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International Union, UAW v. Johnson Controls, Inc.: Fetal Protection and Title VII Revisited

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NOTE

INTERNATIONAL UNION, UAW V. JOHNSON CONTROLS, INC.: FETAL PROTECTION AND TITLE VII REVISITED*

Since 1982, Johnson Controls, Inc., has, as a part of its safety programs,[1] conducted a fetal protection policy "designed to prevent unborn children and their mothers from suffering the adverse effects of lead exposure"[2] in its battery production division. The policy "originate[d] from [Johnson Controls'] longstanding corporate concern for the danger lead poses to the health and welfare of their employees, their employees' families and the general public."[3] It prohibits the hiring or transfer of "women with childbearing capacity[4] . . . into those jobs in which lead levels are defined as excessive."[5]

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and local UAW unions brought suit alleging that the fetal protection policy violated Title VII of the Civil Rights

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* [On March 20, 1991, while this Note was in press, the Supreme Court reversed the Seventh Circuit and remanded the case for trial. Automobile Workers v. Johnson Controls, Inc., No. 89-1215 (U.S. Mar. 20, 1991), 1991 U.S. LEXIS 1715. This Note's conclusion—that the bona fide occupational qualification applies to facially discriminatory fetal protection policies—is consonant with the Court's decision. *Ed.*]

1. These safety programs included "a lead hygiene program, respirator program, biological monitoring program, medical surveillance program and a program regulating the type, use and disposal of employee work clothing and footwear to minimize lead exposure." International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 875 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990). Johnson Controls also minimized the health effects of lead exposure by using laminar flow pumps, central vacuum systems, and powered floor scrubbers "to keep the manufacturing area as clear of lead dust as possible." *Id.* To administer and operate these programs, Johnson "has spent approximately $15 million on environmental engineering controls at its battery division plants." *Id.*

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

3. *Id.* at 875.

4. "The fetal protection policy defines women of childbearing capacity as: 'All women except those whose inability to bear children is medically documented.' " *Id.* at 876 n.8 (quoting the Johnson Controls, Inc. fetal protection policy).

5. *Id.* at 876. Excessive lead exposure levels are defined as: "[W]ork environments in which any current employee has recorded a blood lead level exceeding 30 *ug*/dl during the preceding year or in which the work site has yielded an air sample during the past year containing a lead level in excess of 30 *ug* per cubic meter." *Id.*

Act of 1964,[6] as amended by the 1978 Pregnancy Discrimination Act.[7] After a panel argument before the Seventh Circuit and a rehearing en banc, a majority of the court,[8] in "likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII,"[9] affirmed the district court's[10] grant of summary judgment[11] in favor of Johnson Controls. In *International Union, UAW v. Johnson Controls, Inc.*,[12] the Seventh Circuit "agree[d] with the Fourth Circuit,[13] [the] Eleventh Circuit[14] and [the] EEOC[15] [(Equal Employment Opportunity Commission)] that the business necessity defense can be appropriately applied to fetal protection policy cases under Title VII."[16] The court held that the employer met its burden of establishing a business necessity defense to the facially discriminatory policy

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6. 42 U.S.C. §§ 2000e-2000h (1988).

7. 42 U.S.C. § 2000e(k) (1988).

8. The en banc majority opinion resulted in a 7-4 decision in favor of granting summary judgment to Johnson Controls, Inc. Judge Coffey wrote for the majority, joined by Chief Judge Bauer and Judges Cummings, Wood, Ripple, Manion, and Kanne. Judges Cudahy, Posner, Easterbrook, and Flaum dissented. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 874 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

9. *Id.* at 920 (Easterbrook & Flaum, JJ., dissenting).

> Some employment discrimination experts say they consider the case "classically cert-worthy," adding that if the UAW decides to appeal further, the U.S. Supreme Court may be in a position to accept a fetal protection policy case for the first time, in part, because of the unusual alignment in which the lower court's conservative keystone, Judges Frank H. Easterbrook and Richard A. Posner, and two prominent liberals, Richard B. Cudahy and Joel M. Flaum, dissented.

Samborn, *Worker Safety: 7th Circuit Bias Ruling Criticized*, Nat'l L.J., Oct. 16, 1989, at 3, 30; *see also* Swoboda, *EEOC Limits Compliance With Fetal Case Ruling: Appeal is Carried to Supreme Court*, Wash. Post, Jan. 30, 1990, at A4, col. 1 ("If the [Supreme] [C]ourt agrees to hear it [on the writ of certiorari filed on January 29, 1990], it could become a landmark decision in the area of employment discrimination against women.").

10. International Union v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

11. According to Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (trial judge must determine whether there is a genuine issue for trial and submission to a jury by examining the evidence favoring the nonmoving party); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (moving party is entitled to summary judgment if the nonmoving party has failed to proffer sufficient evidence to satisfy burden of proof on an essential element of the case).

12. 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

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

14. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984).

15. The EEOC's position was set forth in *Policy Guidance on Reproductive and Fetal Hazards*, 2 Empl. Prac. Guide (CCH) ¶ 5164, at 6449 (Oct. 7, 1988) [hereinafter *Fetal Hazards*].

16. *Johnson Controls*, 886 F.2d at 887.

when the employer demonstrated significant evidence of a substantial risk of harm to the unborn child, with this risk occurring only through exposure to female employees, and the lack of adequate but less discriminatory alternatives.[17] The court's holding has been criticized as an anomaly in settled Title VII law.[18]

Section 717 of Title VII[19] prohibits employers from discriminating based upon race, color, religion, sex, or national origin in any personnel action.[20] Under the Pregnancy Discrimination Act, sex discrimination is defined to include discrimination on the basis of pregnancy, childbirth, and related medical conditions.[21] Employers, therefore, who exclude fertile women from a potentially hazardous workplace[22] risk violating Title VII, as amended by the Pregnancy Discrimination Act. Arguably, Johnson Controls' "exclusion of women who are pregnant or of childbearing capacity . . .

17. *Id.* at 883-87.

18. Judge Cudahy described the majority opinion as "result-oriented gimmickery," *id.* at 902 (dissenting), while Judge Posner called the Seventh Circuit's approach "legerdemain [that] is as unnecessary as it is questionable." *Id.* at 903 (dissenting).

19. 42 U.S.C. § 2000e-16 (1982).

20. *Id.*

21. The Pregnancy Discrimination Act provides in part:

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

42 U.S.C. § 2000e(k) (1982).

22. These so-called fetal protection policies may operate solely on women who are already pregnant, *e.g.*, Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1546 (11th Cir. 1984); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 988 (5th Cir. 1982), or, more drastically, on all fertile women with no demonstrated medical evidence of sterility. *E.g.*, International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). *See generally* M. ROTHSTEIN, MEDICAL SCREENING: AND THE EMPLOYEE HEALTH COST CRISIS 47-55 (1989) [hereinafter MEDICAL SCREENING] (discussing, *inter alia*, substances under review for reproductive health effects, reported fetal developmental effects of exposure to reproductive hazards, and reproductive toxic effects). For scholarly discussion of fetal protection policies, see generally Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577 (1986); Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980); Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities with Respect to Fetal Protection Policies*, 23 HARV. J. ON LEGIS. 159 (1986); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981); Comment, *Maternal Liability: Courts Strive to Keep Doors Open to Fetal Protection—But Can They Succeed?*, 20 J. MARSHALL L. REV. 747 (1987); Comment, *Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 757 (1985).

to protect the fetus from harm is a gender-based distinction and constitutes [overt] sex discrimination under the [Pregnancy Discrimination] Act."[23]

The statutory proscription against overt sex-based treatment in the workplace has one exemption: When sex is "a bona fide occupational qualification [(bfoq)] reasonably necessary to the normal operation of that particular business or enterprise."[24] Interpreted narrowly, this justification for facial discrimination is a difficult, though not impossible, standard to satisfy.[25] Unlike other burden of proof allocations under Title VII,[26] including covert forms of disparate treatment, the statutorily prescribed bfoq defense places the ultimate burden of persuasion on the defendant-employer to justify a facially discriminatory policy.

Conversely, facially neutral employment practices—that is, practices which apply to all employees equally but operate to discriminate against a protected class under Title VII—are treated under disparate impact theory[27] and may be justified under the separate, less stringent, and more flexible business necessity defense,[28] as modified recently by *Wards Cove Packing Co. v. Atonio*.[29] Under disparate impact theory, the ultimate burden of persuasion remains at all times with the plaintiff[30] because a facially neutral policy, by definition, does not itself establish unlawful discrimination. Rather, a facially neutral policy may be unlawful if it negatively and disparately affects a protected group.

In litigation involving facially discriminatory fetal protection policies, the issue is not whether women are using Title VII "to enforce a right to endanger knowingly a helpless fetus with blood lead poisoning and consequent

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23. 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, 679 (1981); *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (The PDA "has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.").

24. 42 U.S.C. § 2000e-2(e)(1) (1982). In Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), the Court summarized the import and clear meaning of this provision:

> Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a [bfoq]. . . . The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her.

Id. at 1786 (citation omitted).

25. *See infra* notes 52-67 and accompanying text.

26. *See infra* notes 44-50, 71-86 and accompanying text.

27. *See infra* notes 69-88 and accompanying text.

28. *Id.*

29. 109 S. Ct. 2115 (1989).

30. *Wards Cove*, 109 S. Ct. at 2126; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988).

mental and physical impairment."[31] Rather, the issue is whether the employer has satisfied its legitimate, statutory bfoq burden of proof in intentionally excluding qualified women because of their sex, fertility, or pregnancy.

The troubling aspect of *Johnson Controls* is that the Seventh Circuit affirmed the grant of summary judgment based upon the business necessity defense, reserved only for disparate impact cases. Yet, the Johnson Controls policy[32] is clearly facially discriminatory. By applying the disparate impact standard to a facially discriminatory policy, the Seventh Circuit abrogated the employer's statutorily prescribed bfoq burden of proof. This decision may have far reaching effects on the job opportunities of women,[33] should other areas of industry follow the Johnson Controls policy.[34]

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31. Fein, *Their Noble Cause Gone Mad*, Wash. Times, Oct. 31, 1989, F1, col. 4, at F4, col. 1.

32. The fetal protection policy was based upon the medically documented and potentially harmful effects of lead exposure to a fertile or pregnant woman and her unborn fetus. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 879-83 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990). As a result of these findings, " '[a]ll women except those whose inability to bear children [was] medically documented' " were excluded from areas with lead exposure levels considered excessive by the company. *Id.* at 876 n.8 (quoting the Johnson Controls, Inc. fetal protection policy).

33. "The Bureau of National Affairs estimates 15 million to 20 million jobs implicate fetal risks due to chemical exposure, and additional occupations, such as X-ray technician, that expose workers to radiation similarly endanger the health of embryos." Fein, *supra* note 31, at F1, col. 4; *see also Johnson Controls*, 886 F.2d at 914 (Easterbrook & Flaum, JJ., dissenting) ("[R]igorous implementation of fetal protection policies could close more than 20 million jobs to women." (footnote omitted)). *But see id.* at 901 n.43 ("This speculative statement, [based upon a Bureau of National Affairs Special Report, PREGNANCY AND EMPLOYMENT (1987)], taken at its face value, merely suggests a *possibility* of reproductive injury [to 15-20 million workers] from *unidentified* and *undefined* toxic substances." (emphasis supplied)). An earlier estimate in 1979 concluded that at least 100,000 jobs were closed to women and that the trend was on the rise. Williams, *supra* note 23, at 647 n.30 & n.29 (referring to Wash. Post, Nov. 3, 1979, at A6, col. 5; Wash. Star, May 30, 1979, at A12, col. 1).

34. The outcome of the case could affect a wide variety of industries in which factory workers may be exposed to poisons that could cause physical or mental deformity or deficiency in future children born to those workers. Although the Johnson Controls case involves only lead poisoning, the legal principles that emerge may go well beyond.

New Haven Reg., Feb. 18, 1990, at A16, col. 1. The Equal Employment Opportunity Commission believes that

> there are potentially millions of jobs at issue . . . . By 1990, 58 percent of all women in the United States will be employed. The new "high tech" industries may present heretofore unsuspected risks. Video display workers and semiconductor manufacturers, in particular, are suspected of being at risk from exposure to reproductive hazards.

Fetal Hazards, *supra* note 15, at 6450 n.2 (citations omitted). "Millions of woman [sic] of childbearing age who use computers, for example, could be affected because of claims by some safety experts that low-level radiation from video display terminals may have harmful effects

This Note will critically examine the result of *Johnson Controls* in the context of traditional Title VII disparate treatment and disparate impact analyses. The Note will compare the Seventh Circuit's approach to fetal protection policies in *Johnson Controls* with similar decisions by the Fourth Circuit, the Eleventh Circuit, and the EEOC. Because of these consistent, but statutorily inappropriate, applications of the business necessity defense (in a facially discriminatory posture), this Note supplies an argument for reinterpretation of fetal protection in the Title VII framework. Further, this Note will argue that since the bfoq defense is the only statutory exception to facial discrimination, the business necessity defense should not be applied to sex-based fetal protection policies. This Note will conclude that not all fetal protection policies are per se violative of Title VII; rather, only those facially discriminatory policies that fail to satisfy the stringent statutory requirements of the bfoq should be declared unlawful.

I. TRADITIONAL TITLE VII ANALYSES—DISPARATE TREATMENT AND DISPARATE IMPACT

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[35] Through Title VII and the Pregnancy Discrimination Act, Congress has attempted to remove all "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[36] The overriding goal of Title VII is to provide equality in employment opportunities and practices, prohibiting "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[37] To this end, Title VII requires courts to "focus on fairness to individuals rather than fairness to classes"[38] and award equitable relief as

on pregnant women's fetuses." Swoboda, *EEOC Limits Compliance With Fetal Case Ruling: Appeal is Carried to Supreme Court*, Wash. Post, Jan. 30, 1990, at A4, col. 1; *see also Johnson Controls*, 886 F.2d at 914 n.7 (Easterbrook & Flaum, JJ., dissenting) (Because "many additional women are affected by restrictions placed on other jobs, such as the x-ray technician jobs that exposed embryos to radiation[, c]oncern about emissions from computers and their terminals has led to proposals that could restrict access even to traditional office jobs."); Note, *Pink Collar Blues: Potential Hazards of Video Display Terminal Radiation*, 57 S. CAL. L. REV. 139, 151-57 (1983) (discussing the differential impact on, and disparate treatment of, men and women exposed to video display terminal radiation).

35. 42 U.S.C. § 2000e-2(a) (1982).

36. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971); *accord* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973).

37. *Griggs*, 401 U.S. at 431; *accord* Pullman-Standard v. Swint, 456 U.S. 273, 276 (1982).

38. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978).

deemed appropriate.[39]

The Pregnancy Discrimination Act amended the definition section of Title VII to provide that discrimination on the basis of sex included discrimination on the basis of pregnancy, childbirth, or related medical conditions.[40] Although neither the Act nor its legislative history directly addressed the problem of fetal protection policies, the "bill ma[de] clear that its protection extends to the whole range of matters concerning the child-bearing process."[41] In doing so, the House Report stated unequivocally:

> Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as *potentially pregnant*. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women . . . .[42]

In light of this support for the otherwise plain text of the Pregnancy Discrimination Act, Johnson Controls' sweeping exclusion of all women, except those whose infertility is medically documented, appears violative of Title VII and the Pregnancy Discrimination Act.[43]

A. Disparate Treatment and the Bona Fide Occupational Qualification

The term "disparate treatment" encompasses both facially discriminatory policies and adverse employment actions caused, directly or indirectly, by discriminatory conduct. Without direct evidence of discriminatory conduct or evidence of a facially discriminatory policy, however, a plaintiff's Title VII disparate treatment allegations are subjected to a rigorous burden shift-

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39. 42 U.S.C. § 2000e-5(g) (1982). Traditional Title VII remedies allow for "reinstatement or hiring of employees, with or without back pay." *Id. See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (addressing the central remedial statutory purposes of Title VII).

40. Pub. L. No. 99-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

41. H.R. REP. NO. 95-948, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4753.

42. *Id.* at 6-7, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4754-55 (emphasis supplied).

43. Where the justification for the exclusion [of women] is possible genetic harm, the line drawn treats men and women differently with respect to the carrying of genetic material, a characteristic shared by both sexes. A line thus drawn has always been viewed as facial gender-based discrimination. When the justification for the exclusion is the protection of the fetus from *in utero* exposure to workplace hazards—a characteristic unique to women—the Pregnancy Discrimination Act[] renders the employer's action facial sex discrimination as well.

Williams, *supra* note 23, at 679 (footnotes omitted).

ing analysis.[44] This burden shifting approach is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[45]

For decisions affecting the work environment, courts preserve Title VII's recognition of, and deference to, the employer's legitimate business judgment.[46] As such, courts do not require the defendant-employer, faced with allegations of discrimination, to meet strictly each burden of production in accordance with the judicially crafted factors set forth in *McDonnell Douglas Corp. v. Green*[47] and *Texas Department of Community Affairs v. Burdine*.[48]

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44. Under this approach, the plaintiff must suffer an adverse employment action under circumstances indicating that a prohibited criterion influenced the employer's decision. To establish an inference of discrimination, the record must contain direct evidence of discrimination, or circumstances that give rise to an inference of discrimination. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). An inference of discrimination creates a rebuttable "presumption that the employer unlawfully discriminated against the [plaintiff]." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

In order to rebut the presumption of discrimination, "the [employer] must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's [adverse employment action]." *Burdine*, 450 U.S. at 255. In other words, the employer must produce " 'evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.' " United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983) (quoting *Burdine*, 450 U.S. at 254). Furthermore, the proffered explanation must be reasonably specific, sufficient to justify a judgment for the employer, and framed with "sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255-56.

Once the employer has investigated the allegations and/or offered an explanation for the challenged action, "the *McDonnell-Burdine* presumption drops from the case and the factual inquiry proceeds to a new level of specificity." *Aikens*, 460 U.S. at 715 (citations and quotations omitted). The central focus, upon reviewing the proffered explanation in light of the entire record, is whether the employer treated the plaintiff less favorably than others because of the plaintiff's protected status. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). Hence, after the defendant has sustained his burden of production in the face of an inference of discrimination, the fact-finder's task is to "decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716.

In order to sustain a claim of discrimination, the record must show by a preponderance of the evidence that the employer's reason for the personnel action, if any, was motivated by a prohibited criterion. The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Consequently, while the burden of setting forth a credible reason for the action, in order to rebut the presumption of discrimination, rests with the employer, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253.

45. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

46. *See, e.g.*, Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1786 (1989) ("The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.").

47. 411 U.S. 792 (1973).

These elements, useful in determining the issue of discrimination, were "never intended to be rigid, mechanized, or ritualistic."[49] However, when the employer (through its policy) decides explicitly to limit the employment opportunities of a class, based solely upon the characteristics of that class, the critical question of discrimination is proven, without a judicial analysis, and Congress has statutorily limited the circumstances in which an employer may implement such a policy.[50] Hence, the flexible burden-shifting approach (determining the question of discrimination) is irrelevant to facially discriminatory policies; the court must proceed only to determine if the proscribed practice can nonetheless be justified within the bfoq exemption.

Although Title VII prohibits discrimination in all employment practices, the bfoq exception to this prohibition provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .[51]

Courts narrowly interpret this exception to the rule of non-discrimination[52] and justify its use only in rare circumstances.[53] Generally, the bfoq defense, and thus, "discrimination based on sex[,] is [permissible] only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[54] Accordingly, mere administrative convenience is insufficient to satisfy the bfoq exception.[55]

Once a defendant invokes the bfoq defense, the judicial analysis begins,

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48. 450 U.S. 248 (1981).

49. *Furnco*, 438 U.S. at 577.

50. Title VII forbids an employer deliberately to exclude a worker from a particular job because of the worker's sex [or pregnancy] unless sex[/pregnancy] is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). . . . It is written narrowly and has been read narrowly. . . . A narrow reading is, nevertheless, inevitable [because a] broad reading would gut the statute.

International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 902-03 (7th Cir. 1989) (en banc) (Posner, J., dissenting) (citations omitted), *cert. granted*, 110 S. Ct. 1522 (1990).

51. 42 U.S.C. § 2000e-2(e) (1988).

52. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); Hardin v. Stynchcomb, 691 F.2d 1364, 1370 (11th Cir. 1982); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969); Torres v. Wisconsin Dep't of Health & Social Servs., 639 F. Supp. 271, 277 (E.D. Wis. 1986), *aff'd*, 838 F.2d 944 (7th Cir.), *rev'd on other grounds*, 859 F.2d 1523, 1527 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1133 (1989); 29 C.F.R. § 1604.2(a) (1989).

53. Manley v. Mobile County, 441 F. Supp. 1351, 1357 (S.D. Ala. 1977); *Torres*, 639 F. Supp. at 278; *see also Dothard*, 433 U.S. at 334-37.

54. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.) (emphasis in original), *cert. denied*, 404 U.S. 950 (1971).

55. Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir.) ("Title VII

and the lawfulness of the facially discriminatory policy remains at issue. In order to prevail on a statutory bfoq defense, the employer-defendant must ultimately prove:[56]

> (1) that the essence of the activity in question would be undermined by the employment of one sex . . . in the positions in dispute;
> (2) that there is reasonable cause to believe[, that is—a factual basis for believing,] that all, or substantially all, members of one sex . . . would be unable to perform the job duties in question safely and efficiently;[57]
> (3) that failure to allow members of one sex . . . to work the positions in question was based on actual sexual characteristics rather than stereotyped assumptions;[58] and
> (4) that there were no less restrictive alternatives which could have been utilized to avoid the [classification] of the positions in question.[59]

Whether the bfoq applies in a given situation is controlled by the statutory language,[60] and the bfoq will apply whenever an employer directly fails or refuses to hire an individual because of that individual's sex or uses overt discrimination to protect a public or private interest.[61] The courts normally employ a strict balancing test and may require proof that an employer could

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requires administrative necessity, not merely administrative inconvenience, to satisfy the bfoq exception." (citation omitted)), *cert. denied*, 446 U.S. 966 (1980).

56. Torres v. Wisconsin Dep't of Health & Social Servs., 639 F. Supp. 271, 278 (E.D. Wis. 1986) (citing Griffin v. Michigan Dep't of Corrections, 31 Empl. Prac. Dec. (CCH) ¶ 33,482 (E.D. Mich. Nov. 12, 1982)), *aff'd*, 838 F.2d 944 (7th Cir.), *rev'd on other grounds*, 859 F.2d 1523, 1527 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1133 (1989).

57. *Accord* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

58. *See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (employment decisions may not be based on myths or stereotypical assumptions of male or female characteristics); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971) (congressional purpose of Title VII is the elimination of "subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work"); *Weeks*, 408 F.2d at 236 ("Title VII rejects . . . romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks."); Woody v. City of W. Miami, 477 F. Supp. 1073, 1079 (S.D. Fla. 1979) (Title VII prohibits "stereotypical culturally-based concepts" of the ability to perform certain tasks because of sex).

59. *Torres*, 639 F. Supp. at 279 ("The Court finds as a matter of law that before an employer defendant can overcome the strong policy against sex discrimination and avail itself of the narrow exception of a bfoq, it must establish that no administrative alternatives are available or feasible that can avoid overt sex discrimination.").

60. *See* 42 U.S.C. § 2000e-2(a)(1) (1982) (defining unlawful employer practices); 42 U.S.C. § 2000e-2(e) (1988) (providing for bona fide occupational qualification exemption).

61. *See, e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422-23 (1985) (bfoq applied to age restrictions on flight engineers); Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1526-28 (7th Cir. 1988) (bfoq applied to exclusion of male guards from female prison because of privacy concerns), *cert. denied*, 109 S. Ct. 1133 (1989).

not reasonably develop alternative operating procedures to avoid conflicts between private interests and equal employment opportunity.[62] Ultimately, the employer-defendant must bear the entire burden of proving that the distinction is "reasonably necessary to the normal operation of that particular" organization. Otherwise, the employment policy based upon the proscribed distinction violates Title VII.

In particular, the essential job requirements and/or the health or safety of third persons have been found reasonably necessary to the normal operation of the particular business, and therefore have been dispositive in determining the sufficiency of the employer's bfoq defense.[63] This reasoning suggests that the defense, while requiring a narrow interpretation, is not insurmountable.

62. *See, e.g.*, Smith v. Fairman, 678 F.2d 52, 54-55 (7th Cir. 1982) (adjustment of facility and work assignments of male guards in female prisons protects inmate privacy), *cert. denied*, 461 U.S. 907 (1983); Hardin v. Stynchcomb, 691 F.2d 1364, 1370-71 (11th Cir. 1982) (same); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086-87 (8th Cir.) (possible to develop narrowly drawn job classifications for correctional officers to protect inmate privacy), *cert. denied*, 446 U.S. 966 (1980); Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769, 779 (S.D. Ohio 1981) (adjustment of facility and work assignments of male guards in female prison protects inmate privacy), *aff'd mem.*, 779 F.2d 50 (6th Cir. 1985); Hudson v. Goodlander, 494 F. Supp. 890, 893-94 (D. Md. 1980) (selective work assignments protect both inmate privacy and female equal employment opportunities); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1351 (D. Del. 1978) (adjustment of facility and male intern work assignments protects privacy), *aff'd mem.*, 591 F.2d 1334 (3rd Cir. 1979); Forts v. Ward, 471 F. Supp. 1095, 1100 (S.D.N.Y. 1978) (adjustment of facility and work assignments of male guards in female prisons protects inmate privacy), *vacated in part*, 621 F.2d 1210 (2d Cir. 1980); Reynolds v. Wise, 375 F. Supp. 145, 151 (N.D. Tex. 1974) (held Bureau of Prisons could make selective work assignments to protect inmate privacy without discriminating against women). *Contra Torres*, 859 F.2d at 1530 (consumer preference and privacy not the issue when addressing the state's responsibility to implement statutory goal of rehabilitation by excluding male guards from female correctional institution).

63. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 335-37 (1977) (male-only certification for correctional guards in maximum security prison, in highly unusual and dangerous circumstances, constitutes a bfoq where female guards would threaten prison security); Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997-99 (5th Cir. 1984) (nonpregnancy constitutes bfoq when possible pregnancy conditions would threaten passenger safety); Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176 (4th Cir. 1977) (per curiam) (same), *cert. denied*, 435 U.S. 934 (1978); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir.) (a classification narrowly drawn involving duties necessary to inmate privacy may satisfy a bfoq), *cert. denied*, 446 U.S. 966 (1980); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236-38 (5th Cir. 1976) (age will constitute bfoq for bus driver when age related conditions might threaten passenger safety); Pime v. Loyola Univ. of Chicago, 585 F. Supp. 435, 442-43 (N.D. Ill. 1984) (preserving Jesuit presence on a Catholic university faculty deemed to be bfoq and reasonably necessary to normal operation of university), *aff'd*, 803 F.2d 351 (7th Cir. 1986); Coble v. Texas Dep't of Corrections, 40 Fair Empl. Prac. Cas. (BNA) 140, 148 (S.D. Tex. 1982) (same sex requirement for employees performing, *inter alia*, strip searches on a random, nonemergency basis is justifiable bfoq and does not violate Title VII); Backus v. Baptist Medical Center, 510 F. Supp. 1191, 1193-97 (E.D. Ark. 1981) (female qualification permitted for nurse in labor and delivery areas of hospital), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1351-54 (D. Del. 1978) (bfoq established in

However, the Fourth Circuit, in *Burwell v. Eastern Air Lines, Inc.*,[64] held that nonpregnancy was not a bfoq for a stewardess position. Despite arguments that a pregnant stewardess posed dangers to herself and her fetus, the court held that the airline's concern for the health of the worker and the fetus did not relate to the essence of its business.[65] Similarly, the District Court for the Southern District of Florida, in *In re National Airlines, Inc.*,[66] ruled that nonpregnancy was not a bfoq for a stewardess position, despite concerns for the safety of passengers,[67] and specifically found that "the question of harm to the fetus is basically a decision to be made not by this court, but by the mother of the fetus."[68]

B. Disparate Impact and the Business Necessity Defense

The business necessity defense, unlike the bfoq, has no statutory basis within Title VII. The defense was judicially manufactured by the Supreme Court of the United States in *Griggs v. Duke Power Co.*,[69] and operates, if proven, to shield an employer from claims that facially neutral employment practices have a discriminatory impact on protected groups. Examples of facially neutral policies, normally involving standardized tests or job requirements, are numerous.[70]

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nursing home based upon the privacy interests and preferences of guests), *aff'd mem.*, 591 F.2d 1334 (3rd Cir. 1979).

64. 633 F.2d 361 (4th Cir. 1980) (en banc) (per curiam), *cert. denied*, 450 U.S. 965 (1981).

65. *Burwell*, 633 F.2d at 366 ("The medical experts and sources . . . point to the virtual unanimous conclusion that a pregnant flight attendant can adequately perform routine and emergency duties through the thirteenth week of pregnancy."). A disparate impact analysis was adopted to decide that mandatory pregnancy leave policies for stewardesses provided a legitimate business necessity. *Id.* at 373. The court did, however, dismiss the fetal safety argument, favoring instead the passenger safety rationale:

> Eastern's contention that an element of business necessity is its consideration for the safety of the pregnant flight attendant and her unborn child is not persuasive. . . . Focusing [on] all the evidence at trial . . . demonstrates that Eastern's policy as it relates to pregnancy after the thirteenth week results from the legitimate business necessity of safely transporting passengers.

Id. at 371 (footnote omitted).

66. 434 F. Supp. 249, 259 (S.D. Fla. 1977), *aff'd*, 905 F.2d 1457 (11th Cir. 1990). *But see* Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977) (per curiam) (nonpregnancy is a bfoq when flight attendants, incapacitated by pregnancy-related conditions, might threaten passenger and airline operation safety), *cert. denied*, 435 U.S. 934 (1978).

67. As a result, flight attendants were permitted to fly during the first trimester because pregnancy would not interfere with the performance of their safety duties. In addition, the district court noted that it did "not consider the effect on the fetus as material to the issues of [the] BFOQ." *In re National Airlines*, 434 F. Supp. at 261 n.15.

68. *Id.* at 259.

69. 401 U.S. 424 (1971).

70. *See* Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (employer prohibition against employee metha-

Under traditional disparate impact theory, the plaintiff must initially show that the disputed facially neutral policy or practice actually operates to affect adversely the protected group. "The evidence in these 'disparate impact' cases usually focuses on statistical disparities [between employment of protected and unprotected groups], rather than specific incidents, and on competing explanations for those disparities."[71]

After the plaintiff produces evidence of disparate impact, the defendant may proffer a business necessity defense. The business necessity defense imposes a limited burden of production on the defendant to show that the policy or practice has "a manifest relationship to the employment in question"[72] and is "necessary to safe and efficient job performance."[73]

Although initially the bfoq (reasonably necessary to the normal operation of that business) and the business necessity defense (necessary to safe and efficient job performance) appear similar, the posture of the business necessity defense and its utility has historically remained distinct in different Title VII circumstances.[74] Significantly, the burden of persuasion in business necessity defense cases has recently been clarified; unlike bfoq defense cases, it remains at all times with the plaintiff.[75]

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done users); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Washington v. Davis, 426 U.S. 229 (1976) (verbal proficiency examination); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (aptitude tests); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (written standardized test).

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

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

73. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977); *accord* Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980).

74. *See Dothard*, 433 U.S. at 328-34 (rejecting characterization of height and weight requirements as facially neutral, consequently applying bfoq, not business necessity); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 370 (4th Cir. 1980) (en banc) ("In sex discrimination cases, . . . clear disparate impact discrimination will be tested by business necessity and clear disparate treatment discrimination will be tested by a BFOQ defense." (citation omitted)), *cert. denied*, 450 U.S. 965 (1981); Garcia v. Gloor, 609 F.2d 156, 163 (5th Cir. 1980) (The "BFOQ is a warrant for affirmative, deliberate discrimination while a BND [Business Necessity Defense] is a defense to the prima facie case made when an apparently neutral employment practice is shown to have discriminatory effect[s]." (footnote omitted)), *cert. denied*, 449 U.S. 1113 (1981); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 n.8 (8th Cir.) (overt discriminatory policy violates Title VII unless bfoq, while facially neutral practice, discriminatory in operation, violates Title VII unless justified as business necessity), *cert. denied*, 446 U.S. 966 (1980); Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 674 & n.2 (9th Cir. 1980) (The bona fide occupational qualification "defense is applicable to employment practices that purposefully discriminate on the basis of sex while the Business Necessity defense is appropriately raised where facially neutral employment practices run afoul of Title VII only because of their disparate impact." (footnote and citation omitted)).

75. *See infra* note 83. Unlike disparate treatment cases, the plaintiff is not required to prove discriminatory intent in disparate impact cases. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

This essential distinction between the two defenses emerged from two landmark Supreme Court decisions: *Watson v. Fort Worth Bank & Trust*[76] and *Wards Cove Packing Co. v. Atonio*.[77] To establish a disparate impact case and thereby invite the business necessity defense, a plaintiff must meet three evidentiary burdens. First, the plaintiff must present statistical evidence demonstrating a disparity in the employer's workforce.[78] Second, the plaintiff must identify a specific employment policy or practice responsible for the disparity.[79] Third, "causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[80] After *Watson* and *Wards Cove*, statistical disparities "alone[, without identification of the source-policy and proof of causation,] will *not* suffice to make out a prima facie case of disparate impact."[81]

If a plaintiff makes out a prima facie case, the defendant-employer must rebut the inference of disparate impact by demonstrating a business necessity: that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer."[82] This burden on the defendant, how-

76. 487 U.S. 977 (1988).

77. 109 S. Ct. 2115 (1989).

78. *Watson*, 487 U.S. at 994 ("[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's workforce."). For such evidence to be helpful, the statistics "must be sufficiently substantial that they raise . . . an inference of causation." *Id.* at 995.

79. *Id.* at 994 ("[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." (citation omitted)); *Wards Cove*, 109 S. Ct. at 2124 ("As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

80. *Watson*, 487 U.S. at 994; *see also Wards Cove*, 109 S. Ct. at 2125.

81. *Wards Cove*, 109 S. Ct. at 2125 (emphasis in original). This is because "[i]t would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson*, 487 U.S. at 992; *accord Wards Cove*, 109 S. Ct. at 2125.

82. *Wards Cove*, 109 S. Ct. at 2125-26 (citations omitted).

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils . . . .

Id. at 2126 (citations omitted).

Prior to *Watson* and *Wards Cove*, the defendant's burden was as follows:

> [T]he business purpose must be sufficiently compelling to override any disparate im-

ever, in no way relieves the plaintiff of his ultimate burden of persuasion on the issue of discrimination.[83]

If the plaintiff's prima facie case of disparate impact is rebutted by evidence of a business necessity, the plaintiff may succeed only by suggesting other employment practices or policies that would serve the employer's legitimate employment goals without the disparate impact.[84] In evaluating the plaintiff's proffered alternatives, however, courts recognize that the judiciary is " 'generally less competent than employers to restructure business practices' "[85] and, therefore, "should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit."[86]

Despite the consistently separate theoretical and practical application of the bona fide occupational qualification/disparate treatment model and the business necessity/disparate impact model,[87] courts have had difficulty deciding which defense provides the requisite quantum of proof to rebut adequately an overt, discriminatory fetal protection policy.[88]

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pact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser [disparate] impact.

Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979) (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)), *cert. denied*, 446 U.S. 928 (1980).

83. *Wards Cove*, 109 S. Ct. at 2126 (quoting *Watson*, 487 U.S. at 997) ("The ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." (emphasis in *Wards Cove*)).

84. *Watson*, 487 U.S. at 998.

> [W]hen a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable . . . effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."

Id. (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). However, it must be remembered that "any alternative practice[] which [plaintiff] offer[s] up in this respect must be equally effective as [the employer's] chosen hiring procedures in achieving [the employer's] legitimate employment goals." *Wards Cove*, 109 S. Ct. at 2127. *Compare supra* note 82 and accompanying text (pre-*Wards Cove* standard for business necessity).

85. *Wards Cove*, 109 S. Ct. at 2127 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).

86. *Id.*

87. *See supra* note 74.

88. This difficulty stems from confusing the legal application of the bfoq and the business necessity defense to the specific facts of a case. *See, e.g.*, Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474, 495 n.11 (E.D. Va. 1978) ("[I]t is not entirely clear whether [the policy] should be tested under the 'business necessity' test, the bfoq test, or both."), *aff'd in part and rev'd in part*, 633 F.2d 361 (4th Cir. 1980) (en banc) (per curiam), *cert. denied*, 450 U.S. 965 (1981). In addition, evidentiary problems abound because of the nature and uncertainty of

II. TITLE VII AND FETAL PROTECTION POLICIES: BFOQ OR BUSINESS NECESSITY?

The first major case addressing a fetal protection policy and its proper conceptual framework for judicial analysis was *Wright v. Olin Corp.*[89] The Olin Corporation created a female employment and fetal vulnerability program that encompassed three job classifications for women working in its chemical plant: restricted,[90] controlled,[91] and unrestricted.[92] The Fourth Circuit, after struggling with the application of the bfoq exemption or the business necessity defense, held that Olin's facially discriminatory policy could be defended with proof of a business necessity, thereby rejecting the plaintiff's contention that an overt, discriminatory policy forces an employer to defend under the bfoq defense.

Although "the evidence of the existence and operation of the fetal vulnerability program established as a matter of law a *prima facie* case of Title VII violation,"[93] the *Olin* court reasoned that "[w]hile the loose equation—overt discrimination/only b.f.o.q. defense—is therefore properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine."[94] In other words, the Fourth Circuit found the bfoq to be a defense "that obviously cannot be established,"[95] and declared that the "defendant [was] entitled to have considered—though not necessarily to have accepted—the defense actually advanced under the *wider scope* of the business necessity theory."[96]

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scientific evidence and the different effects of discrete occupational agents on male and female reproduction. Employers, themselves, confront two problems in controlling the effects of reproductive hazards:

> First, with regard to at least some agents, the developing embryo and fetus may suffer severe effects at exposure levels that have no effect on the mother (or father). These levels may be so low as to render their elimination technologically and economically infeasible. Second, the nature and severity of developmental defects depends [sic] on the degree of exposure and the time of exposure.

MEDICAL SCREENING, *supra* note 22, at 48 (footnote omitted).

89. 697 F.2d 1172, 1182-92 (4th Cir. 1982).

90. "Restricted jobs are those which may require contact with and exposure to known or suspected abortifacient or teratogenic agents. Fertile women [ages 5 to 63] are excluded from such jobs." *Wright*, 697 F.2d at 1182 (quotation marks omitted).

91. "Controlled jobs may require very limited contact with the harmful chemicals. Pregnant women may work at such jobs only after individual case-by-case evaluations. Non-pregnant women may work in controlled jobs after signing a form stating that they recognize that the job presents some risk, although slight." *Id.* (quotation marks and footnote omitted).

92. "Unrestricted jobs are those which do not present a hazard to the pregnant female or the fetus. They are open to all women." *Id.* (quotation marks omitted).

93. *Id.* at 1187 (emphasis in original).

94. *Id.* at 1186 n.21.

95. *Id.*

96. *Id.* (emphasis supplied).

In *Hayes v. Shelby Memorial Hosp.*,[97] the Eleventh Circuit consulted the decision in *Olin* to find that adverse employment actions taken by the employer in the fetal protection area could be justified by the business necessity defense.[98] Consistent with the Fourth Circuit's holding in *Olin*, though disagreeing with that court's reasoning,[99] the Eleventh Circuit opined that a fetal protection policy that applied solely to one sex would violate Title VII unless: "(1) [the employer proves] that a substantial risk of harm exists; and (2) that 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."[100]

The *Hayes* court reasoned that a policy meeting these criteria,[101] regardless of its facially discriminatory operation and effect, "is neutral in the sense that it effectively and equally protects the offspring of all employees."[102] In

97. 726 F.2d 1543 (11th Cir. 1984).

98. *Hayes*, 726 F.2d at 1552. The defendant-hospital dismissed a pregnant woman out of concern for fetal exposure to X-rays. The *Hayes* court permitted the application of the business necessity defense to this facially discriminatory action. However, the court held that because the hospital failed to rebut the presumption of discrimination and failed to consider less discriminatory alternatives to firing the plaintiff, it violated the Pregnancy Discrimination Act of 1978. *Id.* at 1554.

99. We believe it unnecessary to place the fetus into a legal classification developed for an entirely different aspect of the law, and therefore decline to endorse *Olin*'s approach of equating a fetus with a business invitee or licensee. Instead, we simply recognize fetal protection as a legitimate area of employer concern to which the business necessity defense extends.

Id. at 1552 n.14.

100. *Id.* at 1554.

101. The Eleventh Circuit, in deciding which defense was appropriate in fetal protection cases, created a rebuttable presumption that fetal protection policies were facially discriminatory. Moreover, when this presumption was not rebutted by a showing that the policy "effectively and equally protect[ed] the offspring of all employees," *id.* at 1548, the only defense available for the facially discriminatory policy would be the bfoq. *Id.* at 1548-49. Once applied, the sufficiency of the bfoq defense in these cases was questioned in the following terms: "[W]hen a policy designed to protect employee offspring from workplace hazards proves facially discriminatory, there is, in effect, no defense, unless the employer shows a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job." *Id.* at 1549.

102. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984). In order to refute this judicial conclusion, the plaintiff is permitted to show, and has the burden to prove, that "there are acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purpose with a less adverse impact on one sex." *Id.* at 1553 (citing Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982)).

The conclusion that discrimination on the basis of pregnancy is "neutral," in any sense of the word, was rejected by Congress with the 1978 enactment of the Pregnancy Discrimination Act (PDA). *See* Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669, 676-79 (1983) (explaining that the PDA was enacted both to prevent pregnancy discrimination from being treated as a neutral distinction for Title VII purposes and specifically to preclude the result reached in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), which held that the exclu-

so doing, the court determined that the appropriate way to approach a fetal protection case may depend on the type of defense the employer can muster, not on the overt, discriminatory nature of the employment practice.[103]

In designating fetal protection a "legitimate area of employer concern"[104] and by abandoning the bfoq and business necessity focus on business characteristics and job performance, the *Hayes-Olin* decisions (i) may have effectively reinforced the notion that employers can legitimately exclude women (without proving the bfoq) based upon benevolent societal values, and (ii), in

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sion of pregnancy-related disabilities from the company disability plan did not constitute sex discrimination). *See generally* Note, *California Federal Savings & Loan Ass'n v. Guerra: State Guarantee of Pregnancy Disability Leave Confronts Title VII of the Civil Rights Act of 1964*, 2 J. CONTEMP. HEALTH L. & POL'Y 327 (1986) (discussing congressional rejection of a neutral characterization for pregnancy discrimination in the context of state anti-discrimination legislation).

103. In *Hayes*, the court stated: "Although we tend to agree that this is a facial discrimination case, to ensure complete fairness to the [employer], we will also analyze this case under the disparate impact/business necessity theory." *Hayes*, 726 F.2d at 1548. Similarly, the *Olin* court opined:

> [W]here the defendant-employer has not attempted to present a classic b.f.o.q. defense, it may not properly be forced to do so. We therefore reject claimant's suggestion that because the claim of violation here is arguably one of 'overt' discrimination, the employer is confined to a b.f.o.q defense that obviously cannot be established and indeed is not advanced.

Wright v. Olin Corp., 697 F.2d 1172, 1186 n.21 (4th Cir. 1982).

With these pronouncements, the *Hayes-Olin* decisions abandoned the statutorily prescribed bfoq defense because it would be unfair, or inopportune for the defendant. These statutory semantics, underlying much of the legal reasoning employed in the fetal protection area, bring to mind the following oft-quoted conversation between Alice and Humpty Dumpty:

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

L. CARROLL, THROUGH THE LOOKING-GLASS: AND WHAT ALICE FOUND THERE 94 (Random House spec. ed. 1946) (emphasis in original).

104. *Hayes*, 726 F.2d at 1552 n.14. The *Olin* court similarly held:

> We do not think that a general basis for the "business necessity" asserted here need be sought in other considerations than the general societal interest—reflected in many national laws imposing legal obligations upon business enterprises—in having those enterprises operated in ways protective of the health of workers and their families, consumers, and environmental neighbors. *E.g.*, 15 U.S.C. §§ 2051-2083 (Consumer Product Safety Act); 21 U.S.C. §§ 301-392 (Federal Food, Drug and Cosmetic Act); 29 U.S.C. §§ 651-678 (Occupational Safety and Health Act).

697 F.2d at 1190 n.26. The *Olin* court analogized the concern for the health of the unborn with the concern for the safety of business invitees and licensees: "[W]e cannot believe that Congress meant by Title VII absolutely to deprive employers of the right to provide any protection for licensees and invitees legitimately and necessarily upon their premises by any policy having a *disparate impact* upon certain workers." *Id.* at 1189 (emphasis supplied) (citation omitted).

so doing, may have opened a Pandora's box.[105]

In both *Olin* and *Hayes*, decided before *Watson v. Fort Worth Bank & Trust*[106] and *Wards Cove Packing v. Atonio*,[107] the employer retained the ultimate burden of proof[108] on two issues: the substantial risk of harm requirement and the risk of fetal exposure through the single-sex-excluded requirement.[109] By mistakenly interpreting the business necessity defense in

105. As one dissenting opinion in *Johnson Controls* noted:

> How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women?

International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 917 (7th Cir. 1989) (en banc) (Easterbrook & Flaum, JJ., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

Additionally, one commentator has posed the following questions:

> Is it acceptable for an employer to single out a group of employees believed to be hypersusceptible, and remove those workers from the workplace, in order to protect their health, the health of others, and—in economic terms—the health of the business? Stated otherwise, can a company manipulate the composition of its workforce in order to minimize the impact of toxic substance exposure on employee health? Can an employer decide, for example, that it will not hire fertile women, or men with high blood pressure, or people younger than forty, in order to limit its possible liability for later illness?

Bor, *Fetal Protection Policies and Title VII*, 2 LAB. LAW. 683, 683 (1986).

The Johnson Controls policy explicitly embodied these concerns. Denise Zutz, spokeswoman for Johnson Controls, stated that there was "clearly a moral dimension" to the company's fetal protection policy. New Haven Reg., Feb. 18, 1990, at A16, col. 1. A company lawyer is quoted as stating that Johnson Controls felt " 'morally required to protect children from their parents' mistakes.' " *Id.* Joan E. Bertin, associate director of the women's rights project of the American Civil Liberties Union, disagreed: "Obviously we're opposed to these policies and this approach to health protection, in part, because we don't think it offers health protection. It's coercive to women workers who are dependant on their employment for their well-being and the well-being of their families." Samborn, *Worker Safety: 7th Circuit Bias Ruling Criticized*, Nat'l L.J., Oct. 16, 1989, at 30, col. 1.

106. 487 U.S. 977 (1988).

107. 109 S. Ct. 2115 (1989).

108. To sustain this burden, the defendant-employer must produce independent and objective scientific evidence which is "supported by the opinion evidence of qualified experts in the relevant scientific fields." Wright v. Olin Corp., 697 F.2d 1172, 1190 (4th Cir. 1982); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984). In addition,

> it is not necessary to prove the existence of a general consensus on the points within the qualified scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists, and . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be an accurate one.

Olin, 697 F.2d at 1191 (citation omitted); *Hayes*, 726 F.2d at 1548. Finally, "[t]his burden may not be carried by proof alone that the employer subjectively and in good faith believed its program to be necessary and effective for the purpose [of workplace safety]." *Olin*, 697 F.2d at 1190; *Hayes*, 726 F.2d at 1548.

109. *The burden of persuasion* is upon the employer to prove that significant risks of harm to the unborn children of women workers from their exposure during preg-

this way, as *Watson* and *Wards Cove* point out,[110] and by interpreting the bfoq and business necessity defenses similarly,[111] the *Olin-Hayes* courts may have obscured the statutory imperative to apply the bfoq defense to a facially discriminatory policy. *Watson* and *Wards Cove*, however, emphatically left the ultimate burden of persuasion with the plaintiff when litigating a facially neutral policy. Hence, after *Watson* and *Wards Cove*, there can be no interchangeability between the bfoq and the business necessity defenses. Despite the unambiguous distinction drawn in *Watson* and *Wards Cove*, the court in *Johnson Controls* (like *Hayes* and *Olin*) *incorrectly applied* the business necessity defense to a facially discriminatory policy, but, unlike *Olin* and *Hayes*, *correctly interpreted* the defense as placing the ultimate burden of proof on the plaintiff.

Consequently, the defendant-employer in *Johnson Controls* escaped even

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> nancy to toxic hazards in the workplace make necessary, for the safety of the unborn children, that fertile women workers, though not men workers, be appropriately restricted from exposure to those hazards and that its program of restriction is effective for th[at] purpose.

Olin, 697 F.2d at 1190 (emphasis supplied) (citation omitted). In addition, "[s]howing that the risk sought to be avoided is, on the best available scientific data, substantially confined to the exposure of women workers is critical to showing the program's effectiveness." *Id.* at 1190 n.27.

Similarly, *Hayes* stated:

> [T]he employer *must show* (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace, and (2) that the hazard applies to fertile or pregnant women, but not to men.

726 F.2d at 1548 (emphasis supplied) (footnote omitted).

110. We acknowledge that some of our earlier decisions can be read as suggesting [that the employer retains a burden of proof in disparate impact cases]. But to the extent that those cases speak of an employers' "burden of proof" with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden. The persuasion burden [in disparate impact cases] must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity.

Wards Cove, 109 S. Ct. at 2126 (citations omitted); *see also Watson*, 487 U.S. at 997.

111. For example, after *Wards Cove*, the Seventh Circuit, in *Johnson Controls*, relied upon the pre-*Wards Cove* decision of the Eighth Circuit in Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987), for the principle that:

> [A] district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq "is similar to and overlaps with the judicially created 'business necessity test.' " The various standards for establishing business necessity [before *Wards Cove*] are quite similar to those for determining a bfoq.

International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 894 (7th Cir. 1989) (en banc) (citation omitted) (quoting *Chambers*, 834 F.2d at 704), *cert. granted*, 110 S. Ct. 1522 (1990); *accord* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 n.8 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

the burden of proving the requirements under *Hayes* or *Olin*, and had merely to *produce evidence* of a substantial risk of harm to the fetus through exposure of the excluded sex. Moreover, the defendant-employer did not have to prove that the harmful environment affected only females and not males; instead the defendant needed only to show that there was substantial evidence of risk to fertile women. This significant difference relieves the employer of the bfoq burden to proffer comparative scientific evidence before sex-based action is taken.[112] Hence, without the burden of proving scientifically that fetal risk through paternal exposure is insignificant, the employer may succeed by showing only scientific evidence of fetal harm through maternal lead exposure.[113]

This post-*Wards Cove* reinterpretation of the business necessity defense demonstrates the problem of applying the defense in circumstances of overt discrimination. Title VII states that when an employer discriminates expressly "because of sex," it violates Title VII "unless sex is a bfoq," with the consequent burden of persuasion resting with the defendant-employer. However, when an employer discriminates expressly "because of sex," and a court applies instead the business necessity defense, the burden of persuasion improperly rests, at the expense of the statute's language, with the plaintiff.

Accordingly, any similarity between the bfoq and the business necessity defense should now be recognized only in the type of evidence presented and the nature of the issues being litigated. The requisite burdens of proof and the types of Title VII problems addressed with each defense should not be confused in the fetal protection area. Unfortunately, precisely the opposite result occurred in *Johnson Controls*.

III. THE IMPACT OF *International Union, UAW V. Johnson Controls*

In granting a motion for summary judgment for Johnson Controls, the Seventh Circuit relied upon the conclusions reached within *Olin*, *Hayes*, and the Equal Employment Opportunity Commission (EEOC).[114]

The court first reasoned that there were no inherent restraints in Title VII that operated to preclude the defendant from successfully using the business

112. Because of the uncertainty of the scientific evidence, the allocation of the burden of proof is crucial. An employer will have an extremely difficult time proving the negative proposition that a one-sex policy is not underinclusive as a matter of science. In other words, the employer may be able to prove that there are risks to women workers, but not that there are no similar risks to men workers.

MEDICAL SCREENING, *supra* note 22, at 54.

113. *See, e.g.*, *Johnson Controls*, 886 F.2d at 879-83 (considering the overwhelming evidence of risk of harm that lead exposure presents to the fetus and mother, but largely omitting any discussion of the reproductive effects of paternal lead exposure).

114. *Id.* at 887.

necessity defense. Thus, the court adhered to "the necessity of avoiding rigid application of proof patterns to particular factual situations,"[115] especially those "judicially devised proof patterns in cases that present factual circumstances different from those encountered previously."[116] These flexible principles, however, were originally announced in a context other than one of overt, facial discrimination.[117] Thus, however meritorious this flexible principle is when the critical issue of discrimination has not been reached and evidentiary burdens need to be allocated in the face of allegations of discrimination, when faced with an overt, discriminatory policy that excludes women solely because of their sex, reliance on this principle is misplaced[118] because it allows a defendant, using a business necessity defense, to

115. *Id.* at 883.

116. *Id.* (citation omitted).

117. The Seventh Circuit derived these conclusions from three Supreme Court decisions: Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 883 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990). However, none of these decisions involved an overt discrimination factual situation where the statutory bfoq would apply. *See Furnco*, 438 U.S. at 580 n.9 (minority applicants denied employment for bricklayer position and "the general hiring practice, though perhaps legitimate in the abstract, was discriminatorily applied in this case"); *Teamsters*, 431 U.S. at 335-37 (because facially discriminatory policy not involved, court determined whether there was a pattern or practice of disparate treatment motivated by prohibited criteria); *McDonnell Douglas*, 411 U.S. at 800-01 (minority civil rights activist denied employment and alleged discrimination because of civil rights activities, color, and race). Because of the absence of an overt, discriminatory policy, flexibility in the allocation of burdens of proof was necessary to determine whether the allegations proved the ultimate question of discrimination.

118. When the critical issue of discrimination has already been proven, as is the case when there is direct evidence of discrimination, the necessity for flexibility in presenting the case is removed. In the age-discrimination context, the Supreme Court has stated simply that "the *McDonnell Douglas* [burden shifting] test is inapplicable where the plaintiff presents direct evidence of discrimination." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); *see also* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2d Cir. 1980) (When direct proof of discrimination is available, there is no reason to "adhere stubbornly to [*McDonnell Douglas*'s] specific formulae when common sense dictates the same result on the basis of alternative formulae."), *cert. denied*, 452 U.S. 940 (1981).

Moreover, as stated in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983):

> The "factual inquiry" in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. In other words, is the employer treating some people less favorably than others because of their race, color, religion, sex, or national origin. The prima facie case method established in *McDonnell-Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the *evidence* in light of common experience as it bears on the critical question of discrimination. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the

escape both a finding of discrimination and a finding of liability.[119]

In deciding *Johnson Controls*, the Seventh Circuit was "convinced that the components of the business necessity defense . . . [,] utilized in fetal protection cases[,] balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII."[120] By requiring proof of a substantial health risk to the unborn child,[121] proof that "the risk of harm to

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evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.

460 U.S. at 715 (citations and quotation marks omitted) (emphasis supplied). In *Johnson Controls*, however, because "[the] case d[id] not concern the order of proof and methods of inference[, the need for evidentiary flexibility to determine the issue of discrimination was removed]; Johnson expressly use[d] sex to make decisions." 886 F.2d at 911 (Easterbrook & Flaum, JJ., dissenting). At this stage, the case should merely search for a bfoq and determine the question of liability. *Id.* ("When Wisconsin excluded male guards from a women's prison, we saw this as disparate treatment and searched for a BFOQ.") (citing Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1526-28 (7th Cir. 1988) (en banc)).

119. When a finding of employment discrimination has been made, the defendant-employer may still escape liability for the violation. In Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), the Court held:

> [W]hen a plaintiff in a Title VII case proves that [prohibited criteria] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [prohibited criteria] into account.

Id. at 1795; *see also* Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987) (preponderance of the evidence standard); Blalock v. Metals Trades, Inc., 775 F.2d 703, 711 (6th Cir. 1985) (same), *cert. denied*, 109 S. Ct. 2062 (1989); Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (same); Miles v. M.N.C. Corp., 750 F.2d 867, 875-76 (11th Cir. 1985) (same). *But see* Smallwood v. United Air Lines, Inc., 728 F.2d 614, 620 (4th Cir.) (clear and convincing evidence standard), *cert. denied*, 469 U.S. 832 (1984); Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980) (same); Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (same); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974) (same); 29 C.F.R. § 1613.271(b)(1), (2) (1990) (same). In addition, 42 U.S.C. § 2000e-5(g) (1982), limits the employer's liability for back pay to two years prior to the date of filing the Equal Employment Opportunity complaint.

120. *Johnson Controls*, 886 F.2d at 886.

121. The court stated that requiring proof of substantial harm to the unborn child "effectively distinguishes between the legitimate risk of harm to health and safety which Title VII permits employers to consider and the 'myths or purely habitual assumptions' that employers sometimes attempt to impermissibly utilize to support the exclusion of women from employment opportunities." *Id.* (quoting City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)). The *Johnson Controls* court held:

> The overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child from lead exposure . . . approaches a "general consensus within the qualified scientific community," and certainly "suffices to show that within that community there is a considerable body of opinion that significant risk exists." Accordingly, . . . there is no genuine issue of material fact with respect to this component of Johnson Controls' business necessity defense.

886 F.2d at 889 (footnote omitted) (quoting Wright v. Olin, 697 F.2d 1172, 1191 (4th Cir. 1982)).

offspring be substantially confined to female employees,"[122] and the absence of less discriminatory alternatives,[123] the court was "assure[d] that these policies are only as restrictive as necessary to prevent the serious risk of harm to the unborn child."[124]

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122. *Id.* at 886. With this requirement met, the court noted that "a fetal protection policy applying only to women recognizes the basic physical fact of human reproduction, that only women are capable of bearing children." *Id.*

In the majority opinion, the court held that UAW failed "to present facts sufficient for the trier of fact to conclude that transmission of the significant risk of harm lead presents to the unborn child is not substantially confined to female employees." *Id.* at 889. In other words, the UAW did not "present facts sufficient *to carry its burden of demonstrating the absence* of the second element of Johnson Controls' business necessity defense, application of the risk of transmitting lead exposure to unborn children only through females." *Id.* at 890 (emphasis supplied). If the bfoq were applied as intended, the *defendant-company* would bear this burden to show that male exposure to existing lead levels would have no significant effect on their reproductive system; thereby creating no risk to offspring (and justifying its sex-specific exclusion). Instead, the Seventh Circuit imposed upon the *plaintiffs* the burden to prove the negative; *i.e.*, Johnson Controls' argument that lead affected only females was not supported because male reproductive systems were affected detrimentally.

Johnson Controls' experts, taking "the position that because this data dealt exclusively with animals, the results of these studies were not scientifically established as being applicable to humans," "testified that a male worker's exposure to lead at levels . . . set forth in OSHA's [Occupational Safety and Health Administration's] current (1978) lead exposure guidelines did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." *Id.* at 889. However, the court opined that "*[t]he UAW's* animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead." *Id.* at 889-90 (emphasis supplied). It is unclear from the opinion whether the Seventh Circuit found that none of the evidence presented by Johnson Controls relied upon nonhuman scientific data. *See id.* at 919 (Easterbrook & Flaum, JJ., dissenting) (citation omitted) ("The medical profession . . . will be stunned to discover that animal studies are too 'speculative' . . . to be the basis of conclusions about risks.").

123. *Wards Cove* makes clear (1) that the UAW *bears the burden of presenting* specific economically and technologically feasible alternatives to Johnson Controls' fetal protection policy; (2) that if the UAW presents such alternatives, the UAW also *bears the burden* of demonstrating that its proposed alternative policy is "equally effective as Johnson Controls' fetal protection policy in achieving Johnson's legitimate employment goals"; and (3) that this inquiry is to be undertaken with the recognition "that factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective . . . ," and that "courts are generally less competent than employers to restructure business practices . . . ."

Johnson Controls, 886 F.2d at 892 (emphasis supplied) (citations omitted). The court held that the UAW had not met the burden of presenting a genuine issue of material fact at the summary judgment stage of the litigation because they "failed to present even one specific alternative to Johnson's fetal protection policy." *Id.*

124. *Id.* at 886-87. Underlying these assurances may be the general societal interest in protecting fetuses or children and the specific employer interest in avoiding possible future liability for fetal harm to the offspring of workers exposed to lead. *See id.* at 897 ("[M]ore is at stake in this case than an individual woman's decision to weigh and accept the risks of employ-

The Seventh Circuit was further convinced[125] by the EEOC's findings in

ment . . . [because a] female's decision to work in a high lead exposure job risks the intellectual and physical development of the baby she may carry." (citation omitted)); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 n.10 (5th Cir. 1982) (dictum) ("The economic consequences of a tort suit brought against the Hospital by a congenitally malformed child could be financially devastating, seriously disrupting the safe and efficient operation of the business." (citation omitted)). Similar concerns were expressed by the district court in *Johnson Controls*: "As a concern for society and future generations[,] this Court must uphold the fetal protection policy[]" and provide the fetus with "special protection from lead." International Union v. Johnson Controls, Inc., 680 F. Supp. 309, 316 (E.D. Wis. 1988). "Furthermore, although not of primary importance, a business should be able to protect itself from future lawsuits which may arise because a child was prenatally exposed to lead." *Id.* at 317. *But see* Wright v. Olin Corp., 697 F.2d 1172, 1190 n.26 (4th Cir. 1982) (Because the general societal interest in protecting the health of workers and their offspring is overriding, "it is irrelevant that . . . the mere purpose to avoid potential liability and consequent economic loss may not suffice, standing alone, to establish a business necessity defense." (citation omitted)).

Because the Supreme Court has generally rejected female employee safety concerns of the employer-defendant in the routine prison context, *see* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) ("[T]he argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."), and similarly rejected cost concerns in other sex and pregnancy-related areas, *see* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1085 & n.15 (1983) (retirement benefits); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 (1983) (health insurance); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (retirement benefits); *see also* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552-53 n.15 (11th Cir. 1984) ("The employer is, of course, free to protect itself from financially ruinous lawsuits by purchasing insurance and maintaining the degree of care required by law."), societal interest and fetal protection concerns should not prevent the application of the statutory bfoq defense.

As Judge Posner properly noted:

> The [bfoq] defense is applicable to [a] case [of overt discrimination] and[,] although it is of limited scope[,] it is not the proverbial eye of a needle. In particular, the "normal operation" of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties.

Johnson Controls, 886 F.2d at 904 (dissenting); *cf.* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1786 (1989) (The Court has developed an "awareness of Title VII's balance between employee rights and employer prerogatives."). Hence, the concerns of a business must not prevent the *application* of the appropriate statutory defense, in this case the bfoq, *cf.* TVA v. Hill, 437 U.S. 153, 185 (1978) ("It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated . . . ."); *Manhart*, 435 U.S. at 709 ("[T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address."), rather, they should be considered when deciding the *sufficiency* of Johnson Controls' bfoq defense.

125. *See Johnson Controls*, 886 F.2d at 886. The Court indicated that courts and litigants may resort to EEOC policy statements for guidance because they are derived from the agency's experience and expertise. These statements do not, however, have the force of law. *Id.* at 885.

Although the Seventh Circuit cited this material favorably when discussing the EEOC guidelines, the court effectively ignored the *gender-neutral* language, *infra*, contained in the Occupational Safety and Health Administration's (OSHA) 1978 Lead Standard. 29 C.F.R. § 1910.1025 (1990) (Final Standard for Occupational Exposure to Lead); *see Johnson Controls*, 886 F.2d at 876 n.7, 879 n.13, 880, 882 & n.24.

As the federal agency directed by Congress to regulate workplace health and safety, OSHA's

its *Policy Statement of Reproductive and Fetal Hazards under Title VII.*[126] Although it "candidly recognized that fetal protection policies that 'exclude only women constitute *per se* violations of the [Pregnancy Discrimination] Act,' "[127] the EEOC, following the *Olin-Hayes* approach, concluded that the business necessity defense may apply in fetal protection cases.[128] By follow-

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views may also represent a body of experienced and informed judgment deserving of at least some judicial deference. *See* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1257-58 (D.C. Cir. 1980) (When addressing the propriety of a challenge to OSHA's Lead Standard and the "scientific accuracy of OSHA's studies[,] . . . we must defer to the reasonable and conscientious interpretations of the agency."), *cert. denied*, 453 U.S. 913 (1981); *see also* Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (agency's reasonable interpretation given "controlling weight").

The Preamble to the OSHA Lead Standard stated unequivocally:

> The record in this rulemaking is clear that male workers may be adversely effected [sic] by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes [that] there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy. Effective compliance with all aspects of these [sic] standard will minimize risk to all persons and should therefore insure equal employment for both men and women. There is no evidentiary basis, nor is there anything in this final standard, which would form the basis for not hiring workers of either sex in the lead industry.

43 Fed. Reg. 52,966 (1978); *see also* 43 Fed. Reg. 52,959 (1978) ("Exposure to lead has profoundly adverse effects on the course of reproduction in both males and females."). *But see* Thompson, *Pinpointing the Risk From Lead: Does Evidence About Effects of Exposure on the Fetus Warrant Banning Women From Specific Jobs?*, Wash. Post, Oct. 16, 1990, Health, at 8, col. 4 (Joel Schwartz, a federal Environmental Protection Agency scientist, stated that "[t]he OSHA standard was set in 1978, and it is woefully inadequate today[;] . . . blood pressure effects [are seen] at levels much lower than the OSHA standards.").

In light of OSHA's gender-neutral language, the conflicting evidence regarding the level of safe exposure for both men and women, and the "exclusivity" of female exposure risk raises doubts about the propriety of granting summary judgment in favor of Johnson Controls on this issue. *See supra* note 11.

126. *Fetal Hazards*, *supra* note 15, at 6449.

127. International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 885-86 (7th Cir. 1989) (en banc) (quoting *Fetal Hazards*, *supra* note 15, at 6451 n.11), *cert. granted*, 110 S. Ct. 1522 (1990).

128. Although the BFOQ defense is normally the only one available in cases of overt discrimination, the Commission follows the lead of every court of appeals to have addressed the question . . . that the business necessity defense applies in these cases. While business necessity has traditionally been limited to disparate impact cases, there is an argument that in this narrow class of cases the defense should be flexibly applied.

Fetal Hazards, *supra* note 15, at 6451 (footnotes and citations omitted). The EEOC based its decision upon the theory that fetal protection "cases do not fit neatly into the traditional Title VII analytical framework and, therefore, must be regarded as a class unto themselves." *Id.* at 6451 n.11.

This conclusion is, however, contrary to earlier Proposed Interpretive Guidelines on Em-

ing the Fourth Circuit, the Eleventh Circuit, and the EEOC, the Seventh Circuit found that Title VII recognized women to be solely capable of bearing children[129] and that Johnson's policy qualified as a business necessity or,

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ployment Discrimination and Reproductive Hazards issued by the EEOC and the Department of Labor. 45 Fed. Reg. 7516 (1980), *withdrawn*, 46 Fed. Reg. 3916 (1981). Section 2 of the Proposed Guidelines provided, in part:

> *Nondiscriminatory policy to protect employees from reproductive hazards.* (a) An employer/contractor may not have policies, practices or plans designed to protect employees from reproductive hazards which, by their terms, exclude applicants or employees from employment opportunities on the basis of sex. Such policies are discriminatory on their face.
>
> (b) An employer/contractor may not disparately treat individual applicants or employees on the basis of sex. Such treatment constitutes an apparent violation of Title VII and Executive Order No. 11246, as amended (Executive Order No. 11246).
>
> (c) An employer/contractor may establish a neutral policy, practice or plan to protect all its employees from reproductive hazards. However, a facially neutral policy, practice or plan which has an adverse impact on one sex must be justified in accordance with relevant legal principles.

Id. (footnote omitted) (emphasis in original).

In addition, the Explanatory Note, preceding the Proposed Guidelines stated summarily:

> [T]he bona fide occupational qualification exception does not apply to the situations covered by these guidelines. That narrow exception pertains only to situations where all or substantially all of a protected class is unable to perform the duties of the job in question. Such cannot be the case in the reproductive hazards setting, where exclusions are based on the premise of danger to the employee or fetus and not on the ability to perform.

Id.

After the Seventh Circuit's decision in *Johnson Controls*, the EEOC once again reversed itself. *See Policy Guidance on United Auto Workers v. Johnson Controls, Inc.*, 2 Empl. Prac. Guide (CCH) ¶ 5247, at 6886. The EEOC's inconsistent approach to fetal protection should have reduced the amount of judicial deference afforded to its pronouncements. *Cf.* Teamsters v. Daniels, 439 U.S. 551, 566 n.20 (1979) ("It is commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight; . . . [b]ut this deference is constrained by our obligation to honor the clear meaning of a statute . . . ." (citations omitted)).

129. Although women may be solely responsible for bearing children, men clearly have an equally important responsibility in procreation. In some cases, exposure of the male reproductive system to workplace hazards may create the risk of imperfect conception or the risk of harm to a child, in utero. From a policy perspective, Johnson's fetal protection program may therefore be underinclusive. *See* MEDICAL SCREENING, *supra* note 22, at 53 ("For some . . . agents, such as ionizing radiation, the hazards to men are greater than the hazards to women." (footnote omitted)).

> The human reproductive function is sensitive to chemical exposure in a variety of ways, ranging from loss of libido, through impotency in men and infertility in both sexes, to fetal death and structural and functional disorders in offspring. The outcome with which employers have expressed concern—structural and functional disorders in offspring—can occur through both sexes and in several different ways. The exposure of the pregnant woman to harmful substances at the work site, is one, but only one, of the ways in which the fetus may be harmed.

Williams, *supra* note 23, at 655 (footnote omitted). Some of the numerous examples include:

> [C]arcinogens, mutagens, and teratogens are three classes of chemical (*e.g.*, drugs) or

in the alternative, as a bfoq.[130]

With the result reached in *Johnson Controls*, it is increasingly evident that, by using the *Olin-Hayes* business necessity defense coupled with the *Watson-Wards Cove* reinterpretation, the defendant-employer is faced with a steadily dwindling evidentiary burden[131] in seeking to exclude all fertile women, pregnant or not, from workplace hazards. Prior to the advent of fetal protection policies, the business necessity defense never absolved an employer of Title VII liability for intentional, overt discrimination.[132] Traditionally, the business necessity defense has been used, and interpreted

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physical (*e.g.*, radiation) agents known to disrupt reproductive function. Carcinogens are agents which can cause cancer. Carcinogens are capable of acting on cells in the fetus in a way which leads to cancer in the offspring. Mutagens are agents which alter the genetic material of cells. Such alteration can lead to cancer or other abnormal cell functioning. . . . Teratogens are agents which cause malformations in developing animals. . . . Toxic exposure of pregnant women on the job may affect fetuses by: (1) mutagenesis and teratogenesis, (2) exposure to transplacental carcinogenesis (carcinogens passed from mother to fetus), (3) injury to the fetus due to killing of or injury to fetal cells, and (4) interference with the essential physiology of pregnancy leading to abortion, premature delivery, or fetal injury.

Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 121-22 (1980) (footnotes omitted). In addition,

> [e]xposure of *either* parent prior to conception to substances that damage the germ cells is an additional way in which fetuses may be harmed. . . . Also, the pregnant woman and, as a consequence, her fetus, can be exposed through a male worker to toxic substances found in the workplace. One well documented way in which such exposure occurs is by male transportation of hazardous substances from work to home on his clothes, shoes, . . . hair[, or possibly] . . . through vaginal absorption of toxic substances carried in the seminal fluid of the exposed male worker. . . . Moreover, any particular hazardous substance rarely has just one effect; rather it is likely to have a range of effects on men, women, and fetuses; and reproductive effects are likely to be found in men as well as women workers.

Williams, *supra* note 23, at 656-58 (footnotes omitted); *see also* MEDICAL SCREENING, *supra* note 22, at 53 (occupational toxins with suspected effects on male reproduction include heat, ionizing radiation, mumps virus, lead, manganese, dibromochloropropane, chlordecone, oral contraceptives, carbon disulfide, ethylene dibromide, ethylene glycol ethers, and vinyl chloride) (citing Paul, *Reproductive Fitness and Risk*, 3 OCCUPATIONAL MED.: STATE OF THE ART REVS. 323, 329 (1988)).

130. For the Seventh Circuit's discussion of the validity of Johnson's fetal protection policy as a bfoq, see *Johnson Controls*, 886 F.2d at 893-901 (alternative holding).

131. We know from *Wards Cove Packing Co. v. Atonio* . . . that the plaintiff bears the burden of persuasion on all questions in every disparate impact case, as the majority today emphasizes. So the *Wright-Hayes* standard has been watered down. The court's 'adoption' of *Wright*, *Hayes*, and the EEOC's policy statement is thus in practice more favorable to employers than the Fourth and Eleventh Circuits (and the EEOC) anticipated their approach would be. The plaintiff won in *Hayes*; she would lose under the majority's approach.

Id. at 915 (Easterbrook & Flaum, JJ., dissenting).

132. Within Title VII, although there are means to avoid a finding of liability even after

correctly, to rebut *inferential*, e.g., statistical, not direct or overt, evidence of discrimination.

A direct result of the holding in *Johnson Controls*, "[i]f allowed to stand, [may be to] encourage employers to begin barring women from certain production jobs where toxic chemicals are used."[133] These positions normally command the higher paying salaries in industry.[134] Furthermore, an additional effect of the Seventh Circuit's ruling "might be that more women will seek to have themselves sterilized in order to survive economically . . . , placing doctors in a great moral dilemma."[135]

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there has been a finding of discrimination, *see supra* note 119, the bfoq is the only statutorily prescribed justification for overt discrimination.

133. *New Approaches to Safety, Heightened Expectations in Safety and Health Community as 1990's Open*, Daily Lab. Rep. (BNA) No. 8, C-1, at C-16 (Jan. 11, 1990) [hereinafter *New Approaches*] (subsection entitled Reproductive Hazards). "According to attorney Joan Bertin of the American Civil Liberties Union's Women's Rights Project, many employers already exclude women from certain jobs due to reproductive hazards, and that the practice is not confined to small employers but includes Fortune 500 companies." *Id.* Additionally,

> Maureen Paul, an obstetrician-gynecologist associated with the University of Massachusetts's Occupational Health Program, told BNA that a Massachusetts study involving more than 200 employers showed that 20 percent of the companies had some type of practice that excluded women from certain jobs. Only one company had a policy that excluded men . . . .

Id. Ms. Paul stated that if *Johnson Controls* is upheld, the largely "invisible" policies excluding females might "come out of the closet." *Id.*

134. *Id.* Professor Mary E. Becker, of the University of Chicago Law School, felt that "the majority opinion [in *Johnson Controls*] effectively 'excludes whole categories of higher-paying union jobs from [gender] integration.' " Samborn, *Worker Safety: 7th Circuit Bias Ruling Criticized*, Nat'l L.J., Oct. 16, 1989, at 30, col. 2.

135. *New Approaches*, *supra* note 133, at C-16.

> Similarly, excluding all women of child-bearing capacity is probably overinclusive. Where the toxin or other hazard presents an unreasonable risk to the fetus in the first few weeks of development, employers may be concerned about accidental pregnancies. Yet less than nine percent of all fertile working women are pregnant in any given year; for blue collar women over 30, the birth rate may be less than two percent, and only 1 in 5000 women between the ages of 45 and 49 has a child in a given year. Moreover, even some fertile women, for a variety of reasons including celibacy, sexual orientation, or relations with a non-fertile male, are at little or no risk of becoming pregnant. More importantly, in the past few years the technology of early pregnancy testing has advanced to the point that, through regular testing, pregnancy could be detected almost immediately. Employers' fears of concealed pregnancies could, in some instances, be eliminated by adopting a policy of transfers to a non-hazardous area with no reduction in pay or seniority. Whether the employer can reasonably adopt a less exclusionary policy must be determined on a case-by-case basis. Of course, a conclusion that a policy is overbroad does not necessarily invalidate the entire policy if it is [otherwise] valid, but does so only to the extent of its overbreadth.

Fetal Hazards, *supra* note 15, at n.16 (citations omitted).

One dissenting opinion in *Johnson Controls* agreed in saying:

> [I]t is clear that defendant's fetal protection policy is excessively cautious in two

To prevent these effects when addressing overt gender-based fetal protection in the future, the employer must retain the burden of proving the bfoq[136] when deliberately excluding fertile women because of their sex. By requiring this, courts will adhere to the language and goals of Title VII and the Pregnancy Discrimination Act.[137] Hence, employers will be forced to

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> regards: first in presuming that any woman under the age of 70 is fertile, and second in excluding a presumptively fertile woman from any job from which she might ultimately be promoted into battery making, even if her present job does not expose her to lead.

International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 907 (7th Cir. 1989) (en banc) (Posner, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

136. Indeed, this result may be guided by the plain meaning of the language in Title VII, the PDA, and the bfoq. Requiring the statutory application of the bfoq to gender-based fetal protection policies may therefore be beyond serious doubt. *See* Board of Governors v. Dimension Fin., 474 U.S. 361, 368 (1986) ("If the statute is clear and unambiguous 'that is the end of the matter . . . .' " (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984))); Garcia v. United States, 469 U.S. 70, 75 (1984) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.' " (citation omitted)); North Dakota v. United States, 460 U.S. 300, 312 (1983) ("As with any case involving statutory interpretation, 'we state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language.' " (quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 110 (1983)) (citation omitted)); Howe v. Smith, 452 U.S. 473, 480 (1981) ("As in every case involving the interpretation of a statute, analysis must begin with the language employed by Congress." (citation omitted)); Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself [and a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); TVA v. Hill, 437 U.S. 153, 194 (1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."); 2A SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 46.04 (Sands 4th ed. 1984).

The result intended by Congress, application of the bfoq defense, will not, however, necessarily sound the death knell for all fetal protection policies. The employer still has the opportunity to satisfy the bfoq, maintaining the ultimate burden of persuasion throughout. In addition, employers may structure facially neutral fetal protection policies that exclude, rotate, or grant mandatory leave to both males and females at risk from workplace hazards.

137. These mandates have recently been vindicated in Grant v. General Motors Corp., 908 F.2d 1303, 1310-11 (6th Cir. 1990) and Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 551, 267 Cal. Rptr. 158, 176-77 (1990).

In *Grant*, a female employee brought suit alleging that her reassignment (according to the General Motors Corp. (GM) fetal protection policy) from a foundry area, which contained levels of airborne lead, violated Title VII. The GM policy, similar in many respects to that of Johnson Controls, mandated the exclusion of female employees from areas containing excessive airborne lead levels, and included mandatory bi-monthly blood testing and the use of respirators. *Grant*, 908 F.2d at 1305. The policy, in all respects, applied only to female employees. *Id.*

After canvassing the *Wright*, *Hayes*, and *Johnson Controls* decisions, the Sixth Circuit vacated the district court's grant of summary judgment to GM:

> [F]etal 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. To hold otherwise would be to usurp congressional power

satisfy the bfoq or adopt facially neutral exclusionary policies. Facially neutral policies, developed after testing for the deleterious effects of workplace toxins on both sexes, may exclude predominately one sex, depending on the nature of the toxin. This result, however, will treat employees equally and

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to regulate pregnancy discrimination on the basis of public policy. Our task is one of interpretation, not legislation.

Id. at 1310 (citation omitted).

The state court, under California law, held that Johnson Controls' fetal protection policy, identical to the one upheld in *Johnson Controls*, could not be justified under either the business necessity or bfoq defense. The court concluded:

> By excluding all women solely on the basis of fertility, the Company makes at least the following unfounded assumptions about women—*none of which* has anything whatsoever to do with "objective differences" between men and women: (1) that all unmarried fertile women are either presently actively involved in sexual relationships with men, or will definitely become so involved; (2) that fertile women who are actively involved in sexual relationships with men or who may become so involved, are or will be involved with a fertile man (a woman's partner, for example, might have had a vasectomy); (3) that fertile women who are actively involved in sexual relationships with a fertile man, or will become so, cannot be trusted to employ reasonably adequate prophylactic measures against an unexpected pregnancy; and (4) that fertile women, even when possessed of sufficient information about the worksite hazard, are incapable of properly weighing the chances of unexpected pregnancy, notwithstanding use of prophylactic measures, against the possibility of fetal hazard should she become pregnant.

Johnson Controls, 218 Cal. App. 3d at 551, 267 Cal. Rptr. at 177 (emphasis in original) (footnote omitted).

Accompanying the above text, the court stated:

> We would suggest that women may or may not want children, may or may not be bound by an oath to strict chastity, or may or may not have sexual preferences that do not include males or the possibility of pregnancy. We are in an era of *choice*. A woman is not required to be a Victorian brood mare. She may, with constitutional basis, prefer not to have children. Had the job seeker in this case been a fertile nun, the Company's purported justification for excluding her from the job—fetal protection—would manifestly be far from persuasive. Such an example points to this conclusion. The Company's concern would be less with biological differences and more with the possibility [that] the woman would violate her vow of celibacy.

Id. at 551 n.16, 267 Cal. Rptr. at 177 n.15 (emphasis in original).

> The Company's policy is predicated upon the presumption that the employer is better suited to safeguard the interests of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself—i.e., that society's interest in fetal safety is best served, not by fully informing women of the risks involved and allowing them to make informed choices, not by fixing the workplace, but rather by removing from women the opportunity to make any choices in the matter at all.
>
> Distilled to its essence, this is not discrimination based on "objective differences" between men and women, it is discrimination based on categorical, long ago discarded assumptions about the ability of women to make . . . reasoned, informed choices.
>
> However laudable the concern by businesses such as the Company for the safety of the unborn, they may not effectuate their goals in that regard at the expense of a woman's ability to obtain work for which she is otherwise qualified.

Id. at 551-52, 267 Cal. Rptr. at 177-78 (footnote omitted).

will be based upon the company's specific evidence of the toxin's effects on both sexes. Only then should the employer have the relative luxury of producing a cognizable business necessity defense.

When faced with a facially neutral fetal protection policy, the plaintiff may be able to rebut evidence of a business necessity by proving the availability of alternative measures that are equally as protective and/or cost-effective, remaining consistent with the decision in *Wards Cove*. As a result of this burden, employers have an incentive to adopt facially neutral practices and examine the effects of hazardous workplace environments on both sexes; thereby adhering more closely to their professed goal of workplace safety, a goal which should be applied neutrally and in the interests of all employees. If, and when, male workers find that dangerous chemicals significantly affect both male and female reproductive systems, employers, fearing inadequate labor supply, may have a more forceful economic incentive to develop the now unforeseeable technology to provide a healthy, safe, and cost-effective work environment.[138]

IV. CONCLUSION

Under Title VII, the touchstone of any fetal protection policy should be facial neutrality. By characterizing a facially discriminatory policy as a facially neutral policy, and consequently applying the business necessity defense, the court in *Johnson Controls* confused the application of Title VII defenses. Like every other area of Title VII, the employer should be forced to make business decisions with an even hand. Therefore, a court should apply the strict bfoq requirement to facially discriminatory policies. Employers may then be forced to structure their policies toward exclusion of any worker, male or female, whose offspring or reproductive capacities are jeopardized by exposure to a dangerous workplace environment. This requirement may encourage employers to establish testing procedures that are not skewed solely to determine the effects of workplace hazards on fertile women.

In the end, the results of testing for a facially neutral fetal protection policy may well show that fertile and/or pregnant women pose the most serious risk to the employer's legitimate business goal of workplace safety. This result will, however, be predicated on an even-handed approach to the vulnerability of both sexes in the workplace. Most importantly, this approach will avoid the potential for overinclusiveness (excluding qualified women who are

138. As Judge Coffey noted, "if ever a lead-free battery were developed, the problems in this case would fall by the wayside. We hope that this is achieved tomorrow." *Johnson Controls*, 886 F.2d at 901 n.43.

not at risk, or women who have no plans to procreate) and underinclusiveness (failing to exclude men who, along with their families, are at risk).

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