UAW v. JOHNSON CONTROLS: AN AFFIRMANCE OF EQUAL EMPLOYMENT OPPORTUNITIES FOR WOMEN

INTRODUCTION

Congress adopted Title VII of the Civil Rights Act to guarantee equal employment opportunities for all persons. The Act prohibits discrimination on the basis of "race, color, religion, sex, or national origin." In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act ("PDA"). The PDA states that employment policies and practices based on an employee's pregnancy or a related medical condition constitute a form of sex discrimination and are actionable under Title VII. Both Title VII and the PDA permit discriminatory policies but only if those policies qualify as either a bona fide occupational qualification ("BFOQ") or a business necessity. The former, a very narrow exception, is applied to facially discriminatory policies and the latter is applied to those policies that are facially neutral but have a discriminatory impact on a protected class.

Recently, employers have begun adopting sex-specific exclusion-

4. 42 U.S.C. § 2000e-(2)(k) (1978). See infra notes 67-70 and accompanying text. For clarity, these employment policies and practices are simply referred to as policies unless the facts of a particular case state otherwise.
ary policies designed to protect the fetuses of its employees. Title VII challenges to these fetal protection policies resulted in confusion among the courts as to how the policies should be analyzed.

In *UAW v. Johnson Controls, Inc.*, the United States Supreme Court examined whether a fetal protection policy was acceptable under Title VII and the PDA. The Court held that fetal protection policies are per se violations of Title VII and are not an acceptable exception under the BFOQ defense.

This Note examines the case law interpreting and defining Title VII and the PDA, and the defenses available to employers. The Court's decision in *Johnson Controls, Inc.* is then analyzed in light of these earlier decisions. Finally, this Note concludes that the majority opinion in *Johnson Controls, Inc.*, by not broadening the scope of the BFOQ defense to include fetal protection policies, was in accord with the case law and the congressional intent underlying Title VII and the PDA.

FACTS AND HOLDING

On March 20, 1991, the United States Supreme Court announced its decision in the case of *UAW v. Johnson Controls, Inc.* At issue was a fetal protection policy adopted by Johnson Controls as a method of addressing alleged fetal health risks associated with its female employees.

Johnson Controls is in the business of manufacturing batteries. Lead is a primary ingredient of that manufacturing process and is recognized as a highly toxic substance. After researching the hazards associated with lead exposure, Johnson Controls determined that the health and safety of a potential fetus is jeopardized when female employees are exposed to lead during the course of their em-

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10. Id. at 1199.
11. Id. at 1196. See infra notes 39, 40-51 and accompanying text.
12. See infra notes 66-178 and accompanying text.
13. See infra notes 179-262 and accompanying text.
14. See infra notes 263-74 and accompanying text.
16. Id. at 1199.
17. Id.
In 1982, Johnson Controls adopted a policy that excluded any female of childbearing capacity from a position that involved lead exposure. Any female seeking such employment was required to produce documentation verifying her sterility.

In 1984, an action challenging Johnson Controls' policy as a violation of Title VII of the Civil Rights Act was filed in the United States District Court for the Eastern District of Wisconsin. The petitioners consisted of several employees who had suffered alleged monetary or health losses as a result of the policy. The district court certified a class that included the United Auto Workers ("UAW") as a representative of all present and future employees of Johnson Controls who would be affected by the policy.

In the complaint, the petitioners alleged that the policy was a form of sex discrimination as defined by Title VII and the Pregnancy Discrimination Act ("PDA") of 1978. Johnson Controls argued that the policy was necessitated by the fetal risks associated with the exposure of females to lead. When Johnson Controls moved for summary judgment, the district court granted the motion, declaring the policy to be a business necessity. The court held that the fetal health risks negated a presumption of facial discrimination. Therefore, Johnson Controls needed only to demonstrate that the policy reflected a legitimate concern given Johnson Controls' business of manufacturing batteries. The district court held that the protection

19. UAW v. Johnson Controls, Inc., 886 F.2d 871, 876 (7th Cir. 1989). Johnson Controls stated that prior to the 1982 policy, six employees in jobs involving lead exposure became pregnant and that one of those babies had an elevated blood lead level. Id. at 876-77.

20. Johnson Controls, Inc., 111 S. Ct. at 1200. The policy states in part: "[Johnson Controls'] policy 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.

21. Id.


23. Johnson Controls, Inc., 111 S. Ct. at 1200. Petitioners consisted of Mary Craig, who chose to be sterilized to keep her job, Elsie Nasson, who suffered benefit losses when she was forced to change jobs, and Donald Penney, who was denied a request for a leave of absence to reduce his blood lead level before becoming a father. Id.

24. Id.


29. Id. at 314-15. Facially discriminatory cases are traditionally analyzed under the more restrictive statutory BFOQ defense, whereas policies that are not facially discriminatory but have a discriminatory impact are analyzed under the judicially created business necessity defense. Id. at 312-13. See infra notes 87-93 and accompanying text.
of a fetus was a business necessity in this case.\textsuperscript{30}

Sitting en banc, the United States Court of Appeals for the Seventh Circuit affirmed the district court’s decision.\textsuperscript{31} Although the policy was found to be facially discriminatory, the court applied the business necessity defense.\textsuperscript{32} The court reasoned that Johnson Controls had rebutted the presumption of facial discrimination by establishing, through a considerable body of medical research, that fetal safety is only jeopardized when a female employee, not a male employee, is exposed to lead.\textsuperscript{33} The court then found that UAW failed to present sufficient evidence to rebut Johnson Controls’ business necessity defense.\textsuperscript{34} The court stated that the challenged policy had adequately balanced the interests of both Johnson Controls and its employees, and therefore was consistent with the underlying principles of Title VII.\textsuperscript{35}

Although the court decided that it was proper to apply the business necessity defense to a sex-specific fetal protection policy, the court stated that the Johnson Controls policy would have also qualified under the more restrictive bona fide occupational qualification (“BFOQ”) defense.\textsuperscript{36} The court stated that industrial safety was the essence of Johnson Controls’ business and that the policy was directly related to the promotion of industrial safety.\textsuperscript{37}

The United States Supreme Court granted certiorari to address the discrepancies and misunderstandings that had developed concerning sex-specific fetal protection policies challenged under Title VII.\textsuperscript{38} The Court ruled that any sex-specific fetal protection policy is facially discriminatory and can only be justified by establishing that the policy is a bona fide occupational qualification (“BFOQ”).\textsuperscript{39} The Court noted that sex discrimination is prohibited except where “sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”\textsuperscript{40} Strictly construing the meaning of the BFOQ defense, the Court

\textsuperscript{30}. \textit{Johnson Controls, Inc.}, 680 F. Supp. at 316.
\textsuperscript{31}. \textit{Johnson Controls, Inc.}, 886 F.2d at 886.
\textsuperscript{32}. \textit{Id. See infra} notes 132-40 and accompanying text.
\textsuperscript{33}. \textit{Johnson Controls, Inc.}, 886 F.2d at 888-89.
\textsuperscript{34}. \textit{Id. at} 890.
\textsuperscript{35}. \textit{Id. at} 886.
\textsuperscript{36}. \textit{Johnson Controls, Inc.}, 886 F.2d at 893. Johnson Controls’ policy was sex-specific because it specifically excluded women from a particular job on the basis of their sex. “Sex-specific” is also referred to as “gender-based.” \textit{Johnson Controls}, 111 S. Ct. at 1199-1200. \textit{See infra} notes 87-93 and accompanying text.
\textsuperscript{37}. \textit{Johnson Controls}, 886 F.2d at 896-99.
\textsuperscript{39}. \textit{Johnson Controls, Inc.}, 111 S. Ct. at 1202-04.
ruled that only discriminatory policies reasonably related to the essence of an employer's business will be tolerated.\textsuperscript{41} Contrary to the findings of the Seventh Circuit, the Court stated that the essence of Johnson Controls' business was the manufacturing of batteries and that the fetal protection policy was not reasonably related to accomplishing that objective.\textsuperscript{42} The Court distinguished previous cases upholding various sex discriminatory policies for safety reasons from \textit{Johnson Controls, Inc.}, stating that those cases involved safety policies that were directly related to the operation of the particular business.\textsuperscript{43} In concluding that the essence of Johnson Controls' business was the manufacturing of batteries, the Court held that the childbearing capacity of its employees in no way affected the operation of that business.\textsuperscript{44} The Court added that Congress, in adopting the PDA, intended for any employment decisions that involved the weighing of risks to an employee's family to be made by that employee, and not by the employer.\textsuperscript{45}

In addition, the Court addressed the issue of employer liability for prenatal injuries resulting from the employment of women in jobs involving lead exposure.\textsuperscript{46} The Court opined that if an employer properly informs its female employees of the potential risks associated with the employment, and if the employer does not act negligently in monitoring the workplace, then the possibility of liability is remote.\textsuperscript{47} Responding to Justice White's concurring opinion stating that an employer may be liable under state tort law for prenatal injuries, the Court explained that if state tort law encouraged noncompliance of Title VII to avoid tort liability, then Title VII would preempt the state tort law.\textsuperscript{48} The Court stated that by not adopting sex-specific exclusionary policies, an employer will not be subject to tort liability claims under state law.\textsuperscript{49} The Court reasoned that a fear of liability indicates a cost justification policy for hiring men rather than women because male employees would cost less to employ.\textsuperscript{50} The Court stated that cost justification policies are not an acceptable

\begin{enumerate}
\item \textit{Id.} at 1204-07.
\item \textit{Id.} at 1206.
\item \textit{Id.} at 1205-06. \textit{See infra} notes 94-109 and accompanying text.
\item \textit{Johnson Controls, Inc.}, 111 S. Ct. at 1206-08.
\item \textit{Id.} at 1207.
\item \textit{Id.} at 1208-09 (responding to Justice White's concurring opinion).
\item \textit{Id.} at 1208. The Court stated that compliance with OSHA safety standards would greatly diminish the risk to both the employee and a potential fetus. \textit{Id.}
\item \textit{Id.} at 1208-09. The Court argued that "[w]hen it is impossible for an employer to comply with both state and federal requirements, this court has ruled that federal law pre-empts that of the States." \textit{Id.} at 1209.
\item \textit{Id.} (stating, however, that the preemption issue was not an issue in \textit{Johnson Controls, Inc.}).
\item \textit{Id.}
\end{enumerate}
BFOQ defense.\textsuperscript{51}

Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, filed a concurring opinion.\textsuperscript{52} Justice Scalia also filed a concurring opinion.\textsuperscript{53} Both of the concurring opinions stated that the BFOQ defense must be applied to the \textit{Johnson Controls, Inc.} case and any case involving a sex-specific fetal protection policy.\textsuperscript{54}

Justice White argued that the BFOQ defense should not be used to ban all sex-specific fetal protection policies.\textsuperscript{55} Justice White stated that it may be necessary for a business to avoid substantial tort liability by adopting a policy that excludes women from a particular class of jobs.\textsuperscript{56} Justice White also noted that state tort law recognizes liability actions arising from prenatal injuries, and that a company's compliance with Occupational Safety and Health Act ("OSHA") standards does not protect that company from liability resulting from the operation of its business.\textsuperscript{57} Justice White reasoned that safety risks associated with the operation of a particular business constitute an overwhelming public interest and a business cost, which Congress did not intend to ignore when it enacted Title VII and the PDA.\textsuperscript{58} Justice White stated that the BFOQ defense is broad enough to include a fetal protection policy that addresses the cost and safety considerations associated with lead exposure.\textsuperscript{59}

Justice White explained that the record in \textit{Johnson Controls, Inc.} did not adequately present conclusive evidence necessary to resolve the issue of whether substantial costs and safety risks existed because of the employment of women in the battery division.\textsuperscript{60} Justice White stated further that Johnson Controls' policy was too broad in excluding all fertile women from jobs involving lead exposure.\textsuperscript{61}

\textsuperscript{51} Id. The Court stated that the \textit{Johnson Controls, Inc.} case did not involve costs so substantial that the survival of the business was in jeopardy. \textit{Id.}

\textsuperscript{52} Id. at 1210. (White, J., concurring).

\textsuperscript{53} Id. at 1216. (Scalia, J., concurring).

\textsuperscript{54} Id. at 1210 and 1216. (White, J., and Scalia, J., concurring).

\textsuperscript{55} Id. at 1210. (White, J., concurring) Justice White stated that although the BFOQ "is a difficult standard to satisfy, nothing in the statute's language indicates that it could never support a sex-specific fetal protection policy." \textit{Id.}

\textsuperscript{56} Id. at 1210-11. Justice White argued that "[c]ommon sense tells us it is part of the normal operation of business concerns to avoid causing injury to third parties . . ., if for no other reason than to avoid tort liability and its substantial costs." \textit{Id.}

\textsuperscript{57} Id. at 1211; OSHA on Lead Exposure, 29 C.F.R. § 1910.1025 (1990). The policy addressed the fetal risks associated with lead exposure of both male and female parents and recommended certain blood lead levels, for those who wish to become parents, to reduce the risk of fetal harm associated with their employment. \textit{Id.}

\textsuperscript{58} \textit{Johnson Controls, Inc.}, 111 S. Ct. at 1213-14 (White, J., concurring).

\textsuperscript{59} Id. at 1212.

\textsuperscript{60} Id. at 1214-15.

\textsuperscript{61} Id. at 1215. Justice White also stated that Johnson Controls failed to prove that the policy was reasonably necessary to the operation of its business and that the lower courts erred in not considering evidence presented by UAW that demonstrated
Justice Scalia also concurred, finding that Johnson Controls had failed to demonstrate the existence of a substantial risk associated with the employment of women employees. Justice Scalia stated that any policy that differentiates on the basis of sex or childbearing capacity is a violation of Title VII. Justice Scalia noted that employment decisions affecting an employee's family are better left to the employee and the employee's family, and suggested that the legislative process would be a more proper forum to address any concerns the public may have regarding such a policy. Addressing the majority's statement that the increased costs of running a business are not justified under a BFOQ defense, Justice Scalia stated that previous case law did not justify the use of the BFOQ defense to prohibit employers from making cost efficient decisions.

BACKGROUND

The Civil Rights Act of 1964 prohibits any employment practices, policies or decisions based on an individual's race, sex, color, religion or national origin. However, prior to the Pregnancy Discrimination Act of 1978 ("PDA"), which amended the Civil Rights Act, discrimination on the basis of pregnancy was not considered a violation of Title VII. Specifically, the United States Supreme Court, in General Electric v. Gilbert, held that employment decisions based on pregnancy did not constitute a form of sex discrimination and did not violate Title VII. In response to Gilbert, Congress enacted the PDA, which provides that discrimination on the basis of "pregnancy, childbirth, or related medical conditions" constitutes sex discrimination and is actionable under Title VII.

Generally, there are two types of Title VII claims that arise in

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potential fetal risks transmitted by male employees who have been exposed to lead.  

62. Id. at 1216 (Scalia, J., concurring).  
63. Id. He reasoned that "Congress has unequivocally said so." Id.  
64. Id. (citing UAW v. Johnson Controls, Inc., 886 F.2d 871, 915 (7th Cir. 1989) (Easterbrook, J., dissenting opinion).  
65. Id. at 1216-17. Justice Scalia contended that inordinately expensive changes in operating a business should be a feasible exception under the BFOQ defense. Id.  
68. 429 U.S. 125 (1976).  
69. Id. at 145-46.  
sex discrimination actions—disparate treatment and disparate impact. Disparate treatment cases involve proof of an employer's discriminatory intent. The discriminatory intent can be shown by direct evidence or by inference from the different treatment caused by an employment policy. Disparate impact cases involve employment policies that are facially neutral but have a discriminatory effect on a protected class.

Disparate Treatment Cases

Facial Discrimination

Facial discrimination involves an explicit discriminatory employment policy, in which an employer treats persons differently on the basis of race, religion, color, sex, or national origin. Although men and women are inherently different, the objective of Title VII is to prohibit employers from treating men and women differently because of stereotypical assumptions or generalizations about the entire gender. The purpose of the statute is to promote the treatment of persons as individuals rather than as members of a particular group. A policy that fails to show "treatment of a person in a manner which but for that person's sex would be different" is a policy that is undeniably discriminatory.

To establish a prima facie case of facial discrimination, a plaintiff need only show direct evidence of discrimination. Once a plaintiff-employee has presented direct evidence of discrimination, the defendant-employer can only avoid Title VII liability by justifying the employment practice as a bona fide occupational qualification.
Discrimination by Inference

Absent direct evidence of discriminatory intent, a plaintiff may still challenge a discriminatory policy under the disparate treatment theory. The Supreme Court has recognized that a plaintiff may proceed with a disparate treatment claim when the plaintiff can show an inference of discriminatory intent. In supporting an inference of discrimination, the plaintiff must prove, by a preponderance of the evidence, the employer's discriminatory intent. Once the plaintiff presents a prima facie case, discrimination is presumed. An employer may rebut this presumption by producing evidence articulating a legitimate and non-discriminatory reason for the employment decision. If the defendant rebuts the prima facie case, the plaintiff may still prevail by proving by a preponderance of the evidence that the employer's proffered reasons are merely a pretext for discrimination.

BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

Once a plaintiff has presented a prima facie case of disparate treatment, a defendant-employer may justify its policy as a BFOQ.

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81. International Bhd. of Teamsters v. United States, 431 U.S. at 335-36 n.15. S. SCHULMAN & C. ABERNATHY, supra note 71, at ¶ 1.02(2). Since Johnson Controls' sex-specific fetal protection policy is direct evidence of discrimination this Note does not address disparate treatment cases involving a plaintiff alleging discriminatory intent by inference.


83. S. SCHULMAN & C. ABERNATHY, supra note 71, at ¶ 1.02(2). If a plaintiff is alleging individual disparate treatment, the plaintiff must show by a preponderance of the evidence that the plaintiff applied for an available position with the defendant-employer, that the plaintiff was qualified for that position, and that the plaintiff was rejected. This type of disparate treatment case is referred to as individual disparate treatment. Burdine, 450 U.S. at 253-54; McDonnell Douglas, 411 U.S. at 802. If the plaintiff is alleging systemwide discrimination, the plaintiff bears the burden of establishing by a preponderance of the evidence that the defendant-employer's workforce is different than it would be absent any discrimination. This type of disparate treatment case is referred to as systemic disparate treatment. International Bhd. of Teamsters, 431 U.S. at 336, 342. S. SCHULMAN & C. ABERNATHY, supra note 71, at ¶ 1.02(2).

84. Burdine, 450 U.S. at 254.

85. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 254-55.

86. McDonnell Douglas, 411 U.S. at 804; Burdine, 450 U.S. at 255-56.

The burden of persuasion for establishing a BFOQ defense is on the defendant-employer. What constitutes a BFOQ has been formulated in various ways, but has been consistently interpreted and applied as an extremely narrow exception to Title VII. The controlling principle behind the exception is the prohibition of any employment decisions or policies based on stereotypical characterizations or assumptions regarding abilities or inabilities of persons based on their sex.

In examining a defense offered by an employer, a court examines the particular type of business involved. The court must then determine if the challenged policy goes to the essence of that business. If so, the court must determine whether the policy is reasonably necessary to achieve the objectives of that business.

JUDICIAL APPLICATIONS OF THE BFOQ DEFENSE

In 1977, the United States Supreme Court, in Dothard v. Rawlinson, ruled that Alabama Regulation 204, which explicitly prohibited women from working as counselors in state all male maximum-security prisons, was justified as a BFOQ. The Court described the environment within those prisons as being extremely violent and disorganized. The Court stated that security was the essence of the business of the prison, and particularly, of the job of a counselor. The Court stated that the risk associated with the employment of fe-

88. Weeks, 408 F.2d at 231-32 (stating, “when dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it.”).
91. Id. at 1528.
92. Id. at 1530.
93. Id.
95. Dothard, 433 U.S. at 334; Alabama Board of Corrections Administrative Regulation 204. See infra notes 141-50 and accompanying text. Alabama Regulation 204 establishes “gender criteria for assigning correctional counselors to maximum-security institutions for ‘contact positions,’ that is, positions requiring continual close physical proximity to inmates of the institution.” Dothard, 433 U.S. at 325 and n.6. The Court also addressed the department’s height and weight requirements under the business necessity defense. Id. at 328.
96. Dothard, 433 U.S. at 334-35. The Court commented that “[t]he environment in Alabama’s penitentiaries is a peculiarly inhospitable one for human beings of whatever sex.” Id. at 334.
97. Id.
male correction counselors adversely affected the security of the entire prison.\textsuperscript{98}

In 1985, the Supreme Court, in \textit{Western Air Lines, Inc. v. Criswell},\textsuperscript{99} examined a mandatory retirement policy of Western Airlines that allegedly violated the Age Discrimination in Employment Act of 1967 ("ADEA").\textsuperscript{100} In \textit{Criswell}, the Court stated that for a policy to qualify as a BFOQ, the policy must be "reasonably necessary to the normal operation of the particular business."\textsuperscript{101} At issue was a policy Western Airlines had adopted that required mandatory retirement for all flight engineers reaching the age of 60.\textsuperscript{102} However, the Federal Aviation Administration ("FAA") had required mandatory retirement only for pilots and co-pilots, reaching the age of 60.\textsuperscript{103} In adopting its retirement policy, Western Airlines reasoned that because a flight engineer was third in line to pilot the plane, the FAA retirement age should also apply to flight engineers to insure the safety of the passengers.\textsuperscript{104} Noting the lack of evidence presented by Western Airlines, the Court stated that although the safe transportation of its passengers was the essence of the business of Western Airlines, the mandatory retirement policy was not reasonably necessary to the operation of the business so as to invoke such a safety exception.\textsuperscript{105}

In addition, the safety exception as a BFOQ has been utilized in several pregnancy discrimination cases.\textsuperscript{106} The United States Court of Appeals for the Ninth Circuit, in \textit{Harriss v. Pan American World Airways},\textsuperscript{107} applied a BFOQ analysis to a mandatory pregnancy leave policy that required a pregnant flight attendant to be relieved of her

\textsuperscript{98} Id. at 335-36. The Court noted that "[m]ore is at stake ... than an individual woman's decision to weigh and accept the risks ..." Id. at 335.

\textsuperscript{99} 472 U.S. 400 (1985).

\textsuperscript{100} Id. at 402-03 (discussing the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967)). The BFOQ exception to the ADEA was modeled after the BFOQ exception adopted in Title VII of the Civil Rights Act. Id. at 411-12.

\textsuperscript{101} Id. at 413. The Court stated that such qualifications must be more than mere convenience or reasonableness. The Court rejected the argument of the airline that its policy should be accepted because "there existed a rational basis in fact for the defendant to believe that use of [flight engineers] over age 60 ... would increase the likelihood of risk to its passengers." Id. at 413, 417.

\textsuperscript{102} Id. at 402.

\textsuperscript{103} Id. at 404.

\textsuperscript{104} Id. at 403-05.

\textsuperscript{105} Id. at 418-19, 420-22. The Court noted that "the FAA, Western, and other airlines all recognized that the qualifications for a flight engineer were less rigorous than those required for a pilot." Id. at 418.


\textsuperscript{107} 649 F.2d 670 (9th Cir.), cert. denied, 435 U.S. 934 (1980).
job when the flight attendant learned of her pregnancy.\textsuperscript{108} Pan American presented substantial evidence demonstrating the likelihood that a pregnant flight attendant would become incapacitated during flight and the resulting risk posed to passengers.\textsuperscript{109} The court ruled that the safe transportation of the passengers "was the essence of PanAm's business", and that the substantial safety risk that pregnant flight attendants posed to the passengers justified the policy as a BFOQ.\textsuperscript{110}

Cost efficient employment policies have also been examined under Title VII but have not been accepted by the Supreme Court.\textsuperscript{111} In \textit{City of Los Angeles Dept. of Water and Power v. Manhart},\textsuperscript{112} the Court examined an employee pension plan that required female employees to contribute more to the fund than their male counterparts.\textsuperscript{113} The female employees, however, would receive the same monthly payments as the male employees who had contributed less to the fund.\textsuperscript{114} The employer based the discriminatory pension policy on actuarial tables that indicated that women live longer than men, and that the result would be that men, as a class, would receive less benefits than women at the pay-out stage.\textsuperscript{115} The Court stated that longevity tables based solely on gender are discriminatory and cannot be justified under Title VII.\textsuperscript{116}

To qualify as a BFOQ, an employer's discriminatory policy must be manifestly related to the essence and continuance of the business.\textsuperscript{117} However, the policy must be more essential than just a convenient or cost-efficient means of conducting that business.\textsuperscript{118}

\textbf{DISPARATE IMPACT}

Disparate impact is the second type of Title VII claim used to
challenge alleged discriminatory employment practices. In *Griggs v. Duke Power Co.*, the Supreme Court developed the business necessity analysis to apply to those policies that are facially neutral but have a discriminatory effect on members of a protected group. The Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." In *Griggs*, the employer adopted a hiring policy that required job applicants to have a high school diploma and to submit to an intelligence test. The Court found that absent proof or presumption of discriminatory intent, the plaintiffs could proceed in their challenge against the employment policy. The Court noted that Title VII mandated that the touchstone of employment requirements that have a discriminatory effect is business necessity or job relatedness. In *Griggs*, the Court held that requiring job applicants to have a high school diploma and to submit to an intelligence test was prohibited because the company had made no attempt to demonstrate that such requirements were related to job performance. The Court stated that the business necessity analysis requires an examination of the policy and a determination of whether the policy is "demonstrably a reasonable measure of job performance."

To establish a prima facie case of disparate impact, a plaintiff must show more than a statistical disparity among the employer's class of workers. The plaintiff must identify the specific employment practice responsible for the disparity and demonstrate how the practice caused the disparate effect. An employer can rebut a prima facie case of disparate impact by challenging the sufficiency of the statistics indicating the disparity or by refuting the alleged causa-

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119. See supra notes 71-74 and accompanying text.
120. 401 U.S. 424 (1971).
121. Id. at 430-31. The Court stated 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.
122. Id. at 431.
123. Id. at 427.
124. Id. at 429, 432.
125. Id. at 429-31.
126. Id. at 431. In fact, the company stated that it adopted the policy to "improve the overall quality of the work force." Id.
127. Id. at 436. For support, the Court cited the EEOC guidelines that state that Title VII only permits employers to use job related tests. Id. at 433.
128. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 650-51 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988). Disparate impact policies are policies that are facially neutral but have a discriminatory effect on a protected class of persons. See supra notes 74, 119-31 and accompanying text.
129. Watson, 487 U.S. at 994.
If the plaintiff’s prima facie case is not rebutted, then an employer can plead a business necessity defense.

**BUSINESS NECESSITY DEFENSE**

In 1989, the Supreme Court, in *Wards Cove Packing Co., Inc. v. Atonio*, specified the allocation of the burdens of proof after a plaintiff has established a prima facie case of disparate impact. Unlike a disparate treatment case, the burden of persuasion in a disparate impact case remains with the plaintiff throughout the entire case. Once the plaintiff establishes a prima facie case of disparate impact, the employer carries only a burden of production in presenting a business necessity defense.

A viable business necessity justification is a demonstration that the challenged policy is “a reasonable measure of job performance” and is related to a legitimate employment goal. At no time is the employer required to show that the policy is “essential” or “indispensable” to the business. The business goal need only be “significantly served by” the challenged policy. Ultimately, the plaintiff must prove that the policy is discriminatory. The plaintiff can defeat an employer’s business necessity defense by proving or demonstrating the availability of less discriminatory alternative policies that meet the same business goals.

**JUDICIAL APPLICATION OF THE BUSINESS NECESSITY DEFENSE**

In *Dothard*, the Court struck down the justification offered by the employer for the height and weight requirements set for correc-

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130. *Id.* at 996-97. The Court explained that an employer may “impeach the reliability of the statistical evidence.” Examples of such challenges include “small or incomplete data sets and inadequate statistical techniques.” *Id.*

131. *Id.* at 997. See infra notes 132-40 and accompanying text.


133. *Id.* at 658.

134. *Watson*, 487 U.S. at 997. The Court explained that the “ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.” *Id.*


138. *Id.*

139. *Id.*

Although the employer argued that both requirements indicated the strength of an applicant, the employer did not produce any evidence to support that belief. The Court reasoned that if strength is job related, then a better alternative policy would be to individually measure the strength of each applicant, rather than rule out an entire class of persons based on their sex.

In Burwell v. Eastern Air Lines, Inc., the United States Court of Appeals for the Fourth Circuit examined the policy of Eastern Airlines that required mandatory leave for any flight attendant immediately upon the flight attendant learning of her pregnancy. The employer presented evidence regarding the potential risks to the pregnant employee and the unborn child, as well as evidence of the chances a pregnant flight attendant would become incapacitated during flight and be unable to function during non-emergency or emergency situations. The Fourth Circuit, applying a business necessity defense, ruled that the concern of the airline for the safety of the female employee and her unborn child were unpersuasive as a justification for the policy. The court stated that such concerns were commendable, but "personal risk decisions not affecting business operations are best left to the individuals who are targets of the discrimination...." Based upon the evidence, the court found that the policy was related to the business of the airline, safely transporting passengers, and held that the policy enhanced passenger safety.

Finding passenger safety to be a legitimate business goal, the court stated that a mandatory leave policy after the 13th week of pregnancy was justifiable as a business necessity.

FETAL PROTECTION POLICIES AND TITLE VII

The United States Court of Appeals for the Fourth Circuit, in

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141. Dothard, 433 U.S. at 331. See supra notes 94-98 and accompanying text.
142. Dothard, 433 U.S. at 331. The Court found no evidence in the record that proved a correlation existed between a person’s height and weight and a person’s strength. Id.
143. Id. at 332.
144. 633 F.2d 361 (4th Cir.), cert. denied, 450 U.S. 965 (1980).
145. Id. at 363. However, Eastern Air Lines permitted pregnant flight attendants to assume ground duty for the duration of their pregnancy. Id.
146. Id. at 370-71. The court focused on evidence submitted at trial which indicated that there exists a substantial risk to passengers when a stewardess surpasses her thirteenth week of pregnancy. Id. at 371.
147. Id. (stating “[i]f this personal compassion can be attributed to corporate policy it is commendable, but in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination”).
148. Id.
149. Id. The court stated that the burden of persuasion lies with the plaintiff to prove the proffered defense inadequate. Id. at 371 n.17.
150. Id. at 372.
Wright v. Olin Corp.,\textsuperscript{151} was the first United States Court of Appeals to examine an employer's fetal protection policy.\textsuperscript{152} The court stated that the disparate treatment-BFOQ defense was inappropriate because the narrowness of the BFOQ requires that the policy be related to the ability of the employee to perform the job, and the BFOQ defense would effectively deprive an employer of the opportunity to present a justification.\textsuperscript{153} The court chose instead to apply a disparate impact-business necessity analysis.\textsuperscript{154} The Fourth Circuit remanded the case for consideration of the defendant-employer's evidence under the business necessity defense.\textsuperscript{155}

Shortly thereafter, in Hayes v. Shelby Memorial Hospital,\textsuperscript{156} the United States Court of Appeals for the Eleventh Circuit addressed a Title VII challenge to a fetal protection policy.\textsuperscript{157} Slightly changing and elaborating on the Fourth Circuit analysis in Wright, the Eleventh Circuit, in Hayes, began its analysis by finding that the fetal protection policy was facially discriminatory.\textsuperscript{158} Traditionally, courts had applied the BFOQ defense to facially discriminatory policies.\textsuperscript{159} In Hayes, the court held that an employer could successfully rebut the presumption of discrimination.\textsuperscript{160} The court stated that an employer could rebut the discrimination by showing that a substantial risk to the fetus exists and that transmission to a fetus of that risk is confined to only female employees.\textsuperscript{161} The court opined that, in essence, such a policy is neutral because it "equally protects the offspring of all employees."\textsuperscript{162} However, the employer in Hayes could neither prove that a substantial risk to fetuses existed nor prove that the risk was confined to female radiation exposure.\textsuperscript{163} Thus, the employer failed to defeat the presumption of discrimination.\textsuperscript{164} The court, however, continued its analysis as if the employer could have

\begin{itemize}
\item \textsuperscript{151} 697 F.2d 1172 (4th Cir. 1982).
\item \textsuperscript{152} Id. at 1184.
\item \textsuperscript{153} Id. at 1185.
\item \textsuperscript{154} Id. The court reasoned that Title VII did not limit all employer justifications to the narrow BFOQ standard. Id.
\item \textsuperscript{155} Id. at 1192.
\item \textsuperscript{156} 726 F.2d 1543 (11th Cir. 1984).
\item \textsuperscript{157} Id. at 1546.
\item \textsuperscript{158} Id. at 1548.
\item \textsuperscript{159} See supra notes 75-80 and accompanying text. See also Becker, 53 U. CHI. L. REV. at 1250.
\item \textsuperscript{160} Hayes, 726 F.2d at 1548.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. at 1551.
\item \textsuperscript{164} Id. The court stated that an employer carries the burden of establishing that no such risk is associated with its male employees. Id. at 1548.
\end{itemize}
The court discussed whether the employer could have established a business necessity justification for the policy. The court stated that fetal safety should qualify as a business necessity and that the same evidence that would rebut a presumption of facial discrimination would automatically satisfy the business necessity defense. Further, the court held that the employer-hospital had failed to consider available but less discriminatory alternatives to its exclusionary policy.

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - POLICY STATEMENTS**

In 1988, the Equal Employment Opportunity Commission ("EEOC") issued a policy statement regarding its approach to analyzing sex-specific fetal protection policies. The EEOC, agreeing with the *Hayes* court, stated that any sex-specific policy is a per se violation of Title VII. However, the EEOC determined that a more flexible framework than the BFOQ defense should be used in analyzing these cases. The EEOC stated that if a substantial risk of fetal harm exists, which is only transmitted by one sex, and the challenged policy effectively eliminates that risk, then that policy should be upheld.

Two years later, the EEOC issued another policy statement regarding sex-specific fetal protection policies. The EEOC reevaluated its 1988 statement and concluded that the more restrictive BFOQ defense should be used in addressing Title VII challenges to a sex-specific fetal protection policy. The EEOC explained that although it had previously endorsed the application of a business necessity defense, the EEOC had not intended for the burdens of proof

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165. *Id.* at 1552. The court explained that the lower court did not apply the type of analysis outlined by the present court. *Id.*

166. *Id.*. "[I]f the employer rebuts the prima facie case of facial discrimination, the employee has an automatic prima facie case of disparate impact." *Id.*

167. *Id.* at 1552-53. The court recognized that a fetal protection policy lacks any connection in a strict sense to job performance. *Id.* at 1552.

168. *Id.* at 1553-54. Less discriminatory policies may include reassigning a pregnant employee to another job, or minimizing radiation exposure in her present job. *Id.*

169. EEOC: *Policy Statement on Reproductive and Fetal Hazards Under Title VII*, 405 Fair Empl. Prac. Cas. (BNA), No. 641, at 6613 (Oct. 3, 1988). The policy was based on the *Wright* and *Hayes* decisions. *Id.* at 6613-15.

170. *Id.* at 6614.

171. *Id.* at 6614-15.

172. *Id.* at 6615-16.


174. *Id.* at 6800.
set forth in *Wards Cove Packing Co., Inc.* to apply as well.\(^{175}\) The EEOC stated that keeping the burden of persuasion on the plaintiff throughout the case is too lenient a burden on the employer, considering that a sex-specific policy is facially discriminatory.\(^{176}\) The EEOC stated that applying a BFOQ defense would be more consistent with the purposes of Title VII.\(^{177}\) The EEOC concluded by stating that it did not know whether a BFOQ defense would exclude all sex-specific policies, but it cautioned that the statutory defense is extremely narrow, and an employer must demonstrate that the challenged policy is reasonably necessary to the normal operation of that particular business.\(^{178}\)

**ANALYSIS**

In analyzing a sex-specific fetal protection policy, a court must first determine which legal framework to apply—disparate treatment or disparate impact.\(^{179}\) The court must then decide whether an employer's desire to reduce potential fetal safety risks and potential liability costs constitutes an affirmative defense to a Title VII challenge.\(^{180}\)

**THE BFOQ OR THE BUSINESS NECESSITY DEFENSE?**

Title VII of the Civil Rights Act prohibits any employment policy or decision based on a generalization or classification of an individual because of his or her race, sex, color, religion, or national origin.\(^{181}\) In addition, Congress has extended the definition of sex discrimination under Title VII by enacting the Pregnancy Discrimination Act ("PDA"), which mandates that any employment decision based on the childbearing capacity of an individual constitutes a form

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175. Id. See supra notes 132-40 and accompanying text.

176. EEOC: Policy Guide on United Auto Workers v. Johnson Controls, 405 Fair Empl. Prac. Cas. (BNA), No. 641, at 6800 (Jan. 24, 1990). The Commission reasoned "that if an employer allows gender to affect its decision making process, then it must carry the burden of justifying its ultimate decision." Id. (quoting Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1789).\(^{177}\)

177. Id. The Commission explained that a defendant is allowed only the BFOQ defense as stated in the statute. Id.

178. Id. at 6800-01. The Commission stated that a BFOQ is difficult to establish but a defendant should be given an opportunity to try. Id. (citing Johnson Controls, Inc., 51 E.P.D. 39,359 at 59,491).


of sex discrimination. The policy of Johnson Controls explicitly applied different standards to its female employees because of their childbearing capacity. In overruling the decision of the United States Court of Appeals for the Seventh Circuit in *UAW v. Johnson Controls*, the United States Supreme Court found the policy of Johnson Controls to be a per se violation of Title VII.

The Seventh Circuit had stated that the policy was facially discriminatory but had then applied the business necessity defense. Applying a business necessity defense to a facially discriminatory policy had previously been done by the United States Court of Appeals for the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital*. In *Hayes*, the court determined that the employer could not present a bona fide occupational qualification ("BFOQ") defense and that it was more appropriate to apply the business necessity defense. In *Wright v. Olin Corp.*, the United States Court of Appeals for the Fourth Circuit reasoned that the business necessity defense should be applied because the BFOQ defense would prevent the employer from effectively defending a discriminatory policy. The circuit courts had selected the framework of analysis based upon the anticipated defense the defendant-employer may have attempted to assert.

The Seventh Circuit, in *Johnson Controls, Inc.*, adopted this circular reasoning when it applied the approach used by *Wright* and *Hayes*. The court then declared that approach to be consistent with Title VII. However, Title VII and the PDA specifically require that a facially discriminatory policy can only be justified under Title VII when that policy is a proven BFOQ.

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183. *See supra* notes 20-21 and accompanying text.

184. 886 F.2d 871 (7th Cir. 1989).


186. *Johnson Controls, Inc.*, 886 F.2d at 886-87. The court reasoned that the presence of a substantial health risk is more than a generalization or assumption used to exclude women and thus made the policy neutral. *Id.* at 886.

187. 726 F.2d 1543 (11th Cir. 1984).

188. *Id.* at 1549-50, 1552. See Wright v. Olin, 697 F.2d 1172, 1185 (4th Cir. 1982).

189. 697 F.2d 1172 (4th Cir. 1982).

190. *Id.* at 1185 n.21. *See supra* notes 151-55 and accompanying text.

191. *See supra* notes 151-68 and accompanying text.

192. *Johnson Controls, Inc.*, 886 F.2d at 884-87.

193. *Id.* at 886.

The BFOQ was specifically adopted by Congress and applied by the courts in a very narrow and restrictive manner.195 Once a plaintiff establishes discrimination, the burden of persuasion shifts to the employer to prove that the challenged policy is not discriminatory on the basis of prejudicial generalizations and assumptions.196

The business necessity defense was introduced by the Supreme Court in an effort to permit a plaintiff to challenge employment policies that may be facially neutral but have a discriminatory effect on a protected class.197 The business necessity defense permits a plaintiff to proceed with a case absent proof of the facial discrimination that is necessary to establish a disparate treatment-BFOQ case.198 The Supreme Court, in Griggs v. Duke Power Co.,199 stated that the business necessity defense permits an analysis of facially neutral policies that have a discriminatory impact on a protected class of persons.200

The Court, in Griggs, reasoned that the business necessity analysis furthers Congressional intent to prohibit arbitrary and unnecessary employment decisions that are barriers to employment.201

The business necessity defense is an alternative method of permitting a covert discriminatory practice to be judicially analyzed in furtherance of the purposes of Title VII.202 The burdens on the employer are more lenient in a disparate impact case because a plaintiff lacks the proof of discriminatory intent needed to establish a prima facie disparate treatment case, and not because it may be difficult or impossible for an employer to defend his policy.203

The Seventh Circuit, in Johnson Controls, Inc., also argued that a benign motive justifies the use of a business necessity defense instead of the BFOQ defense.204 The court explained that Johnson Controls' desire to address an alleged risk associated with the employment of persons of one gender defeated a presumption of facial discrimina-

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196. See supra notes 87-93 and accompanying text.
197. See supra notes 132-40 and accompanying text.
200. Id. at 429-30.
201. Id. at 430-31.
202. Id.
203. See supra note 132-40 and accompanying text.
204. Johnson Controls, Inc., 111 S. Ct. at 1203-04; Johnson Controls, Inc., 886 F.2d at 885. The court stated that a sex-specific fetal protection policy is facially neutral when the policy equally protects the offspring of all employees. Id.
tion. However, the motives underlying an employment policy are irrelevant to the determination of whether that policy is facially discriminatory or neutral. Motives have never been considered in determining which analytical approach to apply to a discriminatory policy. In *Dothard v. Rawlinson*, the employer's desire to maintain prison security by excluding women from correction counselor positions did not preclude the Court from finding the policy to be explicitly discriminatory and applying a BFOQ defense. Likewise, in *Phillips v. Martin Marietta Corp.*, the employer's desire to employ an efficient and productive workforce did not affect the Court's finding that the policy constituted sex discrimination. The motives of an employer in adopting a facially discriminatory policy are more appropriately examined as a BFOQ defense to a plaintiff's case, not in determining whether to analyze the policy as a disparate treatment or disparate impact case.

The examination of fetal protection policies under the BFOQ defense is supported by the 1990 Equal Employment Opportunity Commission policy statement in which the EEOC stressed that sex-specific fetal protection policies are per se violations of Title VII. The EEOC stated that placing the burden of persuasion on the plaintiff, despite a finding that the policy is facially discriminatory, is inconsistent with the purposes of Title VII.

Johnson Controls' policy unquestionably differentiated between its employees based on their childbearing capacity, particularly considering the requirement that only female employees had to prove their sterility before they could be assigned to jobs involving lead exposure. The Court correctly stated that Johnson Controls' policy

205. *Johnson Controls, Inc.*, 886 F.2d at 885-87.
209. Id. at 332-33.
211. Id. at 544.
212. Id. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1248-49. *See supra* notes 87-92 and accompanying text. The employer argued that female employees would not perform on the job as well as the male employees due to a woman's family obligations. The Court stated that these concerns could be evidence of a BFOQ, but ruled that the policy itself was discriminatory. *Phillips*, 400 U.S. at 544.
213. EEOC 1990 Policy Guide at 6799. The Commission found the 'hybrid approach' applied in *Wright* and *Hayes* and then in *Johnson Controls, Inc.* to be problematic, and stated "... we now think BFOQ is the better approach." *Id.* at 6800.
214. *Id.* at 6799.
was facially discriminatory and could only be analyzed under the statutory BFOQ defense.\(^{216}\)

**APPLICATION OF THE BFOQ DEFENSE**

*Discussion of the Safety Exception Under the BFOQ Defense*

The differences of opinion among the Supreme Court Justices in the *Johnson Controls, Inc.* case focused on whether an employer may adopt sex-specific exclusionary policies to protect the offspring of its employees.\(^{217}\) The case law interpreting and applying the BFOQ defense to discriminatory policies has consistently required that such policies be reasonably related to the particular business involved.\(^{218}\) The crucial question then becomes what is reasonably related to an employer's business to justify the discriminatory policy.\(^{219}\)

The majority focused on the job performance of an employee in a job that is the essence of the employer's business.\(^{220}\) Johnson Controls argued that the safety of a potential fetus was essential to the operation of its business, thus justifying the exclusionary policy.\(^{221}\) Historically, the use of a safety exception under a BFOQ defense has been very narrowly applied.\(^{222}\) Those safety exception cases focused on the safety of third parties who were found to be reasonably necessary to the particular business.\(^{223}\) Those cases specifically limited the analysis to whether the employee could perform the particular job involved.\(^{224}\)

In *Dothard v. Rawlinson*,\(^{225}\) the Court upheld a state regulation that prohibited women from employment as corrections

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\(^{216}\) See *Johnson Controls, Inc.*, 111 S. Ct. at 1202-04, 1210, 1216 (White, J., and Scalia, J., concurring). See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 355-36 n.15 (1977) (stating "... disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

\(^{217}\) See supra notes 52-65 and accompanying text.

\(^{218}\) Western Airlines, Inc. v. Criswell, 472 U.S. 400, 417 (1985); *Dothard*, 433 U.S. 321, 333 (1977); *Phillips*, 400 U.S. 542, 544 (1971); *Harriss*, 649 F.2d 670, 676 (9th Cir. 1980); *Weeks*, 408 F.2d 228, 235 (5th Cir. 1969).

\(^{219}\) *Dothard*, 433 U.S. at 326, 335 (stating that the essence of the job was maintaining prison security); *Torres v. Wisconsin Dept. of Health and Social Services*, 859 F.2d 1523, 1528-30 (7th Cir. 1988) (holding that the essence of the employer's business was rehabilitation of the female prisoners).

\(^{220}\) *Johnson Controls, Inc.*, 111 S. Ct. at 1204. The Court specifically focused on the word "occupational" in the BFOQ defense itself as an indication of congressional intent to limit BFOQ exceptions to job relatedness. *Id.* at 1204-05.

\(^{221}\) *Id.* at 1205; *Johnson Controls, Inc.*, 886 F.2d at 875-79, 880-83 (discussing the evidence regarding adverse affects of blood lead levels on the development of a fetus).

\(^{222}\) See supra notes 95-110 and accompanying text.

\(^{223}\) *Johnson Controls, Inc.*, 886 F.2d at 913 (Easterbrook, J., dissenting) Judge Easterbrook referred to these as "customer-safety cases." *Id.* See supra notes 105-16 and accompanying text.

\(^{224}\) See supra notes 99-110 and accompanying text.

counselors in all male maximum-security prisons in Alabama.\footnote{226} Regardless of the risks to individual employees associated with such employment, the Court upheld the regulation because the mere gender of a woman rendered her incapable of furthering the needed security and control within such facilities.\footnote{227} In Harriss v. Pan American World Airways, Inc.,\footnote{228} the Fourth Circuit held that pregnant flight attendants can be required to take mandatory leave after their thirteenth week of pregnancy.\footnote{229} The court’s decision was based on evidence in the record that supported the finding by the court that the mere pregnancy of a flight attendant increased the risk of her becoming incapacitated during flight, which would render her incapable of performing her job of insuring the safety of the passengers.\footnote{230} The safety of the pregnant flight attendant and her unborn child were irrelevant to the court’s finding.\footnote{231}

In applying the BFOQ defense to the Johnson Controls policy, the Court properly focused on the individual employee’s ability to perform the job.\footnote{232} Protecting a potential fetus can never be the essence of an employer’s business, although, the pregnancy or a related condition of an employee may render the employee incapable of performing the job.\footnote{233} In Johnson Controls, Inc., the Court stated that the childbearing capacity of an employee was unrelated to job performance.\footnote{234} Justice White argued that the public has an interest in promoting industrial safety and that the safety of a fetus warrants an exclusionary policy such as that of Johnson Controls.\footnote{235} Concerns for industrial safety and the safety of a potential fetus are not the primary considerations of Title VII and the Pregnancy Discrimination Act ("PDA").\footnote{236} Title VII and the PDA are laws specifically

\footnote{226. Id. at 332-37.}
\footnote{227. Id. at 335. See supra notes 95-110 and accompanying text.}
\footnote{228. 649 F.2d 670 (9th Cir. 1980).}
\footnote{229. Id. at 676-77.}
\footnote{230. Id.}
\footnote{231. Id. The court focused on the risk to the passengers and not on the risk to the flight attendant or her unborn child. Id. See also Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980). The court specifically dismissed the employer’s concerns for the safety of the employee or the safety of the fetus under the business necessity defense. Id.}
\footnote{232. See infra notes 233-38 and accompanying text.}
\footnote{233. See infra notes 233-38 and accompanying text.}
\footnote{234. Johnson Controls, Inc., 111 S. Ct at 1207-08. The Court stated “that Johnson Controls has shown no ‘factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.’” Id. at 1208 (quoting Weeks v. Southern Bell Tele. & Tele. Co., 408 F.2d 228, 235 (5th Cir. 1969)).}
\footnote{235. Id. at 1214. (White, J., concurring). He stated that “[i]n enacting the BFOQ standard, ‘Congress did not ignore the public interest in safety.’” (quoting Criswell, 472 U.S. 400, 419 (1985)). See also Becker, 53 U. Chi. L. Rev. at 1246-47.}
\footnote{236. See supra notes 2, 4 and accompanying text.}
adopted to promote and insure that persons have equal access to employment opportunities.\textsuperscript{237} Although Title VII and the PDA do not ignore the need for businesses to operate safely, the laws do prohibit discrimination.\textsuperscript{238}

Allowing an employer to adopt discriminatory policies to promote safety concerns would undermine the employment opportunity purposes of Title VII and the PDA.\textsuperscript{239} Congress specifically adopted the PDA to insure that discriminatory decisions on the basis of pregnancy are treated the same way sex discrimination policies are under Title VII.\textsuperscript{240} In furtherance of this policy, Congress specifically used the words “ability or inability to work” in drafting the PDA.\textsuperscript{241} This requirement did not change the interpretation of the BFOQ, but merely reiterated the requirements that courts have been applying since the adoption of Title VII.\textsuperscript{242}

Discussion of Tort Liability Under the BFOQ Defense

Approaching the issue from a different perspective, Justice White argued in his concurring opinion in \textit{Johnson Controls, Inc.} that a fetal protection policy adopted to avoid substantial tort liability for prenatal injuries should be a permitted exception under the BFOQ.\textsuperscript{243} Justice White contended that unlike the safety exception, cost efficiency policies that avoid tort liability are the essence of any business operation.\textsuperscript{244} Such reasoning circumvents the test of an employee's ability to perform the particular job involved.\textsuperscript{245} Cost justification or cost efficient policies have been the subject of few judicial decisions.\textsuperscript{246} However, such policies must still fail as an exception under the BFOQ defense for the same reasons as the fetal safety policies.\textsuperscript{247}

The Supreme Court briefly addressed the issue of cost justifica-

\begin{itemize}
\item \textsuperscript{238} \textit{Dothard}, 433 U.S. at 333-34; \textit{Weeks}, 408 F.2d at 235-36. See Becker, 53 U. CHI. L. REV. at 1262-63.
\item \textsuperscript{239} \textit{See supra} notes 2, 4, 66-70 and accompanying text.
\item \textsuperscript{240} \textit{See supra} note 2, 66-70 and accompanying text.
\item \textsuperscript{242} \textit{Johnson Controls, Inc.}, 111 S. Ct. at 1206-07. \textit{See supra} note 4 and accompanying text.
\item \textsuperscript{243} \textit{Id.} at 1210 (White, J., concurring).
\item \textsuperscript{244} \textit{Id.} at 1210-11.
\item \textsuperscript{245} \textit{See supra} note 87-93 and accompanying text.
\item \textsuperscript{246} \textit{See supra} notes 111-18 and accompanying text.
\item \textsuperscript{247} \textit{See supra} notes 111-18 and accompanying text.
\end{itemize}
tion in City of Los Angeles Dept. of Water and Power v. Manhart. 248 In that case, the Court stated that a cost justification defense may be acceptable under the BFOQ defense but cautioned that it would have to be a very narrow exception. 249 The cost justification reason proffered by the employers in Manhart failed because the discriminatory policy was a policy based on unproven gender assumptions and generalizations. 250 A fetal protection policy, like that of Johnson Controls, is based on no more than the same such assumptions and generalizations. Not only does such an exclusionary policy ignore an individual woman's choices regarding her reproductive capabilities, but the research used to justify these policies is speculative and inconclusive. 251

Specifically, in Johnson Controls, Inc., the UAW offered evidence that demonstrated that prenatal injuries can be transmitted by males who have been exposed to lead. 252 However, those studies were based on animal research and were dismissed as unpersuasive by the district court and the court of appeals. 253 In addition, the studies on fetal risks associated with parental employment in general have been widely criticized as prejudicial for their focus on only those fetal risks associated with female employment. 254 The inherent inconsistencies in this area of research indicate that Johnson Controls considered no more than an employee's gender and childbearing capacity in adopting its policy. 255 Basing employment decisions on a person's gender is specifically prohibited by Title VII and the PDA. 256

Allowing cost efficient policies to be an exception under the BFOQ would potentially render the intent of Title VII and the PDA ineffective. 257 Cost efficient policies are employer motivated, whereas Title VII was designed specifically to protect the interests of potential employees. 258 Congress did not intend to require employers to change the nature of their businesses or ignore sex-based differences, but the language of the statute and the case law mandate that

249. City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. at 716; Norris, 463 U.S. at 1077.
250. Manhart, 435 U.S. at 704-5; Norris, 463 U.S. at 1077, 1083.
253. Id. Johnson Controls, Inc., 886 F.2d at 889 (stating that animal studies indicating that fetal genetic harm can be caused by male lead exposure were unconvincing).
255. Cf. Manhart, 435 U.S. at 712, 716-17 (holding that contributions to an employer's pension plan based solely on the gender of its employees violates Title VII).
256. Id. at 716-17; H.R. REP. No. 948, 95th Cong., 2nd Sess. 3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4751.
257. See supra notes 2, 4, 112-16 and accompanying text.
258. See supra notes 2, 4, 112-16 and accompanying text.
an employer not foster discriminatory policies merely to avoid an inconvenience or an extra cost of employing a member of a protected class.259

Finally, Johnson Controls neither argued nor presented any evidence that its business was in jeopardy because of potential liability actions stemming from prenatal injuries associated with the employment of women in its battery division.260 In fact, Johnson Controls had never been the subject of such a liability action, even prior to adopting the 1982 exclusionary policy.261 Cost efficient policies should not be an acceptable BFOQ defense.262

CONCLUSION

The decision of the United States Supreme Court in UAW v. Johnson Controls, Inc.263 is consistent with the case law and congressional intent that support Title VII and the Pregnancy Discrimination Act ("PDA").264 Title VII mandates that all facially discriminatory employment practices be analyzed under the BFOQ defense, regardless of intent.265 Further, Title VII and the PDA specifically require a strict and narrow application of the BFOQ defense.266 The safety exception to the BFOQ defense mandates that any discriminatory employment policy be directly related to an employee's ability to perform the job involved, and that the job be reasonably necessary to the essence of the employer's business.267 Policies addressing fetal risks "fall outside these rules."268

Further, cost justification policies directly conflict with the purposes of Title VII and the PDA.269 Title VII and the PDA were enacted to prohibit employers from adopting discriminatory policies based on generalizations about a particular class of persons.270 The object of both Title VII and the PDA is to require employers to as-

259. Manhart, 435 U.S. at 707, 716-17; Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387-88 (5th Cir.), cert. denied, 404 U.S. 950 (1971). The court stated that the BFOQ defense is a test of necessity not a test of convenience. Id.
261. Id. at 1209, 1215 (White, J., concurring).
264. See supra notes 76-77 and accompanying text.
265. See supra notes 80, 87-93 and accompanying text.
266. See supra notes 87-93 and accompanying text.
267. See supra notes 87-93 and accompanying text.
269. See supra notes 76-77 and accompanying text.
270. See supra notes 2, 4, 76-77 and accompanying text.
sess each employee or potential employee as an individual, even if one class of persons may cost more than another to employ. 271

If, in the future, fetal health hazards are proven to be associated with the employment of a particular class of persons, then Congress would be the appropriate forum to address the issue. 272 Congress can access all the evidence and make a specific and narrow statutory exception designed to protect employers and employees. 273 Such a process would avoid the potential for abuse by employers and the courts in broadening the restrictive scope of the BFOQ defense. 274

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271. See supra notes 111-18 and accompanying text.
274. Id. at 1266-63.