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Employment Discrimination -- Wright v. Olin Corp.: Title VII and the Exclusion of Women from the Fetally Toxic Workplace

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Employment Discrimination—*Wright v. Olin Corp.*: Title VII and the Exclusion of Women from the Fetally Toxic Workplace

During the past decade, women have altered dramatically this country's workforce by entering the job market at an estimated rate of two million per year.[1] This increase in the number of women workers has been accompanied by an increase in the awareness of reproductive hazards[2] associated with exposure to certain chemicals[3] in the workplace. Although future generations also may be at risk through the effects of reproductive hazards on male workers,[4] employers have singled out women as most susceptible to these hazards.[5] In an effort to protect the fetus from harm and themselves from possible tort liability,[6] a growing number of employers have adopted policies excluding fertile women from positions in toxic work environments.[7]

The situation giving rise to such exclusionary policies is fraught with ethical, social, and legal dilemmas. Although exclusionary policies may serve so-

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1. Nothstein & Ayres, *Sex-Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII*, 26 VILL. L. REV. 239, 241 (1981).

2. Finneran, *Title VII and Restrictions on Employment of Fertile Women*, 31 LAB. L.J. 223 (1980); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Hricko, *Social Policy Considerations of Occupational Health Standards: The Example of Lead and Reproductive Effects*, 7 PREVENTIVE MED. 398 (1978). Preliminary evidence collected by the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance Programs indicates that approximately twenty million jobs involve exposure to reproductive hazards. 45 Fed. Reg. 7514 (1980).

3. These chemicals can be classified according to their effect on human reproductive processes. Mutagens can alter the genetic structure of reproductive cells in both males and females; such alterations can result in birth defects that may be passed on to future generations. Gametotoxins can limit the fertility of either sex by reducing or damaging the sperm and ova. Teratogens damage the fetus directly by passing through the mother's placenta; damage may occur before the mother is even aware that she is pregnant. Certain substances may have mutagenic, gametotoxic, and teratogenic characteristics. Only if a toxin can be classified exclusively as a teratogen will the threat of reproductive harm be limited to women. *See* Howard, *supra* note 2, at 802-06; Note, *Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination?* 5 COLUM. J. ENVTL. L. 97, 99-100 (1978).

4. *See supra* note 3. Even if the only hazardous substance in the workplace is a teratogen, male workers may endanger fetuses carried by their wives if the wife is exposed to the substance carried on the husband's clothes, shoes, or hair. 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, 657 (1981).

5. This practice may be due to traditional notions regarding women's primary function as childbearer. Note, *supra* note 3, at 97 n.1. Also, most scientific research has focused almost exclusively on teratogenic effects. *See* Williams, *supra* note 4, at 661.

6. *See* Williams, *supra* note 4, at 644-46. *See also infra* notes 185-98 and accompanying text.

7. Companies excluding women from jobs involving exposure to toxic chemicals include American Cyanamid Co., Environmental Protection & Aeration Systems, Inc., General Motors Corp., St. Joe Minerals Corp., Dow Chemical Co., Monsanto, Firestone, and B.F. Goodrich Co. *See* Williams, *supra* note 4, at 642 n.11; Howard, *supra* note 2, at 798 n.3. Interestingly, no attempts to exclude fertile women from toxic work environments in industries in which female workers predominate have been reported; only male dominated industries have adopted exclusionary policies. *Id.*

ciety's unquestionable interest in the health of future generations[8] as well as satisfy the employer's common-law duty to the fetus[9] (which in turn serves the employer's interest in profitability through avoidance of tort liability), these policies inevitably conflict with the national objective of equal employment opportunity mandated by Title VII of the Civil Rights Act of 1964.[10] In an effort to reconcile the competing interests of fetal health and a fertile woman's right to work, the Equal Employment Opportunity Commission (EEOC)[11] and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), in consultation with the Occupational Safety and Health Administration (OSHA),[12] issued draft interpretive guidelines[13] for employers considering exclusionary policies. After receiving much criticism, however, the agencies withdrew the guidelines, concluding that the most appropriate method of eliminating employment discrimination in industries concerned about reproductive hazards is through investigation and enforcement of the law on a case-by-case basis.[14] Left without any guidance for resolving the competing interests of the fetus and the fertile woman who wishes to work in a fetally toxic environment, the Fourth Circuit in *Wright v. Olin Corp.*[15] became the first court of appeals[16] to apply this case-by-case analysis.

Olin was the result of an appeal[17] from a judgment for defendant Olin in

8. *See* Beal v. Doe, 432 U.S. 438, 446 (1977) (reasonable for state to further "unquestionably strong and legitimate interest in encouraging normal childbirth"); Roe v. Wade, 410 U.S. 113, 154 (1973) (state may properly assert important interests in safeguarding health and in protecting potential life).

9. *See* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956) (child born alive after sustaining prenatal tortious injury has cause of action); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969) (cause of action exists for wrongful death of unborn fetus); W. PROSSER, LAW OF TORTS 336-38 (4th ed. 1971); Robertson, *Toward Rational Boundaries of Tort Liability for the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401.

10. 42 U.S.C. § 2000e (1976 & Supp. V 1981). *See infra* note 45 and accompanying text.

11. Congress created the EEOC as part of Title VII and delegated to it the primary responsibility for preventing and eliminating the unlawful employment practices defined in Title VII. H.R. REP. NO. 914, 88th Cong., 2d Sess. 11, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401. The EEOC is directed to cooperate with other departments and agencies when performing its educational and promotional activities. *Id.* at 12, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2404.

12. Congress set up OSHA to administer the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976), and gave it the power to set standards necessary to provide safe or healthful employment and places of employment. *Id.* § 654(a)(2).

13. Interpretative Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514 (1980).

14. 46 Fed. Reg. 3916 (1981).

15. 697 F.2d 1172 (4th Cir. 1982).

16. Two cases involving policies excluding women of childbearing ability have not progressed beyond the district court. Litigation is pending in Christman v. American Cyanamid Co., No. 80-0024-P (N.D.W. Va., filed May 20, 1980). In Doerr v. B.F. Goodrich Co., 484 F. Supp. 320 (N.D. Ohio 1979), the court avoided analysis of the exclusionary policy under Title VII by determining that plaintiff had not shown irreparable injury. *Id.* at 325. Plaintiff merely had been moved to a lower level position without loss of pay. *Id.* at 321.

17. *Olin* was a consolidated appeal of two complex employment discrimination actions, EEOC v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1646 (W.D.N.C. 1980), and Wright v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1615 (W.D.N.C. 1980), a class action. Plaintiffs charged Olin with discrimination in its recruitment, hiring, job assignments, promotions, terminations, reemployment, and seniority system. *Olin*, 697 F.2d at 1176. Olin won both cases in district court. Only *EEOC v. Olin Corp.* addressed the fetal vulnerability issue.

an action brought by the EEOC pursuant to its authority under Title VII.[18] The EEOC challenged Olin's "female employment and fetal vulnerability program."[19] This program created three job classifications for women, each classification corresponding to the level of exposure to chemicals in different areas, and flatly excluded women of childbearing capacity from certain positions.[20] No similar restrictions were placed on men; they merely received a warning required by OSHA concerning the potentially adverse reproductive effects of lead exposure.[21]

The district court found that "the policy was instituted for sound medical and humane reasons and is based upon sound medical knowledge and research and years of monitoring of levels of chemical exposure at Olin's plant."[22] The court further found that Olin's policy "was not instituted . . . with the intent or purpose to discriminate against females because of their sex. . . . [Instead,] the purpose [was] to protect the unborn fetus at a time when it is most vulnerable to exposure to harmful chemicals."[23] In applying these findings, the district court determined that the exclusionary policy did not violate Title VII, but the court failed to subject the policy to a traditional Title VII analysis.[24] It may be inferred, however, that the court relied on a covert disparate treatment analysis, given its emphasis on the legitimate, nondiscriminatory nature of Olin's policy.[25]

The Fourth Circuit determined that the proof scheme developed for covert disparate treatment was "wholly inappropriate" for assessing the legality of

18. 42 U.S.C. § 2000e-5. The section relates to the enforcement of Title VII. Once an allegedly aggrieved party files a charge with the EEOC, the EEOC must notify the employer of the charge and conduct an investigation. If at least two of the five members of the EEOC find reasonable cause for crediting the charge, the EEOC must attempt to eliminate the discriminatory practice through conciliation efforts with the employer. If the EEOC is unsuccessful in procuring an agreement with the employer within thirty days after the charge was filed, it may bring its own civil action against the employer within ninety days. If the EEOC does not file an action within that time, the aggrieved party may bring an action if at least one member of the EEOC so authorizes. *Id. See also* H.R. REP. No. 914, 88th Cong., 2d Sess. 12, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2404-05.

19. *Olin*, 697 F.2d at 1182.

20. *Id.* A "restricted" job is one that "may require contact with and exposure to known or suspected abortifacient or teratogenic agents." *Id.* Such a job is not available to women unless they can prove they are sterile and will not sustain other physical harm from the environment. A "controlled" job is one in which contact with harmful chemicals is limited. Pregnant women may work in "controlled" areas only after an individual evaluation, and are encouraged to seek transfers. Nonpregnant women capable of childbearing may hold "controlled" jobs only after signing a form stating that they recognize that the job presents "some risk, although slight." An "unrestricted" job does not present a hazard to pregnant women or their fetuses; any woman may work in an unrestricted area. *Id.*

21. *Id.*

22. EEOC v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1646, 1659 (W.D.N.C. 1980). Three Olin employees testified about the necessity of such a policy to protect unborn fetuses and their mothers. They were not experts in the field, however, and were unable to identify any articles or journals supporting their conclusions. *Olin*, 697 F.2d at 1182.

23. EEOC v. Olin Corp., 24 Fair Empl. Prac. Cas. (BNA) 1646, 1659 (W.D.N.C. 1980).

24. For a discussion of the analytic frameworks that have developed under Title VII doctrine, see *infra* notes 47-68 and accompanying text.

25. *Olin*, 697 F.2d at 1186 n.22. Covert disparate treatment analysis is used for policies that are mere pretexts for discrimination. For a discussion of the covert disparate treatment theory for analyzing Title VII claims and defenses, see *infra* notes 51-53 & 61-64 and accompanying text.

the fetal vulnerability program.[26] The court vacated the district court's opinion regarding Olin's exclusionary policy and remanded the case with directions to determine additional facts and apply different legal principles.[27] After noting that no theory under Title VII applied precisely to Olin's policy,[28] the court determined that the disparate impact-business necessity theory[29] was the most appropriate conceptual framework for analysis of the fetal vulnerability program.[30] The court noted that plaintiffs arguably had stated a claim of overt discrimination.[31] It nevertheless refused to recognize the overt discrimination-bona fide occupational qualification (bfoq) theory of claim and defense[32] as exclusively applicable because, if properly applied, it would deny the employer the opportunity to justify its policy under the wider scope of the business necessity defense.[33] Noting that the bfoq defense "obviously" could not be established, the court held that the employer should not be "forced" to attempt to do so.[34]

The court characterized fetal protection as a valid business concern. It determined that the safety of unborn children is more analogous to the safety of customers than to the safety of workers.[35] Although workers usually have an absolute right to be free from discriminatory regulations that concern their own exposure to workplace hazards,[36] the employer ordinarily is allowed to regulate its workers' performance or presence, even through discriminatory means, when the customers' safety is at risk.[37] The Court concluded that the business necessity defense may be available to an employer with a fetal vulnerability program because of society's interest in protecting the health of unborn children.[38] The court held that to establish a business necessity defense,

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26. *Olin*, 697 F.2d at 1185 & n.20. The court noted that the "special feature of [that] proof scheme [is] its threshold presumption to aid proof of the claimed intent to 'treat less favorably' that is provided precisely because that intent is denied, is not manifest, and can only be proved circumstancially." *Id.* In *Olin*, the claim was that the intent was manifest in the nature of the program and the defense was not aimed at denying or rebutting the claim of intent but at justifying it. *Id.*

27. *Olin*, 697 F.2d at 1176.

28. *Id.* at 1185.

29. This analysis is used to evaluate policies that are facially neutral but have a disproportionately adverse effect on a protected class of employees (*e.g.*, women, blacks, and Indians). *See infra* notes 54-56 & 65-68 and accompanying text.

30. *Olin*, 697 F.2d at 1185.

31. *Id.* at 1186 n.21. Overt discrimination occurs when a policy is based explicitly on race, color, sex, national origin, or religion. For a discussion of overt discrimination, see *infra* notes 48-50 and accompanying text.

32. For a discussion of the bfoq defense, see *infra* notes 58-60 & 69-92 and accompanying text.

33. *Olin*, 697 F.2d at 1185 n.21.

34. *Id.* at 1186 n.21.

35. *Id.* at 1189. The court gave no reason for its conclusion other than summarily stating that "[c]ertainly the safety of unborn children of workers would seem no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon an employer's premises." *Id.*

36. *See infra* note 76.

37. *Olin*, 697 F.2d at 1188-89. *See infra* notes 91, 107 & text accompanying note 181.

38. *Olin*, 697 F.2d at 1189-90 & n.26. The court stated that the societal interest was so compelling that it was unnecessary to consider the employer's economic interest in avoiding potential liablity to damaged fetuses. Thus, as far as the court was concerned, it was irrelevant that avoid-

Olin must prove: (1) that toxic hazards in the work environment pose significant risks of harm to fetuses;[39] (2) that "on the best available scientific data"[40] the risks are substantially limited to women workers (*i.e.*, that there is no risk of harm to the unborn children of men workers);[41] and (3) that the exclusionary policy effectively protects fetuses of women workers.[42] Even if Olin could satisfy this business necessity test, the court held that the district court should rule against Olin if the claimant could prove that acceptable alternative practices would achieve the purpose as effectively as the exclusionary policy with a less discriminatory impact on fertile women.[43]

To determine the propriety of the Fourth Circuit's opinion in *Olin* and its ramifications for exclusionary policies and Title VII doctrine, one must understand the analytic framework that has developed under Title VII. Of particular importance is the application of the various theories to sex discrimination; specifically, discrimination based on pregnancy and childbearing capacity.

Congress passed Title VII of the Civil Rights Act of 1964 to eliminate "artificial, arbitrary, and unnecessary barriers to employment"[44] by prohibiting discrimination on the basis of race, sex,[45] color, religion, or national origin.[46] Two theories of discrimination have developed under Title VII: disparate treatment and disparate impact.[47] An employer can violate Title VII

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ance of liability and economic loss may not be enough to constitute a business necessity. *Id.* at 1190 n.26.

39. *Id.* at 1190.

40. *Id.* at n.27.

41. *Id.* at 1190 & n.27.

42. *Id.* at 1190. The court adapted the proof scheme for the business necessity defense that it had formulated in Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir.) (facially neutral seniority system with disparate racial impact), *cert. dismissed*, 404 U.S. 1006 (1971). For further discussion of *Robinson*, see *infra* notes 99-102 and accompanying text.

43. *Olin*, 697 F.2d at 1191.

44. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1977).

45. Ironically, "sex" as a proscribed basis for discrimination can be credited to a staunch opponent of the Civil Rights Bill. On the last day that the bill was debated in the House, Representative Smith of Virginia proposed an amendment including "sex" in the array of prohibited classifications, partially to ridicule the bill, but mainly to destroy its chances of passing. 110 CONG. REC. 2577 (1964). To his dismay, the bill was enacted as amended.

46. 42 U.S.C. § 2000e-2(a) (1976) provides:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge 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.

47. *See* International Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977):

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

under the disparate treatment theory in two ways. First, he may explicitly treat a protected class differently from others (overt discrimination).[48] For example, an employer who flatly refuses to hire women, for whatever reason, is guilty per se of overt discrimination.[49] Proof of discriminatory intent is required. Because intent is implicit in the employer's policy of classifying employees or potential employees, however, this burden is easily met.[50] Second, an employer may discriminate intentionally but covertly against a protected class (covert disparate treatment).[51] In this situation, the employer's different treatment of a member of a protected class allegedly is based on a reason other than membership in that class, but that reason is only a pretext for intentional discrimination.[52] Proof of discriminatory motive is essential for holding an employer guilty of covert disparate treatment, since it is not facially apparent that the employer's act violates Title VII.[53]

Under the disparate impact theory, an employer violates Title VII by adopting a policy that does not differentiate on the basis of class, but nonetheless has a disproportionate, adverse effect on a class protected by Title VII (disparate impact).[54] For example, an employer who sets minimum height and weight requirements for applicants may prevent a disproportionate number of females from being considered for hire; such a policy would prima facie violate Title VII.[55] Proof of discriminatory intent is not required in dis-

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Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

48. *See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716 (1977) (employer's practice of deducting larger sums from female's paycheck than from male's paychecks for contribution to pension is facially discriminatory).

49. *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 231 (5th Cir. 1969) (employer refused to hire female applicant for switchman position because job too strenuous for women).

50. *See* Williams, *supra* note 4, at 669 n.176.

51. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (employer may have used illegal conduct as pretext for racial motive when deciding not to rehire black employee).

52. An example of how plaintiff may prove a prima facie case of discrimination is found in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In that case, plaintiff established a prima facie case by showing: (1) that he belonged to a protected class (race); (2) that he applied for and was qualified for a position for which the employer was seeking applicants; (3) that his application was denied despite his qualifications; and (4) that the employer continued to seek applicants with similar qualifications. *Id.* at 802. As noted in Furnco Constr. Co. v. Waters, 438 U.S. 567, 575 (1978), the evidence necessary to demonstrate disparate treatment will vary from case to case.

53. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court stated that "in the absence of proof of pretext or discriminatory application of [employer's asserted] reason [for his treatment of claimant], this cannot be thought the kind of 'artificial, arbitrary and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove." *Id.* at 806 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1979)). Discriminatory motive ordinarily is proven with circumstantial evidence. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13-15 (2d ed. 1983). Examples of such circumstantial evidence include the employer's treatment of other classes in similar situations; the employer's treatment of the claimant(s) during employment; and the employer's general policy and practice with respect to minority employment, which may be shown through statistics. *See McDonnell Douglas*, 411 U.S. at 804-05.

54. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (policy of not hiring methadone users a prima facie violation of Title VII because disproportionate number of blacks and Hispanics excluded from consideration).

55. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (prima facie case established when

parate impact cases because the consequences of the facially neutral policy constitute the violation.[56]

Traditionally, each claim of discrimination has been associated with a distinct defense.[57] If an employer is faced with a prima facie case of overt discrimination, it ordinarily must prove that religion, sex, or national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[58] This is the only available defense to a claim of overt, class-based discrimination contemplated by

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plaintiff showed facially neutral standards—here, that applicant be at least 5'2" and 120 pounds—were used to select applicants for hire in significantly discriminatory pattern).

56. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970): "[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."

57. The Supreme Court's analysis in Dothard v. Rawlinson, 433 U.S. 321 (1977), indicates that the defenses available to an employer are separate and distinct and traditionally apply to different types of Title VII claims. In *Dothard* the Court considered only the bfoq defense, *see infra* note 58, in reviewing a policy that explicitly discriminated against women and only the business necessity defense, *see infra* notes 65-66 and accompanying text, for the employer's facially neutral policy. *See also* Garcia v. Gloor, 609 F.2d 156, 163 (5th Cir. 1980) ("BFOQ is a warrant for affirmative, deliberate discrimination while a BND [business necessity defense] is a defense to the prima facie case made when an apparently neutral employment practice is shown to have discriminatory effect"), *cert. denied*, 449 U.S. 1113 (1981); Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 674 & n.2 (9th Cir. 1980) ("BFOQ defense is applicable to employment practices that purposefully discriminate on the basis of sex while the Business Necessity defense in appropriately raised where facially neutral employment practices run afoul of Title VII only because of their disparate impact"); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 n.8 (8th Cir.) (overtly discriminatory employment practice violates Title VII unless there is a bfoq; facially neutral employment policy discriminatory in practice justified only if it meets judicially created business necessity test), *cert. denied*, 446 U.S. 966 (1980); Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 369-70 (4th Cir. 1980) (en banc) (noting trial court's confusion over whether bfoq or business necessity should be applied to claim of disparate impact; citing *Dothard* for proposition that clear disparate impact will be tested by business necessity and clear disparate treatment by bfoq), *cert. denied*, 450 U.S. 965 (1981). Nonetheless, the lower courts have not applied the corresponding claims and defenses consistently. *See, e.g.*, Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 263 (N.D. Ala. 1982) (citing *Garcia* for distinction between bfoq and business necessity defenses, but stating that "[a]lthough the present case involves an affirmative, deliberate discrimination rather than a neutral employment practice with a discriminatory effect, the court will, nevertheless, address the business necessity defense as well as the [bfoq] defense"); Maclennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977) (policy giving rise to claim of disparate impact assessed under bfoq *and* business necessity defenses); *In re* National Airlines, 434 F. Supp. 249, 259 (S.D. Fla. 1977) (bfoq defense applied to claim of disparate impact), *aff'd per curiam*, 700 F.2d 695 (11th Cir. 1983).

The Fourth Circuit indicated in *Olin* that it would allow an employer to advance a business necessity defense in response to a prima facie case of overt discrimination. *See* Wright v. Olin Corp., 697 F.2d 1172, 1185-86 n.21 (4th Cir. 1982). For a criticism of this position see *infra* notes 162-76 and accompanying text.

58. 42 U.S.C. § 2000e-2(e)(1) (1976). In full, the section provides:

> (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, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, 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.

It is important for purposes of later analysis that Congress did not extend the bfoq exception to discriminatory practices based on race. *See infra* notes 155-56 and accompanying text.

Congress;[59] it is also the most difficult of the three Title VII defenses to establish.[60]

When charged with covert disparate treatment an employer must articulate a "legitimate, nondiscriminatory reason" for the challenged action.[61] This is not a heavy burden;[62] it is necessary only for the employer to raise a sufficient issue of fact about its intention to discriminate against plaintiff, not to persuade the court that it *actually* was motivated by the reason it articulates.[63] The ultimate burden of persuasion then shifts back to plaintiff to prove that the articulated reason was merely a pretext for discrimination.[64]

Finally, if plaintiff proves that an employer's facially neutral and perhaps benignly motivated policy disproportionately and adversely affects a protected class, the employer must show that the policy is justified as a business necessity.[65] This is a judicially created defense designed especially for cases of disparate impact.[66] Some courts have held that the plaintiff may defeat a defendant's business necessity defense by proving that the employer could have adopted other policies that would have achieved the same business purpose with a less burdensome effect on the protected class.[67] Others have placed the burden on the plaintiff to suggest alternatives, after which the defendant must persuade the court why the suggested policies are not feasible.[68]

The bfoq and the business necessity defenses have been construed and applied in varying fashions.[69] Several tests have evolved for evaluating the bfoq defense in the area of sex discrimination.[70] However the tests are articulated, it is well established that the bfoq defense is an extremely narrow exception in cases of overt sex discrimination.[71] The most often cited formulations of the bfoq defense in the area of sex discrimination originated in three court of appeals cases.

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59. *See* Williams, *supra* note 4, at 672-73. *See also infra* notes 164-69 & 174-76 and accompanying text.

60. *See infra* notes 71-92 and accompanying text.

61. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

62. The defendant's burden of rebuttal is much less demanding in cases of covert disparate treatment than in cases of disparate impact. *See* Note, *Good Faith as a Defense in Title VII Actions*—Stouer v. Marsh, 19 WAKE FOREST L. REV. 291, 301 (1983).

63. *See* Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

64. *Id.*

65. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1977).

66. *Id. Griggs* was the first case in which the Supreme Court recognized the disparate impact theory and the business necessity defense.

67. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

68. *See, e.g.*, Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 270 (N.D. Ind. 1977); Crockett v. Green, 388 F. Supp. 912, 920 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976).

69. *See generally* 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, 89-98 (1980).

70. *See infra* notes 75-85 and accompanying text.

71. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 n.19 (1977). *See also* EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604 2(a) (1980) ("The Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly.").

In *Rosenfeld v. Southern Pacific Co.*[72] and *Weeks v. Southern Bell Telephone and Telegraph Co.*[73] the courts considered employer policies excluding women from positions involving strenuous physical activities.[74] Relying on state protective statutes limiting the amount of weight women were allowed to lift on the job, the employers claimed that being male was a bfoq for these positions.[75] Both courts rejected the common stereotype of women as the weaker sex as a proper basis for establishing a bfoq,[76] but they adopted different standards for what would properly constitute a bfoq. In *Rosenfeld* the court stated that "sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception."[77] These sexual characteristics must be "crucial to the successful performance of the job, as they would be for the position of a wet nurse."[78]

The test adopted by the *Weeks* court is not as strict. That court stated that "to rely on the bona fide occupational qualification exception an employer has the burden of proving that he has reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and effectively the duties of the job."[79] The court noted in dicta that the employer may establish a bfoq if it can show that it is "impossible to deal with women [or any protected class] on an individualized basis."[80] The *Weeks* test enables employers to exclude women who are able to perform since they are merely exceptions to the rule.[81]

The court in *Diaz v. Pan American World Airways*[82] rejected the employer's argument that males should not be hired as flight attendants because men generally do not possess typically female abilities in certain nonmechanical aspects of the job, such as giving courteous personalized service.[83] The court stated that "discrimination based on sex is valid only when the *essence* of

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72. 444 F.2d 1219 (9th Cir. 1971).

73. 408 F.2d 228 (5th Cir. 1969).

74. *Rosenfeld*, 444 F.2d at 1223; *Weeks*, 408 F.2d at 231-32.

75. *Rosenfeld*, 444 F.2d at 1224; *Weeks*, 408 F.2d at 232-33.

76. *Rosenfeld*, 444 F.2d at 1224; *Weeks*, 408 F.2d at 235-36. Employer policies purporting to protect women have not fared well under Title VII. The *Weeks* court stated the following:

> Title VII rejects . . . romantic paternalism as unduly Victorian and instead vest[s] individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremetal increase in remuneration for strenuous, dangerous, obnoxious, boring, or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

Id. at 236. *See also* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980) (en banc) ("personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination"), *cert. denied*, 450 U.S. 965 (1981).

77. *Rosenfeld*, 444 F.2d at 1225.

78. *Id.* at 1224.

79. *Weeks*, 408 F.2d at 235.

80. *Id.* at 235 n.5.

81. *See* Furnish, *supra* note 69, at 91-92.

82. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

83. *Id.* at 387.

the business operation would be undermined by not hiring members of one sex exclusively."[84] The court concluded that to find a bfoq exception to sex discrimination, "it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are *necessary* to the business, not merely tangential."[85]

Although it did not articulate a specific test, the Supreme Court in *Dothard v. Rawlinson*[86] considered elements from both *Weeks* and *Diaz* when assessing a state regulation prohibiting women from working in "contact positions" in a male maximum security prison.[87] Since twenty percent of the prisoners were sex offenders who were scattered throughout the prison,[88] the Court found that there was a "basis in fact" for believing that a female correctional counselor's "very womanhood" would increase the likelihood that she would be assaulted.[89] Because such an assault would threaten not only the female employee, but also the control of the prison and the safety of the other prisoners and security personnel, the Court held that a female's sex would "directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."[90] Thus, being a male was a bfoq.[91]

Despite the different formulations, the foregoing tests for the bfoq defense have a common thread: the employer must be able to prove a nexus between sex and the individual's ability to perform the essential duties of the job to justify its policy of explicit discrimination as a bfoq.[92]

In *Griggs v. Duke Power Co.*[93] the Supreme Court first defined the business necessity test within the narrow context of pre-employment testing and high school completion requirements. The employer's policy, though apparently adopted without discriminatory intent,[94] excluded many more blacks

84. *Id.* at 388 (emphasis in original).

85. *Id.* at 388-89 (emphasis in original).

86. 433 U.S. 321 (1977).

87. *Id.* at 325, 333.

88. *Id.* at 335.

89. *Id.* at 335-36.

90. *Id.* at 336.

91. Courts have been more willing to find a bfoq when the safety of others is concerned. It should be noted, however, that preventing harm to third parties must be an integral part of the employee's job responsibilities. *See, e.g.*, Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176 (4th Cir. 1977) (per curiam) (nonpregnancy is bfoq for flight attendants since pregnancy could interfere with duty to protect passengers), *cert. denied*, 435 U.S. 934 (1978); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976) (Age is bfoq for bus drivers since slower reflexes of older drivers might endanger passenger safety: "The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving.").

92. *See* Furnish, *supra* note 69, at 92.

93. 401 U.S. 424 (1971).

94. The employer's vice-president stated that the testing and diploma requirements were adopted to "improve the overall quality of the work force." *Id.* at 431. These requirements applied to positions in all of the plant's five operating departments except the labor department. The jobs in these departments traditionally had been filled only by whites; blacks were restricted to the labor department until 1965, when the testing and diploma requirements went into effect for both initial admission into the other departments as well as transfer into the other departments from labor. *Id.* at 427-28.

than whites and thus established a prima facie case of disparate impact.[95] The Court found that to justify such a policy the employer must show that the policy is "related to job performance,"[96] that it "bear[s] a demonstrable relationship to successful performance of the job for which it was used,"[97] and that it has "a manifest relationship to the employment in question."[98] The Court stated that when assessing the policy under Title VII, the "touchstone is business necessity."[99]

In *Robinson v. Lorillard*[100] the Fourth Circuit applied an alternative to the "job-relatedness" means of proving that a facially neutral policy with disparate impact should be justified as a business necessity:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[101]

In *Robinson* the employer argued in part that its acceptance of the union-imposed seniority system that was the source of the disparate impact was a business necessity because refusing to accept the system could have resulted in a strike and consequential economic loss.[102] The court found that considerations of economy and efficiency may help establish the existence of a business necessity, but that avoidance of cost alone could not justify a policy challenged under the disparate impact theory as a business necessity.[103]

The Supreme Court in *Dothard v. Rawlinson*[104] rejected the Alabama prison system's contention that, because strength was necessary for successful job performance, the minimum height and weight requirements for correc-

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95. *Id.* at 429.

96. *Id.* at 431.

97. *Id.*

98. *Id.* at 432.

99. *Id.* at 431.

100. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

101. *Id.* at 798. Supreme Court decisions since the Fourth Circuit's decision in *Robinson* have placed the burden of proving the existence of less discriminatory alternatives on the plaintiff as a rebuttal to the employer's business necessity defense. *See supra* note 67.

102. *Id.* at 799.

103. *Id.* at 799 n.8. *Cf.* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1975) (cost argument in defending discriminatory policy could not prevail since Title VII contains no cost justification defense and no court has recognized such defense under Title VII). *See also* Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 264 (N.D. Ala. 1982), (the court declined to recognize the avoidance of potential liability to a fetus damaged by exposure to X-rays as a business purpose necessary to the safe and efficient operation of the business because such a justification for a policy excluding pregnant employees would shift the focus of business necessity from a concern about the health of hospital patients to a concern about hospital finances), *aff'd*, 726 F.2d 1543 (11th Cir. 1984); EEOC Decision No. 72-1292, 4 Fair Empl. Prac. Cas. (BNA) 845, 845 (1972) (financial expense not a business necessity).

104. 433 U.S. 321 (1977).

tional counselors were job-related and thus justified as a business necessity despite their disparate impact on women.[105] The Court explicitly adopted the *Griggs* standard that the employer must show a manifest relationship between its requirements and the employment in question.[106] In addition, the Court stated in language similar to that found in *Robinson* that an employment policy with a discriminatory impact will survive attack under Title VII only if it is "necessary to safe and efficient job performance."[107] Since the employer gave no evidence correlating the height and weight requirements and the level of strength necessary for successful job performance,[108] the Court found that a strength test would achieve the business goal more effectively and with a less discriminatory impact on women.[109]

Although the success of the employers' business defenses in *Griggs* and *Dothard* turned on whether the employers' policies were significantly related to the employees' successful performance of particular jobs,[110] ability to perform a job is only one of many legitimate business purposes that is "necessary to the safe and efficient *operation* of [a] business."[111] Thus, to the extent that the business necessity defense is not limited to the narrow concept of "occupational qualifications" as they relate to an individual employee's ability to perform a job, the business necessity defense is easier to establish than the bfoq defense.[112]

To determine whether the Fourth Circuit placed Olin's exclusionary policy into the proper Title VII analytic framework, it is necessary to understand the history of pregnancy-based discrimination under Title VII. In *General Electric Co. v. Gilbert*[113] the Supreme Court held that the exclusion of preg-

105. *Id.* at 331.

106. *Id.* at 329.

107. *Id.* at 332 n.14. Whenever the safety of third parties is involved, courts traditionally have been more receptive to the employer's asserted business necessity defenses. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (recognizing special responsibility for public safety borne by transit authority employees, Court held exclusion of methadone users from jobs requiring maximum alertness and competence sufficiently "job-related" to be business necessity); Spurlock v. United Air Lines, Inc., 475 F.2d 216, 219 (10th Cir. 1972) (court accepted exclusion of noncollege graduates from positions as airline pilots; "when the job clearly requires a high degree of skill and the . . . human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related").

108. *Dothard*, 433 U.S. at 331.

109. *Id.* at 332. Although it is not apparent whether plaintiff in *Dothard* presented this less discriminatory alternative, or whether the Court took judicial notice of it in deciding that the requirement was not an absolute business necessity, the Court did state earlier in its opinion in dicta that plaintiff could rebut the employer's showing of business necessity by showing less burdensome alternatives. *Id.* at 329. This is a distinct departure from the *Robinson* approach of placing the burden of proving the absence of less discriminatory alternatives on the employer.

110. *See supra* notes 96-98, 105 & 107 and accompanying text.

111. *Robinson*, 444 F.2d at 798 (emphasis added).

112. *See* Williams, *supra* note 4, at 672-73.

113. 429 U.S. 125 (1976). *Gilbert* involved a class action charging that the employer's disability plan violated Title VII by excluding pregnancy from its otherwise comprehensive coverage of nonoccupational sicknesses and accidents. *Id.* at 128-29. Before the Supreme Court's opinion in *Gilbert*, the lower federal courts had consistently struck down policies adversely affecting women because of pregnancy or a related condition, equating pregnancy-based differentiation with overt gender-based discrimination. *See* Berg v. Richmond Unified School Dist., 528 F.2d 1208, 1213

nancy from the employer's disability benefits program "is not a gender-based discrimination at all."[114] The Supreme Court reasoned that the exclusion was based neutrally on the nature of a physical disability rather than on the employee's sex.[115] Nor did the Court find a disparate impact on women since the program benefited male and female employees equally.[116] The Court noted that a policy based on pregnancy could be challenged as a pretext for sex discrimination,[117] but that the mere existence of such a policy did not give rise automatically to an inference of pretext.[118]

In *Nashville Gas Co. v. Satty*[119] the Supreme Court reiterated its holding in *Gilbert* that an employer's policy that differentiates on the basis of pregnancy "is not on its face a discriminatory policy."[120] The employer in *Satty* required pregnant workers to take an unpaid maternity leave[121] and stripped those workers of any accrued seniority on return to work from the mandatory maternity leave.[122] The Court regarded this policy as facially neutral,[123] and thus analyzed it under the disparate impact theory.[124] It upheld the denial of sick pay to pregnant workers on leave[125] while striking down the seniority plan.[126] The Court distinguished the legality of the two policies on grounds that the sick leave policy merely denied a *benefit* to women that men cannot

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(9th Cir. 1975), *vacated*, 434 U.S. 158 (1977); Satty v. Nashville Gas Co., 522 F.2d 850, 853-54 (6th Cir. 1975), *modified in part*, 434 U.S. 136 (1977); Hutchison v. Lake Oswego School Dist., 519 F.2d 961, 964 (9th Cir. 1975), *vacated*, 429 U.S. 1033, *cert. denied*, 429 U.S. 1037 (1977); Gilbert v. General Elec. Co., 519 F.2d 661, 663 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); Holthaus v. Compton & Sons, Inc., 514 F.2d 651, 654 (8th Cir. 1975); Communication Workers v. American Tel. & Tel. Co., 513 F.2d 1024, 1028-31 (2d Cir. 1975), *vacated*, 429 U.S. 1033 (1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976). These decisions were consistent with the EEOC guidelines on pregnancy-based discrimination. 29 C.F.R. § 1604.10 (1978).

114. *Gilbert*, 429 U.S. at 136.

115. *Id.* at 135. The Court's reasoning largely was based on its language in Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974), which involved a disability plan excluding pregnancy from its coverage:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

116. *Gilbert*, 429 U.S. at 137-40. The Court stated that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.* at 139 (emphasis in original).

117. *Id.* at 136.

118. *Id.* For further analyses of *Gilbert*, see Furnish, *supra* note 69, at 74-77 & 75 n.63; Note, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 241-50 (1977).

119. 434 U.S. 136 (1977).

120. *Id.* at 140.

121. *Id.* at 137. Although the employer did not extend sick pay to pregnant workers, it did compensate employees for limited absences due to illnesses or disabilities that were not job-related. *Id.* at 143.

122. *Id.* at 140. Any employee who took a leave of absence for any other medical reason was not divested of any accumulated seniority and actually continued accruing seniority while on leave. *Id.*

123. *Id.* at 143-44.

124. *Id.* at 141-42, 144-45.

125. *Id.* at 145.

126. *Id.* at 143.

receive and thus did not have a disparate impact on women,[127] whereas the seniority plan imposed on women "a substantial *burden* that men need not suffer . . . in such a way as to deprive [women] of employment opportunities because of their different role."[128] Since the employer presented no proof that stripping pregnant workers of their seniority rights was a business necessity, the seniority plan violated Title VII.[129]

Congress responded quickly to rectify the Supreme Court's treatment of pregnancy-related policies as facially neutral rather than overtly discriminatory by enacting the 1978 pregnancy amendment to Title VII.[130] The purpose of the amendment was "to clarify Congress' intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment."[131] Hence, the amendment renders any policies based on or related to pregnancy "subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute."[132]

The legislative history clearly indicates that the amendment encompasses discrimination based on the capacity to bear children as well as conditions related to an existing pregnancy. In pointing out the need for the amendment, Senator Williams, one of the bill's sponsors, stated that "the overall effect of discrimination against women because they *might become pregnant*, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status with regard to career advancement and continuity of employment and wages."[133] He warned that the "shocking statistics" regarding the disparity between employment opportunities for men and those for women "cannot be made better unless working women are pro-

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127. *Id.* at 142, 145.

128. *Id.* at 142 (emphasis added).

129. *Id.* at 143. For further analysis of *Satty*, see Williams, *supra* note 4, at 676-77; Note, *The Demise of the Discriminatory Effect Analysis*—Nashville Gas Co. v. Satty, 27 DEPAUL L. REV. 1301 (1978).

130. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (Supp. V 1981)). The Act provides in part:

> 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. . . .

42 U.S.C. § 2000e(k) (Supp. V 1981).

131. H.R. REP. No. 948, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750.

132. *Id.* at 4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 4752.

133. 123 CONG. REC. 29385 (1977) (emphasis added). *See also* S. REP. No. 331, 95th Cong., 1st Sess. 3 (1977) ("the assumption women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace"); *Proposed Amendment to Title VII to Prohibit Sex 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. 32 (1977) (statement of Ethel Bent Walsh, Vice Chairman, EEOC) ("There can be no question that the wide range of employment policies directed at pregnant women—or at all women because they might become pregnant—constitute one of the most significant hindrances to women's equal participation in the labor market.") [hereinafter cited as *Hearings*].

vided effective protection against discrimination on the basis of their childbearing capacity."[134] Senator Clark explained that he was cosponsoring the amendment "because it is clear to me that discriminating against women on the narrow basis of their capacity to become pregnant is not consistent with the goals set forth in the Civil Rights Act."[135] The House Report accompanying the amendment states that the bill's protection is meant to extend to "the whole range of matters concerning the childbearing process";[136] maintaining the ability to become pregnant certainly is critical to that process.[137] The Senate Report recognizes the following passages from the dissenting opinions in *Gilbert* as "correctly express[ing] both the principle and the meaning of Title VII."[138] Justice Stevens stated that "[b]y definition, . . . a [pregnancy-related] rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[139] Likewise, Justice Brennan stated that "it offends commonsense to suggest . . . that a classification revolving around pregnancy is not at the minimum strongly 'sex-related.' "[140] The Senate Report notes that the amendment was introduced to reflect the "commonsense" view and to guarantee working women protection from all forms of discrimination based on sex.[141] Since a classification of applicants or employees according to their capacity to bear children undoubtedly revolves around pregnancy and hence sex, it clearly falls within the scope of the amendment and Title VII's ban on gender-based discrimination.

In *Harriss v. Pan American World Airways*[142] the Ninth Circuit recognized that the 1978 amendment mandated this change in the analytic framework for pregnancy-based discrimination. In *Harriss* the employer had enforced a mandatory maternity leave both before and after Congress' amendment of the statute.[143] The court stated that the Supreme Court's reasoning in *Gilbert* applied to the employer's enforcement of the policy prior to the amendment;[144] hence for that period the court treated the policy as gender-neutral, assessing the claim under disparate impact theory and the employer's justification for the policy in terms of the business necessity defense.[145] After the amendment, however, the policy constituted per se sex discrimination;[146]

134. 123 CONG. REC. 29385 (1977).

135. *Hearings*, *supra* note 133, at 393.

136. H.R. REP. No. 948, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750.

137. *See* Note, *supra* note 3, at 144.

138. S. REP. No. 331, 95th Cong., 1st Sess. 2 (1977).

139. *Gilbert*, 429 U.S. at 161-62 (Stevens, J., dissenting). *See* S. REP. No. 331, 95th Cong., 1st Sess. 2-3 (1977).

140. *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting). *See* S. REP. No. 331, 95th Cong., 1st Sess. 2 (1977).

141. *Id.*

142. 649 F.2d 670 (9th Cir. 1980).

143. *Id.* at 673. The policy required female flight attendants to go on maternity leave immediately upon knowledge of pregnancy and to remain on leave until sixty days after birth. *Id.*

144. *Id.* at 674.

145. *Id.*

146. *Id.* at 676.

hence, the employer's justification for the policy during that period had to be evaluated in terms of the bfoq defense.[147]

Unlike the *Harriss* court, in determining the appropriate Title VII theory for analysis of the pregnancy-related fetal vulnerability program, the *Olin* court either did not understand Congress' intention in the pregnancy amendment or chose to ignore it. The *Olin* court rejected as "conceptually unsound" plaintiff's contention that the disparate impact-business necessity theory should apply to Olin's fetal vulnerability program for the period prior to the amendment, and the overt discrimination-bfoq theory for the period following.[148] Instead, the *Olin* court relied on the Supreme Court's pre-amendment opinion in the "generally comparable situation"[149] in *Satty*[150] to hold that Olin's policy was gender-neutral and that the disparate impact theory should be applied "unhesitatingly."[151]

Had the *Olin* court followed Congress' mandate that pregnancy-related discrimination be treated the same as other forms of sex discrimination, and accordingly applied the overt discrimination-bfoq theory to Olin's policy, the plaintiff would have prevailed. The exclusion of fertile women to protect fetal health cannot possibly be justified under the narrow tests devised under the bfoq defense to sex discrimination;[152] harm to a fetus has no bearing on an employee's ability to perform her job.[153] Apparently, the court was unwilling to accept an automatic ban on such policies, for it engaged in analytical gymnastics to attempt to fit the claim into disparate impact theory.

The *Olin* court correctly noted that the disparate impact theory was designed to apply to facially neutral employment practices that fall more harshly on one group than another.[154] It nonetheless attempted to place Olin's policy within the disparate impact theory by focusing exclusively on the pol-

147. *Id.* The court noted that the two defenses must be applied distinctly. *Id.*

148. Wright v. Olin Corp., 697 F.2d 1172, 1183-84 n.17 (4th Cir. 1982).

149. *Id.* at 1186. The court found that Olin's policy was similar to the seniority plan in *Satty*, *see supra* notes 118-27 and accompanying text, because the "facial neutrality [of the policies] was only superficial in view of the palpable correlation between the gender of employees and [their] manifest consequences," *id.* at 1186, and that each of the policies, "though literally expressed in gender-neutral terms, has as its obvious and indisputable intended consequence the imposing upon women workers of a 'substantial burden that men need not suffer.' " *Id.* (quoting *Satty*, 434 U.S. at 142).

150. *See supra* text accompanying notes 119-129.

151. 697 F.2d at 1186. This position is inconsistent with the legislative intent apparent in the following passage in the House Report accompanying the pregnancy amendment: "By making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*." H.R. REP. No. 948, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4751.

152. *See supra* notes 69-92 and accompanying text.

153. Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 264 (N.D. Ala. 1982) (potential for fetal harm that does not affect adversely a mother's job performance is irrelevant to bfoq issue), *aff'd*, 726 F.2d 1543 (11th Cir. 1984); *see also* Maclennan v. American Airlines, Inc., 440 F. Supp. 466, 471 (E.D. Va. 1977) (threat of inflight abortion relevant to bfoq only if it affects job performance of flight attendant); *In re* National Airlines, 434 F. Supp. 249, 262 (S.D. Fla. 1977) (fetal harm not relevant to bfoq issue), *aff'd per curiam*, 700 F.2d 695 (11th Cir. 1983).

154. *Olin*, 697 F.2d at 1186.

icy's impact on the employment rights of women.[155] It justified its approach by stating that the theory "has as its critical feature the consequences of employment policies rather than the 'neutrality' with which the policies happen to be formally expressed."[156] The court's focus, however, was misplaced. Whether the court had chosen to characterize Olin's policy as overtly discriminatory or facially neutral, it would have had the inevitable feature of adversely affecting women. Hence, focusing on the consequences of the policy is meaningless unless it is preceded by an evaluation of the policy itself. If the policy classifies employees according to race, color, religion, sex, or national origin, it violates Title VII without regard to its actual consequences.[157] On the other hand, if the policy is based on neutral criteria, it does not violate Title VII unless it is discriminatory in operation. Thus, while proof of disproportionate adverse consequences is indispensable to establishing a prima facie case of disparate impact,[158] such proof is necessary only if the disputed policy is facially neutral. Olin's policy was clearly not facially neutral; indeed, it fell within Title VII's ban by classifying applicants on the basis of their ability to become pregnant.[159] By focusing exclusively on the inevitable consequences of Olin's policy in applying the disparate impact theory, the *Olin* court opened the door for courts to assess any policy that explicitly discriminates on a proscribed basis under either the overt discrimination-bfoq theory or the disparate impact-business necessity theory.

This approach might be followed by courts who wish to provide employers with the wider scope of the business necessity defense but feel constrained to apply that defense only to claims of disparate impact. Despite its own extreme efforts to fit the fetal vulnerability claim into the disparate impact-business necessity theory, the *Olin* court nonetheless indicated in dictum that it would have allowed the business necessity defense even if it had characterized Olin's policy as overt discrimination.[160] The court considered the use of the bfoq defense in cases of overt discrimination to be merely an employer's specific litigation choice and not a reflection of "any inherent constraints in Title VII doctrine."[161]

The court's position that the business necessity defense may be available in cases of overt discrimination is disconcerting for several reasons. First, Congress created the statutory bfoq defense as "a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification."[162] Noticeably absent

155. *See id.*

156. *Id.* The court characterized any dispute over the facial neutrality of Olin's policy as "mere semantic quibbling having no relevance to the underlying substantive principle that gave rise to [the disparate impact] theory." *Id.*

157. *See supra* notes 48-50 & accompanying text; *infra* note 174.

158. *See* B. SCHLEI & P. GROSSMAN, *supra* note 53, at 1326.

159. *See supra* notes 130-141 and accompanying text.

160. *Olin*, 697 F.2d at 1185-86 n.21.

161. *Id.*

162. *Interpretative Memorandum of Title VII*, 110 CONG. REC. 7213 (1964) (remarks of Sens. Clark and Case).

from the exception is the right to discriminate on the basis of race. Hence, should the *Olin* court's dictum be interpreted to encompass overt discrimination in general, a court could contradict Congress' unwillingness to allow an affirmative defense to deliberate discriminatory treatment based on race[163] by permitting an employer guilty of overt racial discrimination to respond with a business necessity defense.

Second, the legislative history to Title VII and the pregnancy amendment indicate that the bfoq defense should be the only defense to classification of jobs on the basis of sex. In the legislative history to the original bill it was stated that "under Title VII, jobs can no longer be classified as to sex *except* where there is a rational basis for discrimination *on the grounds of bona fide occupational qualifications*."[164] Indeed, the Fourth Circuit in *Burwell v. Eastern Airlines*[165] stated that "[i]n sex discrimination cases, . . . clear disparate treatment will be tested by a BFOQ defense."[166] The pregnancy amendment also reinforced the conclusion that the ability to do the necessary work is the required standard in an employer's treatment of different classes.[167] Allowing class-based distinctions only when they are an occupational qualification necessary to perform the job in question is the essence of the bfoq defense.[168] In contrast, ability to perform is only one possible business purpose that may be raised to establish a business necessity.[169] Hence, allowing a defense under the wider scope of the business necessity theory would again undermine congressional intent.

Third, the business necessity defense originally was designed as the proper response to the judicially created claim of disparate impact.[170] Unlike policies that overtly discriminate, policies that give rise to claims of disparate impact are "fair in form, but discriminatory in operation."[171] Such policies conceivably may be of two types: (1) neutral, good faith policies designed without regard to possible discriminatory effects,[172] and (2) policies that reflect subtle attempts by employers to evade Title VII by imposing neutral requirements while knowing of their inevitably discriminatory consequences.[173]

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163. *See* Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980) (omission of race from bfoq was intentional because Congress did not view race as a qualification that could be reasonably necessary to the efficient operation of any business), *rev'd on other grounds*, 456 U.S. 273 (1983); Detroit Police Officers' Ass'n v. Young, 446 F. Supp. 979, 1005 (E.D. Mich. 1978) (same), *rev'd on other grounds*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

164. 110 CONG. REC. 7217 (1964) (emphasis added).

165. 633 F.2d 361 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981).

166. *Id.* at 370 (dictum).

167. *See* 42 U.S.C. § 2000e(k) (Supp. V 1981); *supra* note 130. The House Report states that women subject to the amendment must "be treated the same as other employees on the basis of their ability or inability to work." H.R. REP. No. 948, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4752.

168. *See supra* note 92 and accompanying text.

169. *See supra* notes 111-12 and accompanying text.

170. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

171. *Id.* at 424.

172. *Id.* at 430.

173. This may have been the case in *Griggs*. The employer overtly discriminated against blacks until July 2, 1965, the date on which Title VII became effective. *Id.* at 427. On that date

While disparate impact and overt discrimination are both violations of Title VII, there is no doubt that an employer with an overtly discriminatory policy intended to violate the ban on discrimination. In contrast, an employer guilty of disparate impact might have been cognizant of his duties under the statute even though his policy ran afoul of it. In such a case, the act is perhaps not so invidious as the blatant act of the employer who overtly discriminates. Since an employer may not be able to foresee the discriminatory effects of a facially neutral business policy, a wider scope of justifications, even for policies with a racial impact, is warranted. The same cannot be said when an employer deliberately violates the statute—such an act does not warrant the benefit of the broader business necessity defense.

Finally, by enacting Title VII, Congress made the judgment that race, color, religion, sex, and national origin are the "five forbidden criteria" for making employment decisions.[174] In cases of disparate impact, the policies are not based on these forbidden criteria; since the criteria are legitimate under the statute, the employer should be given broader leeway in the pursuit of his legitimate business purposes. The business necessity defense reflects the need to prevent non-job-related criteria from hampering equal employment opportunities while respecting the "employer's right to insist that any prospective applicant . . . must meet the applicable job qualifications" when those qualifications are based on legitimate criteria.[175] In contrast, policies that overtly discriminate are *never* based on legitimate criteria. Regardless of whether other business interests are served by making distinctions on the basis of the "five forbidden criteria," Congress made the further judgment that the only time an employer may use sex, national origin, or religion as a selection criterion is when it is a bfoq.[176] Hence, extending the business necessity defense to overt discrimination would create a wider license to use class-based criteria for making employment decisions than Congress intended, thereby allowing employers to second-guess Congress about when sex or other forbidden criteria may be used to promote the employer's business goals.

The court's analysis would have been proper had the court merely been

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the employer instituted its testing and high school diploma requirement, *id.* at 431-32, which operated to have as significant an adverse impact on blacks as did the employer's overtly discriminatory policy. *Id.* at 430.

174. In their Interpretative Memorandum of Title VII, Senators Case and Clark—floor managers of the bill—stated that "those distinctions or differences in treatment or favor which are prohibited by [Title VII] are those which are based on the five forbidden criteria: race, color, religion, sex, and national origin. Any other criteria or qualification for employment is not affected by this title." 110 CONG. REC. 7213 (1964).

175. *Id.* at 7247.

176. Indeed, the defeat of an amendment that would have allowed an employer to hire or refuse to hire an individual because of the individual's race, color, religion, or national origin when hiring the individual would benefit the business or "the good will thereof" clearly indicates that Congress meant to limit an employer's justification for overt discrimination to bfoq. *Id.* at 13825. The Senate defeated the amendment by a vote of 60 to 31. *Id.* at 13826. Senator McClellan had introduced the amendment to protect the "employer's right to exercise his judgment in his own business affairs." *Id.* at 13825. Senator Case urged defeat of the amendment because in effect it "would destroy [Title VII]." *Id.*

determining the pre-amendment legality of the program.[177] Since other pre-amendment exclusionary policies or truly neutral exclusionary policies[178] may be presented to courts, and since the *Olin* court indicated that it would consider a business necessity defense even if the policy were established to be overtly discriminatory, it is important to determine whether the *Olin* court's application of the business necessity defense was conceptually sound.

The major obstacle to establishing the business necessity defense in this context is the requirement that the defendant show an "overriding legitimate *business* purpose"[179] for the challenged practice. The *Olin* court's characterization of the safety of fetuses as "no less a matter of legitimate business concern than the safety of the traditional business licensee or invitee upon the employer's premises"[180] is debatable. Business licensees and invitees are involved directly in the operation of a business, and thus it is justifiably in the employer's business interest to ensure their safety, even though a conflict with the employment rights of another party may result.[181] In contrast, fetuses have nothing to do with operating a business; thus, the only apparent basis for the employer's paternalistic desire to protect fetuses is the *societal* concern for the health of future generations.[182]

Extending the business necessity defense beyond traditional employer policies relating to the operation of a business, to policies relating only to society's best interest, may allow an employer to avoid compliance with Title VII on the basis of its perception of the public interest.[183] Determining which societal goals override compliance with established laws should be a function of the legislature, not of the business sector.[184] Thus, by stating that "a general basis for the 'business necessity' asserted [in *Olin*] need [not] be sought in

177. The pregnancy amendment does not apply retroactively. *See* H.R. REP. No. 948, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4756.

178. An example of a neutral exclusionary policy is one that excludes workers according to their susceptibility to reproductive hazards. Since both men and women may be subject to such hazards, *see supra* notes 3-4 and accompanying text, the policy would be considered gender-neutral.

179. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (emphasis added).

180. 697 F.2d at 1189.

181. *See supra* note 107.

182. *See supra* note 8 and accompanying text.

183. *See* Note, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 U. MICH. J.L. REF. 237, 257-58 (1979). Olin's perception of the public's interest completely disregards the countervailing societal interest in reserving to individuals the right to make childbearing decisions without coercion by third parties. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). Reported instances show that an employer's requirement of infertility for employment in fetally toxic work environments has caused some women to seek sterilization out of economic necessity for keeping their jobs. *See, e.g.*, Bronson, *Issue of Fetal Damage Stirs Women Workers at Chemical Plant*, Wall St. J., Feb. 9, 1979, at 1, col. 1 (five women employees at American Cyanamid Company underwent sterilization when faced with choice between job and fertility). Thus, exclusionary policies conceivably could be deemed economic coercion to relinquish the right to decide to bear a child.

184. *See* Note, *supra* note 183, at 257-58.

other considerations than the general societal interest,"[185] the *Olin* court set a dangerous precedent for expansion of the business necessity defense to contexts unrelated to traditional business concerns.

Avoidance of potentially astronomical tort liability to a damaged fetus through an exclusionary policy is a more valid basis for establishing a legitimate *business* purpose.[186] Since children who suffer harm through prenatal exposure at the workplace are not limited to recovery under worker's compensation laws,[187] and since a female worker may not waive a cause of action belonging to her child,[188] an employer reasonably may believe that resorting to an exclusionary policy is the only dependable means of protecting the profitability or perhaps even the solvency of its enterprise. Nonetheless, the employer must be able to prove that the necessity of protecting itself from tort liability is "sufficiently 'compelling' to 'override' conflicting private interests protected by Title VII."[189] Courts consistently have been unwilling to accept avoidance of financial burden alone as a sufficiently compelling defense to discriminatory policies,[190] and have required the employer to bear the costs incidental to remedying discrimination.[191] Some courts, however, apparently have left open the possibility of such a defense when the financial impact of eliminating a policy substantially outweighs the discriminatory impact of the policy.[192]

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185. *Olin*, 697 F.2d at 1190 n.26.

186. *See* Note, *Employment Rights of Women in the Toxic Workplace*, 65 CALIF. L. REV. 1113, 1131 (1977). *See also* Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 n.10 (5th Cir. 1982) (dictum) ("Although concern over fetal health alone is arguably not the province of the employer, but of the mother, the economic consequences of a tort suit brought against the hospital by a congenitally malformed child could be financially devastating, seriously disrupting the 'safe and efficient operation of the business.' ") (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)).

187. 1 J. LARSON, LAW OF WORKMEN'S COMPENSATION § 1.10(c), (e) (1982) (coverage limited to persons having status of employee who suffers work-related injuries; dependents and spouses subject to Act only when recovering for work-related death of employee-parent or -spouse). *See* Williams, *supra* note 4, at 645-46 & n.23.

188. *See* Sell v. Hotchkiss, 264 N.C. 185, 191, 141 S.E.2d 259, 264 (1965) (parent cannot bind minor child by signing covenant not to sue); Cumberland County Welfare Bd. v. Rodriquez, 144 N.J. Super. 365, 378-79, 365 A.2d 723, 730-31 (1976) (parent has no authority to waive, release, or compromise claims or causes of action of child).

189. *Olin*, 697 F.2d at 1190 n.26 (citing Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir), *cert. dismissed*, 404 U.S. 1006 (1971)).

190. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 & nn.31-32 (1978) (neither Congress nor the courts have recognized a cost justification defense under Title VII; pension plan costs not a sufficient basis for establishing business necessity defense); Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 966 (9th Cir. 1975) (administrative costs that might justify an employment practice for purposes of equal protection would not necessarily be an adequate defense under Title VII), *vacated*, 429 U.S. 1033, *cert. denied*, 429 U.S. 1037 (1977); Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir.) ("[w]hile considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative"), *cert. dismissed*, 404 U.S. 1006 (1971).

191. *See* United States v. N. L. Indus., Inc., 479 F.2d 354, 366 & n.11 (8th Cir. 1973) (additional training costs accompanying prevention of employment discrimination must be borne by employer); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 788 (N.D. Iowa 1975) ("for women to have the equal employment opportunities . . . intended by the enactment of Title VII, employers . . . must accept as a cost of production whatever increases in sick leave program costs . . . will ensue by including pregnancy as a disability").

192. *See* Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975) (implying that court

Although the elimination of an exclusionary policy would not impose automatically an onerous financial burden on an employer, the employer might be able to establish that the need for the policy is sufficiently compelling to outweigh its discriminatory impact if the likelihood of the feared tort liability is great[193] and if the relationship between liability and the employer's ongoing profitability is clear.[194] The burden of meeting such a balancing test is likely to be great for several reasons. The availability of birth control and abortion may lessen the risk that a fetus who could be exposed to a toxic environment will be conceived or carried to term, hence reducing the likelihood of any employer liability.[195] Even if the employer were sued by a child who had suffered prenatal harm, if a negligence theory rather than a strict liability theory[196] were imposed, a mother's voluntary and informed decision to work in a necessarily hazardous environment would seem to indicate an absence of employer negligence or may be considered a superseding cause insulating the employer from liability.[197] Also, showing a causal relationship between the mother's exposure and the child's birth defect in a negligence case could prove to be scientifically difficult.[198] Concerning the relationship between liability and the ongoing profitability of the business, the availability of insurance against the risk of liability to damaged children could reduce significantly the financial impact of potential suits.[199] Hence, even though fear of tort liability is a valid business concern, that fear may not be sufficiently compelling to override the interests of fertile women protected by Title VII.

Another obstacle to establishing a business necessity defense for a policy

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might have considered cost a defense if employer had presented statistical information showing that increased cost for pregnancy benefits would be "devastating"), *vacated on other grounds*, 424 U.S. 737 (1976); Bing v. Roadway Express, Inc., 444 F.2d 687, 690 (5th Cir. 1971) (employer failed to establish business necessity defense since costs of training replacements for black transferees not substantial enough to outweigh the detriment of locking members of protected class into inferior positions). *Cf.* 45 C.F.R. § 84.12 (1982) (employer may avoid charge of discrimination against the handicapped by demonstrating that costs of accomodating limitations of handicapped employee or applicant would impose an "undue hardship"). *See generally* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1150 (1971) ("[C]ostliness does become significant in extreme circumstances. A remedy should not be imposed which threatens a business with extinction.").

193. *See* Williams, *supra* note 4, at 646.

194. *See* Howard, *supra* note 2, at 832.

195. Probabilities indicate that fetuses of women workers in industries adopting exclusionary policies represent only "a minuscule source of potential liability." Bertin, *Workplace Bias Takes the Form of "Fetal Protectionism,"* Legal Times, Aug. 1, 1983, at 18, col. 1.

196. *See* Williams, *supra* note 4, at 646 n.25, 657 & n.106 (birth defect of developmental disability may be caused in a number of ways, *e.g.*, direct exposure of mother; mother's exposure through male worker carrying toxic substance on clothes or hair; exposure of fetus through vaginal absorption of toxic substances in seminal fluid of exposed male worker; and spontaneous occurrence of genetic error). *See also* Crowell & Copus, *Safety and Equality at Odds: OSHA and Title VII Clash over Health Hazards in the Workplace*, 2 IND. REL. L.J. 567, 588 (1978).

197. *See* RESTATEMENT (SECOND) LAW OF TORTS § 519 (1977) (one conducting an abnormally dangerous activity is liable for harm resulting from that activity even if he exercised utmost care to prevent harm).

198. *See* Crowell & Copus, *supra* note 196, at 588.

199. *See* Williams, *supra* note 4, at 646 n.25 (if work-related suits for prenatal damage should become financially onerous for industry, legislatures are likely to respond by enacting laws, similar to worker's compensation laws, limiting liability); Note, *supra* note 183, at 257.

that results in the exclusion of fertile women is the requirement embraced by the *Olin* court that the policy "effectively carry out the business purpose it is alleged to serve."[200] The employer may encounter two problems in proving the effectiveness of the exclusionary policy. First, if the policy applies only to fertile women, it may not include all classes necessary to achieve its purpose.[201] If fetal damage may occur through paternal as well as maternal exposure, the exclusion of only women neither maximizes the protection of fetuses nor eliminates the risk of employer liability.[202] Second, if the policy applies to all women of childbearing capacity, the policy may include more women than is necessary to achieve its purpose.[203] The class adversely affected not only includes those women who actually present a risk (*i.e.*, those who might become pregnant and would give birth) but also the larger percentage of women who do not need protection from exposure (*i.e.*, those who, because of chance or design, would not become pregnant or who would not carry the pregnancy to term).[204] Hence, even though the *Olin* court weakened the traditional Title VII business necessity defense by recognizing the societal concern for fetal health as a legitimate business purpose, it at least prevents "casual resort" to broad exclusionary policies by requiring that the policies be narrowly tailored to the hazard contemplated.[205]

The exclusionary policy in *Olin* clearly constituted overt discrimination, and hence the business necessity defense should not even have been considered by the court. Since no bfoq for the policy could have been shown, the court should have struck down the policy as violating Title VII without further analysis. Although the *Olin* court's concern over fetal health is commendable, its manipulation of existing Title VII analysis to avoid an automatic ban on exclusionary policies reveals that the court did not recognize the potential for abuse of the Title VII theories of claims and defenses in other contexts not related to business. It blatantly ignored the congressional mandate in the pregnancy amendment to treat pregnancy-related discrimination as overt sex discrimination. Although society's interest in future generations is a valid concern, it is improper for courts to allow employers to use social policies rather than business purposes to excuse violations of the policy to eliminate employment discrimination. Instead, when such important social policies conflict, resolution is best left to Congress.

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200. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *See supra* note 42 and accompanying text.

201. *See* Williams, *supra* note 4, at 695-96.

202. *See* Note, *supra* note 186, at 1133.

203. *See* Williams, *supra* note 4, at 695-96.

204. *Id.* at 696 & n.314. It has been estimated that less than nine percent of all working women are pregnant in any given year. *Id. See also* Note, *supra* note 186, at 1134.

205. *See* Bertin, *supra* note 195, at 20, col. 3.