

FETAL *Injuries*

EMPLOYERS BLAMED FOR BIRTH DEFECTS

'Remote' prospect of liability has become closer at hand

BBy MICHAEL STARR and CHRISTINE M. WILSON

Fetal injury in the workplace is a growing concern as courts are increasingly holding employers liable for children born with birth defects that result from their mother's workplace exposure to toxic chemicals or her injury in a workplace accident.

Employers engage in illegal sex discrimination when they exclude pregnant or fertile women from working, or from particular jobs, even for the seemingly benevolent reason that the work environment will subject the woman worker's fetus to injury.

As the U.S. Supreme Court said in its landmark decision of *UAW v. Johnson Controls*, 299 U.S. 187, 206 (1991): "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." What was not known when *Johnson Controls* was decided, however, was whether employers could be liable under state tort law if, complying with federal anti-discrimination law, they allow pregnant women to work and those workers' babies are born with birth defects due to conditions that their mothers were exposed to on the job. The answer under current law seems to be a resounding "yes."

Fetal Protection Policies

By the time of *Johnson Controls*, many companies had instituted "fetal protection policies," which barred fertile or pregnant women from certain jobs that required working in hazardous environments potentially injurious to a woman's fetus or, in some cases, required sterilization of any fertile female employee wishing to work in such jobs.

The court ruled that, notwithstanding the "ostensibly benign" purpose of "protecting women's unconceived offspring," such policies were unlawful under Title VII of the Civil Rights Act



medical conditions." According to the court, it is the woman, not the employer or the courts, who must decide whether her "reproductive role is more important to herself and to her family than her economic role."

The court gave short shrift to employer concerns that they could face tort liability in the event a child suffered fetal injuries that were linked to the mother's work environment. As the majority saw it, if "Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best."

Since *Johnson Controls*, the "remote" prospect of liability has become closer at hand. State courts now regularly allow employers to be sued under such circumstances. Employers have argued that such claims are barred by state workers' compensation laws, which typically mandate that workers' com-

of 1964, as amended by the Pregnancy Discrimination Act, which provides that sex discrimination includes discrimination "because of or on the basis of pregnancy, childbirth or related

Michael Starr is a partner in the labor and employment group of Hogan & Hartson. Christine M. Wilson is an associate in that group.

pensation benefits are the exclusive remedy for workplace injuries and bar tort actions against the employer.

Mother's Health Disregarded

But courts have rejected such arguments and ruled that the exclusivity provisions of these statutes apply only to injuries suffered by the worker herself and not to fetal injury, now seen as legally distinct.

Some such cases involve egregious employer disregard for maternal health. In *Pizza Hut of America Inc. v. Keefe*, 900 P.2d 97 (Colo. 1995), the employer faced tort liability for coercing a pregnant employee to ignore work restrictions imposed by her doctor; the employee went into premature labor, and the infant died shortly after birth. Workers' comp statutes usually contain an exception to their exclusivity provisions when there is intentional wrongdoing by the employer. Forcing a pregnant worker to work contrary to medical advice easily falls into that exception.

More common are cases of fetal injury resulting from exposure to noxious fumes. In one case, a woman in her first trimester became ill from fumes of a recently painted factory floor; with her supervisor's permission she promptly went home to recover, but six months later, her baby was born prematurely and died the same day from a lung condition attributed to in utero exposure to the paint fumes. *Ransburg Industries v. Brown*, 659 N.E.2d 1081 (Ind. Ct. App. 1995). In another case, the employer was allegedly negligent in hiring a janitorial contractor that operated a floor-buffing machine without adequate ventilation, resulting in hazardous levels of carbon monoxide. A pregnant employee fainted and was taken to the hospital with symptoms of nausea, headaches and respiratory distress. Her unborn child, however, suffered permanent brain damage due to her in utero carbon-monoxide exposure and was born with cerebral palsy. *Synder v. Michael's Stores*

Inc., 16 Cal. 4th 991 (1997). In both these cases, and others like them, the employer was held liable for the resultant fetal injuries.

Conflicting Obligations

Employers frequently argue that state tort liability for fetal workplace injury conflicts with their anti-discrimination obligations under Title VII and should, therefore, be pre-empted. Such arguments are uniformly rejected primarily on the ground that since tort liability requires proof of employer negligence, there is not an unavoidable conflict with Title VII requirements and, hence, no basis for federal pre-emption.

It is open to question whether the fetus, with its heightened sensitivity to physical injury and environmental hazard, is—or should be—within the foreseeable zone of danger that employers must anticipate in their efforts to promote workplace safety and health.

But this focus on negligence overlooks important employment law considerations. Workers' compensation laws reflect a grand compromise under which employers are automatically liable for workplace injuries and injured workers are absolved from having to prove negligence, all in exchange for a guaranteed, though limited, schedule of benefits. This arrangement is disrupted if employers are to be liable for injury to fetuses who are ineluctably present in the workplace by virtue of their mother's decision to work, and whose injuries

from otherwise insubstantial workplace mishaps can be dire.

In effect, employers now owe a higher duty of care to female workers than to males, not because they are women, but because they, if pregnant, carry with them a fetus that, according to the fetal injury cases, has independent legal rights against the employer. Negligence is inherently contextual, and it is open to question whether the fetus, with its heightened sensitivity to physical injury and environmental hazard, is — or should be — within the foreseeable zone of danger that employers must anticipate in their efforts to promote workplace safety and health.

Furthermore, under general employment law principles, employers are vicariously liable for the negligence of their employees in the course of their employment. As a result, if fetal injury is due to the mother's own negligence — by, e.g., stumbling at work or choosing to work in a hazardous environment — the employer would, it seems, be vicariously liable, even though there was no negligence by any of its authorized decision-makers.

Although the Supreme Court said that federal sex-discrimination law mandates that decisions concerning the health of unborn children rest with their parents, not with the companies that employ their pregnant mothers, state courts are holding the employers liable if, as a result of parental choices, workplace fetal injury occurs. Striking the proper balance between the societal goal of equal employment opportunity for women and the cost of fetal injury that may result from the presence of pregnant women in the workplace may be something that only the legislatures can resolve. ■