UAW v. Johnson Controls: A Final Word on Fetal Protection Policies and Their Effect on Women's Rights in Today's Economy

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UAW v. JOHNSON CONTROLS*: A FINAL WORD ON FETAL PROTECTION POLICIES AND THEIR EFFECT ON WOMEN’S RIGHTS IN TODAY’S ECONOMY

I. INTRODUCTION

In perhaps the most controversial sex-based discrimination case since Roe v. Wade, the Supreme Court, on March 20, 1991, decided that American employers will no longer be able to use concerns for the health of unborn children to justify “fetal protection policies” which exclude fertile women from jobs that may involve a health risk to a woman’s fetus.

The decision outlaws employer fetal protection policies which have, over the years, posed serious conflicts of interest, rights and responsibilities between women, employers and society in general. On the one hand, a woman wants to feel that she has control to make her own decisions free from any sex-specific guidelines, and on the other hand, is an employer's interest in his/her business not to cause harm to a worker’s offspring and to avoid the possible tort liability connected with such harm. Furthermore, society has a gen-

2. 410 U.S. 113 (1973); see also UAW v. Johnson Controls, 886 F.2d 871, 920 (1989) (Easterbrook, J., dissenting) (stating that the case “is likely the most important sex-discrimination case in any court since 1964 . . .”). In his opinion, Judge Easterbrook, emphasized that if fetal protection policies were legalized, approximately twenty million industrial jobs could be lost to women. Id. Moreover, he felt that this would allow employers to consign women to mere “women’s work” while reserving higher paying but more hazardous jobs for men. See id. Finally, the Circuit Court Judge concluded that to legalize fetal protection policies would perpetuate sexual discrimination based on job classification, and Title VII was designed to eliminate, not continue such “matching of sexes to jobs.” Id.
3. See Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1209-10.
4. See Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, (1986) (advocating that fetal protection policies discriminate on the basis of sex and should be banned completely, regardless of any employer concerns).
5. See 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, 651 (1981) (arguing that included in a woman's interest in equal opportunity employment is her right to make life decisions concerning any job).
6. See Becker, supra note, 4, at 1219.
eral concern in preventing harm to its future generation, as well as a strong interest in providing equal opportunities for women.8

The response to these conflicting concerns has led many employers to demand that the women's interests yield to society's concern for protecting the future generation by promulgating policies which require female employees to become sterilized before being allowed to work in job settings that could be potentially hazardous to fetuses.9 However, many women have refused to allow these employers to make decisions concerning what is in their best interest. Consequently, they have challenged fetal protection policies by commencing lawsuits claiming that these policies constitute a form of sex discrimination and are violative of Title VII of the Civil Rights Act of 1964,10 as amended by the Pregnancy Discrimination Act11 ("PDA"), which together ban sex and pregnancy discrimination.12 Until recently, courts have expressed many different views on this controversial topic, and accordingly, these differences in opinion led

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7. See Roe v. Wade, 410 U.S. at 162-163 (stating that society has a tremendous interest in the health of its members and that this interest extends to fetuses).
8. See Blanco, Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption, 46 U. Pitt. L. Rev. 755, 761 (1985) (asserting that employers must balance the two societal interests of fetal health and equal employment, and that these interests can only be adequately balanced under the most narrowly tailored of policies).
9. The fetal protection policy in issue in Johnson Controls barred all women, unless they were declared medically infertile, from jobs involving actual or potential lead exposure exceeding the Occupational Safety and Health Administration ("OSHA") standards. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1199-1200. This policy was typical of fetal protection policies issued by many American employers. See Blanco, supra note 8, at 756.
12. Title VII Provides:

It shall be an unlawful employment practice for an employer—

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


The PDA amended Title VII and reads in pertinent part:

The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis 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.

to a conflict between the United States circuit courts.\textsuperscript{13} However, in this landmark decision, the Supreme Court resolved the conflict between the circuits, and in doing so, put an end to "one of the most divisive moral and religious questions of our generation"\textsuperscript{14} by determining that a pregnant woman’s ability to exercise free choice of her life decisions outweighs an employer’s interest in the health of her fetus.\textsuperscript{15}

This Comment will discuss the factual and procedural background of the Johnson Controls case.\textsuperscript{16} It will also examine the general analytical framework of Title VII claims,\textsuperscript{17} as well as the legal analysis utilized by the Supreme Court in its opinion.\textsuperscript{18} This Comment will then analyze the controversial policy issues embodied in the case.\textsuperscript{19} Finally, this Comment will evaluate the effect of this landmark decision on today’s economy and on the rights of women.\textsuperscript{20}

\section*{II. THE FACTUAL AND PROCEDURAL BACKGROUND}

Johnson Controls is a company in the battery manufacturing business.\textsuperscript{21} It owns seventeen plants in its battery division, fourteen of which manufacture batteries.\textsuperscript{22} The principal material used in making batteries is lead.\textsuperscript{23} It is the main ingredient in the paste which forms the plates of the batteries, and it creates the "structure for all the conductive elements in batter for transmitting current."\textsuperscript{24} Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.\textsuperscript{25}

13. The \textit{Johnson Controls} Court stated that it was granting certiorari in order to resolve the "obvious conflict" between the Fourth, Seventh and Eleventh Circuits. \textit{Johnson Controls}, \textsuperscript{---} U.S. at \textsuperscript{---}, 111 S. Ct. at 1202. The Court also noted that the Sixth Circuit added to this conflict after its grant of certiorari. \textsuperscript{---} U.S. at \textsuperscript{---}, 111 S. Ct. at 1202 n.1.


15. \textit{See Johnson Controls}, \textsuperscript{---} U.S. at \textsuperscript{---}, 111 S. Ct. at 1210.

16. \textit{See infra} notes 21-57 and accompanying text.

17. \textit{See infra} notes 58-81 and accompanying text.

18. \textit{See infra} notes 102-149 and accompanying text.

19. \textit{See infra} notes 150-167 and accompanying text.

20. \textit{See infra} notes 168-254 and accompanying text.

21. \textit{See Johnson Controls}, \textsuperscript{---} U.S. at \textsuperscript{---}, 111 S.Ct. at 1197.


23. \textit{Id}.

24. \textit{Id}.

25. In the Circuit Court, both the UAW and Johnson Controls agreed that the evidence contained in the record established that there was a substantial health risk to the unborn child. \textit{See UAW v. Johnson Controls}, 886 F.2d 871, 888 (7th Cir. 1989). Moreover, the court acknowledged that "the evidence in the record ... conclusively supports the accepted medical and scientific finding that lead creates a substantial risk of harm to unborn children. \textit{Id}.
Before the Civil Rights Act of 1964,26 Johnson Controls did not employ any women in a battery-manufacturing job.27 However, after the Civil Rights Act was passed, the company started hiring women.28 In June 1977, Johnson Controls announced its first policy concerning the company's employment of women in lead-exposure job settings. The policy stated that:

Protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons. Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.29

In accordance with this policy, Johnson Controls did not exclude all women capable of becoming pregnant from workplaces with lead exposure, but emphasized that a woman who planned on having a child should not choose a job in which she would be subject to such exposure.30 Furthermore, the company required all women who wished to take these health risks to sign a statement acknowledging that she had been advised of the risk of having a child while she was exposed to lead.31

Despite the policy of warning, eight employees, between 1979 and 1983, became pregnant while maintaining blood lead levels32 over 30 micrograms per deciliter.33 Moreover, it is this level of 30 micrograms per deciliter that the Occupational Health and Safety Administration (“OSHA”)34 considers to be the critical level for a

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27. ___ U.S. at ___, 111 S. Ct. at 1199.
28. Id.
29. Id.
30. Id.
31. Id.
32. A word commonly used by experts is blood lead. See Johnson Controls, 680 F. Supp. at (2) n. 1. Blood lead is a measure of the amount of lead that is present in the circulation where venous blood is drawn. Id.
33. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1199-1200. Blood lead levels are most often reported in units of micrograms per deciliter. 29 C.F.R. § 1910.1025 (1989). A microgram is equivalent to 1,000,000 units in a gram. ATTORNEYS MEDICAL DESKBOOK, § 89 (1983). A deciliter is equivalent to 100 cubic centimeters. Id. at § 92.
34. OSHA is an administration created by Congress to provide for the general welfare of American workers by assuring so far as possible every working man and woman in the United States safe and healthful working conditions. 29 U.S.C. § 651(b) (1988).
worker who plans to have a family.\textsuperscript{35} In response to these blood lead level results, Johnson Controls issued a broad policy of exclusion emphasizing the company's concern for the protection of its employees and their families from occupational health hazards.\textsuperscript{36} This subsequent policy stated that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure."\textsuperscript{37} The policy defined women capable of bearing children as "all women except those whose inability to bear children is medically documented."\textsuperscript{38}

In April 1984, Mary Craig, who had chosen to be sterilized in order to avoid losing her job, and Elsie Nason, a fifty year old divorcee, who had suffered a loss in compensation when she was transferred out of a job where she was exposed to lead, were among the individual plaintiffs who filed a petition for a class action challenging Johnson Controls' fetal protection policy.\textsuperscript{39} In 1985, as a result of a stipulation between the parties, The District Court for the Eastern District of Wisconsin certified a class consisting of "all past, present and future production and maintenance employees employed in bargaining units represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") . . . who have been and continue to be affected by [Johnson Controls' fetal protection policy]."\textsuperscript{40}

The District Court quickly dismissed the case on a summary judgment motion in favor of the defendant, Johnson Controls.\textsuperscript{41} In its holding, the court concluded that Johnson Controls' fetal protec-

\begin{itemize}
\item \textsuperscript{35} 29 C.F.R. § 1910.1025 (1989). The section states that:
\begin{quote}
    The blood lead levels of workers who intend to have children should be maintained below 30 [micrograms per deciliter] to minimize adverse reproductive health effects to the parents and to the developing fetus.
\end{quote}
\textit{Id.}
\item \textsuperscript{36} \textbf{Johnson Controls}, 886 F.2d at 877.
\item \textsuperscript{37} The reasoning behind excluding women who are merely capable of becoming pregnant rather than those who are actually pregnant is that a fetus is most vulnerable to the risk of harm from a hazardous material during a period when the female may not or cannot even know that she is pregnant. \textit{See} Nothstein & Ayres, \textit{Sex Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII}, 26 \textit{VILL. L. REV.} 239, 256 (1981); Rothstein, \textit{Reproductive Hazards and Sex Discrimination in the Workplace: New Legal Concerns in Industry and on Campus}, 10 \textit{J. COLL. & U.L.} 495, 498 (1983-84).
\item \textsuperscript{38} \textbf{Johnson Controls}, --- U.S. at ---, 111 S. Ct. at 1200.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textbf{Johnson Controls}, 680 F. Supp. at 310.
\item \textsuperscript{41} \textbf{UAW} v. \textbf{Johnson Controls}, 680 F. Supp. 309. Rule 56(e) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "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." \textit{Fed. R. Ctv. P.} 56(e).
\end{itemize}
tion policy could be justified on business necessity grounds. Consequently, this judicially fabricated defense to Title VII claims was utilized to bar the plaintiff's sexual discrimination claim. In its opinion, the district court undertook a large policy analysis that gave a great amount of weight to society's interest in the protection of fetal harm. The decision concluded that occurrences of defects or deaths in fetuses are "too serious for this Court to find unimportant", and since the risks of these results is borne only by women who are capable of becoming pregnant, the plaintiffs must show that there is an acceptable alternative that would have a lesser impact on women or the fetal protection policy will not be found violative of Title VII.

The plaintiffs appealed the district court's decision to the Court of Appeals for the Seventh Circuit. The Court of Appeals, sitting en banc, affirmed the district court, concluding that there was no genuine issue of material fact about the substantial risk to the fetus from lead exposure, and therefore, the lower court's finding would be affirmed unless the plaintiffs could prove that an acceptable alternative exists. The opinion approved of the district court's acceptance of Johnson Controls' business necessity defense, and agreed that the plaintiffs had not produced enough evidence of any less discriminatory alternatives.

However, while the circuit court believed that under the appropriate legal framework, a business necessity defense was the only one available to Johnson Controls, it also decided to view the case under another method of analysis, which allowed for the use of the

42. See infra notes 59-61 and accompanying text.
43. See Johnson Controls, 680 F. Supp. at 317.
44. The District Court used the following syllogism to come to its conclusion:
(1) Society has an interest in protecting fetal safety; (2) Lead poses a substantial risk of harm to the fetus; (3) This risk is born only by women who are pregnant or could become pregnant; (4) The plaintiffs have not shown that there is an acceptable alternative that would have a lesser impact on females; (5) Therefore, Johnson Controls fetal protection policy odes not violate Title VII. Id. at 317.
45. Id.
46. Id. The Court concluded that the plaintiffs did not carry their burden of showing a less discriminatory acceptable alternative, and thus summary judgment was granted. Id.
48. Id. at 889.
49. Johnson Controls, 886 F. 2d at 890-891.
50. Johnson Controls, 886 F. 2d at 890-893.
51. See infra notes 59-61 and accompanying text.
52. It is well established that courts like to "assess particular Title VII claims and defenses alternatively under different theories." See Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir.
bona fide occupational qualification ("BFOQ") defense. Despite this alternative analysis, the court hastily asserted that Johnson Controls would also be able to meet this test.

Conversely, the dissenter on the court reasoned that it was a mistake to decide this case "once and for all on so meager a record," and that the only defense that should be available to Johnson Controls was the BFOQ defense, not the business necessity defense. Furthermore, they concluded that the BFOQ defense should not prevail because the policy interest of protecting a fetus is not relevant to the legal analysis of the case.

III. THE ANALYTICAL FRAMEWORK OF TITLE VII CLAIMS

Since the plaintiff's claim was based upon sexual discrimination allegations on the basis of a female pregnancy being violative of Title VII, the legal analysis of this case must be conducted in light of Title VII's amendment by the Pregnancy Discrimination Act ("PDA"). Before Congress passed the PDA, the Supreme Court, in General Electric Company v. Gilbert held that discrimination on the basis of pregnancy was not included within Title VII's definition of sex based discrimination. Consequently, Congress promptly passed the PDA to overrule Gilbert. Thus, discrimination on the basis of pregnancy is presently considered discrimination on the basis of sex, and accordingly, it must be included in the analysis of a Title VII suit.
The Supreme Court has recognized two methods under which a Title VII claimant may attempt to prove employment discrimination on the basis of sex or pregnancy. The first method is referred to as a "disparate treatment" claim, while the second is considered a "disparate impact" claim. The distinction between the two is significant because depending on which framework the litigation falls under will determine what type of a defense an employer will be allowed to use. For example, if a claim is one of disparate treatment, then the only defense that can be utilized is the BFOQ defense. However, if a claim is one of disparate impact, then the only defense available is the business necessity defense.

Moreover, there are two types of disparate treatment cases. The first kind consists of a "facial" discrimination claim in which an employer adopts a policy which explicitly treats some employees differently from others on the basis of race, religion, national origin, gender or pregnancy. The second type is a "pretext" discrimination claim, in which an employer adopts what appears to be a facially neutral policy, but which the plaintiff contends is a "pretext" for some unlawful discrimination.

Pursuant to Title VII, only one exception exists for policies that fall under one of these two types of disparate treatment scenarios. This exception is the statutory BFOQ defense, which provides an exception to Title VII discrimination when religion, sex (pregnancy) or national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." However, this defense has historically received a very narrow interpretation by the United States Supreme Court, and will

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66. See Williams, supra note 5, at 668-669.
67. Id.
68. Id.
69. See Hayes, 726 F.2d at 1547.
70. See Williams, supra note 5, at 679.
71. Id. at 687. The "pretext" theory was set out in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). However, a pretext theory would not be appropriate in fetal protection cases because the employer readily admits to discharging female employees on the basis of their pregnancy, rather than some other potentially non-discriminatory reason. See generally Hayes, 726 F.2d at 1547-48.
72. See Note, supra note 63, at 778.
74. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122-125 (1985) (stressing...
only be honored in very limited instances. A
Conversely, there exists only one type of disparate impact case. A plaintiff’s claim under this type of case occurs when an employee concedes that an employer’s policy is neutral, but claims that the policy has a “disproportionate” impact on a group protected from discrimination under Title VII. Although this type of policy is not intentionally discriminatory, it has the same effect as a facially discriminatory policy, and consequently, will be found to be violative of Title VII. If a court finds a particular employer’s policy to have a disparate impact, then the only defense available to the employer is the judicially created business necessity defense. This defense is much broader than the BFOQ, and provides that where an employer enacts a fetal protection policy that applies only to females, then the policy will violate Title VII unless the employer can show: (1) that a substantial risk of harm exists to the fetus; (2) that the risk is born only by fertile women; and (3) that the employee fails to produce evidence that there are other acceptable alternate policies which would have a lesser impact on the affected sex.

IV. THE DIVERGENCE OF OPINION WITHIN THE CIRCUIT COURTS

Complications inherent in the application of this analytical framework has led to a split in circuit court rulings on the issue. The conflict has resulted from the disagreement between the circuits

the narrow application of the BFOQ; Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977) (asserting that the BFOQ defense has a very narrow scope).

75. See Johnson Controls, __ U.S. at ___, 111 S. Ct. at 1204; see also Dothard 433 U.S. at 333 (stating that an employer can rely on the BFOQ exception only if there is a factual basis for believing that “all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.”).

76. See generally Note, supra note 63, at 779.

77. See Hayes, 726 F.2d at 1547.

78. See Griggs, 401 U.S. at 432 (stating that Congress directed the thrust of Title VII to the consequences of employment practices not simply the motivation). The Griggs Court then asserted that a business necessity defense can be utilized in these types of disparate impact cases. Id. at 431. To be successful, an employer must show that the challenged neutral job criteria is directly linked to the employee’s ability to adequately perform the job. Id. However, circuit courts addressing fetal protection policy cases have slightly altered this original defense. See infra note 81 and accompanying text.

79. See Griggs at 431; see also Williams, supra note 5, at 687.

80. See Hayes 726 F.2d at 1547.

81. Id. at 1554; see also Blanco, supra note 8, at 787 (asserting that this was essentially the same test administered by the circuit courts in deciding this issue).

82. The Four circuits that created this split were: (1) the Eleventh Circuit (Hayes); (2) the Seventh Circuit (Johnson Controls); (3) the Fourth Circuit (Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982)); and (4) the Sixth Circuit (Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990)).
on whether a fetal protection policy should be analyzed under a disparate treatment/BFOQ framework or under a disparate impact/business necessity framework.

The Fourth Circuit, in Wright, decided that the employer's fetal protection policy in question was facially neutral in order to enable the employer to utilize the broader business necessity defense.\(^8\) In the Wright case, an oil company issued a fetal protection policy which excluded fertile women from jobs which "may require contact with and exposure to known or suspected [chemical materials]."\(^4\) Furthermore, the company assumed that any woman between the ages of five and sixty-three was fertile, and that this assumption could only be rebutted by medical proof of sterility.\(^5\) In addition, the company called for case-by-case evaluations to determine whether or not fertile women could work in jobs that required "very limited contact with . . . harmful chemicals."\(^6\) Consequently, employees affected by the broad fetal protection policies brought a class action challenging the policies on sexual discrimination grounds.\(^7\)

Although the appellate court recognized that the policies may initially appear to be facially discriminatory,\(^8\) the court focused on the societal policy interest in protecting fetal health.\(^9\) As a result, the Wright court held that societal interests could provide a basis for the business necessity defense.\(^9\)

The Eleventh Circuit, in Hayes, joined the Fourth Circuit by declaring that an employer's fetal protection policy could be facially neutral and analyzed under the more lenient disparate impact/business necessity test.\(^91\) The court rationalized its decision by stating that a fetal protection policy could be unbiased "in the sense that it

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\(^{83.}\) Wright, 697 F.2d at 1186.
\(^{84.}\) Id. at 1182.
\(^{85.}\) See id.
\(^{86.}\) Id.
\(^{87.}\) Id. at 1176.
\(^{88.}\) Id. at 1186.
\(^{89.}\) Id. at 1189.
\(^{90.}\) Id. at 1189-90. The district court, on remand, held that the plaintiffs had failed to show acceptable alternatives, so the employer was able to use the business necessity defense. Wright v. Olin Corp., 585 F. Supp. 1447 (W.D.N.C.), vacated, 767 F.2d 915 (4th Cir. 1984).
\(^{91.}\) See Hayes, 726 F.2d at 1552. In Hayes, Sylvia Hayes, a certified x-ray technician, was fired by her hospital/employer when she informed her supervisor that she was pregnant. See id. at 1546. In response to this information, the hospital fired Hayes pursuant to its belief that the continued employment of a pregnant x-ray technician presented a substantial hazard to her fetus. Id. Subsequently, Hayes commenced a lawsuit charging the hospital with violating her equal employment rights guaranteed by Title VII of the 1964 Civil Rights Act. Id. The hospital defended its actions on both business necessity and BFOQ grounds. Id.
equally protects the offspring of all employees. However, the opinion noted that the policy clearly impacted women more than men. Nevertheless, the court, based on its overall desire to promote an unborn child’s health, found the policy to be facially neutral so that the business necessity defense could be utilized. However, unlike Wright, the Hayes court decided that the employer did not in fact establish a business necessity defense because the hospital/employer failed to meet the third prong of the defense by failing to consider an employee’s acceptable alternatives to the fetal protection policy.

Following the Seventh Circuit’s decision in Johnson Controls, the Sixth Circuit next addressed the issue of fetal protection. In Grant, the appellate court came to a completely different conclusion. The Grant court held that an employer’s fetal protection policy, which restricted fertile female employees from holding jobs that involved potential exposure to specified levels of lead, was facially discriminatory and could only be justified by a BFOQ defense. In its opinion the court criticized the earlier circuit court decisions and their policy analysis of the issue by emphasizing that these fetal protection policies could not logically be recast as being facially neutral. To do so would be “to usurp congressional power to regulate pregnancy discrimination on the basis of public policy.”

V. THE SUPREME COURT’S LEGAL ANALYSIS

The Seventh Circuit became the first court to decide that a fetal protection policy could possibly qualify as a BFOQ. The Sixth Circuit soon followed their lead. As a result, the Supreme Court granted certiorari to resolve the conflict between the Fourth, Sixth, Seventh and Eleventh Circuits on the issue of whether an employer,

92. Id. at 1552.
93. Id.
94. Id. at 1553.
95. Id. at 1553-54 (holding that the female employee’s alternate policies would have minimized the risk of hazardous exposure to the pregnant employee).
96. See supra notes 47-57 and accompanying text.
98. Id. at 1305.
99. Id. at 1310.
100. Id.
101. Id. The court pointed out that Congress’ enactment of the PDA should be interpreted to mean that any fetal protection policy constitutes overt discrimination. Id.
102. See supra notes 47-57 and accompanying text.
103. The Grant Court went one step further and “agreed with the dissenters in Johnson Controls that the BFOQ defense was the only available defense to an employer issuing a fetal protection policy.” Grant 908 F.2d at 1310 (emphasis added).
seeking to protect unborn children, could issue facially discriminatory fetal protection policies.104

In order to determine this question, the Court first had to decide whether to analyze this case under a disparate treatment/BFOQ framework or under a disparate impact/business necessity framework. This preliminary issue had led to the split among the circuits and the Supreme Court needed to settle this area of contention once and for all.

The Court decided that Johnson Control's fetal protection policy, which barred fertile women from jobs that involved actual or potential lead exposure exceeding OSHA standards,105 was facially discriminatory, had a disparate impact on women and should be violative of Title VII unless Johnson Controls could show that its policy fell within the BFOQ exception to Title VII.106 In its opinion, the Court reasoned that: (1) the policy provided for explicit sexual discrimination based on the potential for pregnancy107; and (2) the policy was not neutral simply because its purpose, to protect the fetus in female employees, was apparently favorable to women.108

The Court promptly declared that the fetal protection policy at issue was violative of Title VII of the Civil Rights Act since it was facially discriminatory based upon gender and child bearing capacity.109 Title VII explicitly prohibits any sex-based classifications in terms or conditions of employment, or in hiring and discharging decisions.110 In light of the statute, the Court found the policy, which gave fertile men but not fertile women a choice as to whether they wanted to take the risk of exposing their reproductive health in a particular job, to be a clear sex-based classification and thus facially discriminatory.111

105. At the time the critical level of exposure to lead noted by OSHA was 30 micrograms per deciliter. See 29 C.F.R. § 1910.1025 (1989); see also supra notes 32-35 and accompanying text (describing OSHA's standards for occupational exposure to lead).
106. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1204.
107. Id.
108. Id. at ___, 111 S. Ct. at 1203-04.
109. Id. at ___, 111 S. Ct. at 1202.
111. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1202. The Court also noted that the policy was only concerned with harm to the offspring of its female employees, despite evidence in the record concerning the possibly debilitating effect of lead exposure on the male reproductive system. Id. at ___, 111 S. Ct. at 1203. See also Timko, Exploring the Limits of Legal Duty: A Union’s Responsibilities with Respect to Fetal Protection Policies, 23 Harv. J. on Legis. 159, 165 (1986) (stating that fetal protection policies are underinclusive because they fail to protect a male worker’s potential offspring from damage resulting from his exposure to hazardous materials).
While the Johnson Court concluded that fetal protection policies on the basis of sex were facially discriminatory, it supported its decision through the use of the PDA. Under the PDA, Congress explicitly provided that for all Title VII purposes discrimination on the basis of sex includes discrimination "on the basis of pregnancy." Thus, the PDA makes clear that for all Title VII purposes "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Consequently, the Court maintained that Johnson Controls' policy, which excluded female employees "capable of bearing children", explicitly classified employees on the basis of their ability to bear children and, therefore, must be treated as facially discriminatory.

The opinion also rejected the assumption that a fetal protection policy is neutral because it is favorable to women, in that it seeks to protect their offspring. "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy." The Court asserted that motive is irrelevant to the analysis of the classification of an employer's policy and that even the apparent benevolence of an employer's purpose will not override a policy that involves disparate treatment through explicit sex-based discrimination. Through its decision to treat fetal protection policies as facially discriminatory, the Court overruled previous circuit court decisions which had held that a facially neutral/business necessity framework should be used. Furthermore, the Court declared that a facially discriminative/BFOQ framework was the appropriate legal framework within which to analyze fetal protection policies.

Having concluded that the fetal protection policy in question was facially discriminatory, the Court stated that Johnson Controls' policy violated Title VII unless the company could show that its policy fell within the BFOQ exception to Title VII. The BFOQ exception provides that an employer may explicitly discriminate against an employee on the basis of "religion, sex, or national origin..."
in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 122 The Court decided that a fetal protection policy is not one of those "certain instances" that comes within the BFOQ exception. 123

The decision to exclude fetal protection policies from the BFOQ exception was based on three factors: (1) the language of the BFOQ provision and the PDA which amended it; (2) applicable case law interpreting this exception; and (3) the legislative history of Title VII, as amended by the PDA. 124

The Supreme Court in Johnson emphasized that its decision was based on the restrictive scope of the BFOQ, noting that the BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." 125 After examining the language of the statute, the Court concluded that the only way a fetal protection policy could fall within the exception was if gender would affect the employee's ability to perform the job. 126 Here, however, there was no evidence to the contrary. 127 In fact, fertile women who participate in the manufacturing of batteries work as efficiently as anyone else. 128 As a result, the Court appropriately held that the policy could not suffice to establish a BFOQ of female sterility. 129

However, in its argument, Johnson Controls asserted that its policy fell within the so-called "safety exception" to the BFOQ. 130 This judicially created exception to the BFOQ allows an employer to issue a discriminatory policy where the safety of third parties may be at risk if the discriminated party is allowed to continue working. 131

123. See Johnson Controls ___ U.S. at ___, 111 S. Ct. at 1207.
124. Id.
125. See Dothard 433 U.S. at 334. See also supra note 74-75 and accompanying text (discussing the narrow scope of the BFOQ defense).
126. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1204 (emphasis added). The Court specifically noted that the word "occupational" combined with the word "qualification" narrowed the BFOQ exception to qualifications that affect an employee's ability to perform the job rather than a qualification based on an arbitrary requirement that an employer could choose to make (such as infertility). See id. at ___, 111 S. Ct. at 1205.
127. Id. at ___, 111 S. Ct. at 1207 (pointing out that nowhere in the record did it state that a fertile female could not manufacture batteries as efficiently as anyone else).
128. The Court claimed that the evidence in the record established that fertile women participate in the manufacturing of batteries as efficiently as men. Id.
129. Id.
130. Id. at ___, 111 S. Ct. at 1205.
131. Id.; see also Dothard, 433 U.S. 321; Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (maintaining that an airline's concern for its passengers could possibly justify a safety exception claim); Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1981).
Nevertheless, the Court rejected Johnson Control's argument, maintaining that third party safety consideration will only be allowed to enter into the BFOQ analysis when the third party's safety is essential to the employer's business.\textsuperscript{132} For example, in \textit{Dothard}, the Supreme Court allowed an all-male prison to refuse to hire women for the position of prison guard in “contact” jobs.\textsuperscript{133} The Court justified this hiring policy under the prison's “safety exception” defense because in this all-male, maximum-security, unclassified penitentiary, “where violence is the order of the day”, a woman's ability to maintain order could be directly reduced by her gender.\textsuperscript{134} The \textit{Dothard} Court, in its analysis, placed great emphasis on fact that sex offenders, who had criminally assaulted women in the past, would be motivated to do so again if access to females was established in the prison.\textsuperscript{135} Consequently, by allowing a woman to work in this prison, the essence of the prison's “business” (i.e. maintaining security) could be disrupted, and the safety of others, such as other inmates or employees, could be at risk.\textsuperscript{136}

Similarly, in \textit{Criswell} the Supreme Court focused on an airline's policy that all flight engineers must retire by the age of 60.\textsuperscript{137} Here, the \textit{Criswell} Court analyzed this safety exception in the context of the Age Discrimination in Employment Act\textsuperscript{138} (“ADEA”), which contains the same BFOQ exception as Title VII, and concluded that the safety concerns of passengers was certainly essential to the airline business.\textsuperscript{139} However, the Court would not allow the airline to utilize the safety exception defense unless it could show that the discriminated party would be unable to satisfactorily perform the

\textsuperscript{1980} (justifying, pursuant to the safety exception to the BFOQ, an airline's policy of laying off pregnant flight attendants at different times during the first five months of pregnancy on the grounds that the employer's policy was necessary to ensure the safety of the airline's passengers).

132. \textit{Johnson Controls}, at \textit{___}, 111 S. Ct. at 1205 (emphasis added).

133. \textit{Dothard}, 433 U.S. at 336-337. In \textit{Dothard}, Dianne Rawlinson sought employment with the Alabama Board of Corrections as a prison guard. \textit{Id.} at 323. After her application was rejected, Rawlinson brought suit against the Correction facility. \textit{Id.} She challenged the prisons' regulation, which established a gender criteria for assigning prison guards to “contact” positions (i.e. positions requiring close physical proximity to inmates), as violative of Title VII. \textit{Id.} at 324-325.

134. \textit{Id.} at 334-336.

135. \textit{Id.}

136. \textit{Id.} at 336-337 (because of the safety exception, the Court held that being male was a BFOQ for the job).


139. The Court asserted that the “safe transportation of [the airline's] passengers” was the essence of an airline's business. \textit{Criswell}, 472 U.S. at 420.
Both *Dothard* and *Criswell* illustrate that the only way Johnson Controls' fetal protection policy could fall within the safety exception to the BFOQ defense is if the safety of third person's is essential to Johnson's business, and if pregnancy would interfere with the employee's ability to perform the job. In light of these two cases, the *Johnson Controls* Court rejected the employer's argument, stating that allowing fetal protection policies to fall under the safety exception, would ignore the "essence of business" test articulated in *Dothard* and *Criswell*.

The Court concluded that the fetuses of female employees are "neither customers nor third parties whose safety is essential to the business of battery manufacturing." The BFOQ is not so broad so as to transform this admittedly serious social concern into an essential aspect of batterymaking. To do so would contradict the narrowness of the BFOQ.

The *Johnson Controls* Court bolstered its determination that fetal protection policies did not fall under the BFOQ exception by citing to the legislative history of the PDA which "counsels against expanding the BFOQ to allow fetal-protection policies." The Senate reports accompanying the PDA make clear that "employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue", and that "women who are able to work must be permitted to work on the same conditions as other employees." The court found this statutory history to be very persuasive and concluded that since the fetal protection policy at issue in the case was made without concern for a woman's ability to do her job and was only interested in the protection of her

140. *Criswell*, 472 U.S. at 422-23. The Court concluded that the airline did not produce sufficient evidence to sustain its burden of showing that flight engineers over 60 would not be able to perform their job effectively. *Id.* at 472 U.S. 400.

141. See supra notes 132-136 and accompanying text (discussing the "essence of business" exception).

142. See supra notes 137-140 and accompanying text (illustrating the importance of one's ability to perform his/her job before the safety exception can be utilized).

143. *Johnson Controls*, ___ U.S. at ___, 111 S. Ct. at 1205-06.

144. *Id.* ___ U.S. at ___, 111 S. Ct. at 1206.

145. *Id.*

146. *Id.* ___ U.S. at ___, 111 S. Ct. at 1206. The *Johnson* Court maintained that "such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception but [also] the plain language and history of the [PDA]." *Id.*


fetus, the policy could not be justified under the BFOQ defense. 149

VI. THE SUPREME COURT’S POLICY ANALYSIS

In reaching its decision, the Johnson Court refused to allow policy interests to get in the way of its legal analysis. In fact, the Court subtly criticized the circuit courts who had heavily relied on these policy interests in arriving at their respective decisions. 150 The conflicting social concerns at issue included: (1) society’s moral and humanitarian interest in avoiding injury to the next generation; (2) an employer’s desire to avoid tort liability for injury to the children of its workers; and (3) society’s strong interest in providing equal employment opportunities for women. 151 However, the Court expeditiously disposed of these policy differences by stating that moral and ethical concerns about the welfare of the next generation will not be allowed to expand the narrow BFOQ exception. 152 These policy concerns do not establish the proposition that fertile women will not be able to perform the job of manufacturing batteries effectively. 153 Moreover, concerns about the welfare of future generations were found to be equally unpersuasive because the safety of a female employee’s fetus is not part of the “essence” of battery manufacturing. 154

The Court also took a brief look at the employer’s claim that potential tort liability for prenatal injuries suffered by the newborn children would suffice to justify the fetal protection policy. 155 In general, employers feel that a fetal protection policy which excludes all fertile women is necessary because the fetus may be exposed to the hazard before the woman even knows she is pregnant. 156 Most chemicals, especially lead, linger in the body for a substantial amount of time, so that even exposure prior to conception can still lead to fetal harm despite no occurrences of exposure during the pregnancy itself. 157 Furthermore, employers fear state laws that recognize a right to recover for prenatal injury based on either negligence or wrongful

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149. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1207.
150. The circuit courts referred to are the Fourth, Seventh and Eleventh Circuits; see supra notes 82-95 and accompanying text (detailing these decisions).
151. See Blanco, supra note 5, at 761; Becker, supra note 4, at 1228.
152. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1207.
153. Id.
154. Id.
155. Id. at ___, 111 S. Ct. at 1208.
156. See supra note 37 and accompanying text (explaining why fetal protection policies include women who are merely capable of becoming pregnant).
157. See Becker, supra note 4, at 1228-29.
Consequently, employers contend that a deformed or retarded child can sue a company if the defect was caused by excessive exposure to hazardous chemicals, although the child was merely a fetus. In addition, employers point out that parents cannot waive causes of action on behalf of their children. Therefore, the em-


159. There are three main ways that hazardous chemicals can harm a fetus. See Timko, *supra* note 111, at 165. The chemicals may interfere with a fetuses' normal development through entry into the mother as: (1) fetal toxins; (2) fetal teratogens; or (3) fetal mutagens. *Id.* at 164. A fetal toxin penetrates the placenta and poisons the fetus, causing stillbirths and other birth defects. *Id.* A fetal teratogen passes through the placenta to the fetus and alters the mother's physiology so as to stunt fetal development. *Id.* A fetal mutagen can cause birth defects by altering the female reproductive cells. *Id.* at 165.

160. See *Johnson Controls*, — U.S. at __, 111 S. Ct. at 1211 (White, J., concurring). Justice White stressed that the general rule in this area is that parents cannot waive causes of action on behalf of their children, and the parents' negligence will not be imputed to the children. *Id.*
ployer would not be allowed to protect itself from this liability by requiring employees to sign waivers.\textsuperscript{161} For these reasons, employers feel their only source of protection lies in an all exclusive fetal protection policy.

However, the \textit{Johnson Controls} Court found these employer concerns unconvincing.\textsuperscript{162} The Court simply refused to allow these concerns to alter its legal interpretation of Title VII to preclude "sex-specific fetal-protection policies."\textsuperscript{163} The opinion disposed of the issue by maintaining that if Title VII were to ban fetal protection policies, the employer completely informs the female employee of the risk and the employer has not acted negligently in any way, then the basis for holding an employer liable seems "remote at best."\textsuperscript{164} The Court reasoned that without some negligence, it would be difficult under general tort principles, to find an employer liable.\textsuperscript{165} Moreover, by complying with "Title VII's clear command", any state law to the contrary would be preempted.\textsuperscript{166} Through this reasoning, the Court concluded that \textit{Johnson Controls'} fetal protection policy could not be justified and as a result was violative of Title VII.\textsuperscript{167}

\section*{VII. \textit{JOHNSON CONTROLS'} Effect on the Working Woman in Today's Economy}

One of the most significant trends in the United States labor force has been the growth of working women.\textsuperscript{168} While originally the woman's role in the workplace was limited, the participation of women in the workplace has drastically increased in the last three decades.\textsuperscript{169} In fact, from 1975-1990 the participation rate of women, 16 years and older, in the labor force increased from 46.3 percent to \textsuperscript{161} See \textit{id.}.
\textsuperscript{162} See \textit{id.} at \textsuperscript{111} S. Ct. at 1208.
\textsuperscript{163} \textit{Id.} at \textsuperscript{111} S. Ct. at 1208-09.
\textsuperscript{164} \textit{Id.} at \textsuperscript{111} S. Ct. at 1208.
\textsuperscript{165} \textit{Id.}.
\textsuperscript{166} \textit{Id.} at \textsuperscript{111} S. Ct. at 1209; see also Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963) (holding that if it is impossible for an employer to comply with both state and federal requirements, then the federal law will preempt the state law).
\textsuperscript{167} \textit{Johnson Controls, \textit{\textsuperscript{111} S. Ct. at 1209-10.}}
\textsuperscript{169} See Vanderwaerdt, Resolving the Conflict Between Hazardous Substances in the Workplace and Equal Employment Opportunity, 21 Amer. Bus. L.J. 157, 170 (1983) (asserting that the amount of women entering the labor market has increased in the last several decades).
57.5 percent, an increase of 11.2 percent.\textsuperscript{170} By the start of 1991 working women represented more than 45 percent of all Americans employed.\textsuperscript{171} Moreover, it is projected that by the end of the century this trend will continue to increase, and an even larger percentage of women will be employed in the labor market.\textsuperscript{172}

However, despite this large increase, only approximately 2 percent of all employed women are in skilled trades.\textsuperscript{173} This means that more women are forced to work in unskilled, lower paying, less desirable, blue collar jobs that may consist of working with, or near, hazardous chemicals and materials.\textsuperscript{174} It is due to this rise in the women's labor movement, especially in these blue collar fields, that have led many employers to issue fetal protection policies to "protect" women and the next generation of offspring.\textsuperscript{175}

Legislation to protect women dates back all the way to the beginning of this century. States enacted statutes that limited the number of hours a woman could work or the number of days that she could work in a row.\textsuperscript{176} Some even prohibited the employment of women in certain industries.\textsuperscript{177} For example, the Supreme Court in the landmark case of \textit{Muller v. Oregon},\textsuperscript{178} upheld a state statute that prohibited women from working more than ten hours a day in any mechanical establishment, factory or laundry.\textsuperscript{179} The \textit{Muller} Court...
reasoned that "healthy mothers [were] essential to vigorous offspring", and that these restrictions were imposed not only for her benefit but for "the benefit of [society]."  

While society’s attitude towards women may have been different during the Muller era, it is clear that any such standards in today’s world would be considered extremely sexist.

Today, this type of state protective legislation can no longer be enforced. Since the enactment of Title VII, courts have uniformly held that sex-specific state labor statutes are preempted by this federal statute. However, courts have become more tolerant towards fetal protection policies issued by employers due to the societal interest of protecting the next generation. This is where the current controversy exists.

With its decision in Johnson Controls, the Supreme Court laid to rest the growing controversy over the legality of fetal protection policies. In doing so, the Court made a policy decision that society’s interest in equal employment opportunity for women and the opportunity for females to make life decisions, outweighed society’s interest in protecting the future generation. As a result of this Supreme Court ruling, society’s concern for protecting its next generation from reproductive hazards in the workplace will intensify.

180. Muller, 208 U.S. at 422.
181. The Muller Court itself noted that “women [have] always been dependent upon man.” Id. at 421; see also Becker, supra note 4, at 1231-32 (asserting that at the beginning of the century “[w]omen were seen only in terms of the reproductive and domestic functions associated with motherhood”, and were not seen as individuals with autonomous interests).
182. Becker, supra note 4, at 1222.
183. Id. at 1225.
185. Becker, supra note 4, at 1225.
186. Johnson Controls, ___ U.S. at ___, 111 S. Ct. at 1209-1210.
187. While the Court did not allow policy considerations to get in the way of its legal analysis, it did make a policy statement in its conclusion that “[i]t is no more appropriate for 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.” Id. at ___, 111 S.Ct. at 1210.
188. See Howard, Hazardous Substances in the Workplace: Implications For the Employment Rights of Women, 129 U. Pa. L. Rev. 798, 835 (1981) (asserting that a resolution of the legal issues involved will not resolve the disturbing problem of reproductive hazards in the workplace). A reproductive hazard, which includes lead, is defined as “any hazard where a work-related exposure is capable of either harming the fetus of the exposed worker or harming the reproductive system or sexual capacity of the worker.” Comment, Gener Specific Regulations in the Chemical Workplace, 27 Santa Clara L. Rev. 353, 366 (1987); see also Ashford & Caldart, The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention, 5 Indus. Rel. J. 523, 524 (1983) (discussing reproductive hazards in more detail).
Specifically, because fertile women may now work at hazardous job sites, even while they are pregnant, more deformed or retarded babies may be born. Consequently, society's commitment to the healthy and normal development of unborn fetuses may be seriously hampered. The question now posed is whether the Supreme Court decision is truly in society's best interest.

Employers have long argued that their fetal protection policies are justified in light of society's concern for the future generation and for their fear of tort liability based upon prenatal injury. They argue that the most efficient way to accommodate these concerns is to exclude all fertile women from being exposed to any hazards in the workplace. Moreover, some employers also fear that it is their duty to keep fertile women away from jobs that pose recognized reproductive hazards under the "general duty" clause of the Occupational Safety and Health Act of 1970 ("OSHA"). The clause provides that an employer must maintain his/her workplace "free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. However, this argument would not prevail because the OSHA Act "alone is not adequate to remedy sex-based employment discrimination purportedly justified by the risk of reproductive harm." At first glance, these policy arguments appear to be persuasive reasons to exclude women because it would seem inhumane to allow our future generation to become filled with defected or deformed children. However, this is only one side of the coin. On the other side is society's interest in promoting a woman's right to seek equal opportunity employment, free from sexual barriers, and the recognition that she is competent to make her own decisions, including evaluating any employment risks. Furthermore, these fetal protection policies are often made without any regard for

189. See supra note 25 and accompanying text (supporting the conclusion that occupational exposure to chemical materials can create a risk of harm to a pregnant employee's fetus).

190. See Buss, Getting Beyond Discrimination: A Regulatory Solution to the problem of Fetal Hazards in the Workplace, 95 Yale L.J. 577, 577 (1986) (maintaining that society has a general desire to protect the future generation).

191. See Note, supra note 63, at 774.

192. See Williams, supra note 5, at 644.


194. Id.

195. Howard, supra note 188, at 808. The article also notes that it is merely an "open question" as to whether a hazard impinging only upon the reproductive system is one likely to cause "death or serious physical harm" to employees. Id. at 809.

196. Williams, supra note 5, at 647.
the possibility of a fertile woman actually becoming pregnant. It is the interests on this "other side" that frustrate an employer's argument in favor of justifying workplace fetal protection policies.

A. Economic Consequences to Women from Sexual Employment Barriers

Title VII's overall objective is to ensure that equal employment opportunities are available to women and to abolish sexual classifications in the workplace. However, fetal protection policies have an adverse affect on female employment opportunities. Although estimates of actual impact are uncertain, early estimates suggest that over 100,000 jobs are closed to women because of these unfair policies. Add to this statistic the fact that nearly 20 million jobs may involve some type of exposure to workplace hazards, and it can be projected that much more than 100,000 jobs may be lost by women if fetal protection policies were legal. Consequently, the female unemployment rate would be destined to increase.

These numbers are alarming in light of today's recessionary economy. In October, 1991, the number of unemployed workers increased by 1.8 million since the recession began some sixteen months earlier. Furthermore, although the unemployment rate for women averaged 5.4 percent in 1990, the unemployment rate has hovered around 6.5 percent in 1991. Thus, the legalization of workplace fetal protection policies would only add to the already growing number of unemployed and further damage any prospect for economic recovery.

These protection policies simply do not take into account the

197. See infra notes 241-254 and accompanying text.
198. See Williams, supra note 5, at 666.
199. Federal equal employment officials estimate at least 100,000 jobs involving contacts with hazardous materials are closed to women, either due to corporate policies or through "subtle channeling of women away from those positions." Wash. Post, Nov. 3, 1979, § A, at 6, col. 5.
200. See Blanco, supra note 8, at 757 (mentioning that preliminary studies indicate that as many as 20 million jobs may involve exposure to reproductive hazards). The Article explained that a reproductive hazard in the workplace is "any worker exposure that is capable of (a) harming the fetus or prospective child of the exposed worker and/or (b) harming the reproductive system or sexual capacity of the exposed worker." Id.
201. The recession was considered to have begun in July, 1990. See U.S. Department of Labor, Women and Work, Nov. 1991 at 9.
202. Id.
203. U.S. Department of Labor, Bureau of Labor Statistics, Nov. 1991 at 120, table No. 8. An estimated twenty-five million Americans, twenty percent of the work force, were jobless at some point in 1991. NEWSWEEK, Jan. 13 p. 18 (1992) It is interesting to note that in 1933, when the Great Depression was at its worst, sixteen million Americans were jobless. Id.
economic consequences that women may suffer if denied the opportunity to work. In 1990, over 6 million families were headed by females. Clearly, these women need job security. Moreover, this figure does not include the number of women who are single, but have no family or those women who are widows. Therefore, these employer policies would leave many women, who desperately need their jobs, with a choice between losing their job or losing their capacity to have children, in order to maintain their job. This dilemma could create a devastating blow to society, especially if a female employee chose to give up her opportunity to be a mother in order to keep her job. However, in spite of the argument that women have the additional option of either not working at all or simply working elsewhere, "economically coerced sterilization" could become a harsh reality in today's economic hard times.

Furthermore, although employers argue that fetal protection policies are in the best interest of the unborn fetus, this may not

204. See Becker, supra note 4, at 1224 (arguing that employers do not take into consideration the effects that their policies could have on women and their families).

205. In 1990, the annual average of women who maintained a family was 6,358,000. U.S. Department of Labor, Bureau of Labor Statistics, Nov. 1991, p. 119, table No. 6. Moreover, the annual unemployment rate for women who maintained a family was 8.2 percent, in 1990. Id at 118, table No. 7.

206. See Williams, supra note 5, at 650 n. 63 (stating that many women need to for compelling economic reasons).

207. See Blanco, supra note 8, at 764 (stating that fetal protection policies can lead to "economically coerced sterilization"). The classic example of economically coerced sterilization was seen in Oil, Chemical and Atomic Workers International Union v. American Cyanamid Company, 741 F.2d 444 (D.C. Cir. 1984). In that case, the American Cyanamid Company issued a fetal protection policy in its West Virginia plant which prohibited fertile women from working in jobs that involved contact with hazardous materials. The policy presumed women ages 16 to 60 to be fertile unless they presented proof of surgical sterilization. American Cyanamid, 741 F.2d at 446. Women employees were explained the situation and told that only seven jobs for fertile women would ultimately remain at the plant and that, apart from those seven positions, fertile women would be terminated. Id. Subsequently, the policy was modified to apply only to jobs sites that involved exposure to lead. Nevertheless, five of the seven female workers affected by the policy chose to undergo sterilization operations. Id Moreover, three of these women were the sole or main economic support of their families. See Williams, supra note 5, at 651 n.64. Thus, American Cyanamid illustrates how a woman might be forced to undergo a psychologically painful sterilization process in order to survive economically.

208. See Williams, supra note 5, at 605 (asserting that this may be an "excruciatingly high price" to pay in order for a woman to keep her job).

209. Unlike earlier times, when female wage earnings were considered of marginal importance, many women, today, are no longer dependent on their husbands. See Becker, supra note 4 at 1225. Moreover, in many cases even when a woman is married, she still contributes significantly to the family income. See U.S. Department of Labor, Women's Bureau, Working Mothers and Their Children, No. 89-3, Aug. 1989, p. 2.

210. See Note, Exclusionary Employment Practices in Hazardous Industries: Protection
always be the case.\textsuperscript{211} For instance, if a woman loses her job and then cannot find a new job in today’s recession, she may lose her ability to purchase as much food as she would like, or in the extreme case, any food at all.\textsuperscript{212} This could eventually lead to malnutrition of her fetus.\textsuperscript{213} Also, she may no longer be able to pay for “luxuries” such as heat or air conditioning.\textsuperscript{214} If this is the case, her fetus may suffer from excessive heat or cold and this is by no means a health benefit to either the mother or the unborn child.\textsuperscript{215} Moreover, if a woman loses her job due to a fetal protection policy, she not only loses the income derived from the job, but in many cases she also loses the employment-related benefits that accompanied her work.\textsuperscript{216} Thus, a newborn child may be denied medical or dental treatment simply because the mother cannot afford it. While not all unemployed women will suffer such drastic economic consequences, it is still a serious possibility, especially in today’s economic crises. Accordingly, potential adverse economic consequences such as these should be enough to justify prohibiting fetal protection policies. Although eliminating these fetal protection policies may increase the danger of exposing unborn fetuses to hazardous materials, it may be the price society must pay in order to ensure equal employment opportunities for women.\textsuperscript{217}

\section*{B. Psychological Consequences to Women}

In addition to the aforementioned economic consequences that could accompany fetal protection policies, are the psychological consequences of sexual segregation.\textsuperscript{218} This includes: (1) a loss in achieving personal fulfillment values, such as a sense of self-sufficiency; (2) a feeling that control over life decisions is not limited by an accident of birth; and (3) a loss in the sense of oneself as a valua-

\begin{itemize}
  \item 211. See Becker, supra note 4, at 1231-32 (declaring that there are “countless” number of ways in which fetal protection policies can make a woman and her children worse off in terms of health).
  \item 212. Id. at 1231.
  \item 213. Id. at 1231.
  \item 214. Id (explaining how excessive heat can have detrimental effects on pregnancy, and a working mother is more likely to be able to afford air conditioning).
  \item 215. Id.
  \item 216. Id at 1229.
  \item 217. See Howard, supra note 188, at 836.
  \item 218. See Williams, supra note 5, at 651.
\end{itemize}
ble contributing human being.\textsuperscript{219} With the adoption of fetal protection policies, employers are simply contending that women cannot be trusted to act responsibly.\textsuperscript{220} By viewing women "in terms of their group's reproductive function, proponents of fetal [protection] policies fail to treat women as individuals."\textsuperscript{221} Employers are not allowing women to decide what is or is not in their best interest, but instead, employers are making this decision for them and thus intensifying the problem by injecting "an emotional element that re-enforces stereotypes of women as mothers."\textsuperscript{222}

However, this is illegal in light of judicial decisions and Title VII, which forbids this practice.\textsuperscript{223} The fact that a particular job may be too dangerous for women "may be appropriately met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."\textsuperscript{224} Similarly, the Fifth Circuit, in \textit{Weeks v. Southern Bell Telephone & Telegraph Company},\textsuperscript{225} while comparing the general freedom of choice between men and women, made the strong statement that Title VII:

rejects. . . romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.\textsuperscript{226}

Moreover, even the \textit{Johnson Controls} Court, which refused to allow policy interests to interfere with its legal analysis, declared that "[i]t 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 . . . than her economic role."\textsuperscript{227} Clearly, the statements made by these courts illustrate the modern view that soci-

\begin{thebibliography}{99}
\bibitem{219} Id.
\bibitem{220} See \textit{Andrade, The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person}, 4 HARV. WOMEN'S L.J. 71, 79 (1981) (arguing that fetal protection policies imply that women are not capable of making life decisions on their own).
\bibitem{221} Becker, \textit{supra} note 4, at 1232.
\bibitem{222} Howard, \textit{supra} note 188, at 836.
\bibitem{223} See \textit{Dothard}, 433 U.S. 321; \textit{Roe v. Wade}, 410 U.S. 113, The Roe Court held that a woman's interest in autonomy was so important that it was part of the basis for their constitutional right to abortions. \textit{Id.} at 153, 162.
\bibitem{224} \textit{Dothard}, 433 U.S. at 335.
\bibitem{225} 408 F.2d 228 (5th Cir. 1969).
\bibitem{226} \textit{Id.} at 236.
\bibitem{227} \textit{Johnson Controls}, ___ U.S. at ___, 111 S. Ct. at 1210.
\end{thebibliography}
ety's interest in providing women with the opportunity to make their own life decisions is extremely strong and should not be easily removed.

There are other reasons why women, not employers, should decide when females should be able to work at particular job-sites. First, even if a woman comes to the same decision as her employer, not working at a particular job-site, the woman who makes this decision herself "will feel that she, rather than others, [are] in control of her life." Second, it should be assumed that an individual woman will be deeply concerned about her unborn child's health, and consequently, would do everything to protect the fetus. Therefore, even if she felt that her economic situation was such that she could not afford to stop working, then at least this would be her decision and she would have to live with any adverse consequences.

While this may seem unconscionable to proponents of fetal protection, it is an acceptable price to pay for the removal of all sexual barriers to employment. Moreover, society should presume that each woman is competent to make the best decisions for her fetus. However, while the woman should have the right of choice, she should not have the right to subject the fetus to any risk of harm, regardless of magnitude. Consequently, this should alleviate society's fear that a pregnant employee, exposed to hazardous chemicals, would make an irrational decision regarding her unborn child's health.

Moreover, one court has noted that employees are under a duty

228. See Becker, supra note 4, at 1242 (providing these reasons).
229. Becker, supra note 4, at 1242.
230. See Id.
231. A woman's autonomy is very important for society and is a primary reason for allowing her to make her own decisions about smoking and drinking before and during pregnancy. Id.
232. See Howard, supra note 188, at 836 (declaring that if a female employee wishes to shoulder the risk of harm to herself or her child, then that is no one's business but her own).
233. Thus, if a pregnant woman decides to continue her job, in light of possible health risks to her fetus, it is likely that the alternatives to continuing hazardous employment are worse for her unborn child than the risks of unemployment. See Becker, supra note 4, at 1242.
234. See Williams, supra note 5, at 652; King, The Judicial Status of the Fetus: A proposal for Legal Protection of the unborn, 77 MICH. L. REV. 1647, 1684 (1979) contending that society may punish drug addicted mothers for causing unborn children to become addicted.
235. It must be noted that the Supreme Court has not made any determinations as to what extent a pregnant employee can subject her fetus to hazardous chemicals, but several legal commentators have implied that unconscionable exposure to unborn children will not be tolerated. Id.
to comply with Section 654(b) of OSHA, which states that: "employees shall comply with occupational safety and health standards . . . which are applicable to [their] own actions and conduct." At least one court has maintained that, it is conceivable for an employee to be cited under the statute for working under hazardous conditions. However, despite OSHA's imposition of employee duties, there have been generally no legal penalties for their noncompliance. Whether or not this could be construed to include a mother exposing her fetus to hazardous materials is yet to be litigated. Nevertheless, the Johnson Controls decision remains in conformity with the overwhelming societal and judicial concern for keeping women on "equal footing" with men and allowing them to decide what is in their best interest.

C. Overinclusiveness Concerns

Many fetal protection policies tend to be overinclusive in that they exclude all fertile women. These policies exclude all fertile women without any regard for considerations that would effect the probability of a woman becoming pregnant. For example, fetal protection policies often cover all fertile women, "without respect to marital status, sexual activity, use of contraception or fertility of the sexual partner." Consequently, these policies assume that the probability of any given woman becoming pregnant in the future is sufficiently high enough to justify excluding her from a job for which she is qualified. This assumption is without merit because the probability of becoming pregnant varies tremendously among indi-

237. Id.
239. See Northstein and Ayres, supra note 238, at 271
240. See supra notes 168–235 and accompanying text.
241. See supra note 8, at 764. Most fetal protection policies ban women of ages 16–60 unless they can present proof of surgical sterilization. See Id. at 766 (illustrating the typical fetal protection policy set out in the American Cyanamid case).
242. See Becker, supra note 4, at 1232–33 (arguing that the probability of a woman becoming pregnant depends on many factors, not just age).
243. Blanco, supra note 8, at 364 (criticizing fetal protection policies as overinclusive and paternalistic).
244. Becker, supra note 4, at 1232. "[Fetal protection] policies that only apply to all fertile women assume that the probability that any given fertile woman will become pregnant in the future is sufficiently high to justify excluding her from a job [sic]." Id.
Individual women.\textsuperscript{245} The factors that must be taken into consideration to determine this probability include: family situation; age; number of existing children; birth control method being utilized; and many other factors.\textsuperscript{246} Thus, there are many considerations, any of which can make it extremely unlikely that a particular woman will become pregnant.\textsuperscript{247} For example, it would be foolish to exclude a woman who uses a highly effective method of contraception and who has no intention of becoming pregnant from a certain job just because she has the ability to become pregnant. Similarly, if a woman is not sexually active or is married to an infertile partner, it would be unfair to ban her from the workplace on the basis of this fear of exposing a fetus to hazardous materials.

Furthermore, these policies also seek to ban women who, although fertile, are almost assured of not having any more children. For instance, the birth rate to women over 40 approaches zero.\textsuperscript{248} There is only a 0.38 percent chance that a female employee between the ages of 40-44 will become pregnant,\textsuperscript{249} and only a 0.02 percent chance of a woman between 45-49 conceiving a child.\textsuperscript{250} Moreover, such birth statistics do not even exist for women over 50 years old.\textsuperscript{251} Therefore, the percentage of women who become pregnant above this age is minimal, and is certainly not a sufficient risk to allow an employer to force a 50+ woman out of a job. It is one thing to be concerned about women who presently are pregnant, but it is entirely a different situation when companies seek to ban women who may never even become pregnant. Although employers justify their all inclusive policies on the theory that a fetus can be harmed by exposure to the chemicals at the period when the mother does not even know she is pregnant,\textsuperscript{252} there are surely less discriminatory

\textsuperscript{245} Id (listing relevant factors).
\textsuperscript{246} Id.
\textsuperscript{247} Id (observing that when fetal protection policies apply to all fertile women, the fact that a particular woman is unlikely to have children is ignored).
\textsuperscript{249} Id. Moreover, the birthrate for blue-collar women over 30 is less than 2 percent. Becker, supra note 4, at 1233.
\textsuperscript{250} U.S. DEPARTMENT OF COMMERCE BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1986 at 57 (1985). This means that only one out of 5,000 women aged 45-49 has a child in any given year. Id.
\textsuperscript{251} Id.
\textsuperscript{252} See supra note 37 and accompanying text (stating that the reasoning behind excluding all fertile women is that a fetus is most vulnerable to the risk of harm from a hazardous material during a period when the female may not even know that she is pregnant).
ways to circumvent the problem. For example, a woman should have the opportunity to present extrinsic factors that would prove that she has no intention of becoming pregnant or that the chances of her conceiving are slim. However, these less discriminatory alternatives were rendered moot in light of the Johnson Controls decision. Accordingly, these harsh and unreasonable policies must now give way to society's interest in allowing women to make their own life choices.

VIII. CONCLUSION

The Supreme Court's opinion in Johnson Controls was well reasoned, timely and correct. The decision features two beneficial results: (1) it prohibits nationwide layoffs of women, which would have detrimentally added to the national problem of unemployment in our country during this tough economic crisis; and (2) it overrules lower court decisions which were inconsistent with what is now considered to be a woman's best interest.

First, in light of the widespread recession in the United States, it would be unpopular for the Supreme Court to hand down any decision that would add to the country's economic crisis. However, had the Court chosen to legalize fetal protection policies, it would have done just that. Although the Johnson Controls Court makes no mention of the effects that fetal protection policies could have on the economy, the Court undoubtedly recognized the long term effects of its ruling. By 1991, unemployment rates had skyrocketed to levels that the country had not experienced in six years, reaching levels as high as 7 percent during the year and lingering around 6.8 percent towards the end of 1991. Hundreds of thousands of women

253. See Note, supra note 63, at 796 (discussing less discriminatory alternatives to all exclusive fetal protection policies).
255. See supra notes 198-217 and accompanying text.
256. See supra notes 186-254 and accompanying text (describing what is in a woman’s best interest).
257. See supra notes 199-203 and accompanying text (considering the economic consequences if fetal protection policies were legalized).
258. In September, 1991 the unemployment rate was 1.2 percent higher than it was in 1990. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, Nov. 1991, p. 119, table No. 7.
losing their jobs would only add to these already high unemployment levels. Therefore, although the Court may have made its decision without any regard to the economy's current status, this ruling would, nevertheless, save many jobs. This is certainly a step in the right direction toward overcoming the unemployment problem that our nation currently faces.\footnote{261}

Second, the Johnson Court refused to be persuaded by the circuit courts' policy analysis that the interest in protecting the next generation was more important than equal employment opportunities for women, and therefore, fetal protection policies should be justified as a business necessity.\footnote{262} Instead, the Court undertook an extensive legal analysis and concluded that Title VII and the Pregnancy Discrimination Act were designed to prevent this type of discrimination.\footnote{263} Such facial discrimination could only be defended by Title VII's statutory BFOQ exception.\footnote{264} The Supreme Court then proceeded to deny Johnson Controls use of such a defense on the grounds that a woman's ability to become pregnant did not affect her ability to perform her job effectively.\footnote{265} Moreover, the Court concluded that concerns about the safety of an employee's fetus were not essential to Johnson Control's business.\footnote{266} Although the Court mentioned society's interest in protecting unborn children, it asserted that the narrow BFOQ exception was simply not broad enough to include such concerns.\footnote{267}

In fact, the Johnson Controls Court undertook its own policy analysis and concluded that "[i]t 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."\footnote{268} This policy conclusion is more appropriate for today's women.\footnote{269} Johnson Controls represents a move in the right direction for women's goals, including being considered on equal grounds with men, and should rank up there with the Roe v. Wade decision. This Supreme Court decision gives a woman the

\footnotesize{261. Id (indicating the high unemployment rates in America).
262. See supra notes 83-95 and accompanying text (discussing the circuit court decisions).
263. See supra notes 102-149 and accompanying text (analyzing the legal aspects of the Johnson Court's decision).
264. Id.
265. See supra notes 121-149 and accompanying text (describing the safety exception to the BFOQ).
266. Id.
267. See Johnson Controls — U.S. at —, 111 S. Ct. at 1206.
268. Id. at 1210.
269. See supra notes 186-254 and accompanying text.
ability to make her own choices as to when a particular employment risk is too dangerous for her well being.\footnote{270} It also presumes that a woman is competent and responsible enough to make her own life decisions.\footnote{271} Furthermore, this landmark case avoids any painful emotional scars, such as the psychological effects of sexual discrimination or economically coerced sterilization.\footnote{272} Although there exists an important societal interest in protecting our future generation,\footnote{273} this interest should, and will, now yield to the equally compelling societal interest in ensuring free choice and equal employment opportunities for women.

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