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Fetal Protection Policies: Balancing the Interests of the Employee, Employer, and the Unborn under Title VII

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During the past decade, employers have been increasingly concerned about the health of children of employees. U.S. companies have been adopting fetal protection policies that prohibit fertile women from working in a toxic environment. These fetal protection policies, mandated by the employer, focus on toxic hazards in the workplace that are capable of causing harm to the unborn children of employees. They may have the impact of discriminating against all women except for those known to be unable to bear children.

The causes of birth defects in humans are not well understood by the medical profession. It is estimated that 70 percent of birth defects have unknown causes. The National Institute of Occupational Safety and Health has created a list of 28,000 toxic substances.[1] Some of these substances can be categorized as either mutagens or teratogens. Mutagens affect chromosomal development of the ova or the sperm cells and teratogens cause deformities in developing fetuses.[2] These toxic substances are often found in the work environment.[3]

In February 1990, a medical report suggested that men working in nuclear power plants should consider refraining from having children, since there is a high correlation between their work and children contracting leukemia.[4] Some jobs require working with toxic chemicals, such as battery manufacturing.[5] In those jobs, it has been found that high levels of lead can accumulate in a person's system. At sufficiently high enough levels, miscarriages are known to occur.[6] Other employers are concerned with asbestos in both production plants and contaminated buildings,[7] passive smoke problems,[8] and radiation exposure,[9] to mention a few. It

[1] Earl A. Molander, *Regulating Reproductive Risks in the Workplace* (New York: McGraw-Hill, 1980).

[2] Id.

[3] Paskal, "Dilemma: Save the Fetus or Sue the Employer," 39 CCH LABOR LAW JOURNAL 323 (1988).

[4] "Study Links Dad's Exposure to Radiation to Leukemia in Children," *Stockton Record*, Feb. 16, 1990, at A-9, col.3.

[5] *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871 (DC Wis 1988), 46 EPD ¶ 37,858; aff'd en banc (CA-7 1989), 51 EPD ¶ 39,359. This case has been accepted by the U.S. Supreme Court for hearing in the 1990-91 term. Cert. granted (US 1990), SCt, 52 EPD ¶ 39,734, 110 SCt 1522.

[6] At high enough levels, lead exposure can cause genetic changes in both male and female children. 43 FR 52,951 upheld in *United Steelworkers v. Marshall*, 647 F2d 1189 (D.C.Cir. 1980), cert. denied 453 U.S. 913 (1981).

[7] For a discussion of various indoor pollutants including asbestos, see Comment, "Behind Closed Doors: Indoor Air Pollution and Government Policy," 6 *Harv. Envtl. L. Rev.*, 355-58 (1982).

[8] Repace & Lowrey, "Passive Smoke: Risk to Nonsmokers Only?" 131 *Sci. News*, 360 (1987).

[9] Computer radiation concerns are primarily limited to exposure during the first trimester of pregnancy. See Goldfaber, "The Risk of Miscarriage and Birth Defects Among Women Who Use Video Display Terminals During Pregnancy," 13 *AM.J. Indus.Med.*, 695 (1988).

has been estimated that over twenty-million employees may be exposed to workplace reproductive hazards.[10]

While both male and female employees have equal susceptibilities to reproductive hazards, the unborn child is vulnerable to toxic levels that may be harmless to adults.[11] The fetus has greater susceptibility to toxic substances because during the early weeks of pregnancy most major organ systems are being formed. During the developmental stage, any alteration of the process can cause serious consequences to the unborn child. To complicate the problem, the female employee is usually unaware of her pregnancy during the most important stages of fetal development.

In order to cope with these concerns, many employers have been adopting fetal protection policies.[12] The intent is to protect the fetus of a pregnant employee and protect the non-pregnant female employee's reproductive system so that healthy children can be conceived in the future. Though the intent is most admirable, it may discriminate against women who have no intention of having children.

Title VII of the Civil Rights Act of 1964,[13] including Section 701 (k), commonly referred to as the Pregnancy Discrimination Act, is the basis of the law in this area and has been interpreted by the Equal Employment Opportunity Commission (EEOC) and the courts. The EEOC has promulgated an internal agency policy to help interpret issues involving reproductive and fetal hazards,[14] and four federal circuits have reviewed cases involving fetal protection policies under Title VII.[15] The Fourth, Fifth, Eleventh, and Seventh Circuits have struggled with the issue, resulting in a split among the circuits. Both the Fourth and the Fifth Circuits have utilized disparate impact analysis, whereas the Eleventh and the Seventh Circuits have applied facial discrimination theory. The Seventh Circuit case of *United Auto Workers v. Johnson Controls*[16] has been granted certiorari by the United States Supreme Court and will be argued in the fall of 1990.

This article will provide a brief summary of federal law as it relates to fetal protection issues. A comparison of Title VII's sex discrimination provision with the Pregnancy Discrimination Act will give direction on the appropriate analytical framework. Next this article will review the holdings of the Fourth, Fifth, Eleventh, and Seventh Circuits involving employer fetal protection policies and practices with an analysis of each case. Finally, this article will provide some insight into the different approaches the courts have taken to analyzing the issues.

Most of the law is found in federal legislation and regulation. Though some states, such as California, have differing and stronger regulations that basically prohibit such policies, discussion here will be limited to the federal law.

Title VII of the 1964 Civil Rights Act

Initially, there was a belief that Title VII of the Civil Rights Act of 1964 would prohibit pregnancy discrimination and fetal protection policies because Section 703(a) specifically provided that it was unlawful for an employer: "(1) to fail or refuse to hire or discharge or otherwise

[10] "Proposed Interpretive Guidelines on Employment Discrimination in Reproductive Hazards," 45 FR 7514 (1980) withdrawn, 46 FR 3916 (1981).

[11] Rothstein, "Reproductive Hazards and Sex Discrimination in the Workplace: New Legal Concerns in Industry and on Campus," 10 *J. Coll. & U.S.*, 495 (1983-84).

[12] *Oil, Chemical & Atomic Workers Int'l. Union v. American Cyanamid Co.*, 741 F2d 444 (D.C. Cir.1984). This was one of the first fetal protection policy cases.

[13] 42 USC 2000e-2 (1982).

[14] "Reproductive and Fetal Hazards," EEOC Compliance Manual, Vol. II, Section 624; Guidance Number 915,034, October 7, 1988, p.1.

[15] *Wright v. Olin Corporation*, 697 F2d 1172 (CA-4 1982), 30 EPD ¶ 33,257, decided on remand (DC NC 1984) 35 EPD ¶ 34,637, 585; *Zuniga v. Kleberg County Hospital*, 692 F2d 986 (CA-5 1982), 30 EPD ¶ 33, 213; *Hayes v. Shelby Memorial Hospital*, 726 F2d 1543 (CA-11 1984), 33 EPD ¶ 34,219; and *UAW v. Johnson Controls*, 886 F2d 871 (DC Wis 1988), 46 EPD ¶ 37,858.

[16] Greenhouse, "High Court to Review Plans on Fertile Women at Work," *New York Times*, March 27, 1990, p.9. See also *UAW v. Johnson Controls, Inc.*, cited at footnote 5.

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 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."[17](Emphasis added).

Section 703(a)(1) often has been referred to as the disparate treatment theory. In such cases, an employer has violated the law if the employer fails to hire a woman because there is a feeling that the woman is incapable of functioning in the job due to her sex. On the other hand, if an employer has a facially neutral hiring policy but discriminates against the classification of employees, such as placing unnecessary weight or height restriction on employees that actually cause discrimination against hiring women, then there is a violation of Section 703(a)(2). This is referred to as the disparate impact theory. Both of these theories have been applied to sex discrimination cases.

The term sex, however, was not interpreted by the courts to mean female or sexual preference but was "gender" based. Thus, so long as men and women are treated the same, there is no gender-based discrimination.[18]

In a series of decisions, the Supreme Court looked at various cases dealing with women asserting discrimination due to pregnancy benefits. The Court has consistently held that pregnancy discrimination was not facially sex-based.[19]

The Pregnancy Discrimination Act of 1978

Growing concern over the Court's interpretation of Title VII and the ineffectiveness of Title VII in dealing with pregnancy issues led to the enactment of the Pregnancy Discrimination Act. The Act was an amendment to Title VII.

Section 701(k) states in part that 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."[20]

Thus, the Act makes it unlawful for an employer to discriminate against women in employment decisions because of pregnancy or childbirth. This includes discrimination in hiring, promotion, seniority rights, and fringe benefits.[21] This also includes the requirement that pregnancy and related medical problems be covered on insurance plans, if an employer has a disability and/or insurance plan.[22]

However, does this Act prohibit employers from discriminating against pregnant or fertile women in the toxic work environment? This question is not easily answered. Some would agree that it depends on where, how, and why the discrimination is taking place. The courts have attempted to apply the traditional disparate treatment and disparate impact theories to these cases but have run into certain understandable problems.

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[17] 42 USC 2000 e-2(a) (1982).

[18] See *General Electric Co. v. Gilbert*, rev'd (US 1976) 12 EPD ¶ 11,240, for a discussion of the legality under Title VII of the exclusion of pregnancy disability insurance for a private employers' female employers.

[19] *Geduldig v. Aiello*, 417 US 484, 7 EPD ¶ 943 and *General Electric Co. v. Gilbert*, cited at note 18.

[20] 42 USC 2000e (k)(1983).

[21] For a brief discussion see 1989 CCH GUIDEBOOK to FAIR EMPLOYMENT PRACTICES, ¶ 112.4, 18.

[22] Id., p.21. It should also be noted that abortions do not have to be included in a plan if the employer has moral or religious objections. However, a plan must pay for an abortion if it is to save the life of the mother or there are serious complications.

EEOC Guidelines

On October 3, 1988, the EEOC issued a policy statement on Reproductive and Fetal Hazards Under Title VII.[23] Its intent was to provide guidance for analyzing cases in which employers limited women's job appointments under the guise of protecting the unborn. The EEOC adopted the analysis from the Fourth and Eleventh Circuits.[24] The EEOC policy was not submitted for comments to the public. It noted that the fetal protection cases "do not fit' neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves."[25]

The EEOC stated that fetal protection policies excluding only women from the work force are considered per se violations. The policy statement, following the court cases, applied the business necessity defense to all cases, not only to disparate impact situations.[26] The EEOC policy also states that if there is a reasonable alternative that will protect the unborn and reproductive system of the employees, then a business fetal protection policy should fail.

Finally, the EEOC statement explains in detail the type of scientific information that should be obtained. Scientific evidence substantiating the need for a fetal protection policy is required in order to allow discriminatory policies to stand. If there appears to be the possibility of risk of harm to *both* men and women, then a "cause letter of determination" finding the fetal protection policy discriminatory will issue. This is not the usual result.

Wright v. Olin

The courts have struggled with the appropriate application of Title VII analysis in fetal protection litigation. In most cases, the employer excludes women from certain positions because of potential health hazards to the female employee herself or an unborn child, which may effectively infringe on the equal opportunities of women in the workplace. Fetal protection policies and practices, whether justified or not, have generated a fair amount of litigation. Presently, four federal circuits have ruled on the legitimacy of fetal protection policies under Title VII, and the U.S. Supreme Court has granted certiorari in a Seventh Circuit case to resolve the issue.[27]

In 1982, both the Fourth and Fifth Circuits decided cases involving fetal protection policies.[28] The two cases are similar in that all pregnant women were excluded from certain jobs thought to be hazardous to the fetus. The courts, however, came to different conclusions on how to apply Title VII in fetal protection cases.

The leading federal case was decided by the Fourth Circuit in *Wright v. Olin Corporation.*[29] Olin Corporation adopted a fetal vulnerability program in 1978 that excluded female employees from some jobs. Olin's vulnerability program classified jobs that required exposure to toxic materials as either restricted or controlled.

Job that were restricted involved contact with known or suspected abortifacient or teratogenic agents. Women between the ages of 5 and 62 were excluded from these jobs unless Olin's medical doctors confirmed that they could not bear children. Controlled jobs required the employee to come into contact with harmful chemicals on a limited basis. Pregnant women could work in controlled jobs if approved, and nonpregnant women were required to sign a form acknowledging the risks of performing the job. The program was implemented on the recommendation of three Olin employees, two of whom were medical doctors, to primarily protect the unborn from toxic chemicals,

[23] See cite at note 14.

[24] See *Wright* and *Hayes*, at note 15.

[25] See cite at note 14.

[26] See cite at note 14 , p.401:60415.

[27] See cite at note 5.

[28] See *Wright* and *Zuniga* at note 15.

[29] See *Wright* at note 15.

principally lead, used in the manufacturing process.[30]

The district court found as a matter of law that the policy did not discriminate against females in violation of Title VII.[31] The district court's central findings were that the fetal vulnerability program was implemented with the intent to protect the unborn fetus and not for the purpose of discriminating against females because of their sex.[32]

On appeal, the Fourth Circuit noted that the case as one of first impression and fashioned a Title VII analysis to fit fetal protection policies. The court discussed the inappropriateness of using disparate treatment analysis and concluded that the best theory to apply to fetal vulnerability programs was disparate impact analysis. Circuit Judge Phillips, writing for the majority, stated: "We therefore hold, in line with our earlier discussion of this theory of recovery, that the evidence of the existence and operation of the fetal vulnerability program established as a matter of law a prima facie case of Title VII violation."[33]

According to the *Olin* court, once the plaintiff has established a prima facie case, the burden of persuasion shifts to the employer to prove the following three elements of the business necessity defense. "(1) Significant risks exist for the unborn children of women workers from their exposure to toxic hazards in the workplace. (2) For the safety of the unborn children, fertile women workers, though not men workers, are restricted from exposure to those hazards. (3) The restriction is effective for the intended purpose."[34]

The court further stated that the employer must prove that the program is necessary and effective by presenting independent objective and scientific evidence by qualified experts. The employer's defense may be rebutted by proof that acceptable alternative policies or practices would better accomplish the business purpose, or accomplish it equally well with less differential impact. Such evidence refutes the employer's business necessity defense and results in employer liability. The *Olin* approach to analyzing fetal protection policies requires the employer to substantiate the risk to the unborn children of fertile women in the workplace and use the least discriminatory methods of restricting women from exposure to toxic hazards.

Zuniga v. Kleberg

Zuniga v. Kleberg,[35] was decided in 1982 by the Fifth Circuit. In this case, Rita Zuniga was forced to resign as an X-ray technician at the Kleberg County Hospital after she became pregnant. Hospital policy required X-ray technicians to resign or be terminated once they became pregnant. Zuniga applied for and was denied a leave of absence during her pregnancy. The Kleberg County Hospital attempted to justify their fetal protection practices on two grounds. (1) The hospital argued that they were entitled to assert the business necessity defense because of the potential harm to the fetus from ionizing radiation and the possibility of a tort suit by a future damaged child. (2) The hospital subsequently offered Zuniga a nurses aide position and reemployment as an X-ray technician after the birth of her child. The Fifth Circuit found the Kleberg County Hospital to be in violation of Title VII.

Olin and *Zuniga* were decided only two weeks apart and both courts applied disparate impact analysis.[36] The court in *Zuniga* did not consider whether or not the hospital was justified in claiming the business necessity defense since Zuniga effectively proved the fetal protection policy to be mere pretext. The *Zuniga* court held: "Because the hospital failed to

[30] Id., p.1182.

[31] Id. The EEOC in No. 81-1230 had charged Olin with race and sex discrimination. The district court decided the threshold jurisdictional issues but failed to make proper findings on the fetal vulnerability issue.

[32] Id., p.1176

[33] Id., p.1190.

[34] Id., pp. 1190 and 1191.

[35] See *Zuniga* at note 15.

[36] Id., pp.991 and 992.

utilize an alternative, less discriminatory means of achieving its stated goal, it's business purpose stands revealed as a pretext, and its business necessity defense must fail."[37]

The court found that Zuniga's supervisor incorrectly assumed it was too difficult to find a female X-ray technician to replace her temporarily. As a result of denying Zuniga a leave of absence, the company did not allow her accumulated sick leave, maternity benefits, or insurance coverage. The court concluded that the hospital should have granted Zuniga a leave of absence, which would have been a less discriminatory alternative that accomplished the hospital's business purpose.[38]

Hayes v. Shelby

In *Hayes v. Shelby Memorial Hospital*,[39] the Eleventh Circuit approached the fetal protection issue differently. The case involved Sylvia Hayes, an X-ray technician who was employed by Shelby Memorial Hospital in the radiology department. Hayes was fired after she informed her supervisor that she was pregnant. The hospital claimed that alternative employment was not available for Hayes at the time of her discharge.

The Eleventh Circuit noted the case as one of first impression and stated that the primary issue for resolution was the proper legal framework for analyzing fetal protection policies. The court pointed out in a footnote that *Zuniga* was decided before enactment of the Pregnancy Discrimination Act, and *Olin* did not make it clear whether it was applying principles extant before the Act or arising from it.[40] Hayes brought her case under the Pregnancy Discrimination Act.[41]

The Eleventh Circuit agreed that *Olin* reached the correct result. Senior Circuit Judge Tuttle, writing for the majority, begins by enumerating the possible theories that can be used in a sex discrimination case. Judge Tuttle quickly concluded that under the Pregnancy Discrimination Act no pregnancy-based rule can be neutral, thus requiring the application of facial discrimination analysis.[42] Once the plaintiff proves the fetal protection policy applies to women only, whether pregnant or not, the employer's policy or practice is presumed to be facially discriminatory. The presumption may be rebutted by proof of the following two criteria. (1) There is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, during pregnancy or while fertile, to toxic hazards in the workplace. (2) The hazard applies to fertile or pregnant women but not to men.[43]

The court borrowed these requirements from the *Olin* business necessity analysis. Upon proof of both criteria, the presumption of discrimination is rebutted and the policy is considered neutral, as it equally protects the offspring of all employees.

If the employer successfully refutes the presumption, then the disparate impact theory applies and the employer is entitled to assert business necessity as a defense. By rebutting the presumption, the employer has simultaneously proved business necessity. The employee may rebut the employers business necessity defense by proving that acceptable alternative policies would have better accomplished the purpose of promoting fetal health or that the alternative would accomplish the purpose with less adverse impact on one sex.[44] The court stated: "In other words, to avoid Title VII liability for a fetal protection policy, an employer must adopt the most effective policy available with the least discriminatory impact possible."[45]

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[37] Id., p.994.

[38] Id., p.992.

[39] See *Hayes* at note 15.

[40] Id., p.1547.

[41] See cite at note 20.

[42] See *Hayes* at note 15, p.1547.

[43] Id., p.1548.

[44] Id., p.1552.

[45] Id., p.1553.

If the employer fails to rebut the presumption, then the policy is analyzed as facially discriminatory and the only defense available to the employer is a bona fide occupational qualification (BFOQ). The court held that policies to protect employee offspring from workplace hazards can be justified "if the employer shows a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job."[46]

The court refused to expand the BFOQ defense beyond its traditional application.[47] Although the court set out to clarify the analysis in fetal protection cases, Judge Tuttle admits the opinion is confusing. The court held that *Shelby Memorial Hospital* violated Title VII by failing to rebut the presumption of a facially discriminatory policy, and that less discriminatory alternatives were available.

Allied Industrial Workers v. Johnson Controls

In *Allied Industrial Workers of America v. Johnson Controls, Inc.*,[48] the Seventh Circuit affirmed en banc the district court's summary judgment in favor of the employer. Johnson Controls acquired Globe Union, Inc., in 1978. Globe manufactures batteries in which lead is used in the process. In 1982, Johnson Controls adopted a fetal protection program that banned women from working in high lead exposure positions in the battery manufacturing division.[49] The policy stated that women with childbearing capacity will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive.[50]

Johnson Controls had spent $15 million over a period of ten years on environmental engineering controls at its battery division plants. Globe Union, in 1977, adopted a voluntary fetal protection policy, advising female employees of the potential risk to unborn children and recommending each woman capable of bearing children to seek counsel with a family doctor. Johnson adopted its 1982, more restrictive, fetal protection policy because of the inability of the previous voluntary policy to protect women and their unborn children from dangerous blood lead levels. During the period from 1979 to 1983, six women became pregnant in high level lead exposure positions. The court also noted that no other method of manufacturing is available to produce batteries without high levels of lead exposure.

The Seventh Circuit directly acknowledged the decisions in *Olin* and *Shelby*. Circuit Judge Coffey, writing for the majority, stated: "Accordingly, we agree with the Fourth Circuit, Eleventh Circuit, and EEOC that the business necessity defense can be appropriately applied to fetal protection policy cases under Title VII."[51]

Although not definitely stated, the court pronounced Johnson's fetal protection policy as a form of facial discrimination. The court concluded that not all forms of overt discrimination require the application of the bona fide occupational qualification defense and that the interests of the employer, employee, and the unborn child are balanced in a manner consistent with Title VII by utilizing the business necessity defense.

The Seventh Circuit set forth the essential components of the business necessity defense in fetal protection cases. "(1) The employer has the burden of producing evidence that a substantial health risk to the unborn child exists. (2) The risk of harm to offspring must be substantially confined to female employees."[52]

The employee may refute the employer's business necessity defense by presenting acceptable alternative policies

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[46] Id., p.1549.

[47] Id., p. 1547. The court began its opinion by stating it would analyze the case under all three possible theories.

[48] See *UAW v. Johnson Controls*, at note 5.

[49] Id., p.875.

[50] Id., p.876.

[51] Id., p.887.

[52] Id., p.886.

or practices that would better accomplish the business purpose or accomplish it equally well with a less differential impact. The court noted that according to the U.S. Supreme Court's recent decision in *Wards Cove Packing Co.v. Atonio*,[53] the burden of persuasion in a disparate-impact case remains with the employee at all times. According to *Wards*, the employee bears the burden of disproving an employers assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.[54]

The court went on to further clarify the plaintiff's burden in fetal protection cases. The plaintiff has the burden of presenting specific economically and technologically feasible alternatives to the employer's policy. Once such alternatives have been presented, the plaintiff bears the burden of proving that its proposed alternative is equally effective in achieving legitimate employment goals, and such factors as cost or other burdens of the proposed alternative are relevant in determining if they would be equally as effective as the challenged practices.[55] The court held that a business necessity defense may shield an employer from liability for sex discrimination under Title VII involving a fetal protection policy.

The *Johnson* court then proceeded to analyze the fetal protection policy under the BFOQ theory. The court, citing from *Dothard v. Rowlenson*,[56] stated that a BFOQ was valid only if the essence of the business operation would be undermined by not hiring members of one sex exclusively and if the employer had reason to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.[57]

The court concluded that Johnson's policy of excluding pregnant women from high levels of lead exposure was supported by BFOQ considerations.[58] In addition, the court stated: "We are also of the opinion that Johnson Controls' well reasoned and scientifically documented decision to apply this policy to all fertile women employed in high lead exposure positions constitutes a bona fide occupational qualification."[59] The case will be argued before the Supreme Court during its October 1990 term.

These circuits have pronounced some significant opinions involving fetal protection policies. One reason the courts have attempted to apply disparate impact theory is that fetal protection policies seem to have neutral employer motivations. What seems clear from a careful consideration of these decisions is that the circuits have attempted to mandate business necessity principles in one form or another. The circuits have consistently focused on four criteria: (1) a substantial risk of harm to an unborn child or potential offspring of women employees; (2) the substantiation of the risk through objective, scientific evidence; (3) the risk applies to fertile or pregnant women employees only; and (4) the employer has utilized the least discriminatory method of protecting the unborn child or future children. How the above criteria are implemented by the courts depends upon the court's approach to the issue. The courts have approached fetal protection policies by either balancing the interests of those affected, weighing the magnitude of the risk, or emphasizing less discriminatory alternatives.

Interests of the Affected

In almost all fetal protection cases three parties have an interest to be considered. (1) The employee asserts a denial of equal employment opportunity as a result of a discharge or other limitation on advancement. (2) The employer asserts the right to protect the unborn children of employees and to be free of potential liability from future children of employees.

[53] 109 SCt 2115, 2d 733, 50 EPD ¶ 39,021 (1989).

[54] See *UAW v. Johnson Controls*, at note 5, p.887.

[55] Id., p.890.

[56] 433 US 321 (1977).

[57] See *UAW v. Johnson Controls*, at note 5, p.896.

[58] Id., p.895.

[59] Id., p.898.

(3) The unborn child asserts the interest in being born free of toxic substances that can cause intellectual and motor retardation, behavioral abnormalities, and deficiencies in learning abilities.[60]

In *Johnson Controls*, the court listed three potential interests that must be considered in analyzing the employer's policy. The court stated: "The bona fide occupational qualification defense, like other Title VII defenses, must be construed in a manner which gives meaningful and thoughtful consideration to the interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child."[61]

In both *Johnson Controls* and *Olin*, the courts carefully considered the interests of the employee in relation to the potential harm to the unborn child. The more severe the exposure to toxic materials the greater the potential for validation of the employer's protection policy. In *Johnson Controls*, the evidence proved that high levels of lead exposure by a pregnant employee are a substantial health risk to the unborn child.[62] In *Olin*, the court remanded the case to the trial court so the employer might have an opportunity to present evidence concerning the risk of harm to the unborn child.

In *Shelby*, the Eleventh Circuit failed to recognize the interests of the unborn child apart from the employee. The court, by labeling the case as one of facial discrimination, imposed a greater burden on the employer at the expense of the interests of the unborn child. The *Shelby* court failed to allow the employer to protect the unborn children of employees if the potential hazard lacked significant presentable evidence.

While the *Shelby* court felt constrained to apply the facial discrimination/bona fide occupation qualification equation, the court in *Johnson Controls* took a different approach. In *Johnson Controls*, the court recognized fetal protection practices as a form of facial discrimination, but in the interests of the fetus did not require the employer prove a BFOQ defense.

The *Zuniga* court, along with the *Shelby* court, approached the issue from the interests of the employee and the employer only. Both courts failed to consider the interest of a child or a potential child in being born healthy and free of abnormalities.

In light of the complexities of most fetal protection cases, the approach of the *Johnson* court seems to be most appropriate. The interests of all individuals involved must be given equal consideration. Attempting to evaluate a fetal protection policy without the interests of the unborn represented provides only a superficial analysis. Since Title VII theory is inadequate to address the safety and health concerns, and the employee's safety and health may affect the unborn child, the courts should broaden the analysis to include the unborn as a co-equal.

The Magnitude of the Risk

The courts have weighed the risk to the unborn utilizing different measures. Under the business necessity analysis of *Olin*, the significant risk of harm to the unborn must be proven by a considerable body of opinion. As in *Shelby*, the employer must prove a substantial risk of harm by producing objective evidence, of essentially a scientific nature, from qualified experts in the relevant scientific fields. The court in *Shelby* stated that the risk must be so great "that an informed employer could not responsibly fail to act on the assumption that his opinion might be an accurate one."[63] The court in *Johnson Controls* adopted that aspect of the *Shelby* analysis.[64]

The employer's burden allows justification of a policy only on the basis of well known health hazards to employees or to the unborn children of employees. The employer is prohibited from making poli-

[60] Id., p.880.
[61] Id., p.893.
[62] Id., p.886.
[63] See *Hayes*, at note 15, p.1548.
[64] See *UAW v. Johnson Controls*, at note 5, p.889.

cies based upon suspicion or unpublished empirical evidence. The courts justify this requirement as the antidote to the elimination of myths and purely habitual assumptions that employers attempt to utilize to support the exclusion of women from employment opportunities. The courts thus leave little room for management discretion.

In *Zuniga* and *Hayes*, the courts placed the emphasis on the lack of verifiable evidence of the risk to the unborn children of the employees. In instances where the risk is low or not susceptible to scientific proof, the courts have either concluded that a violation has occurred or lowered the standard of proof. A decision in favor of the plaintiff presents the potential for harm to the unborn resulting from the lack of evidence of a hazard. Lowering the standard, however, may allow the employer to discriminate against female employees.

In order for the employer to be able to meet the burden of proving a risk of harm, there must have been substantial amounts of research conducted and proper communication of the results made to the scientific field concerned. As workplace history has revealed, a legitimate risk may be apparent, but scientific data supporting the hazards of the risk may not be discovered for decades.

Least Discriminatory Alternative

One thread that runs consistently through the majority of fetal protection cases is the requirement that only females are subject to the risk. Whether as part of the employers proof of a business necessity defense or to neutralize the criteria, the courts have attempted to mandate that employers base fetal protection policies on the lack of evidence of a risk to male employees' reproductive systems. The courts have responded to the argument that if both fertile female and male employees are affected adversely by toxic materials, both female and male employees must be excluded.

The courts have further attempted to limit the harshness of fetal protection policies by requiring the employer to implement the least discriminatory alternative. In *Shelby*, the court quickly concluded that the hospital could have granted Hayes a leave of absence that would have been less discriminatory and accomplished the hospital's business purpose.[65] The employer's business necessity was rebutted by proof of an acceptable alternative policy that promoted fetal health with less adverse impact on one sex.

In *Zuniga*, the employee's proof of a less discriminatory alternative caused the court to skip over any analysis of the issue concerning the safe and efficient operation of the business.[66]

The courts, by emphasizing alternative programs or practices, may fail to fully protect the employees or the unborn child. In *Shelby*, since the hazard was temporary, a leave of absence would have provided the least discriminatory alternative.

The *Zuniga* and *Shelby* courts failed to consider the potential X-ray exposure during the period when the female employee is unaware of her pregnant condition.[67] If the fetus, however, is in danger during the initial days or weeks of development from radiation, then a leave of absence is not an alternative.

Conclusion

The federal courts have struggled with employer fetal protection practices and policies under Title VII. The federal circuits are split on the proper approach to utilize when determining the validity of a fetal protection policy. Both the Fourth and the Fifth Circuits have declared disparate impact/business necessity analysis as the appropriate method. The Eleventh and the Seventh Circuits have nominally analyzed fetal protection policies under facial discrimination theory, but in essence they have imputed the business

[65] See *Hayes*, at note 15, p.1553.

[66] See *Zuniga*, at note 15, p.992.

[67] See *Zuniga* and *Hayes*, at note 15.

necessity defense criteria into the equation. Whether or not the courts have labeled the theory as disparate treatment or disparate impact, the criteria to be analyzed seems to be agreed upon. The courts have included three factors when determining the validity of a fetal protection policy. The Court in *Johnson Controls* enumerated those three factors as: (1) a demonstration of the existence of substantial health risk to the unborn child; (2) establishing that transmission of the hazard to the unborn child occurs only through women; and (3) lack of evidence by the employee that less discriminatory alternatives equally capable of preventing the health hazard to the unborn were available.

Employers, employees, and the unborn have an interest in workplace health and safety. However, the interests of the three may not be fully addressed under Title VII analysis unless substantial scientific evidence exists concerning the health hazard. In the event that the evidence clearly indicates the health of the unborn is at risk, the courts have upheld employer fetal protection policies, as long as the risk is only to the female employee and the least discriminatory alternative is utilized. In cases where the risk is unverifiable or the risk applies to both sexes, the courts are hesitant to uphold a fetal protection policy and would prefer that the employer to eliminate the risk altogether.

Traditional Title VII theory seems inadequate to equitably deal with workplace safety and health. In the event a choice must be made between preserving the health of unborn children and preventing unfair treatment of a female employee, the courts should choose the former. The effect of choosing the latter allows the most abusive form of discrimination upon the unborn.

[The End]

Schools May Ban Religious Attire

It was lawful for a school board to refuse to hire a teacher who insisted upon wearing a head scarf and long, loose dress in accordance with her Muslim religion, the Third Circuit ruled in *U.S. vs. Philadelphia School Board* (54 EPD ¶ 40,144). A state law prohibited teachers from wearing clothes indicating an adherence to a particular religious order, sect, or denomination. The appeals court held that the state could not be held liable for religious discrimination on the basis of this state law, citing a Supreme Court ruling on a similar law in another state. The appeals court reasoned that the state had a compelling interest in maintaining an apperance of religious neutrality in the classroom. The state law in question seemed to be narrowly tailored to fit this objective and was enforced in a nondiscriminatory manner against Catholics as well as Muslims, the Third Circuit found.