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From the Inception to the aftermath of International Union, UAW v. Johnson Controls, Inc.: Achieving Its Potential to Advance Women's Employment Rights

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As women entered the work force in increasing numbers during the twentieth century, employers instituted policies limiting their participation in certain work-related activities on the basis of gender or reproductive capacity.1 Frequently, employers rationalized such policies by espousing the stereotype that women, as the weaker and more delicate sex, required special rules and guidance.2

1. See, e.g., Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding an Iowa statute proscribing the number of hours women were permitted to work). For a citation list of nineteen other state statutes that imposed mandatory working hours for women, see id. at 419 n.1; see also Mary E. Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Cin. L. Rev. 1219 (1986) (examining the development of fetal protection policies from Muller to modern case law).

2. See Muller, 208 U.S. at 421. The Muller Court graphically depicted society's view of women in 1908:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. The Muller Court added: “Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control . . . has continued to the present.” Id. This view continued well into the 20th century, as recognized by the findings of a congressional committee in 1978: “Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant.” H.R. REP. No. 948, 95th Cong., 2d Sess. 6-7 (1978). The Petitioners in International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991), cited these stereotypes in support of their argument to the Supreme Court, stating: “[T]here is at least a substantial risk that employers instituting fetal protection policies are expressing, albeit unthinking, the stereotypical assumption that women are marginal workers whose economic importance and need for employment is necessarily subordinate to their childbearing role.” Brief for Petitioner at 24, Johnson Controls (No. 89-1215). Cf. Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 710 (1978) (invalidating under Title VII an employer’s policy of requiring women to contribute more than men to retirement plans based on the assumption that women generally outlive men). The Manhart Court noted: “It is now well
Congress sought to eliminate discriminatory employment practices by enacting Title VII of the Civil Rights Act of 1964, which contains prohibitions against gender discrimination in the workplace. § 703(a) of the Act provides, in pertinent part:

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.

Section 703(a) of the Act provides, in pertinent part:


4. Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise...

Id. Note that race is excluded from the BFOQ exception; therefore, a policy explicitly discriminating against an individual on the basis of race will be invalidated automatically. See Stephen F. Befort, BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination, 52 Ohio St. L.J. 5, 5-7 (1991) (discussing the basic components of the BFOQ defense and its minimal legislative history).

5. See, e.g., Harris v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980) (upholding under the BFOQ exception, a company policy requiring pregnant flight attendants to take mandatory leaves of absences on the ground that their pregnancy would impair their mobility, affecting their job performance); Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977) (sustaining a facially discriminatory company policy that required pregnant flight attendants to take mandatory leaves of absence on the ground that endurance and strength are BFOQs for the job), cert. denied, 435 U.S. 934 (1978). See also Torres v. Wisconsin Dept' of Health & Social Servs., 859 F.2d 1523 (7th Cir. 1988) (upholding womanhood as a BFOQ for correctional officer positions in an exclusively women prison), cert. denied, 489 U.S. 1017, and cert. denied, 489 U.S. 1082 (1989).
Facially discriminatory or disparate treatment policies directly violate Title VII's prohibitions against gender discrimination because the measures themselves contain language explicitly discriminating on the basis of gender. Such employer regulations will be invalidated unless the employer successfully raises the BFOQ defense. In contrast, disparate impact policies contain no explicit reference to gender in the policies' actual language, thus they do not expressly target a protected group for differential treatment. However, as applied, such policies disproportionately burden women. Facially neutral policies may be upheld if the employer successfully raises the business necessity defense.

In 1978, Congress enacted the Pregnancy Discrimination Act (PDA) as an amendment to Title VII, in order to accord women greater protection from so-called "neutral policies" that do not discriminate on the basis of gender per se, but rather discriminate on the basis of pregnancy. The

6. See, e.g., Harris, 649 F.2d at 676-77.
7. See supra note 5 and accompanying text for examples of this defense.
8. See, e.g., Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (sustaining an employer policy that excluded fertile women from certain jobs by determining that the employer successfully raised the business necessity defense). For discussions of the differences between the two tests, see Pendleton E. Hamlet, Note, Fetal Protection Policies: A Statutory Proposal in the Wake of International Union, UAW v. Johnson Controls, Inc., 75 Cornell L. Rev. 1110, 1112-14 (1990) (examining the two theories and providing examples).
10. See, e.g., Burwell v. Eastern Air Lines, Inc. 633 F.2d 361 (4th Cir. 1980) (sustaining as a business necessity an employer's policy requiring that flight attendants take a mandatory leave of absence between the thirteenth and twenty-eighth weeks of pregnancy on the grounds that overriding passenger safety concerns justified the discrimination and no reasonable alternative existed), cert. denied, 450 U.S. 965 (1981); see STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2D Sess., A REPORT ON THE EEOC, TITLE VII AND WORKPLACE FETAL PROTECTION POLICIES IN THE 1980s, 13 (Comm. Print 1990) [hereinafter EDUCATION AND LABOR REPORT]. The House Report describes disparate impact policies as:
neutral employment practices which have discriminatory effects, without having to prove discriminatory intent . . . . A minimum height requirement is an example of such a policy, because it would screen out more female than male applicants. Under this theory, an employment practice violates Title VII if it has a significant "disparate impact" on women, unless the employer establishes that the policy is justified by business necessity.

Id.; see also Befort, supra note 4, at 8 (containing a succinct summary of disparate treatment and disparate impact theories).

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical con-
PDA mandates that policies which deprive women of employment opportunities on the basis of pregnancy or "related medical conditions" are equivalent to explicit gender discrimination and, therefore, directly violate Title VII's proscriptions against gender discrimination.\(^1\) Despite these clear legislative pronouncements, prior to the Supreme Court's decision in *International Union, UAW v. Johnson Controls, Inc.*,\(^2\) no clear consensus existed among the circuits as to whether gender-based, fetal protection policies consistently required disparate treatment/BFOQ analysis or disparate impact/business necessity analysis.\(^3\)

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\(^1\) Id.

\(^2\) See *id.*; Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (striking down as unlawful under the PDA, a company policy that excluded male employee's spouses from receiving pregnancy benefits by equating discrimination on the basis of pregnancy with overt gender discrimination).

\(^3\) See, e.g., *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1554 (11th Cir. 1984) (sustaining under the business necessity defense an employer policy requiring pregnant x-ray technicians to take mandatory leaves of absences); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) (utilizing the disparate impact framework to uphold, under the business necessity defense, an employer policy barring fertile women from certain positions); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 369 (4th Cir. 1980) (classifying an employer's mandatory leave policy as facially neutral; however, "[t]he trial court, recognize[ed] [that] some confusion in Title VII sex discrimination cases [exists] as to whether a BFOQ defense or a business necessity defense applies to a disparate impact type discrimination" (footnotes omitted)), *cert. denied*, 450 U.S. 965 (1981). *Cf.* *Grant v. General Motors Corp.*, 908 F.2d 1303, 1310-12 (6th Cir. 1990) (classifying a policy excluding women from lead exposure jobs as a facially discriminatory policy that does not establish a BFOQ); *Torres v. Wisconsin Dep't of Health & Social Servs.*, 859 F.2d 1523 (7th Cir. 1988) (sustaining as a BFOQ a facially discriminatory policy requiring prison guards to be female at an all-women correctional facility), *cert. denied*, 489 U.S. 1017, and *cert. denied*, 489 U.S. 1082 (1989); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1981) (characterizing a pregnancy leave policy as facially discriminatory but holding that it could be sustained under the BFOQ exception); *Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977) (upholding a facially discriminatory company practice of requiring pregnant flight attendants to take mandatory leave of absence on the ground that physical endurance is a BFOQ for the occupation), *cert. denied*, 435 U.S. 934 (1978); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (determining that a facially discriminatory employer policy of barring women from "switchmen" positions can not survive BFOQ analysis); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715, 718 (7th Cir. 1969) (invalidating a facially discriminatory policy that deemed women employees ineligible for positions that would require them to lift objects exceeding 35 pounds but permitting the employer to substitute the policy with a neutral measure that required all employees to show that they could satisfy the employer's lifting requirements on the ground that the ability to lift heavy objects constituted a BFOQ for the job); *Gudbrandson v. Genuine Parts Co.*, 297 F. Supp. 134 (E.D. Minn. 1968) (invalidating a facially discriminatory policy of excluding women from warehouseman jobs on the ground that being male did not qualify as a BFOQ).
Johnson Controls arose out of an employee class action brought in the United States District Court for the Eastern District of Wisconsin against a battery manufacturing company. The class challenged under Title VII of the 1964 Civil Rights Act, as amended by the PDA, the company's fetal protection policy that expressly excluded all fertile women, regardless of whether they were pregnant or ever intended to have children, from positions in which they could be exposed to lead levels in excess of the Occupational Safety and Health Administration's (OSHA) regulations.

15. See International Union, UAW v. Johnson Controls, Inc., 680 F. Supp. 309, 310 (E.D. Wis. 1988), aff'd en banc, 886 F.2d 871 (7th Cir. 1989), rev'd, 111 S. Ct. 1196 (1991). The class consisted of persons including: Mary Craig, a Johnson Controls worker who elected to undergo sterilization to prevent the company from terminating her employment; Elsie Nason, a 50-year old employee who suffered a salary reduction when the company effectuated her mandatory transfer to another division where she would not be exposed to lead; and Donald Penney, an employee in the lead industry, whose request for a voluntary leave of absence in order to reduce his blood lead level before attempting to father a child was denied. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1200 (1991).

16. Johnson Controls, 111 S. Ct. at 1200. Johnson Controls's 1982 fetal protection policy stated in relevant part: "[t]he policy is that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Id. (quoting Johnson Controls's fetal protection policy (alteration in original)). Prior to the 1982 policy, the company adhered to a fetal protection policy established in 1977 that substantially differed from the one at issue before the Supreme Court. Id. at 1199. Under the former policy, the company did not place any restrictions on fertile women whatsoever; the measure merely advised fertile women not to accept employment in the lead industry. Id. The 1977 policy stated in relevant part:

"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 on 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." Id. (quoting Johnson Controls's "first official" fetal protection policy (alterations in original)).

17. Id. at 1199-1200. OSHA set the "permissible [lead] exposure limit" as no "greater than fifty micrograms per cubic meter of air . . . averaged over an 8-hour period." 29 C.F.R. § 1910.1025(c)(1) (1992). The lead standard requires that if "any employee is exposed to lead above the permissible exposure limit for more than 30 days per year, the employer shall implement engineering and work practice controls." Id. § 1910.1025(e)(1). The standard established the "[a]ction level" at "30 micrograms of lead per cubic meter of air." Id. § 1910.1025(b). When an employee's lead exposure level reaches the "action level," he or she must undergo "initial [medical] monitoring" of his or her lead exposure level. Id. § 1910.1025(c)(4). OSHA did not promulgate a separate "permissible exposure limit" for men and women who desire to conceive children. See id. However, in 1978, OSHA recommended that
Adopting the Fourth and Eleventh Circuits' approach of classifying fetal protection policies as facially neutral and analyzing them under the disparate impact theory, the United States Court of Appeals for the Seventh Circuit affirmed the district court's summary judgment ruling in favor of Johnson Controls. The court held that the company could sus-

the blood level of workers, both men and women, who wish to plan pregnancies should be maintained at less than 30... [micrograms per cubic grams of air] during this period, and this knowledge forms the basis for the action level of 30... [micrograms per cubic grams of air] established in this final standard which the agency believes will maintain the majority of blood levels below 30... [micrograms per cubic grams of air].

Occupational Exposure to Lead, 43 Fed. Reg. 52952, 52963 (1978). OSHA emphasized that adverse effects to the reproductive system from lead exposure can occur in both men and women. Id. at 52960. Moreover, OSHA specifically maintained that its final lead standard must not be construed as mandating that women be excluded from the lead industry. Id. at 52966. The following passage summarizes OSHA's positions that lead exposure has deleterious effects on both sexes and that women should not be prohibited from accepting lead-exposure occupations.

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

Id. (emphasis added).

Johnson Controls claimed to have complied with all precautionary measures established by OSHA to alleviate lead exposure in both male and female workers. See Johnson Controls, 680 F. Supp. at 314. However, despite the foregoing pronouncements against unilaterally excluding women from the lead industry, the company responded to OSHA's recommendation by instituting its broad fetal protection policy in 1982. See Johnson Controls, 111 S. Ct. at 1200. Under the Johnson Controls policy, the company banned all women from jobs exposing them to lead in instances where the results of a single female employee's blood test revealed a lead reading in excess of 30 micrograms per deciliter, unless a physician attested to a female employee's infertility. See Pet. for Cert. at 5, Johnson Controls (No. 89-1215). The potential dangers to the fetus from exposure to lead include: impairment to the central nervous system, behavioral difficulties and learning disabilities. Johnson Controls, 680 F. Supp. at 314 (citing expert testimony). Studies indicate that lead in a pregnant woman's blood stream can be conveyed to the fetus through the placenta. Id. However, it is imperative to note that "[o]f the eight pregnancies reported among the female employees, it has not been shown that any of the babies have birth defects or other abnormalities." Johnson Controls, 111 S. Ct. at 1208.


the proper legal analysis to be applied to Johnson's fetal protection program under Title VII. The question presented is should we follow the lead of the
tain the policy under the modified business necessity defense created by the Fourth Circuit. Moreover, the Seventh Circuit recognized that the policy could also be validated under the BFOQ exception because the "industrial safety" concern with lead exposure justified the discriminatory policy. The Seventh Circuit decision became the only fetal protection

Fourth Circuit, the Eleventh Circuit and the EEOC in determining that these policies can be justified with a "business necessity" defense or must we conclude that these policies may only be justified with a bona fide occupational qualification defense.

Id. at 883. This Comment focuses on the revision of analytical paradigms for scrutinizing fetal protection policies. Therefore, the issue of potential employer tort liability resulting from fetal injury is beyond the scope of this Comment. See generally infra note 307 (raising the issue of tort liability and citing articles that provide further discussion of the issue).

19. Johnson Controls, 886 F.2d at 893, 901. In justifying its decision to apply disparate impact analysis principles and allow the policy to be justified by the company under the business necessity defense the court proclaimed: "We are convinced that the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." Id. at 886. Applying the three-prong business necessity defense to Johnson Controls's policy, the Seventh Circuit readily articulated that no dispute as to any material fact existed with respect to the first and third elements of the business necessity defense. The court found that uncontroverted testimony revealed that a "substantial risk" of fetal harm existed and held that the plaintiffs waived their right to prove that other viable alternatives existed by failing to raise that issue on appeal. Id. at 888-91. With respect to the second prong, that the harm must be transmitted only through one sex, the court discussed at length whether Johnson Controls showed the absence of a factual dispute regarding whether the harm could only be transmitted through women. Id. at 889. Resolving the issue in favor of Johnson Controls, the court classified as speculative animal studies indicating that a male's reproductive system is adversely affected by lead exposure, and ultimately concluded that the company established that fetal injury could only be transmitted through women. Id. Cf. United Steelworkers v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980) (permitting the use of animal studies as evidence revealing the deleterious effects of lead on males), cert. denied, 453 U.S. 913 (1981); see also Marcelo L. Riffaud, Comment, Fetal Protection and UAW v. Johnson Controls, Inc.: Job Openings for Barred Women Only, 58 Fordham L. Rev. 843 (1990) (examining the Johnson Controls opinion issued by the Seventh Circuit). See infra notes 75-83 and accompanying text for discussion of the three prong business necessity test.

20. Johnson Controls, 886 F.2d at 893-94, 901. However, dissenting Judges Posner, Easterbrook and Cudahy disputed the majority's conclusion that the Johnson Controls policy could survive BFOQ analysis. See id. at 901-21 (Cudahy, Posner & Easterbrook, J.J., dissenting). In Judge Posner's separate dissenting opinion, he asserted that the majority erred in characterizing the company's measure as facially neutral. Id. at 901 (Posner, J., dissenting). Judge Easterbrook, in his separate dissent, stated that "Johnson's policy is sex discrimination, forbidden unless sex is a 'bona fide occupational qualification—which it is not." Id. at 908 (Easterbrook, J., dissenting). In espousing this view, Judge Easterbrook stated:

Johnson defends its fetal protection policy on the basis of concern for the welfare of the next generation, an objective unrelated to its ability to make batteries . . . [while the BFOQ test] speaks of the 'operation of the business' or to any woman's 'ability or inability to work' (the standard of the PDA).

Id. at 912.
case that explicitly upheld, under both the business necessity and BFOQ analysis, policies that excluded women from certain positions.\textsuperscript{21}

In a unanimous decision, the United States Supreme Court reversed the Seventh Circuit’s decision, in large part by refusing to treat the policy as facially neutral.\textsuperscript{22} The Court recharacterized the fetal protection policy as facially discriminatory because it explicitly singled out women for special treatment despite the existence of studies revealing the harmful effects of lead exposure on males.\textsuperscript{23} Applying disparate treatment analysis, the Court reasoned that the female sterility requirement did not establish a BFOQ because the measure was not “reasonably necessary to the normal operation” of battery manufacturing.\textsuperscript{24} Moreover, the \textit{Johnson Controls} Court relied on the PDA, which deems discrimination against potentially pregnant women equal to gender discrimination, and pointed out that the PDA establishes “a BFOQ standard of its own”—that women capable of childbearing must be treated the same as others with respect to their occupational abilities.\textsuperscript{25}

Given that fertile and infertile women are equally capable of efficient battery production, the Court concluded that the fetal protection policy must fail under this analysis.\textsuperscript{26} By unequivocally mandating the application of disparate treatment/BFOQ analysis, \textit{Johnson Controls} resolved the conflict formerly existing among the circuits regarding which analytic framework warranted application to employer fetal protection policies.\textsuperscript{27} Furthermore, the decision puts teeth into the PDA by effectuating its mandate of modifying the definition of gender discrimination to include discrimination against pregnant or potentially pregnant women.\textsuperscript{28}

This Comment first examines judicial decisions leading up to the Supreme Court’s decision in \textit{International Union, UAW v. Johnson Controls, Inc.} by focusing on the two tests employed in gender discrimination cases arising under Title VII: disparate impact and disparate treatment. This Comment then discusses the significant cases that interpret and define the BFOQ exception under the Title VII of the Civil Rights Act of 1964, as amended by the PDA. Next, this Comment analyzes \textit{Johnson}

\begin{itemize}
  \item \textsuperscript{21} Id. at 901.
  \item \textsuperscript{22} See \textit{Johnson Controls}, 111 S. Ct. at 1202. Justice Blackmun’s opinion was joined by Justices Marshall, Stevens, O’Connor and Souter.
  \item \textsuperscript{23} Id. (“The bias on Johnson Controls’ policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.”).
  \item \textsuperscript{24} Id. at 1204, 1207 (quoting 42 U.S.C. § 2000e(1) (1988)).
  \item \textsuperscript{25} Id. at 1206.
  \item \textsuperscript{26} Id. at 1207.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id. at 1206.
\end{itemize}
Controls and reasons that the Court’s determination that fetal protection policies must be analyzed only under the rigorous disparate treatment principles represents an accurate interpretation of Title VII and affords women augmented employment rights. Finally, this Comment explores the impact of Johnson Controls by focusing on a case currently working its way through the legal system, International Union, UAW v. Exide Corp. Examining Johnson Controls’s far-reaching impact of ensuring that women employees receive fair and equal treatment, this Comment culminates with a prediction of Exide’s outcome based on the Johnson Controls rationale.

I. **The Two Frameworks for Analyzing Policies Challenged as Violative of Title VII: Disparate Impact vs. Disparate Treatment Analysis**

A. **Disparate Impact Analysis and theJudicially Created Business Necessity Defense**

The hallmark of the business necessity defense is that an employer can justify a facially neutral policy, resulting in a disparate impact on a protected class, where he or she establishes “a manifest relationship to the employment in question.”29 The Supreme Court developed this test in a series of cases commencing with Griggs v. Duke Power Co.30 Almost ten years later, the Fourth and Eleventh Circuits built on the principles articulated in Griggs by developing a modified business necessity defense to be applied exclusively to fetal protection policies.31


In Griggs, the Supreme Court first confronted the challenge of reconciling the Title VII provisions with a facially neutral company promotion policy that, as applied, disproportionately burdened a protected class.32 In that case, a group of African-American employees challenged their employer’s policy deeming only workers who passed intelligence tests or

31. See infra notes 75-83, 89-91 and accompanying text.
possessed high school diplomas eligible for certain jobs and promotions. The Court characterized the policy as facially neutral because the requirements contained no overt language excluding the protected class from employment opportunities; therefore, the policy did not directly violate Section 703(a) of Title VII, as it existed in 1971. However, as applied, the measure disproportionately burdened African-Americans because very few of them met the testing or high school diploma requirements that would have qualified them for job transfers.

The Court refused to uphold the exclusionary policy even though it technically complied with Title VII. The Griggs Court looked beyond the statutory language and scrutinized Title VII's legislative history for an alternative test to apply to a measure that lacked expressly exclusionary terms. The majority concluded that the congressional intent for enacting Title VII was to ensure racial equality and to eradicate the "artificial, arbitrary, and unnecessary barriers to employment" that protected groups encountered. The Court reasoned that sustaining the employer's policy that did not facially violate Title VII but which, as applied, served to perpetuate past discriminatory employment practices, would clearly frustrate the congressional motivation for enacting Title VII. For this reason, the Court devised the separate analytical paradigm for analyzing neutral policies that would become the crux of disparate impact analysis.

33. Griggs, 401 U.S. at 427-28. Before the Civil Rights Act of 1964 went into effect on July 2, 1965, "the Company openly discriminated" against African-American employees by allowing them to work only in the labor department, thereby excluding them on the basis of race from the four other departments where whites exclusively held the positions. Id. at 426-27. After July 2, 1965, the company replaced its facially discriminatory policy with the neutral policy, requiring certain aptitude test scores and a high school diploma as prerequisites for hiring and transfer. Id. The Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2(h) (1988), permits employers to use "any professionally developed ability test...[that] is not designed, intended or used to discriminate because of race." Id.

34. Id. at 431; see infra note 57 (describing the 1991 Amendment to the Civil Rights Act of 1964 codifying disparate impact principles).

35. Griggs, 401 U.S. at 430 (quoting the appellate court's opinion noting that "whites register far better on the Company's alternative requirements" than blacks).

36. See id. at 436.

37. Id. at 429-31.

38. Id. at 431. The Court explained that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Id. at 430.

39. Id. at 431-32. "The objective of Congress in the enactment of Title VII . . . . [W]as to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Id. at 429-30.

40. See id. at 429-31.
only be maintained if the Title VII plaintiff establishes the existence of neutral employment measures and that the policy disproportionately burdens a protected class.\textsuperscript{41} The plaintiff need not prove that the employer engaged in intentional discrimination.\textsuperscript{42} After the plaintiff establishes a prima facie case of disparate impact, the burden of persuasion shifts to the defendant-employer to raise the business necessity defense by demonstrating that the measure legitimately bears a "manifest relationship to the employment in question."\textsuperscript{43}

Applying this test, the Court invalidated the Duke Power policy on the ground that the company failed to meet its burden of showing a reasonable relationship between the educational requirements and job performance.\textsuperscript{44} To the contrary, the evidence revealed that the unskilled, predominantly African-American workers could perform their occupational tasks as well as the workers who passed the tests or possessed high school diplomas.\textsuperscript{45} By holding that the employer could not justify the disparate impact policy under the business necessity test, the Supreme Court made the monumental pronouncement that it would not condone policies that accomplished the impermissible goal of employment discrimination in their application.\textsuperscript{46}

\textsuperscript{41} See id.
\textsuperscript{42} Id. at 432.
\textsuperscript{43} Id. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touch-stone is business necessity." Id. at 431.
\textsuperscript{44} Id. at 431, 436. "On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." Id. at 431. Accentuating the absence of a relationship between occupational achievement and the requirements, the Court stated that "employees who have not completed high school or taken the tests have continued to perform satisfactorily." Id.; see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (extending disparate impact analysis to judging whether subjective hiring criteria, as opposed to objective tests, amount to impermissible discrimination).

\textsuperscript{45} Griggs, 401 U.S. at 431-32, 436.
\textsuperscript{46} See id. at 436. The Supreme Court recognized the business necessity defense set forth in Griggs in subsequent decisions. See Connecticut v. Teal, 457 U.S. 440, 446-47 (1982) (following Griggs by requiring the employer to show that neutral policy bears "a manifest relationship to the employment in question" (quoting Griggs, 401 U.S. at 432)); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-77 (1978) (affirming the Seventh Circuit's ruling invalidating a facially neutral hiring policy on the ground that the employer's purported safety concern did not qualify as a business necessity).

Griggs and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination. Even in such a case, however,
2. Wards Cove Packing Co. v. Atonio: Relaxing the Requirements for Establishing Business Necessity and the Burdens of Proof from the Employer's Perspective

In Wards Cove Packing Co. v. Atonio, employees challenged their employer's facially neutral hiring practice as causing a disproportionate number of non-whites to occupy unskilled cannery positions. The Supreme Court reversed the Ninth Circuit's judgment for the employees on the ground that a statistical discrepancy alone, indicating a racial division in occupational positions, will not suffice to establish a prima facie case of employment discrimination. Rather, the Court emphasized that the plaintiff must demonstrate that each discrete employment practice caused the stratification.

Furthermore, the Court relaxed the business necessity defense itself, thus lessening the requirements for the defendant-employer to establish business necessity. Deviating from the Griggs "manifest relationship" test, the Supreme Court held that the employment practice need not be "'indispensable'" to the particular occupation to qualify as a business necessity. In making this pronouncement, the majority explained that an

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the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Teal, 457 U.S. at 446-47 (quoting Griggs, 401 U.S. at 432) (alteration in original).
48. Id. at 647-48. The affected employees argued "that a variety of petitioners' hiring/promotion practices—e.g., nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial stratification." Id.
49. Id. at 653. The Court deemed significant the fact that the company hired mostly nonwhite employees for unskilled because it contracted with a predominately non-white union. Id. at 654. The Court stated that "[r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact." Id. at 653; see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O'Connor, J., concurring) (arguing that "statistical disparities in the employer's work force" are not enough to establish a prima facie case of discrimination; rather, the plaintiff must show that the employer's specific practices themselves achieved the disparity).
50. See Wards Cove, 490 U.S. at 658. The majority acknowledged that "[s]ome will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs." Id. at 657; see Meredith L. Jason, Note, International Union v. Johnson Controls, Inc.: Controlling Women's Equal Employment Opportunities Through Fetal Protection Policies, 40 Am. U. L. Rev. 453, 462-63 (1990) (detailing the impact of Wards Cove on disparate impact analysis).
51. Wards Cove, 490 U.S. at 658.
53. Wards Cove, 490 U.S. at 659 (describing the scope of the business necessity defense by noting that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet"); see Befort, supra note 4, at 11; Jason, supra note 50, at 462.
employer may establish business necessity by simply revealing a relationship between any job requirement and the policy so long as the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." 54

The Wards Cove Court further simplified the business necessity defense from the employer's perspective by reallocating the burdens of proof established in Griggs. 55 The Court dictated that once the plaintiff makes out a prima facie case of disparate impact, the burden of production, not persuasion, shifts to the defendant-employer to provide any "business justification" for the policy. 56 In contrast to Griggs, however, the Wards Cove Court reassigned the burdens of proof by holding that the burden of persuasion will remain consistently with the Title VII plaintiff to demonstrate that the employer's articulated business reason did not qualify as a business necessity. 57 The essential holding of Griggs survived in Wards Cove: that an employer may only succeed in the business necessity defense if he or she can establish a relationship between the policy and the

54. Wards Cove, 490 U.S. at 659.
55. Id.
56. In delineating the revised burden shifting framework, the majority clarified that after the plaintiff set forth a prima facie case of disparate impact, "the employer carries the burden of producing evidence of a business justification for his employment practice." Id.
57. Id. at 660. The Court emphasized that the "burden of persuasion . . . remains with the disparate-impact plaintiff." Id. at 659. The majority further explained that "the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." Id. at 660. However, in the Civil Rights Act of 1991, Congress revised the Wards Cove burdens of proof required to make out a prima facie case of disparate impact. See 42 U.S.C. § 2000e-2(k) (Supp. III 1991). Rather than adapting the Wards Cove burden of proof framework in which the plaintiff bears the burden of persuasion, Congress codified the standard set forth in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1977), by reassigning the burden of persuasion to the defendant-employer. 42 U.S.C. § 2000 (k)(1)(A)(i). Congress mandated that the employer "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" after the Title VII plaintiff sustains his or her burden of establishing that the employer policy has a disparate impact on a protected class. Id. The definitional section of the statute specifies that "[t]he term 'demonstrates' means meets the burdens of production and persuasion." Id. § 2000e(m). The Civil Rights Act of 1991 not only reinstated the Griggs burden-shifting paradigm, but it also codified the more stringent Griggs business necessity defense. Pub. L. No. 102-166, § 3, 105 Stat. 1071 (stating that the purpose of the Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 410 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989)"). In enacting the 1991 legislation, Congress recognized that "the decision of the Supreme Court in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections." Id. § 2, 105 Stat. at 1071; see also Note, The Civil Rights Act of 1991: The Business Necessity Standard, 106 HARV. L. REV. 896, 903-06, 910-13 (1993) (describing the impact of the Civil Rights Act of 1991 on the holding in Wards Cove).
occupation. However, the Wards Cove Court markedly eased the requirements for the employer to succeed in the business necessity defense.


The Fourth and Eleventh Circuits developed a modified business necessity defense to be applied exclusively to fetal protection policies.\(^\text{58}\) The revised test significantly differed from the traditional business necessity defense because it did not require the employer to establish any reasonable relationship between the policy and the occupation.\(^\text{59}\) The rationale for eliminating this fundamental requirement was that occupational policies designed to ensure fetal health do not relate to actual job performance; rather, employers generally institute these policies to protect their employees' potential offspring.\(^\text{60}\) Therefore, under established business necessity principles, it would be difficult, if not impossible, for an employer to find a connection between the health of children and the female employee's ability to fulfill her occupational duties.

Wright v. Olin Corp.\(^\text{62}\) initially required the Fourth Circuit to determine which legal theory to apply when analyzing an employer-imposed fetal protection policy.\(^\text{63}\) The majority prefaced its opinion by emphasis-

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\(^{58}\) See Recent Case, 103 Harv. L. Rev. 977 (1990) (critiquing the modified business necessity standard specific to fetal protection policies as applied in the Seventh Circuit Johnson Controls decision); infra notes 75-83 and accompanying text (discussing the business necessity defense specific to fetal protection policies).

\(^{59}\) Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984). Although the Civil Rights Act of 1991 appeared to overrule Wards Cove entirely, the legislation upheld a crucial aspect of that decision regarding the causation issue. The Act specified that the Title VII plaintiff, in effectuating his or her prima facie case, must establish that each discrete employment practice caused the discriminatory impact on a protected class. 42 U.S.C. § 2000e-2(k)(1)(B)(i). However, the Act exempts plaintiffs who demonstrate that the employer practices cannot be evaluated on an individual basis from the requirement that each distinct employment measure must be proven to cause a discriminatory effect. Id.

\(^{60}\) Hayes, 726 F.2d at 1552.

\(^{61}\) See id.

\(^{62}\) 697 F.2d 1172 (4th Cir. 1982).

\(^{63}\) Id. at 1184. The majority recognized at the outset that the problem of fitting the fetal vulnerability program into the appropriate theory of claim and defense as developed in Title VII litigation is one of first impression with this court and—we are advised—with any court of appeals . . . .

... [A]s is well established, it is often appropriate to assess particular Title VII claims and defenses alternatively under different theories.

Id. The plaintiffs argued that BFOQ analysis was appropriate in the wake of the PDA, which equates discrimination on the basis of reproductive potential with gender discrimi-
ing that neither of these analytic frameworks should not be applied rigidly.44 Wright arose out of a Title VII class action challenge to a policy excluding women from working in areas containing airborne lead.45 The employer instituted the policy to protect its employees' potential offspring.46 After acknowledging the difficulty in characterizing the company policy,47 the majority reasoned that fetal protection policies more closely resemble neutral than facially discriminatory policies because employers draft such measures "in gender neutral terms" to protect all children from potential lead damage.48 Thus, only as applied do such measures have the "obvious and indisputable[er] . . . consequence" of excluding women from certain positions.49 However, the majority recog-

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64. See Wright, 697 F.2d at 1184. "The Court has continually admonished . . . that these theories were not expected nor intended to operate with rigid precision with respect to the infinite variety of factual patterns that would emerge in Title VII litigation." Id. (footnotes omitted). The Wright Court pointed out that "while the loose equation—overt discrimination/only b.f.o.q. defense—is therefore properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine." Id. at 1185 n.21.

65. Id. at 1182. The February, 1978 policy stated in relevant part:

1) Restricted jobs are those which "may require contact with and exposure to known or suspected abortifacient or teratogenic agents." Fertile women are excluded from such jobs. Any woman age 5 through 63 is assumed to be fertile and can be placed in a restricted job only after consulting with Olin's medical doctors to confirm the woman cannot bear children and will sustain no other adverse physiological effects from the environment.

Id.

66. Id.

67. Id. at 1184. The court "conced[ed] that the fact situation . . . does not fit with absolute precision into any of the developed theories." Id.

68. Id. at 1186. Explaining the inapplicability of disparate treatment principles to the instant matter, the opinion stated:

[the] claim is that the intention to "treat less favorably" is manifest in the very nature of the program and the factual defense is not truly aimed at rebutting this indisputable fact but at justifying it on the basis that the purpose behind it was benign in relation to the claimants' sex. To force such a claim and defense into that special proof scheme would torture its logical foundations.

Id. at 1185 n.20.

69. Id. at 1186. Applying pre-PDA principles, the court did not consider the effect of the PDA on fetal protection policies, which equates discrimination on the basis of reproductive potential with gender discrimination. It appears that the Fourth Circuit was still relying on the pre-PDA framework, under which courts viewed employer policies excluding women based on fertility as neutral policies, requiring analysis under disparate impact principles. Cf. Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990) (applying post-PDA analysis to characterize an employer's fetal protection policy, designed to protect female employees' potential offspring from lead exposure, as facially discriminatory).
nized that the "facial neutrality' of Olin's fetal vulnerability program might be subject to logical dispute" because the policy obviously restricted only women despite its purportedly "neutral" terms. Nonetheless, the court characterized the fetal protection policy as neutral, having a disparate impact on women, rather than as overt discrimination. The majority further justified the application of business necessity principles to fetal protection policies by asserting that the same safety concerns that have validated employer policies designed to protect invitees and licensees exist in fetal protection policies that seek to preserve the health and safety of employees' offspring.

Adhering to basic disparate impact principles while recognizing the difficulty in applying the traditional business necessity defense to this novel fact situation, the Fourth Circuit developed a three-prong business necessity defense to be applied exclusively to fetal protection policies. Under the Wright test, the employer must first show that a "significant" risk of harm exists to the unborn fetus and, second, that the hazard is transmitted only through a single sex. If the employer establishes these elements, a prima facie case of business necessity exists. However, the third prong allows the plaintiff to rebut the presumption of business necessity by showing the existence of alternative policies that would equally minimize the risk of fetal harm while alleviating the disparate impact on women. If the Title VII plaintiff successfully sustains her burden, the policy will fail for lack of business necessity. Conversely, if he or she does not, the employer policy will be sustained under the modified

For discussion of the pre- and post-PDA analytic frameworks, see infra notes 147-81 and accompanying text.

70. Wright, 697 F.2d at 1186; see Befort, supra note 4, at 31-32.
71. Wright, 697 F.2d at 1186.
72. Id. at 1185.
73. Id. at 1189. The Wright court concluded that "the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon an employer's premises." Id.
74. Id. at 1184-85.
75. Id. at 1190-91.
76. Id. at 1190.
77. Id.
78. Id. at 1191-92.
79. Id. The court described in broad terms the standard that the plaintiff must meet to rebut the presumption of business necessity, requiring the plaintiff to demonstrate that "there are 'acceptable alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish it equally well with a lesser differential . . . impact [between women and men workers]." Id. at 1191 (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (examining an employer's seniority hiring practice that disproportionately burdened African-American employees under the traditional business necessity defense) (alteration in original)).
80. See id. at 1189-91.
business necessity defense. The court stressed that an employer must present factual evidence to meet his or her burdens under the test; "subjective" evidence suggesting an employer's benevolent motivations will not suffice to satisfy this modified business necessity defense. After devising this revised defense, the Fourth Circuit vacated the district court's judgment for the defendant so that the case could be retried under the innovative test.

In contrast to the Fourth Circuit's reading of fetal protection policies as neutral, the Eleventh Circuit took a different approach in Hayes v. Shelby Memorial Hospital. In Hayes, the court initially characterized the hospital's fetal protection policy, mandating the firing of pregnant x-ray technicians, as creating a presumption of facial discrimination because the measure plainly targeted women only. However, the majority reasoned that the employer could rebut the presumption of facial discrimination if he or she could establish the policy's neutrality by showing that "it effectively and equally prot[ec]ted the offspring of all employees." The Eleventh Circuit further explained that, even if the employer could prove the termination policy's neutrality under that standard, as applied, the policy impaired women only. Thus, the court concluded that the policy could not be sustained unless the employer could satisfy the Wright business necessity test. In applying the Fourth Circuit's three-prong test, however, the court held that the employer-hospital failed to meet the first and third prongs. The defendant neither established that the plaintiff would be subjected to an unreasonable risk of radiation, nor did the employer show the absence of less discriminatory alternatives. Thus, the Eleventh Circuit affirmed the district court's rul-

81. Id.
82. Id. at 1190.
83. Id.
84. Id. at 1187.
85. 726 F.2d 1543 (11th Cir. 1984).
86. Id. at 1548. The hospital implemented the policy out of concern over the deleterious effects that radiation exposure could have on pregnant employees' children, as well out of fear of tort liability. See id.
87. Id. Cf. Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) (characterizing a hospital policy that required pregnant x-ray technicians to resign as facially neutral at the onset).
88. See Hayes, 726 F.2d at 1548.
89. Id.; see supra notes 75-83 and accompanying text (discussing the three-prong business necessity defense for fetal protection policies developed by the Fourth Circuit).
90. Hayes, 726 F.2d at 1550-51.
91. Id. at 1551.
ing that an employer's firing of an employee upon the discovery of her pregnancy violated Title VII as amended by the PDA.\(^92\)

Building on the doubts expressed by the Fourth Circuit, the Eleventh Circuit recognized the difficulty in applying the traditional business necessity test to fetal protection policies because the key requirement for business necessity is to establish a connection between the policy and job performance.\(^93\) However, fetal protection policies do not relate directly to job performance;\(^94\) a pregnant woman's exposure to radiation makes her no less capable of performing her job as an x-ray technician.\(^95\) Thus, the Hayes court asserted that the modified business necessity defense for fetal protection policies broadened the scope of the defense by allowing the employer to raise it—despite the absence of a correlation between the policy and job performance—if the employer's motivation for the policy arose from his or her concern for the health of the female employee's potential offspring.\(^96\)

### B. Disparate Treatment Analysis and the Application of the Statutory Bona Fide Occupational Qualification Exception

If the explicit language of an employer's policy discriminates against a class protected under Title VII, courts generally characterize the policy as facially discriminatory and in direct contravention of Section 703(a) of Title VII's statutory prohibitions.\(^97\) However, in very narrow circumstances, a court will legalize a policy with clearly discriminatory language

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92. Id. at 1554.
93. Id. at 1552.
94. Id.; see Williams, supra note 32, at 689 (discussing the difficulty in employing the business necessity defense to fetal protection policies due to the lack of "'job-relatedness'"). "The 'job-relatedness' test for business necessity, although appropriate when testing and employment qualifications are at issue, cannot easily be employed in situations involving fetal health hazards. In such situations, the business purpose of the exclusionary rule, to preserve fetal health, is unrelated to job performance." Id.
95. Hayes, 726 F.2d at 1552.
96. See id.
97. See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding that a policy denying job applications to women with pre-school children will only be sustained if it qualifies as a BFOQ); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (holding that a company policy excluding women from "switchmen" positions did not establish a BFOQ because women's job performance was not impaired by their inability to lift certain heavy objects); Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968) (holding that an employer's policy permitting only men to serve as warehousemen did not qualify as a BFOQ because women employees could perform the occupational tasks as well as men). For a general discussion of the history of the BFOQ defense, see United States Commission on Civil Rights, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1176-86 (1971) [hereinafter Employment Discrimination].
if the employer successfully raises the Section 703(e) bona fide occupational qualification defense. The statutory BFOQ defense permits an employer to implement an overtly discriminatory policy only "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." This standard requires the relationship between the challenged policy and the employment practice to be "reasonably necessary," not merely reasonably related, as permitted under the business necessity defense.

The general principle that challenged facially discriminatory policies will be sustained only if the employer successfully raises the BFOQ exception, and that challenged facially neutral policies may be justified under the business necessity defense, is not a mutually exclusive, rigidly applied rule. As evinced by Hayes, some courts have permitted employers to raise the business necessity defense despite the fact that the Eleventh Circuit determined that fetal protection policies created a presumption of facial discrimination. Conversely, in other matters, employers have successfully justified facially neutral policies under the BFOQ standard. The Supreme Court defined the BFOQ exception in a series of cases during the 1970s and 1980s. Subsequently, the Fourth

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98. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 336-37 (1977) (upholding an expressly exclusionary prison policy that forbade women from occupying prison guard positions on the ground that masculinity qualified as a BFOQ).
100. Id.
101. See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1546-47 (11th Cir. 1984) (characterizing a termination policy for pregnant women as facially discriminatory, but ultimately applying the modified business necessity defense, a test normally applied to neutral policies only); Wright v. Olin Corp., 697 F.2d 1172, 1184 (4th Cir. 1982) ("The Court has continually admonished, and indeed demonstrated in its own decisions, that these theories were not expected nor intended to operate with rigid precision with respect to the infinite variety of factual patterns that would emerge in Title VII litigation." (footnotes omitted)); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 364 (4th Cir. 1980) (applying pre-PDA principles to characterize facially discriminatory mandatory leave policy for pregnant women as facially neutral), cert. denied, 450 U.S. 965 (1981); see also Williams, supra note 32, at 670 ("Lower federal court decisions demonstrate serious confusion about the . . . frameworks. There are a number of cases in which courts confound or commingle the theories of disparate treatment and disparate effects and their respective defenses.").
102. See Hayes, 726 F.2d at 1548.
103. See, e.g., Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (allowing an employer to substitute his facially discriminatory policy with a neutral policy requiring all employees to be able to lift over 35 pounds as a prerequisite for securing a job because the employer established that lifting was a BFOQ for job performance).
104. See infra notes 106-36 and accompanying text.
and Ninth Circuits followed the Supreme Court's lead by utilizing this statutory defense to scrutinize challenged gender-based policies.\(^\text{105}\)

1. **The Supreme Court's Initial Examination of the BFOQ Defense**

In *Phillips v. Martin Marietta Corp.*,\(^\text{106}\) the Supreme Court initially articulated the general rule that a gender-based, facially discriminatory policy violates Title VII, unless the employer can establish a BFOQ.\(^\text{107}\) In *Phillips*, a corporation instituted a policy of rejecting job applications from all women with pre-school age children on the ground that their competing family obligations would adversely affect their job performance.\(^\text{108}\) Refusing to affirm the United States Court of Appeals for the Fifth Circuit's summary judgment motion in favor of the employer, the Supreme Court held that the Fifth Circuit incorrectly validated the school leave policy because no evidence substantiated the employer's contention that women with young children were less capable than men of fulfilling their job obligations.\(^\text{109}\) Absent evidence of real differences between the occupational capabilities of men and women with young children, the Court prohibited the employer from sustaining a male-only pre-school teacher policy under the BFOQ exception.\(^\text{110}\)

In his concurring opinion, Justice Marshall paved the way for later Supreme Court decisions by establishing parameters for the manner in which the BFOQ would be interpreted.\(^\text{111}\) Citing regulations of the Equal Employment Opportunity Commission (EEOC), the government agency charged with enforcing Title VII,\(^\text{112}\) Justice Marshall argued that the BFOQ exception must be construed narrowly.\(^\text{113}\) He pointed out that

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105. See infra notes 137-46 and accompanying text.
107. See id. at 544.
108. Id. at 543.
109. Id.
110. See id. at 544. The Court remanded the matter to provide the employer an opportunity to sustain its burden of establishing a BFOQ by furnishing group data to establish that women with young children were less capable than men to perform the job. Id. However, a year later, in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978), the Supreme Court prohibited an employer from relying on group data showing that women generally live longer than men in order to justify a policy of requiring them to contribute more to their pensions than male employees. See infra notes 130-36 (analyzing *Manhart*).
111. *Phillips*, 400 U.S. at 544-47 (Marshall, J., concurring); see infra notes 113-14 and accompanying text.
112. *Phillips*, 400 U.S. at 545 (stating that the EEOC regulations should be given "'great deference.'" (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965))).
113. Id. The EEOC regulations cited by Justice Marshall provide, in pertinent part:
   (a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and
the EEOC regulations indicate that facially discriminatory policies will only be justified under the BFOQ exception in rare instances in which a particular position "require[s] specific physical characteristics necessarily possessed by only one sex." Relying on this standard, Justice Marshall concluded that an employer's act of stereotyping women as having competing family responsibilities could never qualify as a narrow circumstance whereby a woman's physical traits rendered her unable to perform her job.

In Dothard v. Rawlinson, the Court appeared to adopt and refine Justice Marshall's analysis of the BFOQ defense set forth in his Phillips concurrence. In that case, the Court validated a facially discriminatory policy instituted by the Alabama Department of Safety that explicitly forbade female correctional officers from holding "contact positions." “Women’s jobs”—tend to deny employment opportunities unnecessarily to one sex or the other.

(i) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

. . . .

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes.

29 C.F.R. § 1604.1 (1972), quoted in Phillips, 400 U.S. at 546 n.3; see also Torres v. Wisconsin Dept. of Health & Social Servs., 859 F.2d 1523, 1532-33 (7th Cir. 1988) ("Rare is the employment situation in which an employer could argue that gender-based distinctions are a 'reasonably necessary' approach . . . ."), cert. denied, 489 U.S. 1017, and cert. denied, 489 U.S. 1082 (1989); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969) ("The legislative history indicates that this exception was intended to be narrowly construed."); Employment Discrimination, supra note 97, at 1176 (discussing the legislative history of the BFOQ, indicating that it was intended to be narrowly interpreted).

Phillips, 400 U.S. at 546 (Marshall, J., concurring). Justice Marshall criticized the majority for ignoring congressional intent and instead "fall[ing] into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination." Id. at 545.

Moreover, Justice Marshall emphasized that Congress's primary motivation for promulgating Title VII prohibitions against gender discrimination was to establish that policies based on stereotypical notions of women's traditional roles would not be tolerated. Id.; see also Weeks, 408 F.2d at 235-36 (holding that barring women from "switchmen" positions does not qualify as a BFOQ on the ground that factual bases, not stereotypical assumptions, must exist are required to uphold the policy under the BFOQ exception).


Dothard, 433 U.S. at 324-25, 336-37. The Alabama state prison policy first mandated that both men and women correctional officers meet the facially neutral requirement of being at least five feet, two inches and weighing 120 pounds or more. Id. at 323-24. The Dothard Court permitted the State to raise the business necessity defense in an effort to sustain the neutral policy that, as applied, excluded women from correctional officer positions. See id. at 331. However, the Court held that the height and weight policy did not qualify as a business necessity because the employer failed to demonstrate that such standards were "essential to effective job performance as a correctional counselor." Id. at 331.

A second policy, entitled Regulation 204, excluded women from “contact positions,” (i.e.
Before determining the policy’s lawfulness, the Court defined the scope of the BFOQ defense.119 The majority stressed that the BFOQ defense must succeed in only the narrowest circumstances where the very “essence” of the particular business operation would be impaired if one sex were not exclusively employed.120 More specifically, the majority stated that the defense would be recognized only if the vast majority of women “would be unable to perform safely and efficiently the duties of the job involved.”121 Drawing on previous decisions, the Court further emphasized that employer measures designed to perpetuate gender based stereotypes would not be tolerated under the statutory exception.122

Evaluating the exclusionary policy at issue under these standards, the Court reasoned that women correctional counselors occupying “‘contact’ position[s]” would confront an immediate threat of severe harm because their job would require them to interact regularly with convicted male sex offenders.123 After evaluating the evidence, the majority determined that this risk was neither unfounded, nor rooted in stereotypical assump-
Recognizing that Congress established Title VII's proscriptions against gender discrimination partly to enable women to make their own decisions regarding the risks they would accept in the workplace, the Court stated that a restriction on free choice would be justified only in limited circumstances that present imminent hazards to women employees. Moreover, the majority explained ensuring that women correctional officers' ability to perform their core task of ensuring order and safety would be undermined by their gender. In this narrow circumstance, the majority declared, where both the woman's safety and her ability to carry out her job would be severely jeopardized, the male-only state policy could be justified under the BFOQ defense.

Under the BFOQ exception, the Supreme Court has refused to uphold gender-based company policies that treat women as a homogeneous group rather than as individuals with distinctive characteristics. The Court articulated this rule in *Los Angeles Department of Water & Power Co. v. Manhart.* In that case, the Court scrutinized the Los Angeles Water & Power Company's policy of requiring women to make larger payments into their employee pension funds than their male co-work-

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124. See id.
125. See id.
126. Id. at 336. The Court justified the policy under the BFOQ exception by concluding that "[t]he employee's very womanhood would... directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.*
127. Id.; see Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1532 (7th Cir. 1988) (adopting *Dothard* by sustaining as BFOQ requirement that males exclusively hold prison guard positions), *cert. denied,* 489 U.S. 1017, *and cert. denied,* 489 U.S. 1082 (1989); *see also* Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding as constitutional a California statutory rape law that applied only to men on the ground that real sex differences between men and women justified only males receiving a penalty).
128. *Id.*
129. Los Angeles Dep't of Water & Power Co. v. Manhart, 435 U.S. 702, 707 (1978). The Court noted that "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Id.* (citing Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971)). The Supreme Court explained that "[p]ractices that classify employees in terms of... sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Id.* at 709.
The company attempted to justify the policy on the ground that women generally live longer than men and that therefore, the higher contribution requirement was proper because women as a whole would benefit from the plan longer than men. The majority rejected this argument because the policy neglected to consider the individual differences that exist among women. Specifically, the Court determined that the company policy impermissibly treated women as one group that lives longer than men, while neglecting to consider that, despite the aggregate data, not every woman within the group will outlive her male counterpart.

Furthermore, the Court noted that the employer failed to satisfy the BFOQ test because no evidence indicated that the facially discriminatory pension plan was "reasonably necessary to the normal operation" of the company's business retirement plan. Characterizing the provision as unfairly overinclusive by requiring women who would not outlive males to make higher contributions, the Court struck down the policy under Section 703(a) of Title VII. The Fourth and Ninth Circuits have followed the Supreme Court's logic in analyzing gender discriminatory policies.

2. The Fourth and Ninth Circuit Approaches to the BFOQ Defense

The Fourth and Ninth Circuits have followed the Supreme Court's precedent of construing the BFOQ defense narrowly. In Condit v. United Air Lines, Inc., the Fourth Circuit sustained United Air Lines' practice of requiring flight attendants to take mandatory leaves of absence upon discovering their pregnancy. In upholding the facially discriminatory policy as a BFOQ, the court emphasized that the policy could be sustained under the narrow exception to Title VII because pregnancy inter-
ferred with a flight attendant’s fulfillment of her primary responsibility—ensuring passenger safety.139

In Harriss v. Pan American World Airways, Inc.,140 the Ninth Circuit, applying the Supreme Court’s reasoning in Dothard, recapitulated the narrow circumstances in which an industrial safety concern establishes a BFOQ.141 The Harriss court explained that a safety concern will only qualify as a BFOQ where the core requirement of the particular job is to ensure safety of others.142 The Ninth Circuit stressed that a generalized safety concern would not suffice.143 Applying this limited safety definition to the facts in Harriss, the court upheld another mandatory leave policy for pregnant flight attendants under the BFOQ exception on the ground that a pregnant flight attendant’s reduced mobility would interfere with her ability to fulfill her essential duty of promoting passenger safety.144 Thus, the majority concluded that the pregnancy leave policy, though facially discriminatory, was “reasonably necessary” to the safe operation of aircraft.145 Therefore,

139. Id. The court stated that “pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft.” Id. at 1176. Cf. Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 367-69 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981). The Burwell court invalidated another mandatory leave policy that required flight attendants to suspend their work prior to their 28th week of pregnancy because the court determined that before that critical period, “a flight attendant undergoing a normal pregnancy can perform both normal and emergency duties as well as a non-pregnant flight attendant.” Id. at 367.
140. 649 F.2d 670 (9th Cir. 1980).
141. Id. at 676-77.
142. See id.; see also Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236-38 (5th Cir. 1976) (justifying as a BFOQ, age limitations for bus drivers on the ground that the “essence” of the job of safely transporting passengers is threatened when the company employs older drivers). Cf. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122-23 (1985) (holding that the airline’s practice of barring people age 60 or above from flight engineer positions failed to qualify as BFOQ because the employer did not establish that persons in that age group posed a safety threat or could not perform the job).
143. See Harriss, 649 F.2d at 677.
144. Id. Using post-PDA principles, the court classified the policy as facially discriminatory. See id. at 676; infra notes 147-81 and accompanying text for discussion of pre- and post-PDA approaches.
145. Harriss, 649 F.2d at 677. The Ninth Circuit justified its decision to uphold the policy under the BFOQ exception by explaining that “'[t]he greater the 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.'” Id. 676 (quoting Usery, 531 F.2d at 236). Cf. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984) (utilizing the modified business necessity defense in applying disparate impact principles to a hospital policy that excluded pregnant women from serving as x-ray technicians); Wright v. Olin Corp., 697 F.2d 1172, 1186-90 (4th Cir. 1982) (characterizing a company policy restricting fertile women from holding positions where they would be exposed to lead as facially neutral and creating a modified business necessity defense for analyzing such policies).
the court held that the employer successfully raised the narrow BFOQ defense.¹⁴⁶

II. THE PREGNANCY DISCRIMINATION ACT (PDA): EQUATING DISCRIMINATION AGAINST FERTILE WOMEN WITH UNLAWFUL GENDER DISCRIMINATION

A. The PDA’s Impact on Title VII and the Rationale Behind Its Enactment

In 1978, Congress enacted the PDA as an amendment to Title VII’s employment discrimination provisions.¹⁴⁷ The PDA mandates that policies that do not discriminate directly “on the basis of sex” alone, but that treat women less favorably based on their pregnancy or childbearing capacity, must be deemed facial discrimination on the basis of gender.¹⁴⁸ Therefore, such policies directly violate Title VII’s prohibitions against gender discrimination and will only be sustained if the employer can successfully raise the BFOQ defense.¹⁴⁹ Moreover, the second clause of the PDA prohibits employers from treating women adversely on the basis of their pregnancy or fertility by dictating that they must be treated the “same for all employment-related purposes” as all other workers.¹⁵⁰ Congress included this latter provision to ensure that any restrictions placed on women based on their pregnancy or childbearing capacity would only be valid in narrow instances where their ability to perform their occupational tasks became impaired as a result of their condition.¹⁵¹

Congress enacted the PDA in response to the Supreme Court’s decision in General Electric Co. v. Gilbert,¹⁵² where the Court held that dis-

¹⁴⁶ Harriss, 649 F.2d at 677.
¹⁴⁸ H.R. REP. No. 948, supra note 2, at 1 (“The purpose of H.R. 6075 [the PDA] is to amend Title VII of the Civil Rights Act of 1964 by adding to section 701 a new subsection (k) which clarifies that the prohibitions against gender discrimination in the act include discrimination in employment based on pregnancy, child birth or related medical conditions.”); S. REP. No. 331, 95th Cong., 2d Sess. 1-2 (1978); see Jason, supra note 50, at 464-66 (discussing the PDA).
¹⁴⁹ See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676-79 (1983) (interpreting the PDA as making discrimination against pregnant women equivalent to overt, sex-based discrimination, directly prohibited under Title VII unless a BFOQ exists).
¹⁵¹ S. REP. No. 331, supra note 148, at 4 (“Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.”).
crimination on the basis of pregnancy did not constitute explicit gender discrimination. The Supreme Court reversed the Fourth Circuit's ruling that the policy violated Title VII. The Court reached this conclusion by refusing to equate discrimination based on pregnancy with Title VII gender discrimination. The majority pronounced that General Electric's plan did not impermissibly discriminate against women directly, but rather that the insurance policy simply failed to provide coverage for "one physical condition—pregnancy."

B. The Circuit Court Split Over Whether Disparate Treatment or Disparate Impact Analysis Is Proper in Matters Implicating the PDA

In spite of the PDA's clear statutory language that equating discrimination against the potentially pregnant with facial discrimination, circuit courts have interpreted the Act differently. Notwithstanding the PDA, some circuits continued to evaluate policies based on pregnancy or childbearing capacity under the pre-PDA framework by characterizing them as neutral disparate impact policies that may be sustained if the employer successfully raises the business necessity test. In contrast, the Fourth and Sixth Circuits followed the PDA's declaration by interpreting it as mandating that any restrictions related to pregnancy or

153. *Id.* at 136.

154. *Id.* at 127-29.


156. See *General Electric*, 429 U.S. at 133. The Supreme Court believed *Geduldig* to be controlling. *Id.* In *General Electric*, the Court relied on its finding in *Geduldig* that a disability program did not violate the Equal Protection Clause, to hold that a similar program could not be invalidated under Title VII. *Id.*

157. *Id.* at 134 (quoting *Geduldig*, 417 U.S. at 496 n.20).

childbearing are covered under Title VII's gender discrimination definition, directly contravening § 703(a) unless a BFOQ exists.\footnote{159}

The Seventh Circuit appeared to follow the pre-PDA framework in \textit{Scherr v. Woodland School Community Consolidated District No. 50.}\footnote{160} In \textit{Scherr,} two teachers challenged the school's pregnancy leave plan, prohibiting them from taking specified amounts of maternity leave, as unlawful under Title VII as amended by the PDA.\footnote{161} The Seventh Circuit read the leave policy as neutral, warranting disparate impact analysis, rather than construing the policy as facial discrimination on the basis of pregnancy as mandated by the PDA.\footnote{162} By failing to treat discrimination on the basis of pregnancy in the same manner as explicit gender discrimination, the court appeared to overlook the PDA's intent.\footnote{163} Finding merit with the plaintiffs' argument while continuing to treat the measure as neutral, the court reversed the order of summary judgment granted to the defendant-school district and remanded the matter to enable the plaintiffs to present evidence regarding the policy's disparate impact.\footnote{164}

In contrast, the Fourth Circuit in \textit{Newport News Shipbuilding & Dry Dock Co. v. EEOC,}\footnote{165} interpreted the PDA as equating discrimination on the basis of pregnancy with discrimination on the basis of gender.\footnote{166} \textit{Newport News} involved a challenge to a company policy that provided female employees with pregnancy disability benefits while denying such

\footnotesize{\footnote{159. See, e.g., Grant v. General Motors Corp., 908 F.2d 1303, 1307-08 (6th Cir. 1990) (invalidating an employer policy that excluded fertile women from lead exposure jobs by treating discrimination on the basis of childbearing capacity the same as overt gender discrimination); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 667 F.2d 448, 451 (4th Cir.) (finding that an employer policy of denying insurance coverage to the insured spouses of its male employees amounted to facial discrimination under the PDA), aff'd per curiam, 682 F.2d 113 (4th Cir. 1982), aff'd, 462 U.S. 669 (1983).}}

\footnotesize{\footnote{160. 867 F.2d 974 (7th Cir. 1988).}}

\footnotesize{\footnote{161. \textit{Id.} at 975-76. Plaintiff Maganuco intended to use her accumulated paid sick leave during the time she would be disabled as a result of her pregnancy, followed by an unpaid leave of absence for the rest of that school year. \textit{Id.} However, under the policy, she could not take paid, accumulated leave consecutively with an uncompensated leave of absence. \textit{Id.} Plaintiff Scherr desired to take paid sick leave while disabled due to her pregnancy; however, the specifics of her school's policy required her to take an unpaid maternity leave. \textit{Id.}}}

\footnotesize{\footnote{162. \textit{Id.} at 981.}}

\footnotesize{\footnote{163. \textit{Id.} at 978-79. The Seventh Circuit elaborated that "the defendants err[ed] by neglecting the context of the PDA and treating it as an independent statutory enactment. It is not. The PDA is an amendment to a highly developed statutory scheme added in response to the Supreme Court's decision in \textit{General Electric Co. v. Gilbert.}" \textit{Id.} at 978 (citation omitted).}}

\footnotesize{\footnote{164. \textit{Id.} at 984.}}

\footnotesize{\footnote{165. 667 F.2d 448 (4th Cir.), aff'd per curiam, 682 F.2d 113 (4th Cir. 1982), aff'd, 462 U.S. 669 (1983).}}

\footnotesize{\footnote{166. \textit{Id.} at 451.}}
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coverage to the insured spouses of its male employees. The district court upheld the policy on the ground that the PDA pertained to female employees only; therefore, the exclusionary policy could be sustained because employees' spouses did not fall within the class of persons entitled to statutory protection. The Fourth Circuit reversed, holding that the disparity in receiving pregnancy benefits constituted "impermissible" discrimination under the PDA. Recognizing the arduous task lower courts faced in interpreting the PDA, the Supreme Court granted certiorari.

Affirming the Fourth Circuit's judgment, the majority held that the scope of the PDA is not so limited as to exclude the spouses of employees from its protection. The Court emphasized that Congress enacted the PDA "to protect all individuals from sex discrimination in employment—including but not limited to pregnant women workers." Thus, the majority interpreted the PDA broadly by deeming male employees entitled to PDA protection in order to rectify the policy's discriminatory effect on male employees whose spouses were denied coverage. Moreover, the Court explicitly mandated that the PDA equates discrimination based on pregnancy with express, gender-based discrimination, thus automatically triggering disparate treatment analysis.

Recently, the Sixth Circuit, in Grant v. General Motors Corp., followed the decisions of the Fourth Circuit and the Supreme Court precedent in Newport News. Grant involved a Title VII challenge to a fetal protection policy that excluded all fertile women from positions that would expose them to certain levels of lead. The district court, characterizing the policy as facially neutral, upheld the measure under the business necessity defense by adhering to pre-PDA principles. The court

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167. Id. at 449.
168. Id. at 450.
169. Id. at 451.
171. Id. at 685.
172. Id. at 681 (citing 123 Cong. Rec. 7539 (1977) (remarks of Sen. Williams)).
173. See id. at 684. The majority explained that "[t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Id.
174. Id.
175. 908 F.2d 1303 (6th Cir. 1990).
176. See supra notes 165-74 and accompanying text.
177. Grant, 908 F.2d at 1304. The Grant court noted that the objective of General Motors' policy was "'to protect fetuses which women of childbearing age may be carrying, knowingly or unknowingly.'" Id. at 1305.
178. Id. at 1304. Restating the district court's rationale, the Fourth Circuit wrote, "[d]espite the policy's explicit ban on women performing certain tasks, the district court treated the fetal protection policy as facially neutral and applied disparate impact analysis
of appeals, however, reversed, holding that the PDA mandates that a policy discriminating against women based on their ability to conceive children constitutes express gender discrimination; therefore, the court determined, the company policy could only be validated if a BFOQ existed.\textsuperscript{179} Justifying its characterization of the policy as facially discriminatory, the Sixth Circuit cited to the PDA as clearly stating that discrimination on the basis of pregnancy or childbearing capacity must be considered explicit gender discrimination.\textsuperscript{180} The Supreme Court decision in \textit{International Union, UAW v. Johnson Controls, Inc.} reaffirmed this interpretation of the PDA.\textsuperscript{181}

III. Affording Women Greater Rights in the Workplace: The Supreme Court's Reclassification of the Fetal Protection Policy

A. The Supreme Court's Repudiation of the Modified Business Necessity Defense for Fetal Protection Policies

The Supreme Court granted certiorari in \textit{Johnson Controls} in large part to determine whether fetal protection policies should be analyzed under disparate treatment/BFOQ or disparate impact/business necessity principles.\textsuperscript{182} The Court unanimously\textsuperscript{183} repudiated both the district and circuit courts' characterization of Johnson Controls' policy that excluded fertile women from lead exposure jobs as facially neutral.\textsuperscript{184} By rejecting the Seventh Circuit's classification of fetal protection policies as facially neutral measures to be examined under the disparate impact framework, the Supreme Court invalidated the modified business necessity defense for fetal protection policies developed by the Fourth Circuit in \textit{Wright v.}
Olin Corp., and adopted by the Eleventh Circuit in Hayes v. Shelby Memorial Hospital.

The Johnson Controls Court recharacterized the expressly exclusionary company policy as facially discriminatory; therefore, the Court determined, it explicitly violated Section 703 of Title VII in the absence of a BFOQ. Thus, the company could only designate female sterility as a BFOQ if the employer could demonstrate that fertile women could not perform their occupational tasks as well as infertile women. Under this strict job-relatedness standard, it would be virtually impossible for any employer to establish female sterility as a BFOQ.

The Court refused to characterize the policy as facially neutral and permit the employer to justify it under the business necessity test because the company drafted the policy in terms that directly excluded women on the basis of their childbearing capabilities while leaving male employees unrestricted. The Court denounced Johnson Controls' policy because it applied only to its women employees notwithstanding evidence of the deleterious effects of lead on the male reproductive system. Furthermore, the Court rejected the Seventh Circuit's classification of the policy as neutral on the ground that the company purportedly instituted it with the goal of protecting children, rather than to exclude women. In admonishing the Seventh Circuit for using an employer's alleged motivations as the basis for characterizing the policy as facially neutral, the Supreme Court explained that motive is irrelevant in ascertaining whether a policy can be sustained under the BFOQ exception. Thus, courts must confine their examination to the policy's language alone, without considering the employer's presumed reasons for establishing it. Applying the facts in Johnson Controls to this rule, the Court stated

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185. 697 F.2d 1172 (4th Cir. 1982).
186. 726 F.2d 1543 (11th Cir. 1984).
188. See id. at 1204, 1207.
189. Id. at 1202-03.
190. Id. at 1200, 1203; see supra note 17.
191. Johnson Controls, 111 S. Ct. at 1203 ("The [circuit] court assumed that because the asserted reason for the sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect."). In rejecting the Seventh Circuit's argument that a fetal protection policy is neutral because the employer purportedly enacted it with benevolent intentions, the Court mandated that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." Id. at 1203-04.
192. Id.
193. Id. In explaining its position, the Court stated: "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." Id. at 1204. Furthermore, Justice Blackmun's opinion cited Phillips v. Martin Marietta Corp.,
that the company's purported beneficent objective for instituting the policy did not alter its discriminatory nature or entitle the policy to a label of neutrality. The Johnson Controls Court properly refused to be lured into the erroneous reasoning of the Fourth, Seventh and Eleventh Circuits that the employer's subjective motivations will lessen the intensity of a fetal protection policy by transforming it into a neutral measure. The Supreme Court's refusal to consider intent in determining whether the employer could justify the policy under the BFOQ exception affords women the meaningful protection from being relegated to obeying discriminatory policies justified by an employer's apparently altruistic motivations.

After recasting the policy as facially discriminatory, the Court proceeded to analyze whether Johnson Controls could justify the policy under the BFOQ exception. Relying on the "terms of restriction" contained in Section 703(e) of Title VII, the Court concluded that the female sterility requirement at issue in Johnson Controls could not qualify as a BFOQ because that defense is only available in those "certain instances" where the qualification is "reasonably necessary to the 'normal operation' of that 'particular' business." Justice Blackmun's opinion emphasized that the "most telling" term in the BFOQ statute is "occupational" which he defined as meaning only "objective" and "verifiable" job-requirements that are essential to the business's normal functioning. Utilizing this definition, the Court emphasized that nothing in the record indicated that fertile women were any less able to fulfill their occupational responsibilities than infertile women; therefore, no BFOQ could be established. The Court further noted that, because the policy was not job-related, it certainly failed to satisfy the Dothard standard—that the qualification must go to the "essence" of the particular business.

400 U.S. 542 (1971), as supporting the proposition that the "motives underlying the employers' express exclusion of women did not alter the intentionally discriminatory character of the policy." Id.
194. Johnson Controls, 111 S. Ct. at 1203-04.
195. Id. at 1204 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.").
196. See id.
197. Id. at 1204.
199. Id.
200. Id. at 1207.
201. Id.
Justice White, in a concurring opinion, agreed with the Court's characterization of the policy as overt, gender-based discrimination, in contravention of Title VII unless the employer successfully raises the affirmative BFOQ defense.202 However, Justice White disputed the Court's narrow reading of the BFOQ provision as containing "terms of restriction."203 Instead, he interpreted the statutory term "'occupational qualification,'" broadly to encompass any ability the employer deemed appropriate for the job, rather than as meaning only a qualification normally related to that particular business.204 Under this analysis, Justice White reasoned that female sterility is an "'occupational qualification.'"205 However, Justice White explained that the next issue to consider was whether the occupational qualification comported with the statutory exception of being "'reasonably necessary to the normal operation of making batteries.'"206 On this point, he agreed with Justice Blackmun's opinion that it was not.207

By reading the BFOQ exception narrowly, the Johnson Controls Court intimated that a fetal protection policy could never establish a BFOQ because no reasonable relation could ever exist between fetal health and occupational capabilities.208 Moreover, the Supreme Court rejected the Seventh Circuit's conclusion that an employer's general concern for the unborn can justify a fetal protection policy under the BFOQ defense.209 In contrast, Justice White denounced the Court for implying that a fetal protection policy could never qualify as a BFOQ.210 Conceding that the BFOQ exception is a "'difficult standard to satisfy,'" he focused on the fact that the statutory language does not restrict its application to fetal protection policies.211 Providing an example, Justice White stated that a fetal protection policy should be upheld under the statutory exception if en-

202. Id. at 1210 (White, J., concurring).
203. Id. at 1204 (opinion of Court).
204. Id. at 1210 n.1 (White, J., concurring). Citing Webster's Dictionary, Justice White asserted that "'occupational' encompasses any criteria related to the job, as defined by the employer. Id.
205. Id.
206. Id.
207. Id.
208. Id. at 1206 (opinion of Court). In espousing this position, the Court explained: "The unconceived fetuses of Johnson Controls' female employees . . . are neither customers nor third parties whose safety is essential to the business of battery manufacturing." Id.
209. Id. at 1206-07. Refusing to justify the policy on the ground that the employer is concerned with protecting potential life, Justice Blackmun proclaimed that "[n]o one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of batterymaking." Id. at 1206.
210. Id. at 1210 (White, J., concurring).
211. Id.
acted due to employer concerns about potential tort liability.\textsuperscript{212} Thus, Justice White posited that preventing injury to employees and third parties should be considered important components of Johnson Controls' business.\textsuperscript{213}

\section*{B. The Court's Rejection of Industrial "Safety Concerns" as Sufficient to Validate Fetal Protection Policies}

The \textit{Johnson Controls} Court sharply criticized Justice White's contention that Johnson Controls' industrial "safety concerns" with fetal health established a BFOQ.\textsuperscript{214} The Court discounted this argument by distinguishing the instant matter from previous cases in which an industrial "safety concern" qualified as a BFOQ.\textsuperscript{215} The Court enunciated that safety considerations will only permit a facially discriminatory policy to succeed under the BFOQ exception if promoting safety constitutes an essential occupational task and if a woman's ability to ensure the safety of third-parties becomes impaired.\textsuperscript{216}

Citing previous circuit decisions in which third-party safety concerns established a BFOQ, Justice White faulted the Court for failing to extend that principle to find that fetal safety concerns could also justify a facially discriminatory policy.\textsuperscript{217} Applying the "'essence of the business'" test, Justice White asserted that fetal safety should be construed as going to the "essence" of ordinary operation of the battery manufacturing facility.\textsuperscript{218} Citing \textit{Western Air Lines v. Criswell}\textsuperscript{219} and \textit{Dothard v. Rawlinson},\textsuperscript{220} Justice White delineated that Johnson Controls' concerns for the health and safety of its employees' offspring are as strong as an airline company's passenger safety concerns.\textsuperscript{221} Thus, he suggested that the same industrial "safety concerns" that sustained policies under BFOQ analysis in \textit{Dothard} and \textit{Criswell} should be extended to fetal protection policies.\textsuperscript{222} Justice White argued that a concern for the well-being of the female employees' children goes to the "essence" of the battery making

\begin{itemize}
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id. at 1205-06 (opinion of court).
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id. at 1206. The Court emphasized that free choice must be afforded to women by asserting that "'[fetal, as opposed to passenger, safety was best left to the mother."
\item \textsuperscript{217} Id. at 1212 (White, J., concurring).
\item \textsuperscript{218} Id. at 1213 n.5.
\item \textsuperscript{219} 472 U.S. 400, 414 (1985).
\item \textsuperscript{220} 433 U.S. 321, 333 (1977).
\item \textsuperscript{221} \textit{Johnson Controls}, 111 S. Ct. at 1212-13.
\item \textsuperscript{222} Id.
\end{itemize}
business, thus qualifying as a BFOQ. This strained argument resembles the holdings in Wright v. Olin Corp. and Hayes v. Shelby Memorial Hospital, in which the Fourth and Eleventh Circuits expanded the industrial "safety concern" to include an employer's concern for the health of its employees' potential offspring.

The Johnson Controls Court wisely rejected the circuit courts' expanded application of the industrial safety consideration as a justification for upholding fetal protection policies. In doing so, the Supreme Court refused to adopt the broadened use of the BFOQ exception to include policies motivated by safety concerns, and reaffirmed the position that decisions regarding the type of employment one will accept are personal choices that must be made by women and their families, not by their employers.

C. The PDA: A Critical Addition to Title VII's Definition Section

In justifying its decision in Johnson Controls to classify fetal protection policies as facially discriminatory, the Supreme Court properly relied on the express language of the 1978 amendment to Title VII, mandating that discrimination on the basis of pregnancy or "related medical conditions" (i.e., childbearing capacity) be treated the same as express discrimination on the basis of gender. The Court looked to its previous holding in Newport News Shipbuilding & Dry Dock Co. v. EEOC, in which it interpreted the PDA as making "clear that, for all Title VII purposes, discrimination based on a woman's pregnancy [or capability for childbearing] is, on its face, discrimination because of her sex," thus directly violating Section 703(a) of Title VII in the absence of a BFOQ.

In addition to the definitional clarification, the Court emphasized that the

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223. Id. at 1213 n.5.
224. 697 F.2d 1172 (4th Cir. 1982).
225. 726 F.2d 1543 (11th Cir. 1984).
226. See supra notes 62-96 and accompanying text.
228. Id. at 1206-07, 1210. Describing the importance of allowing women to be able to make their own employment decisions, the Court explained 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. Congress has left this choice to the woman as hers to make." Id. at 1210.
229. Id. at 1206.
232. Id. at 1204. Detailing its interpretation of the PDA, the Johnson Controls Court stated: "Under the PDA, such a classification must be regarded . . . in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex." Id. at 1203.
PDA further strengthened Title VII by setting the standard that women may only be restricted from jobs where their pregnancy or childbearing capabilities impair job performance. This provision appears to supplement the general Title VII BFOQ exception that the qualification or restriction must be "reasonably necessary to the normal operation" of the battery manufacturing business.

The PDA should be interpreted as dictating that discrimination against women based on pregnancy or "related medical conditions" be evaluated under the existing Section 703(a) of Title VII unless the employer can establish a BFOQ under the existing Section 703(e). Moreover, any challenged measure must not contravene the PDA's separate requirement that pregnant women or women with "related medical conditions" be treated the same as other women "in their ability or inability to work." This statutory restriction for occupational abilities shows that fetal safety concerns that bear no relationship to job performance do not pass either the PDA test of job-relatedness or the general BFOQ defense.

By focusing on the express language of the PDA, Justice Blackmun's opinion correctly explained that the provision requires discrimination on the basis of childbearing to be analyzed the same as overt gender discrim-

233. Id. at 1206.
234. See id.; 42 U.S.C. § 2000e-2(e)(1) (1988). Emphasizing the impact of the PDA's precise requirements, the Court concluded that "[t]he PDA's amendment to Title VII contains a BFOQ standard of its own: unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" Johnson Controls, 111 S. Ct. at 1206 (quoting 42 U.S.C. § 2000e(k) (1988)). The Court elaborated that "[t]his language clearly sets forth Congress' remedy for discrimination on the basis of pregnancy and potential pregnancy. . . . In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." Id.

In contrast, Justice White interpreted the PDA as an addition to Title VII's definition section that "did not restrict the scope of the BFOQ defense." Id. at 1213 (White, J., concurring). Diverging from the Court's interpretation, Justice White stated that the PDA does not modify the gender discrimination provisions under Title VII in any fashion. Id. In reaching his conclusion, Justice White apparently disregarded the second sentence of the PDA, id. at 1206, requiring that women capable of childbearing "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (1988); see supra note 11 (setting forth statutory language). Justice Blackmun's majority opinion correctly interpreted this clause as providing substantive value by containing "a BFOQ standard of its own." Johnson Controls, 111 S. Ct. at 1206. Responding to "the concurrence['s] assert[ion] that the PDA did not alter the BFOQ defense," Justice Blackmun accused Justice White of "seek[ing] to read the second clause of the Act." Id.
235. See Johnson Controls, 111 S. Ct. at 1206.
237. See Johnson Controls, 111 S. Ct. at 1206.
ination, thus warranting disparate treatment analysis. Justice Blackmun's reading of the PDA not only comports with the statutory language, but also indicates an appropriate adherence to the Supreme Court's decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC.* Furthermore, the *Johnson Controls* Court followed the Sixth and Ninth Circuits' interpretations of the PDA in *Grant v. General Motors Corp.* and *Harriss v. Pan American World Airways, Inc.*, respectively, in which those courts characterized policies discriminating against the pregnant and potentially pregnant as equivalent to overt gender discrimination.

**D. Potential Risk to the Fetus Does Not Justify a Restriction on Free Choice**

The Supreme Court impugned Johnson Controls' employment qualification measure as amounting to overt, gender discrimination because it explicitly restricted women from making their own occupational decisions while leaving men free to make such choices for themselves.

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238. *Id.* at 1203.
240. 908 F.2d 1303 (6th Cir. 1990).
241. 649 F.2d 670 (9th Cir. 1981).
242. See supra notes 140-46, 175-80 and accompanying text.
By asserting that the company policy constituted explicit gender discrimination because the policy did not apply to male employees, notwithstanding the potential harmful effects of lead exposure on men, the Court failed to acknowledge that an explicit gender-based policy remains facially discriminatory regardless of whether men also experienced negative effects from lead. Justice Scalia, in his concurrence, accurately pointed out this flaw in the Court's reasoning.

However, the fact that Johnson Controls did not restrict male employees' participation in lead exposure jobs remains significant for another reason. The fact that the policy pertained exclusively to women suggests that Johnson Controls' rationale for the measure was rooted in the generalization that women need guidance in making decisions regarding personal choices while men do not. The Court has long invalidated policies based on such gender stereotypes.

In an ill-fated attempt to justify this restriction on free choice, Justice White cited Dothard v. Rawlinson to support the proposition that such limitations on employment can be justified if a threat of imminent harm to the class that the policy was designed to protect. Thus, the policy violated the Supreme Court's rule in Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), that an employer provision which treats women as a class, without taking into account individual differences within that class, violates Title VII's prescriptions against gender discrimination in the work force. Id. at 710; EDUCATION AND LABOR REPORT, supra note 10, at 8-9; see supra notes 129-36 and accompanying text. Moreover, the House committee report depicted the underinclusiveness of fetal protection policies. The report explained:

fetal protection policies seldom address the health risks posed by workplace hazards in a comprehensive fashion. Whether employers have disregarded hard evidence of male-related fetal health risks, or have chosen to avoid finding out if such risks exist, they have commonly adopted underinclusive policies which serve neither the interests of workplace health and safety nor the employment rights of women.

EDUCATION AND LABOR REPORT, supra note 10, at 8-9.

244. Johnson Controls, 111 S. Ct. at 1216 (Scalia, J., concurring).

245. Id. In his concurrence, Justice Scalia disputed the Court's finding that the Johnson Controls policy impermissibly discriminated against women because it applied only to female employees, despite evidence of the harmful effects of lead exposure on males. Id. He explained that even if deleterious effects from air-borne lead never befell men, the policy would remain violative of the PDA because that provision expressly equates discrimination on the basis of female fertility with intolerable discrimination on the basis of gender. See id. Thus, according to Justice Scalia, the policy should be invalidated without ever reaching the issue of the potential consequences of lead upon male battery manufacturing employees. Id.

246. See id. at 1202 (opinion of Court).


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However, Justice White failed to point out that the restriction on free choice sustained in Dothard is the exception, not the rule. In that case, the Dothard Court emphasized that a facially discriminatory policy could be justified, notwithstanding the restriction on personal decision-making, only in extremely narrow circumstances in which women confronted an inescapable threat of harm that prevented them from performing their central occupational task of ensuring safety.

Justice White's reliance on Dothard appears misplaced because the Dothard exception does not warrant application to the dissimilar fact situation presented in Johnson Controls. In Dothard, a real risk that inmates would assault the women guards existed; thus, their very presence hindered the women employees' ability to fulfill their primary occupational responsibility of ensuring prison safety. In Johnson Controls, however, the presence of women in the battery manufacturing business did not pose a grave risk to their potential offspring, and their exposure to lead did not interfere with their ability to perform their essential occupational tasks. Hence, the BFOQ justification that the Court accepted in Dothard to permit the restriction on free choice does not apply to the markedly different context presented in Johnson Controls.

Under Johnson Controls, however, Dothard remains good law. Although the risk in Johnson Controls did not justify the fetal protection policy under the Dothard exception, the Johnson Controls decision does not preclude the possibility that a gender-based policy could be sustained under the BFOQ exception if the risk of harm would undermine a woman's ability to perform her job. Only in those narrow instances, however, would a curtailment of free choice be justified.

IV. Comment: The Aftermath of Johnson Controls: Pending Litigation in International Union, UAW Local 1829 v. Exide Corporation

While the Supreme Court deliberated Johnson Controls, union workers in the small town of West Burlington, Iowa, anxiously awaited the high
court's ruling that would directly affect the Milwaukee State Equal Employment Opportunity Commission's probable cause determination in International Union, UAW v. Exide Corp. The Exide case involves a matter analogous to Johnson Controls. An Iowa battery manufacturing company, Exide Corporation, instituted an exclusionary policy in 1988 in which the company indicated that it would no longer hire fertile women to work in areas of the plant where they would be exposed to airborne lead. In applying the policy, the company asked every woman candidate during her interview, as well as on her job application, to disclose whether or not she was physically capable of bearing children. Exide also required its female employees to sign an elaborate consent form, delineating the risks of lead exposure on the fetus. The company did not require its male employees to sign the consent form, nor did the company inquire into male applicants' fertility despite scientific data documenting the potential harmful effects of lead exposure on males.

256. Local 1829 and Int'l Union v. Exide Corp., Charge No. 260-90-0656 (EEOC July 10, 1992) (determination) (on file with the Catholic University Law Review) [hereinafter Exide Charge]; see Brenda Woody, Fired Worker Keeps Eye on High Court, The Hawk Eyes, Dec. 2, 1990, at A1, A10; Telephone Interview with Joan Bertin, Associate Professor, Columbia University School of Public Health; former Associate Director, American Civil Liberties Union's Women's Rights Project; and author, Amicus Brief for ACLU Women's Law Project, International Union, UAW v. Johnson Controls Inc., 111 S. Ct. 1196 (1991) (No. 89-1215), (Mar. 8, 1993) [hereinafter Bertin Interview]; see also infra note 278 (discussing the requisite procedures a complainant must follow to establish a Title VII claim).


Women of child-bearing potential ("fertile females") are defined as any female who has not entered menopause or who has not had a surgical sterilization procedure. Use of birth control measures will not alter their status. Women will be presumed to be capable of reproduction until they medically prove that they are not capable of bearing children.

258. See Exide Charge, supra note 256, at 2.

259. See Exide's Fetal Protection Policy, supra note 257 (requiring every female employee to sign its fetal protection policy as an indication that she understood and would comply with its terms).

260. See id. The policy is devoid of any reference to the potential deleterious effects on males from lead exposure. Id.; see also Bertin Interview, supra note 256; Jackson Interview, supra note 257.
The company's policy directly victimized former Exide employee, Tammy D.261 During her hiring interview in August 22, 1990, an Exide official asked Tammy D. whether or not she was fertile.262 She answered in the affirmative, but explained that she already had four children, and that her husband had received a vasectomy; therefore, the couple would definitely not have any more children.263 Notwithstanding her fertility status, the supervisor hired Tammy D. because she had prior work experience in the manufacturing industry and met all objective hiring criteria.264 The company placed her in an “entry-level job” where she would not be exposed to lead.265 However, her supervisor informed her that once she acquired seniority, she could be transferred into a higher paying position in a division that would expose her to airborne lead.266

After she worked in an exemplary manner for a mere three weeks, the company unilaterally terminated her on September 5, 1990.267 When asked for an explanation of the grounds for her dismissal, Exide informed her that they fired her because she did not submit to sterilization, despite the fact that she could eventually be eligible for a position in the lead industry.268 Exide then informed Tammy D. of the

261. See Exide Charge, supra note 256. In addition to the UAW Local 1829 action against Exide, Tammy D. filed a separate charge against the company claiming that the employer fetal protection policy contravened Title VII and caused her to be illegally terminated. See Tammy D. v. Exide Corp., Charge No. 260-91-0053 (EEOC July 10, 1992) (on file with the Catholic University Law Review) [hereinafter Tammy D.; Gene Erb, 'Fetal Protection' Policy Leaves Some Iowans Feeling Victimized, Des Moines Register, Oct. 15, 1990, at A1 (describing the plight of Tammy D.).

262. Erb, supra note 261, at A1. The reporter explained that “Tammy D . . . had no idea why the company wanted to know about her family plans when she interviewed for a job at the Exide Battery Co. plant in Burlington.” Id.

263. Id.; see Tammy D., supra note 261, at 2. The EEOC probable cause determination in the matter of Tammy D. v. Exide Corp. states that “[b]ecause her husband had a vasectomy she responded that she could not have any children.” Id.

264. See Tammy D., supra note 261, at 2; see also Jackson Interview, supra note 257.


266. Id. The article stated that Tammy D. “began working at an entry-level job in an area free of lead exposure. However, she understood that in time, as she gained seniority, she could be promoted into an area where the exposure to lead would be greater” and where she would receive a higher salary. Id.


268. Id. In response to the employer's termination decision, Tammy D. explained: “I told him [the Exide supervisor for whom she worked] that I could prove that my husband has had a vasectomy. We have four kids. The oldest is 12. The youngest is 6. We don't plan to have any more. But that wasn't good enough. He said something might happen to my husband. I might remarry and decide to have more kids.” Id. at A1, A8. The fact that Tammy D.'s employer was concerned with her childbearing status, as well as her present and future marital status, demonstrates that the company exceeded its bounds of ensuring that its workers possessed the qualifications to perform.
company policy that forbade fertile women from working in the lead industry.\textsuperscript{269}

Tammy D., as well as other female employees of Exide, brought the company's discriminatory practices to the attention of International Union, UAW Local 1829 President, Larry Jackson.\textsuperscript{270} On behalf of the union, Mr. Jackson filed a charge with the Milwaukee district office of the EEOC, charging that Exide's exclusionary policy violated Title VII's prohibitions against gender discrimination in the workplace.\textsuperscript{271}

Instead of expeditiously responding with an initial probable cause determination, the EEOC awaited the Supreme Court's decision in \textit{Johnson Controls}.\textsuperscript{272} However, even after the Court issued its decision in \textit{Johnson Controls}, the Milwaukee EEOC did not immediately respond with its probable cause determination regarding Exide's exclusionary policy. In direct response to the Supreme Court ruling, though, Exide promptly rescinded its express fetal protection policy\textsuperscript{273} Yet the company continued its practice of excluding women from positions in the lead industry by contemporaneously substituting the explicit policy with a different practi-

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\textsuperscript{270} See Tammy D., \textit{supra} note 261. In addition to Tammy D.’s separate action against Exide, two other former women employees, Patty M. and Helen R., whom the Company also terminated on the ground that they could not prove infertility, brought charges against Exide before the EEOC, Milwaukee District Office. Patty M. applied for a job in the lead industry with Exide in August of 1988. Patty M. v. Exide Corp., Charge No. 260-90-0654 (EEOC July 10, 1992) (determination) (on file with the \textit{Catholic University Law Review}). However, a company official informed her that she could not submit an application unless she could provide proof from her doctor attesting to her infertility. \textit{Id.} She responded that she could not offer such proof because she was in fact fertile. \textit{Id.} Thus, the Exide officer refused to accept her application, notwithstanding the fact that her extensive prior employment experience in the factory industry revealed that she possessed the requisite job qualifications for a position with Exide. \textit{Id.} Helen R. filed a separate complaint in which she alleged that Exide violated Title VII's prohibitions against gender discrimination in the workplace because the company rejected her employment application on the ground that she refused to sign a form stating that she would comply with the company's fetal protection policy. Helen R. v. Exide Corp., Charge No. 260-90-0655 (EEOC July 10, 1992) (determination) (on file with the \textit{Catholic University Law Review}).

\textsuperscript{271} Exide Charge, \textit{supra} note 256.

\textsuperscript{272} See Woody, \textit{supra} note 256, at A1, A10; Bertin Interview, \textit{supra} note 256.

\textsuperscript{273} See \textit{id}.
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Exide began requiring its female employees to view graphic films at annual meetings and to attend "educational programs" depicting the potential negative impact on fetuses from lead exposure and strongly advising fertile women against accepting any position that would expose them to lead. The film did not discuss the debilitating effects of lead exposure on males, nor did it explain that women's personal choices with respect to childbearing bore no relation to their job of battery-manufacturing. In conducting its investigation of the union's charge against Exide, the Milwaukee EEOC uncovered this new practice, designed to accomplish the same unlawful end as Exide's former exclusionary policy.

Finally, on July 10, 1992, the Milwaukee EEOC issued its probable cause determination in favor of the union. It determined that, under

Training and Counseling of All Applicants/Employees
1. All current Exide employees will be required to attend a training session in which a video presentation will be shown regarding the adverse effects of lead on the male and female reproductive systems and on the unborn fetus. Employees will be required to sign an Attendance Roster to which will be attached a copy of the document entitled "Effects of Lead on Human Reproduction and Fetal Health."

Id.; see infra note 276.

274. Exide Corp., Reproductive and Fetal Hazards, (Mar. 25, 1991) (on file with the Catholic University Law Review) (consisting of Exide's revised fetal protection policy in the wake of Johnson Controls). The new policy states in pertinent part:

The recent decision by the Supreme Court of the United States in UAW v. Johnson Controls, Inc. now prohibits employers from utilizing fetal protection policies which involuntarily exclude fertile women from lead-exposed jobs. The Supreme Court has held that employers may not restrict the employment opportunities of their employees because of the hazards to an unborn fetus.

275. Id.

276. See id. The revised Exide policy statement claims that its video presentation depicts "the adverse effects of lead on the male and female reproductive systems." Id. However, according to former UAW Local 1829 Union President, Larry Jackson, the video program only described the potential harmful effects from lead on female employees, without addressing the possible adverse impact on males. Jackson Interview, supra note 257. Mr. Jackson attended the annual meeting when Exide delivered its video presentation; hence, he had first-hand knowledge of the content of the presentation. Id.

277. Bertin Interview, supra note 256.

278. See Exide Charge, supra note 256. Section 706(b) of Title VII sets forth the procedures for commencing a legal action under this Title of the 1964 Civil Rights Act. 42 U.S.C. § 2000e-5(a)-(f) (1988 & Supp. 11991). Prior to filing a civil suit in federal district court, a party charging a Title VII violation must follow the requisite pre-trial proceedings, the first of which requires the complainant to submit a "charge" with the district EEOC office where the alleged violation transpired. See id. § 2000e-5(b). After conducting an investigation, if the EEOC determines that "reasonable cause" exists that a defendant-employer contravened Title VII, the EEOC will issue a "determination," which merely serves as a preliminary finding that a potential Title VII violation exists. See id. Upon issuing the "determination" the Commission will attempt "to eliminate any such alleged
Johnson Controls, probable cause existed that both the direct removal policy, as well as the videotape program, constituted impermissible gender discrimination under Title VII.\textsuperscript{279} Although that the Johnson Controls Court did not directly confront the issue of whether or not programs devised to dissuade fertile women from accepting jobs in the lead industry violated Title VII, the EEOC's probable cause determination stated that the company's video presentation also "establish[ed] a violation of Title VII," as amended by the PDA.\textsuperscript{280}

Thus, the critical question of the breadth of Johnson Controls remains unanswered. In the pending Exide matter, the unresolved issue endures of whether or not the holding of Johnson Controls can be applied to invalidate a mandatory company program designed to persuade women to refuse lead-exposure positions. However, the influential precedent of Johnson Controls,\textsuperscript{281} the revised EEOC policy guidance,\textsuperscript{282} as well as political responses and subsequent judicial applications of the decision,\textsuperscript{283} clearly demonstrate that the Johnson Controls holding can be readily applied to invalidate the video program established to entice women into accepting lower paying positions in the non-lead industry.

\textsuperscript{279} See Exide Charge, supra note 256.
\textsuperscript{280} Id. at 2.
\textsuperscript{281} See infra notes 284-91 and accompanying text.
\textsuperscript{282} See infra notes 292-304 and accompanying text.
\textsuperscript{283} See infra notes 305-10 and accompanying text.
A. Applying the Johnson Controls Rationale to Invalidate the Exide Video Presentation

In *Johnson Controls*, the Supreme Court made a sweeping pronouncement that employer fetal protection policies, established to prevent fertile women from working in the lead industry, would not be validated. In large part, the *Johnson Controls* Court based its decision on the fact that such policies facially discriminate on the basis of sex and that no BFOQ for female sterility exists in the lead industry. Moreover, the *Johnson Controls* Court emphasized the important point—that males may be adversely affected by lead exposure, yet the company policy exclusively applied to its female employees.

The *Johnson Controls* rationale can be applied to invalidate Exide's mandatory videotape practice. The *Johnson Controls* Court outlawed an employer policy that *directly* excluded women; therefore, the federal district court should not sustain a policy that seeks to accomplish the same impermissible objective *indirectly* through the use of one-sided video presentations that compel women to forego jobs in the lead industry. If a reviewing court were to sustain such indirect policies the end result would be an evisceration of *Johnson Controls*. Employers would merely pay lip service to *Johnson Controls* by nullifying their express exclusionary policies, and replacing them with less obvious tactics designed to achieve the same end of baring women from lead exposure positions. Thus, if the Exide policy were upheld, it would pave the way for future employers to institute similar measures to accomplish the objective that the Supreme Court declared illegal in *Johnson Controls*.

The failure of the video program to emphasize the impact of lead exposure on males apparently reveals that Exide believed women needed guidance in making personal choices while males were capable of making identical choices without instruction from their employer. Clearly, the

285. *Id.* at 1202, 1207-08; see *supra* notes 187, 197-201 and accompanying text.
286. *See supra* notes 17, 189-90 and accompanying text.
287. *Johnson Controls*, 111 S. Ct. at 1207-08.
288. The author refers to the federal district court to postulate the manner in which that court may decide *Exide* if conciliation and arbitration efforts fail and the matter proceeds to the United States District Court for the Eastern District of Wisconsin. *See supra* note 278 (discussing the procedures for bringing a Title VII claim in federal district court).
289. Brenda Woody, *ACLU Lawyer Says Fetal Policy Discriminates*, THE HAWK EYE, Dec. 2, 1990, at A1. The article discusses Joan Bertin's reaction to the *Exide* policy. *Id.* In describing the similarities between the Johnson Controls and Exide policies she stated: "We call them sex discrimination . . . because they create impediments to women's em-
Exide video program contravenes the Johnson Controls Court's instruction to employers that “[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”

Invalidating Exide's policy will not only protect women from explicit exclusionary policies but will also afford them the additional right, logically flowing from the liberty granted in Johnson Controls, of prohibiting employers from subjecting women to subtle measures designed to exclude them from the very same positions that the Johnson Controls Court declared them entitled to obtain. Thus, the Johnson Controls rationale allows for the invalidation of educational programs established to perpetuate gender stereotypes and to exclude women from jobs for which they are qualified. Invalidating the Exide practice would not require the modification of Johnson Controls's basic holding. To the contrary, nullifying Exide's practice would further ensure the realization of the Johnson Controls objective of prohibiting gender-based, fetal protection policies, regardless of such policies' form.

B. The Exide Program Cannot Be Sustained Under the EEOC's Revised Policy Guidance Statement for Fetal Protection Policies

In direct response to Johnson Controls, the EEOC rescinded its three prior policy guidance statements on fetal protection policies. These statements generally required EEOC officials to examine fetal protection policies under disparate impact principles and allowed employers to defend such policies under the three-prong business necessity test created by the Fourth Circuit for evaluating fetal protection policies. The employment that are neither rational nor fair, because they don't have similar concern for the health of male workers.”

Ms. Bertin also pointed out that, like the Johnson Controls policy, the Exide policy “is used strictly against women—and not against men who may father future children.” Id. at A10. Ms. Bertin explained that “Johnson [Controls] and Exide ignored the findings about male vulnerability . . . . The way they translated the findings was to say women couldn't work.” Id.; see supra notes 243, 246-47 and accompanying text (discussing the paternalistic nature of Johnson Controls' policy that directs women to work in only confined areas while leaving male employees unrestricted).

290. Johnson Controls, 111 S. Ct. at 1207.
291. See id.
292. See infra notes 293-94 and accompanying text.
293. See Reproductive/Fetal Hazards, 2 EEOC Compl. Man. (BNA) § 624, at 31 (July 1986) (containing the initial fetal policy guidelines). The 1986 guidance mandated that “[t]he bona fide occupational qualification (BFOQ) exception to Title VII protection does not apply to the situations covered by this manual section.” Id. § 624.4, at 33; Notice, Policy Guidance on Reproductive and Fetal Hazards, 3 EEOC Compl. Man. (BNA) No. 120, at 5 (Oct. 7, 1988) (containing the former fetal protection policy guidance that existed prior to the Seventh Circuit Johnson Controls decision). The 1988 EEOC policy guidance recognized the difficulty in determining whether to apply disparate treatment or disparate
EEOC supplanted its obsolete policy statements with an innovative guidance that directed EEOC officials to analyze fetal protection policies under the principles enunciated Johnson Controls. The revised EEOC policy guidance serves as an important mechanism to ensure future compliance with the Johnson Controls ruling. Thus, the revised EEOC policy guidance statement ensures that the Johnson Controls objective of

impact principles to fetal protection policies. Id. In embracing the approaches of the Fourth and Eleventh Circuits of examining fetal protection policies under disparate impact principles, the EEOC explained:

The initial question is what framework should be used to analyze cases involving such policies? In the few cases challenging reproductive and fetal protection policies aimed at pregnant employees or female employees of child-bearing age or capacity, the courts have primarily employed an adverse impact/business necessity framework for analysis.

... [T]he Commission follows the lead of every court of appeals to [sic] have addressed the question ... that the business necessity defense applies to these cases.

Id. at 7-8 (footnotes omitted); Notice, Policy Guidance on United Auto Workers v. Johnson Controls, 3 EEOC Compl. Man. (BNA) No. 135, at 19 (Jan 24, 1990) (containing the EEOC policy guidance based on the Seventh Circuit decision in Johnson Controls in which the Commission directed its officials to partially disregard the Johnson Controls majority by continuing to examine fetal protection policies according to its 1988 policy guidance). This 1990 policy guidance partially stated:

Commission field offices should not rely on the Johnson Controls decision as guidance for processing “fetal hazards” charges. Employment policies that exclude women on the basis of pregnancy or capacity to become pregnant are discriminatory on their face and employer justifications for such policies must be examined critically. The majority in Johnson Controls gave undue deference to the employer's judgment in broadly drawing its exclusionary policy.

The directions for investigation and evaluation of evidence set forth by the Commission in its interim Policy Guidance on Reproductive and Fetal Hazards, [the 1988 policy] as elaborated on by this document, should continue to be followed in processing charges challenging fetal protection policies.

Id. at 29-30 (footnotes omitted). Although the 1989 policy guidance specified that fetal protection policies should be construed as facially discriminatory, the guidance explicitly required that such policies be scrutinized under the three-prong business necessity defense.

Id. at 30.

294. EEOC: Policy Guide on Supreme Court's Johnson Controls Decision, 405 Fair Empl. Prac. Manual (BNA) 6941, 6943 (June 28, 1991) [hereinafter Current Policy Guidance] (“In light of the Supreme Court’s decision in Johnson Controls, Compliance Manual Section 624 (Reproductive and Fetal Hazards) and the Commission's prior policy guidance issuances on fetal protection policies are hereby rescinded, and the mode of analysis set forth in those documents should no longer be applied.” (footnote omitted)).

295. See id. The EEOC's current policy guidance clearly enunciates that “[a]s a result of the Supreme Court’s decision in Johnson Controls, policies that exclude members of one sex from a workplace for the purpose of protecting fetuses cannot be justified under Title VII.” Id. (footnote omitted).
enabling women to attain enhanced protections in the workplace will be effectuated.296

The EEOC policy guidance is not drafted in terms that would limit its application to expressly written employer policies that unequivocally exclude women from positions where they would be exposed to lead.297 Instead, the broad language utilized in the policy guidance reveals its intent to encompass any type of fetal protection policy, regardless of whether it takes the form of an explicit prohibition or manifests itself in a so-called educational program.298 The policy guidance simply states that “policies . . . protecting fetuses cannot be justified under Title VII.”299 The guidance does not restrict the word “policies” to only certain forms of employer measures designed to exclude women from jobs based on their fertility, a criteria wholly unrelated to their ability to perform their job of battery-manufacturing.300 Clearly, the policy guidance’s fundamental purpose is to prohibit employers from instituting any type of gender-based exclusionary measures.301

Despite the fact that the Exide program does not go so far as to directly forbid women from obtaining work in the lead industry, the program achieves the same illegal goal as express policies of dictating women’s employment choices.302 Therefore, under the revised EEOC policy guidance, Exide’s program should be treated identically to both the former Exide policy that expressly barred women from these positions,303 and the exclusionary policy that the Johnson Controls Court declared violative of Title VII.304 Only if courts apply the rationale delineated in the revised EEOC policy guidance to all employer measures that exclude women on the basis of their fertility, regardless of their form, will Johnson

296. See id. The policy guidance declares that “[i]ndividuals who can perform the essential functions of a job must be considered eligible for employment, regardless of the presence of workplace hazards to fetuses.” Id. By determining that fetal protection policies may no longer be sustained under the three-prong business necessity defense and instead requiring that such policies be treated as facial discrimination on the basis of gender, the policy statement affords women greater rights in the workplace by ensuring that the EEOC will no longer validate discriminatory, sex-based policies under disparate impact principles. See id.

297. See id.

298. See id.

299. Id. (emphasis added).

300. Id.

301. See id.

302. See supra note 17 (discussing the deleterious effects from lead exposure on males).

303. See supra note 257 (depicting Exide’s exclusionary policy).

Controls] truly achieve the goal of safeguarding women from discriminatory employment policies.

C. Political Reactions and Subsequent Judicial Applications of Johnson Controls Will Not Allow the Exide Program to Be Sustained

In the wake of intense political pressure to ensure that Johnson Controls fulfills its potential of augmenting women's rights in the workplace, one can readily predict that the Exide program will not be sustained by a reviewing court. Women's rights activists and other political figures describe Johnson Controls as among the most significant women's rights cases in modern history. In predicting the aftermath of Johnson Controls, scholars and political leaders estimate that the decision will have an indelible impact on American business by requiring them to ensure the health and safety of the workplace for both men and women, rather than permitting companies to exclude women from an unhealthy workplace by designating sterility as a job qualification. These groups

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306. See, e.g., Marcia Coyle, A Policy for Her Own Good, Nat'l L.J., Oct. 22, 1990, at 1 ("[T]he case 'is likely the most important sex discrimination case in any court' since the enactment of Title VII of the 1964 Civil Rights Act."); (quoting Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit); Bruce Fein & William B. Reynolds, Fetal Protection or Female Rejection, Legal Times, Oct. 1, 1990, at 24 (describing Johnson Controls as among "the most potent business cases" of the term); John P. Furfaro & Maury B. Josephson, Supreme Court Review: Part II, N.Y. Law J. Oct. 4, 1991, at 3 (characterizing Johnson Controls as "[o]ne of the most publicized cases of the term"); David G. Savage, Court Rejects Limiting Jobs to Protect Fetuses, L.A. Times, Mar. 21, 1991 (describing Johnson Controls as "a decision hailed by feminists").

307. See, e.g., Moss, supra note 305, at 13-14 (explaining that the decision should have the positive impact of causing employers to make the workplace a healthier and safer place for all employees). To substantiate her prediction, Moss quoted from the Johnson Controls
decision stating that “[sex discrimination . . . cannot be used] ‘as a method of diverting attention from an employer’s obligation to police the workplace.’” *Id.* at 14 (quoting International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1209 (1991) (alterations to correct misquote in original)). Ms. Moss went on to explain that “[e]mployers must take into account that some of their workers will be pregnant. They cannot avoid the consequences of their own negligent conduct by eliminating a class of workers from their employment.” *Id.*; see also Gloria Negri & Diane Lewis, *Justices Bar Job Curbs Aimed at Shielding Fetuses; “Fighting Mad” Worker Celebrates Her Victory at a Vermont Factory*, BOSTON GLOBE, Mar. 21, 1991, at 1, 26 (describing the “‘landmark sex discrimination case’” as sending “‘a strong message to employers throughout the nation . . . to provide a safe workplace for all workers, men and women.’” (quoting Peggy Wiesenberg, spokeswoman for the Coalition Against Workplace Reproductive Hazards located in Boston)); Savage, *supra*, note 306, at 1 (reporting that “[i]n the solution to hazardous workplaces is to eliminate the hazard, not the women employees.” (quoting Marcia Greenberger of the National Women’s Law Center.)).

However, some business leaders criticize *Johnson Controls* for requiring them to bear excessive costs to make the workplace hospitable for fertile women. See, e.g., *Fetal Protection Ruling Criticized by Business Community*, Daily Lab. Rep. (BNA) No. 56, at A-11 (Mar. 22, 1991) (explaining that *Johnson Controls* is “has been met with dismay from a business community fearing lawsuits and predicting job losses from overseas flight.”); see also Joan Beck, *Johnson Controls Decision Leaves Risk for Babies, Bosses*, Chi. Trib., Mar. 25, 1991, at 15 (asserting that “[w]hile the Supreme Court did safeguard the rights of women in this case, it left two other groups—babies and employers—at serious risk.”); Julia Lawlor, “*Victory* For Women is “Cold Comfort” for Business Community, USA Today, Mar. 21, 1991, at 2A (reporting that “[w]hile feminists applaud Wednesday’s Supreme Court decision abolishing corporate fetal protection policies, the business community warns the ruling could make life on the job even more difficult”). Julia Lawlor reported that rather than hire fertile women and endure the extra costs of ensuring the health and safety of the workplace, “[t]here’s speculation here that it will drive companies to do more business overseas, or force companies to have robots doing these kinds of jobs.” *Id.* (quoting Robin Conrad, Vice-President, United States Chamber of Commerce’s National Chamber Litigation Center); see Peter T. Kilborn, *Employers Left With Many Decisions*, N.Y. TIMES, Mar. 21, 1991, at B12 (reporting that *Johnson Controls* requires employers to rescind their exclusionary fetal protection policies adopted “in part to protect themselves from costly suits” and to decide how to revamp the workplace to ensure the safety and health of all workers); see also Yxta Maya Murray, Note, *Employer Liability After Johnson Controls: A No-Fault Solution*, 45 STAN. L. REV. 453 (1993) (arguing that the issue of whether the doctrine of preemption will protect businesses that adhere to *Johnson Controls* from negligence suits brought under state law remains unresolved). The Note maintains that *Johnson Controls* “leaves employers at risk. Business that follow the Court’s ruling may expose fertile female employees to toxic substances, yet there is no guarantee that compliance with Title VII will shield employers from tort actions brought on behalf of employees’ injured fetuses.” *Id.*

*Cf. Current Policy Guidance*, supra note 294, at 6942 n.7 (examining the *Johnson Controls* Court’s discussion of the potential tort liability issue in which the Court concludes that employer liability “‘seems remote at best.’” *Id.* (quoting International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1208 (1991))). If companies comply fully with the OSHA standards regulating lead exposure, inform women workers of the potential hazards, and maintain working environments free of negligent conditions, then such employers should not be deemed liable for any resulting fetal injury. *Johnson Controls*, 111 S. Ct. at 1208). *Johnson Controls* mandates that women may not be refused positions in the lead industry based on their fertility; this requirement does not alter an employer’s duties
predict that Johnson Controls will have the far-reaching impact of prohibiting employers from banning women from any position for which they are qualified.308 The widespread impact of Johnson Controls can be evinced by the fact that a number of companies have rescinded their former fetal protection policies that violated Johnson Controls,309 and courts throughout the country have relied on the decision as a basis for invalidating other employer policies.310 Undeniably, the Johnson Controls precedent should be employed to invalidate more neutral measures, under common law negligence principles to maintain a safe and healthy workplace. See id.; see also Bertin Interview, supra note 256.

308. See Ethan Bronner, Justices Bar Job Cuts Aimed at Shielding Fetuses; Restrictions on Women are Held to be Biased, BOSTON GLOBE, Mar. 21, 1991, at 1. The article predicts that Johnson Controls "will probably force companies to work harder to reduce the levels of substances that could endanger fetuses... Until now, a common way of dealing with the problem has been to bar women from the jobs to avoid harm..." Id. at 28; see also supra note 305.


310. See, e.g., Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 791-92 (1993) (Stevens, J., dissenting) (relying on Johnson Controls to support his assertion "that classifications based on ability to become pregnant are necessarily discriminatory"); Lucero v. Operation Rescue, 954 F.2d 624, 632 (11th Cir. 1992) (applying Johnson Controls to find that a purported beneficent intention will not "neutralize a discriminatory motive"); EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944 (10th Cir. 1992), cert. denied, 113 S. Ct. 60 (1992); Hernandez v. University of St. Thomas, 793 F. Supp. 214, 216 (D. Minn. 1992) (drawing on Johnson Controls's logic, the court stated that a BFOQ may be established only if the criterion relates to the "central mission of the employer's business"); Huisenga v. Opus Corp., 494 N.W.2d 469 (Minn. 1992) (invalidating a policy analogous to that in Johnson Controls that required women to prove their infertility as a precondition for employment in the lead industry on the ground that no BFOQ for infertility existed); EEOC v. Elgin Teachers Ass'n, 780 F. Supp. 1195, 1196 (N.D. Ill. 1991) (following Johnson Controls by concluding that collective bargaining agreements that disfavor pregnant women must be construed as facially discriminatory; hence they may only be sustained if a BFOQ exists); Little Forest Medical Ctr. v. Ohio Civ. Rights Comm'n, 575 N.E.2d 1164, 1169 (Ohio 1991) (applying disparate treatment analysis over disparate impact analysis to gender-discriminatory hiring practices), cert. denied, 112 S. Ct. 1263 (1992); O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. Dist. Ct. App. 1991) (analyzing an employer policy that discriminated on the basis of pregnancy in accord with Johnson Controls principles); see also Turpin v. Merrell Dow Pharmaceuticals, Inc., 959 F.2d 1349, 1360 (6th Cir.) (relying on Johnson Controls to support the proposition that animal studies "often comprise the backbone of evidence indicating biological hazards"); cert. denied, 113 S. Ct. 84 (1992); EEOC v. J. M. Huber Corp., 942 F.2d 930 (5th Cir. 1991) (requiring the Fifth Circuit to reexamine an employer practice of withholding a past employee's retirement benefits where the former worker contested her termination under Title VII). The Huber court resolved the issue of whether Johnson Controls mandates that the policy be characterized as facially discriminatory. Id. at 932. In resolving this issue, the court determined
including the Exide program, that attempt to circumvent the decision by replacing overt exclusionary policies with more cryptic devices designed to accomplish the identical, unlawful goal of discrimination.

V. Conclusion

The Supreme Court's decision in International Union, UAW v. Johnson Controls, Inc. marks a major victory for working women. Johnson Controls dictates that an employer may not attempt to shape the direction of its female employees' vocational choices, except in very limited circumstances. Johnson Controls established a uniform rule of law that fetal protection policies amount to facial discrimination, and therefore directly violate Title VII, as amended by the PDA.\(^3\) Thus, the decision repudiated the use of the modified business necessity test for fetal protection policies previously utilized by the Fourth, Seventh and Eleventh Circuits to sustain such employer measures. This important pronouncement rewrites the law in the employment discrimination field by mandating that fetal protection policies be analyzed according to disparate treatment principles. The Johnson Controls decision positively impacts millions of working women who will no longer be excluded on the basis of their fertility from jobs for which they are qualified.

The critical question of the scope of Johnson Controls endures. International Union, UAW v. Exide Corp. requires the resolution of whether mandatory employer programs that entice women to refuse certain jobs on the basis of their fertility can survive judicial review in the aftermath of Johnson Controls. Clearly, the rationale of Johnson Controls can be applied to invalidate such measures. Johnson Controls expressly prohibits employers from directly accomplishing this impermissible objective by instituting explicit exclusionary policies. Therefore, the Exide program, which utilizes less obvious means to achieve the identical discriminatory goal, will not be sustained. If such a policy survived judicial scrutiny, the application and impact of Johnson Controls would be severely undermined.

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