

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT	)	Case No. CV 06-01915 DDP (SSx)
OPPORTUNITY COMMISSION,	)	
	)	<b>ORDER RE CROSS MOTIONS FOR</b>
Plaintiff,	)	<b>SUMMARY JUDGMENT</b>
v.	)	
	)	[Motions filed on August 21, 2007
CATHOLIC HEALTHCARE WEST	)	and October 30, 2007]
d/b/a NORTHRIDGE HOSPITAL	)	
MEDICAL CENTER,	)	
	)	
Defendants.	)	

---

This matter comes before the Court on the parties' cross motions for summary judgment or partial summary judgment. After reviewing the materials submitted by the parties and considering the arguments therein, the Court grants summary judgment for Plaintiff Equal Employment Opportunity Commission ("EEOC") on the issue of liability, and sends to the jury the question of punitive damages.

**I. BACKGROUND**

Since 1997 or 1998, Catholic Healthcare West has owned Northridge Hospital Medical Center (collectively, "Defendant"),

1 which is located in Northridge, California.<sup>1</sup> As part of its  
2 medical services, Defendant has a Cardiac Catheterization  
3 Laboratory ("Cardiac Cath Lab" or "Cath Lab"), which provides  
4 fluoroscopy (high intensity radiation) procedures for patients who  
5 require diagnostic and interventional cardiac care. The procedures  
6 performed in the Cardiac Cath Lab include cardiac catheterizations,  
7 angiograms, interventions to correct arterial blockages, electrical  
8 physiology studies, and implants of pacemakers and defibrillators.

9 The Cardiac Cath Lab team consists of approximately four  
10 members, in addition to the cardiologist or physician. The team  
11 members are either registered nurses, radiology technologists, or  
12 cardiovascular technologists. During a fluoroscopic procedure, one  
13 member of the team "scrubs"; that is, he assists the physician at  
14 the procedure table by making sure all the equipment is available  
15 for the physician. A radiology technologist operates the X-ray  
16 machine or camera. A registered nurse attends to the patient by  
17 sedating him and monitoring his vital signs, neurological status,  
18 and circulation. Then, in a separate control room, another member  
19 of the team "monitors" the fluoroscopic procedure by watching the  
20 patient's EKG and heart rhythms.

21 Each team must have a registered nurse to attend to the  
22 patient and a radiology technologist to operate the X-ray machine.  
23 The scrubbing and monitoring duties can be done by a registered  
24 nurse, radiology technologist, or cardiovascular technologist.  
25 When working in the room where the fluoroscopy occurs, each team  
26 member wears a radiation badge to measure radiation exposure and a

27 \_\_\_\_\_

28 <sup>1</sup> Unless otherwise noted, this background consists of facts  
agreed upon by the parties.

1 lead apron for protection against radiation exposure. The team  
2 member who performs the monitoring duties does not have to wear a  
3 lead apron because he works in a separate control room protected by  
4 lead glass.

5 Federal regulations restrict occupational workers' annual  
6 exposure to radiation. The limits for pregnant woman are lower  
7 than those applicable to men or non-pregnant women because of the  
8 sensitivity of the fetus. With respect to the radiation at issue  
9 in this case, however, the parties' experts "agree" that "a  
10 pregnant woman does not have to be removed from the cardiac cath"  
11 lab because the radiation "dose that they potentially could receive  
12 would be below the regulatory limits." (Def's. Ex. 14, Takahashi  
13 Depo. at 64.)

14 From January 1998 until at least April 2005, Defendant had in  
15 place the following policy:

16 All pregnant personnel must immediately report pregnancy  
17 status to the director. . . . The pregnant personnel shall not  
18 partake in any fluoroscopy or portable procedures during her  
19 term. This will ensure safety and protection.

20 (Pl's. Ex. 7, Policy # 76300.802.)<sup>2</sup>

---

21  
22 <sup>2</sup> In April 2005, Policy # 86600.1117 became effective. This  
23 policy provides that it is optional for a woman to "declare" her  
24 pregnancy officially, that only "declared pregnant women" are  
25 limited to a lower amount of radiation exposure than non-pregnant  
26 employees, and that a declaration of pregnancy may be withdrawn at  
27 any time. (Pl's. Ex. 2, Policy #86600.1117.) "Employees who do  
28 not declare their pregnancy and their fetus/embryo will continue to  
be subject to the same radiation dose limits that apply to other  
radiation healthcare workers." (*Id.*) However, Policy # 86600.1117  
does not mention Policy # 76300.802, and Defendant has not  
submitted any additional documentation explaining the latter  
policy's effect on the former. Accordingly, it is not clear  
whether Policy # 76300.802's provision excluding pregnant women  
from fluoroscopy procedures is still in effect.

1 From 1998 to January 2005, Diana Girard-Simone worked as a  
2 registered nurse in Defendant's Cardiac Cath Lab. She is still  
3 working for Defendant, now as Program Manager for telemetry in the  
4 cardiovascular stepdown unit. In 2000, Girard-Simone announced her  
5 first pregnancy to her supervisor, Ken Cappella. During her  
6 pregnancy, she performed only monitoring duties in the Cardiac Cath  
7 Lab. In 2002, she informed her supervisor, Sonni Logan, of her  
8 second pregnancy. Again, she monitored exclusively for a short  
9 period, but then she miscarried. In December 2002, Girard-Simone  
10 informed management of her third pregnancy. It is undisputed that  
11 she did not work in the procedure room during her pregnancies.

12 From 1998 to 2001, and from 2003 through August 2004, Avril  
13 Betoushana worked as a radiology technologist in Defendant's  
14 Cardiac Cath Lab. In August 2004, Betoushana learned that she was  
15 pregnant. She informed Tony Hidalgo, the director of cardiology,  
16 of this fact. It is undisputed that after discussions with  
17 management, Betoushana was transferred to work in the Department of  
18 Radiology and ACC Data until she went on maternity leave in 2005.

19 On August 26, 2005 Betoushana filed a charge of sex  
20 discrimination against Defendant with the EEOC. On or about  
21 September 12, 2005, the EEOC sent Defendant a letter stating that  
22 an investigation had revealed reasonable cause to believe that such  
23 discrimination had occurred. Plaintiff EEOC then filed this  
24 action, alleging that Defendant has engaged in a pattern or  
25 practice of sex discrimination. The parties now file cross-motions  
26 for summary judgment or partial summary judgment.

27 ///

28 ///

1 **II. LEGAL STANDARD**

2 Summary judgment is appropriate where "the pleadings,  
3 depositions, answers to interrogatories, and admissions on file,  
4 together with the affidavits, if any, show that there is no genuine  
5 issue as to any material fact and that the moving party is entitled  
6 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A  
7 genuine issue exists if "the evidence is such that a reasonable  
8 jury could return a verdict for the nonmoving party," and material  
9 facts are those "that might affect the outcome of the suit under  
10 the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
11 248 (1986). In adjudicating a motion for summary judgment, the  
12 court must draw all reasonable inferences in favor of the nonmoving  
13 party. Id. at 255.

14

15 **III. DISCUSSION**

16 A. Discrimination on the Basis of Pregnancy

17 Title VII of the Civil Rights Act ("Title VII") prohibits  
18 discrimination on the basis of sex. 42. U.S.C. § 2000e-2(a).<sup>3</sup> In

19

20

---

21 <sup>3</sup> The statute reads:

22

It shall be an unlawful employment practice for an employer--  
23 (1) to fail or refuse to hire or to discharge any individual,  
24 or otherwise to discriminate against any individual with  
25 respect to his compensation, terms, conditions, or privileges  
26 of employment, because of such individual's race, color,  
27 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.

28

1 1978, Congress passed the Pregnancy Discrimination Act ("PDA"),  
2 which amended Title VII to make clear that

3 [t]he terms "because of sex" or "on the basis of sex" include,  
4 but are not limited to, because of or on the basis of  
5 pregnancy, childbirth, or related medical conditions; and  
6 women affected by pregnancy, childbirth, or related medical  
7 conditions shall be treated the same for all employment-  
8 related purposes, including receipt of benefits under fringe  
9 benefit programs, as other persons not so affected but similar  
10 in their ability or inability to work. . . .

11 42 U.S.C. § 2000e(k). Plaintiff EEOC argues that Defendant engaged  
12 in a pattern or practice of sex discrimination for at least as long  
13 as Policy # 76300.802 was in effect. The Court agrees.

14 Defendant urges the Court to analyze this case using the  
15 burden-shifting framework established by McDonnell Douglas Corp. v.  
16 Green, 411 U.S. 792 (1973), wherein the plaintiff must make out a  
17 prima facie case of discrimination, the defendant may respond by  
18 proffering a legitimate business reason for the allegedly  
19 discriminatory action, and then the plaintiff may seal his case by  
20 showing that the proffered justification was in fact a pretext for  
21 discrimination. (Def's. Mot. 11-12.) However, where a challenged  
22 policy is discriminatory on its face, this burden shifting analysis  
23 does not apply. Cnty. House, Inc. v. City of Boise, 490 F.3d 1041,  
24 1049-50 (9th Cir. 2007). Instead, a facially discriminatory  
25 "fetal-protection policy is sex discrimination forbidden under  
26 Title VII unless [the employer] can establish that sex is a 'bona  
27 fide occupational qualification.'" Int'l Union, United Auto.,  
28 Aerospace and Agric. Implement Workers of Am., UAW, et al.

1 v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (quoting 42  
2 U.S.C. § 2000e-2(e)(1)).<sup>4</sup>

3         The Court finds that there is no issue of fact as to whether  
4 the policy in question discriminates on its face. Defendant  
5 concedes that Policy # 76300.802 states that “[t]he pregnant  
6 personnel shall not partake in any fluoroscopy or portable  
7 procedures during her term.” The language clearly classifies  
8 pregnant people (and therefore, only women) in a manner that would  
9 tend to deprive them of employment in a fluoroscopy lab. A policy  
10 “is not neutral” for Title VII and PDA purposes when it “does not  
11 apply to the reproductive capacity of the company’s male employees  
12 in the same way as it applies to that of the females.” Johnson  
13 Controls, 499 U.S. at 199. Defendant does not contest this fact;  
14 instead it posits several reasons why the policy nonetheless should  
15 not be considered facially discriminatory. None is convincing.

16             1. Good Intentions

17         Defendant admits that Policy # 76300.802 “requires pregnant  
18 employees to be removed from fluoroscopic procedures,” but defends  
19 the classification on the basis that, “at the time it was adopted,  
20 [Defendant] believed that the policy was in the best interests of  
21 its pregnant employees.” (Def’s. Reply 3.) The Court does not  
22 challenge Defendant’s good intentions. However, the Supreme Court  
23 has made clear that “the absence of a malevolent motive does not  
24 convert a facially discriminatory policy into a neutral policy.”  
25 Johnson Controls, 499 U.S. at 199. Moreover, the Court’s decision,  
26 which like this case addressed a “fetal-protection policy,” was

27 \_\_\_\_\_  
28             <sup>4</sup> This so-called “BFOQ” affirmative defense will be discussed  
infra.

1 issued in 1991 - seven years before the effective date of Policy #  
2 76300.802. By the time Defendant issued its new policy in 2005,  
3 fourteen years had passed since the Supreme Court had confirmed the  
4 unlawful nature of classifications on the basis of pregnancy.<sup>5</sup>  
5 Accordingly, Defendant should have known that even the best of  
6 intentions would not justify its discrimination against pregnant  
7 women.

8 2. Betoushana and Girard-Simone Requested Their Own  
9 Removal from the Fluoroscopy Room

10 Defendant claims that the policy does not discriminate on its  
11 face because Betoushana and Girard-Simone requested to be removed  
12 from the fluoroscopy room and allowed to perform the monitoring  
13 tasks exclusively. The EEOC counters that any such "requests" were  
14 not really requests at all because the hospital's discriminatory  
15 policy forced its pregnant employees either to leave fluoroscopy  
16 altogether or to seek an accommodation allowing them to alter their  
17 regular duties. Defendant thus urges this Court to consider  
18 whether the women requested their own removal to be a question of  
19 material fact precluding summary judgment.

20 Instead, the Court finds this issue to be a red herring. The  
21 undisputed evidence shows that Defendant's facially discriminatory  
22 policy # 76300.802 was in effect between at least 1998 and 2005,  
23 and that Betoushana and Girard-Simone were removed from the Cath  
24 Lab during this period. Betoushana testified, for example, that  
25 when management asked to meet with her upon learning of her

26 \_\_\_\_\_  
27 <sup>5</sup> Defendant does not even mention - much less discuss or  
28 distinguish - Johnson Controls, the leading Supreme Court case on  
this issue. This omission is particularly surprising given that  
the case was relied upon in Plaintiff's briefing.



1 pregnancy, she "kind of already knew what the meeting was going to  
2 be"; she expected they were going to order her to discontinue her  
3 duties in the fluoroscopy room because "[i]t was kind of in the  
4 air" and because "there was another pregnant woman in the cath lab  
5 that was asked to leave some time ago." (Betoushana Depo. at 41.)  
6 Betoushana also testified that she was aware of Policy # 76300.802  
7 even before the meeting. (Id. at 46.)

8 Hospital officials confirm that they would not allow to  
9 Betoushana to continue her duties in the fluoroscopy room, and that  
10 they made this clear to her. In a letter summarizing the meeting,  
11 Human Resources Associate Susan Paulson recounted that Nana Deeb,  
12 the Director of Imaging Services, informed Betoushana that she  
13 could not remain in her current position because "hospital policy  
14 dictates that employees are removed from fluoroscopic procedures  
15 during pregnancy." (Pl's Ex. 9.) Nana Deeb herself submitted a  
16 declaration to this Court explaining that the policy in effect  
17 during the relevant time period "required a pregnant woman to  
18 refrain from engaging in fluoroscopy procedures." (Deeb Decl. 2.)

19 Similarly, Defendant appears to concede that hospital policy  
20 precluded Girard-Simone from continuing to work in the procedure  
21 room. In discussing her situation, Defendant highlights, for  
22 example, the fact that pregnant women were covered by a 2002 policy  
23 requiring those employees who could not perform all their job  
24 functions to be transferred out of the Cath Lab. (Def's. Mot.  
25 Summ. J. 7.) This indicates that the hospital considers pregnant  
26 employees unable to perform all the functions in the Cath Lab.  
27 Defendant has not suggested any reason, other than the radiation  
28

1 risk to fetuses, for pregnant employees' alleged inability to do  
2 their jobs.

3 Defendant attempts to characterize this case as one about  
4 pretext. In other words, can Plaintiff show that Defendant's  
5 policy was the but-for cause of the women in question leaving the  
6 fluoroscopy procedure room?<sup>6</sup> However, whether or not Betoushana  
7 and Girard-Simone requested accommodations is not the point. As  
8 already explained, in cases where an employer imposes a facially  
9 discriminatory policy on its employees, the burden is not on the  
10 plaintiff to show pretext.<sup>7</sup> Instead, it is the defendant that must

---

11  
12 <sup>6</sup> That Defendant is taking this tactic is underscored by the  
13 fact that its briefing fails even to mention the analysis for a  
14 facially discriminatory policy.

15 <sup>7</sup> Even if the reasons Betoushana and Girard-Simone left the  
16 Cath Lab were germane to this case, the Court would find that the  
17 undisputed evidence shows that the women only requested  
18 accommodations after being told they could not continue to work in  
19 the fluoroscopy room.

20 There is no dispute that Betoushana's "request" to monitor  
21 occurred as follows: Upon learning she was pregnant, she informed  
22 her supervisor. Either based on his wishes, or "maybe to do with  
23 the hospital policy," she "started monitoring only at that time, on  
24 the procedure." (Betoushana Depo. at 40.) This was "not in  
25 response to anything [she]'d asked for" and she was "satisfied  
26 doing the actual scrubbing and X-ray technician work" in the  
27 procedure room. (*Id.*) After about a week, she was asked to attend  
28 a meeting to discuss her job. As recalled by Susan Paulson, during  
this meeting "Nana Deeb explained that hospital policy dictates  
that employees are removed from fluoroscopic procedures during  
pregnancy." (Pl's. Ex. 7.) After that, Betoushana "conveyed [that  
she] really wanted to stay in the cath lab." (Betoushana Depo. at  
48.) She "suggested [she] could work procedures or have monitoring  
responsibilities" but "Nana again explained that due to the levels  
of fluoroscopy" it "would not be a safe environment for you or your  
unborn baby." (Pl's. Ex. 7.) Betoushana then "suggested [she]  
could double vest or kilt" but management worried about the safety  
of that option as well. (*Id.*)

It may be true that Betoushana did state at one point that  
"during her first trimester, she wanted to monitor exclusively."  
(Deeb Decl. ¶ IX.) However, the undisputed facts show that this  
conversation happened only after she had been called into a meeting  
and told she could not continue with her normal responsibilities

(continued...)

1 present a valid BFOQ. Otherwise, a violation of Title VII has been  
2 established. Period. The particular motivations prompting an  
3 individual to leave the Cath Lab do not neutralize a facially  
4 discriminatory policy any more than do the good intentions of the  
5 hospital.

6 3. Sufficient Showing of Discrimination

7 Defendant argues that two alleged incidents cannot support the  
8 finding of a "pattern or practice" of discrimination. This  
9 contention lacks merit because it ignores the fact that Defendant's  
10 official policy discriminated on its face. Cf. Cooper v. Fed.  
11 Reserve Bank of Richmond, 467 U.S. 867, 878 (1984) (noting, in a

---

12  
13 <sup>7</sup>(...continued)

14 and only in the context of her prior knowledge of Defendant's  
15 discriminatory policy. The only reasonable interpretation of this  
16 request is as an attempt to retain part of her job in any way  
17 possible, not as a demand to monitor instead of working in the  
18 fluoroscopy room. Indeed, Betoushana's undisputed testimony is  
19 that she told management that if she could stay in the Cath Lab she  
20 would work in "any capacity that [they] could take" her.  
(Betoushana Depo. at 66.)

21 There is no dispute that Girard-Simone's "request" to monitor  
22 occurred as follows: she was told she would be "removed from the  
23 cath lab" after she declared her third pregnancy. (Girard-Simone  
24 Depo. at 46.) She was told she was "going to be transferred to a  
25 different department," to which she responded that she was "not  
26 interested in making a transfer" because "as [she] did [during her]  
27 first pregnancy," she could continue to "fulfill [her] job and  
28 responsibilities in a very high quality manner." (Id.) When the  
hospital further expressed a "desire for [her] to transfer," she  
again pleaded that she "wanted to stay." (Id. at 51-52.) At this  
point Nana Deeb suggested "some sort of work for me to do that  
could occur outside of the . . . procedure room" but still within  
the Cardiac Cath Department. (Id. at 53.) Girard-Simone "had an  
objection" to that proposal "in that [she] wanted to remain  
monitoring." (Id. at 54.)

29 In context, then, Girard-Simone was requesting to monitor  
30 exclusively as opposed to transferring out of the department or  
31 performing other duties outside the procedure room, not as opposed  
32 to continuing with her regular duties. In fact, Girard-Simone has  
33 made clear that she did want to perform her full duties in the Cath  
34 Lab: "In December 2002, I was able and willing to perform all my  
35 duties as a registered nurse working in the cardiac cath lab."  
(Girard-Simone Decl. ¶ 4.)

1 case where the evidence of discrimination was not a facially  
2 discriminatory policy but rather anecdotal evidence that black  
3 employees were paid and promoted less than that whites, that a  
4 "pattern or practice" claim "may fail even though discrimination  
5 against one or two individuals has been proved").

6 Defendant further contends even where a written provision is  
7 facially discriminatory, "an allegedly discriminatory provision is  
8 not automatically the equivalent of a discriminatory *policy* for  
9 purposes of establishing a prima facie case of discrimination  
10 absent some showing of enforcement or application of the  
11 provision." E.E.O.C. v. Sears, Roebuck & Co., 839 F.2d 302, 355  
12 (7th Cir. 1988). Assuming, without deciding, that the Seventh  
13 Circuit's standard is also Ninth Circuit law, Plaintiff EEOC has  
14 made this showing. It has provided evidence that the  
15 discriminatory policy was in force, that hospital management was  
16 aware and in support of it, and that it was applied to at least  
17 Betoushana and Girard-Simone. Defendant has not provided any  
18 evidence to the contrary. In fact, Defendant has never contended  
19 that, during the period Policy # 76300.802 was in effect, the  
20 hospital allowed women who so chose to continue their work in the  
21 fluoroscopy procedure room. A reasonable jury could only conclude  
22 that the discriminatory policy constituted "the company's standard  
23 operating procedure." Cooper, 467 U.S. at 876.<sup>8</sup> Accordingly, the

---

24  
25 <sup>8</sup> Nana Deeb states in her declaration that the policy was easy  
26 to enforce because most women request to be removed from fluroscopy  
27 procedures. (Deeb Decl. ¶ VII.) Because the undisputed evidence  
28 shows that Defendant's policy forbade women from working in  
fluoroscopy and that employees were aware of this policy, however,  
it is impossible to determine how many of those alleged "requests"  
were in fact made only because the pregnant employees knew they had  
(continued...)

1 Court finds that, between 1998 and at least 2005 Defendant had a  
2 policy that discriminated on the basis of pregnancy.

3 B. Affirmative Defenses

4 1. Bona Fide Occupational Qualification

5 Because Defendant enforced a policy that discriminates on its  
6 face, Plaintiff EEOC succeeds on its Title VII claim "unless  
7 [Defendant] can establish that sex is a 'bona fide occupational  
8 qualification.'" Johnson Controls, 499 U.S. at 200. The BFOQ  
9 defense allows employers to classify on the basis of sex when such  
10 a classification is "reasonably necessary to the normal operation  
11 of that particular business or enterprise." 42 U.S.C. § 2000e-  
12 2(e)(1). As a matter of law, Defendant cannot succeed on a BFOQ  
13 defense in this case.

14 The Supreme Court has explained that the BFOQ defense is only  
15 available in "narrow circumstances"; "[t]he statute thus limits the  
16 situations in which discrimination is permissible to 'certain  
17 instances' where sex discrimination is 'reasonably necessary' to .  
18 . . job-related skills and aptitudes." Johnson Controls, 499 U.S.  
19 at 201-02. Defendant has not argued, much less presented any  
20 evidence, that pregnant employees are in any way less capable of  
21 performing all the tasks required to work in the Cardiac Cath Lab  
22 than their male counterparts. Instead, Defendant argues that the  
23 policy was intended "to protect its female employees and their  
24 babies." (Def's. Reply 11.) At oral argument, Defendant again  
25 insisted that fetal-safety concerns justify the discrimination.  
26 The Court disagrees.

---

27  
28 <sup>8</sup>(...continued)  
no choice but to leave.

1 First, Defendant mischaracterizes the federal requirements  
2 regarding radiation exposure. Regulations promulgated by the  
3 United States Nuclear Regulatory Commission impose higher radiation  
4 limits on "declared pregnant women" than on men and nonpregnant  
5 women. (Def's. Opp'n. Ex. 13, Regulatory Guide 8.13 - Instruction  
6 Concerning Prenatal Radiation Exposure, at 4.) Defendant relies on  
7 these regulations to urge that it is, in a sense, caught between a  
8 rock and a hard place, between complying with federal law and  
9 treating all employees equally. However, Defendant omits the  
10 crucial fact that the regulations explicitly retain to the woman  
11 the choice as to whether or not to declare her pregnancy:

12 Declared pregnant woman means a woman who has voluntarily  
13 informed the licensee [employer], in writing, of her pregnancy  
14 and the estimated date of conception. The declaration remains  
in effect until the declared pregnant woman withdraws the  
declaration in writing or is no longer pregnant.

15 10 C.F.R. § 20.1003 (emphasis added). In sharp contrast, the  
16 facially discriminatory policy put in place by Defendant, in  
17 addition to imposing a blanket prohibition on their participation  
18 in fluoroscopy procedures, required "[a]ll pregnant personnel [to]  
19 immediately report pregnancy status to the director." (Pl's. Ex. 7,  
20 Policy # 76300.802.)<sup>9</sup> Defendant is thus not required by federal  
21 regulations to limit all pregnant women's exposure to radiation; it  
22 is only required to limit the exposure of those women who  
23 voluntarily "declare" their pregnancy in writing. Yet, the

24  
25

26 \_\_\_\_\_  
27 <sup>9</sup> Defendant may have known this policy did not comply with  
28 federal law, for its revised 2005 policy follows the Nuclear  
Regulatory Commission's lead by making it optional for a woman to  
officially "declare" her pregnancy.

1 discriminatory policy at issue makes such pregnancy declarations  
2 mandatory.<sup>10</sup>

3       Second, and more importantly, the Supreme Court has roundly  
4 rejected fetal safety as a defense to policies that facially  
5 discriminate on the basis of pregnancy. In Johnson Controls, the  
6 employer had a policy of prohibiting pregnant women and women who  
7 could become pregnant from working in battery-manufacturing jobs  
8 because they involved exposure to lead. The employer argued that  
9 this facial discrimination was justified by a BFOQ because of the  
10 safety risk that exposure to lead could pose to a fetus. Johnson  
11 Controls, 499 U.S. at 202. The Supreme Court struck down the  
12 policy, holding that the BFOQ's "safety exception is limited to  
13 instances in which sex or pregnancy actually interferes with the  
14 employee's ability to perform the job."<sup>11</sup> Id. at 204.

15       The Court's reasoning is worth recounting. It noted that the  
16 purpose of the PDA was to ensure that "women as capable of doing  
17 their jobs as their male counterparts may not be forced to choose  
18 between having a child and having a job." Id. "Employment late in  
19 pregnancy often imposes risks on the unborn child," the Court

20

---

21       <sup>10</sup> The Court encourages all employers to be mindful of their  
22 pregnant employees, to ensure that employees are aware of any  
23 radiation risks and to accommodate those women who voluntarily  
24 declare their pregnancies in order to limit their exposure to  
25 radiation. Here, however, the Court is faced with a facially  
discriminatory policy which strips women of any agency in their  
occupational destinies while pregnant, and that the Court cannot  
condone.

26       <sup>11</sup> Defendant's contention that it rejected Betoushana's offer  
27 to wear a double layer of protective vests because of the potential  
28 safety risks to other employees is yet another red herring. That  
any number of proposed accommodations might well be unreasonable  
because they are unsafe for other employees in no way justifies a  
blanket policy that discriminates on its face.

1 reminded, but "[d]ecisions about the welfare of future children  
2 must be left to the parents who conceive, bear, support, and raise  
3 them rather than to the employers who hire those parents."<sup>12</sup> Id.  
4 at 205-06. Otherwise, we as a society would send the message that  
5 we trust employers more than we trust women to make decisions about  
6 their own bodies and their own destinies.

7 Indeed, the Court cautioned that paternalistic "[c]oncern for  
8 a woman's existing or potential offspring historically has been the  
9 excuse for denying women equal employment opportunities." Id. at  
10 211. Therefore, the United States Supreme Court admonished:

11 It is no more appropriate for the courts than it is for  
12 individual employers to decide whether a woman's reproductive  
13 role is more important to herself and her family than her  
14 economic role. Congress has left this choice to the woman to  
15 make.<sup>13</sup>

16 Id. Johnson Controls means what it says. This Court will not  
17 sanction a facially discriminatory policy on the basis that an  
18 employer thinks it is for the woman's own good.<sup>14</sup> Accordingly, the

---

19 <sup>12</sup> Moreover, to the extent that an employer might worry about  
20 potential tort liability for fetal injuries, the Court noted that  
21 "[w]ithout negligence, it would be difficult for a court to find  
22 liability on the part of the employer. If, under general tort  
23 principles, Title VII bans sex-specific fetal-protection policies,  
24 the employer fully informs the woman of the risk, and the employer  
25 has not acted negligently, the basis for holding an employer liable  
26 seems remote at best." Johnson Controls, 499 U.S. at 208.

27 <sup>13</sup> For this reason, the fact that many pregnant employees may  
28 in fact seek to avoid working in fluoroscopy in no way justifies an  
official policy excluding them. "It is correct to say that Title  
VII does not prevent the employer from having a conscience. The  
statute, however, does prevent sex-specific fetal-protection  
policies. These two aspects of Title VII do not conflict." Id. at  
208.

<sup>14</sup> Moreover, both parties' radiation experts agree that "a  
pregnant woman does not have to be removed from the cardiac cath"  
lab because the radiation "dose that they potentially could receive  
would be below the regulatory limits." (Def's. Ex. 14, Takahashi

(continued...)



1 Court grants Plaintiff's motion for summary adjudication that  
2 Defendant cannot raise the BFOQ defense.

3           2.    Administrative Defenses

4           Defendant contends that Girard-Simone's claim is barred  
5 because she failed to exhaust her administrative remedies by filing  
6 a timely charge of discrimination with the EEOC, and, for the same  
7 reason, that her claim is barred by the statute of limitations  
8 requiring an aggrieved party to file a charge within 300 days of  
9 the unlawful conduct.<sup>15</sup> See 42 U.S.C. § 2000e-5(e)(1). The Court  
10 rejects these arguments because the EEOC, not Girard-Simone, is the  
11 Plaintiff in this action.

12           The EEOC is not subject to any statute of limitations  
13 restriction on its ability "to file suit in a federal court."  
14 Occidental Life Ins. Co. of Cal. v. E.E.O.C., 432 U.S. 355, 366  
15 (1977). With respect to exhaustion, "[i]n a Title VII  
16 representative suit, unnamed class members need not individually  
17 bring a charge with the EEOC as a prerequisite to joining the  
18 litigation." Bean v. Crocker Nat'l Bank, 600 F.2d 754, 759 (9th  
19 Cir. 1979). This is so because "the EEOC is not merely a proxy for  
20 the victims of discrimination"; instead, "[w]hen the EEOC acts,  
21 albeit at the behest of and for the benefit of specific

---

22  
23           <sup>14</sup>(...continued)  
24 Depo. at 64.) In other words, it is not necessarily unsafe for  
25 pregnant women to work in the Cath Lab. Of course, a pregnant  
26 employee who feels her fetus is at risk or needs an accommodation  
27 due to a pregnancy-related condition may well have that legal  
right. See, e.g., Cal. Gov. Code §§ 12940, 12945 (requiring that  
reasonable accommodations be made for pregnancy-related  
conditions).

28           <sup>15</sup> Defendant concedes that Betoushana has met her  
administrative prerequisites to filing a suit.

1 individuals, it acts also to vindicate the public interest in  
2 preventing employment discrimination." Gen. Tel. Co. Of Nw., Inc.  
3 v. E.E.O.C., 446 U.S. 318, 326 (1980). The EEOC may thus seek  
4 relief for Girard-Simone and any other employees who may have been  
5 affected by Defendant's discriminatory policy even though they have  
6 not complied with the requirements necessary to bring private  
7 actions on their own. Accordingly, Plaintiff's motion for summary  
8 adjudication of these issues is granted.

9 3. Laches

10 "Laches requires proof of (1) lack of diligence by the party  
11 against whom the defense is asserted, and (2) prejudice to the  
12 party asserting the defense." United States v. Dang, 488 F.3d  
13 1135, 1144 (9th Cir. 2007) (internal quotation marks omitted).  
14 Assuming for present purposes only that there is a question of  
15 material fact as to whether the EEOC unreasonably delayed in  
16 bringing this action, the laches defense fails as a matter of law  
17 because there is no evidence that Defendant was prejudiced by this  
18 delay. Defendant asserts that one of its witnesses, Sonni Logan,  
19 has since moved out of state, "making it difficult and expensive to  
20 depose her and call her as a witness at trial." (Def's. Opp'n 14.)  
21 However, the Court notes that Defendant was in fact able to depose  
22 her and has not suggested she will be unavailable to attend a  
23 trial. A review of the case law has convinced the Court that this  
24 potential extra cost is not the sort of prejudice that would  
25 justify a laches defense. Cf. Boone v. Mech. Specialties Co., 609  
26 F.2d 956, 959-60 (9th Cir. 1979 (affirming a finding of prejudice  
27 where the plaintiff had delayed seven years in bringing his lawsuit  
28 and "most of the witnesses are no longer available").

1                   4.    Unclean Hands

2                   “The unclean hands doctrine closes the doors of a court of  
3 equity to one tainted with inequitableness or bad faith relative to  
4 the matter in which he seeks relief, however improper may have been  
5 the behavior of the defendant.” Adler v. Fed. Republic of Nigeria,  
6 219 F.3d 869, 876-77 (9th Cir. 2000) (internal quotation marks  
7 omitted). Defendant claims that “it is inequitable and bad faith  
8 for the EEOC to claim on behalf of Avril Betoushana that she was  
9 removed from the cath lab when she testified that she wanted to  
10 monitor only.” (Def’s. Opp’n 9.) However, as discussed supra, the  
11 undisputed facts show that Defendant maintained a facially  
12 discriminatory policy, and that Betoushana was removed from the  
13 Cath Lab pursuant to that policy. Whatever her personal  
14 motivations may have been do not mitigate or justify that policy,  
15 and it is the policy that the EEOC challenges in this lawsuit.  
16 Under these circumstances, the Court finds that Defendant has  
17 presented no evidence that would support a defense of unclean  
18 hands.

19                   In light of the above analysis, the Court grants summary  
20 adjudication on liability in favor of Plaintiff. Ultimately, the  
21 case is straightforward. Under Johnson Controls, Defendant’s  
22 policy violates Title VII unless it can demonstrate a valid BFOQ.  
23 The only BFOQ Defendant asserts is one that was rejected by the  
24 United States Supreme Court in 1991. The other potential  
25 affirmative defenses raised by Defendant are without merit.  
26 Accordingly, as a matter of law, Plaintiff EEOC has proven  
27 liability.

28                   C.    Injunction

1 Defendant argues that Plaintiff is not entitled to injunctive  
2 relief as a matter of law because the discriminatory policy is no  
3 longer in effect. Plaintiff responds that it is unclear whether  
4 the 2005 policy in fact replaced the earlier unlawful policy, and  
5 that in any case, the old policy may as a practical matter still be  
6 in effect. Indeed, Policy # 86600.1117 does not mention, much less  
7 explicitly revise or rescind, the facially discriminatory policy.  
8 Because Policy # 76300.802's provision excluding pregnant women  
9 from fluoroscopy procedures may still be in effect, thus requiring  
10 injunctive relief of some kind, the Court denies summary  
11 adjudication on this issue.

12 D. Punitive Damages

13 Defendant argues that punitive damages are not available in  
14 this case as a matter of law. The Court disagrees.

15 Title VII allows for punitive damages where an employer  
16 "engaged in a discriminatory practice . . . with malice or reckless  
17 indifference to the federally protected rights of an aggrieved  
18 individual." 42 U.S.C. § 1981a(b)(1). The Supreme Court has made  
19 clear that "[t]he terms 'malice' or 'reckless indifference' pertain  
20 to the employer's knowledge that it may be acting in violation of  
21 federal law, not its awareness that it is engaging in  
22 discrimination." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535  
23 (1999). Moreover, liability for punitive damages does not require  
24 a showing that the employer "engage[d] in conduct with some  
25 independent, 'egregious' quality"; instead "the reprehensible  
26 character of the conduct is not generally considered apart from the  
27 requisite state of mind." Id. at 538.

28

1 Put another way, in Title VII cases, "an employer may be  
2 liable for punitive damages in any case where it 'discriminates in  
3 the face of a perceived risk that its actions will violate federal  
4 law.'" Passatino v. Johnson & Johnson Consumer Prod., Inc., 212  
5 F.3d 493, 515 (9th Cir. 2000) (quoting Kolstad, 527 U.S. at 536).  
6 "Thus, in general, intentional discrimination is enough to  
7 establish punitive damages liability." Id. As already discussed,  
8 the Court finds that Defendant has engaged in intentional  
9 discrimination as a matter of law by implementing an official  
10 policy that facially discriminates on the basis of sex.

11 The Supreme Court has, however,

12 set forth three areas in which the factfinder could find  
13 intentional discrimination but the defendant would nonetheless  
14 not be liable for punitive damages. First, if the theory of  
15 discrimination was novel or poorly recognized, the employer  
16 could reasonably believe that its action was legal even though  
17 discriminatory. Second, the employer could believe it had a  
18 valid BFOQ defense to its discriminatory conduct. Third, in  
19 some (presumably rare) situations, the employer could actually  
20 be unaware of Title VII's prohibition against discrimination.  
21 Common to all of these exceptions is that they occur when the  
22 employer is aware of the specific discriminatory conduct at  
23 issue, but nonetheless reasonably believes that conduct is  
24 lawful. Under such circumstances, an employer may not be  
25 liable for punitive damages.

19 Id. (citing Kolstad, 527 U.S. at 536-37). The Court finds that  
20 punitive damages are available in this case.

21 Plaintiff has shown that Defendant imposed its unlawful policy  
22 starting in 1998 even though the Supreme Court had explicitly held  
23 seven years earlier that those that policies that restrict pregnant  
24 women from certain positions constitute facial sex discrimination.  
25 Because this theory of discrimination is neither novel nor poorly  
26 recognized, a jury could find that Defendant could not have  
27 reasonably believed its policy was legal.  
28

1 Defendant has never suggested it is unaware of Title VII's  
2 well-known policy forbidding discrimination, or that the statute's  
3 protections encompass pregnancy. Instead, it insists that it  
4 "never had any intent to discriminate, its intent at all times was  
5 to protect its pregnant employees and their fetuses." (Def's.  
6 Reply 12.) However, Johnson Controls made clear in 1991 that an  
7 intention to protect fetuses did not justify classifications on the  
8 basis of pregnancy. Therefore, a jury could conclude that  
9 Defendant could not have reasonably believed that the fetal-  
10 protection rationale would constitute a valid BFOQ defense.

11 Defendant may in fact have instituted its unlawful policy in  
12 an attempt to protect its pregnant workers and their fetuses. It  
13 may have had no "evil motive" whatsoever in the way one might  
14 normally think of the phrase. That is not the standard for  
15 imposing punitive damage liability, however. If the jury believes  
16 that Defendant acted with the knowledge or reckless disregard of  
17 the fact that it was violating federal law, it is subject to  
18 punitive damage liability, even if it honestly believes that  
19 classifications in an attempt to protect fetuses should not count  
20 as discrimination. Accordingly, the Court leaves the question of  
21 punitive damages to a jury.

22

23

24

25

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 Based on the foregoing analysis, the Court grants summary  
3 judgment in favor of Plaintiff EEOC on the issue of liability, and  
4 sends the question of punitive damages to a jury.

5

6 IT IS SO ORDERED.

7

8

9 Dated: January 3, 2008



---

DEAN D. PREGERSON  
United States District Judge

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28