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Title VII: Misapplication of the Business Necessity Defense

Joanne Jocha Ervin
University of Dayton

CASENOTES

TITLE VII: MISAPPLICATION OF THE BUSINESS NECESSITY DEFENSE—*UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989).

I. INTRODUCTION

In recent years, employers have implemented fetal protection policies, in part to protect the health of the unborn children of pregnant employees and in part to protect themselves from tort actions brought on behalf of children born with physical or developmental disabilities traceable to the exposure of the mother to workplace health hazards.[1] The typical fetal protection policy prevents pregnant women from working in jobs which would expose them to chemicals or other toxic substances or processes which might harm their unborn children.[2] Some policies apply only to women who are known to be pregnant.[3] Others apply to all fertile women, typically those aged fifty-five and under.[4]

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits an employer from basing any employment decision on an employee's sex,[5] or on pregnancy, childbirth or related medical conditions.[6] The purpose served by the statute, to ensure equal employment opportunities for all citizens,[7] thus conflicts with the employer's interest in limiting tort liability and society's interest in protecting the healthy development of unborn children.

In 1989, the Seventh Circuit Court of Appeals decided *UAW v. Johnson Controls, Inc.*[8] In its complaint, the union alleged that the

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1. *See* Fletcher, *Sex Discrimination OK to Protect Fetus*, BUS. INS., Oct. 16, 1989, at 78.
2. *See, e.g.*, Oil, Chem. & Atomic Workers Int'l Union v. Occupational Safety and Health Review Comm'n, 671 F.2d 643, 645 (D.C. Cir. 1982).
3. *See, e.g.*, Zuniga v. Kleberg County Hosp., 692 F.2d 986, 988 (5th Cir. 1982).
4. *See* Oil, Chem. & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444, 445 (D.C. Cir. 1984). The American Cyanamid policy deems any woman between the ages of 16 and 50 to be of childbearing capacity unless she has been surgically sterilized. *Id.* at 446.
5. *See* 42 U.S.C. § 2000e-2(a)(1) (1982).
6. *See* 42 U.S.C. § 2000e(k) (1982).
7. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288 (1987) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).
8. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (interim ed. 1990).

employer's fetal protection policy violated Title VII.[9] The employer moved for summary judgment which motion was granted by the district court.[10] Even though one dissenting judge called *Johnson Controls* likely the "most important sex-discrimination case in any court since 1964"[11] the Seventh Circuit, after a rehearing en banc, affirmed the district court's grant.

The most important question of law arising from *Johnson Controls* is whether the business necessity defense, traditionally reserved for Title VII cases involving disparate impact, is applicable to an employer policy that is on its face non-neutral. The Seventh Circuit in *Johnson Controls*, building upon the reasoning of two earlier cases[12] involving fetal protection policies, held as a matter of law that the business necessity defense is available to an employer who establishes a fetal protection policy applicable only to women.

It is the assertion of this casenote that the business necessity defense should not apply to a case of disparate treatment under Title VII involving a fetal protection policy targeted solely to women. Further, the appropriate defense, bona fide occupational qualification (BFOQ), when applied to the record before the court, does not support a grant of summary judgement under the analytical framework set forth in *Western Airlines, Inc. v. Criswell*.[13] The BFOQ defense fails when applied to that prong of the policy affecting pregnant women. The defense fails also when applied to that prong of the policy affecting fertile women. The female employee's rights under Title VII should not be set aside because she is capable of conceiving a child. The Supreme Court has not interpreted Title VII to implicate the interests of non-consumer third parties and unborn children of employees are sufficiently dissimilar to customers and clients to discourage extension of Title VII doctrine to them. The interests of unborn children of both male and female employees are adequately protected by Occupational Safety and Health Administration (OSHA) regulations. Last, employers without fetal protection policies do not need protection from tort liability. The employer may not have a duty to a fetus injured when non-viable, an employer who adheres to OSHA regulations governing lead is not likely to breach any duty that might be imposed, and even if the employer is found to be negligent, costs of judgment are unlikely to be borne by the employer alone.

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9. *Id.* at 874.

10. *Id.*

11. *Id.* at 920 (Easterbrook, J., dissenting).

12. *Id. See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

13. 472 U.S. 400 (1985).

II. FACTS AND HOLDING

In *UAW v. Johnson Controls, Inc.*,[14] plaintiffs International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "UAW"), several UAW-affiliated local unions, and a group of individual employees brought suit alleging that the fetal protection policy of Johnson Controls violated Title VII.[15] The case came before the Seventh Circuit upon plaintiffs' appeal of the district court's grant of summary judgment to defendant Johnson Controls.[16]

The controversy surrounding Johnson Controls' fetal protection policy grew out of the operation of its battery division.[17] An essential material in the manufacture of batteries is lead, which is known to be an occupational hazard.[18] Globe Union, Johnson Controls' predecessor, had "initiated a large number of innovative programs in an attempt to control and regulate industrial lead exposure."[19] The first fetal protection policy was implemented in 1977,[20] a year before OSHA announced its revised standard for occupational exposure to lead.[21] The original policy did not prohibit women capable of bearing children from working in lead handling jobs, but instead advised women that lead exposure creates a risk of unknown dimensions to the unborn.[22] Globe advised women who were considering a family to consult with the family doctor and notify the company of any wish to transfer.[23] Globe manag-

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14. 886 F.2d 871 (7th Cir. 1989), *cert. granted,* 110 S. Ct. 1522 (interim ed. 1990).

15. *Id.* at 874.

16. *Id.* at 874. Originally, the case was argued before a panel of the court which, prior to publication of its opinion, circulated the opinion among all members of the court pursuant to circuit rule. A majority of the members voted to hear the case before an en banc court. *Id.* at 874-75.

17. The battery division was created when Johnson Controls purchased Globe Union, Inc. in 1978. *Id.* at 875.

18. *See* Occupational Exposure to Lead: Attachments to Preamble for the Final Standard, 43 Fed. Reg. 54,354-509. (1978). ("The basis for this revised lead standard is evidence of the toxic effects of lead on the heme, renal, neurological, and reproductive systems at relatively low levels of exposure to lead."); *see also* Final Standard for Occupational Exposure to Lead, Supplementary Information, 43 Fed. Reg. 52,952-53,025 (1978). ("The record demonstrates that lead has profoundly adverse effects on the health of workers in the lead industry.")

19. 886 F.2d at 875. Efforts included lead hygiene, respirators, biological monitoring and medical surveillance programs; regulation of the type, use, and disposal of employee work clothing and footwear; transferring employees with high blood lead levels out of high lead environments with corresponding medical removal benefits; and the use of pumps, sweepers and scrubbers designed to keep the work area as free of lead dust as possible. *Id.*

20. *Id.* at 875-76.

21. *See supra* note 18.

22. 886 F.2d at 876.

23. *Id.* It is not clear whether a woman so transferred would receive any removal benefits or whether she would retain her former rate of pay. In addition, the number of women choosing to transfer is unknown.

ers were also instructed to ask any woman considering pregnancy to sign a statement indicating she had been advised of the risk.[24]

The fetal protection policy giving rise to the *Johnson Controls* litigation was adopted in 1982.[25] "The policy recite[d] that women with childbearing capacity will neither be hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive."[26] The policy applied to all women except those whose infertility was medically documented.[27] A grandmother clause in the policy permitted fertile women currently in high lead exposure positions to retain these jobs so long as they were able to maintain blood lead levels below 30 micrograms per 100 grams of whole blood.[28] Employees who were removed from positions as a result of elevated blood lead levels were "transferred to another job in Johnson's employ without suffering either a loss of pay or benefits."[29]

The given reason for the adoption of the revised fetal protection policy was the ineffectiveness of the former, voluntary policy in protecting pregnant women and their unborn children from "dangerous blood lead levels."[30] Johnson Controls emphasized its continuing interest in protecting employees and their families from occupational health hazards.[31]

Johnson Controls had considered and rejected several alternatives to excluding fertile women from high lead exposure positions prior to implementing its revised policy.[32] It concluded that its voluntary program was ineffective and rejected its continuation.[33] The manufacture of batteries without lead was presumably infeasible.[34] The technology

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Men were not affected by the policy. *Id.*

28. *Id.* This measure was lower than the 50 μdl level permitted under OSHA lead exposure regulations. *See* Occupational Safety & Health Standards: Lead, 29 C.F.R. § 1910.1025(c)(1) (1990).

29. 886 F.2d at 876. Medical removal with full benefits is required by OSHA. *See* 29 C.F.R. § 1910.1025(k)(2) (1989).

30. 886 F.2d at 876. In the four years between 1979 and 1983, six Johnson Controls employees in high lead exposure positions became pregnant while maintaining blood lead levels in excess of 30 micrograms. *Id.* at 876-77. One of the children born to this group of employees had an elevated blood lead level. *Id.* at 877. There was no evidence that the blood lead levels of children born to all Johnson Controls employees, men and women, were monitored by the employer. *Id.*

31. *Id.*

32. *Id.* at 878.

33. *Id.* The only evidence of birth defects appeared to be anecdotal testimony of hyperactivity in one child with an elevated blood lead level. This child was born to a mother working in the Owosso, Michigan plant. *Id.* at 877.

34. *Id.* at 878. It is unknown whether the record before the district court contained testimony on this issue.

to further reduce lead exposure of employees was not developed.[35] Application of the policy only to women who actually were pregnant was ruled out for two reasons. First, it was thought that exposure to lead could damage the fetus before the mother discovered she was pregnant.[36] Second, Johnson Controls asserted that even if the mother discovered her pregnancy immediately and was thereupon removed from a high lead exposure job, the fetus would continue to be exposed to lead because lead in the blood does not dissipate immediately.[37] Limiting the policy to women who were planning pregnancies was rejected because of the frequency of unplanned pregnancies.[38]

The Seventh Circuit began its analysis by concluding that the record very clearly established that lead poses a substantial health risk to the offspring of employees of Johnson Controls.[39] Having so satisfied itself of a danger of permanent harm to the potential offspring of female employees, the court next turned to the question of the appropriate analytical framework for judging the propriety of the fetal protection policy of Johnson Controls. Inherent in its analysis was a recognition of the interests of three parties—employer, employee, and unborn child.[40]

The Seventh Circuit, in determining whether the district court appropriately granted summary judgment in favor of Johnson Controls, looked to decisions of the Fourth and Eleventh Circuits involving fetal protection policies. The *Johnson Controls* court noted that the first court of appeals to address the permissibility of a fetal protection policy was the Fourth Circuit in *Wright v. Olin Corp.*[41] There, in a "case involv[ing] a fetal protection program very similar to the one Johnson instituted,"[42] the court applied the disparate impact-business necessity defense that is normally utilized only where the employer's policy is facially non-discriminatory but has a discriminatory effect.[43] In addi-

35. *Id.*

36. *Id.* Other experts take a contrary view and conclude that lead does not cross the placenta until late in pregnancy when the mother is certain to know she is pregnant. *See* Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 538-39, 267 Cal. Rptr. 158, 169 (1990).

37. 886 F.2d at 878.

38. *Id.*

39. *Id.* at 879-83. The court noted that "*both* the UAW and Johnson Controls agree on appeal that a *substantial* health hazard to the unborn child in the womb has been established." *Id.* at 879.

40. *Id.* at 886. ("We are convinced that the components of the business necessity defense . . . balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII.")

41. 679 F.2d 1172 (4th Cir. 1982).

42. 886 F.2d at 883.

43. *Id.* at 884.

tion, the *Johnson Controls* court noted that the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*[44] had taken a similar approach in applying the business necessity defense analytical framework.[45]

The *Johnson Controls* court cited as persuasive on the issue of the appropriate analytical framework the 1988 Equal Employment Opportunity Commission (EEOC) policy statement on fetal hazards under Title VII.[46] While the EEOC's policy followed from and was admittedly an elaboration of the framework set forth by *Olin* and *Hayes*,[47] the *Johnson Controls* court viewed the policy as support for the propriety of utilizing the business necessity defense,[48] concluding, "we agree with the Fourth Circuit, the Eleventh Circuit and the EEOC in their conclusion that a business necessity defense may be utilized in a fetal protection policy case."[49]

The court in *Johnson Controls* also adopted the elements of the business necessity defense set forth by *Olin* and *Hayes*: (1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women.[50] The *Johnson Controls* court also recognized that the employer's defense of business necessity could be rebutted by a showing by employees that "less discriminatory alternatives equally capable of preventing the health hazard to the unborn"[51] were available to the employer.

The ultimate question before the *Johnson Controls* court was

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44. 726 F.2d 1543 (11th Cir. 1984).

45. 886 F.2d at 884-85.

46. *Id.* at 885; *see EEOC: Policy Statement on Reproductive and Fetal Hazards Under Title VII*, 8 Lab. Rel. Rep. (BNA) 405:6613-19 (Oct. 3, 1988) [hereinafter EEOC Policy Statement].

47. "Three courts of appeals have considered cases involving fetal hazards. . . . This policy statement is an elaboration of that framework which is intended to assist the agency in processing its fetal hazard charges." *Id.* at :6013 n.1.

48. The court says, "[a] fair reading of the EEOC's Policy Statement reflects that the EEOC thoroughly considered the various interests under Title VII and followed earlier judicial decisions only after concluding that these decisions properly implemented Title VII policies." 886 F.2d at 885.

49. *Id.* at 886. Support from the EEOC was to be short-lived. On January 24, 1990, the EEOC issued a policy guide on *Johnson Controls* wherein it was stated that the Commission never meant to suggest that a fetal protection policy fits within the category of an adverse impact case. *See EEOC: Policy Guide on United Auto Workers v. Johnson Controls*, 8 Lab. Rel. Rep. (BNA) 405:6797, :6800 (Jan. 24, 1990) [hereinafter EEOC Policy Guide]. The Commission concluded that BFOQ "is the better approach" and endorsed the position taken by the dissenters in *Johnson Controls*. *Id.* The EEOC Policy Guide made the Commission's position clear: fetal protection policies that exclude only one sex from particular jobs are facially discriminatory. *Id.* at :6804.

50. 886 F.2d at 885.

51. *Id.*

"whether the UAW, which bears the burden of persuasion,[52] ha[d] presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense cannot be factually supported."[53] The question in effect consisted of two sub-questions. The first was whether the UAW would be able to establish either that exposure of the mother to lead did not present a substantial risk of harm to the unborn child[54] or that the risk of transmission of potentially harmful lead exposure was not substantially confined to fertile female employees.[55] The second sub-question was whether the union could establish that there were " 'acceptable alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish [it] equally well with a lesser differential . . . impact [between women and men workers].' "[56] The court concluded that the UAW had failed to create a record that would allow the district court to conclude that there was a substantive issue of material fact as to the risk of harm to the fetus[57] or that exposure to the risk occurred only through a single sex.[58] The court emphasized that both the UAW and Johnson Controls agreed that a substantial risk of harm to the fetus had been established.[59] Further, the court characterized the UAW's evidence on the risk to the fetus arising from the father's exposure to lead as "at best, speculative and unconvincing."[60] The court concluded that the sex-based distinction was "based upon real physical differences between men and women relating to childbearing capacity and is consistent with Title VII."[61]

Recognizing that, in theory, the UAW could still prevail if it could demonstrate adequate but less discriminatory alternatives to the fetal protection policy, the court noted that the union in its appellate brief failed to "specifically articulate a less discriminatory alternative argument" and thus had failed to preserve that issue for appeal.[62] The court in dicta, however, concluded that even if the union *had* preserved the issue, "we would be constrained to hold that the UAW failed to present

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52. In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2125 (interim ed. 1989), the Supreme Court made it clear that the burden of persuasion does not shift to the defendant once the plaintiff makes out a prima facie case of disparate impact.

53. 886 F.2d at 888.

54. *Id.* at 888.

55. *Id.* at 889.

56. *Id.* at 891 (quoting Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982)).

57. *Id.* at 888-89.

58. *Id.* at 889-90.

59. *Id.* at 888.

60. *Id.* at 889. The heart of the plaintiffs' case was that the risk of transmission is not confined only to female employees. *Id.*

61. *Id.* at 890.

62. *Id.* at 891.

facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose in protecting unborn children. . . ."[63] The court noted that the UAW failed to present even one specific alternative.[64]

After adopting business necessity as the appropriate analytical framework and holding that the union had failed to demonstrate that there were issues of fact as to the substantial risk of harm and transmission of the risk only by women,[65] the court went on to conclude that even under a BFOQ defense,[66] Johnson Controls' fetal protection policy could be upheld.[67]

The majority opinion evoked dissents from Judges Cudahy, Posner and Easterbrook,[68] all of whom asserted that the fetal protection policy resulted in disparate treatment which might be justified if at all as a BFOQ. The dissenters differed, however, in the conclusions that they drew from the application of the BFOQ defense to the employer's fetal protection policy.

Judge Cudahy asserted that it may be difficult for the employer to establish a BFOQ but the employer should be afforded an opportunity to try. He also suggested that the "painful complexities [of this important sex-discrimination case] are manifestly unsuited for summary judgment."[69]

Judge Posner in his dissent also asserted that the case cannot be decided on so meager a record,[70] and catalogued a series of questions unanswered in the record before the court.[71] While it is clear that

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63. *Id.*

64. *Id.* at 892.

65. For a contrary result involving a Johnson Controls battery plant in California, see Johnson Controls, Inc. v. California Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 536 n.3, 267 Cal. Rptr. 158, 168 n.3 (1990) (men require similar protection from reproductive harm arising from exposure to lead; Seventh Circuit simply ignored evidence relied upon by OSHA).

66. This statutory defense is set forth in 42 U.S.C. § 2000e-2(e)(1) (1982) which provides: "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

67. 886 F.2d at 893.

68. Judge Flaum joined in the Easterbrook dissent. *Id.* at 908.

69. *Id.* at 902.

70. *Id.* Judge Posner expressed his concern that affirmance on so scanty a record would encourage "incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women for minor gains in fetal safety and health." *Id.* at 908.

71. In particular, Judge Posner was troubled by the omission of information concerning the feasibility of warnings as a substitute for the exclusionary policy, the policies of Johnson Controls' competitors, the potential hazard to the fetus through paternal exposure to airborne lead, wages and alternative employment opportunities of women employed in the battery division, and the profitability of the battery manufacturing business. *Id.* at 906-07. The latter would shed light on the vulnerability of the employer with respect to litigation arising from injury to the fetus. *Id.* at 907.

Judge Posner viewed BFOQ as a narrow defense, at the same time he asserted that "the 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties."[72] Under certain conditions, which in the aggregate are a question of fact,[73] a fetal protection policy may be lawful.[74] Judge Posner concluded that "Title VII even as amended by the Pregnancy Discrimination Act does not outlaw all fetal protection policies,"[75] but Johnson Controls' policy is excessively cautious.[76]

In contrast to the Posner dissent, Judge Easterbrook, who agreed with Posner that only the BFOQ defense is applicable to this case of disparate treatment,[77] also agreed with the Fourth Circuit that "as a matter of law, a fetal protection policy does not satisfy the standards for a BFOQ. . . ."[78] He argued that concern for the welfare of the next generation is unrelated to the ability of Johnson Controls' to make batteries or to the ability or inability of any woman to do the work to which she is assigned.[79] Further, he stated unequivocally that Johnson Controls has neither the right nor the mandate under Title VII to assume that women are less able than men of making "intelligent decisions about the welfare of the next generation, that the interests of the next generation always trump the interests of the living woman, and that the only acceptable level of risk is zero."[80]

The Easterbrook dissent, in which Judge Flaum joined, also opined that even if the majority had adopted the appropriate analytical framework,[81] the material disputes in the record before the district court pre-

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72. *Id.* at 904. Judge Posner asserted that employer concern over tort liability is an approximation of the social cost incurred by children who suffer prenatal injury from airborne lead absorbed into their mothers' bloodstreams and that Title VII does not require a company to ignore that social cost. *Id.* at 905.

73. *Id.* at 906. Judge Posner asserted that if the hazard to the fetus from lead is sufficiently great, if lead absorption cannot be reduced without discontinuing production, and if women continue to become pregnant even after being warned of the hazards, "nothing in the text of the statute, or in its history or purpose, . . . prevent[s] an employer from defending his refusal to allow fertile women to work in jobs in which they are exposed to dangerous concentrations of airborne lead." *Id.*

74. *Id.* at 908.

75. *Id.* at 906.

76. *Id.* at 907 (The policy presumes that any woman under age 70 is fertile and also excludes women from non-lead handling jobs from which they might be promoted into battery making.).

77. *Id.* at 911.

78. *Id.* at 912.

79. *Id.* The Pregnancy Discrimination Act states that: "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* . . . ." 42 U.S.C. § 2000e(k) (1982) (emphasis added) [hereinafter PDA].

80. 886 F.2d at 913.

81. Judge Easterbrook emphasized that differences between sexes are the stated rationale of

cluded the granting of summary judgment.[82] On the issue of substantiality of risk to the fetus, Judge Easterbrook noted that "OSHA considered and rejected a proposal to exclude women capable of bearing children from jobs in which blood lead levels may exceed 30 mg/100g";[83] for the court to approve a policy that implements a restriction rejected by OSHA is the counterpart of taking judicial notice that OSHA is wrong.[84] On the transmission of risk by women only, the Judge criticized the majority for overlooking in the record considerable evidence sufficient to warrant a trial linking lead with injury to the male reproductive system.[85] On less restrictive alternatives, the Judge indicated that " 'zero' is not the only acceptable level"[86] of risk. Judge Easterbrook concluded that no "*legal or ethical* principle compels or allows Johnson"[87] to make decisions based upon concern for the next generation[88] or the prospect of tort judgments.[89]

III. BACKGROUND

A. Title VII: Causes of Action and Defenses

The decision in *U.A.W. v. Johnson Controls, Inc.* is the third in a trilogy of cases under section 703(a) of Title VII of the Civil Rights Act of 1964[90] addressing the issue of permissibility of an employer fetal

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the policy and necessitate defense under BFOQ. *Id.* at 909, 911.

82. *Id.* at 915.

83. *Id.* at 917. Judge Easterbrook quoted from the text of hearings conducted prior to the promulgation of the lead standard:

> "OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. Effective compliance with all aspects of these standard[s] will minimize risk to all persons and should therefore insure equal employment for both men and women."

Id. (quoting 43 Fed. Reg. 52,953, 52,966 (1978)).

84. *Id.*

85. *Id.* at 919. A list of *amici curiae*, viewing the evidence differently from the majority, was given in the opinion. *Id.* at 920 n.17.

86. *Id.* at 919.

87. *Id.* at 913 (emphasis added).

88. *Id.* Ironically, removing women from well-paying jobs may reduce the quality of prenatal care and nutrition and thus be more injurious to the unborn child than lead exposure. *Id.* at 918.

89. *Id.* at 914. Judge Easterbrook stated that the "prospect of tort judgments means only that female employees' average cost to Johnson exceeds that of male employees." *Id.* The Court in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), held that employer decision-making based on cost differences between sex groupings violates Title VII because employees are treated as a group (women) rather than individuals.

90. The federal statute is codified at 42 U.S.C. §§ 1981-2000e (1982). Section 2000e-2(a) provides:

> (a) Employer practices
>
> 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

protection policy.[91] "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[92] The intent of Congress was to forbid employers from taking specific employee characteristics into account when making employment decisions.[93] That gender is an impermissible decision-making criterion "appears on the face of the statute."[94] The Supreme Court has announced that the language of the statute means that "gender must be irrelevant to employment decisions."[95]

The Pregnancy Discrimination Act of 1978[96] amended Title VII by adding, to the definitional section, 701(k) which prohibits discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[97] The Act effectively overturned the holding of *General Electric Co. v. Gilbert*[98] where the Supreme Court had held that the exclusion of pregnancy-related disability benefits from the General Electric's otherwise comprehensive employee disability plan did not violate Title VII.[99] The Court made clear in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[100] that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[101]

Title VII actions ordinarily are of one of two types. A claim of disparate *treatment* arises when an employer "treats some people less

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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.

91. The two other cases were: Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

92. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1784 (interim ed. 1989).

93. *Id.* at 1785.

94. *Id.*

95. *Id.*

96. Pub. L. No. 95-555 § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

97. 42 U.S.C. § 2000e(k). The statute in part provides:

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, including receipt of benefits under fringe benefit programs as other persons not so affected but similar in their ability or inability to work, and nothing in 2000e-2(h) of this title shall be interpreted to permit otherwise.

98. 429 U.S. 125 (1976). The passage of the PDA was said to have "unambiguously expressed [Congress'] disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983).

99. 429 U.S. at 145-46.

100. 462 U.S. 669 (1983).

101. *Id.* at 684.

favorably than others because of their race, color, religion, sex, or national origin."[102] Proof of discriminatory motive is required[103] but employer intent may be established by inference.[104] Claims of disparate *impact* involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[105] Proof of discriminatory motive is not required under a theory of disparate impact.[106] "The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice."[107] Statistical proof alone can make out a prima facie case of employment discrimination under disparate impact theory.[108]

1. BFOQ Defense

Each of the separate theories of discrimination under Title VII—treatment and impact—traditionally have given rise to a unique defense. The traditional defense under disparate treatment is the statutory defense of bona fide occupational qualification.[109] Any employer practice which treats an employee differently based upon the employee's membership in a protected class "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[110] The Supreme Court has stated that the BFOQ exception was intended to be an "extremely narrow exception to the general prohibition of discrimination on the basis of sex."[111]

There are two reasonably well-defined branches of the BFOQ de-

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102. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

103. *Id.*

104. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2131 (interim ed. 1989) (Stevens, J., dissenting). The framework for establishing the inference is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

105. *Teamsters*, 431 U.S. at 336 n.15.

106. *Id.*

107. *Wards Cove*, 109 S. Ct. at 2131 (Stevens, J., dissenting). "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The absence of bad faith on the part of the employer does not preclude action under Title VII. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

108. *Teamsters*, 431 U.S. at 439.

109. The defense is set forth in 42 U.S.C. § 2000e-2(e):

> Notwithstanding any other provision of this subchapter . . . 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 . . . ."

110. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977).

111. *Id.* at 334.

fense. The first, *ability to perform*, is based on the premise that a woman, for example, under some circumstances is unable to perform the responsibilities or tasks of the job for which she is hired. In *Dothard v. Rawlinson*, the Supreme Court found that because of the uniquely deplorable conditions that existed in Alabama's penitentiaries[112] at the time Ms. Rawlinson brought suit, a woman's ability to maintain order could be affected by the fact that she was female.[113] As a result, the Court held that being male was a bona fide occupational qualification for the job[114] of correctional counselor[115] at that specific prison and that the employer's policy of hiring only men for the job did not offend Title VII.

In *Western Air Lines, Inc. v. Criswell*,[116] the Court adopted a two-part test for establishing a BFOQ defense to an "age-based qualification purportedly justified by considerations of safety."[117] In *Criswell*, flight engineers were required by the employer's policy to retire at age 60.[118] Two of the respondents had been captains[119] who had applied for reassignment as flight engineers[120] prior to turning 60.[121] The employer denied both requests.[122] At trial, the employer asserted that the age-60 rule for flight engineers was a "BFOQ 'reasonably necessary' to the safe operation of the airline."[123] The Court disagreed, holding that the employer had failed to meet the second prong of the *Tamiami* test.[124]

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112. The Court noted that a district court had described prison conditions in Alabama as "rampant violence" and a "jungle atmosphere." *Id.* at 334 (quoting Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976)).

113. 433 U.S. at 335. The Court said, "The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.* at 336.

114. *Id.*

115. The Court accepted the district court's finding that a correctional counselor was a prison guard. *Id.* at 327 n.8.

116. 472 U.S. 400 (1985).

117. *Id.* at 417. The test originated in the Fifth Circuit decision of Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

118. 472 U.S. at 402.

119. *Id.* at 404.

120. *Id.* at 405. The aircraft operated by Western required three crew members in the cockpit: a captain (the pilot), a first officer (a co-pilot), and a flight engineer who monitored an instrument panel. The flight engineer would not operate the flight controls unless the captain and first officer became incapacitated. *Id.* at 403.

121. *Id.* at 405. A regulation of the Federal Aviation Administration prohibits any person aged sixty from serving as a pilot or first officer on a commercial flight. *Id.* at 404 (citing 14 C.F.R. § 121.383(c) (1985)).

122. *Criswell*, 472 U.S. at 405. The Court noted that the FAA had "refused to establish a mandatory retirement age for flight engineers." *Id.* at 404.

123. *Id.* at 406.

124. *Id.* at 423. The test was established in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). The first prong of the test came from Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971). The *Diaz* element of the BFOQ defense "mandates that the

While the employer had met the first prong by establishing that "good health for a vital crew member is reasonably necessary to the essence of the airline's operations,"[125] Western Airlines did not meet its burden of demonstrating that "all or nearly all employees [in the class] lack the qualifications required for the position."[126] Further, the employer was unable to meet the alternative to the second prong by demonstrating that it was "highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job."[127]

The second branch of the BFOQ defense has been referred to as *same-sex*.[128] This branch relates not to the employee's ability to perform the tasks and responsibilities of her position but, rather, is an accommodation to the interests of third parties—historically clients or customers—with whom the employee must interact in order to perform the responsibilities and tasks of her job.[129] In *Backus v. Baptist Medical Center*,[130] a male registered nurse brought suit against his employer for refusing his requests to be assigned to the labor and delivery section of the obstetrics and gynecology department.[131] The court held that the employer had met its burden of establishing that the same-sex requirement was necessary to the normal operation of its business and that the employee had failed to show that the employer's articulated reasons were a mere pretext.[132] Specifically, the court found that "[d]ue to the intimate touching required in labor and delivery,"[133] it was *not* a trait

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job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business." *Tamiami*, 531 F.2d at 236. The *Diaz* element thus adjusts to the safety factor. *Id.* The second prong of the test came from Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Under *Weeks* "an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [employees in the class] would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 235. There is an alternative to the main *Weeks* test for an employer who can demonstrate that it is "impossible or highly impractical to deal with [persons in the class] on an individualized basis." *Id.* at 235 n.5. Thus, the employer can meet the *Weeks* requirement by establishing that "some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class." 531 F.2d at 235. The *Tamiami* court made clear that added expense is insufficient to meet the employer's burden under the alternative *Weeks* prong. *Id.* at 235 n.26.

125. *Criswell*, 472 U.S. at 418.

126. *Id.* at 422.

127. *Id.* at 423.

128. *See* Sutton v. National Distillers Prod. Corp., 445 F. Supp. 1319, 1325 (S.D. Ohio 1978), *aff'd*, 628 F.2d 936 (6th Cir. 1980).

129. *Id.*

130. 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated*, 671 F.2d 1100 (8th Cir. 1982).

131. *Id.* at 1192.

132. *Id.* at 1198.

133. *Id.* at 1195.

associated with being male that was problematic but rather the very sex itself which made all male nurses inappropriate.[134]

A same-sex BFOQ case coming to a contrary conclusion was *Bagley v. Watson,*[135] where two female prison guards brought a Title VII action against their employer alleging that they were denied employment opportunity as a result of the designation of approximately ninety percent of certain positions as male only.[136] The court held that under the circumstances presented, sex was not a BFOQ and that Title VII precluded the employer's exclusion of women from positions which required them to "perform clothed 'pat down' frisk searches and/or visual observations of male inmates."[137] The court specifically rejected the defendant's BFOQ argument based upon the privacy concerns of the inmates and the preference of some inmates for male guards.[138]

2. Business Necessity Defense

The second defense available to an employer in a Title VII action is the *business necessity* defense traditionally applicable to cases of disparate impact.[139] Judicially created, the business necessity defense has its origin in *Griggs v. Duke Power Co.*[140] There, the employer required a high school education or the passing of a standardized general intelligence test as a condition of employment for certain jobs.[141] The requirements operated to disqualify blacks for higher-paying positions at a substantially greater rate than white employees also seeking those positions because few blacks could pass the two tests.[142] The Court found that the record demonstrated that neither test was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[143] The Court held that even in the absence of discriminatory intent on the part of the employer in implementing the policy,[144] the fact that the "requirements operated to render ineligible a

134. *Id.* The Court noted a conflict with the patient's constitutional right to privacy and with the fact that the OB-GYN nurse is not selected by the patient as would be a doctor. *Id.*

135. 579 F. Supp. 1099 (D. Or. 1983).

136. *Id.* at 1102.

137. *Id.* at 1104.

138. *Id.* at 1105.

139. Ordinarily, the evidence in disparate impact cases "focuses on statistical disparities rather than specific incidents, and on competing explanations for those disparities." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1989).

140. 401 U.S. 424 (1971).

141. *Id.* at 425-26.

142. *Id.* at 426.

143. *Id.* at 431.

144. The Court noted that the district court had found that prior to the Civil Rights Act the employer had followed a policy of overt (intentional) racial discrimination, but, since the Act such conduct had ceased. *Id.* at 428.

markedly disproportionate number of Negroes"[145] was sufficient to violate the Act.[146] "The touchstone is business necessity."[147] The job requirement must be "related to job performance,"[148] and "bear a demonstrable relationship to successful performance of the jobs for which it was used."[149] In sum, the burden is on the employer to show that the requirement has "a manifest relationship to the employment in question."[150]

The business necessity defense was further developed in *Albemarle Paper Co. v. Moody*.[151] In *Albemarle*, employees were required to have a high school diploma and to pass two standardized tests as a condition to employment in certain skilled lines of work.[152] The employer had hired an industrial psychologist to study the job relatedness of the testing program.[153] The consultant concluded that the tests were job related—that is, " 'significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' "[154] The Court disagreed, saying that the study was flawed, and as a result could not be used to determine whether the criteria used by the employer (the tests) were "sufficiently related to the Company's legitimate interest in job-specific ability."[155] The *Albemarle* Court also made clear that even if an employer could demonstrate that the employment selection device was job related, the complaining party, in order to prevail, still could show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[156]

In summary, a plaintiff in an action under Title VII can base her claim either on a theory of disparate treatment or disparate impact.[157] While the former requires proof of intent to discriminate, either direct

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145. *Id.* at 429.

146. "The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." *Id.* at 431.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 432.

151. 422 U.S. 405 (1975).

152. *Id.* at 410-11.

153. *Id.* at 411.

154. *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c)).

155. *Id.* at 433.

156. *Id.* at 425. (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)). The *McDonnell Douglas* Court said, "[t]he broad overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." 411 U.S. at 801.

157. In practice, many plaintiffs assert claims under both theories. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2120 (interim ed. 1989).

or inferential, the latter requires only a demonstration that "some employment practices, adopted without a deliberately discriminatory motive [operate as the] functional[] equivalent to intentional discrimination."[158] Two defenses to a Title VII action are possible. The BFOQ defense traditionally has been employed in cases of disparate treatment with the business necessity defense reserved traditionally for cases of disparate impact.[159]

The Seventh Circuit in *Johnson Controls* applied the business necessity defense to what is on its face a case of overt disparate treatment. Because the *Johnson Controls* court relied on the reasoning of *Wright v. Olin Corp.*[160] and *Hayes v. Shelby Memorial Hospital*[161] to support its conclusion, it is necessary to examine the *Wright* and *Hayes* decisions in detail.

B. Earlier Cases Addressing Fetal Protection Policies

1. *Wright v. Olin Corp.*

The Fourth Circuit was the first court of appeals to pass judgment upon the permissibility of an employer's fetal protection policy when it considered *Wright*[162] in 1982. *Wright* was a consolidated action involving the claims of both individual plaintiffs and the EEOC which had charged Olin with race and sex discrimination.[163] In particular, the plaintiffs questioned Olin's " 'female employment and fetal vulnerability' " policy.[164]

The Olin policy created three job classifications.[165] Fertile women[166] were excluded from *restricted* jobs which involved contact with or exposure to " 'known or suspected 'abortifacient or teratogenic agents'."[167] Pregnant women could be excluded from *controlled* jobs

158. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

159. The Court most recently urged the application of the business necessity defense to a disparate impact claim in *Wards Cove*, 109 S. Ct. at 2124-27.

160. 697 F.2d 1172 (4th Cir. 1982).

161. 726 F.2d 1543 (11th Cir. 1984).

162. 697 F.2d at 1172.

163. *Id.* at 1175-76.

164. *Id.* at 1182.

165. *Id.*

166. Any woman between the ages of 5 and 63 was assumed to be fertile in the absence of evidence to the contrary. *Id.*

167. *Id.* Harm to a fetus can occur in a number of ways. First, a fetus can be harmed by a toxic chemical (fetotoxin) that would also harm a child or adult (carbon monoxide, e.g.). Second, a teratogen can affect the dividing cells of the fetus and cause structural or functional defects or deformities. Thalidomide was a teratogen that caused gross limb deformities. Third, a transplacental carcinogen can cross the placenta and cause cancer in the lifetime of the child. Fourth, chemical or physical agents (mutagens) can harm the germ cells of either parent prior to conception and result in congenital defects or developmental problems when the child inherits from either

which required limited contact with harmful chemicals.[168] Non-pregnant women could work in controlled jobs only after signing a form indicating their recognition of a risk, though slight.[169] *Unrestricted* jobs, those that did not pose a hazard to a pregnant woman or fetus, were open to all women.[170] Men were orally warned about lead exposure in keeping with OSHA regulations but were not restricted.[171] Plaintiffs brought action under both disparate treatment and disparate impact theories.[172]

The employer contended that the proper framework was disparate treatment and that the *McDonnell Douglas-Burdine* inferential framework should be utilized.[173] The plaintiffs asserted that the policy was overtly discriminatory, that the *McDonnell Douglas* proof scheme was inapplicable, and that the employer could prevail only by establishing a BFOQ defense.[174] The Fourth Circuit conceded that the facts before it did "not fit with absolute precision into any of the developed theories,"[175] but concluded that the appropriate analytic framework was disparate impact coupled with the business necessity defense.[176]

The court had three reasons for the adoption of the disparate impact - business necessity approach. First, were the BFOQ defense to be applied, the employer could not assert a justification defense to which it was entitled under Title VII doctrine.[177] Second, while the policy was said to be expressed in gender-neutral terms, its obvious and intended consequence was to impose on women a burden that men need not suf-

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parent an abnormal genetic structure. Ionizing radiation is an example of a mutagen. Williams, *Firing the Women to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641, 655-56 (1981).

168. *Wright*, 697 F.2d at 1182. Permission to work would be determined on a case by case basis. *Id.* Originally, the policy prohibited all pregnant women from working at controlled jobs but two weeks later the policy was revised. *Id.* at 1182 n.12.

169. *Id.* at 1182.

170. *Id.*

171. *Id.*

172. *Id.* at 1183-84. Plaintiffs urged use of the BFOQ defense in light of the policy's facial discrimination or, in the alternative, the *Griggs* framework for disparate impact. *Id.*

173. *Id.* at 1183. This inferential framework was established in McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The employer contended that the purpose of the policy was to protect the unborn fetus and that plaintiffs had not successfully proven pretext. *Wright*, 697 F.2d at 1183.

174. *Id.* In the alternative, plaintiffs asserted that if the policy was construed as facially neutral (based upon the potential for pregnancy), the case was one of disparate impact to which the business necessity defense was applicable. *Id.* at 1184.

175. *Id.*

176. *Id.* at 1185. The court characterized the disparate treatment/*McDonnell Douglas* scheme urged by the employer as wholly inappropriate. *Id.*

177. *Id.* at 1185 n.21. The court recognized that the BFOQ defense was meant to be a narrow exception. *Id.* The court also concluded that the employer could not prevail under a BFOQ defense. *Id.* at 1186 n.21.

fer.[178] Third, the Supreme Court in *Nashville Gas Co. v. Satty*[179] had applied disparate impact analysis to an employer's policy which required a pregnant woman to take a leave of absence and denied her seniority accumulated during maternity leave.[180]

In adopting a disparate impact - business necessity framework, the Fourth Circuit held that "the existence and operation of the fetal vulnerability program established as a matter of law a prima facie case of Title VII violation."[181] In remanding the case, the *Wright* court provided four rules to the district court to aid its application of the business necessity defense to a factual situation involving a fetal protection policy.[182]

First, the employer must demonstrate that "significant risks of harm" to unborn children exist in the workplace.[183] Second, the risks must be confined to the children of women workers and not men workers.[184] Third, the necessity of a program of protective measures confined to women must be demonstrated.[185] Last, the "effectiveness of the actual program for the intended purposes must be established by independent, objective evidence."[186]

The court emphasized that all elements of the business necessity

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178. The court reasoned that a facially neutral policy, as here, that has a discriminatory impact is the classic fact situation to which the *Griggs* framework applies. *Id.*

179. 434 U.S. 136 (1977). The Court in *Satty* stated, "On its face, petitioner's seniority policy appears to be neutral in its treatment of male and female employees. . . . Petitioner's decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy." *Id.* at 140.

180. *Wright*, 697 F.2d at 1186. The district court had treated the case as one of disparate treatment and found that plaintiffs had failed to prove the requisite intent to discriminate. *Id.* at 1187.

181. *Id.*

182. The *Wright* court held that under certain circumstances an employer may, as a business necessity, impose a restriction on employees to protect the health of unborn children of women workers. *Id.* at 1189. The court likened the unborn child to a business customer, deserving of lesser protection than the worker but more protection than visitors. *Id.*

183. *Id.* at 1190.

184. *Id.*

185. *Id.* It is interesting to note that the Fourth Circuit has specified that dollar cost alone is not determinative in establishing a business necessity. Robinson v. Lorillard Corp., 444 F. 2d 791, 799 n.8 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

186. *Wright*, 697 F.2d at 1190. These elements of a business necessity defense were adopted nearly intact from *Lorillard:*

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

444 F.2d at 798 (footnotes omitted).

defense "must be established by independent, objective evidence,"[187] that the defense must be "supported by the opinion evidence of qualified experts in the relevant scientific fields,"[188] and that it is "not necessary to prove the existence of a general consensus on the points within the qualified scientific community."[189]

Finally, the *Wright* court made clear that once the employer had established the risk of harm (necessity) and effectiveness of the challenged program to avoid it,[190] the plaintiff might still prevail by proof that there were acceptable alternative policies that equally protect against the harm with lesser differential impact.[191]

2. *Hayes v. Shelby Memorial Hospital*

In *Hayes v. Shelby Memorial Hospital,*[192] a pregnant x-ray technician brought suit claiming that the employer violated Title VII by firing her immediately upon learning of her pregnancy.[193] The district court, sitting without a jury, found for the plaintiff.[194] The Eleventh Circuit affirmed.[195]

The Eleventh Circuit began its analysis by concluding that the hospital's action—firing the plaintiff because she was pregnant—was discriminatory on its face, thus precluding use of the *McDonnell Douglas - Burdine* inferential framework.[196] The starting point of the Eleventh Circuit thus conflicts with that of the Fourth Circuit in *Wright*, as the latter based its analysis on the premise that the employer's fetal protection policy was on its face neutral.[197] The difference which should result from two opposite starting points disappeared, however, when the

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187. A good faith belief by the employer that the program is necessary or effective will not suffice. *Wright*, 697 F.2d at 1190.

188. *Id.*

189. *Id.* at 1191.

> It suffices to show that within that community there is so considerable a body of opinion that significant risk exists, and that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

Id.

190. This would establish the employer's prima facie defense. *Id.*

191. *Id.* The *Wright* court asserted that should the plaintiff put forward enough "rebuttal" evidence on acceptable alternatives, the plaintiff can establish a prima facie case of disparate treatment. *Id.* at 1192. The theory would shift from disparate impact to disparate treatment because the plaintiff has been successful in demonstrating that the stated purpose of the policy or practice was a mere pretext for discrimination. *Id.*

192. 726 F.2d 1543 (11th Cir. 1984).

193. *Id.* at 1546.

194. *Id.*

195. *Id.*

196. *Id.* at 1547-48.

197. *Wright*, 697 F.2d at 1186. The *Hayes* court indicated that *Wright* did not make clear whether it was applying pre or post PDA principles. *Hayes*, 726 F.2d at 1546 n.2.

Hayes court created a novel maneuver that effectively converted a facially discriminatory policy on the part of the employer into a neutral one.[198]

The mechanics of the *Hayes* maneuver are simple. Ordinarily, a facially discriminatory policy is said to violate Title VII unless the employer mounts a successful affirmative defense under BFOQ.[199] Maintaining a BFOQ defense is tantamount to admitting that a policy or practice is discriminatory while at the same time asserting reasons for discrimination which justify and legitimate a practice which in the absence of the justification would be repugnant to Title VII. Under a BFOQ defense, the discriminatory character of the employer policy or practice does not change. Rather, the availability of the statutory defense is an expression of society's willingness to tolerate some apparent and conspicuous discrimination where the employee is unable to perform the duties of the job assigned.

Under the *Hayes* maneuver, a facially discriminatory policy need not be justified as a BFOQ. If the employer's policy can be said to protect the offspring of all employees, the mere *presumption* of discrimination is effectively rebutted. In other words, if a policy which discriminates on the basis of sex or pregnancy "effectively and equally protects the offspring of all employees,"[200] the policy itself shifts in character from facially discriminatory to facially non-discriminatory.[201] The *Hayes* maneuver "neutralizes" the policy, and makes it eligible for treatment under disparate impact theory.[202]

The *Hayes* maneuver is novel[203] because it permits a facially discriminatory policy to be transformed rather than justified. The most troublesome aspect of the transformation is that it requires the court to determine the essential scientific questions of whether the workplace presents substantial risks of harm to unborn children and whether the employer's policy can prevent that harm. Ordinarily, the court is better

198. The court appears to recognize that in a case of facial discrimination, only the BFOQ defense is applicable. *Id.* at 1548.

199. *See* 42 U.S.C. § 2000e-2(a) & (e) (1982).

200. *Hayes*, 726 F.2d at 1548.

201. This transformation appears to occur because the noble *intentions* of the employer override his or her impermissible *actions* of adopting a discriminatory policy.

202. Judge Posner, in his dissent in *Johnson Controls*, called this process "stitch[ing] a new defense." 886 F.2d at 903.

203. It should be noted that the *Hayes* maneuver requires two conceptual shifts for execution. First, whereas the stated target of the policy is female employees only, the *Hayes* maneuver broadens the reach of the policy to include "all employees." 726 F.2d at 1548. After the operation of the maneuver, the policy is said to address both male and female employees. Second, whereas the stated workplace policy is directed to *employees*, after the maneuver the interests of non-employees (unborn children) are implicated and are, in fact, superior to employee interests. *See id.*

prepared to answer questions of policy rather than questions of scientific fact. The application of the business necessity defense to fetal protection policies, therefore, thrusts the court into an arena in which it is less comfortable and less skilled.[204]

The *Hayes* court looked to *Wright* for the specifics of an employer showing to rebut the *presumption* of facial discrimination.[205] First, the employer must demonstrate that there is "a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace."[206] Second, the employer must show "that the hazard applies to fertile or pregnant women, but not to men."[207] The *Hayes* court also adopted from *Wright* the evidentiary requirements of objective, scientific evidence that need not reflect a general consensus.[208] Should the employer be unable to rebut the presumption of discrimination by producing evidence of substantial risk and isolation of that risk to female employees, the employer would be left only with the BFOQ defense.[209] The *Hayes* court indicated that the employer would be able to prevail under the BFOQ defense only if "the excluded class is unable to perform the duties that constitute the essence of the job."[210]

In applying its newly created framework to the facts before it, the Eleventh Circuit found that the employer failed to meet its burden of demonstrating that radiation from x-rays "posed a significant risk of harm to Hayes's [sic] fetus."[211] Since the employer failed to meet his threshold burden, the court was not required to reach the issues of whether x-ray radiation affects the offspring of only women employees[212] and whether there were available alternative policies with a

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204. Judge Easterbrook addresses the difference between policy and factual arguments in a dissenting comment: "so long as the substantive role of law requires a court to resolve scientific disagreements—which the Wright-Hayes standard does, though the BFOQ standard avoids the problem—the judge must follow the rules which means that material disputes must be resolved at trial." *Johnson Controls*, 886 F.2d at 916 (Easterbrook, J., dissenting).

205. The *Hayes* court indicated that it was borrowing these requirements from *Wright v. Olin Corp.* but "[b]ecause we approach this case differently than did the *Olin* court, we do not label these requirements as 'business necessity'. Nevertheless, our approach and that of *Olin* require an *identical* showing by an employer for the employer to prevail." *Hayes*, 726 F.2d at 1548 n.8.

206. *Id.* at 1548.

207. *Id.*

208. *Id.* The *Hayes* court also indicated that in the absence of scientific evidence regarding hazards to men, an employer may direct its policy only to women. *Id.* at 1549.

209. *Id.*

210. *Id.*

211. *Id.* at 1550. At one point in its analysis the court referred to an "*unreasonable* risk of harm to the fetus." *Id.* at 1550. The "unreasonable" language would appear to create a question as to the appropriate evidentiary standard.

212. *Id.* at 1552.

lesser discriminatory effect.[213]

The court in *Hayes* also conducted a disparate impact analysis on the record before it.[214] Disparate impact analysis under the *Hayes* formulation[215] is conducted, however, only *after* the employer successfully rebuts the plaintiff's prima facie case of facial discrimination, thus creating "an automatic prima facie case of disparate impact."[216] To reach the disparate impact stage with a facially non-neutral policy, the employer already would have demonstrated substantial risk of harm to the fetus and isolation of harm to women, and thus would not need to present additional proof to mount a business necessity defense.[217] Instead, the burden shifts to the plaintiff to demonstrate that there are "acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purpose with a less adverse impact on one sex."[218]

The Eleventh Circuit in *Hayes* made clear that "potential litigation costs [may not] form the basis for the business necessity [defense]."[219] The only salient issues surrounding the permissibility of a fetal protection policy are: (1) whether there is a substantial risk of harm to the fetus of a working woman, (2) whether that harm is transmitted only through the mother, and (3) whether there are available alternative policies or practices with a lesser restrictive effect on the woman employee.

3. Summary

While the decisions in both *Wright* and *Hayes* addressed employer

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213. *Id.* at 1551.

214. The court stated that the district court "lacked the benefit of the approach we have outlined here." *Id.* at 1552. Assuming that the hospital on remand might be able to rebut the plaintiff's case of facial discrimination, the Eleventh Circuit set out to demonstrate that even if the employer were not liable under a theory of disparate treatment, the employer would still be liable under disparate impact theory. *Id.*

215. The *Hayes* court suggested that if the employer rebuts the presumption of facial discrimination by producing evidence of substantial harm to the fetus and isolation of the risk to women, "the employee has an automatic prima facie case of disparate impact." *Id.* Under disparate impact, "the employer is entitled to assert the defense of business necessity." *Id.*

216. *Id.*

217. *Id.* at 1553.

218. *Id.* The *Hayes* court then approved the district court's findings that the hospital failed to explore seriously "alternatives that would accomplish the Hospital's purpose with a less discriminatory impact." *Id.* at 1553-54.

219. *Id.* at 1552 n.15. The court stated,

> [i]n sum, we believe that potential liability is too contingent and too broad a factor to amount to a 'business necessity.' Rather under our formulation of business necessity, the defense in a fetal protection case is justified by a genuine desire to promote the health of employee offspring, not by self-interest.

Id.

policies ostensibly designed to protect the unborn children of working mothers, each court took a fundamentally different approach to analyzing the case. The court in *Wright* concluded that the employer policy was facially neutral and analyzed the case under disparate impact - business necessity theory. In contrast, the *Hayes* court recognized that the employer's policy was facially discriminatory but created a presumption of discrimination which could be rebutted by evidence which showed that the policy protected the offspring of all employees.

IV. ANALYSIS

A. *The Tenuous Foundation of Wright-Hayes*

The Seventh Circuit in *UAW v. Johnson Controls, Inc.*[220] in concluding that a fetal protection policy can be justified by a business necessity defense,[221] utilized a tenuous foundation upon which to build its analysis. As a result, the court's conclusion departs from the language of Title VII, the Pregnancy Discrimination Act and the case law which interprets them.

The foundation provided by *Wright v. Olin Corp.*[222] is especially vulnerable. In holding that a business necessity defense is applicable to a case involving a fetal protection policy,[223] the *Wright* court made two unconventional findings. First, the court labeled the case as disparate impact, stating that the policy was expressed in gender-neutral terms.[224] However, because the policy applies only to fertile women, pregnant women, and non-pregnant women[225] it is difficult to assert that the policy is fully gender-neutral.[226] Additionally, the *Wright* court's reliance on *Nashville Gas Co. v. Satty*[227] seems misplaced since

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220. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (interim ed. 1990).

221. *Id.* at 887, 901.

222. 697 F.2d 1172 (4th Cir. 1982).

223. *Id.* at 1185.

224. *Id.* at 1186.

225. *Id.* at 1182. The employer's own label for the program was "female employment and fetal vulnerability." *Id.*

226. The *Wright* court suggested that to argue the facial neutrality of the policy is to be involved in "mere semantic quibbling having no relevance to the underlying substantive principle that gave rise to this [disparate impact] theory." *Id.* at 1186.

227. 434 U.S. 136 (1977). The Court in *Satty* held that the employer's policy of refraining from granting sick leave pay to pregnant employees did not violate Title VII and said that the employer's "decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy." *Id.* at 140. The PDA was intended to make distinctions based on pregnancy *per se* violations of Title VII, thus eliminating the need for a court to rely on the disparate impact approach used by the Court in *Gilbert* and *Satty*. *See* H.R. REP. NO. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4751.

the Pregnancy Discrimination Act[228] effectively superceded the *Satty* result.[229] Second, unless the *Wright* court meant something different from what it stated, one of its asserted reasons for not applying the BFOQ defense is circular. The court stated that if the BFOQ defense were "properly applied, it would prevent the employer from asserting a justification defense"[230] to which it would be entitled under developed disparate impact theory. The Fourth Circuit concluded that under the circumstances the employer should be able to assert a broader defense theory than would be allowed under the admittedly narrow BFOQ exception.[231] Further, the court stated that if the BFOQ defense were applicable, the employer would not be able to prevail.[232] Thus, because the employer could not prevail under the correct defense (BFOQ), another defense (business necessity) should be made available. The court's decision is inappropriate in light of the language in Title VII which states that where sex is *not* a BFOQ "reasonably necessary to the normal operation of that particular business or enterprise,"[233] it shall be an unlawful employment practice for an employer to make an employment decision on the basis of sex.[234]

The *Johnson Controls* court's reliance on *Hayes v. Shelby Memorial Hospital*[235] also is problematic. The starting point for *Hayes* was that an employment policy which applies only to women is facially discriminatory.[236] Ordinarily, such an assertion indicates a case of disparate treatment under Title VII to which the BFOQ defense applies. However, with the operation of the *Hayes* maneuver, the facially discriminatory policy was transformed into a facially neutral one and the finding of discrimination transformed to a mere presumption.[237] The *Hayes* court thereupon borrowed the requirements of the business necessity defense from *Wright*, disavowed that the employer defense was

228. 42 U.S.C. § 2000e(k) (1982). The language of the Act in part provides that "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." *Id.*

229. *See* California Federal Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 395 (9th Cir. 1985), *aff'd*, 475 U.S. 1139 (1987). *Satty*, decided before the PDA, relied on *Gilbert* and concluded that the employer's policy of not awarding sick-leave pay to pregnant employees while awarding it to employees missing work because of non-pregnancy reasons was gender-neutral. 434 U.S. at 143-44.

230. 697 F.2d at 1185 n.21.

231. *Id.*

232. The court stated, "a b.f.o.q. defense . . . obviously cannot be established . . . ." *Id.* at 1186 n.21.

233. 42 U.S.C. § 2000e-2(e) (1982).

234. *Id.*

235. 726 F.2d 1543 (11th Cir. 1984).

236. The court in *Hayes* states, "if the employer's policy by its terms applies only to women or pregnant women, then the policy is facially discriminatory." *Id.* at 1548.

237. *Id.*

business necessity[238] and created a hybrid defense with significant policy implications. The result was that the court sanctioned the employer's consideration of the interests of the fetus[239] in spite of its stated belief that, under the BFOQ defense, potential for fetal harm is irrelevant unless it affects a mother's job performance.[240] The court clearly stated that when a policy is facially discriminatory, there is no BFOQ defense unless the employer shows a direct relationship between the policy and the actual ability of the employee to perform her job.[241] By adopting the *Hayes* framework, the Seventh Circuit broadened its scope of analysis and strayed from its essential inquiry which should have been to determine whether the employer could have met its burden of demonstrating that fertile and pregnant women were unable to perform the tasks which constitute the essence of the job to which they were assigned.[242]

B. BFOQ: The Appropriate Defense in Cases Involving Fetal Protection Policies

Even though the BFOQ defense was rejected by the courts in *Wright*,[243] *Hayes*,[244] and *Johnson Controls*[245] in favor of a defense that resembles business necessity, it is the assertion of this writer that the BFOQ defense, while concededly narrow, is the appropriate defense for a fetal protection policy implicating either pregnant or fertile women. A policy targeted to pregnant women is facially discriminatory and thus is repugnant to Title VII unless justified as a BFOQ.[246] A policy targeted to fertile women manifests "sex-plus" discrimination[247] and thus also can be justified only on the basis of a BFOQ.[248]

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238. *Id.* at 1548 n.8 ("[W]e do not label these requirements as 'business necessity'.").

239. *Id.* at 1549.

240. *Id.* (quoting Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 264 (N.D. Ala. 1982)).

241. *Id.*

242. *See id.*

243. 697 F.2d at 1185.

244. 726 F.2d at 1549 n.9. The *Hayes* court viewed the BFOQ defense as an alternative defense to be used only when the employer is unable to rebut the presumption of facial discrimination by showing substantial risk of harm to the fetus and transmission of the risk only through the mother. *Id.* at 1548-49. According to the court in *Hayes*, the employer is not likely to prevail. *Id.* at 1549 n.9.

245. 886 F.2d at 887. The business necessity defense was also permitted in Steele v. Illinois Human Rights Comm'n, 160 Ill. App. 3d 577, 580, 513 N.E. 2d 1177, 1179, *appeal denied*, 117 Ill. 2d 554, 517 N.E.2d 1096 (1987).

246. The Sixth Circuit recently came to the same conclusion in Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990) (fetal protection policy amounts to overt sex discrimination and cannot be countenanced without proof that infertility is a BFOQ).

247. Female plus fertile.

248. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

1. BFOQ Defense Appropriate for Policy Addressed to Fertile Women

The fetal protection policy of Johnson Controls is targeted primarily to fertile women.[249] The *Johnson Controls* court apparently assumed that a fetal protection policy violates the Pregnancy Discrimination Act (PDA).[250] Nothing, however, in the PDA itself or its legislative history mandates the conclusion that Congress intended the PDA to cover fertility based (pre-conception) workplace policies. In fact, fertility is a condition applicable to both men and women.[251]

There is little in the legislative history of the PDA to suggest that Congress intended the PDA also to apply to discrimination based on fertility. The language of the Act refers to "pregnancy, childbirth, or related medical conditions."[252] Arguably, it would have been easy for Congress to have included the term "fertility" had it intended to include fertility within the reach of the amendment. Commentators,[253] however, have pointed to language in the report accompanying H.R. 6075 as evidence that Congress intended the PDA also to cover discrimination based upon fertility.[254] Ignored is the next sentence in the report which suggests that the PDA covers only conception through delivery and any related medical complications.[255] Further support that the PDA was not meant to cover fertility per se is that the term "fertility" is mentioned nowhere in the House[256] or Senate[257] reports nor in the Senate debate on the bill.[258]

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249. *Johnson Controls*, 886 F.2d at 876. All women with childbearing capacity are affected. *Id.*

250. *Id.* at 893. The Sixth Circuit has also made the same assumption. *See* Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990) (PDA transforms distinctions based on potential pregnancy into overt sex discrimination in the absence of a showing that infertility is a BFOQ).

251. During the Senate debate on S. 995, the forerunner of the PDA, Senator Biden, the bill's cosponsor, chided his colleagues for their "brilliant observation" that only women can get pregnant. *See* 123 CONG. REC. S29,661 (daily ed. Sept. 16, 1977) (statement of Sen. Biden). The same cannot be said for fertility.

252. 42 U.S.C. § 2000e(k) (1982).

253. *See, e.g.*, Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 845 n.1556 (1986) (legislative history indicates that the amendment extended protection to both fertile and pregnant women).

254. *See* H.R. REP. NO. 948, 95th Cong., 2d Sess. at 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4753, 4791. The report specifies: "[i]n using the broad phrase "women affected by pregnancy, childbirth and related medical conditions," the bill makes clear that its protection extends to the *whole range of matters concerning the childbearing process.*" *Id.* (emphasis added).

255. The report states: "At the same time, the bill i[s] intended to be limited to effects upon a woman who is herself pregnant, bearing a child, or has a related medical condition . . . ." *Id.*

256. *Id.* at 1-18, 1978 U.S. CODE CONG. & ADMIN. NEWS at 4749-66.

257. S. REP. NO. 331, 95th Cong., 1st Sess., 1-17 (1977).

258. *See* 123 CONG. REC. S29,640-65 (daily ed. Sept. 16, (1977).

If the PDA does not cover discrimination based on fertility, the employer policy in *Johnson Controls*, insofar as it applies primarily to fertile women, can be considered a case of "sex-plus" discrimination. Here, the employer discriminates against women[259] but not all women. Only fertile women are affected by the policy.[260] Hence, the policy discriminates against employees who are women *plus* fertile. If the PDA does not cover fertility, then the Johnson Controls' policy must be evaluated in light of pre-PDA principles.

Phillips v. Martin Marietta Corp.[261] sets forth the applicable standard in a "sex-plus" case under Title VII. In *Martin Marietta*, the employer did not accept applications from women with pre-school-age children but did accept applications from men with pre-school-age children.[262] The employer was found to have discriminated on the basis of not only sex, but also those persons with pre-school-age children.[263] More importantly, the Court was specific in its direction on remand that such an employer policy could be justified only on the basis of a BFOQ.[264]

2. BFOQ Defense Appropriate for Policy Addressed to Pregnant Women

Even though the Johnson Controls fetal protection policy is directed primarily to fertile women, it may, under unusual circumstances, reach pregnant women also.[265] Thus, the policy also must be considered under post-PDA case law. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[266] the Court stated that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[267] Thus, that part of Johnson Controls' policy that implicates pregnant women is discrimination on its face. Facial discrimination is defensible only on the basis of a BFOQ.[268]

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259. The policy pertains only to women. 886 F.2d at 876.

260. *Id.* at 876, 877-78.

261. 400 U.S. 542 (1971).

262. *Id.* at 543.

263. *Id.* at 544.

264. *Id.*

265. Tubal ligation is the most common means of inducing female infertility. *See* COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS & SURGEONS, COMPLETE HOME MEDICAL GUIDE 144 (1985). The procedure involves cutting or tying the fallopian tubes so that the egg can no longer travel to the uterus to be fertilized. *Id.* at 143. Even though tubal ligation is a relatively permanent means of sterilization, on occasion the procedure is ineffective and the woman can still become pregnant. Thus a woman whose inability to bear children has been medically documented may still on rare occasion be able to conceive.

266. 462 U.S. 669 (1983).

267. *Id.* at 684.

268. *See* 42 U.S.C. § 2000e-2(e)(1) (1982); Price Waterhouse v. Hopkins, 109 S. Ct. 1775,

Since each prong of the Johnson Controls' fetal protection policy,[269] standing alone, is only justifiable on the basis of a BFOQ under established case law, it seems inconceivable that the policy when considered as a whole could be justified on the basis of the broader business necessity defense.

C. *Interests Upon Which a BFOQ Defense May be Based*

Assuming that the BFOQ defense is appropriately applied to a fetal protection policy, Section 2000e-2(e)(1) of Title VII makes clear that the stated justification must be "reasonably necessary to the normal operation of that particular business or enterprise."[270] The language of the statute does not make clear, however, whether the employer may base a justification on the interests of parties other than himself.

Courts have interpreted Title VII to incorporate employer interest in ensuring that employees will be able to perform their job.[271] The critical question in *Johnson Controls* is whether the interest of the fetus may serve as the basis for an employer justification under the BFOQ defense.[272] While the court in *Johnson Controls* answered this question in the affirmative, the answer should be negative for three reasons. First, there is nothing in the history or language of Title VII or the PDA to suggest that Congress intended to implicate the interests of unborn children when they are contrary to those of the mother under Title VII. Second, even though the Court has recognized the interests of consumers under Title VII, unborn children are distinguishable from consumers and it is inappropriate to further extend the reach of Title VII doctrine to unborn children. Third, the interests of unborn children are adequately protected under OSHA and thus do not need to be protected under Title VII.

1. Title VII Does Not Implicate the Interests of Unborn Children

On the most observable level, Title VII of the Civil Rights Act of

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1786 (interim ed. 1989) (Title VII identifies one circumstance in which an employer may take gender into account in making an employment decision-where gender is a BFOQ.).

269. One prong addresses fertile women; the other addresses pregnant women.

270. *See* 42 U.S.C. § 2000e-2e(1) (1982).

271. 109 S. Ct. at 1786 (goal of Title VII is to "eradicate discrimination while preserving workplace efficiency").

272. This question was raised but not answered in Grant v. General Motors, 908 F.2d 1303 (6th Cir. 1990). *See* Johnson Controls, Inc., v. California Fair Emp. & Hous. Comm'n, 218 Cal. App. 3d 517, 542, 267 Cal. Rptr. 158, 172 (1990). The EEOC, in concurring with the dissent by Judge Cudahy in *Johnson Controls* approves employer consideration of potential third-party interests. *See* EEOC Policy Guide, *supra* note 49, at :6801.

1964 concerns itself with the rights of employees and employers.[273] However, the interests of other parties also are said to be incorporated into Title VII. Consumer interests are said to be incorporated as the beneficiary of "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[274] The privacy interests of persons with whom employees interact on an intimate basis also have been considered under Title VII.[275] In *Backus v. Baptist Medical Center*,[276] the privacy interests of patients in a hospital obstetrics and gynecology wing were sufficient to serve as the basis for an employer BFOQ defense. The safety interests of airline passengers have also been recognized under Title VII. In *Burwell v. Eastern Airlines, Inc.*[277] and *Harriss v. Pan American World Airways, Inc.*[278] the safety interests of passengers were sufficient to justify employer policies which resulted in differential treatment of pregnant flight attendants.[279] Therefore, it would appear that the interests of third parties under some circumstances are sufficient to serve as the basis for an employer BFOQ defense. It is clear that the Fourth Circuit in *Wright* recognized the separate interests of the third-party unborn child within the employee's body when it analogized the unborn child to the customer of a business.[280]

There is nothing in either the legislative history of Title VII[281] or the PDA[282] however, to suggest that Congress wished to implicate the interests of unborn children separate and apart from the working mothers who carry them.

The House report accompanying H.R. 7152 stated that Title VII was designed to "eliminate discriminatory employment practices by

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273. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785 (interim ed. 1989) (Title VII creates a balance between employee rights and employer prerogatives).

274. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

275. *See supra* notes 127-137 and accompanying text. *See also* Local 567 American Fed. v. Michigan Council 25, 635 F. Supp. 1010, 1012 (E.D. Mich. 1986) ("It is clear that in certain situations privacy rights of individuals will justify sex-based classifications.").

276. 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated*, 671 F.2d 1100 (8th Cir. 1982).

277. 633 F.2d 361 (4th Cir. 1980).

278. 24 Fair Empl. Prac. Cas. (BNA) 947 (9th Cir. 1980).

279. *Burwell* was decided under pre-PDA law; the court characterized as facially neutral a policy mandating maternity leave. 633 F.2d at 369. *Harriss* was decided under both pre- and post-PDA law since appellants sought relief implicating time periods both before and after the PDA amended Title VII. *See* 24 Fair Empl. Prac. Cas. at 948.

280. 697 F.2d at 1189. The court in *Hayes* specifically declined to endorse the *Wright* approach which equated a fetus with a business invitee or licensee. 726 F.2d at 1552 n.14. The *Hayes* court did however, recognize fetal protection as a "legitimate area of employer concern." *Id.*

281. *See* S. REP. NO. 872, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355; H.R. REP. NO. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391.

282. *See* S. REP. NO. 331, 95th Cong., 1st Sess. (1977).

business, labor unions, or employment agencies. . ."[283] Comments made by both supporters and detractors[284] of the legislation emphasized that the interests implicated are those of employer and employee. That all segments of the citizenry have a right to gainful employment was expressed perhaps most eloquently in a supplementary report filed by Judge William M. McCulloch and others:

> [i]n other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.
>
> The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty.[285]

In light of the express purpose of Title VII—to enhance employment opportunity and ensure that jobs are filled on the basis of qualification while leaving undisturbed management prerogatives insofar as they are not discriminatory[286]—the finding of the Seventh Circuit in *Johnson Controls* that Title VII permits discrimination directed to female workers based on a desire to protect the next generation is ironic.

In addition, there is nothing in the PDA to suggest that the interests of an unborn child may serve as the basis for discrimination in employment directed to the mother. In fact, just the opposite is true. The Act was promulgated to preserve the "central purpose of the sex discrimination prohibitions of Title VII."[287] If the purpose of the PDA is to prevent discrimination based upon actual pregnancy, and the purpose of Title VII is to prevent discrimination against women based upon any other grounds, it is illogical to conclude that pregnancy or some other condition (sex plus fertility) can justify discrimination. The basic purpose of the bill is to protect women.[288] The holding in *Johnson Controls* undermines that protection.

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283. H.R. REP. NO. 914, 88th Cong., 2d Sess., *reprinted in*, 1964 U.S. CODE CONG. & ADMIN. NEWS 2391.

284. *See* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2426 (Title VII will have "far-reaching consequences on both management and labor; [the title] constitutes an important but ill-devised limitation upon the area of discretion and decision making of both American businesses and American workers.").

285. *Id.* at 2513.

286. *Id.* at 2516.

287. S. REP. NO. 331, 95th Cong., 1st Sess. at 3 (1977).

288. *Id.* at 5.

2. Unborn Children Are Unlike Customers and Their Interests Do Not Warrant Extension of Title VII Doctrine

Even though Title VII has been said to implicate the interests of customers and clients,[289] unborn children are enough unlike customers to discourage extension of third-party protection under Title VII to unborn children. First, unborn children are distinguishable from customers in the role that they play in the employer's business. Customers play a central and positive role in any business. It is not an understatement to say that customers are the raison d'etre of the business, for without customers, the business will cease to exist. Any business organization takes in raw materials and other inputs from the environment, transforms the raw materials through the technology unique to that business, and returns the inputs in changed form to the environment.[290] Without customers or clients to make use of the output of the organization, the production of the organization gets "backed up" and, over time, the organization lacks the resources with which to obtain additional inputs from the environment.[291] Ultimately, the organization must cease to produce or offer its service. In contrast, the unborn child plays no role in the employer's business. Further, to the extent that the presence of an unborn child adversely affects the role performance of a truly critical party—the employee herself—the role played by an unborn child is negative with respect to the employer's operations.

Second, the unborn child is distinguishable from the customer by the manner in which the employer responds to each.[292] A business organization in order to survive[293] must develop and nurture relationships with customers and clients. The typical organization expends substantial resources in defining a market and directing efforts to it. Further, any business organization regularly monitors the environment and modifies its business practices based upon input from customers and clients. All of these actions are conscious and proactive. In contrast, an organization typically undertakes no proactive efforts directed to unborn children. At best, the business merely *reacts* to the presence of an unborn child.[294] Most often, the fetus is ignored. In sum, the organization seeks

289. *See supra* notes 278-85 and accompanying text.

290. *See* J. THOMPSON, ORGANIZATIONS IN ACTION 19-23 (1969).

291. *Id.* at 21.

292. Whether an employer can have any relationship with an unborn child is a matter of debate. If an employer-fetal relationship is possible, however, the relationship should vary depending on whether the fetus is viable or non-viable.

293. This assumes non-monopoly business conditions.

294. This difference between proactivity and reactivity is arguably a reflection of the organization's perceptions of customer and fetal centrality to business operations. *See supra* notes 290-92 and accompanying text.

to cultivate relationships with customers and to increase the size of its customer base; the organization neither seeks to increase the number of unborn children in its sphere of operations nor directs any efforts to them.

Because unborn children are so dissimilar to customers and clients from the employer's perspective, there is scant reason to extend the reach of Title VII from customer interests to interests of unborn children. An employer should not be permitted to justify a workplace policy under Title VII on the basis of the interests of unborn children.

3. The Interests of the Unborn Child and the Fertile Employee are Adequately Protected by Adherence to OSHA Regulations

While neither Title VII nor the PDA contains any mention of fetus or fertility,[295] the OSHA standards pertaining to lead[296] contain no fewer than eighteen references to fertility and fetal issues. Specifically, these standards make reference to an employee's ability to procreate a healthy child,[297] reproductive problems,[298] pregnancy and fertility testing,[299] special precautions applicable when a family is planned,[300] information needed by employees to adequately assess the danger of lead to the reproductive system,[301] the employer's responsibility to provide medical advice when so desired by an employee who wants to procreate a healthy child,[302] temporary removal of workers who are planning to raise children,[303] and the need for a physician to maintain an adequate medical history with respect to reproductive problems.[304] The discussion of the adverse effects of lead on male and female reproductive systems is especially detailed.[305]

In light of OSHA's demonstrated awareness of the problems of employee fertility and fetal risk and the establishment of specific standards designed to guard against the risk, it is difficult to accept Johnson Controls' position that it must implement a policy repugnant to Title VII to protect the next generation. The applicable OSHA standards, duly promulgated, accurately and objectively set forth an em-

295. *See supra* notes 256-64 and accompanying text.
296. *See* Occupational Safety and Health Standards: Lead, 29 C.F.R. § 1910.1025 (1989).
297. § 1910.1025(j)(3)(C).
298. § 1910.1025(j)(3)(D)(ii)(A); § 1910.1025 app. A, at 170.
299. § 1910.1025(j)(3)(D)(ii)(F); § 1910.1025 app. B, at 173.
300. § 1910.1025 app. A, at 170; app. C, at 179-86.
301. § 1910.1025 app. A, at 170; app. B, at 179.
302. § 1910.1025 app. A, at 171; app. C, at 179.
303. § 1910.1025 app. C, at 179.
304. § 1910.1025 app. C, at 186; app. B, at 173.
305. § 1910.1025 app. C, at 185-86. The applicable standards assume that both male and female reproductivity can be adversely affected by lead exposure. *Id.*

ployer's responsibilities to employees exposed to lead. The interests of fertile workers—women and men—and their offspring are protected by adherence to these standards. The employer has no moral obligation to engage in a course of action which is violative of Title VII when the interests of parties it seeks to protect are protected already by compliance with OSHA regulations.

It is clear, however, that by eliminating fertile women from the workplace, the employer can avoid or at least reduce its obligations under OSHA. Because a rational employer is likely to prefer the elimination of fertile women from lead-handling jobs to the payment of temporary medical removal benefits, for example,[306] an employer who grounds a fetal vulnerability policy on concern for the worker and her prospective fetus should be viewed with healthy suspicion.

D. Proper Application of the BFOQ Defense

The Seventh Circuit in *Johnson Controls*, after conducting a business necessity analysis also concluded in dicta that even under a BFOQ defense the employer could prevail.[307] However, because the court utilized the framework set forth in *Torres v. Wisconsin Department of Health & Social Services*,[308] a test devised by the Seventh Circuit itself, it came to a result arguably different from that which would result under *Western Airlines, Inc. v. Criswell*[309] where the employer's policy was geared specifically to the safety of third parties.[310] While the tests of *Torres*[311] and *Criswell* have nearly identical elements, the Seventh

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306. Medical Surveillance Guidelines, § 1910.1025 app. C, at 182 (1989) (An employer who removes an employee because the employee's blood lead level is in excess of the level mandated by the regulation must maintain the employee's rate of pay and benefits and return the employee to his or her former job when the employee's blood lead level returns to a level deemed safe by the regulation.).

307. 886 F.2d at 893.

308. 859 F.2d 1523 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1133 (interim ed. 1989). *Torres* itself has an interesting history. In *Torres*, male correctional officers at a women's prison brought suit alleging that they were as capable as women guards in carrying out the rehabilitative goals of the prison. *Id.* at 1524. The employer had implemented a policy of staffing certain positions in the living units only with women. *Id.* at 1525. Originally, the Seventh Circuit affirmed the judgment of the district court that prison officials had failed to establish that sex was a BFOQ for a women's maximum security prison. 838 F.2d 944 (7th Cir. 1988), *reh'g granted*, 859 F.2d 1523, *cert. denied*, 109 S. Ct. 1133 (interim ed. 1989). The court however granted rehearing en banc and ultimately reversed the district court on the theory that the defendants were required to meet an unrealistic and unfair burden when they were faulted for failure to produce objective evidence validating their theory that rehabilitation of female prisoners is hindered by the use of male guards. 859 F.2d at 1532.

309. 472 U.S. 400 (1985).

310. In *Torres* the third party interest recognized by the Seventh Circuit was female felons (clients) for rehabilitation. 859 F.2d at 1532, 1533.

311. The *Torres* test requires the employer to demonstrate that the BFOQ is reasonably necessary to the normal operation of the employer's business and that he had reasonable cause to

Circuit, in applying *Torres*, lessened the burden imposed on the employer to provide evidence to support its contention that all or nearly all women would be unable to perform the job safely and efficiently. Only with this lessened burden could the employer prevail.

1. *Criswell*: The Appropriate Standard

In *Criswell*[312] the Supreme Court adopted a test for establishing a BFOQ defense for age discrimination allegedly justified on the basis of customer safety.[313] Because the language of the Age Discrimination in Employment Act (ADEA),[314] under which the *Criswell* action was brought, is identical to and borrowed from Title VII,[315] the Court's interpretation of the BFOQ language in *Criswell* is applicable also to actions under Title VII.[316]

To qualify as a BFOQ under *Criswell*, the employer must demonstrate (1) that the job qualification which is invoked to justify discrimination is " 'reasonably necessary to the essence of his business,' "[317] and (2) " 'that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [affected employees] would be unable to perform safely and efficiently the duties of the job involved.' "[318] If the employer cannot meet his burden of establishing that all or substantially all employees would be unable to perform safely, he may in the alternative establish that age is a "legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the [affected] employees on an individualized basis."[319]

The Court in *Criswell* specifically rejected a reasonableness standard urged by the employer,[320] saying that a reasonableness standard is "plainly at odds with Congress' decision . . . to subject such management decisions to a test of objective justification in a court of law."[321]

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believe that all or substantially all persons of one sex are unable to safely and efficiently perform the duties of the job. *Id.* at 1527, 1530. *Cf. supra* notes 124-127 and accompanying text.

312. 472 U.S. at 400.

313. *See supra* notes 116-24 and accompanying text.

314. 29 U.S.C. §§ 621-34 (1988).

315. 472 U.S. at 412.

316. The Court in Lorillard v. Pons, 434 U.S. 575, 584 (1978) noted the similarities between ADEA and Title VII. The *Criswell* Court borrowed a Title VII interpretation for resolution of the ADEA claim. Since the *Criswell* holding was based on Title VII doctrine, it ought to apply also to Title VII claims.

317. 472 U.S. at 413 (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976)).

318. *Id.* at 414 (quoting *Usery*, 531 F.2d at 235).

319. *Id.* (footnote omitted) (quoting *Usery*, 531 F.2d at 236).

320. *Id.* at 419.

321. *Id.* (quoting Petitioner's brief at 30).

In *Criswell* the airline argued that the jury should have been instructed to defer to the airline's selection of job qualifications that were " 'reasonable in light of the safety risks.' "[322] The Court said that the BFOQ standard adopted by ADEA is one of "reasonable necessity" rather than the lower standard of "reasonableness."[323]

In contrast to the *Criswell* standard, the *Torres* standard is one of reasonableness. In fact, the *Torres* court appears to have adopted a "good faith" standard for employers where there is limited scientific evidence supporting the employer's theory linking the employer's policy to the result sought to be achieved.[324] The result in *Torres* is that, absent evidence to the contrary, any *reasonable* employer theory linking the exclusionary policy to a specific desired objective growing out of the essence of the business is sufficient to meet the second prong of the *Torres* test. This standard is clearly at odds with *Criswell.*

2. Application of the Reasonable Necessity Standard to Pregnant Women

The court in *Johnson Controls*, in its application of the *Torres* elements of the BFOQ defense, was required to determine whether the fetal protection policy was "reasonably necessary" to the employer's legitimate interest in industrial safety. This finding would determine whether Johnson Controls had reasonable cause to believe that all or substantially all fertile women[325] would be unable to perform "safely and efficiently"[326] the duties of the job involved.[327] It is at this point that the Seventh Circuit's departure from the *Criswell* standard becomes evident. Assuming, *arguendo*, that fetal safety is essential to the business of Johnson Controls, its exclusion of *all fertile women* from lead-handling jobs, is not "reasonably necessary" to industrial safety under *Criswell.* First, assuming that Johnson Controls' concern is appropriately focused upon the safety of the fetus,[328] it is highly unlikely that all or substantially all women will become pregnant and thus, ar-

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322. *Id.*

323. *Id.*

324. In *Torres*, the court noted that even the plaintiff's own witness testified that there is "little scholarship in the area of rehabilitation of the female felon." 859 F.2d at 1532.

325. The fetal vulnerability policy applies only to women "with childbearing capacity." 886 F.2d at 876.

326. This language was taken from Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Weeks v. Southern Bell Tel. & Tel. Co. 408 F.2d 228, 235 (5th Cir. 1968)).

327. 886 F.2d at 897.

328. Johnson Controls argued that its purpose in implementing its fetal protection policy was to protect both pregnant women and their unborn children. *Id.* at 876. Presumably, all *workers* should be protected by the employer's adherence to the OSHA standards governing lead. Therefore, the more tenable argument is that the fetal protection policy is designed to protect only the *unborn children* of pregnant employees.

guably, unable to perform their jobs safely and efficiently. The employer presented no evidence on fertility rates of Johnson Controls' employees but the court endorsed the employer's tacit assumption that substantially all fertile women during the tenure of their employment in the battery division would conceive and carry a child.[329] Such an assumption, while marginally reasonable, does not meet the *Criswell* standard.[330] Lumping all women into one category and assuming that all will conceive a child violates the standard set forth by *Criswell*. Furthermore it is inconsistent with the requirement under Title VII that each employee be treated as an individual and not as a member of a class.[331] Even though the majority of women may become pregnant, an employer is prohibited by Title VII from implementing a policy that would in effect penalize women who do not conceive. "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[332] Because the employer in *Johnson Controls* presented no evidence to suggest that all or substantially all fertile women in the battery division would conceive and carry a child, the court should not have concluded that the fetal protection policy was reasonably necessary to achieve the goal of industrial safety. The Seventh Circuit's emphasis on the problems created for women by lead exposure[333] is ineffective because it assumes the fact it must establish—that substantially all fertile women will conceive. Further, the evidence presented by Johnson Controls, and noted approvingly by the court, on the desirability of being cautious in light of the conservative trend in lead exposure standards[334] also skirts the real issue by assuming the fact in controversy. Needed was objective evidence that all or substantially all fertile women will become pregnant and thus create the risk that the employer's fetal protection policy seeks to avoid. No such evidence was offered.

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329. The Department of Labor, at the time the PDA was being considered, assumed "a birth rate of 66.7 births per 1,000 women 15 to 44 years of age" per year. H.R. REP. No. 948, 95th Cong., 2d Sess., 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4757. Without supporting statistics to the contrary (none were provided by Johnson Controls), and assuming that all fourteen employees in the battery division are fertile women, see 886 F.2d at 975 n.4, the employees should produce just short of one child per year. In the meantime, thirteen of the fourteen women who will not be pregnant have been denied the opportunity to work in the battery division.

330. In *Criswell*, the Court rejected the airline's argument that flight engineers (who as a group were easily distinguishable from pilots) must meet the same stringent qualifications as pilots and that it was logical to extend to flight engineers the age-60 requirement imposed by the FAA on pilots. 472 U.S. at 418.

331. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708-09 (1978).

332. *Id.* at 708.

333. *Johnson Controls*, 886 F.2d at 898.

334. *Id.* at 899.

The court in *Johnson Controls*, had no reason to conduct further analysis because it concluded that the fetal protection policy was reasonably necessary under the reasonableness standard it embraced. Under the *Criswell* standard of reasonable necessity, however, the employer, in lieu of demonstrating that all or substantially all fertile women will conceive, may establish that sex is a proxy for the desired classification—all women who conceive—by proving that it is impossible or highly impractical to deal with each woman on an individual basis.[335] The question that should have been addressed by the *Johnson Controls* court was whether it was possible for Johnson Controls to identify fertile women who had conceived and to remove them from lead-handling jobs at such time as their pregnancies are documented.

Today a pregnancy can be detected within days after implantation of the egg in the lining of the uterus.[336] After the egg is implanted, ordinarily within one week after fertilization, the tissue between the egg and the uterus (the chorion) produces the hormone human chorionic gonadotropin (HCG) which is excreted into the mother's urine and blood.[337] Non-intrusive rapid test pregnancy screening using the mother's urine as the testing medium registers the presence of HCG with high levels of accuracy, ordinarily in excess of ninety-five per cent.[338] By using blood as the testing medium, the reliability of the test is much higher.[339] The availability of this safe, accurate, and inexpensive procedure calls into question the *Johnson Controls* court's conclusion that "the magnitude of medical difficulties in detecting and diagnosing early pregnancy" justifies the extension of the fetal protection policy to all fertile women.[340] With a workplace testing program for all fertile women who wish to remain eligible for lead-handling jobs, the employer might well be satisfied that only non-pregnant women would be working in positions carrying a substantial risk of harm to the unborn child.[341] With a mandatory pregnancy testing program in place,

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335. *See supra* text accompanying note 323.

336. *See* COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS & SURGEONS, *supra* note 265, at 166.

337. *Id.*

338. *Id.*

339. *Id.*

340. 886 F.2d at 898.

341. Urine or blood testing would appear to be a greater invasion of a woman's privacy than, for example, wearing a badge to detect ionizing radiation, but such testing likely can withstand a privacy challenge. First, a blood or urine test "search" does not implicate the Fourth Amendment where the search and seizure is conducted by a private party unless the private party is acting as a government agent. Skinner v. Railway Executives Ass'n, 109 S. Ct. 1402, 1411 (interim ed. 1989). *But see* Semore v. Pool, 217 Cal. App. 3d 1087, 1094, 266 Cal. Rptr. 280, 282 (1990) (right of privacy in the California constitution protects Californians from actions of private employers as well as government agencies). Second, the employer likely can demonstrate that

the employer would be unable to demonstrate that it was impossible or highly impractical to identify individual employees who are pregnant and then to remove them, temporarily, from high lead-exposure jobs.

3. Application of the Reasonable Necessity Standard to Fertile Women

Women who have not yet conceived but who *will* conceive while holding a job involving lead exposure constitute a second group affected by the fetal protection policy. This group presents a different problem because reduction of blood lead levels following removal from a lead exposure area may require a significant length of time that frequently extends well into the pregnancy term.[342] If a woman discovered her pregnancy immediately after conception and immediately transferred out of a high lead-exposure job, the fetus within her womb might continue to be affected to an unknown extent for a period of time which may vary with a number of factors.[343] It is concern about this potential risk of unknown proportions and indeterminate length which seems to be at the heart of the Seventh Circuit's decision in *Johnson Controls*.

Under *Criswell*, the employer is required to demonstrate that all or substantially all women who conceive while working in lead handling jobs will be affected by lead sufficient to injure their unborn children.[344] This Johnson Controls was unable to do.[345] In the alternative, under *Criswell*, the employer is permitted to assert that sex is a legitimate proxy for the safety-related job classification because it is impossible to deal with employees on an individualized basis.[346] Thus, Johnson Controls could assert that it needed to exclude all fertile women because it could not identify which fertile women will be injured and pass the injury along to the unborn child. If however, one assumes that the OSHA standards governing lead are adequate to guard against injury

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safety considerations justify intrusive testing of certain categories of employers without individualized suspicion. *See Skinner*, 109 S. Ct. at 1421; *see also* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1396 (interim ed. 1989) (compelling interest in public safety outweighs privacy expectation of employees).

342. *Johnson Controls*, 886 F.2d at 878.

343. *Id.* at 882. There is disagreement among experts on this point. *See supra* note 36.

344. 472 U.S. at 414.

345. *See* 886 F.2d at 877. Johnson Controls' medical consultant admitted that only one child born to a mother employed in a lead-handling job allegedly suffered an adverse effect; the child was hyperactive. *Id.* A California court of appeals examining the same fetal protection policy also concluded Johnson Controls had failed to meet its burden. *See* Johnson Control's, Inc., v. California Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 543, 267 Cal. Rptr. 158, 171 (1990) (the mere possibility of harm to offspring falls short of a showing that "all or substantially all" female workers create such a risk).

346. 472 U.S. at 414.

to the mother and father[347] the employer's argument under the alternative to the second *Criswell* prong fails. Only by assuming that the applicable OSHA standards do not protect the fertile woman can an employer assert that unknown dangers to the mother will result in injury to the unborn child. For the court in *Johnson Controls* to approve the employer's argument is thus the equivalent of judicial notice that OSHA's regulations governing lead are incorrect and that the employer must take extraordinary measures.[348] This ruling places the court in the position of second-guessing OSHA on scientific matters, a position it should avoid.

E. Likely Result of Refusal to Uphold a Fetal Protection Policy

The Seventh Circuit in *Johnson Controls* based its approval of the fetal protection policy on two policy grounds: (1) the employer should be protected from tort liability arising from injury to the unborn child separate from any injury to the mother,[349] and (2) society has an interest in protecting the well-being of unborn children.[350] The Seventh Circuit thus indirectly expressed its belief that, in the absence of a fetal protection policy, economic injury would befall the employer as a result of tort judgments and that the interests of the unborn child would be unprotected. Neither of these results will occur.

First. if the employer complies with all applicable OSHA standards governing lead, injury to unborn children is unlikely to occur. Second, assuming that an unborn child may have been injured *in utero,* the employee may not have a duty to the child if the child was injured prior to viability. Third, assuming that an employer has a duty, an employer who acts reasonably is unlikely to breach his duty. Fourth, assuming that the employer's actions were unreasonable, it is unlikely that the cost of any tort judgement will be borne by the employer.

1. The Employer Does Not Need Protection from Tort Liability

Recent Supreme Court decisions in the area of abortion rights demonstrate that under the Constitution the rights of a fetus prior to viability are subordinate to the rights of the woman carrying it. In *Roe v. Wade*[351] the Court said that the word person in the fourteenth

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347. *See supra* notes 300-06 and accompanying text.

348. *See* 886 F.2d at 917 ("my colleagues essentially take judicial notice that OSHA is wrong . . . an extraordinary step") (Easterbrook, J., dissenting).

349. 886 F.2d at 884 n.25. The court stated: "Although costs from tort judgments are merely a secondary consideration, they are still an important and legitimate additional consideration for an employer when lead safety policies may very well affect the development of the child in its most critical stage in the mother's womb." *Id.*

350. *Id.* at 897-98.

351. 410 U.S. 113 (1973).

amendment "has application only postnatally,"[352] but that the state has a compelling interest in protecting the life of the fetus at the point of viability.[353] Prior to viability, decisions about the unborn child are within the purview of the mother and her doctor.[354] While the Court in *Webster v. Reproductive Health Services*[355] criticized the "rigid trimester analysis"[356] of *Roe v. Wade*, the Court stopped short of dismantling the distinction between viability and non-viability.[357] Thus, currently, until the fetus reaches the point of viability, it has no protection under the Constitution.

An employer may have a common law duty to an unborn child of an employee but the duty may depend upon whether the unborn child was viable or non-viable when the injury or death occurred. In Michigan, for example, in which Johnson Controls' Owosso plant is located,[358] three recent cases have addressed an employer's duty to an unborn child. In *Jarvis v. Providence Hospital*[359] the court held that the parents of an unborn child viable at the time of death *in utero* have a cause of action under the state's wrongful death statute against the mother's employer even though the fetus was not viable at the time of the employer's tortious conduct.[360] The mother was employed by the defendant hospital in a laboratory where she contracted hepatitis after cutting herself on a vial containing bilirubin control substance.[361] After reporting the accident, she was not given an injection of gamma globulin to combat hepatitis.[362] At the time of her injury she was three and one-half months pregnant.[363] Even though her unborn child was not viable at the time of the defendant's conduct,[364] the court held that the employer owed a duty of care to the unborn child independent of its duty to the mother because the defendant knew the mother was pregnant and injury to the child resulting from hepatitis was foreseeable.[365]

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352. *Id.* at 157.

353. *Id.* at 163.

354. *Id.*; *see also* Colautti v. Franklin, 439 U.S. 379, 389 (1979).

355. 109. S. Ct. 3040 (interim ed. 1989).

356. *Id.* at 3044.

357. *Id.* at 3057. The Court stated: "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.*

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

359. 178 Mich. App. 586, 444 N.W.2d 236 (1989).

360. *Id.* at 588, 444 N.W.2d at 237.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 590, 444 N.W.2d at 238.

365. *Id.* at 595, 444 N.W.2d at 240.

In addition to liability under the Michigan wrongful death statute, a Michigan employer may also be liable for *injuries* sustained by the unborn child of an employee if the child is subsequently born alive. In *Womack v. Buckhorn*,[366] the Michigan Supreme Court, relying on the reasoning of a New Jersey case[367] established the principle that a child has a " 'legal right to begin life with a sound mind and body.' "[368] The principle of *Womack* is ostensibly extended by *Monusko v. Postle*,[369] a non-employment case, where the court held that a child has a cause of action against her mother's doctor for failure to test the mother for rubella even though the child had not yet been *conceived* at the time of the doctor's actions.[370] Calling the action a preconception tort,[371] the court based the doctor's duty on the foreseeability of injury to the child resulting from failure to test and, if necessary, immunize the mother against rubella.[372] Ostensibly, an employer would be liable for injuries sustained by the unborn child of an employee resulting from the employer's tortious conduct if the injury to the child was foreseeable.

Recently in *Fryover v. Forbes*[373] the Michigan Supreme Court halted the expansion of tort liability for death of an unborn child when it held that the state's wrongful death act did not "create a cause of action for a nonviable fetus not born alive."[374] The decedent in *Fryover* had swerved her vehicle in an attempt to avoid hitting a dog owned by the defendant, resulting in the deaths of both the mother and the sixteen-week-old fetus.[375]

The question of whether an employer has a duty to an unborn child injured or killed prior to viability is thus a complex one. Additionally, because any injury to a fetus from exposure to lead may occur before conception or very early in the pregnancy, and thus well before viability, it is by no means certain that the employer has a duty to an unborn child arguably injured as a result of exposure to lead.

An employer is not in need of protection from tort liability for the second reason that an employer who acts reasonably is unlikely to

366. 384 Mich. 718, 187 N.W.2d 218 (1971).

367. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

368. 384 Mich. at 725, 187 N.W.2d at 222 (quoting *Smith*, 31 N.J. at 364, 157 A.2d at 503).

369. 175 Mich. App. 269, 437 N.W.2d 367 (1989).

370. *Id.* at 276, 437 N.W.2d at 370.

371. *Id.* at 271, 437 N.W.2d at 367-68.

372. *Id.* at 275-76, 437 N.W.2d at 369-70.

373. 433 Mich. 878, 446 N.W.2d 292 (1989).

374. *Id.* at 878, 446 N.W.2d at 292.

375. Fryover v. Forbes, 176 Mich. App. 36, 37, 439 N.W.2d 284, 284, *rev'd*, 433 Mich. 878, 446 N.W.2d 292 (1989). The trial court had granted the defendant's motion for summary judgment; the court of appeals reversed. *Id.*

breach any statutory or common law duty to the unborn child of an employee. *Jarvis*[376] is illustrative. There, the employer, a medical laboratory, failed to follow its own procedure by refusing to administer to the child's mother a gamma globulin injection.[377] Further, the mother's supervisor told her not to be concerned about the cut in spite of a manufacturer's warning indicating that the substance in the vial could transmit hepatitis.[378] The hospital-employer in *Jarvis* was hardly innocent.

In contrast, an employer who acts reasonably in addressing the issue of workplace exposure to toxic substances is unlikely to breach any duty to unborn children of workers of either sex. Diligence in the collection and dissemination of information is key to the responsible exercise of the employer's duty.[379] The employer would appear to strengthen his position by: (1) implementing longitudinal studies on the effects of certain substances on fertile employees and their children, (2) disseminating regularly to employees all pertinent information on the toxic substance in question, including risks to the employee and her or his offspring, (3) conveying all information to employees in language that can be understood by a non-scientist, (4) making available to employees information about alternative employment opportunities within the company to enhance employee decision-making, and (5) encouraging employees to ask questions to better ensure that each employee has all the information needed to make a decision that is appropriate for him or her and any subsequent children. Ultimately, the fully-informed employee is in the best position to determine the appropriateness of a higher-paying but riskier job.

Even if an employer is found to have breached his duty toward the unborn child, it is unlikely that the costs will be borne by the employer alone. In some cases, the costs may be covered by worker's compensation. In *Bell v. Macy's California*[380] the court held that even though the injuries to the employee's unborn child were a direct result of work-related negligence towards the mother,[381] the injuries were within the

376. 178 Mich. App. 586, 444 N.W.2d 236.

377. *Id.* at 589, 444 N.W.2d at 237.

378. *Id.* at 590, 444 N.W.2d at 238.

379. It is assumed that the reasonable employer complies with all appropriate OSHA standards pursuant to its specific duty under 29 U.S.C. § 654(a)(2) (1988). Johnson Controls already had many worker protection programs in place and, arguably, was acting responsibly. *See* 886 F.2d at 875-76.

380. 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 (1989).

381. The mother, seven months pregnant, suffered abdominal pains and sought the assistance of the store nurse. The nurse delayed getting the mother to a hospital. During the delay the uterus ruptured and the baby was born with severe brain damage and other injury. *Id.* at 1446-47, 261 Cal. Rptr. 449-50.

conditions of compensation of the mother and thus worker's compensation provided the exclusive remedy.[382] In other cases, injury to an unborn child would be covered by the employer's liability policy.[383] Either way, the costs associated with employer liability will be shared by society or other employers.

2. The Interests of Unborn Children Are Sufficiently Protected by OSHA Regulations

As the foregoing discussion indicates[384] the employer's observance of all applicable OSHA standards governing lead should be sufficient to protect the interests of unborn children. This is not to say that, under OSHA standards, no harm will befall any of the offspring of Johnson Controls' employees. Instead, the standards incorporate the dual interests of the employee in a safe workplace and the employer in being able to conduct economically viable operations. It is possible that, under current standards, some employees or their offspring may suffer injury as a result of lead exposure. The standards are designed to tolerate an acceptable level of risk;[385] the precise level of risk is left to the determination of those who have the required scientific expertise.

The safety net in the OSHA system is the employee herself. Some employees may be unwilling to tolerate the risk deemed acceptable by the regulators and may choose to leave a job, perhaps only temporarily, in the presence of any risk, however small. The OSHA regulations governing lead take cognizance of the employee's ability to pursue a course of action conducive to family planning.[386] In contrast, the court in *Johnson Controls* assumes that a woman is likely to run the risk of lead exposure in the hope that her child would not be harmed.[387]

In light of carefully promulgated OSHA standards coupled with employee decision-making based on full information, the employer's position in *Johnson Controls*—that precluding fertile women from lead-handling jobs is reasonably necessary to industrial safety—is not tenable.

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382. *Id.* at 1455, 261 Cal. Rptr. at 455-56.

383. *See id.* at 1458, 261 Cal. Rptr. at 457 (White, J., dissenting).

384. *See supra* notes 296-306 and accompanying text.

385. Judge Easterbrook in his dissent in *Johnson Controls* emphasized that zero is not the only acceptable level of risk. 886 F.2d at 919.

386. *See, e.g.*, Occupational Health and Safety Standards: Lead, 29 C.F.R. § 1910.1025 app. A (1989) (employees advised to notify employer of desire for medical advice regarding reproductive activity, to wear respirator when children are desired, and to protect reproductive capacity through medical surveillance).

387. 886 F.2d at 897 ("[I]t would not be improbable that a female employee might somehow rationally discount this clear risk in her hope and belief that her infant would not be adversely affected from lead exposure.").

V. CONCLUSION

There is a growing body of case and statutory law which has conferred upon the fetus rights independent of the pregnant woman who carries it.[388] One commentator has noted that "[c]onceptualizing the fetus as an entity with legal rights . . . has made possible the future creation of fetal rights that could be used against the pregnant woman."[389] Without expressing any intention to do so, the *UAW v. Johnson Controls, Inc.* court used the barely-recognized right of the fetus to healthy development to subvert the mother's right to equal employment opportunity under Title VII. If estimates of the number of women engaged in jobs that present the risk of harm to the fetus[390] are correct, literally millions of women may be affected by employer policies that prevent women from working at jobs which *may* harm unborn children. Further, it appears that society's awareness of workplace hazards is increasing.[391] Substances and processes today recognized as dangerous were paid no heed only twenty years ago.[392] Workplace processes today considered safe may in the twenty-first century be deemed hazardous or at least less safe than originally thought. As a result the estimate of twenty million women workers potentially affected could be too low.

Johnson Controls has a general duty to conduct its workplace practices in accordance with federal and state regulations but has no legal obligation to go beyond what OSHA requires for the creation of a safe workplace.[393] The only general duty regarding safety imposed on an employer comes from the general duty clause of the Occupational Safety and Health Act.[394] The statute, on its face, refers only to the general duty owed by the employer to the employee.[395] To date, no

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388. *See* Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 142, 425 A.2d 92, 94 (1980) (" 'A viable unborn child, is in fact, biologically speaking, a presently existing person and a living human being . . . .' ") (quoting White v. Yup, 85 Nev. 527, 536, 458 P.2d 617, 622 (1969)).

389. Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 614 (1986).

390. The EEOC estimates that 20 million jobs involve exposure to reproductive hazards. 45 Fed. Reg. 7514 (1980).

391. *See* Occupational Safety and Health Act, 29 U.S.C. § 651 (1988).

392. The Occupational Safety and Health Act, which regulates hazardous and unsafe workplace practices, is itself only twenty years old. *See id.*

393. The federal system of promulgating workplace regulations which involves the publication of proposed rules followed by a public comment period seems better able to accommodate the interests of all appropriate parties than ad hoc actions taken by employers who may or may not have sufficient information on technical and medical issues of enormous complexity.

394. *See* 29 U.S.C. § 654(a)(1) (1988) which provides: "(a) Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . ."

395. *Id.*

court has construed the general duty clause to include a duty to the unborn children of employees.[396] Johnson Controls does, however, have an explicit legal obligation under Title VII to refrain from making workplace decisions based upon sex. Johnson Controls' volunteerism here is misplaced and removes from the woman a decision that she is capable of making for herself and for any children she may choose to bear.

Because Johnson Controls' fetal protection policy affects only women, it is on its face non-neutral and must be justified if at all as a BFOQ. Under a BFOQ analysis the interests of only the worker herself should be taken into account. The primary focus of the analysis should be on whether the employee can do her job, *not* whether the fetus will be injured. Title VII contains no reference to the interests of unborn children. In addition, the interpretation of Title VII to include the interests of consumers should not be further extended to embrace the interests of unborn children because unborn children are clearly distinguishable from customers. Last, the interests of the fetus are adequately protected by OSHA regulations governing lead.

Under the standard set forth in *Western Airlines, Inc. v. Criswell*, an employer who implements a policy affecting fertile and pregnant women is required to demonstrate that all or substantially all women will become pregnant, suffer injury to their reproductive systems, and pass the injury along to their unborn children. In the alternative the employer must demonstrate that it is impossible or highly impractical to identify only those who will become pregnant or be injured. Johnson Controls could demonstrate neither. First, the employer could not demonstrate that all fertile employees would become pregnant. Second, the employer could not demonstrate that all pregnant women would suffer injury and pass it along to their offspring. While an employer can assert that it is difficult to determine which if any woman will be injured reproductively, in the presence of uncertainty it is more rational

396. In a case both interesting and disturbing, the Court of Appeals for the District of Columbia Circuit held that an employer's fetal protection policy did not constitute a "hazard" under OSHA's general duty clause. *See* Oil, Chem. & Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444, 448 (D.C. Cir. 1984). The employer's policy gave fertile women working at a plant where lead levels were said to be unsafe for women of childbearing age the choice of sterilization or transfer to other, lower paying jobs. *Id.* at 446. Five women underwent sterilization. *Id.* OSHA issued a citation alleging that the fetal protection policy was a hazard within the general duty clause. *Id.* at 447. The D.C. Circuit disagreed and, in the process, put its stamp of approval on American Cyanamid's decision to preclude fertile women from lead-handling jobs. Further, in dicta, the court stated that the employer could not have been charged under the Act if it had shut down its organic pigments department in order to comply with the applicable standard—30 micrograms of lead per 100 grams of whole blood. *Id.* 446. While the court said that the employer had to "protect fetuses" it is clear that the court adopted the OSHA general standard for lead. *Id.* The employer's duty, therefore, was to the employee rather than the fetus.

to defer to the judgment of OSHA regulators who have established lead exposure standards with the interests of all fertile workers and their offspring in mind.

In the event that the unborn child of a worker is injured, the employer is unlikely to bear the costs of any judgment: the employer may simply have no duty to a fetus injured prior to viability, reasonable conduct on the part of the employer is likely to preclude the possibility of breach, and any damages incurred may be covered by insurance or worker's compensation.

A fetal protection policy is an anathema to the letter and spirit of Title VII, is unnecessary in light of OSHA, and is designed to protect against employer liability that is unlikely to materialize. Furthermore, it presumes that employers must protect the interests of potential offspring of employees. For all these reasons the most narrow defense is appropriate.

Joanne Jocha Ervin