SENATE PUBLIC HEALTH, WELFARE & SAFETY
EXHIBIT NO. 6
DATE: 1-24-05
BILL NO. SB 203

The U.S. Equal Employment Opportunity Commission

The following Commission Decision finds reasonable cause to believe that discrimination occured under Title VII of the Civil Rights Act of 1964, as amended, in two charges challenging the exclusion of prescription contraceptives from a health insurance plan. The Decision is a formal statement of Commission policy as applied to the facts at issue in these charges.

Decision

Summary of Charge

The Charging Parties, female employees of Respondents, allege that Respondents have engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (Title VII). Specifically, Charging Parties challenge Respondents' failure to offer insurance coverage for the cost of prescription contraceptive drugs and devices.

Jurisdiction

Respondents are employers within the meaning of Section 701(b) of the Act. All other jurisdictional requirements have also been met.

Summary of Investigation

Charging Party A, a registered nurse, began working for Respondent A in 1997. Under its health insurance plan, Respondent A covers numerous medical treatments and services, including prescription drugs; vaccinations; preventive medical care for children and adults, including pap smears and routine mammograms for women; and preventive dental care. Respondent A also covers the cost of surgical means of contraception, namely vasectomies and tubal ligations. However, Respondent A's plan excludes coverage for prescription contraceptive drugs and devices, whether they are used for birth control or for other medical purposes.

Charging Party A wishes to use oral contraceptives for birth control purposes. Based on her medical history, Charging Party A also wishes to use oral contraceptives to alleviate the symptoms of dysmenorrhea and pre-menstrual syndrome and to prevent the development of ovarian cancer.

Charging Party B, a registered nurse, began her employment with Respondent B on May 1, 1999. Respondent B is commonly owned with Respondent A, and offers to its employees the same health insurance policy that Respondent A offers to its employees. As a result, Charging Party B is subject to the same exclusions from health coverage as Charging Party A. Charging Party B wishes to use Depo Provera, an injectible prescription contraceptive, for birth control purposes.

Charging Parties both allege that Respondents' failure to offer coverage for prescription contraceptive drugs and devices constitutes discrimination on the bases of sex and pregnancy in violation of Title VII. Respondents deny that the exclusion of prescription contraceptives, which on its face does not distinguish between men and women, is discriminatory.

Discussion

Based on current medical knowledge, individuals who wish to avoid conception may choose from a range of contraceptive alternatives. These alternatives include surgical procedures, like vasectomies and tubal ligations; non-prescription birth control, like condoms; and prescription contraceptive drugs and devices, like birth control pills, diaphragms, intra-uterine devices, and Norplant implants. Prescription contraceptives are available only to women.

Oral contraceptives are also widely recognized as effective in treating certain medical conditions that exclusively affect women, such as dysmenorrhea (menstrual cramps) and pre-menstrual syndrome.[1] Contraceptives are also sometimes prescribed to prevent the development of ovarian cancer. Respondents' insurance plan excludes contraceptives "regardless of intended use."[2]

The Commission concludes that Respondents' exclusion of prescription contraceptives violates Title VII, as amended by the Pregnancy Discrimination Act,[3] whether the contraceptives are used for birth control or for other medical purposes.

I. Exclusion of Prescription Contraceptives Used for Birth Control Purposes

A. The Pregnancy Discrimination Act Applies to Prescription Contraception

To clarify its long-standing intent with regard to Title VII, Congress enacted the Pregnancy Discrimination Act (PDA) to explicitly require equal treatment of women "affected by pregnancy, childbirth, or related medical conditions" in all aspects of employment, including the receipt of fringe benefits.[4] This language bars employers from treating women who are pregnant or affected by related medical conditions differently from others who are similarly able or unable to work. It also prohibits employers from singling out pregnancy or related medical conditions in their benefit plans.

As the Supreme Court has made clear, the PDA's prohibitions cover a woman's potential for pregnancy, as well as pregnancy itself. Recognizing that the PDA prohibits "discrimination on the basis of a woman's ability to become pregnant," the Court concluded that an employment policy that excluded women capable of bearing children from certain jobs was an impermissible classification because it was based on the potential for pregnancy. As the Court held, "[u]nder the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination."[5] Under the Court's analysis, the fact that it is women, rather than men, who have the ability to become pregnant cannot be used to penalize them in any way, including in the terms and conditions of their employment.

Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become

pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, Respondents could not discharge an employee from her job because she uses contraceptives. So, too, Respondents may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.

This conclusion is supported by additional language in the PDA that specifically exempts employers from any obligation to offer health benefits for abortion in most circumstances.[6] Congress understood that absent an explicit exemption, the PDA would require coverage of medical expenses resulting from a woman's decision to terminate a pregnancy.

The same analysis applies to the question of whether the PDA covers prescription contraceptives. As just discussed, the PDA's prohibition of discrimination in connection with a woman's ability to become pregnant necessarily includes the denial of benefits for contraception. Had Congress meant to limit the applicability of the PDA to contraception, therefore, it would have enacted a statutory exemption similar to the abortion exemption. Such an exemption, of course, does not exist for contraceptives.

Further, construing the PDA to cover contraception implements Congress' clearly expressed intent in enacting the PDA. Congress wanted to equalize employment opportunities for men and women, and to address discrimination against female employees that was based on assumptions that they would become pregnant.[7] Congress thus prohibited discrimination against women based on "the whole range of matters concerning the childbearing process,"[8] and gave women "the right ... to be financially and legally protected before, during, and after [their] pregnancies."[9] It was only by extending such protection that Congress could ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to bear children.

In sum, the Commission concludes that the PDA covers contraception based on its plain language, the Supreme Court's interpretation of the statute, and Congress' clearly expressed legislative intent.

B. The PDA Requires Coverage of Prescription Contraceptives in this Case

The PDA requires that expenses related to pregnancy, childbirth, or related medical conditions be treated the same as expenses related to other medical conditions.[10] Because Respondents have failed to provide such equal treatment in this case, they are liable for discrimination under the PDA.

Contraception is a means to prevent, and to control the timing of, the medical condition of pregnancy. In evaluating whether Respondents have provided equal insurance coverage for prescription contraceptives, therefore, the Commission looks to Respondents' coverage of other prescription drugs and devices, or other types of services, that are used to prevent the occurrence of other medical conditions. In Respondents' plan, such drugs, devices, and services include:

vaccinations;
drugs to prevent development of medical conditions, such as those to lower or maintain blood pressure or cholesterol levels;
anorectics (weight loss drugs) for those 18 years of age and under;

> preventive care for children and adults, including physical examinations; laboratory services in connection with such examinations; x-rays; and other screening tests, like pap smears and routine mammograms; and preventive dental care (including oral examinations, tooth cleaning, bite wing x-rays, and fluoride treatments).[11]

Respondents have made three arguments to justify their exclusion. First, Respondents allege that their plan covers treatment of medical conditions only if "there is something abnormal about [the employee's] mental or physical health,"[12] and thus that the above-listed drugs and services are not appropriate comparators for evaluating Respondents' coverage of contraceptives. However, this argument reflects a misunderstanding about the nature of pregnancy. It is widely recognized in the medical community that pregnancy is a medical condition that poses risks to, and consequences for, a woman.[13]

In addition, Respondents' argument is also belied by the explicit terms of their health plan, which is not, in fact, restricted to coverage of "abnormal" conditions. First, Respondents cover contraception through surgical forms of sterilization - vasectomies and tubal ligations -- without requiring any showing of the reasons individuals are undergoing the procedures. More broadly, Respondents cover numerous treatments and services that are designed to maintain current health and prevent the occurrence of future medical conditions, whether or not there is something "abnormal" about the employee's current health status. It is appropriate, for example, to compare Respondents' coverage of vaccinations or physical examinations to that of contraceptives, because both serve the same preventive purposes. Because Respondents have treated contraception differently from preventive treatments and services for other medical conditions, they have discriminated on the basis of pregnancy.[14]

Respondents also claim that Charging Parties' claims are preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1144(a), 1191.[15] This claim is without merit. ERISA preempts certain *state* laws that regulate insurance, but explicitly exempts federal law from preemption.[16] Moreover, the fact that ERISA does not require health plans to "provide specific benefits" does not mean that other statutes - namely Title VII - do not impose such requirements where necessary to avoid or correct discrimination.

Finally, Respondents state that they have excluded contraception for "strictly financial reasons."[17] Respondents' motivation is, however, legally irrelevant. Although Congress clearly anticipated that an employer's insurance costs would likely increase once the PDA required employers to cover pregnancy and related medical conditions,[18] it wrote no cost defense into the law.[19]

II. Exclusion of Prescription Contraceptives Used for Birth Control and/or Other Medical Purposes

The analysis set forth above applies to Charging Parties' claims that Respondents' exclusion unlawfully interferes with their ability to use prescription contraceptives for birth control purposes. Charging Party A has further claimed that Respondents' exclusion applies not only to her use of contraceptives for birth control purposes, but also to her use of contraceptives to treat dysmenorrhea and menstrual cramps. Respondents have violated Title VII's basic nondiscrimination principles regardless of the purpose of Charging Parties' use of contraceptives.

Respondents assert that their exclusion does not constitute sex discrimination because it does not explicitly distinguish between men and women.[20] However, prescription contraceptives are available *only* for women. As a result, Respondents' explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion. Because 100 percent of the people affected by Respondent's policy are members of the same protected group - here, women -- Respondent's policy need not specifically refer to that group in order to be facially discriminatory.[21]

Moreover, Respondents' other efforts to mount a defense are unavailing. Respondents may not rely on arguments that coverage of contraception is precluded by ERISA or may be denied based on cost concerns. Nor can Respondents successfully argue that contraception is not medically necessary, whether used for birth control or other medical purposes. *See* Section I(B), *supra*.

The inequality in treatment is apparent whether Charging Parties wish to use contraceptives to prevent conception or for other medical purposes. This is because Respondents have circumscribed the treatment options available to women, but not to men. Respondents' health plan effectively covers approved, non-experimental treatments for employees' medical conditions *unless* those treatments involve contraceptives. This is unlawful.[22]

Conclusion

There is reasonable cause to believe that Respondents have engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, by failing to offer insurance coverage for the cost of prescription contraceptive drugs and devices. Charging Parties are entitled to reimbursement of the costs of their prescription contraceptives for the applicable back pay period. In addition, the District Office is instructed to determine whether any cognizable damages have resulted from Respondents' actions.

In order to avoid violating Title VII in the future:

> Respondents must cover the expenses of prescription contraceptives to the same extent, and on the same terms, that they cover the expenses of the types of drugs, devices, and preventive care identified above. Respondents must also offer the same coverage for contraception-related outpatient services as are offered for other outpatient services. Where a woman visits her doctor to obtain a prescription for contraceptives, she must be afforded the same coverage that would apply if she, or any other employee, had consulted a doctor for other preventive or health maintenance services. Where, on the other hand, Respondents limit coverage of comparable drugs or services (*e.g.*, by imposing maximum payable benefits), those limits may be applied to contraception as well.
>
> Respondents' coverage must extend to the full range of prescription contraceptive choices. Because the health needs of women may change -- and because different women may need different prescription contraceptives at different times in their lives -- Respondents must cover each of the available options for prescription contraception. Moreover, Respondents must include such coverage in each of the health plan choices that it offers to its employees. *See* 29 C.F.R. part 1604, App. Q&A 24; *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1081-82 n.10 (1983).

The charges are remanded to the field for further processing in accordance with this decision.

FOR THE COMMISSION:

12/14/00
Date

/s/
Executive Officer
Executive Secretariat

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1. *See, e.g.*, Kaunitz, *Oral Contraceptive Health Benefits: Perception v. Reality*, Contraception 1999, 59:29S-33S (January 1999); Sulak, *Oral Contraceptives: Therapeutic Uses and Quality -of-Life Benefits - Case Presentations*, Contraception 1999, 59:35S-38S (January 1999).

2. Letter from Respondents to EEOC, June 22, 2000.

3. Numerous states have also addressed policies like Respondents'. To date, thirteen states have passed legislation mandating insurance coverage of contraception where a policy covers prescription drugs or devices. *See* Cal. Ins. Code 10123.196 (California); Del. Code Ann., title 18, 3559 (Delaware); 1999 Conn. Acts 99-79 (June 3, 1999) (Connecticut); Ga. Code Ann. 33-24-59.6 (Georgia); Hawaii Rev. Stat. 431:10A-116.6, 431:10A-116.7, 432:1-604.5 (Hawaii); Iowa Code 514C.19; Me. Rev. Stat. Ann., title 24, 2332-J, Me. Rev. Stat. Ann., title 24-A, 2756, 2847-G, 4247 (Maine); Md. Code Ann., Ins., 15-826 (Maryland); Nev. Rev. Stat. Ann. 689A.0415 *et seq.* (Nevada); N.H. Rev. Stat. Ann., title 37, 415:18-i (New Hampshire); 1999 N.C. Sess. Laws 90 (June 30, 1999) (North Carolina); R.I. Gen. Laws 27-18-57, 27-19-48, 27-20-43, 27-41-59 (Rhode Island); 8 Vt. Stat. Ann. 4099c (Vermont). Insurance plans offered to federal employees must meet similar requirements. P.L. 106-58, 113 Stat. 430 (Sept. 29, 1999).

4. 42 U.S.C. 2000e(k).

5. *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 199, 211 (1991).

6. 42 U.S.C. 2000e(k).

7. H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978) ("[t]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs"); *see also id.* at 6-7; 123 Cong. Rec. 29,385 (1977) (statement of Senator Williams, chief sponsor of the Senate bill that led to the PDA) ("[b]ecause of their capacity to become pregnant, women have been viewed as marginal workers not deserving of the full benefits of compensation and advancement . . .").

8. H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978).

9. 124 Cong. Rec. H38,574 (daily ed. October 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

10. *See, e.g.*, 29 C.F.R. Part 1604, App. Introduction ("any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions").

11. *See* Respondents' Summary Plan Description at, *e.g.*, pp. 87, 90, 112, 137.

12. Letter from Respondents to EEOC, June 22, 2000.

13. *See, e.g.*, *Equity in Prescription Insurance and Contraceptive Coverage Act 1998: Hearings on S. 766 before the Senate Committee on Labor and Human Resources*, 105th Cong., 2d Sess. 25 (1998) (statement of Richard H. Schwarz, M.D.); 144 Cong. Rec. S9,194 (daily ed. July 29, 1998) (statement of Senator Snowe) (there is "nothing 'optional' about contraception. It is a medical necessity for women during 30 years of their lifespan. To ignore the health benefits of contraception is to say that the alternative of 12 to 15 pregnancies during a woman's lifetime is medically acceptable.") (quoting statement by American College of Obstetricians and Gynecologists).

14. In addition, Respondents cover Viagra where patients complain about "decreased sexual interest or energy," whether or not the individual has been diagnosed as impotent. Letter from Respondents to EEOC, August 25, 2000. Respondents' assertion that their plan covers treatments only for abnormal medical conditions is not credible in light of these facts.

15. Letter from Respondents to EEOC, June 22, 2000.

16. 29 U.S.C. 1144(a) (setting forth basic rule of preemption of state law); 1144(d) ("[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law"); *see also Shaw v. Delta Airlines*, 463 U.S. 85 (1983) (state laws that are co-extensive with federal laws are not preempted by ERISA).

17. Letter from Respondents to EEOC, April 19, 2000.

18. *See, e.g.*, Statement of Senator Williams, floor manager of the PDA, *reprinted in* "Legislative History of the Pregnancy Discrimination Act of 1978," at 63, 64 (1980) (identifying "significant cost factor[s]" that would be incurred by employers, but noting that "the committee found that the cost of equal treatment of pregnancy has been greatly exaggerated"); H. Rep. No. 95-948, 95th Cong., 2d Sess. 10 (1978) (discussing anticipated costs of complying with PDA). In any event, the costs of contraception are low. *See* Alan Guttmacher Institute, *Cost to Employer Health Plans of Covering Contraceptives* (June 1998) (estimating that average added cost to employers of covering contraceptives is $1.43 per employee per month). Moreover, studies -- and common sense -- show that the financial costs associated with childbirth are much greater than the costs of many years of contraception. *See* Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 365 & n. 13 (1998) (citing studies). Even if a cost defense were available as a matter of law, therefore, Respondents would be unlikely to be able to cost-justify the exclusion of contraceptives.

19. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1085 n. 14 (1983) (in enacting the PDA, Congress decided "to forbid special treatment of pregnancy despite the special costs associated therewith . . ."); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 n. 26 (1983) ("no [cost] justification is recognized under Title VII once discrimination has been shown").

20. Letter from Respondents to EEOC, June 22, 2000.

21. This is the rationale that was set forth by the dissenters in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and adopted by Congress in passing the PDA. *See Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting) ("it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related'"); *id.* at 162 (Stevens, J., dissenting) (special treatment of pregnancy is sex discrimination because it is "the capacity to become pregnant which primarily differentiates the female from the male"); H.R. Rep. No. 948, 95th Cong., 2d Sess. 2 (1978) (adopting reasoning of dissenters). *See also Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) ("Congress, by enacting the [PDA], not only overturned the specific holding in [*Gilbert*], but also rejected the test of discrimination employed by the Court in that case"); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987) (in enacting the PDA, Congress "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in" *Gilbert*) (citation omitted).

22. Of course, as has been recognized by legal commentators, an employer's exclusion of contraceptives can also be challenged on disparate impact grounds. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 373-76 (1998). Based on the analysis in text, however, it is unnecessary to address application of the disparate impact theory here.

This page was last modified on December 14, 2000.