Fetal Protection and UAW v. Johnson Controls, Inc.: Job Openings for Barren Women Only

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COMMENT

FETAL PROTECTION AND UAW v. JOHNSON CONTROLS, INC.: JOB OPENINGS FOR BARREN WOMEN ONLY

INTRODUCTION

In recent years, increasing numbers of industrial chemicals have been identified as hazardous to workers' reproductive systems. These chemicals are classified according to their effects on human reproductive systems. Employers have responded to this risk by implementing fetal protection policies that exclude fertile women from toxic workplaces. Three federal appellate courts have attempted to resolve the resulting conflict between a woman's right to be free from employment discrimination and the employer's desire to exclude her from employment that may injure the fetus.

In the most recent case, UAW v. Johnson Controls, Inc., several unions and employees (the "UAW") brought an action under Title VII of the


2. Fertile women are defined as all women who cannot establish their sterility. See International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 876 n.8 (7th Cir. 1989) (en banc), cert. granted, 58 U.S.L.W. 3614 (U.S. Mar. 26, 1990) (No. 89-1215); see also Wright v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982) ("[a]ny woman age 5 through 63 is assumed to be fertile").

3. Companies excluding women from positions involving exposure to toxic chemicals include: American Cyanamid Co., B.F. Goodrich Co., Dow Chemical Co., Environmental Protection & Aeration Systems, Inc., Firestone, General Motors Corp., Monsanto, Johnson Controls, Inc., Olin Corp. and St. Joe Minerals Corp. See Howard, supra note 1, at 798 n.3; Williams, supra note 1, at 642 n.11.

The toxic chemicals for which companies have instituted such policies include benzene, carbon monoxide, lead, mercury and vinyl chloride. See Williams, supra note 1, at 647-48.


Civil Rights Act of 1964 challenging Johnson Controls' ("Johnson") fetal protection policy, which barred all fertile women from jobs involving exposure to lead. The district court granted Johnson's motion for summary judgment, holding that the policy did not violate Title VII.

Affirming the district court's judgment, the Court of Appeals for the Seventh Circuit characterized Johnson's policy as facially neutral, but recognized that it had a disproportionate discriminatory impact on women. The court thus departed from Title VII's plain language, which would have required that the policy be treated as a case of disparate treatment discrimination justifiable only under the statute's "bona fide occupational qualification" (the "BFOQ"). Instead, the Seventh Circuit found the policy to be an instance of disparate impact discrimination that could be justified under the broader business necessity standard.

This finding is clearly troubling for two reasons. Functionally, the opinion is worrisome because by allowing such a broad justification of sex-specific fetal protection policies, the Seventh Circuit essentially permits employers to decide what is in the best interest of their employees, rather than ensure that such decisions remain in the employees' domain. Furthermore, the decision opens the door to judicial undercutting of Title VII's protections, by permitting courts to reach a desired result while paying only lip service to the statute's underlying policies.

This Comment argues that, in view of Title VII's language, its legislative history and developed case law, the Seventh Circuit should have found that Johnson's fetal protection policy involved disparate treatment discrimination unjustifiable under Title VII's BFOQ exception. Part I of this Comment examines why Title VII's legislative history and case law dictate a finding of disparate treatment discrimination. Part II criticizes the Johnson decision and argues that the Fourth and Eleventh Circuits, upon which Johnson relied, erred in making similar findings in analogous cases. Part II also contends that, even assuming the case was properly characterized as one of disparate impact, the Seventh Circuit was incorrect in affirming summary judgment. This Comment concludes that all sex-specific fetal protection policies are unjustifiable under Title VII because they fail to meet the BFOQ's strict standard.

7. See id. at 310. Johnson is engaged in the manufacture of batteries, which entails the use of lead. Its policy bars all fertile women from jobs in which there was a likelihood that the level of lead in their blood would exceed 30 micrograms per deciliter. See id.
8. See id.
11. See Johnson, 886 F.2d at 888-89; infra notes 55-65 & 90-114 and accompanying text.
I. LEGISLATIVE HISTORY AND CASE LAW INTERPRETATION

A. Title VII's Prohibition of Sex Discrimination

Title VII of the Civil Rights Act of 1964 gives sex a protected status that prevents its consideration in employment decisions. The provision's legislative history is meager and gives little indication of Congress's intent. The inclusion of sex in the statute without limiting language, however, suggests that Congress intended to afford Title VII protection against sex discrimination equal to the protection granted to the other prohibited classifications.

B. The Pregnancy Discrimination Act of 1978

Title VII's definition of "discrimination on the basis of sex" was amended by the Pregnancy Discrimination Act of 1978 (the "P.D.A.") to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Employers were thereby prohibited from considering a woman's pregnancy or pregnancy-related condition when making employment decisions. The P.D.A. further requires that women affected by pregnancy, childbirth or related medical conditions must be regarded only in light of their ability to perform the duties of the job in question.


It shall be an unlawful employment practice for an employer —

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


13. See supra note 12 and accompanying text.


The sex classification was proposed on the last day of House debate by Representative Smith of Virginia, a staunch opponent of the Civil Rights Bill. See 110 Cong. Rec. 2577-84 (1964); see also Bujel, 384 F. Supp. at 144 n.4 ("The original proponent of the measure was a southern Congressman who voted against the Act, and whose strategy was allegedly to 'clutter up' Title VII so that it would never pass at all.").

15. See supra note 12 and accompanying text.

16. See supra note 12 and accompanying text.


Congress amended Title VII with the P.D.A. in response to two Supreme Court decisions that refused to follow EEOC guidelines and confused the analysis of pregnancy-related discrimination. Recognizing that these decisions failed to provide guidance as to what analytical framework would apply in a given situation, Congress passed the

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[i]The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

Id. (emphasis added).


In Gilbert, the Supreme Court relied on its decision in Geduldig v. Aiello, 417 U.S. 484 (1974), an equal protection challenge to a disability benefits policy, and held that an employer’s decision not to provide costly disability benefits for pregnancy-related conditions was not sex discrimination. See Gilbert, 429 U.S. at 135-36. The Court reasoned that because women belonged to both the “pregnant” and “non-pregnant” categories, they were not discriminated against as a group. See id. at 135 (quoting Geduldig, 417 U.S. at 496-97, n.20). The Court concluded that because women were denied a benefit that men could not possibly receive, there was no sex discrimination. See id. (citing Geduldig, 417 U.S. at 496-97).

Such reasoning was particularly suspect because the employer’s program provided benefits for disabilities unique to the male reproductive system (such as vasectomies). See id. at 152 (Brennan, J., dissenting).

After concluding that discrimination on the basis of pregnancy was not sex discrimination on its face, the Supreme Court applied a disparate impact analysis and queried whether the disability benefits program had a disproportionate adverse impact on women. See id. at 136-37. The Court found no such impact and, therefore, no discrimination. See Gilbert, 429 U.S. at 136-37.

In Satty, the Supreme Court held that a policy that deprived women of accumulated seniority because of their absence from work for childbirth did have a disparate impact on women and therefore violated Title VII. See Satty, 434 U.S. at 138-43. The Court distinguished Satty from Gilbert by drawing a distinction between benefits and burdens. In Gilbert there was no discrimination because the employer had “merely refused to extend to women a benefit that men cannot . . . receive.” Id. at 142. The employer in Satty, however, violated Title VII because it went further than merely denying women a benefit by “impos[ing] on [them] a substantial burden that men need not suffer.” Id.

18. See supra note 15 and accompanying text.

In disagreeing with the Gilbert majority’s finding that discrimination on the basis of pregnancy was not sex discrimination, Congress expressly referred to Justice Brennan’s dissent, which supported the EEOC guidelines as a reasonable interpretation and implementation of Title VII’s broad social objectives, see House Report, supra note 15, at 4750, and to Justice Stevens’ dissenting opinion that “it is the capacity to become pregnant which primarily differentiates the female from the male.” Id. (quoting Gilbert, 429 U.S. at 162 (Stevens, J., dissenting)). Indeed, Congress stated that “the dissenting Justices correctly interpreted the Act” as a prohibition of discrimination on the basis of pregnancy. See id.


20. In particular, the Satty Court failed to explain why the “burden” approach was not applicable in Gilbert, “where only women were burdened with paying their living expenses out of their own savings” during the time they were disabled due to childbirth. See House Report, supra note 15, at 4751 (emphasis added). Nor did the Satty court explain why “the right to retain one’s seniority while absent from work” could not be considered a benefit. Id. This lack of judicial guidance “left both employers and employees in the untenable position of guessing . . . whether the courts would apply the ‘benefits’ or the ‘burdens’ label to a particular policy.” Id.
P.D.A. to clarify the scope of its intended prohibition against sex discrimination. The P.D.A., therefore, was enacted to "mak[e] clear that distinctions based on pregnancy are per se violations of Title VII, . . . and [to] obviate the difficulties in applying the distinctions created" by the Supreme Court.21

Congress acknowledged that women were discriminated against because of the assumption that they will become pregnant and leave the workforce.22 To prohibit decisions based on such assumptions, Congress indicated that "related medical conditions" include any physiological conditions related to childbearing and unique to women.23 It stressed that the P.D.A. requires employers to consider pregnant women not on the basis of their pregnant condition, but on the basis of how that condition affects their job performance.24

The legislative history further suggests that the P.D.A. may ban sex-specific fetal protection policies. At hearings in both houses, the Chamber of Commerce of the United States submitted written statements opposing the P.D.A. because it "would prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat to the health of either the mother-to-be or her unborn child."25 The passage of the P.D.A. despite these statements indicates that Con-

21. See id.

Congress also indicated that the P.D.A. "would eliminate the need in most instances to rely on the impact approach." Id.; infra notes 55-65 & 90-114 and accompanying text.
24. See House Report, supra note 15, at 4751-54. The report stated that [the bill] specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work. . . . The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work. The 'same treatment' may include [various] practices . . . so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work. . . . In addition to . . . benefit programs, other employment policies which adversely affect pregnant workers are also covered. These policies include: refusal to hire or promote pregnant women; termination of pregnant women; mandatory leave for pregnant women arbitrarily established at a certain time during their pregnancy and not based on their inability to work.

At the Senate hearings, an expert medical witness, responding to whether he thought that the P.D.A. would raise any safety and health issues, stated:
I have long been an advocate for a massive increase in research to deal with the
gress recognized that the P.D.A. could prohibit sex-specific fetal protection policies.\textsuperscript{26}

C. The Bona Fide Occupational Qualification of Title VII

Title VII provides an exception to its general prohibition of sex discrimination in employment, tolerating such discrimination where sex is a "bona fide occupational qualification" for the job in question.\textsuperscript{27} The legislative history of Title VII, however, provides little guidance as to what constitutes a BFOQ.

The debates in the House of Representatives were sparse.\textsuperscript{28} The provision's proponent referred to the "many instances" where sex was a BFOQ, but provided only the example of an "elderly woman who wants a female nurse."\textsuperscript{29} Such a broad reference implies that the BFOQ would

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\textsuperscript{26} See Becker, supra note 1, at 1255-56. The P.D.A.'s legislative history also indicates that Congress intended to protect women against pregnancy-related discrimination, even if doing so resulted in substantially increased costs to employers. See House Report, supra note 15, at 4757-58; infra note 114.

\textsuperscript{27} Congress recognized that the P.D.A.'s passage would increase employer costs in two areas: disability benefits and health insurance. The estimated cost increase to employers for disability benefits ranged from $130 million per year to $571 million per year. See id. Congress found the Department of Labor's figure of $191.5 million per year to be the most reliable. See id.

The increased costs to employers for health insurance could not be reliably estimated due to lack of sufficient data, widely varying hospital and delivery costs throughout the United States, and health plans' varying treatment of pregnancy and related conditions. See id. Congress passed the P.D.A. despite the fact that the actual costs to employers might greatly exceed $191.5 million per year due to these indeterminable health insurance costs.

\textsuperscript{28} 42 U.S.C. § 2000e-2(e)(1) (1988). The BFOQ provision of Title VII provides that: it shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise... .

\textsuperscript{29} 110 Cong. Rec. 2718 (1964); see also Sirota, supra note 13, at 1059-71 (discussing five job categories for which sex has been deemed a BFOQ: jobs requiring authenticity or genuineness, privacy, sex appeal, psychosexual requirements, or prison security).

The EEOC interpreted the provision narrowly. See 29 C.F.R. § 1604.2(a) (1988). According to the EEOC's guidelines, sex is not a BFOQ if the discrimination is based on stereotypical characteristics, co-worker, customer or employer preferences, or state employment legislation. See 29 C.F.R. §§ 1604.2(a)(1)(i)-(iii), 1604.2(b) (1988). The guidelines expressly allow sex as a BFOQ only in cases involving "authenticity," such as the employment of an actress for a woman's role. See 29 C.F.R. § 1604.2(a)(2) (1988).

Addressing the impact of Title VII and the P.D.A. on fetal protection policies,
serve as only a modest check on sex discrimination.

The House debates, however, suggested a narrower interpretation by indicating what the BFOQ was not intended to encompass. An amendment proposed by Representative Dowdy would have permitted sex discrimination if there were other non-prohibited reasons for the employment decision. The House's defeat of Dowdy's amendment indicates that Title VII requires that sex be completely excluded as a factor in employment decisions. A decision motivated partially by sex is as impermissible as one based solely on sex.

The Senate provided a clearer picture of its intended interpretation of the BFOQ provision. The Senate intended to prohibit employers from making sex-based employment decisions on the basis of subjective standards, such as business judgment. Maintenance of business goodwill was also considered a prohibited reason for making sex-based employment decisions, as were employment decisions based wholly or partially

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EEOC issued a Policy Statement that interpreted Title VII's prohibition of discrimination on the basis of pregnancy to include discrimination on the basis of a woman's fertility. See EEOC: Policy Statement on Reproductive and Fetal Hazards Under Title VII, Fair Empl. Pracs. Man. (BNA) 405:6613, at 6614 (Oct. 3, 1988) [hereinafter EEOC: Policy Statement]. The EEOC stated that employers may not treat "a female employee . . . differently from male employees because of her pregnancy or capacity to become pregnant." Id. (emphasis added). The EEOC further indicated that policies expressly barring women from jobs because of fertility are facially discriminatory. See id.

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31. See id.
32. See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785-86 (1989) (employer may avoid liability for decision based on legitimate and illegitimate motives, by showing by preponderance of evidence that same decision would have resulted absent illegitimate motive); cf. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (employer may avoid liability for dismissing teacher for exercising first amendment rights, by proving by preponderance of evidence that it would have reached same decision absent protected conduct).
33. See 110 Cong. Rec. 7212-13 (1964). The Senate floor managers of the Civil Rights Bill issued an Interpretative Memorandum of Title VII stating that the BFOQ provided a "limited right to discriminate" and that it "must not be confused with [the employer's right] to hire and fire on the basis of general qualifications for the job, such as skill or intelligence." Id. at 7213.

Like the House, the Senate rejected several proposed amendments to the Bill, implicitly narrowing the BFOQ's interpretation. Senator McClellan proposed an amendment that would have permitted employers to discriminate on the basis of sex if the goodwill of the business would be adversely affected. See 110 Cong. Rec. 13,825 (1964). Senator McClellan's purpose for the proposed amendment was to allow employers to make employment decisions based on business judgment. See id. One commentator has noted that the Senate's rejection of Senator McClellan's amendment implies that "customer attitudes and preferences, the major component[s] of goodwill," cannot be considered by employers when making employment decisions. Sirota, supra note 13, at 1030.

Senator McClellan also reintroduced the Dowdy amendment, which would have permitted sex discrimination if sex was not the sole basis for the employment decision. See 110 Cong. Rec. 13,837 (1964). This amendment met defeat in the Senate, as it had in the House. See 110 Cong. Rec. 2726-28, 13,837-38 (1964).
34. See 110 Cong. Rec. 7212-13 (1964).
35. See id. at 13,825.
The language and legislative history of Title VII and the P.D.A. clearly indicate that Congress intended to prohibit discrimination on the basis of sex\textsuperscript{36} and to afford similar protection to pregnant women by including discrimination on the basis of pregnancy or capacity to become pregnant under the definition of sex discrimination.\textsuperscript{37} The history and language of the provision also indicate that Congress intended to provide a narrow exception to the prohibition in those instances where sex is a BFOQ for the job in question.\textsuperscript{38} Thus, a fetal protection policy that pursues its goal by excluding all fertile women from the workplace, regardless of their ability to perform, undermines Congress's intent to afford all women protection from discriminatory treatment.

D. Case Law Interpretation of Title VII

The Supreme Court has recognized Congress's intent that Title VII prohibit not only cases of disparate treatment, but also cases involving disparate impact.\textsuperscript{40} Under the disparate treatment theory of discrimination, an employer violates Title VII by intentionally and overtly\textsuperscript{41} dis-
criminating against a member of a protected class. Discriminatory intent can be inferred from the existence of the employer's overtly discriminatory policy. The employer may nonetheless avoid liability for such a policy by justifying it under the statutorily sanctioned BFOQ.

The courts' various tests for the BFOQ justification have all been narrowly formulated. In *Weeks v. Southern Bell Telephone & Telegraph Co.*, the Court of Appeals for the Fifth Circuit, holding that the employer's exclusion of women from telephone switchman positions was not justified under the BFOQ, articulated the "all or substantially all" test for a BFOQ analysis. Under this test, an employer may justify his discrimination by "proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

In *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit held that Pan Am's hiring of only female flight attendants violated Title VII because sex was not a BFOQ for the position. *Diaz* introduced an "essence" test, stating that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."


44. See *Teamsters*, 431 U.S. at 335 n.15; *Williams, supra* note 1, at 669 n.176.

45. See *supra* notes 27-39 and accompanying text.

46. See *infra* notes 47-54 and accompanying text.

47. *Watson, supra* at 235 (emphasis added). In *Weeks*, the employer argued that its refusal to promote a woman into a switchman's position came within the BFOQ because the job entailed "strenuous" lifting of heavy objects. *See id.* at 234. The court disagreed, holding that this discrimination was based on stereotypes and not on the individual woman's abilities and that the employer had failed to prove that all or substantially all women would be incapable of performing the job. *See id.* at 234-36; *cf. Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400, 422 (1985) (articulating same test for BFOQ justification in action under Age Discrimination in Employment Act).

48. *Id.* at 235 (emphasis added). In *Weeks*, the employer argued that its refusal to promote a woman into a switchman's position came within the BFOQ because the job entailed "strenuous" lifting of heavy objects. *See id.* at 234. The court disagreed, holding that this discrimination was based on stereotypes and not on the individual woman's abilities and that the employer had failed to prove that all or substantially all women would be incapable of performing the job. *See id.* at 234-36; *cf. Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400, 422 (1985) (articulating same test for BFOQ justification in action under Age Discrimination in Employment Act).

49. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

50. See *id.* at 389.

51. *Id.* at 388.

In *Diaz*, Pan Am admitted that its policy of restricting the position of flight cabin attendant to women discriminated against men, but attempted to justify its decision by arguing that being a woman was a BFOQ because Pan Am's customers overwhelmingly preferred women attendants. *See id.* at 387. The court held that Pan Am failed to estab-
The Ninth Circuit, in Rosenfeld v. Southern Pacific Co.,\(^5\) espoused a "sexual characteristics" test in rejecting an employer's policy excluding women from jobs requiring strenuous physical activity. Addressing its concern that such policies were based on stereotypical standards and not on an individual woman's ability,\(^5\) the Ninth Circuit required a link between sexual characteristics and the ability to perform the duties in question.\(^5\)

All the tests for the BFOQ justification share a common theme: to prevail, an employer must establish a nexus between sex and the individual's ability to perform the duties of the position in question.

The Supreme Court first articulated the disparate impact theory of discrimination in Griggs v. Duke Power Co.,\(^5\) which held that an employer violates Title VII by adopting a facially neutral policy or practice that has a disproportionate adverse impact on a protected class.\(^5\) Unlike disparate treatment discrimination, the plaintiff need not prove discriminatory intent to establish a prima facie case of disparate impact discrimination because the consequences of the facially neutral policy constitute the violation.\(^5\) Therefore, an employer violates Title VII even if he innocently implements a neutral policy that results in adverse discriminatory effects on a protected class.\(^5\) An employer may, however,
avoid liability by producing evidence that the discrimination was justified under the business necessity defense, which requires that the employer's practice be related to the position in question.

This defense, which was initially applied almost as narrowly as the BFOQ, has recently been expanded. Originally, the defense required that the disparately impacting policy be "necessary to the safe and efficient operation of the business." Today, an employer can prevail by establishing that the policy significantly serves "legitimate employment goals." Even under this expanded interpretation, however, an em-

The Supreme Court developed the disparate impact theory to circumvent the typically heavy evidentiary burdens plaintiffs encountered in establishing discriminatory intent. Congress's objective in enacting Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other[s]." The Court has since retreated from this position, and has placed additional burdens on plaintiff. See, e.g., Wards Cove, 109 S. Ct. at 2126 (shifting burden of persuasion from defendant to plaintiff on issue of whether business necessity exists); Watson, 108 S. Ct. at 2790 (plaintiff has burden of showing that specific employment practice challenged caused disparate impact).

59. See Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); see also Wards Cove, 109 S. Ct. at 2126 (employer has burden of production on issue of whether business necessity defense exists; burden of persuasion is on plaintiff).

60. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2115, 2125-26 (1989) (dictum) (business necessity established where employer's disparately impacting policy significantly serves employer's legitimate employment goals); Watson v. Fort Worth Bank & Trust, 108 S. Ct. at 2777, 2790 (1988) (dictum) (business necessity established if employer could show that subjective hiring criteria were "based on legitimate business reasons," unless employee could show existence of less discriminatory but equally effective alternatives); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (business necessity established where employer's no-methadone policy significantly served legitimate safety and efficiency goals).


64. Wards Cove, 109 S. Ct. at 2125; see also Watson, 108 S. Ct. at 2790 (prima facie
ployer's desire to protect fetuses from harm by excluding women from certain jobs may violate Title VII, because a policy that fails to consider the individual woman's ability to perform the employment in question cannot be said to serve legitimate employment goals.65

II. THE SEVENTH CIRCUIT'S QUESTIONABLE HOLDING

A. Disparate Impact vs. Disparate Treatment

UAW challenged Johnson's fetal protection policy barring fertile women from any jobs in which there was a likelihood that the level of lead in the blood of workers would exceed 30 micrograms per deciliter.66 Johnson's policy also barred fertile women from any jobs that, through promotion, would ultimately lead to lead exposure jobs.67 Affirming the district court's grant of summary judgment,68 the Court of Appeals for the Seventh Circuit found the policy valid under Title VII.69

The Seventh Circuit was persuaded by the approaches taken by the Fourth and Eleventh Circuits in analyzing similar cases, and by the EEOC's Policy Statement regarding fetal protection policies.70 These sources indicated that fetal protection policies could not be justified under the statutory BFOQ analysis.71 Consequently, the courts improperly reclassified the policies as cases of disparate impact, allowing application of the broader business necessity defense.72

65. See supra notes 15-16 and accompanying text.
68. See Johnson, 680 F. Supp. at 310.
69. See Johnson, 886 F.2d at 901.
70. See id. at 883-87; see also Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552-53 (11th Cir. 1984) (in holding employer's policy unjustified, court articulated rule that business necessity defense, normally available only in cases of facially neutral policies, may be used to justify facially discriminatory fetal protection policy); Wright v. Olin Corp., 697 F.2d 1172, 1192 (4th Cir. 1982) (fetal protection policy analyzed and upheld under disparate impact theory); EEOC: Policy Statement, supra note 29, Fair Empl. Pracs. Man. (BNA) at 405:6613 n.1 (outlining analytical framework developed by Hayes and Wright courts).
72. See Hayes, 726 F.2d at 1548; Wright, 697 F.2d at 1186; infra notes 73-89 and accompanying text.

Title VII states that discrimination on the basis of sex is not unlawful if sex is a BFOQ "reasonably necessary to the normal operation" of the business involved. 42 U.S.C. § 2000e-2(e)1 (1982) (emphasis added). Both the Hayes and Wright courts misquoted the BFOQ provision by omitting the word "reasonably." See Hayes, 726 F.2d at 1549; Wright, 697 F.2d at 1185 n.21. By misreading the statute, those courts carved out a narrower exception for the BFOQ than Congress intended. See supra notes 27-39 and accompanying text. Faced with a seemingly insurmountable standard, the courts may have found it necessary to engage in judicial gymnastics in order to apply the less formi-
The Seventh Circuit determined that Johnson’s policy of barring all fertile women from lead exposure jobs was facially neutral, presenting a more easily defensible case of disparate impact, because the policy “effectively and equally protects the offspring of all employees.” Although Johnson’s policy expressly excluded fertile women, the court justified its finding of disparate impact by indicating that the business necessity defense “balance[s] the interests of the employer, the employee and the unborn child in a manner consistent with Title VII.”

This cart-before-the-horse argument is reminiscent of the Fourth Circuit’s analysis in Wright v. Olin Corp., a Title VII challenge to a similar fetal protection policy. In Wright, the Fourth Circuit justified its rejection of the disparate treatment/BFOQ analysis by holding that such an analysis would have precluded the employer from attempting a business necessity defense. In other words, because the employer could not win under a disparate treatment/BFOQ analysis, the case was characterized as one of disparate impact, thus affording the employer the broader business necessity defense. This misapplication of case law created a new defense to facial discrimination on the basis of sex and pregnancy based on present need but devoid of statutory basis.

The Seventh Circuit also relied on the Eleventh Circuit’s decision in Hayes v. Shelby Memorial Hospital, a Title VII challenge to employer’s dismissal of a pregnant X-ray technician. Hayes, like Wright, overcame...
the facial discrimination hurdle through imaginative analysis. 81 The Eleventh Circuit initially found that a fetal protection policy could “never be neutral,” and therefore could only be justified by a BFOQ. 82 It elaborated, however, that such a policy presented only a presumption of disparate treatment, rebuttable by a showing that “although [the policy] applies only to women, [it] is neutral in the sense that it effectively and equally protects the offspring of all employees.” 83 The employer could meet this burden by establishing the elements of a business necessity defense. 84 By allowing an employer to justify a case of disparate treatment discrimination under a business necessity defense, normally applicable only in disparate impact cases, the Eleventh Circuit, like the Fourth Circuit, created a new defense lacking statutory basis and rooted in contorted reasoning. 85

81. See supra notes 76-79 and accompanying text.
82. See Hayes, 726 F.2d at 1547-48.
83. Id. at 1548.
84. See id. The Hayes court held that the employer could rebut the presumption by proving that “there is a substantial risk of harm to the fetus or potential offspring” and that “the hazard applies to fertile or pregnant women, but not to men.” Id. After successfully rebutting the presumption of facial discrimination, the employer would no longer be required to provide a BFOQ justification, and a disparate impact/business necessity analysis would apply automatically “because to reach the disparate impact stage of analysis in a fetal protection case, the employer has already proved—to overcome the presumption of facial discrimination—that its policy is justified.” Id. at 1553.
85. See supra notes 12-39 and accompanying text.

Furthermore, the Supreme Court has held that any employment decisions made on the basis of sex constitute disparate treatment and can be justified only under a BFOQ analysis. In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), an early Title VII sex discrimination case decided before the P.D.A., the Court found that the employer’s refusal to hire women with pre-school age children violated Title VII. The employer’s practice was arguably neutral with respect to sex in that it might have benefitted the offspring of both sexes. Nonetheless, the Court held the practice to be disparate treatment discrimination justifiable only under the BFOQ. See id. at 544; see also Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (policy that particular jobs are “too dangerous for women [violates] . . . the purpose of Title VII to allow the individual woman to make that choice for herself”); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971) (employer’s policy based on subjective assumption that women are weaker than men violated Title VII because employee was “denied an opportunity to demonstrate personal physical qualification” for job); Dzaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.) (policy barring men from flight attendant positions violated Title VII because it failed to “take into consideration the ability of individuals to perform . . . the job”), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) (practice of barring women from “strenuous” lifting jobs divests individual women of power to decide for themselves whether to accept such jobs).

In two post-P.D.A. cases, City of Los Angeles v. Manhart, 435 U.S. 702 (1978), and Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), the Supreme Court held that any distinctions between men and women, no matter how reasonable, are per se disparate treatment discrimination on the basis of sex and violate Title VII. In Manhart, the employer’s policies required women to contribute more to pension plans than men, yet disbursed equal payments to both men and women after retirement. See Manhart, 435 U.S. at 704, 708-09. Similarly, the policies in Norris disbursed smaller retirement benefits to women who had contributed on an equal basis with men. See Norris, 463 U.S. at 1074.

The Court held that Title VII prohibited employers from distinguishing between men and women for pension purposes, even though the distinctions were based on a difference
Under developed Title VII case law, however, the correct and more principled approach is to first determine whether the policy is discriminatory on its face. The answer to this threshold question determines which defense will apply. If the policy is facially discriminatory, the court must apply a BFOQ analysis. If the policy is facially neutral and has a disparate impact, a business necessity defense applies. Only after these initial characterizations should "balancing of the interests" issues arise. A sex-specific fetal protection policy, then, which facially discriminates against members of one sex, constitutes disparate treatment discrimination justifiable only under a BFOQ analysis.

B. Johnson's Business Necessity Defense of Fetal Protection Policies

After deciding that Johnson's policy involved disparate impact discrimination, the Seventh Circuit discussed whether the policy could be justified under a business necessity defense. In fetal protection cases,
this judicially created defense\textsuperscript{91} succeeds if the employer can show that the policy avoids a substantial risk of harm to the fetus or potential fetus,\textsuperscript{92} and that exposure to this risk is transmitted only through women.\textsuperscript{93} The plaintiff can still prevail by proving that there are equally effective but less discriminatory alternatives available.\textsuperscript{94} Applying this framework, the court found Johnson’s policy justified and not in violation of Title VII.\textsuperscript{95}

The majority agreed with Johnson that the element of substantial risk of harm referred to only one harm facing the fetus: exposure to lead.\textsuperscript{96} However, substantial risk may mean substantial net risk to the fetus;\textsuperscript{97} thus, all the effects of Johnson’s policy merit consideration. Barring fertile women from lead exposure jobs may actually increase the fetus’s risk of harm from dangers other than lead exposure.\textsuperscript{98} For example, denying a woman these jobs may lessen the quality of the fetus’s or infant’s medical care because of the denial of the job’s health insurance benefits\textsuperscript{99} while the woman seeks other comparable employment. Moreover, the loss of income resulting from excluding a woman from an entire class of employment may affect the health of the fetus or infant by decreasing the nutrition it receives.\textsuperscript{100} Thus, the net result of Johnson’s policy might be an overall decrease in the fetus’s health.\textsuperscript{101} In such a case, the substantial

\textsuperscript{91.} See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547-48 (11th Cir. 1984) (business necessity defense used to rebut presumption of disparate treatment in fetal protection case); Wright v. Olin Corp., 697 F.2d 1172, 1189-90 (4th Cir. 1982) (business necessity defense applied in fetal protection case); cf. Albemarle, 422 U.S. at 425 (business necessity defense used by employer to justify facially neutral testing policy having discriminatory effect on blacks).

\textsuperscript{92.} See Johnson, 886 F.2d at 886-90; Hayes, 726 F.2d at 1548; Wright, 697 F.2d at 1190-91.

\textsuperscript{93.} See International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 886-90 (7th Cir. 1989) (en banc), cert. granted, 110 S. Ct. 1522 (1990); Hayes, 726 F.2d at 1548; Wright, 697 F.2d at 1190.

\textsuperscript{94.} See Johnson, 886 F.2d at 886-93; Hayes, 726 F.2d at 1553; Wright, 697 F.2d at 1190.

\textsuperscript{95.} See Journal, 886 F.2d at 901.

\textsuperscript{96.} See id. at 889. The evidence established substantial risk of harm to the fetus. Id. at 888.

\textsuperscript{97.} See id. at 918 (Easterbrook, J., dissenting).

\textsuperscript{98.} See id. at 918 (pointing out “strong correlation between” infant’s health and prenatal medical care as well as between infant’s nutrition and parental income) (citing V. Fuchs, How We Live 31-40 (1983)).

\textsuperscript{99.} See Becker, supra note 1, at 1229-31.

\textsuperscript{100.} See id. (citing Greenberg, Unstable Emotions of Children Tied to Poor Diet, N.Y. Times, Aug. 18, 1981, at C1); see also Poor Women At Higher Risk From Anemia in Pregnancy, N.Y. Times, Feb. 13, 1990, at C9, col. 3 (citing Centers for Disease Control report indicating that “[l]ower-income mothers do not seem to bounce back from the anemia common in early pregnancy as well as other women, and that increases the risk of premature delivery and fetal death”).

\textsuperscript{101.} The majority believed that such incidental risks bore “no relevance to Johnson Controls’ employment practices” because women who are transferred out of jobs under the policy retain their salary and benefits. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 889 n.28 (7th Cir. 1989) (en banc), cert. granted, 110 S. Ct. 1522 (1990). The majority ignored the fact that women excluded from these jobs are offered
risk element would not be met and the policy, whose effects would be contrary to its stated purpose of preventing fetal injury, would not be justified under the defense.

In considering the second prong of the defense, the Seventh Circuit was persuaded by testimony of Johnson's experts that a substantial risk of harm to the potential fetus resulted from lead in the female employee's blood stream, and that a male worker's exposure to the maximum lead levels permitted by OSHA did not pose a substantial risk of transmission to the potential fetus. UAW attempted to negate this element of Johnson's defense by offering evidence, based primarily on animal studies, that such lead levels in males caused malformed sperm, thereby creating a risk of injury to potential fetuses. Had this evidence that the harm was communicable by both sexes persuaded the court, the defense would have failed.

Even though Johnson satisfied both prongs of the business necessity defense, UAW might have nonetheless prevailed had it been able to estab-
lish the existence of equally effective, but less restrictive alternatives to Johnson's policy.\footnote{106} Johnson's policy is overly broad in at least three respects.

First, it presumes that all women under the age of 70 are fertile, unless they can medically prove sterility. It has been determined, however, that the pregnancy rates in any given year are less than nine percent of all fertile women;\footnote{107} approximately two percent of all blue collar women over 30 years of age;\footnote{108} 0.38 percent of all women 40-44 years of age;\footnote{109} and 0.02 percent of all women 45-49 years of age.\footnote{110} Because of these low pregnancy rates, the risk of fetal injury is slight; even in the most favorable light, Johnson's policy unjustifiably excludes at least 91 out of every 100 fertile women in order to prevent possible fetal injury stemming from exposure to a lead environment.\footnote{111}

Second, such a broad policy ignores the particular circumstances of each individual. For example, Johnson barred a fifty-year-old divorcee with little likelihood of becoming pregnant.\footnote{112}

Finally, the policy excludes presumptively fertile women from any positions from which they might be promoted into the lead exposure jobs.\footnote{113} These initial jobs, however, pose no lead exposure risk to fetuses. Denying women access to them, without regard to the women's qualifications, violates Title VII.\footnote{114}

\footnote{106}{The majority found that UAW did not preserve for appeal the issue of whether there were less restrictive alternatives available. See \textit{Johnson}, 886 F.2d at 891.}

\footnote{107}{See Williams, supra note 1, at 696.}


\footnote{109}{See id.}

\footnote{110}{See id. The Census Bureau does not list birth rates for women over 49. See \textit{id.} at 1233 n.68.}

\footnote{111}{See Williams, supra note 1, at 696. The statistics further indicate that Johnson's policy unjustifiably excludes: approximately 98 of every 100 blue collar women over 30 years of age, \textit{see id.}, 4,981 of every 5,000 women 40-44 years of age and 4,999 of every 5,000 women 45-49 years of age. See Becker, \textit{supra} note 1, at 1233 & nn.68-69.}


\footnote{113}{See id. Any higher positions in the ladder of progression that are attainable only through promotion from the lead exposure positions are necessarily blocked as well.}

\footnote{114}{See \textit{supra} notes 16, 24 & 55-65 and accompanying text.}

Johnson's costs would likely increase if it initially had to train women for jobs that promote into the lead exposure jobs and later re-train these same women for different jobs because entry to the lead exposure jobs was barred. Cost justification, however, is not recognized under Title VII. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 n.26 (1983); City of Los Angeles v. Manhart, 435 U.S. 702, 716-17 (1978); see also Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1090-91 (1983) (employer violated Title VII by offering pension annuities paying women lower benefits than similarly situated men, even though estimated $85 million annual cost of correcting discriminatory policy might prove prohibitive); \textit{House Report, supra} note 15, at 4757-58 (Congress intended to protect women from pregnancy-related discrimination despite substantial costs to employers). \textit{But see} Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2127 (1989) (cost is relevant in determining whether a less discriminatory alternative is
The evidence presented by UAW casts substantial doubt on the Sev-
enth Circuit's decision to affirm the summary judgment.\textsuperscript{115} UAW's evi-
dence that the risk of harm to the fetus is transmitted through both sexes\textsuperscript{116} raised issues of fact that should have precluded a grant of sum-
mary judgment.\textsuperscript{117} Moreover, the policy's unnecessarily broad sweep raised issues of fact as to the existence of less restrictive alternatives.\textsuperscript{118} The Seventh Circuit should have vacated the summary judgment and remanded the case to the district court for trial.

"equally effective as [employer's] chosen hiring procedures in achieving [employer's] le-
gitimate employment goals").

Another cost justification argument that might have been advanced by Johnson was its wish to avoid potential tort liability for any injuries sustained by a malformed child of an employee mother, who cannot waive the rights of her unborn or unconceived children. Although a full discussion of the issue is beyond the scope of this Comment, general tort principles seem to indicate that there would be no basis for holding an employer liable for fetal injury where the employer has fully informed the female employee of the risks and where the employer has not acted negligently. \textit{See} W. Keeton, D. Dobbs, R. Keeton, & D. Owen, \textit{Prosser and Keeton on Torts} § 18, at 112-15 (5th ed. 1984). Indeed, the employer's argument that this policy is necessary to avoid liability fails because a waiver of negligence by the female employee would be ineffective in most jurisdictions. \textit{See id.} § 68, at 482 & n.22. Moreover, the basis of liability in these prenatal tort actions has usually been negligence by the employer towards the mother and not towards the unborn child. \textit{See} Finley, \textit{supra} note 1, § 16.04, at 16-36 to 16-37.

Even assuming that the child could establish a breach of duty by the employer, causation would prove a more difficult burden due to the lack of strong evidence tying maternal occupational exposure to fetal harm. \textit{See} Becker, \textit{supra} note 1, at 1235 nn.77-81, 1245 (citing Office of Technology Assessment, \textit{Reproductive Health Hazards in the Workplace} (1985)); \textit{see also} Security Nat'l Bank v. Chloride, Inc., 602 F. Supp. 294, 297 (D. Kan. 1985) (in only case to date brought by child allegedly injured through parental lead exposure caused by employer's negligence, jury returned verdict for employer despite plaintiff's argument that employer had exceeded OSHA's maximum lead levels).

A more fundamental issue regarding whether Title VII should permit discriminatory fetal protection policies because of employers' fear of potential tort liability is that if such policies are allowed, the costs of injuries to the children will be borne by those children and their mothers, not by employers. This seems contrary to Title VII's ban of sex dis-

115. Fed. R. Civ. P. 56(c) states that: "[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

116. \textit{See supra} notes 102-105 and accompanying text.

117. Even the EEOC questioned the district court's summary judgment in light of the conflicting evidence. It noted that:

[The district court purported to apply the \textit{Hayes/Wright} analysis. It con-
cluded on summary judgment that the exclusionary policy was justified, despite the fact that . . . there was conflicting evidence about harm mediated through men. In the Commission's view, when conflicting evidence exists, summary judgment is not appropriate.


118. \textit{See supra} notes 106-114 and accompanying text.
C. Johnson's BFOQ Justification of Fetal Protection Policies

The Seventh Circuit also stated in dictum that the policy would have been justified under the BFOQ. Applying the "essence" test, the court stated that the BFOQ would allow Johnson's policy if Johnson could prove that the "essence of [its] business operation would be undermined" by hiring fertile women. The court found that such an eventuality would likely occur because fertile women could not perform their jobs "safely" without exposing their potential fetuses to a substantial risk of harm.

Safety considerations as grounds for discrimination on the basis of sex and pregnancy, however, have been allowed under the BFOQ in limited instances in which the employee's sex or pregnancy has adversely affected her ability to perform the duties of the job in question. Despite the court's broad definition of "safe," to say that a woman's fertility interferes with her ability to achieve the essential goal of Johnson's manufacturing business stretches the BFOQ beyond reason.

The Seventh Circuit's contortion of Title VII is rendered all the more inexcusable by the fact that there could be a fetal protection policy that would satisfy Title VII. A valid policy would have to apply to both sexes.

120. See generally Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.) (first articulation of "essence" test), cert. denied, 404 U.S. 950 (1971); supra notes 49-51 and accompanying text.
121. See Johnson, 886 F.2d at 894 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).
122. See id. at 894-96. This conclusion hinged on the court's definition of the essence of Johnson's business as the "manufacture of batteries in as safe a manner as possible" and its expansion of the meaning of "safe" to include "protect[ing] unborn children from a substantial risk of devastating and permanent impairment ... resulting from exposure to a toxic industrial chemical." Id. at 896.
123. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Supreme Court permitted Alabama to exclude women from prison guard positions at all-male penitentiaries because it found that a woman's sex would be enough to disrupt prison order. See id. at 335-36. Although it noted that Title VII allows the individual woman, and not the employer, to decide whether a particular job is too dangerous for her, the Court held sex to be a BFOQ for the prison guard position because "[m]ore [was] at stake ... than an individual woman's decision to weigh and accept the risks of employment." Id. at 335 (emphasis added). The Court found that a woman's sex interfered with her ability to maintain order, one of the essential duties of the prison guard job. See id. at 335-36.
124. See supra note 122 and accompanying text.
equally\textsuperscript{125} and avoid drawing distinctions based on pregnancy or related conditions.\textsuperscript{126} The more difficult question is whether any \textit{sex-specific} fetal protection policy, which by its nature constitutes disparate treatment in violation of Title VII, could be found to satisfy the narrow BFOQ. The language of Title VII and the P.D.A., their legislative histories and case law all indicate that the BFOQ is satisfied \textit{only} where an employee's sex adversely affects her ability to perform the essential duties of the job.\textsuperscript{127} Therefore, any sex-specific fetal protection policy barring women from employment, without regard to individual ability and job performance, cannot be justified under the BFOQ.

\textbf{CONCLUSION}

Sex-specific fetal protection policies implemented by employers in response to toxic workplaces that threaten the health of employees and their offspring bar only fertile women from the workplace. Although serving the laudable goal of protecting the next generation, such policies ignore the clear efforts of Congress to protect women of \textit{this} generation from employment discrimination. Under Title VII, it is forbidden to connect the policies' sex criteria to the affected jobs, without specifically weighing an individual's capabilities. This failure proves fatal to all sex-specific fetal protection policies.

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\textsuperscript{125} See supra notes 12-14 and accompanying text.
\textsuperscript{126} See supra notes 15-26 and accompanying text.
\textsuperscript{127} See supra notes 27-39 and accompanying text.