Safety and Equality at Odds: OSHA and Title VII Clash over Health Hazards in the Workplace

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It is becoming increasingly clear that men, women, and children yet unborn are susceptible to damage caused by occupational exposure to many sorts of materials and processes. The Occupational Safety and Health Act authorizes and compels that the occasions of such exposure be eliminated or minimized. But where the methods of elimination affect only one sex, the purpose of the Act runs afoul of equal employment opportunity mandates such as Title VII of the Civil Rights Act of 1964. The authors discuss the legal conflict, the social considerations behind it, and the likely future course of the enforcement bodies involved.

I
INTRODUCTION

There is increasing interest concerning the exposure of workers to substances which may have harmful effects not only upon the workers but also upon their progeny. Substances with carcinogenic,1 mutagenic,2 or teratogenic3 effect have been recognized for several decades while others have been identified only recently. Still other substances

1. Carcinogens are "substances or agents which can cause cancer (an abnormal cell growth which can spread)." A. Hricko & M. Brunt, WORKING FOR YOUR LIFE: A WOMAN'S GUIDE TO JOB HEALTH HAZARDS B-4 at (1976) [hereinafter Hricko & Brunt].
2. Mutagens are "substances or agents which can cause mutations or changes in the genetic material of living cells." Id.
3. Teratogens are "substances or agents which can cause birth defects or other abnormalities in offspring." Id. Recently, there has been some evidence that teratogenic effects may result from mutagenesis occasioned by the father's exposure to a hazardous substance. For our purposes, however, we have considered as teratogenic effects only those which follow exposure of the fetus, either directly or indirectly through the mother.
currently are suspected of having such qualities.4

It has been estimated that 25% of the nation's 84,000,000 workers are exposed on a full-time or part-time basis to toxic substances regulated by the Occupational Safety and Health Administration.5 Approximately 880,000 workers are exposed to an OSHA-regulated carcinogen.6

The growing realization of the scope of this problem has lead OSHA to shift its emphasis during the past three years from an almost exclusive concern with occupational safety to a concentration on occupa-
tional health.7 In his May 1977 message to Congress on environ-
mental matters, President Carter stated:

The presence of toxic chemicals in our environment is one of the grim-
mest discoveries of the industrial era. . . . [H]ealth hazards in the work
place cause at least 390,000 new cases of diseases and perhaps as many
as 1,000,000 deaths annually. . . . [We must] examine the full range of
reforms that might be undertaken to assure adequate compensation for
occupationally induced diseases.8

Currently, there are two major activities being undertaken by the
federal government focusing on different aspects of the problem. The
first was announced officially in October 1977 with publication of a
proposed regulation to control carcinogenic substances in the work-
place.9 The preamble to the proposed regulation explains that while
the number of physical or chemical agents known or suspected to cause
cancer has increased, the causative factors and mechanisms are poorly
understood. Due in part to these reasons, OSHA had completed only

4. The National Institute for Occupational Safety and Health [NIOSH] has published a list
of 2,415 substances suspected of having carcinogenic effect. U.S. Department of Health, Educa-
tion, and Welfare, Suspected Carcinogens: A Subfile of the Registry of Toxic Effects of Chemical
Substances (2nd ed. 1976). Dr. Irving J. Selikoff, a noted authority on occupational health mat-
ters, has characterized the capacity of modern practitioners to identify hazardous substances as
"very limited [for teratogenetic or mutagenetic chemicals, and] even more limited for occupational
carcinogens." G. Martin, Battling Occupational Disease: Dr. Irving J. Selikoff Talks About an On-
Going Struggle, JOB SAFETY AND HEALTH 11-14 (February 1978).
Problems and Policy Issues Arising from Exposures to Hazardous Chemicals and Physical Agents
in the Workplace, at 21 (July 1977). The Occupational Safety and Health Administration
(OSHA) is the agency charged with promulgation and enforcement of regulations relating to
safety and health in the workplace. Although more than twenty states have elected to develop
and enforce their own plans regulating occupational safety and health, most have simply adopted
the standards promulgated by OSHA. For this reason only the requirements imposed by and the
activities of OSHA are discussed herein.
6. Id. at 3.
7. Statement of Dr. Eula Bingham, Assistant Secretary of Labor for Occupational Safety
and Health, before the Subcommittee of the Senate Committee on Human Resources, June 29,
1977.
9. Identification, Classification, and Regulation of Toxic Substances Posing a Potential Oc-
six rulemaking proceedings in the health area, covering only nineteen substances, since it was created. In order to deal systematically with toxic substances of carcinogenic potential, the OSHA cancer policy proposes establishment of a "comprehensive set of regulations to identify, classify and regulate potential carcinogens in American workplaces . . . [by] utilizing the best available and generally accepted scientific knowledge . . . ." If the proposed standard is adopted, the scientific and policy issues it resolves will not be contestable in subsequent rulemaking proceedings on specific substances. Of particular relevance to the instant discussion is a proposed provision of the policy which would require that the permissible exposure limit for a carcinogenic substance be set as low as feasible. No occupational exposure would be permitted if less hazardous substitutes are available.

The second development was the announcement on January 30, 1978, that OSHA, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs were jointly examining exclusionary practices barring women from jobs based on alleged greater susceptibility to certain health hazards. The EEOC affirmed its intention to issue guidelines to prevent discriminatory exclusion of women from jobs due to such hazards. Joint discussion with OSHA was established to take advantage of OSHA's scientific and technical expertise on the issue. Discussion with OFCCP was necessary to establish a uniform policy for all government agencies having equal employment opportunity responsibilities.

10. Those rulemaking proceedings resulted in permanent standards covering asbestos (1972), fourteen other carcinogens (January 1974), vinyl chloride (October 1974), coke oven emissions (October 1976), benzene (February 1978), and arsenic (May 1978). The standards hearings for lead and benzene were completed, and a permanent standard for exposure to benzene was promulgated. 43 Fed. Reg. 5919 (1978). The lead standard proceedings initially concluded in May, 1977, but were reopened for additional comment on appropriate protections for workers transferred under the proposed medical surveillance provisions. 42 Fed. Reg. 46547 (1977). No permanent lead standard had been issued at the date of this article, and the benzene standard had been stayed by the Fifth Circuit. 42 Fed. Reg. 54148 (1977).

11. While the proposal noted the possibility of establishing different standards for different industries, 42 Fed. Reg. 54181 (1977), there is no mention of establishing different standards for male and female employees based upon scientific evidence of greater susceptibility of one sex to adverse health effects by exposure to a regulated substance.

12. Hereinafter the EEOC.

13. Hereinafter the OFCCP.


15. Id.

16. Id.

17. A recent example of the non-coordination of different government agencies having similar responsibilities is the promulgation of qualification testing guidelines by the EEOC which differed from those approved for use by the OFCCP and other federal agencies.
To date, the standards regulating health hazards which have been adopted by OSHA are not sex-specific as to exposure levels. In practice, employers in several industries have determined that women of child bearing age will be excluded completely from jobs involving exposure to substances known to cause fetal damage. The status of such practices under the general duty clause of the Occupational Health and Safety Act which requires employers to provide employees with a safe working environment, standards promulgated under section 6(b) of the Act, and the requirements of Title VII of the Civil Rights Act of 1964 is unclear. However, the increased activity by OSHA, EEOC, and OFCCP in the area of occupational health and exclusionary employment practices must inevitably confront possible conflicts between the Occupational Safety and Health Act and Title VII. Guidelines and regulations can only provide partial resolution of the problem. The following sections will demonstrate the ambiguity inherent in such an approach and alternative applications of such regulations.

II

THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The oft-cited purpose of the Occupational Safety and Health Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." In practice, it may result in substantial conflicts with Title VII and other equal employment opportunity requirements, such as those of the OFCCP.

In considering health hazards which have a disparate effect on men and women, compliance with specific standards by employers may depend upon the availability of economic infeasibility as a defense. This section addresses that defense and the relationship of specific standards to sex-specific health hazards.

18. Solicitor of Labor Carin Claus has noted that the Department of Labor is aware of broad exclusionary policies in the lead and vinyl chloride industries. 7 O.S.H. Rep. 1339 (1977). It has been reported that American Cyanamid, Union Carbide, Eastman Kodak, Celanese, and Du Pont all have policies which exclude women from certain jobs. Wall Street Journal, Nov. 1977.

Since fetal damage is the most easily identified symptom of reproductive system damage, scientific evidence on the matter is based upon studies of women who have been exposed, rather than on examination of similarly exposed men. For this reason, women are generally the first to be eased out of jobs where chemical hazard is present.


SAFETY AND EQUALITY

A. Specific Standards

The Act provides that its purpose is to be advanced by the promulgation of specific standards. These are to be based in part upon “medical criteria which will assure insofar as practical that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience.” In setting standards through its rulemaking procedures, OSHA consistently has invited interested parties to submit written data, impressions, and arguments relating to the proposed standards. This is to provide the Secretary with the information necessary to fulfill the obligation imposed by the Act.

In promulgating standards dealing with toxic materials or harmful physical agents, under this subsection (the Secretary) shall set the standard which most adequately assures, to the extent feasible, on the basis of the best evidence available, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. (emphasis supplied.)

1. The Economic Infeasibility Defense

Beginning with the legislative history, the term “feasible” has been construed to include both economic and technological feasibility. Senator Jacob Javits, the author of the amendment which added the feasibility requirement, reflected the Congressional concern that economic and practical considerations be considered in the standard setting process as well as technical considerations.

As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill, which might be interpreted to require absolute health and safety in all cases, regardless of feasibility, and the Administration bill, which contains no criteria for standards at all.

In one of the first cases involving a health standard, Industrial Union Department, AFL-CIO v. Hodgson, the court ruled that economic feasibility is a proper consideration in the standard setting process.

There can be no question that OSHA represents a decision to require safeguards for the health of employees even if such measures substantially increase production costs. This is not, however, the same thing as saying that Congress intended to require immediate implementation of all protective measures technologically achievable without regard for

24. 499 F.2d 467 (D.C. Cir. 1974).
their economic impact. To the contrary, it would comport with common usage to say that a standard that is prohibitively expensive is not feasible. . . . Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.\(^{25}\) (emphasis supplied)

However, in discussing the Secretary's authority to consider the economic impact of a particular standard, the court severely limited the economic infeasibility defense.

Standards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers.\(^{26}\)

The Third Circuit opinion in *AFL-CIO v. Brennan*\(^{27}\) is perhaps the most frequently quoted statement indicating that economic consequences may include the elimination of some businesses.

Congress did contemplate that the Secretary's rulemaking would put out of business some businesses so marginally efficient or productive as to be unable to follow standards otherwise universally feasible. But we will not impute to congressional silence a direction to the Secretary to disregard the possibility of massive economic dislocation caused by an unreasonable standard. An economically impossible standard would in all likelihood prove unenforceable, inducing employers faced with going out of business to evade rather than comply with the regulation. The Act does vest the Secretary with authority to enforce his regulations, but the burden of enforcing a regulation uniformly ignored by a majority of industry members would prove overwhelming.\(^{28}\)

The Act has also been held to require technological improvement, further restricting the economic infeasibility defense. For example, in *Society of the Plastics Industry, Inc. v. OSHA*, the court rejected an economic infeasibility defense based upon such a construction.

In the area of safety, we wish to emphasize, the Secretary is not restricted by the status quo. He may raise standards which require improvements in existing technologies or which require the development of new technology, and he is not limited to issuing standards based

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25. *Id.* at 477-78 (footnote omitted).
26. *Id.* at 478. *See also*, Florida Peach Growers Ass'n v. United States Dept. of Lab., 489 F.2d 120, 130 (5th Cir. 1974).
27. 530 F.2d 109 (3rd Cir. 1975).
28. *Id.* at 123.
solely on devices already fully developed.29

The Occupational Safety and Health Review Commission also has been unreceptive to the economic infeasibility defense. The Commission has ruled that an employer may not defeat a citation by claiming that it lacked sufficient funds to achieve abatement,30 that an OSHA Area Director failed to consider the cost of abatement,31 that the cost of compliance would exceed the damages resulting from job injuries,32 that it would be expensive and time consuming to comply,33 that the standard was impractical due to causing expense,34 or that the cost of compliance would be passed on to customers.35

Economic infeasibility has been accepted by the Review Commission as a defense only to violation of the noise standard.36 In the leading decision in this area, Continental Can Company,37 the Review Commission held that both technological and economic feasibility should be considered in determining whether engineering and administrative controls designed to reduce noise levels were feasible. The lead opinion, however, noted that with noise,

the hazard is not life-threatening . . . and although it will produce serious loss of hearing in some cases we must consider the fact that the harm in other cases will be little if any hearing loss. The situation, therefore, is distinguishable from life-threatening hazards such as those posed by carcinogenic substances.38 (emphasis supplied)

The Review Commission also noted the finite resources available to employers to abate health hazards. The Secretary argued that economic feasibility should be considered only if a company's financial viability would be seriously jeopardized, but the Review Commission rejected that position in the absence of a life-threatening hazard.

The argument also ignores the benefits to be gained since it requires employers to expend funds for each and every health hazard whether life threatening or not without limit so long as the expenditures for each hazard can be borne without putting the employers' financial condition in jeopardy. Clearly, employers have finite resources avail-

30. Intermountain Block & Pipe Corp., 1 O.S.A.H.R.C. 455 (1972). (All Review Commission citations in footnote will be to the official bound reporter and microfiche. Since these are not universally available, cross-citation of all cited cases to Occupational Safety and Health Cases (BNA) is provided in an appendix at the end of this article.)
36. 29 C.F.R. § 1910.95.
38. Id. at B6. (citations omitted).
able for use to abate health hazards. And just as clearly if they are to be made to spend without limit for abatement of this hazard their financial ability to abate other hazards, including life threatening hazards, is reduced. We can conceive that in some if not many cases it will be reduced to the point that they will be put in financial jeopardy when faced with the problem of abating a life threatening hazard. Such a result does not comport with the purposes of the Act because in our view resources should be allocated on a priority basis to obtain the benefits that may be achieved by eliminating life threatening hazards first and lesser hazards second. And by saying "second" we do not mean second in time but rather second in priority for allocation of resources. In this regard Congress recognized the need for establishing priorities in eliminating workplace hazards. Thus it mandated Labor to set priorities on an urgency of the need basis.39

The Review Commission further explained its concern that allocation of employers' finite resources should reflect not only consideration of the economic consequences of compliance with the standards but also recognition of the benefit employees would derive.

Accordingly, we conclude that the standard should be interpreted to require those engineering and administrative controls which are economically, as well as technically feasible. Controls may be economically feasible even though they are expensive and increase production cost. . . . But they will not be required without regard to the costs which must be incurred and the benefits they will achieve. In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed.40

In subsequent decisions, the Review Commission has considered economic factors in cases involving noise violations.41 However, the Review Commission has indicated that the economic infeasibility defense will be restricted to hazards which do not threaten life.42

2. Sex-specific Hazards and Specific Standards

It is conceivable under the Act that the Secretary could adopt standards containing sex-specific exposure levels, that is, levels allowing different exposure for male and female workers. OSHA has previously expressed some interest in the possibility of establishing sex-specific standards.43 However, OSHA has clearly indicated in its pro-

39. Id. at B7.
40. Id.
43. The October 3, 1975 publication of the proposed lead standard listed as one of the ten major issues of significance the following: "To what extent are there groups with increased suscep-
posed cancer policy that standards for exposure to known and suspected carcinogens will be set as low as feasible, allowing no occupational exposure where suitable alternatives exist. It is reasonable, therefore, to anticipate that OSHA will require that exposure to hazardous substances to which workers of one sex are more susceptible be established at levels which will assure their safety and health.

There are three distinct alternatives from which OSHA may choose in setting standards.

1. OSHA may adopt the position that the exposure level which is feasible is that which provides protection to the most susceptible employee, and if that level can be attained immediately, there would be no conflict with Title VII. An employer would be hard pressed to establish a business necessity defense for his exclusion of workers of one sex under such a standard.

2. OSHA may adopt a standard which would provide a safe level of exposure for both sexes, whether or not it is sex-specific, but if it is not immediately attainable, the business necessity defense might be raised to justify temporary exclusion of the more susceptible sex until compliance with the OSHA standard may be achieved.

3. OSHA may determine that there is no safe level of exposure for workers of one sex or that such level cannot feasibly be attained, but that there is a safe level attainable for the other sex, an employer would then have a substantial argument that a business necessity defense would permit the exclusion of the more susceptible sex.

The impact of Title VII on these alternatives, the applicability of the Title VII business necessity defense, and other Title VII implications with regard to restrictive employment policies will be discussed in Part III.

B. General Duty Clause

The general duty clause of the Act provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or

44. It should be remembered that the term "feasible" has been given a broad interpretation by the courts so as to make the Act a technology-forcing law. The fact that a specified exposure level is not immediately attainable will not preclude such a level being held feasible. See, e.g., Society of the Plastics Industry, Inc. v. OSHA, 509 F.2d 1301 (1975). In view of the conservative approach taken by OSHA in its cancer policy, perhaps the only limitation on setting exposure levels will be the existence of measuring devices with the capability to measure very low concentrations, such as parts per million or per billion.

45. Although the Act applies only to employees, it is reasonable to conclude that the ability of an employee to produce healthy offspring is a vital part of the intended protection.
are likely to cause death or serious physical harm to his employees." (emphasis supplied). If it can be demonstrated that a recognized hazard exists for only one sex, it is unclear under the Act whether greater protection may be afforded the sex for which the greater hazard exists. The following section will analyze an employer's potential liability for exposure of his employees to hazardous substances under the general duty clause, focusing on the legislative purpose of section 5(a)(1) and the interpretation given the general duty clause by the Review Commission and the courts.

In the landmark case, *National Realty and Construction Co., Inc. v. OSHRC*, an employer was cited for a serious violation of section 5(a)(1) after a foreman riding on the running board of a front-end loader was killed when it toppled over. Construing the term "recognized" in light of the legislative history, the Court of Appeals for the District of Columbia concluded that the section was directed to "known" hazards.

An activity may be a "recognized hazard" even if the defendant employer is ignorant of the activity's existence or its potential for harm. The term received a concise definition in a floor speech by Representative Daniels when he proposed an amendment which became the present version of the General Duty Clause:

A recognized hazard is a condition that is known to be hazardous and is known not necessarily by each and every individual employer but is known taking into account standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it." 116 Cong. Rec. (Pt.28) 38377 (1970). The standard would be the common knowledge of safety experts who were familiar with the circumstances of the industry or activity in question.

After noting that "Congress did not intend unpreventable hazards to be considered 'recognized' under the clause," the court went on to say:

This is not to say that a safety precaution must find general usage in an industry before its absence gives rise to a general duty violation.

47. For example, it is now well known that radiation may affect the reproductive functions of both men and women. Under the general duty clause, does an employer incur an obligation to afford a pregnant woman greater protection than that afforded non-pregnant employees? His duty of care to provide a safe and healthful workplace might be construed to require him at all times to provide an environment that will be safe for the most susceptible of his employees. This appears to be the position of OSHA with respect to exposure levels set through the standards-setting process.
49. *Id.* at 1265 n. 32.
50. *Id.* at 1266.
The question is whether a precaution is recognized by safety experts as feasible, not whether the precaution's use has become customary. Similarly, a precaution does not become infeasible merely because it is expensive.51

Under the National Realty standard, an employer need not have actual knowledge of a hazard to sustain a violation where a recognized hazard exists. As stated by the Eighth Circuit, the legislative history "clearly indicates that the term recognized was chosen by Congress . . . to include the generally recognized knowledge of the industry," as well as actual knowledge.52

Most cases to date concerning general duty clause violations have involved safety hazards, which have been readily detectable. However, there have been several general duty clause citations issued for health hazards. In Brennan v. OSHRC (Vy Lactos Laboratories),53 the employer was engaged in manufacturing animal feed concentrates which used proteinaceous fish solubles. These fish solubles were stored in basement tanks in liquid "slurry" form which was treated with sulphuric acid to retard decomposition. A tank of slurry had overflowed into another room overnight. The following morning it was pumped out and employees were instructed to clean up the remaining slurry. Upon entering the basement they were overcome by hydrogen sulfide gas, as were other employees who attempted to rescue them. The employer had provided no emergency breathing apparatus, and had taken no other safety precautions to deal with accumulations of hydrogen sulfide gas. Three employees died and two others were seriously injured as a result. The Review Commission affirmed54 the administrative law judge's report and recommendations, which dismissed the citation and proposed penalty. These findings were based on the theory that the hydrogen sulfide gas accumulation was the result of an unforeseeable chemical reaction between the acid in the slurry and the iron sulfide particles which dropped into the slurry when an emergency ventilation hole was cut through to the basement room from the floor above.

The Review Commission majority held that proof of the employer's actual knowledge of the conditions and their hazardous nature was not enough to sustain the Secretary's burden of proving that a recognized hazard existed.

[T]he question under section 5(a)(1) is not whether Respondent personally recognized the hazard. Rather, the question is whether the hazard

51. Id. at 1266 n. 37.
52. Brennan v. OSHRC (Vy Lactos Laboratories), 494 F.2d 460, 464 (8th Cir. 1974).
53. 494 F.2d 460 (8th Cir. 1974).
is recognized by the industry of which Respondent is a part.\textsuperscript{55}

The Eighth Circuit reversed and remanded the case to the Review Commission. The court held that “the Commission erred to the extent that it ignored the Secretary’s evidence of actual knowledge in determining whether or not the hazard involved here had been recognized.”\textsuperscript{56}

Under the Eighth Circuit’s rationale, an employer’s actual knowledge of the existence of a hazard, whether or not otherwise recognized in the particular industry, is sufficient to sustain a general duty clause violation. Actual knowledge vitiates the requirement that the hazard be recognized in the industry. Thus, absent the Secretary proving either actual knowledge of the cited employer or industry recognition that a condition is hazardous, no general duty clause violation can be established.\textsuperscript{57}

There is only one section 5(a)(1) health hazard case in which the effects of exposure to a recognized hazard were long-term rather than immediate. In \textit{American Smelting \& Refining Co.,} the company was cited for allowing airborne concentrations of inorganic lead which significantly exceeded the ANSI standard levels.\textsuperscript{58} The employer argued that the term “recognized hazard” was intended to apply only to hazards detectable by the basic human senses, not to hazards detectable only by use of testing devices. The Review Commission majority summarily rejected this position.

Clearly, it was thought that the readily apparent hazards test only covered those hazards that are obvious, i.e., those which can be detected by the basic human senses. It is also clear that the Congress by rejecting the readily apparent hazards test and accepting the recognized hazards test in its place intended that non-obvious hazards be within the scope of the general duty requirements. There can be no question that non-obvious hazards include those that can only be detected by instrumentation.

Moreover, acceptance of Respondent’s argument requires a conclusion that Congress did not intend the general duty to cover known health hazards which are of a serious nature, which can only be detected by instrumentation, and for which a standard does not exist. We cannot so conclude. The Congress itself recognized the existence of health hazards which are of a serious nature and which are detecta-

\textsuperscript{55} Id. at 621.  
\textsuperscript{56} 494 F.2d at 463.  
\textsuperscript{57} \textit{See, e.g.}, State, Inc., 76 O.S.A.H.R.C. 134/F7; (1976); Penrod Drilling Co., 76 O.S.A.H.R.C. 115/B8 (1976).  
\textsuperscript{58} 4 O.S.A.H.R.C. 445 (1973).  
\textsuperscript{59} ANSI is the acronym for the American National Standards Institute, a nationally recognized private organization that establishes recommended standards for a wide variety of industrial operations. These standards are well-known by experts in the fields to which they apply.
ble only by instrumentation. For example, both the Senate and the
House recognized that industry and medical practitioners have known
for years that employees exposed to asbestos have incurred serious
physical harm and death by virtue of their exposure. (footnote omit-
ted)

Respondent would have us say that health hazards of this kind are
outside the scope of the general duty. We will not agree. 60

On appeal, the Eighth Circuit affirmed, holding that hazards de-
tectable only by instrumentation could be the subject of general duty
clause citations. 61

Whether a hazard can be discovered by observation or only instru-
mentation, the quantum of information constituting “knowledge” by
an employer to bring a hazard within the term “recognized” remains a
fundamental issue. Clearly, actual knowledge will sustain a general
duty clause citation, as will “the common knowledge of safety experts
who were familiar with the circumstances of the industry of activity in
question.” 62 A hazard which is recognized in one industry is not per se
a recognized hazard in another industry. 63 However, two Review
Commission decisions indicate that where a cited employer has actual
knowledge that the cited condition is a recognized hazard in another
industry, a violation may be sustained. In Sugar Cane Growers Coop-
erative of Florida, 64 the employer was cited under the general duty
clause for transporting employees in a stake bed truck that lacked seat-
ing. Testimony and documentary evidence established that the em-
ployer had notice that the practice was a recognized hazard by the
general public, other government agencies, transportation experts, and
the Employment and Training Administration (formerly the Man-
power Administration) of the U.S. Department of Labor. Notice was

60. 4 O.S.A.H.R.C. at 446.
61. We further think that the purpose and intent of the Act is to protect the health of the
workers and that a narrow construction of the general duty clause would endanger this
purpose in many cases. To expose workers to health dangers that may not be emergency
situations and to limit the general duty clause to dangers only detectable by the human
senses seems to us to be a folly. Our technological age depends on instrumentation to
monitor many conditions of industrial operations and the environment. Where hazards
are recognized but not detectable by the senses, common sense and prudence demand
that instrumentation be utilized. Certain kinds of health hazards, such as carbon monox-
ide and asbestos poisoning, can only be detected by technical devices. 29 C.F.R. Secs.
1918.83(a) and 1910.93a [sic]. The Petitioner’s contention, though advanced by arguable
but loose legislative interpretation, would have us accept a result that would ignore the
advances of industrial scientists, technologists, and hygienists, and also ignore the plain
wording, purpose, and intent of this Act. The health of workers should not be subjected
to such a narrow construction.
American Smelting & Refining Co. v. OSHRC, 501 F.2d 504, 511 (8th Cir. 1974) (footnotes omit-
ted).
63. Republic Creosoting Co., 2 O.S.A.H.R.C. 400 (1973), aff’d, 501 F.2d 1196 (7th Cir.
1974).
effected by correspondence from the Manpower Administration to the Florida Fruit and Vegetable Association, which distributed copies to its members, including the cited employer, and by speeches and meetings at which the cited employer was present and the hazard of seatless trucks was discussed. On the basis of these facts, the Commission affirmed the administrative law judge's holding that the hazard was recognized within the meaning of section 5(a)(1). A similar result was reached in *Atlantic Sugar Association*,65 involving the same hazard and specifically relying upon the *Sugar Cane Growers Cooperative* case.

It should be emphasized that in both cases it is unclear whether the citation was based on the employer's "actual knowledge" of the hazardous condition or the employer's "actual knowledge" of recognition of the hazard by another industry. No matter which interpretation was intended, the hazard under consideration—transportation of field workers in trucks without seats—was both easily identifiable and readily correctable, which often is not the case with toxic substances. In the context of health hazards, the sources from which an employer will be deemed to have knowledge sufficient to sustain a violation of the general duty clause is unclear. Actual knowledge will support a general duty clause violation,66 as will industry knowledge.67 In addition, OSHA's Industrial Hygiene Field Operations Manual uses standards developed by the American Conference of Government Industrial Hygienists (ACGIH) as guidance for issuance of citations when no OSHA standard exists for a particular substance.68 A citation issued under these standards would of necessity be a general duty clause citation and the employer's knowledge of the recognized hazard would have to be established. Whether the mere existence of the ACGIH standards will be sufficient to support such a citation has yet to be litigated, but it is reasonable to anticipate that the Secretary will advance this argument.

Assuming that an employer has actual knowledge that the level of exposure in his workplace presents a greater hazard to one sex than the other, his obligation under the general duty clause remains to "furnish to each of his employees employment and a place of employment which are free from recognized hazards . . . ." Assuming further an absence of knowledge of adverse effects upon the other sex, an employer might attempt to avoid a duty clause citation by adopting an exclusionary policy toward the more susceptible sex. Prior case law involving the question of employee access to a hazardous area might support such a position,69 but it is a virtual certainty that a conflict

66. American Smelting & Refining Co. v. OSHRC, 501 F.2d 504 (8th Cir. 1974).
68. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, FIELD OPERATIONS MANUAL.
exists with Title VII, as is discussed in the following section.

III

TITLE VII IMPLICATIONS

In discussing the implications of Title VII of the Civil Rights Act of 1964\(^7\) and Executive Order 11246, the following sections will distinguish between hazardous substances whose major impact is on workers themselves and those whose major impact is on the offspring of the workers.

The focus of exclusionary employment practices based on supposed dangers to health has been women.\(^7\) In addition, most of the research on possible dangers to offspring of workers has concerned women. Because of these historical and practical reasons, this section will deal with exclusionary policies directed against women. However, it should be borne in mind that under Title VII, exclusionary policies directed against men suffer similar restrictions.

A. Danger to Workers

Where employment entails exposure to substances which are hazardous only to the workers themselves, the employer’s obligation is relatively clear. The prohibitions against sex-based discrimination in Title VII, and by implication Executive Order 11246, have generally been interpreted to bar any policy which excludes women from a job simply to “protect” women workers from dangers to themselves.

Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.\(^7\) (emphasis supplied)

Even where a state “protective” law prohibits the employment of women in certain dangerous jobs, Title VII forbids the exclusion of women from those jobs on the basis of that state “protective” law.\(^7\)

However, cases applying Title VII to this context have involved situations where the dangers were not sex-specific. Men and women

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7. Title VII Implications

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70. 42 U.S.C. § 2000e.

71. HRICKO & BRUNT, supra n.1.

72. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969). See also Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

73. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).
were both exposed to similar hazards. It is possible that a different result would be reached if the hazard were sex-specific, for example, where exposure to a particular substance created a significant risk of cancer in female workers but little or no carcinogenic risk in male workers. It could be argued that while it may be unlawful to exclude women where similar hazards exist for both sexes, sex-specific treatment would be permissible where the hazard existed for only one sex.

Such an argument could only be made where medical and scientific information indicates that no risk of any kind exists for the less susceptible sex. For example, there is some evidence that exposure to certain estrogens may cause cancer in women, while there is little evidence of any carcinogenic effect on males exposed to estrogens. There is however, substantial evidence of other adverse effects on males. Under such circumstances, exclusion of women from employment involving exposure to estrogens would likely be held to violate Title VII.

Where the only recognized dangers to the workers are sex-specific a more difficult situation may exist under Title VII. This may be the case with lead, where there is some evidence that the toxic exposure level for women might be significantly lower than for men. Male workers could therefore be employed safely at lead exposure levels which might pose a hazard for women; in such circumstances, three options are available. First, exposure levels could be reduced to eliminate the hazard to women. Second, women could be employed at hazardous exposure levels after careful and complete warnings are given. Third, women could be excluded from the jobs in question.

The first alternative would fully comply with OSHA and Title VII and ought to be given prime consideration. It will not be realistic, however, if a reduction to an exposure level safe for both sexes is not technically feasible, or if the cost of such a reduction is prohibitive. Cost may be relevant under OSHA, as discussed earlier. Its relevance under Title VII will be discussed below.

The second alternative may not comply with the requirements of OSHA as discussed above, and may also expose the employer to liability in tort. The risk of tort liability for injury to the workers, however, can be significantly reduced, if not entirely eliminated, by a full and

74. Both Weeks and Bowe involved lifting of weights over 30 pounds; Rosenfeld involved heavy physical effort.
75. An employer could not in good faith make such an argument if some of its jobs posed sex-specific hazards to males but men continued to work in those jobs. The singling out of women would clearly be disparate treatment in violation of Title VII.
76. The effects attributed to exposure of men to estrogens are gynecomastia (enlargement of the breasts) and decline in sex drive. See, e.g., NIOSH plans Industrywide Study on Workplace Exposure to Estrogens, 7 O.S.H. Rep. 1388 (1978); Chemical Workers Union Urges Notice of Imminent Danger at Dawe's Facility, 7 O.S.H. Rep. 311 (1977); Estrogen Study Shows Problems: Interim Standard is Recommended, 6 O.S.H. Rep. 1393 (1977).
adequate warning. The primary problem with the second option is its failure to meet the requirements of the Act "to assure so far as possible every working man and woman in the nation safe and healthful working conditions . . . by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience." The second option would satisfy the requirements of Title VII unless a reduction of exposure levels is technically and economically feasible. If such a reduction is feasible, endangered workers may successfully argue that it is unlawful for the employer to provide safer working conditions for one sex than the other. Therefore, if it is technically and economically feasible to reduce exposure to a level safe for all workers, the first option would appear to be preferable.

Similarly, the third option, excluding the more susceptible sex, presents grave Title VII problems where a reduction to exposure levels safe for all workers is feasible. In those cases where it is not technically feasible or the cost is clearly prohibitive, Title VII may require that individual workers be given the option of employment in a hazardous job. In the leading cases in which employers claimed that females were particularly endangered even though the job hazards were not, in fact, sex-specific, the courts have concluded that women workers are to be given completely equal opportunities, including the freedom to choose a particularly dangerous job. Courts have constantly rejected employer claims in this area, and employers cannot expect a hospitable reception to exclusionary employment practices even where there is significant clinical evidence that the suspected health hazards are unique to one sex.

If it is technically and economically feasible, then, an employer should reduce all hazardous exposures to a level safe for both female and male workers. If such a reduction is not feasible, all workers should be fully informed of the risks involved and allowed to accept or

77. 29 U.S.C. § 651.
78. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).
79. An employer could raise a claim that sex was a "bona fide occupational qualification." However, where such a claim is based on potential harm to the employee, and the employee is willing to assume the risk, Weeks would require that she be given the opportunity. The employer must show substantial risk to others before it may exclude women from a job based on a claim of occupational qualification. See Dothard v. Rawlinson, 433 U.S. 321 (1977); Condit v. United Air Lines, 558 F.2d 1176 (4th Cir. 1977); Harris v. Pan American World Airways, 437 F. Supp. 413 (N.D. Cal. 1977). An employer might argue that his policy of excluding women is simply the fortuitous result of a neutral rule that excluded all persons potentially endangered by exposure. However, a "neutral" rule whose impact which actually affects only women would have to be justified by business necessity.
decline employment in the hazardous jobs if the requirements of Title VII are to be satisfied.

B. Danger to Offspring

1. Nature of the Problem

Offspring of workers can be affected by exposure of a male or female parent to a hazardous substance prior to conception, by exposure of the mother after conception, by direct exposure of the embryo or fetus (e.g., through radiation), and by direct exposure of the child. The vast majority of research studies related to hazards to offspring have involved women. Consequently, there is substantially more medical evidence of the potential damage to offspring because of occupational exposure of the female parent to hazardous substances than exists with respect to the male parent. Nevertheless, a growing body of evidence indicates that exposure of male workers to certain mutagens may result in genetic damage to their offspring.

Where reliable medical evidence indicates that comparable risks to offspring exist irrespective of the sex of the parent exposed to a particular mutagen, an employer could not bar one sex from jobs exposed to the substance, while continuing to employ the other. In addition, even where the medical evidence of potential danger to offspring exists only for one sex, company policy with respect to all members of that sex must be uniform. For example, an employer could not exclude women workers from benzene production positions in a petro-chemical plant while employing women in clerical positions, if the exposure level in the clerical offices were not significantly different than in the manufacturing facility. Compelling medical evidence would be needed to sustain a policy of excluding women from some, but not all, jobs where similar exposure to a hazardous substance existed. If the jobs in which women were employed were traditionally female jobs and those from which they were excluded were higher-paying, traditionally male jobs, the exclusionary policies would be particularly suspect.

2. Exclusion of Pregnant Women

Significant medical evidence indicates that there is substantial risk to offspring where the mother is exposed during pregnancy to substances such as lead, anesthetic gases, vinyl chloride, methyl mercury,
and radiation. This risk can be created by direct exposure of the fetus, as with radiation, or through the transplacental transfer of a teratogen from the mother's bloodstream to the fetus, as with lead.

Where there is a substantial risk of exposing pregnant females to substances endangering the embryo or fetus, the relevant medical evidence must be carefully examined. In a number of unreported decisions, the Equal Employment Opportunity Commission has rejected claims by various airlines that the employment of pregnant flight personnel presented a danger to the fetus. The decisions were based on the lack of convincing medical evidence concerning the alleged risk. The opposite result might be reached if adequate medical evidence were available.

In addition to medical evidence of the risk to the fetus through exposure of the pregnant female, evidence relative to the mutagenic effect of exposure of male workers is also relevant. If comparable risks to the fetus also exist through exposure of the father prior to conception, a policy excluding only pregnant women while employing susceptible males could not be supported under Title VII. This may be the situation at vinyl chloride facilities; recent studies have shown that the wives of male vinyl chloride workers have a higher rate of miscarriages and stillbirths than women whose husbands were not exposed to vinyl chloride.

If the only known risk to the fetus is through direct exposure or transplacental transfer, the same three options discussed above would be available to the employer. First, exposure levels could be reduced to levels safe for the fetus. This alternative would comply with the requirements of both OSHA and Title VII. However, given the extreme sensitivity of embryos and fetuses to even very low level exposure to most teratogens, this would often be technically infeasible or cost-prohibitive.

Second, pregnant females could be employed at the potentially dangerous exposure levels, providing that ample warning of the risk to the fetus were given. Although providing notice to the employee may

83. HRICKO & BRUNT, supra n.1, Part C.
85. HRICKO & BRUNT, supra n.1, at C-16.
86. This is a reasonable assumption, since OSHA's Threshold Limit Values do not take into account teratogenic effects. HRICKO & BRUNT, p. C-3.
87. See text accompanying note 82.
88. Apparently the recent recommendation of NIOSH regarding anesthetic gases would require employers to reduce exposure to levels safe to the fetus. Testimony of Hricko, supra n.81, at 690.
terminate any tort liability toward the mother, liability to a child born alive would not be eliminated. Because of the potentially astronomical financial liability for damage to the child and because of society's interest in protecting the health of its progeny, employers cannot realistically be compelled to employ pregnant women in jobs which may be dangerous to the embryo or fetus through exposure of the mother to hazardous substances. Therefore, the second option might never be a viable alternative.

The third possibility, exclusion of pregnant women from jobs which are hazardous to embryos or fetuses, presents difficult questions under the requirements of Title VII. Such an exclusion might be defended on three different theories: (a) that the exclusion is not based upon sex, (b) that the exclusion, though based upon sex, is compelled by business necessity, and (c) that the exclusion, although based upon sex, is also based upon a bona fide occupational qualification.

a. Exclusion Based on Sex

Under the opinion of the Supreme Court in Gilbert v. General Electric Co., the exclusion of pregnant workers might be justified, since according to the opinion an employment decision based on pregnancy is not based upon sex. However, the subsequent opinion in Nashville Gas Co. v. Satty clearly indicates that disparate treatment of pregnant workers constitutes sex discrimination under Title VII if such treatment burdens female workers with unequal employment opportunities because of their role as child-bearers. It seems reasonable to conclude that the exclusion of pregnant workers from employment which is hazardous to their offspring places a burden on such workers, which must be justified by either the business necessity defense or the bona fide occupational qualification defense.

b. Business Necessity

There are a host of decisions which indicate that an employment practice which is otherwise unlawful under Title VII may be permissible if it is compelled by business necessity. The elements necessary to establish the business necessity defense were enumerated in Robinson v. Lorillard Corp.:

Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a

89. See notes 98-102 and accompanying text.
90. 429 U.S. 125 (1976). Gilbert involved exclusion of pregnancy from conditions covered by an employer's disability plan. The Court held that such an exclusion was not gender-based discrimination under Title VII unless used as a mere pretext to effect an invidious discrimination against the members of one sex.
challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.92

The business necessity defense appears to justify the exclusion of pregnant women from jobs which may be dangerous to an embryo or fetus. However, a more careful examination indicates that it may not be easily established in such cases. The defense has rarely been successfully invoked. Moreover, it is generally thought to be available only in cases where the challenged practice is neutral on its face, such as is the case with a seniority system.93

The EEOC has repeatedly stated that a business necessity defense cannot be used to justify any practice which overtly distinguishes between male and female workers or between black and white workers. For example, the EEOC General Counsel has informed the Atomic Energy Commission that the business necessity defense would not be available to justify a policy which sets lower radiation exposure levels for pregnant females.94 Still, the business necessity defense may be available in certain instances even though the employment practice overtly distinguishes between pregnant females and all other workers. The EEOC General Counsel noted that any decisions concerning disparate treatment of pregnant females must be the result of a balancing test, in which the risks are weighed against alternative safeguards;95 this provides a theoretical basis for a business necessity defense. Two reported 1974 EEOC decisions indicate that a business necessity defense would be sustained if its elements were adequately proved.96 More recently, at the OSHA hearings on proposed lead standards, the EEOC acknowledged the availability of the defense where danger to embryos and fetuses exists.97

95. The EEOC's advocacy of a balancing test is wholly inconsistent with its simultaneous rejection of the business necessity defense. The EEOC General Counsel's letter to the AEC did not advert to this glaring gap in logic.
96. FAIR EMPLOYMENT PRACTICES CASES 287, 814 (1974). In both cases, the employer's exclusionary policies were found wanting because of the availability of alternative, less restrictive policies.
In order to invoke the business necessity defense, an employer must convincingly establish each element of the defense. Initially, the employer must show a compelling business purpose. The employer's interest in excluding women from employment which threatens their offspring may be supported on two grounds: society's general interest in the health of future generations, and the risk of tort liability to a child damaged by exposure of the mother during pregnancy.

The legitimacy of a general societal concern for the health of offspring is supported by the Supreme Court's decision in *Roe v. Wade*,98 the EEOC testimony before the lead hearings,99 at least one reported EEOC decision,100 and at least one arbitration case.101 Concern for future tort liability to any child has been mentioned in an arbitration case,102 but is considerably more speculative. The difficulty of proving a causal relationship between exposure of the mother and a child's birth defect is substantial. Further, there would seem to be an absence of employer negligence in cases where the mother was fully apprised of the dangers.103

There are serious emotional and moral questions surrounding this issue, but it is not certain that a court would hold an employer's interest to be more compelling than a pregnant worker's right to employment, despite possible risks to the fetus. For example, the National Commission of the Observance of International Women's Year submitted testimony at the OSHA lead hearings conceding the need to balance the various interests, but concluded that the pregnant female should do the balancing, not the employer.104

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98. 410 U.S. 113, 154-56, 162-66 (1973). See also, Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972); Hodgson v. Greyhound Lines, Inc., 499 F.2d 216, 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Townsend v. Nassau County Medical Center, 558 F.2d 117 (2nd Cir. 1977); Condit v. United Air Lines, 558 F.2s 1176 (4th Cir. 1977); Harris v. Pan American World Airways, 437 F. Supp. 413 (N.D. Cal. 1977). These cases involve general public safety considerations in the employment of airline personnel, interstate bus drivers, and medical personnel, and so are not directly relevant to the issue of danger to the fetus. They do, however, indicate that the public interest in health and safety considerations are important factors in evaluating the lawfulness of a restrictive employment practice.


100. 10 FAIR EMPLOYMENT PRACTICES CASES 287 (1974).


102. Id.

103. The most likely avenue of tort recovery for a fetus born alive would be the strict liability of an employer operating an "inherently dangerous" workplace. At least one jurisdiction has allowed recovery for fetal injury arising from preconception negligent exposure of the mother to a toxic substance. Renslow v. Mennonite Hospital, 67 Ill. 2d 348 (1977).

104. Testimony of Catherine East, entered at OSHA Lead Standard Hearings (March 23, 1977). Ironically, the Women's Bureau of the Department of Labor thirty years ago urged the transfer of all pregnant women exposed to substances dangerous to the fetus. *HRICKO & BRUNT, supra* n.1, at A-5. The employer might plausibly argue that it would be contrary to public policy to allow women to choose employment hazardous to the fetus since their choice might well be
However, though the courts may agree that an employer has a compelling business interest in protecting the embryo or fetus of a pregnant worker,\textsuperscript{105} the employer must also show that an exclusionary practice effectively protects that interest. Such a showing could routinely be made in most cases. However, inconsistent policies for workers similarly situated would indicate that the business necessity defense was a sham, and preclude an employer from claiming its protection. An employer could not therefore exclude susceptible workers from production jobs while employing equally susceptible workers in clerical jobs with a similar exposure level. Such policies could not be supported as an employee protection measure, and would have to be eliminated before a business necessity defense would be upheld.

If the employer can demonstrate that exclusionary employment practices effectuate a valid purpose, the unavailability of equally effective but less restrictive alternative policies must be shown. This requirement is the hurdle at which most business necessity defenses fall. Where a reduction of exposure levels is technically and economically feasible, no business necessity defense would be allowed. Although imposing a sort of “cosmic search” for alternatives may well be criticized as requiring employers to prove a negative, it is clear that the employer has a heavy burden to justify exclusionary employment practices. Where it is technically feasible to provide safe employment for pregnant women, but the employer claims that the cost would be prohibitive, the EEOC has indicated it would find a Title VII violation unless the employer can show that it would go bankrupt if forced to reduce exposure levels.\textsuperscript{106} While this may be a strict interpretation of the business necessity standard, at least one District Court has ruled that expense is no defense to an otherwise discriminatory policy.\textsuperscript{107}

\textsuperscript{105} This is especially possible given the EEOC’s recognition that it is a legitimate concern. See note 43, supra. Indeed, as the discussion later indicates, the EEOC has consistently refused to challenge in court the exclusion of all fertile women from jobs where exposure to lead might be injurious to an embryo. Apparently the position taken by the EEOC on a particular health hazard is based upon the strength or weakness of the medical support for the employer’s exclusionary practices.

\textsuperscript{106} Testimony of Constance Dupre, supra n.81, at 4112-15. See also the EEOC General Counsel’s 1974 letter to the AEC. In this respect, the EEOC policy is somewhat less stringent than the position taken by the courts regarding implementation of engineering controls to protect employees from hazards of exposure to toxic substances. The fact that marginal employers may be forced out of business has been recognized by the courts, but the objective of safety and health of employees has been deemed to outweigh this consideration. See, e.g., Continental Can Co., 76 O.S.A.H.R.C. 109/A2 (1976); Occupational Safety and Health Administration, Field Operations Manual § X-G6c-2.

\textsuperscript{107} Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971). While Robinson
An employer supporting a business necessity argument with a claim of economic infeasibility must show that the cost of mitigation is exorbitant and that a diligent search for less expensive alternatives has been conducted.

The employer will also have a heavy burden to show a lack of technically feasible alternatives. For example, claims by the plastics industry that a reduction of vinyl chloride exposure is impossible were found to be "exaggerated." The industry has been admonished to have "more faith in [its] own technological potentialities. . . ."108 In cases involving exposure to lead, plaintiffs can also be expected to suggest numerous alternatives which may be technically feasible.109

If the business necessity standards are met, Title VII problems are by no means resolved. The restrictive employment policies must be limited to the jobs where dangerous exposure levels exist and to susceptible workers. More difficult problems arise in cases where incumbent female workers become pregnant while employed in jobs presenting dangers to fetuses.110

If a safe job is available, it seems reasonable to require the employer to offer the affected employee an alternative job. This has been the consistent position of the EEOC.111 Moreover, although the EEOC recently indicated that rate-retention and seniority protection might not be required in all cases,112 it is likely that courts applying the business necessity doctrine would require an employer to take every possible measure to minimize the impact of the exclusionary policy on the affected employee.113 Since alternative employment with seniority and wage protection are possible in most cases, Title VII will likely be

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108. Society of the Plastics Industry v. OSHA, 509 F.2d 1301, 1309-10 (2nd Cir. 1975). See also Reserve Mining Co. v. EPA, 514 F.2d 492, 503 (8th Cir. 1975), where the court found that it was technically feasible for the company to eliminate the dangers caused by its waste disposal system.

109. For a rendering of various methods to minimize lead hazard, see Testimony of Hricko, supra n.81, at 692-95.

110. Several of these issues were addressed in the reopening of the lead hearings last year, and may be answered by OSHA regulations requiring medical removal protections (such as rate-retention) when symptoms described in the standard require removal of the employee from the area of exposure. See 42 Fed. Reg. 46548 (1977).

111. Testimony of Andrea Hricko, supra n.81.

112. 10 FAIR EMPLOYMENT PRACTICES CASES 287, 814. See also Testimony of Constance Dupre, supra n.81, at 4097, 4103; 29 C.F.R. § 1604.10(c).

113. Testimony of Constance Dupre, supra n.81, at 4103.
interpreted to require them.\textsuperscript{114} Similarly, the employer should ordinar-ily offer the original position, with seniority, to an employee upon her return to work after giving birth.

c. \textit{Bona Fide Occupational Qualification.}

Section 703(e) of Title VII provides that employers may differentiate on the basis of sex if sex is a "bona fide occupational qualification." However, it is generally agreed that "the EEOC has quite literally interpreted the BFOQ exception on sex out of existence."\textsuperscript{115} To date, section 703(e) has been successfully invoked only upon a showing of a substantial risk to the operation of the employer's business.\textsuperscript{116} Where the risk is only to the fetus of a pregnant worker, the section 703(e) defense is unlikely to prevail.

3. \textit{Exclusion of All Fertile Women.}

Where an employer cannot lawfully exclude pregnant women from jobs entailing a substantial risk to offspring, an employer could not exclude all fertile women from those jobs. However, where a business necessity defense is based upon danger to possibly undetected embryos, it may be possible to justify a policy of excluding all fertile women. Such a policy has far greater impact than one limited to pregnant females, since well over half of all female workers are in their childbearing years. Because of this impact, it is reasonable to anticipate vigorous resistance to such justification from the EEOC and strict scrutiny by the courts.

The EEOC has convinced the AEC to reject the recommendation of the National Council on Radiation Protection that lower radiation exposure levels be established for fertile women.\textsuperscript{117} OSHA has also refused to prohibit the employment of fertile women in vinyl chloride production despite the recommendation of the National Institute for Occupational Safety and Health.\textsuperscript{118}

\textsuperscript{114} This is certainly the position of unions and civil rights groups. See, \textit{e.g.}, Testimony of Catherine East, \textit{supra} n. 104. The EEOC has taken the position that the employer must apply the same policies to pregnant women as are applied to other temporarily disabled employees. Thus, if an employer routinely provides alternative employment for other disabled employees, he should do the same for pregnant workers. \textit{But see}, Roller v. City of San Mateo, 15 \textit{EMPLOYMENT PRACTICES} (CCH) \textsuperscript{115}8062 (9th Cir. 1977), where the court held that a temporarily disabled pregnant worker did not have to be offered light duty work if a temporarily disabled man would not be offered such alternative work.

\textsuperscript{115}\textit{SCHLEI} \& \textit{GROSSMAN}, \textit{supra} n. 93, at 279.

\textsuperscript{116} See cases cited in notes 79 and 98.

\textsuperscript{117} \textit{HRICKO} \& \textit{BRUNT}, \textit{supra} n. 1, at A-45; EEOC General Counsel's letter to AEC, \textit{supra} n. 94.

\textsuperscript{118} Hricko \& Brunt, \textit{supra} n.1, at C-17.
The EEOC has found that an exclusion of all fertile women from employment in battery plant jobs is unlawful, even though the employer claims that the jobs would involve exposure to airborne lead at levels which would damage an embryo. In another lead case, the California employment safety agency retracted its proposed prohibition on the employment of fertile women at a major battery plant.

In Pittsburgh, Pennsylvania, the St. Joe Minerals Corp. recently barred the employment of fertile women at its lead smelter. The Pennsylvania Human Relations Commission found a violation of the state's anti-discrimination law and has scheduled the case for hearing. Although the company has settled a private Title VII action without changing its policy, the state agency proceeding will continue. Suit has recently been brought against General Motors challenging its policy of excluding fertile women from jobs at its Delco battery facility in Muncie, Indiana. Significantly, the EEOC did not join the suit; instead, the EEOC chose to sue on behalf of a single woman past childbearing age whom the agency claimed was unlawfully refused employment. Allied Chemical Corp. recently barred fertile women from its Danville, Illinois, plant because of exposure to flourcarbon-22, which the company believes may be a teratogen. The International Chemical Workers Union has filed a grievance challenging the move. Finally, the Solicitor's Office at the Department of Labor reportedly has under active review prohibitions by some federal contractors against the employment of fertile women in hazardous areas, which include at least one vinyl chloride production facility.

Assuming the availability of a business necessity defense, these cases will probably turn on the ability of the employer to present substantial medical evidence of significant risk to the fetus during the first trimester, when it is extremely difficult to verify conception prior to the occurrence of the risk. Several courts have acknowledged that a

119. Conspicuously, however, the EEOC has refused to litigate the issue thus far, despite opportunities to do so.
120. Interview with Andrea Hricko, conducted by author David Copus.
126. This may well be the case with lead, since the rate of decline of lead in the bloodstream is quite slow and the fetus would be exposed to dangerous levels through transplacental transfer even if the mother stopped working in the exposed areas at the moment of conception. Several major women's rights groups conceded as much at the recent lead hearings. See Testimony of Amanda Hawes, entered at OSHA Lead Standard Hearings (March 1977) on behalf of the Women's Legal Defense Fund, Women Organized for Employment, Women in Apprenticeship, and ACLU's Women's Rights Project.
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blanket exclusion may be justified where it is impossible or highly impractical to deal with women on an individualized basis.\(^\text{127}\)

The risks involved will probably be balanced against the impact of the restrictive policy. Where the potential damage would be significant to even a few children, there is strong support for the complete exclusion of fertile women; in cases involving similar legal issues, employment bans affecting older bus drivers were permitted upon a showing of a “minimal increase in risk” of death to a single person.\(^\text{128}\)

Courts appear to be particularly sensitive to carcinogenic substances, giving wide latitude to government regulations concerning dangers as “sensitive and frightladened as cancer.”\(^\text{129}\) On the other hand, where the risk of damage is quite remote, a policy forbidding employment of all fertile women may not be justified.\(^\text{130}\)

While an employer may be able to rely on its own medical advisors when there is a genuine conflict in scientific opinion,\(^\text{131}\) medical evidence supporting the employer’s position must be substantial. An employer may not rely on “hunches and wild guesses.”\(^\text{132}\) However, since most occupational health issues are “on the frontiers of scientific knowledge”,\(^\text{133}\) where “speculation, conflicts in evidence and theoretical speculation” abound,\(^\text{134}\) good faith reliance on rationally justified, reasonable medical concern might provide a sufficient basis for a restrictive employment policy.\(^\text{135}\) Here, too, the amount of scientific certainty required to justify an exclusionary policy would be inversely related to the extent of the risk involved.

Having demonstrated a substantial risk, an employer would still have to prove the absence of less restrictive alternative policies. Assuming that a reduction of the exposure level to one safe for an embryo is not feasible, a further showing that it is not feasible to confirm pregnancy prior to the embryonic exposure would still be necessary. Since

\(^{127}\) Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d at 235 n. 5.

\(^{128}\) Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 449 F.2d 859 (7th Cir. 1974). See also, Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972), and Townsend v. Nassau County Medical Center, 558 F.2d 117 (2nd Cir. 1977), where the courts balanced the risks and the impact of the employment practice. But see Aaritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977).


\(^{130}\) See EEOC General Counsel’s letter to the AEC, supra n. 94.


\(^{132}\) Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976).

\(^{133}\) Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

\(^{134}\) Ethyl Corp. v. EPA, 541 F.2d 1, 24 (D.C. Cir. 1976).

\(^{135}\) In addition to the cases cited immediately above, see Reserve Mining Co. v. EPA, 514 F.2d 492, 507 n. 20 (8th Cir. 1975); Society of the Plastics Industry v. OSHA, 509 F.2d 1301, 1308 (2nd Cir. 1975); Certified Color Mfrs. Ass’n v. Mathews, 543 F.2d 274, 297-298 (D.C. Cir. 1976); Hodgson v. Greyhound Lines, Inc., 449 F.2d 859 (7th Cir. 1974).
pregnancy is now arguably detectable with 100% certainty within one week of conception,136 fertile women should be excluded only where there is a likelihood of dangerous exposure during the first week of pregnancy, or when toxic levels in the mother's bloodstream could not be rapidly reduced to a safe level for the embryo.

Where it is not possible to protect the embryo on the basis of the prompt identification of pregnancy, exclusion of all fertile women might be justified.137 But companies currently employing fertile women in jobs where there is a substantial risk to an embryo before it is possible to detect pregnancy cannot simply discharge those employees; they are still under the obligation to provide for incumbent female workers discussed above.

IV
CONCLUSION

The problems presented by job health hazards which have a disparate effect on men and women are not capable of ready resolution. Increase in technology and protective systems may ultimately provide the only adequate solutions to these problems. Until solutions are discovered and made feasible, methods of dealing with the problems must be examined carefully in order to conform to occupational health and anti-discrimination laws.

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

American Smelting & Refining Co. ............... 1 O.S.H. Cas. 1256
Arkansas-Best Freight Sys., Inc. .................... 2 O.S.H. Cas. 1620
Castle & Cooke Foods, Inc. .......................... 5 O.S.H. Cas. 1435
Chief Freight Lines ................................. 3 O.S.H. Cas. 2083
Continental Can Co. .................................. 4 O.S.H. Cas. 1541
Cornell & Co. ....................................... 4 O.S.H. Cas. 1431
Derr Constr. Co. ..................................... 5 O.S.H. Cas. 1333
Dic-Underhill, A Joint Venture ..................... 4 O.S.H. Cas. 1051
Great Falls Tribune Co. .............................. 5 O.S.H. Cas. 1443
Intermountain Block & Pipe ......................... 1 O.S.H. Cas. 3145
Jos. Bucheit & Sons Co. ............................. 1 O.S.H. Cas. 3106
Mandell, Corsini, Inc. ............................... 1 O.S.H. Cas. 3310
Mayfair Constr. Co. .................................. 4 O.S.H. Cas. 1529
Penrod Drilling Co. .................................. 4 O.S.H. Cas. 1654
Reedy Tank Erectors, Inc. ............................ 2 O.S.H. Cas. 3310
Republic Creosoting Co. .............................. 1 O.S.H. Cas. 1124
Star Hill Co. ........................................ 5 O.S.H. Cas. 1844
State, Inc. .......................................... 4 O.S.H. Cas. 1806
Sugar Cane Growers Coop. of Fla. ................. 4 O.S.H. Cas. 1320
Turner Co. ........................................... 4 O.S.H. Cas. 1554
Vy Lactos Laboratories .............................. 1 O.S.H. Cas. 1141
Weyerhauser Co. ..................................... 4 O.S.H. Cas. 1972
Yosemite Park & Curry Co. ......................... 5 O.S.H. Cas. 1428