University of Arkansas at Little Rock Law Review

Volume 14 | Issue 2 Article 3

1992

Employment Discrimination—Title VII Prohibits Fetal Protection Policy That Excludes All Fertile Women from Positions Involving Lead Exposure. International Union, United Auto Workers v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

Edie Renee Ervin

EMPLOYMENT DISCRIMINATION—TITLE VII PROHIBITS FETAL PROTECTION POLICY THAT EXCLUDES ALL FERTILE WOMEN FROM POSITIONS INVOLVING LEAD EXPOSURE. *International Union, United Auto Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

Johnson Controls, Inc. manufactures batteries, the process of which requires lead as a primary ingredient.[1] Lead exposure poses a health hazard to those with whom it comes in contact, including unborn children.[2] In 1982 Johnson Controls implemented a policy to exclude all fertile women from positions involving lead exposure because of the possible risk of injury to unborn children.[3] This change in policy followed the pregnancies of eight women employees with blood lead levels of over thirty micrograms per deciliter between 1979 and 1983.[4]

In 1984 a class action was certified challenging Johnson Controls' fetal protection policy.[5] Petitioners in the suit included men and women adversely affected by the policy who alleged that the policy constituted

---

1. International Union, United Auto Workers v. Johnson Controls, Inc., 111 S. Ct. 1196, 1199 (1991).

2. *Id.* The Occupational Health and Safety Administration (OSHA) has established guidelines for employee lead exposure based upon the level of lead in the blood. For workers planning to become parents in the near future, the maximum level is set at 30 micrograms per 100 grams. No distinction is made between male and female workers. 29 CFR § 1910.1025 (1990).

3. *Johnson Controls*, 111 S. Ct. at 1200. The policy stipulated that " '[I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.' " *Id.* (quoting App. at 85-86). Johnson Controls' policy presumed all women to be fertile unless they could produce medical documentation of their infertility. *Id.*

4. 111 S. Ct. at 1199-1200. Of these eight reported pregnancies, no birth defects or other abnormalities were reported. *Id.* at 1208. Prior to 1977 Johnson Controls employed only males in battery manufacturing positions. In June of 1977 the company began hiring women for those positions and warning them of the risks lead exposure posed to unborn children. Johnson Controls' official policy announcing their decision to hire women for the first time included the following:

> [P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons. . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.

Id. at 1199 (quoting App. at 140).

5. *Id.*

sex discrimination[6] as prohibited by Title VII of the Civil Rights Act of 1964.[7] The district court granted Johnson Controls' motion for summary judgment after concluding that the fetal protection policy was defensible under a business necessity analysis.[8] The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision[9] after concluding that the business necessity defense was properly applied by the district court and Johnson Controls was entitled to summary judgment.[10] The court of appeals further held that Johnson Controls' fetal protection policy could also meet the more stringent standard of being defensible as a bona fide occupational qualification (BFOQ)[11] as well as a business necessity.[12] With this ruling, the Seventh Circuit became the first circuit court to hold that an employer's fetal protection policy applicable only to women could be justified as a BFOQ.[13]

The United States Supreme Court granted certiorari[14] to address the differences between the Fourth, Seventh, and Eleventh Circuits

---

6. *Id.*

7. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-1 to -17 (1988) [hereinafter Title VII].

8. 680 F. Supp. 309 (E.D. Wis. 1988). Business necessity, a judicial creation, is an employer's defense to a Title VII disparate impact allegation. *See infra* notes 57-63 and accompanying text. For a discussion of business necessity in the realm of fetal protection policies see Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984), Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

9. International Union, United Auto Workers v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989).

10. *Id.* at 901.

11. *Id.* at 893-901. The bona fide occupational qualification (BFOQ) defense to Title VII violations is statutorily provided for in 42 U.S.C. § 2000e-2(e)(1). *See infra* notes 40-47 and accompanying text.

12. 886 F.2d at 893-901.

13. *Johnson Controls*, 111 S. Ct. at 1202. Prior to the Seventh Circuit's ruling, the Fourth and Eleventh Circuits had confronted the issue of whether an employer's fetal protection policy violates Title VII in Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) and Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984). The Court in *Johnson Controls* spoke of the "obvious conflict" between the three circuits. *Johnson Controls*, 111 S. Ct. at 1202. However, taken as a whole the cases were similiar in that each circuit court labelled sex specific fetal protection policies as facially neutral, thereby freeing the employer from the burden of establishing the statutory BFOQ affirmative defense, and allowed the employer to use the more lenient business necessity defense. *Id.* at 1203. The Seventh Circuit went one step further to say that a BFOQ defense could be established to justify a sex specific fetal protection policy. *Johnson Controls*, 886 F.2d at 893. In contrast, the Fourth and Eleventh Circuits assumed that an employer forced to assert a BFOQ defense to a sex specific fetal protection policy would be unable to do so (or able to do so only in the rarest of situations). *Wright*, 697 F.2d at 1185 n.21; *Hayes*, 726 F.2d at 1549 n.9.

14. 110 S. Ct. 1522 (1990).

over the proper analysis of an employer's fetal protection policy.[15] The Court reversed the lower court's decision.[16] The Court ruled that the Seventh Circuit erred in applying the business necessity defense to a disparate treatment case involving explicit facial discrimination.[17] The Court concluded that the sex specific fetal protection policy enacted by Johnson Controls was sex discrimination prohibited by Title VII as amended by the Pregnancy Discrimination Act.[18] *International Union, United Auto Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of sex.[19] Congressional intent on the measure is scant because the prohibition against sex-based discrimination was added at the last minute in an attempt to prevent its passage.[20] In 1978 Congress amended Title VII with the Pregnancy Discrimination Act (PDA).[21] Passage of the PDA enlarged the definition of Title VII sex discrimination to include pregnancy classifications.[22]

---

15. 111 S. Ct. at 1202.
16. *Id.* at 1210.
17. *Id.* at 1203.
18. *Id.* at 1210.
19. 42 U.S.C. § 2000e-2 reads in pertinent part:

> It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

20. 110 CONG. REC. 2577-84 (1964). Representative Smith of Virginia, a staunch opponent of Title VII, proposed the addition of sex as a classification on the last day of the House debate. *Id.* He was certain that the addition of sex to the antidiscrimination bill would bring its progression through Congress to an abrupt halt. *See* Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027 (1977).

21. The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1988)) [hereinafter PDA].

22. 42 U.S.C. § 2000e(k). The PDA reads:

> 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 similiar in their ability or inability to work. . . .

Id.

Congressional enactment of the PDA was a swift reaction to the Supreme Court's decision in *General Electric Co. v. Gilbert*,[23] in which the Court placed employment distinctions based on pregnancy outside the reach of Title VII's ban on sex discrimination.[24] Consequently, the PDA, unlike the Title VII provision on sex discrimination, was accompanied by extensive legislative history.[25] Despite the abundance of discussion regarding the PDA, however, Congress was virtually silent on the potential fetal health issues posed by toxic work environments.[26] As a result, when the fetal protection policy issue surfaced judicially, the courts struggled to fit these cases into one of the traditional Title VII frameworks and accompanying defenses.[27]

Under established Title VII law, two broad types of sexually discriminatory practices are prohibited based upon the two statutory theo-

---

23. 429 U.S. 125 (1976).

24. *Id.* at 133-34. In *Gilbert*, the Supreme Court upheld an employer's disability plan that excluded pregnancy-related disabilities from coverage, while including other nonoccupational disabilities. The Court reasoned that distinctions on the basis of pregnancy did not constitute sex discrimination because women were included in both the pregnant and nonpregnant classifications. *Id.* at 135.

The Court's decision in *Gilbert* provoked a spirited criticism among commentators. *See, e.g.*, Hannah A. Furnish, *Fetally Toxic Work Environments*, 66 IOWA L. REV. 63, 75-77 (1980); Sirota, *supra* note 20, at 1036-38.

25. *See* AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. NO. 331, 95th Cong., 1st Sess. 2-3 (1977); PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S.C.C.A.N. (95 Stat.) 4749 [hereinafter HOUSE REPORT]. Reports from both houses of Congress indicated that legislators considered the approach taken in *Gilbert* to be contradictory to the nondiscrimination principles of Title VII. The House Report noted:

> the consequences of . . . discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the childbearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

HOUSE REPORT at 4754-55.

26. *See* Furnish, *supra* note 24, at 78-82.

27. The traditional Title VII sex discrimination framework has been labelled by some as inadequate to deal with fetal protection policies. Apparently, the alleged deficiencies stem not so much from the Title VII analytical framework itself, but from various courts construing fetal protection policies under Title VII, twisting and distorting the law rather than simply applying it. *See* P. Elizabeth Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of* International Union, UAW v. Johnson Controls, Inc., 75 CORNELL L. REV. 1110, 1134-47 (1990) (proposing legislation to deal with the fetal protection issue); Barbara J. Naretto, Note, *Employment Discrimination Made Easy: Fetal Protection Policies*, 24 VAL. U. L. REV. 441, 469 (1990) (proposing that Congress amend the PDA to add "fertility" as a prohibited basis for differential treatment).

ries of "unlawful employment practices":[28] disparate treatment and disparate impact.[29] Under each theory the plaintiff retains the ultimate burden of persuading the court that a certain employment practice resulted in discrimination forbidden by Title VII.[30]

Disparate treatment occurs when an employer treats certain employees less favorably than others based upon a distinction forbidden by Title VII.[31] Disparate treatment cases can be established in two ways, either directly, by showing discrimination on its face (facial discrimination), or by showing that the employer's excuse for the practice is pretextual (pretextual discrimination).[32] Both categories require that an intent to discriminate, either actual or implied, be shown.[33]

Direct or facial discrimination, the most straightforward type of disparate treatment claim, arises when an employer enacts a practice or policy that explicitly treats a group protected by Title VII differently from others.[34] The employer's categorization of employees on a basis prohibited by Title VII establishes the requisite intent.[35] For example,

---

28. 42 U.S.C. § 2000e-2(1)-(2). *See supra* note 19 for the specific statutory language.

29. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In *International Brotherhood of Teamsters*, the Court distinguished between disparate treatment and disparate impact in the following manner:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

Id. at 335-36 n.15.

For a complete, intensive look at the disparate treatment versus disparate impact dichotomy, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286-1394 (2d ed. 1983). For an excellent discussion of Title VII analysis in general and in the specific context of fetal protection policies see Wendy W. 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, 668-82 (1981).

30. *See* Wards Cove Packing Co. v. Atonio, 490 U.S 642 (1989).

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

32. Hayes v. Shelby Memorial Hosp. 726 F.2d 1543, 1547 (11th Cir. 1984). *See* Williams, *supra* note 29, at 673-82.

33. *See* Williams, *supra* note 29, at 669.

34. *Hayes*, 726 F.2d at 1547; *See* Williams, *supra* note 29, at 668.

35. *See* Williams, *supra* note 29, at 669 n.176.

in *Phillips v. Martin Marietta Co.*,[36] the Court found that an employer's hiring policy that refused to employ women with preschool age children but imposed no similiar exclusion on men with preschool age children was facially discriminatory.[37] In *Los Angeles Department of Water & Power v. Manhart*[38] an employer's policy that required women to make larger pension payments than men was found to be facially discriminatory.[39] An employer charged with facial disparate treatment discrimination has only one defense available, the bona fide occupational qualification (BFOQ)[40] defense statutorily provided for in Title VII.[41] This defense tolerates discrimination on the basis of religion, sex, or national origin only when such distinctions are "reasonably necessary to the normal operation of that particular business or enterprise."[42]

In *Dothard v. Rawlinson*,[43] the sole application by the United States Supreme Court of the BFOQ to a sex discrimination case, the Court specifically stated that the BFOQ defense is "meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[44] *Dothard* involved an Alabama Board of Corrections regulation that stated that only men would be hired for positions involving contact with maximum security male prisoners.[45] The Court upheld the male-only hiring policy as a valid BFOQ.[46] The Court stressed that an employer relying upon a BFOQ defense must prove "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[47]

On the other hand, the more typical, and subtle, form of disparate

---

36. 400 U.S. 542 (1971).

37. *Id.* at 544.

38. 435 U.S. 702 (1976).

39. *Id.* at 716.

40. *Hayes*, 726 F.2d at 1547; *See* Williams, *supra* note 29, at 668.

41. 42 U.S.C. § 2000e-2(e)(1) (1988).

42. *Id.* at § 2000e-2(e). The BFOQ defense is unavailable to an employer charged with discrimination on the basis of race. *Id.*

43. 433 U.S. 321 (1977).

44. *Id.* at 334.

45. *Id.*

46. *Id.*

47. *Id.* at 333 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)). *See also* Williams, *supra* note 29, at 679-82 (discussing the BFOQ in the context of a fetal protection case and concluding that the BFOQ defense is unavailable to an employer who enacts a fetal protection plan and is charged with facial disparate treatment because the exclusion of women is unrelated to their ability to perform their job).

treatment—the pretextual variety—occurs when an employee alleges that the employer intentionally treats him differently than others who are similarly situated. In such cases, the law creates a presumption based on a minimum threshold showing.[48] Once the plaintiff establishes a prima facie case, an inference of discrimination arises analagous to a rebuttable presumption.[49] The employer can rebut the presumption by alleging a "legitimate nondiscriminatory reason" for the employment action taken.[50] After the employer articulates a legitimate, nondiscriminatory reason for the challenged conduct, the employee must prove that the grounds cited are merely a pretext for discriminatory intent.[51] The plaintiff retains the burden of persuasion during the entire pretextual disparate treatment analysis.[52]

Disparate impact, the second major type of Title VII violation, occurs when an employer adopts a neutral policy that has a disproportionate impact on a protected class.[53] The major distinction between disparate impact and disparate treatment discrimination is found in the differing points of emphasis of the two theories. Disparate impact focuses on the consequences of an employer's facially neutral policy, regardless of intent.[54] Conversely, disparate treatment focuses on the em-

---

48. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (finding that pretextual racial discrimination may exist where an employer refuses to rehire a black employee because of prior criminal conduct). *McDonnell Douglas* is the leading case for the pretextual disparate treatment theory. The plaintiff in that case alleged racial discrimination, and he was able to make out a prima facie case by showing: (1) that he was a member of a racial minority, (2) that he applied for and was qualified for the job, (3) that he was rejected for the position despite his qualifications, and subsequently, (4) that the position remained unfilled and the employer continued to take applications from persons with the plaintiff's qualifications. *Id.* at 802. *See also* Williams, *supra* note 29, at 668-69 n.173 (discussing how pretext arguments arise in Title VII cases).

49. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

50. *See generally* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (The burden that shifts to the defendant is the burden of going forward with the case; the employer need not prove legitimate, nondiscriminatory motivation; the plaintiff, not the defendant, retains the burden of proof throughout the pretextual case.).

51. *McDonnell Douglas*, 411 U.S. at 804. The employee may meet her burden of proving pretext by showing that the proffered reason is not worthy of credence or that it was not the true reason for the conduct.

52. *Burdine*, 450 U.S. at 253-56 (1981). *Burdine* applied the analysis set forth in *McDonnell Douglas* and expounded further on the allocations of proof. *Id.*

53. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In *Griggs*, black employees challenged an employer's use of intelligence tests as unrelated to job performance and as having a disproportionate exclusionary effect on blacks. The Court responded by creating the disparate impact theory, stating that Title VII forbids employment practices that are "fair in form, but discriminatory in operation" as well as overt discrimination. *Id.*

54. *See id.* at 430-32. Intent to discriminate is irrelevant under the discriminatory impact theory because intent is inferred from the employer's adoption of the policy in spite of its apparent

ployer's intent to discriminate, either actual or implied.[55]

The disparate impact theory of recovery had its judicial birth in *Griggs v. Duke Power Co.*[56] A plaintiff seeking to prove disparate impact must establish a prima facie case by showing, usually through statistical evidence, that an employer's neutral policy substantially and adversely impacts a group protected by Title VII.[57]

At the same time the Court created the disparate impact theory, it formulated the business necessity defense which allowed employers to defend against allegations of disparate impact employment discrimination.[58] Under the Court's reasoning in *Griggs*, an employer confronted with a prima facie case of disparate impact had a burden to assert a business necessity defense to avoid liability.[59] If the defendant responded with a valid business necessity defense, the plaintiff was then given an opportunity to prove that a less discriminatory alternative existed to accomplish the same result.[60]

---

effects. *Id.*

55. *McDonnell Douglas*, 411 U.S. at 804. Discriminatory motive must be proven to hold an employer liable for discriminatory treatment. *Id. See* Williams, *supra* note 29, at 669-70; Furnish, *supra* note 24, at 88-89.

56. 401 U.S. 424 (1971) (holding that an employment practice that results in the exclusion of blacks and is not related to job performance is prohibited). In *Griggs*, the Court first interpreted Title VII to prohibit neutral policies with discriminatory effects. The Court stated:

> The objective of Congress . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Id. at 429-30.

57. *See Griggs*, 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). These leading cases established the order and allocation of proof in disparate impact cases. *Id. See also* Williams, *supra* note 29, at 671-72 (discussing the creation by the courts of disparate impact and its importance in attaining equal employment goals espoused by Title VII).

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

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

Id. at 431-32. *See also* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983) (citing *Griggs*, 401 U.S. at 431). *But see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658-59 (1989) (requiring that "the legitimate employment goals of the employer" be furthered by the challenged employment practice).

59. *Griggs*, 401 U.S. at 432. In *Griggs* the Court stated that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id. See also Dothard*, 433 U.S. at 329.

60. *Dothard*, 433 U.S. at 329; Albemarle Paper Co. v. Moody, 422 U.S. at 425 (1975).

In *Wards Cove Packing Co. v. Atonio*,[61] the Court revamped the traditional burdens of proof in a disparate impact case so that the plaintiff now retains the burden of persuasion at all times.[62] Additionally, the language in *Wards Cove* widened the business necessity defense considerably by describing the crux of a business necessity defense as "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[63] After *Wards Cove*, plaintiffs who are able to prove that an employment policy has a discriminatory effect on a protected population face the additional burden of showing that the employer's underlying objective can be met by an alternative that has a less discriminatory impact upon the plaintiff's group while simultaneously not burdening the defendant employer with additional costs.[64]

Thus, a court's designation of a challenged employment practice as facially discriminatory or facially neutral establishes both the plaintiff's burden of proof and the defense—either the more stringent BFOQ or the less demanding business necessity defense—that will be available to the defendant.[65] This distinction is likely to be outcome determinative, particularly when the challenged employment practice is a fetal protection policy. Prior to the Supreme Court's decision in *Johnson Controls*,[66] cases involving fetal protection policies were disposed of as disparate impact cases.[67] In *Wright v. Olin Corp.*,[68] the court decided to

---

61. 490 U.S. 642 (1989).

62. *Id.* at 659.

63. *Id.* at 658-59. *See* Marcelo L. Riffaud, Comment, *Fetal Protection and* UAW v. Johnson Controls, Inc.: *Job Openings For Barren Women Only*, 58 FORDHAM L. REVIEW 843, 853-54 (1990).

The *Wards Cove* decision has evoked considerable criticism among commentators. *See generally*, Raymond L. Hogler, and Jeanette N. Cleveland, *Wards Cove and the Theory of Disparate Impact: From Bad Law to Worse Policy*, 41 LAB. L.J. 138, 142 (1990).

64. *Wards Cove*, 490 U.S. at 660. Because a plaintiff is likely to have both limited funds and limited access to employer motivations, this task may prove to be inordinately difficult and ultimately may be outcome determinative. *See* Hamlet, Note, *supra* note 27, at 1117.

65. At least one commentator has criticized some jurisdictions for blurring the distinction and demonstrating confusion about these important differences. *See* Williams, *supra* note 29, at 670 n.179 (discussing lower federal court decisions indicating that the BFOQ defense and business necessity defense, instead of being separate and distinct, might be commingled and used to defend either type of employment discrimination).

66. International Union, United Auto Workers v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

67. *See, e.g.*, 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). Each of these cases determined that the disparate impact/business necessity analysis was the proper framework to evaluate policies that excluded women from certain employment

analyze Olin's fertility policy as facially neutral, although the court admitted that the label "might be subject to logical dispute."[69] The court determined that to apply the facial discrimination/BFOQ analysis would unfairly prejudice the employer since a BFOQ defense could not be established.[70] The court proceeded to advance a three-pronged inquiry to satisfy the business necessity defense in the context of a fetal protection policy.[71]

In *Hayes v. Shelby Memorial Hospital*,[72] a subsequent fetal protection case, the Eleventh Circuit Court of Appeals "borrowed" the *Wright* criteria and applied them to the facts of its case.[73] The court in *Hayes* stated that under its analysis, a sex specific fetal protection policy violates Title VII unless a defendant can show: "(1) that a substantial risk of harm exists, and (2) the risk is borne only by members of one sex, and (3) the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex."[74]

---

positions based on a stated concern for fetal health.

The decision by these courts to evaluate fetal protection policies under this framework has been criticized by commentators. *See* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV 1219, 1248-51 (1986); Barbara J. Naretto, Note, *Employment Discrimination Made Easy: Fetal Protection Policies*, 24 VAL. U. L. REV. 441, 457-60 (1990); Diane S. Peake, Note, *Employment Discrimination*—Wright v. Olin Corp.: *Title VII and the Exclusion of Women from the Fetally Toxic Workplace*, 62 N.C. L. REV. 1068, 1083 (1984). It should be noted that during the period between the Court's grant of certiorari and its decision in *Johnson Controls*, the Sixth Circuit reversed a district court's grant of summary judgment for an employer who excluded all fertile female employees from foundry jobs involving lead exposure. Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990). In making its determination that the employer could justify the fetal protection policy only as a BFOQ, the court stated, "[w]e agree with the view of the dissenters in *Johnson Controls* that fetal protection policies perforce amount to overt sex discrimination, which cannot logically be recast as disparate impact and cannot be countenanced without proof that infertility is a BFOQ." *Id.* at 1310.

68. 697 F.2d 1172 (4th Cir. 1982). *Wright* was the first federal court of appeals case to address the fetal protection plan dilemma. *Id.*

69. *Id.* at 1186. Olin's policy barred all fertile women from work areas involving exposure to hazardous chemicals, primarily lead. *Id.* at 1182.

70. *Id.* at 1185 n.21. The court's only stated justification for analyzing the policy under a disparate impact analysis rather than a disparate treatment analysis is to allow the employer a defense. *Id.*

71. *Wright*, 697 F.2d at 1190.

72. 726 F.2d 1543 (11th Cir. 1984).

73. *Id.* at 1548 n.8. *Hayes* involved a hospital that dismissed an x-ray technician after she became pregnant to avoid potential liability for fetal harm due to radiation exposure. *Id.* at 1546.

74. *Id.* at 1554. The *Hayes* court stressed that it was not applying a business necessity defense even though the showing required of the employer was identical. *Id.* at 1548 n.8. Instead of classifying the policy as neutral on the front-end, the court began its analysis by saying that the policy presented a presumption of facial discrimination, rebuttable by the employer's satisfaction

In *International Union, United Auto Workers v. Johnson Controls*,[75] both the district court[76] and the Seventh Circuit[77] followed the analytical framework used by the Fourth and Eleventh Circuits in *Wright* and *Hayes*.[78] The Supreme Court, however, rejected the notion that sex specific fetal protection policies can be classified as anything but facially discriminatory.[79] In support, the Court pointed out that *Johnson Controls* completely ignored evidence that lead exposure is equally as detrimental to the male reproductive system as it is to a female's in making the decision to implement a restrictive policy pertaining only to women.[80] Additionally, the Court declared that the PDA mandates that a fetal protection policy that excludes all women from employment on the basis of their childbearing capability must be labelled facially discriminatory.[81] As such, the Court held that Johnson Controls' only defense was to establish a BFOQ.[82]

Reaffirming previous holdings that the BFOQ defense is to be given a narrow, restrictive interpretation, the Supreme Court next con-

---

of the first and second prongs of the "defense." *Id.* at 1548-49.

The court offered no precedent to explain why it could simply ignore the BFOQ, a statutory affirmative defense, in an admittedly facially discriminatory situation and replace it with other requirements. *See* Naretto, Note, *supra* note 67, at 463 n.161.

75. 680 F. Supp. 309 (E.D. Wis. 1988), *aff'd en banc*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).

76. *Johnson Controls*, 680 F. Supp. 309 (E.D. Wis. 1988).

77. *Johnson Controls*, 886 F.2d 871 (7th Cir. 1989).

78. *Johnson Controls*, 680 F. Supp. at 315; 886 F.2d at 883-87.

79. *Johnson Controls*, 111 S. Ct. at 1202-03. The Court stated:

> The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. . . .[Johnson Controls'] fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender.

Id. at 1202.

80. *Id.* The Court noted further that under a *Hayes* analysis, Johnson Controls would not have prevailed because their policy protected only the children of female employees. *Id.*

81. *Id.*

82. *Id.* at 1204. The entire Court agreed that Johnson Controls' fetal protection policy was defensible only as a BFOQ. The majority declared that "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . . and thus may be defended only as a BFOQ." *Id.* Justice White agreed in a concurring opinion that "[t]he Court properly holds that Johnson Controls' fetal protection policy overtly discriminates against women, and thus is prohibited by Title VII unless it falls within the bona fide occupational qualification (BFOQ) exception. . . ." *Id.* at 1210 (White, J., concurring). Justice Scalia stated in his concurrence that he generally agreed with the majority's analysis except for several reservations, none of which contradicted the conclusion that the only defense available to Johnson Controls was the BFOQ. *Id.* at 1216 (Scalia, J., concurring).

sidered whether Johnson Controls could establish a BFOQ.[83] The Court rejected Johnson Controls' argument that the "so-called safety exception to the BFOQ" applied.[84] In the context of a sex specific fetal protection policy, the safety exception, the Court held, is limited to instances in which sex or pregnancy actually interferes with an employee's ability to perform her job.[85] The Court distinguished its decisions in *Dothard v. Rawlinson*[86] and *Western Airlines, Inc. v. Criswell*[87] by noting that the third parties in those cases were essential to the specific business in question.[88] The Court succinctly summarized its view when it stated: "No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of batterymaking."[89]

The Court's examination of the PDA and its legislative history resulted in the conclusion that the PDA contains its own BFOQ.[90] According to the majority opinion, pregnant or fertile women in an employment setting must be treated the same as other workers not so affected, as long as their abilities to perform the job in question do not differ.[91] The Court then concluded that, based on the record, Johnson Controls could not present a valid BFOQ.[92]

Justice White, in a concurring opinion joined by Chief Justice Rehnquist and Justice Kennedy, wrote that the majority erroneously interpreted the BFOQ defense so narrowly that a sex specific fetal protection policy could never be justified.[93] The concurring justices as-

---

83. *Id.* at 1204-07.

84. *Id.* at 1205.

85. *Id.*

86. 433 U.S. 321 (1977) (sex was found to be a valid BFOQ in an all-male maximum security prison).

87. 472 U.S. 400 (1985) (age-based discrimination against flight engineer justified based on the safety of airplane passengers).

88. *Johnson Controls*, 111 S. Ct. at 1205-06.

89. *Id.* at 1206

90. *Id.*

91. *Id.* at 1206-07. One of the two concurring opinions disagreed with the idea that the PDA altered the BFOQ defense. Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, wrote that the PDA's only purpose was to bring pregnancy discrimination within the realm of the protection of Title VII. *Id.* at 1213-14 (White, J., concurring).

92. *Id.* at 1207. In order for Johnson Controls' to establish a valid BFOQ under the majority opinion, the employer would have to demonstrate that substantially all fertile female employees were unable to perform their jobs. *Id.* at 1208.

93. *Id.* at 1210 (White, J., concurring). The concurrence also disagreed with the majority that Johnson Controls' policy had to be completely invalidated. *Id.* at 1215-16.

serted that an employer could justify a fetal protection policy as a BFOQ by showing that the exclusion of women was either reasonably necessary to avoid substantial tort liability[94] or reasonably necessary for the safe operation of the business.[95] Further, they also indicated that increased costs other than tort liability might be sufficient to justify a fetal protection policy as a BFOQ.[96]

Although the majority held that sex specific fetal protection policies violate Title VII, other questions were left unanswered. For example, will an employer who complies with Title VII face tort liability if an employee's fetus sustains injuries as a result of exposure to toxics in the workplace?[97] The concurring justices were particularly concerned with the potential for employer tort liability, an issue they alleged the majority dismissed by speculation.[98] The majority labelled the possibility of an employer being held liable under general tort principles "remote at best"[99] since Title VII forbids sex specific fetal protection policies. If the employer warns women fully of the risks of exposure and does not act negligently, there should be no liability.[100] In contrast, the concurring justices disagreed that the tort issue was that easily resolved and made three observations to illustrate that viewpoint. First, the concurrence pointed out that the issue of whether Title VII compliance

---

94. *Id.* at 1210.

95. *Id.* at 1212-13. With respect to the interpretation to be given to the safety exception of the BFOQ defense, the concurrence disagreed with the majority's attempt to distinguish *Dothard*, 433 U.S. 321, and *Criswell*, 472 U.S. 400, as situations in which the third parties whose safety was being considered were essential to the specific business in question. *Id. See supra* notes 83-88 and accompanying text for the majority's rejection of the safety exception to the BFOQ. The concurrence stated that, "protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons (*Dothard*) or flying airplanes (*Criswell*)." *Johnson Controls*, 111 S. Ct. at 1213 (White, J., concurring).

96. 111 S. Ct. at 1213 (White, J., concurring). On this point, the concurrence stated that the enactment of the BFOQ indicated an unwillingness on the part of Congress " 'to require employers to change the very nature of their operations.' " *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989)).

Justice Scalia, in a separate concurrence, also asserted that the majority went too far in stating that increased costs, short of business threatening costs, cannot support a BFOQ defense. *Johnson Controls*, 111 S. Ct. at 1216 (Scalia, J., concurring).

97. This is not a purely hypothetical question. There is already one reported case in which a female employee's child sued a battery manufacturer for injuries caused by lead exposure. The case made it to the jury, but the verdict was returned for the employer. Security Nat'l Bank v. Chloride, Inc., 602 F. Supp. 294 (D. Kan. 1985).

98. *Johnson Controls*, 111 S. Ct. at 1211 (White, J., concurring).

99. *Id.* at 1208.

100. *Id.* While the majority stressed its prior decisions which held that an employer cannot rely on the incremental costs of hiring women to justify discrimination under Title VII, it stopped short of saying that business threatening costs could never excuse Title VII violations. *Id.* at 1209.

will preempt state tort claims remains unsettled.[101] Second, warnings of potential fetal injuries to parents will not prevent the assertion of tort claims by injured children because parents cannot waive their offspring's causes of action and any negligence on the parents behalf will not be imputed to their children.[102] Third, employers will be faced with the difficult task of determining in advance what constitutes negligence.[103] Thus, employers with fetally toxic work environments are left to speculate on whether they may face future tort liability for complying with Title VII.

The *Johnson Controls* decision makes it practically impossible for an employer to enact a fetal protection policy without violating Title VII, as amended by the PDA. This decision makes further inroads for women in the workplace. It certainly comports with Congressional efforts to protect women from being penalized in the workforce as a result of their sex. Restrictions on the employment opportunities of women are neither new nor rare[104]—neither are fetal protection policies.[105] Interestingly, employers have excluded all fertile women through the enactment of fetal protection policies only in male domi-

---

101. *Id.* at 1211 (White, J., concurring). By the majority's own admission, the issue of whether an employer's compliance with Title VII will preempt state tort liability if an employee's child suffers an injury due to fetal exposure in a toxic workplace remains unanswered. While acknowledging that the preemption issue was not before the Court, the majority reflected that an employer complying with Title VII would not be held liable for violating state law if it was impossible to comply with both state and federal laws. The majority further speculated that state tort liability might obstruct the Congressional aim in enacting Title VII, which was to prevent discrimination in the workplace. *Id.* at 1209.

102. *Id.* at 1211 (White, J., concurring).

103. *Id.*

104. *See* Muller v. Oregon, 208 U.S. 412 (1908). The Supreme Court in *Muller* employed the following rhetoric to justify an Oregon statute limiting working women to ten-hour work days:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not . . . continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Still again, history discloses the fact that woman has always been dependent upon man . . . .

Id. at 421.

105. Companies such as American Cyanamid, Allied Chemical, B.F. Goodrich, Monsanto, Sun Oil, Gulf Oil, Union Carbide, and General Motors, to name a few, are among those who have enacted restrictive fetal protection policies. *See* Becker, *supra* note 67, at 1226. By one estimate, fetal protection programs place upwards of 100,000 jobs out of women's reach. Williams, *supra* note 29, at 647.

nated occupations.[106] Despite the evidence of fetal health risks in other, traditionally female jobs, employers generally allow women to continue working in these positions without imposing fetal safety limitations.[107] This dichotomy between "male" and "female" occupations has been attributed to various employer concerns,[108] all of which translate into various financial reasons for excluding women, via sex specific fetal protection policies, from the typically male blue-collar work force.[109]

Furthermore, the evidence traditionally relied on to establish risks to fetal health is questionable as well as slanted almost exclusively towards examining only those hazards introduced maternally. Paternally transmitted fetal risks are virtually ignored by both the scientific community in their experimental efforts and employers who are (or should be) aware of such risks.[110] All of which casts at least a shadow of doubt on employer assertions that the enactment of fetal protection policies are truly and exclusively acts of beneficence for fetal well-being.[111]

Irrespective of their actual motivation, employers seeking to protect fetal health must now do it through neutral rather than gender-specific policies to avoid Title VII liability.[112] Unfortunately, with the question of whether compliance with Title VII will preempt tort liability remaining unanswered, employers may be left in a quandary. If employers who nonnegligently keep the doors open to both sexes are subjected to tort liability, both men and women stand to lose if those jobs disappear.

Thus, the costs and stakes associated with the two big questions left unanswered by *Johnson Controls*—whether there can be a cost-based BFOQ in any circumstance and whether compliance with Title

---

106. Becker, *supra* note 67, at 1237-40. Such policies have been implemented almost exclusively in unionized, traditionally male, blue-collar industries. *Id.* at 1240.

107. Becker, *supra* note 67, at 1238-39.

108. Some of these considerations include: the extra cost of providing facilities (washrooms and showers), equipment, and clothing for women; dealing with the disruptions and disorder likely to result from admitting women into the traditionally male workplace where men are often hostile to female co-workers; and, in unionized industries with fixed pay systems, an inability to offset the high costs of hiring women by paying them lower wages. Becker, *supra* note 67, at 1240-41.

109. Becker, supra note 67, at 1237-40. This is not to imply that financial considerations are anything but relevant to an employer who must make a profit or cease to exist.

110. Becker, *supra* note 67, at 1236.

111. Johnson Controls sought to justify its fetal protection policy solely on its avowed concern for fetal health.

112. At least one commentator contends that, in the long run, this result may prove more beneficial for fetal health because it demands that employers address fetal toxins transmitted from both the male and female. Williams, *supra* note 29, at 681-82. Of course, the flip side of this coin is that employers might decide simply to ignore fetal health interests altogether.

VII may result in tort liability for fetal injuries—pose a number of questions for the judicial and legislative branches to address in the future.

Edie Renee Ervin

Editor's Note

After this note was accepted for publication, Congress enacted the Civil Rights Act of 1991. The new Act makes extensive changes in Title VII of the Civil Rights Act of 1964 and other anti-discrimination statutes. The topic of this Note, UAW v. Johnson Controls, *111 S. Ct. 1196 (1991), is substantively unaffected by the new Act. However, the Act did explicitly overrule several recent Supreme Court decisions, including* Wards Cove Packing Co. v. Atonio, *490 U.S. 642 (1989), discussed in this note. Practicing attorneys should consult the new Act for specific changes.*