

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,

and

LOCAL 3-499, OIL, CHEMICAL AND
ATOMIC WORKERS,

Petitioners,

v.

AMERICAN CYANAMID COMPANY,

Respondent.

NO. 81-1687

United States Court of Appeals
For the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Introduction.....	1
I. ALTHOUGH "THE ACT IS NOT INFINITE IN ITS SCOPE," IT REACHES THE VIOLATION AT ISSUE HERE.....	3
A. The Facts Concerning Cyanamid's Adoption and Implementation of the Sterilization Policy Must Be Considered in Determining the Nature of That Policy.....	3
B. Cyanamid's Arguments that the Sterilization Policy is Not Cognizable Under the Act Lack Merit.....	5
II. THE POTENTIAL APPLICATION OF THE NATIONAL LABOR RELATIONS ACT OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 TO CERTAIN ASPECTS OF CYANAMID'S CONDUCT IS OF NO RELEVANCE HERE.....	14
III. THERE IS NO MERIT TO CYANAMID'S ALTERNATIVE CLAIM THAT IT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE STERILIZATION POLICY WAS A NECESSARY MEANS OF PROTECTING FETUSES.....	19
CONCLUSION.....	27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
Baltimore & Ohio RR Co. v. OSHRC, 179 U.S.App. D.C. 97, 548 F.2d 1052 (1976).....	10, 17
* Barr v. United States, 324 U.S. 83 (1945).....	7
Brennan v. OSHRC (Vy Lactos Laboratories), 494 F.2d 460 (8th Cir. 1974).....	4
* C. R. Burnett & Sons, Inc., 9 OSHC 1009 (1980).....	10, 11
Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913 (3d Cir. 1980).....	10, 17
Corning Glass Works v. Brennan, 417 U.S. 188 (1974).....	7-10
Diamond v. Chakrabarty, 447 U.S. 303 (1980).....	7
Empire-Detroit Steel Div. v. OSHRC, 579 F.2d 378 (6th Cir. 1978).....	4
Fineberg Packing Co., Inc., 1 OSHC 1598 (1974).....	17
* Gearhart-Owen Industries, Inc., 2 OSHC 1568 (1975).....	17
Luhr Bros., Inc., 5 OSHC 1970 (1977).....	17
* Machinists Local v. Labor Board, 362 U.S. 411 (1960)....	5
National Realty & Constr. Co. v. OSHRC, 160 U.S.App. D.C. 133, 489 F.2d 1257 (1973).....	4
Northwest Airlines, Inc., 8 OSHC 1982 (1980).....	17
PBR, Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981).....	17
* People of Puerto Rico v. Shell Co., 302 U.S. 253 (1937).....	7
Southern Pacific Transp. Co. v. Uery, 539 F.2d 386 (5th Cir. 1976), <u>cert. denied</u> , 434 U.S. 874 (1977)....	10, 17

	<u>Page</u>
Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir.), <u>cert. denied</u> , 429 U.S. 999 (1976).....	10, 17
Sugar Cane Growers Cooperative of Florida, 4 OSHC 1320 (1976).....	10, 11
United Airlines, Inc. v. Evans, 431 U.S. 553 (1977).....	5
* United Steelworkers of America v. Marshall, 208 U.S.App. D.C. 60, 647 F.2d 1189 (1980), <u>cert. denied</u> , 453 U.S. 913 (1981).....	14, 21, 22, 24, 25, 26
Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).....	4
Wright v. Olin Corp., 30 FEP Cases 889 (4th Cir. 1982).....	16
Zuniga v. Kleberg County Hospital, 30 FEP Cases 650 (5th Cir. 1982).....	16

Statutes

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 <u>et seq.</u>	passim
Section 2(a), 29 U.S.C. § 651(a).....	6
Section 2(b), 29 U.S.C. § 651(b).....	6
Section 2(b)(13), 29 U.S.C. § 651(b)(13).....	6
Section 4(b)(1), 29 U.S.C. § 653(b)(1).....	9, 17
Section 5(a)(1), 29 U.S.C. § 654(a)(1).....	passim
Section 9(c), 29 U.S.C. § 658(c).....	4
Section 17(k), 29 U.S.C. § 666(j).....	6
National Labor Relations Act, as amended, 29 U.S.C. § 151 <u>et seq.</u>	14
Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e <u>et seq.</u>	14

	<u>Page</u>
Equal Pay Act, 29 U.S.C. § 206(d)(1)	8
 <u>Federal Register</u>	
43 Fed. Reg. 54462 (Nov. 21, 1978)	23
45 Fed. Reg. 7514 (Feb. 1, 1980)	18
 <u>Legislative History</u>	
S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970)	13
H. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970)	13

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REPLY BRIEF FOR PETITIONERS

Introduction

This case concerns an employer's policy which required that female employees undergo surgical sterilization in order to be eligible for employment in certain areas of the plant, and which caused five employees to undergo such sterilization. The only question presented is whether the Occupational Safety and Health Review Commission committed legal error in holding, on a motion for summary judgment, that such a policy is not a hazard cognizable under § 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) (the "general duty clause").

One would therefore have expected that the brief for respondent, American Cyanamid Company ("Cyanamid") would

address the question whether the policy at issue comes within the language of the general duty clause, and within the purpose of the clause as articulated in its legislative history. But Cyanamid's brief is silent on those points. Indeed, Cyanamid leaves completely unanswered our demonstration that the policy at issue here falls within the plain meaning of the general duty clause,¹ and that the legislative history of the provision supports its application to this case.²

Rather than focus on the issue actually presented, Cyanamid prefers to knock down a straw man by laboring to establish that "the Act is not infinite in its scope" (Brief for Respondent, American Cyanamid Company ("Resp. Br.") at 26). As we show in Part I infra, none of the arguments advanced by Cyanamid in support of that undisputed proposition undercuts our showing that the sterilization rule at issue here is within the scope of the general duty clause.

After devoting only a few pages to its discussion of the finite scope of the Act, Cyanamid spends the rest of its brief on two irrelevant subjects. First, Cyanamid argues that "the allegations of the citation would be significant only under a different statute," namely the National Labor Relations Act and/or Title VII of the Civil Rights Act of 1964. Id. at 36-42. But Cyanamid never explains how its contentions in this regard are of any pertinence, and we show in Part II infra that they are not.

¹ See Brief for Petitioners ("Pet. Br.") at 24-26.

² Id. at 28-29.

Then, Cyanamid assumes that the merit of its sterilization policy is in issue, and undertakes to defend the policy by asserting that it is a necessary means of protecting fetuses from exposure to lead. Resp. Br. at 43-51. But as we show in Part III infra, the defense Cyanamid seeks to advance was not addressed by the Commission, because it turns on a host of disputed issues of fact which can only be resolved in an evidentiary hearing on the merits of the citation. As we further show, there is virtually no chance that Cyanamid could prevail on this defense after a hearing; but at the very least, the issue cannot be resolved in favor of the Company at this preliminary stage in the proceedings.

I. ALTHOUGH "THE ACT IS NOT INFINITE IN ITS SCOPE," IT REACHES THE VIOLATION AT ISSUE HERE.

A. The Facts Concerning Cyanamid's Adoption and Implementation of the Sterilization Policy Must Be Considered in Determining the Nature of That Policy.

Before addressing the question whether its sterilization policy is cognizable under the Act, Cyanamid attempts to establish that the only events that may be considered in this regard are those that took place within the six-month period preceding the issuance of the citation. See Resp. Br. 3-4, 19. Cyanamid's effort is understandable, because if its position were accepted, virtually all the evidence concerning the adoption and implementation of the policy at issue, including the five sterilizations that it caused, would be foreclosed from consideration. Cyanamid is certainly correct in implicitly acknowledging that this evidence is extremely

harmful to its cause; but the company's contention that the evidence cannot be considered is wrong.

Cyanamid's contention is based on § 9(c) of the Act, 29 U.S.C. § 658(c), which provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." Cyanamid does not maintain, however, that the instant citation was untimely under §9(c); nor could such an argument succeed, because it is undisputed that the challenged sterilization rule was in effect during the six months preceding the citation.³ Rather, Cyanamid's contention is that in assessing the nature of the sterilization rule, "all occurrences before April 1979 [i.e., the date six months prior to the issuance of the citation] ... are immaterial to this proceeding" Resp. Br. 19.

This contention is contrary to settled law. The fact that an event occurred outside the period that is actionable under a

³ Cyanamid notes that during this period no women of child-bearing capacity were working in the Inorganic Pigments Department, where the sterilization rule was applicable. (Resp. Br. 5). But Cyanamid cannot and does not contend that this renders the sterilization rule immune from citation. During the period in question any female employee who desired to transfer into the Inorganic Pigments Department, or to return to that Department, or otherwise to obtain a job there, continued to be subject to the rule requiring that she undergo surgical sterilization as a prerequisite to such employment. The fact that during the six months preceding the citation no employee underwent sterilization as a result of the rule -- and that as a consequence no woman worked in the Inorganic Pigments Department -- does not put the rule beyond the reach of the Act. "The Act does not wait for an employee to die or become injured. It authorizes ... the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring." Whirlpool Corp. v. Marshall, 445 U.S. 1, 12 (1980). See, e.g., National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1267 (D.C. Cir. 1973); Empire-Detroit Steel Div. v. OSHRC, 579 F.2d 378, 384 (6th Cir. 1978); Brennan v. OSHRC (Vy Lactos Laboratories), 494 F.2d 460, 463 (8th Cir. 1974).

statute of limitations does not mean that the event is immaterial; for, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period" Machinists Local v. Labor Board, 362 U.S. 411, 416 (1960). See also United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977) (events outside the limitations period "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue").⁴

Accordingly, Cyanamid cannot be heard to argue that the Court should disregard the evidence which shows the "true character" of the sterilization rule (Machinists, supra, 362 U.S. at 416).

B. Cyanamid's Arguments that the Sterilization Policy is Not Cognizable Under the Act Lack Merit.

Cyanamid's argument begins with a dissertation on the theme that "the Act is not infinite in its scope." Resp. Br. 26. We readily concede that proposition; but as we now show, the arguments Cyanamid advances in support of it do not overcome our demonstration that the sterilization policy is cognizable under § 5(a)(1).

⁴ Indeed, Cyanamid itself, while asserting that the events of 1978 are "immaterial," states in the same breath that "the sterilizations that occurred in 1978 ... do show that the ... sterilization policy alleged by the citation did not involve [the presence of sterilizing chemicals or the use of physical force]." Resp. Br. 20, n. 32. By that statement Cyanamid appears to recognize that the promulgation and implementation of the sterilization policy, and the five sterilizations that occurred, may properly be considered in assessing whether the policy for which the Company was cited constitutes a "recognized hazard[] that [was] causing or likely to cause ... serious physical harm to ... employees" (§ 5(a)(1)).

1. Cyanamid first cites a number of provisions of the statute which, according to the Company, "establish that Congress intended the Act to apply [only] to physical hazards present in the workplace or arising from materials, equipment, services, or facilities supplied by the employer." Resp. Br. 28. But the provisions Cyanamid cites refer to such matters as "work situations,"⁵ "working conditions,"⁶ "injuries ... arising out of employment,"⁷ and "practices ... which have been adopted ... in [a] place of employment."⁸ Simply to quote those provisions, which are fully broad enough to encompass the challenged sterilization rule, is to refute Cyanamid's narrow construction of them.⁹ That construction is supported by nothing but Cyanamid's wishful thinking.

2. Cyanamid emphasizes that the hazards mentioned in the legislative history of the statute involved "chemical[s] ...[,]
physical agent[s] ... [and] safety hazard[s]." Resp. Br. 31. But as we explained in our opening brief, that point proves nothing, because the kinds of hazards to which Cyanamid refers are far and away the most common forms of occupational hazards, and it is therefore hardly surprising that they were the focus of the legislators' attention. See Pet. Br. 29-31. Of

⁵ Section 2(a), 29 U.S.C. § 651(a), quoted in Resp. Br. at 28.

⁶ Section 2(b), 29 U.S.C. § 651(b), quoted in Resp. Br. at 28.

⁷ Section 2(b)(13), 29 U.S.C. § 651(b)(13), quoted in Resp. Br. at 28.

⁸ Section 17(k), 29 U.S.C. § 666(j), quoted in Resp. Br. at 28, n. 35.

⁹ See also Pet. Br. 28, n. 77.

particular significance, the absence of any legislative materials concerning the type of hazard involved here is perfectly understandable, given Cyanamid's acknowledgement that the kind of practice at issue only came into being "during the 1970's" (Resp. Br. 6), subsequent to the passage of the Act.

In these circumstances, the issue is not whether Congress had practices of this nature in mind when it legislated, but whether Congress "has made a choice of language which fairly brings [the] given situation within [the] statute."¹⁰ If that is the case, the practice is covered by the statute unless it can fairly be concluded that "had [the situation] been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act."¹¹ As we have previously shown, under this governing test the challenged sterilization rule is cognizable under § 5(a)(1). Pet. Br. 24-31. Nothing in Cyanamid's brief undercuts that dispositive point.

3. Lacking support in this statute, Cyanamid seeks solace in a decision under the Equal Pay Act: Corning Glass Works v. Brennan, 417 U.S. 188 (1974). The Company's unlikely endeavor fails.

The issue in Corning was whether night inspection work was "equal", for purposes of compensation under the Equal Pay Act,

¹⁰ Barr v. United States, 324 U.S. 83, 90 (1945). See also Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980).

¹¹ People of Puerto Rico v. Shell Co., 302 U.S. 253, 257 (1937).

to the same work performed during the day, or whether the work was different because it involved different "working conditions" within the meaning of that statute.¹² In addressing that question the Court began by noting that in drafting the Equal Pay Act, Congress made a deliberate decision to adopt the terminology that was generally used in the industrial job evaluation plans that would be subject to that Act. Id. at 198-201. For that reason, the Court looked to the language of job evaluation plans in order to answer the question whether time of day was regarded as a "working condition" for purposes of determining compensation:

While a layman might well assume that time of day worked reflects one aspect of a job's "working conditions," the term has a different and much more specific meaning in the language of industrial relations. As Corning's own representative testified at the hearings, the element of working conditions encompasses two subfactors: "surroundings" and "hazards." "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of "working conditions" is not only manifested in Corning's own job evaluation plans but is also well accepted across a wide range of American industry.

¹² The Equal Pay Act prohibits paying different wages to men and women "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" 29 U.S.C. § 206(d)(1).

Nowhere in any of these definitions is time of day worked mentioned as a relevant criterion. The fact of the matter is that the concept of "working conditions," as used in the specialized language of job evaluation systems, simply does not encompass shift differentials. Indeed, while Corning now argues that night inspection work is not equal to day inspection work, all of its own job evaluation plans, including the one now in effect, have consistently treated them as equal in all respects, including working conditions. [Id. at 202-203 (emphasis added).]

Cyanamid's argument that Corning sheds light on the meaning of the term "hazard" in § 5(a)(1) of the OSH Act is untenable. Corning did not involve any issue as to whether or not a "hazard" was present at a workplace; it involved the totally unrelated question whether time of day is a "working condition" for purposes of determining compensation. And in any event, what was at issue in Corning was "the specialized language of job evaluation systems," id. at 203, because the Equal Pay Act was adopted to govern such systems and was deliberately drafted so as to employ their terminology. The OSH Act, of course, has nothing to do with job evaluation or compensation, and consequently there is no basis for importing "the specialized language of job evaluation systems" into this statute.¹³

¹³ Cyanamid notes that some courts have cited Corning in construing the meaning of the term "working conditions" in § 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1), which provides that the statute "shall [not] apply to working conditions of employees with respect to which other ... agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." See Resp. Br. 32-33. But in those cases, as in Corning, no question was

4. Cyanamid's final contention is that prior decisions of the Commission, and prior practice of the Secretary under the Act, support the Company's position. Resp. Br. 34-36. Again, Cyanamid is mistaken.

In our opening brief we showed that the theory adopted by the Commission in this case -- i.e., that the Act applies only to "work processes and materials"¹⁴ -- is inconsistent with the Commission's own decisions in C.R. Burnett & Sons, Inc., 9 OSHC 1009 (1980); and Sugar Cane Growers Cooperative of Florida, 4 OSHC 1320 (1976). Pet. Br. 34-35. Cyanamid makes no attempt to support the Commission's theory, but puts forward its

13 (Continued)

presented as to whether or not a "hazard" was present at a workplace, and the cases are therefore not relevant. The question discussed in the cases upon which Cyanamid relies was whether § 4(b)(1) exempts entire industries from the Act, or whether only particular situations are exempted. In answering that question, three courts have cited Corning for the obvious proposition that "the term 'working conditions' plainly refers to something more limited than every aspect of an entire industry." Southern Pacific Transp. Co. v. Usery, 539 F.2d 386, 390 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Railway Co. v. OSHRC, 539 F.2d 335, 339 (4th Cir.), cert. denied, 429 U.S. 999 (1976); Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913, 916-917, n. 8 (3d Cir. 1980). Whether or not it was appropriate for those decisions to cite Corning in that limited respect, the decisions plainly do not touch on the question presented here. We note further that Cyanamid errs in asserting that "this Circuit ... ha[s] acknowledged that the Supreme Court's definitions in Corning Glass of 'working conditions' and 'hazard' apply to the OSH Act" (Resp. Br. 33). In the decision cited by Cyanamid, this Court agreed with the holdings in Southern Pacific and Southern Railway, supra; but significantly, the Court did not refer to Corning, but referred instead to other aspects of the reasoning in Southern Pacific and Southern Railway. See Baltimore & Ohio RR Co. v. OSHRC, 548 F.2d 1052, 1053-54 (D.C. Cir. 1976).

14 9 OSHC at 1600 (JA 508).

own theory -- that the Act reaches only "physical hazards" -- and then contends that C.R. Burnett and Sugar Cane Growers are consistent with such a theory. Resp. Br. 34.

It is not clear precisely what Cyanamid means by "physical hazards;" but whatever the Company may mean, C.R. Burnett and Sugar Cane Growers do not purport to confine the application of the Act to "physical hazards;" rather, the approach adopted by the Commission in those cases is that "a particular condition" is covered by the Act if it "bears a sufficient nexus to employment" C.R. Burnett, 9 OSHC at 1018. The significance of the Commission's decision in C. R. Burnett is its recognition that any hazard which is created by an employer and "bears a 'direct relationship to employment'" is within the scope of the Act, whether or not the employer requires employees to subject themselves to the harm involved. Ibid.¹⁵

¹⁵ As the Commission emphasized in C.R. Burnett, in that case employees were not required by their employer to reside in the temporary labor camps where the cited hazards existed; and in Sugar Cane Growers employees were not required by their employer to accept the hazardous transportation to the worksite which was at issue in that case. See 9 OSHC at 1011, 1018.

Cyanamid asserts that "OCAW has misrepresented the holdings in [C.R. Burnett and Sugar Cane Growers] to suggest that they stand for the proposition that any condition of employment is subject to the Act; yet the Review Commission rejected a 'condition of employment' test as a touchstone for determining the coverage of the Act." Resp. Br. 34, n. 40 (emphasis in original). The Company's charge of "misrepresent[ation]" is unwarranted. In our brief we stated that the Commission "rejected as unduly stringent [the] 'condition of employment' [test]." Pet. Br. 35. That statement is precisely correct. See C.R. Burnett, 9 OSHC at 1018, n. 25 ("we reject the more restrictive 'condition of employment' test"). As we explained, the test adopted in C. R. Burnett is whether a practice has a "direct relationship to employment."

Thus, C.R. Burnett and Sugar Cane Growers lend no more support to Cyanamid's construction of the Act than they do to the construction the Commission adopted in this case.

Nor is Cyanamid correct in asserting, with the Commission, that the Secretary has not previously construed the Act to apply to anything other than "a condition or practice that ... operate[s] directly upon employees engaged in work or work-related activities." Resp. Br. 35, quoting 9 OSHC at 1600, n. 22 (JA 508). As we discussed in our opening brief, the standard promulgated by the Secretary with respect to occupational exposure to lead prohibits the practice of "prophylactic chelation," irrespective of whether that proscribed medical procedure is performed at the workplace or in a hospital. Pet. Br. 36-38. Like the hazard at issue here, prophylactic chelation involves subjecting employees to a medical procedure for the purported purpose of controlling the effects of their exposure to lead. And, like the hazard at issue here, chelation does not "operate directly upon employees engaged in work or work-related activities." Thus, Cyanamid and the Commission err in suggesting that the citation issued in this case represents a departure from the Secretary's past construction of the Act.¹⁶ What is more, Cyanamid has no answer to our argument

¹⁶ Cyanamid also notes that the Secretary's informal guidelines on the general duty clause provide that "[i]n general, a 'hazard' within the meaning of Section 5(a)(1) is a dangerous condition or a harmful situation." Resp. Br. 35-36. As in the case of the various statutory provisions previously discussed which employ similar language (see p. 6 supra), the breadth of the Secretary's formulation supports OCAW's position, not Cyanamid's.

that if the theories espoused by the Commission and the Company in this case were to prevail, OSHA's ability to regulate practices such as prophylactic chelation would be severely impeded.¹⁷

In sum, Cyanamid's arguments in support of its contention that the sterilization policy is outside the scope of the Act cannot withstand analysis. It may well be that the Congress that enacted this statute did not envision the day when employers would seek to "control" exposures to lead and other toxic substances by inducing employees to undergo such "prophylactic" procedures as surgical sterilization or chelation. But where an employer's policy with respect to such a procedure "caus[es] or [is] likely to cause death or serious harm to his employees" (§ 5(a)(1)), the policy falls not only within the literal terms of the general duty clause, but within the purpose of the clause as well: to ensure that employers "bring no adverse effects to the life and health of their employees throughout the course of their employment."¹⁸

¹⁷ Significantly, in its brief Cyanamid neither denies that its theories would lead to such a result, nor contends that such a result would be acceptable. Rather, notwithstanding the emphasis placed on this point in our opening brief, Cyanamid has studiously avoided the subject of prophylactic chelation and other harmful medical procedures performed on employees.

¹⁸ S. Rep. No. 91-1282, 91st Cong., 2d Sess. 9 (1970); H. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970). See Pet. Br. 28-29.

II. THE POTENTIAL APPLICATION OF THE NATIONAL LABOR RELATIONS ACT OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 TO CERTAIN ASPECTS OF CYANAMID'S CONDUCT IS OF NO RELEVANCE HERE.

Cyanamid argues at length that "the allegations of the citation would be significant only under a different statute," quixotically attempting to make much of the fact that its conduct in promulgating and implementing the so-called Fetal Protection Policy may have violated the National Labor Relations Act ("NLRA"), Cyanamid's collective bargaining agreement with OCAW, and/or Title VII of the Civil Rights Act of 1964. Resp. Br. 36-42. Although we do believe that the OSH Act is not the only statute Cyanamid has violated, that point is wholly irrelevant to this case.

a) The fact that employment policies such as the "Fetal Protection Policy" are matters which are subject to collective bargaining within the framework of the NLRA (Resp. Br. 37-38) in no way suggests that they are immune from regulation under the OSH Act. This Court rejected that very contention in United Steelworkers of America v. Marshall, 647 F.2d 1189, 1237 (1980), cert. denied, 453 U.S. 913 (1981):

[The policy in question] is no doubt a mandatory subject of bargaining, but so is any issue directly related to worker safety. NLRB v. Gulf Power Co., 384 F.2d 822, 824-825 (5th Cir. 1967). In passing a massive worker health and safety statute, Congress certainly knew it was laying a basis for agency regulations that would replace or obviate worker safety provisions of many collective bargaining agreements. Congress may well have viewed collective bargaining agreements along with state worker's compensation laws as part of the status quo that had failed to provide workers sufficient protection.

* * * *

[W]e find nothing in the OSH Act or other labor legislation to suggest that Congress could remove from OSHA the power to create a program instrumental to achieving worker safety simply because such a program could otherwise be created through collective bargaining.¹⁹

¹⁹ Cyanamid asserts that OCAW, "[a]lthough fully informed of every development in the implementation of the Fetus Protection Policy from January 1978 onward ..., raised no objection to the policy until after the October 2 transfer of ... two employees [who had not undergone the required sterilization]," at which point OCAW filed a grievance asking, inter alia, that the two employees be restored to their former job classifications. Resp. Br. 16. From this, Cyanamid draws the conclusion "that OCAW's motivation in requesting an OSHA inspection was to strengthen its collective bargaining position with respect to the labor-management issues of mandatory transfers, possible wage rate reductions, and possible layoffs." Id. at 17. Such unfounded speculation, which is completely false, has no place in this proceeding. Because the record is silent with respect to OCAW's response to the Fetus Protection Policy (apart from OCAW's participation in this case) we will not follow Cyanamid's lead by detailing our view of those extra-record events. Suffice it to say, however, that beginning in March 1978 OCAW made repeated requests for information pertinent to the Fetus Protection Policy, which was not provided by Cyanamid until 1979, after an NLRB charge had been filed. There is no truth to the Company's suggestion that the union acquiesced in the sterilization rule. And, the fact that OCAW filed a grievance contending that Cyanamid's transfer of the two employees violated certain provisions of the collective bargaining agreement that govern such transfers in no way suggests that OCAW's concerns were limited to that situation; the Court can see for itself the sincerity of OCAW's position in this case by reviewing the record, particularly the transcript of the pre-hearing conference (JA 148-300).

Cyanamid also overreaches by asserting that the Company had discussed the Fetus Protection Policy with government officials, "who made no statement to the effect that the Company should not implement its policy." Resp. Br. 15. Despite the irrelevance of that assertion, we are constrained to point out that it has no support in the record. Cyanamid relies exclusively upon a self-serving letter composed by its attorneys (see Pet. Br. 5, n. 7), its attorney's assertions at the pre-hearing conference (JA 266), and one of its requests for admissions (JA 50-51) (request #33). What Cyanamid fails to disclose is that the Secretary objected to this request for admissions "on the grounds that he cannot fairly admit the request without material qualification or explanation" (JA 320).

b) Nor is it relevant that the Fetal Protection Policy almost certainly violates Title VII.²⁰ The sex-discrimination aspect of the policy is not what this proceeding seeks to redress; rather, this proceeding seeks to eliminate a policy which endangers the reproductive capacity of employees by causing them to undergo surgical sterilization. In all respects pertinent here, this case would have been the same if Cyanamid had required men as well as women to undergo sterilization.²¹ Indeed, the case would have been the same if Cyanamid had required employees to undergo chelation, or to impair the functional capacity of some part of their bodies other than the reproductive system. While Cyanamid repeatedly describes this as a sex discrimination case, that characterization is merely a smokescreen to obscure a critical flaw in its position; for what is at issue in this proceeding is not a loss of employment, but a loss of reproductive capacity on the part of five employees, and a likelihood that other employees might suffer the same loss because of Cyanamid's sterilization rule.

In any event, Cyanamid never explains why the fact that the Fetal Protection Policy may violate Title VII is of any

²⁰ See Wright v. Olin Corp. 30 FEP Cases 889 (4th Cir. 1982); Zuniga v. Kleberg County Hospital, 30 FEP Cases 650 (5th Cir. 1982).

²¹ In one limited respect, however, the fact that Cyanamid applied the policy only to women might prove to be of evidentiary significance in assessing the Company's attempt to defend the policy as a reasonable and necessary means of protecting fetuses. See note 30 infra.

pertinence here,²² and it plainly is not.

Section 4(b)(1) of the OSH Act expressly defines the limited circumstances in which the authority exercised by other agencies under other statutes may limit the application of the OSH Act to an occupational hazard; it provides that the Act does not apply to "working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). Under that provision, application of the OSH Act is foreclosed only where an agency has actually exercised its authority to promulgate regulations,²³ and the regulations are issued "pursuant to enabling legislation the purpose of which was to affect occupational safety and health."²⁴

²² As before (note 19 supra), Cyanamid attempts, without any basis, to suggest that OCAW has pursued this case for an ulterior purpose, i.e., to remedy sex discrimination. See Resp. Br. 36, 42. Yet, as Cyanamid is forced to acknowledge, OCAW made clear in the administrative proceedings that it would not have invoked OSHA's jurisdiction to challenge the "Fetus Protection Policy" if this case had merely involved an exclusionary policy, rather than one which has a severe impact on the physical integrity of employees. See Resp. Br. 38, n. 47.

²³ See Baltimore & Ohio RR Co. v. OSHRC, 548 F.2d 1052, 1054-55 (D.C. Cir. 1976); PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 896 (1st Cir. 1981); Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913, 916, n. 7. (3d Cir. 1980); Southern Pac. Transp. Co. v. Usery, 539 F.2d 386, 392-393 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Ry. Co. v. OSHRC, 539 F.2d 335, 336-337 (4th Cir.), cert. denied, 429 U.S. 999 (1976).

²⁴ Gearhart-Owen Industries, Inc., 2 OSHC 1568, 1569-70 (1975) (emphasis in original). Accord, Northwest Airlines, Inc., 8 OSHC 1982, 1986-87 (1980), Luhr Bros., Inc., 5 OSHC 1970, 1973 (1977); Fineberg Packing Co., Inc., 1 OSHC 1598 (1974).

Neither of those conditions is present here. The Equal Employment Opportunity Commission, which administers Title VII, has not issued any regulations concerning reproductive hazards;²⁵ and in any event, Title VII does not authorize EEOC to issue regulations for the purpose of protecting occupational safety and health. Consequently, as EEOC itself has recognized, "[t]he task of assuring a workplace free of conditions that threaten the health or safety of employees remains with the federal agencies specifically granted that responsibility."²⁶

²⁵ As Cyanamid notes, EEOC at one point issued proposed guidelines on "employment discrimination and reproductive hazards," but the agency subsequently withdrew the guidelines. Resp. Br. 41, n. 53. In any event, the proposed guidelines dealt only with the question whether a practice of excluding women from employment can be justified under Title VII as nondiscriminatory if the purpose of the exclusion is to protect health. The guidelines did not speak to the issue whether an employer may lawfully cause employees to undergo surgical sterilization. See JA 495-498. Indeed, the introduction to the proposed guidelines stated:

It is recognized that the concerns of the enforcement agencies with respect to non-discrimination in employment are . . . distinct from the concerns of agencies responsible for health and safety regulation; these guidelines preserve those distinctions.

* * * *

[T]he proposed guidelines do not attempt to implement or enforce federal policies related to health and safety The task of assuring a workplace free of conditions that threaten the health or safety of employees remains with the federal agencies specifically granted that responsibility. [JA 495].

²⁶ 45 Fed. Reg. 7514 (Feb. 1, 1980) (JA 495). See note 25 supra.

Title VII therefore does not limit the application of the OSH Act in this case, and the fact that Cyanamid may well have violated both statutes simply means that the Company should be brought to account for both aspects of its unlawful conduct, not that it should somehow be immune from citation under the OSH Act.

III. THERE IS NO MERIT TO CYANAMID'S ALTERNATIVE CLAIM THAT IT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE STERILIZATION POLICY WAS A NECESSARY MEANS OF PROTECTING FETUSES.

Cyanamid also argues at length that its sterilization rule cannot be cited as a violation of the Act because the rule is part of a "Fetal Protection Policy" which the Company states was adopted for the purpose of protecting fetuses from exposure to lead. Resp. Br. 43-50.

As we explained in our opening brief, the Commission did not reach -- let alone accept -- Cyanamid's claim that the sterilization rule was a necessary means of protecting fetuses. Accordingly, this Court should not entertain that claim. But even if the claim were properly before the court, the present posture of this case is such that summary judgment could not be granted in favor of Cyanamid on this basis. Although the Act recognizes a "greater hazard" defense in certain limited circumstances,²⁷ the record in this case certainly does not contain undisputed evidence establishing that defense. To the contrary, as we show at 21-26 infra, the material in the record on which Cyanamid relies lends no

²⁷ See cases cited in Pet. Br. 38-39.

support to its position. What is more, OCAW and the Secretary offered in the Commission proceedings to present evidence to establish that Cyanamid could have provided protection to fetuses without requiring the surgical sterilization of employees, and they sought discovery to refute Cyanamid's opposing contentions (see Pet. Br. 13, 40-41). But because the ALJ, at Cyanamid's urging, disposed of the case by adopting the threshold position that the sterilization rule was not a hazard cognizable under the Act, a factual record was not made on this seriously disputed point.

Nevertheless, Cyanamid persists in trying to establish that no feasible alternatives to the sterilization rule were available. Resp. Br. 10-14, 48. But the Company's effort only succeeds in demonstrating that summary judgment could not conceivably be granted in its favor on this matter, and indeed, that Cyanamid is almost certain not to prevail on this defense when the relevant evidence is adduced.²⁸ For, not only does

²⁸ To deflect attention from the obvious weakness of its position, Cyanamid resorts to a sleight of hand. Arguing from the premise that the hazard alleged in the citation was "the risk of harm that lead poses to the fetus," Cyanamid advances a number of arguments why it would be impermissible for OSHA to seek to specify what steps the Company should take to abate that hazard. Resp. Br. 48-50. But this effort to avoid the issue cannot succeed. In this proceeding Cyanamid was cited for subjecting female employees to surgical sterilization, not for subjecting fetuses to lead. Cyanamid seeks to introduce the issue of possible risks to fetuses, to justify its policy of causing employees to undergo impairment of their reproductive capacity. If Cyanamid could have protected fetuses without causing employees to be surgically sterilized, the Company's asserted justification fails. Cyanamid therefore cannot foreclose consideration of the issue whether alternatives to the sterilization rule could have been devised, unless the Company is willing to abandon its "greater hazard" defense.

Cyanamid rely almost exclusively on material from other proceedings, which cannot properly be considered here, but in addition, that material actually shows the Company's position to be untenable.

The clearest illustration of this point is that although Cyanamid cites extensively to snippets of testimony from the informal rulemaking hearing on the OSHA Lead Standard and selected statements from the preamble to that standard, in reviewing that rulemaking record both OSHA and this Court squarely rejected the position Cyanamid now advances. As this Court stated:

LIA [Lead Industries Association] . . .
contended . . . that precisely because
fertile women require such low blood-lead
levels [to protect the fetus], no feasible
lead standard could possibly protect
them. . . .

* * * *

[But] . . . OSHA decided that a level of 40
ug/100g would be sufficiently protective,
concluding that other protective measures in
the lead standard would compensate for any
harm. . . . These include the 30 ug/100g
action level, education and training of
workers planning families, careful use of
medical surveillance, and the possibility of
special precautions -- even respirators --
under the medical examination provisions of
the medical removal program. . . .

LIA had essentially argued that . . .
the only feasible means of protecting fertile
women was to exclude them from the workplace
or to counsel them out on a case-by-case
basis. . . . OSHA has advanced substantial
evidence to show that its goal of 40 ug/100g
-- the same level which it presents as a
feasible and necessary one to prevent the
other health effects of lead -- can in fact
protect women from reproductive harm. . . .

United Steelworkers of American v. Marshall, supra, 647 F.2d at 1256-57.²⁹

29 Citing the preamble to the Lead Standard, Cyanamid nevertheless asserts that OSHA actually "concluded that exclusion [of fertile women] may be necessary." Resp. Br. 14, n. 26. But a reading of the complete passage in question, which we quote below, will dispel any notion that OSHA was adopting Cyanamid's view that there is no way to protect the fetus from excessive exposure to lead other than broad-scale exclusion or sterilization of fertile female employees:

In addition, temporary medical removal may in particular cases be needed for some workers desiring to parent a child in the near future.

* * * *

Instead of providing an automatic transfer opportunity, OSHA has determined that questions concerning reproduction can best be addressed first by primary control measures protective of reproductive capability . . . , and second, by the flexibility and informed medical judgment which will result from the medical surveillance and MRP provisions of the standard. Where medically indicated, temporary removal of workers intending to parent can be provided pursuant to a medical determination. Temporary removal is only one of several alternatives, however. For example, a physician might first recommend that a particular employee be provided with a powered air purifying respirator to use several hours each day, even though the worker would otherwise have no opportunity under the standard to obtain this form of respirator. If this respirator usage proved inadequate, the physician could later recommend complete removal of the worker from lead exposure.

(Continued)

Thus, what Cyanamid asks this Court now to accept as an incontestable fact was squarely rejected by this Court in the very proceeding upon which Cyanamid relies.³⁰ As this point demonstrates, Cyanamid's claim that its sterilization

29 (continued)

The preceding use of special protective measures or temporary medical removals for those intending to parent equally applies to pregnant employees. The preamble's discussion of lead's effects on the reproductive system indicates that in many cases it would be unacceptable for a pregnant employee having an elevated blood lead level to continue to experience substantial lead exposure during the pregnancy. If the employee's blood lead level were only slightly elevated, and the employee's normal lead exposure were low or moderate, then removal of the employee might not be essential -- perhaps the provision of a powered air purifying respirator would afford adequate protection to both the mother and the fetus. In other cases, physical removal of the employee from all significant lead exposure might be imperative due to such factors as (1) the employee's blood lead level, (2) the extent of the employee's prior exposure to lead, (3) the nature of the employee's present exposure to lead, or (4) the lack of other protective alternatives. As with other medical conditions, the nature of special protective measures which should be provided to pregnant employees will depend on the circumstances of each case. [43 Fed. Reg. 54462 (Nov. 21, 1978).]

³⁰ Although it is sufficient to note that this Court has rejected Cyanamid's ultimate conclusion -- i.e., that fetuses can be protected from excessive exposure to lead only by excluding fertile women or by rendering them infertile -- we note in passing that each of the underlying points advanced by the Company in support of that conclusion is at best disputed, and at worst plainly wrong.

(Continued)

policy was the only possible means of protecting fetuses from exposure to lead may well be disingenuous. The reality, as OCAW offered to prove, is that Cyanamid simply "chose the easy way out" of dealing with this situation (JA 229 (statement of OCAW representative Steven Wodka)). The Company's decision is

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Thus, Cyanamid first states that adequate reductions in ambient air lead levels at the Willow Island plant were not feasible. Resp. Br. 10. To support that assertion, the Company cites a finding by an administrative law judge in another proceeding which is presently under review by the Commission, and as to which no final Commission order has issued. Id. at 10, n. 18. Obviously, Cyanamid cannot put forward the ALJ's finding -- which has been strongly challenged on review -- as an undisputed fact. Cyanamid also emphasizes that OSHA has not yet determined whether an ambient air lead level of 50 ug/m³ is feasible for the pigment manufacturing industry as a whole. Id. at 11, n. 18. But that says nothing as to what level could have been achieved at Willow Island. The simple fact is that the record in this case contains no evidence concerning the feasibility of reducing lead levels at Willow Island. To suggest that the point is beyond dispute is absurd.

Cyanamid next states that respirators could not have played any part in protecting fetuses from excessive exposure to lead, because OSHA stated in the preamble to the Lead Standard that respirators are unacceptable. Id. at 11. But OSHA merely stated that respirators are unacceptable as a substitute for engineering controls. As this Court has recognized, OSHA properly concluded that respirators could play a valuable role in a program designed to protect the fetus from excessive exposure to lead. Steelworkers, supra, 647 F.2d at 1257. Cyanamid further asserts, however, that it "already had a respiratory protection program in effect in the Inorganic Pigments Department that adequately protected adults, but the program had proven unable to protect the fetus by reducing blood lead levels to 30 ug/100g." Resp. Br. 12, n. 19. Once again, there is nothing in the record with respect to any "respiratory protection program" at Willow Island. A proper respiratory protection program requires "strict rules on selecting, fitting, and testing" (Steelworkers, supra at 1205 (describing OSHA Lead Standard)); the record is silent as to whether Cyanamid had such a program.

(Continued)

designed to protect fetuses at all costs -- even at the cost of the reproductive capacity of its employees -- perhaps because of the Company's fear of potential liability to fetuses

30 (Continued)

Cyanamid next asserts that medical surveillance could not assist in protecting fetuses, citing a statement by OSHA in the preamble to the Lead Standard. Resp. Br. 12 and n. 20. Just as in the case of respirators, the statement cited by Cyanamid merely indicates that medical surveillance is not an adequate substitute for engineering controls; and once again, this Court expressly upheld OSHA's determination that "careful use of medical surveillance" could play a part in protecting fetuses from excessive exposure to lead. Steelworkers, supra, 647 F.2d at 1257.

Finally, Cyanamid rejects any approach under which "the family planning practices of individual employees" would be taken into account in a fetal protection program, on the ground that this "would have been an unwarranted invasion of the legitimate privacy interests of workers." Resp. Br. 12. But that principle simply renders the Company's sterilization policy all the more indefensible. For the sterilization policy involves an extreme intrusion into the privacy of employees. As the Company's Director of Industrial Relations so delicately put it, in announcing the sterilization rule to female employees:

The Company realizes that it is a very personal and private matter whether or not a woman cannot become pregnant because of surgical procedures. It must be pointed out, however, that this very personal matter will no longer be private if you are permitted, and choose, to remain in one of the Departments [where the sterilization rule would apply]" (JA 446).

One further factual matter warrants mention. As noted in our opening brief, the justification asserted by Cyanamid for its sterilization policy is further clouded because OSHA has found that exposure of males to lead can affect the sperm in such a way as to cause harm to offspring, yet Cyanamid's policy applies only to women. (Pet. Br. 41, n. 97.) Cyanamid attacks this contention, asserting that in the hearing on the Lead Standard, no evidence was adduced to support the proposition that lead can cause birth defects by harming the sperm.

(Continued)

which "cannot be discharged through operation of the assumption of risk doctrine." Resp. Br. 13. Cyanamid apparently hoped that by the expedient of the sterilization rule it could avoid any potential liability to fetuses, without being made to answer for the physical harm caused to employees. From all

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Once again, Cyanamid has failed to review this Court's decision in Steelworkers, supra, 647 F.2d at 1257:

OSHA found evidence that lead-exposed males suffer serious harm to their spermatogenesis, including malformed sperm. . . . The chief study was that of the European neuro-endocrinologist Dr. Lancranjan, whose work revealed adverse effects of spermatogenesis among lead-exposed workers with blood-lead levels as low as 41 ug/100g.

* * * *

Dr. Lancranjan's work found some confirmation in a Mt. Sinai survey of 153 lead smelter workers, which revealed unusually high rates of fetal and newborn mortality in the children of these men. . . . Older studies found alarmingly high rates of spontaneous abortion, miscarriage, stillbirth, and birth defects in the pregnancies of women married to lead-exposed workers. . . . Other studies found serious chromosomal abnormalities among lead-exposed workers. . . .

OSHA thus found abundant support for the view expressed by experts from NIOSH and the American Health Foundation that a lead standard must protect the reproductive capacities of males as well as females.

* * * *

LIA had essentially argued that only the reproductive functions of women were threatened at low blood-lead levels. . . . OSHA has advanced substantial evidence to show . . . that men require similar protection.

that appears, this consideration -- rather than the purported unavailability of the sterilization rule -- may explain the adoption of the rule.

We are thus hard-pressed to comprehend how the facts in this case could ever support Cyanamid's contention that the sterilization policy is statutorily protected because of its alleged benefits to potential fetuses. But at the very least, the record in this case could not possibly support a grant of summary judgment in favor of Cyanamid on the issue.

The Commission did not purport to resolve this disputed issue in Cyanamid's favor. Neither should the Court.

CONCLUSION

For the reasons stated above and in OCAW's opening brief, the petition for review should be granted, the Commission's order should be set aside, and the case should be remanded for further proceedings.

Respectfully submitted,



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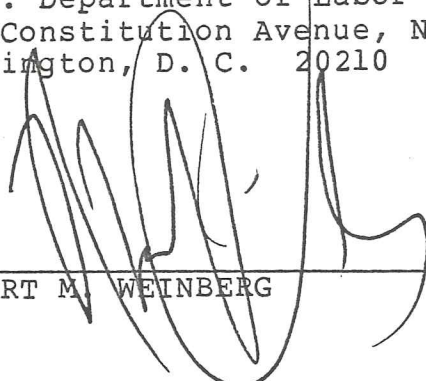
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