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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.[1] Employers have responded to this risk by implementing fetal protection policies that exclude fertile women[2] from toxic workplaces.[3] Three federal appellate courts[4] have attempted to resolve the resulting conflict between a woman's right to be free from employment discrimination[5] 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.*,[6] several unions and employees (the "UAW") brought an action under Title VII of the

1. These chemicals are classified according to their effects on human reproductive systems. *See* Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. Pa. L. Rev. 798, 802-06 (1981); Note, *Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination?*, 5 Colum. J. Envtl. L. 97, 99-100 (1978).

Several commentators have discussed the issue of reproductive hazards in the workplace. *See* Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219 (1986); Finley, *The Exclusion of Fertile Women from the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?*, in Proceedings of N.Y.U. Thirty-eighth Ann. Nat'l Conf. on Labor § 16-1 (1985); Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63 (1980); Howard, *supra*; Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Geo. L.J. 641 (1981); Note, *supra*.

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.

4. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); *infra* notes 66-89 and accompanying text.

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), prohibits employment discrimination on the basis of color, national origin, race, religion and sex. *See infra* notes 12-14 and accompanying text.

6. 680 F. Supp. 309 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).

Civil Rights Act of 1964 challenging Johnson Controls' ("Johnson") fetal protection policy, which barred all fertile women from jobs involving exposure to lead.[7] The district court granted Johnson's motion for summary judgment, holding that the policy did not violate Title VII.[8]

Affirming the district court's judgment,[9] 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").[10] 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.[11]

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.

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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.*

9. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 901 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

10. *See infra* notes 27-39 & 119-127 and accompanying text.

11. *See Johnson*, 886 F.2d at 888-93; *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.[12] The provision's legislative history is meager and gives little indication of Congress's intent.[13] The inclusion of sex in the statute without limiting language,[14] 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."[15] 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.[16]

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12. *See* 42 U.S.C. § 2000e (1988). Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer —
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> (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*.

42 U.S.C. § 2000e-2(a) (1982) (emphasis added).

13. *See* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex. L. Rev. 1025, 1027 (1977) (citing Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 144 n.4 (E.D. Mich. 1974)).

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.").

14. *See supra* note 12 and accompanying text.

15. 42 U.S.C. § 2000(e)k (1982).

After Title VII's enactment, but before the P.D.A., the Equal Employment Opportunity Commission ("EEOC"), the government agency charged with implementing Title VII, issued guidelines stating that exclusion of applicants or employees from employment because of pregnancy, miscarriage, abortion, childbirth (or recovery therefrom) violates Title VII. *See* 29 C.F.R. § 1604.10(a) (1975); Prohibition of Sex Discrimination Based on Pregnancy, H.R. Rep. No. 948, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4749, 4750 [hereinafter *House Report*].

16. 42 U.S.C. § 2000e(k) (1982). The P.D.A. provides that:

Congress amended Title VII with the P.D.A. in response to two Supreme Court decisions[17] that refused to follow EEOC guidelines[18] and confused the analysis of pregnancy-related discrimination.[19] Recognizing that these decisions failed to provide guidance as to what analytical framework would apply in a given situation,[20] Congress passed the

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> [t]he 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).

17. *See* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

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.*

19. *See House Report*, *supra* note 15, at 4750-51.

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-

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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.

22. *See* 123 Cong. Rec. 29,385 (1977); *House Report, supra* note 15, at 4751; Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977) [hereinafter *Senate Report*].

23. *See Senate Report, supra* note 22, at 3-4; *House Report, supra* note 15, at 4753.

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.*

Id. (emphasis added); *see also Senate Report, supra* note 22, at 4 (treatment of pregnant women must focus on actual effects of pregnancy on ability to work).

25. *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 482 (1977) [hereinafter *Senate Hearings*]; *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy, 1977: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 84, 88 (1977).

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.[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.[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.[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."[29] Such a broad reference implies that the BFOQ would

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effects of poisons, chemicals, physical or other agents on pregnant working women. . . .

But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, *we have to look at the effects on testicles, the effects on ovaries and the effects on the fetuses* . . . .

Senate Hearings, supra, at 67 (emphasis added).

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.

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.

27. 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 . . . .

Id. (emphasis added).

28. *See supra* note 13 and accompanying text.

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, the

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.[30] An amendment proposed by Representative Dowdy would have permitted sex discrimination if there were other non-prohibited reasons for the employment decision.[31] 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.[32]

The Senate provided a clearer picture of its intended interpretation of the BFOQ provision.[33] The Senate intended to prohibit employers from making sex-based employment decisions on the basis of subjective standards, such as business judgment.[34] Maintenance of business goodwill was also considered a prohibited reason for making sex-based employment decisions,[35] 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 women'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.*

30. *See* 110 Cong. Rec. 2726-28 (1964).

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.

on sex.[36]

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[37] 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.[38] 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.[39] 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.[40] Under the disparate treatment theory of discrimination, an employer violates Title VII by intentionally and overtly[41] dis-

36. *See id.* at 13,837.

37. *See supra* notes 12-14 and accompanying text.

38. *See supra* notes 15-26 and accompanying text.

39. *See supra* notes 27-38 and accompanying text.

Arguably, the P.D.A. might be read as inapplicable to fertile women because its language does not expressly mention fertility: it refers only to pregnancy, childbirth and related medical conditions. This interpretation would produce the anomalous result of expressly protecting pregnant-fertile women, while leaving nonpregnant-fertile women to seek protection under the more easily defensible disparate impact analysis. *See infra* notes 55-65 & 90-114 and accompanying text. Indeed, it seems illogical to prevent employers from discriminating against women on the basis of sex (Title VII) and to include in the the definition of sex the characteristics of pregnancy, childbirth and related medical conditions (P.D.A.), but still allow exclusion of *fertile* women.

40. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-27 (1975) (applying *Griggs* analysis).

41. *See infra* notes 42-54 and accompanying text.

An employer might also covertly discriminate against members of a protected class. Under this theory, an employer violates Title VII by discriminating intentionally, but covertly, against a protected class by implementing a facially neutral policy designed to treat that class less favorably. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973). Such covert disparate treatment is allegedly based on a non-prohibited reason that is merely a pretext for intentional discrimination. *See id.* at 801.

Proof of discriminatory intent is therefore essential to establish a prima facie case of covert discrimination. *See id.* at 801-02. The burden on the employee here is more difficult to meet than in cases of overt discrimination because the policy is facially neutral. The *McDonnell* Court indicated that plaintiff may establish a prima facie case by showing that (a) he belonged to a protected class; (b) he was qualified for and applied for an open position; (c) he was rejected despite his qualifications; and (d) the employer continued interviewing similarly qualified applicants. *See id.* at 802.

The employer may rebut plaintiff's prima facie case by articulating a "legitimate, nondiscriminatory reason" for the employment decision. *Id.* Plaintiff can still prevail by proving that the stated reason is merely a pretext for intentional discrimination. *See id.*

criminating against a member of a protected class.[42] Discriminatory intent[43] can be inferred from the existence of the employer's overtly discriminatory policy.[44] The employer may nonetheless avoid liability for such a policy by justifying it under the statutorily sanctioned BFOQ.[45]

The courts' various tests for the BFOQ justification have all been narrowly formulated.[46] In *Weeks v. Southern Bell Telephone & Telegraph Co.*,[47] 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."[48]

In *Diaz v. Pan American World Airways, Inc.*,[49] 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.[50] *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."[51]

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at 802-03. This burden is met by a showing "that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle*, 422 U.S. at 425 (citing *McDonnell*, 411 U.S. at 801). The *McDonnell* Court justified its analytical framework by noting that, absent such proof of pretext, the employer's policy could not be considered "the kind of 'artificial, arbitrary, and unnecessary barrier[] to employment' " that Congress intended to remove. *McDonnell*, 411 U.S. at 806 (quoting *Griggs*, 401 U.S. at 431).

42. *See, e.g.*, Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1081 (1983) (payment of higher pension benefits to men than to similarly situated women constitutes facial discrimination); City of Los Angeles v. Manhart, 435 U.S. 702, 711 (1978) (practice of deducting greater pension contributions from female employees' paychecks than from males' paychecks constitutes facial discrimination).

43. *See* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2784 (1988); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

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. 408 F.2d 228 (5th Cir. 1969).

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.*,[52] 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,[53] the Ninth Circuit required a link between sexual characteristics and the ability to perform the duties in question.[54]

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.*,[55] 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.[56] 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.[57] Therefore, an employer violates Title VII even if he innocently implements a neutral policy that results in adverse discriminatory effects on a protected class.[58] An employer may, however,

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lish the BFOQ justification because the function of the cabin attendant's position was tangential to the essence of Pan Am's business: transporting passengers safely from one point to another. *See id.* at 388. *But see* Dothard v. Rawlinson, 433 U.S. 321, 334-35 (1977) (BFOQ established where Alabama hired only male correctional counselors for male maximum-security prisons housing sex offenders because ability to keep order was "essen[tial] [to] a correctional counselor's job" and to maintain security).

52. 444 F.2d 1219 (9th Cir. 1971).

53. *See id.* at 1225. The court stated that "sexual characteristics, rather than characteristics that *might, to one degree or another, correlate with a particular sex*, must be the basis for the application of the BFOQ exception." *Id.* (emphasis added).

54. *See id.* at 1224. The court stated that the sexual characteristics must be as "*crucial to the successful performance* of the job, as they would be for the position of a wet-nurse." *Id.* (emphasis added).

55. 401 U.S. 424 (1971).

56. *See id.* at 431.

In *Griggs*, the employer's intelligence tests, while not intended to be discriminatory, disproportionately excluded blacks from jobs. The Court found that Title VII prohibits such disparate impact discrimination, stating that "[t]he Act proscribes not only overt discrimination but also practices that are *fair in form, but discriminatory in operation.*" *Id.* (emphasis added).

57. *See id.* at 430-32.

The Court noted that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432; *see also* Dothard v. Rawlinson, 433 U.S. 321, 328-30 (1977) (prima facie case established where employer's facially neutral height and weight requirements resulted in exclusion of disproportionate number of women). *But see* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (requiring that plaintiff establish prima facie case by identifying specific employment practice being challenged and showing it to be cause of statistical disparity under attack); Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2788 (1988) (same).

58. A plaintiff can establish a prima facie case of discrimination under this theory by showing that the neutral policy operates to disproportionately exclude members of a pro-

avoid liability by producing evidence that the discrimination was justified under the business necessity defense,[59] which requires that the employer's practice be related to the position in question.[60]

This defense, which was initially applied almost as narrowly as the BFOQ,[61] has recently been expanded.[62] Originally, the defense required that the disparately impacting policy be "*necessary* to the safe and efficient operation of the business."[63] Today, an employer can prevail by establishing that the policy significantly serves "legitimate employment goals."[64] Even under this expanded interpretation, however, an em-

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tected class. *See Dothard*, 433 U.S. at 329; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 431.

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]." *Griggs*, 401 U.S. at 429-30 (emphasis added).

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 Griggs*, 401 U.S. at 431. The Court stated that:

> The touchstone is business necessity. If an employment practice which operates to exclude [a protected class] cannot be shown to be *related to job performance*, the practice is prohibited. . . .
>
> Congress has placed on the employer the burden of showing that any given requirement must have a *manifest relationship* to the employment in question.

Id. at 431-32 (emphasis added). Specifically, the Court held that to be justified as a business necessity, the employer's intelligence test must be "demonstrably a reasonable measure of job performance." *Id.* at 436. *But see* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125-26 (1989) (dictum) (requiring that challenged policy significantly serve "the legitimate employment goals of the employer").

61. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (business necessity not established where employer's practice insufficiently related to essence of job under disparate impact analysis); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (business necessity not established where employer's testing requirements not manifestly related to job in question); *Griggs*, 401 U.S. at 431-36 (employment practice excluding blacks was not related to job performance).

62. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 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. 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).

63. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (emphasis added); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (policy should bear "manifest relationship" to job in question).

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]

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case rebuttable where employer's subjective hiring criteria are "based on legitimate business reasons").

65. *See supra* notes 15-16 and accompanying text.

66. *See* International Union, UAW v. Johnson Controls, Inc., 680 F. Supp. 309, 310 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

67. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 919 (7th Cir. 1989) (Easterbrook, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

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).

71. *See Hayes*, 726 F.2d at 1547-49; *Wright*, 697 F.2d at 1185 n.21; *EEOC: Policy Statement*, *supra* note 29, Fair Empl. Pracs. Man. (BNA) at 405:6614-15 & n.10.

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."[73] Although Johnson's policy expressly excluded fertile women,[74] 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."[75]

This cart-before-the-horse argument is reminiscent of the Fourth Circuit's analysis in *Wright v. Olin Corp.*,[76] 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.[77] 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.[78] This misapplication of case law[79] 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*,[80] a Title VII challenge to employer's dismissal of a pregnant X-ray technician. *Hayes*, like *Wright*, overcame

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dable business necessity defense. Had they correctly read the statute, however, they might have analyzed the policies under the disparate treatment rubric and applied the BFOQ. As Judge Posner noted in his dissent, the language of the BFOQ "is not so cramped that it has to be stretched" to justify a fetal protection policy. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

73. *See Johnson*, 886 F.2d at 885 (quoting *Hayes*, 726 F.2d at 1548) (emphasis added). The court so held because fetal protection policies involve "motivations and consequences most closely resembling a disparate impact case." *Id.* at 884. The court recognized, however, that the "facial neutrality of a fetal protection policy 'might be subject to logical dispute.'" *Id.* at 884 (quoting *Wright*, 697 F.2d at 1186).

74. *See id.* at 876 n.8.

75. *Id.* at 886. The majority's concern with weighing the interests of the fetus under Title VII is questionable because the statute nowhere addresses fetal interests. *See supra* note 12; *see also Johnson*, 886 F.2d at 913 (Easterbrook, J., dissenting) ("Risk to fetuses falls outside these rules.").

The majority most likely believed that social policies outside of Title VII warrant an exception to the statute's normal approach. *See Johnson*, 886 F.2d at 884-86 (agreeing with EEOC that business necessity defense applies to this "narrow class" of cases). The EEOC implicitly recognized that *extra*-Title VII policies are involved when it states that fetal protection cases "must be regarded as a class unto themselves" because they fail to "fit neatly into the traditional Title VII analytical framework." *See EEOC: Policy Statement*, *supra* note 29, Fair Empl. Pracs. Man. (BNA) at 405:6615 n.11.

76. 697 F.2d 1172 (4th Cir. 1982).

77. *See id.* at 1185 & n.21.

78. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 910 (Easterbrook, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

79. *See infra* notes 86-89 and accompanying text.

80. 726 F.2d 1543 (11th Cir. 1984).

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]

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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); Diaz 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 employers' 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*.[86] The answer to this threshold question determines which defense will apply. If the policy is facially discriminatory, the court *must* apply a BFOQ analysis.[87] If the policy is facially neutral and has a disparate impact, a business necessity defense applies.[88] Only after these initial characterizations should "balancing of the interests"[89] 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.[90] In fetal protection cases,

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in the life expectancies of men and women. *See Norris*, 463 U.S. at 1077 (Marshall, J., concurring); *Manhart*, 435 U.S. at 708. The Court found the policies facially discriminatory because they used sex as the criterion for decision. *See Norris*, 463 U.S. at 1074-75; *Manhart*, 435 U.S. at 708. That a policy might produce equal outcomes was irrelevant in the Court's view because of Title VII's requirement that employees be treated as individuals, regardless of sex. *See Norris*, 463 U.S. at 1074-75; *Manhart*, 435 U.S. at 708.

86. *See, e.g.*, *Norris*, 463 U.S. at 1079-82 (Marshall, J., concurring) (policy paying smaller retirement benefits to women than similarly situated men facially discriminates against women); *Manhart*, 435 U.S. at 711 (policy requiring women to contribute more than men to pension plan constitutes sex discrimination); *Dothard*, 433 U.S. at 331 (statutory height and weight requirements for prison guard positions constituted disparate impact discrimination); *Phillips*, 400 U.S. at 544 (policy excluding women with pre-school age children constituted sex discrimination justifiable only under BFOQ); *Hayes*, 726 F.2d at 1547-48 (firing of pregnant X-ray technician constituted facial discrimination).

87. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); *Diaz*, 442 F.2d at 386-87; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232-34 (5th Cir. 1969); *supra* notes 47-54 and accompanying text; *cf.* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422-23 (1985) (in age discrimination case, BFOQ required to justify employer's mandatory retirement policy); Johnson v. Mayor & City Council, 472 U.S. 353, 355-56 (1985) (same); Hahn v. City of Buffalo, 770 F.2d 12, 16 (2d Cir. 1985) (in age discrimination challenge, BFOQ required to justify policy that set maximum age for job applicants).

88. *See Dothard*, 433 U.S. at 329; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); *supra* notes 55-65 and accompanying text.

89. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 886 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

Judge Easterbrook, in his dissent, also disagreed with the court's analysis. He stated that such an approach

> makes things turn not on whether the employer uses sex as a ground of decision but on whether the employer uses sex to serve a 'good' policy. If the policy is beneficent and the injury to women 'tolerable' in light of the interests served, the court changes the standard of inquiry. Yet whether a policy is 'good' is a statutory question, governed by the BFOQ test .... *A court's belief that a good end is in view does not justify departure from the statutory framework; it is an occasion for applying the statutory framework.*

Id. at 909 (Easterbrook, J., dissenting) (emphasis added).

90. *See Johnson*, 886 F.2d at 883-87.

this judicially created defense[91] succeeds if the employer can show that the policy avoids a substantial risk of harm to the fetus or potential fetus,[92] and that exposure to this risk is transmitted only through women.[93] The plaintiff can still prevail by proving that there are equally effective but less discriminatory alternatives available.[94] Applying this framework, the court found Johnson's policy justified and not in violation of Title VII.[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.[96] However, substantial risk may mean substantial *net* risk to the fetus;[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.[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[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.[100] Thus, the net result of Johnson's policy might be an overall *decrease* in the fetus's health.[101] In such a case, the substantial

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).

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

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.

94. *See Johnson*, 886 F.2d at 886-93; *Hayes*, 726 F.2d at 1553; *Wright*, 697 F.2d at 1190.

95. *See Johnson*, 886 F.2d at 901.

96. *See id.* at 889. The evidence established substantial risk of harm to the fetus. *Id.* at 888.

97. *See id.* at 918 (Easterbrook, J., dissenting).

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)).

99. *See* Becker, *supra* note 1, at 1229-31.

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").

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[102] did not pose a substantial risk of transmission to the potential fetus.[103] 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.[104] Had this evidence that the harm was communicable by both sexes persuaded the court, the defense would have failed.[105]

Even though Johnson satisfied both prongs of the business necessity defense, UAW might have nonetheless prevailed had it been able to estab-

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no equivalent protection; they never receive the salary and benefits they would have earned in those positions. *See id.* at 918 n.16 (Easterbrook, J., dissenting). Nor did the majority address the problem of female employees who could no longer exercise their seniority rights to avoid layoffs because such "bumping" would place them in the prohibited jobs. *See id.*

102. *See* 29 C.F.R. § 1910.1025(k)(1)(i)(D) (1989) (50 micrograms per deciliter).

103. *See Johnson*, 886 F.2d at 889.

104. *See id.* at 888-89. The court was not persuaded by UAW's "attempt to bridge the wide chasm" between animal and human studies and labelled the evidence too "speculative and unconvincing" to form the basis of conclusions regarding risks. *Id.* at 889.

The Supreme Court, however, has found that animal studies may be used to assess risks. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 657 n.64 (1980). Even OSHA, the agency charged with promulgating rules for workplace safety, uses animal studies in establishing its lead control regulations. *See* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1257 n.97 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

105. Furthermore, OSHA's medical guidelines conclude that lead in men, as well as women, creates risks to fetuses. *See* 29 C.F.R. § 1910.1025 Appendix C (II)(5) (1987). The guidelines state in pertinent part that:

> Exposure to lead can have serious effects on reproductive function in both males and females. In male workers exposed to lead there can be a decrease in sexual drive, impotence, *decreased ability to produce healthy sperm*, and sterility. *Malformed sperm* (teratospermia), decreased number of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur. . . . [B]ecause of the . . . *demonstrated adverse effects of lead on reproductive function in both the male and female as well as the risk of genetic damage of lead on both the ovum and sperm*, OSHA recommends a [30 microgram per 100 gram] maximum permissible blood lead level in both males and females who wish to bear children.

Id. (emphasis added); *see also Marshall*, 647 F.2d at 1256-58 (evidence that lead harms both sexes' reproductive systems sufficient to sustain finding that exclusion of only women from jobs was unjustified).

Additionally, an *amicus* brief filed by the American Public Health Association and other health and medical groups cited numerous studies finding that lead injures the male reproductive system which ultimately injures offspring. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 918 (7th Cir. 1989) (Easterbrook, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

lish the existence of equally effective, but less restrictive alternatives to Johnson's policy.[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;[107] approximately two percent of all blue collar women over 30 years of age;[108] 0.38 percent of all women 40-44 years of age;[109] and 0.02 percent of all women 45-49 years of age.[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.[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.[112]

Finally, the policy excludes presumptively fertile women from any positions from which they might be promoted into the lead exposure jobs.[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.[114]

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

107. *See* Williams, *supra* note 1, at 696.

108. *See* Becker, *supra* note 1, at 1233 & nn. 68-69 (citing United States Department of Commerce Bureau of the Census, Statistical Abstract of the United States 1986, at 57 (1985) (1983 rates)).

109. *See id.*

110. *See id.* The Census Bureau does not list birth rates for women over 49. *See id.* at 1233 n.68.

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, *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, *supra* note 1, at 1233 & nn.68-69.

112. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 919 (7th Cir. 1989) (Easterbrook, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

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.

114. *See 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); *House Report*, *supra* note 15, at 4757-58 (Congress intended to protect women from pregnancy-related discrimination despite substantial costs to employers). *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 Seventh Circuit's decision to affirm the summary judgment.[115] UAW's evidence that the risk of harm to the fetus is transmitted through both sexes[116] raised issues of fact that should have precluded a grant of summary judgment.[117] Moreover, the policy's unnecessarily broad sweep raised issues of fact as to the existence of less restrictive alternatives.[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] legitimate 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. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, 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. *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. *See* Finley, *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. *See* Becker, *supra* note 1, at 1235 nn.77-81, 1245 (citing Office of Technology Assessment, Reproductive Health Hazards in the Workplace (1985)); *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 discrimination because women who are forced to carry these costs due to their capacity to become pregnant shoulder a greater burden than men. Possible solutions more in line with Title VII's objectives might be to engage in further efforts to remove toxins from the workplace or to extend existing worker's compensation systems to include fetal injuries related to parental occupational exposure to hazardous substances.

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. *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:

> [T]he district court purported to apply the *Hayes/Wright* analysis. It concluded 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.

EEOC: Policy Statement, *supra* note 29, Fair Empl. Pracs. Man. (BNA) at 405:6618 n.22.

118. *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.[119] Applying the "essence" test,[120] 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.[121] 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.[122]

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.[123] Despite the court's broad definition of "safe,"[124] 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

119. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 893-99 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

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.

Analogously, discrimination on the basis of pregnancy because of safety considerations has been allowed when airlines dismiss pregnant stewardesses. *See* Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 677 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 372-73 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). In these cases, the essence of the employer's business was defined as transporting passengers safely and the pregnant condition was found to hinder stewardesses' ability to assist passengers in emergency situations. *See Harriss*, 649 F.2d at 676-77; *Burwell*, 633 F.2d at 365-72; *Condit*, 558 F.2d at 1176.

124. *See supra* note 122 and accompanying text.

equally[125] and avoid drawing distinctions based on pregnancy or related conditions.[126] The more difficult question is whether any *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 *only* where an employee's sex adversely affects her ability to perform the essential duties of the job.[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.

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 *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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125. *See supra* notes 12-14 and accompanying text.
126. *See supra* notes 15-26 and accompanying text.
127. *See supra* notes 27-39 and accompanying text.