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International Union v. Johnson Controls, Inc.: Sex-Specific Fetal Protection Policies of Employers are Prohibited by Title VII as Amended by the Pregnancy Discrimination Act

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits sex-based classifications in employment decisions related to the hire and discharge of individuals and in decisions related to other terms and conditions of employment. It is unlawful for an employer to "classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . ." The Pregnancy Discrimination Act of 1978

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2. Id. at (a)(2).
further provides that, under Title VII, discrimination on the basis of sex includes discrimination on the basis of pregnancy.\textsuperscript{3}

The United States Supreme Court has interpreted the language of the Pregnancy Discrimination Act (PDA) to mean what its clear language says: "for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex."\textsuperscript{4} Under Title VII, discrimination on the basis of sex is allowable only if sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the employer’s particular business.\textsuperscript{5} Yet, several federal appellate courts failed to apply this BFOQ defense to sex discrimination when considering cases involving employers’ policies which excluded women from jobs on the basis of their pregnancy or their capacity to become pregnant.\textsuperscript{6} The need arose to address the conflict existing between various courts in their treatment of such fetal-protection policies.\textsuperscript{7}

Recently, the United States Supreme Court, in \textit{International Union v. Johnson Controls, Inc.} (hereinafter \textit{Johnson Controls}),\textsuperscript{8} considered whether an employer, in seeking to protect potential fetuses from workplace hazards, could discriminate against women who had the capacity to become pregnant. In a class action brought by Johnson Controls, Inc. (hereinafter Johnson Controls) employees in UAW bargaining units, the Court was asked to determine whether the company’s policy, which barred fertile women from jobs involving exposure or potential exposure to lead, was sex discrimination in violation of Title VII of the Civil Rights Act of 1964.\textsuperscript{9} In order to resolve this question, the Supreme Court was required to address the following issues:

\begin{thebibliography}{99}
\bibitem{4} Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (holding that a company’s health insurance plan, which provided less extensive pregnancy benefits to the spouses of male employees than it provided to female employees, discriminated against male employees).
\bibitem{6} Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982).
\bibitem{8} \textit{Id.} 1196 (1991).
\bibitem{9} \textit{Id.}
(1) whether the employer's fetal-protection policy was facially discriminatory;
(2) whether the only defense available to the employer was the BFOQ exception to sex discrimination under Title VII;\(^9\)
(3) whether the employer's fetal-protection policy fell within the BFOQ exception and was therefore allowable.

Ultimately, in a decision in which all of the Justices concurred in the judgment, the Court reversed and remanded the Seventh Circuit's ruling and held that Title VII, as amended by the PDA, prohibits employers from implementing sex-specific fetal-protection policies.\(^1\) With this holding, the Court emphasized that the plain language of Title VII, as amended by the PDA, means exactly what it says: discrimination based upon a woman's capacity to become pregnant is prohibited.\(^2\)

This Comment discusses Johnson Controls to enable the reader to more fully comprehend the Court's decision. The holding does raise questions regarding potential tort liability of employers for fetal injuries caused by workplace hazards. Yet, despite possible tort liability concerns of employers arising from the Court's decision, the Court's logical reasoning and adherence to existing law fully justified the holding in Johnson Controls.

II. STATEMENT OF THE CASE

Johnson Controls is a battery manufacturer. Lead is a primary ingredient used in manufacturing batteries.\(^3\) In 1982, Johnson Controls implemented a policy under which all women who were capable of bearing children were excluded from jobs which exposed them to lead or which could expose them to lead through their transfer or promotion.\(^4\) Jobs with unacceptable lead levels were those in which, during a twelve month period, an employee had a blood level in excess of thirty micrograms per deciliter.\(^5\) This is the standard

\(^{11}\) 111 S. Ct. 1196, 1209-10 (1991).
\(^{12}\) Id.
\(^{13}\) Id. at 1199.
\(^{14}\) Id. at 1200.
\(^{15}\) Id.
recommended by the Occupational Safety and Health Administra-
tion (OSHA) for employees who intend to have children.\textsuperscript{16}

In 1984, employees of Johnson Controls brought a class action in the United States District Court for the Eastern District of Wisconsin challenging Johnson Controls' fetal-protection policy as sex discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended.\textsuperscript{17} In 1985, upon stipulation of the parties, the court certified a class consisting of "all past, present and future production and maintenance employees" in UAW bargaining units at nine of Johnson Controls' plants "who have been and continue to be affected by Defendant's Fetal Protection Policy implemented in 1982."\textsuperscript{18}

The district court granted Johnson Controls' motion for summary judgment and held that Johnson Controls' fetal-protection policy did not violate Title VII.\textsuperscript{19} The court determined that the company's fetal-protection policy was facially neutral,\textsuperscript{20} but that it did have a disproportionate impact on women.\textsuperscript{21} Because a \textit{prima facie} case of disparate impact existed, the court applied the business necessity defense.\textsuperscript{22} Since there was a societal interest in protecting fetal safety, the court held there did exist a business necessity to protect fetuses.\textsuperscript{23} The plaintiffs failed to demonstrate that there was an acceptable alternative that would have had a lesser impact on women.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{17} International Union v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988).
\item \textsuperscript{18} \textit{Id.} at 310.
\item \textsuperscript{19} \textit{Id.} at 317-18.
\item \textsuperscript{20} The court reasoned that "because of the fetuses possibility of unknown existence to the mother and the severe risk of harm . . . the fetal protection policy is not facially discriminatory." \textit{Id.} at 316.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} The court applied the business necessity defense as established in Fourth and Eleventh Circuit fetal protection cases. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). As set forth in \textit{Hayes}, the business necessity framework for analyzing sex-specific fetal-protection policies is as follows: Such a policy "violates Title VII unless the employer shows (1) that a substantial risk of harm exists and (2) that 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." \textit{Hayes}, 726 F.2d at 1554.
\item \textsuperscript{24} \textit{Id.}
\end{itemize}
The unions and employees appealed the district court's decision. The Seventh Circuit affirmed the summary judgment in favor of Johnson Controls. The court held that the proper standard for evaluating Johnson Controls' fetal-protection policy was the business necessity inquiry, and that the company had satisfied that standard. The court then analyzed the case under the BFOQ defense and determined that, even under that more rigorous standard, Johnson Controls would still prevail. The majority held that the company's fetal-protection policy was reasonably necessary to further industrial safety, which was part of the essence of Johnson Controls' business.

Again, the unions and employees appealed, and the United States Supreme Court granted certiorari. The Court held that Johnson Controls' fetal-protection policy was sex discrimination in violation of Title VII, as amended by the PDA. Justice Blackmun delivered the opinion of the Court which stated that the only defense available to Johnson Controls' facially discriminatory policy was the BFOQ exception to sex discrimination under Title VII. The company did not meet this requirement of establishing that sex was a bona fide occupational qualification for the jobs from which fertile women were excluded. The Court emphasized that under Title VII, decisions concerning the welfare of future children are for the children's parents to make, rather than the employers of the children's parents. The Court reversed the holding of the Seventh Circuit and remanded the case.

26. Id. at 901.
27. Id. at 886.
28. Id. at 888-93.
29. Id. at 893.
30. Id. at 896-901.
33. Id. at 1204. The business necessity defense was inappropriate because it may be applied only when an employer's policy is facially neutral. Johnson Controls' policy was facially discriminatory. Id. at 1203-04.
34. Id. at 1207.
35. Id.
36. Id. at 1210.
III. PRIOR LAW

Prior to Johnson Controls, the United States Supreme Court had not considered Title VII questions concerning fetal safety. The Seventh Circuit's treatment of this case was patterned after decisions made by the Fourth and Eleventh Circuits, which had considered similar cases. The United States Supreme Court has decided other sex discrimination cases under Title VII and the PDA. The following provides an overview of the Fourth and Eleventh Circuits' fetal-protection cases, as well as notable United States Supreme Court cases upon which the Court relied in deciding Johnson Controls.

A. Fetal Protection Cases

In Wright v. Olin Corp., the Fourth Circuit Court of Appeals became the first circuit court to address, in depth, the issue of sex discrimination in relation to an employer's fetal-protection policy. Olin Corporation (hereinafter Olin) had implemented a fetal vulnerability program under which fertile women were restricted from jobs which might have required contact with certain toxic chemicals. The Court held a prima facie case of sex discrimination in violation of Title VII existed. The Court went on to determine that the business necessity defense, rather than the BFOQ defense, was the appropriate theory under which the fetal vulnerability program should be analyzed. Since the safety of unborn children of employees was "no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon an employer's premises," the court found that the business necessity defense to discrimination was available to Olin.

38. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).
39. 697 F.2d 1172 (1982).
40. Any woman age 5 through 63 was assumed to be fertile, unless Olin's doctors confirmed otherwise. Id. at 1182.
41. Id.
42. Id. at 1187.
43. Id. at 1185.
44. Id. at 1189-90.
FETAL PROTECTION POLICIES

Following *Wright*, the Eleventh Circuit Court of Appeals considered a sex discrimination case brought by a pregnant X-ray technician in *Hayes v. Shelby Memorial Hospital*. The claimant had been terminated by her employer after she had informed her supervisor that she was pregnant. The *Hayes* court determined that the hospital’s policy of excluding pregnant women from jobs involving exposure to radiation raised the presumption of facial discrimination. Such a presumption could be rebutted, however, if the employer could show that “although its policy applies only to women, the policy is neutral in the sense that it effectively and equally protects the offspring of all employees.” The court went on to state that even if the hospital established that its policy was neutral, the policy had a disproportionate impact on women, and the employee would have an automatic *prima facie* case of disparate impact. Under the disparate impact theory, the employer would be entitled to assert the business necessity defense. Thus, both the *Hayes* and *Wright* courts held that the business necessity defense was applicable to sex discrimination claims arising from employers’ fetal-protection policies.

**B. Dothard v. Rawlinson: “The Essence of the Business” Test**

The language of Title VII clearly states that sex discrimination in employment decisions is impermissible unless sex “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” In *Dothard v. Rawlinson*, the United States Supreme Court interpreted the BFOQ defense to be “an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” In this class action brought by women alleging that they had been denied employment as prison guards on the basis of sex, the Court in *Dothard* held that

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45. 726 F.2d 1543 (11th Cir. 1984).
46. *Id.* at 1546.
47. *Id.* at 1549-50.
48. *Id.* at 1548.
49. *Id.* at 1552.
50. *Id.*
being male was a bona fide occupational qualification for the job of a prison guard in a maximum-security state penitentiary for men.\textsuperscript{53} The Court determined that a woman’s job performance — her ability to maintain order — could be reduced by the fact that she was a woman.\textsuperscript{54} The Court clarified what became the “essence of the business” test: sex discrimination “is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.”\textsuperscript{55} In \textit{Dothard}, the Court held the test had been met.\textsuperscript{56}

\textbf{C. Interpretations of the Language of Title VII, as Amended by the PDA}

The United States Supreme Court has previously interpreted the language of Title VII to mean what it clearly states: classifications based on sex are unlawful.\textsuperscript{58} In \textit{City of Los Angeles Department of Water and Power v. Manhart}, the Court held the Department of Water’s policy, which required female employees to make larger contributions to a pension fund than their male counterparts because females have greater longevity, violated Title VII.\textsuperscript{59} The Court stated that “[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply . . . . Practices that classify employees in terms of . . . sex . . . tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.”\textsuperscript{60}

In \textit{Newport News Shipbuilding & Dry Dock Co. v. EEOC}, the United States Supreme Court verified the language of the PDA by stating that “for all Title VII purposes, discrimination based on a

\begin{footnotes}
\footnote{53. \textit{Id.} at 336-37.}
\footnote{54. \textit{Id.} at 336. The Court explained that the prison inmates had been deprived of a normal heterosexual environment and individuals who had been convicted of sex offenses were present. Thus, the risk of assault to a female guard existed. \textit{Id.} at 335-36.}
\footnote{55. \textit{International Union v. Johnson Controls, Inc.}, 111 S. Ct. 1196, 1205-06 (1991).}
\footnote{57. \textit{Id.} at 336-37.}
\footnote{58. \textit{City of Los Angeles v. Manhart}, 435 U.S. 702, 709 (1978).}
\footnote{59. \textit{Id.} at 711.}
\footnote{60. \textit{Id.} at 708-09.}
\end{footnotes}
woman's pregnancy is, on its face, discrimination because of her sex.\textsuperscript{61} The Court in \textit{Newport News} held the company's health insurance plan, which provided less extensive pregnancy benefits to spouses of male employees than it provided to female employees, violated Title VII.\textsuperscript{62} Since the sex of an employee's spouse is the opposite of the sex of the employee, the Court reasoned, discrimination against female spouses in the providing of benefits was discrimination against male employees.\textsuperscript{63} Thus, the Court has previously held that the PDA does mean what it says: discrimination on the basis of a woman's ability to become pregnant is prohibited.\textsuperscript{64}

The United States Supreme Court has interpreted Title VII to mean that an explicitly gender-based discriminatory policy of an employer may be defended only as a BFOQ.\textsuperscript{65} In \textit{Phillips v. Martin Marietta Corp.},\textsuperscript{66} the Court held the employer's hiring policy, which expressly excluded women who had preschool age children, could be defended only as a BFOQ.\textsuperscript{67} The apparently benign motives of the employer in establishing the discriminatory policy did not lead to the consideration of the more lenient business necessity defense.\textsuperscript{68}

\section*{IV. The Majority Opinion in Johnson Controls}

Justice Blackmun, writing for the majority, began his discussion of the issues in \textit{Johnson Controls}\textsuperscript{69} with the statement that Johnson Controls' fetal-protection policy was clearly discriminatory on its face.\textsuperscript{70} He determined the only defense available to the company was to establish that sex was a bona fide occupational qualification for the positions from which fertile women were excluded.\textsuperscript{71} Blackmun

\begin{thebibliography}{99}
\bibitem{62} Id.
\bibitem{63} Id.
\bibitem{65} Id. at 1204.
\bibitem{66} 400 U.S. 542 (1971).
\bibitem{67} Id. at 544.
\bibitem{69} Id. at 1196 (1991).
\bibitem{70} Id. at 1202.
\bibitem{71} Id. at 1204.
\end{thebibliography}
then held that the BFOQ defense is extremely narrow\textsuperscript{72} and does not encompass sex-specific fetal-protection policies such as that of Johnson Controls.\textsuperscript{73} Blackmun reviewed the statutory language of Title VII, the language of the PDA, the relevant case law, and the legislative history of the PDA, which all served to support his claim.\textsuperscript{74}

\textbf{A. The Necessity of a BFOQ Defense}

Immediately in his analysis, Blackmun stated that, because Johnson Controls' policy excluded women of child-bearing capacity from certain jobs, the policy created a sex-based discriminatory facial classification.\textsuperscript{75} He analogized the case to that of \textit{Martin Marietta}\textsuperscript{76} in which a similarly benign motive of the employer did not alter the fact that the employer's policy was sex-based discrimination.\textsuperscript{77} Blackmun further supported his statement by referencing the language of the PDA and its interpretation by the Court in \textit{Newport News}.\textsuperscript{78} Under the PDA, Johnson Controls' explicit classification on the basis of potential pregnancy was sex discrimination in violation of Title VII.\textsuperscript{79}

Since Johnson Controls' fetal-protection policy was facially discriminatory in violation of Title VII, Blackmun stated that it could be defended only by Johnson Controls demonstrating that sex was a bona fide occupational qualification for the jobs from which fertile women were excluded.\textsuperscript{80} He attacked the analysis used by the Court of Appeals and the \textit{Wright} and \textit{Hayes} courts which had inquired whether the employer in each case had established its fetal-protection policy was justified as a business necessity.\textsuperscript{81} Blackmun again relied

\begin{itemize}
\item \textsuperscript{72.} \textit{Id.}
\item \textsuperscript{73.} \textit{Id.} at 1207.
\item \textsuperscript{74.} \textit{Id.} at 1204-07.
\item \textsuperscript{75.} \textit{Id.} at 1202.
\item \textsuperscript{76.} Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). \textit{See supra} text accompanying notes 66-68.
\item \textsuperscript{78.} Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). \textit{See supra} text accompanying notes 61-63.
\item \textsuperscript{79.} Johnson Controls, 111 S. Ct. at 1204.
\item \textsuperscript{80.} \textit{Id.}
\item \textsuperscript{81.} \textit{Id.} at 1203.
\end{itemize}
on the Court’s reasoning in *Martin Marietta*,\(^8^2\) in which the Court determined an employer’s facially discriminatory policy could be defended only under the BFOQ inquiry.\(^8^3\) Blackmun also referenced a Policy Guidance issued by the Equal Employment Opportunity Commission (EEOC) which stated the BFOQ defense was appropriate in fetal-protection cases.\(^8^4\) The language of Title VII itself provides support for Blackmun’s assertion. The only exception to unlawful sex discrimination stated therein is “in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .”\(^8^5\)

**B. Narrowness of the BFOQ Exception to Sex Discrimination**

Blackmun addressed next the question of whether Johnson Controls’ fetal-protection policy was within the BFOQ exception to unlawful sex discrimination.\(^8^6\) He stated that the BFOQ defense is extremely narrow.\(^8^7\) He first considered the Court’s interpretation of the BFOQ defense. In *Dothard v. Rawlinson*, the Court held that “the BFOQ exception was, in fact, meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”\(^8^8\) Blackmun then considered age discrimination cases because the BFOQ language of the Age Discrimination in Employment Act of 1967 (ADEA)\(^8^9\) parallels that of Title VII. He cited *Western Air Lines v. Criswell*,\(^9^0\) in which the Court held the BFOQ exception was meant to be an extremely narrow exception to the general prohibition against age discrimination.\(^9^1\)

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83. Id. at 544.
86. Johnson Controls, 111 S. Ct. at 1204.
87. Id.
89. 29 U.S.C. § 623(f)(1) (1988). The provision reads: “It shall not be unlawful for an employer . . . to take any action otherwise prohibited under [this statute] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . .”
90. 472 U.S. 400 (1985) (holding that the airline company’s policy, which required flight engineers to retire at age 60, violated the ADEA).
91. Id. at 412.
Blackmun next examined the specific language of the BFOQ defense which indicates the situations in which sex discrimination is permissible are extremely limited. He stated the words within the statute such as “certain instances,” “normal operation,” and “particular business” indicated that an objective, verifiable requirement exists in the determination of those situations in which discrimination is allowable. Blackmun focused on the legislature’s use of the term “occupational” qualification which indicates that Congress limited the term “qualification” to include only those job requirements which concerned job-related skills. Under this reasoning, Johnson Controls would have to show that sex was a bona fide job requirement necessary for battery making. Blackmun attacked Justice White’s definition of the term “occupational qualification” in White’s concurring opinion, which was simply a “job-related qualification.” Blackmun claimed White’s interpretation rendered the term “occupational” unnecessary, and thus did not reflect the intention of Congress.

Blackmun considered Johnson Controls’ assertion that its policy fell into the category of cases in which sex discrimination was allowable because of safety concerns. Referring to Dothard, Blackmun stated that sex discrimination because of safety concerns is allowable only in limited circumstances. In Dothard, sex was a BFOQ because the employment of a female prison guard would create a real risk of violence, and the safety of third parties would be threatened. Blackmun compared Dothard to airline cases in which pregnant flight attendants were terminated because of the necessity of ensuring the safety of airline passengers. Such layoffs were

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92. 42 U.S.C. § 2000e-2(e) (1988). The section provides that “it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .”
94. Id.
95. Id. at 1210, n.1 (White, J., concurring).
96. Id. at 1205.
97. Id.
98. Id.
allowable because there was evidence that pregnant flight attendants were more likely to be incapacitated during emergency evacuations than nonpregnant flight attendants.\textsuperscript{101} As in \textit{Dothard}, the safety of third parties would be threatened if the airlines' discriminatory policies were not upheld.

Blackmun attacked White's concurring opinion for ignoring the "essence of the business" test which had been established clearly in \textit{Dothard}.\textsuperscript{102} White's concurrence stated that "protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons (\textit{Dothard}) or flying airplanes (\textit{Criswell})."\textsuperscript{103} Blackmun distinguished \textit{Johnson Controls} from \textit{Dothard} and \textit{Criswell} on the basis that in the latter two cases, third party safety considerations were crucial to the employee's job performance; moreover, that job performance involved the central purpose of the employer's business.\textsuperscript{104} However, Blackmun stated, the safety of potential fetuses is not the essence of the business of a battery manufacturer.\textsuperscript{105} He asserted that the narrow BFOQ defense should not be expanded to include the social concern of the employer for the possibility of injury to future children.\textsuperscript{106}

Blackmun proceeded to verify his interpretation of the narrow BFOQ defense by examining the language of the PDA.\textsuperscript{107} This amendment to Title VII states that "women affected by pregnancy ... or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ... ."\textsuperscript{108} As applied

\textsuperscript{101} Harriss v. Pan American World Airways, 649 F. 2d 670, 675 (9th Cir. 1980) (holding that an airline's policy, which required that female flight attendants take maternity leave immediately upon learning of their pregnancy, was justified under the BFOQ defense); Condit v. United Air Lines, 558 F.2d 1176, 1176 (4th Cir. 1977) (holding that an airline's policy, which prohibited stewardesses from flying from the time they learned that they were pregnant, was justified under the BFOQ defense).

\textsuperscript{102} 433 U.S. at 333. \textit{See supra} text accompanying notes 56-57.

\textsuperscript{103} 111 S. Ct. at 1213 (White, J., concurring).

\textsuperscript{104} \textit{Id}. at 1206.

\textsuperscript{105} \textit{Id}.

\textsuperscript{106} \textit{Id}.

\textsuperscript{107} \textit{Id}.

to the present case, female employees, who are as capable of doing jobs as their male peers, may not be forced out of a job due to their potential to become pregnant.\footnote{109}{International Union v. Johnson Controls, Inc., 111 S. Ct. 1196, 1206 (1991).}

Blackmun turned next to the legislative history of the PDA. He stated the PDA’s purpose was to protect female employees from being treated differently solely due to their child-bearing capabilities.\footnote{110}{Id.} Indeed, the legislative history of the PDA indicates that, prior to its passage, women were viewed by their employers as potentially pregnant individuals and, therefore, marginal workers.\footnote{111}{H.R. Rep. No. 95-948, 95th Cong., 2d Sess., pt. 5, at 6-7 (1978), \textit{reprinted in} 1978 U.S.C.C.A.N. 4749, 4754-55.} The goal of the PDA was to eliminate discrimination based on pregnancy in order to forward the goal of Title VII which is to provide equal employment opportunities.\footnote{112}{H.R. Rep. No. 95-948 at 7, 1978 U.S.C.C.A.N. at 4755.} Blackmun was correct in his contention that such a purpose would be inconsistent with the expansion of the BFOQ defense to include fetal-protection policies such as that of Johnson Controls.\footnote{113}{International Union v. Johnson Controls, Inc., 111 S. Ct. 1196, 1207 (1991).}

After thoroughly examining case law, the language of the BFOQ provision, the PDA, and legislative history, Blackmun concluded that an employer is prohibited from discriminating against a woman on the basis of her capacity to become pregnant unless this reproductive capability actually prevents her from performing her job responsibilities.\footnote{114}{Id.} Blackmun held that Johnson Controls did not establish a BFOQ defense because fertile women “participate in the manufacture of batteries as efficiently as anyone else.”\footnote{115}{Id.} Blackmun emphasized that Congress, through Title VII and the PDA, mandated that decisions regarding the safety of children should be made by their parents, rather than by their parent’s employer.\footnote{116}{Id.} These federal statutes “simply do not allow a woman’s dismissal because of her failure to submit to sterilization.”\footnote{117}{Id.}
C. Tort Liability Concerns

The majority of state courts do recognize a right to recover for a prenatal injury based on either negligence or wrongful death.\textsuperscript{118} For example, the West Virginia Supreme Court of Appeals has held that an action may be maintained by the personal representative of a viable unborn child for the wrongful death of the child caused by injuries sustained while in its mother's womb resulting from the negligence of the defendant.\textsuperscript{119} Judges and lawyers have raised concerns regarding employer's potential tort liability resulting from the prohibition of fetal-protection policies.\textsuperscript{120}

Blackmun briefly discussed the issue of employer tort liability arising from the present \textit{Johnson Controls} decision.\textsuperscript{121} He noted that after having considered the problem of lead exposure, OSHA stated that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy."\textsuperscript{122} Furthermore, Blackmun stated, there must be a determination of negligence on the part of the employer in order for the employer to be liable in tort for fetal injury.\textsuperscript{123} If, while operating without sex-specific fetal-protection policies, an employer informs a woman of the risk of fetal injury stemming from her job responsibilities, and the employer is not negligent, "the basis for holding an employer liable seems remote at best."\textsuperscript{124}

Blackmun next discussed the issue of pre-emption which is raised in Justice White's separate opinion.\textsuperscript{125} Because Johnson Controls did

\begin{itemize}
\item 118. Deborah M. Santello, Note, \textit{Maternal Tort Liability for Prenatal Injuries}, 22 \textsc{suffolk} \textsc{L. Rev.} 747, 753-54 (1988).
\item 119. Baldwin v. Butcher, 184 S.E.2d 428, 434 (W. Va. 1971) (reversing judgment for defendant in a case where the decedent, in the womb and viable at the time when its mother was a passenger in the defendant's vehicle, was stillborn two days after receiving injuries in an automobile accident).
\item 121. \textit{Id.} at 1208-09.
\item 122. \textit{Id.} at 1208 (citing 43 Fed. Reg. 52952, 52966 (1978)). OSHA has also determined that male workers, as well as female workers, may be adversely affected by lead. "Male workers may be rendered infertile or impotent, and both men and women are subjected to genetic damage which may affect both the course and outcome of pregnancy." 43 Fed. Reg. 52952, 52966 (1978). Such evidence may add additional strength to the assertion that the sex-specific fetal-protection policy of Johnson Controls was not justified.
\item 123. \textit{Johnson Controls}, 111 S. Ct. at 1208.
\item 124. \textit{Id.}
\item 125. Justice White asserted that "it is far from clear that compliance with Title VII will pre-empt state tort liability . . ." \textit{Id.} at 1211 (White, J., concurring).
\end{itemize}
not argue that it faced costs due to state tort liability, the pre-emption issue was not before the Court. However, Blackmun referenced the Court’s decision in *Florida Lime & Avocado Growers v. Paul* in which the Court held that when compliance with both federal and state law is impossible, federal law pre-empts that of the state. He went on to analogize the *Johnson Controls* case to *Farmers’ Educational & Cooperative Union of America v. WDAY* in which the Court held a federal law prohibiting censorship by a broadcasting station carried with it immunity from liability for defamation under state tort law. The Court in *WDAY* stated that “we have not hesitated to abrogate state law where satisfied that its enforcement would stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Similarly, Blackmun stated that state tort law which prevented employers from hiring qualified women due to their child-bearing capabilities would impede the purpose of Title VII.

Blackmun concluded his discussion of tort liability by stating that the extra cost of potential tort liability does not justify policies which exclude fertile women from the workplace. Blackmun referenced the Court’s decision in *Manhart* in which the Court held that even if a generalization is true, it is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Although *Johnson Controls* has important ramifications in the field of employment law, Blackmun contends that the holding is not remarkable. The PDA clearly prohibits discrimination on the basis

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126. *Id.* at 1208-09.
127. 373 U.S. 132 (1963) (upholding a California statute which contained regulations regarding the maturity of avocados, because it was not impossible to comply with both federal and state standards).
128. *Id.* at 142-43.
130. *Id.* at 531.
131. *Id.* at 535 (quoting Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 773 (1947)).
133. *Id.*
135. 111 S. Ct. at 1209-10.
of pregnancy or related conditions. A woman’s capacity to bear children is a pregnancy-related condition. Thus, as Blackmun states, the Court in Johnson Controls has done “no more than hold that the Pregnancy Discrimination Act means what it says.”

V. THE CONCURRING OPINIONS

Justice White issued a separate opinion, which was joined by Chief Justice Rehnquist and Justice Kennedy, in which he concurred with the majority on their holding that summary judgment in favor of Johnson Controls had been improper. White did, however, find problematic two parts of the majority’s opinion. He thought the majority had interpreted the BFOQ defense too narrowly. He also expressed greater concerns than the majority had in relation to the potential tort liability of employers resulting from the decision.

White first asserted that the language of the BFOQ exception to sex discrimination in Title VII does not indicate that the statute could never support a sex-specific fetal-protection policy. This is undoubtedly true, as the statutory language is necessarily very general. However, the Court’s interpretation of the statute has indicated that, in order to meet its purpose of prohibiting sex discrimination, the BFOQ defense is necessarily a very narrow one that does not encompass sex-specific fetal-protection policies.

White discussed Dothard and Criswell in order to demonstrate that discrimination is allowable under the BFOQ defense when the safety of third parties, such as fetuses, is at risk. However, as Blackmun noted, White ignored the “essence of the business” test which had been established in Dothard. That is, White did not consider the fact that sex discrimination under a sex-specific fetal-

138. Id. at 1210 (White, J., concurring).
139. Id. at 1214.
140. See id. at 1211-12.
141. Id. at 1210.
142. Id. at 1212-13.
protection policy would be valid only if the essence of Johnson Controls’ battery manufacturing operation would be undermined by not hiring men exclusively.\textsuperscript{144}

White claimed that the PDA had not restricted the scope of the BFOQ defense as Blackmun claimed it had.\textsuperscript{145} White asserted that the legislative history of the PDA, as well as its interpretation by the Court, indicated that the PDA was only an amendment to the definitions section of Title VII.\textsuperscript{146} He stated its purpose was to make clear that pregnancy and related conditions were to be included within Title VII’s antidiscrimination provisions.\textsuperscript{147} Whether the PDA served to narrow the scope of Title VII BFOQ exceptions to discrimination or only served to apply Title VII prohibitions to discrimination on the basis of pregnancy, seems to be a question without great significance in this case. The law is clear: “Women affected by pregnancy . . . or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .”\textsuperscript{148}

Finally, White criticized the majority’s assertion that since Title VII bans sex-specific fetal-protection policies, if an employer fully informs women of job-related risks to potential fetuses and does not act negligently, the basis for holding that employer liable for fetal injury would be very limited.\textsuperscript{149} White postulates that employers face a real risk of tort liability to future children.\textsuperscript{150} As he points out, a parent may not release the cause of action of his or her child, and negligence of the parent may not be imputed to the child.\textsuperscript{151}

\textsuperscript{145} Id. at 1213 (White, J., concurring).
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. In re Estate of Infant Fontaine, 519 A.2d 227, 230 (N.H. 1986); Collins v. Eli Lilly Co., 342 N.W.2d 37, 53, n.14 (Wis. 1984), cert. denied, 469 U.S. 826 (1984); Doyle v. Bowdoin College, 403 A.2d 1206, 1208, n.3 (Me. 1979); Littleton v. Jordan, 428 S.W.2d 472, 475 (Tex. 1968); Fallow v. Hobbs, 147 S.E.2d 517, 519 (Ga. 1966); see also Restatement (Second) of Torts § 488(1) (1965).
However, since federal law pre-empts state law, it may be that the statutory prohibition against discrimination on the basis of pregnancy carries with it an immunity from state tort liability for fetal injury in the absence of employer negligence. As Blackmun indicated, this issue has not yet come before the Court. It appears likely that in the future the Court will necessarily be called upon to resolve the tort liability issue. Employers will then have a basis on which to predict their degree of liability to potential children.

Justice Scalia issued a separate opinion in which he concurred in the judgment of the majority, but expressed reservations regarding some of the majority’s reasoning. Scalia found two of the majority’s areas of discussion to be irrelevant in light of Title VII, as amended by the PDA. Specifically, although the majority pointed out that evidence existed of the dangers of lead to the male reproductive system, Scalia stated that treating women differently on the basis of pregnancy is prohibited regardless of the adverse effects of lead on the male reproductive system. The majority also stated that Johnson Controls offered no evidence indicating that substantially all fertile women would be unable to perform their job responsibilities safely. Scalia asserted that even if all pregnant women placed their unborn children at risk by taking jobs with lead exposure, under Title VII, it is for parents to make such decisions affecting their children.

Scalia agreed with the majority that any action required by Title VII cannot give rise to tort liability under state law. However, he believed that it was possible that “Title VII has accommodated state tort law through the BFOQ exception.” As the pre-emption ques-

154. Id.
155. Id. at 1216 (Scalia, J., concurring).
156. Id. at 1203.
157. Id. at 1216 (Scalia, J., concurring). Scalia reasoned that even in the absence of evidence of the harmful effects of lead on the male reproductive system, treating women differently on the basis of pregnancy would still be sex discrimination under the clear language of the PDA. Id.
158. Id. at 1208.
159. Id. at 1216 (Scalia, J., concurring).
160. Id.
161. Id.
tion was not before the Court in this case, it remains to be seen how this issue will be resolved.

Finally, Scalia disagreed with the majority that increased costs to an employer cannot support a BFOQ defense. However, since Johnson Controls did not assert a BFOQ based upon increased costs, this is another issue which was not definitively resolved in the present case.

VI. ANALYSIS

Although Justice Blackmun described the Johnson Controls decision as unremarkable, it is significant for several reasons. First, the Court affirmed that the clear language of the PDA means exactly what it says: discrimination on the basis of pregnancy will not be tolerated. Importantly, the decision clarified that if an employer's policy is facially discriminatory, the only defense that is available to the employer is the BFOQ defense established in Title VII. The business necessity defense, used previously by federal appellate courts, is not appropriate. Moreover, the Court affirmed its previous holding that the BFOQ exception to illegal discrimination is an extremely narrow one. Finally, the Court issued a clear statement to employers that sex-specific fetal-protection policies are prohibited by Title VII, as amended by the PDA.

The Johnson Controls decision has already had an impact on decisions in the lower courts. In the case of O'Loughlin v. Pinchback, a Florida court relied heavily on Johnson Controls in its holding that a correctional officer employed at the county jail had been unlawfully discriminated against when she was terminated due to her pregnancy. Further, the Johnson Controls decision was also broadly interpreted by the court in Hargett v. Delta Automotive, Inc. which held that the defendant's discharge of an employee

162. Id.
163. Id. at 1209-10.
165. Id. at 796. The court determined that under Johnson Controls, since the employer's policy was not facially neutral, the business necessity defense was inapplicable. The only available defense was the BFOQ, which the employer had failed to establish. Id. at 793-95.
violated the PDA because the employee had established that her pregnancy was a factor in the termination decision.\textsuperscript{167} Other courts have cited Johnson Controls when discussing pre-emption\textsuperscript{168} and the interpretation of statutory law.\textsuperscript{169} Although the Johnson Controls decision left some issues open to resolution in the future, Blackmun’s thorough analysis and clear, strong statements will cause the decision to continue to be of important precedential value.

Although Blackmun does not discuss potential tort liability concerns resulting from the Johnson Controls decision in detail, the impact of the decision on tort liability issues will be of great concern to employers. Because Blackmun refers to compliance with OSHA standards in his discussion of an employer’s avoidance of tort liability,\textsuperscript{170} it is likely that employers’ attention to compliance with these standards will increase. Increased attention to workplace safety and health standards resulting from Johnson Controls would be a beneficial consequence of the decision. A safer work environment for all employees would likely accompany increased attempts to protect potential fetuses.

By excluding women from jobs solely on the basis of their capacity to bear children, Johnson Controls made several assumptions: 1) that fertile women employees were sexually active or would be in the future, 2) that fertile women employees were sexually active with fertile men, 3) that the fertile women employees who were

\textsuperscript{167} Id. at 1494. The court stated that “[a]ccording to Johnson Controls, Congress has put firmly in place a public policy giving pregnant women a substantial degree of extra protection against any form of adverse treatment in the work place, no matter who else may be hurt.” Id.

\textsuperscript{168} Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240 (11th Cir. 1991) (stating that a state law prohibiting school systems from employing uncertified teachers may not be a defense in a Title VII action brought by a black uncertified teacher who had claimed that the school board had wrongfully refused to renew her contract).

\textsuperscript{169} Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631, 2638 (1991) (stating that, in an action by taxpayers seeking redeterminations of deficiencies assessed against them, the Court is deeply reluctant “to interpret a statutory provision so as to render superfluous other provisions in the same enactment” (quoting Pennsylvania Public Welfare Dept. v. Davenport, 110 S. Ct. 2126, 2133 (1990))).

\textsuperscript{170} International Union v. Johnson Controls, Inc., 111 S. Ct. 1196, 1208 (1991). Immediately following his discussion of OSHA standards, Blackmun states “[w]ithout negligence, it would be difficult for a court to find liability on the part of the employer.” Id.
sexually active with fertile men would be unable to consider the risk of workplace hazards to fetuses and take contraceptive measures or make informed decisions regarding their placement in such jobs, or both. Johnson Controls' fetal-protection policy was based upon the assumption that the company was better suited to protect the safety interests of women employees' future offspring than the women themselves. With its recent holding, the Supreme Court has ensured that the law is taking steps forward from the decision of Muller v. Oregon in 1908, not backward. Although the concern of companies for the welfare of future children is praiseworthy, the Johnson Controls decision has made it clear that these companies may not reach their goals at the expense of the ability of women to obtain and keep jobs for which they are qualified.

VII. CONCLUSION

In Johnson Controls, the Supreme Court held that Title VII, as amended by the PDA, prohibits employers from implementing sex-specific fetal-protection policies. The Court relied on the statutory language of Title VII and the Court's previous interpretations of the statutory language to hold that the business necessity defense, previously used by lower courts, is not an appropriate means of analyzing employers' sex-specific fetal-protection policies. When an employer's fetal-protection policy is facially discriminatory, the employer's only available defense is to establish that sex is a BFOQ for the jobs from which fertile women are excluded. The BFOQ

171. Johnson Controls, Inc. v. California Fair Employment & Housing Comm'n., 267 Cal. Rptr. 158, 177 (Cal. Ct. App. 1990) (holding that Johnson Controls' fetal protection policy was discriminatory and not defensible as a BFOQ).
172. Id. at 177-78.
173. 208 U.S. 412, 421 (1908) (upholding an Oregon statute, which forbade women from working greater than ten hours a day in a laundry, on the basis of the fact that women on their feet for long periods of time tend to injure their bodies, "and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.").
175. 267 Cal. Rptr. at 178.
177. 111 S. Ct. at 1203-04.
178. Id. at 1204.
defense is extremely narrow and does not encompass sex-specific fetal-protection policies such as that of Johnson Controls.\footnote{Id. at 1204, 1207.}

The Johnson Controls decision left questions concerning potential employer tort liability unresolved. However, the Court’s clear analysis of existing law and sound reasoning make the decision an important precedent. Importantly, the Court affirmed the language of the PDA: discrimination on the basis of pregnancy or related conditions is prohibited. Blackmun contended that the Johnson Controls decision was unremarkable. However, the decision is especially significant in light of the generally conservative stance of the existing Court regarding other women’s issues. While forbidding employers from implementing sex-specific fetal-protection policies, the Court has ensured that women will be protected from losing their jobs on the basis of their fertility.

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