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International Union, UAW v. Johnson Controls, Inc.: Fetal Protection Policies and the Subordination of a Woman's Economic Role to Her Reproductive Role in Society

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I. INTRODUCTION

In 1987, a woman six months pregnant and dying of cancer was admitted into a hospital. Determining that her death was only days away, doctors suggested that she submit to a caesarean section in order to save the life of her unborn child. The woman and her family opposed the operation, arguing that the baby's chance of survival was minimal, and that the surgery would subject her to pain and discomfort in the last hours of her life. A hearing was held and a court ordered the caesarean section, finding that the fetus should be given the opportunity to live. The child died two hours after birth, and the mother suffered intense emotional and physical pain the last few days of her life.[1]

In recent years, court rulings nationwide have been chipping away at a woman's constitutional right to privacy while expanding the notion of "fetal rights."[2] By justifying outcomes such as court-ordered caesarean sections, coerced medical treatment, and involuntary detention during pregnancy, courts have indicated that fetal rights are superior to a woman's rights.[3] Commentators have suggested that judicial recognition of the emerging "fetal rights doctrine" has resulted in courts treating women as reproductive vessels.[4]

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1. *In re* A.C., 533 A.2d 611 (D.C. 1987).

2. There have been numerous commentaries regarding the emerging concept of "fetal rights." *See, e.g.*, Bigge, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261 (1989); Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights: Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333 (1982); Note, *Fetal Rights: Defining "Person" Under 42 U.S.C. § 1983*, 1983 U. ILL. L. REV. 347.

3. *In re* A.C. 533 A.2d at 617; Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981); *In re* Jamaica Hosp., 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup. Ct. 1985); Crouse Irving Memorial Hosp. Inc. v. Paddock, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. 1985).

4. Gallagher, *supra* note 2, at 57.

The controversy surrounding the conflicting rights of a woman and her fetus is also present in the employment sector. Here, a woman's interest in job selection is restricted by employers in the interest of protecting the health of her unborn or unconceived children.[5] Numerous companies have adopted fetal protection policies that exclude all fertile women from a workplace where toxic substances may endanger their reproductive capacities and the health of their potential offspring.[6] The impact of such policies on women in the workplace has been and will continue to be harsh. An estimated 100,000 jobs already have been closed to women due to reproductive hazards, and employers may soon use fetal protection policies to exclude fertile women from as many as twenty million employment opportunities.[7]

Because fetal protection policies apply only to women, their implementation has resulted in charges of sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[8] Five federal appellate courts have addressed the issue of the legality of such policies under Title VII.[9] There is, however, disagreement among the circuits as to the proper Title VII analytical framework for resolving the fetal protection policy dispute.[10]

In a recently decided case, *International Union, UAW v. Johnson Controls, Inc.*,[11] the Seventh Circuit Court of Appeals upheld a fe-

5. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Duncan, *Fetal Protection and the Exclusion of Women From the Toxic Workplace*, 18 N.C. CENT. L.J. 67 (1989); Hembacher, *Fetal Protection Policies: Reasonable Protection or Unreasonable Limitation on Female Employees?*, 11 INDUS. REL. L.J. 32 (1989); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981).

6. Washington Post, Nov. 3, 1979, at A6, col. 5.

7. *See* Williams, *supra* note 5, at 647 (at least 100,000 jobs are affected by exclusionary policies); EEOC Report, 45 Fed. Reg. 7514 (1980) (EEOC estimated that as many as 20 million jobs may involve exposure to reproductive hazards); *Occupational Safety and Health Act (OSHA) News*, JOB SAFETY & HEALTH, Dec. 1978, at 2 (835,000 jobs are affected by OSHA's standards for exposure to lead); Goldfaber, *The Risk of Miscarriage and Birth Defects Among Women Who Use Video Display Terminals During Pregnancy*, 13 AM. J. INDUS. MED. 695 (1988) (use of computers for more than twenty hours per week poses a threat of miscarriage during the first trimester of pregnancy); BUREAU OF NAT'L AFFAIRS, PREGNANCY AND EMPLOYMENT 57 (1987) (15 to 20 million jobs in the United States expose workers to chemicals that may cause reproductive injury).

8. *See* 42 U.S.C. § 2000e-2(a) (1988).

9. Grant v. General Motors Corp., No. 89-3478 (6th Cir. July 20, 1990); International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S.Ct. 1522 (1990); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982).

10. *See infra* notes 51-74 and accompanying text.

11. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990). More re-

tal protection policy on a motion for summary judgment. Both the outcome and reasoning of *Johnson Controls* are significant because the case expands the legality of fetal protection policies under Title VII. UAW's petition for writ of certiorari has been granted, and the case is currently awaiting consideration by the United States Supreme Court.

This Note first discusses the traditional legal analysis applied under Title VII in sex discrimination cases, and how courts have distorted this analysis when fetal protection policies are involved. This Note then examines the *Johnson Controls* decision and discusses whether its deviation from historical Title VII precedent is justifiable. Next, this Note attempts to predict whether the Supreme Court will validate this distorted Title VII framework in light of established precedent and the right to privacy implications of fetal protection policies. Finally, this Note proposes alternatives to fetal protection policies that could effectively promote an employer's interest in fetal safety and simultaneously recognize a woman's separate interest in employment.

II. HISTORICAL BACKGROUND

A. Traditional Legal Analysis Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[12] Courts traditionally have utilized two analytical frameworks to resolve Title VII sex discrimination disputes.[13] The first of these is the "disparate treatment theory," which involves claims based on employment policies that are either facially discriminatory or a product of improper motivation.[14] Disparate treatment discrimination can be justified only if the employer successfully asserts the statutory "bona fide occupational qualifica-

cently, the Sixth Circuit Court of Appeals adopted the view of the dissenters in *Johnson* and held that a fetal protection policy could be justified only by the statutory bona fide occupational qualification defense. Grant v. General Motors Corp., No. 89-3478 (6th Cir. July 20, 1990).

12. 42 U.S.C. § 2000e-2(a) (1988).

13. *See* Williams, *supra* note 5, at 668. Williams discerns three distinct analytical frameworks under Title VII. A plaintiff can establish a Title VII violation by showing that the employment policy is either facially discriminatory, a product of discriminatory intent, or has a disproportionate adverse impact on a protected class. The first two categories are referred to as disparate treatment cases to which the statutory BFOQ defense applies. The last category is considered a disparate impact case in which an employer is entitled to assert the business necessity defense. *Id.* at 668-73.

14. 42 U.S.C. § 2000e-2(a)(1) (1988) (prohibiting classification of employees on the basis of race, color, sex, or national origin).

tion" (BFOQ) defense.[15] The second framework is the "disparate impact theory," which is utilized when the claim arises from a facially neutral employment policy that adversely impacts one sex.[16] The only defense available to the employer under this theory is the judicially-created "business necessity" defense.[17]

1. Disparate Treatment Framework

Disparate treatment discrimination occurs when an employer treats employees differently because of their sex.[18] To establish a prima facie case under this theory, the plaintiff is required to offer proof of the employer's discriminatory intent. The plaintiff can establish the requisite intent by demonstrating that the policy is facially discriminatory or that a facially neutral policy was motivated by a proscribed factor.[19] The burden then shifts to the employer who is entitled to justify the policy only by asserting the statutory BFOQ defense.[20] The BFOQ exception to Title VII permits sex discrimination when sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business."[21]

To establish a BFOQ defense, an employer must prove two ele-

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15. *Id.* § 2000e-2(e).

16. *Id.* § 2000e-2(a)(2) (prohibiting classifications based on neutral factors that tend to affect adversely a protected class).

17. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

18. *See, e.g.*, Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding that any distinction between men and women, no matter how reasonable, is per se discrimination on the basis of sex, and therefore a violation of Title VII unless justified by the BFOQ defense). *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (employment policy that prohibited hiring mothers with preschool-aged children but, not similarly situated fathers, is disparate treatment sex discrimination).

19. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the formula for demonstrating a prima facie case of disparate treatment). *But see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978) (noting that the *McDonnell* formula "was not intended to be an inflexible rule"); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (noting that "the facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from a plaintiff is not necessarily applicable in every respect to differing factual situations").

20. Title VII expressly allows intentional sex discrimination if sex is found to be a BFOQ:

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . 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 . . . .

42 U.S.C. § 2000e-2(e) (1988).

21. *Id.*

ments. The first is that the job qualification is one that affects the very essence of the employer's business.[22] This element developed from the "normal operation" language of the BFOQ exception. The employer must demonstrate that members of the excluded class could not perform essential job duties safely and efficiently; thus, their employment would significantly undermine the employer's particular business purpose.[23]

The second required element of proof is that the job qualification is "reasonably necessary" to the normal operation of the employer's business.[24] An employer must show that substantially all excluded class members are unable to perform the job duties safely and efficiently.[25] Alternatively, an employer may show that it is impossible or highly impractical to evaluate the ability of employees on an individual basis, and that a blanket exclusion is therefore necessary.[26] Finally, if there is a reasonable alternative that would serve the employer's business needs equally well, then exclusion of a protected class is not "necessary."[27]

The BFOQ is an extremely narrow exception to Title VII's prohibition of sex discrimination.[28] In limited circumstances, courts have construed the BFOQ as allowing sex or pregnancy discrimination because of safety concerns. For example, sex will be a legitimate BFOQ when a woman's employment would jeopardize the safety of third parties.[29] On the other hand, the fact that a particular job is too dangerous for a woman does not justify sex discrimination, because Title VII allows the woman to make that choice

22. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971). In *Diaz*, the court found that sex was not a BFOQ for the position of a flight attendant. Although the exclusive presence of women may have a soothing affect on passengers, a policy of hiring only women as flight attendants is not reasonably necessary to the essence of an airline's business purpose of safely transporting passengers. *Id.* at 388. Mere inability of members of an excluded class to perform peripheral or tangential job duties does not establish a BFOQ defense. *Id.*; *see also* Western Air Lines v. Criswell, 472 U.S. 400, 413 (1985); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (approving the *Diaz* rationale).

23. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

24. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). *See also Western Air Lines*, 472 U.S. 400 (1985); *Dothard*, 433 U.S. 321 (1977) (approving the *Weeks* formulation of the BFOQ defense).

25. *Weeks*, 408 F.2d at 235.

26. *Dothard*, 433 U.S. at 335-36.

27. Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

28. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (1990). The Supreme Court noted that the EEOC guidelines on sex discrimination reflect the Court's position that the BFOQ should be interpreted narrowly as to sex. *Dothard*, 433 U.S. at 334.

29. *Dothard*, 433 U.S. at 335-36.

for herself.[30] In either case, the BFOQ defense focuses on a woman's ability to perform the job; accordingly, sex may be a BFOQ only if a woman's sex directly interferes with her ability to perform the job safely and efficiently.[31]

In *Dothard v. Rawlinson*, the Supreme Court found that sex was a valid BFOQ for correctional counselor "contact" positions in a male maximum security prison.[32] First, the Court noted that maintaining security was the essence of a correctional counselor's job.[33] Next, the Court found that because of that particular prison's environment, there was a real risk that inmates would assault a woman contact guard because she was a woman.[34] The likelihood of such attacks would pose a threat not only to the woman, but also to the basic control of the prison and the protection of its inmates and other security personnel.[35] Thus, the court permitted sex discrimination because a woman's ability to maintain order was directly undermined by her womanhood.[36]

Similarly, courts have concluded that the BFOQ permits pregnancy discrimination in the airline industry on the basis of safety concerns. Policies requiring the layoff of pregnant airline flight attendants have been upheld as necessary to ensure the safety of passengers.[37] Such discriminatory policies, however, are maintained only when pregnancy directly interferes with a flight attendant's ability to perform her job safely and effectively in an emergency

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30. *Id.* at 335.

31. For example, a BFOQ permits exclusion of women as correctional officers when a "woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood." *Id.*

32. *Id.* at 336. A "contact" position is one requiring close physical proximity to inmates. *Id.*

33. *Id.* at 335.

34. *Id.* The Court explained:

> [w]here violence is the order of the day, inmate access to guards is facilitated by dormitory living arrangements, every institution is understaffed, and a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few deterrents to inmate assaults on women custodians.

Id. at 335-36. Further, the record contained evidence of previous inmate attacks on female workers and visitors in that prison. *Id.* at 335 n.22.

35. *Id.* at 336.

36. *Id.*

37. Some courts have recognized that, at a certain point, pregnancy reduces a woman's physical capacity and agility. This leads to an increased risk of potentially incapacitating medical problems or reduced efficiency. This increased safety risk is sufficient to establish nonpregnancy as a BFOQ for all flight attendants. *See* Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984); Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980).

situation.[38] Hence, the relevant issue when discrimination is based on safety concerns is whether the risks posed to others are a consequence of a woman's inability to perform the job.

2. Disparate Impact Framework

Disparate impact discrimination involves facially neutral employment policies that have a disproportionate impact on a protected group.[39] A plaintiff can establish a prima facie case of disparate impact by presenting statistical data that shows a neutral policy's disproportionate negative impact on a protected class.[40] The burden then shifts to the employer to justify the policy by asserting the judicially-created business necessity defense.[41] To invoke the business necessity defense, the employer must demonstrate the existence of a compelling relationship between the qualification and job performance.[42] If the employer establishes a business necessity defense, the burden shifts back to the plaintiff to prove that there were alternative methods with less discriminatory impact.[43]

The United States Supreme Court has established two frameworks to analyze sex discrimination claims under Title VII. The characterization of a particular employment policy under either the disparate treatment or disparate impact framework is critical to that policy's potential validity or illegality. The BFOQ defense imposes a more demanding obligation on the employer than does the more flexible business necessity defense.[44] Therefore, an employer has a better chance of maintaining a discriminatory

38. *Levin*, 730 F.2d at 997; *Harriss*, 649 F.2d at 676; *Burwell*, 633 F.2d at 370 (allowing pregnancy discrimination only when the disability prevents a woman from performing the essential elements of the job safely and efficiently).

39. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (establishing the procedure for evaluating disparate impact sex discrimination cases under Title VII); *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

40. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2121 (1989). An employer's motivation for the policy is insignificant in a disparate impact case. *Id.* at 2119.

41. *Id.* at 2125.

42. *Id.* at 2125-26. To assert the business necessity defense, an employer need not show that the particular employment practice is essential or indispensable to the business, but must show more than an insubstantial justification. Also, there cannot be an equally suitable, less discriminatory alternative. *Id.*; *see also* Robinson v. Lorillard Corp. 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

43. *Wards Cove*, 109 S. Ct. at 2126-27.

44. The BFOQ allows the exclusion of protected groups only when the exclusion is reasonably necessary to the normal operation of that particular business. Williams, *supra* note 5, at 670-71. In contrast, the business necessity defense does not require that the employment policy be essential or indispensable to the business, but rather that it have a manifest relationship to a legitimate employment goal. *Id.* at 671-72.

employment policy under Title VII when he is entitled to assert the business necessity defense.

B. The Pregnancy Discrimination Act

Congress passed the Pregnancy Discrimination Act of 1978 (PDA)[45] in reaction to a line of Supreme Court decisions that narrowly interpreted sex-based discrimination under Title VII. The crux of these decisions was that pregnancy classifications are facially neutral sex discrimination because the distinction is between pregnant persons and nonpregnant persons, rather than between men and women.[46] As a result, employment policies classifying on the basis of pregnancy were analyzed under the disparate impact-business necessity framework.[47]

Dissatisfied with the Supreme Court's interpretation of Title VII, Congress enacted the PDA to make it clear that discrimination on the basis of pregnancy is facial discrimination on the basis of sex.[48] The PDA provides that the word "sex" in Title VII includes pregnancy, child birth, or other related medical conditions.[49] Therefore, the effect of the PDA is that distinctions based on pregnancy are per se violations of Title VII and are impermissible under the traditional disparate treatment theory unless justified by a BFOQ defense.[50]

C. Application of Title VII to Fetal Protection Policies

Fetal protection policies exclude fertile women from jobs that

45. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

46. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (citing Gedulig v. Aiello, 417 U.S. 484 (1974)) (upholding the exclusion of pregnancy-related benefits from otherwise comprehensive disability plans).

47. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). The Supreme Court noted that because pregnancy distinctions were not facially sex-based, there was no per se violation of Title VII. The Court found, however, that a policy utilizing pregnancy classifications that has a discriminatory effect on women would be considered a violation of Title VII. *Id.* at 143.

48. The PDA reads 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, 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 section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1988).

49. *Id.*

50. *See supra* notes 18-38 and accompanying text.

may present reproductive or fetal hazards. The PDA provides that discrimination against women on the basis of their capacity to bear children is sex discrimination. Therefore, any policy that excludes fertile women but not fertile men can be justified only with a BFOQ defense.

However, federal courts examining fetal protection policies have not required the employer to justify its policy with a BFOQ defense. Instead, these courts have elected to utilize a modified version of the disparate impact-business necessity analysis.[51]

One of the first courts[52] to consider the legality of fetal protection policies under Title VII was the Fourth Circuit Court of Appeals in *Wright v. Olin Corp.*[53] The *Wright* court acknowledged that the issue did not fit with precision into any of the developed Title VII theories, but concluded that a disparate impact-business necessity analysis was more appropriate in analyzing a sex discrimination claim arising from a fetal protection policy.[54] The court's analysis failed to address the fact that a fetal protection policy is facially discriminatory. Rather, the court simply stated that the BFOQ defense could not be met, and that such a result would be undesirable in the fetal protection area.[55]

Noting that the business necessity defense had been extended to embrace safety considerations in other contexts, the court concluded that an employer could establish a business necessity defense based on the need to protect unborn children.[56] The court went on to define the substantive elements of proof that comprise the modified business necessity defense as applied to fetal protec-

51. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1554 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1190 (4th Cir. 1982).

52. Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982), also involved a fetal protection policy. In that case, however, the events in question occurred prior to the advent of the PDA and the court appropriately applied the disparate impact-business necessity analysis. *Id.* at 989. The hospital's practice of dismissing pregnant x-ray technicians was held to be invalid because there existed less discriminatory ways to achieve the desired goal. *Id.* at 994.

53. 697 F.2d 1172 (4th Cir. 1982).

54. *Id.* at 1185. The *Wright* court relied on the Supreme Court's position that Title VII theories should be flexible rather than rigid in permitting the use of a specialized form of the business necessity defense to a facially discriminatory policy. *Id.* Further, the court found the business necessity defense more appropriate because a fetal protection policy involves motivations and consequences most closely resembling a disparate impact case. *Id.* at 1186.

55. *Id.* at 1185-86 n.21.

56. *Id.* at 1189-90. The court analogized the employer's interest in fetal safety with its legally recognized interest in protecting the safety of customers. *Id.* at 1189; *see also supra* notes 39-44 and accompanying text.

tion policies.[57] In essence, an employer must prove by well-established medical evidence that the harm feared is greater to fertile women than fertile men, and that there is no less discriminatory alternative for avoiding the risk. Once the employer establishes a business necessity defense, the plaintiff can rebut it by showing the existence of alternatives that would accomplish the same results with less discriminatory impact.[58] The Fourth Circuit remanded the case for decision on the narrow issue of whether a business necessity was shown.[59]

Following the lead of the Fourth Circuit, the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*[60] also departed from the traditional Title VII framework by allowing a fetal protection policy to be justified with a business necessity defense. In *Hayes*, an x-ray technician brought a lawsuit against her employer after she was fired during her pregnancy.[61] The court recognized that a pregnancy-based rule could never be neutral, and that firing Hayes because she was pregnant was therefore facially discriminatory.[62] Nevertheless, the court rejected the argument that the only available defense was a BFOQ, and, in fairness to the hospital, the court found that a deviation from traditional Title VII analysis was appropriate.[63]

Under the *Hayes* analysis, a policy that applies only to women or pregnant women creates a presumption of facial discrimination. The employer can rebut this presumption by showing that the policy is "neutral" because it equally protects the offspring of all employees.[64] In defining the proof necessary to rebut this presumption, the court adopted a version of the business necessity defense set out in *Wright*: (1) the employer must produce sufficient evidence that there is a substantial risk of harm to unborn children from the employee's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace, and (2) that the reproductive hazard affects only fertile women, not fertile men.[65]

If the employer satisfies this test, then the burden shifts to the employee to rebut the business necessity defense by proving that

57. *Wright*, 697 F.2d at 1190-91.
58. *Id.* at 1191.
59. *Id.* at 1187.
60. 726 F.2d 1543 (11th Cir. 1984).
61. *Id.* at 1546.
62. *Id.* at 1547-48.
63. *Id.* at 1548.
64. *Id.*
65. *Id.*

there were less discriminatory alternatives.[66] The court further stated that even if the employer failed to establish a business necessity, he could still attempt to justify the policy with a BFOQ.[67]

Noting that a BFOQ requires proof of a correlation between the fetal protection policy and the fertile female employee's ability to perform the job, the court concluded that a BFOQ could not be established, because there existed less discriminatory alternatives.[68] The court also found that the employer failed to justify the policy with a business necessity defense, on the ground that the evidence of fetal harm was insubstantial.[69] Accordingly, the court did not uphold the fetal protection policy in question.[70]

The approaches established in *Wright* and *Hayes* form a hybrid Title VII framework for analyzing fetal protection polices. According to this framework, an employment policy based expressly on pregnancy may be justified by a business necessity defense, a defense formerly reserved only for neutral policies.[71] Despite this deviation from traditional precedent, the Equal Employment Opportunity Commission (EEOC) has endorsed this framework for analyzing fetal protection policies.[72] Although it recognized fetal protection as a form of overt discrimination, the EEOC nevertheless concluded that the business necessity defense should be applied flexibly in this narrow class of cases.[73] The EEOC observed that this approach better balanced the interests of the employee, the

66. The *Hayes* court admitted that its analysis was confusing. *Id.* at 1554. In detail, the complete analysis proceeds as follows: (1) if the employer rebuts the presumption of facial discrimination by meeting the *Hayes* test, then the policy is deemed neutral and is considered under the disparate impact theory, *Id.* at 1552; (2) the employer's business necessity defense, however, already has been established because he has offered the necessary proof by rebutting the presumption, *Id.* at 1553; (3) in accordance with traditional disparate impact analysis, after an employer establishes a business necessity defense, a plaintiff may still defeat the policy by proving that it is not the least discriminatory alternative. *Id.*

67. *Id.* at 1549. If the employer fails to rebut the presumption he simultaneously fails to establish a business necessity defense because the elements of proof for each are identical. According to the *Hayes* court, the policy may then be analyzed under the disparate treatment theory by which the employer is given a second chance to defend the policy with a BFOQ. *Id.*

68. *Id.* at 1553-54. The hospital failed to produce sufficient medical evidence demonstrating a risk of fetal harm from the employee's radiation exposure. *Id.* at 1551. Also, the hospital could have achieved its purpose by monitoring the levels of radiation exposure or temporarily re-assigning the employee. *Id.* at 1553-54.

69. *Id.* at 1551.

70. *Id.* at 1554.

71. *See supra* notes 41-44 and accompanying text.

72. *EEOC: Policy Statement on Reproductive and Fetal Hazards Under Title VII*, 8 Lab. Rel. Rep. (BNA) (Fair Empl. Prac. Man. 405:6613 (Oct. 3, 1988)).

73. *Id.* at 405:6614-15.

employer, and the unborn child under Title VII.[74]

III. International Union, UAW v. Johnson Controls, Inc.

A. Factual Background

The Battery Division of Johnson Controls, Inc. (Johnson) has maintained a fetal protection policy barring fertile or pregnant women from working in high lead exposure positions since 1982.[75] The policy was designed to protect unborn children and their mothers from the adverse effects of lead exposure.[76] This policy specifically provides that women with childbearing capacity will be neither hired for nor allowed to transfer into those jobs in which lead levels are defined as excessive.[77]

Before the 1982 policy was instituted, Johnson had a voluntary fetal protection policy that left with the individual woman the ultimate choice whether to bear the potential risks of lead exposure.[78] This policy had been in effect since 1977, and, rather than automatically excluding fertile women, it informed women of the potential risks involved while recommending that fertile women not work in high risk areas if they were considering a family. Furthermore, this policy provided fertile women the opportunity to transfer to a comparable position if they chose not to bear the potential risks.[79] While this policy was maintained, however, six employees in high lead exposure positions became pregnant. One woman's child later recorded an elevated blood level for lead and was diagnosed as hyperactive.[80] Due to these incidents, Johnson deter-

74. *Id.* at 405:6615-16.

75. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 874 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).

76. *Id.* at 874. The fetal protection policy applies to work environments in which any current employee has recorded a blood lead level exceeding 30 μg/dl, a level considered unsafe for prospective parents by the Centers for Disease Control and other experts. *Id.* at 876 n.7. However, blood lead levels under 50 μg/100g are considered safe according to OSHA's lead exposure regulations for all employees. *Id.* (citing 29 C.F.R. § 1910.1025(c)(1) and (k)(i)(D) (1989)).

77. *Id.* at 876. "The fetal protection policy defines women of childbearing capacity as: 'All women except those whose inability to bear children is medically documented.'" *Id.* n.8.

78. *Id.* at 876. In 1977, the year that the former policy was implemented, scientific and medical evidence had not yet conclusively established the risk of lead exposure posed to the unborn from maternal exposure. *Id.*

79. *Id.*

80. *Id.* at 876-77. Johnson's medical consultant opined that the hyperactivity resulted from maternal exposure to lead during pregnancy. All six of these employees became pregnant while maintaining blood lead levels in excess of 30 μg/dl. *Id.* at 877.

mined that a voluntary policy was incapable of achieving its desired goal of fetal safety.[81]

Johnson implemented its current policy in response to the ineffectiveness of the voluntary program and the introduction of conclusive medical evidence that lead exposure *in utero* presents a substantial health risk to an unborn fetus.[82] Prior to updating its former policy, Johnson actively considered alternatives to the mandatory exclusion of fertile women.[83] Johnson concluded, however, that no other method adequately would protect the unborn child from risks associated with excessive lead exposure.[84]

Because the current fetal protection policy excludes only fertile female employees from high risk areas, several employees challenged the policy on the grounds that it violated Title VII's prohibition of sex discrimination. The district court granted summary judgment in favor of Johnson, finding that the policy was justified by the business necessity defense.[85] UAW appealed and the Seventh Circuit Court of Appeals heard the case en banc.

B. The Majority Opinion

1. The Business Necessity Defense

Judge Coffey's opinion began by determining the proper legal analysis to be applied to Johnson's fetal protection program under Title VII.[86] The majority agreed with the Fourth Circuit, Eleventh Circuit, and EEOC that a business necessity defense may be uti-

81. *Id.* at 877.

82. *Id.* There was no conclusive evidence, however, that paternal exposure to lead could result in harm to an unconceived child. *Id.*

83. *Id.* at 878.

84. *Id.* The court noted that a voluntary program was incapable of promoting fetal safety because six women became pregnant while that policy was in effect. In addition, neither Johnson nor other battery manufacturers have been able to produce a lead free battery or to implement a system capable of reducing the lead exposure of fertile female employees. Excluding only pregnant women was deemed ineffective because of the possibility that lead exposure will occur between conception and the time that the woman discovers her pregnancy. Further, reduction of blood lead level after removal from a high risk area takes a significant length of time that would extend into the pregnancy term. *Id.*

Also, excluding only women who planned to become pregnant was unsuitable due to the frequency of unplanned pregnancies. Finally, permitting fertile employees to attempt to maintain a blood lead level below 30 μg/dl would not protect adequately the unborn child because an employee's risk of high lead levels is usually greatest immediately after commencement of work in a high lead environment. *Id.*

85. International Union, UAW v. Johnson Controls, Inc., 680 F. Supp. 309, 318 (E.D. Wis. 1988).

86. *Johnson*, 886 F.2d at 883. Both UAW and Johnson agreed that a substantial risk of harm to the fetus had been established. The court discussed the exact nature of this risk as contained in the record. *Id.* at 879-83.

lized in a fetal protection policy case.[87] In arriving at this conclusion, the court observed that neither the text of Title VII nor the Supreme Court interpretations of Title VII mandated that all forms of facial discrimination be justifiable only with a BFOQ defense.[88]

The Seventh Circuit then adopted the requirements of the business necessity defense articulated in *Hayes* and *Wright*.[89] That test requires the employer to demonstrate that a substantial health risk to the unborn child exists, and that this risk can be transmitted only through fertile or pregnant women.[90] Further, the test allows the employee to present evidence of less discriminatory alternatives equally capable of preventing the hazard to the unborn.[91] The court explained that these elements "balance the interests of the employer, the employee, and the unborn child in a manner consistent with Title VII."[92]

Next, the Seventh Circuit considered whether Johnson's fetal protection policy could be sustained under the business necessity defense.[93] Noting that both parties agreed that Johnson's workplace posed a substantial health risk to an unborn child, the court found that the first element of the business necessity defense was satisfied.[94]

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87. *Id.* at 883-87. For a complete discussion of the reasoning utilized by these courts, see *supra* notes 53-74 and accompanying text. However, in a recently decided case, the Sixth Circuit disagreed with this analysis and held that a fetal protection policy can be sustained only by a BFOQ. *See* Grant v. General Motors Corp., No. 89-3478 (6th Cir. July 20, 1990).

88. *Johnson*, 886 F.2d at 886.

89. *Id.* at 885.

90. *Id.*

91. *Id.*

92. *Id.* at 886. The court stated that the "substantial health risk" requirement ensured that the policy was not based on " '[m]yths or purely habitual assumptions' " forbidden under Title VII. *Id.* (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)). Additionally, the requirement that the risk be confined only to female employees means that a fetal protection policy recognizes the physical differences between men and women with respect to human reproduction. Finally, the employee's option to demonstrate less discriminatory alternatives assures that fetal protection policies are not unnecessarily restrictive. *Id.* at 886-87.

93. *Id.* at 887. The court first clarified the proper allocation of the burden of proof with respect to the business necessity defense as it applied in summary judgment proceedings. Relying on Wards Cove Packing Co. v. Atonio, 109 S. Ct 2115, 2126 (1989), the court stated that, although an employer must present evidence of a business justification for his employment practices, the burden of persuasion always remains with the plaintiff. Therefore, the relevant inquiry in *Johnson* was whether UAW, which bore the burden of persuasion, had presented sufficient evidence to support a finding that Johnson's business necessity defense could not be factually supported. *Johnson*, 886 F.2d at 886-87.

94. *Johnson*, 886 F.2d at 888.

The court next concluded that Johnson also established the second element: that the transmission of the hazard to the unborn child occurs only through women.[95] The court reasoned that the evidence established that the risk of fetal harm was confined to fertile female employees, and that findings of paternal transmission of risk were "speculative and unconvincing."[96] Furthermore, the court observed that Title VII permits distinctions based on the real sex-based differences between men and women, especially those relating to child birth.[97] Therefore, the court concluded that the sex-based distinction present in Johnson's policy was consistent with Title VII because the sexes are not similarly situated with respect to the transmission of fetal risk.[98]

Finally, the court recognized that Johnson's fetal protection policy might not have been sustained if UAW had presented evidence of equally effective alternative practices with a lesser discriminatory impact.[99] The court, however, found that UAW failed to preserve this issue for appeal by not presenting it in its brief.[100] Assuming that UAW had preserved this issue for appeal, the court went on to state that it still would have held that UAW failed to provide sufficient evidence of the existence of alternatives to rebut successfully the business necessity defense.[101] The court reasoned that UAW failed to present even one specific alternative to Johnson's fetal protection policy in its briefs and arguments.[102] In addition, the court noted that Johnson tried and failed to find a viable alternative prior to adopting its current fetal protection policy.[103]

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95. *Id.* at 889.

96. *Id.* The only findings of paternal transmission of risk were based on animal studies. The court stated that animal research evidence is not the type of scientific data on which to base a reliable conclusion that paternal exposure to lead presents the same danger to the unborn child as that resulting from maternal exposure. *Id.*

97. *Id.* at 890 (citing Torres v. Wisconsin Dep't of Health & Human Social Servs., 859 F.2d 1523, 1527-28 (7th Cir. 1988) (en banc)).

98. *Id.*

99. *Id.* at 890-91.

100. *Id.* at 891. The Federal Rules of Appellate Procedure require " 'an appellant to present in his brief the issues that he desires to litigate and to support his arguments on those issues with appropriate judicial authority.' " *Id.* (quoting Zelazny v. Lyng, 853 F.2d 540, 542 n.1 (7th Cir. 1988)); *see also* FED. R. APP. P. 28(a)(4).

101. *Id.* In resolving this issue, the Seventh Circuit noted the Supreme Court's warning that " ' "[c]ourts are generally less competent than employers to restructure business practices, [consequently,] the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's [proposed alternative employment policy] in response to a Title VII suit." ' " *Id.* at 893 (quoting Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115, 2127 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978))).

102. *Id.* at 892.

103. *Id. See supra* notes 83-84 and accompanying text.

Finding that UAW failed to present sufficient evidence demonstrating the absence of the business necessity defense, the Seventh Circuit affirmed the district court's entry of summary judgment in favor of Johnson.[104]

2. The BFOQ Defense

After upholding Johnson's fetal protection policy under the business necessity defense, the Seventh Circuit went a step further and found the policy also could be justified as a BFOQ.[105] In addressing the BFOQ question, the court relied upon several previously established principles underlying the application of the BFOQ defense.

First, the court observed that the BFOQ is a narrow exception to Title VII's prohibition of employment discrimination.[106] Next, the court noted that sex discrimination is permissible only if the essence of a business operation would be undermined by hiring members of both sexes.[107] Further, to rely on the BFOQ defense, the court recognized that an employer must prove that substantially all women would be unable to perform safely and efficiently the duties of the job involved.[108]

Finally, the court discussed the well-established principle that a BFOQ may not be based on traditional stereotypes of the sexes.[109] The court stated, however, that Title VII recognizes that the BFOQ may be based on real differences between men and women in circumstances in which the sexes are not similarly situated.[110] Although real physical differences may justify limited distinctions between men and women, the court concluded that the critical question is whether, given the reasonable objectives of the em-

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104. *Johnson*, 886 F.2d at 901.

105. *Id.* at 893.

106. *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321, 334 (1977)).

107. *Id.* at 894 (citing *Dothard*, 433 U.S. at 333 (quoting Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971))). In *Diaz*, the Fifth Circuit rejected gender as a BFOQ for airline flight attendants because the airlines proposed justification—to provide a pleasing environment for passengers—was merely tangential to the airline's primary objective of safe transportation of passengers. *Diaz*, 442 F.2d at 388.

108. *Johnson*, 886 F.2d at 894 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).

109. *Id.* (quoting *Dothard*, 433 U.S. at 333).

110. *Id.* at 895 (quoting Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1527 (7th Cir. 1988)(en banc)). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 286 (1987). This principle has been recognized in the federal constitutional context as well. *See* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981); Parham v. Hughes, 441 U.S. 347, 354 (1979).

ployer, the very manhood or very womanhood of the employee undermines his or her capacity to perform a job satisfactorily.[111]

Next, the Seventh Circuit ascertained the validity of Johnson's fetal protection policy as a BFOQ.[112] First, the court broadly defined Johnson's business purpose as the manufacture of batteries. The court stated, however, that Johnson's business is "unique" because it requires the use of lead, a toxic substance scientifically known to endanger the offspring of female employees.[113] In order to respond to problems unique to its battery manufacturing operation, Johnson properly made it part of its business goal to manufacture batteries in a safe manner.[114] Consequently, the court concluded that this "safety interest" is part of the "essence" of the business of a battery manufacturer.[115]

The Seventh Circuit then determined whether the fetal protection policy was "reasonably necessary" to further the objective of industrial safety.[116] This determination requires that Johnson had a factual basis for believing that virtually all fertile female employees would be unable to perform the job duties involved safely and efficiently.[117] Focusing on the "safety" aspect of this showing, the court stated that, although Title VII gives a woman the right to choose whether she wants to accept the risks associated with employment, the unusual facts of this case justified a departure from the general maxim.[118]

Relying on *Dothard* for the proposition that the BFOQ permits sex discrimination on the basis of safety concerns, the Seventh Circuit reasoned that more was at stake in this case "than an individual woman's decision to weigh and accept the risks of employment."[119] The court explained that a female employee's decision to work in a high-lead-exposure job poses grave danger to

111. *Johnson*, 886 F.2d at 894 (citing *Dothard*, 433 U.S. at 336).

112. *Id.* at 895. The court relied on the method it formulated in *Torres* to determine whether sex was a legitimate BFOQ. *Id.*

113. *Id.* at 896.

114. *Id.*

115. *Id.*

116. *Id.* at 897.

117. *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969))).

118. *Id.* The Seventh Circuit reasoned that it was following the lead of the Supreme Court in *Dothard* in departing from general Title VII principles. *Dothard*, 433 U.S. at 336 (sex will be a legitimate BFOQ when a woman's sex directly interferes with her ability to perform the job safely, thus creating a risk of harm to third parties).

119. *Johnson*, 886 F.2d at 897 (citing *Dothard*, 433 U.S. at 335).

her unborn child, who has no opportunity to avoid these risks.[120] The court also feared that she somehow may discount the potential risks to her fetus in her desire to better her family's economic position.[121] Because "more was at stake" than an individual woman's safety, the court determined that *Dothard* supported a conclusion that Johnson's fetal protection policy constituted a bona fide occupational qualification "reasonably necessary to further industrial safety."[122] The court explained that, given Johnson's safety goal of protecting fetal health, a woman's capacity to perform the job satisfactorily is directly undermined by her sex.[123]

C. *The Dissents*

Judges Cudahy, Posner, Flaum, and Easterbrook dissented from the majority opinion. All of the dissenters concluded that the complexity of the issues involved in fetal protection policy cases did not justify the majority's deviation from traditional Title VII analysis.[124] Rather, the BFOQ defense is the only defense that Title VII allows in what the dissenters saw as a clear case of disparate treatment sex discrimination.

Judge Posner, joined by Judge Cudahy, adopted the BFOQ standard, but advocated remand for a full trial to determine whether the evidentiary record sufficiently established that Johnson's fetal protection policy was a legitimate BFOQ.[125] Judge Posner determined that Title VII does not outlaw all fetal protection policies, and that a particular policy may satisfy the stringent requirements of the BFOQ defense.[126]

Judge Posner argued that the "normal operation" of a business includes both practical and ethical concerns about the effects of an employer's activities on the public.[127] Thus, Johnson's concerns about the potential cost of tort liability arising from fetal injury and its moral interest in protecting unborn children may be considered in evaluating the validity its fetal protection policy.[128]

120. *Id.* at 898-99. Medical and scientific evidence documented the extent of fetal risk due to lead exposure. *Id.* at 899.

121. *Id.* at 897.

122. *Id.* at 898.

123. *Id.*

124. *See* Grant v. General Motors Corp., No. 89-3478 (6th Cir. July 20, 1990) (adopting the *Johnson* dissenters' position and holding that a fetal protection policy can only be maintained if justified by the BFOQ defense).

125. *Johnson*, 886 F.2d at 902 (Posner, J., dissenting).

126. *Id.* at 903 (Posner, J., dissenting).

127. *Id.* at 904 (Posner, J., dissenting).

128. *Id.* at 904-05 (Posner, J., dissenting).

Judge Posner, however, found that the evidentiary record was insufficient to establish that Johnson's fetal protection policy was "reasonably necessary" to the normal operation of its business.[129] First, Johnson failed to document its exposure to tort liability arising from workplace hazards. Judge Posner argued that if Johnson could demonstrate that the potential cost of tort liability was significant enough to affect the company's normal method of operation, then infertility would be a legitimate BFOQ.[130]

Second, Johnson failed to demonstrate whether adverse public relations from endangering the health of children would interfere with the normal operation of its business. Judge Posner noted that people who are passionately protective of fetal welfare cannot be expected "to park their passions at the company gate," and that at some point this animosity could affect severely the operation of Johnson's battery plant.[131]

Due to the numerous unanswered questions regarding the extent of potential tort liability, adverse public relations, the profitability of a battery manufacturer, and the feasibility of alternatives, Judge Posner concluded that the district court erred in granting summary judgment on such a sparse record.[132] Accordingly, Judge Posner recommended that the case be remanded for further proceedings to enable the district court to compile a sufficient evidentiary record.[133]

Similarly, Judge Easterbrook, joined by Judge Flaum, adopted the BFOQ standard, but concluded that it never could be established in a fetal protection policy case.[134] First, Judge Easterbrook stated that ethical and cost concerns regarding the welfare of unborn children are not included within the "normal operation" of Johnson's business.[135] Judge Easterbrook explained that the focus of the BFOQ is on the ability of an employee to perform the job, and fetal safety is an objective unrelated to an employee's ability to manufacture batteries.[136] Furthermore, Judge Easterbrook noted, the purpose of Title VII is to allow the individual woman to make decisions concerning her employment, including decisions about

129. *Id.* at 905 (Posner, J., dissenting).
130. *Id.* (Posner, J., dissenting).
131. *Id.* at 905-06 (Posner, J., dissenting).
132. *Id.* at 906-08 (Posner, J., dissenting).
133. *Id.* at 908 (Posner, J., dissenting).
134. *Id.* at 913-14 (Easterbrook, J., dissenting).
135. *Id.* at 912 (Easterbrook, J., dissenting).
136. *Id.* (Easterbrook, J., dissenting).

the welfare of her unborn children.[137]

Next, Judge Easterbrook determined that Johnson's fetal protection policy was not "reasonably necessary" to the normal operation of its business. Judge Easterbrook reasoned that Johnson could not prove that substantially all women would be unable to manufacture batteries without risk to potential children.[138] There was no evidence that all women employees would have children, or that prenatal injury had ever occurred in Johnson's history.[139] Thus, Judge Easterbrook concluded, a speculative fear of prenatal injury among a minority of women is clearly inadequate to support a BFOQ.[140]

IV. ANALYSIS

A. The BFOQ Is the Appropriate Defense

1. Statutory Support

The language of Title VII should be the focal point in determining the validity of fetal protection policies. Title VII prohibits discrimination on the basis of sex,[141] unless sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business."[142] By enacting the PDA,[143] Congress made it clear that discrimination on the basis of pregnancy is discrimination on the basis of sex. Johnson's fetal protection policy makes distinctions based on a woman's ability to become pregnant. Johnson's policy, therefore, is unlawful sex discrimination unless justified as a BFOQ.

2. Supreme Court Precedent

The Seventh Circuit disregarded traditional Title VII theory when it upheld Johnson's fetal protection policy under a variation of the business necessity defense. In creating a new framework for fetal protection policies, the Seventh Circuit relied on the pronouncement of the United States Supreme Court that requires flexible application of established proof patterns in cases that present

137. *Id.* at 913 (Easterbrook, J., dissenting) (citing Dothard v. Rawlinson, 433 U.S. 321, 335 (1971)).
138. *Id.* (Easterbrook, J., dissenting).
139. *Id.* (Easterbrook, J., dissenting).
140. *Id.* (Easterbrook, J., dissenting).
141. 42 U.S.C. § 2000e-2(a)(1) (1988).
142. *Id.* § 2000e-2(e)(1).
143. *Id.* § 2000e(k); see *supra* note 48 for full text of amendment.

novel factual circumstances.[144] The Seventh Circuit noted that this flexibility is particularly important in fetal protection policy cases, which balance a woman's interest in economic reward against a risk of harm to her children.[145] The court concluded, therefore, that it was appropriate to devise a new analytical framework for fetal protection policies.[146]

The Seventh Circuit's reliance on the Supreme Court's mandate with respect to proof patterns is misplaced. True, the Supreme Court has stated that its formula for demonstrating a prima facie case of disparate treatment is flexible and should be adjusted to particular factual circumstances.[147] False, however, is the Seventh Circuit's notion that the issue in this case is whether the plaintiff has established a prima facie case of sex discrimination.[148] Quite to the contrary, Johnson's fetal protection policy expressly distinguishes on the basis of sex and therefore is a clear case of disparate treatment sex discrimination. Consequently, the Seventh Circuit's deviation from traditional Title VII frameworks defies United States Supreme Court precedent.

The Supreme Court's approach in *Los Angeles Department of Water and Power v. Manhart*[149] established the norm in sex discrimination cases. In *Manhart*, female employees were required to make larger pension fund contributions than their male counterparts, ostensibly due to the longer life expectancy of women.[150] The Supreme Court determined that such an employment policy, which uses sex as a basis for disparate treatment, constitutes discrimination because of sex.[151] The Supreme Court consistently has followed the *Manhart* approach in sex discrimination cases decided under Title VII. The crux of these decisions is that a policy distinguishing on the basis of sex is disparate treatment discrimination, unlawful unless supported by a BFOQ.[152] Johnson's fetal protection policy distinguishes on the basis of pregnancy and therefore is a clear case of disparate treatment sex discrimination. Hence, the Seventh Circuit should have found the policy unlawful unless justified as a BFOQ.

144. *Johnson*, 886 F.2d at 883 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978)). *See supra* note 19.
145. *Johnson*, 886 F.2d at 883.
146. *Id.* at 886.
147. *See supra* note 19.
148. *See Johnson*, 886 F.2d at 911 (Easterbrook, J., dissenting).
149. 435 U.S. 702 (1978). *See supra* note 18.
150. *Manhart*, 435 U.S. at 704.
151. *Id.* at 711.
152. *See supra* note 18.

B. Johnson's Policy Is Not a BFOQ

1. "Normal Operation"

Assuming that the United States Supreme Court reviews *Johnson Controls* consistently with its Title VII precedent, the Court will have to determine whether Johnson's fetal protection policy is a BFOQ. The Court's first step will be to define the "normal operation" of Johnson's "business."[153]

The Supreme Court has recognized that the "normal operation" of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties.[154] Thus, fetal safety is a legitimate interest of Johnson in operating its business. Johnson validly may be concerned with both future tort liability and adverse public relations arising from fetal injury within a hazardous workplace.[155]

Although fetal safety is a legitimate interest in operating a business, the critical question in determining the validity of a BFOQ is whether this interest is part of the "essence" of the employer's business purpose. Fetal safety is not an essential element of the manufacture of batteries in the same sense that maintaining security is the essential duty of a security guard.[156] Further, to assert that the essence of Johnson's business is to manufacture batteries without fetal risk is distinguishable from asserting that the essence of an airline's business is to transport passengers without risk.[157] Rather, as a "cosmetic environment" is peripheral to an airline's central business, fetal safety is peripheral to a battery manufacturer's central business. Accordingly, Johnson's fetal protection policy fails to satisfy the "normal operation" prong of the BFOQ defense.

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153. *See supra* notes 22-23 and accompanying text.

154. *See* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (the likelihood of attacks on women contact guards could create a risk of safety to other guards and inmates); Western Airlines Inc. v. Criswell, 472 U.S. 400, 407 (1985) (essence of airline business is the safe transportation of customers); *see also* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 904 (7th Cir. 1989) (Posner, J., dissenting). The term "normal operation" should "dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded." *Id.* (Posner, J., dissenting).

155. *See* Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 352 (1987) (Title VII cases historically have not accepted a cost-based defense as valid); *see generally* Becker, *supra* note 5 (discussing how Johnson's moral justifications are analogous to protective labor legislation sustained by Muller v. Oregon, 208 U.S. 412 (1908), in the interest of protecting the next generation).

156. *See supra* notes 32-36 and accompanying text.

157. *See supra* note 22.

2. "Reasonably Necessary"

The Supreme Court's next inquiry in determining whether there is a BFOQ will be whether Johnson's fetal protection policy is "reasonably necessary" to the objective of fetal safety.[158] To establish reasonable necessity, Johnson must demonstrate that all or substantially all fertile women would be unable to manufacture batteries without jeopardizing the safety of their potential offspring.[159]

Johnson's policy presumes that most fertile women will become pregnant in the future. Actually, the probability of having a child varies a great deal among women. Variable factors include age, birth control method, existing family, and attitudes toward abortion.[160] Most women in an industrial labor force do not become pregnant.[161] In addition, most of these women will maintain blood lead levels under 30 μg/dl, the level considered unsafe for prospective parents by some experts.[162] Furthermore, Johnson's experience demonstrates that most women who become pregnant with levels exceeding 30 μg/dl will bear normal children.[163]

Although there exists a possibility that some fertile women may become pregnant and that a subset of their children may suffer, a fear of fetal injury materializing in a minority of cases is insufficient

158. *See supra* notes 24-27 and accompanying text.

159. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). Alternatively, an employer may demonstrate that it is impractical or impossible to evaluate the ability of fertile women to manufacture batteries without jeopardizing the health of their potential offspring and therefore a blanket exclusion is necessary. *See Western Air Lines v. Criswell*, 472 U.S. 402, 414-17 (1985). Because this alternate formulation of the BFOQ is only utilized in cases decided under the Age Discrimination and Employment Act of 1967, it is not applicable here. However, even if it were applicable, Johnson could not prove that it is impossible to deal with fertile female employees on an individualized basis. There are numerous methods that Johnson can use to predict which female employees plan on bearing children, and, consequently, which ones are most likely to transmit risk to their offspring. *See infra* notes 170-74 and accompanying text.

160. *See* Becker, *supra* note 5, at 1232.

161. *See id.* at 1233. Although approximately 9% of all fertile women become pregnant each year, the birth rate for blue collar women over 30 is about 2%. Further, only one out of 5000 working women aged 45-49 becomes pregnant in a given year. *Id.*

The record in *Johnson* does not reveal the birth rate for Johnson's female employees, but given Johnson's efforts to discourage pregnancy in high lead exposure areas, it is probably lower.

162. *Johnson*, 886 F.2d at 913 (Easterbrook, J., dissenting) (approximately one-third of the employees exposed to lead at Johnson's plants have higher levels of lead in their blood).

163. *Johnson*, 886 F.2d at 877. Among the six employees who became pregnant with blood lead levels exceeding 30 μg/dl, Johnson reports no birth defects or abnormalities. One of these children recorded an elevated blood lead level, but this has not produced any medical problems. *Id.*

to sustain a BFOQ.[164] Fertility does not directly interfere with most women's ability to manufacture batteries in a safe manner. As traditionally interpreted, the BFOQ will permit discrimination based on safety concerns only when fertility actually prevents most women from performing their jobs. Consequently, Johnson's fetal protection policy excluding all fertile women fails to meet the "reasonably necessary" requirement of a BFOQ and constitutes impermissible sex discrimination.

V. IMPACT

A. Right to Privacy

Fetal protection policies raise questions concerning the appropriate balance between fetal rights and a woman's constitutional right to privacy. A woman's right to privacy includes the right to make childbearing decisions.[165] Fetal protection policies restrict a woman's freedom of choice regarding procreation by forcing her to choose between fertility and employment.[166] By upholding Johnson's policy under the business necessity defense, the Supreme Court not only will deviate from its Title VII precedent, but also will seriously burden the exercise of a constitutionally protected right.

Although the fourteenth amendment generally does not apply to the actions of a private employer,[167] the Supreme Court should not ignore the significant burden imposed upon a woman's autonomy when determining the validity of fetal protection policies under Title VII.[168] By distorting traditional Title VII framework to affirm Johnson's policy, the Supreme Court will indicate that a woman's interest in employment should yield to the interests of her potential offspring.

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164. *See id.* at 879-83. Although there is significant medical evidence that fetal exposure to lead results in fetal injury, Johnson has not presented actual evidence that this risk has or is likely to materialize within its particular business. *Id.*

165. The right to privacy guaranteed under the fourteenth amendment includes a woman's childbearing choices. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Whalen v. Roe, 429 U.S. 589 (1977).

166. *Johnson*, 886 F.2d at 876. *See* Oil, Chem. & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (five women were sterilized when employer instituted a policy excluding fertile women from reproductively hazardous jobs).

167. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of this [fourteenth] amendment." Civil Rights Cases, 109 U.S. 3, 11 (1883).

168. *See* Gardner v. National Airlines, 434 F. Supp. 249, 258 (S.D. Fla. 1977) (comparing legitimate governmental interest under the Fourteenth Amendment with an employer's interest under Title VII).

Fetal safety should be a national priority, but the costs of fetal safety should not be borne entirely by women.[169] An employer interested in promoting fetal safety by instituting a policy that overtly discriminates against women should also bear the burden of proving that sex is a "bona fide occupational qualification" for his particular business. In this way, the health of the next generation is a burden shared between both the employer and the individual woman, and a woman's separate interest in employment will not go unrecognized. Hence, right to privacy considerations, above and beyond Title VII precedent, mandate that fetal protection policies be upheld only if they meet the requirements of the more stringent BFOQ defense.

B. Less Discriminatory Alternatives

Johnson's fetal protection policy completely eliminates fetal risk by not hiring, transferring, or promoting a fertile woman to a high-lead-exposure job.[170] Zero, however, should not be the only acceptable level of risk when a woman's constitutional right to privacy is involved. Furthermore, most fertile female employees will not become pregnant, and therefore do not pose any risk to fetal safety.[171] Alternatives are available that could protect the interests of a fetus while recognizing the separate employment interests of a woman in accordance with Title VII.[172]

One possible alternative for Johnson and similarly situated employers is to narrow exclusionary policies to apply only to pregnant women or women who plan on becoming pregnant in the future. In determining who comprises this class, employers can request reproductive information from current or prospective employees as a condition of their employment in high risk areas.

Additionally, employers can implement mandatory blood lead level testing programs and mandatory routine pregnancy tests in order to identify women who pose fetal risks. These procedures would be less intrusive on a woman's reproductive freedom and right to privacy than offering her a choice only between proving sterility and obtaining a desired job.[173]

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169. *See generally*, Becker, *supra* note 5, at 1221-43. Becker compares the justifications for distorting Title VII frameworks in upholding fetal protection policies with the arguments once advanced in favor of sex-specific protective labor legislation. *Id.*

170. *Johnson*, 886 F.2d at 876.

171. *See supra* notes 168-69 and accompanying text.

172. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (Title VII's purpose is to allow the individual woman to make choices concerning employment for herself).

173. *See generally*, Becker, *supra* note 5, at 1233-34.

Another viable alternative would be for employers to educate their employees regarding the reproductive hazards present in their respective workplaces. Lack of awareness is one of the primary problems in this area.[174] Detailed information on the potential adverse effects associated with lead exposure, as well as the probabilities of occurrence in different jobs and sexes, would facilitate a woman's ability to make an informed choice whether to remain in a high risk job or pursue other options.

Education, however, is not enough. Employers must also provide attractive options to women who are at risk. These options may include permanent or temporary transfers within the company to jobs comparable in skill and income. Alternatively, employers could provide career counseling and placement for different jobs within or without the respective industry.

Limiting fetal protection policies to women who actually pose a risk of fetal harm, monitoring women with a potential to pose risk, educating women to make informed decisions about the health of their potential offspring, and providing attractive options to women posing a true risk of fetal harm are each reasonable alternatives to onerous blanket exclusions of all fertile women employees. The increased costs associated with these alternatives will be borne willingly by employers who truly wish to assume responsibility for the health of the next generation. More importantly, these alternatives effectively would decrease fetal risks associated with hazardous workplaces while recognizing women's concomitant interests in employment.

VI. CONCLUSION

The controversy over the legality of fetal protection policies pits fundamental values against one another: a woman's interest in employment versus society's interest in protecting the welfare of the next generation. By distorting Title VII analysis to uphold fetal protection policies, courts have decided that protecting the future generation should prevail over a woman's interest in working.

The Supreme Court should decide that this deviation is unjustifiable in light of Title VII precedent, the Pregnancy Discrimination Act, and the right to privacy implications involved. Proper Title VII analysis requires a finding that fetal protection policies are unlawful unless justified by the statutory BFOQ defense. The rigid

174. *See generally* Butterfield, *Study Says Job Hazards Go Unrecognized*, Boston Globe, Nov. 11, 1988, at 1.

requirements of the BFOQ would allow an employer some latitude in shaping policies to protect unborn children, but not at the expense of denying meaningful employment opportunities to women. By sustaining fetal protection policies only as a BFOQ, the Supreme Court would recognize the importance of a woman's economic role in addition to her natural reproductive role within our society.

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