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FETAL PROTECTION AND THE EXCLUSION OF WOMEN FROM THE TOXIC WORKPLACE

ALLYSON K. DUNCAN*

Federal efforts to protect women in the workplace from discrimination on the basis of their ability to bear children have had a tortured history. From the Supreme Court's early decisions holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex through an unequivocal legislative mandate that sex discrimination includes distinctions on the basis of pregnancy and childbirth, Congress and the courts have wrestled with the issue of the extent to which employers can legally protect or limit the rights of female employees of childbearing age. The Equal Employment Opportunity Commission (EEOC), the agency charged with the administration and enforcement of federal laws prohibiting sex discrimination in employment, has also taken differing positions on the extent of an employer's obligations.

The resolution of the issue assumes particular significance in the context of a workplace that grows increasingly polluted. Women as mothers can be affected in two ways: hazardous substances in the workplace may directly injure the fetus of a pregnant employee; also, such substances may affect the reproductive systems of non-pregnant females so that their ability to conceive and bear healthy children is impaired. Employers facing the prospect of liability to injured mothers and offspring have sought to protect themselves by the wholesale exclusion of women of childbearing age from jobs which may present reproductive or fetal hazards. However, such exclusions collide with the proscriptions of Title VII of the Civil Rights Act of 1964, which make it illegal to discriminate on the basis of sex in the making of employment decisions.¹

Courts have yet to devise a workable solution to the conflict despite the fact that the problem grows more acute. Although it is unclear how many jobs are closed to women due to such health risks, the estimates are high and the consensus is that the numbers are growing. In 1979, one source indicated that at least 100,000 jobs were affected by exclusionary policies.² One year later, the EEOC estimated that as many as twenty

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1. 42 U. S. C. S. §§ 2000e-2 (1982).

2. *The Washington Post*, November 3, 1979, § A at 6, col. 5, cited in Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Geo. L. J. 641 (1981).

million jobs may involve exposure to reproductive hazards.³ According to the Occupational Safety and Health Administration (OSHA), 835,000 are affected by its standards for exposure to lead alone.⁴ The widespread use of computers has recently been recognized as posing an as yet largely unexplored threat. The July, 1988, issue of the American Journal of Industrial Medicine reported a "significantly elevated risk of miscarriage" among women who use video display terminals for more than twenty hours per week during the first trimester of pregnancy.⁵

Three circuits have addressed the issue of the extent to which the exclusion of women from certain jobs because of reproductive or fetal risk violates Title VII's prohibition of sex discrimination, and they have reached inconsistent results. In October of 1988, the EEOC issued policy guidance that departs significantly from its 1980 guidelines on the same subject. The inconsistencies are due at least in part to the fact that traditional Title VII theory has proved inadequate to the analysis of the issue. Title VII defenses have usually not been applied when a risk of harm to someone other than the employee exists.

This paper will examine the inadequacy of current Title VII theories and defenses for resolving the conflict between exclusionary fetal protection policies and the requirement that women not be discriminated against in employment opportunities. Part I traces the historical development of the treatment of pregnancy by Congress and the courts. Part II considers the applicable Title VII theory and defenses as set forth in the statute and developed through case law. Part III sets out the EEOC's varying approaches to the resolution of the problem. Part IV discusses deficiencies in the current analyses and proposes an alternative approach.

PART I. PREGNANCY DISCRIMINATION: A TITLE VII STEPCHILD

Title VII of the comprehensive Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.⁶ Although neither the statute nor the legislative history

3. 45 Fed. Reg. 7514 (1980).

4. OSHA News, 6 Job Safety and Health 2 (Dec. 1978), cited in 69 Geo. L. J. at 647.

5. Goldfaber, *The Risk of Miscarriage and Birth Defects Among Women Who Use Video Display Terminals During Pregnancy*, 13 AM. J. INDUS. MED. 695 (1988).

6. As enacted, Section 703(a) provided that it shall be an unlawful employment practice for an employer

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin, or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000 e-2(a) (1989).

define the term "sex," the EEOC and the courts have consistently held that "sex" equates to "gender," therefore Title VII does not protect, for example, against discrimination on the basis of sexual preference.⁷

Initially, the narrow reading of the term "sex" carried over into the area of pregnancy, and distinctions based on pregnancy were held not to constitute sex discrimination within the meaning of Title VII. This analysis had a constitutional underpinning. In *Geduldig v. Aiello*,⁸ women challenged the exclusion of normal pregnancies from coverage under a state disability plan on the ground that it violated the equal protection and due process clauses of the Fourteenth Amendment. The Supreme Court held that pregnancy is an "objectively identifiable physical condition," and not a facial distinction based on sex. Therefore, pregnancy distinctions were not entitled to heightened judicial scrutiny. According to the Court, the disability plan divided the universe of potential recipients into two groups—pregnant persons and non-pregnant persons. Although the former group was exclusively female, the latter group included members of both sexes. The Court felt that the lack of identity between the excluded disability and gender defeated the sex discrimination claim.⁹

Two years later, the Supreme Court considered a challenge to a similar plan under Title VII. Rejecting the unanimous views of the six Circuit Courts of Appeals to have considered the issue, the Supreme Court in *General Electric Co. v. Gilbert* found no gender-based discrimination in the exclusion of pregnancy from coverage under a private employer-sponsored disability insurance program.¹⁰ The Court relied on *Geduldig* in finding that an employer could legitimately exclude pregnancy-related disabilities from coverage as long as men and women were treated the same with respect to the disabilities that were included. The fact that the suit was brought under Title VII rather than the Constitution did not change the result, despite the fact that Title VII analysis differs. Under the Fourteenth Amendment, where the allegation is that a neutral classification has a disproportionate adverse impact on a protected group, the plaintiff has to prove invidious motivation or purpose.¹¹ On the other hand, a prima facie violation of Title VII can be established on the basis of the discriminatory effect of a facially neutral policy.¹² Based on the rationale in *Geduldig*, the *Gilbert* court held that pregnancy distinctions are not facially sex-based. The court then went on to consider whether

7. EEOC Dec. No. 76-75, [1976] Emp. Prac. Guide (CCH) ¶ 6495, at 4266; see also, e.g., *De Santis v. Pacific Telephone & Telegraph Co.*, 608 F2d 327 (9th Cir. 1979).

8. 417 U.S. 484 (1974).

9. *Id.* at 496-97 n. 20.

10. 429 U.S. 125 (1976).

11. *Washington v. Davis*, 426 U.S. 229 (1976).

12. *Griggs v. Duke Power Co.*, 401 U.S. 421 (1976).

they have a disproportionate effect for Title VII purposes, and concluded that they do not. The Court stated that “. . . pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of benefits, accruing to men and women alike, which results from the facially evenhanded *under inclusion* of risks.”¹³

One year later, the Supreme Court acted to limit the holding in *Gilbert*. In *Nashville Gas Co. v. Satty*,¹⁴ the Court considered the validity under Title VII of a policy denying accumulated seniority to employees returning from maternity leave, but not from leave related to any other disability. The Court found that the policy violated Section 703(a)(2)¹⁵. Since under *Geduldig* and *Gilbert* pregnancy distinctions are not facially gender-based, the Court found no per se violation of Title VII. However, this plan, unlike the one in *Gilbert*, was held to have a discriminatory effect: “[h]ere, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer.”¹⁶

Despite the narrowing interpretation of *Satty*, Congress conclusively resolved the issue of the illegality of pregnancy discrimination by amending Title VII in 1978 to include a new Section 701(k). The so-called Pregnancy Discrimination Act (PDA), reads in pertinent part:

The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. . . .¹⁷

In enacting the PDA, Congress specifically rejected both the holding and the reasoning of *Gilbert*.¹⁸ The proponents of the revision felt that the Supreme Court’s decision was inconsistent with the wording and purpose of Title VII, and that the amendment was necessary to reestablish the correct interpretation of the law that prevailed prior to *Gilbert*.¹⁹ Thus, the PDA makes it clear that discrimination on the basis of preg-

13. *Gilbert*, 429 U.S. at 139 (emphasis in original).

14. 434 U.S. 136 (1977).

15. 703(a)(2) makes it an unlawful employment practice for an employer (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individuals of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1983).

16. *Nashville Gas Co. v. Satty*, 434 U.S. at 142.

17. 42 U.S.C. § 2000e(k) (1983).

18. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

19. *Id.*, citing S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977), Leg. Hist., at 39-40.

nancy is facial discrimination on the basis of sex. The amendment, while effectively resolving the *Gilbert* line of issues, leaves open the question of the extent to which the pregnant female must be accommodated in the toxic workplace.

PART II THEORIES OF AND DEFENSES TO SEX-BASED DISCRIMINATION

The 1978 Amendment of Title VII included "pregnancy, childbirth, or related medical conditions" within the meaning of the statutory terms "because of sex", thus conclusively establishing that pregnancy distinctions are facially gender-based. The question which then arises is whether or not the distinctions are justified by some statutory or judicially-created exception or defense.

Title VII recognizes two underlying theories of discrimination, each with its own proof process and corresponding defense. These two theories track the two subheadings of the basic substantive provision of Title VII, Section 703(a). Section 703(a) essentially prohibits two things: first, hiring, firing, failing to promote and so on, on the basis of a prohibited characteristic; in other words, an action directed specifically at an individual or group of individuals; and second, limiting, segregating or classifying employees in a way that tends to affect them adversely. The two theories, called disparate treatment and disparate impact respectively, can be illustrated as follows: if an employer refuses to hire women as prison guards because he feels that they are physically incapable of functioning in that capacity, then he is liable for disparate treatment. If the employer imposes no overt sex barrier, but adopts a policy of hiring as prison guards only individuals who are taller than 5'6" and weigh more than 120 pounds, such a policy, while neutral on its face, would nevertheless have a disparate impact on the hiring of women.²⁰

A. *Bona Fide Occupational Qualifications*

Title VII itself creates an exception to the disparate treatment claim. Section 703(e) provides that "notwithstanding any other provision of this title. . .it shall not be an unlawful employment practice for an employer to hire and employ employees. . .on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business."²¹

The bona fide occupational qualification (bfoq) has been consistently

20. This was the fact pattern in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), a seminal case in disparate impact analysis.

21. 42 U.S.C. § 2000e-2(e) (1982).

interpreted by the EEOC and the courts as providing "...only the narrowest of exceptions to the general rule requiring equality of employment opportunities."²² Consistent with this strict interpretation is the fact that the existence of a bfoq is an affirmative defense which must be pleaded and proved.²³ Courts have recognized two inquiries as relevant to this analysis. The first is whether the position is one that affects the very essence of the employer's business. In the words of the statute, it must be "reasonably necessary" to its "normal operation." Some positions or functions would be so peripheral to the employer's central mission that no sexually discriminatory job qualifications would be justified. In *Diaz v. Pan American World Airways, Inc.*, for example, the Fifth Circuit held that while the presence of women exclusively may indeed have a soothing affect on the traveling public, the policy of only hiring women as flight attendants is not reasonably necessary to the business of transporting passengers from one destination to another.²⁴ Thus, the requirement that the job involve the employer's central purpose functions as a kind of sliding scale. The more intimately a job is associated with the nature of the employer's business, and the higher the degree of public safety involved in that business, the more leniency an employer will be allowed in imposing sex-based job qualifications.²⁵

The second consideration in determining the existence of a bfoq is whether the job qualification is "reasonably necessary" rather than merely convenient. There are two ways to establish reasonable necessity. The employer may show that it "had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."²⁶

Alternatively the employer may show that sex is a legitimate consideration for a job by proving that it is "impossible or highly impractical" to evaluate the ability of employees on an individual basis and that a blanket exclusion is therefore necessary.²⁷ In either showing, the focus of the

22. *Dothard v. Rawlinson*, 433 U.S. at 333. See also n. 19, in which the court notes that "[t]he EEOC issued guidelines on sex discrimination in 1965 reflecting its position that 'the bona fide occupational qualification as to sex should be interpreted narrowly' 29 CFR § 1604.2(a). It has adhered to that principle consistently, and its constriction of the statute can accordingly be given weight."

23. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

24. 442 F.2d 385 (5th Cir. 1971).

25. In *Usery v. Tamiami Trail Tours, Inc.* 531 F.2d 224 (5th Cir. 1976), the court considered the validity of a bfoq defense under the Age Discrimination in Employment Act, which has an identical provision. The court held that:

[T]he job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business—here, the safe transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm . . . in case of an accident, the more stringent may be the job qualifications designed to insure safe driving.

531 F.2d at 236 (emphasis in original).

26. *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d at 235.

27. *Id.* at n. 5.

defense is on the ability of the individual employee to perform the job. If the employee is capable of performing it safely and efficiently the defense has generally been held not to lie. This highlights the difficulty of utilizing the bfoq as a defense to the hiring of women of childbearing age in a potentially toxic environment. The employer is not attempting to show that the woman is unqualified; it is relying on the potential for harm to a third person.

B. *Business Necessity*

When a facially neutral employment policy has a disparate impact on a protected group, it must be justified by business necessity. The seminal case, *Griggs v. Duke Powers Co.*, established the principle that "if an employment practice which operates to exclude [the protected group] cannot be shown to be related to job performance, the practice is prohibited."²⁸ The touchstone here, as with the bfoq, is on necessity. The employer must show that the qualification bears "a demonstrable relationship to successful performance of the jobs for which it was used."²⁹

Proof of sex discrimination under adverse impact theory proceeds in tripartite fashion: the female claimant would have to show, usually through the use of statistical data, that a facially neutral policy had a disproportionate, negative impact on women; the employer would then have to show the existence of a compelling relationship between the qualification and job performance; and the burden would then shift back to the plaintiff to establish that there were alternative methods with less discriminatory impact.³⁰

Thus, the courts have two established theories of discrimination to analyze sex discrimination claims arising out of exclusion of women from

28. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

29. *Id.*

30. Although the Supreme Court has never defined "business necessity" with precision, it seems clear that the mere fact that the policy is reasonable will not suffice. See, for example, *Dothard v. Rawlinson*, 433 U.S. at 331, where the court noted that the employer produced no evidence correlating height and weight requirements for maximum security prison guards with attributes "essential to good job performance."

In discussing the cases developing the business necessity defense in the context of racial discrimination in *Robinson v. Lorillard Corporation*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) the Fourth Circuit stated:

Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. 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 a lesser differential racial impact.

Id. at 798 (footnote omitted).

the potentially toxic workplace. Neither, however, is a perfect fit: the bfoq defense appears inappropriate because of its traditional focus on the ability of the employee to perform the job; and business necessity seems inapplicable because it is predicated on the existence of a facially neutral policy, which pregnancy classifications by definition cannot be. The three federal courts of appeal to have addressed the issue have elected to utilize a modified adverse impact analysis.

C. *Zuniga v. Kleburg County Hospital*³¹

Rita Zuniga was the first female x-ray technician hired by the defendant hospital.³² When she became pregnant, she was told that she would have to either resign or be fired.³³ The hospital administrator informed her that she would not be granted a leave of absence, nor entitled to either sick leave, the maternity benefits generally available to female employees, nor her Blue Cross Blue Shield coverage, and that she could not be guaranteed reemployment after the baby's birth.³⁴ There was no written policy so providing; the decision was based solely on the administrator's concern over the potentially damaging effects of x-ray radiation on the fetus and resulting liability.³⁵ The hospital's discretionary leave policy, applicable to all other employees, guaranteed their jobs upon return.³⁶

After trial, the district court entered judgment for the hospital, concluding that Zuniga had not been discriminated against on the basis of sex. The court further found that the hospital's policy of dismissing pregnant x-ray technicians was the only way it could carry out its legitimate business purposes.³⁷

The Fifth Circuit reversed.³⁸ It noted initially that the events in question occurred prior to the amendment of Title VII to include pregnancy as a protected basis; thus the *Gilbert* holding that pregnancy distinctions are not facially sex-based applied.³⁹ The Fifth Circuit went on to find, however, that rather than merely withholding from women benefits that men could not enjoy, the hospital's decision imposed a substantial burden on women that men need not suffer, as in *Satty*.⁴⁰ The Court found it "difficult to conceive of a more straightforward prima facie case of sex

31. 692 F2d 986 (5th Cir. 1982).

32. *Id.* at 987.

33. *Id.* at 988.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 989.

38. *Id.* at 994.

39. *Id.* at 989.

40. *Id.* at 991.

discrimination under 703(a)(2),⁴¹ the disparate impact provision. It then considered whether the hospital had made the requisite showing of business necessity, and concluded that it had not.⁴² The Court found it unnecessary to decide whether the business necessity defense reaches preservation of fetal health and the avoidance of tort liability.⁴³ Zuniga would prevail because it was clear that the hospital failed to utilize an alternative, less discriminatory means of achieving its ends: the hospital could have protected itself, the fetus and Zuniga's employment prospects by following its own established leave policies.⁴⁴ There was no adequate showing that Zuniga could not have been temporarily replaced and granted a discretionary leave of absence.⁴⁵

The result in *Zuniga* seems preordained by the fact that the Pregnancy Discrimination Act was inapplicable. If pregnancy is not considered a facially sex-based classification, then disparate impact, depending as it does on the existence of a facially neutral policy, becomes the appropriate analysis. The Fourth Circuit, in considering a similar issue the same year, could not rely on the same presumption.

D. *Wright v. Olin Corporation*⁴⁶

In 1978, the year that the Pregnancy Discrimination Act brought pregnancy within the scope of Title VII protection, Olin Corporation adopted a "female employment and fetal vulnerability program which created three job classifications: 1) unrestricted jobs, which presented no hazard to the pregnant female or fetus; 2) controlled jobs, which might require limited contact with harmful chemicals; and 3) restricted jobs, which 'may require contact with and exposure to known or suspected abortifacient or teratogenic agents.'"⁴⁷ Unrestricted jobs were open to all women.⁴⁸ Controlled jobs were limited to nonpregnant women who signed a form stating their awareness of the existence of some risk.⁴⁹ Restricted jobs were closed to all fertile women.⁵⁰ All women from ages 5 to 63 were considered to be fertile unless Olin's medical staff confirmed their inability to have children.⁵¹ Of the approximately 265 job classifications at the plant, twelve were placed in the restricted category and a significant number were controlled. Five of eleven lines of progression

41. *Id.* at n.8. See also *Geduldig v. Aiello*, 417 U.S. 484 (1974).

42. *Id.* at 992.

43. *Id.*

44. *Id.* at 994.

45. *Id.* at 993.

46. 697 F.2d. 1172 (4th Cir. 1982).

47. *Id.* at 1182.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

were affected.⁵²

Three Olin employees, two doctors and one lay person, testified in support of the program.⁵³ Based on their review of the medical literature, they concluded that the program was necessary to protect fetuses from exposure to certain toxic chemicals, particularly lead, used in the plant's manufacturing processes.⁵⁴ These witnesses, none of whom were recognized as experts in the field, testified that no less restrictive alternatives, such as improving ventilation or providing personal protection devices, were feasible.⁵⁵

In considering the legality of the program, the court noted that its first task was to determine the appropriate analytical framework—a point of considerable conflict between the parties.⁵⁶ The female claimants initially argued a hybrid theory that at least ostensibly appears to best reflect the changed treatment of pregnancy classifications.⁵⁷ They suggested that disparate impact theory would apply until October 31, 1978, the effective date of the Pregnancy Discrimination Act, and bfoq theory thereafter, since as of that date the program became one of overt sex discrimination.⁵⁸ The Court in a footnote dismissed the argument without discussion.⁵⁹ It acknowledged that the issue did not fit with precision into any of the developed theories,⁶⁰ but concluded that a disparate impact/business necessity analysis "is best suited for a principled application of Title VII doctrine to the fetal vulnerability program."⁶¹

The Court gave short shrift to the discrepancy highlighted by the claimants; that the Pregnancy Discrimination Act eliminated any argument that pregnancy distinctions could be considered neutral. Without referring to the applicability of the amendment, it noted only that "[w]hile the 'facial neutrality' of Olin's fetal vulnerability program might be subject to logical dispute, the dispute would involve mere semantic quibbling. . ."⁶² The court quite candidly gave as its reason for not utilizing the seemingly more appropriate bfoq defense the fact that the employer could not possibly meet it:

The inappropriateness of applying the overt discrimination/bfoq theory of claim and defense—or, more accurately, of treating it as the exclusively applicable, hence dispositive, theory—is that, properly applied, it

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1183.

57. *Id.*, n. 17.

58. *Id.* at 1183, fn. 17.

59. *Id.*

60. *Id.* at 1184.

61. *Id.* at 1185.

62. *Id.* at 1186.

would prevent the employer from asserting a justification defense which under developed Title VII doctrine it is entitled to present.⁶³

Having decided that disparate impact was the more appropriate analysis, the court then discussed whether Olin had established business necessity. The Court noted that the fetal vulnerability issue was one of first impression and that the defense as traditionally interpreted would have to be adjusted in order to be applicable. It therefore remanded for further proceedings on the narrow issue of whether business necessity was shown.⁶⁴ Pointing out that the concept of business necessity had already been extended to embrace considerations of workplace safety in other contexts, the Court went on to analogize the employer's interest in the safety of the fetus with its legally recognized interest in protecting the safety of customers.⁶⁵ The Court concluded that an employer could establish a business necessity defense to the imposition of otherwise prohibited restrictions on the employment opportunities of women based on the need to protect the health of unborn children, and set out principles to be considered in determining whether the employer had met its burden of proof. The burden of persuasion is on the employer to prove by independent, objective evidence that a significant risk of fetal harm exists, that the hazard is such that women, but not men, need protection, and that the program devised is tailored to that purpose.⁶⁶ Once the employer establishes these elements of proof, the claimant can rebut by showing the existence of alternatives that would accomplish the same results with less discriminatory impact.⁶⁷

E. *Hayes v. Shelby Memorial Hospital*⁶⁸

The Eleventh Circuit was the last to consider fetal vulnerability in the context of a Title VII challenge, and it did so after the passage of the Pregnancy Discrimination Act. The facts in *Hayes* are virtually identical to those in *Zuniga*. The defendant hospital fired Hayes, a female x-ray technician, after learning that she was pregnant, claiming that it could not find alternative employment for her.⁶⁹ Hayes brought suit alleging Title VII as well as constitutional violations.⁷⁰ The district court found in her favor, and the hospital appealed.⁷¹

The Eleventh Circuit affirmed.⁷² It recognized that Title VII as

63. *Id.* at 1185, n. 21.

64. *Id.* at 1187.

65. *Id.* at 1188.

66. *Id.* at 1189-90.

67. *Id.* at 1191.

68. 726 F2d 1543 (11th Cir.), *rehg denied*, 732 F2d 944 (1984).

69. *Id.* at 1546.

70. *Id.*

71. *Id.*

72. *Id.*

amended “. . . mandates that a pregnancy-based rule can never be neutral,”⁷³ and that firing Hayes because she was pregnant was therefore facially discriminatory.⁷⁴ The Court nevertheless rejected Hayes’ argument that the only affirmative defense available to the hospital would be the existence of a bfoq.⁷⁵ Instead, it decided that the fact that an employer’s policy applies only to pregnant women creates a presumption of facial discrimination which the employer can rebut by showing that even though applicable only to women, the policy is neutral in the sense that it protects the offspring of all employees.⁷⁶

The Court then went on to adopt a version of the requirements set out in *Olin*: 1) that the employer produce objective, scientific evidence that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women’s exposure to toxic hazards in the workplace, and 2) that the hazard applies to fertile or pregnant women, but not to men.⁷⁷ The Court did not appear to recognize the inconsistency in requiring as a condition of establishing facial neutrality that a policy affect members of one sex only. Nor did it mention the third *Olin* requirement—that the policy be effective in protecting against the risk. The Court acknowledges as the reason for its reluctance to find facial discrimination the fact that “. . . when a policy designed to protect employee offspring from workplace hazards proves facially discriminatory, there is, in effect, no defense. . . .”⁷⁸

The Court then considered whether the Hospital had rebutted the presumption of facial discrimination, and concluded that it had not.⁷⁹ The Hospital failed to meet the threshold requirement of proving that the x-ray radiation to which Hayes would be exposed posed a significant risk of harm to her fetus.⁸⁰ The medical testimony introduced at trial established that Hayes, as a night technician, was unlikely to ever be exposed to levels of radiation in excess of those considered safe by the National Council on Radiation Protection and Measurements.⁸¹ Further, even if the levels of radiation to which she would be exposed were to exceed the safe range, the Hospital would still have the heavy burden of proving that no alternative positions were available.⁸²

Despite concluding that facial discrimination existed and that a bfoq could not be established, which should have ended the inquiry, the Court

73. *Id.* at 1547.

74. *Id.* at 1548.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1549.

79. *Id.* at 1551.

80. *Id.* at 1550.

81. *Id.* at 1551.

82. *Id.*

nevertheless went on to consider Hayes' claim under disparate impact theory.⁸³ The Court decided that a disparate impact claim automatically existed because the policy affected only women.⁸⁴ Further, it found that a business necessity defense was also automatically established.⁸⁵ "That is because to reach the disparate impact stage of analysis in a fetal protection case, the employer has already proved—to overcome the presumption of facial discrimination—that its policy is justified on a scientific basis and addresses a harm that does not affect men. To add any more requirements would be to render it nearly impossible to have a fetal protection program under any circumstances."⁸⁶ Even though under the Court's analysis business necessity was established, Hayes would still prevail because of the Hospital's failure to explore less discriminatory alternatives—other duties within the hospital that Hayes could perform.

Although the policy is cast as one of facial discrimination, the language of the decision tracts disparate impact theory almost exclusively. Thus, the analysis comes full circle. By paraphrasing the *Olin* requirements for business necessity and finding they demonstrate facial neutrality, the court allows a claim of facially discriminatory conduct to be rebutted by a showing less than that required to sustain a bfoq.

As a result of the decision, an employer can apply a business necessity defense to a policy based expressly on pregnancy despite the passage of the Pregnancy Discrimination Act.

PART III: THE EEOC POSITION: THEN AND NOW

In February of 1980, the EEOC published proposed Interpretive Guidelines on Employment Discrimination and Reproductive Hazards in the Federal Register for notice and comment.⁸⁷ The proposed 1980 guidelines were the joint effort of the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Occupational Safety and Health Administration (OSHA).⁸⁸ They took the position that an employer or contractor may not have a plan designed to protect employees from reproductive hazards that negatively affects their employment opportunities specifically on the basis of sex. Such policies were deemed discriminatory on their face.⁸⁹

The proposed 1980 guidelines went on to provide, however, that an

83. *Id.* at 1552.

84. *Id.*

85. *Id.*

86. *Id.* at 1553.

87. 45 *Fed. Reg.* 7514 (1980)

88. OFCCP Administers Executive Order 11246, 30 *Fed. Reg.* 12319 (1965), which provides that contractors may not discriminate against employees on the basis of race, color, religion, sex or national origin.

89. 45 *Fed. Reg.* at 7516.

employer could establish a neutral policy to protect all its employees from reproductive hazards, but if it had an adverse impact on one sex, it would have to be justified by business necessity.⁹⁰ Nine factors are listed as relevant to an inquiry as to whether business necessity was established:

- 1) whether the employer's policy was applied consistently to employees of both sexes,
- 2) whether the employer has complied with applicable occupational safety and health laws;
- 3) whether the employer has investigated the effects of all the known hazards in its workplace and relied on reputable scientific evidence in developing its plan;
- 4) whether the threat from exposure is greater to the sex affected by the policy than to that not affected;
- 5) whether there is any evidence of discriminatory practices prior to the implementation of the plan;
- 6) whether the plan defines the affected class as narrowly as is feasible given the scope of the risk;
- 7) whether there is evidence that the hazard poses a threat to bodily systems other than the reproductive system;
- 8) whether the employer considered less discriminatory alternatives such as the use of protective devices; and
- 9) whether the employer is monitoring scientific developments that may affect the effectiveness of the policy.⁹¹

The 1980 guidelines provided for the availability of technical assistance from OSHA and also allowed an employer to utilize a temporary emergency exclusion pending the securing of scientific evidence where it appeared that a hazard might cause significant and immediate harm.⁹²

The explanatory note to the 1980 guidelines made two additional points. First, it took the position that the bfoq exception does not apply to the analysis of issues involving fetal and reproductive hazards. The note stated that the narrow bfoq exception pertains only to those situations where all or substantially all of a protected class are unable to perform the duties of the job in question. In this context, the exclusion is based on the existence of a threat to the employee or fetus, not the employee's ability to perform.⁹³

Secondly, it was noted that the 1980 guidelines did not preclude an employer from temporarily removing employees of both sexes from work areas where reproductive hazards might exist.⁹⁴

90. *Id.*

91. 45 *Fed. Reg.* 7517.

92. *Id.*

93. 45 *Fed. Reg.* 7516.

94. *Id.*

Numerous comments were received on the proposed Guidelines, most of them critical, and they were subsequently withdrawn.⁹⁵ EEOC and OFCCP stated in the notice of withdrawal that the complexity of the issue suggested the need for consideration of facts on a case-by-case basis.⁹⁶

Effective October 7, 1988, the EEOC implemented new policy guidance on reproductive and fetal hazards.⁹⁷ In the interim between the issuance of the two statements, the three Courts of Appeals' cases had been decided. The 1988 Policy Guidance purports to be an elaboration of the analytical framework adopted by those courts. Perhaps for that reason, a determination of the appropriate theory for considering reproductive hazard cases receives little attention. The EEOC simply states that "[a]lthough the BFOQ defense is normally the only one available in cases of overt discrimination, the Commission follows the lead of every court of appeals to have addressed the question . . . and concluded that the business necessity defense applies . . ."⁹⁸ Within that framework the employer must prove 1) whether there is a substantial risk of harm to offspring of employees through exposure to hazards in the workplace; 2) whether the harm takes place through the exposure of one sex but not the other; and 3) whether the employer's policy effectively eliminates the risk.⁹⁹ The EEOC goes on to state that even if these elements are proved the policy will be considered invalid if a reasonable alternative with less discriminatory impact is shown. If such an alternative exists, it must be used. Possible alternatives would include protective devices or techniques, and also temporary or permanent transfers or reassignments.¹⁰⁰ Whenever possible, the EEOC will defer to OSHA's opinion as to the existence of a risk of harm, and whether the employer's policy effectively reduces the level of risk.¹⁰¹

Several provisions of the former Guidelines are not included in the recent version. The new Guidance does not state that expressly sex-based policies are discriminatory on their face. They do not take the position that the bfoq defense is inapplicable. Moreover, there is no suggestion that the employer might bring itself into compliance by temporarily removing members of both sexes from the hazardous area.

The procedural posture of the two statements also differs. The 1980 Guidelines were promulgated in conjunction with OFCCP and OSHA.

95. 46 *Fed. Reg.* 3916 (1981).

96. *Id.*

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

98. *Id.* at 4.

99. *Id.* at 5.

100. *Id.* at 9, citing EEOC Compliance Manual section 624.7(i), alternatives.

101. *Id.* at 8.

They were published in the Federal Register for notice and comment. The 1988 Policy Guidance was issued unilaterally, and was adopted as the agency's interpretation without the customary publication for notice and comment.

PART IV: RETURNING TO THE LANGUAGE OF TITLE VII

The starting point of any attempt to resolve this issue should be the language of the statute. Section 701(k)¹⁰² expressly provides that discrimination on the basis of pregnancy constitutes discrimination on the basis of sex. In amending Title VII to so state, Congress removed the underpinning of any argument that a pregnancy-based policy is neutral. If the policy is not neutral, but facially discriminatory, the number of exceptions or defenses available is limited. Section 703(e) permits sex to become an employment criterion only where it is "reasonably necessary to the normal operation of that particular business or enterprise."¹⁰³ As written, the statutory language, while narrow, would appear to allow an employer to demonstrate, for example, that the potential for liability to a large number of affected offspring would jeopardize its solvency. As interpreted, the bfoq defense has been narrowed further to apply to only those situations in which all or substantially all women are unable to perform the duties of the job.¹⁰⁴

Neither the three Courts of Appeals' decisions nor EEOC's Policy Guidance state that the bfoq defense cannot be applied. The Courts decline to apply it because of their view that it would result in automatic employer liability in a situation where the policy serves a social good. The softening of the EEOC's position from 1980 to 1989 may also reflect a growing concern for the tenuousness of the employer's position, in having to provide equal employment opportunity on the one hand, yet protect itself from the liability of injured offspring. This concern, however, overlooks a critical fact: if one asks why automatic liability results, the answer would seem to be that it stems from the structuring of a plan in terms of sex, not risk. It is, in fact, an overstatement to say that the actions in *Zuniga* and *Hayes* were taken pursuant to a "plan." The decisions in those cases were ad hoc determinations by individual supervisors based on the largely subjective belief that any x-ray radiation is harmful to a pregnant female. Only the *Olin* "plan" qualified as such, and it was specifically labeled a "*female* employment and fetal vulnerability" program and developed by three non-experts in the field.¹⁰⁵

Even where there is a formal plan, employers tend toward overinclu-

102. 42 U.S.C. § 2000(e) (1982).

103. 42 U.S.C. § 2000e-2(e) (1982).

104. See *Hayes v. Shelby Memorial Hospital*, 726 F.2d at 1549.

105. *Wright v. Olin Corp.*, 697 F.2d at 1182 *emphasis added*.

siveness. The Olin plan, for example, applied to all females between the ages of 5 and 63.¹⁰⁶ There seems to be little empirical support for framing exclusionary policies that broadly. It is unlikely that there are any five year olds in the workforce, and women beyond the age of fifty are far less likely to conceive.¹⁰⁷ Moreover, there are women in the twenty to forty year old group who because of choice, incapacity, or sexual preference will not bear children.¹⁰⁸ An employer could narrow its policy on those grounds alone.

Employers may be tempted to draft broad policies because the parameters of risk from workplace hazards are as yet unclear. As the EEOC recognizes, the evaluation of risk is difficult because evidence of reproductive harm at this point is "largely inconclusive."¹⁰⁹ The Hayes Court, after listening to testimony that any dose of radiation is excessive, to the point that it is dangerous for a pregnant woman to sunbathe in a bathing suit, concluded that ". . . scientists know little about the detrimental effects of even the lowest levels of radiation."¹¹⁰ There is an even greater uncertainty as to the risk of harm to offspring resulting from exposure of the male reproductive system.¹¹¹

In view of the current state of scientific knowledge, it is arguable that exclusionary policies framed in terms of sex should have to show that they are reasonably necessary to the operation of the business, for several reasons: 1] by simply tracking the interpretation of the bfoq defense under the Age Discrimination Employment Act, the test can also be met in the reproductive hazard context; 2] the hybridized business defense as set forth in *Hayes* and the EEOC Policy Guidance is not as lenient as it might appear at first glance; 3] to the extent that the bfoq exception is more stringent, it provides greater incentive for the employer to narrowly tailor any exclusionary policy to meet the risk; and 4] focusing on the general rules applicable to facial discrimination would not result in a de facto overturning of the Pregnancy Discrimination Act.

Although the formulations differ somewhat, it is universally recognized that the bfoq exception is meant to be extremely narrow.¹¹² In one of the most frequently cited cases, the Fifth Circuit held that an em-

106. *Id.*

107. See Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1233 (1986), noting that for blue collar women over the age of 30, the birth rate may be less than 2%, and only one in 5,000 women.

108. EEOC Policy Guidance Number 915, 034, October 7, 1988. at 7, n. 16.

109. EEOC Policy Guidance Number 915, 034, October 7, 1988, at 7-8; citing the office of Technology Assessment U.S. Congress, Reproductive Health Hazards in the Workplace 67-68 (1985).

110. *Hayes v. Shelby Memorial Hospital*, 726 F.2d at 1550.

111. See, e.g., *International Union v. Johnson Controls*, 680 F. Supp. 309 (E.D. Wisc. 1988) where the Court upheld an exclusionary policy from women in the face of testimony about risk of harm to a fetus through the male.

112. *Dothard v. Rawlinson*, 433 US at 333; see also legislative history at 110 Cong. Rec. 7213.

ployer could rely on a bfoq exception only by proving "that he had reasonable basis to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."¹¹³ Subsequent formulations focusing on the woman's ability to perform tend to either read the "safely" language as applying only to the safety of the woman, or to read it out altogether. Yet in cases under the Age Discrimination in Employment Act, safety to the public is a major factor in determining the applicability of a bfoq.

In *Western Air Lines v. Criswell*, the Supreme Court considered whether being under the age of 60 was a bfoq for the position of flight engineer.¹¹⁴ The Court recognized that suspect classifications such as sex may be used only when the employer is compelled to rely on sex as a proxy for safety-related considerations¹¹⁵. This could be established either by showing a factual basis for believing that all or substantially all women could not safely and efficiently perform, or that the sex was a legitimate proxy for safety because it would be virtually impossible to make individualized determinations.¹¹⁶

If the safety of the public is a legitimate consideration in determining the applicability of the bfoq defense, then the personal safety of the woman is not the only focus; the safety of others is also a relevant concern. That same concern would justify considering the safety of potential offspring. Under such an analysis, the employer could meet the bfoq requirements of showing that sex is a proxy for safety considerations, including safety to the fetus, if the "all or substantially all women" language were interpreted to mean all those covered by the employer's plan. The employer would have to show either that all or substantially all women covered by the exclusionary policy would be unable to perform the job without jeopardizing their safety or that of the fetus, or that treating the class of women covered by the plan differently is necessary because of the difficulty of making determinations on an individualized basis. Although this is a modified reading of the bfoq defense, it requires less tinkering with the language of the statute and traditional Title VII theory than the revised business necessity approach of *Hayes* and the EEOC.

Although the bfoq test is a strict one, the standards set out by the EEOC and the courts are by no means lenient. In order to establish business necessity under the EEOC Guidance the employee must prove that the harm to the offspring takes place through the exposure of members of one sex only.¹¹⁷ Even if that is shown, the policy is still vulnera-

113. *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d at 235.

114. 472 U.S. 400 (1985).

115. *Id.* at 414.

116. *Id.*

117. EEOC Policy Guidance Number 915, 034, October 7, 1988, at 5.

ble if less discriminatory alternatives are available.¹¹⁸ Under *Hayes*, the business necessity defense cannot be invoked unless the employer can show that the policy is neutral in the sense that it protects the offspring of all employees equally.¹¹⁹ There, too, the plaintiff could rebut by showing that less discriminatory alternatives exist. Neither the EEOC Guidance nor the decisions impose cost limitations on the availability of alternatives, although the Guidance does speak of an alternative policy that is "reasonable."¹²⁰ The Guidance also specifically provides that transfers and reassignments, presumably with no loss in pay, will be considered reasonable.¹²¹

Since even the business necessity defense as articulated requires a showing that only one sex is affected, something that the current state of scientific knowledge would be hard pressed to do with any degree of certainty, there would seem to be little advantage in ignoring plain statutory language and case law interpreting both defenses to reach the result in *Hayes*. Assuming that the employer could document the existence of a risk affecting members of one sex only, it is hard to imagine many situations in which it will be able to show that no temporary transfer or reassignment was available. Of course, if an employer can frame a policy in terms of actual risk to bodily systems, it would presumably be considered gender-neutral and traditional business necessity analysis would apply. If the employer cannot do so and prefers to limit its policies to pregnant or fertile women without exploring the possibility that the class can be narrowed, then it is arguable that the employer should have to assume the burden of showing that the classification is reasonably necessary to the operation of its business. Otherwise, the employer has little incentive not to overinclude.

To the extent that the bfoq exception is more stringent than the EEOC/*Hayes* test, it should encourage employers to do the research and obtain the medical data necessary to tailor any exclusionary policy as narrowly as is possible and needed to address and perhaps correct the hazards within the workplace. The EEOC Policy Guidance notes that "[t]he same impulse that has led some employers to exaggerate the risks of employing handicapped workers can also lead to exaggeration of risk to offspring."¹²² Having to justify its classification as a proxy for safety to offspring should discourage employers from too-quickly adopting a plan excluding all women of child-bearing capacity from certain jobs.

This revisionist bfoq approach is more consistent with the language of Title VII and the prevailing construction of both defenses. The Preg-

118. *Id.*

119. *Hayes v. Shelby Memorial Hospital*, 726 F.2d at 1548.

120. EEOC Policy Guidance Number 915, 034, October 7, 1988 at 9.

121. *Id.*

122. *Id.* at 6, n. 16.

nancy Discrimination Act was passed to prohibit just such a conclusion that a policy which only applies to pregnant women can ever be gender-neutral. Although the EEOC and the courts could, and did, revise the business necessity defense to fit a reproductive hazard claim, they could not transform an instance of the clearest kind of facial discrimination into adverse impact.

CONCLUSION

In order to implement a plan excluding women of childbearing age from certain jobs, an employer should have to show either that most of the women covered would be unable to perform it without jeopardizing their ability to bear children or that it would be highly impractical to determine which ones would be affected on an individual basis. Requiring an employer to meet the public safety criteria of the bfoq defense has two salutary results. First, it comports with the legal reality that pregnancy classifications cannot be neutral. Second, it compels the employer to acquire the empirical data necessary to tailor the plan to fit the need, given the toxins present in the particular workplace. Employers should have some latitude in fashioning policies to protect the health of unborn children. But that latitude must be kept within narrow bounds so that it does not become impermissible discrimination.