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COMMENTS

GENDER SPECIFIC REGULATIONS IN THE CHEMICAL WORKPLACE

I. INTRODUCTION

Women are entering the workforce in increasing proportions, particularly in traditionally male-dominated job categories. There are an estimated 36,000,000 female workers in the United States, approximately 65% of childbearing age.¹ Some of the jobs selected by women involve potential exposure to health or safety risks, including the possibility of reproductive injury (e.g., exposure to lead, radiation, anesthetic gas, or potentially dangerous chemicals).² Many employers have chosen to restrict women of childbearing capacity from working with reproductive hazards while not restricting men who may also be exposed to such hazards.³ Employers argue that they must choose between either risking a sex discrimination lawsuit by adopting “gender specific” regulations or risking tort damages

¹ 1987 by Sherri Evans-Stanton. The author wishes to thank Kent Stormer for his inspiration and guidance.

1. Hricko, Social Policy Considerations of Occupational Health Standards: The Example of Lead and Reproductive Effects, 7 PREVENTIVE MED. 394, 400 (1978). “Childbearing age” or “childbearing capacity” refers to the range of ages during which women are biologically capable of becoming pregnant regardless of whether they use birth control. See infra text accompanying notes 48-49. For purposes of this discussion, a 25-year-old woman is not “fertile” if she is using a highly effective method of birth control (e.g., oral contraceptives), however, she is still of childbearing capacity.

2. Reproductive injuries in men and women refer to those injuries that damage the reproductive systems. In addition, both the courts and commentators have often categorized fetal injury, due to the mother’s work-related exposure, as a type of reproductive injury. Workplace hazards that cause reproductive injury will hereinafter be referred to as “reproductive hazards.” See infra text accompanying notes 70-75.

3. See, e.g., Manson, Human and Laboratory Test Systems Available for Detection of Reproductive Failure, 7 PREVENTIVE MED. 322, 327 (1978) (lead exposure in men resulted in reproductive failure and decreased sperm count). Although there are many compounds that may cause reproductive injury to males or their offspring, the focus of this comment will be on reproductive injury to females or their offspring.
from injuries to the mother or the fetus caused by hazards in the workplace.\(^4\)

This comment discusses gender specific regulations that may expose an employer to liability in a sex discrimination lawsuit. Corporate Guidelines are presented which may assist the employer in the formulation of a valid policy to avoid such liability. Recently, several courts ruled on the validity of policies which were allegedly discriminatory. For example, both the Fourth\(^6\) and Eleventh Circuit\(^7\) Federal District Courts have ruled that the implementation of a policy that restricts or forbids women, but not men, from working in areas that expose both sexes to reproductive hazards, discriminates against women. Such a policy violates Title VII,\(^8\) as amended by the Pregnancy Discrimination Act,\(^9\) unless the employer shows that the policy is valid through one of two defenses.\(^10\) Additionally, the em-

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4. See Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237, 240 (10th Cir. 1973) (action for prenatal injury allowed if child is born alive); Robertson, Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life, 1978 DUKE L.J. 1401, 1401-03 (discussing wrongful life cases and the difficulty in proving causation). See also Williams, Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII, 69 GEO L.J. 641, 645 (1981) (employer could be held liable to women worker's children who suffer prenatal harm for a worksite exposure under tort and contract principles of law). It should be noted that it is much more difficult to trace fetal injuries to the male worker than to the female worker. See Hricko, supra note 1, at 399 (the causal link between a male worker's lead exposure and his wife's miscarriage or inability to conceive is more remote and less likely to result in a lawsuit).


6. Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). Olin's "female employment and fetal vulnerability" program created three job classifications: 1) "restricted jobs" are those which "may require contact with and exposure to known or suspected abortifacient or teratogenic agents"; fertile women age 5-63 were excluded from restricted jobs; 2) "controlled jobs" are those that may require "very limited contact with the harmful chemicals"; pregnant women were evaluated on a case-by-case basis; and 3) "unrestricted jobs" are those that do not present a hazard to the pregnant woman or the fetus. Id. at 1182.


10. A cause of action based on Title VII sex discrimination should be distinguished from a cause of action that invokes the equal protection clause of the fourteenth amendment. In the latter case, state or governmental involvement must be present in order to bring a cause of action. United Steel Workers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979). No such requirement exists with respect to a Title VII action. Additionally, because two distinct
ployer must demonstrate through valid scientific evidence that reproductive hazards affect women, not men.11

In order to comply with the tests set forth by the Fourth and Eleventh Circuits, it is necessary to review several current developments in the area of health and safety. This comment explores the effect of the Occupational Safety and Health Act Hazard Communication Standard ("OSHA Standard") enacted in 1983,12 which required employers to establish comprehensive hazard communication programs and appropriate training for employees by May 1986.13 The OSHA Standard imposes greater responsibility on the employer to assess potential workplace chemical hazards and to educate workers regarding these hazards. This will heighten employee awareness concerning hazards in the workplace.

An important issue raised in both the case law and OSHA Standard is whether there must be valid scientific evidence to document differential reproductive effects in male and female employees before females may be treated differently. For example, relevant scientific evidence indicates that some reproductive hazards affect males and females similarly.14 On the other hand, some reproductive hazards may affect the offspring of either women (e.g., abortifacients)15 or men.16 Scientific evidence plays an extremely important role in case law and will be used to assist the employer in assessing hazards in the workplace.

Several courts have set forth tests that would allow an employer

11. Wright, 697 F.2d at 1190; Hayes, 726 F.2d at 1548.
14. Haas & Schottenfeld, Risks to the Offspring from Parental Occupational Exposures, 2 J. OCC. MED. 607, 609 (1979) (chromosomal abnormalities occur following vinyl chloride exposure); id. at 610-11 (benzene may cause chromosomal aberrations following heavy occupational exposure).
15. See, e.g., Ashford & Caldart, The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention, 5 INDUS. REL. L.J. 523, 527 (1983) (increased risk of involuntary abortion or stillbirth from maternal exposure to lead); Hricko, supra note 1, at 402 (women workers suffer significantly more miscarriages from waste anesthetic gas).
16. See Manson, supra note 3, at 327 (occupational exposures of lead and dibromochloropropane (DBCP) associated with reproductive failure, decreased sperm count, and sperm abnormalities); Ashford & Caldart, supra note 15, at 528 (exposure to DBCP, lead and ethylene dibromide reduce fertility in men).
to defend an otherwise discriminatory policy. No employer, however, has successfully defended such a policy. This comment will propose Corporate Guidelines that integrate the principles set forth in the OSHA Standard and case law. The Guidelines are legally significant because they provide a novel approach to identify, document, and evaluate reproductive hazards in the workplace, as required by the courts, prior to developing a policy that treats women differently from men. The purpose of the Guidelines is to help avoid inappropriate gender discrimination and to protect the health and safety of employees and their unborn children by gathering information and implementing a written policy concerning reproductive hazards. Compliance with the Guidelines can substantially reduce an employer's risk of tort liability relating to injuries to the unborn fetus because the employer's decision would be based on a uniform policy setting forth appropriate standards. In addition, the Guidelines could be used to support either a Bona Fide Occupational Qualification (BFOQ) or a Business Necessity defense in a Title VII sex discrimination lawsuit.

II. HISTORY OF GENDER SPECIFIC REGULATIONS

A. Title VII, Civil Rights Act (1964)

The foundation for a sex discrimination lawsuit was established by Title VII of the Civil Rights Act in 1964. Title VII prohibits discrimination on the basis of race, color, creed, national origin or sex. Title VII was later amended by the Pregnancy Discrimination Act to include protection against discrimination of pregnant women. Historically, some employers, legislators and courts have restricted

17. See Wright, 697 F.2d at 1172; Zuniga v. Kleburg County Hosp., 692 F.2d 986 (5th Cir. 1982); Hayes, 726 F.2d at 1543.
18. See infra notes 32-44 and accompanying text for a discussion concerning the BFOQ and Business Necessity defenses.
19. The 1964 Civil Rights Act states, in pertinent part:
   (a) 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) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

the employment opportunities of women professing concern for the health of women and their offspring. In 1908, the United States Supreme Court in Muller v. Oregon upheld a statute prohibiting females from working more than ten hours per day in a mechanical establishment, factory or laundry because it was "dangerous to the public health, safety, morals or welfare." Sixty-eight years later in General Electric Co. v. Gilbert the Supreme Court held that Congress did not include discrimination on the basis of pregnancy within the protection of Title VII's definition of gender-based discrimination. However, Gilbert was in effect overruled when Congress passed the Pregnancy Discrimination Act.

B. Title VII and the Pregnancy Discrimination Act

In 1978, Title VII of the 1964 Civil Rights Act was amended by the Pregnancy Discrimination Act. The Pregnancy Discrimination Act provides, in pertinent part, that "[w]omen affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." A policy that discriminates against women based upon their ability to become pregnant puts them in a category that is afforded protection under Title VII in a sex discrimination lawsuit. A woman could argue that such a policy is either facially discriminatory or that it has a disparate impact on a group protected under Title VII.

20. Hayes, 726 F.2d at 1543.
22. Id. at 416. But see Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (employment policy denying opportunities on the basis of characterization of physical capabilities and endurance of women not excusable under the exceptions in Title VII of the Civil Rights Act).
25. The Pregnancy Discrimination Act states, in pertinent part:
   (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, 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, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

Id.
26. An employer's defense to a facial discrimination lawsuit is referred to as a Bona Fide Occupational Qualification (BFOQ) defense. See infra notes 32-37 and accompanying text. An employer's defense to a disparate impact argument is referred to as a Business Necessity defense. See infra notes 38-44 and accompanying text.
1. Title VII Sex Discrimination Lawsuit
   a. Facial Discrimination/Disparate Impact

A facially discriminatory policy, as defined in Hayes v. Shelby, is a policy adopted by an employer that explicitly treats some employees differently from others based on race, religion, national origin or gender (pregnancy). A policy designed to protect female employees and their potential offspring from workplace hazards is facially discriminatory. Furthermore, a policy that only applies to pregnant women and their offspring is facially discriminatory. Even if the employer successfully argues that the policy is neutral, the plaintiff may show that it has a disparate or disproportionate impact on a group protected under Title VII.

A disparate impact argument occurs when the employer’s policy is facially neutral but the plaintiff demonstrates that it has a disproportionate impact on a group protected under Title VII. The plaintiff establishes a prima facie case of discrimination by showing with statistics and scientific evidence that the policy has a disparate impact on a protected class. In Hayes v. Shelby, the court said that an employer must prove that a policy applied to women or pregnant women employees, “is justified on a scientific basis and is not necessary to protect the offspring of male employees. . .” Such a policy would be “neutral” in the sense that it protects the offspring of all employees; however, it would have a disproportionate impact on a group protected under Title VII, i.e., pregnant women. Two defenses may be used against an allegation that a policy is facially

27. Hayes, 726 F.2d at 1547.
28. Id. A plaintiff who uses a disparate impact argument may prevail without proving intentional discrimination as would be required under an equal protection analysis under the fourteenth amendment. See, e.g., Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) (black woman, who alleged she had been discriminated against by employer, filed one cause of action under Title VII and the other under the equal protection clause of the fourteenth amendment).
29. Zuniga, 692 F.2d at 986. In this case a hospital violated Title VII by terminating a pregnant x-ray technician on the basis of fetal harm and resultant liability. The plaintiff originally filed suit against the hospital alleging violations of Title VII of the Civil Rights Act and the equal protection clause of the fourteenth amendment. On appeal, Zuniga argued that she had established a prima facie case of sex discrimination. First, she argued that sex discrimination was present because the hospital’s facially neutral policy of terminating pregnant x-ray technicians burdened women’s employment opportunities without affecting those of men. Second, the plaintiff argued that the district court erred in finding that the hospital had a valid Business Necessity defense to her prima facie case. See also Logan, Adapting Fetal Vulnerability Programs to Title VII: Wright v. Olin, 9 EMPL. REL. L.J. 605 (1984).
30. Hayes, 726 F.2d at 1552.
31. Id.
discriminatory or that it has a disparate impact on a particular group.

b. Defenses

The Bona Fide Occupational Qualification (BFOQ) defense is an affirmative defense to facial discrimination and requires that the employer demonstrate that the discriminatory policy was reasonably necessary both to the “essence of its business” and to the “promotion of worker safety or efficiency.” An employer may rebut an employee’s prima facie case of an overtly intended discriminatory act by articulating a legitimate nondiscriminatory reason for the policy. The effect of the nondiscriminatory reason is to make an otherwise facially discriminatory policy “neutral.”

The BFOQ defense has only been available when the employer has shown that the excluded class was unable to perform the duties that constitute the essence of the job. In Hayes v. Shelby, the court held that there is no defense to a facially discriminatory policy unless the employer shows a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job. To prevail, the employer must produce scientific evidence, from experts in the relevant fields, of reproductive effects relating to the specific compound or exposure. Additionally, if employers prove that there is a significant risk of harm, they must then show through scientific evidence that the policy was necessary to protect the unborn fetuses of pregnant women from the damaging toxic effects of certain chemicals. However, it is extremely unlikely that radiation below certain levels will have a detrimental effect on a particular individual. Hayes, 726 F.2d at 1550.

33. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981). See Wright, 697 F.2d at 1183 (claimants argued that their fetal protection program served a legitimate nondiscriminatory purpose that could be used as evidence to rebut any prima facie case of sex discrimination). But see Hayes, 726 F.2d at 1547-48 (court reasoned that because the Pregnancy Discrimination Act mandates that a pregnancy-based rule can never be neutral, Burdine is inapplicable).
34. Hayes, 726 F.2d at 1549.
35. Id.
36. Wright, 697 F.2d at 1182, 1190. In this case, three employees testified as to the necessity of the policy in question. The first witness, the corporate director of Health Affairs and a medical doctor, testified that the policy was necessary to protect the unborn fetuses of pregnant women from the damaging toxic effects of certain chemicals. However, he was unable to name the articles or journals which supported his medical conclusions. The second witness testified that he had measured the exposure levels of certain chemicals and had rejected alternatives, such as substituting non-toxic materials or improving ventilation or personal protective equipment as being infeasible. Finally, the third witness testified that he had not been consulted during the program’s development and was not familiar with any research done before its implementation. The court concluded that none of the witnesses were qualified or testified as experts in any relevant scientific or medical field.

In Hayes, the court found that although any amount of radiation can have a detrimental effect on humans, it is extremely unlikely that radiation below certain levels will have a detrimental effect on a particular individual. Hayes, 726 F.2d at 1550.
evidence that the hazard does not also apply to male employees or their offspring.\textsuperscript{37}

A Business Necessity defense is an affirmative defense to a disparate impact claim.\textsuperscript{38} The Business Necessity defense may be used by an employer in two situations. The first instance is when there is substantial risk of harm to the fetus or potential offspring of women employees from exposure, either during pregnancy or while fertile, to toxic hazards in the workplace. The second instance is when the hazard applies to fertile or pregnant women, but not to men.\textsuperscript{39} The test is whether there exists an "overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."\textsuperscript{40} To reach the disparate impact stage of analysis, the employer must overcome the presumption of facial discrimination by demonstrating "that its policy is justified on a scientific basis and addresses a harm that does not affect men."\textsuperscript{41} The burden of persuasion is on the employer to present evidence of significant risks of reproductive injury to women workers or their unborn children arising from exposure to toxic hazards in the workplace, requiring women, not men, to be restricted.\textsuperscript{42} Additionally, employers must show that there are no acceptable alternatives that would accomplish the purpose with a less adverse impact on one sex\textsuperscript{43} and that the programs of restriction are effective for the intended purpose.\textsuperscript{44} The Corporate Guidelines discussed in section VI

\textsuperscript{37} Hayes, 726 F.2d at 1548 (citing Williams, \textit{supra} note 4, at 661). Williams argues that an employer may be able to restrict women in those instances where scientific evidence indicates women are exposed to reproductive risks, but no such evidence exists concerning men.

\textsuperscript{38} Griggs v. Duke Power Co., 401 U.S. 424 (1971). The cases thus far have only applied the Business Necessity defense to a disparate impact claim. However, it may be possible to apply the Business Necessity defense to a facial discrimination assertion.

\textsuperscript{39} Wright, 697 F.2d at 1190-91; Hayes, 726 F.2d at 1548 n.8. Hayes borrowed the requirements from Wright's Business Necessity defense. Although Hayes does not specifically adopt the term "Business Necessity," the requirements are identical to Wright.

\textsuperscript{40} Wright, 697 F.2d at 1188 (citing Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), \textit{cert. dismissed}, 404 U.S. 1006 (1971)).

\textsuperscript{41} Hayes, 726 F.2d at 1553.

\textsuperscript{42} See Robinson, 444 F.2d at 798 (necessity and effectiveness criteria stated); Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (objective basis rather than subjective assumptions required to establish BFOQ defense); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 367 n.6 (4th Cir. 1980) (objective proof required to establish a business necessity).

\textsuperscript{43} Wright, 697 F.2d at 1191; Hayes, 726 F.2d at 1553.

\textsuperscript{44} Zuniga, 692 F.2d at 992. See also Robinson, 444 F.2d at 798; Wright, 697 F.2d at 1191; Hayes, 726 F.2d at 1553. \textit{But see} Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474 (E.D. Va. 1978) (Business Necessity defense upheld in airline case when safety of passenger, not pregnant female, was considered); Levin v. Delta Airlines, Inc., 730 F.2d 994 (5th Cir. 1984) (removal of pregnant woman as soon as pregnancy was discovered was justified by Business Necessity defense).
below are designed to support either a BFOQ or Business Necessity defense.

2. *Fetal Protection Policies Under Title VII*

Two recent cases, *Wright v. Olin*\(^{45}\) and *Hayes v. Shelby*\(^{46}\) held that the Business Necessity defense was more appropriate than the BFOQ defense in considering fetal protection programs under Title VII. However, the methods used to reach these decisions were different.\(^{47}\) Fetal protection policies generally concern fertile women or women of childbearing capacity, ranging in age from 16-50.\(^{48}\) In *Wright v. Olin* the term "childbearing capacity" included women ranging in age from 5-63.\(^{49}\) These policies may involve either facial discrimination (e.g., fertile or pregnant females are treated differently because they are pregnant, not because of their work performance) or disparate impact (e.g., although the policy may be facially neutral, the effect of the policy is that it has a disproportionate impact on a particular group).\(^{50}\)

Fetal protection policies have often been criticized because the programs operate to exclude women while allowing men to continue in jobs that expose them to similar reproductive risks.\(^{51}\) One author argues that there is scientific evidence supporting the theory that such programs are under-inclusive in that they do not include men exposed to hazardous substances.\(^{52}\) Others have argued that, while fetal protection policies may provide some protection for future offspring, the economic benefit inures largely to the employer who

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45. 697 F.2d at 1185-86 n.21.
46. 726 F.2d at 1549.
47. *Wright*, 697 F.2d at 1189. The court did not believe that the fetus was directly protected by the Business Necessity defense. Instead, the court specially categorized the fetus as an invitee and licensee on the business premises, and protected the fetus via its special categorization if exposed to any of the associated workplace hazards. *But see Hayes*, 726 F.2d at 1552 n.14, where the court explicitly rejected the special categorization of the fetus stating instead that "fetal protection is a legitimate area of employer concern to which the Business Necessity defense extends."
48. Secretary of Labor v. American Cyanamid Co., 9 O.S.H. CAS. (BNA) 1596, 1597 (1981). The American Cyanamid policy excluded women aged 16 through 50 from production jobs in the lead pigment department unless they could prove that they had been surgically sterilized. The purpose of the policy was to protect the fetuses of women workers from exposure to lead. *Id.*
49. 697 F.2d at 1182. *See also supra* note 6 and accompanying text.
50. *See supra* notes 28-31 and accompanying text.
51. *See Logan, supra* note 29, at 608 (discussion concerning the exclusion of female employees based on fetal health when exposure in the workplace due to toxic substances occurs with male and female workers).
52. *Id.* at 607-08.
avoids the cost of removing the reproductive hazard from the workplace. Fetal protection programs generally fall into two categories: 1) policies that prohibit all women of childbearing capacity from working with reproductive hazards in the workplace; and 2) policies that prohibit other specifically defined groups from working with reproductive hazards.

a. Policies that Prohibit Women of Childbearing Capacity from Working with Reproductive Hazards

A policy that prohibits all women of childbearing capacity from working with reproductive hazards may be too broad because it "discriminates against women on the basis of their potential to become pregnant." For example, American Cyanamid, a chemical company, established a policy in 1977 which required that women of childbearing age (16-50) be removed from production jobs in the lead pigment department unless they could prove they had been sterilized. The policy was overbroad because it categorically restricted all women of childbearing capacity regardless of whether the women wanted or were capable of having children, or whether the women or their spouses used contraceptives. Ironically, this policy was also criticized for being under-inclusive because men suffered reproductive injury from lead exposure, yet no such policy applied to men. In addition to these criticisms of fetal protection policies, some policies are ineffective because they do not accomplish their intended purpose.

A policy that does not take effect until after a woman has knowledge that she is pregnant may be ineffective in preventing fetal injury during the first several weeks of pregnancy. For example, certain exposures, including lead and radiation, are known to cause significant damage to the fetus during the first six weeks of development. In *Hayes v. Shelby*, significant damage to a fetus due to a

54. Id. at 544. See also Hricko, supra note 1, at 400 (as many as 100,000 females may be affected by fetal protection policies).
55. American Cyanamid, 9 O.S.H. CAS. (BNA) at 1597, 1605. See also supra note 48.
56. Hayes, 726 F.2d at 1551 n.13; Zuniga, 692 F.2d at 986.
57. Ashford & Caldart, supra note 15, at 527 (increased risk of involuntary abortion from maternal exposure to lead during first six weeks after conception); Zuniga, 692 F.2d at 986 (damage to fetus due to radiation exposure occurs during first six weeks). See supra notes 14-16.
technician's exposure occurred during the first six weeks of pregnancy, prior to the woman's knowledge of her pregnancy.\textsuperscript{58} When the purpose of the policy is to prevent fetal injury, and the policy is found to be ineffective for that purpose, an employee cannot be terminated. Thus, in \textit{Hayes v. Shelby}, the court found that the policy was ineffective and ruled that it was a pretext for discrimination.\textsuperscript{59} That does not indicate that there are no instances where fetal protection policies are valid.

\textbf{b. Policies that Prohibit Specifically Defined Groups from Working with Reproductive Hazards}

As discussed above, fetal protection policies that discriminate against all women of childbearing capacity violate Title VII, as amended by the Pregnancy Discrimination Act, unless the employer successfully applies either the BFOQ or Business Necessity defense.\textsuperscript{60} The employer should narrowly define the group that he or she determines must be protected by the fetal protection policy. Moreover, in order for a fetal protection policy to withstand a discrimination lawsuit, there should be a written policy that informs the affected employees of their rights before they become pregnant, provides warnings about the potential danger of the employment, and demonstrates that the employer has attempted a balance between employee safety and equal employment opportunities.\textsuperscript{61} Finally, any policy that excludes certain women must be based on sound medical data that supports the theory that the reproductive risks only affect the excluded females.\textsuperscript{62} These principles comprise the backbone of the proposed Guidelines described in section VI.

An evaluation of reproductive hazards should take into account the health and safety of all employees. The "exclusion of one seg-

\begin{thebibliography}{9}
\bibitem{58} 726 F.2d at 1551 n.13; see \textit{infra} notes 72-75 and accompanying text concerning injury to the fetus due to worker exposure to reproductive hazards.
\bibitem{59} 726 F.2d at 1551 n.13. \textit{See Zuniga}, 692 F.2d at 986. In \textit{Zuniga}, the hospital had an unwritten policy requiring that pregnant x-ray technicians be fired or terminated without any guarantee of reinstatement as soon as they discovered that they were pregnant. The hospital's policy was found ineffective for the intended purpose of protecting the fetus because the damage would have been done before the woman found out she was pregnant. In addition, the court ruled that the policy was unconstitutional because the hospital failed to utilize an alternative, less discriminatory means of achieving its end (e.g., alternative employment, leave of absence). The hospital's business purpose was a pretext, and its Business Necessity defense failed. \textit{Id.} at 992-93.
\bibitem{60} \textit{See supra} notes 32-44 and accompanying text.
\bibitem{61} \textit{Hayes}, 726 F.2d at 1549 n.10. \textit{See also} \textit{Lake, Liability and Societal Obligation are Bases for Fetal Protection Laws}, 8 \textit{Bus. Health} 49 (July/Aug. 1984).
\bibitem{62} \textit{Zener, supra} note 5, at 234. \textit{See supra} text accompanying note 11.
\end{thebibliography}
ment of the working force, in the interest of 'safety,' may act to di-
vert public attention from the harder question — the limits to which
a society can afford to subject its workers to high levels of risk and
injury.”

In considering the risks and injuries due to worker ex-
posures to reproductive hazards, it is important to discuss the legislative
authority that regulates safe and healthful working conditions.

C. Occupational Safety and Health Act of 1970 (OSHA)

The Occupational Safety and Health Act was enacted in 1970
to assure, so far as possible, every man and woman in the nation safe
and healthful working conditions by encouraging employers and em-
ployees to reduce the number of occupational safety and health
hazards and by authorizing the imposition of mandatory occupa-
tional safety and health standards. OSHA ultimately affects fetal
protection policies by requiring employers “to reduce to the maxi-
mum extent ‘feasible,’ employee exposure to toxic agents causing
material impairment of health.”

Although OSHA has a duty to provide a safe and healthful workplace for employees, it is unclear
whether this duty extends to the future offspring of workers. Many
employers have assumed that they may be liable for tort damages
from injury to the unborn fetus. This assumption has led to the im-
plementation of fetal protection policies by employers who treat
women of childbearing capacity differently than men who may be

63. Comment, Employment Rights of Women in the Toxic Workplace, 65 CALIF. L.

64. The Declaration of Purpose and Policy of the Occupational Safety & Health Act
[hereinafter OSHA] states, in pertinent part:

(a) The Congress finds that personal injuries and illnesses arising out of
work situations impose a substantial burden upon, and are a hindrance to, in-
terstate commerce in terms of lost production, wage loss, medical expenses, and
disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exer-
cise of its powers to regulate commerce among the several States and with for-
eign nations and to provide for the general welfare, to assure so far as possible
every working man and woman in the Nation safe and healthful working condi-
tions and to preserve our human resources. . .

version at 29 U.S.C. § 651(a), (b) (1970)).

65. Zener, supra note 5, at 227. See American Petroleum Inst. v. OSHA, 581 F.2d 493
(5th Cir. 1978), aff’d sub nom., Industrial Union Dep’t, AFL-CIO v. American Petroleum
as required by the Act, if it calls for expenditures wholly disproportionate to the expected
health and safety benefits.”).

66. Ashford & Caldari, supra note 15, at 524 (authors argue that reproductive hazards
are a proper subject for standard setting under OSHA when the exposure poses a danger to
the health or functional capacity of the exposed workers or their offspring).
exposed to the same reproductive risks. In 1983, OSHA promulgated a Hazard Communication Standard designed to improve the health and safety of employees.

D. OSHA Hazard Communication Standard

The OSHA Hazard Communication Standard required employers to perform the following tasks by May 1986: 1) establish a comprehensive hazard communication program which includes assessing the hazard of chemicals in the workplace, labeling and other types of warning; 2) establish training programs that include the methods used to detect the presence or release of a hazardous chemical in the work area (e.g., measuring airborne exposure levels in the work area); and 3) inform employees of the measures they can take to protect themselves from hazards. The OSHA Standard will force employers to evaluate hazards in the workplace and properly train employees. Employers will obtain new toxicological information that may better prepare them to design a fair policy that

68. The OSHA Standard states, in pertinent part:
   (h) Employee information and training. Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.
   (1) Information. Employees shall be informed of:
      (i) The requirements of this section;
      (ii) Any operations in their work area where hazardous chemicals are present; and,
      (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.
   (2) Training. Employee training shall include at least:
      (i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);
      (ii) The physical and health hazards of the chemicals in the work area;
      (iii) The measures employees can take to protect themselves from these health hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,
      (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

Id. at § 1910.1200(h).
protects all workers' health and safety rather than protect select groups. In order to comply with the OSHA Standard, employers should review scientific data to evaluate the workplace. The OSHA Standard will be used as a tool for gathering information to evaluate the scientific and other data necessary to make informed decisions concerning reproductive hazards.

III. SCIENTIFIC EVIDENCE RELATING TO REPRODUCTIVE EXPOSURES

To defend an otherwise discriminatory policy, an employer must establish through scientific experts that exposure to certain substances has reproductive effects on the selected group (e.g., pregnant women). This requires an understanding of reproductive hazards.

A. Reproductive Hazard Defined

A reproductive hazard is any hazard where a work-related exposure is capable of either harming the fetus of the exposed worker or harming the reproductive system or sexual capacity of the exposed worker. Toxic substances that may cause reproductive damage are generally divided into two categories: mutagens and teratogens. A mutagen is a chemical which damages genetic materials. If the genetic material is in the egg or sperm, the damage may be passed on to future generations. If the genetic material is not in the egg or sperm, the damage may only persist in that person for his or her lifespan. Removal from exposure to the mutagen in the workplace does not remove the damage, but prevents additional harm. A teratogen, on the other hand, is a chemical which produces damage to the fetus after conception. The most crucial period of development during which a fetus is susceptible to damage is during the first three to eight weeks after conception. However, most women are between four to six weeks pregnant before they know they have conceived. At later stages of development, growth retardation and functional disturbances are the most common injuries resulting from toxic expo-

69. Logan, supra note 29, at 606-07.
70. Ashford & Caldart, supra note 15, at 524.
71. Logan, supra note 29, at 606.
72. Id. at 607. See also McElveen, Reproductive Hazards in the Workplace, 20 Forum 547, 548-51 (1985).
73. Carr & Gedeon, Population Cytogenetics of Human Abortuses, Population Cytogenetics 1-9 (E.B. Hook & I.H. Porter eds. 1977); Manson, supra note 3, at 325; Logan, supra note 29, at 607.
sure. Before developing a fetal protection policy, employers must evaluate occupational risks to determine the nature of the exposure and the type of injury the worker or fetus would suffer.

B. Occupational Exposures

An occupational exposure is an exposure to a hazard on the job that may or may not affect the reproductive system of the worker. Occupational exposures may affect workers' offspring in two ways: 1) the chemical substance crosses the placenta and damages the embryo or fetus (sometimes resulting in spontaneous abortion); or 2) exposure to the male or female is transferred genetically during fertilization. Scientific evidence exists concerning the reproductive affects of specific industrial agents in both males and females.

Based on sound scientific evidence, restricting women of childbearing capacity from work-related exposures may not adequately protect the fetus from reproductive hazards since both fertile males and females are susceptible to reproductive damage. It has been suggested that the most reasonable approach to reduce reproductive hazards is to lower or abolish the exposure levels of all workers to potentially toxic substances thus making the workplace a safer environment. Unfortunately, reducing or eliminating exposure levels may not be economically or technically feasible. In any event, the employer has the responsibility to evaluate reproductive

74. Manson, supra note 3, at 325.
75. See supra notes 48-63 and accompanying text.
76. Zener, supra note 5, at 226.
77. Ashford & Caldart, supra note 15, at 527 (increased risk of involuntary abortion from maternal exposure to lead); Manson, supra note 3, at 327 (occupational exposures to lead associated with reproductive failure in males as well as decreased sperm count); Strobino, Kline & Stein, Chemical and Physical Exposures of Parents: Effects on Human Offspring, 1 EARLY HUMAN DEV. 371, 372, 390 (1978) (anesthetic gas exposure in workers associated with reproductive failure in males; paternal exposure to vinyl chloride is associated to spontaneous abortion in the wives of exposed men); Hricko, supra note 1, at 402 (occupational exposure to anesthetic gas associated with reproductive failure in males); Haas & Schottenfeld, supra note 14, at 609-11 (heavy occupational exposure to anesthetic gas may cause chromosomal aberrations and may persist for years; benzene exposure may cause reproductive injury; chromosomal abnormalities may occur especially following intense exposures of vinyl chloride); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1154 (D.C. Cir. 1983) (ethylene oxide is both mutagenic and carcinogenic in animals and humans); Manson, supra note 3, at 322 (vinyl chloride is capable of causing reproductive failure in males and females).
78. Hricko, supra note 1, at 395 (occupational exposures harm reproductive systems of both males and females by causing genetic, gametotoxic, intrauterine or extrauterine effects). See also Strobino, Kline & Stein, supra note 77, at 375 (paternal exposure to vinyl chloride associated with spontaneous abortion in wives of exposed men); Haas & Schottenfeld, supra note 14, at 611 (congenital anomalies reported in offspring of male anesthesiologists).
79. Manson, supra note 3, at 327.
hazards and to adopt a fair and reasonable policy that is not gender specific, but rather protects the health and safety of all employees.

IV. IDENTIFICATION OF THE PROBLEM

Fetal protection policies tend to treat women of childbearing capacity differently from men in jobs that may expose both sexes to reproductive injury. The policies are adopted by employers to avoid tort liability relating to injuries sustained by the unborn fetus due to worker exposure. Instead, employers may be faced with a sex discrimination lawsuit.\(^{80}\) In adopting broad fetal protection policies that exclude all women of childbearing capacity, many employers have ignored scientific evidence that indicates males as well as females may suffer from reproductive injury due to exposures to a particular chemical in the workplace.\(^{81}\) Recent case law as well as the OSHA Standard have demonstrated the increased responsibility of employers concerning worker health and safety in the workplace. For example, several courts have established tests to support a Business Necessity defense in a Title VII action that would validate a fetal protection policy.\(^{82}\) However, no employer has successfully defended such a policy.

Corporate Guidelines are proposed below to reduce the employer’s risk of liability. By using these Guidelines, the employer can implement a valid policy which evaluates workplace hazards and incorporates existing tests established by the Courts.\(^{83}\)

V. ANALYSIS

Employers have several options to choose from in developing policies that protect workers and their unborn children from reproductive injuries. A policy that restricts or eliminates all women of childbearing capacity from the workforce via the implementation of gender specific regulations may be overbroad. For example, the policy may not take into consideration whether the female employee wants children, or whether she or her spouse use contraceptives. Employers who adopt policies without scientific evidence risk a discrimination lawsuit. On the other hand, policies that take into consideration whether the female employee wants children or uses

\(^{80}\) See supra notes 19-24 and accompanying text.

\(^{81}\) See supra notes 51-52 and accompanying text.

\(^{82}\) See supra notes 38-50 and accompanying text.

\(^{83}\) See supra notes 32-44 and accompanying text.
contraceptives raises other problems. If employers do not restrict women from working with reproductive hazards, they risk liability in a tort action for injuries to the unborn fetus.

At present, there are no guidelines incorporating both the information in the OSHA Standard and the court cases. An employer seeking to reduce his or her liability of work-related exposures has little information with which to proceed. The solution to some of these complicated issues is to design a policy that incorporates the tests set forth in the court cases with the information collected to comply with the OSHA Standard. The employer can use the Guidelines as a legal framework to evaluate workplace hazards. In effect, the Guidelines can be used to develop a fair policy to protect workers from reproductive hazards. Development of such a policy requires a thorough evaluation of the reproductive hazards in the workplace, including a comparison of the reproductive effects in men and women, before any groups are segregated.

A. Males and Females Suffer Similar Reproductive Injuries

If the information contained in section III, part A, subpart 4 of the Guidelines indicates that males and females are susceptible to reproductive injuries for a given chemical, an employer cannot enforce a policy that treats females differently. Such a policy would violate Title VII as amended by the Pregnancy Discrimination Act. A woman could argue that the policy is either facially discriminatory or that it has a disparate impact on a group protected under Title VII. An employer has no defense in this situation because under both the BFOQ and Business Necessity defenses, the reproductive risks must only affect the group the employer intends to restrict (e.g., pregnant women). In this situation, the employer should attempt to reduce the risks in the workplace for all employees.

84. These issues include: whether a woman’s use of contraceptives could (or should) be monitored; whether monitoring of a woman’s choice to use contraceptives would amount to an invasion of privacy; whether a male spouse’s use of contraceptives should be monitored; whether an employer should take into account that the male spouse uses contraceptives but the female worker does not; and whether a birth control method need be 100% accurate before the employer is willing to risk liability.
85. See supra notes 19-20 and accompanying text.
86. Wright, 697 F.2d at 1172; Zuniga, 692 F.2d 986; Hayes, 726 F.2d at 1543.
87. See supra note 12-13 and accompanying text.
89. See supra notes 27-31 and accompanying text.
90. See supra notes 32-44 and accompanying text.
B. Females, Not Males, Suffer Reproductive Injuries

An employer should be able to construct a valid policy, based on information obtained through the application of the Guidelines to protect female workers from reproductive hazards. In developing a policy, an employer should determine whether the reproductive injury affects all women. For example, an employer may be justified in excluding all women of childbearing capacity from working with compounds that cause reproductive injury to the female worker prior to her knowledge of pregnancy. Examples of reproductive injuries that occur during the first six weeks of fetal development include lead and radiation exposure as well as exposure to abortifacients. The female employee could argue that the policy is facially discriminatory, or that it has a disparate impact on a group protected under Title VII. The employer, however, would argue that: 1) there is substantial risk of harm to the potential offspring of women employees from exposure to reproductive hazards; 2) the hazard applies to fertile or pregnant women, but not men; and 3) the hazard cannot reasonably or practically be reduced. It should be noted that in the recent cases involving fetal protection policies, the employers were unable to demonstrate a valid Business Necessity defense through scientific evidence.

The diagram and questions in section III, part A, subpart 4 of the Guidelines provide a format for the employer to obtain scientific information to support either a BFOQ or Business Necessity defense. If the employer comes forward with evidence supporting a BFOQ or Business Necessity defense, the employee may argue that there are acceptable alternatives that would accomplish the same purpose. Examples of alternatives include: 1) allowing only women who use highly effective methods of contraceptives to work in areas that pose reproductive risks; 2) transferring the women to other areas that do not expose them to reproductive risks; or 3) reducing the reproductive risks if technically and economically feasible. If, on the other hand, the reproductive injury would not take place until after a woman discovered that she was pregnant, an employer could design a policy that would only restrict a precisely defined group (i.e., pregnant women). Here again, a pregnant employee could argue that the policy has a disparate impact on pregnant women, thus affording Title VII protection. The employer could oppose a discrimination

91. See supra note 39 and accompanying text.
92. Wright, 697 F.2d at 1182; Hayes, 726 F.2d at 1551 n.13.
93. See supra note 43 and accompanying text.
lawsuit with a Business Necessity defense supported by scientific evidence. The Corporate Guidelines described below provide a legal format for collecting relevant information needed to evaluate reproductive hazards in the workplace. In turn, this information could be used to develop a policy for handling reproductive hazards. Additionally, the information could be used to support either a BFOQ or Business Necessity defense.

VI. Model Corporate Guidelines

To assist employers in obtaining relevant information to address the liability issues raised by employers as well as some discrimination and worker safety issues raised by employees, Corporate Guidelines (Appendix A) are proposed. The purpose of the Guidelines is to obtain information concerning the workplace to determine: 1) whether there are reproductive hazards in the workplace; 2) who is affected (e.g., males and females, males only, females only, unborn children of either male or female); 3) whether the risks can be reduced; and 4) whether the group can be narrowed. The Guidelines should assist the employer in complying with current case law as well as the OSHA Standard. The information obtained through the use of the Guidelines could be used to support either a BFOQ or Business Necessity defense.

The questions in Appendix A are intended to assist the employer in evaluating information relating to workplace hazards. The employer could then develop a written policy that informs employees of their rights and warns them of hazards in the workplace. Additionally, if the employer determines that, based on the information obtained, select groups should be treated differently, any written policy should describe how that decision was reached. Finally, to maximize the use of the Guidelines, scientific evidence must support the conclusions reached by the employer.

VII. Conclusion

Employers have increasingly sought to enforce policies that protect workers and their unborn children from reproductive injuries. However, a policy that restricts or eliminates all women of childbearing capacity from the workforce by the implementation of fetal protection policies may be overbroad. Gender specific regulations are designed to protect the employer from liability from a discrimination lawsuit, as well as to protect women of childbearing capacity and their unborn children from reproductive injuries due to
worker exposure. In order to develop a fair and reasonable policy that protects the health and safety of all workers, employers must evaluate and document reproductive hazards in the workplace before designing a gender-based policy that excludes a segment of the workforce. The first step in designing a policy is to gather information and evaluate reproductive hazards.

Corporate Guidelines are proposed to assist the employer in evaluating whether the employer is in compliance with the tests set forth in the recent case law, as well as incorporating the information required under the new OSHA Standard. The information obtained through the use of the Guidelines could then be used to support either a BFOQ or Business Necessity defense against a sex discrimination lawsuit. Additionally, the information could be used to help the employer develop a fair and reasonable written policy concerning the health and safety of all employees.

Sherri Evans-Stanton
Appendix A

MODEL CORPORATE GUIDELINES

I. Is the policy facially discriminatory?
   A. Does the policy explicitly treat a defined group of employees differently from others (e.g., pregnant women)?
   B. Is the group protected under Title VII of the Civil Rights Act as amended by the Pregnancy Discrimination Act?

II. Does the policy have a disparate impact on a group protected under Title VII (based on race, color, creed, national origin or sex (including pregnancy))? 

III. Are there any defenses?
   A. Bona Fide Occupational Qualification (BFOQ) defense
      1. Is the policy reasonably necessary both to the essence of the business and to the promotion of worker safety?
      2. Is there a substantial risk of harm to either the employee or unborn child affected by the policy?
      3. Does the hazard affect others not covered by the policy?
      4. Is there scientific evidence concerning the reproductive effects in males, females and/or unborn children?
         a. Review all records and files to evaluate chemical compound.
         b. Does human or animal data exist?
         c. Is there any evidence of human side effects (i.e., medical records, complaints, symptoms)?
         d. Are any of the physical effects
unique to a particular group?

e. Is there a significant exposure risk during normal operations or during emergency situations (e.g., is the substance being used in a closed or open system)?

f. If there is a significant exposure, can the risk reasonably be reduced (i.e., is it technically or economically feasible)?

g. Is the compound one that requires prolonged or chronic exposure before injury occurs?

h. Are there procedures in the event of a spill, upset or emergency?

i. Are employees monitored after a spill, upset or emergency?

j. Are wastes generated? If so, is there risk of exposure to such wastes?

k. Do all employees have access to material safety data sheets concerning the chemical compound (if applicable)?

l. Are employees properly trained? How often?

m. Do employees use appropriate protective equipment?

n. Is equipment properly tested? How often?

o. Is the work environment monitored (i.e., air monitoring, wipe samples, employee monitoring)?

p. Are there periodic inspections? How often?

q. Have historical records been re-
GENDER SPECIFIC REGULATIONS

viewed to assist in evaluating the workplace?

B. Business Necessity Defense

1. Is the policy absolutely necessary to the continuation of the business?

2. Are there any reasonable alternatives?

3. Is the practice necessary to the safe and efficient operation of the business?

4. Is there substantial risk of harm to the employee or unborn children affected by the policy?

5. Does the hazard affect others not covered by the policy?

6. Is the program of restriction effective for the intended purpose?

7. Is there objective scientific evidence concerning the reproductive effects in males, females and/or children?
GUIDELINES FOR EVALUATING REPRODUCTIVE HAZARDS

1. Start

   Are there sufficient data to establish who is affected (men, women or both) at what doses and at what stage(s) of reproduction?

   NO

   - Gather more data (review literature, conduct animal testing).

   YES

   - Does risk affect females only or both females and males?

     - Both

       - Make workplace changes. No need for gender-specific selection policy.

     - Females Only or Males Only

       - Can the risk reasonably be reduced (i.e., is it technically and economically feasible?)

         YES

         - Develop a narrowly-drawn gender-specific policy and establish documentation for defense.

         NO

         - Develop a narrowly-drawn gender-specific policy and establish documentation for defense.

     NO

   - Develop a narrowly-drawn gender-specific policy and establish documentation for defense.

   Stop