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Fetal Protection Policies: Reasonable Protection or Unreasonable Limitation on Female Employees?

Brian Hembacher†

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INTRODUCTION

A growing area of concern in employment discrimination law pits fundamental values against each other: the right of all individuals, men and women, to have equal access to job opportunity, regardless of their childbearing capacity, versus the concern employers have for the well-being of the offspring of employees exposed to hazardous substances in the workplace. This issue touches upon one of our deepest modern anxieties: that chemicals in the environment may harm unborn children.

There are jobs throughout the United States that are excluded to women because of fear of exposure to chemicals that can endanger the workers’ health or the health of the workers’ unborn children.¹ A worker may be exposed to a variety of hazards on the job: benzene, lead, mercury, cadmium, vinyl chloride, radiation, and asbestos are among the best known.²

In the last fifteen years, as employers began integrating all-male workforces with women employees, many employers began to con-
cerned with the effects of hazardous exposures to pregnant employees. Few studies have examined the effect of hazardous substances to fetuses because of the ethical dilemma caused by endangering live fetuses by interuterine tests. Consequently, most studies analogize to children. There is extensive literature on the harm to children caused by various substances, especially lead and radiation. A child's circulatory system handles chemicals, such as lead, differently than an adult's circulatory system and reacts negatively to smaller levels of exposure than an adult's circulatory system. Children can be especially susceptible to hazardous chemicals or radiation as their bodies are small. Scientists assume that fetuses would be endangered in the same manner and at similar levels of exposure as children.

In response to this potential threat to employees and their unborn children, many companies have created what are generally referred to as "Fetal Protection Policies." These policies assume that there is a danger to the fetus in the pregnant employee that is different or greater than the risk of mutagenic changes in the sperm or egg when exposed to the same level of a hazardous substance. Although these policies vary, most prohibit all fertile women employees from working where there are levels of exposure to hazardous materials greater than found medically acceptable for children. These prohibitions on employment are often very restrictive and can bar most females between the ages of puberty and menopause. Employers with fetal protection policies require women to prove their sterility as a prerequisite to employment. In contrast, the same employers do not restrict fertile males from employment in situations where they would encounter similar levels of exposure to hazardous materials.

Because most fetal protection policies apply only to women, they have given rise to charges of discrimination. These claims are supported by medical research which demonstrates that hazardous materials can cause changes in all gene cells, whether they be female (the ova) or male (the sperm). OSHA has concluded that exposure to lead which exceeds its lead standard poses a risk of genetic damage to either the male or female worker's offspring. This conclusion was upheld in United Steelworkers v. Marshall.

5. Id. at 52,959.
I
DEFENSES TO CLAIMS OF DISCRIMINATION BASED ON
FETAL PROTECTION POLICIES

To justify a policy which is facially discriminatory toward women, an employer is required by state and federal law to prove that being a man or an unfertile woman is a "Bona Fide Occupational Qualification" ("BFOQ") for the job.7 To meet this burden, an employer must show that all or substantially all of the excluded individuals are unable to safely or efficiently perform the job in question and the essence of the business purpose would be otherwise undermined by employing a member of the excluded group.8 To deter the use of sexual stereotypes to justify exclusion, the courts narrowly construe BFOQ defenses.9 The Ninth Circuit, in response to a gender-based BFOQ defense, has stated: "Sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception."10

Since fetal protection policies are overinclusive to women, they are very difficult to justify under the BFOQ analysis. Although all fertile women can become pregnant, not all fertile women will become pregnant. More importantly, the concern for safety focuses not on the employee and the worksite, as required by the courts to support a BFOQ, but on the health of a worker's potential offspring.

II
FEDERAL APPROACH

Federal courts examining fetal protection policies have not required the employer to justify its policy under traditional BFOQ analyses. Instead, the federal courts have used a modified version of the business necessity defense.11 This approach has been controversial; it has been previously held that the business necessity defense is appropriate where the practice in dispute is neutral on its face, but is shown to be discriminatory in its effect or application.12 Previously, federal courts have uni-

8. CAL. ADMIN. CODE tit. 2, § 7286.7 (1980); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).
11. Wright v. Olin Corp., 697 F.2d 1172, 1190-91 (4th Cir. 1982); traditionally, business necessity focuses on whether the neutral practice is necessary to permit the worker or applicant to do the job in question safely and efficiently. Griggs v. Duke Power, 401 U.S. at 431. The company cannot make decisions about the employee's right to take risks. Weeks, 408 F.2d at 235-36.
12. See also CAL. ADMIN. CODE tit. 2, § 7286.7(b) (1980).
formly held that where a practice is discriminatory on its face, such as a policy prohibiting all fertile women but not fertile men, the practice must be justified as a BFOQ. The Pregnancy Discrimination Act provides that discrimination against women on the basis of their capacity to bear children is sex discrimination. By extension, therefore, any policy excluding a group on the basis of capacity to become pregnant can only be defended through a BFOQ defense. Accordingly, the business necessity defense is an inappropriate defense to justify a Fetal Protection Plan.

The leading federal case concerning a fetal protection policy is *Wright v. Olin Corp.* The Olin Corporation had a fetal protection policy which restricted all fertile women from certain jobs which would expose them to lead and other potentially harmful chemicals. The program, although designed somewhat to protect pregnant employees, was principally created to protect fetuses of pregnant employees. Since Olin’s program focused primarily on the health of the fetus rather than the health of the employee, Olin’s program did not meet the traditional BFOQ analysis.

Olin argued that its policy did not violate Title VII because it was not intended to discriminate against women. The court rejected this argument and ruled that the employer bore the burden of proving an affirmative defense to justify its action.

The *Olin* court, relying on the Supreme Court’s position that Title VII theories should be flexible rather than rigid, permitted the use of a specialized form of the business necessity defense and created a seven part standard. The standard promulgated by the *Olin* court consists of the following principles:

1. The employer bears the burden of proving that the risk to unborn children is great enough to require that women, and not men, be restricted.
2. The employer’s program must be substantiated by independent, objective evidence and not based merely on a subjective and good faith belief.
3. The defense need not be solely established by expert opinion.

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15. 697 F.2d 1172.
16. Id. at 1184.
18. In Burwell v. Eastern Airlines, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the Fourth Circuit held that neither concern for the health of the mother nor her fetus justified the use of the business necessity defense. The *Olin* court, however, did not follow this case and did consider the risk to a potential fetus as part of the defense.
but must be supported by opinions of qualified experts in relevant fields.

4. It is not necessary to prove general concensus, but there must be a considerable body of opinion that the risk exists and is confined to women workers (information must be contemporaneously available).

5. The proof that the risk of harm to women is greater than the risk of harm to men and the effectiveness of the challenged program constitutes the prima facie defense of business necessity.

6. This defense may be rebutted by proof that there are acceptable alternative practices which would better accomplish the stated business purpose with less disparate impact. The rebuttal evidence may consist of two elements:
   a. an employee or applicant can show an acceptable alternative that has less differential impact. The remedy in this kind of case would “vindicate . . . the claimant’s rights as they would exist under the acceptable alternative policy.”
   b. an employee or applicant might also prove that there was, in fact, a discriminatory intent to the policy which is evidenced by the overbreadth of the policy in excluding all fertile women from too many jobs and in too many circumstances.

In summary, the Olin decision requires an employer to justify an exclusion of fertile women by showing well-established medical evidence that the harm feared is greater to fertile women than to fertile men, and that there is no less discriminatory alternative for avoiding the risk.

The Olin approach has been widely criticized by Equal Employment Opportunity practitioners. Olin deviates widely from established Title VII law in its use of the business necessity concept in a “facial” discrimination case. The commentators have pointed out that, since a whole group of persons protected by Title VII was excluded, the Olin Corporation should have been required to show that a BFOQ justified the exclusion of fertile women. Further, some equal rights advocates have pointed out that rather than excluding women on the basis of imperfect medical data, the courts should encourage rather than discourage employers in making the workplace safe for all workers and their offspring.

The second federal case to address a fetal protection policy was

19. 697 F.2d at 1191.
20. Id.
22. See, e.g., Williams, supra note 2, at 703-04.
Zuniga v. Kleburg County Hospital. In Zuniga, the job duties of x-ray technicians exposed the technicians to radiation. The employer was concerned that radiation exposure could cause birth defects in the unborn children of pregnant x-ray technicians. When Zuniga became pregnant, the employer gave her the option of resigning or being fired.

The court found the employer's treatment of Zuniga to be discriminatory. Since the employer's policy burdened females in a way men could not be burdened, the policy was prima facie discriminatory. In response, the employer argued the Olin business necessity defense of possible harm to fetuses and the possibility of future lawsuits.

The Zuniga court, in dicta, seemingly limited the business necessity defense. The Zuniga court noted that the business necessity defense must be a "legitimate business purpose . . . necessary to safe and efficient operation of the business." Apparently, the court questioned whether the business necessity defense applied to the health of the fetus or the employer's fear of liability.

Unfortunately, the issue was not fully addressed because the court ruled for the plaintiff on narrower grounds, finding a less discriminatory alternative available to achieve the employer's business purpose. The Zuniga court found that the employer could have granted the pregnant employee a leave of absence in accordance with its own policies. This alternative would have permitted the employer to accomplish its stated purpose without violating Zuniga's right to be free from sex (pregnancy) discrimination.

In another case, Hayes v. Shelby Memorial Hospital, the Eleventh Circuit addressed the legality of a fetal protection policy. In Hayes, an x-ray technician brought a lawsuit against her employer after she was terminated during her pregnancy. The employer was concerned about fetal health and potential litigation. Hayes alleged that the employer, by firing her, violated Title VII's pregnancy and sex discrimination prohibitions. The employer defended Hayes' dismissal by claiming the termination was justified by business necessity and a BFOQ.

The Hayes court said that a pregnancy-based rule could not be neutral on its face. The judges agreed that the employer's policy was probably facially discriminatory and could only be justified by a BFOQ.

23. 692 F.2d 986 (5th Cir. 1982).
24. Id. at 988.
25. Id. at 991.
26. Id. at 992.
27. Id. at 992 n.10.
28. Id. at 993-94.
29. 726 F.2d 1543 (11th Cir. 1984).
30. Id. at 1547.
However, in "fairness to the hospital," the court also considered the business necessity defense.

The *Hayes* court held that there was a "presumption" that a policy applying only to women or pregnant women violated Title VII. However, the employer could rebut this presumption by showing that the policy was neutral in "that it effectively and equally protects the offspring of all employees." To make such a showing, the court stated that the employer must prove that:

1. There is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace; and

2. The hazard affects fertile or pregnant women, but not men.

The *Hayes* court followed the holding of *Olin*, but stated further that if the employer cannot meet the business necessity test, it must meet the traditional BFOQ analysis. This requires the employer to prove a correlation between the fetal protection policy and the fertile female's ability to perform the job. The court stated that the "Pregnancy Discrimination Act mandates that employers treat workers equally when it seeks to protect their offspring."

Applying the business necessity defense, the *Hayes* court found that the employer's policy could have been accomplished by less discriminatory means. X-ray technicians wore two radiation badges while working to ensure that they were not overexposed to radiation. The reading on Hayes' badge showed that she would receive less radiation than the generally recognized safe level of exposure. Further, the judges pointed out, if her exposure started to exceed the safe amount, the employer could temporarily assign her to different duties. Since the employer's policy could have been accomplished by other acceptable, less discriminatory means, the *Hayes* court rejected the business necessity defense.

The *Hayes* court addressed the issue of disparate impact with a somewhat confusing application of the business necessity defense. According to *Hayes*, once the employer has overcome the presumption of sexual discrimination by showing scientific evidence of a harm isolated to women, the burden switches to the employee to rebut by proving that there were less discriminatory alternatives. Hayes successfully rebutted the business necessity defense by showing that less discriminatory alter-

31. Id. at 1548.
32. Id.
33. Id.
34. Id. at 1549.
35. Id.
36. Id. at 1553-54.
natives did exist: monitoring the radiation, or temporarily rearranging Hayes' job duties.

In concluding its opinion, the *Hayes* court admitted that its discussion was "lengthy, theoretical, and perhaps confusing." However, the court contended that its formula is simple: a fetal protection policy which applies to only one sex is lawful only where substantial risk of harm exists, the risk is borne by one sex and the employee fails to show a less discriminatory alternative.38

In a recently decided case, *UAW v. Johnson Controls*,39 a federal trial court considered a Title VII claim of sex discrimination with respect to a fetal protection policy. The *Johnson Controls* case involved a worksite which exposed employees to lead. Employees' blood level often rose to about thirty micrograms, a level considered unsafe for prospective parents by OSHA, the Center for Disease Control, and other experts.40

The *Johnson Controls* court relied on evidence, submitted by affidavit accompanying a motion for summary judgment, which indicated danger to the fetus at very low blood lead levels. This danger did not exist for adult male or female workers.41 Other evidence supported the argument that there was also a likely danger to sperm at the levels present in the plant.

The *Johnson Controls* court, however, using a summary of the *Olin* and *Hayes* analyses, held that there was a "considerable body" of expert opinion pointing to greater danger to the fetus from lead absorption than to adults.42 Further, the court held that evidence supported the view that, even if a woman removed herself from the lead-exposed environment upon learning she was pregnant, the absorbed lead stays in the mother's body for a considerable amount of time and can still be passed to the fetus.43

The *Johnson Controls* court was also concerned with accidental pregnancy. The court held that although there was evidence of danger to the gene cells of men and women, the danger to the fetus was greater. The court said it could not "overlook this possibility of severe harm to the fetus."44

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37. *Id.* at 1554.
38. *Id.*
41. One can criticize deciding this case on affidavits, where there is much dispute as to the effects of lead on the germ cell, without the right to cross examine the experts as to the studies upon which their opinions were based.
42. 680 F.Supp. At 315.
43. *Id.*
44. *Id.* at 316.
Further, the Johnson Controls court stated that the business necessity defense, as in Hayes, is not limited to evaluating how the policy is related to job performance, but may consider the effect on potential offspring.\textsuperscript{45} The judge justified the expansion of the business necessity defense by analogizing the employer's duty to the fetus as similar to the duty to a licensee or invitee on to the employer's premises. In contrast to Hayes, the Johnson Controls court expanded the business necessity defense to include the employer's right to protect itself from lawsuits and society's general interest in protecting fetuses and children.\textsuperscript{46}

The Johnson Controls court held for the defendant because the plaintiff has not demonstrated a less discriminatory alternative to the employer's fetal protection plan. Additionally, the court flatly rejected the plaintiff's argument that, under the Toxic Substance Control Act, it is the Environmental Protection Agency and not the company that has the sole responsibility of protecting fetuses from lead exposure.\textsuperscript{47}

III
CALIFORNIA APPROACH

The California approach to fetal protection policies has differed from the federal approach. This difference is based, in part, on the difference between the California's Fair Employment and Housing Act ("FEHA")\textsuperscript{48} and Title VII. Three sections of the FEHA may be violated by a fetal protection policy. Like Title VII, the FEHA prohibits sex discrimination.\textsuperscript{49} The regulations of the Fair Employment and Housing Commission ("FEHC") states that "discrimination because of pregnancy, child birth or other related medical conditions constitutes sex discrimination."\textsuperscript{50} The FEHA also prohibits discrimination against women in "terms, conditions and privileges of employment" based on pregnancy.\textsuperscript{51} Further, the FEHA provides that "it shall be an unlawful practice for an employer to require any employee to be sterilized as a condition of employment."\textsuperscript{52} California courts are not obligated to follow federal analysis of Title VII in their interpretation of the FEHA.\textsuperscript{53}

In DFEH v. Globe Battery,\textsuperscript{54} the FEHC addressed issues almost

\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 316-17.
\item \textsuperscript{47} Id. at 317.
\item \textsuperscript{48} CAL. GOV. CODE §§ 12900-12996 (Deering 1982 & Supp. 1988).
\item \textsuperscript{49} Id. at § 12940(a).
\item \textsuperscript{50} CAL. ADMIN. CODE tit. 2, § 7291.2(d) (1987).
\item \textsuperscript{51} CAL. GOV. CODE § 12945.
\item \textsuperscript{52} Id. at § 12945.5; see infra text accompanying note 67.
\item \textsuperscript{54} FEHC Dec. No. 87-19 (1987).
\end{itemize}
identical to those raised in the *Johnson Controls* case. The case involved the same employer and essentially the same policy.

The complainant in the California case, Queen Elizabeth Foster, sought employment with Globe Battery, a division of Johnson Controls, as a C.O.S. loader. A C.O.S. loader must physically handle stacks of lead oxide battery plates and is exposed to lead dust and fumes on the job. Johnson Controls had a policy of not allowing fertile women to work as a C.O.S. loader or in any other position where lead absorption of any employee was 30 ug/ml. or higher.\(^5\) At the time of Foster's application, the preamble to the Federal OSHA standard stated that males and females who planned pregnancies should keep their blood lead levels below 30 ug/ml.\(^6\)

The expert's evidence in *Globe Battery* was similar to that before the court in *Johnson Controls*; some expert evidence suggested the harm was isolated to the fetus, and other evidence suggested that the harm to the fetus could come from a mother or father who absorbed over 30 ug/ml. of lead.\(^7\)

The FEHC rejected the *Olin* and *Hayes* approach. It held that the business necessity defense could not be used to justify the employer's fetal protection policy. Instead, the FEHC stated that only a BFOQ could justify such a policy. The FEHC held that:

In order to establish a BFOQ defense, the Act and our regulations require respondent to prove that, 1) all or substantially all of the excluded individuals—here, fertile women—are unable to safely and efficiently perform the job in question, and that 2) the essence of the business operations would be undermined if respondent were to employ fertile women in the lead production jobs from which they are being excluded.\(^8\)

The employer, Globe Battery, conceded that its policy did not exclude fertile women from lead-exposed jobs because of concern for the women worker's health and safety. Instead, Globe Battery focused its "plan" solely on potential risk to fetuses of female employees.\(^9\)

The FEHC held that concern over prospective fetuses did not support a BFOQ defense under the FEHA. The BFOQ, the FEHC stated, must address only the safety of the person performing the job. Since Globe Battery identified no harm to female employees, the FEHC could not permit the defense. The FEHC found that the FEHA required "that consideration of risks to fetuses . . . be left to the sound discretion" of the

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55. Lead exposure is measured in milligrams per cubic meter of air (ug/30 ml), lead absorption is measured by micrograms of lead per hundred milliliters of whole blood (ug/100 ml).
57. FEHC Dec. No. 87-19 at 3.
58. *Id.* at 9.
59. *Id.*
Having found that the BFOQ defense did not apply, the FEHC commented on the Globe Battery fetal protection plan. The FEHC pointed out that there is some evidence of risk to male worker's offspring where the male worker is exposed to lead. Further, the FEHC noted that Globe Battery's 1977 voluntary fetal protection program was a "sound and proper response to this problem." Globe Battery's voluntary removal plan educated women employees about the dangers of the job and allowed them to make their own decision. During the time the voluntary plan was in effect, only six women became pregnant. Only two had blood levels above 30 ug/ml and none gave birth to children with birth defects. In other words, it was uncertain what risks the job presented and whether such risks were isolated to women.

Finally, the FEHC pointed out that even if Globe Battery could have demonstrated health risks to women workers, they would still have had to prove the "second prong" of the BFOQ standard: that the essence of the business of manufacturing batteries would have been undermined by employing fertile women. The FEHC stated that a claim on such grounds would be unlikely to succeed. Further, the FEHC stated that future economic liability would not be an acceptable defense.

In Globe Battery, the FEHC held that the business necessity defense did not apply since the fetal protection plan at Globe Battery was facially discriminatory. The decision specifically rejected the Olin and Hayes analysis. The FEHC stated that Olin and Hayes ignore the traditional affirmative defense principle and "distort the concepts of 'facially neutral practice' and 'business necessity' out of any recognizable shape in order to reach their results."

Also, the FEHC rejected the Department's argument that Globe Battery had made sterilization a condition of employment, a condition made illegal under the FEHA. The FEHC found that the FEHA prohibition on forced sterilization applied only to current employees.

The FEHC, having found that Globe Battery discriminated on the basis of sex, awarded the complainant backpay and required Globe Battery to cease and desist from implementing their fetal protection policy.

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60. Id. at 10.
61. Id.
62. Id. at 10 n.4.
64. FEHC Dec. No. 87-19 at 11 n.5.
65. Id. at 12.
66. Id. at 8.
67. Id.
68. Id. at 12, 14.
Globe Battery's petition for writ of mandate has been granted, and the case is currently pending before the California Court of Appeals.

CONCLUSION

It is more than likely that fetal protection policies will spawn more litigation as they are applied to a greater number of jobs. The courts will continue to have difficulties grappling with the analysis, since fear for the offspring of workers was not considered by Congress in creating Title VII or the Pregnancy Discrimination Act.

The traditional affirmative defenses, Bona Fide Occupational Qualification and business necessity, do not provide a good basis for analyzing the discrimination and health issues involved. The Hayes and Olin courts, in attempting to apply the traditional affirmative defenses, stretched the two defenses to the point where the customary BFOQ and business necessity analyses all but disappeared.

The federal courts that have considered fetal protection policies have permitted the use of the hybrid business necessity defense set forth in Olin. The federal courts have, with the exception of Johnson Controls, found that the employers' fetal protection plan was not justified by a valid business necessity defense. In Olin, the issue was remanded. In Hayes and Zuniga, the courts found liability under Title VII, because there were less discriminatory alternatives available to the employer.

The federal courts seem to all agree that the employer must prove:
1. Through competent scientific evidence, the presence of a substantial risk of harm from exposure to dangerous substances.
2. That the hazards are limited to female employees, which takes into account the danger to the fetus they may be carrying.
3. That there are no less discriminatory alternatives which would eliminate or reduce the risk.

None of the appellate decisions have considered whether birth control, education and voluntary removal is a less discriminatory alternative. Nor have they, except for Johnson Controls, addressed whether a program that applies to all fertile women, not just pregnant women or women contemplating having a child, can ever fall within the definition of the least discriminatory alternative.

In California, the FEHA offers more protection to fertile women than Title VII. Under the FEHA, discrimination on the basis of pregnancy is unlawful unless "based upon a bona fide qualification."69 Since the FEHA does not specify other affirmative defenses, it may be interpreted as not permitting the use of a business necessity defense to discrimination based on a woman's ability to become pregnant.

Further, the FEHA specifically prohibits employers "to require any employees to be sterilized as a condition of employment." This section shows that the California Legislature had very specific concerns that fertility not be the basis of an employer's decision to hire, fire or transfer a worker.

Fetal protection policies will undoubtedly be the subject of further litigation. It remains to be seen whether the federal courts will continue to use the "hybrid" business necessity test used in Olin and Hayes or adopt the FEHC approach. It seems clear that courts will not accept broad fetal protection policies that are not based on known risks which are significant and cannot be accommodated during pregnancy. For women workers, it is more than an interesting intellectual argument; there is the well-based concern for fetal health juxtaposed against policies which discriminate against women. Hopefully, future policies will protect women workers and their offspring, but will not, as their price, deny full employment opportunity to women.

70. Id.; see supra note 66.