Chapter 8

Sex Discrimination Issues

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Chapter 8

Sex Discrimination Issues[1]

INTRODUCTION

Some companies have implemented, or are considering, policies that exclude women of childbearing age from jobs involving exposure to suspected reproductive health hazards. Although it is impossible to determine how many companies have either written or unwritten exclusionary policies, at least 15 of the Fortune 500 as well as numerous hospitals are reported to exclude fertile and/or pregnant women from some jobs. Restricting the employment rights of women presents difficult ethical, legal, and policy questions. This chapter focuses on the legal aspects of sex discrimination and discusses the dilemma of balancing apparently competing policies of nondiscrimination and occupational health. (A discussion of the ethical aspects of sex discrimination appears in chapter 11.) The chapter begins with a historical view of exclusionary policies promulgated by State legislatures and implemented by employers. Special attention is paid to the ideological forces that have identified women as being hypersusceptible to occupational health hazards and once served as the basis for judicial approval of discriminatory policies. The chapter next addresses modern discrimination law and analyzes the law's ban on employment discrimination as it relates to exclusionary policies based on sex. The chapter concludes with a discussion of the relationship between Federal antidiscrimination law and the need to protect worker and fetal health.

[1]References in the text to judicial and legislative bodies include both Federal and State institutions unless otherwise noted.

HISTORICAL PERSPECTIVE: THE COMMON LAW AND PROTECTIVE LEGISLATION

In 1869, Myra Bradwell applied for admission to the Illinois bar. Although she had passed the qualifying examination, she was denied admission by the State supreme court because she was a woman. Bradwell took her case to the Supreme Court of the United States, claiming she was unconstitutionally denied the privileges and immunities guaranteed to all citizens of the United States by the recently ratified 14th Amendment to the United States Constitution.[2] The Supreme Court rejected her claim. An opinion agreed to by three justices stated:

> [The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, a woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution-of family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So fir-rely fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[3]

[2]Section 1 of the 14th amendment states:

> All persons horn or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws

[3]Bradwell v. Illinois, 83 U.S. (16 Wall.) 1130 (1873).

Bradwel] was one of the first cases in which a woman went to court in an attempt to secure the freedom to choose an occupation. The opinion quoted here is representative of both judicial and societal attitudes of that era: a woman's role—first, foremost, and preferably exclusively—was that of wife and mother. Women were not supposed to work outside the home, and society saw the increasing numbers of working women as cause for civic concern and moral outrage.

Nevertheless, women began entering the nonagricultural labor force in large numbers in the 1880s. By the turn of the century, they constituted approximately 20 percent of the nonagricultural labor force,[4] The belief that women were inferior to men encouraged companies to use women workers only for the "women's work" that women had been doing in the home for centuries (e.g., sewing and weaving). The labor market was fundamentally segregated by sex; women were confined to the same few low-paying job categories as were reserved for children. Despite their marginal status as workers, women became a reserve force of inexpensive labor available to replace higher paid males in the nascent labor unions. They thus threatened men's jobs and wage levels, which may have helped motivate the suggestion that women stay home.[5] Yet, the fundamental sex segregation of the labor market was not affected by the occasional use of women to replace men simply because there were too few working women to replace men in any substantial numbers.

During the late 19th and early 2oth centuries, labor unions often discriminated against women as much as employers did. Some union constitutions excluded women from membership, some set quotas on female membership, and others limited women to positions as apprentices or helpers. A few unions organized women into separate locals. Unions often negotiated contracts for women to be paid less than men and for women to be excluded from '(men's jobs. "G One labor historian has described the attitudes of unions as "a tacit understanding in the great brotherhood of man, that woman's place was in the home."7 An American Federation of Labor pamphlet from this period stated this view quite directly:

> . . . as the woman is transferred from the home to the workshop . . . her refinement and elevating influence in the domestic circle [is] destroyed, and hence the social environment, and therefore the character of the child, the family, and ultimately that of the whole industrial community is thereby lowered.[a]

During this same period, working conditions resulting from the industrial revolution raised concerns about workplace healthfulness. The States began to enact laws, known as protective labor laws, regulating the working conditions for both men and women. Many of these statutes applied only to women, or required different working conditions for women. These laws limited the weights women could lift, the hours they could work, and the jobs they could perform; established a minimum wage for women; and generally attempted to protect the health and safety of women workers, Women's organizations, having failed to secure voting rights for women, launched a strategy of improving the status of women in other sectors of society and were prominent among those who lobbied in favor of protective legislation. Unfortunately, protective laws were often revealed to be ruses for "protecting" women from more lucrative jobs. For example, women were "protected" from lucrative night work in factories, but not night win-k as waitresses, and in California the maximum hours law for women was suspended during harvest season.

By 1908, 20 States had enacted laws setting maximum hours or prohibiting night work for wom - en.[8] The constitutionality of these laws was upheld by State courts in four States and struck down in two States.

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[4] *Bread and Roses: Working Women's* **Consciousness** *Develops*, **1905-1920, 10 The Human E-actor, Journal of the Graduate** Sociology **Student Union of Columbia University,** No.1, **33 (1970).**

[5] **B. Babcock, A. Freedman, E. Norton, and S. Ross, Sex** *Discrimination and the Law: Causes and Remedies* **24 (1975).**

[6] Falk, *Women and Unions: A Historical View*, **Women's Rts. L. Rep.** 54 **(spring 1973).**

[7] Wolfson, *Trade Union Activities of Women,* **143 Annals 123 (May 1929).**

[8] Quoted **in P. Foner, 3 History of the Labor Movement in the United States 224 (1947).**

[a] **Massachusetts, Rhode Island, Louisiana, Connecticut,** Maine, **New Hampshire, Maryland, Virginia, Pennsylvania, New York, Nebraska, Washington, Colorado, New Jersey, Oklahoma, North Dakota, South Dakota, Wisconsin, Oregon, and South Carolina.**

Muller v. Oregon, [10] decided by the U.S. SUpreme Court in 1908, was the the first case that involved a protective law affecting only women to reach the Supreme Court. The Court unanimously upheld Oregon's maximum hour rule for women, even though the Court had invalidated a New York protective law that established maximum hours for (generally male) bakers 3 years earlier .11 The ***Muller*** decision stated that a woman "is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." The distinction between men and women was based in large part on scientific and pseudo-scientific data concerning the effects of overwork on "female functions, " reproductive capacity, and infant mortality among the children of women workers. The ***Muller*** case was one of the first in which suspected reproductive impairment caused by working conditions was advanced as a justification to limit the employment of women. The Court justified the maximum hour rule by asserting that:

> . . . a "woman's physical structure and the performance of maternal functions place her at a disadvantage. . . . This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to [cause] injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of w~oman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

After ***Muller,*** reform groups turned their attention to the establishment of a minimum wage for women and the issue was brought to the U.S. SUpreme Court in 1923,[12] Supporters of the women's minimum wage statute submitted briefs filled with tables and charts demonstrating the impact of poverty and malnutrition on the health of women workers and their children. The Court, however, was unimpressed with arguments about the relationship between women's wages and the health of future generations and found the minimum wage law to be unconstitutional. *[3]

[10] 208 U.S. 412 (1908).

[11] Lochner v. New York, 198 U.S. 45 (1905)

[12] Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923).

[13] The courts continued to hold minimum wage laws, for both men and women, to be unconstitutional for almost 15 years, until the Supreme Court reversed itself. West Coast Hotel Co. v. Parrish, 300" U.S. 379 (1937).

THE EQUAL PROTECTION CLAUSE AND DISCRIMINATION

Basic constitutional principles control congressional and State legislative activity; congressional action that treats men and women differently for purposes of protecting fetal and adult health must meet constitutional standards. The equal protection clause of the 14th amendment is the primary constitutional limiting factor on legislating sex-biased classifications. The clause has no effect on the rights of the private sector to discriminate between men and women, though such discrimination might be a violation of the Federal sex discrimination statute (discussed later).

Historically, the courts have interpreted the equal protection clause as permitting almost any governmentally imposed restriction on the rights of women .14 As in the case of protective labor legislation, women were considered to be special people whose morals, health, and childbearing capacity were in need of special protections and restrictions. Although the courts currently examine governmentally created sex-biased classifications much more closely than in the past, the courts are reluctant to equate the discriminatory

[14] The 14th amendment is directly applicable only to the States and does not reach conduct by either the Federal Government or private entities. However, since the courts believe that equal protection concepts are an inherent part of due process, the substance of the equal protection clause has been made applicable to the Federal Government by incorporation into the due process requirement of the fifth amendment. Boiling v. Sharpe, 347 U.S 497 (1954).

potential of legislative classifications based on sex with those based on race or national origin. Consequently, women may continue to be subject to restrictions that would be unconstitutional if applied to a racial, religious, or ethnic group. This is the result of a judicially created theoretical framework that labels legislative classifications as either "suspect" (e.g., racial group) and therefore subject to a high level of judicial scrutiny, or "nonsuspect" (e.g., war veterans) and therefore subject to a low level of judicial scrutiny. Gender classifications were historically nonsuspect but now rank between these categories and are subject to "heightened scrutiny."

According to the courts, the equal protection clause does not require people or characteristics that are different to be treated by the law as though they were the same. For example, criminals need not be treated like law-abiding people, foreign nationals need not be treated like citizens, and children need not be treated like adults. But the courts do require that similar things be treated similarly. The judicially created ***doctrine of reasonable classification*** requires that legislative classifications such as these be reasonably related to accomplishing a constitutionally permissible purpose. A reasonable legislative classification should, so far as is possible, include all that is the same (lest it be underinclusive) and exclude all that is different (lest it be overinclusive). The extent to which a legislative classification is "reasonable" (and therefore acceptable to the courts) is determined by the classification's success in treating similarly those people who are similarly situated and excluding those who are not, given the legislative purpose of the classification.

For example, if a legislature wants to prevent birth defects caused by developmental hazards in the workplace (a constitutionally permissible purpose), it might decide to exclude from the workplace persons at risk. If the legislature excludes "all women, " this classification might be ***overinclusive*** because it includes infertile women, who do not need protection from the risks of reproductive health hazards. However, excluding all women might also be ***underinclusive*** if men are subject to the same risk but have not been excluded. "All women" might also be considered overinclusive because it lumps together both women who are, or plan to be, pregnant with women who are practicing birth control or are abstaining and those who are no longer of reproductive age. Overinclusiveness and underinclusiveness are not necessarily mutually exclusive, nor is it always easy to determine the most appropriate classification that will achieve legislative goals,

After World War II, the reasonable classification test evolved into two alternative tests: the strict scrutiny test and the rational basis test. The choice of test is based on judicial labeling of a legislative classification as being either suspect or nonsuspect. Suspect classifications are subject to a stricter standard of review (strict scrutiny test) than are nonsuspect classifications (rational basis test).

A classification is suspect if it identifies for special treatment people who historically have been victimized by discriminatory treatment, especially if such people are easily identifiable by physical characteristics and are therefore easy targets of discrimination (e.g., race).[15] A classification labeled suspect is then subjected to a court's strict scrutiny and will be upheld only if the State shows: 1) that the legislative purpose is a "compelling State interest," meaning that the legislature's goal is of overwhelming public importance, and 2) the legislative purpose cannot be achie~~ed with a less drastic classification than the one used. A less drastic classification would be less burdensome to the affected class, less underinclusive or overinclusive in defining the class, or would not use a suspect classification at all.[16]

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[15] [A] s[,,] [law Wi]] be '(suspect" if it infringes on an interest the courts deem to be '(fundamental," such as the right to vote, the right to procreate, and the right to travel freely.

[16] [In the example described previously, a strict scrutiny standard would prescribe a less drastic classification than "all women. " A *less burdensome* law might require women to wear protective equipment or rotate job assignments rather than face expulsion from the workplace. If men are also at risk, a *less underinclusive* classification would include both men and women. A less *overinclusive* classification might be "all women between the ages of 16 and 45, except those who are certified infertile by a physician. ". \ classification of "all women between the ages of 16 and 50 except those who are certified by a physician to be either (a) infertile, or (b) using an effective birth control method" would be even less overinclusive, but might be considered somewhat underinclusive because some women who use birth control become pregnant and are therefore subject to reproductive harm.

Legislative classifications that do not isolate a historically victimized group are labeled nonsus - pect. For nonsuspect classifications, the courts require only that a "rational" relationship exist between the classification and a valid State interest. A "rational" relationship is one that is based on sufficient data to lead a court to conclude that the classification used is not arbitrary; it makes no difference that a more rational classification could hate been chosen. Furthermore, the legislative purpose must merely be constitutionally permissible; a compelling State interest is not required .1'

The difference between the strict scrutiny test (applied to suspect classifications) and the rational basis test (applied to nonsuspect classifications) is even greater than is immediately apparent. If a classification is nonsuspect, the person challenging the classification has the burden of proving to the court that the classification is arbitrary and has no rational basis. The courts ordinarily presume that the legislature is acting rationally and usually accept the legislature's version of the facts. Alternatively, if a classification is suspect, the legislature has the burden of proof on all issues, including whether the legislative purpose is a compelling State interest, whether the classification is necessary to achieve the legislative purpose, and whether less drastic alternatives to the classification are available.

Race is the quintessential suspect classification; members of minority racial groups have historically been discriminated against and have easily identifiable physical characteristics. Sex might have been labeled a suspect classification for the same reasons. However, the courts generally refused to analogize sex and race for purposes of choosing one of the two equal protection analytical frameworks, and, until recently, gender was considered a nonsuspect classification. The judiciary saw women primarily as mothers, wives, and homemakers, and as the morally pure members of the human species, and was as eager to "protect" women as were the legislatures. Until the late 1960s, the courts generally upheld sex-biased laws by applying the rational basis test .[18]

In the late 1960s, a number of cases brought to the lower courts challenged the notion that sex classifications were always reasonable. After the passage of Title VII of the Civil Rights Act of 1964, the courts began to examine more closely the States' justifications for differential treatment. In one case, a court refused to assume the existence of moral and social hazards in order to justify the exclusion of women from bars:

> Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unwashed humanity will no longer justify separatism. 19

In another bartending case, the California Supreme Court was the first State court to hold that sex was a suspect classification. [20] Decisions such as these in New York and California helped change judicial attitudes towards sex discrimination in other States and in the Federal courts.

The U.S. Supreme Court cautiously began breaking new ground in the application of equal protection analysis to sex discrimination in a 1971 case, Reed v. Heed.zl Reed concerned a State law that gave mandatory preference to males over females as estate administrators, without regard to their individual qualifications. The Court unanimous invalidated the law, holding that the preference for males was arbitrary and wholly unrelated to the objective of the statute (reducing the workload on probate courts). The Court applied neither the relatively deferential rational

[17] If gender were a nonsuspect classification, then the classification in the previous footnote excluding "all women" may be constitutionally acceptable.

[18] For example, a State law that discriminated between male and female bar owners (by permitting the daughters of male bar owners to tend bar but not the daughters of female bar owners) was upheld by the Supreme Court in 1948. Applying the rational basis test, the Court held that the law was a permissible way to protect women from the "moral hazards" of dealing with drunken customers, even though the legislature chose to protect female bartenders by depriving them of their jobs rather than by penalizing antisocial customers. Goesaert v. Clearly, 335 U.S.464 (1948). This decision was finally renounced by the Court in Craig v. Boren, 429 U.S.190, 210 n.23 (1976). Less than a generation ago, a State supreme court upheld a statute excluding women from jury service with the following justification:

> The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still on a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial. State v. Hall, 187 So 2d 861, 863 (Miss 1 966)

[19] Seidenberg v. McSorley's Old Ale House, 317 F. Supp. 593, 606 (S. D.N.Y. 1970).

[20] Sail'er Inn, Inc. v. Kirbv, 5 Cal. 3d 1, 489 P.2d 529, 95 Cal. Rptr. 329 (1971).

21 404 U.S. 71 (1971).

basis standard nor the sharper strict scrutiny standard, but rather a new approach somewhere between the two. This third approach recognized, for the first time, that a classification based on sex was subject to "scrutiny," but did not go so far as to require the legislature to have a "compelling State interest" or the classification to be the least drastic way of achieving the legislature's goals (see table 8-l).

In 1976, the Court clearly articulated a new standard for evaluating sex discrimination claims under the constitution. Classifications by gender are required to be "substantially related" to an "important Government objective," a stricter view than the rational basis test's '(valid Government interest" but less stringent than the "compelling governmental interest" required under the strict scrutiny standard. Similarly, the classification itself was required to be "substantially related" to achievement of the legislative purpose; though this requires a more significant relationship than a mere "rational basis," the classification need not be the least drastic means of accomplishing the legislature's goals." The "heightened scrutiny" test continues to be the standard against which most gender classifications are measured when challenged on constitutional grounds (as opposed to statutory grounds such as Title VII).

Discrimination on the Basis of Pregnancy

Pregnancy discrimination presents certain difficulties under historical equal protection analysis. The problem is an irreconcilable theoretical conflict between those who believe that the gender equality principle can be applied only where men and women are treated differently with respect to a shared characteristic (which pregnancy is not) and those who believe that discrimination on the basis of physical characteristics inextricably linked to one sex is a form of sex discrimination.[23] The courts have generally taken the former approach with the result that discrimination on the basis of pregnancy has ***not*** been deemed sex discrimination per se under constitutional analysis.

The Supreme Court was first urged to recognize pregnancy discrimination as sex discrimination in two 1974 cases.[24] Although the challenged law was invalidated in one case and upheld in the other, these cases made it clear that the Court believed that gender equality did not apply to cases where men and women are treated differently due to a difference in physical characteristics, rather than because of stereotypical notions as to the roles, abilities, and sensitivities of the sexes. These cases also demonstrated that the Court would continue to apply the rational basis test to pregnancy discrimination, rather than the middle ground test used in ***Boren.***

In the ***LaFZeur*** case, the Court held that school district rules requiring pregnant teachers to take unpaid maternity leave beginning 4 months before the expected childbirth were unconstitutionally burdensome on the "freedom of personal choice in matters of marriage and family life." Although the Court rested its decision on an interpretation of the due process clause rather than

[22] Craig v. Boren, 429 U.S. 190 (1976).

[23] B Babcock, A. Freedman, E. Norton, and S. Ross, Sex *Discrimination and the Law: Causes and Remedies (W'.* Williams Supp. 1978).

[24] Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Geduldig v. Aeillo, 417 U.S. 484 (1974).

Table 8-1 .—Summary of Equal Protection Analysis

Type of classification	Test used	Legislative purpose must be:	Classification must be:
"Suspect" (example: race)	Strict scrutiny	Constitutionally permissible *and* of overwhelming public importance	Least drastic way to achieve purpose
Gender (since 1971)	Middle ground	Constitutionally permissible *and* important government objective	Substantially related to achieving purpose
"Nonsuspect" (including pregnancy and, before 1971, gender)	Rational basis	Constitutionally permissible	Rational way to achieve purpose

SOURCE: Office of Technology Assessment.

the equal protection clause, the opinion employed an analysis similar to the rational basis test for nonsuspect classifications. The decision in LaFleur may be explained by the Court's increasing concern with the right to personal privacy in decisions relating to childbearing, as evidenced by its decision in a landmark abortion case the previous term .[25] The ***LaFZeur*** policy assumed an irrebuttable presumption against a pregnant woman's fitness to teach.

In the ***Geduldig*** case, the Court upheld the validity of a State disability insurance system that excluded pregnancy from coverage, since the system did not exclude anyone from benefit eligibility because of gender but merely removed one physical condition—pregnancy—from the list of compensable disabilities. The Court used the rational basis test, refusing to equate pregnancy discrimination with sex discrimination in the absence of a showing that distinctions involving pregnancy are mere pretexts designed to effect sex discrimination. Three dissenting judges argued that the middle ground test should have been applied and the disability system invalidated:

> IBly singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout.

[25] Roe v. Wade, 410 U.S. 113 (1973). In this case, the court held that a State criminal abortion statute that exempts from criminality on J a *life-saving* procedure on behalf of the mother without regard to pregnancy stage and without recognition of the mother's personal privacy and other interests, is violative of the due process clause of the 14th amendment. The court attempted to balance the rights of a pregnant woman to preserve her health and privacy with the State's interest in protecting and preserving the health of both the pregnant woman and the "potentiality of human life." The court held that during the first trimester of pregnancy, the abortion decision and its effectuation must be left to the medical judgment of the pregnant \ \ oman's physician For the stage running from the end of the first trimester until fetal viability, the State may, if it chooses, promote its interest in the health of the mother by regulating abortion procedures in ways that are reasonably related to maternal health. For the stage subsequent to viability, the State may, if it chooses, promote its interest in the potentiality of human life by regulating or even proscribing abortion except where it is necessary for the preservation of the life or health of the mother

FEDERAL STATUTES RELATING TO SEX AND PREGNANCY DISCRIMINATION IN EMPLOYMENT

Title VII of the Civil Rights Act of 1964[26] prohibits sex discrimination by an employer of 15 or more persons engaged in any industry affecting Commerce [27] It is important to understand judicial interpretations of Title VII's requirements in order to understand the courts' treatment of exclusionary policies.

The principal language of the statute reads:

> It shall be an 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. 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 individual's race, color, religion, sex, or national origin.

Because the statute did not define discrimination "because of sex," the Supreme Court was reluctant to expand its own narrow definition of sex discrimination so as to include pregnancy discrimination,[28] In a 1976 case that quoted ***Gedul-***

[26] 42 U.S.C. § 2000e (1982)

[27] Title VII does not apply to tax-exempt private membership clubs or to religious corporations, associations, educational institutions, or societies. In addition, the Federal Government is exempted from certain provisions of Title VII, though not from the prohibition against discrimination.

[28] Title VII's prohibition against sex discrimination was added as a floor amendment, As such, there is no committee report and very little legislative history to define the scope of that term. Some commentators believe the floor amendment was added in an attempt to defeat passage of the bill. M.A. Player, Federal Law of Employment Discrimination in a Nutshell (1976).

dig extensively, the Court held that a company did not violate Title VII by excluding pregnancy from its disability benefit plan. The Court again stated there that pregnancy discrimination was not the same as sex discrimination, unless a distinction based on pregnancy was in fact a '(subterfuge" for sex discrimination.[29] The Court expanded the prohibition against pregnancy discrimination, however, in a later case.[30]

In **1978,** Congress responded to the Court's refusal to categorize pregnancy discrimination as per se sex discrimination by amending Title VII to explicitly prohibit discrimination based on pregnancy. The amendment, known as the Pregnancy Discrimination Act, states:

> . . . [tlhe terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth **or** related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.

Types of Discrimination

Under Title VII, the courts use three analytical frameworks to analyze allegedly discriminatory policies.

The first framework applies in those situations in which the employer has engaged in "facial" discrimination. Facial discrimination occurs when an employer adopts a policy or practice of treating women differently than men because of their sex, such as excluding women from certain job categories. Such a practice is overtly and intentionally discriminatory; it is discriminatory on its face.

The second framework applies to those situations in which the employer adopts a policy or practice that on its face classifies workers on a neutral, nondiscriminatory basis, but which the plaintiff alleges to be a mere pretext for illegal discrimination. For example, an employer who is clever enough to avoid overt facial discrimination might impose neutral requirements which disproportionately affect women, solely as a ruse to effect intentional discrimination. Although the policy is neutral on its face, the employer's discriminatory motive makes this a pretext case.

The third framework is used when the plaintiff admits that the employer's policy is sex-neutral but seeks to demonstrate that the rule has a disproportionately adverse effect on women. The sex-neutral policy may be either a specific policy (e.g., height and weight minima) or a more general pattern of failing to hire women. Under this framework, neutral employment practices are judged by their impact and not by the good faith in which they were instituted. The absence of a discriminatory intent does not absolve an employer of Title VII liability. For example, a company might impose a height and weight requirement on its truck drivers. Since women are generally shorter and lighter than men, such a policy is facially neutral but has an adverse effect on women applicants. This policy would therefore be considered discriminatory.

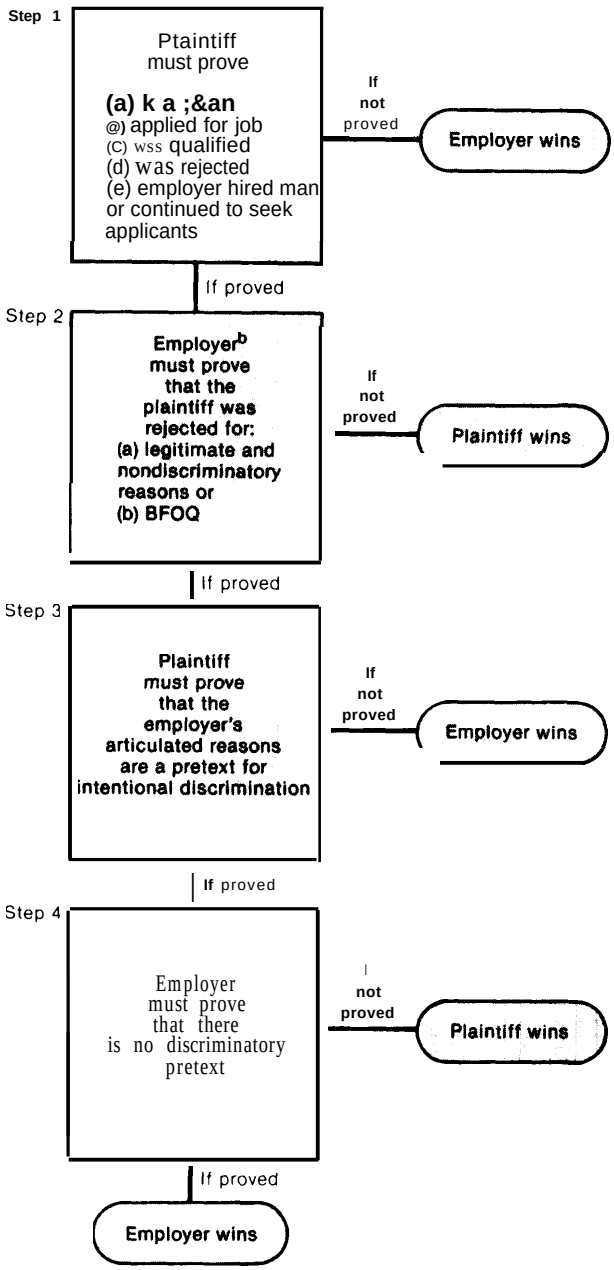
Both facial discrimination and pretext cases are referred to as "discriminatory treatment" cases and require proof of the employer's intent to discriminate. Intent may be inferred from proof of the elements of a prima facie case (see figure 8-1). Cases involving a neutral rule with disproportionate adverse effects are known as "discriminatory impact" cases and do not require proof of a discriminatory motive (see table 8-2).

Exceptions to the Prohibition Against Discrimination

Title VII explicitly provides an exception to the prohibition against facial discrimination. The exception allows an employer to employ (or refuse to employ) an individual on the basis of sex, religion, or national origin where the individual's sex, religion, or national origin is a "bona fide occupational qualification IBFOQ] reasonably necessary to the normal operation of that particular business or enterprise." This BFOQ exception does not apply to facial discrimination on the basis of race or color, as these are never bona fide occupational qualifications under Title VII, The courts have created a similar exception for disparate impact cases so as to permit neutral rules that have a disparate impact when they are justified by

[29]General Electric Co. v. Gilbert, 429 U.S. 125 (1976).
[30]Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

Figure 8-1.—Summary of Discriminatory Treatment Litigation



[a]Plaintiff proves these elements when claiming she was refused a job on the basis of sex Similar elements are proved in other types of facial discrimination cases

[b]If the employer claims the plaintiff was rejected for legitimate and nondiscriminatory reasons, he is asserting that he did not discriminate If employer claims BFOQ, he is claiming that he did discriminate but was justified in doing so

Source" Off Ice of Technology Assessment

"business necessity." Unlike the BFOQ exception, the business necessity exception applies to policies that affect employees on the basis of race or color.

The BFOQ exception has been interpreted narrowly by the courts. Sex is a bona fide occupational qualification where it is genuinely essential for purposes of authenticity (e.g., requiring a female character to be portrayed by an actress) and successful job performance (e.g., requiring wet nurses to be female and sperm donors to be male)) including safe operation of the business where safety is essential to the business (e.g., requiring a violent male prison population to be supervised by male guards).

Generally, however, the principle of nondiscrimination requires that individuals be considered on the basis of individual capabilities and not on the basis of any characteristics generally attributed to the group. The BFOQ exception does not permit sex discrimination because of customer preferences (e.g., an airline hiring policy reflecting customer preferences for male pilots and female stewardesses), assumptions about the comparative employment characteristics of women in general (e.g., the assumption that the turnover rate among women is higher than among men), or because of stereotypical characterizations of the sexes (e.g., that women are less capable of aggressive salesmanship). If a job requires, for example, regular lifting of heavy weights, an employer cannot refuse to consider women job applicants even though ***most*** men can perform this task more safely and efficiently than *most* women. Unless the employer can prove that all ***or substantially all*** women are unable to safely and efficiently perform the duties of the position, the employer is required to test each job applicant, male and female, to determine whether that particular individual is capable of performing the job.[31] Generally, the increased economic cost of testing women (or providing restroom facilities) may not be used to justify discrimination.

The exception in discriminatory impact cases is known as the business necessity exception. The

[31]Rosenfeld v. Southern Pacific Co., 444 F.2d **1219** (9th Cir. **1971**); Weeks v. **Southern** Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969).

Table 8-2.—Summary of Types of Discrimination and Exceptions

Type of discrimination claimed:	Must plaintiff prove discriminatory intent?	Exception permitting discrimination:	Exception applies to:
Discriminatory treatment (facial and pretext discrimination)	Yes	Bona fide occupational qualification	Sex, religion, national origin (but not race or color)
Discriminatory impact (disparate impact)	No	Business necessity	Sex, religion, national origin, race, and color

SOURCE Office of Technology Assessment

exception is broader in definition than the BFOQ exception because it focuses on the general busi - ness enterprise and job-relatedness rather than the narrower concept of job qualifications.

For a policy to be a "business necessity," the business purpose must meet three tests. First, it must be sufficiently compelling to override any discriminatory impact. Second, the challenged policy must effectively carry out the business purpose. And finally, there must be no acceptable alternative policies that would be less burdensome to the protected class. Using this standard, the courts have decided that the following employment criteria are permissible in at least some circumstances and for some jobs, even though they have a disproportionately adverse impact on some groups: educational minima, seniority systems, strength and agility tests, height and 'weight minima, lack of criminal record, and previous experience.

THE NEW PROTECTIONISM

Thus far, this chapter has described the restraints historically placed on women's occupational choice by State legislatures and employers concerned with the possible adverse effects of work on women's health, offspring, mortality, and morality. Protective labor legislation was consistently upheld against constitutional challenges until the late 1960s and early 1970s, when the courts refused to continue to accept stereotypical characterizations of the "weaker sex" as adequate justification for overtly discriminatory policies. The enactment of Title VII provided impetus for this change in judicial attitudes towards State-legislated sex discrimination, as well as being the first Federal statute prohibiting discrimination by employers.

During the past 16 years, the courts have interpreted and reinterpreted the prohibitions of Title VII with increasing breadth, especially following passage of the Pregnancy Discrimination Act in 1978. The courts now consider disparate impact, pregnancy discrimination, and sexual harassment to be aspects of sex discrimination. Several States have passed amendments to their State constitutions affirming the right of women to receive equal treatment at the hands of employers. Furthermore, numerous employers have voluntarily or by court order established affirmative action programs to increase the number of female employees at all levels. Although vestiges of past discrimination remain (women continue to earn 60 to 65 percent as much as men do),[32] many barriers to occupational choice have been broken.

Given both the history of sex discrimination in the United States and the remarkable progress that has been made in the past decade, many people find it troubling that sex is once again the basis for exclusion from some workplaces due to the presence of known or suspected reproductive health hazards.

Company policies excluding either fertile or pregnant women from certain jobs are becoming increasingly common. The spectrum of employers instituting such policies ranges from large chemical and automobile manufacturers to small community hospitals.

[32] Shack-Marquez, *Earnings Differences Between Men and Women: An Introductory Note,* **U.S. Department of Labor, Bureau of Labor Statistics, Monthly Lab. Rev. (June 1984).**

There is tremendous diversity in company exclusionary policies. Some of these policies have a basis in epidemiological and toxicological research findings with respect to particular substances, while others are more speculative about potential reproductive health hazards. Some policies are written and documented, while others are unwritten, making them more flexible but also more ambiguous. In large manufacturing companies, policies are generally announced to employees and their unions prior to implementation, while smaller organizations appear to formulate and apply policies as a perceived problem arises. Some policies recognize that a fetal hazard may be mediated through the male or female worker, while others by their terms apply only to women.

In some cases, these policies have faced court challenges on grounds of sex discrimination. While many of these cases are apparently settled out of court, some cases have been adjudicated. Three of these cases,[33] as noted in the following discussion, have reached the Federal courts of appeals in the Fourth, Fifth, and Eleventh Circuits. All three courts of appeals have held that the exclusion of fertile or pregnant women constitutes illegal sex discrimination under some circumstances, although these courts have approached the issue of exclusionary policies somewhat differently. One issue of disagreement is whether an employment policy barring pregnant or fertile women from certain job categories should be evaluated as sex-biased on its face (facial discrimination) because its terms apply only to women, or sex-neutral (disparate impact) because the policy's effect is similar on both sexes by providing equal health protection (though it may in fact be discriminatory by putting a disproportionate burden on women), The reason for this issue is that the choice determines whether BFOQ or business necessity is the relevant defense. Another point of contention has been whether an employer's concern about either fetal health or possible tort liability constitutes the business necessity defense. One circuit court treated fetuses like business visitors for purposes of determining the employer's responsibility for fetal safety.

[33]Hayes v. Shelby Memorial Hospital, 726 k'. Xi 2095 filth Cir. 1984); Wright v. **olin** Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hospital, **692** F.2d 986 **[.5th** Cir. 1982).

Although the three courts used different approaches, the following general principles can be extracted from these cases:

- A fetal protection policy (FPP) that applies only to women is presumptively discriminatory. That is, the mere existence of an FPP will create Title VII liability for the employer in the absence of strongly supportive scientific evidence.
- To overcome the presumption of discrimination, the employer must be able to prove that the body of scientific evidence supports legal findings that: 1) exposure at the level encountered in the workplace involves a significant risk of harm to the unborn children of women workers, 2) exposure at the level encountered in the workplace does not involve a similar risk of harm to the unborn children of male employees, and 3) the FPP is effective in significantly reducing the risk. An employer's subjective but scientifically unsupportable ***belief*** in the necessity of the policy is insufficient to defend it.
- If the employer proves both points (embrayo/fetal risk through maternal exposure and lack of embryo/fetal risk through paternal exposure), the plaintiff may nevertheless prevail by proving that an acceptable alternative policy would promote embryo/fetal health at least as well with a less adverse impact on one sex or by showing that the FPP is a pretext for discrimination.

Following is a description of the three cases decided by the Federal courts of appeals for the Fourth, Fifth, and Eleventh Circuits. The most recent decision, Hayes v. ***Shelby Memorial Hospital,*** is also the most analytically sound and the most likely to be followed by those jurisdictions that have not yet examined the issue of fetal protection as sex discrimination. The Hayes case is therefore discussed first and in greater detail than the other cases.

Hayes v. Shelby Memorial Hospita1[34]

In August 1980, an Alabama hospitaI hired a female X-ray technician to work the night shift in the hospital's radiology department. Two months

[34]726 F.2d 2095 (11th Cir. 1984).

later, the technician was fired after she informed her supervisor that she was pregnant. Following her dismissal, the technician filed a sex discrimination suit against the hospital in Federal court. The hospital defended on the grounds of "bona fide occupational qualification" and "business necessity." The trial court concluded that the hospital violated Title VII and awarded the technician damages. The hospital appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit. The appellate court examined the case under both facial discrimination and disparate impact theories, and concluded that the hospital had indeed violated the Federal statute governing sex discrimination .35

The ***Hayes*** decision approaches the issue of fetal protection policies in a manner more consistent with traditional Title VII analysis than the other **cases** that have been decided by Federal appellate courts. The court of appeals began by establishing a presumption that if an employment policy by its terms only applies **to** women or pregnant women, then the policy is facially discriminatory. That presumption may be rebutted if the employer can show that, although its policy applies only **to** women, the policy is both necessary and neutral in the sense that it effectively and equally protects all employees. Thus, in a fetal protection **case,** the employer must meet the requirements of a two-pronged test. The employer must show: 1) that there is an unreasonable risk of harm from exposure to toxic hazards in the workplace to the fetuses of women employees during pregnancy, and 2) that the hazard applies to pregnant women, but not to men.[3G] The court did not consider application of a fetal protection policy to nonpregnant women. Under the court analysis, the burden of proving a substantial risk of harm to the fetus is a threshold requirement. To meet this burden, the employer must "produce objective evidence of an essentially scientific nature supported by the opinion evidence of qualified experts in the relevant scientific fields." This burden may not be carried by merely proving that the employer subjectively and in good faith believed **a** substantial embryo/fetal risk to exist. The employer need not show that a consensus exists within the qualified scientific community. Rather, the employer carries its burden by showing that "the body of opinion believing that significant risk exists is so considerable that an informed employer could **not** responsibly fail to act on the assumption that this opinion might be the accurate one. "[37]

If the employer proves that there is a significant risk of harm to a developing fetus, **it** must then also prove that there is no similar risk for the offspring of male employees. Again, scientific evidence **is** necessary. The court noted that **a "certain** amount of subtle bias" has focused scientific research on hazardousness to the reproductive systems of women more so than on the hazards to male reproduction. Although the issue was not raised in the case, and is therefore still open to resolution, the court suggested that in those instances where scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a policy aimed solely at women. Presumably, however, employers would be required to adopt nondiscriminatory alternatives if available. and the failure to do so would be evidence of a discriminatory pretext.

If an employer fails to prove that the ultimate effect of a sex-based FPP is in fact sex-neutral in that it provides equivalent health protection to both sexes (due to both substantial risk to women and the absence of substantial risk to men), then the employer's only remaining defense is BFOQ. Utilizing the traditional analysis, the court stated that the BFOQ defense is available only when the employer can show that pregnant women are "unable to perform the duties that constitute the essence of the job. "[38] Under this analysis, potential for embryo/fetal harm is irrelevant to the BFOQ issue unless the toxic exposure adversely affects a woman's job performance (e.g., by making her too afraid to perform her job). Thus, there is in effect no BFOQ defense unless the employer shows a direct relationship between the fetal protection policy and the actual ability of a pregnant woman to perform her job. Critics of this analysis assert that a sex-based policy cannot be converted into a sex-neutral one based on the policy's

[35] *Id.* **at** 2108
[36] *Id.* at 2101.
[37] *Id.*, quoting Wright r'. Olin Corp.
[38] *Id.* **at 2102.**

ultimate effect of protecting the offspring of both sexes.

Applying this framework to the facts of the ***Hayes*** case, the court found that a presumption of facial discrimination existed because only pregnant X-ray technicians were subject to removal from jobs requiring radiation exposure.

The court then turned to the issue of whether the hospital rebutted the presumption of discrimination. The court first looked at whether the hospital proved that radiation from X-rays posed a significant risk of harm to the technician's fetus. The expert witnesses generally agreed that the standards set by the National Council on Radiation Protection and Measurements (NCRP) were authoritative, conservative, and provided a wide margin for safety. The NCRP proposes 0.5 rem as the maximum radiation dose to which a fetus should be exposed during the **9** months of gestation. The technician's radiation badges, which monitored the amount of radiation to which she was exposed, indicated that the technician's total radiation exposure during pregnancy would be below the **0.5** rem limit. The evidence at trial led the court to conclude that, '(although any amount of radiation can have a detrimental effect on humans, it is extremely unlikely in most cases that radiation below certain doses ***will*** have a detrimental effect"[39] (emphasis in original). The court concluded that the hospital had failed to prove that the technician's level of exposure posed an unreasonable risk of harm to her fetus

The court held that the hospital's failure to prove the necessity of its policy was sufficient to make the policy legally discriminatory. Having reached this conclusion, the court did not need to decide the factual issue of whether X-ray radiation affects the offspring of employees only through pregnant women, or whether similar effects can occur from male exposure .4'

Although the court's decision rested on a facial discrimination analysis, the court also analyzed the case using disparate impact analysis to show that, even if a fetal protection policy is facially sex-neutral, the policy might still constitute illegal discrimination.

The court began its disparate impact analysis by assuming, for the sake of analysis, that the application of a fetal protection policy solely to pregnant or fertile women was scientifically justified under the two-pronged test requiring necessity (exposure of pregnant or fertile women would result in an unreasonable risk of harm to fetuses) and neutrality (exposure of fertile men would ***not*** result in an unreasonable risk of harm to fetuses). Such a policy would be facially sex-neutral but would nevertheless have a disproportionate impact on women as a class since only women are affected by the policy. Therefore, "even if the employer rebuts the prima facie case of facial discrimination, the employee has an automatic prima facie case of disparate impact."[42]

The ***Hayes*** court stated that the employer's business necessity defense, like the employee's prima facie disparate impact case, also applies "automatically" in fetal protection cases. This is because the employer, in rebutting the presumption of facial discrimination that necessarily precedes disparate impact analysis in a fetal protection case, has already proven that its policy is scientifically justified.

The court, by accepting scientific evidence of a ***fetal*** hazard as a basis for the business necessity defense, extended the defense beyond the traditional definition of business necessity. The traditional definition generally limits the application of the business necessity defense to situations in which adverse job performance makes an employment policy necessary, despite its disparate impact on a protected class. The court did, however, limit its extension of the business necessity defense by carefully limiting the defense to an employer's genuine desire to promote the health

[39] Id , at 2104.

[40] The court noted **that,** even if the **hospital had** proved that the **technician's exposure** was excessive, **the fetal protection** policy would probably have **been** ineffective because **the greatest** danger **of fetal** damage **from** radiation occurs **during the earliest** days **of** pregnancy. **In such a case, the** employee **could** reasonably assert **that the** policy was **a pretext for** discrimination.

[41] The court did note, however, the existence **of studies** suggesting **that** radiation-induced mutations **ran piss to offspring** via the father's **sperm,**

[42] *Id.* at 2106. When the court says **that the** employee's case of disparate impact and the **employer's defense of business** necessity apply "automatically," **this** means **that no** additional evidence needs to be introduced at trial on these **points,** and the **trial** judge may proceed to the next **issue,** whether there were acceptable alternative policies.

of its employees' offspring. Designating fetal protection as a "legitimate area of employer concern to which the business necessity defense extends,"[43] the court distinguished between the avoidance of potential tort liability (discussed in chapter 10) and concern for fetal health. The purpose of this distinction was to make clear that extension of the business necessity defense was "based on a higher public policy than simply protecting employers from lawsuits."[44] Although the hospital claimed that concern about the potential economic consequences of tort liability constituted a business necessity, the court rejected this argument for fear that such an extension of the defense would shift the focus of the defense from a concern for the safety of hospital patients to a concern for hospital finances.[45]

The ***Hayes*** decision indicated that the employee may rebut the employer's business necessity defense with proof that there are "acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purpose with a less adverse impact on one sex."[46] The burden of proving the existence of acceptable alternative policies rests on the employee. Such policies might include temporary reassignment, temporary change in job description, job rotation, engineering controls, substitution of materials, and use of personal protective equipment. If there is more than one possible alternative policy, the employer must adopt the most effective policy possible with the least disparate impact possible to avoid Title VII liability. Furthermore, evidence of either failure to consider nondiscriminatory alternative approaches to fetal protection or lack of concern for nonreproductive occupational health protection could be used to show pretextual discrimination.

Unlike most sex discrimination cases (which proceed under either facial discrimination, pretext discrimination, or disparate impact theory), cases involving fetal protection policies that apply only to women would proceed under both theories in a sequential manner under the ***Hayes*** approach. Since the employee's prima facie case of disparate treatment and the employer's business necessity defense are automatic, the employee's failure to prove facial discrimination would lead directly to the issue of alternative policies, as demonstrated in figure 8-2.

Zuniga v. Kleberg County Hospital[47]

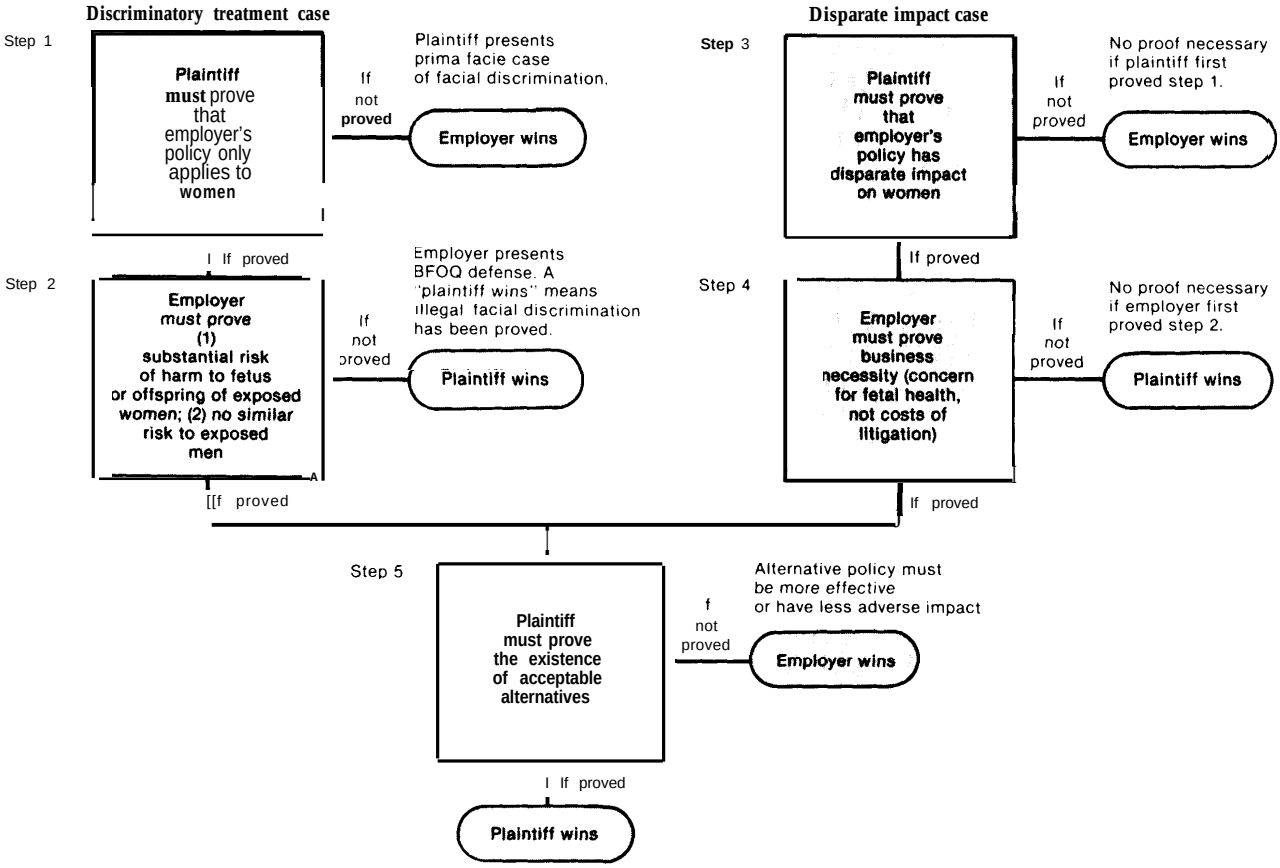
Zuniga was another case concerning a hospital's firing of a pregnant X-ray technician. Unlike ***Hayes,*** the events in ***Zuniga*** all occurred prior to the effective date of the Pregnancy Discrimination Act.[48] Thus, under applicable Supreme Court precedent, a pregnancy-based distinction could not be characterized as facial discrimination. Nevertheless, the court found the policy to be discriminatory because of its impact on women, and held that no defense was made because the hospital failed to employ an "available, alternative, less discriminatory means of achieving its business purpose."[49] In this case, the less discriminatory policy was to grant the plaintiff a requested leave of absence in accordance with the hospital's own established policies. Although the court did not explicitly state whether the burden of proving the existence of a less discriminatory alternative falls on the plaintiff or the employer, the plaintiff in this case assumed the burden and won the case.

The Zunjga court did not decide whether concern over embryo/fetal health and fear of tort liability ever justifies termination on the basis of business necessity. The opinion suggests that the health of the embryo/fetus is more the concern of the mother than of the employer, and cites conflicting authority as to whether the economic consequences of a tort suit might constitute a business necessity for a fetal protection policy.[50] This

[43] *Id.* at 2106 n. 14.
[44] *Id.*
[45] *Id.* at 2106 n. 15.
[46] *Id.* at 2107,

[47] 692 F.2d 986 (5th Cir. 1982).
[48] 42 U.S.C. § 2000e(k) (1982). The Pregnancy Discrimination Act does not apply retroactively.
[49] 682 F.2d at 992.
[50] Pretextual discrimination is said to exist when a facially neutral rule disguises an employer's '(hidden agenda" to intentionally' discriminate. Because pretext cases are essentially cases of discriminatory treatment rather than disparate impact, they are judicially treated in accordance with their true nature (intentional discrimination) rather than their guise (disparate impact). For this reason, pretextual discrimination is only excusable when membership in a certain class is a BFOQ, and not merely when class membership is a business necessity. The distinction is important, as BFOQ is quite narrowly defined by the courts as limited to occupational qualifications genuinely necessary for successful job performance. Because BFOQs must be strictly performance-related, employer concerns about fetal health or tort litigation costs would never constitute BFOQs, though they might qualify as business necessities.
[55] *Id.* at 992 n. 10,

Figure 8-2.—Litigation of Fetal Protection Cases Under Hayes



Note" A facial dlscrlmlnatlon case begins at step 1 and proceeds through step 2 If the plalntlff falls to wln by the end of step 2, the case becomes one for dlsparate Impact However, no evidence need be Introduced at steps 3 and 4 because these steps are "automatically"' completed under the evidence presented at steps 1 and 2, respectively A disparate treatment case begins at step 3 and proceeds through the remalnlng steps, with evidence Introduced at each step

Source Office of Technology Assessment

is distinct from Hayes, in which the court rejected the notion that economic consequences might constitute business necessity in fetal protection cases.

Wright v. Olin Corp. [51]

The first fetal protection case to reach a Federal court of appeals was ***Wright v. Olin*** in **1982,** a class action suit charging the chemical company with race and sex discrimination. One of the issues was the legality of Olin's "fetal vulnerability" program, adopted in early 1978 after some 4 years of planning.

As required under Occupational Safety and Health Administration (OSHA) regulations, Olin orally warns its male employees about the dangers of lead, but the warnings are much less formal than the written warnings to women. In addition, while no restrictions are placed on male employees, Olin's fetal protection policy (FPP) excludes all unsterilized females between the ages of 5 and 63 from certain jobs.[52] Since only 1 out

[51] 697 F.2d 1172 **(4th** Cir. **1982)**

[52] **"'Restricted jobs" are those that Olin** believes "may require **contact** with **and exposure to** known **or suspected abortifacient or** teratogenic **agents. " All women** between **the ages of 5 and** 63 **are** excluded **from such jobs, unless consultation with** Olin's **staff physicians confirms that a woman is sterile and will sustain no** adverse **health effects from exposure. "Controlled jobs" may require** very **limited contact with hazardous chemicals. Originally, all pregnant** women **were prohibited from** working **in such jobs.** Several **weeks** later, *Olin* **revised its policy to** allow **for a** case-by-case review. **Olin encourages women in controlled jobs to bid for other jobs if they intend to become pregnant.** "Unrestricted **jobs" are those that do not, according to Olin, present a hazard to the pregnant female or the fetus, and are open to all women.** *Id.* **at 1182.**

of every 5000 women between the ages of 45 and 49 gives birth each year, and births to women between the ages of 50 and 63 are virtually nonexistent,[53] Olin's fetal protection policy is unnecessarily restrictive even if a fetal hazard exists.

The trial court ruled in favor of Olin, saying the FPP was based on sound scientific evidence, and that it was instituted and maintained with no intent to discriminate on the basis of sex. The plaintiffs appealed the decision to the U.S. Court of Appeals for the Fourth Circuit. The appellate court set aside the portion of the judgment applying to the FPP and remanded the case to the trial court for further factual development under legal principles, discussed below, that the appellate court held were not properly applied.[54] (After the case was remanded, plaintiff Wright moved for a voluntary dismissal on the grounds that her own claim was moot and that she was no longer a proper class representative. The trial judge refused to dismiss the case and a trial was held in which only Olin participated. The judge rendered another judgment favorable to Olin which has been vacated on constitutional grounds.)55

The appellate court decision conceded that the Olin FPP was "as a matter of law a prima facie Title VII violation," which is essentially the definition of facial discrimination.[5G] Nevertheless, the court explicitly rejected facial discrimination/BFOQ analysis because the narrowness of the job performance-oriented BFOQ defense would almost always prevent the employer from asserting that an FPP is justified .57 The court concluded that disparate impact/business necessity theory was more suited for application to FPP cases than the discriminatory treatment analysis applied by the trial court.

The appellate court attempted to divine probable congressional intent in its adaptation of the business necessity defense to FPPs.[58] The court began by asking whether fetal protection could under any circumstances be properly considered a business necessity. While the safety of women workers themselves might be thought to be the most obvious subject of legally justifiable employment restrictions, the opposite is the case. As the court noted, "it is the purpose of Title VII to allow the individual woman to make [the] choice for herself ."The same overriding consideration does not, however, apply to the safety of others. As the court stated, the safety of customers has been recognized as being sufficiently necessary to override Title VII considerations.[GO]

The court compared the safety of embryo/fetuses to the safety of business customers and held that an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on female employment that are "reasonably required to protect the health" of embryo/fetuses.Gl The court stated that the business necessity was based on a "general societal interest" in having business enterprises operated in ways that preserve the health of workers and consumers, rather than on the avoidance of potential tort 1iability.G'

The other principles that the court deemed to be controlling in FPP cases were substantially repeated in ***Hayes.*** According to Ofin, the employer must prove by "the best available scientific evidence" that: 1) significant risks of fetal harm would result from the mother's exposure, 2) the risk is substantially confined to female and not male workers, and 3) the FPP is effective in significantly reducing the risk. The employer's subjective motivation and good faith belief that the FPP is necessary and effective is insufficient to prove necessity or effectiveness. The essentially scientific nature of these issues requires opinion evidence of qualified experts in the relevant scientific fields. To establish the requisite degree of risk, the employer need not prove the existence of a general consensus within the qualified scientific community. However, the employer must

[53] U S, Department of Health and Human Services, National Center for Health Statistics, Advance Report of Final Natality Statistics, 1981, *Monthly Vital Statistics Report,* vol. 32, No, 9, supp., DHHS Publication No, (PHS) 84-1120 (December 1983).

[54] 697 F.2d at 1176.

[55] Wright v. Olin Corp., 585 F. Supp. 1447 (W.D. h' .C.), *vacated,* No. 84-1276 (4th Cir. Aug. 31, 1984).

[56] 697 F.2d at 1187.

[57] *Id.* at 1185 n.21,

[58] *Id.* at 1188,

[59] *Id* at 1188, quoting the landmark discrimination case, Dot hard v. Rawlinson, 433 U.S. 321, 335 (1977).

[60] *E.g.,* Burwell v. Eastern Air Lines, inc., 633 F.2d 361 (4th Cir. 1980) (en bane), *cert. denied,* 45o U.S. 965 (1981), which held that airline passenger safety justifies a policy of mandatory leave for pregnant stewardesses.

[61] 697 F.2d at 1189.

[62] *Id. at 1 190.*

show that within that community there is a considerable body of opinion that significant risk exists and that the risk is substantially confined to women workers, so that an employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.[63] Once the employer has established the business necessity defense, the plaintiff may nevertheless prevail by proving that there are "acceptable alternative policies or practices" that would better accomplish the business purpose, or accomplish it equally with less disparate impact.[64] Furthermore, pretextual policies are still unlawful.

63kf at **1191**
b4j~,

Under the ***OZin*** analysis, such rebutting evidence may have either of two effects, both resulting in employer liability, but with possibly different consequences. If the plaintiff shows the existence of an acceptable alternative, she would be entitled to a judgment that vindicates (in both injunctive and monetary award aspects) the plaintiff rights as they would exist under the acceptable alternative policy. On the other hand, if the plaintiff can prove that the acceptable alternatives were not implemented because of the employer's ***discriminatory intent,*** the plaintiff would be entitled to a judgment wholly freed of any restrictions due to the alternative policy.

CASE STUDY: AMERICAN CYANAMID'S FETAL PROTECTION POLICY

In January 1978, the American Cyanamid Co. announced that all fertile women would be removed from exposure to certain toxic substances at its Willow Island, West Virginia, plant. This policy, implemented in October 1978, required that women of childbearing capacity not be assigned to jobs, or allowed to bid on jobs, that involved exposure to substances the company believed were harmful to fetuses. As a result of this fetal protection policy (FPP), two women workers were transferred to janitorial jobs, while several other tvomen underwent surgical sterilization because they feared they would lose their jobs. In early 1980, these women and others affected by the FPP filed suit against Cyanamid, claiming that the company's fetal protection policy constituted sex discrimination in \Tio]ation of Title WI. After 3% years of pretrial proceedings and shortly before the trial was to begin, the case was resolved by an offer of judgment for $200,000 plus costs and attorneys' fees, pursuant to Federal Rule of Civil Procedure 68.[65] There was no admission of liability by the company.

This case study describes how one firm, the American Cyanamid Co., became suspicious that its workers might be exposed to reproductive health hazards and describes the steps leading to the announcement of a fetal protection policy excluding women from some work assignments. The chronology of events suggests that the company initiated its exclusionary policy with little scientific justification and little sensitivity to the needs of its workers, though to its credit, Cyanamid responded to some of the OSHA and labor union criticisms of the policy.

Since a number of major corporations have implemented, or are considering, similar exclusionary policies, the Cyanamid story suggests that industry needs to develop greater sensitivity and education on the reproductive hazards issue. While it is not clear that the Cyanamid case is representative of these policies, it is illustrative of how one major corporation attempted to deal with the possible risks caused by potential reproductive health hazards in the chemical workplace. Appendix 8A describes the policies of some other large companies and hospitals.

This description of events leading to the implementation of the fetal protection policy is based on portions of sworn deposition testimony taken by counsel for the plaintiffs of a physician who

65~11,68 allows a Federal court **defendant to offer** to allow **a judgment** to **be taken against him for a specified amount of money. If the plaintiff fails to** accept the **offer** and wins a **judgment that is** less favorable **than the defendant** offer, **the plaintiff must** pay **the costs** incurred **after** the **making of the offer.**

served as Cyanamid's Corporate Medical Director during the relevant period. Cyanamid has reviewed a draft of this chapter and has presented some of its comments in the critique that follows this case study.

At the time the FPP was developed, Cyanamid's central medical department reported to the personnel director and was composed of three programs: toxicology, industrial hygiene, and employee health. The toxicology group was composed of toxicologists who worked in a specialized laboratory performing animal studies of the effects of chemicals used in Cyanamid plants. The industrial hygiene group, composed of five centrally located industrial hygienists as well as resident hygienists at three plants, was charged with conducting industrial hygiene surveys of every Cyanamid plant in the United States and Canada. Plants were surveyed at least annually, although larger plants and those with complex product mixes were surveyed as frequently as every month. As a result of these surveys, and in conjunction with the central medical department, the industrial hygienists set permissible exposure limits for chemicals encountered at Cyanamid plants. The corporate medical director was the only person with the authority to change these permissible exposure levels. The employee health group was composed of: 1) 2 centrally located physicians, who were responsible for implementing the employee health program throughout the company, 2) 15 medical offices located at various Cyanamid plants, and 3) approximately 130 "fee for service" physicians who worked for the company as needed. The medical officers reported to the corporate medical department informally as needed and on a formal basis once each month. They reported all medically related activities during the previous month, including deaths, serious accidents, lesser but recurring accidents (e.g., eye irritation), personnel changes, physical examinations, and evaluations of employee exposure to toxic substances. Cumulative reports were also made to the central medical department on an annual basis.

In 1975, the corporate medical director first perceived a potential problem for women of childbearing capacity who worked with toxic chemicals, Although he did not know the magnitude of the problem, he believed that it was to be one of increasing importance because more and more women were bidding on jobs in heavy chemical areas. He was concerned that this change in employment patterns might pose a risk to the embryos and fetuses of employees. The medical director believed the risk to employees from possible reproductive health hazards to be greater than the risk from suspected carcinogens, since exposure to suspected carcinogens was either eliminated (through substitution of nonsuspect chemicals) or reduced significantly. He defined the reproductive health hazards problem as one of embryofetotoxicity [toxic effects on the embryo or fetus) due to the exposure of either parent to hazardous chemicals. He considered embryofetotoxicity to have four components: direct toxicity to the fetus, mutagenicity, teratogenicity, and transplacental carcinogenicity. Such a definition excludes negative reproductive outcomes such as infertility and sterility.

The medical director claims he was initially concerned with all embryofetotoxic effects of chemicals used by Cyanamid but later decided to focus exclusively on the potential adverse effects to the fetus transmitted through the mother. The medical director stated the reasons for this change in focus to be because of his "professional judgment" that there was a much more compelling body of evidence concerning embryofetotox - icity as mediated through the mother than through the father.

Prior to announcing the FPP, the medical director had considered applying the policy only to women who were pregnant or planning pregnancies, but rejected this approach as being impractical because of his belief that most women are unaware of their pregnancies at the early stages. However, when rejecting this approach, the medical director had no specific information suggesting that any of Cyanamid's chemicals had an impact on the embryo during the first 3 months of pregnancy,

In August 1976, after much discussion within the central medical department and approval by the personnel officer, the medical officer circulated a memo to senior management containing an FPP applying only to female production work-

ers. The FPP prohibited '(female employees in the childbearing age (considered in industry to be 16 to 55 years)" from working in production jobs where they would be exposed to any of 29 chemicals listed in the policy memo, regardless of the level of exposure. The medical director expected the policy to be effective immediately and to affect the jobs of 25 to 50 female Cyanamid employees.

As of the time the FPP was proposed, no assessment had been made of the degree of risk to the offspring of either male or female employees. Although the medical director was unable to quantify the risk of a woman worker bearing a child damaged by workplace exposure, his professional judgment led him to believe that such an outcome was a "likely possibility." Although the medical director's assessment of the likelihood of harm included consideration of exposure levels, he felt that he could not determine with certainty what a safe exposure level for an embryo/fetus would be, given the greater susceptibility of an embryo/fetus. For this reason, exposures at any level were prohibited.

In addition, the statement of the medical director indicates:

1. The medical director had never instructed plant physicians to inquire about fertility or reproduction problems among production workers.
2. The company had never conducted or commissioned an epidemiological or other study designed to determine whether any employees had suffered from any form of reproductive toxicity.
3. No organized collection of sperm samples of male employees was ever proposed or conducted.
4. No studies were made to determine whether Cyanamid employees or their children had chromosomal abnormalities.
5. The medical director had never issued any kind of instructions to plant physicians about counseling or treating employees who were exposed to reproductive toxins,
6. The medical director was not aware of any cases in which an employee was reproductively harmed or a child, fetus, or embryo was affected as a result of workplace exposures at a Cyanamid plant.
7. No studies were performed on the childbearing patterns of the production force.
8. Although members of the Central Medical Department had looked up certain articles on reproductive toxins, they did not perform a literature search or research project for internal discussion.

The list of 29 substances was "compiled as a result of a quick review of computer sheets. " No animal studies were performed. The medical director knew the effects of lead on an embryo or fetus resulting from maternal exposure from the writings of several epidemiologists, but had no specific information as to whether any of the other 28 chemicals were embryofetotoxins. The selection of these substances was based on volume of use, toxicity to adults, and a professional judgment that any substance that was highly toxic to an adult might be even more toxic to an embryo or fetus, The medical director identified nine of the substances as being suspected carcinogens and, in fact, three of these were placed on the list solely because of their carcinogenic (as opposed to toxic) potential. For these nine chemicals, the medical director was more concerned with their potential effects on an embryo or fetus than with potential carcinogenicity in adult workers. For the three chemicals that were placed on the list due to their potential carcinogenicity, he was concerned that the embryo or fetus might either develop cancer in and of itself or contract cancer due to metastasis of chemically induced cancer in the mother. No materials were prepared addressing the possibility of such alternatives to the FPP as engineering controls, substitution of chemicals, the use of personal protectit~e equipment, or job rotation.

The FPP applied only to female production workers. Research personnel were exempted from policy coverage because the medical director believed that laboratory hazards were better controlled than hazards in production facilities. However, the medical director had no knowledge of what kinds of substances female research personnel were exposed to or whether these employees used protective equipment.

The original policy was circulated but not implemented. Some Cyanamid managers expressed concern as to whether there was in fact a significant danger to women, whether research personnel should be exempt, and whether such a sweeping company-wide policy should be implemented without the advice of the company's Executive Committee.

In September 1976, the Executive Committee held up implementation of the policy and asked for additional information. The personnel director sent a confidential memo to the presidents of all Cyanamid divisions, listing the 29 chemicals and asking that the divisions indicate how many male and female production workers were exposed to each chemical. In addition, the female employees were to be listed by name, age, department, and frequency of exposure. The survey responses led the Central Medical Department to believe that, in "many instances)" the female employees' exposure was not significant.

Nevertheless, guidelines for implementing the FPP were circulated in December 1976. They continued to propose prohibiting any exposure to women workers, even on an occasional basis. The guidelines did, however, revise the class of women affected. "Childbearing potential" was redefined as occurring before the age of so, rather than 5s. This change resulted from discussions between the medical director and his staff concerning the unlikelihood that a woman would conceive past the age of 50. (The possibility of lowering the maximum age to 4s had been considered but rejected because the medical director believed that "any numbers of pregnancies" occur between the ages of 45 and SO. However, the medical director stated that he was unaware of the proportion of pregnancies that occur between those ages. As noted in chapter 7, only 1 of every 5,000 women aged 45 to 49 gives birth each year.) In addition, the guidelines suggested that a 6-month period be allowed for voluntary reassignment of female employees. The original FPP provided no such transition period.

Throughout the l-year period beginning with the announcement of the original version of the FPP, the medical office's research into the potential risks and hazards associated with Cyanamid remained at a low level. The medical librarian was asked to review any new publications relevant to the FPP, but the medical director was unable to recall any specific occasions on which the medical librarian in fact forwarded an article to him. No specific research was performed, except for a list of references compiled by the associate medical director. No research was undertaken to address the possibility of alternatives to the FPP.

In September 1977, the Executive Committee approved a modified fetal protection policy, subject to the concurrence of the legal and insurance departments. The new policy was similar to the first policy. Childbearing age was defined in the new FPP as 16 to 50 instead of 16 to 55. The language in the new policy was milder than in the original FPP; for example, while the first memo stated that certain chemical and physical agents '(have the capacity to cause developmental defects," the new policy stated that these substances "may" have this capacity. The December 1976 guidelines were incorporated into the new FPP. Like the original policy, the FPP distributed in September 1977 was limited to female production workers, prohibited any exposure whatsoever to the 29 substances, and was intended to be effective immediately. This policy **was** announced but not implemented.

Shortly after the announcement of the new policy, several industrial hygienists and **an** associate medical director suggested that exposure limitations be substituted for the exposure prohibition. They felt that it would be inappropriate to prohibit employees from experiencing workplace exposure **to** substances to which they were exposed in the environment. In October 1977, the medical office issued **a set** of maximum permissible exposures for women employees who were exposed to any chemicals on the list. The maximum permissible exposures for fertile women between 16 and 50 years of age were set at a fraction of the maximum permissible exposures recommended for adults by the American Conference of Governmental Industrial Hygienists. (This fraction **was** determined by the industrial hygienists, and the medical director did not know how the fraction **was** derived.) The substitution of exposure limits for the total exclusion of fertile women had

little practical effect, however, as the maximum exposures were so low as to require the exclusion of most women working with most of the chemicals. In a letter to the medical director of Western Electric Co., Cyanamid's medical director stated that "we have not determined a safe level of exposure but have arbitrarily taken fractions of existent threshold limit values and employ these as threshold limit values for fertile females. "

In early November 1977, representatives of Cyanamid, OSHA, and the National Institute for Occupational Safety and Health (NIOSH) met to discuss Cyanamid's policy on female production workers. The meeting was held at OSHA'S request after the United Steelworkers of America filed a complaint to an OSHA area office. OSHA and NIOSH expressed three major concerns: 1) the lack of scientific data to support the inclusion of the 29 listed materials, 2) the possibility that women would be eliminated from the chemical workplace, and 3) the possibility that several companies would each set their own permissible exposure levels below the OSHA levels. At the meeting, the medical director stated that Cyanamid had not conducted studies to generate new data about the effects of the chemicals, but had relied on "extensive literature research and experience" to arrive at professional judgments and that 12 months of time were spent on this review. When asked whether Cyanamid had considered a policy addressing the potential effects of chemicals on male reproductive function, the medical director replied that he was not aware of any information concerning adverse effects on male reproductive function. When asked whether Cyanamid planned to conduct research aimed at supporting its FPP, the medical director stated that a $40,000 project had been approved to study the teratogenic effects of acrylamide, one of the 29 substances, and that additional research activities were expected. When a NIOSH representative pointed out that the NIOSH Criteria Document on acrylamide stated that no teratogenic effects were known, the medical director indicated that he was aware of this, having served as a review consultant for the document. (Acrylamide was the only one of the 29 substances to be tested by Cyanamid. It was selected for study because of labor relations problems at one of Cyanamid's plants resulting from the FPP's inclusion of acrylamide. As a result of the study, acrylamide was removed from the list.)

Also in November 1977, the medicaI department issued a second set of Permissible Exposure Limits (PELs) which contained ceiling limit values as well as time-weighted average values and provided time-weighted average values for the different physical states of the chemicals. In every instance, the ceiling limit values were three times greater than the 8-hour time-weighted average. No comparisons were made between the values set and the actual exposure levels in the company's plants.

In late November 1977, the medical director sent a memo to the personnel director concerning guidelines for fertile female employees who worked in Cyanamid's laboratories. The memo stated that if workers followed existing laboratory rules, exposures would be below the PELs established by the medical department.

In December 1977, the medical director wrote a letter to the assistant corporate medical director at E. I. du Pent de Nemours & Co., in which he stated that the PELs "were arrived at quite arbitrarily and really constitute an educated professional guess rather than anything that we could document on the basis of clinical or laboratory experience. "

Although the medical director excluded fertile female production workers from exposure to the 29 chemicals with virtually no data to support this policy, he stated that he was unwilling to exclude fertile men in the absence of "epidemiological studies indicating that the compound was indeed a human mutagen. " He would not be persuaded by animal studies showing evidence of a chemical's mutagenic effect on sperm and claims that "the only meaningful information that he] would accept is epidemiological information. "

The fetal protection policy was announced to workers, though not actually implemented, at some Cyanamid plants in late 1977 and early 1978. The corporate FPP was silent as to whether implementation was to be on a departmental or job-by-job basis. At the Willow Island plant, women were informed in January that, beginning on May 1, those under 50 who were not surgically ster-

ilized would be excluded from **8** of the plant's **10** departments. No mention was made of PELs and no monitoring had been done to determine whether exposure levels for all of the jobs in the exclusionary departments were in excess of the PELs established by the corporate medical department. Employees were informed that fertile women would only be employed in the remaining two departments or in janitorial positions. Positions in these departments would be subject to the departments' personnel needs and wages. In most cases, women transferring out of an exclusionary department would receive lower wages in the new department. There was no assurance that a sufficient number of jobs would exist in unaffected departments to accommodate all women displaced by the FPP, in which case women were expected to be laid off.

At a later time, Cyanamid reconsidered the exclusion of female laboratory workers from the bounds of the FPP after receiving reports from industrial hygienists that not all laboratory workers were observing the cautionary guidelines. Fertile female laboratory workers were therefore made subject to the FPP, but the policy was never in fact enforced for laboratory workers.

In early 1978, the supervisor of industrial relations at Willow Island asked the medical director whether the FPP should be implemented on a departmental or an individual basis. The medical director informed him that the policy had always been to consider each individual job rather than to require exclusion by department. However, the medical director did not believe it was necessary to make this clarification on a corporate level because he believed that consideration by individual job could be inferred from the written policy. The medical director interpreted the Willow Island announcement as excluding fertile women on a job-by-job basis rather than on a departmental basis, even though the announcement stated that:

> . . . [tlhe Departments in which female production employees with childbearing potential will not be permitted to work after May **1, 1978** are as follows. . . . These female employees are encouraged to submit requests for transfer, in accordance with the [union] contract, to the following Departments. . . . These are the only Departments where female employees of childbearing potential will be permitted to work after May **1,** *1978.* Those female employees of childbearing potential who remain in the [exclusionary] Departments . . . will be subject to reassignment or to layoff . . .

In April 1978, the Office of the Chairman (which replaced the executive committee) announced that implementation of the FPP was to be further delayed until July. The delay was based on concerns, expressed by both union and management officials, as to the magnitude of the risk and the policy. In June 1978, the Office of the Chairman decided to defer implementation of the FPP until September **1** and announced that prior to that date the newly formed Occupational Exposure Review Committee (OERC) would review and appraise the scientific basis for the PELs and FPP and report back to the Office of the Chairman. Although the medical director was satisfied that he had sufficient information to support the PELs and the FPP, he agreed with the formation of the OERC "in view of the fact that the company had decided that they wanted documentation of a scientific nature" and the use of "professional judgment" should play a lesser role, The OERC'S mandate was to review the scientific literature concerning the list of 29 compounds, analyze the documentation for the PELs established by the medical department, and determine whether any of the compounds should be deleted from the list or subject to different PELs. The medical director stated that the OERC had authority to inquire into the effects of chemical exposures on male reproduction and the children of male workers, as well as the effects on female workers and their children.

The OERC review resulted in exposure limitations (and exclusion of fertile female workers who would be exposed in excess of these levels) for only six compounds: lead, diamox, hydrazine sulfate, hydrazine hydrate, methotrexate, and thio - tepa. The new FPP was to apply to women between the ages of 16 and 50, both production and laboratory workers, who were not proven incapable of childbearing. Women whose job assignments resulted in exposure in excess of the PELs would not be terminated but given alternate assignments and wage rate retention for a "reason-

able period of time and under reasonable conditions." With the reduced list, it appeared that the FPP's impact would be limited to eight female employees at the Willow Island plant. Several women there already had themselves surgically sterilized in response to the original announcement in January 1978, before the new FPP was finally implemented at Willow Island in the fall of 1978. In February 1979, the FPP was again revised, with diamox deleted from the list. In late 1979, the lead pigment department was shut down by Cyanamid, a year after the FPP was announced.

In 1979, OSHA issued a citation claiming that Cyanamid's fetal protection policy violated section 5(a)(l) of the general duty clause of the Occupational Safety and Health Act of 1970. (See discussion in chapter 7.) OSHA argued that the general duty clause requirement that employers provide employment free of '(recognized hazards" prohibited any condition of employment that could ultimately result in reduced functional capacity, including FPPs that might result in some employees undergoing surgical sterilization. OSHA'S citation was struck down by the Occupational Safety and Health Review Commission, which ruled that Congress did not intend "recognized hazards" to include policies that might encourage sterilization. The Commission's decision was affirmed by the District of Columbia Court of Appeals.

According to a reconstruction of the events of 1978 by the U.S. Court of Appeals for the District of Columbia:

> In January and February of 1978, Glen Mercer, the plant Director of Industrial Relations, conducted a series of meetings for small groups of the **Willow Islancl plant's female employees.**
>
> **At these meetings, Mercer informedl the wom**en that hundreds of chemicals used at the plant were harmful to fetuses and that, consequently, the company had decided to exclude women of "childbearing capacity" from all departments of the plant where such chemicals were used.
>
> Mercer further declared that the company would deem any woman between the ages of 16 **and 50** to be of childbearing capacitvv unless she presented proof that she had been surgically sterilized.
>
> A company doctor and nurse accompanied Mercer to these meetings and addressed the women. They explained to the women that "buttonhole surgery" was simple and that it could be obtained locally in several places. The women were also told that the company's medical insurance would pay for the procedure, and that sick leave would be provided to those undergoing the surgery.
>
> Mercer told the women that once the fetal protection policy was fully implemented, the plant would have only about seven jobs for fertile women in the entire facility. Approximately 30 women were then employed at the plant.
>
> Apart from the women who obtained those seven positions, Mercer said that female employees who failed to undergo surgical sterilization by May 1, 1978 would be terminated. The company extended the May 1 deadline several times. In September 1978, the company informed the women of changes in its policy. The deadline had been extended to October 2, 1978, the inorganic pigments department was the only department affected, and the only material covered by the policy was lead. . . .
>
> Between February and July 1978, five women employed in the inorganic pigments department underwent surgical sterilization at a hospital not connected with the company. Two women in that department did not choose sterilization. The company transferred them into other departments and, after 90 days, lowered their rate of pay to correspond to the rates characteristic of their new jobs."[66]

Would Cyanamid have acted differently had it realized that its fetal protection policies would provoke a lawsuit? Would the company have acted differently if application of a FPP had resulted in requiring men to be sterilized to keep their jobs? The $200,000[67] offer of judgment may have been less expensive than either a more comprehensive research effort or the institution of engineering controls to prevent potentially hazardous exposures. It may also have been less expensive than a lawsuit by the defective child of an exposed worker. It is not clear whether the economic disincentive of facing a sex discrimination lawsuit is sufficient to alter company policies.

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[66] Oil, Chemical, and Atomic Workers International Union v American Cyanamid Co., 741 F 2d 444 (D.C. Cir. 1984)

[67] However, the cost of defending such a case may be significant A defendant may also have to pay the plaintiff's costs In the *Cyanamid* case, a substantial claim for attorneys' fees is still pending

These questions and those that follow are intended to be generally illustrative and to raise issues, not to impugn the motives of a specific company,

The evolution of American Cyanamid's FPP raises a number of policy questions about corporate decisionmaking concerning potential reproductive health hazards in the workplace. Should employers seeking to identify reproductive health hazards and develop a protective health policy be required to make these decisions in a certain way? If so, what should be required? To what degree should an employer be permitted to err on the side of caution? Should this discretion vary, depending on either the severity or permanence of the potential health effect? Should this discretion vary with the economic burden it places on employees? If the existence of a reproductive hazard is suspected, should a company have the right to modify the work force rather than modifying the workplace? Should limits be placed on the extent to which a company can exclude women?

What constitutes sufficient scientific evidence to establish or rebut hazardousness and unacceptable riskiness for the purpose of implementing a protective policy? In the absence of sufficient scientific evidence regarding hazardousness, what weight should be given to professional medical judgment? If scientific evidence establishing or rebutting hazardousness is available, should professional medical judgment bean acceptable substitute? Should professional medical judgment be sufficient to establish the existence of a reproductive hazard for the purpose of implementing a protective policy that places the economic burden on the worker rather than the employer? Should professional medical judgment be sufficient to rebut a hazard for the purpose of avoiding a protective policy?

Although the courts have tentatively answered a few of these questions (see chapter 10), many of them remain unresolved. As long as these questions have no clear-cut answers, companies may continue to institute exclusionary policies that are discriminatory. Or they may not control exposure to reproductive health hazards in their workplaces.

OTA'S ***Note: OTA requested comments, criticism, and clarification from American Cyanamid on a draft of this case study, Approximately half of the companyb comments resulted in revisions that are reflected in the foregoing material. The remainder are reprinted below.***

American Cyanamid Co. Re8ponse

The following are limited comments of American Cyanamid as requested by the Office of Technology Assessment (OTA) on its case study of Cyanamid's fetal protection policy (FPP). The OTA draft is based solely on deposition testimony of the retired corporate medical director of Cyanamid. As such, it does not reflect the involvement of other key Cyanamid personnel directly involved in the development of the policy and is limited to subjects that plaintiffs' counsel chose to pursue in questioning. OTA requested Cyanamid to limit its comments to a specific and very short critique of the draft, and it has attempted to meet that requirement. However, the company does not intend these comments to be interpreted as reflecting its agreement with other statements in the draft. To the maximum extent, the comments track the sequence of topics covered in the draft case study:

- The draft omits some critical events, The FPP was implemented in a form substantially revised from that announced in January 1978, after extensive consideration by the Occupational Exposure Review Committee (OERC), composed of Cyanamid's top medical and scientific professionals, and top management. Moreover, as ultimately put into effect in October, only employees working with one substance (lead) and in one department were affected. No employee lost a job as a result of the FPP. Of the two employees who were required to transfer from production to janitorial positions, one transferred at the same pay rate; the other had her prior wage rate retained on transfer. Furthermore, those two employees had opportunities to transfer back into production positions. Indeed, one employee declined an offer to transfer back into a production position while the other requested permanent assignment to the Janitors Department.

- The draft should also be revised to reflect that, when announced, both health professionals and management at the plant expressly discouraged female workers from undergoing sterilization procedures.
- The draft incorrectly suggests that Cyanamid did not consider infertility, sterility, or potential effects on the offspring mediated through paternal, as opposed to maternal, exposure to workplace chemicals. Cyanamid did in fact consider all those risks. However, it considered infertility and sterility to be adult, rather than fetal health risks, and, thus, protected via its existing health program. With respect to risks via paternal exposure, both Dr. Clyne and OERC, in its review of the FPP, continued to consider all available evidence of male-mediated risks.
- Contrary to the implication in the draft, Cyanamid considered the proper scope of the FPP throughout 1976-79. Whether the policy could be restricted to pregnant women was a specific item of discussion at the OERC in the summer of 1978, before the policy was implemented, as well as a subject of concern for Dr. Clyne in 1976.
- The draft concentrates on events that took place prior to September 1977, and, therefore, fails to put the development of the FPP in proper perspective. It particularly fails to discuss the critical importance of the OERC in developing and refining the policy. The draft should make clear the following sequence of events. Dr. Clyne circulated a statement of his proposed FPP to senior management in August 1976, but the Executive Committee directed that no further action be taken to implement the policy. The Executive Committee did not approve in principle the FPP until September 1977, and even then, implementation was postponed pending further study. In June 1978, top management created the OERC, which functioned as a peer review panel, to reexamine the scientific documentation of risks to the fetus for the 29 substances then subjected to the proposed policy. The revised policy (narrowed to six chemicals) received management approval in August 1978.
- The draft, by focusing only on the very early stages of the policy, misleadingly suggests that chemicals were included in a haphazard basis. The deposition makes clear that, in selecting the substances, Dr. Clyne and his staff proceeded cautiously and on the basis of their very extensive experience in the occupational health, toxicology, and industrial hygiene fields. All were familiar with the scientific literature regarding toxicity of chemicals in use at Cyanamid and employed the widely accepted convention that the rapidly differentiating tissue and speed of development of the fetus would enhance its susceptibility to certain substances known to be toxic to adults. Finally, the OERC'S detailed review of the scientific literature in 1978 should be acknowledged. The OERC'S consensus conclusion from that continued examination was that six (later five) substances did require special exposure standards for fertile women. As to the others, the draft should make clear that OERC did not dismiss them as not toxic to the fetus, but rather concluded only that the scientific documentation of risk was not such that company action was required.
- Contrary to the impression created by the draft, the company's corporate medical staff had given considerable attention to the "exposure limit" issue prior to the initial issuance of the policy in September 1977. The staff adopted a "zero exposure" standard for the substances covered by the policy because they felt that a very conservative approach was justified on the issue of fetal health, particularly given their knowledge that the exposure level at which no effects on the fetus would occur was uncertain for these substances. The OTA draft also incorrectly suggests that the company's subsequent adoption of exposure limits in order to make its approach to fetal health as consistent as possible with its approach to adult health "had little practical effect, as the PELs were so low as to require the exclusion of most women working with most chemicals. " These limits formed the basis for Willow Island's job-by-job approach to the policy's implementation, which carefully limited the number of posi-

tions to be covered by the policy. Moreover, the OTA draft fails to recognize that the policy, as ultimately implemented at Willow Island in October 1978, covered only one chemical at that plant and affected only one department, requiring the transfer of only two employees.

- The draft also takes out of context Dr. Clyne's use of the word "arbitrarily" in describing to a colleague the methodology used for setting policy exposure limits in October 1977. "Arbitrarily" merely signified that the company's medical staff had not attempted to quantify scientifically the actual "no effect" level below which there would not be a risk in the fetus. Dr. Clyne and his staff had employed professional judgment in selecting limits, lower than the permissible adult level, that they believed would be protective of fetal health. Contrary to the implication in the draft, it would have been inappropriate for the staff, in setting these limits, to compare them with actual exposure levels in the plants.
- The draft presents an incomplete account of the fall 1977 meeting OSHA and NIOSH had requested with the company to discuss its policy. Most importantly, it ignores the OSHA representative's commendation to the company for its efforts to provide a safer workplace than required by OSHA standards.
- The draft is misleading in asserting that no materials were prepared or research done to address the possibility of alternatives to the exclusion of women of childbearing capacity, such as engineering controls, personal protective equipment, or job rotation. First, it was the role of the company's operating divisions, not the corporate medical staff, to address the "operational alternatives" issues. Secondly, the company had conducted studies that allowed the operating divisions to assess the alternatives issue without additional research. The company's industrial hygienists had studied engineering controls in the Lead Pigments Department at Willow Island in 1972 and 1977. Engineering controls installed as a result of the 1972 study were found to have had little impact on reduction of lead-in-air levels. The company also had considered the reliability of various respirators and had concluded, consistent with the literature in the respirator field, that factors such as the fit of the respirator on the wearer's face significantly reduced the reliability of this alternative. Finally, the OERC-revised policy required consideration of alternatives in implementing the policy, The Organic Chemicals Division gave specific consideration to engineering controls, respirators, and job rotation in the fall of 1978 and determined that there were no feasible alternatives to the exclusion of women of childbearing capacity from the Lead Pigments Department at Willow Island.
- Cyanamid strongly disagrees with the draft's suggestion that the company might have preferred the cost of Title VII litigation to the costs necessary to engage in more comprehensive research, to develop better engineering controls, or to resolve a lawsuit involving a defective child. This paragraph should be deleted. First, there was not the slightest suggestion in the testimony or documents that the express purpose of the policy was not to protect the fetus. The policy was not adopted because of concern for potential financial liability or as a substitute for more expensive exposure controls. Indeed, the risks of injury to the fetus from chemical exposure cannot be calculated in financial terms. Cyanamid's expenditures to limit chemical exposures in the workplace are very substantial and demonstrate its longstanding commitment to this goal. The FPP was a further step in the fulfillment of that safety objective, not a convenient substitute for it.

CONCLUSION

The spectrum of employers instituting or considering fetal protection policies ranges from large chemical and automobile manufacturers to small community hospitals. Although it is impossible to determine how many companies have either written or unwritten exclusionary policies, at least 15

of the Fortune 500 as well as numerous hospitals are reported to exclude fertile and/or pregnant women from some jobs.

There is tremendous diversity in company exclusionary policies. Some of these policies are strongly grounded in epidemiological and toxicological research findings with respect to particular substances, while others are more speculatitve about potential reproductive health hazards. Some policies are carefully written and documented, while others are unwritten, making them more flexible but also more ambiguous. In large manufacturing companies, policies are generally announced to employees and their unions prior to implementation, while smaller organizations appear to formulate and apply policies as a perceived problem arises. Some policies recognize that a fetal hazard may be mediated through either the male or female workers, while others apply only to women.

In some cases, these policies have faced court challenges on grounds of sex discrimination in violation of Federal law. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, while the Pregnancy Discrimination Act of 1978, an amendment to Title VII, specifically forbids discrimination on the basis of pregnancy, childbirth, or related medical conditions. The law requires that women affected by these conditions be treated the same for all employment purposes as others not so affected but similar in their ability or inability to work.

While many of these cases are apparently settled out of court, some have been adjudicated and three have been decided by the Federal courts of appeals in the Fourth, Fifth, and Eleventh Circuits, All three courts have held that the exclusion of fertile or pregnant women constitutes illegal sex discrimination under some circumstances. Although the three courts used different approaches, the following general principles can be extracted from these cases:

- A fetal protection policy (FPP) that applies only to women is presumptively discriminatory, That is, the mere existence of an FPP will create Title VII liability for the employer in the absence of strongly supportive scientific evidence.
- To overcome the presumption of discrimination, the employer must be abIe to prove that the body of scientific evidence supports legal findings that: 1) exposure at the level encountered in the workplace involves a significant risk of harm to the unborn children of women workers, 2) exposure at the level encountered in the workplace does not involve a similar risk of harm to the future offspring of male employees, and 3) the FPP is effective in significantly reducing the risk. An employer's subjective but scientifically unsupportable belief in the necessity of the policy is insufficient to defend it.
- If the employer proves both points embryo/fetal risk through maternal exposure and lack of embryo/fetal risk through paternal exposure), the plaintiff may nevertheless prevail by proving that an acceptable alternative policy would promote embryo/fetal health at least as well with a less adverse impact on one sex or by showing that the FPP is a pretext for discrimination.

TECHNICAL NOTE 8-1: LITIGATION OF SEX DISCRIMINATION CASES

Discriminatory Treatment

The Supreme Court established the framework by which the factual issues are resolved in a Title VII case of discriminatory treatment. The most notable feature of this framework is that the burden of proof shifts back and forth between the plaintiff -emplovee - applicant and the defendant-employer. The framework is applicable to cases of claimed discrimination in hiring, promoting, and firing.

The plaintiff has the initial burden of proof to establish a prima facie case of disparate treatment. A prima facie sex discrimination case is established by showing that the plaintiff: 1) is female, 2) applied for a position for which the employer was seeking applicants, 3) was qualified to perform the job, 4) was denied the

[68]McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

job, and 5) the employer hired a male or continued to seek applicants for the job. A plaintiff's failure to establish all five facts will generally result in a judgment in favor of the employer.

If the plaintiff establishes a prima facie case, however, the burden of proof shifts to the employer. The plaintiff is entitled to win as a matter of law unless the employer proves either that sex is a bona fide occupational qualification (BFOQ) or that there are "legitimate and nondiscriminatory reasons" for the plaintiff's rejection. Examples of legitimate reasons for rejecting the plaintiff include inadequate qualifications, experience, seniority, and performance. An employer's failure to prove legitimate reasons for failing to hire the plaintiff will result in a judgment in the plaintiff's favor.

If the employer proves legitimate reasons for refusing to hire the plaintiff, the ball is back in the plaintiff's court. To prevail, the plaintiff must prove that the employer's apparently legitimate reasons were merely a pretext for an illegal discriminatory motive. A plaintiff could show such a pretext by demonstrating, for example, that the employer's asserted criteria were not applied uniformly to all applicants, that the employer had a history of discriminating against women, or that the employer made work assignments in such a way as to cause the plaintiff's poor performance. If the plaintiff produces evidence of a pretext for discrimination, the employer may produce his or her own evidence in response. The court then examines all of the evidence to make a determination as to whether the employer's rejection of the plaintiff was motivated by improper purposes or based on the legitimate reasons presented.

Disparate Impact

There are fewer steps involved in litigation of disparate impact cases. First, the employee or applicant must prove that an employer's specific employment policy or general employment practices have a disproportionately adverse impact on a protected class; she need not prove discriminatory intent. If the plaintiff fails to demonstrate an adverse impact, the employer wins. If the adverse impact is demonstrated, the employer must prove that the policy is a business necessity. If the employer fails to demonstrate a business necessity, the plaintiff wins.

Despite the seeming simplicity of this formula, proving disparate impact is often extremely complex. One method uses ***applicant flow*** data. Under guidelines established by the EEOC, a selection process will normally be considered to have a discriminatory impact if the selection rate for any race, sex, or ethnic group is less than 80 percent of the rate for the group with the highest rate."[68] For example, if 100 women apply and 20 are hired, the female selection rate is 20 percent. If 150 men apply and 45 are hired, the male selection rate is 30 percent. Since the female selection rate is only 67 percent of the male selection rate, the hiring policy would generally be considered to have a discriminatory impact. If at least 24 women had been hired, the policy would generally be considered nondiscriminatory.

There may be problems with using applicant flow data and the 80 percent rule, however. Selecting an appropriate sample for applicant flow data comparison is often extremely difficult. For example, in a lawsuit by a black female applicant for a managerial engineering job, a court must make two initial determinations: should it look at the company's record of hiring women, blacks, black women, or minority women, and should it look at these applicants for all professional jobs, for engineering jobs, or for managerial jobs? Often, these determinations will dictate whett-ler the employment policy meets the 80 percent requirement. Furthermore, the 80 percent rule is far from absolute. Smaller differences in selection rate may nevertheless constitute adverse impact where they are significant in both statistical and practical terms, or where the employer's actions (or history of discriminatory practices) have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the rates were derived from a statistically insignificant applicant pool, or where special recruiting programs cause the pool of minority or female applicants to be atypical of the normal pool of applicants from that group. If an applicant pool is too small to be statistically significant, evidence may be introduced concerning the impact of the policy over a longer period of time or concerning the impact that the selection procedure had when used in the same manner in similar circumstances elsewhere. When time-frame analysis must be done, the question arises as to which of the infinite number of possible time frames is most appropriate for analysis. This is sometimes complicated by the fact that employment policies change over time so that no time frame contains all of the employment policies challenged by the plaintiff. If a comparison is made with similar policies used in similar circumstances by other employers, a question arises as to how similar is similar enough for relevant comparison.

[68] 29 C.F.R. § 1607.4D (1984)

Population pool analysis, a variation of applicant flow analysis, compares the number of women or minorities in the employer's work force, or a unit thereof, with the percentage of women or minorities in the relevant geographic area. Another variation compares the percentages of protected class members to nonprotected class members who possess the qualification required by the employer (e.g., educational minima) in a particular geographic area to establish a disparate impact. Yet another variation compares the percentage of minorities in the employer's work force (or unit) who have been promoted with the percentage of nonminorities who have been promoted. Demographic comparisons are especially relevant when an employer's past discrimination or current neutral employment policy (e.g., height and weight minima) may be discouraging minorities or women from applying for a job or promotion, and thus fail to be accurately reflected in an applicant flow analysis.

The problems with these tests are manifold and the plaintiff in a disparate treatment case is often faced with a fight over which test is most appropriate, which geographical area or labor market is most relevant, which unit of the employer's work force should be examined, whether the sample size is statistically significant, and how the protected class should be defined. Resolution of these issues will often require the testimony of statisticians, demographers, and other expert witnesses, and conflicting statistical inferences are possible. Use of an inappropriate test, methodology, or set of statistics may result in a decision being overturned on appeal .70

Once the plaintiff has established adverse impact, the employer must show that the employment practice or policy is a business necessity. Proving that an employment practice is substantially job-related in not necessarily simple. Virtually all intelligence, psychological, and physical tests used in the hiring and promotion process must be professionally developed and carefully documented by appropriate validation studies in accordance with professional standards reconlmended by the EEOC .71 Although Title VII permits disparate impact pursuant to seniority and merit systems, the use of subjective criteria (e.g., intertriews or vague performance evaluations) seldom counterbalances ciiscriminatory impact unless qualifications or performance cannot be evaluated on the basis of objective criteria (e.g., selection of dancers for a show). Educational requirements are almost never sustainable as prerequisites for manual or semiskilled employment, **or f'or** admission into training programs.

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70 E g , H...l wood School District v U lnited States, 433 U S 299 (1977) In this case, the trial court compared the percentage of black teachers in the Hazelwood school system with the percentage of Mark students in the school system and held that there was no evidence of disparate impact The Federal court of appeals rev ersed, reject ing the trial court's analy sis of the statistical data as resting on an irrelev ant comparison and ordering the trial court to compare the percentage of black teachers in the school system with the percentage of black teachers in the [oral labor market composed of St Louis City and St Louis County The U s Supreme Court then rev ersed the appellate court, holding that the appellate court had not considered the fact that an affirmative action program in St Louis City may have distorted the comparison.

71 (: F R § 1607 5-14 (1984)

APPENDIX 8A: REPRODUCTIVE HEALTH PROTECTION POLICIES

The following appendix contains sample policies for the protection of employee reproductive health obtained from a range of employers and labor unions. While the material that foI1ows is the actual text of employee protection policies received, many of the facilities surveyed described unwritten policies or procedures for the management of exposure to reproductive health hazards that are not included in this document. OTA has not reviewed company activities to determine whether the policies are in fact complied with or are applied uniformly or in nondiscriminatory fashion. It should also be noted that certain of the companies and facilities contacted by OTA that have written policies did not grant permission for OTA to publish those policies.

Some of the more common features of reproductive health protection programs include:

- Orientation and information sessions: These aim to alert employees to potential hazards, including reproductive hazards, to which they may be exposed on the job. Employees are instructed on protective measures (e.g., equipment, hygiene) that can be taken in the workplace.
- Obtaining information on intentions for reproduction: Employees may be questioned as to their intentions for reproduction and advised accordingly. (Mandatory exclusion of emplOyees who state an intent to reproduce poses legal issues which are discussed in chapter 8.)
- Elimination of hazards: An employer may elim -

inate use of a proven or suspected reproductive health hazard. While this strategy improves safety without necessitating exclusionary practices, technical problems, economic constraints, and/or scientific uncertainty may make it infeasible.

- Monitoring exposure levels: Where known or suspected hazards exist, employers may attempt to implement surveillance programs in order to monitor worker exposure levels. Such programs, however, may pose numerous difficulties (e.g., monitoring may be technically infeasible, financially burdensome, or intrusive; scientific uncertainty may remain regarding the degree of hazard and threshold exposure levels of specific agents).
- Job rotation: Rotation may be voluntary (e.g., at the request of a male or female employee who intends to have children and is concerned about specific agents in the workplace) or mandatory (e.g., rotation of workers whose exposure levels to a known hazard reach a threshold level). Job rotation is, in most cases, temporary and does not involve a reduction in pay.
- Exclusion: An employer may institute a policy that excludes workers who express an intent to reproduce from jobs that pose a threat to worker reproductive health and/or to the health of their offspring. Exclusionary policies that are directed solely at pregnant employees, however, generally do not address the problem of agents that exert their effect on the reproductive capacity of the male or female exposed ***before*** conception occurs. Moreover, the policies have been criticized as discriminatory because they affect only female employees. (See chapter 8.)
- Recommended/required notification of pregnancy: It is the policy of many employers to request that female employees provide notice (e.g., to the Employee Health Service and/or Personnel Office) if they become pregnant. Some employers offer a counseling service to pregnant employees to inform them of potential workplace hazards that may jeopardize the pregnancy and/or health of the developing fetus. Others seek the recommendations of the employee's personal physician regarding appropriate employment activities during pregnancy.
- Counseling of pregnant employees: Employers may offer a service wherein female employees who become pregnant are given specific health attention (e.g., by a company physician or health officer). The job site of a pregnant employee may be assessed to identify possible hazards to the employee and/or the developing fetus. Where her job is deemed hazardous, temporary rotation may be considered.

Companies

Shell Oil Co.

Shell has an explicit policy for protection of the embryo/fetus in the workplace. Its purpose is to address and/or manage the risk when existing standards, if any, may not be adequate; when releases may occur, despite controls, that could lead to excessive exposure; or when the employee may not know that she is pregnant. The focus of the policy is to provide as much information as is available on the risk to an embryo/fetus through individual counseling of female employees. In hiring women, there is no distinction made on the basis of age, reproductive, or marital status. A woman is informed of the company's assessment of risk and is also urged to consult her own physician for additional advice if she becomes pregnant or is planning a pregnancy.

First, attempts are made to reduce exposure through the use of engineering or other controls. Jobs in which a fetotoxic or teratogenic agent is present are classified according to the potential for exposure to such agents. For example, a class A job is deemed to present no significant risk. Class B jobs may have levels of exposure which pose a potential threat through the mechanism of fetotoxicity. Class C jobs may have levels of exposure which pose a risk through the mechanism of teratogenicity.

The specific criteria for job categorization are as follows:

- Category A—Job assignments that involve substances that have been suggested to have embryo-fetotoxicity, but for which the Company believes the pattern of evidence does not indicate that the health of an embryo/fetus would be endangered.
- Category B—Job assignments determined by the Company as posing a potential threat to the embryo/fetus as a result of cumulative exposure or possible exposure above normal operating conditions, but where the Company believes the threat to the embryo/fetus prior to detection of pregnancy is not significant.
- Category C—Job assignments determined by the Company as posing a clearly defined risk to an embryo/fetus because of the possibility of early embryo-fetotoxic and/or teratogenic effects occurring before a pregnancy is detected,

Categorization is to be based on both qualitative and, where possible, quantitative assessment of the likelihood that a given substance could produce adverse

effects on the embryo/fetus. This is accomplished through a thorough review of the available scientific literature relative to the substance under consideration. Reported effects, if any, are assessed with due consideration for the levels which produced those effects and the comparable levels of exposure in the workplace.

The effectiveness of engineering (or other) controls is factored into the categorization process when we examine existing air-monitoring data as a part of risk assessment.

The risk to the woman who is unaware of her pregnancy is explained in the definition of Category C above, A job may be categorized as C irrespective of the level of exposure should we identify a possibility of an accidental release, spill, or other event which might result in high levels of exposure for a short period.

Although local union contracts and policies may vary as to eligibility for medical transfer, a woman in any job category may ask to be transferred to another job if she is planning to be pregnant or is pregnant. There is no mandatory rule that a woman inform the Company when planning a pregnancy.

In general, the Company's experience to date in assessing risks has been that controls instituted to protect against carcinogenic risk more than adequately protect against adverse effects on the embryo/fetus.

E.I. du Pent de Nemours & Co.

Du Pent uses a four-step procedure for management of female employees of childbearing capability in order to protect the embryo/fetus:

1. Employees who maybe affected shall be informed of the possible consequences of exposure to such substances and appropriate safe handling procedures shall be established and communicated.
2. Engineering controls shall be used to the extent practical to reduce and maintain exposure to embryotoxins to acceptable levels. Such controls shall be augmented by administrative controls as appropriate.
3. Whenever engineering and administrative controls are not practical to keep exposure at or below acceptable levels, personal protective equipment, where appropriate, and training for its proper use shall be provided and required to be used by employees who may be affected by such compounds.
4. Females of childbearing capability shall be excluded from work areas where:
   a. there is potential for exposure to an embryotoxin for which an acceptable exposure level cannot be set, or
   b. whenever engineering and administrative controls augmented as appropriate by personal protective equipment are determined to be inadequate to ensure acceptable levels of exposure.

Du Pent scientists have designated seven substances as requiring special controls because of their potential teratogenic effect:

1. **Lead and related compounds:** Level of 5 ugm/m^3 set which corresponds to about 25 to 30 umg/dl in blood.
2. Ethylene thiourea (ETu): Oxidizing agent used in curing rubber. No acceptable exposure level established, found in small quantities because it is a byproduct of some chemical processes in Du Pent plants.
3. **Hexafluoroacetone** (HFA): An additive for polymeric products and a byproduct of such production. Acceptable level set at 0.1 ppm TLV. HFA exhibits a male reproductive impairment effect as well as a teratogenic effect.
4. **Dimethylformamide** (DMF): Solvent, absorbed extremely rapidly through the skin, embryolethal.
5. Dimethylacetamide (DMAC): Solvent used in spinning processes; like DMF, rapidly absorbed by-the skin, teratogen.

   TLV for both set at 10 ppm. Women of childbearing capacity not excluded if no opportunities for absorption through skin are present or if TLV is not exceeded, and if use of protective equipment protects them from exposure of skin to the liquid.
6. Formamide: Embryolethal, similar to DMF, absorbed through the skin. TLV of 10 ppm set, treatment of female employees of childbearing capacity same as that for DMF.
7. 2 Ethoxy ethanol: TLV set at 10 ppm. Some evi - dence of both male and female reproductive impairment in experimental animals at 5 ppm. TLV is a compromise.

Additional Sources:

Du Pent newsletter, Medical Division, November 1983, "Issue-Reproductive Hazards. " Tom Beauchamp, ''Du Pent's Policy of Exclusion From the Workplace, " ***Ethics in Business and Society,*** Beauchamp and Childress (eds.), pp. 24-30.

Exxon Chemical Americas

Policy.—The policy of Exxon Chemical Americas regarding toxic substances is to assure that its operations and products do not create unacceptable risks to the health of employees, customers, carriers, and the public, or to the environment. To this end it will:

A. Adhere to all laws and regulations pertaining to

toxic substances control which are applicable to the Company's business. If what is needed to avoid unacceptable risks to health and the environment goes beyond legal requirements, to adopt the practices which the Company judges are necessary, and

B. Take a responsible position of its own where guidelines are needed but where controlling laws and regulations do not exist.

In furtherance of this policy, the Company will:

C. Identify the risks from toxic materials used by the Company or produced in its operations and control them by proper equipment design and operation procedures;

D. Specify precautions required in handling, transporting, using and disposing of products supplied by the Company, in accordance with current knowledge, laws, and regulations;

E. Seek and evaluate new and extended knowledge about the toxic effects of materials manufactured, used and sold by the Company, and share promptly any significant properly evaluated finding with employees, customers, the scientific community, government agencies, and the public; and

F. Work with government agencies and others, as appropriate, in the development and implementation of standards, laws, regulations, and other measures that are needed to achieve satisfactory protection of health and the environment.

The Company's policy is based on the recognition that any substance can be harmful depending on the circumstances of its use or exposure. Since it is not possible to have a "no-risk" environment, the realistic objective is the elimination of unacceptable risks. Historically, society has accepted some level of risk if sufficient safeguards are taken and sufficient benefits are obtained. Ultimately, it remains the responsibility of appropriate public officials to determine what situations are too important to be left to individual choice and in those cases to determine levels of acceptable risk based on competent scientific, economic, and social evaluations.

Guidelines for Implementation of Policy Regarding Toxic Substances.—It is the intent of Exxon Chemical Americas' Policy Regarding Toxic Substances that its facilities will be operated and its products supplied in a manner designed to protect employees and the public from unacceptable risk due to toxic substances. In cases where it is not possible to control such risks by proper designs or practices, the manufacture or use of such materials should cease. Any required precautions associated with the handling of products sold by the Company or its affiliate should by provided by product labels and other means as appropriate. If management has reason to believe that such products are being used in ways that may produce unacceptable risks, it should emphasize to the user the necessity of following the advice for proper practices that has been provided. If subsequent control of the risk is known not to have been achieved, additional appropriate action should be taken.

The primary responsibility for assuring that operations are conducted in accordance with the Company's policy rests with the product lines and operating organization. Managers at all appropriate levels are expected to keep informed on the subject of risks from toxic substances. They are to monitor activities under their supervision, identify and control toxic risks in accordance with the policy, and keep higher management properly informed of any adverse situation regarding materials used or sold by the Company or its affiliates.

Much remains to be learned in defining the parameters of toxicity, and accordingly, managements must be alert to new information and changing circumstances. Sensitivity to the scope and changing nature of toxicity problems and good judgment in seeking solutions to them are required.

Guidelines for Handling Reproductive Risks in the Workplace.—A developing body of scientific evidence indicates that some exposures of humans to such environmental factors as personal lifestyle choices, drugs, certain chemicals, and physical agents such as ionizing radiation can lead to reproductive effects in both males and females. These effects may result in infertility, miscarriages, embryotoxicity, birth defects, and changes in genetic material capable of being inherited. There is particular concern about exposures to the fetus, since it may be especially susceptible to the effects of external agents at exposures which have no effect on an adult, Moreover, an embryo often is most vulnerable to the effects of toxic substances during its earliest development, perhaps even before the mother-to-be is aware of her pregnancy.

Currently, no well-defined or generally accepted approach to the prevention of reproductive risks to employees exists because of scientific uncertainties and differing public opinion. However, the Company has a moral obligation to concern itself with the potential reproductive effects of substances or agents used or produced in its operations.

In accordance with the policy on Toxic and Hazardous Substances and in recognition of the Company's obligation to provide healthful working conditions, the Company's guidelines to reduce the potential for reproductive hazards in their workplaces are outlined below:

A. Review operational and associated biological, chemical, and physical workplace exposures in light of the best presently available information to identify those that might have the potential to be a reproductive hazard.
B. Inform all exposed employees of any potential hazards to the reproductive system from toxic substances to which they are exposed and educate them in the use of personal protective equipment and safe work practices.
c. Control the exposure to such potential hazards to acceptable levels for all employees through the best combination of:
   1. process or equipment engineering designs,
   2. work practice arrangements (such as shortened exposure times where necessary), and
   3. personal protective equipment.

   When there is insufficient basis for the scientific definition of an exposure level with an acceptable reproductive risk, the Medical Department will designate an interim standard which incorporates an appreciable safety factor, and will seek the development of information required for a "permanent" standard.
D. In cases where certain employees are particularly susceptible to the known toxicity of a specific agent, and where exposure cannot be controlled to acceptable levels, implement the indicated protective work assignment practices, including, if necessary, total restriction from potential exposure.
E. Seek on a continuing basis new information on the potential reproductive toxicity associated with manufacturing processes and materials produced, used, transported, and sold by the **Corporation.**
F. Terminate the manufacture or use of such toxic substances where it is not possible to prevent unacceptable risks to reproductive functions.

Communication Guidelines.—This guideline is intended to further clarify communications requirements of the policy regarding Toxic and Hazardous Substances. Specifically, the following communications requirements relate to information obtained by completion of significant scientific studies of toxic or hazardous substances (such as TSCA 8(e) requirements) or occupational health (e.g., employee epidemiology studies):

1. **ECA** Management Committee will review plans for and results of studies at critical decision points.
2. ECA will communicate study results and handling recommendation to co-producers and appropri - ate customers concurrent with **release of'** significant information to appropriate government agencies.
3. Worldwide implications of studies and communication needs will be developed in cooperation with Exxon Chemical's headquarters function **and appropriate** product lines,
4. Results, including recommended exposure limits, safe handling recommendations, and potential impact will be communicated clearly to all exposed and interested employees.
5. ECA will initiate and/or support publication of completed and internally cleared study results in major scientific journals after peer review
6. Press release or response statement (with Q's and A's) will be developed and distributed as appropriate.

Related Policies Include "Medical" and "Personnel Safety."

Another Corporation *

This company does not have a fetal protection policy as such. Instead it has implemented procedures for evaluating the **risk of** exposure to reproductive or developmental (i.e., teratogenic, fetotoxic) health hazards. The following is their description of their objectives and **activities:**

Reproductive Health Activities.—This company has an established objective of providing a safe working environment for all employees which encompasses the reproductive health of men and women and the fetus. The company has undertaken several steps to achieve this objective:

1. It has developed a computerized data base of citations taken from standardized reference sources where reproductive impairment has been evaluated. These include:

Reference	*Author*
Catalog of Teratogenic Agents	Thomas H Shepard, M.D
Reproductive Hazards of **Industrial** Chemicals	S.M.Barlow **l',** M.Sullivan
Chemical Hazards to Human Reproduction	**Ian** C.T Nisbet **Nathan J,** Karch
Handbook **of** Teratology	James G. Wilson F. Clarke Fraser
occupational Chemicals Tested **for** Teratogenicity (Int. Arch. Occup. **Environ. Health)**	K. Hemminki
Health Effects of Environmental **Chemicals on the** Adult Human Reproduct ive System **(Toxicology Information Response Center)**	J.G.Pruett/S.G.Winslow
Registry **of** Toxic **Effects of Chemical Substances** (Reproductive Subfiles)	

2. An inventory of all chemicals used or manufactured at each facility has been developed. These

• This Institution company has asked to remain anonymous

inventories are then compared with the chemicals listed in the data base.
3. Each chemical that comes up from the cross tabulation is carefully reviewed and analyzed by an experienced toxicologist and a physician.
4. Exposure data are considered, should the literature review indicate a potential hazard to reproductive health.
5 If work practices and engineering controls are insufficient to protect the workers from risk to reproductive health, alterations in work procedure will be implemented. To date, there has been no need for risk management strategies because no chemicals in use or manufacture have been found that pose a sufficient reproductive health risk.
6. For chemicals of significant use at the company for which adequate reproductive toxicology data are unavailable, the company has a toxicology research effort to develop and validate screening methods. The company is doing some of this research in-house and working with various trade associations that are examining the validity of standardized tests for reproductive impairment.

Hospitals

Memorial Sloan-Kettering Cancer Center Personnel Department Guidelines for Pregnant Employees

Policy.–Pregnancy will be treated as any other illness requiring temporary disability. The policy on temporary disability due to pregnancy is maintained in the personnel Department. Employees receiving temporary disability are paid their full salary, not to exceed 26 weeks.

Purpose:

1. To protect the health of the pregnant employee and her fetus by developing recommendations for her safe placement in a particular job, for her continuing to work as pregnancy develops, and for her return to work following delivery.
2. To promote early recognition of pregnancy as a means of health and safety protection for the pregnant employee and the fetus.

Procedure:

1. After an employee is hired, the Personnel Department orients the new employee to medical insurance and disability benefits.
2. During the Employee Health Service (EHS) preplacement health evaluation and orientation, the employee is informed of the EHS services that are available, including Free Pregnancy Testing.
3. If the Personnel Department first becomes aware of an employee's pregnancy, they:
   a. review the temporary disability policy with the employee, and
   b. refer the employee to the Employee Health Service.
4. If the Employee Health Service Department first becomes aware of an employee's pregnancy, we:
   a. refer the employee to Personnel for the review of policy;
   b, ask for permission to contact the Laboratory Safety Department;
   c. request that the employee and her personal physician complete a Disability Form; and
   d. offer counseling.
5. Representatives of the Laboratory Safety Department inspect the employee's work site and discuss with the employee her daily work activities. Recommendations are then made for possible modifications in work safety practice, transfer, or temporary discontinuance of work. If the two latter recommendations are made, the Personnel Department is notified.

   Recommendations by the Lab Safety Department are made in the interests of the pregnant employee in a way that will help her understand, accept, and use them. If, however, the employee refuses to accept these recommendations, the Lab Safety Department requests her to sign a form indicating that she has been make aware of the potential hazards.
6 When the Disability Form is returned to the EHS:
   a. recommendations by the personal physician are granted if deemed reasonable according to accepted medical practice. If a recommendation does not seem to be reasonable, the EHS may request that the employee obtain a second opinion from a doctor selected by the EHS, at no cost to the employee.
   b. The EHS sends the original Disability Form to the Personnel Benefits Department, Disability Section, and retains a copy for the employee's medical folder.
   c. The nurse makes a notation on the calendar of the employee's first date of inability to work and later transfers it to the Disability List.
7. The EHS requests notification of the date of delivery and sends another Disability Form to the employee which is to be filled out by her and her obstetrician at the 6-\week postpartum appointment.

Another Hospital*

Statement of Purpose.—In a complex medical environment employees may work with substances known

*This institution company has asked to remain anonymous

or suspected of being capable of posing a hazard to human reproduction. The purpose of this policy is to ensure that exposures to these substances pose no significant risk to employees.

Policy and Guidelines.—This policy is important to employees who are working with substances that may be capable of posing a hazard to human reproduction. A list of substances applicable to this policy is included. Periodic updates of this list will be made by the Environmental Safety Committee.

Exposure levels shall be limited to one-half (½) of the safe exposure guidelines established by the American Conference of Governmental Industrial Hygienists. If no such guideline exists, exposures shall, through engineering and/or work practice controls, be controlled to acceptably low levels of risk for adverse reproductive health effects. When, in the opinion of the Division of Preventative Medicine, the risk of exposure to a substance is such that no exposure can be considered safe, placement shall be determined on a case-by-case basis.

When exposures to the listed substances have been controlled as prescribed in the above paragraphs, employees will be expected to continue in their current job assignment.

Supervisors of personnel having exposures to listed substances should review this policy with their employees and remind them of the need to inform their supervisor in the event they become pregnant. Further information on risks and precautions should be referred to the Division of Preventative Medicine, or the Personnel Section's Environmental Safety Coordinator.

Reproductive health risks associated with infectious agents are addressed by the Infection Committee in institutional isolation procedures. Questions should be referred to the Chairman of the Infection Committee.

Reproductive health risks associated with ionizing radiation are addressed by the Radiation Safety Office in accordance with guidelines established by the U.S. Nuclear Regulatory Commission. Questions should be referred to the Radiation Safety Officer.

Substances:

Adriamycin	Carbon monoxide
5-Azacytidine	Carbon tetrachloride
Benzene	Chlorambucil
Cadmium	Cyclophosphamide
Capafol (Difolatan®)	Dacarbazine
Captan	Diazinon
Carbaryl	2,4-dichlorophenoxyacetic acid (2,4-D)
Diethylstilbestrol	Mercury compounds
Dibutylphthalate	Methoxyfluorane
Dimethyl acetamide	Methyl cellosolve
Dimethylphthalate	Methotrexate
Dioxin	Nitrous oxide
Diphenylamine	Paraquat
Diquat	Parathion
Ergotamines	Procarbazine
Ethylene dibromide	Thiotepa
Ethylene oxide	Thiram
Ethylene thiourea	2, 4, 5-Tricholorphenoxyacetic
Hexafluoroacetone	(Agent orange)
Indium and compounds	Vinblastine
Lead compounds	Vinyl chloride
Melphalan	Warfarin

Walter Reed Army Medical Center: Medical Service Occupational Health Program

Purpose.—This regulation outlines policies and procedures for the implementation of the occupational health portion of the WRAMC Occupational Safety and Health Program.

Scope:

A. Program elements are listed in appendix 8A-1.

B. The provisions of this regulation apply to assigned and attached elements of WRAMC, its tenant activities, and to other commands, installations, and activities provided occupational health support by WRAMC. This regulation should be incorporated by reference into applicable local regulations. Support Agreements, Memorandums of Understanding, and similar agreements supersede the provisions of this regulation while they are in force. The term "employee" refers to both military and civilian personnel, unless stated otherwise.

C Specific applicable procedures for the Hearing Conservation Program (WR 40-62) and the Occupational Vision Program (WR 40-14) will be found in the indicated regulations.

General:

A. Commanders are responsible for the establishment, implementation, and overall supervision of the occupational health program at supported facilities.

B< Items of protective clothing and equipment required to comply with safety and occupational health regulations and procedures shall be furnished to military and civilian personnel at no cost to these personnel.

C A desire and a willingness to utilize protective clothing and equipment should be stimulated among personnel by an educational program to include formal discussion, films, and the use of posters. Safety awards ma-y increase motivation. Habitual nonuse of protective clothing and equipment, engineering controls, and violation of SOPS should be considered grounds for disciplinary action.

D WRAMC occupational health personnel will participate in health maintenance and health promotion activities to the maximum extent possible;

however, whenever employees are exposed to occupational health hazards, priority for available resources must be given to prevention, detection, and correction of occupational health illness and injury, as required by law and by regulation.

Responsibilities:

A. Commanders at every echelon shall ensure that:
   1. The working conditions for each employee, civilian and military, have been evaluated for occupational health hazards.
   2. Appropriate engineering controls and/or protective clothing and equipment are provided.
   3. Each employee, civilian and military, is enrolled in an appropriate medical surveillance program.
   4. Periodic inspections are conducted to ensure compliance. Appropriate corrective measures are instituted.
   5. Each employee is given information regarding health hazards associated with his job, relevant medical symptoms, appropriate emergency treatment, and the employee's responsibility for using protective clothing and equipment.

B. Preventive Medicine Activity, WRAMC will:
   1. Provide occupational medicine consultation.
   2. Complete and periodically update an Inventory of Occupational Health Hazards.
   3. Conduct industrial hygiene surveys to evaluate operations or practices involving actual or potential occupational health hazards. Assign and report Risk Assessment Codes for health hazards to the appropriate Safety Officer.
   4. Conduct epidemiologic investigations when situations develop suggesting the possibility of an increased disease or injury rate attributable to occupational hazards.
   5. Assist commanders in providing employee health education by provision of lesson plans, lecturers, and loan of health education materials.
   6. Provide physician review of medical monitoring recommendations for employees serviced by the WRAMC Occupational Health Clinic and the Civilian Employees Health Service, DOD (CEHS).
   7. In conjunction with Chief, WRAMC Department of Primary Care and Community Medicine (DPCCM) will:
      a. Conduct job-related health examinations including preplacement, periodic, and administrative examinations. Voluntary health maintenance examinations, such as screening for high blood pressure, diabetes, glaucoma, etc., will be conducted as personnel and other resources permit.
      b. Provide limited treatment of illness and injury.
      c. Conduct illness absence monitoring:
         i. Employees should be required to clear through the servicing occupational health clinic facility prior to departure from work because of illness to insure they receive adequate medical care, to permit detection of illness caused by work conditions, and to conserve lost man-hours where palliative treatment will permit the employees to remain on the job.
         ii. Employees also should be cleared through the clinical facility prior to returning to work after an illness in excess of 5 working days to ensure they are not returning to work before being physically able, will not be adversely affected by exposures to health hazards (e.g., unable to wear a respirator), or pose a risk to other employees with chronic diseases or disabilities who may affect or be affected by their work assignment.
      d. Conduct Chronic Disease or Disability Surveillance. Identify and maintain a list of employees with chronic diseases or disabilities who may affect or be affected by their work assignment.
      e. Conduct an Immunization Program. Appropriate immunizations will be provided employees potentially exposed to infectious disease because of the work environment or required foreign travel. Influenza vaccine immunizations will be made available annually. Guidelines for administration of specific immunizations are given in HSC Pam 40-2.
      f. Conduct a Pregnancy Surveillance Program. Pregnant workers, military and civilian, are encouraged to report to the clinical facility as soon as pregnancy is determined so that the impact of work conditions upon the pregnancy can be evaluated, and protective measures prescribed. This surveillance will not supplant care provided by the employee's personal physician.
      g. Conduct an Alcohol and Drug Abuse Prevention and Control Program. Evaluation, diagnosis, counseling, and referral will be conducted in conjunction with established command, installation, and activity programs.
      h. Provide Employee Health Education. One-to-one health counseling on both job-related topics and general health maintenance will be conducted during nursing appraisals and

health examinations. Group general health maintenance and health promotion activities will be provided upon request to the servicing occupational health facility and as resources permit.

i. Prepare and maintain appropriate medical records, and Army and Occupational Safety and Health Reports.

j. Maintain master schedules by work location for, and schedule, medical surveillance.

C. Chief, WRAMC Department of Primary Care and Community Medicine (DPCChl), will:

1. Discharge those joint responsibilities indicated in subparagraph 4b(7).

2. Provide physician review of medical surveillance recommendations for employees serviced by the WRALIC U.S. Army Health Clinics.

D. Civilian Personnel Officers will:

1. Provide periodic updates to servicing occupational health clinical facilities regarding terminations, new hires, and transfers.

2. Maintain the following inventories:

a. Job categories requiring specific levels of physical fitness for the employee to perform effectively and with safety to himself/herself and others, e.g., firemen and mobile equipment operators.

b. Job categories which involve exposures to occupational health hazards.

3. Ensure personnel applying for positions in job categories requiring a minimum level of physical fitness are referred to the supporting occupational health clinical facility for preplacement examinations.

4. Ensure that each new employee assigned to positions involving occupational health hazard exposures processes through the supporting occupational health clinical facility so that appropriate medical baseline examinations can be conducted and a medical record initiated.

5. Incorporate physical fitness requirements, and requirements for utilization of personal protective equipment into job descriptions, as appropriate.

E. Safety Officers will:

1. Assume responsibility for overall conduct of the OSHA Program in their area of responsibility, as delegated by Commanders.

2. Implement safety aspects of the organization's OSHA program to include:

a. Validation of requests for protective clothing and equipment.

b. Inspection of workplace environments utilizing Standard Army Safety and Occupational Health Inspection (SASOHI) procedures, if applicable.

c. Management of the Army Hazard Reporting System, when applicable.

d. Preparation and monitoring of the Installation Hazard Abatement Plan (DA Form 4756, for Army installations) or variance for each hazard identified with Risk Assessment Code (RAC) of IIIB or higher, not correctable within 30 days.

e. Conduct of job safety and health training.

3. Complete all OSHA-required reports except as noted in para 4b(7) and 5d.

F. Supervisors will:

1. Schedule employees for medical examination when appropriate (such as, when notified periodic medical examinations are due, for new employees, when employees return from sick leave in excess of five (5) days, and when **fitness for duty examinations** are required).

2. Ensure personal protective equipment is utilized when necessary, and that action is initiated to evaluate and/or abate a hazard occurring in the workplace.

3. Initiate adverse personnel actions when necessary to ensure compliance with applicable Occupational Safety and Health rules and regulations.

G. Employees will:

1. Comply with requirement established under the provisions of OSHA to assure a safe and healthful working environment.

2. Utilize protective clothing and equipment provided, and report for scheduled medical examinations and health and safety training.

3. Report unsafe and unhealthful working conditions.

Procedures:

A. Inventory of Occupational Health Hazards:

1. The inventory will include, as a minimum, information required by the Occupational Safety and Health act (OSHA):

a. Location.

b. Description of the operation and the number of employees inlolved.

c. Exposure information, both actual and potential, to occupational health hazards including type and degree of exposure, and documentation of exposures approaching or exceeding national consensus standards for a hazard.

d. Description of controls utilized to reduce or eliminate employee exposure.

e. Identification, by name and SSN, of employees exposed at each location.

2. The inventory will be completed and updated in accordance with an Industrial Hygiene Implementation Plan (II-UP) prepared annually to satisfy WRAMC Occupational Health Program goals.
3. Access to information in the inventory will be restricted under the provisions of the Privacy Act as specified in AR 340-18-9. Copies will be provided the servicing occupational health clinical facility with extracts provided Safety, Civilian Personnel Officers, and others upon request.

B. Health Examinations:

1. In the absence of completed occupational health hazard inventories, physicians authorized to establish medical surveillance requirements should utilize work location, work history, and the following references to specific requirements:
   a. Appendices E, G, and H, Medical Surveillance Guide, USAEHA.
   b. DOD manual 6055.M, Occupational Health Surveillance Manual.
   c. TB Med 279, Control of Hazards to Health from Laser Radiation.
   d. TB Med 501, Hearing Conser\Tation.
   e. TB Med 502, Respiratory Protection Program.
   f. TB Med 506, Occupational Vision.
   g. TB Med 523, Control of Hazards to Health from Microwave and Radio Frequency Radiation and Ultrasound.
2. Upon completion of the inventory, physicians will be provided recommendations for medical surveillance by the WRAMC Preventive Medicine Activity, tailored to significant exposures in an employee's job. Physicians are encouraged to minimize laboratory support requirements and health examination complexity so that utilization of occupational health nurse expertise can be maximized and employee lost time minimized. Guidelines for minimum physical examination requirements are given in HSC Pam 40-2.
3. The only personnel authorized to establish, or modify, medical surveillance protocols are: Deputy for Preventive Medicine Activities; Chief, Department of Primary Care and Community Medicine, for Army Health Clinics; and Director, Civilian Employees Health Service, DOD. Medical personnel other than those physicians specifically designated as responsible for establishing medical surveillance requirements are not authorized to make revisions to an individual's health examination protocol without specific written permission. Apparent discrepancies between work history and the health examination protocol will be referred to the WRAMC Preventive Medicine Activity for resolution. Discrepancies will not serve as an excuse to delay implementation of the established protocol.
4. New employee and periodic health examinations will be performed at the servicing occupational health clinical facility by assigned, and qualified, occupational health nurses to the greatest extent possible. These examinations will be given priority over walk-in visits for nonoccupational illness and injury. Employees will normally be referred for physician examination when special, preplacement, requirements exist, and when toxic chemical exposures are involved and will be referred to servicing medical laboratories for laboratory work. Alternative arrangements for the purpose of reducing employee lost-time for laboratory visits, such as utilization of local Agency resources for collection and delivery of laboratory samples, are encouraged.

C. Treatment of Illness and Injury:

1. Civilian employees on TDY status are eligible for treatment.
2. Employees with job-related illness and injury will be provided or compensated for (under Federal Employee Compensation Act rules and procedures, or equivalent programs for military personnel) emergency and follow-up care.
3. Emergency treatment and limited palliative treatment of both occupational and nonoccupational conditions is provided to prevent loss of life, relieve suffering, or reduce absenteeism, with referral to personal physician or other health resources as appropriate. The capability to provide treatment for illness and injury is extremely limited. Neither staffing nor equipment are available to provide full shift coverage or more than basic CPR emergency support.
4. Unless located at installations having after-hours emergency health care facilities, however, care should be sought from the servicing Fire and Rescue Service, or the nearest civilian emergency treatment facility.
5. First aid kits are not normally considered acceptable and will be procured and equipped only with the authorization of the Deputy for

Preventive Medicine Activities, WRAMC. Conditions under which such kits may be authorized include industrial locations where either fast-acting, highly toxic chemicals are in use which require specific treatments and antidotes to be readily available, or significant waits could be expected before the arrival of ambulances during hours when the servicing occupational health clinical facility is closed, In each case, kits must be assigned to individuals currently certified as having acceptable first aid training (e.g., American Red Cross Courses).

D. Medical Records:
   1. A civilian employee medical record will be initiated and maintained on all civilian employees identified by CPO as belonging to a job category or by LOHHI as involving occupational exposure, including permanent Nonappropriated Fund employees. Utilization of DA Form 3444 (Terminal Digit File for Medical Record) is not authorized. Civilian employee medical records will be maintained separately from military medical records, and will normally be maintained in the occupational health clinical facility directly servicing the employee's work area.
   2. Medical records of Active Duty (AD) military personnel will not be maintained in the servicing occupational health clinical facility. The medical record will be flagged with a small sticker to indicate that the individual is occupationally exposed to significant health hazards. The stickers, and explanatory fact sheets requesting reporting of job-related illness and injury to the occupational health facility, will be provided by the WRAMC Deputy for Prventive Medicine Activities. Clinical facilities are encouraged to initiate and maintain a record on military personnel containing, as a minimum, HSC Form 79 (hlaster Problem List), and DD Form 2005 (Privacy Act Statement-hfedical Records).
   3. Medical records of dual status personnel will be handled the same as military medical records, when possible, to include flagging. If the individual refuses to bring the military medical record to the occupational health clinical facility, medical records may be maintained until such time as the medical record becomes available. The individual should be provided a copy of SF 600 (Chronological Record of Medical Care) for placement in the military medical record. A distinctive mark, such as a "D," may be used as a flag.
   4. An additional distinctive mark, such as ~vhite tape, may be used to indicate records of personnel with chronic disease and injury problems.

E. Army and Occupational Safety and Health Records and Reports:
   1. The Army Occupational Health Report (DA Form 3076) will be prepared by each clinical facility providing occupational health services and submitted NLT the 3rd working day of the month following the end of a semiannual reporting period to the WRAMC Preventive Medicine Activity (ATTN: HSHL-HO). Daily occupational health workload data will be collected utilizing DA Form 3075 (Occupational Health Daily Log), or its equivalent.
   2. OSHA Form lOOF (Log of Federal Occupational Injuries and Illnesses) will be maintained by each clinical facility providing occupational health services and submitted as requested by the servicing CPO or Safety Office.
   3. Other records will be maintained as necessary for time accounting, billing, and other purposes as specified in applicable Standing Operating Procedures. Duplication of recordkeeping efforts will be avoided.

F. Medical Surveillance Scheduling:
   1. Master schedules will be prepared by the servicing occupational health clinical facility for medical surveillance scheduling. Schedules should be based on Local Occupational Health Hazard Inventories (LOHHI) provided by Deputy for Preventive Medicine Activities, and should be organized so that an entire department, section, or organization is scheduled within a short time period.
   2, The clinical facility will notify supervisors, in writing, when medical surveillance examinations are required. The attached form (appendix 8A-2) may be utilized, and need not be typewritten. A log of notifications should be maintained so that second notices may be sent if scheduled personnel fail to keep their appointments.
   3. The clinical facility will notify its next higher organizational element (DPCCitl, Deputy for Preventive Medicine Activities, CEHS) of second failures to keep appointments. This element should then notify, in writing, applicable Headquarters elements of the failure so that appropriate administrative measures may be taken.

References

A. WR 40-14, Occupational Vision.
B. WR 40-62, Hearing Conservation.
C. HSC PM 40-2, Occupational Health Program.
D. AR 40-5, Health and Environment.
E. AR 385-32, Protective Clothing and Equipment.

Appendix A-1: Occupational Health Program Elements (by priority)

1. Required by law and regulation.
   a. Inventory of Occupational Health Hazards and Listing of Positions Requiring Special Physical Fitness Standards.
   b. Job-related Medical Surveillance-Preplacement/Reassignment, Periodic, Termination, including vision and hearing conservation screening.
   c. Treatment of Occupational Illness and Injury.
   d. Employee Education Regarding Job Hazards.
   e. Safety and Health Inspections.
   f. Medical Records.
   g. OSHA Record/Reports.
   h. Medical Directives.
   i. Alcohol and Drug Abuse Prevention and Control.
2. Required by Regulation.
   a. Industrial Hygiene Survey.
   b. Administrative Examination-Fitness for Duty, Return After Illness, Disability Retirement.
   c. Elective Periodic Vision Screening.
   d. Emergency/Palliative Treatment of Nonoccupational Injury.
   e. Sickness Absence Prevention.
   f. Chronic Disease Surveillance.
   g. Pregnancy Surveillance.
   h. Job-Related Immunizations.
   i. Epidemiologic Investigations.
   j. Occupational Health Reports, Local Regulations and Supplements, and Standing Operating Procedures.
3. Elective:
   a. Voluntary Health Maintenance Evaluations-Medical Examinations, Nursing Health Appraisals, Specific Disease Screening.
   b. Non-Job-Related Immunizations.

Appendix A-2

Your organization is scheduled to report for medi- cal surveillance examinations during ***the*** month ***of*** _____ ***Request you contact this occupational health clinical facility at*** _____ ***to schedule the individuals named below for medical surveillance.***

Occupational Health Nurse

Labor Unions

United Steelworkers of America

The following policy of the steelworkers combines the preventive aspects of industrial hygiene, medicine, and law in a manner designed to maximize the occupational health and equal employment opportunities for all workers, including those capable of having children:

"Policy on Potential Reproductive Hazards"

A. It is the goal of the Company to fully protect the reproductive health of male and female employees, and to eliminate any risk of damage to unborn children. The Company recognizes that there are several steps that may be taken when exposure to a toxic substance poses a risk to the reproductive health of employees, or to their unborn children. The best alternatives are the replacement of the substance by a safer material; the installation of effective engineering controls, such as enclosure and local exhaust ventilation; and the use of safer work practices. While the transfer of certain male or female employees may be necessary in some cases, it will only be considered where:
   1. Substitution, additional engineering controls, and safer work practices are technologically infeasible or ineffective in reducing exposure to the desired levels, and;
   2. The risk of reproductive damage is confined to the group to be transferred.

B, Wherever the Company has reason to believe that a particular substance or substances may pose a risk to the reproductive health of male or female employees, or to their unborn children, the Company will inform the Union and will, prior to any action, discuss with the Union the reasons for its beliefs (with documentation, if requested) and the steps to be taken.

C When a determination is made that exposure to a particular substance poses a risk to the reproductive health of male or female employees, or to their unborn children, the Company will replace the substance with a safer material, or will install all feasible engineering controls, and institute safer work practices, in order to reduce exposure to safe or lowest feasible levels. Such steps will be taken even if certain employees are also transferred from the particular job or department.

D. If it is decided that certain employees must be removed from exposure, then the group of employees affected will be defined as narrowly as possible, taking into account the risks of the particular substance, while providing for the greatest possible element of employee choice consistent with adequate protection of reproductive health and the health" of unborn children.

E. No employee removed as a result of this policy will suffer any loss of earnings. Transfers will take place according to existing seniority arrangements. Trans-

ferred employees will receive the earnings applicable to the new job, or to the former job, whichever is higher.

F. The Company will provide proper medical surveillance to employees exposed to occupational hazards.

G. The Company will maintain an adequate research program, in order to determine the reproductive and other effects of the substances to which employees are exposed.

H. The Company will not discriminate by sex, race, or age in the hiring or promotion of employees because of alleged differences in susceptibility to reproductive effects caused by toxic substances.

International Chemical workers Union: Policy on Reproductive Effects of Hazardous Materials

Introduction.—During 1977, several companies announced policies that would remove women of childbearing age from certain departments or jobs. Such policies aim to limit exposure to ". . . chemical agents which may have the capacity to cause developmental defects in unborn fetuses. " (The scientific term for such a chemical which affects an unborn fetus is "teratogen. ") These same policies would also prevent women from bidding on future openings for jobs in those departments.

In dealing with reproductive hazards, labor unions are faced with three major concerns. First, many teratogens are also "mutagens' '-agents that can alter the genetic make-up of the chromosomes contained in the human egg and sperm. This means that future generations might carry new or '(mutant" characteristics **which** could be detrimental but may remain hidden for some generations. Damaged chromosomes from either parent could also cause birth defects or spontaneous abortions. In addition to genetic damage, reproduction functions may also be affected. Sterility may occur or there may be an inability of the sperm and egg to conceive a new individual.

Secondly, teratogens and mutagens may also be "carcinogens, " chemicals that are known to cause cancer. It is therefore essential that chemicals that pose a reproductive hazard be controlled as if they were suspected carcinogens.

A third major concern for labor unions is the emphasis that companies have placed on protecting a developing fetus. This concern is based on the companies' fear of third-party liability. An injured child might well file suits against a company for damages resulting from the mother's occupational exposure during pregnancy. Rather than risk such third-party liability, companies are choosing to bar and remove women of childbearing age from exposure to chemical hazards regardless of the scientific basis for such actions.

Company policies, however, do not address the fact that birth defects from chromosomal damage can be passed along after women are removed from hazardous exposure. Also, despite the fact that chemical mutagens can attack the genetic materials of men and women equally, companies have addressed reproductive hazards as if they only affected women. Some companies are trying to deliberately drive a wedge between men and women workers with the ultimate objective of eliminating women from the workplace. Companies take advantage of normal male feelings which tend to protect women and mothers, and, on the other hand, normal female emotions which may lead women to relinquish their jobs and job rights in order to protect their unborn children.

Companies, however, assume additional liabilities under EEOC if women are discriminated against because they have unjustly been denied equal employment opportunities, promotions, and even jobs. ***There is also a potential discrimination claim by the men who continue to be exposed after the women are removed.*** A union may also be liable if it does not successfully provide for a safe working environment through collective bargaining and administration of the agreement; that is, a liability for failure to fairly represent employees. In addition to the reproductive hazards from exposure to teratogens or mutagens, there may be other harmful health effects. ***The union cannot ignore its responsibilities to bargain for a safe and healthful working environment for all its members, regardless of sex.*** Allowing women to be arbitrarily barred from a workplace because of a reproductive hazard is an inadequate solution in protecting the health of ***all*** workers. Our policy therefore must be broad enough to protect all of our members, while allowing for the resolution of specific problems. The following policy should provide general guidance to our field staff and local union officers who will be first confronted with company policies or scientific evi - dence regarding reproductive hazards.

Policy.—The International Union will require its subsidiary bodies to follow the following procedures when they are faced with the announcement by an employer that females will no longer be allowed to apply for or retain a specific job or work in a specific department or on a special process:

1. When an ICWU local union receives notice from the employer about a change involving sex-related hazardous exposures, the Regional Director, the ICWU Health and Safety or Legal Department shduld be contacted immediately and before an official reply is given to the company.

z. Usually the union is informed orally about the employer's decision. A written request should immediately be made to the employer asking them to meet officially with the Union Committee to bargain over the appropriateness of the company's decision and the effects of that decision. The request should also ask for written justification of the employer's position and all information pertinent to the decision (air-monitoring data, scientific literature, results of medical surveillance of all exposed employees, etc.).

3. a. Regardless of whether or not the data are inconclusive or inconsistent with the employer's position, we should demand that the employer bargain on the issue; or

   b. A grievance should be filed on the matter without undue delay so that our rights to contest the proposed change will be protected.

NOTE: Any refusal by the employer to meet with the union, to provide requested information, bargain on the issue, or process a grievance should be communicated immediately to the International President and the ICWU Legal Department.

4. If the employer's announcement comes during negotiation of a new agreement or at a time just prior to negotiations, we must deal with the issue in the negotiations. Again, the ICWU Health and Safety and/or Legal Department must be advised. Contract proposals and advice will be provided.

5. Before any final action is taken, we may seek plant inspections by the Occupational Safety and Health Administration (OSHA) and/or a Health Hazard Evaluation performed by the National Institute for occupational Safety and Health (NIOSH) in an effort to secure the best possible data for our final position regarding health and safety matters.

6. The ICWU Collective Bargaining Department will provide collective bargaining advice and agreement language for negotiations which will be specifically designed to protect the rights of our local unions and members and ensure relief from the undue hazardous exposures that are specific to the particular local union. General agreement language can be found in the ZCWU Health and ***Safety Guide for Local Unions..***

It is the position of the International Chemical Workers Union that worker exposure to hazardous materials should be reduced to zero or at least to the lowest technologically feasible level. Separate exposure levels for men and women would not provide a safe and healthful workplace for all workers.

In most cases, engineering controls and process technology are available to industry which will reduce, if not totally eliminate, hazardous exposures. Unfortunately, industry usually responds with inflated cost estimates and proposals that workers be encapsulated in respirators or full-body protective devices. The OSH Act of 1970 recognizes the use of personal protective devices as only a temporary solution. The implementation of engineering controls is the only acceptable final solution for the control of hazardous materials.

We believe it is within the capacity of industry to provide a workplace free of recognized hazards for both men and women. This union, therefore, rejects and challenges any company policies which would remove or bar women from any employment opportunities available to men in plants under contract to **Icwu.**