approval for an abortion?

Does OSHA have the authority to issue guidelines recommending transfer of pregnant workers at no loss in pay or seniority? If transferred and the employee obtains less pay, could she claim discrimination? If she were transferred and reimbursed at her [illegible] pay level could a man working [illegible] the same job at less pay claim discrimination? If special standards were set up for pregnant woman - lower than for those who would not be childbearing, could a suit be filed by the woman who had decided to remain childless, on the grounds that the lower standards were arbitrarily discriminatory?(28)

In summary, in situations where an employer has responsibility for workroom exposures to stresses which may have an adverse effect on employees or the reproductive capability of employees or the descendants of employees, the best protection lies in 1) keeping informed concerning the scientific implications of exposure, 2) providing adequate information concerning the possible adverse effects of exposure to the employees involved, 3) insuring that existing exposure levels of the involved employees are within recognized standard for allowable exposure levels and 4) adhering to pertinent complementing guidelines.

REFERENCES

ROSS V. BFS

1. Occupational Safety and Health Reporter, Bureau of National Affairs, Vol.7, No. 13, pg. 396 (Aug. 25, 1977)
2. Occupational Safety and Health Reporter, Bureau of National Affairs, Vol.7, No. 16, p. 459 (Sept. 15, 1977)
3. PL 91-173
4. PL 91-596
5. PL 94-469
6. SB-1678 (California)
7. Trial The Magazine of The Trial Lawyers of America, 1976
8. Player, Mack A.: Federal Law of Employment Discrimination, West Publishing Co., 1976, pg. 2-3
9. Ross, John F.: New Developments in Equal Employment Opportunity. Practising Law Institute Legal Notes and Viewpoints, Vol.13, No. 12, 1976.
10. Los Angeles Daily Journal, Sept. 5, 1977.
11. Player, supra reference 8, pg. 109
12. Player, supra reference 8, pg. 111
13. Player, supra reference 8, pg 116-120
14. Phillips V. Martin Marietta Corp., 400 U.S. 542, 1971
15. Player, supra reference 8, pgs. 120-122
16. Player, supra reference 8, pg. 121-122
17. Player, supra reference 8, p. 123
18. The Wall Street Journal, August 2, 1977
19. 410 U.S. 115
20. 410 U.S. 181
21. Ely, The Wages of Crying Wolf: A Comment on Roe V. Wade, 82 Yale L.J. 920, 922 (1973)
22. Continuing Education of the Bar, California Workers' Compensation Practice, 1973
23. The Association of Trial Lawyers of America Newsletter, December, 1976

24. Los Angeles Daily Journal, May 2, 1977

25. 537 S.W. 2d. 164

26. The Association of Trial Lawyers of America Newsletter, November, 1976

27. Hershey and Miller: Human Experimentation and the Law, Aspen Systems Corporation, 1976.

28. From "Existing Legislation", presented at the "Women in the Workplace" Symposium by the Northern California Section of the American Industrial Hygiene Section of the American Industrial Hygiene Association, March 24-25,1977