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LEGISLATORS SHOULD NOT HAVE FEARED TITLE VII PRE-EMPTION OF CALIFORNIA'S TEMPORARY TRANSFER ALTERNATIVE TO DISCRIMINATORY FETAL PROTECTION POLICIES

I. INTRODUCTION

California law requires an employer¹ to temporarily transfer a pregnant employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests.² Legislative history demonstrates that the law was specifically designed to provide pregnant workers with employment rights during the

1. In California, an employer is defined as one with five or more employees. *See* CAL. GOV'T CODE § 12926(c) (West 1980 & Supp. 1989) which states: "(c) 'Employer,' except as hereinafter provided, includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities."

CAL. CODE REGS. tit. II, § 7286.5 (1986) (formerly CAL. ADMIN. CODE) states: "(a) 'Employer.' Any person or individual engaged in any business or enterprise regularly employing five or more individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written."

2. CAL. GOV'T CODE § 12945 (West 1980) states in pertinent part:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

. . . .

(c)(1) For an employer who has a policy, practice, or collective-bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(2) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such a transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

course of their pregnancy³ and to alleviate the consequences of discriminatory fetal protection policies.⁴

Unlike its treatment of a provision granting pregnancy disability leave,⁵ California law exempts employers⁶ subject to the Civil Rights Act of 1964 [hereinafter title VII]⁷ from its transfer provisions.⁸ Consequently, transfer provisions in California's

3. See *infra* notes 153 through 164 for discussion of legislative history.

4. See *infra* note 33 for definition and discussion of fetal protection policies.

5. The only portion of CAL. GOV'T CODE § 12945 which is applicable to title VII employers is section (b)(2) regarding mandatory pregnancy disability leave. See *infra* note 142 for text of CAL. GOV'T CODE § 12945(b)(2) (West 1980). The statute has been amended twice since its original passage in 1978.

6. The Equal Employment Opportunities subchapter of the Civil Rights Act of 1964 defines employers [hereinafter title VII employers] as:

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5, or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 5, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (1982).

7. Title VII of the Civil Rights Act of 1964 [hereinafter title VII] provides in pertinent part:

(a) Employer practices

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 . . . sex . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of individual's . . . sex

42 U.S.C. § 2000e-2(a)(1)-(2) (1982).

8. See *supra* note 2 for text of the statutory transfer provisions. The language invalidating most of the statute for employers subject to title VII was originally introduced in Article 4, Section 4 of A.B. 1960 codified at CAL. LABOR CODE § 1420.35. The section read:

SEC. 4. In the event Congress enacts legislation amending Title VII of the Civil Rights Act of 1964 to prohibit sex dis-

statutory scheme are enforceable⁹ only against those employers

crimination on the basis of pregnancy, the provisions of this act, except paragraph (2) of subdivision (b) of Section 1420.35 of the Labor Code, shall be inapplicable to any employer subject to such federal law, except that this section shall not pertain to complaints filed prior to the effective date of this act.

Assembly Bill No. 1960, Amended in Conference, Assembly, August 31, 1978; Senate, August 31, 1978 at 6.

Section four was subsequently amended by A.B. 121, ch., 13 § 1 (1979), to become subsection (e) as it exists in its present form. These provisions were codified at CAL. LABOR CODE § 1420.35 which was subsequently recodified in 1980 by ch. 992, § 4 (at CAL. GOV'T CODE § 12945 (West 1980)).

Throughout this comment, the invalidating subsection will be referred to as subsection (e) in its codified form and section four when referencing its placement in A.B. 1960.

9. CAL. GOV'T CODE § 12945 is interpreted and enforced by the California Fair Employment and Housing Commission (FEHC). See CAL. GOV'T CODE § 12935(a) (West 1980 & Supp. 1989). The FEHC has promulgated the following regulations which provide on-the-job protection for pregnant employees by allowing them to request a transfer:

CAL. CODE REGS. tit. II, § 7291.1(d)(1)(A) (1982) (formerly CAL. ADMIN. CODE) states in part:

(d) Dangers to Health, Safety, or Reproductive Function.

(1) If working conditions pose a greater danger to the health, safety, or reproductive functions of applicants or employees of one sex than to individuals of the other sex working under the same conditions, the employer or other covered entity shall make reasonable accommodation to:

(A) Upon the request of an employee of the more endangered sex, transfer the employee to a less hazardous or strenuous position for the duration of the greater danger, unless it can be demonstrated that the transfer would impose an undue hardship on the employer;

CAL. CODE REGS. tit. II, § 7291.2(d)(2) (1987) (formerly CAL. ADMIN. CODE) states in part:

. . . .

(2) Transfer to Less Hazardous or Strenuous Positions. For an employee temporarily disabled due to pregnancy, childbirth or a related medical condition but *who is capable of working at a less strenuous or hazardous position*, the following rules apply:

(A) All Employers with a Transfer Policy. When an employer has a policy, practice or collective bargaining agreement which requires or authorizes the transfer of a temporarily disabled employee to a less hazardous or strenuous position for the duration of the disability, it is unlawful for an employer to deny the request for an employee temporarily disabled due to pregnancy, childbirth or a related medical condition to transfer to a less hazardous or strenuous position.

(B) Title VII Employers with no Transfer Policy. Where an employer has no policy, practice, or collective bargaining agreement which requires or authorizes the transfer of a temporarily disabled employee to a less hazardous or strenuous

who have between five and fourteen employees.¹⁰

When developing the transfer provisions, California legislators anticipated that title VII would pre-empt the state's action.¹¹ In light of the recent United States Supreme Court decision in *California Federal Savings & Loan Ass'n v. Guerra*,¹²

position for the duration of the disability, it is unlawful for an employer to deny the request of an employee disabled by pregnancy, childbirth or a related medical condition to transfer to a less hazardous or strenuous position if the employer's refusal would have an *adverse impact on the equal employment opportunities of an employee disabled by pregnancy, childbirth or a related medical condition and the refusal is not excused by business necessity or a job-relatedness defense*

(C) Non-Title VII Employers with no Transfer Policy. Where a non-Title VII employer has no policy, practice or collective bargaining agreement which requires or authorizes the transfer of a temporarily disabled employee to a less hazardous or strenuous position for the duration of the disability, it is unlawful for a non-Title VII employer to refuse to transfer an employee disabled by pregnancy, childbirth or a related medical condition to a less hazardous or strenuous position for the duration of the disability provided that:

1. The employee requests the transfer;
2. The employee's request is based on the advice of her physician or other licensed health care practitioner; and
3. Such transfer can be reasonably accommodated by the employer. No employer is required to create additional employment which would not otherwise be created, discharge another employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the job.

(emphasis added).

10. See *supra* note 1 for California's definition of employer. The term "employer" is also defined in the CALIFORNIA CODE OF REGULATIONS which states: "A 'Title VII employer' is any 'employer,' as that term is defined in Government Code section 12926, subdivision (c), and section 7286.5 subdivision (a) of these regulations that is also subject to any provision of Title VII of the federal Civil Rights Act of 1964." CAL. CODE REGS. tit. II, § 7291.2(a)(7) (1987) (formerly CAL. ADMIN. CODE). See *supra* note 6 for federal definition of employer.

11. See *infra* notes 141 through 183 and accompanying text for discussion of the legislative history of CAL. GOV'T CODE § 12945. Legislative history materials for A.B. 1960, ch. 1321, § 1 Stats. 1978 and A.B. 121, ch. 13, § 1 Stats. 1979 are now part of the Golden Gate University School of Law library collection. These materials were originally obtained from the California Secretary of State, California State Archives, 1020 "O" Street, Room 130, Sacramento, California 95814.

12. 479 U.S. 272, 292 (1987) (CAL. GOV'T CODE § 12945(b)(2) not pre-empted by title VII, as amended by the Pregnancy Discrimination Act, as not inconsistent with the purposes of the federal statute, nor does it require the doing of an act which is unlawful under title VII).

this comment will argue that Congress did not intend to prohibit statutory accommodation of an individual pregnant employee's right to temporarily transfer from a hazardous work environment as an alternative to discriminatory fetal protection policies.

Additionally, this comment argues that the California legislature's fear of pre-emption was premature.¹³ The legislature should amend the statute¹⁴ to require compliance by title VII employers in order to conform with public policy articulated in *California Federal* and to fulfill the original legislative intent.¹⁵

This comment recognizes that both male and female workers have a right to work in a toxin-free environment.¹⁶ There are environments nevertheless, such as strenuous or hazardous¹⁷ workplaces, where one may need to consider that certain toxins have negative effects on the reproductive capabilities of workers.¹⁸ The goal of title VII, equality of employment opportu-

13. See *infra* notes 120 through 140 and accompanying text for discussion of the United States Supreme Court decision in *California Federal*, 479 U.S. 272 (1987).

14. CAL. GOV'T CODE § 12945 (West 1980). When amending the California statute, the legislature should delete subsection (e) which provides: "The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964." *Id.* at (e).

15. See *infra* notes 141 through 183 and accompanying text for discussion of legislative history.

16. See *infra* note 83 and accompanying text for discussion of an employer's federally mandated duty to provide workers with a hazard-free environment. CAL. GOV'T CODE § 12945 was California's attempt to extend this alternative to pregnant workers when the environment remained hazardous. See *supra* notes 159 through 163 and accompanying text.

17. The EEOC Compliance Manual defines a hazardous substance as a "chemical compound in any physical state (solid, liquid or gas) or other substance, (e.g., viruses or bacteria) that is known to cause or is suspected of causing, short or long term harm to individuals exposed to it, or to their offspring." *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.2(a) at 624:0001 (July 1986).

Hazardous physical agent is defined as "anything not a substance or condition that is known to cause or is suspected of causing short or long term harm to individuals exposed to it, or to their offspring. Examples include certain types of radiation, heat and possibility of extremes of air pressure (such as high or low altitudes)." *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.2(b) at 624:0001 (July 1986).

Hazardous condition is defined as "any physically stressful activity that is known to cause or is suspected of causing such harm. *There is at present very little scientific evidence as to what activities this may include.*" *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.2(c) at 624:0001 (July 1986) (emphasis added).

The general language of these definitions makes it impossible to avoid discriminatory impact on pregnant employees even when compliance is attempted.

18. Many commentators are concerned that "different" treatment of pregnant

nity,¹⁹ would not be undermined by accommodating a trait unique to women such as pregnancy, through the use of California's mandatory transfer provisions.

In illustration of the necessity of the right to temporary transfer provisions, this comment provides a brief history of employers' use of discriminatory fetal protection policies against pregnant workers.²⁰ Following is a discussion of the inadequacy of the federal approach to alleviating pregnancy discrimination in the context of hazardous environments, beginning with an examination of title VII as amended by the Pregnancy Discrimination Act and including California's Fair Employment and Housing Commission's disagreement with recent federal case law in this area.²¹ The section includes a discussion of enforcement of the Pregnancy Discrimination Act by the Equal Employment Opportunity Commission²² and Occupational Safety and Health Administration.²³ The section also critiques the bias in the scientific data upon which the federal system relies to justify and analyze employers' use of fetal protection policies.²⁴ The next section discusses the impact of federal case law on the Fair Employment and Housing Commission's enforcement capabilities.²⁵

The comment then explores the recent United States Supreme Court decision in *California Federal*.²⁶ Following, is an examination of the legislative history of the California statute which provides temporary transfers for pregnant employees in hazardous environments.²⁷ In light of *California Federal*, the

women in hazardous workplace environments, termed by some to be "preferential," will only discourage the scientific and employer communities from studying and remedying the effects of exposure to all workers. See Peteros, Pinto, Johnston, "Sorry, you can't work here . . .," SECOND OPINION: COALITION FOR THE MEDICAL RIGHTS OF WOMEN, at 7 (Oct. 1981). Employers should not be allowed to use fetal protection policies as a pretext for discriminating against women, and women must not be forced to choose between their health, pregnancy or occupations.

19. See *infra* notes 42 through 44 and accompanying text for discussion of the purposes of title VII.

20. See *infra* notes 29 through 41 and accompanying text.

21. See *infra* notes 42 through 59 and accompanying text; see *infra* notes 108 through 112 and accompanying text.

22. See *infra* notes 60 through 79 and accompanying text.

23. See *infra* notes 80 through 90 and accompanying text.

24. See *infra* notes 91 through 107 and accompanying text.

25. See *infra* notes 113 through 119 and accompanying text.

26. See *infra* notes 120 through 140 and accompanying text.

27. See *infra* notes 141 through 183 and accompanying text.

comment argues that the California legislature was premature in fearing title VII pre-emption. The conclusion asserts that the Pregnancy Discrimination Act and California statute can coexist and argues for the elimination of subsection (e) of CAL. Gov't CODE § 12945.²⁸

II. BACKGROUND

A. HISTORY OF DISCRIMINATION AGAINST PREGNANT WORKERS

Discrimination based upon an individual's gender has been prohibited at the federal level since 1964.²⁹ Discrimination based upon pregnancy, a characteristic unique to women, has only been federally prohibited since 1978.³⁰ Employees in California have a right to freedom from gender discrimination protected under the state constitution³¹ as well as by statute.³² Despite

28. CAL. GOV'T CODE § 12945(e) (West 1980) provides: "The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964."

29. See *supra* note 7 for text of title VII of the Civil Rights Act of 1964 codified at 42 U.S.C. § 2000e-2(a)(1)-(2) (1982).

30. See 42 U.S.C. § 2000e-2(a)(1)-(2) (1982). Congress enacted S. 995, 95th Cong., 2d Sess. (Oct. 31, 1978) § 1, 92 Stat. 2076 (Pub. L. 95-555). Congressional Record, Proceedings and Debates, Volume 124, Part 28, October 14, 1978 at 38086. The Pregnancy Discrimination Act of 1978 (PDA) added subsection (k) to the definition portion of title VII. Subsection (k) provides in relevant part:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

42 U.S.C. § 2000e(k) (1982).

31. CAL. CONST. art. 1, § 8 (West 1980) provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." Acts which violate this clause are subject to strict scrutiny. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971) (strict scrutiny used to conclude that sexual classifications made with respect to a fundamental interest such as employment, are suspect).

32. CAL. GOV'T CODE § 12921 (West 1980) provides: "The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right."

Employment protection for pregnant workers is also supplied by CAL. GOV'T CODE

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federal and state prohibitions, discrimination against pregnant women persists through employers' use of fetal protection policies.³³

§ 12940 (West 1980 & Supp. 1989) which provides in relevant part:

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

33. Fetal protection or vulnerability policies are measures taken by employers terminating pregnant and fertile women from employment, or excluding them from particular positions within a company, where such employment is alleged to involve risk of fetal injury. Annotation, *Exclusion of Women from Employment Involving Risk of Fetal Injury as Violative of Title VII of Civil Rights Act of 1964* (42 U.S.C. § 2000e et seq.), 66 A.L.R. FED. 968 (1984).

Many employers have sought to protect fetuses from the dangers of toxic or hazardous work environments, either by totally excluding potential mothers from certain jobs or by demanding medical proof of sterilization from women of childbearing age before allowing them to work in potentially hazardous jobs. See 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, 641 n.1, 642 n.7 (1981) [hereinafter Williams, *Firing the Woman*]. Fetal protection policies may be implemented regardless of the individual woman's desire to have children, her sexual orientation or proof of spousal sterilization. See Bertin, *Reproductive Hazards in the Workplace*, REPRODUCTIVE LAWS FOR THE 1990s 277 (S. Cohen & N. Taub eds. 1989) [hereinafter Bertin, *Reproductive Hazards*]. These policies are violative of title VII in that: (1) the policies tend to be based on archaic assumptions regarding women's role as childbearers rather than actual hazards to fetuses demonstrated by scientific evidence; (2) the policies frequently are used as a pretext to keep women from more lucrative parts of the workforce, see Bertin, *Reproductive Hazards*, *supra*, at 279-82; and (3) the scientific data that is available regarding danger to the fetus through parental exposure to toxins shows that *paternal* exposure is also a significant source of danger. See Williams, *Firing the Woman*, *supra*, at 656-63.

Employers may have continued to use fetal protection policies because reproductive injuries which do not inhibit an individual's ability to work may be excluded by many state workers' compensation schemes. However, a child who can prove injury caused by his or her parents' work environment may have a cause of action against the employer after birth. See Bertin and Henifin, *Legal Issues in Women's Occupational Health*, WOMEN AND WORK: AN ANNUAL REVIEW, Vol. 2, Ch. 4 at 98-99 (A. Stromberg, L. Larwood, B. Gutek, eds. 1987) [hereinafter Bertin, *Legal Issues*]. These legal impediments pave the way for employer justification of fetal protection policies.

The federal Equal Employment Opportunities Commission (EEOC) has specifically acknowledged that "[i]n a number of situations the presence of known or suspected hazards has led employers to exclude one or more classes protected by Title VII (usually

B. DISCRIMINATORY USE OF FETAL PROTECTION POLICIES

Employment outside the home has been an economic necessity for women since well before the turn of the century.³⁴ Traditionally, occupations viewed as being exclusively "women's jobs" were considered safe despite considerable evidence to the contrary.³⁵ Fetal protection policies are now used throughout the country to exclude both pregnant women and women of childbearing capacity from jobs traditionally considered male-dominated.³⁶ Recently employers have also begun to exclude women from industries substantially populated by women,³⁷ al-

women) from the workplace because of concern for the health of those employees and/or their fetuses or because of concern for liability for lawsuits arising from harm to those employees and/or their fetuses." *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.1 at 624:0001 (July 1986).

In this writer's opinion, fetal protection policies should never pass strict scrutiny analysis required in California, *see supra* note 31, because of the inherent bias in the medical knowledge and data collection surrounding reproductive health issues. *See infra* notes 91 through 107 and accompanying text for discussion of bias in scientific information concerning reproductive health. Consequently, individualized solutions, such as temporary transfer provisions as provided in CAL. GOV'T CODE § 12945 (c)(1)-(2) (West 1980) must be mandated.

34. J. STELLMAN, *WOMEN'S WORK, WOMEN'S HEALTH, MYTHS AND REALITIES* 7 (1977). In 1985, 64% of all women ages 16 to 64 worked for pay. Of the more than 36 million women employed in non-professional occupations, 24 million (67%) worked in female-dominated jobs (those where 75% or more of the workers were women). Only 11% of all women workers in 1985 were in non-traditional occupations (those in which 75% or more of the workers are men). *An Overview of Women in the Work Force*, NATIONAL COMMISSION ON WORKING WOMEN (1988). Eighty percent of the women who worked outside the home in 1983, were in clerical, sales, service, factory or plant jobs. Women constituted half of the 12 million workers employed in the nation's plants and factories. *Women, Work and Health Hazards*, NATIONAL COMMISSION ON WORKING WOMEN (1988).

35. For examples of workplace hazards, *see* East Bay SftP, *Danger: Women's Work*, SCIENCE FOR THE PEOPLE, March/April 1980. Health workers are exposed to hepatitis, back injury from heavy lifting and heat stress. *Id.* at 8-9. Clerical workers suffer from stress and the hazards of poor work space design, leading to back trouble and eye strain. *Id.* at 9-10. Women in the textile industry breathe in cotton fibers, which can produce byssinosis, a disabling disease commonly known as "brown lung." *Id.* at 10-11. Researchers have also linked the use of VDTs (video display terminals) to potential for miscarriage. *Id.* at 10. *See also* McCloud, *Pink Collar Blues: Potential Hazards of Video Display Terminal Radiation*, 57 S. CAL. L. REV. 139, 150 (1983).

36. Bertin, *Reproductive Hazards*, *supra* note 33, at 278 (manufacturers of semiconductor chips announced plans to limit employment of women).

37. *See id.* Use of discriminatory fetal protection policies suggests that women are viewed by employers as "marginal" workers, *id.*, whose "rights and interests in employment must always yield to their paramount responsibility as childbearers." *Id.* *See* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1232 (1986) ("Employers' associations have asserted as uncontroversial that any independent interests women have should yield to the interest of the fetus or potential

legedly because they fear potential harm to women's reproductive health or to pregnant employees' fetuses. However, to treat all women during their entire working life as "potential breeders" directly violates the clear mandate of title VII.³⁸

Although fetal protection policies purport to protect future generations, men are infrequently excluded from hazardous work environments.³⁹ Additionally, exclusion solely of women is premised on biased scientific information.⁴⁰ Thus, fetal protection

fetus.")

Evidence suggests that most women work for the same reasons men do; to support themselves and their families. In 1978, over 42 million women were in the labor force as full-time and part-time workers. Forty percent were either single, widowed, separated or divorced, tending to suggest that these women worked to support themselves and dependents. See East Bay SftP, *Danger: Women's Work*, SCIENCE FOR THE PEOPLE, March/April 1980 at 7. In 1978, nearly two-thirds of the women in the labor force worked to support themselves and their families, or to supplement low family incomes. Women's Bureau, U.S. Department of Labor, *Economic Responsibilities of Working Women*, (Washington, D.C., Sept. 1979) at 1. The average American woman will bear only two children. Most working women plan the timing of those births, and many blue-collar women bear children early in life, before going to work. Bertin, *Reproductive Hazards*, *supra* note 33, at 279 (citing U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports, Series P-20, No. 325, "Fertility of American Women: June 1977," Table B, at 3 (1978)).

38. Many women prevent pregnancy through the use of birth control, have spouses who are infertile, intentionally choose sterilization or use a host of other family planning methods. See Bertin, *Reproductive Hazards*, *supra* note 33, at 279 ("[c]oncern for specific workplace effects on pregnancy cannot rationally be directed at the entire female workforce, and women cannot be viewed as permanently potentially pregnant or as powerless to control conception and childbirth.") See *supra* note 7 for text of title VII of the Civil Rights Act of 1964 codified at 42 U.S.C. § 2000e-2(a)(1)-(2) (1982); see also *infra* notes 50 through 79 for discussion of the Equal Employment Opportunities Commission's application of title VII.

39. Men's offspring are also subject to potential harm. See Bertin, *Reproductive Hazards*, *supra* note 33, at 281-82 (not only are men not excluded, when harm to their reproductive capacity is caused by a hazard, the hazard is usually banned). See *infra* notes 97 and 98 and accompanying text for further discussion of harm to men's reproductive capabilities.

40. See *infra* notes 91 through 107 and accompanying text for discussion of bias in scientific information.

In *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir.) (citing Williams, *Firing the Woman*, *supra* note 33, at 661), *reh'g denied*, 732 F.2d 944 (11th Cir. 1984) the Eleventh Circuit in dicta noted:

[A]t present there is, even within the scientific community, a certain amount of subtle bias that has focused research on the hazardous effects of workplace substances as they pertain to reproductive health on women more so than men. . . . In those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed

policies realistically operate as effective means of excluding women from multiple facets of the workforce.⁴¹

III. FEDERAL LAW - WHY IT FAILS TO BE SUFFICIENT

A. TITLE VII AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT

Congress enacted title VII of the Civil Rights Act of 1964⁴²

only women. As additional research on men becomes available, however, the employer must adjust its policy or risk running afoul of Title VII.

Hayes, 726 F.2d at 1548-49 (emphasis added). With dicta such as this, title VII employers will never have any incentive to seek out medical research on men.

A recent report prepared by the American Medical Association to heighten physicians' awareness about the circumstances associated with reproductive health of workers is also quite telling:

The advice given by generations of physicians regarding work during normal pregnancy has historically been more the result of social and cultural beliefs about the nature of pregnancy (and of pregnant women) than the result of any documented medical experience with pregnancy and work. In attempting to review the available literature on the effect of gestation on ability to work, it is impressive to realize how few of our standard medical beliefs about the physical and emotional characteristics of pregnancy have any scientific basis.

Effects of Pregnancy on Work Performance, J.A.M.A., Vol. 251, No. 15 at 1995 (Apr. 20, 1984).

Even if title VII employers did attempt to seek out research on effects of male exposure, there is little reliable data available due in part to the longstanding bias that reproduction is solely a women's health issue. See *infra* notes 91 through 107.

41. See Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986) (comparing contemporary fetal protection policies to sex-specific protectionist legislation of the early twentieth century). Fetal protection policies appear to be based upon the following stereotypical ideas about women's role in society: (1) All women are potential mothers; (2) protecting the embryo or fetus is paramount to protecting the lives of women; (3) women are totally responsible for reproduction and parenting, and are economically dependent upon men. See Peteros, Pinto, Johnston, "Sorry, you can't work here . . .," SECOND OPINION: COALITION FOR THE MEDICAL RIGHTS OF WOMEN, at 6 (Oct. 1981).

For a particularly egregious example of the endorsement of the use of fetal protection policies, see *Oil, Chemical and Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984), (Bork, J.) where the court announced that a company's policy of requiring women to undergo voluntary sterilization procedures in order to keep their jobs was not a "hazard" for purposes of the Occupational Health & Safety Act of 1970, § 5(a)(1), as amended, 29 U.S.C. § 654(a)(1) (1982). Five women submitted to surgical sterilization to keep their jobs, and one year later the department in which they worked was closed, allegedly for "business reasons". See also Bertin, *Reproductive Hazards*, *supra* note 33, at 278.

42. 42 U.S.C. § 2000e-2(a)(1)-(2) (1982).

for the express purpose of prohibiting employment discrimination, including employment discrimination based on sex.⁴³ In enacting title VII, Congress required the removal of artificial, arbitrary and unnecessary barriers to employment which operated to invidiously discriminate on the basis of impermissible classifications,⁴⁴ including sex.

In response to the United States Supreme Court's holding in *General Electric Co. v. Gilbert*,⁴⁵ Congress found it necessary to expand its definition of sex discrimination⁴⁶ and enacted the Pregnancy Discrimination Act of 1978 [hereinafter PDA].⁴⁷ Like

43. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 276-77 (1987). Referring to the Pregnancy Discrimination Act, Senator Williams, the sponsor of Senate Bill S. 995 stated:

The hallmark of title VII, and of this legislation, is that it would require that all American workers be treated fairly by their employers, without regard to their sex, except insofar as it would affect their ability or inability to work. Any kind of arbitrary classification . . . has no place in this legislation.

Id. (citing 123 Cong. Rec. 15047 (daily ed. Sept. 16, 1977)).

44. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). The Court held that a company could not as a condition for employment require black employees to have a high school degree or pass a standardized intelligence test. Neither criteria could be shown to be related to successful job performance and both operated to disqualify blacks at a rate disproportionately higher than whites. *Id.* at 425-26. The Court clarified that Congress' objective in enacting title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group" of employees over another. *Id.* at 429-30.

45. 429 U.S. 125 (1976). The majority opinion written by Justice Rehnquist held that an otherwise comprehensive disability insurance plan did not violate title VII even though it failed to cover pregnancy related disabilities. *Id.* at 145-46. The Court reasoned that since "there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme. . . ." *Id.* at 138. The dissent stated that the plan covered men for all categories of risk but gave women only partial protection, and was thus exactly the type of discrimination based on gender which title VII meant to avoid. *Id.* at 160 (Brennan, J., dissenting). The dissenting Justices' opinion provided the legal basis for subsequent passage of the Pregnancy Discrimination Act. *California Federal*, 479 U.S. at 277 n.6.

46. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983). There, the Court held that in denying pregnancy benefits to the wives of male employees, the employer's health plan violated the Pregnancy Discrimination Act by unlawfully giving married male employees' dependents a benefit package that was less inclusive than the dependency coverage provided to married female employees. *Id.* at 685.

47. 42 U.S.C. § 2000e(k) (1982). The Pregnancy Discrimination Act unambiguously demonstrated that Congress agreed with both the holding and reasoning announced by the dissent in *Gilbert*. See *Newport News*, 462 U.S. at 678-79. "[I]t seems only common sense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy." *Id.* at n.17 (quoting 123 Cong. Rec. 10581) (1977) (remarks of Rep. Hawkins).

the California legislature,⁴⁸ Congress overrode the *Gilbert* decision⁴⁹ and explicitly stated that impermissible sex discrimination included discrimination on the basis of pregnancy.⁵⁰

As interpreted⁵¹ and enforced,⁵² the PDA⁵³ fails to adequately prevent discrimination against women who continue to work in hazardous workplace environments⁵⁴ when their preg-

48. See *infra* notes 154 and 155 and accompanying text.

49. *Newport News*, 462 U.S. at 676.

50. *Id.* at 677-78.

51. For analysis purposes the United States Supreme Court has broken the critical first sentence of the PDA into two phrases. See *Newport News*, 478 U.S. at 678 n.14.

To illustrate, the phrases are as follows:

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*

See 42 U.S.C. § 2000e(k) (1982) (emphasis added).

The meaning of the second phrase of the PDA provides a source of debate. Some argue that its clear language means that women should be treated exactly the same as other people who are unable to work and that the second phrase limits the meaning of the first. Others argue that through the second phrase, Congress intended merely to illustrate remedies for pregnancy discrimination. See *Furnish, Beyond Protection: Relevant Differences and Equality in the Toxic Work Environment*, 21 U.C. DAVIS L. REV. 1, 4-6 (1987).

The Supreme Court has held that the second phrase is explanatory only and does not limit the meaning of the first phrase. The Court stated "[t]he meaning of the first clause [of the PDA] is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." *Newport News*, 462 U.S. at 678 n.14.

California Federal, 479 U.S. 272 (1987), resolved the debate in favor of those who argue that the second phrase of the PDA is merely illustrative and does not prohibit accommodation of pregnancy as a characteristic unique to women. See *id.* at 285.

52. The Equal Employment Opportunities Commission (EEOC) has recently promulgated federal guidelines on fetal protection policies, *EEOC's Policy Guidance on Reproductive and Fetal Hazards*, (BNA) No. 193, D-1 to D-4 (Oct. 5, 1988) [hereinafter *EEOC fetal protection guidelines*]. See *infra* notes 60 through 79 for critique of the guidelines' analysis.

53. 42 U.S.C. § 2000e(k) (1982).

54. Industries associated with reproductive toxic effects to both men and women include: agriculture, anesthesia, construction (builders and painters), degreasing, drug manufacturing, dry cleaning, electrical power, leather, oil and gasoline refining and retailing, painting and dyeing, plastics and polymer manufacturing, smelting, synthetic chemistry and textile manufacturing. See *Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave, and Health & Safety*, (BNA) at 75-87 [hereinafter *BNA Pregnancy and Employment*].

See generally Buttrey, *Ergonomics/Physical Energy Conditions*, GUIDELINES ON

nancy is not technically disabling.⁵⁵ Likening pregnancy to a "temporary disability," as do federal⁵⁶ and state⁵⁷ statutes and regulations, tends to stigmatize women.⁵⁸ Allowing employers to focus on pregnancy as analogous to an illness draws attention away from the need to improve safety in work environments which present potential harm to the reproductive health of *all workers*.⁵⁹ Tolerance of fetal protection policies prevents title

PREGNANCY AND WORK (1977); Brix, *Environmental and Occupational Hazards to the Fetus*, 27 J. REPRODUCTIVE MEDICINE 577 (Sept. 1982).

55. A pregnancy is technically disabling when a woman is unable to adequately perform her job. However, it is important to note that the state of pregnancy is infrequently disabling and is not an illness.

56. Pregnancy disability, defined as the ability or inability to work due to pregnancy related conditions, is a circumstance which is protected from employment discrimination. See *supra* note 30. The PDA incorporated language focused on pregnancy as a disability due to its historical context as a Congressional response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (pregnancy disability insurance). See *supra* notes 45 to 50 and accompanying text.

Although the United States Supreme Court has found the second phrase of the PDA to be illustrative in nature, see *infra* notes 125 and 126, effectiveness of the PDA for pregnant workers remaining in hazardous workplaces has been limited by analyzing pregnancy discrimination with the pre-existing and ill-fitting legal terminology and guidelines used for employees with disabilities. In reality, for many employees pregnancy does not result in an inability to work (except, of course, during the delivery period). Such limited analysis is underinclusive in situations where pregnant women need protection from hazardous workplaces, without being subject to employer discrimination.

57. CAL. CODE REGS. tit. 2, § 7291.2(a) (1987) (formerly CAL. ADMIN. CODE) states in part:

(1) A woman is "disabled by pregnancy, childbirth or a related medical condition" if in the opinion of her own doctor or other licensed health care practitioner she is unable because of pregnancy, childbirth or a related medical condition to perform the essential duties of her job or to perform these duties without undue risk to herself or other persons.

(2) A woman is "affected by pregnancy, childbirth or related medical conditions" if she is pregnant, in childbirth or has a related medical condition, or is so perceived, whether or not she is disabled by any of these conditions.

58. This perspective also has the deleterious effect of equating all pregnancy in the workplace with disability, using legal frameworks developed for temporary disabilities, instead of dealing with the condition of pregnancy as a separate, unique and permanent facet of the workforce.

The disability language in the second phrase of the PDA has a potentially chilling effect on the adoption of statutory alternatives, such as mandatory transfer upon request provisions, to employers' use of fetal protection policies in toxic work environments. CAL. GOV'T CODE § 12945 (West 1980) is exemplary of this effect. In anticipation of the passage of the PDA, the California legislators voluntarily invalidated most of the statute as it applied to employers subject to title VII. See *infra* notes 165 through 183 and accompanying text.

59. Pregnant workers in hazardous environments frequently have no disability or inability to perform their job tasks. Rather, it is the work environment itself which is

VII employers from planning for and accommodating pregnancy as a permanent facet of the workplace.

B. ENFORCEMENT OF TITLE VII AND THE PDA

1. EEOC Standards and Enforcement

The Equal Employment Opportunity Commission (EEOC) is the agency charged with enforcing title VII.⁶⁰ In early October 1988, the EEOC announced its long-awaited Policy Guidance on Reproductive and Fetal Hazards [hereinafter EEOC fetal protection guidelines].⁶¹ The Commission's newly articulated position on fetal protection concludes that employer policies which exclude women from workplaces constitute per se violations of the Pregnancy Discrimination Act.⁶² However, the EEOC continues to allow limited use of fetal protection policies and justifies such use as serving a dual public policy purpose.⁶³

"sick".

60. See 42 U.S.C. §§ 2000e-4 - 2000e-5 (1982); see also *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.3 at 624:0003 (July 1986) which states:

Limited Role of Commission - In investigating charges under this manual section, the EOS should keep in mind that it is not the Commission's role to implement or enforce federal laws related to health and safety in the workplace. This role remains with the Occupational Safety and Health Administration and other federal and state agencies specifically granted that responsibility. Rather, the Commission's responsibility is to assure equality of employment opportunity. Title VII only applies when an employer has a policy or practice of excluding from the workplace one group protected by Title VII and not another. . . .

61. EEOC fetal protection guidelines, *supra* note 52, at D-2. The Commission had proposed earlier standards, but abandoned them for a case-by-case analysis in 1981. *Id.* For criticism of the EEOC's inaction in this area, see Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities With Respect to Fetal Protection Policies*, 23 HARV. J. ON LEGIS. 159, 172-74 (1986) [hereinafter Timko, *Exploring the Limits*] (EEOC abandoned ineffective proposed guidelines in 1981, deciding to review fetal protection policies on a case-by-case basis); BNA *Pregnancy and Employment*, *supra* note 54, at 25 (Augustus Hawkins, Chairman, Committee on Housing, Education and Labor, wrote the EEOC in 1987 requesting an explanation for the EEOC's reluctance to issue regulations on reproductive hazards discrimination).

62. Since the passage of the PDA, a pregnancy-based rule, such as a fetal protection policy, can never be facially "neutral". Thus, if the plaintiff shows that the rule is pregnancy-based, she has made out a prima facie case of discrimination. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1547-48 (11th Cir. 1984). See also EEOC fetal protection guidelines, *supra* note 52, at D-1.

63. The EEOC's articulated policy is to prevent "unnecessary limitations on women's employment opportunities, while preserving the employers' (and society's) legit-

The new EEOC fetal protection guidelines purport to give guidance for analyzing cases where employers have implemented fetal protection policies which limit women's, but not men's, employment opportunities.⁶⁴ In reality, the new EEOC guidelines do little more than affirm the pre-existing federal case law analysis used in evaluating discriminatory employer practices.⁶⁵

imate interest in protecting the health of offspring." *EEOC fetal protection guidelines*, *supra* note 52, at D-1.

64. *Id.* The EEOC purports to scrutinize use of fetal protection policies because the policies interfere with the employment opportunities of women, a class of workers protected by title VII. *Id.*

To effectively evaluate fetal protection policies, the EEOC requires the following information:

- (1) the nature of the specific toxic or other hazard(s) that exist(s) in the workplace;
- (2) scientific evidence relating to the existence or nonexistence of a substantial risk of fetal or reproductive harm through the exposure of pregnant or fertile female employees or male employees to the hazard, including information from the Occupational Safety and Health Administration (OSHA), the National Institute of Occupational Safety and Health (NIOSH), the Environmental Protection Agency (EPA), the Nuclear Regulatory Commission (NRC), or other federal agencies;
- (3) the specific time period during which exposure to the toxic substance or other hazard will cause harm;
- (4) alternative methods of protection from the hazard, and whether they have been utilized by the employer;
- (5) whether the employer's policy is under- or over-inclusive, *i.e.*, whether there are employees who are being excluded from the workplace who need not be excluded or whether there are employees who are exposed to hazards who should be protected;
- (6) evidence as to the effectiveness of the employer's exclusionary policy;
- (7) whether the employer is complying with applicable federal, state, or local occupational safety and health laws;
- (8) whether the collective bargaining agreement contains provisions which may be relevant to the issue of less discriminatory alternatives; and
- (9) what information employees have been given about the potential hazards.

Id. at D-2.

65. The analysis has previously been articulated by three United States Circuit Courts of Appeals which have addressed the issue of the discriminatory effects of fetal protection policies. *See Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (giving new meaning to the business necessity defense); *Wright v. Olin Corp.*, 697 F.2d 1172, 1184 (4th Cir. 1982), *vacated*, 767 F.2d 915 (4th Cir. 1984) (first case to discuss fetal protection issues and to announce a framework for analysis of claims purported to be violative of title VII of the Civil Rights Act of 1964); *Zuniga v. Kleberg County Hosp.*, Kingsville, Tex., 692 F.2d 986 (5th Cir. 1982). *Hayes* and *Zuniga* involved x-ray technicians who were fired once they became pregnant. Both employers claimed that their pur-

The analysis used by the federal courts and adopted by the EEOC allows an employer that has implemented a fetal protection policy to assert the business necessity defense⁶⁶ if it can show its discriminatory practice is necessary for "safe and efficient job performance."⁶⁷ The EEOC fetal protection guidelines solidify an employer's opportunity to utilize the business necessity defense, despite the fact that the bona fide occupational qualification (BFOQ) defense⁶⁸ has traditionally been the only

pose in firing the women was to protect the women's unborn children from the potentially detrimental effect of x-ray radiation. The fifth and eleventh circuits both found that the employers' policies were based on unsupported assumptions about risks, rather than scientific data. See *Hayes*, 726 F.2d at 1550-52; *Zuniga*, 692 F.2d at 992-94.

Recently the Seventh Circuit considered International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) and found plaintiff UAW had failed to carry its burden of persuasion that the employer should not be able to utilize a business necessity defense.

66. "Business necessity" was redefined as the existence of an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. *Hayes*, 726 F.2d at 1552 n.14. Traditionally, this defense has been narrowly used to uphold employer policies related to job performance. The problem in the fetal protection context is that fetal protection does not, in a strict sense, have anything to do with actual job performance. *Id.* at 1552. The Eleventh Circuit chose to give the defense broader meaning, with its sweeping statement, "we simply recognize fetal protection as a legitimate area of employer concern to which the business necessity defense extends." *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1552 n.14 (11th Cir. 1984).

Under the California Fair Employment and Housing Act "business necessity" follows the old title VII analysis and is only available where a facially neutral employment policy has a discriminatory impact on a protected class. *City and County of San Francisco v. Fair Employment & Hous. Comm'n*, 191 Cal. App. 3d 976, 985-86, 236 Cal. Rptr. 716, 721-22, *rev. dismissed*, (1987). The California Fair Employment and Housing Commission (FEHC) has refused to apply the "business necessity" defense in fetal protection cases. The FEHC has stated, "[i]t is readily apparent that respondent's FPP, which applies only to women and excludes only women, is . . . an overtly discriminatory practice. As such, the 'business necessity' defense is totally inapposite to this case and is unavailable as a defense to defendant's conduct." *Dep't of Fair Employment & Hous. v. Globe Battery*, FEHC Dec. No. 87-19 at 11 (1987). See also *Dep't of Fair Employment & Hous. Comm'n v. Interstate Brands Corp.*, FEHC Dec. No. 78-05 at 17 n.11 (1979).

67. *Hayes*, 726 F.2d at 1552 n.14.

68. The BFOQ defense is available only when an employer can show that the "excluded class is unable to perform the duties that constitute the essence of the job." *Hayes*, 726 F.2d at 1549. Title VII defines these duties as reasonably "necessary to the normal operation of the particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1982).

In California, the BFOQ defense is narrowly construed and the burden is on the employer to establish the defense by a preponderance of the evidence. See *Bohemian Club v. Fair Employment & Hous. Comm'n*, 187 Cal. App. 3d 1, 18-23, 231 Cal. Rptr. 769, 799-83 (1986), *appeal dismissed*, 484 U.S. 805 (1987); *County of Alameda v. Fair Employment & Hous. Comm'n*, 153 Cal. App. 3d 499, 505, 200 Cal. Rptr. 381, 384 (1984).

The FEHC has refused to allow the BFOQ defense to be used to justify a fetal protection policy where there was "some evidence in the record of potential risk to the fetuses and offspring of male, as well as female, workers who are exposed to lead. . . ." *Dep't of Fair Employment & Hous. v. Globe Battery*, FEHC Dec. No. 87-19 at 10 (1987)

available defense in cases of overt discrimination.⁶⁹

The EEOC guidelines prohibit employers from "establishing policies that exclude from the workplace members of one sex but not the other because of a reproductive or fetal hazard, unless that policy can be justified by *reputable objective evidence of an essentially scientific nature*."⁷⁰ Proof that harm to fetuses occurs through the mother and not the father must be satisfied by "substantial evidence" before an employer may exclude employees of one sex from the workplace.⁷¹ Theoretically, workers may then be excluded only to the extent necessary to protect their offspring from reproductive or fetal hazards.⁷² However, the term "substantial evidence" is not satisfactorily defined.⁷³ This lack of definition impairs the EEOC fetal protection guidelines' ability to provide effective prevention and to eliminate discriminatory employer action allegedly supported by scientific

(emphasis in original).

69. *EEOC fetal protection guidelines*, *supra* note 52, at D-1. The court in *Hayes* found that the potential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the BFOQ issue, and that therefore the defense did not apply to cases concerning fetal protection policies. *Hayes v. Shelby Memorial Hosp.*, 726 F.2d at 1548.

70. *EEOC fetal protection guidelines*, *supra* note 52, at D-1 (citing *Hayes*, 726 F.2d at 1548) (emphasis added). See *infra* notes 91 through 107 and accompanying text for discussion of lack of objectivity and reliability in the scientific evidence available to OSHA when formulating these standards.

71. See *EEOC fetal protection guidelines*, *supra* note 52, at D-1. Under the new EEOC fetal protection guidelines, the issues the Commission will address when analyzing a potentially discriminatory fetal protection policy are: (1) whether there exists a substantial risk of harm to employees' offspring through the exposure of employees to a reproductive or fetal hazard in the workplace; (2) whether the harm to employees' offspring takes place through the exposure of employees of one sex but not employees of the opposite sex; and (3) whether the employer's policy effectively eliminates the risk of fetal or reproductive harm. *Id.*

72. *Id.* If there is a reasonable alternative policy which would provide the same protection with a less discriminatory impact, the employers' policy will not survive scrutiny. *Id.* The reality in California is, however, that employers provide pregnant workers with lists of chemicals used in the workplace. Women then must take the lists to their doctors to get approval to continue working in the environment. If the doctor will not give approval, the woman loses her job. Consequently, many women who cannot afford to lose their jobs continue to work in dangerous environments. Statements by Alicia N. Orosco, *Emerging Issues in Environmental Law, Twentieth National Conference on Women in the Law*, (Mar. 30 - Apr. 2, 1989) (discussing the electronics industry in "Silicon Valley" Santa Clara County, California).

73. See *EEOC fetal protection guidelines*, *supra* note 52, at D-1 (EEOC provides no definition of "substantial evidence"). Without a standard for measuring how much evidence is "substantial" it seems truly impossible for any court or employer to achieve consistent results.

evidence.

There is yet another defective aspect of the new EEOC fetal protection guidelines. The Commission has determined that should it find inconclusive evidence regarding risk of fetal or reproductive harm through male employees, even if due to the "paucity of research,"⁷⁴ it will proceed as if a determination had been made that the risks in question were substantially confined to female employees.⁷⁵ A cycle of justifiable discrimination is therefore created by reliance on biased scientific information.

The analysis developed by federal circuit courts and adopted in the EEOC fetal protection guidelines scrutinizes an employer's policy only after a pregnant woman has been impermissibly excluded from the workplace. Consequently, the first pregnant woman to experience discrimination due to an employer's fetal protection policy will be required to litigate to obtain the right to discrimination-free employment which she is guaranteed by title VII⁷⁶ in the first place.⁷⁷

In practice, the federally promulgated guidelines may influence California employers who are excused from compliance

74. *Id.* at D-2.

75. *Id.*

76. Title VII of the Civil Rights Act of 1964 codified at 42 U.S.C. § 2000e-2(a)(2) (1982) provides in pertinent part:

(a) Employer Practices

It shall be 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 individual of employment opportunities or otherwise adversely affect his status as an employee, because of individual's . . . sex

77. The plaintiff's burden has been made even more onerous by the Supreme Court's decision in *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. ___, ___, 109 S.Ct. ___, ___, 104 L.Ed.2d 733, 750 (1989) (statistically demonstrated racial imbalance in one segment of an employer's workforce was insufficient to establish a prima facie case of disparate impact with respect to selection of workers for other positions). In *Wards Cove*, the Court found that a plaintiff employee must establish not only that an employer's practice has a prima facie disparate impact, but that the impact was caused by the employer's practice and not some other societal factor. *Id.* at 750-51 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. ___, ___, 108 S.Ct. 2777, ___, 101 L.Ed.2d 827, 845 (1989) ("the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."))

with CAL. GOV'T CODE § 12945⁷⁸ to ignore available scientific evidence regarding harm to the reproductive health of both sexes until a victim has the ability to challenge the discriminatory exclusionary policies.⁷⁹

2. OSHA Standards and Enforcement

The fetal protection guidelines recently promulgated by the EEOC⁸⁰ instruct federal courts to defer to Occupational Safety and Health Administration (OSHA)⁸¹ when evaluating scientific evidence provided by litigants attempting to prove that a fetus will suffer harm as a result of parental exposure to toxic or hazardous conditions.⁸² The EEOC's permissive approach in allowing employers to utilize defenses based on biased scientific evidence fails to give meaningful consideration to the fact that women, as well as men, are guaranteed safe working conditions

78. See *infra* note 142 for text of CAL. GOV'T CODE § 12945 (West 1980).

CAL. GOV'T CODE § 12945(e) effectively excuses title VII employers from complying with the transfer provisions and permits them to follow the less stringent federal guidelines. See *supra* notes 60 through 79 for critique of the new EEOC fetal protection guidelines.

79. See generally *Johnson Controls v. California Fair Employment & Hous. Comm'n*, No. G007029 (Cal. App. 4th Dist. filed 1988) (Globe Battery refused to hire a woman for job in lead battery plant in Fullerton, California because she would not provide medical proof of sterility).

80. The EEOC's recently promulgated guidelines are to be used in evaluating claims of pregnancy discrimination based on an employer's use of a fetal protection policy. See *EEOC fetal protection guidelines*, *supra* note 52, at D-1 to D-4.

81. The federal government looks to the Occupational Health & Safety Administration to set exposure limits for hazardous workplace conditions. The Occupational Safety and Health Act (OSHA) codified at 29 U.S.C. § 651(b)(3) (1982), established the Occupational Health Review Commission to set these standards. Unfortunately, to date OSHA has only set three standards regarding reproductive hazards. See *infra* note 87 and accompanying text.

82. *EEOC fetal protection guidelines*, *supra* note 52, at D-2. Unfortunately, OSHA has not been effectively enforced by federal courts in the past to protect women from discriminatory fetal protection policies. See Bertin, *Reproductive Hazards*, *supra* note 33, at 282-84. See, e.g., *Oil, Chemical and Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984), where OSHA determined that a fetal protection policy which required women to provide proof of sterilization in order to keep their jobs was a workplace hazard, but the circuit court held that work "hazard" in the general duties clause of the OSH Act was intended to cover only physical workplace conditions, that it could not be stretched to reach the consequences of a fetal protection policy, and therefore, the employer's policy of requiring women to show proof of sterilization to keep their jobs was not a "hazard" within the meaning of the Act. *Id.* at 450. See OCCUPATIONAL SAFETY AND HEALTH LAW, 126-27 (S. Bokart, H. Thompson, III eds. 1988) (discussing the *American Cyanamid* decision).

through the "general duty clause" of OSHA.⁸³

OSHA has been largely unsuccessful⁸⁴ in ensuring "safe and healthful working conditions . . . to preserve . . . human resources"⁸⁵ since its enactment. Of over 77,000 chemicals in use in American workplaces, OSHA has set exposure limits for approximately 400 and has set specific comprehensive standards for only twenty-eight toxic substances.⁸⁶ OSHA has promulgated only three health standards concerning reproductive hazards caused by lead, ethylene oxide and dibromochloropropane (DBCP).⁸⁷

In part due to the existence of workers' compensation laws in most states, employers have little incentive to comply with OSHA to prevent workplace injury and illness.⁸⁸ It is frequently less expensive for employers to ignore OSHA standards than to comply with them because the chance of being caught is low.⁸⁹

83. The Occupational Safety and Health Act, 29 U.S.C. § 651 (1982), requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Under OSHA, employers are required "to adhere to mandatory safety and health standards and to assume a general duty of ensuring workplace safety." See Timko, *Exploring the Limits*, *supra* note 61, at 168.

The OSHA general duty clause requires that an employer must do everything feasible to reduce recognized hazards. Commentators argue that the phrase "to reduce recognized hazards" imposes a general duty on employers to protect workers against technologically preventable harms. Others have unsuccessfully argued that fetal protection policies are themselves hazards. *Id.* at 170-71.

Use of fetal protection policies allows employers to ignore their obligations to eliminate hazardous work conditions which are dangerous to the reproductive capabilities of both men and women. Fetal protection policies do not sufficiently protect male workers from reproductive hazards, nor do they protect workers from hazards unrelated to their reproductive ability. *Id.* at 170. Commentators are unaware of similar policies which exclude men from workplaces which may cause them to unwittingly injure their offspring. In fact, once there is proof that a chemical is harmful to the reproductive health of men, the chemical is usually banned. See Bertin, *Reproductive Hazards*, *supra* note 33, at 281-82.

84. See Bertin, *Legal Issues*, *supra* note 33, at 93, 99-101.

85. 29 U.S.C. § 651(b) (1982).

86. See BNA *Pregnancy and Employment*, *supra* note 54, at 68.

87. *Id.* In 1977, male workers at an Occidental Chemical Company plant in California reported an unusually low birth rate in their families. Testing showed that 14 of 25 men were either sterile or had extremely low sperm counts. All the affected men had worked with dibromochloropropane (DBCP), a pesticide. Subsequently, DBCP was banned for almost all uses. See Bertin, *Reproductive Hazards*, *supra* note 33, at 280.

88. See Bertin, *Legal Issues*, *supra* note 33, at 99-100.

89. *Id.* at 100.

Even if employers are cited, the penalty may be insignificant in comparison to the costs of correcting the hazard.⁹⁰

OSHA has been ineffective in requiring employers to clean up toxic environments in order to protect the reproductive health of female and male workers and their offspring. OSHA has failed to set standards which protect pregnant women who remain in hazardous workplaces. The EEOC's reliance on OSHA standards therefore provides inadequate scrutiny of employers' discriminatory fetal protection policies.

3. *Scientific Evidence*

The approach recently condoned by the EEOC allows employers to continue to use fetal protection policies subject to certain limitations.⁹¹ An employer may present scientific evidence which "proves" that potential harm to the fetus occurs through women only, and not through men, as a defense to its use of fetal protection policies.⁹² However, the use of fetal protection policies justified by gender-biased scientific evidence is inconsistent with the EEOC's articulated purposes.⁹³ It is, therefore, important to understand the nature of the bias in current scientific data.⁹⁴

90. *Id.* In 1983, the average proposed penalty was only \$172 for those companies cited for serious violations (those that create a "substantial probability [of] death or serious physical harm"). *Id.* (citing Office of Technology Assessment, *Preventing Illness and Injury in the Workplace* at 235-36 (1984)).

91. See *EEOC fetal protection guidelines*, *supra* note 52, at D-1.

92. See *id.* at D-1 to D-2. Again, note that this occurs only after a woman has experienced discrimination and has filed a complaint with the EEOC. See *EEOC fetal protection guidelines*, *supra* note 52, at D-2. There is little enforceable protection which is preventative in nature at the federal level before a pregnant woman loses her job. The EEOC Compliance Guidelines suggest that an employer may allow a pregnant worker to transfer, but these provisions are not mandatory. See *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.7(i) at 624:0009 (July 1986).

93. See *supra* notes 61 through 64 and accompanying text. Fetal protection policies which exclude pregnant women or women of childbearing capacity from the workplace fail to adequately protect future generations because the scientific evidence under which they are scrutinized is inherently gender biased.

94. See generally *Working Women: Occupational Health Issues of the 1980s*, Conference Report, Northwest Center for Occupational Health and Safety, Univ. of Washington (Apr. 19-20, 1988) (conference report compiles several scientific and legal articles relevant to women's occupational health issues) (available at Golden Gate University School of Law library).

The EEOC itself has conceded that "[u]ntil recently, there has been little research on the direct effects of many of these substances [chemicals, radiation, etc.], conditions,

The bulk of available scientific research concerning reproductive health relies on the archaic stereotype that fetal health is solely a function of maternal exposure.⁹⁵ While there is no dispute that exposure to some toxins may cause permanent damage to a woman's reproductive health or to her fetus,⁹⁶ men are also

and physical agents on workers exposed to them, and even less research on the effects on fetuses through the workers; therefore, the scientific research necessary to fully resolve a charge may not yet exist." *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.8 at 624:0010 (July 1986).

95. See Williams, *Firing the Woman*, *supra* note 33, at 661 (effects of paternal environmental exposure infrequently studied; most scientific studies equate the childbearer with the source of defects in offspring by focusing almost exclusively on teratogenic effects); Bertin, *Reproductive Hazards*, *supra* note 33, at 280 ("adverse health effects of toxic chemicals are rarely confined to the fetus *in utero*.")

The effects of these stereotypical notions still persist. See International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989). In accepting Johnson Control's experts' arguments that animal studies did not demonstrate a possible risk of genetic damage through male lead exposure, the court stated:

... [T]he UAW has not presented any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure. It is this lack of convincing scientific data that the plaintiffs attempt to gloss over and cast aside in ignoring the differences between the effect of lead on the human and animal reproductive systems.

Id. at 889. If there is admittedly a paucity of research concerning effects of hazardous substances to male reproductive systems, see *EEOC fetal protection guidelines*, *supra* note 52, at D-2, it is unreasonable for a court to refuse to consider animal studies.

It is interesting to note that the EEOC had negatively commented on the district court's decision in *Johnson Controls* in the recently promulgated EEOC fetal protection guidelines. See *EEOC fetal protection guidelines*, *supra* note 52, at D-4. Specifically, the EEOC stated that in *International Union, UAW v. Johnson Controls, Inc.*, 680 F. Supp. 309 (E.D. Wisc. 1988), the district court had "concluded on summary judgment that the exclusionary policy was justified, despite the fact that, as we understand it, there was conflicting evidence about harm mediated through men. In the Commission's view, when conflicting evidence exists, summary judgment is not appropriate." See *EEOC fetal protection guidelines*, *supra* note 52, at D-4.

96. A woman's complement of ova may be damaged by toxins prior to conception. *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.2(f)(1) at 624:0002 (July 1986).

A woman and her fetus are susceptible to some environmental hazards during pregnancy. Fetal loss and malformations are the primary results if maternal exposure has occurred during the first trimester. Exposures during the second and third trimesters are more likely to be associated with shorter gestational length or low birth weight. The highest sensitivity of a fetus to exposure to teratogens, at least with regard to structural deviation, occurs during the period of organogenesis, from about days 18 to 20 until about days 55 to 60. See *Reproductive Health Hazards in the Workplace*, Office of Technology Assessment, Washington, D.C. (1985).

The absolute peak of sensitivity may be reached before day 30 post-conception. As organogenesis is completed, susceptibility to anatomical defects diminishes greatly, but probably minor structural deviation is possible until histogenesis is completed late in the

susceptible⁹⁷ to many toxins that harm their offspring and reproductive capacities.⁹⁸

Reproductive health research tends to isolate women for study due to the "preconceived notion that there is an exclusive connection between birth defects and women who carry the offspring, . . ."⁹⁹ Additionally, the reproductive effects of occupational exposure on women are difficult to study due to the lack of standardized data collection systems.¹⁰⁰ Pre-existing data col-

fetal period. Deviations during the fetal period are more likely to involve growth or functional aspects because these are the predominant developmental features at this time. See Faustman, *Reproductive and Development Toxicology*, at 11, in *Working Women: Occupational Health Issues of the 1980s*, *supra* note 93, (Apr. 19-20, 1988).

97. Critical exposure to male reproductive capability generally occurs preconception, and may result in sterility, subfertility, depressed libido, impotence, defects in sperm integrity and miscarriage. See Selevan, *The Dose-Response Fallacy in Human Reproductive Studies of Toxic Exposure*, 29 J. OCCUP. MED., 451-54 (May 1987). Semen changes in male workers are not observed prior to 11 to 15 weeks after the first exposure. See Selevan, *Design Considerations in Pregnancy Outcome Studies of Occupational Populations*, 7 SCAND. J. WORK ENVIRON. HEALTH, suppl. 4: 76, 78 Fig. 1 (1981).

98. Hazardous substances, physical agents, or conditions may affect the fetus directly through men in a number of ways. A man continually produces sperm cells throughout his fertile years (from puberty throughout his lifetime). A substance, physical agent, or condition can build up in the man's body so that it alters sperm cells as they are produced in such a way that, when one of them fertilizes a woman's ova, the resulting fetus is deformed or damaged and will either die before birth or be born with birth defects. Similarly, the hazard can alter the sperm cells present in the male at the time of exposure having the same effect. The hazard could affect the man in such a way that he can only produce (either temporarily or permanently) similarly defective sperm cells. See *Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.2(f)(2) at 624:0002 (July 1986).

The ostensible goal of fetal protection policies is to protect the fetus. In large part utilization of these policies assumes that a fetus will survive to birth, and then be born with a birth defect for which it could sue its parents' employer. This may be one reason for excessive concentration on study of women, since a woman and her fetus are inextricably bound until birth. However, exposure to men may result in an inability to even conceive, or may result in losing the fetus early in the pregnancy. See Bertin, *Reproductive Hazards*, *supra* note 33, at 280-82 and accompanying footnotes. Since these events are also likely to occur naturally in the general population, employer liability is not questioned and therefore the possibility that the harm was caused by male exposure is frequently overlooked.

99. Williams, *Firing the Woman*, *supra* note 33, at 660. See Timko, *Exploring the Limits*, *supra* note 61, at 166 ("[s]cientific inquiry into reproductive hazards has focused on females, particularly those in male-dominated occupations.")

100. For example, the most universal systems containing reproductive data are vital records systems. The data is limited by the completeness of the systems in terms of registration of the event (e.g., early fetal loss) and completeness of the registration of outcome (e.g., malformations, many of which are not detectable at birth). See Selevan, *Linking Data to Study Reproductive Effects of Occupational Exposures*, 1 OCCUP. MEDICINE: STATE OF THE ART REVIEWS, 445 (July - Sept. 1986).

lection sources in the United States frequently provide inadequate or erroneous data.¹⁰¹

The fact that workers move in and out of exposure to toxins as their work schedules and duties change further inhibits accurate study.¹⁰² Workers do not experience constant or equal risk during their reproductive cycles.¹⁰³ Factors such as workers' transfer between exposed and unexposed jobs affect the probability that a pregnancy between given partners will be "exposed."¹⁰⁴

Many women who have successful live births may also stop working to remain at home, while those who experience early fetal loss or infant death are more likely to return to work.¹⁰⁵ Unless all women return to the same workplace after the termination of their pregnancy, an inflated proportion of reports of fetal loss and infant death can be expected as well as a reduced proportion of reports of live births identified in both exposed and unexposed groups.¹⁰⁶

The factors discussed above are examples of the difficulties researchers encounter in obtaining accurate results from reproductive health studies. The bias and inaccuracy in gathering and

101. *See id.* at 445-49.

102. *See* Lemasters and Selevan, *Use of Exposure Data in Occupational Reproductive Studies*, 10 SCAND. J. WORK ENVIRON. HEALTH, 1, 3 (1984).

103. *Id.* Adverse reproductive events caused by exposure to a toxicant may be associated with individual idiosyncracies in absorption, metabolism, distribution, and excretion that would not be reflected by ambient exposure measurements. Monitoring a particular reproductive event may, therefore, create gaps in the assignment of exposure doses during crucial periods of reproduction. *See id.* at 4.

104. *See* Selevan, *Design of Pregnancy Outcome Studies of Industrial Exposures*, in OCCUPATIONAL HAZARDS AND REPRODUCTION, 219, 222 (K. Hemminki, M. Sorsa, H. Vainio eds. 1985).

105. Selevan, *Design of Pregnancy Outcome Studies of Industrial Exposures*, OCCUPATIONAL HAZARDS AND REPRODUCTION, 219, 222 (1985). Most industry-based studies are retrospective and the current age of the population distribution affects the actual calendar time span covered by the study. Most industrial populations are of limited size: 93.9 percent of the employers in the United States employ fewer than 100 workers. *Id.* When female workers are studied, inclusion of terminated workers is mandatory to prevent biased conclusions regarding certain pregnancy outcomes. *Id.* at 223. It is also unlikely that when males are studied any negative outcome of a female partner's pregnancy will affect the male worker's employment status. *Id.* at 222.

Early fetal loss or infant death could easily be related to male exposure. *See supra* notes 97 and 98 and accompanying text.

106. *Id.*

developing scientific evidence makes it inherently unreliable. Consequently, the EEOC's and OSHA's reliance upon flawed scientific evidence provides inadequate criteria upon which to judge discriminatory employer policies.¹⁰⁷

4. *Inadequate Federal Remedy*

The EEOC policy guidelines are of little assistance for pregnant women who are able to work but whose personal health or fetuses are at risk from hazards in the workplace. Under current federal guidelines, a pregnant woman does not have a mandatory right to transfer from a hazardous work environment.¹⁰⁸

Due to the temporary nature of pregnancy,¹⁰⁹ the remedies offered by federal enforcement agencies are inadequate because a woman must lose her job or experience discrimination before she can seek a remedy.¹¹⁰ Should the EEOC grant a right to sue letter, a plaintiff faces difficult proof problems¹¹¹ before she is

107. The employer is given too much leeway to make policies which adversely affect a portion of the workforce, while purportedly relying on scientific study. This disparate impact is adverse to title VII's individualized treatment philosophy. *See supra* notes 31 through 33 and accompanying text.

108. *See Reproductive/Fetal Hazards*, 92 EEOC Compl. Man. (BNA) § 624.7(i) at 624:0009 (July 1986) (whether or not an employer has considered alternatives to its exclusionary policy is only a factor the EEOC considers during its investigation of discriminatory practices; transfers are suggested, but not mandated, as examples of alternative practices).

109. Limited by a nine-month gestational period.

110. *See EEOC fetal protection guidelines*, *supra* note 52, at D-1 to D-4. The guidelines' articulated purpose is to provide "guidance for analyzing cases in which employers have limited women's employment opportunities by implementing sex-based policies alleged to protect against the risk of harm to employees' offspring from reproductive or fetal hazards." *Id.* at D-1 (emphasis added).

The EEOC investigates and conciliates charges of employment discrimination. *See* 42 U.S.C. § 2000e-5(b)-(d) (1982). If it is not possible to negotiate settlement between the worker and the employer, the EEOC issues a right to sue letter which grants the plaintiff a cause of action in federal court. *See* 42 U.S.C. § 2000e-5(f)(1) (1982). Consequently, title VII is enforced primarily through private action. Many pregnant women cannot afford the expense in time or money that such litigation would require. Additionally, the right to sue is an ineffective remedy for a woman who desires to keep her job and not solely receive back pay. With administrative and judicial delay, by the time the private action remedy is provided, the pregnancy has ended.

111. *See Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. ___, ___, 109 S.Ct. ___, ___, 104 L.Ed.2d 733, 750-51 (1989) (plaintiff retains the burden of persuasion on the issue of disparate impact). Additionally, the EEOC regulations and compliance manual rely upon scientifically biased evidence. *See supra* notes 91 through 107 and accompanying text.

granted relief.

With ineffective federal remedies, individual states must be able to utilize common sense in formulating realistic solutions to the problem of discrimination against pregnant workers in toxic environments. Temporary transfer provisions, like California's,¹¹² can achieve the goal of providing equal employment opportunities for pregnant women while simultaneously removing them from hazardous or toxic environments. Unfortunately, the mandatory provisions of California's law are presently inapplicable to employers subject to title VII.

5. *Influence of Federal Law Despite FEHC Disapproval*

While the FEHC¹¹³ argues that federal resolution of the issue of fetal protection is unpersuasive, California courts have nevertheless relied upon the federal rationale.¹¹⁴ Federal case law and EEOC fetal protection guidelines will have a potentially detrimental effect upon California law regarding fetal protection policies, despite the fact that the FEHC is under no obligation to follow federal precedent.¹¹⁵ The Commission gives careful consideration to title VII precedent when it is persuaded that it is a practical and appropriate guide for interpretation.¹¹⁶ In the

112. See *supra* note 2 for text.

113. The FEHC is the enforcing agency of California law which prohibits pregnancy discrimination. See CAL. GOV'T CODE § 12935(a) (West 1980 & Supp. 1989).

114. See *Johnson Controls v. California Fair Employment & Hous. Comm'n*, No. G007029 (Cal. App. 4th Dist. 1988) (superior court remanded, finding that the Commission had erred as a matter of law for failing to consider the "business necessity" defense as set forth in *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984)). Opening Brief for Appellant Commission at 9, *Johnson Controls v. California Fair Employment & Hous. Comm'n*, No. G007029 (Cal. App. 4th Dist. 1988). However, the FEHC had considered the federal cases concerning fetal protection and "found them substantially wanting in analytical coherence and in consistency with settled principles of employment discrimination law." *Id.* at 49.

115. CAL. CODE REGS. tit. II, § 7285.1(d) (1985) provides in pertinent part:

Except as required by the Supremacy Clause of the United States Constitution, federal laws and their interpretations regarding discrimination in employment . . . are not determinative of the construction of those regulations and the California statutes which they interpret and implement but in the spirit of comity, shall be considered to the extent practical and appropriate.

116. "Where Title VII precedent does not appear sound, however, or would conflict with the essential purposes of the Act, we may not and do not rely on it." Opening Brief for Appellant Commission at 11, *Johnson Controls v. California Fair Employment &*

fetal protection arena, however, the FEHC strongly disagrees with the application of the "business necessity" defense allowed by the court in *Hayes*.¹¹⁷

The Commission's position is that fetal protection policies present fundamental policy questions and that "if an employer's voluntary undertaking of a fetal safety program is to outweigh the rights of women to equal employment opportunity then it is the *Legislature*, not the *Commission*, that must make that decision."¹¹⁸ The legislature has examined these issues and has provided for temporary transfer policies to protect California employees from pregnancy discrimination.¹¹⁹

IV. RECENT UNITED STATES SUPREME COURT INTERPRETATION OF THE PDA

Although the Supreme Court's recent decision in *California Federal Savings & Loan Ass'n v. Guerra*¹²⁰ does not directly ad-

Hous. Comm'n, No. G007029 (Cal. App. 4th Dist. 1988) (citing DFEH v. Church's Fried Chicken, FEHC Dec. No. 87-18 at 12 (1987)).

117. In rejecting the federal attempt to justify an employer's good intentions in protecting the fetus the Commission has stated, "... no case has ever ruled that a categorical [sic] and intentional discrimination can be 'neutralized' by reference to the employer's purported *purpose* for the discrimination." Reply Brief for Appellant Commission at 10, *Johnson Controls v. California Fair Employment & Hous. Comm'n*, No. G007029 (Cal. App. 4th Dist. 1988)(emphasis in original). The Commission had previously concluded that Globe Battery was *not* exempt from the "prohibitions against sex discrimination because it justified the discrimination as necessary to effectuate a voluntarily assumed responsibility for the protection of unborn offspring." Opening Brief for Appellant Commission at 2, *Johnson Controls v. California Fair Employment & Hous. Comm'n*, No. G007029 (Cal. App. 4th Dist. 1988).

118. Opening Brief for Appellant Commission at 48, *Johnson Controls v. California Fair Employment & Hous. Comm'n*, No. G007029 (Cal. App. 4th Dist. 1988).

119. See note 161 and accompanying text.

120. 479 U.S. 272 (1987) (Marshall, J.) (CAL. GOV'T CODE § 12945(b)(2) is not preempted by title VII, as amended by the Pregnancy Discrimination Act of 1978, because it is not inconsistent with the purposes of the federal statute, and it does not require the doing of an act which is unlawful under title VII). *California Federal*, 479 U.S. at 292.

Lillian Garland was employed by California Federal Savings and Loan Association (the bank), an employer subject to title VII. The bank maintained a facially neutral leave policy which allowed an employee, after three months service, to take an unpaid leave of absence with no guarantee of reinstatement, for a variety of reasons, including pregnancy and disability. After taking four months pregnancy disability leave, Ms. Garland's request for reinstatement at the bank was denied. Ms. Garland filed a complaint with the Department of Fair Employment and Housing which issued an administrative accusation against the bank charging it had violated CAL. GOV'T CODE § 12945(b)(2). *California Federal*, 479 U.S. at 278.

dress the issue of fetal protection policies, its logic and discussion of Congressional intent in enacting the PDA¹²¹ are instructive.

California Federal buttresses this comment's argument that title VII does not pre-empt state legislation aimed at accommodating pregnancy as a characteristic unique to female employees.¹²² The opinion demonstrates the compatibility between title VII, as amended by the PDA, and the California provisions requiring temporary transfers for pregnant workers.¹²³

A. CASE DISCUSSION

The operative issue in *California Federal* was whether the PDA, as part of the definition portion of title VII, prohibited states from requiring employers to reinstate pregnant workers,

The California Fair Employment and Housing Commission, the state agency authorized by CAL. GOV'T CODE § 12935(a) to interpret the California Fair Employment and Housing Act, had construed the statute to require California employers subject to title VII, to reinstate an employee returning from pregnancy disability leave to the job she previously held, unless it was no longer available due to business necessity. If the position was unavailable, the employer was required to make a reasonable, good faith effort to place the employee in a substantially similar job. *California Federal*, 479 U.S. at 276.

Prior to the first FEHC hearing, the bank brought an action in the United States District Court for the Central District of California, seeking a declaration that the California statute was inconsistent with and pre-empted by title VII, as amended by the Pregnancy Discrimination Act. The bank sought an injunction against enforcement of the statute. *Id.* at 278-80. The district court granted the bank's motion for summary judgment and the Ninth Circuit Court of Appeals reversed. The United States Supreme Court affirmed the Ninth Circuit's opinion. *Id.* at 272.

121. The Pregnancy Discrimination Act of 1978 (PDA), amending the definition portion of title VII, provides in relevant part:

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

42 U.S.C. § 2000e(k) (1982).

122. Accommodations include mandatory transfer provisions which would protect an individual woman's desire to simultaneously protect her fetus and her job. *See infra* notes 152 and 156 for discussion of California's legislative intent in providing such accommodation.

123. *See* CAL. GOV'T CODE § 12945 (West 1980). *See infra* notes 153 through 155 and accompanying text for discussion of compatibility.

regardless of their policy for disabled workers in general.¹²⁴ The Court also resolved the issue of whether the second phrase¹²⁵ of the PDA afforded pregnant women unique treatment.¹²⁶

The Court held that in two specific sections of the 1964 Civil Rights Act, section 708¹²⁷ and section 1104,¹²⁸ Congress demonstrated that state laws would be pre-empted only if they *actually conflicted with federal law*.¹²⁹ The Court found the two sections severely limited title VII's pre-emptive effect.¹³⁰

Relying on the PDA's legislative history,¹³¹ the Court ruled Congress did not intend to *prohibit* preferential treatment.¹³²

124. *Id.* at 283-84.

125. *California Federal*, 479 U.S. at 284-85. The second phrase of the PDA is:
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*

See 42 U.S.C. § 2000e(k) (1982) (emphasis added).

126. The debate was whether the PDA required pregnant women to be treated *exactly* the same as people with similar ability to work, or whether it allowed pregnant women to be given *special and preferential treatment*. See Furnish, *Beyond Protection: Relevant Difference and Equality in the Toxic Work Environment*, 21 U.C. DAVIS L. REV. 1, 4-6 (1987) (emphasis added). The bank had argued that the second clause of the PDA unambiguously rejected California's special treatment approach to pregnancy discrimination. *California Federal*, 479 U.S. at 284.

127. 42 U.S.C. § 2000e-7, § 708 (1982) provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

128. 42 U.S.C. § 2000h-4, § 1104 (1982) provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

129. *California Federal*, 479 U.S. at 281 (emphasis added).

130. *Id.* at 282.

131. *Id.* at 283-88.

132. *Id.* at 287. The Ninth Circuit's earlier decision in this case provided the Court with useful insight about the "equal v. special treatment" debate. The Ninth Circuit recognizes that the California statute deals with a physical condition that is unique to women - pregnancy - rather than stereotypical notions about women as the more "quali-

The Court stated California law and title VII, as amended by the PDA, shared the common purpose of promoting equal employment opportunity for women by removing barriers that operated in the past to disfavor pregnant workers.¹³³

The Court adopted the Ninth Circuit's conclusion that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."¹³⁴ The Court also found the California statute was consistent with the dissent in *Gilbert*¹³⁵ and that "[b]y 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."¹³⁶

The Supreme Court recognized "the PDA does not 'demand that state law be blind to pregnancy's existence.'" ¹³⁷ In so stating the Court adopted "a realistic understanding of conditions found in today's labor environment."¹³⁸ The Court emphasized it would not allow employers to resort to archaic stereotypes regarding women's capabilities in the workplace.¹³⁹ Additionally, the Court articulated that its decision allowed women to remain viable contributors to the workforce without forcing them to choose between their jobs and "the fundamental right to *full participation* in family life."¹⁴⁰

fied" parent. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 395 (9th Cir. 1985), *aff'd*, 479 U.S. 272 (1987).

133. *California Federal*, 479 U.S. at 288.

134. *Id.* at 285 (1987), *aff'g* 758 F.2d 390, 396 (9th Cir. 1985).

135. *Id.* at 289 (citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)).

136. *Id.* The Court added a *caveat* which may be interpreted to limit the decision's applicability to fetal protection cases. It emphasized that CAL. GOV'T CODE § 12945(b)(2) was narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth or related medical conditions. *California Federal*, 479 U.S. at 290 (emphasis in original).

137. *Id.* at 280 (citing *California Federal*, 758 F.2d 390, 395 (9th Cir. 1985)).

138. *California Federal*, 758 F.2d at 395 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)). Hazardous and toxic work environments are a prevalent part of today's labor environment. See *generally supra* note 54.

139. *California Federal*, 479 U.S. at 290.

140. *Id.* at 289 (quoting one of the Act's authors, Senator Williams, 123 Cong. Rec. 29658 (1977)) (emphasis added). It is important to emphasize that both forcing a pregnant worker to lose her job and exposing her fetus to hazardous conditions strip her of her fundamental right to full participation in family life. See *California Federal*, 479 U.S. at 289.

V. CALIFORNIA LAW

A. HISTORICAL RELATIONSHIP TO PREGNANCY DISCRIMINATION ACT

In 1978, one month prior to the passage of the federal Pregnancy Discrimination Act,¹⁴¹ the California legislature passed a statute guaranteeing certain employment rights to pregnant workers.¹⁴² The California statute contemplated the type of indi-

141. CAL. LABOR CODE § 1420.35, ch. 1321, Stats. of 1978 was chaptered on September 28, 1978. The Pregnancy Discrimination Act became law October 14, 1978. *See supra* note 30. The California bill prohibiting employment discrimination on the basis of pregnancy was introduced to the California State Assembly by Assembly Majority Leader Howard Berman on May 18, 1977. CALIFORNIA ASSEMBLY FINAL HISTORY, 1978 SUMMARY DIGEST at 1174.

142. CAL. GOV'T CODE § 12945 (West 1980) (formerly CAL. LABOR CODE § 1420.35 (West 1978)) states:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

(a) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:

(1) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including to take disability or sick leave or any other accrued leave which is made available by the employer to temporarily disabled employees. For purposes of this section, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth, or related medical condition for a period exceeding six weeks. Nothing in this section shall be construed to require an employer to provide his or her employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any such health insurance coverage of any provisions or coverage relating to medical costs of pregnancy, childbirth, or related medical conditions shall not be construed to require the inclusion of any other provisions or cov-

vidualized treatment title VII demands,¹⁴³ allowing a pregnant employee, in conjunction with her physician, to make her own decisions about her employment. The California statute provided that a pregnant woman could request and obtain a transfer¹⁴⁴ in situations in which she and her physician felt that she

erage, nor shall coverage of any related medical conditions be required by virtue of coverage of medical costs of pregnancy, childbirth, or other related medical conditions.

(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. Nothing herein shall be construed to limit the provisions of paragraph (1) of subdivision (b).

An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

(c)(1) For an employer who has a policy, practice, or collective-bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(2) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(d) This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy.

(e) The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964.

Subsection (e) is the replacement subsection. *See infra* note 150 for its original wording as subsection four.

143. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1970) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.")

144. CAL. GOV'T CODE § 12945 (1) § 12945(1)-(2) (West 1980). A transfer to a less strenuous or hazardous environment is not the perfect solution, because the physician upon whose advice the woman relies, may also be operating from misinformation or lack of knowledge regarding the effects of workplace hazards during or before pregnancy. *See supra* note 40 and accompanying text. However, until workplace environments are made

risked personal danger or jeopardy of fetal exposure to hazards.¹⁴⁶

California legislators mistakenly¹⁴⁶ feared pre-emption of the entire statute guaranteeing rights to pregnant employees¹⁴⁷ by the then pending amendments to title VII.¹⁴⁸ On the last day

safe for all workers, a transfer option is the optimal practical interim solution.

145. CAL. GOV'T CODE § 12945(c)(1) 12945(c)(1)-(2) (West 1980) states in pertinent part:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

. . . .

(c)(1) For an employer who has a policy, practice, or collective-bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(2) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

See also *supra* note 9 for the FEHC's interpretations and regulations regarding these subsections.

146. See *supra* notes 111 through 131 and accompanying text for discussion of Supreme Court's holding in *California Federal*, 479 U.S. 272 (1987) (the PDA was not intended to pre-empt similar state statutes).

147. Memorandum from Christine Curtis, Dep't of Indus. Rel. Staff Counsel, to Assembly Majority Leader Howard Berman, Author of A.B. 1960 (Sept. 14, 1978) (AB 1960; Veto or Sign?).

148. The amendments became the Pregnancy Discrimination Act of 1978, P.L. 95-555, 78 Stat. (codified at 42 U.S.C. § 2000e(k) (1982)).

In a memorandum explaining the anticipated effects of the addition of subsection 4 to A.B. 1960 Christine Curtis, Dep't of Indus. Rel. Staff Counsel, stated:

the recently-enacted pregnancy law, AB 1960 Assemblyman Berman, provides that if federal pregnancy legislation amending Title VII is enacted, then the State of California [sic] jurisdiction of pregnancy rights of employees of employers of 15 or more passes to the federal EEOC except for enforcement of equal pay, of hiring and of the 4-month unpaid leave policy. Such a bill passed Congress in October, 1978 and this is before President Carter. The FEP would continue to enforce . . . the rights of all pregnant employees of employers of between 5 and 15 employees. . . .

C. Curtis, *Pregnancy Employment Rights* at 3 (1978) (available at Golden Gate University School of Law library).

of the California legislative session¹⁴⁹ the author, Assembly Majority Leader Howard L. Berman, added a new section¹⁵⁰ which severely limited California's ability to implement preventative alternatives and to shield pregnant employees of title VII employers¹⁵¹ from discriminatory fetal protection policies.¹⁵²

B. LEGISLATIVE HISTORY OF THE CALIFORNIA STATUTE GRANTING EMPLOYMENT RIGHTS TO PREGNANT WORKERS

California's statutory protection of pregnant employees¹⁵³ demonstrates that the temporary transfer provisions in the statute are compatible with the purpose and provisions of the PDA.

See supra notes 60 through 79 and accompanying text for discussion of undesirability and ineffectiveness of EEOC enforcement.

149. The subsection was added August 31, 1978, and the bill was enrolled September 11, 1978. CALIFORNIA ASSEMBLY FINAL HISTORY, 1978 SUMMARY DIGEST, at 1174.

150. Article 4, section four was added to A.B. 1960. It provided:

SEC. 4. *In the event Congress enacts legislation* amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, the provisions of this act, except paragraph (2) of the subdivision (b) of Section 1420.35 of the Labor Code, shall be inapplicable to any employer subject to such federal law, except that this section shall not pertain to complaints filed prior to the effective date of this act.

Assembly Bill No. 1960, Amended in Conference, Assembly, August 31, 1978; Senate, August 3, 1978 at 6 (emphasis added).

Later, the author stated that subsection four of A.B. 1960:

reflected an agreement between proponents and opponents of the bill, and the author, that if pending federal legislation regarding sex discrimination as it related to pregnancy did go into effect, AB 1960 would not be applicable to those employers subject to federal law upon its effective date with the exception of AB 1960's provision on [sic] four months pregnancy leave.

Summary of A.B. 121 (1979 Session) Clean-Up Bill to A.B. 1960. Howard L. Berman, Assembly Majority Leader (A.B. 121, Author's File, 1979) at 1 (available at Golden Gate University School of Law library).

151. Employers with 15 or more employees. *See* 42 U.S.C. § 2000e(b) (1982). *See supra* note 6 for federal definition of employer.

152. Women are denied the right to individual mandatory transfer and maintenance of their jobs and are subject to termination before they can seek a meaningful remedy. As noted previously, EEOC remedies become available only after discrimination occurs. *See supra* notes 108 through 112 and accompanying text. Additionally, the guidelines rely on biased scientific evidence and are therefore ineffective. *See supra* notes 91 through 107 and accompanying text.

153. *See supra* note 142 for text of CAL. GOV'T CODE § 12945(c)(1) 12945(c)(1)-(2) (West 1980); *see also supra* note 9 for text of the CALIFORNIA CODE OF REGULATIONS sections which implement the statute. Local California agencies are in a proximate position to provide more effective enforcement.

One of the articulated purposes of the statute¹⁵⁴ was to ameliorate the effects of the United States Supreme Court decision in *General Electric Co. v. Gilbert*.¹⁵⁵

The expressed intent of A.B. 1960 was:

A.B. 1960 thus remedies pregnancy discrimination *on the job*. The bill recognizes that women are a legitimate part of the primary work force and must not be disadvantaged by temporary incapacity to work due to pregnancy. Now, the employment structure by both private and public employers frequently avoids protection of pregnant employees. A.B. 1960 is an important step by the California Legislature to eliminate this glaring discrepancy between the employment treatment of men and women, based solely on the reality that, while both sexes can be parents, one sex carries the child and has, as a result, been placed in a less responsible portion of the work force.¹⁵⁶

154. Sponsors of the new California statute prohibiting pregnancy discrimination sought to clarify legislative intent "to correct what was viewed as the Supreme Court's misinterpretation of the ban on sex discrimination as it related to pregnancy." Howard L. Berman, Assembly Majority Leader (Pregnancy Discrimination and Pregnancy Benefits - A Brief History) (A.B. 121, Author's File, 1979) at 1.

While federal and state anti-discrimination guidelines barred any different treatment of pregnant workers in regards to sick time, leave of absence [sic], seniority rights, and insurance and other benefits, the U.S. Supreme Court in a decision last year, *Gilbert v. G.E.*, (429 U.S. 125), ruled that an exclusion of pregnancy-related disabilities from an employee disability benefit plan did not constitute gender-based discrimination absent a showing that the exclusion was designed to cause invidious discrimination against one sex over the other.

.....
This measure would overcome the current court rulings by naming pregnant employees as a protected class and requiring employers to treat them in a prescribed way concerning maternity leave, benefits, and disability and health insurance.

Employment Discrimination Based on Pregnancy: Hearing on A.B. 1960 Before the Assembly Committee on Labor, Employment and Consumer Affairs (Jan. 11, 1978) at 1-2 (memorandum on A.B. 1960) (available at Golden Gate University School of Law library).

155. 429 U.S. 125 (1976) (an otherwise comprehensive disability insurance plan did not violate title VII prohibition against sex discrimination even though it failed to cover pregnancy related disabilities).

156. INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, LL ANALYSIS TO THE SENATE COMMITTEE ON INDUSTRIAL RELATIONS, at 5 (Jan. 17, 1978) (emphasis added).

California enacted AB 1960 to statutorily define certain preg-

The bill was explicitly to comply with the California Supreme Court holding in *Sail'er Inn, Inc. v. Kirby*¹⁵⁷ mandating women not be accorded second class status and women be allowed to participate in the workforce.¹⁵⁸

Mandatory transfer provisions¹⁵⁹ were a crucial part of A.B. 1960¹⁶⁰ from the bill's inception.¹⁶¹ The provisions provided that

nancy provisions in FEP law as *minimum* protections for female employees. . . . It was the intent of AB 1960 to expand protections and benefits to all workers affected by pregnancy, yet not set a limit on what constitutes pregnancy discrimination as contained in FEPC sex discrimination regulations.

Howard L. Berman, Assembly Majority Leader (Pregnancy Discrimination and Pregnancy Benefits - A Brief History) (A.B. 121, Author's File, 1979) at 2 (emphasis in original) (available at Golden Gate University School of Law library).

"The female employee is thus to receive as much protection as possible and she is not to be treated as any other employees in all circumstances, basically as she varies from other workers in that she is carrying a child." Memorandum from Christine Curtis, Dep't of Indus. Rel. Staff Counsel, to Assembly Majority Leader Howard Berman, Author of A.B. 1960 (Mar. 22, 1978) at 2 (proposed amendments to A.B. 1960).

See also Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1229-31 (discussing the severe economic impact on individual women fired under fetal protection policies and noting that without good medical care during pregnancy a fetus may actually face higher risks as result of maternal unemployment than had the woman remained in the "hazardous" environment).

157. 5 Cal. 3d 1, 22, 485 P.2d 529, 542, 95 Cal. Rptr. 329, 342 (1971) (a California statute prohibiting most women from serving as bartenders was unconstitutional and violated CAL. CONST., art. XX, § 18 (now CAL. CONST., art. I, § 8)). A person may not be disqualified because of gender from entering or pursuing a lawful business, vocation, or profession. *Sail'er Inn*, 5 Cal. 3d at 22. Such discrimination violates the equal protection clauses of the federal and state constitutions. *Id.* The court used "strict" scrutiny to conclude that sexual classifications, made with respect to a fundamental interest such as employment, are suspect. *Id.* at 20.

158. INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, LL ANALYSIS TO THE SENATE COMMITTEE ON INDUSTRIAL RELATIONS at 2 (Jan. 17, 1978).

159. See *supra* note 142 for text of the transfer provisions codified at CAL. GOV'T CODE § 12945(c)(1) and (2) (West 1980).

160. One memorandum in support of the bill stated:

[t]his provision would help women working in such industry [sic] as lead plants where exposure to lead could harm the fetus and would provide an alternative to the total exclusion of women working in such industry. AB 1960 thus guarantees that a pregnant employee achieve the best working conditions possible if the job is potentially damaging to the unborn child, that a pregnant employee be able to establish her own reasonable time off to have the child, and that she be entitled to the same economic support during her absence available to other employees.

INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, LL ANALYSIS TO THE SENATE COMMITTEE ON INDUSTRIAL RELATIONS at 2 (Jan. 17, 1978) (emphasis added).

161. The bill was first introduced on May 18, 1977. See 1978 CAL. LEGIS. SUMM. DIG.

an employer must accommodate the working conditions of a pregnant employee whose job was strenuous or hazardous by transferring her, upon her request, to safer tasks for the duration of her pregnancy.¹⁶² The provision mandated transfer upon request when the transfer could be accommodated without undue economic hardship to the employer.¹⁶³

An examination of the legislative history demonstrates that the mandatory transfer section of the California pregnancy discrimination statute was designed to protect pregnant women during employment. The legislators were specifically concerned with safeguarding women from dangers posed by hazards in the workplace and wanted to provide safety without forcing a pregnant employee to lose her job. This approach was significantly more availing than the federal government's focus on private right of action.¹⁶⁴

C. WHY THE CALIFORNIA LEGISLATURE INVALIDATED MOST OF CAL. GOV'T CODE § 12945 AS TO TITLE VII EMPLOYERS

1. A.B. 1960

The authors of the California pregnancy discrimination bill were aware of the existence of similar pending federal legislation early in A.B. 1960's history.¹⁶⁵ Initially, they felt that their ef-

ch. 1321.

162. See *supra* note 145. One Enrolled Bill report recommending that Governor Brown sign the bill stated:

[A.B. 1960] also initiates reasonable relief for pregnant women who are working in hazardous and/or strenuous occupations so that they will not further expose their fetus [sic] to danger during the pregnancy. This provision is a partial response to federal OSHA concerns about women in such industries (such as lead plants) and heads off an attempt to prohibit all women of childbearing age from working in these industries.

INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, ENROLLED BILL REPORT at 3 (Sept. 26, 1978).

163. INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, LL ANALYSIS TO THE SENATE COMMITTEE ON INDUSTRIAL RELATIONS at 1 (Jan. 17, 1978).

164. See *supra* notes 108 through 112 and accompanying text.

165. "Congress just (in the spring of 1977) responded to this December 7, 1976 Supreme Court Decision [General Electric Co. v. Gilbert] by introducing S995 and HR5055 to amend Title VII of the Civil Rights Act of 1964. . . . AB 1960 is the corresponding California legislative response to that recent Supreme Court action" INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, LL ANALYSIS TO THE SENATE COMMITTEE ON INDUSTRIAL RELATIONS at 2-3 (Jan. 17, 1978).

forts were consistent with the federal legislation.¹⁶⁶ However, the original wording of the mandatory transfer sections engendered vocal employer opposition.¹⁶⁷

It appears the opposition from Kaiser Steel¹⁶⁸ caused the legislators to eventually doubt the legitimacy of the bill in light

166. Christine Curtis, Counsel, Dep't of Indus. Rel. urged that the transfer provision of subsection (c) was consistent with the federal provisions.

This specific provision would be deemed to be included in the federal provisions. The transfer formula provided in AB 1960 accords with the general Title VII and other civil rights cases pertaining to work force placement remedies for past discrimination.

C. Curtis, Pregnancy Employment Rights at 11 (1978) (available at Golden Gate University School of Law library).

The California Legislature is thus following the lead of the New York highest court in determining that the United States Supreme Court cannot dictate a state's policy as to pregnancy benefits coverage; it is following the lead of Congress in specifically mandating that it is legislative intent that there be no discrimination for pregnancy; and it is following the lead of the California Supreme Court that there be no second class treatment of women, especially of issues affecting the participation of women in the work force.

The California Legislature, further, would be following and expanding its own efforts to eliminate employment discrimination on the basis of pregnancy. . . . These sections clearly indicate that the California State Legislature has considered pregnancy and that substantial precedence exists for protecting pregnant and working women and for providing more complete coverage.

INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, LL ANALYSIS TO THE SENATE COMMITTEE ON INDUSTRIAL RELATIONS at 3-4 (Jan. 17, 1978) (available at Golden Gate University School of Law library).

167. The California Seed Association objected that the "transferral of pregnant employees to less strenuous or hazardous positions. . . . is in complete conflict with the seniority system. Employees who have worked long and hard with the hope of promotion may be bypassed for promotion merely to accommodate the transfer of a pregnant female due to this provision." Letter from California Seed Association to the Members of the Industrial Relations Commission (Apr. 4, 1978) (objecting to A.B. 1960) (available at Golden Gate University School of Law library).

The California Manufacturers Association said with regard to employee transfers, "[t]his subdivision also implies that all employers are callous, and unsensitive [sic] to their employee's [sic] needs. Surely, common sense would say that any employer would transfer a pregnant employee to a less strenuous job, if it is possible to do so." Memorandum by California Manufacturers Association at 4 (Apr. 4, 1978) (providing a critical analysis of A.B. 1960) (available at Golden Gate University School of Law library). The Association recommended deletion of subdivision (c) in its entirety. *Id.*

168. Letter from Kaiser Steel Corporation to Casey Young, Chief Consultant, Industrial Relations Commission of California at 1-2 (Apr. 5, 1978) (opposing A.B. 1960) (available at Golden Gate University School of Law library).

of pending federal legislation.¹⁶⁹ In disagreeing with the mandatory transfer section, Kaiser argued that the “[u]nilateral right of [a] pregnant employee to transfer to [a] ‘less strenuous or hazardous position’ disrupts collective bargaining agreements, and could initiate discrimination charges under Title VII of EEOC Guidelines.”¹⁷⁰ Kaiser objected to what it characterized as the subsection’s creation of a “super-protected class within an already protected class”¹⁷¹ and the appearance that the protected class was afforded “preferential treatment.”¹⁷² Kaiser suggested that as the statute provided a gender-related benefit, it must fail because it conflicted with federal law.¹⁷³

As a result of opposition the bill’s author added section four in the final days of the session.¹⁷⁴ With the pre-emptive section appended,¹⁷⁵ many proponents withdrew support and advocated that Governor Edmund G. Brown, Jr. refuse to sign the bill.¹⁷⁶

169. S. 995 and H.R. 5055 were pending in Congress. The bills were later consolidated as the Pregnancy Discrimination Act and codified at 42 U.S.C. 2000e(k) (1982).

170. Letter from Kaiser Steel Corporation to Casey Young, Chief Consultant, Industrial Relations Commission of California at 1 (Apr. 5, 1978) (opposing A.B. 1960) (available at Golden Gate University School of Law library).

171. *Id.*

172. *Id.* Kaiser Steel further objected that subsection (c):
discriminates against all non-pregnant employees, who may therefore be bumped from their jobs, which they have acquired through seniority or ability, solely because they are not pregnant. Since only female employees can become pregnant, this bill is *possibly violative* of the discrimination provisions of Title VII, as it provides a benefit that is necessarily gender-related.

Id. (emphasis added).

This characterization was found by the dissent in *Gilbert*, 429 U.S. 125 (1976) to be faulty and was the express reason for the passage of the Pregnancy Discrimination Act. See *California Federal*, 479 U.S. at 277 n.6.

173. Letter from Kaiser Steel Corporation to Casey Young, Chief Consultant, Industrial Relations Commission of California at 2 (Apr. 5, 1978) (opposing A.B. 1960) (available at Golden Gate University School of Law library).

174. See *supra* notes 149 through 152 and accompanying text.

175. “The main objection to the signing of A.B. 1960 is § 4, the federal preemption of state legislation as to employers covered by federal legislation, should the federal bill pass” Memorandum from Christine Curtis, Dep’t of Indus. Rel. Staff Counsel, to Assembly Majority Leader Howard Berman, Author of A.B. 1960 (Sept. 14, 1978) (AB 1960; Veto or Sign?) (emphasis in original) (available at Golden Gate University School of Law library).

176. One Enrolled Bill Report warned,
Some of the trade-offs apparent in this bill make it impossible to know with any certainty whether the law will provide the protections described. For example, the amendment added in

Despite withdrawn support,¹⁷⁷ A.B. 1960 was enrolled with the exemption for title VII employers intact. It was presented to and signed by Governor Brown on September 28, 1978.¹⁷⁸

2. A.B. 121

Two months after A.B. 1960 had been chaptered, its author, Assemblyman Berman, introduced a new bill to "clean up" the statute granting employment rights to pregnant women.¹⁷⁹ The bill only amended section four of the statute.¹⁸⁰ The articulated

Section 4 of AB 1960 provides that if Congress enacts legislation amending Title VII to prohibit discrimination on the basis of pregnancy, the provisions of AB 1960 (with certain limited exceptions) shall be inapplicable to any employer subject to federal law.

California residents are, therefore, stripped of the possibility of achieving protections under the California Fair Employment Practice Act and are subject to the vicissitudes of Title VII law as interpreted by the Burger Supreme Court. The trend of that court is clear and it would be indeed unfortunate if California lost the ability to provide protections to women under state law when it is possible for our state courts to provide much more progressive, comprehensive and forceful protection. This amendment is too high a price to pay for this legislation.

INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, ENROLLED BILL REPORT at 1-2 (Sept. 11, 1978) (A.B. 1960) (available at Golden Gate University School of Law library).

177. The Fair Employment Practice Commission requested that Assemblyman Berman kill A.B. 1960 as amended. Representatives of various California agencies met with him to discuss their concerns. Later they stated:

If after weighing the issues raised . . . you determine to continue your support of this bill, then we will enforce the law according to the provisions of AB 1960 as forcefully and as intelligently as possible. In short, the law you so effectively sponsored, if signed by the Governor, will not be victim to half-hearted enforcement or lukewarm implementation.

Letter from David A. Garcia and Alice A. Lytle to Howard L. Berman (Sept. 19, 1978) (discussing A.B. 1960) (available at Golden Gate University School of Law library).

178. 1978 CAL. LEGIS. SUMM. DIG. ch. 1321, CALIFORNIA ASSEMBLY FINAL HISTORY at 1174. The Secretary of State chaptered the bill on September 18, 1978.

179. 1979 CAL. LEGIS. SUMM. DIG. ch. 13, CALIFORNIA ASSEMBLY FINAL HISTORY at 146. The bill also addressed portions of CAL. UNEMP. INS. CODE § 2626.2 to eliminate inconsistencies between it and CAL. LABOR CODE § 1420.35 (West 1978). *Id.* Assembly Majority Leader Howard L. Berman introduced A.B. 121 on December 12, 1978.

180. The clarifying language read: "The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the Civil Rights Act of 1964." CAL. LABOR CODE § 1420.35(e) (West 1978).

Section four had been added to A.B. 1960 on the last day of the session as a result of employer opposition. It is conceivable that the author had little time to research the consequences or necessity of the addition. The California legislature did not know if the

purpose of the amending legislation¹⁸¹ was to clarify the applicability of A.B. 1960 with respect to those employers subject to federal law.¹⁸² The clean-up amendment was added solely because the PDA had passed.¹⁸³ There is no indication that the

federal legislation would pass and, if it did, what it would provide. In fact it was potentially a violation of the California Constitution to accede enforcement power to the federal government. *See infra* note 183.

181. Howard L. Berman, Assembly Majority Leader, stated:

The intent of Section 4 was to provide that upon Congressional enactment of an amendment to Title VII of the Civil Rights Act of 1964 prohibiting sex discrimination on the basis of pregnancy, AB 1960 would be inapplicable to those employers subject to such federal law, upon the federal law's effective dates.

....
It was not known at the time AB 1960 was passed that the federal legislation pending would pass or that if it did pass, it would have *two* effective dates. The confusion resulting from this fact is addressed and hopefully clarified by the clean-up bill, AB 121.

Assembly Majority Leader Howard Berman, Summary of A.B. 1960, ch. 1321 of 1978 at 6 (1978) (emphasis in original) (available at Golden Gate University School of Law library).

The only section directly affecting the Fair Employment Practice Act is Section 1420.35(e) of the proposed legislation, which clarifies the Legislature's intent to exempt employers with 15 or more employees from all but one provision of the state law governing discrimination on the basis of pregnancy. Because federal legislation amending Title VII of the Civil Rights Acts was not passed until after the state law was signed, such clarification was necessary.

INDUSTRIAL RELATIONS COMMISSION OF CALIFORNIA, ENROLLED BILL REPORT for A.B. 121 (Mar. 20, 1979) (available at Golden Gate University School of Law library).

182. Summary of A.B. 121 (1979 Session) Clean-Up Bill to A.B. 1960. Howard L. Berman, Assembly Majority Leader. *See supra* note 6 for federal definition of employer. The amending legislation provided:

Specifically, the bill:

....
(2) Exempts employers of 15 or more persons from the state discrimination prohibitions covering pregnancy leave, except that reasonable leave up to four months is retained in the current law and, [sic] recognizes the federal law prohibiting employment discrimination on the basis of pregnancy.

Assembly Third Reading, A.B. 121, revised Feb. 5, 1979, Assembly Office of Research.

183. "Language contained in AB 1960 making most of its provisions inapplicable to employers subject to the federal Civil Rights Act (employers with 15 or more employees) if that act is amended to include provisions relating to pregnancy discrimination is rewritten to reflect the fact that such legislation was in fact enacted." Senate Industrial Relations Committee, Bill Analysis of A.B. 121 (Berman) as amended January 18, 1979 at 4. (Feb. 20, 1979).

The amendment also remedied a potentially unconstitutional delegation of power. Although it is valid for state legislatures to adopt *existing* statutes, rules or regulations

legislators gave renewed thought or research into the possible effects of subsection (e).

The foregoing analysis demonstrates that in adding subsection (e) to the pregnancy discrimination statute the legislature acted prematurely and without sufficient contemplation of the consequences of adding the invalidating portion of the section.

VI. CONCLUSION: THE PREGNANCY DISCRIMINATION ACT AND CALIFORNIA STATUTE CAN COEXIST

In light of the interpretation given to the second clause of the Pregnancy Discrimination Act by the United States Supreme Court in *California Federal Savings & Loan Ass'n v. Guerra* it is now possible to see that the California legislature's fear of pre-emption of CAL. GOV'T CODE § 12945 was premature. The statute does not conflict with or malign the purpose of the Pregnancy Discrimination Act in any way. In fact, both are completely complementary. The California statute shares a common goal with title VII: ensuring that women, like men, are assured of full participation in the job market and in family life. However, unlike the Pregnancy Discrimination Act, the California statute has been interpreted by the FEHC to provide on-the-job rights to pregnant workers and to put decisions regarding pregnancy into the hands of the individuals to whom they belong.

of Congress or another state, by reference, the attempt to make *future* regulations of another jurisdiction part of the state law is generally held to be an unconstitutional delegation of legislative power in violation of the California Constitution. *Brock v. Superior Court of Los Angeles County*, 9 Cal. 2d 291, 297, 71 P.2d 209, 212-13 (1937) (citing *In re Burke*, 190 Cal. 326, 328, 211 P. 193, 193-94 (1923) (legislation which adopted future provision of an existing act would be void)).

At the time Section 4 was agreed upon, it was *not* known: 1) That the two federal bills pending in the Senate House Conference Committee would be reported out of the conference committee as one compromise version. (There was major disagreement between the two houses with respect to abortion language). 2) That if a compromise version was reported out, both the Senate and the House would adopt that version. 3) That the President would sign the federal legislation as enacted by both houses. 4) That there would be *two effective dates*. All of the four developments listed above which were either the subject of speculation or not foreseen at all when AB 1960 was passed, did in fact take place.

Summary of A.B. 121 (1979 Session) Clean-Up Bill to A.B. 1960. Howard L. Berman, Assembly Majority Leader (emphasis added).

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As enforced, the provisions of title VII have proven ineffective in ensuring freedom from employment discrimination for women. This is particularly true in the context of pregnant women working in potentially hazardous environments. The United States Supreme Court has stated that in enacting the PDA Congress had no intention of occupying the entire field of granting employment rights to pregnant women. California should therefore be free to extend CAL. GOV'T CODE § 12945 to protect the health and employment opportunities of all pregnant workers within the state by deleting subsection (e).

Concededly, the ideal solution to problems allegedly addressed by the use of fetal protection policies would be to eliminate toxins and hazards from workplaces. Until that occurs, however, a pregnant woman in California must be allowed to utilize her statutory right to transfer to a less strenuous or hazardous position upon her physician's recommendation. Title VII employers must be subject to this provision to preserve the spirit of both title VII and California law.

*Constance Norton**

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