Marquette Law Review

Volume 75
Issue 2 *Winter 1992*

Article 8

1992

Fetal Protection Policies No Longer a Bona Fide Occupational Qualification Defense? International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991).

Theresa M. Scannell

NOTE

Fetal Protection Policies No Longer a Bona Fide Occupational Qualification Defense? *International Union, UAW v. Johnson Controls*, 111 S. Ct. 1196 (1991)

I. INTRODUCTION

In today's society, factories use chemicals and other hazardous substances that may adversely affect employees' reproductive systems, as well as the health of fetuses carried by pregnant employees.[1] In response to these hazards and to potential tort liability, many employers have instituted policies that exclude fertile women from jobs that expose them to such substances.[2] Because these policies limit job opportunities, it is hotly debated whether fetal protection policies are morally, ethically, and legally justified.[3]

The United States Supreme Court, in *International Union, UAW v. Johnson Controls*,[4] recently decided the legal aspect of this debate. Johnson Controls, a Milwaukee-based producer of automotive batteries, instituted a fetal protection policy that excluded fertile women from jobs involving lead exposure in excess of the Occupational Safety and Health Administration (OSHA) standards.[5] The Supreme Court held that Title VII of the 1964 Civil Rights Act[6] forbids such sex-specific fetal protection policies because they overtly discriminate and are not justified as a bona fide occupational qualification.[7]

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1. *See* Pendleton Elizabeth Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of* International Union, UAW v. Johnson Controls, Inc., 75 CORNELL L. REV. 1110, 1120-24 (1990).

2. *See, e.g.*, Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 986 (5th Cir. 1982); *see also* Mary E. Becker, Note, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Wendy W. Williams, Note, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641, 641-43 (1981); Recent Case, 103 HARV. L. REV. 977, 980-83 (1990).

3. *See, e.g.*, Becker, *supra* note 2, at 1219-21; Williams, *supra* note 2, at 643; Arlynn Leiber Presser, *Women At Work: Should "Fetal Protection" Policies Be Upheld?* A.B.A. J., June 1990, at 38.

4. 111 S. Ct. 1196 (1991).

5. 29 C.F.R. § 1910.1025 (1991).

6. 42 U.S.C. §§ 2000e to 2000e-17 (1991).

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

This Note will discuss the impact of *Johnson Controls* on current Title VII law. First, the facts of *Johnson Controls* will be presented.[8] Second, a general background of the applicable law[9] will be discussed. Third, *Johnson Controls'* holding will be analyzed.[10] This article will conclude that *Johnson Controls* correctly follows established Title VII law and allows for a compromise among the competing concerns of employers, society, and employees.[11]

II. STATEMENT OF THE CASE

Johnson Controls is a major manufacturer of automotive batteries. Lead, a substance with known health risks to anyone exposed to it,[12] is a primary ingredient in the manufacturing process. From 1977 to 1982, Johnson Controls allowed women to work in the various jobs, but strongly warned female employees that if they expected to have a child, they should not choose a job which would expose them to lead.[13] Between 1979 and 1983, eight employees became pregnant while maintaining lead levels in their blood in excess of thirty micrograms per deciliter, the critical level set by the Occupational Safety and Health Act.[14] In response, and in fear of potential tort liability, the company instituted a new policy in 1982. Women were excluded from jobs exposing them to lead levels in excess of OSHA standards unless they could medically document their infertility.[15]

In April 1984, the International Union, United Auto Workers (UAW) filed a class action in United States District Court for the Eastern District of Wisconsin.[16] The plaintiffs challenged Johnson Controls' fetal protection policy as being discriminatory under Title VII of the 1964 Civil Rights

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8. See *infra* notes 12-22 and accompanying text.

9. See *infra* note 23-61 and accompanying text.

10. See *infra* notes 62-99 and accompanying text.

11. See *infra* notes 100-120 and accompanying text.

12. International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1199 (1991); *see also* Hamlet, *supra* note 1, at 1120-24; Williams, *supra* note 2, at 655-60.

13. *Johnson Controls*, 111 S. Ct. at 1199. Prior to June 1977, Johnson Controls did not employ any females in battery-manufacturing jobs. *Id.*

14. *Id.* at 1199-1200; *see* 29 C.F.R. § 1910.1025 (1991).

15. *Johnson Controls*, 111 S. Ct. at 1200. They were also excluded from promotions to jobs which could expose them to lead. *Id.*

16. The class was certified as "consisting of 'all past, present and future production and maintenance employees' in United Auto Workers bargaining units at nine of Johnson Controls' plants who have been and continue to be affected by [the employers] Fetal Protection Policy." *Id.* Individual plaintiffs included Mary Craig, who chose to be sterilized to avoid losing her job; Elsie Nason, who suffered a pay cut when she was transferred out of a lead-exposed job; and Donald Penney, who was denied a leave of absence to lower his lead level because he intended to become a father. *Id.*

Act.[17] The district court analyzed the policy under a three part business necessity defense: whether there is a substantial health risk to the fetus, whether transmission of the hazard to the fetus occurs only through women, and whether there is a less discriminatory alternative equally capable of preventing the hazard to the fetus.[18] The court granted summary judgment in favor of Johnson Controls because it found that there was a substantial hazard to the fetus, that the fetus was more vulnerable to lead exposure than adults, and that petitioners failed to establish an acceptable alternative capable of protecting the fetus.[19]

The Seventh Circuit affirmed summary judgment by a 7-4 vote.[20] Like the lower court, the majority held that the business necessity defense was the proper standard for evaluating the fetal protection policy and upheld the policy because there was a substantial risk of lead exposure to a fetus, the evidence of risk through the father's exposure, unlike the mother's, was "at best speculative," and petitioners did not present evidence of a less discriminatory alternative.[21] The court also ruled that Johnson Controls met the bona fide occupational qualification defense (BFOQ) because industrial safety is a part of the essence of its business and the policy is reasonably necessary to further this concern.[22] The Supreme Court granted certiorari and ruled that the fetal protection policy is facially discriminatory and not justified as a BFOQ.[23]

III. BACKGROUND OF THE LAW

A. Early History of Title VII

Historically, employers legally limited women's employment opportunities out of a professed "concern for the health of women and their offspring."[24] Title VII of the 1964 Civil Rights Act later declared such

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17. 42 U.S.C. §§ 2000e to 2000e-2 (1991).

18. International Union, UAW v. Johnson Controls, 680 F. Supp. 309, 313 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989), *rev'd* 111 S. Ct. 1196 (1991).

19. *Id.* at 315-16. Because the policy met the business necessity defense, a bona fide occupational qualification analysis was not necessary. *Id.* at 316 n.5.

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

21. *Id.* at 888-93.

22. *Id.* at 898. The Seventh Circuit became the first court of appeals to hold a fetal protection to be justified as a BFOQ.

23. *Johnson Controls*, 111 S. Ct. at 1196.

24. Hayes v. Shelby Memorial Hospital, 726 F.2d 1543, 1545 (11th Cir. 1984) (citing Muller v. Oregon, 208 U.S. 412 (1908)); *see* Note, *Developments in the Law Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166-95 (1971). Women were considered less able to protect themselves and suffered from such stereotypical views as

practices to be unlawful sex discrimination,[25] yet employers continued to limit employment opportunities on the basis of pregnancy. Although the Equal Employment Opportunity Commission stated that such a practice constitutes sex discrimination,[26] the Supreme Court, in *General Electric Co. v. Gilbert*,[27] held that pregnancy-based discrimination is not sex discrimination under Title VII.[28]

Congress quickly responded to the *Gilbert* decision by passing the Pregnancy Discrimination Act (PDA).[29] Title VII now states:

> The terms "because of sex" or "on the basis of sex" include . . . 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 . . . .[30]

The PDA overruled not only *Gilbert*'s holding that different treatment based on pregnancy is not a violation of Title VII, but also its test of sex

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having less need for money, a high rate of absenteeism, and being emotionally weak and incapable of doing the work. *Id.* at 1167-68.

25. 42 U.S.C. §§ 2000e to 2000e-2 (1991). This act states that it is unlawful for an employer to

> fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or . . . limit, segregate, or classify his employment or applications 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 . . . sex.

42 U.S.C. § 2000e-2.

26. Equal Employment Opportunity Commission Guideline, 29 C.F.R. § 1604.10(b) (1975). This states in pertinent part:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. . . . [Benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Id.

27. 429 U.S. 125 (1976).

28. The Court based its rationale on the premise that the employer's disability plan distinguished between pregnant women on the one hand and nonpregnant women and men on the other. Pregnancy-related disabilities are just an additional risk, unique to women. *Gilbert*, 429 U.S. at 139. Such a "neutral" distinction, however, can be discriminatory if the pregnancy concerns are a mere pretext to deny women of employment opportunities or have the effect of denying women such opportunities. *Id.*

29. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000(e)(k) (1991)).

30. 42 U.S.C. § 2000e(k) (1991).

discrimination.[31] Sex discrimination occurs where employees of one sex are treated in a manner which but for their sex would be different.[32]

B. Approaches to Title VII

The courts have developed two theories by which an employee may establish a Title VII violation—disparate treatment and disparate impact. Disparate treatment occurs where the employer treats some people less favorably because of race, religion, sex, color, or national origin. Proof of a discriminatory motive is critical, although such a motive may be inferred from the circumstances. Disparate impact cases involve a facially neutral employer practice that falls more harshly on one group of people than another. Unlike disparate treatment cases, proof of discriminatory motive is not necessary.[33] Although both theories are forms of Title VII discrimination, each is established differently and presents different defenses for the employer.[34]

In disparate treatment cases, the employee must establish by a preponderance of the evidence a facially discriminatory employment practice. The employee may make such a prima facie case by showing that she applied for an available job position for which she was qualified, but was rejected under circumstances giving rise to an inference of discrimination.[35] The employer must then rebut the presumption of discrimination by producing evidence of a legitimate nondiscriminatory reason for the employee's rejection.[36] The employer need not persuade the trier of fact that the defendant was actually motivated by the stated reasons. If a clear and reasonably specific

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31. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676 (1983).

32. *Id.* at 683 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)). Using this test, *Newport News* struck down as discriminatory an employer's insurance plan that provided less extensive pregnancy benefits for the spouses of male employees than it provided for female employees. *Id.* at 676.

33. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

34. *See* Hayes v. Shelby Memorial Hosp., 725 F.2d 1543, 1547 (1908).

35. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* Court stated that a prima facie case may be established through a four part showing: (1) the plaintiff belongs to a class protected by Title VII; (2) the plaintiff applied for a job for which the defendant was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was not hired; and (4) the position remained open and the employer continued to seek applicants from persons of plaintiff's qualification. *Id.* at 802. However, the Court recognized that the exact facts of this four part showing may vary with the circumstances. *Id.* at 802 n.13.

36. *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802. Obviously the employer cannot meet this burden merely through an answer in the complaint or by argument of counsel. The evidence must be legally sufficient to justify a judgment for the defendant. *Burdine*, 450 U.S. at 255. The employee retains the burden of persuading the trier of fact that the employer intentionally discriminated against the employee. *Id.* at 253.

reason is given, the policy is justified unless the employee shows that the proffered reason is merely a pretext for discrimination.[37] The employee may do this "by persuading the court that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence."[38]

Once a case of sex discrimination is made, the employer's only recourse is the statutory BFOQ affirmative defense. Under this defense, the employer's practice is unlawful except where the employer shows sex to be "a bona fide occupational qualification reasonably necessary to the normal occupation of that particular business."[39] This defense is extremely narrow[40] in that job qualification must be such that the essence of the business would be undermined without it. *Western Air Lines, Inc. v. Criswell*[41] established a two prong approach to the BFOQ defense. First, the job qualification must not be "so peripheral to the central mission of the employer's business"[42] that it is not reasonably necessary to the normal operation of the business. Second, to meet the "reasonably necessary" standard, the employer must show "a factual basis for believing, that all or substantially all [females] would be unable to perform safely and efficiently the duties of the job,"[43] or that it is impossible or highly impractical to deal with female employees on an individualized basis.[44]

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37. *See Burdine*, 450 U.S. at 256.

38. *Id.*; *see also McDonnell Douglas*, 411 U.S. at 804-05. The *McDonnell Douglas* Court indicated that evidence of a pretext included considerations of how others with the plaintiff's qualifications were treated, of the employer's prior treatment of the plaintiff during employment, and of the employer's general policy and practice with respect to minority (or other) employment. *McDonnell Douglas*, 411 U.S. at 804-05.

39. 42 U.S.C. § 2000e-2(e) (1991).

40. International Union, UAW v. Johnson Controls, 111 S. Ct. 1197, 1205 (1991); Dothard v. Rawlinson, 433 U.S. 321, 333 (1977). The *Dothard* Court found that the BFOQ defense was met because the height and weight requirements for correctional counselors in high security prisons were necessary to counteract the environment of violence and disorganization in the penitentiaries, where essence of the job is to maintain security. *Dothard*, 433 U.S. at 334-35.

41. 472 U.S. 400 (1985).

42. *Id.* at 413. In some cases, safety concerns of third parties may go to the essence, or central mission, of the business, such as business customers who are indispensable to the business. *See Dothard*, 433 U.S. 321 (holding safety is part of the essence of a correctional counselor's job in a high security prison); Western Airlines v. Criswell, 472 U.S. 400 (1985) (using the Age Discrimination Employment Act's parallel to Title VII's BFOQ—safety was held to be part of the essence of an airline's business). Where safety does go to the essence of the business, "[t]he greater safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to ensure [safety]." *Criswell*, 472 U.S. at 413 (quoting Usery v. Tamiami Trial Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976)).

43. *Criswell*, 472 U.S. at 414.

44. *Id.*

Griggs v. Duke Power Co.[45] and its progeny set forth the disparate impact situation. This line of cases holds that Title VII covers "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[46] To establish a case of disparate impact, the employee must establish that the employer's policy has a discriminatory effect despite being neutral on its face, and even neutral in terms of the employer's intent.[47] Such a policy is prohibited unless the employer justifies it as a business necessity.[48]

Unlike the BFOQ, the business necessity defense was created by case law. When *Griggs* expanded Title VII to prohibit discrimination resulting from disparate impact, the Supreme Court created the business necessity defense to dispel the inference of discrimination that arises because of a policy's discriminatory impact.[49] In fact, business necessity is not really a defense to discrimination. Instead, it assists in the determination of whether the policy is discriminatory in the first instance.[50] When asserting this defense, the employer has the burden of production, but not persuasion,[51] to show that "any given requirement [has] a manifest relationship to

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45. 401 U.S. 424 (1971). The *Griggs* Court struck down policies that indirectly continued the employer's formerly overt discriminatory practices by requiring employees to pass aptitude tests and to have a high school education. Such neutral policies "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." *Id.* at 430. The Court went on to state that although Title VII

> does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group . . . [w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

46. *Id.* at 431.

47. *Id.* at 430; *see* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The *Moody* Court struck down a policy similar to the one in *Griggs* because it was not shown "to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Moody*, 422 U.S. at 431 (citing EEOC Guideline, 29 C.F.R. § 1607.4(c) (1975)).

48. *Griggs*, 401 U.S. at 431. Unlike the BFOQ, there is "no requirement that the challenged practice be 'essential' or 'indispensable' to the employers business for it to pass muster" under the business necessity defense. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

49. *Griggs*, 401 U.S. at 431.

50. *See* Stephen F. Befort, Note, *BFOQ Revisited:* Johnson Controls *Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 10 (1991).

51. *Wards Cove*, 490 U.S. at 659. This holding reversed prior Supreme Court decisions that placed this burden on the employer, and now makes it harder for the employee to establish a case of discrimination. *See Griggs*, 401 U.S. at 424; *Moody*, 422 U.S. at 405. However, the Civil Rights Act of 1991 overturns the *Wards Cove* holding by again placing both the burden of production and persuasion on the employer. 42 U.S.C. §§ 2000e(m), 2000e-(k)(2)(A)(i) (1991).

the employment in question."[52] The necessity must relate to the safe and efficient operation of the business.[53] If the employer meets its burden and the employee fails to persuade the fact finder that the defense does not apply, the policy will be upheld unless the employee shows that "other [policies], without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[54]

C. *Fetal Protection Issues*

In light of this background, the issue now is how to deal with fetal protection policies instituted in the work place. This issue involves the interrelation of Title VII's regulation of employment discrimination and the Occupational Safety and Health Act's[55] regulation of work place safety. Many employment situations expose workers to toxic substances which "could cause harm to . . . reproductive systems [of both men and women] and prove deadly to a fetus."[56] Although the exact effect of many substances is largely unknown,[57] it is known that lead is extremely dangerous to human health, even in moderate doses.[58] Furthermore, every jurisdiction now permits suits by children who were injured as fetuses by third

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

53. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977). "Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract." *Griggs*, 401 U.S. at 436. Although not adopted by the Supreme Court, an alternative test expands the business necessity defense beyond mere job relatedness by showing that (1) the purpose must be sufficiently compelling to override any discriminatory impact, (2) the policy must effectively carry out the business purpose it is alleged to serve, and (3) there must be no acceptable alternative policies or practices which would better accomplish the business purpose advanced. Robinson v. Lorrillard, 444 F.2d 791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971).

54. *Moody*, 422 U.S. at 425.

55. 29 U.S.C. § 651 (1991).

56. Hamlet, *supra* note 1, at 1121.

57. As one scholar noted, "[t]he lack of scientific evidence regarding the effect of chemicals on the reproductive systems of both male and female workers complicates the problem of articulating an adequate fetal protection policy." *Id.* at 1122.

58. *Id.* at 1121-22. The author goes on to state:

> [T]oleration levels for lead exposure are much lower for young children and developing fetuses than for adult men and women. Lead attacks the human nervous system, posing serious hazards to a developing brain. Lead-exposed fetuses are threatened with stillbirth, low birth weight, and 'retarded cognitive development which may result in learning and behavioral disorders.' The fact that the human body stores lead in soft tissues and bone further complicates the problem of lead exposure; high levels of lead may remain in a worker's bloodstream for a long period of time after removal of the worker from a toxic area. This makes it difficult for women to plan pregnancies while working, and it poses a real threat to fetuses in unexpected or accidental pregnancies.

Id. at 1124 (citations omitted).

parties.[59] As a result, employers may face potential tort liability for any injuries that these children may receive as a result of their parents' exposure to toxic substances in the work place.[60]

Motivated by concern for the effect of such substances on fetuses and for potential tort liability,[61] "employers opt to close doors to women workers rather than face potential liability for future injuries"[62] and thus institute fetal protection policies. These policies generally exclude only women from jobs exposing them to such substances despite studies that indicate that men and their offspring are also at risk. Furthermore, women are "excluded more often from the traditionally male-intensive jobs than female-intensive jobs, even when exposures [to hazardous substances] are similar."[63] Many courts must now decide what approach to use in evaluating sex-specific fetal protection policies under Title VII. Courts which have decided this issue have reached different results: some adopted the disparate impact approach,[64] others adopted the overt discrimination approach,[65] and still others formulated their own approach.[66]

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59. *Id.* at 1127.

60. *Id.* at 1126-27. Most authors believe that parental waiver would not bar such suits, though there are arguments to the contrary. *See* International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1211 (1991); 3 FOWLER HARPER, ET AL., LAW OF TORTS 677-78 n.15 (2d ed. 1986); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984).

61. It is noteworthy that despite these fears, awards regarding prenatal injuries from maternal exposure to toxins at the work place are almost nonexistent, and that many scholars feel that there is almost no basis for holding an employer liable for fetal harm if the employer fully informs the employee of the risks and has not acted in a negligent manner. Hamlet, *supra* note 1, at 1125-26.

62. *Id.* at 1124.

63. Williams, *supra* note 2, at 649 (footnote omitted). For example, female workers are not excluded from certain health care jobs and clerical jobs where they sit in front of video display terminals, which also present reproductive health hazards. Hamlet, *supra* note 1, at 1125; BNA SPECIAL REPORT, PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE, HEALTH AND SAFETY 58 (1987); Becker, *supra* note 2, at 1219; Williams, *supra* note 2, at 649 n.58. It has been noted that "[a]s a general pattern, employers will not employ women in toxic areas unless their need for a female labor source outweighs their fear of tort liability." Hamlet, *supra* note 1, at 1125.

64. Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) (decided under pre-PDA law, the court found that pregnant x-ray technicians who were denied a leave of absence and not guaranteed a job on return faced a substantial burden male x-ray technicians did not face); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (decided under post-PDA law, but ignored the PDA's mandate that pregnancy discrimination is overt gender discrimination, noting that the BFOQ defense was too hard for employers to meet).

65. Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990) (decided shortly after the Supreme Court granted certiorari in *Johnson Controls*, it became the first appellate court to note in the fetal protection area that the PDA transformed distinctions based on pregnancy into overt sexual discrimination so that the only defense is the BFOQ).

66. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1543-44 (11th Cir. 1984) (interpreted the PDA as making distinctions based on pregnancy presumptively discriminatory, which can be

IV. EVALUATION OF *JOHNSON CONTROLS*

A. The Majority Opinion

In *International Union, UAW v. Johnson Controls*,[67] the Supreme Court held that sex-specific fetal protection policies are explicitly discriminatory and can only be justified as a BFOQ.[68] By excluding fertile women from jobs which would expose them to lead while "[f]ertile men . . . are given a choice as to whether they wish to risk their reproductive health for a particular job,"[69] Johnson Controls created a classification based on gender, thus discriminating against women.[70] Moreover, by using "capable of bearing children" as the criterion for exclusion and by treating all female employees as potentially pregnant, Johnson Controls' policy discriminated on the basis of pregnancy, which the Pregnancy Discrimination Act (PDA)[71] states is gender-based discrimination.[72] Johnson Controls' benevolent intent did not make this explicitly discriminatory policy neutral.[73] In sum, the policy treated "a person in a manner which but for that person's sex would be different."[74]

Narrowly construing the BFOQ defense, the majority ruled that the BFOQ defense prohibits an employer from discriminating against a woman because of her capacity to become pregnant unless it prevents her from do-

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rebutted if "the employer shows (1) that a substantial risk of harm exists and (2) that the risk is borne only by members of one sex; and (3) the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex."). *Id.* at 1554.

67. 111 S. Ct. 1196 (1991).

68. *Id.* at 1204 (citing Equal Employment Opportunity Commission's Policy Guidance, Appendix to Petition for Certiorari 127a at 133a-134a, International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991)).

69. *Id.* at 1202. The respondent assumed as much in its brief, yet the Seventh Circuit, like other circuits, still assumed that such policies do not involve facial discrimination and proceeded to analyze them under the business necessity defense. *Id.* at 1203; *see also* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1190 (4th Cir. 1982).

70. *Johnson Controls*, 111 S. Ct. at 1203. Johnson Controls is "concerned only with the harms that may befall the unborn offspring of its female employees," as evidenced by its requirement that only female employees must produce proof of their infertility. *Id.* at 1203.

71. 42 U.S.C. § 2000e(k) (1991).

72. *Johnson Controls*, 111 S. Ct. at 1203; *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983). This is true despite evidence about the risks of lead exposure on the male reproductive system. *Johnson Controls*, 111 S. Ct. at 1202-03.

73. As the Court noted, "disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Id.* at 1204; *see* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (motives underlying the employer's express exclusion of women did not alter the policy's intentionally discriminatory character).

74. *Johnson Controls*, 111 S. Ct. at 1204 (quoting Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

ing the job.[75] The language of Title VII of the Civil Rights Act[76] and the PDA,[77] as well as their legislative histories[78] and case law,[79] support this interpretation by indicating that the occupational qualification must be objective and must concern job-related skills and aptitudes so that the qualification falls within the essence of the business. Safety concerns constitute a BFOQ only where "sex or pregnancy actually interferes with the woman's ability to perform the job."[80] Concerns about the safety of third parties properly justify a policy only where those third parties are so indispensable to the particular business that the employee's job performance and the central purpose of the business are implicated.[81] Unconceived fetuses are "neither customers nor third parties whose safety is essential to the business of battery manufacturing."[82]

Under this interpretation, Johnson Controls' policy was not a BFOQ. Fertile women were able to perform the job in question as safely and efficiently as anyone else, and there was no factual basis for believing other-

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75. *Id.* at 1204-07.

76. The BFOQ defense reaches only "those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e-2(e)(1) (1991).

77. "[W]omen 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. § 2000 e(k) (1991).

78. AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. NO. 331, 95th Cong., 1st Sess. 4-6 (1977) states:

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

See also PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. NO. 948, 95th Cong., 2d Sess. 3-6, *reprinted in* 1978 U.S.C.C.A.N. 4749. Congress thus made clear that the decision to become pregnant or work while pregnant or fertile is reserved for each woman to make for herself.

79. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).

80. *Johnson Controls*, 111 S. Ct. at 1206.

81. *Id.*; *see, e.g., Dothard*, 433 U.S. at 321 (high security prison counselors); *Criswell*, 472 U.S. at 400 (flight engineers); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980) *cert. denied*, 450 U.S. 965 (1981) (flight attendants); Gardner v. National Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977), *aff'd*, 965 F.2d 1457 (11th Cir. 1990) Thus, the court reiterates that "an employer must direct its concerns about a women's ability to perform her job safely and efficiently to those aspects of the woman's job related activities that fall within the 'essence' of the particular business." *Johnson Controls*, 111 S. Ct. at 1207.

82. *Johnson Controls*, 111 S. Ct. at 1206. Though no one can disregard the possibility of injury to future children, the BFOQ is not so broad as to transform this social concern into an essential aspect of battery making. *Id.*

wise. Concern about the welfare of the next generation does not establish a BFOQ defense.[83] Title VII and the PDA mandate that "[d]ecisions about the welfare of future children 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."[84] Such concerns, the majority stated, do not go to the "essence" of Johnson Controls' business.[85]

While potential fetal injury "is a social cost that Title VII does not require a company to ignore,"[86] the majority felt that this concern did not conflict with Title VII's ban of sex-specific fetal protection policies.[87] OSHA considered this problem but concluded "there is no basis whatsoever for the claim that women of child bearing age should be excluded from the workplace in order to protect the fetus."[88] Furthermore, Title VII forbids illegal sex discrimination as a way to divert attention from an employer's obligation to police the workplace.[89] Given that Title VII bans sex-specific fetal protection policies, the majority believed that as long as "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."[90]

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83. Johnson Controls' fear of prenatal injury, no matter how sincere, did not begin to show that a substantial number of pregnant women were incapable of doing their job. In addition, the record does not indicate that there are many Johnson Controls workers who do in fact become pregnant. National statistics indicate that approximately nine percent of fertile women become pregnant each year and this drops to two percent for blue collar workers over thirty. *Id.; see* Becker, *supra* note 2 at 1233. Furthermore, of the eight reported pregnancies, it hasn't been shown that any of the babies have birth defects or abnormalities. *Johnson Controls*, 111 S. Ct. at 1208.

84. *Id.* at 1207.

85. *Id.* It is mere word play to say that Johnson Controls' job is to make batteries without risk to fetuses in the same way Western Air Lines' job is to fly planes without crashing. *Id.* (quoting International Union, UAW v. Johnson Controls, 886 F.2d 871, 913 (1988) (Easterbrook, J., dissenting).

86. The cost includes not only the injury, but also tort liability since almost all states recognize a right to recover for a prenatal injury based on negligence or wrongful death. *Id.* at 1208 (citing *Johnson Controls*, 886 F.2d at 904-05).

87. *Id.* at 1208.

88. *Id.* at 1209.

89. *Id.* (citing 43 Fed. Reg. 52952, 52966 (1978)).

90. *Id.* at 1208. To the extent state tort law furthers discrimination in the work place and prevents employers from hiring women who are capable of doing the job as efficiently as men, it will impede the goals behind Title VII. Such state laws are thus preempted by Title VII, since they punish employers for complying with Title VII. *Id.* at 1209; *see, e.g.*, Florida Line & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959).

Any incremental cost of employing members of one sex is irrelevant to the BFOQ defense.[91]

B. The White, Rehnquist, and Kennedy Concurrence

In their concurrence, Justice White, Chief Justice Rehnquist, and Justice Kennedy believed that the BFOQ defense was broad enough to include considerations of cost, safety, and potential tort liability and could justify sex-specific policies.[92] Both *Dothard v. Rawlinson*[93] and *Western Airlines v. Criswell*[94] make it clear that

> avoidance of substantial safety risks to third parties is *inherently* part of both an employee's ability to perform a job and an employer's normal operation of its business . . . [and] that costs are relevant in determining whether a discriminatory policy is reasonably necessary for the normal operation of a business.[95]

Common sense dictates that it is "part of the normal operation of business . . . to avoid causing [harm] to [others] as well as . . . to avoid tort liability and its substantial costs."[96] Furthermore, the PDA does not restrict this

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91. *Johnson Controls*, 111 S. Ct. at 1209 (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-18 n.32 (1978)). Congress considered the cost of providing equal treatment of pregnancy and related conditions "but made the 'decision to forbid special treatment of pregnancy despite the social costs associated therewith.' " *Id.* (quoting Arizona Governing Committee v. Norris, 463 U.S. 1073, 1084 n.14 (1983)). The Court "did not decide a case in which costs would be so prohibitive as to threaten the survival of the employer's business." *Id.*

92. *Id.* at 1210-11 (White, J., concurring). Nothing in the wording of the statutory BFOQ defense indicates that it could never justify sex-specific fetal protection policies. *Id.* Furthermore, contrary to what the majority suggests, tort liability for fetal injuries is a very real possibility. First, it is not clear that Title VII preempts state tort law. *Id.* Second, although warnings may preclude employee's claims, they do not preclude their children's claims because parents cannot waive causes of actions on behalf of the children. *Id.* Finally, it will be difficult for employers to determine in advance what constitutes negligence. *Id.* Mere compliance with OSHA is not a defense to tort liability. *Id.* (citing National Solid Wastes Management Ass'n. v. Killian, 918 F.2d 671, 680 (7th Cir. 1990)). Moreover, strict liability is a possibility if the manufacturing process is abnormally dangerous. *Id.*

93. 433 U.S. 321 (1977).

94. 472 U.S. 400 (1985).

95. *Johnson Controls*, 111 S. Ct. at 1213 (White, J., concurring) (emphasis in original); *Dothard*, 433 U.S. 321 (Safety concerns of female prison guards justified sex as BFOQ). In *Criswell*, the Court held that "[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." *Criswell*, 472 U.S. at 419.

96. *Johnson Controls*, 111 S. Ct. at 1210 (White, J., concurring). The majority's reliance on *Manhart* for the proposition that extra costs is not a defense is misplaced because that decision did not hold that costs were irrelevant to a BFOQ. *Id.* at 1211.

BFOQ test. It merely clarifies "that pregnancy and related conditions are included within Title VII's anti-discrimination provisions."[97]

The concurrence agreed, however, that summary judgment was improper because there was a dispute over material facts.[98] First, the lower court failed to consider whether the policy insisted on a risk avoidance level higher than that normally tolerated in the operation of Johnson Controls' business.[99] Second, the policy reached too far with its presumption of fertility and "exclusion of presumptively fertile women from positions that might result in a promotion to a position involving high lead exposure levels."[100] Third, Johnson Controls did not identify any grounds for believing its current policy to be reasonably necessary to its normal operations.[101] Neither did it show that the risk of harm or costs substantially increased since the institution of its old policy.[102] Finally, the lower court failed to consider the evidence of harm to the offspring caused by lead exposure in males.[103]

C. *Justice Scalia's Concurrence*

Justice Scalia, although generally agreeing with the majority, expressed some reservations. First, he believed that evidence about the debilitating effect of lead exposure on the male reproductive system was irrelevant. The policy would still be discriminatory without such evidence because it treats women differently than men on the basis of pregnancy.[104] The fact that Johnson Controls showed no factual basis for believing that all or substantially all women would be unable to perform their job safely was also irrelevant because "Title VII gives parents the power to make occupational decisions affecting their families."[105] Furthermore, he indicated that preemptions only result when compliance with Title VII violates state law. However, because he believed Title VII accommodates state tort law

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97. *Id.* at 1213 (White, J., concurring); *see* AMENDING TITLE VII, *supra* note 78, at 4 ("[I]t did not change the application of Title VII . . . in any other way" other than including pregnancy within its terms); PROHIBITION OF SEX DISCRIMINATION, *supra* note 78, at 4 ("Pregnancy-based distinctions are subject to the same scrutiny on the same terms as other acts of sex discrimination").

98. *Johnson Controls*, 111 S. Ct. at 1215-16 (White, J., concurring).

99. *Id.* at 1215 (White, J., concurring).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1216 (Scalia, J., concurring) (citing Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1991)).

105. *Id.* (Scalia, J., concurring) (quoting International Union, UAW v. Johnson Controls, 886 F.2d 871, 915 (1988) (Easterbrook, J., dissenting)).

through the BFOQ exception, Justice Scalia was still willing to assume that action required by Title VII could not give rise to liability under state tort law. In any event, Johnson Controls "has not demonstrated a substantial risk of tort liability—which is alone enough to defeat a tort-based assertion of BFOQ exception."[106] Finally, nothing in prior case law suggested that increased costs could not support a BFOQ defense. However, Johnson Controls did not assert a cost-based BFOQ. For these reasons, Justice Scalia believed that summary judgment was improper.

V. ANALYSIS

International Union, UAW v. Johnson Controls'[107] majority properly follows Title VII of the 1964 Civil Rights Act[108] law by applying the BFOQ defense. Lower courts fashioned a result-oriented approach based on the business necessity defense and ignored the basic fact that sex-specific fetal protection programs constitute overt gender discrimination.[109] Not only did Johnson Controls discriminate on the basis of sex by excluding only fertile women, but it also discriminated on the basis of pregnancy by excluding only those capable of bearing children.[110] The BFOQ is the only defense in such cases,[111] and it only applies to those cases where sex or pregnancy adversely affect the person's ability to do the job.[112] Cost considerations and the health of fetuses are simply unrelated to the person's ability to do the job.

Extending the BFOQ to allow, in all cases, for concerns of third party safety would confuse the narrow BFOQ with the broader business necessity defense.[113] It would also contravene the Pregnancy Discrimination Act's (PDA) mandate that pregnant women be treated the same as those with similar abilities, as well as inadequately protect women from employers' decisions, who generally apply such policies only to women and only when they are perceived as marginal workers. Furthermore, the use of the business necessity defense, which places on the plaintiff the burden of persuading the lack of a defense, with sex-specific policies would also be improper.

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106. *Id.* (Scalia, J., concurring).

107. 111 S. Ct. 1196 (1991).

108. 42 U.S.C. §§ 2000e to 2000e-17 (1991).

109. *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Becker, *supra* note 2; Williams, *supra* note 2. This was not unusual for federal courts, as they commonly confused business necessity with BFOQ.

110. Williams, *supra* note 2, at 677-78; *see supra* notes 62-69 and accompanying text.

111. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991).

112. *See supra* notes 70-78 and accompanying text.

113. Business necessity is defined in terms of safety and efficiency. *See* Recent Case, *supra* note 2, at 981.

This defense was made only for neutral policies having a discriminatory effect[114] and to use it here would undermine the protection of Title VII and the PDA.[115] This is not to say that the business necessity defense is never appropriate or that fetal protection policies are forever banned. *Johnson Controls* only mandates that the policies not be discriminatory. If the policies are facially neutral, they may be defended as a business necessity, which allows for consideration of cost and safety[116] and which justifies policies where there is clear evidence of fetal harm through maternal exposure and no evidence of other causes of harm.[117]

Johnson Controls is also correct in not making fetal protection policies an exception to the traditional Title VII mandates. Title VII was designed to regulate employment discrimination, not work place safety. Regulation of work place safety is the function of the Occupational Safety and Health Act (OSHA).[118] Fetal protection requires a balancing of these two statutes and their goals.[119] A compromise must be made between employers' and society's concern for fetal safety, costs, and tort liability. None of these concerns have been so "compelling that society has seen fit to provide absolute protection for them."[120] While "parents do have a right to make unhindered routine decisions concerning the child's physical welfare,"[121] limits have been placed where society has an overriding compelling interest in the child's safety.[122] On the other hand, employers should not be given free reign in making fetal protection policies. Absent an incentive to consider the concerns of female employees, employers tend to consider only their own concerns and will institute the most cost-effective policy despite the adverse effect it may have on women. By allowing only nondiscriminatory fetal protection policies, Johnson Controls continues Title VII's prohibition of sex discrimination, yet allows for the regulation of work place safety.

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114. *See supra* note 48 and accompanying text.

115. *See* Hamlet, *supra* note 1, at 1141-42.

116. Alternatively, neutral policies can still be challenged as a pretext for discrimination. *See supra* notes 42-50 and accompanying text.

117. Williams, *supra* note 2, at 652.

118. 29 U.S.C. § 651 (1991).

119. One scholar has suggested that should OSHA standards necessitate sex-specific fetal protection policies, then the mandates of Title VII should give way unless a less discriminatory alternative is feasible. However, Title VII's goals should prevail when a safety policy exceeds or conflicts with OSHA standards. Befort, *supra* note 50, at 45.

120. Williams, *supra* note 2, at 652.

121. *Id.*

122. *Id.*

Sex-specific fetal protection policies should be used with caution. They have the same troubling aspects as the sex-specific protectionist legislation of the pre-Title VII era. First, exclusionary policies relegate women to lower paying, traditionally female jobs with fewer health benefits. Such lower paying jobs also involve exposure to hazardous substances, yet typically are not covered by fetal protection policies because female workers are needed. Given these facts, such policies may hurt more than aid fetal safety. Second, such policies treat women only as child bearers and fail to consider that women have an interest in earning a living and being a productive part of society. Third, such policies, by applying only to women, are also too narrow because they ignore evidence that the same substances equally affect the male's reproductive system and his children.[123] Fourth, fetal protection policies are not instituted uniformly. The policies tend to exist only in those jobs where women are considered marginal workers. Finally, such policies ignore the fact that women are competent decision makers, are concerned for their children's health, and, once informed of the risks and advantages, are in a better position than their employers to make decisions as to fetal safety.[124]

Should there ever be a need for sex-specific fetal protection policies, Congress, not the employers or the courts, should institute them. Employers have no incentive to balance competing interests. Courts tend to be biased against women's claims of discrimination, with some even dismissing such claims with overt hostility to the female claimants.[125] Congress, on the other hand, will be lobbied from both sides and will more likely come to a balanced compromise. Whatever Congress does, though, it should keep in mind the presumption that both men and women have the right to make informed decisions as to the environment they will work.[126] Furthermore, individuals excluded from a job should be compensated for the loss incurred so that they do not bear the entire cost of fetal safety.[127]

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123. International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1196 (1991).

124. 42 U.S.C. §§ 2000e to 2000e-17 (1991).

125. *Johnson Controls*, 111 S. Ct. at 1260. Most judges currently tend to hold stereotypical views of women. *Id.* at 1261.

126. One scholar suggested that employees be allowed to transfer out of a hazardous job to an available job upon their request, although this does not require the employer to maintain the employee's former wage rate, nor to create additional jobs to accommodate the change. This allows an employee to "control his or her toxic exposure level by attempting to ensure some degree of job flexibility in light of personal reproductive plans." Hamlet, *supra* note 1, at 1147.

127. Employers, as an argument for fetal protection policies, state that they should not be the one to bear the cost of fetal safety. This begs the question of why all female employees, many of whom do not intend to and will not have children, should bear the full cost.

The *Johnson Controls* decision does leave several issues open. The first is the scope of the BFOQ. While the majority opinion narrowly construed the BFOQ defense to allow policies only where they relate to the employee's actual ability to perform the job, the concurring opinions expanded the BFOQ to include considerations of cost and safety. A decision on the scope of the BFOQ was unnecessary in *Johnson Controls* because Johnson Controls' policy was not justified even under the broad BFOQ defense advocated by the concurring justices. The majority correctly narrowed the scope of the BFOQ. To include considerations of cost and safety would confuse the BFOQ, which is a defense to overt discrimination, with the business necessity defense, which justifies neutral policies having a discriminatory effect.

The effect of Title VII on employer's potential tort liability towards children of employees also remains unanswered. Should OSHA standards be too lenient, compliance with Title VII and OSHA may still result in injuries to children of employees, and thus lend to potential liability under state tort law. While the majority of the justices were willing to assume that compliance with Title VII would prevent any state tort liability, Justices White, Rehnquist, and Kennedy strongly felt otherwise. Justice Scalia was correct in stating that preemption occurs only when compliance with Title VII requires a violation of state tort law.[128] Furthermore, as indicated by the White opinion, warnings to employees of potential hazards will not preclude claims by injured children because parents cannot waive causes of action on behalf of their children.[129] Nevertheless, because tort liability still remains a possibility despite the prohibition of sex-specific fetal protection policies, the fear of liability provides an incentive for employers to make the work place safe for *all* employees.

VI. CONCLUSION

The Supreme Court in *International Union, UAW v. Johnson Controls*[130] clarified the proper guidelines for lower courts to follow when judging fetal protection programs. The Court recognized that sex-specific fetal protection policies are overtly discriminatory and are generally unjustified as a BFOQ. This interpretation of the 1964 Civil Rights Act comports with established Title VII[131] law and allows for a balancing of the interests of the employers and society in fetal safety with those of the employees in equal

128. *Johnson Controls*, 111 S. Ct. at 1216 (Scalia, J., concurring).
129. *Id.* at 1211 (White, J., concurring).
130. 111 S. Ct. 1196 (1991).
131. 42 U.S.C. §§ 2000e to 2000e-17 (1991).

employment opportunities. Any changes in this law should be made by Congress. The precise scope of the BFOQ defense and the preemptive effect of Title VII towards state tort liability still remain in issue. However, *Johnson Controls* clarified Title VII law with respect to fetal protection policies by indicating that the BFOQ defense, and not the business necessity defense, applies to sex-specific policies. Furthermore, given this decision, the fear of tort liability will provide an incentive to make the work place safe for all employees.

THERESA M. SCANNELL