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Status of Sex-specific Fetal Protection Policies, The

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The Status of Sex-specific Fetal Protection Policies

International Union, UAW v. Johnson Controls, Inc.[1]

I. INTRODUCTION

Many commentators and judges[2] consider cases involving fetal protection policies the most important sex discrimination cases since Congress enacted Title VII of the Civil Rights Act of 1964.[3] With as many as twenty million[4] workers potentially exposed to chemicals in the workplace that may cause reproductive health problems, employers have implemented fetal protection policies. The employers' motivation for enacting these policies is dual in nature: (1) to protect the health of future generations[5] and (2) to protect themselves from potential tort liability.[6] Regardless of the benevolence of employers' motives, the issue is whether individual employers should be allowed to close hazardous jobs to women because of the risk of fetal harm.

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1. 111 S. Ct. 1196 (1991).

2. *See* International Union, UAW v. Johnson Controls, 886 F.2d 871, 920 (7th Cir. 1989) (Easterbrook, J., dissenting), *rev'd*, 111 S. Ct. 1196 (1991); Catherine Ruckelshaus, *Fetal Protection Policies: The Most Important Sex Discrimination Case(s) in Any Court Since Title VII Was Enacted, in* 19TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 1990, at 245 (PLI Litig. & Admin. Practice Course Handbook Series No. 386, 1990).

3. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988).

4. *Johnson Controls*, 886 F.2d at 877 (Easterbrook, J., dissenting); *see also* Ruckelshaus, *supra* note 2.

5. *Johnson Controls*, 111 S. Ct at 1203.

6. *Id.* at 1208.

II. FACTS AND HOLDING

A battery manufacturer's fetal protection policy collided with the Title VII prohibition[7] against sex discrimination in *International Union, UAW v. Johnson Controls, Inc.*[8] In 1982 the defendant, Johnson Controls, Inc. (Johnson) announced a broad exclusionary fetal protection policy barring all fertile women from jobs involving a specified amount[9] of lead exposure or jobs which could expose them to lead through the exercise of job bidding, bumping, transfer, or promotion rights.[10] Only women who could prove their sterility by medical documentation were excluded from the company policy.[11] The policy was prompted by the ineffectiveness of a former voluntary policy and by an Occupational Health and Safety Administration (OHSA) regulation noting the critical level of lead exposure for a worker planning to have a family.[12] All parties to the action agreed that there was substantial risk to a fetus from lead exposure.[13]

Johnson's policy was first challenged in 1984 by three individuals and their respective unions: a woman who had been sterilized to avoid losing her job, a fifty-year-old divorcee who suffered a loss in compensation when she was transferred from a job where she was exposed to lead, and a man denied a leave of absence for the purpose of lowering the level of lead in his blood because he intended to be a father.[14] The three brought suit in the United

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7. Title VII provides in relevant part:

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

42 U.S.C. § 2000e-2(a)(1) (1988).

8. 111 S. Ct. 1196 (1991).

9. A prohibited work area was determined as one where over the past year an employee recorded a lead blood level of more than 30 micrograms per deciliter or the work site yielded an air sampling containing a lead level in excess of 30 micrograms per cubic meter. *Id.* at 1200.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1201.

14. *Id.* at 1200.

States District Court for the Eastern District of Wisconsin and were certified as a class representing all past, present, and future production and maintenance employees who belonged to various unions.[15] The plaintiffs alleged that Johnson's fetal protection policy was overtly discriminatory, thereby violating Title VII as amended by the Pregnancy Discrimination Act (PDA).[16] The district court found that the policy was facially neutral but had a disparate impact on women; thus, the appropriate defense was "business necessity."[17] The district court applied a three-part business necessity test.[18] First, the court found a substantial health risk to a fetus exposed to lead.[19] Second, the court determined that transmission of the hazard to the fetus occurs only through women.[20] Finally, the court found that the plaintiffs[21] failed to prove that a less discriminatory alternative was equally capable of preventing the health hazard to the fetus.[22] Therefore, the district court granted summary judgment for the defendant, and the plaintiffs appealed.[23]

The Seventh Circuit, sitting en banc, affirmed the district court's grant of summary judgment.[24] The majority agreed that the proper standard for evaluating a fetal protection policy was the defense of business necessity.[25]

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15. International Union, UAW v. Johnson Controls, Inc., 680 F. Supp. 309, 310 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).

16. The Pregnancy Discrimination Act added subsection (k) to § 701 of the Civil Rights Act of 1964 and reads in pertinent part:

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis or pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k) (1988).

17. *Johnson Controls*, 680 F. Supp. at 316. See *infra* notes 79-126 for a discussion of disparate treatment and disparate impact cases and the proper defenses.

18. *Johnson Controls*, 111 S. Ct. at 1200. The three-part test was derived from fetal protection cases in the Fourth and Eleventh Circuits discussed *infra* notes 142-59 and accompanying text.

19. *Johnson Controls*, 111 S. Ct. at 1201.

20. *Johnson Controls*, 680 F. Supp. at 316. There was evidence indicating harm to offspring caused by lead exposure in males. *Johnson Controls*, 111 S. Ct. at 1215.

21. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (the burden of persuasion remains with the plaintiff when challenging a business necessity defense).

22. *Johnson Controls*, 680 F. Supp. at 316.

23. *Id.* at 309.

24. *Johnson Controls*, 886 F.2d at 874.

25. *Id.* at 883.

The majority then found there was substantial evidence of a health-risk factor to the fetus[26] via transmission through the mother, while the evidence concerning harmful effects through potential fathers was, at best, speculative.[27] Furthermore, the issue of less discriminatory alternatives was waived because it had not been raised by the plaintiffs.[28]

The court of appeals further stated that although the proper analytical framework was the business necessity defense, the bona fide occupational qualification (BFOQ) defense was satisfied as well.[29] Discrimination on the basis of sex because of safety concerns is allowed in circumstances where the job qualification relates to the "essence" or "central mission" of the employer's business and is indispensable to the particular business.[30] The court found that industrial safety was part of the "essence" of Johnson's business, and that a fetal protection policy was reasonably necessary to further that concern.[31]

Judge Posner[32] and Judge Easterbrook[33] wrote separate dissents to the majority *en banc* decision. Judge Posner found the fetal protection policy to be discriminatory on its face; therefore, the policy could only be defended as a BFOQ.[34] He would have remanded the case, believing that whether the policy was lawful as a BFOQ required additional factual findings.[35] Judge Easterbrook agreed with Judge Posner that the only possible defense for a facially discriminatory policy was a BFOQ, but he concluded that the BFOQ defense would not prevail because Johnson's concern for the health of the unborn was irrelevant to the operation of the business under the BFOQ.[36]

The Supreme Court of the United States granted certiorari and reversed the appellate court's decision.[37] Using the BFOQ defense as its analytical framework, the Court held that the language of both the BFOQ provision and the Pregnancy Discrimination Act (PDA) which amended it, as well as

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26. *Id.* at 888.

27. *Id.* at 889.

28. *Id.*

29. *Id.* at 893.

30. *See* Western Airlines, Inc. v. Criswell, 472 U.S. 400, 404 (1985) (flight engineers over 60 are not permitted to fly because age-connected debility poses great threat to safety of passengers); Dothard v. Rawlinson, 433.U.S. 321, 335 (1977) (sex discrimination is permissible because gender is related to a guard's ability to maintain security at a maximum security prison).

31. *Johnson Controls*, 886 F.2d at 894.

32. Judge Cudahy also dissented. *Id.* at 901.

33. His dissent was joined by Judge Flaum. *Id.*

34. *Id.* at 902.

35. *Id.* at 908.

36. *Id.* at 912.

37. *Johnson Controls*, 111 S. Ct. at 1197.

legislative history and case law, prohibit employers from discriminating against a woman because of her capacity to become pregnant, unless her reproductive potential prevents her from performing the duties of her job.[38] Decisions concerning the welfare of future children, the Court stated, must be left to the parents who conceive, bear, support and raise them rather than to employers who hire those parents.[39]

III. LEGAL BACKGROUND

A. Sex-Specific Protectionist Legislation

At the turn of the century, the United States Supreme Court, in *Muller v. Oregon*,[40] upheld an Oregon statute prohibiting women from working more than ten hours a day in certain labor intensive industries.[41] The Oregon statute was characteristic of the protectionist legislation advanced by labor groups and social reformers of the time.[42] Those petitioning to uphold sex-specific legislation sought to improve the health of working mothers and the health of future generations.[43] In *Muller*, Chief Justice Brewer reasoned that the sex-specific legislation was justified because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race."[44] The Chief Justice in essence determined that any conflict between a woman's interest in employment and society's interest in the domestic and reproductive responsibilities of women must be resolved in favor of the latter.[45]

The asserted justifications for sex-specific legislation are subject to criticism. First, they did not address the lack of alternatives available to working women and the potentially devastating economic effects of those alternatives on the workers and their families.[46] Traditionally, women's

38. *Id.* at 1207.

39. *Id.*

40. 208 U.S. 412 (1908).

41. *Id.* at 423.

42. Wendy 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, 654 (1981).

43. BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 24, 29-30 (1975).

44. *Muller*, 208 U.S. at 421.

45. *Id.*

46. Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1224 (1986).

financial contributions to their families were considered less important than their biological and domestic contributions.[47] But today, as one commentator argues, employment in higher-paying hazardous jobs may serve the next generation better than exclusionary policies by enabling women to provide their children with better medical care and nutrition.[48] For unskilled women, such jobs may provide the only escape from poverty.[49] Second, the protectionist legislation was typically over-inclusive because it restricted all women without regard to their marital status, use of contraception, expressed desire to have children, or even actual childbearing ability.[50] Third, proponents were willing to place restrictions on women without firm scientific evidence of a need for restrictions.[51] Additionally, the potential detrimental effects on reproductive organs are as likely to occur in men as women.[52] Fourth, women were excluded only when they were dispensable; for example, no legislation was passed to prevent women from providing all-night nursing services, although the very hazards used to justify other protectionist legislation were present.[53] Finally, supporters of the legislation dismissed the possibility that women were competent decision-makers.[54]

Since the enactment of Title VII of the Civil Rights Act and the Pregnancy Discrimination Act, courts have uniformly held that sex-specific state labor statutes are unenforceable.[55] However, the practice of limiting women's employment opportunities for the good of their potential children resurfaced in the workforce in the form of employer fetal protection policies.[56] The same justifications proffered in turn-of-the-century protectionist legislation is echoed by fetal protection policy proponents. Ironically, while Title VII prohibits state legislation from protecting only women

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47. *Id.*

48. Mary E. Becker, *Sterile Women Only Need Apply: Fetal Protection Policies and Johnson Controls*, 1991 WL 330749, at *6 (Jan. 1991).

49. Joan Bertin, *Should "Fetal Protection" Policies Be Upheld? No: Fix the Job Not the Worker*, 76 A.B.A. J., June 1990, at 39.

50. Sherri Evans-Stanton, Comment, *Gender Specific Regulations in the Chemical Workplace*, 27 SANTA CLARA L. REV. 353, 362 (1987); Holly C. Keehn, Comment, *Bridging the Gap: The Problem of Uniquely Susceptible Individuals in the Workplace*, 64 TUL. L. REV. 1677, 1682 (1990).

51. *See* Becker, *supra* note 46, at 1225.

52. Gary A. Nothstein & Jeffrey P. Ayres, *Sex Based Considerations of Differentiation in the Workplace: Exploring the Biochemical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239, 243-44 (1981).

53. *See* Becker, *supra* note 46, at 1225.

54. *Id.*

55. *Id.* at 1229.

56. *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Becker, *supra* note 46, at 1220-21.

workers, earlier circuit decisions[57] allowed private employers to adopt policies protecting potential offspring from the risks associated with maternal employment.[58] The decision in *Johnson Controls* established some limits on sex-specific fetal protection policies.

B. Fetal Protection Policies and the Hazardous Workplace

The rise in fetal protection policies can be attributed in large part to the pressure exerted on employers in the 1970s to hire more women in traditionally male, unionized, blue-collar jobs.[59] Many jobs, even dental assistance and word processing,[60] expose workers to industrial chemicals that have been identified as hazardous to employees' reproductive systems.[61]

A reproductive hazard in the workplace is defined as any employee exposure capable of harming the fetus or prospective child of the worker, or any exposure harming the reproductive system or sexual capacity of the exposed worker.[62] The resulting structural and functional disorders in offspring can occur through both sexes.[63] Contrary to common belief, susceptibility based on sex is largely without merit.[64] However, employers continue to develop fetal protection policies which single out only female employees.

The justifications advanced for female-oriented policies resemble discussions on protectionist legislation.[65] Employers argue that they have a moral duty to protect the health of future generations.[66] Often, employers

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57. *See Hayes*, 726 F.2d at 1552; *Wright*, 697 F.2d at 1189-90; Becker, *supra* note 46, at 1220-21.

58. Williams, *supra* note 42, at 655.

59. Becker, *supra* note 46, at 1225-26.

60. Pendleton E. Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of* International Union, UAW v. Johnson Controls, Inc., 75 CORNELL L. REV. 1110, 1122 (1990).

61. *See generally* Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981).

62. Alan C. Blanco, Comment, *Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755, 757 (1985) (citing Nicholas A. Ashford & Charles C. Caldart, *The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention*, 5 INDUS. REL. L.J. 523 (1983)).

63. For a discussion of exposure classifications, see Williams, *supra* note 42, at 655-63.

64. *See* Nothstein & Ayres, *supra* note 52, at 239.

65. *See generally* Becker, *supra* note 46.

66. Joni Katz, *Hazardous Working Conditions and Fetal Protection Policies: Women Are Going Back to the Future*, 17 ENVTL. AFF. 210, 212-14 (1989).

adopt broad exclusionary policies without regard to the woman's ability, desire or likelihood to bear children. However, similar to earlier protectionist legislation that attempted to protect only women from adverse effects experienced by both men and women, the scant scientific research presently indicates that paternal exposure is equally as harmful to the fetus as maternal exposure.[67] Evidence in *Johnson Controls* demonstrated this. Animal research presented in the case suggested that lead exposure may be hazardous to male reproductive organs and cause many fetal defects.[68] Critics find many of the policies to be nothing more than "pretexts for denying women high-paying, traditionally male, blue-collar jobs."[69] The same employers adopting female exclusionary policies often disregard evidence that the toxins also threaten male reproductive functions or that the company's hazardous waste threatens the health of nearby residents and their future offspring.[70] Perhaps the better explanation for employers' inconsistent behavior is fear of potential tort liability.[71] Nevertheless, women are still excluded more often from traditionally male-intensive jobs than from female-intensive jobs.[72]

C. *Traditional Title VII Jurisprudence*

Congress passed Title VII in an effort to eliminate long-standing discriminatory barriers in the workplace.[73] Title VII prohibits an employer from discharging, refusing to hire, or otherwise discriminating against any employee with respect to compensation, terms, or conditions or privileges of employment based on the individual's race, color religion, sex or national origin.[74] Title VII did not, however, specifically address situations involving pregnant employees. Thus, in *General Electric Co. v. Gilbert*,[75] the Supreme Court upheld an employer's disallowance of medical benefits for pregnancy, reasoning that pregnancy did not fall within the purview of Title VII and that pregnancy coverage would afford women additional benefits not allowed to

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67. *See* Williams, *supra* note 42, at 641.

68. *Johnson Controls*, 111 S. Ct. at 1203.

69. Emily Buss, Note, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577, 579 (1986).

70. *Id.* at 579 n.10.

71. See *infra* notes 127-41 and accompanying text for a discussion of potential employer liability.

72. *See* Hamlet, *supra* note 60, at 1125 & n.76.

73. Hannah A. Furnish, *Prenatal Exposure to Fetally Toxic Work Environment: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 74 (1980).

74. 42 U.S.C. § 2000e-17 (1988).

75. 429 U.S. 125 (1976).

men.[76] The Pregnancy Discrimination Act of 1978[77] amended Title VII to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[78] The passage of the PDA effectively overruled the *Gilbert* decision. Having determined that Title VII prohibited pregnancy discrimination, courts had to decide what theory to use in analyzing pregnancy discrimination.

1. The Disparate Treatment Analytical Framework

There are two basic analytical frameworks under Title VII: disparate treatment and disparate impact.[79] Both are rooted in § 703(a) of the Civil Rights Act. Under disparate treatment analysis, there are generally two types of claims.[80] The first type arises in situations in which the employer has engaged in "facial" discrimination. Facial discrimination occurs when the employer adopts a rule, policy, or practice of treating certain classes of employees differently from other employees on the basis of one of the statutorily specified characteristics.[81] The employer's only affirmative defense to an allegation of facial discrimination is a BFOQ as provided for in § 703(e) of Title VII.[82]

The second type of disparate treatment claim arises when the employer adopts a rule, policy, or practice that ostensibly categorizes employees on a basis other than race, religion, national origin or sex, but which the plaintiff argues was adopted as a pretext for impermissible discrimination.[83] Once the plaintiff's prima facie case for disparate treatment is established, the employer must articulate a "legitimate non-discriminatory reason"[84] for the policy. In order to prevail, the plaintiff must then prove[85] that the "legitimate non-

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76. *Id.* at 146.

77. 42 U.S.C. § 2000(e)k (1988).

78. *Id.* Originally the Civil Rights Bill was intended to protect racial and religious minorities. The prohibition against sex discrimination was added as an unsuccessful effort by Representative Smith of Virginia to defeat passage of the bill. *See* Furnish, *supra* note 73, at 74.

79. *See generally* BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983).

80. Allison E. Accurso, Note, *Title VII and Exclusionary Employment Practices: Fertile and Pregnant Women Need Not Apply*, 17 RUTGERS L.J. 95, 106 (1985).

81. Williams, *supra* note 42, at 668.

82. *See* Katz, *supra* note 66, at 205.

83. Blanco, *supra* note 62, at 767.

84. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

85. In disparate treatment cases, the plaintiff bears the burden of proof throughout the proceeding. *See* Meredith L. Jason, Note, International Union v. Johnson Controls,

discriminatory reason" is merely a pretext for the employer's illegal motive.[86] Thus, *intent to discriminate* is a crucial element of the plaintiff's case.[87]

2. The Disparate Impact Analytical Framework

Disparate impact claims arise when an employer's facially neutral policy has a disproportionate, adverse effect on a class protected under Title VII.[88] The only defense available to employers is that of business necessity.[89] The business necessity defense is, unquestionably, an easier defense to establish than a BFOQ.[90] *Griggs v. Duke Power Co.*[91] is the Supreme Court's seminal disparate impact case. Under *Griggs*, the plaintiff, with the initial burden of proof, must establish a prima facie case by showing that a rule or policy has a disparate impact on a protected class.[92] The burden of proof then shifts to the employer to demonstrate an affirmative defense that business necessity justifies the rule or policy.[93] According to the decision, the plaintiff need not show intent to discriminate in a disparate impact claim. The *Griggs* Court analyzed the challenged policy in terms of job-relatedness, defining an action or practice justified by business necessity as one with a "manifest relationship to the employment in question."[94]

The Supreme Court substantially modified the *Griggs* disparate impact analysis with its decision in *Wards Cove Packing Co. v. Atonio*.[95] *Wards Cove* marked three significant changes in disparate impact analysis. First, the Court cemented the requirement suggested in an earlier decision[96] that the plaintiff must isolate the challenged employment practice or criteria.[97]

Inc.: *Controlling Women's Equal Employment Opportunities Through Fetal Protection Policies*, 40 AM. U.L. REV. 453, 460-61 & n.37 (1990).

86. *McDonnell Douglas*, 411 U.S. at 805.

87. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

88. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

89. *Id.* at 431.

90. *See* Buss, *supra* note 69, at 584.

91. 401 U.S. 424 (1971).

92. *Id.* The plaintiff needs to show a substantial impact upon a protected group, not necessarily a statistically significant disparate impact. *See* Michael A. Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?*, 42 OKLA. L. REV. 187, 198 (1989).

93. For a discussion of the business necessity defense, see *infra* notes 117-26 and accompanying text.

94. *Griggs*, 401 U.S. at 432.

95. 490 U.S. 642 (1989).

96. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

97. In one part of the opinion, the Court stated that the plaintiffs must "demon-

Second, the Court intimated that "intent to discriminate" may be a relevant factor in disparate impact analysis.[98] If the employer demonstrates that the challenged action justifies "business necessity," then the plaintiff must prove "pretext" by showing a less discriminatory alternative exists and the employer's refusal to adopt it.[99] Previously, the term "pretext" was synonymous with "intent" and was used only in disparate treatment cases. In impact cases, a demonstration of a less discriminatory alternative to the employer's challenged practice was used to undermine the "business necessity" of the practice.[100] In *Wards Cove*, the term "pretext" was borrowed from disparate treatment cases and inserted into disparate impact analysis, raising an inference of intent and blurring the line between disparate treatment and disparate impact analysis.[101] Finally, the most significant change[102] announced in *Wards Cove* was the burden of proof allocation.[103] Business necessity was previously thought to be an affirmative defense, meaning the employer had both the burden of production and the burden of persuasion.[104] However, the Supreme Court stated in *Wards Cove* that even in disparate impact cases, the burden of persuasion remains at all times with the plaintiff.[105] Justice Blackmun, joined by Justices Brennan and Marshall, argued vehemently that the majority's decision was "upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases."[106]

Recently, Congress passed the Civil Rights Act of 1991 which explicitly overruled the *Wards Cove* decision.[107] However, this new legislation does not necessarily return the law to *Griggs*. Instead, the new Act appears to embody disparate impact cases preceding *Wards Cove*, making it possible,

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strate that the disparity they complain of is the result of one or more of the employment practices they are attacking." *Wards Cove*, 490 U.S. at 658. Thus, the door may be open for challenges to the combined effects of multiple employment practices. *See* Middleton, *supra* note 92, at 240.

98. *Wards Cove*, 490 U.S. at 650.

99. *Id.* at 653.

100. *See* Middleton, *supra* note 92, at 241.

101. *Id.* at 205 n.99.

102. The majority stated that it was not changing the allocation of the burden of proof but just clarifying it. *Wards Cove*, 490 U.S. at 659-60. Earlier cases discussing the employer's burden of proof, the Court explained, "should have been understood to mean an employer's production—but not persuasion—burden." *Id.* at 660.

103. *Id.*

104. *See* Hamlet, *supra* note 60, at 1115; *see also Griggs*, 401 U.S. at 659-60.

105. *Wards Cove*, 490 U.S. at 659.

106. *Id.* at 661.

107. Civil Rights Acts of 1991, Pub. L. No. 102-166, § 3, 1991 U.S.C.C.A.N. (105 STAT.) 1071.

although not realistic, for the Court to hand down a *Wards Cove* decision again.

D. Defenses Under Title VII

1. The Bona Fide Occupational Qualification Defense

The statutory defense to disparate treatment is a BFOQ as set forth in § 703(e) of Title VII and codified in 42 U.S.C. § 2000e-2(e):

> Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification *reasonably necessary* to the *normal operation* of that *particular* business or enterprise.[108]

The legislative history and the language of this provision indicate that the BFOQ exception is narrow.[109] In addition, the EEOC has issued guidelines reflecting its position that the BFOQ provision relating to sex discrimination should be interpreted narrowly.[110] The Supreme Court is also in accord, stating that the BFOQ exception was intended to be an "extremely narrow exception to the general prohibition of discrimination on the basis of sex."[111]

In determining whether an employer's requirement qualifies as a BFOQ, the Supreme Court, in *Western Airlines, Inc. v. Criswell*,[112] stated that the action must be "reasonably necessary" to the central mission of the employer's business.[113] In *Criswell*, an airline adopted a policy of retiring flight engineers at age sixty.[114] The Court found that age-connected debility might affect the safety of the passengers, which was reasonably necessary to the "central mission" or "essence" of the airline's business.[115] Thus, class-based

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108. 42 U.S.C. § 2000e-2(e) (1988) (emphasis added). The BFOQ defense is not available in race discrimination claims. *See* Middleton, *supra* note 92, at 188 n.6.

109. For a discussion on the legislative history, see Marcelo L. Riffaud, Comment, *Fetal Protection and* UAW v. Johnson Controls, Inc.*: Job Openings for Barren Women Only*, 58 FORDHAM L. REV. 843, 848-50 (1990).

110. 29 C.F.R. § 1604.2(a) (1991).

111. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

112. 472 U.S. 400 (1985).

113. *Id.* at 419.

114. *Id.* at 409.

115. *Id.* at 413.

exclusions are acceptable only when founded upon genuine qualifications for the job in question.[116]

2. The Business Necessity Defense

The judicially created business necessity defense used in disparate impact cases is much broader than the BFOQ exception[117] because it focuses on the core notion of business necessity and is not limited by the narrower concept of "occupational qualification."[118] According to *Griggs v. Duke Power Co.*,[119] an action is a business necessity if it bears "a demonstrable relationship to successful performance of the jobs for which it was used."[120] The definition of business necessity was made more expansive in subsequent cases. In *New York Transit Authority v. Beazer*,[121] a rule excluding all narcotics users from Transit Authority jobs regardless of the job's relation with safety was challenged.[122] The Supreme Court held that business necessity encompasses job requirements that significantly serve the employer's "legitimate employment goals."[123] The defense was also used in *Washington v. Davis*,[124] which involved a testing requirement that indicated likeliness of the applicant's success in a police training program rather than likeliness of success in job performance.[125] Although the action was brought under the Fourteenth Amendment, the Supreme Court, in analyzing business necessity, stated that the test would satisfy Title VII standards even though it admittedly did not relate directly to the job.[126]

E. Potential Employer Tort Liability

Perhaps the most common reason for instituting fetal protection policies is the employer's concern about future liability for fetal defects. One of the greatest expenses for employers is worker compensation contributions. State workers' compensation plans ordinarily provide relief for injury, disablement,

116. *See* Williams, *supra* note 42, at 670-71.
117. *Griggs*, 401 U.S. at 431.
118. *See* Williams, *supra* note 42, at 672.
119. 401 U.S. 424 (1971).
120. *Id.* at 431.
121. 440 U.S. 568 (1979).
122. *Id.* at 572.
123. *Id.* at 587 n.31.
124. 426 U.S. 229 (1976).
125. *Id.* at 234-35.
126. *Id.* at 251.

or death of workers resulting from industrial accident, casualty, or disease.[127] The workers' compensation scheme works to preclude all other remedies and liabilities, including a tort cause of action.[128] The extent of the injury is usually the crucial factor in determining the extent of the recovery.[129] One of the fundamental principles of workers' compensation is that the employee is compensated for job-related injuries resulting in disability, including accidental injury not attributable to the employee or the employer.[130] Most workers' compensation schemes define "disability" as incapacity to perform work or to earn wages in the same or other employment.[131]

According to one commentator, "[d]amage to an employee's reproductive capacity has no effect upon the wage-earning or job-performance capacity of the employee, and, thus would usually not be compensable under . . . workers' compensation laws."[132] Furthermore, because the term "employees" has not been construed to include unborn children, workers' compensation does not extend to children who suffer prenatal injuries caused by reproductive hazards in the workplace.[133] "Employee" is ordinarily limited to persons who occupy the status of servant under the law of master and servant.[134] Therefore, a workforce without a fetal protection policy is unlikely to increase the costs of workers' compensation. Instead, any employer liability to the fetus must be established under a traditional tort theory.

Employers' biggest concern in the fetal protection arena is that they have no way to protect themselves from tort liability because a woman cannot waive the rights of her unborn or unconceived children.[135] Many scholars, however, find this argument without merit.[136] Under general tort principles,

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127. *See* Katz, *supra* note 66, at 212-13.

128. 81 AM. JUR. 2D *Workmen's Compensation* § 2 (1976).

129. Junius C. McElveen, Jr., *Reproductive Hazards in the Workplace*, 20 FORUM 547, 561 (1985).

130. 81 AM. JUR. 2D *Workmen's Compensation* §§ 223-224 (1976).

131. *See* McElveen, *supra* note 129, at 561.

132. *See id.* Present law indicates that injury connected to sexual or childbearing organs or capacity cannot be the basis for a suit for common law damages against the employer absent a special statutory provision to the contrary. However, recent developments suggests that employees may be able to bring reproductive-related tort actions. *Id.* at 561-62.

133. *See* Katz, *supra* note 66, at 213; Allan Sloan, *Employer's Tort Liability When a Female Employee Is Exposed to Harmful Substances*, 3 EMPLOYEE REL. L.J. 506, 511 (1978).

134. 81 AM. JUR. 2D *Workmen's Compensation* § 152 (1976).

135. *See* Becker, *supra* note 46, at 1244. However, the common law is still undecided as to whether a parent's waiver should be precluded. *See* Hamlet, *supra* note 60, at 1127.

136. *See* Becker, *supra* note 46, at 1244; Hamlet, *supra* note 60, at 1125-28. *But*

even assuming the employer owes a duty[137] to the fetus,[138] there appears to be no basis for employer liability if the woman is fully informed of the risks.[139] Liability usually requires some degree of fault. Although tort liability was not at issue in *Johnson Controls*, the Court indicated that informed consent negates the possibility of finding the employer negligent.[140] Furthermore, informed consent should insulate the employer from liability to the fetus. If the employee is fully informed of the risks, then the employer has not acted unreasonably or in a negligent manner. Even if the woman cannot waive the rights of the unborn or unconceived child, full consent shifts the causation element from the employer to the mother.[141]

F. Previous Fetal Protection Policy Cases

In 1982,[142] the Fourth Circuit evaluated a fetal protection policy in *Wright v. Olin Corp.*[143] The *Olin* policy created three job classifications. The first excluded fertile women from restricted jobs that involved contact or exposure to known or suspected harmful agents.[144] The definition of fertile included women from ages five to sixty-three unless there was medical evidence to the contrary.[145] The second category barred pregnant women from controlled jobs that potentially required contact with hazardous chemicals.[146] In the third category were those jobs that were completely insulated from potential harmful exposure and were left unrestricted to women.[147]

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see Katz, *supra* note 66, at 212-14.

137. *See* Joann J. Ervin, Note, *Title VII: Misapplication of the Business Necessity Defense*—UAW v. Johnson Controls, Inc., 15 U. DAYTON L. REV. 241, 281 (1990) ("An employer may have a common law duty to an unborn child of an employee but the duty may depend upon whether the unborn child was viable or non-viable when the injury or death occurred.").

138. For a discussion of recoveries for children injured as a result of prenatal injuries, see McElveen, *supra* note 129, at 563-65.

139. *See* Becker, *supra* note 46, at 1244.

140. *Johnson Controls*, 111 S. Ct. at 1208.

141. *See* Becker, *supra* note 46, at 1224.

142. For a discussion of cases addressing fetal protection policies before the enactment of the PDA, see Blanco, *supra* note 62, at 773-75.

143. 697 F.2d 1172 (4th Cir. 1982).

144. *Id.* at 1182.

145. *Id.*

146. *Id.*

147. *Id.*

In deciding whether to analyze the policy under disparate impact or treatment theory, the court admitted that the policy's facial neutrality was subject to dispute.[148] However, the disparate treatment/BFOQ defense was rejected because "it would prevent the employer from asserting a justification defense which under the Title VII doctrine it is entitled to present."[149] The court implied that such a result was undesirable in the fetal protection area because under the BFOQ analysis, the employer could not prevail.[150] In analyzing the fetal protection policy, the court analogized protecting the safety of unborn children to protecting the safety of public service customers, which the Supreme Court had recognized to some extent in the past as a business necessity.[151] Thus, the way was paved for disparate impact analysis.

Another fetal protection policy was challenged in the Eleventh Circuit. In *Hayes v. Shelby Memorial Hospital*,[152] a hospital fired an x-ray technician after she had become pregnant.[153] The court followed disparate impact analysis and relied on the business necessity defense.[154] The court found that although a pregnancy-based rule can never be truly neutral,[155] the BFOQ defense was not applicable in this situation because the policy was neutral in the sense that it protected all employees' offspring.[156] A three-pronged test was used to determine whether the fetal protection policy constituted a business necessity: 1) whether a substantial risk of harm exists; 2) whether the risk is borne only by members of one sex; and 3) whether a less discriminatory alternative exists.[157] The court found that the employee had demonstrated less discriminatory alternatives available to the employer;[158] therefore, the policy was discriminatory.[159] The disparate impact analysis was fairly well entrenched in the appellate courts until the Supreme Court decision of *Johnson Controls*.

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148. *Id.* at 1186.

149. *Id.* at 1185 n.21.

150. *See* Jason, *supra* note 85, at 467 n.79.

151. *Wright*, 697 F.2d at 1189; *see also Beazer*, 440 U.S. at 587 n.31 (legal narcotic users could be excluded from even clerical jobs in public transportation areas under the rationale of consumer safety).

152. 726 F.2d 1543 (11th Cir. 1984).

153. *Id.* at 1546.

154. *Id.* at 1552-54.

155. *Id.* at 1547.

156. *Id.* at 1549.

157. *Id.* at 1554.

158. *Id.* at 1553.

159. *Id.* at 1553-54.

IV. THE INSTANT DECISION

A. *The Majority*[160]

Contrary to other appellate court decisions confronting the issue of fetal protection policies, the Supreme Court in *Johnson Controls* found that sex-specific policies are facially discriminatory.[161] Johnson's policy classified "on the basis of gender and childbearing capacity, rather than fertility alone."[162] Despite evidence of harmful effects on the male reproductive system, Johnson did not effectively and equally protect the offspring of these employees.[163] Additionally, the policy required only females to produce proof of sterility in order to gain an exemption from the policy.[164] The Court used the Pregnancy Discrimination Act[165] (PDA) to bolster the finding of facial discrimination, stating the PDA mandates that discrimination based on pregnancy be treated in the same manner as explicit sex discrimination.[166] A benevolent motive, the Court noted, could not convert the facially discriminatory policy to a neutral policy.[167] "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination,"[168] according to the Court.

The Court next considered whether Johnson's policy fell within the narrow purview of the BFOQ exception.[169] Under the language of the BFOQ provision, discrimination on the basis of sex is only permissible in "certain instances" where sex is a "qualification reasonably necessary to the normal operation" of the "particular business."[170] The Court found that each of the terms—"certain," "normal," and "particular"—"favors an objective, verifiable requirement."[171] The telling term, however, was "occupational."[172] The term "occupational" was interpreted to mean that the require-

160. Justice Blackmun wrote for the majority, joined by Justices Marshall, Stevens, O'Connor, and Souter.

161. *Johnson Controls*, 111 S. Ct. at 1202.

162. *Id.* at 1203.

163. *Id.*

164. *Id.* at 1203.

165. 42 U.S.C. § 2000e(k) (1988).

166. *Johnson Controls*, 111 S. Ct. at 1203.

167. *Id.* at 1203-04.

168. *Id.* at 1204.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

ments "concern job-related skills and aptitudes."[173] The Court reasoned that "[b]y modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job."[174] Additional support was found in the PDA's amendment to Title VII. The Court pointed out that the PDA contains a BFOQ standard of its own: "[U]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'"[175] In other words, women who are "as capable of performing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[176] The Court stated that the legislative history of Title VII also indicates that an "occupational qualification" permits discrimination only when reproductive potential prevents an employee from performing the duties of the job.[177] A relevant passage from Title VII's legislative history was quoted:

> Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees . . . [u]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue.[178]

Johnson argued that its policy should fall within the "safety exception" of the BFOQ, citing *Dothard v. Rawlinson*[179] and *Western Airlines, Inc. v. Criswell*.[180] In *Dothard*, sex discrimination was permitted because sex was related to a prison guard's ability to maintain prison security, an integral part of the job.[181] In *Criswell*, an airline adopted a policy of retirement at age sixty for all flight engineers because of age-connected debility.[182] The Court considered maintaining safety for third parties a valid basis for a BFOQ.[183] The *Johnson* Court noted that if the safety of third parties is considered a

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173. *Id.*

174. *Id.* at 1205.

175. *Id.* at 1206 (citing 42 U.S.C. § 2000e(k) (1988)).

176. *Id.*

177. *Id.* at 1207.

178. *Id.* at 1206-07 (citing AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. No. 331, 95th Cong., 2d Sess. 4-6 (1977)).

179. 433 U.S. 321 (1977).

180. 472 U.S. 400 (1985).

181. *Dothard*, 433 U.S. at 336-37.

182. *Criswell*, 472 U.S. at 403.

183. *Id.* at 412-13.

relevant factor, the third parties must be indispensable to the particular business at issue.[184] The Court explained that third-party safety considerations properly entered the BFOQ analysis in *Dothard* and *Criswell* because the considerations went to the core of the employee's job performance.[185] The unconceived fetuses of Johnson's employees were "neither customers nor third parties whose safety [was] essential to the business of battery manufacturing."[186] The Court found that Johnson could not establish a BFOQ because there was no evidence that fertility affected women's ability to perform the job, and the fetus' health did not go to the essence of Johnson's business of battery manufacturing.[187]

The *Johnson* Court discussed employers' potential tort liability in dicta, indicating that fear for its potential is unfounded.[188] OSHA standards establish a series of mandatory protections from which the Court reasoned, taken together, "should effectively minimize any risk to the fetus and newborn child."[189] More particularly, OSHA has concluded that in situations involving lead exposure "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus on the course of pregnancy."[190] The Court noted that if the employer fully informs the woman of the dangers and does not act negligently, the basis for holding the employer liable is remote at best.[191] Furthermore, when it is impossible for an employer to comply with both state and federal requirements, federal law pre-empts that of the states.[192] In this situation, if compliance with Title VII required abolition of all sex-specific fetal protection policies, then the state tort laws allowing recovery for fetal injury would be pre-empted. Finally, the extra cost of employing members of

184. *Johnson Controls*, 111 S. Ct. at 1205.

185. *Id.* at 1206.

186. *Id.*

187. *Id.* at 1207-08.

188. *Id.* at 1208-09.

189. *Id.* (citing 29 C.F.R. § 1910.125(k)(ii) (1989)).

190. *Id.* (citing 43 Fed. Reg. 52,952, 52,966 (1978)).

191. *Id.*

192. *Id.* at 1209. However, Justice White, joined by Justice Rehnquist and Justice Kennedy, concurred in result but disagreed with the majority's finding that sex-specific fetal protection policies could never be defended as a BFOQ. *Id.* at 1210. A sex-specific fetal protection policy could be justified, Justice White argued, if an employer could show the policy was reasonably necessary to avoid tort liability. *Id.* Justice White stated Title VII would not pre-empt state tort liability and that it is possible for employers to be held strictly liable. *Id.* at 1211.

one sex, the Court noted, does not provide an affirmative defense for a discriminatory refusal to hire members of that gender.[193]

V. COMMENT

The Supreme Court's decision in *Johnson Controls* is important because it protects women from gender inequality in the workplace regardless of whether the employer's goals are well-intentioned. Society's interest in ensuring fetal health cannot be denied; however, fetal health problems should not be solved by denying women access to higher paying yet hazardous jobs. The goal of protecting fetuses may be achieved in a number of ways without discriminating against women. As one commentator noted,[194] the policy used by Johnson Controls in essence fixes the employee rather than fixing the job. The decision protects women from such policies by precluding an employer from determining that a woman's reproductive role is more important to herself and her family than her economic role.[195] The majority's narrow interpretation of the BFOQ standard serves to ensure equal employment opportunities.

The decision does not deny the importance of ensuring fetal health or preclude other measures of protecting fetuses. One commentator suggests that discriminatory fetal protection policies can be justified by society's interest in protecting fetuses and by the innate right of fetuses to be born free of unnecessary harm.[196] However, society's interest in protecting fetuses may be achieved by requiring the employer to provide a safe workplace for both sexes, rather than denying women jobs. A whole host of other options would achieve the same goal without discriminating against women.

Concern for potential offspring has been a basis for denying women equal employment opportunities for years.[197] However, there is not necessarily a Hobson's choice between discriminating against certain employees or causing detrimental fetal injury. Scholars have advanced many alternatives to fetal protection policies to protect society's concern for future generations. One approach is to institute employer-sponsored educational programs so that employees may make the best possible decision themselves.[198] Lack of education is considered one of the fundamental problems in workplace

193. *Id.* at 1209.

194. Bertin, *supra* note 49, at 39.

195. *Johnson Controls*, 111 S. Ct. at 1194.

196. Michelle M. Braun, Note, *The Battle Between Mother and Fetus: Fetal Protection Policies in the Context of Employment Discrimination:* International Union, UAW v. Johnson Controls, Inc., 14 HAMLINE L. REV. 403, 424-26 (1991).

197. *See* Becker, *supra* note 46, at 1221-34.

198. *See* Katz, *supra* note 66, at 227.

reproductive hazards.[199] The first step in the educational process is to ensure that the employers themselves know what chemicals may be hazardous and which workers are actually a high-risk group. Employers should take nondiscriminatory action towards employees at risk and engage in a concerted, industry-wide effort to pool resources to discover methods for abatement of hazards.[200] The employees will then be educated concerning the potential adverse effects associated with their jobs, as well as the probability of occurrence, so they may make an informed choice to pursue that job or other options.[201] Finally, the employer program should provide attractive options to the employees at risk. The option could include temporary or permanent transfers to other jobs comparable in level and pay, reciprocal transfers between industries or employers, nine-month maternity leave, alternative career counseling and placement, and continuing education with reemployment in less hazardous jobs.[202]

A second alternative suggests amending the PDA to include "fertility" as a prohibited basis of discrimination.[203] Consequently, any policy that denies privileges to male or female employees based on fertility would be *per se* sex discrimination.[204] The effect of amending the PDA to include fertility is that even policies that are not sex specific could only be defended with the BFOQ provision. The amendment would encourage employers to conduct medical testing on the hazardous repercussions of workplace chemicals on both male and female employees.[205] In light of the *Johnson Controls* BFOQ analysis, workplace policies based on fertility could be upheld only if fertility interfered with the employees' ability to do the job, without regard to the fetus.

The most obvious alternative advanced by commentators is to reduce occupational hazards to a safe level for all employees and their potential offspring.[206] The real issue is to what extent society will tolerate working conditions that subject workers to high levels of risk and injury.[207] OSHA was enacted to assure safe and healthy working conditions through mandatory occupational safety and health standards. If society is truly concerned about

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199. *Id.*

200. *Id.* at 228.

201. *Id.* at 229.

202. *Id.*

203. Barbara J. Naretto, Note, *Employment Discrimination Made Easy: Fetal Protection Policies*, 24 VAL. U. L. REV. 441, 469 (1990).

204. *Id.*

205. *Id.*

206. *See* Williams, *supra* note 42, at 698-99; Buss, *supra* note 69, at 591; Keehn, *supra* note 50, at 1704.

207. *See* Evans-Stanton, *supra* note 50, at 364-66.

the health of future generations, then OSHA regulations should be amended to require working conditions safe for the fetus and the worker. Federal action under OSHA or the Toxic Substances Control Act (TSCA)[208] is a better tool than piecemeal litigation addressing individual policies. Congress, or a designated agency, could promulgate cross-industry standards. Agencies are better decision-makers because they have more expertise in this area than individual judges. Agency-established rules are superior to employer policies because of the inherent conflict of interest employers face when instituting policies: "superior bargaining power . . . guided by a cost-minimizing agenda which includes a desire to avoid both the expense of reducing hazards and the potential liability for failing to reduce them."[209]

Perhaps traditional tort litigation is the most appropriate alternative because: (1) federal legislation may still operate to exclude women from the workforce; (2) Congressional insensitivity to women's independent interests is a possible risk; (3) the legislation might be ineffective,[210] and (4) bringing the industry up to fetally-safe standards may be cost-prohibitive. For example, OSHA only requires employers to reduce hazards to the extent feasible, automatically building in a cost-benefit analysis. Common law tort doctrine "requires those whose conduct poses a risk that society deems unreasonable to compensate victims . . . with monetary damages."[211] If the employer fully informs the worker of the potential hazards to the fetus and lets the worker decide what course to take, then the likelihood of the employer's negligence is reduced. However, in situations where a worker has been exposed to an "unreasonable" risk or not fully informed, then employers should bear the costs of their negligence rather than discriminating against fertile workers.

VI. CONCLUSION

The Supreme Court decision in *Johnson Controls* is a long overdue recognition of the inappropriateness of employing paternalism to justify overtly discriminatory employment practices. Like turn of the century sex-specific protectionist labor legislation, discriminatory fetal protection policies will no longer be tolerated by the courts. The conflict between employment

208. 29 U.S.C. §§ 651-678 (1988).
209. Blanco, *supra* note 62, at 761.
210. *See* Becker, *supra* note 46, at 1266.
211. *See* Buss, *supra* note 69, at 597.

and procreation is one which should be resolved by women and not by the employer. Hopefully, if employers seriously want to protect future generations, they will clean up the work place and make it safe for everyone.

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