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Protective Exclusion in the VDT Workplace, Why Alternatives are Needed

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I. INTRODUCTION

Protective exclusion policies are policies that exclude pregnant women from working in a hazardous work environment in order to protect the fetus. Protective exclusion policies were traditionally used in the lead and chemical industries, however they now permeate many other types of businesses. Along with the growth of these policies a body of case law has developed. Some courts have found that

1. See Comment, Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination?, 5 COLUM. J. ENVTL. L. 97 (1978) (authored by Victoria L. Bor) (noting that with the growth of industry and hazardous substances, the belief that these substances pose danger to a worker's reproductive capacity has led some employers to exclude women from the workplace as a means of protecting workers from injury and protecting the company from legal liability).

2. In a recent New York Times article, Joan E. Bertin, Associate Director of the Women's Rights Project of the American Civil Liberties Union, was quoted as saying, "[t]here's more and more protective exclusion of women, even though the women who are being excluded are not always aware of it. You may think it's just chemical companies and manufacturing industries, but I'm hearing about it in hospitals and research labs . . . ." Lewin, Protecting the Baby: Work in Pregnancy Poses Legal Frontier, N.Y. TIMES, Aug. 2, 1988, at A1, col. 1, A15, col. 3-4; see also infra text accompanying notes 18-26 (discussing the growth and use of these policies).

3. A recent article in Student Lawyer noted that "[i]n recent years, a new genre of law has emerged to regulate 'protective exclusion'—a genre full of confusion, contradictions, and controversy." Lempinen, We Only Want What's Best for You, Vol. 17, No. 3, STUDENT LAWYER, 4 Nov. 1988; see also infra text accompanying notes 35-89 (discussing the different court decisions).
protective exclusion policies are merely forms of sex discrimination, while others have found that a protective exclusion policy may be justified when substantial scientific evidence documents that a hazard to the fetus exists.\(^4\)

This Note will focus on the problems that are developing in businesses that use Video Display Terminals (hereinafter “VDT’s”).\(^5\) Although concern is growing that VDT’s may be hazardous to pregnant women,\(^6\) an employer will be unable to protect the fetus by excluding pregnant women from this work environment. A VDT employer, who institutes a protective exclusion policy that prevents the hiring or results in the firing of women from VDT involved jobs, will fail to meet the evidentiary burdens under the existing court tests for Title VII.\(^7\) Such an employer would be subject to liability because little or no conclusive scientific evidence exists on the potential hazards of VDT exposure, and therefore, that employer could not legally justify its policy.\(^8\)

A VDT employer must look to alternative workplace practices\(^9\) to provide a solution to this problem. Alternative practices can protect the fetus, keep the worker employed and shield the employer

\(^4\) Compare Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259 (D. Ala. 1982) (holding that employer’s policy in dismissing a pregnant x-ray technician was discriminatory because the hospital had failed to explore other alternative duties which plaintiff could have performed safely), aff’d, 726 F.2d 1543 (11th Cir. 1984) with Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), on remand, 585 F. Supp. 1447 (W.D.N.C.) (holding that employer’s policy of excluding fertile women from certain jobs was not discriminatory because the policy was supported by scientific evidence which established that the chemicals which the employer used were hazardous to a woman’s reproductive capacity), vacated, 767 F.2d 915 (4th Cir. 1984); see also infra text accompanying notes 35-89 (discussing the court decisions in depth).

\(^5\) A Video Display Terminal (VDT) is simply a “TV-like cathode ray tube (CRT) attached to a typewriter keyboard ... linked to a computer.” B. DeMatteo, THE HAZARDS OF VDT’s, at 1 (1981).

This Note will only discuss the effects of employer’s policies on pregnant women. Although it is recognized that in other industries protective exclusion policies may sometimes encompass all women of childbearing years, such as the lead industry, this Note will not cover such a broad area.

\(^6\) See Ashford & Ayers, Changes and Opportunities in the Environment for Technology Bargaining, 62 NOTRE DAME L. REV. 810 (1987) (stating that workers are being asked to work with VDT’s, the hazards of which are just being discovered); Lewin, Pregnant Women Increasingly Fearful of VDT’s, N.Y. TIMES, July 10, 1988, at 19, col. 1, 3 (quoting Mr. Slesin, the editor of VDT News, as stating that “[t]he shocking thing is that millions of women are using VDT’s everyday, and no one really knows what that does to a fetus.”

\(^7\) 42 U.S.C. § 2000e-2 (1982); see also infra text accompanying notes 106-34 (analyzing a hypothetical VDT employer’s protective exclusion policy under the existing court tests).

\(^8\) See infra text accompanying notes 64-67 (discussing the scientific test required by the courts to legally justify an exclusionary policy as a business necessity).

\(^9\) See infra text accompanying notes 135-63 (discussing the various alternative practices available to an employer).
from liability, thereby satisfying the concerns of all parties involved. Alternatives also provide a basis for future modifications of a work environment in the event VDT’s are conclusively proven to be hazardous.

II. Why an Employer, Whose Employees Use Video Display Terminals in Their Employment, Would Want to Institute a Protective Exclusion Policy

VDT’s are used by over 10 million people in the capacity of their employment.10 Approximately 5 million of these workers are women of childbearing years.11 As VDT usage has become more prevalent, concern has grown that, because VDT’s emit radiation, they may pose a health hazard to the unborn fetus of a pregnant worker.12 Beginning in the 1970’s, many incidents arose highlighting this concern.13 A major Canadian airport reported that, over a two year period, seven cases of miscarriage occurred out of the thirteen VDT ticket operators who had been pregnant.14 Sears and Roebuck in Dallas, Texas reported eight miscarriages out of twelve pregnant VDT operators over a one year period, of which the chance for such a cluster happening naturally is six out of 10,000.15 An Express office in Great Neck, New York reported six miscarriages over a four

11. Id.
12. See Goldhaber, Polen & Hiatt, supra note 10, at 696 (discussing briefly the concern over VDT’s as a potential danger and the recent resurgence of case-control studies in the area); Lewin, supra note 6.

VDT’s work on the same basic principle as a television set, as the images appear on the VDT screen the VDT emits low levels of varying kinds of radiation. B. DeMatteo, supra note 5, at 7. VDT’s emit three basic kinds of radiation: (1) the electron beam which scans the VDT screen produces an x-ray similar to that used medically; (2) the activated screen then emits an ultraviolet light, like that associated with sunlamps; and (3) the electrical components of the VDT produce static electricity and various radio waves like those emitted from radars or microwaves. Id. at 8. These three types of radiation are divided into two categories based on their potential effects: (1) Ionizing radiation which covers the x-radiation effect of the electron beam and has the power to alter a cell’s structure and (2) Nonionizing radiation which includes ultraviolet light and static electricity that can alter a cell’s behavior and result in cancer or genetic damage. Id. at 11.

13. See B. DeMatteo, supra note 5, at 31; see also Altman, Pregnant Women's Use of VDT’s is Scrutinized, N.Y. TIMES, June 5, 1988, at 22, col 5 (stating that “[s]ince 1979, news organizations have reported several small clusters of miscarriages and birth defects among VDT operators in the United States and Canada.”).
15. Id.
month period among their VDT workers. Many other incidents of an equally suspicious nature have also occurred in rare statistical clusters.

Faced with a potential health hazard, such as VDT’s, the common response of employers has been to establish a gender specific fetal-protective exclusion policy. These policies operate by removing the mother of the endangered fetus from the potentially hazardous workplace. The tendency of employers to choose total protective exclusion of the worker from the workplace over alternatives, such as workplace modifications, is buttressed by the fact that such alternatives cost money.

Employers have traditionally attempted to justify the need for their fetal protective exclusion policies as a business necessity. Employers express a desire to protect themselves from the possibility of tort actions brought by an employee’s child arising from an injury caused by a hazard in their workplace. Stating that such suits can

16. Id. at 32.
17. Id. at 31. Additional examples exist. See id. In the Defense Logistics Agency in Atlanta, Georgia, three birth defects and seven miscarriages occurred in one year among the nineteen pregnant VDT workers. Id. In Canada four VDT operators gave birth to children with birth defects and three other women in the same department not using VDT’s gave birth to normal children. Id.; see also Lewin, Miscarriages at USA Today are Under Review, N.Y. TIMES, Dec. 10, 1988, at 32, col. 1 (citing fourteen miscarriages which recently occurred at the office of USA Today in New York and which might have been caused by the VDT’s that these women worked with).
18. See, e.g., International Union v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988) (upholding an employer’s protective exclusion policy that removed women of childbearing years from the workplace based on the fetal health hazard that the lead used in the work environment posed), aff’ed, 886 F.2d 871 (7th Cir. 1989) (en banc); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (illustrating an employer’s protective exclusion policy that categorized female workers into three job classifications and subsequently resulted in the prohibition of some of the jobs to women based on the threat posed by the teratogenic agents in the workplace), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984).
19. See, e.g., International Union, 680 F. Supp. at 310 (excluding women from jobs in the company’s battery making plant, where the lead levels would rise above levels deemed to be safe for the fetus).
20. See Lewis, Questions on Health and PC’s, N.Y. TIMES, July 5, 1988, at C6, col. 3 (stating that employers have been antagonistic towards labor union requests to provide alternatives to VDT usage for pregnant workers). See generally 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, 699 n.330 (1981)(discussing several cases in which employers complained of the costs which were involved in establishing alternative practices).
21. E.g., Hayes v. Shelby Memorial Hosp. 726 F.2d 1543, 1552 n.15 (11th Cir. 1984), aff’g, 546 F. Supp. 259 (D. Ala. 1982); see also Williams, supra note 20, at 644-45 (investigating briefly an employer’s interests in protecting himself from tort actions); Comment, Gender Specific Regulations in the Chemical Workplace, 27 SANTA CLARA L. REV. 353, 353-54 & n.4 (1987) (authored by Sherri Evans-Stanton) [hereinafter Gender Specific Regula-
prove financially devastating to their business, employers claim that their protective exclusion policies are a "business necessity." However, courts do not accept a financial concern as a viable justification for creating a protective exclusion policy. A recent trend has allowed an employer to justify a protective exclusion policy based on a moral concern for the health of the fetus. Although an employer may state that a moral concern is the basis for his policy, it is still likely that the fear of potential tort liability will be the strongest motivating factor in an employer’s decision to adopt a fetal protective exclusion policy.

22. See, e.g., Hayes, 546 F. Supp. at 264 (proposing a defense by employer that the employer’s protective exclusion policy, which allowed for the removal of a pregnant x-ray technician, was justified because of the costs of potential litigation); Zuniga v. Kleberg Hosp., 692 F.2d 986, 992 n.10 (5th Cir. 1982)(recognizing in dicta, employer’s argument that the "economic consequences of a tort suit brought against the Hospital by a congenitally malformed child could be financially devastating. . . ."); Ashford & Caldart, The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention, 5 INDUS. REL. L.J. 523, 552 (1983)(noting a monetary award of damages for fetal tort injuries is likely to be extremely high).

23. A policy that has a disproportionate impact on women falls under a Title VII analysis of disparate impact and may be rebutted by a business necessity defense. See infra text accompanying notes 55-76 (analyzing a disparate impact paradigm). The test for establishing a business necessity defense was set out by the court in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), cert. denied, 404 U.S. 1006 (1971), and has been upheld by most courts. See infra text accompanying notes 57-67 (discussing the business necessity defense in detail).


25. See, e.g., Hayes, 726 F.2d at 1553 n.15 (stating that a genuine desire to promote the health of the fetus may be justifiable as a business necessity); see also infra text and accompanying note 61 (discussing moral concern as a viable justification for a fetal protective exclusion policy).

26. See Vanderwaerdt, supra note 24, at 165 (1983)(stating that protective exclusionary policies are used as the primary means of decreasing tort liability). For a discussion of the existing law on fetal tort injury suits see, W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS, § 55 at 367 (5th ed. 1984). Most courts originally denied recovery for such an injury based on the belief that the defendant owed no duty to an unborn person and that the burden of proving causation would be too great for a plaintiff to meet. Id. However, today this type of suit is recognized where “[t]he child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death.” Id. at 368 (footnotes omitted). See generally Ashford & Caldart, supra note 22, at 553 (discussing plaintiff’s burden of proof in a fetal injury suit); Fetal Protection Programs, supra note 21, at 761-63 n.42 (discussing case law and commentary in this area).
III. THE STATUTORY FRAMEWORK WITHIN WHICH A PROTECTIVE EXCLUSIONARY POLICY WILL BE ANALYZED

Title VII and its 1978 amendment provide the analytical framework within which a court will review a claim of sex discrimination based on a protective exclusion policy. Standing alone, Title VII makes the discharge, segregation or refusal to hire an employee based on that "individual's race, color, religion, sex or natural origin" an unlawful employment practice. In 1978, Title VII was amended to clarify that sex discrimination included discrimination based on pregnancy. The Pregnancy Discrimination Act provides in pertinent part that "[w]omen affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability to work."

The courts have traditionally used three paradigms to outline their analysis of Title VII claims: (1) Facial Discrimination-Disparate Treatment; (2) Disparate Impact; and (3) Pretext-Disparate

27. 42 U.S.C. § 2000e-2 (1982). The Civil Rights Act includes in pertinent part: (a) It shall be an unlawful employment practice for an employer-

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

2. to limit, segregate, or classify his employees 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 such individual's race, color, religion, sex or national origin . . . .


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 . . . .


30. 42 U.S.C. § 2000e(k) (1982). The Pregnancy Discrimination Act was enacted for two reasons: (1) to overrule the case of General Electric Co. v. Gilbert, 429 U.S. 125 (1976), thereby making it clear that those employers who offer disability benefits to their employees must also extend such benefits to women who are unable to work due to pregnancy-related conditions; and (2) to prevent differential treatment of women based on their pregnant condition. See Carney v. Martin Luther Home, Inc., 824 F.2d 643, 646 (8th Cir. 1987).

Under this bill, [the Pregnancy Discrimination Act,] the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees . . . .


32. Facial discrimination-disparate treatment analysis is used when a policy is clearly
A. Facial Discrimination—Disparate Treatment

This paradigm has been used by the courts in analyzing a discriminatory policy on its face. E.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984), affg. 546 F. Supp. 259 (D. Ala. 1982). This means that the policy simply treats some people less favorably than others based on gender. In such cases it is necessary to prove a discriminatory motive existed, although the proof does not have to be direct but may be inferred from circumstantial evidence. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1979). Under Title VII this type of discrimination is allowed if an employer is able to establish that sex is a bona fide occupation qualification (BFOQ). See infra text accompanying notes 35-54 (discussing facial discrimination in detail).

33. Disparate impact occurs when a policy is facially neutral, which means the policy treats all employees the same on its face, however in practice the policy impacts more harshly on one group. E.g., Wright v. Olin Corp., 697 F.2d 1172, 1187 (4th Cir. 1982), on remand, 585 F.Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984); see also infra text accompanying notes 55-76 (discussing disparate impact analysis in detail). In disparate impact cases it is not required to prove that a discriminatory motive existed. See, e.g., International Bhd. of Teamsters, 431 U.S. at 355-56 n.15. The ordinary defense to a prima facie case under disparate impact analysis is a judicially created one of business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970); see also infra text accompanying notes 57-72 (discussing the business necessity defense).

34. A pretext-disparate treatment discrimination analysis is used in a situation where an employer attempts to use a neutral reason to justify his questioned policy. E.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1980). The plaintiff will attempt to show that the employer's policy is not a neutral one because the employer's justification is merely a pretext for discrimination. See, e.g., Texas Dep't of Community Affairs, 450 U.S. 248 (establishing the McDonnell Douglas test as the proper method of analysis for prima facie cases of pretext). This policy is also termed a disparate treatment policy, because just like facial discrimination policy it results in the differential treatment of one group. See also Fetal Protection Programs, supra note 21, at 767; infra text accompanying notes 77-89 (discussing pretext analysis in detail).

35. Originally, the racial discrimination cases that arose after the enactment of the Civil Rights Act of 1964 raised issues of disparate treatment. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (involving a refusal to make accommodations for blacks); Katzenbach v. McClung, 379 U.S. 294 (1964) (involving a refusal to serve blacks in a restaurant). Despite these early decisions, it was not until 1973 in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), that the Supreme Court finally formulated a detailed test for proving racial discrimination in disparate treatment cases. According to McDonnell Douglas the plaintiff must show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

Id. at 802 (footnote omitted). In McDonnell Douglas, the plaintiff alleged that he had been denied employment based on his involvement in civil rights activities and based on his race and color. Id. at 801. The court in McDonnell Douglas stated that "[t]he language of Title VII makes plain the purpose of Congress to assure equal employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." Id. at 800 (citations omitted) (construing
facially discriminatory policy or practice, one that results in the differential treatment of a class of workers, such as pregnant workers. Under this paradigm, the plaintiff bears the burden of establishing a prima facie case of facial discrimination by showing that the policy in question applies only to pregnant women. An employer's only statutory defense to such a charge is provided by Title VII, which establishes that a bona fide occupation qualification (hereinafter "BFOQ") will justify a case of facial discrimination.

The BFOQ defense is provided for by § 42 U.S.C. § 2000e-2(e) which allows an employer to avoid liability and justify his discriminatory policy upon establishing that "sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The courts have narrowly interpreted this defense allowing its application only in instances where the employer can show that "the essence of the business would be undermined without the challenged employment practice."

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

37. The Pregnancy Discrimination Act mandated that this section include women who were pregnant. 42 U.S.C. § 2000e(k) (1982). It should be noted that while this is the only statutorily recognized defense, the courts have created a second broader defense entitled business necessity. Originally a business necessity defense was applied to claims of disparate impact, however, the Hayes court adopted this defense in conjunction with a BFOQ analysis under facial discrimination-disparate treatment. Hayes, 726 F.2d at 1548; see also infra text accompanying notes 48-54.


39. The Supreme Court has stated that a BFOQ is a narrow exception to the general prohibition of discrimination based on sex. See Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); see also Diaz v. Pan American World Airways, Inc., 442 F.3d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971). The Supreme Court in Dothard held that being male was a BFOQ when acting as a security guard in a contact position within a prison. Id.; EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1988).

Many other verbal formulations of this test exist. See, e.g., Griggs v. Duke Power Co.,
Under this interpretation, to invoke a BFOQ an employer must objectively establish some nexus between the worker's pregnant condition and her ability to fulfill her job requirements. Absent successful proof of a BFOQ, an employer will ordinarily lose under facial discrimination analysis.

Recently, two developments in facial discrimination analysis have occurred in the area of fetal protective exclusion policies, thereby altering the paradigm: (1) the rejection of a facial discrimination-BFOQ analysis in a fetal protection case by the Fourth Circuit and (2) the bifurcation of the facial discrimination analysis by the Eleventh Circuit by allowing the business necessity defense, from an ordinary disparate impact analysis, to be inserted into a facial discrimination analysis.

In *Wright v. Olin Corp.*, the Fourth Circuit stated that it
found a facial discrimination analysis to be inapplicable in analyzing a fetal vulnerability program.\footnote{Wright, 697 F.2d at 1185.} Although it was clear that the court rejected the facial discrimination paradigm in the \textit{Wright} case, it was not clear what the future implication of this rejection would be.\footnote{Id. at 1185.} The \textit{Wright} court stated in the body of the opinion that it found disparate impact analysis, rather than facial discrimination, to be “best suited for a principled application of Title VII doctrine to the fetal vulnerability program.”\footnote{Id. at 1185 n.21.} However, in the accompanying footnote the court went on to qualify its apparent rejection of the facial discrimination analysis.\footnote{Id.} The \textit{Wright} court stated that facial discrimination was not \textit{exclusively} applicable to fetal vulnerability cases, and to treat it as exclusive would prevent the use of the business justification defense available under disparate impact analysis.\footnote{Id.}

The Eleventh Circuit, in \textit{Hayes v. Shelby Memorial Hosp.}, meshes both the facial discrimination-disparate treatment and the disparate impact paradigms.\footnote{Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984), \textit{aff'd}, 546 F. Supp. 259 (D. Ala. 1982).} Under the court's analysis a plaintiff is required to establish a prima facie case through evidence that the policy in question applies only to women. At this point the court allows an employer to rebut the presumption of discrimination and show that while its policy applies only to women, the policy is still neutral.\footnote{Hayes, 726 F.2d at 1548.} Under \textit{Hayes} the employer's burden of proof in rebutting plaintiff's prima facie claim is fashioned after the business necessity defense ordinarily used within a disparate impact analysis.\footnote{See \textit{id}.} To carry its burden an employer must show, through objective scientific evidence taken from qualified experts: (1) that its policy is justified on a scientific basis by showing a substantial risk of harm to the fetus and (2) that the hazard applies only to women.\footnote{See \textit{id}. at 1548 n.8 (wherein the court states that while it is not labeling this defense a business necessity, it is borrowing the requirements from those used for a business necessity
The insertion of the "business necessity" test into the beginning of a facial discrimination analysis, by the Eleventh Circuit in *Hayes*, changes a straightline facial discrimination-disparate treatment analysis into a bifurcated one. Normally a BFOQ would be raised to rebut a plaintiff's prima facie case without the use of the business necessity requirements.\(^2\) Under *Hayes*, a BFOQ will be used only upon a failure of an employer to establish its scientific evidentiary burden.\(^3\) However, if an employer is able to meet its scientific burden, the *Hayes* court automatically forces the case into a disparate impact analysis.\(^4\)

**B. Disparate Impact\(^5\)**

This paradigm has been used in cases involving a facially neu-
tral rule that has a disproportionate impact on a class of workers, such as pregnant women. Under this paradigm the plaintiff has the initial burden of establishing a prima facie case by showing that, although defendant employer’s policy is neutral on its face, it affects one group of workers more harshly than another and is therefore discriminatory. An employer may rebut plaintiff’s prima facie case by using the judicially created defense of business necessity. The business necessity defense was recognized by the Supreme Court as a necessary judicial creation to cover discriminatory employment practices that fell outside the realm of job qualifications, an area already covered under a BFOQ.

An employer must first show that the application of the business

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Interpretation of The Civil Rights Act, supra note 35, at 316-18 (discussing the Griggs court test in detail). In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) the Supreme Court refined the Griggs court analysis. The Court in Albemarle added a third step, allowing the plaintiff the opportunity to rebut the employer’s job relatedness claim by illustrating that other less discriminatory alternatives existed which the employer could have used. Id. at 425; see also, The Supreme Court's Interpretation of the Civil Rights Act, supra note 35, at 319-320 (discussing the Albemarle court's analysis). See generally Willborn, The Disparate Impact Model of Discrimination: Theory and Limits, 34 AM. U.L. REV. 799 (1985)(analyzing disparate impact in racial cases).

56. See, e.g., International Union, 680 F. Supp. at 316; Wright v. Olin Corp., 697 F.2d 1172, 1187 (4th Cir. 1982), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984). For a different phrasing of a prima facie case burden see Zuniga v. Kleberg County Hosp. 692 F.2d 986, 990 (5th Cir. 1982)(finding that a pregnancy based classification will violate Title VII when: (1) “its effect is to discriminate on the basis of sex and no showing of sex-based intent is required” and (2) when the policy “impose[s] on women a substantial burden that men need not suffer.” (citing Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977))).

For an automatic application of a prima facie case see Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984), aff'g, 546 F. Supp. 254 (D. Ala. 1982). Under the Hayes court's bifurcated analysis, once an employer rebuts a charge of facial discrimination under facial discrimination-disparate treatment analysis, an employee automatically has established a prima facie case of disparate impact. Id. This is because the policy, while it may be proven neutral, still affects only one group and therefore a disparate impact is automatically created. See also supra text accompanying notes 48-54 (presenting in detail the Hayes court's bifurcated analysis).

An example of a facially neutral policy can be found in Nashville Gas Co. v. Satty, 434 U.S. at 140 n.2 (holding that the employer's pregnancy policy gave the appearance of being neutral, because this policy was identical to a formal leave of absence that was granted to employees, male or female, in order that they might pursue an education).

57. See, e.g., International Union, 680 F. Supp. at 316; see also, Hayes, 726 F.2d at 1552-55 (providing a different approach to applying this defense, based on the court's bifurcation of two paradigms); Wright, 697 F.2d at 1190 & n.26; Zuniga, 692 F.2d at 992 (recognizing the burden but not exploring the defense because plaintiff had already met rebuttal requirements); Williams, supra note 20, at 687-703 (discussing this defense generally).

58. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 329-31 (1977); see also Williams, supra note 20, at 689-95 (critiquing the Supreme Court's development of this defense).
necessity defense would be appropriate, based on the fact that its protective exclusion policy is a business necessity. Employers originally claimed that their protective exclusionary policies were justifiable as business necessities based on the potential litigation costs that would result from a fetal injury suit premised on the hazard in their workplace. Most courts rejected attempts to justify policies based on potential liability, asserting that such justifications did not truly fulfill the courts' intended meaning of business necessity. Recently, however, the courts have held that an employer's moral concern for a fetus' right to be healthy will justify a policy as a business necessity.

Although the courts have determined that a business necessity defense may be an appropriate one in the fetal protection area, an employer must still satisfy other evidentiary requirements in order to take advantage of this defense. As originally developed, the business necessity defense was created for racial discrimination cases and mandated a 'job-relatedness' test wherein the policy in question must relate to job performance. However, a 'job-relatedness' test would prove inappropriate within the context of a fetal protective exclusion

59. See Hayes, 726 F.2d at 1552 n.15. The hospital claimed that its fear of potential litigation costs was behind its firing of a pregnant x-ray technician. Id. Additionally, reference was made to the Zuniga case, where it was stated that fetal injury suits could be financially devastating and interrupt the "safe and efficient operation of business." Id. (quoting Zuniga, 692 F.2d at 992 n.10).

60. See Hayes, 546 F. Supp. at 264 (rejecting such a justification based on the belief that it would "shift the focus of the business necessity defense from a focus of concern for the safety of the hospital patients to a focus of a concern for hospital finances.").

61. See Hayes, 726 F.2d at 1553 n.15 (stating that while potential liability is "too contingent and too broad a factor to amount to a 'business necessity' . . . the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring, not by self-interest."). This concept was most recently upheld in International Union v. Johnson Controls, Inc., 680 F. Supp. 309, 316 (E.D. Wis. 1988), aff'd, 886 F.2d 871 (7th Cir. 1989) (en banc), where the court recognized and upheld the Hayes court's expansion of the business necessity defense. See also Wright, 585 F. Supp. at 1453 (stating that [a]n employer, such as Olin [Corp.,] can justifiably choose a policy of fetal protection as a moral obligation to protect the next generation from injury, and it is a social good that should be encouraged and not penalized."). But cf. Zuniga, 692 F.2d at 992 (stating that because plaintiff had established that alternatives existed it was not necessary for the court, at that time, to examine whether or not a concern for fetal health would be considered a business necessity).

62. In Griggs, 401 U.S. at 429, the Court first enunciated the term business necessity. In Griggs, the Court held that an employment test violated Title VII, of the Civil Rights Act, because the test did not relate to skills necessary for job performance and resulted in the exclusion of a disproportionate amount of blacks. Id. In ordinary sex discrimination cases this test of 'job-relatedness' takes many forms. E.g., Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 702 (8th Cir. 1987)(holding that the employer had met his burden by showing that 'a manifest relationship' existed between the Girls Club's fundamental purpose and its policy against pregnant single women working there).
policy because an employer’s policy in preserving fetal health is unrelated to job performance. Therefore, the courts have adapted the original business necessity ‘job-relatedness’ test to meet the needs of a fetal protective exclusion policy analysis and formulated a new test.

The new business necessity test has two requirements. The employer must prove: (1) the existence of significant risks of harm to the fetus of women employees through their exposure to a hazard in the workplace and (2) that the hazard is confined to women workers. In establishing these two requirements, scientific evidence must be given. An employer must prove, by objective evidence, taken from qualified experts in the relevant scientific fields, that a body of opinion exists believing that the risk is such that an “informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.”

It should be noted that while under a normal disparate impact analysis such scientific evidence will be given in response to plaintiff’s prima facie case of disparate impact, under the Hayes court’s bifurcated disparate treatment analysis, this is not true. In order to reach this stage of the analysis, the Hayes court requires that the evidentiary requirement must have already been successfully established by the employer in its rebuttal of plaintiff’s prima facie facial

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63. See Williams, supra note 20, at 689. It would not be logical to require an employer to prove a job related standard in a fetal protection case. Although a relationship exists between the removal of women from the hazardous workplace and the protection of fetal health, this is not the relationship that would be questioned. Rather it is the relationship between the employer’s purpose in creating a policy to protect the fetus, and an employee’s job performance that would be analyzed. Therefore, under a job-relatedness test it would have to be shown that fear of fetal harm affects job performance. This could not be logically shown. In comparison, in an ordinary discrimination case it would be logical to try to show that an employer’s test requirement, for example, is related to job performance. This is because the skills that are being tested might be those needed for successfully performing the job in question. Therefore, while proving job-relatedness normally makes sense in most business situations, it would not be logical to require proof of this in a fetal protection scenario.

64. E.g., Hayes, 546 F. Supp. at 263 (citing the original Robinson test as a basis for its business necessity defense); see also Wright, 697 F.2d at 1190 (setting forth the principles, based on the original test articulated in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. denied, 404 U.S. 1006 (1971), upon which a business necessity analysis must be premised).

65. See Hayes, 726 F.2d at 1548-49; Wright, 697 F.2d at 1190.

66. See id.

67. Id.

68. See supra text accompanying notes 48-54 (laying out the Hayes court’s bifurcated analysis). Compare Hayes, 726 F.2d at 1553 (creating a bifurcated approach) with Wright, 697 F.2d at 1191 (offering an example of straightforward disparate impact).
discrimination charge. Therefore, once an employer has met its burden under a facial discrimination analysis, it is not required to repeat it, and the analysis will automatically shift to disparate impact. The analysis shifts automatically, because although the employer may have shown its policy to be neutral, the policy still has a disproportionate impact on women and therefore a disparate impact analysis is required. It is at this point that the analyses of the Hayes and Wright courts converge and allow a plaintiff to rebut the employer’s business necessity defense.

A plaintiff may rebut an employer’s business necessity claim by showing that the specific policy in question is not really a business necessity. Therefore, a plaintiff must establish that other non-discriminatory acceptable alternatives existed, that these alternatives were available to the employer and that the employer failed to utilize or even consider them. A showing of available alternatives indi-

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69. See Hayes, 726 F.2d at 1553.
70. Id. at 1553 & n.16; see supra text accompanying notes 48-54 (setting forth this part of the Hayes court’s bifurcated analysis).
71. Id. at 1552-53.
72. Hayes, 726 F.2d at 1553 n.16; Wright, 697 F.2d at 1191; see supra text accompanying notes 48-54 (discussing the Hayes court’s bifurcated analysis).
73. The practice of allowing a plaintiff to rebut an employer’s claim of business necessity by showing that less discriminatory alternatives existed, originated in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In Albemarle Paper Co., the Supreme Court stated that a standard which has no discriminatory effect and serves the employer’s legitimate purposes must be used in preference to a standard with a more discriminatory effect. Id. at 425, quoted in Levin v. Delta Air Lines, 730 F.2d 994, 1000 (5th Cir. 1984). In Levin, the court noted that the Albemarle rule, which had originally encompassed a situation where the number of workers chosen was affected, had been expanded to address the depth of the discriminatory impact as well as breadth. Id. at 1000. Levin goes on to define a less discriminatory alternative as one “which accords with the employer’s customary practices so amenably that the failure to use the alternative indicates that the legitimate concerns supporting the challenged standard or pretextual.” Id. at 1001.
74. E.g., Hayes, 726 F.2d at 1553. The court held that the plaintiff had the burden of rebutting an employer’s business necessity defense. Id. The plaintiff in the case was able to show that the hospital, in which she had worked as an x-ray technician, had failed to consider using alternative practices before firing her. Id. at 1553-54. Plaintiff was able to show that other duties could have been assigned to her that would have reduced her exposure to radiation, and therefore have accomplished defendant’s purpose with a less discriminatory impact. Id. at 1554. However in this case, because the hospital never met its threshold burden of scientific evidentiary proof, the court’s analysis of alternatives was merely a surmise of what the court would have held had the defendant met that threshold burden. See also Zuniga, 692 F.2d 986 (holding defendant had the option of granting a leave of absence as opposed to firing the plaintiff and therefore a less discriminatory alternative had existed).

Courts have noted that the existence or possibility of a less-discriminatory alternative is merely evidence of discriminatory intent and is not a foundation upon which a court could subsequently compel an employer to restructure his business practices and adopt these alternatives. See, e.g., Wright v. Olin Corp, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984). As the Supreme Court stated in Furnco Constr. Corp. v. Waters, 438 U.S.
icates that the employer's discriminatory policy was not really a business necessity as its purpose obviously could also have been accomplished by less discriminatory means. Therefore, by showing the existence of less discriminatory alternatives, a plaintiff can successfully rebut an employer's claim that its policy was a business necessity.

C. Pretext-Disparate Treatment

This paradigm was traditionally used by the courts in their analysis of overt sex discrimination cases. To establish a prima facie case of overt discrimination based on pregnancy the plaintiff has the burden of proving, by a preponderance of the evidence, that she was a member of a protected class (pregnant women) and that she

567, 578 (1978), "courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." quoted in Wright, 585 F. Supp. at 1452.

75. Compare Hayes, 726 F.2d at 1551-54 (holding that alternatives existed which would have allowed the plaintiff to either continue working in the hospital, or remain in the same area without danger by simply changing shifts, and therefore the employer's policy could not be considered a business necessity) with Wright, 585 F. Supp. at 1452 (holding that plaintiff had failed to establish other alternatives which could have been used to afford women protection from the hazardous substances, and therefore this policy was a business necessity as it was necessary to protect the fetus from harm).

76. E.g., Hayes, 726 F.2d at 1553; see also Zuniga, 692 F.2d at 992 (noting that even if the court had allowed defendant to justify his policy as a business necessity based on concern for the fetus, plaintiff had illustrated that alternatives existed, and therefore plaintiff would have been able to successfully rebut such a defense).

77. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the Supreme Court allocated the traditional burdens of proof in racial discrimination cases. See supra note 35 (discussing this case, its origins and setting forth the standards). In a pretext racial discrimination case a plaintiff must first establish a prima facie case of racial discrimination. Id. at 802. The burden then shifts to the employer to prove his policy is really neutral by "articulat[ing] some legitimate nondiscriminatory reason for the employees rejection." Id. at 802. The employee is then given the opportunity to establish that the employer's proffered reason was merely a pretext for discrimination and that he was really rejected because of his race. Id. at 804; see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 258 (1980)(reaffirming the McDonnell Douglas pretextual analysis).

78. E.g., Texas Dep't of Community Affairs, 450 U.S. 248 (holding that in an overt gender based employment discrimination case the plaintiff will be given the opportunity to prove that the reasons preferred for an employer's policy are merely a pretext for discrimination); see also, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)(remanding petitioner's case to determine whether defendant's policy, which effectively denied seniority rights to women who returned from a pregnancy leave, was a pretext for discrimination); General Electric v. Gilbert, 429 U.S. 125 (1976)(holding that defendant's disability plan, which excluded pregnancy, was not in violation of Title VII as plaintiff had failed to establish that defendant's stated reason was pretextual). The Pregnancy Discrimination Act was enacted to overrule the General Electric finding, making it clear that pregnancy was to be included in disability plans. See supra note 30 (discussing General Electric's history and setting forth the provisions of the Pregnancy Discrimination Act).
was either discharged or otherwise treated differently because of her pregnancy, thereby giving rise to an inference of discrimination.\textsuperscript{79}

Once the plaintiff has established her prima facie case, the burden is then shifted to the defendant-employer. To rebut the presumption of discrimination, an employer must show that the plaintiff had been fired or refused employment based on a legitimate non-discriminatory reason.\textsuperscript{80} If the employer is able to rebut the presumption of discrimination, the burden is shifted once again to the plaintiff.\textsuperscript{81} The plaintiff now has the burden of persuading the court that the employer’s proffered reason is merely a pretext for discrimination.\textsuperscript{82}

The courts have held that a pretextual analysis is inappropriate for analyzing a fetal protective exclusion policy.\textsuperscript{83} The pretext analysis was tailored to address a situation of denial and rebuttal.\textsuperscript{84} Al-

\textsuperscript{79. See Texas Dep’t of Community Affairs, 450 U.S. at 252-53 (citing McDonnell Douglas Corp., wherein the Court set forth the recognized elementary steps of a pretext discrimination case). Texas Dep’t of Community Affairs and McDonnell Douglas provide the basic pretextual analysis for reviewing employment discrimination in racial and gender cases. However, cases exist which specifically adapt the prima facie case to a pregnancy situation. See, e.g., Frank’s Shoe Store v. West Virginia Human Rights Comm’n, 365 S.E.2d 251, 258 (W. Va. 1986)(holding plaintiff had satisfied her prima facie burden by showing that she was pregnant and able to perform her job; yet her hours had been reduced while no male employees were treated that way); Midstate Oil Co. v. Missouri Comm’n on Human Rights, 679 S.W.2d 842, 846 (Mo. 1984)(holding that plaintiff had met her prima facie burden by establishing that she had been discharged from her job as a store attendant and that her pregnancy was a factor in her employer’s decision to fire her, thereby giving rise to an inference of discrimination).

\textsuperscript{80. Texas Dep’t of Community Affairs, 450 U.S. at 254. Compare Gammon v. Precision Eng’g Co., 44 Fair Empl. Prac. Cas. (BNA) 1208 (D.C. Minn. Oct. 21, 1987)(holding employer’s claim, that he had terminated plaintiff because she was unable to be temporarily replaced during her pregnancy, was not a legitimate reason when it was shown that other employees who had been sick had been allowed to avail themselves of temporary leaves) with Midstate Oil Co., 679 S.W.2d at 846 (holding that the discharge of plaintiff based on her inability to perform the heavy lifting required by her job, due to her pregnant condition, made her unsuitable for her position and therefore her employer had a legitimate nondiscriminatory reason for firing her).

\textsuperscript{81. Texas Dep’t of Community Affairs, 450 U.S. at 256.

\textsuperscript{82. Id. at 255-56. Compare EEOC v. Old Dominion Sec. Corp., 41 Fair Empl. Prac. Cas. (BNA) 612 (E.D. Va. July 16, 1986) (finding that plaintiff was able to rebut her employer’s claim that she was unable to perform her job as a security guard while pregnant, by showing that her pregnant condition in no way interfered with her work) with Roller v. City of San Mateo, 572 F.2d 1311 (9th Cir.1977)(holding plaintiff, by providing only limited evidence that employer’s failure to assign her light duty instead of placing her on sick leave was a discriminatory action in violation of Title VII, had failed to uphold her burden on rebuttal).

\textsuperscript{83. See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 n.5 (11th Cir. 1984), aff’d, 546 F. Supp. 259 (D. Ala. 1982); Wright v. Olin Corp., 697 F.2d 1172, 1185 (4th Cir. 1982), on remand, 585 F.Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984).

\textsuperscript{84. See, e.g., Old Dominion Sec. Corp., 41 Fair Empl. Prac. Cas. at 616-17 (illustrating employer’s denial that he fired plaintiff from her job as a security guard because she was pregnant and plaintiff’s successful rebuttal showing that she was able to perform her job); see
though the employer denies the existence of discrimination in its policy, the plaintiff attempts to rebut this assertion by using circumstantial evidence to prove that the employer intended to discriminate.\(^8\) However, in the case of fetal protection, there is no denial that the employer’s action is discriminatory in its effect because, by the very nature of the protective exclusion policy, women are treated differently.\(^6\) The employer is not seeking to deny the existence of a discriminatory effect, but rather to justify it under Title VII either as a BFOQ or as a business necessity.\(^7\) Both the Fourth and Eleventh circuits have rejected pretextual analysis finding it inappropriate to the particularities of a fetal protective exclusion policy case.\(^8\) Other courts have simply ignored pretext analysis when addressing the question of a fetal protective exclusion policy’s discriminatory nature.\(^9\)

\(85.\) See, e.g., Roller, 572 F.2d at 1315 (offering only circumstantial proof of discriminating intent premised on the fact that one male employee was treated differently than her, plaintiff was unable to rebut her employer’s professed reasoning for her discharge).

\(86.\) E.g. Wright, 697 F.2d at 1185 n.20. A protective exclusion policy will usually result in a woman not being hired to work at a job or being removed from a job, based on the fact that she is a fertile woman and/or pregnant. See supra text accompanying notes 18-26 (discussing protective exclusion policies in general). The non-hiring or firing of women is considered discriminatory based on Title VII and its 1978 amendment, which state that it is a discriminatory action to treat an employee differently based on sex or pregnancy. See supra notes 27-31.

\(87.\) In most fetal protective exclusion cases the employer does not deny the discriminatory effect of his policy, rather he outrightly admits to it. E.g., Hayes, 726 F.2d at 1547-48 (stating that the employer had admitted that his reason for firing the plaintiff was based solely on the fact that she was pregnant). In fetal protective exclusion cases an employer does not deny the discriminatory effect of his policy because his intent is to keep these women out of his work environment. However, his motivation may be based on a fear of future tort liability or concern for the health of the fetus or women. An employer will try to justify his policy under a recognized defense, i.e., BFOQ or business necessity. See supra text accompanying notes 37-41 (setting out the standard BFOQ defense) and notes 57-67 (setting out the business necessity defense).

\(88.\) See Hayes, 726 F.2d at 1547 n.5. The Hayes court did make note of the fact that a pretext case would be appropriate in analyzing a fetal protection policy if the policy affected both sexes. Id. at 1547-48 n.5, citing Williams, supra note 20, at 682-87; see also Wright 697 F.2d at 1185 (stating that the McDonnell Douglas pretext analysis was “wholly inappropriate for resolving the legal and factual theories of claim and defense centered on the fetal vulnerability program.”). See generally Williams, supra note 20, at 682-87 (discussing these cases and the paradigms).

Other circuits have also refuted pretext analysis. See, e.g., Levin v. Delta Air Lines, 730 F.2d 994, 999 (5th Cir. 1984) (rejecting pretext analysis because under that form of analysis, while an employer might establish that pregnant employees were a safety hazard, a court would be forced to further examine discriminatory motivation and might find itself forcing the employment of women even though they were proven to be a safety risk).

\(89.\) See, e.g., Zuniga v. Kleburg County Hosp., 692 F.2d 986 (5th Cir. 1982) (ignoring
IV. AN EMPLOYER WOULD BE UNABLE TO SUSTAIN A VDT PROTECTIVE EXCLUSION POLICY UNDER TITLE VII BECAUSE THERE IS NO CONCLUSIVE EVIDENCE THAT VDT'S ARE HAZARDOUS

A. Scientific Evidence Concerning the Dangers of VDT's to Pregnant Women is in Conflict and Therefore Cannot Provide the Necessary Consensus Requirement Needed to Meet the Court Tests

Although the general belief is that VDT's do not pose a threat, some studies have produced great conflict of opinion within the scientific community. A recent study conducted among 1,583 pregnant women who attended three obstetrical and gynecological clinics in Northern California, operated by the Kaiser-Permanente Medical Program in Oakland, has elicited a great deal of concern that VDT's could indeed pose a threat to pregnant women. The Kaiser study concluded that women who work with VDT's for more than twenty hours a week, early in their pregnancy, suffered twice as many miscarriages as other office workers. The authors of the study were unable to attribute these results to other factors such as smoking, alcohol, or other maternal characteristics. The Kaiser study provides a foundation for justifying the growing concerns over VDT's as realistic.

The Kaiser study indicates that VDT's may prove hazardous, however, problems exist that prevent the study from being considered conclusive. The authors of the study note that reporting discrepancies were possible within the surveyed cohort. It is possible that

the pretext analysis totally and beginning the analysis with a discussion of the case under the disparate impact paradigm).

90. Compare Altman, supra note 13, at 22, col. 5 (citing the National Institute for Occupational Safety and Health (NIOSH), which finds that VDT's emit radiation well below allowable standards, and although the institute recognizes that statistical clusters of miscarriages exist among VDT users, the institute has found no cause and effect relationship between the VDT's and these incidents) with Goldhaber, Polen & Hiatt, supra note 10, at 704 (stating that the Kaiser study indicates that VDT's could be potentially hazardous to pregnant women).

91. Goldhaber, Polen & Hiatt, supra note 10; see also Altman, supra note 13, at 22, col. 5 (stating that while organizations and scientists have speculated over this problem before, the Kaiser study provides the first real evidence based on substantial numbers of VDT users).

92. Goldhaber, Polen & Hiatt, supra note 10, at 695; see also Altman, supra note 13, at 22, col. 5 (stating that while findings on birth defects were reported at an increase of over 40%, the study's authors held this number not to be significant).

93. Goldhaber, Polen & Hiatt, supra note 10, at 695.

94. Id. at 704.

95. Id. at 695.
the women who did return the surveys suffered a selective memory lapse in estimating just how long they used VDT's.⁹⁶ It was also recognized that an overreporting by women using VDT's who had adverse pregnancies was a potential problem and was possibly compounded by an underreporting of women using VDT's who had no problems.⁹⁷

Other authorities point out that factors such as job related stress or poor working conditions (ergonomics) could also account for the results of the Kaiser study.⁹⁸ This belief is supported by a table produced in the study which illustrates that, although all categories of workers were analyzed, only clerical and administrative VDT workers showed an increase in miscarriages; whereas professional and managerial employees, who also spent over twenty hours a week on VDT's, did not develop such a high rate of miscarriages.⁹⁹ This difference has been used to illustrate the belief that it is poor working conditions that are at the root of the problem, not VDT's.¹⁰⁰

Even with all of these complications striking at the conclusiveness of the Kaiser study, cause for concern still exists.¹⁰¹ The Kaiser study itself still provides, at the very least, epidemiological evidence that high use of VDT's may increase the risk of miscarriage.¹⁰² Although experts feel it will be several years before a sound scientific conclusion can be reached, there are still discrepancies over whether a pregnant worker should continue to use VDT's.¹⁰³ The need exists for a large cohort study of working women that would be able to provide objective measures of VDT exposures, while excluding other

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96. Id. at 704.
97. Id. at 695.
98. Lewin, supra note 6, at 19, col.
99. Id.
100. Id.
101. See, e.g., B. DeMatteo, supra note 5, at 18-25 (explaining that the government's tests should not be considered accurate because these tests are not conducted under rigorous scientific procedures, these tests do not take into account the fact that VDT machines can leak, and these tests fail to measure the combined effect of the radiation emitted from VDT's that are placed in groups); Lewin, supra note 6, at 19, col. 1 (noting that concern remains based on earlier studies of animal embryos that "have shown very low frequency, pulsed, non-ionizing electromagnetic radiation emitted from VDT's can disrupt cellular growth."); see also Hendricks, VDT's on Trial, 134 Sci. News, Sept. 10, 1988, at 175 (citing to additional VDT laboratory experiments using VDT's, with one laboratory finding that VDT exposure resulted in a four-fold increase in abnormalities within embryos in one study and another laboratory finding a doubling in the numbers of abnormal embryos from VDT exposure); Lewis, supra note 20, at C6, col. 3 (citing other studies conducted in the U.S., Spain, Canada and Sweden that found VDT usage to result in "significant developmental abnormalities" in chicken embryos).
102. Goldhaber, Polen & Hiatt, supra note 10, at 705.
103. Lewin, supra note 6, at 19, col. 1.
factors such as ergonomic influences or job related stress. Until then, no scientific consensus can be established in the field. Without scientific consensus an employer will be prevented from meeting its evidentiary burden in the event that it establishes a protective exclusion policy that is challenged by the court.

B. Applying the Statutory Framework to a VDT Based Fetal-Protective Exclusion Policy

A fetal protective exclusion policy that would prevent the hiring or result in the firing of pregnant women from jobs involving VDT's would never survive judicial scrutiny under a Title VII analysis. As courts have avoided the use of the pretext paradigm in analyzing cases involving hazardous workplaces, a VDT policy would be analyzed under facial discrimination, disparate impact or both. When analyzed under these two paradigms an employer's VDT fetal protective exclusion policy will be found discriminatory because the employer will be either: (1) unable to establish its statutory defense of BFOQ or (2) it will lack the scientific evidence necessary to fulfill the business necessity defense.

1. Examining a VDT Protective Exclusionary Policy Under a Straightline Facial Discrimination-BFOQ Analysis

Under the traditional application of this paradigm, an employer, even absent a scientific evidentiary burden, will still be unable to justify its fetal protective exclusion policy. A plaintiff could establish a prima facie case based on the fact that the employer's VDT policy treats pregnant women differently from other employees by excluding them from VDT involved jobs. To rebut this charge of dis-

104. See Goldhaber, Polen & Hiatt, supra note 10, at 705; see also Altman, supra note 13, at 22, col. 6 (citing the Kaiser study's authors as stating that their study was not definitive because it was not really designed to determine the cause of the miscarriages outside of the influence of other factors such as job related stress and ergonomics); Lewin, supra note 6, at 19, col. 4 (stating that this fall NIOSH in Cincinnati was expected to study VDT use by telephone workers in order to determine potential hazards).

105. See supra text accompanying notes 65-67 (setting forth the scientific evidentiary test) and notes 57-67 (discussing the business necessity defense).

106. See, e.g., Wright v. Olin Corp., 697 F.2d 1172, 1185 n.20 (4th Cir. 1982) (stating that the McDonnell Douglas disparate treatment proof scheme was developed to apply in situations of denial and rebuttal, something not found in the ordinary fetal vulnerability policy cases), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984); see also supra text accompanying notes 77-89 (discussing in more detail the cases that reject pretext analysis).

107. See supra text accompanying notes 37-41 (discussing the BFOQ defense) and notes 57-67 (discussing the business necessity defense).

108. E.g., Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 703 (8th Cir. 1987)
crimination an employer will have to establish non-pregnancy as a BFOQ.\textsuperscript{109}

Title VII allows for a narrow exception to its prohibition against discrimination by allowing policies that are based on a BFOQ.\textsuperscript{110} The BFOQ exception has traditionally been found to be limited to situations where the "excluded class cannot adequately perform the job in question."\textsuperscript{111} Therefore, non-pregnancy would be considered a BFOQ in a job that required heavy lifting or moving.\textsuperscript{112} However, the average VDT worker is not required to perform duties within which her pregnant condition would prove to be a physical barrier, therefore, a BFOQ could not be established.\textsuperscript{113} If an employer fails to establish a BFOQ defense, then its VDT policy will be found to be discriminatory under a traditional facial discrimination analysis.\textsuperscript{114}

2. The Hayes Court's Bifurcated Facial Discrimination Analysis

Under either line of this bifurcated analysis, an employer will be unable to maintain that its policy is not discriminatory. Just as in the traditional facial discrimination analysis, under this bifurcated analysis a plaintiff must also establish a prima facie case by showing

(holding that the plaintiff had met her prima facie burden by showing that unmarried pregnant women were treated differently than other employees because they were not allowed to hold jobs at the club); see supra text accompanying note 36 (setting out the initial burden in a facial discrimination case).

109. See supra text and accompanying notes 37-41 (describing the BFOQ defense).


111. Williams, supra note 20, at 680; see, e.g., Dohard, 433 U.S. 321 (holding that being male was a BFOQ for maintaining a job as a prison security guard because women would be too vulnerable to an attack and therefore would not be able to perform effectively); Chambers, 834 F.2d at 704-05 (holding that the employer had established a BFOQ by showing that as an unmarried woman, in order for plaintiff to correctly perform her job as a role model for teenage girls, she could not be pregnant).

112. See, e.g., Harris v. Pan American World Airways, 649 F.2d 670, 677 (1980)(holding that the airline's policy of requiring pregnant flight attendants to stop working after a certain period of time was justified where non-pregnancy was a BFOQ because pregnant employees would be physically unable to perform their assigned tasks); see also supra text accompanying notes 37-41 (setting forth the BFOQ defense).

113. See Wright v. Olin Corp., 697 F.2d 1172, 1185 (4th Cir. 1982) (stating that disparate treatment-BFOQ analysis is inappropriate for analyzing fetal vulnerability programs), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984); see also Andrade, The Toxic Workplace: Title VII Protection for Potentially Pregnant Person, 4 Harv. Women's L.J. 77, 89 (Spring 1981)(arguing that a BFOQ defense is inapposite in the reproductive hazards setting because the issue employers assert is the effect the workplace might have on the fetus and the resultant liability of employers rather than whether fertile or pregnant women can perform their jobs).

114. E.g., Carney v. Martin Luther Home, Inc., 824 F.2d 643 (8th Cir. 1987)(finding employer had failed to show that plaintiff's pregnant condition was a BFOQ and therefore by firing her the employer had violated Title VII and was guilty of discrimination).
that the employer's policy applies only to pregnant women and is therefore discriminatory on its face.\textsuperscript{115} An employer is then faced with rebutting the plaintiff's prima facie charge in one of two ways: (1) if it is not able to meet its scientific evidentiary burden it must instead establish a BFOQ or (2) it must establish the requirements of the business necessity defense and provide a scientifically based justification for its policy.\textsuperscript{116} This note has previously established that an employer will be unable to establish that non-pregnancy is a BFOQ to performing the job of a VDT operator,\textsuperscript{117} therefore the employer's only choice is to satisfy the business necessity requirements adopted by the \textit{Hayes} court.\textsuperscript{118}

The \textit{Hayes} court's business necessity defense requires scientific evidence, and in the instance of VDT usage an employer will be unable to provide it. To sustain a business necessity defense an employer would have to establish that: (1) its policy of excluding pregnant women from working with VDT's was justified on a scientific basis because a significant risk of harm to the fetus from VDT exposure existed and (2) that this danger applied only to pregnant women.\textsuperscript{118} The courts have stated that an employer must show that the existing scientific evidence was such that as an informed employer it "could not responsibly fail to act on the assumption that this opinion might be the accurate one."\textsuperscript{120} As previously stated, however, little conclusive evidence concerning VDT's and their potential hazard to pregnant women exists.\textsuperscript{121} An additional problem exists because the evi-
idence that is available, such as the Kaiser study, is far from conclusive due to many procedural and substantive inadequacies.\textsuperscript{122} Therefore, because the evidence is in conflict and inconclusive, an employer would be unable to state that it would be irresponsible in ignoring this evidence as an accurate assessment of the danger.\textsuperscript{123} An employer who is unable to sufficiently satisfy this evidentiary burden will lose under this analysis.\textsuperscript{124}

3. Disparate Impact

Under this paradigm a VDT employer would also fail to carry its burden of proof in justifying a fetal protective exclusion policy. It should be remembered that although the Hayes court only addresses this paradigm after an employer has met its evidentiary burden under facial discrimination, the Wright court uses this as its only method of analysis.\textsuperscript{125} A plaintiff can establish her prima facie burden by showing that although the employer's policy is facially neutral, because it protects all offspring equally, the policy still discriminates by impacting more harshly on pregnant women.\textsuperscript{126} An employer may then rebut this prima facie showing by establishing the judicially recognized defense of business necessity.\textsuperscript{127}

An employer can show that the use of the business necessity defense is appropriate because its policy is based on the concern for protecting the fetus of its pregnant employee from exposure to the hazards caused by VDT's.\textsuperscript{128} An employer must then submit scientific evidence to support its belief that VDT's pose a significant risk

\begin{itemize}
\item \textsuperscript{122} See supra text accompanying notes 95-100 (setting forth the problems involved in accepting the Kaiser Study as conclusive proof of VDT hazards).
\item \textsuperscript{123} See supra text accompanying notes 57-67 (stating the business necessity requirements).
\item \textsuperscript{124} E.g., Hayes, 726 F.2d at 1550-51 (holding that the district court was correct in finding that the employer had failed to demonstrate that plaintiff's fetus would be exposed to an unreasonable risk of harm from radiation and therefore was correct in holding the employer liable).
\item \textsuperscript{125} Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984), aff'd, 546 F. Supp. 259 (D. Ala. 1982); Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th. Cir. 1984); see supra text accompanying notes 55-76 (setting forth and analyzing disparate impact analysis).
\item \textsuperscript{126} E.g., Wright, 697 F.2d at 1187; see supra text accompanying note 56 (defining the plaintiff's prima facie burden under facial discrimination analysis).
\item \textsuperscript{127} Id. at 1190 n.6; see also Hayes 726 F.2d at 1548 n.8 (allowing this defense in rebuttal to plaintiff's prima facie showing of facial discrimination); supra text accompanying notes 57-67 (setting forth the employer's business necessity defense).
\item \textsuperscript{128} See, e.g., Hayes, 726 F.2d at 1552 n.15 (holding that a concern for fetal health is a justifiable business necessity if it is not motivated by self interest); see supra text and accompanying note 61 (discussing the concept of moral concern as a justification).
\end{itemize}
of harm to the fetus of pregnant employees. As previously stated, because of inconclusive evidence in this area, an employer will not be able to find sufficient support for such a claim.

Even if for some reason a court decided to accept the existing evidence as conclusive proof of harm, justifying an employer's policy, an employer could still lose. The last part of the disparate impact analysis, under either the Hayes or Wright courts, allows a plaintiff to rebut an employer's claim by illustrating that less discriminatory alternatives were available and that the employer failed to utilize them. By showing that these alternatives could have protected women from the dangers of VDT's in a less-discriminatory manner than the employer's present protective exclusion policy, a plaintiff may be able to rebut an employer's claim of business necessity. If other acceptable alternatives existed, it is obvious that an employer did not have to institute the policy in question to address its concerns. In the VDT area, there exists a range of viable alternatives of which an employer would be able to take advantage, and that would dispel the employer's need for a protective exclusion policy.

V. ALTERNATIVES AVAILABLE TO THE VDT EMPLOYER

Courts encourage the exploration and implementation of alternative policies and exemplify this by rejecting a business necessity defense where a plaintiff establishes that other viable, less discriminatory alternatives existed and that the employer failed to utilize them. Rearranging the employee's duties, job transferring, adding additional safety precautions or modifying the work environment, are alternatives that can be utilized by an employer. These alter-

129. Wright, 697 F.2d at 1190; see supra text accompanying notes 65-67 (setting forth the scientific evidentiary requirements of the business necessity defense).
130. Altman, supra note 13, at 22, col. 5 (stating that of the few existing studies that have resulted in equivocal findings, the Kaiser study was the first to provide real evidence of a potential harm); see supra text accompanying note 121-24 (discussing the lack of evidence on VDT's, that will prevent an employer from meeting his scientific evidentiary burden).
131. E.g., Hayes, 726 F.2d at 1553; see supra text accompanying notes 73-76 (setting forth plaintiff's rebuttal standard).
132. Hayes, 726 F.2d at 1553; Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 (5th Cir. 1982); see supra text accompanying notes 73-75 (discussing why the existence of alternatives illustrates an employer's discriminatory intent).
133. See supra text accompanying notes 18-26 (discussing protective exclusion policies).
134. See infra text accompanying notes 134-162 (discussing the available workplace practices that an employer could use as an alternative to a protective exclusion policy); see also Lewis, supra note 20, at C6, col. 3 (stating that employers have been hostile to union requests for alternatives in the VDT workplace).
135. Temporary layoffs will not be discussed because this note focuses on finding alternatives that will allow the woman to continue working. Temporary layoffs can result in eco-
natives will effectively meet the concerns of all parties involved by allowing the worker to keep her job, while protecting the fetus and thereby insuring the employer against future liability.138

A. Rearranging an Employee's Duties

Rearranging an employee's job schedule may be the simplest remedy to invoke in certain circumstances. It is most useful when the potentially dangerous activity encompasses only a small portion of the employee's daily routine.139 In this case it should be possible for the employer to either arrange to have another employee take over these activities, reduce the employee's exposure to a minimum,138 or space such exposure out over long fragmented time periods to lessen the employee's exposure to the danger.139 The adaptation of this alternative would be feasible only where the employee in question was required to use VDT's while performing a small portion of her daily job requirements. The practicality of this alternative also depends on the employer's workforce being of such a size that it can

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136. See Vanderwaerdt, supra note 24, at 178 (advocating that instead of invoking a protective exclusion policy, employers should spend some time trying to develop alternative policies that would better protect their workers in the work environment).

137. See, e.g., Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 264 n.1 (D. Ala. 1982) (stating that testimony had shown that if plaintiff had been allowed to work on the day shift her job functions could have been divided to allow her to perform tasks behind lead walls and thereby effectively meeting the employer's goal of protecting the plaintiff's fetus), aff'd, 546 F. Supp. 259 (D. Ala. 1982).

138. Seligman, Abrahamson & Hager, Are Computer Screens Safe, NEWSWEEK, June 20, 1988, at 53. The authors recommend that pregnant women who use VDT's for more than half the working day should take frequent breaks, and intersperse non-VDT work with VDT work. Id.; see also; B. Dematteo, supra note 5, at 33 (stating that rest breaks for VDT workers and setting maximum operating times for shifts are excellent alternatives); Lewin, supra note 2, at A1, col. 1 (stating that many pregnant women have persuaded their employers to let them do other kinds of work and/or cut down the hours they would spend on a computer).

139. The Kaiser study identified women who worked with VDT's over twenty hours a week early in their pregnancy as suffering twice as many miscarriages as other office workers. Goldhaber, Polen & Hiatt, supra note 10, at 695. Therefore, by limiting the number of hours that an employee works with VDT's to under twenty, it is possible, based on the results of the Kaiser study, to decrease the likelihood of harm. See Lewis, supra note 20, at C6, col. 3.
effectively manipulate the duties of its employees.140

B. Job Transferring

Job transferring, which allows for the temporary removal of the worker from the hazardous work environment, maximizes the goal of protecting the health of the worker's offspring while maintaining equal employment. Job transferring has been used in the lead and toxic chemical industries to remove women from a hazardous work environment, prior to conception, and place them in a non-hazardous setting.141

Ordinarily a transfer must be initiated prior to conception because before a woman can safely conceive, the lead or toxic levels in her body must be allowed to dissipate.142 Although it would be recommended that women seek a transfer from a VDT environment prior to conception, it would be hard to mandate such a policy based solely on the inconclusive scientific evidence presently available.143 Additionally, preconception job transferring would be difficult to enforce. However, by offering women the opportunity to transfer jobs it is possible that women will seek to take advantage of this option at

140. See Hayes, 546 F. Supp. at 264 n.1 (pointing to the fact that a larger number of technicians were employed on the day shift, and therefore it was possible for plaintiff's duties to be divided effectively).

141. In many recent cases, because the hazard is of such a dangerous level, any woman capable of bearing children, regardless of her desire to, has been forced to transfer. E.g., International Union v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988) (requiring women, who are presumed capable of bearing children, to transfer out of jobs where their blood lead levels could rise above allowed levels), aff'd, 886 F.2d 871 (7th Cir. 1989) (en banc); Wright v. Olin Corp. 585 F. Supp. 1447 (W.D.N.C. 1984) (classifying jobs into three categories, restricted, controlled and unrestricted, thereby forcing women to transfer out of the restricted category into other areas), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984). Additionally, the Occupational Safety and Health Act has set standards for exposure levels in the lead industry, included among these standards are provisions allowing employees the option of being transferred temporarily from a hazardous job. See Preamble to OSHA Lead Standard, 43 Fed. Reg. 54,423 (1975); see also Williams, supra note 20, at 700 (discussing the OSHA requirements and relevant case law).

142. E.g., International Union, 680 F. Supp. at 315 (stating that there existed a body of expert opinion which held that a fetus can develop abnormally when the mother's blood lead levels are above 10 micrograms, and that for such levels to reduce sufficiently it would be necessary for the mother to remove herself from the hazardous work environment prior to conception); see also Wright, 585 F. Supp. 1447 (allowing women who work in the controlled section to seek a transfer when they intend to become pregnant). See generally Williams supra note 20, at 700 (discussing this alternative).

143. See supra text accompanying notes 90-105 (discussing the inadequacy of the evidence available concerning the potential hazards of VDT's). Some authorities question whether women have the right to transfer at all since the scientific evidence is so inconclusive and it is possible that it could be years before science arrives at a definite answer. Lewin, supra note 2, at A1, col. 1.
the earliest stage of their pregnancy in order to protect their child.\textsuperscript{144}

As an alternative policy, job transferring has become a popular option sought and obtained by VDT workers.\textsuperscript{145} Recently several labor unions, such as the Communication Workers of America and the Service Employees International Union, have negotiated contracts giving pregnant women the right to transfer from jobs involving VDT's.\textsuperscript{146} Even without union assistance, some women have been able to negotiate the right to transfer to a job which does not involve VDT's for the duration of their pregnancy.\textsuperscript{147} Legislation in over 24 states is being developed in an attempt to recognize these concerns.\textsuperscript{148} Many of these laws include provisions allowing pregnant women the right to transfer.\textsuperscript{149}

A major factor, which is crucial to the effectiveness of any job transfer policy, will be whether or not that policy provides for the maintenance of salary levels and seniority rights. In the past, maintenance provisions have usually been incorporated by industries in their transfer policies.\textsuperscript{150} When formulating a transfer policy an employer should keep in mind that: (1) depriving pregnant employees

\begin{footnotesize}
\begin{enumerate}
\item An optional job transferring policy will find favor with the many women who would suffer from an overinclusive policy, that would exclude them from the workforce, or force them to transfer simply because they are capable of bearing children. An employer who allows individual women to designate when they need to transfer prevents its policy from being overbroad by channeling its policy towards the appropriate employees. Finley, \textit{The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate Neutral Response to an Emerging Social Problem?}, 38 N.Y.U. Conf. on Lab. § 16.01, 16-10 (1985). Some authorities have suggested that if women know they can transfer jobs, and therefore protect their baby from any potential harm, they may postpone becoming pregnant until they know that a job is available. \textit{E.g.}, id. at 16-43-44.

\item Some lawyers oppose this option because they feel that by negotiating for these rights women will provide employers with an incentive to not hire women of childbearing years. Lewin, \textit{supra} note 2, at A1, col. 1.

\item Lewin, \textit{supra} note 2, at A1, col. 1.

\item \textit{id.} (referring to an employee from Emory University who, upon becoming pregnant, had been able to obtain a transfer from her VDT involved job).

\item \textit{id.}

\item \textit{id.}

\item Within the airline industry, where job transferring is a common practice, maintenance of seniority rights is provided for. \textit{E.g.}, Burwell v. Eastern Air Lines, 633 F.2d 361, 364 (4th Cir. 1980) (holding that under the collective bargaining agreement, transfers requested based on pregnancy must not result in the docking of an employee's seniority rights), \textit{cert. denied}, 450 U.S. 965 (1981); Harris v. Pan American World Airways, 649 F.2d 670, 678 (9th Cir. 1980) (citing Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), as providing the precedent for holding that forfeiture of seniority rights by pregnant employees, who were forced to take a leave of absence, was a practice in violation of Title VII); \textit{See also Wright}, 585 F. Supp. 1447 (allowing pregnant women who were located in the controlled job classification to transfer to other jobs and have their seniority rights protected during their absence); Williams, \textit{supra} note 20, at 700 (discussing the OSHA lead standard and noting that salary levels and seniority rights are maintained while the employees are located in their temporary jobs).
\end{enumerate}
\end{footnotesize}
of their seniority rights when they transfer, while allowing other employees who are simply sick or physically incapacitated to maintain these rights, has been held to be discriminatory treatment in violation of Title VII and (2) by providing for these rights, an employer will encourage its workers to take advantage of a job transferring policy. At present, those companies that have developed a VDT policy have provided for salary and seniority rights maintenance.

The feasibility of job transferring as a viable alternative may also depend on two factors: job availability and job skills. VDT's are commonly used by companies of varying size and for a variety of reasons, therefore it is probable that smaller companies may have little or no positions to which an employee would be able to transfer. Even if other openings did exist, the pregnant worker may lack the job skills necessary to perform the other job efficiently and therefore transferring would not be possible.

151. See, e.g., Burwell, 633 F.2d at 364 (holding that because the airline did not dock seniority rights for employees who were physically incapacitated, sick or injured, the airline would be in violation of Title VII if it docked the seniority rights of pregnant employees); Harris, 649 F.2d at 679 (holding that Pan Am's Seniority Policy was prima facie sex discrimination because under the policy the pregnant plaintiffs lost seniority rights while employees who took other types of medical or disability leaves did not lose their seniority rights); see also 29 C.F.R. § 1604.10 (1988)(concluding that "written or unwritten employment policies and practices involving . . . the accrual of seniority and other benefits . . . shall be applied to disability due to pregnancy, . . . on the same terms and conditions as they are applied to other disabilities.").

152. See Vanderwaerdt, supra note 24, at 182. Since women who are excluded from their job may suffer economically, providing benefits, such as maintenance of seniority rights, will remove the economic disincentives associated with job transferring. Id.

153. See, e.g., Levin, supra note 2, at A1, col. 1 (pointing out that most large computer-chip manufacturers allow job transfer into safe jobs while maintaining comparable pay and status). See generally Vanderwaerdt, supra note 24, at 182 n.139 (referencing statements made by the Atomic Workers International Union, in Women's Occupational Health Problems (1973), which express the belief that contract language should include transfer rights, that include maintenance of pay and seniority levels).

154. See Chambers v. Omaha Girls Club, 834 F.2d 697 (8th Cir. 1987). The plaintiff in Chambers argued that the district court had erred in discounting alternative positions to which she might have been transferred. Id. at 702. The defendant employer proffered evidence that showed the nature of his business was such that no positions existed into which the plaintiff could be transferred. Id. at 703. The Club provided counseling for young girls and all available positions involved contact with these girls. Id. Therefore, because of her pregnant condition the plaintiff was no longer qualified for any available job. Id. On appeal, the court held that the employer's requirement that its employees not be pregnant was a bona fide occupational requirement. Id. at 705.

155. See Levin v. Delta Air Lines, 730 F.2d 994 (5th Cir. 1984). The court in Levin stated that it could not force, under Title VII, an employer to effectuate a job transfer for a pregnant stewardess to a ground position if she did not possess the necessary skills for that job. Id. at 1001-02. Additionally, the court cites to the Hayes and Zuniga court decisions stating
C. Workplace Modifications and Safety Precautions

Workplace modifications or safety precautions provide a viable alternative for those employers who cannot facilitate job transferring or may simply desire a more permanent solution. The use of safety gear, such as lead aprons is one way to attack the VDT problem. However, many experts have advised against this for two reasons; (1) the weight of a lead apron could itself prove dangerous and (2) the lead only acts as a shield against ionizing radiation and not the non-ionizing radiation, that VDT's emit.\(^{156}\)

A more logical alternative would be to place the modifications on the item that is causing the problem, the VDT's, rather than on the employee who is using it. Placing a radiation shield on the VDT will help improve safety.\(^{157}\) Studies have found that terminals which had a metal shield around them emitted lower levels of radiation than those that were encased in plastic cabinets.\(^{158}\) It may soon be possible to remove the offending item altogether, as it has been found that it is the cathode ray tube which emits the radiation and that terminals are presently being developed which will use a plasma screen instead.\(^{159}\)

Unfortunately, there are problems with instituting workplace modifications. Because so little is really known about the hazards VDT's impose, it is hard to develop safety mechanisms.\(^{160}\) Therefore it is advisable that, in addition to workplace modifications, some attempt to reduce exposure time should also be instituted.\(^{161}\) An additional problem is that workplace modifications cost money and there-

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156. Lewin, supra note 6, at 19, col. 1; see also Vanderwaerdt, supra note 24, at 182 (mentioning that personal protection devices can prove to be uncomfortable).

157. See B. DeMatteo, supra note 5, at 33; Gorman, All Eyes on the VDT, Time, June 27, 1988, at 51 (stating that computer manufacturers have responded to health concerns by shielding their products against radiation leakage).

158. B. DeMatteo, supra note 5, at 25 & 33; see also, Vanderwaerdt, supra note 24, at 142 (recommending the elimination or minimization of the hazard at its source by using effective engineering controls, such as technological modifications that would eliminate or dilute emissions).

159. B. DeMatteo, supra note 5, at 33.

160. See Lewin, supra note 6, at 19, col. 1, 3 (quoting Sharon Danam, a research director for the Nine to Five Union of Cleveland Office Workers, who stated that because of the lack of knowledge in this area, safety standards would be hard to develop and therefore reducing exposure to VDT's may be the safest thing to do).

161. Id.
fore many employers will be hostile to the idea of such changes.\textsuperscript{162} The amount of money involved and the burden that such costs will place on an employer will vary depending on the size of the company involved and the amount of changes that need to be made.\textsuperscript{163} Based on these problems it is advisable that, if feasible, a job transfer policy should be developed. Ideally these workplace modifications should also be made in order to afford all workers some form of protection against this potential hazard.

VI. CONCLUSION

A policy that prevents the hiring or results in the firing of pregnant women from a VDT involved job is a violation of Title VII.\textsuperscript{164} Under the paradigms discussed, an employer may be found liable either because: (1) it would not be able to justify non-pregnancy as a BFOQ, as required by a straightline disparate treatment analysis or by the Hayes bifurcated analysis\textsuperscript{165} or (2) it would not be able to establish the scientific evidence necessary to support a business necessity defense, as required by a disparate impact analysis or by the Hayes bifurcated analysis.\textsuperscript{166} Therefore, a VDT employer should explore and adopt uniform alternative workplace practices in order to address the growing concerns regarding the hazards of VDT’s.\textsuperscript{167}

\textsuperscript{162} It should be noted that in cases involving the provision of benefits, such as retirement policies, the Supreme Court has explicitly rejected a cost based defense. \textit{See, e.g.}, Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1085 n.14 (1983); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 n.32 (1978). In \textit{Arizona Governing Comm.}, the Court stated, that a sex based retirement plan was a form of discrimination. \textit{Id.} at 1085 n.14. The Court’s holding was premised on “Congress’ decision to forbid special treatment of pregnancy despite the special costs associated therewith.” \textit{Id.} The Court in \textit{Arizona Governing Comm.}, made additional reference to 29 C.F.R. § 1604.9(e) (1982), which stated that “[i]t shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.” \textit{Id.} Therefore, if Congress meant to disregard a cost based defense as a justification for discriminatory treatment, then it is probable that in a hazardous work environment scenario an employer would be unable to plead that the cost of workplace modifications prevented his application of them. Additional support for this proposition is derived from the rejection of the broad cost differential defense that was rejected when the Equal Pay Act became law. \textit{City of Los Angeles Dep't of Water & Power}, 435 U.S. at 717 n.32.

\textsuperscript{163} \textit{See} Williams, \textit{supra} note 20, at 699 n.326-68 (discussing the cost of different alternatives in the toxic workplace).

\textsuperscript{164} \textit{See} supra text accompanying notes 27-31 (discussing a Title VII action).

\textsuperscript{165} \textit{See} supra text accompanying notes 35-47 (discussing a straightline disparate treatment approach); \textit{supra} text accompanying notes 48-54 (detailing the Hayes court’s bifurcated approach).

\textsuperscript{166} \textit{See} supra text accompanying notes 57-67 (discussing the business necessity defense).

\textsuperscript{167} \textit{See} supra text accompanying notes 135-63 (illustrating alternative workplace practices that an employer can adopt).
Both an employer and its employees will benefit from the institution of alternative workplace practices. Alternative practices will allow an employer to maintain its workforce and protect the fetus of its pregnant worker, while protecting itself from liability. By allowing women to keep their jobs and protect the fetus, these alternatives will also serve to keep the VDT workers happy.

An added advantage can be attained if an employer adopts a job transferring policy. In the past, certain policies were attacked by women because the policies treated all women as if they were pregnant, hence the myth of perpetual pregnancy arose.\textsuperscript{168} A policy that allows for job transferring will enable an employer and a female employee to work together to address the needs of only those employees who require protection.\textsuperscript{169} An employer alone cannot predict when a woman is pregnant, therefore, by offering women the option of temporary job transfer, an employer allows women to identify themselves as candidates for transfer.\textsuperscript{170} By addressing its policy to only pregnant women or women about to conceive, an employer prevents its policy from being overinclusive, thereby removing the myth of perpetual pregnancy. This alternative will keep workers happy, prevent liability and keep the fetus healthy.\textsuperscript{171}

\textsuperscript{168} See generally Finley, supra note 144, at 16-10 (stating that preventing an employer's policy from being overinclusive entails a realization by the employer that not all women want children, although they may be able to have them); Williams, supra note 20, at 696-97 (discussing the problems created by any policy that treats all women as if they are pregnant and labeling this type of policy as one that is overinclusive because it extends its coverage beyond those who are really in need of protection and affects others).

\textsuperscript{169} See Finley, supra note 144, at 16-10 (maintaining that an employer should address its policy only to those women who want and intend to have children); Williams, supra note 20, at 696-97 (stating that many women do not plan to become pregnant and that those who do plan to become pregnant are able either to plan their pregnancy or realize that they are pregnant at an early date).

\textsuperscript{170} Many authorities feel that the mother, and not the employer, should be considered the representative of the child's welfare. See, e.g. Finley, supra note 144, at 16-27 (discussing whether or not the mother should be deemed representative for her child and why). This is because it will be the mother who would have to carry the child to term, and who would have to care for a potentially deformed child for the rest of its life. Therefore, many authorities state that the mother should be relied on to identify herself and assist the employer in its effort to remove her from the hazardous work environment in order to protect the unborn fetus. \textit{Id.}

\textsuperscript{171} See Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), on remand, 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984). The court, in \textit{Wright}, encouraged the maximization of worker health and equal employment through the option of job transferring. 585 F. Supp. at 1449. The \textit{Wright} court maintained that no female employee had filed a charge claiming that she had been denied the right to transfer to a non-risk position \textit{Id}. Therefore, the company was able to satisfactorily maximize its goals of worker health and equal employment, while also satisfying its employees. \textit{Id}. The court also stated that “[w]omen in general should applaud the effort and there is every indication that most women employees at the Olin plant appreciate and support the policy.” \textit{Id}. at 1453.
Not all employers will be able to take advantage of a job transferring policy. Some may have businesses that are too small to facilitate job transferring. However, even if the employer's business is of a larger size, job diversity and required skills may prevent transferring. Therefore, employers may seek to take advantage of workplace modifications, or possibly attempt to simply reschedule the employee's duties. Yet no matter which alternative an employer chooses, the benefit will remain the same. The employer will still be able to protect the fetus, prevent itself from liability and keep its workers happy.

In addition to adopting uniform alternative workplace practices, an employer should develop a clear written policy which states what alternatives are available to a pregnant worker in the VDT environment. An employer who does this will place itself in a better position legally. Such a policy will not only inform employees of their rights and the options available to them, but it will also illustrate that the employer has attempted to maintain equal employment.

In reviewing the development of alternatives, an employer should consider that many unions have recently begun to request that alternatives be developed and afforded to pregnant women. Under traditional labor law, unions have the right to negotiate over health and safety issues, as they are mandatory subjects of collective bargaining. Therefore, although an employer is not required to

172. See supra note 154 (discussing a situation where an employer's business was too small to accommodate a job transfer).

173. See supra text accompanying notes 155.

174. In Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 n.10 (11th Cir. 1984), aff'g, 546 F. Supp. 259 (D. Ala. 1982), the court strongly recommended that an employer develop a uniform policy.

175. The court in Hayes, 726 F.2d at 1549 n.10, stated that a company, which had developed a carefully studied and narrowly tailored written policy establishing the process that it would go through to address the problem of a pregnant employee working in a hazardous job, would be in a much stronger position than a company which lacked such a policy. Id. By developing a written policy for pregnant employees in hazardous jobs an employer might be able to demonstrate that it has attempted to strike a balance between employee safety and equal opportunity. Id. The defendant in Hayes was unable to demonstrate any evidence of such an attempt. Id. Although the Hayes court did not state that the existence of a written policy would automatically clear an employer of liability, the court did stress that the existence of such a policy would put the employer in a better position. Id.

176. Id.

177. See Lewin, supra note 6, at 19, col. 1 (citing the option of job transferring as being offered most often by employees).

178. The National Labor Relations Act (NLRA) guarantees employees the right to bargain collectively with management, and generally extends the duty to bargain to "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d) (1982). Any change affecting health and safety issues maintains a mandatory duty to bargain. See generally Ash-
agree with the union on the institution of alternatives, it will still be required to bargain over alternative practices in good faith.\textsuperscript{179}

Although studies may be inconclusive regarding the danger of VDT use, it is still advisable that an employer begin to explore and adopt alternative workplace practices. Not only will developing alternative practices allow an employer to manage the growing concerns in its workplace, but an alternative practices policy will allow the employer to meet any forthcoming union requests. The existing concern over the potential hazards that VDT’s pose is significant to both the workers and the employers and therefore these concerns will be considered a high priority in the collective bargaining process.\textsuperscript{180} An employer is therefore well advised to forego any attempt to institute a protective exclusion policy and instead explore and institute alternative practices.

\textit{Leslie Ann Berkoff}

\textsuperscript{179} See Ashford & Ayers, supra note 6, at 816 (quoting NLRB v. Wooster Div. of Borg-Warner Corp. 356 U.S. 342 (1958) which held that anything falling within the terms and conditions of the employment phrase of § 8d mandatory subject of collective bargaining and that while an employer is not obligated to agree on the subject the employer must at least bargain about the subject in good faith).

\textsuperscript{180} Ashford & Ayers, supra note 6, at 847.