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Sent: Monday, November 16, 2009 2:46 PM
To: NIOSH Docket Office (CDC)
Cc: CAROL MIASKOFF; DIANNA JOHNSTON; KERRY LEIBIG; PEGGY MASTROIANNI
Subject: Docket No. NIOSH-150

Attachments: niosh - reproductive hazards - final.doc



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The attached comments on Docket No. NIOSH-150 (Request for Information on Alternative Duty: Temporary Reassignment for Health Care Workers Who Work with Hazardous Drugs) are submitted on behalf of Peggy R. Mastroianni, Associate Legal Counsel, Equal Employment Opportunity Commission.

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Dear Sir or Madam:

This letter provides comments on Docket Number NIOSH-150, which requests public information on a planned Current Intelligence Bulletin (CIB) on alternative duty and other forms of administrative controls for health care workers who work with hazardous drugs and are trying to conceive, are pregnant, and/or are breastfeeding. As explained in NIOSH-150, the National Institute for Occupational Safety and Health (NIOSH) plans to provide recommendations in the CIB to protect workers and their offspring from the potential adverse reproductive effects of hazardous drugs.

The Equal Employment Opportunity Commission (EEOC) fully supports proactive efforts to protect workers and their offspring from the harmful effects of exposure to hazardous drugs. NIOSH-150 notes that exposure to even small concentrations of certain drugs may be hazardous to reproductive health, including reduced fertility, birth defects, spontaneous abortions, and stillbirths and that the use of personal protective equipment and other controls may not eliminate exposure for some workers who work directly with hazardous drugs, and alternative duty or reassignment away from the hazard drugs may help protect workers and their offspring.

EEOC enforces, among other statutes, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which prohibits discrimination on the basis of race, color, religion, sex, or national origin. As amended by the Pregnancy Discrimination Act, Title VII's prohibition against "sex" discrimination includes discrimination on the basis of pregnancy or potential pregnancy. 42 U.S.C. § 2000e(k); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

It is important that alternative duty or other workplace policies intended to protect workers and their offspring do so in a manner that does not discriminate against workers on the basis of sex or another protected characteristic. In order to help minimize the potential for unlawful discrimination, this letter discusses workers' rights under the federal antidiscrimination laws and how they may be implicated by efforts to protect workers from exposure to hazardous drugs.

In the seminal case of *Johnson Controls*, the Supreme Court held that the employer's policy of excluding all fertile women from positions that involved actual or potential lead exposure unlawfully discriminated on the basis of sex. 499 U.S. 187 (1991). The Court noted that, despite evidence of the adverse effects of lead exposure on the male reproductive system, the employer was solely concerned with potential harm to the unborn offspring of female employees.¹ Because the policy did not apply to male reproductive

¹ The individual plaintiffs included a male employee who had been denied a leave of absence for the purpose of lowering his lead level because he intended to become a father. 499 U.S. at 192.

capacity in the same way that it applied to female reproductive capacity, it was facially discriminatory, despite the employer's arguably "benign" motives in adopting the policy. 499 U.S. at 198-99.

Because the policy was facially discriminatory, the employer was required to establish that non-fertility was a BFOQ. The Court stated that in adopting the Pregnancy Discrimination Act, "Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." *Id.* at 206. The record established that fertile women participated in the employer's business of manufacturing batteries as efficiently as anyone else. *Id.* at 207. Finally, the Court noted that while most states recognize the right to recover in some circumstances for a prenatal injury, the potential for employer liability is "remote at best" where the employer has fully informed pregnant workers of the risks of lead exposure and the employer has not acted negligently. *Id.* at 208. Therefore, the employer's concerns about potential harm to female offspring did not justify the exclusionary policy.

Title VII will not be implicated, however, if an alternative duty policy is optional. Thus, if an employer provides alternative duty for pregnant workers to limit their exposure to hazardous drugs, then the policy will not violate Title VII as long as employees retain the right to remain in their positions, if they so choose, and not be reassigned. For example, regulations promulgated by the Nuclear Regulatory Commission impose more stringent radiation limits on "declared pregnant women" than on men or nonpregnant women but the regulations explicitly allow a woman the right to choose whether to "declare" her pregnancy, and she may withdraw the declaration after it is made.² Because the NRC regulations allow a woman to decide whether to declare her pregnancy, the court, in *EEOC v. Catholic Healthcare West*, 530 F. Supp. 2d 1096 (C.D. Cal. 2008), rejected the employer's argument that its policy of prohibiting pregnant workers from performing fluoroscopy procedures was justified by the NRC regulations.

As illustrated by *Johnson Controls* and *Catholic Healthcare West*, a policy that treats men and women differently or that treats pregnant women differently from other workers is likely to be unlawful unless it is voluntary. The EEOC therefore urges that the CIB make clear that alternative duty policies should treat male and female employees alike and apply to male reproductive capacity in the same way that they apply to female reproductive capacity. The CIB should also make clear that policies directed at pregnant workers or members of one sex should be voluntary. By contrast, an alternative duty policy that is involuntary and applies only to pregnant workers or to members of a particular sex is likely to be unlawful.

We hope that these comments have been helpful.

Sincerely,

/s/

Peggy R. Mastroianni
Associate Legal Counsel

² "Declared pregnant woman means a woman who has voluntarily informed the licensee [employer], in writing, of her pregnancy The declaration remains in effect until the declared pregnant woman withdraws the declaration in writing or is no longer pregnant." 10 C.F.R. § 20.1003 (cited in *Catholic Healthcare West*, 530 F. Supp. 2d at 1105).