Warning: Denial of Fetal Protection under Title VII May Be Hazardous to the Health of Industry and Society

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Introduction

Over the past ten years, an increasing number of chemicals used in the workplace have been identified as potential reproductive hazards. Many employers have responded to these risks by adopting "fetal protection policies," which prohibit fertile women from working in toxic environments. These fetal protection policies have created a conflict with the prohibition against sex discrimination. Because these policies affect only women's jobs, the courts consider this conflict exclusively in the context of Title VII of the Civil Rights Act of 1964. UAW v. Johnson Controls, Inc. provided the U.S. Supreme Court with the opportunity to resolve the conflict between employers protecting women's reproductive health and violating Title VII by discriminating on the basis of sex. Instead, the Court's holding left industry with no means of shielding its female workers from fetal toxics without violating Title VII, and with no way of protecting itself against potential future liability.

This Comment examines the Supreme Court's recent decision in Johnson Controls. Part I explores the background of Title VII, its amendment by the Pregnancy Discrimination Act and the confusion of the federal circuit courts on the proper application of Title VII for determining the validity of fetal protection policies. Part II addresses the facts of the case and the reasoning adopted by the Court. Part III focuses upon a general analysis of the case, discusses how the Court's de-

2. Employers who have adopted fetal protection policies include American Cyanamid Co., B. F. Goodrich Co., Dow Chemical Co., Environmental Protection & Aeration Systems, Inc., Firestone, General Motors Corp., Monsanto, Olin Corp. and St. Joe Minerals Corp. See Riffaud, supra note 1, at 843 n.3.
3. Fertile women have been defined as all women who are not certifiably sterile. See UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1200 (1991). See also Wright v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982) (all women between ages 5 and 63 are assumed fertile).
7. Id.
cision may affect the future of businesses whose operations expose workers to fetal-toxic hazards and comments on society's interest in the problems the decision may create.

I. BACKGROUND

A. Title VII

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of race, sex, national origin or religious beliefs in hiring and employment practices. The provision was passed to protect racial minorities from historical barriers to employment. In an unsuccessful attempt to defeat the bill, Congress added sex to the list of prohibitions against discrimination. Since the bill's enactment, courts have vigorously defended women's rights against job discrimination. Under Title VII, two major claims of discrimination have emerged: disparate treatment and disparate impact.

Disparate Treatment

Disparate treatment claims arise in two situations. The first is facial or overt discrimination, which occurs when an employer adopts a practice or policy of treating women differently from men on the basis of sex. The only affirmative defense available to an employer for an allegation of facial discrimination is the existence of a bona fide occupational qualification (BFOQ). This statutorily created exception permits discrimination on the basis of sex only when it is "reasonably necessary to the normal operation of that particular business or enterprise."

The Supreme Court has narrowly interpreted the BFOQ exception. The exception has been found to justify discrimination only if the employer has a reasonable cause to believe "that all or substantially all women would be unable to perform safely and efficiently the duties of

10. Hamlet, supra note 4, at 1112.
11. Id.
12. Id.
14. Williams, supra note 4, at 668.
  (c) Notwithstanding any other provision of this title, (1) 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 . . . .

Id.
16. Id.
the job involved."® For example, the courts have allowed the BFOQ because of safety concerns (the "safety exception"), but stressed that such exceptions are applied only in narrow circumstances.® The safety exception has been applied to cases in which there is a concern for the safety of a third party that is indispensable to the business in question. In Dothard v. Rawlinson,® the Court determined that hiring only male guards in a maximum security men's prison was a BFOQ because the ability to keep order and maintain security was essential to the job where a woman's presence could pose a threat to herself, other security personnel and the inmates.® Justice Marshall, in his minority opinion in Dothard, emphasized that although he did not approve of the "sex discrimination condoned by the majority," he felt that it was fortunate the majority decision was carefully limited to the facts, namely, the "inhuman conditions in Alabama prisons."®

The Court also found a safety exception in Western Air Lines, Inc. v. Criswell,® a case arising under the Age Discrimination in Employment Act of 1967.® Affirming the Ninth Circuit, the Court held that to establish a BFOQ an employer must show, among other things, that age can be legitimately used as a safety-related job qualification when it is not practicable to deal individually with older employees.® Such job qualification must be "reasonably necessary to the essence of his business [as] here . . . safe transportation . . . ."® Accordingly, courts have upheld facial sex discrimination in very limited situations.

The second situation in which a disparate treatment claim arises is pretextual discrimination. This occurs when an employer adopts a practice or policy that is facially neutral but the employee asserts that the policy is only a pretext for intentional discrimination on the basis of sex.®

Disparate Impact

A disparate impact claim, by contrast, arises when an employer's facially neutral policy has a disproportionately adverse effect on one group (such as women) and not on another (such as men) and is not

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® Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).
® Id. at 321.
® Id. at 336-37.
® Id. at 346-47 (Marshall, J., concurring in part and dissenting in part).
® Id. at 414.
® Id. at 413 (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (1976)).
® For cases failing to find a BFOQ safety exception, see Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985) (mandatory retirement age for firefighters does not automatically constitute a BFOQ in an age discrimination case); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (telephone company failed to prove that heavy lifting and other job requirements constituted a BFOQ).
® See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); Jason, supra note 4, at 460.
justified by a business necessity.\(^2\) This might occur, for example, when an employer bases an employee's salary on past salary.\(^2\) A disparate impact may thus be created in a world in which women have historically been paid less than men.\(^3\)

Unlike disparate treatment claims, the employer's motive is not significant in disparate impact claims because the focus is on the consequences of the employer's practices.\(^4\) The only defense available to the employer for a disparate impact claim is the judicially created business necessity defense.\(^5\) Under the business necessity test, the employer must prove that: (1) there is an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business; (2) the practice effectively carries out the business purpose it is alleged to serve; and (3) there are no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or at least equally accomplish it, with less disparate impact.\(^6\)

**Burdens of Proof**

In *McDonnell Douglas Corp. v. Green*,\(^7\) the Supreme Court set forth a three step scheme for analyzing a disparate treatment case: (1) the employee's prima facie showing, (2) the employer's articulated reason and (3) a pretext.\(^8\) The three steps address only the element of intent to discriminate for which the employee bears the ultimate burden of proving that she has been the victim of intentional discrimination.\(^9\) In establishing her prima facie case, the employee must show that she was treated differently than a person from another gender or race, that the employer intended to discriminate and that the difference in her treatment was caused by the employer's intent to discriminate.\(^10\)

An employer can defend an employee's disparate treatment charge by arguing that there was a "legitimate, nondiscriminatory reason for the [plaintiff's] rejection."\(^11\) The employer must actually articulate a reason for the action because a simple denial of the intent to discriminate will not suffice.\(^12\) The "real" limit on what will be accepted as the employer's reason is credibility.\(^13\) The less the reason is based on "job

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\(^4\) Id.


\(^6\) Id. at 431 (establishing business necessity defense).


\(^8\) 411 U.S. 792 (1973).

\(^9\) Id. at 802-04.

\(^10\) 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 5.7, at 277 (2d ed. 1988).

\(^11\) Id. § 5.8, at 279-80.

\(^12\) Id. § 5.4.4, at 260 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

\(^13\) Id.

\(^14\) Id. at 261.
performance” or “legitimate needs of the business,” the less likely it will be accepted as the actual reason behind the allegedly discriminatory treatment.\textsuperscript{41} To the extent that the employer can introduce rebuttal evidence sufficient to overcome the presumption that discrimination was the reason, a question of fact is created as to whether the employer’s intent was discriminatory or based on a legitimate reason.\textsuperscript{42}

Once this question of fact is raised, the employee may surrebut the employer’s evidence by focusing on more specific elements of the employer’s behavior than she raised in her prima facie case. She may allege that the reason asserted by the employer was merely a pretext to hide the real reason, which was to intentionally discriminate.\textsuperscript{43} In doing so, the employee may show that the employer’s employment practices and policies conform to a general pattern of discrimination against a protected group.\textsuperscript{44}

In Griggs v. Duke Power Co.,\textsuperscript{45} the U.S. Supreme Court held that once an employee showed a particular employment practice had an adverse impact upon members of a protected class (thereby establishing a prima facie case), the employer had the burden of showing that the employment practice has a “manifest relationship to the employment in question.”\textsuperscript{46} The Court stated that “[i]f an employment practice that operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited.”\textsuperscript{47}

In Wards Cove Packing Co. v. Atonio,\textsuperscript{48} the Supreme Court addressed the allocation of the burden of proof in a disparate impact case.\textsuperscript{49} In that case, a group of plaintiffs claimed that several of the employee selection practices had an adverse impact upon their likelihood of being hired or promoted.\textsuperscript{50} Although the selection practices used by the employer were facially fair, they had the practical effect of disqualifying a disproportionate number of minority group members. The Court held that an employer carries the burden in a disparate impact case of offering evidence of business necessity for its employment practice.\textsuperscript{51}

Under Wards Cove, once an employee established a prima facie case of discrimination, the employer merely needed to offer evidence that the “challenged practice serves, in a significant way, the legitimate employment goals of the employer.”\textsuperscript{52} The employer was not required to prove that the challenged practice was “essential” or “indispensable” to

\textsuperscript{41} Id.
\textsuperscript{42} Id. at 261-62.
\textsuperscript{43} Id. § 5.4.5, at 262.
\textsuperscript{44} Id. at 263.
\textsuperscript{45} 401 U.S. 424 (1971).
\textsuperscript{46} Id. at 432.
\textsuperscript{47} Id. at 431.
\textsuperscript{48} 490 U.S. 642 (1989).
\textsuperscript{49} Id. at 656.
\textsuperscript{50} Id. at 647-48.
\textsuperscript{51} Id. at 659.
\textsuperscript{52} Id.
the employer's business. Once such evidence was offered, the employee carried the ultimate burden of proving that a challenged practice was either not justified by business necessity or should be considered a pretext for discrimination for some other reason. Wards Cove further held that where plaintiffs sought to prove discrimination based upon a disparate impact theory, they must identify the specific employment practice that had the effect of disfavoring them in the selection process.

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991 (CRA). The Act reverses parts of recent Supreme Court decisions, including Wards Cove, making it more attractive for employees to bring discrimination suits by providing increased damages and jury trials. The CRA addresses Wards Cove in three significant respects. First, the CRA's express purpose is to restore and codify the concepts of "business necessity" and "job relatedness" as used by the Supreme Court in Griggs and in other decisions prior to Wards Cove. Under the CRA, if the employee is able to establish a prima facie case, the employer in a disparate impact case can prevail only by demonstrating either that the challenged practice does not in fact cause the disparate impact or by proving that the practice is "job related" and justified by "business necessity."

Second, the legislation includes an exception to the Wards Cove requirement that plaintiffs must identify the specific employment practice that caused the discrimination. Under the CRA, plaintiffs can treat the entire decision-making process as one employment practice if they demonstrate that the elements of the employer's decision-making process cannot be separated for purposes of analysis. Finally, the CRA reinforces the principle that claims for disparate treatment and claims for disparate impact must be treated as distinct by expressly prohibiting an employer from raising the business necessity defense to a claim for intentional discrimination.

B. The Pregnancy Discrimination Act

Prior to 1978, there were mixed views concerning how childbearing or pregnancy discrimination fit into a Title VII analysis. During the early 1970s, federal courts generally interpreted sex discrimination laws broadly to include protection of pregnant women and those with
childbearing capacity. In 1972, the Equal Employment Opportunity Commission (EEOC) adopted guidelines stating that Title VII prohibited policies disadvantaging women because of pregnancy, childbirth or related medical conditions. Lower courts interpreted these guidelines to mean that pregnancy discrimination constituted sex discrimination, which could only be justified by the BFOQ exception.

Despite the view generally held by the EEOC and the courts, the Supreme Court in *General Electric Co. v. Gilbert* held that discrimination on the basis of pregnancy did not fall within sex discrimination under Title VII. Justice Rehnquist, writing for the Court, reasoned that excluding pregnancy-related disabilities from an employer's disability insurance program had not been shown to have a disparate impact on women. The Court characterized the program as covering all risks shared by men and women and providing an insurance package worth as much to women as to men. The exclusion of pregnancy was merely the elimination of an extra disability unique to women. In response to *Gilbert* and similar other cases, Congress enacted the Pregnancy Discrimination Act (PDA). The PDA amended the definition of sex discrimination under Title VII to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions ...."

C. Application of Title VII and the PDA to Fetal Protection Policies

Prior to *U.A.W. v. Johnson Controls, Inc.* and since the passage of Title VII, there had been only three reported circuit court cases in which a plaintiff used Title VII as the basis for attacking fetal protection policies. An amicus brief filed in *Johnson* noted that these cases "devised

63. See Williams, supra note 4, at 673-74 n.193 (listing pregnancy discrimination cases prior to the enactment of the Pregnancy Discrimination Act).
64. 29 C.F.R. § 1604.10(a) (1991). The EEOC guidelines state: "A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is a prima facie violation of title VII." Id.
65. See Williams, supra note 4, at 673-74 (identifying decisions during the 1970s as the first phase of pregnancy-based discrimination jurisprudence under Title VII).
67. Id. at 136.
68. Id. at 138.
69. Id.
70. Id. at 139.
72. Id. The PDA provides in pertinent part: The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .
73. See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982). A number of early cases were settled, see Williams, supra note 4, at 642 n.11. See also Doerr v. B.F. Goodrich Co., 484 F. Supp. 820 (N.D. Ohio 1979) (early fetal protection case, it was dismissed on jurisdictional grounds). For a case decided following the Seventh Circuit decision in *U.A.W. v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir.
convoluted methodologies” in order to treat fetal protection policies as “gender neutral” practices with only an incidental disparate impact on women,\textsuperscript{74} thus allowing employers to defend their fetal protection policies by using the business necessity defense.\textsuperscript{75}

In \textit{Zuniga v. Kleberg County Hospital},\textsuperscript{76} the plaintiff argued that she had established a prima facie case of sex discrimination by showing that her employer’s facially neutral policy of terminating pregnant x-ray technicians burdened women’s employment opportunities without affecting those of men. The plaintiff also contended that the hospital had failed to establish a valid business necessity defense for the policy.\textsuperscript{77} Zuniga, the first female x-ray technician to be hired at the hospital, was informed that if she became pregnant, she would have to resign or be terminated, and she would not be entitled to maternity leave.\textsuperscript{78} She subsequently became pregnant and was told to resign or be fired.\textsuperscript{79}

The Fifth Circuit, noting that the PDA did not apply because the termination occurred prior to its effective date,\textsuperscript{80} used a benefit/burden analysis in ruling that Zuniga had established a prima facie case of sex discrimination.\textsuperscript{81} Next, the court found that the hospital could have utilized an “alternative, less discriminatory means of achieving its business purpose.”\textsuperscript{82} By examining the hospital’s leave of absence policy, the court found that a leave of absence could be granted for, among other things, family health,\textsuperscript{83} and to prevent “fetal death, congenital abnormalities, small head, mongolian, or missing organs . . . .”\textsuperscript{84} The court thus held that the same reason cited by the hospital for terminating Zuniga could have justified giving her a leave of absence.\textsuperscript{85} Because the hospital failed to use a less discriminatory alternative, its business purpose was determined a pretext and the business necessity defense failed.\textsuperscript{86} The court declined to consider whether avoidance of tort liability might constitute a business necessity, but acknowledged that “[a]lthough concern over fetal health alone is arguably not the province of the employer, but of the mother” a tort suit brought by a deformed child could be a financial burden, seriously disrupting the safe and effi-

\textsuperscript{74} See Brief of the State of California and the California Fair Employment and Housing Commission as Amici Curiae in Support of Petitioners at 4, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) [hereinafter Amicus Brief].
\textsuperscript{75} Id.
\textsuperscript{76} 692 F.2d 986 (5th Cir. 1982).
\textsuperscript{77} Id. at 989. The court did not consider the issue of whether the impact of the hospital’s policy was a form of disparate treatment.
\textsuperscript{78} Id. at 988.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 989 n.6.
\textsuperscript{81} Id. at 991.
\textsuperscript{82} Id. at 992.
\textsuperscript{83} Id. at 992, 993.
\textsuperscript{84} Id at 993.
\textsuperscript{85} Id. at 993-94.
\textsuperscript{86} Id. at 994.
cient operation of the business.87

Two weeks after the decision in Zuniga, the Fourth Circuit decided Wright v. Olin Corp.88 Wright was the first fetal protection policy case reviewed after the effective date of the PDA. The plaintiffs alleged that Olin's fetal protection policy was a pervasive effort to limit women's advancement or seniority.89 The allegations appeared to resemble a "classic case" of covert discrimination under disparate treatment as applied in McDonnell Douglas Corp. v. Green,90 which Olin disputed by contending that the plaintiffs failed to prove disparate treatment as they failed to prove that the business reason—fetal protection—was pretextual.91

The plaintiffs went on to argue that McDonnell Douglas did not apply. They claimed that their undisputed evidence showed an overt intent to discriminate on the part of Olin because the program had a manifestly adverse effect upon the employment opportunities of women only.92 The conflict between the parties was whether Olin had the burden of articulating a nondiscriminatory business reason for the fetal protection policy or instead had the burden of proving an affirmative defense by the BFOQ or business necessity.93

The Fourth Circuit conceded its difficulty in making the facts of this case fit into a Title VII analysis but concluded that the disparate impact/business necessity analysis was the most appropriate standard to apply.94 The court ruled that the disparate treatment/BFOQ analysis was inappropriate as it would prevent the employer from asserting a business justification defense that it would otherwise be entitled to assert under Title VII.95

There were obvious policy reasons for the court's decision to apply the disparate impact/business necessity analysis. The court justified its decision on the conclusion that the distinction between facial discrimination and disparate impact should not prevent an employer from raising fetal safety as a justification for discriminating on the basis of pregnancy.96 The court believed the defenses were distinguishable, noting that the business necessity defense was "obviously wider" than the BFOQ defense.97 The court recognized the social implications of the problem, but noted that any answers are the subject of national policy, which has not been addressed by Congress.98 This case was the

87. Id. at 992 & n.10.
88. 697 F.2d 1172 (4th Cir. 1982).
89. Id. at 1179.
91. Id. at 1183; Amicus Brief, supra note 74, at 5.
92. Wright, 697 F.2d at 1183.
93. Amicus Brief, supra note 74, at 6 & n.3 (stating that after Wards Cove, the business defense is no longer an affirmative defense for disparate impact discrimination).
94. Wright, 697 F.2d at 1184-85 & n.21.
95. Id. at 1185 n.21. The court also rejected the PDA as "conceptually unsound." Id. at 1184 n.17.
96. Amicus Brief, supra note 74, at 7.
97. Id. at 8 (citing Wright, 697 F.2d at 1185 n.21).
98. Wright, 697 F.2d at 1188.
court's attempt to "divine" congressional intent.\textsuperscript{99} Hence, because the BFOQ is such a narrow defense that could not be established here,\textsuperscript{100} the court had to look to a broader statutory framework and judicial interpretation.\textsuperscript{101}

Two years after \textit{Wright}, the Eleventh Circuit addressed the fetal protection issue in \textit{Hayes v. Shelby Memorial Hospital}.\textsuperscript{102} Shelby Memorial Hospital fired Hayes, an x-ray technician, after she advised her supervisor of her pregnancy.\textsuperscript{108} The hospital claimed that Hayes was terminated because exposure to ionizing radiation might harm the fetus and because the hospital was unable to find alternative employment for her.\textsuperscript{104} Unlike the Fourth Circuit in \textit{Wright}, the Eleventh Circuit recognized that under Title VII, as amended by the PDA, a policy based on pregnancy cannot be deemed neutral.\textsuperscript{105} The court initially determined \textit{Hayes} was a facial discrimination case,\textsuperscript{106} finding that if an employer cannot overcome the burden of proving that its policy is not facially discriminatory, its only defense is the BFOQ.\textsuperscript{107} Therefore, the court held that unless the hospital could show a direct relationship between the policy and a fertile or pregnant woman's actual ability to perform her job, the hospital's defense would fail.\textsuperscript{108} The Eleventh Circuit, however, similar to the \textit{Wright} court, looked to the business necessity defense to find a lower standard than that required to prove a BFOQ.\textsuperscript{109} It sought to find a way to make the employer's pregnancy-based discrimination a facially neutral policy with an "incidental" disparate impact.\textsuperscript{110} The court allowed the hospital to rebut an employer's prima facie case of facial discrimination by proving "that a policy applying only to women or pregnant women employees is justified on a scientific basis and is not necessary to protect the offspring of male employees. . . ."\textsuperscript{111} In so proving, the court reasoned, the employer has proven that the policy is neutral in that it protects offspring of all employees.\textsuperscript{112} Nevertheless, because the policy has a disproportionate impact on women, even if the employer rebuts the presumption, the employee still has an automatic prima facie case of disparate impact.\textsuperscript{113} However, under the disparate impact analysis, the employer has the "wider" business necessity defense.

The court also rejected the hospital's argument that avoidance of

\begin{itemize}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Id.} at 1186 n.21.
\item \textsuperscript{101} \textit{Id.} at 1188.
\item \textsuperscript{102} 726 F.2d 1543 (11th Cir. 1984).
\item \textsuperscript{103} \textit{Id.} at 1546.
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.} at 1547.
\item \textsuperscript{106} \textit{Id.} at 1547-48.
\item \textsuperscript{107} \textit{Id.} at 1549.
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{See Amicus Brief, supra note 74, at 10.}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Hayes}, 726 F.2d at 1552.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.}
\end{itemize}
potential tort liability is a business necessity defense. It stated that potential liability is too contingent and broad to be considered a business necessity. Although an employer could be justified in dismissing an employee for not complying with safety procedures designed to protect the employee or the employee's offspring, the court noted that the focus is on health and safety and not possible litigation.

The circuit courts had stretched to find that fetal protection policies should be analyzed under a disparate impact theory affording employers the "less narrow" business necessity defense. It was at this stage that the U.S. Supreme Court granted certiorari in *UAW v. Johnson Controls, Inc.*

II. INSTANT CASE

A. Facts

Johnson Controls, Inc. (Johnson) is a manufacturer of automotive and specialty batteries of which lead is a principle component. Because of the toxicity of lead, Johnson has a comprehensive hygiene program for controlling employees' lead exposure and absorption. Further, in response to the mounting evidence of the significant health risks of exposure to lead, and at the specific urging of its plant physicians and outside medical consultants, Johnson, in 1982, adopted a fetal protection policy designed to protect unborn children and their mothers from the harmful effects of lead exposure. The policy excluded women of childbearing capacity from working in environments in which their blood-lead level could rise above thirty micrograms. It provided that fertile or pregnant women would not be hired for, or be allowed to transfer into, jobs in which the lead exposure was excessive, nor would they be hired for, or be allowed to transfer into, any position from which they could be promoted to a position with excessive exposure to lead. Female employees were required to medically document their inability to have children before they would be considered for these positions. The women removed from their jobs as a result of the policy were transferred to other positions at Johnson without loss of pay or benefits.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, United Auto Workers and a group of individual employees (UAW), brought a class
action suit in the United States District Court for the Eastern District of Wisconsin, alleging that Johnson's fetal protection policy violated Title VII by discriminating on the basis of sex.  

B. Lower Court Rulings

The district court granted summary judgment for Johnson, applying the business necessity test. The Seventh Circuit affirmed en banc the district court's summary judgment in favor of Johnson. The majority directly acknowledged the decisions in Wright and Hayes holding that the business necessity defense can be appropriately applied to fetal protection policy cases under Title VII. The circuit court concluded that Johnson Controls had shown that a fetal protection policy was a reasonable necessity for industrial safety.

The Seventh Circuit also analyzed the fetal protection policy under the BFOQ defense. Citing Dothard v. Rawlinson, the court recognized that in resolving whether a BFOQ was valid depended on the employer reasonably believing that all or substantially all fertile women would be unable to perform the job safely and efficiently. The court concluded that Johnson's policy was supported by a BFOQ defense. With this decision, the Seventh Circuit became the first circuit court to hold that a fetal protection policy could be upheld as a BFOQ.

C. The Majority

Justice Blackmun delivered the opinion of the Supreme Court in UAW v. Johnson Controls, Inc., which reversed the Seventh Circuit's decision. The Court concluded that Johnson could not establish that its policy met the BFOQ exception to Title VII. The opinion was based on the plain language of the PDA, which prohibits employers from discriminating against female employees because of their ability to become pregnant. The Court interpreted the PDA as providing that a policy based on pregnancy is facially discriminatory and the employer's only defense is a BFOQ.

The Court began with a departure from the views of Wright and Hayes. Those courts had reasoned that the challenged fetal protection
policies were facially neutral. Employers were therefore allowed to justify their policies under the business necessity defense. The Court established that Johnson’s policy was not neutral because it did not apply equally to men and women. Men were allowed to choose whether they wanted to work in a job that was a risk to their reproductive health. The Court also noted that, even though Johnson’s policy may not have had a discriminatory intent, that was not sufficient to convert the overtly discriminatory policy into a neutral policy with a discriminatory effect.

The Court supported its finding that Johnson’s policy was facially discriminatory by using the language of the PDA to show that, for all Title VII purposes, discrimination because of pregnancy is facial discrimination on the basis of sex. Because Johnson chose to treat all female employees as if they could become pregnant, the Court concluded the policy demonstrated such discrimination.

Next, the Court turned to the issue of whether Johnson should be allowed to discriminate on the basis of sex by proving that its fetal protection policy was a BFOQ. For this purpose, the Court reiterated the restrictive scope of the BFOQ as applied in its prior decisions in Dothard v. Rawlinson and Western Air Lines, Inc. v. Criswell. Johnson argued that its fetal protection policy fit into the safety exception, a judicially recognized BFOQ. Refusing to expand the safety exception to fetal protection policies, the Court reasoned that neither conceived nor unconceived fetuses can be considered third parties indispensable to the battery manufacturing business. The Court cited Judge Easterbrook’s dissenting opinion in the Seventh Circuit's decision in which he observed that it was a play on words to say that “the job” at Johnson to manufacture batteries without risk to the fetus was the same as “the job” at Western Airlines to fly planes without crashing. The Court limited the safety exception to those situations where sex or pregnancy affected the employees’ ability to perform their jobs. The Court disposed of the concern for employers’ tort liability raised by Justice White in his concurring opinion by stating that, if an employer fully informs the woman of the risks involved in the job, and has not acted negligently, there is but a remote chance that the employer will be held liable. Based on these findings, the Court ruled that Johnson failed to establish a

137. Id. at 1203.
138. Id.
139. Id.
140. Id. at 1203-04.
141. Id. at 1203.
144. Johnson, 111 S. Ct. at 1205.
145. Id. at 1206.
146. UAW v. Johnson Controls, Inc., 111 S. Ct. at 1207 (citing UAW v. Johnson Controls, Inc., 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)).
147. Id. at 1206.
148. Id. at 1208.
BFOQ and therefore its policy violated Title VII as amended by the PDA.

D. The Concurring Opinions

There were two concurring opinions in the Johnson case. First, in a brief opinion, Justice Scalia elaborated on Judge Easterbrook's view by saying that not only was Johnson prohibited from excluding fertile women from jobs, but that Title VII also gives employees the power to make employment decisions that affect their families. He also addressed the question of whether an employer's compliance under Title VII is required even if it violates state tort law by stating that it is reasonable to believe that Title VII has "accommodated" state tort law through the BFOQ exception.

Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, wrote a separate concurring opinion agreeing with the majority that Johnson's fetal protection policy was facially discriminating and constituted a violation of Title VII unless a BFOQ exception could be proven. Justice White's opinion, however, criticized the majority for reading the BFOQ defense so narrowly that it could never be used to warrant a sex-specific fetal protection policy. According to Justice White, the majority's interpretation of the BFOQ defense meant that even pregnant women could not be prevented from working in areas of high exposure to chemicals toxic to their fetuses.

Justice White argued that avoiding substantial tort liability is a justification for preventing women from working in certain jobs. He also voiced his displeasure with the majority's view that employers have little to fear from liability suits if they inform women of the risk, and if the employer has not acted negligently. He found this to be of little comfort to employers, since: (1) it is not clear whether Title VII preempts state tort liability; and (2) even though employers may avoid claims brought by employees, they cannot escape the claims brought by injured children. Justice White considered the general rule that parents cannot waive their children's rights to sue because of the parents' own negligence. Every state currently allows children born alive to sue in tort for prenatal injuries caused by the negligence of third parties. Furthermore, an increasing number of jurisdictions have allowed recovery for torts causing prenatal injuries prior to conception.

In his opinion, Justice White argued that the majority's limiting of
the safety exception to those situations where sex or pregnancy affected the employees' ability to perform their jobs did not support its conclusion that a fetal protection policy could not be justified as a BFOQ. Justice White asserted that Dothard and Criswell made it clear that avoiding substantial safety risks to third parties was not only an inherent part of an employee's ability to perform a job, but also an inherent part of the usual operations of an employer's business. He pointed out that protecting fetuses while performing the duties of battery manufacturing was as legitimate a concern as was the safety of prison inmates or airline passengers. Furthermore, Justice White noted that the legislative history of Title VII gives examples of permissible sex discrimination, and in none of those situations did sex interfere with the employee's ability to perform the job. Disagreeing with the majority's claim that the PDA restricted the use of the BFOQ defense, Justice White contended that Congress did not intend for the PDA to alter an employer's defenses under Title VII. Congress intended to redefine sex discrimination to include pregnancy and childbirth but not to change, in any other way, how Title VII is applied to sex discrimination.

Although he disagreed with the majority's narrow application of the BFOQ defense, Justice White concluded that Johnson's fetal protection policy reached too far in excluding all fertile women, regardless of age, and in excluding women from jobs that might advance into positions in which the duties require high quantities of lead exposure. He also agreed that Johnson had not shown that its policy was reasonably necessary to its usual business operations, as Johnson had incurred no increase in fetal risk or associated costs since the implementation of its fetal protection policy in 1982.

III. Analysis

The majority opinion in Johnson concluded that sex-specific fetal protection policies are not legal under Title VII unless the safety of third parties is related to job performance and is relevant to an employee's ability to perform the assigned tasks. This decision has the effect of saying that under Title VII, employers are allowed to consider only production-related concerns and are prohibited from recognizing external societal/moral judgments in determining how businesses should operate. The opinion is inconsistent with relevant precedents, statutory language and the legislative history. It also exhibits a total disregard for the employer's legal duty and society's interest in the health of its members. Protecting third parties, including fetuses, from serious health and

159. Id. at 1213.
160. Id.
161. Id.
162. Id. at 1214 n.8. The examples were a female nurse hired to care for an elderly woman, an all-male baseball team, a masseur and a washroom attendant. Id.
163. Id. at 1214.
164. Id. at 1215.
165. Id.
safety risks arising directly out of the manufacturing process is reasonably necessary to a responsible employer’s normal operation and thus can constitute a BFOQ in narrow circumstances.

A. Relevant Precedents, Statutory Language and Legislative History

Each circuit court considering the issue prior to Johnson has struggled with the limits on the BFOQ as a defense to facially discriminatory fetal protection policies. In Wright, the court was admittedly attempting to find the “probable” congressional intent in the absence of specific congressional expression regarding fetal protection policies. In order to find those answers, the court had to devise a way to instead apply a business necessity defense, providing more latitude to explore the conflict between fetal safety and sex discrimination. In Hayes, although the court acknowledged the presumption that the fetal protection policy was facially discriminatory and ruled that the district court’s findings of fact were sufficient to support a holding of facial discrimination, it allowed the employer to rebut the presumption of a disparate impact in order to be “completely fair” to the employer. Thus, it was clear from these cases that the courts were reaching for a reasonable solution to fetal protection policies.

The Supreme Court in Johnson rejected the precedent set by the circuit courts and essentially disposed of the disparate impact analysis and business necessity defense for fetal protection policies, leaving only a BFOQ defense, which the court applies only under the most extreme circumstances. The majority in Johnson also pointed to its decisions in Dothard and Criswell to support its restrictive interpretation of the safety exception as a BFOQ. As Justice White indicated in his concurring opinion, protecting fetal safety while performing the duties of battery manufacturing is as legitimate a concern as is the safety of prison inmates and airline passengers. In the Seventh Circuit’s decision in Johnson, the court acknowledged that the safety exception in Dothard was extremely limited because more was at stake than a woman’s decision to accept the risks of employment in a maximum security male prison. However, the court felt that there was similarly more at stake than a woman’s decision to work in a high lead exposure such as the “intellectual and physical development” of her unborn child. The Seventh Circuit feared that a female employee could somehow “rationally discount” the ultimate risk, believing that her baby would not be harmed from lead exposure. Therefore, the court held that since “more is at stake” than the woman’s right to make an employment decision, Dothard served as support for the conclusion that a fetal protection policy consti-
tuted a BFOQ.\textsuperscript{172}

The Supreme Court's majority decision also found that the PDA established a BFOQ standard that all pregnant employees must be treated the same as other employees unless they differ in their ability or inability to perform the required work.\textsuperscript{173} As Justice White argued, the PDA simply amended the definition of sex under Title VII without eliminating or altering the BFOQ defense.\textsuperscript{174} The PDA merely clarified Title VII to make it clear that pregnancy was included in the protection provided under Title VII's antidiscrimination provisions.\textsuperscript{175} The legislative history of the PDA described pregnancy and related conditions as part of the definition of sex under Title VII, but "it does not change the application of Title VII to sex discrimination in any other way."\textsuperscript{176} The House report also stated that the "pregnancy-based" distinctions would be applied the same way as other proscribed acts of sex discrimination.\textsuperscript{177} Furthermore, the majority failed to offer any explanation of why Congress might have intended a measure, designed in part to protect fetal health, to be construed as requiring an employer to expose the unborn child to toxic hazards known to cause irreparable brain damage.\textsuperscript{178} As the Supreme Court counseled in \textit{Price Waterhouse v. Hopkins}, "[w]e need not leave our common sense at the doorstep when we interpret a statute."\textsuperscript{179}

\section*{B. Employer's Legal Duty}

Johnson has a legal duty to avoid injuries to the unborn child that result directly from the toxic hazards of Johnson's own manufacturing operations. The majority acknowledged that over forty states now recognize a right to recover for prenatal injuries based either on negligence or wrongful death.\textsuperscript{180} What the majority failed to acknowledge is that the child itself, if born alive, is now permitted in every jurisdiction to bring an action for the consequences of prenatal injuries.\textsuperscript{181} There are also a small number of courts that have allowed a cause of action for recovery by children who have not yet even been conceived when the harmful contact with the mother occurs.\textsuperscript{182} Contrary to the majority's suggestion that an employer might discharge this duty simply by cau-

\begin{itemize}
  \item \textsuperscript{172} \textit{Id.} at 898.
  \item \textsuperscript{173} \textit{Johnson,} 111 S. Ct. at 1206.
  \item \textsuperscript{174} \textit{Id.} at 1213 (White, J., concurring).
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id.} at 1214 (quoting \textit{S. Rep. No. 331, 95th Cong., 1st Sess. at 3-4 (1977)})(emphasis omitted).
  \item \textsuperscript{178} Brief for Respondent at 34, \textit{UAW v. Johnson Controls, Inc.}, 886 F.2d 871 (7th Cir. 1989) (No. 89-1215).
  \item \textsuperscript{179} \textit{Id.}
  \item \textsuperscript{180} \textit{Johnson,} 111 S. Ct. at 1208.
  \item \textsuperscript{181} \textit{W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 55 at 368 (5th ed. 1984)}.
  \item \textsuperscript{182} \textit{Id.} at 369 & nn.24-26.
\end{itemize}
tioning its employees about the risks and leaving the choice to the employee, the employer's duty runs directly to the fetus or potential fetus.

It is difficult to estimate Johnson's exposure to tort liability. However, given today's litigious society, it is an important consideration.\footnote{Id. at 905.} As an example, it was mass tort suits that drove the asbestos industry into bankruptcy.\footnote{Id.} For Johnson and other similarly situated companies, compensatory and punitive damages awarded in tort suits brought by lead-poisoned children could easily put them out of business. This decision makes that possibility more of a reality.

C. Society's Interest in the Health of its Members

Whether society's interest is characterized as fulfilling reasonably perceived legal duties or simply as promoting the overriding interest in the health and safety of children, properly implemented fetal protection policies serve a greater public good than merely protecting employers from lawsuits.\footnote{See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553 n.15 (11th Cir. 1984).} Society has an unquestionable interest in the health of its members, including children.\footnote{See Williams, supra note 4, at 645.} An employer's adoption of policies protective of the health of its employees and their families, consumers or persons living near its facility is a social good that should be encouraged. As the country becomes increasingly burdened by industry's hazardous products, by-products and wastes, the government has increased its requirement, at a substantial expense to industry, that health—fetal health included—become a corporate concern.\footnote{Id.}

It seems easy to understand how Johnson's policy could be construed as the offensive intrusion of "reproductive police" into the workplace.\footnote{Arlynn L. Presser, Should "Fetal Protection" Policies Be Upheld? Yes: For Risky Businesses, A.B.A. J., June 1990 at 38.} The majority's holding in \textit{Johnson} may be read to support that view by finding that fetal protection policies violate Title VII by not allowing women to freely choose whether or not to work around fetal toxics.\footnote{UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1209-10 (1991).} The wrong choice, however, may create cause for public concern. For example, at least one out of eight women who had children while working in high-lead environments gave birth to a child suffering from lead poisoning.\footnote{See Presser, supra note 188.} Families with lead-poisoned children may be required to turn to a "deep pocket" such as government or industry for help.\footnote{Id.} Just as babies of cocaine addicts require hundreds of thousands of dollars to survive, lead-poisoned children with irreversible mental retardation require expensive care and frequently institutionalization at taxpayer or corporate expense.\footnote{Id.}
Conclusion

In Johnson, the United States Supreme Court missed an opportunity to modernize Title VII by broadening the BFOQ defense into a tool for balancing rights and, in the instant case, by balancing sexual equality in the workplace against threats to the health and safety of unborn or unconceived children from toxic manufacturing operations. If fetal protection policies are strictly prohibited, as analyzed under this Court's version of a BFOQ standard, many companies will have to abandon these policies or go out of business as a result of substantial tort liability. Clearly, companies will have no defense for Title VII allegations under this restrictive interpretation of the BFOQ because they will not be able to prove that the women excluded cannot perform the physical tasks of their jobs.

Further, this decision equates an employer's efforts to honor its perceived legal obligation with a concern merely for the balance sheet. The fairness of forcing an employer knowingly to expose a fetus to its hazardous substances and processes and then be required to compensate for the consequences should be examined. The consequences of a tort suit could be financially devastating, seriously disrupting the safe and efficient operations of the business.193

Finally, this decision, if carried out, will create a risk to society. If and when a business discontinues operations, for whatever reason, the burden will be shifted to society to establish programs to train and maintain handicapped children or to teach children to cope with the mental and physical injuries which could result from lead exposure or other fetal-toxic hazards in the workplace.

Shirley A. Levy

193. See Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 n.10 (5th Cir. 1982).