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Putting the Teeth Back Into the BFOQ Requirement of Title VII and the Pregnancy Discrimination Act: International Union v. Johnson Controls, Inc.

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CASE NOTE

PUTTING THE TEETH BACK INTO THE BFOQ REQUIREMENT OF TITLE VII AND THE PREGNANCY DISCRIMINATION ACT: *INTERNATIONAL UNION v. JOHNSON CONTROLS, INC.*

In a resounding victory for women's and workers' rights, the U.S. Supreme Court has found that a Wisconsin battery manufacturer, in barring women without proof of infertility from jobs involving exposure to lead, violated the Civil Rights Act of 1964.[1]

I. INTRODUCTION

The United States Supreme Court's recent ruling in *International Union v. Johnson Controls, Inc.*[2] has the potential to impact women's access to an estimated twenty million industrial jobs.[3] In addition, the decision re-establishes the role and effect that both Title VII of the Civil Rights Act of 1964 ("Title VII")[4] and the Pregnancy Discrimination Act of 1978 ("PDA")[5] were intended to fulfill in protecting women against discrimination in the workplace.

This Casenote explores the status of fetal protection policies before *Johnson Controls* and the possible ramifications this decision may have on both employers and employees. Specifically, section two discusses the applicable statutory language of Title VII and the PDA.[6] Section three addresses how the courts interpreted and applied these statutes to fetal protection policies prior to *Johnson Controls*.[7] Section four analyzes the *Johnson Controls* decision itself.[8] Finally, section five forecasts the probable impact that this decision may have on current employment prac-

1. Kary L. Moss, *A Victory for Choice*, 13 NAT'L L.J., April 8, 1991, at 13, col. 1.
2. 111 S. Ct. 1196 (1991).
3. Moss, *supra* note 1. The impact will most likely be two-fold: women will no longer be forced to choose between working and having children, and employers will be forced to clean up hazardous workplaces rather than shut out workers most vulnerable to their vices. *Id.*
4. 42 U.S.C. §§ 2000e to 2000e-17 (1988).
5. *Id.* § 2000e(k).
6. *See infra* notes 10-25 and accompanying text.
7. *See infra* notes 26-53 and accompanying text.
8. *See infra* notes 54-97 and accompanying text.

tices.[9] Overall, this Casenote shows that, in striking down Johnson Controls' fetal protection policy, the Supreme Court has finally put the teeth back into legislation whose goal was to provide equal employment opportunities for women.

II. TITLE VII AND THE PREGNANCY DISCRIMINATION ACT

Fetal protection policies are employment requirements that remove or exclude fertile or pregnant women from jobs in which the working environment is considered to be hazardous to a woman's reproductive health or to an unborn fetus.[10] The dispute engendered by fetal protection policies centers on the difficulty in reconciling the discriminatory effect of such policies and the principles underlying specific congressional legislation aimed at eliminating unjustified sex discrimination in the workplace.[11]

Title VII of the Civil Rights Act of 1964 generally prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[12] Pursuant to Title VII, overt discrimination includes any employment policy that intentionally discriminates against certain employees on the basis of these specifically prohibited classifications. An employer's mere act of implementing such a policy establishes the requisite discriminatory intent.[13] In 1978, Congress amended Title VII by adding the Preg-

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9. *See infra* notes 98-111 and accompanying text.

10. United Auto Workers v. Johnson Controls, Inc., 886 F.2d 871, 875-76 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991). For further discussion of fetal protection policies in the employment context, see George M. Sullivan & William A. Nowlin, *Gender-Based Fetal Protection Policies: Impermissible Sex Discrimination*, 12 LAB. L.J. 387 (1991); Howard A. Simon, *Fetal Protection Policies After* Johnson Controls*: No Easy Answers*, 15 EMPLOYEE RELATIONS L.J. 491 (1990); Patricia E. Pierman, *Fetal Protection Policies and Title VII*, 11 LAB. L.J. 810 (1990); Margaret Post Duncan, *Fetal Protection Policies: Furthering Sex Discrimination in the Marketplace*, 28 J. FAM. L. 727 (1990).

11. Hannah A. 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, 77 (1980).

12. Section 703(a) of Title VII reads:

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

42 U.S.C. § 2000e-2(a) (1988).

13. Barbara J. Naretto, Note, *Employment Discrimination Made Easy: Fetal Protection Policies*, 24 VAL. U. L. REV. 441, 451 (1990). This author explains:

nancy Discrimination Act[14] to ensure that employment distinctions related to a woman's childbearing capabilities would also be considered per se violations of Title VII.[15] Due to the passage of the PDA, discrimination based on pregnancy or the capacity to bear children constitutes prima facie gender-based discrimination. Consequently, a woman may show a

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> [T]he denial of privileges, as illustrated by the language of the employer's policy, may be based on the employee's religion, race, sex, national origin, and . . . pregnancy. In an overt discrimination claim, the employee alleges that the employer's motive in initiating the policy is discriminatory. However, the employer's very act of implementing a policy based on prohibited factors under Title VII establishes his discriminatory intent or motive.

Id. at 451 (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)).

14. The Pregnancy Discrimination Act provides in pertinent part:

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

42 U.S.C. § 2000e(k) (1988).

15. In its report, the House Committee on Education and Labor noted that the PDA clarifies Congress' intent that pregnancy-based discrimination be prohibited in the workplace. *See* PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. No. 948, 95th Cong., 2d Sess. 2-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749. The Committee wrote:

> This legislation would clearly establish that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions. As an amendment to Title VII, this bill will apply to all aspects of employment — hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority and other conditions of employment currently covered by Title VII. Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.

Id. at 4752.

Additionally, the Committee explained its rationale for enacting the PDA:

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

Id. at 4754-55.

Prior to enactment of the PDA, provision of pregnancy benefits to female employees was a much disputed issue before the Supreme Court. In Geduldig v. Aiello, 417 U.S. 484 (1974), the Court held that a state law which excluded pregnancy from temporary disability benefits did not violate equal protection. Two years later, the Court confirmed this holding in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), concluding that a disability plan which covered all disabilities except those related to pregnancy did not violate Title VII. Then in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the Court upheld a disability policy which excluded pregnant women from receiving disability benefits. Following these decisions, Congress amended Title VII with the PDA. This amendment effectively overturned the decisions in *Geduldig*, *Gilbert*, and *Satty*, and made explicit that employers must treat pregnant employees the same as all other employees.

pregnancy or reproductive health rule to be a "pretext for discrimination on the basis of . . . gender."[16]

Notwithstanding its general prohibition on discrimination in the workplace, Title VII provides a narrow defense for employers who breach its provisions. An employer may legitimately discriminate on the basis of a prohibited classification in "certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[17] The use of the words "certain," "normal," "particular," and "occupational" demonstrate that an objective, verifiable requirement concerned with job-related skills is necessary to invoke the defense.[18] Furthermore, the PDA includes its own bona fide occupational qualification ("BFOQ") standard: Unless pregnant workers differ "in their ability or inability to work, they must be treated the same as other employees for all employment-related purposes."[19]

The employer has the burden of proving that its facially discriminatory employment classification constitutes a BFOQ. For example, in a sex discrimination suit, the employer bears the difficult burden of demonstrating why it must use gender as a criterion in employment.[20] In order to prevail under the BFOQ exception, the employer must show a relationship between the individual's sex and his or her ability to perform the requisite duties of the job. This narrow focus on job performance distinguishes the

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16. Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 682 (1981). Professor Williams further noted:

> [The PDA] provides that a pregnancy rule is never neutral, and that a neutral rule . . . can be shown to be a pretext for discrimination on the basis of pregnancy and hence gender. The plaintiff, therefore, need only show that the employer intended to discriminate against pregnant or potentially pregnant women . . . to prove pretext.

Id. at 682.

17. 42 U.S.C. § 2000e-2(e)(1) (1988). The bona fide occupational qualification is a statutory exception for disparate treatment cases filed under Title VII. *See* Vibiana M. Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71, 84 (1981).

For recent federal cases applying the BFOQ defense to gender-related issues, see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Dothard v. Rawlinson, 433 U.S. 321 (1977); EEOC v. J.M. Huber Corp., 942 F.2d 930 (5th Cir. 1991); Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990); Graves v. Women's Professional Rodeo Assoc., Inc., 907 F.2d 71 (8th Cir. 1990); Chambers v. The Omaha Girls Club, Inc., 840 F.2d 583 (8th Cir. 1988); Rider v. Pennsylvania, 850 F.2d 982 (3rd Cir. 1988); Torres v. Wisconsin Dept. of Health and Human Services, 859 F.2d 1523 (7th Cir. 1988).

18. International Union v. Johnson Controls, Inc., 111 S. Ct. 1196, 1204 (1991), *rev'g* 886 F.2d 871 (7th Cir. 1989).

19. 111 S. Ct. at 1206 (quoting 42 U.S.C. § 2000e(k)).

20. Price Waterhouse v. Hopkins, 490 U.S. 228, 248 (1989).

BFOQ defense from the employer's other potential defense under Title VII, the business necessity defense.

The business necessity defense, which would apply with a facially neutral employment policy, imposes on the employee the burden of proving the lack of business necessity while imposing upon the employer only the burden of production.[21] The employer's burden is met if it can show a "manifest relationship" between the employment practice and job performance.[22] Accordingly, the business necessity defense allows the employer to look beyond mere job performance and consider other factors such as workplace safety or the protection of the work environment.[23] Overall, the business necessity defense imposes a less demanding burden on the employer than does the BFOQ defense.

The language found in both Title VII and the PDA demonstrates Congress' intent that discrimination based on pregnancy or the ability to bear children should constitute illegal sex discrimination.[24] Only in narrow circumstances where gender is a BFOQ will this type of discrimination qualify as a valid exception. It is also important to note that the narrow scope of the BFOQ defense does not encompass paternalistic notions of male and female roles.[25] A fetal protection policy that excludes all fertile women, regardless of their ability to perform the job, undermines Congress' express intent to protect all women from sex discrimination in the workplace. Moreover, this type of policy violates Title VII by failing to serve legitimate employment objectives.

III. INTERPRETATION OF TITLE VII AND THE PDA PRIOR TO *JOHNSON CONTROLS*

Prior to the Supreme Court's decision in *Johnson Controls*, two United States courts of appeals held that an employer could justify the exclusion of women from certain jobs where their employment may endanger fetal health. These courts focused on the threat of harm to an employee's progeny instead of on the issue of the employee's job performance. This change in focus signaled the courts' departure from the type of BFOQ analysis Congress had intended the courts to apply.

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21. Wards Cove Packing v. Atonio, 490 U.S. 642, 659-60 (1989).

22. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

23. *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1190 n.26 (4th Cir. 1982).

24. *See supra* text accompanying notes 11-20.

25. Hardin v. Stynchcomb, 691 F.2d 1364, 1370 n.20 (11th Cir. 1982) ("[t]he narrow scope of the bfoq exception does not encompass perceptions of male and female roles based upon romantic paternalism or the divine plan for the separation of the sexes"); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (refusal to hire an individual on the basis of stereotyped classifications of the sexes is prohibited by Title VII).

A. *The Fourth Circuit's Decision in* Wright v. Olin Corporation[26]

In *Wright v. Olin Corporation*, the Fourth Circuit Court of Appeals examined a fetal protection policy entitled "Female Employment and Fetal Vulnerability Policy."[27] Olin had enacted a policy designed to protect potential fetuses by excluding all fertile women from jobs that included contact with toxic chemicals.[28] This policy created three job classifications for female employees — "non-restricted," "controlled," and "restricted" — based on the amount of their exposure to certain chemicals.[29] Because the "restricted" employment classification involved contact with chemicals known to be harmful to fetuses, the company refused to place any female employee in this classification unless the company's doctors found that she was unable to bear children and that she would not suffer adverse psychological effects from the work environment.[30] In contrast, the company merely issued oral warnings to male employees about potential hazards from exposure to the same chemicals without restricting their access to any part of the plant.[31]

In addressing the effects of Olin's fetal protection policy, the Fourth Circuit noted that Title VII permits an employer to defend an allegedly discriminatory employment policy. If the policy is found to be facially discriminatory, thus evidencing disparate treatment, the employer may defend the policy only by showing that its BFOQ is essential to business operations.[32] The court recognized that this particular fetal protection

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26. 697 F.2d 1172 (4th Cir. 1982).

27. *Wright*, 697 F.2d at 1182-92.

28. *Id.* at 1182. The policy assumed that all women aged five to sixty-three were fertile. *Id.*

29. *Id.*

30. The "controlled" employment classification required a female worker who was not pregnant to sign a waiver acknowledging that her job involves "some risk, although slight." Pregnant women were allowed to work in "controlled" jobs only on a case-by-case determination. The "non-restricted" employment classification allowed all women access to such designated positions. *Id.*

31. *Id.*

32. *Id.* at 1184-85. A Title VII violation can be established under two different theories — disparate treatment or disparate impact. In a case of disparate treatment,

> [t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> [On the other hand, a disparate impact claim] involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Proof of discriminatory motive . . . is not required under a disparate impact theory.

Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

The BFOQ is an affirmative defense to facially discriminatory employment practices (disparate treatment); whereas the business necessity standard applies to employment practices

policy was not essential to Olin's business operations, and thus could not withstand the BFOQ inquiry.[33]

Concerned about the fetal health issue, however, the court held that the overt discrimination/BFOQ analysis did not apply anyway. The court was reluctant to require the employer to meet the standard of the BFOQ defense since the narrow scope of this defense did not permit the employer to present the business necessity defense that it would be entitled to assert under a disparate impact claim.[34] Consequently, the court categorized the policy as "facially neutral" and proceeded to evaluate the policy in light of the disparate impact theory and the business necessity defense.[35]

The court determined that Olin's policy constituted a prima facie violation of Title VII because the policy did have a disparate impact on women.[36] Analogizing the fetus to an invitee "legitimately on business premises" and exposed to any of its associated hazards, the court concluded that the employer owed a duty of reasonable care to protect the fetus.[37] Accordingly, the *Wright* court ruled that Olin's fetal protection policy could be justified as a business necessity.[38]

The *Wright* ruling reflected the belief that the goals behind the enactment of Title VII and the PDA should not override an employer's safety policy.[39] Under the court's disparate impact analysis, the employees challenging Olin's policy could rebut the employer's showing of business necessity only by demonstrating a less discriminatory alternative.[40] The employees here were unable to establish an alternative policy. Thus, through convoluted reasoning, the court allowed Olin's facially discriminatory fetal protection policy to avoid the strict requirements of the BFOQ defense. This holding set the stage for later confusion in analyzing fetal protection policies under Title VII.

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with disparate impact. For a thorough explanation of disparate treatment, disparate impact, the BFOQ defense, and the business necessity standard, see Stephen F. Befort, *BFOQ Revisited:* Johnson Controls *Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 4 (1991).

33. *Wright*, 697 F.2d at 1185. The court declined to expand the narrow scope of the BFOQ to include fetal protection policies because it felt this would be an intrusive exercise of the court's power into the statutorily defined parameters of Title VII. *Id.* at 1185 n.21.

34. *Id.*; *see supra* note 32.

35. *Wright*, 697 F.2d at 1186. The court conceded that the facial neutrality requirement for disparate impact analysis "might be subject to logical dispute," but also noted that this type of analysis had previously been applied to similar policies "whose 'facial neutrality' was only superficial." *Id.*

36. *Id.* at 1187.

37. *Id.* at 1189.

38. *Id.* at 1189-90.

39. *Id.* at 1189.

40. *Id.* at 1191.

B. *The Eleventh Circuit's Decision in* Hayes v. Shelby Memorial Hospital[41]

In *Hayes*, an X-ray technician claimed that she had been fired because of her pregnancy and that her termination violated Title VII and the PDA.[42] The Eleventh Circuit conceded that the policy under which Hayes was fired was facially discriminatory. Nevertheless, the court noted that Hayes' employer could have rebutted the presumption of discrimination under the business necessity defense if the policy "effectively and equally protect[ed] the offspring of all employees."[43] If the hospital met this burden of proof, Hayes could then prevail only if she could demonstrate an effective alternative policy.[44] Consequently, the hospital had to show that a substantial risk of harm to the fetus existed in the work environment and that the risk applied only to women.[45] In this instance, the hospital could not present evidence indicating a substantial risk of harm to the fetus, and therefore, could not rebut the presumption of discrimination. Thus, the hospital could not have raised the business necessity defense.[46]

Even though the *Hayes* court stated that it was deciding the case under the overt discrimination/BFOQ theory, the court actually analyzed the policy under the disparate impact theory. The court recognized the problem of asserting a business necessity defense in a fetal protection policy case because the policy generally has no relation to an employee's actual job performance.[47] The court swept this concern aside, however, in a footnote to its opinion: "[W]e simply recognize fetal protection as a legitimate area of employer concern to which the business necessity defense extends."[48] The court offered no reason for this finding other than its desire to promote a "higher public policy than simply protecting employers from lawsuits."[49]

Once again, by allowing an employer to invoke the more lenient business necessity defense in support of its fetal protection policy, a federal court had departed from applying the strict requirements of the BFOQ

41. 726 F.2d 1543 (11th Cir. 1984).

42. *Id.* at 1546.

43. *Id.* at 1548. The employer said that company doctors recommended Hayes be removed from areas where radiation was used, and since alternative employment was not available, her pregnancy was used as the reason for termination of employment. Since the employer admitted Hayes was fired because she was pregnant, this policy decision was on the basis of pregnancy, and thus sex, which violates Title VII. *Id.*

44. As one commentator has noted, there was no precedent for this type of analysis in Title VII or the PDA, and the court's allowance of a rebuttable presumption of discrimination circumvents the BFOQ defense. Naretto, *supra* note 13, at 463 n.161.

45. *Hayes*, 726 F.2d at 1548.

46. *Id.* at 1550-51.

47. *Id.* at 1552.

48. *Id.* at 1552 n.14.

49. *Id.* at 1553 n.15.

defense. In doing so, the *Hayes* court misconstrued the BFOQ provision by omitting the word "reasonably" from its application of Title VII's statutory language.[50] This misinterpretation not only undermined the effectiveness of the BFOQ, but also carved out a narrower exception for the BFOQ than Congress had intended.[51] Furthermore, the court ignored the provisions of the PDA that prohibit policies applicable only to women. By requiring an employer to defend the constitutionality of its fetal protection policy under the business necessity defense instead of the more stringent BFOQ defense, the *Hayes* court allowed an employer a more lenient defense for its discriminatory policy than can be reconciled with the mandates for equal employment rights found under Title VII and the PDA.[52]

C. *Equal Employment Opportunity Commission*

Following the *Wright* and *Hayes* decisions, the Equal Employment Opportunity Commission ("EEOC") adopted guidelines for fetal protection policies that essentially endorsed these circuit court holdings. The guidelines acknowledged that fetal protection policies constituted per se violations of Title VII to which the BFOQ defense usually applied. However, the guidelines noted that fetal protection cases did not fit under the traditional Title VII framework. In this class of cases, therefore, the business necessity defense should be applied.[53]

By adopting the rationales given in *Wright* and *Hayes*, the EEOC allowed employers more latitude in developing policies that discriminated against women. The EEOC acted in the name of an underlying magnanimous purpose of fetal protection. Its latitude, as well as the courts' refusal to apply the congressionally intended BFOQ analysis, took the teeth out of the strict BFOQ requirements found in both Title VII and the

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50. *Id.* at 1552. Sex discrimination is lawful under Title VII if sex is a BFOQ "reasonably necessary" to a business' normal operation. Marcelo L. Riffaud, Comment, *Fetal Protection and* UAW v. Johnson Controls, Inc.: *Job Openings for Barren Women Only*, 58 FORDHAM L. REV. 843, 854 n.72 (1990) (quoting 42 U.S.C. § 2000e-2(e)1 (1982)). Both the *Hayes* and the *Wright* courts, however, omitted the word "reasonably" when referring to this Title VII provision. *See Hayes*, 726 F.2d at 1549 ("the BFOQ defense is available only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job, duties that Title VII defines as 'necessary to the normal operation of the particular business or enterprise.' "); *Wright*, 697 F.2d at 1185 n.21 ("[p]roperly applied, this statutory defense is a narrow one . . . under which a concededly discriminatory occupational qualification is shown . . . to be 'necessary to the essence of [the] business' " (citations omitted)).

51. Riffaud, *supra* note 50, at 854 n.72.

52. Naretto, *supra* note 13, at 457.

53. *Policy Statement on Reproductive and Fetal Hazards Under Title VII* [October 3, 1988] Fair Equal Empl. Prac. Manual (BNA) 401:6013 ("in this narrow class of cases, [the business necessity defense] should be flexibly applied"), *quoted in* Howard A. Simon, *Fetal Protection Policies after* Johnson Controls: *No Easy Answers*, 15 EMPLOYEE REL. L.J. 491, 498 (1990).

PDA prohibiting discrimination on the basis of pregnancy. This judicial and administrative misapplication of law would continue for seven years until *International Union v. Johnson Controls, Inc.*

IV. *International Union v. Johnson Controls, Inc.*[54]

A. *The Lower Courts*

In 1982, Johnson Controls, Inc. ("Johnson Controls") operated fourteen plants that manufactured batteries with lead components.[55] In that year, the company promulgated a fetal protection policy prohibiting all women of childbearing age from working in jobs where their exposure to lead would exceed the level considered safe for children by the U.S. Centers for Disease Control.[56] In 1984, International Union filed a class-action suit in the federal court for the Eastern District of Wisconsin on behalf of "all past, present and future production and maintenance employees employed in bargaining units represented by the International Union . . . at [Johnson Controls'] Battery Division plants . . . who [had] been and continue[d] to be affected by [Johnson Controls'] Fetal Protection Policy."[57] The complaint alleged that the policy discriminated against men and women in violation of Title VII. Johnson Controls moved for summary judgment.[58]

In granting Johnson Controls' motion, the court focused only on two issues: first, whether there was a significant risk of harm to the fetus from exposure to lead; and second, whether the risk was substantially confined to the offspring of women.[59] After reviewing the testimony of experts and the precedent established by *Wright* and *Hayes*, the district court concluded:

> Society has an interest in protecting fetal safety. Lead poses a substantial risk of harm to the fetus. This risk is born *only* by women who are pregnant or will become pregnant. The plaintiffs have not shown that there is an acceptable alternative that would have a lesser impact on females.[60]

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54. 680 F. Supp. 309 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).

55. 680 F. Supp. at 309, 310.

56. *Id.*; *see also* Simon, *supra* note 53, at 499. Johnson Controls' policy stated "that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights."
111 S. Ct. at 1200 (citation omitted).

57. *Johnson Controls*, 680 F. Supp. at 310.

58. *Id.*

59. *Id.* at 310.

60. *Id.* at 317 (emphasis added).

The court also summarily dismissed the need to undertake a BFOQ analysis by stating: "Because of the fetuses [sic] possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory."[61]

These explanations demonstrate the court's view that the risk to fetuses, whether they be in-utero or potential, overrides a woman's interest in equal employment opportunity. This conclusion reflects a paternalistic attitude that, because only women become pregnant and may sometimes not know of the pregnancy, the employer, or the court, is in a better position than the woman to look after the interests of her unborn child.

On appeal,[62] the Seventh Circuit Court of Appeals had only a limited record from the district court to review because summary judgment had been granted. The Seventh Circuit, not surprisingly, cited *Wright*, *Hayes* and the EEOC guidelines in support of its own analysis of fetal protection policies under the disparate impact scheme.[63] The court concluded that, since Title VII allows an employer to enact policies which protect employees' health and safety, proof of a "substantial health risk to the unborn child" would justify establishing a fetal protection policy.[64] In addition, the court accepted the testimony of Johnson Controls' expert which indicated that women were adversely affected by exposure to lead. But, the court rejected as "speculative and unconvincing" the evidence presented by the employees' expert which demonstrated that exposure to lead posed an unhealthy risk to both males and females.[65] Consequently, the court held that the employees failed to prove that the risk affected male employees as well as female employees.[66] Although the employees had presented alternatives to Johnson Controls' policy, the court declined to substitute its judgment for the employer's and rejected the alternatives as not feasible.[67]

The Seventh Circuit also analyzed the case under the BFOQ scheme.[68] Relying upon its previous decision in *Torres v. Wisconsin Department of*

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61. *Id.* at 316 (footnote omitted).

62. International Union v. Johnson Controls, Inc. 886 F.2d 871 (7th Cir. 1989).

63. *Id.* at 886.

64. *Id.*

65. *Id.* at 889. It is interesting to note that the court accepted expert testimony offered by Johnson Controls even though that testimony made no mention of how lead affected men. The experts whose studies were accepted by the court issued a statement to the effect that they did not test men but their "studies were based solely on the reproductive effects in women," and lead's reproductive effects were not limited to women. Naretto, *supra* note 13, at 467 n.185.

66. 886 F.2d at 890.

67. Naretto, *supra* note 13, at 467. Alternatives offered included using different manufacturing procedures, excluding only women who were actually pregnant, and lowering employees' lead levels. *Johnson Controls*, 886 F.2d at 892.

68. 886 F.2d at 893.

Health and Social Services,[69] the court accepted Johnson Controls' fetal protection policy as an essential safety measure necessary to operate the business.[70] In reviewing the research concerning the hazardous effects of exposure to lead, the court stated that the primary risk for fertile women involved the transmission of lead to a fetus; interestingly, the court made no such reference to the risk of lead transmission to the fetus through sperm.[71] On this basis, the court held that employing women in jobs with exposure to lead would undermine the operation of the business.[72]

The court conceded that in the "usual case" a suggestion that a job may be "too dangerous for a woman" could be met with the response that "it is the purpose of Title VII to allow the *individual woman* to make the choice for *herself*."[73] The "usual case" scenario, however, did not apply here because more was at risk "than an individual woman's decision to weigh and accept the risks of employment."[74] The court, therefore, determined that Johnson Controls' fetal protection policy withstood the BFOQ defense requirement of business necessity. With this decision, the Seventh Circuit became the first court of appeals to hold that a sex-specific fetal protection policy could qualify as a BFOQ.

Four of the eleven judges dissented from the majority opinion, contending that Johnson Controls' policy constituted overt sex discrimination that could only be justified with the BFOQ defense.[75] In one of the dissenting opinions, Judge Posner suggested that the majority along with other circuit courts had "stitch[ed] a new defense expressly for fetal protection cases" because they had concluded that the policies would not prevail under the BFOQ analysis.[76] Judge Easterbrook's dissent, joined by Judge Flaum, was more far-reaching. First, he chastised the majority for

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69. 859 F.2d 1523 (7th Cir. 1988). *Torres* involved the issue of whether men could be employed as guards in a women's prison. The court upheld the exclusion of men under the BFOQ defense on the ground that Congress would have allowed the defense in recognition of the differences between men and women. *Id.* at 1527-28.

70. *Johnson Controls*, 886 F.2d at 898.

71. *Id.* at 897-99. This was an erroneous oversight given scientific evidence available at the time. *See infra* text accompanying notes 99-101.

72. 886 F.2d at 898 ("[G]iven the reasonable objectives of the employer, the very womanhood . . . of the employee undermines her capacity to perform a job satisfactorily.") (citations omitted).

73. *Id.* at 897 (emphasis in original) (quoting Dothard v. Rawlingson, 433 U.S. 321, 333 (1977)).

74. *Id.* (citations omitted). The court further stated that "it would not be improbable that a female employee might somehow rationally discount this clear risk. . . ." *Id.* This statement suggests the court's belief that women may be incapable of adequately considering the effects a job may have on their offspring when exercising employment rights protected by Title VII and the PDA. Once again, this paternalistic attitude inhibited a federal court's ability to implement clear statutory requirements.

75. *Id.* at 901-02 (Cudahy, J., dissenting), 903-04 (Posner, J., dissenting), 908 (Easterbrook, J., and joined by Flaum, J., dissenting).

76. *Id.* at 903 (Posner, J., dissenting) (citations omitted).

essentially holding that *Johnson Controls* "*must* [have been] a disparate impact case because an employer couldn't win it as a disparate treatment case."[77] Second, he concluded that Johnson Controls' fetal protection policy would not qualify as a BFOQ because the objective of such a policy — concern for unborn children — is unrelated either to the business of battery-making or to a woman's ability to make batteries.[78] Finally, he expressed concern that the majority's opinion might "consign more women to 'women's work' while reserving better-paying but more hazardous jobs for men."[79]

Following the Seventh Circuit's decision in *Johnson Controls*, the EEOC issued a policy response advocating a BFOQ analysis for fetal protection policies.[80] The EEOC did not, however, proceed to adopt Judge Easterbrook's position regarding the standard to be applied under the BFOQ analysis. In fact, the revised guidelines were virtually identical to the business necessity test from the initial guidelines.[81] The EEOC's new policy required employers to show "stringent and detailed" proof of a BFOQ, but not at the level traditionally required of this defense.[82] Additionally, the EEOC's policy allowed employers to consider the health and safety of unborn children as part of the business, an essential component for establishing a BFOQ.[83]

The circuit court's decision in *Johnson Controls* marked the third time that a federal court had allowed an employer to retain a facially discriminatory fetal protection policy under the lenient business necessity defense.[84] Thus, the mandates of Title VII and the PDA had once again been undermined and were effectively avoided until the Supreme Court reviewed *Johnson Controls* on appeal.

B. *The Supreme Court*

In granting certiorari, the United States Supreme Court stated that its goal was "to resolve the obvious conflict between the Fourth, Seventh, and Eleventh Circuits on this issue, and to address the important and

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77. *Id.* at 910 (Easterbrook, J., dissenting) (emphasis in original).

78. *Id.* at 912.

79. *Id.* at 920.

80. *EEOC Guidelines on Seventh Circuit Decision in* United Auto Workers v. Johnson Controls, Inc., [January 24, 1990] 18 Daily Lab. Rep. (BNA) D-1 (Jan. 26, 1990).

81. *See* Simon, *supra* note 53, at 505-06. The revised guidelines provided: "In short, whether one applies the BFOQ or the 'business necessity' analysis as discussed in the [initial guidelines], the burden is on the employer to justify its policy." *Id.* at 506 (quoting *EEOC Guidelines on Seventh Circuit Decision in* United Auto Workers v. Johnson Controls, Inc. [January 24, 1990] 18 Daily Lab. Rep. (BNA) D-1 (Jan. 26, 1990)).

82. *Id.* at 506.

83. *Id.* at 507.

84. *See supra* text accompanying notes 26-52.

difficult question whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant."[85]

During oral arguments before the Court, the attorney for the employees asserted that a fetal protection policy such as the one initiated by Johnson Controls would "cut the heart out" of Title VII and the PDA.[86] She warned that the policy would oust women from factories and impose a "stigmatic harm" on them by broadcasting throughout the workforce who is or is not fertile.[87] Not surprisingly, the attorney for Johnson Controls argued that the policy fell within the BFOQ defense because it was reasonably necessary "to the business' safe operation."[88] Justice O'Connor's response foreshadowed what would be the Court's approach in analyzing this issue: "It seems to me you're not coming to grips with the Pregnancy Discrimination Act."[89] Justice O'Connor further suggested that the Court's previous holding in *Dothard v. Rawlinson*[90] stood for the proposition that concerns for safety do not support a BFOQ defense.[91]

Declaring that Title VII and the PDA prohibit fetal protection policies aimed only at one sex, the Supreme Court reversed and remanded the Seventh Circuit's holding in *Johnson Controls*.[92] The Court noted that the company's policy was obviously biased against women because it gave only men the choice of risking reproductive health for a certain job. Moreover, because Johnson Controls' policy applied to women on the basis of childbearing capacity, not just fertility, the Court held that the policy was facially discriminatory. Unless the policy could be defended as a BFOQ, it constituted the type of sex-based discrimination forbidden by Title VII.[93]

Addressing the scope of the BFOQ, the Court reiterated the narrow reading that this defense had previously been given with regard to discrimination.[94] Referring to the concurring opinion's emphasis on cost and

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85. 111 S. Ct. 1196, 1202 (1991) (footnote omitted).

86. *Arguments Before the Court*, 59 U.S.L.W. 3304 (Oct. 23, 1990).

87. *Id.* at 3305.

88. *Id.* at 3304.

89. *Id.* at 3305.

90. 433 U.S. 321 (1977).

91. 59 U.S.L.W. at 3305. Justice Scalia stated that Johnson Controls was making "a farce out of the [PDA]" and sarcastically asked if management could create a work rule to prevent pregnant women from working long hours because it may negatively affect the fetus. He commented that "the health of the fetus is a judgment left up to the mother." *Id.*

92. *Johnson Controls*, 111 S. Ct. at 1209-10.

93. *Id.* at 1202-03.

94. *Id.* at 1204; *see* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122-25 (1985); Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977).

safety instead of the "essence of the business" requirement for the BFOQ,[95] the Court stated:

> The unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of batterymaking.
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> . . . .
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> . . . [T]he safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. . . . Johnson Controls suggests, however, that we expand the exception to allow fetal-protection policies that mandate particular standards for pregnant or fertile women. We decline to do so. Such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception but the plain language and history of the Pregnancy Discrimination Act.[96]

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95. The majority and concurring opinions disagreed as to the potential tort liability that an employer may face without a sex-specific fetal protection policy. The majority stated:

> Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

111 S. Ct. at 1208.

Furthermore, the majority dismissed as unpersuasive the tort liability argument that it would cost the employer more to hire fertile women. Noting that Congress considered the cost of treating pregnancy and related conditions equally under the PDA but decided to forbid discrimination "despite the social costs associated therewith," the majority held that discrimination against fertile women could not be justified by the "incremental cost of hiring women." *Id.* at 1209.

In contrast, the concurring opinions expressed skepticism of the majority's view of potential tort liability. *Id.* at 1210-11 (White, J., concurring), 1216 (Scalia, J., concurring). Justice White wrote:

> [A] fetal protection policy would be justified under the terms of the statute if, for example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability. Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties . . . if for no other reason than to avoid tort liability and its substantial costs.

Id. at 1210.

Justice White went on to discuss three potential problems with the majority's optimism as to employer liability. First, compliance with Title VII may not preempt state tort law. Second, warnings to employees would not necessarily preclude tort claims by the children since parents cannot generally waive their children's claims. And third, negligence may be difficult for employers to determine since compliance with OSHA standards may not be a defense to state tort liability. *Id.* at 1211.

This disagreement will most likely foster lively debate among legal scholars as they sort out the compelling arguments presented by both the majority and concurring opinions.

96. *Id.* at 1206. The Court noted that the legislative history of the PDA confirms what the language of this legislation requires:

> Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability

The Court concluded that the language of Title VII and the PDA prohibited "an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevent[ed] her from performing the duties of her job." The Court further ruled that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. . . . Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization."[97]

With these few concise statements, the Supreme Court put the teeth back into the BFOQ requirement of Title VII and the PDA.

V. THE POTENTIAL IMPACT OF *JOHNSON CONTROLS*

According to the Occupational Safety and Health Administration ("OSHA"), at least 835,000 employees are covered by its Standard for Exposure to Lead.[98] This fact is important to note in considering the magnitude of danger presented by exposure to lead. The reproductive effects of lead exposure include: increased rates of miscarriage and stillbirth for women directly exposed to lead and for wives of men who were

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to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees. . . .

Id. at 1206-07 (quoting AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. No. 95-331, 95th Cong., 1st Sess., 4-6 (1977)). "With the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." *Id.* at 1207.

97. *Id.* at 1207. In a footnote to this section the Court states: "We have never addressed privacy-based discrimination and shall not do so here because the sex-based discrimination at issue today does not involve the privacy interests of Johnson Controls' customers. Nothing in our discussion of the 'essence of the business test,' however, suggests that sex could not constitute a BFOQ when privacy interests are implicated." *Id.* at 1207 n.4 (citation omitted).

These statements set up a interesting potential scenario. Suppose a company promulgates a fetal protection policy which applies equally to men and women. This hypothetical policy would require that upon deciding to start a family, or upon learning of a pregnancy, an employee would be automatically transferred to a job with less risk. A female employee is then found to be pregnant but does not want to transfer, and offers to consider having an abortion instead. If the company transfers the woman anyway, citing the need to avoid tort liability to the unborn child (a justifiable standard under Justice White's concurrence, *see id.* at 1210), could the company invoke the BFOQ defense should the woman claim a violation of Title VII and the PDA?

The Court has recognized a woman's privacy interest in deciding to have an abortion, *see* Roe v. Wade, 410 U.S. 113 (1973), yet has failed to strike down a statute recognizing that fetuses have protectable interests in life, health, and well-being which may override a woman's abortion rights. *See* Webster v. Reproductive Health Services, 492 U.S. 490 (1989). These decisions do not suggest a clear answer to the hypothetical proposed above.

98. Williams, *supra* note 16, at 647 (citing OSHA News, 6 JOB SAFETY AND HEALTH 2 (Dec. 1978)).

exposed; reduced male fertility and increased sperm abnormalities; and suspected genetic damage through lead's mutagen capabilities which affects both men and women.[99] Furthermore, animal tests have shown that lead is capable of crossing the placental barrier and entering the blood and tissue of the fetus, and may be capable of causing birth defects because of this exposure.[100] Until the Supreme Court's decision in *Johnson Controls*, this type of evidence was presented in cases challenging fetal protection policies but was dismissed as insufficient. This type of evidence may now provoke changes in the workplace to reduce exposure to lead for both men and women, instead of exclusionary policies aimed only at women. As one commentator has noted, "[c]oncern for female reproductive capacity and the fetus is praiseworthy, but experience is demonstrating that any given substance may be equally damaging to the male reproductive system and, through the male, to the fetus."[101]

By striking down Johnson Controls' policy, the Supreme Court has provided ammunition to attack paternalistic attitudes towards women in the workplace.[102] For too many years employers have enacted special labor practices aimed only at women under the guise of protecting them from job hazards, when in fact, these exclusionary policies only rationalized the resulting discrimination. Fetal protection policies have been promulgated under the "myth of perpetual pregnancy" where every woman is presumed pregnant unless proven otherwise.[103] This myth allows men to consider as reasonable a presumption that, because a woman is not capable of choosing pregnancy, she should not be permitted to choose whether or not to work in a job with risks to her reproductive health.

The fact that employers have presented, and courts have accepted, evidence showing only the risks associated with a woman's exposure to lead makes it easier for companies to justify instituting paternalistic exclusionary policies instead of expending the necessary resources to clean up the work environment for all employees.[104] However, as the Eleventh Circuit stated in *Hardin v. Stynchcomb*, "the narrow scope of the [BFOQ] exception does not encompass perceptions of male and female roles based

99. MARY GIBSON, WORKERS' RIGHTS 8 (1983).

100. *Id.*

101. Letter from Eula Bingham, former Assistant Secretary of Labor, to corporate medical directors (May 1, 1978) (quoted in Williams, *supra* note 16, at 663).

102. A standard characterization of paternalism can be found in the following statement: "By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced." RONALD DWORKIN, PATERNALISM 108 (1971) (quoted in GIBSON, *supra* note 99, at 15).

103. GIBSON, *supra* note 99, at 20.

104. *Id.*

upon romantic paternalism or the divine plan for the separation of the sexes."[105]

Following the decision in *Johnson Controls*, employers may no longer justify fetal protection policies applicable only to women. The Supreme Court has explicitly stated that Title VII and the PDA together establish a federal policy favoring equal employment opportunity such that any policy an employer might choose to create must be applied equally to women and men unless unequal jeopardy can be clearly proven.[106] The resulting requirement that employers meet the stringent BFOQ defense should deter the implementation of arbitrary policies that blatantly discriminate against women.[107] It should also force employers to implement nondiscriminatory measures to lessen the fetal risks already acknowledged through fetal protection policies.

The importance of the *Johnson Controls* decision cannot be overstated. Women constitute more than half of the population of the United States. To treat a threat to this substantial portion of the population as a special vulnerability of the individual worker, but not the responsibility or concern of employers and society, is unacceptable and unjust.[108] As one columnist explained,

> [i]n consideration of women's right to equal employment opportunity and the practical necessity of work for many women, Congress expressly endorsed the proposition that no woman should have to sacrifice the right to work in order to have a family, nor sacrifice the right to have a family in order to work. Title VII and other civil rights measures brought these women the promise of such employment.[109]

Had the Supreme Court upheld Johnson Controls' fetal protection policy, widespread acceptance of the practice of employing only infertile women might have led to the development of a "subclass of 'drones' in

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105. 691 F.2d 1364, 1370 n.20 (4th Cir. 1982).

106. An employer who creates a gender-neutral policy may find that a substance in the workplace does, in fact, affect only women and their fetuses. With respect to that substance, the employer could apply a facially-neutral policy only to affected workers without violating Title VII and the PDA. However, the employer would still have to show that the policy was narrowly tailored and no adequate alternative existed. Williams, *supra* note 16, at 667; *see also Johnson Controls*, 111 S. Ct. at 1213 (White, J., concurring) ("an employer could establish a BFOQ defense by showing that all or substantially all women would be unable to perform *safely and efficiently* the duties of the job involved") (emphasis added in original) (citation omitted).

107. Naretto, *supra* note 13, at 469.

108. GIBSON, *supra* note 99, at 21. Gibson further notes that one rationalization for exclusionary policies aimed at women is that by barring women from certain jobs employers and society are showing concern and exercising responsibility. But the exclusion puts the entire burden on those excluded without any choice as to how that burden will be carried. *Id.* at 21-22.

109. Moss, *supra* note 1, at 14.

society."[110] Or perhaps, it could have led to a "Catch-22" situation offering economic incentives for women to sacrifice ever having children, and, in other words, to give up a physical and mental part of themselves in order to gain the monetary benefits of employment.[111]

VI. CONCLUSION

The Supreme Court's decision in *Johnson Controls* stands for the proposition that sex-specific fetal protection policies cannot be justified. Companies must make the workplace as safe as possible for everyone, fully inform all employees of the risks involved with the job, and allow individual employees to make the final decision whether the risks are acceptable for themselves and their unborn children. As the Court recognized, "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."[112]

When parents make decisions for their children, there is a strong presumption that they are acting in the child's best interest.[113] The Supreme Court has given credence to this presumption by expressing trust in an employee's ability to make mature decisions in the area of fetal protection. Furthermore, the Court has reaffirmed that Title VII and the PDA forbid sex-specific fetal-protection policies that do not meet the BFOQ defense requirement. Essentially, with its holding in *Johnson Controls*, the Supreme Court has reinforced that this legislation "means what it says."[114]

M. Chris Floyd

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110. GIBSON, *supra* note 99, at 142 n.11.

111. Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81, 89 (1990). The author notes that this situation arises mostly with poor women of color who are forced into a system of passively bargained for, privatized eugenics that are controlled by the corporation's business interest. *Id.*

112. International Union v. Johnson Controls, 111 S. Ct. 1196 1210 (1991).

113. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 30 (1987).

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

114. *Johnson Controls*, 111 S. Ct. at 1210.