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Fetal Protection Policies: A Statutory Proposal in the Wake of International Union UAW v. Johnson Controls Inc.

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NOTES

FETAL PROTECTION POLICIES: A STATUTORY PROPOSAL IN THE WAKE OF *INTERNATIONAL UNION, UAW v. JOHNSON CONTROLS, INC.*

Over the past few decades, rapidly changing technology has resulted in the widespread use of new and exotic chemicals at the workplace. Simultaneously, the number of women in the workforce has increased dramatically. Fifty-six percent of all women now work outside the home, compared with forty-three percent in 1970.[1] Working women have been drawn to the growing sectors of the economy: service sector jobs, light industry, laboratory work, and automated data processing.[2] These new jobs, however, often expose workers to potentially toxic chemicals.

Concerns about the effects of chemical exposure to fertile and pregnant workers have led companies to adopt protective or exclusionary policies in many areas of manufacturing. These policies, often referred to as "fetal protection policies," typically exclude all fertile women from work in hazardous areas, regardless of age or childbearing plans. Companies increasingly have turned to these policies in an effort to limit their own future liability at the expense of equal employment opportunities for women.

Critics of fetal protection policies believe that these policies reinforce the perception of women as marginal workers and stereotype women as nurturers first and workers second. Congress only recently outlawed "protective" employer policies for working women,[3] and many believe that the institution of broad exclusionary policies based solely on a worker's sex threatens to re-create those limitations of the past. As one author stated:

> The historical reduction of women's role in life to a single dimen-

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1 BNA SPECIAL REPORT, PREGNANCY AND EMPLOYMENT: THE COMPLETE HANDBOOK ON DISCRIMINATION, MATERNITY LEAVE, HEALTH AND SAFETY 59 (1970) [hereinafter BNA SPECIAL REPORT]; U.S. DEP'T OF LABOR, A WORKING WOMAN'S GUIDE TO HER JOB RIGHTS (1978).

2 BNA SPECIAL REPORT, *supra* note 1, at 59.

3 Title VII of the Civil Rights Act of 1964 bans job discrimination on the basis of sex. 42 U.S.C. § 2000e-2 (1982). In addition, courts have held that state labor statutes are subject to Title VII prohibitions on discrimination. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Manning v. General Motors Corp., 3 Fair Empl. Prac. Cas. (BNA) 968 (N.D. Ohio 1971), *aff'd*, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

> sion—vessel and nurturer for the next generation—resulted in the sacrifice of tremendous human diversity of talent, predilection, and personal aspiration. To the extent restrictions are imposed today upon the normal, routine choices about women's work and nonwork lifestyles, such historical limitations upon women's lives are reimposed.[4]

Congress passed Title VII of the Civil Rights Act of 1964 to combat these stereotypes.[5] The Pregnancy Discrimination Act (PDA) of 1978 amended Title VII, reinforcing the prohibition against workplace discrimination of women with childbearing capability.[6] Recently, women have challenged the legality of fetal protection policies under Title VII, and courts have struggled to use Title VII jurisprudence to balance employer liability concerns and fetal health against the rights of working women.

This Note demonstrates the inadequacy of Title VII as a framework for analyzing fetal protection policy cases. Part I outlines Title VII law and traces traditional Title VII jurisprudence, as well as recent Supreme Court changes to that jurisprudence. The Note focuses on *International Union, UAW v. Johnson Controls, Inc.*,[7] a recent Seventh Circuit Court of Appeals decision that altered the use of Title VII jurisprudence in fetal protection policy cases. The decision effectively prevents fetal protection policy plaintiffs from challenging exclusionary employment policies under Title VII. *Johnson Controls*, presently pending before the Supreme Court, leaves little room for compromise between company policies and the rights of working women.

Part II briefly presents the current level of scientific knowledge regarding workplace toxins. It then discusses fetal protection policies and cases, including *Johnson Controls*, explaining the rationale behind the decisions and offering criticisms. Because the Seventh

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4 Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 653 (1981). Many scholars have addressed the relationship between fetal vulnerability policies at the workplace and equal employment opportunity rights of women. *See, e.g.*, Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Lucinda M. Finley, *The Exclusion of Fertile Women From the Hazardous Workplace: The Latest Example of Discriminatory Protective Policies, or a Legitimate, Neutral Response to an Emerging Social Problem?*, 38 N.Y.U. ANN. NAT'L CONF. ON LAB. 16-1 (1985); Hannah Arterian Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63 (1980); Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981).

5 42 U.S.C. § 2000e-2 (1982); *see infra* text accompanying notes 9-11 (legislative history of Title VII).

6 *Id.* § 2000e(k). For a discussion of the legislative history of the Pregnancy Discrimination Act, see *infra* text accompanying notes 41-48.

7 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

Circuit's decision has undermined the protections intended under Title VII, and because Title VII itself serves as an inadequate tool for analyzing fetal protection policy cases, this Note proposes a federal statute to regulate workplace exclusionary policies.

I
BACKGROUND

A. Title VII

1. *Rationale for Adoption and Explanation of Provisions*

Title VII of the Civil Rights Act of 1964[8] prohibits employers from discriminating against employees on the basis of race, sex, religious beliefs, or national origin in both hiring and employment practices. Congress passed Title VII to eliminate long-existing barriers to employment for racial minorities.[9] Members of Congress added the prohibition on sex discrimination as an afterthought in an unsuccessful effort to defeat passage of the bill.[10] Following enactment of the bill into law, courts have vigorously defended the rights of women against job discrimination. As in race discrimination cases, courts have required that any employment criteria used by an employer "must measure the person for the job and not the person in the abstract."[11] As the Court of Appeals for the Ninth Circuit stated, "the premise of Title VII . . . is that women are to be on equal footing with men and equality of footing is established only if employees otherwise entitled to a position, whether male or female, are excluded only upon a showing of individual incapacity."[12]

Title VII violations fall into two categories. The first category, "disparate treatment," occurs when an employer institutes a policy which on its face discriminates against employees through forbidden means such as race or sex.[13] The statutory language of Title

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8 42 U.S.C. §§ 2000e to 2000e-17 (1982).

9 Furnish, *supra* note 4, at 74.

10 *Id.* at 74 & n.54; WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION, STATUTES, AND THE CREATION OF PUBLIC POLICY 17 (1988).

11 Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971); *see also* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (in a sex discrimination case barring employer discrimination based on "stereotyped" impressions about characteristics of women, the Court required courts to focus on fairness to individuals rather than on fairness to classes).

12 Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

13 In addition to policies which discriminate on their face against certain classes of employees, an employee may attack policies which are neutral on their face but are a *pretext* for overt discrimination. Both the facial discrimination and the pretext theories are considered disparate treatment cases and, as such, are excused under Title VII only by a bona fide occupational qualification defense. See *infra* note 14 for text of Title VII statute; *see also* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (an employer policy neutral on its face violates Title VII if found to be a mere pretext for discrimination against

VII explicitly prohibits disparate treatment. In addition, the statute provides only one defense to an employer charged with disparate treatment: the "bona fide occupational qualification" ("BFOQ") defense.[14] This defense allows employers to discriminate on the basis of religion, sex, or national origin only when those qualities are "reasonably necessary to the normal operation of that particular business or enterprise."[15] The Supreme Court held that the BFOQ defense is meant to be an "*extremely narrow* exception to the general prohibition of discrimination on the basis of sex."[16] Accordingly, courts have upheld sex discrimination on its face only in very limited

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women); General Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (Title VII applies if plaintiff can demonstrate that a policy is a mere "pretex[t] designed to effect an invidious discrimination against the members of one sex or the other").

14 The statute reads in relevant part:

> Unlawful Employment Practices
> (a) Employer Practices
> 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. . . .
> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . 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* reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2 (1982) (emphasis added).

15 *Id.* § 2000e-2(e).

16 Dothard v. Rawlinson, 433 U.S. 321, 347 (1977) (emphasis added) (sex of prison guards in a maximum security prison determined to be a BFOQ); *see also Rosenfeld*, 444 F.2d 1219 (court held that employer who excluded women as a class *per se* for jobs that required heavy lifting did not prove a BFOQ; employer did not prove that the sexual characteristics of an employee were crucial to successful performance of the job); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (defendant telephone company failed to prove that heavy lifting and other job requirements constituted a BFOQ). In *Weeks*, the court stated that "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. . . . We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise." *Id.* at 235-36. *But see* Torres v. Wisconsin Dep't of Health and Social Servs., 859 F.2d 1523 (7th Cir. 1988) (en banc) (burden of proof placed on defendants by the trial court in proving a BFOQ was held by the Court of Appeals as too demanding), *cert. denied*, 109 S. Ct. 1133 (1989).

Cases discussing the BFOQ defense under the Age Discrimination Act include: Western Airlines v. Criswell, 472 U.S. 400 (1985) (mandatory retirement at age 60 for airline pilots held to be a BFOQ); Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985) (mandatory retirement age for firefighters does not automatically constitute a BFOQ in an age discrimination case).

situations. For example, the Court of Appeals for the Fifth Circuit found sex discrimination acceptable only "when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[17]

The second category of discriminatory practice is the "disparate impact" theory in which an employer institutes a policy that appears neutral on its face but discriminates in effect against certain employees on the basis of their race, sex, or religion. The disparate impact analysis is a judicially created theory that first emerged in the 1972 Supreme Court decision of *Griggs v. Duke Power Co.*[18] The Court in *Griggs* also created a "business necessity" defense to the disparate impact theory, a defense less stringent than the statutory BFOQ defense. To utilize this defense successfully, an employer must show job relatedness: the requirement at issue must have "a manifest relationship to the employment in question."[19]

An example of a policy with disparate impact would be an employer who required all employees to be at least five feet, six inches tall. The policy would affect men and women equally, but it would have a disparate impact upon women by excluding a great number of women and a relatively small number of men. An employer could use the business necessity defense successfully if he could prove, for example, that all equipment on the job in question could only be operated safely by persons over the height of five feet, six inches.

2. *Traditional Title VII Burdens of Proof*

In cases alleging disparate treatment, the plaintiff bears the burden of proof throughout the proceedings. Within this category, Title VII requires the plaintiff to establish a prima facie case of *intent* to discriminate under the challenged employment policy.[20] The defendant-employer must articulate a BFOQ defense to justify an alleged discriminatory policy. If the defendant produces a legitimate rationale as a defense for its policy, then the plaintiff must prove

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17 Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (emphasis added), *cert. denied*, 404 U.S. 950 (1971).

18 401 U.S. 424 (1971). The defendant in *Griggs* used nonjob-related diploma requirements and "intelligence testing" requirements for candidates seeking employment in skilled jobs. The tests, although neutral on their face, had a discriminatory impact on the employee population by systematically excluding blacks. The Supreme Court ruled that even though Title VII proscribed only overt discrimination, the intent of the Act was to remove all past employment barriers for minorities. Consequently, the Court ruled that neutral employer policies which worked in practice to exclude certain groups of employees were illegal under Title VII. As the Court unanimously asserted, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

19 *Id.* at 432.

20 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

that the defendant's policy and rationale are only a pretext for discrimination.[21]

Initially, the burden-of-proof standard in disparate *impact* cases was different from the burden-of-proof standard in disparate *treatment* cases. In disparate impact cases, the plaintiff first had to come forward with proof of discriminatory impact of an employer's policies. Once this was done, the burden of proof switched to the defendant in the form of an affirmative defense. Unlike disparate treatment cases, the defendant had to do more than simply articulate a legitimate rationale for the policy. To escape liability, a defendant-employer had to demonstrate that the policy was "necessary to the safe and efficient operation of the business."[22] If the defendant met this burden of proof, the plaintiff then had the opportunity to prove that other less discriminatory alternatives were feasible. If the plaintiff succeeded in doing so, the employer's business necessity defense disappeared.[23]

For example, in terms of the hypothetical cited above, a plaintiff would bear the burden of proving that an employer's minimum height requirement of five feet, six inches had a disparate impact on women. The employer would then have to demonstrate that the height requirement was legitimately connected to his business needs, and that there were no less discriminatory alternatives available. The plaintiff need not demonstrate anything; it remains with the employer to provide evidence justifying the height requirement. If the employer proves that a height minimum is necessary, then the plaintiff has the opportunity to show that there may be feasible alternatives such as adjusting machinery or redistributing tasks on the job.[24] This burden-of-proof pattern in disparate impact cases had

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21 *See id.* at 250; McDonnell Douglas v. Green, 411 U.S. 792 (1973).

22 Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *accord* Connecticut v. Teal, 457 U.S. 440 (1982).

23 *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

24 Burwell v. Eastern Air Lines, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), illustrates how the traditional business necessity defense worked in a sex discrimination suit dealing with pregnancy. In *Burwell*, female flight attendants brought suit against Eastern Air Lines for company pregnancy policies that grounded all pregnant flight attendants and forced forfeiture of those attendants' seniority. The court held that although Eastern's policy appeared to be "neutral in its treatment of male and female employees . . . its impact was solely upon women, . . . depriving them of 'employment opportunities' and adversely affecting their status as employees . . . ." *Id.* at 364. Thus, to justify its policy, Eastern had to supply a legitimate business necessity rationale as a defense. The test applied by the court was "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Id.* at 371 (footnotes omitted). Eastern tried to prove that grounding flight attendants in the first months of pregnancy constituted a legitimate business purpose, but the court held that the only legitimate concern of the employer in light of a "business necessity" was the safety of the passsengers. Accordingly, the court allowed employers to ground flight attendants only in later months of pregnancy, after

remained constant since its inception in 1972. Seventeen years later, in 1989, the Supreme Court changed the proof pattern in *Wards Cove Packing Co. v. Antonio*[25] by requiring the plaintiff to bear the burden of persuasion throughout the proceedings.

3. *Burden of Proof in Disparate Impact Cases After* Wards Cove

In *Wards Cove*, the Supreme Court changed the burdens of proof in disparate impact cases. The plaintiffs in *Wards Cove* were employees at salmon canneries in Alaska who worked in unskilled positions on the cannery production lines. A mix of Filipino and Native Alaskan workers filled these cannery jobs, while mostly white workers held the noncannery-line jobs at the plants. Noncannery-line jobs were generally skilled positions that paid substantially more than the minority-filled, cannery-line positions. Because of the short canning season and the remote location of most of the canneries, the cannery-line workers lived on location and ate in company mess halls. The noncannery-line workers, however, lived and ate in dormitories and dining halls separate from the minority workers.[26]

The plaintiffs brought suit against their employer under both the disparate treatment and disparate impact theories of Title VII law, alleging that the company's hiring and promotion practices created both a racial stratification of the workforce and denied minority workers equal employment opportunities. After a bench trial, the district court entered a judgment for the defendants.[27] The plaintiffs appealed, and the Court of Appeals for the Ninth Circuit agreed to hear the case en banc.[28] Using the traditional Title VII analysis, the Court of Appeals concluded that the plaintiffs had proven a

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the employer proved that an attendant in a late stage of pregnancy might indeed endanger the safety of passengers in the event of an emergency. *Id.*

25 109 S. Ct. 2115 (1989).

26 *Id.* at 2119-20.

27 The district court rejected the plaintiffs' disparate treatment claims. It then rejected the disparate impact claims which the plaintiffs raised regarding the defendants' use of subjective employment criteria, believing that a disparate impact analysis could not be applied to subjective employment criteria. *Id.* at 2120. The Supreme Court later held in Watson v. Fort Worth Bank and Trust Co., 487 U.S. 977 (1988), that a disparate impact analysis could indeed be applied to subjective employment criteria.

28 The Ninth Circuit agreed to hear the case en banc to resolve the controversy over whether courts may apply a disparate impact analysis to subjective employment criteria. In resolving the issue, the court also discussed the parties' respective burdens of proof. The court then remanded the case to a panel. On remand, the panel found that the plaintiffs had established a prima facie case of disparate impact and remanded the case to the district court with instructions that "it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity." *Wards Cove*, 109 S. Ct. at 2120. Before the district court heard the case on remand, the defendants appealed to the Supreme Court.

prima facie case of disparate impact through the use of statistics; accordingly, the burden shifted to the employer to prove the business necessity of the challenged policy.[29] The defendants appealed this finding to the Supreme Court, and the Court granted certiorari. The Court reversed the Ninth Circuit's instruction regarding the burden of proof in disparate impact cases. In doing so, the majority revamped the traditional burden of proof pattern so that the burden of persuasion remains with the plaintiff at all times in all disparate impact cases.[30]

The Court's decision affected the rights of all discrimination victims who use Title VII law to redress their wrongs. In addition to proving that an employer's policy has a discriminatory effect on the employee population, plaintiffs now must provide evidence that the employer's given justification for the policy is not necessary to the operation of the business.[31] Limited funds and limited access to employer information and policy rationales make this task extraordinarily difficult, if not impossible, for plaintiffs. As the four dissenting Justices wrote,[32] the majority decision in *Wards Cove* not only "[t]urn[ed] a blind eye to the meaning and purpose of Title VII,"[33] but also seriously damaged the effectiveness of the anti discrimination law by "depart[ing] from the body of law engendered by this disparate-impact theory [and] reformulating the order of proof and the weight of the parties' burdens."[34] Justice Blackmun lamented the Court's anti-plaintiff stance, noting that "[s]adly this comes as no surprise. One wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was."[35]

Allen v. Seidman,[36] a racial discrimination case, demonstrates the devastating effect of *Wards Cove* on a plaintiff's disparate impact case.[37] In *Allen*, the plaintiffs sued the Federal Deposit Insurance Corporation (FDIC) for using a "Program Evaluation" test to help determine promotions. The plaintiffs asserted that the test was dis-

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29 *Id.* at 2020.

30 *Id.* at 2126.

31 *Id.*

32 Justices Blackmun, Brennan, Marshall, and Stevens dissented. The majority consisted of Justices Kennedy, O'Connor, Rehnquist, Scalia, and White. Justice White wrote the majority opinion.

33 *Wards Cove*, 109 S. Ct. at 2127.

34 *Id.* at 2136.

35 *Id.*

36 881 F.2d 375 (7th Cir. 1989).

37 Judge Posner wrote that this case, along with another appeal, constituted "the first disparate-impact appeals heard and decided by this court in the wake of the Supreme Court's decision in Wards Cove Packing Co. v. Antonio, which modified the ground rules that most lower courts had followed in disparate-impact cases." *Id.* at 377 (citations omitted).

criminatory in nature and consequently had a disparate impact on FDIC minority employees. The district court, deciding the case prior to *Wards Cove*, ruled for the plaintiffs after finding that the test had a disparate impact on the plaintiffs and that the defendant failed to demonstrate a business necessity justification. The Court of Appeals for the Seventh Circuit reversed, explaining that *Wards Cove* switched the burdens of proof in Title VII disparate impact cases. In the majority opinion, Judge Posner noted that the term "business necessity defense" was now a "misnomer," since the plaintiff must carry the burden of persuasion and the defendant no longer must bear the burden of an affirmative defense.[38] The opinion also noted that "[any] alternative[s] proposed by the plaintiff must be 'equally effective as (the defendant's) chosen hiring procedures in achieving (the defendant's) legitimate employment goals.' "[39] The Seventh Circuit would echo these words less than three months later to dismiss a fetal protection policy case on summary judgment.[40]

B. Pregnancy Discrimination Act of 1978

In 1976, in *General Electric v. Gilbert*,[41] the plaintiffs sued an employer for instituting a disability plan that discriminated on the basis of pregnancy. The Supreme Court upheld the plan under Title VII, ruling that pregnancy-based discrimination did *not* constitute gender-based discrimination within the meaning of Title VII. The Court based its rationale on the premise that the employer's policy distinguished between pregnant women on the one hand and nonpregnant women and men on the other. On these grounds, the policy did not discriminate on the basis of sex. Three dissenting Justices disagreed, stating that "[b]y definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[42]

Congress reacted to the decision swiftly, the Court's holding in *Gilbert* by passing an amendment to Title VII. Both the Senate and House Reports that accompanied the amendment explicitly affirmed the dissent's interpretation of Title VII, asserting that discrimination based on pregnancy or the ability to become pregnant violated Title VII.[43] The amendment, known as the Preguancy Discrimina-

38 *Id.* at 377.

39 *Id.* (quoting *Wards Cove*, 109 S. Ct. at 2127).

40 *Johnson Controls*, 886 F.2d at 892.

41 429 U.S. 125 (1976).

42 *Id.* at 161-62.

43 HOUSE COMM. ON EDUCATION AND LABOR, PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. No. 948, 95th Cong., 2d Sess. 2 (1978) [hereinafter H.R. REP. No. 948], *reprinted in* NEW 1978 PREGNANCY BENEFITS AND DISCRIMINATION RULE WITH EXPLANATION AND STATE SURVEY, 55 LAB. L. REP. (CCH) at 52-69 (1978);

tion Act ("PDA") of 1978, reads in part:

> (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 conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.[44]

The House Report stated that the purpose of the amendment was to "ensure that working women are protected from all forms of employment discrimination based on sex."[45] The Senate Report outlined the same intent, asserting that the amendment would protect women from any discriminatory policy based on their ability to become pregnant. The Report noted:

> "[t]he proscription of such policies is perhaps the most important effect of this bill. For, as the history of sex discrimination shows, such policies have long-term effects upon the careers of women and account in a large part for the fact that women remain today primarily in low-paying, dead-end jobs."[46]

It is important to note that the PDA and its legislative history

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Senate Comm. on Human Resources, Amending Title VII, Civil Rights Act of 1964, S. Doc. No. 331, 95th Cong., 1st Sess. 2-3 (1978) [hereinafter S. Doc. No. 331], *reprinted in* NEW 1978 PREGNANCY BENEFITS AND DISCRIMINATION RULES WITH EXPLANATION AND STATE SURVEY, 55 LAB. L. REP. (CCH) at 70-86 (1978).

44 42 U.S.C. § 2000e(k) (1982).

45 H.R. REP. No. 948, *supra* note 43, at 52. The report noted:

> the consequences of . . . discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the childbearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

Id. at 6-7; *see also* Furnish, *supra* note 4, at 77-83 (discussing the legislative history of the Pregnancy Discrimination Act amendment).

46 S. Doc. No. 331, *supra* note 43, at 6. The courts have embraced this interpretation of the Title VII amendment in pregnancy discrimination cases. In Newport News Shipbuilding and Dry Dock v. EEOC, 462 U.S. 669 (1983), the Supreme Court held that Congress had "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." *Id.* at 678. In a later case in which the Court established that *preferential* treatment for pregnant workers was acceptable, the Court stated that the "reports, debates, and hearings make abundantly clear that Congress intended the PDA [Pregnancy Discrimination Act] to provide relief for working women and to end discrimination against women workers." California Fed. Sav. & Loan v. Guerra, 479 U.S. 272, 285-86 (1987); *see* Scherr v. Woodland, 867 F.2d 974, 978 (7th Cir. 1988) (stating that the Pregnancy Discrimination Act must be interpreted in light of

contain little information regarding fetal protection policies.[47] With the amendment, Congress intended to eliminate all job discrimination based on both pregnancy and potential pregnancy, but the legislative history does not indicate that Congress considered the effect of toxic work environments on fertile employees when it passed the Act.[48]

II
FETAL PROTECTION POLICIES

A. Scientific Evidence Regarding Fetal Hazards in the Workplace

The negative effect of exposure to toxic substances varies little between men and women.[49] Although some toxic substances[50] have sex-specific effects,[51] in general, "the reasoned hypothesis of special

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the antidiscrimination context of Title VII, and not as "an independent statutory enactment").

In addition to the courts' interpretation of the Pregnancy Discrimination Act, the Equal Employment Opportunity Commission ("EEOC") also has interpreted the Act to mean that employers may not use pregnancy as a rationale for "refusing to hire or promote an otherwise qualified woman, for forcing her to take maternity leave, for discharging her . . . or for failing to reinstate her." BNA SPECIAL REPORT, *supra* note 1, at 20.

47 *See* Furnish, *supra* note 4, at 77-83.

48 *Id.* According to Furnish, the United States Chamber of Commerce submitted a short statement regarding potential fetal health problems to both the House and Senate Committees. The statement outlined employer concerns about the prohibition of policies which excluded pregnant women. The statement read in part that:

> [The Pregnancy Discrimination Act] would prevent an employer from refusing certain work to a pregnant employee where such work argnably posed a threat to the health of either the mother-to-be or her unborn child. Even though the prospective mother might argnably be considered to have assumed the risk by asking to work in such circumstances, injury to the fetus might give the child a cause of action against the employer who, under the bill, would be powerless to deny the work to the child's mother during the pregnancy.

Id. at 78 n.72 (quoting *Discrimination on the Basis of Pregnancy: Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources*, 95th Cong., 1st Sess. 482 (1977); *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 84 (1977)). Furnish noted that Senator Hatch asked an expert witness about the extent of expressed legislative concern. The expert responded by noting that more research was needed to judge the effects of toxic substances on the reproductive systems of men and women alike. *Id.* at 79 n.73.

49 Gary Z. Nothstein & Jeffery P. Ayres, *Sex-Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239, 243-48 (1980-81).

50 The toxicity of a substance is defined as the "inherent capacity of a substance to cause injury to biological tissue." *Id.* at 243 n.11.

51 Toxic effects on reproductive organs differ between men and women primarily because of differences in gonadal location and function. "Testes are more exposed to hazards than ovaries by virtue of their location, but this is less significant than the fact that sperm cells are always dividing and thus are more susceptible to mutations which frequently occur during cell division." *Id.* at 244 n.13. Nothstein and Ayres also note

susceptibility because of sex is largely without basis."[52] Although exposure to toxins in the workplace at certain levels may be safe for the normal health of men and women, such exposure could cause harm to their reproductive systems and prove deadly to a fetus. Toxic substances harm a fetus either by poisoning it directly ("teratogens"),[53] or by affecting it indirectly through the alteration of the chromosomes of either the male or female reproductive systems ("mutagens").[54] Substances with teratogenic effects may harm a fetus through the exposure of the mother, while substances with mutagenic effects may harm a fetus through the exposure of either the mother or the father.[55]

A chemical may have a combination of teratogenic or mutagenic effects; consequences vary according to the particular substance and the level of exposure.[56] Known toxics with both teratogenic and mutagenic effects include lead (used in gasoline,

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that "[g]onads of both sexes have the same embryonic origin and thus a similar biochemistry. . . . Thus, a toxic substance that affects the gonads of one sex, a mutagen, probably will affect those of the other." *Id.* at 244-45 (footnotes omitted). Carbon disulfide, for example, "appears to interfere with gonadal endocrine function in both sexes, resulting primarily in male impotency but also, to a lesser extent, in female menstrual disorders." *Id.* at 245-46 (footnote omitted).

52 *Id.* at 246 (footnote omitted).

53 Teratogenic effects on a fetus include "structural malformations, metabolic or physiological dysfunctions, and psychological or behavioral alterations in infants, which become evident at birth or in the immediate postnatal period. If the change results in stillbirth or in-utero death, the effect is more properly called embryotoxic or fetotoxic." *Id.* at 245 n.18. *See generally* ANDREA HRICKO, WORKING FOR YOUR LIFE: A WOMAN'S GUIDE TO JOB HAZARDS (1976).

54 Howard, *supra* note 4, at 802. Mutagens are substances that damage the genetic material of both men and women. Scientists differentiate between two types of mutagens, one which affects nongerm cells and may cause malignancy, and a second which affects germ cells and may cause chromosomal mutagenesis. Nothstein & Ayres, *supra* note 49, at 245 n.17. Mutagenic damage affecting chromosomal material may be of greatest concern to society as a whole. As Nothstein and Ayres bluntly state, "cancer dies with the employee. The effect of genetic damage, however, may persist for many generations." *Id.* at 245 n.18; *see* Williams, *supra* note 4, at 659. For a general background on mutagens, see generally Claxton & Barry, *Chemical Mutagenesis, An Emerging Issue for Public Health*, 67 AM. J. PUB. HEALTH 1037 (1977).

55 Nothstein & Ayres, *supra* note 49, at 245 n.18 ("If a substance is strictly a teratogen, only women's reproductive processes can be affected. Fetuses of wives of exposed male employees, however, may also be affected by teratogens.").

56 Howard, *supra* note 4, at 802. For a laundry list of potential effects from harmful levels of exposure, see Nicholas A. Ashford & Charles C. Caldart, *The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention*, 5 INDUS. REL. L.J. 523, 526-29 (1983) (outlining potential damage to both offspring and parents from exposure to toxins at the workplace). For a summary of the results of a few studies done on the potential reproductive effects of toxic exposure, see BNA SPECIAL REPORT, *supra* note 1, at 62-67. This Report includes a word of warning regarding these results, noting that "[w]hile many studies show such possible side effects, there are just as many, if not more, that show none." *Id.* at 65. The Report further stated that many of the studies done "are not scientifically valid, and others suffer from a lack of a sufficiently large study population to accurately demonstrate problems among a particular group." *Id.*

pigments, rubber, batteries, bullets, pipes and roofing materials); vinyl chloride (used in plastics and rubbers); chloroprene; benzene (used in paints, nylon, tires and detergents); ionizing radiation; anesthetic gases; carbon monoxide; mercury (used in thermometers, dental fillings, mirrors, dyes, and neon lights); pesticides; and chlorinated hydrocarbons.[57] Occupations that suffer exposure to these elements range from traditionally male blue-collar jobs such as steel-making and chemical production to traditionally female jobs such as x-ray technicians, dental assistants, and word processing. Accordingly, both parents have the potential to bring home harms to future offspring from exposure at the workplace.[58]

The lack of scientific evidence regarding the effect of chemicals on the reproductive systems of both male and female workers complicates the problem of articulating an adequate fetal protection policy.[59] The potential adverse effects of most chemicals are unknown.[60] Even in situations where it is likely that parental exposure to chemicals causes a certain birth defect, it is often "difficult . . . to determine which of these processes caused the birth defect or for that matter, whether the defect was caused by a work-related exposure, other toxic exposure, or chance."[61] Additionally, scientific studies on this issue have focused on the effect of chemical exposure to the fetus rather than to males or nonpregnant females, skewing the information available on hazards to working persons as a class.

Studies that focus only on the reproductive problems of women

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57 Howard, *supra* note 4, at 803-05; Williams, *supra* note 4, at 647.

58 "The point here is that exclusion of only women from agents that affect reproductive capacity will not solve the problem of toxic effects. Male as well as female workers must be protected from these toxic agents." Nothstein & Ayres, *supra* note 49, at 247.

59 Williams, *supra* note 4, at 661 (noting that a "problem for employers is that, although information on maternal exposure is more readily available than that on paternal exposure, there is a troubling absence of studies on either"). In 1987, one report pronounced that "[v]ery few substances have been studied for their reproductive effects and little is understood about the mechanisms through which adverse effects occur." BNA SPECIAL REPORT, *supra* note 1, at 64.

60 "[O]f the more than 70,000 known chemicals, only about 7,000 have been tested for carcinogenicity, and even fewer have been tested for reproductive hazards." BNA SPECIAL REPORT, *supra* note 1, at 61. The Office of Technology Assessment reported:

> What is known about reproductive health hazards is far outweighed by what is unknown: most commercial chemicals have not been thoroughly evaluated for their possible toxic effects on reproduction and development. . . . There are consequently no reliable estimates as yet of the basic measures of reproductive risk in the workplace—the number of workers exposed to such hazards, their levels of exposure, and the toxicity of the agents to which they are exposed.

OFFICE OF TECHNOLOGY ASSESSMENT, REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE 184 (1985) (*quoted in* Becker, *supra* note 4, at 1235 n.77); *see also* Howard, *supra* note 4, at 802; Williams, *supra* note 4, at 661.

61 Williams, *supra* note 4, at 657 (footnotes omitted).

in the toxic environment may encourage companies to institute policies that affect women exclusively.[62] This in itself creates potentially unfair discriminatory policies, for as one study noted:

> it does not necessarily follow that women are more sensitive to the action of any given agent. Where extensive data have been compiled on both sexes (*e.g.*, for anesthetic gases and smelter emissions), evidence has been found for adverse effects resulting from exposure of both men and women, including some evidence for adverse fetal effects following exposure of males.[63]

Exposure to lead can cause "decreased sexual drive, impotence, sterility, and decreased ability to produce normal sperm" in men, but fetal protection policies do not account for these hazards.[64]

To say that scientific studies are scanty is not to say, however, that all negative effects of toxic substances are unknown. For example, the toxic substance implicated in *International Union, UAW v. Johnson Controls* was lead.[65] Lead is extremely dangerous to human

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62 Professor Williams points out that there is a preconceived notion of an "exclusive connection between birth defects and women who carry the offspring." Williams, *supra* note 4, at 660. Professor Finley notes that scientific studies done on the effects of toxic exposure focus far more on potential reproductive hazards to women than to men. She states that the lack of studies on men "reflects the pervasive assumption that women, as the actual childbearers, are uniquely susceptible to harm, and that the health of fetuses can be affected only through the mother. An additional reason why the male's role in the reproductive process [is] ignored by scientific research . . . is that paternal effects are harder to trace and to ascertain." Finley, *supra* note 4, at 16-6.

Mutagenic toxics may alter genetic material in men, leading to birth defects; yet employers who have mutagens in the workplace often ignore the potential effect on men and close the workplace to women only. One employer who barred only women from a workplace which exposed workers to mutagens stated:

> In the production of electronic equipment there is no feasible way of protecting people from that type of exposure because of the necessity to pick up these elements in your hands. . . . I refuse to bire girls who are of possible childbearing age for that very reason. I tell them absolutely, point blank, there is absolutely no way any of these girls is ever going to work on any of our lines because of that potential hazard. I can't get anyone to tell me what the hazard is, and in the absence of that I'm not going to take a chance. . . . [F]rom what I hear there are chemicals that are possibly mutagenic . . . .

PROCEEDINGS: CONFERENCE ON ENVIRONMENTAL LAW, WILLIAMSBURG, VIRGINIA K-Q-4 to K-Q-5 (Feb. 9-10, 1979) (*quoted in* Williams, *supra* note 4, at 660 n.125).

63 Ashford & Caldart, *supra* note 56, at 546 n.112 (quoting CLEMENT ASSOCIATES, INC., COUNCIL ON ENVIRONMENTAL QUALITY, CHEMICAL HAZARDS TO HUMAN REPRODUCTION (1981)).

64 Howard, *supra* note 4, at 803 (footnote omitted). Besides abnormalities in sperm (which may cause birth defects), paternal exposure to workplace toxics may cause barm to offspring by transmitting the toxins through sexual intercourse (lead often found in the semen of exposed males), or by transmitting the hazards directly from a worker's skin, hair and clothing. Becker, *supra* note 4, at 1237. *See generally* RICHARD L. NAEYE & NEBIAT TAFARI, RISK FACTOR IN PREGNANCY AND DISEASES OF THE FETUS AND NEWBORN (1983). See also discussion on mutagens, *supra* notes 51, 54 & 56.

65 886 F.2d 871, 875 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

health, even in moderate doses.[66] In addition, toleration levels for lead exposure are much lower for young children and developing fetuses than for adult men and women.[67] Lead attacks the human nervous system, posing serious hazards to a developing brain.[68] Lead-exposed fetuses are threatened with stillbirth, low birth weight, and "retarded cognitive development which may result in learning and behavioral disorders."[69] The fact that the human body stores lead in soft tissues and bone further complicates the problem of lead exposure;[70] high levels of lead may remain in a worker's bloodstream for a long period of time after removal of the worker from a toxic area.[71] This makes it difficult for women to plan pregnancies while working, and it poses a real threat to fetuses in unexpected or accidental pregnancies.

B. Exclusionary Policies

1. *Background and Rationale*

In the face of indeterminate evidence regarding the effects of toxics on the reproductive health of workers,[72] more and more companies exclude women from hazardous work areas. Motivated both by concern over tort liability and concern for the health of future generations, employers opt to close doors to women workers rather than face potential liability for future injuries. By 1980, an estimated 100,000 jobs excluded women of childbearing capacity because of fetal protection,[73] and the number currently is much

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66 BNA SPECIAL REPORT, *supra* note 1, at 205; *see also* text accompanying note 64.

67 Nothstein & Ayres, *supra* note 49, at 254 (noting that lead served as an abortion-inducer many years ago). The scientific evidence as to the actual effect of lead on fetuses varies. A California appellate court which addressed the same fetal protection policy implicated in *Johnson Controls* noted that the medical evidence offered by both sides of the issue differed as to "when and to what extent lead crosses the placenta." Johnson Controls, Inc. v. California Fair Emp. & Hous. Comm'n, 267 Cal. Rptr. 158, 169 (Cal. Ct. App. 1990). The experts in the California case differed as to whether lead was any more harmful to fetuses and children than adults. *Id.* at 169 n.5. *See generally* William L. Marcus & C. Richard Cothern, *The Characteristics of an Adverse Effect: Using the Example of Developing a Standard for Lead*, in 16(4) DRUG METABOLISM REVIEWS 423 (1985-86) (reviewing the scientific evidence regarding a safe standard for lead).

68 International Union, UAW v. Johnson Controls, 680 F. Supp. 309, 311 (E.D. Wis. 1988) (expert testimony given to the district court by the director of a Reproductive Toxology Center), *aff'd*, 886 F.2d 871 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990).

69 *Id.*

70 Nothstein & Ayres, *supra* note 49, at 256.

71 *Johnson Controls*, 680 F. Supp. at 312 (A toxicologist from the Environmental Defense Fund testified that the turnover rate of lead in the bloodstream is about 100 days, meaning that a subject in a lead-free environment will have a complete reduction in blood-lead levels within one year.).

72 *See supra* text accompanying notes 49-59.

73 Williams, *supra* note 4, at 647. The Washington Post wrote that "[f]ederal employment officials estimate at least 100,000 jobs involving contacts with potential ter-

higher.[74] Interestingly, women are "excluded more often from traditionally male-intensive jobs than female-intensive jobs, even when exposures are similar."[75] Female workers are not excluded from jobs with exposure to substances known to be a threat to reproductive organs and fetal health when those jobs rely primarily on a female labor force.[76] Scholars have noted that women are covered by exclusionary policies only when they are "perceived as marginal members of the workforce."[77] As a general pattern, employers will not employ women in toxic areas unless their need for a female labor source outweighs their fear of tort liability.[78]

Scholars differ as to how realistic this fear of liability is. One

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atogens are now closed to women, either because of corporate policies or through subtle channeling of women away from those positions." Washington Post, Nov. 3, 1979, § A, at 6, col. 5 (*quoted in* Williams, *supra* note 4, at 647 n.30).

74 *See* Equal Employment Opportunity Commission and Department of Labor, Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (proposed Feb. 1, 1980), *withdrawn*, 46 Fed. Reg. 3916 (1981). The report stated that "evidence indicates that as many as 20 million jobs involve exposure in the workplace to alleged reproductive hazards." *Id.* at 7514 (*quoted in* Emily Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577, 579 n.8 (1986)).

75 Williams, *supra* note 4, at 649 (footnote omitted).

76 For example, the health care industry is notorious for exposing its workers to fetal and reproductive dangers ranging from anesthetic gases to bacteria and viruses. Seventy-five percent of all hospital and health care workers are women. *Id.* at 649 n.58. Video display terminals present another reproductive health hazard to millions of women employed in clerical work. One report cites an example where four out of seven video display terminal operators at the Toronto Star gave birth to children with birth defects within a one-year span. BNA SPECIAL REPORT, *supra* note 1, at 58; *see also* Becker, *supra* note 4, at 1219 (footnotes omitted) ("The scope of [fetal protection] policies is influenced by the sexual composition of the work force. When the work force is predominately male, some employers exclude all fertile women from hazardous jobs. When the work force is predominately female, some employers exclude only pregnant women from hazardous jobs."); Howard, *supra* note 4, at 798 n.3 ("It is instructive to note that traditionally male-dominated industries have demonstrated concern for pregnancy outcomes by excluding fertile women. . . . Exclusionary policies have not been adopted by American employers in female-dominated industries, such as agriculture and textiles, in which substantial numbers of female workers are exposed to similarly hazardous substances, including pesticides and certain hydrocarbons."). Other traditional "women's" jobs which entail exposure to fetal hazards include laundry workers, dry cleaners, laboratory technicians, and electronics workers, where "women form the backbone of the production process." Robin Baker & Sharon Woodrow, *The Clean Light Image of the Electronics Industry: Miracle or Mirage?*, in DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME 21 (Wendy Chavkin ed. 1984).

77 Becker, *supra* note 4, at 1237; Furuish, *supra* note 4, at 123-24; Williams, *supra* note 4, at 649.

78 Professor Becker points out that exclusionary policies have arisen almost entirely in unionized industries with rigid pay scales. She notes generally that women employees in these jobs are likely to be less attractive to an employer than men. Becker, *supra* note 4, at 1240. In addition to possible disruption of the workplace from adding women to the labor force ("men in traditionally male jobs are [often] hostile to women as co-workers . . . ." *Id.*), employers in toxic industries must deal with providing alternative facilities (such as washrooms and showers) and protective clothing and tools specially designed

author asserted, "[u]nder general tort principles, . . . there would seem to be no basis for holding an employer liable for fetal harm if Title VII bans sex-specific fetal vulnerability policies, the employer fully informs the woman of the risks, and the employer has not acted in a negligent manner."[79] Barring intentional infliction of harm or gross negligence, the worker's compensation system handles claims by the employee against the employer. It is generally agreed that waivers for claims of gross or wanton negligence may not be upheld against a worker.[80] However, if an employer complies with disclosure requirements and government standards for exposure levels, gross negligence may be difficult to establish.

With employee claims limited by waivers and worker's compensation, employer concern has focused on the threat of tort suits by children born with birth defects.[81] Yet despite employers' fears regarding the proliferation of such lawsuits, there has yet to be a single award regarding prenatal injuries from maternal exposure to toxics at the workplace.[82] In these suits, the plaintiff must overcome the problem of establishing causation. As one author wrote:

> [a]ssume, for example, that the probability of a particular birth defect occurring is generally two in 100, but that prenatal exposure to a known toxic substance to which the mother was exposed during pregnancy increases the probability to ten in 100. How much help will this information be to the parents or their defective offspring when they bring suit? There is no way to prove that this child is not one of the two in 100 who would otherwise have been born with the defect or to prove that in fact the defect resulted from the exposure.[83]

The lack of claims against employers for birth defects caused by toxic exposure could be due either to a lack of awareness regarding potential hazards, or to a genuine problem in establishing a rela-

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for women. These facts suggest that employers in traditionally male blue-collar industries are likely to argue for exclusion based on financial considerations. *Id.*

79 Becker, *supra* note 4, at 1244 (footnotes omitted). Professor Finley asserts that "an employer who has complied with OSHA exposure standards, otherwise made the workplace as safe as reasonably possible for workers of both sexes, and fully warned workers of the reproductive dangers, would probably escape tort liability." Finley, *supra* note 4, at 16-37.

80 *See* sources cited *supra* note 79; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 68, at 482 n.22 (5th ed. 1984); Becker, *supra* note 4, at 1244; Finley, *supra* note 4, at 16-37.

81 In 1979, the EPA administrator stated that waivers from female employees may be an acceptable alternative, since the prohibition "is for their own protection. . . . A consensual waiver would also insulate the employer from liability for claims asserted by the employee. The rights of an injured child, however, cannot and indeed should not be waived." O.S.H. Rep. (BNA) 1482 (1979).

82 *Johnson Controls*, 886 F.2d 871, 914 (7th Cir. 1989) (en banc), *cert. granted*, 110 S. Ct. 1522 (1990); Becker, *supra* note 4, at 1245-46; Williams, *supra* note 4, at 646.

83 Furnish, *supra* note 4, at 86.

tionship between the exposure and the injury.[84] At least one author has asserted that the problems facing plaintiffs in proving employer liability for injuries to offspring is so great that employer concerns about liability may actually be a pretext for sex discrimination.[85]

Ignoring the causation problems, employers still may limit their liability for exposure hazards through alternative means. Every jurisdiction now permits suits by children who were injured as fetuses by a third party.[86] Less clear is the extent to which a parental waiver may affect such a right. Most authors believe that courts would not uphold such a waiver,[87] although there are arguments to the contrary.[88] Apparently, courts have yet to consider the issue of waiver in the context of preconception or prenatal torts.[89]

In addition to waivers, states may adopt a statutory scheme to limit the extent of the liability that an employer may face. Fetal recovery could be incorporated into worker's compensation coverage, or industries could establish a pooled damage fund to pay compensatory damages to injured children. Whatever methods are used to assuage employer concerns, a company policy that excludes *all* fertile women from certain work environments is over-inclusive. Women are potentially preguant persons, but not all women workers will become pregnant.[90] Exclusionary policies based on assump-

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84 For example, assuming that a child suffering from birth defects could prove a causal connection to lead, that child may have difficulty proving that the lead came from parental exposure at the workplace since lead may be found in other elements such as paint, cooking utensils, air, and water. Finley, *supra* note 4, at 16-39.

85 Williams, *supra* note 4, at 646 n.25.

86 Fnrnish, *supra* note 4, at 85 n.90. However, some states "may require the injury to occur after the fetus is viable." *Id. But see* James L. Marketos, *Tort Liability for Preconception Injuries*, 1978 ANN. SURV. AM. L. 69, 72-73 (1979) (stating that almost all jurisdictions will allow recoveries for infants born alive regardless of when in the pregnancy the injury occurred).

87 *See, e.g.*, Vibiana M. Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person*, 4 HARV. WOMEN'S L.J. 71, 99 (1981); Ashford & Caldart, *supra* note 56, at 556; Williams, *supra* note 4, at 646.

88 The law recognizes the right of parents to make decisions on behalf of their children, even if the decision is one which would be detrimental to the interests of the child. An example of this is courts allowing parents of severely retarded or deformed babies to decide whether or not the hospital should keep the babies alive on life support systems following birth. *But cf.* Huss v. Demott, 215 Kan. 450, 452, P.2d 743, 756 (1974) (one parent cannot compromise a child's right to child support from another parent by settling with the second parent independently); Doyle v. College, 403 A.2d 1206, 1209 (Me. 1979) (parent not allowed to waive a cause of action on behalf of a child for injuries sustained by the child).

89 Williams, *supra* note 4, at 646 n.24. Professor Finley notes that nearly every case granting relief for a prenatal tort has been based on breach of a duty to the mother. Finley, *supra* note 4, at 16-37.

90 Studies estimate that "only one out of 5,000 women between 45 and 49 has a child in any given year. For blue collar women over 30, the birth rate may be less than 2 percent." Becker, *supra* note 4, at 1233 (footnotes omitted). The older a woman worker is, the less likely it is that she will bear children, for "[t]here is only a 0.38 percent

tions of women as childbearers ignore the interests of women as workers. As one scholar wrote: "it is as if [the employers] are stating that women's interests in employment are so weak that they are easily trumped by the interests of beings who may never exist."[91]

2. *Criticisms of Exclusionary Policies*

The firing or exclusion of women from jobs with toxic exposure actually may have a more detrimental effect on future generations than the exposure of the worker herself. These jobs usually offer not only higher wages, but also comprehensive health insurance for the worker and her family. After all, "[w]ith an ever-greater proportion of households headed by women and with an increasing proportion of these households in poverty, entry into traditionally male, high paying positions is important to women and their dependents."[92] As Judge Cudahy asked in his dissent in *Johnson Controls*,

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probability that a woman employee between 40 and 44 will have a child in any given year. For a woman between 45 and 49, there is only a 0.02 percent chance of a birth during any given year." *Id.* Although these figures focus on the odds of a single woman having a child in a particular year, they emphasize the fact that most women in the workforce are not preguant (and probably not contemplating preguancy) and thus are no more vulnerable to toxic reproductive effects than their male counterparts. This is particularly true for women workers over the age of 30. According to the U.S. Bureau of the Census, by age 34, "89% of all women have borne all of the children they expect to bear." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY (March 1982), *cited in* Judith A. Scott, *Keeping Women in Their Place: Exclusionary Policies and Reproduction*, in DOUBLE EXPOSURE, *supra* note 76, at 181.

Policies that apply to all fertile women assume that most working women in a given area will become pregnant. Yet the probability of having a child varies greatly from woman to woman, with factors depending on "family situation, age, number of existing children, birth control method being used, attitudes towards abortion, and a host of other factors." Becker, *supra* note 4, at 1232.

91 Becker, *supra* note 4, at 1232. These exclusionary policies against women do not arise in a vacuum. Historically, "protective" legislation for women in the workplace has been a part of our law for years. *See* Andrade, *supra* note 87, at 75. In 1905, the Supreme Court upheld such regnlations in Muller v. Oregon, 208 U.S. 412 (1905), citing the woman's role as nurturer as a legitimate rationale for state regulation of working women's hours and wages. The Court wrote that because "[h]ealthy 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.* at 421. Such exclusionary and regulatory laws were successfully challenged under Title VII. *See* Andrade, *supra* note 87, at 77. Even with the law on their side, women still have a difficult time battling these policies in court, as many judges still hold preconceived notions of women as child bearers and nurturers first, and workers second. *See* Becker, *supra* note 4, at 1261. One of the dissenting Judges in *Johnson Controls* noted that "of the 12 federal judges to have considered this case to date, none has been female. This may be quite siguificant because this case . . . demands, in addition to command of the disembodied rules, some insight into social reality." *Johnson Controls*, 886 F.2d 871, 902 (7th Cir. 1989) (Cudahy, J., dissenting), *cert. granted*, 110 S. Ct. 1522 (1990).

92 Becker, *supra* note 4, at 1229-30. In addition to better coverage by health insurance, Becker outlines other benefits associated with earning higher wages, noting:

> a woman earning a higher wage may be less likely to live in an old, poorly maintained apartment in which her children are are exposed to lead

"[w]hat is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make?"[93]

Exclusionary policies particularly hurt women in low income areas, for often the only high salaried employment available in a given area involves work in hazardous environments.[94] Exclusionary policies also hurt women in noneconomic ways. At an individual level, "women's interest in employment opportunity involves more than an interest in a particular job."[95] Women have an interest in "avoiding the . . . psychological consequences of sex segregation, and in achieving such personal fulfillment values as a sense of self-sufficiency, a feeling that control over life choices is not limited by an accident of birth, and a sense of oneself as a valuable contributing human being."[96] In addition, policies that take away a woman's right to choose where to work smack of paternalism. They "assume that women cannot be trusted to act responsibly"[97] by excluding themselves or requesting a transfer if pregnancy is contemplated. Most certainly, an individual woman can better decide about her personal reproductive and work future than an employer enacting sweeping policies.[98]

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paint. Both the woman and her children more likely to suffer malnutrition if she does not have a well-paying job. For a pregnant woman, commuting by public transportation may be more hazardous to the fetus than commuting by car; a woman with a higher paying job is more likely to be able to afford a car. Excessive heat can have detrimental effects on pregnancy, and a mother in a higher paying job is more likely to be able to afford air conditioning.

Id. at 1231 (footnotes omitted).

93 *Johnson Controls*, 886 F.2d at 902.

94 Williams, *supra* note 4, at 650-51 (noting the number of women who work for compelling economic reasons, the lack of mobility for women who head over 50% of the families in the nation below the poverty line, and the lack of job opportunity and mobility within traditionally economically depressed areas).

95 *Id.*

96 *Id.*

97 Alan Carlos Blanco, *Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755, 766 (1985).

98 A California Court of Appeal had this to say about a fetal protection policy under consideration:

> The Company's policy is predicated upon the presumption that the employer is better suited to safegnard the interests of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself—i.e., that society's interest in fetal safety is best served, not by fully informing women of the risks involved and allowing them to make informed choices, not by fixing the workplace, but rather by removing from women the opportunity to make any choices in the matter at all.
>
> Distilled to its essence, this is not discrimination based on "objective differences" between men and women, it is discrimination based on cate-

In formulating protection policies, "employers err systematically in favor of fetal safety."[99] A woman, armed with full knowledge and awareness of potential fetal risk, has the ability to weigh the options and decide for herself where she should work. Policies should assume that an informed woman will behave as a rational being and pick the options best for her and her offspring. As one scholar noted, women are not prohibited from smoking and drinking during pregnancy, and more evidence links fetal harm to these activities than to toxic work environments.[100] In our society, a pregnant woman may choose the lifestyle she will live; she also should be able to choose the place in which she will work.[101]

> gorical, long ago discarded assumptions about the ability of women to govern their sexuality and about the comparative ability of women to make reasoned, informed choices.
>
> However laudable the concern by businesses such as the Company for the safety of the unborn, they may not effectuate their goals in that regard at the expense of a woman's ability to obtain work for which she is otherwise qualified.

Johnson Controls, Inc. v. California Fair Emp. & Hous. Comm'n, 267 Cal. Rptr. 158, 178 (Cal. Ct. App. 1990) (footnote omitted).

99 Becker, *supra* note 4, at 1241. Indeed, employers who refuse to hire any fertile women may experience a windfall in two ways. Not only is there a diminishment in concerns about potential future tort liability, see *supra* text accompanying notes 72-92, but also they are excused from providing the necessarily costlier benefits to women workers. As Professor Becker points out, "employers who self-insure medical coverage for their employees, or those whose future insurance premiums depend on current payouts, the pregnant worker is a very costly employee . . . ." *Id.* Thus, "[e]mployers have no financial incentive to consider the advantages of employment to a woman, to her living dependents, to her unborn and unconceived children, and to society." *Id.*

100 *Id.* at 1243. One might argue that fetal harm resulting from drinking and smoking are costs that are borne by society as a whole, whereas fetal harm from maternal toxic exposure are costs that are borne by employers. This argument ignores the fact that employers will pass on to society the additional costs of employing women through the prices of the products they sell. As one author wrote: "[g]iven Title VII's ban on discrimination, why should women and their living dependents, any more than employers, bear the costs of safety for potential third parties?" Becker, *supra* note 4, at 1247.

101 All of this is not to say that fertile women have no interest in working in contaminant-free environments. Employers who give no option for exemptions from toxic workplaces for fertile women have in essence made pregnancy a penalty. *See* Hannah Arterian Furnish, *Beyond Protection: Relevant Difference and Equality in the Toxic Work Environment*, 21 U.C. DAVIS L. REV. 1, 20 (1987). A "safe" workplace as required under the law should *not* mean "safe for men only." *See* Buss, *supra* note 74, at 590. For an excellent article regarding the interests of working women in the face of the norm of the male working world, and a perspective that offers a proposal for change, see Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986). Employers must offer women a meaningful choice regarding workplace environments; exclusionary policies that offer no room for compromise are not an acceptable solution to reproductive hazards at the workplace.

C. Fetal Protection Policy Cases[102]

1. Wright v. Olin Corp.

Wright v. Olin,[103] the first fetal protection policy case to come before a federal appellate court, reached the Court of Appeals for the Fourth Circuit in 1982. In *Wright*, the plaintiffs brought a number of discrimination charges against defendant Olin Corporation, including a sex discrimination charge regarding the defendant's "fetal vulnerability" program which barred all fertile women from certain work areas.[104] The policy in question classified all work at the Olin plants into three categories: "restrictive" jobs requiring contact with hazardous chemicals[105] which excluded all women aged 5 to 63;[106] "controlled" jobs requiring limited contact with hazardous chemicals which excluded all women unless they signed a waiver acknowledging risk; and "unrestricted" jobs which were open to all women.[107] The district court upheld the exclusionary policies, and the plaintiffs appealed.[108]

The appellate court, after recognizing that "the problem of fitting the fetal vulnerability program into . . . Title VII litigation is one of first impression with . . . any court of appeals,"[109] conceded that fetal protection policies do not fit well into the niches of Title VII law.[110] Nonetheless, the *Wright* court forged ahead and structured tests based on the business necessity defense for the District Court to apply on remand. The appellate court declared that Olin's fertility policy was "facially neutral," constituting a case of disparate impact on the plaintiff-employees justifiable by the defense of business necessity.[111] Admitting that to label Olin's policy as facially

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102 There were three fetal protection policy cases heard by federal appellate courts prior to *Johnson Controls*. This Note will discuss two of them, Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), and Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984). The third, Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982), was a case in which a plaintiff, who was fired by her employer when she became pregnant, successfully proved under Title VII that the employer used her pregnancy as a pretext for intentional sex discrimination.

103 697 F.2d 1172.

104 *Id.* at 1176.

105 The court was unclear as to the exact chemicals implicated, but one known exposure hazard was lead.

106 The appellate court opinion cites the policy as barring all women "age 5 through 63." *Wright*, 697 F.2d at 1182. Since it is hard to imagine that Olin Corporation hires five-year-olds, one would assume that this is a typographical error.

107 *Id.* at 1183.

108 *Id.* at 1176.

109 *Id.* at 1184.

110 *Id.*

111 *Id.* at 1185. For a discussion of Title VII law, see *supra* text accompanying notes 8-40.

neutral "might be subject to logical dispute,"[112] the Fourth Circuit nevertheless rejected the application of the overt discrimination/BFOQ defense model because it deemed it unfair to the employer.[113]

In applying the test of business necessity, the court reached a new level of creativity. Noting that in past cases discriminatory policies had been justified under "business necessity" in order to protect workers or third-party customers,[114] the court labeled all fetuses as "licensees and invitees" also deserving protection at the workplace as a business necessity.[115] After making this designation, the appellate court remanded the case to the trial court to determine if the interest of the employer in protecting the invitees or licensees as a business necessity outweighed the Title VII interests of the plaintiffs. On remand, the plaintiff class dropped out of the case. The district court, after hearing only the defendant's argnment, ruled that the exclusionary policy was valid under the appellate court's new Title VII test.[116] The Fourth Circuit Court of Appeals later vacated the decision.[117]

2. Hayes v. Shelby Memorial Hospital[118]

In *Hayes*, the Court of Appeals for the Eleventh Circuit used a different analysis from the one used by the *Wright* court to evaluate a fetal protection policy under Title VII. The plaintiff, an x-ray technician, brought suit against her employer for wrongful termination because of her pregnancy. The plaintiff claimed that her firing was illegal under the Pregnancy Discrimination Act,[119] and the hospital defended by asserting that it could not find a workplace for the

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112 *Wright*, 697 F.2d at 1186.

113 *Id.* at 1185 n.21. The court never mentioned the Pregnancy Discrimination Act ("PDA") in its decision. One would assume that the court was applying pre-PDA principles, since the Act explicitly decreed that employment differentiation based on pregnancy does not constitute facially neutral criteria. 42 U.S.C. § 2000e(k) (1982). For discussion of the Pregancy Discrimination Act, see *supra* supra text accompanying notes 41-48.

114 *Wright*, 697 F.2d at 1189 (citing Burwell v. Eastern Air Lines, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). The court in *Burwell* explicitly ruled that concern for the safety of a fetus could *not* be used in the business necessity calculus under Title VII, stating that "personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination." *Id.* at 371.). For further discussion of *Burwell*, see *supra* note 24.

115 *Wright*, 697 F.2d at 1189.

116 Buss, *supra* note 74, at 582 n.32.

117 *Id.*

118 726 F.2d 1543 (11th Cir. 1984).

119 *Id.* at 1546. It should be noted that the *Wright* court did not discuss the Pregnancy Discrimination Act; thus, it was unclear whether the court "was applying pre- or post- Pregnancy Discrimination Act principles." *Id.* at 1546 n.2. For discussion of the Pregnancy Discrimination Act, see *supra* notes 41-48.

plaintiff that was free of ionizing radiation.[120]

In its decision, the court noted that to fire the plaintiff based on her pregnancy was "just as facially discriminatory under the Pregnancy Discrimination Act as it would be to fire her solely because she was black under Title VII."[121] Despite this pronouncement, however, the court regarded the hospital's act of firing the plaintiff for pregnancy as only a *presumption* of discrimination. The *Hayes* court then allowed the employer to attempt to rebut this presumption of discrimination by showing that even though its policy applied only to women, "the policy [was] neutral in the sense that it effectively and equally protect[ed] the off-spring of *all* employees."[122]

The *Hayes* court held that the defendant-hospital was unable to rebut the presumption of a discriminatory pregnancy policy, and without further discussion,[123] the court applied the disparate impact/business necessity test.[124] Under the disparate impact analysis, the court held that the employer had successfully proved a defense of business necessity,[125] but it ruled that the plaintiff successfully rebutted the business necessity defense by demonstrating that there were less discriminatory alteruatives available to the employer.[126] The court concluded by summing up its newly created test for fetal protection policies, stating that if an employer enacts a fetal protec-

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120 Hospital policy recommended that no pregnant employees be exposed to ionizing radiation at the workplace. *Hayes*, 726 F.2d at 1546.

121 *Id.* at 1548.

122 *Id.* (emphasis added). The defendant-employer must demonstrate this by a showing that there is both a substantial risk of harm from toxics which may affect pregnant or fertile women, and that the risk applies only to women, not to men. *Id.* If the presumption of discrimination is not rebutted by the employer, then the only recourse left open to the employer is the traditional BFOQ defense. *Id.* at 1549. As discussed *supra* in text accompanying notes 14-17, the BFOQ defense is difficult to prove, for the employer must demonstrate "a direct relationship between the policy and the *actual ability* of a pregnant or fertile female to perform her job." *Id.* (emphasis in original).

123 *Id.* at 1552. Because the hospital could not rebut the presumption of discrimination, the hospital's only defense was a BFOQ. However, the court never determined whether or not a BFOQ was present; instead, it chose to apply the disparate impact/business necessity analysis. *Id.* For a discussion of the different defenses available under Title VII, see *supra* text accompanying notes 14-19.

124 *Id.* at 1553. The court applied the disparate impact and business necessity analysis " 'automatically,' . . . mean[ing] simply that in the trial of a case such as this no additional evidence need be introduced on these points, and the trial judge may proceed to the next issue—whether there were acceptable alternative policies, discussed below—without further analysis." *Id.* at 1553 n.16.

125 The court forged new ground in the area of "business necessity" and held that "fetal protection [is] a legitimate area of employer concern to which the business necessity defense extends." *Id.* at 1552 n.14.

126 The *Hayes* court declared that for the plaintiff to rebut the employer's defense, she must present proof of "acceptable alternative policies that would better accomplish the purposes of promoting fetal health, or that would accomplish the purposes with a less adverse impact on one sex." *Id.* at 1553.

tion policy, the policy "violates Title VII unless the employer shows (1) that a substantial risk of harm exists and (2) that the risk is borne only by members of one sex; and (3) the employee fails to show that there are acceptable alternative policies that would have a lesser impact on the affected sex."[127]

The *Wright* and the *Hayes* decisions demonstrate how ill-suited fetal protection policies are for Title VII analysis. Both courts ignored the plain language and meaning of the preguancy discrimination amendment to Title VII; under the amendment, workplace discrimination on the basis of pregnancy is prohibited both by word and intent of Congress.[128] Each court twisted a path around the disparate treatment/BFOQ question in order to apply a disparate impact analysis, allowing the employer to defend its fetal protection policy as a business necessity.[129] The decisions distort Title VII law

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127 *Id.* at 1554.

128 See *supra* text accompanying notes 41-48 for discussion of the Pregnancy Discrimination Act.

129 Each of the three fetal protection policy cases to reach the appellate court level before 1985 either held or stated in dicta that the use of the business necessity defense on behalf of the employer was appropriate in fetal protection policy cases. *See Wright*, 697 F.2d at 1185; *Hayes*, 726 F.2d at 1552; Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) (finding that although the business necessity defense could have been applicable to the defendant's situation, the plaintiff successfully proved that the defendant's fetal protection policy was a pretext for sex discrimination, thereby obviating the need for a disparate impact/business necessity analysis). The *Hayes* court was the only one to break new ground and hold that the employer may use a concern which is not directly business related to justify a business necessity defense. Prior to *Hayes*, courts had held that policies which protected the health of a woman could not be justified under the business necessity defense because it was "the purpose of Title VII to allow the individual woman to make [the] choice for herself." Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

An excellent example of the use of this rationale is the Fifth Circuit decision in *Burwell*. *See supra* note 24. The court in *Burwell* held that a defendant-airline company was not allowed to factor in concerns for the safety of a pregnant woman or her fetus in its decision to ground pregnant flight attendants. The only legitimate employer concern which could be factored into the business necessity defense was the safety of the airline's passengers. *Burwell*, 633 F.2d at 371. This rationale explains the bizarre reasoning of the court in *Wright*. Like the court in *Burwell*, the *Wright* court held that the only legitimate defendant concerns under the business necessity defense were concerns regarding the safety of the defendant's customers. Consequently, the court drew an analogy between fetuses and an employer's customers by labeling them both "invitees" or "licensees," thus holding that both groups could be protected by the employer as a business necessity. *See supra* text accompanying notes 18-24.

In addition to the business necessity concerns regarding safety, the courts have discussed the employer concern over potential tort liability as a legitimate factor in the business necessity defense. The court in *Zuniga* mentioned this concern, stating in dicta that "the economic consequences of a tort suit brought against the Hospital by a congenitally malformed child could be financially devastating, severely disrupting the 'safe and efficient operation of the business.'" *Zuniga*, 692 F.2d at 992 n.10. The *Hayes* court, however, rejected this rationale, stating that "[w]e cannot accept the Hospital's contention that potential litigation costs can form the basis for the business necessity it asserts. . . . In sum, we believe that potential liability is too contingent and too broad a

and the majority opinions use a form of "result-oriented gimmickery,"[130] in the words of a dissenting judge in *Johnson Controls*.

3. International Union, UAW v. Johnson Controls, Inc.

In 1982, Johnson Controls, a major producer of batteries, instituted a fetal protection policy[131] designed to keep all fertile women out of workplace areas which exposed employees to excessive levels of lead.[132] Union members and individual employees brought suit against the employer, alleging that the exclusionary policy violated their rights under Title VII. The district court granted summary judgment in favor of the defendant corporation, and the plaintiffs appealed.[133] The Seventh Circuit, sitting en banc, voted seven to four to affirm the district court in what dissenting Judge Easterbrook stated "is likely the most important sex-discrimination case in any court since 1964 . . . ."[134]

a. *Majority*

The opinion began by discussing the scientific data covering toxic substances at the workplace. Both parties admitted that maternal exposure to lead poses a major health hazard to a developing

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factor to amount to a 'business necessity.' " *Hayes*, 726 F.2d at 1553 n.15. The court in *Wright* also implicitly rejected the potential liability argument, citing City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), for the proposition that an employer policy set up for the purpose of avoiding potential liability and consequent economic damage is not enough to justify a business necessity. *Wright*, 697 F.2d at 1190 n.26. In addition, in his dissent in *Johnson Controls*, Judge Easterbrook noted that it is illegal to discriminate against women workers on the grounds that their benefit plans are too costly. *Johnson Controls*, 886 F.2d at 914 (Easterbrook, J., dissenting); *see, e.g., Manhart*, 435 U.S. at 702. Consequently, if employment costs do not justify employment discrimination, Easterbrook asks "how may the prospect of tort judgments do so? Title VII applies even when—*especially* when—discrimination is rational as the employer sees things." *Johnson Controls*, 886 F.2d at 914 (Easterbrook, J. dissenting) (emphasis in original). For further discussion regarding the employer's potential tort liability, see *supra* text accompanying notes 72-92.

130 *Johnson Controls*, 886 F.2d at 902 (Cudahy, J., dissenting).

131 The policy applies to all work areas in which employees have had blood lead levels of 30 μg/dl or more in the past year. The OSHA standard for blood lead levels is a maximum of 50 μg/ml before a company must transfer an employee. It should be noted, however, that there is strong evidence that blood lead levels far below that standard still may have a detrimental effect on a developing fetus. "Since the growing brain of the fetus is likely to be at least as sensitive to the neurologic balance of lead as the brain of a young child, umbilical cord blood levels should be at least below μ25 g/dl." *Id.* at 880 & n.19 (quoting Center for Disease Control, U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children* 7, 20-21 (1985) (emphasis omitted).

132 For a discussion of the effects of lead on the reproductive system and offspring of workers, see *supra* text accompanying notes 65-71.

133 *Johnson Controls*, 886 F.2d at 874.

134 *Id.* at 920.

fetus.[135] The court also noted that because of the tendency of the body to store excess lead in its system for a long period of time, the "danger resulting from lead exposure cannot simply be avoided through removing a pregnant woman from lead exposure promptly after the discovery of pregnancy."[136] Because of this phenomenon, Johnson Controls asserted that it could not provide an alternative policy which would adequately protect a fetus from the hazards of lead exposure.

In its analysis of the problem, the court looked first to the Title VII tests applied by the appellate courts in *Olin* and *Hayes*. The court found that:

> [a]lthough *Olin* and *Hayes* present somewhat different analyses, both cases, in essence, determine that a business necessity defense in a fetal protection policy case requires (1) a demonstration of the existence of a substantial health risk to the unborn child, and (2) establishment that transmission of the hazard to the unborn child occurs only through women.[137]

The court also noted that the plaintiff may rebut the necessity of the fetal protection policy by presenting evidence of "less discriminatory alternatives equally capable of preventing the health hazard to the unborn."[138] The majority agreed the business necessity defense may be applied in a fetal protection policy case, as it "balance[s] the interests of the employer, the employee, and the unborn child in a manner consistent with Title VII."[139] The court then proceeded to apply the disparate impact/business necessity analysis in a different manner from both the *Wright* and the *Hayes* courts.

The *Johnson Controls* court began its analysis by citing *Wards Cove*, the 1989 case which held that the plaintiff must bear the burden of proof throughout a disparate impact/business necessity defense case.[140] Under *Wards Cove*, a defendant need only produce evidence of a legitimate business necessity to justify a policy; the plaintiff must bear the burden of proving "that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity."[141] The court in *Johnson Controls* took this burden-of-proof scenario, applied it to the facts at hand, and granted summary judgment for the defendant. The court phrased

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135 *Id.* at 879.

136 *Id.* at 881.

137 *Id.* at 885.

138 *Id.*

139 *Id.* at 886.

140 For a discussion of *Wards Cove* and its effect on Title VII jurisprudence, see *supra* text accompanying notes 25-40.

141 *Johnson Controls*, 886 F.2d at 887 (quoting *Wards Cove*, 109 S. Ct. 2115, 2126 (1989) (citations omitted)).

the issue by stating that "the question we must address is whether the UAW, which bears the burden of persuasion, has presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense cannot be factually supported."[142] The court then analyzed the facts presented by the plaintiffs and concluded that "the UAW has not met its evidentiary burden . . . of presenting facts from which a trier of fact could determine that an alternative policy would be equally as effective as Johnson Controls' fetal protection policy in preventing risk of harm to unborn children from lead exposure."[143]

After deciding that the case should be dismissed on summary judgment on the test of the business necessity defense alone, the majority then stepped beyond the boundaries set by both the *Olin* and *Hayes* courts. Stating that "we are also convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense,"[144] the majority applied a disparate treatment/BFOQ analysis.[145] Ignoring the fact that the BFOQ defense had always had an extremely narrow definition which considered only the worker's actual ability to do the job,[146] the majority went ahead and factored the health of a potential fetus into the test and declared that Johnson Controls' policy of barring all fertile women satisfied the requirements of the BFOQ.[147]

b. *Dissent*

The dissent vehemently attacked both the majority's reasoning and result. The use of *Wards Cove* to dismiss the case on summary judgment especially concerned the dissenting judges. As dissenting Judge Posner wrote:

> [a] reader of the majority opinion might be excused for thinking that the case had been fully tried . . . rather than decided by a district judge on a motion for summary judgment. I think it a mistake to suppose that we can decide this case once and for all on so

142 *Id.* at 888.
143 *Id.* at 893.
144 *Id.*
145 *Id.*
146 *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977); Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1537 (1989). As the dissent stated, "sex is a BFOQ when its use is 'reasonably necessary to the normal operation of [the employer's] particular business' (the BFOQ rule), and employers must treat men and pregnant women equally with respect to their 'ability or inability to work' (the PDA). Risk to fetuses falls outside these rules." *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting). For discussion of the narrow definition of the BFOQ defense, see *supra* text accompanying notes 14-17, and *infra* text accompanying notes 176-81.
147 *Id.* at 901.

meager a record.[148]

All four dissenting judges lamented the disintegration of Title VII jurisprudence, disagreeing with the majority's decision to apply the disparate impact/business necessity defense to a facially discriminatory policy.[149] The four dissenters disagreed amongst themselves as to the applicability of the disparate treatment/BFOQ defense.[150] Judge Posner and Judge Cudahy felt that the only applicable analysis of Johnson's facially discriminatory policy was the disparate treatment/BFOQ test. Judge Easterbrook (joined by Judge Flaum) agreed, but unlike Judge Posner he believed that the stringent BFOQ standard could not be met by a defendant in a fetal protection policy case.[151]

Judge Easterbrook filed the most vigorous of the three dissenting opinions.[152] Besides attacking the majority's Title VII jurisprudence (the focal point of Judge Posner's dissent), Judge Easterbrook attacked the main premise underlying the majority's reasoning: that the only acceptable level of fetal risk is zero, and that discrimination based on sex is an acceptable means to reach that level.

> The question is whether a justification of a particular kind is an acceptable defense of sex discrimination. This justification is not. No legal or ethical principle compels or allows Johnson to assume that woman are less able than men to make intelligent decisions

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148 *Id.* at 902 (Posner, J., dissenting).

149 Under Title VII law, an employer's facially discriminatory policy should be analyzed under the disparate treatment model and can only be justified by a BFOQ defense. For a brief discussion of the disparate treatment and disparate impact analyses, see *supra* text accompanying notes 13-19.

The majority justified its contortion of Title VII law by citing the law's "flexibility." *Johnson Controls*, 886 F.2d at 899-901. The dissent replied by stating that "[n]o amount of 'flexibility' justifies sex discrimination without a BFOQ, unless by 'flexibility' we mean a prerogative to disregard the statute when it requires decisions antithetical to our beliefs." *Id.* at 920 (Posner, J., dissenting). Amazingly enough, the majority decision did not even mention the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982), which, as Judge Easterbrook wrote, "puts out of bounds the justifications Johnson offers." *Id.* at 912. The Pregnancy Discrimination Act prohibits discrimination on the basis of pregnancy or related medical conditions. For a discussion of the Pregnancy Discrimination Act, see *supra* text accompanying notes 41-48.

150 For a discussion of the business necessity and BFOQ defenses under Title VII, see *supra* text accompanying notes 14-19.

151 *Johnson Controls*, 886 F.2d at 909 (noting that the PDA demands "that women and men who are 'similar in their ability or inability to work' must be treated the same. A court's belief that a good end is in view does not justify departure from the statutory framework; it is an occasion for applying the statutory framework."). Judge Easterbrook went on to state that "[i]f the rigors of the BFOQ suggest the need for a fresh approach, that is a job for another branch." *Id.* at 910.

152 Easterbrook's dissent was joined in full by Judge Flaum and joined in part by Judge Cudahy, who stated: "I would be pleased to join almost all of Judge Easterbrook's eloquent dissent except for its disposition of the case." *Id.* at 901. (Cudahy, J., dissenting).

> about the welfare of the next generation, that the interests of the next generation always trump the interests of living women, and that the only acceptable level of risk is zero. "[T]he purpose of Title VII is to allow the individual woman to make that choice for herself."[153]

Easterbrook noted that "[m]ost women in an industrial labor force do not become pregnant. . . . Concerns about a tiny minority of women cannot set the standard by which all are judged."[154] Besides the low percentage of pregnancies in industrial workplaces, the unknown levels of fetal risk also concerned Judge Easterbrook. He stated that "[a] small risk, even if compellingly documented, is not enough to exclude women from employment. . . . [I]s the risk one learning disability in two pregnancies? One in two thousand? One in two million? These figures imply different policies, yet we do not know which is correct."[155]

In accord with both the *Wright* decision and the *Hayes* decisions,[156] Judge Easterbrook rejected Johnson Controls's argument that costs of potential tort liability justified its exclusionary policy. Assuming that the prospect of tort judgments would mean that the average cost of employing females would be higher than the average cost of employing males, Judge Easterbrook pointed out that "Title VII requires employers to deal with individual employees rather than with group averages."[157] He then noted the decision of the United States Supreme Court in *Manhart*[158] and asserted that employers may not exclude women "by saying that higher costs of pensions and health care made them too costly. If these costs do not establish a BFOQ, . . . even in principle, how may the prospect of

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153 *Id.* at 913 (Easterbrook, J., dissenting) (quoting Dothard v. Rawlinson, 433 U.S. 321, 335 (1977)).

154 *Id.* (footnote omitted). For a discussion of the likelihood of a working woman becoming pregnant, see *supra* note 90 and accompanying text.

155 *Id.* at 916. Easterbrook continued:

> How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses? For all we can tell, accepting Johnson's argument compels us to answer "yes" to these questions.

Id. at 917 (Easterbrook, J., dissenting).

156 *See supra* text accompanying notes 102-30.

157 *Johnson Controls*, 886 F.2d at 914 (Easterbrook, J., dissenting).

158 City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (striking down an employer pension plan charging women higher monthly premiums than men because women as a class live longer). The Supreme Court held that generalizations about a class are not an acceptable means for discrimination, and that the policy of Title VII requires courts to focus on fairness to individuals, not fairness to classes.

tort judgments do so? Title VII applies even when—*especially* when—discrimination is rational as the employer sees things."[159]

Judge Easterbrook recognized the risk of potential harm to fetuses inherent in allowing women free choice in the workplace,[160] but he realized that this risk is not one that women alone should have to bear. He wrote:

> Risk to the next generation is incident to all activity, starting with getting out of bed. (Staying in bed all day has its own hazards.) To insist on *zero* risk, which the court says Johnson may do, is to exclude women from the industrial jobs that have been a male preserve. By all means let society bend its energies to improving the prospects of those who come after us. Demanding zero risk produces not progress but paralysis. . . . Laudable though its objectives be, Johnson may not reach its goal at the expense of women.[161]

III
ANALYSIS

A. Problems With the Use of Title VII in Fetal Protection Policy Cases: The Argument Between Disparate Treatment and Disparate Impact

Title VII jurisprudence is inadequate for the analysis of fetal protection policies. Under Title VII, as amended by the PDA, an

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159 *Id.* at 914 (Easterbrook, J., dissenting) (footnote omitted) (emphasis in original).

160 In an amusing aside, Judge Easterbrook noted that individuals are not necessarily the more informed decisionmakers. He cited scientific data surveys which concluded that:

> 93-95% of the adult population is scientifically illiterate. "Asked whether the Earth goes around the Sun or the Sun around the Earth, 21 percent replied incorrectly; 7 percent said they did not know. . . . On other questions, the survey found that 43 percent said correctly that electrons, which are components of atoms, are smaller than atoms; 20 percent said they were larger and 37 percent said they did not know which was larger. . . . Of those surveyed, 76 percent answered correctly that light travels faster than sound; 19 percent mistakenly said that sound moves faster." *New York Times*, Oct. 25, 1988, § C p. 10 col. 4. The state of knowledge may be even worse in the United Kingdom: "Only 34% of Britons know that the earth goes around the sun (rather than vice versa) and that it takes a year to do so. Almost one-fifth are presumably busy nailing their furniture to the floor as they imagine themselves hurtling around the sun once a day. And they are confused about what the universe is: given a list comprising solar system, galaxy, earth, universe, and sun, only 53% thought that the universe was the largest item. Some 7% thought that the earth was. Asked if nuclear-power stations cause acid rain, almost half the respondents said yes, and only 34% knew that they did not. . . . So much for environmental awareness. . . . Some people seem unworried by radiation: 13% think that radioactive milk can be made safe by boiling it." *The Economist*, July 15, 1989, p. 84 col. 2.

Id. at 914 n.6 (Easterbrook, J., dissenting).

161 *Id.* at 920-21 (Easterbrook, J., dissenting) (emphasis in original).

employer may not discriminate against a woman based upon her ability to become pregnant.[162] Any employer fetal protection policy that singles out women can be challenged by disparate treatment analysis and can only be defended by a BFOQ. The statutory BFOQ defense available under Title VII by definition must relate to the *actual ability* of an employee to perform a job. The BFOQ formula considers only the effect on the employer's business; the effect on an unrelated third party is irrelevant. As one scholar wrote, "[t]he incidental harm to the worker or the worker's family is irrelevant, unless it has a substantial detrimental impact on job performance."[163] Judge Tuttle stated in *Hayes* that "the BFOQ defense is available only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job. . . . Therefore, under traditional BFOQ analysis, the defense is inapplicable to this case."[164] Courts and scholars have generally agreed that the BFOQ defense, as currently interpreted, is not applicable to the fetal protection policy situation.[165]

1. *Disparate Impact/Business Necessity*

In an attempt to work out a much needed compromise between plaintiff-workers and defendant-employees, courts in the past bypassed the disparate treatment analysis and contorted Title VII law by analyzing the policies under the disparate impact/business necessity theory.[166] By doing so, the courts ignored the plain meaning and the legislative history of both Title VII and the Pregnancy Discrimination Act.[167] Even though the courts undermined the staunch

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162 For a discussion of the Pregnancy Discrimination Act, see *supra* text accompanying notes 41-48.

163 Furnish, *supra* note 4, at 93.

164 Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 (11th Cir. 1984).

165 *See* EEOC: POLICY STATEMENT ON REPRODUCTIVE AND FETAL HAZARDS UNDER TITLE VII n.10 (Oct. 3, 1988) [hereinafter EEOC: POLICY STATEMENT] ("[T]he *Hayes* and *Wright* courts concluded that BFOQ is not generally applicable in fetal protection cases because it is a narrow exception which applies only in a situation where all or substantially all members of a protected class are actually unable to perform the duties of the job in question. Commentators, too, have been reluctant to interpret the exception more expansively.") One commentator stated that although the exact parameters of the BFOQ defense intended by Congress are unclear, it is "unlikely that the BFOQ provision was intended to permit widespread discrimination on the basis of sex." Becker, *supra* note 4, at 1251. *But see infra* text accompanying notes 173-76 for the EEOC's current position regarding the BFOQ defense.

166 For discussion of these cases, see *supra* text accompanying notes 102-30.

167 The House Report on the PDA amendment noted that:

> the assumption that women will become pregnant have [sic] leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs. H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines stan-

protection Congress provided to working women through Title VII, however, they still maintained strong pressure on defendant-employers by requiring them to produce scientific proof to justify their exclusionary policies.[168]

The majority in *Johnson Controls* changed this scenario when it applied the disparate impact analysis outlined by the Supreme Court in *Wards Cove*, shifting the burden of proof from the defendant to the plaintiff.[169] Now, the employer need only articulate a legitimate defense for establishing a fetal protection policy; the employee must then prove that such a policy is not needed. This makes the job more difficult for plaintiffs as scientific information regarding fetal hazards is more readily available to an employer, placing an employee-plaintiff at a distinct disadvantage.[170] By requiring the plaintiffs to bear the burden of proof in a case where the defendant has enacted a facially discriminatory policy, the *Johnson Controls* court contorted Title VII law and its defenses and undermined protections provided to women against discrimination. As

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dards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.

H.R. REP. No. 948, *supra* note 43, at 3; *see also* Becker, *supra* note 4, at 1254 (citing the legislative history to support the proposition that the plain langnage and the legislative history of the PDA provide support for the view that Congress intended *no* job discrimination on the basis of sex); *supra* text accompanying notes 41-48 (discussing the PDA).

168 In other words, although courts have allowed employers to justify exclusionary policies through the business necessity defense, they have always required the *employer* to provide the necessary scientific information which justifies that policy. According to both the *Wright* and *Hayes* courts, employers must demonstrate the risk through "objective evidence of an essentially scientific nature supported by the opinion evidence of qualified experts in the relevant scientific fields." *Hayes*, 726 F.2d at 1548. The EEOC stated in October 1988 that "[i]t is the Commission's position that employers are prohibited from establishing policies that exclude from the workplace members of one sex but not the other because of a reproductive or fetal hazard, unless that policy can be justified by reputable objective evidence of an essentially scientific nature." EEOC: POLICY STATEMENT, *supra* note 165, at 5 (footnote omitted). The EEOC outlined the three elements that the courts had required the employer prove. First, the employer must show that there exists "a substantial risk of harm to employees' offspring through the exposure of employees to a reproductive or fetal hazard in the workplace." *Id.* at 7. Second, the employer must show that the harm of exposure affects only one sex and not the other, and third, the employer must show that the exclusionary policy "effectively eliminates the risk of fetal or reproductive harm." *Id.* (footnotes omitted). The *Hayes* court further defined the proof requirements of the employer, stating that in order to demonstrate substantial risk to one sex, an employer "must produce objective evidence of an essentially scientific nature supported by the opinion evidence of qualified experts in the relevant scientific fields." *Hayes*, 726 F.2d at 1548.

169 For discussion of the *Wards Cove* decision, see *supra* text accompanying notes 25-40.

170 By imposing virtually the entire burden of proof on women challenging these discriminatory policies, plaintiffs now face the impossible task of demonstrating an alternative policy which "would be equally as effective . . . in preventing risk of harm to unborn children from lead exposure" as a policy which outright excludes all fertile women. *Johnson Controls*, 886 F.2d at 893.

Judge Posner bluntly stated in his dissent in *Johnson Controls*, the broad reading of the Title VII defenses given by the majority "gut[s] the statute."[171] Earlier, scholars expressed concern over such an erosion of Title VII law; as one author wrote, "[t]he vitality and cohesiveness of sex discrimination law would be ill-served by the creation of bad law in this highly technical and newly emerging area."[172]

2. *Disparate Treatment/BFOQ*

The Equal Employment Opportunity Commission ("EEOC") issued an updated policy decision on January 26, 1990 in which it condemned the majority decision in *Johnson Controls* and supported the dissenting opinion by Judge Cudahy.[173] The EEOC agreed with the dissenters that a disparate *treatment* analysis was required, declaring that fetal protection policies "are not neutral rules to which adverse [disparate] impact analysis applies."[174] The EEOC rejected the burden-of-proof shift required by *Wards Cove*, stating that "policies which exclude only women constitute *per se violations* of Title VII. For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law."[175] The EEOC then approved the use of the disparate treatment/BFOQ analysis, adopting Judge Cudahy's position that an employer may legitimately include risks to third parties or potential third parties in its BFOQ defense.[176]

If adopted, the EEOC's expanded interpretation of the BFOQ defense still would undermine the statutory protections provided by Title VII. The BFOQ defense provides that employers may discriminate against employees "in those certain instances where religion,

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171 *Id.* at 903 (Posner, J., dissenting).

172 Howard, *supra* note 4, at 835.

173 *EEOC: Policy Guidance on Seventh Circuit Decision in United Auto Workers v. Johnson Controls, Inc.*, 18 DAILY LAB. REPS. D-1 (JAN. 26, 1990).

174 *Id.* at 4.

175 *Id.* (emphasis added). The EEOC further noted that its change in position from its October, 1988 policy statement (in which it approved of the use of the disparate impact/business necessity analysis in fetal protection policy cases) was due to the majority's application in *Johnson Controls* of the *Wards Cove* burden-of-proof scenario. The use of *Wards Cove* convinced the Commission "that the hybrid approach to fetal protection cases is problematic." *Id.* 18 D-1 at 5. For a discussion of the *Wards Cove* decision, see *supra* text accompanying notes 25-40.

176 While this Note was in production, the Court of Appeals for the Sixth Circuit handed down a fetal protection policy case that adopted Judge Cudahy's interpretation of the BFOQ defense. The court reversed a lower court decision that applied a disparate impact/business necessity test to a fetal protection policy at a General Motors plant. The court then remanded the case, instructing the trial court to apply a disparate treatment/BFOQ test that included consideration of a third party fetus. *See* Grant v. General Motors Corp., 908 F.2d 1303 (1990).

sex, or national origin is a bona fide occupational qualification reasonably necessary to the *normal operation* of that particular business or enterprise."[177] Federal courts have interpreted the BFOQ narrowly,[178] allowing only a worker's actual ability to do the job[179] or the safety of an employer's customers to be legitimate factors in the BFOQ formula.[180] The BFOQ analysis precludes employers from using cost considerations to perpetuate discriminatory polices.[181] As Judge Easterbrook noted, "risk to fetuses falls outside these rules."[182] By reading fetal protection into the employer's statutory defense under Title VII, courts will undermine the stringent protections provided to women workers by Title VII and the PDA. The delicate balance required by the fetal protection policy issue demands a statutory solution by the legislature.

B. Inadequacy of Other Federal Regulations

Much federal legislation currently in place relates to the safety of fertile workers on the job, including the Occupational Safety and Health Act ("OSHA") of 1970, and the Toxic Substance Control Act ("TSCA") of 1976.[183] Congress passed both Acts in an effort to establish safe work environments for men and women everywhere. An obvious response to the problem of fetal and reproductive toxins would use these two laws to require employers to maintain workplaces which do not threaten the reproductive health of either men or women. However, the solution is not so easy. Both OSHA and the TSCA have met with limited success in effectively regulating

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177 42 U.S.C. § 2000e-2(e) (1982) (emphasis added).

178 *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (holding that for a defendant to establish a BFOQ there must be "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."). For a discussion of the narrowness of the BFOQ defense, see *supra* text accompanying notes 13-17 & 173-76.

179 *See* sources cited *supra* note 178.

180 *See* Western Airlines v. Criswell, 472 U.S. 400 (1985) (mandatory retirement at age 60 for airline pilots held to be a BFOQ in light of concerns for passenger safety).

181 City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding that additional cost to employer of women's retirement fund was not a legitimate rationale for charging women more under the employer's retirement benefits policy). For an excellent discussion of the role of costs in employer Title VII defenses, see Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987).

182 *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting). In addition, the California Court of Appeal, addressing Johnson Control's fetal protection policy after the January 1990 EEOC guidelines were issued, agreed with Judge Easterbrook. There, the court held that the facts in this case "do not satisfy the BFOQ test. There is no evidence that fertile women cannot efficiently perform jobs involving contact with lead at the Company's facilities. . . . The 'essence' of the business operation—making automative batteries—would not be undermined." Johnson Controls v. California Fair Emp. & Hous. Comm'n, 267 Cal. Rptr. 158, 171 (Cal. Ct. App. 1990).

183 Nothstein & Ayres, *supra* note 49, at 262.

toxic exposure for workers.[184] In addition, Congress designed OSHA to protect workers themselves, not necessarily their offspring. Although healthy reproductive organs may be deemed a necessary part of a safe and healthy worker, Congress passed OSHA with the nonpregnant worker in mind. Overall, OSHA has proven to be an ineffective means of dealing with hazards for workers, and there is little hope of OSHA adequately coping with fetal protection standards.[185]

The TSCA presents much the same picture as OSHA. This Act makes a manufacturer responsible for testing the chemicals it produces; it then requires the information to be submitted to the Environmental Protection Agency ("EPA"). Responsibility for the development and enforcement of regulations of the chemicals falls on the Administrator of the EPA.[186] One section refers to fetal hazards, directing the Administrator to take action "to prevent or reduce to a sufficient extent" potential risks that chemicals will present "to human beings from cancer, gene mutations, or birth defects . . . ."[187] However, as two commentators noted, even though the TSCA "potentially provides an excellent mechanism for the control of many serious reproductive hazards . . . [t]o date . . . [the] EPA has not invoked the provisions . . . for any suspected teratogen or mutagen."[188] This picture of nonenforcement is unlikely to change

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184 Under OSHA, the Secretary of Labor has the authority to set standards "to the extent feasible" so that "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U.S.C. § 655(b)(5) (1988). OSHA also contains a "general duty clause," imposing a general duty on employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm. . . ." *Id.* § 654(a)(1) (1988). Both of these OSHA regnlations are in reality much weaker than they sound. For example, the Supreme Court held in the "Benzene Case," Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980), that for the Secretary to pass a regnlation regarding workplace safety standards, it first must prove "on the basis of substantial evidence" that there is a "significant risk" from a particular exposure level. *Id.* at 653. This level of proof is nearly impossible when little is known regarding the effects of a toxic substance on adult men and women, and even less is known of the substance's negative reproductive effects.

The general duty clause of OSHA also is not as protective as it might seem. Federal courts have held that it requires only that "the employer do all it can feasibly do to eliminate hazardous conditions and hazardous conduct of employees." Nothstein & Ayres, *supra* note 49, at 268; *see id.* at 274-80 (economic feasibility standards); *id.* at 281-86 (technological feasibilty standards). "Feasibility" as defined in relevant case law, includes both economic and technological considerations. Consequently, if removing fetal toxics from the workplace is economically "infeasible," OSHA will not require it.

185 *See* Finley, *supra* note 4, at 16-12 to 16-14 ("the Occupational Safety and Health Act itself does not provide an adequate solution to the dilemma of fetal protection policies").

186 15 U.S.C. § 4(b)(3)(B) (1976); *id.* § 2603(b)(3) & (c) (1988).

187 *Id.* § 2603(f) (1988).

188 Ashford & Caldart, *supra* note 56, at 539.

in the near future. Consequently, new federal legislation needs to be enacted to address the conflict between the rights of fertile workers and the health of the unborn.

C. Proposed Statute

The complex issues posed by the hazards to the offspring of women working in toxic workplaces, and the threat posed to the job opportunities of women everywhere, illuminate the need for federal legislation both to protect the rights of women and to encourage employers to establish rational policies. Federal legislation would be subject to the influence of women's organizations and women voters, allowing them a voice in policy formation. If employers are left a free hand in fetal protection policy formation, they will design policies which most efficiently meet their own needs, disregarding social welfare concerns. Congressional legislation affords the opportunity to distribute the costs of protecting future generations equitably, relieving women of the need to bear the whole of such a burden alone.[189]

The statute begins with the presumption that both men and women have the right to make an informed decision regarding the environment in which they wish to work.[190] The right to be informed of all workplace hazards and potential effects correlates with the present OSHA strategy of regnlating toxic chemicals in the workplace. As of May 1986, the federal government requires employers to assess and label all chemicals in the workplace, warn employees of different hazards, establish training programs to deal with hazards, and inform employees of any and all measures which can be taken to protect themselves from such hazards.[191] The proposed statute requires the warnings to include reproductive hazards.

The purpose behind this statutory proposal is to ensure that workers of both sexes are fully informed of the potential risks to reproductive health caused by exposure to hazardous substances at the workplace. This statute recognizes that in many situations it is technologically impossible or cost-prohibitive to eliminate all poten-

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189 *See* Becker, *supra* note 4, at 1263.

190 Professor Becker cites an example from the *Wright* case in which the defendant-Olin Corporation gave women written information about reproductive bazards associated with jobs entailing toxic exposure, and gave men oral notice of the same. As Becker points out, "[t]his difference in treatment is not merely a formal violation of Title VII. Written information can more easily be shared with one's spouse. And male workers should be able to share information with their wives as female workers are able to share information with their husbands." Becker, *supra* note 4, at 1262 n.188.

191 29 C.F.R. §§ 1900, 1200(h) (1989). Specific disclosure requirements are required for certain substances such as ionizing radiation, vinyl chloride and lead. *See id.* § 1910.96(i), § 1910.1017(j) & § 1910.25(l), respectively.

tial teratogens and mutagens from the workplace. Consequently, the statute assumes that the choice regarding exposure to potential fetal toxins is best left to the individual worker. Under this law, both men and women have access to general information regarding potential effects of exposure as well as access to information contained in their personal medical files regarding their own current level of exposure.

The statute requires an employer to transfer an employee out of a hazardous work area upon the request of that employee. The statute does not require the employer to maintain that employee's wage rate, nor does it mandate that an employer create additional positions or terminate other workers in order to accommodate the transferring employee. What the policy *does* do is allow an employee to control his or her toxic exposure level by attempting to ensure some degree of job flexibility in light of personal reproductive plans.

This statute is not intended to be a complete solution to the complex and serious problem of toxic substances at the workplace. Ideally, OSHA and the EPA (as empowered by the TSCA) should pass tougher regulations and vigorously enforce both new and existing standards in order to reduce the amount of toxic exposure at the workplace. Until such ideals become reality, however, this statute ensures that job opportunities for women are not sacrificed in the name of fetal protection.

STATUTE

§ 1 PURPOSE

The purpose of this statute is to allow all workers the opportunity to make informed decisions regarding their workplace environment and reproductive health.

§ 2 DEFINITIONS

For the purpose of this Part, the following terms shall have the definitions as ascribed below unless the context indicates otherwise:

(1) "Employer" means a person or corporation engaged in an industry affecting commerce who has twenty or more employees for each working calendar week in the current or preceding calendar year.

(2) "Employment Agency" means any person or corporation regularly undertaking, with or without compensation, to procure employment for any person and includes an agent of such an agency.

(3) "Employee" means an individual employed by any em-

ployer including full-time, part-time, and independent contractors.

(4) "Fertility" means the ability of any person, male or female, to produce offspring.

§ 3 PROHIBITION OF DISCRIMINATION BASED ON FERTILITY; EXCEPTIONS

A. It is unlawful for an employer to:

(1) Fail or refuse to hire, or to discharge, any individual or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of such individual's fertility.

(2) Limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee because of such individual's fertility.

(3) Condition employment or continued employment based on acceptance of or transfer to less hazardous positions.

(4) Reduce the wage of any employee in order to comply with this part.

B. It is unlawful for an employment agency to fail: (1) to refer, (2) to classify or refer for employment any individual on the basis of that individual's fertility or infertility or to refuse to refer for employment, (3) or otherwise to discriminate against, any individual because of such individual's fertility.

C. It is unlawful for a labor organization to:

(1) Exclude or expel from its membership, or otherwise discriminate against, any individual because of that individual's fertility status.

(2) Limit, segregate, or classify its membership, or to classify or fail to refer or refuse to refer for employment any individual, in any way, which would deprive or tend to deprive that any individual of employment opportunities, or limit such employment opportunities or otherwise adversely affect his or her status as an employee or as an applicant for employment, solely on the basis of such individual's fertility or infertility.

(3) Cause or attempt to cause an employer to discriminate against an individual in violation of this Act.

D. It is unlawful for any employer to refuse to transfer an em-

ployee, temporarily or otherwise, to a less hazardous position when such employee has requested a transfer for reasons relating to fertility, provided, however, that no employer shall be required by this Section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job. Such a transfer shall not entail a loss of seniority or benefits; it may, however, entail a reduction in wages, provided that this reduction is normal for a new job, and decreased, in whole or part, by the employee's transfer request.

E. This Act shall not apply to employers who refuse to hire pregnant applicants who wish to work in a toxic area and who are knowingly pregnant at the time that they apply for such position.

F. This Act shall not be construed to interfere with or pre-empt any state or federal statutory prohibitions of sex discrimination or any state or federal regulations of maternity or paternity leave policies.

§ 4 MANDATORY DISSEMINATION OF INFORMATION REGARDING REPRODUCTIVE HAZARDS; WAIVERS

A. Employers shall inform, both verbally and in writing, all employees of any possible dangers or effects that the employer knows of or should know of from all potential reproductive hazards existing in their relevant workplace.

(1) Nothing in this Act shall be construed to override existing OSHA regnlations regarding employee notification, education, and training requirements.

(2) Employees shall be allowed full access to any available information regarding reproductive hazards, including access to such employee's personal medical records within a reasonable time after request, not to exceed 30 days.

B. Employers, at their discretion, may require waivers from any employee who wishes to work in an area deemed hazardous to reproductive health, providing that such employee has a full working knowledge of the potential hazards existing at the job area, such employee is subjected to yearly physical checkups and monthly toxic blood-level monitoring, such employee is fully informed of the results of such checkups and monitoring, and such employee is cognizant of the rights so waived.

(1) Such waiver may include a provision waiving employer tort liability for all damages to the health of a parent or the health of a fetus, except that no right or remedy under a state worker's compensation statute shall be waived. Any section or part of such waiver waiving employer liability for gross, wanton, or willful negligence shall be herein invalid, although in such a case all remaining parts of such waiver shall remain valid.

(2) Such a waiver shall be held invalid in its entirety if all other requirements under this Act are not met.

§ 5 CIVIL SUIT AUTHORIZED

A. Any person aggrieved under this Act may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

B. Any relief granted by the court shall be limited to declaratory and injunctive relief, except in the case of employer fraud, including orders to hire or reinstate an aggrieved person or admit such person to a labor organization. In a civil action brought to enforce the provisions of this Act relating to employment, the court may order back pay.

§ 6 NOTICES TO BE POSTED

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice setting forth information to effectuate the purposes of this Act.

Pendleton Elizabeth Hamlet